

ASA Below 40 - Zurich, 21 October 2011

Joinder, intervention and consolidation under institutional rules and national law

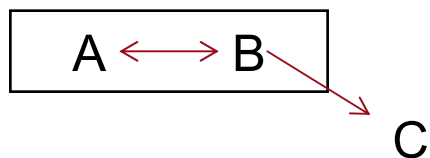


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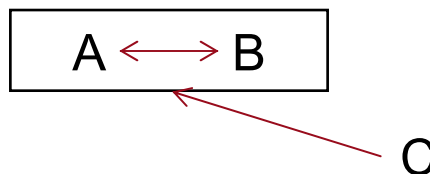
1. Definitions
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1. Definitions

> Joinder:



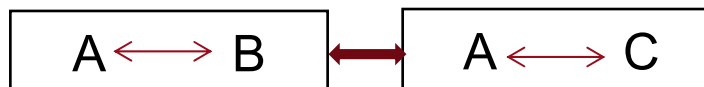
> Intervention:



> Consolidation:



> Indirect joinder:



2. Consent and other requirements

- > Consent
 - > who?
 - > when?
 - > how?
- > Other requirements
 - > related claims
 - > arbitration agreement(s)
 - binding each party, expressly or by extension
 - identical or compatible

3. Authority to decide on joinder, intervention or consolidation and appointment of arbitrators

- > Authority to decide on joinder, intervention or consolidation
 - > arbitral institution
 - > arbitral tribunal
 - > national courts
- > Appointment of arbitrator(s)
 - > direct or indirect joinder before constitution of arbitral tribunal → provisions on appointment in multi-party arbitration
 - > joinder / consolidation after constitution of arbitral tribunal problematic

4. Arbitral rules - consent

- > Joinder and intervention
 - > consent of all parties required → ICC Rules
 - after appointment / confirmation of arbitrator(s): express consent
 - before appointment / confirmation of arbitrator(s): implied consent sufficient
 - > express consent of third party required → LCIA Rules; SIAC Rules
 - > consent of parties / third party not required → Swiss Rules?
- > Consolidation
 - > objective criterion of “connectivity” required → CEPANI Rules; SCC Rules; ICC Rules (10(b)/(c))
 - > consent of all parties required → VIAC Rules; ICC Rules (10(a))
 - > consent of parties not required → Swiss Rules

4. Arbitral rules - authority

- > Authority to decide on joinder / intervention
 - > arbitral tribunal → LCIA Rules, Swiss Rules, SIAC Rules, UNCITRAL 2010 Rules, VIAC Rules, NAI Rules
 - > arbitral tribunal and/or institution → ICC Rules
 - “triage” by Secretary General
 - *prima facie* decision by Court or direct referral to tribunal
- > Authority to decide on consolidation
 - > institution → ICC Rules, Swiss Rules, SCC Rules, CEPANI Rules
 - > arbitral tribunal → VIAC

4. Arbitral rules - appointment

- > Joinder before appointment of arbitrator(s)
 - > joint appointment by parties or appointment by institution if no agreement between parties → ICC Rules; VIAC Rules
- > Joinder after appointment of arbitrator(s)
 - > express consent of third party to joinder = presumed waiver of right to appoint an arbitrator → LCIA Rules; SIAC Rules
 - > discretion of the arbitral tribunal → Swiss Rules; UNCITRAL 2010 Rules
- > Consolidation after appointment of arbitrator(s)
 - > presumed waiver of right to designate arbitrator → Swiss Rules
 - > possible revocation by institution and appointment of new arbitral tribunal → CEPANI Rules

5. National law - consent

- > Consent to consolidation
 - > consolidation only with the parties' express consent → English Arbitration Act
 - > consolidation without the parties' consent → Netherlands Arbitration Act; California Code of Civil Procedure; Hong Kong Arbitration Ordinance; Canadian provincial laws
- > Consent to joinder / intervention
 - > requirement that all parties be bound by same arbitration agreement (= implied consent?) → Swiss Code of Civil Procedure; Italian Code of Civil Procedure; Belgian Judicial Code
 - > “accession” of third party to arbitration agreement (= express consent of all parties) → Netherlands Arbitration Act

5. National law - authority

- > Authority of arbitral tribunal to decide on
 - > joinder / intervention → Swiss Code of Civil Procedure; Netherlands Code of Civil Procedure; Belgian Code of Civil Procedure
 - > consolidation (“where the parties have agreed to confer such power on the arbitral tribunal”) → English Arbitration Act; Irish Arbitration Act; Singapore Arbitration Act

- > Authority of national courts to decide on
 - > joinder / intervention → ?
 - > consolidation → Netherlands Code of Civil Procedure; Hong Kong Arbitration Ordinance; Canadian provincial legislation (British Columbia, Alberta, Ontario, New Brunswick, Nova Scotia); US state legislation (Florida)

6. Conclusion

- > Time is of essence
- > Joinder or consolidation in spite of strong objection of a party may run contrary to aim of efficiency
- > Weighing of interests is necessary in each case

Thank you for your attention.

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