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Consolidation of Arbitral Proceedings and its Ramifications on a Party's Right to Challenge the Jurisdiction of the Tribunal and the Arbitral Award

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The potential ramifications on a party's right to challenge an award made in a consolidated proceeding should inform a party's decision to adopt institutional rules or national arbitration laws that allow for consolidation. Ensuring as a preliminary matter that the mechanism for consolidation and any waiver provisions in the institutional rules or national arbitration laws adopted accords with the parties' intent would avoid any unintended waiver of any grounds to set aside and/or challenge the enforcement of an award made in the consolidated proceedings.

The nature of a consolidation decision and its ramifications on a party's right to challenge the Tribunal's jurisdiction

A consolidation decision may be characterised as purely administrative or jurisdictional in the sense that the consolidation decision creates the jurisdiction of the tribunal of the consolidated proceedings. The characterisation of the nature of a consolidation decision is important as it may have ramifications on a party's right to challenge the jurisdiction of the tribunal of the consolidated proceedings.

It may be said that the consolidation decision by an arbitral institution under institutional rules (such as Article 10 of the 2017 ICC Rules, Article 28.1 2013 of the HKIAC Rules and Article 15 of the 2017 SCC Rules) which allow such consolidation may be regarded as administrative in nature. There are two common features of such a consolidation decision. First, there is no requirement for reasons to be given (for example, see Article 8 of the 2014 ICDR Rules and Rule 40.1 of the 2016 SIAC Rules). Secondly, there is no stipulated avenue for a party to challenge an institution's decision to consolidate proceedings. The institution's decision on consolidation is final.

An institution's decision to consolidate proceedings may be distinguished from an award or a ruling on jurisdiction. Unlike the institution's decision to consolidate proceedings, the latter typically contains reasons and may be set aside under the law of the seat of the arbitration and/or challenged at the enforcement stage. Thus, the institution's decision to consolidate, being administrative in nature, does not preclude a tribunal of the consolidated proceeding from making a determination on the validity of the consolidation in a ruling on its own jurisdiction. The 2016 SIAC Rules appear to adopt this view.

SIAC Rule 8.4 and Rule 8.9 clarify that the consolidation provisions (as with the joinder provisions in Rule 7.4 and Rule 7.10) in the SIAC Rules set out the procedural mechanism for consolidation. The SIAC Rules do not create the jurisdiction of the tribunal in respect of the consolidated proceedings. The tribunal of the consolidated proceedings retains *kompetenz-kompetenz* to decide on its own jurisdiction, including any challenge to its jurisdiction on the basis of the institution's decision to consolidate.

In contrast, there are institutions that appear to treat the consolidation decision as jurisdictional in nature. Article 28.8 of the 2013 HKIAC Rules states that "parties waive any objection, on the basis of HKIAC's decision to consolidate, to the validity and/or enforcement of any award made by the arbitral tribunal in the consolidated proceedings, in so far as such waiver can validly be made". The underlying premise of this waiver provision appears to be that the tribunal of the consolidated proceedings has valid jurisdiction to make an award pursuant to the institution's decision to consolidate proceedings.

However, having regard to the fundamental principle in international arbitration that the tribunal has *kompetenz-kompetenz* to rule on its own jurisdiction, the better view is that the initial decision by the arbitral institution to consolidate should be regarded as administrative in nature, and should not purport to create the jurisdiction of the tribunal of the consolidated proceedings. After all, the initial decision to consolidate does not bear the hallmarks of a jurisdictional ruling or award (i.e. containing reasons and subject to challenge). The tribunal of the consolidated proceedings should retain the competence to rule on its own jurisdiction, including any challenge to its jurisdiction on the basis of the initial decision to consolidate.

This view might be regarded as procedurally inefficient because a party objecting to the consolidation is effectively given a second bite at the apple. However, it upholds the fundamental principle in international arbitration that the tribunal of the consolidated proceedings has competence to rule on its own jurisdiction. It further acknowledges the fact that the initial decision-maker (institution or tribunal) may not have been in the best position to make a decision on consolidation at an early stage of the proceedings because there might have been insufficient information available at that time.

The agreement to consolidate and its ramifications on a party's right to challenge the award

Consolidation of proceedings contrary to parties' consent negates party autonomy and would jeopardise the enforceability of an award made by the tribunal of the consolidated proceedings. However, even where parties have consented to apply institutional rules or national arbitration laws which allow for the consolidation of proceedings, such agreement may have ramifications on the grounds available to a party to challenge an award made by the tribunal of the consolidated proceedings. Three potential ramifications are discussed below.

First, by agreeing to adopt institutional rules that grant the institution the power to decide to consolidate proceedings, parties may be deemed to have waived their right to challenge an award made by the tribunal of the consolidated proceedings on the basis of the institution's decision to consolidate. Article 28.8 of the HKIAC Rules which has been mentioned above provides such an example. Notably, parties can waive their right to set aside an arbitral award in some jurisdictions: see Article 1522 French Code of Civil Procedure and *Noble China Inc v Lei* (1998) 42 O.R. (3d) 69; 42 B.L.R. (2d) 262.

Even if the institutional rules do not contain such a waiver provision, it would be prudent for parties to expressly reserve their rights to challenge any award made by the tribunal of the consolidated proceedings on the basis of the initial decision to consolidate. In *Karaha Bodas v Pertamina* (No 2) [2003] 4 HKC 488, the Hong Kong Court observed (at [29] and [36]) that the fact that the defendant had made no challenge to the decision on consolidation (and appointment of arbitrators) to the supervisory court and had remained silent until the enforcement stage "may be construed as a waiver, if indeed there had been an irregularity".

Secondly, by agreeing to adopt arbitral intuitional rules that grant the institution the power to decide to consolidate proceedings, parties may be deemed to have waived their right to designate an arbitrator.

There are several institutional rules which provide that parties waive their right to designate an arbitrator in the event of a consolidation of proceedings. Examples of these rules include Art 4 of the SRIA Rules and SIAC Rule 8.12. Parties' agreement to adopt such rules endangers a party's right to set aside and/or challenge the enforcement of an award made by the tribunal on the basis that the composition of the tribunal was not in accordance with the parties' agreement under Article 34(2)(a)(iv) of the Model Law and Article V(1)(d) of the New York Convention.

Thirdly, parties may have agreed to apply the law of the seat of the arbitration which allows the national court to order consolidation of arbitrations (for example, the Hong Kong Arbitration Ordinance). Such agreement may affect a party's right to challenge the award made by the tribunal of the consolidated proceedings. For instance, where the consolidation decision is made by the court of the seat of the arbitration in accordance with the law of the seat, it would be difficult for a party to challenge an award made by the tribunal of the consolidated proceedings on the basis that the arbitral procedure and/or constitution of the tribunal was "not in accordance with the law of the country where the arbitration took place" (i.e. the law of the seat) under Article 34(2)(a)(iv) of the Model Law and Article V(1)(d) of the New York Convention.

Concluding remarks

Fidelity to efficiency in international arbitration demands that multi-contract disputes should be consolidated before a single arbitral tribunal. Consolidation reduces time and costs of resolving the dispute and prevents inconsistent / duplicative decisions on related claims and factual issues. However, before agreeing to consolidation, parties should be forewarned of the potential ramifications on their rights to challenge the jurisdiction of the tribunal of the consolidated proceedings and/or an award made in the consolidated proceedings.

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