

The Consolidation Dilemma: Is There Finally a Pragmatic Solution?

B Ted Howes and Allison M Stowell*

Judicial chaos is the aim of many recalcitrant defendants with the right resources. Making it more complicated and more expensive for a claimant to pursue its claims is the most basic of defence strategies. This is no less true in international arbitration than it is in litigation.

In international arbitration, however, respondents are armed with a potent tool of obstruction that is generally not available to court litigants: the right to object to the consolidation of multi-contract disputes before a single decision-maker. This ‘consolidation dilemma’ has become an increasing source of despair to international arbitration claimants, and for good reason. It is often the norm in complex, cross-border commercial transactions that the parties enter into a number of different (but interrelated) contracts as part of one unified transaction. It is also common that different (but affiliated) entities will be party to the different contracts – typically, there will be a principal agreement between two parent companies and one or more ‘ancillary agreements’ between various subsidiaries, affiliates and/or principals of the parent companies. Both commonsense and judicial efficiency dictate that disputes arising in such a multi-contract setting should be resolved by one arbitration tribunal; not only does this reduce the time and expense of resolving the disputes but, more importantly, it prevents the peril of

* B Ted Howes is a partner and Head of the US International Arbitration practice at Mayer Brown. Allison M Stowell is a senior associate at Mayer Brown. Mr Howes can be contacted at bhowes@mayerbrown.com and Ms Stowell can be contacted at astowell@mayerbrown.com.

competing arbitration tribunals reaching different decisions on related, if not identical, claims and factual issues. Nonetheless, commonsense and efficiency do not trump a respondent's right, borne from the fundamental nature of arbitration as a 'creature of contract', to demand that different arbitration tribunals resolve the disputes arising out of each contract.

The result is that international arbitration, touted to users for its efficiency over litigation, too often dissolves into judicial chaos in the context of multi-contract transaction disputes. The result is unacceptable. It threatens to turn off users of international arbitration who have been stung by the consolidation dilemma.

International arbitration institutions are not ignorant of this problem. Recent years have witnessed an attempt by institutions to address the consolidation dilemma by adding rules covering the consolidation of multi-contract disputes. These efforts, however admirable, have largely been ineffective. To date, the consolidation rules adopted by the major international arbitration institutions require either the consent of the parties to the various contracts (which is rarely forthcoming from the defence at the time of dispute) or, absent consent, that the parties to the various contracts at least be identical (which is rarely the case in a multi-contract transactions populated by parents, subsidiaries, affiliates and principals).

This article is divided into four parts. First, we address two case studies that illustrate how the consolidation dilemma can lead to inconsistent and maddeningly inefficient results. Secondly, we address the potential solutions that have been put forth to solve the consolidation dilemma, including remedies in the drafting of the arbitration agreement, case law and statutory remedies, and remedies adopted in the institutional arbitration rules, and we posit that the only way to forge a *comprehensive and reliable* solution to the consolidation dilemma is to revise the world's leading arbitration rules. Thirdly, we examine the consolidation regime that is presently available in the leading international arbitration rules, demonstrating that the rules operate at varying levels of inefficiency.

Finally, we address a recent solution to the consolidation dilemma that surfaced in the 2015 revisions to the arbitration rules of the China International Economic and Trade Arbitration Commission (CIETAC). The new CIETAC approach offers a pragmatic break from the solutions offered in the other major international arbitration rules. Other institutions would serve their users well to follow CIETAC's lead.

Two case studies: arbitration's failure to adequately address multi-contract disputes

In a multi-contract transaction, disputes commonly arise under two or more of the contracts at the same time. As the contracts are interrelated pieces of one unified transaction, this is not only a common scenario, but a natural one.

It is also common that when it comes time to commence arbitration, the claimants and their counsel are unpleasantly surprised to discover that the arbitration clauses in the various contracts do not provide for the consolidation of disputes before a single arbitration tribunal. They should not be. It is an unfortunate recurrence, even in some of the best drafted arbitration clauses, and one that hands respondents the keys to cause mischief.

We present two case studies illustrating the inefficiencies of this all-too-common scenario, and the contortions that parties, arbitrators and institutions have gone through – sometimes successfully, sometimes not – to prevent a naturally unified dispute from being divided among multiple tribunals.

Case Study No 1: solution through luck, or 'finding the lucky case'

In this first case study, Company A and Company B entered into a transaction to establish a joint venture in China. The parties accomplished their transaction through four separate agreements: (1) a 'Framework Agreement' between Company A and Company B, similar to a memorandum of understanding; (2) a 'Master Agreement' among Company A, Company B, the President of Company B and an affiliate of Company B, setting forth the principal operating terms for the joint venture; (3) an 'Investment Agreement' between Company A, Company B, the President of Company B and a single-purpose Hong Kong subsidiary of Company A, for the purpose of selling stock in the joint venture entity to the single-purpose entity; and (4) a 'State-Owned Enterprise Agreement' between Company A, Company B and the single-purpose Hong Kong subsidiary of Company A, setting forth the terms among the joint venturers for the planned buy-out of the interest of a PRC state-owned company in the enterprise.

It would be difficult to conclude that the parties did not intend that disputes under the four contracts would be consolidated before a single arbitration tribunal. The contracts were all part and parcel of a single overarching transaction, that is, the establishment of a joint venture in China. The four contracts were negotiated and executed at the same time by the same individuals. Indeed, the same person signed all of the contracts on behalf of all the Company A parties, and the same person signed all of the contracts on behalf of all the Company B parties. Each of the contracts

called for arbitration in Hong Kong administered by the same arbitration institution and governed by the same arbitration rules.

Still, when disputes arose among the parties, and the Company A parties (as claimants) sought to bring one arbitration under all four contracts, the Company B parties (as respondents) demurred, arguing that a consolidated proceeding violated their 'legitimate rights' to have different arbitrators determine the claims and defence under each of the four contracts. In addition to highlighting the salient fact that the arbitration clauses in the contracts did not provide for consolidation, the Company B parties crafted other arguments to bolster what can only be viewed as a nakedly tactical defence. For example, because two of the contracts were governed by New York law and two were governed by Chinese law, the Company B parties argued that they were entitled to appoint New York lawyers to arbitrate the New York law contracts and Chinese lawyers to arbitrate the Chinese law contracts. Likewise, because two of the contracts called for three arbitrators and two were silent as to the number of arbitrators, the Company B parties argued that they had the right to have two of the contracts arbitrated by a tribunal of three arbitrators and the two others arbitrated by a sole arbitrator (notwithstanding that the arbitration rules in question required three arbitrators where the contracts were silent as to number).

In the end, only a bit of luck saved the Company A parties from this divide-and-conquer defensive strategy. Close to the eve of the hearing on consolidation, counsel for the Company A parties stumbled upon a 2003 decision of the High Court of the Hong Kong Administrative Region, in the case of *Karahas Bodas Company LLC v Pertamina*.¹ The facts in *Pertamina*, as luck would have it, were strikingly similar to the facts in the case at hand: the case involved a joint venture dispute that arose out of two separate but related contracts with different but affiliated parties. The High Court enforced the arbitration award in *Pertamina* notwithstanding the respondents' arguments that: (1) 'the JOC [Joint Operation Contract] and ESC [the Energy Sales Contract] are separate contracts containing separate arbitration clauses'; (2) 'the parties to the contracts are different'; and (3) the contracts 'contain no provision for consolidating arbitrations'.² In so doing, the High Court held as follows:

Claimant's position as stated from the very outset in May 1999 namely:

'Where, as here, the disputes involve not only a single Project consisting of two closely related parts (the JOC part and the ESC part), but also contracts with virtually identical arbitration clauses, the case for allowing

1 *Karahas Bodas Company LLC v Pertamina*, [2003] 380 HKCU 1.

2 *Ibid*, at para 21.

disputes under the one agreement to be arbitrated in the same arbitration with disputes under the other would seem to be even more compelling.’ is well made.³

Citing the *Pertamina* decision, which was the *lex arbitri* for the arbitration, the Company A parties persuaded the Tribunal to rule that a consolidated proceeding covering the disputes under all four contracts could go forward. The arbitrators’ decision made perfect common sense. However, were it not for the fortuitous discovery of *Pertamina*, the arbitrators’ decision would have likely gone the opposite way.

Case Study No 2: solution through ‘patchwork institutional surgery’

Our second case study also concerns an international joint venture. Specifically, the parties decided to enter into two contracts for two different business lines of the same joint venture: (1) a contract between Party A and a 100 per cent owned subsidiary of Party B for the first business line; and (2) a contract between Party A and a *second* 100 per cent owned subsidiary of Party B for the second business line. The two contracts were nearly indistinguishable – indeed, the contracts (each of which ran well over 50 pages) were almost identical, word for word. The two contracts also had identical arbitration clauses: same place of arbitration, same institutional rules, same number of arbitrators, same wording.

The two arbitration clauses also shared one other feature: neither contained a consolidation provision expressly providing that disputes under the two contracts would be heard by the same arbitration tribunal. As a result, when the two subsidiaries of Party B sought to commence a consolidated arbitration under the two contracts, Party A objected.

The argument for consolidation in Case Study No 2 was, if anything, far more compelling than the argument for consolidation in Case Study No 1. Unfortunately, as the *lack* of luck would have it, there was no silver bullet case that allowed consolidation in this case. Consolidation, therefore, was not permitted.

In lieu of consolidation, what happened can best be described as patchwork institutional surgery: Party A, of course, selected two different arbitrators for the two arbitrations; the Party B subsidiaries selected the same arbitrator for the two arbitrations; and the institution, evidently aware of the tactics Party A was employing, *appointed the same Chairperson to preside over both tribunals*. It was not consolidation, but at least it was something.

Party A’s right to object to consolidation, however, was upheld at a stiff cost to judicial efficiency. Because of Party A’s tactics, everything over the

³ *Ibid*, at para 30.

course of the two arbitrations had to be done in duplicate, at great and unnecessary expense to the parties. More fundamentally, the integrity of the international arbitration system suffered by Party A's tactics. It was not until the final prehearing conference that Party A finally consented to a consolidated evidentiary hearing for the two arbitrations. Thus, the parties engaged in the absurd, unfair and unnecessary procedure of conducting a hearing *before four arbitrators*, two of whom had been selected by Party A.

There has to be a better way.

Potential solutions to the consolidation dilemma

On a surface level, the consolidation dilemma can be framed as a struggle between party autonomy and efficiency. On the one hand, consolidation without consent can impinge on party autonomy. As a result, consolidation without consent is not without risk. Under Article V(1)(d) of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') the recognition and enforcement of an award 'may be refused ... if ... the arbitral procedure was not in accordance with the agreement of the parties...'⁴

On the other hand, the failure to consolidate disputes arising out of a multi-contract transaction before a single arbitration tribunal leads to obvious *procedural inefficiencies* (the duplication of efforts across multiple proceedings, causing higher attorney fees, arbitrator fees and administration fees) and, perhaps worse, *systemic inefficiencies* (competing tribunals deciding similar or identical claims and factual issues). The failure to consolidate is also not without significant risk – if two or more arbitral proceedings result in inconsistent awards on common factual and legal issues, the enforcement of the awards could also be subject to challenges.

There are four basic options available to solve the consolidation dilemma: (1) remedies in the drafting of the underlying arbitration agreements; (2) case law remedies; (3) statutory remedies; and (4) remedies in the institutional rules. We discuss each of these solutions, in turn, below.

Consolidation provisions

The easiest and cleanest solution to the consolidation dilemma is to draft the right of consolidation into the contracts underlying a multi-contract transaction. If such 'consolidation provisions' are drafted correctly, no party can argue it has not consented to consolidation at the time of a dispute.

4 New York Convention, Article V(1)(d).

As Paul Friedland observed in *Arbitration Clauses for International Contracts*, '[t]he best way to approach arbitration of related contracts is to establish a standalone protocol signed by all parties to all related agreements.'⁵ Under this approach, the parties to the various agreements execute one 'umbrella' arbitration agreement covering each of the contracts to the transaction. '[T]he next option is for the arbitration clauses in each related contract to state the signatories' consent to consolidation under any of a set of designated related contracts, and to assure that the clauses are complementary and cross-referenced...'⁶ Under this approach, it is critical that the arbitration clause in each contract provide for the same arbitration rules, same place of arbitration, same number of arbitrators, and so on.

While consolidation provisions are an effective way to address the consolidation dilemma, it unfortunately cannot be relied upon to provide a *systemic* solution to the problem. Some multi-contract transactions have consolidation provisions; most still do not. As our transactional colleagues are increasingly educated about the importance of inserting consolidation provisions into multi-contract transaction, this should improve over time. But a hope and a prayer that the transactional attorneys knew enough to include consolidation provisions in the contracts in dispute is not a strategy to solve the problem.

Case law remedies

As demonstrated in Case Study No 1 above, there are times that parties may be able to successfully rely upon the case law of the arbitral seat to argue that a multi-contract dispute should be resolved before a single tribunal. Success here is varied at best, however. For every *Pertamina*, there are more cases that prohibit consolidation without the affirmative consent of the parties in the underlying contracts.⁷ Naturally, this option is also not available to arbitral seats in civil law jurisdictions. For these reasons, case law is neither a reliable nor systemic solution to the problem.

5 Paul D Friedland, *Arbitration Clauses for International Contracts* (2nd edn, JurisNet 2007) at 136.

6 *Ibid.*

7 See, for example, *Champ v Siegel Trading Co*, 55 F.3d 269, 274–75 (7th Cir 1995) (collecting cases from six US courts of appeals holding that district courts are barred from consolidating arbitrations absent an express provision in the parties' arbitration agreement); *Wealands v CLC Contractors Ltd* [1999] 2 Lloyd's Rep 739 (English Ct App) (holding that English courts not authorised to order consolidation of arbitrations); *Liberty Reinsurance Canada v QBE Insurance and Reinsurance* [2002] 42 CCH (3d) 249 (Ont SCJ) (holding that Ontario courts not authorised to order consolidation of arbitrations absent party agreement).

Statutory remedies

Some jurisdictions have enacted legislation providing that parties may seek a consolidation order, in the local courts, absent party consent. For example, Article 1046 of the Netherlands Arbitration Act ('Consolidation of Arbitral Proceedings') provides, in pertinent part, as follows:

'If arbitral proceedings have been commenced before an arbitral tribunal in the Netherlands concerning a subject matter which is connected with the subject matter of arbitral proceedings before another arbitral tribunal in the Netherlands, any of the parties may, unless the parties have agreed otherwise, request the President of the District Court of Amsterdam to order a consolidation of the proceedings. The President may wholly or partially grant or refuse the request, after he has given all the parties and the arbitrators an opportunity to be heard.'⁸

Likewise, the US State of Florida has enacted legislation allowing parties to petition the courts to consolidate one or more arbitrations if, among other things, '[t]he claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of transactions' and the agreements do not prohibit consolidation (thus creating an 'opt-out' rather than an 'opt-in' consolidation regime).⁹

As one can observe, these statutory remedies come with domestic restrictions and apply only to the consolidation of multiple arbitral proceedings, rather than the consolidation of multiple contractual disputes into one proceeding at the commencement of the arbitration. Moreover, there appear as many, if not more, jurisdictions that have enacted legislation *prohibiting* multi-contract consolidation absent party consent.¹⁰

Thus, absent a worldwide treaty obligating nation states to enact consolidation statutes, which is not in the offing, one may not rely on legislation to solve the problem in any systemic manner.

Arbitration rules

The most comprehensive and reliable solution to the consolidation dilemma lies in amending the world's leading international arbitration rules to

8 Netherlands Arbitration Act, Code of Civil Procedure – Book Four: Arbitration, Article 1046 (1986).

9 2015 Florida Statutes s 682.033 ('Consolidation of separate arbitration proceedings').

10 See, for example, English Arbitration Act 1996, s 35(1) ('Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation ...'); International Commercial Arbitration Act of British Columbia 1996, ch 223, s 27(2) ('If the parties to two or more arbitration agreements have agreed, in their respective arbitration agreements, to consolidate the arbitrations arising out of those agreements, the Supreme Court may ... order the arbitrations to be consolidated on terms the Court deems just and necessary ...').

provide for the liberal consolidation of multi-contract disputes. The vast majority of international arbitrations today are administered by a handful of institutions, including the International Chamber of Commerce, the International Centre for Dispute Resolution, the Singapore International Arbitration Centre, the London Court of International Arbitration, the Hong Kong International Arbitration Centre and a few others. Amending the rules of these few leading institutions to provide for liberal consolidation would therefore have a widespread and comprehensive impact.

There is also no need to rely upon the foresight of transactional attorneys to include consolidation provisions in the documents, or upon the hit-or-miss fortuity of legislation or case law at the seat of arbitration, if the solution to the consolidation dilemma is written into the rules. The rules are the rules, and once the parties agree to them, the parties can expect reliable results.

Comparison of the consolidation rules adopted by the leading international arbitration institutions

The question becomes: how *liberally* do the world's leading international arbitration rules treat the consolidation of multi-contract disputes? Can parties to the typical multi-contract transaction – where the signatories to the principal and ancillary agreements are affiliated but not identical – commence a single, consolidated arbitration under the multiple contracts at the time disputes arise? The answer varies from institution to institution, but as demonstrated below, none of the leading international arbitration rules satisfactorily resolves the consolidation dilemma.

The Singapore International Arbitration Centre (SIAC)

The SIAC Rules do not include a provision for consolidation. Rather, SIAC addresses consolidation in a 'frequently asked question' on its website:

'22. Can I consolidate related cases?

SIAC's Rules are silent on consolidation. *Should the parties reach an agreement to consolidate related cases*, consolidation would generally take place after the constitution of the Tribunal, upon the parties' request, and pursuant to directions issued by the Tribunal.¹¹

SIAC's answer to the consolidation dilemma, therefore, is merely to restate the problem: without the explicit agreement of the parties, which will never come from respondents bent on sowing inefficiencies into the process, the parties must resign themselves to multiple proceedings.

11 'Frequently Asked Questions', www.siac.org.sg/faqs <accessed 17 February 2016> (emphasis added).

The London Court of International Arbitration (LCIA)

In February 2014, the LCIA Rules published a new set of Arbitration Rules that added, for the first time, a provision addressing consolidation. However, this provision, LCIA Article 22.1, does not address the commencement of one consolidated arbitration under multiple contracts. Rather, it addresses the related problem of consolidating multiple arbitration proceedings into one arbitration. LCIA Article 22.1 states, in pertinent part as follows:

‘The Arbitral Tribunal shall have the power...:

(ix) to order, with the approval of the LCIA Court, consolidation of the arbitration with one or more arbitrations into a single arbitration ... where *all the parties to the arbitrations to be consolidated so agree in writing*;

(x) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more arbitrations ... with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement *or any compatible arbitration agreement(s) between the same disputing parties*, provided that no arbitral tribunal has yet been formed ... or, if already formed, that such tribunal(s) is(are) composed of the same arbitrators;¹²

Consolidation under LCIA Article 22.1 therefore requires either (1) that the parties ‘agree in writing’ to consolidation (which, again, is rarely forthcoming at the time of a dispute) or (2) that the contracts at issue in the arbitrations to be consolidated are between ‘the same disputing parties’. This is no help to parties caught in the all-too-common scenario of disputes arising under a principal agreement between two parent companies and ancillary agreements between affiliates of the parent companies. Were separate arbitration proceedings to be commenced under the principal agreement and one or more of the ancillary agreements, the arbitration would involve different, not the same, parties.

The International Centre for Dispute Resolution (ICDR)

On 1 June 2014, the ICDR adopted an updated set of its International Arbitration Rules that, like the LCIA Rules, added a rule providing for the consolidation of two or more arbitral proceedings. This rule, ICDR Article 8, suffers from the same limitations as LCIA Article 22.1, namely, the requirement of party consent or, absent that, the requirement that each of the contracts be between the ‘same parties’. As the rule provides:

¹² LCIA Art 22.1 (ix) and (x) (emphasis added). See also LCIA Art 22.6 (‘the LCIA Court may determine ... that two or more arbitrations, subject to the LCIA Rules and commenced *under the same arbitration agreement between the same disputing parties*, shall be consolidated to form one single arbitration ... provided that no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated.’)

‘At the request of a party, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules . . . into a single arbitration where:

- a. the parties have *expressly agreed* to consolidation; or
- b. all of the claims and counterclaims in the arbitrations are made under the *same arbitration agreement*; or
- c. the claims, counterclaims, or setoffs in the arbitrations are made under more than one arbitration agreement; the arbitrations involve the *same parties*; the disputes in the arbitrations arise in connection with the same legal relationship; *and* the consolidation arbitrator finds the arbitration agreements to be compatible.’¹³

The International Chamber of Commerce (ICC)

In its 2012 amendments to the ICC Rules, the ICC added a new rule addressing the situation of ‘Multiple Contracts’. This rule is set forth in Article 9, which provides as follows:

‘Subject to the provisions of Articles 6(3)–6(7) and 23(4), *claims arising out of or in connection with more than one contract may be made in a single arbitration*, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.’¹⁴

Thus, unlike the ICDR and the LCIA Rules, the ICC Rules do not merely provide for the consolidation of arbitration proceedings. The ICC Rules also provide for the consolidation of disputes arising under one or more contracts into a single arbitration at the commencement of the proceedings.

Although ICC Article 9 sounds like a promising solution to the consolidation dilemma, it is not. As Article 9 provides, it is ‘subject to’ a number of other ICC rules, include Article 6(4). Article 6(4)(ii) provides as follows:

‘[W]here *claims pursuant to Article 9 are made under more than one arbitration agreement*, the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied (a) that the arbitration agreements under which those claims are made may be compatible, *and* (b) that *all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration*.’¹⁵

Thus, like the other rules, the ICC Rules restate rather than resolve the problem. By operation of ICC Article 6(4)(ii), the commencement of a

¹³ ICDR Art 8(1).

¹⁴ ICC Rules, Art 9 (emphasis added).

¹⁵ ICC Article 6(4)(ii) (emphasis added).

multi-contract proceeding under Article 9 requires the agreement of all the parties.¹⁶

The Hong Kong International Arbitration Centre (HKIAC)

In November 2013, the HKIAC introduced a new set of Administered Rules that take a significantly more liberal position on consolidation than the other rules discussed above. Like the ICC, the HKIAC added a rule covering the commencement of a single arbitration under multiple contracts. This rule, Article 29, states:

‘Claims arising out of or in connection with more than one contract may be made in a single arbitration, provided that:

- (a) all parties to the arbitration are bound by each arbitration agreement giving rise to the arbitration;
- (b) a common question of law or fact arises under each arbitration agreement giving rise to the arbitration;
- (c) the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions; and
- (d) the arbitration agreements under which those claims are made are compatible.’¹⁷

What is striking about HKIAC Article 29 is that it does away with the requirement of party consent to consolidation in the underlying agreements. As long as ‘all parties to the arbitration are bound by each agreement giving rise to the arbitration’ – and provided that a common question or law of fact arises under each agreement, etc – a single proceeding can be commenced under multiple contracts *even if the parties did not expressly consent to consolidation in their arbitration agreements*.

Though HKIAC Article 29 is a positive step forward, it is of no assistance to parties to the typical multi-contract transaction. The requirement that ‘all parties to the arbitration’ must be ‘bound by each agreement giving rise to the arbitration’ is not satisfied where the transaction is based on principal and ancillary agreements executed by affiliated, but different, parties.

HKIAC’s rule on the consolidation of multiple arbitration proceedings is even more liberal. This rule (‘Consolidation of Arbitrations’) is set forth in HKIAC Article 28.1, which reads:

¹⁶ The ICC rule on consolidation of arbitration proceedings, Art 10, is no more helpful. Like the ICDR and LCIA rules on the consolidation of proceedings, ICC Art 10 permits consolidation only when ‘the parties have agreed to consolidation’, ‘all of the claims in the arbitrations are made under the same arbitration agreement’ or ‘where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties ...’

¹⁷ HKIAC Art 29.

‘HKIAC shall have the power, at the request of a party (the “Request for Consolidation”) and after consulting with the parties and any confirmed arbitrators, to consolidate two or more arbitrations pending under these Rules where:

- (a) the parties agree to consolidate; or
- (b) all of the claims in the arbitrations are made under the same arbitration agreement; *or*
- (c) *the claims are made under more than one arbitration agreement, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and HKIAC finds the arbitration agreements to be compatible.*¹⁸

Thus, the consolidation of multi-contract arbitration proceedings under HKIAC Article 28.1 requires neither the consent of the parties in their arbitration agreements *nor that the signatories to the various agreements be the same parties*. As long as the HKIAC determines that (1) ‘a common question of law or fact arises’ in the multiple arbitrations, (2) the relief claimed in the arbitrations ‘are in respect of, or arise out of, the same transaction *or series of transactions*’, and (3) the arbitration agreements are ‘compatible’, the HKIAC can consolidate the proceedings.

By itself, HKIAC Article 28.1 can be described as a resolution of the consolidation dilemma. But it is not the most pragmatic of solutions. In particular, it requires the commencement of multiple arbitrations and, thereafter, the filing of ‘Requests for Consolidation’ in each of the arbitrations. In addition, it also creates the potential for unnecessary roadblocks and a volley of objections to consolidation from the respondents in each separate arbitration. This potential is reflected in HKIAC Article 28.3, which gives the HKIAC ample discretion to deny consolidation: ‘In deciding whether to consolidate, HKIAC shall take into account the circumstances of the case. Relevant factors may include, but are not limited to, whether one or more arbitrators have been designated or confirmed in more than one of the arbitrations, and if so, whether the same or different arbitrators have been confirmed.’¹⁹

18 HKIAC Art 28.1 (emphasis added).

19 HKIAC Art 28.3.

The new CIETAC Rules: a pragmatic solution to the consolidation dilemma

The new CIETAC Rules, which were adopted on 1 January 2015, carry on where the HKIAC Rules left off. Unlike any of the other leading institutional rules, CIETAC Article 14 ('Multiple Contracts') expressly recognises the practical reality of the principal/ancillary multi-contract scenario and gives claimants the *right to file* one consolidated arbitration as long as three conditions are met:

'The Claimant may initiate a single arbitration concerning disputes arising out of or in connection with multiple contracts, provided that:

- (a) *such contracts consist of a principal contract and its ancillary contract(s), or such contracts involve the same parties as well as legal relationships of the same nature;*
- (b) the disputes arise out of the same transaction or the same series of transactions; and
- (c) the arbitration agreements in such contracts are identical or compatible.²⁰

Under CIETAC's new rule, there is no requirement that the parties to the various contracts be the same. If the contracts in dispute consist of a principal contract and one or more ancillary contracts, the initiation of a consolidated, multi-contract proceeding is permitted as long as the disputes arise out of 'the same transaction or the same series of transactions' – a requirement that should automatically be met in the principal/ancillary multi-contract setting and thus is somewhat redundant. There is also the unavoidable requirement that the arbitration agreements in the principal and ancillary contracts must be 'compatible' – meaning, in particular, that the arbitration clauses in the contracts require the same rules, the same seat of arbitration and the same number of arbitrators. This too, however, should automatically follow in the vast majority of principal/ancillary multi-contract transactions. Although one cannot safely rely upon transactional attorneys to include consolidation provisions in multi-contract transactions, one can generally rely upon them to recycle (if not cut and paste) the same arbitration provision into each of the contracts.

CIETAC's new solution is also reflected in the 2015 revisions that it made to its pre-existing rule regarding the consolidation of arbitral proceedings. A blackline showing the deletions and additions that were made to this rule, Article 19, is reproduced below:

²⁰ CIETAC Art 14 (emphasis added).

~~‘At the request of a party and with the agreement of all the other parties, or where CIETAC believes it necessary and all the parties have agreed, CIETAC may consolidate two or more arbitrations pending under these Rules into a single arbitration if:~~

- (a) all of the claims in the arbitrations are made under the same arbitration agreement;
- (b) the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible and the arbitrations involve the same parties as well as legal relationships of the same nature;
- (c) the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible and the multiple contracts involved consist of a principal contract and its ancillary contract(s); or
- (d) all the parties to the arbitrations have agreed to consolidation.²¹

Hence, like CIETAC’s new rule on the commencement of a consolidated, multi-contract proceeding, CIETAC amended its ‘Consolidation of Arbitrations’ rule to delete the requirement of party agreement and, through subsection (c), add the principal/ancillary contract scenario.

Critics may argue that deleting the party agreement requirement from the rules is an infringement of party autonomy or the corporate form. Such criticism would be misguided. Article 4 of the CIETAC Rules provides that ‘[w]here the parties have agreed to refer their disputes to CIETAC for arbitration, *they shall be deemed to have agreed to arbitration in accordance with these Rules.*’²² Accordingly, if parties agree to CIETAC arbitration, the CIETAC Rules are effectively incorporated into their underlying arbitration agreement (except, of course, where the rules conflict with the agreement). There is no need for the parties to agree to consolidation *again* at the time of the dispute. The agreement to consolidation is part of their original contract.

For the same reason, requiring parents, affiliates and subsidiaries to arbitrate a case together is not an attack on the corporate form if they have each agreed to consolidation. Corporate independence is wholly respected. Indeed, one could argue that it would be a paternalistic affront to the corporate form to let independent companies escape the consequences of their own agreements.

To be sure, each of the leading international arbitration rules has a provision similar to CIETAC Article 4, by which its rules are effectively

²¹ CIETAC Art 19 (blackline of 2015 rule against the prior edition of the rule).

²² CIETAC Art 4 (emphasis added).

incorporated into the parties' agreement.²³ The difference is that those other rules (save the HKIAC Rules) require an express agreement to consolidate, whether in the parties' arbitration agreement or at the time the arbitration is commenced. Unfortunately, one cannot count on either.

Conclusion

The current consensus on the consolidation of multi-contract transactional disputes among the leading international arbitration rules is largely ineffective. The practical reality is that most international multi-contract transactions do not fall into the neat pattern of the 'same parties' signing each contract. Most fall under the principal agreement/ancillary agreements model, where the parties to each contract are affiliated, but different, entities. It is also a practical reality that transactional attorneys fail to include consolidation agreements in many, if not most, international multi-contract transactions.

The result of this reality is that the current regimen of consolidation rules is detrimental to the progress and reputation of international arbitration as a dispute-resolution procedure. The typical multi-contract dispute is subject to easy tactical abuse by respondents. Claimants who expected an efficient process wake up to the difficult choice of fighting multiple arbitrations, with the attendant duplication of expense and fear of inconsistent results, or sacrificing some of their claims in order to unify as much of the dispute as possible before a single tribunal. Users of the process are left disappointed.

The only comprehensive and reliable solution to the consolidation dilemma is to liberalise the consolidation rules of the world's leading international arbitration institutions. CIETAC's new rules on consolidation represent a bold and pragmatic step forward that other institutions should consider replicating.

²³ See, for example, ICC Art 6(1) ('Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules ...'); SIAC Rule 1.1 ('Where parties have agreed to refer their disputes to SIAC for arbitration, the parties shall be deemed to have agreed that the arbitration shall be conducted and administered in accordance with these Rules.');

LCIA Rules at 'Preamble' ('Where any agreement ... provides in whatsoever manner for arbitration under the rules of or by the LCIA ... the parties thereto shall be taken to have agreed in writing that any arbitration between them shall be conducted in accordance with the LCIA Rules');

ICDR Art 1.1 ('Where parties have agreed to arbitrate disputes under these International Arbitration Rules ('Rules') ... the arbitration shall take place in accordance with these Rules; HKIAC Art 1.1 ('These Rules shall govern where an agreement to arbitrate ... provides for these Rules to apply ...').