

The More the Merrier?

Increase in multiparty arbitrations spawns new institutional rules

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Over the last several years, the world's leading arbitral institutions have adopted new rules, recognizing that the growth in international arbitration has been accompanied by the increasing complexity and sophistication of disputes. Institutional statistics reveal increases in disputes involving multiple parties, multiple contracts and multiple arbitration agreements. Parties to a dispute subject to arbitration are also increasingly seeking interim and emergency measures relating to their disputes.

Adapting to this new reality, arbitral institutions that have changed their rules on these points include the American Arbitration Association/International Centre for Dispute Resolution (AAA/

ICDR), International Court of Arbitration at the International Chamber of Commerce (ICC), and London Court of International Arbitration (LCIA).

Those who will find the new rules regarding multiparty practice to be of particular interest include companies involved in ventures with multiple partners (including parents and subsidiaries), policyholders with large insurance programs involving multiple insurance companies, and cedents with reinsurance programs including multiple reinsurers. Often, these types of claimants seek to have a single proceeding cover the entire program in dispute rather than moving forward in individual proceedings against each member of a program. In addition to the obvious cost savings in having a single proceeding, it may also be most efficient and avoid inconsistent

determinations where common factual or legal issues feature in the dispute.

New Institutional Approaches to Multiparty Arbitrations

AAA/ICDR Rules The 2014 AAA/ICDR Rules contained a number of changes over prior versions of the Rules.¹ Most importantly, for the purposes of this article, Article 7 (Joinder) and Article 8 (Consolidation) were added to the Rules.

Under Article 7, "A party wishing to join an additional party to the arbitration shall submit to the Administrator a notice of Arbitration against the additional party."² The rule also requires that notice be provided to the additional party and all other parties at the same time.³ However, critically, it should be noted that Article 7 provides that "No additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree."⁴

Article 8 provides rules governing consolidation of disputes, providing: 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, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration where:



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- the parties have expressly agreed to consolidation; or
- all of the claims and counter-claims in the arbitrations are made under the same arbitration agreement; or
- 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.⁵

Article 8, which requires detailed study by any party seeking to consolidate under the rules, further provides that the Consolidation Arbitrator may take into account all relevant circumstances including: applicable law; whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed; the progress already made in the arbitrations; whether the arbitrations raise common issues of law and/or facts; and whether the consolidation of the arbitrations would serve the interests of justice and efficiency.⁶

ICC Rules The ICC revised its Arbitration Rules in 2012 to address, among other things, “disputes involving multiple contracts and parties.”⁷ To that end, the ICC added Articles 7-10 covering multiple parties, multiple contracts and consolidation.

Under Article 7 (Joinder of Additional Parties), “A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party.”⁸ No additional party may be joined after the confirmation or appointment of any arbitrator unless all parties, including the additional party, agree.⁹

Articles 8 and 9 apply, respectively, to “claims between multiple parties” and “multiple contracts.” As to arbitration with multiple parties, claims may be made by any party against any other party provided that “no new claims may be made after the Terms of Reference are signed or approved by the Court without authorization of the arbitral tribunal.”¹⁰

As to arbitration with multiple contracts, “claims arising out of or in connection with more than one contract may be made in a single arbitration irrespective of whether such terms are made under one or more than one arbitration agreement under the Rules.”¹¹

Under Article 10 (Consolidation of Arbitrations), which, like Article 8 in the AAA/IDCR rules, should be a focal point for any party seeking to consolidate under the rules, the Court may consolidate arbitrations pending under the ICC

A single proceeding may be the most efficient path to resolution.

Rules under the following circumstances:

- the parties have agreed to consolidation; or
- all of the claims in the arbitration 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, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.¹²

In determining whether to consolidate, the Court may take into account any circumstance it considers to be relevant, including whether arbitrators have been confirmed or appointed in the arbitrations and whether the same or different arbitrators were already confirmed or appointed.¹³

LCIA Rules The 2014 LCIA Rules also contain express provisions regarding joinder and consolidation.¹⁴

In Article 22 (Additional Powers), the LCIA Rules provide the Arbitral Tribunal with the power to decide, among others, the following issues:

- viii. to allow one or more persons

to be joined in the arbitration as a party provided any such person and the applicant party have consented to such joinder in writing following the Commencement or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;

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

x. to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitration 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 been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is(are) composed of the same arbitrations;¹⁵

Conclusion

Rules pertaining to multiparty arbitration were also recently adopted by, among others, the Hong Kong International Arbitration Centre in the latest iterations of their rules.¹⁶

Given this trend, parties to arbitration agreements may seek to invoke the rules, where applicable, to seek to join parties to arbitrations or to seek to consolidate arbitrations. In institutions where such rules have not yet been expressly included, parties may seek to persuade tribunals that they have the power to join or consolidate arbitrations on the basis of the trend.

Careful attention must be paid, however, to the rules that apply in a given situation. In particular, timing requirements can bar a party seeking to add additional parties to an active or contemplated arbitration (or to consolidate arbitrations). Accordingly, parties seeking to add additional parties to an active or

contemplated arbitration (or to consolidate arbitrations) should do so as early as possible in the proceeding.

Likely claimants who may want to have a single proceeding with a number of parties should pay careful attention to the applicable arbitral rules when drafting a dispute resolution clause. While an express pre-dispute agreement for all parties to participate in a single arbitration is ideal for a potential claimant seeking to include all potential parties in a dispute, the use of arbitral rules that expressly contemplate multiparty proceedings can assist in the absence of an express agreement.

As noted above, claimants as well as respondents can benefit from the invocation of such multiparty provisions to ensure the efficient resolution of disputes.

1. "The New ICDR International Arbitration Rules," Paul Friedland & John Templeman, available online at: http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7Ba522394f-fbe3-41ef-874f-e085f5806c08%7D_ICDR_Procedures_Changes.pdf. In this commentary, Mr. Friedland and Mr. Templeman note that the old Rules had no prior provisions addressing, among other things, joinder or consolidation.
2. International Dispute Resolution Procedures (including Mediation and Arbitration Rules) – Rules Amended and Effective June 1, 2014, International Centre for Dispute Resolution, at Art. 7(1), available online at: http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B882b243b-d143-4be5-89e0-6aa7f3125560%7D_ICDR_Rules.pdf
3. See *id.*
4. See *id.*
5. See *id.* at Art. 8(1).
6. See *id.* at Art. 8(3).
7. Arbitration Rules: Rules of Arbitration of the International Chamber of Commerce (in force from 1 January 2012) at Forward, available online at: <http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version>
8. See *id.* at Art. 7(1).
9. See *id.*
10. See *id.* at Art. 8(1).
11. See *id.* at Art. 9.
12. See *id.* at Art. 10.
13. See *id.*
14. LCIA Arbitration Rules effective 1 October 2014, LCIA, available online at: <http://www.lcia.org/media/download.aspx?MediaId=379>. Article 22.1(h) of the prior iteration of Rules contained a more limited joinder provision. See LCIA Arbitration Rules effective 1 January 1998, at Art. 22.1(h), available online at: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx.
15. See *id.* at Article 22.1.
16. HKIAC Administered Arbitration Rules 2013, HKIAC, Art. 27-29, available online at <http://www.hkiac.org/en/arbitration/arbitration-rules-guidelines/hkiac-administered-arbitrationrules-2013>.

Anderson Kill is a national law firm with experience representing clients in disputes involving issues in a number of areas, including international commercial arbitration, insurance coverage, employment issues, contract disputes, construction matters and financial – investor/ broker disputes. In the field of arbitration, our practice draws upon our in-depth knowledge of domestic and international arbitration rules, including: American Arbitration Association (AAA) and its international division (ICDR); JAMS; International Court of Arbitration of the International Chamber of Commerce (ICC); the London Court of International Arbitration (LCIA); and the United Nations Commission on International Trade Law (UNCITRAL). Our wealth of litigation and trial experience in courts and before arbitration tribunals informs and enriches our conduct of arbitration matters. Our lawyers also serve as arbitrators and mediators for AAA and on mediation panels in federal and state courts. We also work in the forefront of alternative dispute resolution advancement, lecturing and authoring articles on ADR. To learn more about our alternative dispute resolution practice, visit <http://www.andersonkill.com/Alternative-Dispute-Resolution/default.asp>.