

## **Multi-contract arbitrations under the rules of Vietnam International Arbitration Centre: An introduction and comparative analysis**

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### **I. Introduction**

Commercial relationships and transactions nowadays are often structured in a sophisticated manner. In practice, a single commercial relationship or transaction may comprise of several interrelated agreements between all or some of the parties. When a dispute between the parties arises, one party may have multiple claims against others based on different interrelated contracts.

It follows that a considerable portion of commercial arbitrations nowadays involve multi-contract disputes. For instance, in 2021, 8.4% of arbitrations commenced pursuant to the London Court of International Arbitration (“**LCIA**”)’s rules of arbitration involved disputes arising out of more than one agreement (up from 5.4% in 2020).<sup>1</sup> At the Hong Kong International Arbitration Centre (“**HKIAC**”), among the 277 arbitration cases submitted to HKIAC in 2021, 131 arbitrations involved multiple parties or contracts, and in 32 of those cases, a single arbitration was commenced under multiple contracts.<sup>2</sup>

At the Vietnam International Arbitration Centre (“**VIAC**”), commonly regarded as the leading arbitral institution in Vietnam, in 2017, a single arbitration was commenced under multiple contracts in 26 out of 151 arbitrations accepted by VIAC.<sup>3</sup> Given the statistics at other institutions, it is reasonable to conjecture that the number of multi-contract arbitrations in Vietnam, including at VIAC, have increased since then, and will continue to increase as commercial transactions in Vietnam are becoming increasingly complex.

There are several advantages of adjudicating disputes arising out of related contracts in a single proceeding. The saved time and costs from not having to adjudicate the same issues multiple times, and the reduced likelihood of having inconsistent outcomes in different proceedings are the most important ones.<sup>4</sup> However, if not handled properly, resolving multi-contract disputes in a single proceeding may also hinder the proceedings’ efficiency.

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<sup>1</sup> 2021 LCIA Annual Casework Report, p. 24, available at <https://www.lcia.org/lcia/reports.aspx>, accessed on 20 February 2023

<sup>2</sup> HKIAC 2021 Statistics, available at <https://www.hkiac.org/about-us/statistics>, accessed on 20 February 2023

<sup>3</sup> Phan Trong Dat, *Kiến gộp tại VIAC*, <https://www.viac.vn/thu-tuc-trong-tai/kien-gop-tai-viac-a48.html>, accessed on 20 February 2023

<sup>4</sup> E.g., Gary Born, *International Commercial Arbitration*, pp. 2762-2763 (3<sup>rd</sup> ed. 2020)

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Since most international treaties, most national laws,<sup>5</sup> and the parties' agreements rarely contain detailed rules dealing with multi-contract scenarios, institutional rules often play an especially important role in facilitating multi-contract arbitration.<sup>6</sup> In Vietnam, although commercial arbitration is still at an early stage of development, there have been attempts by both legislators and arbitration institutions, including VIAC, to deal with the procedural issues raised by multi-contract arbitration.

In this article, the authors discuss and analyze the Vietnamese legal framework and the relevant rules under the 2017 VIAC Rules of Arbitration (“**VIAC Rules**”) on the procedural treatment of an arbitration where multiple claims arising out of different contracts are made by either or both of the claimant(s) and the respondent(s), who are all parties to all the instruments invoked. For avoidance of doubt, this article does not discuss the scenario where any party to the arbitration is not a party to any of the instruments invoked (also known as a multi-party scenario), which is rather complicated and presents a new set of procedural issues for which both Vietnamese law and VIAC Rules have not fully addressed in the authors' view.

The authors will also introduce the relevant provisions on multi-contract claims under certain selected arbitration rules of leading institutions, consisting of the (i) 2021 Rules of Arbitration (“**ICC Rules**”) of the International Chamber of Commerce (“**ICC**”), (ii) the 2016 Arbitration Rules (“**SIAC Rules**”) of the Singapore International Arbitration Centre (“**SIAC**”), and (iii) 2018 Administered Arbitration Rules (“**HKIAC Rules**”) of HKIAC. This will help highlight the similarity in the approach of these institutional rules, which may serve as a paradigm of good practice for future improvements to VIAC Rules.

The contents of this article will be structured as followed:

- (1) Section II provides a brief overview of the existing legal framework under Vietnamese laws and the provisions of VIAC Rules dealing with multi-contract arbitrations.
- (2) Section III provides an analysis of the existing provisions under VIAC Rules dealing with multi-contract arbitration, followed by an introduction to certain equivalent provisions under ICC Rules, SIAC Rules and HKIAC Rules.
- (3) Section IV provides the authors' conclusions and recommendation.

## **II. Overview of provision under Vietnamese laws and VIAC Rules dealing with multi-contract arbitrations**

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<sup>5</sup> Gary Born, *supra* n. 4, pp. 2766-68

<sup>6</sup> Gary Born, *supra* n. 4, p. 2766

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## 1. Vietnamese laws

The conduct of commercial arbitration in Vietnam is mainly governed by the following legal instruments:

- The Law on Commercial Arbitration No. 54/2010/QH12 adopted by the National Assembly on 17 June 2010 (“**2010 LCA**”); and
- Resolution No. 01/2014/NQ-HDTP adopted by the Council of Judges of the Supreme People’s Court on 20 March 2014 on implementing a number of provisions of the 2010 LCA (“**Resolution 01/2014**”).

While the 2010 LCA is silent on this topic, multi-contract arbitration is expressly permitted under Article 7.4 of Resolution 01/2014:

*“Article 7. Arbitration agreement as provided in Article 16 of the Law on Commercial Arbitration*

*[...]*

*4. The consolidation of a number of legal relationships in dispute for resolution in one single proceeding is carried out in either of the following circumstances:*

*(a) The parties agree to consolidate a number of legal relationships in dispute for resolution into a single proceeding;*

*(b) The arbitration rules allow the consolidation of a number of legal relationships in dispute or resolution into a single proceeding.”*

The scenario under Article 7.4(a), being parties’ consent, is rather straightforward. Article 7.4(b) of Resolution 01/2014 allows an arbitral institution such as VIAC to prescribe the provisions dealing with multi-contract claims in its arbitration rules.

However, it is not entirely clear if Article 7.4(b) permits arbitration rules to disallow claims arising out of multiple contracts to be resolved in a proceeding even when there is parties’ consent under Article 7.4(a). The chapeau “*is carried out*” to both prongs of Article 7.4 may be construed as imperative, i.e., the different legal relationships must be consolidated in a single proceeding if there is parties’ consent. There may be cases in practice (albeit quite rare) where it is generally impossible for the institution to grant the parties’ request. For instance, where the parties wish to have two or more commenced arbitrations consolidated into a single arbitration, but one or more different arbitrators have been confirmed for each commenced arbitration, it will not be possible to have a single arbitral tribunal resolving all the claims unless the different arbitrator(s) resigns

or is removed.

## **2. VIAC Rules and VIAC Note**

The 2012 version of the arbitration rules of VIAC contains no provision expressly dealing with multi-contract arbitration. In the 2017 version, which applies to arbitrations commenced from 1 March 2017 by default, Article 6 and Article 15 provide for two scenarios where a multi-contract arbitration can be set in motion. Article 6 deals with the scenario where the claimant makes claims arising out of multiple contracts in a single request for arbitration. Article 15 deals with the scenario where two arbitrations commenced under VIAC Rules are consolidated into a single arbitration proceeding.

In addition to VIAC Rules, VIAC's official website published an article titled "*Consolidating claims at VIAC*" dated 30 October 2019, which provides certain guidelines on the application of Article 6 of VIAC Rules ("**VIAC Note**").<sup>7</sup>

While this article is not formally characterized as a supplement to VIAC Rules, it should carry a lot of weight in the application of the rules, as the article was written by the Deputy Secretary General, one of VIAC's highest-ranking officials, who seemed to have expressed VIAC's opinion rather than his own. But unlike some institutional rules which provide that the institution may issue practice note or guidance on the rules from time to time, VIAC Rules does not have such a provision. It remains to be seen whether VIAC Note can be applied without raising issues on the conduct of the proceedings at the stage of setting aside the award.

The contents of VIAC Note will be further analyzed together with the relevant provisions under VIAC Rules in Section III below.

### **III. Analysis of provisions dealing with multi-contract arbitration under VIAC Rules**

A multi-contract situation may arise where:

1. A claimant may make different claims arising out of different contracts in its initial request for arbitration (or the equivalent document, such as notice of arbitration and/or statement of claims), or amend such submission to introduce a new claim arising out of a different contract;
2. A respondent may make different claims arising out of different contracts, including contracts not relied on by the claimant, in its counterclaim (or equivalent documents, such as response to notice of arbitration and/or statement of defense), or amend such submission

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<sup>7</sup> Phan Trong Dat, *Kiến gộp tại VIAC*, <https://www.viac.vn/thu-tuc-trong-tai/kien-gop-tai-viac-a48.html>, accessed on 20 February 2023

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to introduce a new claim arising out of a different contract; and

3. On-going arbitrations resolving claim(s) arising out of different contracts between the same parties may be “consolidated” into a single arbitration to be resolved by a single tribunal.

How each of these scenarios is governed under VIAC Rules, and certain leading institutional including ICC Rules, SIAC Rules and HKIAC Rules are discussed further below.

## 1. Claimant invoking multi-contract claims in its request for arbitration

### (a) VIAC Rules and VIAC Note

The possibility of the claimant to make claims based on several contracts in its request for arbitration is explicitly addressed in Article 6 of VIAC Rules:

#### **“Article 6. Multiple contracts**

*Claims arising out of or in connection with more than one contract may be made in a single Request for Arbitration to be resolved in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement.”*

Article 6 expressly permits the claimant to have claims arising out of or in connection with multiple contracts resolved in a single arbitration by including such claims in its request for arbitration. A plain reading of this Article 6 suggests that there is no additional requirement for such claims.

However, VIAC Note introduces certain understandings of Article 6 as follow:

**First**, according to VIAC Note, the claimant’s right under Article 6 is subject to certain conditions and the decision of the competent body, as indicated by the term “*may be made in a single Request for Arbitration*”.

However, “*may*”, whether under English or Vietnamese, both being the official languages of VIAC Rules,<sup>8</sup> can ordinarily mean either a right or a mere possibility.<sup>9</sup> There are many other instances under VIAC Rules where “*may*” unmistakably means a right rather than just a possibility.<sup>10</sup> In the

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<sup>8</sup> VIAC Rules of Arbitration, <https://www.viac.vn/en/rules-of-arbitration.html>, which reads “*Vietnamese and English are the official languages of the VIAC Rules 2017. In the event of any discrepancy or inconsistency between the Vietnamese and English versions of these Rules and any other languages in which these Rules are published, the Vietnamese and English versions shall prevail.*”, accessed on 20 February 2023

<sup>9</sup> Bryan A. Garner, *Black’s Law Dictionary*, page 1068, definition of “*may*” (“*1. To be permitted to [...] 2. To be a possibility [...]*”) (9<sup>th</sup> ed.)

<sup>10</sup> E.g., Article 4.1 (“*The parties may directly participate in or authorize in writing representatives to participate in the arbitral proceedings*”); Article 9.2 (“*At the request of the Respondent, the Centre may extend the period of time for submission of the Statement of Defence*”); Article 17.2 (“*The Decision of the remaining members of the Arbitral*

context of Article 6, it is more likely that a person applying this rule will understand “*may*” as indicating a right rather than a possibility, due to the fact that there is no condition, procedure for, or a designated competent body to decide on a request for arbitration containing multi-contract claims.

According to VIAC Note, there are two conditions for the claimant to make multi-contract claims in a single request for arbitration.

The first condition is that the arbitration agreements invoked must be compatible. In particular, the details of the arbitration agreements, such as the seat of arbitration, language, applicable law, number of arbitrators, eligibility of arbitrators, and method to constitute the tribunal, must be compatible, i.e., similar or not contradictory.

As will be further discussed, the compatibility of the arbitration agreements is a common requirement under most leading institutional rules. However, that “*applicable law*” is taken into account in assessing compatibility is particularly noteworthy. Since there are several types of laws governing different aspects of an arbitration, such as the law governing the arbitration agreements, or the law governing the substance of the contract, it is not clear what is meant by “*applicable law*” in VIAC Note. As will be further discussed, the fact that the substances of two or more claims are subject to different laws is often not a ground to establish the in compatibility of arbitration agreements.

The second condition for Article 6 to apply according to VIAC Note is that the disputes which are sought to be made in a single request for arbitration must have the “*same legal relationship*”. What constitutes the “*same legal relationship*” is not defined in VIAC Note, but the same instance of supplying goods or providing service is given as an example.

According to VIAC Note, contracts having virtually similar provisions, including the arbitration agreements, will be considered as satisfying both of these conditions. Therefore, it appears that the “*same legal relationship*” may include different contracts made in substantially identical terms between the same parties. This is somewhat different from the equivalent common requirement under certain leading institutional rules, which generally requires that the different contracts in question belong to the same economic transaction or a group of related transactions as will be discussed further below. This is because two or more contracts with substantially identical terms, including the arbitration agreements, can be for separate economic transactions.

According to VIAC Note, the body competent to decide whether the claims can be made in a single request for arbitration is the arbitral tribunal. This competence is not explicitly provided in VIAC

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*Tribunal or of the Centre’s President on the replacement of an Arbitrator may be made without stating the reasons and shall be final.”)*

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Rules.

**Second**, in case the conditions for bringing multi-contract claims in a single request for arbitration are not satisfied, the Notes on Multi-contract Claim provides that the tribunal may decide to “*split*” the arbitration case.

The term “*split*” seems to have been borrowed from the Civil Procedures Code, and may be less appropriate in the context of arbitration since the step of constituting the tribunal is not present in court proceedings. In particular, the term “*split*” creates doubt as to (i) whether one or more new proceedings to resolve the claim(s) not allowed to be made in the same arbitration will immediately take place, or the claimant will have to file a new request for arbitration for such claim(s), and (ii) if one or more new proceedings will immediately take place, whether the same tribunal will decide on all of the claim(s) originally sought to be heard in a single case, or the procedures will start over and possibly a new tribunal will be constituted.

As will be discussed further, under certain leading institutional rules, the decision to be made by the competent body in case the conditions to make multi-contract claims in a single request for arbitration are not satisfied is not “*splitting*” the case, but usually not allowing the arbitration to proceed with respect to one or some of the claims. The claimant will be free to subsequently file a new request for arbitration for a new arbitration proceeding with respect to such claims.

**Third**, according to VIAC Note, the claimant will need to state all claims arising out of different contracts in the initial request for arbitration, and may not introduce a new claim based on a different contract by amending its request for arbitration later in the proceeding.

In the authors’ view, this requirement is not apparent from the wordings of VIAC Rules or the 2010 LCA. Article 6 of VIAC Rules does not explicitly exclude the possibility of amending the request for arbitration to supplement new claims arising out of new contracts. Under Article 37 of the 2010 LCA and Article 14 of VIAC Rules, a claimant has the right to amend and supplement its request for arbitration before the conclusion of the final hearing, unless the tribunal considers the amendment or supplement (i) an abuse aimed at causing difficulties to or delaying the making of the award, or (ii) exceeding the scope of the arbitration agreement applicable to the dispute.

Regarding the first prong, the amendment or supplement of a new claim based on a new contract to the request for arbitration in and of itself does not always evidence an intention to cause difficulties to or delay the making of the award. It can be done at an early stage of the proceeding, and can also be due to legitimate reasons (e.g., the event giving rise to the claim took place after submitting the request for arbitration, the quantum of the claim has not been fully assessed, or the parties were discussing a settlement).

Regarding the second prong, if this is the legal basis for the aforementioned timing requirement in

VIAC Note, it appears that the “*arbitration agreement applicable to the dispute*” is understood as the arbitration agreement(s) invoked in the initial request for arbitration (and not in the request for arbitration as may be amended). The “*arbitration agreement applicable to the dispute*” is not defined in the 2010 LCA and VIAC Rules. The most relevant legal basis may be Article 30.3 of the 2010 LCA, which provides that the initial request for arbitration must be accompanied by the arbitration agreement. Some may construe this provision as implying that such arbitration agreement is the one “applicable to the dispute”, and thereby supporting the understanding that supplementing a new arbitration agreement afterwards will be exceeding the scope of the arbitration agreement applicable to the dispute. However, others may find this to be an over-interpretation, as it is only ordinary that the request for arbitration must be accompanied by at least an arbitration agreement.

In any event, claims arising out of multiple contracts can be made based on a single arbitration agreement. For instance, an arbitration agreement may be broad enough to cover disputes arising out of a group of related contracts, or each of the other contracts in the group may explicitly refer to the arbitration agreement contained in one contract. In these situations, it appears that the second prong above regarding the scope of the “*arbitration agreement applicable to the dispute*” cannot operate to preclude a claimant from introducing a new claim based on a new contract but still relying on the same arbitration agreement by amending or supplement the request for arbitration.

To conclude, VIAC Note, while purporting to clarify Article 6 of VIAC Rules, seems to have introduced certain new understandings of Article 6. While such understandings should not be ignored, it is also difficult and procedurally risky to rely on them, since they are not adopted as a formal amendment to or explanation of the rules.

In practice, in certain cases where the authors acted as counsels in VIAC arbitrations, the tribunals did not adopt the guidelines in VIAC Note, and allowed the claimants to make claims arising out of unrelated contracts in a single request for arbitration. Notably, these were cases where the respondent explicitly challenged the resolution of such claims in a single arbitration, relying, among other things, the guidelines in VIAC Note, and the fact that the contracts on which the claimant relied were unrelated, and arbitrating all such claims in the same proceeding may delay their resolution. Nevertheless, the arbitral tribunals still allowed the arbitrations to proceed with respect to such multi-contract claims based on Article 6 of VIAC Rules.

Interestingly, while the understandings introduced in VIAC Note are not clearly reflected in Article 6 of VIAC Rules, some of them resemble certain common requirements in the arbitration rules of certain leading arbitral institutions as discussed in the next section.

### ***(b) Leading institutional rules***



It may be observed that the provisions under certain leading institutional rules are much more extensive than that under VIAC Rules, but the additional requirements under VIAC Note seem to be similar to those under these rules in certain aspects.

### ICC Rules

Article 9 of ICC Rules provides as follows:

***“Article 9. Multiple Contracts***

***Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.”*** [emphasis added]

The formulation of Article 9 of ICC Rules is almost identical to Article 6 of VIAC Rules, save for two major differences.

**First**, Article 9 of ICC Rules does not limit its application to the claims of the claimants in its request for arbitration. It covers both situations where (i) a claimant commences arbitration by raising claims under two different contracts, each of which includes an arbitration agreement, and (ii) a claimant commences arbitration and makes claims under one arbitration agreement, and the respondent make a counterclaim under a different arbitration agreement.<sup>11</sup>

**Second**, the right of the claimant or respondent to have multi-contract claims resolved in a single arbitration is subject to Articles 6(3)-6(7) and 23(4) of ICC Rules, the equivalent of which is absent in VIAC Rules.

Generally speaking, Article 6(3)-6(7) sets out a process for the ICC Court of Arbitration (“**ICC Court**”) to make a *prima facie* decision on, among other things, whether an arbitration involving claims made under multiple contracts may proceed. The underlying purpose of this preliminary assessment, among other things, is to filter out as early as possible any arbitral proceedings where the Court considers that the conditions for claims made under more than one arbitration agreement are not satisfied so as to save time and cost.<sup>12</sup> That Article 9 is explicitly subject to this assessment is important, as it prevents Article 9 from being used as a jurisdictional or contractual basis for hearing together in a single arbitration claims made under more than one arbitration agreement where there is no consent of the parties.<sup>13</sup>

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<sup>11</sup> J. Fry, S. Greenberg, F. Mazza, *The Secretariat’s Guide to ICC Arbitration*, ¶3-340 (1<sup>st</sup> ed. 2012)

<sup>12</sup> *Ibid.*, ¶3-196, ¶3-209

<sup>13</sup> *Ibid.*, ¶3-343

Pursuant to Article 6(3), if a party raises an objection that the claims made in the arbitration may not be determined together in a single arbitration, such issue by default will be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the ICC Court.

Pursuant to Article 6(4), the ICC Court shall decide whether and to what extent the arbitration in which the multi-contract claims have been made shall proceed. The ICC Court may decide that the arbitration shall proceed in respect of all or any number of claims, or of no claims at all.<sup>14</sup> The nature of this decision is administrative and in no way affect the tribunal's decision on its own jurisdiction.<sup>15</sup>

The key consideration to be made by the ICC Court, as described in the second sentence of Article 6(4), is whether *prima facie* “an arbitration agreement under the Rules may exist.”<sup>16</sup> In other words, the ICC Court will look for a *prima facie* indication of the parties' consent to arbitrate all the claims, including those under different arbitration agreements, in a single proceeding.<sup>17</sup>

In the scenario where there are two parties, and the claims are based on one arbitration agreement, the *prima facie* assessment will be conducted simply by reference to the second sentence of Article 6(4).<sup>18</sup>

In the scenario where there are two parties, and the claims are based on more than one arbitration agreement, the *prima facie* assessment will be conducted by reference to Article 6(4), subparagraph (ii), which provides for the relevant considerations for the ICC Court in such scenario, and is not an alternative to the general assessment pursuant to the second sentence of Article 6(4).<sup>19</sup> Such considerations are (i) the compatibility of the arbitration agreements, and (ii) whether there is a *prima facie* consent to claims arising from different arbitration agreements being heard together in a single arbitration.

Regarding the compatibility of the arbitration agreements, aside from the consent to arbitrate under the ICC Rules of Arbitration, the ICC Court will often examine a number of factors such as the seat of arbitration, number of arbitrators, procedural matters such as languages, time limits, provisions on allocations of arbitration costs, additional or special powers granted to arbitral tribunals.<sup>20</sup> Notably, the fact that the contracts may provide for different laws applicable to the merits will not normally be considered as an incompatibility, as the arbitral tribunal needs not

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<sup>14</sup> *Ibid.*, ¶3-217

<sup>15</sup> *Ibid.*, ¶3-209

<sup>16</sup> *Ibid.*, ¶3-212

<sup>17</sup> *Ibid.*, ¶3-242

<sup>18</sup> *Ibid.*, ¶3-213

<sup>19</sup> *Ibid.*, ¶3-212

<sup>20</sup> *Ibid.*, ¶¶3-243 - 246

apply the same substantive law to all the claims made in an arbitration.<sup>21</sup>

Regarding the *prima facie* consent to claims arising from different arbitration agreements being heard together, such consent can be expressed or implied, and in practice the ICC Court often rely on a number of factors to establish such consent, such as the identity of the parties to the different arbitration agreements, whether the contracts containing the arbitration agreements relate to the same economic transaction, the dates of such contracts, nature of the relationship between the contracts, and the compatibility between the wording of the arbitration agreements.<sup>22</sup>

Article 6(5) further provides that except for claims that the ICC Court has not allowed to proceed, any decision as to the jurisdiction of the arbitral tribunal, including whether the arbitration can proceed with respect to more than one contract where there has been an Article 6(4) decision,<sup>23</sup> shall be determined by the tribunal itself. This is derived from the “competence-competence” principle,<sup>24</sup> and reaffirms that the ICC Court’s decision to allow a case to proceed under Article 6(4) is purely administrative in nature and does not influence or prejudice the arbitral tribunal’s decision on jurisdiction.<sup>25</sup>

For claims that the ICC Court has not allowed to proceed pursuant to Article 6(4), Article 6(7) provides that a party can choose to reintroduce such claims at a later date in other proceedings.

The right to introduce claims arising out of multiple contracts under Article 9 of ICC Rules is also limited by Article 23.4, which provides that no party shall make new claims outside the limits of the Terms of Reference<sup>26</sup> unless so authorized by the arbitral tribunal after the Terms of Reference have been signed by the parties and the tribunal, or approved by the ICC Court. Therefore, it can be inferred that a party is free to introduce a claim arising out of a new contract and arbitration agreement at any time before the Terms of Reference is signed or approved,<sup>27</sup> subject always to Article 6(3)-6(7).

### SIAC Rules

Rule 6.1(a) and Rule 6.1(b) of SIAC Rules allows a claimant to have disputes arising out of or in connection with more than one contract to have them resolved in a single proceeding by either (i)

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<sup>21</sup> *Ibid.*, ¶3-245

<sup>22</sup> *Ibid.*, ¶3-249

<sup>23</sup> *Ibid.*, ¶3-261

<sup>24</sup> *Ibid.*, ¶3-259

<sup>25</sup> *Ibid.*, ¶3-263

<sup>26</sup> The Terms of Reference is a procedural document distinctive to the ICC Rules and certain other institutional rules, which facilitates the arbitration by summarizing the merits of the disputes and setting out the procedural parameters of the arbitration. The Terms of Reference shall be signed by the parties and the arbitral tribunal. In case any of the parties refuses to sign the Terms of Reference, it shall be submitted to the ICC Court for approval.

<sup>27</sup> J. Fry, S. Greenberg, F. Mazza, *supra* n. 11, ¶3-892

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filing a single Notice of Arbitration in respect of each arbitration agreement invoked and concurrently submit an application to consolidate the arbitrations pursuant to Rule 8.1, or (ii) filing a single Notice of Arbitration in respect of all the arbitration agreements invoked, which must include a statement identifying each contract and arbitration agreement invoked and a description of how the applicable criteria under Rule 8.1 are satisfied.

Under Rule 8.1, together with which Rule 6.1 is to be read, a party may file an application with the Registrar of SIAC prior to the constitution of any Tribunal in the arbitrations sought to be consolidated to consolidate two or more pending arbitrations into a single arbitration if any of these criteria is satisfied in respect of the arbitrations to be consolidated:

- all parties have agreed to the consolidation;
- all claims in the arbitrations are made under the same arbitration agreement; or
- the arbitrations agreements are compatible, and: (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions.

Under the third criterion, which deal with scenario where multiple arbitration agreements are invoked, “compatibility” is not defined and is to be considered on a case by case basis.<sup>28</sup> According to a leading commentary on SIAC Rules, incompatibility may be indicated by the arbitration agreements referring to different arbitration rules, different number arbitrators or languages.<sup>29</sup> Notably, the fact that different laws are applicable to the merits is not specifically mentioned in SIAC Rules or the aforementioned commentary as a factor raising compatibility concern.<sup>30</sup>

This third criterion also requires that there is some connection between the disputes which a claimant seek to be resolved in same proceeding. In particular, the disputes should arise out of the same legal relationship(s); or relate to a principal contract and its ancillary contract(s); or arise out of the same transaction or series of transactions (which, according to a leading commentary, can be a series of related or chain contracts entered into over a period of time, between the same group of parties on each side).<sup>31</sup>

Under Rule 8.4, an application under Rule 8.1 will be decided by the SIAC Court of Arbitration (“**SIAC Court**”) after considering the views of all parties and having regard to the circumstances of the case, who may grant the application in whole or in part (e.g., all, some or none of the

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<sup>28</sup> John Choong, Mark Mangan, et al., *A Guide to the SIAC Arbitration Rules (Second Edition)*, ¶7.68 (2<sup>nd</sup> ed. 2018)

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, ¶7.69

arbitrations can be consolidated into a single arbitration). If the application to the SIAC Court is rejected, a claimant may still apply for consolidation again to any arbitral tribunal constituted in the arbitrations sought to be consolidated pursuant to Rule 8.7.

Under Rule 8.7, a party may make an application for consolidation to the arbitral tribunal if certain criteria which are broadly similar to those under Rule 8.1 are satisfied. The major difference is the conditions in the second and third criteria that the same tribunal has been constituted each of the arbitrations sought to be consolidated, or only one tribunal has been constituted in all pending arbitrations.

Under Rule 8.6 and Rule 8.10, if the application for consolidation is granted, the SIAC Court may revoke the appointment of any arbitrators appointed prior to the decision on consolidation.

Whether the consolidation is granted by the SIAC Court or the tribunal, Rule 8.4 and Rule 8.9 expressly affirms that such decision is without prejudice to the tribunal's power to subsequently decide any question as to its jurisdiction arising from such decision. As noted by a leading commentary, the power to rule on such an application is procedural in nature, and does not serve to extend the tribunal's jurisdiction, the scope of which is defined by the parties' agreement and will be determined by the tribunal itself.<sup>32</sup>

### HKIAC Rules

Pursuant to Article 29 of HKIAC Rules, claims arising out of or in connection with more than one contract may be made in a single arbitration subject to the satisfaction of the following conditions:

- a common question of law or fact arises under each arbitration agreement giving rise to the arbitration;
- the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions; and
- the arbitration agreements under which those claims are made are compatible.

Pursuant to Article 1.5, unless otherwise agreed by the parties, Article 29 shall not apply if the arbitration agreement was concluded before 1 November 2013, i.e., the effective date of the 2013 version of the rules which introduced Article 29.

It can be observed that similar to ICC Rules and SIAC Rules, HKIAC Rules also requires that the multi-contract claims to be resolved in a single arbitration are related to each other in certain ways, namely that they concern a common question of law or fact, and be related to the same or a series

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<sup>32</sup> *Ibid.*, ¶¶ 7.37, 7.75, 7.86

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of related transactions.

Regarding the assessment of the compatibility of arbitration agreements, according to a leading commentary on HKIAC Rules, certain factors that may be taken into account include the difference in the arbitration rules, seats, numbers of arbitrators, laws governing the arbitration agreement, preconditions to the commencement of arbitration, required qualifications of arbitrators, procedure for appointing arbitrators, language of the arbitrations, methods for determining the fees and expenses of the tribunal.<sup>33</sup> Notably, the difference in the laws governing the merits is not mentioned as a factor usually being taken into account.

Pursuant to Article 19.5 of HKIAC Rules, the arbitration will only proceed if and to the extent that HKIAC is satisfied on a *prima facie* basis that the arbitration has been properly commenced under Article 29. However, pursuant to Article 19.4, a question arising under Article 29 will be ultimately decided by the arbitral tribunal once it is constituted. Article 19.5 also affirms that any question on the jurisdiction of the tribunal will be determined by the tribunal itself.

There is no explicit requirement that all claims arising out of multiple contracts must be made in the first submission commencing the arbitration (i.e., the Notice of Arbitration under HKIAC Rules). According to a leading commentary on HKIAC Rules, the claimant may bring additional claims after it initially commences the arbitration, such as in the Statement of Claim.<sup>34</sup>

## **2. Respondent invoking multi-contract claims in its counterclaim**

### ***(a) Vietnamese laws***

Article 7.4 of Resolution 01/2014 provides that different legal relationships may be resolved in a single proceeding, without specifying which party may exercise this right. As a result, it can be inferred that the respondent may bring a counterclaim based on one or several contracts not invoked by the claimant.

However, such counterclaim will be subject to a general condition under Article 36.1 of the 2010 LCA that it must be with respect to “*issues relevant to the dispute*”.

### ***(b) VIAC Rules***

Article 6 of VIAC Rules explicitly provides that only the claimant can make claims based on multiple contracts in a single proceeding. This is clear from the term “*yêu cầu khởi kiện*”<sup>35</sup> in the

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<sup>33</sup>Michael Moser, Chiann Bao, *A Guide to HKIAC Arbitration Rules (2nd Edition)*, ¶¶ 10.160, 10.125-13 (2<sup>nd</sup> ed. 2022)

<sup>34</sup>Michael Moser, Chiann Bao, *supra* n. 33, ¶ 10.173

<sup>35</sup>The English version of VIAC Rules reads “*Claims arising out of or in connection with more than one contract [...]*”. In English, “*claims*” can mean those of either the claimant or respondent. However, the official Vietnamese

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Vietnamese texts, as well as the term “*Request for Arbitration*” in both English and Vietnamese texts.

In addition, Article 10.1 of VIAC Rules further provides that the Counterclaim must be based on the arbitration agreement on which the claimant has relied to make the request for arbitration against the respondent. Therefore, the respondent may not introduce counterclaims arising out of one or more contracts which was not invoked by the claimant if such contract(s) contain separate arbitration agreements, and may only do so if such counterclaims fall under the purview of the arbitration agreement invoked by the claimant. Usually, this means that either the contract(s) being the basis for the counterclaims must incorporate the arbitration agreement(s) in the contract(s) being the basis for the claimant’s claims, or such arbitration agreement(s) must be sufficiently broad to cover all disputes under a group of contracts.

The rationale behind Article 10.1 of VIAC Rules is not clear. If this provision for the purpose of complying with the 2010 LCA, two provisions may be relevant.

First, as discussed above, Article 36.1 requires that a counterclaim be made with respect to “*issues related to the dispute*”. However, a counterclaim based on a different contract and possibly a different arbitration agreement from those invoked by the claimant can still be related to the dispute as described in the claimant’s request for arbitration. Both the claim(s) and counterclaim(s) may share a common legal or factual issue, and/or all invoked contracts can be for the purpose of the same economic transaction or series of related transactions.

Second, Article 37.2 of the 2010 LCA requires that an amendment or supplement to a party’s submission must not fall outside the scope of the “*arbitration agreement applicable to the arbitration*”, thereby implying that all submissions, including the Counterclaim, must be based on such arbitration agreement. However, as discussed in Section 1(a) above, whether this is the arbitration agreement(s) invoked in the initial request for arbitration is unclear.

Another possibility is that Article 10.1 of VIAC Rules is modeled after another arbitration rules. It is similar to Article 9.1 of the 2012 version, and these provisions appear to resemble Article 19.3 of the 1976 UNCITRAL Arbitration Rules, which provides that the respondent may “*make a counter-claim arising out of the same contract*”. However, this provision of the 1976 UNCITRAL Arbitration Rules has been revised in the 2010 UNCITRAL Arbitration Rules, Article 21.3 and Article 21.4 of which allow a counterclaim to be based on a contract or legal instrument different from the one submitted by the claimant in the statement of claim.<sup>36</sup>

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version uses the term “*yêu cầu khởi kiện*”, which generally means the filed first claim based on which the lawsuit or arbitration is initiated.

<sup>36</sup> The preparatory works for the 2010 UNCITRAL Arbitration Rules clearly indicates that this is the purpose of the revision. See e.g., *Report of UNCITRAL on its forty-third session* (UN Doc A/65/17), ¶¶ 105, 107; *Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session* (UN Doc A/CN.9/669), ¶¶ 27-32

Given Article 10.1 of VIAC rules, if the respondent wants to have claims arising out of one or more contracts other than the contract(s) invoked by the claimant resolved in the same arbitral proceeding, the respondent will have no option other than making a new request for arbitration and requesting for a consolidation of the new arbitral proceeding with the existing one pursuant to Article 15 of VIAC Rules. This mechanism is further discussed in Section 3 below.

### **(c) Leading institutional rules**

It can be observed that unlike VIAC Rules, certain leading institutional rules introduced below seem to permit the respondent to make a counterclaim based on a contract/arbitration agreement not previously invoked by the claimant.

#### ICC Rules

As discussed above, Article 9 of ICC Rules permits a respondent to make one or several counterclaims based on one or several arbitration agreements other than those invoked by the claimant. Article 5.5, subparagraphs (c) and (d) also expressly permits a respondent to submit in connection with its counterclaims any relevant agreements, including the arbitration agreements, and requires it to indicate the arbitration agreement under which each counterclaim is made where the counterclaims are made under more than one arbitration agreement.

The requirements for and process to allow such counterclaims to proceed in a single arbitration are generally similar to those applicable to the claimant's claims as discussed above.

#### SIAC Rules

There appears to be no rule explicitly permits a respondent to make a counterclaim based on one or more arbitration agreements other than that invoked by the claimant. Rule 6.1 on multi-contract claims expressly states that it is applicable to the claimant. A leading commentary on SIAC Rules notes that the counterclaim must “*fall within the scope of the arbitration agreement*”, citing the second sentence of Rule 20.5.<sup>37</sup> It is not clear if this is the same as the arbitration agreement invoked by the claimant.

In any event, it appears that the respondent in the first commenced arbitration may file a new request for arbitration against the claimant, and request for consolidation of this arbitration with the first commenced arbitration in accordance with Rule 8 of SIAC Rules as discussed above.

#### HKIAC Rules

Article 29 of HKIAC Rules does not limit the right to make multiple-contract claims in a single

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<sup>37</sup> John Choong, Mark Mangan, et al., *supra* n. 28, ¶9.51

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arbitration for only the claimant. According to a leading commentary, pursuant to Article 29, a respondent may also bring counterclaims under another contract to which the claimant and the respondent are parties,<sup>38</sup> in which case the requirements and procedures under Article 29 as discussed above shall apply.

### **3. Consolidation of different arbitrations resolving claims arising out of different contracts**

The term “consolidation” can have different meaning under different regulations and arbitration rules, but it usually refers to the procedural mechanism of joining of two or more separate arbitrations, each possibly with its own reference number and possibly with different arbitrators, into a single arbitration, where a single tribunal will render an award with respect to all of the claims that have been raised the separate arbitrations.

#### ***(a) Vietnamese laws***

There is no express provision dealing with consolidation in the 2010 LCA or Resolution 01/2014. However, Article 7.4 of Resolution 01/2014 can be construed as allowing the consolidation of arbitrations where (i) the parties to such arbitrations so agree, or (ii) the arbitration rules so allow.

#### ***(b) VIAC Rules***

Article 15 of VIAC Rules on consolidation provides as follows:

##### ***“Article 15. Consolidation***

- 1. Parties may agree to consolidate two or more arbitrations pending under these Rules into a single arbitration. The Centre shall decide on whether the arbitrations are consolidated upon its consideration on relevant matters.*
- 2. Unless otherwise agreed by the parties, the arbitrations shall be consolidated into the arbitration that commenced first.”*

It can be observed that the only case where consolidation under VIAC Rules is allowed under VIAC Rules is with parties’ agreement. In certain VIAC arbitration where the authors acted as counsels, if there is no prior agreement, a party may successfully challenge the request for consolidation of the other party simply by stating its objection to the consolidation.

In some circumstances, it is in the interest of the party who is the claimant in the first arbitration and the respondent in the subsequent arbitration to agree with the request for consolidation of the other party (e.g., ensuring consistency in decisions, saving cost and time etc.). However, in other scenarios, it may also reject the request for consolidation due to tactical consideration, which is a

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<sup>38</sup> Michael Moser, Chiann Bao, *supra* n. 33, ¶10.173

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more common scenario as having been observed by some institutions.<sup>39</sup>

As discussed above, Article 6 and Article 10.1 of VIAC Rules do not permit the respondent to make a counterclaim unless it is based on the arbitration agreement invoked by the claimant. Therefore, if it seeks to have any claim against the claimant based on a different arbitration agreement in a related contract be resolved in the same arbitration, the respondent has no choice other than commencing a second arbitration and requesting for its consolidation into the first commenced arbitration pursuant to Article 15.1 of VIAC Rules. If there is no prior agreement on consolidation, the claimant may frustrate the respondent's attempt simply by objecting such request. In comparison, Article 6 of VIAC Rules, as being construed solely from its wordings rather than VIAC Note, imposes no condition on the claimant's right to make claims arising out of multiple contracts in a single request for arbitration.

Therefore, in case the parties have several disputes arising out of related contracts against each other, the combined effect of these provisions is that the party who first submits a dispute to arbitration generally has the discretion to decide which claims can be resolved in that single proceeding. In certain circumstances, this may give an undue tactical advantage to such party.

Another observation on Article 15 is that even if the parties agree on consolidation, VIAC may still disallow the consolidation after consideration of "*relevant matters*", which are not defined or explained. While a degree of flexibility should be afforded to the institution given the multitude of potential considerations in practice, certain guidelines are desirable so that the parties may anticipate what factors are usually taken into account by VIAC.

### *(c) Leading institutional rules*

It can be observed that the provisions under ICC Rules, SIAC Rules, and HKIAC Rules dealing with consolidation are more extensive than that under VIAC Rules.

#### ICC Rules

Pursuant to Article 10, sub-paragraphs (a)-(c) of ICC Rules, the ICC Court may, at the request of a party, consolidate two or more arbitrations pending under ICC Rules in one of the following scenarios:

- the parties have agreed to the consolidation;
- all of the claims in the arbitrations are made under the same arbitration agreement; or
- where the claims in the arbitrations are made under more than one arbitration agreement, (i)

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<sup>39</sup> *Ibid.*, ¶10.100

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the arbitrations are between the same parties, (ii) the disputes in the arbitrations arise in connection with the same legal relationship, and (iii) the Court finds the arbitration agreements to be compatible.

The first scenario is self-explanatory. The second scenario is also rather straightforward, as it relates to the cases where multiple arbitrations are brought under the same arbitration agreement.

Under the third scenario, where there are more than one arbitration, three conditions need to be satisfied. First, the arbitrations need to be between the same parties. Second, the arbitrations must be in connection with the same legal relationship. In practice, this requirement is interpreted by the ICC Court as requiring the contracts to be related to the same economic transaction.<sup>40</sup> Notably, two hotel construction contracts being similar in their terms and objective and containing identical arbitration clauses, but related to two different projects in two different cities, have been held to be not in connection with the same legal relationship.<sup>41</sup> Third, the arbitrations agreement must be compatible, as discussed in Section 1(b) above with respect to Article 6.4.

Under all scenarios, the ICC Court has the discretion to decide on a request for consolidation, even if the requirements under Article 10, sub-paragraphs (a)-(c) of ICC Rules are satisfied, after taking into account any circumstances it considers 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 arbitrators have been confirmed or appointed.

Unlike Article 6(4), subparagraph (ii) on multiple contracts, Article 10 does not clearly indicate whether a decision to consolidate by the ICC Court has any bearing on the tribunal's power to decide on its own jurisdiction. According to the Secretariat's commentary, the ICC Court's decision under Article 10 is also an administrative decision like that under Article 6(4), subparagraph (ii), with a slight difference that administrative decision to consolidate is final rather than a *prima facie* one.<sup>42</sup>

### SIAC Rules

Rule 8 of SIAC Rules dealing with consolidation has been discussed in Section 1(b) above.

### HKIAC Rules

Consolidation is provided under Article 28. Pursuant to Article 1.5, unless otherwise agreed by the parties, Article 28 shall not apply if the arbitration agreement was concluded before 1 November 2013, i.e., the effective date of the 2013 version of the HKIAC Rules which introduced Article 28.

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<sup>40</sup> J. Fry, S. Greenberg, F. Mazza, *supra* n. 11, ¶3-357

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, ¶3-356

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Pursuant to Article 28, sub-paragraphs (a)-(c), at the request of a party and after consulting with the parties and any confirmed or appointed arbitrators, HKIAC has the power consolidate two or more arbitrations pending under HKIAC Rules in one of the following scenarios:

- the parties have agreed to the consolidation;
- all of the claims in the arbitrations are made under the same arbitration agreement; or
- (i) the claims are made under more than one arbitration agreement, (ii) a common question of law or fact arises in all of the arbitrations, (iii) the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions, and (iv) the arbitration agreements are compatible.

These scenarios are either self-explanatory, or broadly similar to the scenarios where claims arising out of multiple contracts may be made in a single arbitration under Article 29 as discussed in Section 1(b) above.

The power to order consolidation of HKIAC is also discretionary, even where all the conditions under Article 28, sub-paragraphs (a)-(c) are satisfied.<sup>43</sup>

Unlike Article 29 on multiple contracts, Article 28 does not clearly indicate whether a decision to consolidate by HKIAC has any bearing on the tribunal's power to decide on its own jurisdiction. Article 32.2 explicitly provides that the parties waive any objection, on the basis of the use of the procedure under Article 28 and any decision made, to the validity and/or enforcement of any award made by the arbitral tribunal in the arbitration(s), in so far as such waiver can validly be made. This provision has been suggested to imply that the tribunal in the consolidated arbitrations has valid jurisdiction to make the final award based on the institution's decision to consolidate.<sup>44</sup>

#### IV. Conclusion and recommendation

**First**, regarding the right to make multi-contract claims in single request for arbitration, a plain reading of Article 6 of VIAC Rules strongly suggests the claimant may make claims arising out of any unrelated contracts, including those containing different arbitration agreements. In other words, it may be, and in practice has been, interpreted as a basis for the tribunal's jurisdiction to resolve any number of unrelated claims in a single arbitration.

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<sup>43</sup> Michael Moser, Chiann Bao, *supra* n. 33, ¶10.103

<sup>44</sup> Eunice Chan Swee En (Drew & Napier), *Consolidation of Arbitral Proceedings and its Ramifications on a Party's Right to Challenge the Jurisdiction of the Tribunal and the Arbitral Award*, <http://arbitrationblog.kluwerarbitration.com/2018/03/21/consolidation-arbitral-proceedings-ramifications-partys-right-challenge-jurisdiction-tribunal-arbitral-award/>, accessed on 20 February 2023 (referring to identical Article 28.8 of the 2013 version of HKIAC Rules)

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This can be viewed as contrary to the widely recognized principle of parties' autonomy in arbitration. Leading commentators have for long noted that whether multi-contract claims can be resolved in a single proceeding is subject to the interpretation of the parties' agreement.<sup>45</sup> Under certain leading institutional rules introduced above as well as certain others, generally speaking, claims arising out of multiple contracts are allowed to be resolved in the same proceeding only if there are some connections between these contracts, and the tribunal must ultimately decide on its jurisdiction to resolve such claims in a single arbitration. That Article 7.4 of Resolution 01/2014 on multi-contract claims is supposed to provide guidance on the contents of an arbitration agreement also suggests that whether claims arising out of multiple contracts can be resolved in the same arbitration is subject to the parties' agreement.

That unrelated claims may be resolved in a single arbitration is also generally inefficient and likely to cause significant delay and costs for the parties, and therefore should be avoided.

**Second**, although VIAC Note attempted to introduce certain additional requirements to the application of Article 6 of VIAC Rules, it has not always been observed in practice. Its non-incorporation into VIAC Rules may create confusion for the parties and the tribunal, as well as the risk that its application may be a ground for vacating the final award.

**Third**, the guidance under VIAC Note, while reflecting some common requirements under ICC Rules, SIAC Rules, and HKIAC Rules, is not sufficiently clear and/or significantly different from these rules in certain respects. These include:

- The possible requirement that the laws applicable to the merits must be compatible to establish the compatibility of the arbitration agreements.
- That contracts between the same parties with substantially identical provisions may always be viewed as arising out of the same legal relationship.
- That the tribunal may decide to 'split' the case in case the conditions for making multi-contract claims are not satisfied.

In our view, the approaches under these leading institutional rules as discussed above are more convincing and appropriate.

**Fourth**, the combined effect of Articles 6, 10.1 and 15 of VIAC Rules is that in case the parties have claims arising out of related contracts with different arbitration agreements against each other, the party who initiates an arbitration first may gain an undue tactical advantage, as it may

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<sup>45</sup> E.g., Philippe Fouchard, Berthold Goldman, *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, ¶¶512, 518-523 (Emmanuel Gaillard, John Savage ed., Kluwer Law International 1999); Gary Born, *supra* n. 4, p. 2816;

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frame which claims can be resolved together in that single proceeding, while the other party has no choice another than initiating a new arbitration if its claim is based on an arbitration agreement not invoked by the former. It is not entirely clear why this restriction on the respondent's counterclaim exists in VIAC Rules. Meanwhile, under ICC Rules, SIAC Rules, and HKIAC Rules, the respondent is generally allowed to have its counterclaim based on a different arbitration agreement resolved in the same arbitration, including by directly making such counterclaim or requesting for consolidation of arbitrations.

Therefore, it is recommended that future revisions to VIAC Rules should take into account the aforementioned issues. The approaches under leading institutional rules as discussed above can serve as references on good practice.

FOR MORE INFORMATION, PLEASE



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