

# **The efficient resolution of construction disputes under the Swiss Rules of International Arbitration – The role of the Swiss Chambers’ Arbitration Institution**

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The Swiss Rules of International Arbitration (the “**Swiss Rules**”) are frequently used in international construction disputes of all sizes. Since the Swiss Rules were first adopted more than a decade ago,<sup>2</sup> they have gained a worldwide reputation, in particular for efficiency and cost-effectiveness. A number of key features of the Swiss Rules, including a number which were introduced or strengthened in the revised version of the Rules issued in 2012, contribute to that reputation. This article explores in detail several aspects of the Swiss Rules that are particularly relevant in the context of construction disputes, which frequently involve multiple parties, focusing on the role played by the Swiss Chambers’ Arbitration Institution (the “**Institution**”), and its Arbitration Court (the “**Court**”).

After providing a general overview of the key features of the Swiss Rules and of the role of the Institution (Section 1), this article addresses the Court’s *prima facie* review of jurisdiction (Section 2), in particular in the context of multi-tier dispute resolution agreements, and the possible extension of arbitration agreements to non-signatory parties. It then turns to the Court’s power to consolidate related proceedings (Section 3), and the Court’s role in the constitution of the arbitral tribunal, in particular in multi-party and parallel arbitrations (Section 4).

## **1 KEY FEATURES OF THE SWISS RULES**

The Swiss Rules provide the parties to an arbitration with a great deal of flexibility, and are geared towards allowing for the efficient and cost-effective resolution of disputes. This section first provides an overview of some of the key aspects of the Swiss Rules (Section 1.1), before turning to one aspect in particular, namely the light but efficient administration of proceedings by the Institution (Section 1.2).

### **1.1 Overview of the key features of the Swiss Rules**

The Swiss Rules have a number of characteristic features which have contributed to their widespread use, including in the context of construction disputes.

First, they are flexible. In particular, as most modern arbitration rules, they allow parties to freely choose the law governing their transaction, the language in which the arbitral proceedings will be conducted, the number of arbitrators, and the seat of the arbitration. The parties are also

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<sup>2</sup> The Swiss Rules were created to unify the arbitration rules of six Swiss chambers of commerce, including those of Geneva and Zurich.

free to choose whoever they wish as counsel in proceedings under the Swiss Rules, including in-house counsel.

Second, the Swiss Rules allow for disputes to be resolved quickly. On average, arbitrations under the Swiss Rules last approximately 14 months, less than under many other international arbitration rules.<sup>3</sup>

Third, the Rules provide for an expedited procedure under which the final award must be rendered within six months of the date of transmission of the file to the arbitral tribunal, a deadline which is enforced by the Court. Approximately 40% of all Swiss Rules arbitrations in the past ten years have been conducted under the expedited procedure, which is applicable if the parties agree to it, either in their arbitration agreement or subsequently, or automatically in cases in which the amount in dispute does not exceed CHF 1 million.<sup>4</sup> Arbitrations conducted in accordance with the expedited procedure are heard by a sole arbitrator,<sup>5</sup> and will as a rule only involve one round of written submissions by the parties following the Notice of Arbitration and the Answer, and a single hearing,<sup>6</sup> helping to keep costs low.

The expedited procedure, and its automatic application to cases with amounts in dispute not exceeding CHF 1 million, underlines that not only large disputes but also smaller cases can be handled under the Swiss Rules in a cost-effective way. In addition, in accordance with the current Schedule of Costs, included as Appendix B to the Swiss Rules, the Institution does not charge any administrative costs for cases with an amount in dispute which does not exceed CHF 2 million, with the exception of the initial CHF 4,500 filing fee.

Fourth, parties may seek emergency interim relief, including *ex parte* relief, prior to the constitution of the arbitral tribunal, allowing them, if necessary, to act quickly to protect their interests, for instance by seeking an order to vacate or to allow access to a construction site, or to attempt to prevent the call of a guarantee. The procedure is quick, neutral, and confidential. Pursuant to Article 43 of the Swiss Rules, the emergency arbitrator, who is appointed by the Court,<sup>7</sup> is required to issue a decision within fifteen days of receiving the case file.<sup>8</sup> If arbitration proceedings have not yet been initiated at time a request for emergency interim relief is made, the applicant must file a Notice of Arbitration within ten days of the Court's receipt of its application for emergency interim relief.

Finally, the Swiss Rules are accompanied by the complementary Swiss Rules of Commercial Mediation (the "**Swiss Mediation Rules**"), under which parties to a dispute may commence a mediation procedure either prior to or during an arbitration. The Swiss Mediation Rules provide in particular that in the course of arbitral proceedings conducted under the Swiss (Arbitration)

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<sup>3</sup> Christoph Brunner, "Introduction to the Swiss Rules", in Manuel Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide* (2013), p. 327, N. 34.

<sup>4</sup> Art. 42 of the Swiss Rules.

<sup>5</sup> Art. 42(2)(b) of the Swiss Rules.

<sup>6</sup> Art. 42(1)(b) and (c) of the Swiss Rules.

<sup>7</sup> Art. 43(2) of the Swiss Rules.

<sup>8</sup> Art. 43(7) of the Swiss Rules.

Rules, the Institution or the arbitral tribunal may propose to the parties to resort to mediation.<sup>9</sup> They further provide that if the parties reach a settlement through mediation during the course of arbitral proceedings, they can seek an award on agreed terms in accordance with Article 34 of the Swiss (Arbitration) Rules.<sup>10</sup> Finally, even if the parties have not previously agreed to mediation under the Swiss Mediation Rules, for instance in a multi-tier clause which requires the parties to attempt mediation for a certain period of time before resorting to arbitration, a party can request the Institution to invite the other party to agree to accept to mediate under the Rules.<sup>11</sup>

## **1.2 The Swiss Chambers' Arbitration Institution's "light" but efficient administration of proceedings**

In addition to the aspects mentioned in Section 1.1 above, an important feature of the Swiss Rules is the "light" but efficient administration of proceedings by the Court, which is assisted in its work by the Secretariat.

The Swiss Rules provide for only a limited involvement of the Court in the arbitral proceedings. The Court performs a "gatekeeper function" in respect of jurisdictional issues, albeit a limited one, as it is required only to determine whether there is "manifestly no agreement to arbitration referring to [the Swiss] Rules"<sup>12</sup> in the event a respondent raises a jurisdictional objection or does not respond to the Notice of Arbitration. In addition, the Court has the power to order consolidation of proceedings, although it exercises its power in this respect in a restrictive way, and retains a key role in the constitution of the arbitral tribunal (see Sections 2 to 4 below).

The Court or its Secretariat do not formally scrutinise the content of the award before it is rendered by the arbitral tribunal, which avoids the delays often associated with such scrutiny by other arbitral institutions, although it does review the arbitral tribunal's final determination as to its fees, which it has the power to adjust.<sup>13</sup> The Court will, however, only use its power to adjust the arbitral tribunal's fees if it is "clearly necessary" to do so,<sup>14</sup> as the arbitral tribunal is better placed to assess the relevant criteria. Tribunals must also consult with the Court before fixing or adjusting the advance on fees or deposit,<sup>15</sup> and will generally follow the Court's guidance in this respect. In addition, the Court's approval is required for any deposit which exceeds the maximum provided for in the scale of fees in the Schedule of Costs.

The Court also plays certain more informal roles. For instance, while the Swiss Rules do not set out any maximum period for the arbitral tribunal to render its final award, except in the case of expedited proceedings (see Section 1.1 above), the Court and its Secretariat will keep track

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<sup>9</sup> Art. 24(1) of the Swiss Mediation Rules.

<sup>10</sup> Art. 23(1) of the Swiss Mediation Rules.

<sup>11</sup> Art. 5 of the Swiss Mediation Rules.

<sup>12</sup> Art. 3(12) of the Swiss Rules.

<sup>13</sup> Art. 40(4) of the Swiss Rules.

<sup>14</sup> Marco Stacher, "Costs" in Zuberbühler, Müller & Habegger, eds., *Swiss Rules of International Arbitration*, 2nd ed. (Schulthess, 2013), p. 395, N. 12.

<sup>15</sup> Art. 41(1) and (3) of the Swiss Rules.

of arbitral proceedings to ensure that they are progressing at an appropriate pace, and will press the arbitral tribunal if they are not.

The Court is organised in such a way as to allow it to render the decisions which it is called on to make under the Swiss Rules quickly, and as to ensure consistency in its decision-making. Upon receipt of a Notice of Arbitration, the Secretariat will appoint a Case Administration Committee composed typically of one to two members of the Court, which is empowered to make “all decisions within the powers of the Court relating to the case concerned”,<sup>16</sup> with a few exceptions. Most decisions with respect to a particular case will therefore be taken by member(s) of the Court who are familiar with it, having followed the arbitration from the beginning. Decisions in respect of certain more delicate matters, such as the consolidation of related proceedings, fall, however, under the remit of the Court Special Committee (the “**Special Committee**”), which is composed of seven members of the Court.<sup>17</sup>

The composition of the Court also ensures that its decisions are taken with an understanding of the relevant practical and commercial realities, and the particularities of the industries and sectors in the context of which disputes arise, including the construction sector. The thirty members of the Court are all experienced arbitration practitioners, and many have significant experience in international construction arbitration.

## **2 THE COURT’S *PRIMA FACIE* REVIEW OF JURISDICTION**

The Court has, in certain circumstances, the role of conducting a *prima facie* review of jurisdiction. It may in particular be called on to conduct such a review in cases in which a party has failed to comply with a multi-tiered dispute resolution agreement, which are frequently used in construction contracts, or in cases in which a party seeks to extend the arbitration agreement to a non-signatory, for instance a guarantor or a joint venture partner.

### **2.1 The Court’s determination under Article 3(12) of the Swiss Rules**

Pursuant to Article 3(12) of the Swiss Rules, the Court performs a “gatekeeper function” as to jurisdiction in the event that a respondent raises a jurisdictional objection, or does not respond to a Notice of Arbitration. This “gatekeeper function” is, however, a limited one, as the Court will only conduct a *prima facie* review of jurisdiction to determine whether there is “manifestly no agreement to arbitrate referring to [the Swiss] Rules”:

“If the Respondent does not submit an Answer to the Notice of Arbitration, or if the Respondent raises an objection to the arbitration being administered under these Rules, the Court shall administer the case, unless there is manifestly no agreement to arbitrate referring to these Rules.” (Emphasis added.)

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<sup>16</sup> Art. 3 of the Internal Rules of the Arbitration Court of the Swiss Chambers’ Arbitration Institution.

<sup>17</sup> Art. 4 of the Internal Rules of the Arbitration Court of the Swiss Chambers’ Arbitration Institution.

In other words, it must be clear that there is no agreement to submit a dispute to arbitration under the Swiss Rules for the Court to decide that an arbitration should not proceed. Any further jurisdictional questions will be for the Arbitral Tribunal to decide.

In practice, the Court quickly issues its decision if it is called on to make a decision under Article 3(12). Such *prima facie* determinations are submitted by the Secretariat to the Court, which issues a decision within a few days of a respondent raising a jurisdictional objection, or failing to respond to a Notice of Arbitration, without any exchange of submissions by the parties.

## **2.2 Factual Scenario: Illustration of the application of Article 3(12) by the Court**

In order to illustrate how the Court would approach a *prima facie* review of jurisdiction under Article 3(12) of the Swiss Rules, it is helpful to resort to a hypothetical factual scenario. The basic factual scenario below, many aspects of which will be familiar to construction practitioners, will be used throughout this article for illustration purposes:

A dispute arises between a Qatari employer (the “**Employer**”) and a Turkish contractor (the “**Contractor**”) as to defective welds performed by a Korean subcontractor (the “**Subcontractor**”). The main contract, which is governed by Swiss law, requires a party to first attempt mediation for a period of 60 days before it can submit a dispute to arbitration before a three-member tribunal constituted under the Swiss Rules, with seat in Geneva.

Under the construction contract, the Contractor provided a performance guarantee from its parent company (the “**Parent Company**”). The guarantee does not contain any provisions on dispute resolution. The Parent Company did not sign the construction contract, but at certain stages of the project, it negotiated directly with the Employer on behalf of the Contractor, and performed some of the work within the Contractor’s scope due to certain internal arrangements within the group of companies.

Once the Employer discovers the defective welds, it raises the issue with the Contractor. The Contractor simply denies that the welds are defective, and neither party makes any attempt to initiate a mediation procedure. Three months later, the Employer initiates arbitration under the Swiss Rules against both the Contractor and the Parent Company. In its Answer to the Notice of Arbitration, the Contractor objects to the jurisdiction of the arbitral tribunal on the ground that the Employer did not comply with the requirement to attempt mediation prior to initiating the arbitration. The Parent Company does not submit an Answer.

The scenario above raises two jurisdictional issues which the Court would be called on to address under the Swiss Rules on a *prima facie* basis as a result of the Contractor’s objection to jurisdiction, and the failure of the Parent Company to respond to the Notice of Arbitration. The first arises from the non-fulfilment of a pre-arbitral requirement. The second arises from the fact that the Parent Company was not a signatory to the arbitration agreement.

With respect to the first issue, provided that the multi-tier dispute resolution provision refers to arbitration under the Swiss Rules, the Court would leave any objection relating to the non-fulfilment of a pre-arbitral requirement to the arbitral tribunal. Indeed, deciding on such an objection would require the Court to address a number of legal and factual issues, such as whether the Contractor had to comply with the pre-arbitral requirement in the circumstances, which go well beyond the Court's remit under Article 13(2) of the Swiss Rules.

As to the second jurisdictional issue, namely that the Parent Company was not a signatory to the arbitration agreement, the Court would likely allow the arbitration to proceed provided that the Employer at least alleges that there are grounds on which the arbitration agreement could be extended to the Employer, for instance that the Parent Company was involved in the negotiation and performance of the main contract. The question of whether the test for the extension of an arbitration agreement under the law applicable to the issue is met would involve issues of fact and law that would be left to the arbitral tribunal.

Even if the Court were to find that there was manifestly no arbitration agreement in respect of the Parent Company, the arbitration could nevertheless proceed against the Contractor. Indeed, a determination by the Court under Article 13(2) of the Swiss Rules that an arbitration should not proceed in respect of one respondent would not prevent the arbitration from proceeding against any other parties/respondents. Similarly, even if the Court were to find that certain claims manifestly did not fall under the scope of the arbitration agreement, the arbitration can proceed if at least one claim can be decided under the Swiss Rules.

### **3 THE COURT'S POWER TO CONSOLIDATE PROCEEDINGS**

The issue of consolidation of two or more arbitrations is particularly relevant to construction disputes, which often involve multiple parties and contracts, but is a controversial and delicate issue (Section 3.1). The Court under the Swiss Rules possibly has broader powers than other arbitral institutions to order consolidation. However, in practice, the Court exercises in this respect in a restrictive way (Section 3.2), as illustrated in the factual scenario below (Section 3.3).

#### **3.1 Consolidation of arbitrations in the context of construction disputes**

Construction projects often involve interconnected contracts between numerous parties, including employers, contractors, subcontractors, and engineers. As a result, when disputes arise, they can often give rise to costly parallel or successive proceedings under different contracts and between different parties addressing some of the same factual and legal issues, giving rise to a risk of conflicting decisions.

The consolidation of related arbitrations can be an attractive solution to some of the problems raised by such parallel or successive proceedings. For instance, resolving multi-party or multi-contract disputes in a single proceeding can lead to greater procedural efficiency and lower costs, as it avoids the need for different tribunals to decide separately on common factual and legal issues, and therefore the need for them to review and hear the same evidence. In addition,

the involvement of other parties in consolidated proceedings may make available to the arbitral tribunal additional evidence, allowing it to assess certain issues with the benefit of a more comprehensive understanding of the relevant facts. Consolidated proceedings also eliminate the risk of conflicting decisions, which can complicate the relationships between parties.

Consolidation is, however, a delicate issue, particularly in the context of construction disputes. Indeed, there are many reasons why consolidation may **not** be in the interests of one or several of the parties to a multi-party and/or multi-contract construction dispute.

For instance, a party may have a legitimate interest in keeping certain aspects of its relationship with another party, such as the price of a contract, confidential. In addition, consolidation can significantly complicate an arbitration from a procedural and substantive point of view, adding to its duration and cost. In particular, consolidation can considerably widen the scope of the factual and legal issues to be addressed in the proceedings and also lead to additional procedural issues, especially if consolidation introduces new parties into the proceedings (as opposed to a new contractual relationship between the same parties) .

Even in cases in which consolidated proceedings may, from the point of view of one or more parties, be more efficient and cost-effective than separate proceedings, that will not necessarily be true for **all** parties. For instance, a contractor may in certain circumstances benefit from the consolidation of separate but related arbitrations against an employer and a subcontractor. However, such consolidation would in most cases not be in the interest of either the employer or the subcontractor, as it would merely add to the complexity and cost of the proceedings by introducing issues which are not relevant to their respective legal relationships with the contractor. Parties may also have an interest in disputes being resolved in a certain sequence. For example, it may be in the interest of a contractor, for insurance or other purposes, for a dispute with the employer to be settled before a dispute with a subcontractor, or vice-versa.

The issue of joinder of third parties is similarly controversial in the context of construction disputes, and raises many of the same pros and cons as set out above in respect of consolidation. This article does not address the issue of joinder in any detail, as it is a matter for the arbitral tribunal rather than the Institution. Indeed, under Article 4(2) of the Swiss Rules, it is for the arbitral tribunal to decide on any requests for joinder. Therefore, contrary to Article 7 of the Arbitration Rules of the International Chamber of Commerce (ICC), which does not allow for joinder after the confirmation or appointment of an arbitrator, the Swiss Rules only contemplate joinder **after** the constitution of the arbitral tribunal.

### **3.2 The power of the Court to order consolidation under the Swiss Rules, and how the Court exercises that power in practice**

The Court has a great deal of discretion to order consolidation under Article 4(1) of the Swiss Rules, which provides in part as follows:

“Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Court may decide, after consulting

with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings. The Court may proceed in the same way where a Notice of Arbitration is submitted between parties that are not identical to the parties in the pending arbitral proceedings. ...”

The Court therefore has the power to order consolidation of the proceedings even **without** the consent of one or more of the parties, and may do so *ex officio*, in the absence of a request of a party. The Court may also order consolidation whether or not the parties in both proceedings are identical, whether or not the proceedings arise from the same contract or under the same arbitration agreement, and even after the constitution of an arbitral tribunal in the proceedings that were initiated first.

As such, the Court has far broader powers to order consolidation than do other arbitral institutions, such as the ICC or the LCIA. For example, under Article 10 of the ICC Rules, the ICC Court can order consolidation only if (1) all parties have agreed to it, (2) all of the claims are made under the same arbitration agreement, or (3) the arbitration agreements are compatible and the disputes relate to the same legal relationship and are between the same parties. The LCIA Rules are even more restrictive: under Article 22.6 of the LCIA Rules, the LCIA Court may only order consolidation of arbitrations commenced under the same arbitration agreement between the same parties, and only if no arbitral tribunal has been constituted in either arbitration.<sup>18</sup>

In practice, however, the Court exercises its broad discretion under Article 4(1) of the Swiss Rules in a restrictive way. Indeed, it will only order consolidation in “limited and justified cases and usually only with the consent of the parties concerned”,<sup>19</sup> and will carefully weigh the relevant factors.

Article 4(1) of the Swiss Rules provides that the Court must take into account “all relevant circumstances” in deciding on consolidation, and requires that the Court consider two factors in particular, namely the “links between the cases and the progress already made in the pending arbitral proceedings.” With respect to the former, the Court will assess, on the basis of the information available to it, whether the arbitrations involve similar legal issues and/or arise out of a connected set of facts, and therefore whether the documentary, witness, and expert evidence submitted in the two cases would overlap significantly.<sup>20</sup> With respect to the latter, the Court will take into account the impact of consolidation on the pending arbitration, notably the possible delays caused by new issues introduced by the second arbitration, and whether there

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<sup>18</sup> The LCIA Rules also allow a tribunal to order consolidation, with the approval of the LCIA Court, although only if all parties agree to it, or if the arbitrations are between the same parties and no tribunal (or the same tribunal) has been constituted in the other arbitration.

<sup>19</sup> Philipp Bärtsch & Angelina Petti, “Consolidation and Joinder” in Zuberbühler, Müller & Habegger, eds., *Swiss Rules of International Arbitration*, 2nd ed. (Schulthess, 2013), p. 52, N. 26. See also Daniel Wehrli & Marco Stacher, “Arbitration under the Swiss Rules” in Corerdo-Moss, *International Commercial Arbitration: Different Forms and their Features* (Cambridge, 2013), p. 345, at p. 365.

<sup>20</sup> Dorothee Schramm, “Article 4: Consolidation and Joinder” in Arroyo, ed., *Arbitration in Switzerland: the Practitioner’s Guide* (Wolters Kluwer, 2013), p. 360, N. 16.

would be a need to reconstitute the arbitral tribunal. As a general rule, the more advanced the pending arbitration is, the less likely the Court would order consolidation.<sup>21</sup>

In addition, the Court would carefully consider the interests and positions of the parties. For instance, the Court would take into account any objection to consolidation a party may raise on the basis of confidentiality, or due to a concern that the cases should be heard by arbitrators with different profiles or qualifications. Conversely, the designation by the parties of the same arbitrators in both proceedings would be considered by the Court as a factor militating in favour of consolidation.<sup>22</sup> The Court would also seek to balance the overall increase in efficiency which may result from consolidation with any additional costs that consolidation would entail for some of the parties, and in proceedings involving multiple contracts, it would take into account the parties' initial choice to conclude separate contracts to govern specific legal relationships.

Even if the parties agree to consolidation or do not raise any valid objections, and all other factors militate in favour of consolidation, the Court would in any case assess whether the arbitration agreements under which the arbitrations arise are compatible, in particular as to the number and qualifications of arbitrators, any specific procedures they set out, the language of arbitration, and, although to a lesser degree, the seat of the arbitration.

In sum, the Court adopts a restrictive and measured approach to exercising its powers under Article 4(1) of the Swiss Rules, and will carefully consider all relevant factors in deciding whether to order consolidation, drawing on the extensive experience of the members of the Court as counsel and arbitrators in complex arbitrations, including in construction disputes. In practice, the Court tends to order consolidation only in cases involving "horizontal" chains of contracts between the same parties or parties of the same group, for example a contract for the design, supply and installation of a particular system, and a related maintenance contract.

Finally, in the event that the Court decides to consolidate two arbitrations in which the parties are **not** identical, the consolidation may raise issues as to the equal treatment of the parties with respect to the constitution of the tribunal if the tribunal in the first arbitration has already been constituted in whole or in part. For this reason, Article 4(1) provides that the parties are "deemed to have waived their right to designate an arbitrator" in the event of consolidation, and that the Court has the power to "revoke the appointment and confirmation of arbitrators" and apply the normal provisions for the constitution of the tribunal as set out in Section II of the Swiss Rules.

In deciding whether or not to exercise its power to revoke the appointment and confirmation of arbitrators, the Court will in particular consider the *lex arbitri* (the law of the seat of the

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<sup>21</sup> See Philipp Bärtsch & Angelina Petti, "Consolidation and Joinder" in Zuberbühler, Müller & Habegger, eds., *Swiss Rules of International Arbitration*, 2nd ed. (Schulthess, 2013), p. 52, N. 33; Dorothee Schramm, "Article 4: Consolidation and Joinder" in Arroyo, ed., *Arbitration in Switzerland: the Practitioner's Guide* (Wolters Kluwer, 2013), p. 360, N. 17.

<sup>22</sup> See Paolo Michele Patocchi, "The Practice of the Special Committee of the Swiss Chambers of Commerce in the Administration of Arbitrations Conducted under the Swiss Rules of the International Arbitration (2004-2007)" in Müller, ed., *New Developments in International Commercial Arbitration 2007* (Schulthess, 2007), p. 91.

arbitration) and the likely place of enforcement, and assess whether keeping the arbitrators in the pending case in place could lead to a substantial risk that a party in the second case will challenge the award or resist enforcement on the basis of unequal treatment.<sup>23</sup> The Court would also consider whether the second case requires particular qualifications on the part of the arbitrators which the arbitrations in the first case do not have.<sup>24</sup>

### **3.3 Factual Scenario: Illustration of the Court’s approach to consolidation under Article 4(1) of the Swiss Rules**

How the Court would exercise its power to order consolidation under the Swiss Rules can be illustrated through the same factual scenario as that used above in respect of the Court’s *prima facie* review of jurisdiction, with the following addition:

Shortly after the Employer initiates arbitration, the Contractor initiates a separate arbitration against the Subcontractor, also under the Swiss Rules, regarding the same defective welding. It then requests that the cases be consolidated pursuant to Article 4(1) of the Swiss Rules. Both the Employer and Subcontractor object to consolidation.

As explained above, the Court would have the power to order consolidation of the arbitrations even though the parties are not identical, the cases arise out of different contracts, and two of the parties object to consolidation. It might be argued that consolidation in this scenario would lead to overall gains in efficiency, as the cases raise the same technical issues and would involve largely the same or similar evidence, and would prevent the risk of conflicting decisions.

It is unlikely, however, that the Court would order consolidation if the employer and subcontractor raise objections based on legitimate concerns, such as the risk that consolidation would make the duration and costs of the proceedings excessive. The Court is, in practice, generally reluctant to order consolidation of proceedings if the parties are not the same, or are not parties of the same group.

## **4 CONSTITUTION OF THE ARBITRAL TRIBUNAL**

The Court also plays an important role in the constitution of the arbitral tribunal under the Swiss Rules, including in the context of multi-party arbitrations, and parallel arbitrations concerning the same or similar subject matter, which often arise in the context of construction disputes.

### **4.1 Role of the Court in the constitution of the arbitral tribunal**

Under the Swiss Rules, the Court has several functions in respect of the constitution of the arbitral tribunal. First, any designation of an arbitrator by the parties or the co-arbitrators must be confirmed by the Court.<sup>25</sup> Second, the Court will be called on to appoint an arbitrator directly

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<sup>23</sup> Dorothee Schramm, “Article 4: Consolidation and Joinder” in Arroyo, ed., *Arbitration in Switzerland: the Practitioner’s Guide* (Wolters Kluwer, 2013), p. 360, N. 21.

<sup>24</sup> Dorothee Schramm, “Article 4: Consolidation and Joinder” in Arroyo, ed., *Arbitration in Switzerland: the Practitioner’s Guide* (Wolters Kluwer, 2013), p. 360, N. 25.

<sup>25</sup> Article 5(1) of the Swiss Rules.

if the parties fail to agree on a sole arbitrator, or, in the case of a three-member tribunal, if one of the parties fails to designate an arbitrator, or the two party-designated arbitrators fail to designate a president.

Where the Court is called on to appoint an arbitrator, it will typically do so quickly. The Court will stand ready to exercise its power before a party requests it to do so. In addition, if the Court considers it necessary to consult with the parties as to an arbitrator's nationality or qualifications, it will impose short deadlines for the parties' comments.

The Swiss Rules do not set out the criteria which the Court should take into consideration in appointing an arbitrator. In practice, however, the Court considers a number of factors, including whether any specific expertise or experience would be required or useful for the case. In the context of construction disputes, for instance, the Court would typically seek an arbitrator with experience in handling such disputes. The Court may also consider a potential arbitrator's familiarity with the substantive law governing the dispute,<sup>26</sup> her is his nationality (although there are no strict requirements relating to nationality), the language of the proceedings, and general arbitration experience, which is especially important for an appointment as sole arbitrator or president of a tribunal.

The Swiss Rules confer on the Court "all powers to address any failure ... in the constitution of the arbitral tribunal," including by "revok[ing] any appointment made, appoint[ing] or reappoint[ing] any of the arbitrators and designat[ing] one of them as presiding arbitrator."<sup>27</sup> The provision is similar to Article 10(3) of the UNCITRAL Arbitration Rules, although its wording is broader, in particular in that it allows the Court to intervene even in the absence of a request to do so by one of the parties. This power can for instance be used by the Court as a tool to deal with arbitration clauses which set out an appointment mechanism that cannot, for one reason or another, be implemented, or in cases in which a third party which did not have the opportunity to participate in the constitution of the tribunal objects to consolidation or joinder, or also in the case of a non-performing arbitrator. However, as explained in Sections 3.2 and 3.3 above in respect of consolidation, it is unlikely that consolidation or joinder would be ordered in the absence of the consent of the all of the parties involved.

#### **4.2 Constitution of the arbitral tribunal in multi-party disputes or parallel arbitrations concerning the same construction project**

The involvement of more than two parties in an arbitration will not generally raise any special issues regarding the appointment of the tribunal if it is heard by a sole arbitrator, as the parties will either all together agree on a joint designation, or the Court will make the appointment directly pursuant to Article 7 of the Swiss Rules. In multi-party cases submitted to a three-member tribunal, however, the parties cannot each designate an arbitrator in the same way that the parties would in a bilateral arbitration. Article 8(4) of the Swiss Rules therefore provides

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<sup>26</sup> Micha Bühler & Michael Feit, "Composition of the Arbitral Tribunal: Art. 8", in Zuberbühler/Müller/Habegger, eds., *Swiss Rules of International Arbitration*, 2<sup>nd</sup> ed. (Schulthess, 2013), Art. 8, N. 14.

<sup>27</sup> Art. 5(3) of the Swiss Rules.

that, unless the parties agree otherwise, one arbitrator will be designated by the claimant or group of claimants, and one will be designated by the respondent or group of respondents.

It might, however, be difficult for a group of parties to agree on a joint designation of an arbitrator. In particular, groups of respondents may, in some cases, have differing interests in the arbitration. In addition, appointment mechanisms of the type set out in Article 8(4) of the Swiss Rules may, in certain jurisdictions, be found to be contrary to the parties' right to equal treatment.

In light of these issues, Article 8(5) of the Swiss Rules provides that if a party or group of parties fails to designate an arbitrator, the Court may not only appoint that arbitrator directly, but also has the **power to appoint all of the arbitrators** and specify the presiding arbitrator. In doing so, the Court may even, under its broad powers in Article 5(3) of the Swiss Rules, revoke the appointment of an arbitrator who has already been appointed.

The Court is not, however, compelled to appoint the entire tribunal in the event of the failure of a group of parties to designate an arbitrator, and will carefully consider whether the circumstances warrant depriving the other party or parties of their right to designate an arbitrator before exercising its power in this respect. Commentators suggest that it may in particular be warranted for the Court to appoint the entire tribunal where the seat of arbitration is in a jurisdiction in which the courts have taken the position that appointment mechanisms of the type set out in Article 8(4) of the Swiss Rules are contrary to the parties' right to equal treatment, such as France.<sup>28</sup>

Finally, where the Court is called on to appoint one or several arbitrators in the context of parallel arbitrations over the same project, it will consider the links between the cases to assess whether it would be appropriate to appoint the same arbitrator(s).

#### **4.3 Factual Scenario: Illustration of the Court's approach to the constitution of the arbitral tribunal in multi-party and parallel arbitrations**

How the Court would exercise its powers in respect of the constitution of the arbitral tribunal in multi-party and parallel arbitrations can be illustrated through the same factual scenario as that used above in respect of the Court's *prima facie* review of jurisdiction, with the following addition:

The Employer initiates arbitration against both the Contractor and the contractor's joint venture partner, which is also a party to the main contract. However the Contractor and its joint venture partner are unable to agree on an arbitrator to designate, and the Court is asked to appoint one.

The Employer then initiates a parallel arbitration against the Contractor under a separate but almost identical contract dealing with a different phase of the same project,

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<sup>28</sup> Micha Bühler & Michael Feit, "Composition of the Arbitral Tribunal: Art. 8", in Zuberbühler/Müller/Habegger, eds., *Swiss Rules of International Arbitration*, 2<sup>nd</sup> ed. (Schulthess, 2013), Art. 8, N. 37.

advancing claims in respect of similarly defective welds. The parties designate the same arbitrators as in the initial arbitration, however the arbitrators cannot agree on a presiding arbitrator.

The scenario concerning the arbitration with the Employer raises the issue of whether the Court should exercise its power under Article 8(5) to appoint **all** of the arbitrators. Given that the seat is in Switzerland, where the courts have found that a provision requiring a group of claimants or respondents to jointly designate an arbitrator is in keeping with the principle of equal treatment,<sup>29</sup> the Court would be unlikely to exercise its power, and would therefore simply appoint an arbitrator on behalf of the co-respondents. With respect to the profile of the arbitrator, the Court would seek to appoint an arbitrator with experience in construction disputes as well as acting as sole or presiding arbitrator, and, in light of the applicable law, with familiarity in Swiss law or a similar legal system.

As to the scenario concerning parallel proceedings, the Court would likely appoint the same presiding arbitrator in the second arbitration as in the initial proceedings. It would in particular take into consideration that the parties themselves had designated the same co-arbitrators. The arbitrations also arise from the same contract and project, albeit a different phase, and raise the same types of technical issues. Therefore, it would likely be beneficial to appoint the same tribunal, in particular to ensure efficiency and to avoid conflicting decisions.

## 5 CONCLUSION

Arbitrations under the Swiss Rules are characterised by light but efficient administration by the Institution, contributing to the efficiency and cost-effectiveness of the arbitral proceedings. Indeed, the Swiss Rules provide for only a limited involvement of the Court in arbitral proceedings. Although the Court has broad powers in some respects, in particular in relation to consolidation and the constitution of the arbitral tribunal, it exercises these broad powers in a restrictive way, with careful consideration of relevant factors, as illustrated by the various factual scenarios addressed above. Nevertheless, the Court's powers, and the expertise and practical experience of its members in international arbitration and construction disputes, allow it to deal effectively, on a case-by-case basis, with the particularities of complex multi-party and multi-contract disputes which often arise in the construction sector.

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<sup>29</sup> Micha Bühler & Michael Feit, "Composition of the Arbitral Tribunal: Art. 8", in Zuberbühler/Müller/Habegger, eds., *Swiss Rules of International Arbitration*, 2<sup>nd</sup> ed. (Schulthess, 2013), Art. 8, N. 18.