

Module 7: Joinder and Consolidation in Arbitration Issues and Risks

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Multi-Party Arbitration



- Increasing complexity of transactions with multiple parties and multiple agreements.
- The CIETAC 2020 Work Report, showed that 502 out of 3615 cases involved multiple contracts and 915 cases involved more than 2 parties.
 - Multiple contracting parties resulting in multiple claimants and or respondents
 - Multiple contracts involved contracts (same standard contract terms) with different parties, or several contracts with related parties upon different terms and or different dispute resolution clauses
- National courts generally allow joinder of parties or consolidate proceedings with leave of court: example
 - Joinder of causes of action (HKCP Order 15 r. 1); Joinder of parties (HKCP Order 15 r.4)
 - Consolidation (HKCP Order 4 r. 9)

Reasons



- It is sometimes considered desirable to deal with all the matters in the same proceedings:
 - (i) to avoid possibility of conflicting decisions on the same issues of law and fact;
 - (ii) to save costs
- Example of categories:
 - (i) Contract between main contractor and the employer and different contract between the main contract and the subcontractor: consolidation; or
 - (ii) the same ultimate ship owner entering into different new ship building contracts using different legal entities to contract with the same shipyard.
 - (iii) String or circle contracts

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- But there are difficulties with joinder and consolidation:
 - Forced joinder or consolidation could impinged upon:
 - Party autonomy;
 - Confidentiality (*Ali Shipping v. Shipyard Trogir* [1999] 1 WLR 314)

Whether the Procedural Law Governing International Arbitration supports joinder or consolidation



- On the matter of joinder and consolidation, the first place to visit is the Lex Arbitri: the Procedural Law of Arbitration
- Hong Kong Arbitration Ordinance Cap 609 in which UNCITRAL ML provisions were adopted:
 - No Joinder provision;
 - Consolidation provision as an “opt in” option (at Schedule 2 section 2(6)): discretion of court to order arbitral proceedings to be consolidated or heard at the same time or immediately one after the other. If the Schedule 2 provision is not opted in, no consolidation. c/f previous Arbitration Ordinance Cap 341 under which in respect of domestic arbitration there can be consolidation with leave of the court.

Procedural Law of other ML jurisdictions



- Singapore International Arbitration Act Cap 143A (“IAA”)
 - ML jurisdiction s.3 of Cap 143A
 - No joinder or consolidation provisions
- New Zealand Arbitration Act 1996
 - ML jurisdiction s.6(1)
 - No joinder or consolidation provisions

Institution Rules



- Trend of Institution rules providing for joinder and consolidation and the parties, having agreed to adopt the arbitration rules of a particular institution, are deemed to have agreed to all the provisions of the rules, including the rule allowing for joinder/consolidation by the institution or the tribunal.
- These rules are such as the Administered Arbitration rules of HKIAC and the new Art 7 (5) of the ICC Rules 2021 edition permits joinder of a co-respondent at the request of a party and with the tribunal's approval, once the tribunal is constituted. The question is in an ad hoc arbitration, in which the jurisdiction of this tribunal is not challenged, whether the arbitral tribunal is fettered in the exercise of its discretion to permit joinder of third person.

Institution Rules (Cont.)



- UNCITRAL Arbitration Rules 2010:
 - Joinder provided (Art. 17.5) but not consolidation
 - Art. 17.5: “ The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties”.

Institution Rules (Cont.)



- HKIAC Administered Arbitration Rules (2018)
 - Art. 27.1 Joinder of additional parties by HKIAC (before the Tribunal is constituted) or by the Tribunal after it is constituted if :
 - (i) the additional party is bound by an arbitration agreement under HKIAC Administered Arbitration Rules; or
 - (ii) all parties including the additional party expressly agree.
 - Art. 28.1 Consolidation of arbitrations by HKIAC after consulting the parties and the arbitrators where:
 - (i) the parties agree to consolidation; or
 - (ii) all the claims in the arbitrations are made under the same arbitration agreement; or
 - (iii) a common question of law or fact arises in all the arbitrations and the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions

Institution Rules (Cont.)



- ICC 2021 Arbitration Rules:
 - Art. 7: Joinder of Additional Parties
 - Art. 10: Consolidation
- SIAC Rules:
 - Rule 7.1: Joinder
 - Rule 8.1: Consolidation
 - Rule 12: Multi-Party appointment of arbitrators

Discussion: Joinder



- Party Autonomy: (i) agreement to arbitrate by “consent”; (ii) “all arbitrations must proceed in limine from an agreement to arbitrate”.
- 1958 New York Convention: ground for refusal of recognition and enforcement under Art. V(1)(a) of the 1958 Convention: requirement of “agreement in writing” - Article II
- Definition of “agreement in writing” include contracts made otherwise than in writing but recorded in any form whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. See Option 1 of Art 7 of UNCITRAL ML adopted as section 19 of the Arbitration Ordinance of Hong Kong Cap 609
- Constitution of the tribunal when a third party is joined

Discussion: Joinder Of Less Than Obvious Party Prof William Park



- At Chapter 25 of *The Leading Arbitrators' Guide to International Arbitration 2nd Edn.*, Mr. William Park, Professor of Law, Boston University (“Professor Park”) discussed joinder of less than obvious parties in arbitration upon either (i) implied consent, (ii) disregard of corporate personality/alter ego; (iii) apparent agency; (iv) assumption; or (v) estoppel.
- He expressed at page 555 that “*implied consent*” focuses on the parties’ true intention and “joinder extends the basic paradigm of mutual consent to situations in which the agreement shows itself in behavior rather than in words”. He wrote “in contrast to implied consent, “**disregard of corporate personality**” builds on factors *such as fraud or undercapitalization. Regardless of the parties’ intent, the legal entity that signed the arbitration clause disappears, and a shareholder answers for its corporate obligations. ...”*

Prof William Park (Cont.)



- At page 554-555, he explained that: *“In each case, an agreement to arbitrate must exist. However, the effect of that agreement **extends beyond the named signatories**, by virtue of behavior that either suggest acceptance of the agreement by someone else or justifies going beyond the corporate form of the signatory entity.”*

Prof William Park (Cont.)



- He illustrated at p. 555 -556: where a businessman actively negotiated a purchase agreement with an arbitration clause, but last minute arranged for it to be signed by a company controlled by the businessman, extending the arbitration clause to the businessman could find support in the notion that the businessman was intended by the parties to be a party to the agreement. Further, “if fraudulent transactions made the company an empty shell, an arbitrator may feel justified in looking beyond the corporation to its owner, irrespective of what the parties had originally intended”

Prof William Park (Cont.)



- Professor Park under the section entitled “The Devil in the Detail: Relevant Criteria” at p. 561 listed out five elements common to joinder analysis, two of which are:
 - (i) non-signatory participation in contract formation (**implied consent** situation) ;
 - (iv) fraud or fraud-like abuse of the corporate form (**the lift of the corporate shield** situation).

There he cited in footnote 24 ICC Case No. 8385 where the arbitrator found “illegitimate conduct” carried on towards the party seeking to lift the corporate veil and decided to pierce the corporate veil.

The Case Titan Unity



- The case of “*Titan Unity*” [2014] SGHCR 4 comprehensively addressed the issues of:
 - (i) the basis for a court (out of its own motion) to order a person to be joined to an arbitration;
 - (ii) whether the parties to the arbitration agreement have consented to extend the agreement to a person not a party to the agreement but who accepts to be bound by it.

The Case Titan Unity (Cont.)



- In “*Titan Unity*”, the Court at §§ 38-39 found that the parties have expressly agreed under Rule 32.2 of SCMA upon a mechanism to join a person who is not a party to the arbitration agreement, and the court deferred its view on implied consent to the joinder to the arbitral tribunal’s determination under Art. 16 of UNCITRAL Model law, “the *Kompetenz - Kompetenz* principle”.
- It was also noted that rule 24(b) of the SIAC rules 2007 confers power upon the tribunal the power to order parties, who are not parties to the arbitration agreement, to be joined to an existing arbitration.

The Case Titan Unity (Cont.)



- The issue is (i) whether the third party is found to be a party to the arbitration agreement under implied consent or upon piercing of corporate shield; or (ii) whether parties to the arbitration agreement have consented to extend the agreement to a person who was not a party to the agreement but who accepts to be bound by it.
- At §28 of “*Titan Unity*”, it is written that “*whether a person is a party to an agreement is a fact-intensive question which has to be determined in accordance with the law applicable ... i.e. the lex arbitri of the forum seized of the stay or joinder application*”.

The Case Titan Unity (Cont.)



- In PT First Media TBK v. Astro [2013] SGCA 57, the Singapore CA wrote:

“ ..., a tribunal cannot extend its jurisdiction to disputes over which it has no jurisdiction by simply purporting to rely on r.24 [of SIAC]. To this extent we accept Mr. Landau’s argument that r 24(b) acts as a procedural power , rather than a means for a tribunal to extend its jurisdiction. ... The terms of any arbitration reference must ultimately lie within the limits described by the arbitration agreement, save to the extent that it might be extended with the explicit consent of all parties. ...”.

The Case Titan Unity (Cont.)



- *In International Research Corp PLC v. Lufthansa Systems* [2014]1SLR 130, citing *Zurich Insurance* [2008] 3 SLR (R), referred to at §29 of “*Titan Unity*, it was written **“the court should have regard to the context and objective circumstances to ascertain the parties’ objective intentions in determining the question of whether a person is a party to an agreement to arbitrate”** and at §30, it was the view of the court that “*it would be useful to refer to international norms derived from cross-jurisdictional cases with similar factual matrix ... in determining whether a person is a party to an agreement to arbitrate for the purposes of ordering a joinder ...*”.

The Case Titan Unity (Cont.)

- Further on at §30, the following principle was asserted: “ ***... in the arbitration context, a party may be estopped from asserting that an arbitration clause contained in a particular document is inapplicable when the same party simultaneously claims the direct benefit of that contract. This estoppel doctrine exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision.***”
- Hence, if the third person was the “*alter-ego*” of a party to the negotiation and the Agreement and it would be appropriate to pierce the corporate veil

**Two Cases:
Risks Of Joinder Of Non-signatory And
Consolidation Without Consent Of All
The Parties**

Two Cases: enforcement problems



- Astro Nusantara Int'l BV and PT Ayunda Prima Mitra [2018] HKCFA 1
- Judgment of Court No. 4 of the Intermediate People's Court of Beijing (2016) 京04认港2号 in respect of the enforcement of the Awards of HKIAC/A13085 and HKIAC/A13027

Q&A



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