

**BLESSED UNIONS IN ARBITRATION- AN INTRODUCTION TO JOINDER AND  
CONSOLIDATION IN INSTITUTIONAL ARBITRATION**

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Arbitration is born out of an arbitration agreement. The scope and ambit of the power of an arbitral tribunal emanates from the arbitration agreement. The arbitral tribunal is a creature of contract. The privity of contract normally implies that only parties to the contract are allowed to participate in arbitral proceedings. This is fast changing and now, it is not unusual to see ‘*non-signatories*’ being dragged into arbitration proceedings.

In today’s commercial world, contractual arrangements are rarely simple. It is not uncommon to see (i) back-to-back contracts between numerous, sometimes unconnected parties; or (ii) multiple independent contracts between related parties, being part of a composite transaction.<sup>1</sup> Claims may also arise by or against third parties, who may not be signatories to any of the agreements, but are somehow involved in the same transaction. While these situations are materially different, they throw up common issues in arbitration proceedings. These situations are becoming increasingly commonplace to commercial dispute resolution and pose challenges regarding combining the different claims and parties in arbitration proceedings.<sup>2</sup> The risk of not doing so, keeping issues of costs and inefficiencies relating to multiplicity of proceedings to the side, is that the conclusions of different proceedings may differ and possibly even contradict each other, which in turn may pose challenges during the enforcement of an award.

The crux of these problems emanate from the fact that arbitration, conceptually, is a consent-driven process which normally would prevent the introduction into the proceedings of claims or parties which are not within the scope of the four corners of the agreement which the contracting parties had agreed to and which forms the mandate

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<sup>1</sup> JULIAN LEW ET AL., *COMPARATIVE AND COMMERCIAL INTERNATIONAL ARBITRATION* 377 (2003).

<sup>2</sup> MICHAEL J. MUSTILL & STEWART C. BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 136-140 (2d ed. 1989).

of the arbitral tribunal. In a dispute scenario, it is difficult to envisage all the parties giving their consent to amalgamate proceedings thereby enlarging the ‘*playing field*’ or ‘*mandate*’ of the arbitral tribunal.<sup>3</sup> It will not be unusual to come across a party that prefers to resolve disputes only in the manner envisaged under their specific agreement. This could be for various different reasons including unnecessary increase in the time and cost burden of a larger, consolidated arbitration.

Having said that, not so long ago, the Supreme Court of India has, in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*,<sup>4</sup> interpreted the expression ‘*person claiming through or under*’ in Section 45<sup>5</sup> of the Arbitration and Conciliation Act, 1996 [“Act”] to mean and take within its ambit *multiple* and *multi-party* agreements. Consequently, even *non-signatories* to some of the agreements could be referred to arbitration. The Court clarified that this was an exception and not the rule. However, the door has been opened and as of now, in certain cases involving composite transactions and interlinked agreements, even *non-signatories* may possibly be referred to arbitration. International jurisprudence in this sphere has been increasingly leaning towards consolidation of separate arbitral proceedings with a view to get a more holistic and conclusive determination of the dispute, as is more specifically pointed out hereunder.

Whether a party can be compelled to participate in arbitration proceedings would depend on a number of factors including the choice of the arbitration rules, the laws governing the arbitration and the clauses of the contract. They may, amongst other things, go so far as to allow joinder of third parties or even consolidation of different arbitral proceedings.<sup>6</sup> Having said that, one cannot lose sight of the fact that issues surrounding joinder and consolidation in arbitration emanate out of an inherent conflict

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<sup>3</sup> ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 184-185 (2d ed. 1991).

<sup>4</sup> *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 S.C.C. 641 (India).

<sup>5</sup> The Arbitration & Conciliation Act, No. 26 of 1996, § 45, INDIA CODE (1996). Section 45: Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (V of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

<sup>6</sup> Patrice Level, *Joinder of Proceedings, Intervention of Third Parties, and Additional Claims and Counterclaims*, I.C.C. INT’L CT. OF ARB. BULL., 36, 39 (1996).

that exists between party autonomy and the desire to finally resolve a dispute under the arbitral process, by bringing in the required parties to the proceedings notwithstanding the fact that they may not have agreed to do so.

The following paragraphs deal with the general concepts of joinder and consolidation and how municipal laws of various jurisdictions have incorporated these concepts. Thereafter, the paper discusses some of the institutional regimes and how they have dealt with the concepts of consolidation and joinder.

## I. Joinder

*Joinder* refers to when a party, who is not party to the arbitration agreement, is *joined* as party to the arbitration proceedings. The concept of *joinder* of third parties or their intervention in *litigation* is a well-recognized and established feature of the national court's sovereign power. A joinder is permitted for reasons of efficient administration and procedural economy. It does not require the explicit consent of the parties.<sup>7</sup>

The position is very different in arbitral proceedings where party autonomy is of paramount importance and consideration. The *forced joinder* of third parties, or even intervention in proceedings, is in conflict with the basic principles of arbitration. In arbitration, enshrined principles of party autonomy outweigh considerations of procedural efficacy and economy. It is because of this reason that, barring a few exceptions, arbitration laws of most countries have not recognized the concepts of *consolidation* and *joinder* against the will of any of the concerned parties. In arbitration, it is usually necessary for all parties to consent to a *joinder* of a third party to the proceedings.<sup>8</sup>

However, it is not compulsory for the parties to consent to *joinder* after the initiation of the proceedings; consent can be considered granted even by merely agreeing to arbitration under institutional arbitration rules which may allow and provide for joinder. An example of such a rule is Article 22(1)(viii) of the London Court of International Arbitration Rules ["LCIA Rules"] which provides that upon an application being made to the arbitral tribunal, a third party may be joined to the proceedings after obtaining the consent of such third party and the applicant. It is not necessary to obtain

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<sup>7</sup> See CODE CIV. PROC., No. 5 of 1908, Order I.

<sup>8</sup> Jean-Louis Devolve, *Final Report on Multi Party Arbitrations*, I.C.C. INT'L CT. OF ARB. BULL., 26 (1995).

consent of the other parties as that has been impliedly provided by agreeing to be governed by the LCIA Rules.

A narrower rule can be found in Article 18 of the Geneva Chamber of Commerce and Industry Arbitration Rules, 1992, where only the respondent to the proceedings can ask for a joinder of parties (ostensibly as the petitioner had an option to avail of such an option at the time of filing the statement of claim). The respondent has to do so at the time of filing the reply the statement of the claim. Should it be done at a later stage, all parties would have to provide their consent of such a joinder of parties.<sup>9</sup> Interestingly, while the institution has the discretion to allow *joinder* of parties on an application by the respondent, the tribunal would have the final say.

The Netherlands Code of Civil Procedure<sup>10</sup> requires all concerned parties to provide their consent for joinder of a third party or intervention. However, the final discretion to allow *joinder* lies with the arbitral tribunal irrespective of whether all concerned parties have consented.<sup>11</sup>

The choice of institutional arbitration rules thus assumes significance in determining whether a party has the opportunity and ability to object to *joinder* of a third party once arbitration proceedings have been invoked. The power of the arbitral tribunal does, however, supersede this in most jurisdictions and thus, a mere enabling provision in the institutional rules may sometimes not be enough to warrant the joinder of a third party into arbitration proceedings. There is no straightjacket solution and the choice of

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<sup>9</sup> Christophe Imhoos, *The 1992 Geneva Chamber of Commerce and Industry Arbitration Rules under Scrutiny*, 9.4 J. INT'L ARB 121, 132 (1992).

<sup>10</sup> See RV 1986, art. 1045 (Neth.):

- (1) At the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit such party to join the proceedings, or to intervene therein. The arbitral tribunal shall send without delay a copy of the request to the parties.
- (2) A party who claims to be indemnified by a third party may serve a notice of joinder on such a party. A copy of the notice shall be sent without delay to the arbitral tribunal and the other party.
- (3) The joinder, intervention or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties, if the third party accedes by agreement in writing between him and the parties to the arbitration agreement.
- (4) On the grant of a request for joinder, intervention, or joinder for the claim of indemnity, the third party becomes a party to the arbitral proceedings. Unless, the parties have agreed thereon, the arbitral tribunal shall determine the further conduct of the proceedings.

<sup>11</sup> A.J. VAN DEN BERG ET AL., NETHERLANDS ARBITRATION LAW 69 (1993).

governing rules plays a significant role in determining whether joinder will be permissible.

## II. Consolidation

‘*Consolidation*’ refers to the amalgamation of different arbitral proceedings which are pending or initiated into a single proceeding. In so far as *consolidation* of arbitral proceedings is concerned, consent of all parties is required. In *consolidation*, all the parties must agree to ‘*merge*’ separate arbitration proceedings arising out of different arbitration agreements. The point of consideration that is usually the catalyst for this decision is whether these separate arbitration proceedings can be amalgamated into one set of proceedings to promote efficiency and/or avoid inconsistent awards (which would open up its own can of worms for the warring parties).<sup>12</sup>

The most convenient manner in which arbitration proceedings can be *consolidated* is to incorporate a provision for consolidation in the arbitration agreement itself. However, a practical issue that parties face is that at the stage of negotiation, it is difficult to envisage and anticipate the nature of disputes that might arise out of the contract.<sup>13</sup> It is a brave party that is willing to sign a provision for consolidation without understanding and being aware of all the potential ramifications. Should a party adopt a clause for consolidation of arbitration proceedings, it may very well find itself in arbitration against numerous other parties, which was a situation it never envisaged or even contemplated. This could be detrimental for its interest if all the other parties to the proceedings are pooling in their resources and expertise against a party which would have been otherwise be segregated into different arbitration proceedings if consolidation was not agreed to by the parties.

Consolidation revolves around “*related disputes*”; which brings forth the consideration of what actually constitutes a *related dispute* and what would be the threshold required to be a *related dispute*. Moreover, at least theoretically, all arbitration clauses in all (independent) contracts would need to contain a similar provision of *consolidation*, for the different proceedings to be merged.

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<sup>12</sup> *Supra* note 3, at pp. 184-187.

<sup>13</sup> *Supra* note 3, at ¶¶ 3-80; KLAUS-PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 296 (1993); Philippe Leboulanger, *Multi-Contract Arbitration*, 13.4 J. INT’L ARB. 43, 72 (1996).

The House of Lords in *Lafarge Redland v. Shepard Hill*<sup>14</sup> stated that Party A could not be asked to mandatorily be a part of the arbitration proceedings between Party B and C, even though all of the parties had entered into contracts with each other regarding the same economic transaction, unless the arbitration clause imposed such an obligation on Party A.

If all the arbitration clauses in different contracts for the same economic venture are identically worded or are covered under the same heading, then it might potentially be argued and construed that the parties had intended to agree to consolidate the proceedings. However, this is not a straightjacket formula that can be implemented to infer consent of all parties and would depend on the facts and circumstances of each particular scenario.<sup>15</sup>

In the *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative*,<sup>16</sup> there was a dispute regarding the jurisdiction of the arbitral tribunal to adjudicate proceedings arising out from differently worded arbitration clauses in different contracts. The newer contracts contained arbitration clauses providing for ICC arbitration while the older arbitration clauses, which were not amended to bring them in line with the new contracts, did not contain any provisions for ICC arbitration. The Swiss Supreme Court relied on the principles of agency, incorporation by reference, waiver, estoppel and good faith to conclude that the whole dispute should be resolved through a single arbitration proceeding despite the existence of three different arbitration clauses in the various contracts. The Supreme Court held that the most recent arbitration clause would be made applicable for all the separate contracts and would be binding on all parties. The Supreme Court had applied the abovementioned principles of law not on the basis of any particular national law but as *general principles of law*.

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<sup>14</sup> *Lafarge Redlands Aggregates Ltd. v. Shephard Hill Civil Engineering Ltd*, [2000] 1 W.L.R. 1621 (U.K.).

<sup>15</sup> *Supra* note 8, at 32; Nichlisch, *Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects*, 11.4 J INT'L ARB. 57, 60 (1994); *See generally* Case No. 5989 of 1990, XV Y.B. Comm. Arb. 74 (ICC Int'l Ct. Arb.).

<sup>16</sup> *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative*, Case No. 9797/CK/AER/ACS (I.C.C.).

One of the major obstacles in consolidating arbitral proceedings even when all concerned contracts have been executed within the framework of the same venture is when material determinations such as the governing law of an arbitration agreement and/or the substantive law of the contract is different in different contracts.<sup>17</sup>

The decision of the French Cour d' Appel de Versailles in the *Iran-French*<sup>18</sup> dispute dealt with a situation where some of the arbitration clauses in a group of related contracts mentioned the seat of arbitration to be France and the applicable law to be French Law and some of the other agreements were silent on this aspect. The French Court of Appeal concluded that the tribunal could not have assumed jurisdiction on an assumption of general will of all parties in a project to resolve disputes through arbitration.

Closer home, in *PR Shah, Shares & Stock Broker (P) Ltd. v. BHH Securities (P) Ltd. & Ors.*,<sup>19</sup> the Supreme Court upheld the doctrine of consolidation of proceedings. This was also followed later by the Bombay High Court.<sup>20</sup>

In *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.*,<sup>21</sup> the Supreme Court has held that the expression '*person claiming through or under*' as provided under Section 45 of the Arbitration and Conciliation Act, 1996 would mean and take within its ambit multiple and multi-party agreements and hence even non-signatory parties to some of the agreements can be referred to arbitration. The Supreme Court, relying on international jurisprudence, gave illustrations of situations where a third party can claim through or under a party to the agreement.<sup>22</sup>

This ruling has widespread implications as now, in certain exceptional cases involving composite transactions and interlinked agreements, even non-signatories to a

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<sup>17</sup> Ricardo Ugarte & Thomas Bevilacqua, *Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions*, 27.1 J. INT'L ARB. 9 (2010).

<sup>18</sup> Cour d'appel [CA] [regional court of appeal] Versailles, Mar. 7, 1990, Rev. Arb. 1991, note Loquin (Fr.).

<sup>19</sup> P.R. Shah, *Shares & Stock Broker (P) Ltd. v. BHH Securities (P) Ltd. & Ors.*, (2012) 1 S.C.C. 594 (India).

<sup>20</sup> *Filmwaves Combine Pvt. Ltd. v. Kochi Cricket Private Limited & Ors.*, Arbitration Application 352 of 2012 (India).

<sup>21</sup> *Supra* note 4.

<sup>22</sup> *Id.*

particular agreement can be referred to and made party to an international commercial arbitration.

As with *joinder*, the consent of parties to *consolidate* arbitration proceedings can also be inferred from their acceptance of institutional arbitration rules, which provide for *consolidation*.<sup>23</sup>

Article 10 of the Belgian Centre for Arbitration and Mediation [“CEPANI Rules”] states that if all contracts contain a CEPANI arbitration clause, then it could be assumed that all the parties have consented to consolidation of the proceedings, even if the clauses are differently worded. If any of the clauses does not contain a CEPANI arbitration clause, then it would have to be examined if the applicable rules allow such a consolidation of proceedings.<sup>24</sup> Similarly, Article 13 of the International Arbitration Rules of Zurich Chamber of Commerce, 1989 states that the same members would constitute the arbitral tribunal in case of a multi-party situation and the tribunal could decide as to whether the proceedings should be consolidated.<sup>25</sup>

If there is no provision for consolidation of proceedings in the arbitration clause, then the only way to consolidate such multi-party arbitrations is by operation of the

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<sup>23</sup> *Supra* note 3, at 308.

<sup>24</sup> CENTRE FOR ARBITRATION AND MEDIATION RULES [CEPANI RULES] art. 10 (Belg.): Multiple Contracts:-

1. Claims arising out of various contracts or in connection with same may be made in a single arbitration. This is the case when the said claims are made pursuant to various arbitration agreements:

a) If the parties have agreed to have recourse to arbitration under the CEPANI Rules and b) if all the parties to the arbitration have agreed to have their claims decided within a single set of proceedings.

2. Differences concerning the applicable rules of law or the language of the proceedings do not give rise to any presumption as to the incompatibility of the arbitration agreements.

3. Arbitration agreements concerning matters that are not related to one another give rise to a presumption that the parties have not agreed to have their claims decided in a single set of proceedings.

4. Within a single set of proceedings each party may make a claim against any other party, subject to the limitations set out in Article 23.8 of the Rules.

<sup>25</sup> International Arbitration Rules of Zurich Chamber of Commerce, 1989 art. 13 (Switz.): If there are several claimants or several respondents, or if the respondent, within the deadline for the answer, files a claim with the Zurich Chamber of Commerce, against a third party based on an arbitration clause valid according to Article 2 subs. 2 an identical three-men Arbitral Tribunal is appointed according to Article 12 subs. 3 for the first and all other arbitrations. The Arbitral Tribunal may conduct the arbitrations separately, or consolidate them, partly or altogether.

governing law. Considering that consolidation without consent goes against the most basic tenet of arbitration, i.e. party autonomy, therefore it appears that very few laws have provisions for consolidation of proceedings without consent of the concerned parties.<sup>26</sup>

Section 35 of the English Arbitration Act requires that all concerned parties agree to consolidation or concurrent hearings. In keeping with party autonomy, unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.<sup>27</sup> Similar provisions exist in the International Commercial Arbitration Act of British Columbia<sup>28</sup> and some of the state arbitration statutes of the United States.<sup>29</sup> The Australian Statute<sup>30</sup> confers the powers of consolidation on the arbitral tribunal instead of the Court. In certain statutes, there is a

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<sup>26</sup> Nana Adjoa Hackman, *The Problem of Arbitration and Multi-Party/Multi-Contract Disputes: Is Court-Ordered Consolidation An Adequate Response?* CENTRE FOR ENERGY, PETROLEUM AND MINERAL LAW AND POLICY (CEPMLP), UNIV. OF DUNDEE, [http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp\\_car13\\_5\\_612306438.pdf](http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13_5_612306438.pdf).

<sup>27</sup> The Arbitration Act, 1996, ch. 23, § 35 (U.K.):

- (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, on 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 concurrent hearings

<sup>28</sup> See International Commercial Arbitration Act of British Columbia, R.S.B.C. 1996, ch. 233, § 27(2) (Can.).

Where the parties to two or more arbitration agreements have agreed in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the Supreme Court, may on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:

- (a) Order the arbitrations to be consolidated on terms the court considers just and necessary;
- (b) Where all parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11(8)
- (c) Where all parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

<sup>29</sup> See California International Arbitration and Conciliation Act, 1988, §§ 1297.272 & 1297.273, CAL. CIV. PROC. CODE § 1297.283 (West Supp. 1990); Arbitration and Conciliation of International Disputes, TEX. REV. CIV. STAT. ANN. §§ 172-173 (Vernon 1989); Oregon International Commercial Arbitration and Conciliation Act, H.B., art. 2381 36.506(2) (1991); OHIO CODE ch. 2712, International Commercial Arbitration, art. 2712.52, (1991); International Commercial Arbitration Act, Cch. 1, art.1-567.57 (1991).

<sup>30</sup> See International Arbitration Act 1974 (Cth) s 24 (Austl.).

distinction between the consolidation of proceedings which are underway before the same tribunal or before different tribunals.

The case of the Dutch Arbitration Law is different.<sup>31</sup> The earlier law provided that an application can be made before the President of the District Court of Amsterdam for consolidation of separate arbitration proceedings either pending before the same arbitral tribunal or different arbitral tribunals and the Court would use its discretion to decide whether the proceedings should be consolidated. Under the new Act, a party may now request that a third party may order consolidation with other arbitral proceedings pending within or outside the Netherlands, if the parties have agreed on such a third party (e.g. an arbitration institute).<sup>32</sup> Similar provisions exist in the arbitration laws for domestic arbitration in Hong Kong.<sup>33</sup>

The Federal Arbitration Act [“FAA”] of the United States does not have a rule providing for consolidation; however, some of the U.S. Courts have consolidated proceedings relying on Section 42(a) of the Federal Rules of Civil Procedure providing for consolidation in litigation. In *Compania Espanola de Petroleos SA v. Nereus Shipping SA*,<sup>34</sup> the Court of Appeal for the Second Circuit had consolidated the proceedings between Party A and Party B with the proceedings between Party A and Party C stating that the liberal purpose of the FAA was to be interpreted in a manner so as to consolidate appropriate proceedings.

This ruling was discarded by the Court of Appeal for the Second Circuit in *Government of the United Kingdom of Greater Britain v. Boeing Co.*,<sup>35</sup> where it was held that if the parties want to consolidate arbitration proceedings arising from the same factual situation, then, the same should be appropriately mentioned in the arbitration clause. In the absence of such an arbitration clause, the Court could not reform the contract which underlines the dispute because of inefficiencies and possible inconsistent determinations.

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<sup>31</sup> See Netherlands Arbitration Law, Rv Stb. 1986, art. 1046 (Neth.).

<sup>32</sup> Van Haersolte van Hof, *Consolidation under the English Arbitration Act 1996: A View from the Netherlands*, 13 ARB. INT’L 427, 428 (1997).

<sup>33</sup> See Hong Kong Arbitration Ordinance, (1982) Cap. 341, O.H.K., § 6 cl. B (H.K.); *Shui On Construction Co. Ltd. v. Moon Yik Company Ltd.*, [1987] 2 H.K.L.R. 1224 (H.C.); V.V. Veeder, *Consolidation: More News from the Front Line- The Second Shui On Case*, 3 ARB. INT’L 262 (1987).

<sup>34</sup> *Compania Espanola de Petroleos S.A. v. Nereus Shipping S.A.*, 426 U.S. 936 (1976).

<sup>35</sup> *The United Kingdom of Greater Britain v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993).

One of the other methods of consolidating proceedings is by appointing the same arbitrators in all the different proceedings. However, such a mechanism has to be suggested by the parties through the arbitration clause.<sup>36</sup> This may be possible when the arbitrators are being appointed by an institution and not by the parties themselves. If the parties have elected to appoint the arbitrators themselves, then, it may very well give rise to a situation that the different parties do not agree upon the same set of arbitrators. It might be a situation where a party gives more importance to a particular arbitrator rather than a conflicting decision. Having said that, in such ad-hoc situations in the Indian context, it is not uncommon for parties to eventually realize that consolidation results in overall efficiencies thus reducing costs, which operates as a major driver for such a decision. Further, while this may bring about procedural and time efficiencies, it may not strictly operate as 'consolidation' given that the arbitral tribunal would still have the obligation of passing separate awards for each reference, but would have the operational benefit of being consistent.

Another way to imbibe some extent of procedural efficacy is to have concurrent proceedings for those portions of the dispute which are inter-related. The Supreme Court of New South Wales in *Aerospatiale v. Elspan et. al.*<sup>37</sup> had considered extending this approach to arbitral proceedings which were concurrent to court proceedings. To avoid conflicting decisions in the parallel proceedings, the Court assumed the power to appoint an arbitrator for some of the issues in the dispute who would act as a referee and update the court regarding those issues.

It is to be seen if the consolidation of proceedings would encroach upon the basic principles of arbitration, such as party autonomy, for the sake of procedural efficiency. It is possible that the parties would not be privy to (although that might not be a valid defense) the existence of such provisions in the domestic laws which would force them to enter into arbitrations with parties that they did not envisage. The other issue which is of considerable importance is the importance of confidentiality in arbitration. The parties might not want to divulge information to a third party with which it had not entered into a contract, but is forced to arbitrate because of consolidation of

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<sup>36</sup> *Supra* note 1, at 378.

<sup>37</sup> *Aerospatiale Holdings Australia Pty Ltd. v. Elspan International Pty Ltd.* [1994] NSWLR 635 (Austl.).

proceedings. Each of these issues are part of a minefield leaving such arbitral awards vulnerable.

### III. The Role of Institutional Arbitration

Whilst ad-hoc arbitration appears to have gained a head start over institutional arbitration in India, parties who have access to sophisticated legal advice and who have high value disputes, slowly but surely prefer to have their disputes resolved by reference to a reputed arbitral institution. In such a situation, the rules of an arbitral institution govern the manner in which proceedings are administered and eventually, whether joinder and/or consolidation are envisaged and therefore provided for.

Given the evolution of multi-party arbitration, the complexities it has thrown up and learnings therefrom, most arbitral institutions have proactively updated or are currently in the process of updating their rules to incorporate provisions in this regard. Therefore, the institutional rules of most arbitral institutions contain provisions to implead, and thereby bind third or additional parties to arbitration proceedings. Presently, the reputed arbitral forums which have incorporated the provisions of *joinder* and *consolidation* into their rules include the ICC, LCIA, HKIAC, KLRCA and CIETAC.<sup>38</sup> However, there are differences in the manner of implementation before the various arbitral institutions including the stage of proceedings at which an application for *joinder* can be preferred; whether an application for *joinder* can be preferred by existing parties or by a third party,<sup>39</sup> and the threshold required to be met for a third party to be impleaded into the proceedings. The choice of which institutional rules are chosen therefore assumes significance.

The current SIAC<sup>40</sup> rules are silent on the issue of consolidation of arbitration proceedings. The arbitral tribunal can, upon request of a party to the arbitration

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<sup>38</sup> CIETAC Arbitration Rules 2015 (Article 19 and Article 14); KLRCA Arbitration Rules 2013 (Rule 8- Consolidation of proceedings); LCIA Arbitration Rules 2014 (Article 22- consolidation and joinder); HKIAC Administered Arbitration Rules 2013 (Article 27- Joinder Article 28- Consolidation)

<sup>39</sup> Whilst technically an application by a third party to become involved and bound by arbitral proceedings is an application for intervention, because it arises in the H.K.I.A.C. Rules within the joinder provision, we use the banner of joinder application.

<sup>40</sup> Singapore International Arbitration Centre Rules, 2013, [http://www.siac.org.sg/images/stories/articles/rules/SIAC-Rules-2013\\_English\\_31072014.pdf](http://www.siac.org.sg/images/stories/articles/rules/SIAC-Rules-2013_English_31072014.pdf).

proceeding, implead one or more third parties to the arbitration provided such third party consents to be impleaded and is bound by the arbitration agreement. However, the recent Singapore Court of Appeal decision in *Astro v. Lippo*<sup>41</sup> considered whether non-parties to an arbitration agreement can be joined to arbitral proceedings under the SIAC Rules, finding that the SIAC Rules do not provide for the so-called "forced joinder" of third parties, absent the parties' consent. The Court of Appeal considered the circumstances in which non-signatories to an arbitration agreement can be joined into existing arbitration proceedings. The decision highlights the care parties and the arbitral tribunals need to take while considering extending the jurisdiction of an arbitral tribunal to non-parties to the arbitration agreement. It would not be out of place to mention here that the current SIAC rules are in the process of being revised and the revised rules are expected to incorporate mechanisms for consolidation, joinder and intervention among other improvements.<sup>42</sup>

The ICC Rules of Arbitration of 1998 did not expressly provide for multi-party and multi-contract arbitration, except for appointment of arbitrators in multi-party situations. This situation has been remedied in the 2012 Rules<sup>43</sup> which provides for the joinder of additional parties to arbitration proceedings. Any of the parties to a proceeding can request for joinder of parties by submitting a request to the ICC Secretariat. The determining factor i.e. the criteria to be satisfied for joinder of parties is that the ICA is *prima facie* satisfied that an arbitration agreement may exist under the ICC Rules that binds them all. Therefore, for a third party to be impleaded into the arbitration proceedings it would have to be a signatory to a contract in dispute or to an umbrella agreement containing an arbitration clause. However, the final decision pertaining to the validity of a request for joinder vests with the arbitral tribunal which would conclusively determine whether it has the requisite jurisdiction over the third party which is to be impleaded into the proceedings. The consolidation of arbitrations is also provided for in the Rules. The ICA may, at the request of one of the parties, consolidate two or more arbitrations that are pending under the Rules into a single arbitration. The Court may, in

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<sup>41</sup> P.T. First Media T.B.K. v. Astro Nusantara International B.V., [2014] 1 S.L.R. 372, 75 [Singapore].

<sup>42</sup> Gary Born, *SIAC Rules under Revision*, KLUWER ARB. BLOG (December 10<sup>th</sup>, 2015), <http://kluwarbitrationblog.com/2015/12/10/a-new-book-published-and-rules-under-revision/>.

<sup>43</sup> Art. 7, ICC Rules of Arbitration, (2012 *available at* <http://www.iccwbo.org/products-and-services/arbitrationand-adr/arbitration/icc-rules-of-arbitration/>).

certain situations, decide on the consolidation after considering the facts of a case. Significantly, the Court has the discretion to deny a request for consolidation of proceedings even though the requirements under the Rules stand satisfied.

In Hong Kong, there is a dual system for arbitrations i.e. the Hong Kong Arbitration Act, 1982 which is applicable to domestic arbitrations and the Model Law which is applicable to international arbitrations. The Hong Kong Arbitration Act, 1982<sup>44</sup> provides for consolidation in domestic cases by an order of a Judicial Authority. The law governing International Arbitrations did not have any provision for the courts to order consolidation of arbitral proceedings.

The current HKIAC rules<sup>45</sup> incorporate the power to consolidate multiple arbitrations at the request of the parties to the proceeding; where the parties agree to consolidation of arbitral proceedings; and when the claims arise out of a common question of fact or law.

The 2013 Rules now expressly allow the HKIAC to consolidate two or more arbitration proceedings that are governed by the 2013 Rules. Where arbitration proceedings are consolidated, they will generally be consolidated into that arbitration proceeding which had commenced first unless otherwise agreed and taking into account the circumstances of the case. Consolidation of pending arbitrations is possible when the parties agree to the same; when all of the claims in the separate arbitration proceedings relate to the same arbitration agreement; or when in claims made under the different arbitration agreements, a common question of fact or law arises in all of the separate arbitration proceedings and the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and the HKIAC finds the arbitration agreements to be 'compatible'.

In deciding whether to consolidate the arbitral proceedings, the HKIAC will consider the circumstances of the case, the contents of the arbitration agreement including whether arbitrators have been designated or confirmed in more than one of the arbitration proceedings (and if so, whether the same or different arbitrators have been appointed). The provisions of consolidation only apply to arbitral agreements concluded

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<sup>44</sup> See Hong Kong Arbitration Ordinance, (1982) Cap. 341, § 6 cl. B (H.K.).

<sup>45</sup> Hong Kong International Arbitration Centre, Administered Arbitration Rules (2013), [http://www.hkiac.org/images/stories/arbitration/2013\\_hkiac\\_rules.pdf](http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf).

after 1 November 2013 (i.e., the date the 2013 Rules come into force), unless otherwise agreed to by the parties.

All parties will be consulted before the tribunal exercises its power to implead third parties. A non-party to an arbitration agreement can prefer an application to be impleaded as a party in an on-going arbitration proceeding. The tribunal may use its discretion to decide as to whether the request should be granted as per the facts of the case after examining whether it would be in the interest of the parties and proceeding. Objections to the tribunal's actions in this regard can be raised by the parties after the formation of the tribunal.

Where an additional party is impleaded into the arbitration proceedings before the tribunal is appointed, or where two or more arbitration proceedings are consolidated, there are various implications. At the outset, all parties will be deemed to have waived their rights to designate an arbitrator and the HKIAC may revoke the appointment of any arbitrators already designated or appointed. In these circumstances, the HKIAC will appoint the arbitral tribunal. The revocation of the appointment of an arbitrator is without prejudice to the validity of any act done or order made by the arbitrators before their appointment was revoked. These are, of course, necessary to make the arbitration workable.

#### **IV. Conclusion**

The need to ensure consistency in dispute resolution in the age of back to back agreements and multiple layers of contracts has forced the arbitration fraternity to come up with new and largely untested solutions. Traditionally, one arbitral proceeding was sought to be stayed till the other was completed, enabling the tribunal to observe the outcome and appropriately take steps to ensure that there are no conflicting decisions. This would inevitably result in delays, as well as a breach of confidentiality and privacy. This has often been experimented with in the Indian context, especially in ad-hoc arbitrations, where delays are anyway abound. Consolidation and joinder in international arbitration are slowly but surely finding their way into the rules of most arbitral institutions.

An aspect of consolidation and joinder that often remains unseen and unreported is the challenges that are faced at the time of execution of an award. Where a third party has been made party to the proceedings, or if multiple proceedings are consolidated, this

might violate a cardinal principle of arbitration, being party autonomy. Needless to say, where consent of all concerned parties for joinder or consolidation was obtained, then it is likely that the resultant award would get enforced; however if the joinder or consolidation has been ordered by a tribunal or a court in pursuance of some law or rule, then the issues on enforceability are not clear.

The question arises as to whether the competent authority should allow such consolidation or joinder of proceedings. A multi-party arbitration can be considered viable if it saves time and money i.e. for procedural efficiency; it reduces the risk of inconsistent awards; it is fair and equitable in order to facilitate fact-finding and the comprehensive presentation of legal and factual positions; it is appropriate for purposes of privacy and confidentiality and if the parties involved can have equal influence on the composition of the tribunal or if the selection of arbitrators is left to an appointing authority.

In certain situations, multiparty arbitrations may throw up more problems than solutions and consequently should not be ordered. These include where two different arbitration tribunals have been constituted; where one of the parties chooses to appoint different arbitrators for different arbitrations; where it is apparent from the outset that the parties would not cooperate and where the award would be vulnerable to challenges and anti-enforcement actions.

One thing remains certain – the doctrines of *joinder* and *consolidation* in arbitration will lead the next wave of changes to institutional rules and will throw up new and untested challenges for courts dealing with enforcement proceedings.