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CONSOLIDATION MECHANISMS IN INSTITUTIONAL  
ARBITRATION

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## Table of Contents

<b>List of Abbreviations.....</b>	<b>12</b>
<b><i>Introduction.....</i></b>	<b>14</b>
<b>Chapter 1. General Background: The Market Desires Consolidation, but Who Can Be Counted on to Provide It Primarily?.....</b>	<b>15</b>
Section 1. Definition.....	15
§1. “Consolidation” in Arbitration.....	15
§2. “Arbitral Institution”.....	16
§3. “Institutional Arbitration”.....	16
Section 2. Market Urges Consolidation Tool in Arbitration and the “White Knight” is Institutional Arbitration Rules.....	18
§1. Usefulness of Consolidation vs Restraints to Develop Consolidation in Arbitration: In the Broad Context of Rising Competition across International Dispute Settlement Mechanisms.....	19
A. Exertion of Consolidation Strengths Inherently Inhibited under Arbitration.....	19
B. The Rising Competition between International Commercial Arbitration and International Commercial Courts Heightens the Urge for Developing Consolidation Mechanisms in Arbitration.....	21
§2. Institutional Rules are Justified to be Mainly Relied upon to Handle Consolidation Subject to the Existing Conditions.....	24
<b>Chapter 2. The Selection of Institutional Rules and the Current General Situation of Consolidation Provisions Therein.....</b>	<b>31</b>
Section 1. Selected Institutional Rules and Selection Criteria.....	31
§1. Institutional Rules Being Targeted.....	31
§2. Criteria of selection.....	33
A. Criterion 1: Rules Serving for Consolidation under the International Commercial Arbitration.....	33
B. Criterion 2: Popularity.....	33
C. Criterion 3: Taking into Account the Geographic Balance and Larger Diversity Coverage.....	35
D. Criterion 4: Keeping an Eye on the Rules of the Arbitral Institution Based in the Jurisdiction with a High-Profile Statutory Consolidation	

Provision.....	36
Section 2. Current General Situation on consolidation provisions.....	37
<b>Chapter 3. Four Consolidation Decision-Making Models in Current Institutional Arbitration Practice: Based on the Identity of the Consolidation Decision-Maker.</b> .....	<b>43</b>
Section 1. Classification Criterion.....	43
Section 2. Overview of the Four Models.....	44
§1. Model 1: Arbitral Tribunal Fully Deciding Model.....	44
§2. Model 2: Delegated “Third Person” Deciding Model with Arbitral Institution’s Facilitation.....	44
§3. Model 3: Arbitral Institution-Arbitral Tribunal Deciding Model.....	45
§4. Model 4: Arbitral Institution Fully Deciding Model.....	46
<b>Chapter 4. Evolution of the Four Models (1992-2023) and Hypothesis of the Most Desirable Model.....</b>	<b>47</b>
Section 1. Four Models’ Evolution (1992-2023): Model 4 Stands Out.....	47
Section 2. Research Question Raised: Which Model Can Be Deemed the Most Desirable One?.....	49
§1. CIArb Guideline on Multiparty Arbitration (2023) Stand up for Model 3... .....	49
§2. My Pre-Research Hypothesis: Model 4 is More Convincing as the Model of Best Efficacy.....	53
Section 3. On Structure of Thesis.....	56
 <b>Part 1. Consolidation Mechanisms under Institutional Arbitration Rules: Four Decision-making Models.....</b>	<b>57</b>
<b>Chapter 1. Model 1’s Representatives: JCAA and KCAB Rules.....</b>	<b>59</b>
Section 1. JCAA Rules.....	59
§1. Context.....	59
§2. Arbitral Tribunal’s Power to Decide Consolidation.....	59
§3. The Consolidation’s Conditions and Tribunal’s Discretion.....	60
A. The Three Alternative Conditions.....	60
B. Consolidating <i>Ad Hoc</i> Arbitration May Be Workable under JCAA.....	61
C. Discretion.....	62
§4. Procedural Fairness.....	62
§5. Legal Effect of the Decision.....	62
§6. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings.....	63

---

Section 2. KCAB Rules.....	64
§1. Arbitral Tribunal’s Power to Decide Consolidation.....	64
A. Condition.....	64
B. Discretion.....	64
§2. Procedural Fairness.....	64
§3. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings.....	65
<b>Chapter 2. Model 2’s Representatives: ICDR and NAI Rules.....</b>	<b>66</b>
Section 1. ICDR Rules.....	66
§1. Context.....	66
§2. Stand-alone “Consolidation Arbitrator” and Its Prescribed Competence to Permit Consolidation beyond the Arbitrations Referring to the Same ICDR Rules.....	67
§3. ICDR Decides Whether to Appoint a Consolidation Arbitrator and Who.....	68
A. Three Alternative Preconditions to Appoint Consolidation Arbitrator.....	69
[1] First precondition.....	70
[2] Second Precondition.....	71
[3] Third Precondition.....	71
[4] ICDR’s Discretion.....	72
B. Appointment Process.....	72
§4. Consolidation Arbitrator’s Discretion and Procedural Fairness.....	74
§5. Consolidation Arbitrator’s Decision: Issuance and Its Legal Effect.....	75
A. Stay Pending Consolidation Decision.....	75
B. Issuance of an Unreasoned Decision Within Fifteen Days.....	76
C. Legal Effect of Consolidation Arbitrator’s Decision.....	76
§6. Establishment of Arbitral Tribunal for Consolidated Arbitration.....	78
Section 2. NAI Rules.....	81
§1. Context.....	81
A. NAI Consolidation Closely Interacts with Article 1046 DCCP.....	81
B. History of Article 1046 DCCP: The Perspective of the Legislative Revision of the Netherlands Arbitration Act Since 1986.....	82
§2. Consolidation Deciding-Making System: Netherlands Arbitration Act and NAI.....	89
A. Netherlands Arbitration Act 2015: Opt-In Third-Person Ordered and Opt-Out Judicially Ordered Consolidation System in Tandem.....	89
[1] Opting Out Court-Ordered System as a Fall-Back.....	89

---

[2] Opting in Third-Person Ordered System as a Precedence.....	90
B. NAI: Third Person Deciding Regime.....	96
[1] “Third Person” Cannot Be NAI Itself but an Individual.....	96
[2] Appointment of “Third Person”.....	97
[3] The Breadth of Consolidation Ordered by the Third Person.....	98
C. Justification of Retaining Opt-Out Judicially Ordered Consolidation System.....	100
[1] Complementary Effect Article 1046 DCCP Imposed on Article 39 NAI in terms of Fulfilling the Efficacy of Consolidation Tool.....	100
[2] Legitimacy of the Opt-Out Judicially Ordered Consolidation System Itself.....	102
§3. Conditions and Discretion.....	106
§4. Procedural Fairness and Issuance of Decision.....	107
§5. Consequences of Consolidation.....	109
A. Establishment of Consolidated Tribunal.....	109
B. Jurisdictional Objections Face Restriction to Raise after Consolidation.. .....	110
§6. Legal Effect of the Decision as to Consolidation.....	112
<b>Chapter 3. Model 3’s Representatives: SIAC, DIAC and LCIA Rules.....</b>	<b>115</b>
Section 1. SIAC Rules.....	115
§1. Context.....	115
§2. SIAC Court and Arbitral Tribunal are Empowered to Decide Consolidation at Different Stages: A Second Application of Consolidation is Possible.....	116
§3. Two Sets of Conditions and Discretion: Largely Analogous Alongside Significant Restraint on the Arbitral Tribunal.....	118
A. Three Broadly Similar Threshold Conditions and Discretion.....	119
[1] First Condition.....	119
[2] Second Condition.....	120
[3] Third Condition.....	120
B. Discrepancy Between Rule 8.1 and Rule 8.7: A Material Restriction Imposed on Arbitral Tribunal to Accept Consolidation Application.....	122
§4. Procedural Fairness.....	125
§5. Legal Effect of the Consolidation Decisions under SIAC.....	126
A. Legal Effect: Neither Binding nor Final.....	126
[1] SIAC Rules Clarifies the Arbitral Tribunal Has the Final Say on The Validity of the Consolidation Decision.....	127

---

[2] If the Arbitral Tribunal Invalidates the Consolidation Decision, What Would be the Consolidated Proceedings' outcome?.....	129
B. In terms of Coherence of Rules, How to Regard Rule 40 to Rule 8?.....	131
[1] The Revocability Nature of The Decision on Consolidation under Rule 8 Is Coherent with Rule 40.....	131
[2] Rule 40.1 Still Partly Applies to SIAC Consolidation.....	133
[2.a] Reasoning? No Need.....	133
[2.b] Confidentiality? Yes, Please!.....	133
§6. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings...	133
Section 2. DIAC Rules.....	136
§1. Context.....	136
§2. DIAC Consolidation Regime is Closely Analogous to the SIAC's Counterpart.....	137
Section 3. LCIA Rules.....	139
§1. Context.....	139
§2. LCIA's Decision-Making Authority Allocation on Consolidation: LCIA Court Seizes the Predominant Position.....	141
A. The Tribunal's Decision to Consolidation Is Subject to LCIA Court's Approval.....	141
B. How to read the application of Article 29 upon the LCIA Court's decision on consolidation?.....	143
[1] The Established Decision by LCIA Court on Consolidation Is Final and Binding.....	143
[2] No Reasons Shall Be Required to Accompany: LCIA Court Decisions alleged as administrative nature in the LCIA Rules.....	145
[3] Contractual Waiver to Raise Challenges against LCIA Court Consolidation Decision to Domestic Court.....	146
C. Is Tribunal-Granted Consolidation Decision Final and Binding As Well, After the Approval by LCIA Court?.....	147
§3. Other Selected Principal Matters.....	151
A. Threshold Conditions.....	151
B. Is Consolidation Allowed beyond the Arbitrations Referring to the Same LCIA Rules?.....	152
<b>Chapter 4. Model 4's Representatives: ICC, Swiss, CEPANI, VIAC, SCC, CIETAC, HKIAC, AIAC, ACICA, and DIS Rules.....</b>	<b>154</b>
Section 1. ICC Rules.....	154

---

§1. Context.....	154
§2. ICC Court’s Power to Decide Consolidation.....	155
§3. The Three Alternative Conditions and ICC Court’s Discretion.....	157
A. First Condition.....	158
B. Second Condition.....	159
C. Third Condition.....	160
D. Discretion.....	165
§4. Procedural Fairness.....	167
§5. Communication of Reasons for ICC Court Decision.....	168
§6. Administrative Handling of Consolidation and Establishment of Arbitral Tribunal to Hear Consolidated Proceedings.....	170
§7. Legal Effect of the ICC Court’s Decision on Consolidation.....	171
Section 2. Swiss Rules.....	174
§1. Context.....	174
A. Structural Changes of the Administrating Institution for Swiss Rules....	174
B. Overview of the Evolvement of the Consolidation Mechanism under the Swiss Rules.....	177
§2. SAC Court’s Power to Decide Consolidation.....	181
A. Sole Competence Conferred upon SAC Court to Order Consolidation... .....	181
B. Related Internal Decision-Making Process and Procedural Fairness.	186
C. No Prescribed Threshold Condition, But All Relevant Circumstances Required to be Considered.....	188
§3. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings..	191
§4. Legal Effect of the SAC Court’s Decision on Consolidation: The Potential Disputable Conclusion(s) Arising out of a Newly Emerged Interpretation in the Name of Clarification.....	193
A. Why is This Interpretation “New”?.....	194
B. A Try to Understand the Logic behind the New Interpretation Approach.....	195
C. Assessment of the Interpretation in Question.....	199
D. The Possible Drive of the Emergence of this New Interpretation Approach.....	201
Section 3. CEPANI Rules.....	202
§1. Context.....	202

---

§2. CEPANI’s Power to Decide Consolidation.....	202
§3. Procedural Fairness.....	204
§4. Condition and Discretion.....	204
§5. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings...	206
§6. Legal Effect of the CEPANI’s Decision on Consolidation.....	207
Section 4. VIAC Rules.....	208
§1. Context.....	208
§2. VIAC Board’s power to Decide Consolidation.....	209
§3. Condition and Discretion: Identical Arbitral Tribunal is the Key.....	210
§4. Procedural Fairness.....	211
§5. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings...	211
§6. Legal Effect of the VIAC Board’s Decision on Consolidation.....	212
Section 5. SCC Rules.....	213
§1. Context.....	213
§2. SCC Board’s Power to Decide Consolidation.....	214
§3. The Three Threshold Conditions and SCC Board’s Discretion.....	217
A. Three Alternative Conditions.....	217
B. Procedural Fairness and SCC Board’s Discretion.....	218
§4. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings...	218
§5. Legal Effect of the SCC Board’s Decision on Consolidation.....	219
Section 6. CIETAC Rules.....	220
§1. Context.....	220
§2. CIETAC’s Power to Decide Consolidation.....	220
§3. The Four Alternative Conditions and CIETAC’s Discretion.....	221
A. Conditions.....	221
B. Procedural Fairness and CIETAC’s Discretion.....	222
§4. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings...	223
§5. Legal Effect of CIETAC’s Decision on Consolidation.....	224
Section 7. HKIAC Rules.....	226
§1. Context.....	226
§2. HKIAC’s Power to Decide Consolidation.....	228
§3. The Three Alternative Conditions and HKIAC’s Discretion.....	228
A. HKIAC Is Empowered to Exercise a Relatively Broader Power to Decide Consolidation.....	229

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B. If Needed, HKIAC Will Review the Merits to Examine the Satisfaction of Conditions.....	231
C. The Discretion Exercised by HKIAC.....	232
§4. Procedural Fairness.....	234
§5. Legal Effect of the HKIAC’s Decision on Consolidation.....	234
§6. The Post-Consolidation Outcomes Based on the HKIAC Rules.....	235
A. Registry at Arbitral Institution.....	236
B. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings.....	236
§7. Practice.....	237
§8. Summary.....	240
Section 8. AIAC Rules.....	240
§1. Context.....	240
§2. AIAC Director’s Power to Decide Consolidation.....	242
A. Three Conditions and Discretion (Procedural Fairness).....	242
B. Legal Effect of the AIAC Director’s Decision on Consolidation.....	243
§3. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings...	244
Section 9. ACICA Rules.....	244
§1. Context.....	244
§2. ACICA Consolidation Regime is Substantially Similar to the HKAIC’s Counterpart.....	245
§3. ACICA’s Power to Decide Consolidation and the Corresponding Process inside ACICA.....	247
§4. Consequences of the Consolidation Decision.....	252
A. Legal Effect of the ACICA’s Decision on Consolidation.....	252
B. Establishment of the Tribunal to Hear Consolidated Proceedings.....	252
Section 10. DIS Rules.....	253
§1. DIS’s Power to Decide Consolidation and the Decision’s Legal Effect..	254
§2. Condition.....	254
§3. Discretion.....	255
§4. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings...	256

***PART 2. Assessment of the Most Desirable Model in Current Practice: In Terms of Efficacy and Legitimacy.....257***

**Chapter 1. Overarching Guidance Standard for Assessment and the List of**

<b>Measuring Indicators thereon.....</b>	<b>257</b>
<b>Chapter 2. Assessment.....</b>	<b>265</b>
Section 1. Assessment in Terms of Maximisation of Efficacy.....	267
§1. Consistency Assessment.....	272
A. Indicator 1①: No Temporal Limit to Request Consolidation.....	272
B. Indicator 1②: Decision-Maker(s) Can Trigger the Consolidation Process Sua Sponte.....	273
C. Indicator 2①: Explicit Agreement of All Parties on Consolidation Is a Prerequisite or Not.....	274
D. Indicator 2②: In the Absence of Explicit Consent, Consolidation Involving Multiple Parties to Multiple Agreements Can Be Permissible	275
E. Indicator 2③: In the Absence of Explicit Consent, Consolidating Arbitrations under Different Versions of Institutional Rules Can Be Permissible.....	279
F. Indicator 2④: In the Absence of Explicit Consent, Consolidating Institutional Arbitration and Ad Hoc Arbitration Can Be Permissible....	280
G. Indicator 2⑤: Consolidation Decision-Maker Sits in A Neutral Position .....	282
§2. Efficiency Assessment.....	284
A. Indicator 1③: Extra Time Wasted for Appointment of the Consolidation Decision-Maker.....	284
B. Indicator 1④: Specific Time Limit to Render the Decision on Consolidation.....	285
C. Indicator 3①: Same Consolidation Request Can Only Be Visited One Time.....	285
D. Indicator 3②: The Decision as to Consolidation is Final and Binding.... .....	287
[1] Assessment in the Eyes of Efficiency.....	287
[2] Theoretical Doubt Raised over the Alleged Administrative Nature of the Institutional Consolidation Decisions.....	289
Section 2. Assessment in Terms of Legitimacy.....	295
§1. Procedural Equality.....	295
A. Indicator 6①: Equal Right to be Heard.....	297
B. Indicator 6②: Equal Treatment in Composing the Consolidated Tribunal.....	298
§2. Independence and Impartiality of the Consolidation Decision-Maker [Indicator 4①].....	303

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A. Introductory Remarks.....	303
B. Evaluation of Model 4.....	305
[1] External Separation of Power for Arbitration Body.....	305
[2] Interior Separation of Power of Consolidation Decision-Making Within the Arbitration Body.....	310
[3] Conflict of Interest of the Institution.....	314
[4] Interlocutory Conclusion.....	317
C. Evaluation of Model 2 and Differing Score Results between Model 4 and Model 2.....	317
[1] “Third Person” under Model 2’ Rules is of Organisational Independence in Nature.....	317
[2] Parties Can Raise Independence and Impartiality Challenges to the “Third Person” akin to Challenge An Arbitrator.....	318
[3] Comparison Results.....	319
D. Final Result of Assessment among Consolidation Decision-Makers.....	320
§3. Transparency.....	320
A. Indicator 5①: Transparency regarding Inner Procedure of Consolidation Decision-Making.....	322
B. Indicator 5②: Communication of Reasons.....	323
Section 3. Assessment Result: Model 2 Triumphs.....	329
<b><i>Final Conclusions and Outlook</i></b> .....	<b>334</b>
<b>Chapter 1. The Fate of Model 4: Not to be Abandoned but to be Ameliorated to Reach its Full Potential</b> .....	<b>334</b>
<b>Chapter 2. The Outlook for Consolidation Mechanisms in Institutional Arbitration</b> .....	<b>337</b>
Section 1. Where We Stand, Where We Head for.....	337
Section 2. The SIAC Cross-Institution Consolidation Protocol: Remarks and Enhancement Proposals.....	342
§1. SIAC Proposal Deserves to be Read as Workable regarding the Overall Pathway.....	343
A. Two Steps to Take Effect the Cross-Institution Consolidation under SIAC Proposal: Complying with the Deemed Consent Principle.....	343
B. Application Scope of SIAC Proposal: Not All-Encompassing but Sound as a New Starting Point.....	346

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§2. Enhancement Proposals on the SIAC Cross-Institution Consolidation Protocol.....	348
A. Cross-Institution Consolidation Decision-Making Procedural Mechanism.....	348
[1] Remarks and Proposals regarding the Decision-Maker.....	351
[2] Proposal regarding Communication of Reasons for Decisions....	353
B. Administration of Consolidated Arbitrations.....	354
<b>Bibliography.....</b>	<b>360</b>
1. Arbitral Awards and Judicial Judgments (A-Z).....	360
2. Literature.....	362
2.1 Books (A-Z).....	362
2.2 Articles (A-Z).....	371
2.3 Online Resources (A-Z).....	378

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## List of Abbreviations

AAA	American Arbitration Association
AALCO	Asian-African Legal Consultative Organization
ACICA	Australian Centre for International Commercial Arbitration
ADGM	Abu Dhabi Global Market
AIAC	Asian International Arbitration Centre (Malaysia)
AIFC	Astana International Financial Center
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
CAMCA	Commercial Arbitration and Mediation Center for the Americas
CEPANI	Belgian Centre for Mediation and Arbitration
CIArb	Chartered Institute of Arbitrators
CICC	China International Commercial Court
CIETAC	China International Economic and Trade Arbitration Commission
DCCP	Dutch Code of Civil Procedure
DIAC	Dubai International Arbitration Centre
DIFC	Dubai International Financial Centre
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Institution of Arbitration)
EAA	English Arbitration Act 1996
HKIAC	Hong Kong International Arbitration Centre
IACAC	Inter-American Commercial Arbitration Commission
ICANN	Internet Corporation for Assigned Names and Numbers

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ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
IIL	Institute of International Law
JCAA	Japan Commercial Arbitration Association
KCAB	Korean Commercial Arbitration Board
LCIA	London Court of International Arbitration
LMAA	London Maritime Arbitrators Association
NAI	Nederlands Arbitrage Instituut (Netherlands Arbitration Institute)
NCC	Netherlands Commercial Court
PCA	Permanent Court of Arbitration
PILA	Swiss Federal Private International Law Act
QIC	Qatar International Court
QMUL	Queen Mary University of London
RCAKL	Regional Centre for Arbitration in Kuala Lumpur
SAC	Swiss Arbitration Centre
SCAI	Swiss Chambers' Arbitration Institution
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
SICC	Singapore International Commercial Court
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitration Centre

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## Introduction

For a long time, consolidation was never universally accepted by the world's major arbitral institutions.<sup>1</sup> But strikingly, the last short three decades, faced with imperious demand for consolidation tools from the sophisticated users of international commercial arbitration, as well as the recognition of significant advantages of consolidation, have witnessed the appearance and then widespread proliferation and dramatic evolution of consolidation provisions among the arbitration rules of the world's leading arbitral institutions. That being said, the consolidation provisions vary in certain principal dimensions among them<sup>2</sup>, yet no consensus on best practices has been reached globally<sup>3</sup>.

In this *Introduction*, I will mainly identify the distinct forms of models of consolidation mechanisms under institutional arbitration based on the identity of the consolidation decision-maker (Introduction-Chapter 3) and propose a pre-research hypothesis concerning which model will stand out as the most desirable (Introduction-Chapter 4). Before doing so, the Introduction will first present why, in the context of an international arbitration market that is particularly eager for consolidation, it has to count primarily on institutional arbitration to address the high demand for consolidation, *viz* arbitral institutions incorporate consolidation provisions in their rules (Introduction-Chapter 1). Following this, I will carefully select seventeen representative institutional rules as a solid basis for launching the research (Introduction-Chapter 2).

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<sup>1</sup> S.I. Strong, 'Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?' (1998) 31 *VandJTransnatlL* 915, 938

<sup>2</sup> Maxi Scherer, Lisa Richman and others, *Arbitrating under the 2014 LCIA Rules: A User's Guide* (Kluwer Law arbitration 2015) 255

<sup>3</sup> Kirtan Prasad, 'Joinder and Consolidation in Institutional Arbitration over the Last 10 Years: Evolution or Revolution?' (2021) 7 *National Law School Business Law Review* 24, 39 ("There is not, as yet, consensus on international best practice in so far as ... consolidation is concerned.")

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# CHAPTER 1. GENERAL BACKGROUND: THE MARKET DESIRES CONSOLIDATION, BUT WHO CAN BE COUNTED ON TO PROVIDE IT PRIMARILY?

Chapter 1 will present that consolidation tools have been greatly desired in recent years, and for now, to achieve a worldwide universal use of consolidation tools, only arbitral institutions can fulfil it to a great extent by incorporating consolidation provisions in their rules instead of other means. Before doing so, the definitions of “consolidation”, “arbitral institution” and its relevant term “institutional arbitration” shall be first carefully given for the purpose of this thesis.

## Section 1. Definition

### §1. “Consolidation” in Arbitration

In order to encompass all situations possible under the mentioned consolidation provisions in this thesis, this analysis will follow *Gilliéron/Pittet* who define consolidation of arbitration in a relatively broader way as a procedural mechanism to merge separate arbitral proceedings which are pending or initiated into one single arbitral proceeding.<sup>4</sup>

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<sup>4</sup> Philippe Gilliéron and Luc Pittet, ‘Introductory Rules: Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties (Art. 4)’ in Tobias Zuberbühler and others (eds), *Swiss Rules of International Arbitration: Commentary* (Kluwer Law International 2005) 36, 44. This definition is also by the following commentaries, such as Lara Michaela Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (Eleven Publishing 2011) 14; Philippe Bärtsch and Angelina M. Petti, ‘I. Introductory Rules: Consolidation and Joinder (Art. 4)’ in Tobias Zuberbühler and others (eds), *Swiss Rules of International Arbitration: Commentary* (2nd edn, Schulthess Juristische Medien AG 2013) para 14; Nikolaus Pitkowitz, ‘Chapter II: The Arbitrator and the Arbitration Procedure, Multi-Party Arbitrations: Joinder and Consolidation Under the Vienna Rules 2013’ in Christian Klausegger, Peter Klein and others (eds), *Austrian Yearbook on International Arbitration 2015* (MANZ Verlag Wien & Stämpfli Verlag AG 2015) 314.

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## §2. “Arbitral Institution”

The term “arbitral institution” refers to, as *Gerbay* defines, a permanent organisation which is reserved certain decisional authority as parties to dispute agree so as to facilitate an arbitration conducted in line with a set of arbitration rules.<sup>5</sup> For the purpose of this thesis, note that the analysis is, by default, concentrated on those organisations which intervene, at least occasionally, in institutional arbitration in the context of international commercial arbitration, rather than the situations where the organisations administer investment arbitration or act as appointing authorities or provide some pure logistical services in *ad hoc* arbitration.

## §3. “Institutional Arbitration”

In this analysis, “institutional arbitration” *stricto sensu* refers to the arbitrations administered by a certain arbitral institution under its own rules of arbitration, which is consistent with the perception of many leading arbitration scholars.<sup>6</sup> Accordingly, not every arbitration administered by an arbitral institution can be of institutional arbitration pursuant to this definition. The typical type concerned is the so-called “*ad hoc* arbitration administered by an arbitral institution”, which is not institutional arbitration in a strict sense even if it is administered by an arbitral institution. For instance, it is commonly perceived that an arbitration conducted under the UNCITRAL Arbitration Rules and administered by an arbitral institution, which is already commonplace for many arbitral institutions, is still conceptually an *ad hoc* arbitration.<sup>7</sup>

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<sup>5</sup> Rémy Gerbay, *The Functions of Arbitral Institutions* (Kluwer Law International 2016) 18

<sup>6</sup> For example, *Redfern and Hunter*, define institutional arbitration as “one that is administered by a specialist arbitral institution under its own rules of arbitration.” Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 45; likely, a former President and CEO of the American Arbitration Association (AAA) defines institutional arbitration “is that which is administered by any one of the existing specialist arbitral institutions under its own rules or arbitration.” William K. II Slate, ‘International Arbitration: Do Institutions Make a Difference’ (1996) 31 Wake Forest L Rev 41, 47.

<sup>7</sup> Ulrich G. Schroeter, ‘*Ad Hoc* or Institutional Arbitration – A Clear-Cut Distinction? A Closer Look at Borderline Cases’ (2017) 10 Contemporary Asia Arbitration Journal 141, 165 (“[A]rbitrations under the 2010 UNCITRAL Arbitration Rules may on occasion be “administered” *ad hoc* arbitrations, but are *ad hoc* arbitrations nonetheless.”); Eric Li, “Institutional Arbitration” (Jus Mundi, Wiki Notes, 23 May 2022) <<https://jusmundi.com/en/document/publication/en-institutional-arbitration>> accessed 25 October 2022

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Nevertheless, another existing definition of “institutional arbitration” in academia may conversely encapsulate the UNCITRAL arbitration administered by an arbitral institution and cause a debate, where institutional arbitration is “where parties submit their disputes to an arbitration procedure, which is conducted under the auspices of or administered or directed by an existing institution”<sup>8</sup> without emphasising the application of the arbitration rules of the administering arbitral institution.<sup>9</sup> In this vein, the UNCITRAL-Rules arbitration may no longer be regarded as an *ad hoc* arbitration once it is served by a certain arbitral institution for some logistical uses, but an institutional arbitration.

I do not want to dive deeper to argue which definition of institutional arbitration prevails from a purely conceptual perspective. However, I prefer to make a choice from a pragmatic view, in consideration of the particular situations of consolidation under the auspice of arbitral institution that this thesis focuses on. As illustrated below, the consolidation under the existing institutional rules is normally restricted between the arbitrations conducting under the administering arbitral institution’s own arbitration rules. Just imagine, if a situation where an arbitration under institutional rules and another arbitration under the UNCITRAL Rules can be consolidated according to a certain set of institutional rules, the adoption of a broader definition of institutional arbitration, i.e., the second one, would hide the nuances among the varied possibilities that consolidation provisions might provide for. Consequently, this thesis will adopt the narrower definition of institutional arbitration as mentioned above, and this definition would exclude the UNCITRAL arbitrations administered by an arbitral institution, the latter of which should be considered as *ad hoc* arbitration as commonly believed by the arbitration industry.

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<sup>8</sup> Julian D. M. Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 32

<sup>9</sup> The similar position to define “institutional arbitration” can also refer to Gerbay, *The Functions of Arbitral Institutions* (n 5) 15. “The notion of institutional arbitration does not necessarily exclude arbitration proceedings conducted under the standalone rules... We are of the view that these UNCITRAL-rules arbitrations, administered by institutions which otherwise apply their own arbitration rules, can potentially constitute ‘institutional arbitration’...”

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## Section 2. Market Urges Consolidation Tool in Arbitration and the “White Knight” is Institutional Arbitration Rules

In 2018, the prestigious International Arbitration Survey of Queen Mary University of London (QMUL Survey) for the first time ranked the “lack of power in relation to third parties” among top 3 complaints about arbitration, which had never appeared in the previous surveys.<sup>10</sup> This finding, on the one hand, reflects that international arbitration, the steadfast primary dispute resolution method for international commercial transactions<sup>11</sup>, is increasingly asked to resolve disputes involving multiple parties and/or multiple contracts.<sup>12</sup> Thus, more and more commentators have acknowledged that international commercial disputes are also multi-party in nature, for the parties residing in different jurisdictions and related contracts are increasingly involved nowadays.<sup>13</sup> On the other hand, this complaint reflected in international arbitration market, at least at that time, there is/was a salient paucity of user-satisfied tools to address the multi-party and/or multi-contract issue in arbitration. And this thesis is limited to address consolidation mechanisms among the series of multi-party and multi-contract procedural tools.

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<sup>10</sup> Queen Mary university of London and white & case, ‘2018 International Arbitration Survey: The Evolution of International Arbitration’ (2018) <<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-international-arbitration-survey-report.pdf>> accessed 28 September 2021

<sup>11</sup> Quentin Loh, ‘the limits of arbitration’ (2014) 1 McGill Journal of Dispute Resolution 67, 68. (“97% of respondents expressed that international arbitration is their preferred method of resolving cross-border disputes.”)

<sup>12</sup> For instance, in 2019, approximately a third of cases registered in the International Chamber of Commerce (ICC) involved more than two parties. ICC, ‘ICC Dispute Resolution 2019 Statistics’ (2020) <[www.iccwbo.org/dr-stat2019](http://www.iccwbo.org/dr-stat2019)> accessed 31 December 2020. And the London Court of International Arbitration (LCIA) shares a similar number (21%). LCIA, ‘2019 Annual Casework Report’ (2020) <<https://www.lcia.org/News/annual-casework-report-2019-the-lcia-records-its-highest-numbe.aspx>> accessed 31 December 2020

<sup>13</sup> Anne-Véronique Schlaepfer and Marily Paralika, ‘Striking the Right Balance: The Roles of Arbitral Institution’, (2015) 2 BCDR International Arbitration Review 329, 332; Gary Born, International Commercial Arbitration (2nd edn, Kluwer Law International 2014) 2564-2613

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*§1. Usefulness of Consolidation vs Restraints to Develop Consolidation in Arbitration: In the Broad Context of Rising Competition across International Dispute Settlement Mechanisms*

**A. Exertion of Consolidation Strengths Inherently Inhibited under Arbitration**

Consolidation mechanism as defined above is commonly recognized as one of the most effective procedural tools to address the said issue, as long with other multiparty procedural mechanisms<sup>14</sup>. Generally speaking, consolidating the arbitrations, where disputes involve similar subject matter, related facts, and common issue of law, in the same arbitral proceedings should increase the overall efficiency and avoid the risk of conflicting results.<sup>15</sup> Moreover, consolidation is also considered to serve fairness for the sake of justice,<sup>16</sup> which was also paid attention on the discussion table of UNCITRAL:

*“Where several distinct disputes arose between the same parties under separate contracts (e.g., related contracts or a chain of contracts) containing separate arbitration clauses or to avoid a situation where a party initiated a separate arbitration in respect of a distinct claim under the same contract in order to gain a tactical advantage.”<sup>17</sup>*

While consolidation mechanism or alike is universally adopted by state courts as provided in domestic civil procedural laws around the world, where the court judges

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<sup>14</sup> Other multiparty procedural mechanisms refer to, such as, joinder of additional party, claims between multiple parties, multiple contracts.

<sup>15</sup> UNCITRAL, ‘Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Sixth Session’, 40th Session, UN Doc A/CN.9/619, n 5, at 23, para 117. Jakob Ragnwaldh, Fredrik Andersson and others, *A Guide to the SCC Arbitration Rules* (Kluwer Law International 2019) 43; Gordon Smith, ‘Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules’ (2018) 35 *JIntlArb* 173, 175; Gary B. Born, *International Commercial Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2021) 2759-2816

<sup>16</sup> Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 16.

<sup>17</sup> UNCITRAL (n 15), n 5, at 23, para 117.

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do not need to defer to the parties' wishes, such coercive power of state courts is not yet ready to be commonly used in arbitration.<sup>18</sup> The theoretical rationale behind this was clearly pointed out by Singapore Chief Justice *Menon*:

*“Because arbitration is tethered to consent, it has historically struggled to deal with disputes involving multiple parties, some of whom may not be signatories to the same, or for that matter to any, arbitration agreement. **In the absence of consent, this has limited the ability of tribunals to join non-parties to, or to consolidate, arbitral proceedings (emphasis added).**”*<sup>19</sup>

Thus, two decades or so ago, i.e. in an IIL (Institute of International Law)'s Resolution made in 2003 in Bruges, Belgium (*2003 IIL Bruges Resolution*), the prestigious Institute of International Law already asserted that the attempt to transfer the national court's unfettered consolidation power to directly apply in addressing the demand for consolidation of arbitrations would “run the risk of compromising both the integrity of arbitration as a dispute resolution method and the principle that arbitration rests on the consent of the parties”.<sup>20</sup>

Arbitration is a consent-based dispute resolution, where the arbitrator's jurisdiction stems exclusively from the agreement of the parties.<sup>21</sup> And traditionally, the notion of arbitration is generally bi-polar in nature, *viz* arbitration involves two parties in dispute over one contract.<sup>22</sup> If the arbitrator intends to consolidate two or more separate arbitrations, the consent from all the parties concerned is a must, particularly in the situations where the to-be-consolidated proceedings involve different parties and/or different arbitration agreements. Therefore, it is conceptually challenging to randomly empower the arbitral tribunal, state court or other appointing authority a broad and coercive competence to order consolidation without deliberation on the parties' full consent, in particular when the power implicates third-party effect. Put

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<sup>18</sup> Maxi Scherer, 'Chapter 18: Multiple Parties, Consolidation and Joinder' in Maxi Scherer, LisaRichman and others (eds), *Arbitrating under the 2020 LCIA Rules: A User's Guide* (Kluwer LawArbitration 2021) 295

<sup>19</sup> Sundaresh Menon, 'Arbitration's Blade: International Arbitration and the Rules of Law' (2021) 38JIntlArb 1, 7.

<sup>20</sup> Institute of International Law, 'Arbitral Settlement of International Disputes Other Than Between States Involving More Than Two Parties' in Institute of International Law Resolution of the Twelfth Commission (Session of Bruges 2003) 2

<sup>21</sup> Michael J. Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (OUP 2017) 207.

<sup>22</sup> Loh (n 11), 74-75.

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differently, the requirement of consent fundamentally constrains the scope of consolidating separate arbitrations absent the consent of all parties concerned.<sup>23</sup> As such, a number of authors unanimously bluntly label multiparty arbitration in general (what this thesis addresses is consolidation therein) as one of the “limits” or “weaknesses” of arbitration or alike.<sup>24</sup>

## B. The Rising Competition between International Commercial Arbitration and International Commercial Courts Heightens the Urge for Developing Consolidation Mechanisms in Arbitration

The urgency of the need to advance consolidation mechanisms in arbitration appears even more pronounced if viewed in the broader context of the recent rise of competition between international commercial arbitration and International commercial courts. Recent years have seen the meteoric growth of international commercial courts established in jurisdictions all over the world.<sup>25</sup> As many scholars consistently acknowledged, this current trend is challenging the international commercial dispute resolution landscape, traditionally dominated by international commercial arbitration in the long term.<sup>26</sup> The prototype of international commercial courts usually refers to the London Commercial Court, founded in 1895.<sup>27</sup> Other “old school” international commercial courts include other commercial courts in London<sup>28</sup>

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<sup>23</sup> Janet Walker, ‘Specialised International Courts: Keeping Arbitration on Top of its Game’ (2019) 85 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 2, 10-11.

<sup>24</sup> Loh (n 11), 74-80 (In this article, multiparty arbitration is defined as one of the limits of arbitration); Pamela K. Bookman, ‘The Adjudication Business’ (2020) 45 *YaleJIntlL* 227, 248 (In this article, multiparty arbitration is perceived as a “shortcoming” or a “weakness” of arbitration); Michael Hwang, ‘Commercial Courts and International Arbitration – Competitors or Partners?’ (2015) 31 *ArbIntl* 193, 195 (In this paper, “the issue of multiple party arbitrations remains an unsolved one”); Walker (n 23) 10-11; Marta Requejo Isidro, ‘International Commercial Courts in the Litigation Market’ (2019) *MPILux Research Paper Series* 2019 (2), available under:

<<https://www.mpi.lu/research/working-paper-series/2019/wp-2019-2/>> Last access on 27 August 2023 (In this article, multiparty arbitration is mentioned as a “weakness of arbitration”.)

<sup>25</sup> Lucas Clover Alcolea, ‘The Rise of the International Commercial Court: A Threat to the Rule of Law?’ (2022) 13 *Journal of International Dispute Settlement* 413, 413; Isidro (n 24); Walker (n 23) 3-4; Bookman (n 24) 228.

<sup>26</sup> Bookman (n 24) 228; Isidro (n 24).

<sup>27</sup> Bookman (n 24) 233; Walker (n 23) 5; Isidro (n 24).

<sup>28</sup> In particular, the Technology and Construction Court in London. *See* Walker (n 23) 6.

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and the specialised commercial courts in New York<sup>29</sup>. The past 20 years have seen the establishment of emerging international commercial courts, mainly including the Dubai International Financial Centre Courts (DIFC Courts) in Dubai (2004), the Qatar International Court (QIC) in Qatar (2009), the Commercial Court of Paris (2010)<sup>30</sup> in France, the Abu Dhabi Global Market Courts (ADGM Courts) in Abu Dhabi (2015), the Singapore International Commercial Court (SICC) in Singapore (2015), the Court of the Astana International Financial Center (AIFC) in Kazakhstan (2015), the International Chamber for Commercial Matters for the Frankfurt district court (2018) in Germany, the China International Commercial Court (CICC) in China (2018) and the Netherlands Commercial Court (NCC) in the Netherlands (2019).<sup>31</sup>

Of relevance to this thesis is that one of the main theoretical grounds that the proponents underscored to justify the establishment of these emerging international commercial courts is the court's unfettered capability of consolidating cases (as well as other procedural power to address multiparty arbitration, such as joining additional party), with or without the unanimous consent of the parties.<sup>32</sup> On the contrary, as discussed above<sup>33</sup>, the fundamental role of consent in arbitration generally restrains the potential for consolidating the related arbitrations — consolidation of arbitrations may only occur when the parties concerned agree upon such a procedure<sup>34</sup>. As such, the litigants' demands for consolidation may not be met effectively in international arbitration, but that is one of the court's primary advantages over arbitration.<sup>35</sup> As part of their selling points to gain the favour of the international commercial dispute resolution market, the international commercial courts emphasise their ability to satisfy the weaknesses of arbitration — in particular, consolidation matters can be better dealt with by the courts.<sup>36</sup> For example, both rules of the SICC and NCC specifically highlight the courts' broad power to consolidate cases at either the party's

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<sup>29</sup> Such as the Commercial Division of the New York's State Court and the Southern District of New York (the latter is the federal trial level, also aspiring to attract transnational commercial litigation by maintaining high standards for the competence, neutrality, and legal expertise of its judges.) *See* Bookman (n 24) 237.

<sup>30</sup> In addition, more recently, an international chamber was also inaugurated within the Paris Court of Appeal. *See* Walker (n 23) 10.

<sup>31</sup> Alcolea (n 25) 413-414; Walker (n 23) 3-4; Isidro (n 24)

<sup>32</sup> *See* Loh (n 11) 80; Isidro (n 24); Hwang (n 24) 195.

<sup>33</sup> *See* Introduction-Chapter 1-Section 2-§1-A

<sup>34</sup> *See* Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816; Walker (n 23) 10-11.

<sup>35</sup> *See* Walker (n 23) 11; Bookman (24) 252.

<sup>36</sup> *See* Bookman (n 24) 248 & 276.

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application or the court's initiative.<sup>37</sup> Of course, this is a high-profile power shared with all the international commercial courts.<sup>38</sup>

Accordingly, to a large extent, international commercial courts and international commercial arbitration are rivals in the competition for market share in the international dispute resolution "market",<sup>39</sup> where the former is leveraging their consolidation strength against the latter. And the international adjudicative "business" is indeed a lucrative industry.<sup>40</sup> Against such a context of "market competition" between international arbitration and international commercial courts, in order to keep arbitration on top of its game, it is significantly urgent for the arbitration community to take initiatives to make consolidation more effective under the international arbitration regime, like innovating more boldly in rule-making and practice. Otherwise, it would only weaken arbitration's competitiveness in its entirety in the international commercial dispute resolution market under pressure posed by the mushrooming of the international commercial courts, especially when encountering multiparty/multi-contract-involved disputes. That is why it becomes (or remains) significant to examine the evolution of consolidation mechanisms in the field of international commercial arbitration at this stage, as it impacts the ongoing competition between international arbitration and international commercial courts viewed from a larger picture.

The subsequent question is, subject to the existing conditions, which approach will be primarily relied upon to handle consolidation matters under international commercial arbitration? This will further help target the concrete research objectives.

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<sup>37</sup> See SICC Rules of Court Order 110 r 9 and Article 6.4 and 6.5 of the NCC Rules. For commentary, see Bookman (n 24) 252; Walker (n 23) 11; Loh (n 11) 80; Hwang (n 24) 201.

<sup>38</sup> Walker (n 23) 11; Bookman (n 24) 244.

<sup>39</sup> Alcolea (n 25) 416; Isidro (n 24). Based on acknowledging the relationship between international arbitration and international commercial courts as competitors, some other literature also assumes that their relationship can also be partners to complement each other, e.g. between the SICC and SIAC in Singapore and between the DIFC Courts and DIAC in Dubai. See Hwang (n 24). Also note that the objective fact that international arbitration and international commercial courts become competitors does not equate to the primary driving force of establishing these international commercial courts is to compete with arbitration to win the best dispute resolution. See Bookman (n 24) 230 & 262.

<sup>40</sup> Alcolea (n 25) 416; Bookman (n 24) 227 & 262; Fernando Miguel Dias Simões, *Commercial Arbitration between China and the Portuguese-Speaking World* (Kluwer Law International 2014) 81; Douglas S. Jones, 'Arbitration Around the World: Alive or Dead?' (2013) 7 *Revista Română de Arbitraj* 1, 6.

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## *§2. Institutional Rules are Justified to be Mainly Relied upon to Handle Consolidation Subject to the Existing Conditions*

In general terms, how can the consolidation be fulfilled in arbitration? Theoretically speaking, there are three possible approaches to fulfill consolidation in arbitration: firstly, upon the *lex arbitri* at the seat of arbitration; secondly, directly via parties unanimously drafting a tailor-made multiparty mechanism provision into the arbitration agreement.; and thirdly, indirectly by referring to the arbitration rules which include the provisions to permit consolidation.<sup>41</sup> Among them, who will be the real white knight?

Regarding the first approach, it is not surprising to find that consolidation relevant provision is absent in most domestic arbitration laws today based on the above argument, and the UNCITRAL Model law was even silent during the course of 2006 revision in this matter.<sup>42</sup> However, it shall be admitted that there are indeed a small number of national arbitration laws which have contained consolidation provisions to differing effects, among which the court-ordered consolidation provision (Article 1046) in the Netherlands Arbitration Act (DCCP) is the most prominent representative<sup>43</sup>.

Regarding the second approach, it seems theoretically workable to expect consolidation to be achieved by enforcing a tailor-made provision permitting consolidation under certain circumstances, which fully conforms with the party autonomy principle. However, reaching a consensus for parties negotiating on such a

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<sup>41</sup> Smith (n 15) 175-176.

<sup>42</sup> Thomas H. Webster and Michael W. Bühler, *Handbook of ICC Arbitration* (Sweet & Maxwell 2021) 168.

<sup>43</sup> See Pitkowitz (n 4) 316 (“[V]ery few national laws provide for statutory consolidation, ... a real exception is Article 1046 of the Netherlands CCP, which gives the judge the power to order the consolidation upon request of one of the parties, unless the parties agreed otherwise.”); Philippe Leboulanger, ‘Multi-Contract Arbitration’ (1996) 13 *JIntlArb* 43, 58 (“[T]he Netherlands ‘may remain the fashionable exception rather than the rule’.”); Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816 (“A few national arbitration statutes provide for consolidation ... of arbitrations even absent the parties’ affirmative agreement ... Article 1046 of the Netherlands Code of Civil Procedure is representative.”) Regarding more details about the Dutch statutory consolidation, see *Part 1-Chapter 2-Section 2*.

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provision is highly likely challenging since not every party is in favour of incorporating a consolidation mechanism, especially for the party that is placed at the two ends of a chain contract, or for the party who fails to appreciate the value for such clause. Moreover, even if parties agree to additionally insert a bespoke consolidation clause, the drafting itself is highly sophisticated work that demands specialist legal expertise, which is not reachable to everyone.<sup>44</sup> For example, a bespoke consolidation clause may be refused to be enforced since the situation in question was not contemplated during the drafting process and was then not covered in such a clause. Not to mention, it is even more difficult to reach an express agreement on consolidation after the disputes have arisen, since the prior cooperation mindset probably goes away when the parties' procedural and substantial interests have diverged from each other.<sup>45</sup> As a result, consolidation is not assumed to be proliferated by virtue of drafting a tailor-made provision by parties (and their counsels) themselves.

Regarding the third approach, it should be discussed in two sub-approaches respectively: one is the *ad hoc* arbitration rules, another is the institutional arbitration rules.

With respect to the *ad hoc* arbitration rules, no such kind of rules (for commercial arbitration *sensu stricto*) contains a provision to permit consolidation, in particular the UNCITRAL Arbitration Rules (UNCITRAL Rules). Actually, during the revision course of the 2010 UNCITRAL Rules, consolidation was formally proposed<sup>46</sup> and discussed in the UNCITRAL working group but got refused at last.<sup>47</sup> The first and primary concern for the working group is that the UNCITRAL Rules, unlike institutional rules, normally would be applied in non-administered arbitration, which

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<sup>44</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 21) 207-208.

<sup>45</sup> *ibid* 226

<sup>46</sup> The UNCITRAL's Secretariat prepared the following draft provision for discuss: "The arbitral tribunal may, on the application of any party, ... assume **jurisdiction** over any claim involving the same parties and arising out of the same legal relationship, provided that such claims are subject to arbitration under these Rules and that the arbitration proceedings in relation to those claims have not yet commenced (emphasis added)." *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, Note by the Secretariat*, UNCITRAL, UN Doc A/CN.9/WG.II/WP.145/Add.1 at 2-3, para 5 (2006) (Draft Article 15 (4) (a)).

<sup>47</sup> David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Second Edition, OUP 2013) 58

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arouse the doubts about the feasibility of applying a consolidation provision in this context.<sup>48</sup> Another concern is with respect to the scope of a consolidation provision.<sup>49</sup>

By contrast with the above approaches, incorporating consolidation provisions into the institutional arbitration rules seems to be the most reliable solution to fulfil the consolidation demand for the international arbitration market. By the way, it is also an approach endorsed by the said *2003 IIL Bruges Resolution* to address consolidation in arbitration.<sup>50</sup> The grounds in my mind that the approach of incorporating consolidation in institutional rules prevails are as follows.

First, faced with the rapidly increasing volume of complex disputes, the arbitral institutions themselves have long felt the need of regime on consolidation.<sup>51</sup> As a matter of fact, a certain of arbitral institutions have had attempted to *de facto* consolidate arbitrations before formally incorporating an express provision in their rules.<sup>52</sup> The usual practice is to appoint an identified arbitral tribunal to jointly hear parallel or related proceedings with the express consent of all parties.<sup>53</sup> But the effect of these consolidation workarounds could reach cannot really compare to the authentic (or “contemporary”) consolidation provisions that users desire in terms of efficacy. Notably, for example as HKIAC’s past experiences illustrated, the parties to dispute are more common to reject consolidation since they regard it as strategically

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<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.* (“To the extent the provision was to address new claims raised under the same contract, some believed that the provision on amendment of the statement of claim contained in the Rules might already apply. To the extent a consolidation provision would address several distinct disputes arising between the same parties under separate contracts, each with its own distinct arbitration clause, problems of consent were identified. For example, in consolidation proceedings, some worried that a party might be forced to participate in the arbitration on terms which differed from those in its arbitration agreement.”)

<sup>50</sup> Institute of International Law (n 20) 1 (“Issues of an international character such as ... consolidation of arbitration proceedings ... should be regulated either by the parties’ agreement or **by the arbitration rules of arbitration institutions** and not by national legislation (emphasis added).”).

<sup>51</sup> Lu Song, ‘The New CIETAC Arbitration Rules of 2012’, (2012) 29 *Journal of International Arbitration* 299, 300.

<sup>52</sup> *ibid* 300.

<sup>53</sup> *ibid*; Paul Oberhammer and Christian Koller, ‘VIAC Rules of Arbitration 2018, Article 15 [Consolidation]’ in Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (ed), *Handbook VIAC Rules of Arbitration and Mediation: A Practitioner’s Guide* (2nd edn, Verlag WKÖ Service GmbH 2019) 104; Anke Sessler and Peter Heckel, ‘§2.02: Request for Arbitration, Answer, Counterclaims and Consolidation of Proceedings, Article 8: Consolidation of Arbitrations’ in Gustav Flecke-Giammarco, Christopher boog and others (eds), *The DIS Arbitration Rules: An Article-by-Article Commentary* (Kluwer Law International 2020) 174; Harald Sippel and Marieke Minkinen, ‘The New KCAB Rules’ (2016) 34 *ASA bulletin* 569, 576.

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expedient to do so<sup>54</sup>, when there is no default and ready-made consolidation mechanism stipulated in the institutional rules. Accordingly, the past *laissez-faire* attitude on consolidation itself among the institutional arbitrations hindered the exertion of consolidation in this field, and it has sparked calls for introducing consolidation rules under the auspices of arbitral institutions. Under this context, some pioneer arbitral institutions began to expressly include their own consolidation provisions gradually.

Second, with the constant adaptation and innovation contributed by the leading arbitral institutions, including their endeavor on consolidation, the role of arbitral institution in shaping the frontiers of international arbitration is affirmed<sup>55</sup>. In the 2018 QMUL Survey, a significant majority of respondents (80%) consider “arbitral institutions” to be best placed to influence the future evolution of international arbitration.<sup>56</sup> The outstanding role seized by arbitral institution, in turn, confers it the mission to contribute more attractive consolidation regime, which has been called for by the market. In the 2021 QMUL Survey, “more tailored procedures for complex and multi-party arbitrations” was listed as one factor of attractiveness to choose an arbitration institution, which is ranked fifth place out of twelve factors.<sup>57</sup> Accordingly, to maintain or improve their market attractiveness and credibility, especially faced with the rising competition posed by the mushrooming of international commercial courts as discussed *supra*, the arbitral institutions are advancing to adapt their own rules to address the perceived competitive disadvantages, where the consolidation provision is attached to significant weight.<sup>58</sup> Today, as a result, containing an express consolidation provision has become a prevailing trend for institutional arbitration rules.

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<sup>54</sup> Michael Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (2nd edn, OUP 2022) 288

<sup>55</sup> Gary B. Born and Dharshini Prasad, ‘Joiner and Consolidation’, (2018) 5 *Bahrain Chamber for Dispute Resolution International Arbitration Review* 54, 84

<sup>56</sup> Queen Mary University of London, ‘2018 International Arbitration Survey: Adapting Arbitration to a Changing World’ (2018)

<<https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf>> accessed 22 September 2023

<sup>57</sup> Queen Mary University of London and White & Case, ‘2021 International Arbitration Survey: Adapting Arbitration to the Changing World’ (2021).

<[https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf)> accessed 12 June 2022

<sup>58</sup> Walker (n 23) 3

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Third, in the current context that national arbitration laws cannot universally provide for consolidation tool, an impressive benefit of this approach is that technically the parties, who perceive consolidation mechanism desirable in their arbitral proceedings, can freely agree to refer to a set of institutional rules which provide for consolidation in almost every corner of the earth. Although it is subject to the mandatory rules provided in the applicable *lex arbitri*, honestly it is rare to see this kind of prohibition among the national arbitration laws.

Lastly, but most importantly, this approach has been equipped with a robust, at least relatively, established legitimacy theory, which is the principle of deemed consent<sup>59</sup>. This principle refers to the parties to an institutional arbitration who are deemed to have consented to any solution that the chosen institutional rules provide for,<sup>60</sup> insofar as there is no limit from the applicable arbitration acts or no concerned agreements for waiver. As such, in the case where the consolidation provision is stipulated in the said rules, the parties are deemed to have given consent in principle to the consolidation of related proceedings in advance of any dispute, given their arbitration cases are administered by the corresponding arbitral institution.<sup>61</sup> In line with Gary B. Born and other authors, the principle of deemed consent is reconciled with party autonomy, the indisputable touchstone of arbitration.<sup>62</sup> In my view, the notion of deemed consent can be regarded as a more flexible and liberal but logical approach to construing party autonomy and consent in the arbitration agreement. However, from the side of the parties (especially the disgruntled party), this may be considered a tactful intrusion into their party autonomy. Relevantly, note that there are a few arbitral rules that refuse to (fully) adopt this theory in their consolidation provisions, as discussed *infra*.

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<sup>59</sup> Born, 'Joiner and Consolidation' (n 55) 80.

<sup>60</sup> Nathalie Voser, 'Multi-party Disputes and Joinder of Third Parties', in Albert Jan den Berg (ed.), *50 Years of the New York Convention*, ICCA Congress Series, Vol. 14 (Kluwer Law International 2009) 360; similarly, Ruth Stackpool-Moore, 'Joinder and Consolidation: Examining Best Practice in the Swiss, HKIAC and ICC Rules', in Nathalie Voser (ed), *10 Years of Swiss Rules of International Arbitration: ASA Special Series No. 44* (JurisNet LLC 2014) 19

<sup>61</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 21) 208, 226; Born, 'Joiner and Consolidation' (n 55) 80.

<sup>62</sup> Born, 'Joiner and Consolidation' (n 55) 80; Stackpool-Moore (n 60) 19 ("[I]t is more than arguable that the fundamental principle of party autonomy is not violated by the mechanisms of ... consolidation, even when they are implemented on a non-unanimous basis, due to the parties' initial agreement to the chosen institutional rules.").

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As the vast majority of international arbitrations are now institutional rather than *ad hoc*,<sup>63</sup> it is conceivable that it would be recognised as a significant advancement in practice if the consolidation issue could be well addressed under the institutional arbitration framework. Notwithstanding, someone may argue that the parties to a dispute can still consent to exclude any consolidation mechanism incorporated into the institutional rules that the parties desire to refer to, as consolidation provision is usually not attributed as “non-derogatable” provisions<sup>64</sup> in institutional rules. It is evidently true under the overriding principle of party autonomy. In comparison with the unilateral resistance to sabotage consolidation in the circumstance where institutional rules do not provide for a consolidation mechanism, however, opting out default consolidation provisions from the agreed institutional rules demands explicit consents from all the related parties in the arbitration agreement or related, which actually raises the threshold to exclude the application of consolidation compared to the former. In terms of facilitating consolidation in arbitration, incorporating a set of default consolidation provisions into arbitration rules is much more favorable to achieve consolidation than simply relying on the express terms of the arbitration agreement to permit consolidating separate proceedings.

With all this being said, the thesis will revolve around the consolidation mechanisms within the realm of institutional arbitration without extending to the consolidation in *ad hoc* arbitration. Moreover, although this thesis is on the topic of consolidation mechanisms, given the expansion of the role of arbitral institutions in the conduct of arbitral proceedings in general in recent years<sup>65</sup>, *inter alia*, the rise of the concept of “jurisdiction of the arbitral institution”<sup>66</sup>, concentrating on institutional consolidation

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<sup>63</sup> Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP 2017) 82; Alexis Mourre, ‘Arbitral Institutions and Professional Organizations as Lawmakers’, in Jean Engelmayr Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaption: The Future of International Arbitration*, ICCA Congress Series, Volume 20 (Kluwer Law International 2019) 90; According to the 2015 QMUL Survey, 79% of the respondents’ arbitrations over the past five years (2010-2015) were institutional rather than *ad hoc*.

<sup>64</sup> Schroeter (n 7) 170.

<sup>65</sup> See Gerbay, *The Functions of Arbitral Institutions* (n 5).

<sup>66</sup> This concept has appeared both in academic works and in the rules texts. In academia, see Gerbay, *The Functions of Arbitral Institutions* (n 5) 19; Martin F. Gusy and James Milton Hosking, *A Guide to the ICDR International Arbitration Rules* (2nd edn, OUP 2019) 24-28 (The author directly uses the term of “institutional arbitration” and “ICDR jurisdiction”.) For the rules texts, see Article 6 of Appendix I Organization of the SCC Rules (2023), which states: “The function of the Board is to take the decisions required of the SCC in administering disputes under the SCC Rules. Such decisions include decisions on the *jurisdiction of the SCC*...(emphasis added)”.

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mechanisms could provide a window to observe the evolution or differences of the role played by the arbitral institutions.

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CHAPTER 2. THE SELECTION OF INSTITUTIONAL RULES AND THE  
CURRENT GENERAL SITUATION OF CONSOLIDATION  
PROVISIONS THEREIN

**Section 1. Selected Institutional Rules and Selection  
Criteria**

*§1. Institutional Rules Being Targeted*

In terms of consolidation mechanisms within the institutional arbitration framework, from my observation, there are seventeen arbitral institutions' rules standing out around the world which will be mainly addressed in *PART I*, and these seventeen selected rules are as follows:

- (1) the Commercial Arbitration Rules of the Japan Commercial Arbitration Association (JCAA Rules),
- (2) the Rules of Arbitration of the International Chamber of Commerce (ICC Rules),
- (3) the Swiss Rules of International Arbitration of the Swiss Arbitration Centre (Swiss Rules),
- (4) the Arbitration Rules of the Belgian Centre for Arbitration and Mediation (CEPANI Rules),
- (5) the Rules of Arbitration and Mediation of the Vienna International Arbitral Centre of the Austrian Federal Chamber of Commerce (VIAC Rules),
- (6) the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules),
- (7) the China International Economic and Trade Arbitration Commission Arbitration Rules (CIETAC Rules),

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- (8) the Hong Kong International Arbitration Centre Administered Arbitration Rules (HKIAC Rules),
  - (9) the Asian International Arbitration Centre (Malaysia) Arbitration Rules (AIAC Rules),
  - (10) the International Dispute Resolution Procedures of the International Centre for Dispute Resolution (ICDR Rules),
  - (11) the Arbitration Rules of the London Court of International Arbitration (LCIA Rules),
  - (12) the Arbitration Rules of the Netherlands Arbitration Institute (NAI Rules),
  - (13) the International Arbitration Rules of the Korean Commercial Arbitration Board (KCAB Rules),
  - (14) the Singapore International Arbitration Centre Arbitration Rules (SIAC Rules),
  - (15) the Arbitration Rules of the Australia Centre for International Commercial Arbitration (ACICA Rules),
  - (16) the German Arbitration Institute Arbitration Rules (DIS Rules), and lastly,
  - (17) the Dubai International Arbitration Centre Arbitration Rules (DIAC Rules).

The above selection is based on a set of comprehensive criteria, as illustrated below.

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## §2. Criteria of selection

### A. Criterion 1: Rules Serving for Consolidation under the International Commercial Arbitration

Firstly, as a matter of course, the candidate rules should provide for a consolidation mechanism for *international commercial arbitration*, which means it will not be considered if the consolidation rule is absent from the arbitral rules or the consolidation rule just serves for domestic arbitration or (international) investment arbitration. Nowadays, consolidation provision has not been acknowledged as a rarity any more among the leading international arbitration rules.<sup>67</sup>

### B. Criterion 2: Popularity

Secondly, the main criterion is to target the most popular arbitral institutions around the world, whose arbitral rules usually provide for, *inter alia*, the most outstanding and diffusive consolidation mechanisms. Essentially, selecting a set of institutional rules is equivalent to selecting a specific arbitral institution since the institutional rules frequently authorise their arbitral institutions as the sole administering body.<sup>68</sup> The more popular an arbitral institution is, the more oft-used and aware its arbitral rules are, and *vice versa*. Logically, high popularity could bring industry leadership status to an international arbitral institution; in turn, the tools designed and practised by such a leading institution could be promulgated more easily and widely. Accordingly, through the accumulated use by clients from different cultures and backgrounds as well as the transnational legal networks, the most frequently used consolidation mechanisms, usually provided by the most popular arbitral institutions, can also be expected to transmit and eventually diffuse the institutionalisation of consolidation mechanism around the world's arbitral centres.

The prestigious QMUL surveys regularly update the rankings of the most preferred arbitral institutions. Based on the latest two QMUL surveys, namely the 2021 QMUL

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<sup>67</sup> Smith (n 15) 176.

<sup>68</sup> For example, Article 1(2) of the ICC Rules 2021 states: “The [ICC] Court is the only body authorized to administer arbitrations under the [ICC] Rules”.

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Survey and the 2018 QMUL Survey<sup>69</sup>, the following arbitral institutions are on the rankings: the ICC<sup>70</sup>, the SIAC<sup>71</sup>, the HKIAC<sup>72</sup>, the LCIA<sup>73</sup>, the CIETAC<sup>74</sup>, the SCC<sup>75</sup>, the ICDR<sup>76</sup>, the ICSID, the PCA and LMAA. The first seven arbitral institutions are admitted in this analysis because they have expressly introduced the consolidation regime in their respective rules, and the majority of them even have gone through several rounds of revisions. With respect to the last three listed institutions, the author will not admit them into the thesis's review since they cannot fully accommodate the definition of "arbitral institution" for the thesis's purpose, as discussed before. Precisely, the PCA (Permanent Court of Arbitration)<sup>77</sup> and the LMAA (London Maritime Arbitrators Association) do not administer institutional arbitration but only provide some support for *ad hoc* arbitration, and the LMAA even does not hold itself as an arbitral institution<sup>78</sup>. The ICSID, standing for International Centre for Settlement of Investment Disputes, as its full name illustrates, focuses on administering investment arbitration rather than institutional commercial arbitration. By the way, akin to the PCA, the ICSID can also be agreed to administer *ad hoc* arbitration under the UNCITRAL Arbitration Rules or other rules.<sup>79</sup>

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<sup>69</sup> Noted that the 2021 QMUL survey released top 10 preferred arbitral institutions, while the 2018 QMUL survey only released top 7 preferred arbitral institutions.

<sup>70</sup> The ICC remained the place of top 1 in both the 2018 and the 2021 QMUL Surveys.

<sup>71</sup> The SIAC was ranked second place in the 2021 QMUL Survey, rising from third place in the 2018 QMUL Survey.

<sup>72</sup> The HKIAC was ranked third place in the 2021 QMUL Survey, rising from fourth place in the 2018 QMUL Survey.

<sup>73</sup> The LCIA was ranked fourth place in the 2021 QMUL Survey, dropping from three place in the 2018 QMUL Survey.

<sup>74</sup> The CIETAC was ranked fifth place in the 2021 QMUL Survey, which is also the first time the CIETAC emerged in the top 5 list.

<sup>75</sup> The SCC was ranked seventh place in the 2021 QMUL Survey, dropping from fifth place in the 2018 QMUL Survey.

<sup>76</sup> The ICDR was ranked eighth place in the 2021 QMUL Survey, dropping from seventh place in the 2018 QMUL Survey.

<sup>77</sup> <<https://pca-cpa.org/en/services/arbitration-services/uncitral-arbitration-rules/>> accessed 12 June 2022.

<sup>78</sup> QMUL, '2021 International Arbitration Survey: Adapting Arbitration to the Changing World' (n 57). In fact, the survey has explicitly clarified that the LMAA is not an arbitral institution as it asserts itself and the fact that the LMAA terms were listed was attributed as an inadvertent typographic error, and the LMAA was retained on the list for the purpose of maintaining the integrity of the survey data.

<sup>79</sup> <<https://icsid.worldbank.org/services/arbitration>> accessed 12 June 2022.

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### C. Criterion 3: Taking into Account the Geographic Balance and Larger Diversity Coverage

Besides the seven world-influential arbitral institutions confirmed above, this analysis will also expand the attention span to a range of arbitral institutions active at the regional levels as an effort to present a more comprehensive awareness of the consolidation regimes diversity by comparing the variants in the context of an increasingly competitive international arbitration market landscape. In other words, the rest candidates should be chosen for the sake of geographic balance and meanwhile enlarging variation diversity of the research objects. For these reasons, in selecting institutional rules, the thesis should give as much consideration as possible to institutional rules from different regions and, as a principle, exclude admitting two or more institutional rules where the prescribed administering institutions are headquartered in the same jurisdiction.

In this way, Swiss Arbitration Centre (SAC), VIAC, DIS and CEPANI in Europe, DIAC<sup>80</sup> in the Middle East, JCAA and KCAB in East Asia, AIAC in Southeast Asia and ACICA in Oceania are selected for their recognisable positions in the respective regions, as well as the active roles played by them to provide consolidation tools without exception.

Unfortunately, the arbitral institutions in some regions fail to be selected. For instance, no arbitral institution from the African continent will be admitted in this thesis, as the Lagos Court of Arbitration, the most popular arbitral institution in Africa<sup>81</sup>, has not yet embraced a consolidation mechanism into its rules. In parallel, the above selection result appears to skew towards European-based and Asian-based arbitration institutions, which cannot be assumed to be an unbalanced selection outcome but a *status quo* reflection of the market landscape of international commercial arbitration. By now, the market of international commercial arbitration is

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<sup>80</sup> The Dubai government once officially asserted that DIAC was named as one the world top 10 arbitral centers by the QMUL 2021 survey. DIAC, 'Dubai International Arbitration Centre launches new 2022 Arbitration Rules' (2 March 2022) <<http://www.diac.ae/idias/resource/Rules2022PR.pdf>> accessed 12 June 2022. However, it seems to me that the QMUL 2021 survey did not list DIAC as one of the top 10 most preferred arbitral institutions but just logged it as an active regional player in Middle East. Instead, it is Dubai that was ranked as one of the most popular arbitral seats. QMUL, '2021 International Arbitration Survey: Adapting Arbitration to the Changing World' (n 57).

<sup>81</sup> QMUL, '2021 International Arbitration Survey: Adapting Arbitration to the Changing World' (n 57).

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heavily dominated by the above-mentioned European-based and Asian-based arbitral institutions, either for the worldwide importance as a trading country<sup>82</sup>, either for the secured position as a world (or regional) dispute resolution hub<sup>83</sup> or for both<sup>84</sup>. In turn, they contribute the most to the institutionalisation and innovation of consolidation regimes to accommodate the market need and ultimately secure the attraction of their rules.

#### D. Criterion 4: Keeping an Eye on the Rules of the Arbitral Institution Based in the Jurisdiction with a High-Profile Statutory Consolidation Provision

Last but not least, this thesis should also keep an eye on the institutional rules where the administering arbitral institution is headquartered in the jurisdiction in which a high-profile statutory consolidation mechanism is stipulated in the national arbitration legislation.

A few national arbitration legislations provide for a default mechanism for the national court to order separate arbitrations to be consolidated where the parties have not affirmatively agreed otherwise, among which the long-lasting Article 1046 of the Dutch Code of Civil Procedure (DCCP) is the most representative.<sup>85</sup> This statutory consolidation provision can date back to 1986, and the opt-out nature remains robust until now, where consolidation could be *de facto* compulsorily ordered unless the parties of the to-be-consolidated proceedings have managed to consent to exclude this mechanism.<sup>86</sup>

NAI is the largest comprehensive arbitral institution based in the Netherlands<sup>87</sup>, which has already enjoyed regional influence. Its consolidation regime highly deserves to be reviewed in this thesis as a representative to be especially observed on the interplay

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<sup>82</sup> For example, the CIETAC from China, the JCAA from Japan, the KCAB from South Korea.

<sup>83</sup> For example, the HKIAC from Hong Kong SAR, the SIAC from Singapore, the SCC from Sweden, the DIAC from the UAE, the SAC from Switzerland.

<sup>84</sup> For example, the LCIA from the UK and the ICC from France.

<sup>85</sup> Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816.

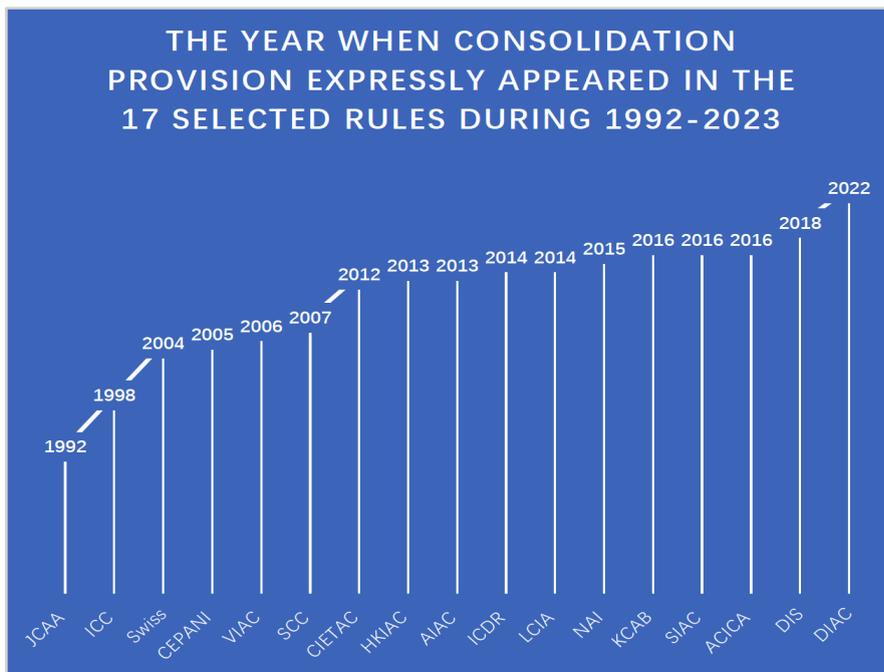
<sup>86</sup> More detailed analysis of this Dutch statutory consolidation provision will be discussed *infra* at Part 1-Chapter 4-Section 2-§1.

<sup>87</sup> Albert Marsman, *International Arbitration in the Netherlands, with a Commentary on the NAI and PCA Arbitration Rules* (Kluwer Law International 2021) 35

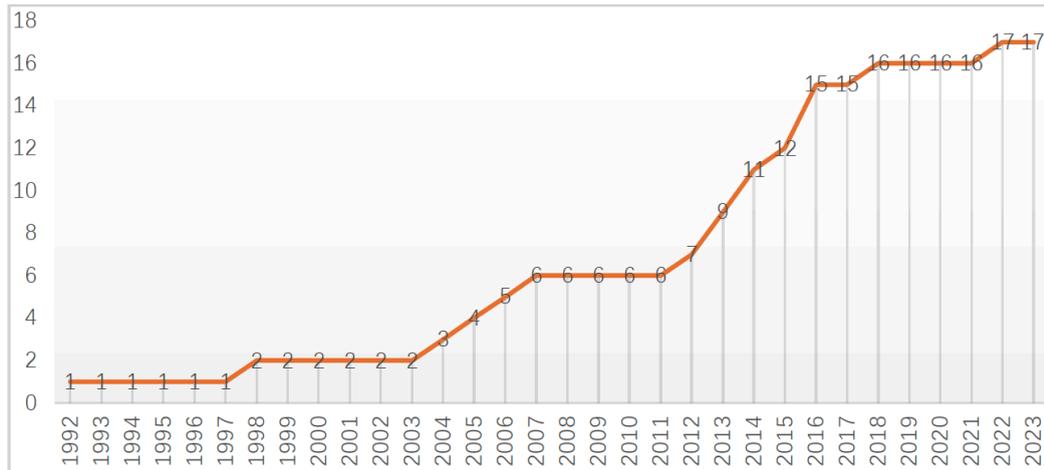
between the consolidation regime in arbitral rules and the default consolidation regime in national legislation, provided the arbitrations considered to be consolidated, at least one of them, are seated in the Netherlands.

## Section 2. Current General Situation on consolidation provisions

By observing the seventeen select institutional rules, consolidation-related provisions appeared very late in institutional rules in the long history of modern international arbitration. Hence, the thesis will extract the period from 1992 to 2023 to review these consolidation provisions, covering from when consolidation provisions first appeared sporadically to the present. A general situation among them is going to be presented in this Section.



**Figure 1** The Year When the 17 Selected Arbitration Rules Newly Introduced the Express Consolidation Provision, 1992–2023



**Figure 2** Total Number of Consolidation Provisions Each Year among the 17 Rules, 1992–2023

Figure 1 aims to illustrate the emergence year of express consolidation provision from each selected institutional rules from 1992 to 2023, while Figure 2 is more intuitive to show the general trend of the introduction of consolidation mechanism under the arbitration centre’s rules by virtue of showing the total number of consolidation provisions each year among the seventeen selected rules over the same period.

Among these rules, the first arbitration centre to introduce consolidation provision was the Japan-based arbitral institution, JCAA, which is kind of surprisingly contrary to the stereotype that ICC seems usually enshrined as the first person to try tomato. In 1992, JCAA Rules already contained an express consolidation provision, whereas other select rules, even ICC Rules, were still silent. It was not until 1998 that ICC, the recognised industry leader, introduced its first consolidation provision, which finally triggered widespread attention and also debate in the international arbitration community about the institutionalisation of consolidation under institutional rules. However, after the ICC’s breakthrough, most institutional rules were still hesitant to introduce consolidation for a long while.

Between 1992 to 2023, as Figure 1 and Figure 2 jointly indicate, there were two concentrated periods where the selected institutional rules joined in introducing consolidation provisions. The first concentrated period was between 2004 and 2007,

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at the beginning of the 21<sup>st</sup> century. This period witnessed a prudent but stable increase: one entrant per year, during which the Swiss Rules (in 2004), CEPANI (in 2005), VIAC (in 2006) and SCC (in 2007) introduced their first generation of consolidation provisions. Yet, before the second decade of the 21<sup>st</sup> century came, consolidation had not been accepted universally under the major international arbitration centres<sup>88</sup> and in particular, arbitral centres from the common law world still closed the door to consolidation. The second concentrated period was between 2012 and 2016, which witnessed a dramatic global growth spurt of entrants introducing consolidation provisions. There were nine selected institutional rules, more than half of all the selected rules, newly brought in consolidation provision within this short five years! These said nine entrants were CIETAC (in 2012), HKIAC (in 2013), AIAC (in 2013), ICDR (in 2014), LCIA (in 2014), NAI (in 2015), KCAB (in 2016), SIAC (in 2016) and ACICA (2016), including almost all the leading arbitral institutions headquartered in common law jurisdictions<sup>89</sup>. Since then, containing a consolidation provision has been overwhelmingly recognised by the leading institutional rules as an established trend.<sup>90</sup> Lastly, DIS and DIAC joined this trend after 2016 as late followers.

At the time when consolidation provisions had just emerged in the international commercial arbitration market, they had endured some criticism and suspicions; however, in parallel, parties have frequently adopted these young rules, and no big complaints have been logged according to the corresponding arbitration centres.<sup>91</sup> An apparent indicator is that, since the consolidation provision was introduced in each reviewed set of rules, no arbitration rules from the seventeen arbitral institutions once withdrew the consolidation regime. Instead, arbitral institutions have forced

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<sup>88</sup> Lara Michaela Pair and Paul Frankenstein, 'The New ICC Rule on Consolidation: Progress or Change' (2011) 25 *EmoryIntlLRev* 1061, 1064 ("Consolidation has not been accepted universally by either national courts adjudicating arbitration-related matters or major arbitral institutions. Only a few solutions for consolidation.")

<sup>89</sup> Namely, HKIAC from Hong Kong, AIAC from Malaysia, ICDR from the US, LCIA from the UK, SIAC from Singapore and ACICA from Australia.

<sup>90</sup> Sessler (n 53) 174; Smith (n 15) 202.

<sup>91</sup> Georg von Segesser, Alexander Jolles and Anya Geroge, 'Swiss Rules of International Arbitration' in Karyl Naim and Patrick Heneghan and others (eds), *Arbitration World, International Series* (5th edition, Thomson Reuters 2015) 249 ("Even though the corresponding provisions gave rise to some criticism and suspicion when they were first introduced with the 2004 Swiss Rules, parties have made frequent use of these provisions since and no major problems have been noted by the Chambers of Commerce.")

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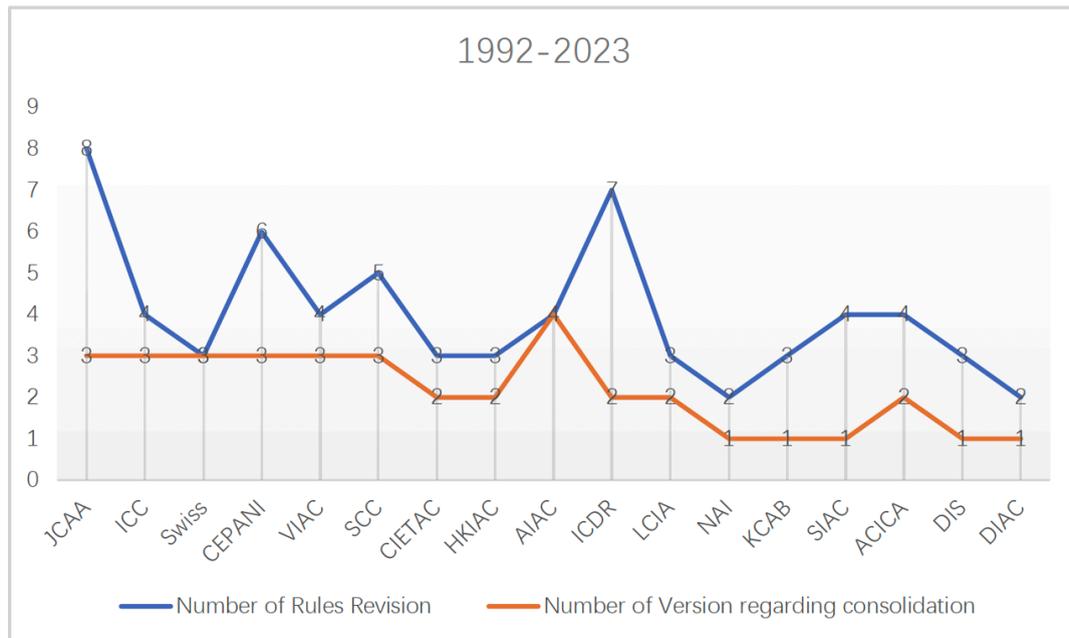
themselves to modernise the consolidation provisions and related practices to accommodate the evolved needs of their users over the years.<sup>92</sup>

The following Figure 3 presents two tendency lines of revision numbers between 1992 and 2023: one line reflects the number of revising arbitration rules at the general level, and another reflects the number of versions specifically regarding consolidation<sup>93</sup>. In response to increasingly various changes in market demand, it is clear that each reviewed set of institutional rules has been revised quite repeatedly during this period, and the average revision time is four times. During the same period, the specific consolidation provision among the seventeen selected rules has been revised an average of two times, and this number is the very half of the average number (four times) of the general revision of arbitration rules. Based on Figure 3, it can be argued that the revision of leading arbitration rules at the general level positively correlates to the consolidation provision revision. In other words, consolidation has played, and is still playing, a prominent role in the modernisation and advancement of international arbitration rules over the recent years.

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<sup>92</sup> Webster (n 42) 167.

<sup>93</sup> It should be noted that “the number of versions specifically regarding consolidation” also counts the original version of consolidation provision, not only the revision number of consolidation provision.



**Figure 3** Comparison between the Number of Rules Revisions and the Number of Versions regarding Consolidation, 1992-2023

As the revision of consolidation provision goes deepening, the weight put on the consolidation regime out of the whole set of rules has become heavier and heavier. From the perspective of formality, it can be reflected from two sides. One side is on the systematic placement that the consolidation provision has been switched from the dependent placement (i.e., a sub-paragraph of an article) in the earliest period<sup>94</sup> to having its stand-alone article(s) at present.<sup>95</sup> Another side is the length of consolidation provision, which becomes longer and longer. The current consolidation provisions from HKIAC and SIAC both occupy three pages in their official printed rules booklets, whereas the ICC Rules 1998 just provided two sentences in total to set out consolidation. As to the substantial contents, in line with what many commentators have observed, there is a wide variation among the selected

<sup>94</sup> For example, the ICC Rules (1998) placed consolidation provision as a sub-paragraph under Article 4 “Request for arbitration”; the Swiss Rules (2004) also placed consolidation provision as a sub-paragraph under Article 4 with participation of third person. Now, the existent rules of ICC and Swiss have enshrined consolidation in an independent article under its own name.

<sup>95</sup> Pair, ‘The New ICC Rule on Consolidation: Progress or Change?’ (n 88) 1065.

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consolidation provisions on a range of aspects,<sup>96</sup> *inter alia* in terms of this thesis, the divergence of the competent body to decide consolidation and the corresponding ramifications<sup>97</sup> stand out.

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<sup>96</sup> For example, Scherer, *Arbitrating under the 2014 LCIA Rules: A User's Guide* (n 2) 255; Smith (n 15) 178.

<sup>97</sup> Such as the time limit to request consolidation, the establishment of the tribunal concerning consolidated proceedings or the neutrality of the decision-maker.

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CHAPTER 3. FOUR CONSOLIDATION DECISION-MAKING MODELS IN  
CURRENT INSTITUTIONAL ARBITRATION PRACTICE:  
BASED ON THE IDENTITY OF THE CONSOLIDATION  
DECISION-MAKER

**Section 1. Classification Criterion**

Consolidation of arbitration proceedings was once argued that only the arbitral tribunal could order it in institutional arbitration.<sup>98</sup> Over the evolution of consolidation regimes among the institutional rules, this stereotype has been broken with more and more diversification of consolidation decision-makers having been developed. Will the distinction of consolidation decision-makers matter the *efficacy* of consolidation differently? As a preliminary effort to answer this question, this thesis sets the identity of the consolidation decision-maker as the criterion to classify the seventeen selected consolidation rules. This classification criterion requires looking at (i) how close the arbitral institution is placed to the centre of consolidation deciding power, as well as (ii) how far the arbitral tribunal is pushed away from deciding consolidation and related issues.

By assessing the selected rules under this criterion, it can be assumed that there are four models of consolidation decision-making identified in the current institutional arbitration practice, and these four models, in this thesis, are named by number: Model 1, Model 2, Model 3, and Model 4. *The numbering method is that the higher the Model's number, the closer the arbitral institution is to the centre of consolidation deciding power.*

There is one caveat: this assumed classification method of underlining the identity of consolidation decision-making authority does not imply that the respective consolidation mechanisms from the institutional rules classified into the same Model according to this taxonomy are necessarily similar in all aspects. Rather, even among the consolidation institutional rules under the same Model, there may be distinct divergences in the efficacy of consolidation due to other factors. Nevertheless, I insist

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<sup>98</sup> Pitkowitz (n 4) 303.

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on adopting this taxonomy, because this taxonomy essentially brings a new benchmark to examine the consolidation mechanisms contained in various institutional rules, and the potential differences in other factors and the gap of efficacy outcome should then be reviewed on this benchmark, so as to test the impact that may bring from the different consolidation decision-maker to the efficacy of consolidation tool under the institutional arbitration level. In this vein, the definition of each Model should be broad enough to cover the rules that fit the taxonomy. In the following, the overview of each model will be presented.

## **Section 2. Overview of the Four Models**

### *§1. Model 1: Arbitral Tribunal Fully Deciding Model*

Model 1 pertains to the consolidation mechanism that only the arbitral tribunal can decide consolidation, as explicitly stated in the rules. In turn, the intervention of the arbitral institution, in this case, is strictly limited within the scope of ancillary support, such as general administrative support, i.e., secretary and logistical service and other procedural support, in particular, the backup support in the appointment of the arbitral tribunal in the multi-party scenario if occurred so<sup>99</sup>. Among the selected rules, JCAA Rules and KCAB Rules, two rules from East Asia, belong to this Model.

### *§2. Model 2: Delegated “Third Person” Deciding Model with Arbitral Institution’s Facilitation*

Model 2 refers to a consolidation mechanism where the consolidation decision-making competence is fully conferred on a stand-alone third person, while the arbitral tribunal is excluded from intervening in the making of a decision as to consolidation. Under Model 2, the administering arbitral institution, though having no deciding power, plays a proactive role by facilitating the operation of such a consolidation mechanism, especially as the default authority to delegate the “third person”.

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<sup>99</sup> For example, the JCAA Rules.

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Insofar as the selected rules, Model 2 can be found in ICDR Rules and NAI Rules, one from common law jurisdiction and another from civil law jurisdiction.

### *§3. Model 3: Arbitral Institution-Arbitral Tribunal Deciding Model*

Model 3 indicates the situation where the arbitral tribunal and the administering arbitral institution share the consolidation deciding power. Precisely, the arbitral institution and the arbitral tribunal are empowered to respectively decide the request for consolidation at different stages, distinguishing between requests filed before or after an arbitral tribunal has been formed, meaning whether the arbitral institution or the arbitral tribunal can only participate in deciding consolidation limitedly. From the side of the arbitral tribunal, the arbitral tribunal is not at full power to decide consolidation anymore, which is unavoidably implicated more or less by the arbitral institution's separate decision, whose extent depends on the competence range empowered upon the arbitral institution on this issue. From the side of the arbitral institution, the arbitral institution enters into the deciding-power field on consolidation issues and shares this power with the arbitral tribunal, subject to some certain differing restrictions imposed by different specific rules.

LCIA, SIAC and DIAC Rules fall into Model 3. In fact, the latter two can continue to be further divided into one sub-model, leaving LCIA Rules in another. Under SIAC or DIAC Rules, the decision preliminarily made by the arbitral institution on consolidation request is without prejudice to the tribunal's own power to consolidate arbitrations insofar as the tribunal satisfies the stipulated conditions to exercise the consolidation-making power. Under LCIA Rules, in contrast, the deciding power on consolidation is clearly demarcated by the timing of the first arbitral tribunal's constitution, i.e., before the constitution of the first arbitral tribunal, the administering institution fully decides consolidation, and the arbitral tribunal later constituted cannot review and overturn the previous consolidation decision made by the arbitral institution; after the constitution of the first arbitral tribunal, consolidation deciding power is fully transferred to the arbitral tribunal if the request for consolidation has not yet been dealt with. It is clear-cut that the intrusion of the arbitral institution into

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the tribunal's procedural power under the LCIA sub-model is rather deeper than the SIAC sub-model. By the way, worth to mention that all these three arbitration rules are from common law jurisdictions.<sup>100</sup>

#### *§4. Model 4: Arbitral Institution Fully Deciding Model*

The consolidation regime under Model 4 means the authority to consolidate fully rests with the arbitral institution, leaving the arbitral tribunal out of the consolidation deciding-power domain. That being said, under some rules, the prior confirmed arbitrators' comments can be taken into account before rendering decisions.<sup>101</sup> Ten out of the seventeen selected rules are attributed to Model 4: ICC Rules, Swiss Rules, CEPANI Rules, VIAC Rules, SCC Rules, CIETAC Rules, HKIAC Rules, AIAC Rules, ACICA Rules and DIS Rules. The arbitral institutions for these arbitration rules are headquartered in both civil law jurisdictions and common law jurisdictions.

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<sup>100</sup> DIAC is specifically based on the Dubai International Financial Centre (DIFC), a separate common-law-based jurisdiction within the Emirate of Dubai, which is civil-law based. Robbie McCrea, 'Once in a decade update for DIAC Rules' (Fenwick Elliott, 26 February 2018) <<https://www.fenwickelliott.com/blog/contracts-documentation/update-diac-rules>> accessed 18 June 2022

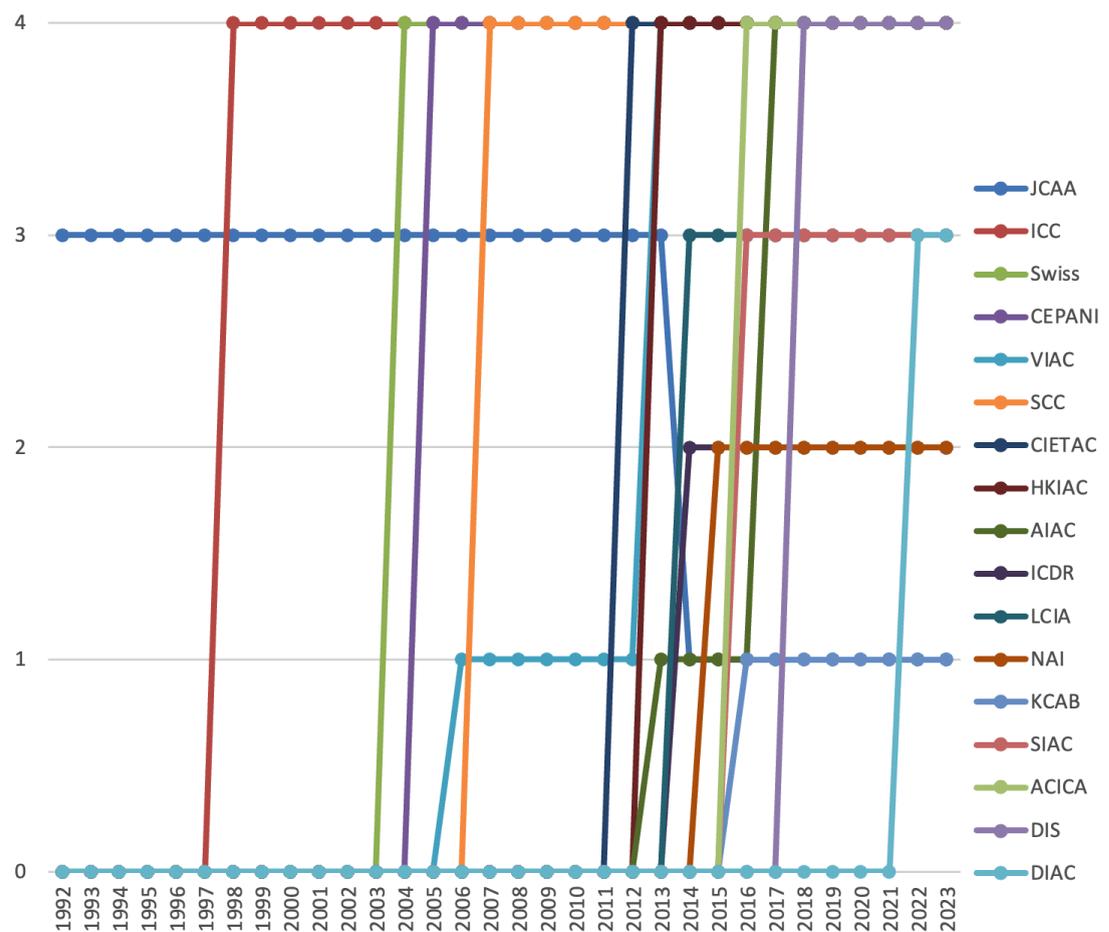
<sup>101</sup> For example, the VIAC Rules, CIETAC Rules etc.

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CHAPTER 4. EVOLUTION OF THE FOUR MODELS (1992-2023) AND  
HYPOTHESIS OF THE MOST DESIRABLE MODEL

**Section 1. Four Models' Evolution (1992-2023): Model 4  
Stands Out**

The evolution of the four models between 1992 and 2023 based on the selected seventeen institutional rules is distinctly illustrated in Figure 4 below. In Figure 4, five figures are used to represent different consolidation mechanisms in the rules, among which “0” means “no express introduction of consolidation in the rules”; “1” means “arbitral institution has no intervention to decide”, namely Model 1; “2” means “deciding power is upon the delegated third person”, namely Model 2; “3” means “deciding power is shared by arbitral institution and arbitral tribunal”, namely Model 3; and “4” means “deciding power is completely upon the arbitral institution”, namely Model 4.



**Figure 4** Four Decision-Making Models of Consolidation Mechanisms, 1992-2023

At first glance of Figure 4, enhancing the intervention of arbitral institutions has become a self-explanatory holistic tendency during the consolidation provision evolution in the institutional rules, no matter which extent of intervention, though some deviant cases exist<sup>102</sup>. Furthermore, whereas the other three models remain alive, with fresh blood steadily joining them, Model 4 undoubtedly occupies the

<sup>102</sup> For example, the consolidation decision-making power under JCAA Rules has been transferred from exercising jointly by arbitral institution and arbitral tribunal (Model 3) to exercising exclusively by arbitral tribunal (Model 1) since 2014.

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greatest weight (close to 60%) among the four decision-making models in institutional arbitration practice. Does this tendency predict Model 4 as an unstoppable, or at least prevailing, trend for the future of consolidation regimes in institutional arbitration?

## **Section 2. Research Question Raised: Which Model Can Be Deemed the Most Desirable One?**

From the global institutional arbitration market perspective, it is conceivable that the competition of attractiveness (direct or indirect) between these four Models (or Sub-Models, if possible) divided based on the identity of the consolidation decision-maker is inescapable. In general terms, “uniformity in the treatment of procedural issues and the conduct of arbitration can make the process more predictable, effective and expeditious”<sup>103</sup>, and if the most desirable consolidation Model can be identified and get promoted spreadly, the international arbitration community as a whole can be expected to enjoy the equivalent benefits in terms of consolidation mechanism in institutional arbitration, or even beyond.

Thus, it becomes significant to explore, among the four consolidation decision-making Models, which one deserves to be promoted as the most desirable Model.

### *§1. CI Arb Guideline on Multiparty Arbitration (2023) Stand up for Model 3*

The Chartered Institute of Arbitrators (CI Arb) is a world-respected British institution that provides arbitration services and training, promoting itself as “[the] world’s leading qualifications and professional body for dispute avoidance and dispute

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<sup>103</sup> Chartered Institute of Arbitrators, ‘CI Arb Guideline: Introduction to the International Arbitration Practice Guidelines’ (October 2015)  
<<https://www.ciarb.org/media/4212/introduction-to-the-international-arbitration-practice-guidelines.pdf>  
> accessed 22 September 2023

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management”.<sup>104</sup> CIArb initially drafted guidelines merely to assist practitioners in understanding and implementing the 1996 England Arbitration Act.<sup>105</sup> Since 2012, CIArb has revised and expanded its Guidelines with the purport of reflecting the best practice in various aspects of international commercial arbitration, as the aspiration to enhance its leading global role in the industry.<sup>106</sup> The nature of the CIArb guidelines is soft law, or put differently, in line with *Dasser*, the codifications of best practice validated by an institutional authority (i.e. CIArb).<sup>107</sup> In the words of Tim Hardy, the then Chair of the CIArb’s Practice and Standards Committee, the CIArb Guidelines “are not prescriptive...but contain suggestions and recommendations aimed at promoting a consistent approach to decision-making”.<sup>108</sup>

On 16 May 2023, CIArb launched its renewed Guideline on Multiparty Arbitration (“*CIArb Guideline (2023)*”), which thus replaces the previous 2011 version, the latter focusing on the multiparty arbitration in the context of the 1996 England Arbitration Act and adopting a relatively conservative stance towards consolidation mechanism in arbitration<sup>109</sup>. Plausibly due to the increasing utilisation and striking development of consolidation mechanisms in arbitration (especially in institutional arbitration) in recent years as well as the *CIArb Guideline (2023)*’s subjective shift of angle from merely serving the users of the English arbitration regime to the international arbitration community as a whole on multiparty arbitration scenarios, CIArb has distinctly shifted its stance to support the use of consolidation mechanism as well as

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<sup>104</sup> <<https://www.ciarb.org/#>> accessed 31 May 2023; also, Felix Dasser, “Soft law” in International Commercial Arbitration (Volume 402)’ in Hague Academy of International Law, *Collected Courses of the Hague Academy of International Law*, 447. Consulted online on 31 May 2023

<[http://dx.doi.org/10.1163/1875-8096\\_pplrde\\_A9789004423923\\_02](http://dx.doi.org/10.1163/1875-8096_pplrde_A9789004423923_02)> First published online: 2019

<sup>105</sup> Dasser (n 104).

<sup>106</sup> *ibid*; CIArb, ‘CIArb Guideline: Introduction to the International Arbitration Practice Guidelines’ (n 103); Currently, developing CIArb’s guidelines has been incorporated as part of achieving one of CIArb’s main Strategic Aims of “be[ing] a global, inclusive thought leader”. See Chartered Institute of Arbitrators, ‘CIArb Strategy 2021 to 2023’, 2020.

<sup>107</sup> Dasser (n 104).

<sup>108</sup> CIArb, ‘CIArb Guideline: Introduction to the International Arbitration Practice Guidelines’ (n 103).

<sup>109</sup> See Chartered Institute of Arbitrators, ‘CIArb Practice Guideline 15: Guidelines for Arbitrators on How to Approach Issues Relating to Multi-Party Arbitrations (2011)’, para 5.8 (“In most multi-party situations it makes more sense to order concurrent hearings of separate arbitrations (whether of the whole arbitration or of common issues) rather than to order a full consolidation. An order for concurrent hearings introduces as a rule less interference with the procedure agreed by the parties than does consolidation.”)

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other multiparty arbitral proceedings (joinder and concurrent hearings), for the sake of improving efficiency and consistency<sup>110</sup>.

Addressing the consolidation mechanism in institutional arbitration, from my observation, the *CI Arb Guideline (2023)* seems to incline more toward identifying Model 3 as the best practice to promote widely. The following provisions lead this indication:

*“9.1 An application to consolidate should be filed with the tribunal once appointed.*

*9.2 In **institutional arbitration**, parties may have the option, depending on the rules of the institution, to **file an application to consolidate with the institution** prior to the appointment of a tribunal (emphasis added).*

*10.1 **If a consolidation application filed with an arbitral institution is rejected**, parties, depending on the rules applicable, may **have the right to file the same application with the tribunal** (emphasis added).”<sup>111</sup>*

Accordingly, in a nutshell, in terms of power allocation of consolidation decision-making, this *CI Arb Guideline (2023)* attempts to suggest that the best practice for conducting consolidation mechanisms under institutional arbitration is that the administering arbitral institution is empowered to decide on the consolidation request prior to the appointment of the first tribunal; and then, after the arbitral tribunal is constituted, the arbitral tribunal is still competent to decide again on the same consolidation request if the arbitral institution has rejected it before. Plus, the *CI Arb Guideline (2023)* stressed that, in line with the spirit of its Article 13.4<sup>112</sup>, whether the consolidation is granted by the arbitral institution or by the arbitral tribunal, the final say to allow third parties (i.e. non-signatory parties to an arbitration

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<sup>110</sup> Chartered Institute of Arbitrators, ‘CI Arb Launches New Guideline on Multiparty Arbitration’, 17 May 2023 <<https://www.ciarb.org/news/ciarb-launches-new-guideline-on-multiparty-arbitration/>> accessed 1 June 2023

<sup>111</sup> Chartered Institute of Arbitrators, ‘CI Arb Guideline on Multiparty Arbitration’ (May 2023) Article 9.1, 9.2 and 10.1 <<https://www.ciarb.org/media/25093/guideline-on-multiparty-arbitration.pdf>> accessed 1 June 2023

<sup>112</sup> Article 13.4 of the *CI Arb Guideline on Multiparty Arbitration (2023)* states: “In institutional arbitration, depending on the rules applicable, the institution will follow similar procedures to allow multiparty arbitration applications. Regardless of whether such applications are made before or after the tribunal has been constituted, and unless a certain multiparty scenario is not allowed by the institutional rules applied, the decision to allow parties lies with the tribunal.”

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agreement in this Guideline) ultimately lies with the tribunal, which implies that the tribunal is empowered to exclude the involvement of a third person, even it is the consequence of the grant of consolidation, namely the tribunal can partly invalidate the arbitral institution prior-made consolidation decision. In my view, this approach that CI Arb attempts to recommend is quite similar to Model 3, or more precisely, very in concert with the SIAC Sub-Model of Model 3, as illustrated before. Of course, bear in mind that the *CI Arb Guideline (2023)* is only applicable in the presence of parties' express consent; meanwhile, its application cannot override any mandatory laws or institutional rules applicable to a multiparty arbitration scenario but is intended for use in conjunction with them, as a recommended guidance.<sup>113</sup> That being said, in terms of the power allocation of consolidation decision-making, it is not deniable that the “best practice” hallmarked by CI Arb is the SIAC Sub-Model under Model 3.

Admittedly, to ensure the *CI Arb Guideline (2023)* reflects international best practice, CI Arb has self-alleged that its guidelines are developed with input from CI Arb members with specialist knowledge and expertise with sufficiently diversified backgrounds.<sup>114</sup> However, as well acknowledged, the so-called “best practice” is ultimately a subjective assessment product, and it is usual to have different approaches to “best practice” depending on different groups of practitioners, individuals or institutional authorities.<sup>115</sup> For that reason, CI Arb's Guideline on consolidation mechanism should not be enshrined to be the unique objective global standard that divides right from wrong<sup>116</sup> or, in the context of this thesis, divides the optimal Model from suboptimal Models. Rather, to my perception, its credibility is naturally open to assessment, verification, criticism, and even denial if proven materially unjustified or unconvincing.

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<sup>113</sup> See Article 2.2 and 3.1 of the CI Arb Guideline on Multiparty Arbitration (2023).

<sup>114</sup> CI Arb, ‘CI Arb Launches New Guideline on Multiparty Arbitration’ (n 110); also CI Arb, ‘CI Arb Guideline: Introduction to the International Arbitration Practice Guidelines’ (n 103) (“To ensure that the new Guidelines reflect international best practice and take into account different legal backgrounds and culture, they are drafted by the PSC [Practice and Standards Committee], whose members come from 13 different jurisdictions and they are also peer reviewed by over 60 academics and practitioners from CI Arb's International branches and teaching faculty.”)

<sup>115</sup> Dasser (n 104).

<sup>116</sup> *ibid.* Inspired by the words of Felix Dasser: “One should just not expect that there is an objective global standard that divides right from wrong for all practitioners.”

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## §2. My Pre-Research Hypothesis: Model 4 is More Convincing as the Model of Best Efficacy

Notwithstanding the *CIArb Guideline 2023* intends to stand up for Model 3 (SIAC Sub-Model, more precisely) as the best practice, I am not aligned with CIArb's position. Rather I perceive that Model 4 may be more convincing to be deemed the most desirable Model, given the above-illustrated historical tendency that Model 4 has stood out overwhelmingly in practice. Given that the ultimate aim of promoting a "best practice" is to realise the uniformity in the treatment of conduct of arbitration, from a pragmatic perspective, Model 4, rather than CIArb-favoured Model 3 or other Models, has become the closest one to reach this end. Admittedly, the fact that Model 4 is predominating the market globally does not automatically lead to the conclusion that it is the most desirable Model. Nevertheless, the global prevalence of Model 4 is undeniably a result of the development of the international arbitration market, in turn, which logically infers that Model 4 must win the market's favour out of some justifiable and appealing grounds.

The *CIArb Guideline 2023* merely identifies which Model of consolidation decision-maker identity it deems as the best practice (*viz* the most desirable Model) but does not explain the metrics on which this judgement is based, which itself leaves the leeway to discuss. In my eyes, the most desirable Model should be the Model of the best efficacy, *viz* the Model which can maximise the aspired values of the consolidation mechanism expected to exert. As discussed earlier, it is commonly recognised that achieving consolidation of separate arbitrations can bring mainly two dimensions of values: (i) lower risk of inconsistent results; (ii) enhance efficiency, procedurally and financially.<sup>117</sup> Accordingly, at the theoretical preliminary envision, a Model of good efficacy arguably implies that the use of the consolidation mechanism of institutional arbitration can be extensive enough that coverage of interconnected disputes can be as expansive as possible so as to maximise the effect of avoidance of contradictory results. Meanwhile, to be a Model of good efficacy, the consolidation decision-making process itself should proceed to the end decision as expeditious as possible without leaving parties tactical opportunities to use stipulated consolidation

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<sup>117</sup> See CIArb, 'CIArb Guideline on Multiparty Arbitration' (n 111) Article 1 [Preamble]; Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816; Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 15-16.

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procedures to halt the overall proceedings, otherwise the aspired efficiency benefit that consolidation offers will be jeopardised.

Based on it, if leaving aside the concrete contents of the selected consolidation rules for the time being, it is plausible to assume that Model 4 prevails among the four Models for achieving the aspired values of consolidation by preliminarily assessing the possible pros and cons of these four solutions of consolidation decision-making power from a purely theoretical perspective.

First and primary, in my understanding, Model 3, especially the said approach CIArb attempts to promote, militates against the efficiency of the arbitration proceedings. Suppose the request for consolidation is made prior to the composition of any tribunal. If asked, the same request for consolidation will likely have to go through two rounds of the consolidation decision-making process, albeit with similar steps, reviewed by different bodies respectively, firstly by the arbitral tribunal and secondly by the composed tribunal *de novo*, until the grant is made, which leaves, at least in theory, more opportunities for the party in bad faith to employ dilatory tactics.

Furthermore, regarding Model 1, consolidation is not apt to be decided by the arbitral tribunal of a to-be-consolidated arbitration because, in this way, the consolidation would be restricted to cases where two or more pending arbitrations involved the same arbitral tribunals<sup>118</sup> so that the use of consolidation mechanism has to be excluded in many situations and thus the aimed effect of lowering the inconsistent decisions will significantly fall out.

Rather, in a bid to obtain the effect of minimising contradictory decisions from a consolidation mechanism, a neutral body detached from any tribunals of arbitrations to be consolidated is more apt to play the role of deciding on consolidation because the potentially tricky questions about which tribunal has the final say on ordering consolidation when different tribunals are constituted (especially when different parties involved) can be avoided, and, objectively speaking, its decision can be expected to be more impartial and independent compared to the decision made by any of the to-be-consolidated tribunals. In this light, both Model 2 and Model 4 satisfy, where the former is upon a stand-alone “third person” under the auspices of the arbitral institution to decide on consolidation exclusively, and the latter is upon the

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<sup>118</sup> Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816.

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very arbitral institution that administers the arbitrations to be consolidated to determine on consolidation fully.

However, Model 4 seems to override Model 2 when taking into account the impact on efficiency. Model 2 implicates the appointment of the “third person”, and in *Born*’s words, such appointment inevitably imposes extra costs and delay, and he also generally suspects the capability of the delegated “third person” to handle consolidation issues.<sup>119</sup> By contrast, Model 4 is unlikely to occur such concerns as to efficiency, for it is inconceivable that parties under Model 4 are entitled to voluntarily select which individual(s) in the arbitral institution to decide. Plus, compared to the delegated “third person”, the arbitral institution is believed to own institutional knowledge and expertise that deciding consolidation necessitates.<sup>120</sup>

Last but not least, it is also argued that, if the consolidation decision made by the arbitral institution is also deemed as an “administrative decision” in nature as other institution-made decisions (e.g. the decision made on the challenge of arbitrators or the decision on the composition of the tribunal), this decision probably will be difficult to become the subject of review by an arbitral tribunal or even a state court and thus become binding and conclusive<sup>121</sup>, which looks beneficial to the efficiency.

Hereby, I hypothesise that Model 4 is the most favourable one among the four Models to ensure the expected values of consolidation to the largest extent, instead of other Models.

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<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.*

<sup>121</sup> See Webster (n 42) 47-48; Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816; Jean-Louis Devolvé, Gerald H. Pointon and Jean Rouche, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd edn, Kluwer Law International 2009) 82 (“The decision of the relevant arbitral institution are considered as matters of administration of the arbitration upon which the parties have agreed and so are binding upon them contractually.”)

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### Section 3. On Structure of Thesis

To test the above hypothesis, *Part 1* of this thesis will first elaborate on the seventeen selected consolidation regimes falling into the four Models divided by the identity of the consolidation decision-maker. On top of it, *Part 2* will then attempt to build up a set of multidimensional metrics to comprehensively assess the four Models (including Sub-Models) in current practice in a far-reaching way.

At the end of *Part 2*'s comprehensive assessment, it will be found that, in current practice, Model 2, rather than Model 4, the most common practice, appears to perform the best, which is against the above hypothesis that assuming Model 4 outperforms other Models. Admittedly, the author-defined yardstick may not be considerably perfect.

Despite this “surprising” result, *Final Conclusion and Outlook* will claim that Model 4 should not be therefore discarded. Instead, from a forward-looking perspective, Model 4 can and also deserves to be preserved and further improved to reach its potential, which seems beneficial for the future evolution of institutional consolidation mechanisms in the longer term, particularly when confirming the pursuit of cross-institution consolidation as the next starting point of the incoming evolution.

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## **PART 1. Consolidation Mechanisms under Institutional Arbitration Rules: Four Decision-making Models**

At the beginning, I want to clarify beforehand that the following enumerated nine principal matters would be paid specific attention in the relative-full-picture depiction and review of the seventeen consolidation mechanisms in *Part 1*, as they, in my view, organically will somehow form part of the critical indicators of the metrics in *Part 2* for comparing the efficacy of consolidation between the four Models, given the benchmark of the identity of the consolidation decision-maker:

- (1) Is there a time limit to request consolidation? And whether the consolidation process can only be triggered by the *ex parte* request of a party.
- (2) Who is/are empowered to decide the application for consolidation?
- (3) Whether the consolidation decision is final and binding?
  - (3a) If ordered by the arbitral institution, can the arbitral tribunal that later hears the consolidated arbitration revoke the consolidation decision?
- (4) Whether and how procedural fairness (equal right to be heard etc.) is guaranteed.
- (5) Whether the decision as to the application for consolidation is reasoned.
- (6) What are the conditions for consolidation?
  - (6a) Whether the explicit consent to consolidation of all parties concerned is a prerequisite to achieving consolidation?
  - (6b) Under what kind of circumstances, consolidating arbitrations that involve different parties or different arbitration agreements may be permitted?
- (7) Provided all the conditions for consolidation have been satisfied, what factors should the decision-maker take into account when exercising its discretion?
- (8) Should consolidation be granted, how would the arbitral tribunal be constituted?
- (9) Is it allowed to consolidate arbitrations beyond the situations which are under the same version of the same institutional rules? In other words, is it possible under the reviewed regime to consolidate arbitrations under different versions of the

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same institution's rules, to consolidate parallel arbitrations seated in different jurisdictions (same applicable arbitration rules), to consolidate arbitrations under different institutional rules, or to consolidate institutional arbitration and *ad hoc* arbitration (under the same auspice)?

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## CHAPTER 1. MODEL 1'S REPRESENTATIVES: JCAA AND KCAB

### RULES

#### Section 1. JCAA Rules

##### *§1. Context*

Referring to what Mr. Kazuhiko Bando, the JCAA President, states: “JCAA serves as one of the longest established arbitration institutions in existence worldwide”<sup>122</sup>, JCAA happens to be the first leading arbitral institution to expressly contain consolidation provision in its rules. To my knowledge, consolidation provision can be traced back at least to the JCAA 1992 Rules. As Figure 3 indicates, the consolidation provisions went through two rounds of revisions after that, in which the 2014 revision overhauled the old 1992 edition to a little bit more relaxed approach, and the 2019 revision continues the 2014 tone only with slight alterations. Nowadays, the JCAA brand-marked consolidation regime is stipulated by Article 57 of the 2021 JCAA Rules.

##### *§2. Arbitral Tribunal's Power to Decide Consolidation*

Article 57 confers the arbitral tribunal the power to consolidate the claims on the condition that no other arbitral tribunal(s) has been constituted. Hence, the arbitral tribunal acts as the sole authority to decide on consolidation, which is quite different from the approach adopted by JCAA before 2014. The pre-2014 JCAA consolidation provisions<sup>123</sup> explicitly vested the consolidation-deciding power to be shared by the arbitral tribunal and the JCAA (the term “Association” was used at that time),<sup>124</sup> but not exclusively by the arbitral tribunal as nowadays. Plus, the 2021 Rules permit the

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<sup>122</sup> <<https://www.jcaa.or.jp/en/about/greeting.html>> accessed 15 June 2022.

<sup>123</sup> The 1992, 1997, 2004 JCAA Rules share the same consolidation provision.

<sup>124</sup> Take the 1992 JCAA Rules as an example, Article 41(1) states: “If the Association or the arbitral tribunal determines that it is necessary to consolidate multiple requests for arbitration that contain claims that are essentially mutually related, the arbitral tribunal, after obtaining the written consent of all the relevant parties, may examine such cases together in the same proceedings; provided that, if multiple requests for arbitration arise out of the same arbitration agreement, no consent of the parties is necessary.”

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tribunal can only exercise this deciding power upon the written request of one party, and the time limit to file a consolidation request should be assumed before any arbitral tribunal as to other claims being constituted.

### *§3. The Consolidation's Conditions and Tribunal's Discretion*

#### **A. The Three Alternative Conditions**

The requirements for consolidation are (1) the parties to all concerned arbitrations have agreed in writing;<sup>125</sup> (2) the pending claims and claims to be consolidated arise under the same arbitration agreement, provided that parties to the arbitration to be consolidated, which are not party to the pending arbitration where the arbitral tribunal is seated, have given their written consent thereto;<sup>126</sup> or (3) all claims arise between the same parties and (a) the same or a similar question of fact or law arises from the claims; (b) all the claims refer to arbitration under either the 2021 JCAA Rules or at the JCAA; and (c) the separate arbitral proceedings are capable of being conducted in a single proceeding in consideration of the place of arbitration, the number of arbitrators, language(s) of the arbitration and other possible factor arising from the claim<sup>127</sup>.

Accordingly, without the explicit consent of all parties concerned, the tribunal is permitted to order consolidation when the pending arbitrations are between the same parties as stipulated in Article 57(2) and (3), which is inherited from the 1992 approach. In the case where different parties are involved between the to-be-consolidated arbitrations, the tribunal may also be allowed to consolidate as long as the tribunal receives written consent to consolidation from the specific party who is from another pending arbitration where the arbitral tribunal is not constituted,

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<sup>125</sup> Article 57(1) of 2021 JCAA Rules.

<sup>126</sup> Article 57(2) of 2021 JCAA Rules.

<sup>127</sup> Article 57(3) of 2021 JCAA Rules.

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which parallelly means the consent to consolidation from the opposite party to the party who files the consolidation request is not necessary in this case.

## B. Consolidating *Ad Hoc* Arbitration May Be Workable under JCAA

With respect to the sub-requirement (3b), “the dispute is referred by the arbitration agreement to arbitration *under the Rules or at the JCAA* (emphasis added)”, it indicates that JCAA consolidation is not restricted within the arbitrations under the same 2021 JCAA Rules but extending the scope to all the arbitrations administered by JCAA, provided the parties concerned to all respective arbitration proceedings are identical. That is to say, if the to-be-consolidated claims not only refer to the specific 2021 JCAA Commercial Arbitration Rules, but also refer to other rules offered by JCAA, like the old editions of JCAA commercial arbitration rules or JCAA Interactive Arbitration Rules<sup>128</sup>, they are arguably workable to be consolidated in accordance with the 2021 JCAA Commercial Arbitration Rules<sup>129</sup>.

Since JCAA also administers UNCITRAL Arbitrations through the JCAA Administrative Rules for UNCITRAL Arbitration, it is not ungrounded to assume that the *ad hoc* arbitrations administered by JCAA may be consolidated into a JCAA arbitration under 2021 JCAA Rules through adopting a liberal interpretation of Article 57. In this case, it is only workable at the stage when the arbitral tribunal for the arbitration under JCAA Rules has been constituted, while the arbitrator to hear *ad hoc* arbitration has not yet been appointed, pursuant to Article 57.

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<sup>128</sup> The JCAA Interactive Arbitration Rules are another kind of arbitration rules offered by JCAA, which is a more “civil law approach”. There are 2019 and current 2021 two versions of JCAA Interactive Arbitration Rules. < <https://www.jcaa.or.jp/en/arbitration/rules.html> > accessed 16 June 2022.

<sup>129</sup> Although current 2021 JCAA Interactive Arbitration Rules also contain consolidation provision, the applicable scope thereof is not expressly extended to the arbitrations “at the JCAA” as 2021 JCAA Commercial Arbitration Rules do so.

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### C. Discretion

Still, the tribunal would only grant consolidation “when it finds it necessary”<sup>130</sup>, which means the tribunal is not bound to grant consolidation provided the above requirements are met but deliberate on a case-by-case basis.

#### *§4. Procedural Fairness*

Unfortunately, it seems unclear whether Article 57 provides for any opportunity for all the parties concerned to present opinions before the arbitrator makes the decision.

#### *§5. Legal Effect of the Decision*

Despite no clear indication in the JCAA Rules, it seems reasonable to infer that the arbitral tribunal should state the reasoning for its decision on consolidation, as the arbitral tribunal should state the reasons for the arbitral award made by them according to Article 66 of the JCAA Rules<sup>131</sup>, and a consolidation decision is also part of the arbitral award that the tribunal makes. Also, in the era where consolidation is not formally stipulated in the institutional rules, and it is also the arbitral tribunal that is expected to rule on the consolidation request, the worldwide case law record illustrates the tribunal did afford reasoning to its consolidation ruling, and usually in an adequate fashion.<sup>132</sup> In this vein, it would be weird to draw a converse conclusion.

In addition, the decision determined by the tribunal, no matter whether consolidation is granted or rejected, could be assumed to be final and binding. In order to justify this assumption, it is worth mentioning that JCAA Rules permit the arbitral tribunal to separate proceedings upon any raised objection under some certain circumstances,

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<sup>130</sup> Article 57 of 2021 JCAA Rules.

<sup>131</sup> Article 66(2) of 2021 JCAA Rules states: “The arbitral award shall state the following: ... (5) the reasons upon which the arbitral award is based.”

<sup>132</sup> For example, Award No. 1491, dated 20 July 1992, in Yearbook Commercial Arbitration (1993), 88-89 (In this award under the Chamber of national and International Arbitration of Milan, the arbitrators carefully considered the economic-legal link between contracts for testing whether consolidation is suitable.); *Holiday Inn v. Morocco*, ICSID Arbitral Award (ARB/72/1), 23 September 1974 (In this case, the arbitrator gave the reasoning as to its ruling on consolidation, by conducting a “economy reality” analysis.); ICC award No. 6829 of 1992, in Yearbook Commercial Arbitration (1993), 170; see more in Leboulanger (n 43) 50-51.

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such as single arbitration for multiple claims or joinder.<sup>133</sup> In general, this kind of bifurcation power is not common to be seen among the institutional rules, by the way. However, this bifurcation tool is not applicable to the case of consolidation under the Rules, which to some extent justifies that arbitral tribunal is not given a second bite at the apple over the consolidation decision made under Article 57, given the context that no avenue to challenge the decision on consolidation request can be found in the Rules.

### *§6. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings*

As an additional party is possible to appear under the JCAA consolidation regime, the issue of the arbitral tribunal's composition will be faced should consolidation be granted.

In case of a sole arbitrator panel, the arbitrator shall be directly appointed by the JCAA where the parties fail to reach an agreement, subject to the nationality requirement raised by one party, as stipulated in Article 27.<sup>134</sup> In the case of a three-arbitrator panel, the JCAA shall appoint all three arbitrators where either or both of the claimant(s) or the respondent(s) fail to jointly appoint an arbitrator or arbitrators, in line with Article 29(8). In such case, the already-appointed arbitrator may be reappointed by the JCAA only when there is no objection raised by any party.<sup>135</sup>

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<sup>133</sup> Article 48 of 2021 JCAA Rules.

<sup>134</sup> Article 27 of 2021 JCAA Rules states: "... (3) If the Parties fail to notify the JCAA of such appointment under Article 25.4 within the time limit under Article 27.1 or 27.2, the JCAA shall appoint an arbitrator. (4) In the case where the JCAA appoints an arbitrator under Article 27.3 and a Party requests that the arbitrator be a person of a different nationality from that of any of the parties, the JCAA shall respect such request."

<sup>135</sup> Article 29(8) of 2021 JCAA Rules.

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## Section 2. KCAB Rules

In the KCAB's golden jubilee, the KCAB Rules for the first time adopted its consolidation provision in its latest revision in 2016.<sup>136</sup>

### *§1. Arbitral Tribunal's Power to Decide Consolidation*

Pursuant to Article 23 of the Rules, the arbitral tribunal, rather than KCAB, is empowered to decide whether to grant consolidation at the request of one party.

#### A. Condition

The pending arbitrations sought to be consolidated, according to Article 23(1), shall be under the KCAB Rules, between the same parties and no arbitrator has been appointed in such separate arbitration proceedings. In other words, the party seeking the consolidation may only file the request no later than any arbitrator is appointed in another separate set of arbitration proceedings.

#### B. Discretion

Insofar as the conditions above are met, Article 23(2) instructs the arbitral tribunal should also take into account several factors in making decision on consolidation, such as the arbitration agreement(s), the nature of claims and any other relevant circumstances.

### *§2. Procedural Fairness*

Meanwhile, all the parties concerned must be given a reasonable opportunity to present their stance and reasons to ensure the parties' rights to be heard; yet, in line

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<sup>136</sup> Sippel (n 53) 576.

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with Article 23(2)<sup>137</sup>, the exchange of written submission seems suffice to meet the requirement of due process rather than an oral hearing.

### *§3. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings*

Should consolidation be granted, though the KCAB Rules do not expressly state, the already-established arbitral tribunal who has determined the consolidation should be the one to continue hearing the consolidated arbitration.

The reasons are two. Firstly, as discussed above, consolidation probably could only be ordered at the stage when no arbitrator has not yet been nominated in another separate arbitration proceeding. Secondly, the KCAB consolidation expressly only allows consolidation occurs between separate arbitrations which involve identical parties, which illustrates the tricky issue of arbitrator appointment in multiparty arbitration would not incur under the auspices of KCAB as many other reviewed rules encounter so.

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<sup>137</sup> KCAB Article 23(2): "...gives the parties a reasonable opportunity to make submissions..."

## Section 1. ICDR Rules

### *§1. Context*

The International Centre for Dispute Resolution (ICDR) is the international division of the primary arbitration institution in the United States, the American Arbitration Association (AAA), which specifically administers the AAA's international cases.<sup>138</sup> The ICDR Rules are primarily based on the UNCITRAL Rules, and the modifications contained reflect the views of a number of users of international arbitration who were consulted by the AAA<sup>139</sup>, including the consolidation provisions, which were first introduced into the ICDR Rules in 2014. The current 2021 ICDR Rules retain the core ethos of consolidation provisions from the 2014 Rules but are more liberal in terms of achieving consolidation.

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<sup>138</sup> Catherine M. Amirfar, Natalie L. Reid and others, 'National Report for the United States of America (2018 through 2020)', in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 2020) 8-9; also see Article 1 of ICDR Rules (2021): "1. Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an *international dispute* by either the International Centre for Dispute Resolution ("ICDR"), the international division of the American Arbitration Association ("AAA"), or the AAA without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. ***The ICDR is the Administrator of these Rules...3. When parties agree to arbitrate under these Rules, or when they provide for arbitration of an international dispute by the ICDR or the AAA without designating particular rules, they thereby authorize the ICDR to administer the arbitration.*** These Rules specify the duties and responsibilities of the ICDR as the Administrator. The Administrator may provide services through any of the ICDR's case management offices or through the facilities of the AAA or arbitral institutions with which the ICDR or the AAA has agreements of cooperation. Arbitrations administered under these Rules shall be administered only by the ICDR or by an individual or organization authorized by the ICDR to do so. (Emphasis is added.)"

<sup>139</sup> Catherine M. Amirfar, Natalie L. Reid and others, 'National Report for the United States of America (2018 through 2020)', in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 2020) 9

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*§2. Stand-Alone “Consolidation Arbitrator” and Its Prescribed Competence to Permit Consolidation beyond the Arbitrations Referring to the Same ICDR Rules*

Since the 2014 edition of ICDR Rules, where the consolidation mechanism was first adopted, the power to consolidate into one single proceeding rests with a “consolidation arbitrator”, who is appointed with the sole mandate to determine whether and how to permit consolidation.<sup>140</sup> It is widely recognised as a unique innovation from ICDR, which the author perceives as the core ethos of ICDR consolidation. The 2021 amendment of ICDR Rules retains this innovative feature.

Furthermore, on the regard of the competence of an ICDR consolidation arbitrator, it is expressly powered to not only consolidate the arbitrations all pending under the same ICDR Rules but also to consolidate the arbitration(s) under the ICDR Rules and other arbitration rules administered by the AAA or ICDR:

*“...[A] consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these [arbitrations under the 2021 ICDR Rules] and other arbitrations rules administered by the AAA or ICDR, into a single arbitration... (emphasis added)”<sup>141</sup>*

As “A Guide to the [2014] ICDR International Arbitration Rules” (“*2014 ICDR Guide*”) explains, ICDR takes charge of administering the CAMCA Rules, IACAC Rules and ICANN Rules, whereas the AAA Commercial Rules, the AAA Construction Industry Arbitration Rules and Mediation Procedures, as well as many other rules are administered by the AAA.<sup>142</sup> It means that, at least in theory, provided that other requirements outlined in Article 9 are met, the consolidation arbitrator could consolidate the arbitrations pending under different sets of rules which are administered under ICDR or AAA, no matter whether the referred rules are active or defunct, presupposing at least one of the pending arbitrations is under the 2021 ICDR

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<sup>140</sup> Scherer, ‘Chapter 18: Multiple Parties, Consolidation and Joinder’ (n 18) 309; Gusy (n 66) 92; Sessler (n 53) 175.

<sup>141</sup> Article 9(1) of the 2021 ICDR Rules

<sup>142</sup> Gusy (n 66) 94.

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Rules. Moreover, as the *2014 ICDR Guide* argues, since ICDR and/or AAA is also competent to administer the *ad hoc* arbitrations under the UNCITRAL Arbitration Rules, it is plausible to infer that consolidation of institutional and *ad hoc* arbitration would also be within the explicit authority of the ICDR consolidation arbitrator under Article 9(1), insofar other requirements provided in Article 9 are satisfied.<sup>143</sup>

Despite the existence of such innovation for nine years, it is hard to observe the related practice since the consolidation arbitrator itself seems very rare to be appointed under ICDR, let alone observe how the consolidation arbitrator handles the pending arbitrations under different sets of rules in practice. The *2014 ICDR Guide* reveals that, until its publication in 2019, no consolidation arbitrator had ever been appointed under the ICDR Rules (2014); this phenomenon was explained by the ICDR senior management that “the detailed procedure set forth in the Rules has helped the parties reach agreement on the consolidation proceedings without the need for involvement of consolidation arbitrator”.<sup>144</sup> The latest amendment in the 2021 edition of Rules, as demonstrated *ut infra*, reflects a clear intention that ICDR consolidation must be achieved via a consolidation arbitrator.

### *§3. ICDR Decides Whether to Appoint a Consolidation Arbitrator and Who*

Despite the fact that ICDR itself does not intervene to decide on consolidation directly as arbitral institutions under Model 3 or Model 4 could do so, ICDR plays a significant role in managing the consolidation provisions as a facilitator to activate the consolidation decision-making process by appointing a consolidation arbitrator when it deems appropriate<sup>145</sup>.

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<sup>143</sup> *ibid.*

<sup>144</sup> *ibid* 93.

<sup>145</sup> *ibid* 33-34.

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In the 2014 ICDR Rules, the consolidation arbitrator can only be appointed by the “Administrator”, i.e. ICDR<sup>146</sup>, upon the request of any party. However, the current 2021 Rules lift such a restriction, under which the ICDR (Administrator) could appoint the consolidation arbitrator *ex officio* rather than passively waiting for the party’s request:

*“At the request of a party or on its own initiative, the Administrator [ICDR] may appoint a consolidation arbitrator...(emphasis added.)”*<sup>147</sup>

It could be expected that the ICDR consolidation arbitrator might be more often appointed than before (under the 2014 Rules) when the ICDR itself has the power to trigger the consolidation process when it deems it appropriate. Undoubtedly, at least in theory, this amended rule enables ICDR to obtain full discretion to determine whether to activate the consolidation process, thus deepening the indirect intervention of ICDR in consolidation decision-making. Worth to mention that ICDR Rules are the only set of rules among the 17 targeted Rules to recently shift to open the administering arbitration institution to trigger the consolidation process on its own motion, which looks opposite to the growing trend – other selected rules which had ever empowered the arbitral institution with such power now all deprive it and leave the triggering power entirely to the hand of the party, e.g. AIAC Rules<sup>148</sup>, CEPANI Rules<sup>149</sup> and Swiss Rules<sup>150</sup>.

### A. Three Alternative Preconditions to Appoint Consolidation Arbitrator

ICDR is authorised to appoint a consolidation arbitrator only when it finds one of the three alternative preconditions set forth in Article 9(1) satisfied, otherwise the consolidation decision-making process has no justified ground to be activated. Albeit, as the *2014 ICDR Guide* admits, the three preconditions under the 2014 ICDR Rules

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<sup>146</sup> Pursuant to Article 1(1) & (3) of the 2021/2014 ICDR Rules, the term “Administrator” under the ICDR Rules refers to ICDR.

<sup>147</sup> Article 9(1) of the 2021 ICDR Rules

<sup>148</sup> The 2018 AIAC Rules empowered the AIAC to trigger the consolidation process on its own initiative, while the 2021 amendment has deprived such power from AIAC.

<sup>149</sup> The 2005/2007 CEPANI Rules empowered the CEPANI to trigger the consolidation process on its own initiative, while the 2020 amendment has deprived such power from CEPANI.

<sup>150</sup> The 2012 Swiss Rules empowered the Court to trigger the consolidation process on its own initiative, while the 2021 amendment has deprived such power from the Court.

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mirrored the three circumstances under which consolidation may be allowed under Article 10 of ICC Rules (2017 & 2021)<sup>151</sup>, the 2021 amendment of the ICDR Rules has adapted these preconditions to be more compatible with its tone and more liberal, leading a result of slight deviation from ICC’s counterpart.

### [1] First precondition

In accordance with Article 9(1)(a) of the 2021 Rules, ICDR is allowed to appoint a consolidation arbitrator if all the parties concerned have expressly agreed to appoint a consolidation arbitrator, while the corresponding provision (Article 8(1)(a)) in the 2014 Rules only provides for “the parties have expressly agreed to consolidation”<sup>152</sup> rather than specifically “agree to appoint a consolidation arbitrator”.

What does the textual difference intend to indicate? Inspired by the *2014 ICDR Guide*, the agreement to consolidation under the 2014 edition of Rules could be made effective without appointing a consolidation arbitrator.<sup>153</sup> In other words, ICDR can *de facto* bypass the consolidation arbitrator and directly permit the consolidation as the parties have consented, insofar as such consolidation agreement is not found incompatible with the ICDR Rules. Nevertheless, it seems contradictory to the consistent intention of the ICDR consolidation regime (2014 & 2021 versions of Rules) in terms of the identity of consolidation decision-making authority, that the decision on consolidation shall be ultimately upon the consolidation arbitrator rather than ICDR, the latter of whom only serves as a facilitator (e.g. to appoint a consolidation arbitrator). Thus, for the sake of coherence in logic, the application of this rule — any decision on consolidation under ICDR shall be made by a consolidation arbitrator — should not be open to any exception, even in the situation where the parties have explicitly consented to consolidate arbitrations into one single proceeding. Hence, the said 2021 amendment on the first precondition could reasonably be deemed to redress the incoherence consequence that occurred under the last edition. In other words, in order to satisfy Article 9(1)(a), all parties’ consent to consolidation does not suffice anymore, but also the consent to appoint a consolidation arbitrator for their intended consolidation so that the formality requirement could be fulfilled that every decision on consolidation is rendered by a

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<sup>151</sup> Gusy (n 66) 91.

<sup>152</sup> Article 8(1)(a) of the 2014 ICDR Rules.

<sup>153</sup> Gusy (n 66) 94.

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consolidation arbitrator. Imaginably, in practice, ICDR, the consolidation facilitator, would be highly likely to remind the parties who have already presented their common intention to consolidation should also clearly state in their agreement that they consent to an ICDR consolidation arbitrator to review their request and render the decision.

## **[2] Second Precondition**

Article 9(1)(b) enables ICDR to appoint a consolidation arbitrator if all of the to-be-consolidated arbitrations are filed under the same arbitration agreement, which is the practical form to accommodate “all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement” written in the provision. In addition, non-identical parties from the pending arbitrations do not constitute a hindrance to satisfying this precondition.

## **[3] Third Precondition**

The third precondition, set forth in Article 9(1)(c), permits ICDR to appoint a consolidation arbitrator where the claims (i.e. “claims, counterclaims or setoffs” in text) are made under more than one arbitration agreement, if ICDR finds the following three sub-conditions are simultaneously met: (1) the arbitrations involve same or related parties; (2) the disputes in the arbitrations arise in connection with the same legal relationship; and (3) the arbitration agreements may be compatible.

This provision gets revised in the 2021 Rules on two points. First, it breaks through the previous confinement (under the 2014 Rules) of identical parties of all pending arbitrations, whereas the latest ICC Rules still retain such confinement. Second, the 2021 revision attempts to redress a technical mistake appearing in the third sub-condition under the 2014 Rules. Precisely, it makes clear that the subject to review the compatibility between the arbitration agreements shall be ICDR (“Administrator”) rather than the consolidation arbitrator as the 2014 Rules mistakenly said<sup>154</sup>, because this is one precondition for ICDR to review and then to conclude whether to appoint a consolidation arbitrator, where it is not logical to expect the latter appears before it is appointed.

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<sup>154</sup> Article 8(1)(c) of the 2014 ICDR Rules states: “...and the *consolidation arbitrator* finds the arbitration agreements to be compatible. (Emphasis is added.)”

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Last but not least, even though the ICDR Rules also require different arbitration agreements to be “compatible”, as ICC Rules or many other institutional rules do so, the range of situations capable of being deemed compatible is certainly different under ICDR and ICC. An evident justification is that, as demonstrated *supra*, referring to different arbitration rules between arbitration agreements can be conditionally accepted for permitting consolidation under ICDR; instead, it is definitely not the case under ICC<sup>155</sup>.

#### [4] ICDR’s Discretion

Even if one of the three preconditions is satisfied, it does not mean ICDR would automatically appoint a consolidation arbitrator. Article 9(1) uses the term “may” rather than “shall”<sup>156</sup>, implicating ICDR still has the discretion to decide whether it is appropriate to appoint a consolidation arbitrator where it finds one of the prescribed preconditions met. Moreover, unlike the consolidation arbitrator demonstrated *infra*, ICDR has the unilateral power to make its decision without the obligation to prior consultation with the parties and/or, if any, arbitrators.

Once ICDR decides to appoint a consolidation arbitrator, it faces the incoming appointment task.

### B. Appointment Process

Howbeit ICDR is also mandated to appoint ordinary arbitrators under the ICDR Rules, the appointment process of a stand-alone consolidation arbitrator is largely deviant from the former, which is specifically set forth in Article 9(2) under consolidation provisions rather than referring to the general provisions of appointing arbitrators (Article 14)<sup>157</sup>. At first, ICDR shall notify the parties in writing of its intention to appoint a consolidation arbitrator and invite all the concerned parties to agree upon an appointment procedure for the sole consolidation arbitrator.<sup>158</sup> Hence, parties are not permitted to directly select a certain individual jointly as the

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<sup>155</sup> See Part 1-Chapter 4-Section 1-§2

<sup>156</sup> Article 9(1) of the 2021 ICDR Rules: “At the request of a party or on its own initiative, the Administrator [ICDR] *may* appoint a consolidation arbitrator...(emphasis added)”

<sup>157</sup> Article 14 of the 2021 ICDR Rules

<sup>158</sup> Article 9(2)(a) of the 2021 ICDR Rules

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consolidation arbitrator as the provisions to appoint ordinary arbitrator allow so<sup>159</sup>, which is arguably out of the consideration of efficiency. Not only that, but the parties are also imposed on a time limit of 15 days to agree upon such procedure; failing it, ICDR shall then directly appoint the consolidation arbitrator.<sup>160</sup> In this regard, the *2014 ICDR Guide* points out that such a time limit is “purposely shorter than the corresponding forty-five-day time limit for the appointment of the arbitrators deciding the parties’ dispute overall”, which is to ensure that “the consolidation decision can be taken quickly in order to minimise any negative cost and time impact on the pending arbitrations”.<sup>161</sup> With respect to the appointment decision made by ICDR, the principle is that no arbitrator who has been already appointed to any to-be-consolidated arbitration could be again appointed as the consolidation arbitrator, unless the parties agree otherwise.<sup>162</sup> This is an endeavour to ensure the decision on consolidation is made by an independent and impartial decision-making authority; if appointed the other way around, it will cause conflicts of interest between the already-appointed arbitrators and risk their impartiality. This rule is complemented by Article 9(6), pursuant to which, absent the agreement of all parties, the consolidation arbitrator shall not be appointed again to hear the consolidated arbitration proceedings. In other words, once the consolidated arbitrator fulfils its mandate as Article 9 sets forth, it is *functus officio*<sup>163</sup>, and it shall thus distance from all the involved arbitrations, no matter whether or how they are consolidated.

Albeit the appointing procedure of a consolidation arbitrator is unique from that of an ordinary arbitrator, Article 9(2)(d) clarifies that the consolidation arbitrator is subject to the same provisions on independence and impartiality (Article 14), challenges (Article 15), and replacement (Article 16) as any other arbitrator<sup>164</sup>. Plus, the default authority to decide all these three matters about arbitrator is ICDR (“Administrator” in the text).

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<sup>159</sup> Article 13(2) of the 2021 ICDR Rules; also, the “ICDR list method” incorporated in Article 13(6) is not applied in appointing the consolidation arbitrator.

<sup>160</sup> Article 9(2)(b) of the 2021 ICDR Rules

<sup>161</sup> Gusy (n 66) 97.

<sup>162</sup> Article 9(2)(c) of the 2021 ICDR Rules

<sup>163</sup> *Functus officio*: no longer holding office, and it has no further powers.

<sup>164</sup> Gusy (n 66) 92.

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#### *§4. Consolidation Arbitrator's Discretion and Procedural Fairness*

Once the consolidation arbitrator is appointed, it is ultimately upon the consolidation arbitrator to decide whether and how to consolidate the pending arbitrations, excluding any intervention of ICDR. Albeit Article 9(1) expressly authorises the consolidation arbitrator to grant consolidation to the case satisfied with any of the three preconditions, the consolidation arbitrator retains the full discretion to find whether a potential consolidation is indeed appropriate for the specific case, even for the case where all the parties have expressly agreed to a consolidation arbitration as per Article 9(1)(a).

For making its decision, first, in the procedural aspect, the consolidation arbitrator under Article 9(3) shall consult all the parties in order to safeguard the parties' right to be heard, in line with the ICDR spirit of conduct of proceedings as per Article 22(1), where the parties shall be treated with equality and given a fair opportunity to present.<sup>165</sup> Plausibly, the form of such exchange would basically rely on the written submissions as Article 9(7) implies.<sup>166</sup> Pursuant to the same provision, the consolidation arbitrator "may" also consult with the established arbitral tribunal(s), but when the consolidation arbitrator would do it? The *2014 ICDR Guide* said it would happen where the parties have different views on whether the consolidation should be ordered and provide differing facts and analyses with respect to the circumstances relevant to the decision on consolidation.<sup>167</sup> Not compelling the consolidation arbitrator to consult the appointed arbitrators as it shall do to the parties is reasonably out of the consideration of procedural economy. Opening the consolidation arbitrator to hear the opinions of the appointed arbitrators is to offer it an additional objective source, where the contradictory opinions between the parties render it in a deadlock to admit the evidence relevant to the decision on consolidation.

Second, as per Article 9(3), the consolidation arbitrator may take into account all the relevant circumstances before rendering the decision, while the circumstances to be assessed should highly depend on the particular case at hand. When weighing the

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<sup>165</sup> *ibid* 98.

<sup>166</sup> *ibid*.

<sup>167</sup> *ibid*.

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relevant circumstances on a specific case, the consolidation arbitrator shall keep in mind whether the aspired legitimate benefits of consolidation can come true if ordering such consolidation in the context of these circumstances, i.e. “to achieve a more time- and cost-efficient resolution of the entire dispute and to avoid inconsistent decisions”.<sup>168</sup> A list of non-exhaustive circumstances is expressly mentioned under Article 9(3) for the consolidation arbitrator to consider extraordinarily: (a) applicable law; (b) whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed; (c) the progress already made in the arbitrations; (d) whether the arbitrations raise common issues of law and/or facts; and (e) whether the consolidation of the arbitration would serve the interests of justice and efficiency.<sup>169</sup> The *2014 ICDR Guide* also mention some other possible circumstances which are not listed in the Rules, such as “difficulties in appointing suitable arbitrators where the pending arbitrations would require arbitrators with different language skill sets”, or “any confidentiality concerns created by the consolidation of the pending arbitration, in particular where the parties are not identical”.<sup>170</sup>

## *§5. Consolidation Arbitrator’s Decision: Issuance and Its Legal Effect*

### A. Stay Pending Consolidation Decision

Article 9(4) empowers the consolidation arbitrator to stay any or all to-be-consolidated arbitrations pending its ruling on a request for consolidation. This rule equips the consolidation arbitrator with a flexible tool to prevent, or at least minimise, the potential negative effect on overall efficiency, considering the fact that the cost and efforts spent by the arbitrators during the time the consolidation arbitrator takes to render the decision would often be lost when these arbitrators are later

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<sup>168</sup> *ibid* 97.

<sup>169</sup> Article 9(3) of the 2021 ICDR Rules

<sup>170</sup> Gusy (n 66) 98.

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discharged of their mandates as a consequence of the consolidation.<sup>171</sup> Also, this solution minimises the risk of compelling the parties to amend and re-submit the submissions<sup>172</sup>, which facilitates the decision as to consolidation that can be rendered in due time.

### B. Issuance of an Unreasoned Decision Within Fifteen Days

Pursuant to Article 9(7), it is the consolidation arbitrator's imperative to render its decision within fifteen days of the date for final submissions on consolidation in a bid to avoid any unnecessary delays to the overall procedure caused by the consolidation decision-making process. In order to fulfil this requirement, the *2014 ICDR Guide* advises the consolidation arbitrator should set out a reasonable short time limit for submissions of briefing.

In addition, under this provision, the issued decision is not obligatory to include a statement of reasons as to why the consolidation request is granted or rejected.

### C. Legal Effect of Consolidation Arbitrator's Decision

Is the decision made by the consolidation arbitrator final and binding? This question seems tricky to answer, considering there is no basis in the ICDR Rules to expressly provide that the consolidation ruling is of finality nature as some other institutional rules do so<sup>173</sup>. Fortunately, this question has been delicately addressed by the *2014 ICDR Guide*<sup>174</sup>, and the reasoning appears convincing. Thus, the following will be briefly based on the *2014 ICDR Guide*'s arguments by applying the 2021 ICDR Rules *mutatis mutandis*.

Faced with this question, the *2014 ICDR Guide* does not give a black-or-white answer. Instead, it attempts to split the issue into two-layer sub-issues, corresponding to Articles 9(1) and 9(3).

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<sup>171</sup> *ibid* 98-99.

<sup>172</sup> *ibid* 99.

<sup>173</sup> For example, Article 2.2 of the 2018 HKIAC Rule, 47.1 of the 2021 AIAC Rules, Article 29.1 of the 2020 LCIA Rules, Article 7 of Appendix I "Organization" of the 2017 SCC Rules.

<sup>174</sup> *See Gusy* (n 66) 101.

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First, the *2014 ICDR Guide* believes that the arbitral tribunal to hear the consolidated arbitration retains the power to decide on any jurisdictional challenges arising out of the consolidation decision<sup>175</sup>, where an express rule basis can be found in Article 21(1):

*“The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objection with respect to arbitrability, or the existence, scope, or validity of the arbitration agreement(s) or with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration, without any need to refer such matters first to a court (emphasis added).”*<sup>176</sup>

Essentially, this provision is where the *competence-competence* principle is enshrined under the ICDR Rules. Unseen in many other reviewed rules, this provision also unexpectedly makes clear that the objection raised to challenge the consolidation decision, i.e. “any objection with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration”, is attributed as a jurisdictional challenge governed by the arbitral tribunal’s power to decide. However, the *2014 ICDR Guide* warns that the review of the consolidation decision caused by the said jurisdictional challenge should be strictly confined to assessing whether the parties consented to consolidation; what is more, the *2014 ICDR Guide* posits such consent is conditioned upon the existence of one of the three preconditions contained in Article 9(1).<sup>177</sup> Accordingly, the three preconditions set forth for ICDR to review whether it is appropriate to appoint a consolidation arbitrator also simultaneously outline the extent to which the arbitral tribunal in the consolidated proceeding is authorised to review; therefore, the three preconditions actually constitute the jurisdictional boundary of consent to consolidation under ICDR. In my view, following this argument, ICDR can be deemed as the first gatekeeper to review the jurisdiction to consolidation when it serves to determine whether to activate the consolidation decision-making process, and in this vein, the tribunal to hear the consolidated arbitration, seizing the second chance to review the three preconditions prescribed in Article 9(a), can be deemed as the subsequent gatekeeper, and also the final gatekeeper, to repeat such assessment, and this act is essentially a review to the

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<sup>175</sup> *ibid.*

<sup>176</sup> Article 21(1) of the 2021 ICDR Rules

<sup>177</sup> Gusy (n 66) 101.

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ICDR's decision. If failing to satisfy any of the preconditions, the tribunal would conclude it lacks jurisdiction to hear the consolidated arbitration.

Nevertheless, once the tribunal finds the preconditions prescribed in Article 9(1) satisfied, the *2014 ICDR Guide* argues that it does not have further power to review and modify the decision made by the consolidation arbitrator based on discretionary factors pursuant to Article 9(3)<sup>178</sup>, since the ICDR Rules clearly confer the consolidation arbitrator, rather than the arbitrators, with the power to consolidate the pending arbitrations which have jointly passed the review under ICDR as per Article 9(1). In this way, as the *2014 ICDR Guide* stresses, procedural efficiency strongly prevails under Article 9(3) and thus leaves no room for the tribunal to revisit the decision made by the consolidation arbitrator based on its dissatisfaction with how the consolidation arbitrator exercises its discretion to assess the circumstances.<sup>179</sup>

### *§6. Establishment of Arbitral Tribunal for Consolidated Arbitration*

Provided the consolidation arbitrator orders consolidation, all the pending arbitrations will be consolidated into the arbitration that commenced first provided in Article 9(5), unless otherwise determined by the consolidation arbitrator or agreed by all parties.<sup>180</sup>

Apart from deciding whether and how to consolidate, another main task within the mandate for a consolidation arbitrator is to establish the arbitral tribunal to hear the consolidated arbitration, with the assistance of the ICDR to complete the appointment when necessary. In the light of Article 9(6), rendering the decision to consolidate separate arbitrations indicates that parties are deemed to waive their rights to nominate an arbitrator irrevocably, and the power to appoint arbitrators for the

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<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*

<sup>180</sup> The *2014 ICDR Guide* elaborates further the possible exception: “[T]he consolidation arbitrator may also find that it is more appropriate to consolidate the arbitration into an arbitration that commenced later. This may be the case where more progress has been made in the arbitration that commenced later or where the arbitration that commenced later involves claims with a considerably higher amount in dispute.” *See ibid* 99.

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consolidated proceedings is entrusted to the consolidation arbitrator and ICDR. Under this provision, the consolidation arbitrator has a flexible but balanced power to appoint the arbitrators in the consolidated arbitration<sup>181</sup> — on the one hand, the consolidation arbitrator may revoke the appointment of any previously appointed arbitrator(s); on the other hand, one of the previously established tribunals may be selected to serve in the consolidated proceedings, and the *2014 ICDR Guide* posits that selecting the previously appointed tribunal that is not being stayed as per Article 9(4), if any, may be particularly appropriate<sup>182</sup>. Although the aim of the latter seems to optimise procedural efficiency, the *2014 ICDR Guide* reminds the consolidation arbitrator, as well as ICDR, to put more weight on ensuring the parties' equal treatment in the appointment process of the tribunal (especially when different parties are consolidated), whereby giving utmost care and diligence to the particular circumstances of the case, in terms of minimising the risk at the enforcement stage.<sup>183</sup>

When is ICDR necessary to intervene to complete such an appointment, which Article 9(6) itself fails to illustrate well? Given that the consolidation arbitrator is not explicitly empowered to appoint any new arbitrator under this rule, it could be plausibly presumed that the necessary situations to demand ICDR to assist in completing such an appointment are when there is a need to appoint a (or more) new arbitrator(s) to fill in the vacancy of the arbitral tribunal (typically when it is a multi-member tribunal), whose power is derived from Article 13 and 16, for example, where the selected previous-appointed tribunal to hear consolidated proceedings lacks one arbitrator, and the vacancy is possibly caused by the revocation decision made by the consolidation arbitrator. Accordingly, even if the parties are ousted of the right to select the arbitrators directly as Article 9(6) provides for, pursuant to Article 13, ICDR is still required to invite consultation with the parties before making the

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<sup>181</sup> *ibid.*

<sup>182</sup> *ibid.*

<sup>183</sup> *ibid* 100.

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appointment<sup>184</sup> and may use the alleged ICDR list method at its discretion<sup>185</sup>, both of which could offer good opportunities for ICDR considering the opinion from the party who has not participated in the selection of the previously appointed tribunal. If understood this way, the labour division embedded in Article 9(6) would become clearer between the consolidation arbitrator and ICDR in establishing the tribunal to hear the consolidated arbitration. Also, this interpretation approach looks more coherent with the whole ICDR Rules than the proposition raised in the *2014 ICDR Guide*, where the consolidation arbitrator also has the power to appoint a new arbitrator for consolidated arbitration<sup>186</sup>.

Again, as demonstrated above, the consolidation arbitrator is prohibited from being appointed to hear the disputes of the consolidated arbitration in the absence of the parties' otherwise agreement.<sup>187</sup>

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<sup>184</sup> Article 13(4) of the 2021 ICDR Rules

<sup>185</sup> Article 13(6) of the 2021 ICDR Rules provides for the "ICDR list method": "The Administrator shall send simultaneously to each party an identical list of names of persons for consideration as arbitrator(s). The parties are encouraged to agree to an arbitrator(s) from the submitted list and shall advise the Administrator of their agreement. If, after receipt of the list, the parties are unable to agree upon an arbitrator(s), each party shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the Administrator. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on the parties' lists, and in accordance with the designated order of mutual preference, the Administrator shall invite an arbitrator(s) to serve. If the parties fail to agree on any of the persons listed, or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have the power to make the appointment without the submission of additional lists. The Administrator shall, if necessary, designate the presiding arbitrator in consultation with the tribunal."

<sup>186</sup> Gusy (n 66) 93.

<sup>187</sup> Article 9(6) of the 2021 ICDR Rules.

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## Section 2. NAI Rules

### §1. Context

#### A. NAI Consolidation Closely Interacts with Article 1046 DCCP

As the premier Dutch arbitration institution for the conduct of international commercial arbitration<sup>188</sup>, NAI has offered a similar consolidation approach as ICDR since first introducing consolidation provisions in its 2015 updated NAI Rules (Article 39 of the 2015 NAI Rules), i.e. to designate a stand-alone authority to exclusively decide on consolidation, who is termed as “third person” under NAI Rules. Nevertheless, unlike the ICDR consolidation mechanism, which its arbitral institution independently invents, the NAI consolidation mechanism is a highly interacted product of NAI with the consolidation provisions of the 2015 Netherlands Arbitration Act, namely Article 1046 of the Dutch Code of Civil Procedure (DCCP). In terms of the text, Article 1046 DCCP could be deemed as the genesis of the arrangement of the NAI consolidation provisions, for Article 39 NAI (2015) is largely a verbatim copy of the former<sup>189</sup> as well as regarding the big picture where the NAI Rules are generally aligned with the Netherlands Arbitration Act<sup>190</sup>. In terms of applicability, Article 1046 DCCP functions as the foundation mechanism for the operation of NAI consolidation. Among other things, the applicability of NAI consolidation presupposes that at least one of the pending NAI arbitrations should be seated in the Netherlands. In other words, NAI consolidation provisions cannot be applied when all the pending NAI arbitrations disconnect from the Netherlands as to the arbitral seat. By contrast, ICDR consolidation rules and many other institutional consolidation rules do not have such similar favourable dependence on the applicability of the arbitration law of the arbitral institution’s headquartered jurisdiction insofar as the applicable arbitration law does not mandatorily prohibit the consolidation approach provided in the agreed institutional rules. Also, the NAI

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<sup>188</sup> Rogier Schellaars and Martijn Doornbos, ‘Netherlands Arbitration Institute’ in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedias of International Law* (online edition, OUP 2020) para 1; Marsman (n 87) 35.

<sup>189</sup> Marsman (n 87) 650.

<sup>190</sup> Schellaars (n 188) para 16.

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consolidation mechanism benefits from the fact that the 2015 NAI Rules entered into force in conjunction with the 2015 Netherlands Arbitration Act on 1 January 2015.<sup>191</sup>

Why NAI has a peculiar consolidation regime dependent on the arbitration law of the jurisdiction where it is based? Clearly, the background to the birth of the NAI consolidation regime cannot be separated from the legislative background of Article 1046 of the DCCP. In the following, the history of Article 1046 DCCP is going to be presented from the angle of the legislative revision of the Netherlands Arbitration Act since 1986.

## B. History of Article 1046 DCCP: The Perspective of the Legislative Revision of the Netherlands Arbitration Act Since 1986

The so-called “Netherlands Arbitration Act” actually denotes Book Four of the Dutch Code of Civil Procedure (DCCP) (Article 1020-76)<sup>192</sup>, and this codification form is one of the results established since the 1986 overhaul of the arbitration legislation in the Netherlands<sup>193</sup>. Likewise, this 1986 revision also established the above-mentioned consolidation provision enshrined in Article 1046 DCCP, standing still until today.

To understand the context of Article 1046 DCCP of 1986, the holistic 1986 revision context should be first regarded. The then Dutch legislature sought to retain the attractiveness of the Netherlands as the venue to solve international disputes<sup>194</sup> by modernising the Dutch statutory arbitration regime.<sup>195</sup> In respect of the modernisation approach, the Dutch legislature embraced an international outlook with careful

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<sup>191</sup> *ibid* para 2.

<sup>192</sup> *ibid* para 15.

<sup>193</sup> Through the 1986 revision, the Dutch state court case law concerning arbitration got codified in a new Book four of the Dutch Civil Code (DCCP) so as to permit easy access to the applicable rules for international parties contemplating arbitration in the Netherlands. Prior to this revision, the first statutory rules as to arbitration were put under Title One of Book Three of the DCCP. *See* Marsman (n 87) 6, 25.

<sup>194</sup> “At that time, the Netherlands was the fifth most chosen seat in international arbitrations administered by the ICC, the US and Iran had just chosen The Hague as the seat for the Iran-United States Claims Tribunal, and there was a considerable increase in the number of NAI arbitrations involving international parties.” *See* *ibid* 5-6.

<sup>195</sup> *ibid* 5-6, 25.

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deliberations of offering “Dutch features”. On the one hand, the then UNCITRAL texts, i.e. the UNCITRAL Model Law of 1985 and the UNCITRAL Rules of 1976, were carefully looked at as a source of inspiration,<sup>196</sup> thus some provisions in the Netherlands Arbitration Act (1986) were broadly comparable to the UNCITRAL texts<sup>197</sup>. On the other hand, in several other respects, the Netherlands Arbitration Act (1986) had also deliberately given priority to “Dutch choices” to distinguish the Netherlands from the jurisdictions adopting the UNCITRAL Model Law (namely, Model Law jurisdictions), which the Dutch legislature believed as a strategy to attract more international arbitrations conducted in the Netherlands.<sup>198</sup> Among others, the Netherlands Arbitration Act of 1986 materialised thanks to extensive input from international arbitration experts and practitioners whom the legislature consulted closely, such as world-leading arbitrators Pieter Sanders and Albert Jan van den Berg.<sup>199</sup>

In this broad context, the Dutch statutory consolidation regime (Article 1046 DCCP) came into being as one of the “Dutch choices”, and its enactment in the Netherlands was primarily a result of lobbying by the Dutch construction industry, where submitting disputes to arbitration is the standard practice there, and construction arbitration is widely recognised to desiderate consolidation tool badly, for it may implicate multiple parties (such as owners, contractors, subcontractors and suppliers) and hence a multitude of related disputes.<sup>200</sup> Since the Netherlands Arbitration Act decided to adopt a monistic model without differentiating domestic and international arbitration seated in the Netherlands<sup>201</sup>, the potential revision in response to the domestic demand would of course then affect international arbitration seated in the Netherlands.

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<sup>196</sup> *ibid* 8, 29; The Netherlands Arbitration Act introduced in 1986 was also greatly influenced by other instruments, which are foreign arbitration legislation (particularly from France and Switzerland) and international treaties (particularly the 1958 New York Convention). *See ibid* 25.

<sup>197</sup> *ibid* 28.

<sup>198</sup> *ibid* 8, 29.

<sup>199</sup> *ibid* 6.

<sup>200</sup> *ibid* 338-339; Jacomijn van Haersolte-van Hof, ‘Consolidation Under the English Act 1996: A view from the Netherlands’ (1997) 13 *ArbIntl* 427, 427; Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816;

<sup>201</sup> Albert Jan van den Berg and Gerard J. Meijer, ‘National Report for the Netherlands (2020 through 2021)’ in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 2020) 2; Marsman (n 87) 26.

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Article 1046 DCCP (1986) established the statutory opt-out court-ordered consolidation regime, under which, absent the parties' affirmative contrary agreement, the President of the Amsterdam District Court was empowered to order consolidation between the Netherlands-based arbitrations at the request of a party and, if granting the consolidation request in whole or in part, the President may also appoint an arbitral tribunal for consolidated arbitration and, if necessary, determine the procedural rules to be applied by that tribunal, if parties failed to do so within a time frame.<sup>202</sup> Albeit the Dutch legislature once intended to<sup>203</sup>, Article 1046 DCCP has

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<sup>202</sup> See Article 1046 DCCP (1986), which states:

“1. If arbitral proceedings have been commenced before an arbitral tribunal in the Netherlands concerning a subject matter which is connected with the subject matter of arbitral proceedings commenced before another arbitral tribunal in the Netherlands, any of the parties may, ***unless the parties have agreed otherwise***, request the President of the District Court in Amsterdam to order a consolidation of the proceedings. (Emphasis is added)

2. The President may wholly or partially grant or refuse the request, after he has given all parties and the arbitrators an opportunity to be heard. His decision shall be communicated in writing to all parties and the arbitral tribunals involved.

3. If the President orders consolidation in full, the parties shall in consultation with each other appoint one arbitrator or an uneven number of arbitrators and determine the procedural rules which shall apply to the consolidated proceedings. If, within the period of time prescribed by the President, the parties have not reached agreement on the above, the President shall, at the request of any of the parties, appoint the arbitrator or arbitrators and, if necessary, determine the procedural rules which shall apply to the consolidated proceedings. The President shall determine the remuneration for the work already carried out by the arbitrators whose mandate is terminated by reason of the full consolidation.

4. If the President orders partial consolidation, he shall decide which disputes shall be consolidated. The President shall, if the parties fail to agree within the period of time prescribed by him, at the request of any of the parties, appoint the arbitrator or arbitrators and determine which rules shall apply to the consolidated proceedings. In this event the arbitral tribunals before which arbitrations have already been commenced shall suspend those arbitrations. The award of the arbitral tribunal appointed for the consolidated arbitration shall be communicated in writing to the other arbitral tribunals involved. Upon receipt of this award, these arbitral tribunals shall continue the arbitrations commenced before them and decide in accordance with the award rendered in the consolidated proceedings.

5. The provisions of article 1027(4) shall apply accordingly in the cases mentioned in paragraphs (3) and (4) above.

6. An award rendered under paragraphs (3) and (4) above shall be subject to appeal to a second arbitral tribunal if and to the extent that all parties involved in the consolidated proceedings have agreed upon such an appeal.”

<sup>203</sup> It is interesting to note that the faculty of “opting out” was not provided in the original draft of the 1986 Netherlands Arbitration Act: “The question was raised before the passing of the Act whether a consolidated arbitration would run counter to the Netherlands Constitution which provides in Article 17 that nobody can be deprived of the right accorded him by law to litigate his case in court. The Dutch Government expressed the opinion that it did not consider the consolidation as provided in the draft of the Act to be at odds with such constitutional right, but for the sake of alleviating any doubt and affording parties the maximum freedom in matters of arbitration, it amended the draft by including the faculty of opting out.” See Albert Jan van den Berg, ‘Consolidated Arbitrations and the 1958 New York Arbitration Convention’ (1986) 2 *ArbIntl* 367, 369

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never been a mandatory provision as some people misperceive,<sup>204</sup> but an opt-out one (“unless the parties have agreed otherwise”), where parties can freely rule such consolidation out by agreement, for which NAI has always provided an optional model clause to exclude consolidation arrangement in each edition of NAI Rules<sup>205</sup>. In turn, if parties failed to exclude it unanimously, Article 1046 would automatically apply as a “default mechanism”<sup>206</sup>. Article 1046 DCCP (1986) arguably operated well in practice, based on the ground that most requests for consolidation, despite the small number of such cases<sup>207</sup>, were granted by the President of the Amsterdam District Court since the 1986 Netherlands Arbitration Act became effective<sup>208</sup>. In accordance with the limited published data, for the period 1986-2006, only four consolidation requests were rejected.<sup>209</sup> In contrast to many jurisdictions, by then or now, passively awaiting the applicable arbitration institutions to introduce consolidation provisions in their rules, or at least some practice, to break the ice to deal with the issue of consolidation that occurred thereon, the opt-out statutory consolidation regime

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<sup>204</sup> For example, Martin Platte, ‘When Should an Arbitrator Join Cases?’ (2002) 18 *ArbIntl* 67, 73 (The author deems the consolidation provided for in 1986 NAI Act can be ordered by the state court without the consent of the parties.)

<sup>205</sup> For example, the NAI Rules (2010) provided the consolidation-exclusion clause as an additional clause for the NAI Recommended text arbitration clause: “Consolidation of the arbitral proceedings with other arbitral proceedings pending in the Netherlands, as provided in Article 1046 of the Dutch Code of Civil Procedure, is excluded.” Likewise, for the present NAI Rules (2015), NAI provides a recommended arbitration clause text to exclude consolidation, including the exclusion of the NAI’s own consolidation mechanism, since NAI consolidation rules emerged from the 2015 edition of NAI Rules, read as: “f. Consolidation: ‘consolidation of the arbitral proceedings with other arbitral proceedings, as provided for in Article 1046 of the Dutch Code of Civil Procedure and Article 39 of the Arbitration Rules of the Netherlands Arbitration Institute, is excluded.’” See <[https://www.nai-nl.org/en/documents/arbitration\\_clause\\_english/](https://www.nai-nl.org/en/documents/arbitration_clause_english/)> accessed 20 Feb. 2023

<sup>206</sup> According to Gary B. Born’s classification for the statutory consolidation provision in absence of parties’ agreement, Article 1046 DCCP is attributed to “national arbitration legislation providing for consolidation as default mechanism”, opposite to “national arbitration legislation providing for consolidation as mandatory rule”. See Born, *International Commercial Arbitration* (n 15) 2759-2816.

<sup>207</sup> For the period 1986-2006, in the twenty years since the entry into force of the Netherlands Arbitration Act in 1986, only some twenty decisions were rendered, which was an extremely small percentage compared to the then annual caseload (between 1,000 and 2,000) of arbitration conducted in the Netherlands. See Jan Willem Bitter, ‘Consolidation of Arbitral Proceedings in the Netherlands: The Practice and Perspective of the Netherlands Arbitration Institute’ in Permanent Court of Arbitration (ed), *Multiple Party Actions in International Arbitration* (OUP 2009) 227, 233.

<sup>208</sup> Bitter (n 207) 233; van Haersolte-van Hof (n 200) 428 (“On average, approximately three requests are submitted to the President per year, and almost without fail, the President orders consolidation in those cases. In practice, therefore, parties have given up objecting to these requests and merely try to co-operate in appointing mutually acceptable arbitrators and working out which rules should apply. In fact, parties even forgo the opportunity to attend the hearings scheduled to discuss a consolidation request and therefore the President often issues decisions by default.”)

<sup>209</sup> Bitter (n 207) 227.

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established in Article 1046 DCCP (1986) makes the Netherlands a jurisdiction to actively handle consolidation request from the legislation level since the era of 1980s, with enlarged possibilities to achieve consolidation.

Nevertheless, the court-ordered consolidation regime seems incapable of wholly substituting the institutional-rule-level consolidation mechanism when the pending arbitrations are administered under the same arbitral institution, on which one of the four refusal decisions mentioned above has reflected. This was an unreported decision issued on July 15, 1994, where the request for consolidating two pending arbitrations under NAI Rules, whereunder the facts seemed to justify consolidation, was refused simply on the fact that the said arbitrations were pending before the same arbitral institution, i.e. the NAI, and thus the then President of the Amsterdam District Court considered that it should be the task of NAI to address the request for consolidation rather than the Amsterdam District Court.<sup>210</sup> In addition, it is interesting to note that the President, in this decision, mistakenly treated NAI as a “tribunal”, given the two pending NAI arbitrations had been appointed the identical tribunal, and argued that it should not exercise its judicial consolidation power because the arbitral proceedings were not pending before different tribunals but before the same tribunal (namely, NAI, as the President alleged).<sup>211</sup> Consequently, as the court ruled out its jurisdiction to decide on consolidation and the then NAI Rules did not contain consolidation provisions, the pending NAI arbitrations failed to be consolidated in this case.

Plus, albeit the enactment of the consolidation provision was to cater to the Dutch construction industry initially, the users did not wholly satisfy with its effect and thus sought arbitral institutions to create a new system to replace, or at least largely bypass, the court-ordered statutory system.<sup>212</sup> For example, at that time, various Dutch construction arbitration institutions had jointly created a new system laid down in the Revised Article of Association of the Court of Arbitration for the Construction Industry (effective since 1 September 1997), under which the respective chairpersons of the institutions involved could jointly decide on the request of cross-institute consolidation, where the arbitral institutions involved share the comparable arbitration rules, and only when these chairpersons fail to reach a decision may the parties resort

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<sup>210</sup> van Haersolte-van Hof (n 200) 428.

<sup>211</sup> Bitter (n 207) 227 (“Van Baal rightly argues that the NAI is not a tribunal, and the fact that two tribunals have identical members does not make them one tribunal.”)

<sup>212</sup> van Haersolte-van Hof (n 200) 428.

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to the President of the Amsterdam District Court.<sup>213</sup> Besides, NAI had also taken the initiative to offer the “unofficial consolidation” mechanism to the parties to NAI arbitrations, attempting to remove the inconvenience for the parties to leave the Institute for the time being and go to the court to seek formal consolidation, given the then statutory law (Article 1046 DCCP (1986)) only provided for the court to decide on consolidation.<sup>214</sup> However, as one then NAI insider argued, there was no ground to find that “parties interested in consolidation would prefer any of the informal means of prevention or avoidance of inconsistent decisions”, as the informal consolidation means stated above were indeed more limited to be used.<sup>215</sup>

In light of the above, Article 1046 DCCP (1986) was in need of reform, but in which direction and to what extent? Will an alternative to the judiciary power, such as arbitral institutions, be permitted to consolidate arbitrations? Will the court-ordered opt-out system still be retained? The 2015 revision of the Netherlands Arbitration Act gave the answer in its revised Article 1046 DCCP (2015). Before reading the alteration of the revised consolidation provisions, the context of the renewed revision deserves a first look.

The process of the 2015 revision of the Netherlands Arbitration Act began in 2002 when the Dutch Government sensed the need to revise its statutory arbitration law further.<sup>216</sup> Generally speaking, the 2015 revision shared a similar purpose and amending approach as the 1986 revision. Akin to the 1986 revision, the stated aim of the 2015 revision was also to modernise Dutch arbitration law, and cement the Netherlands’ position as an important international arbitration hub by incorporating the national and international developments in arbitration that emerged since 1986.<sup>217</sup> As was the case with the 1986 Act, the 2015 revision also took great inspiration, even more extent than the 1986 Act, from the updated UNCITRAL texts (the UNCITRAL Model Law of 2006 and the UNCITRAL Rules of 2010) to modernise the Netherlands Arbitration Act, but the deliberate deviations from the UNCITRAL texts as they existed in the 1986 Act are still retained to outstand the Dutch features in the

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<sup>213</sup> *ibid.*

<sup>214</sup> “In the event of an unofficial consolidation, the NAI will continue to administer two or more separate proceedings, in each of which one single award will be rendered. These awards may be identical or similar.” For more details regarding the NAI’s “unofficial consolidation”, *see* Bitter (n 207).

<sup>215</sup> Bitter (n 207) 223.

<sup>216</sup> Marsman (n 87) 26.

<sup>217</sup> *ibid* 27; Schellaars (n 188) para 14.

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international arbitration competition market.<sup>218</sup> Meanwhile, the Dutch legislature attempted to keep these favoured “Dutch choices” alive via some necessary modification, and the updated consolidation provisions (Article 1046 DCCP (2015)), *inter alia*, are one of the representatives.

Like the Netherlands Arbitration Act 1986, the 2015 Act also came into existence with close consultation with the international arbitration industry. Primarily, the arbitration experts again contributed extensively to the 2015 revision, where the revision proposal from a working group chaired by Albert Jan van den Berg stood out for being the general basis of the legislative revision.<sup>219</sup> This van den Berg draft text proposal was first published in 2005, and the final version was presented to the Dutch government in 2006 after national-wide discussion and certain modifications, which was adopted as the input to prepare a preliminary version of the 2015 Netherlands Arbitration Act.<sup>220</sup> During the consultation phase on the preliminary draft Act, the legislature has taken massive account of the views from, *inter alia*, three primary international arbitration institutions conducting arbitration in the Netherlands, namely the PCA, the ICC and the NAI, whose proposals were largely adopted.<sup>221</sup>

With regard to Article 1046 DCCP (1986), the van den Berg proposal specifically proposed certain revisions, read as follows: “(1) to remove the possibility of partial consolidation; (2) to enable consolidation to be ordered even prior to the appointment of an arbitral tribunal; (3) to permit third parties, such as arbitral institutions, to take the initiative in seeking a consolidation order; (4) to specify that consolidation shall not cause undue delay in the proceedings and that the purpose of consolidation is the avoidance of inconsistent decisions; and (5) to maintain the ‘opting out’ system.”<sup>222</sup> Most of them were finally adopted in the 2015 revised Article 1046 DCCP.

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<sup>218</sup> Marsman (n 87) 27-29.

<sup>219</sup> “[Although] the Explanatory Memorandum does not explicitly refer to the van den Berg proposal...when explaining the 2015 amendments. It is clear, however, that several of the amendments to the Netherlands Arbitration Act were inspired by the work of van den Berg and the Working Group. The legislative history states in general terms that the 2015 Netherlands Arbitration Act was prepared by the legislature was able to build on the van den Berg proposal, and many of the amendments suggested in the proposal were adopted.” *ibid* 29, 30.

<sup>220</sup> *ibid* 29.

<sup>221</sup> *ibid* 6, 30.

<sup>222</sup> Bitter (n 207) 235.

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In this way, the NAI consolidation regime (Article 39 NAI (2015)) emerged against this backdrop. In the following, the analysis of NAI consolidation will be conducted with the revised Article 1046 DCCP analysis in tandem to fully demonstrate the Dutch approach of a mutual complementary regime of consolidation between the arbitral institution (“third person” is typically designated as an arbitral institution) and the state court.

## *§2. Consolidation Deciding-Making System: Netherlands Arbitration Act and NAI*

### A. Netherlands Arbitration Act 2015: Opt-In Third-Person Ordered and Opt-Out Judicially Ordered Consolidation System in Tandem

#### **[1] Opting Out Court-Ordered System as a Fall-Back**

Largely analogous to the counterpart of the 1986 Act, the revised Dutch consolidation provisions of 2015 retain the opt-out judicially ordered consolidation mechanism in respect of consolidating the pending arbitrations all seated in the Netherlands. It is still for the District Court of Amsterdam<sup>223</sup> to decide on consolidation upon the request of any party; however, the consolidation requests should be brought before the

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<sup>223</sup> Note that if the jurisdiction to decide on consolidation is within the default court in assistance of arbitration, the District Court in Amsterdam enjoys an exclusive territorial jurisdiction to hear consolidation matters of arbitration seated wherever in the Netherlands, not just based on the explicit text of Article 1046 DCCP but also on the ground that Article 1072 is excluded from applying on Article 1046, the former of which permits the parties to freely agree on a provisional relief judge from any specific district court they prefer. *See* Article 1072 DCCP (2015), which states: “The parties may designate by agreement the provisional relief judge of a specific district court as the provisional relief judge competent for the matters as referred to in Articles 1026(2) and (4), 1073(3), 1028(1), 1029(2), (4) and (5), 1035(2), and 1041a(1).”

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provisional relief judge within the Amsterdam District Court pursuant to the 2015 revision rather than the President as per the 1986 Act. The “provisional relief judge of the District Court” is said as “a single judge designated to make orders in matters that are considered urgent”.<sup>224</sup> Thus, any party to an arbitration pending in the Netherlands is permitted to request the provisional relief judge of the District Court in Amsterdam to consolidate with other arbitrations pending within the Netherlands insofar as parties have not agreed on the contrary.<sup>225</sup>

## **[2] Opting in Third-Person Ordered System as a Precedence**

As the general theory in arbitration puts it, during the arbitration process, the state court can be called upon for assistance within the bounds of the law only when no other relief is available, operating as a safety net to resolve the deadlocks in the arbitral process for the sake of ensuring the arbitration proceeds smoothly.<sup>226</sup> That is to say, where the arbitral mechanism as parties have agreed to apply offers redress, the state courts in support of arbitration should not intervene, and this theory has been established as part of Dutch courts’ consistent arbitration-friendly policies.<sup>227</sup> Accordingly, the consolidation power conferred to the District Court of Amsterdam under Article 1046 (1986/2015) should also be attributed as one of the fall-back judicial supports, and any parties’ agreed alternative redress for consolidation is supposed to prevail.

The 2015 revision supplemented that the “third person” can be designated to order consolidation as an alternative to the judiciary power in Article 1046 DCCP to respond to the earlier demonstrated demand for reform to call on additionally permitting a third person, typically (but not limited to) an arbitral institution, to order consolidation. Opposite to the preserved opt-out judicially ordered consolidation mechanism, the newly introducing “third person” constitutes an opt-in non-judiciary

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<sup>224</sup> Marsman (n 87) 33.

<sup>225</sup> See Article 1046(1) DCCP (2015), which states: “...In the absence of a third person designated to that end by the parties, the provisional relief judge of the district court of Amsterdam may be requested to order consolidation of arbitral proceedings pending in the Netherlands with other arbitral proceedings pending in the Netherlands, unless the parties have agreed otherwise.”

<sup>226</sup> Marsman (n 87) 407; by the way, the judge designated to fulfil such a function of supporting arbitration in some Francophone jurisdictions is specifically termed as “supporting judge (*juge d’appui*)”.

<sup>227</sup> See *ibid* 7-8.

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ordered consolidation mechanism, with the consequence that the former (formally) retreats as a fall-up mechanism in case no third person is designated to such end. This significant amendment to the consolidation decision-making authority can arguably be deemed as a rectification endeavour in the spirit of complying with the above-discussed precedence theory of the agreed redress mechanism and, in the aspect of practice, to reassure the arbitration industry (e.g. arbitration users, arbitral institutions) that “formal consolidation” ordering power in the Netherlands is not monopolised in the hand of the state court but is also statutorily-based open to “third person” if parties have designated so, the latter affirmatively overriding the court within the same remit of mandate. Thus, provided parties have agreed on another authority, such as an arbitral institution or an appointing authority, to fulfil the consolidation decision-making function that the provisional relief judge of the District Court in Amsterdam would otherwise have fulfilled, no room would be left for the latter to exercise its jurisdiction to decide on consolidation unless the designated body fails to act or the scope of to-be-consolidated arbitrations exceeds the competence of such body. Often such an agreement on designating a third person to decide on consolidation is incorporated in a set of arbitration rules which is agreed to be applicable.

Plus, as the only point contrary to the initial intention of the van den Berg proposal in the finally passed 2015 revision of Article 1046 DCCP, the third person can only exercise its consolidation power upon the request of one party, more precisely, one party to a Netherlands-seated arbitration, rather than taking the initiative to order consolidation. The same requirement applies to the judicially ordered consolidation system.

More strikingly, besides the enhancement of statutory certainty as well as the consequent flexibility, the designated “third person” as per the revised Article 1046(1) DCCP (2015) has been further explicitly empowered to permit consolidation between arbitrations with seats in different jurisdictions, insofar as one of the arbitrations is seated in the Netherlands<sup>228</sup>, while the competent Dutch court is strictly limited to consolidate arbitrations all pending within the Dutch jurisdiction. At least in theory, provided other requirements stipulated in Article 1046 DCCP are satisfied, the

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<sup>228</sup> See Article 1046(1) DCCP (2015), which states: “In respect of arbitral proceedings pending in the Netherlands, a party may request that a third person designated to that end by the parties order consolidation with other arbitral proceedings pending within or without the Netherlands, unless the parties have agreed otherwise.”

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designated third person is at liberty to exercise such consolidation power of “extraterritorial jurisdiction” nature, as long as such a consolidation is not restrained under the *lex arbitri* of the pending arbitration that is seated outside the Netherlands<sup>229</sup>. Looking back at the legislative history, this expansion of power conferred on the third person was initially derived from some legislators’ joint motions and passed without objection in the legislature,<sup>230</sup> reflecting this institutional innovation enjoyed solid public support in the Netherlands when it came into force.

One caveat: in my view, Article 1046 DCCP (2015) merely sets up a loose statutory framework permitting a third person designated to what extent at maximum to allow consolidation at the macro level; based on its opt-in nature, it still relies (ultimately) on the third person that parties have agreed on (typically, an arbitral institution) at the micro level whether the consolidation mechanism in its rules opts to align with the said statutory third-person ordered consolidation framework (particularly, including permitting cross-jurisdiction consolidation): (i) if the applicable rules do not explicitly provide for cross-jurisdiction consolidation, how to construe the applicability of such rules when the Netherlands is (one of the) arbitral seat(s); and (ii) if so, how to implement it in its own arbitration rules, insofar as the parties have not agreed otherwise.

For the purpose of the thesis, suppose all the pending arbitrations are of institutional arbitrations administered by the same specific arbitral institution. If the consolidation mechanism contained in the applicable rules administered under this arbitral institution does not expressly allow cross-jurisdiction consolidation following Article 1046 DCCP, can the competent decision-maker under the applicable rules permit consolidation between Dutch-seated arbitration and foreign-seated arbitration by

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<sup>229</sup> Marsman (n 87) 340.

<sup>230</sup> ([Original text in Dutch] “De leden van de VVD-fractie vragen waarom het voorliggende voorstel van 1046 Rv beperkt is tot gevallen waarin sprake is van twee (of meer) in Nederland aanhangige arbitrages. Tegen een dergelijke samenvoeging door een derde, zoals een arbitrageinstituut, bestaat geen principieel bezwaar. Om te verduidelijken dat samenvoeging van een in Nederland aanhangige arbitrage met een arbitrage die aanhangig is in een ander land door een derde kan worden gelast, is bij nota van wijziging artikel 1046 aangepast.” [English translation] “The members of the VVD Party ask why the present proposal of 1046 Rv is limited to cases involving two (or more) arbitrations pending in the Netherlands. There is no objection in principle to such consolidation by a third person, such as an arbitration institution. To clarify that consolidation of an arbitration pending in the Netherlands with an arbitration pending in another country can be ordered by a third person, Article 1046 was amended by memorandum of amendment.”) See Gerard J. Meijer and others, *Parlementaire Geschiedenis Arbitragewet* (Kluwer Juridische Uitgevers 2015) at “I.43.5 Nota naar aanleiding van het verslag”

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referring to Article 1046 DCCP, provided parties to the Dutch-seated pending arbitration(s) have not agreed to rule out Article 1046 DCCP? In the analysis of the 1986 Act, *van den Berg* once construed that the applicability of a consolidation mechanism from a set of institutional rules (the example he raised was Article 13 of the then ICC Internal Rules) embodies an agreement within the meaning of the phrase “unless the parties have agreed otherwise” enshrined in Article 1046(1) DCCP (1986).<sup>231</sup> Should the same phrase “unless the parties have agreed otherwise” (the first one)<sup>232</sup> appearing in Article 1046(1) DCCP of the 2015 revision be construed in the same way with the effect of excluding the possibility of cross-jurisdiction consolidation once the consolidation rule incorporated in the applicable institutional rules remains silent on this regard? In my view, this one-size-fits-all interpretation based on the 1986 Act does not fully apply to the 2015 Act, considering no arbitral institution was expressly provided to decide consolidation under the former, let alone the expanded consolidation competence beyond the same jurisdiction as the latter confers explicitly. Rather, a more suitable interpretation approach should be rooted in the (at least partly) parties’ intention to arbitrate in the Netherlands and all parties’ intention to conduct the arbitration as per the same institutional rules so that the Dutch statutory provision as to third-person ordered consolidation and the consolidation rule of the applicable institutional rules should be taken into account together to test whether there exists implicit consent to consolidate arbitrations with seats in different jurisdictions.

Accordingly, I assume the interpretation should differentiate at least under two scenarios. First, where the identity of the arbitral seat presupposes the consolidation as the institutional rules expressly provide for, an exclusion agreement within the meaning of Article 1046(1) DCCP (2015) is contained in such applicable institutional consolidation provisions — the possibility of cross-jurisdiction consolidation is excluded out of parties’ agreement to arbitration. For example, as Article 15(1) VIAC expressly stipulates, a prerequisite to ordering consolidation under VIAC Rules is the

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<sup>231</sup> Albert Jan van den Berg, ‘Consolidated Arbitration the New York Arbitration and the Dutch Arbitration Act 1986: A Replique to Mr Jarvin’ (1987) 3 *ArtIntl* 257, 261

<sup>232</sup> Article 1046(1) DCCP (2015), which states: “In respect of arbitral proceedings pending in the Netherlands, a party may request that a *third person* designated to that end by the parties order consolidation with other arbitral proceedings pending within or without the Netherlands, *unless the parties have agreed otherwise*... (emphasis added)”

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identity of the place of arbitration.<sup>233</sup> Thus, it is impossible to expect VIAC Board to consolidate one VIAC arbitration seated in Vienna and another VIAC arbitration seated in the Netherlands in this case.

Second, most consolidation provisions from institutional rules do not expressly contain a threshold of the identity of the arbitral seat as VIAC Rules do. Albeit whether sharing the same seat is deemed a common factor to assess the compatibility of the involved different arbitration agreements in many institutions' practices<sup>234</sup> where consolidation is allowed between the arbitrations arising out of different arbitration agreements, it is rarely explicitly enumerated in the rules but as a non-exhaustively listed factor to be freely taken into account by the competent consolidation decision-makers. Under this scenario that the same seat is not expressly required for achieving consolidation in the applicable institutional rules, the consent by implication to permit cross-jurisdiction consolidation cannot be sweepingly negated ungrounded simply because of the practice record in jurisdictions other than the Netherlands where different arbitral seats lead to failing the consolidation, considering that (partly or all) the parties have agreed to arbitrate in the Netherlands. Owing to a lack of an apparent contradiction against the literal text of institutional rules governing consolidation, Article 1046(1) DCCP featuring cross-jurisdiction consolidation can be ordered by the designated arbitral institution may prevail to form part of the parties' agreement to arbitration together with the consolidation mechanism incorporated in the institutional rules they have agreed on.

Following it, a question may be raised: on which ground the parties to the arbitration pending outside the Netherlands can be assumed the will to consent to apply Article 1046(1) DCCP? To start with, such consent seems self-evident when all the arbitrations pending in different seats are between the same parties. Nevertheless, in case the parties to the non-Dutch seated arbitration differ from the parties to the Dutch seated arbitration, is it still possible to assume there exists the intention between the parties in the former to consent to a set of consolidation provisions prescribed in the national arbitration law from a country other than where the arbitral seat is (i.e. Article 1046 DCCP)? I attempt to speculate in the following way. Suppose two pending SCC arbitrations, one seated in the Hague, the Netherlands, between parties

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<sup>233</sup> Article 15(1) of VIAC Rules (2021): "Upon a party's request, two or more arbitral proceedings may be consolidated if...and the *place of arbitration is the same* (emphasis added)". See more about VIAC consolidation, see Part I-Chapter 4-Section 4.

<sup>234</sup> Born, *International Arbitration: Law and Practice* (n 15) 2759-2816.

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A and B (hereafter “SCC arbitration in the Hague”), another seated in Stockholm, Sweden, between parties B and C (hereafter “SCC arbitration in Stockholm”). If parties B and C have excluded the application of consolidation contained in the SCC rules in their SCC arbitration in Stockholm, it is reasonable to suspect that the parties always incline to exclude all the possibilities of consolidation, let alone the request for consolidation filed on the basis of the Netherlands Arbitration Act, another jurisdiction’s arbitration law, which would otherwise be a surprise attack for them. From the pure theory point of view, the exclusion of consolidation provisions in SCC arbitration in Stockholm is justifiable to extend as an exclusion of agreement within the meaning of Article 1046(1) DCCP in defence to deny the request for consolidation filed on the Dutch arbitration law. Conversely, if parties B and C have not excluded the consolidation provisions incorporated in the SCC Rules, it is plausible to presume that B and C are generally in favour of the values that consolidation may bring (particularly, avoidance of inconsistent decisions) and, therefore, the possible cross-jurisdiction consolidation serving to bolster the effectiveness of such values may also be deemed as having been consented by B and C even the request for consolidation is filed on the basis of another country’s arbitration law (Dutch law), after all, if the consolidation is ordered, the consolidated arbitration will be still conducted under the auspices of SCC following the SCC Rules as before. This interpretation does not offend the principle of party autonomy in principle. Of course, the discretion should leave to the consolidation decision-makers (like in this case, SCC Board) to determine on a case-by-case assessment basis whether the cross-jurisdiction consolidation is indeed contained in the parties’ common will implicitly and, if so, whether it is appropriate to permit it with consideration of all the relevant circumstances. The above presumption is based on pure theoretical analysis, and it is pitiful that no case law in a similar hypothesised scenario has appeared.

Lastly, as to the situation mentioned above, (ii) where the arbitral institution has adopted consolidation provisions aligning with the Dutch statutory third-person ordered consolidation framework, how would this consolidation decision-making system be implemented under the administration of the arbitral institution? In the following, Article 39 NAI (2015), a largely verbatim copy of Article 1046 DCCP, will present how the “third person” system operates under NAI to decide on consolidation.

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## B. NAI: Third Person Deciding Regime

### [1] “Third Person” Cannot Be NAI Itself but an Individual

Although “third person” under the text of Article 1046 DCCP indeed refers to an arbitral institution (most usual) or other possible authorities designated by parties, the same term “third person” in the analogous text of Article 39 NAI cannot be read in the same way. Unfortunately, many works of literature have carelessly caused this potential misunderstanding. For example, in outlining the NAI consolidation, *van den Berg* states that “a new regime for the consolidation of arbitral proceedings was included in the NAI Rules (Art. 39), pursuant to which a third party (e.g. an arbitration institute) will decide on consolidation requests instead of the Court”<sup>235</sup>, which may result in the wrong perception that it is upon the NAI institution itself to determine consolidation under NAI consolidation, in line with consolidation regimes under Model 4, e.g. ICC consolidation. Furthermore, this incorrect impression may be enhanced when the literature highlights the analogy between the “third person” regime under NAI Rules with ICC consolidation (Article 10 ICC (2021)).<sup>236</sup>

In this regard, NAI counsels have clarified that the “third person” under NAI Rules in NAI’s consolidation practice can only be admitted as a natural person rather than a legal entity (e.g. an arbitral institution).<sup>237</sup> The role of “third person” in Article 39 NAI amounts to the provisional relief judge of the District Court of Amsterdam in Article 1046 DCCP, who is also self-explanatory to be played by a natural person rather than an institution. An NAI case of 2021 also proves this point, where a natural person was appointed as “Third Person” as per Article 39 NAI (2015) to decide whether two NAI arbitrations should be merged.<sup>238</sup> From the point of comparability, the “third person”

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<sup>235</sup> van den Berg, ‘National Report for the Netherlands (2020 through 2021)’ (n 201) 6.

<sup>236</sup> For example, *see* Marsman (n 87) 339 (“Each of the parties to the proceedings that are to be consolidated can submit a request for consolidation to the third person appointed by the parties to decide a request for consolidation, **typically an arbitral institution (see e.g. Article 10 ICC Rules 2021)**” (Emphasis is added).)

<sup>237</sup> This has been verified in the interview with counsels of NAI, though having not expressly written in the NAI Rules. Interview with counsels of NAI, Netherlands Arbitration Institute (Rotterdam, the Netherlands, 24 January 2023).

<sup>238</sup> *EXEM v Sonanglo (I)*, NAI Case No. 4687, Final award 13 July 2021, para 4.3 (“4.3 On 6 January 2020 Sonangol’s request (dated 3 October 2019) in another NAI proceeding between the same Parties stemming from a parallel shareholders’ agreement between the Parties (NAI 4760) to consolidate those

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designated to order consolidation under NAI Rules is largely analogous to the standalone “consolidation arbitrator” under ICDR Rules in nature, distinguishing from the consolidation regimes falling under other Models in this thesis, where the administering arbitral institution (under Model 3 and Model 4) or arbitral tribunal (under Model 1 and Model 3) is empowered to decide on consolidation.

## [2] Appointment of “Third Person”

Unlike the ICDR consolidation regime, where ICDR can activate the consolidation at its motion by appointing the “consolidation arbitrator”, the NAI consolidation process can only be triggered upon either party’s request as per Article 39(1) NAI. The NAI Administrator<sup>239</sup> is in charge of receiving such requests for consolidation and then notifying all the parties concerned and, if any, appointed arbitrators.<sup>240</sup> Given that the tribunal in the pending arbitration(s) has been constituted<sup>241</sup>, from the day of the receipt of the request for consolidation, the tribunal may suspend the pending arbitration(s) pursuant to Article 39(2).<sup>242</sup>

Following that, NAI Administrator will organise the appointment of the third person serving for the sole mandate of consolidation decision-making and is required to ensure the appointment can be made within a restrictive timeframe. First, the Administrator shall invite all the parties to jointly appoint an individual as the “third person” within the fixed time limit of 14 days.<sup>243</sup> The candidate agreed by the parties can directly take office as the “third person” without the need to be confirmed by the Administrator as per Article 16 NAI.<sup>244</sup> If parties fail to reach an agreement, the NAI Administrator shall directly appoint a third person<sup>245</sup>, which should be perceived as a

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proceedings with the proceedings in this case (NAI 4687), was rejected by Mr. W.H. van Baren, appointed as “Third Person” under Article 39 NAI Rules. Pending the outcome of this procedural incident, on 28 November 2019 this Tribunal stayed the proceedings in NAI 4687.”)

<sup>239</sup> “Administrator” under NAI Rules refers to “the director of the NAI as provided for in the NAI’s articles of associations and, in the directors’ absence, the member of the executive board designated by the executive board to that end, or an acting administrator appointed as such by the executive board”, in accordance with Article 1(a) of the NAI Rules (2015).

<sup>240</sup> Article 39(2) of the NAI Rules (2015)

<sup>241</sup> For being a pending arbitration, Article 1046 DCCP does not require that tribunals in the to-be-consolidated arbitrations have been constituted in accordance with Article 1024 & 1026 DCCP as to when arbitral proceedings are deemed to be pending. *See also* Marsman (n 87) 343.

<sup>242</sup> This is one notable distinction of the NAI consolidation provisions from Article 1046 DCCP (2015).

<sup>243</sup> Article 39(3)(a) of the NAI Rules (2015)

<sup>244</sup> *See* Article 39(3)(d) and Article 39(6) of the NAI Rules (2015). *See also* Marsman (n 87) 649.

<sup>245</sup> Article 39(3)(b) of the NAI Rules (2015)

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means to avoid deadlock or unnecessary delay caused by noncooperation from any party for the ultimate efficiency purpose. In that case, the candidate in principle should not come from the arbitrators already appointed in the to-be-consolidated cases, unless the parties have agreed otherwise.<sup>246</sup> This is out of consideration to ensure the neutrality of the consolidation decision-maker. In addition, as NAI counsels have verified, the NAI Administrator is more inclined to find someone deemed as experienced as an arbitrator for the particular field with the expertise and experience to judge whether it is appropriate to consolidate in the related specific case.<sup>247</sup>

Similar to the “consolidation arbitrator” under ICDR Rules, in line with Article 39(3)(d), the “third person” under NAI Rules is also required to comply with most requirements imposed on the ordinary arbitrator as well as (most) entitlements the latter enjoys: the third person shall be independent and impartial (Article 11(2)), must make appropriate disclosure (Article 11(3) through (5)), can be released from mandate (Article 17), can be replaced (Article 18), can be challenged (including decided by the NAI Committee<sup>248</sup> as the default way, Article 19), and may request to be assisted by a tribunal’s secretary (upon the approval and appointment of NAI Administrator, Article 20). In this light, in terms of nature, the third person under NAI indeed amounts to a stand-alone arbitrator mandated only for deciding consolidation, in line with ICDR’s consolidation arbitrator.

### **[3] The Breadth of Consolidation Ordered by the Third Person**

In concert with the Dutch statutorily-based third-person ordered consolidation system demonstrated above, NAI’s third person is powered to consolidate Dutch-seated arbitration and foreign-seated arbitration into one set of proceedings, insofar as the NAI Rules apply to all the pending arbitrations, and one of the arbitrations is seated in the Netherlands to ensure that the Dutch consolidation provision (Article 1046 DCCP)

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<sup>246</sup> Article 39(3)(c) of the NAI Rules (2015) and Para 12.2 of the Explanation of the NAI Rules (2015)

<sup>247</sup> Interview with counsels of NAI, Netherlands Arbitration Institute (Rotterdam, the Netherlands, 24 January 2023)

<sup>248</sup> “NAI Committee” under NAI Rules refers to “the committee appointed by the NAI Executive Board that decided on challenge requests as referred to in Article 19”, in accordance with Article 1(d) of the NAI Rules (2015).

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can apply as a basis for such cross-jurisdiction consolidation<sup>249</sup>. For the same reason, it can be assumed that, after consolidation, the proceedings will be more probably determined to fix in the Netherlands if the arbitral seats to the original arbitrations differ, because, supposing the place of the consolidated arbitration is located outside the Netherlands, the consolidated arbitration will lose the statutorily-based ground for its existence as the Netherlands Arbitration Act does not continue to apply.<sup>250</sup>

However, be aware that not all the arbitrations conducted under the same 2015 version of NAI Rules are eligible to be consolidated. The transitional provisions (Article 62(2) NAI) provide that all the arbitration commenced on and after 1 January 2015 should refer to the 2015 version of NAI Rules, whereas the exceptions prescribed under Article 62(2) NAI clearly refrains the NAI's consolidation provisions (Article 39 NAI) from applying to the arbitration agreement concluded before 1 January 2015, unless the parties agreed otherwise.<sup>251</sup> Understandably, the rationale for forming this exception could be in a bid to strictly abide by the parties' initial agreement to arbitration at the time of concluding the arbitration agreement. Parties can agree to exclude the consolidation regime set up in institutional arbitration (Article 1046(1) DCCP (2015) and Article 39(1) NAI (2015) ) when conducting their arbitration agreement but logically will not have done so with no awareness that NAI will introduce consolidation provisions in the future (from 2015 version of NAI Rules).<sup>252</sup> In this light, it can be inferred that consolidation between the NAI arbitrations where different versions of NAI Rules apply respectively cannot be achieved without a doubt. In comparison, there exists less hindrance to expecting consolidation achieved between the arbitrations applying different arbitration rules administered by the same arbitral institution under the aegis of certain other arbitral institutions, such as ICDR, LCIA or JCAA.<sup>253</sup>

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<sup>249</sup> Marsman (n 87) 648.

<sup>250</sup> See Article 1073 DCCP (2015) and Para. 14.1 of the Explanation of the NAI Rules (2015)

<sup>251</sup> Article 62(3) NAI Rules (2015) and Para. 2.1 of the Explanation of the NAI Rules (2015) also prescribes the measures for decision-making to be used by arbitrators (Article 42(1)(3)) belong to the exception alongside with the provisions on consolidation (Article 39), other NAI provisions (2015) are generally applicable to arbitrations that commenced after 1 January 2015, irrespective of the date on which the arbitration agreement was concluded. Also see Schellaars (n 188) para 93.

<sup>252</sup> G.J.Meijer and H.J. van der Baan, 'NAI Arbitragereglement 2015', Tijdschrift voor Arbitrage 2015, 47

<sup>253</sup> Under the ICDR Rules (2021), it is expressly allowed to consolidate the arbitrations under the ICDR Rules and other arbitration rules administered by the AAA or ICDR. See more in Part I-Chapter 2-Section 1. Under the LCIA Rules (2020), consolidation between the arbitrations under different editions of LCIA Rules may be allowed in a workaround way. See more in Part I-Chapter 3-Section 3-§3-B. Under the JACC Rules (2021), JCAA consolidation is not restricted within the arbitrations

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### C. Justification of Retaining Opt-Out Judicially Ordered Consolidation System

As demonstrated above, the newly introduced opt-in third-person ordered consolidation system prescribed in Article 1046 DCCP (2015) constitutes the legal basis of NAI's consolidation regime, particularly the cross-jurisdiction consolidation therein. Then, is it redundant to retain the old opt-out judicially ordered consolidation system in Article 1046 DCCP (2015) in terms of achieving consolidation of arbitrations? Absolutely not! The utility of the court-ordered consolidation system embodies in scenarios where the potential demand for consolidation is between the arbitrations not under the same arbitral institution [1]. In addition, despite the scepticism of jeopardising party autonomy, such an opt-out system should be believed legitimate to stand robustly [2].

#### **[1] Complementary Effect Article 1046 DCCP Imposed on Article 39 NAI in terms of Fulfilling the Efficacy of Consolidation Tool**

Back in the 1980s, when institutional consolidation was far from being as prevalent a trend as it is today, the consolidation provision of the then newly amended Dutch Arbitration Act had recognised that consolidation schemes designed by the arbitration institution would probably be restricted to arbitrations administered under the same institution<sup>254</sup> and that a more efficient approach of resolving related arbitrations would be for the courts to order consolidation.<sup>255</sup> Accordingly, the provisional relief judge of the District Court of Amsterdam under Article 1046 DCCP (2015) is powered to consolidate the arbitrations administered under different arbitral institutions, and to consolidate institutional arbitration and *ad hoc* arbitration, insofar as all the pending arbitrations are seated within the Netherlands, as well as parties concerned have not ruled this court-ordered approach out. Thus, the fallback attributed judicially ordered

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under the same 2021 JCAA Rules but extending the scope to all the arbitrations administered by JCAA. See more in Part I-Chapter 1-Section 1-§3-B.

<sup>254</sup> Today's comments also verify this assumption at that time. See Bernard Hanotiau, *Complex Arbitration: Multi-Party, Multi-Contract, Multi-Issue – A Comparative Study* (2nd edn, Kluwer Law International 2020), 335.

<sup>255</sup> van den Berg, 'Consolidated Arbitration and the 1958 New York Arbitration Convention' (n 203) 367.

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approach can exert a complementary effect outside the scope where the to-be-consolidated arbitrations under the same arbitral institution. In this light, the limitation of the NAI consolidation regime in the range can be complemented by the judicially ordered system in the integrated Dutch arbitration regime, which extensively enlarges the efficacy of the consolidation tool compared to that under arbitration regimes in most other jurisdictions. For example, suppose the related arbitrations are between two arbitrations applicable under the NAI Rules and one arbitration under the UNCITRAL Rules, which are all pending in Hague, the Netherlands. Theoretically speaking, after the two NAI arbitrations are granted to be consolidated, the provisional relief judge of the District Court in Amsterdam can still be requested to consolidate the already consolidated NAI consolidation and the *ad hoc* arbitration.

Admittedly, not sure whether the said provisional relief judge is still competent to consolidate the *ad hoc* arbitration and the NAI consolidated arbitration, given that the latter is merged out of one Dutch-seated NAI arbitration and another foreign-seated NAI arbitration and determined to anchor the seat in the Netherlands. At least in a *prima facie* view of the text of DCCP 1046 DCCP, it appears rational to believe that the provisional relief judge enjoys such competence as long as the seat of all the arbitrations is within the Netherlands at the moment when they are brought in front of him/her. Given the merely supporting nature of the provisional relief judge when deciding consolidation, she/he should not be burdened with the responsibility to look back on the prior consolidation decision and related (e.g. the determination on the arbitral seat) made under the auspices of NAI and to over-review substantially whether these decisions were made appropriate. Albeit the attitude from case law seems unclear in this respect, the above assumption and argument may be a feasible interpretation way from the perspective of maximising the potential effectiveness of consolidation as much as possible within the established Dutch arbitration regime to highlight this unique strength of conducting arbitration in the Netherlands.

If consolidation is achieved outside the scope of arbitrations under the same arbitral institution thanks to the court's order, far-reaching chain effects may occur, deserving high regard. First, consolidation implies only one set of rules that can apply to the consolidated proceedings, causing (part of) the having-been-consolidated arbitration to be governed by a different set of rules than originally agreed.<sup>256</sup> Then, the

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<sup>256</sup> Marsman (n 87) 344.

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determination on choosing which set of arbitration rules is applicable for consolidated arbitration may further affect which arbitral institution continues to administer the consolidated arbitration (e.g. if the to-be-consolidated arbitrations were initially administered by two different arbitral institutions) or even cause the issue of whether the consolidated arbitration will be of nature of institutional arbitration or an *ad hoc* arbitration (e.g. in case one of the having-been-consolidated arbitrations was originally an *ad hoc* arbitration). According to Article 1046(4) DCCP, these questions above are continued to be determined by the provisional relief judge to decide after granting the consolidation. For the sake of mitigating the tension from these effects, some literature has well suggested that: “[The] Court should decide on the applicable arbitrations rules in a manner that resemble the arrangements originally agreed in each of the to-be-consolidated cases as closely as possible.”<sup>257</sup>

## **[2] Legitimacy of the Opt-Out Judicially Ordered Consolidation System Itself**

Despite the desirable and unique complementary effect brought by the opt-out judicially ordered consolidation system, the criticism or concern around it has been commonplace since its emergence in 1986. In this sub-session, I will assert my stance that this opt-out consolidation system ordered by the court is legitimate itself.

It is true, as having been well recognised, that nowadays similar consolidation mechanisms are not, or not to the same extent, stipulated under the arbitration laws of other popular jurisdictions<sup>258</sup>, even though the court-ordered consolidation system was

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<sup>257</sup> *ibid* 344.

<sup>258</sup> *ibid* 16 (“The UNCITRAL Model Law does not provide for ...consolidation, nor does the French arbitration statute. Under the English Arbitration Act the tribunal does not have the power to order consolidation except with the agreement of the parties (Section 35(2) English Arbitration Act 1996) and the Swedish Arbitration Act provides for consolidation only if the same arbitrators have been appointed in both cases (Section 23a Swedish Arbitration Act 2019).”).

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once misperceived as an emerging trend in the 1980s-1990s<sup>259</sup>. From the practice aspect, the careless foreign novice to a Dutch-seated arbitration case may complain about a disagreeable surprise by the unexpected “attack” from the statutorily-based consolidation with possibly some unexpected parties involved from another case<sup>260</sup>, after all, the “opt-out” system is not generally applied in most other popular jurisdictions<sup>261</sup>. However, the practical inconvenience arising from unfamiliarity with the arbitration law of the chosen seat does not suffice to argue the illegitimacy of the opt-out judicially ordered consolidation.

From the theoretical aspect, the criticism concerned revolves around the opt-out nature of this system: would an award which is the result of a judicially ordered consolidation of related arbitration as per Article 1046 DCCP harm the party autonomy and fall under the ground (d) of Article V(1)<sup>262</sup> of the New York Convention in the absence of the parties’ affirmative agreement on consolidation matters?<sup>263</sup>

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<sup>259</sup> See van den Berg, ‘Consolidated Arbitration and the 1958 New York Arbitration Convention’ (n 203) 368-389 (“[T]he recent development in these countries [the US, the Hong Kong and the Netherlands] may signal a new trend. This trend indicates that the solution of the problem of related arbitrations is preferably to be provided by the legislator in the various countries.”); Leboulanger (n 43) 58; A prominent example to prove the trend is not any more is the modification of the court-ordered consolidation mechanism provided for in the Hong Kong Arbitration Ordinance from the opt-out approach in the 1982 Ordinance (Section 6B of the 1982 Hong Kong Arbitration Ordinance) to the opt-in approach after the revision in 2010 for universally integrating the UNCITRAL Model Law (s.2 of Schedule 2 of the Arbitration Ordinance (Cap 609)). See more about applicability of the present opt-in court-ordered consolidation provision, see a recent case of *Employer v Consultant* HCCT 39/2021. In fact, Hong Kong was following the trend that has emerged since the 1990s to become a UNCITRAL Model Law jurisdiction (e.g. Singapore (1994), Germany (1998), Austria (2006)), and the compromise of consolidation provision was one of the endeavours of Hong Kong’s Legislative Council to adapt the Hong Kong Arbitration Act into UNCITRAL Model Law, the latter of which is silent on consolidation issue to date.

<sup>260</sup> See van Haersolte-van Hof (n 200) 429; Bitter (n 207) 225.

<sup>261</sup> Bitter (n 207) 225; Marsman (n 87) 16.

<sup>262</sup> Ground (d) of Article V(1) of the New York Convention provides that enforcement of an award may be refused if the respondent asserts and proves that: “the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was in accordance with the law of the country where the arbitration took place.”

<sup>263</sup> See Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816; And the tense debate between Albert Jan van den Berg and Sigvard Jarvin on the legitimacy of the Dutch opt-out judicially ordered consolidation statutory regime from 1986 to 1987: van den Berg, ‘Consolidated Arbitration and the 1958 New York Arbitration Convention’ (n 203); Sigvard Jarvin, ‘Consolidated Arbitrations, the New York Arbitration Convention and the Dutch Arbitration Act 1986: A Critique of Dr. van den Berg’ (1987) 3 *ArtIntl* 254; Albert Jan van den Berg, ‘Consolidated Arbitration the New York Arbitration and the Dutch Arbitration Act 1986: A Replique to Mr Jarvin’ (1987) 3 *ArtIntl* 257.

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First, some critique questioned the non-mandatory nature of the opt-out system on the ground of ambiguity of the threshold of ruling out the judicially ordered system within the meaning of Article 1046 DCCP:

*“A consolidation case involves at least three parties. Is it sufficient that the parties in the first arbitration agreed between themselves that there shall be no consolidation, or must the agreement be made between all three (or more) parties? It is obviously not enough for one party to oppose consolidation; there must be an agreement between two or even more parties. To leave it to the parties (whoever they are) to opt out appears reasonable, but will it be a very practical solution? When disputes have arisen and the request for consolidation has been made by one party, it is unlikely that the parties will be able to agree to exclude consolidation ... At an earlier stage, when drawing up the various contracts related to a big project, the chances of reaching an agreement to exclude consolidation are greater. This presupposes that the parties are aware of the risk of consolidation, not knowing perhaps at the stage where the arbitration will take place. It also supposes that these parties are aware of who will be parties to the connected arbitration with whom they want to avoid consolidation (if I am right in thinking that all parties concerned with a consolidation must reach agreements to opt out). Since contracts are negotiated at different times and in different places, it will not always be possible to agree in advance; parties may be unknown to each other until the question of consolidation arises. And then it is too late to agree...”<sup>264</sup>*

In this regard, *Albert Jan van den Berg*, one of the leading experts who participated in the drafting of the 1986 Netherlands Arbitration Act, clarified such an opting out within the meaning of Article 1046 DCCP (1986) suffices as long as the exclusion is contained in at least one of the arbitration agreements involved so that parties’ freedom of ruling out judicially ordered consolidation is indeed respected in compliance with the original legislative intention.<sup>265</sup> More clearly, *van den Berg*

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<sup>264</sup> Sigvard Jarvin, ‘Consolidated Arbitrations, the New York Arbitration Convention and the Dutch Arbitration Act 1986: A Critique of Dr. van den Berg’ (1987) 3 *ArtIntl* 254, 256.

<sup>265</sup> van den Berg, ‘Consolidated Arbitration the New York Arbitration and the Dutch Arbitration Act 1986: A Replique to Mr Jarvin’ (n 231) 261; in the legislative history, the Dutch legislature once expressly modified the nature of consolidation ordered system from a mandatory system into an opt-out system in a bid to alleviate any doubt and afford parties the maximum freedom in matters of arbitration.

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pointed out that “unless the parties have agreed otherwise” should be read as “unless two or more parties have excluded by agreement such consolidation or have agreed otherwise”.<sup>266</sup>

This argument was later adopted by a case of deciding a request for consolidation of the District Court of Amsterdam in 2003, where the consolidation request was denied on the court’s finding that the implicit intentions of parties to the contract between the owner and the principal contractor to have their disputes settled under the rules of a specialized institution would be compromised if the consolidation request were granted between one dispute with the developer (requesting party) and the owner (governed by an arbitration agreement where NAI Rules were agreed to conduct the arbitration) and another dispute with the owner and the principal contract (governed by another arbitration agreement where the rules of the Council for Arbitration in the Construction Business were agreed to conduct the arbitration).<sup>267</sup>

Accordingly, the absence of parties’ affirmative agreement on consolidation matters should not be construed as an agreement not to allow consolidation, given that the Netherlands is chosen as the arbitral seat to arbitrate, whose legislation provides for a default rule for achieving consolidation. As *van den Berg* argues, parties’ agreement to arbitrate in a given jurisdiction implies that they have approved the applicability of the arbitration law of that jurisdiction; thus, the judicially ordered consolidation system incorporated in this arbitration law should also form part of their agreement.<sup>268</sup> In other words, as demonstrated above about the “opt-out” nature, the applicability of the judicially ordered consolidation system only matters whether parties have *de facto* ruled this mechanism out, expressly or implicitly.

Suppose parties have not agreed to exclude Article 1046 DCCP, the possible effects arising out of the court-ordered consolidation as per Article 1046 DCCP arguably prevail over the parties’ agreement on the composition of the arbitral tribunal and the arbitral procedure.<sup>269</sup> To prove it, *van den Berg* argues that the provisions in the arbitration law of the arbitral seat that failed to be excluded should be treated as *de*

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<sup>266</sup> van den Berg, ‘Consolidated Arbitration the New York Arbitration and the Dutch Arbitration Act 1986: A Replique to Mr Jarvin’ (n 231) 261.

<sup>267</sup> District Court of Amsterdam, July 23, 2003, TvA 65 (2004) 171; Bitter (n 207) 228-229.

<sup>268</sup> van den Berg, ‘Consolidated Arbitration and the 1958 New York Arbitration Convention’ (n 203) 368.

<sup>269</sup> *ibid*; van den Berg, ‘Consolidated Arbitration the New York Arbitration and the Dutch Arbitration Act 1986: A Replique to Mr Jarvin’ (n 231).

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*facto* “mandatory provisions” of *lex arbitri*, the effects caused by which prevail over an agreement of the parties which deviates therefrom, therefore the parties’ agreement on the composition of the arbitral tribunal or arbitral procedure should be replaced by another appointment method of arbitrators or another method of determining the applicable procedural rules for the consolidated arbitration in this case.<sup>270</sup> Consequently, Where parties have not *de facto* addressed the issue of consolidation, expressly or implicitly, then ordering consolidation pursuant to the court-ordered consolidation mechanism under the Dutch arbitration law as the applicable *lex arbitri* should not be deemed to offend either the New York Convention or the principle of party autonomy.<sup>271</sup>

### §3. Conditions and Discretion

Article 1046(2) DCCP and Article 39(4) NAI provide two identical mandatory conditions that must be satisfied for ordering a consolidation. First, consolidation can only be ordered if the unreasonable delay will not occur on the pending arbitrations as a ramification of the consolidation, where the stage that each arbitration has reached separately by the time of filing the request for consolidation needs particular focus. Second, a sufficiently close connection should exist between the to-be-consolidated arbitrations so that good administration of justice, as the ultimate end, requires these cases to be heard and adjudicated together to avoid the risk of irreconcilable decisions if the cases were to be decided separately. Albeit the close connection prescribed in the Act or the Rules does not strictly require the arbitrations to arise from the same legal relationship or occur between the same parties as some institutional rules do, the case law has demonstrated that issues of law and fact between the arbitrations that are to be consolidated may be inappropriate to be considered for consolidation if they are of a low extent of similarity or relativeness so that no substantial risk of irreconcilable decisions is predicted.<sup>272</sup>

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<sup>270</sup> van den Berg, ‘Consolidated Arbitration the New York Arbitration and the Dutch Arbitration Act 1986: A Replique to Mr Jarvin’ (n 231) 258-259

<sup>271</sup> Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816.

<sup>272</sup> For example District Court of Amsterdam, 6 July 2020 (ECLI:NL:RBAMS:2020:5834), para. 4.6, “rejecting a request for consolidation because one of the to-be-consolidated arbitrations pertained to heaters for on-shore gas exploration with different technical specifications, and because the claims arose out of different legal relationships (contracts between one supplier and different purchasing

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Like consolidation rules in all the discussed institutional rules, the power to consolidate arbitral proceedings under the Netherlands Arbitration Act or NAI Rules is also a discretionary one — even if the abovementioned mandatory conditions are met, the provisional relief judge or third person may still refuse to grant consolidation by freely taking into account any other factors it deems proper for the particular case which are not exhaustively listed in Article 1046(2) DCCP.<sup>273</sup> For example, in analogy to a Dutch Supreme Court decision<sup>274</sup>, consolidation may be refused if one of the pending arbitrations is based on an arbitration agreement that the NAI third person or the provisional relief judge found *prima facie* invalid.<sup>275</sup> In addition, whether the refusal would lead to the loss of any claim of one of the parties also affect whether the consolidation will be ordered.<sup>276</sup> However, unlike most other institutional consolidation regimes where arbitrations arising from different arbitration agreements are permitted to be consolidated presuppose the compatibility of the concerned arbitration agreements<sup>277</sup>, there is no requirement under the NAI consolidation regime that the arbitration agreements be compatible, which is in concert with the outstanding Dutch consolidation feature that seats of the to-be-consolidated arbitrations need not be in the same jurisdiction, as long as one of the arbitrations is seated in the Netherlands.<sup>278</sup>

#### §4. Procedural Fairness and Issuance of Decision

In general, fundamental due process norms cannot be derogated under the Netherlands Arbitration Act, namely the right to equal treatment, the right to be heard and the obligation to prevent undue delay as per Article 1036(2) and (3) DCCP.<sup>279</sup> In this spirit, whether the NAI third person or the provisional relief judge shall offer an opportunity to all the parties concerned and appointed arbitrators to have their

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entities that formed part of the same corporate group) such that there was no substantial risk of irreconcilable decisions.” See Marsman (n 87) 342.

<sup>273</sup> *ibid*; van den Berg, ‘National Report for the Netherlands (2020 through 2021)’ (n 201) 19.

<sup>274</sup> See Dutch Supreme Court, 21 October 2011 (ECLI:NL:HR:2011:BQ8777), NJ 2011/507 (*Hasfeld/Cohen*), para. 5.2

<sup>275</sup> van den Berg, ‘National Report for the Netherlands (2020 through 2021)’ (n 201) 20; Marsman (n 87) 340

<sup>276</sup> van den Berg, ‘National Report for the Netherlands (2020 through 2021)’ (n 201) 20

<sup>277</sup> i.e. ICDR Rules under Model 2, the SIAC and LCIA Rules under Model 3, as well as the SCC, HKIAC, AIAC and ACICA Rules under Model 4.

<sup>278</sup> See Marsman (n 87) 340, 650.

<sup>279</sup> Marsman (n 87) 10.

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opinions heard to ensure procedural fairness before rendering the decision on consolidation, pursuant to Article 1046(3) DCCP.<sup>280</sup> In light of the general Court Rules regarding the provisional relief judge, it is not excluded for the provisional relief judge to conduct a hearing for deciding consolidation.<sup>281</sup> However, in practice, at least before 2015, it was not uncommon that parties waived their opportunities to attend the hearing scheduled to discuss the consolidation request in the District Court so that the decisions were often issued by default.<sup>282</sup> As verified by the counsel of NAI, the NAI third person also has the discretion to decide whether to conduct a hearing scheduled for the request for consolidation.<sup>283</sup>

Following the aforementioned *van den Berg* proposal, the possibility of partial consolidation got removed in the 2015 revision, i.e. the decision on the request for consolidation can either be fully granted or fully rejected without the third option, no matter decided by the third person or the provisional relief judge. Article 1046(3) DCCP prescribes that the decision shall be communicated in the form of writing to all the parties and appointed arbitrators. In NAI's case, the related reasoning as to the decision is also usually attached when issued,<sup>284</sup> whereas it is not a common practice under many other institutional rules.

Albeit the decision made by the provisional relief judge is in general required to be rendered in six weeks after the conclusion of the hearing or, if no hearing was conducted, six weeks after the submission of the request,<sup>285</sup> the time is shorter in practice for rendering a decision on consolidation, which is around one-month<sup>286</sup>.

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<sup>280</sup> Article 1046(3) DCCP (2015) states: “The third person or the provisional relief judge may grant or refuse the request, after he has given all the parties and, if appointed, the arbitrator, an opportunity to make their opinions known. His decision shall be communicated in writing to all the parties and the arbitral tribunals concerned.”

<sup>281</sup> Marsman (n 87) 412; in the same book, Marsman also assumes that for consolidation procedure, “the third person or the preliminary relief judge is not required to conduct a hearing, and may offer the parties the opportunity to give their views only in writing”. See Marsman (n 87) 341.

<sup>282</sup> van Haersolte-van Hof (n 200) 428

<sup>283</sup> This practice has been verified in the interview with counsels of NAI, though having not expressly written in the NAI Rules. Interview with counsels of NAI, Netherlands Arbitration Institute (Rotterdam, the Netherlands, 24 January 2023).

<sup>284</sup> This practice has been verified in the interview with counsels of NAI, though having not expressly written in the NAI Rules. Interview with counsels of NAI, Netherlands Arbitration Institute (Rotterdam, the Netherlands, 24 January 2023).

<sup>285</sup> Marsman (n 87) 412.

<sup>286</sup> This was revealed in the interview with counsels of NAI. Interview with counsels of NAI, Netherlands Arbitration Institute (Rotterdam, the Netherlands, 24 January 2023).

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Likewise, in the NAI's case, parties can expect to obtain the decision as to consolidation around the same duration under NAI.<sup>287</sup>

## §5. Consequences of Consolidation

### A. Establishment of Consolidated Tribunal

Pursuant to Article 1046(4) DCCP<sup>288</sup>, if the request for consolidation has been granted, all parties concerned should attempt to jointly appoint a tribunal composed of an uneven number of arbitrators and, in case no single set of arbitration rules applies to all to-be-consolidated arbitrations, endeavour to determine which arbitration rules will apply to the consolidated proceedings. If parties fail to agree on the arbitrators and the applicable rules within the designated timeframe, the NAI third person or the provisional relief judge shall intervene to complete these two tasks upon the request of the most diligent party.

Despite the paucity of knowledge on how the Provisional Relief Judge of the Amsterdam District Court does so in practice due to the lack of literature, the NAI Rules present how an arbitral institution possibly implements this appointment procedure within its premises in detail. After the third person of NAI grants consolidation, according to Article 39(6) NAI, parties are first given the opportunity to appoint the arbitrator or arbitrators jointly, in an uneven number, to the consolidated arbitral proceedings, subject to a four-week time limit as of the order for consolidation. Although Article 39(6) NAI does not expressly stipulate so, the default

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<sup>287</sup> This was revealed in the interview with counsels of NAI. Interview with counsels of NAI, Netherlands Arbitration Institute (Rotterdam, the Netherlands, 24 January 2023).

<sup>288</sup> Article 1046(4) DCCP (2015) states: "If the third person or the provisional relief judge orders consolidation, the parties shall, in mutual consultation, appoint the arbitrator or arbitrators, in an uneven number, and determine the rules which shall apply to the consolidated proceedings. If, within a time-limit fixed by the third person or the provisional relief judge, the parties fail to reach agreement in this regard, the third person or the provisional relief judge shall, at the request of the most diligent party, appoint the arbitrator or arbitrators and, if necessary, determine the rules which shall apply to the consolidated proceedings. The third person or the provisional relief judge shall, if necessary, determine the remuneration for the work already carried out by the arbitrators whose mandate is terminated by reason of the consolidation. Article 1027(4) shall apply *mutatis mutandis*."

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appointment method under the whole NAI Rules system — list procedure as per Article 14 NAI sounds reasonable to be utilised by the third person for the establishment of the consolidated tribunal, in such case the assistance of NAI Administrator appears to be necessary, causing the similar effect as appointment procedure under ICDR consolidation provisions expressly provides for<sup>289</sup>. The nominated arbitrators willing to accept the mandate should be subject to the confirmation by the NAI Administrator under Article 16 (as opposed to the appointment of the third person), which requires a prior disclosure, *inter alia*, regarding the possible justifiable doubts as to their impartiality and independence (Article 11(3) and (4)).<sup>290</sup>

In addition, since NAI Rules only allow consolidation achieved between the pending arbitrations both applicable under the NAI Rules (2015), without exclusion of the applicability of the incorporated consolidation provisions (Article 39 NAI) as demonstrated above<sup>291</sup>, there will be no controversy with respect to the procedural law applicable to the consolidated proceedings: NAI Rules (2015) continue to apply. As assumed above<sup>292</sup>, the seat of the consolidated arbitration should be preferable to be fixed in the Netherlands, if the seats of to-be-consolidated arbitrations were originally different.

## B. Jurisdictional Objections Face Restriction to Raise after Consolidation

Besides, a party may face certain restrictions and even some uncertainty to raise jurisdictional objections after consolidation has been ordered. As per Article 1052(3) DCCP, a party cooperating in the composition of the consolidated tribunal forfeits the right to contest the tribunal's jurisdiction on the ground that the arbitral tribunal was composed in violation of the applicable rules. Even if the party did not cooperate in

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<sup>289</sup> See Article 9(6) of the ICDR Rules (2021). More about the appointment of consolidated tribunal under ICDR consolidation regime, see Part I-Chapter 4-Section 1-§6.

<sup>290</sup> Article 39(6) expressly stipulates that Article 11(3), 11(4) and 16 shall apply to the appointed arbitrators to the consolidated proceedings.

<sup>291</sup> See Part I-Chapter 4-Section 2-§2-B-[3]

<sup>292</sup> See Part I-Chapter 4-Section 2-§2-B-[3]

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the appointment, it could raise the jurisdiction challenge on the ground that it was not properly composed but only prior to the submission of a defence on the merits.<sup>293</sup>

In line with Article 1046(4) and Article 1027(4) DCCP<sup>294</sup>, a party who has cooperated in appointing arbitrators for the consolidated tribunal retains the right to raise the objection to the consolidated tribunal's jurisdiction on the ground of the non-existence of a valid arbitration agreement following consolidation. It explains why the competent consolidation decision-maker is not required to examine the validity of the arbitration agreement substantially when assessing whether it is fit to order consolidation but just on a *prima facie* level, as mentioned above. However, this jurisdictional challenge is still restricted from being raised no later than any defence on the merits is submitted before the consolidated tribunal as per Article 1052(2) DCCP.<sup>295</sup> The question here is whether a party who had already submitted a defence on merits in one of the to-be-consolidated arbitrations is entitled to challenge the jurisdiction of the (probably) newly appointed tribunal on the ground that no valid arbitration agreement exists in the consolidated proceedings. On this question, a Dutch commentator, *Albert Marsman*, recently argues:

*“Since the issue of whether a valid arbitration exists is independent from the consolidation, any objection that no valid arbitration agreement exists is in our view forfeited if a defence on the merits was submitted prior to the consolidation (i.e. in one of the to-be-consolidated cases) without such an objection having been raised at that time.”*<sup>296</sup>

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<sup>293</sup> Article 1052(3) DCCP (2015) states: “A party who has cooperated in the composition of the arbitral tribunal may not, in the arbitral proceedings or before the court, raise the plea that the arbitral tribunal does not have jurisdiction on the ground that the arbitral tribunal was composed in violation of the applicable rules. A party that has appeared in the arbitral proceedings and that has not cooperated in the composition of the arbitral tribunal shall raise the plea that the arbitral tribunal does not have jurisdiction on the ground that the arbitral tribunal was composed in violation of the applicable rules before submitting a defence, on pain of forfeiting its right to rely on this later, in the arbitral proceedings or before the court.”

<sup>294</sup> Article 1046(4) affirms the application of Article 1027(4) DCCP on consolidation *mutatis mutandis*. Article 1027(4) DCCP (2015) states: “The provisional relief judge or the third person shall appoint the arbitrator or the parties shall not forfeit the right to challenge the jurisdiction of the arbitral tribunal on the ground of non-existence of a valid arbitration agreement.”

<sup>295</sup> Article 1052(2) DCCP (2015) states: “A party that has appeared in the arbitral proceedings must raise a plea that the arbitral tribunal does not have jurisdiction on the ground of non-existence of a valid arbitration agreement before submitting a defence, on pain of forfeiting its right to rely on this later, in the arbitral proceedings or before the court...”; also see Marsman (n 87) 345.

<sup>296</sup> Marsman (n 87) 345.

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This assumption (“Marsman’s Assumption”) seems plausible but kind of thoughtless in my view. In the following, I try to demonstrate my stance. Under Article 1052(2) DCCP, submitting a defence can be read as admitting the jurisdiction as to the existence of a valid arbitration agreement by default. Suppose a party, prior to the consolidation, has indirectly admitted the validity of one arbitration agreement in question as the effect of submitting a defence in one of the to-be-consolidated arbitrations; it is logical to perceive this party has forfeited the right to object to the jurisdiction of the later-composed consolidated tribunal as to the validity of the same arbitration agreement. So far, our argument is largely consistent with Marsman’s answer, subject to a proviso that the to-be-consolidated arbitrations should be originally filed under the same arbitration agreement. As discussed above, nevertheless, the Netherlands Arbitration Act clearly permits consolidating arbitrations filed under different arbitration agreements with no requirement of identical parties. Provided the to-be-consolidated arbitrations involve different arbitration agreements and unidentical parties, the party, after consolidation, is supposed to retain the right to contest the validity of the arbitration agreement(s) newly involved due to consolidation.

Furthermore, *Marsman’s Assumption* appears to refuse that jurisdiction issues would arise from the consolidation decision so as to legitimise that parties have no right to raise jurisdiction challenge on the basis of a consolidation decision and ensures the compatibility with the finality nature of the consolidation decision as discussed below. This is contrary to my view that consolidation may affect the tribunal’s jurisdiction.

Since NAI Rules provide consistent rules concerning jurisdictional plea (Article 10) as the Netherlands Arbitration Act, the above analysis and assumption apply to the NAI consolidation regime *mutatis mutandis*.

### *§6. Legal Effect of the Decision as to Consolidation*

With respect to the legal effect of the decision on consolidation, such a decision should be deemed final and binding in principle, whether made by the provisional relief judge of the District Court in Amsterdam or a designated third person, including the “third person” under NAI. First, Article 1070 DCCP, as a general rule, justifies that the decision made by the competent provisional relief judge of the District Court in all cases of being requested to assist the pending arbitration shall be final with no

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avenue to an appeal, which explicitly covers its decision as to consolidation.<sup>297</sup> The exclusion of appeal as per this provision is to ensure the expeditiousness of obtaining the final decision so that the arbitration can proceed without the risk of tactic delay abuse.<sup>298</sup> Then, albeit no equivalent provision is expressly provided for the decision of the third person in the Netherlands Arbitration Act or in the NAI Rules, out of the same purpose, the decision of the third person, including the decision as to consolidation, is also supposed not open to appeal, subject to any specific mandatory provisions, and some Dutch literature has endorsed this argument<sup>299</sup>.

Admittedly, two exceptional circumstances have emerged to challenge the applicability of exclusion of finality provided for in Article 1070 DCCP, as summarised from Dutch jurisprudence in literature: first, the court has neglected fundamental legal principles, such as a party's right to be heard; second, the court-made decision essentially has hindered the arbitration from proceeding expeditiously.<sup>300</sup> However, considering the case of the decision as to consolidation, these two exceptions may not apply except in some very exceptional circumstances.

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<sup>297</sup> Article 1070 DCCP (2015) states: "No appeal is open against decisions of the provisional relief judge of the district court as referred to in Sections One to Three inclusive of this Title." And Article 1046 DCCP is under Section Two. Also *see* Marsman (n 87) 414.

<sup>298</sup> Marsman (n 87) 411.

<sup>299</sup> H.J. Snijders, *Nederlands Arbitragerecht, Algemene beschouwingen en artikelsgewijze opmerkingen bij de art. 1020-1076 Rv in nationaal den internationaal perspectief*, monografie, vijfde druk, Deventer: Wolters Kluwer 2018, tevens opgenomen in de losbladige/elektronische editie Groene Serie Burgerlijke rechtsvordering, Wolters Kluwer: Deventer ("[Original text in text] Tegen de beslissing van de derde staat, behoudens enige specifieke reglementaire voorziening, geen beroep open. Tegen een beschikking van de voorzieningenrechter staat evenmin hoger beroep open, dit ex art. 1070 Rv (zie ook art. 1072a Rv); [English translation] The decision of the third person, subject to any specific regulatory provision, is not open to appeal. An order of the interim relief judge is also not subject to appeal, this pursuant to Article 1070 Rv (See also Article 1072a Rv)")

<sup>300</sup> Marsman (n 87) 411 ("This exclusion of appeal does not apply in exceptional circumstances where the court has neglected fundamental legal principles, such as a party's right to be heard. For an example Court of Appeal of Arnhem-Leeuwarden, 25 January 2019 (ECLI:NL:GHARL:2019:634), finding that the exclusion of appeal provided for in Article 1070 DCCP did not apply in respect of a decision by the preliminary relief judge to uphold an arbitrator challenge, because the challenged arbitrator had not been called to appear at the hearing before the preliminary relief judge in accordance with the requirements of the European Service Regulation and Article 277 DCCP. Additionally, an exception may apply where the State court rejects the request. In a case concerning a request to the State court for the appointment of an arbitrator (Article 1027(2) DCCP) [Supreme Court, 21 October 2011 (ECLI:NL:HR:2011:BQ8777), NJ 2013/23 (Hasfeld/Cohen)], the Supreme Court has held that if the request to appoint an arbitrator is rejected, the exclusion of appeal (as provided in Article 1070 DCCP) does not apply and the rejection can be appealed. The Supreme Court referred to the rationale for Article 1070 DCCP, i.e. to ensure that the arbitration can proceed expeditiously, as the justification for this exception.")

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Concerning the first exception, it might only apply when the court has manifestly neglected to offer any opportunity to hear opinions from the parties concerned (and appointed arbitrators, if any) before issuing the decision. As to the second exception, considering neither a positive nor negative decision on the request for consolidation would cause a real deadlock from proceeding arbitration to reach a final award, not like the circumstance in the very supreme court case generating this exception where the court refused to appoint arbitrators actually stalled the arbitration from moving forward, it would be wiser not to review this exception on the decision as to consolidation otherwise it implicates a direct review on the discretion of the competent consolidation-ordering body. The directly related case law is still to be seen.

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CHAPTER 3. MODEL 3'S REPRESENTATIVES: SIAC, DIAC AND  
LCIA RULES

**Section 1. SIAC Rules**

*§1. Context*

Compared with the arbitral institutions based in civil law jurisdictions, the ones from common law jurisdictions are overall late to formally adopt the consolidation mechanism. SIAC did not introduce its consolidation provisions in the latest revision of SIAC Rules until 2016. The aim was to accommodate the increasing need of SIAC users in complex multi-party and/or multi-contract transactions.<sup>301</sup> Though a bit late compared to the counterparts in other world-leading institutional rules, the SIAC consolidation mechanism has been actively used since its introduction, as illustrated by the data released by the 2016-2022 SIAC's published annual reports. In 2022, 53 requests for consolidation were initiated, and 31 related requests were granted until the end of this year. In total, since 2016, 368 requests for consolidation were initiated, and 236 of them, namely more than 64% of them, were granted.<sup>302</sup> As some comment indicates, the consolidation rule's clarity and certainty constitute the reason to be welcome.<sup>303</sup>

Year	Request for consolidation	Grant consolidation (until the end of each year)
2022	53	31
2021	67	30

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<sup>301</sup> Boog (n 303) 586.

<sup>302</sup> SIAC, 'SIAC Annual Report 2022', 21. (Singapore International Arbitration Centre, 2023) <[https://siac.org.sg/wp-content/uploads/2023/04/SIAC\\_AR2022\\_Final-For-Upload.pdf](https://siac.org.sg/wp-content/uploads/2023/04/SIAC_AR2022_Final-For-Upload.pdf)> accessed 23 May 2023.

<sup>303</sup> Christopher Boog and Julie Raneda, 'The 2016 SIAC Rules: A State-of-the-Art Rules Revision Ensuring an even more Efficient Process' (2016) 34 ASA Bulletin 584, 586

2020	69	36
2019	53	31
2018	50	28
2017	55	23
2016 (since August 2016)	20	6

**Table 1** SIAC’s annual numbers of consolidation applications and the annual number of granted consolidations until the end of the year (2016-2022) <sup>304</sup>

During the same period, the worldwide leading position of SIAC has remained and also grown, rising from fourth place in the 2015 QMUL Survey to second place in the 2021 QMUL Survey among the most preferred arbitral institutions<sup>305</sup>, indicating that the introduction of the said consolidation mechanism is not irrelevant to this advancement.

The SIAC consolidation mechanism itself, as soon articulated, has initiated a once unique approach<sup>306</sup> in terms of the deciding body of consolidation. Now, this approach has been arguably mirrored by the emerging DIAC Rules, which will be addressed soon after the SIAC Rules.

*§2. SIAC Court and Arbitral Tribunal are Empowered to Decide Consolidation at Different Stages: A Second Application of Consolidation is Possible*

As commonly perceived, under the SIAC Rules, the party is free to request consolidation at any point in time<sup>307</sup> as long as the arbitrations sought to be

<sup>304</sup> The data is collected from the published SIAC’s annual reports from 2016 to 2022.

<sup>305</sup> The consecutive QMUL surveys of 2015, 2018 and 2021 ranked SIAC as the 4<sup>th</sup>, 3<sup>rd</sup> and 2<sup>nd</sup> most preferred arbitral institution.

<sup>306</sup> SIAC consolidation mechanism was also perceived as “unique” in Smith (n 15) 183.

<sup>307</sup> Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue - A comparative Study* (n 254) 343.

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consolidated in the pending stage<sup>308</sup>. That being said, due to the stipulated demarcation of consolidation deciding-making power between SIAC Court and arbitral tribunal, the applicant should file the consolidation request to different bodies at different stages of proceedings.

If consolidation is sought prior to the constitution of any of the tribunals, pursuant to Rule 8.1, SIAC Court is empowered to decide consolidation, and in this situation, the applicant is required to file its consolidation request with the SIAC's Registrar.<sup>309</sup> Once any of the tribunals have been constituted, pursuant to Rule 8.7, it is the arbitral tribunal's turn to decide consolidation, subject to more limitations than Rule 8.1<sup>310</sup>, and the applicant needs to file its consolidation request to the constituted tribunal during this phase.<sup>311</sup> As reminded in the *Guide to the SIAC Arbitration Rules* ("*SIAC Guide*"), the dividing line of application of Rule 8.1 and Rule 8.7 relies on whether the first arbitral tribunal has been fully constituted, which means Rule 8.1 will still apply if just some arbitrators have been appointed, but no tribunal has been fully constituted in any of the arbitral proceedings which are sought to be consolidated.<sup>312</sup>

What made the SIAC consolidation mechanism once unique does not stop on this feature of demarcation of consolidation decision-making power between SIAC Court and arbitral tribunal. Thanks to Rule 8.4, "the Court's decision to reject an application for consolidation... in whole or in part, is without prejudice to any party's right to apply to the Tribunal for consolidation", this mechanism also permits the party a second chance to request consolidation if it has failed to seek the consolidation grant from SIAC Court under Rule 8.1: the unsuccessful applicant can await the arbitral tribunal to be established and then, by virtue of Rule 8.7, submit the consolidation application again to the arbitral tribunal, provided other requirements stipulated in the

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<sup>308</sup> "If only one arbitration has commenced, then the proper procedure would be for a party to apply to be joined into the arbitration under Rule 7, or to commence a second arbitration and to then apply for a consolidation of the arbitrations. If no arbitrations have been commenced, and there are multiple contracts involved in the dispute, then a party should consider invoking Rule 6, dealing with multiple contracts." John Choong, Mark Mangan and Nicholas Lingard, *A Guide to the SIAC Arbitration Rules* (2nd edn, OUP 2018) 125

<sup>309</sup> Rule 8.1 of 2016 SIAC Rules

<sup>310</sup> See Rule 8.7 of SIAC Rules 2016: "...the same Tribunal has been constituted in each of the arbitrations or no Tribunal has been constituted in the other arbitration(s)." This limitation will be concretely analysed in the following §3. *Two Sets of Conditions and Discretion*".

<sup>311</sup> Rule 8.7 of 2016 SIAC Rules

<sup>312</sup> Choong (n 308) 124.

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sub-rule are satisfied.<sup>313</sup> The draft 2016 SIAC Rules may suggest the rulemaking intent behind this second chance of consolidation application, where the SIAC Court is allowed to reject an application “on the basis that it is not appropriate to consolidate the two or more arbitrations at the relevant time or that there is insufficient information to make a conclusive determination”.<sup>314</sup> Comparably, the majority of other institutional rules “contemplate only a single application to a single body”<sup>315</sup>, at least around the time SIAC first introduced this mechanism.

In summary, SIAC Rules offer a dual-layer procedure of consolidation decision-making, which empowers the SIAC Court and arbitral tribunal to decide the request for consolidation separately and independently at different stages, and also allows the party to have a second bite at the apple before the second competent body, i.e. arbitral tribunal, if it has failed before the first competent body, i.e. SIAC Court, at an early stage.

### *§3. Two Sets of Conditions and Discretion: Largely Analogous Alongside Significant Restraint on the Arbitral Tribunal*

Though the Rules provide for separate sets of conditions and discretion to grant consolidation for the SIAC Court and the arbitral tribunal, they are largely analogous but with significant restraint for the tribunal to accept the consolidation application.

Note that these conditions set out in the SIAC Rules are just thresholds, the satisfaction of which does not necessarily cause the outcome of consolidation once the request is submitted. Both the SIAC Court and the competent tribunal retain their discretion even if the threshold conditions are met, and decide whether to grant, in whole or in part. To this purpose, when contemplating consolidation, for example, in line with Rule 8.4, the SIAC Court shall consider the views of all parties and the

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<sup>313</sup> *ibid* 128. See also, Smith (n 15) 183.

<sup>314</sup> Boog (n 303) 594-595.

<sup>315</sup> Smith (n 15) 183.

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circumstances of the specific case. As to what kind of circumstances, Rule 8.4 does not specify, which implies that any circumstance can be contemplated by the SIAC Court for reaching the decision.<sup>316</sup> Rule 8.9 provides for similar discretion for the arbitral tribunal.

### A. Three Broadly Similar Threshold Conditions and Discretion

Rule 8.1 sets out for the SIAC Court three threshold conditions of consolidation. If one of the three following conditions is satisfied, the SIAC Court may grant consolidation: (a) all parties have consented to the consolidation at issue<sup>317</sup>; (b) all the claims in the to-be-consolidated arbitrations are made under the same arbitration agreement<sup>318</sup>; or (c) the arbitration agreements are compatible and one of the three factual connections should be met: (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<sup>319</sup>.

Correspondently, Rule 8.7 provides the conditions for the competent tribunal to decide on consolidation, which are largely analogous to Rule 8.1 for the SIAC Court. Before digging into the nuanced discrepancy between Rule 8.1 and Rule 8.7, the author will first address these broadly similar three conditions. The explanation is based on the text of Rule 8.1 for the SIAC Court, which applies to Rule 8.7 for the tribunal *mutatis mutandis*.

#### [1] First Condition

For Rule 8.1(a) to apply, there must be an explicit agreement on the specific issue of consolidation concluded by all the related parties. Instead, the mere agreement to refer to SIAC Rules cannot invoke Rule 8.1(a).<sup>320</sup> Given that such an agreement is reached by the parties from all the related arbitrations, the permission for the participation of unidentical parties from different original arbitrations, which are even made under

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<sup>316</sup> *ibid* 127

<sup>317</sup> Rule 8.1(a) of SIAC Rules 2016

<sup>318</sup> Rule 8.1(b) of SIAC Rules 2016

<sup>319</sup> Rule 8.1(c) of SIAC Rules 2016

<sup>320</sup> Choong (n 308) 125.

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different arbitration agreements, is self-evident. Note that all parties' consent is not a precondition to granting consolidation under SIAC Rules because Rule 8.1(a) parallels the other two conditions for the SIAC Court to allow consolidation.

## **[2] Second Condition**

In case of no unanimous agreement is reached on the consolidation, the SIAC Court will look to whether Rule 8.1(b) or Rule 8.1(c) can come into play, both of which jointly allow consolidations in relatively expansive situations. Rule 8.1(b) is satisfied as long as all the to-be-consolidated arbitrations were filed under the same arbitration agreement, which is the way to fulfil the requirement that “all claims are made under the same arbitration agreement” in the text. In this vein, arbitrations could be consolidated simply because they were commenced under the same arbitration agreement, even where the involved parties are not identical. But the review should go to a substantial extent to check whether the arbitration agreements invoked by different arbitrations are genuinely identical, rather than a *prima facie* review.<sup>321</sup>

## **[3] Third Condition**

Where the pending arbitrations were not commenced under the same arbitration agreements<sup>322</sup>, Rule 8.1 (c) indicates consolidation is still possibly granted provided two sub-requirements are satisfied, which in fact requires the SIAC Court to review the merits. First, the different arbitration agreements invoked shall be compatible with each other. What counts as “compatible” arbitration agreements? While SIAC Rules *per se* are silent on it, *SIAC Guide* suggests that compatibility should be examined on a case-by-case basis<sup>323</sup>, leaving for SIAC Court to interpret the arbitration agreements in the context of the concrete circumstances of each case. Plus, *SIAC Guide* also points out that arbitration agreements which refer to different arbitration rules, different numbers of arbitrators or different languages are hard to reconcile.<sup>324</sup>

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<sup>321</sup> This point will be demonstrated by the *Lao Holdings and Sanum Investments v San Marco, Kelly Gass and Government of Lao* presented in the following “[3] Third condition”.

<sup>322</sup> “It is implicit in Rule 8.1(c) that for it to apply, at least two arbitration agreements have been invoked in the pending arbitrations.” Choong (n 308) 125.

<sup>323</sup> *ibid* 125.

<sup>324</sup> *ibid*.

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To target the thesis's focus, it indicates that SIAC consolidation is not allowed beyond the situations where the arbitrations are under the SIAC Rules. Moreover, even between the two SIAC arbitrations, in which one refers to SIAC Rules 2016, and another refers to some defunct edition of SIAC Rules equipped with no consolidation provisions, consolidation could be challenging. This concern has been well demonstrated by the SIAC award of *Lao Holdings and Sanum Investments v San Marco, Kelly Gass and Government of Lao*<sup>325</sup>. The arbitral tribunal, in this case, faced with the application of consolidating the two SIAC arbitrations: one is an earlier-commenced SIAC arbitration governed by the 2013 SIAC Arbitration Rules (“*Prior SIAC Arbitration*”), where consolidation provision has not been introduced<sup>326</sup>; another is a SIAC arbitration governed by the latest 2016 SIAC Arbitration Rules, where the consolidation provision has been first introduced<sup>327</sup>. The tribunal of the second SIAC arbitration was the authority sought to handle this application. It refused to grant the consolidation on the very ground that the 2013 SIAC Rules governing the Prior SIAC Arbitration did not contemplate consolidation; even though the 2014 SIAC Practice Note issued by the SIAC Secretariat indeed mentioned consolidation, the tribunal noticed that it highlighted some preconditions imposed on consolidation, in particular, the consent of all parties, which is not met in this case.<sup>328</sup> In addition, the tribunal also contemplates the gap in stages between the two SIAC arbitrations, where the Prior SIAC arbitration “commenced in 2014 and was well underway in mid-2016”<sup>329</sup>, while the second SIAC arbitration just commenced in 2017.<sup>330</sup> This case seems to demonstrate that, without full consent, the consolidation request would probably fail if one or more pending SIAC arbitrations are governed by the past edition of SIAC Rules, which have not contemplated consolidation.

Another interesting observation about the case is, in fact, the two arbitrations were commenced under the same arbitration agreement, the Deed of Settlement (“*Deed*”)<sup>331</sup>; then, what caused the two SIAC arbitrations to be governed by the different editions of SIAC Rules? It is the concrete text written in the Deed, which

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<sup>325</sup> *Lao Holdings NV and Sanum Investments Ltd. V. San Marco Capital Partners LLC, Kelly Gass and the Government of the Lao People's Democratic Republic*, SIAC Case No. ARB 414/17/QW, Final Award No. 084 OF 2021, 11 August 2021.

<sup>326</sup> *ibid* [261], [289].

<sup>327</sup> *ibid* [14].

<sup>328</sup> *ibid* [289].

<sup>329</sup> And the final award of Prior Arbitration was issued on 29 June 2017. *ibid* [75].

<sup>330</sup> *ibid* [289].

<sup>331</sup> *ibid* [75], [93] and [95].

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states: "...[the] arbitration shall be conducted in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre *for the time being in force*... (emphasis added)". This wording only anchors which arbitral institution's rules would be referred to, but not which edition of arbitration rules of that arbitral institution. Thus, the Prior SIAC arbitration commenced in 2014 is governed by the then valid 2013 SIAC Rules, while the second SIAC arbitration commenced in 2017 is governed by the then newly introduced 2016 SIAC Rules, and the inconsistency between these two editions of Rules was regarded as unsatisfaction of threshold condition(s) as to consolidation by the tribunal in this case, particularly with respect to the consolidation. It reflects that, as underscored *ut infra*, a substantial review should be conducted when examining whether the second condition applies. On the face, both of the said two SIAC arbitrations were invoked under the same arbitration agreement, the Deed, but they are divergent if you check the concrete contents.

In addition to the compatibility requirement, Rule 8.1(c) also requires some certain connection between the disputes arising from the pending arbitrations, namely the disputes (i) arise out of the same legal relationship(s); or (ii) implicate a principal and ancillary contract(s), such as "a master or umbrella contract, and related contracts"<sup>332</sup>; or (iii) arise from the same transaction or series of transactions, such as "a series of related or chain contracts entered into over a period of time, between the same group of parties on each side"<sup>333</sup>. To review whether these connections exist, the SIAC Court arguably has to look closely at the factual connections and legal relationships behind the disputes.

#### B. Discrepancy Between Rule 8.1 and Rule 8.7: A Material Restriction Imposed on Arbitral Tribunal to Accept Consolidation Application

With respect to the nuanced difference between Rule 8.1 and Rule 8.7, it does not rest with how the competent body makes decisions but rests with the significant restrictions imposed on the arbitral tribunal on when it can exercise its competence to decide consolidation: in case of no agreement is reached on the consolidation from all

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<sup>332</sup> Choong (n 308) 125.

<sup>333</sup> *ibid.*

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parties to apply Rule 8.7(a)<sup>334</sup>, the constituted arbitral tribunal, often the first constituted one, can accept the consolidation application only if the same arbitral tribunal has been constituted in each of the to-be-consolidated arbitrations or no tribunal has yet been constituted in any other to-be-consolidated arbitrations at the moment of submitting the consolidation application; otherwise, neither Rule 8.7(b)<sup>335</sup> nor Rule 8.7(c)<sup>336</sup> can apply<sup>337</sup>. Once the differing tribunals have been constituted, consolidation application can only be made under Rule 8.7(a), which requires all parties to reach an agreement of consolidation, which is unusual to occur for obvious reasons.

As such, requesting consolidation under SIAC Rules would become far more restrictive once any of the tribunals of pending arbitrations has been constituted and SIAC Court thus has handed over the consolidation deciding power to the arbitral tribunal.

First of all, as mentioned before, SIAC Rules nominally allow the party to file the consolidation application at any point in time; however, under the most usual situations where all parties fail to reach a consolidation agreement, the party can only file the said application no later than the establishment of the second unidentical-composition tribunal compared to the first tribunal. Roughly speaking, an absolute *de facto* application time bar exists for consolidation under SIAC.

Furthermore, theoretically, the party of SIAC arbitration is entitled to request consolidation for the second time to another competent body beyond the SIAC Court; yet, this second bite at the apple is actually not easy to get to bite. Specifically, at the stage where the SIAC Court still withhold the competence to decide consolidation, i.e. no tribunal has yet been fully constituted<sup>338</sup>, it is imaginable that different arbitrators may have already been appointed in the three-member tribunals of separate pending arbitrations, and this fact may plausibly disrupt the second chance of applying consolidation. For example, if a party involved in two pending arbitrations where it is entitled to appoint a co-arbitrator in each case intends to sabotage the opposing party's

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<sup>334</sup> In light of contents, Rule 8.7(a) is comparable to Rule 8.1(a) mentioned above.

<sup>335</sup> In light of contents, Rule 8.7(b) is comparable to Rule 8.1(b) mentioned above.

<sup>336</sup> In light of contents, Rule 8.7(c) is comparable to Rule 8.1(c) mentioned above.

<sup>337</sup> Choong (n 308) 128; In addition, these restrictions are expressly stipulated in the texts of Rule 8.7(b) and (c), which does not appear in Rule 8.7(a).

<sup>338</sup> Typically, when the tribunal is not sole arbitrator panel.

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(possible) intention of the second application of consolidation before the arbitral tribunal (or the first application if the applicant has missed the first application chance before the SIAC Court), it just needs to appoint a different co-arbitrator to the tribunal of each arbitration purposely. Thus, the tribunals' establishment situation would arguably not comply with the criterion of Rule 8.7(b) or 8.7(c), both of which require "the same tribunal has been constituted in each of the arbitrations" if more than one tribunal has been constituted because these two arbitral tribunals are expected to be unavoidably different at the end of the day for obvious reasons, unless the SIAC President refuses to approve the party's nomination pursuant to Rule 9<sup>339</sup> or otherwise agreed by the parties.

Admittedly, it is possible that the applicant may seize the narrow window period to file a consolidation request from the time when the first tribunal has just fully constituted right before the second tribunal has not yet been fully constituted, which seemingly makes sense to satisfy the wording of one of the criteria – "no tribunal has been constituted in the other arbitration(s)" – since the second tribunal has not been fully constituted yet at this application timing. However, at least for the author, this argument seems not convincing in consideration of the possible purpose of the specific restriction imposed on the arbitral tribunal's authority to accept consolidation application. Though neither the SIAC Rules *per se* nor *SIAC Guide* does explain the purpose of the said restriction, this can be assumed in a bid to avoid the potentially inconsistent decisions made by the parallel tribunals with divergent composition because if there were no limitations that only the same composed or the only constituted arbitral tribunal is empowered to decide consolidation, other different arbitral tribunals should have to be empowered the equivalent decision-making authority on the same issue; otherwise, it would clash with the equality (equal treatment) principle, which can justifiably derive the equal decision-making power conferred to the tribunals that the parties participate in their establishment. Nevertheless, it cannot then say the mechanism which only confers the specific arbitral tribunal, rather than other ones, the authority to decide consolidation is justified in light of the principle of equality.<sup>340</sup> Accordingly, if the first-constituted arbitral tribunal managed to accept the consolidation application before the having-been-expected different second tribunal fully constituted, it could be arguably

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<sup>339</sup> Rule 9 of SIAC Rules 2016 provides that the arbitrators nominated by the parties shall be subject to the SIAC President's decision and it is not secured that the President would appoint any nominee proposed by the parties.

<sup>340</sup> The related further analysis will be mainly addressed in *Part II*.

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believed not to adhere to the assumed purpose implied by SIAC Rules. This confusing point calls for clarification by SIAC.<sup>341</sup> To say the least, even if this window period is affirmatively workable for the party to file consolidation requests, the window is undoubtedly too narrow for the applicant to easily catch it in practice.

As a consequence, SIAC Court may still be the only competent body for the party to seek consolidation for a large number of similarly imaginable and usual situations in the premises of SIAC.<sup>342</sup>

#### *§4. Procedural Fairness*

As mentioned above, the two competent bodies are both required to hear opinions from all the parties on the request for consolidation. Note a slight wording difference in this regard, where Rule 8.9 states that tribunal shall give all parties “the opportunity to be heard”, while Rule 8.4 refers to the SIAC Court “considering the views of all parties”. *SIAC Guide* states that this wording nuance “reflects the recognition that the parties to the arbitration have a right to an opportunity to be heard by the tribunal on the important issue of consolidation, once the tribunal has been constituted”<sup>343</sup>, which seemingly suggests that the tribunal than the SIAC Court more intensively implements the right to be heard. In particular, the arbitral tribunal may be expected to conduct an oral hearing to hear parties’ views if necessary<sup>344</sup>, whereas the SIAC Court probably only can rely on the exchange of written submissions.

In addition, the Rules actually demand that competent bodies ensure procedural fairness when handling the consolidation application, which is not provided in the specific consolidation provision but in a general provision. Rule 41.2 prescribes that

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<sup>341</sup> In practice, it is also possible that SIAC President would withhold the approval of the constitution of the first tribunal by exercising the power to refuse the nomination of an arbitrator conferred by the Rule 9, in the case where the same party is suspected to deliberately appoint different co-arbitrators in the parallel arbitrations to sabotage a possible consolidation.

<sup>342</sup> In practice, maybe the tribunal sometimes accepts the consolidation application even it is disallowed in strict sense, like in case of *Lao Holdings*, where the later established tribunal (the second SIAC Arbitration) make the decision of consolidation even the earlier established tribunal (Prior SIAC Arbitration), with different composition, had already been established. But the tribunal will definitely refuse to grant consolidation according to the Rules. It is a pity that the case of *Lao Holdings* does not use this argument to refuse the application.

<sup>343</sup> Choong (n 308) 129.

<sup>344</sup> In the light of expedition principle to conduct SIAC arbitration enshrined in Rule 19 and Rule 41, a party is not entitled to have an unlimited right to be heard, but just a reasonable one. See *ibid* 166.

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both the SIAC Court and arbitral tribunal<sup>345</sup> shall act in the spirit of SIAC Rules, and this amorphous concept is cemented by four fundamental principles, i.e. fairness, expedition, economy and enforceability, to which a SIAC arbitration must adhere.<sup>346</sup> *SIAC Guide* highlights that fairness, namely procedural fairness as we say, is overriding among the four fundamental principles, which mandates the “arbitration is conducted in manner that is fair to all parties”<sup>347</sup>; thus, as a matter of course, the procedural fairness requirement applies to the SIAC Court and the arbitral tribunal when they are handling requests for consolidation. Rule 8, the consolidation provision, echoes the general requirement of procedural fairness in Rule 41 to some extent, referring to the consolidation decision-making authorities shall have regard to all circumstances during the deliberation process, where procedural fairness can be regarded as being encapsulated.<sup>348</sup>

## *§5. Legal Effect of the Consolidation Decisions under SIAC*

### **A. Legal Effect: Neither Binding nor Final**

We have learned that if the SIAC Court issues a negative decision to refuse the request for consolidation, in whole or in part, the tribunal, later composed, may revoke this decision and grant consolidation at the request of a subsequent repetitive application.<sup>349</sup> Thus, the negative decision made by the SIAC Court is neither binding nor final. What if the SIAC Court or the later-constituted tribunal grants the consolidation, is the positive decision then binding or final?

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<sup>345</sup> Along with other decision-making authorities under SIAC arbitration, i.e. the SIAC President, SIAC Registrar. See Rule 41.2 of SIAC Rules 2016, “In all matters not expressly provided for in these Rules, the President, the Court, the Registrar and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any Award.”

<sup>346</sup> Choong (n 308) 306.

<sup>347</sup> *ibid* 164.

<sup>348</sup> In fact, as *SIAC Guide* states, “The Draft SIAC Rules (2016) stated that circumstances which may be taken into account [in Rule 8] include the fair, expeditious, and economical resolution of the dispute”, but the specific listed criteria were deleted in the final SIAC Rules.

<sup>349</sup> Or the tribunal may grant a complete consolidation if the SIAC Court prior has granted consolidation in part.

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## [1] SIAC Rules Clarifies the Arbitral Tribunal Has the Final Say on The Validity of the Consolidation Decision

To this question, Rule 8.4 and Rule 8.9 clarify that the arbitral tribunal still retains the power to subsequently decide any question as to its jurisdiction arising out of such consolidation grant, whether made by the SIAC Court or the tribunal.<sup>350</sup> This power is derived from the doctrine of *Competence-Competence*, where the tribunal is empowered to rule on its own jurisdiction, including any objection to the existence, validity or scope of the arbitration agreement.<sup>351</sup> Through this clarification, SIAC Rules explicitly state that the tribunal's inherent power to decide its own jurisdiction is not compromised when Rule 8 of consolidation applies; namely, the tribunal is ensured to have the final say on the validity of the consolidation order in a ruling on its own jurisdiction<sup>352</sup>. As some comments point out, the decision to grant consolidation under SIAC Rules does not create the jurisdictional basis for the tribunal later established to hear the consolidated proceedings, but merely a pure "procedural" decision within the procedural framework, whose validity cannot be exempted to be reviewed in terms of jurisdiction.<sup>353</sup> And the tribunal, pursuant to the same general principle of deciding on its own jurisdiction to apply, must deliberate the jurisdictional objection arising from the consolidation decision afresh and make an independent determination without being confined in any way by an earlier decision.<sup>354</sup> In this vein, the decision to grant consolidation can be logically deduced as neither binding nor final in terms of legal effect simply because the tribunal can say no to it, in whole or in part, from the perspective of jurisdictional review.

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<sup>350</sup> Rule 8.4 of 2016 SIAC Rules states: "The Court's decision to grant an application for consolidation under this Rule 8.4 is without prejudice to the Tribunal's power to subsequently decide any question as to its jurisdiction arising from such decision." Rule 8.9 states: "The Tribunal's decision to grant an application for consolidation under this Rule 8.9 is without prejudice to its power to subsequently decide any question as to its jurisdiction arising from such decision."

<sup>351</sup> Here, note that tribunal's power to rule on its jurisdiction is not (entirely) based on the parties' consent, but on the law of the seat of arbitration. In other words, not every jurisdiction admits *competence-competence*, because it depends on whether the *lex arbitri* admits the doctrine of *competence-competence*. See Choong (n 308) 195.

<sup>352</sup> Eunice Chan Swee En, 'Consolidation of Arbitral Proceedings and its Ramifications on a Party's Right to Challenge the Jurisdiction of the Tribunal and the Arbitral Award' (Kluwer Arbitration Blog, 21 March 2018)

<<http://arbitrationblog.kluwerarbitration.com/2018/03/21/consolidatiarbitral-proceedings-ramifications-party-right-challengejurisdiction-tribunal-arbitral-award/>> accessed 5 June 2020

<sup>353</sup> *ibid*; Boog (n 303) 591.

<sup>354</sup> *PT Tugu Pratama Indonesia v. Magma Nusantara Ltd* [2003] 4 SLR(R) 257 at [18]

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Regarding whether the questions as to jurisdiction arising from the consolidation decision must be initiated by a party to trigger the tribunal's review, the wording in Rule 8.4 or Rule 8.9 seems ambiguous. A SIAC case of *EKA Software Solutions v. BAK Festivals*<sup>355</sup> clarifies that the tribunal can review the consolidation decision at its motion rather than passively awaiting a party to raise a said jurisdictional challenge. In November 2020, the claimant, EKA Software Solutions ("*EKA*"), commenced two SIAC arbitrations against the respondent, BAK Festivals ("*BAK*"), by invoking two arbitration agreements, one under each of the Software as a Service Subscription Agreement ("*SaaS Agreement*") and the Personal Service Agreement ("*PSA*"), both of which are signed by the two parties without dispute, and formally applied pursuant to 8.1(c) of the 2016 SIAC Rules for consolidation of the multiple arbitrations it was deemed to have commenced under Rule 6.1(b) of the SIAC Rules.<sup>356</sup> Even though the claimant sought Multiple Contracts under Rule 6, note that the principle from this case will definitely apply to Rule 8 of consolidation because, under SIAC Rules, the implementation of Multiple Contracts under Rule 6 entirely refers to Rule 8.<sup>357</sup> Upon the receipts of the applications, on 27 November 2020, the SIAC Court assigned two case numbers ARB1010/20/LSJ and ARB1011/20/LSJ to each arbitration, and determined that it shall decide whether to consolidate the arbitrations after hearing the views of the parties.<sup>358</sup> After waiting for more than 20 days, on 19 January 2021, the SIAC Court decided to grant the consolidation as the claimant requested in the light of Rule 8.4, which was issued without any reasoning. The two arbitrations were consolidated into the first commenced arbitration, whose case number is ARB1010/20/LSJ, pursuant to Rule 8.5.<sup>359</sup> On 4 March 2021, a sole arbitrator was appointed by the President of SIAC Court following the invoked arbitration agreement, who was mandated to hear the consolidated proceedings. In the final award, the said sole arbitrator asked itself at its motion whether it had jurisdiction to

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<sup>355</sup> *EKA Software Solutions v. BAK Festivals*, SIAC Case No. ARB1010/20/LSJ, final award on 11 January 2022

<sup>356</sup> *ibid* [20].

<sup>357</sup> SIAC Rules pertain to an exception to implement multiple contracts mechanism by fully referring to the requirements of consolidation mechanism, which is not in that case among most of other selected institutional rules. Therefore, normally the multiple contracts mechanism still needs to be treated differently from the consolidation unless the concerning rules are set forth in a similar way as SIAC Rules do so.

<sup>358</sup> *EKA* (n 355) [21].

<sup>359</sup> *ibid* [22]. Rule 8.5 of 2016 SIAC Rules states: "Where the Court decides to consolidate two or more arbitrations under Rule 8.4, the arbitrations shall be consolidated into the arbitration that is deemed by the Registrar to have commenced first, unless otherwise agreed by all parties or the Court decides otherwise having regard to the circumstances of the case."

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determine the disputes after being consolidated from the original two arbitrations under the circumstances where there was no objection to its jurisdiction raised by either of the parties.<sup>360</sup> Having regard to Rule 8.4 of the SIAC Rules and considering that SIAC’s 19 January 2021 decision to grant the Claimant’s application for consolidation is without prejudice to the sole arbitrator’s power to subsequently decide any question as to its jurisdiction arising from such decision. Eventually, the sole arbitrator determined it had jurisdiction to decide the claims and defences in this consolidated arbitration, with sufficient reasoning attached: first, there is no dispute that the claimant and the respondent are signatory parties to each of the agreements the subject of this dispute<sup>361</sup>; second, the sole arbitrator determined that the two arbitration agreements invoked to commence two arbitrations genuinely refer to the same<sup>362</sup> and lastly, the sole arbitrator took into account the fact that no objection was raised by either party as to the jurisdiction arising from the consolidation decision<sup>363</sup>.

## **[2] If the Arbitral Tribunal Invalidates the Consolidation Decision, What Would be the Consolidated Proceedings’ outcome?**

Honestly speaking, this question seems to have no answer either in the text of SIAC Rules or in the related *SIAC Guide*. Nevertheless, based on some indirect evidence, it may be inferred that, given the arbitral tribunal invalidated the consolidation decision,

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<sup>360</sup> *ibid* [170].

<sup>361</sup> *ibid* [172].

<sup>362</sup> *ibid* [173] and [174]. Precisely, the claims are made under the SaaS Agreement and the PSA Agreement and “the arbitration agreement in Section 9 of the SaaS Agreement (including the arbitration agreement in Section 9(c)) is expressly incorporated by reference as if fully set forth in the PSA pursuant to Section 7 of same and, in my determination, it therefore applies to each of the SaaS Agreement and the PSA, as well as the Order Form and the Statement of Works pursuant to which each of them was executed, respectively”. The said arbitration agreement states at para 2: “Governing Law; Venue. The laws of the Republic of Singapore (without giving effect to its conflict of laws principles) govern all matters arising out of or relating to this Agreement and the transactions it contemplates. Any claims or actions regarding or arising out of this Agreement must be brought exclusively in binding arbitration in the Republic of Singapore administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the then-existing SIAC Rules applicable to commercial disputes and any then-existing expedited arbitration rules and procedures available and applicable thereto. Any arbitral proceedings shall be conducted under the auspices of a single arbitrator, to be chosen and appointed jointly by both parties. If the parties are unable to agree upon the appointment of an arbitrator within thirty (30) days of the delivery of notice of arbitral proceedings to the non-instigating party, a neutral arbitrator shall be appointed by SIAC in accordance with the then-existing procedures for appoint of arbitrators, provided that any SIAC appointed arbitrator shall have at least five (5) years of relevant experience.”

<sup>363</sup> *ibid* [175].

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the consolidated arbitral proceedings would be split and restored to the initial de-consolidated stage, where each de-consolidated case is under a separate case number to administer. As some proof demonstrates, even if the consolidation is granted, in accordance with the SIAC's tactful counting method, SIAC does not count the number of one set of arbitrations having been consolidated as one; instead, still counts the numbers of all the case numbers already distributed to them before consolidation.<sup>364</sup> In other words, even only the case number of the first commenced arbitration retains use due to the grant of consolidation, the case numbers originally distributed to other to-be-consolidated arbitrations would remain in the administration system of SIAC and be individually counted in the SIAC arbitration caseload statistic. Accordingly, if the consolidation decision gets invalidated, the original distributed case number would be arguably again used for each de-consolidated arbitration case.

Take the case demonstrated above as an analogy, where the SIAC Court assigned two different case numbers ARB1010/20/LSJ and ARB1011/20/LSJ to each arbitration and then, following the consolidation decision made by the SIAC Court, the two arbitrations were consolidated into the first commenced arbitration registered as ARB1010/20/LSJ, if the arbitral tribunal in this case, on the contrary, invalidated the consolidation decision, the de-consolidated arbitrations, in line with the said assumption, would restore their original case numbers, in particular, the original second commenced arbitration will restore the use of the case number ARB1011/20/LSJ. Following that, the SIAC is believed to be more justifiable for handling the situation of de-consolidation decided by the arbitral tribunal in this way in practice.

Above all, this textual clarification to ensure the tribunal reviews the potential jurisdictional issues arising out of the consolidation decision, strictly keeping in line with the doctrine of *competence-competence*, sounds plausibly self-explanatory but extremely rare to see in other institutional rules, especially the rules falling into the

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<sup>364</sup> Alison Ross, 'Why SIAC Case Numbers Made me Choke over My Coffee', Global Arbitration Review, 6 July, 2021. Available under: <https://globalarbitrationreview.com/article/why-siac-case-numbers-made-me-choke-over-my-coffee> (last access on Dec. 12, 2022) In this article, Singapore's Minister of Law K Shaumugam responded to the SIAC's largest case number of all arbitral institutions in 2021 and made a clarification of the SIAC's caseload counting method: "Actually, that's not quite accurate. You know how statistics can be misleading? Within the new caseload, there were two sets of related cases, 261 cases in one set and 145 in another. I don't know how other jurisdictions count their numbers but, to me, when 261 cases arise from essentially one matter, I don't think you can count it as 261."

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scope of Model 4, a large number of which in fact unequivocally adopt an opposite position even though dodging to speak it bluntly in their rules. No matter which position is more justified<sup>365</sup>, the clarity and certainty on this tricky issue are arguably welcome to the users.

**B. In terms of Coherence of Rules, How to Regard Rule 40 to Rule 8?**

**[1] The Revocability Nature of The Decision on Consolidation under Rule 8 Is Coherent with Rule 40**

Provided the revocability nature of the decision on consolidation is established, how to regard Rule 40 to Rule 8? Rule 40 ensures, in general, the conclusive and binding nature of decisions made by the SIAC Court, the SIAC President and the Registrar.<sup>366</sup> On this point, *SIAC Guide* explains there are two exceptions: first, some certain decisions are not intended to be final, as the wording “except as provided in these Rules” in Rule 40.1 suggests; second, the finality effect of the decisions made by the SIAC Court, the SIAC President and the Registrar is subject to by any conflicting mandatory provisions of the *lex arbitri*.<sup>367</sup> The latter shall apply to all discussions about consolidation mechanisms within institutional arbitration as a precondition, which will not be expanded here.

For the former, does the SIAC Court-made decision on the request for consolidation fall into the scope of the exceptions for Rule 40.1, so that the same presumptive conclusion above can be reached that the decision made by the SIAC Court on consolidation application is neither binding nor final? In a bid to ensure the finality nature of the decision taken by the SIAC’s organs as provided in Rule 40.1, the parties who agree to Rule 40.2 have to waive any right of appeal or review to any state court or other judicial authority, where mere two decisions are specifically exempted: Rule 16.1 (decisions on arbitrator challenge) and Rule 28.1 (*prima facie* decisions on

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<sup>365</sup> More discussion will be in *Part II-Chapter 2-Section 1-§2-D-[2]*.

<sup>366</sup> Choong (n 308) 304.

<sup>367</sup> *ibid.*

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jurisdiction),<sup>368</sup> without encompassing Rule 8 (decision on consolidation). In such a case, is the presumptive revocability nature of the decision made by the SIAC Court on the request for consolidation still consistent with Rule 40?

The answer is affirmative because the two exceptions specifically indicated in Rule 40.2 should not be directly read as an exhaustive list of the exceptions for Rule 40.1. Rule 40.2 merely extracts the two specific decisions, which are open for the parties to review or appeal to the judicial authority beyond the auspices of SIAC, from all the decisions made by the SIAC's organs attributed as the exceptions for Rule 40.1, while the rest among them cannot, which encapsulates the decision made by the SIAC Court on the application for consolidation. By the way, though the positive consolidation decision made by the SIAC Court under Rule 8 cannot be reviewed or appealed to the judicial authorities outside SIAC, there still exists a stipulated avenue to challenge the said decision; namely, the arbitral tribunal is empowered to review it as articulated above. Taking into consideration of the doctrine of minimum interference of state court and efficiency of arbitration, it is justifiable not to empower the parties to seek resort to the outside judiciary authorities. On the contrary, take Rule 28.1 as an example, if the SIAC Court *prima facie* unsatisfied before the constitution of arbitral tribunal, the arbitration proceedings would have to terminate along with the side-effect that parties would have no chance to challenge this institution-made decision in front of the arbitral tribunal. In this case, it makes sense for Rule 40.2 to exempt Rule 28.1 and permit the concerned parties to seek resort from the state courts.

Thus, the revocability nature of the decision made by the SIAC Court on the request for consolidation demonstrated *ut supra* is not contradictory to Rule 40, as Rule 8 shall be regarded as one of the exceptions for Rule 40.1. And this demonstration also boosts the justification of the revocability nature demonstrated above from the perspective of systematical interpretation of SIAC Rules.

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<sup>368</sup> *ibid* 305. Rule 40.2 of 2016 SIAC Rules states: "Save in respect of Rule 16.1 and Rule 28.1, the parties waive any right of appeal or review in respect of any decisions of the President, the Court and the Registrar to any State court or other judicial authority."

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**[2] Rule 40.1 Still Partly Applies to SIAC  
Consolidation**

Although the first part of Rule 40.1, the finality and binding nature of the decision made by the SIAC's Court, fails to apply to SIAC consolidation, the rest of Rule 40.1 does so without disputes.

[2.a] Reasoning? No Need

First, the SIAC Court, the SIAC President, and the Registrar are not required to provide reasons for the decisions they are empowered to make unless the SIAC Court determines otherwise or as provided in SIAC Rules.<sup>369</sup> This general rule also applies to the SIAC consolidation when the SIAC Court exerts its power to decide on this matter.<sup>370</sup>

[2.b] Confidentiality? Yes, Please!

Also, in line with Rule 40.1, the discussions and deliberations of the SIAC Court on deciding the request for consolidation are also confidential, which further mystifies the consolidation decision-making process with respect to the SIAC Court, causing the intensification of its non-transparency.

*§6. Establishment of Arbitral Tribunal to Hear  
Consolidated Proceedings*

Should the request for consolidation be granted by the SIAC Court or the arbitral tribunal, pursuant to Rule 8.6 and Rule 8.9, the SIAC Court is reserved the power to revoke the appointment of any prior appointed arbitrator, which aims to “place all the parties on an equal footing with respect to the selection of the tribunal and remove the

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<sup>369</sup> Rule 40.1 of 2016 SIAC Rules

<sup>370</sup> *EKA Software Solutions v. BAK Festivals* also reflects it as demonstrated above.

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risk that the selection may affect the integrity of the proceedings<sup>371</sup>. Nevertheless, unlike many other institutional rules<sup>372</sup>, Rule 8.6 or Rule 8.9 itself adopts a permissive wording<sup>373</sup>, which does not mean the SIAC Court should automatically revoke the appointment of all or any prior appointed arbitrators once the consolidation is granted<sup>374</sup>. On the contrary, if Rule 8.6 is not invoked by the SIAC Court, the arbitral tribunal to hear the consolidated proceedings, by reference to Rule 8.5, will directly include the arbitrators who have already been appointed in the first commenced arbitration deemed by the Registrar.<sup>375</sup> Upholding the stance that “parties’ participation in the constitution of the tribunal is of utmost importance to the procedural integrity of an arbitral proceeding”<sup>376</sup>, SIAC Rules seem to attempt to strike a balance between procedural fairness and respect for the party’s participation in the appointment of arbitrators. As *SIAC guide* indicates, there exist several situations where revocation of the prior appointed arbitrator(s) is unnecessary, especially when, though the parties to all the consolidated arbitrations may not be identical, they may align closely to each other within one claimant group and/or respondent group and have no issue to jointly appoint the co-arbitrator to represent them.<sup>377</sup> In such kind of situations, the SIAC Court will regard the specific circumstances of each case and may opt not to revoke the arbitrator in question, if, in the SIAC Court’s judgment, each side is still ensured to have an equal and fair opportunity to participate in the constitution of the tribunal, no revocation will be carried out.

If the SIAC Court determines to revoke any of the previously appointed arbitrators, the vacancy or vacancies should be refilled in line with Rules 9 to 12 unless otherwise agreed by all parties. For example, in the case where the tribunal should be composed of three arbitrators, the claimant(s) and/or the respondent(s) shall jointly nominate one co-arbitrator<sup>378</sup>, and the presiding arbitrator shall be appointed by the SIAC President

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<sup>371</sup> Choong (n 308) 120.

<sup>372</sup> For example, ICC, Article 15.11 of 2016 ACIAC Rules, Article 28.8 of 2018 HKIAC Rules

<sup>373</sup> Rule 8.6 or Rule 8.10 both states: “Where an application for consolidation is granted under..., the Court *may* revoke the appointment of any arbitrators appointed prior to the decision on consolidation.” (The emphasis is added)

<sup>374</sup> Choong (n 308) 128.

<sup>375</sup> *ibid* 127.

<sup>376</sup> *ibid* 129.

<sup>377</sup> *ibid* 120, 127. Other or just simply in the case the later-joined party shows no objection to the previously appointed arbitrator.

<sup>378</sup> Rule 12.2 of 2016 SIAC Rules

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if there is no other agreement on that.<sup>379</sup> In the absence of both such joint nominations on co-arbitrators, the SIAC President shall appoint all three arbitrators and shall designate one of them as the presiding arbitrator.<sup>380</sup> As the general rule set out in Rule 9, the SIAC President reserves the discretion to refuse the arbitrators nominated by the parties or by co-arbitrators; and the SIAC President's ultimate decision on appointment shall be final and be prohibited from appealing.

At last, Rule 8.11 expressly ensures that the revocation of arbitrator(s) will not jeopardize the validity of any act done or order or award issued by the arbitrator(s) at issue<sup>381</sup>, and Rule 8.12 sets out a "contractual waiver"<sup>382</sup> to deprive the right of the party to participate in the constitution of the tribunal once the consolidation is granted, which is perceived as an "added layer of protection"<sup>383</sup> to enhance the revocation power of the SIAC Court on the constitution of tribunal to hear consolidated arbitration.

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<sup>379</sup> Rule 11.3 of 2016 SIAC Rules

<sup>380</sup> Rule 12.2 of 2016 SIAC Rules

<sup>381</sup> Choong (n 308) 127-128.

<sup>382</sup> *ibid* 129. "Rule 8.12 is in effect a contractual waiver of a party's right to challenge an award subsequently, on the basis that the party has not had an opportunity to participate (in full or in part) in the constitution of the tribunal. While such a deemed waiver may well be recognized in some jurisdictions, an advance or deemed waiver may be void as a matter of public policy in other jurisdictions."

<sup>383</sup> *ibid* 123.

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## Section 2. DIAC Rules

### §1. Context

DIAC, Dubai International Arbitration Centre, is the self-proclaimed largest arbitration centre in the region of the Middle East and, as part of Dubai's state development strategy, is ambitious to seek the position as "one of the world's top 5 arbitration centres in the next three years (2022-2025)".<sup>384</sup> For this ambition, 2022 witnessed the latest revision of DIAC's arbitration rules (i.e. 2022 DIAC Rules) to accommodate the demands of the arbitration community and to enhance efficiency.<sup>385</sup> By the way, the 2022 DIAC Rules are also the first set of DIAC Rules after DIAC formally decoupling with LCIA and reconstituting itself as a new DIAC (DIAC 2.0)<sup>386</sup>, wherein consolidation mechanism was for the first time to be supplemented into DIAC Rules as part of the efforts to increase the efficiency of DIAC arbitration. Some commentators perceive the DIAC consolidation mechanism as very similar to the ICC's or LCIA's counterparts<sup>387</sup>; yet, I incline to say the DIAC consolidation is more closely analogous to the SIAC consolidation than compared to ICC's or LCIA's, at least for the purpose of the thesis.

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<sup>384</sup> DIAC, 'Dubai International Arbitration Centre Launches New 2022 Arbitration Rules: The New Rules Will Come into Force on 21 March 2022', DIAC, 2 March 2022. Available under: <<http://www.diac.ae/idias/resource/Rules2022PR.pdf>> (Last access on 14 December, 2022) In this DIAC's official statement, DIAC declared it had been named as one of the top ten arbitral centres in the world by the 2021 QMUL Survey, however, which was not verified by the author through reading the authentic text of the 2021 QMUL Survey.

<sup>385</sup> *ibid.*

<sup>386</sup> Briefly, it is the result of implementation of Dubai Government Decree No.34/2021. See Alcolea (n 25) 434. "[T]he DIFC-London Court of International Arbitration (LCIA) centre was abolished on 20 September 2021 and all its assets were transferred to a new 'Dubai International Arbitration Centre'." Also see Gordon Blanke, 'DIAC 2.0: A Mirage or A Tale of 1001 Arabian Nights' (Kluwer Arbitration Blog, 29 January 2022) <<http://arbitrationblog.kluwerarbitration.com/2022/01/29/diac-2-0-a-mirage-or-a-tale-of-1001-arabian-nights/>> accessed 14 December 2022. "[T]he Degree No. 34/2021 is to unify the institutional arbitration offering of Dubai under DIAC 2.0, a new, reconstituted DIAC... which, in turn, has triggered the disintegration of the joint venture between the LCIA and the DAI which formed the basis of the DIFC-LCIA."

<sup>387</sup> Soraya Corm-Bakhos, 'DIAC 2022 Rules of Arbitration: A Modernised Set of Rules for a New Era' (Kluwer Arbitration Blog, 21 March 2022) <<http://arbitrationblog.kluwerarbitration.com/2022/03/21/diac-2022-rules-of-arbitration-a-modernised-set-of-rules-for-a-new-era/>> accessed 14 December 2022

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## §2. DIAC Consolidation Regime is Closely Analogous to the SIAC's Counterpart

The DIAC's consolidation regime set out in Article 8, "Multiple Contracts and Consolidation", of 2022 DIAC Rules is largely a verbatim copy of SIAC's consolidation provision, especially concerning the demarcation of deciding power on the request for consolidation between the arbitral institution and the arbitral tribunal as well as the precedence of *competence-competence* doctrine above the validity of consolidation decision.

In the author's eyes, compared to SIAC's counterpart, the DIAC's consolidation provisions seem to release an even more coherent position as to the relationship between the consolidation decision and the *competence-competence* doctrine established in the same rules. Akin to many other rules, DIAC Rules establish that the arbitral tribunal itself has the power to rule on its own jurisdiction, whereas the DIAC Court is empowered to *prima facie* review the jurisdiction-related issues before the constitution of any arbitral tribunal.<sup>388</sup> Back to Article 8, though the same three threshold conditions apply to the DIAC Court and the arbitral tribunal when they are competent to decide on consolidation, the different review degrees with respect to the said threshold conditions are highlighted in the provisions: in the absence of all parties agreeing, the DIAC Court suffices to be satisfied on the *prima facie* basis, while the arbitral tribunal cannot.<sup>389</sup> On the contrary, such distinction finds nowhere in SIAC Rules, which could give the impression that the SIAC Court and the arbitral tribunal are supposed to review the common threshold conditions under the same, or at least similar, level when they are exercising the authority to decide on consolidation. Besides the threshold conditions, in the meanwhile, DIAC Rules

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<sup>388</sup> Article 6 of 2022 DIAC Rules

<sup>389</sup> Article 8.2 of 2022 DIAC Rules states: "[T]he Arbitration Court may...allow the consolidation into a single arbitration of two or more arbitrations, where all parties agree to such consolidation or it is satisfied on a *prima facie* basis that: (a) all claims in the arbitrations are made under the same agreement to arbitrate; or (b) the arbitrations involve the same parties, the agreements to arbitrate are compatible, and: (i) the disputes arise out of the same legal relationship(s); or (ii) the underlying contracts consist of a principal contract and its ancillary contract(s); or (iii) the claims arise out of the same transaction or series of related transactions." While Article 8.5 states: "[T]he Tribunal may consolidate two or more arbitrations into a single arbitration, where: (a) all parties agree to such consolidation; or (b) the requirements of Article 8.2(a) or (b) have been met", where *prima facie* review standard is not expressly written.

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expressly demand that the arbitral tribunal should additionally take into account more substantial factors than the DIAC Court before making the determination, i.e. the tribunal shall consider any other relevant factors, including the “composition of the proposed Tribunal and the impact of the proposed consolidation on the arbitration and its efficient and expeditious progress”<sup>390</sup>, while the DIAC Court is not imposed such requirement by Rules<sup>391</sup>, which further confirms that the tribunal is burdened with more substantial review duty than the DIAC Court on the decision-making process of consolidation under DIAC Rules. And such clarified distinction provided in the consolidation provisions looks more coherent with the distinction of review standard between the DIAC Court and the arbitral tribunal in terms of deciding the jurisdictional issues than other institutional rules who fail to do so.

In fact, a more notable distinction between the DIAC’s consolidation mechanism and SIAC’s rests upon a DIAC’s restriction on threshold condition that the involved parties to the to-be-consolidated arbitrations shall be the same when the arbitration agreements involved are not identical, consolidation is not permitted otherwise<sup>392</sup>; to the contrary, SIAC Rules do not have this restriction. For obvious reasons, this restriction substantially shrinks the potential range of situations that could be expected to achieve consolidation under DIAC Rules.

As to why the author argues, among the selected Rules under Model 3, the DIAC consolidation is more divergent from LCIA’s than SIAC’s, the following demonstration of the LCIA’s consolidation mechanism will answer it.

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<sup>390</sup> Article 8.5 of 2022 DIAC Rules.

<sup>391</sup> But both the DIAC Court and the arbitral tribunal are required to invite all parties to comment. See the Article 8.2 and Article 8.5 of 2022 DIAC Rules.

<sup>392</sup> Article 8.2 of 2022 DIAC Rules states: “[T]he Arbitration Court may...allow the consolidation into a single arbitration of two or more arbitrations...satisfied on a *prima facie* basis that: ... (b) the arbitrations involve the *same parties*, the agreements to arbitrate are compatible, and: (i) the disputes arise out of the same legal relationship(s); or (ii) the underlying contracts consist of a principal contract and its ancillary contract(s); or (iii) the claims arise out of the same transaction or series of related transactions (emphasis added).”

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## Section 3. LCIA Rules

### §1. Context

As the allegedly oldest continuously established international arbitration institution in the world<sup>393</sup>, LCIA has encountered multi-party and/or multi-contract related disputes for a long time<sup>394</sup>. However, LCIA's arbitration rules remained silent on consolidation until 2014, the first LCIA consolidation provisions gave birth<sup>395</sup>. Prior to it, consolidation can be permitted under LCIA only if all the parties agree. Worth to remind that the codification of consolidation into the LCIA Rules is 18 years later than the codification of consolidation in the English Arbitration Act 1996 (EAA)<sup>396</sup>, the arbitration law of the country where LCIA is headquartered, though the latter, as a non-mandatory provision<sup>397</sup>, also just prescribes the arbitral tribunal can be conferred the power to order consolidation only if all the parties to all of the proceedings agree so<sup>398</sup>.

2014 LCIA Rules package the consolidation-related provisions and other unrelated rules under one Article named "Additional Powers"<sup>399</sup> and only allow consolidation under a narrow scope of circumstances. Shortly thereafter, the following revision of LCIA Rules in 2020 (2020 LCIA Rules) significantly amended the consolidation provisions: in short, the consolidation-related provisions detaching from the original "Additional Powers" Article are independently enshrined in the Article comprising its name, i.e. Article 22A "Power to Order Consolidation/Concurrent Conduct of

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<sup>393</sup> Lisa Richman, 'Chapter 1: Introduction and the Institution' in Maxi Scherer, Lisa Richman and others (eds), *Arbitrating under the 2020 LCIA Rules: A User's Guide* (Kluwer Law International 2021) 1, 2

<sup>394</sup> For example, as early as 2000s, more than 50% of the cases registered under LCIA already have involved more than two parties. See Platte, 'When Should an Arbitrator Join Cases?' (n 204) 67.

<sup>395</sup> Scherer, *Arbitrating under the 2014 LCIA Rules: A User's Guide* (n 2) 255.

<sup>396</sup> Section 35 (consolidation of proceedings and concurrent hearings) of the English Arbitration Act 1996: "(1) The parties are free to agree (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or (b) that concurrent hearings shall be held, or such terms as may be agreed. (2) **Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or current hearings.** (Emphasis is added)"

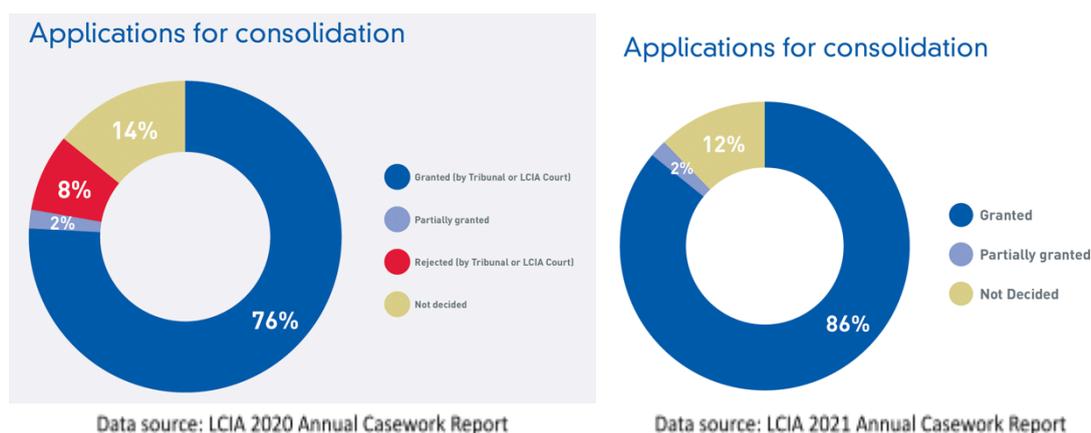
<sup>397</sup> See Section 4(2) of the English Arbitration Act 1996.

<sup>398</sup> Audley Sheppard, 'English Arbitration Act (Chapter 23), Part I, The Arbitral Proceedings, Section 35 [Consolidation of proceedings and concurrent hearings]', in Loukas A. Mistelis (ed), *Concise International Arbitration* (2nd edn, Kluwer Law International 2015) 1032, 1033

<sup>399</sup> See Article 22 of 2014 LCIA Rules, where consolidation-related contents are referred to in Article 22.1(ix), 22.1(x) and 22.6.

Arbitrations<sup>400</sup>, and consolidation is allowed under broader circumstances under the aegis of LCIA following the amendment<sup>401</sup>.

Parties to LCIA arbitrations have regularly utilised the consolidation mechanism since its introduction. From 2014 to 2019, LCIA averagely accepted 19.7 applications for consolidation each year (6% of LCIA cases commenced that year on average).<sup>402</sup> Abruptly, 2020 witnessed an increase of more than 40% in consolidation applications compared with 2019, reaching 50 applications (12% of LCIA cases commenced in 2020), with 76% of applications fully granted and only 8% of full rejection<sup>403</sup>. 2021 continued the roughly equivalent quantity of applications for consolidation as 2020 and a distinct increase in grant rate: 43 applications (13% of LCIA cases commenced in 2021), with 86% of applications fully granted and no full rejection.<sup>404</sup> The sheer increase in consolidation applications began in the very year 2020 when LCIA adopted its amended consolidation provisions, which may justifiably infer that the new LCIA consolidation mechanism may have enlarged LCIA's users' opportunities to use it and also strengthened their confidence to use it, and in turn, a decent grant rate appears desirable for them.



<sup>400</sup> The label number "Article 22A" of consolidation leaves the trace to remind us that it is the "Article 22 Additional Powers" from which the consolidation provisions were detached in the rule-making history of LCIA Rules.

<sup>401</sup> LCIA, '2020 Annual Casework Report' (2021), 5. <<https://www.lcia.org/LCIA/reports.aspx>> accessed 16 December 2022

<sup>402</sup> Scherer, 'Chapter 18: Multiple Parties, Consolidation and Joinder' (n 18) 297

<sup>403</sup> Of the 50 applications for consolidations, there are 12 applications were made in cases pursuant to the 2020 Rules. LCIA, '2020 Annual Casework Report' (n 401) 24.

<sup>404</sup> LCIA, '2021 Annual Casework Report', LCIA, 25. Available under: <<https://www.lcia.org/LCIA/reports.aspx>> (Last access on 16 December 2022)

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Although, alongside SIAC's and DIAC's counterparts, LCIA consolidation is also attributable to Model 2, where consolidation requires grant either from the administering arbitral institution or from the arbitral tribunal, distinguishing between the requests filed before and after an arbitral tribunal has been formed, LCIA consolidation is wildly divergent from SIAC consolidation and its follower, DIAC consolidation, primarily in terms of decision-making power allocation on consolidation. Through the comparison with SIAC consolidation, this hardcore divergence will first be demonstrated in the next subsection. After it, other principal features of LCIA consolidation will also be touched on.

## *§2. LCIA's Decision-Making Authority Allocation on Consolidation: LCIA Court Seizes the Predominant Position*

### **A. The Tribunal's Decision to Consolidation Is Subject to LCIA Court's Approval**

Despite the arrangement that both the LCIA Court and the arbitral tribunal are empowered to decide on consolidation at different stages, the grant decision made by the latter is subject to the LCIA Court's approval in all circumstances<sup>405</sup>, even where all the parties to the to-be-consolidated arbitrations expressly agree such consolidation<sup>406</sup>. In turn, if the competent tribunal deliberates not to grant consolidation, the LCIA Court has no position to intervene in the negative decision.

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<sup>405</sup> Scherer, 'Chapter 18: Multiple Parties, Consolidation and Joinder' (n 18) 309; Scherer, *Arbitrating under the 2014 LCIA Rules: A User's Guide* (n 2) 256.

<sup>406</sup> See Article 22.7 of 2020 LCIA Rules, "The Arbitral Tribunal shall have the power to order **with the approval of the LCIA Court**... (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**... (Emphasis is added) "

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This extraordinary feature was first established in 2014 LCIA Rules<sup>407</sup> and remains in 2020 LCIA Rules.

What on earth does the feature that the validity of the tribunal's decision to consolidate is upon the LCIA Court's approval mean? Literally speaking, it means the LCIA Court has the final say upon the consolidation leave granted by the tribunal; namely, if the LCIA Court objected to the consolidation order made by the tribunal, the said consolidation order would be overturned, and thus consolidation would fail to be accomplished even the competent arbitral tribunal intended so. This presumption can be well verified by an LCIA case *Bloomfield v Grow Land, KCV and Grow Holdings*<sup>408</sup>, where the formed arbitral tribunal directed the consolidation of two LCIA arbitration proceedings at issue in the form of procedural order upon Bloomfield's application<sup>409</sup> despite other parties' jurisdiction challenge<sup>410</sup>, but the LCIA Court later declined to approve the consolidation<sup>411</sup> which was bound upon the tribunal<sup>412</sup>, so the consolidation failed to accomplish.<sup>413</sup> Likewise, though the statistics on consolidation officially released by LCIA do not specify the number of cases granted by the arbitral tribunal but dismissed by the LCIA Court, all statistics on the number of consolidation cases granted by the arbitral tribunal clearly state that they were also approved by the LCIA Court<sup>414</sup>, which could indirectly indicate that for a

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<sup>407</sup> See Article 22.1 of 2014 LCIA Rules, "The Arbitral Tribunal shall have the power... (ix) to order, with the approval of the LCIA Court, 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; (x) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more than 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) "

<sup>408</sup> *Bloomfield Investments LLC v. (1) Grow Land and Water LLC (Grow Land), (2) Kings County Ventures LLC (KCV), (3) Green Renewable Organic and Water Holdings LLC (D/B/A Grow Holdings LLC) (Grow Holdings)*, LCIA Case No. 183996, LCIA Award, 7 May 2021.

<sup>409</sup> *ibid*, at [50]

<sup>410</sup> *ibid*, at [51], [44], [41] and [24] (Precisely, it is Grow Holdings and Quay Hay that initiated the jurisdiction challenges)

<sup>411</sup> *ibid*, at [52]

<sup>412</sup> *ibid*, at [53]

<sup>413</sup> Although the two involved arbitrations in this case both referred to 2014 LCIA Rules (at [21]) rather than 2020 Rules, the principle extracted from this case would also apply to 2020 LCIA Rules since, as stated before, 2014 LCIA Rules have already stipulated the tribunal-made consolidation decision subject to LCIA Court's approval, and this feature remains intact in the 2020 Rules.

<sup>414</sup> See, for example, LCIA, '2021 Annual Casework Report' (n 404) 25. ("Of the 43 applications for consolidation: ... (c) five applications were *granted by the Tribunal, with approval of the Court*... (d) five applications were *granted by the Tribunal, with approval of the Court*... (emphasis is added)")

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tribunal-granted consolidation decision to be effective, additional approval of the LCIA Court should be followed; otherwise it would not be recorded in statistics.

In sum, the tribunal-granted consolidation decision can only be validated with the endorsement from the LCIA Court, and it is just the opposite of SIAC consolidation (and DIAC consolidation), where the arbitral tribunal, on the contrary, is supposed to be the ultimate body to have the final say on the consolidation since it is empowered to overturn the consolidation decision (no matter made by the arbitral institution or by the tribunal) provided the jurisdiction challenge arising out of the consolidation decision is justifiable at its discretion, as well as to accept the consolidation application filed again by the recalcitrant if the arbitral institution has refused it in prior. Instead, it is not the case for LCIA consolidation. As reiterated in this section, it is the LCIA Court that has the final say in determining the validity of the consolidation order rendered by the arbitral tribunal. Intuitively, it can be presumed that, under the aegis of LCIA, the arrangement that the arbitral tribunal has the competence to decide on consolidation does not constitute the opportunity for a party to file a second application for consolidation as SIAC Rules (and DIAC Rules) allow so, where two dimensions suffice to demonstrate it. First, no indication can be found in LCIA Rules to entitle a party to do so, which can then visually embody this presumption. Moreover, the deeper justification behind this is that the decision on the request for consolidation made by the LCIA Court is arguably conclusive and binding where the tribunal cannot overturn it in the later stage by accepting and deciding the same consolidation application again, which is the conclusion inferred from the general rule established in Article 29 of LCIA Rules 2020, where the next section will address on it.

## B. How to read the application of Article 29 upon the LCIA Court's decision on consolidation?

### **[1] The Established Decision by LCIA Court on Consolidation Is Final and Binding**

Article 29 explicitly establishes the general principle that the determinations and decisions rendered by the LCIA Court shall be final and binding upon the parties and

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the arbitral tribunal, unless the LCIA Court decides otherwise under its discretion.<sup>415</sup> This principle has been retained since its first appearance in the 1985 edition of LCIA Rules.<sup>416</sup>

Since 2014 when LCIA Rules adopted consolidation provisions, where the LCIA Court began to be empowered to make the decision on consolidation before the first arbitral tribunal is formed, Article 29<sup>417</sup>, as a general qualitative provision for all the arbitration-related decisions rendered by the LCIA Court, applies to it as a matter of course. As a result, the decision rendered by the LCIA Court on consolidation will be accordingly final and binding upon the arbitral tribunal; thus, the tribunal later constituted is naturally deprived of the power to review the LCIA Court-made decision, no matter which is a positive or a negative decision, but to fully abide it and proceed the arbitral proceedings. To the opposite, although SIAC Rules encompass a comparable rule<sup>418</sup> as Article 29 of LCIA Rules which in general ensures the finality and binding nature of SIAC Court decisions, the SIAC Court-made consolidation decision is excluded from this scope as demonstrated above<sup>419</sup>. Nevertheless, Article 29 of LCIA Rules does not leave any leeway open for exceptions as SIAC Rules do.<sup>420</sup> In this vein, this argument suffices to justify why the unsatisfied applicant for consolidation to LCIA arbitrations could not give the second bite at the apple before the tribunal as the counterparts to SIAC arbitrations (or DIAC arbitrations) can permit so.

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<sup>415</sup> Article 29.1 of 2020 LCIA Rules states: “The determinations of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal, unless otherwise directed by the LCIA Court...”

<sup>416</sup> Richman (n 393) 1, 9.

<sup>417</sup> In 2014 LCIA Rules, this rule is also enshrined under Article 29 without any difference.

<sup>418</sup> Namely, Rule 40 of 2016 SIAC Rules.

<sup>419</sup> *Vide supra* Chapter 4-Section 1-§5-B

<sup>420</sup> Rule 40.1 of 2016 SIAC Rules particularly contains the wording “except as provided in these Rules”, while similar wording cannot be found in Article 29 of 2020 LCIA Rules. With regard to the discretion that the LCIA Court may exercise to negate the finality nature of the decisions made by itself, it only makes sense to apply the said discretion on a case-by-case basis, which excludes the possibility for the LCIA Court to universally negate certain types of decisions' finality, like consolidation decisions.

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**[2] No Reasons Shall Be Required to Accompany:  
LCIA Court Decisions alleged as administrative nature in the LCIA Rules**

As most selected institutional rules<sup>421</sup>, the administering institution under LCIA Rules (LCIA Court) is also not required to accompany the reasons when rendering the decision on consolidation to the parties. However, LCIA Rules attempt to justify this arrangement by alleging the decisions rendered by the LCIA Court as “administrative” through Article 29.1:

“...Save for reasoned decisions on arbitral challenges under Article 10, such determinations are to be treated as **administrative in nature**... (emphasis added)”<sup>422</sup>

In light of the explanation from the “*Arbitrating under the 2020 LCIA Rules: A User’s Guide*” (LCIA Guide)<sup>423</sup>, emphasising the so-called “administrative” character of the LCIA Court decisions instead of “judicial” or “quasi-judicial” is to exempt the LCIA Court from fulfilling the due process requirements that apply to the arbitral tribunal, including attaching the related reasoning when issuing the decisions to the parties (and tribunal at times), where the rationale behind to define them as “administrative” nature purely because the LCIA Court, the decision-issuing body, is presumed as merely functioning as an administrative role.<sup>424</sup> Put in the same logic, the decision on consolidation rendered by the LCIA Court shall also be treated as an administrative decision without the necessity to accompany any reasoning.<sup>425</sup> In fact, this rationale is far from invulnerable, but the related discussion will leave to be mainly articulated in *Part II*<sup>426</sup> rather than here. At least, LCIA is the sole arbitral institution among the selected arbitral institutions to bluntly speak out the allegedly “administrative nature” of the decision made by the administering institution in the text of its institutional

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<sup>421</sup> Such as the ICDR Rules under Model 2, the SIAC, DIAC and LCIA Rules under Model 3, and the Swiss, CEPANI, VIAC, SCC, CIETAC, HKIAC, ACICA and DIS Rules under Model 4, as summarised in Part II-Chapter 2-Section 2-§3-B.

<sup>422</sup> See Rule 29.1 of 2020 LCIA Rules.

<sup>423</sup> i.e. Maxi Scherer, Lisa Richman and others, *Arbitrating under the 2020 LCIA Rules: A User’s Guide* (Kluwer Law International 2021)

<sup>424</sup> Richman (n 393) 1, 10;

<sup>425</sup> However, note that Article 29.1 contains a “clarification that ...decisions on arbitral challenges under Article 10 are accompanied by the LCIA Court’s reasoning, and the basis for its decisions” and such exception is “to ensure that decisions are accepted by the parties” as *LCIA Guide* explains. See *ibid*

<sup>426</sup> *Viz Part II-Chapter 2-Section 1-§2-D-[2]*.

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rules as an effort to justify the contestable fact that arbitral institution is not required to attach any reasoning when rendering consolidation decisions<sup>427</sup>; whereas other selected arbitral institutions deliberately circumvent to address this conceptual issue in their rules, though, behind the curtain, they may align with LCIA's stance, or at most communicate the same message in indirect way<sup>428</sup>.

### **[3] Contractual Waiver to Raise Challenges against LCIA Court Consolidation Decision to Domestic Court**

Last, Article 29.2<sup>429</sup> thoughtfully sets forth a contractual waiver to limit the ability of the unsatisfied party to challenge any determination or decision made by the LCIA Court to domestic court, subject to the circumstances where the applicable domestic law may permit such waiver<sup>430</sup>. In this way, the parties to LCIA arbitration may be compelled to forgo their right to raise an appeal or review the LCIA Court-made consolidation decision to the outside judiciary authority, provided no mandatory rules in the applicable arbitration law permit such recourse to the arbitral institution. Notwithstanding any challenge against the LCIA Court consolidation decision raised in front of the domestic court in the light of the mandatory provision of applicable law, the LCIA Court still retains its discretion to decide whether to proceed with the arbitration or not under the auspices of LCIA pursuant to the second sentence of Article 29.2.

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<sup>427</sup> As well as other acts done by the arbitral institution not in compliance with the due process criteria under which international arbitration proceeding is supposed to be universally conducted, including when consolidation procedure is involved.

<sup>428</sup> See Article 1(2) of ICC Rules 2021, “[t]he Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC [...]”

<sup>429</sup> Article 29.2 of 2020 LCIA Rules: “To the extent permitted by any applicable law, the parties shall be taken to have waived any right of appeal or review in respect of any determination and decision of the LCIA Court to any state court or other legal authority...”

<sup>430</sup> As *LCIA Guide* mentioned, English Arbitration Act (EAA) 1996 (Section 74) does not permit recourse against any decision made by the LCIA Court, except the reasoned decision of the LCIA Court on arbitrator challenges, while French law does not prescribe such immunity to arbitral institution where the latter may be instead liable for failure to provide an effective and efficient means of arbitration. See Richman (n 393) 1, 11

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### C. Is Tribunal-Granted Consolidation Decision Final and Binding As Well, After the Approval by LCIA Court?

After the demonstrations of the finality of the consolidation decision of the LCIA Court<sup>431</sup> as well as the validity of the tribunal-granted consolidation decision depending on the LCIA Court's approval<sup>432</sup>, it is the turn to address whether the tribunal-granted consolidation decision is final and binding as well, with the approval of the LCIA Court. Namely, does the tribunal reserve the power to overturn the valid tribunal-made consolidation decision, having been approved by the LCIA Court? Honestly, the answer seems uncertain.

As clarified by *LCIA Notes for Arbitrators*, the LCIA-issued note allegedly underscores the broad principles by which arbitral tribunal to LCIA arbitration should abide when conducting the LCIA arbitrations, "if the Arbitral Tribunal does order consolidation, this should be recorded in a procedural order"<sup>433</sup>. It is generally accepted that a procedural order, unlike an award, is not characterised as finality<sup>434</sup>, which aims to direct the conduct of arbitration proceedings to reach a final award later<sup>435</sup>. If mechanically applying this principle, at first glance, the procedural order as the form for the arbitral tribunal to issue the consolidation decision can direct to an easy conclusion that such positive decision is not final or binding, despite the LCIA Court having approved it; instead, the tribunal can still revisit the consolidation decision after the arbitrations having been joined and revoke it. Moreover, the same rationale deriving from the *competence-competence* doctrine exercised on the SIAC tribunal may also logically be used to justify that the LCIA tribunal reserves the inherent power to de-consolidate if the jurisdiction challenges arise out of the said

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<sup>431</sup> *Vide supra* Chapter 4-Section 3-§2-B-[1]

<sup>432</sup> *Vide supra* Chapter 4-Section 3-§2-A

<sup>433</sup> See LCIA Notes for Arbitration, at [29].

<<https://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx>> accessed 27 December 2022.

Although these guidance notes expressly refer to the 2014 LCIA Rules, *LCIA Guide* confirms the requirement of procedural order form also applies to 2020 LCIA Rules. See Scherer, 'Chapter 18: Multiple Parties, Consolidation and Joinder' (n 18) 310.

<sup>434</sup> Patricia Zivkovic, 'Is a Departure from a Procedural Order by an Arbitral Tribunal Considered to Be a Procedural Error?' (Blogs of University of Aberdeen Law School, 28 August 2020) <

<https://www.abdn.ac.uk/law/blog/is-a-departure-from-a-procedural-order-by-an-arbitral-tribunal-considered-to-be-a-procedural-error-/#:~:text=The%20procedural%20error%20invoked%20by,before%20rendering%20the%20Partial%20Award.>> accessed 27 December 2022

<sup>435</sup> Rashda Rana, Jason A. Crook and others, *International Arbitration Workbook: Module 1/ Law, Practice & Procedure* (Chartered Institute of Arbitrators (CIArb) 2021) 255.

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consolidation decision, as the competence-competence doctrine is a general-accepted principle in international arbitration. Last, the said revocation power might make sense in consideration of the fact that the competent tribunal is empowered to make a valid decision to refuse the consolidation application without further approval from the LCIA Court.

The above assertion, as well as its grounds, seems plausible alone; however, it seems to deviate from the overall understanding of the text of LCIA consolidation rules and the possible original intention behind it.

First of all, the additional approval of the LCIA Court expressly requested for validating the tribunal-made consolidation decision and the confirmed finality and binding nature of the LCIA Court decision on consolidation together seem to imply that LCIA Rules attempt to render the LCIA Court predominate in the consolidation decision-making process, and thus monitor the tribunal on determining the request for consolidation. Though failing to reveal all the reasons for requiring the additional approval of the LCIA Court, *LCIA Guide* assumes the peculiar third-party effect that the tribunal-issued consolidation procedural order could bring is one of the reasons,<sup>436</sup> which suggests that whether to extend the consolidation scope to any differing party is ultimately upon the LCIA Court, rather than the tribunal, the latter seems to only have a preliminary deciding power on this issue. Accordingly, the LCIA Court appears to act more like an ultimate gatekeeper to ensure the consolidation decision made by the tribunal is “qualified” enough to be implemented, especially in the circumstances involving the third party, lest the unjustifiable consolidation would jeopardize the enforcement of the LCIA arbitral award later. In my mind, if the tribunal under LCIA also reserves the revocation power like the tribunal under SIAC does, it will be in disharmony with the tone of the LCIA Court’s predominant role and even the ultimate gatekeeper role implicated in the LCIA consolidation rules.

Also, even if the tribunal was open to revoking the tribunal-rendered consolidation decision in light of the *competence-competence* doctrine, it is still prohibited to revisit any decision on consolidation made by the LCIA Court as the LCIA Rules require, which would cause a risk of bizarre imbalance on the efficiency: the dispute revolving around consolidation can be resolved in one time shot when the consolidation application is filed before the LCIA Court, while, when the consolidation application

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<sup>436</sup> Scherer, ‘Chapter 18: Multiple Parties, Consolidation and Joinder’ (n 18) 310

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is filed before the competent tribunal, the assumed inconclusive nature of consolidation decision can be easily utilised as the dilatory tactics by parties which would prejudice the efficiency in the tribunal-deciding stage of LCIA consolidation. Considering that efficiency is one of the main purposes for LCIA to provide for consolidation mechanism<sup>437</sup> and that choosing the LCIA Rules shall be perceived as empowering the LCIA Court and tribunal to equally take a favourable stance as the general presumption on determining consolidation application, where all other conditions are satisfied and no party's interest would then be prejudiced<sup>438</sup>, permitting the tribunal to modify the approved tribunal-made consolidation decision with the consequence of causing different decision-makers under LCIA to handle the same consolidation matter (also under the same threshold conditions) in the opposite efficiency due to the opposing binding forces of the decisions issued by different bodies is unconvincing to be read as the LCIA Rules' actual intention.

Therefore, presuming the tribunal is not powered to revoke the tribunal-made consolidation decision with the approval of the LCIA Court appears to make more sense. In order to justify this presumption at the theory level, Article 22A can be boldly read in the way where the consolidation deciding power that arbitral tribunal to LCIA arbitration possesses is a power delegated by the LCIA Court for facilitating the tribunal better organise and conduct the arbitral proceeding after its formation rather than its own inherent power. In such a way, the arbitral-made consolidation decision hallmarked with the LCIA Court's approval can be deemed as an indirect LCIA Court-issued decision, thus it is inherently logical that this decision is also final and binding in the light of Article 29.

With respect to its issuance form as procedural order, which may directly shallow the doubt on the finality of tribunal-granted consolidation decision as discussed above, more and more case law illustrates a tendency of domestic courts to find that a decision entitled "procedural order" may well constitute an award when the decision is to finally resolve a specific matter.<sup>439</sup> French courts, including the Supreme Court

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<sup>437</sup> As *LCIA Guide* states, "the main purposes of consolidation: to ensure efficiency and fairness and to avoid inconsistent decisions with regard to factually and closely related circumstances and parties." *ibid* 309.

<sup>438</sup> *ibid*.

<sup>439</sup> Rana (n 435) 255; Elie Kleiman and Claire Pauly, 'Defining "Arbitral Awards": Supreme Court Weighs in' (Lexology, 29 November 2012)

<<https://www.lexology.com/commentary/arbitration-adr/france/freshfields-bruckhaus-deringer-llp/defining-arbitral-awards-supreme-court-weighs-in>> accessed 30 December 2022

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(Cour de cassation), have coherently denied the approach to characterise a decision depending on the terms used by the arbitrator; instead, the courts look only at the intrinsic nature of the decision at issue.<sup>440</sup> In the landmark decision *Tabet v. Congo*, the French Supreme Court defined “award” as:

*“Decisions made by the arbitrators which resolve in a definitive manner all or part of the dispute that is submitted to them on the merits, jurisdiction or a procedural matter which leads them to put an end to the proceedings (emphasis added).”<sup>441</sup>*

It could be argued that the decision on consolidation is justified to be attributed as an award to settle a jurisdictional matter, i.e., the decision to grant consolidation (or deny) is of a jurisdiction nature, which in turn causes the effect that such decision is final and binding, but the detailed demonstration will leave for *Part II* to mainly address, given *Part I* aims to highlight more on the intervention of arbitral institutions in the decision-making process of consolidation.

In any event, this finality nature issue is in need of LCIA’s further clarification to give arbitrators clearer guidance and provide the LCIA (potential) users more certainty, which calls for corresponding solid and clear justifications. For example, LCIA Rules lack a coherent application of competence-competence doctrine as SIAC Rules do so, under which the arbitral tribunal is permitted to modify the decision of the arbitral institution (SIAC Court) on consolidation, where the justification behind the LCIA approach requires to be clarified. In case the LCIA were to clarify that tribunal indeed reserves the power to revoke the tribunal-rendered consolidation decision, at least, what can be confirmed is that the LCIA Court has the final say on approving consolidation, which would remain unshakable of the predominant status of the LCIA Court in the LCIA consolidation mechanism.

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<sup>440</sup> Kleiman (n 439); ‘Société Braspetro Oil Service (Brasoil) v. GMRA, Cour d’appel de paris (1Ch.C), 1 July 1999’, (1999) 1999 Revue de l’Arbitrage 834, 834

<sup>441</sup> Cass Civ 1, October 12 2011, *Groupe Antoine Tabet v République du Congo*, pourvoi n° 09-72.439. The original text in French is: “...les véritables sentences arbitrale, c’est-à-dire les actes des arbitres qui tranchent de manière définitive, en tout ou en parties, le litige qui leur est soumis, que ce soit sur le fond, sur la compétence ou sur un moyen de procédure qui les conduit à mettre fin à l’instance...”

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### §3. Other Selected Principal Matters

#### A. Threshold Conditions

Despite the predominant position of the LCIA Court in the LCIA consolidation mechanism, the LCIA Court and the competent arbitral tribunal share the same threshold conditions to review the request for consolidation<sup>442</sup>, as well as both are required to give the equivalent reasonable opportunity to all the affected parties to state their views.<sup>443</sup> Compared to 2014 LCIA Rules, where consolidation requires either the consent of all the affected parties, either the circumstance where the pending LCIA arbitrations are under the same arbitration agreement (or compatible arbitration agreements) between the same disputing parties<sup>444</sup>, 2020 LCIA Rules permit consolidation under broader circumstances<sup>445</sup>, particularly when the pending arbitrations involve with different parties.

Besides all the affected parties agreeing to accomplish consolidation in writing, Article 22A also allows the LCIA Court and the tribunal to leave the grant where the pending arbitrations are 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 transactions or series of related transactions.<sup>446</sup> Accordingly, as long as the arbitration agreement is the same or the separate arbitration agreements are not incompatible, the parties to the arbitration are not demanded to be identical as

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<sup>442</sup> Note that LCIA Rules only expressly require the tribunal is empowered to decide on consolidation only upon the application by one of the parties under Article 22.7, whereas such requirement is not imposed upon the LCIA Court under Article 22.8. However, *LCIA Guide* defends that: “In practice...it is unlikely that the LCIA Court would order consolidation of arbitrations on its own volition and without considering the parties’ positions. Rather, if the Registrar notes sufficient similarities between two references, the parties would be invited to comment on whether they would like their proceedings to be consolidated nor not. This is likely to either result in a formal application or in clarity as regards the parties’ joint wish to proceed with separate arbitrations.” See Scherer, ‘Chapter 18: Multiple Parties, Consolidation and Joinder’ (n 18) 303.

<sup>443</sup> See Article 22.7 (with respect to the arbitral tribunal) and Article 22.8 (with respect to the LCIA Court) of the 2020 LCIA Rules.

<sup>444</sup> Under the 2014 LCIA Rules, only the tribunal, rather than the LCIA Court, has the power to permit consolidation when the pending arbitrations are commenced under compatible arbitration agreements between the same parties. See Article 22.1(ix), (x) and Article 22.6 of the 2014 LCIA Rules.

<sup>445</sup> LCIA, ‘2021 Annual Casework Report’ (n 404) 25.

<sup>446</sup> Article 22.7(ii) and Article 22.8(ii) of 2020 LCIA Rules.

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the predecessor version required.<sup>447</sup> In practice, broadening the scope of consolidation by lowering the thresholds permits “more arbitrations to be consolidated by the LCIA Court at an earlier stage”<sup>448</sup>, causing most of the consolidations to be ordered by the LCIA Court under the 2020 LCIA Rules, rather than by the arbitral tribunal as before. Pursuant to the *LCIA 2021 Annual Casework Report*, “in 2021, 30 of the 38 (79%) successful applications for consolidation were granted by the [LCIA] Court, compared to 15 out of 41 (37%) of successful applications for consolidation being granted by the [LCIA] Court 2020”<sup>449</sup>, in consideration of the finality nature of the decision made by the LCIA Court on the request for consolidation as demonstrated above, the LCIA Court is consequently powered more say in the decision-making process of consolidation in practice.

However, like many other rules, the dual competent bodies still reserve the discretion to deny the consolidation application even if the threshold conditions are satisfied. For example, even if all parties consent, consolidation between an LCIA arbitration and *ad hoc* arbitration or other institutional arbitration would be difficult to accomplish, which will be addressed as follows.

#### B. Is Consolidation Allowed beyond the Arbitrations Referring to the Same LCIA Rules?

Akin to other institutional arbitration (including SIAC), the consolidation between an LCIA arbitration and an *ad hoc* arbitration or an institutional arbitration administered by another arbitral institution is very difficult. In case of no consent is reached by all the parties, the arbitration agreements would definitely not be deemed as “compatible” with each other where one provides for an LCIA arbitration, another provides for an *ad hoc* arbitration or an institutional arbitration administered by another arbitral institution, since the LCIA Rules stress the to-be-consolidated arbitrations shall be “subject to the LCIA Rules”, namely only LCIA arbitrations are allowed to be consolidated under the auspice of LCIA.<sup>450</sup> Nevertheless, in case of such consolidation is agreed upon by all the parties, though difficult, LCIA may allow for the consolidation in a workaround way as *LCIA Guide* states — “their agreement [on

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<sup>447</sup> Scherer, ‘Chapter 18: Multiple Parties, Consolidation and Joinder’ (n 18) 307.

<sup>448</sup> LCIA, ‘2021 Annual Casework Report’ (n 404) 25.

<sup>449</sup> *ibid.*

<sup>450</sup> Scherer, ‘Chapter 18: Multiple Parties, Consolidation and Joinder’ (n 18) 303-304.

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such consolidation] could be interpreted as an amendment to their Arbitration Agreement, thus transforming the *ad hoc* or other institutional arbitration into an LCIA arbitration”<sup>451</sup>. Admittedly, this approach is not without risk of occurring parallel arbitrations since “it is uncertain how the other institution or *ad hoc* tribunal would handle such an agreement and whether they would readily consent for the arbitration to move to the LCIA”<sup>452</sup>.

Unlike SIAC consolidation<sup>453</sup>, however, designating different editions of the LCIA Rules (e.g. where one Arbitration Agreement refers to the “2020 LCIA Rules” and another Arbitration Agreement refers to the “2014 LCIA Rules”) may be reconciled under LCIA, for “the latest version of the LCIA Rules would apply even where the Arbitration Agreement expressly designates a prior version” unless there exist specific indications to manifest the parties’ clear intention to be only bound by a defunct version of the LCIA Rules.<sup>454</sup> This flexible approach is based on the Preamble of every version of the LCIA Rules (including the current 2020 version) under which “such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration”, as thus the latest version of the LCIA Rules will form part of the arbitration agreement and apply to both arbitrations.<sup>455</sup> Therefore, reference to different versions of the LCIA Rule, even for the version equipped with no consolidation provisions, does not constitute a hindrance to consolidation<sup>456</sup>. Compared to SIAC, though also subject to strict restrictions, LCIA attempts to allow for consolidation beyond reference to the same version of the LCIA Rules by adopting a more flexible approach.

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<sup>451</sup> *ibid* 302.

<sup>452</sup> *ibid* 302.

<sup>453</sup> *Vide supra* Chapter 4-Section 1-§3-A-[3]

<sup>454</sup> Scherer, ‘Chapter 18: Multiple Parties, Consolidation and Joinder’ (n 18) 305.

<sup>455</sup> *See* LCIA Rules (2020), Preamble; LCIA Rules (2014), Preamble; LCIA Rules (1998), Preamble. Also *see* Scherer, ‘Chapter 18: Multiple Parties, Consolidation and Joinder’ (n 18) 305.

<sup>456</sup> Scherer, ‘Chapter 18: Multiple Parties, Consolidation and Joinder’ (n 18) 305.

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CHAPTER 4. MODEL 4'S REPRESENTATIVES: ICC, SWISS, CEPANI,  
VIAC, SCC, CIETAC, HKIAC, AIAC, ACICA,  
AND DIS RULES

**Section 1. ICC Rules**

*§1. Context*

The International Court of Arbitration of the International Chamber of Commerce (ICC Court) is one of the earliest arbitral institutions to expressly introduce the consolidation provision in its arbitration rules, i.e. the ICC Rules 1998. Since ICC Court enjoys the most enduring industry leader position widely recognised on a global level<sup>457</sup>, viz seized as the most preferred arbitral institution worldwide and even self-proclaimed as “a cornerstone of international arbitration as a global system of justice”<sup>458</sup>, ICC Court’s breakthrough in introducing a consolidation mechanism *per se* has had a pivotal impact and thus attracted international peers to follow the fashion but more or less inject their own featured innovations in each consolidation solution, which ultimately boosted the proliferation of consolidation mechanisms at the institutional arbitration level in a diversified pattern within 25 years.

Besides the first edition of the consolidation mechanism introduced in the 1998 ICC Rules, the holistic Rules revisions in 2012, 2017 and 2021 also witnessed changes in the ICC consolidation provision. Nevertheless, in general terms, the present ICC consolidation provision contained in the 2021 ICC Rules, although having made a relatively distinct expansion compared to its previous versions, is often criticized as a

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<sup>457</sup> Besides the historical reputation in the international arbitration since its foundation in 1923, for example, the ICC Court has seized the top 1 preferred arbitral institution on the global level to date, in accordance with the QMUL International Arbitration Surveys (2015-2021).

<sup>458</sup> Helene Maïo, ‘Understanding the Current and Future Role of the ICC Court President: An Interview with Alexis Mourre’ (ICC, 28 April 2020)

<<https://iccwbo.org/news-publications/news/understanding-the-current-and-future-role-of-the-icc-court-president-an-interview-with-alexis-mourre/>> accessed 9 July 2023

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conservative approach due to its narrow scope compared to the peer competitors.<sup>459</sup> In particular, albeit the ICC Rules have relaxed its position to allow consolidation where the initial arbitrations are made upon more than one arbitral agreement since the 2012 revision, the restriction of the identity of parties imposed in this scenario persists until the present 2021 ICC Rules. This means that consolidation would be tough to be consolidated under the ICC Court in the typical situation of the engineering or construction industry where a subcontractor commences an arbitration against the general contractor based on one contract, and the latter then commences a separate arbitration against the employer (owner) based on another contract, unless all parties concerned have reached unanimous consent to such consolidation.<sup>460</sup>

As a practical matter, conceivably, the relatively narrow language of the ICC consolidation provision [Article 10] may make it hard to accommodate well the large case volume of the cases involved with multi-party and multi-contract registered in the ICC Court, and the possible accompanying complexity. From the statistics point of view, of the total 946 arbitral cases registered under the ICC Court in 2020, 31% involved multiple parties (i.e. around 293 multiparty cases filed in 2020)<sup>461</sup>, whereas, in the same year, the ICC considered 25 consolidation applications, of which 17 were granted<sup>462</sup>.

## *§2. ICC Court's Power to Decide Consolidation*

The ICC Rules have established the pattern that the issue of consolidation should be exclusively decided by the ICC Court rather than by an arbitral tribunal from the first

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<sup>459</sup> Furthermore, this criticism is long-lasting on the ICC consolidation solution, whether previous or current one. For example, on the 2012 ICC Rules, *see* Pair, 'The New ICC Rule on Consolidation: Progress or Change?' (n 88) 1078 ("One of the most frequent criticisms of the existing ICC rule on consolidation has been its limited scope."); on the present ICC Rules 2021, *see* Webster (n 42) 192 ("If in the practice of ICC arbitration, consolidation played a relatively small role, this was due to the overly restrictive language of art. 10.").

<sup>460</sup> Webster (n 42) 192

<sup>461</sup> International Chamber of Commerce (ICC), *ICC Dispute Resolution 2020 Statistics* (ICC, 3 August 2021) 9. Available under:

<<https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/>> (Last access on 5 May 2023)

<sup>462</sup> Webster (n 42) 192.

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ICC consolidation provision adopted in the 1998 version, which pioneered the fashion of Model 4.<sup>463</sup> Some commentators, like *Grierson* and *van Hooft*, further analyse that ICC's arbitral tribunal is not authorised to order consolidation in any event, including when the same arbitrators have been appointed in all to-be-consolidated arbitrations.<sup>464</sup> *Pair* and *Frankenstein* even bluntly speak out that “the arbitral panel has no jurisdiction to consolidate cases”.<sup>465</sup> The revised Article 10 in the present 2021 ICC Rules retains this feature.<sup>466</sup> By the way, in terms of the ICC Court itself, albeit it is not a legal entity separate from the ICC (International Chamber of Commerce) from the legal point of view, the ICC Rules ensure its relative independence from other parts of the ICC.<sup>467</sup>

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<sup>463</sup> See Article 4(6) of the ICC Rules 1998, which stated: “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... (emphasis added).” Massive comments on the 2012 and 2017 ICC Rules also verified this position. For example, on the 2012 version of the ICC consolidation provision, see Jacob Grierson and Annet van Hooft, *Arbitrating under the 2012 ICC Rules* (Kluwer Law International 2012) 122 (“[I]t is the only the Court that can order consolidation of arbitrations...”); Dimitar Kondev, *Multi-Party and Multi-Contract Arbitration in the Construction Industry* (John Wiley & Sons 2017) 70 (“Under Article 10 it is only the ICC Court that may decide to consolidate proceedings...”); and Pair, ‘The New ICC Rule on Consolidation: Progress or Change?’ (n 88) 1068; while on the 2017 version of the ICC consolidation provision, see Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816 (“Article 10 provides the ICC Court, rather than the arbitral tribunal, with the authority to order consolidation (regardless when the request is made).”); Andrea Carlevaris and Anne Marie Whitesell, ‘International Court of Arbitration of the International Chamber of Commerce’ in H  lene Ruiz Fabri (ed), *Max Planck Encyclopedias of International Procedural Law* (online edition, OUP 2019) para 37; and Smith (n 15) 198. However, there also exist some rare comments standing on the contrary position, for example, see William W. Park, ‘Challenging Arbitral Jurisdiction: The Role of Institutional Rules’ (2015) *Boston University School of Law, Public Law Research Paper No. 15-40*, <[https://scholarship.law.bu.edu/faculty\\_scholarship/11](https://scholarship.law.bu.edu/faculty_scholarship/11)> accessed 21 September 2023 (“However, this does not necessarily mean that the ICC Court has exclusive powers to consolidate proceedings.”) This conflict in academia will be discussed in detail in the following “§7. *Legal Effect of the ICC Court’s Decision on Consolidation*”.

<sup>464</sup> Grierson (n 463) 122.

<sup>465</sup> Pair, ‘The New ICC Rule on Consolidation: Progress or Change?’ (n 88) 1068.

<sup>466</sup> Webster (n 42) 191.

<sup>467</sup> See Article 1(1) of the ICC Rules 2021, which states: “The International Court of Arbitration (the ‘Court’) of the International Chamber of Commerce (‘ICC’) is the independent arbitration body of ICC.” Webster (n 42) 29.

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However, the ICC Court cannot exercise this consolidation-making power *sua sponte*, rather only upon the request of a party.<sup>468</sup> In the 1998 version of the ICC Rules, there was a definite time limit for the party to submit the request for consolidation before the Terms of Reference had been signed or approved by the ICC Court.<sup>469</sup> Since the revision in 2012, whether the requesting party or the ICC Court has been no longer subject to this temporal restriction.<sup>470</sup> In turn, if the consolidation decision is made after the Terms of Reference have been signed or approved under the existing rules, the Terms need to be amended accordingly.<sup>471</sup>

### *§3. The Three Alternative Conditions and ICC Court's Discretion*

Under the 1998 Rules (Article 4(6)), in the absence of all parties' agreement, the ICC Court could only consolidate separate proceedings when the to-be-consolidated arbitrations were between the same parties.<sup>472</sup> The present Article 10 of the ICC Rules 2021 has cautiously broadened the ICC Court's power, as stated in the following three

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<sup>468</sup> Article 10 of the ICC Rules 2021 states: "The Court may, **at the request of a party**, consolidate two or more arbitrations pending under the Rules into a single arbitration... (emphasis is added)."; Pair, 'The New ICC Rule on Consolidation: Progress or Change?' (n 88) 1068

<sup>469</sup> See Article 4(6) of the ICC Rules 1998 which stated: "...[T]he 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 (emphasis added)." As Lara M. Pair analyses, the reference of the then Article 19 does not cause consolidation strictly. See further in Pair, 'The New ICC Rule on Consolidation: Progress or Change?' (n 88) 1072-1073

<sup>470</sup> Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC Publication 2012) 3-350, 112; Webster (n 42) 191; Christophe Imhoos, Erik Schäfer and Herman Verbist, *ICC Arbitration in Practice* (2nd edn, Kluwer Law International 2015) 61; Pair, 'The New ICC Rule on Consolidation: Progress or Change?' (n 88) 1072.

<sup>471</sup> W. Laurence Craig and Laurent Jaeger, 'The 2012 ICC Rules: Important Changes and Issues for Future Resolution', (2012) 1 *Les Cahiers de l'Arbitrage/The Paris Journal of International Arbitration* 15, 21

<sup>472</sup> See Article 4(6) of the ICC Rules 1998, which stated: "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... (emphasis added)." Imhoos (n 470) 61.

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alternative conditions, where the ICC Court still retains the discretion to accept or reject the consolidation request even if one of the conditions is in principle met.

### A. First Condition

As per Article 10(a) regarding the first condition, the Court may order consolidation in accordance with an explicit agreement of all the parties in all the to-be-consolidated arbitrations. Albeit not specifically mentioned in the ICC Rules, the official *Secretariat's Guide to ICC Arbitration published in 2012* (“*ICC Secretariat's Guide (2012)*”) <sup>473</sup> suggests the timing of reaching such an explicit agreement matters. If such an agreement is jointly reached prior to or alongside the commencement of the arbitrations to be consolidated, the Secretariat will directly take the administrative steps necessary to effect the consolidation without requesting a decision from the ICC Court; while if such an agreement is made after the commencement of the arbitrations to be consolidated, the Secretariat has to forward the application to the ICC Court.<sup>474</sup> However, some commentators submit that, even though there exists an explicit agreement to consolidation, the compatibility requirement between the different arbitration agreements as expressly prescribed in subparagraph (c) (*vit* the third condition) still needs to suffice in the application of subparagraph (a).<sup>475</sup> In this situation, it may be more justified to expect, even if the agreement to consolidation is made before the commencement of the to-be-consolidated arbitration, the Secretariat to request the ICC Court to make a decision rather than directly implement the consolidation when there is any suspicion of incompatibility between the arbitration agreements involved that parties fail to rectify jointly.

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<sup>473</sup> Although the ICC Secretariat's Guide (2012) was specifically for the application of the ICC Rules 2012, the Guide's interpretation should still be deemed as applicable *mutatis mutandis* when the related provision has not changed in substance.

<sup>474</sup> Fry (n 470) 3-353, 112.

<sup>475</sup> See Webster (n 42) 192. (“If the parties agree to have two or more cases consolidated, the ICC Court will normally want to respect that agreement, unless there existed circumstances making such consolidation inappropriate. This could be the case, for instance, if the arbitration clauses of the respective arbitration were not compatible, and the parties' agreement to consolidate would not cure the incompatibility. As a matter of fact, even if all of the conditions listed in art. 10 are satisfied the ICC Court may refuse the consolidation when each matter referred to different places of arbitration arguing that it was the parties' intention to have separate arbitrations with different seats.”)

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## B. Second Condition

As per Article 10(b) regarding the second condition, consolidation may be ordered when all claims are made under the same agreement or arbitration agreements. Under this scenario, no strict identity between the parties of the to-be-consolidated arbitrations is required; the controlling factor rests with whether all parties are subject to the same arbitration agreement or the same arbitration agreements. How to understand the wording “same arbitration *agreements*” added in the 2021 revision? The *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2021)* (“2021 ICC Note”) provides a good example in this regard: parties A, B, C and D are parties to a Share Purchase Agreement and a Shareholders Agreement. Where parties A and D are parties to Arbitration 1, whereas parties B and C are parties to Arbitration 2, both of which are based on the Share Purchase Agreement and the Shareholders Agreement, it may be possible to consolidate Arbitration 1 and Arbitration 2.<sup>476</sup> In this vein, the typical engineering disputes between the owner, general contractor, on the one hand, and between the general contractor and the sub-contractor, on the other hand, may be possible to achieve an ICC consolidation if their claims are all bound by the same arbitration agreement(s), for example, under an umbrella agreement.

In addition, by applying the illustration from the *ICC Secretariat’s Guide (2012)* *mutatis mutandis*, the mere fact that two or more arbitrations have been commenced under the same arbitration agreement or agreements does not suffice for the ICC Court to order the consolidation, where the Court still necessitates to find whether there is any link or not between the claims made in each arbitration on a case-by-case basis at its discretion.<sup>477</sup> If the Court fails to find any link between the claims arising from the same arbitration agreement, the consolidation is probably refused to be ordered.

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<sup>476</sup> ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (1 January 2021) para 19(b), 5

<sup>477</sup> See Fry (n 470) 3-355, 113.

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### C. Third Condition

Article 10(c), where the third threshold condition is contained, authorizes the ICC Court to order consolidation in case claims are not made under the same arbitration agreement or agreements, if the following three conditions are met: when (i) the claims remain between the same parties, (ii) the disputes in the arbitrations arise in connection with the same legal relationship, and finally, (iii) the Court finds the arbitration agreements to be compatible.<sup>478</sup>

First, as mentioned in the context *supra*, it is clear that, unless all parties agree to the contrary, consolidation is not permitted involving multiple parties to multiple agreements under the auspice of the ICC Court. Thus, as the iterated example, a dispute between the owner and general contractor based on one arbitration agreement on the one side, and the general contractor and sub-contractor based on another arbitration agreement on the other side could not be consolidated by the ICC Court, absence the parties' agreement within the meaning of subparagraph (a).<sup>479</sup>

Second, concerning the "same legal relationship", even though it is a more undefined term, to which a common understanding seems to have been formed, *viz* the "same legal relationship" refers to "the same economic transaction" in the ICC context, where, among other things, the *ICC Secretariat's Guide* (2012) with a strong guiding effect holds this stance, together with the various academic comments.<sup>480</sup> The "same economic transaction" can be, for example, a common construction project or a common distribution strategy.<sup>481</sup> The ICC Court may consolidate two cases arising in connection with the same project, where the different contracts on which the arbitrations are based to commence are between the same parties, share the same relief and most of the evidence is overlapped,<sup>482</sup> for instance, the case where the claims are brought under a joint venture agreement and a shareholders' agreement pertaining to the joint venture company<sup>483</sup>.

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<sup>478</sup> Article 10(c) of the 2021 ICC Rules.

<sup>479</sup> Webster (n 42) 192-193

<sup>480</sup> See Fry (n 470) 3-357, 114 ("In the context of its practice relating to multi-contract arbitration, the Court interpreted this requirement as meaning that all contracts must be related to the same economic transaction.") Pair, 'The New ICC Rule on Consolidation: Progress or Change?' (n 88) 1075.

<sup>481</sup> Grierson (n 463) 124.

<sup>482</sup> Pair, 'The New ICC Rule on Consolidation: Progress or Change?' (n 88) 1075

<sup>483</sup> Grierson (n 463) 124.

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Third, regarding the compatibility between the different arbitration agreements, it does not mean the arbitration agreements must be identical but required to be at least substantially compatible.<sup>484</sup> The following list of factors which may and may not affect such compatibility needs to bear in mind, which is comprehensively summarized mainly on the basis of the *ICC Secretariat's Guide (2012)*<sup>485</sup>, the latest literature on the 2021 ICC Rules contributed by *Webster and Bühler*<sup>486</sup>, and some case law:

- At first, each arbitration agreement must be an agreement to arbitrate *under the ICC Rules*<sup>487</sup>, which can derive two further sub-issues: (i) whether the ICC Court is allowed to consolidate an arbitration under the ICC Rules and an arbitration not under the ICC Rule; and (ii) whether the ICC Court is allowed to consolidate the arbitrations under different versions of ICC Rules.
  - As to sub-issue (i), providing for different arbitration rules between the arbitration agreements is considered incompatible under the ICC Rules<sup>488</sup>, implying that the ICC Court is prohibited from consolidating a standard ICC arbitration (an institutional arbitration administered by the ICC Court and referring to the ICC Rules) and an institutional arbitration administered by an arbitral institution other than the ICC Court, or an *ad hoc* arbitration. That being said, as the ICC Secretariat's Guide (2012) confirms, the ICC Court may appoint the same arbitral tribunal in the relevant cases in the event of failure of consolidation to run the cases concurrently. This workaround may also be utilised where consolidation cannot be expected to achieve between one arbitration administered by the ICC and another not administered by the ICC, which the case *Privinest Shipbuilding v. Mozambique (2020)*<sup>489</sup> well illustrated, even the consolidation application was directly not sought to consolidate institutional arbitrations administered by different arbitral institutions. This case involved a total of 5 relevant arbitrations seated in

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<sup>484</sup> Fry (n 470) [3-243], 81.

<sup>485</sup> *ibid* [3-357], 114, and [3-243]-[3-247], 81.

<sup>486</sup> Webster (n 42) 127.

<sup>487</sup> Fry (n 470) [3-243], 81.

<sup>488</sup> See Webster (n 42) 127. ("If the arbitration agreements provide for arbitration under different arbitration rules, then they are also inconsistent."); Pair, 'The New ICC Rule on Consolidation: Progress or Change?' (n 88) 1076-1077 ("Certainly, for consolidation, all parties must have agreed to the same arbitral institution.")

<sup>489</sup> *Privinest Shipbuilding S.A.L. (Holding) v. The Republic of Mozambique*, Judgement of the High Court of Justice of England and Wales [2020] EWHC 2012, 30 July 2020

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Geneva, Switzerland (sharing a similar allegation and answer), where 3 were administered by the ICC (under the ICC Rules 2017) based on one arbitration agreement, and 2 were administered by the SCAI (under the Swiss Rules 2012) based on another arbitration agreement.<sup>490</sup> The two SCAI arbitrations were consolidated into the same proceeding under the SCAI.<sup>491</sup> In addition, the arbitral tribunals in the first commenced ICC arbitration and the SCAI consolidated arbitration comprised the same three arbitrators, and both sets of arbitrations were being managed together though not consolidated with each other (e.g. sharing a similar timetable).<sup>492</sup> In this situation, though the ICC Court refused the application of consolidating the second and third commenced ICC arbitrations with the first commenced arbitration, it rather appointed the same tribunal as that in the first ICC and the consolidated SCAI arbitrations.<sup>493</sup> In doing so, albeit formal cross-institution consolidation is impossible merely under the ICC Rules (*viz* without any extra cross-institution consolidation provision provided for in the default procedural law like the Netherlands Arbitration Act does so), somehow, a *de facto* consolidation may be accomplished by appointing the same arbitral tribunals in each pending arbitration.

- Regarding sub-issue (ii), referring to different versions of the ICC Rules between arbitration agreements does not necessarily constitute an incompatibility to hinder consolidation. The ICC Case, *GUPC v. ACP (IV)*, reflects this position of the ICC Court.<sup>494</sup> Over the ICC-Court-rendered decision on the consolidation application, the ICC Court *vis-à-vis* addressed the alleged incompatibility arising out of the referring different versions of the ICC Rules between the two initial arbitrations in this case (where one arbitration was under the 2012 version of the ICC Rules, and another fell under the 2017 version).<sup>495</sup> Considering that, first, both versions allowed the Court to consolidate proceedings, and second, the general fact that

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<sup>490</sup> *ibid*, [24]-[36]

<sup>491</sup> *ibid*, [37]

<sup>492</sup> *ibid*, [38]-[39]

<sup>493</sup> *ibid*, [40]

<sup>494</sup> ICC Case No. 22466/ASM/JPA(C-22967/JPA), *Grupo Unidos por el Canal, S.A., Sacyr S.A., Salini-Impregilo S.P.A and Jan de Nul N.V. v Autoridad del Canal de Panamá (IV)*, Decision of the ICC Court on Consolidation of ICC Cases No. 22967/JPA and 22466/ASM/JPA into Case 20910/ASM/JPA, 6 December 2017

<sup>495</sup> *ibid*, [23]-[24]

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consolidation will always have the later proceedings merged into earlier claims, which in turn did not necessarily preclude the Court from consolidating the arbitration(s) commenced under the earlier version of the ICC Rules, the Court found that there was no real incompatibility caused by the differences in versions of the ICC Rules in this particular case.<sup>496</sup> In turn, incompatibility may arise if any substantial gap exists between the different versions regarding the related consolidation issue in specific cases. In the context that parties had agreed, through Article 6(1), to submit their arbitration to the ICC Rules in effect on the date that the arbitration commences, it makes it possible to have the arbitrations subject to different versions of the ICC Rules even they are initiated under the identical arbitration agreement. In this case, the reference to the 2012 and 2021 versions between different arbitration agreements might be deemed incompatible when the to-be-consolidated arbitrations involve different parties, even if the claims are all under the same arbitral clause, because the 2012 version of the ICC consolidation provision did not permit different parties to be involved in the absence of all parties' agreement, let alone the distinct inconsistency by referring to the 1998 version and other later versions. In a word, whether referring to different versions of the ICC Rules between arbitration agreements hinders consolidation or not depends on the particular circumstances on a case-by-case basis.

- Beyond doubt, it gives rise to the incompatibility that prevents the ICC Court from allowing the case to proceed, if the agreed language, number of arbitrators, or seat of arbitration are clearly distinct between the arbitration agreements in question. Among other things, it is argued that the justification for refusing to apply different seats of arbitration as a ramification of a consolidating decision is that one award cannot be rendered that is subject to annulment in two different jurisdictions, particularly where the award would be set aside in one jurisdiction and not the other.<sup>497</sup> If some ambiguity exists in regard to the abovementioned aspects in the arbitration agreements involved, the issue of compatibility could be delicate to determine. For example, as the *ICC Secretariat' Guide (2012)* indicates, where one arbitration agreement provides for Paris as the seat of arbitration, and another is silent regarding the seat of arbitration, or one provides for three arbitrators and the other is silent regarding the number of arbitrators,

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<sup>496</sup> *ibid* [24]-[25].

<sup>497</sup> Webster (n 42) 127.

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there does not necessarily occur inconsistently.<sup>498</sup> In such cases, the ICC Court may rectify the potential incompatibility, by fixing the seat of arbitration under the current Article 18(1)<sup>499</sup> or by fixing the number of arbitrators under the current Article 12(2)<sup>500</sup>. Meanwhile, the *ICC Secretariat's Guide (2012)* stresses that the ICC Court should exercise such power of making arbitral clauses compatible with caution and restraint.<sup>501</sup> Even so, endorsed of the views of *Webster* and *Bühler*, the ICC Court could be deemed more justified to do so if there is an underlying legitimate interest to have the arbitrations commenced under the different arbitration agreements heard together, such as to avoid inconsistency in results or simply for the sake of procedural efficiency and cost reduction.<sup>502</sup>

- Some aspects of difference between arbitration agreements, however, do not, or may not, prevent the ICC Court from consolidating cases. For example, in contrast to the situation that different applicable procedural laws or rules are provided for between arbitration agreements, providing for differing governing laws of the underlying contracts between arbitration agreements is not generally attributed to an incompatibility on the ground that the arbitral tribunal is not confined to apply the same substantial law to all the claims consolidated in one set of arbitral proceedings, who can apply one law to the claims made under one arbitration agreement and apply different law to those made under another, without altering any substantial law as the initial arbitral agreements provide for.<sup>503</sup> In addition, as to the different time limit set, or certain additional powers conferred upon arbitral tribunals contained in the arbitration agreements, whether these incompatibilities are deemed to cause substantial incoherency all depends on the specific circumstances of the case.<sup>504</sup>
  
- Last but not least, bear in mind that the parties can always rectify the

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<sup>498</sup> Fry (n 470) [3-244], 81.

<sup>499</sup> Article 18(1) of the ICC Rules 2021 states: “The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.”

<sup>500</sup> Article 12(2) of the ICC Rule2 2021 states: “Where the parties have not agreed upon the number of arbitrators, the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.”

<sup>501</sup> Fry (n 470) [3-244], 81.

<sup>502</sup> Webster (n 42) 128.

<sup>503</sup> Fry (n 470) [3-245], 81; Webster (n 42) 127.

<sup>504</sup> Fry (n 470) [3-246], 81

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incompatibilities between the initial arbitration agreements by the subsequent agreements.<sup>505</sup>

#### D. Discretion

In light of the text of Article 10, the ICC Court “may”, not “must”, grant the consolidation mechanically, even if one of the three threshold conditions is satisfied. After contemplating any circumstance it considers relevant, the ICC Court still reserves the full discretion to reject the request for consolidation when it considers it suitable. The abovementioned refusal decision on the consolidation in *GUPC v. ACP (IV)* rendered by the ICC Court continues to serve as an intuitionistic illustration to gain insight into the ICC Court’s exercise of its discretion on consolidation.

In general terms, the case was related to various claims arising in connection to the same project involving the Panama Canal.<sup>506</sup> On 17 October 2017, the claimants jointly filed the application seeking to consolidate two extant ICC cases, headed 22967/JPA and 22466/ASM/JPA, into the mother proceedings, ICC case 20910/ASM/JPA (C-20911/ASM), under Article 10(b) and/or 10(c) of the ICC Rules 2012.<sup>507</sup> Among them, Cases 22967/JPA and 22466/ASM/JPA were commenced in December 2016 and July 2017 respectively, while the mother proceedings, consolidated upon agreement as Case 20910/ASM/JPA (C-20911/ASM), were commenced in March 2015.<sup>508</sup> The ICC Court first assessed whether the consolidation application fell under Article 10(b) and/or (c) as alleged. Regarding Article 10(b), the ICC Court found the focused conditions therein that “*all of the claims* in the arbitrations are made under **the same** arbitration agreement (emphasis added)” were not met, given the fact that certain of the claims were made under different arbitration agreements under different contracts.<sup>509</sup> As to Article 10(c), after reviewing the facts of the case, the ICC Court recognized that the conditions of Article 10(c) were in principle met, on the grounds that: (i) the arbitrations were between the same parties, (ii) the relevant disputes arose in relative to the same legal relationship, and (iii) none

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<sup>505</sup> *ibid* [3-247], 81 (“The participation of all parties in the arbitration and their agreement as to how the arbitration should proceed will generally overcome incompatibilities of any kind between arbitration agreements.”).

<sup>506</sup> *GUPC* (n 494) [5].

<sup>507</sup> *ibid*, [1] & [6]

<sup>508</sup> *ibid*, [6]-[7]

<sup>509</sup> *ibid*, [9]-[18]

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of the differences identified by the respondent who opposed this consolidation were likely to render the arbitral clauses substantively incompatible such as to prevent the Court from ordering consolidation.<sup>510</sup>

Then, despite the above finding that Article 10(c) would apply in principle, the ICC Court determined to further exercise its discretion *sua sponte* by reviewing some circumstances it considered “most relevant [to] the facts of this case”,<sup>511</sup> part of them were inspired by parties’ exchange of submissions. The ICC Court paid high regard to the practical impact on the efficient and effective conduct of the original arbitration (i.e. Case 20910/ASM/JPA (C-20911/ASM)), should the consolidation be ordered.<sup>512</sup> First, as to the respective stages of the pending arbitrations, the Court found that the various proceedings were not at a similar stage as the claimants argued in the submissions — the first arbitration (Case 20910/ASM/JPA (C-20911/ASM) commenced in 2015 was already well-advanced (e.g. the Terms of Reference had been signed on 7 July 2016; a partial award on jurisdiction had been rendered; the full Statement of Claim had been filed; and the full Statement of Defence was due shortly), whereas the other two arbitral proceedings (i.e. ICC Case 22967/JPA and ICC Case 22466/ASM/JPA, respectively) had yet formed their tribunals, by the time the consolidation application was filed.<sup>513</sup> Second, given that the tribunal in Case 20910/ASM/JPA (C-20911/ASM) had already decided various jurisdictional matters in a partial award, the ICC Court anticipated risk of disruption, because should such consolidation be granted, the tribunal in Case 20910/ASM/JPA (C-20911/ASM) would have to resolve new jurisdictional claims arising from the newly-joined cases (ICC Case 22967/JPA and ICC Case 22466/ASM/JPA), giving rise to the inevitable interaction between those various decisions in the jurisdiction which may create further disruption to the proceedings.<sup>514</sup> Third, the Court found that it was too late to merge the two other later-initiated proceedings into the original action, otherwise all of the arbitrations would run the risk of disruption materially, which was also in opposition to the claimants’ stance.<sup>515</sup>

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<sup>510</sup> *ibid.*, [9], and [19]-[27]

<sup>511</sup> *ibid.*, [28]-[29]

<sup>512</sup> *Ibid.*, [30]

<sup>513</sup> *ibid.*, [30]

<sup>514</sup> *ibid.*, [31]

<sup>515</sup> *ibid.*, [32]-[33]

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For these three reasons that the potential consolidation would materially impair the efficiency and effectiveness of the original arbitration (Case 20910/ASM/JPA (C-20911/ASM)), the ICC Court decided to decline the application to consolidation by exercising its discretion.<sup>516</sup>

#### §4. Procedural Fairness

Unlike most other selected consolidation rules, the ICC consolidation provision [Article 10] does not expressly demand the ICC Court hear the comments from the parties and, if any, prior-appointed arbitrators, on the request for consolidation before rendering its decision on such request.

Nevertheless, there is no need to raise concerns arising from the lack of such a stipulation. The established practice has formed that the Secretariat does provide the parties (at least for the parties) with the equal opportunity to comment on the request for consolidation, and then the Secretariat will forward the submitted comments to the ICC Court, and this has been codified in the *2021 ICC Note*<sup>517</sup>. In addition, note that the form of the ICC Court hearing the comments from the parties is generally confined to the written submissions transferred via the Secretariat as a go-between. Put differently, at any event, the ICC Court would never conduct an oral hearing to have the party do any vis-à-vis oral presentation as to the request for consolidation, on the basis of the general rule enshrined in Article 1 of the *ICC Internal Rules* that the parties (and the prior-appointed arbitrators) are prohibited from attending sessions of the ICC Court out of the respect of confidential nature of the work of the ICC Court<sup>518</sup>.

The ICC Case No. 23988/MHM/HBH (C-24011/MHM/HBH) rendered in 2020 illustrates it well.<sup>519</sup> In this case, three claimants (contractors) jointly commenced two separate ICC arbitrations against the same respondent (employer) under two different

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<sup>516</sup> *ibid*, [9] & [34]

<sup>517</sup> ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (1 January 2021) para 49 (“Such request [for the communication of reasons] may be made when the Secretariat invites parties to comment ahead of the Court’s decision.”)

<sup>518</sup> Webster (n 42) 37.

<sup>519</sup> ICC Case No. 23988/MHM/HBH (C-24011/MHM/HBH), *The Joint Venture “JV Copri Construction Enterprises W.L.L. & Aktor Technical Société Anonyme”, Copri Construction Enterprises W.L.L. and Aktor S.A. v. Albanian Road Authority under the Authority of the Ministry of Public Works and Transport*, Final Award, 1 September 2020

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contracts, which were both subject to the ICC Rules (2017) and both seated in Paris, France.<sup>520</sup> The respondent applied to consolidate these two arbitrations into one set of proceedings under Article 10<sup>521</sup>, but the claimants expressly disagreed with this request<sup>522</sup>. In this situation, the Secretariat invited all the parties to submit their comments on the said request for consolidation within a 5-day time frame.<sup>523</sup> And both three claimants and one respondent submitted their comments on the consolidation issue in due time.<sup>524</sup> In two days after the receipt of the submission of the parties' comments, the ICC Court rendered the final decision which is to grant this request.<sup>525</sup>

Of course, for the sake of ameliorating clarity and predictability, it would be ideal to codify this established practice into the ICC Rules in future revisions.

### *§5. Communication of Reasons for ICC Court Decision*

According to the general standard practice on a global level, no reasons are obligatory to communicate with respect to the decisions made by the administering arbitral institution, usually on the ground that they are of an administrative, rather than of a judicial nature. Under some selected rules, there are even explicit provisions to indicate that no reasons will be provided for the decision on consolidation rendered by the administering institution.<sup>526</sup> Nevertheless, in this regard, the ICC Court has shifted to adopt an opposite stance. In response to the increasing users' demand, the ICC Court has not only become one of the pioneers in communicating reasons for its decision on consolidation but also acts as the only arbitral institution among the 17 selected institutions to institutionalise the practice of communicating the reasons for its decisions on the consolidation request through its own official *ICC Internal Rules*

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<sup>520</sup> *ibid*, [14]-[17]

<sup>521</sup> *ibid*, [19]

<sup>522</sup> *ibid*, [21]

<sup>523</sup> *ibid*, [26] (“Further to correspondence of the Parties, the Secretariat indicated on 11 January 2019 that, if any of the parties wished to provide additional comments regarding the consolidation issue, such comments may be filed by 15 January 2019.”)

<sup>524</sup> *ibid*, [27]

<sup>525</sup> *ibid*, [28]

<sup>526</sup> For example, Rule 29.1 of 2020 LCIA Rules. Further *see* Part 1-Chapter 3-Section 3-§2-B-[2].

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and the *ICC Note* since 2016<sup>527</sup>, both at the effort to increase the understanding and transparency of the internal practice of the ICC Court to the users of ICC arbitration.

As per the current *ICC Internal Rules* (Article 5. “Communication of Reasons of Decisions”) and the *ICC Note* (Para 46-49 “Communication of Reasons for the Court’s Decisions”) for the ICC Rules 2021, the ICC Court may communicate the reasons for the decision on consolidation upon a request of a party filed in advance of the decision as to consolidation. Put differently, the party is not entitled to request the communication of reasons after the consolidation decision has been rendered by the Court. In addition, in consideration of the more conservative approach adopted in previous rules and practices<sup>528</sup>, the *2021 ICC Note* clarifies that for arbitration conducted under the previous ICC Rules effective prior to the 2017 version, a request for communication of reasons must be made jointly by all the parties concerned. However, at a legit request, the ICC Court “may”, not “must”, accept to communicate the related reasons for its decision on consolidation. Namely, it is fully at the ICC Court’s discretion to decide whether it is fit to communicate the reasons as requested on a case-by-case basis, but ICC Court would only reject a request for communication of reasons in exceptional cases, as the *2021 ICC Note* specifies.<sup>529</sup>

Similar to the award, the ICC also has some Court-made decisions on consolidation attached with reasons published conditionally, and it allows the outsiders to gain a visual perception of what the reasons issued by the Court on the consolidation decision may look like in practice. The abovementioned ICC Case, *GUPC v. ACP (IV)*, is such an example. At first glance, this decision, titled “*Decision of the ICC Court on Consolidation of ICC Cases No. 22967/JPA and 22466/ASM/JPA into Case 20910/ASM/JPA*”, in structure, is composed of an overall procedural process regarding the request for consolidation, an overview of the application, and then give the conclusion and the following reasons.<sup>530</sup> Among other things, it can be said that

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<sup>527</sup> First of all, it was the 2016 ICC Note that took the first step to amend that the ICC Court may communicate reasons to the parties for decisions on consolidation of cases, upon all parties’ joint request; and then, the 2019 ICC Note further relaxed the condition to file the request — the request can be made *ex parte*, rather than requiring all parties’ consent; at last, the 2021 ICC Internal Rules codifies this practice and the 2021 ICC Note also update in more details.

<sup>528</sup> *ibid.*

<sup>529</sup> ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (1 January 2021) para 47 (“In exceptional circumstances, however, the Court may decide not to communicate the reasons for any of these decisions.”)

<sup>530</sup> *GUPC* (n 494).

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the reasoning part was well elaborated and demonstrated step by step. Following the consolidation provisions in Article 10 and the claims, the ICC Court first assessed whether the scenarios of this case met the conditions in Article 10(b) and (c) under the applicable 2012 ICC Rules as the applicant alleged.<sup>531</sup> Based on the finding that one threshold condition (enshrined in Article 10(c)) was met in principle<sup>532</sup>, the Court further took into all the related circumstances of this case, from which it found consolidation unsuitable.<sup>533</sup> Hence, the ICC Court exercised its discretion to reject granting the requested consolidation as the final decision.<sup>534</sup> Clearly, the reasons provided by the ICC Court are highly detailed and comparable to those of a tribunal-made award. They are definitely not perfunctory and superficial in nature.

### *§6. Administrative Handling of Consolidation and Establishment of Arbitral Tribunal to Hear Consolidated Proceedings*

When the ICC Court decides to grant the consolidation, as per the third subparagraph of Article 10, the arbitrations shall be consolidated into the arbitration that was commenced first, unless otherwise agreed. This stipulation contains two aspects of effects. First, in terms of an administrative effect, the case reference (including the case number and caption) of the first case filed with the ICC Court will become the reference of the arbitration after the consolidation, and the Secretariat, in practice, will always keep in parenthesis the full case reference of the second case. For example, as follows:

*“23988/MHM/HBH (C-24011/MHM/HBH).”<sup>535</sup>*

*Or “20910/ASM/JPA (C-20911/ASM).”<sup>536</sup>*

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<sup>531</sup> *ibid*, at [8] and [10]-[27]

<sup>532</sup> *ibid*, at [19]-[27]

<sup>533</sup> *ibid*, at [28]-[33]

<sup>534</sup> *ibid*, at [9] and [34]

<sup>535</sup> *Albanian Road Authority* (n 519).

<sup>536</sup> *GUPC* (n 494).

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Meanwhile, merging all the arbitrations into the first commenced arbitration also implies that the tribunal in the first arbitration is in charge of hearing the consolidated proceedings. Furthermore, when the ICC Court exercises its discretion, the second subparagraph of Article 10 highlights that the ICC Court shall take into account “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”<sup>537</sup>. In light of the *ICC Secretariat’s Guide (2012)*, if arbitrators have been confirmed in more than one of the arbitrations and those arbitrators are different individuals, the ICC Court is deprived of the power to consolidate the arbitrations because it will be incapable of establishing a single tribunal to hear the consolidated arbitration absent the resignation of arbitrators or their removal by the ICC Court by agreement of the parties.<sup>538</sup> Accordingly, much literature summarises that a *de facto* temporal limit exists on consolidation under the ICC Rules up to the stage when an arbitrator is confirmed in more than one of the to-be-consolidated arbitrations.<sup>539</sup> Beyond that, *Gary B. Born* even argues that such a restrictive composition approach of the consolidated tribunal will, in turn, make consolidation unlikely to be ordered in cases of involvement of different parties, as some of them will not have participated in the arbitrator(s) appointment of the “first” tribunal.<sup>540</sup>

### *§7. Legal Effect of the ICC Court’s Decision on Consolidation*

Concerning the legal effect of the ICC Court’s decision on consolidation, strictly speaking, no express declaration on the issue can be found in the ICC Rules. To my observation, however, the answer to this issue seems clear enough, thanks to the clarification of the official *ICC Secretariat’s Guide (2012)*<sup>541</sup> and the consensus reached in academia. In a word, the ICC’s decisions on consolidation are final and

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<sup>537</sup> Article 10 of the ICC Rules 2021

<sup>538</sup> Fry (n 470) 3-358, 114; also, Smith (n 15) 201

<sup>539</sup> Smith (n 15) 196-197, 200; Pair, ‘The New ICC Rule on Consolidation: Progress or Change?’ (n 88) 1073, nevertheless, this article still stresses that it does not amount to a “definite time limit” yet.

<sup>540</sup> Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816.

<sup>541</sup> Fry (n 470) 3-356, 114.

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binding, not only upon the parties but also upon the tribunal, particularly meaning that the tribunal is not authorised to review or undo the Court's decision with respect to consolidation.<sup>542</sup>

To demonstrate this conclusion, in particular, the *ICC Secretariat's Guide (2012)* and the literature collectively emphasise that, under the framework of the ICC Rules, albeit Articles 7 [joinder of additional parties], 8 [claims between multiple parties] and 9 [multiple contracts] are all indicated to be subject to the Court's *prima facie* jurisdiction threshold enshrined in Article 6, Article 6 does not play any role in consolidation under Article 10.<sup>543</sup> Accordingly, while the Court's decision made under Articles 7, 8, and 9 is a *prima facie* decision for jurisdiction by reference to Article 6, which is not binding upon the tribunal in case of a positive decision, whereas the Court's decision made under Article 10 is essentially not a "*prima facie*" one but a final decision, to which arbitral tribunal shall submit.<sup>544</sup> Hence, it can further conclude that there is no interrelationship between consolidation under Article 10 and all other procedural tools serving for multi-contract and multi-party arbitration, i.e. Article 7 [joinder of additional parties], 8 [claims between multiple parties] and 9 [multiple contracts]), under the ICC Rules.

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<sup>542</sup> The following literature explicitly share the same position: Webster (n 42) 191; Craig, 'The 2012 ICC Rules: Important Changes and Issues for Future Resolution' (n 471) 21-22; Grierson (n 463) 122; Kondev (n 463) 70; Whitesell (n 463) para 37; Park, 'Challenging Arbitral Jurisdiction: The Role of Institutional Rules' (n 463)

<sup>543</sup> Fry (n 470) 3-356, 114 and 3-359, 115 ("Article 6 plays no role in consolidation under Article 10")

<sup>544</sup> Webster (n 42) 128 ("On a more general level, there is an issue of whether the criteria under art. 6(4) with respect to arbitration under more than one arbitration agreement should be interpreted in the light of the requirements for joinder under art. 10...[T]here is no cross reference to art. 10 in art. 6(4)."); Grierson (n 463) 125 ("Although the wording of Article 10(c) is not identical to the wording of Article 6(4)(ii), the Secretariat has announced the intention of the Court to apply the articles in a similar manner. Nevertheless, **it should not be forgotten that Article 10(c) provides for a final decision by the Court, whereas Article 6(4)(ii) only provides for a prima facie screening, subject to a final decision by the arbitral tribunal.**"); Kondev (n 463) 70 ("Unlike the decision under Article 9, **the ICC Court's decision under Article 10 is not a prima facie decision but a final procedural decision.**")

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Based on the conclusion that the ICC Court's decision on consolidation is binding on the tribunal, some commentators, like *Webster*<sup>545</sup> and *Craig*<sup>546</sup>, attempt to make sense of the more restrictive approach adopted in the consolidation provision under Article 10 than the one in the multiple contracts provision under Article 9, despite the recognised similarity in concept between consolidation and multiple contracts within the ICC Rules<sup>547</sup>, on the ground that ICC Court does not exercise a *prima facie* control on the issue of consolidation as it does so on multiple contracts under Article 9, the decision on the former cannot be reviewed and overturned by the tribunal as that one on the latter may do so, so that the scope of consolidation is set relatively narrow. The same logic also applies to the assessment of the relationship between Article 10 and Articles 7 and 8.

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<sup>545</sup> Webster (n 42) 191 ("This decision to consolidate the arbitrations is to be taken exclusively by the ICC Court. It is an administrative decision, which is binding not only upon the parties, but also upon the Tribunal. The arbitrators have no power under the Rules to consolidate ICC arbitration proceedings, nor can they undo the ICC Court's decision to consolidate. **This explains the relatively narrow scope of application of art. 10.**")

<sup>546</sup> Craig, 'The 2012 ICC Rules: Important Changes and Issues for Future Resolution' (n 471) 22 ("The requirements for such a decision are therefore stricter.")

<sup>547</sup> Fry (n 470) 3-356, 113 ("Article 10, subparagraph (c)... That third requirement is also found in Article 6(4), subparagraph (ii), when the Court considers whether a single arbitration can proceed on the basis of more than one arbitration agreement. **This shows the similarity between a single arbitration involving claims under more than one arbitration agreement and the consolidation of two or more arbitrations involving claims made under different arbitration agreements.**")

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## Section 2. Swiss Rules

### §1. Context

#### A. Structural Changes of the Administrating Institution for Swiss Rules

Switzerland is reputable as a neutral and popular seat of international arbitration<sup>548</sup>, and institutional arbitration has been rooted on this soil for more than 150 years under the auspices of the Swiss chambers of commerce<sup>549</sup>. Before 2004, each canton-based Chambers of Commerce and Industry in Switzerland had their own different arbitration rules for the resolution of international commercial disputes.<sup>550</sup> In a bid to promote Swiss institutional arbitration overall and harmonize the existing rules of arbitration scattered around Switzerland, the Swiss chambers of commerce jointly adopted a set of uniform rules of international arbitration in 2004, namely the Swiss Rules 2004, which replaced the Chambers' former rules of international arbitration.<sup>551</sup> The Swiss chambers of commerce were directly responsible for administering the arbitrations conducted under the Swiss Rules 2004, whose power was further delegated to the "Arbitration Committee" and the "Special Committee" for implementation.<sup>552</sup>

Since then, the Swiss Rules encountered total two times of major revisions, one in 2012 (i.e. the Swiss Rules 2012), and another in 2021 (i.e. the Swiss Rules 2021), each undergoing afresh structural change. In the 2012 revision, the Swiss chambers of

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<sup>548</sup> 'Advantages of Swiss Arbitration: Neutral-Accessible-Predictable-Balanced' (Swiss Arbitration Centre) <<https://www.swissarbitration.org/swiss-arbitration/advantages-of-swiss-arbitration/>> accessed 13 April 2023

<sup>549</sup> Arbitration: Services for More Than 150 Years' (Swiss Arbitration Centre) <<https://www.swissarbitration.org/centre/arbitration/>> accessed 13 April 2023

<sup>550</sup> Introduction (a) of Swiss Rules (2004).

<sup>551</sup> Introduction (b) of Swiss Rules (2004). The involved "Chambers of Commerce and Industry in Switzerland" are the Basel Chamber of Commerce, the Chamber of Commerce and Industry of Bern, the Geneva Chamber of Commerce, Industry and Services, the Chamber of Commerce and Industry of Ticino, the Chamber of Commerce and Industry of Vaud, the Zurich Chamber of Commerce (the six Chambers were the initiators) and the Neuchâtel Chamber of Commerce (later joined to adopt the Swiss Rules 2004), and they are together referred as "Swiss chambers of commerce".

<sup>552</sup> Introduction (d) and (e) of Swiss Rules (2004).

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commerce founded the Swiss Chambers' Arbitration Institution (SCAI) as an independent institution to provide arbitration services in the form of a not-for-profit association under Swiss law, where the Chambers were members thereof.<sup>553</sup> Within the SCAI, the Arbitration Court was established to administer arbitrations under the Swiss Rules specifically and independently; its work is assisted by the Secretariat of the Court (the "Secretariat").<sup>554</sup> Hence, the power to administer arbitrations under the Swiss Rules has been shifted from the Swiss Chambers of Commerce (with the delegation of the responsibility to the "Arbitration Committee" and the "Special Committee" in its purview) to the Arbitration Court since the Swiss Rules 2012 entered into force.

Against the background of an increasingly competitive market of international arbitration, in the latest revision of 2021, as the result of formally joining the forces of the Swiss Chambers with the Swiss Arbitration Association (ASA)<sup>555</sup> for the development of SCAI, SCAI was converted from a Swiss association into a Swiss limited liability company, and renamed as the "Swiss Arbitration Centre" (SAC), whose shareholders are ASA (the majority shareholder), on the one hand, and each Swiss Chamber formerly a member of SCAI, on the other hand.<sup>556</sup> As the legal successor of SCAI, SAC substituted SCAI from the corporate perspective and has taken over all the tasks previously handled by or supposed to be handled by the SCAI to ensure the continuity and validity of the arbitration agreements formerly referring to SCAI or the Swiss Chambers.<sup>557</sup> Speaking of the corporate structure of the newly

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<sup>553</sup> Introduction (b) of Swiss Rules (2012), and Introduction (a) of Swiss Rules (2021). Tobias Zuberbühler, Christoph Müller and Philipp Habegger (eds), *Swiss Rules of International Arbitration: Commentary* (3rd edn, Schulthess 2023) 5, 9; Sebastiano Nessi, 'A Swiss "(R)Evolution": SCIA Becomes the Swiss Arbitration Centre and Enacts New Arbitration Rules' (Kluwer Arbitration Blog, 15 June 2021) <<https://arbitrationblog.kluwerarbitration.com/2021/06/15/a-swiss-revolution-scai-becomes-the-swiss-arbitration-centre-and-enacts-new-arbitration-rules/>> accessed 19 September 2021

<sup>554</sup> Introduction (b) of Swiss Rules (2012).

<sup>555</sup> The Swiss Arbitration Association (SAA) is a non-profit association traditionally devoted to the development of international arbitration and the improvement of know-how for arbitration practitioners and academics, including via its renowned ASA Conferences and the ASA Bulletin (a leading journal in the field of international arbitration).

<sup>556</sup> Introduction (c) of Swiss Rules (2021). Swiss Arbitration Centre, 'Swiss Rules of International Arbitration Practice Note' (Entry into force as of 1 March 2023) para 4. Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 8-9; Xavier Favre-Bulle and others, 'International Arbitration in Switzerland: Revised Swiss Rules of International Arbitration' (Lexology, 28 May 2021) accessed 19 September 2021; Nessi (n 553).

<sup>557</sup> Introduction (c) of Swiss Rules (2021). Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 9.

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established SAC, the Board of Directors (Board), at the highest hierarchy, is in charge of supervising the operation of the SAC, the company itself, but it plays no role in the management of cases administered by SAC.<sup>558</sup> Rather, the administration and supervision of the arbitral proceedings conducted under the Swiss Rules still fully retain within the competence of the Arbitration Court set up under the Swiss Arbitration Centre (“SAC Court”) assisted by the Secretariat, so the same administration power arrangement as in the Swiss Rules 2012, just the Members of whom are appointed by the Board in terms of institutional structure.<sup>559</sup> The SAC Court exercises its power as provided for under the Swiss Rules 2021, and it also refers to the updated Internal Rules of the Arbitration Court (“*Internal Rules*”) and the *Practice Note* for the revised Swiss Rules as the supplement basis to implement its powers.<sup>560</sup> The *Practice Note* stresses that the SAC Court “is an independent body... as the final authority for proper application of the Swiss Rules ... [and] renders decisions as provided for under the Swiss Rules”.<sup>561</sup>

In sum, the structural evolution of the administering institution for Swiss Rules unfolds the centralization of the administration, and improvement of the independence of a decision rendered by the administering institution in the sense of precluding the direct involvement of the institution's operation stakeholders in the administration of arbitral proceedings. In fact, such structural evolution is closely concerned with the procedural mechanism of consolidation under the Swiss Rules, because consolidation has been adopted since the first version of Swiss Rules, and the body responsible for administering the arbitrations conducted under the Swiss Rules has been serving as the authority to decide on consolidation always, whose identity also got evolved alongside with the SAC and predecessors' structural change, and this may constitute an indicator to observe the possible intervention variation of the arbitral institution on the matter of consolidation.

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<sup>558</sup> Swiss Arbitration Centre, ‘Swiss Rules of International Arbitration Practice Note’ (Entry into force as of 1 March 2023) para 7.

<sup>559</sup> Introduction (d) of Swiss Rules (2021). Swiss Arbitration Centre, ‘Swiss Rules of International Arbitration Practice Note’ (Entry into force as of 1 March 2023) para 7 and 8. Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 9.

<sup>560</sup> Introduction (d) of Swiss Rules (2021) states: “...[The Court] may delegate to one or more members or committees the power to take certain decisions pursuant to its Internal Rules and may issue Guidelines and Practice Note to implement and supplement these Rules...”

<sup>561</sup> Swiss Arbitration Centre, ‘Swiss Rules of International Arbitration Practice Note’ (Entry into force as of 1 March 2023) para 8

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## B. Overview of the Evolvement of the Consolidation Mechanism under the Swiss Rules

The Swiss Rules have consistently attached high weight to the offer and development of the consolidation mechanism to accommodate users' evolved needs on multi-party and multi-contract arbitration. As of the first version in 2004, the Swiss Rules were at the forefront of institutional arbitration rules in regard to the consolidation of arbitral proceedings (Article 4(1)),<sup>562</sup> the third institutional rules after JCAA and ICC Rules to introduce consolidation among the leading institutional rules, albeit the then Swiss Rules were self-alleged to be based on the UNCITRAL Rules<sup>563</sup>, where consolidation has not been ever adopted yet therein. Indeed, beyond doubt, the consolidation mechanism has been seized as one of the key original features Swiss Rules prioritise to adapt the UNCITRAL Rules since the adoption of the Swiss Rules. Furthermore, the Swiss consolidation was once well-known in terms of its broadest liberality and flexibility as provided for under the Swiss Rules that other contemporaneous institutional consolidation rules could not compare to — the administering institution could order consolidation where the parties in two or more arbitrations are not identical, no matter whether the consolidation is going to be involved with single or multitude of arbitration agreements, and this power could be wielded without the consent of any party and without any application by a party.<sup>564</sup>

These prescribed liberal features were completely passed on to the modified consolidation provision in the Swiss Rules 2012 (Article 4(1)). Thus, the SCAI Court technically enjoyed a broadly expansive discretion to determine consolidation as

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<sup>562</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 10.

<sup>563</sup> See Introduction (b) of Swiss Rules (2004): “These Rules are based on the UNCITRAL Arbitration Rules...”.

<sup>564</sup> Smith (n 15) 180 and 197 (“The Swiss Rules differ from the other Rules, in that Article 4.1 appears to give the SAC [Swiss Arbitration Court] wide discretion to decide upon consolidation on the basis of a notice of arbitration, and does not refer expressly to the requirement for a party to request consolidation.”); Dorothee Schramm, ‘Chapter 3, Part II: Commentary on the Swiss Rules, Article 4 [Consolidation and Joinder]’, in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner’s Guide* (2nd edn, Kluwer Law International 2018) 483 (“Article 4 has few equivalents in other arbitration rules in terms of its liberality.”), 484 (“This possibility is broader than under most other arbitration rules and national arbitration laws.”); Von Segesser, ‘Swiss Rules of International Arbitration’ (n 91) 238 ; Tobias Zuberbühler, Christoph Müller and Philipp Habegger (eds), *Swiss Rules of International Arbitration: Commentary* (Kluwer Law International 2005) 39

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provided for under Article 4(1)<sup>565</sup>, the consolidation solution under the Swiss Rules has been openly described as “the most flexible” in the international arbitration community<sup>566</sup>. However, as the Swiss Arbitration Court and several commentaries have unanimously reiterated, there are many indicators that the Court (under the Swiss Rules 2012) or the Chambers (under the Swiss Rules 2005) indeed only wielded this power in a restrictive approach in practice, despite enjoying the wide powers as formulated in the text of the provision.<sup>567</sup> For example, the SCAI’s Secretariat once clarified in an interview that consolidation should only occur where a party has filed a request for consolidation.<sup>568</sup> From the statistics perspective, only 34 cases were consolidated pursuant to the Swiss Rules between 2004 and 2021, which only amounts to the number of successful consolidation cases of a certain year in LCIA or SIAC (for example, 2021 saw around 36 consolidation applications were ordered under the LCIA Rules<sup>569</sup>, or 2020 saw 36 cases consolidation applications were ordered under the SIAC Rules<sup>570</sup>). Moreover, consolidation was usually ordered only with all the consent of the parties concerned<sup>571</sup>, for example, only 4 cases were reported to be consolidated despite one party’s objection between 2004 and 2016 out of all the 23 application cases<sup>572</sup>. Clearly, the tension, or at least inconformity, between the aggressive consolidation power conferred upon the administering institution as provided for in the text of the Swiss Rules and the conservative implementation of the very consolidation provision under the practice of the administering institution for the Swiss Rules did exist and last for quite a period.

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<sup>565</sup> Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816 (“The Swiss Chambers’ Arbitration Institution has broad discretion when deciding whether to consolidate two or more arbitrations.”); Smith (n 15) 197

<sup>566</sup> Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue - A comparative Study* (n 254) 345; Kondev (463) 84 (“The Swiss Rules probably introduce the most flexible and liberal approach concerning multiparty arbitrations.”)

<sup>567</sup> Schramm (n 53) 485 (“Since the enactment of the 2004 Swiss Rules, the Swiss Chambers’ Arbitration Institution has shown a cautious approach to consolidating proceedings.”); Stackpool-Moore (n 60) 28; Smith (n 15) 197 (“Notwithstanding the wide scope of Article 4.1, there are indications from both the SAC [Swiss Arbitration Court] and commentators that the SAC will continue to take a restrictive approach to consolidation...”); Domitille Baizeau and Sam Moss, ‘The Efficient Resolution of Construction Disputes Under the Swiss Rules of International Arbitration: The Role of the Swiss Chambers’ Arbitration Institution’ in Atamer et al. (eds.), *Uluslararası İnşaat Sözleşmeleri ve Uyuşmazlık Çözüm Yolları* (On İki Levha 2016) 8; Bärtsch (n 4) 58-59; Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 106.

<sup>568</sup> See Stackpool-Moore (n 60) 28.

<sup>569</sup> Further see Part 1-Chapter 5-Section 3-§1

<sup>570</sup> Further see Part 1-Chapter 5-Section 1-§1

<sup>571</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 106; Bärtsch (n 4) 59.

<sup>572</sup> Schramm (n 564) 485.

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Admittedly, such a cautious approach the Swiss institute adopted in practice was to ease the expressed concern about the over-extensive power vested in an arbitral institution by some international arbitration practitioners, and some comments from insiders have predicted that this relatively restrictive approach would probably persist under the Swiss Rules.<sup>573</sup> However, it is also true that the parties, opting for the Swiss Rules instead of other institutional rules, would be hard to meet the initial expectation if they expected the chosen Swiss original expansive consolidation power to exert the effect of countering back the possible consolidation-obstruction tactic during the arbitral proceedings. Rationally speaking, this expectation should have been taken for granted when the Swiss Rules were chosen, because, via opting for the Swiss Rules and, in particular, the consolidation provision therein (Article 4(1)), the parties are not only deemed to have agreed in advance that the Swiss Arbitration Court may decide to consolidate future arbitrations when appropriate but also deemed to have agreed in advance the broad powers that the Court authorized as prescribed in the chosen rules to exercise on the matter of consolidation.

That being said, according to a 2014 survey conducted under ASA's direction on the Swiss Rules right after the enactment of the 2012 revised version, the inclusion of the consolidation mechanism in the Swiss Rules to solve possible issues arising out of multi-party and/or multi-contract settings was perceived as one of the key advantages to attract arbitration users to choose the Swiss Rules rather than other institutional rules.<sup>574</sup> Hence, to cement the favour of the market on the Swiss consolidation mechanism, the latest revision of the Swiss Rules in 2021 carefully gave its consolidation provision a delicate modification. Xavier Favre-Bulle, the President of the SAC Court, stated in the SAC official introduction video of the Swiss Rules 2021 with a high-profile appreciation of the renewed consolidation provisions:

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<sup>573</sup> Bärtsch (n 4) 59. ("When this [consolidation] provision was first adopted, some practitioners in the field of international arbitration expressed concerns that it was providing too extensive a power too extensive a power to the institution. However, these concerns were not justified as the Chambers have ordered consolidation only in limited and justified cases and usual only with the consent. It seems safe to assume that the Court will continue to follow the same restrictive approach.") The following edition of this Swiss Rules commentary published in 2023 withholds the similar demonstration. See Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 106.

<sup>574</sup> In detail, 46.51% of the interviewees (the majority of them (84.91%) have already used the Swiss Rules) perceived the "possibility for joinder and consolidation in complex arbitration" as an advantage to distinguish the then Swiss Rules from other institutional rules, and 31.82% of interviewees perceived it as one of the most valued special features of the Swiss Rules. In addition, averagely 17% of the interviewees deemed the Swiss Rules recommended in case of multiparty settings or multi-contract settings, respectively. See Nathalie Voser (ed), *10 Years of Swiss Rules of International Arbitration: ASA Special Series No. 44* (JurisNet LLC 2014) 293, 294 and 296

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*“We are proud of an **innovative** mechanism of **consolidation** proceedings and joinder of third parties, of course preserving the requirement for the parties’ consent while giving leeway to the institution and tribunals to bring tailor-made solutions. (Emphasis is added)”<sup>575</sup>*

The latest-modified Swiss consolidation provision is now contained in a stand-alone article, namely Article 7, no longer placed under the same article (Article 4) with the joinder of a third party as previously. In terms of content changes compared to the 2012 Swiss Rules, a large number of commentaries unanimously opine that the revised consolidation provisions of the 2021 Rules did not undergo significant changes in substance<sup>576</sup>, except the only recognized substantive change that the SAC Court will not consolidate *sua sponte*, but rather upon request of a party<sup>577</sup>. Rather, most changes were regarded as no more than linguistic changes to improve the wording and introduce useful clarification.<sup>578</sup> Remarkably, the above opinion is also shared with the former or current insiders of the SAC Court in their updated edition of “Swiss Rules of International Arbitration: Commentary (2023)” (“*SAC Commentary 2023*”).<sup>579</sup>

In my view, however, the previous alleged “over-extensive” power of the SAC Court on consolidation has shrunk due to the changes in the Swiss Rules, not only the

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<sup>575</sup> Xavier Favre-Bulle, ‘Introducing...the Swiss Rules 2021’ (14 June 2021)

<<https://www.youtube.com/watch?v=mTrp382znT8>> accessed 14 April 2023.

<sup>576</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 10 (“These new provisions [Article 7] do **not** result in **any major changes of substances...**”), 11 (“Article 7 Swiss Rules 2021 now introduced the rules on consolidation previously contained at Article 4(1). **No changes of substance** have been made, and consolidation remains within the competence of the Court.”); Favre-Bulle, ‘International Arbitration in Switzerland: Revised Swiss Rules of International Arbitration’ (n 556) (“The new Article 7 on consolidation replaces the former Article 4(1) of the 2012 version, **without any substantive changes.**”); Nessi (n 553) (“Regarding the issue of consolidation, Article 7 of the 2021 Swiss Rules replaces Article 4(1) of the 2012 Swiss Rules, **without any substantive changes.**”).

<sup>577</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 102; Georg von Segesser and Angelina M. Petti, ‘The Changing Legal Landscape of Arbitration in Switzerland’ (Global Arbitration Review, 17 November 2021)

<<https://globalarbitrationreview.com/review/the-european-arbitration-review/2022/article/the-changing-legal-landscape-of-arbitration-in-switzerland>> accessed 16 April 2023

<sup>578</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 10, 102; Von Segesser, ‘The Changing Legal Landscape of Arbitration in Switzerland’ (n 577).

<sup>579</sup> Namely, the book: Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553), where Dr. Philipp Habegger is a past president of the Arbitration Court of the Swiss Arbitration Centre and Christoph Müller is a Member of the Arbitration Court (and the Special Committee) under the Swiss Rules of International Arbitration.

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modification in the consolidation provisions *per se* but also arising out of the comprehensive revision of the Rules. It can be deemed a statutory return to the established restrictive approach in Court's practice discussed above. Among other things, in terms of the intervention of the SAC Court in deciding on consolidation, albeit the role of the institution has been reinforced under the 2021 Swiss Rules in general (including the intervention of the SAC Court)<sup>580</sup>, the role of the SAC Court formulated under the updated consolidation regime, in my mind, could have been indeed weakened. This assumption may prove justified when considering the prohibition for the Court to decide consolidation on its own motion first imposed in the 2021 revision. Moreover, it would appear more justified provided the disputable interpretation approach, unprecedentedly adopted in the *SAC Commentary 2023*, in the application of Article 7 (illustrated in the following §5) has been literally adopted, which could essentially alter the legal effect of the decision on consolidation made by the Court. Possibly, through the following analysis of the 2021 Swiss consolidation regime, the international arbitration community may no longer deem the Swiss solution as the “most liberal” one in the global institutional arbitration market as it did and even still does so<sup>581</sup>.

## §2. SAC Court's Power to Decide Consolidation

### A. Sole Competence Conferred upon SAC Court to Order Consolidation

As noted in the *Context (A) supra*, the authority to decide on consolidation under every version of the Swiss Rules has always been exclusively vested with the body responsible for administering arbitration conducted under the Swiss Rules, which varies following the structural change of the administering institution for the Swiss Rules.

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<sup>580</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 10; Nessi (n 553); Favre-Bulle, ‘International Arbitration in Switzerland: Revised Swiss Rules of International Arbitration’ (n 556).

<sup>581</sup> For example, Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 104.

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Under the Swiss Rules 2004, the Swiss chambers of commerce, directly administering the arbitrations conducted under the Swiss Rules, was the body to decide upon consolidation, which exercised all of its administering power via its delegated “Arbitration Committee”<sup>582</sup>. Although, as per Article 4(1) (2004), the Swiss chambers were mandatory to consult with the Special Committee on the consolidation issue, the Special Committee’s decision was merely advisory nature that the Swiss Chambers were not bound to follow.<sup>583</sup> In the view of comparative law, the role of the former Special Committee is comparable to the ACICA Council in the present ACICA’s internal consolidation decision-making process (Part I-Chapter 4-Section 9-§3).

As of the establishment of the independent Swiss Arbitration Court in 2012, the Swiss chambers ceased to administer arbitrations and decide consolidation directly, and the Court has replaced the Swiss chambers (including the former “Arbitration Committee” and the “Special Committee” of the Swiss Rules 2004) as the sole competent body to exercise such powers since then.<sup>584</sup> As said, such roles of the Court remain unchanged under the 2021 corporate shift from an association, SCAI, to a limited liability company, Swiss Arbitration Centre. Regardless of changes in the decision-making body for consolidation inside the administering institution, the arbitral tribunal has never been involved in deciding to consolidate proceedings under the Swiss Rules.

That being said, in contrast to the two former versions of the Swiss Rules, the SAC Court could not order consolidation *sua sponte* any more as per the revised Article 7(1) of the 2021 Rules. Instead, the Court can trigger the procedure to deliberate consolidation only upon the request of a party. This modification seems to symbolise the first statutory U-turn step to approach the established restrictive practice and formally narrow the allegedly over-wide power for the SAC Court to deal with consolidation in a bid to be more in line with the consolidation rules proposed by other institutions. In the past, the flexible feature that the Swiss Arbitration Court was powered to consolidate arbitrations even if all the parties involved objected to the consolidation (and simultaneously no prescribed threshold conditions for the Court,

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<sup>582</sup> Introduction(d) of the Swiss Rules 2004 states: “In order to ensure the administration of arbitrations under these Rules, the Chambers have appointed an Arbitration Committee (hereinafter the “Arbitration Committee”), which shall exercise the powers vested in the Chambers under these Rules, so that any reference to the Chambers in these Rules shall be deemed to refer to the Arbitration Committee.”

<sup>583</sup> See Article 4(1) of the Swiss Rules 2004. Schramm (564) 487.

<sup>584</sup> Zuberbühler (n 553) 5; Schramm (n 564) 485.

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discussed *infra*) caused extensive debate in academia, which revolved around whether submitting the dispute to the Swiss Rules and in particular the incorporated consolidation provision amounts to an expansion of the original arbitration agreement so that parties have in advance agreed on such aggressive power of the Court on consolidation as per the referred Rules and the corresponding consequences.<sup>585</sup> Practically speaking, the removal of the Court's *sua sponte* power to consolidate from the text of the Swiss Rules can be plausibly deemed as a further attempt to ease the said controversy following the reiterative clarification of the restrictive approach adopted in the Swiss Arbitration Court's practice. In theory, such an amendment reflects an updated intention to put more weight on the fundamental consensual nature of the arbitration within the Swiss consolidation solution, highlighting that "the conduct of any arbitration should primarily be determined by the parties".<sup>586</sup>

Furthermore, Article 7(1) stipulates that only the "arbitration proceedings pending under these Rules" are possible to be consolidated by the Court. How to construe it?

First, pursuant to Article 3(2), proceedings amount to be "pending" as of the date when the Secretariat of the Court receives the notice of arbitration. The *Practice Note* further clarifies that consolidation can be requested in both situations, where one or more arbitrations are already pending, a new arbitration is initiated, or two or more arbitrations are initiated simultaneously.<sup>587</sup>

Second, the to-be-consolidated arbitrations within the competence of the SAC Court are limited to the arbitrations subject to the Swiss Rules, which excludes the

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<sup>585</sup> Kondev (n 463) 86-87 (The author summarized the debate: "Some scholars are of the opinion that Article 4 [of the Swiss Rules 2012] gives the arbitral tribunal far-reaching powers to disregard the lack of consent of the parties involved upon deciding on consolidation, joinder or intervention. More particularly, they apprehend that consolidation, joinder and intervention are possible even in cases where consent thereto is not expressed by the parties in their agreements, as these legal mechanisms are envisaged under the arbitration rules to which the parties have referred in their arbitration agreements. Thus, by agreeing to apply the Swiss Rules, the parties have consented in advance to the possible multiparty arbitration solutions and the relevant consequences pertaining to these solutions. Other authors suggest that the wording of Article 4 cannot be a substitute for the parties' consent and claim that such consent is still required. The opinions of the parties will, of course, be one of the circumstances that the Arbitration Court is obliged to consider when deciding on consolidation.")

<sup>586</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 105 (The authors also submit that parties are free to deviate from Article 7(1) and confer the *sua sponte* power to the Court on deciding consolidation.)

<sup>587</sup> Swiss Arbitration Centre, 'Swiss Rules of International Arbitration Practice Note' (Entry into force as of 1 March 2023) para 76

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possibility of having any arbitration subject to other arbitration rules (whether *ad hoc* rules or other institutional rules) to be consolidated by the Court. The abovementioned case under the ICC Rules Section, *Prinvest Shipbuilding v. Mozambique* (2020), also unfolds that a formal cross-institution consolidation can hardly be permitted, where the request to consolidate a bundle of already consolidated SCAI arbitrations and an ICC arbitration was rejected.<sup>588</sup>

Third, unlike NAI Rules<sup>589</sup> or ACICA Rules<sup>590</sup>, both of which expressly set a more rigid temporal scope of application of consolidation provisions than that of the other general provisions, explicitly refraining their consolidation provisions from applying to the arbitration agreement concluded before the date on which the Rules entered into force, the Swiss Rules 2021 do not impose the same extent of restrictive temporal condition on the application of its consolidation provisions but only impose the uniform temporal scope condition as all the other provisions of the Swiss Rules, namely the Swiss consolidation provisions apply to the arbitration commenced on and after the date on which the Swiss Rules 2021 came into force (1 June 2021), unless parties have agreed otherwise<sup>591</sup>. Thus, it implies that the parties are deemed to have consented to the application of the consolidation provisions then in force (as well as the rest of the applicable Rules) at the timing point when the notice of arbitration is submitted unless they have manifested a different intention. The rationale behind this rule is that giving the parties the benefits of the most up-to-date rules is generally desirable.<sup>592</sup> As a logical consequence, all the arbitration commenced on and after 1 June 2021 (no matter when the involved arbitration agreement was concluded), referring to the Swiss Rules without specifying the defunct version, may fall into the competence of the SAC Court to decide consolidation under Article 7 of the Swiss Rules 2021. That said, in theory, this way of application may be questioned given the existence of “modifications concerning a substantially new or unexpected provision” between the different versions of Rules where parties could not have reasonably expected a future change of rules to such a dramatic extent at the time of the arbitration agreement prior to the revision.<sup>593</sup> However, in my mind, such an objection thread appears not to be convincing to apply in the case of the specific application of

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<sup>588</sup> *Prinvest Shipbuilding* (n 489).

<sup>589</sup> Article 62 of the NAI Rules 2015

<sup>590</sup> Article 2.5 of the ACICA Rules 2021

<sup>591</sup> Article 1(2) of the Swiss Rules 2021

<sup>592</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 29

<sup>593</sup> *ibid* 13.

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the Swiss consolidation provisions on the ground that no significant changes beyond the parties' expectation (who concluded their arbitration agreement prior to 1 June 2021) have occurred for the consolidation provisions under the Swiss Rules between before and after 1 June 2021, particularly in terms of the scope of possibilities of consolidation (i.e. conditions for consolidation). The only distinct procedural gap where the Court can no longer order consolidation on its own motion, rather upon request of a party, would not cause "unexpected" surprise to the parties. Nevertheless, given that significant changes exist between the 2004 first edition and the 2012 revision in general terms (while the 2012 revision is basically in concert with the 2021 revision), as established in *SAC Commentary 2023*,<sup>594</sup> it is more prudent to submit that, when all the to-be-consolidated arbitrations are commenced after 1 June 2021, (i) parties who agreed to arbitrate under the Swiss Rules between the 2012 revision and the 2021 revision in principle can be bound by consolidation provisions of the 2021 revision; (ii) parties who agreed to arbitrate before the 2004 edition and 2012 revision might also be bound by consolidation provision of the 2021 revision, only if any of the to-be-consolidated arbitrations does not involve any deemed-significant changes between 2004 edition and the following versions of the Swiss Rules (such as mechanisms of emergency relief).

As such, another related interesting issue may arise. If there is any doubt of the parties' true intention as to which version of the Swiss Rules to apply due to the blurred expression in the arbitration agreement without specifying the version thereof or whether the version then in force at the time when the arbitration is commenced, as an established rule puts, it is exclusively up to the arbitral tribunal to determine rather than the administering institution.<sup>595</sup> Nevertheless, it is conceivable that the Court, at the aim of deciding on the consolidation, could not circumvent to determine itself which version of rules apply when one of the pending arbitrations encounters such a doubt; otherwise, it would not be realistic to expect the Court to fulfil properly its role in deciding on consolidation in line with Article 7, especially when consolidation is usually to be requested before (all) the tribunals to the original separate proceedings have been established. Thus, there may exist a tension between the rule that assessment of parties' true intention on which version of Swiss Rules to apply should leave to the arbitral tribunal, on the one hand, and the reality that the SAC Court, as the sole consolidation decision-maker as per the Swiss Rules, may have to substitute

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<sup>594</sup> *ibid.*

<sup>595</sup> *ibid.* 29.

tribunal to deal with such an issue. In general, this could be deemed as a general issue in all the institutional rules under Model 4.

## B. Related Internal Decision-Making Process and Procedural Fairness

The *Internal Rules* and the *Practise Note* reveal the internal process to some extent regarding a decision on consolidation being made inside the SAC Court in practice, based on which a brief roadmap is depicted as follows.

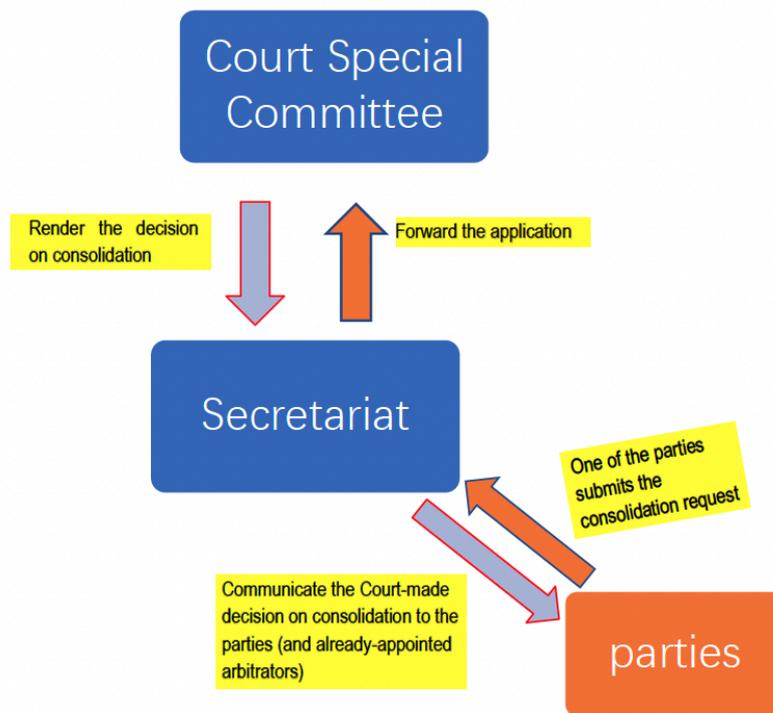


Figure 5: SAC Court's Consolidation Decision-Making Process Flow

First and foremost, the consolidation matter is exclusively designated by the SAC Court to the “Court Special Committee” to decide, which is composed of seven members of the Court, including the President, Vice-Presidents and a Secretary.<sup>596</sup> As a rule, the members of the Court cannot be appointed as arbitrators in the arbitrations

<sup>596</sup> Article 4 of the Internal Rules (2022) for the Swiss Rules 2021.

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under the Swiss Rules.<sup>597</sup> And the matters falling into the competence of the Court Special Committee are deemed important for the administration of the arbitral proceedings.<sup>598</sup> During the procedure, all the communications between the parties or arbitrators and the Court shall undergo exclusively via the Secretariat.<sup>599</sup> Put differently, any direct contact between the Court and the parties (or arbitrators) is not permitted. In this light, the requesting party for consolidation needs first submit the request to the Secretariat, wherein the reasons in support of consolidation are required to be included.<sup>600</sup> In terms of form, such a request can be made either through a separate application or by including a consolidation claim directly in the notice of arbitration in any one of the to-be-consolidated arbitrations,<sup>601</sup> and there is no formal time limit to file such a request. Then, for reasons of procedural fairness, the Secretariat who has received the consolidation application will seek written comments on such a request from all the parties concerned and, if any, already prior-appointed arbitrators.<sup>602</sup> They usually have 15 days to submit their comments, a time limit set by the Secretariat.<sup>603</sup> Next, the Secretariat will forward the consolidation request and related comments to the Court Special Committee.<sup>604</sup> After deliberation, the Court Special Committee will make the decision as to consolidation by way of voting. The decision, in principle, can be deemed valid provided that at least five of the members of the Court Special Committee have participated in the decision-making process.<sup>605</sup> Usually, it is made by a simple majority, with the President or, in his or her absence, the most senior-ranking member from the Executive Committee (consisting of the President, two Vice-President and a Secretary) participating in the consolidation decision-making process reserving a casting vote.<sup>606</sup> Pursuant to Article 9(2) of the

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<sup>597</sup> Article 9(1) of the Internal Rules (2022) for the Swiss Rules 2021 (If some restrictive conditions are satisfied, the Member is still possible to be appointed as arbitrator under the Swiss Rules.)

<sup>598</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 14.

<sup>599</sup> Article 7 of the Internal Rules (2022) for the Swiss Rules 2021.

<sup>600</sup> Swiss Arbitration Centre, 'Swiss Rules of International Arbitration Practice Note' (Entry into force as of 1 March 2023) para 76

<sup>601</sup> Swiss Arbitration Centre, 'Swiss Rules of International Arbitration Practice Note' (Entry into force as of 1 March 2023) para 76

<sup>602</sup> Article 7(1) of the Swiss Rules 2021 and Swiss Arbitration Centre, 'Swiss Rules of International Arbitration Practice Note' (Entry into force as of 1 March 2023) para 77

<sup>603</sup> Swiss Arbitration Centre, 'Swiss Rules of International Arbitration Practice Note' (Entry into force as of 1 March 2023) para 77

<sup>604</sup> Swiss Arbitration Centre, 'Swiss Rules of International Arbitration Practice Note' (Entry into force as of 1 March 2023) para 78

<sup>605</sup> Article 4(4) of the Internal Rules (2022) for the Swiss Rules 2021. (Note, in exceptional cases, the decision may still be deemed validly rendered when the requisite quorum fails to be reached.)

<sup>606</sup> Article 4(5) of the Internal Rules (2022) for the Swiss Rules 2021

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Internal Rules, if one or more Members of the Court Special Committee were to have a conflict of interest in the administration of a case, the Members in question should be disqualified from the Special Committee to participate in the discussion and the decision on the consolidation application from this case. Also, in light of the general confidentiality rule contained in Article 10 of the Internal Rules, whether the sessions or the documents as to the discussion and decision of the consolidation application should be of a confidential nature, i.e. not be open to the personnel outside the SAC Court.<sup>607</sup> At last, the President or, in his or her absence, the most senior ranking member of the Executive Committee participating in the decision-making process issues the decision in electronic form<sup>608</sup>, which is then communicated to the parties (and arbitrators) via the Secretariat.

Is the Court Special Committee obliged to accompany the related reasons when rendering the decision on consolidation? In my observation, the answer is not clear from the text of the Swiss Rules and the official supplementary instruments (*Practice Note* and *Internal Rules*). Reasonably, a horizontal comparison in text with other decisions rendered by the Court may help. The decision as to arbitrator challenge is also rendered by the Court, where the *Practice Note* expressly prescribes that “summary reasons” will be provided when the Court issues this decision.<sup>609</sup> Given this contrast in the language of text, it can be inferred that the Court does not attach related reasons when issuing the decision on consolidation.

### C. No Prescribed Threshold Condition, But All Relevant Circumstances Required to be Considered

Unlike the consolidation solutions under most other institutional rules, the Swiss Rules do not expressly provide for a set of mandatory threshold conditions for consolidation to the extent that consolidation under the Swiss Rules is entirely within the discretionary power of the SAC Court. For rendering a decision on consolidation,

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<sup>607</sup> See Article 10 of the Internal Rules (2022) for the Swiss Rules 2021. In precise, only the Members, the Executive Director and the Secretariat of the SAC Court have right to access, including some other persons authorised by the SAC Court’s President.

<sup>608</sup> Article 4(6) of the Internal Rules (2022) for the Swiss Rules 2021

<sup>609</sup> Swiss Arbitration Centre, ‘Swiss Rules of International Arbitration Practice Note’ (Entry into force as of 1 March 2023) para 105

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Article 7(2) merely requires the Court (through its Special Committee) to take into account “all relevant circumstances” in general terms, besides the comments expressed by the parties or arbitrator. This preserved traditional character renders the Swiss consolidation regime still perceived as a relatively liberal representative, though, in my view, the extent of liberality is slimmed down through the 2021 revision. Accordingly, some representative deterrents to consolidation, which can be seen in some other rules, such as the absence of consent of all parties to consolidation<sup>610</sup>, the involvement of different parties (particularly when arising from different arbitration agreements)<sup>611</sup>, or the timing of filing consolidation (particularly, asked to apply no later than the establishment of a different tribunal)<sup>612</sup>, would not hammer a consolidation to be ordered by the Court, so long as the Court thinks appropriate.

However, the Court exercises its discretion as cautiously as possible to determine consolidation, which is inherently within the meaning of its self-proclaimed consistent restrictive approach in practice, despite the large scope of discretion as the Swiss Rules indeed confer. In this light, the following restrictive practices in different aspects have been widely established, as illustrated by the published literature.

- The links between the claims are one of the two circumstances that Article 7(2) specifically highlights. This requires the Court to assess whether the arbitrations involve similar legal issues and/or arise out of a connected set of facts, and therefore to find whether the related evidence submitted in the pending cases would overlap significantly.<sup>613</sup>
- The progress already made in the pending proceedings is another circumstance that Article 7(2) specifically focuses on. The Court could be reluctant to approve consolidation if the potential consolidation over-proportionately jeopardizes procedural fairness for the first commenced arbitration by causing undesirable ramifications for its procedural efficiencies, such as a severe delay due to the extensive new issues introduced by the second arbitration, the need for reconstitution of the tribunal or repetitive evidentiary steps, particularly when the

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<sup>610</sup> For example, see Article 8 of the 2018 DIS Rules.

<sup>611</sup> For example, see Article 57 of 2021 JCAA Rules.

<sup>612</sup> For example, see Article 23 of the KCAB Rules 2016 or Rule 8 of the SIAC Rules 2016.

<sup>613</sup> See Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 107; Baizeau (n 567) 8; Bärtsch (n 4) 60.

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parties to the first arbitration are not identical to that of the second arbitration.<sup>614</sup>

- Though the mere circumstance that different parties in the separate pending arbitrations does not hinder consolidation, the Court is, in practice, generally unwilling to permit consolidation if the parties are not the same or are not parties of the same group.<sup>615</sup>
- In case two and more arbitration agreements are involved, though not expressly provided in the text of the Swiss Rules, the Court would, in any event, examine the compatibility of the arbitration agreements under which the arbitrations arise, and refuse to order consolidation if the finding is adverse.<sup>616</sup> The related examining factors include the applicable procedure (expedited or non-expedited procedure), the number and qualification of arbitrators, the language of the proceedings and the seat of the arbitration.<sup>617</sup> Among other things, with respect to the seat of arbitration, it is acknowledged to be compatible if the pending arbitrations under the Swiss Rules are all seated in different cities of Switzerland, since the *lex arbitri* remains the same in this case (i.e. PILA). In other words, the commentary submits that the Court should refuse to order consolidation where different *leges arbitri* apply to the separate pending proceedings, respectively.<sup>618</sup>

To sum up, considering the above-mentioned restrictive practice that the Court adopts, it can conclude that the scope of consolidation possibilities under the Swiss Rules is substantially in line with that under other institutional rules with broad provisions on consolidation, like SCC consolidation (2017), or HKIAC consolidation (2018).

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<sup>614</sup> See Schramm (n 564) 488; Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 107; Baizeau (n 567) 8-9

<sup>615</sup> Baizeau (n 567) 9-10.

<sup>616</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 107; Baizeau (n 567) 9.

<sup>617</sup> Baizeau (n 567) 488; Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 107

<sup>618</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 108.

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### *§3. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings*

Should the SAC Court decide to grant consolidation, as Article 7(3) expressly provides, in the absence of all parties' agreement on the composition of the tribunal to hear consolidated proceedings, the SAC Court is empowered to revoke any appointment and confirmation of arbitrator already made and appoint arbitrators afresh when deemed appropriate following the general tribunal composition provisions (particularly, Article 8).<sup>619</sup> Revocation power sounds suitable under the Swiss Rules since consolidation thereunder is allowed to involve one or more other parties, who may fail to have any say in the composition of the arbitral tribunal already confirmed and also disagree with the already-confirmed composition of the tribunal.<sup>620</sup> In the meanwhile, insofar as the law governing the arbitration allows, all the parties are deemed to have waived their right to designate an arbitrator under the Swiss Rules, unless all parties agree or the Court decides otherwise.<sup>621</sup> This approach follows the 2012 Swiss Rules but with more clarification. Notably, the 2021 revision makes it clear that the consolidated proceedings shall be consolidated into the arbitration commenced first in the sense of administration, unless all parties agree or the Court decides otherwise.<sup>622</sup>

When analyzing Article 7(3) itself, it is clear that the SAC Court may exercise its revocation power where a party raises an objection to consolidation or to the constitution of the tribunal to hear consolidated proceedings. However, *SAC Commentary 2023* asserts that the Court would only revoke the already-made arbitrator(s) on the basis of the endorsement of the said additional party, merely on the ground that “in the past, the Court adopted a restrictive approach when determining

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<sup>619</sup> Article 7(3) of the Swiss Rules 2021 states: “Where the Court decides to consolidate proceedings in which one or more arbitrators have been confirmed by the Court, and absent an agreement of all parties in all proceedings on the constitution of the arbitral tribunal in the consolidated proceedings, the Court may revoke the confirmation or appointment of arbitrators and apply the provisions of Section II (Composition of the Arbitral Tribunal)”. Also, Swiss Arbitration Centre, ‘Swiss Rules of International Arbitration Practice Note’ (Entry into force as of 1 March 2023) para 81. Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 109

<sup>620</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 109.

<sup>621</sup> See Article 7(3) of the Swiss Rules 2021

<sup>622</sup> See Article 7(3) of the Swiss Rules 2021 and Swiss Arbitration Centre, ‘Swiss Rules of International Arbitration Practice Note’ (Entry into force as of 1 March 2023) para 82.

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whether to consolidate proceedings and usually only ordered consolidation with the endorsement of the concerned parties. It can be expected that the Court will continue to apply this practice”, and then concludes that the Court is “unlikely” to revoke the appointment of the already-appointed arbitrator(s) in case of an objection raised by any of the parties.<sup>623</sup> To me, this analysis looks inconsiderate and illogical. First, the methodology of the said analysis seems to encompass the authors’ potential attempt to circumvent the concern arising from the plausible possible theoretical scenarios that occurred from the provision in the way of jumping to a conclusion merely based on the past practice in a bid to justify the composition way of the consolidated tribunal under the Swiss Rules. Second, even in terms of the facts on which the authors rely, it is not logical to directly conclude that the SAC Court would not revoke a confirmed arbitrator over the objection of one of the parties because the fact that the Court “usually” only order consolidation with the agreement of all concerned parties does not imply the Court has never ordered consolidation when an objection is raised. As a matter of fact, among the total 17 admitted consolidation cases between 2004 and 2016, there were 8 cases (47%) of consolidation applications were granted in the absence of the consent of all parties.<sup>624</sup> And the official *Practice Note* applying for the 2021 Swiss Rules also confirms that “the Court may also order consolidation absent the agreement of a party if it considers that the circumstances so warrant”.<sup>625</sup>

Last, it is definitely not the only disputable argument that *SAC Commentary 2023* “contributed” to the 2021 revised Swiss consolidation regime. A more controversial argument is as follows.

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<sup>623</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 130.

<sup>624</sup> In detail, four cases were consolidated without express consent of one of the parties, and another four cases were consolidated regardless of one party’s objection. See Schramm (n 564) 485.

<sup>625</sup> Swiss Arbitration Centre, ‘Swiss Rules of International Arbitration Practice Note’ (Entry into force as of 1 March 2023) para 80.

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*§4. Legal Effect of the SAC Court's Decision on Consolidation: The Potential Disputable Conclusion(s) Arising out of A Newly Emerged Interpretation in the Name of Clarification*

Is the SAC Court's decision on consolidation final and binding as per the Swiss Rules? On the face of the provisions of the Swiss Rules (including the *Internal Rules* and the *Practice Note*), this question is not directly addressed, which necessitates finding clues to deduce a credible answer. But it seems tricky for me to give a conclusive answer.

As noted, there is no doubt that the power to decide whether to consolidate proceedings falls exclusively with the SAC Court according to Article 7. Admittedly, this does not suffice to deduce that such a decision made by the Court would be of full finality nature. In any event, what can be at least assured is that the decision can only be conclusive if the Court rejects to order consolidation because, again, only the Court can order consolidation rather than the arbitral tribunal or other authority under the auspices of SAC. What if the Court decides to order consolidation? Such an order will bind the tribunal, or is the tribunal possible to overturn it?

A new interpretation appeared in the recently re-edited *SAC Commentary 2023*, in the name of introducing some "useful clarifications" to enhance "legal predictability" following the latest version of the Swiss Rules (2021) entered into force<sup>626</sup>, which intends to justify that the tribunal is authorized to overturn the consolidation order made by the Court. *SAC Commentary 2023* states that:

*"In cases where the consolidation of several proceedings would amount to the joinder of additional parties in the initial proceedings, the Court will apply Art. 6 and 7 jointly...If the request for consolidation (and joinder) is made prior to the constitution of the arbitral tribunal, all other parties will have the opportunity to raise jurisdictional objections and the Court will apply Art. 5 [Administration of Claims] mutatis mutandis (Art. 6(2)). While under Art. 7, the Court has full authority to decide on the request for consolidation, the*

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<sup>626</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 10.

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*arbitral tribunal retains the power to decide over its jurisdiction over any additional party*  
(See Art. 6(3)) (emphasis added).<sup>627</sup>

### A. Why is This Interpretation “New”?

This interpretation approach for the Swiss consolidation rules seems unprecedented to me. First, even though different parties are allowed in terms of accomplishing consolidation from the first edition of Swiss Rules (2004), in my observation, such an interpretation did(does) not appear in the past commentaries on predecessors of the Swiss Rules (and even some comments for the present 2021 version), even including the former editions of the same book, *SAC Commentary 2023*.<sup>628</sup> Second, among these materials, the differentiation of decision-maker identity between the SAC Court to the consolidation matter and the tribunal to the third-party joinder matter under the Swiss Rules was/is universally stressed on the ground that the third-party joinder relates to the scope of the arbitration agreement and the jurisdiction of the arbitral tribunal, which is justified to leave to the arbitral tribunal to decide.<sup>629</sup> In turn, it seems to imply that consolidation designed to be determined by the Court other than the tribunal is distinct from the joinder, both of which are exclusively governed by different provisions without the possibility to cross-apply.<sup>630</sup> Based on these two grounds, albeit the above-mentioned interpretation appeared in the name of introducing some “useful clarifications” to enhance “legal predictability” following the latest version of the Swiss Rules (2021) entered into force<sup>631</sup>, I am more inclined to deem it as a brand-new interpretation approach.

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<sup>627</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 106-107.

<sup>628</sup> Namely, Tobias Zuberbühler, Christoph Müller and Philipp Habegger (eds), *Swiss Rules of International Arbitration: Commentary* (2nd edn, Schulthess Juristische Medien AG 2013) and Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 564).

<sup>629</sup> Such as, Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 564) 40; Schramm (n 564) 493; Favre-Bulle, ‘International Arbitration in Switzerland: Revised Swiss Rules of International Arbitration’ (n 556).

<sup>630</sup> For example, see Baizeau (n 567) (The author explicitly refuses to address the then joinder provision (Article 4(2) 2012) in any detail in the part of “The Court’s Power to Consolidate Proceedings”, “as it is a matter for the arbitral tribunal rather than the Institution”. Imagine if the joinder provisions can be applied mutatis mutandis by the Court when deciding consolidation; then, reasonably, the author would specifically mention it.).

<sup>631</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 10.

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## B. A Try to Understand the Logic behind the New Interpretation Approach

As mentioned before, *SAC Commentary 2023* is authored by the former or present insiders of the SAC Court, including that “one of the editors was a member of the working group for the revision of the Swiss Rules and thus had special insight into the revision process”<sup>632</sup>, their comments on the 2021 revised Swiss Rules can be reasonably presumed as of some authoritative credible reference value. Bearing it in mind, it is worth, as the first step, trying to understand the logic of this interpretation under the present Swiss Rules.

Albeit the consolidation provisions broadly remain the same in substance through the revisions of the Swiss Rules, it seems to me that the overall changes from some other provisions of the Swiss Rules through the 2021 revision may have “sneakily” changed the allocation of powers behind Article 7 [consolidation], particularly the changes in Article 6 [cross-claim, joinder, intervention], Article 5 [administration of claims] and Article 23 [objection to the jurisdiction of the arbitral tribunal], which may be deemed to leave some reasonable leeway for this interpretation.

Starting from Article 5, this revised provision cements the Court’s role as gatekeeper to conduct a *prima facie* review of *all* jurisdictional objections as to the arbitral tribunal’s jurisdiction.<sup>633</sup> Generally speaking, the *prima facie* test conducted under the administering institution has fairly become a practice standard in institutional arbitrations around the world, where the institution exercises a degree of discretion to refuse to administer the arbitration in case there is “manifestly no binding arbitration agreement referring to the rules of the institution”, as an effort to boost the efficiency of arbitral proceedings under the administration of the institution.<sup>634</sup> As a matter of principle, the threshold of a *prima facie* test conducted by the Court is relatively low, aiming to avoid undermining the arbitral tribunal’s competence-competence.<sup>635</sup>

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<sup>632</sup> See the publisher’s résumé for this latest edition. Available under:  
<<https://www.schulthess.com/buchshop/detail/ISBN-9783725583867/Zuberbuehler-Tobias-Hrsg.-Haberger-Philipp-Hrsg.-Mueller-Christoph-Hrsg./Swiss-Rules-of-International-Arbitration-PrintPlu%25A7>> (Last access on 12 April 2023)

<sup>633</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 64.

<sup>634</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 68-71; Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 65.

<sup>635</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 65-68.

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In the 2012 version of the Swiss Rules, the Court's *prima facie* review power, set out only in subparagraph (Article 3(12)), was limited to the objections to “the arbitration being administered” under the Swiss Rules, namely to examine is there manifestly an arbitration agreement referring to the Swiss Rules.<sup>636</sup> The 2021 revision, through setting out it in a standalone provision (Article 5) at the beginning of the revised Swiss Rules, has strengthened the overall position of the Court as a jurisdiction gatekeeper under the Swiss Rules, notably by expanding the scope of the Court's *prima facie* review to the cases where claims are made under more than one arbitration agreement, i.e. multi-contract arbitrations, and cases where an additional party is involved in the arbitration, i.e. multi-party arbitrations.<sup>637</sup> In the event of multi-party arbitration, the Court needs to examine whether there is *prima facie* evidence that would justify the arbitration proceeds in relation to an additional party.<sup>638</sup> While in the event of multi-contract arbitration, the Court is authorized to examine *prima facie* whether the claims made under more than one arbitration agreement should be determined together, by first examining whether each of the arbitration agreements individually manifestly refers to the Swiss Rules,<sup>639</sup> then examining whether these arbitration agreements are manifestly incompatible,<sup>640</sup> and lastly examining whether the parties have consented to have the particular claims to be arbitrated in the same proceedings.<sup>641</sup> This also means that, where relevant, the Court will examine *prima facie* whether the involvement of an additional party is beyond the arbitration agreement or not in cases an additional party is involved in the multi-contract arbitration. In any event, as Article 5(2) expressly confirms, the Court's *prima facie* decision on jurisdiction should not compromise the arbitral tribunal's inherent power to decide on all jurisdictional issues.<sup>642</sup> Though, note that the negative *prima facie* decision emanating from the Court indeed puts an end to the proceedings and thus is of a finality nature.<sup>643</sup>

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<sup>636</sup> Article 3(12) of the Swiss Rules 2012

<sup>637</sup> Article 5(1) of the Swiss Rules 2021. Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 64.

<sup>638</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 68.

<sup>639</sup> Article 5(1)(a) of the Swiss Rules 2021

<sup>640</sup> Article 5(1)(b) of the Swiss Rules 2021

<sup>641</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 68, 310.

<sup>642</sup> Article 5(2) of the Swiss Rules 2021 states: “The Court's decision to proceed with claims is without prejudice to the arbitral tribunal's power to render any decision as provided for in Article 23.”

<sup>643</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 72.

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Meanwhile, Article 23, as to the tribunal’s power of deciding on its jurisdiction, also updates in the 2021 revision to adapt to the modification in Article 5. Article 23(1) specifically adds that the arbitral tribunal shall have the power to rule on “any objections that claims made under more than one Arbitration Agreement should not be determined together”<sup>644</sup>, which clarifies that the objections concerned are within the coverage of the jurisdiction review, precisely are covered by objections to the existence, validity or scope of the arbitration agreement<sup>645</sup>. The quoted part of Article 23(1) covers the situations where jurisdictional objection is raised in a multi-contract scenario. As such, *SAC Commentary 2023* opines that the situations concerned should refer to the matters under Article 6, namely cross-claims, requests for joinder and requests for intervention, in case where the related claims are made under more than one arbitration agreement.<sup>646</sup> However, in my mind, if applying the same logic, the objection to the consolidation decision made under Article 7 of the Swiss Rules is also in the meaning of the objection that the claims made under multiple arbitration agreements can be determined in the same arbitration.

Article 6, as a standalone provision, addresses the cross-claim, request for joinder of third person or request for intervention of third person. After the constitution of the arbitral tribunal, these claims shall be decided by the arbitral tribunal.<sup>647</sup> In fact, in the former versions of the 2012 Swiss Rules, joinder could only be contemplated after the constitution of the arbitral tribunal<sup>648</sup> and the scope of the Court’s *prima facie* review had not expanded to the extent of involvement of multiple parties or multiple contracts (at least on the surface of the Swiss Rules), leaving the Court no room to intervene in the joinder matter. But as noted, the institution’s *prima facie* review on jurisdiction has formed as a general standard in practice, even though not having been codified in the Rules. Based on the Court’s overall *prima facie* review system founded in the revised Article 5, the Court is expressly specified in Article 6 to address the jurisdictional objections raised against the claims for cross-claim, joinder and intervention of additional party *mutatis mutandis* within its *prima facie* jurisdictional review power, prior to the constitution of the arbitral tribunal, in particular regarding the application of the Swiss Rules to the claim in question and regarding the possibility that claims filed under more than one arbitration agreement be determined

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<sup>644</sup> Article 23(1) of the Swiss Rules 2021

<sup>645</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 309.

<sup>646</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 310

<sup>647</sup> Article 6(3) of the Swiss Rules 2021

<sup>648</sup> Baizeau (n 567) 7.

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in the same proceedings.<sup>649</sup> The deadline to file the objection to the claims made under Article 6 is 15 days, counting from the date of receipt of the notice of claim, which is shorter than the 30-day time limit to file an answer to the notice of arbitration.<sup>650</sup> In light of Article 5, which applies not only when an express objection is raised but also when the respondent is in default, the Court will also conduct its *prima facie* review where an additional party against whom a claim is filed fails to submit its answer within the 15-day deadline.<sup>651</sup> Lastly, in line with Article 5(2), subject to the negative Court's decision, the arbitral tribunal retains the power to decide over its jurisdiction over any additional. That said, the general low *prima facie* review threshold usually requires the Court to leave the issue of whether the arbitration agreement extends to a third party or related issues to the arbitral tribunal in case of doubt, rather than rendering a negative decision.<sup>652</sup> This approach is for the sake of preserving the arbitral tribunal's competence-competence, as provided for in Article 23.

Now, back to Article 7 [consolidation]. If following the said interpretation from the *SAC Commentary 2023* with regard to the application of Article 7, the Court's power to order consolidation is not a standalone power exclusively governed by Article 7 but is also governed by both Article 5 and Article 6, in the case where the potential consolidation of several arbitral proceedings could amount to the joinder of third persons in the initial proceedings. Accordingly, prior to the constitution of the arbitral tribunal, the Court conducts the *prima facie* review to test whether the arbitration agreement extends to the additional parties. After the constitution of the arbitral tribunal to hear the consolidated proceedings, the tribunal retains the ultimate power to revoke the decision of consolidation if it finds itself that the jurisdictional objection to the extension over an additional party resulting from the consolidation decision in question raised by one of the parties is justifiable. As a consequence, the consolidation decision made by the Court is not of finality character in the event of the involvement of different parties from initial arbitrations. I acknowledge this is

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<sup>649</sup> Article 6(2) of the Swiss Rules 2021 states: "Prior to the constitution of the arbitral tribunal...Any objection to the application of these Rules to the claims or any other jurisdictional objection, including that claims made under more than one Arbitration Agreement may not be determined together, shall be raised by the addressee of the claim or any other party within 15 days from the date of receipt of the notice of claim. **Article 5 shall apply mutatis mutandis** (emphasis added)." Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 88.

<sup>650</sup> Article 6(2) and Article 4(1) of the Swiss Rules 2021

<sup>651</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 89.

<sup>652</sup> *ibid* 68.

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convincing to some extent but do not fully agree with it, or at least reserve my suspicion. The following is my demonstration.

### C. Assessment of the Interpretation in Question

Based on the above discussion, it appears justified that the Court's consolidation ordering power prescribed in Article 7 is also checked by the Court's jurisdictional reviewing power limited to the *prima facie* extent under Article 5, in consideration of the overall position of the Court as a jurisdiction gatekeeper under the Swiss Rules, as established in Article 5, functioning particularly in cases of multi-party or multi-contacts.

Nevertheless, this interpretation authentically submits that Article 5 can only be referred to in the application of Article 7 when the connecting point Article 6 is triggered, i.e. when the request for consolidation involves a request for joinder/intervention of the third person. It can be construed with two layers of meaning: first, the authors of *SAC Commentary 2023* recognize that the consolidation of different arbitrations may result in the alteration of the jurisdiction scope, but second, they only admit that such an alteration in the scope of jurisdiction occurs strictly when the consolidation results in the participation of a third person. In my view, the alteration of jurisdictional scope caused as a result of consolidating proceedings may occur beyond the case of different parties involved from initial arbitrations, meaning the scope of jurisdiction may also be changed in the cases where consolidation involves identical parties under different arbitration agreements or even the identical parties under the same arbitration agreement. But the related detailed demonstration will leave in *Part II*.

Next, from a systematic perspective, the cross-reference between the consolidation provision (Article 7) and the alleged connecting point, the third-party participation provision (Article 6), seems farfetched. Unlike between Article 6 and Article 5, where there exists an express textual nexus that "Article 5 shall apply *mutatis mutandis*" contained in Article 6(2), Article 7 does not contain an analogous text to expressly direct the Court to apply Article 6 and/or Article 5 in case that a future consolidation may involve an additional party. Moreover, the systematic restructuring, where the provisions to address the issue of joinder and consolidation from being provided under the same article (Article 4) in the 2012 Swiss Rules into being set out in two

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distinct and standalone provisions through the 2021 Swiss Rules (Article 6 [joinder] and Article 7 [consolidation]), is also reasonable to be interpreted as an intent of drafters to deviate the consolidation regime (Article 7) from the third-party participation regime (Article 6). So, it is arguable to conclude that Article 5 and Article 6 may not play a role in consolidation under Article 7, which otherwise (i.e. the *SAC Commentary 2023*'s interpretation in question) would convincingly contradict the original intent of the Rules drafters. Taking the related discussion as to the ICC Rules as a horizontal analogous reference, the provision as to the ICC Court's *prima facie* test to an arbitral agreement (Article 6 ICC [2021]) also plays no role in the provision as to ICC's consolidation (Article 10 ICC [2021]), which has been established by the *Secretariat's Guide to ICC Arbitration (2012)*.<sup>653</sup>

Furthermore, it could be argued that this interpretation may be inconsistent with the meaning within Article 7 on the ground that the full consolidation decision-making authority conferred to the Court under this provision can also be plausibly construed that the Court shall exclusively decide consolidation rather than tolerating any additional intervention from any other authority (e.g. tribunal) within the premises of SAC.

Last but not least, were the Court to apply Article 5 and Article 6 *mutatis mutandis* when exercising its power to decide on consolidation following the interpretation approach, the operation might bring some unexpected problems. Among other things, the way of constitution of the arbitral tribunal can vary following the consolidation decision and the joinder decision, particularly considering the waiver of a party's right to appoint its arbitrator is only provided in the consolidation system (Article 7) rather than in the third-party participation system (Article 6). As such, no express rule is set out in the Swiss Rules to guide reconciling such inconsistency. Another possible inconsistency could be over the loss of re-introduction chance. Specifically, in line with Article 6(3), the Court's decision not to proceed with a given claim (request for joinder or intervention, etc.) would not, in principle, hinder its re-introduction after the establishment of the tribunal.<sup>654</sup> Distinct from the system under Article 6 [cross-claim, joinder, intervention], where the same given claim, at most, can be reviewed first by the Court and then by the arbitral tribunal, the system under Article 7 [consolidation] limits the same request for consolidation can only be reviewed by

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<sup>653</sup> Fry (n 470) 3-359, 115.

<sup>654</sup> Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 72.

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the Court one time, seemingly to imply that the re-file right can only be deprived once the Court applies Article 6 *mutatis mutandis* in the context of exercising the consolidation-making power under Article 7. Again, no express provision in the Swiss Rules can help to reconcile such an inconsistency. In a word, it can be assumed that the present framework of the Swiss Rules may not suffice to support the potential operation under this interpretation.

To sum up, these cracks illustrated above may suffice to raise suspicion about the legitimacy of establishing the new interpretation, or at least are enough to call on the SAC Court to make some further clarification.

#### D. The Possible Drive of the Emergence of this New Interpretation Approach

In spite of the questions discussed above, what possibly drives the emergence of this new interpretation? What does this interpretation aim at? Out of the general fact that consolidation decision may objectively cause the scope alteration of the jurisdiction, such way of interpretation, in my view, can be presumed as an attempt to reconcile the relationship between the rule-based competence of the arbitral institution (SAC Court) to decide consolidation fully, on the one hand, and the tribunal's inherent power to determine its jurisdiction as per the universal competence-competence principle, on the other hand. Put differently, this interpretation tries to demonstrate that the exclusive consolidation decision-making power conferred to the Court as per the Swiss Rules does not compromise the tribunal from exercising its power to decide on its jurisdiction.

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## Section 3. CEPANI Rules

### §1. Context

CEPANI saw its first consolidation provisions come into existence in 2005<sup>655</sup>, only one year after the first consolidation provisions of the Swiss Rules (in 2004). Some main features established in the 2005 consolidation provisions have been engraved in successive versions of the CEPANI Rules, even after the modifications made in the 2013 and 2020 versions of the CEPANI Rules<sup>656</sup>. The latest valid CEPANI Rules are now the 2023 version, where the consolidation provisions follow the 2020 version of the consolidation provisions unchanged. As the analysis *infra* will reflect, the said modifications were aimed to regulate the decision-making conduct of CEPANI consolidation rooted in the 2005 Rules by providing a more clarified and restrained guideline.

### §2. CEPANI's Power to Decide Consolidation

Following the initial version of consolidation provisions in the CEPANI Rules (2005), the power to decide on consolidation under the present 2023 CEPANI Rules rests with the Appointments Committee or the President of CEPANI, both attributed to CEPANI's inner bodies.<sup>657</sup> In accordance with Schedule III<sup>658</sup> of CEPANI Rules, the "President of CEPANI" is appointed by the Board of Directors among its members, while the "Appointments Committee (of CEPANI)" is composed of this President and two other members appointed by the Board of Directors. None of them can be appointed as an arbitrator during their mandate<sup>659</sup>, which excludes any opportunity for

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<sup>655</sup> Note that the term used in the 2005 version of CEPANI Rules for regulating consolidation matter is not "consolidation" but "**joinder**". See Article 12 of the CEPANI Rules (2005): "When several contracts containing a CEPANI arbitration clause give rise to disputes that are closely related or indivisible, the Appointments Committee or the Chairman is empowered to order the joinder of the arbitration proceedings..." (emphasis added)"

<sup>656</sup> To be more explicit, since two versions of CEPANI Rules came into being in the same year (2020), the modification of the consolidation provision mentioned here occurred in the January 2020 version of the Rules.

<sup>657</sup> See Article 13(1) of the CEPANI Rules (2023)

<sup>658</sup> Pursuant to Article 1 and Article 7(1) of the CEPANI Rules (2023), the fact that parties have agreed to resort to arbitration under the CEPANI Rules brings the effect that the Schedules of the CEPANI Rules are also equivalently applicable.

<sup>659</sup> See Article 4 of Schedule III of CEPANI Rules

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consolidation matters that can be *de facto* decided by the (potential) arbitrator(s) under CEPANI. It is left to CEPANI to choose whether the President or the Appointment Committee will deal with the consolidation matter in the specific case.<sup>660</sup>

However, the President or the Appointment Committee is not powered to take the initiative to determine consolidation, though it was allowed in the prior CEPANI Rules before the Rules modification in 2013<sup>661</sup>. Instead, the power to initiate a request for consolidation is up to one of the parties or any of the composed arbitral tribunals, where the former is required not to file such a request later than any other plea<sup>662</sup>, while the latter is not expressly imposed with a similar restriction.<sup>663</sup> Likewise, the decision on consolidation is also required to be rendered before any other plea if the request was initiated by a party, while the decision on consolidation can be made at any time, at least in theory, if the request was initiated by a tribunal.<sup>664</sup>

Lastly, as Gary B. Born well reminds, since Article 13(1) CEPANI requires all the arbitrations to be consolidated under CEPANI should be governed by the CEPANI rules, selection of different arbitral institutions (beyond CEPANI) would indicate lack of consent to CEPANI consolidation and fail the consolidation submitted in such situation.<sup>665</sup>

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<sup>660</sup> Benoît Allemeersch, Olivier Caprasse and others, *Guide to the CEPANI Arbitration Rules* (Wolters Kluwer 2021) 73

<sup>661</sup> See Article 12 of the CEPANI Rules (2005 & 2007): "...This decision shall be taken either at the request of the Arbitral Tribunal, or, prior to any other issue, at the request of the parties or of the most diligent party, or **upon CEPANI's own motion**..." (Emphasis is added.)

<sup>662</sup> "Before any plea" in the Rules should be interpreted fairly, as some literature reminds, in the way that the parties are supposed to request at the earliest opportunity, subject to the precondition that "parties must have reasonable time to assess the procedural situation and decide for themselves whether consolidation is appropriate", and excessive formalism is not encouraged with regard to the exact order of pleas. See Allemeersch (n 660) 72.

<sup>663</sup> See Article 13(1) of the CEPANI Rules (2023): "... This decision is taken either, prior to any other plea at the request of the most diligent party or at the request of the Arbitral Tribunal or any one of them ..."

<sup>664</sup> *ibid*

<sup>665</sup> Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816

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### *§3. Procedural Fairness*

In terms of procedural fairness, no decision on consolidation can be issued without offering parties and, if any, the arbitral tribunal(s) the opportunity to have their opinions to be heard. Under Article 13(1) CEPANI, the exchange of written submissions rather than an oral hearing suffices, and the Secretariat will set a fixed time limit for it.

### *§4. Condition and Discretion*

Where the parties have reached an agreement on the consolidation of arbitrations, the Appointments Committee or the President of CEPANI shall grant the consolidation as it is agreed to, in line with Article 13(2).

Where there is no such specific agreement on consolidation, the Appointments Committee or the President of CEPANI enjoys the discretion to decide whether consolidation should be ordered, insofar as the pending CEPANI arbitrations are deemed as related or indivisible in the eyes of the Appointments Committee or the President.<sup>666</sup> Another potential mandatory restriction, as per Article 13(3), is that the consolidation may not be ordered if a preliminary decision (e.g. an order for document production, the appointment of an expert or a provisional measure), a decision on admissibility or on merits of a claim has already been rendered. The purpose of this restriction is to circumvent the possible unwelcome or unpredicted effects arising from the prior decisions in question on the later consolidated procedure.<sup>667</sup> In this respect, some other institutional rules do not really mind it to this

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<sup>666</sup> See Article 13(1) of the CEPANI Rules (2023): “The Appointments Committee or the President *may order the consolidation of two or more **related** or **indivisible** arbitrations pending under the Rules* (emphasis added).”

<sup>667</sup> Allemeersch (n 660) 75.

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extent.<sup>668</sup> Nevertheless, this restriction can be ruled out if parties agree so, given the respect for party autonomy.<sup>669</sup>

Compared to many other institutional consolidation regimes, the CEPANI consolidation regime offers relatively more flexibility to permit consolidation: many threshold conditions to permit consolidation under other rules are merely discretionary factors that may deserve to be considered under the CEPANI Rules. For example, the following three factors, which are from an unexhaustive list of discretionary factors for deliberating consolidation enumerated in Article 13(2) CEPANI, are (or at least partly are) largely mirrored with the threshold conditions for consolidation under the institutional rules, such as Article 28 HKIAC (2018), Rule 8 SIAC (2016), Article 10 ICC (2021), Article 9 ICDR (2021), Article 15 SCC (2023):

*“(b) whether the claims made in the separate arbitrations have been made pursuant to the same arbitration agreement;*

*(c) where the claims have been made pursuant to more than one arbitration agreement, whether the arbitration agreements are compatible and whether the arbitrations involve the same parties and concern disputes arising from the same legal relationship.*

*(d) where the claims have been made under more than one arbitration agreement, whether the arbitration agreements are compatible and whether the relief sought arises out of the same series of connected legal relationships;”*

In fact, these three discretionary factors above were actually introduced as three alternative threshold conditions in its first emergence in CEPANI Rules in the 2013 version. Most likely, this was influenced by the consolidation provisions in other popular institutional rules newly amended in the same period. Since the amendments in the 2020 version, these three situations have been "downgraded" to the same

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<sup>668</sup> For example, Article 28.9 HKIAC (2018) provides that: “The revocation of the confirmation or appointment of an arbitrator pursuant to Article 28.8 is without prejudice to: (a) ***the validity of any act done or order made by the arbitrator before his or her confirmation or appointment was revoked.***” (Emphasis is added.), subject to the competent court’s decision as per Article 28.7 HKIAC (2018). ACICA Rules share the similar rule as Article 28.9 HKIAC (2018) in Article 16.10(a) ACICA (2021).

<sup>669</sup> See Article 13(3) of the CEPANI Rules (2023)

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discretionary factors as the progress of each pending arbitration<sup>670</sup>, the composition of tribunals to different pending arbitrations<sup>671</sup>, the place of arbitration<sup>672</sup>, etc. This modification history may imply a supposed more liberal rule-making intent to achieve consolidation under the present CEPANI rules, which the Appointments Committee and CEPANI President may need to give due regard to while weighing the different consolidation-related factors on a case-by-case basis. In any event, different parties or different arbitration agreements never constitute a hindrance to preventing consolidation, no matter under which version of the CEPANI Rules.

### *§5. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings*

If the Appointment Committee or the President of CEPANI decides to grant the consolidation, the tribunal for consolidated proceedings needs to be newly established. In this respect, Article 15(8) CEPANI (2023) has specifically set out a composition procedure, which expressly authorizes the Appointment Committee or the President of CEPANI continues to directly appoint the sole arbitrator or each member of the tribunal. Out of respect for party autonomy, however, parties are still allowed to appoint the sole arbitrator or all members of the tribunal by agreement, subject to the confirmation by the Appointment Committee or the President.<sup>673</sup>

The decision regarding the arbitrators' appointment and confirmation per the way above is not subject to further recourse, as Article 15(9) CEPANI stipulates.<sup>674</sup>

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<sup>670</sup> See Article 13(2)(e) of the CEPANI Rules (2023)

<sup>671</sup> *ibid*

<sup>672</sup> See Article 13(2)(f) of the CEPANI Rules (2023)

<sup>673</sup> See paragraph 2 under Article 16(8) of the CEPANI Rules (2023)

<sup>674</sup> Article 15(9) of CEPANI Rules (2023) states: "The decisions of the Appointments Committee or the President as to the appointment, confirmation or appointment following replacement of an arbitrator shall not be subject to recourse."

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## §6. *Legal Effect of the CEPANI's Decision on Consolidation*

Regarding whether the consolidation decision made by CRPANI is final and binding, the CEPANI Rules do not expressly address it. However, the answer, in my view, should be affirmative, which may be indirectly inferred by the related provisions expressly providing for the tribunal's power to review jurisdiction on the decision made from other multiparty-related procedural mechanisms (excluding consolidation) under the CEPANI Rules.

Article 12 CEPANI is the provision to stipulate the *competence-competence* principle that the arbitral tribunal shall rule on all disputes as to its own jurisdiction. From the perspective of the codification order within the Rules, Article 12 is arranged under the section named "Multiple Parties, Multiple Contracts, Intervention and Consolidation" (Articles 9-13), and consolidation provision is placed behind this Article 12 as Article 13. Article 12(1) CEPANI expressly states that the jurisdiction review that the arbitral tribunal can exercise within the meaning of this provision shall include the "[disputes as to its own jurisdiction] in connection with articles 9 to 11 of the Rules", namely the jurisdictional related disputes arising from the decision of multiple parties (Article 9), multiple contracts (Article 10), intervention and joinder of a third party (Article 11). In other words, the decision made from the consolidation mechanism enshrined in Article 13 is expressly excluded from the scope that a tribunal can exercise its *competence-competence*. In this light, the consolidation decision is not subject to the review of the consolidated tribunal as to jurisdiction, which should be then deemed as final and binding.

Someone may deny the above argument by reference to Article 7(3), where the arbitral tribunal is expressly empowered to rule itself on "whether the claims made in the arbitration may be determined together in a single arbitration" regardless of the prior *prima facie* determination made by the CEPANI President, arguing that consolidation decision is also included in it. Through the CEPANI Rules, however, this power (bluntly, the same quoted wording in text) is only echoed in the provisions of multiple contracts per Article 10; therefore, Article 7(3) should not be treated as

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governing the consolidation decision made under Article 13, which is also confirmed in the CEPANI comments literature<sup>675</sup>.

## Section 4. VIAC Rules

### §1. Context

VIAC, like other leading Continental European-based arbitral institutions, incorporated consolidation provision in its rules relatively early. The first VIAC consolidation provision was born in 2006. The year 2013 witnessed an overhaul over the consolidation provision, which since then remained fundamentally unchanged until the current 2021 VIAC Rules, except for a slight simplification of wording during the revision course of 2021<sup>676</sup>.

Under the 2006 VIAC Rules, consolidation of separate arbitrations is only permitted if identical arbitrators have been appointed in all to-be-arbitrations, and all the parties concerned, and the arbitral tribunal unanimously consent.<sup>677</sup> In such case, the consolidation decision is made by the arbitral tribunal.<sup>678</sup>

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<sup>675</sup> See Allemeersch (n 660) 44 (“Article 7(3), considering Article 10, refers to the competence of the Arbitral Tribunal in deciding whether all the claims made in an arbitration dispute may be decided in a single arbitration.”)

<sup>676</sup> The slight change is to replace “and the place of arbitration in all of the arbitration agreements on which the claims are based is the same” in 2018 Rules into “and the place of arbitration is the same” in 2021 Rules in the same placement of Article, without any other alternation.

<sup>677</sup> Article 15(8) of the 2006 VIAC Rules states: “...the consolidation of two or more disputes shall be admissible only if the same arbitrators have been appointed in all the disputes that are to be consolidated and if all parties and the sole arbitrator (arbitral tribunal) agree.”

<sup>678</sup> Article 15(9) of the 2006 VIAC Rules states: “The decision whether multiparty proceedings, *as per* paragraph 1 of this Article, are admissible, shall be taken by the sole arbitrator (the arbitral tribunal) upon application of one of the Respondents. If the admissibility of multiparty proceedings is denied, the arbitral proceedings return to the stage they were in for the Respondents before the sole arbitrator (the arbitral tribunal) was appointed.”

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## *§2. VIAC Board's power to Decide Consolidation*

The consolidation regime got delicately transformed in 2013, and the Viennese ethos of consolidation persists so far. Among other things, VIAC Rules confers the consolidation-deciding power from the arbitral tribunal to VIAC Board, the arbitral institution. This is confirmed unambiguously by Alice Fremuth-Wolf, the former VIAC Secretary-General, that “the VIAC board has the sole competence to decide consolidation, and the tribunal has then to accept it.”<sup>679</sup> Pursuant to Annex 2(7) of VIAC Rules, the Board is not obliged to give reasons when issuing decision on the request for consolidation.

Nevertheless, in accordance with 15(1), VIAC Board can only decide consolidation upon the request of a party, rather than on its own initiative. As to the wording of the provision, there is no time limit for the party to initiate the request. It is commonly known among all the rules that the later the request is initiated, the less the enhancement of efficiency can be achieved by consolidating separate proceedings, thus the decision-maker, by exercising its discretionary power, might refuse to grant consolidation if the initiation timing is too late. Accordingly, the consolidation request is encouraged to be initiated at a (relatively) early stage, this common norm also applies to VIAC Rules, as Article 15(2) strengthens the importance of considering the stage having been processed in each case for Board's decision.

In line with Article 15, however, there might be a tricky stage for VIAC Board to make decision when the consolidation request is initiated before the tribunal of other arbitration(s) initiated later is composed, since in this case VIAC might make a consolidation decision not only without approval of all parties but also without waiting for all tribunals of separate proceedings to be nominated in which the parties are entitled the opportunity to substantially exclude consolidation as discussed below.

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<sup>679</sup> Email from Dr. Alice Fremuth-Wolf, the former VIAC Secretary-General, to author (23 February 2022)

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### *§3. Condition and Discretion: Identical Arbitral Tribunal is the Key*

The current requirements to grant consolidation in VIAC have been prudently extended. Pursuant to the Article 15 of 2021 VIAC Rules, the prerequisite to grant consolidation has been changed, i.e., the place of arbitration must be identical for all arbitral proceedings, which shall be respected in all cases.<sup>680</sup> In other words, consolidation will fail to be ordered if the to-be-consolidated arbitrations are seated in different places, as so other rules do. However, the Rules are not that rigid to examine the seats. With reference to Article 25(1), Vienna is the default place of arbitration, in case such agreement of identical seat is absent.

In contrast, the old two prerequisites stipulated in 2006 Rules as stated above have been discreetly relaxed to the effect that it will suffice so long as one of the conditions is satisfied, namely either all parties agree, or the same arbitrator(s) was/were appointed between the separate proceedings. Note that consent from arbitral tribunal is not necessary anymore, but as VIAC commentators indicate, the arbitral tribunal's comment will be consulted as an important basis for the Board's decision.<sup>681</sup> Insofar as the conditions above are met, consolidating separate arbitral proceedings may be granted in the case where the parties to the separate proceedings are not identical, or/and the arbitration agreements involved are not same but just compatible with each other<sup>682</sup>, subject to Board's full discretion. In line with Article 15(2), the Board shall consider all relevant circumstances in exercising its discretion, including the compatibility of the arbitration agreements and the respective stage of the arbitral proceedings.

The identical composition of the arbitral tribunal is decisive in VIAC consolidation regime<sup>683</sup>, as some VIAC commentators highlight, behind which there is a legislative intent from the rule-drafters:

*“Unlike other arbitration rules, the Vienna Rules largely put the decision on whether consolidation would seem expedient into the hands of the parties and*

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<sup>680</sup> Oberhammer (n 53) 105.

<sup>681</sup> *ibid* 104.

<sup>682</sup> Pitkowitz (n 4) 316

<sup>683</sup> Oberhammer (n 53) 106.

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*not into those of the institution, as each party is able to prevent consolidation by nominating a different arbitrator in the proceedings that were instituted later and by withholding its consent to consolidation.*"<sup>684</sup>

This arrangement reflects VIAC's delicate attempt to strike equilibrium between authorizing VIAC Board the necessary power to determine consolidation and not trespassing party autonomy substantially. Indeed, referring to VIAC Rules in the arbitration agreements, which provide for consolidation, is deemed to the effect that the parties to the said arbitration agreements empower VIAC to decide consolidation beforehand; nevertheless, a party still retains some autonomy to *ex parte* exclude consolidation outcome by nominating a different arbitrator in the arbitral proceedings initiated later.<sup>685</sup> Likewise, where the number of arbitrators agreed in different arbitration agreements diverges, consolidation is thus excluded as the said arbitration agreements are obviously incompatible with each other.<sup>686</sup>

#### *§4. Procedural Fairness*

Though, in all case the parties and the arbitrator(s) already appointed are granted the right to be heard in the form of written exchange statements, where the parties can express their dissent, but the effect of this dissent cannot compare to the effect of appointing different arbitrators under VIAC Rules, where the former is a guiding effect at most, whereas the latter is a straightforward decisive effect.

#### *§5. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings*

Provided the consolidation is granted in the case same arbitrators are nominated, no issue would occur with regard to the tribunal composition in multiparty arbitration, since the arbitral tribunal that all parties have confirmed continues to hear the consolidated proceedings. However, in the situation where the consolidation is sought to be achieved on the basis of all parties' agreement, and the tribunals of separate proceedings are not the same, for the purpose of Article 15 that the Board is not

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<sup>684</sup> *ibid* 104.

<sup>685</sup> *ibid* 106.

<sup>686</sup> *ibid* 106.

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authorised to consolidate two or more arbitral tribunals, the parties need to decide which tribunal prevail among them or they can revoke both/all of them and appoint an entirely new tribunal; otherwise, the consolidation request would be denied by the Board to prevent risking the integrity of the arbitral proceedings.<sup>687</sup>

### *§6. Legal Effect of the VIAC Board's Decision on Consolidation*

Is the decision ordered by the Board final and binding? There is no doubt that the consolidation power is exclusively in the hand of VIAC, the administering arbitral institution, rather than the tribunal, which means if the Board declines to grant consolidation, the tribunal before one of the separate proceedings then cannot order consolidation if the tribunal thinks it necessary, and even all separate proceedings are heard by the same tribunal. However, it is quite ambiguous on whether the tribunal or the Board can bifurcate (or revoke, essentially) the consolidated proceedings after the consolidation is ordered, as the provision of separation of proceedings is absent from the Rules<sup>688</sup>. Following *Oberhammer* and *Koller*, partial or complete bifurcation of proceedings is within the residual procedural discretion that arbitral tribunal retains even the consolidation has already been ordered, according to the general principle that an issue which is regulated nowhere will be subject to the arbitral tribunal's discretion (subject to the *lex arbitri*, applicable substantive law and admissible agreements between the parties)<sup>689</sup>. They believe that the Board in principle is just authorized to temporarily intervene in the arbitral tribunal's work of ruling on the cases brought before it, and thus consolidation only builds up a foundation for the conduct of proceedings by the arbitral tribunal under VIAC Rules.<sup>690</sup> By applying this logic, the tribunal can exercise its discretionary power to overturn the Board-made consolidation decision and thus bifurcate the consolidated proceedings, so long as the tribunal has a better knowledge of case or some developments just occur after proceedings were consolidated upon the compulsory consideration of the previous

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<sup>687</sup> *ibid* 108. This was also confirmed by Dr. Alice Fremuth-Wolf. Email from Dr. Alice Fremuth-Wolf, the former VIAC Secretary-General, to author (24 February 2022)

<sup>688</sup> Like many other institutional arbitration rules.

<sup>689</sup> *Oberhammer* (n 53) 109.

<sup>690</sup> *ibid*

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consolidation decision.<sup>691</sup> In this regard, *Fremuth-Wolf* agrees that the tribunal has all its procedural power to bifurcate the consolidated proceedings, but acknowledges that

*“The arbitral cannot order the de-consolidation of proceedings but it might – by way of conducting the proceedings in accordance with its inherent power – split various issues and decided issues separately.”*<sup>692</sup>

This argument is consistent with her abovementioned standpoint that the tribunal has to accept the consolidation decision made by the Board. It can be deduced from her words that the tribunal cannot separate the consolidated arbitration case to the extent from one case number to two or more case numbers in the VIAC administrative way, but to the extent that tribunal, within its inherent procedural power, can split the claims and then hear separately and render the respective awards one by one under the formality framework of one integrated case. *Fremuth-Wolf* also highlights that the bifurcation completely depends on the case in hand, in which consolidation alone is not an indicator to provoke or impede.<sup>693</sup>

## Section 5. SCC Rules

### §1. Context

SCC is widely recognized as one of the world’s reputable international arbitral institutions, traditionally renowned for its favoured position in resolving West-East disputes.<sup>694</sup> As part of its “constant ambition to provide users with state-of-the-art dispute resolution services to help them navigate the [increasingly] complex international business environment”<sup>695</sup>, SCC introduced its consolidation regime in

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<sup>691</sup> *ibid*

<sup>692</sup> Email from Dr. Alice Fremuth-Wolf, the former VIAC Secretary-General, to author (24 February 2022)

<sup>693</sup> *ibid*.

<sup>694</sup> ‘Our history’ (SCC) <<https://sccarbitrationinstitute.se/en/about-scc/our-history>> accessed 29 March 2023)

<sup>695</sup> Annette Magnusson and Kristin Campbell, ‘Foreword’, in Jakob Ragnwaldh, Fredrik Andersson and others, *A Guide to the SCC Arbitration Rules* (Kluwer Law Arbitration 2019) ix-x

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2007 and has witnessed a steadily expansive development thereof from the following two revisions (one in 2010, another in 2017), as briefly illustrated below.

The first revision of SCC consolidation in 2010 did not bring any substantial change (but some stylistic alteration in text) to the equivalent provisions established in 2007, both of which limited the SCC Board’s power to order consolidation to the extent that the to-be-consolidated SCC arbitrations should involve the same parties and the relevant disputes should arise out of the same legal relationship.<sup>696</sup> This was deemed “too narrow” for the possibilities to permit consolidation under SCC, since “parallel arbitrations often involve related but not identical parties”, e.g. two parallel arbitrations commenced under the same shareholders’ agreement could not be consolidated into one proceeding just for the reason that the shareholders involved in the separate case are not identical.<sup>697</sup> The second revision in 2017<sup>698</sup> truly brings to the SCC consolidation significant changes, which primarily expands the SCC Board’s power to permit the consolidation of multiple contracts involving multiple different parties for strengthening the effectiveness of the consolidation tool under SCC to facilitate the efficient resolution of disputes overall. As of 1 January 2023, SCC has adopted the latest-amended Rules, where the consolidation provisions (Article 15 SCC (2023)) remain unchanged in connection with the 2017 version.

## *§2. SCC Board’s Power to Decide Consolidation*

After consolidation provisions were ever incorporated in the SCC Rules, the authority to consolidate arbitrations under the auspices of the SCC has always fully lied on the SCC Board, which persists till the present 2023 Rules.<sup>699</sup> Together with the SCC Secretariat, the “SCC Board” is one of the two inner bodies of the SCC, comprising one Chairperson, up to three Vice-Chairpersons and up to twelve additional members,

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<sup>696</sup> See Article 11 of the SCC Rules (2007) and Article 11 of the SCC Rules (2010)

<sup>697</sup> Ragnwaldh (n 15) 43.

<sup>698</sup> See Article 15 of the SCC Rules (2017)

<sup>699</sup> See Article 15(1) of the SCC Rules (2023); also see Ragnwaldh (n 15) 44; Patrik Schöldström, ‘Chapter 6. The Arbitrators’ in Annette Magnusson, Jakob Ragnwaldh and Martin Wallin (eds), *International Arbitration in Sweden: A Practitioner’s Guide* (2nd edn, Kluwer Law International 2021) 154; Smith (n 15) 181

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non-Swedish nationals required.<sup>700</sup> Divergent from the SCC Secretariat, whose role is to carry out the day-to-day arbitration work, the function of the SCC Board is to make decisions required of the SCC in administering disputes under the SCC Rules.<sup>701</sup> Although the SCC Board, as per Article 7 of Appendix I (2023), may delegate some of these decisions to the Secretariat with the aim of improving the efficiency of the proceedings, it is unequivocal that any request for consolidation shall be exclusively determined by the SCC Board rather than as a matter which can be delegated to the Secretariat.<sup>702</sup>

As a general matter, the SCC Board meets once a month to make related decisions over the cases that the SCC Secretariat and the allocated case-administered counsel are satisfied that the information in the submissions made is sufficient enough to be reviewed by the Board.<sup>703</sup> If the Board fails to reach a majority, the Chairperson retains the casting vote.<sup>704</sup> Also, the Board may appoint a specific Committee to make certain decisions on behalf of the Board.<sup>705</sup> In case of an emergency, the Chairperson or a Vice-Chairperson can make a decision on behalf of the Board.<sup>706</sup> Thus, a decision on consolidation may be made either way above.

Pursuant to Article 15(1) SCC (2023), the SCC Board can only wield power to run the consolidation process upon a party's request rather than on its own motion (*ex officio*). Also, as an implicit rule to apply Article 15 SCC (2023), SCC consolidation presupposes that all the to-be-consolidated arbitrations are governed by the SCC Rules, which means the SCC Board has no power to consider the consolidation involving any arbitration subject to the rules of other arbitral institutions or

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<sup>700</sup> See Article 1 and 3 of Appendix I Organization of the SCC Rules (2023).

<sup>701</sup> See Article 11 of the SCC Rules (2023) and Article 7 of Appendix I Organization of the SCC Rules (2023). Also see 'The Board: Here You Will Find More Information About the The SCC board' (SCC) <<https://sccarbitrationinstitute.se/en/about-scc/contact/board>> accessed 30 March 2023

<sup>702</sup> In accordance with Article 7 of Appendix I Organization of the SCC Rules (2023) and Article 11 of the SCC Rules (2023), the decisions which may be delegated from the SCC Board to the SCC Secretariat are: decisions on the advances on costs, extensions of the time limit to render the final award, dismissal for non-payment of registration fee, release of arbitrators and the fixing of the costs of the arbitration. Rather, decisions on issues such as the prima facie jurisdiction of the SCC, arbitrator appointments, challenges to arbitrators, consolidation, joinder, claims under multiple contracts and the removal of an administrative secretary are, in principle, not delegated to the Secretariat. Also See Ragnwaldh (n 15) 31

<sup>703</sup> Ragnwaldh (n 15) 31

<sup>704</sup> See Article 7 of Appendix I Organization of the SCC Rules (2023).

<sup>705</sup> See Article 7 of Appendix I Organization of the SCC Rules (2023).

<sup>706</sup> See Article 7 of Appendix I Organization of the SCC Rules (2023).

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commenced in *ad hoc* proceedings, unless the parties have remedied such incompatibility by later agreement.<sup>707</sup> Further to ask, is the purview of the SCC Board to decide consolidation narrowly limited to the arbitrations commenced under the same set of SCC Rules? First, it is reasonable to conclude that, insofar as parties don't agree otherwise, the arbitration conducted under the SCC Rules for Expedited Arbitration cannot be consolidated into another arbitration under the standard SCC Rules, for the former lacks the incorporation of consolidation provisions and the parties involved could be deemed to exclude consolidation possibility incorporated in the latter by specifically opting to the SCC Rules for the Expedited Arbitration.<sup>708</sup> The same logic also applies *mutandis mutatis* to the consolidation issue between the arbitrations commenced under different versions of SCC Rules, which probably leads to the incompatibility between respective applicable SCC consolidation provisions, e.g. one arbitration under the 2010 SCC rules and another arbitration under the 2023 SCC Rules is hard to be expected to be consolidated. However, since the 2023 SCC Rules share an utterly identical set of consolidation provisions and relevant arrangements with the 2017 SCC Rules, to my understanding, it is hard to find any reason to deny the possibility of consolidating merely because one of the to-be-consolidated arbitrations is under the 2017 Rules and another is under the 2023 Rules.

The same provision (Article 15(1)) provides that it is the “newly commenced arbitration” to be consolidated into a “pending” arbitration, rather than a new “pending” arbitration to be consolidated into an “old” pending arbitration, as many other rules allow<sup>709</sup>. As *Ragnwaldh and Andersson* point out: “The wording in Article 15(1) suggests that consolidation is not possible when an arbitration can no longer be considered to be ‘newly commenced’. Thus, consolidation should be, in principle, be requested as early as possible in the proceedings.”<sup>710</sup> In practice, the requirement for consolidation application to be initiated as early as possible can reach the effect, though not entirely avoidable, of greatly reducing the chances of releasing the arbitrators already appointed<sup>711</sup> and, to the extent possible, avoiding unnecessary delay over the antecedent pending arbitration.

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<sup>707</sup> Ragnwaldh (n 15) 44.

<sup>708</sup> The same conclusion is shared by the SCC Rules' commentators. *See* *ibid* 44.

<sup>709</sup> Like ICC consolidation, Swiss consolidation (SAC), HKIAC consolidation, ACICA consolidation, AIAC consolidation, NAI consolidation, CIETAC consolidation and so on.

<sup>710</sup> Ragnwaldh (n 15) 44.

<sup>711</sup> *ibid* 44.

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### §3. *The Three Threshold Conditions and SCC Board's Discretion*

#### A. Three Alternative Conditions

Article 15(1) SCC (2023) sets out three threshold conditions that the SCC Board is authorized to order consolidation as long as either of these conditions is satisfied.

First, serving to confirm party autonomy, consolidation should be permitted if all the parties have specifically agreed to consolidation.<sup>712</sup> In this case, parties are even free to request consolidating the arbitrations filed under the incompatible arbitration agreements, presupposing they can remedy the incompatibilities and bend all the arbitration agreements to the SCC Rules.<sup>713</sup> When the parties manage to reach an agreement on consolidation, in practice, it is not necessary to await a decision from the Board — “Rather, the Secretariat will simply confirm the parties’ agreement and take the administrative steps necessary to implement the consolidation agreed upon”, clarified so the *Guide to the SCC Arbitration Rules* (“*SCC Guide 2017*”).<sup>714</sup>

Second, without the additional agreement to consolidation, the SCC Board is allowed to consolidate arbitrations where all the claims made in the different arbitrations are under the same arbitration agreement.<sup>715</sup> Third, if the claims are made under more than one arbitration agreement, the Board still has a chance to grant consolidation, provided the relief sought arises out of the same transaction or series of transactions and the Board believes the different arbitration agreements involved to be compatible.<sup>716</sup> Out of the question, merely the fact of unidentical parties from original arbitrations does not hinder a consolidation achieved under SCC at all.

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<sup>712</sup> See Article 15(1)(i) of the SCC Rules (2023)

<sup>713</sup> Ragnwaldh (n 15) 45.

<sup>714</sup> *ibid* 45.

<sup>715</sup> See Article 15(1)(ii) of the SCC Rules (2023)

<sup>716</sup> See Article 15(1)(iii) of the SCC Rules (2023)

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## B. Procedural Fairness and SCC Board's Discretion

Albeit one of the conditions above is satisfied, SCC Board still reserves the discretion to deny the consolidation request, following the wording that SCC Board “may” decide to consolidate arbitrations in Article 15(1).<sup>717</sup> Before rendering the final decision, as per Article 15(2), the Board needs to consult with the parties (and arbitrators, if any) and take into account all the relevant circumstances to the specific case. The same provision sets out a non-exhaustive list of factors for the SCC Board to pay careful attention to, which includes (a) the stage of the pending arbitration and (b) the efficiency and the expeditiousness of the arbitration.<sup>718</sup>

Apart from them, the Board should assess all the possible circumstances related to the specific case. For example, as the *SCC Guide (2019)* points out, where the said second condition where the arbitrations are all commenced under the same arbitration agreement is satisfied, it would not be sufficient for the Board to grant consolidation if these arbitrations actually concern unrelated disputes which share different issues of facts or law, since this situation would in general not benefit from consolidation.<sup>719</sup>

### *§4. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings*

If the SCC Board decides to grant consolidation, the mandate to establish the consolidated tribunal remains upon the Board. As per Article 15(3) SCC (2023), the SCC Board may release any arbitrators already appointed at its discretion to proceed, given that different arbitrators have been appointed in the to-be-consolidated arbitrations before the issuance of consolidation decision.<sup>720</sup>

If looking at the text on the face, this provision may raise a question of whether the eligible arbitrators to be chosen to hear the consolidated proceedings are only limited to the prior appointed arbitrators. If so, it may harm the newly joined party's right to nominate the arbitrator for the consolidated arbitration since consolidation occurs

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<sup>717</sup> Ragnwaldh (n 15) 46.

<sup>718</sup> See Article 15(2) of the SCC Rules (2023)

<sup>719</sup> Ragnwaldh (n 15) 45.

<sup>720</sup> *ibid* 47.

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when his involved original arbitration is at the required “newly commenced” stage, where he has not had a chance to nominate yet. This way of implementing rules may risk the equal treatment principle.

More reasonably, inspired by consolidation rules under other arbitral institutions<sup>721</sup> and SCC’s joinder rule (Article 13(8)), the SCC Board should also be competent to appoint the entire arbitral tribunal if necessary. As such, Articles 17(3) & (5), which share a similar spirit, should be referred to be applied together with Article 15(3) when SCC Board establishes the tribunal for the consolidated arbitral proceedings.

### *§5. Legal Effect of the SCC Board’s Decision on Consolidation*

According to Article 7 of Appendix 1 (2023), all the decisions made by the SCC Board are supposed to be final, including the Board’s decision on consolidation, whether negative or positive. The *SCC Guide 2017* also confirms it:

*“The decision whether or not to consolidate is final, irrespective of any subsequent ruling from the Arbitral Tribunal on its own jurisdiction over any of the parties or any of the claims.”*<sup>722</sup>

However, merely from the SCC Rules and the related Appendix, it is not clear whether the reasons for the decision will be provided to the parties. From the SCC’s past practice, as illustrated in one SCC case applicable under the predecessor rules (SCC Rules (2014)), no related reasons seem to be provided to the parties when the SCC Board issued the decision on consolidation.<sup>723</sup>

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<sup>721</sup> Like HKIAC consolidation, SAC consolidation, ICC consolidation, SIAC consolidation, AIAC consolidation, CEPANI consolidation and so on.

<sup>722</sup> Ragnwaldh (n 15) 46.

<sup>723</sup> *National Joint Stock Company Naftogaz of Ukraine v. Public Joint Stock Company Gazprom*, SCC Case No. V2014/129, 28 Feb. 2018 (“265. On 28 January 2015, the Board of the SCC decided not to consolidate SCC Arbitration Case V2014/129 with SCC Arbitration Case V2014/78.”)

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## Section 6. CIETAC Rules

### §1. Context

The consolidation regime was first introduced by CIETAC under the 2012 Rules. CIETAC could only consolidate separate arbitral proceedings if and only if all parties concerned agree to consolidation, at the request of any party, or on its own initiative. This approach was quite conservative and cautious, which was considered in connection with “[the] pragmatic concern of the legal environment in China not being as arbitration-friendly as desired”, as some commentator explained at that time.<sup>724</sup>

The CIETAC 2015 Rules significantly liberalised its consolidation regime, which is recognised as “one of many examples of CIETAC’s efforts to develop into a world-class arbitration institution and catch up with the prevailing international arbitration practices”<sup>725</sup>.

### §2. CIETAC’s Power to Decide Consolidation

Unlike the 2012 Rules, CIETAC may trigger the consolidation process only upon the request of a party, rather than *ex officio*.<sup>726</sup> Along with the 2012 Rules, the 2015 Rules still vest CIETAC with the power to decide consolidation rather than the arbitral tribunal. It is quite confirmed that, under CIETAC rules, consolidating arbitrations is an exclusive matter for CIETAC, the arbitral institution, to determine, even though some consultation with the arbitral tribunal may be helpful.<sup>727</sup>

By the way, an organizational alternation is worth mentioning that a new CIETAC Arbitration Court has been established to replace the CIETAC Secretariat to exercise

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<sup>724</sup> Lu (n 51) 302.

<sup>725</sup> Jingzhou Tao, ‘CIETAC Arbitration Rules, Chapter II, Section 1, Article 19 [Consolidation of Arbitrations]’ in Loukas A. Mistelis (ed), *Concise International Arbitration* (Second edition, Kluwer Law International 2015) 646

<sup>726</sup> Man Sing Yeung, ‘The CIETAC Arbitration Rules 2015’, (2015) 17 *Asian Dispute Review* 136, 138.

<sup>727</sup> Lu (n 51) 302.

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case management power over consolidation and other procedures since the 2015 reformation.<sup>728</sup>

### *§3. The Four Alternative Conditions and CIETAC's Discretion*

#### **A. Conditions**

By contrast to the 2012 Rules, the consolidation-deciding power conferred on CIETAC now gets largely strengthened by enlarging the grounds to permit consolidation. Pursuant to Article 19(1), CIETAC may grant consolidation if (a) all claims are made under the same arbitration agreement; (b) where the claims are made under more than one arbitration agreement, the arbitration agreements should be identical or compatible, and the arbitrations should involve the same parties as well as legal relationships of the same nature; (c) where the claims are made under more than one arbitration agreements, the arbitration agreements should be identical or compatible, and the multiple contracts involved are a principal contract and its ancillary contract(s) or (d) all parties agree.

Among other things, consent of all parties is no longer a precondition to consolidation, but only as one of the four alternatives which CIETAC can rest upon to determine whether to grant consolidation or not. Some commentator thus argues that this signals a fundamental transformation to CIETAC's approach over consolidation regime, since now it is empowered to order "compulsory consolidation against the wishes of a party", instead of giving full party autonomy and refraining itself as previous.<sup>729</sup> However, CIETAC is still relatively unwilling to consolidate arbitrations

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<sup>728</sup> Yeung (n 726) 137. Also, Article 19 of the Articles of Associations of CIETAC: "The Arbitration Court shall take charge of the procedural administration of the arbitration cases accepted by CIETAC. The Arbitration Court has one President. The main functions and duties of the Arbitration Court are: 1. To administer international, foreign-related and domestic arbitration cases..."

<sup>729</sup> Yeung (n 726) 138.

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between different parties unless the multiple contracts involved are a principal contract and ancillary contract(s).<sup>730</sup>

## B. Procedural Fairness and CIETAC's Discretion

Insofar as one of the grounds above is satisfied, CIETAC still need to take into account the opinions of all parties and other relevant factors rather than ordering consolidation automatically. In this vein, all parties concerned are entitled to present their opinions to CIETAC before the decision on the consolidation request is issued. As for what the “other relevant factors” are, Article 19(2) does not set forth a clear list of factors for CIETAC to consider when exercising its discretion but imposes CIETAC no restriction in such case.<sup>731</sup>

Regardless, one factor is particularly emphasised in the provision for CIETAC to consider, which is the “correlation between the arbitrations concerned, including the nomination and appointment of arbitrators in the separate arbitrations.” Following *Tao*, it may be construed in the situation where the arbitrator(s) has already been appointed, consolidation of arbitrations may not be encouraged by CIETAC in practice.<sup>732</sup> Furthermore, in accordance with *Yu* and *Cao*, the CIETAC's insiders, the “correlation[s] between the arbitrations” include, but are not limited to, the following scenarios in CIETAC's practice:

- 1) whether the to-be-consolidated arbitrations involve common issue(s) of law;
- 2) whether the to-be-consolidated arbitrations involve common issue(s) of facts (and thus a material amount of overlapping evidence);

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<sup>730</sup> Following Wei Sun and Melanie Willems, “ancillary contracts” referred to Article 19 (1b) under Chinese law mean contracts that cannot independently exist in the absence of the principal contract. For instance, if A lends money to B under Contract 1 and C agrees to guarantee B's repayment of the debt to A under Contract 2, then Contract 2 is the ancillary contract and Contract 1 is the principal contract because the guarantee cannot exist without the underlying debt. In this case if A initiates arbitration proceedings against B and C separately before CIETAC, C may request that CIETAC consolidate the proceedings even if A or B do not agree. Wei Sun and Melanie Willems, *Arbitration in China* (Kluwer Law International 2015) 179

<sup>731</sup> Tao, ‘CIETAC Arbitration Rules, Chapter II, Section 1, Article 19 [Consolidation of Arbitrations]’ (n 725) 646.

<sup>732</sup> *ibid* 646; this argument is also largely in line with *Yu* and *Cao*, see Jianlong Yu and Lijun Cao, *A Guide to the CIETAC Arbitration Rules and Practice* (OUP 2021) 294 (“[T]he CIETAC is more likely to grant consolidation before, rather than after, the formation of the arbitral tribunal.”)

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- 3) whether the disputes of arbitrations arise out of the same transaction or the same series of transactions;
  - 4) whether the decision on a specific matter in one arbitration is dependent on a decision from another arbitration;
  - 5) whether the gap of the stage of procedures of the to-be-consolidated arbitrations is too far to reconcile.<sup>733</sup>

#### *§4. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings*

Should consolidation be ordered, the separate proceedings shall be consolidated into the arbitration that was first commenced, where there is no specific agreement.<sup>734</sup> In the case where the different parties from separate proceedings are consolidated into one arbitral proceeding as to Article 19(1c) stipulates, the typical tribunal composition issue arising from multiple parties would occur. Pursuant to Article 29, where there are two or more Claimants and/or Respondents in an arbitration case, the Claimants and/or Respondents first shall jointly nominate the co-arbitrator(s) or jointly entrust the Chairman of CIETAC to do so; if the said parties fail to do as such, the Chairman of CIETAC shall appoint all three members of the arbitral tribunal and one of them shall be designated as the presiding arbitrator by CIETAC. As a matter of course, where the consolidation occurs in regard to multiple arbitrations between two same parties, Article 29 will not come into play.<sup>735</sup>

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<sup>733</sup> Yu, *A Guide to the CIETAC Arbitration Rules and Practice* (n 732) 293-294.

<sup>734</sup> Article 19(3) of 2015 CIETAC Rules.

<sup>735</sup> Yu, *A Guide to the CIETAC Arbitration Rules and Practice* (n 732) 294.

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## §5. Legal Effect of CIETAC's Decision on Consolidation

Confirmed by the CIETAC insiders, there is no time limit contained in the CIETAC Rules for rendering the decision on consolidation, which is out of consideration for the sake of flexibility of the arbitral process.<sup>736</sup>

With regard to the legal effect of CIETAC's decision on consolidation, such decision seems final and binding and cannot be revoked by the arbitral tribunal later on the basis of the Rules. This inference gets confirmed unequivocally by a former council J working in a Chinese leading arbitration institution<sup>737</sup>. During the interview with J, I asked whether the arbitral tribunal of the consolidated proceeding still retain the power to overturn the consolidation decision made by the arbitral commission<sup>738</sup>. J said:

*“In practice, arbitrator is impossible to overturn the decision by the arbitral commission. From the perspective of [Chinese arbitration] practice, arbitral commission is like the ‘iron-forged whole barrack’, and the arbitrator is nothing more than a ‘soldier like water come and go’<sup>739</sup>, consequently arbitrator is impossible to conflict with arbitral commission.”<sup>740</sup>*

From the perspective of special Chinese arbitration culture, J further explained the metaphor above and the *status quo* relationship between the arbitrator and arbitral institution in China:

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<sup>736</sup> *ibid.*

<sup>737</sup> This source is close to the inner-source of Chinese leading arbitration institution but unwilling to disclose his name. So, I use alias “J” to refer to the source. The WeChat interview with J (5 March 2022)

<sup>738</sup> China-based arbitration institutions are generally named as “XX Arbitration Commission (XX 仲裁委员会zhōng cái wěi yuán huì)” as Article 10 of China Arbitration Law provides. In order to accurately reflect the interview's contents and context, the term “arbitral commission” will be continually used as to the interview and this term refers to China-based arbitration institution(s) in this analysis.

<sup>739</sup> Here, J was in fact referring to a Chinese saying, “A barrack is an iron-forged whole, where soldiers like water come and go (铁打的营盘流水的兵)”, which literally means that the barrack is permanently standing, while the soldiers stationed in the barrack is always changing.

<sup>740</sup> The WeChat interview with J (5 March 2022)

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*“Due to the reality that ad hoc arbitration is not allowed in China<sup>741</sup>, all arbitrations in China are monopolized by arbitration commissions, which means that it is arbitration commission that is the long-standing and reputable platform, whereas arbitrators are just important employees to these arbitration commissions<sup>742</sup>. As such, no arbitrator dares to irritate the arbitration commission, doesn't it? From the arbitrator's side, the purpose of maintaining this high-paid job causes the arbitrator definitely attaching himself/herself on the arbitration commission. If the arbitrator failed to keep good relationship with arbitration commission, she/he naturally would lose the future business afterwards, and then lose this decent hob. This culture haunts every field in China: individual has no power to counter a platform (institution). Arbitrator is easy to find everywhere (to replace the old ones who irritates arbitration commissions), but only the arbitration commission stands persistently<sup>743</sup>. Based on this norm, you could easily understand why it is impossible for the arbitrator (individual) to encounter against the arbitration commission (platform).”<sup>744</sup>*

In addition, J also revealed that, on the aspect of specific operation, the decision on the consolidation request made by CIETAC will be stamped with its own official seal, which symbolises the red line to deter the arbitrator's challenge. <sup>745</sup>

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<sup>741</sup> The existent China Arbitration law forbids *ad hoc* arbitration with reference to Article 18 of PRC Arbitration law.

<sup>742</sup> It should be understood that it is the arbitrator that work for the arbitration commission, not arbitration commission works for arbitrator.

<sup>743</sup> It should be understood that it is the institution that parties trust and seek recourse to, rather than some certain arbitrators.

<sup>744</sup> The WeChat interview with J (5 March 2022)

<sup>745</sup> The interview also involved with other aspects, such as legal justifications of empowering CIETAC to decide consolidation, which will leave to be articulated in Block 3.

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## Section 7. HKIAC Rules

### §1. Context

As mentioned in Chapter 4, the arbitral institutions based in common law jurisdictions are generally slower than the global competitors based in civil law jurisdictions to introduce consolidation provisions in their arbitration rules expressly. HKIAC, the Hong Kong-based prominent dispute resolution service provider, is the earliest leading arbitral institution from a common law jurisdiction to provide for consolidation provisions in its institutional rules. In the 2013 version of HKIAC rules, consolidation rules were added for the first time. From 2018, the current consolidation rules come into effect in the latest version of HKIAC Rules. In a bid to well accommodate the growing demand from corporate users of HKIAC in complex multi-party and/or multi-contract transaction, the coherent two versions of Hong Kong-style consolidation mechanisms are considerably more detailed than the counterparts in other rules, “in keeping with its overall aim of ensuring that the HKIAC Rules provide maximum clarity and flexibility, while affording minimal opportunity for delay or obstruction”.<sup>746</sup> The 2018 version is even broader than the former one.<sup>747</sup>

According to the feedback from practitioners, as released by HKIAC itself in 2016, the detailed-featured HKIAC consolidation provision exempts the users of HKIAC from the need for additional lengthy drafting by bringing them “the comfort of knowing that the [consolidation] Rules cater for the most common eventualities”, thus the feedbacks from the arbitration community on HKIAC consolidation mechanism are “very positive”.<sup>748</sup> From the perspective of statistics, the consolidation tool has

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<sup>746</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 54) 288; Moser, *A Guide to the HKIAC Arbitration Rules* (n 21) 227

<sup>747</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 54) 288

<sup>748</sup> Karen Tan, ‘New Year, New Practice Note: HKIAC Issues Practice Note on Consolidation of Arbitrations’ (*HKIAC*, 1 January 2016) <<https://www.hkiac.org/news/practice-note-consolidation-arbitrations>> accessed 5 October 2022. By contrast, there was also criticism voices on HKIAC’s consolidation rules, such as Gilbert Samberg, ‘New Rules of the Hong Kong International Arbitration Centre Arguably Foster Collective and Opt-in Class Arbitration’ (*MINTZ*, 15 November 2018) <<https://www.mintz.com/insights-center/viewpoints/2018-11-20-new-rules-hong-kong-international-arbitration-centre-arguably>> accessed 5 October 2022. It commented: “The movement toward enabling joinder and consolidation arguably jumps the shard, however, when the specific consents of all of the

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been steadily used since it came out, and the majority of the requests for consolidation are granted. This observation is clearly illustrated by the table below, which is based on the annual statistics released by HKIAC which specifically cover consolidation<sup>749</sup>.

Year	Request for consolidation	Grant consolidation (until the end of each year)
2022	10	8
2021	6	5
2020	8	7
2019	4	3
2018	9	8
2017	11	9
2016	4	1
2015	2	2

**Table 2** HKIAC’s annual numbers of consolidation applications and the annual number of granted consolidations until the end of the year (2015-2022)

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affected parties ceases to be prerequisite. That is inconsistent with the fundamental nature of arbitration as a wholly consensual method of dispute resolution.”

<sup>749</sup> HKIAC, ‘2022 Statistics’ (Hong Kong International Arbitration Centre, 2023)

<<https://www.hkiac.org/about-us/statistics>> accessed 20 January 2023.

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## *§2. HKIAC's Power to Decide Consolidation*

Keeping in line with the 2013 Rules, the power to order consolidation remains fully with HKIAC under the Article 28.1 of 2018 Rules, instead of any arbitral tribunal. Inside the HKIAC, in precise, the Proceedings Committee under auspices of the HKIAC Executive Committee is mandated to perform this function.<sup>750</sup>

Nevertheless, HKIAC (through the Proceedings Committee) may not exercise this power on its own initiative<sup>751</sup>, because it can order consolidation only upon the request of a party. And the Rules literally allow a party to request consolidation at any stage of the arbitration<sup>752</sup>, even after some arbitrators being appointed.

## *§3. The Three Alternative Conditions and HKIAC's Discretion*

Pursuant to Article 28.1, consolidation may only be contemplated by HKIAC to grant, provided one of the three conditions can be satisfied, where:

- (a) all parties to all arbitrations consent to consolidate; or
- (b) all claims in the arbitrations are under the same arbitration agreement; or
- (c) the claims are under more than one arbitration agreement, the following three sub-requirements should be satisfied simultaneously—
  - (i) a common question of law or fact exists in all of the to-be-consolidated arbitrations; (ii) the reliefs claimed are all related to, or arise out of, the same

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<sup>750</sup> Hong Kong International Arbitration Centre, 'Proceedings Committee', available under: <<https://www.hkiac.org/about-us/council-members-and-committees/proceedings-committee>> (Last access on 14 August 2023)

<sup>751</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 54) 290.

<sup>752</sup> Joe Liu, 'A Case Study on the HKIAC Administered Arbitration Rules 2018', (2019) 21 *Asian Dispute Review* 24, 28

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transaction or a series of related transactions; and (iii) the involved arbitration agreements are compatible to each other.

With regard to the above three conditions for consolidation under HKIAC, three remarks are worth underlining for the purpose of this thesis.

#### A. HKIAC Is Empowered to Exercise a Relatively Broader Power to Decide Consolidation

First, compared with many rules, HKIAC is vested with a broader power to consolidate separate arbitrations, which is reflected in two respects.

First of all, consolidation does not presuppose all parties' consent under HKIAC rules, despite the stipulated obligation that HKIAC shall consult the comments from all the parties and any confirmed arbitrators. Article 28.1(a) applies to the case where explicit agreement on consolidation has been reached by all the parties to all the relevant arbitral proceedings. In HKIAC's practice, such consent shall be in form of writing and be submitted to HKIAC as an attachment of the Request for Consolidation.<sup>753</sup> Consolidation by agreement is not unusual in HKIAC's house<sup>754</sup>, but agreement of consolidation is just one of the three approaches to achieve consolidation in HKIAC, which means a unilateral opposition comment given by one or more parties cannot deter HKIAC from continuing to contemplate ordering consolidation or not.

As to the second dimension, HKIAC Rules further make it possible to consolidate separate arbitrations involving different parties that occur in more expansive circumstances, under many of which consolidation is unequivocally disallowed if applying many other rules. Article 28.1(b) might cover all the situations where the claims arising out of two or more to-be-consolidated arbitrations are made under the same arbitration agreement, including the situations where the parties are not the same in each arbitration proceeding, provided they are all parties to the same arbitration agreement and all the to-be-consolidated arbitrations have been commenced under

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<sup>753</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 54) 290.

<sup>754</sup> *ibid.* "Consolidation by agreement is not uncommon. HKIAC has administered a number of arbitrations where all parties have agreed to consolidate, both before and after the HKIAC Rules (2013) came into force."

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that same arbitration agreement.<sup>755</sup> A particular example given by the HKIAC Rules guidebook is the situation where the separate arbitrations involving different parties are all made under a stand-alone dispute resolution agreement (often known as an “umbrella agreement”) which refers to arbitration.<sup>756</sup> In this case, a Request for Consolidation may be submitted based on Article 28.1(b). Many rules also contain a similar provision, for example ICC Article 10(b). However, unlike ICC and many other rules, HKIAC does not stop here with regard to consolidating separate arbitrations involved with different parties. Article 28.1(c) widely extends the possible consolidation range involved with different parties to the cases where the claims are under more than one arbitration agreement, subject to a series of substantial requirements. Thanks to that, the dispute arising out of a “chain” of contracts that probably involve different parties could be much easier to be consolidated and end up with one award in order to avoid the inconsistent-decision outcome. For example, under this circumstance, a dispute between the owner and general contractor where the claims are under one arbitration agreement, and the general contractor and its subcontractor where the claims are under another arbitration agreement may be expected to be consolidated under the auspice of HKIAC. As articulated above, such kind of consolidation is out of question to be granted by ICC Court or CIETAC Court, absent the parties’ specific agreement. ICC and CIETAC Rules both stipulate the situations where consolidation can be granted if claims are made under two or more arbitration agreements, but the former demands the parties involved must be identical<sup>757</sup>, and the latter can only apply in the case of principal-ancillary contract relationship<sup>758</sup>, which is not in line with the stated chain contract case. Moreover, since HKIAC is the exclusive competent body to decide consolidation, this administering arbitral institution enjoys a broad consolidation power as established by the Rules, which seems to reflect HKIAC’s liberal mindset of applying deemed consent principle on the question of consolidation with obviously lessened self-restraints in consideration of party autonomy. Maybe that is why some commentor has been tempted to say HKIAC has a “broad *compulsory* consolidation power”<sup>759</sup>.

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<sup>755</sup> *ibid* 291

<sup>756</sup> *ibid*

<sup>757</sup> Article 10(c) of ICC Rules 2021

<sup>758</sup> Article 19(1b) of CIETAC Rules 2015

<sup>759</sup> Vincent Connor and Mohammed Talib, ‘Joinder, Intervention and Consolidation under the HKIAC Administered Arbitration Rules 2013’ (2014) 2014 Asian Dispute Review 190, 194

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## B. If Needed, HKIAC Will Review the Merits to Examine the Satisfaction of Conditions

Second, in order to determine whether the conditions to permit consolidation are satisfied, HKIAC will review the merits of each Request for Consolidation<sup>760</sup>, which is concentratedly reflected in the application of Article 28.1(c). To grant consolidation under Article 28.1(c), HKIAC shall be satisfied that all the three requirements therein are fulfilled.

As to the first requirement where at least one common question of law or fact must exist across all the to-be-consolidated arbitrations, HKIAC will first consult the parties and any confirmed arbitrators to establish whether they agree on such existence, and HKIAC will consider this requirement satisfied if positive answer is given; if not, HKIAC will have to conduct further enquiries, typically based on the submitted pleadings, and then determine its position.<sup>761</sup>

With respect to the second requirement where the reliefs claimed must be all related to, or arise out of, the same transaction or a series of related transactions, HKIAC will again first confirm if the parties and any appointed arbitrators agree on such existence by consulting with their opinions, and HKIAC will accept that this requirement is met if such agreement is reached; if not, HKIAC's decision will then be highly dependent on the relevant factual matrix, by the means of examining the underlying contractual documents to confirm whether the disputes arise out of the same transaction or series of related transactions, with consideration of the background(s) to the transaction(s) that could be set forth in the related contractual files.<sup>762</sup>

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<sup>760</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 54) 288.

<sup>761</sup> *ibid* 291. The Guide to the HKIAC Arbitration Rules (2022) gives more details on how HKIAC determines its position on the first requirement based on the further enquires it conducts: “[HKIAC] will typically assess the information in the pleadings and may occasionally request that the parties to each arbitration submit a list of issues arising in that arbitration and seek to identify any question of law or fact that is common to all the lists. If there appears to be a common question of law or fact on the lists, HKIAC will seek the parties’ comments before it determines whether this condition is met. Even where common questions are raised to determine different questions of law, HKIAC will usually consider this criterion has been satisfied. If HKIAC cannot identify any common question of law or fact, it will consider that this condition is not satisfied.”

<sup>762</sup> *ibid* 292. The Guide to the HKIAC Arbitration Rules (2022) enumerates the situations to which this requirement may apply include, without limitation, the following:

“(1) Repeat orders in a sale of goods transaction, where the purchaser places the same order on a repeat basis from the same supplier, under the same original contract, or under a series of identical contracts;

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In respect of the third requirement where the arbitration agreements must be compatible, the involved arbitration agreements shall be substantively compatible to fulfil this criterion, which means the discrepancy existed between the involved arbitration agreements can only be accepted and considered as compatible when the differences can be surmounted by parties, the tribunal and HKIAC and will not cause any practical difficulties.<sup>763</sup> As the *Guide to the HKIAC Rules (2022)* illustrates, accordingly, it will be hard in practice to consolidate the arbitrations, respectively lodged under two arbitration agreements which stipulate different rules, different seats, different numbers of arbitrations or different languages<sup>764</sup>, in the absence of significant rectification made in those aspects.<sup>765</sup>

### C. The Discretion Exercised by HKIAC

Last but not least, HKIAC retains discretion to decide whether to order consolidation, even if all conditions set forth in Article 28.1 are satisfied<sup>766</sup>. HKIAC should

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- (2) Construction projects, in which disputes arise between the employer and contractor under the head contract, and related disputes arise between the contractor and one or more subcontractors under subcontracts (so-called ‘chain of contracts situation);
  - (3) Insurance and reinsurance agreements;
  - (4) Disputes arising under a loan agreement in respect of which there is a separate but related guarantee;
  - (5) Supply chain contracts;
  - (6) Derivatives transactions concluded under an ISDA Master Agreement, in respect of which there are several, separate confirmation; and
  - (7) Suites of transaction documents, for example a share purchase agreement and related shareholders agreement or memorandum of agreement.”

<sup>763</sup> *ibid* 293.

<sup>764</sup> *ibid* 294. In respect of language, the *Guide to the HKIAC Rules (2022)* clarifies that it is likely to be incompatible between one arbitration agreement which stipulates bilinguality (English and Chinese), and another stipulates English or Chinese under HKIAC, even users of HKIAC are known to frequently agree their arbitrations be bilingual (normally English and Chinese).

<sup>765</sup> *ibid* 293-294. “Other factors to be considered when determining compatibility include, without limitation, are as follows:

- (1) Any preconditions to the commencement of arbitration;
- (2) Any required qualifications of the arbitrators (e.g., that an arbitrator be qualified in a particular law or discipline, or speak a particular language);
- (3) The procedure for appointing arbitrators;
- (4) The governing law of the arbitration agreements; and
- (5) The method for determining the fees and expenses of the tribunal.”

<sup>766</sup> *ibid* 290. Even for art 28.1(a) condition, HKIAC retains the discretion to decline consolidation where the consolidation agreement has been reached by all the parties to all arbitration, when there are compelling reasons not to consolidate. Nevertheless, in practice, consolidation will be ordered by HKIAC if all parties in all arbitrations agree.

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cautiously contemplate on the particular circumstances of each case, such as “any mandatory provisions of the applicable law affecting consolidation, any procedural prejudice caused to any party as a result of consolidation, and the extent of cost and time efficiency achieved by consolidation”<sup>767</sup>, and consolidation can only be enabled where HKIAC considers it appropriate, on the premise where Article 28.1 conditions are met under HKIAC’s determination. Under the HKIAC consolidation’s overriding purpose referring to “maximize procedural efficiency, promote consistency and minimize cost”, HKIAC will consider, aiming at producing the most fair and efficient result for all parties, whether decline or permit consolidation, and if the ramification of consolidation prevails, whether full consolidation or partial consolidation (e.g. leaving the parties to one arbitration served by arbitrating separately) could be better for the particular case.<sup>768</sup>

In fact, the discretion that HKIAC exercises is closely related to HKIAC's determination of assessing the fulfilment of the stipulated conditions for consolidation when reviewing the merits. As an example illustrated by *Moser and Bao* in the HKIAC Rules Guidebook,<sup>769</sup> where one arbitration agreement specifies Hong Kong as the seat of arbitration, and the other fails to specify any seat, these two arbitration agreements are not necessarily incompatible, and consolidation may still be possible to be ordered under HKIAC’s discretion by assessing the particular circumstances of the case. In this regard, HKIAC will consider all relevant factors to determine whether the silent agreement can be perceived to point to Hong Kong, including taking into account of Article 14.1 of the HKIAC Rules (2018), under which Hong Kong is presumed as the default seat unless the arbitral tribunal determines another seat is more appropriate in the circumstances of the case. HKIAC may determine these two arbitration agreements to be compatible and continue to order consolidation, if HKIAC is convinced that an arbitral tribunal could decide the seat as Hong Kong.<sup>770</sup> But at least before the arbitral tribunal has been established, in order to figure out whether there maybe another more appropriate seat for this case than Hong Kong for ultimately determining the compatibilities of arbitration agreements, HKIAC is supposed to assume itself to substitute the position of the arbitral tribunal to determine this issue and the decision will be heavily dependent on HKIAC’s own discretion.

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<sup>767</sup> Liu (n 752) 28.

<sup>768</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 54) 291, 288.

<sup>769</sup> *ibid* 294. This example is given by the Guide to the HKIAC Rules (2022).

<sup>770</sup> *ibid*

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#### *§4. Procedural Fairness*

With respect to the equal right to be heard, as mentioned before, HKIAC has obligation to consult opinions from all the related parties to all arbitrations and any confirmed arbitrators on the Request of Consolidation pursuant to Article 28.1 and Article 28.5, which is an imperative before making the decision. However, any opposite comments cannot unilaterally unsettle the independent decision-making power held by HKIAC on the question of consolidation, even the dissent from the confirmed arbitrators. Likewise, on the later issue of the composition of the arbitral tribunal when consolidation is ordered, HKIAC will also consult opinions from all the related parties or any arbitrators who have been appointed or confirmed, and then make the corresponding decision on its own.

In addition, where the *lex arbitri* contains any mandatory requirements on consolidation, the consultation period is supposed to be a good timing for the related parties and any confirmed arbitrators to inform HKIAC, since HKIAC itself will not conduct independent enquiries.<sup>771</sup>

#### *§5. Legal Effect of the HKIAC's Decision on Consolidation*

In respect of the legal effect of HKIAC's decision on consolidation, the administered arbitral institution's decision on consolidation under its own administered arbitration rules is final and binding since "there is no stipulated avenue for a party to challenge an institution's decision to consolidate proceedings".<sup>772</sup> The explicit rule support is in Article 2.2 HKIAC, where all the decisions made by HKIAC under the HKIAC Rules

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<sup>771</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 21) 227. It should be reminded that, for the HKIAC arbitrations seated in Hong Kong as majority HKIAC arbitrations do so, the Hong Kong Arbitration Ordinance contains no mandatory requirements which would not interfere with HKIAC's Article 28 power to order consolidation, provided that the Article 28 criteria are satisfied. This notification expectation only applies to the HKIAC arbitration with a seat outside Hong Kong and the law of the seat contains mandatory requirements on consolidation.

<sup>772</sup> Chan (n 352).

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are prescribed as final, unless HKIAC itself determines otherwise, and not subject to appeal, insofar as the applicable law permits.<sup>773</sup> The same provision also clarifies that HKIAC has no obligation to give reasons for any decision it makes pursuant to the Rules, including for the HKIAC-made consolidation decision. Also, it is also the HKIAC's duty to communicate such decision to all the parties concerned and the already-appointed arbitrators.<sup>774</sup>

Article 28.8 of HKIAC Rules (2013) once clearly reads that “parties waive any objection, on the basis of HKIAC’s decision to consolidate, to the validity and/or enforcement of any award made by the arbitral tribunal in the consolidated proceedings, in so far as such waiver can validly be made”.<sup>775</sup> This provision precludes any party to the arbitration from challenging or resisting enforcement of the award on the basis of HKIAC’s decision to consolidate, subject to any mandatory provision of the applicable law that would invalidate this kind of contractual waiver.<sup>776</sup> Even though this waiver provision got repealed in the amendment of the 2018 version of HKIAC Rules, there is still no clear avenue under the institutional rules either for a party to complain about the HKIAC’s decision on consolidation, either for the later-established arbitral tribunal to reconsider the institution-made decision on consolidation and to revoke such decision if necessary.

### *§6. The Post-Consolidation Outcomes Based on the HKIAC Rules*

Provided consolidation request is granted by HKIAC, the HKIAC Rules explicitly stipulate a series of outcomes to be caused.

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<sup>773</sup> Article 2.2 HKIAC (2018) states: “HKIAC has no obligation to give reasons for any decision it makes in respect of any arbitration commenced under these Rules. Unless otherwise determined by HKIAC, all decisions made by HKIAC under these Rules are final and, to the extent permitted by any applicable law, not subject to appeal.”

<sup>774</sup> Article 28.6 of HKIAC Rules (2018)

<sup>775</sup> This provision is similar to Article 29.2 of 2020 LCIA Rules.

<sup>776</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 21) 241-242

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## A. Registry at Arbitral Institution

First, in terms of registry administration, the case number and caption of the first case filed with HKIAC will prevail leaving the case numbers of other original arbitrations to appear in parentheses, in line with Article 28.6 which stipulates that arbitrations shall be consolidated into the arbitration commenced first as a default rule.<sup>777</sup>

## B. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings

Second, of more consequence, HKIAC's decision to consolidate will directly affect the composition of the arbitral tribunal. Article 28.8 unequivocally stipulates that, if consolidation is granted, all parties to the consolidated proceedings shall be deemed to have waived their right to appoint an arbitrator, and any prior confirmed or appointed arbitrator may be revoked by HKIAC. Such similar waiver is also adopted in (other rules) Swiss Rules<sup>778</sup>. To ensure the equal treatment of all parties in the appointment process of the tribunal, HKIAC is empowered to appoint the arbitral tribunal of the consolidated proceedings with or without consideration of any party's appointment, which means HKIAC shall appoint the entire arbitral tribunal instead of simply reconfirming the already appointed arbitrators of any relevant arbitration.<sup>779</sup>

It worth noted that HKIAC's power to revoke prior confirmed arbitrator(s) is discretionary.<sup>780</sup> HKIAC will determine on its own after seeking views of all the parties or any arbitrators who have been appointed or confirmed. Normally, HKIAC will sustain the prior confirmation or appointment only when no party expresses objection on that; On the contrary, if there is any dispute or objection in respect of any candidate(s), the usual practice of HKIAC will be to "wipe the slate clean", by revoking all the prior confirmed arbitrators and appoint an entirely new tribunal.<sup>781</sup> In

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<sup>777</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 54) 300. "However, there are exceptions. The first exception is where all parties to all the relevant cases so agree. Even where there is no agreement, HKIAC may depart from the default rule and consolidate the proceedings differently, if it considers that would better serve the interests of the parties." The Guide to the HKIAC Rules (2022) illustrate some examples for the latter.

<sup>778</sup> Article 7(3) of Swiss Rules of International Arbitration

<sup>779</sup> Moser, *A Guide to the HKIAC Arbitration Rules* (n 54) 301-302.

<sup>780</sup> *ibid* 303.

<sup>781</sup> *ibid*.

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any event, the prior confirmed arbitrators cannot be given any priority to sit on the panel of the consolidated arbitration under HKIAC's Rules unless all parties agree to do so. And again, there is no requirement for HKIAC to attach any reason with regard to its appointment of the tribunal when informing the parties of the newly-established tribunal which will hear the consolidated proceedings.

### §7. Practice

A 2015 HKIAC partial award, *Wisco v. Pointer and CESA*<sup>782</sup>, could be a textbook example to reflect the ethos of HKIAC's consolidation mechanism, even the applicable rules of this case are HKIAC Rule (2013).

The consolidation decision-making process of this case, insofar as the first partial final award, arose out of two chain contracts of sales and purchase, which both referred to the administration of HKIAC and application of HKIAC Rules (2013). POINTER UNVESTMENT (H.K.) LIMITED ("Pointer") and WISCO AMERICA COMPANY LIMITED ("Wisco") concluded a sales and purchase agreement No. 1401 (dated 19 March 2014) ("No. the 1401 Agreement"), in which Pointer agreed to buy 110,000 Wet Metric Tonnes ("WMT") in Wisco's option of Brazilian iron ore lumps ("Cargo") at a provisional price of US\$99.60 per Dry Metric Ton ("DMT") to be shipped from Tubarao (Brazil) to a main port in China. The Cargo was supplied to Wisco by Commercial Exportadora Serra Azul S/A ("CESA") based on CESA contract of sale and purchase (dated 18 March 2014). Actually, Wisco has played as the mediator between these two chain contracts of sales and purchase, for Wisco acted as the seller of the No. 1401 Agreement with Pointer and also acted as the buyer of CESA contract with CESA.

As Pointer failed to claim two refunds, damages and related interests and costs, it commenced an arbitration on Wisco in HKIAC on 12 September 2014, where the latter assigned Case No. HKIAC/A14127. And the appointment of the three arbitrators of this arbitration's tribunal was confirmed by HKIAC after each party designated its co-arbitrator and two co-arbitrators jointly designated one presiding

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<sup>782</sup> *Pointer Investment (H.K.) Limited v. Wisco America Company Limited and Wisco America Company Limited v. Commercial Exportadora Serra Azuul S/A*, First Partial Final Arbitration Award, HKIAC Case No. A14127 (No. 14179), 17 November 2015.

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arbitrator.<sup>783</sup> Later on, Wisco filed another arbitration on CESA on 26 November 2014 and at the same time, designated the same co-arbitrator<sup>784</sup> as in the first arbitration. HKIAC assigned it Case No. HKIAC/A14179. On the same day, 26 November 2014, Wisco also requested to have the first arbitration (Case No. HKIAC/A14127) and the second arbitration (Case No. HKIAC/A14179) consolidated pursuant to Article 28 of the HKIAC Rules (2013), while Pointer from the first arbitration opposed it.

After considering submissions made by parties and receiving the comments of the confirmed arbitrators, on 5 January 2015, HKIAC informed the parties the result that it had decided to consolidate the two arbitrations into the first arbitration under Case No. HKIAC/A14127, without attaching any reasoning. This is a decision made based on Article 28.6 of the HKIAC Rules (2013). In respect of the post-consolidation outcome of the tribunal's composition, the parties to the consolidated arbitration would be deemed to have waived their rights to designate an arbitrator, in spite of an arbitration agreement stressing the arbitrator-designation right that each party is entitled<sup>785</sup>. Notwithstanding the arbitral tribunal of the first arbitration had been fully confirmed, as well as a common arbitrator had seated in both tribunals, HKIAC proceeded to revoke the appointments of all confirmed arbitrators. According to Article 28.6, HKIAC continued to wholly appoint a new three-arbitrator tribunal<sup>786</sup> for the consolidated proceedings and simply informed this result to the related parties without reasoning.

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<sup>783</sup> *ibid*, para [10]. Mr. Philip Yang was designated on behalf of Pointer and this appointment was confirmed by HKIAC on 22 October 2014. Mr. Russell Coleman SC was designated on behalf of Wisco and this appointment was confirmed by HKIAC on 8 December 2022. And Mr. Philip Yang and Mr. Russel Coleman jointly designated Prof. Anselmo Reyes as the third and presiding arbitrator.

<sup>784</sup> Namely, Mr. Russell Coleman SC.

<sup>785</sup> Article 12. Arbitration Clause of “No. the 1401 Agreement”: “All disputes in connection with this contract or the execution thereof shall be settled amicably by friendly negotiations between the two parties. If no settlement can be reached, the case in dispute shall then be submitted for arbitration in Hong Kong by Hong Kong International Arbitration Centre (“HKIAC Rules”), which rules are deemed to be incorporated by reference in this clause. The dispute shall be heard by three arbitrators. Each Party shall nominate one arbitrator in accordance with the HKIAC Rules. The two Party nominated arbitrators shall nominate the third arbitrator who shall act as the presiding arbitrator. The arbitration award shall be final and binding on both the parties and may be enforced in any court having jurisdiction over the party against which enforcement is sought. The cost of arbitration shall be borne by the losing party unless otherwise awarded.” However, it should be noted that the arbitrator-designation entitlement of each party stressed in this clause is also subject to the applicable HKIAC Rules as it states so.

<sup>786</sup> *Pointer Investment* (n 782) Para [16]. “The HKIAC informed the parties that they appointed Mr. Bill Amos, Ms. Mary Thomson and Mr. Christopher Moger QC (Presiding) as the three member arbitral tribunal.”

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This award also demonstrates how substantial and forceful the deciding-making power that HKIAC exercises as well as the compelling effect of HKIAC's decision on consolidation through an interesting perspective.

In fact, before the application of consolidation by Wisco, Pointer already had lodged an application of the expedited procedure to HKIAC for the first arbitration on 4 November 2014, based on Article 41.3 of Rules (2013). Alike consolidation, the expedite procedure is also rested upon HKIAC to decide under HKIAC Rules.<sup>787</sup> Considering the application time of these two requests in tandem, it cannot induce that Pointer had an explicit malicious intention to disrupt consolidation, which should be illustrated at first. On the same day when HKIAC decided to grant consolidation, the same body rejected the Pointer's application on the expedited procedure, where the reasons were given that the expedited procedure does not apply to consolidated proceedings in accordance with Article 41(3) of HKIAC Rules (2013)<sup>788</sup>.

In my view, it looks bizarre since the refusal reason given by HKIAC does not contain any substantial analysis of whether the case from the first arbitration is feasible to apply expedited procedure or not, despite the fact that the request for the expedited procedure was filed earlier than the request for consolidation. Instead, HKIAC refused the request for an expedited procedure simply on the ground that it decided to grant another parallel request, i.e., consolidation, the outcome of which is incompatible with an expedited procedure. Reasonably, it can be speculated that the HKIAC authority, behind the curtain, had probably contemplated comprehensively these two requests which are under its own competence, and considered which request should be dealt with as a priority, behind which is the values competition between the two procedural tools, which left for HKIAC to trade off in the consideration of the specific case. It seems to illustrate that HKIAC's powerful discretion is not only confined to the decision-making of an individual issue itself, but also to the coordination across the different issues and/or requests arising out of one case or related cases which are under its competence, rather than mechanically processing requests in the order in which they were filed. Again, the exercise of this substantial deciding power requires reviewing the merits of each case. Back to the case at issue, unfortunately, the refusal reason for the expedited procedure is quite insufficient, and it could be unconvincing

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<sup>787</sup> Article 41 of HKIAC Rules (2013).

<sup>788</sup> Article 41.3 of HKIAC Rules (2013) states: "Unless the parties agree otherwise, the Expedited Procedure contained in Article 41 shall not apply to any consolidated proceedings under Article 28 or to any arbitration commenced under Article 29."

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for the applicant party. However, all the parties and the arbitral tribunal constituted for the consolidated proceedings had to accept this decision made by HKIAC without any possible avenue to further challenge according to the applicable Rules. Thus, once the consolidation request is ordered by HKIAC, the decision will be final and binding, and possibly will cause a negative effect on other requests, like the request for expedited procedure in this case.

### *§8. Summary*

To sum up, HKIAC relatively adopts an “institution-predominant approach” to consolidation compared to the “party-centric approach” that many other arbitration houses do, in terms of HKIAC's exclusive power to decide consolidation in a broader range, and the irreversible effect of such decision, as well as HKIAC’s full power to determine the constitution of the arbitral tribunal for consolidated proceedings, subject to the strict adherence of equal treatment principle.

## **Section 8. AIAC Rules**

### *§1. Context*

Differing from other selected arbitral institutions, which are created purely by domestic law, AIAC was established, upon the initiative of States<sup>789</sup>, pursuant to a host country agreement between an intergovernmental organization, the Asian-African Legal Consultative Organization (AALCO), and the Government of Malaysia.<sup>790</sup> This treaty agreement recognizes “AIAC as a not-for-profit, non-governmental international arbitration institution (AIAC has its own juridical

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<sup>789</sup> Mourre (n 63) 91.

<sup>790</sup> AIAC, ‘ADR in the Age of Innovation: 2021 Annual Report’ (2021), 6.

<[https://admin.aiac.world/uploads/ckupload/ckupload\\_20220729062318\\_34.pdf](https://admin.aiac.world/uploads/ckupload/ckupload_20220729062318_34.pdf)> accessed 1 February 2023

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personality<sup>791</sup>) which has been accorded independence and certain privileges and immunities by the Government of Malaysia for the purposes of executing its functions as an independent, international organization”<sup>792</sup>, though not been given the form of an international organization with international legal personality<sup>793</sup>. The Kuala Lumpur-based AIAC, formerly known as the Regional Centre for Arbitration in Kuala Lumpur (RCAKL), was one among five regional arbitration centres formed under the auspices of AALCO<sup>794</sup>, the other four being located in Egypt, Nigeria, Iran and Kenya.<sup>795</sup> The initial purpose for AALCO to establish a network of Regional Centres for Arbitration in different parts of Asia and Africa is to minimize the flow of arbitration cases to arbitral institutions outside the Afro-Asian region so as to build a feasible alternative to the traditional arbitration institutions in the West.<sup>796</sup>

With regard to the AIAC consolidation regime, since the first attempt to regulate the consolidation issue in the 2013 Revision of the AIAC Rules, consolidation provisions have been renewed in the 2017 edition (the 2018 edition remains), and the current 2021 edition of AIAC Rules.

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<sup>791</sup> Thomas R. Klötzel, ‘Part III. Asian International Arbitration Centre (AIAC) Arbitration Rules 2018 with Commentary’ in Sundra Rajoo, *UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 [Amended 2011 & 2018] and The AIAC Arbitration Rules 2018* (Sweet & Maxwell Asia 2018) 707

<sup>792</sup> AIAC, ‘About AIAC’ <<https://www.aiac.world/About-AIAC->> accessed 1 February 2023. In detail, as a Senior Case Counsel at AIAC, Teoh Shu Ling, further explained to me about the corporation nature of AIAC in a virtual interview, “[As the treaty agreement requires,] The support rendered by the Government of Malaysia to the AIAC does not, however, affect the independent functioning of the Centre. Given the status of the AIAC as an international organization, and the Government of Malaysia’s recognition of the Centre as such, certain immunities and the privileges are conferred upon the AIAC under the domestic laws of Malaysia, namely, the International Organizations (Privileges and Immunities) Act 1992.” Email from Teoh Shu Ling, a Senior Case Counsel at AIAC, to author (3 February 2023)

<sup>793</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 21.

<sup>794</sup> AIAC, then known as RCAKL, was also the first regional arbitration institution established in Asia under the auspices of AALCO. In 2018, the official name of the arbitral institution was changed from RCAKL to AIAC (the Asian International Arbitration Centre) as part of its holistic rebranding. See AIAC, ‘ADR in the Age of Innovation: 2021 Annual Report’ (n 790) 6.

<sup>795</sup> AIAC, ‘ADR in the Age of Innovation: 2021 Annual Report’ (n 790) 9.

<chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://admin.aiac.world/uploads/ckupload/ckupload\_20220729062318\_34.pdf> (Last access: 1 February 2023)

<sup>796</sup> AALCO, ‘Asian-Africa Legal Consultative Organization (AALCO): Regional Centres for International Commercial Arbitration’ <<https://www.aalco.int/arbitration>> accessed 1 February 2023.

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## §2. AIAC Director's Power to Decide Consolidation

### A. Three Conditions and Discretion (Procedural Fairness)

Following the 2017 edition's legacy, the Director of the AIAC remains as the sole authority to grant consolidation under the 2021 AIAC Rules.<sup>797</sup> As the AIAC official annual report revealed, the Director of AIAC is an individual, who is appointed by the Government of Malaysia, after consulting with the AALCO.<sup>798</sup>

In line with Rule 22.1, the AIAC Director may permit consolidation if one of the three conditions is satisfied: (i) a written agreement to consolidate between all parties<sup>799</sup>, or (ii) all pending claims in the arbitrations all under the same arbitration agreement<sup>800</sup>, or (iii) in case the pending claims are under different arbitration agreements, the dispute arises out of the same legal relationship and the Director recognizes the compatibility between the arbitration agreements<sup>801</sup>. Note that, less liberal than the 2017/2018 AIAC Rules, the Director under the 2021 Rules can only *ex parte* exercise its consolidation deciding power when a party file the request for consolidation, rather than exercising this power on its own motion as the 2017/2018 Rules allow<sup>802</sup>.

Alike other rules, insofar as the one of the conditions is satisfied, the AIAC's Director still need to take into account the opinions of all parties, arbitral tribunal (if already formed) and other appropriate circumstances without ordering consolidation automatically.<sup>803</sup> Rule 22.5 contains a non-exclusive list of the relevant circumstances: (i) the stage of the to-be-consolidated arbitrations and the situation of establishment of arbitral tribunal; (ii) whether the disputes from each arbitration arise out of the same legal relationship; (iii) whether the claims arise out of the same transaction or a series of related transactions; (iv) whether the arbitration agreements are compatible; (v)

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<sup>797</sup> See Rule 22.1 of the 2021 AIAC Rules. Also see, Klötzel (n 791) 756.

<sup>798</sup> AIAC, 'ADR in the Age of Innovation: 2021 Annual Report' (n 790) 8.

<sup>799</sup> Rule 22.1(a) of 2021 AIAC Rules

<sup>800</sup> Rule 22.1(b) of 2021 AIAC Rules

<sup>801</sup> Rule 22.1(c) of 2021 AIAC Rules

<sup>802</sup> For example, Rule 10(1) of 2018 AIAC Rules states: "Upon the request of any Party *or, if the Director deems it appropriate*, the Director may consolidate two or more arbitrations into one arbitration, if... (emphasis added)."

<sup>803</sup> Rule 22.5 of 2021 AIAC Rules

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whether the consolidation grant may cause any prejudice to any of the parties and (vi) the efficiency and expeditiousness.

## B. Legal Effect of the AIAC Director's Decision on Consolidation

Pursuant to Rule 47.1, the AIAC Director's decision on consolidation shall be conclusive and binding upon the parties and the arbitral tribunal,<sup>804</sup> which expressly indicates that there is no avenue to appeal or challenge the AIAC Director's decision on consolidation within the premises of AIAC. Arguably, since the Director's consolidation decision is treated as final, the arbitral tribunal established later to hear the consolidated arbitrations has no chance to overturn such a decision by deciding on a plea for lack of jurisdiction out of the consolidation decision. This assumption has been affirmatively verified by an AIAC Senior Counsel during a virtual interview with the author.<sup>805</sup> Also, the text of AIAC Rules implies in the same way: Rule 22 (consolidation) does not expressly contain an equivalent provision as Rule 21.7 under joinder provisions<sup>806</sup>, according to which the joinder decision granted by the Director can be reviewed by the arbitral tribunal to decide any question as to its jurisdiction arising from such a decision.

Furthermore, although Rule 47.2 expressly provides that, in principle, the Director shall not be required to attach reasons for the decisions made (including decision on consolidations)<sup>807</sup>, the Senior Counsel of AIAC specifically revealed in the interview that, "in practice, the Director does furnish his reasons and considerations for allowing or dismissing a Consolidation Request"<sup>808</sup>.

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<sup>804</sup> Rule 47.1 of 2021 AIAC Rules states: "Save where provided for in the AIAC Arbitration Rules, the **decisions of the Director** and of the AIAC, with respect to all matters relating to arbitration **shall be conclusive and binding upon the Parties and the Arbitral Tribunal** (emphasis is added)." The application of Rule 47.1 on consolidation decision made by the Director has been affirmatively verified by the AIAC counsel. Email from Teoh Shu Ling, a Senior Case Counsel at AIAC, to the author (3 February 2023)

<sup>805</sup> Email from Teoh Shu Ling, a Senior Case Counsel at AIAC, to the author (3 February 2023).

<sup>806</sup> Rule 21.7 of 2021 AIAC Rules states: "Any decision by the Director pursuant to Rule 21.6 to allow the Joinder Request is without prejudice to the Arbitral Tribunal's power to decide any question as to its jurisdiction arising from such a decision."

<sup>807</sup> Rule 47.1 of 2021 AIAC Rules states: "The **Director** and the AIAC **shall not be required to provide reasons for decisions made**, unless required by an order of the court or where stated otherwise in the AIAC Arbitration Rules. (Emphasis is added)"

<sup>808</sup> Email from Teoh Shu Ling, a Senior Case Counsel at AIAC, to the author (3 February 2023)

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### *§3. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings*

Provided the Director renders the decision to grant consolidation, all the pending arbitrations will be consolidated into the arbitration that commenced first following “the priority principle”<sup>809</sup> provided in Rule 22.7, unless otherwise determined by the Director after consulting with the parties.<sup>810</sup> The application of the priority principle would not affect the right of parties to agree on some other consolidation.<sup>811</sup>

Within 15 days of being notified of such consolidation decision, all the parties concerned are allowed to agree on the arbitrators to be appointed to hear the consolidated proceedings and/or the process of such agreement. Failing it, the Director, upon one party’s request, would execute its function as the appointing authority under the AIAC Rules to appoint the arbitral tribunal for the consolidated arbitration proceedings in line with the stipulation of Rule 9. Pursuant to Rule 22.8, the Director is authorised to reconstitute the entire arbitral tribunal, including excluding or releasing any already-appointed arbitrator(s) prior to the consolidation decision; in the meanwhile, all parties shall be deemed to forgo their rights to nominate an arbitrator.

## **Section 9. ACICA Rules**

### *§1. Context*

As the present President of ACICA, Georgia Quick, admitted, “[I]n the field of international arbitration, Australia has suffered from what has been termed ‘tyranny of distance’ impacting the extent to which Australian cities are chosen as arbitral seats

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<sup>809</sup> Klötzel (n 791) 756.

<sup>810</sup> Rule 22.7 of 2021 AIAC Rules

<sup>811</sup> Klötzel (n 791) 756.

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and in turn the adoption of the ACICA Rules”.<sup>812</sup> Despite its industry-leading status in Oceania, empirically and statistically speaking, ACICA lacks significance as an international arbitration centre in the larger Asia-Pacific Region, especially compared to the competitors in Singapore, Hong Kong and Mainland China.<sup>813</sup>

Nevertheless, seeing itself as having ideal conditions for international arbitration, such as “stable and transparent legislative framework”, “the quality of the legal expertise”, and “the leading internationalist approach of the judiciary”,<sup>814</sup> Australia perceives transforming into a popular international arbitration jurisdiction as unfulfilled potential. To this end, parallel with the legislature’s endeavours on modernising Australia’s domestic arbitration law, ACICA has always been devoted to promoting state-of-the-art rules at the institutional arbitration level as part of the “cohesive national voice for arbitration in Australia” to advance Australia’s pro-arbitration culture.<sup>815</sup> In this context, ACICA has underlined the up-to-minute consolidation rules as one of the critical values to attract international arbitration users to come to ACICA to solve their disputes.<sup>816</sup>

## *§2. ACICA Consolidation Regime is Substantially Similar to the HKAIC’s Counterpart*

The 2016 version of the ACICA Rules witnessed the first introduction of the consolidation regime, and the latest revised ACICA Rules (2021) continue to develop

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<sup>812</sup> ACICA, ‘Reflections on the Last Decade of Activity at the Australian Centre for International Commercial Arbitration (2011-2021)’ (2022) 4. Available under: <<https://acica.org.au/acica-reflections-report/>> (last access on 23 March 2023)

<sup>813</sup> *ibid* (“Consequently, it can be expected that our case statistics may not be as striking...as some of our counterparts.”); also *see* Leon Trakman and Hugh Montgomery, ‘The “Judicialization” of International Commercial Arbitration: Pitfall or Virtue?’, (2017) 30 *Leiden Journal of International Law* 405, 410 (“Measured empirically, Australia lacks significance as an ICA jurisdiction in Asia. Few ICA cases are conducted in Australia compared to Singapore, Hong Kong, and China.”)

<sup>814</sup> ACICA, ‘Reflections on the Last Decade of Activity at the Australian Centre for International Commercial Arbitration (2011-2021)’ (n 812) 10.

<sup>815</sup> *ibid* 5.

<sup>816</sup> *See* ACICA, “Value of ACICA Input on Life Cycle of Arbitration” <<https://acica.org.au/value-of-acica/>> accessed 23 March 2023. (ACICA officially regards “Consolidation and Joinder of Arbitrations” as one of ten advantages of ACICA arbitration.)

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the ACICA consolidation regime. Shared with other commentators' observations<sup>817</sup>, I found that the ACICA consolidation provisions have always been highly similar to the equivalent provisions in the HKIAC Rule, especially after the significant amendment in the 2021 version of the ACICA Rules: removing the previous restriction set out in the 2016 ACICA Rules that the arbitrations should be between the same parties when the involved arbitration agreements are different. Under the 2016 ACICA Rules, ACICA has handled ten requests for consolidation, with two cases failing to be granted for the same single reason that a difference of parties to multiple arbitration agreements precludes consolidation<sup>818</sup>, while the said de-restriction in 2021 is to expand the power to permit the consolidation of multiple contracts involving multiple differing parties for enhancing the effectiveness of the consolidation tool under ACICA, ensuring the genuine consistency with the foremost counterparts in Asia-Pacific Region, especially the HKIAC, the inspiration source of the ACICA consolidation.

In general terms, the present ACICA consolidation provisions (Article 16 ACICA (2021)) are essentially a verbatim copy of the present HKIAC provisions (Article 28 HKIAC (2018)), *inter alia*, the provisions concerning the identity of consolidation decision-maker, the procedure to trigger and conduct consolidation mechanism, the threshold conditions<sup>819</sup> and procedural fairness<sup>820</sup>. To avoid redundant repetition, please refer to the relevant discussions in HKIAC Section for these common aspects.<sup>821</sup>

The following discussion will focus on the ACICA's consolidation decision-making process (§3) and the consequences of the issuance of a consolidation decision (§4),

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<sup>817</sup> Smith (n 15) 188. In this article, the author did a comparative analysis between the ACICA consolidation provisions (Article 14 ACICA 2016) and HKIAC consolidation provision (Article 28 HKIAC 2013) and concludes: "The ACICA provisions are in similar terms to the equivalent provisions in the HKIAC Rules, except that Article 14.1(c) is in narrower terms, applying only where the arbitrations are between the same parties, thereby precluding consolidation involving multiple parties to multiple agreements." Also see Luke Nottage, Julia Dreosti and others, 'The ACICA Arbitration Rules 2021: Advancing Australia's Pro-Arbitration Culture' (2021) 38 *JIntlArb* 775, 786

<sup>818</sup> ACICA, 'Reflections on the Last Decade of Activity at the Australian Centre for International Commercial Arbitration (2011-2021)' (n 812). This Reflections also revealed that "ACICA has not yet received a request for consolidation under the 2021 ACICA Rules" until the date of its publication.

<sup>819</sup> In these three aspects, Article 16.1, 16.3, 16.4, 16.7, 16.10 of the ACICA Rules (2021) are compatible with Article 28.1, 28.3, 28.4, 28.6 (partly), 28.9 of the HKIAC Rules (2018).

<sup>820</sup> In this aspect, Article 16.2, 16.5 of the ACICA Rules (2021) are compatible with Article 28.2, 28.5, 28.6 (partly).

<sup>821</sup> See Part 1-Chapter 6-Section 7

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which either differs from how the HKIAC Rules provide (e.g. composition method of the consolidated tribunal), either get clarified through an ACICA exclusively-made protocol for deciding consolidation (e.g. ACICA's internal consolidation decision-making process, and the legal effect of a consolidation decision).

### *§3. ACICA's Power to Decide Consolidation and the Corresponding Process inside ACICA*

Aligning with HKIAC consolidation and all other consolidation regimes under Model 4, it is also fully upon the administering arbitral institution to decide on consolidation under the auspice of ACICA.<sup>822</sup> Unlike unclarity on this issue in the HKIAC Rules, there is a clearer clue in the ACICA Rules about whether consolidation can be expected between the arbitrations under different versions of ACICA Rules (e.g. can ACICA consolidate one arbitration under the 2016 ACICA Rules and another arbitration under the 2021 ACICA Rules?). The answer is negative, on the ground that Article 2.5 ACICA expressly provides that Article 16 (consolidation provisions) of the ACICA 2021 Rules only applies to the disputes arising from the contracts concluded after 1 April 2021 referred to arbitration under the ACICA Rules<sup>823</sup>, implying that all the arbitrations applicable under the predecessor ACICA Rules (or the present 2021 ACICA Expedited Arbitration Rules which excludes the consolidation tool) cannot be governed by the consolidation provisions of the present 2022 ACICA Rules. As demonstrated *supra*, the NAI Rules (2015) have also imposed the same bar to achieve consolidation.<sup>824</sup>

More strikingly, as one of Model 4 consolidation representatives, the ACICA consolidation regime makes a contribution in openly illustrating how a decision on consolidation is made inside the organisation of an administering arbitral institution, whereas very few consolidation regimes under Model 4 reveal the internal consolidation decision-making process to such an extent (except the Swiss and SCC

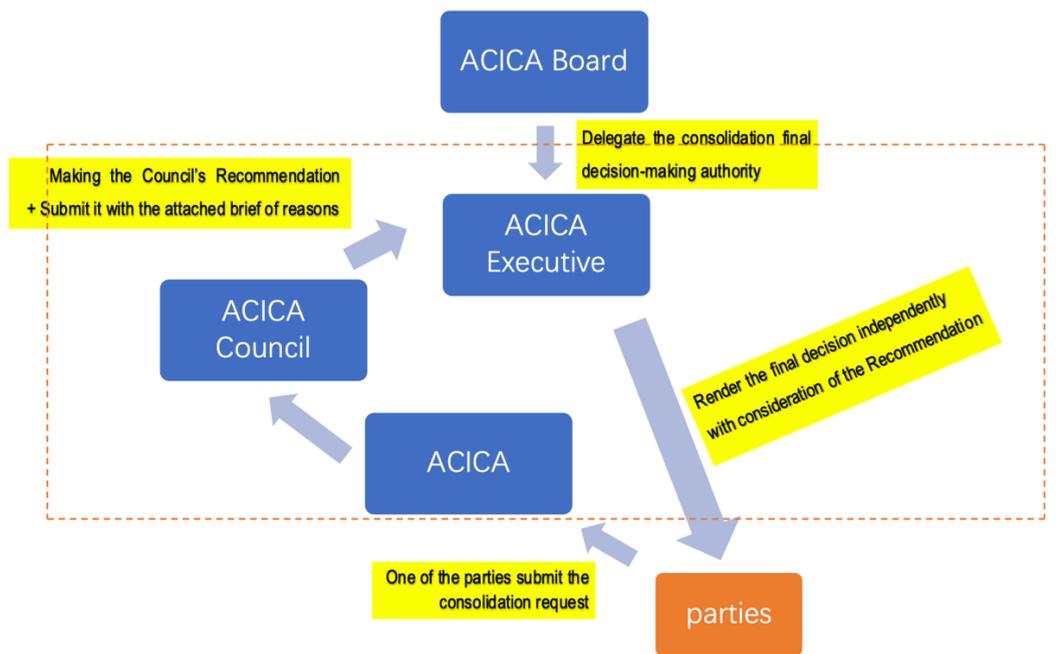
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<sup>822</sup> See Article 16.1 ACICA (2021)

<sup>823</sup> Erika Williams, Christian Santos and Madeleine Graveleine, 'Editorial: Eight Months On – A Reflection on the ACICA Arbitration Rules 2021' (2021) 9 *The ACICA Review* 3, 4

<sup>824</sup> See Part 1-Chapter 4-Section 2-§2-B-[3]

Rules *supra*). ACICA specifically laid out the “Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021” (“ACICA Protocol”)<sup>825</sup>, which ACICA applies to consideration of every application for consolidation initiated based on the 2021 ACICA Rules.<sup>826</sup> Based on this Protocol, I generate a Figure of “ACICA’s Consolidation Decision-Making Process Flow” as follows, which aims to facilitate an easier understanding of the consolidation decision-making internal operation within ACICA via a graphic method.



**Figure 6** ACICA’s Consolidation Decision-Making Process Flow

On the face of the text of the ACICA Rules (2021), what is only visible relating to the consolidation decision-maker under ACICA is that the consolidation decision should be made by “ACICA” (Article 16.1 ACICA), and a general provision providing that

<sup>825</sup> ACICA, ‘Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021’ <<https://acica.org.au/wp-content/uploads/2021/05/Protocol-for-decisions-on-consolidation-joinder-and-challenges-under-the-ACICA-Rules-2021.pdf>> accessed 26 March 2023. Note that there was another set of Protocol for the 2016 version of the ACICA Rules.

<sup>826</sup> ACICA, ‘ACICA Arbitration Rules 2021 Key Amendments’, 2. <[https://acica.org.au/acica-rules-2021/#dearflip-df\\_4218/3/](https://acica.org.au/acica-rules-2021/#dearflip-df_4218/3/)> accessed 26 March 2023

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all the ACICA-made decisions should be made by the “ACICA Board of Directors” or by “any person(s) to whom the Board of Directors has delegated decision making authority” (Article 52.1 ACICA). As of this point, this is also more or less the extent that other selective institutional rules (including the attached schedules or alike behind the Rules text) under Model 4 (also including Model 3) usually reveal concerning how the consolidation decision be made within the administering institution, and the rest of the decision-making process is left behind the curtain.

Thanks to the *ACICA Protocol*, it further clarifies that, as a response to Article 52.1, the ACICA Board of Directors (“ACICA Board”) has delegated the final decision-making authority concerning the consolidation applications to the “ACICA Executive”<sup>827</sup>, who renders the final decision with the pivotal assistance of the “ACICA Council” who submits the “recommendation” on the application for consolidation to the ACICA Executive<sup>828</sup>. The ACICA Executive refers to “the current office-bearers of ACICA”<sup>829</sup>, and it established the ACICA Council in April 2016, the members of which are the selected senior international arbitration practitioners with strong expertise in international commercial arbitration<sup>830</sup>. Pursuant to the general rule provided in Article 2.1 *Protocol*, the holistic process of consolidation decision-making must be confidential within ACICA, which means the process and all the related matters should not be disclosed beyond the ACICA Executive, ACICA Board, ACICA Secretariat and members of the ACICA Council.<sup>831</sup> Accordingly, all the parties involved and, if any, already appointed arbitrators should be in principle excluded outside the consolidation decision-making process.

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<sup>827</sup> Article 5.5 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021; the “ACICA Executive” comprises the ACICA President, three Vice ACICA Presidents, Treasurer and five Executive Directors. *See* ACICA, ‘Reflections on the Last Decade of Activity at the Australian Centre for International Commercial Arbitration (2011-2021)’ (n 812) 12-13.

<sup>828</sup> Article 5.1, 5.2 and 3.3 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>829</sup> Article 1.1 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>830</sup> Article 1.1 and 3.1 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>831</sup> Article 2.1 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021; Article 2.2 of the Protocol further provides that Council members should bear the same level of confidentiality as the parties, the arbitral tribunal and ACICA under the Rules for the avoidance of doubt.

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In the detail of the process, first, when receiving an application for consolidation pursuant to Article 16 ACIAC, ACICA (the Australian Centre for International Commercial Arbitration Ltd)<sup>832</sup> will forward this application to the ACICA Council for making a “recommendation”.<sup>833</sup> In most cases, ACICA will forward the consolidation application to three Council members, while it is at ACICA’s discretion to forward it to a sole Council member in exceptional circumstances (e.g. in an urgent situation).<sup>834</sup> ACICA adopts a rotation system in the light of a list of the members of the Council (their names are also accessible via the official website<sup>835</sup>) to establish the order to decide which Council member(s) to be contacted when a decision on the consolidation application is required to be made,<sup>836</sup> parallel noting to exclude the Council member who might have any conflict of interest with the case in question to assist with the making of a decision (e.g. “(a) he or she acts, has acted, or has been approached to act, as arbitrators, (b) he or she is, has been, or has been approached to be, involved as counsel or in any other capacity”)<sup>837</sup>. The identity of the Council members assigned to a particular consolidation application case should remain anonymous to the parties, counsel, arbitrators, or any other person outside ACICA.<sup>838</sup>

Then, the assigned ACICA Council member(s) should reach a recommendation on the consolidation application by a simple majority within 10 days of the members of the Council receiving the application (in exceptional cases, this time-limit may be extended), following the threshold conditions (Article 16.1) and discretion (Article 16.6) provisions for determining consolidation provided for in the ACICA Rules.<sup>839</sup> A brief summary of the reasons for the recommendation is also required to be provided, but for ACICA’s internal reference only, rather than revealing it to parties or arbitrator

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<sup>832</sup> Article 1.1 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>833</sup> Article 5.1 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>834</sup> Article 5.1 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>835</sup> ACICA, ‘ACICA Council’ <<https://acica.org.au/acicacouncil/>> accessed 14 August 2023

<sup>836</sup> Article 4.1 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>837</sup> Article 3.5 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>838</sup> Article 4.3 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>839</sup> Article 5.2 and 5.4 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

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involved.<sup>840</sup> In other words, parties or arbitrators to the case at issue are not allowed to access the reasons for the decision on consolidation, despite their existence in the record within ACICA. If needed, the assigned Council members can inform ACICA to gather further information from the parties.<sup>841</sup> At last, the recommendation made by the relevant Council members will be forwarded to the ACICA Executive to take into account before issuing the final decision on consolidation to the parties, which is noteworthy not bound by the Council-made recommendation.<sup>842</sup>

To sum up, all the parties involved and, if any, already appointed arbitrators should be, in principle, excluded from the consolidation decision-making process system, which is, as the dotted line circle illustrated in the Figure 6 above, institutionally formed by three ACICA inner bodies, namely ACICA, ACICA Council and ACICA Executive, in a sophisticated closely collaborative labour division approach. Admittedly, the Protocol offers a more pleasant transparency under the ACICA consolidation regime compared to many counterparts under Model 4, which allows the users to understand more about the functioning and internal consolidation decision-making process led by the ACICA Court and, in turn, to boost the parties' confidence and reliability on the quality of ACICA.

What cannot be ignored eventually is that the whole consolidation decision-making system provided in the *Protocol* is fully under the authorisation of the ACICA Board, which reserves the power to amend or revoke this *Protocol*, either upon the proposal of the ACICA Executive, either on its own initiative, both at any time.<sup>843</sup>

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<sup>840</sup> Article 5.4 and 8.1 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>841</sup> Article 5.3 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>842</sup> Article 56 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>843</sup> Article 9 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

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## §4. Consequences of the Consolidation Decision

### A. Legal Effect of the ACICA's Decision on Consolidation

Akin to the HKIAC Rules (2018)<sup>844</sup>, the text of ACICA Rules provides an equivalent general provision for all the decisions made by ACICA, which confirms that any ACICA-made decision on consolidation shall be conclusive and binding, with no obligation to attach any reasons, as well as not subject to appeal, insofar as the applicable law permits.<sup>845</sup> In the ACICA consolidation provisions per se, there is a general waiver that parties to ACICA arbitration should be deemed as having waived any objection to the validity and/or enforcement of any award made by the arbitral tribunal for the consolidated arbitration on the basis of ACICA's decision to consolidate, insofar as the applicable law permits such waiver.<sup>846</sup>

The Protocol further reassures the credibility of the above conclusion, which has reaffirmed that the consolidation decision has no possibility of being excluded outside the applicability of said Article 52 ACICA.<sup>847</sup>

### B. Establishment of the Tribunal to Hear Consolidated Proceedings

A noteworthy but still minor difference between the ACICA consolidation provisions and the HKIAC consolidation provisions lies in the composition of the consolidated arbitral tribunal. Under the HKIAC Rules (2018), all the parties are directly deprived of the right to designate an arbitrator if consolidation is granted, and HKIAC is empowered to appoint the consolidated tribunal, which may revoke any prior appointed arbitrator, but with the possibility to regard to any party's prior designation.<sup>848</sup> In comparison, under the ACICA Rules (2021), the parties still reserve

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<sup>844</sup> Article 2.2 of the HKIAC Rules (2018). See further in Part 1-Chapter 6-Section 7-§5

<sup>845</sup> Article 52.2 and 52.3 of the ACICA Rules (2021).

<sup>846</sup> Article 16.9 of the ACICA Rules (2021). Note that the equivalent provision appeared in the 2013 version of the HKIAC Rules but repealed in the current 2018 version of HKIAC Rules.

<sup>847</sup> Article 8 of the Protocol for Deciding on Applications for Consolidation and Joinder and Challenges to Arbitration under the ACICA Rules 2021

<sup>848</sup> Article 28.8 of the HKIAC Rules (2018) states: "Where HKIAC decides to consolidate two or more arbitrations, the parties to all such arbitrations shall be deemed to have waived their right to designate

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the right to designate the arbitrator(s) to hear the consolidated proceedings jointly by agreement, subject to a 14-day time limit as of being notified of the consolidation decision.<sup>849</sup> Failing it, ACICA will revoke any prior appointed arbitrator and *de novo* appoint each member of the arbitral tribunal,<sup>850</sup> rather than leaving the possible leeway to retain prior party-designated arbitrator(s) like what might happen under the HKIAC Rules. In the meanwhile, as part of the newly introduced “coherent system of institutional supervision and oversight in the process of constituting the Tribunal” in the 2021 Rules<sup>851</sup>, the composition of the tribunal for the consolidated arbitration is also required to be given due regard by ACICA to assure well the independence and impartiality of the appointment of every arbitrator.<sup>852</sup>

## Section 10. DIS Rules

2018 witnessed the first revision of DIS Rules since 1998, in which an explicit consolidation provision (Article 8) was also firstly introduced. Compared with the above rules, consolidation entered into the DIS house a little bit late.

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an arbitrator, and HKIAC may revoke any confirmation or appointment of an arbitrator. HKIAC shall appoint the arbitral tribunal in respect of the consolidated proceedings with or without regard to any party’s designation.”

<sup>849</sup> Article 16.8 of the ACICA Rules (2021) states: “Within 14 days of being notified of a decision by ACICA to consolidate two or more arbitrations, all parties may agree to the identity of the arbitrator(s) to be nominated for confirmation by ACICA in the consolidated arbitration...”

<sup>850</sup> Article 16.8 of the ACICA Rules (2021) states: “Failing such agreement, ACICA shall revoke the confirmation or appointment of any arbitrator already confirmed or appointed and appoint each member of the Arbitral Tribunal and, if the Arbitral Tribunal is composed of three arbitrators, designate one of them to act as the Chairperson...”

<sup>851</sup> ACICA, ‘ACICA Arbitration Rules 2021 Key Amendments’ (n 826).

<sup>852</sup> Article 16.8 of the ACICA Rules (2021) states: “In making the appointments, ACICA shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.”

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## *§1. DIS's Power to Decide Consolidation and the Decision's Legal Effect*

Pursuant to Article 8.1, a request of one party is necessary to trigger the consolidation procedure, but there is no implication of any time frame restriction to file a consolidation request.

Upon the request of one party, Article 8 unequivocally vests the DIS with the power to consolidate the arbitration proceedings and some DIS practitioners further indicate that it is the DIS Secretariat to exercise this exclusive competence in practice.<sup>853</sup> Therefore, neither the arbitral tribunal nor the Arbitration Council (the Arbitration Council of the DIS) may exercise the power to issue a consolidation order under the auspices of DIS.<sup>854</sup> The second sentence of Article 8.1 confirms the said divergence of competences between the DIS's power to consolidate and the arbitral tribunal's power to decide upon the matters in connection with multi-contract arbitration, multiparty arbitration and joinder of additional parties as regulated within the scope of Articles 17 to 19.

As such, the decision issued by the DIS on the consolidation is final<sup>855</sup>, since no formal legal remedies can be found among the rules to deal with the complaints against the decision<sup>856</sup>.

## *§2. Condition*

Pursuant to Article 8.1, the consent of the parties of all the concerned arbitrations is the prerequisite to grant consolidation. As the DIS practitioners explain, the unanimous consent, given by the parties to all the to-be-consolidated arbitrations, must be directed to the specific consolidation, which means the general consent to consolidations, i.e., consent by referring to the DIS Rules to arbitrate which provide for consolidation does not suffice for the purpose of Article 8.1.<sup>857</sup> In other words, the

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<sup>853</sup> Sessler (n 53) 166.

<sup>854</sup> *ibid.*

<sup>855</sup> *ibid* 173.

<sup>856</sup> *ibid* 172.

<sup>857</sup> *ibid* 171.

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deemed consent principle does not apply in the consolidation regime of DIS as many other rules allow so. Likewise, the anticipated or implied consent are not sufficient for DIS to consider ordering consolidating arbitrations.<sup>858</sup>

Unlike other reviewed rules, DIS does not stipulate any other alternative to grant consolidation. Therefore, the consent of all the parties concerned can be regarded as the core attribute of DIS consolidation provision, which leaves DIS a very restrictive leeway to exercise consolidation-deciding power, and in turn DIS must not water down this prerequisite<sup>859</sup>.

### *§3. Discretion*

Even all the parties concerned manage to reach the specific agreement to consolidate, the DIS is not bound to grant consolidation automatically. The term “may” used in Article 8.1 suggests that the DIS still retains discretion as to whether the consolidation should be allowed when the prerequisite is satisfied. Though Article 8 does not expressly provide the circumstance for the DIS to take into consideration when exercising its discretion, commentators assume that the DIS may focus on “whether and to what extent the parties to the disputes are identical, whether and to what extent the subject matters of the disputes are identical or at least similar or interrelated, the stage of the arbitral proceedings, and the potential for savings of time and costs, if any”<sup>860</sup>.

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<sup>858</sup> *ibid* 171.

<sup>859</sup> *ibid* 171.

<sup>860</sup> *ibid* 172.

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*§4. Establishment of Arbitral Tribunal to Hear Consolidated Proceedings*

Provided the consolidation is granted, the later proceeding(s) will be merged into the proceeding initiated first in line with Article 8(2) unless the parties agreed otherwise. The tribunal constituted under the first arbitration will be the one to hear the consolidated arbitration proceeding.

Since DIS consolidation rests with the consent of all the parties concerned on consolidation, it can be deduced that consolidating arbitrations which involves different parties is certainly allowed. Where the consolidation involves unidentical parties, it becomes not clear, by looking at the rules literally, whether and how the unidentical party from another previous proceeding can participate in the composition of arbitral tribunal and further ensure the procedural fairness of appointing arbitrators.<sup>861</sup> Yet, anyway, the consent to specifically agree to consolidation from all the parties concerned seems sufficient enough to justify any bizarre outcome from allowing consolidation like that, at least for DIS.

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<sup>861</sup> Since I assume that the Article 20 of the DIS Rules, which could be relied on to address the issue of appointing arbitrators in case of multiple party, could not be employed to address the composition of arbitral tribunal with respect to consolidation (Article 8) but for the multi-contract arbitration (Article 17), multiparty arbitration (Article 18) and joinder of additional parties (Article 20).

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## **PART 2. Assessment of the Most Desirable Model in Current Practice: In Terms of Efficacy and Legitimacy**

### **CHAPTER 1. OVERARCHING GUIDANCE STANDARD FOR ASSESSMENT AND THE LIST OF MEASURING INDICATORS THEREON**

Through the review of the selected consolidation institutional rules attributed to four Models in *Part 1*, a diverse and competitive picture has been shown to us concerning consolidation mechanisms in institutional arbitration nowadays, and in my view, what lies behind such diversity essentially could be the underlying divergence in value and governance structure between different arbitral institutions<sup>862</sup>. *Part 2* will focus on assessing which Model in current practice amounts to be satisfied as the most desirable consolidation decision-making model. Beyond doubt, any assessment requires criteria in advance. In my eyes, before testing which consolidation Model based on the identity of the decision-maker prevails in current practice, it is indispensable to ask myself what an ideal consolidation decision-making model should look like in theory. And the most desirable Model in present practice should be the one which approaches the theoretically ideal model the closest.

As demonstrated in *Introduction* that the international arbitration community is aspiring a better application of consolidation mechanisms under the framework of institutional arbitration, it thus warrants that a theoretically ideal consolidation model should first and primarily achieve the maximisation of the aspired *efficacy* of consolidation mechanism in the institutional arbitration, namely maximisation of the possibility of lowering the inconsistency of decisions (for short, hereinafter “consistency”), and maximisation of the cost and time efficiency of the arbitration proceedings (for short, hereinafter “efficiency”).<sup>863</sup>

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<sup>862</sup> See Donna Zhijin Huang, ‘Institutions Must Step up to Protect Arbitration Ecosystem’ (*China Business Law Journal*, 14 December 2022) <<https://law.asia/arbitration-ecosystem/>> accessed 30 July 2023 (This perception is inspired by her observation that “[r]enowned institutions have developed largely identical rules of arbitration, but they differ noticeably in value and governance structure.”)

<sup>863</sup> See Stackpool-Moore (n 60) 19.

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Based on it, an ideal consolidation decision-making model (and relevant procedure, especially the appointment procedure of the tribunal following the positive consolidation decision) should also comply with the legitimacy requirements as an arbitration procedural mechanism. Then, how to test the legitimacy of a consolidation mechanism? And what kind of indicators should be taken into account for testing such legitimacy? To this end, it is indispensable to be aware of what is “the legitimacy of consolidation mechanism” in the first place, where the awareness would further form a guiding principle of the assessment methodology on the legitimacy of consolidation mechanism.

Admittedly, the attempt to understand the concept of the “legitimacy of consolidation arbitral mechanism” in theory is not easy. But it may be more accessible to begin by understanding the “legitimacy of arbitration”, a more general and superordinate concept.

From the mainstream perspective, international arbitration is mainly viewed as a system of dispute resolution for settling individual disputes.<sup>864</sup> In terms of “the legitimacy of a system of dispute resolution”, as Singapore Chief Justice Sundaresh Menon argued,

*“The legitimacy of a system of dispute resolution depends intrinsically on the trust and confidence of the users in its decision-making process, and that in turn rests on the general adherence of those processes to the values and principles that constitute the rule of law.”*<sup>865</sup>

Put differently, the rule of law, which unites the goals of liberty, human dignity and good governance, constitutes the foundation of the legitimacy of a given dispute resolution system,<sup>866</sup> including of course international arbitration. For example, the former ICC Court President Alexis Mourre argues that the autonomy of the international arbitration system can only be sustained “if arbitration is perceived as a fair and legitimate means of resolution”.<sup>867</sup> Similarly, the former Hong Kong Chief

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<sup>864</sup> Stephan W. Schill, ‘Conceptions of Legitimacy of International Arbitration’, Amsterdam Center for International Law Research paper 2017-14,

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2932147](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932147)> accessed 22 September 2023

<sup>865</sup> Menon (n 19) 1.

<sup>866</sup> *ibid* 6.

<sup>867</sup> Mourre (n 63) 88.

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Justice Tao-Li Geoffrey Ma strongly highlights the central role of rule of law “in guaranteeing fair, just, impartial and independent decision-making” in arbitration.<sup>868</sup> Besides, Schill has demonstrated that there are indications that international arbitration has metamorphosed from a mono-dimensional dispute settlement mechanism into a system of transnational governance standing on a multidimensional perspective, which implies that the legitimacy discourse of international arbitration should not only take into account the parties of individual disputes in question but also the normative expectations of all other stakeholders, including specifically the communities of users of arbitration but also society as a whole.<sup>869</sup>

If referring to the above rationale by analogy to read the “legitimacy of consolidation arbitral mechanism”, the legitimacy of consolidation mechanism should depend inherently on whether the communities of users of arbitration, as well as the public as whole, have trust and confidence in the consolidation decision-making process prescribed in the agreed institutional rules, and such trust and confidence are established on the general adherence of the given consolidation mechanism to the values and principles that constitute the rule of law. No matter the decision regarding consolidation is made by which decision-maker (arbitral tribunal, arbitral institution or designated third person), such a ruling will be subject to subsequent judicial review in the annulment or enforcement stage<sup>870</sup>. In this context, adherence to the rule of law can ensure the enforceability of the award. After all, the enforceability of the award is the *raison d’être* of the arbitration process, *viz* it is a natural expectation for the parties, who choose arbitration to solve their disputes, not to receive an award at the end of the proceedings, which will be set aside or denied to be recognised or

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<sup>868</sup> Tao-Li Geoffrey Ma, ‘Hong Kong and its Role in International Arbitration’ (2021) 23 *Asia Dispute Review* 4, 4

<sup>869</sup> See Schill (n 864). (“The central factors that account for the increased social impact of international arbitration and that contributed to transforming international arbitration from a dispute settlement to a governance mechanism are, first, the reorientation from ad hoc to institutional arbitration, which led both to a standardization and consolidation of the arbitral procedure and to the creation of a transnational professional community of arbitrators with a common professional ethos and mindset. Second, the broadening of the subject matter of dispute that can be resolved through arbitration...; third, the territorial expansion, and by now global reach, of arbitration...; fourth, the establishment of arbitration as the default mechanism to settle transborder disputes in contracts...; and, finally, a convergence of how arbitration is practised worldwide, that is, the emergence of a universal culture of arbitration.” And Schill in this article raised four dimensions of legitimacy of international arbitration: “party legitimacy” from the perspective of disputing parties, “community legitimacy” from the perspective of users of arbitration as a group, “national legitimacy” from the perspective of a specific country and its society and “global legitimacy” from the perspective of global society and its interests.)

<sup>870</sup> Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816

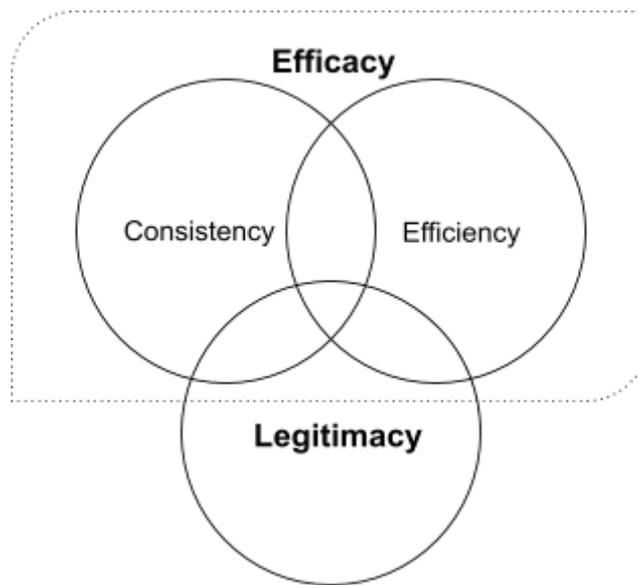
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enforceable at law.<sup>871</sup> Meanwhile, it is also plausibly an expectation from the communities of arbitration users. Thus, the factors arising out of the consolidation decision-making process (and related consequential procedure) which may impact the enforceability of the award should be paid special attention. Beyond that, it should be noted that the assessment scope of legitimacy should also encompass the factors which may not have a direct impact on the enforceability of the award but form part of the organic entirety of legitimacy for the consolidation mechanism from the above-mentioned multidimensional perspective, on the ground that it is natural to expect an ideal consolidation model to be designed to strengthen the trust to the international arbitration system as a whole, from the sakes of disputing parties, communities of arbitration users and the public.

To sum, in a perfect scenario, the ideal consolidation mechanism, at least in my eyes, would maximise the values of efficacy, i.e. consistency and efficiency, sought by the consolidation mechanism on the one hand, and satisfy the parties' reasonable expectations of legitimacy regarding the decision-making process of the consolidation mechanism as well as the related ramifications on the other hand, thus ensuring the enforceability of the relevant award following the decision as to consolidation and, in parallel, not undermining the trust and confidence of the parties and the public in the institutional arbitration system that incorporates the consolidation mechanism. And this forms the overarching guidance standard for materialising the assessment methodology in the subsequent step. Therefore, as the following Figure 7 illustrates, when I assess which consolidation Model is the most desirable one in current practice, it is essentially to find out which Model can best deal with the relationship between efficacy and legitimacy, or more precisely, between consistency, efficiency and legitimacy, viz the most desirable Model should lie in, or at least close to, the overlapped zone of consistency, efficiency (efficacy) and legitimacy in the Figure.

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<sup>871</sup> Martin Platte, 'Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2009) 495.



**Figure 7**

That being said, I believe it is noteworthy to make two concept clarifications. First, from the pure perspective of concept, lowering inconsistent or contradictory decisions itself – one of the values that the consolidation mechanism inherently aspires – contributes to the good administration of justice and makes the adjudication appear more predictable, which is for the sake of the rule of law in its own right, *viz* for the legitimacy of the arbitral system.<sup>872</sup> As early as the 1980s, consolidation was recognised as a scarce “adequate means of achieving the ultimate goals of arbitration: fair, efficiency and economical commercial justice.”<sup>873</sup> In this way, it appears logical for the consistency assessment to be encapsulated into a broader scope of legitimacy assessment. However, in the interest of embodying that the assessment is made on balance between the aspired benefits of the consolidation mechanism and the expected legitimacy of a desired consolidation mechanism acting as an arbitration

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<sup>872</sup> The former Hong Kong Chief Justice Tao-Li Geoffrey Ma clearly defines the relationship between the concepts “administration of justice” and “rule of law”: “In the context of the judiciary, this integrity is known as the administration of justice and this term can be defined as the practical implementation of that vital concept in any community, the rule of law.” *See* Ma (n 868) 5; Regarding the arguments that consolidation contributes to the good administration of justice due to its benefit of lowering inconsistent decisions, *see* Leboulanger (n 43) 63; Menon (n 19) 21; Platte, ‘When Should an Arbitrator Join Cases?’ (n 204) 67.

<sup>873</sup> Thomas Stipanowich, ‘Arbitration and the Multiparty Dispute: The Search for Workable Solutions’ (1987) 72 *Iowa Law Review* 473, 500

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procedure, this thesis inclines more to make such an artificial distinction in the assessment, otherwise, for example, the real efficacy extent of the tested consolidation mechanism would be overshadowed or get confused. Thus, the stance of this thesis towards the relationship between “consistency” and “legitimacy” is that it is admitted that lowering inconsistent decisions is naturally within the meaning of strengthening the legitimacy of a consolidation mechanism in arbitration, but the “legitimacy” assessment in the assessment of *Part 2* will deliberately not include “consistency” assessment part for the reasons demonstrated above.

Second, while the “efficiency” benefit of the consolidation mechanism in this thesis is confined to cost and time efficiency following the conventional literature<sup>874</sup>, I have also noticed another trend in the arbitration community to construe efficiency in international arbitration as standing on the three-legged stool of time, cost, and quality rather than only regarding time and cost as conventionally perceived.<sup>875</sup> The former Deputy Secretary General of the ICC Court, Jennifer Kirby, and the present President of the ICC Court, Claudia Salomon, are the typical advocates of this stance. *Kirby* carefully defines “quality arbitration” to be “one that results in an award that is both correct and enforceable” and rationalises such a stance by inferring that parties would not agree to recklessly save time and expense just to receive a compromised award in quality.<sup>876</sup> If the efficiency of arbitration is viewed in this sense, the notion of “efficiency”, taking into account quality, will also be closely related to the legitimacy

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<sup>874</sup> See Veijo Heiskanen, ‘Key to Efficiency in International Arbitration’ (Kluwer Arbitration Blog, March 29 2015)

<<https://arbitrationblog.kluwerarbitration.com/2015/05/29/key-to-efficiency-in-international-arbitration/>> accessed 21 July 2023 (“The type of efficiency that is relevant in international arbitration can be measured in two different ways – in terms of *time*, or in terms of *money*.”); William W. Park, ‘Arbitrators and Accuracy’ (2010) 1 *Journal of International Dispute Settlement* 25, 28-32; Leboulanger (n 43) 54-55 (“The aims [of consolidation] are to ... serve procedural efficiency; and to save time and costs, namely by coordinating the taking of evidence.”); Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816 (“Permitting consolidation of separate international arbitrations ... [into] a single arbitration can in some circumstances be more efficient than two or more separate arbitrations ... Moreover, a single arbitral proceeding avoids the expense associated with multiple arbitral tribunals.”); Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 16 (“Consolidation also aims at efficiency. Efficiency has two prongs, namely money and time.”)

<sup>875</sup> Jennifer Kirby, ‘Efficiency in International Arbitration: Whose Duty Is It?’ (2015) 32 *JIntlArb* 689, 689; Claudia Salomon, ‘Avoiding the Dreaded Ships Passing in the Night: A Focus on the Issues to be Decided’ (Keynote address at GAR Live, London, 9 November 2021)

<<https://iccwbo.org/news-publications/guests-blog-speeches/avoiding-the-dreaded-ships-passing-in-the-night-a-focus-on-the-issues-to-be-decided/>> accessed 9 July 2023

<sup>876</sup> Kirby (n 875) 692.

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discussion. I personally opine such a concept innovation of “efficiency” sensible in the contents per se, but I choose not to stringently adopt such a concept in this thesis. My rationale is twofold. First, similar to the above reason to exclude “consistency” out of the scope of legitimacy assessment, leaving “efficiency” assessed separately from the assessment of legitimacy will be more operable to reflect more about the actual efficacy extent of the given consolidation mechanism. Second, intrinsically, I don’t view the above overarching guidance standard defined for testing the most desirable consolidation mechanism as substantially contravening the drive behind the evolved version of the “efficiency” concept of explicitly taking into account “quality” since the part of legitimacy assessment is essentially set for ensuring a “quality arbitration” as the evolved “efficiency” concept aims for. In turn, the emergence of the quality-considered “efficiency” concept also demonstrates the importance of assessing consolidation mechanisms in the dimension of legitimacy. However, since a pure concept debate on “efficiency” is not indispensable or constructive for the assessment aim of this *Part*, “efficiency” in this assessment still only refers to the conventional concept of cost and time efficiency.

All that said, following the above-mentioned overarching guidance standard and considering the occurred phenomenon from the review of the consolidation rules in *Part 1*, I display six categories of measurement indicators for comprehensively assessing the most desirable consolidation Model, in total sixteen indicators, in the Table below. These six categories of indicators are divided into two main blocks: Categories 1, 2, and 3 are for the efficacy assessment, while Categories 4, 5, and 6 are for the legitimacy assessment.

The Indicators Measuring the Efficacy and Legitimacy of Consolidation Models	
<b>Category 1: Time Limit Control</b>	① No temporal limit to request consolidation.
	② Consolidation Process can be triggered by the decision-maker(s) without <i>ex parte</i> request of a party.
	③ For the appointment of the consolidation decision-maker, if any, extra time to stay arbitrations is needed.
	④ Specific time limit to render the decision on consolidation.
<b>Category 2: Permitted Application Range of Consolidation Mechanism</b>	① The explicit agreement of all parties is not a prerequisite to achieving consolidation.
	② Consolidation involving multiple parties to multiple agreements can be permissible in the absence of explicit consent to consolidation.
	③ It is permitted to consolidate arbitrations under different versions of the same institutional rules.
	④ It is permitted to consolidate institutional arbitration and <i>ad hoc</i> arbitration.
	⑤ The neutrality of the consolidation decision-maker
<b>Category 3: Legal Effect</b>	① The same consolidation request can only be visited one time.
	② The decision as to consolidation is final and binding.
<b>Category 4: Neutrality (Independence)</b>	① Is the neutrality of consolidation decision-maker(s) well-ensured?
<b>Category 5: Transparency</b>	① The decision as to consolidation is reasoned.
	② Transparency as to the inner procedure of consolidation decision-making?
<b>Category 6: Procedural Equality</b>	① Equal right to be heard
	② Equal treatment in composing consolidated tribunal

**Table 3** The Indicators Measuring the Efficacy and Legitimacy of Consolidation Models

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## CHAPTER 2. ASSESSMENT

In this chapter, the assessment of the four Models will be carried out in light of the comprehensive evaluative indicators listed at the end of the previous chapter. This chapter is mainly composed of three main sections: firstly, the assessment in respect of consolidation's efficacy (Section 1), then the assessment regarding legitimacy (Section 2), and finally, the results of all the indicators will be summarised in a comparison table to arrive at the visualised result of the assessment (Section 3), at the ultimate aim of observing whether such a result complies with the hypothesis initiated in *Introduction*.

Furthermore, the general assessment methodology is needed to be explained here beforehand:

- First, to explain the justifications to introduce the concerned indicators.
- Then, to illustrate the standard to score under a given indicator, *viz* demonstrating the stance on which scenario under a given indicator should be deemed accorded to, closer to, or contrary to the overarching guidance standard *supra*, i.e. where the ideal consolidation model lies. Despite differences between indicators, the score standards will be maintained to be reconcilable to each other as much as possible. Regarding the scoring method, if complying with a given indicator brings a positive effect, enter “+” when the performance complies with such an indicator; instead, enter “-”. Likewise, if complying with a given indicator *per se* brings a negative effect, enter “-” other than “+” in this case, and *vice versa*. Moreover, if the distinctly divided extents of performances occur under such the same indicator, if necessary, multi-score can be based on the performance grades, *viz* enter multiplicity of “+” or “-” depending on the situations. This way of scoring is believed to make the incoming comparison more visualised and straightforward.
- In the final, in light of the above score standard, to find out the “best performance” under the given indicator of all the selected rules attributed to the same Model to enter the data. The rationale for adopting such a “cherry-picking” approach for entering data is mainly to reflect the differences between the four Models, or more delicately, the differences between the consolidated best performance of the rules divided into the same Model on the

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basis of the identity of consolidation decision-maker that in the present practice.

Of course, if needed, the second and last steps may be combined as one step when, for instance, the production of the scored standard requires evaluation based on the occurred scenarios in practice.

In addition, it should be acknowledged in advance that, as the review conducted in *Part I* illustrates, it is not beyond expectation that not every indicator is assured of having a direct and 100% accurate answer set forth in the related institutional rules or equivalent-authoritative instruments under every Model. In this context, when registering the data, if there is no acute answer from any selected rules attributed to the same Model, the assumed conclusions made in *Part I*, whether dogmatically or empirically, will be entered, reserving the uncertainty or potential controversy. On the contrary, if the result needed for the indicator in question fails to be illustrated in *Part I* supra (and the answer is indeed untraceable), it should be recognised as a negative result (“-”). Only if the indicator in question is genuinely irrelevant to the concerned Model (or specific rules) “N/A” will be registered.

Last but not least, there is an exceptional rule regarding assessment exclusion: depending on the needs of the circumstances, if the consolidation mechanisms from some selected rules contain some overly extraordinary feature that may impair the fairness of the assessment, or contain certain features which conversely obscure the attributed Model’s distinguished traits if being taken into account, such kinds of consolidation mechanism are going to be excluded when assessing the specific concerned indicators (rather than excluding the involved rules from all assessment).

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## Section 1. Assessment in Terms of Maximisation of Efficacy

From the point of view of theory, thanks to the deemed consent principle, which satisfies the party autonomy principle, expanding the application scope of consolidation mechanisms in the institutional rules can contribute to accomplishing consolidation between parallel arbitrations in broader scenarios when such a set of institutional rules are referred to, which would thus lower the inconsistent decisions to a greater extent to the effect in favour of good administration of justice, and also save time and costs by avoiding a double presentation of evidence, contributing to the overall efficiency of the arbitration proceedings.

That said, to date, what lies behind the surface picture of the dynamic-evolved and divergent institutional consolidation mechanisms is the theoretical tug-of-war within the global arbitration community between a conservative-inclined stance of rigidly enshrining party autonomy, i.e. institutional rules should not empower the decision-maker (tribunal, institution or third person) to order consolidation over the objection of one of the concerned parties, and a more liberal-inclined stance of reconciling with party autonomy by embracing the said deemed consent principle, i.e. party autonomy would not be infringed by institutional rules permitting consolidation against the will of one of the parties, as parties to arbitration agreements that have initially referred to institutional rules that allow for orders for consolidation have impliedly consented to any such consequential consolidation.<sup>877</sup> I am in line with the latter, believing the deemed consent principle is arguably the suitable solution to strike the right balance between party autonomy and the quest for efficacy for the consolidation mechanism under the framework of institutional arbitration.

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<sup>877</sup> Derek Soller and Tim Robbins, ‘Vienna/Hong Kong: Debating Consolidation/Joinder and Party Autonomy’ (*Global Arbitration Review*, 6 May 2014) <<https://globalarbitrationreview.com/article/viennahong-kong-debating-consolidationjoinder-and-party-autonomy>> accessed 21 September 2023 (From the discussion recorded in this article, the representatives of the conservative stance include Ruth Mosch [DIS], Stepan Guzey [Lidings, Moscow], Derek Soller [Baker & McKenzie, New York], Christopher Boog [Schellenberg Witter, Zurich and Singapore] and Olga Boltenko [Fangda, Hong Kong]; while the representatives of the liberal stance include Joshua Fellenbaum [Tucker Ellis, Cleveland], Friederike Stumpe [Mannheimer Swartling, Frankfurt], Christian Alberti [ICDR], Corey Whiting [Kuok, Singapore] and Romesh Weeramantry [Clifford Chance, Perth].)

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Besides the underpinning from the deemed consent principle, another newly visible ground to uphold the liberal stance of expanding the application scope of consolidation is that failing to consolidate related cases, resulting in inconsistent decisions on common factual and legal issues, may bring enforcement risk, thus undermining the underlying goal of arbitration.<sup>878</sup> The case of *W v. AW* is a notable illustration, where the High Court of Hong Kong decided to set aside an award which contained inconsistent findings from the findings made in an earlier award in a parallel arbitration proceeding between the same parties on the basis of the same facts and same issues.<sup>879</sup> The determining factor to the court's decision was that a common arbitrator was sitting in the two sets of arbitral proceedings, who had made inconsistent findings on the same facts under the clear awareness of the issues decided in the earlier award<sup>880</sup> (the court itself did not review the award for errors of fact or law<sup>881</sup>), failed to deal with or explain the inconsistency,<sup>882</sup> and deprived the parties' right to be heard before making the inconsistent findings against either of them,<sup>883</sup> which led the court to find the structural integrity of the arbitral process and the award was concerned, thus undermining due process and fairness<sup>884</sup>. As such, the Hong Kong court set aside the award in question over the infringement of the public policy.<sup>885</sup> Although this case involves a specific circumstance where the parties are identical, the enlightenment of this case, in my intuition, can arguably be extended to a more general level: in case related arbitral proceedings are to take place, the arisen risks of potential inconsistencies shall be avoided for the sake of achieving enforceability of awards. Accordingly, more effective consolidation mechanisms with expansive application scope become imminently indispensable, as well as other tools for multi-party and multi-contract arbitration.

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<sup>878</sup> Pooja Damodaran, 'SIAC's Cross Institutional Consolidation - Complication or Solution?' (SSRN, 5 May 2020) <<https://ssrn.com/abstract=3593454>> accessed 7 October 2023

<sup>879</sup> High Court of Hong Kong, Court of First Instance, *W v. AW* [2021] HKCFI 1707, Construction and Arbitration Proceedings No. 70 of 2020, HCCT 70/2020, 17 June 2021; Haley G and Pang H, "Conflicting Awards in Parallel Arbitral Proceedings" (*Lexology*, 6 October 2021) <<https://www.lexology.com/library/detail.aspx?g=44b1fd14-cffa-44ac-b3eb-560ffb718220>> accessed 20 September 2022

<sup>880</sup> *W v. AW* (n 879) para [49], [56]

<sup>881</sup> *ibid* para [50].

<sup>882</sup> *ibid* para [52].

<sup>883</sup> *ibid* para [53].

<sup>884</sup> *ibid* para [51].

<sup>885</sup> *ibid*.

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Based on it, the following indicators from Category 1 (Time Limit Control) and Category 2 (Permitted Application Range of Consolidation Mechanism) are believed to facilitate expanding the application scope of consolidation under the framework of institutional arbitration, directly or indirectly:

- Indicator 1①: No temporal limit to request consolidation
- Indicator 1②: Decision-maker(s) can trigger the consolidation process *sua sponte*
- Indicator 2①: Explicit agreement of all parties on consolidation is a prerequisite or not
- Indicator 2②: In the absence of explicit consent, consolidation involving multiple parties to multiple agreements can be permissible
- Indicator 2③: In the absence of explicit consent, consolidating arbitrations under different versions of institutional rules can be permissible
- Indicator 2④: In the absence of explicit consent, consolidating institutional arbitration and *ad hoc* arbitration can be permissible
- Indicator 2⑤: Consolidation decision-maker sits on a neutral position

The above-listed indicators will be examined under §1. *Consistency Assessment*. In addition, it should be noted that, although cross-jurisdiction consolidation can be permitted under the NAI Rules, which is acknowledged as a substantial remarkable breakthrough in accomplishing consolidation of arbitrations, the following “§1. *consistency assessment*” will not take into account the indicator of permitting cross-jurisdiction consolidation. The justification is that as demonstrated *supra* in *Part 1-Chapter 2-§2-A-[2]*, the accomplishment of cross-jurisdiction consolidation under NAI is closely dependent on the statutory support in Article 1046 of the Dutch Arbitration Act (DCCP), rather than merely reliant on how the NAI Rules (institutional rules) provide. In order to be benefited from the application of the DCCP and the NAI Rules to accomplish cross-jurisdiction consolidation set forth therein, at least one of the to-be-consolidated NAI arbitrations should be satisfied to be seated in the Netherlands. In this context, taking into account the exceptional case of NAI’s cross-jurisdiction consolidation in the “consistency assessment” may raise unfair and less systematic competition, or in a safer tone, dilute the meaning of carrying out this assessment between the four Models confined under the framework of institutional arbitration: after all, no other selected consolidation mechanism enjoys an extra, or

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even “customised” to some extent, hard-core statutory support as NAI so has, but rely on the power derived from the institutional rules *per se*.

Admittedly, while expanding the usage of consolidation mechanisms may be a boon to enhance procedural and financial efficiency as a whole, such efficiency benefit is unlikely to serve each party evenly<sup>886</sup>, especially when the to-be-consolidated arbitrations involve different parties. For example, in a typical construction dispute, it is often the “middle party”, the contractor, that has an interest in sought of consolidating one pending arbitration with the upstream party, the employer, and another pending arbitration with the downstream party, the subcontractor, in a bid to have all the parties concerned to the construction dispute in question bound by the determinations of the same final award, in avoidance of wasting time and money in the separate proceedings with an uncertain outcome against the downstream party (subcontractor) to recover any damages it would eventually have to pay to its upstream party (employer) for defects that are not essentially in its liability.<sup>887</sup> On the contrary, it is conceivable that the “non-middle party”, particularly the employer of the construction project, the upstream party, may not usually be in favour of consolidation. From the viewpoint of the employer’s personal interest, consolidation probably brings the employer into more complex and lengthier proceedings, since an additional party (subcontractor) is involved with more complicated facts following more differing legal issues, which are (mostly) likely irrelevant to the employer’s claim, and as a corollary, it could, in fact, raise the time and expense unnecessarily for the employer, compared to the situation where the employer only needs to spare less time and money in an unconsolidated arbitration to reach an almost similar result in damages.<sup>888</sup> Thus, it is indispensable to leave a space in the design of a consolidation mechanism for the decision-maker to strike a balance between overall efficiency and individual parties’ interest in efficiency, particularly to prevent the consolidation mechanism from being illicitly and easily weaponised as a delaying tactic by any party to obstruct proceedings. Otherwise, the unreasonable delays and expenses would outweigh the perceived benefit of efficiency from consolidation, which must impair

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<sup>886</sup> See Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816; Stackpool-Moore (n 60) 17.

<sup>887</sup> See Stackpool-Moore (n 60) 16

<sup>888</sup> Similarly, for example, see Dominique T. Hascher, ‘Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration’ (1984) 1 *JIntlArb* 127, 136 (“Consolidated proceedings are more time-consuming and more costly than unconsolidated proceedings, since additional parties and arbitrators are involved. Matters are enormously complicated by the incorporation of separate disputes in a single arbitration proceeding.”)

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the users' trust and favour in the (at least, this kind of) consolidation mechanism incorporated in the institutional rules. As a matter of fact, even if there are no different parties between the pending arbitrations, an unconstrained consolidation mechanism could also be taken advantage of to stall the arbitration from proceeding smoothly.

For these reasons, the efficacy assessment should also take into account the factors which could contribute to counteracting the potential negative influence of the consolidation mechanism in the efficiency, i.e. the factors which facilitate the timeliness of rendering and fixing the decisions as to consolidation<sup>889</sup>. These indicators will be assessed in the “§2. *Efficiency Assessment*” *infra*. In the general terms, even though the threshold conditions are satisfied, almost all the (selected) consolidation rules authorise the decision-maker with discretion to decide whether to grant or not consolidation in view of the stages of the procedures of the pending arbitrations to ensure no unreasonable delay is caused.<sup>890</sup> Due to the universality of the empowerment of discretion among the four Models, there is no need to specifically assess this factor anymore. Also, the application of discretion is not limited to efficiency, which makes it unsuitable to be assessed under efficiency assessment here. In addition to discretion, from my observation from *Part 1*, the following indicators can also contribute to ensuring the timeliness of the consolidation decision-making:

- Indicator 1③: Extra time wasted for appointment of the consolidation decision-maker
- Indicator 1④: Specific time limit to render the decision on consolidation
- Indicator 3①: Same consolidation request can only be visited one time
- Indicator 3②: The decision as to consolidation is final and binding

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<sup>889</sup> For example, see Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816 (“[I]t would be appropriate to order consolidation or joinder/intervention, there are important issues regarding the timeliness of such decisions. Consolidation, joinder and intervention should not be ordered in a manner that unreasonably delays the resolution of the claimant’s claims, or that imposes unnecessary or unreasonable expense on any of the parties.”)

<sup>890</sup> Among these rules, the NAI rules (*viz* NAI Article 39(4)) even provide it is mandatory to view the respective stages of the pending arbitrations to prevent unreasonable delay from a consolidation order, directly as one of the threshold conditions for consolidation. See more in this regard, see *Part 1-Chapter 2-Section 2-§3*.

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In addition, note that, albeit LCIA Rules belong to Model 3 along with SIAC Rules and DIAC Rules, the assessment of Category 3 (Legal Effect)'s indicators (i.e. Indicator 3①&②) *infra* will exclude the evaluation of the LCIA Rules in this regard. As *Introduction-Chapter 4-Section 2-§3* and analysis for respective Model 3 rules jointly point out, the LCIA Sub-Model is intrinsically distinct from the SIAC-DIAC Sub-Model concerning the arbitral institution's intervention extent of the consolidation request: In the former, LCIA Court is concluded to have the final say on its decision on consolidation request leaving the tribunal no chance to intervene later, while in the latter, the arbitral tribunal reserves the power to review the decision regarding consolidation previously made by the SIAC or DIAC Court. Since the *Hypothesis* in *Introduction* was initiated against the CIArb-favoured consolidation solution, *viz* the SIAC Sub-Model, and also for the purpose of the thesis, after trading-off, it is more systematic to exclude LCIA Rules in the assessment of the Category 3's indicators to reflect the SIAC Sub-Model's characteristics in the evaluation.

## *§1. Consistency Assessment*

### **A. Indicator 1①: No Temporal Limit to Request Consolidation**

From the viewpoint of increasing the likelihood of triggering consolidation, it is better to have no absolute temporal limit to request consolidation in a consolidation mechanism, though acknowledging that decision-makers usually take into account the different stages of pending arbitrations as a factor in their discretion on determining consolidation.

As observed in *Part 1*, there is no mandatory temporal limit for requesting consolidation under each selected institutional rules under Model 2 and the majority of institutional rules under Model 4. However, the following institutional rules do share an absolute de facto application bar for consolidation, *viz* in the absence of joint agreement on consolidation, the party can only file the consolidation request no later than the establishment of the second tribunal, primarily when the latter is composed differently from the first composed tribunal: the JCAA and KCAB Rules under Model

1, the SIAC, DIAC and LCIA Rules under Model 3, and the ICC and VIAC Rules under Model 4. This time bar for applying consolidation may be beneficial for circumventing the trouble of later revoking the previously-appointed arbitrator, as well as reappointing the tribunal, in the composition of the tribunal for consolidated proceedings.<sup>891</sup> Nevertheless, it does impose institutional constraints on the opportunities to apply the consolidation mechanism where the different parties are involved in the related arbitrations.

Thereby, the assessment of four Models under Indicator 1① presents as below:

Indicator 1①	Model 1	Model 2	Model 3	Model 4
No temporal limit to request consolidation.	-	+	-	+

#### B. Indicator 1②: Decision-Maker(s) Can Trigger the Consolidation Process *Sua Sponte*

In theory, more chances of realising consolidation may expand if the decision-maker is empowered by the institutional rules to decide on consolidation *ex officio*, given the arguable broader sights in discovering the potential consolidation opportunity from an institutional view. However, this stance in favour of the efficacy of consolidation is against the growing trend in practice.<sup>892</sup> Few consolidation mechanisms still permit the consolidation decision-maker to exercise its power *sua sponte*, except the ICDR consolidation under Model 2, where the ICDR (Administrator) is empowered to trigger the consolidation process when it finds one of the prescribed preconditions satisfied on its motion (this is a compulsory pre-step of appointing the “consolidation arbitrator”). The rest of the selected consolidation mechanisms can only be triggered

<sup>891</sup> Further on the discussion on the composition of the tribunal for consolidated proceedings, see *Part 2-Chapter 2-Section 2-§ 1-B*

<sup>892</sup> As noted above, the AIAC, CEPANI and Swiss Rules (under Model 4) once all expressly support consolidation decision-maker to exercise its power *ex officio*, but not any more nowadays.

when one of the parties (or the arbitral tribunal, e.g. CEPANI Rules) makes such an application, which is said to respect the party's will.

Hereby, the assessment of four Models under Indicator 1② presents as below:

Indicator 1②	Model 1	Model 2	Model 3	Model 4
Decision-Maker(s) Can Trigger the Consolidation Process <i>Sua Sponte</i> .	-	+	-	-

### C. Indicator 2①: Explicit Agreement of All Parties on Consolidation Is a Prerequisite or Not

Explicit agreement to consolidation is a self-explanatory ground for accomplishing consolidation, which is set as one of the threshold conditions for consolidation in most rules. However, generally speaking, it does not yet serve as the only ground for permitting consolidation under institutional arbitration anymore throughout the consolidation mechanism's evolution therein. Among the seventeen selected rules, only the DIS consolidation under Model 4 adheres to the explicit agreement to consolidation from all concerned parties as the prerequisite, without permitting consolidation under any other more lenient but still reasonable condition, as peers so do.

Hence, the assessment of four Models under Indicator 2① presents as below:

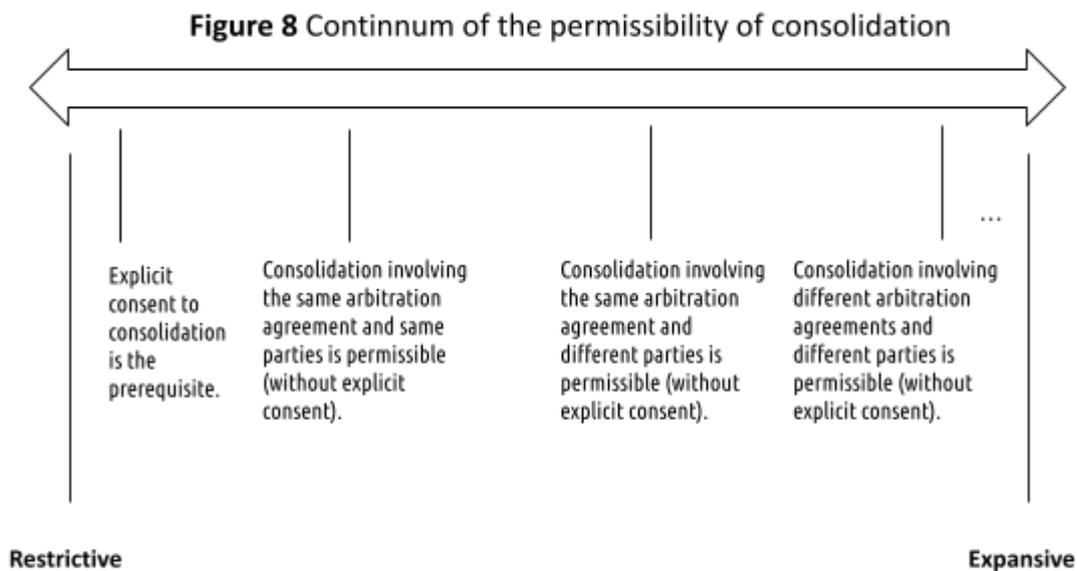
Indicator 2①	Model 1	Model 2	Model 3	Model 4
The explicit agreement of all parties is not a prerequisite to achieving consolidation.	+	+	+	+

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D. Indicator 2②: In the Absence of Explicit Consent,  
Consolidation Involving Multiple Parties to Multiple  
Agreements Can Be Permissible

The evolution of the consolidation mechanism under institutional arbitration in the last three decades or more has witnessed an undeniable expansion trend of permitting consolidation, as provided in the institutional rules. In general terms, not only an explicit agreement to consolidation is not the only prerequisite any longer, but more and more institutional consolidation mechanisms have further expanded to the extent that consolidation can be achieved when different parties are involved or/and even different arbitral agreements involved.

The following is the continuum on which the different scenarios, centring on the involved parties and contract(s), are placed depending on their loosening extent of permitting consolidation.



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Indicator 2② revolves around the consolidation involving multiple arbitration agreements to different parties, the most liberal scenario in the above continuum, to assess (i) which Models include institutional rules which permit consolidation to this level; and (ii) how strict the conditions are prescribed to be satisfied for accomplishing such consolidation.

As a matter of (i), no rules in Model 1 have extended their consolidation to such a scenario of involvement of multiple parties to multiple agreements. Instead, arbitrations arising from different arbitration agreements can only be consolidated if involved with the same parties. In my opinion, it might blame the system arrangement under Model 1 that the consolidation decision-maker shall be the arbitral tribunal of one of the to-be-consolidated arbitrations, which would be conceivably difficult to order consolidation when another to-be-consolidated arbitration involves a different party who is impossible to participate in the composition of the said tribunal or already appointed a different arbitrator from the said tribunal, otherwise equal treatment principle would be violated. By contrast, the majority of the selected rules under Model 2, Model 3, and Model 4 have realised in permitting consolidation when involved with multiple parties to multiple agreements, except the DIAC Rules under Model 3 and the ICC and DIS Rules under Model 4. Theoretically speaking, these rules still seem hesitant to embrace the deemed consent principle fully to varied extents. As an interlocutory result, each of Model 2, Model 3 and Model 4 deserves to be scored at least one “+”, while Model 1 should be scored one “-”.

It should be pointed out that, under Model 3, it may also occur that it is the arbitral tribunal of one of the pending arbitrations that decide on the request for consolidation of arbitrations involving multiple parties to multiple agreements, similar to the case under Model 1. Notwithstanding, this does not essentially contradict the above assumption on Model 1’s decision-maker arrangement, which constrains the realisation of consolidation involving multiple parties to multiple agreements under Model 1, since the tribunal under Model 3 is also restricted to order consolidation only where no different arbitrator has been appointed in a separate arbitration or the same tribunal has been appointed for another pending arbitration. In turn, it also explains why the majority of consolidations under Model 2, either under the SIAC

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Rules<sup>893</sup> or the LCIA Rules, are granted by the administering institution in practice, rather than the tribunal.

Next, in terms of matter (ii), I summarised from the concerned rules that there roughly exist three distinct levels of categories of conditions to be satisfied with the aim of accomplishing consolidation involving multiple parties to multiple agreements, spreading from narrowly stringent to relatively liberal. Let's begin with the most liberal category of condition, where no threshold conditions are specifically imposed on realising the consolidation involving different parties to multiple agreements. It is well represented by the Swiss, CEPANI Rules under Model 4 and the NAI Rules under Model 2. For example, under the Swiss Rules, no mandatory threshold conditions are set for any extent of consolidation. Similarly, under NAI, although threshold conditions are provided in the rules, no exclusive limiting conditions are set for consolidation involving multiple parties to multiple agreements. Instead, the threshold conditions in the NAI consolidation rules are merely of principle, general and apply-all: consolidation is allowed as long as there is a sufficiently close connection between the pending arbitrations, and no unreasonable delay would arise from granting such a consolidation. That being said, as noted in *Part 1*, whether the NAI "third person" or the SAC Court exercises its discretion in determining consolidation very cautiously by taking into account all the relevant factors. Thus, Model 2 and Model 4 will be scored triple "+" in total.

Second, a more stringent level of the category of conditions is adopted by most rules which permit consolidation involving multiple parties to multiple agreements, which can be generalised as follows:

- (a) the concerned arbitration agreements are compatible; and

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<sup>893</sup> For example, according to the SIAC Annual Report 2022, all the approved consolidations (31) of the year 2022 were granted by the SIAC Court of Arbitration rather than by the tribunal; the latter refused all the applications in front of it. See SIAC, 'SIAC Annual Report 2022' (2022), 30 <<https://siac.org.sg/annual-reports>> accessed 3 August 2023

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(b) the disputes arise out of some specific connected relationship, e.g., out of the same legal relationship(s), the same transaction, or a series of transactions.<sup>894</sup>

The rules containing such a medium-stringent category of conditions include the ICDR Rules under Model 2, the SIAC and LCIA Rules under Model 3, as well as the SCC, HKIAC, AIAC and ACICA Rules under Model 4. The threshold conditions written in these rules are similar. Accordingly, Model 3 will be scored two “+” in total.

Third, the most stringent level of the category of conditions is to further narrow down the permissible scope for achieving the multi-party and multi-contract consolidation, which can be found in the CIETAC Rules and the VIAC Rules but limited in different aspects. Under the CIETAC Rules, achieving a consolidation involving multiple parties to multiple agreements necessitates that the separate contracts involved are of a principal-ancillary relationship. It means that the application of consolidation involving different parties to multiple contracts is quite limited. For example, the abovementioned construction dispute involving employer-contractor-subcontractor would fail to apply consolidation under the auspices of CIETAC. Also, as the *2021 CIETAC Guide* illustrates, the separate arbitrations arising out of a “string of contracts”, e.g. usually in the chain of international sales of goods disputes, could not apply the consolidation under the CIETAC Rules, since those separate arbitrations cases usually involve different parties, and the contracts involved seldom consist of a principal contract and its ancillary contract(s).<sup>895</sup> Unlike CIETAC, VIAC restricts the application of consolidation involving multiple parties to multiple agreements by requiring the tribunals of the pending arbitrations should be identical, which is intrinsically a means of imposing a time limit on consolidation application to restrict the application of consolidation under VIAC in a general way. Nevertheless, this most stringent level of conditions under CIETAC or VIAC will not impair the score for Model 4, because the “best performance” of Model 4 lies in the Swiss and CEPANI

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<sup>894</sup> Note the slight differences between the concerned rules, where some rules take a more stringent tone (disputes should strictly arise from the same legal relationship), e.g. the AIAC Rules, while some other rules take a more lenient tone (it is also allowed if disputes arise from the same transaction or series of transactions), e.g. the ICDR, LCIA, SCC, HKIAC, ACICA Rules.

<sup>895</sup> Yu, *A Guide to the CIETAC Arbitration Rules and Practice* (n 732) 291 (“The ultimate goal of ‘a string of arbitrations’ [consolidation] is to produce an arbitral award that is binding on parties along the ‘string’ so that the award can be enforced by each buyer against its immediate contracting seller, or vice versa.”)

Rules, which earns a triple “+” for Model 4. By the way, it is worth mentioning that the newly revised CIETAC Rules, which just entered into force at the beginning of 2024, have relaxed such conditions from the most stringent level to the main-stream medium-stringent level,<sup>896</sup> more converging to the right track of evolution.

In summary, the assessment of four Models under Indicator 2② presents as follows:

Indicator 2②	Model 1	Model 2	Model 3	Model 4
In the absence of explicit consent, consolidation involving multiple parties to multiple agreements can be permissible.	-	+++	++	+++

#### E. Indicator 2③: In the Absence of Explicit Consent, Consolidating Arbitrations under Different Versions of Institutional Rules Can Be Permissible

That consolidation could occur between the pending arbitrations referring to different versions of institutional rules is, seemingly inconspicuous but substantial, beneficial to expand the chance of accomplishing consolidation.

Far from forming a universal norm yet, from my observation of the selected rules, there are representatives from each Model that permit consolidation in this situation, but not to a uniform extent. The JCAA Rules under Model 1, the ICDR Rules under Model 2 and the LCIA Rules under Model 3 all allow consolidating arbitrations which are under different versions of the given rules into the proceedings under the

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<sup>896</sup> Article 19.1 of the CIETAC 2024 Rules states that: “At the request of a party, CIETAC may consolidate two or more arbitrations pending under these Rules into a single arbitration if:  
 (1) all of the claims in the arbitrations are made under the same arbitration agreement;  
 (2) *the claims in the arbitrations are made under the arbitration agreements in multiple contracts that consist of a principle contract and its ancillary contract(s), or involve the same parties as well as legal relationships of the same nature, or involve related subject matters, and the arbitration agreements in such contracts are identical or compatible;* or  
 (3) all the parties to the arbitrations have agreed to the consolidation. (Emphasis is added)”

latest version of rules, regardless of whether the defunct rules provide consolidation or not, insofar as at least one of the pending arbitrations is under the latest version of the given rules, and no explicit manifestation of only being bound by a defunct version of rules.

On the contrary, the two rules under Model 4, which allow for consolidation across different versions of institutional rules, the ICC and Swiss Rules, cannot extend to that reach above in this regard yet. Instead, it is more assured to say that the ICC Court or the SAC Court only permit consolidation across distinct versions of rules to the extent that the given versions all contain consolidation mechanisms, which are also not incompatible in the specific case.

Based on such noticeable distinction in extent, I decided to score two “+” to Model 1, Model 2 and Model 3, while scoring one “+” to Model 4, which is presented as below:

Indicator 2③	Model 1	Model 2	Model 3	Model 4
In the absence of explicit consent, consolidating arbitrations under different versions of institutional rules can be permissible.	++	++	++	+

**F. Indicator 2④: In the Absence of Explicit Consent,  
Consolidating Institutional Arbitration and *Ad Hoc*  
Arbitration Can Be Permissible**

Besides the consolidation between the institutional arbitrations under the same arbitral institution’s rules, in the absence of explicit agreement, a few arbitral institutions also allow for consolidating institutional arbitration and *ad hoc* arbitration, subject to the condition that the latter is also administered by the same arbitral institution as per its rules as the former. In my view, the occurrence of this type of consolidation symbolises a remarkable breakthrough for institutional consolidation mechanisms in

general, as the effect has spanned from being confined between institutional arbitrations to consolidation across dispute settlement mechanisms<sup>897</sup>. Meanwhile, it is reasonable not to view it as an unacceptable intrusion to party autonomy since parties who choose an arbitral institution to administer their *ad hoc* arbitration under UNCITRAL Rules also imply their consent to the rules and practice of administering *ad hoc* arbitration that such a chosen institution, including the arrangement of merging such administered *ad hoc* arbitration with an institutional arbitration under the same arbitral institution, if any.

The JCAA under Model 1 and the ICDR under Model 2 allow it to be accomplished, while no arbitral institutions under Model 3 or Model 4 allow so.

As a consequence, the assessment of four Models under Indicator 2④ presents below:

Indicator 2④	Model 1	Model 2	Model 3	Model 4
In the absence of explicit consent, consolidating institutional arbitration and <i>ad hoc</i> arbitration can be permissible.	+	+	-	-

<sup>897</sup> In academia, consolidating institutional arbitration and ad hoc arbitration has been viewed as falling under “consolidation across dispute settlement mechanism”. For example, *see* Gabrielle Kaufmann-Kohler, ‘Multiple Proceedings in International Arbitration: Blessing or Plague’ (Herbert Smith Freehills and Singapore Management University School of Law Asian Arbitration Lecture, 24 November 2015) <<https://lk-k.com/wp-content/uploads/Kaufmann-Kohler-Multiple-Proceedings-in-International-Arbitration-Blessing-or-Plague-Singapore-Lecture-November-2015.pdf>> accessed 15 June 2022 (“[T]he [Singapore-EU FTA] most interestingly allows for consolidation across dispute settlement mechanisms. For instance, an ICSID and an UNCITRAL arbitration can be consolidated...”)

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## G. Indicator 2⑤: Consolidation Decision-Maker Sits in A Neutral Position

Placing a consolidation decision-maker in a neutral position is a natural reminder that this favours independence and impartiality in decision-making. But this is the perspective of what Indicator 4① under legitimacy assessment *infra* looks at. Nevertheless, I assume that the consolidation decision-maker sitting in a neutral position is also of efficacy benefit: the more neutral place the consolidation decision-maker sits under a framework of consolidation mechanism, the more grounds are possible for expanding the realisation of consolidation under such an institutional framework once intended so (regardless of the threshold conditions provided at present). And this is what the present Indicator 2⑤ genuinely concerns, rather than regarding how well the decision-maker adheres to the principle of independence (again, that is for Indicator 4①).

In my mind, the key benchmark for assessing the present Indicator is whether the arbitral tribunal of one of the to-be-consolidated arbitrations participates in ordering consolidation. As well recognised, if it is the original tribunal empowered with the consolidation deciding power, such a tribunal would be easily hindered from ordering consolidation when the second tribunal is constituted with a different composition because two parallel tribunals are conferred with equal power so that one tribunal is incompetent to order consolidation by dismissing another original tribunal.<sup>898</sup> And, different tribunal composition among the parallel arbitrations usually occurs, especially when the parties involved in the parallel arbitrations are different as a result of appointing different arbitrators. In other words, if it is an original tribunal that is empowered to order consolidation, the application of consolidation under such a framework will hardly extend to the scenarios when the parallel proceedings involve different parties since consolidation request is so easy to be obstructed just by appointing a divergent arbitrator in a separate parallel arbitration. Accordingly, Model 1 and Model 3 both empower the original arbitral tribunal to decide on consolidation,

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<sup>898</sup> See Platte, ‘When Should an Arbitrator Join Cases?’ (n 204) 79 (“In case of a sole arbitrator no party had a say and the arbitrator was appointed by a (neutral) appointing authority. Thus, equal influence is maintained and the problem does not arise... If there are party-appointed co-arbitrators there is a violation of the right of equal treatment and fair trial to those parties to be joined... [I]f a second tribunal is already constituted, in my opinion, an arbitrator should also not join cases. What has been said in the previous paragraph applies with equal force; furthermore, which tribunal would be competent to order consolidation (and thereby dismiss the other tribunal)?”)

which is in disfavour to expanding the efficacy of consolidation. Honestly, Model 3 is comparatively a little bit better than Model 1 in this regard because the rules under Model 3 also confer the arbitral institution to decide on consolidation before any of the tribunals is composed, which makes consolidation involving multiple parties a bit easier to be approved under Model 3 compared with the rules under Model 1, depending on the timing of requesting consolidation. Based on it, I decided to score one “-“ for Model 3 and two “-“ for Model 1.

On the contrary, whether the designated third party under Model 2 or the arbitral institution under Model 4<sup>899</sup> is detached from any of the original arbitral tribunals in parallel arbitrations, avoiding the conflict of interest between parallel tribunals as Model 1 or Model 3 may encounter. Thus, the neutral position of the said decision-makers under Model 2 and Model 4 well ensures the frameworks thereunder have adequate potential space to accommodate the expansion of consolidation’s application in expansive scenarios.

Accordingly, the assessment of four Models under Indicator 2⑤ presents as below:

Indicator 2⑤	Model 1	Model 2	Model 3	Model 4
Consolidation Decision-Maker Sits in a Neutral Position.	--	+	-	+

<sup>899</sup> For example, see Yu, *A Guide to the CIETAC Arbitration Rules and Practice* (n 732) 292-293 (“Even if the arbitral tribunals have been formed, the CIETAC is perceived to be in a better position to decide on this matter, since the arbitrators of each arbitral tribunal for the pending arbitrations may be different and it is inappropriate to authorize either arbitral tribunal to make such decision.”).

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## §2. Efficiency Assessment

### A. Indicator 1③: Extra Time Wasted for Appointment of the Consolidation Decision-Maker

Often, triggering a consolidation process implies inevitable pending upon the arbitrations, partly or all, requested to be consolidated before the result comes out. Thus, for the sake of maintaining efficiency, it is desirable in the design of a consolidation regime to avoid any extra chance to be utilised of wasting time, even disrupting proceedings.

Looking at the generation of the different consolidation decision-makers, only Model 2 among the four requires a separate authority (“third person”) to be designated for exclusively deciding on consolidation after the consolidation process is triggered, which implies demanding more extra time, *viz* impairing the efficiency. Imagine, it would further worsen the efficiency if no time limit is set for appointing such a stand-alone consolidation decision-maker. Fortunately, Each of the Model 2 representatives, the ICDR and NAI Rules, specifically provides the time frame for such an appointment so that the consequential loss in efficiency is strictly restricted. That is why I scored Model 2 *one* “-”, rather than two “-”.

Hereby, the assessment of four Models under Indicator 1③ presents as below:

Indicator 1③	Model 1	Model 2	Model 3	Model 4
Extra time wasted for appointment of the consolidation decision-maker?	+	-	+	+

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**B. Indicator 1④: Specific Time Limit to Render the Decision on Consolidation**

Although setting a time limit to render the decision on consolidation is beneficial to ensure efficiency, no selected rules under Model 1, Model 3, and Model 4 contain such a time limit, which is believed to safeguard flexibility.<sup>900</sup> That said, despite no prescribed time limit, the decision-makers usually adopt the attitude of deciding on consolidation as promptly as possible.<sup>901</sup>

By contrast, each of Model 2’s representative rules (i.e. the ICDR and NAI Rules) does provide for an explicit time limit for making a decision on consolidation, which is plausible to be considered as an attempt within the concerned rules to balance the negative effect on efficiency arising from “additionally” appointing the designated “third person” as discussed above.

Therefore, the assessment of four Models under Indicator 1④ presents below:

Indicator 1④	Model 1	Model 2	Model 3	Model 4
Specific Time Limit to Render the Decision on Consolidation?	-	+	-	-

**C. Indicator 3①: Same Consolidation Request Can Only Be Visited One Time**

From the viewpoint of safeguarding efficiency, the same consolidation request should be prevented from being reviewed more than once. Otherwise, conceivably, it must be arbitrary to be viciously utilised to obstruct the proceedings.

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<sup>900</sup> For example, see Yu, *A Guide to the CIETAC Arbitration Rules and Practice* (n 732) 294 (“To ensure the flexibility, the CIETAC Rules do not contain a time limit for the decision on consolidation.”)

<sup>901</sup> *ibid.*

Opposite to this intention, however, the SIAC Sub-Model (i.e. the SIAC and DIAC Rules under Model 3), does establish a regime to permit the same application of consolidation to be reviewed two times, no matter whether two times of applications are filed by the same party or differing parties, the first time in front of the administering institution, the second time in front of the tribunal, regardless of the result from the first visit made by the institution, subject other conditions are met.

In contrast, no other Models' rules do allow so this way. Or it can even be argued that it is the common framework feature under these other Models (Model 1, Model 2 and Model 4), viz only one decision-maker is authorised to decide on consolidation instead of two decision-makers deciding in order (like under SIAC Sub-Model), that prevents the possibility of having the same consolidation request visited two times from occurring, at the foundation of the system.

By the way, specifying that the same consolidation request can only be reviewed once (by one authority) can bring another benefit other than the interest of efficiency — strengthening the certainty and predictability of the interpretation of consolidation provisions in the institutional rules. Imagine if the administering institution and the later-formed tribunal provide distinct decisions as to consolidation over the same application, which reveals the different underlying interpretations from the two prescribed authorities over the application of the cases on the same institutional consolidation provision, resulting in an increase of unpredictability and uncertainty on the interpretation of rules.

Accordingly, the assessment of four Models under Indicator 3① presents below:

Indicator 3①	Model 1	Model 2	Model 3*	Model 4
Same consolidation request can only be visited one time.	+	+	-	+

Model 3\*: As *Part 2-Chapter 2-Section 1* explains, LCIA Rules are purposely excluded at this indicator's assessment. The reasons for this are not repeated.

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## D. Indicator 3②: The Decision as to Consolidation is Final and Binding

### [1] Assessment in the Eyes of Efficiency

Indicator 3② looks similar to Indicator 3① in terms of improving efficiency effect at first blush but differs in essence. Indicator 3① is on whether the same consolidation request itself can be decided more than once. In contrast, Indicator 3② focuses on whether, once proceedings have been ordered to be consolidated, the arbitral tribunal still has the power to “disentangle” the proceedings based on its *de novo* review of the consolidation decision itself.

The SIAC Sub-Model (including SIAC and DIAC) just offers a perfect example to explain such a difference. Under SIAC, if the applicant does not satisfy with the decision made by the SIAC Court on its consolidation request, the said applicant can file the same request again to the tribunal later composed, insofar as the latter is competent according to the SIAC Rules. Distinct from this second review power on consolidation request, the tribunal (of the consolidated proceedings) under SIAC still retains another separate power: to handle any challenge to its jurisdiction arising out of a consolidation ruling, whether previously made by the SIAC Court or the tribunal. As discussed in *Part I*, this power is demonstrated as part of the tribunal’s power to rule on its jurisdiction based on the doctrine of *competence-competence*. Thus, the SIAC’s tribunal may de-consolidate the proceedings based on its negative finding when reviewing such a jurisdictional challenge based on the initial decision to consolidate. And this is what Indicator 3② set up to assess.

Opposite to the SIAC Sub-Model, each of the rest Models contains institutional rules which provide or are presumed to provide that the decision regarding consolidation is final and binding upon the tribunal. They are the JACC, KCAB Rules under Model 1, the NAI Rules under Model 2, the ICC, Swiss, CEPANI, SCC, CIETAC, HKIAC, AIAC, ACICA and DIS Rules under Model 4. It should be noted that the situation where the tribunal of the consolidated proceedings determines to de-consolidate when it finds validity defects concerning one of the original arbitration agreements itself, rather than on the improper jurisdictional consequence arising out of the consolidation

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decision *per se*, is not contradictory to in what Indicator 3② stands in favour with.<sup>902</sup> Put differently, for the sake of clarity, a consolidation ruling is not regarded as final and binding in this thesis only when the tribunal determines to de-consolidate on the basis that the consolidation decision itself raises jurisdictional issues.

Next, let's briefly retrospect the rationales behind the "final and binding" effect for Model 1, Model 2, and Model 4, demonstrated in *Part I*. Under Model 1, the arbitral tribunal itself makes a conclusive consolidation decision. Under Model 2, the rules of NAI, what justifies the finality nature of the designated third person's decision on consolidation is said to ensure the expeditiousness of reaching the final decision so that the arbitration can proceed without the risk of tactic delay abuse. As for Model 4, where the consolidation decisions are purely institution-made, the generalised rationales behind the "final and binding" effect are partially due to the alleged administrative nature of consolidation decisions taken by arbitral institutions<sup>903</sup> and partially due to the institutional arrangements for consolidation of arbitrations in institutional rules differentiated from other multi-party/multi-contract procedural mechanisms, such as joinder, multiple contracts, which are generally subject to review by the arbitral tribunal, whereas the institution's decisions on consolidation have an irremediable trait<sup>904</sup>.

That being said, the ICDR Rules under Model 2 are presumed to permit the tribunal to hear consolidated proceedings to review the Consolidation Arbitrator's decision. But the said tribunal's review scope is strictly confined within whether one of the stipulated three conditions for the ICDR Administrator to appoint the Consolidation Arbitrator is satisfied, rather than intervening further in examining whether the Consolidation Arbitrator exercises its discretion appropriately or not, once the latter's competence is affirmed. Likewise, the VIAC Rules under Model 4 are also said that the tribunal for the consolidated proceedings is intrinsically authorised to bifurcate consolidated proceedings when necessary, though in the form of splitting issues and deciding separately under the same case number. This is also out of respect to the *competence-competence* doctrine, the same as to the SIAC Sub-Model.

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<sup>902</sup> *GUPC v. ACP (IV)* implied that the ICC's consolidated tribunal still retains the power to review the validity of the separate arbitration agreement, even though the consolidation decision is binding upon it under ICC. *See GUPC* (n 494) [31].

<sup>903</sup> Devolvé (n 121) 82.

<sup>904</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 77.

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To conclude, the assessment of four Models under Indicator 3② presents below:

Indicator 3②	Model 1	Model 2	Model 3*	Model 4
The decision as to consolidation is final and binding.	+	+	-	+

Model 3\*: As *Part 2-Chapter 2-Section 1* explains, LCIA Rules are purposely excluded at this indicator's assessment. The reasons for this are not repeated.

## **[2] Theoretical Doubt Raised over the Alleged Administrative Nature of the Institutional Consolidation Decisions**

Nevertheless, beyond the above perspective of reading the finality of consolidation ruling from the benefit of efficiency, I hereby want to continue eliciting a theoretical doubt thereon further: what is on earth the nature of the intervention of the arbitral institution when it decides on consolidation exclusively, particularly but not limited in the circumstances under Model 4. Specifically speaking, is it an incontestable truth in the theory that the consolidation decision solely ruled by an arbitral institution is of an administrative nature as the ultimate underpinning that arbitral institutions utilise to justify the “finality and binding” effect under Model 4 that we are discussing here? Admittedly, finding a definite answer is difficult, but at least I believe there are some cracks in such a seemingly taken-for-granted assumption.

At the beginning, let's figure out where the assumption that whatever decision the arbitral institution makes (including institutional consolidation ruling) is of an “administrative” nature comes from? It comes from the conventional theoretical representation of arbitral institutions as mere administrators of the proceedings they administer, devoid of any adjudicative function (unlike arbitrator with adjudicative function), inferring that the institution-made decisions should also be deemed “administrative” rather than “jurisdictional” or “adjudicative”.<sup>905</sup> By lending support

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<sup>905</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 117-122; Rémy Gerbay and Alexander Afán, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Deference in International Commercial Arbitration: The Shared System of Control in International Commercial Arbitration* (Kluwer Law International 2023) 183-184, 191-195.

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to the notion of the “administrative decision”, the institutional decisions shall not be required to accompany reasons<sup>906</sup> and will not be subject to judicial review<sup>907</sup>. The underlying rationale behind such an assumption is clear and pragmatic: the perceived need to protect arbitral institutions from delay and disruption caused by judicial review necessitates shielding their decisions.<sup>908</sup> Otherwise, the disgruntled party would seek to slow down the proceedings to cause mischief if the institutional decisions were treated as reviewable.<sup>909</sup> In other words, ensuring the administrative nature of the institution-made decisions as an approach to be exempted from judicial review pertains to strengthening the efficiency of arbitral proceedings.

However, despite such an understandable thread, this conventional assumption appears far from bulletproof. First, it appears seriously inconsistent with the reality of the courts’ attitude vis-à-vis the institutional decisions in practice. As *Gerbay* and *Afnán* elaborated, the conventional administrative nature assumption originates from the French courts<sup>910</sup>, but no other jurisdiction has ever genuinely followed this suit.<sup>911</sup> Instead, it has become regular that domestic courts, in most jurisdictions at least, can review the institution-made decisions.<sup>912</sup> In particular, *Born* has unequivocally affirmed that initial decisions regarding consolidation, whether made by an arbitrator or arbitral institution, are subject to subsequent judicial review in annulment or recognition proceedings.<sup>913</sup> As such, (self-)labelling of an “administrative” nature to institutional decisions, including institutional consolidation decisions, cannot immune such decisions from judicial review as initially expected.

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<sup>906</sup> Gerbay, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 192, 204; also, Article 29 of the LCIA Rules of 1998 provided that: “[T]he decisions of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal. Such decisions are to be **treated as administrative in nature** and the **LCIA Court shall not be required to give any reasons** (emphasis added)”.

<sup>907</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 124; Gerbay, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 191-195.

<sup>908</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 123-125; Gerbay, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 195-196.

<sup>909</sup> Gerbay, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 196; Paulsson J, ‘Vicarious Hypochondria and Institutional Arbitration’ (1990) 6 *ArbIntl* 226, 248.

<sup>910</sup> The representative French cases include: the case of *Société Appareils Dragon* (Cour d’Appel de Paris, 22 June 1982 and Cour de Cassation, 2ième Chambre Civile, 8 June 1983), *Société Techni-Import Professional v. Société Electro Scientific Industries* (Cour l’Appel de Paris, 17 May 1983), *Société Opinter France v. S.A.R.L Dacomex* (Cour d’Appel de Paris, 15 January 1985).

<sup>911</sup> Gerbay, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 191-195.

<sup>912</sup> *ibid.*

<sup>913</sup> Born, *International Arbitration: Law and Practice* (n 15) 2759-2816.

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Second, it is not compelling that the nature of a consolidation decision rests on the identity of the decision-maker. As generalised by *Gerbay*, the said conventional assumption is primarily based on an “organic criterion”, i.e. depending solely on the identity of the decision-maker rather than the character of the decision itself.<sup>914</sup> Relying purely on the person of the decision-maker to identify the nature of the decisions in question seems quite counterintuitive and hasty since this approach ignores the circumstances where the division of roles between the arbitral tribunal or domestic court and the arbitral institution becomes more blurred.<sup>915</sup> The decision regarding consolidation that this thesis revolves around is such an example: the consolidation decision made by the arbitral institution in the context of institutional arbitration is the very decision which would be made by an arbitral tribunal or by the domestic courts in an *ad hoc* context, and if applying the organic criterion, the nature of consolidation ruling may accordingly vary depending on which decision-maker, as well as the subsequent extent of due process requirements expected to satisfy and the expectation of giving reasons.<sup>916</sup> On the contrary, by applying *Gerbay*’s reasoning, I agree that the inherent materiality of the consolidation decision itself (in the sense of its capacity to influence the ramification of a case, the so-called “material criterion” per *Gerbay*) should matter more in determining the nature of the institution-made decision regarding consolidation rather than the identity of the consolidation decision-maker which can be unstable (as observed, there are 4 differing Models based on the person of decision-maker).<sup>917</sup>

If we go further, it’s the turn to explore based on the material criterion: under some circumstances, is it possible that the institution-made consolidation decision amounts to a jurisdictional (or non-administrative) decision? And once in such a case, is it still legitimate for the arbitral institution to retain the final say on consolidation matters? However, this series of questions is rather sensitive and complicated beyond the realm that this thesis can adequately address. Instead, I will briefly contour the inconsistent positions that have arisen, as I merely want to make the potential issue aware here.

As commonly acknowledged, the ruling on consolidation in general (no matter decided by which person) is procedural rather than substantial, but it does not infer

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<sup>914</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 128; Gerbay, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905)192.

<sup>915</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 159.

<sup>916</sup> *ibid.*

<sup>917</sup> *ibid.*

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that consolidation decisions cannot become jurisdictional issues.<sup>918</sup> First, as discussed above, procedural decisions are indeed subject to judicial review because procedural decisions made no matter by institutions or arbitrators can lead to refusal of enforcement or setting aside of an award, as confirmed by both the New York Convention and UNCITRAL Model Law.<sup>919</sup> Second, in general terms, consolidation ruling itself is perceived as closely bound up with the consent to arbitrate: consent to consolidation means agreeing to arbitration with (possibly different) parties of another case.<sup>920</sup> At least in the *ad hoc* context, it is perceived that the arbitrator, by exercising its *competence-competence*, may order consolidation if it finds consent to consolidation reached (or finds ground from *lex arbitri*).<sup>921</sup> In addition to it, in reviewing the consolidation ruling, the judge for the annulment application or enforcement of the award will examine whether the excess of jurisdiction arises from such consolidation ruling, *viz* the arbitral tribunal acted outside the remit to their authority derived from the parties' consent.<sup>922</sup> With all that being said, it seems that a consolidation ruling, in general, may cause jurisdictional effect.

In this context, some authors raise the concern generalised as follows: if the arbitral institution can exclusively decide on consolidation but precludes the arbitral tribunal from having the final say on the validity of the consolidation in a ruling on its own jurisdiction (including any challenge to its jurisdiction based on the institutional decision regarding consolidation), the institution-made consolidation decision may create ultimately the jurisdiction of the tribunal of the consolidated proceedings, which is accused of contradicting to the *competence-competence* principle, this fundamental principle of international arbitration, that arbitral tribunal (instead of the

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<sup>918</sup> William W. Park, 'The Arbitrator's Jurisdiction on Determine Jurisdiction, IV. Taxonomy: What is a Jurisdictional Question' in van den Berg (ed), *ICCA Congress Series No. 13 (Montreal 2006): International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 99-101; Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 139 ("Consolidation is not a purely administrative action, in spite of its administrative consequences ... Procedural implications far outweigh the administrative ones..."), 134 ("[Consolidation] has an impact of jurisdiction and procedure.")

<sup>919</sup> Gerbay, 'Chapter 8: Judicial Deference to Decisions of Arbitral Institutions' (n 905) 196.

<sup>920</sup> Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 133-134.

<sup>921</sup> Platte, 'When Should an Arbitrator Join Cases?' (n 204) 50-51, 72-73, 74; Lew (n 8) 397; Leboulanger (n 43) 96.

<sup>922</sup> Park, 'The Arbitrator's Jurisdiction on Determine Jurisdiction, IV. Taxonomy: What is a Jurisdictional Question' (n 918) 100-101; Leboulanger (n 43) 69.

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arbitral institution) has the competence to rule on its own jurisdiction.<sup>923</sup> This theoretical concern resonates with the position of the above-discussed SIAC sub-model and *CIArb Guideline (2023)*, which retain the tribunal's competence to decide on the jurisdictional challenge arising out of the initial institution-made consolidation decision. In this vein, the LCIA consolidation under Model 3 and all the consolidation regimes under Model 4 except VIAC would possibly be accused of infringing upon the *competence-competence* principle.

However, some other authors dissent from such a concern. For example, *Gerbay and Afnán*, despite their explicit acknowledgement of the rising role played by arbitral institutions with material impact in many dimensions, perceive the act of consolidating separate consolidation proceedings in the institutional arbitration context as “arguably less likely to have a material on the outcome of cases” but just reshape the proceedings.<sup>924</sup> Comparably, the president of the SAC Court, Xavier Favre-Bulle, in answering my question about whether he thought the consolidation decision under Article 7 of the Swiss Rules (where the SAC Court has the exclusive power on ruling consolidation) has a similar impact on jurisdiction (extending the existing arbitral jurisdiction) as the decision regarding joinder and intervention of third party under Article 6 does, clearly stated that consolidation in Article 7 was already about existing cases, which had already been subject to the test in Article 5 as to prima facie existence of arbitral agreement under the Swiss Rules so that no jurisdictional effect would occur from the consolidation decision under Article 7, which is different from the case of the decision regarding third-party joinder/intervention which need a follow-up prima-facie jurisdiction test and then may occur jurisdictional impact.<sup>925</sup>

All in all, at the current stage, I can only conclude that the nature of the institution-made decision is not concluded yet. In this context, I would still stick to indicator 3②, which directs the decision regarding consolidation to be final and binding under the perspective of strengthening efficiency. In case the above-mentioned theoretical concern turns out to be convincing in the future

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<sup>923</sup> Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 139-141; Chan (n 352).

<sup>924</sup> Gerbay, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 188.

<sup>925</sup> Swiss Arbitration Centre, ‘Introducing the Practice Note on the Swiss Rules of International Arbitration’, online seminar, 11 May 2023. Alike, Marsman has similar argument that jurisdictional issue is independent from the consolidation decision. Text to (n 296).

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(unfortunately), I may intuitively sense the necessity of overhauling the conventional *competence-competence* principle from it if taking into account the context of the increasingly judicialised and institutionalised arbitration with the higher and higher intervention of the arbitral institution<sup>926</sup> and the preference of maintaining a sufficiently efficient consolidation process against the broad comprehensive metrics as established in this thesis. Regarding that respect, the emerging notion of “arbitral institution’s jurisdiction”<sup>927</sup> may play a promising role, which could be utilised to redefine the *competence-competence* principle in the specific context of institutional arbitration in a sense that arbitral tribunal and administering arbitral institution jointly rule on their jurisdiction with clear labour-division, of which the competence to the arbitral institution is rigidly confined within the power conferred explicitly from the applicable institutional rules, while all the residual competence is reserved to the arbitral tribunal. In this way, the legitimacy of conferring the final say on the arbitral institution on ruling consolidation might be well strengthened. But this is just my preliminary and super immature motion, which demands another thesis to address specifically.

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<sup>926</sup> Sweet (n 63) 1-33.

<sup>927</sup> See n 66.

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## Section 2. Assessment in Terms of Legitimacy

The legitimacy of the consolidation mechanism defined in Part 2-Chapter 1 implies that the institutional rules regarding consolidation decision-making and the relevant ensuing process should guarantee an appropriate level of fairness, impartiality, and transparency.<sup>928</sup> As such, the author observes that the following various aspects may have an impact on the legitimacy of the consolidation mechanism, deserving to be illustrated and evaluated in turn:

- Indicator 6①: Equal right to be heard
- Indicator 6②: Equal treatment in composing the consolidated tribunal
- Indicator 4①: Is the independence and impartiality of consolidation decision-maker(s) well-ensured?
- Indicator 5①: Transparency regarding Inner Procedure of Consolidation Decision-Making
- Indicator 5②: Communication of Reason

### §1. Procedural Equality

Procedural Equality, or equal treatment of the parties, is a fundamental principle of international commercial arbitration in the interest of ensuring a fair trial.<sup>929</sup> In concept, the connotation of procedural equality is that no party may be given a

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<sup>928</sup> For example, Mourre (n 63) 88 (“Autonomous arbitration can only be maintained if arbitration is perceived as a *fair* and legitimate means of resolving disputes, which in turn implies that the system is *capable of generating rules that ensure its transparency, predictability, and that abuses are sanctioned* (emphasis added).”); Rana (n 435) 38 (“Such provisions imposing the requirement of *fairness* and *impartiality* are ... relevant in arbitration.” “*Fairness* and natural justice are central to the acceptance and enforceability of each method of dispute resolution.” (Emphasis added.)); Ma (n 868) 4.

<sup>929</sup> Platte, ‘Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation’ (n 781) 492; Platte, ‘When Should an Arbitrator Join Cases?’ (n 204) 74; Christopher Stipp, ‘International Multi-Party Arbitration: The Role of Party Autonomy’ (1996) 7 *AmRevIntlArb* 47, 55; Juliya Arbisman, Alexandre Genest and Emmanuel Giakoumakis, ‘Due Process and Procedural Irregularities’, (Global Arbitration Review , 17 May 2023)

<<https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/due-process-and-procedural-irregularities#footnote-048-backlink>> accessed 27 July 2023

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procedural advantage over the others.<sup>930</sup> The principle of procedural equality forms part of due process and international public policy, of which a violation may give rise to the annulment or non-recognition of an award under domestic law and international treaties.<sup>931</sup> For this reason, UNCITRAL Model Law<sup>932</sup> and many arbitration-leading states<sup>933</sup> have incorporated the principle that the parties shall be treated with equality.

Of the consolidation issue, procedural equality mainly embodies two dimensions: one is in the context of parties presenting their case (i.e. Indicator 6①), while another is in the context of the composition of the consolidated tribunal (i.e. Indicator 6②).

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<sup>930</sup> Stippl (n 929) 55; Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 226

<sup>931</sup> See Platte, 'Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation' (n 871) 492 ("Equal treatment of the parties is a fundamental principle of international commercial arbitration and forms part of the international *ordre public*. A violation of the principle of equal treatment may lead to the award being set aside at the place where it was made ... and may result in the award being denied recognition and enforcement under Article V(2)(b) of the New York Convention."); Arbman (n 929) ("International due process has been understood to include the equal treatment of the parties..."). Among these literature, some literature identifies the "procedural equality principle" in the purview of "due process", while some literature identifies it in the purview of "public policy". In line with the stance of Lara M. Pair, the author opines that the abstract differentiation between due process and public policy does not indeed advance the goal of this analysis since identifying the violation based on either of the terms will lead to annulment or unenforceability of the arbitral award. See Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 223-226.

<sup>932</sup> Article 18 of the UNCITRAL Model Law provides that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". The Explanatory Note of Model Law clarifies that "Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. A number of provisions illustrate those principles". Incorporating the equal treatment principle in the UNCITRAL Model Law is essentially influential worldwide because the Model Law is often seen as a benchmark for reforming and modernising arbitral procedures across the globe. To date, the Model Law has provided the basis for domestic arbitration legislation in more than 87 states in 120 jurisdictions. For instance, Germany has modelled their domestic arbitration law in this fashion. Likewise, the UNCITRAL Rules, another UNCITRAL influential instrument in international arbitration, has also introduced an equivalent provision in its Article 17(1).

<sup>933</sup> For example, although not Model Law-based states, Switzerland and England also provide the procedural equality principle in their arbitration acts. Article 182(3) of the 1987 Swiss Federal Act on Private International Law provides that "[r]egardless of the procedure chosen, the arbitral tribunal shall guarantee the equal treatment of the parties and their right to be heard in adversarial proceedings". While Section 1(b) of the UK Arbitration Act 1996 also provides that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest". Also, France expressly states the equal treatment principle for international arbitration in Article 1510 of its Code of Civil Procedure since 2010, as a result influenced by the *Ducto* case (1992), which will be elaborated in **B. Indicator 6②** *infra*. Article 1510 of the French Civil Procedure Code states: "Irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process."

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## A. Indicator 6①: Equal Right to be Heard

In the context of the parties presenting their case, observing the equality principle implies that each party concerned in the consolidated case must be conferred equal opportunity to present their views to the given consolidation initiative and equal right to be heard.<sup>934</sup> Otherwise, a violation of the equal right to be heard will cause unenforceability of the award based on Article V(1)(b) (i.e. on the ground of violating due process) and Article V(2)(b) of the New York Convention (i.e. on the ground of violating public policy).<sup>935</sup>

Except for the JCAA Rules being silent in this regard, the rest of all the selected rules expressly provide the consolidation decision-maker shall have consulted the opinions of all the parties concerned before rendering its decision on consolidation. Many of them even explicitly require the consolidated decision-maker to give due regard to the opinions of the prior-appointed arbitrators, if any.<sup>936</sup> In the form of exchange of opinions, the selected rules under Model 4 only allow the form of written submissions, mostly via the Secretariat of the arbitral institution between the parties, arbitrators, and the given consolidation deciding body inside the arbitral institution.<sup>937</sup> On the contrary, it is plausible that an oral hearing for the consolidation matter could be held if the decision-maker is an arbitral tribunal or a designated “third person”, given the fact that the third person under NAI (Model 2) and SIAC’s competent tribunal (Model 3) have been confirmed to hold an oral hearing specifically for the consolidation request when deemed necessary.

Accordingly, the assessment of four Models under Indicator 6① presents below:

Indicator 6①	Model 1	Model 2	Model 3	Model 4
Equal right to be heard	+	+	+	+

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<sup>934</sup> Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 226

<sup>935</sup> *ibid* 223-228

<sup>936</sup> For example, the NAI under Model 2, the SIAC, DIAC and LCIA under Model 3, the CEPANI, VIAC, HKIAC, ACICA under Model 4.

<sup>937</sup> Note that exception does exist. For instance, DIS consolidation is said to be decided directly by the DIS Secretariat.

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## B. Indicator 6②: Equal Treatment in Composing the Consolidated Tribunal

In the context of the constitution of the tribunal, complying with the equality principle implies that each party must have equal influence over the composition of the tribunal following the consolidation decision.<sup>938</sup>

Specifically, provided the decision-maker is satisfied to order consolidation, the issue may arise to endanger the parties' rights to select equally or at least participate equally in the composition of the tribunal to hear the consolidated proceedings, especially where arbitrations are involved with different parties arising out of the potential consolidation.<sup>939</sup> The famous *Ducto* case, i.e. *Siemens/BKMI v. Ducto*<sup>940</sup>, illustrated that violating the principle of equal treatment in the composition of the consolidated tribunal in the context of multiparty arbitration may lead to the award being set aside or refused to be enforced. In this case, Ducto commenced one arbitration against both Siemens and BKMI, on the basis of the fact that the two respondents and Ducto itself are all members of the same consortium agreement, with the ICC Court, intending to avoid conflicting awards. In the composition of the three-person tribunal, Ducto appointed its party-appointed arbitrator; while Siemens and BKMI insisted they had divergent interests and initially refused to nominate a joint arbitrator, seeking to select their own arbitrators separately. However, the ICC Court then refused the respondents' request and asked the two respondents to appoint an arbitrator jointly. While protesting and issuing reservations, the two respondents complied with the ICC Court's request to jointly appoint one arbitrator. Afterwards, they challenged the award, arguing they had not been provided with an equal opportunity with the claimant (Ducto) in the composition of the arbitral tribunal. The French Cour de Cassation held that the principle that parties are treated equally in appointing arbitrators belongs to the public policy of protection, and an advance waiver of such

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<sup>938</sup> Stippel (n 929) 52&55; Platte, 'When Should an Arbitrator Join Cases?' (n 204) 74-77&79.

<sup>939</sup> Gusy (n 66) 99.

<sup>940</sup> *Sociétés BKMI et Siemens v. Société Ducto*, Cour de Cassation, 7 Jan. 1992. For commentary, see Benoit Le Bars, *International Commercial Arbitration: Landmark Decisions of French Arbitration Law* (LexisNexis 2019) 237-251; Smith (n 15) 201; Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816; Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 106 ("While Ducto addresses joinder of parties rather than consolidation, its holding and reasoning are important for any multi-party case.")

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equal treatment is not permissible. As a result, the French Court de Cassation annulled the award on the ground of inequality in the appointment of the tribunal.

Thus, the impact of the Ducto case is of “shudders” through the international commercial arbitration arena<sup>941</sup>, which has influenced the revision of the institutional rules to ensure equal influence from each party over the composition of the tribunal in the context of arbitration involved multiparty<sup>942</sup>, as well as of national arbitration laws as mentioned *supra*<sup>943</sup>. As iterated, approving a consolidation often accompanies the occurrence of multiparty arbitration, so that whether ensure the equality of each party in the composition of the tribunal is a significant concern for assessing any consolidation mechanism (particularly when the concerned tribunal is not a sole arbitrator tribunal).

Under the rationale of the Ducto case, it is impermissible for the parties to consent in advance to the institutional rules that would result in inequality in the selection of arbitrators, as the then ICC Rules in the Ducto case.<sup>944</sup> In this vein, as *Born* correctly points out, Consolidating arbitrations into the “first” filed arbitration is generally not acceptable if it means that one party would be denied the right to participate in forming the tribunal while the other parties still retain that right.<sup>945</sup> However, the ICC Rules<sup>946</sup>, as well as the KCAB and DIS Rules, are adopting such an approach for “generating” the tribunal for consolidated proceedings. Moreover, even in cases involving the same parties, such an approach delegating to the first composed tribunal to adjudicate consolidated arbitration is also easily to be utilised to thwart the consolidation from being ordered. As *Leboulanger* well argues, to achieve this outcome, the party initiating the second arbitration simply needs to select a different arbitrator than the one chosen for the first arbitration.<sup>947</sup> In a word, such an appointment approach for consolidated tribunal incites a violation of due process and

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<sup>941</sup> Platte, ‘When Should an Arbitrator Join Cases?’ (n 204) 75.

<sup>942</sup> Le Bars (n 940) 240.

<sup>943</sup> *ibid.*

<sup>944</sup> Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 107

<sup>945</sup> Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816

<sup>946</sup> Admittedly, influenced by the Ducto case, Article 12(8) & (9) of the ICC Rules 2021 also provides the “either all or no one” appointment approach of tribunal in multiparty arbitration, i.e. the ICC Court is authorised to appoint the whole arbitral tribunal. But, as verified, the tribunal for consolidated proceedings does not apply on these provisions, but other multiparty arbitration mechanism, like joinder, applies so.

<sup>947</sup> Leboulanger (n 43) 93-94.

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procedural equality principle between the parties<sup>948</sup>, and in turn, it also institutionally constrains from the potential growing space of reaching consolidation on more expansive grounds under such a framework of consolidation mechanism, as also similarly demonstrated under Indicator 1① regarding the application temporal limit *supra*.

In turn, to ensure the equality of parties in the composition of the tribunal under this standard, it implies, in theory, either each party may appoint an arbitrator (including the affected parties agreeing on a joint appointment), or none may do so, i.e. the whole tribunal is appointed by the appointing authority.<sup>949</sup> To date, in the absence of a joint nomination, most selected institutional rules under each Model indicate that the appointing authority (usually, the arbitral institution)<sup>950</sup> has the power to revoke any prior appointed arbitrator, and may appoint the entire tribunal for the consolidated proceedings. These institutional rules include the JACC Rules under Model 1, the ICDR and NAI Rules under Model 2, the SIAC, DIAC<sup>951</sup> and LCIA Rules under Model 3, and the Swiss, CEPANI, SCC, CIETAC, HKIAC, AIAC, ACICA Rules under Model 4. Besides, among them, the ICDR, Swiss, HKIAC and AIAC Rules also expressly contain an express waiver by parties to the right to nominate an arbitrator once consolidation is granted, whose validity is subject to the law governing arbitration in general<sup>952</sup>. *Bars* comments that it is this consistent act adopted to ensure

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<sup>948</sup> *ibid*.

<sup>949</sup> Stippel (n 929) 55; Platte, ‘Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation’ (871) 493.

<sup>950</sup> The exception is in the ICDR Rules, where the composition of consolidated tribunal is the task shared by the ICDR Administrator and the ICDR Consolidation Arbitrator.

<sup>951</sup> Due to no specific elaboration of DIAC’s consolidation tribunal composition in *Part I*, the related provision, Article 12.5, is specifically stated here: “Where there are multiple parties, whether as Claimants and/or Respondents, and where the dispute is to be referred to a three-member Tribunal, the multiple Claimants, jointly, and/or the multiple Respondents, jointly, shall each nominate an arbitrator for appointment by the Arbitration Court in accordance with this Article 12. In the absence of such a joint nomination by the multiple Claimants and/or multiple Respondents and/or where all the parties are unable to agree to a method for the constitution of the Tribunal, the Arbitration Court shall appoint the respective arbitrator(s)...”

<sup>952</sup> In terms of the nature and validity of the waiver, *see* Choog (n 308) 129 (“Such a waiver is in effect a contractual waiver of a party’s right to challenge an award subsequently, on the basis that the party has not had an opportunity to participate (in full or in part) in the constitution of the tribunal. While such a deemed waiver may well be recognized in some jurisdictions, an advance or deemed waiver may be void as a matter of public policy in other jurisdictions.”) For example, such type of waiver contained in the Swiss Rules (Article 7(3)) is permissible under Swiss law as long as the principle of equality is respected. *See* Zuberbühler, *Swiss Rules of International Arbitration: Commentary* (n 553) 109.

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the principle of equality between the parties throughout the world through these leading arbitral institutions that has ultimately established the *Ducto* precedent an instrument of international consensus.<sup>953</sup>

Admittedly, this “either all or no-one” approach was once criticised on the ground that the party is deprived of the right to nominate its “own” arbitrator.<sup>954</sup> The fact that parties can influence the selection of the tribunal’s member(s) in person is one of the crucial advantages of arbitration so attractive to the parties.<sup>955</sup> That said, it is well-recognised that the right to nominate the party-arbitrator is not sacrosanct, as nowhere stated explicitly.<sup>956</sup> Moreover, in any case, the nominated arbitrator would not play as an “agent” to represent the party who nominates him/herself but exercises a judicial function which is required to adhere to independence and impartiality; otherwise, it will raise the possibility of challenging the concerned arbitrator and of inviting that arbitral awards be set aside for invalid formation of the arbitral tribunal.<sup>957</sup> Carried to the extreme, if emphasising parties’ participation in the composition of the tribunal in the context of respecting the equal treatment principle, it implies enlarging the size of the arbitral tribunal for consolidated proceedings as the number of parties grows due to the consolidation, so as to guarantee that each party can have its own nominated arbitrator in the tribunal, which will undeniably fail to balance against efficiency (another natural cornerstone of international arbitration), provided set as the default appointment rule in the institutional rules.<sup>958</sup>

In balance, “either all or no-one” is a safer and more equilibratory approach in circumstances where any party (or several parties) cannot nominate an arbitrator equally for the consolidated proceedings. When delegating a pre-established third party (e.g. arbitral institution) to appoint the tribunal in its entirety as the default rule in institutional rules, there is no risk of violating the principle of equality<sup>959</sup> since

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<sup>953</sup> Le Bars (n 940) 251 (The further rationale for a French case becomes an international precedent in international arbitration is that “no other jurisdiction displays the same level of liberalism as the French Supreme Court’s jurisprudence.”)

<sup>954</sup> *ibid* (n 940) 243-250; Stipl (n 929) 56-57 & 66; Platte, ‘Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation’ (871) 493.

<sup>955</sup> Stipl (n 929) 57.

<sup>956</sup> *ibid* 56-57; Platte, ‘When Should an Arbitrator Join Cases?’ (n 204) 75.

<sup>957</sup> Le Bars (n 940) 243; Stipl (n 929) 56.

<sup>958</sup> Le Bars (n 940) 249-250.

<sup>959</sup> *ibid* 248; Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816 (“The rationale of the *Ducto* decision, forbidding advance waivers of rights to equal participation in constituting a tribunal, would not appear to conflict with such provisions where all the members of the

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“neither of [the parties] to the dispute had more freedom than the other in choosing the arbitrator”<sup>960</sup>, and this approach also maintains a balance with the aim of efficient arbitration.

Last but not least, among the rules which authorise the appointing authority to appoint the entire tribunal for consolidated arbitration, it is observed from *Part 1* that many of them also reserve a certain degree of dynamic flexibility to preserve some respect for the party’s participation in the composition of the tribunal. The common permissive wording (e.g. “may”) rather than mandatory wording for authorising the appointing authority to appoint the entire tribunal after revoking any prior appointed arbitrator is justified to infer that, following the consolidation order, the appointing authority will not mechanically revoke the previously appointed arbitrator(s) and appoint the entire three-arbitrator tribunal without any consideration of the arbitrator appointed by the party before. Generally speaking, the extent of respecting the previously appointed arbitrator(s) is at the discretion of the given arbitral tribunal. At least, when there is no objection raised, the appointing authority under many rules is believed to retain the appointed arbitrator or re-appoint the same individual. It is a growing attempt from the side of the arbitral institutions to strike a balance between procedural equality and respect for the party’s participation in the appointment of arbitrators. But still, as some commentators specifically reminded: it may be more warranted for the arbitral institution (or other prescribed appointing authority) to appoint the entire tribunal where the seat or the enforceability venue is in a jurisdiction like France.<sup>961</sup>

In summary, the assessment of four Models under Indicator 6② presents below:

Indicator 6②	Model 1	Model 2	Model 3	Model 4
Equal treatment in composing the consolidated tribunal.	+	+	+	+

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arbitral tribunal are selected by the arbitral institution.”); Platte, ‘When Should an Arbitrator Join Cases?’ (n 204) 75; Smith (n 15) 200-201

<sup>960</sup> Paris Court of Appeal, 13 Feb. 2003, *Société Vilbena Shipping Ltd. v. Société Afrocean Compania Naviera Inc.*

<sup>961</sup> Baizeau (n 567) 12 (“It may in particular be warranted for the [SCAI] Court to appoint the entire tribunal where the seat is in a jurisdiction ....such as France.”).

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## §2. *Independence and Impartiality of the Consolidation Decision-Maker [Indicator 4①]*

### A. Introductory Remarks

To maintain arbitration as a valid and autonomous alternative dispute resolution from litigation, a certain standard of independence and impartiality of the decision-making authority in the arbitration system must be satisfied,<sup>962</sup> which is, for instance, embodied in Article 6 of the European Convention on Human Rights<sup>963</sup>. In most domestic laws, arbitration rules and influential international soft law<sup>964</sup>, the importance of independence and impartiality of arbitrators are highly underscored, and it is stated that the independence of the arbitrators, under many states' courts, is viewed as a matter of public policy in the context of reviewing enforceability under the New York Convention<sup>965</sup>. Nevertheless, in terms of the consolidation decision, as this thesis has observed so far, the way of arbitrator decision-making solely (i.e. Model 1) is not the only existing model for deciding consolidation nowadays. In

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<sup>962</sup> Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 135

<sup>963</sup> Article 6 of the European Convention of Human Rights (Right to a fair trial): "In the determination of his civil rights and obligations ... everyone is entitled to a fair... hearing ... by an independent and impartial tribunal established by law.". Despite some debate, the ECHR has considered through its case law that the European Convention of Human Rights applied in arbitration, *see* ECHR, 3 April 2008, req. No. 773.03, *Regent Company v. Ukraine*, and ECHR, 20 May 2021, *BEG S.P.A. v. Italy* (Application no. 5312/11).

<sup>964</sup> The most influential example is the IBA Guidelines on Conflicts of Interest in International Arbitration.

<sup>965</sup> Arbisman (n 929) ("Public policy grounds are rather broad...this may include a lack of impartiality or independence...Although the New York Convention does not specifically refer to the tribunal's impartiality or the potential misconduct by the tribunal members as a basis for non-recognition of an award, lack of independence or impartiality of the tribunal will provide a basis for denying recognition of the award under the Convention through different legal bases. "); Pair, *Consolidation in International Commercial Arbitration: The ICC and Swiss Rules* (n 4) 136; Born, *International Arbitration: Law and Practice* (n 15) 476 ("Several different provisions of the Convention may be invoked to resist recognition of an award where the arbitral tribunal was not independent and impartial. First ... Article V(1)(d) of the Convention permits non-recognition of an award where the 'composition of the arbitral authority' was not 'in accordance with the law of the country where the arbitration took place', which can incorporate standards relating to an arbitrator's lack of independence or impartiality and misconduct. Second ... Article V(1)(b) permits non-recognition where a party was 'unable to present his case', which encompasses at least some forms of arbitrator misconduct. Third, claims of lack of independence have been considered under Article V(2)(b)'s general public policy exception in a number of national courts.")

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addition to it, depending on attributed to which Model, consolidation of arbitrations may be ordered (or denied) by the arbitral institution (i.e. Model 4), by the designated third person (i.e. Model 2), or by the arbitral institution and arbitral tribunal (i.e. Model 3). Then, should the consolidation decision-making authorities other than the arbitral tribunal also observe the independence principle? If so, to what extent?

From a broader picture of abiding by good governance principles in the context of institutional arbitration, *Weber-Stecher* suggests that “all the authorities and institutions with decision-making power in the framework of dispute settlement proceedings” should guarantee independence and impartiality when exercising their power.<sup>966</sup> Take arbitral institutions exercising power in general terms as an instance, in *Weber-Stecher*’s words, in the context that arbitral institutions have far-reaching decision-making power, the arbitral institutions have formed a significant part of the judiciary authority within the institutional arbitration regime, so that it is important for the arbitral institution to fully comply with the independence principle as the arbitrators so do.<sup>967</sup> In turn, he argues that, if the institution’s independence is not guaranteed, even if the arbitrators’ independence is ensured, the concern may still give rise to whether the deciding body (comprising not only the arbitrators but the arbitral institution) as a whole fully abides by the principle of independence.<sup>968</sup>

Referring by analogy this rationale to the discussion regarding the assessment of the independence of the consolidation decision-maker(s), it implies that whether the applicable rules empower to decide on consolidation among the arbitrators, the administering arbitral institution, or the designated third person, the measuring standard should be the same: whether the institutional rules in question have guaranteed such a decision-maker to fully adhere to the principle of independence when exercising its power to decide on consolidation. Accordingly, the following will evaluate how well the four Models adhere to the principle of independence in the present practice.

Although, as clarified *supra*, the aim of assessing Indicator 2(5) is different from Indicator 4(1)’s, the rationale of comparing and scoring Model 1 and Model 3 under

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<sup>966</sup> Urs Weber-Stecher, ‘Principles of Good Governance and Organisation of Arbitral Institutions’ in Philipp Habegger and others (eds), *Arbitral Institutions under Scrutiny: ASA Special Series No. 40* (JurisNet, LLC 2013) 38

<sup>967</sup> *ibid* 39-40.

<sup>968</sup> *ibid*.

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Indicator 2(5) applies here *mutatis mutandis* as well for assessing the compliance of independence. Thus, under the assessment of Indicator 4(1), Model 1 scores two “-“, and Model 3 scores one “-“. Instead, albeit Model 2 and Model 4 can reach a comparable extent in terms of the framework thereunder of permitting the potential expansion of realising consolidation (in the context of Indicator 2(5)), a more detailed evaluation of the arbitral institution under Model 4 and the designated third person under Model 2, as well as the comparison in between, needs to be paid here with regard to their conformity of independence and impartiality as consolidation decision-maker.

## B. Evaluation of Model 4

Let’s first examine how the arbitral institution (under Model 4), the most prevailing consolidation decision-maker, ensures its independence and impartiality in exercising its authority on consolidation in the present practice. It seems to me that not many arbitral institutions paid specific weight to ensure their neutrality when fulfilling their function in consolidation decision-making. For example, notably, no arbitral institution (i.e. under Model 3 or Model 4) permits the party to challenge its own independence concerning its authority to decide on consolidation, like permitting the party to challenge the arbitrator in their rules. Notwithstanding, inspired by *Weber-Stecher* in his analysis of good governance in the organisation of arbitral institutions<sup>969</sup> and the endeavours made by some arbitral institutions to enhance their neutrality when exercising their decision-making power (in general, including deciding on consolidation), I found strengthening the independence of an arbitral institution as a consolidation decision-maker are mainly embodied or implemented in the following three aspects from the present practice.

### **[1] External Separation of Power for Arbitration Body**

From the viewpoint of the organisational structure, the arbitration body itself is a self-standing organisation. Or if not, the internal rules of the arbitral institution have introduced appropriate regulation for the separation of powers within the organisation to neutralise the potential risk derived from the organisational structure.

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<sup>969</sup> *Viz* *ibid.*

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Aligned with *Weber-Stecher*, the risk of the arbitral institution lacking independence is less apparent when dealing with “self-standing” organisations.<sup>970</sup> That said, only a small proportion of arbitral institutions are truly both organically and financially independent, *viz* they are not affiliated with another organisation or government and also do not receive funding from a government.<sup>971</sup> Among the seventeen selected arbitral institutions, this typology of institutions refers to the ICDR, an independent not-for-profit organisation,<sup>972</sup> the LCIA, an independent non-profit company limited by guarantee,<sup>973</sup> the HKIAC, also an independent company limited by guarantee with charitable status,<sup>974</sup> the ACICA, an independent and not-for-profit organisation,<sup>975</sup> the NAI, an independent non-profit foundation<sup>976</sup>, the DIS, a loosely described “non-for-profit association”<sup>977</sup>, and the recently restructured Swiss Arbitration Centre (SAC), as stated in *Part I*<sup>978</sup>, converted from a not-for-profit association affiliated with the Swiss chambers of commerce to an independently operated limited liability company. It so happens that both institutions in Model 2 (ICDR and NAI) are attributed to the “stand-alone” organisations; while some institutions (HKIAC, ACICA, DIS and SAC) under Model 4 are also part of it.

As to (most of the) other selected institutions, there is more or less a link with some organisation or government. It is well-known that many influential arbitral institutions are structurally governed by a superior body or belong to a larger organisation,

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<sup>970</sup> *ibid* 40.

<sup>971</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 22.

<sup>972</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) (“The ICDR which was established in 1996 by the AAA is ... incorporated in New York using the [form of a New York domestic not-for profit corporation]. [The ICDR is] not linked to a wider chamber of commerce or State entity, nor do they receive any funding from any government.”); Weber-Stecher (n 966) 40.

<sup>973</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 22 (“While [the LCIA] was established by the City of London and the London Chamber of Commerce in the late nineteenth century, the entity was re-incorporated in the mid-1980s at which stage it emancipated itself from its two founding bodies. The LCIA thereby also became independent from the Chartered Institute of Arbitrators, which had joined the two funding entities in the supervision of the LCIA in the middle of the 1970s.”); Weber-Stecher (n 966) 40.

<sup>974</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 21; Weber-Stecher (n 966) 40.

<sup>975</sup> See ACICA, ‘Introduction’ <<https://acica.org.au/>> accessed 10 August 2023

<sup>976</sup> “Established as a foundation in 1949, the Netherlands Arbitration Institute (Stichting Nederlands Arbitrage Instituut; “NAI”) operates on a non-profit basis. The NAI is not a government institution and does not receive any subsidy from the government or the private sector, which allows it to perform its duties entirely independently and impartially.” See NAI, ‘Objective’

<<https://www.nai-nl.org/en/nai/objective/>> accessed 10 August 2023; Weber-Stecher (n 966) 40

(“[T]he NAI... should be mentioned among the independent arbitral institution.”)

<sup>977</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 22

<sup>978</sup> Further on the restructure of the Swiss Arbitration Centre, see *Part I-Chapter 4-Section 2-§1-A*.

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typically a chamber of commerce at the seat of the institutions.<sup>979</sup> It is the case of the JCAA, ICC, CEPANI, VIAC, and SCC among the selected institutions.<sup>980</sup> CIETAC is more special compared to them. Albeit CIETAC is also a subordinate entity within the China Chamber of International Commerce in name<sup>981</sup>, CIETAC was founded by the Chinese government itself as a public entity<sup>982</sup> and is also financially controlled by the Chinese government<sup>983</sup>. Therefore, though any Chinese arbitral institution is clearly

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<sup>979</sup> According to a survey on scrutiny of 81 arbitral institutions worldwide, held by the Swiss Arbitration Association (ASA) in 2013, 41% of them are branch of or other association with a Chamber of Commerce. See Simone Hofbauer, Michael Burkart and others, 'Survey on Scrutiny of Arbitral Institutions' in Philipp Habegger and others (eds), *Arbitral Institutions under Scrutiny: ASA Special Series No. 40* (JurisNet, LLC 2013) 4; also Gerbay, *The Functions of Arbitral Institutions* (n 5) 22 ("Many other arbitral institutions are linked to a chamber of commerce.").

<sup>980</sup> The JCAA is within the Japan Chamber of Commerce and Industry (JCCI); the ICC is within the International Chamber of Commerce; the CEPANI is under the auspices of the Belgian National Committee of the International Chamber of Commerce (ICC Belgium) and the Federation of Belgian Enterprises (VBO/FEB); the VIAC is within the Austrian Federal Economic Chamber (AFEC); and the SCC is within the Stockholm Chamber of Commerce.

<sup>981</sup> The "China Chamber of International Commerce" is simultaneously the China Council for the Promotion of International Trade (CCPIT), which itself was initially a governmental body operating under the then Ministry of Foreign Trade, and was gradually transformed into an officially-alleged non-governmental, "people to people" economic and trade organisation, but intrinsically a semi-governmental status. See Yu, *A Guide to the CIETAC Arbitration Rules and Practice* (n 732) 17-18; Jingzhou Tao, 'CIETAC Arbitration Rules, Chapter I, Article 1 [The Arbitration Commission]', in Loukas A. Mistelis (ed), *Concise International Arbitration* (2nd edition, Kluwer Law International 2015) 618; Thomson Reuters Practical Law, 'Glossary: China Council for the Promotion of International Trade (CCPIT)', available under:

<[https://uk.practicallaw.thomsonreuters.com/8-552-9327?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/8-552-9327?transitionType=Default&contextData=(sc.Default)&firstPage=true)> (Last access on 11 August 2023); also the Charter of CCPIT (2021) states that, "under the authorisation of the Chinese government, CCPIT undertakes the relevant work and receives guidance from the government (Article 5)", and CCPIT sticks to the Chinese ruling party's socialist ideology (Article 3).

<sup>982</sup> CIETAC was established (in 1956) following a 1954 decision on the country's then highest administrative authority, the "Chinese Administration Council" (now called the "State Council"). See Tao, 'CIETAC Arbitration Rules, Chapter I, Article 1 [The Arbitration Commission]' (n 981) 618; Gerbay, *The Functions of Arbitral Institutions* (n 5) 23

<sup>983</sup> According to Jianlong Yu in 2007, Vice Chairman of CIETAC, all arbitration institutions in China are required since 2002 to "[...] hand up their revenues to the Ministry of Finance or its local branches, and to make an annual budget for their expenditures, which has to be submitted to the Ministry or its branches for approval". This so-called "division of receipts and expenditures" financial management system universally applied in the Chinese arbitral institutions has been recognised as a main obstacle for CIETAC's management and has raised the independence concern of CIETAC as an arbitration body. Although it is said that CIETAC has managed to transform its financial management into an entrepreneurial management system since 2010, it is undeniable that CIETAC still receives funding from the government pursuant to the present Articles of Association of CIETAC (Article 34), leaving the independence concern haunts. See Michael J. Moser and Jianlong Yu, 'CIETAC and its Work: An Interview with Vice Chairman Yu Jianlong' (2007) 24 *JIntlArb* 555, 557; Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Law Press China 2013) 136-137 (樊莹, 《仲裁在中国: 法律与

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provided to be independent of (government) administrative bodies on the text of the Chinese arbitration law<sup>984</sup>, the control by the superior body over CIETAC is conceivably much deepened than over the said “liberal Western”<sup>985</sup> counterparts, or at least it appears to be so. Even more, KCAB is even an arbitral institution directly under the auspices of the Ministry of Justice of Korea.<sup>986</sup> Other institutions, like the SIAC, DIAC, and AIAC, all have some certain link with the government(s), which looks more tenuous.<sup>987</sup>

Accordingly, the potential risk of lacking independence is more evident in such integrated organisations<sup>988</sup>, and the risk would worsen as the link deepens. As such, as *Weber-Stecher* suggests, expressly incorporating the organisational rules on the separation of powers in the applicable arbitration rules can better ensure the

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文化分析》，法律出版社，2017年1月第1版，第136-137页); Jianlong Yu, ‘CIETAC Clears the Air on Sub-Commissions’ (*China Business Law Journal*, 4 September 2013)

<<https://law.asia/cietac-clears-the-air-on-sub-commissions/>> accessed 11 August 2023; and also the Articles of Association of China International Economic and Trade Arbitration Commission <<http://www.cietac.org/index.php?m=Page&a=index&id=36&l=en>> accessed 11 August 2023.

<sup>984</sup> See Article 14 of the China Arbitration Law. Also see Fan (n 983) 125.

<sup>985</sup> This term “liberal Western” is borrowed from Gerbay, *The Functions of Arbitral Institutions* (n 5) 27.

<sup>986</sup> (“Founded in 1966, the Korean Commercial Arbitration Board is the sole arbitral institution in Korea that is statutorily authorized to settle disputes under the Korean Arbitration Act, under the auspices of the Ministry of Justice.”) Available under:

<[http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub0402&CURRENT\\_MENU\\_CODE=MENU0020&TOP\\_MENU\\_CODE=MENU0018](http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub0402&CURRENT_MENU_CODE=MENU0020&TOP_MENU_CODE=MENU0018)>, and also

<[http://www.kcab.or.kr/html/kcab\\_kor/intro/history.jsp](http://www.kcab.or.kr/html/kcab_kor/intro/history.jsp)> accessed 11 August 2023. But since KCAB does not belong to Model 4 (Model 2) specifically for the present section’s discussion, I will not expand more.

<sup>987</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 22-23 (“Sometimes the governmental link is more tenuous, and takes the form of a statutory attribution of responsibilities. The new (2005) Arbitration Act of Malaysia for example makes the [AIAC] the default appointing authority in *ad hoc* arbitrations in certain circumstances, and offers immunity to its Director. Likewise, the SIAC in Singapore is designated by the international arbitration act as competent for the certification of awards for enforcement purposes. The act also confers on the Registrar of SIAC the power to proceed to the taxation of the fees of the arbitral tribunal where these have not been agreed between by the parties.”). Regarding DIAC, it was enacted by a decree of the Dubai’s ruler <<https://www.diac.com/en/home/>> accessed 11 August 2023.

<sup>988</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 22 (“The link to a chamber of commerce presents both advantages and disadvantages for an arbitral institution. For newer institutions, it offers some immediate legitimacy as, in essence, the institution is established by its users, for its users. One possible drawback comes from the fact that an arbitral institution may feel pressured to support financially the non-income generating activities of the wider chamber of commerce, which can in turn create disincentives for the institution to keep its administrative charges as long as possible.”); Weber-Stecher (n 966) 40.

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arbitration body's independence,<sup>989</sup> via erecting a firewall between the arbitral body and its superior body when the former is performing its function of administering and supervising the arbitrations submitted to it. Worth to highlight that once such separation of power is included as part of the arbitration rules, it will constitute a component of the arbitration agreement of the parties that opt for this arbitral institution with a binding contractual effect, which is a commitment effect that a statement simply announced in the institution's website cannot ever reach.<sup>990</sup>

Among the mentioned non-stand-alone institutions under Model 4, the ICC, CEPANI, VIAC, SCC, CIETAC and AIAC, is the separation power regulation for the arbitration body from the intervention of the superior body on administering arbitration provided in their rules?

Of them, the ICC, SCC and CIETAC have explicitly provided the separation of power from their superior bodies in their broadly defined internal rules. Such as in the Statutes of the International Court of Arbitration of the ICC (Appendix I) state that: "As an autonomous body, [the ICC Court] carries out these functions in complete independence from ICC and its organs."<sup>991</sup> With this provision, the apparent influence of the superior body (chamber of commerce) on the subordinated arbitration body is usually limited mainly to the principal personnel appointments and removals, i.e. the election/appointment and removal of the top officers and members of the arbitration body,<sup>992</sup> without intervention, at least no direct intervention, on the arbitral body's administration of the arbitrations in any manner.

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<sup>989</sup> Weber-Stecher (n 966) 41-42.

<sup>990</sup> *ibid* 42.

<sup>991</sup> This is Article 1(2) of the Statutes of the International Court of Arbitration of the ICC (Appendix I). Meanwhile, Article 1(3) of the Statutes of the ICC Court (Appendix I) and Article 3(1) of the Internal Rules of the ICC Court (Appendix II) also stipulate that the Members of the ICC Court should be independent of the ICC and its organs (e.g. the ICC National Committees and Groups which proposed them for appointment by the ICC World Council). As to SCC, Article 1 of the SCC Appendix I Organisation states: "The SCC is part of the Stockholm Chamber of Commerce but is independent in exercising its function in the administration of disputes." Also, regarding CIETAC, Article 1 of the Articles of Association of CIETAC provides: "China International Economic and Trade Arbitration Commission (hereinafter referred to as CIETAC) is a permanent arbitration institution established within the China Council for the Promotion of International Trade (China Chamber of International Commerce) upon the approval of the Central People's Government of the People's Republic of China in 1954 to resolve economic and trade disputes independently."

<sup>992</sup> For example, "[T]he CCPIT appoints the Chairman, Vice Chairmen, and members of the CIETAC Arbitration Commission." See Yu, *A Guide to the CIETAC Arbitration Rules and Practice* (n 732) 19. Also, the SCC Board shall be appointed by the Board of Directors of the Stockholm Chamber of Commerce. See Articles 4 and 5 of the Appendix I Organisation of the SCC (2023).

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And the AIAC's independent status is guaranteed in the international treaty which establishes it, *viz* the host country agreement between the Government of Malaysia and the AALCO.<sup>993</sup> And accordingly, the host country, the Government of Malaysia is in charge of appointing the Director of AIAC, after consulting with the AALCO.<sup>994</sup> Nevertheless, the CEPANI and VIAC are still silent in this regard.

## **[2] Interior Separation of Power of Consolidation Decision-Making Within the Arbitration Body**

If looking from the perspective of the institution's arbitration body, the above first aspect focuses on separating the arbitral body as a whole from external influences to strengthen the independence of the arbitral institution as a consolidation decision-maker. Rather, the second aspect going to be discussed here focuses on the interior separation of power of consolidation decision-making within the arbitration body, which I believe will further enhance the justification of the arbitral institution as a consolidation decision-maker in terms of independence and impartiality.

According to *Weber-Stecher*, to ensure the arbitral institution handles arbitration in a professional and efficient manner, it is desired for institutional tasks to be clearly shared and appropriately delegated to the best-qualified body within the hierarchy of the arbitration body.<sup>995</sup> In particular, when the institutional decisions are of importance for the arbitral proceedings, carefully selected and elected arbitration practitioners within the arbitral institution should be conferred for determining such decisions which will be made in the institution's name, as these kinds of institutional decisions deserve to be attached more weight on quality rather than pure speed/cost efficiency.<sup>996</sup>

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<sup>993</sup> AIAC, 'Malaysia and AALCO Signs Host Country Agreement', 27 March 2013 <<https://www.aiac.world/news/31/Malaysia-and-AALCO-Signs-Host-Country-Agreement>> accessed 11 August 2023; AIAC, 'About Us: Who We Are' <<https://www.aiac.world/About-AIAC->> accessed 12 August 2023 ("Formed pursuant to the host country agreement between Malaysia and AALCO, the AIAC is a not-for-profit, non-governmental international arbitral institution which has been accorded independence and certain privileges and immunities by the Government of Malaysia for the purposes of executing its functions as an independent, international organization."). This is also confirmed by an AIAC Counsel that: "The support rendered by the Government of Malaysia to the AIAC does not affect the independent functioning of the Centre. These are captured in the host country agreement." Email from Teoh Shu Ling, a Senior Case Counsel at AIAC, to the author (3 February 2023).

<sup>994</sup> See *Part 1-Chapter 4-Section 8-§2*

<sup>995</sup> Weber-Stecher (n 967) 45.

<sup>996</sup> *ibid* 45-46.

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Assuming that consolidation is such an important institutional decision, another way of looking at it is that if there is an appropriate division of labour within the arbitral institution regarding the process of deciding on consolidation, this implies that the arbitral institution's power to decide on consolidation is not the product of a one-person show; on the contrary, the decision-making on consolidation in such context demands a designated group of several well-esteemed arbitration practitioners/experts under the aegis of same arbitral institution, probably with diverse background and experience, to present, deliberate and exchange views on the cases pertaining to the consolidation request, and the final decision issued could be probably a balance of their different opinions. Arguably, the decision made in this manner is perceived as more cautious and less error than the manner made by one person who may decide recklessly or arbitrarily in a specific case. If taking the arbitral tribunal as a reference, it is often observed that the three-arbitrator tribunal is overwhelmingly favoured over the sole arbitrator tribunal mainly "because of a perception of greater neutrality and balance in the award, less risk of a poor decision ... and of benefiting from diversity of background and experience in the panel", especially when the case is of complexity nature.<sup>997</sup> By analogy, several persons participating in the determination of the consolidation matter also can earn a perception of greater neutrality and balance in the decision rendered in this manner compared to a one-person determining manner, especially in consideration of the usually complex characteristic of the case involved with consolidation and the difficulty for the parties directly challenging the independence and impartiality of the arbitral institution, or other alike external monitoring, under Model 4.

In the practice of most rules under Model 4, first of all, deciding power on consolidation is wholly in the hand of the institution governing body (i.e. a higher level inner body compared to the Secretariat, often called either "Arbitration Court", "Board", or "Committee") consisting of member(s), except DIS under which consolidation is believed to be handled by its Secretariat<sup>998</sup>. Further, even in the case where the institution governing body is vested with the power to delegate some of its decisions to the Secretariat according to the governing rules, consolidation is excluded from the scope permitted to be delegated, such as Appendix I Organisation of the

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<sup>997</sup> María Angélica Burgos, 'The Fear of the Sole Arbitrator' (*Kluwer Arbitration Blog*, 7 August 2018) <[<sup>998</sup> See \*Part 1-Chapter 4-Section 10-§1\*](https://arbitrationblog.kluwerarbitration.com/2018/08/07/the-fear-of-the-sole-arbitrator/#:~:text=These%20reasons%20appear%20convincing%20and,nominate%20one%20of%20its%20members.> accessed 14 August 2023</a></p></div><div data-bbox=)

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SCC provides so. It does imply that consolidation decision-making is treated in almost all of Model 4's rules as an "important" institutional task that needs to be handled exclusively by the senior arbitration practitioner(s) with strong experiences rather than as a subordinate task dealt with by the Secretariat, for example.<sup>999</sup> Also, it is reasonably understandable concerning why the DIS consolidation is handled directly by the DIS Secretariat, as consolidation can be only permitted in the presence of all parties' specific consent on consolidation under DIS,<sup>1000</sup> which raises no complexity.

On this basis, eight arbitral institutions under Model 4 have stipulated that consolidation in principle should be subject to deliberations by a group of experienced arbitration practitioners (where exceptions may exist under some circumstances, as illustrated *infra*), which are the ICC, SAC, CEPANI, VIAC, SCC, CIETAC, HKIAC and ACICA.

Of them, the Board of the VIAC and SCC and the Court of the CIETAC are directly in charge of the consolidation issue as per the applicable rules. For example, the VIAC Board consists of at least five members, including a president and up to two Vice Presidents.<sup>1001</sup> To reach a quorum, more than one-third of its members shall present<sup>1002</sup>, and the presiding member shall have the casting vote in case of deadlock<sup>1003</sup>. For SCC, its Board consists of one Chairperson, no more than three Vice-Presidents and twelve additional members,<sup>1004</sup> and two members of the Board form a quorum<sup>1005</sup>. The SCC Board meets once a month to make related decisions, including consolidation, and the Chairperson retains the casting vote if a majority is not attained.<sup>1006</sup> Besides, comparatively, the SCC is more flexible that allows two

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<sup>999</sup> In light of Urs Weber-Stecher, important decisions should be dealt with by the group of carefully selected and elected arbitration practitioners; more subordinate tasks should be delegated to the secretariat, the individual staff, or Court members handling the case. See Weber-Stecher (n 966) 46.

<sup>1000</sup> See *Part 1-Chapter 4-Section 10-§2*

<sup>1001</sup> Article 2(1) & (2) of the VIAC Rules 2021.

<sup>1002</sup> Article (2) of the VIAC Annex 2 Internal Rules of the Board (2021).

<sup>1003</sup> Article (3) of the VIAC Annex 2 Internal Rules of the Board (2021). As to how to identify the "presiding member", according to Article 2(2) of the VIAC Rules 2021 and Article (4) of the VIAC Annex 2, in the event the VIAC President is prevented from performing his duties, such duties shall be assumed by the Vice President; and if the Vice Presidents are prevented from exercising their duties, the President's duties shall be assumed by the most senior member based on duration of service as Board member.

<sup>1004</sup> Article 3 of the SCC Appendix I Organisation.

<sup>1005</sup> Article 7 of the SCC Appendix I Organisation.

<sup>1006</sup> See *Part 1-Chapter 4-Section 5-§2*

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more alternatives: i) the SCC Board can delegate a specific committee to make certain decisions (including consolidation) on behalf of the Board; ii) in case of emergency, the Chairperson or a vice chair-person may take such decision on behalf of the Board.<sup>1007</sup> These two alternatives are believed to be efforts to balance better efficiency and professionalism against independence.

Under the ICC, SAC, CEPANI and HKIAC, slightly different, the consolidation is straightforwardly delegated to a subordinated committee under the institution governing body. Such as, in the Internal Rules of the SAC Court, the consolidation decision is specifically allocated to one of the SAC Court's subordinated committees, i.e. the "Court Special Committee". This committee comprises seven members, including the President, Vice President and Secretary of the SAC Court. In principle, at least five members form a quorum, but exceptions are tolerated<sup>1008</sup> for the benefit of flexibility. In case of deadlock, the SAC President, or in his absence, the most senior-ranking member of the Executive Committee (among Vice-Presidents and Secretary) who took part in the specific consolidation decision-making, has the casting vote.<sup>1009</sup> Similarly, the HKIAC institutionally delegates the consolidation to be determined by a subordinate standing committee under the HKIAC Executive Committee, called the Proceedings Committee<sup>1010</sup>, while the ICC Court delegates the consolidation matter to be decided by a Committee thereunder<sup>1011</sup>. Delicately speaking, the CEPANI is somewhat different from the ICC, SAC and HKIAC because the CEPANI Rules vest the power to decide consolidation simultaneously with a Committee (i.e. "Appointments Committee") and the President of CEPANI.<sup>1012</sup> That is to say, it happens under CEPANI that consolidation is determined solely by an individual, as in the case of the AIAC below.

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<sup>1007</sup> Article 7 of the SCC Appendix I Organisation.

<sup>1008</sup> See Article 4(4) of the 2022 Internal Rules of the SAC Court: "Decisions rendered by the Court Special Committee are valid provided that at least five of its members have participated in the decision-making process. Where less than five members of the Court Special Committee are able to participate in the decision-making process, the Secretariat shall ensure the requisite quorum by inviting the necessary number of Members to act as ad hoc Court Special Committee members for the purpose of the relevant decision. If the requisite quorum still cannot be reached, the decision may be validly rendered by those remaining Members who are able to participate in the decision-making process."

<sup>1009</sup> See *Part 1-Chapter 4-Section 2-§2*

<sup>1010</sup> See *Part 1-Chapter 4-Section 7-§2*

<sup>1011</sup> Article 4 of the Statutes of the International Court of Arbitration (Appendix I) (2021).

<sup>1012</sup> See *Part 1-Chapter 4-Section 3-§2*

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Comparatively, the ACICA affords a distinct way to attain a group of people to participate in the consolidation decision-making: first, the ACICA Council, consisting of a group of senior international arbitration practitioners, submit their joint Recommendation to the ACICA Executive (i.e. the office-bearers of ACICA); and then, the ACICA Executive will issue its own decision to the parties, with consideration of the ACICA Council's Recommendation but not be bounded by.<sup>1013</sup> Until here, each of the above-discussed eight arbitral institutions provides an avenue to render a group of people inside the arbitral institution to participate in the decision-making as to consolidation, but the extent of joint participation in the final decision varies somehow.

Last, as said, AIAC consolidation is determined solely by the AIAC Director, without any other personnel's participation under the aegis of the AIAC.<sup>1014</sup> Without any exchange of views within the institution, this may raise the perception that the decision regarding consolidation was made in a less neutral manner; thus, the decision may be suspected as ill-considered or arbitrary.

With the checks and balances that come with the internal division of labour on deciding consolidation, due attention should also be paid to ensure any individual involved in such decision-making is free from conflict of interest in the relevant case to guarantee the institution's independence as a consolidation decision-maker. This will be discussed below.

### **[3] Conflict of Interest of the Institution**

From the perspective of conflicts of interest of the institution, the institution's independence and impartiality under Model 4 can be boosted if the rules governing the arbitral institutions prevent the members of the arbitral institution who have a conflict of interest in a specific case from being involved in or receiving any information on this case,<sup>1015</sup> let alone making any decision (e.g. decision regarding consolidation) concerning this case. The rationale behind this is self-evident, as the members (rarely but sometimes staff) of the arbitration bodies of Model 4's institutions usually participate in making the decision on consolidation.

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<sup>1013</sup> See *Part 1-Chapter 4-Section 9-§3*

<sup>1014</sup> See *Part 1-Chapter 4-Section 8-§2*

<sup>1015</sup> Weber-Stecher (n 966) 47.

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According to the Survey on Scrutiny of Arbitral Institutions held by the Swiss Arbitration Association (ASA) in 2013, only around one-third of institutions (i.e. 41% out of 82 arbitral institutions) provide any rule to regulate the independence and/or impartiality of the members or staff of the institution's arbitration body.<sup>1016</sup> Today, a decade later, among the selected institutions under Model 4, already 60% of them have explicitly contained provisions of such nature in their rules, which are the ICC, CEPANI, VIAC, SAC, ACICA and DIS. This is remarkable progress made by the international arbitration community as a whole.

Among them, the ICC, SAC, and CEPANI contain the sweeping principled regulation forbidding the top officers of the arbitration body, or even any member of the arbitration body, from acting as arbitrator (or counsel) in a case submitted to their arbitral institutions, under any circumstances whatsoever. It directly matters to the consolidation decision-making, as members of arbitration bodies usually participate therein, and the top officer (also belonging to members of arbitration bodies) often has a casting vote for the final decision in case of deadlock, as illustrated above. For example, the Internal Rules of the Arbitration Court of the Swiss Arbitration Centre (SAC) states that: "The [SAC] Court, or any committee established by the Court, shall not appoint any Member, Board member, or any member of the Advisory Council for Mediation, as arbitrator in Arbitration Proceedings...A Member shall not be involved in the administration of a case if he/she has a conflict of interest. Such Members may not participate in the discussions and in the decisions of the Court, or any of its committees, concerning the proceedings in question. They shall not receive any documentation or information pertaining to such proceedings."<sup>1017</sup> Also, the Internal Rules of CEPANI clarify that the President and Secretary-General of CEPANI *shall* not participate in any arbitrations conducted under the CEPANI Rules, either as an arbitrator or counsel, and the members of the Appointments Committee *may* not be appointed as arbitrators.<sup>1018</sup> Under the CEPANI Rules, both the President and the

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<sup>1016</sup> Hofbauer (n 979) 20.

<sup>1017</sup> See Article 9 [Participation of the Members in Arbitrations under the Swiss Rules] of the Internal Rules of the SAC Court. This provision also permits the exception that the Member may be competent to act as arbitrator under the approval of the SAC Court, subject to mentioned conflict of interest conditions, and precondition that they have not acted as Rapporteur or been consulted in their capacity as a member in relation to the relevant case before their designation as arbitrator.

<sup>1018</sup> See Article 2-4 of the CEPANI Internal Rules (2023) of Procedure for the President, the Appointments Committee and the Challenge Committee.

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Appointments Committee (also including the CEPANI President) of CEPANI enjoy the power to order consolidation. The ICC contains loosely similar provisions.<sup>1019</sup>

In comparison, the VIAC, ACICA and DIS<sup>1020</sup> do not straightforwardly forbid the top officers, or members, of arbitration bodies from acting as arbitrators for their arbitrations in any circumstances whatsoever but reversely, on a case-by-case basis, prohibit the concerned members (including top officers) who may raise conflict of interest in a specific case from receiving the information or participating in decisions pertaining to such a case, where the decision regarding consolidation is included. To be deemed a conflict of interest, taking VIAC Rules as an example, these members of the arbitration body are or were involved in an arbitration administered by VIAC in any capacity whatsoever.<sup>1021</sup> Under VIAC, the consolidation matter is decided by the Board of VIAC, consisting of a minimum of five members<sup>1022</sup>, where the members who violate the said conflict of interest have to be excluded from the consolidation decision-making. In addition, the VIAC Rules also provide the members of the Board shall be independent in performing their duties.<sup>1023</sup> Similarly, the internal rules of ACICA expressly require any member of the ACICA Council who may give rise to a conflict of interest should abstain from assisting with the making of a decision (including a decision as to consolidation) in relation to arbitration.<sup>1024</sup> That being said, the downstream office-bearers in charge of rendering the final decision on consolidation, the ACICA Executive, are not bound thereby as per the rules governing the arbitration body of ACICA.

However, opposite to the above rules, the SCC, CIETAC HKIAC or AIAC has not contained any clear rules on handling the conflicts of interest of the members of the arbitration body. At the most, such as the SCC only includes a general but seemingly untargeted provision in Appendix I Organisation: “The SCC ... shall deal with the arbitration in an impartial ... manner”.<sup>1025</sup>

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<sup>1019</sup> See Article 2 [Participation of Members of the International Court of Arbitration in ICC Arbitration] of the Internal Rules of the ICC Court (2021).

<sup>1020</sup> See Article 4.3 of the DIS Internal Rules (2018). But commentators assumed the DIS consolidation is directly handled by the DIS Secretariat, so I will not unfold here.

<sup>1021</sup> See Article 2(3) of the VIAC Rules 2021.

<sup>1022</sup> See Article 2(1) of the VIAC Rules 2021.

<sup>1023</sup> See Article 2(4) of the VIAC Rules 2021.

<sup>1024</sup> See Article 3.5 of the Protocol for Decisions on Applications for Consolidation and Joinder and Challenges to Arbitrators under the ACICA Rules 2021 (2021).

<sup>1025</sup> See Article 9 [Procedure] of the Appendix I Organisation of the SCC Rules (2023).

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#### **[4] Interlocutory Conclusion**

In a nutshell, in my mind, for those arbitral institutions where the above-demonstrated three aspects are provided and implemented in their institutional rules (broadly defined), it is justified to perceive that the independence of the arbitration body as the consolidation decision-maker is comparatively ensured. In the present practice terms, only three arbitral institutions out of the ten selected Model 4's institutions fulfil such three aspects: the ICC, SAC and ACICA.

#### **C. Evaluation of Model 2 and Differing Score Results between Model 4 and Model 2**

As said, the arbitral institution acting as consolidation decision-maker (Model 4) could be deemed to ensure the required independence when the demonstrated-above three conditions are sufficiently satisfied. That being said, I assume that Model 2 (i.e. ICDR and NAI Rules) still outperforms Model 4 at large in terms of the independence and impartiality of the consolidation decision-maker, which is reflected as follows.

#### **[1] “Third Person” under Model 2’ Rules is of Organisational Independence in Nature**

First, the consolidation decision-maker under Model 2 (the “consolidation arbitrator” under ICDR and the “third person” under NAI) completely separates whether from the tribunal or the arbitral body, acting as a clear-cut stand-alone authority exclusively for the matter of consolidation. Albeit the arbitral institution under Model 2 seizes a pivotal position to trigger the consolidation process (i.e. to appoint the delegated “third person”), as a matter of principle, any member of the administering arbitration body cannot assume as the designated “third person”, and then such “third person” cannot be continued to be appointed in the subsequent tribunal for hearing the consolidated proceedings. In other words, the individual delegated for the consolidation decision-making shall be totally independent of the parties, of the arbitral tribunal in charge of adjudicating the case substantially, and of the administering arbitral institution, with the aim to be free from the concern of conflict of interest.

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In addition, as discussed above, the ICDR and NAI are already self-standing organisations as a whole. Accordingly, purely from the organisational independence, the “third person” for deciding consolidation under ICDR and NAI (Model 2) has obtained a double independence guarantee to the extent that even the best-performed arbitral institutions under Model 4 cannot reach. In turn, such a power-allocating arrangement is a boon to safeguard the independence of the administering arbitral institution itself.

That said, note that the indirect intervention extent of the arbitral institution between ICDR and NAI is differing. The intervention of the ICDR is much more substantial and profound than that of NAI in making a decision on consolidation. Under the NAI Rules, the NAI Administrator essentially has no say on whether or not to appoint the delegated third person; while under the ICDR Rules, though there is no doubt that the decision as to consolidation is ultimately made by the delegated ICDR Consolidation Arbitrator, the ICDR plays a crucial gatekeeper role by discretionarily assessing whether it is appropriate to appoint such a Consolidation Arbitrator under the prescribed threshold conditions, which is a real substantial power to affect whether a decision on consolidation can be rendered. In turn, from the perspective of the delegated third person, the scope of the NAI Third Person’s power is more expansive than that of the ICDR Consolidation Arbitrator, since the former must review the prescribed threshold conditions to consolidation on its own before exercising its discretion, whereas the latter could only exercise the discretion to make the final decision without overturning the prior decision made by the ICDR on the assessment of threshold conditions.

## **[2] Parties Can Raise Independence and Impartiality Challenges to the “Third Person” akin to Challenge An Arbitrator**

Under Model 2, not only the parties may participate in the appointment of the “third person” and are aware of the concrete identity of the “third person” designated, but they are also competent to challenge the consolidation “third person” following the institutional rules, *mutatis mutandis*, applying the same criteria as to the impartiality or independence for challenging an arbitrator.<sup>1026</sup>

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<sup>1026</sup> It applies under both the ICDR and NAI Rules. See *Part 1-Chapter 2-Section 1-§2-B* and *Part 1-Chapter 2-Section 2-§2-B-[2]*.

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On the contrary, it could not happen under Model 4: there is no chance for the parties to challenge the administering arbitral institution (or the inner subordinate bodies or the interior personnel) out of independence concern (or any concern) in their decision-making on consolidation. First, parties under Model 4 have no right to participate in the designation and/or access to the information of the institutional members who are allocated to decide their specific case as the parties under Model 2 can do. Admittedly, the websites of many arbitral institutions have published the identity and information of the top officers and other members for dealing with consolidation issues within the institution in general. However, in most cases, the specific consolidation case is allocated to a small group of members from the said pool under the auspices of an arbitral institution<sup>1027</sup>, and the identity of these specific people is provided to remain anonymous to the parties, counsel, arbitrator(s) or any other person outside the arbitral institution.<sup>1028</sup> Moreover, even if the party is aware of who will participate (or is participating) in the consolidation decision-making within the institution, no institutional rules have offered an avenue yet to permit parties to challenge the arbitral institution out of independence concern when it functions as a decision-maker for consolidation.

Someone may argue that the separation of power mechanism inside the institution on determining consolidation together with the inner conflict of interest prevention mechanism roughly serves as an alternative to the parties' right to challenge the impartiality of the decision-maker externally. But, at most, it is a lower standard of alternative. It is because the independence of the arbitral institution as the decision-maker under Model 4 is ultimately dependent on the inter-constraints and inner oversights within the institution, and it is difficult for the parties, and others outside the institution, to monitor it from the outside like under Model 2.

### **[3] Comparison Results**

To conclude, Model 2 can be drawn to be better at ensuring the independence of the consolidation decision-maker than Model 4. It proves that the framework of Model 2

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<sup>1027</sup> From the author's observation, it seems only the HKIAC consolidation is decided by the full members of the Proceedings Committee for each case, without allocating to some of them.

<sup>1028</sup> For example, *see* Article 4.3 of the ACIAC Protocol for Decisions on Applications for Consolidation and Joinder and Challenges to Arbitrators under the ACICA Rules 2021.

can bring a high standard of adherence to the independence and impartiality of the consolidation decision-maker, which is a truly added value that Model 2 contributes to the consolidation mechanism under institutional arbitration. That said, regarding Model 4, despite not performing as well as Model 2, the better view is that the arbitral institution can still be deemed sufficiently independent and impartial independence when acting as a consolidation decision-maker, provided the above-discussed three aspects are soundly satisfied. Thus, I decided to score Model 2 two “+”, while score Model 4 one “+”.

#### D. Final Result of Assessment among Consolidation Decision-Makers

Thereby, the assessment of four Models under Indicator 4① presents as below:

Indicator 4①	Model 1	Model 2	Model 3	Model 4
Independence and Impartiality of consolidation decision-maker(s) are well-ensured.	- -	++	-	+

### *§3. Transparency*

Transparency is a self-evident indication of the rule of law for any dispute settlement system. Arbitration is often criticised for lack of transparency and accountability,<sup>1029</sup>

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<sup>1029</sup> See Trakman (n 813) 419; Michael Mellwrath, ‘Survey Says: Institutions Could Do A Lot to Improve’ (Kluwer Arbitration Blog, 12 October 2012) <<https://arbitrationblog.kluwerarbitration.com/2015/10/12/survey-says-theres-a-lot-institutions-could-improve/>> accessed 25 August 2023

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for example, Lord Peter Goldsmith once exposed the current complaint that “international arbitration for international disputes amounts to an undemocratic secret court system”<sup>1030</sup>. Although arbitrations are not open to the public as a norm, it does not implicate arbitration is conducted in “secret hearing” since the transparency of arbitration is embodied in the procedures adopted in arbitrations that shall be well known, contained and published either in statutes or rules, as Chief Justice *Ma* unequivocally argues.<sup>1031</sup>

In the context of the consolidation mechanism, raising transparency can help parties to know what they are expecting when they choose a system of institutional arbitration which permits consolidation, which contributes to raising the consolidation system’s predictability and reliability, and thus ultimately boosts the parties’ faith thereon.<sup>1032</sup> Borrowed *Weber-Stecher’s* perspective in adherence to the principles of good governance in institutional arbitration<sup>1033</sup>, the users of arbitration have the interest and entitlement to be aware of the internal procedure or inner task assignment of consolidation decision-making (Indicator 5①), and the reasoning of the decision as to consolidation, no matter made by which authority (Indicator 5②). Likewise, as Michael McIlwrath noted, quoting from the QMUL International Arbitration Survey, “Respondents [of the Survey] generally consider that increased transparency in institutional decision-making would be a positive development”.<sup>1034</sup>

It is acknowledged that consolidation provisions under the institutional rules have become more and more detailed (and longer in text) through the evolution of the three decades, but most of the (selected) rules refuse to afford parties the appropriate transparency on these two aspects. Although no satisfaction with these indicators of transparency itself usually will not constitute a statutory ground for denying

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<sup>1030</sup> Peter Goldsmith, ‘CIArb Centenary Celebrations: 3<sup>rd</sup> International Arbitration Conference Keynote Address’, *CIArb Australia News: December 2015 (2015)*, at 17.

<sup>1031</sup> *Ma* (n 868) 8.

<sup>1032</sup> Xavier Favre-Bulle, ‘Are Arbitration Proceedings Still Exclusively Reserved for the Parties’ in Emmanuel Gaillard and others (eds), *Towards A Uniform International Arbitration Law?* (JurisNet LLC 2005) 240-245

<sup>1033</sup> *Weber-Stecher* (n 966) 49 (“Transparency in the organisational structure and assignment of responsibilities to the various bodies is a common standard in state court proceedings. These standards should also be met by a private organisation offering alternative dispute resolution services.” “From a good governance point of view, such [institutional] decisions should be reasoned and made public in an anonymised form.”).

<sup>1034</sup> *McIlwrath* (n 1029).

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enforcement of the award directly<sup>1035</sup>, it is self-explanatory for the importance of the said transparency indicators for the sake of a consolidation mechanism's legitimacy based on the justifications above. In any event, these aspects may affect the parties' choice of arbitral institution when they expect to know the relevant matters.

#### A. Indicator 5①: Transparency regarding Inner Procedure of Consolidation Decision-Making

As to the transparency concerning the inner procedure, or internal task assignment, of consolidation decision-making, it is arguable that all of the selected rules under Model 1 and Model 2 satisfy in this regard. Under Model 1, consolidation is handled by the pre-established tribunal; whereas under Model 2, usually with the institution's initiative, all the parties concerned are invited to participate the appointment of the consolidation decision-making "third person" pursuant to the related process provided in institutional rules and will be informed the finalist of the result. Both approaches make it clear to an adequate extent for the parties to be aware of who will decide on their consolidation matter and, more importantly, how the decision-making process is operated internally.

On the contrary, no rules under Model 3 reveal the inner procedure of the decision-making therein, which is for sure at least in the stage where the arbitral institution renders the decision. Concerning the rules under Model 4, while the majority of them are silent in this regard, the Swiss, SCC and ACICA Rules explicitly provide the internal process of consolidation decision-making inside an administering institution.

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<sup>1035</sup> For example, in terms of the relationship between reasoning and award enforceability, *see* Huang (n 862) ("Academically speaking, neither the New York Convention, the Model Law of the UN Commission on International Trade Law (UNCITRAL), nor China's Arbitration Law has listed "reasoning" as grounds for setting aside an arbitral award.")

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Thus, the assessment of four Models under Indicator 5① presents below:

Indicator 5 ①	Model 1	Model 2	Model 3	Model 4
Transparency as to the inner procedure of consolidation decision-making?	+	+	-	+

### B. Indicator 5②: Communication of Reasons

Regarding the significance of affording reasoning to an award, while arbitral awards are not made public, the existence of the (adequate) reasoning accompanying the award can help to dispel the parties and their lawyers from the suspect that the arbitral tribunal has not adjudicated their case in adherence to the applicable law, arbitration rules, legal principle and spirit.<sup>1036</sup> Per *Trakman* and *Montgomery*'s rationale, as part of the "judicialisation" trend of arbitration, promoting well-constructed reasons in international commercial arbitration overall bolsters transparency and accountability of the arbitration system, which complies with the transnational rule of law as an integral part of what the ideal "best practice" of international commercial arbitration should lead.<sup>1037</sup> The same rationale applies to the consolidation decision: in the case where the decision regarding consolidation is not accompanied by any reasons at all or is not adequate, this may raise suspicion as to whether the given consolidation decision-making authority, whichever the identity, has genuinely acted strictly in accordance to the applicable arbitration law, (institutional) rules or whether it has instead hiddenly taken into account extraneous and illegitimate factors, with the end of an arbitrary decision. Plus, it would impair the predictability of the concerned consolidation mechanism from the users bound thereon and the public.<sup>1038</sup> Ultimately, accompanying the consolidation decision with the underlying reasons should be

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<sup>1036</sup> Ma (n 868) 7.

<sup>1037</sup> *Trakman* (n 813) 419-426.

<sup>1038</sup> *Leboulanger* (n 43) 94-95.

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deemed the foundation for the decision's recipients to understand and further accept it.<sup>1039</sup>

In reality, however, denying affording reasons is commonplace, and even attempting self-justifiable, in institutional arbitration when rendering the decision as to consolidation. Except for Model 1, where the reasoning for the tribunal-made consolidation decision plays part of the arbitral tribunal's overall reasoning for its-made award, the rest three Models all contain the institutional rules refusing to communicate the reasons for the decision regarding consolidation, as a predominance phenomenon. The ICDR Rules under Model 2, the SIAC, DIAC and LCIA Rules under Model 3 (at least where the consolidation decision is made by the institution), and the Swiss, CEPANI, VIAC, SCC, CIETAC, HKIAC, ACICA and DIS Rules under Model 4 are all in this way. Furthermore, the texts of the LCIA Rules bluntly state the justification for denying to afford the reasoning, *viz* the institution-made decision regarding consolidation is of administrative nature, and there is no need to accompany reasoning for an administrative decision.<sup>1040</sup> Arguably, by analogy, this justification is perhaps the default rationale behind many of the other rules that refuse to communicate reasons for the consolidation decision, especially when the concerned consolidation decision is made by the administering institution.<sup>1041</sup>

Nevertheless, borrowing this theory, leaving aside whether it is well-founded *per se*<sup>1042</sup>, to warrant that it is unnecessary to communicate reasons for the institution-made decision regarding consolidation is untenable.<sup>1043</sup> At the outset, as

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<sup>1039</sup> Gerbay, *The Functions of Arbitral Institutions* (n 5) 207 (“The rationale behind accompanying a decision with an account of its underlying reasons is to allow the decision's recipients to understand it, and also to establish that the decision was not arbitrary.”)

<sup>1040</sup> For more on “administrative nature of the LCIA Court’s consolidation decision”, see *Part 1-Chapter 3-Section 3-§2-B-[2]*. Likewise, the SIAC Cross-Institution Consolidation Protocol as discussed in *Final Conclusions and Outlook* expresses in the same way. See SIAC, ‘Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol’ (2017). <<https://siac.org.sg/wp-content/uploads/2023/04/Memorandum-on-Cross-Institutional-Consolidation-with-annexes.pdf>> accessed 7 October 2023 (“Most institutions do not provide reasons for **administrative** decisions (emphasis added).”)

<sup>1041</sup> Gerbay, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 205 (“Those decisions that are provided without any written reasons are naturally harder to defer to ... However, other differences **arise purely from the theoretical understanding of the function of arbitral institutions as mere administrators of the proceedings** conducted under their rules. This inconsistency is unsatisfactory. [Emphasis is added.]”).

<sup>1042</sup> See the discussion in *Part 2-Chapter 2-Section 1-§1-D*

<sup>1043</sup> Gerbay, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 205.

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confirmed above in *Part 2-Chapter 2-Section 1-§1-D*, the decision regarding consolidation cannot be exempted from judicial review only because it is an arbitral institution that makes such a decision. In this context, to answer whether it is necessary to afford reasons, it is more indicative to see whether the degrees of judicial deferences accorded by courts in practice would vary depending on whether the institutional consolidation decision is reasoned. Based on a handful of cases, despite not being coherent globally yet, *Gerbay* and *Afnán* observe that when courts review the institutional decisions concerned, they may probably not afford any judicial deference to the institution-made decisions when there is no written reason to support them.<sup>1044</sup> In their analysis, one example is *A3 v. B3*, where the Abu Dhabi Global Market Court (ADGM) decided to conduct its own de novo review of the facts to determine whether the arbitration agreement in question was valid and binding on the parties in the context where the ICC Court had previously issued a negative *prima facie* decision on jurisdiction (*viz.* the ICC Court had determined not to proceed with the arbitration) but failing to afford any relevant reasoning.<sup>1045</sup> Another persuasive case is *Z v. A* in the High Court of Hong Kong, which was on a set-aside application involved in the interpretation of the arbitral seat in the arbitration clause, *viz* whether the ICC Court fixing Hong Kong as the arbitral seat complied with the intention of the arbitration clause in question, which provided the arbitral seat should be “in China”.<sup>1046</sup> The ICC Court fixed the seat in Hong Kong but did not accompany any written reason (according to the regular practice then). The applicant, seeking to annul the decision, alleged in front of the Hong Kong court that the ICC misdid in arching Hong Kong as the seat but should have chosen a city within mainland China as the seat. The Hong Kong court decided to conduct its own independent review of such an ICC-made decision without affording any judicial deference, although it eventually held the ICC’s decision.<sup>1047</sup> From the two cases, *A3 v. B3* and *Z v. A*, the lack of (sufficient) written reasoning may probably trigger the domestic courts to conduct their own de novo analysis without deferring to any degree.<sup>1048</sup> Similarly, on analysing

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<sup>1044</sup> *ibid* 202.

<sup>1045</sup> *ibid* 201-202; Court of First Instance of the Abu Dhabi Global Market (ADGMCFI), *A3 v. B3*, 4 July 2019, ADGMCFI-2019-007..

<sup>1046</sup> High Court of Hong Kong, Court of First Instance, *Z v. A* [2015] HKEC 289, Construction and Arbitration Proceedings No. 8 of 2013, HCCT 6/2013, 30 January 2015; *Gerbay*, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 202.

<sup>1047</sup> *Gerbay*, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 202.

<sup>1048</sup> *ibid*.

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an English case, *AT&T Corp v. Saudi Cable Co.*,<sup>1049</sup> another author, *Bansal*, also presumes that the domestic courts may accord some degree of deference to the institution-made decision when the arbitral institutions accompany the relevant interpretation and reasoning of their rules in such a concerned decision.<sup>1050</sup> In this case, the Appellate Court held that: “The court, if required to interpret the ICC Rules, would naturally pay the closest attention to any interpretation of the ICC Rules adopted by the ICC Court”.<sup>1051</sup>

Although the above-shared observations are based on various types of institutional decisions without specifically involving the decision of consolidation, I intuitively believe that this conclusion should generally apply to any institution-made decisions, including decisions relevant to consolidation. Theoretically, it is more desirable if a state court can accord some degree of judicial deference to the arbitral institution in general, as it somehow reflects the court’s respect for the notion of party autonomy in arbitration — after all, by choosing a specific set of institutional rules, parties have empowered the specific arbitral institution to make decisions regarding their case on certain matters in line with the chosen rules<sup>1052</sup>. Albeit respecting party autonomy does not automatically imply taking away the power of the court to review the decision made by the institution (or by the arbitrator), it sounds justifiable for the court to defer somehow to the arbitral institution when it is exercising its decision-making power (e.g. a decision regarding consolidation) within the scope of its authority. In addition to that, another recognised reason for the court to cautiously defer to the arbitral institution is that an arbitral institution is viewed as having considerable experience in implementing or interpreting its own rules compared to the judges in court.<sup>1053</sup> As such, when the empirical statistics demonstrate that raising

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<sup>1049</sup> Court of Appeal of England and Wales, *AT&T Corp v. Saudi Cable Co* [2000] EWCA Civ J0515-1, 15 May 2000

<sup>1050</sup> Ritika Bansal, ‘Chapter 9: Judicial Deference to Decisions of Arbitral Institutions’ in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Deference in International Commercial Arbitration: The Shared System of Control in International Commercial Arbitration* (Kluwer Law International 2023) 212

<sup>1051</sup> *ibid*; Court of Appeal of England and Wales, *AT&T Corp v. Saudi Cable Co* [2000] EWCA Civ J0515-1, 15 May 2000, para [49].

<sup>1052</sup> Gerbay, ‘Chapter 8: Judicial Deference to Decisions of Arbitral Institutions’ (n 905) 198.

<sup>1053</sup> For example, Popplewell J opined in the case of *P v. Q* on the question of giving deference to the LCIA’s decision that: “This Court should be very slow to differ from the view of the LCIA Division. The LCIA Division was the parties’ chosen forum for the resolution of the question in issue. ***It had considerable experience and was well placed to judge*** how much time would be required for a co-arbitrator properly to consider interlocutory issues of this type (emphasis added).” See High Court of Justice of England and Wales, *P v. Q and others* [2017] EWHC 194 (Comm), 9 February 2017, para [40]-[41]

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transparency by affording reasons for the institutional decisions relevant to consolidation may put forward a higher degree of judicial deference, I believe it more desirable to universally demand communication of reasons for the consolidation decisions even if the decision-maker is not arbitrator but an arbitral institution or others, as it is a boon for mitigating the over judicial intrusion for the autonomy of arbitration<sup>1054</sup>, as well as for enhancing efficiency<sup>1055</sup>.

As a matter of fact, it is observed that there already occurs a rise to call for providing reasons for the decisions made by the arbitral institution, the scope of which has also swept consolidation decisions.<sup>1056</sup> The most typical case is for the ICC consolidation regime. Even though the institution-made consolidation decision under ICC is likewise deemed as a decision of administrative nature, the communication of reasoning is possible upon request. More impressively, the practice of communicating reasons for the consolidation decision to parties and arbitrators has been formally institutionalised under ICC.<sup>1057</sup> Under the auspices of AIAC, which also belongs to Model 4 as ICC, according to the insider, the AIAC Director has already begun in practice to provide the reasons and considerations for the institutional consolidation decision, though such a mechanism is far from being institutionalised (the AIAC Rules still explicitly refuse to require the Director to be asked to communicate the relevant reasons).<sup>1058</sup> Likewise, as the NAI insiders revealed, the designated third person usually also attaches the reasons when rendering the decision on consolidation, even though not explicitly stipulated thereon in the NAI Rules either.<sup>1059</sup> Therefore, there also exists practice to communicate reasoning under the decision-making fashion of Model 2.

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<sup>1054</sup> L. Ali Khan, 'Arbitral Autonomy' (2013) 74 LaLRev 1, 1

<sup>1055</sup> Bansal (n 1050) 223.

<sup>1056</sup> For example, Andrea Carlevaris, 'Chapter II: The Arbitrator and The Arbitration Procedure, The Rise of Transparency in Arbitral Institutions' Decision-Makings' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2021* (Manz'sche verlags & Universitätsbuchhandlung 2021) 257 ("This call for transparency has led to the communication and publication of several types of decisions, including decisions on the prima facie admissibility of requests for arbitration, on the consolidation of arbitration proceedings and on the replacement of arbitrators upon the institution's initiative..."); Gerbay, *The Functions of Arbitral Institutions* (n 5) 207 ("[A] decision on a challenge or on joinder or consolidation may be more problematical and may thus require more detailed explanantions.").

<sup>1057</sup> For more, see *Part 1-Chapter 4-Section 1-§5*.

<sup>1058</sup> See *Part 1-Chapter 4-Section 8-§2-B*.

<sup>1059</sup> See *Part 1-Chapter 2-Section 2-§4*.

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Based on the above, the assessment of four Models under Indicator 5② presents below:

Indicator 5②	Model 1	Model 2	Model 3	Model 4
The decision as to consolidation is reasoned.	+	+	-	+

### Section 3. Assessment Result: Model 2 Triumphs

Combining each assessment result of the above indicators, the final comprehensive assessment results are shown in the table below:

Comprehensive Assessment Between Four Consolidation Models									
Topic Categories	Concrete Indicators to be Tested	Efficacy		Legitimacy	Model 1	Model 2	Model 3	Model 4	
		Consistency	Efficiency						
<b>Category 1: Time Limit Control</b>	① No temporal limit to request consolidation.	*			-	+	-	+	
	② Consolidation Process can be triggered by the decision-maker(s) without <i>ex parte</i> request of a party.	*			-	+	-	-	
	③ For the appointment of the consolidation decision-maker, if any, extra time to stay arbitrations is needed.		--						
				-		+	-	+	+
	④ Specific time limit to render the decision on consolidation.		*		-	+	-	-	
<b>Category 2: Permitted Usage Range of Consolidation Mechanism</b>	① The explicit agreement of all parties is not a prerequisite to achieving consolidation.	*			+	+	+	+	
	② Consolidation involving multiple parties to multiple agreements can be permissible in the absence of explicit	* * *							
* *					-	+++	++	+++	

## Comprehensive Assessment Between Four Consolidation Models

Topic Categories	Concrete Indicators to be Tested	Efficacy		Legitimacy	Model 1	Model 2	Model 3	Model 4
		Consistency	Efficiency					
	consent to consolidation.	*						
	③ It is permitted to consolidate arbitrations under different versions of the same institutional rules.	* *						
		*			++	++	++	+
	④ It is permitted to consolidate institutional arbitration and <i>ad hoc</i> arbitration.	*			+	+	-	-
	⑤ Consolidation decision-maker sits in a neutral place.	*			--	+	-	+
<b>Category 3: Legal Effect</b>	① The same consolidation request can only be visited one time.		*		+	+	- (exclude LCIA)	+
	② The decision as to consolidation is final and binding.		*		+	+	- (exclude LCIA)	+
<b>Category 4: Neutrality</b>	① Is the independence and impartiality of consolidation decision-maker(s) well ensured?			* *				
				*	--	++	-	+
<b>Category 5: Transparency</b>	① Transparency as to the inner procedure of consolidation decision-making?			*	+	+	-	+
	② The decision as to consolidation is			*	+	+	-	+

Comprehensive Assessment Between Four Consolidation Models								
Topic Categories	Concrete Indicators to be Tested	Efficacy		Legitimacy	Model 1	Model 2	Model 3	Model 4
		Consistency	Efficiency					
	reasoned.							
<b>Category 6: Procedural Equality</b>	① Equal right to be heard			*	+	+	+	+
	② Equal treatment in composing consolidated tribunal			*	+	+	+	+
					<b>+3</b>	<b>+18</b>	<b>-2</b>	<b>+12</b>

**Table 4** Comprehensive Assessment Between Four Consolidation Models

As revealed by the consolidated comparison Table, the final scores results of four Models: Model 1 scores +3, Model 2 scores +18, Model 3 scores -2, and Model 4 scores +12. Accordingly, this Table clearly shows that, against the founded-above assessment criteria, the consolidated best performance in the “cherry-picking” manner under Model 2 prevails over that under other Models in the present practice, including Model 4.

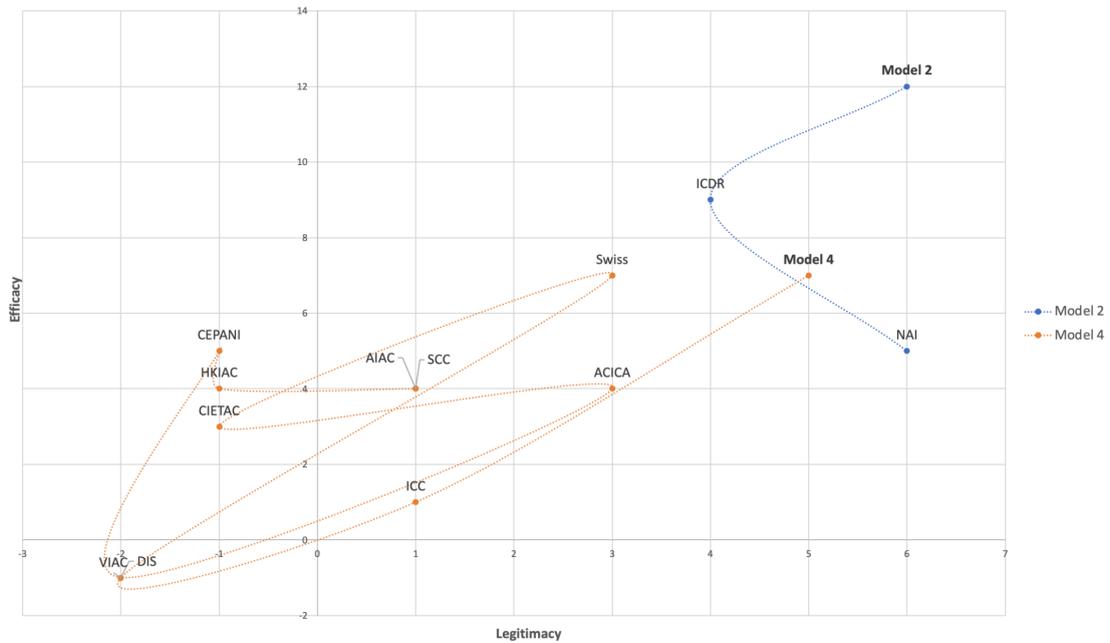
First and primary, it implies that, based on the present institutional rules and implementation, the most-adopted Model 4 is not the last winner as initially hypothesised in *Introduction*, i.e. the most desirable Model among the four Models based on the identity of consolidation decision-maker, but Model 2.

This conclusion could be more evident if taking a closer comparison of each selected individual consolidation mechanism classified under Model 2 and Model 4, as well as the consolidated best performance of these two Models, against the author’s defined metrics above. The table below assesses each selected consolidation mechanism under Model 4 and Model 2, where the scores are divided into scores of efficacy assessment (Category 1, 2, 3) and scores of legitimacy assessment (Category 4, 5, 6) on the basis of the above-defined yardstick.

Assessment of each selected consolidation mechanism under Model 4 and Model 2												
	ICC	Swiss	CEPANI	VIAC	SCC	CIETAC	HKIAC	AIAC	ACICA	DIS	ICDR	NAI
Indicator 1①	-	+	+	-	+	+	+	+	+	+	+	+
Indicator 1②	-	-	-	-	-	-	-	-	-	-	+	-
Indicator 1③	+	+	+	+	+	+	+	+	+	+	-	-
Indicator 1④	-	-	-	-	-	-	-	-	-	-	+	+
Indicator 2①	+	+	+	+	+	+	+	+	+	-	+	+
Indicator 2②	-	+++	+++	+	++	+	++	++	++	-	++	+++
Indicator 2③	+	+	-	-	-	-	-	-	-	-	++	-
Indicator 2④	-	-	-	-	-	-	-	-	-	-	+	-
Indicator 2⑤	+	+	+	+	+	+	+	+	+	+	+	+
Indicator 3①	+	+	+	+	+	+	+	+	+	+	+	+
Indicator 3②	+	+	+	-	+	+	+	+	+	+	-	+
Sum of Category 1, 2, 3	+1	+7	+5	-1	+4	+3	+4	+4	+4	-1	+9	+5
Indicator 4①	+	+	-	-	-	-	-	-	+	N/A	++	++
Indicator 5①	-	+	-	-	+	-	-	-	+	N/A	+	+
Indicator 5②	+	-	-	-	-	-	-	+	-	-	-	+
Indicator 6①	+	+	+	+	+	+	+	+	+	N/A	+	+
Indicator 6②	-	+	+	N/A	+	+	+	+	+	N/A	+	+
Sum of Category 4, 5, 6	+1	+3	-1	-2	+1	-1	-1	+1	+3	-1	+4	+6

**Table 5** Assessment of each selected consolidation mechanism under Model 4 and Model 2

Furthermore, based on this table's data, the following-generated scatter plot more visually illustrates the individual consolidation mechanisms that fall under Model 4, as well as the consolidated-best-performance Model 4 itself, generally underperform the individual rules that fall under Model 2, as well as the consolidated-best-performance Model 2.



**Figure 9** Scatter Plot: Divergences between individual consolidation mechanisms, as well as consolidated best performance, under Model 2 and Model 4

But taking a step back, this result also partly complies with the initial hypothesis: neither Model 1 nor Model 3, the CIArb-favoured one, can be deemed apt to accommodate the consolidation mechanism under institutional arbitration.

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## Final Conclusions and Outlook

### CHAPTER 1. THE FATE OF MODEL 4: NOT TO BE ABANDONED BUT TO BE AMELIORATED TO REACH ITS FULL POTENTIAL

Faced with the assessment outcome that Model 2 outperforms Model 4, as well as other Models, in present practice, I do not intend to draw a conclusion that “we should abandon Model 4 and embrace fully Model 2”. Rather, I would propose ameliorating Model 4 by filling in the gaps that remained in Model 4’s consolidated best performance away from the yardstick established in *Part II* and thus preserving both Model 2 and Model 4 as feasible paradigms to be freely opted for designing consolidation mechanisms in institutional arbitration. I believe there are mainly two justifiable motivations for retaining Model 4 rather than abandoning it.

First, in the context that Model 4 has predominated in the global institutional arbitration market, from the perspective of avoiding the practical complexities, it may be more compelling to propose the institutional rules that have already adopted Model 4 to improve it to the extent of aligning with the author-defined criteria other than urging the large group of arbitral institutions who have incorporated Model 4 in their arbitration rules to revolutionise and convert to adopt Model 3 for consolidation mechanisms. The firm rationale to underpin this proposal is that the present practice of Model 4 generally performs not bad compared to that under Model 1 or Model 3 (against the author-defined yardstick), and more importantly, Model 4 is also a model that is capable of being repaired to the extent of meeting the author-defined yardstick as demonstrated *infra*, contrary to the case of Model 1 or Model 3 that fails to do so due to the restrictions of framework *per se*. In essence, what matters in opting for which Model to adopt for the institutional consolidation mechanism relies on which Model can satisfy the defined criteria rather than confining the Model in present practice which has met the above-defined criteria. In this way of understanding, admittedly, Model 2’s current practice concerts more with the author-defined criteria among the four Models, but this finding does not automatically exclude the legitimacy of persistence of any other Model provided the consolidation regime under which can be improved to meet the said criteria under the framework of the corresponding Model.

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For Model 1 and Model 3, it is self-evident that their frameworks are doomed to fail to rectify the shortcomings in some indicators to reach acceptable. For example, as demonstrated in *Part II*, conferring one of the to-be-consolidated tribunals with the consolidation power *per se*, as a shared feature between Model 1 and 3, suggests it is irreconcilable with ensuring the neutrality of the consolidation decision-maker (i.e. Indicator 4①) and the desirable trend of reasonably expanding the permissive application scope of consolidation in the sense of efficacy (i.e. Indicator 2②&⑤). In addition, the feature of Model 3, *viz* vesting the decision-making power of consolidation with two separate authorities, raises the risk of having the same consolidation request visited more than once, unnecessarily impairs the efficiency of arbitral proceedings (i.e. Indicator 3①). By contrast, although some gaps do exist for Model 4 away from the author-defined criteria, it is achievable to rectify these current gaps, as the framework of Model 4 itself will not restrain such potential acts of amelioration over those underperforming indicators. Admittedly, as demonstrated in *Part II-Chapter 2-Section 2-§2*, the framework of Model 4 restricts the independence and impartiality of consolidation decision-maker to reach a similar extent as high as Model 2 can afford at maximum. Still, as discussed, the independence and impartiality that Model 4 can afford at maximum is deemed sufficient<sup>1060</sup>. In precise, the following aspects may be boosted to improve Model 4 to the acceptable extent under the author-defined criteria:

- (a) The arbitral institution can trigger the consolidation process without *ex parte* request of a party (Indicator 1②);
- (b) Specific time limit is set for the arbitral institution to render the decision on consolidation (Indicator 1④);
- (c) Expanding the situations of permitting consolidation of arbitrations under different versions of the same institutional rules under Model 4 (Indicator 2③);
- (d) Authorising the arbitral institution to consolidate institutional arbitration and *ad hoc* arbitration which is under its administration. In the meanwhile, it implies that, if not available yet, the concerned arbitral institutions should be open to administering *ad hoc* arbitration at first place. (Indicator 2④)

In this way, the scores of Model 2 and Model 4 will be roughly equal. Furthermore, once Model 4 adopted a specific time limit for the arbitral institution to render the decision on consolidation request, Model 4 would arguably outperform Model 2 in

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<sup>1060</sup> See Part II-Chapter 2-Section 2-§2-C-[3]

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terms of the efficiency of the arbitral process because the time of issuing the decision by an arbitral institution would be probably shorter than by a designated third person requiring extra time to identify the third person, provided (similar) issuance time limit is set explicitly for both situations. This furthermore underscores the significance of keeping an enhanced Model 4. As such, in my conclusion, Model 1 and Model 3 should be forfeited as the paradigms of the consolidation mechanism in institutional arbitration but retain Model 2 and Model 4 as the feasible paradigms. Meanwhile, the individual consolidation mechanisms under Model 2 and especially under Model 4 should be ameliorated to catch up with, or at least approach, the author-defined criteria. Admittedly, this set of criteria I built up probably represents only one approach to assessing the institutional consolidation mechanism, only one direction that the consolidation mechanism can seek future evolution for improvement — maybe some indicators are still debatable — but at least they fill in the vacancy of the comprehensive criteria of assessing consolidation mechanisms. It should take time to see whether the criteria are robust enough.

Plus, the second motivation to retain Model 4 relates to the vision to achieve the next level of consolidation, which occurs across arbitral institutions or beyond. The motivation for maintaining Model 4 is to align with the assumption initiated in the SIAC Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol (“SIAC Cross-Institution Consolidation Protocol”) that the decision-maker for determining the request of cross-institution consolidation may be more appropriate to be assumed by the arbitral institution(s) than other bodies (including a designated third person(s) in Model 2), which will be elaborated and demonstrated as justifiable in the next Chapter.

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## CHAPTER 2. THE OUTLOOK FOR CONSOLIDATION MECHANISMS IN INSTITUTIONAL ARBITRATION

In the ending part of the thesis Conclusion, I would like to envisage the outlook of the consolidation mechanisms in institutional arbitration and contribute my remarks and proposals to achieve this vision. To this end, it is necessary in the first place to summarise what circumstances of consolidation have been overall addressed from the pool of the institutional consolidation mechanisms currently in force, despite the divergences, and what possibilities of consolidation of arbitrations have not been touched, as well as where we can stand as the new starting point to proceed a new round of evolution (Section 1). After orienting the pursuit of cross-institution consolidation as the next starting point for expanding consolidation in institutional arbitration, Section 2 will drill into the SIAC Cross-Institution Consolidation Protocol, where I will contribute with some further commentaries and refinement proposals.

### **Section 1. Where We Stand, Where We Head for**

Taken together with the above elaboration and assessment of the existing representatives of institutional consolidation mechanisms, it can be synthesised that, without explicit or tailor-made consent on consolidation, there has formed a likelihood of accomplishing consolidation under the following circumstances in current practice. However, note that some are still unusual and may only be possible under the aegis of the specific arbitral institution(s).

- 1) Supposing the arbitrations are conducted under the same institutional rules, it has become increasingly permissible to aggregate them when involving multiple parties to multiple agreements. That said, the substantial conditions may vary to a divergent extent among the institutional rules.<sup>1061</sup>
- 2) From a more subtle viewpoint, consolidating arbitral proceedings may also become possible even if the applied arbitration rules from the same institution

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<sup>1061</sup> See Part 2-Chapter 2-Section 1-§1-D

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are not the same version, though this permission is far from usual yet, or if any, the condition is not easy to satisfy.<sup>1062</sup>

3) Beyond the consolidation between the institutional arbitrations administered by the same arbitral institution as mentioned above, consolidation may also be allowed between institutional and *ad hoc* arbitration under the prerequisite that the same arbitral institution administers these two proceedings, which can be deemed as a form of consolidation across dispute settlement mechanisms.<sup>1063</sup> Meanwhile, as to the institutional consolidation mechanism, such a type of consolidation arrangement is undeniably one of the dramatic breakthroughs through its evolution. Note that, from the emerged practice as discussed supra, after ordering consolidation, the arbitration rules governing the consolidated proceedings usually converge on the institutional rules of the administering institution, other than the UNCITRAL Rules that apply to the individual *ad hoc* arbitration.

4) Last but not least, although purposely left aside in *Part II* for the sake of a “fairer” and “more systematic” comprehensive assessment<sup>1064</sup>, it is an indisputable fact that consolidating arbitrations administered by the same arbitral institution but seated in different jurisdictions, *viz* cross-jurisdiction consolidation, has emerged in the discipline of institutional arbitration, albeit only one arbitral institution (e.g. NAI) effectuates it so far. As said, in the case of the NAI, cross-jurisdiction consolidation requires strict preconditions, particularly the unambiguous statutory support of the institution’s home jurisdiction for cross-jurisdiction consolidation, and at least one of the to-be-consolidated arbitrations is anchored in the home jurisdiction to receive such statutory support. From the viewpoint of upgrading the institutional consolidation mechanism in the broader scale of dispute settlement mechanism, no one can deny that such type of consolidation brings the institutional consolidation mechanism to a deeper extent.

The above is where we stand now. Although it is admitted that the institutional consolidation mechanism has expanded steadily with one iconic breakthrough and another, there is still some room for the institutional consolidation mechanism to

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<sup>1062</sup> See Part 2-Chapter 2-Section 1-§1-E

<sup>1063</sup> See Part 2-Chapter 2-Section 1-§1-F

<sup>1064</sup> See Part 2-Chapter 2-Section 1

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upgrade in further enhancing the efficacy and efficiency of the arbitral process to reach comparable competitiveness and utility as the consolidation tool commonly used in (international) civil litigation, if looking from the broader context of the emerging competition between international commercial arbitration and international commercial litigation, as discussed in *Introduction*.

For a long while, the consolidation mechanism at the level of the arbitral institutions has usually been subject to the criticism that, whatever the improvement, all arbitral institutions face the common limitation: they can only consolidate the arbitral proceedings conducted under their own rules.<sup>1065</sup> Another well-recognised limitation is that consolidation is very tough to occur when separate arbitrations are seated in different jurisdictions.<sup>1066</sup> Admittedly, it can be said nowadays, the development of institutional consolidation mechanisms has begun to, or at least, has already started to manage to break through these assumed restraints. As summarised above, consolidation between *ad hoc* and institutional arbitration and cross-jurisdiction consolidation of institutional arbitrations have become possible to some limited extent at the level of the arbitral institutions. In turn, there are still piles of evident restrictions to realise true unfettered, or at least more expansive, consolidation between *ad hoc* and institutional arbitration and consolidation of arbitrations across different jurisdictions. For example, at present practice, only the *ad hoc* arbitration administered by an arbitral institution is possible to be consolidated with an institutional arbitration administered by the same institution at the level of institutional arbitration<sup>1067</sup>, which can be viewed as a pragmatic workaround for accomplishing part of the needs for merging interrelated *ad hoc* arbitration and institutional arbitration, at the ready-made advantage of the administration of the same arbitral institution. Yet, this workaround is self-limited: no matter what, an institutional arbitration cannot be expected to consolidate with an *ad hoc* arbitration when they are administered by differing arbitral institutions or the latter is not

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<sup>1065</sup> See Kaufmann-Kohler, 'Multiple Proceedings in International Arbitration: Blessing or Plague' (n 897); Gabrielle Kaufmann-Kohler, 'Multiple Proceedings – New Challenges for the Settlement of Investment Disputes' in Rovine A.W (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill | Nijhoff 2015) 9

<sup>1066</sup> Born, *International Commercial Arbitration: Law and Practice* (n 15) 2759-2816.

<sup>1067</sup> Leaving aside the institutional arbitration level, Article 1046 DCCP in the Netherlands offers a paradigm that *ad hoc* arbitration can be consolidated with institutional arbitration under the order by the state court without the precondition that they should be administered under the same arbitral institution, provided no party excludes the consolidation regime as per Article 1046 DCCP. For more about it, see *Part 1-Chapter 2-Section 2-§2-C-[1]*.

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administered by any arbitral institution at all. Regarding cross-jurisdiction consolidation, the NAI consolidation regime, the sole representative for cross-jurisdiction consolidation targeting the arbitrations under the same arbitral institution but seated in different jurisdictions, implies that, as reiterated, cross-jurisdiction consolidation has no way to be achieved if there is no statutory support seamlessly aligning with the concerned institutional rules, since two or more arbitration agreements referring to two different seats (i.e. the future arbitrations will be subject to different procedural laws) are usually viewed as incompatible – this is convincing evidence to infer there is no consent from the parties therein for consolidation of the disputes arising out of the said two or more arbitration agreements, in the absence of agreement otherwise. Logically and historically, it is challenging to propose the national arbitration acts from various countries to follow the suit of the Netherlands. Therefore, without an international harmonisation between states in statutory arbitration law (in order to avoid potential “forum shopping”, maybe it’d be better to further supplement with international cooperation between states in the form of a multilateral treaty, as called for by *Kaufmann-Kohler*<sup>1068</sup>), it is still not ripe to envisage a widespread cross-jurisdiction consolidation at this stage. On top of it, the NAI consolidation regime further suggests that the hope that cross-jurisdictional consolidation between arbitrations administered by different arbitral institutions can be achieved by seeking to modify one set of institutional rules per se is more like a groundless fantasy. One of the main justifications is that there is no implemented solution or consensus yet to address the demand for consolidating arbitrations administered by different arbitral institutions in the first place, let alone to address the cross-institution consolidation across various jurisdictions. Comparable to the reason for hindering cross-jurisdiction consolidation, what restrains the accomplishment of cross-institution consolidation is that arbitral agreements containing non-identical institutional rules are likewise incompatible with being eligible for consolidation unless agreed otherwise, no matter how closely interconnected the disputes arising from the said arbitral agreements, or put differently, other criteria for consolidation under separate institutional consolidation rules are satisfied.<sup>1069</sup>

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<sup>1068</sup> Kaufmann-Kohler, ‘Multiple Proceedings in International Arbitration: Blessing or Plague’ (n 897) (“[T]he problem with many of the approaches reviewed tonight is that they are unilateral response by one national legislature or judiciary when true coordination would require a multilateral solution, that is a treaty.”)

<sup>1069</sup> See Kshama Loya Modani, ‘To What Extent Does SIAC’s Proposal on Cross-Institution Consolidation Protocol Mitigate the Perceived Weakness of Arbitrations in Effectively Resolving Multi-Party, Multi-Contract Disputes’ (Mondaq, 11 June 2018)

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Overall, all consolidation of arbitrations at the level of institutional arbitration that is possible until now is limited to arbitrations administered by the same arbitral institution in form<sup>1070</sup> (though no restriction to the same set of rules). But comfortingly, the international arbitration industry has taken action in an attempt to break through it. On 19 December 2017, under the initiation of Mr Gary B. Born, the then SIAC President, SIAC formally announced a proposal named “Memorandum regarding Proposal on Cross-Institution Consolidation Protocol” (“SIAC Cross-Institution Consolidation Protocol” or “SIAC Proposal”),<sup>1071</sup> which seeks to expand the institutional consolidation mechanism from the inner-institution level to the cross-institution level. In my view, the SIAC Cross-Institutional Consolidation Protocol offers a welcome opportunity to further reduce the fragmentation of disputes<sup>1072</sup>, and given the evolution of the institutional consolidation mechanism till now, all the more reason for it to be a new starting point for facilitating the consolidation mechanism for institutional arbitration to its full potential at the end of the day.

In the next Section, I will first address whether the SIAC Cross-Institution Consolidation Protocol provides for a workable pathway overall to advance institutional consolidation mechanisms (§1) and then contribute my further remarks and refinement proposals to make this memorandum more feasible and attractive to be promoted worldwide (§2).

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<<https://www.mondaq.com/india/arbitration--dispute-resolution/709212/to-what-extent-does-siacs-proposal-on-cross-institution-consolidation-protocol-mitigate-the-perceived-weakness-of-arbitrations-in-effectively-resolving-multi-party-multi-contract-disputes>> accessed 7 October 2023; Leboulanger (n 43) 80-81; Webster (n 42) 127; Pair, ‘The New ICC Rule on Consolidation: Progress or Change?’ (n 204) 1076-1077.

<sup>1070</sup> Raquel Macedo, ‘Cross-Institutional Consolidation Protocol: The Gifted Horse’ (*LinkedIn*, 12 July 2018)

<<https://www.linkedin.com/pulse/cross-institutional-consolidation-protocol-gifted-macedo-moreira/>> accessed 7 October 2023

<sup>1071</sup> SIAC, ‘Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol’ (n 1040); SIAC, ‘Proposal on Cross-Institution Consolidation Protocol’ (SIAC, Singapore, 19 December 2017) <<https://siac.org.sg/wp-content/uploads/2023/04/Press-Release-PROPOSAL-ON-CROSS-INSTITUTIONAL-CONSOLIDATION-PROTOCOL.pdf>> accessed 7 October 2023

<sup>1072</sup> Born, ‘Joiner and Consolidation’ (n 55) 80.

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## Section 2. The SIAC Cross-Institution Consolidation Protocol: Remarks and Enhancement Proposals

The SIAC Cross-Institution Consolidation Protocol represents an effort to build a mechanism lacking so far in the existing consolidation regime for institutional arbitration to achieve “cross-institution” consolidation of arbitrations subject to different institutional rules in the means of cooperation among leading international arbitral institutions via joint adoption of such Protocol.<sup>1073</sup> Without a doubt, the more arbitral institutions sign, the more desired effectiveness of the mechanism of cross-institution consolidation can be. However, from the official announcement of the SIAC Proposal in 2017 until now, no arbitral institution has pronounced to accede to this Protocol.<sup>1074</sup>

Agreeing with *Macedo*’s words, the SIAC Proposal is undoubtedly path-breaking regardless of people’s contentment.<sup>1075</sup> The reasons, in my eyes, lie in two following dimensions: (a) this is, to date, the first and the only proposed mechanism at the institutional arbitration level in seeking to further expand the application of consolidation to cross-institution scenarios, the adoption of which may bring a more comprehensive understanding of the interrelated issues in a dispute and may result in significant gains of the reliability and accuracy of decision-making<sup>1076</sup>; (b) the SIAC Proposal also implies an unprecedented mechanism innovation — via revolving around institutional cooperation rather than relying on the unilateral endeavour among individual arbitral institutions to address the complex arbitration issue.

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<sup>1073</sup> See SIAC, ‘Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol’ (n 1040).

<sup>1074</sup> The only relevant visible track record officially between international arbitration centres is in the MOU signed between SIAC and CIETAC, under which “SIAC and CIETAC will set up a joint working group to discuss SIAC’s proposed Cross-Institution Protocol”. Even so, the follow-ups of it seem inactive in my observation. See SIAC, ‘SIAC Signs Memorandum of Understanding with the China International Economic and Trade Arbitration Commission’ (2018) <<https://siac.org.sg/wp-content/uploads/2023/04/Press-Release-SIAC-Signs-MOU-with-the-China-International-Economic-and-Trade-Arbitration-Commission.pdf>> accessed 7 October 2023

<sup>1075</sup> Macedo (n 1070).

<sup>1076</sup> See SIAC, ‘Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol’ (n 1040)

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Faced with the existing unpopular reality of the SIAC Proposal, I wonder whether the general thread proposed by the SIAC Proposal to attain cross-institution consolidation is really acceptable as a new starting point to envision the advancement of institutional consolidation mechanism (§1). And if so, what can be done to enhance the proposed cross-institution consolidation mechanism to become more attractive for leading arbitral institutions as intended (§2)?

*§1. SIAC Proposal Deserves to be Read as Workable  
regarding the Overall Pathway*

To assess whether the SIAC Proposal provides an acceptable path in general to address cross-institutional consolidation, I will focus on the logic for taking the SIAC Proposal into effect and the application scope thereof.

**A. Two Steps to Take Effect the Cross-Institution Consolidation  
under SIAC Proposal: Complying with the Deemed Consent  
Principle**

In line with the SIAC Cross-Consolidation Protocol, there are two steps to bring it into effect. As the first step, two or more arbitral institutions are required to adopt this SIAC Proposal. It is worth noting that the SIAC Proposal is in the form of a “memorandum”. Recently, concluding bilateral or multilateral memorandum has become an increasingly valued (alternative) mechanism to facilitate international cooperation in the broad cross-border dispute resolution landscape when there is no possibility of concluding a binding treaty to play a role, for example, the recent trend for several international commercial courts concluding (bilateral) memoranda to suggest enforceability of judgments overseas<sup>1077</sup>. As *Cuiberti* argued, signing memoranda itself does not automatically bring the legally binding force, albeit with a

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<sup>1077</sup> Gilles Cuniberti, ‘Signaling the Enforceability of the Forum’s Judgments Abroad’ (2020) University of Luxembourg Law Working Paper No. 2020-001, <<https://ssrn.com/abstract=3571700>> accessed 22 September 2023

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strong and positive signalling effect.<sup>1078</sup> Despite this conclusion being drawn over the memoranda between the international commercial courts, I believe it also applies analogously to the effect of the memorandum signed between the international arbitration centres generally.

Thus, merely signing the memorandum regarding the SIAC Proposal would not create a binding force to materialise cross-institution consolidation, and that is why the following second step is indispensable: the signed arbitral institutions should go back to further amend their institutional rules to incorporate this consolidation protocol in the sense of empowering the cross-consolidation process with equal contractual force as other provisions of the institutional rules<sup>1079</sup>. In doing so, when parties expressly choose to be governed by such institutional rules, they also tacitly consent to be governed by the Cross-Consolidation Protocol thereof.<sup>1080</sup> In my view, imposing the consolidation protocol through the choice of institutional rules that SIAC proposed seems to make sense in general terms, as the theoretical underpinning that warrants the effectiveness of the consolidation provisions incorporated in institutional rules — the deemed consent principle — plausibly can likewise extend to warrant such means of consolidating arbitrations across various arbitration centres. Thus, it can be said that the SIAC Proposal framework attempts to strike a balance between removing the incompatibility of subject to different institutional rules and fundamentally respecting consent, the cornerstone of arbitration, though admittedly left less flexibility room for the parties. And this approach is roughly acceptable and coherent in my eyes.

As a way to assure the parties are well informed that the institutional rules they submit their disputes to have incorporated such a cross-institution consolidation mechanism, which also conversely demonstrates the parties' deemed consent on it, the SIAC Proposal recommends that the institutions can make the protocol applicable only to arbitration agreements concluded after the date of the protocol first entering into effect, as well as the relevant institutional rules. As related, the SIAC Proposal suggests the institutions concerned consider setting an opt-in mechanism for a transition period.

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<sup>1078</sup> *ibid.*

<sup>1079</sup> SIAC, 'Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol' (n 1040); SIAC, 'Proposal on Cross-Institution Consolidation Protocol' (n 1071).

<sup>1080</sup> SIAC, 'Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol' (n 1040); Modani (n 1069).

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In addition, as the SIAC Proposal does not expressly mention an opt-out mechanism, it has raised some debate in academia on whether there is room for an implied opt-out mechanism under the cross-institution consolidation protocol. Some people argue that an opt-out mechanism should be offered to the parties, leaving parties the freedom to preclude consolidation by way of consent.<sup>1081</sup> On the contrary, some people are against it, arguing that an opt-out mechanism would create more potential chaos (e.g. cause partial consolidation and aggravate the burden of proof), thus could result in compromising the efficacy and efficiency of the desired cross-institution consolidation mechanism contrary to the assumed initial intention of the Protocol.<sup>1082</sup> To my intuition, respecting party autonomy and ensuring strong decision-making effectiveness for covering consolidation-worthy disputes are equally weighted for a go-to arbitral consolidation mechanism based on transnational institutional cooperation. Accordingly, I propose to provide a “deemed opt-out mechanism” for parties, *viz* parties can get exempted from the incorporated cross-institution consolidation protocol only if they have opted out of the consolidation provision within the institutional rules they choose; otherwise, there would be no way to derogate the incorporated cross-institution protocol. I believe this proposal is well-founded and more balanced. This proposal, on the one hand, could ensure the cross-institutional consolidation protocol applicable in most scenarios and, on the other hand, also coherently reflects the respect for the usual inherent right of parties to rule out the (“derogatable”) consolidation provision from the chosen institutional rules, as discussed in *Introduction*. Logically, if parties decide to exclude the consolidation provision of their chosen institutional rules, it can be presumed that they intend to refuse any consolidation possibility, let alone a more complicated consolidation across different arbitration centres. In turn, if parties choose to retain the consolidation provision included in the chosen institutional rules, it reasonably infers they unanimously favour consolidation of related disputes as a whole. As a corollary, the said parties can be presumed to likewise favour a more effective consolidation mechanism at the cross-institution level when the institutional rules they choose have already entered such a mechanism into effect. To attain this effect, it would be more helpful to simultaneously adopt the suggestion initiated by *Modani* that supplementing express terms in the SIAC Cross-Institution Consolidation Protocol “to

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<sup>1081</sup> Damodaran (n 878); Kushank Sindhu, ‘An Analysis of SIAC's Proposal on Cross-Institution Consolidation Protocol’ (*Sigma Chambers*, 27 September 2020) <<https://www.sigmachambers.in/post/an-analysis-of-siac-s-proposal-on-cross-institution-consolidation-protocol>> accessed 7 October 2023

<sup>1082</sup> Modani (n 1069).

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the effect that parties waive their right to challenge the validity and enforcement of the resulting award on grounds emanating from decisions to consolidate<sup>1083</sup>, on adoption of the [SIAC] Consolidation Protocol” as a safeguard for the resultant awards from the challenge of recognition or enforcement.<sup>1084</sup> I hope that this proposal will lead to greater clarity and robustness in the manner in which the cross-institution consolidation mechanism comes into effect.

## B. Application Scope of SIAC Proposal: Not All-Encompassing but Sound as a New Starting Point

Be that as it may, we should be correctly aware that the SIAC Proposal does not apply to any type of cross-institution consolidation — the SIAC Proposal requires the to-be-consolidated arbitrations to have the same seat of arbitration.<sup>1085</sup> Assume, for example, two arbitrations to be requested for consolidation are administered by SIAC and ICC, respectively (assuming SIAC and ICC have adopted the SIAC Proposal). The SIAC Proposal is only applicable when the said SIAC case and the said ICC case are seated in the same jurisdiction, for example, Singapore; otherwise, the SIAC Proposal is without possibility to effectuate. As such, subject to different jurisdictions is still viewed as a factor of incompatibility for arbitration agreements under the framework of the SIAC Proposal. In a word, cross-institution consolidation across differing jurisdictions is beyond the scope of the SIAC Proposal<sup>1086</sup>, suggesting the framework of the SIAC Proposal still inevitably leaves certain room for uncertainty in addressing the issue of cross-institution consolidation<sup>1087</sup>. After all, institutional arbitration is often seated in the home jurisdiction of the administered arbitral institution.<sup>1088</sup>

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<sup>1083</sup> As discussed aforesaid, a similar waiver prescription over the right to challenge has been adopted in several institutional consolidation provisions, like the HKIAC Rules.

<sup>1084</sup> Modani (n 1069).

<sup>1085</sup> See SIAC, ‘Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol’ (n 1040) (“8...The consolidation protocol would not change the current requirement that the arbitration agreements designate the same seat.”); Macedo (n 1070).

<sup>1086</sup> Modani (n 1069).

<sup>1087</sup> Macedo (n 1070).

<sup>1088</sup> For example, in 2022, 88% of the LCIA arbitrations were seated in London, the UK. See LCIA, ‘2022 Annual Casework Report’ (2023). <<https://www.lcia.org/LCIA/reports.aspx>> accessed 16 December 2022; also, in 2022, 81% of the SCC arbitrations were seated in Sweden. See SCC, ‘Statistics 2022’ (2023). <<https://sccarbitrationinstitute.se/en/about-scc/scc-statistics>> accessed 16 December 2022

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Nevertheless, we should not automatically jump to the conclusion that the SIAC Protocol is of no avail due to such a seemingly non-encompassing application arrangement.<sup>1089</sup> Instead, a better view is to regard the SIAC Proposal as a positive starting point to advance the efficacy of the institutional consolidation mechanism. Arguably, no touch on consolidation across jurisdictions could be deemed as a phase tactic aiming to render as many leading arbitral institutions as possible to accept and join the SIAC Cross-Institution Consolidation Protocol, which serves as the present top priority before forwarding the institutional consolidation mechanism to the next level. Plus, as a matter of fact, even though it is not a dominant situation for most arbitral institutions, institutional arbitration seated in a jurisdiction other than the home jurisdiction of the administered institution is also not uncommon. In statistics, for example, 19% of SCC arbitrations in 2022 were seated outside of Sweden.<sup>1090</sup> ICC is even more exceptional and contrary to most other arbitral institutions, where the seats of ICC arbitrations in 2020 reached 113 different cities spread over 65 countries, and the top 1 place for ICC arbitrations is in Switzerland rather than France, where the ICC is headquartered.<sup>1091</sup>

On top of it, combined with the established development of institutional consolidation mechanism as summarised above, it is arguable to expect that under the existing framework of the SIAC Proposal, once effectuated, not just the consolidation of the arbitrations subject to different institutional arbitration rules can be expected to realise as the Propotol literally depicts, but consolidation of the cases that distinct arbitral institutions administer in the sense of broader application range may also be counted to accomplish, including the cases attributed to *ad hoc* arbitration but administered by the accessioned arbitral institution(s), if any. In this sense, some previous criticism that the SIAC Proposal fails to encompass *ad hoc* arbitrations is incorrect.<sup>1092</sup>

From the above, the general thread of the SIAC Proposal, especially the thinking of relying on the cross-institutional corporation and the relevant workability, is justified as reasonable and can provide adequate resilience to advance the further potential of

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<sup>1089</sup> Macedo (n 1070).

<sup>1090</sup> See SCC, 'Statistics 2022' (n 1088).

<sup>1091</sup> ICC, 'ICC Dispute Resolution 2020 Statistics' (August 2021).

<<https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/>> accessed 5 May 2023

<sup>1092</sup> Dina Prokić, 'SIAC Proposal on Cross-Institution Consolidation Protocol: Can It Be Transplanted into Investment Arbitration?' (2019) 36 *JIntlArb* 171, 180.

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the institutional consolidation mechanism. Thus, the SIAC Proposal deserves to be a new starting point.

## *§2. Enhancement Proposals on the SIAC Cross-Institution Consolidation Protocol*

Concerning the detailed operation arrangements of the SIAC Proposal, it mainly encompasses two dimensions: (1) consolidation decision-making process: how the decision to consolidate across arbitral institutions is made; (2) administering consolidated arbitrations: once consolidated, how the proceedings are administered and the governed by which rules.

Inspired by the assessment criteria built in *Part 2*, as well as its underlying overarching guidance standard, for assessing the most desirable Model of consolidation decision-making infra, I intend to contribute some enhancement proposals in an attempt to make the SIAC Cross-Institution Consolidation Protocol more attractive for arbitration institutions, mainly targeting the proposed cross-institution consolidation decision-making procedural mechanism, which is comparable to the subject matter of the thesis.

### A. Cross-Institution Consolidation Decision-Making Procedural Mechanism

The SIAC Proposal is inclined to build up a new, standalone mechanism consisting of the following five aspects to address the decision-making of cross-institution consolidation.<sup>1093</sup>

- i. Identity of a decision-maker regarding consolidation applications

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<sup>1093</sup> SIAC, ‘Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol’ (n 1040); SIAC, ‘Proposal on Cross-Institution Consolidation Protocol’ (n 1071).

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The SIAC Proposal recommends that the decision-maker be a joint committee composed of the appointed members of the concerned arbitral institutions, with a specific committee mandated for each application.<sup>1094</sup> This subject, close to the thesis's core issue, deserves further commentaries with enhancement proposals later (*Conclusion-Chapter 2-Section 2-§2-A-[1]*).

ii. Standards for consolidation of arbitrations

Due to significant divergence between the consolidation provisions of institutional rules, the SIAC Proposal favours the participating arbitral institutions jointly setting out a new, standalone set of standards for determining the cross-institution consolidation applications rather than the arbitration rules of one of the institutions concerned. Although the SIAC leaves concrete contents of the standards for the arbitration centres themselves to decide together in the future, SIAC believes this scheme is workable because reaching such a standard jointly “is unlikely to be arduous for the institutions to reach agreement on a consolidation protocol given the relatively limited number of issues that arise in relation to consolidation”<sup>1095</sup>.

I roughly agree with this scheme. Notwithstanding, given the “founding members” of the cross-institution consolidation mechanism conceivably may probably have a more decisive say in prescribing the consolidation standards than the latecomers, for the sake of democracy and fairness, it would be desirable to attract as many arbitral institutions as possible at the first time.

In addition, despite only a “relatively limited scope” for agreeing on new consolidation standards, faced with the hash divergence of consolidation standards between the institutional consolidation provisions, before institutions go to the negotiation room to set out the said joint consolidation standard, the institutional consolidation rules are better firstly for conducting the harmonisation of their existing consolidation provision in line with the author-defined criteria, particularly in terms of the conditions in relevance with consistency (incl. threshold conditions) as elaborated in *Part II*. Based on it, it would be more possible for the potential institutions to reach a solid agreement

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<sup>1094</sup> SIAC, ‘Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol’ (n 1040)

<sup>1095</sup> *ibid.*

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on the consolidation standards. Otherwise, the existing divergence in consolidation standards would critically discourage the institutions' desire to forward institutional cooperation in a field still filled with substantial disagreements.

iii. Timing of the application and status of existing tribunal appointments

In this regard, SIAC offers no clear-cut scheme, but it is open for future discussion, except that the SIAC Protocol should also permit parties to commence a single proceeding concerning multiple contracts that refer to different institutional rules.<sup>1096</sup>

iv. Partial consolidation

The SIAC Proposal opines it is less compelling to permit partial consolidation.

v. Reasons for consolidation decisions

The SIAC Proposal mentions explicitly the subject of communication of reasons for decisions of consolidation requests.<sup>1097</sup> Still, according to the SIAC Proposal, it is a subject open for the institutions to decide jointly whether the final-confirmed protocol should do so.<sup>1098</sup> I recommend communicating reasons, and such a proposal will be unfolded *infra* (*Conclusion-Chapter 2-Section 2-§2-A-[2]*).

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<sup>1096</sup> *ibid.*

<sup>1097</sup> *ibid.*

<sup>1098</sup> *ibid.*

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## [1] Remarks and Proposals regarding the Decision-Maker

Based on the assumption in *Conclusion-Chapter 1* that adopting Model 4 seems to have significant potential to expand the effectiveness of the institutional consolidation mechanism to the extent across institutions or beyond, I favour the scheme of the SIAC Proposal to vest the cross-institution consolidation decision-making power exclusively to a joint committee, composing the representatives from the decision-making bodies (e.g. Courts or Boards) of the concerned arbitral institutions (with a specific committee being appointed to handle each application), which is arguably a variation of Model 4 where the consolidation decision-maker also consists of the administering arbitral institution, just multiple ones. I intuitively opine that this approach can bring the benefits of simplicity and efficiency that the schemes based on Model 2 cannot reach to the same extent but, meanwhile, can basically comply with the legitimacy requirements claimed in Part II as Model 2 does.<sup>1099</sup> This is also in the spirit of the SIAC Proposal.<sup>1100</sup> For higher efficiency in cost and time, the SIAC Proposal suggests that each concerned institution designate one member on the joint committee.<sup>1101</sup>

Admittedly, if referring to Model 2, it may sound workable to create a joint committee composed of the members of the concerned institutions only acting as an administrator to facilitate the appointment of an individual as the “consolidation arbitrator” to decide on consolidation requests across various institutions. Furthermore, as a causal added value, such a Model 2-based approach may gain more legitimacy because parties are usually given the opportunity to participate in the appointment of a “consolidation arbitrator” under Model 2, which is what the Model 4-based scheme that SIAC proposes misses.<sup>1102</sup> However, once following this way, more practical complexities may arise. In particular, extra time wasted would be

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<sup>1099</sup> Although the thesis has demonstrated that it is not apt for institutional consolidation mechanism to adopt Model 1 or Model 3, it is worth mentioning that the SIAC Proposal also opposes vesting the cross-institution consolidation decision-making power to the arbitral tribunal on the ground that “avoid[ing] the practical complexities in a multi-party context of having a tribunal constituted by some parties decide the consolidation application for all parties, including those that did not participate in their appointment”. *See* *ibid.*

<sup>1100</sup> *ibid.*

<sup>1101</sup> *ibid.*

<sup>1102</sup> *See* Sindhu (n 1081) (“It is important ... that the parties have a greater say in the way in which the applications are being decided, something that the SIAC Memorandum misses.”).

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unavoidable in terms of appointing the “consolidated arbitrator”. In addition, the appointment of a “consolidated arbitrator” usually follows the normal process of appointing a “real” arbitrator under Model 2, implying that the concerned institutions should also need to jointly draft a uniform process of appointment for the “consolidated arbitrator” in the aforesaid standalone standard of consolidation, which unquestionably increases the impracticality and difficulty to implement such a scheme. Plus, the consolidation decision-making across different institutions is conceivably more complicated and sensitive than the counterpart only under one institution; under the former, it seems legitimate for the concerned institution to play equal roles with some substantial controlling power in the decision-making process on cross-institution consolidation applications. Based on it, the check and balance between the concerned arbitral institutions per se within the joint committee brought from the institutions’ equal participation can cement the decision-maker’s independence and impartiality, which is what the original Model 4 under the same arbitral institution cannot attain. Therefore, from my point of view, a Model 4-based joint committee can be a relevantly more acceptable decision-maker concerning applications for cross-institution consolidation.

Meanwhile, in concrete implementation, I propose the following two measures to further enhance the neutrality of the joint committee as a decision-maker. First, preconditioning there are multiple institutions (more than three) adopt the SIAC Proposal, it may reflect more neutrality if the member from the non-concerned institution, if any, assumes a “president institution” with a casting vote in case of deadlock in the aforesaid specific committee mandated for a particular application. Second, inspired by the neutrality demonstration over the arbitral institution as a decision-maker in *Part II*, it would be more desirable to include an inner regulation in the effectuated Cross-Institution Consolidation Protocol to clarify that the designated member(s) of the institutions relevant to the specific application shall not act as arbitrator or counsel for the concerned case for the sake of avoiding conflict of interest. Admittedly, it could bring better effect for enhancing the neutrality of the decision-maker, and also remedying the parties’ lack of participation in the consolidation decision-making process, as discussed above, if revealing the identity of the potential members of the joint committee (only one member from each concerned institution, as the SIAC Proposal suggests) and open for the parties to challenge their independence and impartiality in due time (inspired from the practice in Model 2). However, this scheme probably faces more obstacles considering the potential

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negative effect on the efficiency of the consolidation decision-making process and on the practical attractiveness of the targeted leading arbitral institutions.

In addition, for the sake of efficiency and simplicity, it would be more reasonable not to confer the joint committee the *sua sponte* power to review the possibility of cross-institution consolidation. Applying the same logic, a time frame should also be set for the joint committee to issue the decision.

## **[2] Proposal regarding Communication of Reasons for Decisions**

From my perspective, it is better to communicate the reasons for the cross-institution consolidation application. As indicated in *Part II-Chapter 2-Section 2-§3-B*, affording parties the reasoning of the consolidation decision is generally a boon for improving transparency and, thus, legitimacy of the consolidation decision-making process. These benefits are also endorsed in the SIAC Proposal.<sup>1103</sup> Plus, it has been demonstrated *supra*<sup>1104</sup> that the decision for consolidation made by arbitral institutions is not exempted from the judicial review; by contrast, providing the reasoning concerned as to the institution-made consolidation decision is believed to increase the judicial deference possibly. As a corollary, the consolidation decision made under the SIAC Proposal, likewise attributed to an institution-made decision, may expect a higher standard of judicial deference if the related reasoning is communicated, which is of avail for enhancing efficiency, and the reliability over the cross-institution consolidation regime, a more expansive and bold procedural innovation, as a whole. All in all, affording reasoning for institutional decisions on cross-institution consolidation is avail to the quality of decision-making.

Once the institutions jointly decide to communicate the reasons in the future Protocol, I agree with what the SIAC Proposal underlines that implementing such measures should balance against the inevitable delay and increased cost that may occur.<sup>1105</sup> For example, like how the existing ICC practice does<sup>1106</sup>, a time bar can be set up for applying for communication of reasoning in avoidance of such rights being abused.

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<sup>1103</sup> SIAC, 'Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol' (n 1040).

<sup>1104</sup> Also in *Part II-Chapter 2-Section 2-§3-B*

<sup>1105</sup> SIAC, 'Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol' (n 1040).

<sup>1106</sup> *See* Part 1-Chapter 4-Section 1-§5

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Also, it is critical to ensure issuing reasoning within a regulated time frame. This will help to prevent excessive expenses and time associated with requesting complex cross-institution consolidation and the reasons involved, despite the anticipated more incredible difficulty of jointly issuing reasoning across different institutions. The relevant detailed inner process of how the joint committee issues the reasoning still needs further discussion and refinement.

## B. Administration of Consolidated Arbitrations

Once cross-institution consolidation is granted by the joint committee, the SIAC Proposal inclines the consolidated proceedings to be administered only by one institution applying its own arbitration rules, relying on objective criteria to determine which arbitral institution should administer the consolidated disputes, such as the number of disputes subject to the different rules, the aggregate value of disputes, time of commencement of arbitrations, subject matter of the dispute and nationality and domicile of parties.<sup>1107</sup>

I roughly agree with the SIAC Proposal's stance on the aspect that the consolidated proceedings should be administered only by one institution, which is more pragmatic and achievable than another reference approach, that institutions jointly administer the consolidated proceedings applicable to new rules jointly created by such institutions, which would cause intractable complexity — “the scale of the tasks involved in preparing entirely new set of arbitral rules ... is likely to be significant, cumbersome, time-consuming and, ultimately, unattractive” and “extensive institutional cooperation [arising from the joint committee of members from both institutions to administer each consolidated dispute] will vitally prolong proceedings and increase costs for parties”.<sup>1108</sup> Notwithstanding, it is admissible that expressly envisaging a particular institution to administer their disputes in the arbitration agreement but ending up being administered by another institution under their institutional rules could result in various discomforts to the parties. Thus, it becomes rather sensitive and tricky about using which criterion or criteria to determine the consolidated proceedings administered by which arbitral institution and governed by which arbitration rules — the criteria are supposed to satisfy not only the parties but also the institutions

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<sup>1107</sup> SIAC, ‘Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol’ (n 1040); SIAC, ‘Proposal on Cross-Institution Consolidation Protocol’ (n 1071).

<sup>1108</sup> SIAC, ‘Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol’ (n 1040).

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potentially intended to adopt the SIAC Proposal – after all, the arbitral institutions who intend to adopt the SIAC Proposal would face surrendering their cases.

Moreover, the above-listed objective criteria that the SIAC Proposal initiates for the allotment or transfer of cases may not convince the leading arbitral institutions to compromise, as even the SIAC Proposal itself has admitted the potential risks of almost every criterion as listed (besides the reasonability of setting out each criterion).

- If based on the “aggregate value of disputes”, the SIAC Proposal recognises the risk is that “parties may artificially inflate the quantum of their claims to take advantage of one set of rules over the other. At the consolidation stage, it would be difficult and impractical for institutions to verify the quantification of claims and adequately safeguard against such abuse”.<sup>1109</sup> In addition, it may also breach confidentiality, as Damodaran argues.<sup>1110</sup>

- If based on the “time of commencement of arbitrations”, the SIAC Proposal confessed, “there is a risk that a ‘first in time, stronger in right’ approach could lead to a race to the finish line if parties want to take advantage of one set of rules over the other”.<sup>1111</sup>

- If based on the “subject matter of the dispute”, it may “limit the ability of institutions to expand their disputes portfolio”, and could further be “challenging to ascribe a specific subject matter to a consolidated proceeding, particularly where multiple proceedings have been consolidated or the consolidated proceeding involves multiple contracts across a complex project”.<sup>1112</sup>

- If based on the “nationality and domicile of parties”, according to the SIAC Proposal, it would fetter the geographical reach of the institutions, which is against part of the desired strategic benefit of a cross-institution consolidation mechanism for institutions to access markets outside their existing portfolio.<sup>1113</sup> Also, this criterion is

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<sup>1109</sup> *ibid.*

<sup>1110</sup> Damodaran (n 878).

<sup>1111</sup> SIAC, ‘Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol’ (n 1040).

<sup>1112</sup> *ibid.*

<sup>1113</sup> *ibid.*

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technically inoperative since “where parties come from multiple jurisdictions, it may be difficult to apply a nationality or domicile criteria”.<sup>1114</sup>

- Albeit the SIAC Proposal does not indicate the risk arising from the criterion of “number of cases”, for the reasons set out by SIAC in relevance to “aggregate value of disputes”, this criterion may also seem unattractive because the parties may also artificially inflate the quantum of the applications of arbitration under one arbitral institution, in a way of e.g. tactically splitting one claim into multiple ones, to compete for the perception of preference for one institution than another so that to retain a particular institution’s administrative authority over the merged proceedings.

To sum up, the criteria initiated in the SIAC Proposal are either likely to be abused by the party to harm the integrity of the arbitral proceedings or may indirectly limit the ability of institutions to expand their portfolio in various dimensions (particularly when the institutions involved are based in different jurisdictions), both of which could discourage the arbitral institutions from deliberating on participating in the SIAC Proposal. Hence, providing (a) compelling objective criterion/criteria for the allotment or transfer cases is very tough, requiring more discussion over a more convincing scheme.

In light of this, I hereby put forward a new scheme for administering consolidated arbitrations, which may be ill-considered but I hope will be insightful somehow. The following will be addressed separately under my proposed scheme: (i) which arbitral institution shall administer the consolidated proceedings and (ii) which set of arbitration rules should govern such consolidated arbitration.

In the first place, I still adhere to the SIAC-proposed preference that consolidated proceedings shall be allocated to one arbitral institution rather than joint administration by multiple institutions for the above practical reasons. However, I propose that the consolidated proceedings be administered by a non-local arbitral institution, if any, as a priority in principle. The rationale is based on the abovementioned fact that the SIAC Proposal only addresses the cross-institution consolidation of arbitrations seated in the same jurisdiction. Consequently, it can be arguably anticipated that the to-be-consolidated arbitration concerned under the SIAC Proposal could likely involve the arbitrations administered under an international

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<sup>1114</sup> *ibid.*

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arbitration centre, which is seated in a jurisdiction other than the home jurisdiction of the administering institution. The design of such a scheme is primarily motivated by the desire to attract leading arbitral institutions by providing them with substantive benefits — arbitral institutions that adopt such a mechanism may directly expand their geographical reach to raise their exposure, experience and reputation in foreign jurisdictions, as well as likely other direct/indirect effects in terms of expanding their existing disputes portfolio, e.g. more diversification of the nationality and domicile of parties, and the subject matter of the disputes. What constitutes this approach may be more of a mutual-benefit cooperation spirit amongst the arbitral institutions, creating a more amicable vibe for the (potential) participating institutions for institutional cooperation than the “objective criteria determining approach” originally initiated in the SIAC Proposal.

Regarding the concrete implementation, assume, for example, there are two to-be-consolidated arbitrations seated in Jurisdiction [I], one of which is under the administration of Institution A, headquartered in Jurisdiction [I], and another under the administration of Institution B, headquartered in Jurisdiction [II]. If the said two arbitrations are ordered to be consolidated by the joint committee, Institution A gives way to Institution B to administer the consolidated proceedings. Furthermore, assume that there are more than two to-be-consolidated arbitrations seated in Jurisdiction [I], two or more of which are administered by the institution(s) based in Jurisdiction [I], and there is only one under the administration of Institution B, headquartered in Jurisdiction [II]. In this case, whether the same institution of Jurisdiction [I] administers the two cases or not, the subsequent consolidated proceedings will be administered by Institution B from Jurisdiction [II]. Conversely, if two or more to-be-consolidated cases are administered by different institutions which are not headquartered in Jurisdiction [I] (e.g. Institution A and Institution B), the identity determination of the administering institution of consolidated proceedings should be subject to further filtration from Institution A and Institution B. At this stage, maybe the “objective criteria determining approach” initiated in the SIAC Proposal can be cautiously applied as the second-gate filtration criteria.

Concerning the second question about which set of arbitration rules should govern consolidated arbitration, I would like to propose another scheme to replace the winner-take-all model that SIAC proposes (automatically applying the institutional rules of the administering institution): the proceedings consolidated across different

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arbitral institutions shall be then uniformly governed by the UNCITRAL Rules, subject to the administration of one arbitral institution as determined above. This proposal is mainly inspired by the established practice in international investment arbitration, where the UNCITRAL Rules, according to *Prokić's* observation, serve as the default for governing the consolidated proceedings in international investment arbitration, either the rules concerned explicitly so provide, or because of the parties' absence in agreement otherwise.<sup>1115</sup> Although cross-institution consolidation has not been established either in the field of international investment arbitration, *Prokić* believes adopting the UNCITRAL Rules to apply the post-consolidated case in his paper on envisaging the mechanism of cross-institution consolidation in investment arbitration is acceptable.<sup>1116</sup> His relevant rationale in my mind can apply to the discussion of cross-institution consolidation in international commercial arbitration *mutatis mutandis*: the UNCITRAL Rules are more neutral and would not fall to the questionable perception that a particular set of rules has primacy over the others.<sup>1117</sup> As a result, notwithstanding the consolidated proceedings allocated to one institution's administration, achieving cross-institution consolidation would not directly cause the increased appliance of particular institutional rules; otherwise, it may thus deepen the unfairness, or at least unhealthy competition, between the (potential) participating institutions. To some extent, this milder and more balanced approach may gain more favour from leading arbitral institutions to (re)deliberate in participating in cross-institution cooperation over consolidation issues. Bear in mind that the precondition to adopt such a scheme is that arbitral institutions have universally been powered to administer the UNCITRAL arbitrations as per their own rules, falling under the foregoing proposal in Conclusion, *viz* promoting the harmonisation of the institutional consolidation mechanisms among arbitral institutions following the author-defined criteria.

The above are my remarks and attempted enhancement proposals on the SIAC Cross-Institution Consolidation Protocol. In a word, the SIAC Proposal deserves positive regard as a pathway to advance the efficacy of the consolidation mechanism

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<sup>1115</sup> Prokić (n 1092) 190-196 & 202 (For example, “[a]lthough a claim under NAFTA may be submitted under the ICSID Convention, the ICSID Additional Rules or the UNCITRAL Rules, the consolidated arbitration is conducted under the UNCITRAL Rules”. Similar to NAFTA, the Czech Republic BIT, the Australia-Mexico BIT and the US Model BIT also envisage to provide for UNCITRAL Rules for the consolidated proceedings. By contrast, “some instruments, like CETA and the EU-Singapore IPA, envisage the application of the UNCITRAL Rules only if the parties could not agree”).

<sup>1116</sup> *ibid* 203.

<sup>1117</sup> *ibid* 202-203.

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in institutional arbitration but calls for more delicate refinement to make it more appealing for the leading international arbitral institutions to participate in a cooperation manner. In big-picture terms, if the SIAC Cross-Institution Consolidation Protocol is implemented and popularised, it may be likely to establish a paradigm as a positive precedent for international cooperation between arbitration institutions, which could make it possible to envisage institutional cooperation beyond the field of consolidation within the realm of institutional arbitration.

However, such a future vision of cross-institution consolidation based on Model 4 discussed above is based on the assumption that the legitimacy of the arbitral institution in deciding consolidation exclusively (where the consolidated arbitral tribunal cannot overturn the initial institution-made ruling) is not challenged fundamentally. The theoretical uncertainty regarding the nature of the institutional consolidation decisions with finality nature and the consequential ramifications in terms of compliance with the conventional *competence-competence* principle, as raised in *Part 2-Chapter 2-Section 1-§2-D-[2]*, is still an underlying issue waiting for a thorough demonstration, which in turn ultimately may affect the touchstone of identifying the desirable model of the institutional consolidation mechanism.

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