Kluwer Arbitration Blog

The Current Framework of Consolidation in Arbitration in Bosnia and Herzegovina: No Sustainability Without Reform

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Consolidation of arbitral proceedings is commonly regarded as a procedural device designed to deal with the challenges associated with complex cases. It is a method that combines multiple proceedings and harmonizes the final outcome of the disputes that bear significant resemblance, thus eradicating the risk of having contradictory awards rendered on a closely related set of facts. As such, it contributes to consistency as well as procedural and cost efficiency.

However, this post does not build upon the "intuition" that consolidation is inherently advantageous procedure and is cognizant of some of the apparent shortcomings presented by such practice. The post recognizes that the urge to aggregate proceedings must not amount to an abuse of discretion, and nor should it undermine the viability of individual-specific conditions to each case. That said, the ambiguity surrounding the proceeding of consolidation under the legal framework of Bosnia and Herzegovina ('BiH') prevents such practice to strike a proper balance between the party autonomy and the necessity of harmonization of arbitration awards.

This blog post first highlights some of the shortcomings associated with the current legal framework of BiH with respect to the consolidation proceedings. Then, it proceeds to elaborate upon the possible adverse implications of such open-textured and abstract regulations on the practice of arbitration. Finally, it proposes some factors to be considered in a much-needed reform.

Consolidation under BiH Legal Framework

BiH has a fairly unique and complex legal system due to its multi-layered constitutional regime. Consequently, its *lex arbitri* is fragmented, and is to be found in several different enactments. More precisely, the relevant provisions are not contained in one stand-alone arbitration act or in several different arbitration-dedicated enactments. Rather, they form part of several different acts of civil procedure, including the Civil Procedure Act of the Federation of Bosnia and Herzegovina 2003 ('FBiH CPA'), the Civil Procedure Act of the Republic of Srpska 2003 ('RS CPA'), and the Civil Procedure Act of the Br?ko District 2003 ('District CPA'). All these operate in conjunction with each other and form the national arbitration legal framework.

The concept of consolidation appears in all of these codes, none of which provides a detailed and comprehensive account of the circumstances under which the consolidation ought to be ordered.

For instance, the FBiH CPA allocated a section to arbitration (Articles 433-453), but these do not address any issues regarding consolidation. The matter of consolidation is addressed in Article 83 of the FBiH CPA, but this provision deals exclusively with court proceedings, and it provides judges in this regard with substantial discretion. Moreover, the Arbitration Court with the Foreign Chamber of Commerce of Bosnia and Herzegovina ('Arbitration Court') briefly refers to the concept of consolidation in Article 40 of its institutional rules (Rules on Organization and Work of the Arbitration Court – hereinafter 'Rules') without any significant elaboration.

None of the above provisions envisage further conditions as to the degree to which consolidation is permitted and whether the decision to consolidate is subject to appeal. The vagueness surrounding how the circumstances under which consolidation is permitted has provoked confusion with respect to the nature of consolidation as a procedural or administrative practice. This characterization has a significant bearing on the possibility of challenging an award later on, and also on the rules that the consolidation decision will be subject to. Turning back to Article 83 of the FBiH CPA, while exclusively dealing with the court's approach to consolidation, this Article captures the legislator's intent to treat consolidation as a purely administrative process. It requires no consent from the parties, and the court enjoys almost unfettered discretion to determine whether consolidation is justified or not.

It is noted in the Commentary to the FBiH CPA that parties often sought consent to consolidation as a tactic to delay the process and obstruct the smooth operation of the proceeding. Even in cases where one party would grant consent, the opposing party would refuse to do so for no valid reason. As a result, in order to expedite the proceedings, the recent amendments to the Federation CPA removed the requirement of parties' consent and conferred wide discretion onto court to determine the viability of the consolidation decision. The amendment introduced a number of factors to be taken into account when deciding in relation to consolidation. However, it does not contain information on whether further reasoning is required nor does it stipulate an avenue for a party to appeal the consolidation decision, and the court's decision is believed to be final.

It is not clear what kind of implications this provision may have on the practice of consolidation within the arbitration context. However, it can be argued that the BiH legal framework, in the absence of hard guidance, is leaning towards treating consolidation as more of an administrative process where judges are afforded wide discretion in making such determination. The practice of ordering consolidation within the arbitration context, both under the BiH institutional and *ad hoc* arbitration frameworks, is rare. It is perhaps because of the lack of specificity and the ambivalent nature of this procedure that prevented it from being regarded as a useful procedural device to elevate harmony and increase cost-efficiency.

Consolidation Practice and Its Adverse Implications on the Arbitral Proceedings

The abstract and open-textured language of consolidation contained in BiH *lex arbitri* and institutional rules may have negative implications on arbitration in a number of significant ways. Namely, the scope and ambit of the power of arbitral tribunal emanate from the arbitration agreement. Therefore, this consent-driven process would normally prevent the introduction into the proceedings of claims or parties which are not within the scope of the agreement that the contracting parties had agreed to and which forms the mandate of the arbitral tribunal.

The broad scope of the consolidation concept within the BiH legal framework and the lack of sensible constraints on the power of arbitrators may undermine dedication to individual fairness and diminish the party's autonomy over its case. If the arbitrators are delegated with the prime responsibility of consolidation with no precise and delineated standards, then they may make such determination in an unfettered manner, thus running the risk of rendering the decision in an arbitrary or partial fashion.

If the language of the rules is skewed in favour of consolidation, then there would be some impetus to submerge the individual features of cases. That is, if the disputes are not handled based on their specificity and sensitivity, this may effectively deny meaningful access to justice by deflecting attention from features that distinguish cases from one another. Consolidation may also substantially affect the rights and interests of the parties by impacting discovery incentives on both sides. It may also adversely impact compensation consideration by leaving the strongest claims with insufficient or inadequate compensations, thereby negatively impacting the equilibrium of the parties.

Since the existing regulations provide extensive discretion for arbitrators without advancing coherent guidelines, it is not clear what actions may amount to an abuse of discretion. Thus, the notion of consolidation under BiH rules bears re-examination to ensure proper balance of party autonomy and harmonization of arbitration decisions.

The Need for Comprehensive Reforms: Taking into Account Some Critical Considerations

As the above analysis shows, the current legal framework of consolidation in BiH is plagued by opacity regarding the scope of arbitrator's power and the underlying nature of consolidation. It requires comprehensive reforms to account for a more efficient and sophisticated framework that is consistent with the archetype of modern international standards. In this regard, the arbitration framework of Montenegro, a neighbouring country with a comparable legal system, seems to strike a much better balance between the competing interests by setting out clear guidelines as regards consolidation in Article 11 of the Arbitration Rules of the Arbitration Court at the Chamber of Economy of Montenegro. The mentioned Article 11 recalls the importance of the parties' consent, and it is on this foundation that any future reform in BiH ought to be built. To this end, we offer some critical considerations that the legislators in BiH ought to take into account when, and if, they decide to rehaul their approach to consolidation in arbitration proceedings.

Firstly, it is important that the application of consolidation practice enshrines a focused and confining regime that articulates the nature of consolidation, the availability of appeal mechanisms either through court or arbitral tribunal, and the necessity that the order be accompanied by reasoning. Defining the nature of consolidation and formulating guidelines with respect to reasoning will remove the possibility of having a different substantive law apply to different cases and will promote the harmonization of the consolidation process.

Secondly, the practice of consolidation should not be self-executing, and the arbitrators should at least adhere to rule-based standards that are sensitive to the competing interests of commonalities, specificity, party autonomy and harmonization. The current framework with its ambiguous and self-executing language seems to tip the scale more in favour of expanding arbitrators' authority while diminishing party autonomy. Finally, introducing a formula-based threshold that contains

conditions that trigger consolidation proceeding will compel arbitrators to adhere to objective standards instead of relying on a wide latitude of discretion to determine the viability of their decision.

Conclusion

There exists a strong need to amend the current legal framework of BiH to incorporate standards that enhance the practice of consolidation in the realm of arbitration. Adopting standards that are analogous to those of the modern archetype of consolidation, in particular those that prescribe precise and specific standards, would fortify the practice of consolidation in BiH. To this end, we have suggested several factors to be taken into account in the much-needed reform. If these were to be heeded by the legislators in BiH, the country's arbitration framework, in our view, would be materially improved.

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