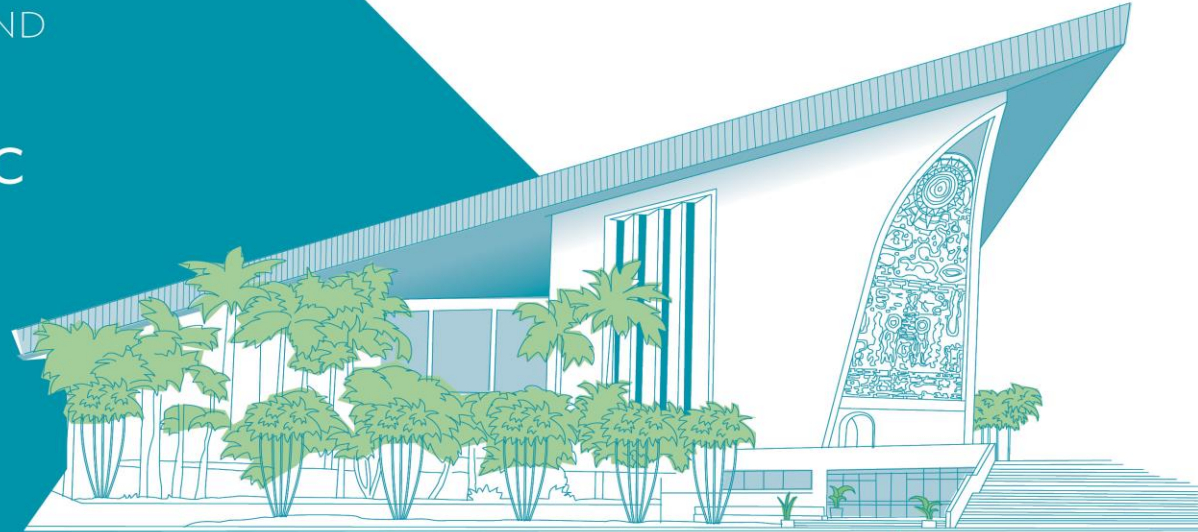




INTERNATIONAL MEDIATION AND  
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# 2nd South Pacific International Arbitration Conference

25–26 March 2019  
Stanley Hotel, Port Moresby  
Papua New Guinea



## MULTIPLE CONTRACTS, CONSOLIDATION AND THE 'CROSS-INSTITUTION CONSOLIDATION PROTOCOL'

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# LIFE CYCLE OF AN SIAC ARBITRATION

STAGES INCLUDE:

COMMENCEMENT OF  
ARBITRATION

CONSTITUTION OF  
TRIBUNAL

ISSUANCE OF  
AWARD



Pre-Constitution  
Applications

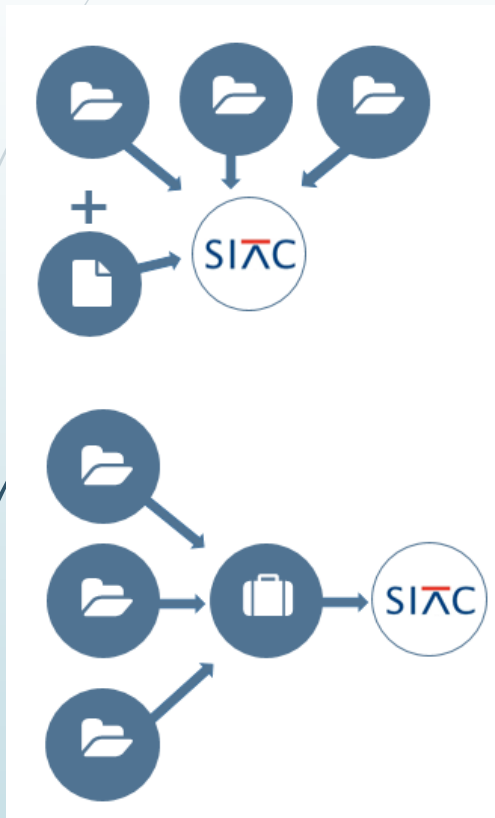
- Jurisdictional Objection
- Consolidation
- Joinder
- Expedited Procedure
- Emergency Arbitration

Post-Constitution  
Applications

- Jurisdictional Objection
- Consolidation
- Joinder
- Early Dismissal

# OVERVIEW OF SIAC RULES 2016

## MULTIPLE CONTRACTS – RULE 6



- ▶ Under Rule 6.1(a)
  - ▶ Claimant may file multiple Notices of Arbitration, one for each arbitration agreement invoked, and concurrently submit an application for consolidation
- ▶ Under Rule 6.1(b)
  - ▶ Claimant may file a single Notice of Arbitration for all arbitration agreements invoked
  - ▶ Claimant deemed to have commenced multiple arbitrations
  - ▶ Notice of Arbitration deemed to be an application to consolidate

- Both options provide certainty on date of commencement for multi-contract disputes

# SIAC RULES 2016

- CONSOLIDATION – RULE 8:
  - Any party may apply for the consolidation of multiple arbitrations
  - Single filing fee and a provisional deposit
  - Broad application. Does not require '*identity*' of the parties
  - Application made to (i) SIAC Court of Arbitration or (ii) Tribunal
  - For pre-constitution applications, all parties participate in the constitution of the Tribunal
  - Decision based on compatibility and connecting factors:
    - (i) party agreement
    - (ii) same arbitration agreement
    - (iii) same legal relationship(s); principal contract and ancillary contract; same transaction or series of transactions

As of 15 March 2019

134	Applications for consolidation received
77	Applications granted

# Consolidation: Costs Savings Example

## Without Consolidation

5 arbitrations have been commenced, each with a sum in dispute of S\$20 million:

- ▶ Maximum costs of arbitration per arbitration: S\$468,000
- ▶ Maximum costs of arbitration for 5 arbitrations: S\$2,340,000 (S\$468,000 x 5)

## With Consolidation

5 arbitrations are consolidated:

- ▶ Maximum costs of arbitration: S\$847,275
- ▶ Difference in maximum costs (savings): ≈S\$1.5 million (PGK 3.7 million)

# CONSOLIDATION – CASE STUDY

## Claimant's Consolidation Application

- 2 contracts relating to the sale and purchase of commodities (Contracts 1 & 2)
- Arbitration Agreements: Identical clauses in the 2 Contracts
- Proceedings:
  - Claimant commenced 2 arbitrations under Contracts 1 & 2. Respondent commenced parallel court proceedings under Contracts 1 & 2
- Claimant's Consolidation Application (Pre-Constitution):
  - Rule 8.1(c)(iii) → compatible arbitration agreements + same transaction or series of transactions
  - Compatibility → identical parties & arbitration agreements
  - Same Transaction or Series of Transactions:
    - Related to a series of agreements on nearly identical terms
    - Nature of the claims in each arbitration was largely identical
    - Factual matrix of the arbitrations was identical



# CONSOLIDATION – CASE STUDY

## Respondent's Objection to Claimant's Consolidation Application

- ▶ Grounds for Respondent's Opposition to the Consolidation Application:
  - ▶ Contract 2 named an additional party not found in Contract 1
  - ▶ Facts of Arbitrations 1 & 2 relate to different shipments made at different times
  - ▶ Different witnesses would be called in Arbitrations 1 & 2
  - ▶ Claims made in the Arbitrations 1 & 2 differ and arise under different contracts

## Outcome

- ▶ SIAC Court granted the Claimant's Consolidation Application



# CROSS-INSTITUTION CONSOLIDATION PROTOCOL

- ▶ Consolidation of arbitral proceedings subject to different sets of institutional rules
- ▶ Structural options:
  - i. ‘*standalone mechanism*’ to be decided by a joint institutional committee
  - ii. authorising one institution to determine applications based on its own consolidation rules
- ▶ Relevant factors: decision-maker(s), standards for consolidation, timing, existing tribunal appointments, partial consolidation, and reasons
- ▶ Selection of the institution: number of cases, aggregate value, time of commencement, subject matter, nationality and domicile of the parties
- ▶ Issues: party autonomy, confidentiality, composition of the tribunal, enforceability
- ▶ Institutional cooperation. Possibility of bilateral or multilateral arrangements



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