CORE ISSUES IN INTERNATIONAL ARBITRATION: CONSOLIDATION OF PROCEEDINGS – KEY CONSIDERATIONS TO BE AWARE OF

In the second of a series of publications on core issues relevant to the world of international arbitration, members of HFW's Asia Pacific arbitration team consider key issues and challenges arising in respect of the consolidation of arbitral proceedings, under certain leading institutional rules.

Aspirations and Challenges of Broad Consolidation Regimes in Arbitral Institution Rules

An ever-broadening scope of consolidation – the rationale

The parties' ability, in particular prevailing circumstances, to consolidate two or more references to arbitration is an important functional tool of international arbitration. When appropriately effected, consolidation may result in significant time and cost savings, and remove the potential for perverse awards in separate references arising out of identical fact patterns.

Of concern, the issue of inconsistent arbitral awards arising out of identical facts poses a threat to the credibility of international arbitration as a consistent and reliable dispute resolution mechanism. This risk was highlighted yet again recently in a Hong Kong court decision addressing two awards rendered on the same set of facts, between the same parties, and in circumstances where the tribunals shared one common arbitrator. On the facts of the case, the Judge set aside a *"manifestly invalid"* second award, in which contradictions and inconsistencies with a first award would have caused *"substantial injustice"* to the award-debtor.[1] Clearly, this is a cautionary tale and a perfect illustration of the benefits of consolidation.

Of equal concern, the reliance on consolidation mechanisms as a tool for efficient case management carries the risk of conflict with the bedrock of international arbitration, that is, the arbitrating parties' consent – to arbitration, to the tribunal constitution, and to the arbitral procedure.

The consolidation of arbitral references is certainly not without its complexities and potential pitfalls therefore. This article considers how a selection of arbitral institutions address the issue of consolidation of proceedings, and highlights a number of key considerations for parties to be mindful of, when deciding whether to seek consolidation.

Consolidation refers to the joining of two or more separate arbitrations (each a "**Consolidated Arbitration**") into a single arbitration (the "**Consolidating Arbitration**"), with a single tribunal rendering an award regarding all of the claims that would have been included in the separate arbitrations. Historically, arbitral institutions and their rules did not provide for consolidation, which could therefore only be achieved, if at all, with the express agreement of all of the parties involved. Over the years, however, many institutional rules began to include mechanisms for forced consolidation, joinder

1 *W v AW* [2021] HKCFI 1707.

and intervention (i.e., in cases where all parties did not expressly agree to the same). Similarly reflecting the need for effective multi-party dispute resolution, but distinct from consolidation, joinder enables a third party to be added to an existing arbitration, often thereby avoiding the need for, or risk of, parallel arbitration involving that third party.

This evolution in arbitral institution rules responded to the increase in complex multi-party and/or multi-contract disputes, commonly pertaining to the same project, development or inter-connected arrangement. Consolidation can offer an efficient, consistent and cost-effective resolution of disputes in these complex circumstances.

Over the last decade, there has been a trend to enable consolidation in an ever-increasing range of situations. It is striking that the LCIA Rules 2020, ICC Rules 2021 and ICDR Rules 2021 have further broadened their existing consolidation mechanisms, while SIAC has sought to innovate with an ambitious proposal for cross-institutional consolidation.

Broadening the scope of consolidation addresses many previous blind-spots. It also raises multiple new challenges, however, such as ensuring: (1) the parties' express or tacit consent to consolidation; and (2) fair and equal treatment between the parties in the Consolidating Arbitration. 'Broadened' forms of consolidation can come with serious risks, when it comes to enforcing the award rendered in a Consolidating Arbitration in particular.

1. Risks relative to the parties' consent to consolidation

The UNCITRAL Model Law, and most national arbitration statutes that have not adopted the UNICTRAL Model Law (such as the UK's Arbitration Act 1996), do not expressly address the issue of consolidation. They simply require arbitration agreements to be enforced in accordance with the parties' intentions. Article 34 (iv) of the UNCITRAL Model Law allows a party to challenge an arbitral award where the, *"...composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties..."* This means, in practice, that consolidation is only permitted with the consent of all of the parties involved.

However, Hong Kong's arbitration law,[2] in certain circumstances empowers the Hong Kong courts to consolidate arbitrations, hear them concurrently, or stay one arbitration pending resolution of another, in certain circumstances (namely where (a) a common question of law or fact arises in the arbitrations; (b) the relief claimed arise out of a same transaction or series of transactions; or (c) for any other reason it is desirable for the court to consolidate). The parties have to opt in to this court power in their arbitration agreements.

Very rarely do parties expressly agree to consolidation in their arbitration agreements, save in respect of complex multi-party projects, where this is increasingly accepted as standard. Parties do, on occasion, agree to consolidate arbitrations post-commencement, where they find themselves with a shared interest in their consolidation. A party will often have very good reasons to resist consolidation. For example, it may not wish to participate in lengthy multi-party proceedings, and be saddled with the ongoing associated costs and inconveniences of doing so, where it is only involved in a relatively discrete or minor aspect of the broader dispute.

In a significant majority of cases, therefore, the parties' consent to consolidation will have to be looked for in the institutional rules chosen in their arbitration agreements.

As pre-requisites for consolidation, institutional rules usually require: (a) identical or 'compatible' arbitration agreements; and (b) some connection between the claims, underlying contracts, parties and/or disputes.

(a) Compatible arbitration agreements

At a fundamental level, incompatible arbitration agreements evidence the parties' absence of consent to consolidation. So the argument goes, had they wanted potential disputes in their particular multi-contract and/or multi-party context to be consolidated, they would have purposely aligned their arbitration agreements.

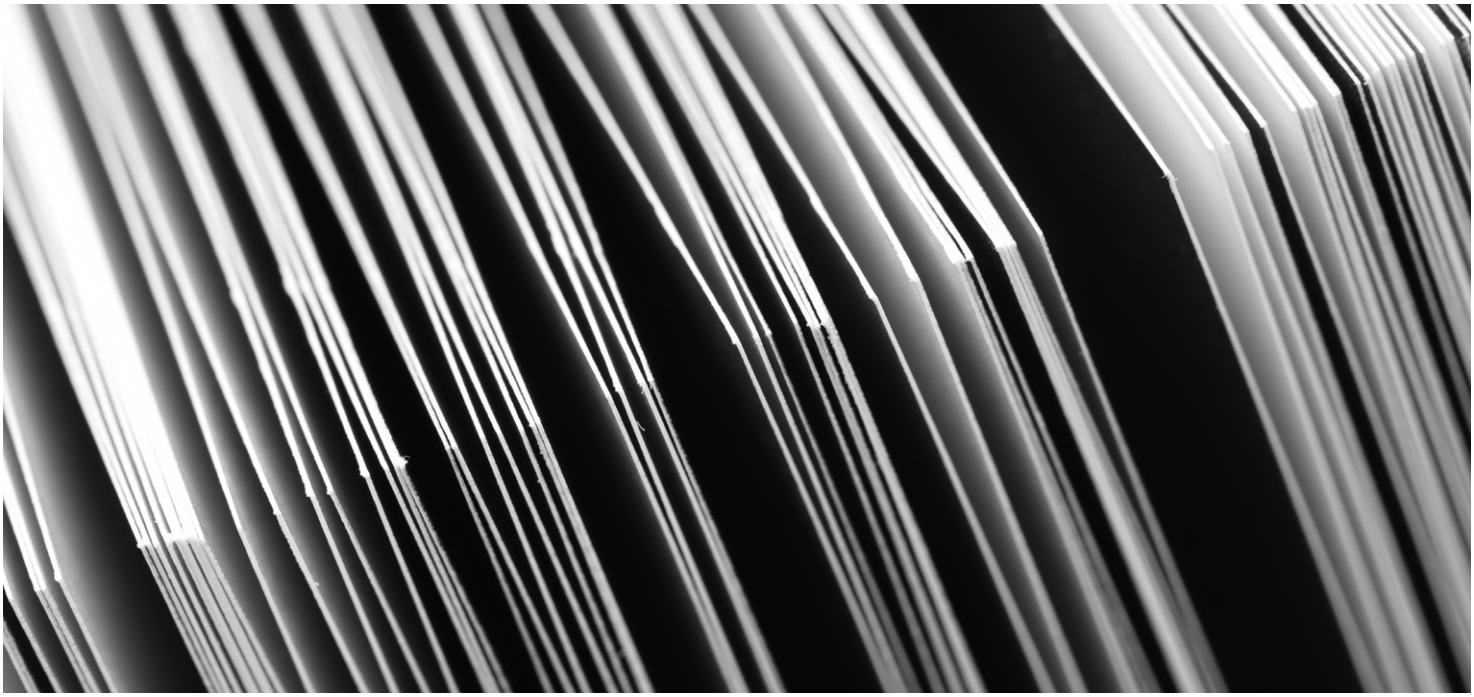
Arbitration agreements are generally considered incompatible where they differ in their fundamental aspects, such as the institutional or *ad hoc* nature of the arbitration, the seat, the number of arbitrators and/or their appointment procedure. They are considered compatible where they differ in secondary aspects of the arbitration procedure. The distinction is not always clear-cut. It seems open for debate, for example, whether differences in the law applicable to the merits of an arbitration claim fall within one category or the other.

Difficult questions arise where one of the arbitration agreements is silent on certain matters (the seat or the language of the arbitration, for example) and the institution or tribunal is required to determine whether the arbitration agreements are sufficiently compatible to warrant consolidation. The institution or tribunal may first have to determine the seat of a particular arbitration, which is often a difficult and contentious question in itself. Consolidation in such circumstances opens up avenues for the award to be challenged later at the enforcement stage.

Recognising that differences in the choice of arbitral institution is often a somewhat 'artificial' and unwarranted barrier to consolidation, the SIAC issued a proposal in 2017 for cross-institution consolidation (the consolidation of a SIAC arbitration with an ICC arbitration for example).[3] Under this innovative proposal, leading institutions would incorporate an identical "consolidation protocol" into their rules, which would: (a) allow for cross-institution consolidation; and (b) identify the Consolidating Arbitration's institutional rules. The parties' consent to the consolidation protocol would be implied from their choice of institutional rules that incorporate it. At this time, however, it remains to be seen whether this proposal will eventually be broadly adopted, to facilitate consolidation across major institutional rules.

2 Hong Kong Arbitration Ordinance (Cap 609) at Part 11 section 99 and section 2 of Schedule 2.

3 **http://www.siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20(with%20%20annexes).pdf** - see our briefing of January 2018: **https://www.hfw.com/SIAC-cross-institutional-consolidation-protocol-summary-January-2018**



(b) Some degree of connection between the claims, contracts and/or disputes

In the more complex cases of consolidation, a delicate assessment of facts and law is often required. This is to determine whether two or more parties; two or more contracts; two or more underlying transactions; and/or two or more underlying disputes are somehow related or connected, as per the specific requirements of the applicable institutional rules.

At their 'broadest', institutional rules such as the SIAC Rules 2016 and the LCIA Rules 2020 both allow different parties under different underlying contracts to consolidate the arbitration of disputes arising out of related transactions (whereas other institutional rules, such as the ICC Rules, take a more restrictive approach). Here particularly difficult and contentious determinations are asked of the institution or tribunal. Such determinations are all the more difficult to make as: (a) the parties' respective case(s) are not commonly fully mapped out, at the preliminary stages of arbitral proceedings; (b) there is little guidance (from academic commentary or precedents) to assist the institution or tribunal on the issue; and (c) more likely than not, one or more parties will heatedly resist being pulled into a 'collective' arbitration of connected disputes.

While national courts would, at the recognition and enforcement stage, by and large defer to an institution's or a tribunal's findings of facts and law on consolidation, this is by no means guaranteed in certain jurisdictions. There is a risk that some national courts would reopen the issue of whether consolidation was factually appropriate in the circumstances.

Notwithstanding the fact that parties would have impliedly consented to the 'broader' (and more contentious) forms of consolidation (by choosing the SIAC Rules 2016 or the LCIA Rules 2020 to govern their disputes, for example), these broad forms of consolidation are particularly vulnerable to challenge, at all stages of the arbitration. They test the limits of consolidation against principles of party autonomy and consent; natural justice; and/or public policy.

The looser the connection between the arbitrations to be consolidated, therefore, the higher the risk that the arbitral award will later be challenged, at the recognition and enforcement stage, under the New York Convention's Article V(1)(c) (i.e. the award deals with issues falling outside the scope of the submission to arbitration) or Article V(1)(d) (i.e. the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties).

2. Risks of inequality between the parties

A specific challenge of consolidation is managing the Consolidated Arbitrations' discontinuation, all the more so when arbitrators are already nominated or appointed. Certain institutional rules give broad powers to the institution to revoke and appoint arbitrators as part of the consolidation process (SIAC Rules 2016, ICDR Rules 2021). Most rules may refuse consolidation, or require further criteria to be met, where a tribunal is already constituted in a Consolidated Arbitration (ICC Rules 2021, SIAC Rules 2016, LCIA Rules 2020).

Another challenge is ensuring the Consolidating Arbitration's tribunal reflects a fair and equal treatment of the parties. The risk of unequal treatment is particularly acute where the Consolidating Arbitration will have more than two parties (i.e., a multi-party arbitration).

The risks of unequal treatment in multi-party arbitrations was first forcibly identified in the case of *Dutco*.[4] Here, a claimant had appointed its arbitrator and the two respondents made a joint appointment under protest, claiming the right to each appoint their separate arbitrator. The French Cour de Cassation annulled the

4 Siemens AG and BKMI Industrieanlagen GmbH v *Dutco* Construction Co. (10 ASA Bull. 295, 297 (1992))

subsequent arbitral award, holding that if one party is entitled under the arbitration agreement to nominate an arbitrator but other parties are not, there is an unequal treatment between them. It also found that arbitration agreements providing for unequal rights of participation in the tribunal's constitution violated French principles of procedural public policy. Whilst the emphasis on equality of the parties is rightly seen as a specificity of French-seated arbitrations since the decision in *Dutco* – in contrast with other arbitration traditions, such as the common law approach, which place the primary emphasis on party autonomy – it remains a fundamental building-block of fairness and due process across all international arbitration traditions.

As the comparative table in the Appendix to this publication shows, institutional rules have sought to mitigate the risk of unequal treatment (to the extent possible) whilst retaining broad conditions for consolidation. The SIAC Rules 2016, the HKIAC Rules 2018 and the ICDR Rules 2021 for example include an express waiver of parties' rights to participate in the Consolidating Arbitration's tribunal constitution. These rules and the LCIA Rules 2020 also allow the institution to constitute the tribunal in the parties' place. The ICC Court has no such powers under the Art.10 ICC Rules 2021 which deals with consolidation, although in this latest edition of the ICC Rules, it has been given the power to constitute the tribunal in multi-party arbitrations, in derogation from the arbitration agreement, in exceptional circumstances (Article 12(9) ICC Rules 2021).

Consolidating multi-party arbitrations may therefore result in one or more of the parties not having a say in the constitution of the Consolidating Arbitration's tribunal. In principle, choosing to arbitrate under institutional rules that allow such a result to occur should be considered a valid expression of party autonomy – at the very least in cases where the applicable arbitration rules are those in force at the time of entering into their arbitration agreement. Where the arbitration rules at the time of entering into the arbitration agreement did not permit consolidation, arguments that the parties never contemplated the possibility of consolidation may be significantly more persuasive – even where it can be said that they had agreed to the possibility of changes to the rules, when choosing those 'in force at the time of submission to arbitration.' This opens up a heightened risk of challenge to any award rendered in such (limited) circumstances. Sensibly, the HKIAC Rules expressly restrict [5] consolidation to agreements that were entered into after the introduction of its consolidation mechanism in 2013. In practice, this issue will arise less frequently going forward as most institutional rules will by now have introduced consolidation provisions prior to the majority of arbitration agreements under which new disputes will arise being entered into.

Whether or not this issue of party autonomy is resolved, consolidating multi-party arbitrations in which one or more party does not participate in the tribunal's constitution may later open grounds for challenge of the resulting award, under the New York Convention's Article V(1)(d) (i.e., the composition of the arbitral authority was not in accordance with the agreement of the parties) or Article V(2)(b) (i.e. the recognition or enforcement of the award would be contrary to public policy). There is no guarantee that, in such situations, adherence to principles of party autonomy will remove the risk of a successful challenge of the award. For example, it is possible that the national court at the place of enforcement would refuse to recognise the validity of the pre-agreed waivers found in the SIAC Rules 2016, the HKIAC Rules or the ICDR Rules 2021, on grounds of public policy similar to those considered in *Dutco*.

Reviewing the arbitral institution's decision to consolidate arbitrations

The decision of an arbitral institution (e.g., the ICC Court, the LCIA Court, the HKIAC or the SIAC Court) to consolidate arbitrations raises questions as to:

- the Consolidating Arbitration tribunal's ability to rule on its own jurisdiction, whose jurisdiction is grounded in the institution's decision to consolidate; and
- a party's ability to challenge this jurisdiction.

An institution's decision to consolidate is generally regarded as an administrative task, meaning that (as a tribunal order but unlike an arbitral award) it cannot be set aside at the seat of the arbitration. Only the arbitral award itself can be challenged, in setting-aside or in recognition and enforcement proceedings.

Most institutional arbitration rules do not expressly preserve the Consolidating Arbitration tribunal's ability to rule on its own jurisdiction under the well-established international arbitration principle of *kompetenz-kompetenz*. In contrast, the SIAC Rules 2016 expressly preserve the Consolidating Arbitration's tribunalsability to do so (Rule 8.4: *"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"*).

The preferred view is that, in line with *kompetenz-kompetenz*, and whether expressly stated in the applicable institutional rules or not, a tribunal should always retain the ability to rule on its own jurisdiction, grounded in the institution's, or indeed its own, decision to consolidate.

Interestingly, the previous edition of the HKIAC Administered Arbitration Rules 2013 provided that, *"...[t]he 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..."* (Article 28.8). Whilst somewhat ambiguous, this provision seemed to indicate that the HKIAC Court's decision on consolidation definitively established (by way of a party's waiver to challenge in setting-aside or enforcement proceedings) the Consolidating Arbitration tribunal's jurisdiction. For good reasons, this waiver was removed from the HKIAC

5 See also HKIAC Practice Note on Consolidation of Arbitrations (2016) **https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/Final%20Practice%20Note%20on%20Consolidation.pdf**

"Parties are well-advised to seek local law advice very early on to assess the prospects of enforcing an award rendered in a consolidated arbitration, particularly where consolidation is likely to be contested."

Administered Arbitration Rules 2018, which are now aligned on the general consensus around the ability for the tribunal to rule – and be challenged – on its jurisdiction.

In effect, this means that a party will have several avenues for challenging the consolidation of arbitrations:

- at the time of the application to consolidate;
- by challenging the tribunal's jurisdiction in the Consolidating Arbitration;
- by applying to set aside the arbitral award rendered in the Consolidating Arbitration; and/or
- by resisting the award's recognition and enforcement.

As a matter of good practice, a party may wish to expressly reserve its right to challenge the Consolidating Arbitration tribunal's jurisdiction as soon as the initial decision to consolidate is rendered. The party's silence otherwise risks being construed as a waiver, as was the case in the Hong Kong Court decision in *Karaha Bodas v Pertamina*. Here a party remained silent until the enforcement stage, at which point its attempt to challenge the Consolidating Arbitration tribunal's jurisdiction was unsuccessful.[6]

For clarity, a party's waiver of its right to challenge the Consolidating Arbitration tribunal's jurisdiction grounded in the institution's decision to consolidate (as existed under the previous edition of the HKIAC Rules) is very different from a party's waiver of its right to designate its own arbitrator in the Consolidating Arbitration (as it exists under the SIAC Rules, ICDR Rules or HKIAC Rules). In the latter case, the waiver does not violate the kompetenz-kompetenz principle and accords better with established principles of international arbitration – although as seen above, the question remains open whether an inequality in the parties' rights to constitute the tribunal could be challenged on public policy grounds.

Comparison of Consolidation Requirements Across Major Institutional Rules

The table in the Appendix contrasts and compares the essential features of a number of major arbitral institutional rules on consolidation.

Conclusion

In addition to the issues identified above, there are possibly many other blind-spots in institutional rules' consolidation provisions which, depending on the specific circumstances, increase the risks of challenge to multi-party and/or multi-contract consolidations.

Parties should be particularly circumspect when applying for consolidation, notably in multi-party and/or multi-contract contexts. In this, they should balance: (a) the potential efficiency and resulting cost savings they expect to flow from the consolidation of references; against (b) the risk of the consolidation being challenged, during the arbitration or at the stage of recognition and enforcement of the arbitral award. The attitude of the national courts at the expected place of enforcement will be particularly relevant. Parties are well-advised to seek local law advice very early on to assess the prospects of enforcing an award rendered in a consolidated arbitration, particularly where consolidation is likely to be contested.

In cases where consolidation is neither achievable nor advisable, the next best practice for handling multi-contract and/or multi-party and/or interconnected disputes may be to seek to have the arbitrations run concurrently. In the next publication in its series dedicated to core issues in international arbitration, HFW's Asia Pacific arbitration team will consider the issues and challenges arising from running related arbitrations concurrently.

6 [2003] HKEC 511 at [36]. Further attempts to resist enforcement in Hong Kong were not successful. [2009] 2 HK 303

Our international arbitration team across the Asia Pacific region has extensive experience of all of the major arbitral rules and can assist with any issues that arise under the new or old arbitral rules.

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APPENDIX
COMPARISON OF CONSOLIDATION PROVISIONS IN MAJOR INSTITUTIONAL RULES

The below table compares the consolidation provisions of the following institutional rules:

- the International Chamber of Commerce's 2021 Arbitration Rules (**ICC Rules**)[7]
- the Singapore International Arbitration Centre Rules (6th Edition, 1 August 2016) (**SIAC Rules**[8]
- the London Court of Arbitration Rules 2020 (**LCIA Rules**)[9]
- the International Centre for Dispute Resolution's International Arbitration and Mediation Rules 2021 (**ICDR Rules**)[10]
- the Hong Kong International Arbitration Centre's Administered Arbitration Rules 2018 (**HKIAC Rules**)[11]
- the Australian Centre for International Commercial Arbitration's Arbitration Rules 2021 (**ACICA Rules**)[12]

7 https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/
8 https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule6
9 https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx
10 https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar
11 https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018
12 https://acica.org.au/acica-rules-2021/

1. At what stage of an arbitration can consolidation be sought?

ICC Rules (Art.10)	SIAC Rules (Rule 8)	LCIA Rules (Art. 22A)	ICDR Rules (Art. 9)	HKIAC Rules (Art. 28)	ACICA Rules (Art.16)
At any time. Consolidation is extremely difficult to achieve where different arbitrators have been appointed in more than one arbitration. The ICC Court may refuse such consolidation, given that it does not have the express power to remove an arbitrator in the context of consolidation.	At any time. Consolidation is more easily achieved than under the ICC Rules or the LCIA Rules for example, where arbitrators have already been appointed in more than one arbitration, since the SIAC Court has the express power to revoke their appointment if necessary [Rules 8.6 and 8.10]. A party can apply for consolidation twice: a first time to the SIAC Court prior to the constitution of any tribunal, and a second time to the tribunal [Rules 8.1, 8.4 and 8.7].	At any time. Consolidation is extremely difficult to achieve where different arbitrators have been appointed in more than one arbitration. The LCIA Court may refuse such consolidation, given that it does not have the express power to remove an arbitrator in the context of consolidation. The LCIA Court shall refuse consolidation where different tribunals are constituted in more than one arbitration [Art. 22.7(ii) and 22.8(ii)].	At any time. Consolidation is more easily achieved than under the ICC Rules or the LCIA Rules for example, where arbitrators have been appointed in more than one arbitration, since the Consolidating Arbitrator has the express power to revoke its appointment if necessary [Art. 9.6].	At any time. Consolidation is more easily achieved than under the ICC Rules or the LCIA Rules for example, where different arbitrators have been appointed in more than one arbitration, since the HKIAC has the express power to revoke any confirmation or appointment of arbitrators, and shall appoint the tribunal in the Consolidating Arbitration with or without regard to any party's designation [Art. 28.8].	At any time. In considering an application for consolidation, ACICA will take into account whether one or more arbitrators have been appointed in one or more of the arbitrations [Art. 16.6].

2. Who can trigger consolidation?

ICC Rules (Art.10)	SIAC Rules (Rule 8)	LCIA Rules (Art. 22A)	ICDR Rules (Art. 9)	HKIAC Rules (Art. 28)	ACICA Rules (Art.16)
Any party.	Any party.	1. Any party. 2. The LCIA Court on its own initiative, if all parties agree or no tribunal has yet been constituted [Art. 22.8(i)].	1. Any party. 2. The ICDR on its own initiative [Art. 9.1].	Any party.	Any party.

3. Who decides on the application for consolidation?

ICC Rules (Art.10)	SIAC Rules (Rule 8)	LCIA Rules (Art. 22A)	ICDR Rules (Art. 9)	HKIAC Rules (Art. 28)	ACICA Rules (Art.16)
The ICC Court.	Depending on the timing of the application: 1. The SIAC Court if no tribunal is constituted [Rule 8.4]. 2. The tribunal [Rule 8.9].	Depending on how the consolidation process is triggered: 1. The LCIA Court, when acting on its own initiative [Art. 22.8]. 2. The tribunal, with the approval of the LCIA Court [Art. 22.7].	The Consolidation Arbitrator ("**CA**"), appointed in the following circumstances [Art. 9.2]: 1. The parties first seek to agree on a CA appointment procedure. 2. If no agreement is reached within 15 days, the CA is appointed by the ICDR. 3. Unless the parties agree, the CA shall not be an existing arbitrator.	The HKIAC.	The ACICA. Note the Protocol for decisions on applications for consolidation and joinder and challenges to arbitrators under the ACICA Rules 2021.

4. What are the conditions for consolidation – other than those relative to an existing appointment of arbitrators?

ICC Rules (Art.10)	SIAC Rules (Rule 8)	LCIA Rules (Art. 22A)	ICDR Rules (Art. 9)	HKIAC Rules (Art. 28)	ACICA Rules (Art.16)
1. Where each party agrees [Art. 10(a)].	1. Where each party agrees [Rules 8.1(a) and 8.7(a)].	1. Where each party agrees and the LCIA Court approves (meaning consolidation can be refused even where each party agrees [Art. 22.7(i)].	1. Where each party agrees [Art. 9.1.a.].	1. Where each party agrees [Art 28.1(a)].	1. Where each party agrees [Art 16.1(a)].
2. Where all of the claims in the arbitrations are made under the same arbitration agreement or agreements [Art. 10(b)]. 3. Where the claims in the arbitrations are made under compatible arbitration agreements, and: (a) the arbitrations are between the same parties; and (b) the disputes in the arbitrations arise in connection with the same legal relationship. [Art. 10(c)]	2. Where all claims are made under the same arbitration agreement [Rule 8.1(b) and 8.7(b)]. 3. Where the arbitration agreements are compatible and the dispute in the arbitrations arises out of: (a) the same legal relationship(s); or (b) a principal contract and ancillary contracts; or (c) the same transaction or series of transactions. [Rule 8.2(c) and 8.7(c)]	2. Where all arbitrations are commenced under the same arbitration agreement [Rule 22.7(ii)]. 3. Where the arbitrations are commenced under compatible arbitration agreements, and either: (a) between the same parties; or (b) arising out of the same transaction or series of related transactions. [Art 22.7(ii)]	2. Where all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement [Art. 9.1.b.] 3. Where the claims, counterclaims, or setoffs in the arbitrations are made under arbitration agreements that may be compatible, and: (a) the arbitrations involve the same or related parties; and (b) the disputes in the arbitrations arise in connection with the same legal relationship. [Art. 9.1]	2. Where all of the claims in the arbitrations are made under the same arbitration agreement [Art 28.1(b)). 3. Where the claims are made under compatible arbitration agreements, and: (a) a common question of law or fact arises in all of the arbitrations; and (b) the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions. [Art. 28.1]	2. All the claims in the arbitration are made under the same arbitration agreement [Art 16.1(b)]. 3. Where the claims are made under compatible arbitration agreements, and: (a) a common question of law or fact arises in all of the arbitrations; and (b) the rights to relief claimed arise out of the same transaction or series of transactions. [Art. 16.1]

ICC Rules (Art.10)	SIAC Rules (Rule 8)	LCIA Rules (Art. 22A)	ICDR Rules (Art. 9)	HKIAC Rules (Art. 28)	ACICA Rules (Art.16)
In summary, arbitrations can be consolidated between: (i) the same or different parties under the same underlying contract; (ii) the same or different parties under different underlying contracts with identical arbitration agreements; or (iii) the same parties (but not different parties) under different underlying contracts with compatible arbitration agreements so long as the disputes arise in connection with the same legal relationship. The scope of consolidation is narrower than under the SIAC, HKIAC, LCIA or ACICA Rules, for example, since consolidation is not possible with **different** parties under different underlying contracts with compatible arbitration agreements (which these other Rules, under certain conditions, allow).	In summary, arbitrations can be consolidated between: (i) the same or different parties under the same underlying contract; (ii) the same parties (but not different parties) under different underlying contracts with compatible arbitration agreements – so long as the disputes arise in connection with the same legal relationship; (iii) the same or different parties under different underlying contracts with compatible arbitration agreements – so long as are connected as principal and ancillary contracts; or (iv) the same or different parties under different underlying contracts with compatible arbitration agreements – so long as the disputes arise out of a same transaction or series of transactions. The SIAC, LCIA, HKIAC, and ACICA Rules have a broadly similar scope of consolidation.	In summary, arbitrations can be consolidated between: (i) the same parties under the same underlying contract; (ii) the same parties under different underlying contracts with identical or compatible arbitration agreements – irrespective (unlike under the ICC Rules and the SIAC Rules which require the disputes to arise out of the same legal relationship); (iii) different parties under a same underlying contract – so long as the arbitrations arise out of the same or related transactions; or (iv) different parties under different underlying contracts with compatible arbitration clauses – so long as the arbitrations arise out of the same or related transactions. The SIAC, LCIA, HKIAC, and ACICA Rules have a broadly similar scope of consolidation.	In summary, arbitrations can be consolidated between: (i) the same or different parties under the same underlying contract; or (ii) the same or related parties under different underlying contracts with compatible arbitration agreements, provided that the disputes arise in connection with the same legal relationship. The scope of consolidation is narrower than under the SIAC, HKIAC, LCIA or ACICA Rules, for example, since consolidation is not possible with different parties under different underlying contracts with compatible arbitration agreements, unless these different parties are related (which last requirement these other Rules do not have).	In summary, arbitrations can be consolidated between: (i) the same or different parties under the same underlying contract; (ii) the same or different parties under different underlying contracts with compatible arbitrations, provided that there is a common question of law or fact and the relief claimed arises out of a same transaction or series of transactions. The SIAC, LCIA, HKIAC, and ACICA Rules have a broadly similar scope of consolidation.	In summary, arbitrations can be consolidated between: (i) the same or different parties under the same underlying contract; (ii) the same or different parties under different underlying contracts with compatible arbitrations, provided that there is a common question of law or fact and the relief claimed arises out of a same transaction or series of transactions. The SIAC, LCIA, HKIAC, and ACICA Rules have a broadly similar scope of consolidation.

5. Are there conditions for consolidation relative to an existing appointment of arbitrators?

ICC Rules (Art.10)	SIAC Rules (Rule 8)	LCIA Rules (Art. 22A)	ICDR Rules (Art. 9)	HKIAC Rules (Art. 28)	ACICA Rules (Art.16)
Yes, in practice. The ICC Court may (but does not have to) 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*." [Art. 10] However, the existing appointment of different arbitrators would make it unlikely for the ICC Court to order consolidation, given the practical problems this entails. For instance: 1. Unless the parties otherwise agree, the tribunal in the arbitration first commenced is imposed on all parties, some of which may not have participated in its constitution (in a multi-party consolidation in particular). 2. The ICC Court does not have the power to remove arbitrators in the Consolidated Arbitrations, but would have to rely on either:	Yes. Save where the parties agree otherwise, the tribunal cannot order consolidation unless: 1. no tribunal has been constituted in the other arbitration(s); or 2. the same tribunal has been constituted in each arbitration. [Rule 8.7(b) and (c)] The SIAC Court has extensive powers to take measures to facilitate consolidation where more than one tribunal has been constituted, and may: 1. revoke the appointment of the arbitrators in the Consolidated Arbitrations [Rules 8.6 and 8.10] and 2. nominate and appoint arbitrators in the Consolidating Arbitration in multi-party arbitrations where the parties are unable to agree on any joint appointment [Rule 12]. Where arbitrations are consolidated, any party that has not participated	Yes. Save where the parties agree otherwise, the LCIA Court or a tribunal cannot order consolidation unless: 1. no tribunal has been constituted in the other arbitration(s); or 2. the same tribunal has been constituted in each arbitration. [Art. 22.7(ii) and (iii) and 22.8(ii))] The LCIA Rules do not provide any express powers on the LCIA Court to revoke and/ or appoint arbitrators pursuant to consolidation.	No. The CA may (but does not have to) take into account whether: 1. tribunals have been constituted in the other arbitrations; or 2. the same tribunal has been constituted in each arbitration. [Art. 9.3(b)] The CA has extensive powers to take measures to facilitate consolidation where more than one tribunal has been constituted, and: 1. may revoke the appointment of any arbitrators; 2. may select one of the previously-appointed tribunals to serve in the Consolidating Arbitration; and 3. shall, as necessary, complete the appointment of the Consolidation Arbitration's tribunal. Where arbitrations are consolidated, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. [Art. 9.6]	No. The fact that one or more arbitrators have been confirmed or appointed in the Consolidated Arbitrations does not prevent HKIAC from consolidating the arbitrations, as it has extensive powers to facilitate consolidation in these circumstances. It may: 1. revoke any confirmation or appointment of an arbitrator; and 2. appoint the tribunal in respect of the Consolidating Arbitration with or without regard to any party's designation. Where the HKIAC decides to consolidate two or more arbitrations, the parties to all such arbitrations shall be deemed to have waived their right to designate an arbitrator. [Art. 28.8]	No. ACICA may (but does not have to) take into account circumstances it considers to be relevant, including, but not limited to, whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different arbitrators have been appointed [Art. 16.6]. ACICA has powers to: 1. revoke any arbitrator appointments (if required); and 2. appoint the arbitrator(s) in the Consolidating Arbitration, unless the parties agree on the arbitrator(s). If they do not agree, having regard to considerations as are likely to secure the appointment of an independent and impartial arbitrator. [Art. 16.8]

(a) the parties' agreement to the removal; or (b) the arbitrator(s)' own resignation.	in the Consolidating Arbitration's tribunal constitution shall be deemed to have waived its right to do so [Rule 8.12]. Considering the extensive SIAC Court powers to revoke and appoint arbitrators, there is scope to argue that the SIAC Rules are ripe for reform to allow the consolidation of arbitrations in which different arbitrators have been appointed.				

6. What is the consolidation decision-making process?

ICC Rules (Art.10)	SIAC Rules (Rule 8)	LCIA Rules (Art. 22A)	ICDR Rules (Art. 9)	HKIAC Rules (Art. 28)	ACICA Rules (Art.16)
The ICC Court "may take into account any circumstances it considers to be relevant" [Art. 10].	The SIAC Court or tribunal decides on the consolidation after considering the views of all parties, and having regard to the circumstances of the case [Rule 8.4 and 8.9]. The SIAC Court's decision to consolidate is without prejudice to the tribunal's power to subsequently decide any question as to its jurisdiction arising from the SIAC Court's decision [Rule 8.4] The SIAC Court's refusal to consolidate is without prejudice to the tribunal's power to decide on a subsequent consolidation application [Rule 8.4].	The LCIA Court or tribunal shall give the parties "a reasonable opportunity to state their views" (Art. 22.7 and 22.8(ii)].	The CA shall consult the parties, may consult the arbitral tribunal(s) and "may take into account all relevant circumstances" including: 1. the applicable law; 2. whether arbitrators have already been appointed; 3. the progress already made in the arbitrations; 4. whether the arbitrations raise common issues of law and/or facts; and 5. whether the consolidation would serve the interests of justice and efficiency.	The HKIAC shall consult with the parties and any confirmed or appointed arbitrators [Art. 28.1].	ACICA may request the other parties to comment or any confirmed or appointed arbitrators to comment on the request for consolidation [Art. 16.5].

	The tribunal's decision to consolidate is without prejudice to its power to subsequently decide any question as to its jurisdiction arising from such decision [Rule 8.9]. Whilst the SIAC Rules are the only institutional rules to expressly preserve the kompetenz-kompetenz principle, there is arguably nothing in the other institutional rules to prevent the Consolidating Arbitration tribunal from ruling on its own jurisdiction.		[Art. 9.3] The CA's decision, which need not include a statement of reasons, shall be rendered within 15 days of the date for final submissions on consolidation [Art. 9.7]. The CA may order any or all arbitrations to be stayed pending its ruling on consolidation [Art. 9.4]		

7. What is the consolidation process?

ICC Rules (Art.10)	SIAC Rules (Rule 8)	LCIA Rules (Art. 22A)	ICDR Rules (Art. 9)	HKIAC Rules (Art. 28)	ACICA Rules (Art.16)
The Consolidating Arbitration is the arbitration first commenced, unless the parties agree otherwise.	Where the SIAC Court decides, the Consolidating Arbitration is the arbitration first commenced, unless the parties agree otherwise or the SIAC Court decides otherwise having regard to the circumstances of the case [Rule 8.5]. Where the tribunal decides, the SIAC Rules do not specify which is the Consolidating Arbitration, although this is likely to be that which tribunal orders consolidation.	None prescribed.	The Consolidating Arbitration is the arbitration first commenced, unless the parties agree otherwise or the CA decides otherwise [Art. 9.5].	The Consolidating Arbitration is the arbitration first commenced, unless the parties agree otherwise or HKIAC decides otherwise, taking into account the circumstances of the case [Art. 28.6].	The Consolidating Arbitration is the arbitration first commenced, unless the parties agree otherwise [Art. 16.7].

8. Other relevant provisions

ICC Rules (Art.10)	SIAC Rules (Rule 8)	LCIA Rules (Art. 22A)	ICDR Rules (Art. 9)	HKIAC Rules (Art. 28)	ACICA Rules (Art.16)
Multiple Contracts: Claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether they are made under one or more arbitration agreements [Art.9]. **Multi-party tribunal appointments:** Notwithstanding any agreement by the parties on the method of constitution of the tribunal, in exceptional circumstances the ICC Court can appoint each member of the tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award [Art. 12.9].	**Multiple Contracts:** Where a dispute arises out of or in connection with multiple contracts, a claimant commence arbitration by filing a single notice of arbitration that contains a consolidation application [Rule 6.1.b]. **Multi-party tribunal appointments:** In the case of multi-party appointment of arbitrators, if the parties are unable to agree on the joint nomination of a sole arbitrator or three-arbitrator tribunal (as applicable) within 28 days of the commencement of arbitration, SIAC President shall make the appointments in their place [Rule 12].	**Concurrent arbitrations:** Upon a party's application to consolidate arbitration, the LCIA Court may determine that the arbitrations shall be conducted concurrently instead [Art. 22.7(iii)]. **Multi-party tribunal appointments:** In the case of multi-party appointment of arbitrators, if the parties are unable to agree to form two separate "sides" for the formation of the tribunal, the LCIA Court shall appoint the tribunal without regard to the party's entitlement or nomination [Art. 8.1].	**Multiple Contracts:** Where claims are made under more than one arbitration agreement, the notice of arbitration shall identify the arbitration agreements under which each claim is made [Art.2.3.c]. **Multi-party tribunal appointments:** In the case of multi-party appointment of arbitrators, the ICDR may appoint all arbitrators unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration [Art.13.4].	**Multiple Contracts:** Where a dispute arises out of or in connection with multiple contracts, a claim can be made in a single arbitration, provided that a common question of law or fact arises, the rights to relief claimed arise out of the same transaction or series of related transactions, and the arbitration agreements are compatible [Art.29]. **Multi-party tribunal appointments:** Unless the parties otherwise, the group of claimants and group of respondents each designate their arbitrator. Should they fail to agree the HKIAC may appoint all members of the tribunal [Art. 8.2].	**Multiple Contracts:** Claims arising out of multiple contracts may be made in a single arbitration, by filing a single notice of arbitration, including an application to ACICA to consolidate the arbitrations [Art.18.1 and 18.2]. **Multi-party tribunal appointments:** Where multiple claimants or multiple respondents do not act jointly in appointing an arbitrator, ACICA shall appoint each member of the tribunal [Art.15.2].

9. What are the latest reforms to the institutional rules' consolidation mechanism?

ICC Rules (Art.10)	SIAC Rules (Rule 8)	LCIA Rules (Art. 22A)	ICDR Rules (Art. 9)	HKIAC Rules (Art. 28)	ACICA Rules (Art.16)
The ICC Rules 2021 broaden the scope of consolidation permitted under the ICC Rules 2017. Art. 10(b) was amended to read: "*Where all of the claims in the arbitrations are made under the same arbitration agreement* ***or agreements***" (additional wording underlined) This enables the consolidation under Art. 10(b) of arbitrations under different underlying contracts with identical arbitration agreements.	The SIAC Rules 2016 are the first edition of the rules allowing for the consolidation of arbitrations. Previous to these rules arbitrations could only be consolidated by the parties' consent.	The LCIA Rules 2020 broaden the scope of consolidation permitted under the LCIA Rules 2014. Art. 22.1(ix) of the LCIA Rules 2014 only allowed the consolidation of arbitrations "*commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties*." Art. 22.7(ii) of the LCIA Rules 2020 now also allows the consolidation of arbitrations "*arising out of the same transaction or series of related transactions*."	The ICDR Rules 2021 broaden the scope of consolidation permitted under the ICDR Rules 2014. Art. 8(1)(c) of the ICDR Rules 2014 only allowed consolidation between the same parties. Art. 9.1(c) of the ICDR Rules 2021 now also allows consolidations where the arbitrations involve the same or "*related*" parties. The ICDR Rules 2021 also now the ICDR to appoint a CA of its own initiative – which the ICDR Rules 2014 did not.	The HKIAC Rules 2018 broadly left untouched the consolidation mechanism already provided for under the HKIAC Administered Arbitration Rules 2013. Art. 28.8 of the 2013 rules, however, pursuant to which the parties waived their right to challenge the consolidation, was removed in the HKIAC Rules 2018.	The ACICA Rules 2021 broaden the scope of consolidation permitted under the ACICA Rules 2016, by expanding the power to consolidate arbitrations where claims are made under more than one arbitration agreement and the parties are not the same, provided the other criteria are satisfied.