

Efficiency at all cost - arbitration and consolidation?

Kluwer Arbitration Blog

March 14, 2014

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Please refer to this post as: Lara Pair, 'Efficiency at all cost - arbitration and consolidation?', Kluwer Arbitration Blog, March 14 2014, <http://arbitrationblog.kluwerarbitration.com/2014/03/14/efficiency-at-all-cost-arbitration-and-consolidation/>

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Consolidation of multiple disputes into a single arbitration proceeding is considered progress with respect to the efficiency of the arbitration process. Consolidation is a procedural mechanism allowing for two or more claims to be united into one single procedure concerning all related parties and disputes.

On the surface, it seems more efficient to do everything at once, but a closer look reveals that this is not always the case. This blog will examine the different practical aspects of consolidation.

Consolidation may be of various types:

1. multiple parties to the same contract;
2. the same parties in multiple layers of a project;
3. the same parties to multiple contracts; and
4. multiple parties involved in multiple contracts and different projects.

Until very recently, the great majority of case law did not support consolidation, absent specific contractual authorization (e.g. *Connecticut General Life Ins. Co. v. Unicover Managers, Inc.*, 210 F.3d 771 at 773 [7th Cir. 2000]). This trend now seems to have been broken, with a number of arbitration rules enlarging consolidation rules (such as the Swiss Rules and the ICC Rules) and arbitral decisions, most notably the PCA tribunal decision recently commented on in the Kluwer blog.

The reason for litigation rules permitting the consolidation of many different claims into one proceeding is clear; it is a question of resources and not of the will of the parties. However, the same is not true in arbitration. Public policy concerns about efficient use or allocation of resources do not apply in arbitration. If the parties want to conserve their resources, they can still do so, as arbitration is a voluntary method of dispute resolution based on the will of the parties. The reason for permitting consolidation in arbitration has to be justifiable within the framework of arbitration, not litigation. Usually efficiency and saving costs and time are mentioned.

Arguments against consolidation made by objecting parties and some commentators focus on: (i) lack of the parties' consent; (ii) non-participation in the appointment of the arbitral tribunal; (iii) potential

infringements of a party's substantive rights; (iv) allocation of arbitral fees and other costs; and (v) general lack of efficiency.

A unified process avoids repetition or duplication of the same evidentiary materials in proceedings and related costs such as expert witness fees. A second source of savings relates to a single payment of arbitrator fees, an expenditure which often constitutes a significant portion of the costs of arbitration.

However, it is possible that single arbitrations may be more efficient for an individual disputant. A party to a consolidated case may have small or indirect claims, the determination of which is likely to take longer and be more expensive in a consolidated arbitration than in a purely bilateral dispute resolution (i.e. one claimant and one respondent).

Timing of the consolidation, compensation of dismissed arbitrators and duplication of already submitted evidence for the benefit of parties not previously part of the case create additional issues.

Timing is a central issue. While many rules take into account that early consolidation is a way to prevent as much duplication as possible, timing also limits the usefulness of the tool. Consolidation may become necessary even if the proceedings are at an advanced stage. Whether an arbitration is truly efficient when consolidated cannot be easily assessed.

Furthermore, when cases are consolidated after arbitrators have been chosen for both proceedings, one (set of) arbitrator(s) is superfluous. The dismissed (set of) arbitrator(s) is entitled to certain compensation, decreasing thus cost efficiency.

Similarly, costs may be increased because collection of evidence or other procedural steps must be repeated. Due to the principle that only evidence perceived in the courtroom may be taken into account, which requires the arbitrator to form his or her own conclusions, the impressions of the arbitrator during oral witness testimony cannot be adequately contained in a mere transcript. Even if a protocol with the insights of the previous arbitrator was created, the previous arbitrator is not the decision-maker. Especially from the common law perspective, in which the personal impression of the arbitrator forms a basis for assessment of evidence, non-repetition may be an issue.

As for contradicting awards, they may be avoided by other means. Adjudication by a neutral judge is guaranteed by most national jurisdictions. This arises both out of a desire to maintain governmental powers and prevent self-adjudication. National laws allow certain classes of disputes that concern only the parties to circumvent court systems by agreeing to arbitration, such as purely commercial disputes. Exceptions to enforcement mentioned in Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") pertain primarily to breaches of due process and a few other narrow exceptions (see e.g. 1985 UNCITRAL Model Law on International Commercial Arbitration, Articles 34 and 36; Article V New York Convention; 1986 Netherlands Code of Civil Procedure, Articles 1062 to 1068; 2011 French Decree reforming the law governing arbitration, Articles 1523 and 1525 read together with 1520; 1996 English Arbitration Act, s. 68, 69 and 103). As a consequence, inconsistent or contradictory awards may not be reconciled or set aside by annulment committees or judicial authorities. Conflicting or contradictory awards may be said to be inherent in the arbitral process and thus an acceptable risk. After all, the parties choose to leave the all inclusive jurisdiction of litigation and enter into a dispute resolution process outside of binding precedent. Furthermore, having obtained a decision in one forum could cause the parties to comply with this decision and its consequences, and not commence, or participate in, other proceedings that contradict the arbitral award. Many awards are adhered to without further litigation or disputes on the basis of the agreement to arbitrate.

Some argue, and this is also the opinion defended here, that the risk of inconsistent awards is slightly exaggerated from a theoretical point of view; arbitral practice shows that this risk rarely materialises and thus does not raise substantial problems. Others have argued that the risk of inconsistent or contradictory awards in and of itself diminishes the confidence of the international community in arbitration as an effective means of dispute resolution, as it may result in unjust or inequitable solutions, in particular where issues of public interest are at stake.

However, not all objections to efficiency through consolidation are based on the general nature of the consolidation. Some relate to the actual conduct of the arbitration.

An otherwise basic issue like the sequence of submissions by parties could prove problematic in consolidated arbitration. In the same vein, the question of how much time is allocated to each party can raise issues. One should bear in mind that it is a cardinal principle in arbitration that parties must be treated substantially equally, if party autonomy is the first principle to be applied in relation to arbitral procedure. Not every party may have the same interests in all issues.

Another problem is how to ensure confidentiality during the course of the consolidated arbitration proceedings. In a commercial dispute, it is likely that some confidential information such as trade secrets, confidential data etc. may be disclosed. Not all parties would be comfortable arbitrating together with parties not privy to sensitive information in the same proceedings.

Assuming that the emerging line of cases will allow arbitral tribunals to determine consolidation issues as a matter of procedure, other practical problems remain. Ad hoc tribunals make it difficult to coordinate decisions on such a question. Ad hoc panels cannot bind one another and if local law does not provide for consolidation by judges, there are no tools available to actually consolidate. Failure to comply with equal treatment and basic fairness requirements may lead to a refusal to recognize or enforce an award, or, at a minimum, while the proceedings are pending, may result in potential challenges brought both before arbitrators and the courts.

This author therefore wonders how efficient consolidation truly is in each case and hopes that it will be used with caution.