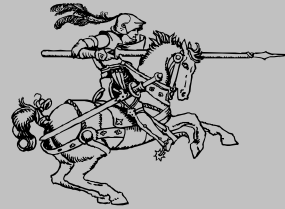


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Consolidation of arbitration proceedings



by Dmytro Donenko

Senior Associate
ENGARDE Attorneys at Law



Consolidation

Case Study:

- Complex M&A transaction on acquiring a large Ukrainian business;
- Multiple parties: 2 Buyers, Guarantor, 2 Sellers;
- Multiple contracts and arbitration clauses: SPA, Loan Assignment Agreement, Deferred Purchase Price Agreement etc.

Initial Claim:

Two Buyers and Guarantor v. Two Sellers re finding all transaction documents *void ab initio* on the basis of fraud.

Parallel proceedings:

- 1) First Seller v. First Buyer re payment under Loan Assignment Agreement;
- 2) Two Sellers v. Guarantor re payment under the Deferred Purchase Price Agreement.



Consolidation

Consolidation

is a procedural device which denotes the process whereby two or more claims are united into one single procedure concerning all parties and all disputes.

When?

1. One contract – same parties;
2. One contract – different parties;
3. Multiple contract – same parties;
4. Multiple contracts – different parties.



Pros and Contras of Consolidation

Pros

- Better procedural efficiency in most cases;
- Lower costs;
- No risk of inconsistent decisions rendered in different proceedings.

Contras

- Consolidation without parties' consent runs counter to the intent of the parties and the nature of arbitration as a consensual process;
- Non-participation of all parties in appointment of arbitrators;
- Higher risk – possible challenges and enforcement issues;
- Confidentiality issues;
- Apportionment of costs issues.



Consolidation under Arbitration Rules

Consolidation without parties' consent is possible in limited number of institutional arbitration rules:

- ICC Rules of Arbitration (2012);
- LCIA Rules of Arbitration (2014);
- SCC Rules of Arbitration (2010);
- Swiss Rules of International Arbitration (2012);
- VIAC Rules of Arbitration (2013).

Arbitration rules for *ad hoc* arbitration proceedings (such as UNCITRAL) do not generally contain provisions on consolidation.



ICC Rules of Arbitration (2012)

Article 10

- Upon request of a party only;
- If timing is correct – before the procedure for appointment and confirmation of arbitrators is completed;
- If the requirements for consolidation are met:
 - There is parties' agreement; or
 - All claims are made under the same arbitration agreement; or
 - Different arbitration agreements, but
 - Arbitrations are between the same parties; and
 - disputes arise in connection with the same legal relationship (same economic transaction); and
 - arbitration agreements are compatible;
- At the ICC Court's discretion (the Court is not bound to consolidate proceedings).

Consolidation under Arbitration Rules

| | ICC | LCIA | SCC | Swiss Rules | VIAC |
|---|---|------------------------|--|-------------|--------------------------------------|
| One contract – same parties | Yes | Yes | Yes (if same legal relationship, only for new claims) | Yes | Yes (same arbitrator, same place) |
| One contract – different parties | Yes | No | No | Yes | Yes (same arbitrator, same place) |
| Multiple contracts – same parties | Yes (if compatible, same economic transaction) | Yes (if compatible) | Yes (if same legal relationship, only for new claims) | Yes | Yes (same arbitrator, same place) |
| Multiple contracts – different parties | No | No | No | Yes | Yes (same arbitrator, same place) |



National Laws on Consolidation

National legislations are mostly silent on the issue of consolidation.

BUT

National legislations allowing consolidation without consent of parties:

- The Netherlands;
- USA (in particular states).

National legislations expressly prohibiting consolidation without consent of parties:

- UK;
- Australia.



National Laws on Consolidation

Article 1046 of Code of Civil Procedure of the Netherlands:

- Court may consolidate arbitral proceedings without parties consent, if:
 - Place of all arbitrations is in the Netherlands;
 - Subject matters of all arbitrations are related;
 - Parties have not opted out such possibility;
- Exclusive jurisdiction to decide of consolidation is vested on Provisional Relief Judge of the District Court in Amsterdam
- If necessary, Judge may appoint arbitrators and determine procedural rules.



Challenge of Consolidation

Challenge before the Arbitral Tribunal:

- The prevailing view in doctrine is that a decision of institution may and must be challenged before the arbitral tribunal;
- Decision of arbitral institution is *prima facie* decision. Final decision is upon the arbitral tribunal;
- Arbitral tribunal may not decide to deconsolidate, but may decide that it has no jurisdiction to hear both cases;
- Powers of arbitral tribunal to decide on challenge are based on *competence competence* principle;
- The issues to decide:
 - Whether both cases are included within the scope of respective arbitration agreements;
 - Whether the second case falls within the material and personal scope of the other agreement;
 - Whether the parties validly consented to hearing the cases together;
- Failure to protest within the time limit constitutes irrevocable waiver.



Challenge of Consolidation

Challenge before the state courts of the seat of arbitration:

Prevailing view is that a decision of arbitral institution on consolidation may not be directly challenged in the court :

- it does not terminate any aspect on merits;
- no prayer for relief is answered by consolidation;
- all claims remain and are still to be decided.

Decision on consolidation may be challenged indirectly within the proceedings for setting aside an arbitral award.

BUT

Parties must be mindful of waiver to jurisdictional objections. If objections to jurisdiction is not raised in arbitration, a party most likely will be precluded from raising this argument in court.



Challenges of Consolidation

Challenge in states of enforcement:

- Prevailing view is that decision on consolidation may be challenged in the state of enforcement:
 - Lack of Jurisdiction – Articles V(1)(a) and (c) NYC;
 - Violation of Party Agreement – Article V(1)(d) NYC;
 - Violations of Due Process and Public Policy – Articles V(1)(b) and V(2)(b) NYC.
- However, many national jurisdictions contain provisions that prohibit the assertion of the violation of rights after a substantial amount of time has passed or in cases of *venire contra factum proprium*;
- *Res judicata* may also prevent the renewed assertion in relation to defenses that relate to the same applicable law.



Challenges of Consolidation

Practical implications to avoid challenges:

- The procedure must ensure that all parties had a possibility to appoint and to challenge arbitrators;
- All parties are to have access to all case materials irrespective to confidentiality issues;
- Procedural orders are to be altered if there is a risk of unequal treatment;
- All parties are to be provided with a possibility to participate in all stages of the proceedings.



If Consolidation Fails...

Alternatives to consolidation:

1. Appointment of the same arbitrators;
2. To run arbitrations in parallel;
3. Concurrent hearings;
4. Stay proceedings.



Thank You !

Dmytro Donenko

Senior Associate

ENGARDE Attorneys at Law

T: +38 044 498 73 80 (81-89)

F: +38 044 498 73 85

www.engage-attorneys.com

Dmytro.Donenko@engage-attorneys.com