Specialeafhandling: 
Joinder in International Commercial Arbitration

**Fagområde:** International Commercial Arbitration

**Problemformulering:** The objective of this study is to examine the development within the different iterations of joinder provisions across multiple institutional arbitration rules. In doing so, the different iterations of the joinder provisions will be examined according to a predetermined set of parameters; consent/arbitration agreement, circumstances to be taken into account, temporal restrictions, constitution of the arbitral and the deciding body. Subsequently, it will be explored whether there are certain prevailing tendencies within the newest iterations of the joinder provisions. This will lay a path for a discussion regarding consent as a jurisdictional basis and how it may limit the development of joinder provisions.

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**Afleveringsdato:** 14. december 2021

**Karakter:**
Abstract


Analysen foretages ud fra fem parametre, der er udvalgt med det formål at i) analysere udviklingen i den enkelte bestemmelses versioner ud fra konkrete vurderingsmomenter og ii) foretage en komparativ analyse af de 25 regelsæts bestemmelser ud fra parametrene med henblik på at vurdere, om der kan udledes særlige tendenser. Udviklingen peger ikke i retning af én fremtidig universel joinder bestemmelse. Umiddelbart synes bestemmelserne hverken påvirket af geografi eller kultur. Derimod tyder det på, at de store og mere indflydelsesrige institutioner i nogen grad påvirker de mindre institutioner. Det ses dog også, at få mindre institutioner prøver at skille sig ud ved at lave mere "innovative" bestemmelser, bl.a. hvor jurisdiktion ikke skabes på baggrund af parternes samtykke.


1 Der er dog få undtagelser hertil, fx i CIETAC reglerne og regler, som ikke inkluderer en joinder bestemmelse.
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<td>A party requested to join proceedings</td>
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<tr>
<td>De facto</td>
<td>In fact</td>
</tr>
<tr>
<td>E.g.</td>
<td>Exempli gratia (for example)</td>
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<tr>
<td>Estopped</td>
<td>Prevents one from asserting a right that contradicts what they previously agreed to.</td>
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<td>Explicit consent</td>
<td>Specific consent to the joinder</td>
</tr>
<tr>
<td>I.e.</td>
<td>Id est (that is)</td>
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<tr>
<td>Inter alia</td>
<td>Among other things</td>
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<tr>
<td>Lex arbitri</td>
<td>Law of the seat of the arbitration</td>
</tr>
<tr>
<td>Non-signatory(-ies)</td>
<td>A party that has not signed the arbitration</td>
</tr>
<tr>
<td>Opposing Party</td>
<td>The party <em>not</em> requesting the joinder of an additional party. Not necessarily a party that objects to the joinder.</td>
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<td>Original parties</td>
<td>Parties who are a part of the commenced arbitral proceedings</td>
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<td>Prima facie</td>
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<td>Requesting party</td>
<td>A party who requests the joinder</td>
</tr>
<tr>
<td>Signatory</td>
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2.1 Problem formulation

“The objective of this study is to examine the development within the different iterations of joinder provisions across multiple institutional arbitration rules. In doing so, the different iterations of the joinder provisions will be examined according to a predetermined set of parameters; consent/arbitration agreement, circumstances to be taken into account, temporal restrictions, constitution of the arbitral and the deciding body. Subsequently, it will be explored whether there are certain prevailing tendencies within the newest iterations of the joinder provisions. This will lay a path for a discussion regarding consent as a jurisdictional basis and how it may limit the development of joinder provisions.”

2.2. Delimitation

The primary focus of this study is to examine the development of the procedural tool of joinder in institutional commercial arbitration rules (section 4.1).

The authors have chosen to focus on joinder and thus exclude similar procedural tools, such as consolidation and intervention. While arbitration is normally a voluntary dispute resolution method, joinder might include situations where the additional party to be joined is unwilling to participate in the arbitral proceedings. This makes joinder particularly interesting.

The joinder provisions from the chosen institutional arbitration rules will be presented and examined as per the seven items stated below (a-g).² This covers a brief introduction (a), a categorisation of five particularly interesting parameters (b-f) and, finally, any concluding remarks (g):

a) Introduction;
b) Consent / Party Agreement;
c) Circumstances to be Taken into Account;
d) Temporal Restrictions;

² See section 4.1.2 for a further description of content of the parameters
e) Constitution of the Arbitral Tribunal;

f) The Deciding Body; and

g) Concluding Remarks

The five parameters are primarily chosen based on features that are common in joinder provisions. Further, this division facilitates the process of conducting a comparative analysis. The parameters will also be of use when discussing whether the joinder provisions comply with fundamental principles of international commercial arbitration, the likes of which are party consent and autonomy, the right to be heard, and the right to equal treatment.

The authors have chosen to analyse 25 different arbitration rules: the UNCITRAL Rules and 24 institutional arbitration rules. Granted that any empirical study should aim to maximise its empirical evidence, this master’s thesis has been constrained in that regard on reasons of space limitations. As such, the authors have had to strike a balance of, on the one hand, having a sufficient amount of empirical data for a comparative analysis (section 4.2), and on the other, ensuring that this is thoroughly examined.

The objective of this study has been to present a global perspective on the development within joinder provisions with the purpose of addressing if geography, culture, or legal traditions seem to influence the joinder provisions. Take, for instance, the typical Scandinavian approach to joinder provisions.

It has furthermore been important to the authors to present a mix of large arbitral institutions, and the smaller, lesser known, institutions. Mainly motivated by the question as to whether the larger institutions influence the smaller ones, but also to uncover if smaller institutions take certain measures to differentiate themselves from their larger counterparts. The order in which the institutional arbitration rules are examined in section 4.1 is based on the authors’ perception of how the joinder provisions could be “grouped” on the basis of shared features.

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3 This study focuses on the situations with three-members tribunal as these are most commonly iterated upon in institutional arbitration rules.

4 For more regarding these principles, see section 3.2.2. of the introduction

5 Although not an institution, the UNCITRAL Rules are included as they seem to influence other institutional arbitration rules.
Due to space restrictions, and because the main focus is the development within the institutional joinder provisions and the comparative aspect, the analysis in section 4.1 of each chosen institute and its joinder provision could have been further developed. This is, as mentioned, the result of the authors’ balancing act. Nonetheless, the analysis in section 4.1 contains the information that is necessary for the subsequent comparative analysis in section 4.2.

The comparative analysis in section 4.2 serves the purpose of illustrating the prevailing tendencies in joinder provisions in the newest iterations, based on the parameters from section 4.1. Although the joinder provisions seem to influence each other, they certainly vary. Therefore, it would be too complicated to conduct a sufficient comparative analysis based on the joinder provisions, were they to be considered holistically.

The analyses are based on the different iterations in the respective published arbitration rules. Thus, a precaution must be taken as it cannot be ruled out the existence of older, unpublished versions which have not been included in this study. However, it has been possible to collect the arbitration rules, which contained the first iteration of a joinder provision. As such, it is possible to conduct an examination of the development within the different iterations of the joinder provisions.

Furthermore, due to the confidentiality of arbitral proceedings, there are not many published, neutral, and credible sources regarding the popularity of the institutions. Therefore, the authors have chosen, as a guiding principle, not to include such data. The only exception being the Queen Mary International Arbitration Survey 2021 which has been included on grounds that the authors have assessed it to be a credible source for data collection.

Joinder provisions contained in institutional arbitration rules regarding expedited proceedings or fast track proceedings are not included. This is primarily due to space restrictions, but also because only a few of the chosen institutions explicitly include this kind of procedure in their arbitration rules. Thus, it would not be possible to conduct a thorough analysis across the chosen arbitration rules.

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6 For instance, by looking further into the lex arbitri or national jurisprudence.
The authors are aware of the fact that should the *lex arbitri* prohibit joinder, it should not be possible to join an additional party to arbitral proceedings *even though* the institutional arbitration rules provide for joinder. However, *if* national jurisprudence explicitly prohibits joinder, then the rules would arguably not include such joinder provision.

Due to the objective of the analysis, being to examine the development within *institutional* joinder provisions, any further investigations into the likes of national law and jurisprudence will, broadly, be left unexplored. An exception to this is when a set of institutional arbitration rules do *not* include a joinder provision. In this situation, it will briefly be examined whether the choice of *not* including a joinder provision is due to the *lex arbitri,* the legal traditions and/or culture, or simply the opinion of the institution that the benefits of joinder do not outweigh the risks.

While the discussion of this study could have been guided in many directions, it has been fixed around the first parameter: consent/arbitration agreement. More specifically, the options whereby procedural efficiency is used *prima facie* as a basis for establishing jurisdiction over the additional party. The authors have chosen this direction because it is interesting to discuss the role of consent as a jurisdictional basis, especially the question of how far the requirement of consent in the joinder provision can be “stretched”. Because while this might be of great benefit to arbitration and joinder by enabling a more efficient resolution, it would seem to, simultaneously, contradict the very nature of arbitration; namely the parties’ consent (agreement) to arbitrate.

As a part of the discussion, the authors have chosen to briefly touch upon some legal theories for compelling non-signatories into arbitral proceedings. These legal theories/doctrines are included as they may be applicable in case joinder provisions do not specify how jurisdiction may be ascertained over the additional party. The legal theories/doctrines are used to illustrate the potential consequences that could follow from vague, or even silent, joinder provisions. Due to space limitations, the authors have only chosen a few legal theories/doctrines. These are some of the more well-known legal theories/doctrines: *agency, implied consent, and the Group of Companies Doctrine.* The legal theories/doctrine do, however, have a limited scope

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7 See section 4.1.(W, X, Y).
as they must be derived from precise, well-defined, and largely recognised rules in the *lex arbitri* to which the arbitration agreement is subject. Furthermore, they are often discussed in scholarly literature and are at times criticised. As such, and due to the objective of the study, the above is not of primary focus.

### 2.3. Research methodology

To examine the research question, emphasis is especially given to *empirical research* which helps to identify the best legal means to reach a certain goal. The legal means in this master’s thesis are the joinder provisions included in the 25 chosen rules. The goal is to analyse the development of the joinder provisions, to compare the joinder provisions according to different parameters, and to discuss the results of these analyses.

The usual process of empirical research involves four steps; designing the project, collecting the data, analysing the data (section 4.1) and subsequently determining the best method to present the results (section 4.2). Furthermore, there are two main types of empirical legal research; the qualitative method and the quantitative method. This master’s thesis uses the qualitative method by extracting the relevant information, then analysing and interpreting the information and subsequently organising the information into categories based on the chosen criteria, and ultimately using the information to identify certain patterns.

Furthermore, the *legal dogmatic method* is used. The legal dogmatic method aims at describing the relevant and applicable law and practice, and consequently examining the general legal status of a specific area of the law. In this study, this method is used to present the fundamental principles of international commercial arbitration, legal theories/doctrines, and furthermore in both the analyses in section 4.1 and 4.2 to examine the different iterations of the joinder provisions. Consequently, to find and describe the current legal status of how joinder is dealt with in the chosen rules.

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8 See, for instance, Landbrecht and Wehowsky, pp. 837-838  
9 See Hoecke, Preface, paragraph (1)  
10 See Riis and Jan Trzaskowski, pp. 132ff  
11 Ibid  
12 Ibid  
13 Ibid, pp. 278ff
In order to achieve the best results in this master’s thesis, the comparative method is used to compare joinder provisions. More specifically, how the outcome of these joinder provisions could vary depending on the given set of arbitration rules that applies. o, how the outcome could vary depending on the given set of arbitration rules. While the comparative method is ordinarily used to compare the law of one country to that of another, this study uses the method somewhat differently by comparing different institutional arbitration rules. This does not, however, change the fact that the comparative method contributes to getting a better understanding of how different institutions handle the same issue. It merely distinguishes particular features of the joinder provisions.

\[14\] See Eberle, p. 52
3. Introduction

3.1. Introduction to International Commercial Arbitration

3.1.1. The basics of international commercial arbitration

According to Gary Born, the definition of international commercial arbitration which best captures the consensus is that “[...] international commercial arbitration is a means by which international business disputes can be definitively resolved, pursuant to the parties’ agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral adjudicative procedures that provide the parties an opportunity to be heard.”  

3.1.1.1. Pursuant to the parties’ agreement

The foundation of arbitration is the arbitration agreement as arbitration cannot be commenced without a valid arbitration agreement. This voluntary mode of dispute resolution is in contrast to the coercive power of courts to, under various circumstances, force a party into court proceedings. The arbitration agreement is usually found in an “arbitration clause” in a contract. The arbitration agreement can also be separate from the contract. This, for instance, could be of relevance in multi-contract situations where one arbitration agreement refers to multiple contracts. Another type of agreement is the “submission agreement”, which can be made by the parties after the dispute has arisen.

3.1.1.2. By independent, non-governmental decision-makers, selected by or for the parties

The contracting parties agree to submit a potential dispute to independent, non-governmental decision-makers, i.e., arbitrators, whose decision they are willing to trust. The opportunity to select arbitrators is a unique feature of arbitration and illustrates the parties’ autonomy. Arguably, this opportunity is one of the main reasons that commercial parties choose arbitration. As the parties usually have a predominant role in selecting the arbitrators, these choices are also one of the most important tasks the parties will undertake during the arbitral proceedings.

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15 See Born, p. 67
16 See Redfern and Hunter, p. 12
17 Ibid.
18 See Redfern and Hunter, p. 2
19 See Born, para 12.01
20 Ibid.
In each case, the arbitrators, who form the arbitral tribunal, will consider the parties’ arguments regarding the facts and the law of the particular dispute, and on that basis render a decision.\textsuperscript{21} This decision is enshrined in an arbitral award which is final and binding on the parties. Accordingly, arbitration is an effective dispute resolution method as the parties obtain a final and binding arbitral award on their dispute, as a main rule, without reference to a court. Judicial review of arbitral awards is usually narrowly confined to issues regarding procedural fairness, jurisdiction, and public policy.\textsuperscript{22} Public policy expresses the most basic notions of morality and justice in a state and constitutes a basis for denying \textit{inter alia} arbitral awards.\textsuperscript{23} A court may also be asked to enforce the award if the losing party does not implement the decision voluntarily.\textsuperscript{24}

3.1.1.3. Applying neutral adjudicative procedures that provide the parties an opportunity to be heard

The right to be heard is a fundamental principle of arbitration and is viewed upon as one of the parties’ \textit{due process} rights.\textsuperscript{25} The right to be heard is also a matter of public policy. If the arbitration has not been conducted in accordance with the right to be heard, among others \textit{due process} rights,\textsuperscript{26} the arbitral award may, at the request of a party, risk being set aside according to the New York Convention.\textsuperscript{27} Being “set-aside” results in the lack of recognition and enforcement of the arbitral award. Thus, an arbitral tribunal must ensure that the arbitral proceedings, and subsequently the arbitral award, is \textit{not} subject to setting-aside procedures.

3.1.2. The principal reasons to choose arbitration

There are several reasons why international commercial arbitration is an attractive dispute resolution method. The reasons of prime importance include party autonomy, neutrality, efficiency and procedural efficiency, enforcement, and confidentiality.

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\textsuperscript{21} Ibid.
\textsuperscript{22} See Born, p. 80
\textsuperscript{23} See Schwebel and Lahne, pp. 205 - 226
\textsuperscript{24} See Redfern and Hunter, para 1.04
\textsuperscript{25} Ibid, p. 316
\textsuperscript{26} An example of \textit{due process} rights is the right to equal treatment, which is elaborated in section 3.2.2.2.
\textsuperscript{27} See Article V(1)(b) of the New York Convention (Appendix 2, p. 3)
3.1.2.2. Party Autonomy

The first advantage is the fact that arbitration is based on the principle of party autonomy. Party autonomy is, largely, the notion of enabling the parties to freely to choose the specific procedures and arbitrators\(^{28}\) that meet their requirements.\(^{29}\) As an example, the parties are typically free to agree upon the substantive laws and procedures applicable to the arbitration.\(^{30}\) Furthermore, the parties can, \textit{inter alia}, agree to the timetable, language, the place of hearings, and the modes for presentation of evidence.\(^{31}\) As will be discussed further in section 5.4, the parties are, however, \textit{not} free to agree on a procedure that would undermine public policy.

3.1.2.3. Neutrality

Another advantage is neutrality. Neutrality in\textit{ international} commercial arbitration often relates to the \textit{seat} of the arbitration. The seat of the arbitration is the chosen location where the arbitral proceedings are to be held. The national law of the seat, the \textit{lex arbitri}, often applies to the arbitration. Say the seat of arbitration is in Singapore, then the mandatory provisions of Singaporean law will apply to the arbitral proceedings, and any subsequent arbitral award will be a Singaporean award.\(^{32}\) The \textit{lex arbitri} will generally not be very specific,\(^{33}\) but rather state certain principles, e.g., relating to the public policy.\(^{34}\)

As such, international parties will often choose a neutral seat in a country that neither of the parties have a connection to.\(^{35}\) A neutral seat can provide a more impartial basis for the resolution of the dispute\(^{36}\) whereby any potential “home-court advantage”, that would favor the one, is avoided. Such an advantage could possibly stem from the convenience and familiarity for this party and its regular counsel.\(^{37}\) The other party or parties would, in contrast, likely find the courts of the home-town party inconvenient and unfamiliar.\(^{38}\) Even under the assumption that

\(^{28}\) The parties’ rights to select their own arbitrators and constitute an arbitral tribunal are confirmed in Article V(1)(d) of the New York Convention (Appendix 2, p. 3)
\(^{29}\) See Born, p. 82
\(^{30}\) Ibid, p. 81
\(^{31}\) Ibid, p. 82
\(^{32}\) See Redfern and Hunter, p. 7
\(^{33}\) For a more detailed procedure regarding, \textit{inter alia}, exchange of statements and witness statements, the parties will often choose to conduct the arbitration in accordance with an institution and its institutional arbitration rules. See also section 3.1.3 regarding institutional arbitration
\(^{34}\) Ibid, p. 42
\(^{35}\) Ibid.
\(^{36}\) See Born, p. 90
\(^{37}\) Ibid, p. 72
\(^{38}\) Ibid.
a “home-court advantage” is entirely baseless and illusory, the mere awareness of its plausibility could influence the parties to seek other countries.

3.1.2.4. Efficiency and Procedural Efficiency

In contrast to litigation, arbitration enables the parties to obtain procedures that allow for speedy and efficient results.\(^{39}\) Efficiency usually relates to cost and time.\(^{40}\) Procedural efficiency could, from a more general perspective, extend into areas that include expediting the dispute resolution, e.g., by joining an additional party to the proceedings and thus mitigating the risk of conflicting awards. Although efficiency and procedural efficiency are, largely, tied together, the parties ought not to pursue the efficient conduct of the proceedings at the expense of the procedural efficiency. Consider, for instance, “trading off” either the correct substantive outcome or the parties’ right to due process,\(^{41}\) solely for the purpose of time- and cost savings.

3.1.2.5. Enforcement

The New York Convention imposes an obligation on the contracting states’ national courts to recognise arbitration agreements in writing\(^ {42}\) and enforce arbitral awards. This ability to seek enforcement of an arbitral award in the more than 160 states\(^ {43}\) is one of the key benefits of international arbitration. In contrast to alternative forms of dispute resolution, an arbitral award is final, binding, and directly enforceable, nationally, and transnationally by court action.\(^ {44}\) As such, the New York Convention contributes to ensure a consistent, simple, and efficient regime for enforcing arbitral awards. Though similar conventions exist elsewhere,\(^ {45}\) the New York Convention is the most significant.

3.1.2.6. Confidentiality

Another advantage is the privacy and confidentiality surrounding the arbitral proceedings.\(^ {46}\) This feature is particularly attractive to commercial private parties that become involved in

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\(^{39}\) Ibid, p. 2288

\(^{40}\) Costs will not be further detailed in this study

\(^{41}\) See Fortese and Hemmi, p. 116

\(^{42}\) The requirement of “in writing” is enshrined in Article II of the New York Convention (Appendix 2, p. 2)

\(^{43}\) For the list of contracting states, see: https://www.newyorkconvention.org/list+of+contracting+states

\(^{44}\) See Redfern and Hunter, p. 29


\(^{46}\) See Redfern and Hunter, p. 30
legal proceedings in order to protect their trade secrets, competitive practices, or to reduce adverse publicity.\(^47\)

3.1.3. Institutional arbitration

The parties often choose to conduct the arbitration in accordance with the rules of an arbitral institution. The concept of institutional arbitration is, contrary to \textit{ad-hoc} arbitration,\(^48\) a form of arbitration whereby the parties agree upon an arbitral institution to administer any potential dispute relating to the arbitration agreement and underlying contract, possibly in accordance with the institute’s arbitration rules.\(^49\)

The institutional arbitration rules will often be in accordance with the \textit{lex arbitri} of the country where the institution is based. The \textit{lex arbitri} can be inspired by, or be an outright adoption of, the UNCITRAL Model Law.\(^50\) The compatibility between the institutional arbitration rules and the \textit{lex arbitri} might, at least in some respects, be important, should the institution or the arbitral tribunal require to seek judicial assistance to obtain evidence or to perform other judicial acts.

Furthermore, the institutions should ensure that the institutional arbitration rules are \textit{not} conflicted with the requirements enshrined in the New York Convention.\(^51\) If the rules create significant risks regarding enforcement according to the New York Convention, they would presumably be avoided by all parties.

The use of institutional arbitration rules presents several benefits compared to \textit{ad hoc} arbitration, for instance the availability of already established rules and procedures. As such, the parties are provided the choice between the set of institutional arbitration rules which satisfy their particular needs in terms of specific provisions and procedure. Additionally, most institutions provide assistance via its administrative services, including receiving and distributing notice of arbitration, administering deposit and fees, assisting the arbitral tribunal at various times,

\(^{47}\) Ibid.
\(^{48}\) In \textit{ad hoc} arbitration, the parties create their own procedural rules and administer the arbitration themselves.
\(^{49}\) Some parties might choose institutional arbitration only due to the administrative services.
\(^{50}\) A significant number of arbitration laws have been harmonised because of the UNCITRAL Model Law. See Redfern and Hunter, p. 1
\(^{51}\) See section 4.1.U, litra b, which illustrates an example of institutional rules that might be in conflict with the New York Convention.
providing proper physical or online spaces, and occasionally, assisting with the appointment of arbitrators.

3.2. Joinder in International Commercial Arbitration

3.2.1. Setting the scene

Evidently, there are many advantages of international commercial arbitration. On the flip side, because arbitration is based on party consent and autonomy, its procedures may fall short in other settings.52

Joinder is a procedural tool for permitting an additional party to be joined into already commenced arbitral proceedings between other, original, parties. Joinder requires that one of the original parties to the proceedings files a request for joinder to the deciding body.53 Historically, there were rules that allowed the deciding body itself to propose the joinder to the original parties.54 Crucially, this opened for the possibility that a request for joinder was not resultant of the additional party’s own will, or action, to participate in the commenced arbitral proceedings.55

For many decades, international commercial arbitration was most commonly a bilateral dispute resolution method involving two parties: the claimant and the respondent. As a result of, e.g., the growing international trade involving multiple international parties, the number of multi-party arbitration disputes increased considerably over the years.56 Consequently, and especially in the wake of the Dutco case,57 potential problems related to multi-party arbitration and, inter alia, joinder of an additional party, were brought to light.58

52 See Redfern and Hunter, p. 31
53 If the additional party itself files the request, it is called intervention which will not be elaborated on further, see section 2.2.
54 See Article 24(1)(c) of the SIAC 1991 Rules (Appendix 1B, p. 281)
55 This situation is called intervention and will not be further elaborated, see delimation in section 2.2 of the introduction.
56 See Born, para 18.01
57 For a thorough explanation of the Dutco case, see section 3.2.2.3. The Dutco case is from 1992, which is around the same time where the first joinder provisions was iterated. See Appendix 3.
58 See Redfern and Hunter, p. 31
To illustrate the benefits and challenges of joinder, a hypothetical case will be presented. In this case, A contracted with B, who then sub-contracted the work to C, whereafter some imaginary dispute occurred. A asserted that the work did not satisfy the agreement. B, on the other hand, asserted that the work was fulfilled as per the contract. Yet, if in fact the work did not satisfy the contract, then C remained at fault and should be the party held liable for any damages.

In this situation, there would be several benefits in having a single, unified, arbitration between all parties as opposed to having two proceedings between respectively A and B, and B and C. Having two procedures could entail the risk of two conflicting arbitral awards. For instance, the case between A and B could result in an arbitral award according to which the work was not in accordance with the contract, while the case between parties B and C could result in an arbitral award according to which the work was in accordance with the contract. The confidential nature of arbitration could make it difficult, in the case between B and C, to incorporate the arbitral award in the case between A and B, not to mention the reasoning behind this particular decision. As such, conflicting arbitral awards represent a risk for asymmetric information because party C had crucial information regarding the work in dispute.

However, as the parties in this imaginary case entered into different contracts and, ultimately, different arbitration agreements, joinder of the additional party C could cause several issues. These include the questions pertaining to what the parties had initially agreed, and to the jurisdiction over C. Furthermore, issues relating to equal treatment could arise if C was compelled into the arbitral proceedings without the possibility to select an arbitrator or somehow participate in the constitution of the arbitral tribunal, especially where the original parties already did so themselves.

59 See Redfern and Hunter, p. 31
60 See section 3.2.2.1. regarding jurisdiction over, and consent to, the joinder
61 See section 3.2.2. for a more thorough elaboration of these issues
3.2.2. The fundamental principles in joinder

3.2.2.1. Consent to the joinder

In contrast to national courts, the deciding body in arbitration derive its power to resolve the dispute, i.e., jurisdiction, from the consent of all the parties. Accordingly, joinder will generally only be possible with the consent of all parties concerned.62

In principle, only those parties who entered into the arbitration agreement, the signatories, may take part in the following arbitral proceedings.63 In this regard, there are differing opinions whether the consent to the joinder must be explicitly stated in the arbitration agreement64 or if it be sufficient that the arbitration agreement designates (institutional) arbitral rules, which provide for the joinder of an additional party.65 In relation to the first approach, the rationale seems that if the parties expect the joinder to become relevant in the present case, then it should have been explicitly reflected in the arbitration agreement. On the other hand, as follows from the second approach, it cannot supposedly be expected that the parties are held accountable for any dispute that may arise, and then subsequently have that written into the arbitration agreement. Historically, the parties have not demonstrated great care or cognisance with regard to these particularities of their arbitration agreements.66

Consent to the joinder can further be given explicitly by the parties when a request for joinder is rendered to already initiated arbitral proceedings.67 This is often the case when the additional party is not a signatory to the arbitration agreement.

In certain situations, an additional party, who is not a signatory to the arbitration agreement, might be deemed to have consented to joinder in other ways.68 These situations are, inter alia,

62 Ibid, p. 91
63 See Lew, Misterlis and Kröll, paras 7-3ff
64 As exemplified by the LCIA Rules, see section 4.1.E, litra b
65 As exemplified by the UNCITRAL Rules, see section 4.1.A, litra b
66 See Born, p. 2765
67 See section 4.2, section b, 2, which states all the institutional rules with this approach
68 In scholarly literature and case law, this phenomenon is often referred to as “extending the arbitration agreements to a non-signatory”. However, this expression seems inaccurate as it implies that an additional party, who is not a signatory, is subject to that agreement’s effects, by virtue of something else than the parties’ consent, see Born, p. 1414.
enshrined in legal theories/doctrines. As alluded to in the delimitation, the legal theories/doctrines have a very limited scope and are, to varying degrees, not universally recognised. Nonetheless, they contribute with wide-ranging conceptions of consent and, accordingly, stipulate the manner by which jurisdiction over the additional party might be ascertained. The legal theories/doctrines to be further described are agency, implied consent, and the Group of Companies Doctrine.

Agency should be viewed as a natural extension to, or consequence of, its use in contract law. In these situations, a principal must be deemed to have consented to the arbitration if the arbitration agreement is signed by its agent acting on its behalf. While this theory should be viewed as a reflection of basic contract law, the legal theories/doctrines in the below are usually considered controversial.

Implied consent is arguably broader in its scope of applicability. The fundamental question in the context of implied consent is whether the intention of the additional party was to become a party to the arbitration agreement. The intention, thereby consent, can thus be inferred from the additional party’s participation in the formation, conclusion, and/or performance of the underlying contract. Although the additional party’s intention is often the most controversial, the original parties’ intentions are also necessary, i.e. whether the original parties intended to arbitrate with the additional party. This approach is indeed one such theory that is limited in acceptability on grounds of being controversial.

Lastly, the Group of Companies doctrine might be applicable. According to the Group of Companies doctrine, the additional party’s consent can be “stretched”, in the sense of extending its coverability, given certain circumstances. Say, the additional party is a part of a corporate group, which is subject to the control of a corporate affiliate that has executed the contract and

69 See section 2.2
70 See section 2.2
71 Other examples could be incorporation by reference and assumption. See also Samal, p. 3.
72 See Samal, p. 3
73 See Born, p. 1531ff
74 See Born, p. 1540
75 See Hosking, p. 290
76 See Born, p. 1540
77 Ibid
78 The doctrine is based on the French interim award of Dow Chemical v Isover Saint Gobain, which has become the primary authority and reference of the doctrine. In this regard, see Samal, p. 4.
has been actively participating in the negotiation or performance of the contract.\textsuperscript{79} Thus far, the \textit{Group of Companies doctrine} has only been explicitly accepted in some jurisdictions.\textsuperscript{80} The doctrine has especially been criticised for undermining party autonomy.\textsuperscript{81}

Consequently, the deciding body can ascertain consent to the joinder in different ways. However, as a baseline, any type of consent must be \textit{adequate} and ensure that the deciding body has the requisite jurisdiction. The borderline separating adequate from inadequate consent differs depending on the jurisdiction in question.

The importance of the parties’ adequate consent, and accordingly the deciding body’s requisite jurisdiction, is illustrated in the New York Convention. For instance, the arbitral award may be refused recognition and enforcement according to Article V(1)(c) if the arbitral award “[..] \textit{contains decisions on matters beyond the scope of the submission to arbitration} [..]”.\textsuperscript{82} Broadly, the term “matters” encompasses two situations relating to whether the deciding body had jurisdiction over the i) subject matter and ii) the parties addressed in the award (personal jurisdiction).\textsuperscript{83} As such, an arbitral award might risk being set aside on the grounds that the arbitral award addressed an additional party without the requisite jurisdiction.

Alternatively, an arbitral award could risk being set aside under Article V(1)(a) of the New York Convention according to which “[t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid [..]”.\textsuperscript{84} This is primarily related to disputes regarding the \textit{validity} of the parties’ consent (though mostly in relation to lack of capacity to agree to arbitrate) or the existence of a valid arbitration agreement.\textsuperscript{85}

\footnotesize
\begin{itemize}
  \item \textsuperscript{79} Ibid. p. 5ff. See also Born, p. 1559
  \item \textsuperscript{80} See Born, p. 1559
  \item \textsuperscript{81} See Samal, p. 4 & 15-16
  \item \textsuperscript{82} Article V(1)(c) of the New York Convention (Appendix 2, p. 3)
  \item \textsuperscript{83} Chapter V(1)(c), clause c, paragraph 16, of the New York Convention Guide
  \item \textsuperscript{84} See Article V(1)(a) of the New York Convention (Appendix 2, p. 3). See also Chapter V(1)(c), clause c, paragraph 24, of the New York Convention Guide
  \item \textsuperscript{85} Chapter V(1)(a), paragraph 5, the New York Convention Guide
\end{itemize}
3.2.2.2. Consent in relation to joinder illustrated in case law

A recent case from the Swiss Federal Supreme Court (the Federal Tribunal)\textsuperscript{86} illustrates the difficulties that come about from the conception of an adequate consent.

The case from the Federal Tribunal revolved around a dispute regarding several contracts for the supply of power to the Bangladeshi government. Following the conclusion of a contract, a contractor concluded a supply contract with a subcontractor.\textsuperscript{87} Subsequently, a dispute arose due to a defective diesel engine.\textsuperscript{88} After the initiation of arbitration pursuant to the ICC Arbitration Rules,\textsuperscript{89} an arbitral tribunal was constituted with its seat in Geneva. The respondents attempted to join the subcontractor into the proceedings. The subcontractor rejected the joinder and argued that the arbitral tribunal did not have the requisite jurisdiction over the subcontractor. This was because the subcontractor was neither a signatory to the contract nor the arbitration agreement.

In contrast, the Federal Tribunal found that the subcontractor’s participation in the formation and performance of the contract lacked a sufficient connection to the arbitration agreement. The arbitral tribunal reached its decision by taking into account the subcontractor’s participation in the formation and performance of the contract. The subcontractor had, \textit{inter alia}, participated in a number of early meetings prior to the signings.\textsuperscript{90} Therefore, the arbitral tribunal concluded that the subcontractor had been involved in the conclusion of the contracts. This relates to the legal theory of \textit{implied consent}.\textsuperscript{91} According to the arbitral tribunal, the subcontractor’s involvement was sufficient to constitute an adequate consent, and accordingly to be bound by the arbitration agreement. This decision was appealed by the subcontractor to the Federal Tribunal.

In contrast, the Federal Tribunal found that the subcontractor’s participation in the formation and performance of the contract did not create a sufficient connection to the arbitration agreement. This was because the subcontractor’s participation did not go further than what was

\textsuperscript{86} \textit{Decision 4A_124/2020}, Schweizerisches Bundesgericht, 13 November 2020
\textsuperscript{87} Ibid, section A.a and A.b.
\textsuperscript{88} Ibid, section A.c.
\textsuperscript{89} The decision does not mention what iteration of arbitration rules is used.
\textsuperscript{90} \textit{Decision 4A_124/2020}, Schweizerisches Bundesgericht, 13 November 2020, section 3.2.
\textsuperscript{91} See section 3.2.2.1. for a further description of \textit{implied consent}
agreed upon between the contractor and the subcontractor, i.e., in the sub-contractor agreement. On that basis, the Federal Tribunal set aside the partial award.

The decision suggests that if the theory of implied consent is to be applied, then C’s participation in the contract between A and B should go beyond what has been agreed to between C and B. This would, however, not be advisable as it could result in other contractual breaches. Consequently, this decision seems to suggest a strong apprehension towards the use of implied consent that stretches the consent of the additional party.

3.2.2.3. Equal treatment in relation to joinder

Another fundamental principle of arbitration is equal treatment of the parties. Equal treatment is of crucial importance as it safeguards the parties’ ability to have the same rights and amount of influence in the arbitral proceedings.\(^\text{92}\) For instance, breaches of equal treatment could pertain to the arbitration agreement containing a procedure which is significantly in favour of one party while being detrimental to the other, or the arbitrators granting only one of the parties the opportunity to be heard.\(^\text{93}\) In the context of joinder, equal treatment is especially reflected in relation to the constitution of the arbitral tribunal.

In bilateral arbitration cases with a three-member arbitral tribunal,\(^\text{94}\) the parties usually appoint one arbitrator each and the chairman of the arbitral tribunal is appointed either by the parties (insofar they agree), by selection of the already appointed arbitrators, or by appointing an authority designated by the parties or by the applicable institutional arbitration rules.\(^\text{95}\) This solution is typically not possible when an additional party is joined into the proceedings, especially if the additional party is joined after the constitution of the arbitral tribunal.

To avoid issues relating to, \textit{inter alia}, equal treatment, most institutional arbitration rules advise a procedure for the appointment of arbitrators in case of joinder.\(^\text{96}\) Some rules provide that the additional party joined after the constitution must waive, i.e. be deemed to have estopped, the right to appoint an arbitrator and the subsequent right to object due to an alleged breach of this

\(^{92}\) See Scherer, Prasad, and Prokic, p. 6.

\(^{93}\) See section 3.1.1.3. regarding the right to be heard

\(^{94}\) There might also be arbitral proceedings with a sole arbitrator. This study, however, focuses on the situations with three-members tribunal as these are most commonly iterated upon in institutional arbitration rules.

\(^{95}\) See Gomez, p. 482

\(^{96}\) See Lew, Misterlis, and Kröll, p. 381, section 16-16
right.\textsuperscript{97} Other institutional arbitration rules state that the \textit{entire} arbitral tribunal is to be revoked, whereby either the institution or the parties, including the additional party, must appoint a new arbitral tribunal.\textsuperscript{98} The first option, however, deprives the parties from one of the main benefits of arbitration: the possibility to choose an arbitrator. Whilst the second option may cater to this benefit, it is likely to do so at the expense of significant delays to the proceedings, notwithstanding that all the parties can agree. A third option is to remove altogether the option of joining additional parties after the constitution of the arbitral tribunal.\textsuperscript{99} This option will mitigate the risks associated with joinder after the constitution but deny the aforementioned benefits of joinder.

Ultimately, if an additional party is joined to the proceedings \textit{without} having participated in, or consented to, the constitution of the arbitral tribunal, several issues regarding equal treatment of the parties could arise. Issues, which could risk the arbitral award being set aside under, \textit{inter alia}, the New York Convention.

While it is widely acknowledged that Article V(1)(b) of the New York Convention\textsuperscript{100} is the ground for setting an arbitral award aside due to unequal treatment of the parties,\textsuperscript{101} Article V(2)(b) of the New York Convention\textsuperscript{102} also seems to reflect the principle of equal treatment.\textsuperscript{103} The New York Convention Article V(2)(b) prescribes that an arbitral award might be refused recognition or enforcement if “[…] the award would be contrary to the public policy of that country.”\textsuperscript{104}

3.2.2.4. Equal treatment in relation to joinder illustrated in case law

The \textit{Dutco} case\textsuperscript{105} is of prime relevance, and often referred to, in relation to the issues pertaining to unequal treatment when constituting the arbitral tribunal. The \textit{Dutco} case, and the issues contained therein, provide one likely motivation for why most institutional arbitration rules

\textsuperscript{97} See 4.2, section e, 3., where all the arbitration rules with this approach are mentioned
\textsuperscript{98} See 4.2, section e, 2., where all the arbitration rules with this approach are mentioned
\textsuperscript{99} See, for instance, the HKIAC Rules in section 4.1.G, litra e
\textsuperscript{100} See Appendix 2, p. 3
\textsuperscript{101} See Scherer, Prasad, and Prokic, p. 3
\textsuperscript{102} See Appendix 2, p. 3
\textsuperscript{103} As will be elaborated on in section 3.2.2.4, this was the case in \textit{Dutco Construction v. BKMI Industrienlagen GmbH et Siemens AG}, French Cour de Cassation, 7 January 1992
\textsuperscript{104} See Article V(2)(b) of the New York Convention (Appendix 2, p. 3)
\textsuperscript{105} \textit{Dutco Construction v. BKMI Industrienlagen GmbH et Siemens AG}, French Cour de Cassation, 7 January 1992
today contain specific provisions on how to deal with the appointment of arbitrators in multi-party situations.

In 1981, BKMI Industrieanlagen GmbH (“BKMI”) was contacted by an Omani company and was subsequently hired to build a cement factory. In due course, BKMI entered into a silent consortium agreement with Siemens and Dutco to perform parts of the construction work. The agreement between the three parties contained an arbitration clause, which stated that all disputes should be solved in accordance with the ICC Rules by three arbitrators, also appointed in accordance with the ICC Rules.

In 1986, Dutco (the claimant) filed a joint request for arbitration with The ICC International Court of Arbitration (“the ICC Court”) due to several alleged failures by BKMI and Siemens (the respondents) in the performance of the agreement. Furthermore, Dutco appointed one arbitrator, which was accepted by the ICC Court. Both BKMI and Siemens objected to the appointment. Nevertheless, the ICC Court, according to its practice at the time, requested BKMI and Siemens to jointly nominate an arbitrator, which they refused to do. Accordingly, the ICC Court threatened to appoint an arbitrator on their behalf, should they not reach an agreement. Thereafter, BKMI and Siemens unwillingly reached a decision and, under protest, jointly appointed an arbitrator.

In 1988, the arbitral tribunal rendered an interim arbitral award which confirmed the regularity in the procedure of appointing the arbitrators and that the proceedings could be pursued as a multi-party proceeding with one claimant and two respondents. BKMI and Siemens, however, initiated an action for the French Court of Appeal to have the interim award set aside due to unequal treatment in relation to the appointment of arbitrators. The case was decided upon by Cour d’appel in 1989.

The French Cour d’appel ruled that the procedure did not constitute a violation of public policy (ordre public), including BKMI’s and Siemens’ right to equal treatment. The underlying rationale was that the three parties were deemed to have accepted that the respondent-side and

106 The decision does not mention what iteration of arbitration rules is used
the claimant-side should *each* appoint *one* arbitrator. This was because the arbitration agreement referred to the ICC Rules which dictated each party, i.e., claimant and respondent, to appoint an arbitrator. Irrespective of the fact that the side with two parties, in this case the respondent-side, would have to agree upon *one* arbitrator.

In 1992, the decision by the Cour d’appel was annulled by the French Cour de cassation. The Cour de cassation ruled that the procedure, according to which the arbitrators had been appointed, constituted a violation of French ordre public. As a consequence, Dutco had a favourable position to influence the composition of the arbitral tribunal and, ultimately, to the effect of changing the outcome of the proceedings. Accordingly, the Cour de cassation stated that it was not possible for the parties to waive their right to equal treatment through an arbitration agreement, no less so if the chosen institutional arbitration rules provide for a procedure such that each side should nominate an arbitrator.

### 3.3. Drafting joinder provisions in institutional arbitration rules

When creating joinder provisions, the institutions must make a balancing act that ensures the benefits of joinder (procedural efficiency) while, at the same time, avoiding the risks (inadequate consent and unequal treatment) that joinder may entail. The institutional arbitration rules ought supposedly to help the arbitral tribunal in rendering enforceable arbitral awards. Consequently, several balancing acts are needed by the arbitral institutions when drafting a joinder provision.

Throughout the last decade and especially in recent years, institutions have created the joinder provision which they are convinced is the most “attractive” to parties. As the analyses will show, this has not resulted in the creation of identical, but rather very inconsistent and arguably unique joinder provisions. As for the balancing act, which constitutes the “best” and most “attractive” joinder provisions, there is a seeming misalignment between the institutions.
4.1. The development within joinder provisions

4.1.1. Short introduction to the analysis

The purpose of this analysis is to illustrate the development within the joinder provisions of 25 chosen rules. The analysis will lay the groundwork for the comparative analysis regarding the prevailing tendencies in joinder provision (section 4.2) and subsequent discussion regarding the role of consent as a jurisdictional basis and its limitation on joinder provisions (section 5).

4.1.2. The parameters

In the ensuing analysis, the joinder provisions from the chosen institutional arbitration rules will be presented and examined as per the seven items stated below (a-g).107 This covers a brief introduction (a), a categorisation of five particularly interesting parameters (b-f) and, finally, any concluding remarks (g).

a. Introduction

In “section a”, the institution and its rules are briefly introduced. The primary aim of the introduction is to establish when the joinder provision was introduced and whether it has been revised since.

b. Consent / Party Agreement

“Section b” discusses how different institutions ensure that the deciding body has the requisite jurisdiction over the additional party to order the joinder. Specifically, is explicit consent from all parties required? Is it required that the additional party is a signatory to the arbitration agreement upon which the proceedings are commenced? Is it sufficient that the additional party is “bound by” the arbitration agreement? Or is jurisdiction ascertained by other means?

c. Circumstances to be Taken into Account

In “section c”, the circumstances to be taken into account by the deciding body are designated. Some institutional arbitration rules prescribe that specific circumstances must be taken into consideration.

107 See section 4.1.2 for a further description of content of the parameters
account. Some rules do not prescribe any specific circumstances, and some rules grant the
deciding body discretion to choose the circumstances which it deems relevant. Having speci-
fied circumstances in the joinder provision, the deciding body cannot intentionally avoid taking
them into account. This will, at least to some extent, naturally limit the discretion of the decid-
ing body. If no circumstances are specified in the rules, the deciding body naturally has a
broader discretion to include the circumstances which it deems relevant.

d. Temporal Restrictions

“Section d” focuses on temporal restrictions which may impede a request for joinder. Temporal
restrictions are presumably included in joinder provisions to ensure efficient conduct of the
arbitral proceedings, and to avoid possible risks associated with late joinder. Temporal re-
strictions entail several advantages, especially for the additional party to be joined. For in-
stance, if the temporal restriction entails that joinder should be requested prior to the constitu-
tion, the additional party will often be able to participate in the selection of arbitrators. Con-
versely, the disadvantage of including temporal restrictions is that it may exclude an additional
party from being joined to the proceedings. In these situations, one could imagine that another
set of arbitral proceedings would have to be initiated and subsequently result in conflicting
awards regarding (to some extent) the same dispute. As such, it is interesting to analyse how
the different joinder provisions balanced these opposing considerations.

e. Constitution of the Arbitral Tribunal

“Section e” deals with the parties’ participation in the composition of the arbitral tribunal. Es-
pecially in this part of arbitration, the parties’ participation is considered to be a cornerstone as
it is intrinsically tied to the fairness and independence of the arbitral proceedings. In the
wake of the Dutco case, the vast majority of institutions have included procedures regarding
the appointment of arbitrators. Besides describing the institution’s chosen procedure, the sub-
sequent advantages and disadvantages will be illuminated.

108 See 4.2, section c, 2. regarding all the joinder provisions that includes specific circumstances
109 See section 3.2.2.3 of the introduction
110 See section 3.1.1.2. of the introduction
111 See section 3.2.2.4. of the introduction
f. The Deciding Body

“Section f” focuses on the deciding body. In most joinder provisions, the deciding body is explicitly designated. Usually, the deciding body is either the arbitral tribunal, the institution or both. In situations where the arbitral tribunal and the institution are jointly designated as deciding bodies, the competences are typically divided in relation to when the request for joinder is received. Such options represent the normative approaches, albeit there are variations to this standard.

g. Concluding Remarks

Lastly, “section g” of the analysis will contain a brief concluding remark. These sections will primarily focus on the particularly interesting features of the joinder provisions especially in relation to the development within the iterations of the joinder provision.

4.1.3. The analysis

A. UNCITRAL

1. Introduction

UNCITRAL was established in December 1966 by the United Nations General Assembly. In 1976, UNCITRAL adopted its first arbitration rule set, which parties can agree to employ for the conduct of their arbitral proceedings. Today, these rules are widely employed, especially for the resolution of disputes in ad hoc arbitration. The UNCITRAL arbitration rules (“the UNCITRAL Rules”) were revised and became effective as of 15 August 2010. Further, minor revisions were made to the UNICTRAL Rules in 2013.
1. The development of the joinder provision

a. Introduction

The first joinder provision in the UNCITRAL regime was introduced in the 2010 revision. The joinder provision was added in Article 17.5. The UNCITRAL Rules were further revised in 2013, where the joinder provision remained unchanged. As will be illustrated, the UNCITRAL Rules have often, at least to some extent, been influential to other institutional arbitration rules.

b. Consent / Party Agreement

According to Article 17.5, joinder is permitted “provided that the additional party is a party to the arbitration agreement.”\(^{116}\) Thus, by agreeing to arbitrate according to the UNCITRAL Rules in the arbitration agreement, all parties must, in advance, be deemed to have agreed to a potential joinder.\(^{117}\) As such, no further consent from the original parties or the additional party is required in relation to the joinder.

c. Circumstances to be Taken into Account

In the UNCITRAL Rules, the arbitral tribunal must only allow joinder “after giving all parties, including the person or persons to be joined, the opportunity to be heard.”\(^{118}\) As such, there is only a duty for the arbitral tribunal to consult with the parties, and not to obtain further consent to the joinder beyond that contained in the arbitration agreement. Should the arbitral tribunal find, after having heard the parties, “[..]that joinder should not be permitted because of prejudice to any of those parties [..]”,\(^{119}\) the arbitral tribunal can deny the request for joinder. The provision does not provide for an explanation of what prejudice to any of the parties entails. However, an example could be the issue which China raised in its comments to the draft UNCITRAL 2010 Rules; the additional party could be prejudiced by not having the right to participate in the appointment of arbitrators.\(^{120}\)

d. Temporal Restrictions

Article 17.5 of the UNCITRAL Rules does not set any temporal restrictions for the

\(^{116}\) See Article 17.5. of the UNCITRAL 2010 and 2013 Rules (Appendix 1A, pp. 46 and 90)
\(^{117}\) See Gomez, p. 491
\(^{118}\) See Article 17.5. of the UNCITRAL 2010 and 2013 Rules (Appendix 1A, pp. 46 and 90)
\(^{119}\) See Article 17.5. of the UNCITRAL 2010 and 2013 Rules (Appendix 1A, pp. 46 and 90)
\(^{120}\) See UN - General Assembly, Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules. Compilation of comments by Governments and international organizations, p. 2
joinder request. Nonetheless, as only the arbitral tribunal is mentioned in the joinder provision, the joinder request will presumably be decided upon after the constitution of the tribunal. As will be described in section f, this is presumably linked to the fact that the UNCITRAL Rules are primarily used in *ad hoc* arbitrations.

e. Constitution of the Arbitral Tribunal

The joinder provision does not specify how the constitution of the arbitral tribunal should be dealt with in case of joinder. Therefore, the additional parties’ rights could potentially be prejudiced in these situations.

a. The Deciding Body

The arbitral tribunal is seemingly the only designated deciding body. This does, however, make sense as the UNCITRAL Rules are primarily used in *ad hoc* arbitrations, which is not administered by an institution.

b. Concluding remarks

In conclusion, the UNCITRAL joinder provision is relatively stringent in its requirements, as it only allows the joinder of additional parties who are signatories to the arbitration agreement. This could be viewed as a rather “conservative” approach than other institutional arbitration rules, which allow for joinder of non-signatory additional parties.

2. B. CRCICA

1. Introduction

CRCICA (The Cairo Regional Centre for International Commercial Arbitration) is one of the institutions, which have been influenced by the UNCITRAL Rules’ joinder provision. In fact, CRCICA has since its establishment adopted all the UNCITRAL Rules with minor modifications. These modifications are mainly due to the necessity of adapting the “*ad hoc*-friendly” UNCITRAL Rules to fit into an institutional arbitration context.\(^{121}\) The newest iteration of the rules (“the CRCICA Rules”) were put into force as of 1 March 2011. These rules were created

\(^{121}\) See: [https://crcica.org/Arbitration.aspx](https://crcica.org/Arbitration.aspx)
immediately following the adoption of the UNCITRAL 2010 Rules. Like the UNCITRAL Rules, excluding the minor revision in 2013, the CRCICA Rules have not been revised since.

2. The development of the joinder provision
   a. Introduction

   A joinder provision was first introduced as Article 17.6 in the 2011 iteration of the CRCICA Rules. Accordingly, the joinder provision was a part of the “general provisions” prescribing the powers of the arbitral tribunal. As the article is identical to Article 17.5 in the UNCITRAL 2010 and 2013 Rules, further examination has been omitted.

   b. Consent / Party Agreement

   [OMITTED - See section 4.1.3, litra b]

   c. Circumstances to be Taken into Account

   [OMITTED - See section 4.1.3, litra c]

   d. Temporal Restrictions

   [OMITTED - See section 4.1.3, litra d]

   e. Constitution of the Arbitral Tribunal

   [OMITTED - See section 4.1.3, litra e]

   f. The Deciding Body

   [OMITTED - See section 4.1.3, litra f]

   g. Concluding remarks

   Article 17.6 of the CRCICA Rules is an adoption of the joinder provision in Article 17.5 of the UNCITRAL 2010 and 2013 Rules.

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122 See the timeline in Appendix 3
C. AIAC

1. Introduction

Another institution, which has, at least initially, been influenced by the UNCITRAL Rules is the AIAC (Asian International Arbitration Centre), the formerly KLRCA (Kuala Lumpur Regional Centre for Arbitration). The institution, which was established in 1978 (the first Centre in Asia)\(^{123}\) has had several iterations of its arbitration rules ("the AIAC Rules") with the newest rules entering into force 1 August 2021.

2. The development of the joinder provision

a. Introduction

The first joinder provision in the AIAC Rules was introduced in 2013 as a part of the general provision in Article 17.5. This provision was also identical to Article 17.5 in the UNCITRAL 2010 and 2013 Rules. The joinder provision was further revised in 2017, 2018, and 2021, marking the divergence from the UNCITRAL Rules.

b. Consent / Party Agreement

As AIAC adopted the UNCITRAL Rules’ joinder provision, joinder was in the 2013 AIAC Rules only allowed if the additional party was a *signatory* to the arbitration agreement.\(^{124}\)

With the revision of the joinder provision in the AIAC 2017 Rules, joinder was allowed insofar as "[...] all parties to the arbitration and the Additional Party give their consent in writing to the joinder or provided that such Additional Party is prima facie bound by the arbitration agreement [...]".\(^{125}\) Accordingly, there were now two options for establishing jurisdiction over the additional party. Besides giving explicit consent to the joinder, the additional party could

\(^{123}\) See: https://www.aalco.int/arbitrationAIAC

\(^{124}\) See Rule 17.5 of the AIAC 2013 Rules (Appendix 1A, p. 381)

\(^{125}\) See Rule 9.1 of the AIAC 2017 Rules (Appendix 1A, p. 451)
be joined to the arbitral proceedings if it was “prima facie bound by the arbitration agreement”.\textsuperscript{126} The use of the expression "bound by" could include allowance of different legal theories/doctrines to be used to infer the additional party’s consent.\textsuperscript{127} Consequently, the joinder provision was arguably more “liberal” in its requirements compared to the previous iterations.

In 2018, the rules were revised once more with only minor changes to the joinder provision. For instance, it was added to Rule 9.3.(c) that a separate arbitration agreement could be included in the request for joinder. This does not, however, change the fundamental fact that the additional party (and original parties) had to either give their consent in writing or be prima facie bound by the arbitration agreement. Thus, its inclusion could possibly relate to cases where a specific contract lacks an arbitration clause, and where the parties have entered into a separate arbitration agreement. This situation can be of relevance in complex contractual relationships.\textsuperscript{128}

More recently, in 2021, the rules were revised again, and the previous Rule 9 was now revised as Rule 21. One of the additions to the joinder provision is that the arbitral tribunal or the institution (depending on when the request is received)\textsuperscript{129} may join an additional party on the basis that “the participation of such Additional Party is necessary for the efficient resolution of the dispute and directly affects the outcome of the arbitral proceedings.”\textsuperscript{130} In principle, the deciding body would now have the authority to join a non-signatory based only on notions of an efficient resolution of the dispute. This option is however limited by the fundamental requirement in arbitration, as also mentioned in the AIAC Rules several times,\textsuperscript{131} that the arbitral tribunal must have jurisdiction over all parties.\textsuperscript{132}

c. Circumstances to be Taken into Account

According to the AIAC 2013 Rules, the arbitral tribunal had to give all parties, including the additional party, the opportunity to be heard regarding the request for joinder. In the 2017 rules,

\textsuperscript{126} See Rule 9.1 of the AIAC 2017 Rules (Appendix 1A, p. 451)
\textsuperscript{127} See the discussion in section 5.2. See also Born, p. 1522.
\textsuperscript{128} See: https://www.mofo.com/resources/insights/180315-asian-arbitration-rules.html
\textsuperscript{129} See section d below regarding temporal restrictions
\textsuperscript{130} See Rule 21.1.(c) and Article 21.6.(c) of AIAC 2021 Rules (Appendix 1A, pp. 644f)
\textsuperscript{131} See, for instance, Rule 21.7 of the AIAC 2021 Rules (Appendix 1A, p. 646)
\textsuperscript{132} See Rule 20.3 of the AIAC 2021 Rules, where a party can plea that the arbitral tribunal is acting in excess of its authority (Appendix 1A, p. 644)
it was additionally required that other relevant circumstances should be taken into account. It was, however, not further described what relevant circumstances implied. This requirement was preserved in the AIAC 2018 and 2018 Rules.

d. Temporal Restrictions

While not being part of the previous iterations, a temporal restriction was added to the AIAC 2021 Rules. According to Rule 21.1, the request for joinder must be filed "no later than the filing of the statement of defence and counterclaim, or at any time thereafter provided there exists exceptional circumstances". The addition of such a temporal restriction is presumably to contribute to the efficient conduct of the proceedings and the avoidance of the possible risks associated with a “late” joinder.

e. Constitution of the Arbitral Tribunal

While not being a part of the previous iterations, the AIAC 2017 Rules included rules pertaining to a joinder’s influence on the constitution of the arbitral tribunal. This was added in conjunction with a joint competence between the arbitral tribunal and the institution. The AIAC 2017 and 2018 Rules’ joinder provisions dealt with potential issues of equal treatment relating to the constitution of the arbitral tribunal as follows: “If the Additional Party is joined to the arbitration before the date on which the arbitral tribunal is constituted, the Director shall appoint the arbitral tribunal and may release any arbitrators already appointed. In these circumstances, all parties shall be deemed to have waived their right to nominate an arbitrator.” The joinder provisions did not, however, address the situation where joinder was ordered after the constitution of the arbitral tribunal.

This approach was, with only minor language changes, preserved with the AIAC 2021 Rules. Though, due to the inclusion of the temporal restriction, an additional party will primarily only be joined prior to the constitution of the arbitral tribunal. As such, the absence of a procedure for after the constitution is, in contrast to the previous iterations, not necessary.

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133 See Article 9.5. and Article 9.6. of the AIAC 2017 Rules (Appendix 1A, p. 452)
134 See Article 21.1 of the AIAC 2021 Rules (Appendix 1A, p. 644)
135 See section f below regarding the deciding body
136 See section 3.2.2.3 of the introduction
137 See Article 9.8 of the AIAC 2017 Rules (Appendix 1A, p. 453)
f. The Deciding Body

Prior to the AIAC 2017 Rules, the arbitral tribunal was the only deciding body. With the AIAC 2017 Rules, this approach was replaced with "[..] A Request for Joinder shall be submitted to the arbitral tribunal or, prior to the constitution of the arbitral tribunal, to the Director."\textsuperscript{138}

As such, the deciding body was dependent on when the request was received. Nevertheless, the competence was not shared equally as the arbitral tribunal could decide on requests for joinder \textit{ex officio}, notwithstanding a decision of the director.\textsuperscript{139} This joinder provision was preserved in the following iterations.

g. Concluding remarks

Upon review of the changes made from the AIAC 2013 Rules to the AIAC 2021 Rules, it appears that procedural efficiency has seemingly become more important. This is especially the case, given the added option of joining an additional party based on notions of efficiency and the addition of the temporal restriction which entails that joinder is usually not possible after the constitution of the arbitral tribunal.

D. DAI

1. Introduction

Another institute, which was also influenced by the UNCITRAL Rules in their first iteration of a joinder provision, is the DAI (The Danish Arbitration Institute).\textsuperscript{140} The institution, which was established in 1981, has had multiple iterations of its arbitration rules ("the DAI Rules") with the newest rules entering into force on 13 April 2021.

2. The development of the joinder provision

a. Introduction

The first joinder provision in the DAI Rules was included with the 2013 revision as Article 9(3). In 2021, the DAI Rules were further revised, and the joinder provision was changed and placed in Article 16.

\textsuperscript{138} See Article 9.3 of the AIAC 2017 Rules (Appendix 1A, p. 451)
\textsuperscript{139} See Article 9.7 of the AIAC 2017 Rules (Appendix 1A, p. 452)
\textsuperscript{140} The first joinder provision in the DAI 2013 Rules was added after the addition of a joinder provision in the UNCITRAL Rules. See Appendix 3.
b. Consent / Party Agreement

According to Article 9(3) of the DAI 2013 Rules, the arbitral tribunal should “[...] decide on such [joinder] request, provided that an arbitration agreement covering the third party/parties exists [...]”. As such, the joinder provision only allowed for joinder of additional parties, who were covered by the arbitration agreement. It is not clear whether this requirement means that the additional party should be a signatory to the arbitration agreement, as seen in the UNCITRAL Rules, or whether the requirement is more similar to the “bound by” requirement, as seen in the AIAC Rules. Arguably, the latter seems more likely. Thus, the pool of additional parties, who could be joined to the proceedings is seemingly broadened.

This requirement was omitted with the 2021 revision. As such, there is now no explicit requirement that the additional party must be covered by the arbitration agreement. Nevertheless, it is presumably still a requirement. According to Article 16(2) “[...] The request shall be in accordance with the requirements in Art. 4 - 6 [...]”, and Article 6(1), which concerns the requirements for a request for joinder, prescribing that “(1) Documents etc. referred to in the Statement of Claim, including the arbitration agreement, shall be attached.”

Additionally, Article 16(7) refers to Article 25(1), which states that “[t]he Arbitral Tribunal shall rule on its own jurisdiction, including in relation to any objections with respect to the existence or validity of the arbitration agreement(s) [...]”. Accordingly, it does not seem like there has been any further reasoning behind the removal of the explicit requirement. Thus, an arbitration agreement covering the additional party still seems a requirement.

c. Circumstances to be Taken into Account

Previously in the DAI 2013 Rules, the arbitral tribunal should decide on the request for joinder “[...] after consulting with all of the parties, including the party/parties to be joined, taking into account all relevant circumstances, including the mutual connection between such third party/parties and the parties to the pending case and the progress already made in the pending case.”

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141 See Article 9(3) of the DAI 2013 Rules (Appendix 1A, p. 732)
142 See Article 16(2) of the DAI 2021 Rules (Appendix 1A, p. 765)
143 See Article 6(1) of the DAI 2021 Rules (Appendix 1A, p. 760)
144 See Article 25(1) of the DAI 2021 Rules (Appendix 1A, p. 769)
case.”  As such, the joinder provision seems to emphasise the importance of, *inter alia*, the additional party’s relevance to, and the procedural efficiency of, the pending case.

With the 2021 revision, the circumstances were amended to “[..] the specific circumstances, including the parties’ concluded arbitration agreement(s), the connection between the claims and the connection between third party and the parties.” The requirement of consulting with the parties was only preserved in certain situations: “[i]f the third party and/or a party objects to the request to join the additional party, the Arbitral Tribunal shall decide on the objection, after consultation of the third party and the parties.” Accordingly, even if a party objects, the arbitral tribunal is only obliged to consult with the parties, and not obtain any further consent to the joinder.

d. Temporal Restrictions

In 2021, a temporal restriction was added to the joinder provision. According to Article 16(2), “A request [..] shall be submitted before the referral of the case to the Arbitral Tribunal, see Art. 24, unless the parties have agreed otherwise or particular circumstances apply. [..]” As such, a request for joinder must now be made before the arbitral tribunal is constituted, unless the parties have agreed otherwise or if any particular circumstances apply.

e. Constitution of the Arbitral Tribunal

The joinder provision in the DAI 2013 Rules was silent when it came to the additional parties’ possible right to participate in the constitution of the arbitral tribunal. This seems logical since the joinder could only be decided upon after the constitution of the arbitral tribunal. The risks associated with joinder at that stage of the proceedings was, however, still present.

This was changed with the 2021 revision. With the current revision, if the joinder was granted prior to the constitution of the arbitral tribunal, and “[..] if the joined third party cannot agree to the appointment of the members of the Arbitral Tribunal made by the original parties in the arbitration, the members of the Arbitral Tribunal are released [..]. All members of the Arbitral Tribunal shall be appointed by the Chair’s Committee, unless the appointment(s) can be made

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145 See Article 9(3) of the DAI 2013 Rules (Appendix 1A, p. 732)
146 See Article 16(3) of the DAI 2021 Rules (Appendix 1A, p. 765)
147 Ibid
“in accordance with another procedure, which is agreed between the parties, including the third party concerned.”

On the other hand, if joinder occurs after the case has been referred to the arbitral tribunal, “[..] the third party is required to agree to the appointment of the members of the Arbitral Tribunal made by the original parties to the case.” If the additional party agrees to the appointment of the arbitral tribunal, then it must be deemed to have estopped its right to participate further in this regard. Thereby, the DAI 2021 Rules attempted to remedy the challenge of joinder in relation to the constitution of the arbitral tribunal.

f. The Deciding Body

The DAI 2013 Rules designated the arbitral tribunal as the only deciding body. With the 2021 revision, the institution is now also designated as a deciding body. Whether it is the arbitral tribunal or the institution that decides on the request for joinder depends on when the request is filed.

The institution, i.e., the Chair’s Committee, may decide on the request for joinder prior to the referral of the case to the arbitral tribunal. After the referral, the arbitral tribunal will be the deciding body. Article 16(7) further details that “[t]he decision of the Chair’s Committee [..] is without prejudice to the Arbitral Tribunal’s power to rule on its own jurisdiction [..]” This approach, besides being in accordance with the competence-principle, stresses the importance of the arbitral tribunal ensuring that it has the requisite jurisdiction over the parties.

g. Concluding remarks

The joinder provision in the DAI Rules has, in some ways, developed a lot since the 2013 iteration in Article 9(3). The development shows an increasing focus on procedural efficiency by including, inter alia, temporal restrictions and allowing the institution to join additional parties, but also seems to ensure equal treatment by explicitly including paragraphs on how appointment of arbitrators should be dealt with in case of joinder.

148 See Article 16(4) of the DAI 2021 Rules (Appendix 1A, p. 765)
149 See Article 16(5) of the DAI 2021 Rules (Appendix 1A, p. 765)
150 See Article 16(3) of the DAI 2021 Rules (Appendix 1A, p. 765)
E. LCIA

1. Introduction

Similarly to UNCITRAL, the LCIA (The London Court of International Arbitration) is an influential institution. LCIA is one of the world’s leading international institutions for commercial dispute resolution providing, *inter alia*, administrative arbitral services.\(^{151}\) More importantly, LCIA was one of the *first* institutions to include a joinder provision in its rules. The institution, which was formally inaugurated in 1892,\(^{152}\) has had multiple iterations of its arbitration rules (“the LCIA Rules”) with the newest rules becoming effective on 1 October 2020.

2. The development of the joinder provision

a. Introduction

LCIA was one of the first institutions to include a joinder provision in 1998 as Article 22.1.(h). Article 22 consisted of a list of “Additional Powers of the Arbitral Tribunal”. The joinder provision was revised in 2014 and 2020.

b. Consent / Party Agreement

According to Article 22.1(h) in the LCIA 1998 Rules, the arbitral tribunal had the power to join additional parties, “[..] only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, [..]”.\(^{153}\) As such, there was no requirement with regard to the additional party being a signatory or in other ways being bound by the arbitration agreement. Only consent from some of the parties, i.e., the additional party and the requesting party, was required.

Regarding the requirement of consent “*in writing*”, a similar requirement is found in the New York Convention. According to the New York Convention, in writing means “[..] signed by the parties or contained in an exchange of letters or telegrams”.\(^{154}\)

\(^{151}\) See: https://www.lcia.org/LCIA/introduction.aspx
\(^{152}\) See: https://www.lcia.org/LCIA/history.aspx
\(^{153}\) See Article 22.1(h) of the LCIA 1998 Rules (Appendix 1A, p. 799)
\(^{154}\) See Articles II(1) & II(2) in New York Convention (Appendix 2, p. 2)
With the revision in 2014, the joinder provision was amended to: “[...] provided that any such third person and the applicant party have consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; [...]”. 155 As such, it was now also possible to join an additional party if the requesting party and the additional party prior to the commencement date consented to the joinder in the arbitration agreement. Seemingly, it was not sufficient that the arbitration agreement incorporated arbitrations rules, which included a procedure for joinder. A consent to the joinder in the arbitration agreement was required. Note, however, that it was also still possible to join the additional party based on consent to the joinder in writing.

In the LCIA 2020 Rules, the joinder provision was further amended to: “[...] have consented expressly to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement [...]”. 156 While the term “expressly” is new, it is debatable what the exact consequences of this change are as explicit consent has seemingly always been of importance throughout the different iterations of the LCIA Rules.

c. Circumstances to be Taken into Account

Neither the LCIA 1998 nor the 2014 Rules’ joinder provision mentioned any circumstances that should be taken into account by the deciding body. In the LCIA 2020 Rules, it was added that the arbitral tribunal “[...] shall have the power, [...] only after giving the parties a reasonable opportunity to state their views [...]”. 157 While not being a “circumstance” to be taken into account per se, this procedural change can still have some merit as the parties are now, explicitly, given a chance to state their views. Nonetheless, the arbitral tribunal is not bound by the parties’ views and may decide otherwise.

d. Temporal Restrictions

Neither the LCIA 1998, 2014, nor the 2020 Rules’ joinder provisions contain any explicit temporal restrictions. Nevertheless, since only the arbitral tribunal seems to be the deciding body, a request for joinder will presumably first be decided upon after the constitution.

155 See Article 22.1(viii) of the LCIA 2014 Rules (Appendix 1A, p. 822)
156 See Article 22.1(x) of the LCIA 2020 Rules (Appendix 1A, p. 844)
157 Ibid
e. Constitution of the Arbitral Tribunal

None of the iterations mention joinder’s influence on the constitution of the arbitral tribunal. As such, issues relating to equal treatment could arise and risk the arbitral award being subject to setting aside procedures under the New York Convention.158

f. The Deciding Body

Throughout all the iterations of the LCIA Rules, only the arbitral tribunal seems to have the competence to decide on a request for joinder.

g. Concluding remarks

The main focus of the LCIA Rules’ joinder provision is the consent in writing of all participating parties. As such, the LCIA Rules arguably seem to focus more on party autonomy and the importance of the parties’ explicit consent rather than giving the arbitral tribunal wide discretion to decide on the joinder in the name of, inter alia, procedural efficiency.

F. MIAC

1. Introduction

MIAC (The Madrid International Arbitration Centre) seems to have a similar approach to joinder as the LCIA Rules. MIAC is a new institution which was established on 1 January 2020 as a result of the merger of different courts of arbitration.159 MIAC is a body of the Madrid International Arbitration Association which was established on 25 July 2019.160 MIAC’s newest, and only, set of rules (“the MIAC Rules”) became effective on 1 January 2020.

2. The development of the joinder provision

a. Introduction

In the 2020 rules, MIAC included a joinder (and intervention) provision in Article 17.

158 For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
159 See: https://madridarb.com/en/bodies/
160 Ibid
b. Consent / Party Agreement

Prior to constitution, joinder is allowed “[..] if this is permitted by the arbitration agreement [..]”\(^{161}\). The requirement of when joinder is “permitted” by the arbitration agreement is vague. According to some authors, such a requirement entails that joinder is permitted when the arbitration agreement refers to institutional arbitration rules that allow for joinder,\(^{162}\) and presumably that all parties, including the additional party, is a signatory to that arbitration agreement. After the constitution, joinder is allowed in case “[..] all parties, including the third party, so agree in writing [..]”\(^{163}\). As the requirement of written consent is the only option after the constitution is presumably related to it being viewed upon as a waiver of the additional party’s right to participate in appointment of arbitrators.\(^{164}\)

c. Circumstances to be Taken into Account

In relation to the circumstances, the deciding body is only obliged to consult all of the parties, including the additional party: “[..] having heard all of them, allow such third party to be joined in the arbitration [..]” This approach is similar to the LCIA Rules.\(^{165}\)

d. Temporal Restrictions

The joinder provision does not set any explicit temporal restrictions for the joinder request. Evidently, a request for joinder can be filed both prior to, and after, the constitution of the arbitral tribunal.

e. Constitution of the Arbitral Tribunal

In contrast to the LCIA Rules,\(^{166}\) this joinder provision explicitly states that if the additional party is joined prior to the constitution of the arbitral tribunal: “[..] This third party shall participate in the appointment of arbitrators in accordance with the previous Articles.”\(^{167}\)

Thereby, the MIAC rules aim to preserve and protect the additional party’s right to participate in the constitution. Ultimately to ensure equal treatment. However, if the request is received after the constitution and the joinder is subsequently allowed: “[..] The involved third party

\(^{161}\) See Articles 17.1 and 17.2. of the MIAC 2020 Rules (Appendix 1A, p. 871)
\(^{162}\) See López-Ilbor, de Luna, Jover and Legal
\(^{163}\) See Articles 17.1 and 17.2. of the MIAC 2020 Rules (Appendix 1A, p. 871)
\(^{164}\) See the last sentence in Article 17.2 of the MIAC 2020 Rules (Appendix 1A, p. 871)
\(^{165}\) See section 4.1.E, litra c
\(^{166}\) Ibid.
\(^{167}\) See Article 21.1 of the MIAC 2020 Rules (Appendix 1A, p. 873)
shall be deemed to waive its rights to participate in the appointment of arbitrators.”\textsuperscript{168} The risks that are usually associated with this waiver are mitigated as the requirement of written consent is the only possibility after the constitution for the deciding body to create a jurisdictional basis to the joinder.

f. The Deciding Body

In contrast to the vast majority of institutions, the deciding body pursuant to Article 17 is the Centre. This is the case both prior to, and after, the constitution of the arbitral tribunal. Nevertheless, the arbitral tribunal is still empowered to decide on its own jurisdiction in accordance with the competence-competence principle, which is enumerated in Article 39 of the MIAC Rules. Accordingly, if the arbitral tribunal finds that it does not have jurisdiction over the additional party, it cannot decide on the case even if the Centre allowed the joinder.

g. Concluding remarks

Consequently, the joinder provision is presumably inspired by the LCIA Rules in relation to the requirement of consent in writing. On the other hand, MIAC has taken a different approach in terms of giving the deciding competence to the Centre, which is explicitly the only deciding body. Furthermore, in contrast to the LCIA Rules, the joinder provision also contains a procedure for the additional party’s participation in the constitution of the arbitral tribunal in case of joinder.

G. HKIAC

1. Introduction

Similar to UNCITRAL and LCIA, the HKIAC (The Hong Kong International Arbitration Centre) also seems to be influential. According to the Queen Mary International Arbitration Survey 2021, HKIAC is one of the most preferred institutions in the world.\textsuperscript{169} The institution, which was established in 1985, has had several iterations of its arbitration rules (“the HKIAC Rules”) with the newest rules coming into effect as of 1 November 2018.

\textsuperscript{168} See Article 21.2 of the MIAC 2020 Rules (Appendix 1A, p. 873)
\textsuperscript{169} See Queen Mary International Arbitration Survey 2021, p. 4
2. The development of the joinder provision
   
a. Introduction

The first joinder provision in the HKIAC Rules was included in its 2008 iteration. This joinder provision was essentially identical to the LCIA 1998 Rules’ joinder provision. The joinder provision was revised in 2013 and 2018. Although some of the substantive elements were preserved, a multitude of new elements were added.

b. Consent / Party Agreement

In the HKIAC 2008 Rules, Article 14.6 detailed that joinder could be decided upon by the arbitral tribunal “[..] provided that such third person or persons and the applicant party have consented to such joinder in writing.” This requirement was omitted with the 2013 rules. Instead, the HKIAC 2013 Rules stated in its Article 27 that the additional party could only be joined “[..] provided that, prima facie, the additional party is bound by an arbitration agreement under these Rules giving rise to the arbitration, [..].”

The latest revision of the joinder provision in the HKIAC 2018 Rules seems to have found a compromise between the two previous iterations. Now, being prima facie bound by the arbitration agreement is no longer the only explicitly mentioned option in the rules. According to Article 27.1(b), an additional party can be joined when “[..] all parties, including the additional party, expressly agree.” Both options are applicable prior to and after the constitution of the arbitral tribunal.

In addition to these two options, a third option was also presented in the proposed amendments to the HKIAC 2013 Rules, which was evidently not included in the final joinder provision. According to Article 27.1(c) in these proposed amendments, an additional party could also be joined into the arbitral proceedings by a different arbitration agreement in accordance with the HKIAC Rules, and where “[1] a common question of law or fact arises, 2) the rights to relief

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170 See section 4.1.E
171 See Article 14.6 of the HKIAC 2008 Rules (Appendix 1A, p. 925)
172 See Articles 27.1 and 27.8 of the HKIAC 2013 Rules. (Appendix 1A, p. 1023ff).
173 See Articles 27.1(a) and (b) in the HKIAC 2018 Rules (Appendix 1A, p. 1089)
174 See Articles 27.1(b) in the HKIAC 2018 Rules (Appendix 1A, p. 1089)
175 In contrast to, e.g., the MIAC Rules. See section 4.1.F
176 See: The Proposed Amendments to the HKIAC 2013 Rules of 29 August 2017
claimed are in respect of, or arise out of, the same transaction or a series of related transactions, and 3) the arbitration agreements are compatible.\textsuperscript{177} Had this addition not been omitted, it would have entailed a significant departure from the principle of party autonomy.

c. Circumstances to be Taken into Account

Neither the joinder provision in the HKIAC 2008, 2013, nor the 2018 Rules explicitly state any circumstances which the deciding body should take into account before deciding on a request for joinder.

d. Temporal Restrictions

In the HKIAC 2008 Rules, the joinder provision did not specify any temporal restrictions. In the HKIAC 2013 Rules, it was added that the “[..] HKIAC may fix a time limit for the submission of a Request for Joinder.”\textsuperscript{178} This could be seen as a flexible alternative to a stringent time limit.

In the HKIAC 2018 Rules, an explicit temporal restriction was added in Article 27.3. The temporal restriction entails that “[..] any Request for Joinder shall be raised no later than in the Statement of Defence, except in exceptional circumstances.”\textsuperscript{179} Although rather stringent, it could potentially hinder issues relating to at late joinder. For instance, the additional party might not be able to participate in some parts of the discussions of the merits of the case. Evidently, this could evidently result in due process issues and increase the risk of setting aside procedures under the New York Convention.\textsuperscript{180}

e. Constitution of the Arbitral Tribunal

In the HKIAC 2008 Rules, the joinder provision did not contain any procedures regarding the (re-)constitution of the arbitral tribunal in case of joinder. Subsequently, in the 2013 iteration, a procedure was included. The substantive elements of the HKIAC 2013 Rules were preserved in the HKIAC 2018 Rules.

\textsuperscript{177} See Articles 27.1(c) in the HKIAC 2018 Rules (Appendix 1A, p. 1089)
\textsuperscript{178} See Article 27.3 of the HKIAC 2013 Rules (Appendix 1A, p. 1023).
\textsuperscript{179} An identical restriction can be found in the AIAC 2021 Rules, See section 4.1.R
\textsuperscript{180} For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
If the additional party is joined prior to the confirmation of the arbitral tribunal, “[..] all parties to the arbitration shall be deemed to have waived their right to designate an arbitrator, and HKIAC may revoke the appointment of any arbitrators already designated or confirmed. In these circumstances, HKIAC shall appoint the arbitral tribunal.”\textsuperscript{181} As such, any arbitrator already designated or confirmed will be revoked by the institution, who then \textit{ex officio} appoints the arbitral tribunal.\textsuperscript{182} This revocation does not, however, prejudice the validity of any of the arbitrator’s acts prior to the revocation.\textsuperscript{183} If the request for joinder is made after the confirmation of the arbitral tribunal, no explicit procedure is mentioned in the joinder provision. The number of joinders after the constitution is presumably limited due to the temporal restriction.\textsuperscript{184}

\textbf{f. The Deciding Body}

In the HKIAC 2008 Rules, the arbitral tribunal was seemingly the only deciding body. With the 2013 iteration of the rules, which in this regard is similar to the 2018 iteration of the rules, it was added that prior to the constitution: “[..] HKIAC may join the additional party to the arbitration.”\textsuperscript{185} As such, although the HKIAC is granted the competence to decide on the request for joinder prior to the constitution, the arbitral tribunal is still has able to decide on: “[a]ny question as to the jurisdiction of the arbitral tribunal arising from HKIAC’s decision under this Article 27.8 shall be decided by the arbitral tribunal once confirmed [..].”\textsuperscript{186} This approach is in accordance with the \textit{competence-competence} principle.

\textbf{g. Concluding remarks}

The HKIAC Rules’ joinder provision has developed a lot since its first iteration in 2008. The newest iteration of the joinder provision is more encompassing in its scope by allowing joinder in situations where the additional party is \textit{prima facie} bound by an arbitration agreement and in situations where all the parties, including the additional party, \textit{expressly agree}. Furthermore,
the provision sets out a rather strict temporal restriction for the joinder request, which presum-
ably contributes to accelerate the efficiency of the proceedings and to mitigate the risks asso-
ciated with a late joinder.

H. KCAB

1. Introduction

The KCAB (Korean Commercial Arbitration Board) is an institution based in Seoul, Korea. The institution, which was founded in 1966, has had several iterations of its arbitration rules (“the KCAB Rules”) with the newest rules187 entering into force 1 June 2016. The KCAB Rules entail, to some extent, some of the same features as the LCIA Rules and the HKIAC Rules.

2. The development of the joinder provision
   a. Introduction

The first joinder provision was introduced in the KCAB 2016 Rules as Article 21.

   b. Consent / Party Agreement

According to Article 21.1, joinder of an additional party is possible provided that: “(a) All parties and the Additional Party have all agreed in writing to the joinder of the Additional Party to the arbitration proceedings; or (b) The Additional Party is a party to the same arbitration agreement with the parties and the Additional Party has agreed in writing to the joinder in the arbitration proceedings.”188 As such, consent is required in both scenarios; the first being the explicit consent in writing from all parties (similar to the LCIA Rules and HKIAC Rules requirement), and the second being the consent from the original parties enshrined in the arbitration agreement and the explicit written consent from the additional party.

   c. Circumstances to be Taken into Account

According to Article 21.3 “[..] the Arbitral Tribunal may refuse joinder of an Additional Party where there is a reasonable ground to do so, such as a delay of the arbitration proceedings.”189

187 The rules for international arbitration. KCAB also provides rules for domestic arbitration. These will however not be accessed.
188 See Article 21.1(a) and 21.1(b) of the KCAB 2016 Rules (Appendix 1B, p. 77)
189 See Article 21.3 of the KCAB 2016 Rules (Appendix 1B, p. 77)
As the joinder provision does not further describe what “a reasonable ground” entails, besides delay of the arbitral proceedings, the arbitral tribunal is seemingly granted the discretion to decide which circumstances - or reasonable grounds - it takes into account.

d. Temporal Restrictions
The joinder provision does not explicitly mention any temporal restrictions in relation to the request for joinder.

e. Constitution of the Arbitral Tribunal
According to Article 21.2 “[..] if an Additional Party is joined by the decision of the Arbitral Tribunal, this shall not affect the constitution of the Arbitral Tribunal.” Although not explicitly mentioned in the joinder provision, the additional party must be deemed to have estopped its right to participate in the constitution of the arbitral tribunal. However, as mentioned in section b, as the written consent of the additional party is always required, this could be construed as a sufficient waiver.

f. The Deciding Body
The arbitral tribunal is seemingly the only explicitly designated deciding body.

g. Concluding remarks
The KCAB Rules are especially interesting in relation to the broad discretion, which the arbitral tribunal is granted. This is primarily due to the lack of description of what “reasonable grounds” entails. Another interesting feature of the KCAB Rules is the fact that the additional party is not, at any point in the proceedings, allowed to participate in the constitution of the arbitral tribunal. Beforehand, the additional party must be deemed to have estopped its right to participate in the constitution of the arbitral tribunal. However, as the written consent of the additional party is always required, this should possibly be construed as a sufficient waiver, which does not result in setting aside procedure under the New York Convention.

190 See Article 21.2 of the KCAB 2016 Rules (Appendix 1B, p. 77)
191 For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
I. JCAA

1. Introduction

Another institution, which has some similar features in its joinder provision to, *inter alia*, the LCIA, HKIAC, and KCAB, is the JCAA (The Japan Commercial Arbitration Association). This institution was established in 1950. The JCAA offers three sets of arbitration rules. The rules subject to this analysis are the JCAA Commercial Arbitration Rules with the newest iteration entering into force on 1 July 2021 (“the JCAA Rules”).

2. The development of the joinder provision

a. Introduction

Previously, the JCAA Rules only provided for *intervention* by additional parties. In 2015, a joinder provision was, however, combined with the intervention provision and rewritten as Article 52. Article 52 is identical to Article 56 in the more recent JCAA 2019 and 2021 Rules.

b. Consent / Party Agreement

According to Article 56.1, the arbitral tribunal may only grant a request for joinder of an additional party as a co-respondent in two situations. Firstly, joinder may be granted if: “[..] all Parties and the third party have agreed in writing about the joinder [..]”. Secondly, joinder may be permitted if “[..] all claims are made under the same Arbitration Agreement; provided, however, the third party’s consent in writing to such joinder is necessary when the third party is requested to join as respondent after the constitution of the arbitral tribunal.” As such, the requirements are dependent on whether the request is made prior to or after the constitution of the arbitral tribunal. Note, once again, the use of the requirement of the consent / agreement to the joinder having to be “in writing”.

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192 https://www.jcaa.or.jp/en/about/greeting.html
193 The UNCITRAL Rules, the JCAA Commercial Arbitration Rules, and the Interactive Arbitration Rules.
194 See Rule 43 in the JCAA 2008 Rules (Appendix 1B, p. 102)
195 An additional party can only become a *co-claimant* by intervening. It is seemingly not possible to be joined as a separate additional party.
196 See Article 56.1.1 of the JCAA 2021 Rules (Appendix 1B, p. 189)
197 See Article 56.1.2 of the JCAA 2021 Rules (Appendix 1B, p. 189)
c. Circumstances to be Taken into Account

The joinder provision grants the arbitral tribunal a broad discretion to decide on the request for joinder. Even if the requirements in Article 56.1 are met, the arbitral tribunal may still “deny joinder if it finds that such joinder will delay the arbitral proceedings or it finds any other reasonable grounds”.\(^\text{198}\) The joinder provision does not further describe what “reasonable grounds” cover, although delays to the proceedings should be applicable as in the KCAB Rules.\(^\text{199}\)

d. Temporal Restrictions

The joinder provision does not set out any explicit temporal restrictions in relation to the request for joinder.

e. Constitution of the Arbitral Tribunal

If the additional party is joined prior to the constitution, any arbitrators already appointed is revoked: “[i]f any arbitrators have been appointed under these Rules before the third party joinder, the appointment of such arbitrators shall be no longer effective.”\(^\text{200}\) Afterwards, arbitrators should be reappointed by the parties or the institution. Furthermore, Article 56.4 states that the arbitral tribunal will remain the same if the additional party is joined after the constitution. As such, although not explicitly mentioned in the joinder provision, the additional party must be deemed to have estopped its right to participate in the constitution of the arbitral tribunal. This approach is similar to the KCAB Rules. Nonetheless, as was also the case in the KCAB Rules, because the written consent of the additional party is always required after the constitution, this should possibly be construed as a sufficient waiver, which does not result in setting aside procedure under the New York Convention.\(^\text{201}\)

\(^{198}\) See Article 56.4 of the JCAA 2021 Rules (Appendix 1B, p. 189)

\(^{199}\) Delays are explicitly mentioned in the KCAB Rules as a “reasonable ground” to deny joinder. See section 4.1.H, litra c.

\(^{200}\) See Article 56.2 of the JCAA 2021 Rules (Appendix 1B, p. 189)

\(^{201}\) For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
f. The Deciding Body

The arbitral tribunal is the only explicitly mentioned deciding body. Nonetheless, the fact that a party may be joined prior to constitution suggests that the institution has some competence regarding joinder.

g. Concluding remarks

The JCAA Rules are in many ways similar, if not outright identical, to the KCAB Rules. The requirements regarding consent, the circumstance to be taken into account, and the way that joinder is handled post-constitution in order to avoid possible risks, are all similar. JCAA Rules are, however, different to KCAB Rules by the presumed possibility of the institution having some competence in deciding upon a request for joinder prior to the constitution of the arbitral tribunal.

J. SIAC

1. Introduction

Another institution, which is both influential, and which joinder provision shares of the same features as the LCIA-, HKIAC-, KCAB-, and the JCAA Rules, is the SIAC (Singapore International Arbitration Centre). SIAC is ranked second among the world’s top 5 arbitral institutions according to Queen Mary International Arbitration Survey 2021 and is thus the preferred arbitral institution in Asia-Pacific. The institution, which was established in 1991, has had multiple iterations of its arbitration rules (“the SIAC Rules”) with the latest rule set entering into force 1 August 2016.

2. The development of the joinder provision

   a. Introduction

In 1991, SIAC introduced its first joinder provision as a part of Article 24, which detailed the additional powers of the arbitral tribunal. As such, SIAC was the first institution to include a joinder provision. Since 1991, the joinder provision has been revised several times.

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202 See for instance Article 56.5 of the JCAA 2021 Rules (Appendix 1B, p. 189)
203 See Article 56.2 of the JCAA 2021 Rules (Appendix 1B, p. 189)
204 See Queen Mary International Arbitration Survey 2021, p. 4
b. Consent / Party Agreement

In the SIAC 1991 and 1997 Rules, the arbitral tribunal could only allow additional parties to be joined to the arbitration “[..] with their express consent.”\(^{205}\) Seemingly, express consent was only required from the additional party to be joined. This, in conjunction with the fact that the arbitral tribunal at that time could decide on joinder “on the application of any party or of its own motion”,\(^{206}\) suggests that there could be situations where none of the original parties’ consent to the joinder. The original parties were seemingly deemed to have consented, in advance, to any potential joinder in the arbitration agreement. The underlying rationale presumably being that in the arbitration agreement, the parties agreed upon the SIAC Rules which provide for the possibility of the arbitral tribunal using its powers to order joinder.

In the SIAC 2007 Rules, the arbitral tribunal’s competence to ex officio order the joinder of additional parties was removed.\(^{207}\) As such, the situation where none of the original parties consented to the joinder was no longer possible. The material substance of the joinder provision, i.e., requiring the express consent from the additional party, was however preserved.

In the SIAC 2010 and 2013 Rules, it was included that the arbitral tribunal could “[..] allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party [..]”.\(^{208}\) As such, an additional requirement of the additional party being a signatory to the arbitration agreement was included in the joinder provision.

In the SIAC 2016 Rules, the joinder provision was again amended to: “[..] a. the additional party to be joined is prima facie bound by the arbitration agreement; or b. all parties, including the additional party to be joined, have consented to the joinder of the additional party.”\(^{209}\) Thus, with this latest revision of the joinder provision, it seems that a compromise between the previous iterations has been reached. It is now a requirement that the additional party is either

\(^{205}\) See Article 24.1.c of the SIAC 1991 and Article 25.b. of the SIAC 1997 Rules (Appendix 1B, pp. 281 and 300)
\(^{206}\) See Article 25 of the SIAC 1997 Rules (Appendix 1B, p. 300)
\(^{207}\) See Article 24 of the SIAC 2007 Rules (Appendix 1B, p. 316)
\(^{208}\) See Article 24.b of the SIAC 2010 and 2013 Rules (Appendix 1B, pp. 336 and 372)
\(^{209}\) See Article 7.1 and 7.8 of the SIAC 2016 Rules (Appendix 1B, p. 407)
prima facie bound by\textsuperscript{210} the arbitration agreement, or that all parties, including the additional party, consent to the joinder. These options are similar to the HKIAC 2018 Rules.\textsuperscript{211}

c. Circumstances to be Taken into Account

In the SIAC 1991 and 1997 Rules, the deciding body should give parties “[..] the opportunity to state their views [..]”.\textsuperscript{212} In the SIAC 2007 Rules, this opportunity was removed until it was reintroduced in the SIAC 2016 Rules.

According to Article 7.4 in the SIAC 2016 Rules, if the request for joinder is filed prior to the constitution, the institution (the Court) shall “[..] after considering the views of all parties, including the additional party to be joined, and having regard to the circumstances of the case, decide [..]”.\textsuperscript{213} If the request for joinder is filed after the constitution, the arbitral tribunal shall according to Article 7.10 “[..] after giving all parties, including the additional party to be joined, the opportunity to be heard, and having regard to the circumstances of the case, decide [..]”. The “circumstances of the case” are not specified in neither Article 7.4 nor Article 7.10. Presumably, it is therefore within the discretion of the deciding body to include the circumstances which it deems relevant to the case.

d. Temporal Restrictions

The joinder provision does not set out any explicit temporal restrictions in relation to the request for joinder.

e. Constitution of the Arbitral Tribunal

In the previous iterations of the joinder provision, a procedure regarding the constitution of the arbitral tribunal in case of joinder was absent. In the SIAC 2016 Rules, the possibility of joinder both prior to, and after, the constitution of the arbitral tribunal was added.\textsuperscript{214}

\textsuperscript{210} Regarding the requirement “bound by”, see section C, litra b
\textsuperscript{211} See section 4.1.G, litra b
\textsuperscript{212} See Article 24.1.c of the SIAC 1991 and Article 25.b. of the SIAC 1997 Rules (Appendix 1B, pp. 281 and 300)
\textsuperscript{213} See Article 7.4 of the SIAC 2016 Rules (Appendix 1B, p. 407)
\textsuperscript{214} See Article 7.1 and 7.8 of the SIAC 2016 Rules (Appendix 1B, p. 406ff)
If joinder is granted *prior* to the constitution, “[..] the Court may revoke the appointment of any arbitrators appointed prior to the decision on joinder. Unless otherwise agreed by all parties, including the additional party joined, Rule 9 to Rule 12 shall apply as appropriate.” As such, all of the parties, including the additional party, are free to agree on a new procedure of appointing the arbitrator(s). If no such agreement can be made, the institution shall appoint the arbitrator(s).

If the joinder is granted *after* the constitution of the arbitral tribunal, the additional party “[..] shall be deemed to have waived its right to nominate an arbitrator or otherwise participate in the constitution of the Tribunal [..]”. In other institutional arbitration rules such as the MIAC-, JCAA- and KCAB Rules, this waiver could possibly be “excused” by the fact that the only option for a post-constitution joinder was the additional party’s explicit consent. In contrast, because the SIAC Rules also allowed joinder by the additional party being *prima facie bound* by the arbitration agreement, issues pertaining the additional party’s right to equal treatment may arise.

### f. The Deciding Body

According to the joinder provision in the SIAC Rules from 1991-2013, the arbitral tribunal was the only explicitly designated deciding body. With the revision in the SIAC 2016 Rules, the competences were split between the institution, i.e., the Court, and the arbitral tribunal. Accordingly, the Court will be the deciding body *prior* to the constitution, and the arbitral tribunal will be the deciding body *after* the constitution. The Court’s decision to reject an application for joinder in Article 7.4 is *without prejudice* to any party’s right to apply to the arbitral tribunal for joinder pursuant to Article 7.8. Accordingly, the joinder provision *de facto* provides for the possibility to apply for joinder twice, which is a rather unique feature among institutional arbitration rules.

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215 See Article 7.1 of the SIAC 2016 Rules (Appendix 1B, p. 406)
216 See Article 7.12 of the SIAC 2016 Rules (Appendix 1B, p. 408)
217 See Article 7.4 of the SIAC 2016 Rules (Appendix 1B, p. 407)
218 See Article 7.10 of the SIAC 2016 Rules (Appendix 1B, p. 408)
219 See the last sentence of Article 7.4 of the SIAC 2016 Rules (Appendix 1B, p. 407)
220 See Smith, endnote 14
g. Concluding remarks

Going through the iterations of the joinder provision in the SIAC Rules, it is remarkable how joinder has become more important, or at least has gotten more attention in the rules, throughout the years. This was highlighted in the SIAC 2016 Rules where joinder was made into its entire own, and much more detailed, provision in Article 7. Article 7 entails two particularly interesting features. Firstly, in relation to the constitution of the arbitral tribunal, the additional party is deemed to have estopped its right to participate in the constitution only by being bound by the arbitration agreement. Secondly, the joinder provision de facto provides for the possibility to apply for joinder twice. Consequently, although the SIAC Rules share some of the same features as the LCIA-, HKIAC-, KCAB- and JCAA Rules, it remains unique in certain regards.

K. CIETAC

1. Introduction

CIETAC (The China International Economic and Trade Arbitration Commission) is another interesting institution. CIETAC was formerly known as the Foreign Trade Arbitration Commission, which was set up in April 1956 under the China Council for the Promotion of International Trade (CCPIT). Since then, CIETAC has had multiple iterations of its arbitration rules ("the CIETAC Rules") with the newest rules becoming effective as of 1 January 2015.

2. The development of the joinder provision
   a. Introduction

While the CIETAC 2015 Rules is the first set of rules to expressly include a joinder provision, joinder was previously allowed in practice. If the parties filed a request for joinder of additional parties to the institution, it would decide on the request as it deemed appropriate. This practice was codified in Article 18 with the CIETAC 2015 Rules.

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221 See: http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en
222 See for instance Rogers and Townsend
223 Ibid
b. Consent / Party Agreement

According to Article 18.1, an additional party may be joined to the proceedings insofar as “[..] the arbitration agreement invoked in the arbitration that prima facie binds the additional party [..]”. 224

c. Circumstances to be Taken into Account

The deciding body may deny joinder “[..] where any other circumstance exists that makes the joinder inappropriate.” 225 The joinder provision does not give any examples of circumstances that could make the joinder inappropriate. Accordingly, the deciding body has wide discretion to include circumstances which it deems relevant.

d. Temporal Restrictions

The joinder provision does not set out any explicit temporal restrictions in relation to the request for joinder.

e. Constitution of the Arbitral Tribunal

According to Article 18.5, if the procedure for appointing arbitrators “[..] takes place prior to the formation of the arbitral tribunal, the relevant provisions on party’s nominating or entrusting of the Chairman of CIETAC to appoint arbitrator under these Rules shall apply to the additional party. The arbitral tribunal shall be formed in accordance with Article 29 of these Rules.” 226 According to Article 29.1, “[..] the Claimant side and/or the Respondent side, following discussion, shall each jointly nominate or jointly entrust the Chairman of CIETAC to appoint one arbitrator.” 227 If, however, the parties fail to agree upon either jointly nominating or jointly entrusting the Chairman of CIETAC, “[..] the Chairman of CIETAC shall appoint all three members of the arbitral tribunal and designate one of them to act as the presiding arbitrator.” 228

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224 See Article 18.1 of the CIETAC 2015 Rules (Appendix 1B, p. 572).
225 See Article 18.7 of the CIETAC 2015 Rules (Appendix 1B, p. 573)
226 See Article 18.5 of the CIETAC 2015 Rules (Appendix 1B, p. 572f)
227 See Article 29.1 of the CIETAC 2015 Rules (Appendix 1B, p. 577)
228 See Article 29.3 of the CIETAC 2015 Rules (Appendix 1B, p. 577)
If the joinder takes place after the constitution, the additional party is asked to approve the arbitral tribunal as it is already constituted.\textsuperscript{229} If the additional party does not approve of the constitution, the arbitrators will be re-nominated by the parties or the institution.\textsuperscript{230}

f. The Deciding Body

In contrast to most other institutional arbitration rules’ joinder provisions, the institution is the only deciding body in the CIETAC Rules. In fact, while it is the arbitral tribunal that, \textit{inter alia}, hears from all parties and considers whether joinder is necessary \textquotedblleft[..] the decision shall be made by CIETAC [..]\textquotedblright.\textsuperscript{231} In contrast to the \textit{competence-competence} principle, where the arbitral tribunal has the power to decide on its own jurisdiction, the institution is the deciding body that \textquotedblleft[..] has the power to decide on its jurisdiction based on the arbitration agreement and relevant evidence\textquotedblright if any party objects to the joinder.\textsuperscript{232} This is presumably because national Chinese law does not acknowledge the \textit{competence-competence} principle.\textsuperscript{233}

g. Concluding remarks

The joinder provision in the CIETAC Rules entail several interesting elements, especially in relation to the additional party’s participation in the constitution of the arbitration tribunal, where the additional party is granted a significant amount of influence. Furthermore, the power balance between the institution and the arbitral tribunal, granting the institution significantly more power, is rather unique. This is presumably due to the Chinese law and legal tradition of \textit{not} acknowledging the principle of \textit{competence-competence}.

L. RAC

1. Introduction

RAC (Russian Arbitration Centre) is a subdivision of the Russian Institute of Modern Arbitration based in Moscow and is one of the youngest arbitral institutions in Russia. The institution

\textsuperscript{229} See the second paragraph of Article 18(5) of the CIETAC 2015 Rules (Appendix 1B, p. 572)
\textsuperscript{230} Ibid.
\textsuperscript{231} See Article 18(1) of the CIETAC 2015 Rules (Appendix 1B, p. 572)
\textsuperscript{232} See Article 18(3) of the CIETAC 2015 Rules (Appendix 1B, p. 572)
\textsuperscript{233} See Fei, Wang, Liu
was launched in 2016 and received governmental authorisation to administer permanent arbitral proceedings in Russia in 2017.\textsuperscript{234} The newest iteration of rules (“the RAC Rules”) entered into force 21 January 2019.

2. The development of the joinder provision

a. Introduction

The first RAC Rules to include a joinder provision was Article 35 in RAC 2017 Rules. This joinder provision was preserved in the RAC 2019 Rules.

b. Consent / Party Agreement

According to Article 35.4, an additional party may be joined to the proceedings if one of the three requirements listed in Article 35(4)(1-3) is satisfied. The requirements are the following: “1) all Parties and third parties have consented to the entry of an additional claimant into the proceedings; 2) a person or entity entering the proceedings as an additional claimant is a party to the Arbitration Agreement; 3) the claims of the additional claimant and the claims of the Claimant are covered by Arbitration Agreements that are compatible including as regards the seat and language of arbitration, the procedure for constitution of the Arbitral Tribunal and other material conditions, and such claims arise from principal and ancillary obligations (or other interconnected obligations).”\textsuperscript{235}

While the first and second option are present in numerous other institution rules, the third option stand out. The third option only requires that there are arbitration agreements, which are compatible. The arbitration agreements must presumably be compatible in the sense of having identical/similar terms of seat, language of arbitration, procedure for constitution and other material conditions. Isolated, the third option could allow the joinder of a very broad range of additional parties. The option is though narrowed by the, arguably sensible, requirement that the claims arise from principal and ancillary obligations or other interconnected obligations. As such, the contracts, which the arbitration agreements are based on, and therefore the parties to these contracts, ought to be connected in some way.

\textsuperscript{234} See: https://iclg.com/firms/russian-arbitration-center
\textsuperscript{235} See Article 35.4 of the RAC 2017 Rules and the RAC 2019 Rules (Appendix 1B, p. 647 and 756)
Still, this third option should be construed as entailing a departure from the principles of party autonomy as it *could* result in joinder of additional parties, which the original parties, nor the additional party, initially accounted for. Nonetheless, this option should be limited by the fundamental requirement of the deciding body’s jurisdiction over the parties. This requirement is also detailed in Article 83 of the RAC 2019 Rules regarding objections to the arbitral tribunal’s jurisdiction.\(^{236}\)

c. Circumstances to be Taken into Account

The arbitral tribunal is, according to Article 35(7), granted the discretion to deny a joinder “[..] if this may result in undue delay or disruption of the proceedings.”\(^{237}\) These are the only explicitly listed circumstances which the arbitral tribunal should take into account before rendering a decision on joinder.

d. Temporal Restrictions

The joinder provision does not set out any explicit temporal restrictions in relation to the request for joinder.

e. Constitution of the Arbitral Tribunal

Article 35(8) deals with the constitution of the arbitral tribunal in case of joinder. If the additional party is joined *prior* to the constitution of the arbitral tribunal, it “[..] may participate in the constitution of the Arbitral Tribunal in accordance with the procedure set forth in Article 16 [..].”\(^{238}\) According to Article 16: “[i]n case of the multi-party arbitration, where the Parties fail to agree on the arbitrator(s) or the procedure for the appointment of the Arbitral Tribunal in the Arbitration Agreement, or if the Arbitral Tribunal cannot be constituted in accordance with the Arbitration Agreement, the Arbitral Tribunal shall be appointed entirely by the Board [..].”\(^{239}\)

On the other hand, if the additional party is joined to the proceedings *after* constitution, it must be “[..] deemed to have waived their right to participate in the constitution [..].”\(^{240}\) As such,

\(^{236}\) See Article 83 of the RAC 2017 Rules and the RAC 2019 Rules (Appendix 1B, p. 672 and 801)

\(^{237}\) See Article 35(7) of the RAC 2017 Rules and the RAC 2019 Rules (Appendix 1B, p. 647 and 757)

\(^{238}\) See Article 35(8) of the RAC 2017 Rules and the RAC 2019 Rules (Appendix 1B, p. 647 and 757)

\(^{239}\) See Article 16 of the RAC 2017 Rules and the RAC 2019 Rules (Appendix 1B, p. 635 and 736)

\(^{240}\) See Article 35(8) of the RAC 2017 Rules and the RAC 2019 Rules (Appendix 1B, p. 647 and 757)
this structure is similar to many other joinder provisions that deal with the participation in the constitution of the arbitral tribunal in case of joinder.241

However, the third option, described in section b, could result in issues regarding the additional party’s right to participate in the constitution as the party possibly never expected, or could reasonably expect, to be joined. As such, the only argument as to why the additional party might have accepted such a waiver is the inclusion of a compatible arbitration agreement in their contract. One should keep in mind that the description of compatible arbitration agreements in Article 35(3)(3) does not explicitly include the inclusion of the RAC Rules. Therefore, in principle, the additional party might not have had any knowledge of this waiver in Article 35(8). Although compatible arbitration agreements presumably always entail the same chosen rules, this regime could arguably create issues regarding the additional party’s right to participate in the constitution, for instance due to principles of equal treatment.

f. The Deciding Body

According to the RAC Rules, the deciding body is dependent on when the joinder request is received. If the request is received prior to the constitution of the arbitral tribunal, the institution (the Board) shall decide on the request.242 If the request is received after the constitution, the arbitral tribunal shall decide on the request.243 The arbitral tribunal is furthermore empowered to re-evaluate the joinder and declare it inadmissible if it finds that the requirements described in section b are not satisfied.244 This is similar to the arbitral tribunal’s power in the SIAC 2016 Rules.245

g. Concluding remarks

The most interesting feature of the joinder provision in the RAC Rules is the possibility to join an additional party on the basis of compatible arbitration agreements and claims that arise from principal and ancillary obligations. Although there might be situations where it could make sense to join an additional party on this basis, because the additional party plays an important role in the resolution of the dispute, it seems a risky approach to ascertain jurisdiction.

241 See 4.2, section e, 3, where all of the rules with this procedure are mentioned.
242 See Article 35(5) of the RAC 2017 Rules and the RAC 2019 Rules (Appendix 1B, p. 647 and 757)
243 Ibid.
244 See Article 35(6) of the RAC 2017 Rules and the RAC 2019 Rules (Appendix 1B, p. 647 and 757)
245 See section 4.1.J, litra f
M. NAI

1. Introduction
The NAI (Netherlands Arbitration Institution) is a large general arbitration institute in the Netherlands.246 The institution, which was founded in 1949, has had multiple iterations of its arbitration rules (“the NAI Rules”) with the newest rules entering into force on 1 January 2015. The NAI is currently in the process of creating the NAI 2022 Rules, which will seemingly not entail any changes to the joinder provision.247

2. The development of the joinder provision
a. Introduction
The first joinder (and intervention) provision in the NAI Rules was introduced in 1998 as Article 41. As such, NAI was one of the first institutions to include a joinder provision in its arbitration rules. The joinder provision was not subject to any changes in the two later revisions in 2001 and 2010 until it was revised in the latest set of NAI Rules in 2015. Although Article 37 in the NAI 2015 Rules has the heading “joinder and intervention”,248 the provision which de facto regulates joinder is Article 38.249 Article 37 seemingly only concerns varying scenarios of intervention.

b. Consent / Party Agreement
In the NAI 1998-2010 Rules, the joinder provision in Article 41 provided for joinder of an additional party on the request of one of the original parties, who claimed to be indemnified by the additional party. Pursuant to Article 41(4), the additional party was then required to “[..] accede[s] to the arbitration agreement by an agreement in writing between him and the parties to the arbitration agreement. [..]”. Some authors contend that where the additional party was already a signatory, but not a part of the initiated proceedings, there was no need for a new agreement in writing as prescribed by Article 41(4).250 Thus, the requirement of consent in

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246 See: https://www.nai-nl.org/en/
247 See Hogendoorn and Wanders
248 Joinder, according to the NAI rules, pertains to the scenario where the additional party itself seeks to support the position of one of the original parties to the arbitration.
249 While this procedure is called “impleader”, this thesis still makes use of the same terms as with the other rules in section 4.1 to maintain consistency.
250 See Gomez, p. 485
writing was only required if the additional party was not a signatory to the arbitration agreement. This reading further avoids that an additional party could resist the joinder. As such, the additional party was deemed to have agreed to any, potential, arbitration arising out of the contract.  

In the NAI 2015 Rules, the additional party is required to be a signatory to the arbitration agreement giving rise to the arbitration or that the arbitration agreement “enters into force” between the party requesting the joinder and the additional party. At first sight, the latter option seems to entail that an additional party would suddenly become bound by the arbitration agreement. Nonetheless, looking further into the substance, this scenario is not different to the arbitration rules which require the additional party’s consent to the joinder. In both cases, the additional parties de facto agree to the arbitration agreement given rise to the arbitration.

c. Circumstances to be Taken into Account

In the NAI 1998-2010 Rules, joinder could only be permitted if the arbitral tribunal had “[..] heard the parties and the third party [..].” The joinder provision did not, however, explicitly mention any circumstances which had to be taken into account.

In the NAI 2015 Rules, it was added in Article 38.2 that the arbitral tribunal should likewise give the parties, including the additional party “[..] the opportunity to make their opinions on the request known.” Furthermore, it was added in Article 38.3 that the arbitral tribunal “[..] shall not allow the impleader if the arbitral tribunal finds it implausible, in advance, that the third person will be required to bear the adverse consequences of a possible award against the interested party or is of the opinion that impleader proceedings are likely to cause unreasonable or unnecessary delay of the proceedings.” The requirement of such a preliminary review ensures that no additional party is joined into the proceedings without at least a prima facie substantive basis. Joining an additional party in such situations would further be inconsistent with the requirement of the joinder not causing unreasonable or unnecessary delay.

251 Ibid
252 See Article 38(1) of the NAI 2015 Rules (Appendix 1C, p. 161)
253 See Article 41(4) of the NAI 1998, 2001 and 2010 Rules (Appendix 1C, pp. 37, 66 and 118)
254 See Article 38(2) of the NAI 2015 Rules (Appendix 1C, p. 161)
255 See Article 38(3) of the NAI 2015 Rules (Appendix 1C, p. 161)
256 Finding (or disproving) a substantive basis for liability is, however, the main objective during the merits of the arbitration. See also Marsman, para. 27-019.
257 See Article 38(3) of the NAI 2015 Rules (Appendix 1C, p. 161)
d. Temporal Restrictions

While no explicit temporal restrictions can be found in the previous iterations of the joinder provisions nor the newest iteration, the NAI 2015 Rules do include an instigation to file the request “[..] as soon as possible.”258

e. Constitution of the Arbitral Tribunal

The joinder provisions in the NAI Rules do not address, nor provide any solutions to, alleviate any concerns regarding the party’s possible right to participate in the constitution of the arbitral tribunal.259 This could be justified by the fact that the additional party is required to be a signatory to, or entered into, the arbitration agreement which provides for the NAI Rules. Thereby also accepting the risk associated with not being able to participate in the constitution.260 While entering into the arbitration agreement (and de facto consenting) could be seen as a waiver of the right to object, being a signatory to an arbitration agreement seems less of a clear-cut waiver. As such, the latter situation is presumably more likely to be associated with issues in regard to equal treatment.

f. The Deciding Body

In the NAI 1998-2010 Rules, the arbitration tribunal was the only explicitly empowered body to decide on a request for joinder.261 This approach is seemingly still preserved in the NAI 2015 Rules as the joinder provision provides that “the arbitral tribunal may allow that party to implead a third person [..]”.262

g. Concluding remarks

The NAI Rules primarily stand out with regard to the (non-existing) post-constitution procedure. The fact that the joinder provision does not have a procedure for the additional party’s participation in the constitution and, at the same time, not requiring any explicit consent from the additional party, may entail several issues of equal treatment. Ultimately, these risks could result in the subsequent arbitral award being set aside under the New York Convention.263

258 See Article 38(4) of the NAI 2015 Rules (Appendix 1C, p. 161)
259 See section 3.2.2.4. regarding the Dutco case.
260 See Marsman, para. 27-026.
261 See Article 41(4) of the NAI 1998, 2001, and 2010 Rules (Appendix 1C, pp. 37, 66 and 118)
262 See Article 38(1) of the NAI 2015 Rules (Appendix 1C, p. 161)
263 For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
N. ACICA

1. Introduction

ACICA (Australian Centre for International Commercial Arbitration) is a well-known international dispute resolution institution based in Australia. The institution, which was established in 1985, has had several iterations of its arbitration rules ("the ACICA Rules") with the latest rules coming into effect on 1 April 2021.

2. The development of the joinder provision

a. Introduction

The first joinder (and intervention) provision in the ACICA Rules was introduced with the ACICA 2016 Rules as Article 15. In 2021, the joinder provision was revised with the addition of a few important features.

b. Consent / Party Agreement

In the ACICA 2016 Rules, an additional party could be joined to the arbitral proceedings provided that "[..] prima facie, the additional party is bound by the same arbitration agreement between the existing parties to the arbitration." This option was preserved in 2021 ACICA Rules.

In the ACICA 2021 Rules, it was further added to the joinder provision that an additional party may be joined to the arbitral proceedings if: "(b) all parties, including the additional party, expressly agree." As such, it is now also possible to join an additional party based on explicit consent, even though the additional party is not a signatory to or otherwise bound by the arbitration agreement. Note, however, that this addition only applies after the constitution of the arbitral tribunal. Prior to the constitution, the institution may still only permit a joinder based on "[..] whether, prima facie, the additional party is bound by the same arbitration agreement between the existing parties to the arbitration; [..]."

264 See Article 15.1 of the ACICA 2016 Rules (Appendix 1C, 308)
265 See Article 17.1.(b) of the ACICA 2021 Rules (Appendix 1C, p. 393)
266 See Article 17.8 of the ACICA 2021 Rules (Appendix 1C, p. 395)
c. Circumstances to be Taken into Account

Neither the ACICA 2016 nor the 2021 Rules contain explicit circumstances, which must be taken into account. In the ACICA 2021 Rules, the arbitral tribunal shall now give “[...] all parties, including the additional party to be joined, the opportunity to be heard [...]”,\textsuperscript{267} and likewise shall the institution decide “[...] after considering the views of all parties [...].”\textsuperscript{268} Although this distinction might seem peculiar, it de facto entails the same procedure for the deciding body; to consult with all the parties.

d. Temporal Restrictions

Neither the ACICA 2016 rules nor the 2021 Rules contain any explicit temporal restrictions. The institution is, however, in both iterations of the rules granted the discretion to “[...] fix a time limit for the submission of a Request for Joinder.”\textsuperscript{269} As such, it depends on the specific case whether there are any temporal restrictions to comply with.

e. Constitution of the Arbitral Tribunal

According to Article 15.11 in the ACICA 2016 Rules, if the additional party was joined prior to the constitution, the institution shall “[...] revoke the appointment of any arbitrators already appointed, unless all parties agree on all members of the Arbitral Tribunal [...]. Where there is no such agreement, ACICA shall appoint each member of the Arbitral Tribunal and, if the Arbitral Tribunal is composed of three arbitrators, shall designate one of them to act as Chairperson. [...]”\textsuperscript{270}

The content of Article 15.11 was preserved in the ACICA 2021 Rules as Article 17.12. Interestingly, the joinder provision does not contain any information on how this situation should be dealt with in case joinder is permitted after the constitution of the arbitral tribunal. If this omission entails that the additional party must, like in many other joinder provisions,\textsuperscript{271} be deemed to have estopped its right to participate in the constitution, it is arguably controversial not to explicitly state it. Accordingly, the arbitral award could also risk being set aside under the New York Convention.\textsuperscript{272}

\textsuperscript{267} See Article 17.1 of the ACICA 2021 Rules (Appendix 1C, p. 393)
\textsuperscript{268} See Article 17.8 of the ACICA 2021 Rules (Appendix 1C, p. 395)
\textsuperscript{269} See Articles 15.3 of the ACICA 2016 Rules and 17.3 of the ACICA 2021 Rules (Appendix 1C, pp. 309 and 311)
\textsuperscript{270} See 4.2, section e, 3 regarding all the rules that mention this approach.
\textsuperscript{271} For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
f. The Deciding Body

Since the ACICA 2016 Rules, the competences have been divided between the institution, which is the deciding body prior to the constitution of the arbitral tribunal\textsuperscript{273} and the arbitral tribunal, which is the deciding body after the constitution of the arbitral tribunal.\textsuperscript{274} In relation to the power balance between the two deciding bodies, it may, firstly, be noted that “\textit{\{a\}ny question as to the jurisdiction of the Arbitral Tribunal arising from ACICA’s decision under this Article shall be decided by the Arbitral Tribunal once constituted} [\ldots]”.\textsuperscript{275} This approach is in accordance with the competence-competence principle. Secondly it may be noted that “\textit{ACICA’s decision to reject an application for joinder [\ldots] is without prejudice to any party’s or third party’s right to apply to the Arbitral Tribunal for joinder [\ldots]}”.\textsuperscript{276} As such, if requested by a party, the arbitral tribunal can decide on the same request for joinder even if it has already been rejected by the institution. This is similar to the arbitral tribunal’s power in the SIAC 2016 Rules\textsuperscript{277} and the RAC Rules.\textsuperscript{278}

g. Concluding remarks

The ACICA Rules’ joinder provision is similar to most other rules\textsuperscript{279} with regard to the requirements of the deciding body’s jurisdiction being ascertained through express consent to joinder or being bound by the arbitration agreement. Nonetheless, similar to the NAI Rules,\textsuperscript{280} the fact that the ACICA Rules lack a procedure regarding joinder post-constitution could create certain risks. Ultimately, these risks could result in the subsequent arbitral award being set aside under the New York Convention.\textsuperscript{281}

\textsuperscript{273} See Article 15.8 of the ACICA 2016 Rules (Appendix 1C, p. 310)
\textsuperscript{274} See Article 15.1 of the ACICA 2016 Rules (Appendix 1C, p. 308)
\textsuperscript{275} See Articles 15.8 of the ACICA 2016 Rules and 17.9 of the ACICA 2021 Rules (Appendix 1C, pp. 310 and 395)
\textsuperscript{276} Ibid.
\textsuperscript{277} See section 4.1.J, litra f
\textsuperscript{278} See section 4.1.L, litra f
\textsuperscript{279} See, for instance, 4.1(J and U), litra b
\textsuperscript{280} See section 4.1.M, litra g
\textsuperscript{281} For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
O. ICC

1. Introduction
The ICC (International Chamber of Commerce International Court of Arbitration) is one of the preferred institutions for international commercial arbitration, according to the Queen Mary International Arbitration Survey 2021.\textsuperscript{282} The institution, which was established in 1923, has had multiple iterations of its arbitration rules with the newest rules becoming effective on 1 January 2021.

2. The development of the joinder provision
   a. Introduction
According to some authors, ICC had a practice for joining an additional signatory to arbitral proceedings since the ICC 1998 Rules.\textsuperscript{283} A joinder provision was, however, first included in the ICC 2012 Rules as Article 7. In 2017 and 2021, the ICC Rules were revised with only minor changes to the joinder provision.

   b. Consent / Party Agreement
In the ICC 2012 Rules, there was no requirement that the parties, including the additional party, had to give either explicit consent or be a signatory to the same arbitration agreement. This joinder provision was, \textit{prima facie}, silent on this matter. Nonetheless, Article 7(1) stated that “\[a\]ny such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9.” According to Article 6.4 “[i]n all cases […] the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is \textit{prima facie} satisfied that an arbitration agreement under the Rules may exist […]”.\textsuperscript{284} As such, it was seemingly a requirement that an arbitration agreement between all the parties existed. Article 7(1) was preserved in the ICC 2017 and 2021 Rules.

   c. Circumstances to be Taken into Account
The joinder provisions in the ICC 2012 and 2017 Rules did not contain any circumstances, which should be taken into account.

\textsuperscript{282} See Queen Mary International Arbitration Survey 2021, p. 4
\textsuperscript{283} See Lörcher and Wolf, p. 7
\textsuperscript{284} See Article 6(4) of the ICC 2012 Rules (Appendix 1C, p. 539)
In the ICC 2021 Rules Article 21(5) was however added to the joinder provision. According to Article 21(5) “[..] the arbitral tribunal shall take into account all relevant circumstances, which may include whether the arbitral tribunal has prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure.” Accordingly, several circumstances are now explicitly listed in the joinder provision. Nonetheless, the first circumstance, the consideration of jurisdiction being necessary is a matter of the basic arbitration as a subsequent award could otherwise risk being set aside under the New York Convention. The second circumstance, the timing of the request and the impact of the joinder on the arbitral procedure, are presumably included to ensure the efficient conduct of the proceedings. The third circumstance brings awareness of potential conflicts of interest. In general, all of these circumstances are, in most institutional arbitration rules, regulated upon or highlighted as being important elsewhere in the rules. As such, although not explicitly stated in all joinder provisions, these circumstances are presumably always to be taken into account in case of joinder, explicitly listed in the circumstances or not.

d. Temporal Restrictions

The ICC 2012 Rules contained a temporal restriction. This temporal restriction could, however, be deviated from. According to Article 7(1) “[..] No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree [..]” That the parties could agree and deviate from this restriction seems to be in accordance with party autonomy. Furthermore, Article 7(1) prescribed that the institution could “[..] fix a time limit for the submission of a Request for Joinder.” As such, it would be case specific whether there would be any temporal restrictions in relation to the request for joinder. Both requirements are still included in the ICC 2021 Rules.

It has, however, been added in the ICC 2021 Rules that “[..]. Unless all parties, including the additional party, otherwise agree, or as provided for in Article 7(5), no additional party may

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285 See Article 7(5) of the ICC 2021 Rules (Appendix 1C, p. 740)
286 For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
287 See Article 7(1) of the ICC 2012 Rules (Appendix 1C, p. 541)
288 See Article 7(1) of the ICC 2012 Rules (Appendix 1C, p. 541)
be joined after the confirmation or appointment of any arbitrator [...]”. 289 As detailed in Article 7(5), “[a]ny Request for Joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party accepting the constitution of the arbitral tribunal [...]”. 290 As such, the additional party may now be joined into proceedings after the constitution tribunal, under the condition that it consents to the already constituted arbitral tribunal. Consequently, the main difference from the previous iterations is that consent is only required from the additional party, and not all parties are required to agree. This addition is furthermore relevant with regards to the constitution itself. 291

e. Constitution of the Arbitral Tribunal

The new addition of Article 7(5) in the ICC 2021 Rules contributes to mitigate any possible issues regarding equal treatment. As the consent of the additional party is required for joinder after the constitution, the additional party must be deemed to have estopped its right to participate in the constitution. If the additional party is joined into the proceedings prior to the appointment of arbitrators, it shall participate jointly in the appointment. 292 In the absence of a joint nomination, the institution (the ICC Court) will appoint each member. 293

f. The Deciding Body

Although not explicitly stated in the joinder provision, the previous iterations of Article 7 from the ICC 2012 and 2017 Rules seem to suggest that the institution (the Secretariat) decides on the request for joinder of additional parties.

In the newest iteration of Article 7 in the ICC 2021 Rules, it still seems to be the institution that decides on the request for joinder of additional parties. In contrast to the previous iterations, Article 7(5) explicitly states that “[a]ny Request for Joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once constituted [...]”. 294 Thus, the arbitral tribunal is now explicitly designated as a deciding body. This decision by the arbitral tribunal will, most likely, involve a more thorough review of the facts and interests of

289 See Article 7(1) of the ICC 2021 Rules (Appendix 1C, p. 739)
290 See Article 7(5) of the ICC 2021 Rules (Appendix 1C, p. 740)
291 See section e below
292 See Article 12(7) of the ICC 2021 Rules (Appendix 1C, p. 744)
293 See Article 12(8) of the ICC 2021 Rules (Appendix 1C, p. 744)
294 See Article 7(5) of the ICC 2021 Arbitration Rules (Appendix 1C, p. 740)
the parties as to whether the requirements for the joinder of the additional party are in fact satisfied.\textsuperscript{295}

g. Concluding remarks

The most noteworthy feature throughout the iterations of the ICC Rules is arguably the increased focus on procedural efficiency. This is, \textit{inter alia}, due to the temporal restriction according to which joinder can, as a main rule, only be permitted \textit{prior} to the constitution of the arbitral tribunal. Should joinder be permitted \textit{after} the constitution, the additional party is required to accept the appointed arbitral tribunal. As such, the ICC 2021 Rules seem to mitigate scenarios of disruption or delays relating to (re)-constitution of the arbitral tribunal, while at the same time avoiding possible objections due the additional party’s right to participate in the constitution.

P. SCC

1. Introduction

The SCC (Arbitration Institute of the SCC) is the principal institution in Sweden.\textsuperscript{296} The institution, which was established in 1917, has had several iterations of its arbitration rules (“the SCC Rules”) with the newest rules entering into force on 1 January 2017.

2. The development of the joinder provision

a. Introduction

The first joinder provision was included in the SCC 2017 Rules as Article 13.

b. Consent / Party Agreement

Upon receiving a request for joinder, an additional party may be joined to the arbitral proceedings provided that the institution does not \textit{“manifestly lack jurisdiction over the dispute between the parties”}, including the additional party.\textsuperscript{297} The threshold that must be reached to

\textsuperscript{295} See Lörcher and Wolf, p. 9
\textsuperscript{296} See: https://sccinstitute.com/about-the-scc/
\textsuperscript{297} See Article 13(5) of the SCC 2017 Rules (Appendix 1C, p. 905)
satisfy this requirement is low.\textsuperscript{298} In other words, it should not be disputable whether the parties intended for the SCC to have jurisdiction over the particular dispute.

c. Circumstances to be Taken into Account

Before a decision on joinder, “[..] the Board shall consult with the parties and shall have regard to Article 14(3)(i)-(iv).”\textsuperscript{299} Article 14(3)(i-iv) is the multiple-contracts provision in the SCC Rules. The conditions stated in this provision are \textit{inter alia}: “[..] (iii) the efficiency and expeditiousness of the proceedings; and (iv) any other relevant circumstances.”\textsuperscript{300}

d. Temporal Restrictions

Article 13(2) states that the request for the joinder “[..] shall be made as early as possible”.\textsuperscript{301} Additionally, the joinder provision states that a request made after the submission of the answer to the request for arbitration “[..] will not be considered, unless the institution decides otherwise”.\textsuperscript{302} The joinder provision does not contain any indication as to what will make the institution decide otherwise. While this temporal restriction may be deviated from, it seems rather strict.

e. Constitution of the Arbitral Tribunal

If a request for joinder has been granted by the institution, and the appointed arbitrators are not accepted by the additional party, the institution may “[..] release the arbitrators and appoint the entire Arbitral Tribunal [..]”.\textsuperscript{303} An exception to this procedure is if “[..] all parties, including the additional party, agree on a different procedure for the appointment of the Arbitral Tribunal.”\textsuperscript{304} As such, this procedure seems to provide equal treatment of all the parties, including the additional party. Thus, presumably mitigating the risks of the arbitral award being set aside under the New York Convention.\textsuperscript{305}

\begin{footnotes}
\item[298] See Ramsjö and Strömberg, p. 2
\item[299] See Article 13(6) of the SCC 2017 Rules (Appendix 1C, p. 905)
\item[300] See Article 14(3)(i)-(iv) of the SCC 2017 Rules (Appendix 1C, p. 906)
\item[301] See Article 13(2) of the SCC 2017 Rules (Appendix 1C, p. 905)
\item[302] Ibid.
\item[303] See Article 13(8) of the SCC 2017 Rules (Appendix 1C, p. 906)
\item[304] Ibid
\item[305] For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
\end{footnotes}
f. The Deciding Body

In contrast to most other joinder provisions, the institution, i.e., the Board of Directors of the SCC, is the only deciding body. Nevertheless, the institution’s decision to grant the request for the joinder of an additional party does not prejudice the arbitral tribunal’s power to decide on its own jurisdiction. This approach is in accordance with the competence-competence principle.

g. Concluding remarks

The joinder provision in the SCC Rules seems remarkable. Firstly, although possibly resulting in the same solutions, the wording “manifestly lack jurisdiction over the dispute between the parties” is in contrast to most other institutions, which explicitly require either specific consent to the joinder, or the additional party being party to the arbitration agreement. Secondly, the fact that only the institution is explicitly mentioned as the deciding body is rare among institutional joinder provisions. The latter read in conjunction with efficiency and expediency mentioned as relevant circumstances and the temporal restriction seem to accelerate the efficient conduct of the arbitral proceedings.

Q. ADRIC

1. Introduction

The ADRIC (the ADR Institute of Canada) is recognized as Canada’s preeminent self-regulatory professional Dispute Resolution organisation. In 1992, ADRIC introduced its arbitration rules. The latest set of rules came into effect 1 December 2016 (“the ADRIC Rules”). This set of rules constitutes a revision of the rules from 1 December 2014 with only minor changes.
2. The development of the joinder provision
   
a. Introduction

The first joinder provision was included in the ADRIC 2014 Rules as Article 4.3.1 under the heading “Adding parties to an arbitration”. The ADRIC 2016 Rules preserved this version of the joinder provision.

b. Consent / Party Agreement

According to Article 4.3.1, an additional party may be joined to the arbitral proceedings “[...] if the existing parties and the new party all consent.” The joinder provision does not explicitly set any further formal requirements regarding the consent of the parties.

c. Circumstances to be Taken into Account

The joinder provision does not provide any circumstances which should be taken into account when rendering a decision on joinder.

d. Temporal Restrictions

In the ADRIC Rules, it explicitly stated that the additional party can be joined even after the arbitral tribunal has been constituted. The inclusion of the wording “even if the tribunal has been appointed” could suggest that joinder is possible prior to the constitution. The placement of the joinder provision as Article 4, which has the heading “Proceedings before Arbitral Tribunal”, could however suggest otherwise.

e. Constitution of the Arbitral Tribunal

The joinder provision itself is silent with regard to the constitution of the arbitral tribunal in case joinder is permitted. This can probably be explained by the fact that all parties must consent to the joinder. Thereby, the additional party must be deemed to have estopped its right to participate in the appointment of the arbitral tribunal. If it is possible to join an additional party prior to the constitution this party would presumably participate in the appointment of arbitrators as detailed in Article 3 of the ADRIC 2014 and 2016 Rules.

309 See Article 4.3.1 of the ADRIC 2014 and 2016 Rules (Appendix 1C, pp. 976 and 1002)
310 Ibid.
311 Ibid.
312 See Article 4 of the ADRIC 2014 and 2016 Rules (Appendix 1C, pp. 976 and 1002)
313 See sections d and f
f. The Deciding Body

Seemingly, the arbitral tribunal is the only deciding body.\textsuperscript{314}

g. Concluding remarks

Although the joinder provision in the ADRIC Rules is rather limited and does not offer a lot of information, party autonomy seems to be in focus as, \textit{inter alia}, the consent to the joinder of all parties, including the additional party, is required.

R. SAC

1. Introduction

The SAC (Swiss Arbitration Centre), formerly known as SCAI (the Swiss Chambers’ Arbitration Institution), is a global platform for arbitration under the leadership of the ASA (Swiss Arbitration Association). The institution, originally established in 1866,\textsuperscript{315} has had several iterations of its arbitration rules (“the SAC Rules”) with the newest rules becoming effective on 1 June 2021.

2. The development of the joinder provision

a. Introduction

Although SAC was not one of the first institutions to include joinder in its arbitration rules, it was one of the first institutions to include joinder as a \textit{separate provision} and not as a part of a general provision on the arbitral tribunal’s powers. The SAC Rules were revised in 2012 and in 2021. The first revision in the SAC 2012 Rules entailed only minor changes to the joinder provision, whereas the recent revision in 2021 included several new additions.

b. Consent / Party Agreement

In the SAC 2004 Rules, there was no express requirement that the original parties or the additional party should provide consent to the joinder.\textsuperscript{316} There was neither any express requirement of the additional party being a \textit{signatory} to, or otherwise \textit{bound by}, the arbitration agreement.

\textsuperscript{314} See the discussion in section d above
\textsuperscript{315} See: https://www.swissarbitration.org/centre/
\textsuperscript{316} See Article 4(2) of the SAC 2004 Rules (Appendix 1D, p. 9)
The joinder provision did not mention any other way for the arbitral tribunal to create jurisdictional basis to the joinder. However, permitting an additional party to be joined into the arbitral proceedings still require some measure of consent, for instance to avoid “[..] objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”\textsuperscript{317} Nonetheless, the fact that no means of ascertaining jurisdiction over the additional party is mentioned in the joinder provision, seems to illustrate, to some degree, a departure from the principle of party autonomy.\textsuperscript{318} This approach was preserved in the SAC 2012 and 2021 Rules.

c. Circumstances to be Taken into Account

In the SAC 2004 Rules, the arbitral tribunal was obliged to consult with all parties and take into account the circumstances which it deemed relevant before deciding on a request for joinder. The joinder provision did not further describe "relevant circumstances". As such, deciding which circumstances could be of relevance was within the arbitral tribunal’s discretion.

In the SAC 2012 Rules, it was added to the joinder provision that the arbitral tribunal should decide on the request “[..] after consulting with all of the parties, including the person or persons to be joined [..]”.\textsuperscript{319} As such, the fact that the additional party was now also explicitly to be consulted suggests a strengthening of the additional party’s position in the proceedings as the consultation could, possibly, influence the outcome of the decision. This approach was preserved in the SAC 2021 Rules. As such, the arbitral tribunal still decides on the request for joinder “[..] after consulting with all parties, taking into account all relevant circumstances.”\textsuperscript{320}

With the SAC 2021 Rules, the institution is also granted the power to make a \textit{prima facie} decision on joinder in accordance with Article 5 \textit{mutatis mutandis}.\textsuperscript{321} In that regard, the institution must take into account whether: “[..] (a) there is manifestly no Arbitration Agreement

\textsuperscript{317} See Article 21 of the SAC 2004 Rules. See also the reference to jurisdictional objections in the last sentence of Article 6(2) of the SAC 2021 Rules (Appendix 1D, pp. 14 and 74)
\textsuperscript{318} See Gomez, pp. 496ff
\textsuperscript{319} See Article 4(2) of the SAC 2012 Rules (Appendix 1D, p. 41)
\textsuperscript{320} See Article 6(3) of the SAC 2021 Rules (Appendix 1D, p. 74)
\textsuperscript{321} See Article 6(2) of the SAC 2021 Rules (Appendix 1D, p. 74)
referring to these Rules; or (b) where claims are made under more than one Arbitration Agreement, the Arbitration Agreements are manifestly incompatible.”

Accordingly, the circumstances to be taken into account by the institution are more thoroughly described than the circumstances which the arbitral tribunal has to take into account. Especially, one should note the explicit acceptance of multi-contract arbitration.

d. Temporal Restrictions
Neither the SAC 2004, 2012, nor the 2021 Rules include any explicit temporal restrictions in the joinder provision.

e. Constitution of the Arbitral Tribunal
In the SAC 2004 and 2012 Rules, only the arbitral tribunal was explicitly empowered to decide on any request for joinder. Thus, the issue of joinder could presumably only be addressed after the constitution. However, the joinder provision did not provide for a procedure after constitution either.

Although the SAC 2021 Rules’ joinder provision can be construed as an expansion compared to the 2004 and 2012 joinder provisions, it still does not address how to deal with potential equal treatment issues in regard to the constitution of the arbitration tribunal. This, read in conjunction with the fact that no explicit consent to the joinder is required - which could otherwise be construed as a waiver - makes this one of the most “liberal” joinder provisions. This approach could entail several risks that could arguably risk the award being set aside under the New York Convention.

f. The Deciding Body
While the arbitral tribunal was the only designated deciding body in the SAC 2004 and 2012 Rules, Article 6(2) in the SAC 2021 Rules provides that it is the institution, which prior to the constitution of the arbitral tribunal receives the notice of claim from the requesting party and subsequently makes a prima facie decision in accordance with Article 5 mutatis mutandis.

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322 See Article 5(a)-(b) of the SAC 2021 Rules (Appendix 1D, p. 74)
323 See Articles 11(3) and 11(4) of the SAC 2021 Rules (Appendix 1D, p. 76)
324 For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
325 See Article 6(2) of the SAC 2021 Rules (Appendix 1D, p. 74)
The rationale underpinning this changed approach in the institution’s role is arguably to increase efficiency of the arbitral proceedings.

Any decision made by the institution in this regard is, however, without prejudice to the arbitral tribunal’s power to decide on its own jurisdiction in accordance with the competence-competence principle as also enshrined in Article 23(1) of the SAC Rules: “[t]he arbitral tribunal shall have the power to rule on any objections to its jurisdiction [...]”. As such, although the arbitral tribunal will, presumably, have the final say both prior to the constitution due to the principle of competence-competence and explicitly after constitution, the competence of being the deciding body is now formally divided between the institution and the arbitral tribunal.

g. Concluding remarks

The most remarkable part about the joinder provisions in the SAC Rules relates to the arbitral tribunal’s jurisdiction. In contrast to most other joinder provisions, there is no express requirement of either explicit consent, consent enshrined in the arbitration agreement by being a signatory, or by being “bound by” the arbitration agreement. As such, the SAC Rules’ joinder provision must be said to illustrate a departure - to some degree - from the principle of party autonomy. Even so, the deciding body still needs to ascertain whether they have jurisdiction over the additional party. As such, the aforementioned ways of ascertaining jurisdiction could still be highly relevant, or necessary, with regards to a possible joinder according to the SAC Rules.

S. VIAC

1. Introduction

The VIAC (Vienna International Arbitration Centre) is the premier arbitral institution in Central and South-Eastern Europe. The institution, which was established as an independent centre in 1975, has had multiple iterations of its arbitration rules (“the VIAC Rules”) with the newest rules entering into force as of 1 July 2021.

326 See Article 23(1) of the SAC 2021 Rules (Appendix 1D, p. 78)
2. The development of the joinder provision
   
a. Introduction

The first joinder provision was introduced in 2013 as Article 14. The VIAC Rules were later revised with minor changes in the VIAC 2018 and 2021 Rules, which did not affect the substance of the joinder provision. In many ways, VIAC has adopted the same approach to joinder as the SAC.\(^{327}\)

b. Consent / Party Agreement

Neither of the joinder provisions in the VIAC 2013, 2018, nor the 2021 Rules contain any express requirement that the original parties or the additional party should give explicit consent to the joinder, that the additional party should be a signatory, nor otherwise bound by, the arbitration agreement. Furthermore, the joinder provisions did not explicitly mention any other way for the arbitral tribunal to create jurisdictional basis to the joinder. Nonetheless, it must once again be mentioned that permitting an additional party to be joined into the arbitral proceedings still requires, as a matter of jurisdiction, some form of consent. This is for instance to avoid “[a]n objection that the arbitral tribunal is exceeding the scope of its authority [...]”.\(^{328}\) However, the fact that no way of ascertaining jurisdiction over the additional party is mentioned in the joinder provision seems to illustrate, to some degree, a departure from the principle of party autonomy.

c. Circumstances to be Taken into Account

Throughout all the iterations of the joinder provision in the VIAC Rules, the arbitral tribunal should decide on the request for joinder “[..] after hearing all parties and the third party to be joined as well as after considering all relevant circumstances.”\(^{329}\) As the relevant circumstances are not further detailed, the arbitral tribunal is granted flexibility to decide on the request for joinder as it may include all circumstances it deems relevant.

d. Temporal Restrictions

The joinder provision has not at any time set any explicit temporal restrictions in relation to the request for joinder.

\(^{327}\) See section 4.1.R, litra b
\(^{328}\) See Article 24(2) of the VIAC 2021 Rules
\(^{329}\) See Article 14.1 of the VIAC 2013, 2018, and 2021 Rules (Appendix 1D, pp. 149, 186, 245)
e. Constitution of the Arbitral Tribunal

Throughout all the iterations of the joinder provision, it is stated that “[..] the third party may participate in the constitution of the arbitral tribunal […] if no arbitrator has yet been appointed.” The provision does, however, not provide any information on the procedure in case joinder is granted after the constitution of the arbitral tribunal.

In contrast to most other institutional arbitration rules, the VIAC Rules’ joinder provision has a procedure in case the additional party did participate in the constitution of the arbitral tribunal and then joinder is subsequently refused by the arbitral tribunal. In this case, “[..] the Board may revoke any confirmed nomination or appointment of arbitrators and order the renewed constitution of the arbitral tribunal […]”.

f. The Deciding Body

Seemingly, the arbitral tribunal is the only deciding body, although the institution, i.e., the Secretariat, is also mentioned in the joinder provision. However, the role of the institution in relation to the joinder seems to be more practical. For instance, the request “[..] shall be submitted to the Secretariat. […]. The Secretary General shall transmit the Statement of Claim to the third party to be joined as well as to the other parties for their comments.” As such, the institution is not a deciding body, in contrast to the SAC Rules where the institution can make a prima facie decision.

g. Concluding remarks

Similar to the SAC Rules, the most interesting part about the joinder provision relates to the arbitral tribunal’s jurisdiction. Presumably, VIAC, which introduced its first joinder provision in 2013, was influenced by the approach to joinder in the SAC Rules which introduced a new iteration of its joinder provision in 2012. The VIAC Rules are however not entirely identical to the SAC Rules. Inter alia, in relation to the deciding body and the procedure in case the additional party participated in the constitution of the arbitral tribunal, but the joinder was subsequently denied.

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330 See Article 14.3 of the VIAC 2013, 2018 and 2021 Rules (Appendix 1D, pp. 149, 186, 246)
331 See Article 14.3.1 of the VIAC 2013, 2018, and 2021 Rules (Appendix 1D, pp. 149, 186, 246)
332 See section 4.1.R, litra f
333 See Appendix 3
T. CAM

1. Introduction

The CAM (Milan Chamber of Arbitration) is a special branch of the Chamber of Commerce of Milan and is the leading arbitral institution in Italy.\textsuperscript{334} The institution, which was established in 1986, has had several iterations of its arbitration rules (“the CAM Rules”) with the newest rules entering into force as of 1 July 2020.

2. The development of the joinder provision

a. Introduction

The first joinder (and intervention) provision in the CAM Rules was introduced in the CAM 2010 Rules as Article 22.5. This version of the joinder provision was preserved in the CAM 2019 and 2020 Rules. This joinder provisions is in many ways similar to the SAC Rules\textsuperscript{335} and the VIAC Rules.\textsuperscript{336} The joinder provision is though rather limited, as it only consists of a single sentence in an article detailing the various powers of the arbitral tribunal similar to e.g., the LCIA Rules.\textsuperscript{337}

b. Consent / Party Agreement

The joinder provision according to the CAM Rules does not, similarly to the SAC Rules\textsuperscript{338} and the VIAC Rules\textsuperscript{339}, contain any express requirement that the original parties or the additional party give consent to the joinder, or that the additional party is a signatory or, or otherwise bound by, the arbitration agreement. Nevertheless, it must once again be mentioned that permitting an additional party to be joined into the arbitral proceedings still requires some form of consent to the participation. As illustrated by Article 13 of the CAM 2020 Rules, which deals with objections due to a lack of jurisdiction, the arbitral tribunal still needs to ascertain, whether it does have the \textit{requisite jurisdiction} of the additional party to allow the request for joinder. However, the fact that no way of ascertaining jurisdiction over the additional party is mentioned

\textsuperscript{334} See: https://arbitrationlaw.com/library/chamber-arbitration-milan-cam-national-arbitration-institution-world-arbitration-reporter
\textsuperscript{335} See section 4.1.R
\textsuperscript{336} See section 4.1.S
\textsuperscript{337} See section 4.1.E
\textsuperscript{338} See section 4.1.R, litra b
\textsuperscript{339} See section 4.1.S, litra b
in the joinder provision seems to illustrate, to some degree, a departure from the principle of party autonomy.

c. Circumstances to be Taken into Account

The arbitral tribunal shall decide on the request for joinder “[..] after consulting the parties, taking into consideration all the relevant circumstances of the case.” As the circumstances are not further detailed, the arbitral tribunal is granted some degree of flexibility to decide on the request for joinder as it may include all circumstances it deems relevant. This approach is also similar to the VIAC Rules.

d. Temporal Restrictions

The joinder provision does not contain any explicit temporal restrictions in relation to the request for joinder.

e. Constitution of the Arbitral Tribunal

The joinder provision does not provide a procedure on how to deal with potential issues relating to the constitution of the arbitral tribunal in case joinder is permitted.

f. The Deciding Body

Seemingly, only the arbitral tribunal can be the deciding body as detailed in the joinder provision: “[..] the Arbitral Tribunal shall decide the application [..]”.

g. Concluding remarks

Similar to the SAC Rules and the VIAC Rules, the most noteworthy part about the joinder provision relates to the arbitral tribunal’s jurisdiction. The fact that there is no express requirement of either explicit consent, consent enshrined in the arbitration agreement by being a signatory, or that the additional party should be “bound by” the arbitration agreement is in contrast to most other joinder provisions. Presumably, CAM, which introduced its first joinder provision in the CAM 2010 Rules, was influenced by the SAC Rules’ first joinder provision in the SAC 2004 Rules.

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340 See Article 22.5 of the CAM 2010 Rules and Article 25.7 of the CAM 2019 and 2020 Rules (Appendix 1D, pp. 342, 409, and 437)
341 See section 4.1.5, litra c
342 See Article 22.5 of the CAM 2010 Rules and Article 25.7 of the CAM 2019 and 2020 Rules (Appendix 1D, pp. 342, 409, and 437)
U. DIS

1. The Institution

The DIS (Deutsche Institution für Schiedsgerichtsbarkeit e.V.) is the leading institution on arbitration in relation to both national and international commercial disputes in Germany. The institution, which was established on 1 January 1992, as a result of a merger between the German Arbitration Institute and the German Arbitration Committee, has had multiple iterations of its arbitration rules (“the DIS Rules”) with the newest rules becoming effective as of 1 March 2018. In 2021, few changes were added to the DIS Rules. None of these changes affected the joinder provision.

2. The development of the joinder provision
   a. Introduction

While the DIS 1998 Rules regulated multi-party arbitration, the DIS 2018 Rules is the first to contain a joinder provision.

   b. Consent / Party Agreement

The joinder provision does not require that the parties should give explicit consent or be a signatory to the same arbitration agreement. Article 19.5 of the joinder provision does, however, provide that “[..] [t]he arbitral tribunal, in making its decision, shall apply the provisions of Article 18 (Multi-Party Arbitration) and, when claims are made under more than one contract, the arbitral tribunal shall also apply the provisions of Article 17 (Multi-Contract Arbitration).”

Looking to Article 18.1, it is stated that “[c]laims made in an arbitration with multiple parties [...] may be decided in that arbitration if there is an arbitration agreement that binds all of the parties to have their claims decided in a single arbitration or if all of the parties have so agreed in a different manner [...]”. As such, an additional party may be joined into the proceedings.

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344 See Section 13 of the DIS 1998 Rules (Appendix 1D, p. 469)
345 See Article 19 of the DIS 2018 Rules (Appendix 1D, p. 499)
346 See Article 19.5 of the DIS 2018 Rules (Appendix 1D, p. 499)
347 See Article 18.1 of the DIS 2018 Rules (Appendix 1D, p. 499)
if there is a binding arbitration agreement between the original parties and the additional party, or if all the parties, including the additional party, agree. Interestingly, Article 18.1 seemingly allows the agreement to be an oral agreement, as the arbitral tribunal can decide on any dispute “[..] in particular when there is no express agreement in writing to that effect”.348 This could potentially result in conflict with the “in writing” requirement in the New York Convention.349

In case of multi-contract arbitration, Articles 17.1 and 17.2 respectively requires that “[..] all parties have agreed thereto [..]”,350 and that “[..] the arbitration agreements are compatible.”351 While the option of ascertaining jurisdiction based on compatible arbitration agreements might, at first sight, seem similar to the third option in the RAC Rules,352 the defining difference is that the DIS Rules additionally, and explicitly, require all the parties consent to the joinder.

c. Circumstances to be Taken into Account

The joinder provision does not provide any circumstances that should be taken into account before the request for joinder is decided upon.

d. Temporal Restrictions

A temporal restriction can be found in Article 19.1. According to this joinder provision, a request for joinder must be filed “[p]rior to the appointment of any arbitrator [..]”.353 No exception to this temporal restriction can be found in the DIS 2018 Rules.

e. Constitution of the Arbitral Tribunal

The temporal restriction in Article 19.1 ensures that no additional party can be joined after the appointment of any arbitrator. As such, an additional party can only be joined prior to the constitution of the arbitral tribunal. In this regard, the DIS 2018 Rules further provide that the additional party shall participate in the constitution of the arbitral tribunal.354 The procedure

348 See the last sentence of Article 18.1 of the DIS 2018 Rules (Appendix 1D, p. 499)
349 See Articles II(1) & II(2) in the New York Convention (Appendix 2, p. 2)
350 See Article 17.1 of the DIS 2018 Rules (Appendix 1D, p. 499)
351 See Article 17.2 of the DIS 2018 Rules (Appendix 1D, p. 499)
352 See section 4.11, litra b
353 See Article 19.1 of the DIS 2018 Rules (Appendix 1D, p. 499)
354 See Article 20.5 of the DIS 2018 Rules (Appendix 1D, p. 500)
for appointing arbitrators in case of joinder is that the additional party may nominate an arbitrator jointly with the claimant(s) or the respondents(s). In the absence of a joint nomination, the institution, i.e., the Appointing Committee, must after consultation with the parties decide to either 1) appoint an arbitrator for the side which has not nominated an arbitrator, while appointing the arbitrator chosen by the opposing side, 2) appoint an arbitrator for the side, which has not nominated an arbitrator and voiding the choice of arbitrator made by the opposing side, or 3) appoint both the arbitrators and the president.

f. The Deciding Body

Seemingly, the competences are divided between the institution and the arbitral tribunal. The joinder provision only explicitly provides that the arbitral tribunal shall decide “[...] whether claims made by or against the additional party may be resolved in the pending arbitration” in case there are claims against the additional party. It is, however, the institution, i.e., the Arbitration Council, which is the deciding body with regard to, inter alia, challenges to the appointed arbitrators.

g. Concluding remarks

The joinder provision in the DIS Rules seems to illustrate an efficiency-based approach to joinder with, inter alia, a strict temporal restriction and having the institution in charge throughout most of the process.

V. ICDR-AAA

1. Introduction

The ICDR (International Centre for Dispute Resolution) is the international division of the largest arbitral institution in the world, the AAA (American Arbitration Association). The institution, which was established in 1996, has had several iterations of its arbitration rules with the newest rules becoming effective on 1 March 2021.

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355 See Article 20.5 of the DIS 2018 Rules (Appendix 1D, p. 500)
356 See respectively Articles 20.5(i), (ii), and (iii) of the DIS 2018 Rules (Appendix 1D, p. 500)
357 See Article 19.5 of the DIS 2018 Rules (Appendix 1D, p. 499)
358 See Article 15.4 of the DIS 2018 Rules (Appendix 1D, p. 498)
2. The development of the joinder provision

a. Introduction

The first joinder provision in the ICDR-AAA Rules was introduced in 2014 as Article 7. In 2021, ICDR-AAA launched a new set of rules in which joinder is included in Article 8. Only minor changes were made to the previous Article 7.

b. Consent / Party Agreement

The ICDR-AAA 2014 and 2021 Rules do not contain an express requirement as to how jurisdiction over the additional party to be joined can be created. Nevertheless, the joinder provisions state that “[t]he request for joinder shall contain the same information required […] under Article 2(3) […]”.359 And according to Article 2(3), this information is, inter alia, “[..] a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agreement, a copy of the arbitration agreement under which each claim is made.”360 According to scholarly literature, this may be interpreted as a requirement that the additional party should be a signatory to the underlying arbitration agreement.361

c. Circumstances to be Taken into Account

If the joinder is requested after the constitution, the arbitral tribunal may, inter alia, only grant the joinder if it “[..] determines that the joinder of an additional party is appropriate”.362 It is, however, not further described what “appropriate” entails. As such, insofar the additional party gives its consent to the joinder, the arbitral tribunal is seemingly granted a broad discretion to decide on the request for joinder.

d. Temporal Restrictions

Article 7(1) in ICDR-AAA 2014 Rules entailed a temporal restriction according to which “no additional party could be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agreed.”363 This temporal restriction was preserved in the ICDR-AAA 2021 Rules. It was however included as an exemption to the temporal re-

359 See Article 7(2) of the ICDR 2014 Rules (Appendix 1D, p. 632)
360 See Article 2(3)(c) of the ICDR 2014 and 2021 Rules (Appendix 1D, pp. 630 and 669)
361 See Choi, pp. 7-8
362 See Article 8(1) of the ICDR-AAA 2021 Rules (Appendix 1D, p. 672)
363 See Article 7(1) of the ICDR-AAA 2014 Rules (Appendix 1D, p. 632)
striction, other than all parties agreeing, that if “[..] the arbitral tribunal once constituted determines that the joinder of an additional party is appropriate, and the additional party consents to such joinder.” Thus, if the additional party consents, this new addition enables the arbitral tribunal to ex officio deviate from the temporal restriction.

e. Constitution of the Arbitral Tribunal

The joinder provision in both the ICDR-AAA 2014 and 2021 Rules refer to, inter alia, articles according to which, “[i]f there are more than two parties to the arbitration, the Administrator may appoint all arbitrators unless the parties have agreed otherwise [..]”. This procedure only applies prior to the constitution of the arbitral tribunal. After the constitution of the arbitral tribunal, it is explicitly stated in the joinder provision that “[n]o additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree.” As such, although not explicitly mentioned in the joinder provision, the additional party must - by consenting to the joinder at this stage of the proceedings - be deemed to have estopped its right to participate in the constitution of the arbitral tribunal.

f. The Deciding Body

Only the arbitral tribunal is explicitly mentioned in the joinder provision. However, as the joinder of additional parties is seemingly only a possibility prior to the constitution, the institution could be empowered in some way to decide on this issue.

g. Concluding remarks

Similar to the SAC Rules, VIAC Rules, and the CAM Rules, an interesting part about the joinder provision relates to the arbitral tribunal’s jurisdiction. It seems to create some uncertainty whether the additional party, with the references to other articles in the ICDR-AAA Rules, is required to be a signatory to the arbitration agreement. This is presumably the case as jurisdiction over all the parties to the joinder is necessary.

364 See Article 8(1) of the ICDR-AAA 2021 Rules (Appendix 1D, p. 672)
365 See Article 12(5) of the ICDR-AAA 2014 Rules and Article 13(5) of the ICDR-AAA 2021 Rules (Appendix 1D, pp. 635 and 675)
366 See Article 7(1) of the ICDR-AAA 2014 Arbitration Rules and Article 8(1) of the ICDR-AAA 2021 Arbitration Rules (Appendix 1D, pp. 632 and 672)
367 Ibid.
W. OCC

1. Introduction

In Norway, most arbitrations are conducted as *ad hoc* arbitration in accordance with the parties’ chosen arbitration clause and supplemented by the Norwegian Arbitration Act. Institutional arbitration is however still offered by the OCC (The Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce). The institution, which was established in 1984, has had some iterations of its arbitration rules (“the OCC Rules”) with the newest rules being adopted by the Board of the Institute at the meeting on 5 December 2016 and entered into force on 1 January 2017.

2. The development of the joinder provision

a. Introduction

The OCC is an interesting case. In the OCC 2005 Arbitration Rules, a joinder provision was included in Article 11 regarding the various powers of the arbitral tribunal. In the OCC 2017 Rules the joinder provision was removed and not replaced.

b. Consent / Party Agreement

According to the OCC 2005 Rules, the arbitral tribunal had the power to “*unless a party objects, allow the scope of the Arbitration to be extended through the inclusion of new claims and other parties to be joined*”. It is not further described what kind of consent such an extension would entail. Arguably, this *could* include the use of legal theories/doctrines.

c. Circumstances to be Taken into Account

The joinder provision did not provide any information in relation to the circumstances which could be taken into account when rendering a decision on joinder. As such, “*unless a party objects*” the arbitral tribunal was seemingly granted a broad discretion to decide on the joinder.

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368 See Knudzon
369 See Article 11(e) of the OCC 2005 Rules (Appendix 1D, p. 700)
370 Ibid
371 See the discussion in section 5.2
372 Ibid
d. Temporal Restrictions
The joinder provision in the OCC 2005 Rules did not set out any explicit temporal restrictions in relation to the request for joinder. As only the arbitral tribunal was explicitly empowered to decide on any request for joinder, this could apparently only take place after constitution of the arbitral tribunal.

e. Constitution of the Arbitral Tribunal
The joinder provision did not contain any information on how to deal with the constitution of the arbitral tribunal.

f. The Deciding Body
As the joinder provision was included as a part of the general powers of arbitral tribunal, it was seemingly only for the arbitral tribunal to decide on a request for joinder. As such, issues relating to equal treatment could possibly arise and risk the arbitral award being subject to setting aside procedures under the New York Convention.373

g. Concluding remarks
The fact that the institution decided to remove the joinder provision seems peculiar. There are no published preparatory works related to this decision, which could otherwise explain the rationale.

The explanation is neither found in the lex arbitri. The Norwegian Arbitration Act has not been changed since 2004 and does not explicitly prohibit joinder.374

General considerations behind the OCC 2017 Rules are, however, described in an article by Ola Ø. Nisja and Thomas K. Svensen. Nisja and Svensen emphasise that it was considered important to keep the complexity of the rules low and close to the customary Norwegian ad hoc practice.375 As such, one could imagine the removal of joinder being in service of this simplification purpose. Nonetheless, the article also touches upon the fact that the OCC 2017 Rules

373 For instance, due to Article V(1)(b) or V(2)(b) of the New York Convention (Appendix 2, p. 3)
374 See Act of 14 May 2004 no. 25 relating to Arbitration
375 Nisja and Svensen, p. 41
now seem to be less detailed compared to other arbitration institutions, which was not the intended purpose with the revision of the rules. Consequently, one could imagine joinder being reintroduced with a later revision of the OCC Rules.

X. MCIA

1. Introduction

The MCIA (The Mumbai Centre for International Arbitration) was formally launched in October 2016. The first, and the newest, set of rules (“the MCIA Rules”) became effective as of June 2016.

2. The development of the joinder provision

a. Introduction

The MCIA Rules do not include a joinder provision. Neither does the *lex arbitri*, the Indian Arbitration and Conciliation Act of 1996, which governs both domestic and international arbitration. On the other hand, the *lex arbitri* does not seem to preclude joinder. This is supported by the fact that according to scholarly literature and case law, joinder is possible in India. In fact, the Indian courts have been hesitant to refuse enforcement of arbitral awards, where the arbitral tribunal ordered joinder of non-signatory additional parties.

As such, India illustrates an interesting example which seemingly allows joinder in practice but is not explicitly regulated in the *lex arbitri* nor in the MCIA Rules. An explanation could presumably be that *procedural tools* for conducting multi-party arbitration is a rather new concept in an Indian context. Due to the objective of this study, which is primarily to examine the development *within the chosen arbitration rules*, the general legal status of joinder in India will not be analysed further.

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376 Nisja and Svensen, p. 47
377 Dave, Hunter, Narimann and Paulsson, p. 472
378 For instance: *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, The Supreme Court of India, Civil Appeal No. 7134 of 2012, 28 September 2012, regarding joinder of non-signatory parties.
379 See Dave, Hunter, Narimann and Paulsson, p. 69
380 Interestingly, another Indian arbitration institution, Nani Palkhivala Arbitration Centre, also lacks a joinder provision, see Deepak
381 See Deepak
b. Consent / Party Agreement

[NOT AVAILABLE]

c. Circumstances to be Taken into Account

[NOT AVAILABLE]

d. Temporal Restrictions

[NOT AVAILABLE]

e. Constitution of the arbitral tribunal

[NOT AVAILABLE]

f. The Deciding Body

[NOT AVAILABLE]

g. Concluding remarks

[NOT AVAILABLE]

Y. CAM-CCBC

1. Introduction

The CAM-CCBC (The Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada) is a Brazilian institution which administers arbitral proceedings. The institution, which was founded in 1976, has had a few iterations of its arbitration rules ("the CAM-CCBC Rules") with the newest rules approved on 1 September 2011 with later amendments on 28 April 2016.

2. The development of the joinder provision

a. Introduction

Similar to the MCIA Rules, neither the CAM-CCBC Rules nor the lex arbitri, the Brazilian Arbitration Act, regulate the matter of joinder. Though, in contrast to India, scholarly literature and case law are not in agreement regarding the use of joinder in Brazil.³⁸³

Brazilian law has, at times, been construed to allow non-signatory additional parties to be bound by an arbitration agreement, and accordingly joined into arbitral proceedings, when replaced by an original party, or when the additional party has participated in the negotiation of the contract.³⁸⁴ This seems like an acceptance of the legal theories/doctrines of agency and implied consent.³⁸⁵ This position is, however, not free from opposition and could thus be viewed as controversial.³⁸⁶

As such, Brazil illustrates an interesting example as joinder might be permitted in theory and/or practice but is not regulated in the lex arbitri nor the CAM-CCBC Rules. Due to the objective of this study, which is primarily to examine the development within the chosen arbitration rules, the general legal status of joinder in Brazil will not be analysed further.

b. Consent / Party Agreement

[NOT AVAILABLE]

c. Circumstances to be Taken into Account

[NOT AVAILABLE]

d. Temporal Restrictions

[NOT AVAILABLE]

e. Constitution of the Arbitral Tribunal

[NOT AVAILABLE]

³⁸³ Bianco, Correa, Pereira and Murayama, para 10
³⁸⁴ Bianco, Correa, Pereira and Murayama, para 10
³⁸⁵ See section 3.2.2.1 for a description of agency and implied consent.
³⁸⁶ See Bianco, Correa, Pereira and Murayama, para 10
4.2. Prevailing tendencies in joinder provisions

1. Introduction

Based on the analysis in section 4.1, different prevailing tendencies within the newest iterations of the joinder provisions are now presented and compared. The tendencies are presented according to the same five parameters as in section 4.1 and further categorised into subsections which illustrate the different prevailing tendencies.

2. The parameters

b. Consent / Party Agreement

1. Introduction

The examined institutional arbitration rules illustrate five tendencies as to how jurisdiction over the additional party may be ascertained. Most of the joinder provisions do, however, provide several options. It is therefore difficult to establish a clear-cut categorisation. Nevertheless, it is the authors opinion that there are five prevailing tendencies: explicit consent to the joinder, signatory to the arbitration agreement, “bound by” the arbitration agreement, the “efficiency-options”, and “silent” joinder provisions.

2. Explicit consent to the joinder

The first tendency is the joinder provisions requiring explicit consent to the joinder. This tendency is illustrated in the HKIAC Rules, the ADRIC Rules, LCIA Rules, the MIAC

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387 See section 4.1.G
388 See section 4.1.Q
389 See section 4.1.E
Rules, 390 KCAB Rules, 391 and the JCAA Rules. 392 Although these joinder provisions require explicit consent to the joinder, there are some variations as to how explicit consent must be given.

The HKIAC Rules and the ADRIC Rules require that all parties, including the additional party, expressly agree/consent to the joinder. Another approach is found in the LCIA Rules and the MIAC Rules. According to these joinder provisions, the explicit consent should be in writing. 393 The LCIA Rules and the MIAC Rules, however, have different procedures with regard to which of the parties are required to consent. The MIAC Rules require that all parties consent, while the LCIA Rules only require the consent of the requesting party and the additional party. A similar requirement (of consent to the joinder having to be in writing) is found within the KCAB Rules and the JCAA Rules. According to these joinder provisions, it is sufficient that only the additional party consents to the joinder.

This tendency illustrates a strong emphasis on party autonomy and on the notion of explicit consent as being the primary or only way to establish jurisdictional basis.

3. Signatory to the arbitration agreement

The second tendency is found in the UNCITRAL Rules, 394 the CRCICA Rules, 395 the ICC Rules, 396 and the NAI Rules. 397 According to these rules, jurisdiction to order the joinder is ascertained if all the parties, including the additional party, are signatories to the arbitration agreement.

As such, the parties do not have to re-issue consent to the joinder insofar as the original parties and the additional party have already done so by means of the arbitration agreement. Thus, all parties who signed the arbitration agreement are deemed to have consented to arbitration even
if they are not a party to the initially commenced arbitral proceedings. The act of agreeing to arbitrate in accordance with a set of arbitration rules that include joinder, suffices for consent.

It could be argued that the first tendency (explicit consent to the joinder) and the second (being a signatory) are de facto similar. In both cases, the additional party gives consent to arbitrate the dispute with the particular parties. There are, nonetheless, some differences. For instance, while the first tendency allows for joinder of a non-signatory party who gives explicit consent, the second allows only joinder of signatory parties.

4. “Bound by” the arbitration agreement

The third tendency is illustrated in the CIETAC Rules, ACICA Rules, SIAC Rules, and the DIS Rules. According to this tendency, an additional party may be joined if it is “bound by” the arbitration agreement upon which the arbitral proceedings were founded.

This tendency seems ill-defined and ambiguous in relation to consent. It leaves open an array of interpretations as to the necessary conditions for establishing consent. Further, it could bring about the possibility of leveraging different legal theories/doctrines for purposes such as extending the additional party’s consent, thus also the binding effect of the arbitration agreement. This will be further discussed in section 5.2.

5. The “efficiency-options”

The fourth tendency is inferred from the RAC Rules and the AIAC Rules (the “efficiency-options”). According to the RAC Rules, joinder may be permitted if the claims, of both the additional claimant and the claimant, are covered by compatible arbitration agreements and that the claims arise from principal and ancillary obligations or other interconnected obligations. According to the AIAC Rules, joinder may be permitted if the participation of the

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398 See section 4.1.K
399 See section 4.1.N
400 See section 4.1.J
401 See section 4.1.U
402 See section 3.2.2.1., which describes some of these legal theories/doctrines.
403 See section 4.1.L
404 See section 4.1.C
405 Note, however, that the RAC Rules also provide for the possibility of giving explicit consent or being a signatory to the arbitration agreement upon which the proceedings are commenced.
406 Note, however, that the AIAC Rules also provide for the possibility of giving explicit consent or being bound by the arbitration agreement upon which the proceedings are commenced.
additional party is considered necessary for the efficient resolution of the dispute and directly affects the outcome of the arbitral proceedings.

In both situations, there seems to be no requirement of consent from either parties, but rather, a more wide-ranging base for the joinder. These approaches would appear as a diversion from the consensual nature of arbitration towards a more liberal approach, focusing on, and *prima facie* creating jurisdiction based upon, whether the arbitration agreements are compatible or whether the joinder is necessary for the efficient resolution of the dispute.

The efficiency-options are interesting when considering the fundamental principles of arbitration, especially party consent and party autonomy. These considerations, on the use of efficiency-options to establish jurisdiction over an additional party, will be further discussed in section 5.3.

6. “Silent” joinder provisions

The last tendency is found in the DAI Rules, the SAC Rules, the VIAC Rules, the CAM Rules, and the SCC Rules. These joinder provisions do not entail any mentioning of how jurisdiction over the additional party is ascertained.

What is more, the SCC Rules’ joinder provision is the only one that even addresses the matter of jurisdiction. According to it, the deciding body must not “manifestly” lack jurisdiction. Beyond this requirement, the joinder provision, taken in isolation, provides no further specifications as to how jurisdiction can be ascertained.

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407 See section 4.1.D - Note, however, that the DAI Rules refer to other provisions in the DAI Rules where an arbitration agreement is seemingly required.

408 See section 4.1.R

409 See section 4.1.S

410 See section 4.1.T

411 See section 4.1.P
In any of the other joinder provisions, there is no explicit mentioning of jurisdiction or how jurisdiction is ascertained. Yet, joinder of an additional party must require some form of consent, e.g., by allowing the application of different legal theories/doctrine\textsuperscript{412} to extend the additional party’s consent, and, thereby, the binding effect of the arbitration agreement. This will be further discussed in section 5.2.

Nonetheless, the fact that the joinder provisions are silent on the matter seems to demonstrate some degree of diversion from the fundamental principle of party consent within arbitration.

7. Conclusion

When it comes to establishing the requisite jurisdiction over the additional party, there are five prevailing tendencies among the analysed joinder provisions. The first two tendencies reflect a rather strict focus on consent to the joinder, whereas the latter three present a more liberal approach whereby consent might be inferred from alternative methods and, for instance, enable the use of different legal theories/doctrines. As stated, this gives rise to several considerations and will be further discussed in section 5.2 and 5.3.

c. Circumstances to be Taken into Account

1. Introduction

The examined institutional rules showcase three tendencies regarding circumstances which the deciding body must take into account before rendering a decision on joinder. The authors argue that these tendencies can be categorised into: i) specific circumstances, ii) no specific circumstances, and iii) where the deciding body chooses the circumstances.

2. Specific circumstances

The SCC Rules,\textsuperscript{413} the DAI Rules,\textsuperscript{414} and the NAI Rules\textsuperscript{415} illustrate joinder provisions which provide several specific circumstances that must be taken into account. The listed circumstances include matters such as the efficiency and expediency of the proceedings,\textsuperscript{416} the connection between the claims, and the connection between the additional party and the original.

\textsuperscript{412} See section 3.2.2.1., which describes some of these legal theories/doctrines.
\textsuperscript{413} See section 4.1.P
\textsuperscript{414} See section 4.1.D
\textsuperscript{415} See section 4.1.M
\textsuperscript{416} See section 4.1.P, litra c
parties,\textsuperscript{417} or whether the joinder is likely to cause unreasonable delay to the arbitral proceedings.\textsuperscript{418} All these circumstances are of such nature, however, that even if not explicitly mentioned in the joinder provision, they would presumably always be included in the deciding body’s considerations.

3. No specific circumstances

Other joinder provisions, such as illustrated in the SAC Rules,\textsuperscript{419} VIAC Rules,\textsuperscript{420} and the CAM Rules\textsuperscript{421} do not provide any such specified circumstances. According to these rules, the arbitral tribunal is only obliged to consult with all parties, not to obtain their (further) consent to the joinder.\textsuperscript{422} Therefore, the deciding body is in principle allowed to, after the consultation of the parties, decide contrary to the wishes of the parties. As no circumstances are specified, it leaves the deciding body with the discretion to include any and all circumstances it deems relevant when rendering a decision. Presumably, the deciding body would include some of those circumstances that were exemplified in section 4.2.c.2.

4. The deciding body chooses the circumstances

There are also joinder provisions that fall somewhere in-between on this spectrum. These rules do not list specific circumstances but rather require that “reasonable grounds” should be taken into account. Illustrated by the joinder provisions in the KCAB Rules\textsuperscript{423} and the JCAA Rules.\textsuperscript{424} According to the former, joinder may be refused if there is a reasonable ground to do so, such as a delay of the arbitration proceedings.\textsuperscript{425} The isolated meaning of “reasonable ground” is fairly ambiguous and leaves open for the deciding body the interpretation it deems relevant. However, as is clarified in later sections of the sentence, “reasonable ground” includes \textit{inter alia} delays. As such, setting a “baseline” that distinguishes what is reasonable from what is not. Thus, while the deciding body may be left with some discretion, it remains restricted in the sense of having to be guided by this normative baseline.

\textsuperscript{417} See section 4.1.D, litra c
\textsuperscript{418} See section 4.1.M, litra c
\textsuperscript{419} See section 4.1.R
\textsuperscript{420} See section 4.1.S
\textsuperscript{421} See section 4.1.T
\textsuperscript{422} See section 4.1.R, S, and T, litra c
\textsuperscript{423} See section 4.1.H
\textsuperscript{424} See section 4.1.I
\textsuperscript{425} See section 4.1.H and I, litra c
This approach is similarly found in the ICC Rules, according to which all relevant circumstances must be taken into account.\(^{426}\) Subsequently, “relevant circumstances” are detailed in the provision and “may include” e.g., the timing of the request for joinder, potential conflicts of interests and the impact of the joinder on the arbitral procedure. As such, the deciding body is “recommended”, but not obliged, to be guided by the aforementioned circumstances.

5. Conclusion

As for the circumstances which should be taken into account before rendering a decision on joinder, there are three prevailing tendencies among the analysed joinder provisions. The joinder provisions range widely when it comes to providing, more or less specified, circumstances. Nonetheless, the deciding bodies will likely be prone to always including certain circumstances in their decision on joinder. As such, the consequences of specifying, or not specifying, circumstances in the joinder provision will presumably not have significant effects on the deciding body’s decision.

d. Temporal Restrictions

1. Introduction

The examined institutional rules illuminate two prevailing tendencies regarding the addition of temporal restrictions in the joinder provisions. It is pondered that the joinder provisions can be categorised into those that provide for i) explicit temporal restrictions and ii) no temporal restrictions. Of these, the most interesting examples will be contemplated in the discussion to come.

2. Explicit Temporal Restrictions

Some institutional arbitration rules, such as the SCC Rules,\(^{427}\) the HKIAC Rules,\(^{428}\) and the AIAC Rules\(^{429}\) provide, as a guiding principle, that joinder requests must not be submitted later than the submission of an answer to the notice of arbitration. Nonetheless, these joinder provisions do encapsulate certain exceptions. For instance, as stated by the HKIAC Rules and AIAC Rules, if exceptional circumstances apply.

\(^{426}\) See section 4.1.O, litra c
\(^{427}\) See section 4.1.P
\(^{428}\) See section 4.1.G
\(^{429}\) See section 4.1.C
Other institutional arbitration rules, such as the DIS Rules, has decided to include a, comparatively, more strict temporal restriction in the joinder provision. According to the joinder provision in the DIS Rules, joinder can only happen prior to the constitution of the arbitral tribunal. This restriction is seemingly without exceptions which sets it apart from other joinder provisions.

This is somewhat contradictory to other joinder provisions such as illustrated in the ICC Rules, or the DAI Rules, where joinder can only occur prior to the constitution or before the referral of the case to the arbitral tribunal, unless the parties agree otherwise or if particular circumstances apply. According to the ICC Rules, these circumstances mainly relate to the additional party accepting the constitution of the arbitral tribunal. The DAI Rules do not detail any particular circumstances.

3. No Temporal Restrictions

Other joinder provisions, such as illustrated in the ADRIC Rules, the LCIA Rules, the SIAC Rules, and the VIAC Rules, inter alia, do not include any temporal restrictions. Thus, in these institutional arbitration rules, a request for joinder can theoretically be filed at any time in the proceedings.

This approach, to disregard a temporal restriction, presumably improves the flexibility and procedural efficiency of the arbitration. Say, by avoiding the possibility of conflicting decisions if an additional party is later revealed to be relevant to the arbitral proceedings.

On the other hand, joining this additional party late into the proceedings could raise several issues, e.g., regarding the enforcement of any award. As such, a deciding body must arguably deny a request for joinder, regardless of any temporal restrictions, if the proceedings, for instance, are too far into the merits of the case. Otherwise, if the additional party has not been
heard regarding its claims, evidence, and defences, and thus been “unable to present its case”,438 the subsequent arbitral award could risk being set aside according to Article V(1)(b) of the New York Convention.

4. Conclusion

When it comes to temporal restrictions in joinder provisions, there are two prevailing tendencies among the analysed joinder provisions. Temporal restrictions are frequently included to facilitate the efficient conduct of the proceedings and to avoid the possible risks of a “late” joinder. Nonetheless, although many joinder provisions entail temporal restrictions, these are most commonly not without exception. These exceptions would indicate an acceptance of the notion that an arbitral award should, preferably, solve the dispute for all parties concerned.

e. Constitution of the Arbitral Tribunal

1. Introduction

The examined institutional rules illustrate two prevailing tendencies regarding the procedure for handling the constitution of the arbitral tribunal in case of joinder and the potentially associated issues. These procedures consist of i) releasing the already appointed arbitrators, and ii) the additional party is deemed to have estopped its right to object. The option to be used is typically dependent on when the joinder is requested.

2. Releasing the already appointed arbitrators

The first tendency is arguably the more favourable to the additional party, albeit that it usually also requires that the additional party is joined prior to the constitution of the arbitral. This tendency is highlighted in the DAI rules,439 the AIAC Rules,440 the HKIAC Rules,441 the JCAA

| 438 See Article V(1)(b) of the New York Convention (Appendix 2, p. 3) |
| 439 See section 4.1.D, litra e |
| 440 See section 4.1.C, litra e |
| 441 See section 4.1.G, litra e |
Rules, the SIAC Rules, the CIETAC Rules, the RAC Rules, the ICC Rules, the SCC Rules, and the ACICA Rules.

Although these joinder provisions require that the already appointed arbitrators must be released, there are some variations to the procedure. As illustrated in the AIAC Rules, the HKIAC Rules, and the JCAA Rules, the institution will be the one to appoint the new arbitrators. As such, in case of joinder, all the parties are deemed to have estopped its right to participate in the constitution of the arbitral tribunal.

Additionally, as illustrated in the SIAC Rules, the SCC Rules, the ICC Rules, the RAC Rules, the CIETAC Rules and the ACICA Rules, the institution appoints the entire arbitral tribunal, unless all parties, including the additional party joined into the proceedings, agree on a different procedure. Thereby granting the parties, including the additional party, a possibility to pursue another procedure for appointing the new arbitrators.

Uniquely, as the only joinder provision, the CIETAC Rules provide that even after constitution of the arbitral tribunal, the additional party is still asked to approve the arbitral tribunal as it is already constituted. If the additional party does not approve, the whole arbitral tribunal will need to be reconstituted. The joinder provision in the CIETAC Rules would thus appear to trade off the efficiency (time and costs), in order to gain procedural efficiency (mitigating potentially conflicting decisions and the award being set aside due to unequal treatment), by allowing the dismissal of the already constituted arbitral tribunal.

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\(^{442}\) See section 4.1.I, litra e
\(^{443}\) See section 4.1.J, litra e
\(^{444}\) See section 4.1.K, litra e
\(^{445}\) See section 4.1.L, litra e
\(^{446}\) See section 4.1.O, litra e
\(^{447}\) See section 4.1.P, litra e
\(^{448}\) See section 4.1.N, litra e
\(^{449}\) See section 4.1.P, litra e
3. The additional party must be deemed to have estopped its right to object

The other prevailing tendency relating to the constitution of the arbitral tribunal is traced to the MIAC Rules, the JCAA Rules, the KCAB Rules, the SIAC Rules, the NAI Rules, the ICC Rules, and the RAC Rules. This tendency primarily relates to situations where the joinder is ordered post-constitution of the arbitral tribunal.

According to these joinder provisions, an additional party being joined after the constitution of the arbitral tribunal shall be deemed to have estopped its right to influence the arbitral tribunal. Accordingly, the initial composition of the arbitral tribunal will be preserved. Indicating that these joinder provisions focus more on efficiency as opposed to all parties’ (possible) right to participation in constituting the arbitral tribunal.

Taken in isolation, this approach could result in risks relating to, e.g., equal treatment and thus the enforcement of the subsequent arbitral award. Such risks are, nonetheless, mitigated when the additional party is required to give its explicit consent to the joinder. As such, in the MIAC Rules, the JCAA Rules, and the ICC Rules, this waiver of the right to participate, prescribed in the rules, could be justified by the fact that only the explicit consent of the additional party warrants a post-constituted joinder.

In regard to the NAI Rules, SIAC Rules, the KCAB Rules, and the RAC Rules, this aforementioned waiver (of its right to participate in the constitution) seems to bring about some element of risk insofar as it bypasses the requirement of explicit consent of the additional party. Consequently, the act of waiving the additional party’s rights when consent is established through i) being signatory to, or ii) being “bound by” the arbitration agreement, or iii) having merely a compatible arbitration agreement, appear inherently more risky.

450 See section 4.1.F, litra e
451 See section 4.1.I, litra e
452 See section 4.1.H, litra e
453 See section 4.1.J, litra e
454 See section 4.1.M, litra e
455 See section 4.1.O, litra e
456 See section 4.1.L, litra e
4. Conclusion

When it comes to the procedure of constituting the arbitral tribunal in case of joinder, there are two prevailing tendencies among the analysed joinder provisions. Seemingly, it is most common for already appointed arbitrators to be released prior the constitution in order to allow the institution to select the arbitrators anew. Thus, at the same time ensuring that the additional party is granted equal treatment on par with the original parties. After constitution, it is, however, most common that the additional party be deemed to have estopped its right to participate in, and object to, the constitution of the arbitral tribunal. The latter could be associated with risks relating to the subsequent enforcement of the arbitral award. CIETAC is the only example of a joinder provision, which provide for reconstitution of the entire arbitral tribunal. Although CIETAC’s joinder provision thus exemplifies the compromise of expediency in the arbitral proceedings, it does so, to some extent, to ensure the equal treatment of the parties throughout the proceedings.

f. The Deciding Body

1. Introduction

The examined institutional arbitration rules illustrate three tendencies regarding the deciding body: the arbitral tribunal as the deciding body, divided authority between the institution and the arbitral tribunal, and the institution as the deciding body.

2. The arbitral tribunal as the only deciding body

The first and most prevailing tendency, is that the joinder provision nominates the arbitral tribunal as the only deciding body. This is found in UNCITRAL Rules,\textsuperscript{457} the CRCICA Rules,\textsuperscript{458} the LCIA Rules,\textsuperscript{459} the KCAB Rules,\textsuperscript{460} the NAI Rules,\textsuperscript{461} the ADRIC Rules,\textsuperscript{462} the VIAC Rules,\textsuperscript{463} the CAM Rules,\textsuperscript{464} and the ICDR-AAA Rules.\textsuperscript{465}

\textsuperscript{457} See section 4.1.A, litra f
\textsuperscript{458} See section 4.1.B, litra f
\textsuperscript{459} See section 4.1.E, litra f
\textsuperscript{460} See section 4.1.H, litra f
\textsuperscript{461} See section 4.1.M, litra f
\textsuperscript{462} See section 4.1.Q, litra f
\textsuperscript{463} See section 4.1.S, litra f
\textsuperscript{464} See section 4.1.T, litra f
\textsuperscript{465} See section 4.1.V, litra f
The choice to entrust the arbitral tribunal the decisions on requests for joinder can be seen as a manifestation of party autonomy. This is because of the parties’ influence on, inter alia, the appointment of the arbitrators and the specific procedure, which the arbitral tribunal are obliged to follow. The parties do not have the same influence on the institution. Therefore, some parties would arguably be wary of granting the institution certain powers.

3. Divided authority between the institution and the arbitral tribunal

The second tendency among the analysed joinder provisions is the notion of dividing the authority to order the joinder between the institution and the arbitral tribunal. This process can take several forms.

Some explicitly state the division of the authority between the institution and the arbitral tribunal, as illustrated the ICC Rules,\(^ \text{466} \) DAI Rules,\(^ \text{467} \) AIAC Rules,\(^ \text{468} \) and RAC Rules,\(^ \text{469} \) and the DIS Rules.\(^ \text{470} \) According to these rules, the institution will determine the request for joinder prior to the constitution of the arbitral tribunal and after the constitution, the arbitral tribunal will decide on the request.

Other rules, such as the ACICA Rules,\(^ \text{471} \) and the SIAC Rules,\(^ \text{472} \) further provide that if the institution denies a request for joinder, the same request for joinder can subsequently be rendered before the arbitral tribunal. In other words, the institution denies the request for joinder without prejudice to the arbitral tribunal’s later decision. This option respects the principle of competence-competence and could furthermore be seen as an acknowledgement of the special relationship that the parties share, and, contrary to the relationship with the institution, are expected to have. Regardless, the position of the institution appears somewhat weakened by this option.

\(^ {466} \) See section 4.1.O, litra f  
\(^ {467} \) See section 4.1.D, litra f  
\(^ {468} \) See section 4.1.C, litra f  
\(^ {469} \) See section 4.1.L, litra f  
\(^ {470} \) See section 4.1.U, litra f  
\(^ {471} \) See section 4.1.N, litra f  
\(^ {472} \) See section 4.1.J, litra f
The principle of *competence-competence* is explicitly stated in the MIAC Rules, the HKIAC Rules, the SCC Rules, and the SAC Rules. In these cases, the institution is the primary deciding body. The arbitral tribunal is only implicitly empowered to decide on, or rather dismiss, the request for joinder, if it finds that it does not have the requisite jurisdiction over the additional party. Nevertheless, the role of the arbitral tribunal is significantly restricted as compared to what is the case in most other joinder provisions.

Lastly, the JCAA Rules must be mentioned. Although, the JCAA Rules only explicitly designates the arbitral tribunal as the deciding body, joinder may be granted prior to the constitution of the arbitral tribunal. Thus, although not expressly stated in the joinder provision, the institution is arguably also authorised to decide on the request for joinder.

4. The institution as the only deciding body

Uniquely, in the CIETAC Rules, the decision regarding the request for joinder is made by the institution both prior to and after the constitution of the arbitral tribunal. Furthermore, according to the CIETAC Rules, the institution is the empowered authority to decide on its jurisdiction, not the arbitral tribunal. It would appear plausible that the CIETAC Rules will become subject to changes in the future, if one looks at the recently published draft of the amended Chinese Arbitration Law, which seems to contain an adoption of the principle of *competence-competence*.

5. Conclusion

On the matter of designating the deciding body in joinder provisions, there are two dominant tendencies, supplemented by a third rather unique development, among the analysed joinder provisions. The fact that the established institutions do not seem to favour the institutions more power than that of the arbitral tribunal, would indicate the importance of party autonomy in the relationship between the arbitral tribunal and the parties.

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473 See section 4.1.F, litra f
474 See section 4.1.G, litra f
475 See section 4.1.P, litra f
476 See section 4.1.R, litra f
477 See section 4.1.I, litra f
478 See section 4.1.K, litra f
479 See Ware, Gao, and Yang
5. The role of consent as a jurisdictional basis and limitations on joinder provisions

5.1. Introduction

As illustrated throughout the analyses of the joinder provisions’ requirement for consent/party agreement in section 4.1 and section 4.2.b, most of the joinder provisions detail that jurisdiction must be ascertained through some form of consent to the joinder. The most common, and less controversial, joinder provisions prescribe that consent can be given explicitly to the joinder or by being a signatory to the arbitration agreement upon which the arbitral proceedings have been commenced. Nevertheless, there exists tendencies in certain joinder provisions which stand out as questions-begging and, conveniently, cater to a discussion. These are the joinder provisions which allow the deciding body to ascertain jurisdiction over the additional party through an ill-defined and vague form of consent. These include situations where the additional party is “bound by” the arbitration agreement, \(^{481}\) the efficiency-options, \(^{482}\) and silent joinder provisions.\(^ {483}\)

The discussion revolves around the latter three options which appear to highlight a less strict focus on consent. Firstly, it is discussed the consequences of the ambiguous wording, therein also the complete lack of details in the “silent” joinder provisions, in respects to the requirement of consent (section 5.2). Then the discussion narrows in on the efficiency-options exclusively. It asks the questions as to whether the efficiency-options are indicative of an upcoming revolution within joinder provisions, whether they even reflect the fundamental principles of arbitration, and what is more, the hypothetical effects of their potentially widespread adoption into arbitration (section 5.3). Lastly, it is discussed whether the principles of party consent and party autonomy always prevail when conflicted with other principles of arbitration (section 5.4).

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\(^{480}\) See section 4.2.b.(2-3)
\(^{481}\) See section 4.2.b.(4)
\(^{482}\) See section 4.2.b.(5)
\(^{483}\) See section 4.2.b.(6)
5.2. Consequences of an ill-defined form of consent

In section 3.2.2.1 of the introduction, several legal theories/doctrines, which can be used to infer and extend the parties’ consent to the joinder, were briefly presented. As such, it is interesting to discuss whether these legal theories/doctrines could possibly apply to some of the joinder provisions, i.e., the joinder provision which includes the “bound by” requirement\(^{484}\) and the silent joinder provisions.\(^{485}\)

This section will discuss some of the more well-known legal theories/doctrines and whether the above referenced joinder provisions could, purposely or not, enable the use of such legal theories/doctrines. Admittedly, the questions being posed provide material for a master's thesis on its own and reach far beyond the scope and space limitations of this study.\(^{486}\) For current purposes, this discussion serves only as a peeping hole to get a glimpse of the debate.

While different jurisdictions could have different opinions regarding what “bound by”, or the silent joinder provisions, do entail, it could allow for joinder in situations where the deciding body creates jurisdiction over the additional party by using one of these legal theories/doctrines.

First, these joinder provisions could allow for the joinder of an additional party using *agency*. *Agency* is, however, near-universally applicable due to its roots in basic contract law\(^{487}\) and therefore, the use of *agency* to join non-signatories – i.e., the principal - is typically not controversial. Nevertheless, *agency* is limited in its scope as it “stretches” only the consent to the principal. As such, *agency* does not allow for a broad inclusion of additional parties.\(^{488}\) Other legal theories/doctrines which are perhaps more broadly applicable in their scope and more controversial in their use will now be attended.

For instance, one could imagine that these joinder provisions allow for the use *implied consent* or the *Group of Companies Doctrine*. These legal theories/doctrines infer, or “stretches”, the

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\(^{484}\) See section 4.2.b.4
\(^{485}\) See section 4.2.b.6
\(^{486}\) See the delimitation in section 2.2.
\(^{487}\) See Samal, p. 3
\(^{488}\) A similar example could be estoppel. See section 3.2.2.1.
consent *inter alia* based on the parties’ actions and presumed intentions in relation to the contract and/or arbitration agreement upon which the arbitral proceedings are commenced. For this to be true, it would, however, require a more thorough analysis of the *lex arbitri*. This is primarily because judicial intervention from the national courts could become relevant, especially in disputes regarding jurisdiction. Furthermore, it would require a more thorough examination of the respective institution’s intentions behind the ambiguous wording or the silent joinder provision. This could be done by looking in *inter alia* the *travaux préparatoires*, case law or scholarly of the institution. As such, it is difficult to conclude definitively whether these legal theories/doctrines could be usable by looking at the institutional arbitration rules in isolation.

If, however, the *lex arbitri* and the institution’s intentions which motivate the joinder provision do allow for the use of legal theories/doctrines, it could cause several issues. As these legal theories/doctrines inevitably “stretches” the consent based on e.g., the parties’ actions and intentions, one could envisage several issues regarding the subsequent enforcement of the arbitral award. Joining an additional party without adequate consent, and accordingly rendering an arbitral award without the requisite jurisdiction (the jurisdiction over the additional party is based on the legal theories/doctrines) could constitute a ground for refusing recognition and enforcement, see New York Convention Article V(1)(a) and Article V(1)(c).

### 5.3. A further examination of the efficiency-options

#### 5.3.1. An upcoming revolution?

Another interesting conception of how far consent may be “stretched” is illustrated in the efficiency options in, *inter alia*, the AIAC Rules, and RAC Rules. The efficiency-options seem to suggest that jurisdiction can be ascertained *only* based on efficiency considerations. According to these efficiency-options, an additional party may be joined to the arbitral pro-

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489 See section 3.2.2.
490 See section 3.2.2.1. See also Appendix 2, p. 3.
491 See section 4.1.C
492 See section 4.1.L
ceedings, if: “[..] the participation of such Additional Party is necessary for the efficient resolution of the dispute[..]”,493 or if: “[..] the claims of the additional claimant and the claims of the Claimant are covered by Arbitration Agreements that are compatible [..]”494

By this phrasing, the efficiency-options leave the impression that efficiency or a compatible arbitration agreement is the only necessary condition for ascertaining jurisdiction over the additional party to the joinder. Thereby, presenting prima facie non-consensual options to parties as a basis for joining - or rather, forcing - an additional party to the commenced arbitral proceedings.

Looking towards the larger arbitral institutions such as the LCIA, SIAC, and HKIAC, no efficiency-options of such nature can be found. In contrast, these arbitral institutions do, like most other institutions, explicitly require the parties’ consent to the joinder.495 The larger arbitral institutions, in contrast, illustrate a rather strict approach to the deciding body’s possibility to create jurisdiction over the joinder. Therefore, it is not the influence of the larger arbitral institutions, which is the cause of these efficiency-options.

Arguably, the inclusion of such wide-ranging options for joining an additional party could be an attempt at differentiation in a market of hundreds of institutional arbitration rules. And, truth be told, these efficiency-options could understandably appear attractive at face value. For instance, regarding the example detailed in section 3.2.1 of the introduction, although the additional party (C) had not given its explicit consent, was a signatory to, or otherwise bound by, the same arbitration agreement, joinder of C could indeed be considered necessary for the efficient resolution of the dispute.

5.3.2. The hypothetical scenario

Although the efficiency-options are not widely acknowledged at current, the theoretical possibility of their widespread adoption into arbitration, does serve for an interesting discussion. More generally, whether the efficiency-options would be compatible with the fundamental principles of arbitration (section 5.3.3), were they ever to be universalised? Which broader

493 See Article 21 in the AIAC 2021 Rules (Appendix 1A, pp. 644f)
494 See Article 35(4)(3) in the RAC 2019 Rules (Appendix 1B, 756)
495 See litra b of sections 4.1(E, G, & J)
consequences would arbitration suffer (section 5.3.4) if efficiency-options became a mainstream approach?

5.3.3. The efficiency-options’ compatibility with fundamental principles
The following discusses whether the efficiency-options are contradictory to some of the fundamental principles of arbitration, *inter alia*, party consent, party autonomy, and enforcement.496

5.3.3.1. Party Consent and Party Autonomy
According to the efficiency-options, neither the original parties nor the additional parties are *prima facie* required to have, in some way, consented to the joinder. The determining factor is seemingly whether the joinder would be necessary or contribute to the efficiency of the arbitral proceedings. However, in practice and theory, joining an additional party without any form of consent remains unlikely.497 Consent is the foundation of arbitration and joinder, as arbitral tribunals derive their jurisdiction from the consent of the parties, typically enshrined in the arbitration agreement.

Thus, if the institution includes possibilities such as the efficiency-options, which do not seemingly require any form of consent, it would, ultimately, be voiding and rewriting the parties’ agreement upon which the existence of the arbitration is based. Therefore, no matter the considerations of efficiency that might be relevant in a specific request for joinder, jurisdiction which arises from the consent of the parties is *always* determinant for the limits of the arbitral tribunal’s powers.

5.3.3.2. Enforcement
If the arbitral tribunal exceeds its jurisdiction by joining an additional party, without consent, based on efficiency-options, this decision would be beyond its given scope. Consequently, the arbitral award could risk being set aside pursuant to Article V(1)(c) of the New York Convention.498

496 See section 3.2.2. regarding the fundamental principles of arbitration
497 See Gomez, p. 504
498 See section 3.2.2.1.
Furthermore, beside the fact that the arbitral tribunal would exceed its jurisdiction, the institutions should, initially, refrain from initiating such efficiency-options. These efficiency-options may lose their appeal to efficiency, being that they potentially result in the arbitral award being set aside under the New York Convention. Consequentially, while one might appreciate the strong focus on procedural efficiency, the efficiency-options ought to be considered unattractive. Essentially, the purpose to promote efficiency is undermined by the resulting inefficient implications.

5.3.4. The possible consequences of the efficiency-options

As detailed in the sections above, the efficiency-options are presumably neither theoretically nor practically possible, as it directly contradicts the very spirit and foundation of arbitration. Therefore, if these options are to be made viable, it would require a fundamental revolution of arbitration. This is because an “efficiency-based” model of ascertaining jurisdiction does not harmonize very nicely with party consent, party autonomy, and the importance of enforceable awards. These fundamental principles are enshrined throughout arbitration and all the auxiliary legal sources. As such, it would require a thorough review of, inter alia, the New York Convention, the UNCITRAL Model Law, national laws, and several soft law instruments.

One could imagine the hypothetical review of the New York Convention. While the New York Convention is of prime importance with regards to the enforcement of awards, arbitral awards can also be enforced under other conventions, bilateral treaties, and national law. This could favor the formation of a separate regime to the New York Convention which is less stringent and allows enforcement based on the efficiency-options. Nonetheless, it has been argued by scholars that the possibility of enforcing arbitral awards is less due to the New York Convention being an international treaty, than it is resultant of the consensual nature of arbitration. This does not change the fact that the New York Convention is highly influential and not easily replaced. The consensual nature of arbitration should be credited for making it easier to regulate the international enforcement of arbitral awards. Much more so than court judgements which have a more coercive nature. Therefore, were an arbitral award to suddenly not be based on consent but rather the efficiency-options, it would presumably complicate the enforcement of

499 See section 3.2.2.1.
500 See Strong, p. 918.
501 See Craig, p. 7f
the arbitral awards. It would be difficult to imagine a version, similar to that of the New York Convention, with arbitral awards having been rendered on the basis of the coercive nature of courts.

Consequently, if the efficiency-options were included as a recurring option for the deciding body to create jurisdiction over the additional party, it would indeed be a revolution. It would shake the foundation of arbitration. Although these resting principles constitute the foundation of arbitration, there might still be situations in arbitration where these are, legitimately, limited. This will be discussed in the following.

5.4. Do Party Consent and Party Autonomy always prevail?

As party consent and party autonomy constitute the foundation of arbitration, it would seem a fair assessment that they were categorically given the highest priority in all matters of arbitration (as illustrated when conflicted with considerations of (procedural) efficiency). Nonetheless, there are instances throughout arbitral proceedings where party consent and party autonomy are restricted.

An example could be if the procedure, which the parties have consented to and agreed upon, violates any of the parties’ right to equal treatment or the right to fully present its case. 502 Both of these principles are usually viewed as matters of public policy, as illustrated inter alia in the Dutco case. 503 Accordingly, these principles seem to prohibit an agreement - that would otherwise be respected due to the principle of party autonomy - so long as it entails that one of the parties would not be sufficiently heard during the arbitral proceedings. As such, joinder could, in certain situations, be legitimately allowed even when conflicted with the party consent and party autonomy, because its denial would otherwise violate matters of public policy.

The worst-case scenario could engender that an arbitral tribunal would be forced into terminating the arbitral proceedings insofar as the arbitral tribunal views joinder (contrary to the parties’ agreement) necessary as a matter of public policy. Say, the additional party had important information which could help one of the parties right to fully present its case. 504 Ultimately, the

502 See Strong, p. 926
503 See section 3.2.2.4 of the introduction
504 See Strong, p. 992
parties would have to choose between either accepting the joinder or terminating the arbitral proceedings altogether. The latter would likely transpire and further result in the dispute becoming a subject for litigation rather than the parties’ initial agreement to solve the dispute with arbitration.\textsuperscript{505}

Another example where party consent and party autonomy seem to be, at least partly, set aside, is in relation to interim relief/provisional measures of the arbitral tribunal. It is widely accepted that the arbitral tribunal, like courts, has the power to grant certain measures, within its authority, to control the efficient conduct of the arbitral proceedings.\textsuperscript{506} Interim relief will usually be necessary due the urgency of the relief that has been requested. An example hereof could be the joinder of an additional party that is in the process of disposing of its assets. The immediate joinder of this party would be necessary to ensure the requesting party’s right to indemnification.\textsuperscript{507}

Despite the restrictions of party autonomy due to public policy and arbitral tribunal using interim relief/provisional measures, the jurisdiction of the deciding body is still the limiting factor in relation to joinder. Even if the joinder is considered necessary owing to matters of public policy, the arbitral tribunal must still ensure that it has the necessary jurisdiction over the additional party. If the joinder is indeed necessary, but no jurisdiction exists, the only proper action would be to terminate the arbitral proceedings, and instead litigate the dispute.

Consequently, on the matter of joinder, party consent and party autonomy will always, to the extent possible, prevail as these are prerequisites for the deciding body’s jurisdiction to order joinder of the additional party. This represents the defining difference between, on the one hand, achieving jurisdiction based on the consent of the parties in arbitration, and on the other, achieving it based on the coercive powers of the courts in litigation.

\textsuperscript{505} See Strong, p. 989-991
\textsuperscript{506} Ibid. p. 989
\textsuperscript{507} Ibid, p. 990
5.5. The discussion summarised

The parties’ autonomy and consent are the foundation of the arbitral proceedings. It follows, that some form of consent is always necessary to establish the requisite jurisdiction over the additional party.

The institutions should execute diligence to create arbitration rules that do not bring about unnecessary doubt regarding the interpretation of the requirement of consent. Although broad joinder provisions might be beneficial to the deciding body’s discretion, they could potentially enable the use of certain legal theories/doctrines.

Furthermore, it is presumably not attainable to join an additional party based solely on efficiency-options. This would entail a departure from the fundamental principles of arbitration. Therefore, these options, however appealing they might appear at face value, arguably contain mere empty promises.

If these efficiency-options were to be made viable, it would require a fundamental revolution of arbitration as the backbone of arbitration would be dissolved. This is presumably why the more established arbitral institutions preserve their focus on party consent.\(^{508}\)

In other parts of the arbitral proceedings, party consent and party autonomy might be defeated due to matters of public policy or interim relief/provisional measures of the arbitral tribunal. The imperative difference between the aforementioned and joinder, is the jurisdiction of the arbitral tribunal. Once the latter is established, the arbitral tribunal usually has wide discretion to further conduct the arbitral proceedings. To attain jurisdiction, however, some form of consent is crucial. Hence, in relation to joinder and specifically the deciding body’s jurisdiction over the additional party, consent is the enabling step. This protects the very nature of arbitration.

\(^{508}\) See section 4.2.b.2 and 4.2.b.3.
6. Conclusion

The objective of this study was to examine the development within the iterations of joinder provisions across multiple institutional arbitration rules. As such, 25 joinder provisions in institutional arbitration rules, including the UNCITRAL Rules, across multiple iterations have been analysed. This analysis was conducted upon the five parameters: consent/party agreement, circumstances to be taken into account, temporal restrictions, constitution of the arbitral tribunal, and the deciding body.

The analysis initially aimed at isolating and exposing geographical and cultural tendencies in joinder provisions, especially whether a Scandinavian approach could be identified. It was found that no such tendencies could be traced to solely geographical and/or cultural discrepancies in the created joinder provisions. A few exceptions were, however, found in the CIETAC Rules and the institutional arbitration rules where joinder provisions are absent. In these cases, cultural/legal traditions seem, to some degree, to play a role. Thus, as opposed to being geographically/culturally determined, it is concluded that some joinder provisions in institutional arbitration rules are, one way or another, influenced by the larger and more influential institutions.

Based on the five parameters, the newest iterations of the joinder provisions were divided into different categories to illustrate the prevailing tendencies.

Regarding the first parameter “consent/party agreement”, it is concluded that most joinder provisions require either explicit consent to the joinder or that the additional party is a signatory to the arbitration agreement. This is arguably the most sensible and safe pathway to create jurisdiction over the additional party. Some joinder provisions further provide the possibility of joining an additional party, by either; i) being “bound by” the arbitration agreement, ii) through the efficiency-options, or iii) the “silent” joinder provisions which do not set any further requirements of how jurisdiction can be created over the additional party.

As for the second parameter, encompassing the relevant circumstances to take into account, it is concluded that the institutional arbitration rules range widely when it comes to providing specifications of the circumstances to be considered when rendering a decision on joinder. The
deciding bodies will, however, ordinarily include certain circumstances in their decision on joinder, whether it be explicit or not.

Regarding the third parameter “temporal restrictions”, it is concluded that some institutional arbitration rules include temporal restrictions in the joinder provision to increase the efficient conduct of the arbitral proceedings and to avoid the risks of a “late” joinder. These risks include \textit{inter alia} unequal treatment in relation to the constitution of the arbitral tribunal. Temporal restrictions could be used as a simple cut-off point after which no request for joinder is allowed, by exception of some extraordinary circumstances. Other temporal restrictions require explicit consent of the additional party if a request for joinder is made after a certain point of time in the arbitral proceedings. This should mainly be viewed as the additional party having estopped its right to object based on potential rights or issues.

The fourth parameter regarding the constitution of the arbitral tribunal entails similar considerations to those of the temporal restrictions. It is concluded that there are many ways to deal with the constitution of the arbitral tribunal in case of joinder. Most commonly, joinder provisions provide the possibility of releasing already appointed arbitrators, primarily before the original constitution has been finalised. If the constitution indeed has been completed, most rules do \textit{not} provide a procedure to satisfy the additional party’s right to participate in the constitution. The joinder provisions that do \textit{not} include any such procedure in case of joinder could give rise to certain risks regarding equal treatment.

As for the final and fifth parameter, “the deciding body”, it is concluded that there are differing approaches among the established institutions. There is predominantly a regime consisting of either i) the acknowledgment of the arbitral tribunal as the main deciding body, or ii) the use of a balanced division of the authority between the arbitral tribunal and a body of the institution, for instance a court, secretariat, etc. The division is pragmatically motivated due to the necessity that the institution is the deciding body prior to the constitution. There are, however, certain institutional rules, mainly CIETAC, which provides only the institution as the deciding body.

Consequently, there are many different approaches to joinder provisions which reflect the institution’s considerations and the balancing acts of, \textit{inter alia}, party consent, equal treatment, and procedural efficiency.
Unlike other areas of law, institutional arbitration rules do not necessarily need to be harmonised. On the contrary, the diversity in these rules give the parties the opportunity to choose an institution based on the approach and procedures they agree to. This contributes to the strengthening of party autonomy.

While the diverse set of institutional rules are beneficial to the regime of arbitration, all institutional arbitration rules are limited by the requirement of jurisdiction, which, as the cornerstone of arbitration, depends on consent. Although one may appreciate the benefit of a joinder provision which focuses on the joinder's effect on the procedural efficiency, the requirement for consent is pivotal. As such, incorporating the efficiency-options, and subsequently joining an additional party without requisite jurisdiction, would necessitate a revolution of arbitration. This is primarily because the efficiency-options would conflict with fundamental principles of arbitration, such as party consent, and party autonomy. Not to mention the added risks owing to the requirements of the regime to enforce arbitral awards, including, especially, the New York Convention.

Evidently, there are areas of arbitral proceedings where party consent and party autonomy are set aside, at least partly, for reasons such as public policy or interim relief/provisional measures. Be that as it may, this study has emphasised that no such overruling can apply in the case of joinder. In the regime of joinder, the deciding body’s jurisdiction over all parties is the imperative and absolute principle, rooted to the notion that the parties’ consent is the very core of arbitration.
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