

ASA Below 40 - Zurich, 21 October 2011

# Joinder, intervention and consolidation under institutional rules and national law

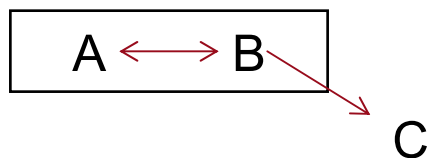


# Table of contents

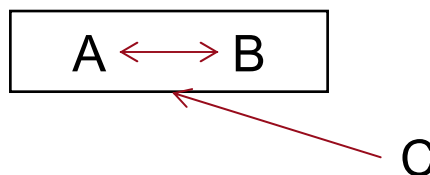
1. Definitions
2. Consent and other requirements
3. Authority to decide on joinder, intervention or consolidation and appointment of arbitrators
4. Arbitral rules
5. National laws
6. Conclusion

# 1. Definitions

> Joinder:



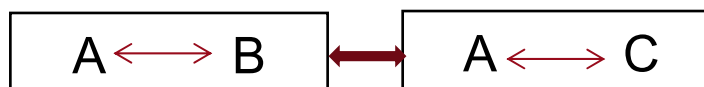
> Intervention:



> 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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