MULTI-PARTY AND MULTI-CONTRACT ARBITRATION MECHANISMS IN INTERNATIONAL COMMERCIAL ARBITRATION

A study on institutional rules of consolidation, joinder, and intervention from a Finnish perspective

Klas Laitinen
012459869
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Professor Dan Frände
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International commercial arbitration is the de facto method of solving disputes between corporations. Multi-party and multi-contract arbitration situations have increased significantly in recent years, which has led to arbitration institutes creating new mechanisms to increase efficiency in such situations. However, these new rules have not been studied in-depth and compared to each other, to ascertain possible similarities, dissimilarities, and common requirements. This thesis examines joinder, intervention, and consolidation mechanisms at five international arbitration institutes (‘the FAI’ is the Arbitration Institute of the Finland Chamber of Commerce, ‘the SCC’ is the Arbitration Institute of the Stockholm Chamber of Commerce, ‘The ICC’ is the International Chamber of Commerce International Court of Arbitration, ‘The HKIAC’ is the Hong Kong International Arbitration Centre, and ‘the SCCAM’ is the Swiss Chambers of Commerce Association for Arbitration and Mediation) to ascertain common requirements, and effects on the fairness, efficiency, and economy of international commercial arbitration.

This thesis finds that the solutions chosen at the studied institutions are largely similar in theory and in practice. There are four common requirements: 1) the consent requirement meaning that party consent is demonstrable both in cases with many agreements, and in cases with non-signatories as potential parties; 2) the timing requirement meaning that the earlier in the process the request is made by a party, the more likely it is to succeed. Different institutions have different deadlines for involuntary consolidation, joinder, and intervention; 3) the connectivity requirement meaning that there needs to be a certain degree of similarity between cases and/or parties. The connectivity requirements in relation to multi-party and multi-contract mechanisms differ among institutions studied; 4) the procedural efficiency requirement meaning that, in addition to fulfilling the other requirements, the request must also enhance procedural efficiency of the process or benefit the institution in some way.

Three of five institutions studied have chosen mostly similar rules; the ICC, the FAI and the HKIAC are almost identical in their treatment of multi-party situations. Therefore, they are considered by this thesis to be the new international standard. The SCC is significantly more restrictive than ICC, FAI and HKIAC in allowing involuntary mechanisms. The SCCAM is most liberal of institutes studied, and allows arbitrators a significant amount of freedom, at the cost of party autonomy and confidentiality, to allow third-parties to intervene in arbitration proceedings, whether the third-party is directly involved in the dispute or not.

The findings of this thesis show that multi-party and multi-contract mechanisms may increase the effectiveness of international arbitration at a cost to party autonomy. Party autonomy is limited by arbitration institutions nominating all arbitrators in multi-party disputes, and allowing involuntary transformation of bi-party disputes into multi-party disputes through the mechanisms of joinder, intervention, and consolidation. The increased efficiency is however limited to bi-polar multi-party proceedings and is ill equipped to handle multi-polar arbitration proceedings.

The conclusions in this thesis are that multi-party mechanisms are a good addition to international commercial arbitration and should be readily adopted by institutions, but the usage of such mechanisms should only be considered when efficiency gains outweigh the costs to party autonomy.
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1 Introduction

1.1 General background

International commercial arbitration has become the de facto standard method of solving disputes between international corporations, as the overwhelming majority of large corporations (88%, as of a 2008 survey) prefer it to international litigation, which is seen as costly and time-consuming. In arbitration, the parties voluntarily refer their dispute to an impartial third person, an arbitrator who is selected by them to make a decision based on the evidence and arguments presented before an arbitral tribunal. The rules and process of the arbitral tribunal vary according to local law, institutional rules, and international practice. Lew defines the four fundamental features of arbitration: firstly, arbitration is an alternative to litigation in a national court; secondly, it is a private mechanism for resolving disputes; thirdly, it is selected and controlled by the parties; finally, the end result of arbitration is a final and binding determination of parties rights and obligations.

International commercial arbitration is an established mechanism for the final and binding resolution of disputes that concern a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures, rules, and legal standards chosen directly or indirectly by the parties.

International commercial contracts are almost always subject to an arbitration clause. The foremost reason is that corporations are reluctant to subject themselves to the jurisdiction of foreign courts, which may have unfamiliar laws and procedures. Other reasons include enforceability, confidentiality, speed, and cost-effectiveness.

Multi-party arbitration proceedings have become more prevalent in the last two decades. In 2012, the ICC reported that more than a third of arbitrations involved more than two parties and that the average number of parties in these cases was four; in one case there were more than 25 parties. 57% of multiparty cases involved one claimant and several respondents, 26% involved several claimants and one respondent, and the remaining 17 %

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2 Enforcement is one of the problems of international litigation. Outside the European Union it is difficult to enforce foreign court decisions. States evidently see enforcement of foreign court decisions as lessening their sovereignty, whereas enforcement of an arbitration award is not as problematic.
3 Lew et al. 2003, p. 3.
4 ibid p. 3.
5 ibid p. 3.
several claimants and several respondents.\(^6\) In general, about 40% of arbitration cases worldwide involve more than two parties.\(^7\)

In the last few decades, multi-polar arbitrations -- that is, rather than a claimant camp and a respondent camp, each party may have diverging claims and interests towards the other parties of the arbitration -- have become more common.\(^8\) Many authors have considered the problems inherent to multi-party situations to be disadvantageous for arbitration.\(^9\) Surveys have concluded that a lack of appeals and third- and multi-party mechanisms, as well as time and cost, were seen as the biggest drawbacks of international commercial arbitration.\(^10\)

Multi-party arbitration mechanisms may enhance the efficiency of the arbitration process. Consider the following example: A respondent group Q, (consisting of a number of companies, and one individual who was the majority shareholder) had sold their interests in the assets of various companies of Q, to a number of companies controlled by a claimant group, X International SA.

The shares purchase agreement provided for application of Belgian law and ICC arbitration in Luxembourg in case of dispute […] various ancillary and related agreements were also signed. These agreements included a shareholders’ agreement concluded between some of the sellers who were already shareholders of the group companies, on the one hand, and on the other hand, new shareholders X International SA and Swiss bank (Y) […] a request for arbitration was filed by the purchasers against the sellers on the basis of a breach of the representations and warranties. The arbitral tribunal was appointed under CEPANI rules […] the respondents decided to file a counterclaim against the claimants and bank Y, which was not a party to the arbitration. The claimants objected. Therefore, the counterclaim became a separate arbitration between Bank Y and the respondents.\(^11\)

This case clearly illustrates that, if proper multi-party mechanisms had existed, then bank Y would have been allowed to join in the first arbitration process, rather than being forced into separate and costly arbitration processes. In this case the CEPANI rules allow for consolidation and one of the cases, was consolidated, into the other. Had the arbitration

\(^6\) ICC 2013
\(^7\) Voser & Schellenberg 2009, p. 343.
\(^8\) Silva-Romero 2005, p. 77.
\(^10\) Mistelis & Baltag 2008b, p. 95.
\(^11\) CEPANI cases No. 2176 and 2189 as cited in Hanotiau Complex Arbitrations, p. 184.
taken place under ICC or FAI rules in force at the time, there would have been no way to consolidate the two cases; neither, would joinder have been a possibility.

Arbitration institutes worldwide have begun adopting mechanisms for dealing with multi-party and multi-contract arbitration proceedings. The pressure to adopt such rules has come from the business community, as users of arbitration. The rules adopted expand the consent of the parties in multi-party and multi-contract cases, by creating mechanisms that allow for two or more cases to be consolidated, or allow for third-party participation, without the consent of all the parties to the arbitration.

This thesis will study the effects of these new rules within the framework of international commercial arbitration and the Finnish perspective, to determine whether the new rules enhance the fair, effective, and economical resolution of commercial disputes. This thesis will also systematize the rules at studied institutions to find common requirements.

I will now define the multi-party mechanisms studied in this thesis, and describe their characteristics, advantages, and disadvantages.

1.2 What are Multi-party Mechanisms

1.2.1 Joinder and Intervention

In arbitration, ‘joinder’ is the joining of a third party to the arbitration process by one of the original parties of the arbitration process, through a procedural request. A request for joinder is an additional request for arbitration by the respondent towards a third party, either solely, or in conjunction with that filed against the claimant. Joinder may also occur when, at a later stage of the proceedings, the claimant decides that a third party should become an additional respondent.\(^{12}\)

When a third party accedes to bi-party arbitration, it becomes a multi-party arbitration proceeding. Insolvency is the most common situation for joinder requests.\(^{13}\)

\(^{12}\) Voser & Schellenberg 2009, p. 346.
\(^{13}\) Hanotiau Groups of Companies, p. 279.
‘Intervention’ is when a third party requests to join an arbitration already in progress. If intervention is permitted by the relevant institutional rules or national laws, the arbitration institution typically requires that the request be made within a certain timeframe, after which the institution and/or arbitrators make the final decision as to whether the new party can join the arbitration in progress.

An example of this would be a third-party guarantor, which is not directly party to the main agreement but has a contract with one party to the agreement. This is less burdensome towards the interested party than would be first starting a new arbitration and then requesting that this arbitration be consolidated with the arbitration already in progress.
1.2.2 Consolidation

In arbitration, ‘consolidation’ refers to the act or process of uniting into one case several independent proceedings that are pending or have been initiated.¹⁴ The rules of the arbitration institute, the contents of arbitration clause, and the laws of the seat of arbitration present different requirements and procedures for consolidation. In general, a request for consolidation is sent to the arbitration institute, by one or several of the parties to the arbitrations which are to be consolidated. Thereafter the arbitral institution, arbitrator, or national court (depending on the situation and applicable rules) will examine the request and decide if the proceedings in question meet the requirements for consolidation.

1.2.3 Cross-claims

In arbitration, a ‘cross-claim’ is a respondent’s claim against another respondent within the same arbitration proceeding. The principal difference is that cross-claims do not add other parties to the arbitration, but rather add new claims between parties.

According to Voser, cross-claims are often a claim in guarantee or in damages; for example, a claim by a sub-contractor against another sub-contractor when the main contractor has started an arbitration proceeding against both.¹⁵

Due to the limitations of this thesis, I have chosen to not examine cross-claims; although they are important, their potential for enhancing arbitration is smaller than joinder,

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intervention, and consolidation, which are therefore the mechanisms on which I have chosen to focus.

I will now briefly examine some of the advantages and disadvantages of these multi-party mechanisms.

1.2.4 Advantages and disadvantages

Fair, efficient, and economical commercial justice benefits from efficient arbitration proceedings. Mechanisms that allow for joinder, intervention, consolidation and cross-claims may enhance efficiency because:

1) they prevent inconsistent and conflicting decisions; and help counteract problems related to preclusion;
2) arbitrators get a more complete picture of a transaction and the parties obligations towards each other; and
3) duplicate proceedings are a waste of time and money.

However, there are disadvantages to parties in cases where one party’s involvement is not substantial in the dispute. As Ten Cate and others have noted, for these parties, consolidated proceedings are more time-consuming and costly than separate arbitration proceedings dealing with just their claims. This may lead to situations where one party would try to intimidate another with the possibility of consolidation and a costly and complex process.

A second disadvantage is the loss of confidentiality, because the more parties are involved, the more parties are privy to confidential information that is shared during the arbitration proceedings. These problems can be resolved through confidentiality agreements or other legal instruments, before or during the proceedings.

A third disadvantage of multi-party mechanisms is the loss of the ability for parties to select their preferred arbitrator (as explained in greater detail later in this thesis). A fourth disadvantage is the lack of strategic multi-shot arrangements, which mean that parties

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18 ibid p. 378.
21 See for example: Lew et al. 2003, p. 408; and Ten Cate 2004, p. 138.
might otherwise have multiple possibilities to try the same dispute as well as preclusion related problems (as explained in greater detail later in this thesis).

However, as Ten Cate points out, the burdens resulting from multi-party mechanisms should not be exaggerated.\textsuperscript{23} Consolidation should only be considered when there are common issues of law and fact arising from related transactions, where the evidence will often be the same regardless of the number of parties in the proceedings.\textsuperscript{24}

The suitability of consolidation, joinder, or intervention in a particular case should be determined based on whether the benefits of bringing all parties and claims together in a single proceeding outweigh the disadvantages.\textsuperscript{25} The alternative may also be a \textit{de facto} consolidation, meaning that the arbitration institution nominates the same arbitrators across the different disputes between the parties, since this will often solve the problem of conflicting decisions by arbitral panels.

As Born aptly concludes: “The decision whether or not to consolidate two or more arbitrations, or to permit joinder or intervention, is an issue that involves issues of case management and procedural efficiency and fairness that are quintessentially (sic) for arbitral resolution.”\textsuperscript{26}

\textbf{1.3 Perspective}

I have chosen to view international commercial arbitration as a global system of justice with three distinct levels (illustrated in Figure 3.) Kurkela & Turunen state that there is a core of material that is common for a great majority of trading nations, the so-called \textit{lex mercatoria}, which floats above all jurisdictions and horizontally covers many parts of national laws and regulations. The differences in material laws relating to business are often superficial, and although there are different processes, the end results are strikingly similar.\textsuperscript{27}

Arbitration forms part of \textit{lex mercatoria}, and is therefore part of this floating global system. The reason for this is that arbitration is, at its core, a contractual mechanism. Furthermore, the institutions are international, and the international arbitration community adapts rules discussed in the international arena into the practice of a more national

\textsuperscript{23} Ten Cate 2004, 133, p. 139.
\textsuperscript{24} Stipanowich 1987, p. 505.
\textsuperscript{25} Ten Cate 2004, 133, p. 139.
\textsuperscript{26} Born 2009, p. 2091.
\textsuperscript{27} Kurkela & Turunen 2010, p. 5.
character. Due to the substantial international norms and soft-law of an international nature, it is fair to say that the law of arbitration is uniquely international, according to Kurkela & Turunen.\textsuperscript{28}

This thesis views international arbitration as a three-level system, with level that are independent but connected. The aim is to help develop a wider and more easily identifiable uniformity in the arbitration system and its procedures, or, as Kurkela & Turunen define it, \textit{lex proceduralia}.\textsuperscript{29}

Figure 3 illustrates this system. The global level, which floats above, is where the arbitration institutions and the international arbitration community reside. The second transnational level is signified by its main inhabitant, the New York Convention, which provides the core rules of arbitration both to the global level and to the national level. The third level is that of the states, whose courts oversee the procedural rights and enforce the awards. Furthermore, for the purpose of this thesis, I will view this three-level system from two distinct perspectives: that of the system, and that of the user perspective.

\textsuperscript{28} ibid p. 7-8.
\textsuperscript{29} ibid p. 8.
1.4 Purpose

The purpose of this thesis is to examine the recent developments of multi-party and multi-contract arbitration mechanisms from the perspective of the global arbitration system and its users. The focus is on party consent, both to the arbitration agreement and to the rules of the arbitral institutions.

The main hypothesis of this thesis is that consolidation, joinder, and intervention enhance the effectiveness of arbitration proceedings, from both the users’ and the system’s perspective, and should be encouraged on all levels, national, transnational and global.

Thus, the research questions of this thesis are i) to compare and evaluate whether the different solutions chosen at arbitration institutions with regards to multi-party
mechanisms enhance the effectiveness of arbitration proceedings by expanding party consent; and ii) to evaluate whether multi-party arbitration mechanisms can improve the attractiveness of Finland as a seat of arbitration.

To reach these objectives I will create a theoretical framework for analysis and then undertake a functional study of the relevant rules and practices of international arbitration, both in general and particularly at five international arbitral institutions, so as to discover the practical requirements for consolidation, joinder, and intervention, as well as evaluate the state of regulation in Finland.

1.5 Outline

The thesis is organized as follows. Chapter 2 introduces the materials and methods used in this dissertation. Chapter 3 introduces Finnish arbitration law and practice. In Chapter 4, the principles of arbitration are examined from the perspective of multi-party arbitration mechanisms. A study and discussion on multi-party and multi-contract arbitration rules at the five arbitration institutes studied is undertaken in Chapter 5. Chapter 6 is a practical guide for the users of arbitration. Chapter 7 examines the effect of multi-party rules on Finland as a seat of arbitration.

1.6 Multi-party constellations

There are two main types of multi-party arbitration: bi-polar and multipolar. Both will be presented below. Each concept is illustrated by a figure on the basis of a typical case.

1.6.1 Bi-polar multi-party proceeding

A bi-polar multi-party arbitration is similar to normal bi-party arbitration, because the parties are organized into a claimant camp and a respondent camp. Each camp may have claims and counter-claims towards the other camp, but within the each camp, all parties have the same interests. For example: in the construction industry, bi-polar multi-party arbitrations are normal, because guarantors (C) and primary contractors (B) are often in one camp while the owner (A) is in the other.
1.6.2 Multi-polar arbitration proceeding

Multi-polar multi-party arbitration on the other hand is problematic, because arbitration was conceived as a dispute resolution mechanism between two parties. In a multi-party multi-polar arbitration, the parties may have divergent interests. In practice, this means that parties in the same arbitration often have cross-claims against each other (figure 5).

Arbitration institutions have historically been very reluctant to entertain multi-party arbitrations. Redfern & Hunter among others have noted it is generally desirable to deal with all issues in a singular proceeding, rather than in a series of separate proceedings, as this saves time and money. More importantly, it also avoids the problems of conflicting decisions on the same issues of law and fact, since the same tribunal determines all issues.\(^\text{30}\)

\(^{30}\) Redfern & Hunter 2009, p. 149.
Multi-party and multi-contract arbitrations come in many forms. The following is a presentation of some of the most prolific.

### 1.6.3 Single contract with multiple parties

![Diagram of Joint Venture Agreement](Source: Author)

This is perhaps the most classical example where multi-party arbitrations occur, as several parties have signed an agreement together, which contains an arbitration clause.

A classical example is a joint venture agreement with multiple parties and a single arbitration clause. Other examples are standard contracts within the building and shipping industry.

### 1.6.4 Multiple contracts between parties

Long-standing commercial ventures between parties often necessitate a multitude of contractual undertakings. Thus, parties may find themselves with a dispute that covers more than one contract and even several different arbitration clauses. This is often referred to as a complex contractual web of obligations between parties.

![Diagram of Multiple contracts between two parties](Source: Author)

A classic example is a contract involving a guarantee clause, or stipulation in favor of a third party. If A has a contract to provide machines to B, and A makes a parallel contract with C to provide B with service for said machines, then *prima facie* these may seem like
to separate contracts; however, in the contract between A and B contain engagements with regards to C, and the contract between A and C contains engagements with regards to B, and C has ratified the contract and performed obligations under said contract, then it becomes a triangular A-B-C contract. If both contracts contain a similar arbitration clause, claims can be brought to the same arbitration proceeding for all disputes related to both contracts.31

1.6.5 String arbitration

String arbitration is usually used in disputes regarding the subsequent sale of goods whose quality has been contested. In string arbitration, all contracts are identical except for the parties and the price. They all refer to the same set of arbitration rules. The award is rendered between the first seller and the last buyer, and is binding for all string-partners. An example of this can be found in Grain and Food Trade Association standard agreement.32

![Diagram of string arbitration](image.png)

Figure 8: Illustrates a string arbitration, where all parties are bound. (Source: Author)

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31 For case examples see: Hanotiau Complex Arbitrations, p. 15; and Townsend 2006, p. 20.
32 Sanders 1999, p. 212.
2 Methods and Materials

2.1 Introduction

This chapter is a short explanation of the methodology used in this thesis. The choice of method cannot be made in isolation, as there are always reasons for the method chosen. The choice of method for this thesis is practical, by which I mean the methods chosen are those that are able to help answer the main research questions best. Method in this context means an orderly and systematic manner in which research is done and thus, methodology deals with the questions concerning methods.33

2.2 Legal Dogmatics

The main method used in this thesis is legal dogmatics (or constructive jurisprudence), which aims to interpret and systemize legal norms with the aid of legal sources. It views the legal order from within and seeks to answer the question what is the content of applicable law at this moment -- in other words, praxis, through the analysis of legal sources.34 The scope of legal sources is dependent on the object of interpretation and systematization. According to Tuori, legal sources themselves give symbolic language-based information on the contents of the legal order.35 Traditional Finnish legal literature has advocated for a strict and rigid hierarchy between the various legal sources, because this creates a strong legal certainty.36

The object of examination in this thesis requires a more flexible and situationally aware approach. Flexible legal dogmatics as developed by Karhu is suitable for the situation at hand. In Karhu’s modern approach, legal dogmatics adopts a situational awareness, meaning that it focuses on the behaviors, rather than the rules, of a situation. This situational awareness does not exclude rules-based jurisprudence; rather, rules become important once the situation and the relevant rule-space have been identified.37 Knuts states in his dissertation that adequate interpretation and systematization is in line with traditional

33 Husa 2006, p. 1096.
34 Aarnio 1978, p. 52.
35 Tuori 2003, p. 50.
36 Traditionally the law itself is the most important legal source, thereafter decisions by the Supreme Court and travaux préparatoires, recently this strict hierarchy has accepted EU law and court praxis into the highest levels of the hierarchy. For a discussion on the recent developments regarding legal sources in Finnish legal dogmatics see for example: Ari Hirvonen. ’Mitkä metodit’ (2011) - Opas oikeustieteen metodologiaan. Yleisen oikeustieteen julkaisuja
37 Karhu 2003, p. 36-38.
legal dogmatics and as such requires contacts and interpretation of the context and application of rules (of law).\textsuperscript{38}

International commercial arbitration is a multi-level system with three distinct levels of study.\textsuperscript{39} Thus, research into arbitration necessitates flexible and situational view on legal sources. The core principles and rules of the arbitration process are global, but they have local distinctive qualities that may influence the outcome. This global floating system and the local system may have distinctly different legal sources depending on the situation.\textsuperscript{40}

The global arbitration system derives its jurisdiction from consent, and that consent is controlled at the local level by national authorities. The national levels are situational, meaning that different states have different rules regarding arbitration. For example, one state may accept an oral arbitration agreement as binding consent, while another state will not even consider this. There can be no arbitration without consent, and consent has many situational rules.

The arbitration process at an institution is a separate situation, with its own rules and culture, depending on the institute in question. The end result of this process is an award, which, if it conforms to the rules and requirements of the New York Convention becomes enforceable in most countries. However, there are aspects of enforcement and recognition that have a situational character and need to be studied and systematized. The New York Convention transitions the global arbitration legal systems decision into a locally enforceable form.\textsuperscript{41}

The examination is conducted in many different situations that necessitate the flexible interpretation of legal sources and their binding character on the situation at hand. At the national level, normal legal dogmatics with its rigid hierarchy is appropriate. The most important sources are the binding laws of arbitration and contracts, as well as other relevant laws. In addition, Supreme Court praxis and \textit{travaux préparatoires} are used.

The second level of study is the New York Convention and its requirements that form the de facto legal requirements of arbitration, when they are applied locally, through the recognition and enforcement mechanisms included in the Convention. The most important

\textsuperscript{38} Knuts 2010, p.49.
\textsuperscript{39} See Chapter 1.3 for more information.
\textsuperscript{40} Kurkela & Turunen 2010, p. 8-12.
\textsuperscript{41} It is interesting to note that the recognition of arbitral awards is almost universal in comparison to the recognition of foreign court decisions, which outside of the European Union is quite difficult. Recognition of arbitral awards is not seen as a restriction on national sovereignty in the same way as the recognition of a foreign court award would be.
sources identified are the convention itself and its *travaux préparatoires* as well as *opinio
iuris*.

On the third level of study is the international commercial arbitration system, from the institutional perspective. This arbitration system forms its own separate legal system, with its own rules and regulations. The most important sources are: 1) the rules themselves; 2) published cases; 3) documents prepared by the arbitral institutions; 4) laws of the seat of arbitration; and 5) articles written by authors close to the institutions. There is no concrete hierarchy between these legal sources, because relevant rules depend on the situation at hand.

The goal of this thesis is to examine and systematize the rules of arbitration at the studied institutions. Therefore, I will compare the relevant rules of multi-party and multi-contract arbitration at these institutions, in order to help systematize the arbitration system and discover possible standards. The perspective adopted is internal and therefore compatible with flexible legal dogmatics.

The functional evaluation that will help systematize the different solutions at arbitration institutes can be summed up in the following way:

1) Pose a functional question on how problem X is solved;
2) List the similarities and differences in ways of solving X at the studied institutions;
3) Consider the similarities and differences;
4) Evaluate the solutions and judge which, if any, is best, or fashion a superior synthesis solution;
5) Critically evaluate the research and its results.

The method is somewhat similar to methods used in comparative legal studies.\(^4^2\) It is important to study not only the rules themselves but also the context of those rules, because there may be institutions, extralegal phenomena, unwritten rules of commerce that perform the same function in the foreign legal system, or in this case at the different arbitration institutes.\(^4^3\) I intend to use the functional evaluation to examine the solutions

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\(^{4^2}\) Gerber 2001; Husa 2013, p.60
\(^{4^3}\) See for example: See For example: Husa 2006, p.1095; Husa 2013; Zweiger & Kötz, p. 38; To summarize: Husa has summed up the functional method of comparative legal studies in the following way: 1) Pose a functional question on how socio-legal problem X is solved; 2) List the similarities and differences in ways of solving X in the studied legal systems; 3) Adopt a new point of view from which to consider the similarities and differences; and 4) Evaluate the discoveries made and perhaps judge which of the solutions offered is “best”. Or perhaps fashion a solution that is superior to all others. Zweigert & Kötz furthermore stress the need to critically evaluate the comparative research and its results.
chosen for the problem of multi-party and multi-contract situations at the studied arbitration institutes.

In conclusion, this thesis adopts a flexible and situational legal dogmatics as the primary method used in this thesis. In conjunction with this method, a functional evaluation on how different arbitration institutes have solved the problem of multi-party and multi-contract arbitration situations is undertaken.

2.3 Material

The materials used in this thesis are the relevant rules, or proposed rules, of the studied arbitral institutions, as well as relevant case material, theoretical academic writing, and discussions with prominent advocates.

Gathering materials on the global legal system of arbitration from the arbitration institutions is difficult, since most of them do not publish cases, and even those that do only publish a small subset of cases each year. Therefore, examining the actual praxis of those institutions relies on second-hand material, such as handbooks and books by authors close to the institutions. Thus, it is important to critically evaluate the conclusions, which can be drawn from such material, since second-hand material rarely tells the entire story.

Materials regarding the transnational and national level are easier to gather, because they are mostly public materials, such as court cases, laws, and travaux préparatoires. Thus, there is more legal certainty in the conclusions reached.

2.4 Institutions studied

The functional evaluation in this thesis focuses on the following institutions and their rules as of 1.12.2013:

(1) The ICC has enacted new arbitration rules that came into effect on the 1st of January 2012, the first change since 1998. In the new rules there is a section on multi-party arbitration that concerns the joinder of additional parties, claims between multiple parties, multiple contracts and the consolidation of arbitrations.44

(2) The Swiss Chambers of Commerce Association for Arbitration and Mediation (the “SCCAM”) has revised the Swiss Rules of International Arbitration (the “Swiss Rules”), which have taken effect on the 1st of June 2012.

44 Articles 7 - 10 of the ICC Rules
(3) The Hong Kong International Arbitration Centre (the “HKIAC”) is also conducting a revision of its rules. HKIAC has enacted the new rules from the 1st of January 2013.

(4) The Arbitration Institute of the Finland Chamber of Commerce (the “FAI Institute”) has been working on new rules (the “FAI Rules”), which have been enacted on the 1st of June 2013.

(5) The Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC Institute”) whose most recent rules (the “SCC Rules”) entered into force on 1st of January 2010.

Other institutions mentioned are the London Court of International Arbitration (the “LCIA”), the Belgian Centre for Arbitration and Mediation (the “CEPANI”), the Conflict Management Institute of the University of Helsinki (the “COMI”),
3 The Finnish perspective

3.1 Introduction

This chapter is a brief introduction in Finnish arbitration law and practice in the context of multi-party and multi-contract arbitration proceedings. Commercial arbitration has a long history in Finland. For example, the Arbitration Institute of the Finland Chamber of Commerce (the “FAI”) was established in 1911. According to Möller, about 100 arbitral awards are made every year in Finland, and the vast majority are ones where at least one party is Finnish. The FAI received 69 arbitration requests in 2012.

The Finnish arbitration act enacted in 1992 provides a general framework for arbitral proceedings that take place in Finland, as well as enforcement procedures of foreign awards. Finland has ratified the New York Convention, as well as all other relevant conventions relating to arbitration.

3.2 Finland and the Model Law

The UNCITRAL model law (the “Model Law”) contains no provisions for consolidation, joinder and intervention. Rules regarding multi-party and multi-contract arbitration proceedings were considered for both the 1985 version and the updated 2006 revision, but were rejected.

In the absence of specific provisions for consolidation, joinder, and intervention, they are subject to the Model Law’s basic requirements on enforcement and recognition in accordance with parties intentions and consent. Several states have adopted additional statutes on multi-party and multi-contract that provide courts or arbitral tribunals with powers to allow for third-party participation and consolidation.

45 http://arbitration.fi/en/; The FAI is by no means the only institute that offers arbitration in Finland. The University of Helsinki Conflict Management Institute also offers arbitration services. (See for example: http://www.comi.fi)
47 Lehtinen & Yildiz 2013, p. 53.
48 Laki välimiesmenettelystä, 23.10.1992/967
49 Finland has ratified the following international treaties related to arbitration: Protocol on Arbitration Clauses (Geneva, 24 Sept. 1923); Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 Sept. 1927); General Act of Arbitration (Pacific Settlement of International Disputes) (Geneva, 26 Sept. 1928); Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) (10 June 1958); Convention on the settlement of investment disputes between States and nationals of other States (Washington, 18 March 1965); Convention on Conciliation and Arbitration within the CSCE (Stockholm, 15 Dec. 1992).
50 Born 2009, p. 2076.
51 ibid p. 2076.
Finland does not follow the UNCITRAL Model Law, but has compatible national regulations. Arbitration in Finland is governed by the Finnish arbitration act (the “FAA”), which does not contain any rules on multi-party or multi-contract arbitration proceedings. The rest of this chapter will deal with key differences between the Model Law and the Finnish arbitration act, from the point of view of complex arbitration proceedings.

The FAA is applied to both domestic and international arbitrations. The act is applicable to all civil and commercial disputes that can be referred to arbitration for binding decision.\textsuperscript{52} In contrast, the Model Law is focused on international commercial arbitration, meaning that the arbitration must have an international character, such as one or more foreign parties.

The FAA requires that the arbitration agreement be in writing as a separate document, included in another document, or included in electronic communications.\textsuperscript{53} The Model Law is identical. Compared to the Swedish Arbitration Act, that allows for oral acquiescence of an arbitration clause.

The Model Law restricts national courts’ jurisdiction in arbitration matters, by expressly stating where national courts can interfere.\textsuperscript{54} The FAA contains no such provision, but the jurisprudence of the Finnish Supreme Court is restrictive, with the exception of procedural rights and consent.

An illustrative example is Article 16 of the Model Law that grants arbitral tribunals the right to rule on jurisdiction, but provides the parties with right of appeal to a national court. The FAA provides an equal right of appeal through § 42, which grants courts the right to set aside an award if the arbitral tribunal has exceeded its authority. The most recent case involving arbitration is KKO 2013:84, where the question of binding a non-signatory to the main agreement was accepted in circumstances where the party had derived the benefits in question through that agreement. The arbitral tribunal had not exceeded its authority.

Finland has adopted the New York Convention. The FAA and the Model Law are therefore identical in rules for setting aside awards.\textsuperscript{55} Both also provide for interim measures granted by a competent national court.\textsuperscript{56}

\textsuperscript{52} FAA § 2
\textsuperscript{53} Möller 1997, p. 18-19.
\textsuperscript{54} Article 5 of the UNCITRAL Model Law
\textsuperscript{55} Which will be dealt with later in this thesis, in chapter 4.3.
\textsuperscript{56} FAA § 5 (2) and Model Law Chapter IV
Neither the FAA nor the Model Law contain regulations on the appointment of arbitrators in multi-party situations. However, both regulatory models provide for the possibility of courts appointing arbitrators if parties cannot agree on appointments.  

3.3 Conclusions

As Möller clearly states “The 1992 Act is to a large extent compatible with the UNCITRAL Model Law on International Commercial Arbitration of 1985 despite the fact that it applies without distinction to both domestic and international arbitration.”  

Neither the FAA nor the Model Law contains any relevant clauses with regards to multi-party arbitration proceedings. Therefore, there is no authoritative regulation on the conduct of multi-party arbitration proceedings. This means that it is up to the individual arbitration clauses, or the arbitral institution rules, to determine the extent of party consent.  

57 FAA § 15 and Model Law Article 11.
59 There has recently been some discussion in Finland at different forums on the idea of adopting the Model Law in Finland. This discussion is interesting, partly because Finnish law is already compatible with the New York Convention and partly because it would not change anything. It seems that it is a question of public relations, because explaining that we have our own system is much harder, than just saying we follow the Model Law and that is the end of the discussion with foreign parties. With regards to complex arbitration proceedings the basic Model Law does not contain any regulations on those matters.
4 Principles of international commercial arbitration

4.1 Introduction

The objective of any arbitration process is to provide fair, efficient, and economical justice to the parties of that process. International commercial arbitration has few absolute rules, but many principles to be balanced against each other to reach this objective.

In this chapter I will examine the principles of international commercial arbitration in the context of multi-party and multi-contract arbitration proceedings. The principles form the ground upon which international commercial arbitration as a legal institution rests. The weighing and balancing of principles is difficult, and dependent on institutional support and *in casu* determination of applicability. The principles form the arbitrators’ toolbox and help determine what is important in a particular case.\(^60\)

This chapter will answer how the principles of international commercial arbitration should be applied in order to provide fair, efficient, and economical justice in multi-party and multi-contract arbitration proceedings. ‘Fair’ means that party autonomy and due process are respected; ‘efficient’ means an enforceable award and procedural efficiency of the adjudication; ‘economical’ means duration and costs are kept reasonable. Fair, efficient, and economical justice, as defined in this chapter, is used to measure chosen solutions in later chapters.

There are three levels in the global arbitration system, and these principles have differing reach at each level. The levels I have identified are the global, the transnational and the local. I will focus on the global and transnational levels, but also reference the local level in Finland and other countries, where appropriate.

Companies choose arbitration because it is fair, efficient, and economical.\(^61\) The guiding objective of international commercial arbitration community must be to safeguard the key advantages of arbitration as compared to litigation. The principles of international commercial arbitration are an expression of this objective.

This chapter is divided into the following subchapters: the first subchapter deals with consent, which has often been described as the main obstacle to effective multi-party and multi-contract arbitration proceedings. The second subchapter deals with enforceability

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\(^60\) Kurkela & Turunen 2010, p. 13.
\(^61\) See for example: Mistelis & Baltag 2008a, p. 321; and Mistelis & Baltag 2008b, p. 99.
under the New York Convention with regards to multi-party and multi-contract arbitration awards. The third subchapter deals with due process in multi-party and multi-contract arbitration. The fourth subchapter deals with speed and cost effectiveness. This chapter concludes with a synthesis that ties the examined principles into the guiding objective of fair, efficient, and economical justice.

4.2 Consent is the cornerstone of arbitration

“Who is a party to the [arbitration] clause, or has adhered to it, or eventually is estopped from contending that it has not adhered to it. This is in other words a classic problem of contract law. The real issue therefore becomes whether international commercial arbitration, given its specific character [...] one should follow the same rules as applicable to ordinary civil and commercial cases or adopt a more liberal approach: and in the latter case what approach should be adopted.” 62

Consent is the most important requirement of all arbitration. The jurisdiction of the arbitral tribunal is derived from the consent of the parties. If there is no consent, either explicit or implicit, there can be no arbitration.

The jurisdiction of the arbitral tribunal is derived solely from an agreement between the parties; this forms the basis of the tribunal’s competence, i.e. the space in which it can make decisions. This is in stark contrast to court litigation, where state courts have authoritative jurisdiction over the parties and can order consolidations or allow third-party participation without the consent of the parties. 63

Arbitration agreements between two signature parties rarely lead to problems with consent. However, it has become more common that single commercial projects have many parties and not all of them have signed agreements containing arbitration clauses. Consider the following example: Companies A and B have a shareholder agreement that gives individual C the right to purchase shares at a certain time for a certain price (an option). C is not a signatory to the original agreement. If a dispute on the option arises, the question remains whether C, who has not explicitly signed the arbitration agreement, is bound by such an arbitration agreement.

The question I will examine in this subchapter is when third parties, such as C in the example above, who are not signatories to the agreement, can still be bound by the arbitration agreement. This is referred to as extension in arbitration literature.

4.2.1 The basics of extension

There are no parties to arbitration without consent. Consent may be expressed explicitly by signing the contract containing an arbitration clause and becoming a party to the agreement. However, it is possible to become a party to a contract without signing such a document; conversely, a signature, in itself does not always signify consent. 64 In general, signing the underlying agreement will signify that the company has consented to the arbitration agreement. 65 Problems arise when there are third parties that are not mentioned in the agreement, but are nonetheless part of the performance of an economic transaction. In certain circumstances those parties have implicitly consented to the agreement.

How should arbitrators or courts approach the task of bringing in the “less-than-obvious” parties? As Park states, this is the most relevant question. 66 Courts and arbitral tribunals determine party’s implicit consent, or lack thereof, by thoroughly analyzing the facts of the case. 67 It is also necessary to determine the personal scope of the arbitration agreement, and whether it may be extended to the third party through one of the theories developed by arbitral tribunals and courts. 68 In literature, such implicit consent has been found through: a) oral acceptance, signed or unsigned letters, or other communications; b) conduct, such as shipping or accepting goods; and c) through acquiescence, such as failing to object to statements of other parties. 69

Consent is given and determined locally at a national level, both when arbitration takes place in a country and when an arbitral award is enforced. Lack of consent means any action taken, either by the parties or an arbitral tribunal, is null and void. Finnish jurisprudence is restrictive with regards to implicit consent to an arbitration agreement. The Finnish Supreme Court recently decided 70 that a non-signatory party could be considered to have implicitly consented to an agreement containing an arbitration clause, if the entirety of the dispute is derived from benefits that agreement would grant this party.

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64 Hanotiau 2001, p. 269; Moses 2012, p. 19.
66 Park 2009, p. 2.
67 Hanotiau Complex Arbitrations, p. 8.
69 Born 2009, p. 663.
70 Finnish Supreme Court Case KKO 2013:84
The specifics of the case KKO 2013:84 are as follows: an agreement between J Oy and M Oy (two corporations) gave individual A the option to purchase shares of J Oy at a certain time for a fixed price. If A did not use this option, then other shareholders, or the company itself would be eligible to purchase the shares. The agreement contained an arbitration clause. J Oy had already sold the shares to a third party, denying A the option to buy the shares in accordance with the agreement. The question was whether J Oy could assert that A was bound by the arbitration clause when the claim A was raising in front of the court were all based on the agreement between J Oy and M Oy. A had not personally signed the agreement between J Oy and M Oy containing the arbitration clause. The Finnish Supreme Court decided that even though A was not a party to the arbitration agreement, and had not consented to a written arbitration agreement after the dispute arose. The agreement still binds A, because all of the claims for damages that A asserts are based on a breach of the agreement containing the arbitration clause. Therefore, the Supreme Court found that it was a contractual dispute and the arbitration clause was valid and binding upon A in this dispute.71

There are several different methods, which courts and arbitral institutions have developed to decide whether a party has consented to an arbitration clause. The theories presented in this chapter are: 1) representation; 2) agency-theory; 3) good faith and estoppel; 4) transfers; 5) conduct; and 6) group companies.

4.2.2 Representation

A representative who signs an agreement binds the entity, which is being represented.72 When B formally represents A in signing a contract wherein A is to be bound, the mandate given to B may either be expressed or implied. There must therefore be an express or apparent mandate. See for example case ICC award 6519 of 1991, where a special-purpose holding vehicle created only for an Anglo-French joint venture was subject to a joinder because it had participated in the negotiations leading to the agreement and was central in

71 A similar case is KKO 1996:27 where a franchising contract between Rautakirja Oy and the entrepreneur of a small kiosk was considered valid and not unreasonable, since the entrepreneur could not be equated with a consumer or worker, given the size of the business etc. However, in the case KKO 2003:60 where Opstock Oy and Pertti K had an investment agreement containing an arbitration clause, the Supreme Court considered the arbitration clause unreasonable, because Pertti K was penniless. His insolvency would have led to the arbitration never being convened, since he would be unable to pay the security. This would have left Pertti K in a situation, where there was no legal recourse available to him. He would have been denied access to justice.

72 Hanotiau Complex Arbitrations, p. 9.
the negotiations. Two other parties were refused joinder.\(^{73}\) This is often called agency-
doctrine in civil law countries.

The mandate requirement has several consequences: if the signatory entity is without legal
personality, the owner or parent company is bound by the agreement. The same situation
arises if an individual enters into contract on behalf of a corporation that does not exist.
Furthermore, arbitration clauses may not be extended to a second defendant on the basis
that its president signed the agreement, if he was only acting as a representative of the first
defendant.\(^{74}\) Representation must be proven, without evidence to support the claim that the
party was contracted as an agent on behalf of others, and then the claim must be dismissed.\(^{75}\)

There is also the case of apparent mandate or ostensible authority that is sometimes
mentioned. An example of this is ICC case no. 1434 of 1975, where the tribunal concluded
that: “Mr. A had led the national company of state B to justifiably believe that he engaged
all the companies of the group he managed.”\(^{76}\) The arbitral tribunal found on this basis and
other factual findings that the national company of State B had in fact contracted with
Group A.

4.2.3 Agency-theory

In the United States, however, there is a more liberal interpretation of consent, and agency-
theory is perhaps most commonly cited basis for non-signatories claiming the benefits of
an agreement to arbitrate. According to U.S Restatement (Second) of Agency 1 §:

“Agency is the fiduciary relation which results from the manifestation of consent by one
person to another that the other shall act on his behalf and subject to his control, and
consent by other to so act.”\(^{77}\)

Court and arbitral tribunals in the United States therefore often contend that when parties
to an arbitration clause intend to arbitrate all disputes which might arise, their agreement
should be applied to all claims against agents or entities related to the signatories.\(^{78}\)
However, as Hanotiau notes, this is not followed in all U.S. jurisdictions to the same

\(^{73}\) ICC award in case no. 6519 of 1999; Park 2009.
\(^{74}\) Hanotiau Complex Arbitrations, p.10.
\(^{75}\) See for example: ICC final award in case no. 7626 of 1995 (Yearbook of Commercial Arbitration) 1997
1995 (van den Berg, Albert (ed)) , p. 131.
\(^{77}\) Restatement (Second) of Agency 1958
\(^{78}\) Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 1993
degree. The U.S courts do however recognize and assert the five different theories by which a party can be forced to arbitrate, if the facts of the case support it. The five theories are agency, assumption, estoppel, third-party beneficiary, and piercing the corporate veil.

According to Townsend, U.S. courts have become more restrictive in their treatment of non-signatories, compared with the decade from 1990-2000. In the case of InterGen v. Grina, which Townsend refers to as a prime example, where the claimant contended that each of the five theories accepted in American courts applied: a) InterGen was bound because of its contracting subsidiary; b) Intergen was bound because it had asserted rights as a third-party beneficiary of the contracts; c) that Intergen should be estopped from denying its obligation to arbitrate, because the claims were founded and intertwined with contracts containing arbitration clauses; and d) that Intergen should be required to arbitrate, because the contracts containing the arbitration clauses were signed by its agent.

However, the District Court found that even though the legal theories advanced by the claimant were valid bases for requiring arbitration of the dispute, none of them achieved the objective in this particular case. The court reasoned as follows:

That ‘courts should be extremely cautious about forcing arbitration in ‘situations in which the identity of the parties who have agreed to arbitrate is unclear’.... [N]o party to this case, plaintiff or defendant, is a signatory to any of the five agreements. Thus, if ALSTOM is to invoke any of the designated arbitration clauses against InterGen, it must somehow go beyond the four corners of the agreements themselves and show both that it is entitled to the agreements’ benefits and that InterGen is obliged to shoulder their burdens.

4.2.4 Good Faith and Estoppel

In several European civil law countries, the concept of good faith, apparent mandate, and ostensible authority have sometimes been used to compel a party to arbitrate. Countries such as Finland and Sweden protect parties from breaches of good faith; thus, if a party has acted as if it is party to a contract, then it is party to a contract.

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79 Hanotiau Complex Arbitrations, p. 13.
80 Townsend 2009, p. 360.
81 InterGen N.V. v. Grina, 2003
82 Townsend 2009, p. 360.
83 InterGen N.V. v. Grina, 2003, at 143.
The ICC has adopted a similar position in several cases; for example, in *ICC case no. 2375 of 1975*, where the arbitral tribunal found that despite the wording of certain clauses of the contract, company B had made a deal with group A, rather than just one company of the group. Therefore, the arbitral tribunal found that it had jurisdiction over the companies of group A.\(^8^4\) Another good example case according to Hanotiau, is *ICC case no. 5370 of 1988*, where the tribunal found it had jurisdiction over Mr. Z because, in the eyes of third parties, all the companies owned by Mr. Z form a group of companies dependent on Mr. Z and Mr. Z could not in good faith argue to the contrary.\(^8^5\)

On the other hand, common law countries often use estoppel in similar cases. In particular American courts often use estoppel to stop parties from claiming benefits of a contract without also submitting to its burdens by claiming to be a non-signatory. As with agency-theory, estoppel is an American common law invention that can perhaps be summed up as the Fourt Circuit court in the *International Paper case* reasoned:

"Equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertion of those rights contrary to equity. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him".\(^8^6\)

Thus, there is a requirement that the party that is estopped from claiming to be a non-signatory to have derived benefit from the contract containing the arbitration clause. The benefit does not have to be direct sale of goods. For example, in the *Deloitte Noraudit A/S v. Deloitte Haskins & Sells U.S.* case the use of a trade name was considered a benefit that bound the company to the arbitration clause even as a non-signing party. The courts decided that because Noraudit had failed to object to the agreement when it received it and accepted the benefits of said agreement it was a party to the agreement.\(^8^7\)

Hanotiau notes that a similar result would have occurred in a civil law court, but the legal theory would acceptance through subsequent conduct.\(^8^8\) He further argues that although estoppel is a useful theory, it has not been used in multi-contract, multi-party disputes in

\(^8^4\) Hanotiau Complex Arbitrations, p. 28.;ICC awards , p. 257
\(^8^5\) ibid p. 29;ICC awards, p. 410.
\(^8^8\) Hanotiau Complex Arbitrations, p. 26.
cases where the law applied has been continental European civil law. The reason is that it is not part of civil law tradition.\[^{89}\]

### 4.2.5 Transfers

The effects of universal or individual transfers, such as mergers, succession, subrogation\[^{90}\], transfer of contract, or transfer of debt may change the final parties to the arbitration clause. Thus, sometimes such transfers may result in multi-party arbitrations.

It is generally agreed that when X transfers to Y a contract with Z containing an arbitration clause, it is Y not X that has the right to begin arbitration proceedings against Z, as a new party to the contract and arbitration clause therein.\[^{91}\]

### 4.2.6 Conduct

A party that conducts its business as if it had consented to the arbitration agreement has implicitly consented to the agreement, under certain circumstances. As Hanotiau states, Tribunals often use conduct as a substitute for consent.\[^{92}\]

Consider the following example: A and B enter into an agreement containing an arbitration clause; subsequently, A sues B in court together with C, a non-signatory. But B and C invoke the existence of an arbitration clause to challenge the jurisdiction of the court, and the case is referred to an arbitral tribunal. The arbitral tribunal is justified in considering it has jurisdiction over C, because C has by conduct implied its consent to the arbitration agreement in court proceedings.\[^{93}\]

Conduct is a question of evidence. Courts and arbitral tribunals will only accept conduct as a sign of consent, if the involvement has been substantial, either as negotiation or performance of the agreement. This is an *e contrario* interpretation from -- for example -- ICC case no. 4972 of 1989, where the arbitrators concluded that the second defendant, part of the same group of companies, had not played a substantial enough part, so that one could deduce that the second defendant had ratified the agreement.\[^{94}\]

\[^{89}\] ibid p. 28.
\[^{90}\] See for example: Paris Court of Appeals, 1st Ch. C, 6 Feb 1997, 1997 rev. arb 556.
\[^{91}\] Hanotiau Complex Arbitrations, p. 18.
\[^{92}\] ibid p. 36.
\[^{94}\] See for example: ICC award in case no. 4972 of 1989. as cited in ibid.
The absolute requirement of a written agreement for arbitration may lead to problems, in jurisdictions such as Finland, where oral agreements are otherwise accepted.\footnote{Finnish Arbitration Act § 2} The problems arise from a situation where parties have made an oral agreement containing the arbitration clause, because the rest of the agreement valid but the arbitration clause lacks validity. As Koulu states, there might be cases where the parties are bound by the main contract, but not the arbitration clause.\footnote{Koulu 2008, p. 89.} Compare this to Sweden and Denmark, where both oral, and even silent acceptance, of an arbitration agreement may bind the parties, if there is sufficient evidence.\footnote{Madsen 2006, p. 49.} However, as noted above in Finnish Supreme Court case KKO 2013:84, a third party could be bound to an agreement he had not signed but had benefitted from, and where the dispute was on a breach of said agreement and damages of the breach.

Hanotiau notes that, the existence of a group of companies gives a special dimension to the issue of conduct or consent.\footnote{Hanotiau Complex Arbitrations, p.38.} It is a special case, which I will examine in the next part.

4.2.7 Group of companies doctrine

Group of companies doctrine originated in 1970s in France, and is one of the most prominent theories used in the extension of an arbitration agreement to non-signatories.\footnote{See for example: Hanotiau Groups of Companies, p. 279; Hanotiau Complex Arbitrations; Park 2009; and Voser & Schellenberg 2009, p. 372-374, among others.} As we will see in this part, the group of companies doctrine is controversial and while it creates a presumption that the company might be bound it does not, by itself, bind companies of the same group to arbitration agreements made by other companies of the same group of companies.

The interim award in the Dow Chemical case of 1982 is perhaps the most widely known statement of the group of companies doctrine. The arbitral tribunal stated that “the arbitration clause expressly accepted by certain companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these
contracts or to have been principally concerned by them and the disputes to which they may give rise.”

The mere existence of the group companies is not in itself sufficient to permit the extension of an arbitration agreement to a non-signatory company of the group. This was already made clear in the Dow Chemical case itself. Rather, it is more important to judge the conduct of the non-signatory party.

According to Hanotiau, the group of companies doctrine has the following principles: firstly, the question of consent to arbitration may have a special dimension when one or several companies to a complex international transaction are members of a group of companies, given the nature of relationships between companies in such a group.

Secondly, the consent to arbitrate may be implied from the conduct of a company of the group, even if they did not sign the relevant arbitration agreement. Rather, the companies’ conduct during the negotiation, performance, and termination of the agreement may be such that consent to arbitrate exists.

Lastly, Hanotiau points out that simply being part of a group of companies where one or more of the companies have signed the agreement containing the arbitration clause does not in itself permit extension to such a company. The Swiss Federal Supreme Court doctrine states that a company can become bound to the same arbitration agreement as another company of the group if the general principles of Swiss law would lead to a binding of the affiliated company.

The group of companies doctrine has become unpopular within opinio iuris in later years because, as Hanotiau states, there is a risk that the formula will be used as a “shortcut permitting avoidance of rigorous legal reasoning” that would allow the extension of an arbitration clause to a company where its conduct and the circumstances of the case have not warranted such an extension. It is quite clear that Hanotiau views the group of companies doctrine as suboptimal legal reasoning for the extension of an arbitration clause.

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100 Dow Chemical v. Isover Saint Gobain, Interim Award of 23 September 1982. The award was confirmed by the Paris Court of Appeal by a judgment of 21 October 1983, YCA IX 1984, p. 98.
101 Voser & Schellenberg 2009, p. 373.
102 Hanotiau Complex Arbitrations, p. 51.
103 Voser & Schellenberg 2009, p. 375.
104 Hanotiau Complex Arbitrations, p. 50-51.
to a non-signatory. In Finland, the group of companies doctrine has no related case law. Piercing of the corporate veil is extremely rare.\textsuperscript{105}

4.2.8 Conclusions

Clear rules on the extension of arbitration agreements to non-signatory parties are necessary, because effective dispute resolution in multi-party and multi-contract situations requires rules that bind connected parties to the process. In complex arbitral proceedings with multiple parties, the question of consent is amplified: for example, can a guarantor that has not signed the original contract be joined into an arbitration process at its request. Thus, effective rules and principles that lead to predictable results are a necessity.

There are problems with predictability, since most theories on consent are used \textit{in casu}, rather than as part of a logical system. It would be beneficial for the international commercial arbitration community to develop a common framework for consent.

As Hanotiau aptly noted, \textit{“one is sometimes tempted to wonder whether equity is not in some cases the paramount consideration, and all the legal theories that advance the final decision are ex post facto creations.”}\textsuperscript{106} In the functional study chapter I will explore how these theories influence the rules and practices at international arbitration institutions.

4.3 Enforcement

A core requirement of the binding resolution of a dispute is that the decision actually binds the parties. Enforcement of a decision means recognition in the national courts of the parties home state, because national courts can compel action by a party. Enforcement and recognition of awards are a key requirement of international commercial arbitration: without them corporations would be subject to the whims of national courts, and arbitration would be meaningless.\textsuperscript{107} In this part I will examine the requirements for enforceability and recognition in accordance with the New York Convention.

The core requirements for enforcement of arbitral awards are contained in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) that entered into force in 1959. This convention is the reason for the close to universal enforceability of arbitral awards globally. It is key part of the global arbitration system. The New York Convention provides for uniform enforcement rules in more than

\textsuperscript{105} Kokko & Merikalla-Teir 2013, Section 11.
\textsuperscript{106} Hanotiau Complex Arbitrations, p. 9.
\textsuperscript{107} Lew et al. 2003, p. 688; Varady 2009, p. 840-841.
149 countries. Therefore, parties in international arbitrations can be reasonably sure that the arbitral award will be enforceable against the other party, wherever they may be located.

The New York Convention provides for a flexible framework with regards to enforcement of arbitral awards, with few requirements that an awards must meet in order to be eligible for enforcement. According to Kurkela & Turunen, the Convention forms the core procedural rules of due process in international commercial arbitration.108

The robust enforcement mechanism rests upon Article V and Article VII. Article V limits denial of recognition to only stated reasons in the Convention. Article VII allows parties to choose the most favorable regime for enforcement, whether that is the convention itself, another treaty, or local laws.109 This allows for better co-existence between national laws and international instruments.110 Thus, van den Berg and others have said, the New York Convention has a pro-enforcement bias, and that national courts shall interpret the grounds for refusal strictly.111

The robust enforcement mechanism ensures that very few cases actually require its usage.112 A survey from 2008 found, that users of arbitration reported that only 11% of all cases required the usage of enforcement proceedings to collect awards. Less than 3% of all cases had genuine problems with enforcement. Even then, the most prevalent problem was that the opposing party lacked assets (46% of the 3%) and an even smaller minority were related to problems with the New York Convention (6% of the 3%) or hostility to enforcement of foreign awards (17% of the 3%).113

The requirements are laid out in articles II - VII in the convention. The principal grounds for non-recognition, according to Born, are: (a) lack of valid arbitration agreement or excess of jurisdiction; (b) procedural irregularities in the arbitration; (c) bias of the arbitral tribunal; (d) violation of public policy; (e) non-arbitrability; (f) lack of binding status of the award; and (g) annulment of the award in the arbitral seat.114 I will now examine these grounds for non-recognition in depth.

110 Lew et al. 2003, p. 698.
112 Redfern & Hunter 2009, p. 29.
113 Mistelis & Baltag 2008a, p. 345-347.
114 Born 2009, p. 2729; Kurkela & Turunen 2010, p. 16. Kurkela & Turunen see the main categories for requirements as the following: a) public policy, b) arbitrability, c) requirements of the arbitration agreement, d) incapacity and invalidity, e) ability to present One's Case, f) finality of the award.
4.3.1 **Validity (a)**

A valid written arbitration agreement is required for enforcement, according to Article II (1) and (2) of the New York Convention, which states that states shall recognize an agreement in writing under which the parties agree to submit their dispute to arbitration, as long as it is a matter capable of being settled by arbitration. Agreements in writing may be a specific arbitration agreement or a clause in a contract. The validity of the award also requires that it be final and not subject to conditionals.\(^{115}\)

The question is one of valid consent, which is also raised by Article V(1)(a), which gives a party the right to challenge the validity of an arbitration agreement. According to Lew et al., Article V(1)(a) and Article II are linked by the question of consent.\(^{116}\) The award binds non-signatories that have consented, but this may lead to problems with recognition in some jurisdictions.\(^{117}\)

The valid arbitration agreement gives the arbitrators the mandate to settle the dispute as well as allow the parties to exclude the application of certain laws and regulations.\(^{118}\) There are limitations with regards to public policy, arbitrability, and reasonableness. Arbitrators must respect the boundaries set by the parties, because there is no jurisdiction except that which is given in the agreement to arbitrate.\(^{119}\)

The requirement of a valid written arbitration agreement has led to problems with regards to non-signatories in multi-party and multi-contract situations. The New York Convention in its current form is not well suited for enforcement of awards with non-signatories, because of the requirements of Article II. However, the ‘most favored rule principle’ often ensures enforceability in such circumstances, because other treaties or local laws can provide for enforcement and recognition. An unanswered question that has potential to be a problem can be illustrated with the following example: Sweden which is very liberal on the question of consent, as the Swedish Arbitration Act does not require a written contract; therefore an arbitration with its seat in Sweden might run into problems in a state like Germany, where the written arbitration agreement requirement is much more strict.\(^{120}\)

\(^{115}\) ibid p. 41.

\(^{116}\) Lew et al. 2003, p. 709.

\(^{117}\) See chapter 4.2.

\(^{118}\) Kurkela & Turunen 2010, p. 25.

\(^{119}\) ibid p. 29.

\(^{120}\) Madsen 2006, p. 49.
4.3.2 Losers’ rights (b-c)

The first paragraph of Article V lists the grounds for refusal of enforcement that must be proven by the respondent. These are often called the “loser’s rights to a fair arbitration”\footnote{Lew et al. 2003, p. 707.}, because they grant national courts the discretion to reject or annul an award with procedural irregularities. Such cases can arise if the arbitrators have set aside requirements of the \textit{audi alteram partem} principle, or the right to present one’s case.

Article V(1)(a) also extends to situations where parties cannot in advance waive their rights to national courts. In the United States, for example, contracts between businesses and consumers often include arbitration clauses; however, this is not possible in countries of the European Union, where the consumer protection regulations state that, consumers are not bound by arbitration agreements agreed to before the dispute arose.

Kurkela & Turunen also state that when the situation is \textit{ultra petita} or beyond the scope of the agreement, the recognition and enforcement may be refused according to Article V(1)(c).\footnote{Kurkela & Turunen 2010, p. 20.}

According to Born, article V(1)(d) means that if the parties have agreed or consented, either in explicitly or implicitly, that consolidation or joinder are allowed, then the award can be enforced under the convention.\footnote{Born 2009, p. 2073.} Thus, if consolidation is based on the parties consent, then the convention does not provide any grounds for denying the recognition of an award. Therefore, the question of how far the rules of the arbitration institutions stretch this consent is important.

4.3.3 Public policy and arbitrability (d-e)

Public policy is a reason for refusing enforcement according to Article V (2)(b). This means awards, which are contrary to public policy of forum country may be refused enforcement.\footnote{Van den Berg 2003, p. 13.} This means a competent national authority, i.e. a court, may refuse enforcement irrespective of whether parties or the arbitral panel raised issues of public policy.\footnote{Kurkela & Turunen 2010, p. 20.} It may also be referred to as the public policy exception or \textit{ordré public}.

Fundamental principles of justice, morality, essential norms, and international obligations form the core of non-recognition on grounds of public policy. Courts apply public policy
exceptions *ex officio*, regardless of parties’ acts or omissions. Thus a failure raise grounds for a public policy exception during arbitral proceedings does not bar their usage in recognition proceedings, according to Kurkela & Turunen.126

The European Court of Human Rights (the “ECHR”) has on several occasions stated that the very essence of due process rights guaranteed by the European Convention on Human Rights cannot be waived in the course of arbitral proceedings, and this is grounds for quashing awards.127 Kurkela & Turunen have noted, that essential norms or mandatory public policy should bar recognition and enforcement only when (a) the scope of the rule is intended to encompass the situation at hand; or (b) the recognition or enforcement would clearly disrupt vital, political, social, or economic interests protected by the rule. The violations should furthermore be essential rather than minor.128

Arbitrations must concern matters that are capable of settlement through arbitration. Article V(2)(a) of the New York Convention allows competent national authorities to refuse recognition of an award on a subject matter that is not capable of settlement through arbitration. There are several types of disputes where arbitrability differs between signatory states. Unlike the United States, the European Union states forbid mandatory arbitration agreements in advance between companies and consumers. There has been some discussion on competition policies in the European Union and whether breaches of these policies could be subject to arbitration;129 however, the general consensus is that they cannot be subject to arbitration, as it is a question of jurisdiction. Indispositive issues cannot be arbitrated, because in such cases, the parties cannot cede the jurisdiction of national courts to the arbitration tribunal.

The effectiveness of arbitration as a means of resolving disputes is fundamentally tied to the possibility of enforcing those awards against the loser in a foreign jurisdiction. Arbitration is pointless without enforceability.

126 ibid p. 23.
4.4 Due process

The core due process requirements in arbitration come from Article V of the New York Convention, which allows parties to raise objections in front of a national court if there have been grave procedural irregularities in the arbitration process. The courts may then refuse recognition or annul the award.

The core of due process are principles of neutrality and equality-at-arms. In this subchapter I will expand upon these fundamental due process requirements in the context of multi-party arbitration.

Neutrality is always at the top of reasons for choosing arbitration to international litigation. International arbitration is chosen, because it allows parties to choose neutral rules and a neutral place for the adjudication of disputes, and certainty that awards can be enforced. Neutrality is a negative right and equality-at-arms, as we will see, is a positive right of parties.

I will first deal with the neutrality of the forum; thereafter the arbitrators; and finally the process itself.

4.4.1 Forum

Parties to international contracts come from different countries and legal systems. Therefore, they want to submit their disputes to a neutral third party for adjudication, rather than a foreign court with unfamiliar rules, language and laws. National rules have not been created with international commerce in mind, whereas international commercial arbitration exists to serve the needs of international commerce.

A dispute concerning an international agreement without an arbitration clause may find parties having to commence proceedings at a foreign court, employ unfamiliar lawyers, translate documents, and use resources and time in a system they do not properly understand. Parties also fear local judges’ predisposition to finding for the local party.

Arbitration clauses in international commerce can be analogous to an insurance policy. Should a dispute arise, both parties can be reasonably sure that they are not unfairly disadvantaged. Parties can rarely escape all local laws, because both the rules of the seat (lex arbitri) and the due process guarantees play a role in the procedural rules, as well as in

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130 Bühring-Uhle 2006, p. 31
131 Redfern & Hunter 2009, p. 31-32.
132 ibid p. 32.
the proceedings to have awards annulled or recognition refused. So parties may still find themselves in the jurisdiction of a foreign court, trapped within a foreign legal system.

Parties should pay attention to the rules of the arbitration institution and seat of arbitration, especially when concerned with multi-party and multi-contract arbitration agreements, since the rules vary considerably at this time.

### 4.4.2 Arbitrators

Selecting one’s own arbitrator is a core right of arbitration. Multi-party arbitration situations limit this right to safeguard neutrality and equality-at-arms. Parties can agree upon the number and selection of arbitrators’ freely in the arbitration agreement. The most common number of arbitrators is either one or three, which is stipulated by almost all arbitration institution rules.

The appointment of arbitrators was considered a difficult issue with regards to multi-party arbitration proceedings.\(^{133}\) The reasons can be found in the famous DUTCO case and the decision of the French Court of Cassation in 1992.

The DUTCO case was an arbitration process regarding the construction of a cement factory. The construction agreement contained an ICC arbitration clause with a three-member arbitral tribunal. Dutco initiated the arbitration against BKMI and Siemens. The ICC Court asked BKMI and Siemens to jointly nominate an arbitrator, which they did under protest. The arbitral tribunal ruled that it had jurisdiction, and a lower court in Paris confirmed this decision. However, the French Court of Cassation held that a joint appointment violated Siemens’ and BKMI’s right to equal treatment, overturned the decision on the basis that the right to equal treatment was part of public policy. This meant that the right of each party to appoint its arbitrator could not be waived in advance.\(^{134}\)

The ICC was the first institute to provide for a mechanism whereby the parties to each side were bound to agree on an arbitrator. If they failed to do so, the institution would appoint all the arbitrators. The rationale behind these rules is obvious: if the institution appoints all the arbitrators of a tribunal, then all parties have been treated equally.\(^{135}\) Other international arbitration institutions followed the ICC’s lead and enacted similar rules.\(^{136}\)

\(^{133}\) See for example: Voser & Schellenberg 2009, p. 361.

\(^{134}\) For a more detailed overview of the DUTCO case see for example: Schwartz 1993, p. 5.


\(^{136}\) See for example: Article 12(6)-12(8) of the ICC Rules; and Article 19 of the FAI Rules.
Born argues, that the selection of all arbitrators by the neutral appointing authority does the least violence to the principles of equal treatment of parties.\(^{137}\) However, as Voser \textit{et al.}, point out, this requires an assumption that the French court went too far in the DUTCO case by calling it a public policy issue and that institutional rules, which amount to an advanced waiver, are valid.\(^{138}\)

Arbitration institutions have chosen slightly different extents to which their rules expand party consent on the matter of appointment of arbitrators in multi-party situations. The ICC, FAI, Swiss, and HKIAC rules all state that the institute may appoint all the arbitrators if parties are unable to agree upon the selection of arbitrators.\(^{139}\) This leaves the appointment at the discretion of the arbitral institute. Other arbitration institutions have adopted a stricter approach: the SCC, ICDR, CEPANI, and LCIA arbitration institution rules all state that in a situation where parties are unable to agree upon the selection of arbitrators, the institute shall appoint all the arbitrators.\(^{140}\) In Finland the courts can appoint arbitrators if the parties are unwilling or unable to reach an agreement on the arbitrators.\(^{141}\)

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\textit{Table 1: Appointment of arbitrators (Source: Author)}

The ICC Court has in the past confirmed the claimants’ appointment and only appointed a co-arbitrator for the respondents, rather than appointing all of the arbitrators. The ICC first puts parties on notice that it may resort to appointing the arbitrators unless parties can agree, which often leads to parties agreeing on an arbitrator.\(^{142}\) It is clear that the ICC has on occasion used the flexibility of its rules to appoint only one party’s arbitrator.

Voser \textit{et al.} recommend that arbitration institutions open their policies and broaden their acceptance of multi-polar arbitrations, and allow for the appointment of more than three arbitrators if necessary.\(^{143}\)

\(^{137}\) Born 2009, p. 2099.
\(^{139}\) Article 12(7) of the ICC Rules; Article 19(e) of the FAI Rules, Article 6(5) of the HKIAC Rules; and Article 6(5) of the Swiss Rules.
\(^{140}\) Article 13(5) of the SCC Rules; Article 6(5) of the ICDR rules; Article 15 (5) of the CEPANI rules; and Article 8(1) of the LCIA rules.
\(^{141}\) Finnish Arbitration Act § 15.
\(^{142}\) Voser & Schellenberg 2009,p. 363; Whitesell & Silva-Romero 2003, p. 11-12.
\(^{143}\) Voser & Schellenberg 2009, p. 364.
The right to select one’s arbitrator is important, and removing that right, even if it is necessary, is a disadvantage for multi-party arbitration proceedings. The arbitration institutions should expand their rules to allow for more input by the parties in the process of the selection of arbitrators. The perceived quality of the arbitration is directly related to quality of the arbitrators.

4.4.3 Procedural guarantees

The due process rights of the parties must be guaranteed throughout the arbitration process otherwise the award will not be final. Most exceptions to the finality of the arbitral award are based on basic procedural guarantees not being respected.\[144\]

The essences of the due process requirement is the *audi alteram partem* maxim, which means that each party shall have be given the possibility to present its’ case from its’ own point of view and bring all the relevant evidence in support of its’ position before an impartial arbitrator, who leads the process.\[145\]

Multi-party proceedings are not exempt from procedural guarantees, although such proceedings may place more demands on the arbitrators, the basic demands of due process must be met: parties must have an opportunity to make submissions, and comment on the submissions of other parties. Inadequate opportunities to present ones’ case may lead to annulment of awards.\[146\] The parties’ core rights of due process are not waivable.\[147\]

“In managing the procedure, the key element is the equal treatment of the parties, which is a due process requirement and part of lex proceduralia. The tribunal has to make certain that it does not act in a way that would result in an objective impression of bias whether or not the tribunal was actually biased. In addition, all the parties have to be given an equal and sufficient opportunity to present their case. Finally, the tribunal should work toward a correct result.”\[148\] It is important to make sure parties’ submissions are distributed to all parties involved effectively and without delay.\[149\]

I will now expand upon the most prevalent recurring categories of procedural unfairness claims: Introducing a new claim at the last minute without affording the counter-party an

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144 The other main question answered by the courts is whether someone is party to an arbitration agreement or bound by it.
145 Kurkela & Turunen 2010, p. 38.
146 Born 2009, p. 2572-2573.
147 ibid p. 2574.
149 Ovaska 2007, p. 78-79.
adequate opportunity to respond is a basis for annulling the award. However, arbitrators are allowed substantial discretion.\textsuperscript{150} Institutional rules, or agreement by the parties, may limit this discretion.\textsuperscript{151}

Equality of treatment means that each party must be given an opportunity to present its case. For example, if an arbitral tribunal only presents one of the parties with the opportunity to address an issue, submit evidence, or otherwise present its case, then the case is subject to annulment.\textsuperscript{152} The guarantees are not exact and tribunals are afforded considerable discretion.

Failure to permit a party to present its arguments or evidence is a fundamental procedural guarantee in arbitration, and recognized by most legal systems. In Finland § 22 of the FAA states “the arbitral tribunal shall give the parties a sufficient opportunity to present their case”. This is the principle of equality-of-arms, meaning the right to examine opponents’ submissions, make observation upon them, and refute them with the parties’ own submission and offers of evidence. The discretion given the tribunal on matters of evidence is broad, and makes annulment on this ground very unlikely.\textsuperscript{153}

The refusal to hold a hearing (specifically, an oral hearing) at the request of one of the parties can be a denial of that party's opportunity to be heard. However, the arbitrators are allowed significant leeway in determining the need for hearings on issues that arise in arbitration.\textsuperscript{154}

According to Born, parties sometimes seek to annul arbitral awards on the grounds of scheduling decisions by the arbitral tribunal that negated their right to present their case, by (for instance) preventing the attendance of a witness, granting less preparation time than requested, or providing the opponent more time to respond.\textsuperscript{155} The tribunals generally have a lot of discretion, but if the tribunal grants a significant and unjustified advantage to one party, then the award is vulnerable to annulment.

\textsuperscript{150} Born 2009, p. 2581.
\textsuperscript{151} See for example: ICC Rules Article 23 (4) ibid p. 2581.
\textsuperscript{152} Ibid p. 2581.
\textsuperscript{153} Hober 2011, p. 330; Ovaska 2007, p. 263.
\textsuperscript{154} Born 2009, p. 2581; Kurkela 2004, p. 223.
\textsuperscript{155} Born 2009, p. 2582.
Procedural objections can be waived in some circumstances. Many institutional rules state that, unless parties raise procedural objections promptly, they are deemed to have waived the right to do so.\textsuperscript{156}

Multi-party situations require more attention to be paid to the arbitration process. Specifically the equal treatment of parties requires more organized process leadership. Submissions and comments by parties must be directed properly, so that all parties can comment on all the other parties’ submissions. Ensuring that parties are able to present their cases in a complete manner, but still keeping the process from becoming too time consuming. Kurkela & Turunen remark, that it is very important to put all parties on notice and give them reasonable opportunity to present their views, defenses, or claims in multi-party situations.\textsuperscript{157}

\subsection*{4.4.4 Lis pendens and res judicata}

Arbitral tribunals, and courts, decisions are subject to rules of preclusion. A court shall not examine a case that concerns a dispute with a valid arbitration agreement.\textsuperscript{158} The inverse is also true and the rules of preclusion are part of the applicable law, which arbitral tribunals must apply. Basic preclusion rules are part of public policy in most countries. Courts in Switzerland, the United States, France, Sweden, and others have annulled awards due to preclusion.\textsuperscript{159} In Finland the FAA does not contain any specific rules on the subject of preclusion, but general procedural rules apply, and arbitrators must examine such claims, if made by parties.\textsuperscript{160}

There are two main rules of preclusion that are part of public policy: 1) finally settled disputes cannot be refought in a different forum, this is often called ‘\textit{res judicata}’; 2) if a dispute has been raised in one competent forum it cannot be raised at the same time in another forum, this is called ‘\textit{lis pendens}’.

If two parties have commenced arbitration on the same matter, the one that was commenced first has a \textit{lis pendens} effect on the second. The situation is more complicated when there is a court case and an arbitration case pending on the same matter. Lindskog states that the existence of a court case should not hinder the commencement of arbitration,

\begin{itemize}
  \item \textsuperscript{156} Kurkela & Turunen 2005, p. 191-193.
  \item \textsuperscript{157} Kurkela & Turunen 2010, p. 82.
  \item \textsuperscript{158} See for example: Möller 1997, p. 31.
  \item \textsuperscript{159} Born 2009 p. 2915; Hober 2011, p. 318.
  \item \textsuperscript{160} Ovaska 2007, p. 189.
\end{itemize}
by itself. A court case on the existence of, or consent to, an arbitration agreement should have a strong preclusion effect. Should a competent court decide there is no agreement or consent, the arbitrators will lack jurisdiction and any arbitral award will be unenforceable, according to Born. It is unclear, whether arbitral tribunals are obliged to examine *lis pendens ex officio*. Lindskog argues, that they should only examine *lis pendens or res judicata*, if a party raises such a claim.

However, the strength of preclusion rules are muddled when dealing with matters, such as the scope of an agreement, termination, or waivers. If an arbitral tribunal concludes that a prior jurisdictional decision is incorrect, or rests on non-arbitrability, or public policy, the tribunal may properly reach a different conclusion, according to Born. In provisional measures the *res judicata* effect should be strong and parties should not be permitted to seek the same measures multiple times.

Arbitral tribunals have developed their own *sui generis* international preclusion principles, according to which, the binding effect of the first award is inclusive the contents and extends to the legal reasons for the award, i.e. the *ratio decidendi*. However, *res judicata* is often given a much narrower scope in arbitration proceedings, binding only the two exact parties in this exact dispute. In multi-party and multi-contract situations this may lead to problems with conflicting decisions, between arbitral tribunals in the same economic transaction or legal relationship. If the arbitral tribunal, against the wishes of any party, reconsiders an issue that has been competently decided by court or arbitral tribunal, the award may be subject to an annulment claim.

*Lis pendens* is not readily applied to international arbitration, because it rests on the presumption that there are two competent forums to which a dispute may be referred. Rather international arbitration contends that the only competent forum is the one mentioned in the arbitration clause. However, jurisdictional objections to national courts should have a *lis pendens* effect on the arbitral tribunal. Lindskog aptly notes, that there

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161 Lindskog 2012, p. 553.
163 Born 2009, p. 2920.
164 Lindskog 2012, p. 553
165 Born 2009, p. 2926.
166 ibid p. 2932.
167 ibid p. 2917.
168 Lindskog 2012, p. 553.
may be significant issues of what preclusion effect a ruling in a foreign court, which may or may not be recognized, should have on an arbitration process in another country.\textsuperscript{170}

The same dispute between, two same or effectively same, parties that is pending at different arbitral tribunals under the same institute gives rise to \textit{lis pendens}. An example of such a case is where two bilateral investment treaty tribunals considered almost identical claims for expropriation against the same state respondent by an individual entrepreneur and an investment vehicle. One of the tribunals was requested to suspend proceedings pending an award in the other, on the grounds of \textit{lis pendens}. The request was denied, because the treaty does not deprive one claimant of jurisdiction if it is granted another under the treaty.\textsuperscript{171} \textit{Lis pendens} should be applicable in multi-party proceedings, since it would increase legal certainty and decrease conflicting decisions.

Right now parties may strategically plan to use the possibilities that lack of preclusion rules presents them, by trying essentially the same dispute several times, until they find a tribunal that decides in a favorable way. This so-called “multi-shot” arbitration should be discouraged.

As we have seen in this subchapter, a just process is the best guarantee for valid awards. In the following subchapter, I will deal with speed and efficiency of the arbitral process.

\textbf{4.5 Efficiency}

It is regarded as common knowledge that arbitration is faster and more efficient than international litigation. This perception of efficiency exists because arbitrators can start work immediately\textsuperscript{172}, and the decision is final and binding, with no right of appeal.\textsuperscript{173} This efficiency principal is a reason why arbitration is often chosen as a means to resolve disputes.\textsuperscript{174}

However, recent developments have lead some to conclude that international commercial arbitration can no longer be characterized as ‘fast’, because typical disputes take between 18 to 36 months to resolve. Interestingly, the FAI states that the average times to resolve a dispute in Finland is 9 months.\textsuperscript{175}

\textsuperscript{170} Lindskog 2012, p. 555
\textsuperscript{172} Heuman 2012, p. 28.
\textsuperscript{173} Moses 2012, p. 3.
\textsuperscript{174} Mistelis & Baltag 2008b.
\textsuperscript{175} http://arbitration.fi/en/statistics/
Increasing the complexity of the arbitration increases the time required for its resolution. This leads to an interesting question with regards to complex arbitrations -- namely, whether a complex processes with more parties is in aggregate, more efficient than several simpler proceedings. The answer will vary according to the situation and should be considered in casu. Multiple parties in an arbitration means there is more work for each party, and the arbitrators, because submissions, comments on others submissions, hearings, and submitting evidence take significantly longer.

Smaller parties are therefore less likely to accept consolidation into a larger dispute, because the whole dispute will likely take longer to resolve, than the smaller party’s simple case. Larger parties may also decline consolidation, because they view their position as tenuous and prefer to have a multi-shot situation, where they perceive themselves as able to win at least some of the cases.

Parties strategic behavior in these circumstances, which is in their self-interest, is detrimental to the efficiency of international commercial arbitration as a whole, in cases where the aggregated case, would be more efficient than several parallel or serial cases.

4.6 Cost-effectiveness

Earlier arbitration was universally perceived as cost-effective for users. Recent surveys show that corporations no longer consider cost-effectiveness a feature of arbitration (over 50% of respondents in a 2006 survey answered that cost-effectiveness is not a feature of arbitration). Cost-effectiveness is directly related to the legal costs of arbitration users.

International commercial arbitration is an expensive process, because parties are required to pay the arbitral institution and arbitrators, in addition to, their own legal costs, as well as logistical expenses, which can amount to substantial costs for all involved parties. Moses further argues that, as the stakes have grown in international commercial arbitration so have the parties begun using litigation tactics, which tend to raise costs, create delays, and increase the adversarial nature of the process. Born argues, that arbitration is more expensive than litigation in many cases. Most of the costs of arbitration are related to legal expenses of parties, rather than fees of institutes or arbitrators. This requires being mindful of procedural bloat, which occurs when processes become too big to be handled properly.

177 Moses 2012, p. 4.
The other advantages -- including lack of appellate courts, procedural disputes, and legal uncertainty regarding enforceability -- are still significant enough to make arbitration appealing.\textsuperscript{179} Users of arbitration would welcome developments, which would make arbitration cheaper for the users. Multi-party arbitration mechanisms may be able to enhance the cost-effective resolution of certain types of disputes.

4.7 Conclusions

Applying the general principles of international commercial arbitration to multi-party and multi-contract proceedings is necessary, but not straightforward. Mechanisms allowing for consolidation, and third party participation may be necessary for fair, efficient, and economical commercial justice. Increased procedural efficiency and cost effectiveness must not come at the cost of parties rights of due process, meaning neutrality and equality.

To summarize, increasing effectiveness of complex arbitration proceedings must be mindful of fairness above all else. Without fairness there can be no effective arbitration. Fairness means that all core due process requirements are respected for all parties involved. Arbitral institutions must ensure that parties are dealt with in a neutral and equal manner when appointing arbitrators. Arbitrators must keep within their jurisdiction and allow each party to present its’ case. Multi-party and multi-contract mechanisms should not hinder fairness, but rather enhance legal certainty, for example, in cases where parties have multiple disputes; the same arbitrators should adjudicate them all.

Efficient international commercial arbitration safeguards enforcement and recognition foremost, and within reason endeavors to increase the efficiency of the process. Increasing efficiency in multi-party and multi-contract situations by bringing all relevant parties into the same process, when aggregate efficiency requires, as long as there is consent. Ensuring that parties have consented to the arbitration agreement is very important in cases where there are non-signatories involved. The arbitral institutions should also endeavor to begin arbitration as soon as possible, by nominating and confirming arbitrators within a reasonable time.

Ensuring fairness and promoting efficiency safeguards cost effectiveness, because the costliest proceeding is one that leads to no results, i.e. the award is annulled or not recognized. That being said any action that arbitrators or arbitral institutions can undertake to minimize procedural bloat and empty time periods should be taken. In multi-party and

\textsuperscript{179} ibid p. 86.
multi-contract cases this means that arbitrators should draw up a plan for the process as well as fix submission, and comment timetables as soon as possible.

It is also important to take note of the problems related to *res judicata*, and *lis pendens* in multi-party and multi-contract situations, because parallel proceedings and inconsistent verdicts can be a problem, due to the way arbitral institutes interpret them. Institutions must be at the forefront, because parties strategic interest when the dispute has commenced is not beneficial for arbitration as a whole.

The next chapter will study the multi-party mechanisms at international arbitration institutions in the context of the principles developed in this chapter.
5 Study on multi-party mechanisms

5.1 Introduction

“From a broader perspective, many cases reveal that consolidation or joinder may be the only adequate means of achieving the ultimate goals of arbitration: fair, efficient, and economical commercial justice.” - Thomas Stipanovic.\textsuperscript{180}

The aim of this chapter is to examine, systematize, and compare, in a global perspective, the multi-party rules enacted by the five studied arbitration institutions. The rules studied are those dealing with consolidation, joinder, and intervention. For the purpose of this study I will assume that the \textit{lex arbitri} or seat of arbitration is the same as the home country of the institution. The rules which create multi-party mechanisms differ in scope, theoretical background, and effects.

The rules of arbitral institutions create mechanisms that can be employed in specific circumstances. The arbitral institutions surveyed are the ICC, FAI, HKIAC, SCC, and SCCAM. Although the rules are similar there are key differences between the mechanisms created. This chapter will showcase some of the key differences and similarities of the rules at the studied arbitral institutions, and attempt to assess whether they enhance. I will also critically analyze the mechanisms chosen.

There are two distinct writing techniques employed at the surveyed arbitration institutions: first, the ICC, FAI and HKIAC write exact and in-depth rules, which aim to give a high legal certainty to readers of the rules, meaning that it is easier to know the effects of the rules in advance. The second, used at the SCC and SCCAM is generalist, which means a preference of open clauses that give the institution and arbitrators more flexibility to interpret the exact contents of the rules on the basis of the situation at hand.

The chapter is divided into two parts: the first, deals with joinder and intervention, and the second part deals with consolidation. In both parts the ICC rules are explained first and used as a reference point, and then compared to the other institutes rules. The ICC Rules changed substantially on 1.1.2012 to include, among others, multi-party procedural rules on joinder, and consolidation. The new rules are a result of many years of revision and planning.\textsuperscript{181} The ICC's rules are used as a benchmark against which other institutions' rules are compared.

\textsuperscript{180} Stipanowich 1987, p. 500.
\textsuperscript{181} Berger & Robertson 2011, p. 145.
rules will be compared, because the ICC is the oldest and most popular international arbitration institute. The analysis is functional in nature and based upon the rules themselves and other available material, such as handbooks and guides by the institutes, or parties close to the institutes.

5.2 Joinder and intervention

Joinder is simply a request for arbitration, containing a claim against a new party that should be added to an arbitration that is already in progress, by an existing party to that arbitration process. Intervention is a request for arbitration by a third party wishing to be added as a claimant into an existing arbitration process. Both requests for arbitration are received by the secretariat of the arbitral institution and subject to the requirements set forth in the institutes rules either accepted or declined.

The rules that create the mechanisms of joinder and intervention are largely inspired by procedural rules for courts in most countries. National courts almost always have the ability to join additional claimants or defendants to cases, if their claims are compatible and procedural efficiency is enhanced. In Finland, for instance, the procedural law allows similar claims between connected parties, and even other claims or parties (if deemed appropriate for the solution of all claims) to be joined.\textsuperscript{182} Other countries have similar procedural rules. The joinder and intervention mechanisms are transplants of this mechanism to international commercial arbitration.

The general procedure for joinder and intervention is as follows: a party that wishes a third party joined or a party that wishes to join an arbitration in progress submits a request for arbitration to the institution that has a specific format. These are called either request for joinder or request for intervention. Thereafter, the institution examines the request and allows the new party to enter the arbitration in progress, if it fulfills the requirements set forth in the institutions rules. The request requires certain information, such as identification of the case already in progress, a copy of the arbitration agreement, contact details, etc.\textsuperscript{183}

\textsuperscript{182} The Finnish Procedural Law 18:1-7
\textsuperscript{183} See for example Article 10.4 of the FAI Rules; Articles 7(2) and 4 (3) c,d,e,f of the ICC Rules; Article 27.4 of the HKIAC Rules; The request for joinder should contain the following information: 1) Identification of the existing case e.g. case number; 2) The names and contact details of the parties, including the additional party; 3) Identification and where possible a copy of the arbitration agreement under which the dispute is to be settled; 4) Identification of any contract, other legal instrument or relationship from where the dispute against the additional party arises; 5) a description of the nature and circumstances of the dispute giving rise to the claims against this additional party; 6) Where claims are made under more than one arbitration
If the request for joinder or the request for intervention is accepted, then the arbitral institute must revoke possible nominations of arbitrators and nominate new ones, unless all parties consent to already-nominated arbitrators. This means that arbitral institutes have implemented strict timing for these requests, since institutes will not revoke nominations of arbitrators, unless it is absolutely necessary. The ICC, for example, limits requests for joinder to before the case has been transmitted to the arbitral panel for this reason.

The chief difference between joinder and intervention is information availability. In joinder, a party already privy to all the information of the case requests for a new party to be added. In intervention, the third party must have learnt of the arbitration in progress and wish to join. Therefore, in practice, intervention requests are made by third parties close to the original parties.

Joinder and intervention help to lessen the problems of *lis pendens* and *res judicata*, since they allow for all parties to be involved in the same process, rather than leading to parallel processes.

**5.2.1 Typical cases**

A typical joinder or intervention dispute is a dispute regarding a joint-venture agreement, where A, B, and C are all party to the same agreement, which contains an arbitration clause. If one party brings a claim against another in this type of contractual system, it may be expedient to bring the third party into the same procedure. The parties have all consented to the same arbitration agreement, therefore they can be deemed to have consented to having all their claims dealt with in a single proceeding if the arbitration clause is compatible.

Another typical case for joinder is as follows: A contracts with B, and on the same day separately with B's parent company C, which issues a guarantee for B's obligations towards A. If all contracts contain compatible arbitration clauses, then if A sues B and B denies responsibility, A will seek to have C joined into the proceeding. The arbitral tribunal must determine whether it has jurisdiction, and -- if so -- whether C should be joined, because of procedural efficiency and *lis pendens*.
A typical example case of intervention being required is if A, B, and C are co-owners of company D, whose bylaws contain an arbitration clause. If a dispute arises between A and B regarding the company, and the dispute is to be settled through arbitration, then the company D and/or co-owner C will both become aware of the arbitration in progress, and may have grounds to intervene to protect their interests.

5.2.2 Study of rules and practices

I will begin with mechanisms that allow for joinder, and thereafter deal with mechanisms that allow for intervention. All of the institutes have mechanisms in place for joinder. The Article 7 (1) of the ICC Rules states that a party wishing to join an additional party shall submit its request for arbitration against the additional party to the secretariat. The date when the request is received is the date that the arbitration has commenced against the additional party. This means that *lis pendens* effects also begin the day the request is received by the secretariat. This is interesting, because parties to be joined might not have been informed of this request until later. Joinder requests are also subject to the same provisions as normal arbitration requests.184

The ICC has simplified its joinder request process, so that it is identical with a normal arbitration request. This means that parties are on equal footing, since the rules no longer make distinctions between claimants and respondents requesting third-party joinders. The secretariat may fix a time limit for the submission of joinder requests. No additional parties may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the party to be joined, otherwise agree.185 Any one or several parties to arbitration may request a joinder of an additional party.186

Article 10.1 of the FAI rules allows parties to pending arbitrations, wishing to join additional parties to the arbitration, to submit a request for arbitration against the additional party to the secretariat. This is identical with the ICC Rules.

The FAI rules imposes a strict time limit for joinder requests by mandating that such requests, shall at latest be submitted to the institute before the transmission of the case file to the arbitral tribunal.187 Failure to comply with this strict deadline will result in dismissal of the request for joinder, unless all the parties to the arbitration, including the additional parties.

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184 At least Articles 6(3) - 6(7) and 9 of the ICC Rules.
186 ibid, para. 3-293
187 Article 10.2 of the FAI Rules.
party, agree to the joinder and accept the confirmed arbitrators. In comparison with the ICC Rules, the FAI would allow joinder after nomination of arbitrators, but before the transmission of the case file, meaning at a later time. In practice, a request for joinder is unlikely to succeed after any arbitrator has been nominated, because rescinding such a nomination is a significant measure, which the secretariat is unlikely to consider unless there are exceptional circumstances.\textsuperscript{188}

The FAI secretariat considers that parties to the same contract have consented to a single proceeding if that contract contains an FAI arbitration clause. This means that additional parties to the same contract can often be joined into the same proceeding. However, there are limitations regarding vertical contractual relationships, in which Savola notes that parties cannot be deemed to have consented in advance to having all disputes handled in one proceeding.\textsuperscript{189} An example of such a case is as follows: owner A sues main contractor B of a building project, and B seeks to join subcontractor C to the proceeding. The joinder request will be denied, because although they are both part of the same economic transaction, the legal relationship is distinctly different. Unless, there is explicit or implicit consent, either through the actions of the owner, or if the owner has signed the subcontractor agreement, then C cannot be joined into the arbitration. An example of a permissible joinder request is a case where A and B have entered into an agreement containing an arbitration clause, and B and bank C have on the same day signed a separate guarantee agreement relating to the main contract and containing a compatible arbitration clause.\textsuperscript{190} In comparison, the ICC Rules would likely lead to the same result; however, the Swiss Rules might lead to a very different result.

The HKIAC Rules gives the tribunal power to allow additional parties to be joined to the arbitration in progress, if they are bound by an arbitration agreement under the HKIAC rules.\textsuperscript{191} Furthermore, the tribunal has the power to decide on any question of its own jurisdiction.\textsuperscript{192} The HKIAC allows both joinder and intervention. This is the main difference between the ICC and HKIAC rules.

Requests for arbitration against additional parties shall be submitted to the HKIAC. The time limit imposed by the HKIAC Rules is the confirmation of the arbitral tribunal; if a

\begin{footnotesize}
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\item[\textsuperscript{188}] Mika Savola, ‘Speech at the Helsinki International Arbitration Day 2013: Overview of the New Rules’ (2013)
\item[\textsuperscript{189}] ibid
\item[\textsuperscript{190}] ibid.
\item[\textsuperscript{191}] Article 27 of the HKIAC Rules.
\item[\textsuperscript{192}] ibid. Article 27.2
\end{itemize}
\end{footnotesize}
third party is joined into an arbitration in progress all parties will be deemed to have waived their right to designate an arbitrator, and appointments can be revoked. In such circumstances, the HKIAC shall appoint the arbitral tribunal. There are several key differences between the HKIAC rules and ICC rules regarding timing and arbitrator selection. The HKIAC Rules do not see revocation of an appointment as an extreme measure to be used only in exceptional circumstances; thus, in practice, the timing of requests for third party participation to the HKIAC is less crucial. However, it must happen before the arbitral panel is confirmed and the case is transmitted. Joinder and intervention can be allowed after the panel has been confirmed if all parties unanimously consent to such a measure.

Article 4(2) of the Swiss Rules state that, where one or more third persons request to participate in arbitral proceedings already pending under these Rules, or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances. The contrast between the ICC and Swiss Rules is stark, because they are written in a completely different way. I will now explain some of the key differences.

The Swiss Rules use the word ‘person’, instead of ‘party’, because the rules make no distinction on whether an entity is a party when their entry into the arbitration is requested. It may even be the case that they will never become party to the arbitration, even if a request has been submitted and approved. The Swiss Rules are not a binary system, but rather accept different types of participation. Commentators contend that this wording is meant to allow for “side interventions”, such as amicus curiae briefs.193 The Swiss Rules intend to cover a full spectrum of potential third-person participation. This is clear, because persons need not be joined as parties nor do they necessarily need to be part of an arbitration agreement to participate.194 Commentators have also noted that selecting the Swiss Rules in an arbitration clause means giving consent to a wide variety of third-person participation in the arbitration proceedings.195

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193 Habegger 2012, p. 278.
194 ibid p. 279.
As Voser notes, joining of third parties without existing parties’ consent should happen only if “the balance between the party refusing and the party requesting joinder is clearly in favor of the requesting party”. The rules intend to grant the arbitral tribunal maximum flexibility when deciding on joinder requests by parties or third persons.\(^\text{196}\)

In comparison, the ICC Rules and secretariat’s guide unequivocally states: “Secretariat is not even in a position to acknowledge the existence of an arbitration, much less entertain a request for intervention”\(^\text{197}\) The ICC and Swiss Rules strike a different balance between confidentiality of the parties and efficiency of the process: the ICC stands on the side of confidentiality at the cost of efficiency, whereas the Swiss Rules give arbitral tribunals more possibilities to enhance efficiency and legal certainty, but may infringe on confidentiality of the parties.

The SCC Rules contain no specific rules on joinder and intervention. However, Lindskog maintains that subject to the consent of all the parties, a third person may enter into the arbitration proceedings. This consent may be given in advance as part of the arbitration agreement, or during the arbitration process.\(^\text{198}\) Thus, it follows that with unanimous consent, a third person may join the arbitration process in Sweden. The SCC Rules do not contain specific consent to multi-party arbitration mechanisms; therefore only unanimous consent of all parties allows joinder or intervention. The difference between all other surveyed institutes is stark, because they have all adopted rules that expand parties’ consent in these matters.

Other institutes such as the LCIA and CEPANI also have rules on joinder, but they are not part of this examination. However, article 22.1 of the LCIA Rules is interesting, because it allows the Arbitral Tribunal the power, by application or on its own, to allow third parties to be joined in the arbitration. The interesting part is that the LCIA does not require a compatible arbitration agreement, or an agreement between all parties; it is enough that an agreement exists between the party requesting joinder and the new party. This provision is one of the most disputed in the LCIA Rules.\(^\text{199}\)

To summarize joinder is less controversial and is permitted at most institutions until the arbitrators are confirmed, or the case is transmitted to the arbitral tribunal. Thus, timing is key for parties wishing to have third parties joined into an arbitration in progress. The

\(^{196}\) ibid p. 395.
\(^{197}\) ICC Secretariat’s Guide, para. 3-294.
\(^{198}\) Lindskog 2012, p. 563-564.
\(^{199}\) Voser & Schellenberg 2009, p. 397.
earlier the request is made, the more likely it is to succeed at all the examined institutes. Institutes are unlikely to rescind appointed arbitrators, unless there are exceptional circumstances. This means that the practical time limit for joinder requests is the confirmation of arbitrators, whether or not the rules of the institute say differently. Unanimous consent of all parties involved allows joinder at later stages of arbitration proceedings.

Intervention is more contentious and is clearly a question of efficiency at the cost of confidentiality. The HKIAC and Swiss Rules allow for third-party intervention. The HKIAC is more restrictive, because intervention is allowed only for potential parties. The Swiss Rules allow for a wider range of third-person participation.

There is an interesting semantic debate to be had in the Swiss Rules refer to “third-person participation”, as opposed the the other institutes reference to third-party participation. There is a clear difference in the restrictiveness of the choice of words. Person’ refers to the public at large, as well as potential parties; conversely, ‘party’ only refers to potential parties, i.e. those that have consented to the arbitration agreement.

I will now move on to a deeper analysis and a discussion on conclusions that can be reached from this examination.

5.2.3 Discussion on findings and conclusions

Joinder and intervention are mechanisms for allowing third persons to participate, or become a party to, an arbitration in progress or about to commence. The principle of bringing together all the relevant parties to a dispute enhances efficiency of dispute resolution. It can also make it fairer towards the parties themselves. Joinder is accepted at four of the five institutes studied and intervention is accepted at two institutes. I have identified four standard requirements for involuntary joinder and intervention, where applicable:

1) The consent requirement means that parties have consented to an arbitration clause referencing the rules of an institution, which allows for joinder or intervention. Determination of consent is especially important if the requested party is a non-signatory. Without consent the institute has no jurisdiction and there can be no final enforceable award. Therefore, the very essence of a fair, efficient, and economical commercial justice requires that there is demonstrable consent.
2) The connectivity requirement, meaning the same arbitration agreement for all parties. Joinder and intervention are applicable when new claims against a new party are made on the basis of the same arbitration agreement. This means there is a stricter requirement of connectivity as compared to consolidation (explained later in this chapter).

3) The temporal requirement is strict at most institutes. In practice, all the institutes which allow joinder and/or intervention set a time limit for its usage. This time limit is generally the nomination or confirmation of arbitrators, because multi-party arbitration proceedings mean that the nomination of arbitrators shifts to the arbitral institute.

4) The procedural efficiency requirement is that, even if the request for joinder or intervention fulfills the other requirements, the institutes generally retain the option of declining joinder or intervention. This means that the institute requires there be some form of efficiency gain from the joinder or intervention which exceeds the loss of party autonomy in the selection of arbitrators and the increase in time consumption and costs.

The increase in legal certainty that joinder and intervention allow are significant, because of the weak character of the res judicata effect in arbitration. A similar process on the same basic legal grounds can lead to a completely different award, allowing related parties a chance to enter into the same arbitration lessens this problem.

It is unclear what effects lis pendens would have in such circumstances, because two arbitrations pending at the same institute between effectively the same parties on the same issues should give rise to lis pendens. Therefore, one solution is simply allowing these parties to join the process that has commenced earlier, which is better for all parties involved.

Joinder and intervention are an adaptation by arbitration institutes to the growing complexity of international commerce. Both mechanisms are a good step, which some institutes have taken bravely and others tentatively. It is clear that they have the potential of increasing fairness and efficiency of international commercial arbitration proceedings.

5.3 Consolidation

Consolidation is the act of combining two or more commenced arbitrations into one arbitration proceeding. Consolidation does not require all parties to have submitted to the same arbitration contract, or to have the same basis for the dispute.
Consolidation is usually initiated either by request of a party to at least one of the arbitration proceedings in progress, or when a new dispute emerges between the same parties that can be consolidated into the proceeding in progress. The request for consolidation is sent to the secretariat of the arbitration institution. After receipt of a request for consolidation the secretariat will ascertain whether it fulfills the requirement set by the arbitration institution’s rules, and decide whether the consolidation will go ahead.

5.3.1 Typical cases

Typical cases for consolidation concern arise when disputes have the same legal relationship (e.g., a construction contract), and have similar legal facts, (e.g., non-payment of bills).

A typical case, where consolidation is beneficial is a construction project involving companies A, B, and C, who have all signed a main contract containing an arbitration clause. A, the main contractor, does not pay its bills. B and C separately lodge arbitration claims against A. Since the legal relationship is the same, the legal facts are similar, and all parties abide under the same arbitration clause, the cases should be consolidated into one process.

Another typical case where consolidation should be considered is disputes involving joint venture agreements. If companies A, B, C, and D have concluded a joint venture agreement containing an arbitration clause and then disputes arise between the different parties, such disputes should all be consolidated into one proceeding.

5.3.2 Study on the rules and practices

Consolidation is possible at all the studied institutes, if all parties consent. The following study presupposes that at least one party does not consent to the consolidation of claims. Four out of five institutions have clear rules on consolidation under these conditions, while the SCC only allows for limited consolidation of new claims between the same parties.

I will start by examining the independence of the institutes. Can an arbitration institute initiate a consolidation process if no party requests consolidation?

The ICC had opted to use the word ‘may’ in the context of consolidation. The ICC Secretariat’s guide explains that the ICC Court retains the right to deny a request for
consolidation, even if it meets all the requirements of Article 10. Presumably this means that the ICC will consider other factors, such as process efficiency, before deciding on consolidation.

The ICC can only consider consolidation upon the request of any party to any of the claims to be consolidated. The ICC contends that this increases procedural efficiency. When requesting consolidation parties should specify how and why the different disputes fit into one of the situations allowing for consolidation. The FAI, SCC and HKIAC rules are identical to the ICC rules regarding the institute’s autonomy to consolidate.

The Swiss Rules allow the institute to initiate consolidation on its own accord. Article 4 of the Swiss Rules states: “Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Court may decide, after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings. The Court may proceed in the same way where a Notice of Arbitration is submitted between parties that are not identical to the parties in the pending arbitral proceedings… the Court shall take into account all relevant circumstances…”

The secretariat of the SCCAM has stated in an interview that consolidation should only occur upon the request of one of the parties. The rules do not contain any reference to this; therefore, parties would be powerless should the arbitration institute remain inactive.

Timing is crucial when considering consolidation. The ICC Rules state that the institute may take into account any circumstances it considers relevant, such as whether any arbitrators have been confirmed or appointed in the arbitrations, and if so whether the appointed arbitrators the same or different. Since the ICC has opted to use the word ‘may’, it has retained significant leeway in deciding what the relevant factors are when considering consolidation. Compared to the previous rules of the ICC, the rules from 2012

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201 Article 10 of ICC Rules.
202 ICC Secretariat’s Guide, para. 3-348-349.
203 HKIAC Rules article 28.1 a-b; FAI Rules article 13.1 a-b; SCC Article 11.
204 As cited in: Pair 2012, p.46.
205 ibid. p.46.
206 Article 10 of ICC Rules.
have expanded the timeframe for consolidation. Previously it could only be considered before terms of reference had been signed.\textsuperscript{207}

The SCC Rules contain no rules on timing. Hobér states that the \textit{travaux préparatoires} of the rules include the presumption that arbitrators should be generous to new claims and set-off claims, as long as they fall within the jurisdiction of the arbitrators and do not cause obstruction of the proceedings.\textsuperscript{208} This means that new claims between the same parties can be consolidated much later into the process.

The FAI is unlikely to consolidate arbitrations, if arbitrators have been confirmed, unless all parties consent.\textsuperscript{209} The rules, however, do not restrict the arbitration institute from consolidating cases that have been transmitted to the arbitrators. The FAI Rules simply state that the institute shall take into account whether arbitrators have been confirmed or appointed in any of the arbitrations and, if so, whether they are the same or different persons.\textsuperscript{210}

The Swiss Rules give the arbitration institute wide leeway to consolidate cases even after transmission to the arbitrators, according to commentators.\textsuperscript{211} The Swiss Rules themselves contain no mention of timing. This means “parties’ legal certainty” is unclear.

Having dealt with institutional autonomy and timing, I will now move on to the material requirements of consolidation. According to ICC Rules, claims made under the same arbitration agreement can be consolidated without consent of all parties. These rules are also used by the HKIAC and FAI: as long as claims are under one arbitration agreement, there is a presumption of party consent to have all claims in one process.\textsuperscript{212}

However, claims under more than one arbitration agreement can be consolidated without party consent if 1) the arbitrations are between the same parties, 2) the disputes are in connection to the same legal relationship, and 3) the ICC finds the arbitration agreements compatible.\textsuperscript{213} In addition, 4) the court’s discretion creates a requirement that it benefit the ICC or the process to consolidate.

\textsuperscript{207} Pair 2012, p. 47-48.  
\textsuperscript{208} Hober 2011, p. 217.  
\textsuperscript{209} Mika Savola, ’Speech at the Helsinki International Arbitration Day 2013: Overview of the New Rules’ (2013)  
\textsuperscript{210} Article 13.2 of the FAI Rules.  
\textsuperscript{211} Pair 2012, p. 49.  
\textsuperscript{212} Article 10 (a)/(b) of the ICC Rules; Article 28.1 a-b of the HKIAC Rules; Article 13.1 a-b of the FAI Rules, are all identical.  
\textsuperscript{213} Article 10 (c) of the ICC Rules.
I will now examine the three requirements in detail: 1) The Secretariat’s guide states that the new rules expand the ICC’s powers to consolidate, but the same-parties requirement is strict. For example, parties A, B, and C sign a contract containing an ICC arbitration agreement; A then initiates a first arbitration against B and C, later B initiates a second arbitration against C. In such situations, the ICC Secretariat suggests that it may be useful to bring all claims into a single arbitration.\(^{214}\) Thus, if the parties are clearly the same as in the agreement, consolidation is possible. Earlier, the same-party requirement was even more restrictive, requiring same parties and same exact economic transaction, and that was reason that most requests for consolidation were rejected.\(^{215}\) 2) The same legal relationship means that all the contracts must be related to the same economic transaction. According to the Secretariat’s guide, this is usually not a problem. The same economic transaction can mean the same construction project, the same acquisition of a company, etc. Usually consolidation parties request consolidation, when the disputes are related.\(^{216}\) According to commentators, this is the largest expansion of consolidation rules compared to the old rules, because previously the same legal relationship was a requirement, which in practice meant that all parties must have signed the same agreement.\(^{217}\) The 2012 Rules open far more arbitrations for consolidation. 3) Compatible arbitration agreements are the final requirement. This will be dealt with later in this chapter. 4) The ICC’s discretion, meaning that the consolidation is judged as beneficial by the ICC; this distinction is made by the usage of the word “may” in Article 10.\(^{218}\) The FAI Rules on consolidation are similar to those of the ICC. According to the FAI Rules, claims in arbitrations made under different arbitration agreements, but arising in connection with the same legal relationship, and compatible arbitration clauses may be consolidated.\(^{219}\) Consolidation requests are most likely to be accepted if the parties are the same, the arbitration agreement is the same, and no arbitrators have been confirmed. The inverse is also true that when parties are different, the arbitration agreement is different, or arbitrators have been confirmed, consolidation is very unlikely. Savola says he cannot think of a scenario where the Board would agree to consolidation in such a setting, absent unanimous

\(^{214}\) ICC Secretariat’s Guide, para. 3-349. 
\(^{216}\) ICC Secretariat’s Guide, para. 3-357. 
\(^{218}\) Ibid. s. 3-358. 
\(^{219}\) Article 13 (c) of the FAI Rules.
party consent. It is also unlikely that consolidation will occur if the parties are different or the arbitrators have already been confirmed.\(^{220}\) Consolidation is almost impossible if it results in the revocation of confirmation of any of the arbitrators. All claims must also arise from the same legal relationship, meaning the same economic transaction and arbitration clauses must be compatible.

Less similar to the ICC rules are the HKIAC rules, which only permit consolidation when either a) there is a common question or law or fact arising from all the arbitrations, or b) the rights of relief claimed are in respect to, or arise from, the same transaction or series of transactions -- and, as well, when the HKIAC finds the arbitration agreements to be compatible. However, the requirement of a common question of law or fact or relief, gives a more in-depth understanding as to what the circumstances considered are. The HKIAC considers consolidation beneficial if there are more commonalities between the arbitrations.

The SCC is restrictive on consolidation. Article 11 of The SCC rules stipulate two relevant requirements for consolidation: firstly, that it concerns the same legal relationship; and secondly, that it is a new claim. The SCC rules, in practice, allow consolidation, outside unanimous consent, if the claims are made under the same agreement, which contains an arbitration clause. This means that the SCC will not allow consolidation if the parties are different, or the there are more than one agreement containing the arbitration clause. The SCC rules are therefore closer to the previous ICC rules in their restrictiveness.

Article 4 of the Swiss Rules states that the arbitral tribunal shall take into account all relevant circumstances, including links between the case and progress already made in the pending proceedings; however, it does not require that the parties be the same. Thus, the Swiss Rules seem *prima facie* to be more ready to accept a true multi-party processes.

In practice, all institutes require there to be a compatible arbitration clause. I will now examine what constitutes a compatible arbitration clause.

The compatible arbitration clause requirement arises out of consent, because the jurisdiction of arbitral institutes comes from consent, without which there can be no binding final award.

According to Pair, a compatible arbitration clause must at least contain a reference to the same arbitration institute, seat of arbitration and language.221 ‘Language’ in this context means the wording of the arbitration clause.

Identical language in arbitration clauses across different agreements legitimizes an assumption that parties intended to submit all disputes in connection with this transaction to a single tribunal.222 However, the degree of difference in the arbitration clause language necessary to constitute incompatibility is contested.223 Certainly, for consolidation to occur, all parties must at least have agreed to the same arbitral institution.224

The Swiss Federal Court has published a decision in a case where two companies had several contracts between them. Each agreement contained its own incompatible arbitration clause, choosing different institutions, seats, and applicable laws.225 The arbitral panel decided that the case could not be consolidated. The Swiss Federal Court agreed, concluding that the inconsistencies between the contracts between the same parties indicated that they had not intended for cases to be consolidated.226

Thus, incompatibility between agreements is present when the seat, the constitution of the arbitral tribunal, or the applicable procedure is different.227 Pair concludes that, in multiple-contract scenarios, consolidation by reference to institutional rules is superseded by party agreement when there are “1) incompatible seats; 2) incompatible language; 3) incompatible choice of institutions; 5) incompatible applicable law either on merits or procedure; or 6) different number, qualification, or selection procedures for arbitrators.”228 It must be noted, however, that despite even a partial incompatibility automatically resulting in consolidation being rejected, even a total compatibility will not automatically result in a consolidation being approved..

In practice, when consolidation occurs, all institutes will consider parties as having waived their right to nominate an arbitrator, as it then becomes a multi-party proceeding.229 All

221 Pair & Frankenstein 2012, p. 1074
222 Lew et al. 2003; Strong 2012, p. 23.
223 See for example: Lew et al. 2003, p. 540.
225 Tribunal federal [TF] [Federal Court] Feb. 29, 2008
226 ibid, pt C. 2.5.3
227 See for example: Hanotiau Complex Arbitrations; and Lew et al. 2003, p. 395.
228 Pair & Frankenstein 2012, p. 1077.
229 See for example: article 15 of the FAI Rules
institutes also consolidate cases into the arbitration that has commenced first, unless all parties unanimously agree otherwise.\textsuperscript{230}

To summarize, the standards for consolidation are remarkably similar at the ICC, FAI and HKIAC. This is the \textit{de facto} minimum standard that I think all arbitration institutes will follow. Minor differences exist between these three institutes, relative to the legal relationships and similarities of the parties and their claims, but in practice it is likely that, in similar cases, consolidation will occur at all these institutes in similar cases. The Swiss Rules allow, at least in principle, for more flexibility and autonomy for the arbitrators in deciding to consolidate, but -- as commentators have noted -- the practice is similar to the international standard, as espoused by the ICC. The SCC, conversely, has not implemented this minimum standard. It will be interesting to see whether or possibly when, the SCC finds itself pressured to adopt similar rules on consolidation. The following table may help clarify the practical differences on consolidation rules.

<table>
<thead>
<tr>
<th>Requirement</th>
<th>ICC</th>
<th>FAI</th>
<th>SCC</th>
<th>HKIAC</th>
<th>SWISS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Demonstrable consent</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Compatible arbitration agreement</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Only on party request</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Timing: before nomination or confirmation of arbitrators.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Timing: After confirmation</td>
<td>No\textsuperscript{1}</td>
<td>No\textsuperscript{1}</td>
<td>N/A</td>
<td>No\textsuperscript{1}</td>
<td>Yes</td>
</tr>
<tr>
<td>Connectivity requirement</td>
<td>Transaction</td>
<td>Transaction</td>
<td>Agreement</td>
<td>Law/Fact/Relief</td>
<td>General</td>
</tr>
<tr>
<td>Benefits procedural efficiency or institution</td>
<td>Yes</td>
<td>Yes</td>
<td>N/A</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Waive rights to nominate arbitrators</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

\textsuperscript{1} In practice, even if the wording of rules state that it may be allowed after nomination of arbitrators.

\textbf{Table 2: Basic consolidation requirements (Source: Author)}

\textsuperscript{230} See for example: Article 10 of the ICC Rules.
5.3.3 Discussion on findings and conclusions

The question that now remains is to systematize the findings of the examinations, as well as compare the results to the principles of fair, efficient, and economic commercial justice. Reference to an arbitration institute whose rules allow consolidation, expands party consent further than referencing the rules of an institute whose rules do not. The majority of institutes examined for this chapter have enacted rules extending party consent on consolidation to situations where unanimous consent is absent. I have identified four requirements that are common to most of the institutes examined:

1) The requirement of consent means that, before any institute can consider involuntary consolidation, it must be certain of parties’ consent; in cases of non-signatory parties the existence of consent must be proven, and in cases of more than one arbitration agreement, the clauses must be compatible. If either facet of consent is missing, there can be no consolidation. Without consent, arbitral tribunals have no jurisdiction over the parties. It would be contrary to the concept of a fair, efficient, and economical commercial justice to render awards that are unenforceable. Nonexistence of consent renders consolidation impossible.

2) The connectivity requirement is the second requirement set by most institutes. Connectivity means that there must be some connection between the cases, i.e. a reason why consolidation should be considered. The rules of institutes have worded the connectivity requirement in several ways: the same parties, the same economic transaction, the same legal relationship, a common question of law or even relief sought. The more connectivity there is between cases, the more likely an institute is to accept a request for consolidation. Consequently, if none of the connectivity requirements are met, then there is no reason to consolidate the cases. While it may be more efficient to group together unrelated cases, it would clearly be against the principle of a fair process.

3) The temporal requirement, meaning that a request must be submitted before a certain point in the arbitration process. Most of the institutes studied have stated, either directly in their rules or through commentary, that a request for consolidation is likelier to succeed the earlier it is submitted in the process. The chance of a successful request for consolidation after nomination or confirmation of arbitrators is miniscule, and possible only in exceptional circumstances.
4) The procedural efficiency requirement is considered only if all the other requirements are met. Even when consent exists, the cases are connected, and the request has been submitted within a reasonable time, there must be a legitimate efficiency gain that outweighs the restrictions multi-party processes place on parties. Restrictions such as inability to nominate preferred arbitrators should be taken into account. Therefore, consolidation should only be considered where the efficiency and legal certainty gains outweigh the costs to a fair and equitable process.

The arbitral institute must bear in mind the balance between the right of the parties to a fair and equitable process, and the systemic efficiency and legal certainty of arbitral awards. The flexibility of the arbitration process is restricted in multi-party proceedings, by the simple fact that more parties means less possibilities for unanimous consent. Multi-party proceedings are also likely to take longer for individual parties than smaller bi-party processes.

I will now discuss the findings and evaluate the mechanisms in general from the perspective of fair, efficient, and economical commercial justice.

5.4 Critical remarks and future considerations

Having examined the mechanisms that allow for joinder, intervention, and consolidation in international commercial arbitration at select arbitral institutes, I will now examine the current state of affairs with regards to multi-party and multi-contract rules at these institutes. The arbitral institutes have responded to the increasing complexity of international commerce by amending the rules to allow for a more flexible multi-party process. There has been a significant shift towards an international standard on joinder and consolidation, while intervention is slightly controversial.

Among the studied institutes, joinder is accepted among those which have amended their rules after 2011. Allowing joinder is only a minor expansion of consent, because the requirements are so strict and confidentiality is protected. Joinder provides some tools for dealing with problems of *lis pendens* and *res judicata* by allowing more of the connected disputes to be handled in one process, thus circumventing problematic preclusion rules which may or may not apply. It also enhances the efficiency of the arbitration process at a cost to party autonomy.

Among studied institutes, involuntary consolidation is accepted at all, which have amended their rules after 2011. Involuntary consolidation is a considerable expansion of party
consent, because the requirements of connectivity are less strict. Compared to joinder, where the arbitration agreement must be the same, consolidation requires only connectivity, such as the same economic transaction, or the same parties. The systemic efficiency gains from consolidation are considerable. However, there are questions of fairness and cost effectiveness for the parties: minor parties in a contractual web may be intimidated by consolidation, because it increases their costs. Furthermore, as is the case with all multi-party processes, consolidation limits party autonomy in the selection of arbitrations etc. That said, consolidation can counteract legal uncertainty in arbitration, by allowing for connected disputes to be handled at the same time rather than in serial or in parallel. This counteracts the problems of *res judicata* as well as parties’ strategic actions, such as multi-shooting, i.e. effectively trying the same issue several times.

Intervention is the most controversial of the three mechanisms, which is interesting. Only two of the five institutes studied allow for intervention of third persons or parties in an arbitration process. The HKIAC has chosen a restrictive approach, where the requirements are strict, and identical with joinder. The Swiss Rules have chosen an extremely expansive approach to both joinder and intervention, by referencing only third-person participation, meaning that the requirements are much less strict than at the other institutes. It is interesting that the ICC considers intervention impossible but allows for consolidation, since both can lead to the same results. A party can commence an arbitration against a party to another arbitration and then ask for the cases to be consolidated; thus the end result would be the same, as allowing for intervention. The ICC secretariat’s reasoning against intervention on the grounds of confidentiality is a bit hollow viewed from this perspective.

There are clearly two camps within the institutes studied: the more conservative camp that follows the lead of the ICC and the more expansive such as the Swiss Rules. It is unclear how other international arbitral institutes will amend their rules, and it will be interesting to see whether they follow the ICC lead, or opt for a more expansive regime.

The balance between systemic efficiency and fairness and cost for individual parties has shifted towards systemic efficiency in the latest wave of rules amendments. It is clear from surveys that the users of arbitration have clearly stated that they wish for more mechanisms to deal with complex situations, but at what cost?

Party autonomy decreases when bi-party arbitration becomes a multi-party arbitration, parties may no longer appoint their own arbitrators; rather, they must trust that appointees
of the institute. The flexibility of the arbitration process also decreases, since more parties mean fewer possibilities to streamline proceedings through unanimous decisions. A multi-party process is also likely to be more expensive for the individual party than is bi-party proceeding.

Practitioners view any efficiency enhancement as a good thing. However, in discussions with prominent Finnish lawyers, there was doubt if the new rules would actually hinder party obstruction. Ultimately, arbitration is only as good as the arbitrator(s) selected. In general, practitioners felt that the more flexible the rules are for the arbitrators, the better the results are, since they give the arbitrators the possibility to coax obstructing parties.

Consolidation and joinder have become a mainstay at many of the surveyed arbitral institutions. However, the mechanism is only as good as the people implementing it, i.e. the arbitrators and the institution. Therefore, it is as of yet unclear whether the mechanism will yield significant improvements to fair, efficient, and economical justice.
6 A Practical Guide for the User

This chapter is a short practical guide to the user of arbitration. The chapter aims to illuminate the practical differences of the treatment of multi-party cases, and help in the choice of institution.

Dispute resolution is perhaps the most overlooked part of contract negotiations. Parties should pay more attention to dispute resolution in long-term projects and economic transactions. Often, signing the deal becomes far more important than considering possible problems, and thus an arbitration clause contains the bare minimum -- a choice of institution, and perhaps a choice of laws. This means parties may be unaware how far their consent extends in disputes. They might be deprived of the possibility to choose an arbitrator, for example.

Paying close attention to dispute resolution clauses in contracts is good long-term planning. Multi-party and multi-contract rules need consideration when the contract contains multiple parties or it is part of a web of contracts related to an economic transaction, or project. The following short questions and answers will help to make an informed choice:

a) Is it beneficial for us that all possible disputes are handled in single process, or should we opt out?

Factors which determine when multi-party or multi-contract proceedings are beneficial are at least the following: 1) are we the larger party near the center of the contractual web, for example, the main contractor of a construction project; 2) can we benefit from multi-shot dispute processes, i.e. from having more than one possibility to try the dispute; and 3) can prohibitive costs of complex arbitration discourage our smaller partners from raising disputes?

Conversely if 1) we are the small party performing a simple part of a large project; and/or 2) if possible disputes are time-critical, i.e. should be resolved quickly; then we should avoid dispute resolution clauses that involve the risk of multi-party proceedings.

Opting out of multi-party and multi-contract proceedings is possible by choosing an arbitration institute that does not allow joinder, intervention, or consolidation, without unanimous party consent.
It is easy to opt out of multi-contract processes by choosing different institutions, seats and language of the clauses in the different contracts -- in other words, making the arbitration clauses incompatible. No institution will consolidate cases where the arbitration clauses are clearly incompatible.

b) Is it beneficial for us that we, or another party, to the contract can invite others to the same process?

This question is closely related to the first question: for example, if we have a contract with our bank, which has given us a guarantee that is related to the main contract. In such cases it may be beneficial, if we could request that the bank be allowed to join the dispute process.

c) Is it beneficial for us that third parties can intervene?

This is a complex question, and one that I am unable to thoroughly answer within the confines of this thesis. Cases where this is beneficial would be very large projects with a multitude of contractual relationships between the different parties, where the resolution of one dispute may lead to another dispute or have a significant impact on another dispute. Or where it is a question of international law, or the arbitration takes place with a national government or through an institution such as the WTO, where there would be substantial legal grey areas. In such cases, the Swiss Chambers are the most liberal in regard to third-person participation.

d) Is it beneficial for us that the institution can consolidate cases, where we are a party? And if so, under what circumstances?

If we are the main contractor with many sub-contractors who are all bound by the same arbitration agreement with a compatible arbitration clause, and we can minimize the cost of disputes, then it may be beneficial. Similar benefits may be had if we are at the center of a large contractual web between a few parties, i.e. it is a multi-party multi-contract situation. However, it may also invite parties to raise smaller disputes than they would otherwise, since they could share costs.

For small parties to a large contract, it is unlikely that a consolidation clause is in their best interests, because it is likely to make any dispute bigger, more costly and take longer to resolve. If we are the bigger party in a contractual web, we should consider creating firewalls, so that disputes can be managed. By ‘firewalls’ I mean incompatible arbitration clauses or opt-outs from multi-party processes.
Since different institutions allow for consolidation on slightly differing rules, perhaps the most interesting problematic is the question of the same legal relationship, same economic transaction, or common legal question.

If the benefits outweigh the risks and we want a unified process, then we should choose the institution that is more liberal with its application of joinder and consolidation, such as the FAI, HKIAC, or Swiss Chambers.

If a party must compromise, or have no opinion, then the party should perhaps adopt what will undoubtedly become the *de facto* standard, i.e. the ICC. If we wish to opt-out as far as possible from multi-party proceedings, we should either write the opt-out into the clause, or choose an institution that is conservative with regards to joinder and consolidation, such as the SCC.
7 Multi-party arbitration mechanisms by themselves do not enhance the attractiveness of Finland as a seat of arbitration

7.1 Introduction

In this chapter I will examine the situation in Finland from the perspective of improving the attractiveness of Finland as a seat of arbitration.

The seat of arbitration, or *lex fori*, is important, because it determines the legal framework for arbitral proceedings and the arbitral awards. Furthermore, the law of the arbitral seat provides for mandatory rules applicable to the proceedings, form, notification, correction, and annulment of an arbitral award.231

The two main questions examined are: 1) whether the new rules on multi-party arbitration proceedings will have an effect on attractiveness; and 2) what other action can be taken to improve the attractiveness of Finland as a seat of arbitration.

7.2 Situation Today

The Finnish Arbitration Institute received 69 arbitration requests in 2012. A quarter of which were international cases.232 Ad hoc arbitration is very common in Finland: in fact, the FAI estimates that only about half of all arbitrations in Finland are institutional.233 The closest competitor to the FAI is the SCC Institute in Sweden, which received 177 arbitration requests in 2012, with 92 of those being international.234

7.3 The role of multi-party mechanisms in choice of seat

Surveys from 2006 and 2008 have shown that the lack of multi-party mechanisms, expense and time were seen as the major drawbacks of international commercial arbitration.235 The decision to create multi-party mechanisms through rules amendments at the various international arbitration institutes is a response to this need.

The created new mechanisms for dealing with multi-party and multi-contract situations have been successful; a new survey from 2012 shows that multi-party mechanisms are no

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233 Lehtinen & Yildiz 2013.
235 Mistelis & Baltag 2008b, p. 95.
longer lacking in international commercial arbitration. Today, basic multi-party mechanisms are standard at most arbitration institutes that have amended their rules after 2010. It is likely that this trend will continue, as more institutes perceive the new standards as obligatory. This is particularly true for institutes that are not extremely well known or world-leading.

The new rules adopted by the FAI are a necessary step towards becoming a more attractive arbitration destination, because there is really no alternative. A prominent Finnish attorney remarked that adopting the commonly accepted rules is a requirement, since deviating too much from the standard becomes a liability for the institution, at least if it is trying to drum up business.

The next part of this chapter deals with what proactive steps could be taken in Finland to enhance the attractiveness of Finland as a seat of arbitration, in light of recent surveys.

7.4 Other factors affecting choice of seat

Surveys have found that parties generally want an arbitration-friendly regime, meaning little interference in the arbitral process and easily enforceable awards. In addition, the seat must be perceived as neutral.237

The most important factors when choosing a seat of arbitration are: 1) formal legal infrastructure at the seat (62% of respondents); 2) law governing the substance of the dispute (46% of respondents); 3) convenience (45% of respondents); and 4) general infrastructure (e.g. costs, access, physical infrastructure) (31% of respondents).238

On the basis of the study, I will now analyze the Finnish regulatory system in brief and remark on possible ways to improve Finland’s attractiveness as a seat for arbitration. Finland fulfills (1) the requirements of the formal legal infrastructure at the seat well, since Finnish law is arbitration friendly and prizes neutrality and impartiality. Furthermore, Finland is a signatory to the New York Convention.239 Finnish arbitration law is also compatible with the UNCITRAL Model Law.240

236 Zrilic & Brekoulakis 2012.
237 Moses 2012, p. 47.
238 Zrilic & Brekoulakis 2012.
239 In the 2012 Study 34 % said that neutrality and impartiality are are the most influential of the formal legal infrastructure factor and 20 % said that being a signatory to the New York Convention was the most important factor.
240 Möller 1984 (Updated 2008).
The following factors were identified in the 2012 Study as the most important factors regarding the convenience of the seat: the most important was efficiency of the local court system; second most important was language; third most important was established contacts with lawyers operating at the seat; fourth the location of parties; and a finally cultural familiarity. Lack of bribery was also seen as an important factor. \(^{241}\)

The Finnish courts are generally regarded as effective.\(^ {242}\) Bribery is a non-existent problem in Finland. Finnish arbitrators in general are apt at English, but may lack knowledge of other languages. One of the key differences between Finland and Sweden is that there are several excellent and recent English language books on arbitration proceedings in Sweden\(^ {243}\), whereas currently there are no recent extensive books on arbitration in Finland.

The 2012 Study also highlighted that the existence of specialized lawyers in the location affects the choice of seat, with 34 % of respondents saying this is an important factor.\(^ {244}\) This may also be a significant factor; although there are many excellent lawyers specializing in arbitration in Finland, there are not very many that are well known internationally. However, many of Finland’s largest law firms have expanded to Sweden and Russia; this is an excellent first step in increasing familiarity of Finland in these countries. Both countries would be excellent locations for marketing Finland as a seat of arbitration.

Increasing research and publication of relevant literature in English and perhaps other languages would improve the familiarity of Finland abroad. Furthermore, Finnish experts should visit relevant conferences and give presentations. The FAI needs increased visibility, because it is unlikely that people will choose Finland as seat of arbitration unless they are aware of the high quality of adjudication.

The 2012 Study highlighted that very few respondents view the actual arbitration laws as a very important factor in the choice of the seat of arbitration, as long as they are compatible with the New York Convention. Therefore, it is unlikely that adopting the UNCITRAL Model Law would, in itself, lead to more international commercial arbitrations in Finland.

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\(^{241}\) Zrilic & Brekoulakis 2012.  
\(^{242}\) Dubois et al. 2013, p. 174-175.  
\(^{244}\) Zrilic & Brekoulakis 2012.
Arbitration institutions rely on their good name and thus, successful arbitrations give rise to more arbitration proceedings.

Another possible idea is to develop the Finnish arbitration legislation and the rules of the FAI so as to make the extremely efficient solution of complex arbitration proceedings possible. However, this may be too radical at this juncture, and might backfire.

Radically increasing the amount of arbitration that takes place in Finland is difficult, and would require Finland and the FAI finding a niche market. New markets for arbitration are opening up online; perhaps online dispute resolution could be an answer. However, this would require a radical re-thinking of the process. Proper English-language books on arbitration in Finland would be good start --- however, at the moment they are sorely lacking.
8 Conclusions

This dissertation set out to examine multi-party mechanisms in international commercial arbitration from a Finnish and international perspective. There have been no studies on the rules of joinder, intervention, and consolidation that include the FAI rules. The institutes examined have enacted similar but slightly differing solutions to the problems of multi-party and multi-contract arbitrations. The thesis also sought to examine whether the development of multi-party mechanisms would make Finland more attractive as a seat of arbitration, and to answer the following two research questions:

1) What are the similarities and differences of solutions chosen at international arbitration institutions with regards to multi-party mechanisms, and do they enhance the effectiveness of arbitration proceedings?

2) Can development of multi-party mechanisms make Finland more attractive as a seat of arbitration?

Flexible legal dogmatics was used as the method, because it allows for the situational flexibility in the examination of legal sources. Arbitration is an opaque field, where unlike national courts and decisions, it is hard to get original authoritative source material. Thus, a flexible method leads to the best results. Functionally analyzing the solutions chosen at arbitration institutes helps to understand their differences. This analysis was conducted on three levels, local, transnational, and global.

The main findings are chapter-specific, and summarized in detail in their respective chapters. Following is a short summary of findings related to the research questions:

1) The mechanisms created at international arbitration institutes are similar and all have the same main requirements: consent, connectivity, timing and procedural efficiency. Arbitration institutes that have amended their rules after 2011 have enacted similar rules. All of the chosen solutions expand party consent and allow for more involvement of third parties or connected processes. Most of the studied institutions have chosen to enact similar rules to that of the ICC, which can be said to be the international standard. The Swiss Rules are more expansive towards party consent by design; however, in practice, the end results are not dissimilar.

2) The development of multi-party mechanisms does not, in itself, make Finland more attractive as a seat of arbitration. However, it is a prerequisite, because the new mechanisms have become a de facto standard in international commercial arbitration.
Studies show that being too liberal or too conservative will not attract new arbitration users.

It is clear from this limited study of five international arbitration institutes that international commercial arbitration is evolving to better handle complex international commerce better by offering slightly differing solutions to the problems of multi-party and multi-contract disputes. The chosen solutions also help lessen the problems of *lis pendens* and *res judicata* in international commercial arbitration, because there are fewer parties outside that are dependent on the ongoing process. It is likely that future amendments of institutional rules at various arbitration institutes will see the enactment of similar multi-party and multi-contract rules. This improves procedural efficiency at some cost to fairness and party autonomy. It seems that the arbitration community has found this an acceptable trade-off.

Finland and the FAI have taken the first steps towards improving the attractiveness of Finland as a seat of arbitration by adopting rules that are up to international standards. It is clear that this is not in itself enough; rather, a more comprehensive program for improving the attractiveness and image of Finland is needed.

The theoretical case for multi-party mechanisms in international arbitration is their enhancement of the efficiency and the fairness of the arbitration process. This study supports this hypothesis from the system perspective. Furthermore, this dissertation shows that this hypothesis has been put into practice by several arbitral institutions.

Recommendations for future research on the basis of this dissertation can be divided into three categories:

a) Evaluation of the effectiveness of multi-party mechanisms. This dissertation can only scratch the surface, because the new rules have only been in effect a very short time. Therefore, more research is needed into the actual usage of these new mechanisms, because rules are one thing, and praxis is quite often another.

Possible research questions could be: for example, do the new mechanisms actually lead to more efficient proceedings? This can be researched empirically: for example, do the new mechanisms, when used, actually lower costs to parties. Another alternative approach is to interview users and practitioners to see how they view the new mechanisms.
b) Comparing the differences between institutions to find the best solution. A more in-depth comparison of arbitral institutions should be undertaken. Perhaps using typical cases to examine how institutions would respond to requests and interviewing users, practitioners and representatives of the arbitral institutions.

c) Finnish situation. Finland and the FAI need to create a program for improving the attractiveness of Finland as seat of arbitration. This requires further research to be able to ascertain the best ways to spend limited resources. Some research topics include: identifying potential customers and their needs; developing practical and scholarly handbooks that meet international standards; and determining what kind of legal regulation Finland needs in order to be attractive.

This study has offered a legal dogmatic perspective on important developments within the international commercial arbitration community. The study was conducted through reading of materials provided by institutions, and by authors close to institutions. As a direct consequence of this methodology, the study has a number of limitations, which need to be considered.

The availability of materials is problematic, since institutions only publish a small subset of their cases, and authors close to institutions have their own interests and have chosen what to include and exclude. Examination of the Finnish situation finds a lack of research the biggest issue and has concentrated on identifying new problems and questions that require study.

The dissertation has made a contribution to the body of knowledge related to multi-party mechanisms in international commercial arbitration. It has expanded the knowledge of solutions chosen by several institutions that have recently adopted new rules. The prevailing viewpoint is that multi-party mechanisms universally enhance the efficiency of complex arbitration proceedings. However, as this study has found, while this may be true from the system perspective, it is not always true for the individual users of arbitration. Furthermore, this dissertation has contributed to the discussion in Finland by evaluating the effects of multi-party rules, as well as raising relevant questions and problems that are pressing if Finland is to increase its attractiveness as a seat of arbitration.