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Guideline on Multiparty Arbitration



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1. Preamble

1.1. Multiparty arbitration allows certain third parties, most notably non-signatories to an arbitration agreement, to participate in arbitration proceedings. This can be done by means of joinder, consolidation, and concurrent hearings. The prerequisites for the decision to resort to one of these scenarios can be different. Examples include interrelated contracts containing the same or similar arbitration agreements or where a non-signatory third party has an opportunity to benefit from or contribute to the outcome of a dispute. As a result, depending on the circumstances of a particular case, by choosing multiparty arbitration, parties can benefit from enhanced procedural efficiency, reduced costs, and lower risk of inconsistent awards.

2. Introduction

2.1. The purpose of this Guideline is to provide relevant information on some of the most widely encountered scenarios, considerations that should be taken into account, and conditions that should be satisfied by arbitrators and/or parties when deciding whether to pursue a multiparty pathway. It also aims to show how to use the procedural options offered by multiparty arbitration in an efficient manner.¹ This Guideline does not address multiparty arbitration proceedings where all of the parties are signatories to an arbitration agreement, nor does it address multiparty arbitrations where the non-signatory parties refuse consent to participate. Its scope of application is limited to situations where one or more non-signatory parties express their consent to participate in the proceedings.

2.2. This Guideline is intended for use in conjunction with, and does not supersede, any mandatory laws or institutional rules applicable to a multiparty arbitration scenario.

3. Consent

3.1. Consent to joinder, consolidation, and other types of multiparty mechanisms, if not made expressly, can become a stumbling block to arbitral and enforcement proceedings. National laws regarding joinder and consolidation can supplement, but cannot replace, the consensual nature of arbitration. It is therefore important to keep in mind that in the absence of parties' express consent, this guideline would not apply.

¹ The tribunal should be mindful of the nature of third parties that might participate in or have any other connection to the dispute (e.g. liquidators, agents, assignees, third-party funders) and consider the provisions of the applicable legislation.

Part 1 – Joinder

4. Joinder conditions

4.1. Joinder allows third parties to be joined by application of one or more of the parties, or to join by intervention, to a pending or upcoming arbitration.

4.2. Joinder may be necessary or desirable for a variety of purposes, such as, but not limited to, increasing the efficiency of an arbitral proceeding, if, due to certain circumstances surrounding the dispute, a third party might benefit from the outcome of the dispute; or where it is crucial for a claimant to join a third party where, for example, such party was involved in the implementation of a complex contract.

4.3. In *ad hoc* arbitration, parties willing to join a third party to their arbitration should agree to do so, unless the relevant provision is already embodied in their arbitration agreement or any other agreement thereto. Parties should be mindful of the relevant provisions of the applicable laws and rules.

5. Agreement on joinder²

5.1. Parties, including a third party, should record their willingness to join the arbitration in writing. This is especially important as some arbitral institutions might not allow joinder once the tribunal has been appointed unless all parties agree otherwise.

5.2. If parties' express agreement to join was not entered into at the beginning of their contractual relationship, this can be done by means of a new or post-dispute arbitration clause or, where necessary, an umbrella arbitration clause (useful in, for example, multi-contract scenarios, such as construction).

5.3. The provisions of such an agreement should include, but are not limited to the following:

- i. Whether the arbitration will be institutional or *ad hoc*.
- ii. The scope of the agreement, including a desirable type of multiparty arbitration scenario.
- iii. The number of and the appointment method for arbitrators.

²The provisions of this article are also applicable to matters of consent to consolidation and concurrent hearings.

5.4. In a situation where parties are seeking joinder, appointment of an arbitrator by every party may become impractical. This is seen where the tribunal number specified in the arbitral agreement is different than the number of parties to the dispute (i.e., a three-member tribunal was specified but there are five parties to the dispute). This may give rise to issues of equality of opportunity for each party to select their desired arbitrator. It is, therefore, recommended to stipulate an appointing authority in the arbitration agreement that would appoint a tribunal in such cases. Another solution is to draft the arbitration agreement to allow the multiple claimants and/or the multiple respondents to each appoint an arbitrator collectively, the two of whom would then appoint a tribunal chairperson. This would require each group to agree on an arbitrator among themselves. An appointing authority should be named in this scenario to be used if the collective claimant and/or respondent parties fail to agree among themselves on their appointee.

5.5. In institutional arbitration, parties should rely on the appointment mechanism offered by the institution.

5.6. Each joinder application should be reviewed on a case-by-case basis. Parties should be mindful of the wording of their arbitration agreement, as it may help them ensure that procedural risks, such as confidentiality or enforcement-related concerns, are mitigated.

6. Joinder application³

6.1. Joinder application made before the tribunal has been appointed

6.1.2. If joinder is sought in an institutional arbitration and before the tribunal has been appointed, such joinder can be requested through the relevant procedures of the administering institution, both by a party or a third party to a dispute. Depending on the requirements of a particular institution, certain information supporting the request may have to be provided, including evidence of parties' consent to joinder and that the third party to be joined is bound by the arbitration agreement. Irrespective of whether the application is made before or after the tribunal has been appointed, it is important to identify whether the third party would be joining as claimant or respondent. It should, however, be noted that in some cases a third party may have crossclaims against its co-claimant or co-respondent.⁴

³ Note that under the rules of some institutions, arbitral appointments may be affected by joinder of third parties. This can be seen, for instance, in arbitration rules of SIAC, HKIAC and the SCC.

⁴ Some rules allow the administering institution to revoke the appointment of a tribunal prior to a successful application for joinder. See i.e. SIAC Rules Art 7.6-7.7, HKIAC Rules Art 27.13, SCC Rules Art 13.8.

6.1.3. Parties may request joinder of more than one third party.

6.2. Joinder application made after the tribunal has been appointed

6.2.1. Joinder applications made after the tribunal has been appointed should be addressed to and reviewed by the tribunal.

6.2.2 The composition of the tribunal must be in accordance with parties' arbitration agreement as an improperly constituted tribunal can result in an unenforceable award.⁵ It is, therefore, preferable for joinder to be affected before the tribunal has been appointed. If a third party is joined to the arbitration after the appointment of the tribunal and subsequently objects to the appointment process used, this should be addressed via jurisdictional applications to the tribunal.⁶

6.2.3 Before rendering a decision on whether to allow joinder, a tribunal should consider all of the factual circumstances of the case and give all parties an opportunity to be heard. The tribunal should determine whether the parties consented to the joinder and whether the joining party is bound by the arbitration agreement through express consent. If joinder is allowed, the tribunal will further rule on whether it has jurisdiction to hear the case separately.

Part 2 - Consolidation

7. Consolidation conditions

7.1. Consolidation is used to combine two or more separate, yet similar arbitrations. Consolidation may be sought by the parties. In most scenarios the tribunal, if constituted, shall have the power to consolidate. As a result, a single award, binding on all parties, is rendered.

7.2. Where different arbitrations are administered by one arbitral institution, the same institution will administer if such arbitrations are consolidated.

7.3. Regardless of whether the cases subject to the request to be consolidated arise from the same or multiple arbitration agreements, certain criteria should be satisfied for a successful consolidation application. Together with the factual circumstances of the case, they should be reviewed by the tribunal, or arbitral institution in relevant

⁵The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

⁶However, it should be noted that some institutional rules allow the tribunal to reconsider successful applications for joinder made to the institution prior to their appointment. See i.e. SIAC Rules 7.4.

cases, and include, but are not limited to the following:

- i. Whether there is an agreement to consolidate.
- ii. Whether claims made result from the same or compatible arbitration agreements.
- iii. Whether disputes arise from one contract or a series of related contracts, as well as parties' course of dealing.

7.4. A consolidation application will be under higher scrutiny where there are arbitration agreements containing substantially different provisions as to the procedure (i.e. the choice of seat).

8. Arbitration agreement

8.1. Parties' willingness to consolidate can be expressed in the arbitration agreement or a supplementary post-dispute agreement. Other indications of parties' willingness to consolidate include interconnected factors in contracts (for example, contracts containing identical arbitration clauses). However, interconnected contracts containing arbitration agreements with differing provisions (i.e. the seat or applicable law) may indicate the opposite. In such cases, the tribunal would have to determine whether they have jurisdiction in each instance.

8.2. Applicable laws and rules may contain some provisions restricting consolidation (for instance, rules requiring class action, rather than consolidation) and parties should take this into account.

9. Application to consolidate

9.1. An application to consolidate should be filed with the tribunal once appointed.

9.2 In institutional arbitration, parties may have the option, depending on the rules of the institution, to file an application to consolidate with the institution prior to the appointment of a tribunal.⁷

10. Consolidation by the tribunal

10.1. If a consolidation application filed with an arbitral institution is rejected, parties, depending on the rules applicable, may have the right to file the same application with the tribunal.

⁷ It is important to keep in mind that in some jurisdictions (for instance, the Netherlands and Hong Kong) and under certain strict conditions, national courts have the power to consolidate arbitrations.

10.2. Where a tribunal has been constituted in one of the arbitrations to be consolidated, the parties should reach an agreement to stay appointment of any other tribunals until the appointed tribunal has decided the consolidation issue. In the absence of such an agreement, parties may apply to the courts of the seat for a stay. An agreement that such tribunal shall also arbitrate the dispute if the consolidation is successful should also be made where possible.

10.3. When deciding on consolidation, the tribunal should ensure that consolidation will result in consistent and procedurally and financially efficient settlement of all the disputes in question.

11. Concurrent hearings

11.1. Where consolidation is not possible, the same tribunal might be appointed in other related arbitration(s).

11.2. In this case a feasible solution might be to hold hearings of two or more arbitrations concurrently. In such cases, tribunals would hold concurrent hearings and hear evidence in one arbitration concurrently with evidence from the related arbitrations.

11.3. Parties may also request the tribunal to stay certain related proceedings while the preferred one(s) is (are) being heard.

11.4. The tribunal should conduct hearings concurrently, where there is an express agreement of the parties to do so. The tribunal, however, should also consider other matters that may affect the proceedings, such as confidentiality concerns, costs, and procedural efficiency.

11.5. If concurrent hearings have been agreed by the parties or allowed by the applicable rules, the tribunal should, in accordance with the rules and laws applicable, exercise all powers necessary for the purposes of such hearings.

11.6. In disputes where there were concurrent hearings the tribunal has the power to consider whether to issue one award or separate awards under each contract, however, unless the parties agree otherwise, separate awards should be issued.

Part 3 – Multiple claimants and multiple respondents

12. Rights and roles

12.1. A claimant is entitled to decide on whether to file a claim solely or with other claimants, while there is no such choice for a respondent. If a respondent believes that other third parties should properly be included as respondents to a claim, the respondent should apply to join those third parties (see Part 1).

12.2. In cases of multiple respondents, the issue of whether one of them could file a crossclaim would depend on the rules applicable. For example, some institutions would not allow or provide for such crossclaims. In this case, parties' express consent to that end is imperative.

13. The authority to exclude parties

13.1. In *ad hoc* arbitration, if a party objects to the participation of any other party, the tribunal has the power to review the basis on which multiple parties are on the side of claimant and/or respondent. This will require the tribunal to ensure that parties can provide evidence to demonstrate their consent to be bound by an arbitration agreement. This will usually be sufficient if joinder is properly requested (see 2.1).

13.2. In consolidation or concurrent hearing scenarios the tribunal will also have to look at the following:

- i. The nature of disputes to be heard concurrently or consolidated.
- ii. The provisions of an arbitration agreement (or, if there are several arbitration agreements, their compatibility) or any other agreement on a multiparty dispute resolution mechanism.
- iii. The contract or series of contracts related to the disputes and parties' course of dealing.

13.3. The decision on whether a party should be allowed to participate in an arbitration should be made on a case-by-case basis. This decision shall be without prejudice to any tribunal's decision(s) on their jurisdiction.

13.4. In institutional arbitration, depending on the rules applicable, the institution will follow similar procedures to allow multiparty arbitration applications. Regardless of whether such applications are made before or after the tribunal has been constituted, and unless a certain multiparty scenario is not allowed by the institutional rules applied, the decision to allow third parties lies with the tribunal.

