

JOINDER OF THIRD PARTIES IN INTERNATIONAL ARBITRATION**

Summary

Multiparty arbitration has been recognized as an important feature in international arbitration and has consequently become an indispensable part of arbitration rules. With its inherent features and peculiarity, the provisions regulating multiparty proceedings are frequently ameliorated as they are constantly in the center of discussion among drafters and working groups, together with legal commentators. Arbitration rules were silent on the matter of a joinder for a long period. Gradually, joinder provisions have been introduced and are now being improved and enhanced with almost every revision of the arbitration rules. This paper discusses the joinder as one of the main mechanisms for transforming proceedings into multiparty proceedings. The author provides a comparative analysis of the joinder provisions under different sets of arbitration rules, focusing on key elements — the consent of the parties and the equal treatment of the parties.

Keywords: Multiparty arbitration, joinder, arbitration rules, third party, consent.

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PRISTUPANJE TREĆIH LICA U MEĐUNARODNOJ ARBITRAŽI

Sažetak

Mogućnost formiranja višestranačke arbitraže predstavlja važnu karakteristiku međunarodne arbitraže, te su posledično odredbe koje regulišu ovu materiju postale neizostavni deo arbitražnih pravila. Sa svojim inherentnim karakteristikama i specifičnostima, odredbe koje regulišu višestranačke arbitražne postupke često se unapređuju, budući da se konstantno nalaze u centru pravnih diskusija. Arbitražna pravila dugo nisu poznavala mogućnost pristupanja arbitražnom postupku. Vremenom se pravila o pristupanju trećih lica uvode, a takođe se i unapređuju skoro prilikom svake revizije arbitražnih pravila. Ovaj rad se bavi pitanjem pristupanja trećih lica arbitražnom postupku, kao jednim od glavnih mehanizama za pretvaranje arbitražnog postupka u višestranački. Autor pruža uporednu analizu odredaba o pristupanju arbitražnom postupku, analizirajući različita arbitražna pravila i fokusirajući se na ključne elemente pristupanja – saglasnost stranaka i jednak tretman stranaka.

Ključne reči: višestranačka arbitraža, pristupanje arbitražnom postupku, arbitražna pravila, treća lica, saglasnost.

1. Introduction

Multiparty arbitrations are not a novelty in the arbitration world (Born, 2021, p. 2759). The main mechanisms for transforming the proceedings into multiparty proceedings are consolidation, joinder, and intervention. In litigation, the courts are vested with the power to order the consolidation of proceedings and the joinder of third parties – such power “stems from the national court’s sovereign power” (Lew, Mistelis & Kröll, 2003, p. 389, paras. 16-39; see also Born, 2021, p. 2761). In arbitration, on the other hand, the arbitral tribunal derives its power from the arbitration agreement concluded between the parties (Lew, Mistelis & Kröll, 2003, p. 389, paras. 16-40; Voser, 2009, p. 350).

Over the years, there has been a noticeable increase in the number of commenced arbitrations involving more than two parties (Voser, 2009, p. 343; see also Vukadinović Marković & Popović, 2022, p. 188). Consequently, the leading arbitral institutions have modified their arbitration rules and have incorporated provisions to regulate the matter.

This paper will attempt to shed light on the issue of joinder by analyzing the key concerns when deciding on the joinder request. The author will consider the selected arbitration rules and each of their revised versions in the past 20 years regarding the matter of joinder, as well as the relevant case law. The author has selected the arbitration rules of the major arbitral institutions – Arbitration rules of the International Court of Arbitration of the International Chamber of Commerce (ICC Rules¹), Swiss Rules of International Arbitration of the Swiss Arbitration Centre (Swiss Rules²), Arbitration Rules of the London Court of International Arbitration (LCIA Rules³), Arbitration Rules of the Vienna International Arbitration Center (Vienna Rules⁴), Arbitration Rules of the Singapore International Arbitration Center (SIAC Rules⁵), Arbitration Rules of the Hong Kong International Arbitration Centre (HKIAC Rules⁶), China International Economic and Trade Arbitration Commission Arbitration Rules (CIETAC Rules⁷), as well as United Nations Commission On International Trade Law (UNCITRAL) Arbitration Rules (UNCITRAL Rules⁸). The author believes that certain provisions could be enhanced, since they may lead to inadequate or unjust results.

2. The Notion of the Joinder of Additional Parties

Envision the scenario – you and your friend have agreed to host a private gathering. All the necessary details have been discussed in advance – the purpose of the gathering, the place, the theme, the guest list, the menu. The invitations have already been sent, reservations have been made, and preparations are coming to an end. Everything seems to be set so the evening can start. But what happens in situations when one of the hosts wishes to invite additional person(s), or when a third person hears about the gathering and wants to join in? That person can be an acquaintance, a colleague, or perhaps a business partner who is expected to contribute in some way. Should they be allowed to join the gathering? What if the other host does not agree? What about the timing of the invitation?

¹ Art. 7 ICC Rules 2012, ICC Rules 2017, ICC Rules 2021.

² Art. 4 (2) Swiss Rules 2004 and Swiss Rules 2012, Art. 6 Swiss Rules 2021.

³ Art. 22 (1) (h) LCIA Rules 1998, Art. 22 (1) (viii) LCIA Rules 2014, Art. 22 (1) (x) LCIA Rules 2020.

⁴ Art. 14 Vienna Rules 2013, Vienna Rules 2018, Vienna Rules 2021.

⁵ Rule 24 (1) (b) SIAC Rules 2007, SIAC Rules 2010, SIAC Rules 2013, Rule 7 SIAC Rules 2016.

⁶ Art. 14 (6) HKIAC Rules 2008, Art. 27 HKIAC Rules 2013, HKIAC Rules 2018.

⁷ Art. 18 CIETAC Rules 2015.

⁸ Art. 17 (5) 2010 UNCITRAL Rules, 2013 UNCITRAL Rules and 2021 UNCITRAL Rules.

Metaphorically explained in the simplest terms, however, the same questions are raised when the joinder mechanism is discussed.

3. What Is a Joinder?

The joinder refers to situations “where there are third party/ies or other party/ies to the agreement, depending on whether it is a ‘multiple parties to one contract’ or a ‘multiple parties to multiple contracts’ situation, and there is only one arbitration pending or initiated” (Platte, 2002, par. 8). The joinder should be differentiated from the “issue of ‘extension’ of the arbitration clause to non-signatories” (Hanotiau, 2007, p. 346), since the joinder answers the question “whether a non-party to the arbitration may intervene in the arbitration proceedings, once they have been initiated, or whether a party to the arbitration proceedings (Claimant on the one hand, Respondent on the other hand) may join a non-party during the arbitration” (Hanotiau, 2007, p. 346).

Commercial relationships have become more complex, leading to an increase in multiparty disputes (Bamforth & Maidment^{2009, p. 3}; Blackaby et al., 2015, p. 32). Joinder is generally requested in the disputes arising out of joint venture or consortium agreements, construction projects, shareholders’ agreements, banking transactions, reinsurance contracts (Carrión^{2015, p. 479}; Voser, 2009, p. 344; Bamforth & Maidment, 2009, p. 4). These are the types of disputes that “typically include more than two parties” (Voser, 2009, p. 344).

However, there are important issues to be considered when deciding on the joinder. Firstly, the consensual and “inherently private nature of arbitration” (Waincymer, 2012, p. 540) raises certain concerns with respect to the joinder. Secondly, the equal treatment of the parties cannot be disregarded either. Together, these aspects create difficulties for bringing third parties to the proceedings that can end with an undesirable outcome “since the lack of consent as well as any unequal treatment of the parties are grounds of resisting enforcement under the New York Convention” (Lew, Mistelis & Kröll, 2003, p. 378, par. 16-3; see also Jovičić, 2020, pp. 23-24).

4. Who Can Request a Joinder and Who Can Join the Proceedings?

Returning to the aforementioned scenario, it would be unusual to invite a complete stranger to a private gathering, or to allow just anybody to join in. Most likely, the hosts would invite their friends, colleagues, or business partners,

because they believe that the presence of the invitees could somehow be beneficial. What would be the benefits of having more people in the same room? How do you get on the guest list?

The involvement of multiple parties in the same proceedings can have a positive impact – procedural efficiency and cost efficiency can be increased, the risk of conflicting and inconsistent awards can be mitigated, whereas the matter of the dispute(s) can be comprehensively resolved in the same proceeding (Born, 2021, pp. 2762-2763; Voser, 2009, p. 350). These are the main advantages of joinder.

The request for joinder can be submitted either by the original party to the arbitration (joinder) or by the third party itself (“intervention-type joinder” (Choi, 2019, p. 31)). There are numerous reasons why the parties would request joinder; however, it all comes down to the question of liability. The claimant may assume that the respondent and a third party are jointly liable and therefore may request a joinder of the third party and submit a claim against both of them, saving time and avoiding additional costs (Voser & Meier, 2008, p. 116). Similarly, the respondent can request a joinder of a third party and submit a claim against the third party (Voser, 2009, p. 347), for example, a claim for recourse (Voser, 2009, p. 347; Voser & Meier, 2008, p. 116), and/or extend a counterclaim to that third party (Voser, 2009, p. 347; Bamforth & Maidment, 2009, p. 3). Finally, to protect its interests, a third party may request to be joined.

However, there are significant differences among different sets of arbitration rules. Some arbitration rules are more restrictive, and others have taken a more liberal approach.

For example, under Swiss Rules (Bärtsch & Petti, 2013, p. 63), HKIAC Rules 2013 and HKIAC Rules 2018 (Moser & Bao, 2017, p. 210, para. 10.15; Smith, 2018, p. 189), Vienna Rules (Pitkowitz, 2015, p. 310, para. 73), SIAC Rules 2007 (Voser, 2009, p. 400), and SIAC Rules 2016 (Dulac & Lo, 2016, p. 113; Born, 2021, p. 2806; Smith, 2018, p. 189; Choi, 2019, p. 49), the request for joinder can be submitted either by the party to the arbitration or the third party. UNCITRAL Rules stipulate that the third party can request joinder only if it is a party to the arbitration agreement (Caron & Caplan, 2013, p. 139).

Contrarily, under HKIAC Rules 2008 (Connor & Talib, 2014, p. 191), LCIA Rules (Choi, 2019, p. 44; Smith, 2018, p. 181; Carrión, 2015, p. 486), ICC Rules (Voser, 2011, p. 793; Smith, 2018, p. 178; Choi, 2019, p. 51; Grierson & van Hooff, 2012, p. 97, fn. 299; Secomb, 2017, p. 331), SIAC Rules 2010 and SIAC Rules 2013 (Carrión, 2015, p. 488), and CIETAC Rules 2015 (Choi, 2019, p. 46), the third party cannot file the joinder request. Under ICC Rules 2012 and 2017, a third party cannot request joinder even if it is a party to the underlying arbitration agreement (Choi, 2019, p. 51).

Further, some arbitration rules have paid more attention to the third parties themselves. Vienna Rules give a definition of the third party in Article 6(1) (4) – “one or more third parties who are neither a claimant nor respondent in the pending arbitration and whose joinder to this arbitration has been requested”⁹. Art. 3 (5) HKIAC Rules 2013 states that “additional party” implies one or more entities¹⁰. Under each set of selected arbitration rules, the joinder of more than one entity is permitted.

UNCITRAL Rules necessitate that the third person has to be a party to the existing arbitration agreement, which is the basis of the arbitration proceedings (Born, 2021, p. 2795). The specific terminology (“third persons”, not “third parties”) was deliberately used, emphasizing this condition¹¹. Hence, joinder under UNCITRAL Rules is not anticipated for multi-contract situations (Caron & Caplan, 2013, p. 56; Born, 2021, p. 2795) (it would be on the parties to specifically agree, in their arbitration agreements, on the possible joinder – “although Article 17(5) of the UNCITRAL Rules does not authorize joinder or intervention in these circumstances, it also does not preclude it” (Born, 2021, p. 2795)).

Other arbitration rules do not require that the third party has to be a party to the underlying arbitration agreement. For example, commentators have specifically noted that LCIA Rules do not impose such a condition (Turner & Mohtashami, 2009, p. 149; Carrión, 2015, p. 487). Interestingly, in the case *CJD v. CJE and another*¹² (the governing rules were LCIA Rules 2014), the Singapore High Court found that the third person, being a party to the arbitration agreement, did not automatically consent in writing to the joinder and has denied the joinder request, even though the third party was already a party to the underlying arbitration agreement. This ruling has been addressed in theory by commentators, stating that “the decision of the Singapore High Court reflects a correct understanding of the importance of party autonomy in arbitration” (Ross & Asschenfeldt, 2022, p. 705).

In addition, SIAC Rules 2016¹³ (Hanotiau, 2020, p. 331) (exception when all the parties agree to the joinder), HKIAC Rules 2013¹⁴ and HKIAC Rules 2018¹⁵

⁹ Art. 6 (1) (4) Vienna Rules 2013, Vienna Rules 2018, Vienna Rules 2021.

¹⁰ Art. 3 (5) HKIAC Rules 2013.

¹¹ UNCITRAL Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session (Vienna, 15-19 September 2008), A/CN.9/665, 30 September 2008, para 129.

¹² *CJD v. CJE and another*, 2021, SGHC 61, High Court, Singapore, paras. 46–64.

¹³ Rule 7 (1) and 7 (8) SIAC Rules 2016.

¹⁴ Art. 27 (1) HKIAC Rules 2013; Art. 27 (8) HKIAC Rules 2013.

¹⁵ Art. 27 (1) HKIAC Rules 2018.

(exception when all the parties agree to the joinder) and CIETAC Rules 2015¹⁶ require that the third party is *prima facie* bound by the arbitration agreement. Under ICC Rules 2021, the *prima facie* test is one of the relevant circumstances the tribunal should take into account when making a decision¹⁷. Other rules do not have such a requirement.

Finally, Swiss Rules and Vienna Rules provide that the third party can participate in different capacities (Habegger, 2012, p. 278; Bärtsch & Petti, 2013, p. 55; Pitkowitz, 2015, pp. 308-309; Baier & Hahnkamper, 2013, p. 142).¹⁸ Other rules provide that the third party can only be joined in full capacity (Boog & Raneda, 2016, p. 589; Mangan & Lingard, 2018, p. 115, par. 7.22; Turner & Mohtashami, 2009, p. 150; Moser & Bao, 2017, p. 221, para. 10.65). Additionally, the commentators of the LCIA Rules specifically note that the joined party, as it became “a full party to the proceedings” (Turner & Mohtashami, 2009, p. 150), would have the right to join the fourth party (Turner & Mohtashami, 2009, p. 150).

The author is of the opinion that both the parties to the arbitration as well as the third party should be given the opportunity to request the joinder. There are many (legitimate) reasons why the parties would prefer to join additional parties or to be joined in the proceedings, and the parties should be able to act upon them. The author criticizes the solution adopted under ICC Rules 2012 and ICC Rules 2017, which prohibits third parties from requesting joinder, even if they are a party to the underlying arbitration agreement on which basis the arbitration has been initiated.

5. When Can the Joinder Be Requested and Who Can Decide on the Matter?

Coming back to the imaginary scenario, the (newly invited) guest(s) should still be invited in a timely manner. It would be unfair not to leave enough time for the guests to prepare for the evening. Besides, they are expected to arrive on time to participate in the planned activities during the gathering. Security would not let the invitees in if it is already late at night, and their presence would hinder others. Is there a time limit for sending new invitations? Would the newcomers be treated differently than other guests?

The parties’ ability to influence the constitution of the arbitral tribunal by appointing the arbitrators is considered to be one of the main advantages of

¹⁶ Art. 18 (1) CIETAC Rules 2015.

¹⁷ Art. 7 (5) ICC Rules 2021.

¹⁸ Art. 14 (2) (3) Vienna Rules 2013, Vienna Rules 2018, Vienna Rules 2021; Art. 6 (4) Swiss Rules 2021.

arbitration (Lew, Mistelis & Kröll, 2003, pp. 223, 382, paras. 10-11, 16-18). However, in situations where more than two parties are involved, the constitution of the arbitral tribunal may raise some difficulties (Born, 2021, p. 2764). Enabling each of the parties to appoint an arbitrator would not be possible, and making the parties “choose the side” with others would not be fair (Lew, Mistelis & Kröll, 2003, p. 380, paras. 16-12). The equal treatment of the parties is “a vital aspect of a fair adjudicative process and must be regarded as an essential element of the opportunity to be heard” (Born, 2021, p. 3840).

The importance of the equal treatment of the parties in the constitution of the arbitral tribunal has been clearly demonstrated in *Dutco Case*¹⁹. In *Dutco Case*, the claimant appointed one arbitrator, the two respondents jointly appointed the second arbitrator, and the presiding was appointed by the ICC Court. Later, however, The Court of Cassation briefly found that “the principle of equality of the parties in the appointment of arbitrators is of public order; that it cannot be waived until after the dispute has arisen” (*Dutco Case*, para. 4)²⁰ and annulled the Court of Appeal’s decision (*Dutco Case*, para. 9)²¹. With the more recent revisions, the institutional rules have incorporated particular provisions to navigate the composition of the tribunal in multiparty scenarios.²²

The question of equal treatment of the parties and the parties’ ability to appoint an arbitrator is intertwined with the question of the timing of the joinder request and the competent body to decide on such a request. Here, the arbitration rules provide for three possibilities.

Firstly, UNCITRAL Rules and LCIA Rules give discretion only to the arbitral tribunal, and at the same time, these rules stipulate that the joinder can solely be requested after the constitution of the tribunal (Choi, 2019, p. 53). As UNCITRAL Rules are, in general, “primarily designed for ad hoc arbitration proceedings” (Choi, 2019, p. 53), there exists no other “decision-making body for joinder requests” (Choi, 2019, p. 53). Under LCIA Rules, the discretion to decide on the

¹⁹ *BKMI Industrienlagen GmbH and Siemens AG v. Dutco Construction*, 7 January 1992; French Court of Cassation, Civ. 1 No 2, decision of the Chambre, Civile 1 of the Cour de Cassation (no. 89-18.708, 89-18.726).

²⁰ *BKMI Industrienlagen GmbH and Siemens AG v. Dutco Construction*, 7 January 1992; French Court of Cassation, Civ. 1 No 2, decision of the Chambre, Civile 1 of the Cour de Cassation (no. 89-18.708, 89-18.726, para 4).

²¹ *BKMI Industrienlagen GmbH and Siemens AG v. Dutco Construction*, 7 January 1992; French Court of Cassation, Civ. 1 No. 2, decision of the Chambre, Civile 1 of the Cour de Cassation (no. 89-18.708, 89-18.726, para 9).

²² See Art. 29 CIETAC Rules 2015; Art. 8 (2) HKIAC Rules 2018; Art. 12 SIAC Rules 2016; Art. 18 Vienna Rules 2021; Art. 11 (3) (4) (5) Swiss Rules 2021; Art. 8 LCIA Rules 2020; Art. 12 (6) (7) (8) ICC Rules 2021; Art. 10 UNCITRAL Rules.

joinder request is considered to be an additional power of the tribunal, and thus, the decision can only be made after its constitution (Darwazeh & Johnson 2019, p. 89; Scherer, 2021, p. 313).

Both of these sets of rules deprive the third party of their chance to appoint the arbitrator (Turner & Mohtashami, 2009, p. 150; Choi, 2019, pp. 44, 53; Scherer, 2021, p. 313). The commentators of LCIA Rules state that “any successful application for joinder under the LCIA Rules will always have to include the third party’s waiver of its right to equal participation in the appointment process” (Choi, 2019, p. 46, see also Scherer, 2021, p. 313). However, both sets of rules permit the third party “to state its views on the prospective joinder” (Paulsson & Petrochilos, 2017, p. 141; Turner & Mohtashami, 2009, p. 148)²³, if the tribunal finds that any party, or the third person who had not participated in the constitution of the arbitral tribunal, would suffer prejudice by the joinder (Caron & Caplan, 2013, p. 56), the joinder would not be allowed²⁴.

Moreover, ICC Rules give discretion to the arbitral tribunal – the joinder can be requested either before or after the constitution of the tribunal. Under ICC Rules 2012 and ICC Rules 2017, joinder after the constitution of the tribunal would only be possible if all the parties agree (Smith, 2018, p. 190; Choi, 2019, p. 52; Darwazeh & Johnson, 2019, p. 89; Meier, 2018, p. 2517; Grierson & van Hooff, 2012, p. 97; Carrión, 2015, p. 499; Meier, 2018a, p. 2214). The consent of the third party is considered “as its contemporaneous waiver of the right to participate in constituting the tribunal” (Choi, 2019, p. 52; see also Carrión, 2015, p. 499). However, Art. 7(5) of ICC Rules 2021 “marks a shift” (Vega-Gonzalez & Gonzalez, 2020), omitting the requirement of the necessary agreement between the parties to join the third party after the constitution of the tribunal, depriving the parties of a possible veto (Vega-Gonzalez & Gonzalez, 2020; Đorđević, 2021, p. 420).

Secondly, under Vienna Rules, SIAC Rules 2016, and HKIAC Rules, the request can be submitted either before or after the appointment of the arbitrator(s). If the joinder has been requested before the constitution of the tribunal, the institution itself can permit the joinder²⁵ (Schwarz & Konrad, 2014, p. 803; Ali et al., 2019, p. 629). According to Rule 7 (6) SIAC Rules 2016, the institution has the right to “revoke the appointment of any arbitrators appointed prior to the decision on joinder”²⁶ (Schwarz & Konrad, 2013, p. 803; Oberhammer & Koller, 2014,

²³ See Art. 17 (5) UNCITRAL Rules and Art. 22 LCIA Rules.

²⁴ Art. 17 (5) UNCITRAL Rules.

²⁵ Rule 7 (4) SIAC Rules 2016; Art. 27 (8) and (9) HKIAC Rules.

²⁶ Rule 7 (6) SIAC Rules 2016. See also Art. 27 (11) HKIAC Rules 2013, Art. 14 (3) (3) Vienna Rules 2013, Vienna Rules 2018, Vienna Rules 2021.

p. 79; Baier & Hahnkamper, 2013, p. 142). Nevertheless, the decision of the institution is without prejudice to the tribunal's power to rule on its jurisdiction.²⁷

It is worth pointing out some differences. Under SIAC Rules and HKIAC Rules, if the joinder was approved before the confirmation of the tribunal, the parties would be deemed to waive their right to designate an arbitrator.²⁸ Under Vienna Rules, the third party may participate in the constitution of the tribunal²⁹; however, if one has already been constituted and the third party has not waived its right to appoint an arbitrator, the statement of claim must be returned to the Secretariat and shall be dealt with in separate proceedings³⁰ (Pitkowitz, 2015, pp. 311-312). Additionally, it seems that the party which requests the joinder can have "two bites at the cherry" (Boltenko & Lua, 2016) under SIAC Rules, as the SIAC Court's refusal of such request does not preclude the party to submit it again when the tribunal has been appointed (Boltenko & Lua, 2016; Boog & Raneda, 2016, p. 588; Choong, Mangan & Lingard, 2018, p. 120, para. 7.49; Dulac & Lo, 2016, p. 131; Smith, 2018, p. 184).

On the other hand, under Swiss Rules, the request can be submitted either before or after the constitution of the tribunal (Zuberbühler, Müller & Habegger, 2022, p. 86). The tribunal has discretion to decide on the joinder request; however, there is a difference in treatment if the request for joinder has been made after the constitution of the arbitral tribunal. If the third person is requesting to intervene, it is deemed the third person has accepted the constituted arbitral tribunal; however, if the original party is requesting the joinder, the third person must accept the constituted arbitral tribunal – if not, the joinder should not be allowed (Bärtsch & Petti, 2013, p. 66; Zuberbühler, Müller & Habegger, 2022, p. 91).

Finally, CIETAC Rules 2015 are the rules that allow the request for joinder to be made at any stage of the proceedings, but only the institution has the discretion to decide. The institution has been granted "the extraordinary power to make the final call for joinder requests" (Choi, 2018, p. 46), and the tribunal is only assisting (Choi, 2018, p. 46). The third party can "remove the already constituted tribunal when the joinder takes place after its formation and if it decides to exercise its right to nominate an arbitrator" (Choi, 2018, p. 46). The additional party may request that the proceedings start over, "so that it has a fair opportunity to present its case" (Sun & Willems, 2015, p. 176). However, to avoid prolonging and further complicating the proceedings, CIETAC may deny the request if it finds the joinder unsuitable (Peter, 2021, pp. 53-54; Hanotiau, 2020, p. 331).

²⁷ Rule 7 (4) SIAC Rules 2016; Art. 27 (8) HKIAC Rules.

²⁸ Rule 7 (12) SIAC Rules 2016; Art. 27 (11) HKIAC Rules.

²⁹ Art. 14 (3) (2) Vienna Rules.

³⁰ Art. 14 (3) (3) Vienna Rules.

The author understands the importance of equal treatment of the parties in international arbitration; however, the author believes that allowing third parties to have a major influence on the proceedings (and even demand that the proceedings start from the beginning, as in CIETAC Rules) is not completely justified, as third parties can abuse such opportunity and further prolong the proceedings. In situations where the third party is not deemed to have waived its right to appoint the arbitrator (the situations where the third party can request the joinder), the author proposes the following solution: if the parties cannot reach an agreement regarding the appointment of the arbitrators, the arbitral tribunal shall be appointed by the institution. This solution is only applicable to institutional rules.

6. Who Has to Agree to the Joinder?

Coming to “the grand finale of the evening” with the burning question: do both hosts have to agree on the newly invited guest(s)? What if the invitee does not want to come to the gathering? Is it possible that the person has accepted the invitation earlier, but now has changed its mind?

The arbitral tribunals “derive their powers from a private agreement (the arbitration agreement) and not from the authority of a state” (Girsberger & Voser, 2016, p. 141). Thus, consent is the cornerstone of arbitration. According to the unanimous view in the doctrine, the joinder of third parties is not permissible without consent (Born, 2021, p. 2762; Blackaby et al., 2015, p. 91, par. 2.59). However, there are differing opinions when the question of consent is raised – specifically, in which way can consent be given and which parties have to consent to the joinder. The arbitration rules have differently regulated the matter.

For example, LCIA Rules, HKIAC Rules 2008, SIAC Rules 2010, and SIAC Rules 2013 require written consent, while SIAC Rules 2007 require express consent. LCIA Rules 2020 require consent “expressly in writing”. HKIAC Rules 2018 require the parties’ express consent if the third party is not a party to the arbitration agreement on which the proceedings are based (Born, 2021, p. 2802).³¹

When it comes to the parties which have to consent, LCIA Rules and HKIAC Rules 2008 necessitate only the written consent of the requesting party and the third party³² (Bao, 2014; Moser & Bao, 2017, p. 209, para. 10.12). It is worth noting that LCIA Rules 2020 “only require the consent of one of the disputants and the third party, and thus allow for joinder despite the objection of one of the parties” (Scherer & Jensen, 2023, p. 208).

³¹ Art. 27 (1) HKIAC Rules 2018.

³² Art. 22 LCIA Rules; Art. 14 (6) HKIAC Rules 2008.

Similarly, under UNCITRAL Rules, the consent of the other party is not needed since “a non-requesting party to the arbitration is deemed to have consented to any request to join a third person who is also a party to the arbitration agreement” (Caron & Caplan, 2013, p. 55). The third person has to already be a party to the existing arbitration agreement, which is the basis of the arbitration proceedings (Born, 2021, p. 2795). Thus, UNCITRAL Rules are “more restrictive in scope” (Caron & Caplan, 2013, p. 55) compared to LCIA Rules.

However, the most disputed way of giving consent to the joinder is simply by agreeing to the arbitration rules (Lew, Mistelis & Kröll, 2003, p. 390, para. 16-42; Born, 2021, p. 2766). Specifically, this question is raised when it comes to LCIA Rules and Swiss Rules. On the one hand, some authors state that the parties have already given their consent by agreeing to arbitrate under these sets of rules (Turner & Mohtashami, 2009, p. 149; Lew, Mistelis & Kröll, 2003, p. 390, para. 16-44; Waincymer, 2012, pp. 566-567; Born, 2014, p. 2601; Kim & Mitchenson, 2013, p. 413; Gerbay, 2013, p. 70; Park, 2007, p. 130, fn. 380; Carrión, 2015, pp. 487, 497; Choi, 2019, p. 44; Scherer, 2021, pp. 311-312; Born, 2021, p. 2801; Loh, 2014, p. 77; Hanotiau, 2020, p. 333; Schramm, 2018, p. 491; Scherer & Jensen, 2023, p. 218). On the other hand, some commentators advocate for a more strict approach and insist that anticipatory consent is not enough (Voser, 2009, p. 397; Habegger, 2012, p. 280; Bärtsch & Petti, 2013, p. 64; Meier, 2018, p. 2517; Girsberger & Voser, 2016, p. 141). Finally, commentators have addressed the ambiguity of the Swiss Rules by stating that “the former Art. 4(2) of the 2012 Swiss Rules could not, in our view, be a substitute for the consent of the parties to the arbitration or the third person. The same is true for Art. 6, and this has now been clarified...” (Zuberbühler, Müller & Habegger, 2022, p. 79) and “just like Art. 4(2) of the 2012 Swiss Rules, Art. 6 does not create a standalone jurisdictional basis over the third person or persons to be joined” (Zuberbühler, Müller & Habegger, 2022, p. 80).

When it comes to the stand of the arbitral tribunal, this issue has not been sufficiently addressed (Born, 2021, p. 2800). Nevertheless, an important decision has been rendered in *Astro Case*³³. Even though the governing rules were the SIAC Rules 2007, the court thoroughly addressed the nature of forced joinders under the LCIA Rules and Swiss Rules as well. In the *Astro* case, the Singapore Court of Appeal asserted that “a joinder under the LCIA Rules and the Swiss Rules has, rather aptly, been termed a ‘forced joinder,’ since a joinder under these rules is possible notwithstanding the objections of a party to the arbitration” (*Astro case*, para. 176). Furthermore, the Court addressed the question of consent through the subscription to the institutional rules that provide for the possibility of a joinder, affirming

³³ *PT First Media TBK v Astro Nusantara International BV*, 2013, SGCA 57, Court of Appeal, Singapore.

that “if there is consent given in any form, either under the arbitration agreement or through subscription to a set of institutional rules that unambiguously permits forced joinders, that would suffice to negate any subsequent allegation that there was no agreement to arbitrate with the joined party” (*Astro case*, para. 177). However, “at a more general level, in the face of linguistic ambiguity in the provision that regulates the power to join without obtaining further consent, the consent under an arbitration agreement to arbitrate in accordance with a set of institutional rules cannot be taken as *ex ante* consent to the forced joinder” (*Astro case*, para. 197).

The Court held that “the idea of forced joinders is a drastic one” (*Astro case*, para. 197) and represents “also a major derogation from the principle of party autonomy ... by compelling an arbitration with other persons with whom the parties had not specifically agreed to arbitrate” (*Astro case*, para. 188). Additionally, the Court insisted that “a rule which allows the tribunal to order a forced joinder without obtaining ‘fresh’ consent to the joinder must be decidedly unambiguous” (*Astro case*, para. 197).

The author sides with the commentators stating that the acceptance of the arbitration rules that provide the possibility for a joinder can imply consent to the joinder. Given the fact that there is a significant difference among the institutional rules as to the form and the degree of the required consent, the parties can choose the more restrictive set of arbitration rules.

7. Conclusion

The arbitral tribunals, when making a decision on a joinder request, are faced with immeasurably more complicated tasks than those organizing a private gathering. The tribunal has to pay special attention to every detail, since the fundamental principles of the international arbitration are at risk – with just one misstep the award could be unenforceable.

LCIA Rules and SIAC Rules are the rules that have paved the way for other arbitration institutions to incorporate and specifically regulate the joinder mechanism. As the pioneers in the matter, LCIA Rules and SIAC Rules imposed the model which has been used as the inspiration for the drafters in the beginning stages. Certainly, each institution would add a few unique components. As a consequence, the variety of the joinder provisions from which the parties can choose exists and parties can opt for the most suitable one. The key similarities and differences between the arbitration rules can be pointed out, however the main issues of the joinder mechanism remain the consent of the parties and the equal treatment of the parties in the constitution of the arbitral tribunal.

The author has attempted to metaphorically simplify the aspects of the joinder and the difficulties which arise with the additional parties. The direction which the development of the arbitration rules will take and whether there will be some new questions for the organizers to consider when planning the events and inviting the guests, remains to be seen.

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