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The Consolidation Arbitrator – An Arbitrator Too Far?

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Whilst many institutional rules now contain provisions which expressly address the complex issue of consolidation, the recently revised rules of the International Centre for Dispute Resolution (the "ICDR"), the international arm of the American Arbitration Association (the "AAA"), are the first to have introduced the novel concept of the "consolidation arbitrator". Under the ICDR Rules, rather than granting the power to consider and ultimately order consolidation to either the institution itself or a tribunal which has already been appointed in one of the existing arbitrations, a separate, specifically-appointed consolidation arbitrator is appointed for the task.

Whilst this innovation seeks to address a number of procedural complexities associated with the issue of consolidation, this post also examines some of the potential difficulties and disadvantages which might arise in practice.

Under Article 8 of the ICDR rules, a party can request the Administrator of the ICDR to appoint a consolidation arbitrator, who has the power to consolidate two or more arbitrations into a single arbitration. Consolidation may be ordered when (i) the parties have expressly agreed to consolidation (ii) all the claims are made under the same arbitration agreement or (iii) all the claims are made under more than one arbitration agreement, the arbitrations involve the same parties, the disputes in the arbitrations arise in the same legal relationship and the consolidation arbitrator finds the arbitration agreements to be compatible.

The consolidation arbitrator is afforded broad powers. In particular, he or she has the power to stay any or all of the pre-existing arbitrations which are subject to potential consolidation. Further, when arbitrations are consolidated, whilst the default position is that they shall be consolidated into the arbitration that commenced first, the consolidation arbitrator has the discretion to decide otherwise. Therefore, theoretically, the consolidation arbitrator could decide to appoint an entirely new tribunal. Relevant circumstances which can be taken into account include the applicable law, whether one or more arbitrators have been appointed in more than one of the arbitrations, the progress already made in the arbitrations, whether the arbitrations raise common issues of law and/or facts, and whether the consolidation of the arbitrations would serve the interests of justice.

The introduction of a consolidation arbitrator ensures that the decision-making function relating to what is a complex and difficult issue is performed by an independent and appropriately-qualified third party. It therefore avoids the potential conflict of interest posed by vesting such a power in an arbitrator who has already been appointed, and it also divorces what is a substantive decision-making function from the administrative division of the institution.

However, it is possible to identify a number of potential draw-backs of this mechanism.

First of all, it appears from the rules that a consolidation arbitrator can be appointed even when both parties agree to consolidate the proceedings (upon the request of a party). In such circumstances, it may be that the appointment of a consolidation arbitrator is a mere formality, to assist with the practical implementation of the agreement to consolidate. However, this is not clear from the ICDR Rules. Rather, it seems that a consolidation arbitrator would still have the power to consider the relevant circumstances and decide not to consolidate the proceedings. If so, in circumstances where the parties have reached agreement and there is no procedural or substantive "dispute" as to the way forward, there is a question as to whether the consolidation arbitrator would have the jurisdiction to take such a decision. Is it a sufficient basis for jurisdiction that the parties have agreed to implement the ICDR Rules? It is arguable that the jurisdiction of the consolidation arbitrator is derived solely in relation to a dispute concerning the issue of consolidation. In the absence of such a dispute, there is a question as to whether the jurisdictional basis for such an appointment would be open to challenge, presumably before the consolidation arbitrator (under the principle of kompetenz-kompetenz) or in the courts of the seat. In practice however, if the parties are agreed to consolidation, they could agree to amend the arbitration agreement so as to provide for consolidation without appointment of a consolidation arbitrator, disapplying Article 8. It would be slightly unfortunate if, the parties having agreed to the ICDR Rules, they then find themselves re-opening the arbitration agreements before their disputes are resolved.

It is also unclear what the status of the consolidation arbitrator's pronouncement is. Article 8 refers to a "decision" but arguably the consolidation arbitrator issues an award. It finally resolves the only issue of substance between the parties put before the consolidation arbitrator, and it is intended to be final and binding. However, if it is an award, it could be challenged in accordance with the laws of the seat and presumably, could be recognized and enforced under the New York Convention. If so, is the "award" of a consolidation arbitrator more valuable than a consolidation "order" from an existing tribunal – which cannot be challenged (but equally cannot be enforced)?

Lastly, there is the issue of cost. Issues of consolidation can be extremely complex, particularly where there are multiple parties and multiple agreements to be taken into consideration. Whilst it is important that the consolidation arbitrator has the power to conduct as thorough an investigation as possible in order to reach a considered decision (and the ICDR Rules provide for this by listing a number of factors to be taken into consideration), there will no doubt be an additional cost associated with such a process. Parties will have to pay the fees of an additional arbitrator alongside the costs of that arbitrator's consultation (which could involve additional time spent by the tribunals already established), which could include a detailed investigation of relevant facts and law, potentially involving an element of duplication, as some aspects may have already been pleaded before an existing tribunal. This process may also take considerable time, slowing down the progress of the arbitration(s).

Whilst the ICDR's provision for a consolidation arbitrator may be an advantage for some parties, particularly in complex multi-party and multi-contract scenarios, this must also be weighed against its potential for causing a disproportionate increase in costs, even in circumstances where the parties may largely agree on the way forward.

The views expressed are those of the author.

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