M&A ARBITRATION GUIDE

M&A Arbitration Guide

Fourth Edition

Editor

Amy C Kläsener

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This article was first published in December 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Published in the United Kingdom by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.globalarbitrationreview.com

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Enquiries concerning editorial content should be directed to the Publisher –
david.samuels@lbresearch.com

ISBN 978-1-83862-909-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

AlixPartners

Clifford Chance LLP

Eversheds Sutherland (US) LLP

Fieldfisher

Freshfields Bruckhaus Deringer Rechtsanwälte Steuerberater PartG mbG

Jones Day

K&L Gates LLP

Kim & Chang

Law Offices of Thomas Webster

McNair International LLC

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Wachtell, Lipton, Rosen & Katz

White & Case

Withers LLP

Publisher's Note

Global Arbitration Review (GAR) is delighted to publish the *M&A Arbitration Guide*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews, conferences and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more.

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. We are therefore delighted to be publishing the fourth edition of this guide on mergers and acquisitions within the world of arbitration. It is a practical know-how text in two parts. Part I identifies the most salient issues in M&A arbitration, while Part II surveys substantive principles from select regional perspectives.

We are flattered to have worked with so many leading firms and individuals to produce the *M&A Arbitration Guide*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, mining, challenging and enforcing awards and intellectual property, in the same practical way. We also have books in the series on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*). Our thanks to the editor, Amy C Kläsener, for her vision and energy in pursuing this project and to our colleagues in production for achieving such a polished work.

Contents

Introduction

Amy C Kläsener[1]

M&A transactions generate a large number of disputes, many of which are procedurally complex. In this book, M&A disputes specialists pool their knowledge on working with problematic contracts in the most contentious disputes. We hope that their experience will be useful to practitioners and clients in preventing and managing M&A disputes. The chapters concentrate on the distinctive procedural aspects of M&A disputes and highlight the key role that substantive law can play in their generation and resolution. The book has a pragmatic focus on planning and contains a plethora of recommendations for minimising the potential for disputes and resolving them efficiently.

The book is divided into two parts, with Part I consisting of 10 chapters focusing on procedural and planning issues, and Part II surveying differences in the substantive and procedural laws that may play a role in M&A disputes.

Any dispute will be heavily influenced by the drafting of the arbitration clause. In Chapter 1, Anne Véronique Schlaepfer and Alexandre Mazuranic of White & Case address pre-arbitral dispute resolution mechanisms, expert determination clauses, and consolidation and joinder. They also consider whether mechanisms such as fast-track arbitration and emergency arbitrator provisions make sense in the M&A context.

Issues of joinder and consolidation present frequently in M&A arbitration. Yan Zhang and Nathaniel Lai of Sidley Austin address these issues in Chapter 2. Potential parties to an M&A arbitration include multiple sellers, guarantors and, increasingly, insurers. The contractual frameworks may include multiple SPAs,

1 Amy C Kläsener is a partner at Jones Day.

ancillary services or other agreements and insurance contracts. Whatever the context, failing to consider them at the transaction phase can add significant uncertainty, time and cost to the resolution of ensuing disputes.

Many M&A disputes can and should be resolved by expert determination rather than arbitration. However, procedural issues can arise when there is competing or overlapping jurisdiction between the expert and the arbitral tribunal. Dr Wolfgang Peter of Peter & Kim and Dr Daniel Greineder of McNair International address these issues in Chapter 3.

In Chapter 4, Thomas Webster and I consider how the advent of warranty and indemnity insurance will impact M&A arbitration. Warranty and indemnity insurance is now obtained in a large proportion of transactions. Although many or even most disputes will now be handled by the underwriting departments of insurers, the disputes that go to arbitration will raise new procedural issues and challenges.

Quantum determinations play a decisive role in many M&A disputes. In Chapter 5, three experienced quantum experts from AlixPartners, Andrew Grantham, Kai Schumacher and Greg Huitson-Little, offer strategies on how to maximise the value of expert evidence. This starts with identifying the expertise required, investigative and valuation works, and how to communicate complex valuation techniques successfully.

M&A transactions generate a large number of disputes, but a large proportion of them are successfully dealt with in expert determination proceedings and never reach arbitration. In Chapter 6, Sandy Cowan, Fiona Frith and Alexandra Kingston of Mazars share their insights on how to make the most of expert determination proceedings. This begins with selecting the right expert and defining an effective and efficient expert determination process.

In Chapter 7, Hussein Haeri, Clàudia Baró Huelmo and Giacomo Gasparotti of Withers provide an excellent introduction to third-party funding. Although third-party funding is not yet widely used in M&A arbitration, it is available as a further risk management tool.

The next two chapters address the two types of clauses in M&A contracts that generate the largest number of disputes. In Chapter 8, William S Dudzinsky, Lance J Phillips, Amy Chen and Michael Mannino of Eversheds Sutherland focus on purchase price adjustment clauses. Their chapter provides strategic advice for drafting purchase price adjustment clauses in light of their potential for generating disputes, including choice of dispute resolution mechanism, and a useful practitioner's checklist. In Chapter 9, Chris Drewe, Patricia Moroney

and James Fox of Mazars discuss the particularities of accounts warranties. The chapter provides a useful guide for disputes lawyers, explaining the complexity of interpreting and analysing these clauses from an accounting expert's perspective.

The capstone chapter of Part I is Chapter 10, which pulls together advice to parties on how to structure their contracts to minimise the potential for dispute. Jonathan M Moses of Wachtell, Lipton, Rosen & Katz discusses key clauses that aid parties in ensuring that the deal closes, defining and limiting liability, reducing the risk disputes arising from true-ups and earn-out clauses, as well as minimising the impact of disputes on ongoing business relationships.

Part II focuses on the choice of substantive law in M&A contracts. The first eight chapters provide a geographical survey focusing on the particularities of substantive law that may influence the outcome of M&A disputes. Each chapter is structured in the same way for ease of comparison. This edition includes chapters for China (Sidley Austin), Germany (Freshfields Bruckhaus Deringer), Italy (Fieldfisher), South Korea (Kim & Chang), Switzerland (Thouvenin), the United Kingdom (Pallas Partners) and the United States (K&L Gates).

In these chapters, the first section considers the frequency of M&A disputes for transactions. The range in frequency is due in no small part to the substantive law and the extent to which it allows disputes to proceed on statutory grounds notwithstanding contractual limitations of liability. In particular, certain civil law jurisdictions open the door to cases where there are allegations of intentional failure to disclose relevant information.

The second section considers the frequency of litigation versus arbitration as a dispute resolution mechanism. Although litigation remains a popular choice, arbitration has become the nearly ubiquitous choice for dispute resolution in many jurisdictions. While a boon to arbitration practitioners, the dearth of published decisions in M&A disputes makes books like this all the more important.

The following section assesses the relative frequency of types of M&A disputes, including price adjustment disputes, earn-out disputes, pre-contractual failure to disclose and fraud disputes, and disputes arising from misrepresentations and breaches of warranties. While this cannot be done with scientific precision, this Section demonstrates again that there are two camps – one tending to allow fraud disputes, and one tending to disallow them. This distinction may be so significant as to brand the former as buyer-friendly regimes and the latter as seller-friendly.

The fourth section of each chapter in Part II addresses the applicable standard in the case of fraud or a failure to disclose information in the transaction phase. The scope of this standard, and the extent to which parties may derogate from

it in contract, are key factors in determining the volume of fraud-related M&A disputes. This is without doubt a key factor that parties should consider in choosing the applicable substantive law for their agreement.

The next section addresses burden of proof issues. In some jurisdictions there is a shifting of the burden of proof in cases where one party has better access to information or has been accused of wrongdoing. This burden-shifting may, in turn, be characterised as procedural or substantive. Burden-shifting can give the party lacking evidence (usually the buyer) a significant advantage and can thus be relevant to the choice of law. Tribunals may be faced with thorny issues involving the confluence of burden-shifting mechanisms arising under substantive law and procedural mechanisms available in arbitration that exceed those that would normally accompany the burden-shifting mechanism in state courts of that jurisdiction.

Sixth, some laws contain rules on imputation, attribution or pooling knowledge of sellers with management or target representatives. As M&A contracts typically limit representations and warranties to the knowledge of a defined group of persons at the seller, it is possible that relevant information at the target is not disclosed and may form the basis for claims. Whether or not the applicable substantive law contains such doctrines can materially impact a buyer's chances of succeeding on some claims.

In the seventh section, each chapter describes the remedies available under the substantive law of that jurisdiction. While all jurisdictions allow for money damages, some jurisdictions prioritise specific performance or may even provide for rescission or unwinding of the transaction in certain circumstances. Both buyers and sellers are well advised to understand the scope of potential remedies under the chosen substantive law.

In the eighth section, the authors discuss how damages are to be calculated. As discussed in Chapter 5, the choice of method can have a significant effect on the measure of damages. Parties and arbitrators should be aware of this legal backdrop in preparing and assessing expert evidence.

Ninth, the authors address the potential overlap between contractual and tort claims arising from the same set of facts and circumstances. In certain jurisdictions, law or doctrine may prevent an injured party from asserting tort claims in parallel.

Tenth, the authors analyse whether a choice of law clause in respect of the M&A contract would be interpreted to extend to ancillary tort claims arising out of or in connection with the transaction.

In the eleventh section, the authors consider whether there are special substantive issues in the jurisdiction that bear consideration. Some jurisdictions may subject M&A transactions to substantive rules governing sale of goods, whereas others may subject them to laws governing general terms and conditions, consumer protection laws or laws concerning unfair contract terms. For example, some jurisdictions may enforce 'best efforts' requirements, while others will not.

Finally, each chapter considers any special procedural issues that may arise in M&A disputes. These include special rules regarding the form of arbitration agreements, rules regarding joinder and consolidation, expert determinations, court support of arbitration, and special issues involving set-aside or recognition and enforcement.

Part II concludes with an overview chapter, authored by myself, analysing the country surveys and demonstrating some of the ways in which the choice of substantive law in the M&A contract may affect the outcome of an M&A dispute.

Conclusion

My thanks go to the talented and experienced team of lawyers and experts who have come together to deliver a truly pragmatic guide for M&A and disputes practitioners. This book continues to break new ground by considering the procedural, substantive and strategic aspects of M&A disputes. We are all grateful to Global Arbitration Review for including this book in the series of GAR Guides and for the team's highly professional guidance and support.

Part I

Key Issues in M&A Arbitration

CHAPTER 2

M&A Arbitrations involving Multiple Parties and Contracts

Yan Zhang and Nathaniel Lai[1]

Background and introduction

Merger and acquisition (M&A) transactions typically feature heavily negotiated terms, numerous signing entities and stakeholders, as well as multifaceted and interlinked contracts. Owing to their complex nature, M&A transactions inevitably give rise to a wide range of disputes, in many circumstances involving multiple contracts and parties. These issues need to be taken into account when considering whether and how to arbitrate M&A disputes. This chapter discusses practical solutions for parties negotiating their agreements as well as in conducting their dispute proceedings.

Procedural complexity in M&A arbitration

Whereas the paradigmatic arbitration involves two parties – a claimant and a respondent – multi-party situations involving more than two parties often arise in M&A disputes. The following are (non-exhaustive) examples of when complications relating to multiple parties and contracts have arisen:

- *Multiple transaction documents*: Sophisticated M&A transactions almost always involve multiple transaction documents. For example, parties may enter into a subscription or share purchase agreement, a shareholders' agreement, amended constitutional documents governing the target company, guarantees and other bespoke ancillary agreements relating to financing the

1 Yan Zhang is a partner at Nathaniel Lai is a counsel at Sidley Austin. The authors are very grateful to Hui Wu, associate at Sidley Austin, for her assistance with research and drafting.

deal, such as loan agreements and share pledges. Conduct said to be a breach of obligations often will constitute breaches of or trigger obligations under multiple agreements.

- *Joint venture disputes involving breaches of constitutional documents*: In joint venture transactions where the parties acquire equity interests in a joint venture entity and exercise control over the joint venture, shareholders' agreements are often signed to govern the parties' obligations in the joint venture. In addition to shareholders' agreements, the parties' conduct as shareholders is also subject to provisions in the constitutional documents of the joint venture entity (as well as pursuant to its governing corporate law). Disputes that arise often involve allegations of breach of both documents by various entities and persons.
- *Multiple sellers in an M&A transaction*: The sellers may be different shareholders in a target company, selling to one or more buyers. The deal might be conducted as a single transaction involving multiple parties under a single or possibly multiple purchase agreements, and potentially alongside new or amended shareholders' agreements being signed.

In disputes involving multiple parties or contracts, it would typically be efficient and desirable for parties to resolve their dispute in a single proceeding before a single tribunal. This is where the procedural mechanisms of joinder and consolidation come into play.

In traditional national court proceedings, joinder and consolidation are commonly used in consideration of fairness and efficiency. National courts ordinarily have broad and uncontroversial discretion to order joinder and consolidation even absent parties' consent.[2] In international arbitration, however, joinder and consolidation of proceedings are not straightforward and present specific problems. Arbitral proceedings by their nature are consensual and driven by the doctrine of party autonomy, and generally it is difficult to join a party to an arbitration without its consent.

Accordingly, in recognition of the increasingly complex nature of commercial disputes, and to keep up with the rising trend of disputes involving multiple contracts and parties, many arbitral institutions have revised their rules to provide for joinder and consolidation. By agreeing to these rules, therefore, parties consent to joinder and consolidation in the circumstances set out in the rules. These circumstances across rules and are summarised in the following pages. Parties

2 See Gary Born, *International Commercial Arbitration* (3rd Edition), § 18.1, p. 2761.

would do well to consider them when thinking about which arbitral rule system to select to govern their M&A transaction and, when disputes are on foot and a decision has to be made, whether to seek joinder or consolidation.

Comparative study of common institutional and ad hoc rules

The majority of popular arbitral rules today contain provisions dealing with multi-party and multi-contract situations. In this section, we briefly discuss how they work and the circumstances in which parties may join a third party to the arbitration or consolidate their arbitration with another dispute.

ICC Rules

Under the Rules of Arbitration of the International Chamber of Commerce (the ICC Rules), additional parties may be joined both prior to and following the appointment of an arbitrator.[3] In the former case, the arbitration will proceed if the ICC Court is prima facie satisfied that an arbitration agreement under the ICC Rules that binds all parties may exist.[4] Once joined, the additional party may jointly nominate a co-arbitrator with the claimant or respondent, failing which the ICC Court will appoint all three members of the tribunal.[5] If the joinder request is made following the appointment of an arbitrator, it will have to be decided by the arbitral tribunal, taking into account all relevant circumstances and on condition that the additional party to be joined accepts the constitution of the arbitral tribunal and agrees to the terms of reference.[6]

Article 9 of the 2021 ICC Rules deals with the multi-contract scenario, providing that claims arising out of multiple contracts can be made in a single arbitration so long as the ICC Court is prima facie satisfied that the arbitration agreements under which those claims are made are compatible, and all parties have agreed that those claims can be determined together in a single arbitration.[7]

Consolidation issue are decided by the ICC Court. Multiple arbitrations under the ICC Rules can be consolidated if (1) the parties have agreed to consolidation, (2) all claims in the arbitrations are made under the same arbitration agreement or agreements, or (3) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between

3 International Chamber of Commerce, Rules of Arbitration, January 2021 (2021 ICC Rules), Article 7.

4 2021 ICC Rules, Article 6(4)(i).

5 ibid., Article 12, Paragraphs (7) to (9).

6 ibid., Article 7(5).

7 ibid., Articles 9 and 6(4)(ii).

the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the ICC Court finds the arbitration agreements to be compatible.[8]

HKIAC Rules

Under the Hong Kong International Arbitration Centre's Administered Arbitration Rules (the HKIAC Rules), additional parties may be joined in two circumstances: (1) the additional party is prima facie bound by an arbitration agreement under the HKIAC Rules giving rise to the arbitration; or (2) all parties expressly agree.[9] Joinder can be raised both prior to and following constitution of the arbitral tribunal.[10] If the tribunal is not yet constituted, HKIAC may decide whether to allow joinder,[11] and may revoke any arbitrator appointment or appoint the entire tribunal.[12]

Consolidation of proceedings and multi-contract claims are covered under Articles 28 and 29 of the HKIAC Rules. Article 28.1 provides the HKIAC with the power to consolidate arbitrations pending under the HKIAC Rules in any of the following circumstances: (1) the parties agree to consolidation; (2) all claims in the arbitrations are made under the same arbitration agreement; or (3) if the claims are made under more than one arbitration agreement, a common question of law or fact arises in all the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions and the arbitration agreements are compatible (this is also the test for bringing claims under multiple contracts in a single arbitration).[13] If the HKIAC decides to consolidate, as a default rule the HKIAC will consolidate the arbitrations into the arbitration that commenced first in time, unless all parties agree otherwise or the HKIAC decides otherwise given the circumstances of the case.[14]

SIAC Rules

Under the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules), effective as of August 2016, parties can be joined either prior to or following constitution of the tribunal with the consent of all parties (including

8 ibid., Article 10.
9 Hong Kong International Arbitration Centre, Administered Arbitration Rules, 2018 (2018 HKIAC Rules), Article 27.1.
10 2018 HKIAC Rules, Article 27.1.
11 ibid., Article 27.1.
12 ibid., Article 27.13.
13 ibid., Article 29.
14 ibid., Article 28.6.

the additional party sought to be joined) or, in the absence of consent, where the additional party is prima facie bound by the arbitration agreement.[15] If a party is joined prior to constitution of the tribunal, the claimants are to jointly nominate one co-arbitrator and the respondents are to jointly nominate the other, with the presiding arbitrator to be nominated based on a procedure agreed between the parties or, failing agreement, by the SIAC. If the claimants or respondents are unable to agree jointly on a co-arbitrator, the SIAC will appoint all three arbitrators.[16] If the joinder application is made following constitution of the tribunal, the tribunal will decide on whether to order joinder.[17] In such cases, the additional party will be deemed to have waived its right to nominate an arbitrator.[18]

Under the 2016 SIAC Rules, parties may seek consolidation both prior to the constitution of any tribunal in the arbitrations sought to be consolidated, or following constitution of one or more tribunals.[19] Where no tribunal has been constituted, the application will be determined by the SIAC Court, which may grant the application if any of the following criteria is satisfied: (1) all parties have agreed to the consolidation; (2) all the claims in the arbitrations are made under the same arbitration agreement; or (3) the arbitration agreements are compatible and the disputes arise out of the same legal relationship or relationships, or contracts consisting of a principal contract and its ancillary contracts, or the same transaction or series of transactions.[20] If a tribunal has already been appointed, any party may apply to the tribunal for consolidation. The same criteria set out above apply, save that consolidation is not possible where different tribunals have already been appointed, unless the parties expressly agree to consolidate (and on the issue of which tribunal will preside going forward).[21] Claims under multiple contracts are dealt with under Rule 6 of the 2016 SIAC Rules, which approaches the issue as one of consolidation and applies the same test.

15 Arbitration Rules of the Singapore International Arbitration Centre, August 2016 (2016 SIAC Rules), Rules 7.1 and 7.8.

16 2016 SIAC Rules, Rules 7.1 and 12.2.

17 ibid., Rule 7.10.

18 ibid., Rule 7.12.

19 ibid., Rules 8.1 and 8.7.

20 ibid., Rule 8.1.

21 ibid., Rule 8.7.

LCIA Rules

Unlike the institutional rules discussed above, the Arbitration Rules of the London Court of International Arbitration (LCIA Rules), effective as of 1 October 2020, permit joinder only if the parties have expressly consented to joinder. Merely signing a multi-party contract stipulating arbitration under the LCIA Rules does not itself constitute consent to joinder; rather, parties have to expressly opt in to joinder.[22] Under the 2020 LCIA Rules, as in the previous 2014 LCIA Rules, the tribunal has the power to allow a third party to be joined, provided the third party and the applicant party have consented expressly to joinder in writing following the commencement of the arbitration or in the arbitration agreement itself.[23] Notably, this means that the LCIA Rules permit forced joinder (i.e., joining a third party that consents to be joined even if one of the other parties to the arbitration objects).[24]

As to consolidation, the tribunal, with the approval of the LCIA Court (or the LCIA Court itself, if no tribunal has been constituted), has the power to order consolidation if all parties to the arbitrations to be consolidated agree in writing.[25] Alternatively, arbitrations can be consolidated if commenced under the same arbitration agreement or compatible arbitration agreements, and are either between the same disputing parties or arising out of the same transaction or series of related transactions, provided that no or only one tribunal has been constituted, or if the same tribunal members have been appointed in two or more proceedings.[26]

ICDR Rules

Like the LCIA Rules, the International Dispute Resolution Procedures of the International Centre for Dispute Resolution (ICDR Rules) permit joinder only if the parties separately agree to joinder (i.e., the parties have to opt into joinder). Notably, under the 2021 ICDR Rules, additional parties may be joined not only when all parties (including the additional party) consent to joinder but also when the tribunal, once appointed, determines joinder to be appropriate and the additional party consents to joinder (i.e., forced joinder is permitted).[27]

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22 See, e.g., *CJD v. CJE and CJF* [2021] SGHC 61.

23 London Court of International Arbitration, Arbitration Rules, October 2020 (2020 LCIA Rules), Article 22.1(x).

24 See, e.g., *CJD v. CJE and CJF* [2021] SGHC 61.

25 2020 LCIA Rules, Articles 22.7(1) and 22.8(1).

26 ibid., Articles 22.7, 22.8.

27 International Centre for Dispute Resolution, International Dispute Resolution Procedures, March 2021 (2021 ICDR Rules), Article 8(1).

The 2021 ICDR Rules provide for a unique mechanism for consolidation in contrast to other institutional rules. Specifically, the ICDR may appoint a consolidation arbitrator at the request of a party or on its own initiative, who will have the power to decide whether and how to consolidate multiple arbitrations.[28] The consolidation arbitrator may consolidate arbitrations pending under the ICDR Rules or administered by the American Arbitration Association (AAA) or the ICDR into a single arbitration where the parties have expressly agreed to appoint a consolidation arbitrator, or where all the claims and counterclaims in the arbitrations are made under the same arbitration agreement.[29] Alternatively, in the event the arbitrations arise out of different arbitration agreements, consolidation is possible where (1) the arbitrations involve the same or related parties, (2) the disputes arise out of the same legal relationship, or (3) the consolidation arbitrator finds the arbitration agreements to be compatible.[30] Notably, under the latest rules, effective as of March 2021, arbitrations can be consolidated across arbitration agreements even if the parties are different, so long as they involve related parties. This is significant in the M&A context, where transaction documents are often executed by related parties rather than only by one seller or buyer.

If the consolidation arbitrator decides to consolidate the arbitrations, the parties will be deemed to have waived their right to appoint a co-arbitrator. The consolidation arbitrator has the power to revoke the appointment of any arbitrators already appointed, and may select any previously appointed tribunal to serve in the consolidated proceeding. If necessary, the ICDR will appoint any remaining arbitrators yet to be appointed.[31]

CIETAC Rules

Under the Arbitration Rules of the China International Economic and Trade Arbitration Commission, of January 2015 (2015 CIETAC Rules), a party wishing to join an additional party to the arbitration may file a request with CIETAC if the additional party is prima facie bound by the arbitration agreement.[32] CIETAC is empowered to decide whether to order joinder based on the evidence and its views of the circumstances and interpretation of the arbitration agreements.[33]

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28 2021 ICDR Rules, Article 9.

29 ibid., Article 9(1), Paragraphs (a) and (b).

30 ibid., Article 9(1)(c).

31 ibid., Article 9(6).

32 China International Economic and Trade Arbitration Commission, Arbitration Rules January 2015 (2015 CIETAC Rules), Article 18(1).

33 2015 CIETAC Rules, Article 18, Paragraphs 1, 3, 4 and 7.

If the request for joinder is filed after the constitution of the arbitral tribunal, CIETAC may decide whether to permit the request if the tribunal considers the joinder necessary having heard from all parties (including the additional party).[34]

Once a joinder application has been granted, the claimants or respondents are to jointly nominate their respective co-arbitrators, and if no agreement can be reached at this stage, CIETAC will appoint all three members of the tribunal.[35] Notably, if joinder is permitted after the constitution of the arbitral tribunal, the 2015 CIETAC Rules permit the additional party to request that a new tribunal be appointed to allow its participation in its constitution.[36]

The CIETAC Rules also contain fairly broad consolidation provisions. At the request of a party, CIETAC may consolidate two or more arbitrations under the CIETAC Rules into a single arbitration in any of the following situations: (1) the claims in the arbitrations are made under the same arbitration agreement; (2) the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible, and the arbitrations involve the same parties as well as legal relationships of the same nature; (3) the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible and the multiple contracts involved consist of a principal contract and its ancillary contracts; or (4) all the parties to the arbitrations have agreed to consolidation.[37]

Swiss Rules

Under the Swiss Rules of Arbitration, effective as of June 2021 (2021 Swiss Rules), an additional party can request or be requested by a party to join an arbitration either before or after the constitution of the arbitral tribunal. If the tribunal has yet to be constituted, the arbitration shall proceed with all claims (including by or against the additional party) unless the Swiss Arbitration Centre determines that there is manifestly no arbitration agreement referring to the 2021 Swiss Rules, or where claims are made under multiple arbitration agreements that are manifestly incompatible.[38] This decision is without prejudice and subject to the tribunal's decision to decide on its jurisdiction after it is constituted.[39] After

34 ibid., Article 18(1).
35 ibid., Article 29.
36 ibid., Article 18(5).
37 ibid., Article 19(1).
38 Swiss Rules of International Arbitration, June 2021 (2021 Swiss Rules), Article 5(1).
39 2021 Swiss Rules, Article 5(2).

the tribunal is constituted, any request for joinder (or intervention) is decided by the arbitral tribunal, 'after consulting with the parties, [taking] into account all relevant circumstances'.[40]

The 2021 Swiss Rules authorise the Swiss Arbitration Centre to consolidate arbitration proceedings at the request of a party and after consulting all parties and any confirmed arbitrator,[41] after taking into account all relevant circumstances, including the links between the claims and the progress already made in the respective proceedings.[42] When consolidation is granted, the Swiss Arbitration Centre may revoke the appointment of arbitrators and proceed to constitute a separate tribunal to adjudicate the consolidated arbitration in accordance with the Rules.[43]

UNCITRAL Rules

In contrast to the institutional rules above, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules) are more limited in providing for joinder and consolidation. This is perhaps not surprising since it is a set of ad hoc rules, and there is no administering institution to oversee joinder prior to constitution of the tribunal or to make decisions on consolidation of proceedings. The latest version of the UNCITRAL Rules, adopted in December 2021, now provides a limited scope for joinder. However, there is still no provision for consolidation of proceedings, meaning that unless parties can agree at the time of the dispute to consolidate, they might have to resolve their disputes in multiple parallel proceedings, potentially before different tribunals.

The joinder provisions under the 2021 UNCITRAL Rules are found at Article 17(5), which provides that the arbitral tribunal may, at the request of any party, 'allow one or more third persons' to join an ongoing arbitration provided that the person is also a party to the arbitration agreement. The tribunal may deny joinder if it finds that joinder will cause prejudice to any of the parties.[44] In practice, this provision is likely to see most use where third parties are actively seeking to join the suit (e.g., as an additional claimant or cross-claimant); it is unlikely that tribunals will be able to use it to join parties against their will (e.g., as an additional respondent) given that they may only 'allow' parties to join rather than

40 ibid., Article 6(3).
41 ibid., Article 7(1).
42 ibid., Article 7(2).
43 ibid., Article 7(3).
44 United Nations Commission on International Trade Law, Arbitration Rules (2021), Article 17(5).

require them to be joined, and since additional parties seeking to resist joinder will often be able to convincingly argue that they would be prejudiced because they were denied their right to nominate a co-arbitrator.

Strategic considerations

In this section, we discuss the strategic considerations in multi-party and multi-contract situations that typically arise in M&A transactions and disputes.

Considerations at time of contracting

Joinder and consolidation offer significant benefits to parties in terms of efficiency in dispute resolution but are not without problems. The general view is that, on balance, providing for some form of joinder and consolidation is beneficial and would be what commercial parties would have opted for had they put their minds to this issue in negotiations. This is the position taken by the majority of institutions, which provide for joinder and consolidation by default such that parties would have to expressly opt out of these positions, although there are a minority that continue to allow joinder or consolidation (or both) only if the parties expressly opt in (e.g., the LCIA Rules). Nonetheless, in individual transactions, there might be specific factors at play, and parties need to be mindful of the possibility of joinder and consolidation when negotiating their arbitration clauses.

The principal benefit of providing for joinder and consolidation (or selecting a set of rules that incorporate consent to joinder and consolidation) is that it would prevent parallel proceedings, since the disputes arising between the various parties and under the various agreements can be resolved in a single multi-party or multi-contract arbitration before a single tribunal having access to all the relevant evidence. This is efficient since it would obviate the parties incurring costs litigating the same issues in different forums and, more importantly, avoid the possibility of different tribunals or courts reaching different results on similar issues, and creating enforcement problems and uncertainty in the outcome of the dispute.[45]

These considerations are relevant in the M&A transaction context. Many of the multi-party and multi-contract scenarios set out above are likely to give rise to parallel proceedings. Accordingly, at the outset where it is unclear which transacting party might end up in potential breach, and where all parties have an

45 See further Gary Born, *International Commercial Arbitration* (3rd Edition), § 18.1, pp. 2762–63.

interest in maximising the likelihood of compliance by ensuring that the terms of the agreement can be easily enforced should any party breach, it would be in all parties' interests to opt for the possibility of joinder and consolidation. They can do so by expressly consenting to joinder and consolidation in all their arbitration agreements or, as is more likely to be the case, selecting a set of rules that provide for joinder and consolidation. Importantly, to ensure compatibility between the arbitration agreements so that joinder or consolidation can take place, the parties should ensure that the same rules, arbitral seat, language and number of arbitrators are provided for in the arbitration clauses of every transaction document.

However, joinder and consolidation can present problems of which the parties and their deal counsel should be aware. The key issue here relates to constitution of the tribunal and the parties' rights to nominate co-arbitrators. Arbitration is paradigmatically designed to facilitate disputes between a single claimant and a single respondent, such that the typical tribunal is comprised of three members – one nominated by each party with a third presiding arbitrator nominated through a joint procedure or by an institution. This is hard to square with situations involving more than two parties. Of course, if all the respondents (or claimants, as the case may be) are aligned and have common interests (e.g., if they are in fact affiliates, or are similarly situated buyers or sellers), then there is little issue. However, if the additional party sought to be joined is aligned with neither the claimant nor the respondent (e.g., a third-party guarantor impleaded in a claim between a claimant and the primary obligor, or a seller joined in a dispute between the buyer and the target), then the issue arises as to which of the three or more parties should be permitted to nominate the two co-arbitrators.

This problem is dealt with in different ways by the various rule systems, as discussed earlier in the chapter. Generally, if the additional party is unable to agree on arbitrator nomination with its co-claimant or co-respondent, the common approach is for the institution to appoint all three members of the tribunal (e.g., ICC Rules, SIAC Rules and HKIAC Rules). If the tribunal has already been constituted, one solution appears to be to permit joinder only if the additional party agrees to be joined (e.g., the ICC Rules), although there are also rules that take the view that the arbitration can continue with the tribunal that has been appointed and that the additional party has waived its right to arbitrator selection.[46] Even though these solutions provide certainty to parties as to

46 Some jurisdictions view equality in the nomination of arbitrators as a matter of public policy. See, e.g., *Siemens AG and BKMI Industrieanlagen GmbH v. Dutco Construction Co.*, 10 *ASA Bull.* 295, 297 (1992) (French Court of Cassation Civ. 1).

how their dispute will be handled in multi-party situations, they are by no means complete solutions. For example, allowing the institution to appoint all three tribunal members might preserve equality between the parties in the sense that no party will have the right to nominate a co-arbitrator, but defeats the parties' legitimate expectations in agreeing to arbitration that they would be able to have a hand in picking their decision-maker. Parties should be mindful of this issue and the differences between the various rules in this regard when negotiating their arbitration agreements.

This issue also arises in the consolidation context. If there are multiple arbitrations, multiple tribunals might already have been constituted, or be in the process of being constituted, yet following consolidation only one tribunal will proceed to decide on the matter. The predominant solution here among the various rule systems appears to be to refuse consolidation if that would mean overturning a tribunal that has already been validly constituted, meaning that ultimately it may still be difficult to avoid parallel proceedings.

Strategic considerations at time of dispute

Whereas the parties may have aligned interests in providing for joinder and consolidation at the time of contracting, these interests often change once an actual dispute arises after the transaction documents have been signed. Various scenarios giving rise to joinder and consolidation might develop at this point, especially in M&A disputes:

- The claimant might seek to claim against the respondent under multiple agreements and, to ensure efficient resolution of the dispute and consistency in the findings obtained, might seek to commence a single arbitration under multiple agreements (or commence multiple arbitrations with a concurrent request for consolidation). This arises when, for example, the claimant has claims under both the shareholders' agreement and the share purchase agreement, or when the claimant is a purchaser or subscriber that purchased (or subscribed to) separate tranches of shares sold (or issued) by the respondent under separate agreements.
- The respondent might seek to implead a third party to escape or reduce liability. For example, a guarantor might seek to join the primary obligor to the proceeding so that it can be held liable on its primary obligation.

- The claimant might seek to join additional respondents to the proceedings after more facts come to light suggesting that additional parties may be liable to it for breach. Potentially, this situation can arise when affiliates of the respondent are parties to transaction documents with the claimant, and the claimant later discovers that these affiliates were also implicated in the respondent's breach.
- Additional parties might attempt to join the arbitration as co-claimants if they also have claims against the respondent arising out of the transaction. For example, in a claim by an investor against a seller or issuer, other investors might also seek to join the arbitration as co-claimants.
- For strategic reasons, the respondent might seek to commence parallel proceedings, thereby creating procedural complexity and uncertainty in the dispute. On the other hand, it will generally be in the claimant's interest to consolidate these proceedings so that the dispute can proceed smoothly and efficiently and, importantly, to prevent the possibility of conflicting findings and awards that might cast uncertainty over the result of the dispute and complicate its later enforcement efforts.
- Apart from pursuing or avoiding liability, parties may also seek to join additional parties that are in possession of relevant and material evidence. Joining them to the arbitration potentially opens the possibility of obtaining disclosure of documents from them.

In many of these situations, and more generally in the context of a dispute having arisen, often there will be one side that seeks joinder or consolidation (or both), and one side that opposes it either to avoid liability or for tactical reasons. In the authors' experience, joinder and consolidation applications tend to be contested. As a threshold issue, applications are likely to fail if the applicable dispute resolution agreements under which joinder or consolidation are sought are not only different but incompatible. As a general matter, it is also typically more difficult to join a party or to consolidate proceedings after arbitrators have been appointed. Ultimately, however, whether joinder and consolidation is possible will depend on the specifics of the case and the rules chosen by the parties.

APPENDIX 1

About the Authors

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Yan Zhang is a partner in Sidley Austin's global arbitration, trade and advocacy practice, based in Hong Kong. She focuses her practice on acting for clients in international commercial arbitration under various institutional and ad hoc rules. Yan also has a decade of experience as an international transactional lawyer practising in New York, Hong Kong and Shanghai, having advised private equity funds and multinational companies in M&A and other corporate transactions.

Yan has been ranked in various legal publications for her work, including *Chambers Global: China Dispute Resolution/Arbitration*, *Chambers Greater China Region* (Dispute Resolution/Arbitration), *Who's Who Legal: Arbitration 2022* and *The Legal 500 Asia Pacific 2018 – International Arbitration*, and was shortlisted as a Commercial Arbitration Lawyer of the Year for IFLR's Women in Business Law APAC Awards 2022. In addition to her work as counsel, Yan also sits as an arbitrator.

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Nathaniel Lai is a counsel in Sidley Austin's global arbitration, trade and advocacy practice, based in Singapore. Nathaniel has acted for clients in international arbitration cases conducted under various institutional and ad hoc rules and in a wide variety of areas (including M&A, private equity, fraud, construction, sale of goods and technology disputes). He also has broad experience in advising on general commercial litigation matters, white-collar litigation and investigations, bankruptcy and insolvency disputes, and complex cross-border disputes.

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She has also advised European, Caribbean and Latin American states in public international law matters, such as state succession, territorial and maritime boundaries, new approaches to trade treaties with the United Kingdom post-Brexit, business and human rights, settlement of international disputes, and relations with international organisations.

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Before joining the firm, she worked for a leading international arbitration firm in Geneva (2017–2019) and a public international boutique law firm in London (2016–2017). Prior to that, she taught public international law courses at the Autonomous University of Barcelona and worked in a Spanish law firm specialising in banking litigation (2015–2016).

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Michael Bösch is a specialist in commercial arbitration. He has acted as counsel and arbitrator in dozens of international and national arbitrations, both under institutional rules such as the ICC, LCIA and Swiss Rules, and also ad hoc. His cases involve a wide area of matters, in particular M&A transactions and shareholders' agreements, but also agency and distribution, sale of goods and construction, including turn-key projects. Michael is frequently called on to speak at arbitration conventions and is the co-author of the firm's *Arbitration Newsletter Switzerland* on selected decisions of the Swiss Federal Supreme Court relating to actions for annulment of arbitral awards. Through his corporate and commercial advisory work, Michael has developed a robust and profound understanding of various business sectors, enabling him to use this expertise in contentious matters for the benefit of his clients or the tribunal.

Since 2018, *Who's Who Legal: Arbitration* has recognised Michael as a 'Future Leader' in the partner category. He is lauded by peers as 'an excellent lawyer' who is 'intelligent, knowledgeable and responsive' and further as 'a sharp-thinking' lawyer, who 'epitomises the practitioner and arbitrator who gives succinct and no-nonsense advice and decisions'. His arbitration work is also recommended by *The Legal 500* and *Leaders League*. Michael holds an LLM from Georgetown University Law Center, Washington, DC, and is a Fellow of the Chartered Institute of Arbitrators.

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M&A disputes can be unique in their hostility and complexity. The *M&A Arbitration Guide* – published by Global Arbitration Review – is a practical guide on what merger parties should think about when it comes to disputes. It pools the wisdom of specialists on how to prevent these disputes arising and how best to resolve them when it is too late. The guide is structured in two sections. Part I consists of 10 chapters on planning and procedural issues, covering everything from drafting clauses to how to structure contracts to minimise the potential for disputes. Part II offers a geographical survey of important differences in national laws that may affect the outcome of a dispute. It is written by 39 specialists from a variety of backgrounds and takes a practical approach throughout.

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ISBN 978-1-83862-909-0