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# CONSOLIDATION OF PROCEEDINGS AT POLISH AND INTERNATIONAL ARBITRAL INSTITUTIONS[1]

**Abstract:** This article examines the procedures for consolidating proceedings in chosen Polish and international arbitration institutions. As Polish arbitration rules of two major institutions recently changed, with new versions of the Rules

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of the Lewiatan Court of Arbitration (Lewiatan Rules) and, Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce (SAKIG Rules) coming into force on 1 January 2025, this paper analyses their implications on dispute resolution efficiency and consistency. Consolidation is highlighted as a critical mechanism for addressing multiple claims related to the same venture, aiding in the prevention of contradictory rulings and reducing costs. A comparative methodology is employed to explore the consolidation frameworks of the SAKIG and Lewiatan Rules. Polish institutions rules on consolidation will be compared with approaches from the International Chamber of Commerce Arbitration Rules (ICC Rules) and the London Court of International Arbitration Rules (LCIA Rules). Key distinctions arise regarding the authority responsible for consolidation, form of party consent, and the compatibility of arbitration agreements. The article discusses the role of the Arbitral Tribunal and the importance of considering the parties' interests, legal relationships, and procedural efficiency in consolidation decisions. The study reveals a notable shift in the Lewiatan Rules toward a more consensus-driven approach, while the SAKIG Rules show a more gradual and refined development.

**Keywords:** arbitration, consolidation, commercial, international, Poland

## 1. Introduction

New procedural rules of leading Polish arbitration institutions recently entered into force. New Rules of both the Lewiatan Court of Arbitration (Lewiatan Rules) and Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce (SAKIG Rules) also came into force and became effective on 1 January 2025.[2]

In business transactions, often more than one dispute arises from a single venture or between the same parties. The settlement of such disputes before a single forum is associated with numerous advantages and benefits. It allows the parties to avoid the multiplication of proceedings resulting in the minimalisation of the risk of contradictory rulings and the reduction of the amount of legal fees.[3] However, the enforceability of the award might also be at stake when consolidation leads to the abuse of parties' right

2 Kubicka-Żach, „Prace nad nowym Regulaminem SAKL"; „Nowy regulamin SAKL wejdzie w życie 1 stycznia – spotkanie Klubu Arbitra"; Komitet ds. zmiany regulaminu, „Prace Nad Nowym Regulaminem Sądu".

3 Jochemczak and Wojciechowska, „Komentarz do paragrafu 28", 415-16.

to decide on the composition of an Arbitral Tribunal[4] or is ruled with abuse of party autonomy. The growing importance of consolidation and the consequences of its improper application result in the need for analysis of how this institution is shaped in the new rules of Polish institutions.

We will use comparative methodology to compare the Polish institutions' rules mentioned above with International Chamber of Commerce Rules of Arbitration of 2021 (ICC Rules) and with London Court of International Arbitration's Arbitration Rules (LCIA Rules) as rules of two of the leading arbitration institutions worldwide.[5]

Both Polish institutions resolve national and international disputes providing arbitration and mediation. The Confederation of Lewiatan (Lewiatan) has provided dispute resolution for business entities since 2005. It is known for its solution of two instances of the proceedings that is not common in arbitration in general.[6] Lewiatan approached the first revision of its rules in 2015 and recently in 2023.

The Court of Arbitration at the Polish Chamber of Commerce (SAKIG) has been functioning for over 70 years now with around 20% of disputes being international. It is also a member of the European Arbitration Group of the ICC.[7]

Consolidation in arbitration is worth analysing for several reasons. Firstly, it impacts fairness and the protection of privacy and confidentiality. Consolidation can reduce the risk of inconsistent awards, which is essential for maintaining the integrity of the arbitration process. With confidentiality issues it is more likely that the Arbitral Tribunal will decide according to the parties' agreement due to the possible unexpected consequences of breaking such a confidentiality requirement.[8] Secondly, consolidation is important for efficiency and cost-effectiveness. It allows for uniform and consistent case law in similar cases, contributing to greater predictability and stability in the law. Additionally, consolidation can reduce the costs associated with conducting multiple separate proceedings, benefiting both the parties and the arbitration system as a whole.

4 „The New York Convention", Article V (1d); Damodaran, „Consolidation of Arbitration Without Parties' Consent", 26; Born, *International Commercial Arbitration*, 2767-68.

5 Greenblatt and Griffin, „Towards the Harmonization of International Arbitration Rules".

6 Gessel-Kalinowska vel Kalisz and Kwiatkowski, „Komentarz do paragrafu 1 Załącznika V. Regulaminu Postępowania Apelacyjnego", para. 1.

7 „General Information".

8 Born, *International Arbitration: Cases and Materials*, 888.

The main part of the article will focus on prerequisites for consolidation, we have identified six important prerequisites in the analysed texts. At the beginning we will answer the question which body is competent to govern the proceedings. Another crucial aspect is the party's position in the proceedings and how the arbitration rules are shaping the party's consent role in the process. Parties play an important role since they are authorised to request consolidation. It will be shown that a party's autonomy is key to consolidate proceedings, however, for the sake of procedural economy, tribunals sometimes enjoy quite broad discretion when deciding on consolidation. To further understand the problem, we will analyse both arbitration clause compatibility and claims compatibility. Another critical factor to examine in this article is efficiency relating to time and the costs of the proceedings. However, not all analysed arbitration institutions contain rules on efficiency. Building upon the previous discussion, it is essential to consider other relevant circumstances that some rules include. The circumstances have a broad scope, but two main issues that will be elaborated on are: the interests of the parties and efficiency of the proceedings. When it comes to the interest of the parties, it is a general clause that can relate directly to the opposite interests of the parties in the matter as well as common interests: financial, time or other interests in other proceedings.

We decided not to discuss multiparty arbitration to limit the scope of the article. Addressing multiparty arbitration would necessitate a separate, extensive discussion to cover the unique procedural challenges it presents, such as the coordination of multiple parties' interests and the appointment of arbitrators. By concentrating on the implications for dispute resolution efficiency and consistency, the article aims to provide a detailed analysis of how consolidation mechanisms can prevent contradictory rulings and reduce costs. Including multiparty arbitration would introduce additional complexities that could detract from this focused analysis.

The article's focus is on the procedural aspects of commercial arbitration, specifically within the context of Polish arbitration rules and their evolution. Investment state arbitration, which involves disputes between investors and states, operates under a different set of rules and principles compared to commercial arbitration. Investment state arbitration involves unique legal frameworks and treaties, such as bilateral investment treaties and multilateral agreements, which are distinct from the rules governing commercial arbitration. However, case law from investor-state arbitration may be relevant for the interpretation of the rules presented.

## 2. Competent Authority

Consolidation, as an integral aspect of formal proceedings, must be ordered by a competent authority—that is, a designated body which, either upon request or acting *ex officio*, must issue a formal decision pursuant to which two or more pending proceedings are consolidated. Without prejudice to other parts of this article, it is only worth marking, that as the consent of the parties to proceeding is a keystone for arbitration, there is hardly, if any, instance, when the competent authority will act by its own initiative. Rather, it will take into consideration the possibility to consolidate, once a party will file a relevant motion. When it comes to what body is competent to issue a decision on consolidation, there is no one clear answer. Quite on the contrary, every institution, be it international or national, seems to have adopted its own, distinctive solution.[9] This does not mean, however, that there is no pattern that seems to prevail. This is why, in this Chapter, the authors, following the established organisation of this Article will discuss the solution implemented by two leading international institutions – the ICC and LCIA and compare them with solutions implemented and proposed by two Polish institutions – the SAKIG and Lewiatan.

### 2.1. SAKIG Rules

In paragraph 9(3) of the SAKIG Rules it is clearly stated that it is the Arbitral Tribunal which issues a ruling on consolidation. The wording is also rather clear, whereas the commentaries highlight the sole competence of the Tribunal for the consolidation of the proceedings.[10] That may be connected to the fact that for proceedings before SAKIG, a consolidation is only possible, when there is an identical composition of a tribunal in each case – a requirement not present in, for example, the ICC Rules. That solution seems to be rather solid in SAKIG's approach, as the proposed amendment to the SAKIG Rules Project does not change the wording of provision regarding consolidation.

9 Kaufmann-Kohler et al., „Consolidation of Proceedings in Investment Arbitration", 94.
10 Morek, „Komentarz do paragrafu 9", para. 23.

### 2.2. Lewiatan Rules

In the Lewiatan Rules in paragraph 28(1), one can read that it is the President of the Court that decides on consolidation. It is a solution, which seems to resemble the ICC's solution – which is also noted in the commentaries to the Lewiatan Rules.[11] In the authors' opinion, however, the resemblance comes only as far as the ICC Rules are concerned. This is due to the fact that, in Lewiatan, the President may consolidate the proceedings after consulting the parties and the Arbitral Tribunal of a proceeding that has already been commenced. In paragraph 28(3) however, one can read that once a composition of a tribunal in the 'second' (the one which was to be consolidated with the already ongoing proceeding) has been established – the proceedings cannot be consolidated, unless the composition of both tribunals is the same. This clearly indicates that there cannot be consolidation done by a tribunal – as there is a *verbatim* prohibition of consolidation during later stages of proceedings.

This, as far as the composition of the Tribunals are concerned, resembles the solution implemented by the SAKIG rules, where there is even greater emphasis on the identical composition of tribunals. However not present in the ICC or LCIA rules, the abovementioned requirement has some connection to international practice. For example, in *von Pezold v. Zimbabwe* and *Border v. Zimbabwe*[12] disputes, although the proceedings were not formally consolidated, the Tribunals, in both cases, had exactly the same composition. That allowed for, on the one hand, time and cost savings, as the hearing, procedural order, might have been held or published jointly for both cases, as far as it was made possible by the merits of the two cases. On the other hand, given the experience from so-called *Argentine* cases, which caused some trouble in the procedural aspects, i.e. each case required a tailored-made procedure which caused issues when it comes to consolidation.[13] That, in the authors' opinion, may be one reason behind the solution implemented by Lewiatan and SAKIG when it comes to an obligatory requirement of identical composition of the Tribunals – if there is the same composition of two Tribunals, the chances for inconsistencies when it comes to the procedural aspects, organisation of the proceeding are mitigated, but the pros of the consolidation are still present.

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11 Jochemczak and Wojciechowska, „Komentarz do paragrafu 28".

12 *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15.

13 Kinnear and Mavromati, „Chapter 15: Consolidation of Cases at ICSID", 253.

In the proposed new version of the Lewiatan Rules Project, the requirement for the identical composition of two Tribunals has not been changed. What is more, the power to consolidate still resides with the President of the Court (paragraph 29(2) of the Lewiatan Rules Project). The requirement for consultation with the Parties and the Tribunal was deleted and substituted with the parties' consent prerequisite. In the new rules, there is no situation described where the parties' consent is presumed. Lack of consultation with the panel strengthens the role of the President of the Lewiatan Court in relation to the Tribunal.

### 2.3. ICC Rules

When it comes to the model of the ICC Rules, the case seems to be a little more complex. A textual interpretation of Article 10 of the ICC Rules leads to the conclusion that consolidation is permissible solely under the auspices of the ICC Court. However, ICC Rules do not provide a clear ban on ordering consolidation by the Arbitral Tribunal. Here, a clear wording of the provision of the ICC Rules on one hand and general principle of parties' autonomy on the other, collide. As some of the doctrine states:

> Where a Party is seeking a consolidation in an ICC arbitration it should request this at the outset from the ICC Court. However, this does not prevent a tribunal from deciding a consolidation request. Consolidation can only take place after that by agreement of all the parties.[14]

That clearly highlights the agreement, so the will, of the parties – if parties want the proceedings to be consolidated by the Arbitral Tribunal, the Arbitral Tribunal should be entitled to grant that request. Although, one needs to remember that that view is not the only one present in the discussion. It has to be highlighted, that the ICC Rules are rather clear on the Court's competence to consolidate the proceedings, whereas they are silent on the competence of the Arbitral Tribunal to do so. Yet still, a conclusion may be drawn that it is the ICC Court which certainly can consolidate the proceedings, with the potential power yielded to the Tribunal by the parties' agreement.

14 Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 379.

That solution, compared to Polish approaches presented above differs substantially. However, the most distinctive factor, in the authors' opinion, is not which body can or cannot consolidate, but rather the idea behind the ICC rules to leave some of the possibilities unregulated by the Rules and leave that to be potentially regulated by the parties to a certain proceeding. As presented above, the rules of Polish institutions tend to regulate every possibility of the proceeding, when it comes to consolidation, whereas the ICC does leave a certain aspect of possibilities to the parties, somehow stressing the role of the parties' will as a driving force of arbitration.

### 2.4. LCIA Rules

Article 22A of the LCIA Rules deals with the power to consolidate the proceedings before the LCIA. Thus, according to the general clause from Article 22(7) of the LCIA Rules, it is the Arbitral Tribunal that has the power to consolidate the proceedings, with the approval of the LCIA Court and after giving 'all affected parties a reasonable opportunity to state their views.[15]' However, according to Article 22(8) of the LCIA Rules, after fulfilling some additional requirements set out in Article 22(8)(i) - (ii) of the LCIA Rules, it is the LCIA Court that may consolidate the proceedings.

That provision seems to be a somewhat hybrid of the ICC Rules and Lewiatan approach. First, it verbalises the ICC idea between the two bodies – i.e. the Court as an administrative body and the Arbitral Tribunal as a judicial body, being granted the power to consolidate the proceedings. This gives the flexibility to the arbitration proceedings, one of the qualities that arbitration is generally praised for. On the other hand, LCIA's solution seems to take great care in including all parties involved in the arbitration, by engaging (in its general framework for consolidation under Article 22(7) of the LCIA Rules) not only the administrative body, the LCIA Court, but also the parties by forcing the Tribunal to give a certain heads-up to them about possible consolidation.

The obvious downside of that solution is that it may be lengthy, having to engage so many entities takes time. This is why, in the authors' view, the Lewiatan Court, in its Lewiatan Rules Projects deleted the requirement for the President to consult with the Tribunal (the opposite situation to the one in the LCIA Rules, however the mechanism comparable). That

15 LCIA Arbitration Rules, Article 22(7).

will, most definitely, speed up proceedings, but, at the same time, it cares for involvement of all of the parties concerned.

### 2.5. Conclusions

A general conclusion may be drawn, that Polish institutions tend to have a more regulated system when it comes to the competent authority, with the majority of the possibilities covered by their Rules. However, the LCIA does follow suit, offering two regulated possibilities for the consolidation of proceedings. The least regulated, when it comes to the scenarios covered and by the procedure itself, was implemented by the ICC. Given the inherent characteristics of arbitration – namely its expediency and the parties' autonomy in shaping the proceedings – the authors are of the opinion that the ICC standards should be followed. The partial deregulation of certain aspects affords parties greater flexibility to tailor the proceedings to their specific needs, which in turn may foster broader satisfaction and a greater willingness to engage in arbitration globally.

## 3. Party Position in the Consolidation Process

Arbitration is perceived as 'a creature of contract'[16] meaning that it is governed by the party's agreement to arbitrate. When considering consolidation, two important issues must be analysed: first, the balance between party autonomy and the discretionary power of the authority competent to decide consolidation, particularly in the context of initiating proceedings; and second, the nature of consent to consolidation – whether it is given expressly or implied through the selection of the procedural rules governing the arbitration.

### 3.1. Party Autonomy in Initiation of Proceedings

#### *3.1.1.SAKIG Rules*

In the SAKIG Rules, it is Application of one Party that triggers consolidation: '[o]n the application of a party, the Arbitral Tribunal may consolidate two

16 Núñez del Prado, „The Fallacy of Consent: Should Arbitration Be a Creature of Contract?", 2.

or more proceedings.[17]' The second section of paragraph 27 may provide some doubt to the necessity of a party's request to trigger consolidation proceedings:

1. On the application of a party, the Arbitral Tribunal may consolidate two or more proceedings between the same parties, if the composition of the Arbitral Tribunal in each of the proceedings is the same and:
    1. the parties' claims in the proceedings to be consolidated are made under identical arbitration agreements, or
    2. the parties' claims in the proceedings to be consolidated are related to each other.
2. Proceedings may also be consolidated where the parties are not the same, provided that the composition of the Arbitral Tribunal in each of the proceedings is the same, at least one of the conditions set out in section 1(1) or (2) is met, and the parties to all of the proceedings consent to the consolidation. [18]

As made evident by the part in bold, Section 1 of commented provision contains four prerequisites for consolidation: 1. application of the party; 2. same parties to the disputes; 3. composition of the Arbitral Tribunal; 4. proprieties of the claims expressed in section 1(1) and 1(2), section two considers cases where parties are not the same and is silent as to a party's request, instead it requires all parties consent to consolidate. Such regulation of a party's request to consolidation gives tribunal power to initiate consolidation, however party autonomy is safeguarded by obligatory party's consent to consolidation.

### *3.1.2. Lewiatan Rules*

The Lewiatan Rules require the request of the party to consolidate: 'At the request of a party, two or more arbitration proceedings conducted under the Rules may be consolidated if the parties agree to the consolidation.[19]'

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17 Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce, paragraph 27(1); the same is true for previous version of rules (Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce, paragraph 9(1).

18 Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce – Project, paragraph 27(1-2); Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce, paragraph 9 (1-2) (emphasis added).

19 Rules of the Court of Arbitration at the Confederation of Lewiatan, paragraph 29(1); Translated from Polish to English using ChatGPT, an AI language model by OpenAI, on 6

The Lewiatan Rules in contrast to the SAKIG Rules always require a party to request a consolidation.

### *3.1.3. ICC Rules*

Article 10 of the ICC Rules provides for consolidation only upon the request of a party. This approach limits the discretionary power of the Court (and in some cases, the Tribunal), as under no circumstances can the institution initiate consolidation proceedings without party initiative. Like other rules analysed in this article, the request of only one of the parties is sufficient to consider other prerequisites.

### *3.1.4. LCIA Rules*

The LCIA Rules contain solutions that can override party autonomy in requesting consolidation, in some extent similarities can be drawn with section 2 of paragraph 27 of the SAKIG Rules, however, the LCIA Rules go even further and in the early stage of proceedings, provide for broad discretionary power of the LCIA Court. The general rule in the LCIA Rules is similarly to the ICC, Lewiatan and SAKIG rules on party application '[t]he Arbitral Tribunal shall have the power to order [consolidation] with the approval of the LCIA Court, upon the application of any party.[20]' However, there is also possibility for the Court to consolidate arbitrations without party request in two instances: first when parties agree in writing to it,[21] which makes it very similar to the SAKIG Rules; second LCIA Rules allow for consolidation by the Court in the early stages of arbitrations when other prerequisites are fulfilled.[22]

Summarising the approaches, the analysed arbitration rules rely on a party's request as the foundation for initiating consolidation proceedings, with the Lewiatan and ICC Rules requiring such a request as the sole basis. By contrast, the SAKIG Rules and LCIA Rules afford greater discretion to the institution, with the LCIA Rules uniquely allowing consolidation without explicit party consent where the Court initiates the process. For

January2025. [Na wniosek strony połączonych może zostać dwa lub więcej postępowań arbitrażowych prowadzonych na podstawie Regulaminu, jeżeli strony zgadzają się na połączenie.].

20 LCIA Arbitration Rules, Article 22(7).

21 Ibidem, Article 22(8)(i).

22 Ibidem, Article 22.8 (ii).

parties selecting arbitration, the ICC and Lewiatan Rules offer enhanced control and predictability by prioritizing party autonomy, while the LCIA Rules may appeal to those seeking procedural flexibility and efficiency in multi-party or complex disputes through broader institutional authority.

### 3.2. Form of Party Consent to Consolidation

It is generally acknowledged that consolidation requires parties' consent in some form.[23] When analysing a party's role in the process, the key question is whether explicit consent is required or if, by choosing an institution with broader discretionary power, the parties implicitly consent to consolidation (i.e., meeting the requirements equates to party consent). Choosing rules that allow consolidation without the parties' explicit consent carries a higher risk of allegations of breaching party autonomy, potentially leading to unenforceability of the award. However, it can also help prevent parties from using procedural tactics, such as withholding consent to consolidation.

#### *3.2.1. SAKIG Rules*

When it comes to parties' consent to consolidate, the SAKIG Rules do not contain provisions similar to Article 10(a) of the ICC Rules[24] or Article 22(7)(i) of the LCIA Rules so literal reading of paragraph 27 of the SAKIG Rules could lead to the conclusion that a party's consent like in the ICC Rules, is not enough, and prerequisites stated in the relevant provision of the SAKIG Rules need to be fulfilled (the Arbitral Tribunal is the same, parties are the same and arbitration agreement is the same or claims are related,[25] when parties are not the same, additional consent of all the parties is required). In our opinion, because of the contractual character of arbitration and principle of determination of rules of procedure[26] parties' consent can override prerequisites stipulated in the SAKIG Rules, and when parties explicitly consent to consolidation, the Arbitral Tribunal can consolidate proceedings

23 Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, para. 4(9) and examples cited therein; Born, *International Commercial Arbitration*, 2762.

24 Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce 2022, para. 9; Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce, para. 27.

25 Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce 2022, para. 9(1); Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce, para. 27(1).

26 'Commentary to Trans-Lex Principle' principle no. XIV 3(2).

even when proceedings are pending under different arbitration agreements and claims are not connected.

In the previous version of the SAKIG Rules there was an additional requirement for arbitrators to consider all relevant circumstances and parties' interests,[27] making it similar to the ICC Rules.[28] However, in the current SAKIG Rules this provision was deleted. The ole of the parties in both the current version and the SAKIG Rules Project is also stressed in their power to decide on the version of the rules, which is by default version current at the moment of consolidation.[29]

### *3.2.2. Lewiatan Rules*

Capital change was made in the current Lewiatan rules, parties' consent is the only material prerequisite necessary to consolidate.[30] However, these rules do not contain any guidance on the form of the consent (in contrast to written form requirement in Article 22(7)(i) LCIA rules). Previous Lewiatan Rules similarly to the SAKIG Rules did not contain provisions explicitly referring to a party's consent. The prerequisites necessary to presume the consent for consolidation in line with the Rules were the same legal relationship and utilisation of the Lewiatan Rules.[31] After one of the parties has requested the consolidation, the party's role is of a consulting nature, the President of the Court is required to consult consolidation with the parties.[32]

A party's autonomy is key to consolidate proceedings, however for the sake of procedural economy, tribunals sometimes enjoy quite broad discretion when deciding on consolidation. An interesting observation is that while the current version of the the Lewiatan Rules shifts toward a fully consensual approach to consolidation, the SAKIG Rules remain silent on party consent when the consolidated proceedings involve the same parties, in both the current and previous versions of the Rules.

27 Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce 2022, para. 9(4).

28 ICC Arbitration Rules, Article 10 *in fine*.

29 Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce, para. 9(5) - 9(4).

30 Rules of the Court of Arbitration at the Confederation of Lewiatan, para. 29(1).

31 Rules of the Court of Arbitration at the Confederation of Lewiatan 2012, para. 28(1).

32 Ibid., para. 28(2).

### *3.2.3. ICC Rules*

The approach of the ICC Rules complements parties' agreement and by widening institutional discretion allows consolidation of proceedings in situations where one party is subsequently trying to oppose consolidation by providing description of circumstances where parties consent is presumed (same arbitration agreement[33] or same parties, legal relationship and compatibility[34]).

#### *3.2.3.1. LCIA Rules*

In the LCIA Rules, parties' consent is the first and most important prerequisite,[35] consent must be evidenced by agreement in writing, this solution is unprecedented in other rules, it allows for disambiguation of parties' consent and gives more clear understanding of it. The rules also consider situations when parties' consent may be presumed from their acceptance of the LCIA Rules. By choosing these rules, parties acknowledge that consolidation may occur under specific conditions outlined in Articles 22(7)(ii) and (iii) and 22(8)(ii). These conditions include scenarios where the disputes arise under the same or compatible arbitration agreements, involve the same parties or closely related transactions, and meet certain procedural safeguards. In such cases, an arbitral tribunal or the LCIA Court may order consolidation after giving all affected parties the opportunity to present their views. Additionally, in early stages of arbitration, where no tribunal has been constituted, the LCIA Court may consolidate arbitrations without explicit party consent, provided the disputes meet the required criteria, such as being connected by similar agreements or transactions. Here, the parties' initial decision to arbitrate under the LCIA Rules is considered sufficient to empower the Court to act.

33 ICC Arbitration Rules, Article 10(b).
34 Ibid., Article 10 (c).
35 LCIA Arbitration Rules, Article 22.7 (i), Article 22.8 (i).

## 4. Arbitration Clause Compatibility

### 4.1. SAKIG Rules

A condition *sine qua non* for the consolidation of the proceedings pending before SAKIG is, *inter alia*, that the claims of the parties in the merged proceedings are based on the same arbitration clause or the claims of the parties in the merged proceedings are connected with each other.[36] When interpreting the phrase 'claims of the parties that are related to each other', one may cautiously draw from case law and doctrine against the background of the similar provision of Article 219 of Polish Code of Civil Procedure.[37] In assessing the merits of the consolidation of proceedings, it is necessary to consider both the factual and legal relationship. Such a relationship exists, for example, when both claims relate to the same subject matter, indicated as their basis, the same factual situation or the same event, and when the merits of one of the claims will affect the outcome of the other claim.[38]

### 4.2. Lewiatan Rules

Lewiatan Rules suggest the following arbitration clause:

> Wszelkie spory wynikające z niniejszej umowy lub powstałe w związku z nią będą ostatecznie rozstrzygane przez Zespół Orzekający działający przy Sądzie Arbitrażowym przy Konfederacji Lewiatan w Warszawie zgodnie z postanowieniami Regulaminu tego Sądu obowiązującego w dniu wszczęcia postępowania.[39]
> (English: Any disputes arising out of or in connection with this Agreement shall be finally resolved by the Arbitral Tribunal operating at the Court of Arbitration at the Confederation of Lewiatan in Warsaw in accordance with

36 Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce, para. 26(1).
37 Article 219 of Polish Code of Civil Procedure (Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego [Dz. U. z 2023 r. poz. 1550 z późn. zm.]: *Article 219. The court may order several separate cases pending before the court to be combined in order to be heard jointly or heard and adjudicated if they are interrelated or could have been covered by a single complaint*. Morek, „Komentarz do paragrafu 9", para. 7.
38 Ibid.
39 Rules of the Court of Arbitration at the Confederation of Lewiatan model arbitration clauses.

> the provisions of the Rules of that Court in effect on the date of commencement of the proceedings.)

What follows from the foregoing, Lewiatan's arbitration rules provide a model arbitration clause emphasising the finality of dispute resolution under its procedural framework. While its rules do not explicitly address consolidation criteria in the same manner as SAKIG, the suggested arbitration clause grants broad jurisdiction to the tribunal, allowing flexibility in dispute resolution. The choice between SAKIG and Lewiatan may depend on the parties' preference for procedural clarity in consolidation (SAKIG) or a more flexible arbitration framework (Lewiatan).

### 4.3. LCIA Rules

As for arbitration clauses in the LCIA, according to the LCIA Rules:

> the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules and commenced under the same arbitration agreement or any compatible arbitration agreement(s) and either between the same disputing parties or arising out of the same transaction or series of related transactions, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such arbitral tribunal(s) is(are) composed of the same arbitrators; (...) and that two or more arbitrations, subject to the LCIA Rules and commenced under the same arbitration agreement or any compatible arbitration agreement(s) and either between the same disputing parties or arising out of the same transaction or series of related transactions, shall be conducted concurrently where the same arbitral tribunal is constituted in respect of each arbitration.[40]

In view of the above, the LCIA Rules allow consolidation of arbitrations under the same or compatible agreements if they involve the same parties or related transactions. This is possible if no tribunal is formed or if the same arbitrators preside. Concurrent proceedings are also permitted, ensuring efficiency while maintaining procedural integrity.

40 LCIA Arbitration Rules, Article 22A.

### 4.4. ICC Rules

As it was mentioned, under ICC Rules, the arbitration agreements must be compatible. However, 'the compatibility requirement does not mean that the arbitration agreements must be identical; they must merely be substantively compatible.[41]' To illustrate this matter, we can cite examples from Secretariat's Guide to ICC Arbitration (hereinafter: Secretariat's Guide):

> [F]or example, if one arbitration agreement provides for Paris as the place of arbitration and another provides for New York, or one arbitration agreement provides for three arbitrators and another for a single arbitrator, the clauses are clearly incompatible (...).
> [W]here one arbitration agreement provides for Paris as the place of arbitration and another is silent as to the place of arbitration, or one provides for three arbitrators and the other is silent as to the number of arbitrators, there is not necessarily any incompatibility.[42]

As far as arbitration clauses are concerned, a significant difference is that, in foreign doctrine, consent to consolidation of proceedings may be expressed explicitly in the wording of the arbitration clause or derived from it by implication. In other words, consent does not have to be expressed explicitly in the arbitration clause, consent can be expressed implicitly. In contrast, Polish arbitration law excludes the possibility to consent to consolidation of proceedings by implication.[43]

## 5. Claims Compatibility

### 5.1. SAKIG Rules

As already mentioned, according to paragraph 27 of the SAKIG Rules, the Arbitral Tribunal may consolidate two proceedings or more proceedings

41 Fry et al., *The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration*, 81.
42 Ibid.
43 Jochemczak and Wojciechowska, „Komentarz do paragrafu 28", 418; Supreme Court Resolution of June 27 IV CR 874/59, OSNC.

pending between the same parties if the claims of the parties in the proceedings to be merged are interrelated related.[44]

When interpreting the phrase 'claims of the parties remaining related to each other' in paragraph 27 of the SAKIG Rules, one can cautiously draw on the views of case law and doctrine against the background of the analogous premise in Article 219 of the CCP. When assessing the legitimacy of the consolidation of proceedings, it comes into both factual and legal connection is involved (for example: Supreme Court decision of April 9, 2015, I UZ 25/14). Such a relationship occurs, for example, when both claims relate to the same subject matter, indicate as a basis the same factual situation or the same event, and when the legitimacy of one of the claims will affect the settlement of the other claim.[45]

### 5.2. Lewiatan Rules

In order to consolidate the proceedings pending at the Lewiatan Court, it is necessary that the legal relationship of the cases to be consolidated is compatible. Pursuant to paragraph 29 of the Lewiatan Rules, two or more arbitrations conducted under the Rules may be combined at the request of a party, provided that the parties agree to the merger.[46] Pursuant to paragraph 10 of the Supplementary Regulations for Proceedings in Corporate Disputes of the Lewiatan Rules, if a second or further suit for the annulment of the same resolution is brought before the Arbitration Court, it shall be merged for joint consideration and decision with the proceedings initiated earlier, which remain pending.[47]

Previously, under the expired Lewiatan Rules, in accordance with paragraph 28 of the Lewiatan Rules, if arbitration proceedings have been instituted concerning a legal relationship to which another proceeding already pending between the same parties under the Rules is also concerned, the President of the Court, at the request of a party, may decide to join those proceedings with the arbitration proceedings already pending.[48]

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44 Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce, para. 27.

45 Morek, „Komentarz do paragrafu 9", para. 26.

46 Rules of the Court of Arbitration at the Confederation of Lewiatan, para. 29.

47 Supplementary Regulations for Proceedings in Corporate Disputes of the Lewiatan Rules, para. 10.

48 Rules of the Court of Arbitration at the Confederation of Lewiatan 2012, para. 28.

The updated Lewiatan Rules make consolidation more structured, and party driven. Now, proceedings can be merged if their legal relationships are compatible, and the parties agree. In corporate disputes, multiple challenges to the same resolution must be mandatorily joined. This contrasts with the previous rules, where consolidation depended on the President of the Court's discretion.

### 5.3. ICC Rules

In order to consolidate the proceedings pending at the ICC Arbitral Tribunal, it is necessary that the legal relationship of the cases to be consolidated is compatible. As it was mentioned, in accordance with the ICC Rules, the Court may consolidate two or more arbitrations pending under the Rules into a single arbitration, among others, when the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the disputes in the arbitrations arise in connection with the same legal relationship.[49] In the ICC Arbitration Tribunal, in general, 'the Court interpreted this requirement [of the identity of legal relationship] as meaning that all contracts must be related to the same economic transaction.[50]'

What is more, it should be highlighted that the identity of the contract is not enough to consolidate two (or more) proceedings. The fact that two or more arbitration proceedings have been initiated under the same arbitration agreement does not necessarily imply a sufficient connection between the claims in each arbitration. The Court therefore considers on a case-by-case basis whether cases brought under the same arbitration agreement should be consolidated. The Court may consider, for example, that there is no relationship between the claims or that the claims do not arise from the same 'legal relationship.[51]' Then there can be no consolidation.

When it comes to the condition of the identity of the legal relationship adopted in the ICC Rules,[52] the question may arise whether the notion of disputes concerning the same legal relationship should be understood more broadly than the notion of disputes arising from the same legal

49 ICC Arbitration Rules, Article 10(b), 10(c).

50 Fry et al., *The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration*, 114.

51 Ibid., 113.

52 Jochemczak and Wojciechowska, „Komentarz do paragrafu 28", 423.

relationship.[53] The interpretation of 'identity of legal relationship' in the ICC Rules is as follows: the concept of legal relationship should be understood very broadly as the same economic transaction. This broad interpretation allows for the consolidation of proceedings that involve claims arising from several different but related contracts and corresponds to the needs of business.[54]

### 5.4. LCIA Rules

Under the LCIA Rules, two or more arbitration proceedings may be combined if the disputes to which they relate arise from the same transaction or a series of related transactions.[55] The scope for consolidating arbitrations under the LCIA Rules 2014 is more restricted. Notably, Article 22(1)(x) of the LCIA Rules 2014 does not explicitly allow for consolidation in cases where arbitrations originate from the same transaction or a series of related transactions.[56]

## 6. Efficiency

Efficiency can relate to the time and costs of the proceedings. When it comes to consolidation it is important both in the ICC Rules and SAKIG Rules. The Lewiatan Rules do not include the matter of time and costs of proceedings as important factors for consolidation but as a general principle. The LCIA Rules concentrated on different aspects of efficiency in the adoption of the 2020 amendments. In general, Polish arbitration institutions have taken their 'first steps' into regarding efficiency as a basic rule that needs to be considered equally as others.

When it comes to time, the state of the case has to be regarded as well. Generally, the later the motion for consolidation comes, the less likely it is for the deciding body to accept it. In some arbitrations this factor is even a separate one (Article 4(1) of Swiss Reg.). There are no rules being analysed in this article that refer to the state of proceedings (except from the ICC Rules but in Article 23(4) that does not relate to consolidation).

53 Ibid.
54 Ibid., 423-24.
55 LCIA Arbitration Rules, Article 22A.
56 The London Court of International Arbitration, 'Guidance Note for Parties and Arbitrators', para. 256.

### 6.1. SAKIG Rules

ThenSAKIG Rules have a general rule of effectiveness and speed of proceedings (paragraph 6 of the SAKIG Rules), though there is no direct way of interpreting those clauses differently than *e.g.* in the ICC Rules. Lewiatan has only the general rule that obliges both the Arbitral Tribunal and parties to make every attempt to conduct proceedings in an efficient and cost-effective manner. There is also no indication that the Arbitral Tribunals should especially be guided by them while deciding on consolidation, as there are no enforcement measures.

#### *6.1.1. Lewiatan Rules*

When it comes to the Lewiatan Rules a rule on cost or time efficiency as factors for arbitrator's decision can be derived from one of the awards. A respondent denied agreeing on consolidation of two proceedings between the same parties even though the Arbitral Tribunal suggested so. In consequence, the respondent was granted a lower amount of reimbursement of legal representation costs, even though the merits of the case were ruled in its favour. According to paragraph 48(1) of the Lewiatan Rules while deciding on costs, the Arbitral Tribunal should regard the outcome of proceedings and other relevant circumstances. As stated in the judgement, conducting two proceedings instead of one led to generating more costs.[57]

#### *6.1.2. ICC Rules*

Interestingly, the ICC Rules do not directly refer to efficiency matters on consolidation (as stated earlier, Article 10 of the ICC Rules includes only the general clause of other circumstances). Secretariat's Guide considers the direct demand of efficiency: 'In determining whether authorisation is appropriate, the arbitral tribunal will need to balance any disruption that would result in the arbitration against any inefficiency caused if the claim needs to be brought in other proceedings.[58]' Generally, the fact that the new claim would disrupt the proceedings and efficiency matters, would not work in favour of its acceptance, however the ICC Rules consider that in

57 Judgment nr 415, Lewiatan, 9 October 2020.

58 Fry et al., *The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration*, 259.

some circumstances the disruption is unavoidable. Another factor taken into consideration is whether the opposite party will extend the full right to defend – also without causing serious delays.[59]

Costs are being taken into consideration in a completely different manner. It is a factor that parties should specifically advocate for. However, it is important to highlight that when looking at costs, the ICC Court takes into consideration: efficiency in conducting proceedings; time spent on the case; the rapidity and complexity of the dispute; and timeliness of the submission of the draft award,[60] so the requirements are also used in connection to consolidation. The question of costs is nevertheless far more complicated and needs to be a topic of another academic discussion.

Sometimes it may occur that adding a new claim will reduce the general costs provided by the Rules but will increase others, *e.g.* costs for lawyers that will have to spend more time arguing why the new claim should or should not be added to the pending arbitration. At the first glance, it may seem that after consolidation as only one Arbitral Tribunal will have to be given remuneration, costs generally will be lower. However, as indicated in Article 2(2) Appendix III of ICC Rules:

> In setting the arbitrator's fees, The Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 38(2) of ICC Rules), at a figure higher or lower than those limits.[61]

Therefore, if two separate proceedings are conducted and both Arbitral Tribunals are composed of the same individuals, the remuneration of the arbitrators will be reduced to a minimum and thus comparable with the remuneration of conducting one proceeding. When deciding on that, the Arbitral Tribunal has to decide whether there are solid reasons for not making the claim earlier and whether the attempt is just an abusive way of delaying the proceedings or wrongfully surprising the other party. The risk of not authorising new claims is higher, the closest it is to ending the proceedings, especially if a new claim would demand new evidence

59 Ibid.
60 Schäfer, Verbist, and Imhoos, *ICC Arbitration in Practice*, 132.
61 ICC Arbitration Rules, app. III Article 2(2).

to be produced or performed.[62] Moreover, one can derive the efficiency recommendation from Article 22(1) of the ICC Rules which directs the Arbitral Tribunal to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute in every case. This means the Arbitral Tribunal has to maximise efficiency to the extent permitted in particular circumstances of the case, especially its complexity and monetary or non-monetary value.[63]

#### *6.1.3. LCIA Rules*

Amendments of LCIA Rules brought a new perspective on the matter of efficiency in general. The scope of the control of the Arbitral Tribunal has expanded allowing the issue of procedural orders that can limit actions taken by the parties (arguments, memorandum, hearings, etc.). Therefore, the Arbitral Tribunal is encouraged to adopt a proactive approach in managing cases. Moreover, the sole way a party is required to file a claim changed completely. Previously it was demanded that a claimant issue claims separately and then it can request consolidation only after commencing each of the proceedings. Now according to Article 1(2) LCIA Rules, consolidation can be ordered after the claimant issue 'a composite Request in respect of all such arbitrations'. Although parties can incur difficulties with choosing the panel of arbitrators as described in a previous section, LCIA provides 'Speed and efficiency in the appointment of arbitrators.'[64]

## 7. Other Relevant Circumstances

Some rules also allow for or require consideration of other relevant factors while deciding on consolidation. To understand the broad scope of the term 'all relevant circumstances' one has to acknowledge that specific interpretation can differ between institutions. Nevertheless, there are two main categories of such circumstances distinguished based on which aspect the institution may focus on. Those categories are the interests of the parties and efficiency of the proceedings. However, the circumstances are of a broader

62 Schäfer, Verbist, and Imhoos, *ICC Arbitration in Practice*, 76.

63 Fry et al., *The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration*, 233.

64 The London Court of International Arbitration, "Guidance Note for Parties and Arbitrators", sec. 3.

scope than only those two factors. Other important factors that are not directly addressed in none of the rules being discussed can be *e.g.* a matter of fairness, appropriateness for purposes of privacy and confidentiality and how consolidation would influence the state of risk of inconsistent awards, these factors can be derived from general rules of arbitration and specific rules governing institutions.

### 7.1. SAKIG Rules

The SAKIG Rules demand that the panel of arbitrators should be identical, as discussed in the introduction. This is clearly an adoption of the ICC Rules though more restrictive since the ICC Court should only regard this as one of the aspects for the decision on consolidation and not a condition for it, as explained below. In the SAKIG Rules and the ICC Rules, it is also the Court (as the administrative body of the institution) that officially appoints arbitrators.

In the SAKIG Rules special attention is given to efficient conduct of proceedings, similarly to ICC Rules (paragraph 9(4) of SAKIG Rules). According to the SAKIG Rules, the Arbitral Tribunal can still deny consolidating the proceedings even if all the requirements are met. It should always consider all material circumstances and interests of the parties, especially efficiency of the proceedings.

What is vague, as mentioned before, in the SAKIG Rules Project is that all the additional directives for the Arbitral Tribunal to take into consideration while deciding on consolidation have been removed. Therefore, the Arbitral Tribunal is no longer obliged to regard all material circumstances and interests of the parties mentioned above which does not mean that the principles of the proceedings in general in the SAKIG Rules are not including those factors (e.g. paragraph 6(2) of SAKIG Rules Project). Now the Arbitral Tribunal would decide only on the basis of whether claims are asserted under the same arbitration clause or whether the claims are related (paragraph 27 of SAKIG Rules Project). At the same time new regulations would bring some actualities on efficiency, such as the condition that a judgement has to be issued in 6 months from the moment the arbitral tribunal is established and two months from the last hearing or the last memorandum (paragraph 41(3) of SAKIG Rules Project) and new procedure of early determination for the easiest cases (paragraph 29 of SAKIG Rules Project).

### 7.2. Lewiatan Rules

The fact that the Lewiatan Rules have no substantial directives as to the decision on consolidation is specifically odd as those rules apply specific conditions under which the parties can be allowed to make amendments of the lawsuit and withdraw the lawsuit (paragraph 29 of Lewiatan Rules). According to this part of the Lewiatan Rules, the Tribunal should regard in this matter the stage of proceedings, interests of the parties and other relevant circumstances. Provisions on consolidation do not refer to those indicators even though structurally the Lewiatan Rules place them next to each other. In the Lewiatan Rules Project those indicators are still in force, while provisions on consolidation do not copy them. Instead, they grant the arbitrary decision to the President to decide on consolidation, without mentioning any factors it needs to consider. That is quite a crucial imbalance when it comes to the power of the Lewiatan institutional bodies.

### 7.3. ICC Rules

When it comes to the ICC Rules on consolidation, Article 10 mentions just the general clause of 'any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.'[65] It must be noted that scope of the Court discretion in the ICC Rules is quite wide:

> In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.[66]

Parties can influence consolidation by providing the Court with information about any relevant circumstances that the Court should take into account. This factor is highlighted because (...) if arbitrators have been confirmed in more than one of the arbitrations, and if those arbitrators are

65 ICC Arbitration Rules, Article 10.
66 Born, *International Commercial Arbitration*, 2792.

different individuals, the Court will be unable to consolidate the arbitrations as it will be impossible to constitute a single arbitral tribunal unless the different arbitrator(s) resign or are removed by the Court at the parties' request.[67]

### 7.4. LCIA Rules

With regards to the LCIA Rules, the amendments provided in 2020 raised concerns as to justification of ordering consolidation when there is doubt whether a party will be provided with a right to appoint an arbitrator. The discretion of the Arbitral Tribunal under those rules might be limited and every case of possible consolidation treated with caution. However, the LCIA Rules regards the interests of the parties in a different matter: it can only order consolidation 'after giving all affected parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise).[68]'

## 8. Conclusions

The conclusions drawn from the analysis of the characteristics and grounds for consolidation presented above show differences in the approach to arbitration rules, between international and Polish regulations.

As it has been analysed above, strong differences between the Polish and international approach to consolidation are visible in the competent authority that is given the power to decide. In the SAKIG Rules, this power is given exclusively to the Arbitral Tribunal without exceptions and this solution is also maintained in the SAKIG Rules Project version. However, in the Lewiatan Rules, the President of the Court holds this power, but the parties have to be consulted beforehand. In the proposed new version of the Lewiatan Rules Project, the requirement for consultation with the Parties and the Arbitral Tribunal was erased, which only strengthens the power of this body. Nevertheless, the ICC Rules remain, in comparison to Polish rules, even with the proposed amendments, the most complex in this matter, which is the result of the strong influences of parties' agreement and the importance of their autonomy. According to the ICC Rules, it is the ICC Court, which after a party's request, decides on consolidation,

67 Fry et al., *The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration*, 114.
68 LCIA Arbitration Rules, Article 22(7).

however it can be seen in the commentaries that there have been cases where, because of parties' agreement, the power to consolidate can be transferred to the Arbitral Tribunal.[69] The LCIA Rules adopt a more flexible solution. The default rule grants the Arbitral Tribunal the power to consolidate proceedings, with the approval of the LCIA Court and after allowing the Parties to express their opinions. However, the LCIA Rules also grant the LCIA Court the power to order consolidation directly, even without a party request, in specific situations, such as when arbitration agreements being the base for arbitration are the same or compatible. This approach seems to be the most reasonable one as it balances party autonomy, which is extremely crucial for arbitration itself, with the supervision of an institution that is still in control of the process.

Another important element that has been discussed is the meaning of consent and the agreement of the Parties. This prerequisite plays a particularly crucial role in how the ICC Rules are interpreted. Even though, consent generally appears to play the main role in arbitration as it is the first step for the parties to initiate it – they have to agree that they will submit their disputes to it, the SAKIG and Lewiatan Rules do not allow the agreement of the parties to change their arbitration rules to the extent the ICC Rules do. For the ICC Rules, with a much more elaborated mechanism of consolidation, consent is the main and fundamental prerequisite. If the parties' consent to consolidation, the ICC Court shall decide accordingly. If there is no explicit consent of the parties as to whether to consolidate, the ICC Court can decide on consolidation if certain prerequisites are fulfilled.[70] The consent of the parties is, in this case, implied by choosing the ICC as an institution before which the parties submit to arbitration. The importance of parties' consent is extremely vital; however it is the ICC Court, which has the broad discretion and holds the final decision on this matter. Contrary to international regulations, Polish rules do not value the consent of the parties in the matter of consolidation as much. According to the SAKIG Rules, consent is technically not enough to decide on consolidation, rather there has to be other prerequisites fulfilled.[71] Practically, however, it can be observed that because of the contractual character of arbitration, parties consent can override the prerequisites stipulated in the provision,

69 Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 407.

70 ICC Arbitration Rules, Article 10.

71 Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce 2022, para. 9.

when parties explicitly consent to consolidation. Moreover, in assessing the prerequisites, the Arbitral Tribunal holds a strong discretionary power. In the SAKIG Rules Project, this position is maintained with even a stronger power of the Arbitral Tribunal no longer being obliged to regard all material circumstances and interests of the parties. In the Lewiatan Rules, there is no direct mention of the consent as the valid prerequisite for consolidation. The President of the Court decides on it based on the existence of the same legal relationship and the fact that the parties agreed on the utilisation of the Lewiatan Rules to the dispute. In the SAKIG Rules, as well in the ICC Rules, consolidation is decided based on the request of the party. The Lewiatan Rules also state that the right to request consolidation is the right of the party, which regardless of the approach to consent, shows its essential role in this process. The importance of consent is also visible in the cases, where no consolidation can be decided. According to the ICC Rules, the ICC Court cannot decide on consolidation when there is no request of the parties or they did not agree on it in the arbitration agreement. Contrary to that, for Polish institutions, again consent does not play such a big role and an obstacle to consolidation is *e.g.* the selection of the Arbitral Tribunal (in the Lewiatan Rules) or different arbitral tribunals or parties in the SAKIG Rules. This factor is also one to consider for the ICC Court when deciding on consolidation as the acceptance or appointment of arbitrators in both proceedings can make it impossible for the ICC Court to consolidate them, even with the agreement of the parties. The LCIA Rules, however, explicitly require written party consent in some scenarios, but also presume consent in others, such as when disputes arise from the same transaction or compatible arbitration agreements. Moreover, the LCIA Court may order consolidation in the early stages of arbitration, even without explicit party approval, which is a different approach than the consent-oriented one presented by the ICC Rules.

As to the other prerequisites, they are more similar between the institutions than the approach towards consent. In both the ICC Rules and Lewiatan Rules – the unanimous identity of a legal relationship between parties is important to examine. Moreover, the compatibility of arbitration clauses and the claims themselves plays a vital role. Also, in regard to other relevant circumstances, the similarities can also be observed. The interest of the parties ought to be always considered. In both the SAKIG and Lewiatan Rules, it is an important aspect of deciding on consolidation. Within the meaning of the Lewiatan Rules, the interest can be understood as direct consultation with the parties, especially before deciding on consolidation.

Also, when it comes to other relevant circumstances, in every set of rules analysed above, the importance of efficiency in regard to cost and time is to be seen. Even though there are no explicit regulations in Article 10 of the ICC Rules about efficiency, the general rule included in Article 22 of the ICC Rules requires the arbitration to be conducted in an expeditious and cost-effective manner.[72] This shows the importance of potential savings in cost and time that have to be considered by the Court before deciding on consolidation. A similar understanding is to be found in the Lewiatan and SAKIG Rules – even though in both of them, explicit guidelines are not stated, there is a general understanding of the importance of efficiency and effectiveness, expressed in the SAKIG Rules, where the effectiveness and fastness of the proceedings is highlighted.[73] On the other hand, the LCIA amendments from 2020 expanded the powers of the Arbitral Tribunal, allowing for more streamlined case management and procedural orders to limit excessive submissions or hearings. Additionally, the LCIA introduced the possibility of filing a 'composite request' for multiple arbitrations, facilitating consolidation at an earlier stage and reducing procedural inefficiencies.

After careful and comparative analysis of the rules on consolidation within different arbitral institutions, what appears to be of utmost importance is the consent of the parties – visible primarily in international rules (ICC Rules, LCIA Rules). This approach is derived from the simple understanding that, at the end of the day, the agreement of the parties is the touchstone for arbitration[74] and the flexibility and possibility to determine the rules or the proceedings is why the Parties submit to it. Within Polish institutions, this approach, even though valid and respected, is limited by a stricter and less flexible procedure, whose origins and roots can be found in a strong courtroom legal culture, where the court has a very active and decisive role. It is difficult to predict how the recent amendments to both the Lewiatan and SAKIG Rules will change the approach presented by Polish institutions. These amendments are multidimensional. On one hand, in certain amendments, a shift from a completely arbitrary approach to consolidation to the consensual character of this process can be seen. Others seem to only strengthen the already strong position of the Court and arbitral tribunals.

72 ICC Arbitration Rules, Article 22(1).

73 Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce 2022, para. 7.

74 Born, *International Commercial Arbitration*, 2764.

Most probably only after the introduction and practical use of both the SAKIG and Lewiatan Project Rules, it will be possible to state whether the newest amendments help with shifting Polish arbitral proceedings towards a more contractual, thus international, direction or make them remain in a well-known courtroom-like setting.

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