Climate Change and Supply Chain Arbitrations: Impact of EU Law on the BRI and Non-EU Entities

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The article explores the implementation and enforcement of corporate climate policies along international supply chains by means of contractual cascading and international commercial arbitration. EU law (in particular the Corporate Sustainability Reporting and Due Diligence Directives) and the ever-increasing stakeholder pressure (climate litigations and greenwashing allegations harming the companies' reputation and business are on the rise) impel more and more supply chain leading companies to intensify their supply chain–related due diligence mechanisms in relation to environmental, social and governance (ESG) topics. Due to extraterritorial effects, ESG-related EU law will have a direct or indirect impact on non-EU entities and Belt and Road Initiative (BRI)-related projects as well. The article stresses the need for climate-related contractual provisions and discusses the construction of such clauses for supply chains. Due to the nature of international supply chains (the article highlights the construction and automotive industry) characterized by multiple parties, contracts and tiers of subcontractors and suppliers, the enforcement of corporate climate policies will most likely lead to multi-party disputes. In this context, the article addresses the joinders of additional parties and the consolidation of several pending climate-related arbitrations and compares the arbitration rules of the International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), London Court of International Arbitration (LCIA) and some of the most important Chinese arbitration institutions. The article answers the question concerning what arbitration rules allow forced joinders and consolidations against the objection of a party. Last but not least, the article emphasizes some China-related specifics in the context of consolidations and joinders in order to avoid invalid arbitration agreements and the non-recognition and non-enforcement of foreign arbitral awards in China.

Keywords: CSDD, climate change, supply chain, consolidation, joinder, due diligence, sustainability, ESG, GHG emissions

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1 CLIMATE CHANGE, THE PARIS AGREEMENT AND EU LAW

1.1 The Path to the EU climate law

On 12 December 2015, the Paris Agreement[1] was adopted by more than 190 parties during the 21st Conference of the Parties (COP21) of the United Nations Framework Convention on Climate Change (UNFCCC). Most importantly, Article 2 (a) Paris Agreement sets the goal to limit the global average temperature increase to 1.5°C above pre-industrial levels. In order to achieve this long-term temperature goal, Article 4 Paris Agreement requires the signatories to prepare, communicate and maintain successive nationally determined contributions which have to be updated every five years. The EU ratified the Paris Agreement on 5 October 2016.[2]

In line with the Paris Agreement, the European Commission presented the European Green Deal[3] on 11 December 2019, committing to climate neutrality by 2050. The European Climate Law[4] implemented the Paris Agreement's and the European Green Deal's goal to become climate-neutral into law. Article 2 (1) European Climate Law sets forth the legally binding climate neutrality objective to reduce greenhouse gas (GHG) emissions to net zero by 2050. The EU institutions and the EU Member States are mandated to take the necessary measures at EU and national level to achieve the net zero target. Article 4 (1) European Climate Law provides a legally binding interim climate target to reduce GHG emissions by at least 55% compared to 1990 levels by 2030. A further interim climate target for 2040 must still be set. For such interim target, the European Commission will have to make a legislative proposal based on a detailed impact assessment.[5]

1.2 The corporate sustainability reporting directive

The Corporate Sustainability Reporting Directive (CSRD)[6] entered into force on 5 January 2023. Among other EU Directives, the CSRD amends Directive

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1 Paris Agreement (2015), as contained in the report of the Conference of the Parties on its twenty-first session, FCCC/CP/2015/10/Add.1, https://unfccc.int/process/conferences/pastconferences/paris-climate-change-conference-november-2015/paris-agreement (accessed 18 Oct. 2023).

2 Council Decision (EU) 2016/1841 of 5 Oct. 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, OJ L 282, 19 Oct. 2016, at 1–3.

3 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM/2019/640 final.

4 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 Jun. 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, OJ L 243, 9.7.2021, at 1–17.

5 Article 4 (3) European Climate Law.

6 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 Dec. 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322 (16 Dec. 2022), at 15–80.

2013/34/EU (Accounting Directive).[7] Most importantly, the CSRD extends the scope of reporting entities and reporting areas in comparison with the Non-Financial Reporting Directive (NFRD).[8] The CSRD requires reporting entities to report Environmental, Social And Governance (ESG) matters from two perspectives (double materiality perspective): how the reporting entities' activities impact the people and the environment (inside-out perspective, e.g., environmental damage), and how the reporting entities are affected by sustainability issues/events/developments/legislation (outside-in perspective exposing the risks for the reporting entities, e.g., reputational or monetary damage in the event of greenwashing, corruption or human rights-related violations).[9]

In relation to the targets of the Paris Agreement and the reduction of GHG emissions, it is particularly noteworthy that the CSRD introduces the requirement for reporting entities to include in their management reports information on their plans and implementing actions to ensure that their business model and strategy are in line with the requirements of the Paris Agreement and the EU Climate Law.[10] Furthermore, the CSRD contains the obligation to disclose:

> where appropriate, absolute greenhouse gas emission reduction targets at least for 2030 and 2050, a description of the progress the undertaking has made towards achieving those targets, and a statement of whether the undertaking's targets related to environmental factors are based on conclusive scientific evidence.[11]

Recital 47 of the CSRD addresses scope 3 emissions (indirect upstream and downstream emissions materializing in the reporting entity's value chain)[12] and acknowledges that it is in particular significant for the various stakeholders to attain information about the emission levels, and which categories of scope 3 emissions are relevant for the respective reporting entity.

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7 Directive 2013/34/EU of the European Parliament and of the Council of 26 Jun. 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182 (29 Jun. 2013), at 19–76.

8 Directive 2014/95/EU of the European Parliament and of the Council of 22 Oct. 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330 (15 Nov. 2014), at 1–9.

9 Recital 29 CSRD.

10 Article 19a (2) (a) (iii) of Accounting Directive (as amended by the CSRD). For consolidated sustainability reporting *see* Art. 29a (2) (a) (iii) Accounting Directive (as amended by the CSRD).

11 Article 19a (2) (b) Accounting Directive (as amended by the CSRD). For consolidated sustainability reporting *see* Art. 29a (2) (b) Accounting Directive (as amended by the CSRD).

12 Greenhouse Gas Protocol, FAQ, https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf (accessed 18 Oct. 2023).

The European Sustainability Reporting Standards (ESRS)[13] specify the CSRD's disclosure obligations regarding scope 1,[14] scope 2[15] and scope 3 GHG emissions.[16] The ESRS were adopted by the European Commission by means of delegated act[17] on 31 July 2023. Reporting companies will only have to disclose climate change–related information if they conclude that climate change is material for them. However, they will have to disclose a climate change–related materiality assessment including a detailed explanation of their conclusions. The ESRS define GHG emissions to cover carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulphur hexafluoride (SF6) and nitrogen trifluoride (NF3). Among other disclosure obligations, the ESRS require reporting companies to disclose whether and how they have set GHG emission reduction targets. In connection with these targets, reporting companies will have to disclose transition plans for climate change mitigation. These plans must contain explanations of how the reporting companies' GHG emission reduction targets are compatible with the targets of the Paris Agreement. If a reporting company has set GHG emission reduction targets, it must disclose its scope 1, scope 2 and scope 3 GHG emissions. The targets must at least include target values for 2030 and (if available) 2050. From 2030, target values ought to be set after every five year period thereafter. In the event of reporting companies' public claims of GHG neutrality involving the use of carbon credits, such companies will, inter alia, be required to explain the credibility and integrity of the carbon credits used. Reporting companies' with net-zero targets will have to outline the scope, methodologies and frameworks applied and how the residual GHG emissions are intended to be neutralized (including GHG removals in upstream and downstream value chains). It is worth mentioning that reporting companies will also have to disclose whether and how climate-related considerations are factored into the remuneration of members of the administrative, management and supervisory bodies.

It should be emphasized also that in contrast to the NFRD, compliance of the sustainability reporting with the CSRD's requirements will have to be mandatorily verified by auditing firms or independent assurance services providers based on a limited assurance engagement.[18]

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13 Annex to the Commission Delegated Regulation (EU) … / … supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, C(2023) 5303 final.

14 'Scope 1 emissions are direct emissions from owned or controlled sources'. *See* Greenhouse Gas Protocol, FAQ, *supra* n. 12.

15 'Scope 2 emissions are indirect emissions from the generation of purchased energy'. *See* Greenhouse Gas Protocol, FAQ, *supra* n. 12.

16 Article 29b (2) (a) (i) Accounting Directive (as amended by the CSRD).

17 Article 29b (1) Accounting Directive (as amended by the CSRD).

18 Article 34 (1) (a) (ii) (aa) Accounting Directive (as amended by the CSRD). Pursuant to Art. 26a (3) of Directive 2006/43/EU (as amended by the CSRD), the European Commission will have to adopt

The NFRD applied to large public-interest entities[19] with an average number of employees in excess of 500. The CSRD covers additional categories of reporting entities, such as large undertakings[20] (not necessarily listed on a stock exchange) and all undertakings (including small and medium-sized entities[21] with the exception of micro-undertakings[22]) whose securities are admitted to trading on a regulated market in the EU. Non-EU entities may be bound by the CSRD's reporting obligations if they (1) generate an annual net turnover of more than EUR 150 million in the EU and (2) have a subsidiary[23] or a branch[24] in the territory of the EU.[25] It is estimated that a total of around 50,000 companies will have to report on the basis of the CSRD.[26]

1.3 The corporate sustainability due diligence directive

On 23 February 2022, the European Commission adopted the Proposal for a Corporate Sustainability Due Diligence Directive (CSDD Proposal).[27] The CSDD Proposal requires large companies to develop a supply/value chain–related

limited assurance standards by means of delegated acts before 1 Oct. 2026. Standards for a much more comprehensive reasonable assurance have to be adopted no later than 1 Oct. 2028.

19 Article 2 (1) Accounting Directive stipulates that public-interest entities are listed on an EU regular market or are certain credit institutions and insurance undertakings.

20 Pursuant to Art. 3 (4) Accounting Directive, '[l]arge undertakings shall be undertakings which on their balance sheet dates exceed at least two of the three following criteria: (a) balance sheet total: EUR 20 000 000; (b) net turnover: EUR 40 000 000; (c) average number of employees during the financial year: 250'.

21 Article 19a (7) Accounting Directive (as amended by the CSRD) allows small and medium-sized entities to opt out of sustainability reporting until 2028 (they may decide not to include the required sustainability-related information in their management reports for financial years starting before 1 Jan. 2028). In addition, Art. 19a (6) Accounting Directive (as amended by the CSRD) authorizes small and medium-sized entities to limit the contents of their sustainability reporting. In particular, Art. 19a (6) Accounting Directive does not mention the requirement for a (1) plan and implementing actions concerning the objectives of the Paris Agreement and the EU Climate Law and (2) the disclosure of absolute greenhouse gas emission reduction targets (where appropriate).

22 Micro-undertakings are defined by Art. 3 (1) Accounting Directive 'as undertakings which on their balance sheet dates do not exceed the limits of at least two of the three following criteria: (a) balance sheet total: EUR 350 000; (b) net turnover: EUR 700 000; (c) average number of employees during the financial year: 10'.

23 The subsidiary must be a large undertaking or a small or medium-sized entity (with the exception of a micro-undertaking) listed on an EU regulated market.

24 The branch of a non-EU entity must have an annual net turnover of more than EUR 40 million.

25 Article 40a (1) Accounting Directive (as amended by the CSRD). Pursuant to Art. 5 CSRD, the reporting of non-EU entities is due from 2029 for the financial years starting on or after 1 Jan. 2028.

26 Corporate sustainability reporting, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en (accessed 18 Oct. 2023).

27 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 Feb. 2022, COM(2022) 71 final, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF (accessed 18 Oct. 2023).

due diligence policy[28] identifying and preventing adverse environmental and human rights impacts arising from the violation of one of the rights, prohibitions and obligations contained in the international environmental and human rights conventions which are listed in the CSDD Proposal's Annex.[29] It is expected that a modified version of the CSDD Proposal will be adopted by the European Parliament and the Council in 2024. The Council adopted its negotiating position (Council's Position)[30] on 30 November 2022.

Pursuant to Article 5 (1) (b) and (c) CSDD Proposal, the due diligence policy must contain a code of conduct (to be followed by the company's employees, subsidiaries and both direct and indirect business partners)[31] and measures taken to verify compliance with such code. Articles 7 (2) (b) and 8 (3) (c) CSDD Proposal determine that in relation to the code of conduct companies must seek contractual assurances from their direct business partners who in turn have to provide corresponding contractual assurances (contractual cascading) from their partners (lower-tier supply chain members). Pursuant to Articles 7 (4) and 8 (5) CSDD Proposal, compliance must be verified by referring to suitable industry initiatives or by independent third parties. Articles 7 (5) (a) and (b)/8 (6) (a) and (b) CSDD Proposal require a company to temporarily suspend or even terminate (in severe cases) a business relationship in the event of adverse environmental and/or human rights impacts.

It should be reiterated that the Annex[32] to the CSDD Proposal lists the environmental violations and prohibitions leading to adverse environmental impacts. However, it is crucial to note a decisive weakness of the CSDD Proposal: the Annex refers neither to the Paris Agreement nor to the EU Climate Law. As a matter of fact, climate change–related matters and GHG emission reductions are not mentioned at all in the CSDD Proposal's Annex. Consequently, GHG emissions–related violations are not deemed adverse environmental impacts as defined by the CSDD Proposal. In other words, adverse climate impacts are not part of adverse environmental impacts. Accordingly, adverse climate impacts do not have to be included into a company's due diligence policy and code of conduct pursuant to Article 5 CSDD Proposal. Nevertheless, Article 15 (1) CSDD Proposal mandates the adoption of a plan to ensure that a company's business model and strategy 'are compatible with the transition to a sustainable economy and with the limiting of global warming

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28 Article 5 (1) CSDD Proposal.

29 Article 3 (b) and (c) CSDD Proposal.

30 Council general approach on the directive on corporate sustainability due diligence (30 Nov. 2022), https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf (accessed 18 Oct. 2023).

31 The reference to direct and indirect business partners was added by the Council's Position: Art. 5 (1a) (b) CSDD Proposal on the basis of the Council's Position.

32 Annex to the proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

to 1.5 °C in line with the Paris Agreement'. If climate change is or should have been identified as a principal risk for, or a principal impact of, a company's operations, such company must include GHG emission reduction objectives in the plan.[33] Article 29 (d) CSDD Proposal sets forth that no later than seven years after entry into force of the CSDD, the European Commission must assess in a report (to the European Parliament and the Council) whether the due diligence mechanism (Articles 4 to 14 CSDD Proposal) should be extended to adverse climate impacts.

In this context, it is important to note that in contrast to the EU Commission's proposal and the Council's Position, the EU Parliament's position integrates the climate targets of the Paris Agreement into a company's due diligence policy for its value chains and consequently adds the obligation to achieve reductions in GHG emissions interpreted in line with the Paris Agreement and the European Climate Law to the CSDD's Annex. Companies will also have to have transition plans including 'time-bound targets related to climate change set by the company for scope 1, 2 and, where relevant, scope 3 emissions, including where appropriate, absolute emission reduction targets for greenhouse gas for 2030 and in five-year steps up to 2050'.[34] The Council does not share the EU Parliament's position in this respect. As the CSDD will have to be adopted by the EU Parliament and the Council, the outcome of the interinstitutional negotiations will be very interesting to watch. If the EU Parliament succeeds in the negotiations, climate-related provisions will have to be contractually cascaded along the different supply chain tiers in accordance with the CSDD's due diligence mechanism (Articles 4 to 14 CSDD Proposal). The adoption of the CSDD can be expected in the first half of 2024.

EU Member States' supervisory authorities will supervise the companies' compliance with their obligations under Article 15 CSDD Proposal.[35] The Council's Position contains the clarification that concerning Article 15 CSDD Proposal, 'Member States shall only require supervisory authorities to supervise that companies have adopted the plan'.[36] Thus, the supervisory authorities will not have the power to assess the implementation of the plan. This would be another weakness of the CSDD. It remains to be seen whether this provision will be in the final version of the CSDD.

The explanatory memorandum contained in the CSDD Proposal points out the synergy between the CSDD and the CSRD in terms of the plan implementing the Paris Agreement's 1.5°C target: the CSRD will require the companies to

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33 Article 15 (2) CSDD Proposal.

34 Amendments adopted by the European Parliament on 1 Jun. 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.pdf (accessed 18 Oct. 2023).

35 Article 17 (1) CSDD Proposal.

36 Article 18 (1) CSDD Proposal on the basis of the Council's Position.

report on the contents of such plan and the CSDD will set obligations for companies to have in place the plan pursuant to Article 15 CSDD Proposal. Thus the CSDD 'will lead to companies' reporting being more complete and effective'.[37] In the author's view, in order to avoid any potential greenwashing-related allegations, companies will be well-advised to include GHG emissions–related targets in their supply chain–related codes of conduct and their due diligence policy if their plan (Article 15 CSDD) includes scope 3 emission reduction objectives covering their supply chains. As mentioned above, the CSRD emphasizes the significance of reporting scope 3 emissions.

EU entities will be covered by the CSDD if they have more than 500 employees on average and a worldwide annual net turnover amounting to more than EUR 150 million.[38] Entities incorporated outside of the EU will either be directly or indirectly affected by the CSDD. The CSDD will directly apply to non-EU entities (direct extraterritorial effect) if their annual net turnover exceeds EUR 150 million within the EU. In contrast to EU entities, the number of employees is irrelevant.[39] Due to the CSDD's very high threshold, non-EU entities (including small and medium-sized entities) will rather be indirectly impacted by the CSDD by being part of an EU-related supply chain and subject to the mandatory sustainability-related due diligence (ESG-related obligations will in particular be passed on throughout the entire supply chain by means of contractual cascading) of a supply chain leading company which is directly covered by the CSDD. Not complying with the CSDD's environmental and human rights-related standards could give rise to being eliminated (contractual termination) from the supply chain and major damage claims.

EU Member States will have to transpose the CSDD into their respective national legislation within two years after the CSDD's entry into force.[40] In addition, the Council's Position extends several transition periods (from three to five years) after the CSDD's entry into force.

1.4 Impact on the BRI

Due to the extraterritorial effect of the EU law discussed above, it will have a significant impact on projects of the so-called Belt and Road Initiative (BRI) as

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37 CSDD Proposal, Explanatory Memorandum, 4 et seq.

38 Article 2 (1) (a) CSDD Proposal. Pursuant to Art. 2 (1) (b) CSDD Proposal, the respective thresholds are lowered (more than 250 employees, more than EUR 40 million net worldwide turnover) if a company generates the turnover in certain high-impact sectors.

39 Article 2 (2) (a) CSDD Proposal. Article 2 (2) (b) CSDD Proposal reduces the threshold in relation to certain high-impact sectors to turnover amounts exceeding EUR 40 million.

40 Article 30 (1) CSDD Proposal.

well. The BRI was announced by the Chinese President Xi Jinping in 2013. The 10th anniversary was celebrated at the third Belt and Road Forum for International Cooperation in Beijing in October 2023.[41] The BRI primarily involves infrastructure investments in the areas of transport (e.g., high-speed railways, ports and motorways), energy (e.g., gas and oil pipelines) and information and communication technology. The BRI's main focus is on Asia and Africa. In terms of Europe, China is mainly interested in the Central and Eastern European (CEE) states which is also evidenced by the fact that China initiated the so-called 14+1 Initiative[42] in 2012 to facilitate investments in this region.[43]

One of the major projects in the CEE region is the Belgrade-Budapest railway project. It is expected that the travel time from Belgrade to Budapest will be reduced from eight to 3.5 hours facilitating transportation of Chinese products from the Greek port in Piraeus to Western Europe. While the project is mainly financed by China, it involves several non-Chinese contractors, including companies from Germany (DB Engineering & Consulting and the engineering services company Peri), Hungary and Serbia. The project is expected to be completed by 2025.[44]

However, European companies are also involved in BRI-related projects outside of Europe as contractors, subcontractors and suppliers.[45] Prime examples include Siemens and Schneider Electric. In a press release dated 6 June 2018, the German multinational technology conglomerate Siemens announced that it 'entered into more than ten agreements with Chinese partners today in support and exploration of opportunities from the Belt and Road Initiative (BRI)'.[46] In April 2023, Schneider Electric, the French multinational specialist in energy

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41 *China to host 3rd Belt and Road Forum for Int'l Cooperation in October* (31 Aug. 2023), https://english.news.cn/20230831/89fde063bed246cba6e115e272cfb36e/c.html (accessed 18 Oct. 2023).

42 Initially, the cooperation was called the 16+1 Initiative. After Greece joined in 2019, the cooperation had briefly been called the 17+1 Initiative. In recent years, the Baltic nations Lithuania, Estonia and Latvia left the Initiative due to political reasons reducing it to 14+1 ('1' stands for China). The following nine EU Member States are members of the 14+1 Initiative: Bulgaria, Croatia, Czech Republic, Greece, Hungary, Poland, Romania, Slovakia and Slovenia. The remaining five members of the 14+1 Initiative are Albania, Bosnia and Herzegovina, North Macedonia, Montenegro and Serbia.

43 Adolf Peter, *Austria and the Chinese Belt and Road Initiative: Arbitration or Litigation as the Preferred Means for the Settlement of Potential Disputes between Austrian and Chinese Companies?*, in *Chinese Strategies in Politics, Foreign Policy, Security Policy, Economy and Law* 247, at 248 (Gerd Kaminski ed. 2019).

44 *Belgrade-Budapest Railway Project, Europe* (6 Apr. 2022) https://www.railway-technology.com/projects/belgrade-budapest-railway-project-europe/ (accessed on 18 Oct. 2023); From Belgrade to Budapest in 3.5 hours: Chinese-backed rail line benefits Hungary and Serbia (21 Jan. 2023), https://newseu.cgtn.com/news/2023-01-21/Experts-eye-gains-from-new-China-backed-Belgrade-to-Budapest-rail-line-1gJiwTkNkNW/index.html (accessed 18 Oct. 2023).

45 Ai Ai Wong & Stanley Jia, *Belt & Road: Opportunity & Risk. The Prospects and Perils of Building China's New Silk Road* (2017), https://www.bakermckenzie.com/-/media/files/insight/publications/2017/10/belt-road/baker_mckenzie_belt_road_report_2017.pdf (accessed 18 Oct. 2023).

46 *Siemens Embraces Belt and Road Initiative* (6 Jun. 2018), https://press.siemens.com/global/en/pressrelease/siemens-embraces-belt-and-road-initiative (accessed 18 Oct. 2023).

management and automation, signed a Memorandum of Understanding on Cooperation with China Power Construction Corporation Limited focusing on low-carbon energy, smart transportation, infrastructure and other BRI-related key industries.[47]

EU and non-EU companies directly bound by the ESG-related EU law will have to make sure in BRI-related projects inside and outside of the EU that their direct and indirect business partners (including non-EU entities) in the project adhere to the EU climate standards and other ESG-related criteria by means of an ESG-related due diligence including contractual cascading of climate and other ESG-related provisions.

2 CLIMATE-RELATED LITIGATIONS, SUPPLIER CODES OF CONDUCT AND CONTRACTUAL CLAUSES FOR SUPPLY CHAINS

2.1 Stakeholder Pressure to Enforce GHG emission–related targets along supply chains

Taking into account that the CSDD has not yet been adopted, and both the CSRD and the CSDD require transposition into the national laws of the EU Member States and contain generous transition periods, it will still take years before all categories of EU and non-EU entities covered by these directives will have to fulfil the respective reporting and due diligence–related obligations, including the adoption and disclosure of a plan concerning the reduction of GHG emissions.

Nevertheless, companies are well-advised to already take climate issues seriously because climate litigations commenced by various stakeholders (in particular NGOs and individuals) against corporate defendants have been rapidly increasing in recent years.[48]

2.1[a] *Climate Litigations*

The climate litigations against corporate defendants can best be assigned to the following three case categories/litigation strategies:

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[47] *Schneider Electric and China Power Construction Signed a Memorandum of Cooperation, Further Upgrading their global Strategic Cooperation* (24 Apr. 2023), https://www.kl-telecom.com/news/schneider-electric-and-china-power-construction-signed-a-memorandum-of-cooperation-further-upgrading-their-global-strategic-cooperation.html (accessed 18 Oct. 2023).

[48] Joana Setzer & Catherine Higham, *Global trends in Climate Change Litigation: 2022 Snapshot* (Jun. 2022) 2, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf (accessed 18 Oct. 2023).

- Corporate framework cases focus on companies' policies and strategies in relation to GHG emissions and 'seek to disincentivise companies from continuing with high-emitting activities by requiring changes in corporate governance and decision-making'.[49]
- Climate-washing cases address companies' misleading and inaccurate climate-related disclosures, marketing and advertising.[50]
- Compensation cases aim to recover damages from corporate defendants 'based on an alleged contribution to climate change harms'.[51]

The most famous corporate framework case is without a doubt Milieudefensie et al. *v.* Royal Dutch Shell plc (Shell Case).[52] The NGOs Milieudefensie and Greenpeace Nederland, another five NGOs and 17,379 individual plaintiffs filed a class action against Royal Dutch Shell (Shell). On 26 May 2021, the Hague District Court (Hague DC) ordered Shell 'to reduce the CO_2 emissions of the Shell group by net 45% in 2030, compared to 2019 levels, through the Shell group's corporate policy'.[53] The judgment was based on a Dutch unwritten standard of care. The Hague DC confirmed that the plaintiffs would not be allowed to directly invoke human rights with respect to a corporate defendant. However, the Hague DC factored the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region in the interpretation of the unwritten standard of care.[54] It is in particular remarkable that the ordered emission reductions relate to Shell's worldwide value chain, including closely affiliated companies, direct and indirect business partners and suppliers (e.g., raw material, heat and electricity) and the end-users of Shell's products (scope 1, 2 and 3 emissions).[55] The Hague DC clarified that the ordered emission reductions are an obligation of result concerning Shell's group activities (scope 1 emissions) and a best-efforts obligation in relation to Shell's business relations (including end-users).[56]

Although Shell filed an appeal against the decision of the Hague DC,[57] Shell must immediately comply with the order because the Hague Court declared it

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[49] *Ibid.*, at 18.
[50] *Ibid.*, at 20.
[51] *Ibid.*, at 19. The pending litigation between a Peruvian farmer against the German electricity producer RWE is an example for compensation cases. For further details *see* Luciano Lliuya *v.* RWE, https://climate-laws.org/geographies/germany/litigation_cases/luciano-lliuya-v-rwe (accessed 18 Oct. 2023).
[52] Milieudefensie et al. *v.* Royal Dutch Shell plc, C/09/571932 / HA ZA 19–379, ECLI:NL:RBDHA:2021:5339 (26 May 2021), https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339 (accessed 18 Oct. 2023).
[53] *Ibid.*
[54] *Ibid.*, para. 4.4.9.
[55] *Ibid.*, para. 4.4.18.
[56] *Ibid.*, para. 4.4.37; para. 4.4.39.
[57] *Frequently asked questions (FAQ) on Dutch District Court legal case*, https://www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-

provisionally enforceable.[58] It is evident that in order to comply, Shell will have to ensure that its corporate climate policy is implemented throughout its value chain by means of contractual cascading (codes of conduct, provisions imposing GHG emission targets in supply chain–related contracts). Due to the international nature of its supply chains, Shell will be well-advised to conclude arbitration agreements to enforce its corporate climate policy based on the court-ordered emission reductions.

It is expected that more class action lawsuits will follow in other jurisdictions. However, it remains to be seen whether courts in other jurisdictions will render similar judgments against corporate actors on a comparable legal basis.

Due to the recent increase of climate-washing/greenwashing cases, corporate actors need to be very careful about their climate-related disclosures and targets:

> Organisations should avoid at all costs viewing ESG disclosures as 'soft' statements and approaching them as if they were corporate marketing/PR. These very statements may be used against them in ESG-related litigation, such as parent company liability and value chain liability claims, as well as 'greenwashing' actions.[59]

A prime example for a pending climate-washing case is a legal action brought by Greenpeace, Friends of Earth and other NGOs against the French oil and gas group TotalEnergies. By relying on French national law implementing the EU Unfair Commercial Practices Directive, the plaintiffs allege that TotalEnergies' carbon neutrality commitments would mislead the public, taking into account TotalEnergies' continued investments in fossil fuel projects.[60] Moreover, Greenpeace published a report in November 2022 alleging TotalEnergies' GHG emissions to be almost four times higher than reported by the latter. In particular, Greenpeace disputes TotalEnergies' methodology to calculate GHG emissions.[61] On the basis of Greenpeace's report, TotalEnergies decided to initiate legal proceedings as Greenpeace's claims in its report may give rise to reputational damage causing potential pecuniary loss.[62]

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case/_jcr_content/root/main/section/simple/text_1377231351_copy.multi.stream/1657006823005/460167304a697f411be1b9f80c6e05be0ac057fb/dutch-district-legal-case-faq.pdf (accessed 18 Oct. 2023).

58 Milieudefensie et al. *v.* Royal Dutch Shell plc, *supra* n. 52, para. 4.5.7.

59 Doug Bryden et al. (Travers Smith), *ESG Risk and the Tech and Automotive Sectors: Why Tesla's Proposed 'Solution' to the Supply Chain pinch may not be for Everyone* (13 Oct. 2023) https://www.traverssmith.com/knowledge/knowledge-container/esg-risk-and-the-tech-and-automotive-sectors-why-teslas-proposed-solution-to-the-supply-chain-pinch-may-not-be-for-everyone/ (accessed 18 Oct. 2023).

60 *TotalEnergies Target of Lawsuit to Test 'Greenwashing' in Advertising* (3 Mar. 2022), https://www.ft.com/content/bdef4e7a-7bc9-4061-968a-a68d9aa32771 (accessed 18 Oct. 2023); Setzer & Higham, *supra* n. 48, at 40.

61 Greenpeace International, *Greenpeace finds TotalEnergies Emissions Almost 4 Times Higher than Reported* (3 Nov. 2023), https://www.greenpeace.org/international/press-release/56491/greenpeace-finds-totalenergies-emissions-almost-4-times-higher-than-reported/ (accessed 18 Oct. 2023).

62 TotalEnergies, *TotalEnergies' Response to the Greenpeace Report* (3 Nov. 2022), https://totalenergies.com/media/news/press-releases/totalenergies-response-greenpeace-report (accessed 18 Oct. 2023).

Another example for a pending climate-washing case is a lawsuit initiated on 25 August 2021 by the NGO Australasian Centre for Corporate Responsibility (ACCR) against the Australian oil and gas company Santos. Among other things, ACCR claims that Santos' plan for net zero GHG emissions by 2040 was misleading.[63]

In respect of international supply chains, climate-washing/greenwashing may in particular occur if supply chain leading companies fail to implement an effective (climate) due diligence policy by (1) not sufficiently controlling their direct and indirect business partners (contractually agreed ESG and climate-related third party audits and unannounced on-site visits), (2) not resorting to contractual cascading mechanisms in terms of climate-related corporate policies contained in supplier codes of conduct, and (3) not incorporating a contractual escalation and dispute resolution (arbitration) mechanism which enables the removal of infringing supply chain members from the supply/value chain (contractual termination regime) and the assertion of damages against them in the event of ongoing violations of material ESG (climate-related) standards.

The CSRD's reporting obligations and the CSDD Proposal's requirement to set up a plan to ensure compliance with the targets of the Paris Agreement (the climate targets of the Paris Agreement may even have to be integrated into a company's due diligence policy if the EU Parliament succeeds in its interinstitutional negotiations with the Council) will contribute to the reduction of climate-washing because reporting false or insufficient information will certainly result in more stakeholder pressure, trigger additional climate litigations and may even have criminal consequences in some jurisdictions.

2.1[b] *The ESG-related Borealis Project Halt*

On 27 July 2022, Borealis[64] was forced to halt for several months a EUR one billion construction project for a new propane dehydrogenation (PDH) plant in Kallo, Belgium (the project halt was announced by Borealis on 4 August 2022)[65] due to social fraud and human trafficking allegations against Borealis' main contractor IREM Group (responsible for piping and mechanical, electrical and

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[63] *Australasian Centre for Corporate Responsibility v. Santos*, https://climate-laws.org/geographies/australia/litigation_cases/australasian-centre-for-corporate-responsibility-v-santos (accessed 18 Oct. 2023).

[64] Borealis is a global leader in providing chemical and polyolefin solutions. Borealis is headquartered in Vienna, Austria and employs approximately 6,900 employees in over 120 countries. The majority owner (75%) of Borealis is OMV, the Austria-based international oil and gas company. *See* Borealis, Company Profile, https://www.borealisgroup.com/about-us (accessed 18 Oct. 2023).

[65] Borealis, *Borealis Suspends Construction in Kallo after Serious Allegations Against Contractor and Continues to Support Belgian Authorities in Investigation* (4 Aug. 2022) https://www.borealisgroup.com/news/borealis-suspends-construction-in-kallo-after-serious-allegations-against-contractor-and-continues-to-support-belgian-authorities-in-investigation (accessed 18 Oct. 2023).

instrumentation works in the project) and the subcontractors (Anki Technologies and Raj Bhar Engineering). Acting quickly, Borealis first suspended and in a second step terminated the contracts with the IREM Group. The contractual termination resulted in significant delays of the project because Borealis was forced to retender the vast majority of the construction works leading to a substantial increase in costs and major damage claims.[66] It should be mentioned that Borealis included 'protective clauses applicable to all business partners, in particular the Business Ethics Code of Conduct, in the agreement'.[67] Borealis confirmed that it would intensify the auditing of its contractors and ensure that the latter effectively control the subcontractors.[68]

Although the Borealis project halt concerns the social component of ESG, the author predicts that due to the ever-increasing pressure of stakeholders (in particular NGOs) and climate-related reporting and due diligence obligations, similar cases (giving rise to the standstill of projects and substantial damage claims caused by delays) will occur in the future in the event of non-compliance with GHG emission reduction requirements.

2.1[c] *NIO's ESG-related Supplier Due Diligence Policy*

The Chinese electric vehicle manufacturer NIO Inc. (NIO) has recently entered the EU market. NIO offers its products and services in Germany, the Netherlands, Denmark, and Sweden.[69] Being listed on the New York Stock Exchange, NIO has extensive reporting obligations. It is quite remarkable that its annual report on Form 20-F NIO corroborates that it does not control its suppliers, with the consequence of not being able to guarantee the suppliers' compliance with environmental (including climate-related) obligations. The lack of a supplier-related due diligence is alarming considering the CSRD, the CSDD Proposal (the author expects that NIO will surpass the CSDD Proposal's thresholds), the increase of climate litigations and the potential threat of ESG-related project halts:

> We do not control our independent suppliers or their business practices. Accordingly, we cannot guarantee their compliance with ethical business practices, such as environmental responsibilities, fair wage practices, and compliance with child labor laws, among others. […] Violation of labor or other laws by our suppliers or the divergence of an

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66 Borealis, *Re-tendering Process for Construction works in Kallo Concluded* (28 Apr. 2023), https://www.borealisgroup.com/borealis/news/re-tendering-process-for-construction-works-in-kallo-concluded (accessed 18 Oct. 2023); Borealis, *About the Kallo Case* (23 Jan. 2023) https://www.borealisgroup.com/news/about-the-kallo-case (accessed 18 Oct. 2023).

67 Borealis Media Release, *infra* n. 65.

68 Borealis Media Release, *Borealis Restarts PDH Construction site in Kallo with Ponticelli as Contractor* (3 Oct. 2022) https://www.borealisgroup.com/news/borealis-restarts-pdh-construction-site-in-kallo-with-ponticelli-as-contractor (accessed 18 Oct. 2023).

69 NIO Press Release: *NIO Announces Details of its Expansion into German, Dutch, Danish and Swedish Markets at European Launch Event* (7 Oct. 2022) https://www.nio.com/news/nio-announces-expansion-german-dutch-danish-swedish-markets-european-launch-event (accessed 15 Aug. 2023).

> independent supplier's labor or other practices from those generally accepted as ethical in the markets in which we do business could also attract negative publicity for us and our brand. This could diminish the value of our brand image and reduce demand for our electric vehicles if, as a result of such violation, we were to attract negative publicity. If we, or other players in our industry, encounter similar problems in the future, it could harm our brand image, business, prospects, results of operations and financial condition.[70]

NIO is fully aware of the fact that not controlling its suppliers in terms of compliance with ESG standards may give rise to a substantial reputational damage causing pecuniary losses by losing customers (loss of sales) and the loss/termination of significant business relations/projects/opportunities.

It is worth noting that NIO has recently entered into an agreement with Shell to jointly construct and operate battery charging and swap stations across China and Europe.[71] In light of the judgment of the Hague DC,[72] Shell would be well-advised to urge NIO to control its suppliers regarding the generation of GHG emissions.

2.2 Climate-related contractual provisions and contractually binding supplier codes of conduct

It is more than evident that climate-related corporate policies need to be made contractually binding along international supply chains in order to be effective and to avoid climate-washing/greenwashing. In general, ESG-related obligations may gain contractual force by (1) being directly included into a contract (express terms model), (2) referring to a company's code of conduct in the main contract (reference model) or (3) directly signing a company's code of conduct (stand-alone model).[73] As mentioned above,[74] Articles 7 (2) (b) and 8 (3) (c) CSDD Proposal stipulate that compliance with a company's code of conduct along a supply chain shall be ensured by contractual cascading.[75] As a consequence, Article 12 CSDD Proposal requires the European Commission to 'adopt guidance about voluntary model contract clauses'.

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70 NIO Annual Report pursuant to s. 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2022 41, https://ir.nio.com/static-files/19213364-af76-4805-9b52-e4338588695e (accessed 18 Oct. 2023).

71 *NIO and Shell Introduce the First Integrated Power Charger and Swap Station* (2 Aug. 2022), https://www.nio.com/blog/nio-and-shell-introduce-first-integrated-power-charger-and-swap-station (accessed 15 Aug. 2023).

72 *See* above at 2.1[a].

73 Vibe Ulfbeck, Ole Hansen & Alexandra Andhov, *Contractual Enforcement of CSR Clauses and the Protection of Weak Parties in Supply Chains*, in *Law and Responsible Supply Chain Management. Contract and Tort Interplay and Overlap* 46, at 48 et seq. (Vibe Ulfbeck Alexandra Andhov & Kateřina Mitkidis Ed., Routledge 2019).

74 *See* above at 1.3.

75 Article 7 (2) (b) CSDD Proposal.

The Chancery Lane Project, a collaborative initiative of international legal and industry professionals, provides a wide variety of contractual climate-related template clauses.[76]

2.2[a] *Climate Clauses in Supply Chain–related Contracts*

Climate-related contractual provisions should ideally have the following minimum contents:

- The definition of GHG emissions shall cover scope 1, 2 and 3 emissions as defined in the GHG Protocol.[77]
- The supply chain leading companies' corporate climate policies (contained in their supplier codes of conduct) shall set clear, quantified and verifiable targets for annual total GHG emission reductions. In accordance with the Chancery Lane Project, the GHG emissions should at least be 7% less than the total emissions of the preceding year.[78] In order to achieve the Paris Agreement's 1.5 °C target, the annual average decarbonisation rate must be at least 7%.[79]
- Most companies set GHG emission reduction targets in relation to scope 1 and 2 emissions. However, it is crucial to include scope 3 emissions in the annual total emissions targets because scope 3 emissions are by far the largest source of a company's GHG emissions in most sectors.[80] For example, Shell's scope 3 emissions account for over 90% of Shell's total emissions.[81]
- The supply chain members shall measure, manage and report their annual GHG emissions[82] and be obliged to accept and enforce the supply chain leading companies' climate policies (including the annual GHG emission reduction targets of at least 7%) by means

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76 The Chancery Lane Project, https://chancerylaneproject.org/about/ (accessed 18 Oct. 2023).

77 The Greenhouse Gas Protocol: *A Corporate Accounting and Reporting Standard*, Revised Edition 25 et seq. (2015), https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf (accessed 18 Oct. 2023).

78 The Chancery Lane Project, *The Net Zero Standard for Suppliers*, Matilda's Annex, https://chancerylaneproject.org/climate-clauses/the-net-zero-standard-for-suppliers/ (accessed 18 Oct. 2023).

79 EU Technical Expert Group on Sustainable Finance, *TEG Final Report on EU Climate Benchmarks and Benchmark ESG Disclosures* 47 (Sep. 2019), https://commission.europa.eu/system/files/2019-09/190930-sustainable-finance-teg-final-report-climate-benchmarks-and-disclosures_en.pdf (accessed 18 Oct. 2023).

80 Science Based Targets Initiative/Navigant/Gold Standard, Value Change in the Value Chain: Best Practices in Scope 3 Greenhouse Gas Management 9 (Nov. 2018), file:///C:/Users/ddrap/OneDrive/Dokumente/WeChat%20Files/wxid_hp4qvz8er17f22/FileStorage/File/2023-02/SBT_Value_Chain_Report-1.pdf (accessed 18 Oct. 2023).

81 Shell Global, *Our Climate Target: Frequently Asked Questions*, What is a net-zero emissions energy business?, https://www.shell.com/energy-and-innovation/the-energy-future/what-is-shells-net-carbon-footprint-ambition/faq.html (accessed 18 Oct. 2023).

82 The Chancery Lane Project, *supra* n. 78.

of contractual cascading. The contractual cascading approach of the Chancery Lane Project regarding suppliers (Matilda's Annex) is too mild because it only obliges suppliers to adhere to the supply chain leading companies' climate policies 'as far as possible' or to 'use best endeavors'.[83] In order to avoid climate-washing/greenwashing allegations from various stakeholders and becoming involved in potential climate litigations (especially in cases where supply chain leading companies set publicly available GHG emissions targets and advertise them), it is in the best interest of the supply chain leading companies to contractually pass on strict (minimum) GHG emission reduction targets along the different tiers of a supply chain.

- For this reason, the Chancery Lane Project's contractual cascading approach for the construction industry (Olivia's Clause) is preferable as the main contractor shall only be allowed to conclude a subcontract with a subcontractor having a net zero target and accepting the defined contract target regarding the GHG emission reductions.[84]
- It will be necessary as well to be as precise as possible in terms of what is deemed a material breach[85] of the contract (e.g., the failure to achieve the 7% minimum annual GHG emission reduction target) and to provide contractual penalties (in the event that the annual emission targets are not achieved) and an escalation mechanism to remove (contractual termination) persistent (e.g., failure to achieve the minimum annual GHG emission reduction targets in two consecutive years) or major (e.g., in the event of a supplier's increase of GHG emissions or its failure to report on the annual GHG emissions) infringers and being able to claim damages.
- The reported annual GHG emissions by the supply chain members of the various tiers shall be verified by an independent third party (e.g., auditing firm) specializing in sustainability (climate) audits/verifications.
- Supply chain leading companies should also consider linking the quality of ordered goods with climate-related criteria (ethically tainted goods)[86] rendering goods defective (non-conforming)

[83] *Ibid*.

[84] The Chancery Lane Project, *Net Zero Obligations in FIDIC Engineering, Procurement and Construction (EPC) Contracts*, Olivia's Clause, https://chancerylaneproject.org/climate-clauses/net-zero-obligations-in-fidic-engineering-procurement-and-construction-epc-contracts/ (accessed 18 Oct. 2023).

[85] The Chancery Lane Project, *Sustainability Clauses in Supply Chain Contracts*, Austen's Clause, https://chancerylaneproject.org/climate-clauses/sustainability-clauses-in-supply-chain-contracts/ (accessed 18 Oct. 2023).

which do not meet the contractually agreed carbon-related requirements/standards (e.g., contractually specified low-carbon production processes and components), thus, giving rise to contractual remedies such as avoidance and potential damage claims (e.g., in the event of customer boycotts after effective media-campaigns initiated by NGOs).

2.2[b] *The Volvo Group Supply Partner Code of Conduct*

The Volvo Group Supply Code of Conduct (Volvo Code) is an excellent example for a modern supply chain–related code of conduct committing to net zero GHG emissions by 2040, covering scope 1, 2, and 3 emissions and requiring a third-party verification by the Science Based Targets initiative (SBTi)[87]:

> Supplier shall establish net zero greenhouse gas (GHG) emission operations and supply chains by 2040 at the latest. In order to reach this target, all Suppliers shall, as a minimum and first step, develop and implement interim targets and a plan to reduce the GHG emissions of their own operations and logistic system, scope 1 and 2, in accordance with the 1.5 degree scenario as presented by the UNFCC Paris Agreement. The plan shall be relevant for Suppliers' core business and contribute to relevant industry initiatives. Supplier shall monitor, track and document the progress of such plan and upon request by the Volvo Group be open and transparent about its GHG emissions in accordance with above, including the results and progress of its emission reduction plan […] In Supplier's efforts to establish net zero GHG emission supply chains by 2040, the Volvo Group encourages Supplier to set science-based targets for their entire supply chain and scope 1, 2 and 3 as defined by the Greenhouse Gas Protocol Corporate Standard. Suppliers are also encouraged to have these targets verified by the Science Based Targets Initiative.[88]

It must be emphasized that the Volvo Code also contains contractual cascading obligations for supply chain members. As the Volvo Code expressly clarifies that the passing on of obligations to sub-suppliers relates to all requirements contained in the Volvo Code, it is apparent that the net zero climate targets need to be contractually mirrored in the subcontracts or lower-tier subcontracts as well:

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[86] *See* Peter Schlechtriem, *Non-Material Damages – Recovery under the CISG?*, 19 Pace Int'l L. Rev. 89, at 97 et seq. (2017) doi: 10.58948/2331-3536.1061.

[87] The SBTi is a partnership between CDP, the United Nations Global Compact, World Resources Institute (WRI) and the World Wide Fund for Nature (WWF). Among other things, the SBTi provides companies with independent assessment and validation of GHG emissions targets. *See* https://sciencebasedtargets.org/about-us#who-we-are (accessed 18 Oct. 2023).

[88] Volvo Group Supply Partner Code of Conduct 26 (Issue 2 2022), https://www.volvogroup.com/content/dam/volvo-group/markets/master/suppliers/our-supplier-requirements/Supply%20Partner%20Code%20of%20Conductn%202%20edition.pdf (accessed 18 Oct. 2023).

> Supplier shall ensure that all Requirements of this Supply Partner Code of Conduct are cascaded to and complied with within its own operations and by its own direct suppliers. This shall be ensured through proper contractual wording or a fully implemented supplier code of conduct.[89]

Furthermore, the Volvo Code mandates suppliers to conduct a due diligence (including a climate due diligence) with their business partners:

> The Volvo Group requires every Supplier to perform due diligence in the areas covered by this Supply Partner Code of Conduct. Supplier's due diligence efforts shall be in accordance with international standards such as the OECD Due Diligence Guidance for Responsible Business Conduct and the UN Guiding Principles on Business and Human Rights. Supplier shall include impacts of its own operations and its supply chain with a focus on where it has the highest risks of doing harm, and appropriate to company size and circumstances.[90]

Last but not least, the Volvo Code contractually obliges suppliers to allow on-site audits by Volvo Group staff or independent third parties. Non-compliance with the Volvo Code may lead (as a last resort) to a contractual termination and the removal from the supply chain:

> Upon being onboarded as a Supplier to the Volvo Group and thereafter as required from Volvo Group from time to time, the Volvo Group verifies compliance with the Requirements and Aspirations of this Supply Partner Code of Conduct by means of a self-assessment questionnaire and reserves the right to conduct an on-site audit, either through employees of the Volvo Group or through an independent third party appointed by the Volvo Group. Lack of cooperation, failure to address violations of the Requirements of this Supply Partner Code of Conduct and/or non-timely implementation of necessary corrective action plans may result in a reduction in business and, ultimately, an end to the business relationship with the Volvo Group.[91]

3 CLIMATE-RELATED SUPPLY CHAIN ARBITRATIONS

The following analysis pertains to supply chain–related disputes between multiple parties having concluded multiple arbitration agreements which are compatible. Subject matter of the (fictitious) disputes are material violations of the carbon emission reduction provisions (contained in a code of conduct contractually passed on back-to-back along the entire supply chain) by a subcontractor giving rise to substantial delays causing major damages. Such a scenario may, for example, arise in the construction industry (BRI-related projects, etc.) or in the automotive sector.

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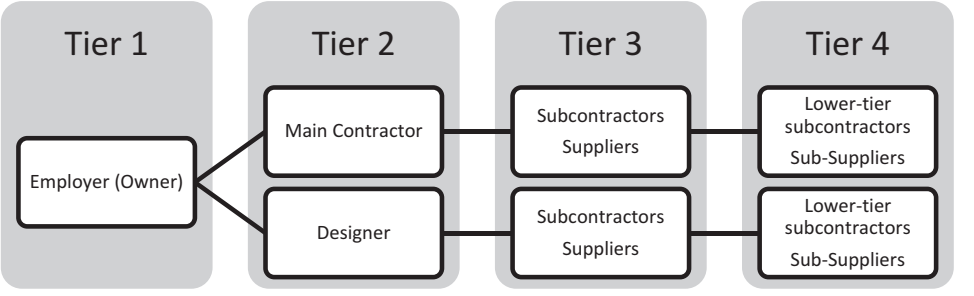
89 *Ibid.*, at 6.
90 *Ibid.*, at 8.
91 *Ibid.*, at 9.

3.1 Typical construction and automotive supply chains

Supply chains in the construction industry are characterized by the involvement of multiple parties of different tiers: an owner usually concludes the main contract with the main contractor (under the design-build model, the main contractor is responsible for both the design and construction works whereas under the build-only model, the employer enters into two separate contracts with the designer and the main contractor),[92] who in turn enters into legal relationships (subcontracts) with subcontractors/suppliers. The latter may involve lower-tier subcontractors and sub-suppliers. This way, a supply chain may consist of numerous tiers with direct legal relationships usually only between the neighbours of the respective tiers. A construction supply chain may also include construction managers, engineers, architects, banks, insurers, reinsurers, and so on.[93] Usually, the main contractor is liable to the employer for the subcontractors' violations. However, the main contractor may assert recourse claims against the defaulting subcontractors. Based on the same principle, a subcontractor can bring a claim against an infringing lower-tier subcontractor.[94]

As mentioned above at 2.1[b], a supply chain–related scenario halting a construction project (similar to the one involving Borealis) may occur in the future in connection with environmental or climate change–related infringements of contractual provisions and/or provisions in codes of conduct.

Figure 1 Build-only Model

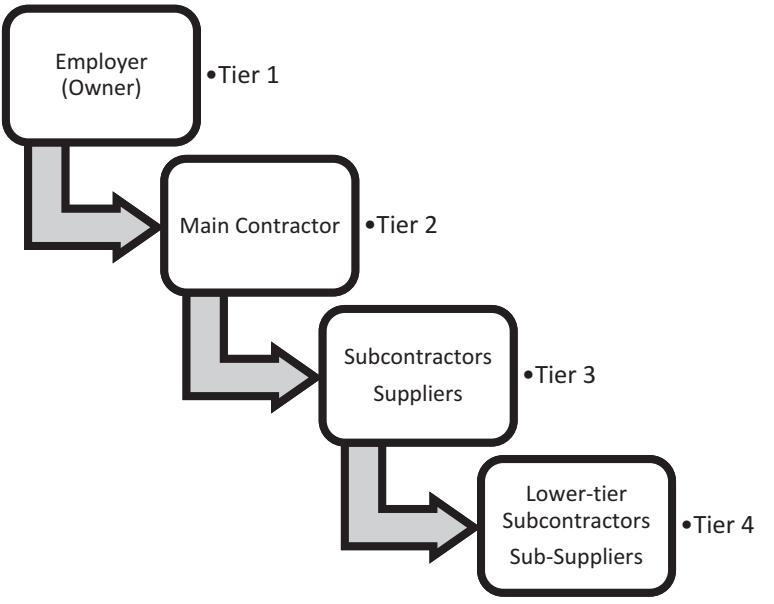


92 Dimitar Kondev, *Multi-Party and Multi-Contract Arbitration in the Construction Industry* 41 et seq. (2017); A.C.E. Building Service, *What Is Design-Build Construction?*, https://www.acebuildingservice.com/what-is-design-build-construction (accessed 18 Oct. 2023).

93 Peter C. Sheridan & Alex Linhardt, *Managing the Battlefield: Using a Uniform Multi-Party Construction Arbitration Agreement*, 11(1) Journal of the ACCL, 39, at 40 (2017).

94 Stavros Brekoulakis & Ahmed El Far, *Subcontracts and Multiparty Arbitration in Construction Disputes* (19 Oct. 2021) https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fourth-edition/article/subcontracts-and-multiparty-arbitration-in-construction-disputes (accessed 18 Oct. 2023).

Figure 2 Design-Build Model

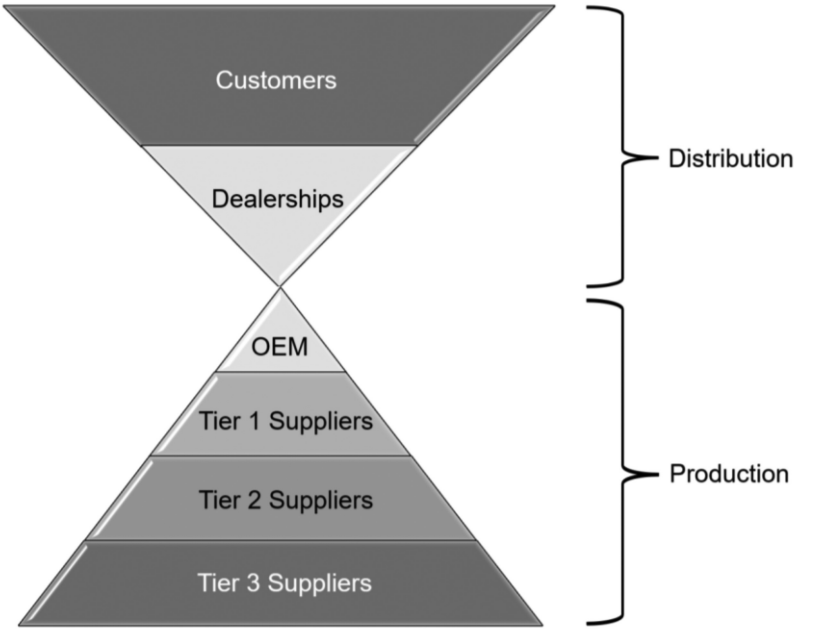


A supply chain in the automotive sector typically comprises suppliers, car manufacturers/original equipment manufacturers (OEM), dealerships and customers. In practice, there are three tiers of suppliers. First-tier suppliers have a direct contractual relationship with the car manufacturers and supply prefabricated systems/modules (e.g., brake systems, engines, car seats or infotainment consoles). Second-tier suppliers (no direct contractual relationship with the car manufacturer) provide first-tier suppliers with the necessary components (e.g., integrated circuits) for their prefabricated systems/modules. The second tier-suppliers obtain raw materials (e.g., plastics, metals) and parts (e.g., screws) from third-tier suppliers. Suppliers of the lower tiers may also be called subcontractors. Suppliers may switch between the tiers: for example, a third-tier supplier delivers screws to both a second-tier supplier and the OEM.[95]

It is evident that supply chain disruptions caused by climate change–related infringements (e.g., a second-tier supplier supplying semiconductors needs to be

[95] Kevin Baxter, *What Is the Supply Chain in the Automotive Industry?* (7 Mar. 2022), https://blog.intekfreight-logistics.com/what-is-supply-chain-automotive-industry (accessed 18 Oct. 2023); *What is a first tier Supplier?*, https://www.time-matters.com/emergency-logistics-glossary/tier-1-supplier/ (accessed 18 Oct. 2023); Peter Lipp, *Delivery Chains in Automotive Manufacturing Run Smoothly* (15 Apr. 2022), https://www.editel.eu/edi-makes-delivery-chains-in-automotive-manufacturing-run-smoothly/ (accessed 18 Oct. 2023).

Figure 3 Automotive Supply Chain



replaced due to ongoing and persistent violations of the carbon emission reduction targets contained in the car manufacturer's code of conduct) may lead to major damage claims (just-in-time production requirements cannot be met resulting in production shortages and lost revenue) asserted by the car manufacturer against the first-tier supplier who in turn has recourse claims against the violating second-tier supplier.

Based on the fact that automotive supply chains increasingly involve international suppliers (a US-based OEM may be supplied by a German supplier having its production lines in countries such as China, Mexico or Romania; making things even more complex, the US-based OEM may have factories outside of the United States, e.g., in China),[96] the conclusion of arbitration agreements between the automotive supply chain members becomes more and more prevalent because it is easier to globally enforce arbitral awards on the basis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[97]

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[96] Karl Pörnbacher, *To Resolve International Disputes, the Automotive Industry Increasingly looks to International Arbitration,* Hogan Lovells (8 Oct. 2019) https://www.hoganlovells.com/en/publications/the-automotive-industry-increasingly-looks-to-international-arbitration (accessed 18 Oct. 2023).

3.2 Multi-party and multi-contract arbitrations

The following sections will explore the consolidation and joinder rules of selected arbitration rules of international arbitration institutions taking particularly into consideration the specific circumstances (multiple parties, tiers, contracts and arbitration agreements) prevalent in construction and automotive supply chains. Taking into account that multi-party arbitrations may not be in the interest of all parties, the analysis will focus on provisions allowing a consolidation or a joinder against a party's objection. The analysis will feature the arbitration rules of the four most preferred market leading arbitration institutions based on the Queen Mary University of London/White & Case 2021 International Arbitration Survey.[98] The most preferred international arbitration institution is the International Chamber of Commerce (ICC), selected by 57% of the survey's participants. In second position is the Singapore International Arbitration Centre (SIAC) with 49%, followed by the Hong Kong International Arbitration Centre (HKIAC) and the London Court of International Arbitration (LCIA) arriving at 44% and 39%, respectively.[99] In addition, the analysis will highlight some of the most flexible provisions of Chinese arbitration institutions because of the major relevance of Chinese companies (including wholly-foreign-owned companies and Sino-foreign joint ventures incorporated in China) for international supply chains.

3.2[a] *Definitions*

A consolidation is the combination of two or more pending arbitral proceedings into one arbitration to be decided by one and the same arbitral tribunal. A joinder enables an additional party to join one pending arbitration to decide on certain connected claims (e.g., the main contractor's recourse claims against the additional party or damage claims asserted by the additional party joining the side of the main contractor against the employer) in relation to the additional party.

3.2[b] *The Purpose of Consolidations and Joinders*

The key advantage of consolidations and joinders is to avoid potential contradictory or inconsistent arbitral awards. This holds especially true for recourse

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[97] Daniel González, *To resolve International Disputes, the Automotive Industry Increasingly looks to International arbitration,* Hogan Lovells (8 Oct. 2019) https://www.hoganlovells.com/en/publications/the-automotive-industry-increasingly-looks-to-international-arbitration (accessed 18 Oct. 2023).

[98] Queen Mary University of London/White & Case LLP, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf (accessed 18 Oct. 2023).

[99] *Ibid*., at 10.

claims: 'One party to a tripartite dispute may be found liable to another party in one arbitration, while in a second arbitration the same party may be denied recovery from a different party on a theory inconsistent with the rationale of the first proceeding'.[100] Other advantages include efficiency considerations, such as savings in overall legal fees (e.g., only one arbitral tribunal needs to be compensated, expert witnesses and reports are only required in relation to one arbitration), witnesses' time (witnesses only have to attend evidentiary hearings in one pending arbitration; witness statements only need to be prepared once), preparation efforts (the legal counsel does not have to draft submissions and prepare for oral hearings in several proceedings), and so on.[101] It should also be stressed that cross-examinations with the same witnesses on the same facts may lead to different outcomes and testimonies in separate proceedings.

Confidentiality-related issues (e.g., keeping contract prices confidential) are frequently mentioned as being the main disadvantage of multi-party proceedings. For some parties, the costs may even increase if they get involved in multi-party proceedings, and the latter may take longer than standard proceedings between two parties.[102] Most importantly, consolidations and joinders may not be in the interest of every party.[103] As the main contractor is usually liable for the subcontractors' actions, an employer may not be interested in multi-party proceedings (including a subcontractor by way of consolidation or joinder).[104]

3.2[c] *Express or Implied Consent – Objections after the Commencement of a Dispute*

Based on the consensual nature of arbitration and the principle of party autonomy, consolidations and joinders require the consent of all parties. Such consent may be express or implied.[105] It is rare that arbitration agreements contain an express consent to consolidations or joinders. Most arbitration agreements are silent on the issue of potential multi-party proceedings.

Different legal doctrines have successfully been used to establish an implied consent to bind non-signatories to arbitration agreements: agency, assignment, third-party beneficiary, incorporation by reference, alter ego, equitable or arbitral estoppel, and others. However, in the context of the typical multi-party scenario in a construction or automotive supply chain with independent subcontractors and

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100 Gary B. Born, *International Commercial Arbitration* 2762 et seq. (3d ed., Wolters Kluwer 2021).
101 *Ibid*., at 2762.
102 *Ibid*., at 2764.
103 For more details *see* Adolf Peter, *CSR and Codes of Business Ethics in the USA, Austria (EU) and China and their Enforcement in International Supply Chain Arbitrations* 165 et seq. (Springer Singapore 2021).
104 This assessment may change in the event of collateral warranties. *See* below at 3.3[c].
105 Thomas H. Webster & Michael W. Bühler, *Handbook of ICC Arbitration* (5th ed., Sweet & Maxwell 2021) Arts 7–10, mn 7–7.

suppliers of various tiers, the application of these legal doctrines will most likely not result in a successful joinder or a consolidation.[106]

It should be stressed that in the construction and automotive supply chain scenario, an *advance* consent may be implied from the parties' consent to apply arbitration rules containing specific criteria which have to be fulfilled in order to achieve a consolidation or a joinder without the parties' express consent. By all means, such an *implied advance consent* cannot be established if the parties expressly exclude multi-party arbitrations in their arbitration agreement.[107]

Later objections by a party bound by its implied advance consent (provided in the arbitration agreement by agreeing to the respective arbitration rules) will not prevent a consolidation or a joinder if one of the criteria contained in the applicable arbitration rules is fulfilled.

3.2[d] *Compatible Arbitration Agreements*

A consolidation of arbitral proceedings cannot be granted if the arbitration agreements underlying the pending arbitrations are incompatible. For example, arbitration clauses are incompatible if they refer to different arbitration institutions and rules, different seats of arbitration, different languages of arbitration or a different number of arbitrators.[108]

3.3 Analysis of consolidation provisions of selected international arbitration institutions

Institutional arbitration rules usually allow consolidations if the parties expressly agree. In the event of no such express agreement, consolidation applications may typically be granted if the claims are made under the same arbitration agreement(s) or separate but compatible arbitration agreements provided that they are the underlying arbitration agreements in a series of related transactions, concern principal and ancillary contracts or relate to the same legal relationships.

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[106] Brekoulakis & El Far, *supra* n. 94.

[107] Kondev, *supra* n. 92, at 315; Brekoulakis & El Far, *supra* n. 94; Peter, *supra* n. 103, at 170; Adolf Peter, *Procedural Considerations in CIETAC Arbitrations Seated in Vienna*, 17(1) Asian Int'l Arb. J. 41, at 45 (2021), doi: 10.54648/AIAJ2021003; Webster & Bühler, *supra* n. 105, at mn 7–7, classify such consent as indirect (reference to arbitration rules containing appropriate provisions).

[108] Born, *supra* n. 100, at 2780.

3.3[a] *Same Arbitration Agreements – ICC's Approach*

Pursuant to Article 10 (b) of the 2021 ICC Rules of Arbitration (ICC Rules),[109] the ICC International Court of Arbitration[110] 'may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where all of the claims in the arbitrations are made under the same arbitration agreement or agreements'.

Webster/Bühler[111] interpret this provision restrictively by not allowing the consolidation of two pending arbitrations involving the employer, main contractor and subcontractor without an express agreement:

> By requiring that the arbitration agreements are the same, the ICC Court has set an important limit to consolidation when different parties are involved in the arbitration. For instance, a dispute between the owner and general contractor on the one hand, and the general contractor and one of its subcontractors on the other hand could not be consolidated by the Court, absent the parties agreement (as per art.10(a).

The author respectfully disagrees with this interpretation. Arbitral proceedings in supply chain–related scenarios involving the main contract and subcontracts (employer against main contractor in the first arbitration and main contractor against the subcontractor in the second arbitration) may be consolidated by the ICC International Court of Arbitration on the basis of Article 10 (b) ICC Rules, without an express agreement between the parties involved pursuant to Article 10 (a) ICC Rules[112]: Article 10 (b) ICC Rules requires 'same arbitration agreements'; 'same' in terms of identical phrasing, however, separate because the arbitration agreements may relate to different contracts.[113] It is not sufficient that the arbitration agreements underlying the pending arbitrations are merely compatible. They must be identical. This can be achieved in supply chains with different tiers of subcontractors by extending the contractual cascading (in practice, subcontracts contain plenty of back-to-back provisions mirroring the main contractor's obligations towards the employer) to dispute resolution clauses (cascading in relation to arbitration clauses). Having identical arbitration clauses (agreements) along the entire supply chain is a strong indication for the parties' intention to consolidate their interrelated disputes.

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109 Effective as of 1 Jan. 2021.

110 Article 1 (2) ICC Rules sets forth that the ICC International Court of Arbitration administers the resolution of disputes conducted by arbitral tribunals but does not resolve any disputes by itself.

111 Webster & Bühler, *supra* n. 105, at mn 10–10.

112 The author has held that view since early 2021. *See* Peter, *supra* n. 103, at 176 et seq.

113 Legal commentators with a similar view include Daniel Sharma (DLA Piper), *Revised New 2021 ICC Arbitration Rules* (14 Apr. 2021), https://www.dlapiper.com/en/insights/publications/2021/04/the-revised-new-2021-icc-arbitration-rules (accessed 18 Oct. 2023); Smitha Menon & Charles Tian (WongPartnership LLP), *Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Resolving Complex Disputes* (3 Jan. 2021) http://arbitrationblog.kluwerarbitration.com/2021/01/03/joinder-and-consolidation-provisions-under-2021-icc-arbitration-rules-enhancing-efficiency-and-flexibility-for-resolving-complex-disputes/ (accessed 18 Oct. 2023).

Due to the increasing pressure of various stakeholders (including NGOs and customers) and the huge potential for enormous reputational damages causing pecuniary loss (lost profits, loss of customers, loss of market share, loss of business opportunities, and so on), even employers will be more and more interested in the participation of infringing subcontractors in their climate-change–related disputes against the main contractor. The main contractor will mostly be interested in a consolidation in order to avoid contradictory arbitral awards. Should the main contract not include an obligation for the main contractor to pass on (back-to-back) the dispute resolution clause along the supply chain (if the main contract is silent on this issue), the main contractor himself may oblige the subcontractors to conclude identical arbitration agreements with lower-tier supply chain members in order to enable consolidations. It is for this reason that an employer who is not interested in multi-party proceedings is well-advised to expressly prohibit consolidations and joinders in the arbitration agreement relating to the main contract.

In the event of compatible (not identical) arbitration agreements, pending arbitrations may only be consolidated on the basis of Article 10 (c) ICC Rules if the parties in all the pending arbitrations are the same, which is obviously not the case in supply chain–related arbitrations involving the employer, main contractor and subcontractor. Article 10 (b) ICC Rules does not determine that the parties have to be the same.

Similarly to *Webster/Bühler, Ehle/Moss*[114] also support a restrictive interpretation of Article 10 (b) ICC Rules and take the view that the:

> reference to the 'same arbitration … agreements' appears to be merely intended to apply to situations in which individual arbitrations are commenced under more than one arbitration agreement, not where two arbitrations are commenced under arbitration agreements in different contracts.

The relevant ICC Note[115] contains an example for the application of Article 10 (b) ICC Rules: 'parties A, B, C and D are parties to a Share Purchase Agreement (SPA) and a Shareholders Agreement (SHA). Parties A and D are parties to arbitration 1, while parties B and C are parties to arbitration 2'. The SPA and the SHA are interrelated but separate contracts containing identical arbitration clauses. Consequently, the example in the ICC Note allows the consolidation of two pending arbitrations under identical arbitration agreements contained in

[114] Bernd Ehle & Sam Moss (Lalive), *The 2021 ICC Arbitration Rules – What Revised Joinder and Consolidation rules mean for Construction Disputes* (15 Mar. 2021), https://www.lexology.com/commentary/projects-construction-infrastructure/international/lalive/the-2021-icc-arbitration-rules-what-revised-joinder-and-consolidation-rules-mean-for-construction-disputes (accessed 18 Oct. 2023).

[115] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (1 Jan. 2021) mn 19 (b), https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf (accessed 18 Oct. 2023).

different (separate) contracts. Although the contractual parties in both the SPA and SHA are the same, Article 10 (b) ICC Rules and the accompanying ICC Note do not expressly disallow the consolidation of arbitrations if the parties in the underlying contracts and in the arbitration agreements are not the same. Thus, a consolidation of arbitrations involving a main contract and subcontracts should be possible.

3.3[b] *Series of Related Transactions*

The criterion referring to a series of related transactions is one of the most promising criteria contained in institutional arbitration rules to enable the consolidation of supply chain–related arbitrations against the objection of a party.

Article 28.1 (c) of the 2018 HKIAC Administered Arbitration Rules (HKIAC Rules)[116] stipulates that the:

> HKIAC shall have the power, at the request of a party and after consulting with the parties and any confirmed or appointed arbitrators, to consolidate two or more arbitrations pending under these Rules where: […] (c) the claims are made under more than one arbitration agreement, a common question of law or fact arises in all of the arbitrations, 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 are compatible.

In the case that the arbitration agreements (there can be multiple arbitration agreements in relation to multiple contracts) underlying the pending arbitrations are compatible (the arbitration agreements do not have to be identical), a consolidation may be granted by the HKIAC if the pending arbitrations are sufficiently connected by mainly addressing the same legal and factual issues in connection with a series of related transactions. Should specific carbon emission reduction obligations have to be passed on along construction (the main contract, subcontracts and lower-tier subcontracts related to one and the same project) or automotive supply chains (the final OEM product incorporates the first-tier suppliers' systems, the second-tier suppliers' components and third-tier suppliers' parts and raw materials) by means of contractual cascading, a series of related transactions (subcontracts of different tiers) is more than apparent, and the same legal and factual issues will be the subject matter of the pending arbitrations (e.g., damage claims and related recourse claims in connection with the retender and delay of one and the same project based on climate change–related infringements).

On the basis of the Arbitration Ordinance (containing similar consolidation provisions, particularly in terms of the 'series of transactions' criterion) in force at that time (1999), the Hong Kong Court of First Instance[117] granted the application

[116] Effective as of 1 Nov. 2018.

for a consolidation of three pending arbitrations concerning a dispute relating to a construction project. The main contractor was a party in all three arbitrations. The first arbitration was against the employer, and the two remaining arbitrations were initiated against subcontractors. The main contractor applied for the consolidation. The employer and one of the subcontractors opposed the application. In particular, the Hong Kong Court of First Instance held that:

> [t]he terms as to payment in the sub-contracts were back to back with those in the main contract and the issues of delay, the consequential liability to pay liquidated damages and who should make indemnity were common to all three contracts. The two subcontracts flowed from the main contract and the same architect was responsible for issuing certificates under all three contracts. The contracts should be regarded as one series of transactions about which it would be desirable for the architect to give evidence on one occasion only.

This decision illustrates very well (1) the subcontracts' dependence on the main contract by mirroring key terms, (2) a supply chain's interrelated contracts being part of a series of transactions and (3) the significance of efficiency considerations by requiring key witnesses giving evidence only once.

In a recent case relating to the construction industry,[118] a Hong Kong court granted the consolidation of arbitrations between the employer and his consultant (first arbitration), the employer against contractors (second arbitration) and the contractors versus the subcontractor (third arbitration). The consolidation of the three arbitrations was granted against the objection of the consultant. In spite of the fact that the court ordered the consolidation on the basis of section 2 of Schedule 2 of the Hong Kong Arbitration Ordinance (Cap 609) (Ordinance), the respective Hong Kong Ordinance refers to a common question of law or fact and the same transaction or series of transactions (similar to the HKIAC Rules)[119]:

> The court found that there were clearly common questions of law and fact in the 1st Arbitration and Consolidated Arbitration. The rights to relief claimed undoubtedly arose out of the same transaction or series of transactions in the project, concerned the construction of the bridge, and whether the Consultant, Contractors and/or the Subcontractor should be liable in contract or in negligence for the defects discovered.[120]

Moser/Bao[121] corroborate that the series of related transactions criterion contained in Article 28.1 (c) HKIAC Rules may encompass supply chain contracts and

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117 Chun Wo Building Construction Ltd *v.* China Merchants Tower Co. Ltd. & ORS, 2 Asian Disp. Rev. 27 (2000) https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/asidpurv0002&div=24&id=&page= (accessed 18 Oct. 2023).

118 Employer *v.* Consultant HCCT 39/2021.

119 Kwok Kit (KK) Cheung (Deacons), *Hong Kong – When Can The Court Consolidate Arbitrations?* (6 Jul. 2022) https://conventuslaw.com/report/hong-kong-when-can-the-court-consolidate-arbitrations/ (accessed 18 Oct. 2023).

120 *Ibid*.

disputes in construction projects between the employer, the main contractor and subcontractors.

Similarly to the HKIAC Rules, Article 22.7 (ii) of the LCIA Arbitration Rules (LCIA Rules)[122] allows the arbitral tribunal itself[123] (this in stark contrast to the HKIAC Rules) to consolidate pending arbitrations involving different parties if they arise out of a series of related transactions and are based on compatible arbitration agreements. In the event of no arbitral tribunal having been formed, the LCIA Court may order a consolidation pursuant to Article 22.8 LCIA Rules on the basis of the same criteria.

Rule 8.1 (c) of the SIAC Arbitration Rules (SIAC Rules)[124] offers three alternative consolidation criteria if the relevant separate arbitration agreements (between same or different parties) are compatible. The series of transactions criterion is one of them. Prior to the constitution of any arbitral tribunal, the Court of Arbitration of SIAC (SIAC Court) may grant a party's consolidation application.[125] After the constitution of an arbitral tribunal in one of the pending arbitrations, or in the event that all the pending arbitrations share the same arbitral tribunal, the respective arbitral tribunal has to decide on a consolidation based on the series of transactions criterion.[126] Unlike the HKIAC and the LCIA Rules, the series of transactions criterion in the SIAC Rules does not expressly include the term 'related' (series of related transactions). Nevertheless, a series of contracts without a certain relationship and without legal and factual links will not be sufficient for a consolidation. According to *Choong/Mangan/Lingard,*[127] a series of related or chain contracts would fulfil the series of transactions criterion. Anyway, the automotive and construction-related supply chain scenarios are most likely covered by the series of transactions criterion contained in the SIAC Rules.

On the basis of the latest Consultation Draft[128] in connection with the upcoming revision of the SIAC Rules, it shall be emphasized that the SIAC plans to introduce a fourth alternative criterion for consolidations if the arbitration agreements are compatible: a common question of law arises out of or in connection with all arbitrations. In contrast to the HKIAC Rules, this new criterion

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121 Michael J. Moser & Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (2d ed., Oxford University Press 2022) mn 10.118.

122 Effective as of 1 Oct. 2020.

123 The approval of the LCIA Court is required.

124 Effective as of 1 Aug. 2016.

125 Rule 8.4 SIAC Rules.

126 Rule 8.7 (c) SIAC Rules.

127 John Choong, Mark Mangan & Nicholas Lingard, *A Guide to the SIAC Arbitration Rules*, 2nd ed. (2018 Oxford University Press) mn 7.69.

128 Draft 7th ed. of the SIAC Rules, https://siac.org.sg/wp-content/uploads/2023/08/Draft-7-Edition-of-the-SIAC-Rules-Consultation-Draft.pdf (accessed 18 Oct. 2023).

would be an alternative to the series of transactions criterion (the HKIAC Rules require a series of related transactions and a common question of law or fact arising in all of the arbitrations). Should this provision be in the finalized version of the upcoming new SIAC Rules, a consolidation would even be easier to achieve in disputes involving different parties and contracts. For example, it is more than evident that a dispute based on a breach of an ESG-related contractual provision involving multiple parties of different supply chain tiers (including the main contractor's recourse claims against lower-tier supply chain members and/or the employer's direct claims against subcontractors on the basis of collateral warranties) and leading to a project halt, retenders and damage claims relate to the same facts (specific ESG-related violation by a supply chain member negatively impacts one and the same project) and legal issues (breach of an ESG-related contractual provision contractually cascaded throughout the supply chain triggering various damage claims on different supply chain tiers).

Although both the China International Economic and Trade Arbitration Commission (CIETAC)[129] and the China Maritime Arbitration Commission (CMAC)[130] were established under the China Council for the Promotion of International Trade[131] (China Chamber of International Commerce), unlike the CIETAC Arbitration Rules (CIETAC Rules),[132] Article 19 (1) (d) of the CMAC Arbitration Rules (CMAC Rules)[133] sets forth that pending arbitrations may be consolidated by CMAC (not by the arbitral tribunal) at the request of one party (this implies that a consolidation may be granted against the objection of a party) if 'all the disputes involved relate to the same transaction or series of transactions', and the relevant arbitration agreements do not expressly preclude a consolidation. Consolidations may also be achieved in the event of different arbitration

[129] CIETAC was established in 1956 http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en (accessed 18 Oct. 2023) and is the only Chinese arbitration institution featured in the top 10 (fifth place with 17%) of the Queen Mary University of London/White & Case 2021 International Arbitration Survey (most preferred arbitration institutions), *see* Queen Mary University of London/White & Case LLP, *supra* n. 98. Outside of Mainland China, CIETAC has offices in Hong Kong, Vienna, Austria (CIETAC European Arbitration Centre) and Vancouver, Canada (CIETAC North American Arbitration Centre).

[130] CMAC was established on 22 Jan. 1959. CMAC resolves admiralty, maritime, transport, logistics-related disputes and other commercial disputes. *See* China Maritime Arbitration Commission, http://www.cmac.org.cn/en/index.php?catid=10 (accessed 18 Oct. 2023). CMAC is one of only five Chinese arbitration institutions being part of the Chinese Supreme People's Court's 'One-Stop' Diversified International Commercial Dispute Resolution Mechanism. The other four institutions are CIETAC, the Shanghai International Arbitration Centre, the Shenzhen Court of International Arbitration and the Beijing Arbitration Commission. *See* Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the 'One-stop' Diversified International Commercial Dispute Resolution Mechanism, Faban [2018] No.212, http://cicc.court.gov.cn/html/1/219/208/210/1144.html (accessed 18 Oct.2023).

[131] CCPIT.

[132] Effective as of 1 Jan. 2015.

[133] Effective as of 1 Oct. 2021.

agreements because the five criteria of Article 19 (1) CMAC Rules are alternative, and only the first criterion (a) requires the same arbitration agreement. Article 19 (2) CMAC Rules confirms the necessary interconnection between the multiple arbitrations.

3.3[c] *Principal and Ancillary Contract*

If the multiple arbitration agreements between the same or different parties are compatible and 'the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s)', Rules 8.1 (c)[134] and 8.7 (c)[135] SIAC Rules allow the consolidation of arbitrations against the objection of a party. Whether a consolidation in the construction or automotive supply chain scenarios mentioned above is possible depends on the interpretation of the terms 'principal contract' and 'ancillary contract'. Unfortunately, the SIAC Rules provide no further guidance on the meaning of 'ancillary'.

It is commonly recognized that collateral warranties are ancillary contracts.[136] Collateral warranties are frequently used in the construction industry. A collateral warranty provided by the subcontractor to the employer creates a direct contractual relationship between these two parties.[137] The subcontractor warrants to be in compliance with the subcontract mirroring key terms of the main contract (between employer and main contractor).[138] The collateral warranty is particularly convenient for an employer in cases where the main contractor experiences economic difficulties or becomes insolvent, because the employer will be able to bring a claim directly against the subcontractor providing such a collateral warranty. A collateral warranty may also be attractive for the employer if he nominates subcontractors, possibly leading to the main contractor's limitation of liability for acts of the nominated subcontractors.[139] The underlying contract of the collateral warranty is the subcontract

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134 For a party's consolidation application prior to the constitution of any arbitral tribunal in the pending arbitrations to be consolidated.

135 For a party's consolidation application after the constitution of any arbitral tribunal in the pending arbitrations to be consolidated.

136 Niav O'Higgins, Karen Killoran & Kate Monaghan (Arthur Cox LLP), *Spot the Difference: Collateral Warranties, Direct Agreements, duty of care Deeds Explained* (23 Apr. 2018), https://www.lexology.com/library/detail.aspx?g=c2baf161-c963-4b72-b75e-f02a77532e90 (accessed 18 Oct. 2023); Patrick F. O'Reilly & Co, *Why Collateral Warranties Ancillary to Construction Agreements are Important for Property Owners and Developers* (13 Mar. 2019), https://www.patrickforeilly.com/news/why-collateral-warranties-ancillary-to-construction-agreements-are-important-for-property-owners-and-developers (accessed 18 Oct. 2023).

137 Nicholas Gould (Fenwick Elliott), *Subcontracts* (Feb. 2012) https://www.fenwickelliott.com/research-insight/articles-papers/subcontracts (accessed 18 Oct. 2023).

138 Penningtons Manches Cooper, *Collateral Warranties: An Overview* (4 Jan. 2013) https://www.penningtonslaw.com/news-publications/latest-news/collateral-warranties-an-overview.

139 Kondev, *supra* n. 92, at 48.

concluded between the main contractor and the subcontractor. Consequently, the collateral warranty is the ancillary agreement to the subcontract, enabling the consolidation of pending arbitrations between (1) the employer and the subcontractor (first arbitration on the basis of the collateral warranty) and (2) the main contractor and the subcontractor (second arbitration based on the subcontract).[140]

However, it is unclear whether the principal/ancillary contract criterion can also be used to consolidate arbitrations relating to the main contract and a subcontract. This would particularly be relevant in the case of a delay or halt of a project based on a subcontractor's ESG/climate change–related infringements, urging the employer to commence an arbitration against the main contractor and triggering the latter's recourse claims against the infringing subcontractor. In other words: Can a subcontract be deemed ancillary to a main contract? *Choong/Mangan/Lingard*[141] take the view that related contracts (subcontracts?) fulfil the criterion but do not provide any further explanations regarding the meaning of related contracts.

In the author's opinion, it may be argued that subcontracts are subordinate (ancillary) contracts in relation to the main contract because of mirroring key terms of the main contract. To a certain degree, subcontracts depend on the main contract's contents (passing on some of the main contractor's obligations to the subcontractor). Furthermore, they relate to the same project.[142] *Hök*[143] shares this view: 'Naturally a subcontract is an ancillary contract depending on the existence of a main contract. Both contracts, the Main Contract and the Subcontract, are aimed at achieving the same objective or have a common subset of objectives'. *Brekoulakis/El Far*[144] accurately point at the interrelatedness of the main contract with a subcontract and reiterate that a subcontract would be 'concluded in view and light of the main contract'. Notwithstanding that close connection, the two contracts 'remain two distinct and separate contracts'.[145] This is exactly the reason why *Kondev*,[146] although considering a subcontract being ancillary to the main contract on the basis of the subcontract being 'concluded in implementation of the main contract', does not support the author's view:

> On the other hand, it may be counterargued that such an agreement exists independently from the main contract. It is concluded by different parties and is not subordinate to the main contract. The present author shares this second line of reasoning.[147]

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140 Peter, *supra* n. 107, at 46 et seq.
141 Choong, Mangan & Lingard, *supra* n. 127, at mn 7.69.
142 Peter, *supra* n. 103, at 168 et seq.; Peter, *supra* n. 107, at 48 et seq.
143 Götz-Sebastian Hök, *The FIDIC Subcontract for Works and Design & Build Subcontract* (8 Sep. 2014) https://www.dr-hoek.com/legal-information/commercial-law/the-fidic-subcontract-for-works (accessed 18 Oct. 2023).
144 Brekoulakis & El Far, *supra* n. 94.
145 *Ibid*.
146 Kondev, *supra* n. 92, at 103.

In terms of Chinese arbitration institutions, Article 19 (1) (c) of both the CIETAC and CMAC Rules allow the consolidation of arbitrations relating to multiple compatible arbitration agreements if the contracts concerned are in a principal/ancillary relationship. Still, caution should be exercised in China-seated arbitrations when relying on this criterion in the case of a main contract and a subcontract. According to *Sun Wei/Willems*,[148] only contracts which are accessory to another contract may be deemed ancillary because:

> [u]nder Chinese law, 'ancillary contracts' […] mean contracts that cannot independently exist in the absence of the principal contract. For instance, if A lends money to B under Contract 1 and C agrees to guarantee B's repayment of the debt to A under Contract 2, then Contract 2 is the ancillary contract and Contract 1 is the principal contract because the guarantee cannot exist without the underlying debt. In this case if A initiates arbitration proceedings against B and C separately before CIETAC, C may request that CIETAC consolidates the proceedings even if A or B do not agree.[149]

Collateral warranties are characterized by their accessoriness in relation to the principal contract. They cannot exist without the underlying obligations of the principal contract. This makes a consolidation involving collateral warranties possible under both the CIETAC and CMAC Rules.

3.3[d] *The Beijing Arbitration Commission's Flexible Approach*

Article 30 (1) of the Arbitration Rules of the Beijing Arbitration Commission (BAC Rules)[150] provides the Beijing Arbitration Commission (BAC)[151] with extensive discretionary power in terms of consolidating several pending arbitrations: one party's application may trigger a consolidation if BAC considers a consolidation necessary. The BAC Rules do not define when a consolidation is necessary. However, Article 30 (2) provides some guidelines for BAC. BAC has to:

> take into account the specific circumstances of arbitration agreements on which the relevant arbitrations are based, the nexus between those arbitrations, the stage that each set of arbitration proceedings has reached, the arbitrators already nominated or appointed in the relevant arbitrations and any other relevant factors.

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147 *Ibid*.

148 Sun Wei & Melanie Willems, *Arbitration in China: A Practitioner's Guide* (Wolters Kluwer, Kindle-Version 2015), Ch. 10, Kindle-Position 5173–5178.

149 *Ibid*. For counterarguments *see* Peter, *supra* n. 103, at 184 et seq.; Peter, *supra* n. 107, at 47 et seq.

150 Effective as of 1 Feb. 2022.

151 BAC, also known as the Beijing International Arbitration Center, was established on 28 Sep. 1995. BAC has a rich experience in administrating international cases and focuses on contractual and property-related disputes. *See* http://www.bjac.org.cn/english/page/gybh/introduce_index.html (accessed 18 Oct. 2023).

It seems obvious that the wide discretion provided by the BAC Rules allows for the consolidation of pending arbitrations (even against the objection of a party) concerning interrelated (the required nexus should be sufficient) disputes in construction and automotive supply chains with multiple parties, contracts and separate but (at least) compatible arbitration agreements.

3.3[e] *Appointment of Arbitral Tribunal*

The consolidation of several pending arbitrations raises the crucial question of the parties' equal participation in the constitution of the arbitral tribunal. Article V (1) (d) New York Convention lays down that the recognition or enforcement of an arbitral award may be refused if the composition of the arbitral tribunal is not in accordance with the parties' agreement. Such a situation could occur if all related and pending arbitrations are consolidated into the arbitration which was first commenced, and the parties of the other arbitrations are not provided with the equal opportunity to become involved in the constitution of the arbitral tribunal. One-sided (advance) waiver provisions in institutional arbitration rules (under certain conditions, only some parties lose their participation rights in the arbitral tribunal's selection procedure) may even give rise to public policy violations in some jurisdictions. As an example, in the famous Dutco[152] decision the French Cour de Cassation annulled an arbitral award because the two respondents were forced to jointly appoint a co-arbitrator. The respondents' objections were ignored. The claimant's nomination rights remained untouched.[153]

According to *Gary Born*, the best solution in such scenarios is to remove the nomination rights of all parties and to authorize the arbitration institution to appoint all arbitrators by itself:

> Nevertheless, selection of all three tribunal members by an appointing authority (or, in default, national court) appears to do least violence to principles of equal treatment and the parties' expectations regarding the arbitral process. Although this solution deprives the parties of their preferred means of constituting the arbitral tribunal, it treats the parties equally and is a necessary consequence of multi-party arbitrations.[154]

The HKIAC Rules offer one of the most consolidation-friendly approaches. Even in the case of different arbitral tribunals having been constituted in all pending arbitrations, the HKIAC Rules still allow the consolidation of all arbitrations into the first arbitration.[155] In order to treat all parties equally, Article 28.8 HKIAC

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[152] Judgment of 7 Jan. 1992, BKMI v. Dutco, 10 ASA Bull. 295, 297 (1992) (French Cour de Cassation Civ. 1).
[153] Born, *supra* n. 100, at 2810 et seq.
[154] *Ibid.*, at 2811.
[155] *Ibid.*, at 2802.

Rules stipulates that 'the parties to all such arbitrations shall be deemed to have waived their right to designate an arbitrator, and HKIAC may revoke any confirmation or appointment of an arbitrator'. Revocations of already appointed arbitrators ought to take place if a new party in the consolidated arbitration objects to such arbitrators.[156] As a logical consequence, Article 28.8 HKIAC Rules provides the HKIAC with the authority to appoint the arbitral tribunal in the remaining consolidated arbitration without regard to any party's nomination. Based on the fact that all parties (not only the parties not being part of the arbitration first commenced) lose their nomination rights, such an advance waiver should not lead to recognition and enforcement issues.

Similar to the HKIAC Rules, the SIAC Rules permit arbitrators' revocations.[157] The major difference between the two arbitration rules in this context is that the SIAC Rules[158] contain an advance waiver for the participation in the constitution of the arbitral tribunal only in relation to parties who have not yet nominated an arbitrator. As a consequence, if a consolidation is ordered by the arbitral tribunal of the arbitration first commenced,[159] the parties of the other pending arbitrations lose (advance waiver) their nomination rights in the case that they have not yet nominated arbitrators. As confirmed by *Choong/Mangan/Lingard*[160] this provision may raise recognition and enforcement concerns in some jurisdictions (e.g., possible violation of France's public policy).

The ICC Rules do not authorize the ICC International Court of Arbitration to revoke any arbitrator appointments which makes the consolidation of arbitrations rather unlikely if different parties are involved.[161] The same holds true for consolidations under the LCIA Rules as the LCIA Court does not have the authority to revoke arbitrator appointments in connection with consolidations. It is also questionable whether Article 8.1 LCIA Rules (arbitral tribunal's appointment procedure in proceedings with multiple parties)[162] is applicable in consolidation scenarios.[163]

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156 Moser & Bao, *supra* n. 121, at mn 10.156.
157 Rules 8.6 and 8.10 SIAC Rules.
158 Rule 8.12 SIAC Rules.
159 Rule 8.9 SIAC Rules.
160 Choong, Mangan & Lingard, *supra* n. 127, at mn 7.92.
161 Born, *supra* n. 100, at 2797.
162 Pursuant to Art. 8.1 LCIA Rules, the LCIA Court must appoint the arbitral tribunal without regard to any party's entitlement or nomination if the multiple parties represent more than two separate sides (e.g., an additional party has different interests and joins neither claimant's nor respondent's side).
163 Stuart Dutson & Basil Woodd-Walker (Simmons & Simmons LLP), *The new LCIA Rules' Consolidation rule – A Trap for the Unwary* (16 Oct. 2020) https://www.simmons-simmons.com/en/publications/ckgbzubpq9paj0927wo8e0gll/the-new-lcia-rules-consolidation-rule—a-trap-for-the-unwary (accessed 18 Oct. 2023).

Concerning Mainland Chinese arbitration institutions, the CMAC Rules[164] (in contrast to the CIETAC Rules) strongly facilitate consolidations (in the event of different parties and contracts as in the case of supply chains in the construction and automotive industry) by stipulating the arbitral tribunal's reconstitution (1) 'where some of the arbitrations have constituted arbitral tribunals and others have not constituted arbitral tribunals or constituted different arbitral tribunals' and (2) if the multiple parties fail to agree on the constitution of the arbitral tribunal. Bearing in mind that the CMAC Rules also contain the very consolidation-friendly 'same transaction or series of transactions' criterion in terms of consolidating disputes between an employer, main contractor and subcontractors, the CMAC Rules are very attractive for parties envisaging a consolidation without expressly agreeing on it in the arbitration agreement.

3.4 Analysis of joinder provisions of selected international arbitration institutions

3.4[a] *Forced Joinders – Different Arbitration Agreements*

Taking into account the different interests of various supply chain members and the fact that in practice the same arbitration agreement will in all likelihood not bind all supply chain members, the main question in connection with the joinder of an additional party is whether the institutional arbitration rules examined in this article allow joinders in the case of separate but compatible arbitration agreements against the objection of an existing party (claimant or respondent) or even an additional party (e.g., a subcontractor in an arbitration between the employer and main contractor in the construction industry or a second-tier supplier in an arbitration between the OEM and a first-tier supplier in the automotive industry).

In comparison to the other institutional arbitration rules examined in this article, the LCIA Rules are the only ones to permit a so-called forced joinder (against a party's objection) in cases where an additional party to be joined is not bound by one and the same arbitration agreement[165] serving as the basis for the commencement of the pending arbitration. Pursuant to Article 22.1 (x) LCIA Rules, the arbitral tribunal of the pending arbitration is expressly authorized:

[164] Article 19 (4) CMAC Rules.

[165] Lisa-Marie Ross & Kathrin Asschenfeldt, *Recent Developments of Third Party Joinder in International Arbitration*, 39(5) J. Int'l Arb. 691, at 709 (2022), doi: 10.54648/JOIA2022030.

> to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented expressly to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.

It should be stressed that the forced joinder cannot be granted against the objection of the additional (third) party, because Article 22.1 (x) requires an express consent in writing by both the applicant and the third party. The joinder may be forced upon the non-applying existing parties of the pending arbitration. According to *Gary Born*,[166] the rationale behind the forced joinder is that the objecting party's consent to the application of the LCIA Rules (containing the forced joinder rule) is deemed sufficient. In the author's view, this could create potential enforcement issues in Mainland China (*see* below at 3.6[b]). The applicant can either be the claimant or the respondent of the pending arbitration. Interventions (joinders initiated by the additional party) are not permitted by the LCIA Rules (due to the third party and the joinder's applicant having to be different). As a joinder can only be granted by the arbitral tribunal, it is obvious that the third party will not be able to participate in the appointment procedure of the arbitral tribunal. In the event that the third party's express consent occurs after the appointment of the arbitral tribunal (this should remove any potential enforcement concerns in relation to jurisdictions prohibiting advance waivers), such express consent to join the arbitration in combination with the third party's participation in the arbitral proceedings should be legally qualified as the third party's waiver (the LCIA Rules do not explicitly mention a waiver in such situation) in relation to its rights to participate in constituting the arbitral tribunal.

However, it is very doubtful to attain such express consent from a third party if the latter and the existing parties (both claimant and respondent) have different interests so that the third party joins neither claimant's nor respondent's side. Such a situation is, for example, conceivable if a main contractor (applying for the joinder) intends to bring recourse claims against a subcontractor (third party). It is not likely that in such a situation the subcontractor would be willing to consent to the joinder and waive its rights to participate in constituting the arbitral tribunal. It is questionable whether Article 8.1 LCIA Rules would apply in such scenario. Article 22.1 (x) does not contain any reference to Article 8.1 and vice versa. Pursuant to Article 8.1 LCIA Rules, the LCIA Court has to disregard any parties' nominations and appoint the entire arbitral tribunal by itself if there are more than two parties representing different interests so that it is not possible to establish a claimant's side and/or a respondent's side. *Dutson/Woodd-Walker*[167] argue

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[166] Born, *supra* n. 100, at 2801.

convincingly that Article 8 LCIA Rules would only apply in the event of multiple parties at the outset of an arbitration. In this context, it should be emphasized as well that the LCIA Rules do not provide for the revocation of arbitrators (the arbitral tribunal would have to be revoked in order for the third party to participate in the constitution procedure of a new arbitral tribunal) by the LCIA Court in such a situation.[168] Furthermore, it can also not be expected from an arbitral tribunal to grant a joinder which is immediately followed by its revocation by the LCIA Court.

3.4[b] *Forced Joinders – Same Arbitration Agreement*

As mentioned above (*see* above at 2.2), climate change–related clauses may be found in supplier codes of conduct. A contractually binding code of conduct covering the entire supply chain may also be achieved by having all supply chain members directly sign such code of conduct. Lower-tier supply chain members may be urged to sign the document by means of contractual cascading clauses starting from the top of the supply chain; in the main contract the main contractor would have to be legally obliged to pass on the obligation to directly sign the employer's code of conduct to each subcontractor. The same obligation would have to be implemented in the subcontracts.

If the respective code of conduct contains an arbitration clause, all supply chain members directly signing the code of conduct would be bound by the same arbitration agreement in relation to disputes arising in connection with the code of conduct, including climate change–related infringements. The code of conduct containing the arbitration clause and signed by the supply chain members would in fact be an umbrella agreement binding all parties. Subcontractors and lower-tier suppliers becoming members of a supply chain at a later stage ought to be compelled to accede the umbrella agreement. This can again be achieved by contractual cascading. The conclusion of each subcontract or sub-subcontract must be on the condition of acceding to the umbrella agreement. This approach counters *Kondev's*[169] concern that subcontractors may refuse to accede to an umbrella agreement. The accession of new parties would of course lead to an amendment of the umbrella agreement. Thus, the umbrella agreement would also have to contain an amendment mechanism allowing for the accession of additional

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[167] Dutson & Woodd-Walker, *supra* n. 163.

[168] Pursuant to Art. 10.1 LCIA Rules, an arbitrator may be revoked by the LCIA Court if '(i) that arbitrator gives written notice to the LCIA Court of his or her intent to resign as arbitrator […] (ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act; or (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence'.

[169] Kondev, *supra* n. 92, at 271.

parties.[170] Having such a system in place would certainly contribute to a positive ESG-related image of any employer/OEM, because the latter could advertise the fact that all supply chain members are covered by its 'green' code of conduct. This is a quite strong message potentially attracting further business and customers.

Some of the institutional arbitration rules examined in this article even allow forced joinders against the objection of an additional party (in addition to a possible but unsuccessful objection of the non-applying existing party) bound by the same arbitration agreement giving rise to the pending arbitration. Bearing in mind the Shanghai First Intermediate People's Court's very strict interpretation of the principle of party autonomy (*see* below at 3.6[b]), the Shanghai International Arbitration Centre's (SHIAC's)[171] approach is quite noteworthy. Pursuant to Article 37 of the China (Shanghai) Pilot Free Trade Zone Arbitration Rules (SHIAC Rules),[172] a joinder of additional parties under the same arbitration agreement may be granted:

> 1. [w]here the Claimant or the Respondent requests another party under the same arbitration agreement to be joined into the arbitration proceedings, before the constitution of the tribunal, it shall submit a written application. The Secretariat shall make a decision on the application. In the case that the Secretariat has made a decision to permit such joinder, the multiple Claimants and/or, as the case may be, the multiple Respondents have failed to jointly appoint an respective arbitrator, the Chairman of SHIAC shall appoint all the arbitrators regardless of whether the parties have previously appointed the arbitrators.
> 2. [w]here the tribunal has been constituted and any Claimant or Respondent requests another party under the same arbitration agreement to be joined into the arbitration proceedings as a Respondent, the tribunal may decide whether to permit such application and such party has waived its right to re-appoint arbitrator and accepted the arbitration proceedings.

Although interventions by the additional party are not possible, it is remarkable that Article 37 (2) SHIAC Rules includes an advance waiver provision removing the additional party's participation rights concerning the arbitral tribunal's formation if a party files the joinder application after such formation, and the arbitral

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[170] The amendment could be achieved by the following clause: 'If any new agreement is entered into between […] any Party to this Agreement and a third party, the parties shall procure that this Agreement is amended to […] add such third party as a signatory to this Agreement' *see* Jan Paulsson, Nigel Rawding & Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts* 160 (3d ed., Kluwer Law International 2011).

[171] SHIAC, formerly known as the China International Economic and Trade Arbitration Commission Shanghai Sub-Commission, was established in 1988. SHIAC was one of the first five international commercial arbitration and mediation institutions included in the Chinese Supreme People's Court's 'One-Stop' Diversified Mechanisms for Resolving International Commercial Disputes. Both domestic and international arbitrations administered by SHIAC cover a wide range of commercial disputes, including financial management, international trade and sales of goods, private equity, construction projects, financial leasing, aviation industry, digital transactions, cultural, creative and entertainment, and so on. *See* https://www.shiac.org/pc/SHIAC?moduleCode=aboutus (accessed 18 Oct. 2023).

[172] Effective as of 1 Jan. 2015.

tribunal grants the joinder. As a consequence, the SHIAC Rules enable the forced joinder of an additional party (e.g., subcontractor) for the purpose of bringing recourse claims if the additional party is bound by the same arbitration agreement. It cannot remain unmentioned that advance waivers may be against the public policy in some jurisdictions (e.g., France) resulting in the non-recognition and non-enforcement of an arbitral award. For this reason, the party applying for the joinder should take into consideration in what jurisdictions the arbitral award will have to be enforced. In case of a joinder application prior to the constitution of the arbitral tribunal (Article 37 (1) SHIAC Rules), the SHIAC Secretariat decides on the joinder. Should all parties (including the additional party) have different interests (the additional party neither joins the claimant's nor respondent's side), or should a side consisting of multiple parties be unable to agree on the nomination of an arbitrator, the SHIAC Secretariat will appoint the entire arbitral tribunal. This approach is in line with international practice.

On a par with the SHIAC Rules, the Arbitration Rules (SCIA Rules)[173] of the Shenzhen Court of International Arbitration (SCIA)[174] also allow forced joinders (against the objection of an additional and an existing party) in combination with the advance waiver mentioned above if the additional party is bound by the same arbitration agreement.[175]

In contrast to the SHIAC and SCIA Rules, the CIETAC and CMAC Rules do not provide the possibility for an advance waiver after the formation of the arbitral tribunal: if the additional party in the case of a forced joinder (additional party must be bound by the same arbitration agreement; the joinder can also be forced upon an existing party) requests to nominate an arbitrator, the arbitral tribunal's nomination procedure for all parties starts from scratch again, with the potential of the CIETAC/CMAC Chairman having to appoint all arbitrators provided that either the claimant's side or the respondent's side is unable to agree on the nomination (or if the additional party does not join claimant's or respondent's side).[176]

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[173] Effective as of 21 Feb. 2022.

[174] SCIA, also known as South China International Economic and Trade Arbitration Commission, formerly known as CIETAC South China Sub-Commission and CIETAC Shenzhen Sub-Commission, was the first arbitration institution established in the Guangdong-Hong Kong-Macao area in 1983 http://www.scia.com.cn/en/index/aboutdetail/id/15.html (accessed 18 Oct. 2023).

[175] Article 20 (3) SCIA Rules: 'Where the SCIA has agreed to grant a joinder after the formation of the arbitral tribunal, the arbitral tribunal shall continue to hear the case. Any party that fails to participate in the formation of an arbitral tribunal shall be deemed to have waived such right'.

[176] Article 18 (5) in connection with Art. 29 CIETAC Rules; Art. 18 (5) in connection with Art. 33 CMAC Arbitration Rules.

Although very flexible in connection with consolidations, the BAC Rules do not accept joinder applications after the constitution of the arbitral tribunal, unless all parties (including any additional party) expressly agree to the joinder.[177]

Quite similar to the SHIAC and SCIA Rules, the SIAC Rules permit the forced joinder of additional parties prior to[178] and after[179] the constitution of the arbitral tribunal if the additional parties are bound by the same arbitration agreement. In contrast to the rules of the respective Chinese arbitration institutions, the SIAC Rules also allow interventions (joinder applications by non-parties). Prior to the constitution of the arbitral tribunal, the SIAC Court is authorized to grant a joinder application and to revoke the appointment of any arbitrators (appointed prior to the granting of the joinder) safeguarding all parties' (including additional parties') arbitrator nomination rights.[180] After the arbitral tribunal's formation, Rule 7.12 SIAC Rules stipulates that the additional party 'shall be deemed to have waived its right to nominate an arbitrator or otherwise participate in the constitution of the Tribunal'. Accordingly, Rule 7.12 SIAC Rules (much like Article 37 (2) SHIAC Rules and Article 20 (3) SCIA Rules) has to be qualified as an advance waiver provision. Explaining the rationale of Rule 7.12, *Choong/Mangan/Lingard*[181] consider it 'a contractual waiver of a joined party's right to challenge an award subsequently, on the basis that the party has not had an opportunity to participate (in full or in part) in the constitution of the tribunal'. In other words, by becoming a party of the same arbitration agreement under the SIAC Rules, the party to be joined agreed to the application of Rule 7.12 SIAC Rules. In this context, it must be stressed again that the enforcement of an arbitral award could be threatened in jurisdictions which do not accept advance waivers.[182] The waiver should not create any issues if the additional party applies for the joinder itself (intervention) and joins the proceedings without raising any objections.

In comparison with the SIAC Rules, the HKIAC Rules mainly differ in terms of the advance waiver provision. Article 27.12 HKIAC Rules determines that '[w]here an additional party is joined to the arbitration, all parties to the arbitration shall be deemed to have waived their right to designate an arbitrator'. The waiver applies for joinder decisions both prior and after the constitution of the arbitral tribunal.[183] Although the waiver is of contractual nature, too, the fact that the waiver covers all parties (not only the additional parties) creates a level playing field

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177 Article 14 (3) BAC Rules.
178 Rule 7.1 SIAC Rules.
179 Rule 7.8 SIAC Rules.
180 Rule 7.6 SIAC Rules.
181 Choong, Mangan & Lingard, *supra* n. 127, at mn 7.57.
182 *Ibid*.
183 Moser& Bao, *supra* n. 121, at mn 10.75.

by ensuring party equality in terms of the parties' involvement in the formation procedure of the arbitral tribunal.[184] This provision certainly facilitates enforcement proceedings in jurisdictions different from the seat of arbitration. Like the SIAC Rules, the HKIAC Rules permit interventions by additional parties,[185] even against the objection of all existing parties as long as the additional parties are bound by the same arbitration agreement giving rise to the pending arbitration.[186]

Article 7 (1) in connection with Article 6 (4) ICC Rules permits forced joinders (against the objection of both the additional and non-applying existing party) if the additional party is bound by the same arbitration agreement. Prior to the confirmation/appointment of any arbitrator, it is sufficient for a successful joinder to send a joinder request to the ICC Secretariat. The receipt by the ICC Secretariat will begin the arbitration against the additional party. After the confirmation/appointment of any arbitrator, a forced joinder (against the non-applying existing party) is only possible with the additional party's express consent to the joinder, the already appointed arbitrator(s) and the terms of reference (if already agreed upon between the existing parties).[187]

Thus, the ICC Rules choose a more conservative path by not allowing forced joinders against the objection of the additional party (being bound by the same arbitration agreement) after the confirmation/appointment of any arbitrator. Of course, the main rationale of this approach is to avoid any potential enforcement issues based on a non-involvement of a party in the constitution of the arbitral tribunal. The approach has the following consequence for the main contractor involved in an arbitration against the employer: if a subcontractor is a party to the same arbitration agreement (umbrella agreement), the main contractor (intending to bring recourse claims against the subcontractor) is well-advised to ensure that the ICC Secretariat receives the joinder request prior to the confirmation/appointment of the co-arbitrator nominated by the employer (in case of an arbitral tribunal composed of three arbitrators). Otherwise, it would provide the respective subcontractor with the opportunity to refuse the joinder. It should be mentioned as well that the ICC Rules do not permit joinder applications by additional parties.

Furthermore, the reference of Article 7 (5) ICC Rules to the prima facie jurisdiction in relation to the additional party being one decisive component for the joinder makes the forced joinder of third parties (not bound by the same arbitration agreement) impossible.[188]

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184 *Ibid*.
185 Article 27.9 HKIAC Rules.
186 Article 27.1 (a) HKIAC Rules.
187 Article 7 (5) ICC Rules.
188 Webster & Bühler, *supra* n. 105, at mn 7–46 et seq.; Ross & Asschenfeldt, *supra* n. 165, at 708.

3.5 Achieving legal certainty

Implied/indirect advance consents may create legal uncertainty to some extent because it is not certain how an arbitration institution or arbitral tribunal will apply the respective consolidation/joinder criteria contained in the applicable set of arbitration rules. Despite the fact that consolidations and joinders against the objection of a party (consolidations or joinders may not be in the interest of every party) are compatible with the principle of party autonomy and the consensual nature of arbitration under certain circumstances, there are better ways to implement these major principles of international arbitration. Arbitral awards based on advance waiver provisions (in connection with forced joinders) may not even be enforceable in some jurisdictions. Although implied/indirect advance consents provide a reasonable basis for a consolidation (in particular in the event of a series of related transactions), some parties may still be negatively surprised by such consolidation in the supply chain context.

For these reasons, the parties are well-advised to explicitly address consolidations/joinders in the arbitration agreement. If the parties do not wish to have multi-party proceedings, the arbitration agreement should expressly exclude consolidations and joinders. Alternatively, parties are free to describe in detail under which circumstances consolidations and joinders ought to take place.

3.5[a] *Sample Clause*

In the supply chain context, the author's[189] following sample clause may form the basis for the formulation of an arbitration clause containing (1) the parties' express consent to consolidations and joinders and (2) the obligation to pass on the arbitration clause along the entire supply chain:

> The Parties irrevocably consent to the consolidation of two or more pending arbitrations in relation to [insert defined Subject Matter/Project/Transaction/Related Contracts/Code of Conduct] in accordance with Art. [insert the consolidation provision of the applicable institutional arbitration rules] (effective as from [insert date on which the applicable institutional arbitration rules entered into force]).
>
> The Parties irrevocably consent to join [insert defined Related Parties eligible to be joined] as an additional party in relation to [insert defined Subject Matter/Project/Transaction/Related Contracts/Code of Conduct] in accordance with Art. [insert the joinder provision of the applicable institutional arbitration rules] (effective as from [insert date on which the applicable institutional arbitration rules entered into force]).

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[189] *See* Adolf Peter, *Pitfalls in Arbitration Agreements Involving Sino-Foreign Joint Venture Companies – The Significance of Foreign-Related Contracts, Supply Chain Disputes and the Shanghai International Arbitration Center as Alternative to Offshore Arbitrations*, 3 German Arbitration Journal (SchiedsVZ) 159, at 178 (2022).

> Each of the parties to this Arbitration Agreement shall enter into an identical form of this Arbitration Agreement with [insert defined Related Party] with whom they contract for [insert defined Subject Matter] in relation to the [insert defined Project/ Transaction].

3.5[b] *SHIAC Rules*

If the arbitration agreement is silent on the issue of multi-party proceedings, legal certainty can be achieved by agreeing on a set of institutional arbitration rules requiring express consent of all parties for both consolidations and joinders. As an example, the SHIAC Rules incorporate a strict express consent requirement both in relation to consolidations and joinders of third parties (e.g., subcontractors). Pursuant to Article 36 (1) SHIAC Rules, the arbitral tribunal may only order a consolidation if all parties of the related and pending arbitrations expressly consent. Notwithstanding SHIAC's forced joinders in connection with additional parties bound by the same arbitration agreement[190] (*see* above at 3.4[b]), in the event of joinders of third parties (not parties to the arbitration agreement giving rise to the pending arbitration; typical in construction and automotive supply chain scenarios), the arbitral tribunal must not grant a joinder application unless all parties (including the third party) expressly consent pursuant to Article 38 SHIAC Rules. In this context, interventions are possible as well.

3.6 The legal ramifications of the Chinese supreme people's court's foreign-related contract requirement for consolidations and joinders and the pitfalls of advance waiver provisions in China

It is no secret that Chinese companies play a significant role for international supply chains. BRI-related projects have to be mentioned in this context as well. In order to avoid invalid arbitration agreements (leading to the non-recognition and non-enforcement of foreign arbitral awards in Mainland China), Chinese companies (including Sino-foreign joint venture companies and wholly foreign-owned entities incorporated in Mainland China) may only conclude arbitration agreements referring to a foreign (non–Mainland Chinese) seat of arbitration and foreign arbitration institution if the underlying contract is deemed foreign-related.[191] Article 1 of the Chinese Supreme People's Court's Foreign-Related Civil Relations Interpretation provides the following five alternative criteria for the definition of foreign-related civil relations (contracts):

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[190] Article 37 SHIAC Rules.
[191] Peter, *supra* n. 189, at 166 et seq.

'Where a civil relationship falls under any of the following circumstances, the People's Court may determine it as foreign-related civil relationship:

1. where either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons;
2. where the habitual residence of either party or both parties is located outside the territory of the People's Republic of China;
3. where the subject matter is outside the territory of the People's Republic of China;
4. where the legal fact that leads to establishment, change or termination of civil relationship happens outside the territory of the People's Republic of China; or
5. other circumstances under which the civil relationship may be determined as foreign-related civil relationship'.[192]

Without going into too much detail,[193] taking into account Article 1 of the Chinese Supreme People's Court's Foreign-Related Civil Relations Interpretation, relevant Chinese case law[194] and the Chinese Supreme People's Court's FTZ Opinions,[195] it can be relied upon that a contract will qualify as foreign-related by Chinese courts if (1) one of the parties to an arbitration is incorporated outside of Mainland China, (2) the place of performance is outside of Mainland China, or (3) the dispute is between two wholly foreign-owned entities incorporated in a Mainland Chinese Pilot Free Trade Zone.[196]

3.6[a] *Impact on Consolidations*

Bearing in mind the Chinese foreign-related contract criterium, it should be emphasized that consolidations may lead to non-enforceable arbitral awards in

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[192] Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the 'Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships' (I), Fashi [2012] No. 24, adopted at the 1,563rd Session of the Judicial Committee of the Supreme People's Court on 10 Dec. 2012, issued on 28 Dec. 2012, entered into force on 7 Jan. 2013.

[193] For a detailed analysis of the foreign-related contract issue *see* Peter, *supra* n. 189, at 166 et seq.

[194] In particular the case Shanghai Golden Landmark Co., Ltd. *v.* Siemens International Trading (Shanghai) Co., Ltd., First Intermediate People's Court of Shanghai (2013), Hu Yizhong Minren (Waizhong) zi no. 2, 27 Nov. 2015.

[195] Supreme People's Court's Opinions on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones, Fafa [2016] no. 34. Art. 9 (1) provides that '[w]here wholly foreign funded enterprises registered in the Pilot Free Trade Zones agree to submit commercial disputes among them to offshore arbitration, the arbitration agreement shall not be deemed null and void simply on the basis that the disputes do not have any foreign elements'.

[196] Peter, *supra* n. 189, at 167 et seq.

Mainland China if contractual cascading mandating a non–Mainland Chinese seat of arbitration and the administration by a non–Mainland Chinese arbitration institution results in the consolidation of several pending supply chain–related arbitrations involving at least one arbitration between two Chinese parties (e.g., subcontract without sufficient foreign elements). For this reason, the passing on (contractual cascading) of arbitration clauses along the supply chain requires exemption clauses for supply chain–related contracts between Chinese parties. Such an exemption clause would allow Chinese parties to conclude an arbitration agreement referring to a Mainland Chinese seat of arbitration and a Mainland Chinese arbitration institution to administer the arbitral proceedings.

Needless to say, a consolidation with other pending supply chain–related arbitrations would no longer be possible because of different seats of arbitration, the involvement of different arbitration institutions (Mainland Chinese arbitration institution in the case between the two Chinese parties and a non–Mainland Chinese arbitration institution in the other supply chain–related cases), or the application of different institutional arbitration rules. The solution to enable the consolidation of all supply chain–related arbitrations (including arbitral proceedings between two Chinese parties without sufficient foreign elements) would be that the supply chain leading company mandates (by means of contractual cascading) a Mainland Chinese arbitration seat and the administration of all supply chain–related proceedings by a Mainland Chinese arbitration institution. This is by all means a feasible solution, as the Mainland Chinese arbitration institutions mentioned in this article may all be recommended for the resolution of international supply chain–related disputes.

3.6[b] *Impact on Joinders*

It must be pointed out that the foreign-related requirement applies to parties to the dispute (not parties to the contract).[197] In other words, a dispute will only by deemed foreign-related if, in relation to at least one party (to the arbitration), one of the alternative foreign-related criteria is fulfilled.[198] The following example illustrates the legal ramifications of the Chinese foreign-related approach in connection with a joinder. A contract between a Chinese (incorporated in Mainland China) and European party (incorporated in Europe) must be qualified as foreign-related because the European party is incorporated outside of Mainland China. If

[197] Herbert Smith Freehills, *Dispute Resolution and Governing Law Clauses in China-related Commercial Contracts*, 8th ed. 34 (Aug. 2020), https://www.herbertsmithfreehills.com/latest-thinking/dispute-resolution-and-governing-law-clauses-for-china-related-commercial-contracts (accessed 18 Oct. 2023).

[198] Veit Öhlberger, *China-Related Contracts: What to Consider When Agreeing on CIETAC Arbitration*, in *Austrian Arbitration Yearbook* 113, at 114 (Christian Klausegger et al. ed. 2009).

the European party's Chinese subsidiary (e.g., a Sino-foreign joint venture company incorporated in Mainland China) is a party to the same contract, the joinder of the European parent company may be required in the dispute between the two Chinese entities in order to avoid a non-enforceable arbitral award in China based on a possible lack of sufficient foreign-related elements between the two Chinese entities.

Another concern addresses advance waiver provisions (contained in institutional arbitration rules) in the context of forced joinders even if the additional party is bound by the same arbitration agreement.[199] Not being able to actively participate in the selection process of the arbitral tribunal may violate the principle of party autonomy. In this context, the refusal to enforce an SIAC arbitral award by the Shanghai First Intermediate People's Court (Shanghai Court)[200] must be brought to attention. The refusal was confirmed by the Chinese Supreme People's Court. In short, based on the successful claimant's application for expedited proceedings (SIAC Rule 5), a sole arbitrator conducted the arbitral proceedings, although the parties had agreed (in their arbitration agreement) upon a tribunal consisting of three arbitrators. The Shanghai Court held that the composition of the arbitral tribunal was not in accordance with the arbitration agreement[201] and thus violated the principle of party autonomy. The parties' consent to the application of the SIAC Rules was insufficient to override the parties' explicit agreement requiring a panel of three arbitrators.[202]

4 CONCLUSION

The CSDD Proposal's obligation to adopt a plan implementing the Paris Agreement's 1.5°C target and including GHG emission reduction objectives in combination with the CSRD's climate-related reporting requirements will undoubtedly provoke more climate litigations based on climate-washing allegations, if companies at the same time do not give serious consideration to the establishment of an effective due diligence mechanism preventing or mitigating adverse climate impacts along supply and value chains.

The climate-related cases involving Shell and TotalEnergies serve as evidence that companies doing business in the EU should not follow NIO's example (NIO does not control its suppliers) and wait to enforce GHG emission reduction objectives until the respective EU directives are transposed into the national

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199 *See* above at 3.4[b].

200 Noble Resources International Pte. Ltd. *v.* Shanghai Good Credit International Trade Co., Ltd. [2016] Shanghai No. 1 Intermediate People's Court (Hu 01 Xie Wai Ren No. 1).

201 Article V (1) (d) New York Convention.

202 Peter, *supra* n. 103, at 172 et seq.

legislation of the EU Member States and the transition periods have expired. Although the ESG-related halt of Borealis' construction project was caused by human rights–related allegations, it can be expected in the future that climate-related claims may lead to similar halts with all the negative consequences and potential damage claims. A corporate climate policy can best be implemented along a supply chain by contractual cascading. In this respect, Volvo serves as excellent example. Climate-related clauses in supply chain–related contracts or codes of conduct including mandatory GHG emission reduction targets, enforceable due diligence mechanisms and contractual escalation mechanisms (allowing to remove infringing supply chain members from the supply chain as a last resort and to claim damages) will be essential considering the ever-increasing rise of climate litigations initiated by NGOs and individual plaintiffs.

Enforcing corporate climate policies along an international supply chain requires well-drafted arbitration agreements taking into account potential multi-party proceedings. Parties ought to already address consolidations and joinders in the arbitration agreement. Should the arbitration agreement be silent in this respect, it is crucial to consider the different consolidation/joinder provisions contained in the various institutional arbitration rules. The rules of the HKIAC, SIAC, CMAC and BAC are most likely to allow consolidations against the objection of a party in construction and automotive supply chain scenarios characterized by different parties, contracts and (at least) compatible arbitration agreements. In terms of forced joinders, the arbitration rules of the LCIA are most flexible in that they allow a joinder of a third party not being bound by the same arbitration agreement against the objection of an existing party. Legal certainty can best be achieved by agreeing on the SHIAC Rules as they require the express consent of all parties (including third parties) for consolidations and joinders of third parties not bound by the same arbitration agreement (relevant for construction and automotive supply chain scenarios). If Chinese companies (including wholly-foreign-owned entities and Sino-foreign joint venture companies incorporated in Mainland China) are part of the supply chain, the Chinese Supreme People's Court's foreign-related contract criteria need to be considered in order to avoid invalid arbitration agreements, possibly requiring an agreement on a Chinese arbitration institution if consolidations and joinders should be enabled along the entire supply chain.