

## MEMORANDUM REGARDING PROPOSAL ON CROSS-INSTITUTION CONSOLIDATION PROTOCOL

### I. INTRODUCTION

1. This memorandum outlines a proposal by the Singapore International Arbitration Centre (“SIAC”) for cross-institution cooperation among leading international arbitral institutions. The proposed cooperation involves adoption of a protocol permitting the cross-institution consolidation of arbitrations subject to different institutional arbitration rules (e.g., SIAC and International Chamber of Commerce (“ICC”) arbitration rules). If the proposed protocol is adopted, it would result in significant gains in efficiency and fairness for parties that seek to resolve their disputes through arbitration.

2. Rules on consolidation, joinder and intervention in international arbitration play an important role in the arbitral process. By ensuring that interrelated disputes (as defined by the applicable rules) are resolved in a single proceeding, consolidation allows for more efficient and cost-effective dispute resolution,<sup>1</sup> while minimizing the risk of inconsistent decisions.<sup>2</sup> In the appropriate cases, consolidation may also provide tribunals with a more comprehensive understanding of the interrelated issues in a dispute and, as a result, may increase the reliability and accuracy of decision-making.<sup>3</sup>

3. These benefits have led a number of arbitral institutions to adopt provisions that allow the consolidation of related disputes and/or the joinder of additional parties. Among others, SIAC introduced provisions on consolidation in the SIAC Rules of Arbitration in 2016 (“2016 SIAC Rules”).<sup>4</sup> Other institutions have also adopted consolidation and/or joinder and intervention provisions including the ICC, the London Court of International Arbitration (“LCIA”), the Hong Kong International Arbitration Centre (“HKIAC”), the Mumbai Centre for International Arbitration, the Swiss Chambers of Commerce, the Stockholm Chamber of Commerce (“SCC”), the International Center for Dispute Resolution of the American Arbitration Association (“AAA-ICDR”), the China International Economic and Trade Arbitration Commission (“CIETAC”), the Vienna International Arbitral Centre and the Kuala Lumpur Regional Centre for Arbitration.

4. Importantly, the existing consolidation provisions of institutional arbitration rules do not provide a means to consolidate arbitrations that are subject to different institutional rules, even if they satisfy the other criteria for consolidation. Instead, existing institutional rules

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<sup>1</sup> G. Born, *International Commercial Arbitration* (Kluwer Law International, 2<sup>nd</sup> ed., 2014), at p. 2566 (“It seems reasonable to conclude that consolidation of closely-related disputes where essentially the same evidence will be presented, will result in significant savings of both time and money.”)

<sup>2</sup> B. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issues and Class Actions* (Kluwer Law International, 2006), at p. 179.

<sup>3</sup> P. Leboulanger, *Multi-Contract Arbitration*, *Journal of International Arbitration*, Vol. 13/No. 4 (1996), at pp. 54-55 (“Consolidation of parallel proceedings prevents extensive or complicated issues which are interrelated from being appraised separately. By having all the necessary issues before it, the court in a consolidated proceeding is likely to reach a more complete understanding of the facts in dispute so as to render a decision.”). See also J. Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2010), at p. 497 (“A tribunal may also get a better understanding [...] if all relevant parties are present, although that may be less relevant as they can give evidence as witnesses in any event.”)

<sup>4</sup> These consolidation provisions have proven to be popular among users. In second half of 2016, SIAC received 20 applications for consolidation in 52 cases. SIAC, *2016 Annual Report*, at p. 12.

provide for the consolidation of different arbitral proceedings only where there is “compatibility” between the parties’ arbitration agreements, including by incorporating the same institutional arbitration rules.<sup>5</sup> This is a requirement for consolidation under the SIAC Rules,<sup>6</sup> as well as the consolidation provisions of all other leading arbitral institutions.<sup>7</sup> Thus, one SIAC arbitration can be consolidated with another SIAC arbitration, but not with an ICC or HKIAC arbitration; likewise, one LCIA arbitration can be consolidated with another LCIA arbitration, but an LCIA arbitration cannot be consolidated with an ICC or SCC arbitration.

5. The lack of any existing mechanism for “cross-institution” consolidation of arbitrations subject to different institutional arbitration rules substantially limits the types of disputes that can be consolidated. In many cases, related contracts in a single project or set of transactions will contain agreements to arbitrate under different institutional arbitration rules (e.g., SIAC and ICC) – which, as already noted, cannot be consolidated together. In turn, this prevents related disputes, which otherwise meet the criteria for consolidation, from being heard together and thus limits the ability of arbitration as a dispute resolution mechanism from serving the needs of users. Although there is very limited statistical data on how frequently related disputes arise under different institutional rules, anecdotal evidence suggests that this is not an uncommon occurrence. This is unsurprising given the increasingly complex nature of contemporary business transactions.

6. This shortcoming in the existing treatment of consolidation by arbitral institutions can be remedied through institutional cooperation. In particular, as discussed below, the efficiency and efficacy of the international arbitral process would be materially improved by the adoption of a consolidation protocol by leading arbitral institutions, providing for the cross-institution consolidation of arbitrations, where such proceedings otherwise satisfy the criteria for consolidation.

7. This memorandum outlines a cross-institution approach to consolidation in international arbitration. It proposes a *consolidation protocol*, which leading arbitral

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<sup>5</sup> G. Born, *International Commercial Arbitration* (Kluwer Law International, 2<sup>nd</sup> ed., 2014), at p. 2584 (“[W]here 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 consolidation** or joinder/intervention. On the contrary, by selecting divergent arbitration procedures (e.g., ICC Rules in one arbitration and CIETAC Rules in another), arbitral seats and/or appointing authorities, the parties (wisely or unwisely) expressed their preference for **incompatible dispute resolution mechanisms**, which ordinarily do not admit the possibility of mandatory consolidation...”). See also B. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International, 2006), at para. 296 (“Clauses will be considered **incompatible** if the **difference relates to a fundamental element of the arbitration agreement: the institutional or ad hoc nature of the arbitration, the seat, the number of arbitrators, the appointment procedure**. If, on the other hand, the difference relates to a secondary element (law applicable to the merits, steps to be taken before the initiation of the procedure, etc.), the clauses will be considered compatible.”). In other words, incompatibility is typically found when “the seat, the constitution of the arbitral tribunal or the **applicable procedure differ**.” See J. Poudret & S. Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2007), at p. 199.

<sup>6</sup> Where more than one arbitration agreement is involved, the 2016 SIAC Rules provide that consolidation is only permissible where the arbitration agreements are “compatible.” See 2016 SIAC Rules, Rules 8.1(c) and 8.7(c).

<sup>7</sup> The 2017 ICC, 2014 LCIA, 2017 SCC and 2013 HKIAC Rules contain requirements that the arbitration agreements be “compatible.” See 2017 ICC Rules, Art. 10(c); 2014 LCIA Rules, Art. 22.1(x); 2017 SCC Rules, Arts. 14(3)(i) and 15(1)(iii); 2013 HKIAC Rules, Arts. 28.1(c) and 29.1(d).

institutions would adopt and incorporate into their institutional arbitration rules and utilize for administering consolidated arbitrations:

a. The consolidation protocol would set out a *new, standalone mechanism* for addressing the timing of consolidation applications, the appropriate decision-maker (i.e. the institution(s) or the tribunal) and the applicable criteria to determine when arbitral proceedings are sufficiently related to warrant cross-institution consolidation. A *joint committee* appointed from members of the Courts or Boards of the concerned arbitral institutions would be mandated to decide the applications, with a specific committee being appointed for each application.

b. Once consolidated, the proceedings should be administered only by one institution applying its own arbitration rules. The institutions can agree on objective criteria (such as the number of disputes subject to the different rules or the time of commencement of the first proceeding, discussed in Section III below) to determine which institution should administer the consolidated dispute.

8. The arbitral institutions' rules would be amended to incorporate the consolidation protocol, giving the protocol the same contractual force as other provisions of institutional rules. By expressly selecting the institutional rules, parties in turn consent to the application of the consolidation protocol, which would be applicable to any dispute arising out of or in relation to the arbitration agreement. As with other provisions of institutional rules, it would not be necessary for parties to expressly refer to the consolidation protocol in their arbitration agreement. The consolidation protocol would not change the current requirement that the arbitration agreements designate the same seat.

9. To ensure that parties are well informed and adapted to the rules, the institutions can consider releasing the consolidation protocol for public comment from their respective users. In addition, when the consolidation protocol first enters into effect, institutions can make the protocol applicable only to arbitration agreements concluded after the date of the protocol (or relevant institutional arbitration rules). Institutions could also consider whether to make the protocol an opt-in mechanism for a transition period.

## **II. CONSOLIDATION PROTOCOL: DECISION TO CONSOLIDATE**

10. Many institutional arbitration rules contain provisions for the consolidation of related arbitrations (which have been separately commenced, potentially before different tribunals). As noted above, SIAC introduced new consolidation provisions in the 2016 SIAC Rules. The ICC has also provided mechanisms on consolidation in numerous iterations of its rules, including the most recent edition of its rules introduced in 2017. Other arbitral institutions have similarly adopted consolidation provisions. The consolidation provisions in the leading institutional arbitration rules are set out in **Annex A** of this memorandum.

11. These consolidation provisions share common features – specifically, the prescription of standards for when separate arbitrations may be consolidated into a single arbitral proceeding, and the designation of a decision-maker to apply these standards. Nonetheless,

there are also important differences between the consolidation provisions of leading institutional rules.

12. For example, under the 2017 ICC Rules, the ICC Court of Arbitration has exclusive power to decide all consolidation applications and its decisions are “binding not only upon the parties, but also upon the Tribunal;”<sup>8</sup> in contrast, under the 2016 SIAC Rules, the SIAC Court decides consolidation applications prior to the constitution of the tribunal, while the tribunal exercises that power post-constitution.<sup>9</sup> Furthermore, once proceedings have been commenced, the 2017 ICC Rules only permit consolidation of proceedings under different arbitration agreements where the parties are identical;<sup>10</sup> in contrast, the 2016 SIAC Rules do not require an identity of the parties. A more detailed comparison of the key features of leading institutional rules is set out in **Annex B** of this memorandum.

13. Given these differences, there are two options for a cross-institution consolidation mechanism that leading arbitral institutions could adopt:

a. First, arbitral institutions could adopt a consolidation protocol that sets out a *new, standalone mechanism* for addressing the timing of consolidation applications, the appropriate decision-maker (i.e. the institution(s) or the tribunal) and the applicable criteria to determine when arbitral proceedings are sufficiently related to warrant cross-institution consolidation. A *joint committee* appointed from members of the Courts or Boards of the concerned arbitral institutions would be mandated to decide the applications, with a specific committee being appointed for each application.

b. Second, and alternatively, arbitral institutions could adopt a consolidation protocol providing that *one institution* would be authorized to determine any cross-institution consolidation application based on *its own consolidation rules*. As part of this option, arbitral institutions would agree in the consolidation protocol on *objective criteria* to determine which institution would be authorized to decide particular cross-institution consolidation applications (e.g., based on the number of cases under particular institutional rules or the time of commencement of the first proceeding). The criteria that can be used are set out in greater detail in Section III below which discusses the mechanism to identify the arbitral institution that administers the consolidated proceeding.

14. The first option outlined above may be more attractive to arbitral institutions and parties. While the second option has the benefit of simplicity, and would dispense with the need for institutions to agree on new consolidation provisions that depart from their existing rules, it would also confer substantial discretion on a single institution which may, at least if adopted generally, give rise to reservations.

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<sup>8</sup> T. Webster and M. Buhler, *Handbook of ICC Arbitration: Commentary, Precedents and Materials* (Sweet & Maxwell, 3<sup>rd</sup> ed., 2014), at para. 10-2.

<sup>9</sup> 2016 SIAC Rules, Rules 8(1) and 8(7).

<sup>10</sup> 2017 ICC Rules, Art. 10(c).

15. In contrast, under the first option, both institutions play a role in deciding whether the standards for consolidation have been met and whether the proceedings should be consolidated. New consolidation rules will also avoid the need for either institution to interpret the rules of the other. From a process perspective, it is unlikely to be arduous for the institutions to reach agreement on a consolidation protocol given the relatively limited number of issues that arise in relation to consolidation. In particular, and in addition to the points discussed above on whether the consolidation protocol should operate as an opt-in or opt-out mechanism and whether it should only be made applicable to arbitration agreements concluded after the date of the protocol, the protocol must address the following key issues:

- a. Identity of a decision-maker for decisions regarding consolidation;
- b. Standards for consolidation of arbitrations;
- c. Timing of the application and status of existing tribunal appointments;
- d. Partial consolidation; and
- e. Reasons for consolidation decisions.

16. Each of these issues are addressed below.

A. *Decision-Maker*

17. As explained above, decisions under the consolidation protocol should be decided by a joint committee appointed from members of the Courts or Boards of the concerned arbitral institutions, with a specific committee being appointed for each application. It will be most cost and time effective to have one member from each institution on the joint committee. The committee can in turn be supported by an administrative case team that is similarly composed of one member from each institution.

18. One issue to consider is whether any constituted tribunal should also play a role in the decision-making. For instance, the 2014 LCIA<sup>11</sup> and 2016 SIAC Rules<sup>12</sup> both permit the tribunal to decide consolidation applications if the same tribunal is appointed in all proceedings or no tribunal has been constituted in the other proceedings. In contrast, it is the institution that has exclusive decision-making power under the 2017 ICC,<sup>13</sup> 2013 HKIAC<sup>14</sup> and 2017 SCC Rules.<sup>15</sup> It may be preferable for the consolidation protocol to vest exclusive decision-making power in the joint committee. This has the benefit of simplicity and will avoid the practical complexities in a multi-party context of having a tribunal constituted by some parties decide the consolidation application for all parties, including those that did not participate in their appointment.

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<sup>11</sup> 2014 LCIA Rules, Art. 22.1(x).

<sup>12</sup> 2016 SIAC Rules, Rule 8.7.

<sup>13</sup> T. Webster and M. Buhler, *Handbook of ICC Arbitration: Commentary, Precedents and Materials* (Sweet & Maxwell, 3<sup>rd</sup> ed., 2014), at para. 10-2.

<sup>14</sup> Moser and Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press, 2017), at para. 10.97.

<sup>15</sup> 2017 SCC Rules, Art. 15.

*B. Standards for Consolidation*

19. Each of the leading arbitral rules contain different – albeit overlapping – grounds for consolidation, which are set out in **Annex B**. These standards play a pivotal role in any consolidation application as they determine when proceedings are in fact sufficiently closely related to warrant consolidation.

20. Unsurprisingly, all the rules permit consolidation where there is party agreement. Absent party consent, consolidation is only permitted where the proceedings are related, which, in broad terms, is either because they arise out of the same arbitration agreement or related transactions. The institutions will have to reach agreement on the specific grounds for consolidation in the consolidation protocol, including on whether there should be a requirement for an identity of the parties, which is, for instance, contained in the 2017 ICC<sup>16</sup> and 2014 LCIA Rules,<sup>17</sup> but not the 2013 HKIAC, 2016 SIAC or 2017 SCC Rules.

*C. Timing of the Application and Existing Tribunal Appointments*

21. At the outset, it is important to consider whether, in addition to providing for the consolidation of separately commenced proceedings, the consolidation protocol should also permit parties to commence a single proceeding in relation to multiple contracts that refer to different institutional arbitration rules. This mechanism is available, for instance, under the 2017 ICC,<sup>18</sup> 2016 SIAC<sup>19</sup> and 2013 HKIAC<sup>20</sup> rules and has the benefit of saving parties the filing fees and resources expended in commencing separate proceedings.

22. The commencement of a single proceeding in relation to multiple contracts is not, in strict terms, consolidation as it does not relate to the joinder of separate proceedings. However, it serves the same purpose as consolidation mechanisms do and could be an important benefit to parties. Should the consolidation protocol provide such a feature, it will also be necessary to address what the filing fees for the single proceeding should be and how that fees should be distributed to cover the costs of the joint committee's decision-making.

23. Another question that arises in relation to timing is whether applications should be permitted after the appointment of any arbitrators or the constitution of the tribunal. Under the 2017 ICC Rules, consolidation will typically not be granted, absent party consent, where different arbitrators have been appointed in the separate proceedings.<sup>21</sup> In contrast, the 2013

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<sup>16</sup> 2017 ICC Rules, Art. 10(c).

<sup>17</sup> 2014 LCIA Rules, Arts. 22.1(x) and 22.6.

<sup>18</sup> 2017 ICC Rules, Art. 6(4).

<sup>19</sup> 2016 SIAC Rules, Rule 6.

<sup>20</sup> 2013 HKIAC Rules, Art. 29.

<sup>21</sup> Fry et al, *ICC Secretariat's Guide* (ICC, 2012), at para. 3-358 (“In exercising its discretion, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different arbitrators have been confirmed or appointed. Once consolidated, the previously separate arbitrations will become a single arbitration to be decided by a single arbitral tribunal, so *if arbitrators have been confirmed in more than one of the arbitrations, and if those arbitrators are different individuals, the Court will be unable to consolidate the arbitrations as it will be impossible to constitute a single arbitral tribunal unless the different arbitrator(s) resign or are removed by the Court at the parties' request.*”)

HKIAC<sup>22</sup> and 2016 SIAC<sup>23</sup> Rules permit the institutions to revoke the appointment of any arbitrators that have been appointed prior to the decision to consolidate.

24. Save for the revocation of existing arbitrator appointments set out above, the consolidation rules of most leading arbitral institutions do not limit the ability of the parties to appoint the arbitrators for the consolidated proceeding. The exception is the 2013 HKIAC Rules, which provides that the parties are deemed to have waived their right to designate an arbitrator once the proceedings are consolidated.<sup>24</sup> This distinctive provision was designed to ensure equal treatment of the parties during the arbitrator appointment process, particularly where it may not be easy to divide the claimants and respondents into groups with similar interests for the purposes of nominating an arbitrator.<sup>25</sup>

#### *D. Partial Consolidation*

25. It is likely that in certain instances, only some, but not all proceedings subject to the application meet the standards for consolidation. In such circumstances, the consolidation protocol should address whether partial consolidation of these proceedings is permissible. While a partial consolidation of proceedings may be attractive, and practical, when the arbitration is administered by the same institution, it may be less compelling for users if its results in proceedings being split between different institutions. At present, only the 2016 SIAC Rules provide for partial consolidation.<sup>26</sup>

#### *E. Reasons for Decisions*

26. The consolidation protocol may also address whether the institutions will give the parties a reasoned decision on the consolidation application. Most institutions do not provide reasons for administrative decisions. The ICC recently adopted a policy of providing reasoned decisions of the ICC Court of Arbitration, including on consolidation applications, where the parties agree and subject to a fee.<sup>27</sup> This could be important to parties as it improves the transparency, and thus legitimacy of decision-making, particularly one that could result in their disputes being administered by a different institution than one expressly envisaged in their arbitration agreement. Any requirement to provide reasoned decisions will also have to be balanced against the inevitable delay and increased costs that will occur if the institutions are required to jointly provide reasons for the consolidation decision.

### **III. CONSOLIDATION PROTOCOL: ADMINISTERING CONSOLIDATED ARBITRATIONS**

27. Once two (or more) arbitrations have been consolidated pursuant to the consolidation protocol, the next procedural question is to decide how the proceeding will be administered and under what rules. As above, the institutions can either agree:

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<sup>22</sup> 2013 HKIAC Rules, Art. 28.6.

<sup>23</sup> 2016 SIAC Rules, Rule 8.6 and 8.10.

<sup>24</sup> 2013 HKIAC Rules, Art. 28.6.

<sup>25</sup> Moser and Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press, 2017), at para. 10.139.

<sup>26</sup> 2016 SIAC Rules, Arts. 8.4 and 8.9.

<sup>27</sup> ICC, *ICC Court to Communicate Reasons as a New Service to Users*, 8 October 2015, available at <https://iccwbo.org/media-wall/news-speeches/icc-court-to-communicate-reasons-as-a-new-service-to-users/>.

- a. To new rules that will be applicable to the consolidated proceeding and that can be jointly administered by the institutions; or
- b. That, based on objective criteria (explained below), only one institution will administer the proceeding under its own rules.

28. The first option has strategic benefits. First, by ensuring that both institutions are involved in administering the proceeding, each institution's caseload would increase. Second, the value of disputes administered by each institution would grow. Finally, it is also likely that the geographical spread of disputes would expand for each institution.

29. However, there are significant practical consequences which militate against devising a new set of rules. First, and most importantly, unlike the limited scope of agreeing on new consolidation rules, the scale of the task involved in preparing entirely new set of arbitral rules – from tribunal appointments and challenges, to early dismissal mechanisms, pleadings and fees – is likely to be significant, cumbersome, time-consuming and, ultimately, unattractive. Furthermore, while it is theoretically possible to create a joint committee of members from both institutions to administer each consolidated dispute, such extensive institutional cooperation will inevitably prolong proceedings and increase costs for parties. From a practical perspective, the institutions will also need to standardize case administration practices.

30. These complexities can be avoided if one institution is chosen on the basis of objective criteria, set out in the consolidation protocol, to administer the consolidated proceeding under its own rules. The following paragraphs set out various criteria that can be used to determine which institution should administer any consolidated dispute.

*A. Number of Cases*

31. The first criterion to decide the administering institution could be the number of cases to be consolidated under each institutions' rules. Where the number of proceedings to be consolidated is odd, the institution with the larger number of proceedings in the consolidation application can retain administering authority. Using the example above, as 3 of the 4 proceedings to be consolidated are under the LCIA Rules, the LCIA would retain administering authority over the consolidated proceeding. If the number of cases is even, the institutions can look to other criteria (e.g. the timing of the first commenced arbitration) to resolve the impasse.

32. This approach has the benefit of simplicity. It also ensures that, where the parties to the dispute have overwhelmingly indicated a preference for one institution to administer the dispute in their arbitration agreements, that institution retains administrative authority over the consolidated proceeding.

*B. Aggregate Value of Disputes*

33. Another approach is to use the aggregate value of the disputes to be consolidated as a yardstick to determine which institution should administer the consolidated proceeding. The



institution with a higher aggregate value of disputes will administer the consolidated proceeding.

34. For example, if there are 5 proceedings to be consolidated, 1 SIAC and 4 LCIA, and if the 1 SIAC dispute is valued at US\$50 million, but the 4 LCIA disputes are valued at US\$25 million, SIAC will administer the consolidated proceeding under its own rules given that the aggregate value of the SIAC dispute is higher. If the difference between the aggregate values of disputes is *de minimis* (e.g. US\$20,000 or some other figure agreed to by the institutions), the institutions can use other criteria (e.g. the number of disputes or the timing of the first commenced arbitration) to identify the administering institution.

35. Using the aggregate value of disputes may be appropriate as it increases the odds of preserving the parties' express choice of an arbitral institution in high-value (and potentially also complex) disputes. The institutions can accordingly set a threshold limit for this criterion to apply (e.g. where the aggregate value of the dispute under any institutions rules exceeds US\$100 million). The disadvantage of this approach is the risk that parties may artificially inflate the quantum of their claims to take advantage of one set of rules over the other. At the consolidation stage, it would be difficult and impractical for institutions to verify the quantification of claims and adequately safe-guard against such abuse.

#### *C. Time of Commencement of Arbitrations*

36. The institutions could also look at the time of commencement of the first arbitration to determine the administering authority. This criterion is consistent with, for instance, the existing ICC and SIAC consolidation provisions that provide that proceedings should be consolidated into the arbitration that commenced first.<sup>28</sup>

37. However, this yardstick may be unappealing where the other indicators set out above - the number of disputes and/or the aggregate value of the disputes - point to a different appointing authority. It is also worth noting that there is a risk that a "first in time, stronger in right" approach could lead to a race to the finish line if parties want to take advantage of one set of rules over the other. However, it is hard to see this form of abuse occurring with any frequency in practice.

#### *D. Subject Matter of the Dispute*

38. Another objective criterion is the subject-matter of the dispute (e.g. construction, trade, shipping, energy, etc.). The institutions can agree on a division of cases based on the type of dispute. In 2016, the vast majority of disputes before the ICC were construction and engineering projects, while only 20% were finance and 13% were energy disputes. SIAC's annual caseload for 2016 comprised 24% of commercial, 19% of trade, maritime and shipping, 16% of corporate and 16% of construction and engineering disputes.<sup>29</sup> Reflecting these statistics, the ICC could, for instance, focus on construction, engineering and energy disputes, while SIAC could specialize in commercial, corporate and shipping disputes.

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<sup>28</sup> 2017 ICC Rules, Art. 10(c); 2016 SIAC Rules, Rule 8.5.

<sup>29</sup> SIAC, *2016 Annual Report*, at p. 16.

39. However, this criterion is likely to be unattractive because it limits the ability of institutions to expand their disputes portfolio. Furthermore, it could be challenging to ascribe a specific subject matter to a consolidated proceeding, particularly where multiple proceedings have been consolidated or the consolidated proceeding involves multiple contracts across a complex project.

*E. Nationality and Domicile of Parties*

40. The institutions could also identify the administering institution based on the nationality or domicile of the parties. In 2016, the ICC's top 10 foreign users were parties from the USA, US Virgin Islands, Belize, France, Brazil, Germany, Mexico, Spain, Italy and South Korea.<sup>30</sup> SIAC's top 10 foreign users for 2016 were parties from India, China, USA, Indonesia, South Korea, Australia, Malaysia, Hong Kong, UK and the Netherlands.<sup>31</sup> The ICC could thus focus on disputes relating to European and American parties, while SIAC could focus on cases involving Asian and African parties.

41. However, for the reasons set out above in relation to the subject matter of the dispute, this criterion may be unattractive to institutions as they will not want to fetter their geographical reach. Indeed, part of the strategic benefit of a multi-institution consolidation mechanism is that institutions can access markets outside their existing portfolio. Furthermore, where parties come from multiple jurisdictions, it may be difficult to apply a nationality or domicile criteria.

**IV. CONCLUSION**

42. The consolidation of arbitral proceedings offers important benefits to parties that help reduce the complexity, cost and time of proceedings. In the appropriate cases, having interrelated disputes resolved together may also enhance the quality of decision-making. Currently, consolidation is only possible where two (or more) arbitrations are conducted under the institutional arbitration rules of a single arbitral institution, and not under the rules of different arbitral institutions. The cross-institution consolidation of arbitrations under different institutional rules, pursuant to the consolidation protocol and other mechanisms outlined above, is both achievable and capable of delivering substantial practical benefits to users.



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<sup>30</sup> ICC Statistics, ICC Bulletin Vol. 2017 / No. 2, at p. 106.

<sup>31</sup> SIAC, *2016 Annual Report*, at p. 14.

## ANNEX A – ARBITRATION RULES ON CONSOLIDATION

### I. 2015 CIETAC Rules

- **Article 19**

19.1 At the request of a party, 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 principle contract and its ancillary contract(s); or
- d) all the parties to the arbitrations have agreed to consolidation.

19.2 In deciding whether to consolidate the arbitrations in accordance with the preceding Paragraph 1, CIETAC shall take into account the opinions of all parties and other relevant factors such as the correlation between the arbitrations concerned, including the nomination and appointment of arbitrators in the separate arbitrations.

19.3 Unless otherwise agreed by all the parties, the arbitrations shall be consolidated into the arbitration that was first commenced.

19.4 After the consolidation of arbitrations, the conduct of the arbitral proceedings shall be decided by the Arbitration Court if the arbitral tribunal is not formed, or shall be decided by the arbitral tribunal if it has been formed.

### II. 2017 ICC Rules

- **Article 10**

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

- a) the parties have agreed to consolidation; or
- b) all of the claims in the arbitrations are made under the same arbitration agreement; or
- c) 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.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

### **III. 2014 AAA-ICDR Rules**

- **Article 8**

8.1 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:

- 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.

8.2 A consolidation arbitrator shall be appointed as follows:

- a) The Administrator shall notify the parties in writing of its intention to appoint a consolidation arbitrator and invite the parties to agree upon a procedure for the appointment of a consolidation arbitrator.
- b) If the parties have not within 15 days of such notice agreed upon a procedure for appointment of a consolidation arbitrator, the Administrator shall appoint the consolidation arbitrator.
- c) Absent the agreement of all parties, the consolidation arbitrator shall not be an arbitrator who is appointed to any pending arbitration subject to potential consolidation under this Article.
- d) The provisions of Articles 13-15 of these Rules shall apply to the appointment of the consolidation arbitrator.

8.3 In deciding whether to consolidate, the consolidation arbitrator shall consult the parties and may consult the arbitral tribunal(s) and may take into account all relevant circumstances, including:

- a) applicable law;
- b) 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;
- c) the progress already made in the arbitrations;
- d) whether the arbitrations raise common issues of law and/or facts; and
- e) whether the consolidation of the arbitrations would serve the interests of justice and efficiency.

8.4 The consolidation arbitrator may order that any or all arbitrations subject to potential consolidation be stayed pending a ruling on a request for consolidation.

8.5 When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties or the consolidation arbitrator finds otherwise.

8.6 Where the consolidation arbitrator decides to consolidate an arbitration with one or more other arbitrations, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. The consolidation arbitrator may revoke the appointment of any arbitrators and may select one of the previously -appointed tribunals to serve in the consolidated proceeding. The Administrator shall, as necessary, complete the appointment of the tribunal in the consolidated proceeding. Absent the agreement of all parties, the consolidation arbitrator shall not be appointed in the consolidated proceeding.

8.7 The decision as to consolidation, which need not include a statement of reasons, shall be rendered within 15 days of the date for final submissions on consolidation.

#### **IV. 2013 HKIAC Rules**

- **Article 28**

28.1 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.

28.2 The party making the request shall provide copies of the Request for Consolidation to all other parties and to any confirmed arbitrators.

28.3 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.

28.4 Where HKIAC decides to consolidate two or more arbitrations, the arbitrations shall be consolidated into the arbitration that commenced first, unless all parties agree or HKIAC decides otherwise taking into account the circumstances of the case. HKIAC shall provide copies of such decision to all parties and to any confirmed arbitrators in all arbitrations.

28.5 The consolidation of two or more arbitrations is without prejudice to the validity of any act done or order made by a court in support of the relevant arbitration before it was consolidated.

28.6 Where HKIAC decides to consolidate two or more arbitrations, the parties to all such arbitrations shall be deemed to have waived their right to designate an arbitrator, and HKIAC may revoke the appointment of any arbitrators already designated or confirmed. In these circumstances, HKIAC shall appoint the arbitral tribunal in respect of the consolidated proceedings.

28.7 The revocation of the appointment of an arbitrator under Article 28.6 is without prejudice to:

- a) the validity of any act done or order made by that arbitrator before his or her appointment was revoked;
- b) his or her entitlement to be paid his or her fees and expenses subject to Schedule 2 or 3 as applicable; and
- c) the date when any claim or defence was raised for the purpose of applying any limitation bar or any similar rule or provision.

28.8 The parties waive any objection, on the basis of HKIAC's decision to consolidate, to the validity and/or enforcement of any award made by the arbitral tribunal in the consolidated proceedings, in so far as such waiver can validly be made.

28.9 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) after a Request for Consolidation has been submitted.

## **V. 2014 LCIA Rules**

- **Article 22**

22.1 The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (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 Tribunal may decide:

...

(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 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 by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is(are) composed of the same arbitrators; and

...

22.6 Without prejudice to the generality of Articles 22.1(ix) and (x), the LCIA Court may determine, after giving the parties a reasonable opportunity to state their views, 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 subject to the LCIA Rules, provided that no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated.

## **VI. 2017 SCC Rules**

- **Article 15**

15.1 At the request of a party the Board may decide to consolidate a newly commenced arbitration with a pending arbitration, if:

i) the parties agree to consolidate;

ii) all the claims are made under the same arbitration agreement; or

iii) where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions and the Board considers the arbitration agreements to be compatible.

15.2 In deciding whether to consolidate, the Board shall consult with the parties and the Arbitral Tribunal and shall have regard to:

- i) the stage of the pending arbitration;
- ii) the efficiency and expeditiousness of the proceedings; and
- iii) any other relevant circumstances.

15.3 Where the Board decides to consolidate, the Board may release any arbitrator already appointed.

## **VII. 2016 SIAC Rules**

- **Rule 8**

8.1 Prior to the constitution of any Tribunal in the arbitrations sought to be consolidated, a party may file an application with the Registrar to consolidate two or more arbitrations pending under these Rules into a single arbitration, provided that any of the following criteria is satisfied in respect of the arbitrations to be consolidated

- a) all parties have agreed to the consolidation;
- b) all the claims in the arbitrations are made under the same arbitration agreement; or
- c) the arbitration agreements are compatible, and: (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions.

8.2 An application for consolidation under Rule 8.1 shall include

- a) the case reference numbers of the arbitrations sought to be consolidated;
- b) the names, addresses, telephone numbers, facsimile numbers and electronic mail addresses, if known, of all parties and their representatives, if any, and any arbitrators who have been nominated or appointed in the arbitrations sought to be consolidated;
- c) the information specified in Rule 3.1(c) and Rule 3.1(d);
- d) if the application is being made under Rule 8.1(a), identification of the relevant agreement and, where possible, a copy of such agreement; and
- e) a brief statement of the facts and legal basis supporting the application.

8.3 The party applying for consolidation under Rule 8.1 shall, at the same time as it files an application for consolidation with the Registrar, send a copy of the application to all



parties and shall notify the Registrar that it has done so, specifying the mode of service employed and the date of service.

8.4 The Court shall, after considering the views of all parties, and having regard to the circumstances of the case, decide whether to grant, in whole or in part, any application for consolidation under Rule 8.1. The Court's decision to grant an application for consolidation under this Rule 8.4 is without prejudice to the Tribunal's power to subsequently decide any question as to its jurisdiction arising from such decision. The Court's decision to reject an application for consolidation under this Rule 8.4, in whole or in part, is without prejudice to any party's right to apply to the Tribunal for consolidation pursuant to Rule 8.7. Any arbitrations that are not consolidated shall continue as separate arbitrations under these Rules.

8.5 Where the Court decides to consolidate two or more arbitrations under Rule 8.4, the arbitrations shall be consolidated into the arbitration that is deemed by the Registrar to have commenced first, unless otherwise agreed by all parties or the Court decides otherwise having regard to the circumstances of the case.

8.6 Where an application for consolidation is granted under Rule 8.4, the Court may revoke the appointment of any arbitrators appointed prior to the decision on consolidation. Unless otherwise agreed by all parties, Rule 9 to Rule 12 shall apply as appropriate, and the respective timelines thereunder shall run from the date of receipt of the Court's decision under Rule 8.4.

8.7 After the constitution of any Tribunal in the arbitrations sought to be consolidated, a party may apply to the Tribunal to consolidate two or more arbitrations pending under these Rules into a single arbitration, provided that any of the following criteria is satisfied in respect of the arbitrations to be consolidated:

- a) all parties have agreed to the consolidation;
- b) all the claims in the arbitrations are made under the same arbitration agreement, and the same Tribunal has been constituted in each of the arbitrations or no Tribunal has been constituted in the other arbitration(s); or
- c) the arbitration agreements are compatible, the same Tribunal has been constituted in each of the arbitrations or no Tribunal has been constituted in the other arbitration(s), and: (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions.

8.8 Subject to any specific directions of the Tribunal, the provisions of Rule 8.2 shall apply, *mutatis mutandis*, to an application for consolidation under Rule 8.7.

8.9 The Tribunal shall, after giving all parties the opportunity to be heard, and having regard to the circumstances of the case, decide whether to grant, in whole or in part, any application for consolidation under Rule 8.7. The Tribunal's decision to grant an application

for consolidation under this Rule 8.9 is without prejudice to its power to subsequently decide any question as to its jurisdiction arising from such decision. Any arbitrations that are not consolidated shall continue as separate arbitrations under these Rules.

8.10 Where an application for consolidation is granted under Rule 8.9, the Court may revoke the appointment of any arbitrators appointed prior to the decision on consolidation.

8.11 The Court's decision to revoke the appointment of any arbitrator under Rule 8.6 or Rule 8.10 is without prejudice to the validity of any act done or order or Award made by the arbitrator before his appointment was revoked.

8.12 Where an application for consolidation is granted under Rule 8.4 or Rule 8.9, any party who has not nominated an arbitrator or otherwise participated in the constitution of the Tribunal shall be deemed to have waived its right to nominate an arbitrator or otherwise participate in the constitution of the Tribunal, without prejudice to the right of such party to challenge an arbitrator pursuant to Rule 14.

## ANNEX B – COMPARATIVE TABLE OF CONSOLIDATION RULES

	Decision-Maker	Standards for Consolidation	Identity of the Parties	Partial Consolidation	Reasons for Decision
CIETAC	Institution <sup>32</sup>	<ol style="list-style-type: none"> <li>1. All claims are made under the same arbitration agreement; or</li> <li>2. If more than one arbitration agreement,               <ol style="list-style-type: none"> <li>i. same parties;</li> <li>ii. disputes arise in connection with the legal relationships of the same nature; and</li> <li>iii. identical or compatible arbitration agreements; or</li> </ol> </li> <li>3. If more than one arbitration agreement,               <ol style="list-style-type: none"> <li>i. identical or compatible arbitration agreements; and</li> <li>ii. multiple contracts involved are principle and ancillary contracts; or</li> </ol> </li> <li>4. Party agreement.<sup>33</sup></li> </ol>	Yes <sup>34</sup>	No	No

<sup>32</sup> 2015 CIETAC Rules, Art. 19.1.

<sup>33</sup> 2015 CIETAC Rules, Art. 19.1.

<sup>34</sup> 2015 CIETAC Rules, Art. 19.1(b).

<b>ICC</b>	Institution <sup>35</sup>	<ol style="list-style-type: none"> <li>1. Party agreement; or</li> <li>2. All claims under the same arbitration agreement; or</li> <li>3. If more than one arbitration agreement,               <ol style="list-style-type: none"> <li>i. same parties;</li> <li>ii. disputes arise in connection with the same legal relationship; and</li> <li>iii. compatible arbitration agreements.<sup>36</sup></li> </ol> </li> </ol>	Yes <sup>37</sup>	No	At the request of all parties <sup>38</sup>
<b>AAA-ICDR</b>	Consolidation arbitrator appointed by the parties or the Institution <sup>39</sup>	<ol style="list-style-type: none"> <li>1. Party agreement; or</li> <li>2. All claims under the same arbitration agreement; or</li> <li>3. If more than one arbitration agreement,               <ol style="list-style-type: none"> <li>i. same parties;</li> <li>ii. disputes arise in connection with the same legal relationship; and</li> <li>iii. compatible arbitration agreements.<sup>40</sup></li> </ol> </li> </ol>	Yes <sup>41</sup>	No	No <sup>42</sup>
<b>HKIAC</b>	Institution <sup>43</sup>	<ol style="list-style-type: none"> <li>1. Party agreement; or</li> <li>2. All claims under the same arbitration agreement; or</li> <li>3. If more than one arbitration agreement, then cumulative               <ol style="list-style-type: none"> <li>i. a common question of law or fact;</li> <li>ii. the rights to relief claimed are in respect of, or arise out of,</li> </ol> </li> </ol>	No	No	No

<sup>35</sup> T. Webster and M. Buhler, *Handbook of ICC Arbitration: Commentary, Precedents and Materials* (Sweet & Maxwell, 3<sup>rd</sup> ed., 2014), at para. 10-2.

<sup>36</sup> 2017 ICC Rules, Art 10.

<sup>37</sup> 2017 ICC Rules, Art. 10(c).

<sup>38</sup> ICC, *ICC Court to Communicate Reasons as a New Service to Users*, 8 October 2015, available at <https://iccwbo.org/media-wall/news-speeches/icc-court-to-communicate-reasons-as-a-new-service-to-users/>.

<sup>39</sup> 2014 ICDR Rules, Art. 8.2.

<sup>40</sup> 2014 ICDR Rules, Art. 8.1.

<sup>41</sup> 2014 ICDR Rules, Art. 8.1(c).

<sup>42</sup> 2014 ICDR Rules, Art. 8.7.

<sup>43</sup> 2013 HKIAC Rules, Art. 28. *See also* Moser and Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press, 2017), at para. 10.97.

		the same transaction or series of transactions; and iii. compatible arbitration agreements. <sup>44</sup>			
<b>LCIA</b>	Institution or Arbitral Tribunal <sup>45</sup>	By the Tribunal, if there is: 1. Party agreement; or 2. All claims under the same arbitration agreement; or compatible arbitration agreements and between the same parties, provided that no Tribunal has been constituted or the same Tribunal has been constituted. <sup>46</sup> By the Institution, if all claims are under the same arbitration agreement and between the same parties, provided that no Tribunal has been constituted in any of the arbitrations. <sup>47</sup>	Yes <sup>48</sup>	No	No
<b>SCC</b>	Institution <sup>49</sup>	1. Party agreement; 2. All claims under the same arbitration agreement; or 3. If more than one arbitration agreement, i. the relief sought arises out of the same transaction or series of transactions; and ii. compatible arbitration agreements. <sup>50</sup>	No	No	No

<sup>44</sup> 2013 HKIAC Rules, Art. 28.1.

<sup>45</sup> 2014 LCIA Rules, Art. 22.1(x). The Tribunal may only decide on a consolidation application where the same Tribunal is constituted in all proceedings or no Tribunal is constituted in the other proceedings.

<sup>46</sup> 2014 LCIA Rules, Arts. 22.1(ix) and (x).

<sup>47</sup> 2014 LCIA Rules, Art. 22.6.

<sup>48</sup> 2014 LCIA Rules, Art. 22.1(x).

<sup>49</sup> 2017 SCC Rules, Art. 15.

<sup>50</sup> 2017 SCC Rules, Art. 15(1).

SIAC	Institution or Arbitral Tribunal <sup>51</sup>	<p>1. Party agreement;                  2. All claims under the same arbitration agreement; or                  3. Compatible arbitration agreements, and:                      i. the disputes arise out of the same legal relationship(s);                      ii. the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or                      iii. the disputes arise out of the same transaction or series of transactions<sup>52</sup></p> <p>Where there is more than one Tribunal constituted, consolidation under (2) and (3) is only permitted if the Tribunals are identical.<sup>53</sup></p>	No	Yes <sup>54</sup>	No
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<sup>51</sup> 2016 SIAC Rules, Rule 8.7. Like the LCIA Rules, the Tribunal may only decide on a consolidation application where the same Tribunal is constituted in all proceedings or no Tribunal is constituted in the other proceedings.

<sup>52</sup> 2016 SIAC Rules, Rule 8.1.

<sup>53</sup> 2016 SIAC Rules, Rule 8.7.

<sup>54</sup> 2016 SIAC Rules, Rules 8.4 and 8.9.