

The issues of consolidation in construction arbitration

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Multi-party/multi-contract disputes

Construction disputes often involve more than two parties. It is common for an employer to enter into a construction contract with a main contractor, who then sub-contracts different parts of the works to a number of sub-contractors. The result is that multiple, interconnected construction contracts are in place between various different parties on one project.

In the event of a dispute, there may be many potential causes of action under the various contracts. A single dispute may involve the employer, the contractor and a number of the subcontractors, suppliers and consultants.

If all the contracts are subject to the jurisdiction of the court, this is easily managed by the CPR and the court will ensure all the related claims are joined ('consolidated') into the same proceedings. However, where some or all of the contracts contain an arbitration agreement, the court or tribunal cannot do so without the parties' consent. This can give rise to more than one set of proceedings addressing the same underlying issues. This is often referred to as parallel proceedings.

Parallel proceedings

There are two obvious disadvantages of parallel proceedings. The first is that there is a significant risk of conflicting results. A dispute between the employer and the main contractor may result in a finding of liability on the part of the main contractor as a result of the subcontractor's work. However, a different tribunal in the dispute between the main contractor and the subcontractor may reach a different conclusion and not find the subcontractor liable. This would leave the main contractor unable to recover the amounts it has to pay the employer from the subcontractor.

The second is that parallel proceedings will lead to unnecessary duplication of time and cost.

Avoiding parallel proceedings in arbitration

Whether all the parties can be compelled to participate in one single arbitration will depend upon:

- whether the relevant contracts all contain an arbitration agreement
- whether or not provision has been made in the arbitration agreements for consolidation of different arbitration proceedings
- the arbitration rules which are selected
- the applicable law of the contract

Contractual arbitration agreements

Although institutional arbitration rules and applicable laws can provide for consolidation of arbitration proceedings (see below), the consent of the parties is still usually required and is not always forthcoming. In any event, such rules and laws do not provide the certainty offered by a well drafted arbitration agreement.

If some contracts on a construction project provide for arbitration, and some do not, there is a risk of parallel proceedings taking place in different forums (litigation and arbitration), which cannot be consolidated without the parties' consent.

This risk also exists if all the contracts provide for arbitration, but do not consistently provide for consolidation of arbitration proceedings.

Therefore, if parties to construction contracts want to use arbitration to resolve their disputes, it is recommended that the following steps be taken at the contract drafting stage:

- ensuring all the contracts on the project contain compatible and consistent arbitration agreements
- ensuring that the terms of all arbitration agreements clearly and consistently provide for consolidation
- considering whether express wording in the arbitration agreements is required to diverge from any applicable arbitration rules, which may deal with and/or restrict consolidation. If possible, it is usually preferable for consolidation to be clearly set out in the arbitration agreements, which will take precedence over any applicable arbitration rules

(References: [Lafarge Redlands Aggregates v Shephard Hill Civil Engineering \[2000\] All ER \(D\) 1073](#))

Arbitration rules

Notwithstanding that it is generally preferable to provide for consolidation in the contractual arbitration agreements, applicable institutional arbitration rules may provide for consolidation in certain circumstances. For example:

The (old) International Chamber of Commerce (ICC) Rules 1998 provide for a limited consolidation mechanism. This provides that the ICC may, at the request of a party, include claims contained in a separate request for arbitration in existing proceedings between the same parties. However, the ICC will usually refuse consolidation where the request involves a third party.

The (new) ICC Rules 2012 have a wider mechanism which provides that two or more arbitrations may be consolidated subject to the agreement of all parties; or if all the claims are being made under the same arbitration agreement, or the arbitrations are between the same parties and arise in connection with the 'same legal relationship'.

The London Court of International Arbitration (LCIA) rules provide for the joining of one or more third parties to an arbitration, on the application of a party. Only the applicant and the third party need consent.

(References: [ICC Rules 1998, art 4\(6\)](#))
(References: [ICC Rules 2012, art 10](#))
(References: [LCIA Rules, art 22.1\(h\)](#))

Applicable law

In addition, some governing laws also provide for consolidation in limited circumstances.

However, the majority of laws recognise that arbitration is fundamentally a consensual process, and therefore that consolidation requires the consent of the parties. For example, Section 35 of the English Arbitration Act 1996 provides that:

(References: AA 1996, s 35)

- (1) The parties are free to agree
 - (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
 - (b) that concurrent hearings shall be held...

Notable examples of jurisdictions which provide for consolidation of arbitration proceedings without consent of all parties are:

Hong Kong, although only in relation to domestic arbitrations giving rise to common questions of law or fact

The Netherlands, where the District Court of Amsterdam can order consolidation of two or more arbitrations. The construction industry is the principal user of this law

(References: United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958)

However, in the few jurisdictions which provide for consolidation, significant difficulties remain. For example, because the system in the Netherlands may offend the principle that arbitration is consensual, it is arguable that it is contrary to the regime for enforcement of international arbitral awards.

Conclusion

Arbitration is a consensual process. The parties are free to choose arbitration (or not) and in what form. Without express agreement they are not (in most jurisdictions) obliged to act in a prescribed manner in relation to consolidation of proceedings.

As set out above, institutional arbitration rules and national laws may provide for consolidation, but usually the consent of the parties is still required. In addition, such provisions are unlikely to provide the certainty offered by clear contractual arbitration agreements which deal with consolidation.

Therefore, if parties to construction contracts want to use arbitration to resolve their disputes, it is recommended that steps are taken at the contract drafting stage to ensure that compatible and consistent arbitration agreements, which tackle the issue of consolidation, are incorporated across all the contracts on the project.

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