The Power to Join Parties or Consolidate Separate Arbitrations in International Arbitration

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No man is good enough to govern another man without the other's consent

Abraham Lincoln

Arbitration is a creature of consent: parties agree to contract out of a state court system and into a private dispute resolution mechanism. Subject to some mandatory provisions to safeguard the process, parties can agree on most things. Joining third parties is a complex area of consent. Consent may take many forms but most typically will come from the incorporation of institutional rules that provide for joinder or consolidation. There is a good degree of similarity between the claim to be joined and the existing claim, and both claims generally share the same seat, governing laws and institutional rules. In many cases the same agreement to arbitrate is required. The entity deciding the joinder is likely to be most influenced by considerations of efficiency.

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1 INTRODUCTION

Modern contractual supply chains are extremely complex with parts travelling across borders and many on a 'just in time' basis. This permits specialist component manufacturers to reduce production costs and ultimately gives producers the opportunity to reduce inventory levels and hence costs. When something goes wrong, however, there are potentially many linked claims, both in a supply chain scenario and in modern trade (as well as other commercial arrangements such as banking and finance agreements).

In litigation before courts, a variety of mechanisms exists for consolidating claims between different parties to a dispute into a single proceeding, or for permitting intervention, joinder, or 'vouching in' of additional parties into an ongoing proceeding. For example, if A, B and C enter into related contracts (A with B and B with C), separate actions between A and B and B and C can often be consolidated into a single action; alternatively, C can either intervene in, or be joined in, an

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existing action between A and B. In this article the term 'joinder' is used to cover all mechanisms of intervention, joinder, vouching in and consolidation, unless the contrary appears.

In each of these instances, there is generally no requirement that all parties consent to joinder. Rather, national courts have broad discretion to order joinder, typically based on perceived considerations of fairness and efficiency. One crucial element of fairness is the avoidance of inconsistent results.

Court rules regarding joinder are intended to permit proceedings to occur more efficiently and to avoid the possibility of inconsistent results. These considerations are, at least partially, applicable to international arbitration. In general, however, joinder in international arbitration raises additional, or at least different, issues.

In general terms, permitting joinder of additional parties in international arbitration can provide some obvious advantages. First, as with litigation, a single arbitration can in some circumstances be more efficient than two or more separate arbitrations. A single proceeding permits the same savings of overall legal fees, witness time, preparation and other expenses (including tribunal and institutional fees).

Second, joinder reduces the risk of inconsistent results in two or more separate arbitrations. This can apply both to the overall merits and to interim measures such as to injunctive relief.

Third, there is a benefit of similar subject matter, common facts, and common issues of law, and tribunals have a fuller view of a transaction.

Joinder is not, however, a panacea. It can raise significant problems with respect to the appointment of arbitrators and the composition of the tribunal. First, many arbitrations involve three-person tribunals, with each party nominating one member of the tribunal, and the two party-nominated arbitrators agreeing upon a third (or the appointing authority selecting a third). If there are three (or more) parties to the arbitration, all of whom have distinct interests, each party cannot appoint an arbitrator.[1]

Second, there will be issues over confidentiality. Joinder entails a real, albeit limited, loss of confidentiality. Although this may be warranted, or outweighed by other considerations, it can also be inconsistent with the parties' original agreement to arbitrate, raising concerns not present in national court litigation.

Third, although multi-party proceedings may well be more efficient as a general matter, the savings in cost and time will not always be distributed evenly among the parties. Some parties may even see an increase in costs. This can be

[1] Assuming that the tribunal does not comprise more than three persons.

mitigated by awarding costs and permitting parties not to participate in some bifurcated issues.

2 CONSENT

The cornerstone of arbitration is consent, as embodied in the parties' agreement to arbitrate. By that agreement they agree to oust the jurisdiction of courts and agree to arbitrate disputes, typically on a bilateral[2] basis. In doing so, parties agree to arbitrate with certain other parties (their contractual counterpart) according to specified procedures. They do not typically merely agree to arbitrate with anybody, in any set of proceedings. Accordingly, at the heart of any issue of joinder is consent.

In English law arbitration is, as a general rule, a private process. In *Russell v Russell*[3] Sir George Jessel MR said of arbitration:

> *As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful.*

It is because arbitrations are private that arbitrators have no power to order concurrent hearings (or, it is suggested, any other form of joinder) without the consent of the parties (*Oxford Shipping Co Ltd v Nippon Yusen Kaisha: 'The Eastern Saga'*).[4] The 1996 Act says nothing about privacy or confidentiality and that was a deliberate omission. In its report on the Arbitration Bill (February 1996), paras 10–17, the Departmental Advisory Committee on Arbitration Law recorded that users of commercial arbitration in England '*place much importance on privacy and confidentiality as essential features of English arbitrations*' but, recognising that there was uncertainty as to the breadth and existence of certain exceptions to those principles, recommended that there be no statutory formulation of those principles but that the courts should be left to develop the law '*on a pragmatic case-by-case basis*'.

Parties can agree at any stage to joinder but consent in the face of a dispute is rare. More typically, consent is found in the agreement to arbitrate itself – and as a subset of that, in any institutional rules incorporated into that agreement.

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2 This article assumes a bilateral contract. Plainly, if there are multiple parties to a contract, and that agreement contains an agreement to arbitrate, then there are not the same issues of joinder, as all parties have agreed to the same provision. There may be issues involving appointment of the tribunal (*see* below), there may be cross-claims between the parties, and there may still be the need or at least the desire to join parties who are strangers to the contract.

3 (1880) 14 Ch. D 471, 474.

4 [1984] 3 All ER 835.

Consent might also be found in national laws. The relevant national law will typically be the law of the agreement to arbitrate.[5]

Consent must be from all parties (including those to be joined). In arbitration proceedings between A and B, if B wishes to join C to claim an indemnity or contribution, first B and C must have agreed to arbitrate their disputes, and second, both A and B and B and C must have agreed to arbitrate on the basis that joinder was permissible. If the A/B and the B/C contracts are 'back-to-back' or on a suite of contracts, that latter provision may well be met. Equally, if both contracts provide for arbitration under institutional rules, that may, depending on the institution, be sufficient.

3 THE IMPORTANCE OF DEMONSTRABLE CONSENT – THE NEW YORK CONVENTION AND MODEL LAW

Any award in an arbitration where a joinder has occurred and which a recognising or enforcing court considers impermissible could, arguably, be subject to challenge under Article V1(c) of the New York Convention, which provides that an arbitral award may be denied recognition and enforcement if it deals with a matter not falling within the scope of the arbitration agreement.

On the same or similar grounds, the award would be vulnerable to annulment attempts under Article 34(2)(a)(iii) of the UNCITRAL Model Law as it can be argued that the award goes beyond the scope of the arbitration agreement. Accordingly, it would be prudent to refer to the procedural rules of the seat country (and any likely enforcement country) regarding joinder, and to the seat court's precedents and practice in order to determine whether an award after joinder is likely to be vulnerable in all the circumstances.

4 CONSENT UNDER INSTITUTIONAL RULES

A full review of all institutional rules is not possible in an article of this nature; rather, certain rules are considered below.

4.1 LCIA

The 2020 LCIA Rules permit an application of joinder to be made only by a party to the arbitration under Article 22.1(x).[6] The Rules do not permit an

[5] *See* generally *Enka Insaat Ve Sanayi A.S. (Respondent) v. OOO Insurance Company Chubb* [2020] UKSC 38.

[6] Article 22.1(x) of the 2020 Rules provides: '*The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-para. (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral*

intervention by a third person on its own initiative even if the third person is a party to the underlying contract and arbitration agreement. An application does not require the applicant to specify the claim being raised by the applicant party against a third person to be joined. Thus, the applicant party does not have to have a fully formulated claim (although no doubt details or a draft claim will be helpful) against the third person for joinder to be successful.

The Rules do not expressly regulate when the application may be made; they only provide that the tribunal has the power to allow a third person to be joined in the arbitration as a party, which thus excludes the LCIA Court's competence to rule on joinder applications. This does not, of course, mean that the application cannot be made at an early stage (it generally should be) but merely that it will not be decided until after the constitution of the tribunal. It follows that the party to be joined cannot participate in the appointment process.

For joinder, the LCIA Rules require specific consent of the applicant party and the person to be joined. Article 22.1(x) states that the tribunal may allow a third person to be joined in the arbitration '*provided 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*'. Unless the party sought to be joined ('C') is a party to the same arbitration agreement as the original parties ('A' and 'B' – and 'B' seeks to join 'C'), then C's consent must be express and after the commencement of the arbitration between A and B. A contract between B and C also subject to LCIA Rules will not be sufficient. A's objections to C's joinder can, in theory, be overruled.

Note that the entity to be joined may well have a fundamental objection in that it is unable to have an equal participation right in appointment.[7]

The new Article 22A enlarges the potential for consolidation. It is permissible in two circumstances: first, and as previously, where all parties to both arbitrations agree; and second,[8] where two arbitrations '*aris[e] out of the same*

Tribunal may decide: … (x) to allow 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 expressly to such joinder in writing following the Commencement Date 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 … '.

[7] The person sought to be joined will almost certainly have to waive its right to participate in the appointment of the tribunal. Only parties, not 'persons', participate in the appointment process.

[8] In line with this change, Art. 1.2 of the 2020 Rules now allows for composite Requests for Arbitration, which means that parties can commence a single arbitration in respect of disputes under multiple contracts. Notably, while the issuance of a composite Request may be accompanied by a request for consolidation of those disputes, the consolidation will not be automatic. As noted in *A v. B* [2017] EWHC 3417, composite Requests were previously not permitted under the 2014 LCIA rules. Under the old rules, parties had to issue separate Requests for Arbitration and then seek to have arbitrations consolidated. The amendment in Art. 1.2 of the 2020 Rules, which allows for composite Requests for Arbitration, is clearly a practical response to user need and demand.

transaction or series of related transactions', and provided (a) the LCIA Rules apply, and (b) no tribunal, or the same tribunal, has been appointed. There is also a provision for concurrent hearings of two arbitrations provided (a) the LCIA's Rules apply, (b) the arbitrations are under the same or compatible arbitration agreement(s) and are either between the same disputing parties or arising out of the same transaction or series of related transactions, and (c) the same tribunal has been appointed.

4.2 ICC

Under the 2017 ICC Rules, joinder of additional parties was permitted only with the consent of all parties and before the constitution of the arbitral tribunal. Under the 2021 Rules, new Article 7(5) allows a tribunal, once constituted, and upon a party's request, to join a third party even where there is no universal consent.

The provision applies '*subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable*'. When deciding, the arbitral tribunal must also consider '*all relevant circumstances*', including (1) whether the arbitral tribunal has prima facie jurisdiction over the additional party, (2) the timing of the request, (3) possible conflicts of interest, and (4) the procedural impact of the joinder. Further, under new Article 7(5), '*any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party*'. Accordingly, despite satisfying the prima facie jurisdiction test, a successful joinder application may be subject to further jurisdictional challenges before the arbitral tribunal, including from the joined party.

Under Article 10(b) of the 2017 Rules, the Court may allow consolidation of two or more arbitrations pending under the ICC Rules where '*all the claims are made under the same arbitration agreement*'. This wording left open the question as to whether the term '*same arbitration agreement*' encompassed identical arbitration agreements contained in different contracts. The revision clarifies that the Court may order the consolidation where '*all of the claims in the arbitrations are made under the same arbitration agreement or agreements*' (emphasis added).

In a similar fashion, revised Article 10(c) now allows the Court to order consolidation when '*the claims in the arbitrations are not made under the same arbitration agreement or agreements, but 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*'.

With this update, the 2021 Rules adopt a more liberal approach to consolidation, with the compatibility of the relevant arbitration agreements becoming even more important.

Where joinder takes place prior to the confirmation of any arbitrator, the new party may participate in the normal multi-party nomination procedures under the Rules. Article 12.7 specifically so provides, stating that the additional party may nominate an arbitrator jointly with the other party of the side to which it has joined. If a joint nomination by each 'side' is not possible, Article 12.8 provides that the ICC Court may appoint the entire tribunal.

For joinder after the confirmation of any arbitrator, the ICC Rules require the unanimous consent of all the parties under Article 7.1. Joinder at this stage inevitably involves equal participation issues.

Given these factual possibilities, the unanimous consent requirement under Article 7.1 seems to be a necessary procedural device to eliminate the equal participation issues arising from the right of nomination, and ultimately to prevent all parties, including the additional party, from subsequently raising issues based on their equal nomination rights.

4.3 Swiss rules

The Swiss Rules contain a broad provision regarding joinder/intervention. In effect, Article 4(2) of the Swiss Rules grants the tribunal a wide discretion, '*after consulting with all parties, including the person or persons to be joined, taking into account all relevant circumstances*', to order joinder or intervention of a third person into an existing arbitration. A compulsory joinder of a third party under this provision raises issues with regard to consent: one or more of the parties will probably not have agreed to arbitrate with the other parties to the arbitration, except by virtue of its general acceptance of the Swiss Rules. If challenged, this may give rise to difficulties.

As to consolidation, the administering institution may refer a new case to a tribunal previously constituted for existing arbitral proceedings under the Swiss Rules. The parties are deemed to have given their consent to consolidation in advance by submitting the dispute to the Swiss Rules. While the Swiss Chambers' Arbitration Institution has considerable discretion when deciding whether to consolidate proceedings, it is obliged to consider (a) the relationship between the two cases, and (b) the progress already made in the existing proceedings. Article 4 (1) of the Swiss Rules provides that the parties to a 'new' arbitration shall be deemed to have waived their right to participate in the selection of the arbitral

tribunal (and will thus be required to accept the tribunal in the 'first' arbitration, into which their arbitration is consolidated).

4.4 SIAC

Under an earlier edition of the SIAC Rules, only existing parties to the arbitration could apply for the joinder of non-parties. The SIAC Rules 2016 now allow both parties and non-parties to apply for joinder. They also allow the joinder application to be made either prior to or after the constitution of the tribunal. Under the previous edition, joinder applications could only be made after the constitution of the tribunal. This allows a joinder of parties to be managed more efficiently.

The criteria for joinder have also been expanded in the SIAC Rules 2016. Under the previous edition, the party to be joined must be a party to the arbitration agreement, whereas under the SIAC Rules 2016 the party to be joined only needs to be 'prima facie *bound by the arbitration agreement*'.[9] This clearly extends the availability of joinder. The SIAC Rules 2016 make it clear that any decision of the SIAC Court or the tribunal to grant a joinder application would not prejudice the tribunal's power to subsequently decide any question as to its jurisdiction arising from such decision.

Further, the SIAC Court's decision to reject an application for joinder would not prejudice any party's or non-party's right to subsequently apply to the tribunal for joinder after it has been constituted. This means that a party or non-party has two bites at the cherry in seeking joinder.

The parties' confidentiality obligation has also been modified in the SIAC Rules 2016 to allow for disclosure to third parties for the purpose of the joinder application.[10]

The SIAC Rules 2016 introduce consolidation of arbitrations and largely follow the regimes under other major arbitral institutions. Notably, however, the SIAC Rules 2016 go further by introducing both the usual procedure for the commencement of arbitration for disputes arising out of or in connection with multiple contracts and arbitration agreements, as well as a streamlined one:

- Usual procedure: a claimant files multiple Notices of Arbitration, one for each arbitration agreement, and concurrently submits an application for consolidation; or
- Streamlined procedure: a claimant only needs to file a single Notice of Arbitration for all the relevant arbitration agreements, in which case the claimant would be deemed to have commenced

[9] Rule 7.8a – alternatively, all parties (including the party to be joined) can consent.
[10] Rule 39.2ff.

multiple arbitrations, one for each arbitration agreement, and the Notice of Arbitration itself would be deemed to be an application for consolidation.

As with the rules of other major arbitral institutions, a party may apply for consolidation prior to or after the constitution of the tribunal. Where the application for consolidation is made prior to the constitution of the tribunal, any one of the following criteria must be satisfied for consolidation by the SIAC Court:

- all parties have agreed to the consolidation;
- all the claims in the arbitrations are made under the same arbitration agreement; or
- the arbitration agreements are compatible, and:

1. the disputes arise out of the same legal relationship(s);
2. the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or
3. the disputes arise out of the same transaction or series of transactions.

The same criteria apply for consolidation by a tribunal, with an additional requirement for criteria (2) and (3), that is, that either the same tribunal has been constituted in each of the arbitrations to be consolidated, or that no tribunal has been constituted in the other arbitration(s). If a different tribunal is already constituted in the other arbitration(s), consolidation is no longer an option unless all parties have agreed to the consolidation, in which case the SIAC Rules 2016 are silent on whether the tribunal constituted first should take precedence, and hence agreement on consolidation would also need agreement on the tribunal.

The parties' confidentiality obligation has also been modified in the SIAC Rules 2016 to allow for disclosure to third parties for the purpose of the consolidation application.

5 CONSENT UNDER LAWS

There is little authority on the question of what law governs issues of consolidation, intervention and joinder in international arbitration. In principle, the law governing the parties' arbitration agreement[11] may govern at least some issues of joinder.

[11] As to which *see* generally *Enka Insaat Ve Sanayi A.S. (Respondent) v OOO Insurance Company Chubb* [2020] UKSC 38.

Discussing the effect of arbitration agreements on non-signatories, in *Dallah Real Estate & Tourism Holdings Co v. Pakistan*[12] Lord Collins said: '*Arbitration is a consensual process, and in each type of case the result will depend on a combination of (a) the applicable law; (b) the legal principle which that law uses to supply the answer (which may include agency, alter ego, estoppel, third-party beneficiary); and (c) the facts of the individual case*'. The question is: What is the applicable law?

English conflict of laws necessitates an enquiry. Burton J put the issue in this way in *Egiazaryan v OJSC OEK Finance*[13]*:*

> *At English law there will be many occasions when parties who were not signatories of an arbitration agreement are entitled or bound to be parties to the arbitration: in circumstances such as agency (including cases of undisclosed principal and apparent authority), lifting the corporate veil, assignment, and other scenarios such as universal succession or merger, which may be applicable in other systems of law. English law is the necessary starting point, but where the question to be properly characterised (see Mance LJ in Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC [2001] CLC 843; [2001] QB 825 at paragraph 27) is not who is or was party to the arbitration agreement but whether there is jurisdiction over a non-signatory to the arbitration agreement, then English conflicts rules will or may address another system of law.*

The proper approach is to decide what system of law should be applied to the issue (*lex causae*). That involves a three-stage process:

- characterise the relevant issue;
- select the rule of conflict of laws which lays down a connecting factor for that issue; and
- identify the system of law which is tied by that connecting factor to that issue.[14]

However, as Auld LJ said in *McMillan:*

> *The proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and the defence.*[15]

Further, as Mance LJ said in *Raiffeisen:*

> *The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised.*

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12 [2011] 1 AC 763.
13 [2015] EWHC 3532 (Comm), at 17.
14 *McMillan Inc v. Bishopsgate Investment Trust* [1996] 1 WLR 387, pp391 – 392, and *Raiffeisen Zentralbank v. An Feng Steel* [2001] CLC 843 para. 27.
15 At 407.

Thus, the law of the agreement to arbitrate is not necessarily determinative of all issues such as whether one party was properly the agent of another and whether a merger under foreign law entitled or obliged a party to arbitrate.[16] If the question is who are parties to the agreement to arbitrate on its proper construction, then the law of the agreement to arbitrate will govern. Conversely, if the question involves other issues, then other laws may apply. For example, if there are questions over alter ego, that may well invoke the laws of the place where the companies were incorporated, and questions over estoppel may involve the laws of the place where the relevant acts said to give rise to the estoppel took place.

Applying the law so determined to questions of joinder is consistent with the quasi-procedural character of these issues, as well as with the almost uniform tendency of national arbitration legislation (when it addresses issues of joinder) to be limited to locally seated or domestic arbitrations.

In many states, arbitration legislation does not deal expressly with issues of joinder. That is certainly true under the UNCITRAL Model Law.[17] In the absence of specific statutory provisions, joinder is generally subject to the Model Law's basic requirement that arbitration agreements be recognized and enforced in accordance with the parties' intentions. That is, joinder should be permissible – as an element of the parties' agreement to arbitrate – where that is what the parties have agreed, but not otherwise.

In adopting the Model Law, some states have incorporated amendments addressing the subject of consolidation, generally providing either courts or arbitral tribunals with the power (where the parties have so agreed) to consolidate arbitrations. These statutory provisions vary, with a few providing the arbitral tribunal,[18] but many providing local courts,[19] with the power to order consolidation, in

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16 *Egiazaryan,* at 18.

17 The Model Law's drafters considered but rejected proposals to address these subjects, both in the original 1985 version of the Law and in the 2006 revisions.

18 *See* e.g., Irish Arbitration Act, 2010, §16 ('The arbitral tribunal shall not order the consolidation of proceedings or concurrent hearings unless the parties agree to the making of such an order'.); Scottish Arbitration Act, 2010, Sch. 1, Rule 40; Singapore Arbitration Act, 2012, §26(2) (in relation to domestic arbitrations: 'Unless the parties agree to confer such power on the arbitral tribunal, the tribunal has no power to order consolidation of arbitration proceedings or concurrent hearings'.); Australian International Arbitration Act, 2011, §24; Malaysian Arbitration Act, §40(2) (if 'the parties agree to confer such power on the arbitral tribunal'); Peruvian Arbitration Law, §39(4) ('Unless otherwise agreed, the arbitral tribunal cannot order the consolidation of two or more arbitrations or arrange to conduct joint hearings'.).

19 *See* e.g., Netherlands Code of Civil Procedure, Art. 1046; Alberta International Commercial Arbitration Act, §8; British Columbia International Commercial Arbitration Act, §§27(2), (3); Manitoba International Commercial Arbitration Act, §8; New Brunswick International Commercial Arbitration Act, §8(1); Newfoundland and Labrador International Commercial Arbitration Act, §9; Ontario International Commercial Arbitration Act, §7; Nova Scotia International Commercial Arbitration Act, §9; Prince Edward Island Commercial Arbitration Act, §8; Saskatchewan International Commercial Arbitration Act, §7; Hong Kong Arbitration Ordinance, 2013, Sch. 2,

specified circumstances. Additionally, some statutory provisions limit the power of consolidation to arbitrations pending before the same tribunal[20] or to arbitrations pending between the same parties.[21]

The essential condition for joinder under virtually all of these statutes is the parties' consent. For example, the British Columbia International Commercial Arbitration Act provides for consolidation of arbitral proceedings by a local court:

> *if the parties to two or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise to consolidate the arbitrations arising out of those arbitration agreements*.[22]

Virtually all other arbitration legislation, based on the Model Law, that deals with the subject requires the parties' consent to consolidation.[23]

5.1 US Federal Arbitration Act

As with the Model Law, the federal arbitration acts (FAA's) text does not address joinder. In the absence of statutory guidance, lower US courts reached differing results in cases involving requests for court-ordered consolidation of two or more arbitrations, initially permitting consolidation even in the absence of agreement by the parties, while more recently restricting consolidation to cases where the parties' agreement so provides.

Consistent with the approach of US courts in other contexts, the FAA is held to give effect to the parties' procedural autonomy to structure the arbitration as

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§2; New Zealand Arbitration Act, Sch. 2, Art. 2; Bermuda International Conciliation and Arbitration Act, §9.

20 New Zealand Arbitration Act, Sch. 2, Art. 2(1) (designating procedures for consolidation 'where arbitral proceedings all have the same arbitral tribunal').

21 *See* e.g., Bermuda International Conciliation and Arbitration Act, §9 (providing for consolidation 'in relation to two or more arbitration proceedings in respect of identical parties').

22 British Columbia International Commercial Arbitration Act, §27(2) (emphasis added).

23 *See* e.g., Alberta International Commercial Arbitration Act, §8 ('The Superior Court of Justice, on the application of the parties to two or more arbitration proceedings, may order, (a) the arbitration proceedings to be consolidated, on terms it considers just.'); Ontario International Commercial Arbitration Act, §7 (same); Scottish Arbitration Act, 2010, Sch. 1, Rule 40 ('Parties may agree to consolidate the arbitration with another arbitration, or to hold concurrent hearings. But the tribunal may not order such consolidation, or the holding of concurrent hearings, on its own initiative'.); Australian International Arbitration Act, 2011, §24; New Zealand Arbitration Act, §6(2), Sch. 2, Art. 2; Bermuda International Conciliation and Arbitration Act, §9 ('(1) Where in relation to two or more arbitration proceedings in respect of identical parties it appears to the Court – (a) that some common question of law or fact arises in both or all of them, or (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or (c) that for some other reason it is desirable to make an order under this section, the Court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time, or one immediately after another, or may order any of them to be stayed until after determination of any other of them').

they think best. As the Second Circuit declared in *Government of the United Kingdom v. Boeing Co:*

> *A court is not permitted to interfere with private arbitration arrangements in order to impose its own view of speed and economy. This is the case even where the result would be the possibly inefficient maintenance of separate proceedings. … If contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party.*[24]

The FAA provides that courts (and arbitral tribunals) may not order the consolidation of arbitrations unless this is what the parties have agreed. This general principle was recently recognized, in the context of class arbitration, by the US Supreme Court: '*parties may specify with whom they choose to arbitrate their disputes*'.[25]

The weight of US authority categorises issues of consolidation as matters for the tribunal, not US courts, to resolve.

5.2 French law

In France, there is no legislative provision addressing the issues raised by multi-party arbitrations. The powers given to French courts to control the conduct of international arbitrations do not include the power to consolidate arbitral proceedings or to order joinder.

Under French law, arbitrators are not permitted to consolidate arbitrations or allow joinder in the absence of agreement by the parties. Absent such consent (express or implied), an order by a tribunal requiring joinder would render any subsequent award vulnerable to challenge as an excess of authority.

5.3 English law

The Arbitration Act 1996 is modified from the UNCITRAL Model Law to include provisions regarding consolidation. Section 35 of the Act provides that '*the parties are free to agree*' upon the consolidation of an arbitral proceeding with other arbitral proceedings or that concurrent hearings shall be held, but '*[u]nless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings*'.

In this respect, English legislation codifies the previous common law position by allowing consolidation, or concurrent hearings, if all parties

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[24] *Gov't of United Kingdom of Great Britain & N. Ireland v. Boeing Co.*, 998 F.2d 68, 73–74 (2d Cir. 1993) (emphasis added) (quoting *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991)).

[25] *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758, 1774 (US S.Ct. 2010) (emphasis in original).

agree to this procedure. It is well settled that the incorporation of institutional rules that allow for consolidation is sufficient to constitute such an agreement. The Act does not empower an English court, as distinct from the arbitrators, to order the consolidation of arbitral proceedings.

A final aspect of English law in respect to joinder is that the Act expressly contemplates assignment.[26] An assignee may therefore be joined (or substituted).

5.4 Swiss law

Like French arbitration legislation, the Swiss Law on Private International Law does not expressly address consolidation and joinder/intervention. Swiss commentary concludes that consolidation can only occur when it is agreed to by the parties. The Swiss Federal Tribunal has, in at least one case, required joinder of a third party into a pending arbitration (where the parties' arbitration agreement so provided).

6 THE NATURE OF CONSENT

The most common form taken by agreements permitting joinder is an arbitration agreement incorporating institutional rules that provide expressly for such procedural steps. Where these types of express provisions exist, there will be little question regarding the parties' consent, although there may be substantial differences regarding interpretation and application of the provisions.[27] This is illustrated by the decision of the Privy Council in *The Bay Hotel and Resort Limited v. Cavalier Construction Co. Ltd*[28] where the judgment of the Privy Council included the following: *'Such a rule of an arbitral institution may of course, by incorporation, amount to express or implied consent to extension of the arbitrators' jurisdiction [by joinder or consolidation] by their own order'.*

There may also be provisions for joinder in the specific wording of an agreement to arbitrate in a particular contract. Provisions of this character are ordinarily found only in substantial, multi-party projects or transactions.

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[26] S82(2) provides: 'References in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement'. This impliedly authorises assignment and hence the assignee may be substituted or joined to proceedings.

[27] In principle, requirements as to the form of agreement to arbitrate would appear to apply to agreements regarding joinder. That would require that (e.g.,) the 'writing' requirements of the English Arbitration Act 1996 §5 should be satisfied by such agreements, as material terms of the agreement to arbitrate. There are, however, decisions to the contrary, apparently giving effect to oral agreements to consolidate different arbitrations.

[28] [2001] UKPC 34.

These provisions will, of course, only bind the parties to such agreements. This is clear from *Lafarge Redland Aggregates Ltd v. Shephard Hill Civil Engineering Ltd*[29] where Lord Hope said, *'I do not think that there can be such a thing as a tripartite arbitration that does not have as its starting point a tripartite method of conferring jurisdiction on the arbitrator'*.

There is no reason, however, why an agreement permitting at least some form of joinder cannot be implied or inferred. Consistent with this, a number of US courts have held that an agreement for consolidation can be implied – where the parties' contract is silent – from contractual provisions and structure, as well as from considerations of efficiency and consistency of results.[30] In one court's words, a court has:

> *no power to order … consolidation if the parties' contract does not authorize it … [b]ut in deciding whether the contract does authorize it the court may resort to the usual methods of contract interpretation.*[31]

More specifically, another lower court held that:

> "*An agreement to consolidate may be implied by: (1) the language of the arbitration clause; (2) the amendments or addenda to the agreement; (3) the course of dealing between the parties; or (4) incorporation of rules that permit consolidation.*" [32]

It is difficult to resist these conclusions, particularly given the role of implied or inferred terms in other aspects of the arbitral process.[33]

The role of an implied agreement to consolidate arbitrations or permit joinder of additional parties has particular importance where three (or more) parties agree to the same arbitration agreement contained in the same underlying contract, but do not expressly deal with issues of consolidation and joinder. In these circumstances, there is a substantial argument that the parties have impliedly accepted the possibility of consolidating arbitrations under their multi-party arbitration agreement and/or the joinder of other contracting parties into such arbitrations.

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29 [2000] 1 WLR 1621.

30 *See* e.g., *Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada*, 210 F.3d 771 (7th Cir. 2000) (implied consent to consolidation is possible); *Maxum Found., Inc. v. Salus Corp.*, 817 F.2d 1086, 1087 (4th Cir. 1987) (finding agreement to consolidated arbitration, even absent 'unambiguous' provision to that effect); *Anwar v. Fairfield Green Ltd*, 728 F.Supp.2d 462, 477 (S.D.N.Y. 2010) (applying 'well-settled rules of law concerning the construction of contracts'); *Coastal Shipping Ltd v. S. Petroleum Tankers Ltd*, 812 F.Supp. 396, 402–03 (S.D.N.Y. 1993) (inquiring whether parties' agreement provides for consolidation 'either directly or by implication'). *See also Hartford Accident & Indem. Co. v. Swiss Reins. Am. Corp.*, 246 F.3d 219, 230 (2d Cir. 2001) ('We need not decide, however, whether our precedent prescribes consolidation of similar claims arising between the same parties arising under a series of nearly identical contracts that are silent on the question of consolidation').

31 *Conn. Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada*, 210 F.3d 771, 775 (7th Cir. 2000).

32 *Coastal Shipping Ltd v. S. Petroleum Tankers Ltd*, 812 F.Supp. 396, 402 (S.D.N.Y. 1993).

33 *See* generally the discussion on inferred consent to disclose in the context or arbitrator appointments in *Haliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48, at 88, 89, 99, 104, 116 and 154.

Where all the parties have expressly accepted the possibility of arbitration about a particular legal relationship with one another, it is difficult to presume that they meant to require that arbitrations proceed with the involvement of only some, and no other, parties to the arbitration agreement. In particular, expectations of confidentiality or purely bilateral dispute resolution proceedings are very difficult to justify, given the self-evident possibility of multi-party arbitrations involving all the parties to the agreement to arbitrate.

On this theory, the parties' joint acceptance of a single dispute resolution mechanism, to deal with disputes under a single contractual relationship, reflects their agreement on the possibility of a unified proceeding to resolve their disputes, rather than necessarily requiring fragmented proceedings in all cases. This implied agreement would generally neither require, nor forbid, consolidation in all cases, but would instead ordinarily leave the decision whether or not to consolidate two (or more) arbitrations to the tribunal's judgment (taking into account considerations of efficiency, fairness and the like in particular cases).

At a practical level, absent agreement (whether in the agreement or by incorporating institutional rules) permitting consolidation or national arbitration legislation in the arbitral seat providing the basis for court-ordered consolidation, parties may be able to effectively block consolidation by the simple expedient of appointing different arbitrators in each separate arbitral proceeding.

In these circumstances, consolidation would ordinarily require the removal and reappointment of tribunals, a result that is often difficult to implement consensually. Absent all parties' consent, coercive action would be required to remove and replace one or more of the tribunals – a result which most national arbitration legislation would not readily permit.

A more difficult question arises when three (or more) parties agree to parallel and substantially identical arbitration agreements, in related (but different) underlying contracts. Although the issue is complex, I suggest that agreement to identical or substantially similar dispute resolution provisions (meaning the same institutional rules, arbitral seat, substantive law and number of arbitrators) may imply acceptance of a concurrent hearing if not consolidated arbitration with joinder rights as among parties to the relevant arbitration agreements.

There are respectable arguments to the contrary. The parties can be assumed to have impliedly expected that their arbitral proceedings with one another would be confidential and that they would be able to participate in selection of the arbitral tribunal in such proceedings (in accordance with customary international arbitration practice). Nevertheless, where all the parties are involved in the same commercial transaction, with interrelated contractual obligations and performance, it might be argued that their agreement to identical dispute resolution provisions could be interpreted as impliedly accepting joinder by other parties. It could be

argued that such a conclusion is supported by the parties' general obligation to resolve their disputes by arbitration in good faith, which in turn could be interpreted as including cooperation in an efficient dispute resolution process that avoids the risks of inconsistent decisions.

On the other hand, where the parties have entered into contracts containing differing dispute resolution provisions (including different arbitration provisions), then there will generally be little basis for concluding that they impliedly consented to joinder. By selecting different arbitration procedures (e.g., LCIA Rules in one arbitration and SIAC Rules in another), and/or different seats, the parties did not impliedly consent to joinder. Similarly, where the parties have entered into different contracts, some of which contain no dispute resolution provision, it is very difficult to imply any agreement to joinder in relation to disputes under the various contracts.

These difficulties are illustrated by *Lafarge Redland Aggregates Ltd v. Shephard Hill Civil Engineering Ltd*.[34] In that case disputes arose under contracts to which P was the principal contractor and S was the subcontractor. The subcontract provided that S could seek arbitration which should be conducted '*jointly with the dispute under the main contract*' if the disputes touched upon both contracts. The House of Lords held that, as S had requested arbitration, P was under an obligation to commence it within a reasonable time; and as P was in breach of that obligation, S was entitled to move to arbitration with P independently of the main contract arbitration with the employer: E.

The rationale was that S was powerless in relation to the arbitration of the disputes between P and E and that:

> *The purpose of clause in the subcontract is to enable the contractor [P] to avoid the risk of inconsistent findings as a result of the use of the independent dispute resolution machinery provided for in each contract. The draftsman must have had in the forefront of his mind the fact that the dispute resolution machinery provided for in each contract was binding only on the parties to that contract. These considerations suggest strongly that the clause should be read in such a way that it is capable of being operated without the employer's agreement.*
>
> *A further consideration supports this view. That is the position of the arbitrator. … He derives his authority to pronounce decisions which bind the parties to the arbitration purely and solely from the agreement by virtue of which he has been appointed. … He has no jurisdiction of any kind over any other party, as the entire procedure on which he is engaged depends upon contract. … Accordingly when [the subcontract] refers to the dispute under the subcontract being dealt with 'jointly with the dispute under the main contract … ' it must be taken to have in view the fact that [it] envisages, … , is an arbitration in which the arbitrator derives his authority to issue a binding award solely from the contract which the contractor and the employer have entered into. No provision is made in [the subcontract] for securing the appointment of an arbitrator in which all three parties have participated either by agreeing to his appointment as their arbitrator or by agreeing to the machinery by which he*

[34] (2000) 1 WLR 1621 *supra* n. 29.

> *has been appointed. Indeed, the person who is to act as arbitrator … may already have been agreed or appointed before the contractor gives notice.*[35]

Thus, the provision for the two arbitrations to be dealt with 'jointly' did not enable tripartite arbitration in the sense that all parties would have equal rights and powers. In order to make the procedure workable any arbitration would take place by way of concurrent hearings.

If an agency, alter ego, or similar relationship permits treating a non-signatory as party to the arbitration agreement in one contract, then there will be arguable grounds for permitting or ordering joinder. That is because all 'parties' (including non-signatories) have agreed to the same arbitration agreement. Absent such circumstances, however, the parties who are sought to be joined will not even be party to the arbitration agreement, much less able to require (or to be the subject of an order for) joinder or consolidation in relation to arbitral proceedings under such agreement.

7 IS JOINDER POSSIBLE WITH DIFFERENT SEATS?

It is very difficult to see how arbitrations in different arbitral seats could properly be consolidated, consistent with the parties' agreement. Unless the parties could be said to have agreed to consolidation, and for this agreement to override conflicting agreements as to the arbitral seat, there would be no legitimate basis for ordering consolidation. Consistent with this, under Article 1046 of the Netherlands Code of Civil Procedure, consolidation is only possible where there are two or more '*arbitral tribunal[s] in the Netherlands*' (emphasis added).

8 CONSOLIDATION OF ARBITRATIONS WITH DIFFERENT TRIBUNALS AND RELATED ISSUES

There will also be cases where two or more arbitrations are initiated with different arbitral tribunals. As discussed above, when this has occurred it can be difficult to provide for consolidation of the disputes.

In some cases, national legislation providing for consolidation expressly requires that the same tribunal be presiding over the two (or more) separate, pending arbitral proceedings – and whether or not it does, it is obviously essential. In these cases, one party will frequently have the ability effectively to block consolidation simply by appointing different arbitrators in each of the individual arbitrations (unless the parties have agreed to institutional rules permitting removal

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[35] *Lafarge Redland,* at 1632.

and replacement of the arbitral tribunals in the separate arbitrations, in order to permit a single tribunal to be selected for all of the pending arbitrations).

In contrast, other national arbitration statutes take the opposite approach, providing for the appointment of a single tribunal to hear a consolidated arbitration. In these cases, national courts are given the statutory authority effectively to remove the arbitral tribunals selected by the parties in their individual arbitrations and to replace these tribunals with a new, court-appointed tribunal to sit in the consolidated arbitration. This solution results in no party being able to appoint a party-nominated arbitrator (as it would be permitted to do in unconsolidated proceedings), but ensures that all parties are treated equally (in being denied any appointment rights) and that no party can unilaterally block consolidation (through exercise of its power to appoint an arbitrator).

9 WHO DECIDES

Joinder is a pre–arbitrator appointment issue under the ICC Rules, and the ICC Court determines all applications for joinder. Pursuant to the Swiss, SCC, LCIA, and UNCITRAL Rules, respectively, joinder is a post-constitution of the tribunal issue, since in each case the tribunal decides all applications for joinder.

Under the SIAC, HKIAC, and ACICA Rules, the SIAC Court, HKIAC, and ACICA, respectively, determine joinder pre-constitution of the tribunal, and requests for joinder are determined by the tribunal post-constitution of the tribunal.

10 THE EXERCISE OF THE POWER – DISCRETION

Assuming that a tribunal (or institutional or national court) possesses the power to order joinder, the question then arises as to what factors should be considered in the exercise of the power. As ever, much is left to the tribunal or court's discretion.

In the absence of guidance from applicable legislation (or the parties' agreement/institutional rules),[36] most Courts have considered the existence of:

- common questions of law and fact,
- the risks of conflicting awards, and
- the efficiencies of proof and the possible prejudice (of both joinder and non-joinder) to the parties.

[36] For example, under the 2021 ICC Rules Art. 7.2 an applicant '*may submit … such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute*'. This indicates that efficiency may be at the heart of the decision by the ICC Court. Most other rules do not specify any criteria beyond 'all relevant circumstances' or something similar.

Essentially, the decision whether or not to order joinder is an exercise of procedural judgment, which turns on the particular circumstances of individual cases.

11 WHEN A JOINDER APPLICATION CAN/CANNOT BE MADE

Assuming a party may (apply to) join additional parties to an arbitration, there are important issues regarding when any such application can or should be made. A party should not be permitted to exercise any joinder right that it may possess in a manner that unreasonably delays the resolution of the claims, or that imposes unnecessary or unreasonable expense on other parties. The stage of the pending arbitration(s) will be crucial. The more advanced the pending arbitration(s), the less likely that joinder will be approved, since substantial delay and/or disruption to arbitration proceedings that have already substantially progressed are unlikely to be viewed as more efficient or cost-effective.

12 CONFIDENTIALITY ISSUES

The obligations on the parties to uphold the privacy and confidentiality of an arbitration have been characterised as implied obligations arising out of the nature of arbitration itself: *Dolling-Baker v. Merrett*[37] and *Ali Shipping Corpn v. Shipyard Trogir*.[38] In the latter case Potter LJ stated:

> *The parties have indicated their presumed intention simply by entering into a contract to which the court attributes particular characteristics.*

In *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co,*[39] Mance LJ stated (paragraph 2):

> *Among features long assumed to be implicit in parties' choice to arbitrate in England are privacy and confidentiality.*

Mance LJ went on to state (paragraph 30) that the changes to the CPR in 1997 and 2002:

> *Rest clearly on the philosophy of party autonomy in modern arbitration law, combined with the assumption that parties value English arbitration for its privacy and confidentiality. Party autonomy requires the court so far as possible to respect the parties' choice of arbitration. Their choice of private arbitration constitutes an election for an alternative system of dispute resolution to that provided by the public courts. The same philosophy limits court intervention to the minimum necessary in the public interest, which must include the public interest in ensuring not that arbitrators necessarily decide cases*

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37 [1990] 1 WLR 1205 (CA), 1213 per Parker LJ.
38 [1999] 1 WLR 314, 326 per Potter LJ.
39 [2004] EWCA Civ 314.

in a way which a court would regard as correct, but that they at least decide them in a fundamentally fair way: see section 1 of the 1996 Act.

In *Emmott v Michael Wilson & Partners Ltd*[40] Lawrence Collins LJ (paragraph 84) described the fundamental characteristics of privacy and confidentiality in an agreement to arbitrate under English law as being '*really a rule of substantive law masquerading as an implied term*'. Tribunals must respect the private nature of the proceedings in which they are engaged: *The Eastern Saga*.[41] They are bound to uphold the privacy and confidentiality of the arbitration, whether as a result of contract or in performance of an equitable duty because they have acquired the information in circumstances importing an obligation of confidence. The common law does not limit the obligation of privacy and confidentiality to information, such as a trade secret, which is inherently confidential, but extends it to notes of evidence and other documents disclosed or generated in arbitration because of the implied agreement that such documents can only be used for the purpose of the arbitration. Further, privacy may be violated by the publication or dissemination of documents deployed in the arbitration or information relating to the conduct of the arbitration.[42]

Where the information which must be disclosed is subject to a duty of privacy and confidentiality, disclosure can be made only if the parties to whom the obligations are owed give their consent. Such consent may be express or may be inferred from the arbitration agreement itself in the context of the custom and practice in the relevant field.[43]

As above, English law has long recognized the confidentiality of arbitration. In general terms, parties to arbitration and the tribunal are under implied duties to maintain the confidentiality of the hearing, of the documents generated and disclosed during the arbitral proceedings, and of the award.

Confidentiality is not absolute and there are recognized exceptions – for example, that disclosure may be permitted where it is reasonably necessary for the establishment or protection of a party's legal rights. Disclosure may also be permitted where it is necessary in the interests of justice.

By agreeing to permit joinder, whether at law or by virtue of an arbitration agreement or an institutional rule, a new party becomes subject to the obligation of confidentiality. The parties are taken to have accepted that by arbitrating subject to provisions that permit joinder, they are thus taken to have accepted that a new party might join the arbitration and have sight of the existing submissions and all

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40 [2008] EWCA Civ 184.

41 [1984] 3 All ER 835.

42 *See* further *Emmott v. Michael Wilson & Partners Ltd* per Lawrence Collins LJ (paras 79–83), Thomas LJ (para. 129(i)–(iv)).

43 *See* generally the discussion on inferred consent to disclose in the context or arbitrator appointments in *Haliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48, at 88, 89, 99, 104, 116 and 154.

other documents on the record. Further, this is true if and to the extent necessary such limited breach of confidentiality would be within the principled exceptions to confidentiality set out above or, to the extent necessary, a principled and legitimate incremental extension to those exceptions exists.

13 THE APPOINTMENT OF THE TRIBUNAL

One of the principal concerns in multi-party proceedings is the appointment of the tribunal, and in particular equality of treatment for all parties in the selection and appointment of the arbitral tribunal. Parties who did not have an opportunity to participate in selection of the tribunal have a potential ground to challenge an award under Article 34(2)(iv) of the Model Law and Article 31(2)(e) of the New York Convention.

The 1992 French Cour de Cassation case of *Sociétés BKMI et Siemens v. Société Dutco* demonstrated the importance of procedural fairness. In *Dutco*, the Court set aside an arbitral award rendered in a three-party dispute where each of the two respondents asserted the right to appoint their own arbitrator, rather than make a joint appointment. The arbitration agreement provided for a three-member tribunal where each side appointed one arbitrator and the two appointed arbitrators would appoint the presiding arbitrator. The respondents eventually made a joint nomination, but this was only done under protest. The Court annulled the award on the basis that the appointment procedure violated the respondents' right to equal treatment because it granted the claimant greater influence in the constitution of the tribunal than each of the respondents. The Court held that the '*principle of equality of the parties in the designation of arbitrators is a matter of public policy*'. *Dutco's* practical implications are beyond doubt.

Following that decision, most institutions amended their rules and now generally provide either that claimant(s) and respondent(s) must jointly nominate their respective co-arbitrators, and that failing the joint appointment by either side, the institution will appoint the entire tribunal; that there is a revocation of prior appointments and the institution appoints the entire tribunal; or that joinder is not possible after a tribunal is appointed.

14 CONCLUSION

Consent essentially governs all. A tribunal cannot rule (or in Lincoln's phrase 'govern') over parties and their dispute absent consent. That consent may be express or inferred or implied. That applies to joinder (and its sub-species) as much as it applies to the bilateral agreement to arbitrate. A consent to joinder is

usually manifested by the incorporation of institutional rules that provide for joinder or consolidation and, more infrequently, by national laws.

A good degree of similarity with the same seat, governing laws and institutional rules is almost certainly required. In many cases the same agreement to arbitrate is required and similar issues need to be in play. Assuming consent is found, the relevant decision maker on the joinder issue, be it a national Court, institutional court or arbitral tribunal, is likely to be most influenced by the efficiency implications of joinder. Confidentiality reasons for resisting joinder are unlikely to be persuasive.