Global Arbitration Review

# The Guide to Energy Arbitrations

General Editor
J William Rowley QC

Editors
Doak Bishop and Gordon Kaiser

Third Edition

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For further information please contact Natalie.Clarke@lbresearch.com

**Publisher**
David Samuels

**Business Development Manager**
Gemma Chalk

**Editorial Coordinator**
Hannah Higgins

**Head of Production**
Adam Myers

**Copy-editor**
Rakesh Rajani

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# Editor's Preface to the Third Edition

Economic liberalisation and technological change over the past several decades have altered the global economy profoundly. Businesses, and particularly those involved in the energy sector, have responded to reduced trade barriers and advancement of technology through international expansion, cross-border investments, partnerships and joint ventures of every description.

The move to today's 'internationality' of business and trade patterns alone would have been sufficient to jet-propel the growth of international arbitration. But when coupled with the uncertainties and distrust of 'foreign' court systems and procedures, the stage was set for a move to processes and institutions more suited to the resolution of a new world of transborder disputes.

Not surprisingly, the concept and number of international commercial arbitrations have grown enormously over the past 25 years. Bolstered by the advantages of party autonomy (particularly over access to a neutral forum and the ability to choose expert arbitrators), confidentiality, relative speed and cost-effectiveness, as well as near worldwide enforceability of awards, the system is flourishing. And if a single industry sector can lay claim to parental responsibility for the present universality of international arbitration as the go-to choice for the resolution of commercial and investor-state disputes, it must be the energy business. It is the poster boy of arbitral globalisation.

Led by oil and gas, the energy sector is marked by enormously complex, capital-intensive international deals and projects, frequently involving prominent parties and state interests. Transactions and partnerships are often long-term in nature, and involve 'foreign' places and players. Political instability and different cultural backgrounds characterise many of the sector's investments. In short, the energy sector is a natural incubator for disputes best suited to resolution through international arbitrations.

Indeed, over the past 50 years or so, following a rash of nationalisations in North Africa, the Gulf States and in parts of Latin America, and the lessons learned in 'foreign courts', there is scarcely a major energy sector contract (whether oil, gas, electric, nuclear, wind or

solar) that does not call for disputes to be resolved before an independent and neutral arbitral tribunal, seated, where possible, in a neutral, arbitration-friendly place.

The experience and statistics of the major arbitral institutions bear out the claim that the energy sector has driven, and continues to account for, major growth in international arbitration. ICSID is illustrative, where 42 per cent of its caseload in 2017 involved the energy sector. At the LCIA, case statistics for 2017 revealed that some 34 per cent of respondents were from the energy and resources sector. Between 2014 and 2015, the Stockholm Chamber of Commerce Arbitration Institute saw a 100 per cent increase in the number of its energy-related cases.

Although much of the evidence of the energy sector's arbitral demand is anecdotal, those arbitrators who are known in the field report growing demand and a steady increase in enquiries as to availability. And having regard to the multifaceted fallout from the oil price crash of 2014, a revival of resource nationalism (which exacerbates the natural tension between energy investors and host states), together with Russia's continuing economic difficulties and a world where sanctions imperil contractual performance, the only realistic expectation is for further reliance on arbitrators and arbitral institutions to cope with the disputes that are surfacing daily.

Another driver towards arbitration is the fact that the number of substantive players in the sector is relatively limited. These parties will invariably have multiple agreements, partnerships and joint ventures with each other at the same time, many of which are long term. These dynamics call for disputes to be resolved by decision makers who are known to and trusted by all, and whose decisions are final. The simple fact about business is that the economic uncertainty associated with an unresolved dispute overhanging a long-term partnership is often considered to be more problematic than getting to its quick and definitive resolution, even if the resolution is unfavourable in the context of the particular deal.

Against this backdrop, when Gordon Kaiser raised the question with me in the summer of 2014 of producing a book that gathered together the thinking and recent experiences of some of the leading counsel in the sector, it resonated immediately. Gordon was also more than pleased when I suggested that we might try to interest Doak Bishop as a partner in the project.

With Doak's acceptance of the challenge, we have tried, in the first two editions, to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by those who do business in the energy sector and by their legal and expert advisers.

Before agreeing to take on the role of general editor and devoting serious time to the project, we needed to find a publisher. Because of my long-standing relationship with Law Business Research, the publisher of Global Arbitration Review, we decided that I should discuss the concept and structure of our proposed work with David Samuels, GAR's publisher, and Richard Davey, then managing director of LBR. To our delight, the shared view was that the work could prove to be a valuable addition to the resource material now available. On the assumption that we could persuade a sufficient number of those we had provisionally identified as potential contributors, the project was under way.

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Energy Arbitration*s being seen as an essential desktop reference work in our field. To ensure the high quality of the content, I agreed to go

forward only if we could attract as contributors colleagues who were among the internationally recognised leaders in the field. The book is now in its third edition, and Doak, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors over the years.

The third edition of *The Guide to Energy Arbitrations* has been expanded with a new chapter on upstream oil and gas disputes. The remaining chapters have all been updated to reflect developments since 2017.

In future editions, we hope to fill in important omissions, such as the changing dynamics of investment cases under the Energy Charter Treaty, including the consequences of the *Achmea* decision of the European Court of Justice; the contours of fair and equitable treatment; injunctions against and the setting aside of awards; bribery and corruption; sovereign immunity and enforcement issues; *force majeure* and contractual allocations; and intellectual property and insurance disputes in the energy sector.

Without the tireless efforts of the GAR/LBR team this work never would have been completed within the very tight schedule we allowed ourselves. David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all of my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this third edition will obviously benefit from the thoughts and suggestions of our readers, for which we will be extremely grateful, on how we might be able to improve the next edition.

**J William Rowley QC**
September 2018
London

# Part IV

## Procedural Issues in Energy Arbitrations

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# Consolidation of International Commercial Arbitral Proceedings in the Energy Sector

**George M Vlavianos and Vasilis F L Pappas**[1]

## Introduction

As a method of dispute resolution, arbitration is firmly rooted in the principle of consent: parties consent to resolve their disputes by arbitration, thereby giving up their due process right to have their disputes judicially resolved by the courts. However, the foundational principle of consent raises other issues, one being the difficulty of consolidating multiple arbitral proceedings involving the same facts, issues or law without the consent of the parties.[2] At best, this can lead to inefficiencies and increased costs; at worst, it can lead to inconsistent or contradictory results.[3]

This challenge is particularly acute in the energy industry, in which multi-contract transactions are commonplace, particularly in complex construction contracts and joint venture agreements.[4] In these circumstances, it is not unusual for multiple arbitrations to be commenced involving the same or similar facts, issues and law under the various contracts that form part of the transaction.

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1 George M Vlavianos is the managing partner of Bennett Jones (Gulf) LLP and Vasilis F L Pappas is a partner of Bennett Jones LLP. Both would like to express their thanks and gratitude to Gitanjali Keshava, associate of Bennett Jones LLP, for her assistance in the preparation of this chapter.

2 Generally, consolidation is permissible only with the express consent of the parties. See, 'Joinder of Parties and Joinder of Claims: Voluntary and Compelled Intervention of Third Parties, Cross-claims and Consolidation' in Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions,* International Arbitration Law Library, Vol 14 (Netherlands: Kluwer Law International, 2006) 185-188.

3 Kristof Cox, 'Dépeçage or Consolidation of Disputes Resulting from Connected Agreements: The Role of the Judge in Multiparty Arbitration' in Hanotiau and Schwartz (eds), *Multiparty Arbitration*, Vol 7 (The Netherlands: Kluwer Law International, 2010) at 50. See also Stephen R Bond, 'Dépeçage or Consolidation of the Disputes Resulting from Connected Agreements: The Role of the Arbitrator' in Hanotiau and Schwartz (eds) at 35-36.

4 Gary B Born, *International Commercial Arbitration,* Vol 2 (The Netherlands: Kluwer Law International, 2009) at 2068.

For instance, in a complex construction contract in the energy industry, it is not unusual for an overarching construction contract to exist between an owner and a contractor, and numerous subcontracts between the contractor and its subcontractors to which the owner is not a party. If each of these contracts requires that disputes be resolved by arbitration, and a dispute arises involving all of these parties – for example, the subcontractor breaches its subcontract with the contractor, resulting in the contractor breaching its contract with the owner – it may be difficult to have these disputes heard in a single arbitration proceeding. Indeed, it may be necessary to have these disputes heard in separate arbitrations between the owner and the contractor on the one hand, and the contractor and its subcontractor on the other, even though they may involve substantially the same facts, issues and law. This can lead to inefficiencies, increased costs, and manifestly inconsistent or contradictory results.

The reason is that in the circumstances described above, the owner has consented to arbitration with the contractor only, and the subcontractor has consented to arbitration with the contractor only; neither the owner nor the subcontractor has consented to arbitration with the other. Accordingly, a tribunal constituted under the construction contract can assert jurisdiction over only the owner and the contractor, and a tribunal constituted under the subcontract can assert jurisdiction over only the contractor and the subcontractor. A tribunal constituted under the construction contract cannot assert jurisdiction over the subcontractor, which is not a party to the construction contract; likewise, a tribunal constituted under the subcontract cannot assert jurisdiction over the owner, which is not a party to the subcontract.

Consolidation of arbitrations in these circumstances into a single arbitration can be very difficult and can typically be accomplished only with the consent of all of the parties. This has proved to be a challenge for arbitrators and arbitration practitioners in the energy industry, in which multi-contract transactions are common.

A number of arbitration rules have sought to remedy this situation by providing for the possibility of consolidation of multiple arbitrations without the consent of the parties. However, not all arbitration rules provide for consolidation, and those that do, do so imperfectly.

A number of national courts around the world have also ordered consolidation without the consent of the parties. However, national courts have not done so consistently. Indeed, there remain differing opinions among national courts around the world with respect to whether consolidation can be ordered without the consent of the parties, even within the same jurisdictions.

This chapter will explore the difficulty of consolidating arbitrations without the consent of the parties, and how various arbitration rules and jurisdictions around the world have addressed this issue. This chapter will then turn to consider how arbitration practitioners can make consolidation of arbitrations possible, and mitigate some of the uncertainty surrounding consolidation of arbitrations without the consent of the parties.

## The difficulty of consolidating arbitrations without the consent of the parties

As highlighted above, it can be very challenging for arbitration tribunals to consolidate multiple arbitrations absent the consent of the parties, particularly in multi-contract transactions.

It is trite that consent is the cornerstone to any arbitration. Parties to an arbitration are effectively giving up their due process right to have their disputes heard by a court in favour

of arbitration. Without the consent of all the parties to arbitration – whether in the form of a prospective arbitration clause in a contract or in the form of a submission agreement to arbitration when a dispute arises – an arbitration cannot take place. This requirement of consent can make it very challenging to consolidate multiple arbitration proceedings into a single arbitration when there are multiple contracts in a transaction.

For instance, in many multi-contract transactions, it may be the case that not all of the contracts contain arbitration clauses. Indeed, in many multi-contract transactions in the energy industry, each individual contract is sometimes negotiated separately from the rest, and includes different parties who may not be willing to have their disputes resolved by arbitration. In these circumstances, consolidation of disputes before a single arbitral tribunal is virtually impossible.

Assume, for instance, a multi-contract transaction, in which Party A and Party B enter into Contract 1, which has an arbitration clause, and Party B and Party C enter into Contract 2, which does not. An arbitral tribunal constituted under Contract 1 cannot assert jurisdiction over Party C, because Party C has not consented to arbitration. Accordingly, a dispute that arises under Contract 1 and Contract 2 cannot be consolidated and resolved by an arbitral tribunal constituted under Contract 1 unless all the parties – Parties A, B, and C – consent.

Even when all of the contracts in a multi-contract transaction include arbitration clauses, often the arbitration clauses vary. Again, the various contracts that form part of a transaction are often negotiated separately and involve different parties. Each party may have different preferences with respect to the arbitration rules that will apply, the number of arbitrators who may be appointed, the language in which the arbitration will be undertaken, the seat of the arbitration, and so on. In these circumstances, consolidation likewise becomes very challenging because the parties to the various agreements have essentially consented to different forms of arbitration.

For instance, assume that in the Contract 1 and Contract 2 scenario set out above, both contracts contain arbitration clauses. Contract 1, however, may state that arbitrations are to be resolved under the ICC Rules before three arbitrators seated in London, while Contract 2 states that arbitrations are to be resolved under the LCIA Rules before a single arbitrator seated in New York. These clauses are not compatible, and it would be difficult, if not impossible, for arbitrations commenced under both agreements to be consolidated without the consent of all the parties, as Party A did not consent to arbitration under the LCIA Rules before a single arbitrator in New York, and Party C did not consent to arbitration under the ICC Rules before three arbitrators seated in London. If the arbitration clauses contain any material inconsistencies, it becomes very challenging to consolidate without the consent of all the parties.

And even when all contracts in a multi-party transaction contain arbitration clauses that are materially the same, it can still be difficult to consolidate. Utilising the Contract 1 and Contract 2 scenario outlined above, and even assuming both have identical arbitration clauses, Party A has not consented to submit to the jurisdiction of an arbitral tribunal constituted under Contract 2, and Party C has not consented to submit the jurisdiction of an arbitral tribunal constituted under Contract 1. Therefore, it may still be challenging to consolidate arbitrations commenced under Contract 1 and Contract 2 into a single arbitration,

as it will be an open question as to whether the arbitrations should be consolidated before a tribunal constituted under Contract 1 or Contract 2.

In sum, therefore, there are many challenges that plague the consolidation of arbitrations without the consent of all of the parties, even when such arbitrations involve the same facts, issues, or law.

## Recent treatment of consolidation by arbitration rules

In recognition of the challenges associated with consolidating arbitrations, a number of arbitration institutions in recent years have sought to remedy the situation by introducing procedures for consolidation. However, many arbitration rules still do not contain any procedures for consolidation without the consent of the parties, and those that do have developed imperfect procedures that may not be effective in many real-world circumstances.

For instance, the UNCITRAL Arbitration Rules – likely the most widely used set of *ad hoc* rules in international arbitration – do not contain any provisions on the consolidation of multiple arbitrations with or without the consent of the parties. Accordingly, under the UNCITRAL Arbitration Rules, consolidation without the consent of the parties is a challenge.

Likewise, the AAA Commercial Arbitration Rules do not contain any provisions on the consolidation of multiple arbitrations. Thus, under the AAA Rules as well, consolidation without the consent of the parties is a challenge.[5]

By contrast, the LCIA Arbitration Rules include provisions relating to the consolidation of multiple arbitration proceedings. However, these rules only allow for consolidation where all the parties to the arbitrations consent,[6] or where all the parties to the arbitration do not consent, but all of the following criteria exist:

- the arbitrations to be consolidated are under the same arbitration agreement or compatible arbitration agreements;
- the arbitrations to be consolidated are between the same disputing parties; and
- no tribunals have been formed for any of the arbitrations to be consolidated.[7]

While this may be of some assistance in some circumstances, it only applies to a very narrow set of circumstances and would not be of assistance in multi-contract transactions involving multiple different parties. For instance, applying the same Contract 1 and Contract 2 scenario outlined above, the LCIA Rules would not be of any assistance in consolidating arbitrations commenced under those contracts as they would not be arbitrations involving 'the same disputing parties'.

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5 American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures* (New York: 2013), online: https://www.adr.org/sites/default/files/Commercial%20Rules.pdf (Commercial Arbitration Rules). Note, however, that Section P-2(vi)(c) of the Commercial Arbitration Rules provide that the preliminary hearing procedures should include a consideration of 'consolidation of the claims or counterclaims with another arbitration.' However, there are no procedures in the Commercial Arbitration Rules to effect such a consolidation..

6 The London Court of International Arbitration, *Rules of Arbitration* (London: 2014), online: http:// www.lcia.org//Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx, Article 22.1(ix) (LCIA Rules).

7 Ibid. at Articles 22.1(x) and 22.6. The LCIA Rules recognise that arbitrations can be consolidated where tribunals have been formed, but only if those tribunals are the same.

The ICC Arbitration Rules provide similar provisions for consolidation. In particular, they state that the ICC Court may consolidate two or more arbitrations pending under the ICC Rules where the parties have agreed to consolidation; all of the claims in the arbitrations are made under the same arbitration agreement; or where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between 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]

Again, however, in a multi-contract situation where all the parties do not consent to arbitration, this would only allow for consolidation in very narrow circumstances: namely, when all the arbitrations are pending under the ICC Rules, the arbitrations are between the same parties, and the arbitration agreements are compatible. This would not be of assistance in the multi-contract Contract 1 and Contract 2 scenario outlined above, or in many circumstances in which consolidation of arbitrations might be beneficial.

The ICDR Rules likewise provide similar provisions for consolidation. They state that where requested, the ICDR may appoint a 'consolidation arbitrator' who will have the power to consolidate two or more arbitrations pending under the ICDR Rules (or other arbitration rules administered by the ICDR or AAA) where the parties have agreed to consolidation; all the claims are made under the same arbitration agreement; or the arbitrations involve the same parties, the disputes arise in connection with the same legal relationship, and the arbitration agreements are compatible.[9]

Again, in a multi-contract situation where all the parties do not consent to arbitration, this would only allow for consolidation in narrow circumstances: where the arbitrations are between the same parties, and the arbitration agreements are compatible. This would not be of assistance in the multi-contract Contract 1 and Contract 2 scenarios outlined above, or in many other circumstances.

The HKIAC Rules and the SIAC Rules have the most robust set of consolidation provisions, and allow for the consolidation of arbitrations under multiple contracts involving multiple different parties without the consent of the parties. In particular, both allow for consolidation of arbitrations where: the parties agree to consolidate; all of the claims are made under the same arbitration agreement; or the claims are made under more than one arbitration agreement but a common question of law or fact arises in both arbitrations, the rights to relief claimed are in respect of or arise out of the same transaction or series of transactions, and the arbitration agreements are found to be compatible.[10]

Nevertheless, even the HKIAC Rules and the SIAC Rules are imperfect. In particular, under both sets of rules, they only provide for the consolidation of arbitrations pending under their rules. They do not allow for consolidation of arbitrations under multiple contracts among multiple different parties pending under other sets of arbitration rules.

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8 International Chamber of Commerce, *Arbitration Rules* (Paris: 2018), online: https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-. and-2014-Mediation-Rules-english-version.pdf, Article 9.

9 International Centre for Dispute Resolution, *International Dispute Resolution Procedures* (2018), online: https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf, Article 8.

10 Hong Kong International Arbitration Centre, *Administered Arbitration Rules* (Hong Kong: 2013), online: http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf, Article 28; Singapore International Arbitration Centre, *Arbitration Rules*, 6th ed (Singapore: 2016), online: http://www.siac.org.sg/our-rules/rules/siac-rules-2016, Rule 8.

In sum, while many different sets of arbitration rules have endeavoured to provide a remedy for the difficulties associated with the consolidation of arbitrations, not all of them have done so. Even those that have will typically only apply to a narrow set of circumstances and will not enable consolidation in many circumstances in which consolidation would be beneficial.

## Recent treatment of consolidation by national courts

A number of national courts have considered the question of whether consolidation of multiple arbitrations can be ordered without the consent of the parties. Generally, the results have been mixed. In the sections that follow, we will review recent national court decisions and legislation to assess the degree to which courts are willing to consolidate arbitrations without the consent of the parties. This review is not intended to be an exhaustive comparative analysis of how courts and governments around the world have addressed this issue but is rather set out for illustrative purposes. Following this review, guidance will be provided on how to mitigate some of the uncertainty surrounding whether consolidation can take place without the consent of the parties.

### Canada

Every province in Canada, other than Quebec, has legislation that applies to domestic and international commercial arbitrations seated within its jurisdiction. For domestic commercial arbitrations, each of these statutes provides that all the parties must consent in order for the consolidation of arbitrations to take place.[11] For international commercial arbitrations, the legislation is considerably less certain, and varies from province to province.

For instance, in a number of provinces, such as Ontario and British Columbia, the applicable legislation appears to allow the courts to order consolidation only '[i]f all parties to two or more arbitral proceedings have agreed to consolidate those proceedings'.[12] Meanwhile, other provinces, such as Alberta, Saskatchewan and Manitoba, have legislation that is less certain, stating simply that courts may consolidate international arbitration proceedings 'on the application of the parties.'[13]

There has been some dispute in Canada regarding whether 'the parties' means 'all the parties' (in which case consolidation will be possible only with the consent of all the parties), or only 'one' or 'some' of the parties to multiple arbitration proceedings (in which case consolidation will be possible without the consent of all the parties). Accordingly, there has been some division within Canadian courts as to whether consent of all parties is a requirement for court-ordered consolidation in provinces in which this language is used.

For instance, in *Liberty Reinsurance Canada v. QBE Insurance and Reinsurance*, a reinsured party and a reinsurer entered into two separate reinsurance contracts with different

11 See, e.g., Arbitration Act, RSA 2000, c A-43, s. 8(4).

12 International Commercial Arbitration Act, SO 2017, c 2, Sched 5, Article 8; International Commercial Arbitration Act, RSBC 1996, c 233, Article 27.01.

13 International Commercial Arbitration Act, REA 2000, c I-5, Article 8 (ICAA); International Commercial Arbitration Act, CCSM c C151, Article 8; International Commercial Arbitration Act, SS 1988-89, c I-10.2, Article 7.

arbitration clauses.[14] Multiple arbitrations ensued, and a party sought to consolidate over the objection of another. The Superior Court of Justice refused to consolidate the arbitral proceedings without the consent of both of the parties, holding that the court did not have jurisdiction to make such an order.

Similarly, in *Western Oil Sands Inc v. Allianz Insurance Company of Canada*, a party to multiple arbitrations between an oil company and an insurance underwriter sought to consolidate those arbitrations over the objections of one of the parties. The Court of Queen's Bench ruled that the consent of all the parties was required in order to consolidate the arbitrations.[15]

However, in *Priscapian Development Corp v. BG International Ltd*[16] – a case in which the authors of this chapter were directly involved – a British oil and gas company and an American petroleum exploration company were engaged in multiple arbitrations, and a party sought to consolidate the arbitrations over the objection of the other pursuant to the Alberta International Commercial Arbitration Act (ICAA), which provides at Section 8(1)(a) that the Alberta Court of Queen's Bench can consolidate 'on the application of the parties.' The Chief Justice of the Alberta Court of Queen's Bench considered the meaning of 'on the application of the parties' in Section 8(1)(a) and whether the consent of all the parties was required to consolidate. The court held that it had the power to order consolidation without the consent of the parties given its supervisory jurisdiction over international arbitrations seated in Alberta.[17]

In determining whether a court should order consolidation absent the parties' consent, the Chief Justice held that this should be determined on a case-by-case basis.[18] He established a framework for whether consolidation could be granted without consent, based on the following factors:

- the 'terms of the arbitration agreement between the parties';
- whether the issue is a 'common question of law or fact';
- whether the dispute arises 'out of the same transaction or occurrence or series of transactions or occurrences';
- the fact that the court should be 'non-interventionist' in arbitral proceedings;
- whether time and resources will be saved;
- whether one party will be 'seriously prejudiced by' consolidation; and
- whether one arbitration is at a 'more advanced stage than the other'.[19]

On the basis of these factors, the Chief Justice ultimately chose not to consolidate the two international arbitrations at issue.

In *Alberta Motor Association Insurance Company v. Aspen Insurance UK Ltd*[20] the Alberta Court of Queen's Bench appeared to affirm earlier Canadian rulings by holding that it

14 *Liberty Reinsurance Canada v. QBE Insurance and Reinsurance*, [2002] OJ No. 3599 (SCJ).

15 *Western Oil Sands Inc v Allianz Insurance Co of Canada*, 2004 ABQB 79.

16 2016 ABQB 611 [*Priscapian Development*].

17 Ibid. at para. 92.

18 Ibid. at para. 94.

19 Ibid. at paras. 96–99.

20 2018 ABQB 207.

could not consolidate multiple arbitrations without the consent of the parties, holding that allowing consolidation absent the consent of the parties 'runs contrary to academic commentary on [the] issue.'[21] The court emphasised that the hallmark of the arbitral process was the parties' control, which 'would be sacrificed with too much court involvement.'[22] The court also noted the sophisticated nature of the parties involved in the dispute with the ability to have drafted a more sophisticated arbitration clause,[23] implying that their failure to address consolidation in their written agreement should not be modified by the court after the fact and without the consent of the parties.

Most recently, the Alberta Court of Queen's Bench once again considered this issue in *Japan Canada Oil Sands Ltd v. Toyo Engineering Canada Ltd and Toyo Engineering Corporation*.[24] The court ordered the consolidation of a domestic arbitration into an international arbitration under the provisions of the ICAA,[25] without consent to consolidate from all the parties. In reaching this conclusion, the court interpreted the word 'arbitration' under the ICAA as being sufficiently broad to encompass both domestic and international arbitrations.[26] Further, it differentiated between a decision to arbitrate, to which consent by both parties is a hallmark, and 'procedural issues that may arise once that mutual decision has been made', for the resolution of which consent is not essential.[27] As consolidation did not go to the decision to arbitrate, but rather to a procedural issue, the court held that consolidation could be ordered without the parties' consent. However, the court noted that while it 'has jurisdiction to order consolidation', it may not be appropriate in all cases if the practical problems are so overwhelming that they outbalance the benefits of consolidation'.[28] Those problems were not present in the case and the court ordered consolidation.

In sum, the question of whether consolidation of multiple international commercial arbitrations can be ordered by Canadian courts without the parties is uncertain, and will vary from province to province. In Alberta, there appears to be a trend for courts to exercise jurisdiction to consolidate in such proceedings without the parties' consent. However, appellate authority on this issue is lacking; therefore, the trend is not conclusive.

## England and Wales

Under the United Kingdom Arbitration Act 1996, a tribunal has the power to order consolidation only with the consent of parties.[29] The necessity of consent was expounded by the Court of Appeal in *Abu Dhabi Gas Liquefaction Co Ltd v. Eastern Bechtel Corp*,[30] which concerned the defective construction of a an LNG tank in Abu Dhabi. The owner of the LNG producing plant commenced arbitration proceedings against the main contractor in England under a construction contract. However, the main contractor denied any liability

21 Ibid. at para. 154.
22 Ibid. at para. 161.
23 Ibid. at para. 164.
24 2018 ABQB 844 [*JACOS v Toyo*].
25 *ICAA, supra* note 13.
26 *JACOS v. Toyo*, *supra* note 24 at paras 64-65.
27 Ibid. at para. 100.
28 Ibid. at para. 107.
29 Arbitration Act 1996, c 23, s. 35.
30 [1982] 2 Lloyd's Rep 425 (CA).

for the defects and commenced separate arbitration proceedings against a subcontractor. The court held that consolidation was appropriate in such circumstances but was not possible in the absence of consent of all parties.[31]

This was supported in the subsequent case of *Oxford Shipping Co Ltd v. Nippon Yusen Kaisha (The Eastern Saga)*.[32] The case concerned two disputes regarding the leasing of a vessel, the Eastern Saga. The first dispute was between the owners of the vessel and charterers to whom the vessel was leased. The second dispute was between the charterers and sub-charterers to whom the vessel had been sub-leased. Both disputes concerned the same facts and law, and were brought under the same agreement. The same arbitrators had been appointed in both the disputes and the question was whether consolidation could be ordered by the arbitrators without the consent of the parties. The court declined, and indicated that consolidation could not take place without the parties' consent based on the fact that arbitration is, by nature, a private method of dispute resolution. This characterisation impliedly excludes those not party to the agreement.

In *Guidant LLC v. Swiss Re International SE, Swiss Re International SE,*[33] the court was confronted with a case in which two arbitrations were commenced under insurance policies with the same arbitration clause, and addressed the question of consolidation without the parties' consent. The court acknowledged the desirability of efficiency and consistency of results, but emphasised that in arbitration, 'party choice, privacy and confidentiality are relevant and important.' Ultimately, the court found that neither the courts nor an arbitral tribunal has the power under the UK Arbitration Act to consolidate two arbitral proceedings absent the parties' consent.

Therefore, in England and Wales, it appears that consolidation is not possible without the consent of the parties.

## United States

The state of the law surrounding consolidation of arbitral proceedings varies considerably in the United States, both at the federal and state levels. The Federal Arbitration Act (FAA)[34] has no provision on consolidation. Thus, courts have been split as to whether the FAA permits consolidation absent the consent of the parties. Most federal courts have supported the position that consolidation requires an express provision in the contract, and therefore consent of the parties.[35] Nevertheless, some federal courts have taken a more liberal interpretation and held that consolidation 'is proper where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results.'[36] In that case, the non-consenting party would have to show that they would suffer prejudice 'sufficiently substantial to outweigh the advantages of resolving the dispute in a consolidated proceeding.'

31 Ibid. at para. 427.

32 [1984] 3 All ER 835 QBD..

33 [2016] EWHC 1201 (Comm)..

34 *FAA*, 9 USCA 1-16.

35 *Protective Life Ins Corp v Lincoln Nat'l Life Ins Corp*, 873 F2d 281, 282.

36 *Socieded Anonima De Navegacion Petrolera v CIA De Petróleos De Chile SA*, 634 F Supp 805, 809.

For instance, in *Compania Espanola de Petróleos, SA v. Nereus Shipping*,[37] the court construed the FAA liberally and held that the district court had authority to consolidate if the disputes concerned the same questions of law and fact, even without the consent of the parties. The case concerned two arbitral proceedings, both ultimately subject to the same arbitration clause in a maritime contract of affreightment signed by Nereus Shipping, the agent for owners of various vessels, and a charterer. The two arbitral proceedings at issue became subject to the arbitration clause in the maritime contract as the parties had signed subsequent agreements that ultimately incorporated the terms of the maritime contract, which included the arbitration clause.

In *United Kingdom v. Boeing Co and Textron Inc*,[38] both Boeing Co and Textron Inc had separate contracts with the United Kingdom but with identical arbitration clauses. The court held that there were 'two distinct agreements to arbitrate in distinct contracts'. The court would order the consolidation of arbitral proceedings only if all the parties were signatories and privy to the same contract, despite the existence of similar issues of fact and law. Since this decision, many courts have held that *Boeing* overruled *Nereus*, reiterating that consent of the parties is a requirement for consolidation.[39] For instance, the court in *Anwar v. Fairfield Greenwich Ltd* reaffirmed that federal district courts lack the power to consolidate arbitral proceedings absent the consent of the parties.[40]

In *Maxum Foundations, Inc v. Salus Corp*,[41] 8201 Corporation (8201), a third party defendant-appellant in the action, appealed an order of the US District Court for the Eastern District of Virginia, which had ordered consolidation of arbitral proceedings under a construction contract dispute. The relevant contracts included the contract between 8201 and Salus Corp (which included an arbitration clause) and a contract between Salus Corp and Maxum Foundations (which incorporated the same arbitration clause by reference to the 8201/Salus Corp contract). The court acknowledged that the 'authority of federal courts to order consolidation of arbitration proceedings where the parties have not agreed to do so is uncertain.'[42] However, the court ultimately found consent to consolidate in the absence of any consolidation provision in either of the contracts under consideration. It was held that the arbitration clause was broad enough to consolidate the arbitral proceedings, particularly when read in the context of the two interlocking contracts between 8201 (the owner), Salus Corp (the contractor), and Maxum Foundations (the subcontractor).

In *Connecticut General Life Ins Co v. Sun Life Assurance Co of Canada*,[43] the Seventh Circuit Court of Appeals held, in a case involving a multi-party dispute with multiple agreements between insurers and reinsurers, that implied consent to consolidation was possible and rejected the position that such consent must be expressly stated in the agreements.[44] In the subsequent case of *Rolls-Royce Indus Power Inc v. Zurn EPC Services Inc*, the court clarified

37 A, 527 F2d 966 (2d Cir 1975) (*Nereus*).

38 998 F2d 68 at 74 (2d Cir 1993) (*Boeing*).

39 *Philadelphia Reinsurance Corp v Employers Ins of Wausau*, 61 Fed Appx 816 (2003) at footnote 3; *BP Exploration Libya Ltd v ExxonMobil Libya Ltd*, 689 F.3d 481 (2012).

40 728 F Supp 2d 462 (2010) at 476-7.

41 817 F2d 1086, 1087 (4th Cir 1987).

42 817 F2d 1086, 1087 (4th Cir 1987).

43 210 F3d 771 (7th Cir 2000) [*Connecticut General*].

44 Ibid. at 774.

that Connecticut General did not overrule the general position that consent of the parties is required, and simply relied upon 'usual methods of contract interpretation' to identify the existence of consent.[45] The court in *Rolls-Royce* also challenged the argument that consolidation of arbitral proceedings increases efficiency, noting that the increased complexity and delay do not always yield such a result.[46]

In addition to the uncertainty at the federal level, consolidation rules vary between states, and courts have reached differing conclusions when interpreting these state rules. For example, in New York, there is no consolidation provision in its arbitration legislation,[47] yet courts have alluded to their power to consolidate absent the parties' consent. For instance, in *Steward M Muller Construction Co v. Clement Ferdinand & Co,* the court held that the petitioner may have been successful in a consolidation application if an application had been sought.[48] However, consolidation has also been denied in New York when 'two proceedings differ technically and procedurally' and would go against the parties' agreements.[49]

In Georgia, the Georgia Arbitration Code provides that courts may consolidate arbitral proceedings when there are common parties, common transactions, and common issues of law or fact.[50] Recently, in *Georgia Casualty & Surety Co v. Excalibur Reinsurance Corp*, a case regarding the consolidation of arbitral proceedings between an insurance company and reinsurance company regarding a reinsurance agreement, the court recognised the two conditions in which a court may order consolidation of arbitral proceedings.[51] First, if the dispute is governed by the FAA or a state arbitration act that does not contain a consolidation provision, the court can consolidate only with the consent of the parties. Second, if the dispute is governed by a state arbitration act permitting court-ordered consolidation absent the parties' consent, then a court may order such consolidation in accordance with the terms of the state legislation.[52]

In sum, in the United States, there is significant uncertainty regarding whether consent is required to consolidate multiple arbitration proceedings.

## Hong Kong

In Hong Kong, it is generally accepted that consolidation of arbitrations absent the consent of the parties is permissible in certain circumstances.

Schedule 2 of the Hong Kong Arbitration Ordinance 1997 (Cap 609) is a procedure that allows parties to opt into provisions under the regime. Among those provisions is Article 6B, which permits national courts to make compulsory consolidation orders on the following grounds:

- common questions of law or fact arising in both or all the proceedings;
- the disputes arise out of the same transactions; or

45 2001 WL 1397881 at 4 [*Rolls-Royce*].

46 Ibid. at 6.

47 NY Consol Law §7501-7514 (2012).

48 36 AD2d 814 (1971).

49 *Matter of East Coast Services, Inc (Silverite Const Co, Inc)*, 623 N.Y.S.2d 1020, 1022 (NY Sup Ct 1995).

50 *The Georgia Arbitration Code*, Official Code of Georgia Annotated (OCGA) 9-9-6(e).

51 4 F Supp 3d 1362 (2014) [*Georgia Casualty*].

52 Ibid. at 1370.

- there is another reason that the court holds that it would be desirable for it to make a consolidation order.

In *Chun Wo Building Construction v. China Merchants Tower Co and others*,[53] a party to an arbitration sought an order to consolidate three arbitral proceedings without the consent of all the parties. The court granted the application, holding that there were sufficient common issues, the disputes related to the same series of transactions[54] and that the arbitral proceedings were at an early enough stage to make a consolidation order.[55]

*Cheung Kee Fung Cheung Construction Co Ltd v. Thorn Security (Hong Kong) Ltd and others*[56] concerned an application to consolidate three arbitrations at different stages of proceedings, two of which were at the substantive phases of the proceedings, without the consent of all the parties. The court refused to consolidate because of the delay that would have been caused, but held that absent such logistical issues, it would have consolidated the arbitral proceedings.

As a result, consolidation of arbitrations in Hong Kong appears to be permissible, without the consent of the parties, so long as certain criteria are met.

## Australia

The Australian federal International Arbitration Act (IAA)[57] refers only to the arbitral tribunal's ability to consolidate proceedings on application of a party in the following circumstances:

- there is a 'common question of law or fact aris[ing] in all of those proceedings';
- 'the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions';
- or 'for some other reason specified in the application, it is desirable that an order be made.'[58]

It is unclear to what extent Section 24 of the IAA allows for consolidation without the consent of the parties, as Section 22(5) of the IAA states that 'Section 24 applies to arbitral proceedings commenced in reliance on an arbitration agreement if the parties to the agreement agree (whether in the agreement or otherwise in writing) that it will apply.'

Before 2010, legislation regarding domestic arbitration in Australia varied in different states and territories. In 2010, the Standing Committee of General Attorneys agreed upon a Model Commercial Arbitration Bill in order to create uniformity across domestic arbitration law, which has since been adopted and enacted by all states and territories. Similar to the federal IAA, the uniform Commercial Arbitration Acts (uniform Acts) refer to an arbitral tribunal's ability to consolidate proceedings without the parties' consent only on the

53 [2000] 2 HKC 255.

54 Ibid. at para. 8.

55 Ibid. at para. 12.

56 [2004] HKEC 1617, 2004 WL 7325219 (HC).

57 Australia International Arbitration Act 1974, § 24(1)(a)-(c).

58 Ibid. at s. 24.

same grounds as the IAA.[59] However, the uniform Acts are silent on the courts' ability to consolidate domestic arbitral proceedings. Given the general provision in the uniform Acts stating that courts are permitted to intervene in arbitral proceedings only in accordance with the terms of the uniform Acts,[60] and the fact that there is no provision providing for courts to consolidate arbitral proceedings, it appears that courts lack the power to consolidate arbitral proceedings absent the parties' consent.

Therefore, it is unclear if courts can consolidate arbitrations in Australia without the consent of the parties.

### United Arab Emirates (UAE)

As of 16 June 2018, arbitrations in the UAE are governed by Federal Arbitration Law No. 6 of 2018 (UAE Arbitration Law), repealing Articles 203-218 of the Civil Procedures Code, Federal Law No 11 of 1992 (CPC), which previously applied to arbitrations in the UAE. The UAE Arbitration Law adopts the UNCITRAL Model Law to a large extent. However, it is not applicable to arbitrations in the Dubai International Financial Centre (DIFC) or the Abu Dhabi Global Markets (ADGM), which are governed by the DIFC Law No. 1 of 2008 (as amended by the DIFC Arbitration Law Amendment Law (DIFC Law No. 6 of 2013)), and the Arbitration Regulations 2015, respectively, both of which are also modelled on the UNCITRAL Model Law.

The UAE Arbitration Law will apply:[61]

- to arbitrations seated in the UAE, unless otherwise stated by the parties;
- when parties agree to be subject to the proceedings of the UAE Arbitration Law; and
- to arbitral proceedings arising from a relationship governed by UAE law.

The UAE Arbitration Law does not contain any provisions regarding the consolidation of arbitral proceedings.

As for the DIFC, neither the DIFC Law No. 1 of 2008 nor the 2013 amendments contain provisions regarding the consolidation of arbitral proceedings.

Finally, the Abu Dhabi Global Market Arbitration Regulations 2015 specifically provide that the arbitral tribunal can only consolidate proceedings or hearings with the consent of the parties.[62]

Accordingly, in the UAE, outside of Abu Dhabi, it is unclear to what the extent the courts may consolidate arbitration proceedings without the consent of the parties.

## Practical guidelines

As is clear from the above discussion, the question of whether consolidation can be ordered without the consent of the parties varies depending on the applicable arbitration rules and the jurisdiction, and there is considerable uncertainty regarding this issue.

59 See, Australian Capital Territory Commercial Arbitration Act *2017*, A2017-7, s. 27C (ACT Act).

60 See, ACT Act, s 5: 'In matters governed by this Act, no court must intervene except where so provided by this Act.'

61 United Arab Emirates, *Federal Arbitration Law,* No. 6 of 2018, Article 2.

62 Abu Dhabi Global Market, *Global Market Arbitration Regulations* (Abu Dhabi: 2015), online: http://adgm.complinet.com/net_file_store/new_rulebooks/a/r/Arbitration_Regulations_2015.pdf, s. 35.

This is problematic for all the reasons outlined above. In a multi-contract situation involving multiple parties, the same disputes, involving the same facts, the same issues, and the same law could be heard in multiple different arbitration proceedings involving multiple different arbitrators, leading to inefficiencies, increased costs, and potentially (worst of all) inconsistent results.

Imagine, for instance, a complex construction dispute involving an owner, a contractor and a subcontractor. The owner has a construction contract with the contractor, and the contractor has a subcontract with the subcontractor to which the owner is not a party. If a dispute arises in which the subcontractor breaches the subcontract with the contractor, causing the contractor to breach its contract with the owner, the inability to consolidate these disputes into a single arbitration could be particularly problematic for the contractor. For example, a tribunal constituted to hear an arbitration between the contractor and the subcontractor might find that the subcontractor did not breach the subcontract with the contractor; and a tribunal constituted to hear an arbitration between the contractor and owner might find that the contractor breached its construction contract with the owner. In these circumstances, the contractor may find itself liable to the owner for a breach caused by the subcontractor.

Likewise, the inability to consolidate could result in other manifest injustices. Assume, for instance, that the owner breaches its construction contract with the contractor, causing the contractor to breach its contract with the subcontractor. If these disputes were heard by separate tribunals, it is possible a tribunal constituted under the construction contract may rule that the owner is liable to pay damages to the contractor, while a tribunal constituted under the subcontract might rule that the contractor is not liable to the subcontractor. In these circumstances, the contractor could be left with a windfall award, and the subcontractor deprived of damages it suffered as a consequence of the owner's breach of the construction contract with the contractor.

In order to mitigate those risks, care should be taken when drafting arbitration clauses in multi-contract transactions to make clear the parties' intentions with respect to consolidation. If consolidation is desired in a multi-contract transaction, a number of steps should be taken.

The parties should ensure that each contract in the multi-contract transaction contains an arbitration clause, so that all parties consent to arbitration. They should ensure that the arbitration clauses in each contract are substantially the same, so that arbitrations under each contract are compatible with one another. Among other things, therefore, the parties should ensure that the arbitration clause in each contract should provide for the same arbitration rules; the same number of arbitrators; the same seat of arbitration; the same language of arbitration; and that the governing law in each contract should be the same, to the extent possible.

The parties should expressly agree that a tribunal constituted under any of the agreements can assert jurisdiction over the parties to the other agreements in the multi-contract transaction. They should agree that consolidation of multiple arbitrations should take place before a single arbitral tribunal in appropriate circumstances when the interests of justice and efficiency so require to avoid diverse findings on the same issues, facts or law. The parties should agree on a procedure to be followed to assess whether consolidation should take place. For example, the agreement should cover:

- who will decide whether consolidation should take place (the tribunal in one of the arbitrations, a court, a separately appointed arbitrator to assess the question of consolidation, etc.);
- the factors and criteria to be considered by the individual or individuals deciding on whether consolidation should be ordered;
- which tribunal will hear a consolidated arbitration and the method of appointment of arbitrators in the consolidated arbitration, if necessary;
- the impact of consolidation on arbitrators or tribunals previously appointed by the parties (e.g., that they be deemed to be *functus officio* following consolidation, their entitlement to be paid their fees and disbursements incurred prior to consolidation);
- the validity or invalidity of any acts done or orders made by the arbitrators or tribunals appointed by the parties prior to consolidation;
- that any limitation periods imposed by agreement or by law should run from the date on which any of the consolidated arbitrations were commenced; and
- the parties' entitlement to legal and other costs incurred before the consolidation of the arbitrations.

## Conclusion

Given the prevalence of multi-contract transactions in the energy industry, and the risks associated with multiple arbitration proceedings with respect to disputes concerning the same issues, facts and law, serious thought and consideration should be given to the question of consolidation when entering into those transactions to ensure that such disputes can be heard before a single arbitral tribunal. Failure to do so brings with it the risk of significant inefficiencies, increased costs, and inconsistent or contradictory decisions.

# Appendix 1

## About the Authors

**George M Vlavianos**
Bennett Jones (Gulf) LLP

George Vlavianos is the managing partner of Bennett Jones (Gulf) LLP, which carries on the practice of law in association with Bennett Jones LLP. Leader of the firm's arbitration practice, George practises in the areas of dispute resolution and construction law. He acts for owners, contractors and engineers in a wide range of construction disputes, and has advised on insurance claims arising out of large industrial construction projects. George has extensive experience representing major institutional clients in complex multiparty disputes, and in mediating and arbitrating significant commercial dispites in North America, Europe and Middle East.

George is a Fellow of the Canadian College of Construction Lawyers (CCCL) and a member of the Congress of Fellows of the Center for International Legal Studies. He is also a member of the London Court of International Arbitration. George is admitted to the Panel of International Commercial Arbitrators of the ICC National Committee of the Canadian Chamber of Commerce. He is ranked by *Chambers Global* and *Chambers Canada* in the fields of dispute resolution and construction law.

George is fluent in English, French and Greek. He has a working knowledge of German and a basic knowledge of Arabic.

**Vasilis F L Pappas**
Bennett Jones LLP

Vasilis Pappas's practice focuses on international commercial arbitration and investor–state arbitration, with a particular emphasis on construction disputes.

Vasilis represents multinational companies all over the world in complex commercial disputes in a diverse range of sectors, including, oil and gas, mining, banking, insurance, telecommunications and pharmaceuticals. He has acted as arbitration counsel under the world's leading international arbitration rule systems, including ICC, LCIA, UNCITRAL,

ICDR and AAA, and as litigation counsel before the courts of the United States and Canada. Vasilis also represents sovereign states and multinational companies worldwide in investor–state disputes under NAFTA Chapter 11, the ICSID Convention, and other bilateral and multilateral investment treaties.

Prior to joining Bennett Jones, Vasilis practised for eight years in New York City with a leading international law firm. He also practised with the government of Canada's Department of Foreign Affairs and International Trade, representing Canada in investor–state arbitrations and investment treaty negotiations.

Vasilis now works out of Bennett Jones' Calgary and Doha offices. He is an adjunct professor at the University of Calgary's Faculty of Law in the field of international commercial arbitration, and is on the Canadian roster of arbitrators of the ICC International Court of Arbitration. He also publishes and speaks regularly on topics pertaining to international commercial arbitration and investor–state arbitration.

**Bennett Jones LLP**
4500 Bankers Hall East
855 2nd Street SW
Calgary, Alberta
T2P 4K7 Canada
Tel: +1 403 298 3068
pappasv@bennettjones.com

**Bennett Jones (Gulf) LLP**
37th Floor, Tornado Tower
Al Funduq Street, West Bay
PO Box 11972
Doha, Qatar
Tel: +974 4020 4700
vlavianosg@bennettjones.com

www.bennettjones.com

The energy industry shaped international arbitration and – thanks to resource nationalism, changes in the oil price, shifting geopolitics and febrile sanctions lists - remains one of its biggest users.

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