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TO THE MULTIVERSE OF ARBITRATION BY CONSOLIDATION OF M&A ARBITRATION PROCEEDINGS

Abstract

With the growing number of M&A transactions, the disputes related to them also surge. M&A disputes sometimes pave way for the parallel proceedings, which have a high risk of having inconsistent awards from different tribunals. The article discusses the application of consolidation in M&A arbitration to avoid such awards and the current issues hindering the consolidation of arbitral proceedings. For creating a clear picture of the situation, firstly, we analyzed the different stages of M&A arbitration and specific types of disputes, which can arise in these stages. The advantages and the problems of consolidation have been explored in the second part of the article for the determination of the main problem and the possible solution for the consolidation of proceedings. The assessment of the current problems reveals that every impediment on the way of consolidation has simple solutions to be applied, except the explicit choice of different institutional rules by the parties in an arbitration agreement. The current issue of having different institutional rules being applied to M&A disputes has been researched and the possibility of further cooperation among institutions has been analyzed. It became evident that the choice of an arbitration institution and its applicable rules are specifically vital for M&A transactions, which have complicated nature due to the corporate structure of parties and chain agreements. The article concludes that the enhancement of cooperation among arbitration institutions is needed for the development of consolidation. Such an approach will make consolidation more accessible for parties and easier to apply.

Annotasiya

Günümüzdə birləşmə və qoşulma əməliyyatlarının artması ilə, bu cür əməliyyatlarla bağlı mübahisələr də artmaqdadır. Birləşmə və qoşulma əməliyyatları üzrə mübahisələr paralel icraata yol açaraq bəzən fərqli tribunallar tərəfindən uyğunsuz qərarlar qəbul edilməsi riskini yaradır. Məqalədə birləşmə və qoşulma mübahisələri üzrə arbitrajda bu cür qərarların verilməməsi üçün konsolidasiyanın tətbiqi və arbitraj prosedurunun konsolidasiyasına mane olan aktual məsələlər müzakirə olunur. Vəziyyətin aydın təsəvvürünü yaratmaq üçün əvvəlcə birləşmə və qoşulma mübahisələri üzrə arbitraj prosesinin müxtəlif mərhələləri və bu mərhələlərdə yarana biləcək mübahisələrin xüsusi növləri təhlil edilmişdir. Məqalənin ikinci hissəsində isə əsas problemin və sözügedən prosedurun konsolidasiyası üçün mümkün həll yolunun müəyyənləşdirilməsi məqsədilə konsolidasiyanın üstünlükləri və problemləri araşdırılmışdır. Mövcud problemlərin qiymətləndirilməsi ilə arbitraj müqaviləsində tərəflərin fərqli institusional qaydalarını açıq şəkildə seçmə halları istisna olmaqla, konsolidasiya yolundakı hər bir maneənin sadə həllə malik olduğu ortaya çıxır. Birləşmə və qoşulma əməliyyatları üzrə mübahisələrə fərqli institusional qaydaların tətbiq edilməsi məsələsi araşdırılmış və qurumlar arasında əməkdaşlıq imkanları təhlil edilmişdir. Nəticədə, tərəflərin korporativ strukturu və onlar arasında bağlanan əsas müqavilələr və onların törəmələri səbəbindən mürəkkəb xarakter

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daşıyan birləşmə və qoşulma əməliyyatları üçün xüsusi olaraq vacib olan bir arbitraj institutu və onlara tətbiq olunan qaydalar müəyyən edilmişdir. Məqalədə, konsolidasiyanın inkişafı üçün arbitraj institutları arasında əməkdaşlığın genişləndirilməsinə ehtiyac olduğu qənaətinə gəlinir. Bu cür yanaşma konsolidasiyanı tərəflər üçün daha əlçatan edərək tətbiqini asanlaşdıracaq.

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Introduction

The level of criticism towards arbitration for its high costs and lengthy proceedings is increasing in recent years.[1] Such elements of arbitration become specifically important within the framework of M&A transactions as their complex structures create more possibilities for disputes to arise. What is more frustrating is that once a dispute emerges it usually has a butterfly effect, which means more disputes will follow its lead. Having more than one dispute at the same time will not only be costly and time-consuming, will also pave the way to having inconsistent awards, which will be challenging to enforce. Considering that about one-third of new cases consisted of multiple parties in 2017 according to the ICC[2], it is reasonable to use different tools to avoid such awards. One of the most effective of these tools for different arbitral disputes is considered the consolidation of proceedings. By agreeing to consolidated proceedings, the parties can prevent the possibility of inconsistent awards. Additionally, such consolidation would have different advantages like the access of the tribunal to the facts of the dispute more comprehensively. Nevertheless, its benefits also accompanied several disadvantages. These negative points get more detailed when it comes to M&A arbitration and its different stages.

Following the above-mentioned points, it is reasonable firstly to explain the

[1] Anke Meier, Joinder and Consolidation in M&A Arbitration, *in* Amy C. Klasener, The Guide to M&A Arbitration, 16 (3rd ed. 2021); Niek Peters, The Fundamentals of International Commercial Arbitration, 46-47 (2017); Gary Born, International Arbitration: Law and Practice, para. 23 (2nd ed. 2015).

[2] Meier, *supra* note 1; The 2017 ICC Dispute Resolution Bulletin, 201 (2018).

different types of disputes during different stages of M&A transactions and the former's peculiarities. Afterwards, the article will proceed with the legal basis of arbitration shortly describing the general requirements for the consolidation of proceedings. Next, the discussion will be continued with the advantages and problems of consolidation. The applicable solutions to the issues will also be assessed in the article. In the end, the most challenging situation for the consolidation of proceedings will be analyzed: the possibility of consolidation of two or more disputes, which have different arbitration agreements with different arbitration institution rules as the basis for their proceeding. The recent memorandum published by the SIAC will be discussed as the basis for dealing with the ultimate problem.

I. Arbitration as a dispute resolution mechanism in mergers and acquisitions

The peculiarity of M&A arbitration begins with its change based on the different stages of M&A deals. Therefore, it is worth covering all these stages from the perspective of possible disputes. Based on these stages, disputes are divided into types, which are called pre-closing, and post-closing disputes respectively.

The first stage is the negotiation of an M&A transaction or a series of transactions and the implementation of these transactions. This stage also includes signing a memorandum of understanding between parties at the end of initial negotiations.[3] The memorandum of understanding has different names in the corporate environment, yet all of them serve one purpose: to identify the main obligations of parties before the conclusion of the contract. This document is not considered as a contract but rather an instrument to determine the deal structure and to have a more detailed culpa in contrahendo.[4] Therefore, disputes can arise with the pre-contractual obligations of the parties.[5] The main point is here for our discussion is the basis for arbitration, namely arbitration agreement. Parties can either include a binding arbitration agreement to their letter of intent, or they can agree on submitting their case to the arbitral tribunal separately. Sometimes parties can question the validity of arbitration agreement due to the quasi-legal nature of the memorandum of understanding.[6]

The negotiations part often is followed by due diligence of the target

[3] Bernd D. Ehle, *Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions*, 27 The Comparative Law Yearbook of International Business 287, 291 (2005).
[4] Cahit Agaoglu, Arbitration in Merger and Acquisition Transactions: Problem of Consent in Parallel Proceedings and the Transfer of Arbitration Agreements in Merger and Acquisition Arbitration, 65. Available at: http://qmro.qmul.ac.uk/xmlui/handle/123456789/8363 (last visited May 15, 2021); Georg Von Segesser, *Arbitration Pre-Closing Disputes in Merger and Acquisition Transactions*, 24 ASA Special Series, 274 (2005).
[5] Ehle, *supra* note 3, 291; Klaus Sachs, Schiedsgerichtsverfahren über Unternehmenskaufvertrage - unter besonderer Berücksichtigung kartellrechtlicher Aspekte, 125 (2004).
[6] *Ibid*; *Ibid*.

company. The full due diligence is completed before the signing of the purchase agreement. The result of due diligence is critical for the parties since it will have a great influence on the future of the deal. [7] The lack of trust in the seller on the matter of the completeness of the information provided to the data room can lead to a dispute.[8] It is mainly connected with the pre-contractual duties of the seller.[9]

Many post-M&A disputes are related to contractual representation and warranties. The disputes on representation and warranties arise based on the vague or ambiguous language of the respective provisions in the transaction.[10] This tendency is sometimes unavoidable due to the complexity of the transaction.[11] The basis for the dispute is usually the statements of the seller about the situation of the target company.[12] Buyers mostly demand price change when it is revealed that one of the guaranteed qualities of the target company is not really, as they will claim it as over-valuation.[13] The representation and warranties clauses are not only complex due to their subject matter, but also due to the high probability of involvement of third parties in such claims.[14]

Purchase agreements usually determine only a provisional price, which is subject to change based on the different adjustment methods stipulated in the agreement by the parties.[15] Commonly, parties made purchase price adjustments based on the true-up of financial figures.[16] Another type of these adjustment methods is earn-out clauses. Earn-out clauses provide a basis for the seller to receive an additional benefit based on the future income of the target company in the given period (earn-out period).[17] The disagreement between parties can begin for different reasons. The seller can accuse the buyer of price manipulation using different techniques such as changing accounting practices.[18]

In most purchase agreements, a two-stage dispute resolution mechanism is determined to minimize the costs for possible disputes. The first stage is

[7] *Supra* note 3, 292
[8] *Ibid*; Sachs, *supra* note 5, 126.
[9] *Supra* note 3, 292.
[10] Eliane Fischer and Michael Walbert, Efficient and Expeditious Dispute Resolution in M&A Transactions, *in* Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler (eds.) Austrian Yearbook on International Arbitration, 40 (2017).
[11] *Ibid*.
[12] *Supra* note 3, 293.
[13] *Supra* note 3, 294; C. and K. v. S. Compagnie S. A., *in* ASA Bulletin 2000, 793-802 (1999).
[14] Cf. Irene Welser, M&A Post Closing Issues: Arbitration and Third Party Joinder, *in* Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power,Welser & Zeiler (eds.) Austrian Yearbook on International Arbitration, 3-4 (2011).
[15] *Supra* note 3, 295; Wolfgang Peter, *Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes*, 19 Arbitration International 491, 494 (2003).
[16] Fischer and Walbert, *supra* note 10, 39; Clemens Grossmayer, *M&A: Variable Kaufpreisgestaltung und Feststellung durch Schiedsgutachter*, 590 Ecolex, 395 (2016).
[17] *Supra* note 3, 295
[18] *Ibid*; Peter, *supra* note 15.

expert determination, and it is most suitable for the price adjustment disputes. The expert is usually an accountant who answers specific questions from parties. One of the most important elements of expert determination procedure is its determination by the mutual consent of parties.[19] He is not able to render an award or to enforce his idea on parties. Nevertheless, the tribunal in the latter stages will be bound by the factual outcome determined by the expert.[20]

Parties usually agree on specific time limits for claims, which can be brought by the buyer against the seller (limitation periods). Limitation periods normally differ depending on the type and nature of the claim.[21] It should also be noted that not in all legislations such limitation periods can be applied. By some of the courts, it will be regarded as a violation of the right to access the court.[22] However, such limitation periods also serve well for the multiple proceedings and the consolidation of arbitration proceedings.

II. The consolidation of parallel proceedings

The consolidation of parallel proceedings is not an unusual case for M&A arbitration, taking into account the latter's multidimensional nature.[23] The more parties involved in the case, the more difficult it becomes to make them agree on the consolidation of their proceedings and their details. For the sake of understanding the trend more clearly, we should clarify the legal basis that enables parties to opt for consolidation, the reasons why parties should choose the consolidation, and possible problems on the way to the application of consolidation.

A. The legal basis for consolidation

Parties' agreement is one of the ways for the consolidation. Parties can express their consent for consolidation either through an arbitration agreement or after dispute's arise. A multiparty arbitration clause can be in the form of an umbrella arbitration agreement or can be implemented by inserting "a clause in framework agreement, which is referred to in other individual contracts".[24] Regarding the inclusion of consolidation by parties to the arbitration agreement, the main arbitration doctrine sources generally do

[19] *Supra* note 10, 42.
[20] *Supra* note 3, 298; Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 Arbitration International 157, 163 (1998).
[21] John Leadley, Procedural and Tactical Issues Edward Poulton Arbitration of M&A Transactions, 513. Available at: https://globalarbitrationnews.com/wp-content/uploads/2020/05/Arbitration-of-MA-Transactions-A-Practical-Global-Guide-Second-Edition-Sample-Chapter.pdf (last visited May 15, 2021).
[22] *Ibid*.
[23] Agaoglu, *supra* note 4, 35.
[24] Bernard Hanotiau, *Complex-Multicontract-Multiparty-Arbitrations*, 14 Arbitration International 369, 375 (2014). Available at: https://doi.org/10.1093/arbitration/14.4.369 (last visited May 20, 2021).

not recommend applying this method[25], and respectively such practice is rarely observed in the practice. Furthermore, it is also rare for the parties to agree on consolidation after a dispute has arisen since one of the parties generally refuses to accept consolidation.[26] Consequently, arbitration rules, which are included by parties to arbitration agreements, play a more effective role in the application of consolidation. Nevertheless, it should be noted that this reluctant approach is gradually replaced by the recommendation of the carefully drafted consolidation provision to the contract.[27]

Two situations for multiparty disputes in M&A transactions:

1) one SPA multiple sellers and buyers;

2) multiple contracts multiple targets from one seller to purchaser.[28]

Third parties can also be the party to the agreement such as guarantors.[29]

In the case of multiple SPAs, authors suggest avoiding different forums and instead opt for multiparty arbitration agreements with timing regulations since not all disputes will arise at the same time.[30]

It should also be noted that in the absence of a multiparty arbitration agreement, parties look for alternative bases for the consolidation. Such a basis can be found as express or implied intention of parties appeared during the drafting process of the arbitration agreement.[31]

Each arbitration rule has different requirements for consolidation to be implemented. For instance, the ICC Rules[32] requires the parties to the disputes to be the same, while the HKIAC Rules[33] provides the consolidation of proceedings without the requirement on the identity of parties.

The final method is statutory consolidation provided by arbitration laws of different domestic legislations. This method is rarely applied in practice since it conflicts with the party autonomy principle to a certain extent.[34] Due to its controversial nature, most of the arbitration laws require the consent of both parties.[35] Nevertheless, several countries adopted arbitration laws where the consent of both is not required for statutory consolidation. For example, Hong Kong Arbitration Act permits court-ordered consolidation without the

[25] Alice Marie King, The Consolidation of Claims: A Proposal for Change in the ICSID System, 27 (2008); Julian D. M. Lew QC, Loukas A Mistelis and Stefan M Kroll, Comparative International Commercial Arbitration, 392 (2003).

[26] King, *supra* note 25, 28; David Joseph QC, Jurisdiction and Arbitration Agreements and Their Enforcement, para 4.64 (2005).

[27] Vasilis Pappas, Romeo Rojas and Gita Keshava, When Consolidation Fails: The Challenges of Parallel Arbitral Proceedings, 229 (2020). Available at: https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/when-consolidation-fails-the-challenges-of-parallel-arbitral-proceedings (last visited May 20, 2021).

[28] Meier, *supra* note 1, 20.

[29] *Id*., 17.

[30] *Id*., 21.

[31] Agaoglu, *supra* note 4, 157.

[32] ICC Rules, art. 10 (c) (2017).

[33] HKIAC Rules, art. 28.1 (2013).

[34] King, *supra* note 25, 30.

[35] *Id*., 29.

parties' consent if they choose the application of rules for domestic arbitration.[36]

The requirements for consolidation

In the simplest form of the factual background, consolidation will be required to take place between claims with existing connections and to be implemented with the interest of fair and efficient resolution of a dispute. Thus, certain requirements should be met to be able to consolidate parallel proceedings. While different arbitration rules have different requirements for consolidation, they can be grouped for their common regulations.

The first requirement of consolidation of proceedings is connexity.[37] Different rules define the connexity requirement within different terms. For instance, The Uniform Arbitration Act of the US requires "the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings".[38] Some rules define the connexity within the terms of having the same subject matter.[39] These examples highlight the lack of uniformity about the definition and exact scope of connexity.[40] Overall, the connexity among cases can be in two forms. The first one is the consolidation of cases arising out of "the same event or sequence of events".[41] Second is the consolidation of cases with different factual backgrounds, which have the same legal issue to be solved.[42]

Connexity of disputes should be proved to the Tribunal in the case of disagreement. The consolidation of different proceedings, which are based on different contracts, is possible if arbitration agreements refer to the same institution for administration.[43] In this case, either parties can agree on consolidation, or consolidation may be ordered by the arbitration institution or arbitral tribunal with reference to the rules mentioned in the arbitration agreement.[44] In the latter situation, the arbitration institutions will require different conditions to be met in order to consolidate the proceedings. Tribunal usually searches for the existing legal and contractual relationship of parties to the proceedings to decide for consolidation. As for the involvement of other parties in the proceeding after the consolidation, "the group of

[36] *Id*., 30.
[37] Lukas Vanhonnaeker, The Consolidation of Proceedings and Mass Claims in International Investment Law and Arbitration, *in* Shareholders' Claims for Reflective Loss in International Investment Law, 295 (2020). Available at: https://doi.org/10.1017/9781108784023.010 (last visited May 20, 2021).
[38] Uniform Arbitration Act, Section 10(3); Vanhonnaeker, *supra* note 37.
[39] Vanhonnaeker, *supra* note 37; Rules of Procedure of the EFTA Court, art. 39. Available at: https://eftacourt.int/wp-content/uploads/2019/01/EFTA_Court_Draft_RoP_04072018.pdf (last visited May 20, 2021).
[40] Vanhonnaeker, *supra* note 37.
[41] King, *supra* note 25, 14.
[42] *Ibid*.
[43] Hanotiau, *supra* note 24, 378.
[44] *Id*., 379.

companies" doctrine should specially be mentioned.[45] While some parties may refuse to join the consolidated proceeding, Tribunal can order them to join if it is possible to prove that they participated or intervened in the implementation, negotiation, and termination of the transaction.[46] Furthermore, such third parties should also constitute "a single economic reality"[47] with one of the parties to arbitral proceeding and should be "regarded as the actual party to the agreement".[48] The Tribunal's reasoning was as follows:

"… the arbitration clause expressly accepted by certain of the 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".[49]

Some authors defend that arbitration agreements in the group of contracts should be identical in order to qualify as the basis for consolidation (same institutional rules, same number of arbitrators, and same seat of arbitration).[50] Additionally, while some sources strongly recommend adding additional provisions for consolidation in case of having different parties,[51] nowadays the institutional rules started to recognize the consolidation of disputes with different parties. For example, the LCIA Rules 2014[52] only permitted the consolidation of disputes with the same parties. In the LCIA Rules 2020,[53] the requirement for the same parties is omitted leaving the "same transaction or series of related transactions"[54] as the basis for consolidation.

Another element that is accepted as a requirement for the consolidation of proceedings is that the case should be solved in a fair and efficient manner.[55] This requirement is widely mentioned in different rules and sources.[56] For the Uniform Arbitration Act, "proceedings which can be consolidated in as much as the prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of opposing parties".[57]

[45] *Ibid*.
[46] *Id*., 383.
[47] ICC Award No. 4131, YCA 1984, 131 et seq., 136 (1984). Available at: https://www.trans-lex.org/204131 (last visited May 20, 2021); Hanotiau, *supra* note 24, 383.
[48] Agaoglu, *supra* note 4, 115.
[49] ICC Award, *supra* note 47.
[50] Anne Veronique Schlaepfer and Alexandre Mazuranic, Drafting Arbitration Clauses in M&A Agreements, *in* Amy C. Klasener The Guide to M&A Arbitration, 13 (3rd ed. 2021).
[51] *Id*., 14.
[52] The LCIA Rules, art. 22.1 (x) (2014).
[53] The LCIA Rules, art. 22.7 (ii) (2020).
[54] *Ibid*.
[55] NAFTA, art. 1126 (2).
[56] UNIDROIT Principles of Transnational Civil Procedure, art. 12.5.
[57] Uniform Arbitration ACT, section 10 (a) (4).

Consequently, the interpretation of this condition for the application of consolidation depends on the tribunal or court ordering consolidation.[58]

One of the highly discussed conditions of consolidation is consent. While some arbitration rules require explicit consent, others accept implicit consent. The second reason for their approach with the fact that if parties chose rules that provide consolidation, they implicitly gave their consent. In fact, this is the main basis of criticism against consolidation.

B. Advantages of consolidation

The first advantage of the consolidation is about time, cost saving, and the effective administration of justice.[59] Consolidation of proceedings enables parties to have only one proceeding for similar cases instead of several ones, which could oblige them to deal with same matters in different proceedings. The parties can save time by submitting their evidentiary documents only through one procedure, and they can reduce cost by a single payment for arbitrators' fees.[60] Consolidation also allows the tribunal to analyze issue-causing disputes in "all-encompassing manner".[61]

The efficiency of consolidation, however, is not absolute. It is undeniable that, with different parties and differences in claims, the consolidated proceeding will be more complex, more expensive, and lengthier than any former single claims.[62] In this situation, for some parties, it would seem preferable to choose individual proceeding over the consolidated ones, as they can pay less money and spend less time instead of being obliged to wait through a long procedure that is not related to their claim.[63] Additionally, the consolidation can increase costs of parties to legal counsel fees[64] can give chance to attorneys for dilatory tactics.[65] Nevertheless, this scenario should not be applied to all cases. As the submitted claims usually are similar for their substance and share some factual background, the consolidated claim should not be complex in relation to its substance.[66] The main point on the efficiency of consolidation is about avoiding contradictory awards and court decisions. Conflicting decisions can be made if the findings in relation to legal issues differ in two or more cases because of minor differences about parties or

[58] Vanhonnaeker, *supra* note 37, 296.
[59] *Id*., 298.
[60] *Ibid*; Julie C. Chiu, *Consolidation of Arbitral Proceedings and International Commercial Arbitration*, 7 Journal of International Arbitration 53, 76 (1990).
[61] King, *supra* note 25, 30.
[62] Vanhonnaeker, *supra* note 37, 299.
[63] *Id*., 300; Emmanuel Gaillard, The Consolidation of Arbitral Proceedings and Court Proceedings, *in* International Court of Arbitration (ed.), Complex Arbitrations – Perspectives on their Procedural Implications, 37 (Special Supplement of the ICC International Court of Arbitration Bulletin, ICC 2003).
[64] Vanhonnaeker, *supra* note 37, 299.
[65] Gaillard, *supra* note 63.
[66] Vanhonnaeker, *supra* note 37, 300.

factual background. It is especially important to note since "there is generally no ability to substantively review awards".[67] Even in the case of variance in standards in different proceedings, a tribunal can bifurcate the proceeding into phases in order to assess liabilities and the common points of raised issues.[68] It should also be noted that such consolidation of proceeding should not be the reason for unfair results for the parties.[69]

C. The problems of consolidation

Imposed consolidation on parties by the tribunal or court plays the main role in the criticism of the consolidation of proceedings as it is against their consent.[70] Especially, if the consolidation is not mentioned by the parties in an arbitration agreement, permitting the tribunal to consolidate claims would be against the consensual nature of arbitration.[71] Some of the sources even equate it to a revision of the arbitration agreement by the Tribunal without the parties' consent.[72] The issue becomes more sensitive when it comes to commercial arbitration since the parties' consent is the main cornerstone for consolidation.[73] The specifically mentioned point is that when the parties express their will for two-party arbitration, they choose not to have consolidation in the future.[74] Moreover, the principle of privity of contract provides scope only for the contracting parties to the arbitration.[75] It means joining third parties to the proceeding for consolidation will be difficult.[76]

Such interpretation hardly matches with the realities of daily activities. Most of the times parties choose their arbitration agreement that does not provide consolidation, but they do not decide against it with full awareness.[77] Moreover, parties usually do not carefully negotiate the details of an arbitration agreement.[78] Opposingly, the close interdependence among different contracts may be the basis for the extension of consolidation agreement, if these contracts do not contain a clause referring to courts exclusively as the dispute resolution method.[79] Consequently, the lack of an arbitration agreement, which contains a provision on consolidation most probably, means that parties never discussed that matter.[80] Furthermore,

[67] King, *supra* note 25, 12; Gaillard, *supra* note 63, 35-36.
[68] Vanhonnaeker, *supra* note 37, 303.
[69] *Ibid*.
[70] *Ibid*.
[71] *Id*., 304.
[72] Dominique T. Hascher, *Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?*, 1 Journal of International Arbitration 127, 133-134 (1984).
[73] Vanhonnaeker, *supra* note 37, 305.
[74] Chiu, *supra* note 60, 57.
[75] Hanotiau, *supra* note 24, 370.
[76] *Ibid*.
[77] Vanhonnaeker, *supra* note 37, 306.
[78] Meier, *supra* note 1, 17;
[79] Agaoglu, *supra* note 4, 157.
[80] Meier, *supra* note 1, 17; Joachim Drude, *Post - M&A Arbitration and Joinder: Process and Drafting Considerations for M&A Transactions*, 15 SchiedsVZ 224, 227 (2017).

despite their classic two-party structure, the model clauses of reputable arbitration institutions are proved to be highly effective as the basis for multi-party disputes.[81]

Procedural issues may arise after the consolidation due to the increasing volume of work. Procedural issues may also be divided into three types depending on their nature: The bifurcation of proceeding, the appointment of experts, and the significant number of evidentiary documents which the Tribunal can face with.[82] With respect to the complexity of background, Tribunal can order the bifurcation of proceeding into two phases: the initial phase would be comprised of identifying issues that can be evaluated collectively from those that should be analyzed separately;[83] the second phase would be comprised of *the decision of Tribunal on the substance of claims*.[84] For such an organization of proceeding, Tribunal needs to show convincing reasons such as the difficulty of a case or *the voluminous nature of the record*.[85] The very same reasons can also raise the question of the need to call experts. Tribunal can appoint experts in order to assist them in the evaluation of financial evidence or the calculation of damages.[86] Nevertheless, all of these problems can be eliminated given that in M&A disputes the very essence of cases are similar, and parties use the same or related evidence and factual background.[87] Thus, the number of claimants would not differ much for the Tribunal in the proceeding.

The due process issues begin with the individuals' inability to choose their arbitrators independently in the case of consolidation.[88] Considering choosing your arbitrator is one of the main advantages of arbitration for parties, the consolidation of proceedings can create an impediment for parties to effectively implement their right.[89] In the famous Dutco case, two respondents wanted to nominate their arbitrators, although they were required to choose one together under the former ICC Rules.[90] Afterwards, they made a complaint to the French court based on the fact that their freedom to choose their own arbitrator was violated and it was against the French public policy.[91] After this case, the ICC made a change in their rules: in the case of

[81] Chiu, *supra* note 60, 57.
[82] Vanhonnaeker, *supra* note 37, 308.
[83] Abaclat and others (Case Formerly Known as Giovanna Beccara and Others) v. The Argentine Republic, ICSID (W. Bank) ARB/07/5 (Decision on Jurisdiction and Admissibility) [hereinafter Abaclat Decision on Jurisdiction], para. 669 (2011).
[84] Vanhonnaeker, *supra* note 37, 309.
[85] *Id*., 308.
[86] *Id*., 310; Abaclat Decision on Jurisdiction, *supra* note 83, para. 11.
[87] Vanhonnaeker, *supra* note 37, 311.
[88] *Ibid*.
[89] *Ibid*.
[90] BKMI and Siemens v Dutco, French Cass. Civ. 1ere, 7 January 1992, Bull Civ 1 (1992); Nigel Blackbaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, para 1.111 (6th ed. 2009).
[91] BKMI and Siemens v Dutco, *supra* note 90.

disagreement between parties on choosing an arbitrator, the final decision will be made by the ICC court itself.[92] Thankfully, there are different methods that can be offered for the appointment of arbitrators and can be useful even for the traditional three-arbitrator panels of multiparty disputes.[93] The main rule for the effectiveness of these methods is about maintaining equal treatment for parties.[94]

Another problem that arises related to consolidation is confidentiality concerns.[95] Joined parties can access one another's confidential information, business strategy within the evidentiary documents.[96] This issue becomes vital in M&A arbitration due to the very nature of M&A deals. In fact, confidentiality is one of the main reasons for the contractual parties to agree on M&A arbitration.[97] In the HFCS case, the tribunal refused to consolidate proceedings given the fact that consolidation would require complex confidentiality measures which makes consolidated proceedings too difficult to implement.[98]

Different solutions can be offered for the confidentiality problem. Relevant parties' access to confidential information can be limited without making the proceeding too complex to organize.[99] This can be implemented by Tribunal through issuing protective orders, imposing confidentiality obligations to parties, appointing a confidentiality advisor.[100] Additionally, as it is noted by the Softwood Lumber Tribunal, parties themselves can agree to conclude an additional confidentiality agreement.[101] The Tribunal in this proceeding also pointed out that confidentiality risks cannot be a hindrance for the advantages of consolidation, but a guide for determining the relevance of consolidation for a specific case.[102]

Another point about procedural issues, which requires to be mentioned, is the possible problem that might create equal treatment concerns. Having

[92] ICC Rules, art. 12 (6) (2012). This rule was adopted by the ICC in 1998.
[93] Christopher F. Dugan, Don Wallace Jr., Noah Rubins, and Borzu Sabahi, Investor-State Arbitration, 84 (2008).
[94] Vanhonnaeker, *supra* note 37, 312; Martin Platte, *When Should an Arbitrator Join Cases?*, 18 Arbitration International 67, 75 (2002).
[95] Agaoglu, *supra* note 4, 154.
[96] Vanhonnaeker, *supra* note 37, 313; Irene M. Ten Cate, *Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements under U.S. Law*, 15 American Review of International Arbitration 133, 153 (2004).
[97] Gauthier Vannieuwenhuyse, The Rise of M&A Arbitration (2021), http://arbitrationblog.kluwerarbitration.com/2021/04/06/the-rise-of-ma-arbitration/ (last visited May 20, 2021).
[98] Corn Products International, Inc. v. United Mexican States and Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID (W. Bank) ARB(AF)/04/1 and ARB(AF)/04/5 (Order of the Consolidation Tribunal), para. 8 (2005).
[99] Chiu, *supra* note 60, 60.
[100] Vanhonnaeker, *supra* note 37, 313.
[101] Canfor Corporation v. United States of America and Tembec et al. v. United States of America and Terminal Forest Products Ltd. v. United States of America, UNCITRAL/ICSID (Order of the Consolidation Tribunal), para. 143 (2005).
[102] *Id*., para. 147.

several claimants and a respondent may end up creating difficulties for both sides from different perspectives. While one of the multiple claimants can be deprived of its right to be heard due to a mass of other arguments,[103] the respondent may face with lack of opportunity to get prepared and create a collective defense.[104] Consequently, both parties' procedural rights are at risk of violation. Additionally, the complexity of consolidated proceedings may increase the possibility for arbitrators to make an error.[105]

As for the claimants' right to a fair hearing, the scope of it should be defined in order to determine what could constitute its violation in the case of violation.[106] When it comes to arbitration, the scope of the right to a fair hearing is defined as a "reasonable opportunity" of parties to submit their case.[107] Regarding the respondent's rights, usually, the main issue is the same for all claimants. It means the respondent's preparation for defense will be easier due to the fact that all claims are related. Moreover, effective case management by arbitrators can also mitigate the possible risks for the respondent.[108] Coming to the possibility of errors in consolidation, apart from effective case management, having access to the more detailed facts about the case due to the consolidation can give arbitrators "a wider perspective" to make decisions.[109]

D. Cross-institutional consolidation: the way to future

When an M&A deal involves multiple contracts with different arbitration institutions chosen in their arbitration agreements, the situation gets more challenging. The explicit choice of different institutional rules makes the consolidation of proceedings nearly impossible. For this problem, the SIAC recently has published its memorandum for expanding cooperation among arbitration institutions and establishing the basis for cross-institutional consolidation. The memorandum describes the adoption of the protocol on possible acceptance of the proposal. It is also noted that despite the lack of statistical data, the problem of different institutional rules and the application of consolidation is not an "uncommon occurrence".[110] The memorandum

[103] Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin, Makane Moïse Mbengue, *Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently? Final Report on the Geneva Colloquium Held on 22 April 2006*, 21 ICSID Review – Foreign Investment Law Journal 59, 85 (2006).
[104] Vanhonnaeker, *supra* note 37, 314.
[105] Hascher, *supra* note 72, 136; Vanhonnaeker, *supra* note 37, 314.
[106] Vanhonnaeker, *supra* note 37, 314.
[107] *Id*., 315; Case of Dombo Beheer B.V. v. The Netherlands, ECHR, App no 14448/88 (Judgment), para. 33 (1993); Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID (W. Bank) ARB/98/4 (Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated Dec. 8, 2000), para. 57 (2002).
[108] Vanhonnaeker, *supra* note 37, 316.
[109] *Ibid*; Catherine Yannaca-Small, Consolidation of Claims: A Promising Avenue for Investment Arbitration?, *in* OECD International Investment Perspectives, 237 (2006).
[110] Memorandum regarding Proposal in Cross-Institution Consolidation Protocol SIAC, para. 5.

suggests two methods to be chosen by other institutions in the future protocol. First is the establishment of a new mechanism to decide on the timing of application, the relevant decision-maker, and to determine the applicable criteria to applications in the case of cross-institutional consolidation.[111] As an alternative mechanism, arbitral institutions could adopt a mechanism to authorize one institution to decide on cross-institution consolidation based on its own consolidation rules.[112] For authorization, the objective criteria can be agreed on in the protocol.[113] The protocol defines the same seat of arbitration as the minimum requirement for its application on the consolidation of parallel disputes.

The memorandum also set the minimum criteria of which should be regulated by the protocol, namely the identity of a decision-maker on consolidation, standards for consolidation, the timing of the application and status of existing tribunal appointments, partial consolidation as well as reasons for consolidation decision.[114]

While the protocol gives a basis for more efficient consolidation of disputes in the future, some questions still need answers for the efficient implementation of the protocol. The courts' approach in the future to the awards made based on such a mechanism is a complete mystery. The level of cooperation among institutions is another issue since each of them has its own requirements for consolidation determined in their rules. These issues should be completed based on the cooperation among institutions, as it is the basis intention of the protocol.

Conclusion

Overall, the effective consolidation of proceedings is important for the arbitration to maintain its advantages in complicated situations and survive. It is specifically crucial for M&A arbitration which is the main source for parallel proceedings to emerge and requires new methods to be applied to be as cost minimizing as possible. To achieve effective consolidation, the tribunal should deal with the main concerns of the parties, which can be a problem in the future for enforcement of an award. The proceedings should also be organized promptly as disputes arising in the different stages of M&A arbitration can have different nature, subject matter, and most profoundly can be subject to time limitation clause. The consolidation of M&A arbitration proceedings raises several concerns including due process, confidentiality, procedural concerns, and the lack of basis for the consolidation. While the application of different methods and technology nearly solves most of these problems, the determination of different arbitration institutions in the

[111] *Id*., para. 13 (a).
[112] *Id*., para. 13 (b).
[113] *Id*., para. 7 (b).
[114] *Id*., para. 15.

arbitration agreements makes consolidation impossible. Therefore, we conclude that the cooperation of arbitration institutions with one another can make consolidation possible. It will further assist us to preserve the place of arbitration in M&A disputes as an effective method of dispute resolution. The initiatives by the institutions for partnership can be the beginning point of this process.