Global Arbitration Review

The Guide to Energy Arbitrations

General Editor
J William Rowley QC

Editors
Doak Bishop and Gordon E Kaiser

Fourth Edition

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Publisher's Note

Global Arbitration Review is delighted to publish The Guide to Energy Arbitration.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Most know us for our daily news and analysis service, but we also provide much, much more – technical books and reviews, conferences and handy workflow tools, to name just a few, that go into more depth than the exigencies of journalism allow. (Do visit us at www.globalarbitrationreview.com to see our full range of output.)

The Guide to Energy Arbitrations, fourth edition, is one such volume.

Because GAR is so central to the international arbitration community, we regularly become aware of gaps in the literature. *The Guide to Energy Arbitrations* was the first example of identifying such a gap and we are delighted at the successful way in which it has been filled, with the help of so many leading firms and individuals, and the enduring appeal of this Guide.

If you find it useful, you may also like the other books in the GAR Guides series. They cover construction, mining, post-M&A disputes, IP, advocacy, damages, and the challenge and enforcement of awards in the same practical way. We also have a citation manual – UCIA (*Universal Citation in International Arbitration*).

On behalf of the whole GAR team, I'd like to thank our editors – Bill Rowley, Doak Bishop and Gordon Kaiser – for the energy they've put into the project, and my colleagues in production for the elan with which they've realised our collective idea.

David Samuels

October 2020
London

Contents

Preface

Economic liberalisation and technological change in 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 during 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 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. And despite recent international trade disputes and the appearance earlier this year of the novel coronavirus, both of which are leading to a degree of restructuring of cross-border investments and supply chains, there is no sign that this will diminish the popularity of (and need for) international arbitration.

Indeed, in the past 50 years or so, following a rash of nationalisations in North Africa, the Gulf States and 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 2019 involved the energy sector. At the LCIA, case statistics for 2019 revealed that the energy and resources sector had the highest number of parties, both as claimants and respondents. 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 earlier this year, a revival of resource nationalism (which exacerbates the natural tension between energy investors and host states), with Russia's continuing economic difficulties and a world in which sanctions, as well as the covid-19 pandemic, imperil contractual performance, the only realistic expectation is for further reliance on arbitrators and arbitral institutions coping with the disputes that are surfacing daily.

Another driver towards arbitration of energy disputes 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 three editions of this guide, to produce 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 (LBR), the publisher of Global Arbitration Review (GAR), 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 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 Arbitrations* 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 some of the internationally recognised leaders in the field. The guide is now in its fourth 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 fourth edition of *The Guide to Energy Arbitrations* has been expanded with a new chapter on gas supply and LNG arbitrations. The remaining chapters have all been updated to reflect developments since 2018.

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 not 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 all 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 fourth 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

October 2020
London

Part IV

Procedural Issues in Energy Arbitrations

11

When Consolidation Fails: The Challenges of Parallel Arbitral Proceedings

Vasilis Pappas, Romeo Rojas and Gita Keshava[1]

Introduction

Parallel proceedings arise when two or more disputes involving the same or overlapping parties, contractual agreements or issues in dispute are adjudicated in more than one forum.[2] They arise through one or a combination of the following factors: multiple actors, multiple legal sources for the same claims, or multiple forums to resolve the disputes.[3] Parallel proceedings are often inevitable on projects in which several interrelated agreements are awarded to subcontractors and are exacerbated when the parties are unable to join a third party to an arbitration.[4]

Although the challenge of parallel or multiple proceedings can arise in all industries, it is even more pronounced and frequently encountered in the energy industry because of the frequency of multi-party and multi-contract transactions – particularly in complex construction projects and joint venture agreements[5] – and the potential for overlapping claims arising under state contracts and investment treaties. In these types of projects, it is not uncommon for various combinations of parties to commence multiple dispute resolution proceedings involving the same or similar facts, issues and law under the various contracts or treaties applicable to the project.

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1 Vasilis Pappas and Romeo Rojas are partners and Gita Keshava is an associate at Bennett Jones LLP. The authors extend their gratitude to Stephanie Gagne and Zakariya Chatur for their assistance in the preparation of this chapter.

2 Jamie Shookman, 'Too Many Forums for Investment Disputes? ICSID Illustrations of Parallel Proceedings and Analysis' (2010) 27:4 *J Intl Arb* 361.

3 Gabrielle Kauffmann-Kohler, 'Multiple Proceedings – New Challenges for the Settlement of Investment Disputes' in Arthur W Rovine (ed), *Contemporary Issues In International Arbitration and Mediation: The Fordham Papers 2013*, (Brill Nijhoff, 2014) at 4.

4 Lawrence E Thacker, 'Arbitration procedures and practice in Canada: Overview' (2013), Thomson Reuters.

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

For instance, parallel proceedings may arise from a dispute between a project owner and multiple contractors and subcontractors in a chain of contracts, some or all of which contain different dispute resolution clauses. While the facts, issues, and law that give rise to the disputes may be the same, the dispute resolution procedures will often be incompatible, which could prevent the issues between the various parties from being heard in the same forum.

Parallel proceedings may also arise when an international investor has commercial claims against a state entity pursuant to a commercial agreement – such as an exploration or concession agreement – and an investor-state claim against that same state pursuant to an investment treaty that arises from the same state conduct. A classic example of this is *SGS v. Pakistan*,[6] in which a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) was faced with competing arbitrations between the same parties: an international arbitration seated in Pakistan arising out of the commercial agreement between the parties, and an investor-state claim under the Switzerland–Pakistan bilateral investment treaty (BIT) that was before the ICSID tribunal (among other related court cases). The tribunal was called on to determine, among other things, whether a stay of one of the arbitrations would be appropriate to address issues arising from parallel arbitrations.[7]

Finally, parallel proceedings can arise when several international investors of different nationalities participate, directly or indirectly, in the same foreign investment,[8] or several international investors have made separate foreign investments in the same sector,[9] which are affected by the same host-state measure. In this type of case, each investor may separately initiate proceedings seeking protection under its respective BIT.

This chapter explores the challenges that parties and arbitrators face when they are involved in an arbitration in which there are parallel arbitration or court proceedings with overlapping legal and factual elements that cannot be consolidated. It first examines how various domestic legal systems approach consolidation. It then examines how investment treaties and international investment law address parallel proceedings, and provides examples of how investor-state tribunals have addressed the challenges that arise when arbitrations cannot be consolidated. The chapter then considers how transactional lawyers

6 *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, International Centre for Settlement of Investment Disputes [ICSID] Case No. ARB/01/13.

7 id., Decision on Jurisdiction (6 August 2003).

8 For example, in *CME v. Czech Republic* [*CME*] and *Ronald Lauder v. Czech Republic* [*Lauder*], Mr Lauder, a US citizen, invested in a Czech broadcasting company, CET, through the intermediary of his Netherlands-based company, CME. When Czech government measures allegedly affected this investment, Mr Lauder personally commenced an arbitration under the US–Czech Republic bilateral investment treaty [BIT], and his company commenced an arbitration under the Netherlands–Czech Republic BIT. See also *CME* (Final Award dated 14 March 2003); *Lauder* (Final Award dated 3 September 2001).

9 The HFCS arbitrations against Mexico (See *Corn Products International, Inc v. United Mexican States and Archer Daniels Midland Company*, ICSID Case No. ARB(AF)/04/1 and *Tate and Lyle Ingredients Americas, Inc v. United Mexican States*, ICSID Case No. ARB (AF)/04/5, Order of the Consolidation Tribunal, 20 May 2005) and the softwood lumber cases against the United States (See *Canfor Corp v. United States of America*, *Terminal Forest Products Ltd v. United States of America* and *Tembec Inc et al v. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, at para. 158) under the North American Free Trade Agreement are among the leading examples of parallel disputes arising from multiple investors holding separate international investments in the same economic sector.

can prevent or mitigate the risks associated with parallel arbitration or court proceedings when drafting dispute resolution provisions. Finally, the chapter provides recommendations for arbitration practitioners to mitigate the risks associated with parallel arbitration or court proceedings once disputes have arisen.

Challenges associated with parallel arbitral proceedings

With the increasing number of parties involved in complex projects and the globalisation of investment, there is an increasing number of instances in which disputes with overlapping legal and factual elements result in parallel proceedings. In certain circumstances, consolidation of these parallel proceedings into a single arbitration proceeding may be possible. However, consolidation typically requires the consent of all the parties to all the related arbitrations, which can be difficult to obtain in multi-party, multi-contract transactions associated with large capital projects. Failure to obtain the consent of all parties may result in an inability to consolidate parallel proceedings.

The most frequently encountered examples of parallel proceedings in commercial arbitration practice arise from complex construction projects in the energy sector. In such projects, owners will often negotiate multiple contracts with contractors, who in turn negotiate subcontracts with various subcontractors to carry out discrete aspects of the work. Each of the agreements in these chains of contracts may have different arbitration clauses, or some may have arbitration clauses while others do not. If the arbitration clauses in chains of contracts are not coordinated, those clauses may contain different rules, tribunal appointment processes, languages and seats. In other words, the parties' consent to arbitration may have been based on significantly different arbitral procedures. In other contracts for the same project, the parties may not have consented to refer their disputes to arbitration at all, but rather to litigate their disputes in domestic courts. And even when the parallel proceedings would otherwise be technically capable, all parties still may not consent to consolidation, which could make consolidation difficult or impossible.

As a result, it is not uncommon for the prospect of consolidating parallel arbitration or court proceedings with an existing arbitration to be but a faint hope. When attempts to consolidate fail – or consolidation is not attempted for other reasons – parties and their legal counsel have to navigate and mitigate the challenges of parallel proceedings that may involve the same facts, issues, and law.

The risks associated with parallel proceedings are numerous.

First, as occurred in *CME v. Czech Republic* (*CME*) and *Ronald Lauder v. Czech Republic*, (*Lauder*) parallel arbitral proceedings may result in inconsistent findings of fact or law, and thus inconsistent findings on liability and damages.[10] The challenging nature of these circumstances should be obvious. For instance, a situation could emerge in which two arbitral tribunals are interpreting the same provisions of the same agreement, and arrive at divergent interpretations. On an ongoing project, this could present considerable difficulties.

10 Kauffman-Kohler (footnote 3, above), at 6; *CME* (Final Award dated 14 March 2003); *Lauder* (Final Award dated 3 September 2001).

Likewise, a situation could emerge in which one arbitral tribunal awards damages to a party for claims that another tribunal determines do not have merit. In those circumstances, it may be unclear which award is enforceable.

Second, parallel proceedings create the need for the same parties – or at least a party involved in more than one dispute – to expend time and resources to arbitrate or litigate the same or related disputes in different forums. While this may seem like a minor inconvenience, the reality is that the party involved in multiple related disputes is likely to spend significantly more time and incur significantly higher legal fees to resolve these disputes, particularly in construction projects with voluminous document production and complex and technical factual issues.[11]

Third, inconsistent findings on damages in parallel proceedings create the risk of windfalls and double (if not triple or quadruple) recovery by one party.[12] For instance, consider a case involving a construction project, in which the owner has engaged a contractor under one agreement to engineer, procure and construct the project, and the contractor has engaged a subcontractor under a subcontract agreement to undertake a discrete scope of the contractor's work. In the event that the owner were to delay the project, the subcontractor might commence an arbitration against the contractor for the damage it incurs, and the contractor in turn might commence an arbitration against the owner for the damage asserted against it by its subcontractor. It is entirely possible in these circumstances that the contractor would succeed in its claims against the owner, thereby recovering damages for the delays, but that the subcontractor would be unsuccessful, leading to a windfall for the contractor.

Likewise, consider a case in which the owner procures a piece of equipment to upgrade its facility pursuant to an agreement containing an International Chamber of Commerce (ICC) arbitration clause. The owner then engages a contractor to instal and commission the equipment pursuant to a separate agreement containing an arbitration clause under the London Court of International Arbitration (LCIA). A month after the equipment is installed and commissioned, a fire originating in or around the newly installed equipment destroys the entire facility. The owner commences an ICC arbitration against the equipment manufacturer, alleging the fire was caused by faulty equipment, and a parallel LCIA arbitration against the installer alleging that the fire was caused by improper installation. In both cases, it seeks the cost to rebuild its facility and lost profits. In these circumstances, one can see how conflicting findings of fact with respect to the cause of the fire in the parallel arbitrations could result in the potential for double recovery or overlapping recovery.

The foregoing risk is further exacerbated by the fact that most commercial arbitral proceedings are confidential, and therefore a tribunal in one dispute may not be aware of the findings of fact, law, liability or quantum of damages that may have been awarded by another tribunal. This can give rise to the related risk that aversion to issuing an award that will potentially result in a windfall or double recovery will incentivise tribunals to be cautious as to an award of damages that are otherwise recoverable and meritorious, potentially discounting the successful party's damages to offset the real or perceived risk of double recovery in another forum.

11 Kauffman-Kohler (footnote 3, above), at 6.

12 id.

Challenges of consolidation without unanimous consent and subsequent treatment of parallel proceedings

In the following sections, we give a brief overview of how domestic legal systems approach consolidation to identify guidance that they can provide with respect to drafting agreements to mitigate the possibility of parallel arbitrations. We then turn to the international investment law setting to examine what further guidance the findings of investor-state tribunals can provide to transactional lawyers drafting agreements, and to arbitration lawyers faced with parallel proceedings.

Consolidation in the domestic legal context

As a result of the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration (the UNCITRAL Model Law) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), most countries have a generally uniform approach to addressing parallel court and arbitration proceedings between the same parties under the same arbitration agreement.

With respect to parallel court and arbitration proceedings, Article 8(1) of the UNCITRAL Model Law states:

> *A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*[13]

Likewise, Article II(3) of the New York Convention provides:

> *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*[14]

Thus, under the UNCITRAL Model Law and the New York Convention, when faced with parallel court and arbitration proceedings between the same parties under the same arbitration agreement, courts are directed to avoid parallel proceedings by staying the matter before it and refer the parties to arbitration. Nevertheless, both are silent on what courts are directed to do in circumstances when there are parallel court and arbitration proceedings relating to the same facts, law and issues arising under separate agreements.

13 Angus M Gunn, 'Stays of Canadian Court Proceedings in Favour of International Commercial Arbitration: Recent Trends', ADR Institute of Canada, at https://adric.ca/adr-perspectives/stays-of-canadian-court-proceedings-in-favour-of-international-commercial-arbitration-recent-trends.

14 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (the New York Convention).

Further, the approach to consolidating parallel arbitrations varies by jurisdiction – and even between courts in the same jurisdiction. In some jurisdictions, the prevailing view is that multiple arbitration proceedings can only be consolidated with the consent of all the parties to each of the arbitration proceedings. In other jurisdictions, the prevailing view is that multiple arbitrations can be consolidated on the order of a court, and without the consent of all the parties.

At present, it appears that only the Netherlands, Hong Kong and Colombia provide for court-ordered consolidation of arbitrations without the consent of all parties. In the Netherlands, the court can order consolidation of arbitrations if all arbitrations have their seats in the Netherlands and the parties have not opted out of the provision of the Netherlands' arbitration law that permits the consolidation. In Hong Kong, the court's power to consolidate arbitrations without consent of all parties only applies to domestic arbitrations, but international parties may opt in to the domestic regime. Finally, in Colombia, a 1989 decree on arbitration renders invalid an arbitration agreement between two parties that will affect any non-party to the arbitration agreement who refuses to be joined. In such cases, the arbitration proceedings are joined with any related court proceedings.[15]

The situation in Canada is mixed. The international arbitration legislation in the provinces of Ontario and British Columbia allows the courts to order consolidation only if 'all parties to two or more arbitral proceedings have agreed to consolidate those proceedings'. Thus, it appears that absent consent of all parties to all arbitrations that are proposed to be consolidated, courts may not order consolidation in those jurisdictions.[16] However, the legislation in other provinces, including Alberta, Saskatchewan and Manitoba, allows courts to consolidate international arbitral proceedings 'on the application of the parties'.[17] Although this language is ambiguous, some courts have held that it allows courts in those jurisdictions to order consolidation on the application of a single party (i.e., not all parties to all arbitrations that are being consolidated must consent to consolidation being ordered).[18] While this potentially allows those courts more leeway to order consolidation, and thereby avoid the risks of parallel arbitral proceedings, the outcome of such an application is uncertain. For instance, in 2004, the Alberta Court of Queen's Bench held that the consent of all the parties was required to consolidate the arbitral proceedings at issue.[19] However, in 2016, the same court in *Priscapian Development Corporation v. BG International Ltd* held that it had the

15 Organisation for Economic Co-operation and Development [OECD], Investment Division, *Consolidation of Claims: A Promising Avenue for Investment Arbitration?*, International Investment Perspectives (Paris: OECD Publishing, 2006) at 229.

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

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

18 The situation is clearer with respect to domestic arbitration in Canada. Under the domestic arbitration legislation of most provinces, the courts can only order consolidation on the application of all the parties to more than one arbitration. See, e.g., Arbitration Act, RSBC 1996, c. 55, s. 21; Arbitration Act, RSA 2000, c. A-43, s. 8(4); Arbitration Act, SS 1992, c. A-24.1, s. 9(4); Arbitration Act, 1991, SO 1991, c. 17, s. 8(4); Arbitration Act, SNB 1992, c. A-10, s. 8(4).

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

power to order consolidation of parallel proceedings without the consent of all the parties to both arbitrations as a result of its supervisory jurisdiction over international arbitrations seated in Alberta.[20]

The approach to consolidation in the United States differs at state level, but also at federal level. Given the silence of the Federal Arbitration Act (FAA), requests for consolidation must be based on the language of the parties' arbitration agreement. Most federal courts have supported the position that consolidation requires an express provision in the contract, and thus the consent of all the parties.[21] There are a number of cases in which federal courts interpreted the FAA liberally to give it the power to consolidate arbitral proceedings without the consent of parties, if it involved the same questions of law and fact.[22] However, it seems that this position has been overruled subsequently and that consent of the parties is now required for federal courts to consolidate arbitral proceedings.[23] Nevertheless, there remains uncertainty as to how federal courts interpret the existence of consent of the parties.[24]

The same uncertainty exists at state level. For instance, in New York, there is no consolidation provision in its arbitration legislation,[25] yet courts have alluded to their power to consolidate absent the parties' consent.[26] Consolidation has also been denied in New York when 'two proceedings differ technically and procedurally' and would go against the parties' agreements.[27] To add to the uncertainty, a state court in Ohio confirmed in *Parker v. Dimension Service Corporation* that arbitrators have the power – at least in that state – to consolidate multiple arbitrations brought by six different claimants against the same respondent for purposes of discovery and motions practice without unanimous consent of the parties because the separate agreements under which the disputes arose were identical.[28]

In the United Kingdom, it is generally accepted that consolidation of parallel proceedings is not possible without the parties' consent according to the Arbitration Act 1996, Section 23.[29] To cite but one example, in *Guidant LLC v. Swiss Re International SE and*

20 *Priscapian Development Corp v. BG International Ltd*, 2016 ABQB 611.

21 *Protective Life Ins Corp v. Lincoln Nat'l Life Ins Corp*, 873 F (2d) 281, 282 (11th Cir 1989).

22 *Compania Espanola de Petroleos, SA v. Nereus Shipping SA*, 527 F (2d) 966 (2d Cir 1975). See also *Sociedad Anonima De Navegacion Petrolera v. CIA De Petroleos De Chile* SA, 634 F Supp 805, 809.

23 *UK v. Boeing* 998 F(2d) 68, 72 (2d Cir 1993); *Philadelphia Reinsurance Corp v. Employers Ins of Wausau*, 61 Fed Appx 816 (3rd Cir 2003) at footnote 3; *BP Exploration Libya Ltd v. ExxonMobil Libya Ltd*, 689 F(3d) 481 (5th Cir 2012); *Anwar v. Fairfield Greenwich Ltd*, 728 F Supp (2d) 372 (SDNY 2010) at 476; *Rolls-Royce Indus Power Inc v. Zurn EPC Services Inc*, 2001 WL 1397881 at 4.

24 *Connecticut General Life Ins Co v. Sun Life Assurance Co of Canada*, 210 F (3d) 771 (7th Cir 2000) at 774; *Rolls-Royce Indus Power Inc v. Zurn EPC Services Inc*, 2001 WL 1397881 at 4; *Maxum Foundations, Inc v. Salus Corp*, 817 F (2d) 1086, 1087 (4th Cir 1987).

25 *New York Consolidated Laws 2012*, Civil Practice Law & Rules, Article 75 (§§ 7501 to 7514).

26 *Steward M Muller Construction Co v. Clement Ferdinand & Co*, 36 AD (2d) 814 (1971).

27 *Matter of East Coast Services, Inc (Silverite Const Co, Inc)*, 623 NYS (2d) 1020, 1022 (NY Sup Ct 1995).

28 *Parker v. Dimension Serv Corp.*, 2018-Ohio-5248 (Ct App 2018); James Reiman and Megan Smith Richardson, 'Consolidation and Joinder in Arbitration' (24 April 2019), American Bar Association, at https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2019/consolidation-and-joinder-in-arbitration.

29 Arbitration Act 1996, c 23, Section 35.

Another,[30] 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.

The take-away is that while court-ordered consolidation of parallel arbitration proceedings without the consent of all parties to the arbitrations being consolidated may be possible in certain jurisdictions, the predominant trend appears to be that consent of all parties to all arbitrations is required. As such, if parties are of the view that consolidation is an attractive option to avoid parallel arbitration proceedings, the safest approach is to provide for consolidation in the dispute resolution provisions of agreements where they wish to consolidate disputes from the outset.

Consolidation under 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 actual circumstances.

For instance, the UNCITRAL Arbitration Rules – probably 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 American Arbitration Association (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.[31]

By contrast, the LCIA Arbitration Rules include provisions relating to the consolidation of multiple arbitration proceedings. However, these Rules only allow for consolidation when all the parties to the arbitrations consent,[32] or not all the parties to the arbitration consent but all the following criteria exist:

- the arbitrations to be consolidated are under the same arbitration agreement or compatible arbitration agreements;

30 [2016] EWHC 1201 (Comm).

31 American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (New York: 2013) [Commercial Arbitration Rules], at https://www.adr.org/sites/default/files/Commercial%20Rules.pdf. Note, however, that Section P-2(vi)(c) of the Commercial Arbitration Rules provides 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.

32 The London Court of International Arbitration, Rules of Arbitration (London: 2014) [LCIA Rules], at www.lcia.org//Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx, Article 22.1(ix).

- 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.[33]

Although this may be of some assistance, it only applies to a very narrow set of circumstances and would not be of assistance in multi-contract transactions involving multiple different parties.

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 if the parties have agreed to consolidation; all the claims in the arbitrations are made under the same arbitration agreement; or when 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.[34]

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 many circumstances in which consolidation of arbitrations might be beneficial.

The International Centre for Dispute Resolution (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) in which 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.[35]

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.

The Rules of the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC) have the most robust sets 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 the claims are made under the same arbitration agreement; or the claims are made under more than

33 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.

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

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

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.[36]

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

In summary, although many different sets of arbitration rules have endeavoured to provide a remedy for the difficulties associated with the consolidation of arbitrations, not all 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.

How to deal with parallel proceedings when consolidation is not possible

Guidance from the investor-state context

Given the difficulties associated with consolidating parallel arbitration proceedings highlighted above, many investment treaties contain specific rules intended to eliminate or reduce the possibility of parallel proceedings, either by striking or staying parallel proceedings or consolidating claims by multiple investors.

For example, many investment treaties require that claimants waive their right to initiate or continue proceedings before other tribunals and courts to advance an investment treaty claim. For instance, Article 1121 of the North American Free Trade Agreement (NAFTA) Chapter 11 provides that as a condition precedent to the submission of a claim to arbitration, a claimant must waive its right 'to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach' of Chapter 11.

In *Detroit International Bridge Company v. Government of Canada*, the tribunal held that for a NAFTA tribunal to have jurisdiction to hear a claim, the investor must comply with the waiver requirement set forth in Article 1121 of NAFTA.[37] The investor's failure to comply with the waiver requirement rendered the state party's consent to arbitrate without effect. Similarly, the tribunal in *Commerce Group Corporation & others v. Republic of El Salvador* held that when a BIT contains a waiver clause, the investor must waive any rights to initiate or continue any proceedings to proceed with an investor-state arbitration.[38] In addition, the tribunal in *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State*

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

37 *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25.

38 *Commerce Group Corp & others v. Republic of El Salvador*, ICSID Case No. ARB/09/17.

of Bolivia expressly held that Article 26 of the ICSID Convention – which provides that the consent of the parties to an arbitration under the Convention is deemed to be consent to the arbitration 'to the exclusion of any other remedy'[39] – prohibits parallel proceedings.[40]

When a treaty does not contain express waiver provisions, there are several other mechanisms that parties (primarily state parties) can invoke to attempt to avoid parallel proceedings in the investor-state setting:

- First, a party may seek a stay on the ground of *lis pendens* when the disputes relate to the same parties, the same cause of action and the same legal grounds pending in two jurisdictions.[41] However, the tribunal in *SGS v. Pakistan* held that international tribunals are not subject to *lis pendens* when the parallel proceedings are pending in a domestic forum.[42]
- Second, parties wishing to avoid parallel proceedings may also consider obtaining an anti-suit injunction. Anti-suit injunctions effectively restrain a party from pursuing parallel court or arbitration proceedings in another forum. This option may be suitable when a treaty does not already contain a waiver.[43]
- Finally, the tribunal in *Orascom TMT Investments Sàrl v. People's Democratic Republic of Algeria* held that in extraordinary circumstances, the doctrine of abuse of rights may justify the denial of a party's right to arbitrate under an investment treaty if it is maintaining parallel proceedings in another forum.[44]

Another way of avoiding parallel investor-state arbitrations is through consolidation. When the applicable investment treaty contains consolidation provisions, arbitrations may be consolidated in accordance with the provisions of the treaty.[45] If the treaty does not contain consolidation provisions, the applicable consolidation rules, if any, will be determined by the arbitration rules selected by the parties or – if the rules do not contain consolidation provisions – the law of the seat of the arbitration. That said, obtaining the consent of the parties to consolidate is generally a requirement for consolidation, whether set out in the applicable arbitral rules or the law of the seat of the arbitration. As an example, in

39 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159.

40 *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2.

41 Nadja Erk-Kubat, *Parallel Proceedings in International Arbitration: A Comparative European Perspective*, International Arbitration Law Library, Volume 30 (Kluwer Law International, 2014) at 107 to 108.

42 *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13.

43 *Nexteer v. KDAC*, SIAC Case No. ARB/105/13/SL, Procedural Order No. 3 dated 29 January 2014 (Decision on an Anti-Suit Injunction), paras. 62, 65(i).

44 *Orascom TMT Investments Sàrl v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35.

45 See, e.g., *Corn Products International, Inc v. United Mexican States and Archer Daniels Midland Company*, ICSID Case No. ARB(AF)/04/1 and *Tate and Lyle Ingredients Americas, Inc v. United Mexican States*, ICSID Case No. ARB (AF)/04/5, Order of the Consolidation Tribunal, 20 May 2005. See *Canfor Corp v. United States of America*, *Terminal Forest Products Ltd v. United States of America* and *Tembec Inc et al v. United States of America*, Order of the Consolidation Tribunal, 7 September 2007, at para. 158.

CME and *Lauder*, the claimants proposed to consolidate the two arbitral proceedings, but the respondent state, the Czech Republic, refused and therefore the proceedings were not consolidated.[46]

Other methods of avoiding parallel proceedings include staying related arbitrations. For example, in *SGS v. Pakistan*, the tribunal recommended that a parallel arbitration between the parties be stayed 'until such time, if any, as [the] Tribunal . . . issued an award declining jurisdiction over the . . . dispute, and that award is no longer capable of being interpreted, revised or annulled pursuant to the ICSID Convention'.[47] Another method is to stay all claims apart from one test case so that the issue of liability could be resolved in one case to serve as guidance in the others.

When it is not possible to avoid parallel proceedings, tribunals have sometimes considered the award from their sister tribunals when issuing their awards. This was the case in *Ambiente Ufficio SpA and others v. Argentine Republic*.[48] The tribunal acknowledged that although it recognised that it is called to decide the case on its own needs and merits, it would have been artificial to ignore the decision taken by its sister tribunal. Investor-state tribunals will also consider the effect of the other proceedings at the damages phase of the proceedings to avoid the risk of double recovery. This was recognised by the tribunals in *Lauder* and *CME*. The tribunal in *Lauder* acknowledged the risk of double recovery in parallel proceedings,and held that in cases where damages are granted concurrently by two or more tribunals or courts, 'the amount of damages granted by the second deciding court or arbitral tribunal could take this fact into consideration when assessing the final damages'.[49] This approach was endorsed by the tribunal in *CME*.[50]

Practical guidelines

As has been discussed, the potential of parallel arbitral proceedings is increasing as disputes become more globalised, with a number of forums to adjudicate disputes and with multiple parties involved in complex projects. As set out above, most jurisdictions do not allow for consolidation without the consent of the all parties to both proceedings. In those jurisdictions that allow for consolidation absent the consent of the parties, it is often at the discretion of the court, and the case law is inconsistent – even within the same jurisdiction. Decisions often turn on case-particular factors and outcomes are difficult to predict. As such, both transactional lawyers and arbitration practitioners must be mindful of strategies to mitigate the risk of parallel proceedings, both when drafting dispute resolution agreements and after disputes arise.

46 *CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (Partial Award dated 13 September 2001) at para. 412; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (Final Award dated 14 March 2003) at paras. 426 to 430; *Lauder v.v. Czech Republic* (Final Award dated 3 September 2001) at para 16.

47 *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, at 13.

48 *Ambiente Ufficio SpA and others v. Argentine Republic*, ICSID Case No. ARB/08/9.

49 *Lauder v. Czech Republic* (Final Award dated 3 September 2001) at para. 172.

50 *CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (Final Award dated 14 March 2003) at para. 434.

Transactional lawyers

The following strategies should be considered by transactional lawyers when negotiating contracts to decrease the risk of parallel arbitration proceedings should disputes subsequently arise:

Consideration must be given to whether consolidation of arbitrations makes sense in the commercial context. While consolidation is often the most efficient and cost-effective outcome for the client, there are situations in which consolidation of arbitrations does not make commercial sense and the benefits of maintaining multiple parallel proceedings outweigh the additional costs. The following strategies apply when it is determined that a parallel proceeding should be avoided.

When negotiating a number of contracts between a number of parties for the same project, it is important to ensure that the arbitration clause included in all the contracts is identical in all respects. This is a basic requirement to preserve the ability to consolidate disputes in the future. Differences in the applicable arbitration rules, the number of arbitrators and the method of appointing them, and the seat of the arbitration can be fatal to future consolidation. For more complex commercial arrangements, it is often more efficient to include summary language in the body of the various contracts that refers to a separate dispute resolution procedure that can be attached or incorporated by reference into all contracts relating to the particular project, such as through the use of an umbrella arbitration agreement that would apply to all contracts that are part of the larger global transaction.

The arbitration provisions in each contract must expressly provide consent to consolidation of disputes arising from related contracts (to the extent that the parties want consolidation). As a best practice, the parties must not only consent to consolidation, but the procedures for consolidation should also be agreed. Similarly, consent to joinder or intervention may also be considered and provided for as alternative means to ensure that all related disputes are heard together by one tribunal.

In some cases, it may be unknown at the time of entering into a contract who may be engaged by a party as a subcontractor. In such cases the head contract should provide that the parties to it cannot enter into any subcontract that does not contain an identical arbitration clause and procedure, and does not contain an express consent to consolidation.

Drafters should also consider how to mitigate risks that will arise if related arbitrations cannot be consolidated, either because the parties do not consent to consolidation, arbitration agreements are incompatible, or for some other reason. It may be the case that parties do not want to consent to all disputes under all related agreements being eligible for consolidation. Similarly, a party may commence a related arbitration when it is too late to consolidate – either practically or because the parties agreed that consolidations, interventions or joinders must take place within a certain time of the first dispute arising, which has already expired. In such cases, it is important to consider whether to include provisions that would automatically stay the latter arbitrations. It is also important to consider whether and to what extent confidentiality provisions in the related contracts should provide carveouts permitting the existence of a parallel arbitration, its pleadings, or the resulting awards to be disclosed in a related arbitration as a means to address different findings of fact, law and liability, and to assuage tribunals' concerns regarding windfalls or double recovery.

Related to this, because arbitral awards are only binding on the parties to the arbitration, it is often appropriate to include opt-in or opt-out provisions by which parties are provided notice of an arbitration and given the ability to opt in (typically through intervention) or to opt out (i.e., decide not to participate in the arbitration), while acknowledging that the party that opts out agrees to be bound by the tribunal's decision regardless of its participation in the arbitration. This will prevent the same issue being re-argued by multiple parties, with potentially different results.

Where arbitrations under multiple agreements cannot be consolidated because they are governed by different legislation (e.g., where one arbitration would be domestic and governed by domestic arbitration legislation while another is international and would be governed by international arbitration legislation), the applicable agreements could expressly provide that when consolidation is not legally possible, those arbitrations will instead be heard concurrently before the same tribunal, which will issue two separate awards in respect of the two arbitrations. This will ensure that, for all practical purposes, the arbitrations are effectively consolidated, while maintaining the legal distinction between the two arbitration proceedings.

Arbitration practitioners

Depending on the jurisdiction in which the parties are located or the disputes are being arbitrated, arbitration practitioners should consider the following strategies to mitigate the risk of parallel arbitral proceedings:

For disputes between the same parties, under the same agreement containing an arbitration clause, if a party attempts to initiate court proceedings, the party wishing to preserve its right to arbitrate should consider immediately bringing an application before that court to stay those proceedings.

The situation is more difficult if a parallel court or arbitration proceeding cannot be partially or entirely stayed or consolidated because (1) in the case of parallel court proceedings, one or more parties to the proceedings is not party to the arbitration agreement with the other parties, or (2) in the case of parallel arbitration proceedings, the arbitration clauses are not compatible or the parties have not consented to consolidation. In the former case, the parties subject to the arbitration agreement should consider whether it is more economical and efficient to waive their right to arbitrate and to participate in the court proceedings. Similarly, all parties to the court proceedings may wish to consider whether the parties could agree to enter into an arbitration agreement that includes all the parties to the court proceedings so that the court proceedings are stayed. In the case of parallel arbitrations, the parties may wish to consider whether they should agree to consolidate under a single arbitration agreement.

If consolidation is impossible, a party should consider whether it wishes to apply for a temporary stay of one of the parallel proceedings until a final award has been issued in the other proceeding. Such stays are particularly advisable if the outcome of one proceeding depends in whole or in part on the outcome of the other, such as could be the case if the related contracts included indemnity or flow-through provisions (where relief in one contract is dependent on a party being granted certain relief in another contract).

It is not uncommon for a disputing party to seek disclosure of pleadings, witness statements, expert reports, and awards submitted or issued in a parallel proceeding. If the parallel proceeding is in court, these documents are often matters of public record, and they are easily obtained and disclosed. However, in most arbitrations, they are subject to confidentiality obligations. While the production of such documents can often be resisted on the basis of confidentiality, the party to whom the request was made may wish for strategic reasons to seek the consent of its counterparty or the tribunal in the parallel arbitration to disclose the information. Alternatively, it may be ordered to.

Counsel should therefore plan parallel proceedings on the assumption that they may want to disclose, or be ordered to disclose, information from one proceeding in another proceeding. As such, they should have a single theory for both arbitrations that reconciles the claims in each so that, to the extent possible, the claims, positions taken and damages sought in one proceeding do not undermine the claims in the other.

When a party wishes to disclose information in one proceeding that is subject to a confidentiality agreement or order in another proceeding, is asked for such information in the course of document production, or anticipates that it will be ordered to produce such information, it should address the matter as early as possible. If a party wishes to disclose the information voluntarily, the opposing party in the parallel arbitration should be approached to obtain its consent. Alternatively, at the document production phase of an arbitration, a party receiving such a request for documents from a parallel arbitration, and is not averse to producing them but for its confidentiality obligations, may choose to object to production but volunteer to approach the opposing party, or apply to the tribunal in the parallel arbitration to seek consent for disclosure.[51] Finally, a tribunal may order a party to produce such documents, in which case it will have to determine whether to (1) seek consent from the party or tribunal in the other arbitration, (2) comply with the order without the consent of the other party and risk a claim for breach of confidentiality, or (3) refuse to produce documents in response to the tribunal's order and risk an adverse inference. In all these contexts, all attempts to obtain consent to disclose documents from a parallel arbitration should be done in writing so that the requesting party has evidence of its efforts to obtain that consent (even though the correspondence relating to the other arbitration may itself be confidential). Given the potential confidentiality of the written requests to another arbitral tribunal, counsel should also evidence their attempts to obtain consent from another tribunal by contemporaneously writing to the tribunal in the arbitration that is seeking disclosure, informing it of its attempts. Although there may be cases in which there are compelling grounds to maintain the confidentiality of a parallel proceeding, in our experience the more transparency that is possible between proceedings, the more likely that a tribunal can be satisfied that its award will not result in a windfall or double recovery, and therefore will not discount its award to account for that potential, thereby mitigating this significant risk that arises from parallel proceedings.

51 In our experience, since confidentiality obligations typically arise from an agreement between the parties, tribunals in this position are generally reluctant to order production of documents in the face of an objection.

Finally, once an award is rendered in a parallel arbitration, a party may wish to consider applying for recognition and enforcement of the award at the earliest opportunity. The award must be attached to such an application, and doing so is in most cases an exception to the parties' confidentiality obligations. Once the award is in the public domain, it may then be made available to the tribunals, or tribunals, in ongoing parallel proceedings.

Conclusion

As investment becomes even more globalised and energy projects involve numerous parties from various jurisdictions entering into overlapping and related contractual agreements, the likelihood of parallel arbitral proceedings is likely to increase when disputes arise. Although consolidation of arbitral proceedings is often the most efficient outcome, successful and predictable consolidation requires significant forethought at the beginning of a project. However, even when consolidation was not provided for at the outset, there are a number of techniques that can be used to mitigate the risks of parallel proceedings: by (1) subsequent consolidation, (2) staying one of the proceedings until a parallel proceeding can be completed, the findings of which are necessary to the second proceeding, or (3) attempting to establish transparency between the tribunals, to the extent possible, particularly with respect to damages. As such, the risks of parallel dispute resolution proceedings should be considered at all phases of investments and projects in the energy sector, and counsel should take care in both negotiating and drafting contracts and in arbitrating disputes in which there are parallel proceedings to mitigate these risks for their clients. Although there are many variables at play and each situation has to be considered on its own merits, giving early thought to these issues can go a long way to avoiding unwanted parallel proceedings before they arise, or mitigating the associated risks if they cannot be avoided.

Appendix 1

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Vasilis Pappas is the head of international arbitration at Bennett Jones LLP. He is a recognised leader in the fields of international commercial and investor-state arbitration. Vasilis represents multinational companies all over the world in complex commercial disputes in a diverse range of sectors, including construction, energy, mining, banking, insurance, telecommunications and pharmaceuticals. 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 Trade Law Bureau at Global Affairs Canada, representing Canada in investor-state arbitrations and investment treaty negotiations.

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Before joining Bennett Jones, Romeo practised for nine years with a leading Calgary law firm. Prior to that, he served for seven years as a trade commissioner with the Government of Canada's Department of Foreign Affairs and International Trade (DFAIT), where his assignments included postings to the Consulate of Canada in Dubai, the Embassy of Canada in Abu Dhabi and DFAIT's Trade Law Bureau in Ottawa. Romeo regularly publishes and speaks on international and investor-state arbitration topics, and is adjunct faculty at the University of Calgary Faculty of Law, where he teaches commercial arbitration law. He is a member of the bars of Alberta and British Columbia.

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The energy industry nurtured and shaped what we now know as international arbitration and, for a host of reasons – resource nationalism, oil price drops, geopolitics, climate change, sanctions and pandemics among them – it has remained one of the discipline's biggest clients.

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