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Does the consolidation of arbitrations have an impact on party autonomy?

16/06/2014

Arbitration analysis: Jeremy Wilson, a partner in Covington & Burling's London office, considers whether there is a trend to include consolidation provisions in institutional rules and how this could affect lawyers and their clients.

Is there a trend to include provisions for consolidation in institutional rules? If so, why do you think this is the case?

A number of recently revised institutional rules now contain express provisions on consolidation (ie the combination of two or more separate arbitrations into a single arbitration). These provisions codify the long-standing practice of several institutions (whether or not explicitly sanctioned by the relevant rules) to consolidate arbitrations in appropriate circumstances, but the institutional rules can vary in some key respects.

In some situations the parties to separate arbitrations may not agree on consolidation. When this occurs and a tribunal has not been constituted, the relevant institution will typically make the decision on whether or not to consolidate the separate arbitrations. When consolidation is sought after a tribunal has been formed, more recent rules empower arbitrators to make the decision to consolidate (at least in part), while under other rules the institution decides. The recent International Centre for Dispute Resolution (ICDR) rules have a unique procedure for such decisions, requiring the appointment of a 'consolidation arbitrator', who has the power to consolidate two or more arbitrations in certain situations.

The institutional rules also differ in approach when the parties do not agree on consolidation. For instance, the draft London Court of International Arbitration (LCIA) rules 2014 require the tribunal to be the same in all arbitrations (if one has been appointed) for consolidation to be possible, but do not require that the dispute is brought under the same arbitration agreement or is connected to the same legal relationship or transaction (ie consolidation can occur if the parties are the same and there are compatible arbitration agreements). By way of contrast, for consolidation to be possible under the Hong Kong International Arbitration Centre (HKIAC), International Chamber of Commerce (ICC) and ICDR rules, the claims must be brought under the same arbitration agreement or the dispute must be connected to the same legal relationship or transaction. The HKIAC, ICC and ICDR rules do not necessarily require the tribunal to be the same in all arbitrations (it is only a factor to be considered if a tribunal has been appointed).

Arbitral institutions are including express provisions on consolidation to respond to the modern needs of users, who are increasingly likely to be party to multiple contracts for a single project or transaction. A breach of one contract may have a knock-on effect, resulting in the breach of a related contract. In these situations, consolidated proceedings may be more efficient and can avoid inconsistent findings on similar issues of fact or law. Institutional rules that account for this reality and provide helpful procedures for consolidation that protect the interests of all parties are more likely to be chosen by sophisticated users.

Could there be any unintended consequences? Could a party, for example, lose their right to appoint an arbitrator as a result of objecting to consolidation when a tribunal decides to consolidate despite a party's objection?

A party is unlikely to lose its right to appoint an arbitrator for merely 'objecting' to consolidation. But consolidation can result in losing the right to appoint an arbitrator. For instance, under the HKIAC rules and the ICDR rules, the parties are deemed to have waived their right to appoint an arbitrator where a decision is taken to consolidate the arbitrations. Additionally, consolidation can frequently result in multiple claimants or multiple respondents. Where this occurs, users should be aware that they may lose their right to appoint an arbitrator for other reasons. For example, the combined claimants or respondents may not be able to agree on a sole arbitrator, which will result in an appointment by the institution. Alternatively, the interests of the claimants or the respondents may not be perfectly aligned--this can create a *Dutco* situation (*Siemens AG and BKMI Industrieanlagen GmbH v Dutco Construction Co (Dubai)*--French Cour de Cassation decision of January 7, 1992, *Revue de l'arbitrage* 470 (1992)). In *Dutco*, the French Court de Cassation ruled that where respondents with divergent interests fail to agree on the appointment of a party-nominated arbitrator, the appointing authority must appoint the entire tribunal. This has generally resulted in the institution ignoring the claimant's nomination of an arbitrator.

Other unintended consequences may flow from the consolidation of arbitrations involving compatible--but not identical--arbitration agreements. Assume that there are two related arbitrations between A and B that related to the same project under separate arbitration agreements, and that the parties have not agreed to consolidate separate arbitrations. One agreement states that the place of arbitration should be London. The other agreement does not specify a place of arbitration. Under the ICC rules, the court has the discretion to order consolidation in these circumstances if requested by one of the parties, but will show restraint and caution in exercising that discretion. If consolidation occurred, then one of A and B may lose its right to negotiate the place of arbitration. Parties should be wary of these unintended consequences.

Should advisors inform clients of consolidation provisions in arbitral rules at the point of contracting? Is this a particular issue in any industry?

Consolidation issues are most likely to arise in industries where there are multiple contracts, potentially with multiple parties, relating to a single project or transaction. This is common in a number of sectors. Participants in the energy sector often work on up-stream and down-stream ventures with any number of interested parties at each stage. In the construction industry, even small projects usually have a single contractor entering into multiple contracts with several sub-contractors.

Contracts in the energy and construction industries are bespoke, but are usually based on a standard or model agreement. To preserve the option to consolidate--and, potentially, to encourage it--lawyers should advise clients to insert compatible arbitration clauses into their standard contracts (or at least the contracts related to the same project or transaction). Clients should opt for the same governing law and set of arbitral rules, the same seat of the arbitration and language of the proceedings and the same method of appointing the tribunal to ensure a compatible clause. Legal advisers should ensure that their clients appreciate the differences in the various arbitral rules on this subject (including some of those mentioned above) and understand the practical impact of the drafting. Doing so will help to avoid unintended consequences.

What are your best practice tips?

- o Opt for a set of sophisticated arbitration rules. Choosing institutional rules that expressly provide for consolidation avoids the complexity of trying to agree on procedures for consolidation after a dispute has arisen. There are several options and, as indicated above, the choice has practical consequences. Parties that routinely enter into multiple contracts relating to a single transaction or project should seek advice on this issue.
- o Consider agreeing that the relevant arbitral institution should appoint the tribunal. Particularly for contracts that will necessarily result in multi-party proceedings, parties should consider agreeing that the institution appoint the arbitrators. Divergent interests in consolidated proceedings mean that any party that loses its ability to appoint an arbitrator is likely to be

dissatisfied with the constitution of the tribunal. To avoid inequality between the parties, and expedite the constitution of the tribunal, parties to consolidated proceedings may wish to forgo the opportunity to appoint an arbitrator. Notably, this is the default position in the event of consolidation under the HKIAC and ICDR rules.

- o Use a case memorandum. In consolidated arbitrations involving multiple claimants and multiple respondents, there may be a divergence of interests not only between the claimants and respondents, but also within the group of claimants or the group of respondents. As a result, the tribunal may face a large number of initial overlapping submissions. To maximise efficiency, the claimant(s) should draft a case memorandum--a short, consolidated document that sets out the background to the dispute and a list of issues to be determined. All parties to the dispute must agree to the joint case memorandum, which serves as an effective tool to focus the parties and the tribunal on the issues at hand before determining the procedure for the arbitration.
- o If the parties are selecting the tribunal members, select the same tribunal in each arbitration. Multiple proceedings are unlikely to be consolidated where different tribunals have been constituted in the proceedings. (Indeed, absent the agreement of the parties, consolidation appears impossible under the current draft LCIA rules where the tribunals are not identical.) If multiple proceedings are likely to occur, parties should seek to appoint the same tribunal (including the chairperson) in each arbitration to preserve the option of consolidating multiple proceedings after they have been commenced. Parties should carefully contemplate the implications of this step insofar as it might be viewed as a potential conflict of interest. Paragraph 3.1.3 of the IBA Guidelines on Conflicts of Interest in International Arbitration identifies the repeated appointment of the same arbitrator by the same party (ie more than twice within three years) as an 'orange list' situation that may give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Have you noticed any similar trends recently? What are your predictions for the future in this regard?

Consolidation is increasingly common in the energy and construction industries, and beyond. In 2012, the ICC reported that while the number of multi-party arbitrations remained constant at about one third of all cases filed with the ICC, the number of consolidations accepted has increased.

Arbitration practitioners will need to continue to focus on their client's interests, thinking carefully about situations in which consolidation benefits their client, and situations where it does not. They can then take actions that either encourage or frustrate the possibility of consolidation. As consolidation becomes more routine, we will likely see lawyers developing new, innovative strategies that leverage the procedural complexity of consolidation to their client's best interests.

The institutional rules have made good progress on these issues. They must continue to develop and adapt to ensure that the procedures are easy to understand and implement. If they cannot do so while preserving the features that make international arbitration popular, such as the enforceability of awards and party autonomy, then users may become frustrated with the process as a whole and seek out other dispute resolution mechanisms.

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Interviewed by Lucy Karsten.

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