

**JOINDER OF THE NON-CONSENTING THIRD PARTY IN INTERNATIONAL
COMMERCIAL ARBITRATION AND ITS LEGAL IMPLICATIONS: ANALYSIS
OF INSTITUTIONAL ARBITRATION RULES AND NATIONAL ARBITRATION
LAWS**

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ABSTRACT

The joinder of the non-consenting third party to the arbitration proceeding may have the legal implications since party autonomy is a fundamental principle of the international arbitration. These disadvantages include limitations of the third party's right to equal participation, the concern of the confidentiality of the arbitral proceedings, and possible adverse recourse against the final award initiated by the third party forced to joinder. However, the joinder of the third party is also crucial to ensure procedural efficiency and prevent parallel arbitral proceedings with conflicting awards. The thesis first focuses on the joinder as a procedural mechanism applied in international arbitration and identifies this procedural mechanism's objective and dilemma on its regulation. Then, the thesis analyses the provision of the national arbitration laws and institutional rules on joinder. The evaluation of institutional rules includes their comparative analysis based on two factors: consent for joinder and equal participation right of the party joinder to arbitral proceeding. Subsequently, the thesis explores the limitations related to the judicial review of the award and its annulment on the ground of violation of public policy concerns. The thesis finds that although the joinder of the third non-consenting party to an arbitral proceeding may have legal implications, it is necessary to allow such broad power of the arbitral institutions and arbitral tribunal to order joinder despite the objection of a third party. However, this broad power on deciding the third party's joinder should be balanced with the guarantee of the third party participating in the appointment and constitution of arbitral tribunal equally.

INTRODUCTION

Multi-party disputes are becoming a widespread practice in international commercial arbitration. The statistical data provided by the arbitration institutions reveals a substantial increase in multi-party arbitral proceedings in the last years. This is explained by the trend of international commerce and trade becoming more complex.¹ One of the forms of the third parties' involvement in the arbitral proceeding is the joinder of a third party. The general approach for the joinder of the third party to the arbitral proceeding is that it can be executed only with the unanimous consent of the parties to it. This approach relies on the consensual nature of international arbitration.² However, the third party may be forced to join an arbitration proceeding despite its objection.³ While the extension of the arbitration on non-signatories relies on the legal theories,⁴ the procedural matters on the joinder are regulated by the institutional rules. The national courts provide the judicial review on the joinder within the annulment recognition proceedings.⁵

On the one hand, the main idea behind the joinder of either consenting or non-consenting third parties to an arbitral proceeding is to increase the procedural efficiency and ensure the consistency of arbitration.⁶ On the other hand, the joinder of a third party despite its objection may lead to legal implications due to the absence of consent to arbitrate, due process

¹ Smitha Menon & Charles Tian, Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Resolving Complex Disputes Kluwer Arbitration Blog (2021), <http://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/> (last visited Jun 1, 2021).

² Gary Born, Parties to International Arbitration Agreements, in *International Commercial Arbitration* 1517 (Gary Born 3 ed. 2021).

³ Gary Born, Consolidation, Joinder and Intervention, in *International Commercial Arbitration* 2764 (Gary Born 3 ed. 2021).

⁴ Gary Born, *International Arbitration: Cases and Materials* 551 (2 ed. 2015).

⁵ Gary Born, Consolidation, Joinder and Intervention, in *International Commercial Arbitration* 2793 (Gary Born 3 ed. 2021).

⁶ *Ibid.* 2777-2778.

and public policy concerns.⁷ Moreover, the lack of a coherent approach in the application of joinder enhances complications related to the joinder of non-consenting third parties. Due process concerns related to the joinder of third parties envisage the issues on the equal participation right of the parties. Such limitations imposed by Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides ground for the refusal to recognize and enforce an arbitral under public policy concerns.⁸ The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards states that in the application of the Article V(2)(b) of the New York Convention the courts should take into account both the substantive outcome of the awards, as well as the procedure leading to the award.⁹

Thus, in the last years, the international institutions amended rules to increase the certainty of the provisions on the joinder of a third party to address complications related to this procedural mechanism and ensure procedural efficiency.

The thesis aims to analyse the legal basis for joinder of the non-consenting third party and how institutional rules address the consent and the equal participation of the third party in the arbitral proceeding, as well as the possible adverse effect of such decision on the joinder of the non-consenting third party on the enforcement and recognition of the award. The thesis is based on the hypothesis that the joinder of the non-consenting third party may be necessary to ensure procedural efficiency and prevent parallel proceedings with inconsistent and conflicting awards. However, the institutional rules should have explicit provisions ensuring the equal

⁷ S.I. Strong, *Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 Vanderbilt Journal of Transnational Law 922 (1998).

⁸ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, New York, Jun. 10, 1958.

⁹ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 247 (2016).

participation right of the non-consenting third party to prevent the risk of annulment of the award during judicial review by national courts.

The thesis should answer the following questions. The main question is whether the non-consenting third party can be joined to the arbitration proceeding, and the finality of the award rendered in such arbitral proceeding can be ensured. The thesis envisages to address several subsidiary questions. First, what is the rationale behind the joinder of the third party to the arbitration proceeding. Second, how institutional rules regulate the consent and equal participation rights in relation to the joinder of the third party. Third, what are the grounds for the annulment of the arbitration award rendered in the arbitral proceeding with the joinder of the non-consenting third party.

While analysing the institutional rules, the thesis will cover the recent amendments made to provisions on the joinder. Moreover, the judicial review of the awards involving a joinder of a third party will be analysed to understand the legal challenges rooted in the joinder of the non-consenting third party. This will provide a comprehensive understanding of how the procedural efficiency of the arbitral proceedings involving joinder of the non-consenting third party can be guaranteed.

The thesis comprises an introduction, three chapters, and a conclusion. The first chapter is devoted to the joinder of the non-consenting third parties in international commercial arbitration. The second chapter evaluates the institutional rules and arbitration law on the joinder of the third party, including the joinder despite the third party's objection. The third chapter addresses legal implications related to the joinder of the non-consenting third party. The thesis conclusion provides findings on the possible approach that may ensure the joinder of the third non-consenting party and prevent an adverse recourse against arbitral award at the stage of its enforcement and recognition.

CHAPTER 1. JOINDER OF THE THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION

1.1. Joinder in international commercial arbitration and third-party participation in the arbitration proceeding

The fundamental nature of international commercial arbitration relies on the consent of the parties to arbitrate.¹⁰ Article II of the New York Convention defines the arbitration agreement as an agreement between parties agreed to resolve possible future disputes between parties regarding defined legal relationships that could be contractual or non-contractual.¹¹ The same rule is reflected in Article 7 of UNCITRAL Model Law on International Commercial Arbitration.¹² The aforementioned articles depict the fundamental nature of international commercial arbitration, which relies on the consent of the parties¹³ and their agreement to submit future disputes to arbitration.¹⁴ This assumption derives from the doctrine of the privity of contract, which is recognized in civil and common law jurisdictions and limiting the binding nature of the contract only to the parties of the agreement. Thus, international commercial arbitration relies on the consent and binding effect of the arbitration agreement on the signatory parties.

Nevertheless, the contract with an arbitration clause may be executed not only by the signatories but also by the non-signatories. As such, non-signatories benefitting by the terms

¹⁰ Gary Born, Parties to International Arbitration Agreements, in International Commercial Arbitration 1518 (Gary Born 3 ed. 2021).

¹¹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, New York, Jun. 10, 1958.

¹² UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17, art. 7 (2006).

¹³ G Gary Born, Parties to International Arbitration Agreements, in International Commercial Arbitration 1518 (Gary Born 3 ed. 2021).

¹⁴ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 43 (2016).

of the contract with an arbitration clause may be bound to it.¹⁵ This is explained in the approach applied by courts to define the presence of the consent to arbitrate following the articles of the New York Convention and the UNCITRAL Model Law. The existence of the consent to arbitrate arising disputes is determined by the courts on a case basis. Overall, the various jurisdictions applied New York Convention to find the consent in cases where a party participated in negotiations of the contract, performance of the contract, both negotiation or performance of the contract, had a knowledge of the arbitration agreement, or participated in arbitral proceeding without objection.¹⁶

Two possible legal consequences of the consideration that third parties may be bound to an arbitration clause are the consolidation and joinder of the arbitral proceedings. Although the approach taken in the UNCITRAL Model Law and adopted by many countries is that the joinder of the third party can be ordered only with the unanimous consent of the parties to it, the joinder of the third party to an arbitral proceeding can be ordered despite its objection.¹⁷ Despite the existence of joinder as a procedural mechanism, the international arbitration conventions and national arbitration legislation do not explicitly address if the third parties are bound to an agreement. Thus, the execution of the joinder is left to the discretion of the arbitral tribunal and further review of the decision by the national courts.¹⁸

As such, there are two distinctive approaches for deciding the joinder of the third party:

- 1) establishing the consent of the third party by extending the arbitration agreement to non-

¹⁵ Gary Born, Parties to International Arbitration Agreements, in *International Commercial Arbitration* 1522 (Gary Born 3 ed. 2021).

¹⁶ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 43-47 (2016).

¹⁷ Gary Born, Consolidation, Joinder and Intervention, in *International Commercial Arbitration* 2770 (Gary Born 3 ed. 2021).

¹⁸ Gary Born, Parties to International Arbitration Agreements, in *International Commercial Arbitration* 1525 (Gary Born 3 ed. 2021).

signatories; 2) procedural mechanism on the joinder of the third party to the arbitral proceeding based on the consent of the parties, including the third party.

Concerning the joinder of the non-signatories to an arbitral proceeding, many arbitration rules address only the joinder of a third party as a formal party. However, national arbitration laws¹⁹ and some institutional arbitration rules cover other types of participation of a third party.²⁰

Joinder of a third party to an arbitral proceeding as a formal party provides it with the full procedural autonomy and rights to proceed with submissions and procedural requests. Being granted with all rights and duties as the original parties to an arbitral proceeding, the third party becomes bound with the final award rendered by the arbitral tribunal. Thus, the award will be binding for the joined third party. The thesis discusses the legal implication that can arise due to the joinder of a third party as a formal party to arbitration proceeding despite its objection.

One of the parties to an arbitration proceeding may request a joinder of the third party in order to defend the requesting original party's submission and interest. In such scenario, a third party is an accessory party; its participation has a merely supportive objective, and it does not have any claim to raise or to defend. Substantive laws in some civil law countries, including Swiss law, German law, and French law allows this form of third party's participation. In German law, the third party participating as an accessory party does not have the same procedural rights. French law adopts a different approach depending on the third party's consent to such participation in the proceeding. As such, a third party called against its will has the

¹⁹ Natalie Voser, *Multi-party Disputes and Joinder of Third Parties*, 50 Years of the New York Convention: ICCA International Arbitration Conference 381 (2019).

²⁰ Dorothee Schramm, *Commentary on the Swiss Rules, Article 4 [Consolidation and joinder]*, in *Arbitration in Switzerland: The Practitioner's Guide* 492-493 (Manuel Arroyo 2 ed. 2018).

independent procedural position; however, a third party joined to proceeding on its own will has only limited procedural rights.²¹

Other forms of the third party's participation can be exercised if the joinder as a formal or accessory party is not feasible due to its objection. Since the third party's objection to a joinder may have a significant adverse effect on the final award rendered by the tribunal, the arbitral tribunal may be willing to avoid issuing an order to join a third party. This form is a mere invitation of the third person to participate in the proceeding to support the submission of the original party. While inviting a third party to participate in the proceeding, the arbitral tribunal still should consider the claimant's considerations, such as confidentiality regarding such participation.²² Such participation may contribute to the procedural efficiency of the arbitral proceeding and prevent a possible recourse against the final award.

There are also other forms of third-party participation in an arbitral proceeding with a minimal role. However, such participation does not amount to the joinder of the third party. One of the examples of such limited participation of a third party is filing an *amicus curiae* brief. By filing *amicus curiae*, the third party can provide the tribunal with critical knowledge, facts or expertise concerning the dispute at issue, which could be crucial for the integrity of the rendered award. However, this form of participation can also raise concerns with regard to the confidentiality of arbitration proceeding.²³

²¹ Natalie Voser, *Multi-party Disputes and Joinder of Third Parties*, 50 Years of the New York Convention: ICCA International Arbitration Conference 381 (2019).

²² Dorothee Schramm, *Chapter 3, Part II: Commentary on the Swiss Rules, Article 4 [Consolidation and joinder]*, in *Arbitration in Switzerland: The Practitioner's Guide* (Second Edition) 492-493 (Manuel Arroyo 2 ed. 2018).

²³ Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 *Berkeley Journal of International Law* 206-207 (2011).

1.2. The objective of joinder in international commercial arbitration

Traditional international arbitration was a bilateral process with the claimant and the respondent arbitrating arisen dispute based on the signed arbitration agreement or clause.²⁴ However, the growth of commercial specialisation, increased interdependency in international commerce, and globalisation have led to complex and multi-party business transactions.²⁵ Due to an increasing number of arbitral proceedings involving multiple parties international arbitration gradually evolved from being a bilateral process. A relevant example from the caseload of the International Chamber of Commerce (ICC) perfectly depicts the changes that occurred during the last two decades: while only 10% of the ICC administered cases involved multiple parties in 1998,²⁶ this number of cases with multiple parties climbed to 31% in 2019.²⁷ Despite being limited, available statistical data estimates that in modern international arbitration around 40% of the cases involve more than two parties.²⁸ While multi-party arbitrations usually involve three or four parties, there is no specific limitation concerning the number of parties involved in multi-party arbitral proceedings, and there could be proceedings with a larger number of involved parties.²⁹

Having a steady growth rate in international arbitration, the multi-party arbitration includes following forms of procedural mechanisms: consolidation, joinder, and intervention.

²⁴ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 479 (2015).

²⁵ Cristián Conejero Roos, *Multi-party Arbitration and Rule-making: Same Issues, Contrasting Approaches*, 50 *Years of the New York Convention: ICCA International Arbitration Conference* 411 (2009).

²⁶ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 479 (2015).

²⁷ Smitha Menon & Charles Tian, *Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Resolving Complex Disputes* Kluwer Arbitration Blog (2021), <http://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/> (last visited Jun 1, 2021).

²⁸ Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules*, 35 *Journal of International Arbitration* 174 (2018)

²⁹ Gary Born, *Consolidation, Joinder and Intervention*, in *International Commercial Arbitration* 2760 (Gary Born 3 ed. 2021).

These procedural mechanisms, including joinder, are adopted by international arbitration from court litigation. The rationale of court litigation for applying those mechanisms is ensuring fairness and efficiency and avoiding the inconsistent results.³⁰ Moreover, the court decision on the execution of these mechanisms is not contingent upon the consent of all involved parties.³¹

Having adopted those mechanisms from court litigation, the arbitration follows a relatively similar objective of ensuring procedural efficiency. Nevertheless, the employment of those mechanisms is not the same as in court litigation and thus raises several issues attributable to arbitral proceedings.³² To understand the mechanism of joinder in general and to determine the necessity behind the application of this mechanism, its advantages should be weighed. However, this procedure also has disadvantages, which are especially relevant in the case of the joinder of non-consenting third parties.

Joinder of the third parties to an arbitral proceeding also contributes to procedural efficiency. By ordering a joinder, the initiation two or more parallel arbitral proceedings with interrelated issues at dispute could be avoided. This also leads to lower overall legal fees, less time spent by witnesses' and fewer preparation efforts.

In case of parallel two or more arbitral proceedings with same/related parties or issues at dispute, there is a very high risk of the rendered awards being inconsistent and even conflicting. An example of such inconsistencies could be an award requiring a party to exercise an activity that is forbidden based on the award rendered by another parallel arbitral proceeding.³³ The possibility of conflicting awards negatively affects the arbitral proceeding on different levels: it obstructs the procedural efficiency of the arbitration proceeding, and more importantly, it damages the legitimacy of international arbitration. For instance, the awards

³⁰ Ibid. 2761.

³¹ Gary B. Born, *International Arbitration: Cases and Materials* 933 (2 ed. 2015).

³² Gary Born, *Consolidation, Joinder and Intervention*, in *International Commercial Arbitration* 2761 (Gary Born 3 ed. 2021).

³³ Ibid. 2762-2763.

rendered in arbitral proceedings *Lauder v. the Czech Republic* and *CME Czech Republic B.V. v. the Czech Republic* conducted parallelly and involving different but still relevant claimants were fundamentally inconsistent. Completely opposing conclusions made based on the same fact pattern was evaluated as the ultimate “fiasco” in arbitration.³⁴ Joinder of the third party eliminate such scenarios and contributes to the effectiveness of the result rendered by the arbitral tribunal.

However, the antagonists draw attention to the disadvantages of the joinder, which, in their opinion, could have higher negative impact than the shortages of the parallel proceedings sought to be remedied by application of the joinder.³⁵ First, the joinder raises the issue of party autonomy due to the controversies regarding the consent to joinder.³⁶ Second, the joinder is substantially challenged on the grounds of the right to equal participation of all parties involved in the arbitral proceeding, especially concerning the composition of the arbitral tribunal. Despite being outweighed by other considerations in favour of the joinder, there is also concern regarding confidentiality in the case of the joinder of a third party. Even though the parties experience a limited loss of confidentiality, the joinder entails such a shortage. Moreover, the multi-party arbitral proceeding may incur higher costs on one of the parties and longer proceedings despite being regarded as more efficient than two-party arbitration.³⁷

³⁴ Brooks E. Allen & Tommaso Soave, *Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration*, 30 *Arbitration International* 16 (2014).

³⁵ Gary B. Born, *International Arbitration: Cases and Materials* 934 (2 ed. 2015).

³⁶ Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules*, 35 *Journal of International Arbitration* 174 (2018).

³⁷ Gary B. Born, *International Arbitration: Cases and Materials* 934-935 (2 ed. 2015).

1.3. The regulation dilemma in relation to the joinder of third parties to arbitration proceeding

Joinder is the procedural mechanism that can be initiated in two different scenarios. First, a non-signatory can request its joinder to a pending arbitration proceeding, which can be objected by one of the signatory parties.³⁸ In this case the joinder is based on the consent of the third party.

The second scenario is the submission of a request of joinder by one of the parties to the arbitration agreement.³⁹ First, the respondent can file a claim against the third party or request the joinder of the third party to the respondent claiming the existence of the relationship between the issue at dispute and the third party. Second, the claimant can file a claim against third party within the pending arbitral proceedings.⁴⁰ In such scenario, the third party can object to the request of a joinder.⁴¹

As mentioned in the previous chapter, one of the crucial points to be analysed concerning the joinder is the consent of the parties to joinder, including the third party. The party autonomy and agreement to arbitrate is one of the fundamental characteristics of the arbitration. Thus, the question of the necessity of the consent of a non-signatory to a joinder has been a cornerstone of the academic discussion.

Some of the arbitration rules allow the joinder of a non-signatory based on establishing a prima facie test. This test gives the arbitral tribunal discretion to review the application on the joinder. While applying this test, there is no requirement to establish strict privity of the third party to the arbitration agreement. The test relies on the conclusion of a decision-maker

³⁸ Richard J. Tyler, *Kicking and Screaming: Joinder of Non-Signatories in Arbitration Proceedings*, 75 *Dispute Resolution Journal* 111-112 (2020).

³⁹ *Ibid.* 111-112.

⁴⁰ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 480 (2015).

⁴¹ Richard J. Tyler, *Kicking and Screaming: Joinder of Non-Signatories in Arbitration Proceedings*, 75 *Dispute Resolution Journal* 111-112 (2020).

that “at first sight” an arbitration agreement may exist. It is quite challenging to answer conclusively whether the conditions are sufficient to satisfy *prima facie*. Thus, the standard is supported in practice with the legal theory allowing the extension of an existing arbitration agreement to a non-signatory.⁴²

Nevertheless, the discretion of the arbitral institution to decide on the joinder also depends on consent of the third party. A third party interested in the joinder application may not always end up joined to an arbitral proceeding. At the same time, a third party objecting to the joinder could still be joined to the arbitral proceeding if it is established that the party is bound to the arbitration agreement. In both cases, the decision should rely on an applicable basis and theory extending arbitration agreement on non-signatories.⁴³

This leads to a dichotomy where considerations on the necessity of the consent are weighted against the decision-making power of the arbitral tribunal. As such, it raises the question of when the third party’s consent can be limited based on the discretion of a forum. The supporters of the importance of consent rely on the three main arguments. First, the mechanism of joinder has to be aligned with the principle of party autonomy. Second, the arbitration is chosen by the parties as a dispute-resolution mechanism to ensure predictability and limiting parties’ consent on joinder damages the predictability of the arbitral procedure. Third, the lack of the consent can have an adverse effect on the outcome of the arbitral proceeding, especially at the stage of the final award’s enforcement.⁴⁴

The scholars supporting broader discretion of the arbitral tribunal on the issue of the joinder of a non-consenting third party rely on the following arguments. The first argument relies on the complexity of the issues at dispute in multi-party arbitrations. The scholars

⁴² Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 34-35 (2019).

⁴³ *Ibid.* 34-35.

⁴⁴ Cristián Conejero Roos, *Multi-party Arbitration and Rule-making: Same Issues, Contrasting Approaches*, 50 *Years of the New York Convention: ICCA International Arbitration Conference* 413-414 (2009).

supporting the necessity of consented joinder argue the further tailoring of the arbitration clauses to address the possible issue of a multi-party dispute.⁴⁵ However, not all the possible scenarios can be foreseen by the parties at the stage of the drafting agreement. Thus, limiting the decision on the joinder to the parties' consent will hinder the possibility to order a joinder when it is essential to resolve the dispute.

The second argument favouring the broader discretion of the arbitral tribunal to decide on the joinder argues that this discretion does not go against the party autonomy.⁴⁶ The parties exercise their party autonomy by choosing a specific arbitration rule. Thus, procedural issues, such as joinder, should be regulated based on the provisions of the chosen set of rules. The parties not favouring a joinder of a third party to the arbitration proceeding may choose the arbitration rules that are more tailored to their needs and expectations.

Third, from a procedural perspective, the supporters of wider do not consider the adverse effects of joinder on the enforcement of the final award. They argue that this could be a ground for challenging the award if the joinder is extensively broad or the joinder is ordered after the arbitral tribunal's constitution, thus infringing the third party's right to equal treatment.⁴⁷

⁴⁵ Ibid. 414

⁴⁶ Ibid. 415

⁴⁷ Ibid. 416

CHAPTER 2. EVALUATION OF THE INSTITUTIONAL RULES AND NATIONAL ARBITRATION LAWS ON THE JOINDER OF THIRD PARTY

2.1. Regulation of the joinder under national arbitration laws

The most common approach for the national laws on arbitration is the parties' unanimous agreement to the joinder of a third party. Consequently, if the parties do not agree to the joinder, according to the national law of many countries, the tribunal or national court does not have the power to order the joinder. This approach following the principle of party autonomy in arbitration also corresponds with the provisions of the New York Convention.⁴⁸ Although there is no specific provision in the New York Convention regulating the joinder of a third party to the arbitral proceeding, there is a strong linkage between the execution of the joinder mechanism and the scope of the arbitration agreement. The Convention obliges the national courts to recognise and enforce the terms and scope of an arbitration agreement and consent to the arbitration agreement following Article II(1) and II(3) of the New York Convention. Thus, if parties agreed to arbitrate particular disputes without any third party and vice versa, the aforementioned articles require safeguarding these rights.⁴⁹

Many states used the UNCITRAL Model Law to develop the national law on arbitration with a different degree of departure from the Model Law. The UNCITRAL Model Law does not address the issues of multi-party arbitration, including the joinder of a third party. However, the Model Law follows the provisions of the New York Convention on the terms and scope of arbitration agreement reflecting parties' intention.⁵⁰ Despite the departure from the Model Law in the adopted national arbitration laws, the provisions on the multi-party arbitration of many

⁴⁸ Gary Born, Consolidation, Joinder and Intervention, in *International Commercial Arbitration* 2770 (Gary Born 3 ed. 2021).

⁴⁹ *Ibid.* 2766.

⁵⁰ *Ibid.* 2770-2771.

countries explicitly address only the consolidation. As a result, many arbitration laws do not expressly address the issue of the joinder. Despite the absence of the provisions embracing the procedural matters on the joinder mechanism, consolidations rules are regarded as means of permitting joinder.⁵¹ As such, the national legislations predominantly rely on the unanimous consent of the parties to order joinder. In the absence of such consent, the common approach is to avoid ordering joinder of a third party.⁵²

Since many countries' statutory laws lack an explicit provision dealing with the joinder, most jurisdictions tend to allow the arbitral tribunal and institutions to decide on the matter. The tribunals' decision on joinder can be later subject to a judicial review in annulment and recognition proceedings.⁵³ Hence, the regulation of the joinder is left predominantly to arbitral institutions, and at the stage of enforcement of award to national courts.

2.2. Regulation of the joinder under institutional rules

If there is no regulation in institutional rules addressing the procedural issues regarding the joinder of a third party, the joinder is possible if all involved parties provide consent to the joinder. However, in such scenario, the arbitral tribunals avoid ordering joinder even if all the parties agree to it unless the arbitration agreement contained a provision on the appropriate mechanism for joinder of the possible third parties.⁵⁴

The presence of a provision on the joinder of third parties in the institutional rules ensures legal certainty and predictability on this matter. While choosing the specific institutional rules, the parties already can analyse how particular rules regulate the joinder and

⁵¹ Ibid. 2794.

⁵² Gary B. Born, *International Arbitration: Cases and Materials* 933-960 (2 ed. 2015).

⁵³ Ibid. 2788.

⁵⁴ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 484 (2015).

what should be met to allow such procedural order. Thus, this can give an advantage and better clarity to the parties at the moment of signing arbitration agreement.⁵⁵

Consequently, the increase in the number of the complex issues submitted to the arbitral tribunals and the need to ensure legal certainty required arbitral institutions to adjust their institutional rules to the new realities. Until these changes in rules of many major arbitration institutions, only Article 22.1(h) LCIA 1998 Rules and Article 4.2 Swiss Rules contained a specific provision on the joinder of third parties.⁵⁶ The situation has overwhelmingly changed with the inclusion of joinder provisions in revised editions of the rules of many arbitration institutions.⁵⁷ The adopted changes in the institutional rules address two issues related to the joinder of the third party: consent to joinder and equal participation rights.⁵⁸

2.2.1. Consent as a requirement for the joinder of the third party under institutional rules

One of the core issues related to the third party's joinder is the requirement of consent due to the consensual nature of arbitration. Therefore, the arbitration is based on the understanding that tribunal's jurisdiction derives from the parties' agreement. Therefore, according to this approach, the joinder is possible if all parties, including the third party, provide consent to it.⁵⁹

The institutional rules can be clustered in three groups based on the requirement for the provision of consent to the joinder: 1) agreement of all parties involved; 2) agreement of the requesting party and the third party to be joined despite the objection of the non-requesting

⁵⁵ Ibid. 484.

⁵⁶ Ibid. 480-481.

⁵⁷ Ibid. 483.

⁵⁸ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 29 (2019).

⁵⁹ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 484 (2015).

initial party; 3) allowing the joinder based on the circumstances of the case despite the objection of the third party and non-requesting initial party.⁶⁰

2.2.1.1. Institutional rules allowing joinder of third party based on the consent of all involved parties

An explicit example of the institutional rule falling under the first group mentioned above is the Netherlands Arbitration Institute (NAI) Rules. The NAI Rules 2015 differentiate three forms of third party's participation. Pursuant to Article 37, joinder and intervention can be ordered based on the request of the third party request.⁶¹ NAI Rules 2015 determines the form of the participation based on the request of one of the original parties as impleading. The requirement of the third party's consent for joining the proceeding as impleader is clearly set out in Article 37(4). It requires the party initiating a request to send the notice to the arbitral tribunal, the administrator, and the other original party only after receiving the third party's consent. Another proof of the requirement of a third party's consent is explicitly reflected in Article 37(1). The request to implead a third party can be proceeded under two circumstances: 1) impleaded party is one of the original parties to the arbitration agreement; 2) the arbitration agreement initiating the proceeding enters into force between requesting party and third party. Moreover, Article 37(2) requires the arbitral tribunal to allow original parties and third party to "make their opinions on the request".

Arbitration Rules adopted by the Korean Commercial Arbitration Board (KCAB) also require the consent of all parties for the joinder. Following Article 21(1), a joinder is only allowed based on the application of one of the original parties with a claim raised against a

⁶⁰ Ibid. 484.

⁶¹ Netherlands Arbitration Institution Rules, art. 37 (2015).

third party to be joined.⁶² The application on the joinder should meet one of the two requirements: the unanimous agreement of all parties, including party to be joined, submitted in writing under Article 21(1)(a); or the consent of the third party to the joinder if that party is also the party to the underlying arbitration agreement under Article 21(1)(b). Hence, the arbitral tribunal's discretion to allow the joinder is contingent upon a written consent of the third party no matter this additional party is a signatory or non-signatory to the arbitration agreement.

Although relatively in different interpretation, the requirement of consent of all parties, including the third party to be joined is observed under the Arbitration Rules of International Centre for Dispute Resolution (ICDR) amended in 2021. Following Article 8(1), the third party can be joined to an arbitral proceeding upon the submission of a Notice of Arbitration by one of the original parties. The date on which Administrator receives the Notice is considered as the date of commencement of arbitration against the additional party. The article does not explicitly address the issue of the consent of the third party. However, it is required from the requesting party to send the Notice of Arbitration to the Administrator, other original parties, and the third party. Article 8(2) clarified the requirements for the Notice of Arbitration by referral to Article 2(3), where one of the listed requirements is the submission of "a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agreement, a copy of the arbitration agreement under which each claim is made".⁶³ Some scholars interpret this as the presence of an implied rule that the third party should be a party to the underlying arbitration agreement.⁶⁴

However, a different interpretation of the ICDR Arbitration Rules is provided by other scholars. This approach focuses on the absence of the explicit requirement of consent for the joinder before the appointment of an arbitrator. As such, it is considered that the Administrator

⁶² Korean Commercial Arbitration Board International Arbitration Rules, art. 21 (2016).

⁶³ ICDR International Arbitration Rules, art. 2 (2021).

⁶⁴ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 42-43 (2019).

can take prima facie decision to Accept Notice of Arbitration, which will bound the third party to the arbitral proceeding. Only in case of deficiency of prima facie evidence, this decision will be left to the discretion of the arbitral tribunal.⁶⁵

Regardless of the interpretation of the issue of consent for the joinder of third party, Article 8(1) also refers to Articles 13 (appointment of arbitrators) and 21 (arbitral jurisdiction) to guarantee equal right participation of the joining party.

Amended ICDR Arbitration Rules has a more certain approach regarding the joinder of a third party after the appointment of arbitrator. Rules allow joinder on this stage under two circumstances: all parties, including third party agreed to joinder, or the constituted arbitral tribunal determines the joinder to be appropriate accompanied with the consent of the third party to joinder.

2.2.1.2. Institutional rules allowing joinder of third party based on the consent of the requesting party and third party

As mentioned above, another approach applied by international institutions is to allow joinder relying on the consent of the requesting party and the third party to be joined despite the objection of the non-requesting initial party. The Rules of the London Court of International Arbitration (LCIA) adopt such approach.

The possibility of joinder has already been provided under the LCIA 1998 Rules⁶⁶ and the later revisions maintain provision relatively unchanged (the tribunal's power to allow the

⁶⁵ Martin F. Gusy & James M. Hosking, *A Guide to the ICDR International Arbitration Rules* 85 (2 ed. 2019).

⁶⁶ Maxi Scherer, Lisa Richman & Remy Gerbay, *Arbitrating under the 2014 LCIA Rules: A User's Guide* 250 (2015).

Maxi Scherer, *Special Powers of the Tribunal*, in *Arbitrating under the 2020 LCIA Rules: A User's Guide* Par. 54 (Maxi Scherer, Lisa Richman & Remy Gerbay 2015).

application of the joinder based on its own initiative was removed).^{67,68} The LCIA 2020 Rules enable joinder only after constitution of arbitral tribunal and provision on joinder is provided under Article 22 on additional powers of tribunal.⁶⁹ Following Article 22.1(x), the arbitral tribunal holds discretion to decide on the joinder of one or more third persons based on the application of any original party of the proceeding. As such, LCIA Rules do not require the third party or parties to be a signatory to the underlying arbitration agreement and do not require establishing a prima facie test proving that arbitration agreement binds the third party or parties. As such, the Rules provide a broad scope for the joinder of the third parties.⁷⁰ The provision conditions such decision on the third party's consent and requesting party expressed in writing “following the Commencement Date or (if earlier) in the Arbitration Agreement”. The provision does not require the party initiating a request of joinder to raise a claim against the third party to be joined.⁷¹

As such, the LCIA Rules depart from the standard practice⁷² and do not require the non-requesting party's consent on the joinder. Moreover, the LCIA Rules uses terminology “one or more third persons” not “parties” under Article 22.1(x).^{73,74} Such provision allows the arbitral tribunal to join the third persons that may not be parties to arbitration agreement, and thus do not require the privity of the third party to underlying arbitration agreement.⁷⁵ This can lead to a scenario, where a non-requesting party has to arbitrate dispute with a third person in spite of

⁶⁷ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 486 (2015).

⁶⁸ The provision is under Article 22.1(x) under the LCIA 2020 Rules, while it was under Article 22.1(viii) in previous revisions. The provision remained similar to the provision in the LCIA 2014 Rules.

⁶⁹ Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* 329-330 (2 ed. 2020).

⁷⁰ Maxi Scherer, *Multiple Parties, Consolidation and Joinder*, in *Arbitrating under the 2020 LCIA Rules: A User's Guide* Par. 54 (Maxi Scherer, Lisa Richman & Remy Gerbay 2021).

⁷¹ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 44 (2019).

⁷² Peter J. Turner & Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* 149 (2009).

⁷³ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 487 (2015).

⁷⁴ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 45 (2019).

⁷⁵ Peter J. Turner & Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* 149 (2009).

objecting to joinder. It is considered that the non-requesting party generally consented to joinder provision by agreeing to arbitrate under the LCIA Rules.^{76,77}

In the context of the aforementioned, some scholars provide a more restrictive interpretation of the provision stating that Article 22.1(x) allows a claim between the third party and requesting party only. This provision, intrinsically, cannot encompass arbitration of a claim between non-requesting party and third party by relying on the agreement of non-requesting party to arbitrate under LCIA Rules. However, this approach is not supported in the drafting of the provision.^{78,79} Nevertheless, the practice reveals the arbitral tribunals being reluctant to order joinder notwithstanding the absence of arbitration agreement binding third party or objection of any party involved.⁸⁰

2.2.1.3. Institutional rules allowing joinder despite the objection of the third party and non-requesting initial party

The provisions of some institutional rules apply mixed approach for ordering joinder of a third party to the arbitral proceeding. First, the provisions on joinder of international institutions belonging to this group allow joinder based on the consent of all parties following traditional approach. In addition to that, in case of contest of the joinder, some institutional rules allow the joinder of the third party by establishing prima facie test binding third party to arbitration agreement. Some provisions falling under this category can be substantially restrictive, while other provisions could be flexible and permissive.⁸¹

⁷⁶ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 45 (2019).

⁷⁷ Peter J. Turner & Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* 149 (2009).

⁷⁸ *Ibid.* 149

⁷⁹ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 487 (2015).

⁸⁰ Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* 330 (2 ed. 2020).

⁸¹ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 490 (2015).

The Singapore International Arbitration Centre (SIAC) Rules 2016 significantly expanded the joinder provision in comparison with previous edition by providing wider flexibility.⁸² According to Rule 7.1 request on joinder can be filed by one of the original parties or third party before or after constitution of the arbitral tribunal.⁸³

The joinder mechanism under the SIAC Rules 2016 is set out in Rule 7 and was significantly expanded in comparison with previous revisions.⁸⁴ Either one of the original parties or a non-party can submit an application for a joinder. Rules 7.1 to 7.7 regulate application for a joinder submitted to SIAC Court before the constitution of the tribunal, while Rules 7.8 to 7.11 set out the procedure of requesting a joinder after constitution of tribunal. According to Rule 7.2(c), the additional party should be joined either as Respondent or Claimant. As such, the third party may not be joined for a mere access to arbitration filings reserving its right to raise a claim on later stage of proceedings.⁸⁵

With regards to the consent for the joinder the SIAC Rules 2016 require satisfaction of two alternative criteria set out under Rule 7.1 and Rules 7.8, regulating procedural matters for joinder before constitution of tribunal and after the constitution of tribunal respectively: 1) third party to be prima facie bound by the arbitration agreement; or 2) consent of all parties, including the party to be joined.⁸⁶ Moreover, following Rule 7.4, the rejection of the joinder application by SIAC Court does not deprive the original parties and third party from the right to submit application on joinder for the arbitral tribunal's review after its constitution.⁸⁷ Consequently, if an application was initially made to the SIAC Court and was rejected, the joinder application can be also submitted to the tribunal's consideration.

⁸² Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules*, 35 Journal of International Arbitration 182 (2018)

⁸³ Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* 329-330 (2 ed. 2020).

⁸⁴ John Choong, Mark Mangan & Nicholas Lingard, *A Guide to the SIAC Arbitration Rules* 114 (2 ed. 2018).

⁸⁵ *Ibid.* 115.

⁸⁶ Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules*, 35 Journal of International Arbitration 184 (2018)

⁸⁷ John Choong, Mark Mangan & Nicholas Lingard, *A Guide to the SIAC Arbitration Rules* 117, 120 (2 ed. 2018).

The prima facie test for the joinder of a third party may be applied if there is no unanimous consent of all parties to the joinder. For the prima facie test the institution does not need to determine the existence and scope of the arbitration agreement but only to establish the existence of a valid arbitration clause covering the issue at dispute and the third party.⁸⁸ According to the public consultations on earlier draft of the SIAC 2016 Rules two issues should be taken for allowing the joinder to arbitral proceeding: whether joinder will contribute to the expeditious, fair, and economical dispute resolution and claim in relation to the third party is related to the same transaction(s).⁸⁹

The requirement of the consent in SIAC Rules has been reviewed by Court of Appeal in PT First Media. It was stated that establishment of a consent based on the arbitration agreement or by agreement to arbitrate under a set of institutional rules allowing forced joinder is sufficient to prevent any following allegations on the absence of the agreement to arbitrate with the joined party.⁹⁰

However, the SIAC Rules 2016 also provide provision safeguarding award to be challenged on the ground of breaching equal participation rights, especially in cases with a joinder executed after the constitution of tribunal. Pursuant to Rule 7.10, all parties, including the third party, hold a right to be heard and express its position regarding equal participation. If the third party to be joined to arbitral proceeding does not waive its right to nomination arbitrator and objects to the joinder, the tribunal should not have a competence to order forced joinder, so that the final award is not endangered with a possible recourse.⁹¹

⁸⁸ Ibid. 116.

⁸⁹ Ibid. 118.

⁹⁰ Ibid. 116.

⁹¹ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 49-50 (2019).

In the Rules amended in 2021, the Australian Centre for International Commercial Arbitration (ACICA) has expanded the joinder provisions.⁹² According to Articles 17.1 and 17.8, one of the original parties or a third party may request the joinder. Article 17.1 enables arbitral tribunal to decide on the joinder application, while Article 17.8 regulates the procedural matters on the joinder if the request is made before the constitution of tribunal. Both arbitral tribunal and ACICA shall decide on the application of joinder after giving to all parties the opportunity to be heard by satisfying the prima facie test binding third party to the arbitration agreement. As such, the ACICA Rules 2021 also depart from the party autonomy in arbitration by enabling institution or tribunal to bind third party to the arbitration agreement. Moreover, with reference Article 32.1 on the power of arbitral tribunal to rule on objections on the absence of its jurisdiction, Article 17.9 sets out the competence of arbitral tribunal to review institution's decision on rejection of the joinder application and enables the third party to apply for a joinder after constitution of tribunal. This provision resonates with the rules 7.4 set out in the SIAC Rules 2016.

The Hong Kong International Arbitration Centre (HKIAC) Rules 2018 resonate in regulation of the joinder of a third party with the SIAC Rules 2016 and also represents a departure from the party autonomy. Pursuant Article 27.1, HKIAC in cases arbitral tribunal has not been constituted yet or arbitral tribunal hold the power to allow joinder based on two alternative grounds: 1) third party being prima facie bound to the arbitration agreement; 2) express consent of all parties, including the third party, to the joinder. However, the decision on joinder made before constitution of tribunal does not prejudice the power of arbitral tribunal to make the final decision on its jurisdiction in relation to joinder.⁹³ Article 27.6(h) require the introduction of a claim either by a third party seeking a joinder or by an original party against

⁹² Kevin O'Gorman, Tamlyn Mills & Daniel Allman, Revised ICDR and ACICA Rules (2021), <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/international-arbitration-report-issue-16.pdf?la=en-mh&revision=> (last visited Jun 15, 2021).

⁹³ Hong Kong International Arbitration Centre Administered Arbitration Rules, art. 27.2 (2018)

third party sought to be joinder. In order to increase the efficiency of the arbitral proceedings, the latest revision of the Rules amended the time limit for requesting a joinder. While in previous revision the time limit could have been fixed by HKIAC,⁹⁴ in the HKIAC Rules 2018 the request for joinder shall not be submitted, aside from exceptional circumstances, later than the time limit set in Statement of Defence.⁹⁵ Whether request on a joinder raised by one of the original parties or a third party, the answer to the request for joinder shall be communicated by respective party within 15 days after receiving it (Articles 27.5 and 27.7).

As such, in case of the contest on the issue of the joinder, the Rules give the power to institution and arbitral tribunal to decide on the joinder notwithstanding the objecting of one of the parties based on the satisfaction of prima facie test.

The China International Economic and Trade Arbitration Commission (CIETAC) Rules 2015 stand out from the other institutional rules with the exceptionally large power provided to the institution in deciding the joinder requests.⁹⁶ According to Article 18.1, only one of the original parties of arbitral proceeding may submit a request for a joinder of third party. The request shall be based on the arbitration agreement that prima facie bounds the third party. Even if the arbitral tribunal has already been constituted, the institution holds the power to decide whether third party is prima facie bound to arbitration agreement. Despite the obligation of the institution to ensure the right of all parties to be heard in relation to joinder, there is no explicit mention of the requirement of a consent of the parties. Another requirement for the request of the joinder is the existence of a claim raised against party sought to be joinder.⁹⁷

In comparison with the other institutional rules, the CIETAC Rules 2015 explicitly set out the power of the institution to decide on the joinder based on the agreement and relevant

⁹⁴ Hong Kong International Arbitration Centre Administered Arbitration Rules, art. 27.2 (2013)

⁹⁵ Hong Kong International Arbitration Centre Administered Arbitration Rules, art. 27.3 (2018)

⁹⁶ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 46 (2019).

⁹⁷ China International Economic and Trade Arbitration Commission Arbitration Rules, art. 18.2 (2015).

evidence despite the objection of any party “to the arbitration agreement and jurisdiction over the arbitration with respect to the joinder proceedings”.⁹⁸ The Rules simultaneously give the institution the power to reject joinder based on two alternative grounds: the third party is *prima facie* not bound to the arbitration agreement, or any other circumstances make joinder inappropriate.⁹⁹

The Stockholm Chamber of Commerce (SCC) introduced a provision on joinder in Arbitration Rules in 2017.¹⁰⁰ According to Article 13(1), an original party to the arbitration agreement may request the Board to order a joinder of one or more third parties. The SCC Rules 2017 set out a time limit for the submission of a request and the request shall not be considered if it is made after submission for an answer. However, the Board still holds discretion to decide to proceed a request made after set time limit. Article 13(5) enables the Board to decide to join a third party if it does not manifestly lack jurisdiction over all parties, including third parties. Article 13(6) on a joinder with claims made under more than one arbitration agreement obliges Board to consult with the parties for deciding on the joinder of a third party, and to regard such factors, as the arbitration agreements are compatible, the sought relief is related to same transactions, the procedural efficiency, and other relevant circumstances. The analysis of the provision reveals absence of a strict requirement in the rules for the consent of the parties. Hence, the SCC 2017 Rules provision on the joinder is an example of a departure from the principle of party autonomy. There is no clear requirement to consider the consent of the non-requesting original party or the third party to be joined.¹⁰¹

In light of recent increase of a number of the multi-party arbitration proceedings, the newly adopted the ICC Rules 2021 provide a wider flexibility with the possibility of joining a

⁹⁸ China International Economic and Trade Arbitration Commission Arbitration Rules, art. 18.3 (2015).

⁹⁹ China International Economic and Trade Arbitration Commission Arbitration Rules, art. 18.7 (2015).

¹⁰⁰ Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* 331(2 ed. 2020).

¹⁰¹ Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules*, 35 *Journal of International Arbitration* 181 (2018).

third party after the constitution of the arbitral tribunal.¹⁰² Following Article 7.1, the ICC Rules allow joinder of a third party based only on the request of one of the original parties to the arbitration proceeding. A joinder application submitted before the constitution of the tribunal shall be decided by the arbitral tribunal. However, the Secretary General may refer the matter to the Court.¹⁰³ For the joinder request submitted at this stage of the arbitration proceeding, the ICC Rule under Article 6.4(i) require the satisfaction of the prima facie test, which proves the third party to be bound by the underlying arbitration agreement. This provision existing in the previous version of ICC Rules adopted in 2017 allows the forced joinder of the third party to the arbitration proceeding.¹⁰⁴ Moreover, there are also no clear provision on the requirement of consultations with and/or receiving consent from the non-requesting original party in relation to the joinder.¹⁰⁵

Under ICC Rules 2017, the joinder of a third party after confirmation or appointment of any arbitrator was only possible upon the unanimous agreement of all parties, including the third party. However, the ICC Rules 2021 under Article 7.5 introduced an additional alternative criterion for the joinder of a third party after confirmation or appointment of any arbitrator – only based on the agreement of the third party to accept the authority of the constituted arbitral tribunal and concluded Terms of Reference. This requirement of the consent of third party is important to ensure that the final award is not under risk of annulment or challenging in relation to the constitution of arbitral tribunal.¹⁰⁶ The aforementioned article also indicated the circumstances should be taken into consideration by the arbitral tribunal while deciding on the

¹⁰² Smitha Menon & Charles Tian,, Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Resolving Complex Disputes Kluwer Arbitration Blog (2021), <http://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/> (last visited Jun 1, 2021).

¹⁰³ International Chamber of Commerce Arbitration Rules, Article 6.3 (2021).

¹⁰⁴ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 51-52 (2019).

¹⁰⁵ Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules*, 35 *Journal of International Arbitration* 178 (2018).

¹⁰⁶ Raluca Maria Petrescu & Alexandru Stan, *The 2021 ICC Arbitration Rules – New Commitments to Achieving Better Arbitration*, 15 *Romanian Arbitration Journal* 21 (2021).

joinder. These circumstances include the third-party being prima facie bound to the underlying arbitration agreement, the time when joinder request was made, possible conflict of interests, as well as the impact of the joinder on the arbitral procedure.¹⁰⁷

Such amendment of the provision provides wider power to the arbitral tribunal on the joinder of the third party. The rationale of this amendment is the rarity of the practice, where parties provided unanimous consent for the joinder after confirmation or appointment of any arbitrator.¹⁰⁸ However, this may raise question whether such broad power of arbitral tribunal is a great departure from the party autonomy. Some scholars view this approach not being in breach with party autonomy, since the original parties of the arbitration agreement provided consent to arbitrate under the Rules including the provision on the joinder, and this party's consent remains as prerequisite for the joinder at the aforementioned stage.¹⁰⁹

The Rules adopted by the Swiss Arbitration Centre is also one of the institutional rules giving a high degree of power to the institution and arbitral tribunal on the issue of the joinder.¹¹⁰ Swiss Rules revised in 2021 has introduced significant changes in the procedure of the joinder. First, as in previous revision of 2021, either one of the original parties may raise a claim against a third party (joinder) or the third party may request participation in the arbitral proceeding with a raised claim (intervention).¹¹¹ In contrast with previous revision, Swiss Rules 2021 expressly differentiates two possible stages of introducing a request of a joinder: prior to the constitution of arbitral tribunal and after constitution of arbitral tribunal. According to Article 6.2, a notice of claim shall be submitted to Secretariat if the request is made prior to constitution of tribunal. Following the notification sent by the Secretariat to all parties and any

¹⁰⁷ International Chamber of Commerce Arbitration Rules, art. 7 (2021).

¹⁰⁸ Michael Bühler et al., *The Launch of the 2021 ICC Rules of Arbitration* (2021), <https://www.orricks.com/en/Insights/2020/12/The-Launch-of-the-2021-ICC-Rules-of-Arbitration> (last visited May 24, 2021).

¹⁰⁹ Raluca Maria Petrescu & Alexandru Stan, *The 2021 ICC Arbitration Rules – New Commitments to Achieving Better Arbitration*, 15 Romanian Arbitration Journal 21 (2021).

¹¹⁰ Gary Born, *Consolidation, Joinder and Intervention*, in *International Commercial Arbitration* 2799 (Gary Born 3 ed. 2021).

¹¹¹ Swiss Rules of International Arbitration, art. 6.3 (2021).

confirmed arbitrators, the addressee of the claim, other parties should raise their objection in 15 days. In case the objection is raised by any party, including the party requested to be joined, the Secretariat following Article 5 applies prima facie test to determine if third party is bound by underlying arbitration agreement.¹¹²

If the joinder request submitted after the constitution of arbitral tribunal, the arbitral tribunal holds the discretion to decide on the issue of the joinder under Article 6.3. Such decision shall be made after consulting with all the parties, including third party, as well as taking into account all relevant circumstances. This provision requiring tribunal to consult with parties and consider circumstances resonates with the wording provision in the previous edition of the Rules.¹¹³ This provision on the power of arbitral on deciding the joinder in previous edition of the Rules were interpreted differently by scholars. Some scholars consider such provision without express mention of the consent of the parties as giving to the tribunal wide discretion on ordering joinder notwithstanding objection of original parties or third party to be joined. Other group of scholars argue that the third party's consent is necessary, and Rules does not allow for an implied consent of a third party if the claim against third party raised by one of the original parties. Third group of scholars interpret Swiss Rules in a restrictive manner arguing that the arbitral tribunal can order joinder only based on the consent of all parties. This interpretation relies on the argument that if the Rules intended to bypass consent it would have been expressly stated in the provision.¹¹⁴

Nevertheless, the restrictive interpretation does not correspond with the provision. The most resonating interpretation is the provision being a declaratory norm reflecting the

¹¹² Xavier Favre-Bulle et al., *International Arbitration in Switzerland: Revised Swiss Rules Of International Arbitration* (2021), <https://www.mondaq.com/trials-appeals-compensation/1076746/international-arbitration-in-switzerland-revised-swiss-rules-of-international-arbitration> (last visited Jun 9, 2021).

¹¹³ Swiss Rules of International Arbitration, art. 4.2 (2021).

¹¹⁴ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 497-498 (2015).

competence of the arbitral tribunal.¹¹⁵ The provision does not expressly allow the arbitral tribunal to disregard the objection of the parties in all cases. It allows the arbitral tribunal to order joinder notwithstanding objection in the view of third party being prima facie bound to arbitration agreement,¹¹⁶ considering all circumstances, as well as balance of interest being in favour of the requesting party not the refusing party.¹¹⁷

2.2.2. Equal participation of third party in the process of nominating arbitrators under institutional rules

A right to select arbitrators is one of the features of international arbitration that is rooted in the principle of party autonomy and distinguishes it from litigation.¹¹⁸ This possibility to resolve possible disputes with selected arbitrators instead of pre-established court, as supported by the empirical findings, is one of the features that make the arbitration a favourable dispute resolution method for the parties.¹¹⁹ Nevertheless, the right to nominate an arbitrator is not an absolute right. This right is correlative to the right of the other party to nominate an arbitrator. As such, it is described as the equal opportunity of the parties to participate in the formation of arbitral tribunal. Consequently, the possible breach of the equal opportunity of parties to nominate arbitrators may qualify to unequal treatment of the party, which may subsequently rise public policy concerns. The party whose rights to equal participation in appointment of the arbitrators is breached may challenge the final award on the ground of

¹¹⁵ Natalie Voser, *Multi-party Disputes and Joinder of Third Parties*, 50 Years of the New York Convention: ICCA International Arbitration Conference 396 (2019).

¹¹⁶ Manuel Gómez Carrión, *Joinder of third parties: new institutional developments*, 31 *Arbitration International* 497-498 (2015).

¹¹⁷ Natalie Voser, *Multi-party Disputes and Joinder of Third Parties*, 50 Years of the New York Convention: ICCA International Arbitration Conference 396 (2019).

¹¹⁸ Orkun Akseli, *Appointment of Arbitrators as Specified in the Agreement to Arbitrate*, 20 *Journal of International Arbitration* 247-248 (2003)

¹¹⁹ Gary B. Born, *International Arbitration: Cases and Materials* 1764-1766 (2 ed. 2015).

legality and validity of the formation of tribunal.¹²⁰ The joinder of a third party to an arbitral proceeding may be accompanied with the problems related to ensuring an equal participation of the parties in the designation of an arbitral tribunal.¹²¹ This may be particularly pertinent where the third party is not willing to participate in arbitral proceeding or there are conflicting interests leading to difficulties in appointment of an arbitrator.¹²²

This eventually may endanger the final award due to the possible challenges on the aforementioned grounds. Thus, ensuring the orderly and fair designation of the arbitral tribunal is essential for efficient case management and the finality of the award.¹²³

Scholars provide several possible solutions to ensure equal participation right for the parties in the arbitral proceedings involving a joined third party. First solution is related to the joinder occurring before any arbitrator has been appointed. In such scenario, each side makes joint nomination. Second, if the parties do not agree to make a joint nomination, the institution appoints arbitrators, and all parties become deprived of their right to nominate an arbitrator. Third, if the joinder occurs after the appointment of any arbitrator, the third party can be joined to the arbitral proceeding by agreeing to waive its right to nominate an arbitrator. Another possible scenario with joinder occurring after appointment of any arbitrators is the revocation of appointment and reconstitution of tribunal. The international rules contain provisions that represent the combination of these approaches to ensure orderly and fair appointment of arbitrators in case of joinder.¹²⁴

¹²⁰ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 37-38 (2019).

¹²¹ Ricardo Ugarte & Thomas Bevilacqua, *Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions*, 27 *Journal of International Arbitration* 9-10 (2010).

¹²² Orkun Akseli, *Appointment of Arbitrators as Specified in the Agreement to Arbitrate*, 20 *Journal of International Arbitration* 252 (2003)

¹²³ Ricardo Ugarte & Thomas Bevilacqua, *Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions*, 27 *Journal of International Arbitration* 9-10 (2010).

¹²⁴ *Ibid.* 39.

Some institutional rules enable only arbitral tribunal to decide on the request of joinder. This consequently means that the third party requested to be joined may become a party to the arbitration only after the constitution of tribunal. The NAI Rules 2015, the KCAB Rules 2016, the LCIA Rules 2020 fall into this group.

The NAI Rules 2015 provides discretion to arbitral tribunal only decide on the application of an original party to join third party as impleader. However, the Rules apply very strict approach to the joinder of the third party upon the request of an original party. According to Article 38.1 the joinder of third party as impleader is possible if the underlying arbitration agreement is applied to third party, or third party enters into same arbitration agreement with requesting party. However, some scholars state that being a party to an arbitration agreement cannot amount to a waiver to object against the constitution of arbitral tribunal.¹²⁵ Article 1028(1) of Dutch Code of Civil Procedure allows the impleaded party to object if the other parties have preferential position in the appointment of arbitrators. Accordingly, Article 1028(2) allows state court intervention in the tribunal's constitution.¹²⁶

A similar and explicit approach is applied in the KCAB Rules 2016. The joinder ordered by the tribunal cannot affect the constitution of the arbitral tribunal following Article 21(2). Since there is no provision on the joinder of third party before constitution of tribunal, the third party cannot participate in nomination of arbitrators under KCAB Rules 2016. However, as in the case of NAI Rules, KCAB Rules require an explicit and written consent of the third party to joinder, which serves as waiver of the right to equal treatment in the constitution of arbitral tribunal.

Since the LCIA Rules 2020 provides discretion to arbitral tribunal to decide on the joinder, the third party cannot participate in the tribunal's constitution. As such, the written

¹²⁵ Albert Marsman, *International Arbitration in the Netherlands, with a Commentary on the NAI and PCA Arbitration Rules* 646-647 (2021).

¹²⁶ *Ibid.* 337-338.

consent required to be provided by the third party for a joinder under Article 22(x) will be regarded to contain waiver of the right to participate in the appointment of the arbitrators on equal terms as original parties.

A complex approach is applied by the institutional rules that allow the joinder decision to be made on two different stages of the arbitral proceeding: by institution before the constitution of the tribunal and by arbitral tribunal after its constitution. The ICDR Rules 2021, the SIAC Rules 2016, the HKIAC Rules 2018, the ACICA Rules 2021, the CIETAC Rules 2015, the ICC Rules 2021, as well as the Swiss Arbitration Rules 2021 apply a different procedural method falling under this group.

According to Article 8(1) of the ICDR Rules 2021 the appointment of arbitrators in case of a joinder before constitution of the tribunal should follow multi-party appointment procedures mentioned under Article 13. According to Article 13(5), in an arbitral proceeding involving more than two parties the appointment should be agreed within a set time limit. If the parties fail to appoint arbitrators within mentioned timeframe, the institution holds power to suggest parties to choose arbitrators using list method. If parties fail to appoint arbitrators from the list within specified time, the institution is empowered to appoint the tribunal.

ICDR Rules 2021 allows joinder of a third party after the constitution of tribunals only if all original and joining parties agree to joinder or arbitral tribunal decided on the appropriated of the joinder based on the consent of the third party. The requirement of third party consent to joinder is much more scrutinized if joinder can be ordered only by arbitral tribunal or the joinder application is submitted after appointment of arbitrator. Rules allow joinder on this stage under two circumstances: all parties, including third party agreed to joinder, or the constituted arbitral tribunal determines the joinder to be appropriate accompanied by the third party's consent to joinder. Consequently, the joinder to a proceeding with already constituted

tribunal is contingent upon the agreement of the third party to waive its right to equal participation.

The SIAC Rules 2016 allowing the application of a prima facie test for a joinder of a third party apply a very complex approach in the appointment of arbitrators to guarantee the equal participation rights and avoid any challenges related to possible claims on its breach.¹²⁷ In cases, where application for a joinder is submitted before the constitution of the tribunal, the Court is allowed to revoke any appointment of arbitrator(s) that has already been made under Article 7.6. The Court has a power to appoint all members arbitral tribunal if the parties fail to make joint appointment under Article 12.2. When the third party is joinder after the constitution of the tribunal, the possible objection of the third party in relation to its equal participation right is very crucial for the proceeding. Thus, the SIAC 2016 Rules under Article 7.12 guarantees the waiver of the right of the third party in the constitution of the tribunal if the joinder is granted. The objective of such provision is informing the third party that consent to joinder will be regarded as its waiver of equal participation rights. Moreover, the institution and the arbitral tribunal is obligated to determine the position of the third regarding its equal participation right while hear the opinion of all parties on the joinder request.¹²⁸

The HKIAC Rules 2018 enable the institution to join the third party before the constitution of the tribunal and revocation of appointment of any already designated arbitrator(s). Following Article 27.12, once the joinder decision is made, all the parties “shall be deemed to have waived their right to designated arbitrator”. Consequently, the institution holds the discretion to appoint all the arbitrators, which is a mean to ensure the of equal treatment of all parties involved in the proceeding. Moreover, revocation of the appointment

¹²⁷ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 *Arbitration International* 51 (2019).

¹²⁸ *Ibid.* 51.

by the institution to is discretionary. Thus, if no objection is made by any party during consideration of joinder application, the institution may withhold from revocation.¹²⁹

However, if the joinder requires is submitted after the constitution of the tribunal, the Rules does not require the revocation of the appointed arbitrators. Thus, as indicated in Article 27.5(b) the third party to be joined to a pending arbitral proceeding have an opportunity to express its objection in relation to its equal participation rights in the Answer to the Request for Joinder. In case of existence of any plea submitted to a third party, the tribunal will avoid ordering joinder to ensure finality of the award and avoid possible adverse recourse against it. Moreover, the HKIAC Rules contain another safeguarding rule under Article 27.13 stating that the parties are deemed to waive any objection to the validity and/or enforcement of the award in relation of a decision to join a third party to the arbitration, unless a waiver can be validly made. This provision has a function of notify in advance the parties on their right to make the raise objection in relation to joinder request.¹³⁰

The ACICA Rules 2021 apply considerably similar approach to the HKIAC 2018 Rules in relation to joinder of the third party before the constitution of the tribunal. According to Article 17.12, the institution shall revoke the appointment of any designated arbitrator if a third party joined to pending arbitral proceeding. On the contrary to the similar provision under HKIAC Rules, the ACICA Rules provision is on revocation of the appointment is not discretionary. If the parties do not agree with already nominated arbitrator(s) within set timeframe, ACICA is obliged to initiate revocation of appointment. If such scenario happens, the institution has discretion to constitute tribunal.

If the joinder application is submitted after the constitution of the tribunal, similar to HKIAC Rules 2018, the ACICA Rules do not require the revocation of the tribunal. Following

¹²⁹ Ibid. 40-41.

¹³⁰ Ibid. 41.

Article 17.5(b) a third party may raise objection to the constitution of the tribunal in its Answer to the Request for Joinder. Moreover, Article 17.14 provides similar safeguarding mechanism to ensure the finality of the award. The parties are considered to renounce their right to raise “objection to the validity and/or enforcement of the award in relation of a decision to join a third party to the arbitration, unless a waiver can be validly made”.

The ICC Rules 2021 introduced amendment to the procedure of constitution of arbitral point if a third party is joined to arbitral proceeding. According to Article 12.7, if a third party joined before the constitution of the tribunal and the tribunal constitutes of three arbitrators, the third party can make a join appointment with one of the relevant original parties (either respondent or claimant). If the parties fail to make a join nomination, the Court has a power to appoint all tribunal members under Article 12.8.

The joinder of a third party after appointment of any arbitrator or constitution of tribunal is subject to the requirements of Article 7.5 of the latest edition of the Rules. In order to avoid any potential challenges of the final award, the Rules enable the joinder of the third party at this stage only based on the acceptance of third party of the authority of the arbitral tribunal and concluded Terms of Reference. Consequently, having agreed with the constituted tribunal the third party is deemed to waive its right to the equal participation.

Since the institution and the arbitral tribunal hold a discretion to join a non-consenting third party based on the prima facie test, the Rules allow the third party to express its objection regarding its right to equal participation in the appointment of arbitrators. As such, Article 5.1(e) requires the third party to include “any observations or proposals concerning the number of arbitrators and their choice... and any nomination of an arbitrator required thereby”. The latest edition of the Rules introduced a new provision under Article 12.9 aiming to safeguard the award from possible challenges on the ground of unequal treatment. This rule enables the Court to appoint all members of the tribunal in exceptional cases in order to avoid risks of

unequal treatment of the parties no matter what agreement is made by the parties in relation to the constitution of tribunal. However, this provision may also be regarded as the limitation of the party's autonomy, which is a cornerstone of arbitration.^{131,132}

The Swiss Arbitration Rules address the issue of the appointment of arbitrators under Article 11. However, the specific provision of this Article sets out procedural issues with regard to all forms of multi-party proceedings without any specific rule to be applied for the proceedings involving joinder of a third party. According to Article 11.3, in the proceedings with multiple parties the arbitral tribunal shall be constituted based on the parties' agreement. In case of failure to reach such agreement on the procedure of arbitral tribunal's constitution, the Court shall set time limit for the designation of the arbitrators. The Court may appoint some or all arbitrators if any party or all parties fail to submit its nomination.

An outstanding feature of the Swiss Arbitration Rules is the lack of the provisions addressing legal matters on the equal participation right of the third parties in case of the joinder after constitution of tribunal. Article 6.3 setting out the joinder mechanism after constitution of the tribunal is interpreted by many scholars as a significant departure from the concept of the party autonomy. Although there is no explicit requirement to have consent of the parties, the tribunal should consult with all parties on the request of joinder. A possible objection of the third party based on the concerns of its equal participation right in the constitution of the tribunal at that stage would be a significant factor for tribunal to reject joinder application.

The CIETAC Rules 2015, as mentioned in the previous chapter, provides outstandingly wide discretion to the institution to decide on the joinder of a third party both prior and after constitution of tribunal. Under Article 18.5 the institution is also granted with a wide discretion

¹³¹ Craig Tevendale, Thierry Tomasi & Vanessa Naish, *Inside arbitration: the new ICC Rules 2021: What you need to know* (2021), <https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-the-new-icc-rules-2021-what-you-need-to-know> (last visited May 14, 2021).

¹³² Jalal El Ahdab, et al., *New 2021 Rules at the ICC, after the LCIA, and before the SIAC* (2021), <https://www.twobirds.com/en/news/articles/2020/global/new-2021-rules-at-the-icc-after-the-lcia-and-before-the-siac> (last visited May 14, 2021).

in relation to the nomination of arbitrators in case of a joinder both prior and after constitution of tribunal. If the joinder takes place before the constitution of the tribunal, the formation of the arbitral tribunal should follow rules set out in Article 29. In a situation, where the joinder occurs after the constitution of the tribunal, the tribunal shall hear the position of the third party on the formation of the tribunal. In case the third party does not agree with the constituted tribunal and entrust the appointment of arbitrator institution, the other parties to proceeding shall entrust nomination of arbitrators to tribunal and tribunal should be constituted based on Article 29. According to Article 29.1, in the proceedings involving two or more claimants and/or respondents the parties should entrust appointment of arbitrators to the Chairman of CIETAC. In case of failure of the parties to act in accordance with Article 29.1 within a set timeframe, the Chairman of CIETAC shall constitute the arbitral tribunal.

The SCC Rules 2017 differs from the rules belonging to both groups since it does not address the joinder decision made by arbitral tribunal. As mentioned in previous chapter, under Article 13(5) the Board holds a power to decide on the joinder of a third party if it does not manifestly lack jurisdiction over all original and third parties. Article 13(8) sets out the procedural matters with regard to the appointment of arbitrators if a third party joined arbitral proceeding. Where the third party rises objection against any already designated arbitrator, the Board may revoke the appointment. However, such decision of Board on revocation is discretionary. If, however, revocation takes place, either all parties may agree on different procedure of appointment, or the Board constitutes the tribunal.

CHAPTER 3. LEGAL IMPLICATIONS RELATED TO THE JOINDER OF NON-CONSENTING THIRD PARTY

3.1. Public policy concern as a ground for the annulment of award due to the joinder of the non-consenting party

The joinder of a third party despite its objection may rise legal implication related to the absence of consent to arbitrate and public policy concerns. Annulment and recognition proceedings allow the national courts to provide judicial review on the joinder of the third party to an arbitral proceeding.

The courts determine the existence of the consent to arbitrate on a case basis following the articles of the New York Convention and UNCITRAL Model Law. As mentioned earlier, Article 2 of the New York Convention and Article 7 of UNCITRAL Model Law on International Commercial Arbitration interpret arbitration agreement as an agreement between parties to resolve disputes regarding defined contractual or non-contractual legal relationship.¹³³ The definition relies on the party autonomy and doctrine of privity of contracts, which relies on the consent of the parties.¹³⁴ Nevertheless, as discussed in previous chapters, the institutions and arbitral tribunals may order joinder of non-signatory third party despite its objection.

Such joinder of a third party may raise legal implication related to the public policy concerns. Among all public policy concerns, due process and equal participation is a primary

¹³³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

¹³⁴ Gary Born, Parties to International Arbitration Agreements, in International Commercial Arbitration 1518 (Gary Born 3 ed. 2021).

issue absolute the joinder of non-consenting this party.¹³⁵ Due process concerns related to joinder of third parties cover the issues of equal participation of the parties and the right of each party to fully present its case. Although equal participation is not an absolute right, infringement of the right of third party to equally participate in the constitution of arbitral tribunal can be a ground to challenge the arbitral award.¹³⁶ Following Article V(2)(b) of the New York Convention, procedural violation, such as the violation parties' equal participation right, can be a ground for the court to set an award aside.^{137,138} This public policy concerns as a ground for the refusal of the recognition and enforcement of award is set under Article 32(2)(b)(ii) of the UNCITRAL Model Law.¹³⁹

Following aforementioned articles, which are also reflected in the national arbitration law of most of countries, the national courts analyse whether arbitral tribunal ensured due process and equal treatment of the parties while ordering joinder of the third party. Some national courts have also provided comprehensive definition of the procedural violations that can be considered being contrary to public policy.

One of the landmark cases in relation of the judicial review of an arbitral award is the decision of French Court of Cassation in Dutco case. In French law, Article 1510 CCP requires arbitral tribunal to ensure equal treatment of the parties and upholding the due process. As such, Article 1520.4 CCP expressly indicated the violation of due process as ground for setting

¹³⁵ S. I. Strong, *Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 Vanderbilt Journal of Transnational Law 922 (1998)

¹³⁶ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 Arbitration International 37-38 (2019).

¹³⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, New York, Jun. 10, 1958.

¹³⁸ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 247 (2016).

¹³⁹ UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17, art. 32 (2006).

aside an award. The requirement to guarantee equal treatment is covered under Article 1520.5 CCP, which considers the violation of this rule as a breach of international public policy.¹⁴⁰

Article 1065(1) of the Dutch Code of Civil Procedure sets out the scope of the public policy concerns that may be grounds for setting aside a final award rendered by arbitral tribunal. A violation of public policy can be established if there has been violation of fundamental principles of the procedural law. Supreme Court determined that these principles cannot be limited by procedure and include the parties' right to be heard and equal treatment.¹⁴¹

Swiss Private International Law Act addresses public policy concerns very broadly under Article 190(2)(e). According to this provision, domestic public policy and mandatory rules are different from international public policy concerns in relation to most fundamental principles of legal order. As such, the domestic public policy concerns have broader concept. Swiss Federal Supreme Court finds the violation of public policy concerns if the decision violates the fundamental and recognised procedural principles of domestic legal order in an “intolerable manner”.¹⁴² The court also differentiates the procedural public policy and the substantive public policy.¹⁴³

In common law jurisdictions, courts apply a more cautious approach to consider public policy concerns as ground for setting aside an arbitral award. The provision under Section 103 of the English Arbitration Act favours the enforcement of the award and puts the burden of proof “firmly” on the party challenging the enforcement of award. The cases involving

¹⁴⁰ Caroline Kleiner, *Country Report: France, in Due Process as a Limit to Discretion in International Commercial Arbitration* 165-166 (Franco Ferrari, Friedrich Jakob Rosenfeld & Dietmar Czernich 2020).

¹⁴¹ Jacob van de Velden & Abdel Khalek Zirar, *Country Report: The Netherlands, in Due Process as a Limit to Discretion in International Commercial Arbitration* 284-285 (Franco Ferrari, Friedrich Jakob Rosenfeld & Dietmar Czernich 2020).

¹⁴² Simon Hohler, *Country Report: Switzerland, in Due Process as a Limit to Discretion in International Commercial Arbitration* 383 (Franco Ferrari, Friedrich Jakob Rosenfeld & Dietmar Czernich 2020).

¹⁴³ Ibid. 381.

procedural injustice, English court sets high threshold for establishment of the recognition of the procedural violation amounting to rejection of the enforcement of the final award.¹⁴⁴

A similar approach to the determination of the scope of public policy concerns is observed under the U.S. Federal Arbitration Act, which allows the award to be set aside by the court only on limited grounds. The U.S. courts apply a very restrictive approach to establish violation of public policy concerns and recognise existence of such violation only if there is an explicit violation of “the basic notions of morality and justice” or some explicit public policy that is well defined and dominant.” Hence, court does not qualify the misapplication of the legal principles as violation of public policy and court decisions rejecting enforcement of an arbitral award due to its contrariness to public policy are rare.

Although the countries apply different approach and threshold for the public policy concerns, the joinder of a third party despite its objections is a substantial ground for the court to annul the arbitral award. However, some countries stand out with application of a very strict approach in this matter, while other countries, predominantly common law jurisdictions, tend to set the higher threshold to confirm the violation of procedural law in arbitral proceeding amounting to violation of public policy.

3.2. Judicial review of arbitral awards due to the joinder of the non-consenting third party

The third-party consent as a ground for ordering a joinder was a subject of the case law. The case law includes decisions examining the requirement of the consent of the initial parties, as well as the joinder of the third party. Although the focus of the thesis is the consent of the non-signatory third party, the decisions on the requirement of the consent of the original parties

¹⁴⁴ Hattie R. Middleditch, *Country Report: United Kingdom, in Due Process as a Limit to Discretion in International Commercial Arbitration* 406 (Franco Ferrari, Friedrich Jakob Rosenfeld & Dietmar Czernich 2020).

can also provide a better understanding of the approach of national courts on the consensual nature of arbitration.

It is noteworthy to mention the PT First Media case where the Court of Appeals of Singapore interpreted the importance of the consent for the joinder of a third party. In the arbitral proceeding, claimant parties filed an application to join a third party, PT First Media. The latter was guarantor in the joint venture and a member of the conglomerate Lippo Group, that was original party to proceeding. SIAC ordered joinder despite the objection of Lippo Group. The court reviewed the award based on the allegation of the third party. In its decision, court analysed the importance of the consent, including consent of the original parties, to be considered while ordering joinder of a third party. This consent can be provided in any form, either under arbitration agreement or through agreement to arbitrate under specific institutional rules. However, this institutional rule should have explicit provisions that allow “unambiguously” forced joinder. In such case, the subsequent allegation of the party on the absence of the consent to arbitrate with the joinder party would not have a ground for annulment of the award.¹⁴⁵

In the case Bay Hotel & Resort Ltd and Zurich Indemnity Company of Canada v. Cavalier Construction Co. Ltd, the respondent filed an application for the joinder of Cavalier CTI as a party. The reasoning for the application on the joinder was that Cavalier CTI carried out the contract and was formed and entirely financed by the respondent. The institution ordered joinder despite the objection of the claimant. The court held that arbitral tribunal lacks jurisdiction to order a joinder in circumstances, where a non-consenting party rejects to arbitrate with the non-signatory.¹⁴⁶

¹⁴⁵ PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV et al., Court of Appeal, Civil Appeals Nos. 150 and 151 of 2012, 31 October 2013.

¹⁴⁶ Bay Hotel & Resort Ltd and Zurich Indemnity Company of Canada v. Cavalier Construction Co. Ltd and Cavalier Construction Co. Ltd, UK Privy Council, 16 July 2001.

The most recent case on the arbitral proceeding administered under LCIA 2020 Rules provides a further step in relation to the judicial review of the forced joinder. According to the court's decision, the simple fact that third party is a signatory to an arbitration agreement does not evidence the implied consent to a specific arbitration between other two parties arisen out of the underlying arbitration agreement. In the dispute between CJE and CJD, the latter filed an application to join the CJE's parent company, CJF to the arbitration proceeding according to Article 22.1(viii) LCIA Rules. As the provision requires the party's written consent to be joined, the arbitral tribunal rejected application. The High Court of Singapore upheld the decision of the arbitral tribunal in its review of the award. The court stated that forced joinder is not about the joinder of the third party despite its objection, but joinder of the third party based on its consent despite the objection of one of the original parties to arbitration proceeding. Moreover, court restated the doctrine of "double separability" with reference to the PT First Media Case. Court mentioned that being signatory to arbitration agreement does not preclude the consent of the party to also arbitrate in the arbitration proceeding initiated based on the separate agreement between the original parties for the particular arbitration reference.¹⁴⁷ This case allows to conclude that courts are very cautious on the joinder of the third party to an arbitration proceeding despite its express objection to such request.

Moreover, another issue to be considered in case of the joinder of non-consenting third party is the procedures available to ensure its equal participation rights. One of the fundamental cases on the right of the joined third party to equal participation is Dutco case. The decision of French Court of Cassation in Dutco had a far-fetched impact on the practice of the arbitration institutions in the designation of arbitrators in multi-party arbitrations, including joinder.¹⁴⁸ The arbitration involved one claimant and two respondents, where the latter had to make a joint

¹⁴⁷ Jay Randhawa & Asya Jamaludin, Joinder of third-parties to arbitration proceedings: High Court of Singapore rules on the requirements for consent (2021), https://www.cms-lawnow.com/ealerts/2021/04/joinder-of-third-parties-to-arbitration-proceedings-high-court-of-singapore-rules?cc_lang=en (last visited Apr 16, 2021).

¹⁴⁸ Orkun Akseli, *Appointment of Arbitrators as Specified in the Agreement to Arbitrate*, 20 Journal of International Arbitration 253 (2003)

appointment under protest. The interim award was set aside by Court holding that the tribunal was irregularly constituted despite the objection of the parties. Court quashed the argument that parties' agreement to arbitrate under the specific rules should be considered as a waiver of their right to nominate the arbitrators. On the contrary, the Court states that the right to nominate an arbitrator is a matter of public policy and can be waived only after the dispute has arisen.¹⁴⁹ As such, this decision led to two conclusions with regards to the equal participation of the parties in the multi-party arbitrations. First, the decision confirmed the appointment of arbitrators as a right to equal participation is a public policy concern. Second, this right cannot be waived before the dispute has arisen.¹⁵⁰

Joinder of the non-consenting third party shows that there is still a heavy reliance on the fundamental principle of the arbitration, which is its consensual nature. Thus, the arbitral tribunals and national courts avoid joinder of the third non-consenting party if there is no fundamental ground and facts proving the close ties between the third party and the dispute.

¹⁴⁹ Christopher R Seppala, *Multi-Party Arbitrations at Risk in France*, 12 International Financial Law Review 34 (1993).

¹⁵⁰ Dongdoo Choi, *Joinder in international commercial arbitration*, 35 Arbitration International 38 (2019). P. 38

CONCLUSION

The main aim of the thesis was to explore the legal issues around the joinder of the non-consenting third party to an arbitral proceeding. Moreover, the thesis had an objective to compare the provisions of existing institutional rules, as well as the case law to explore how the joinder of the non-consenting third party is regulated. This analysis was based on the two main principles related to international arbitration, consent and equal participation of the parties. The thesis looked at the approaches of institutional arbitration to balance these two principles concerning the joinder of the non-consenting third party. Based on the case law, it also checked how the national court weight the joinder of the non-consenting third party against these two fundamental principles and provides legal reasoning on violation of these principles.

Overall, the analysis shows that the third party's consent is crucial for safeguarding the finality of the award. However, international arbitration is becoming more complex and predominantly involves multiple parties. The arbitration agreement cannot foresee all the possible future disputes to be the only basis for the provision of the specific consent of the original parties to include particular third parties to the arbitral proceeding in case a dispute arises. Thus, the complexity of international trade and transactions requires arbitration institutions to include broad provisions on the joinder. However, these broad provisions, especially provisions relying on the *prima facie* tests, need to be balanced with the guarantees of the third party's right to equal participation in the appointment. Unless the third party openly waives its right to participation in the appointment of the arbitrators, the joinder of the non-consenting third party may not ensure the finality of the rendered award. In this context, special attention may be given to the attempts of the institutional rules to avoid the risk of the annulment of the rendered award by including safeguarding provisions. Such provisions require the party to express its waiver to the appointment of the arbitrator.

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