Dispute Resolution Hotline

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TO WHAT EXTENT DOES SIAC'S PROPOSAL ON CROSS-INSTITUTION CONSOLIDATION PROTOCOL MITIGATE THE PERCEIVED WEAKNESS OF ARBITRATIONS IN EFFECTIVELY RESOLVING MULTI-PARTY, MULTI-CONTRACT DISPUTES?

INTRODUCTION

The contemporary commercial age is witnessing a surge of complex intertwined transactions. Identical parties may perform different roles under a single contract having multiple layers or under multiple contracts. Conversely, multiple parties may play varying roles under multiple contracts. Such multi-dimensional and interdependent contracts are prevalent in industries involving execution of large projects, such as maritime and construction. These related contracts and legal relationships present a complex mesh of issues on several fronts such as performance of contracts, rights and liabilities of parties, and dispute resolution.

As much as business projects frequently work under the umbrella of a parent agreement or in sync with ancillary agreements - tending towards consolidated performance, divergent dispute resolution clauses in related contracts can disrupt the contractual equilibrium and hamper consolidation of disputes. Distinct dispute resolution clauses can reduce a singular body of dispute into oft-futile fractions – challenging to resolve, difficult to harmonize. A legal framework fostering consolidation of disputes in related contracts is not just important for effective adjudication, but necessary to bind the large transaction together and to achieve attainable resolution for stakeholders.

I. Current Consolidation Regime

Commercial agreements today readily choose arbitration as a means to resolve disputes. Arbitral institutions have emerged as active assistants to arbitrations – facilitating effective administration of arbitral proceedings. The rules introduced by arbitral institutions ('institutional rules') provide a procedural framework that reflects, if not mirrors, the procedural intricacies contained in national laws governing conduct of arbitral proceedings. As a result, parties are increasingly adopting institutional rules to walk hand in hand with the curial law, save for the mandatory provisions.

In majority of institutional rules, consolidation is permissible only when parties either consent to consolidate; all claims arise under the same arbitration agreement; or if not so, the varying arbitration agreements are compatible.[1] While party consent and same arbitration agreement serve as visible grounds for consolidation, compatibility requires some delving into. It is now a settled position that arbitration agreements are considered incompatible if the difference relates to a fundamental element of the arbitration agreement, such as institutional or ad hoc nature of an arbitration, or the seat. If the difference relates to secondary elements such as governing law of merits, the clauses will be considered compatible.[2] This article focuses on compatibility of institutional rules. Presently, related contracts containing choice of different institutional rules are not compatible, and hence, are not eligible for consolidation.[3]

II. Perceived Weakness of Arbitration in resolving related disputes:

Rejection of consolidation on the ground of choice of divergent institutional rules by parties is a setback for present day multi-party, multi-contract arrangements. Proponents against consolidation argue that arbitration is a creature of contract; and contract is a product of consent. Parties agreeing to administration by rules of institution 'A' may not welcome consolidation resulting in imposition of administration by institution 'B' - merely by virtue of an underlying thread of related contractual relationship. Whether parties are identical or otherwise, legal relationships inform consent, and consent is the epicenter of arbitration. Therefore, the fundamental basis for incompatibility is found in lack of party consent.

However, proponents in favor of consolidation (irrespective of institutional divergence) can argue that related disputes which would otherwise qualify for consolidation ought not to be denied consolidation merely for choice of divergent procedural rules. They may contend that choice of differing procedures does not affect the fundamental nature of the dispute, so as to make arbitration agreements incompatible for consolidation. According to this line of thought, while consent forms the backbone of contracts, it can also be an Achilles' heel in effective resolution of related disputes.

Some relevant questions emerge from the existing regime. Is it 'effective' to have fractions of related disputes resolved in a piece-meal manner by different arbitral institutions? Is it 'fair' to permit consolidation in set of contracts A in an industry - for their choice of identical institutional rules; while an identical set of contracts B in the industry fails consolidation due to divergent institutional rules? Is it cost-effective? While consolidation is a unifying term, why should choice of different institutional rules fetter harmonization of commercial disputes? Is engagement of multiple institutions to administer related disputes resourceful? Most significantly, aren't parties willingly opening doors to inconsistent decisions through a window of varying institutional rules in related contracts? However, if two or more

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arbitral institutions are permitted to consolidate the particular disputes, how will the inter-play be regulated? Would all institutions jointly administer the disputes or would one be chosen over the other? When administration by one institution is imposed on parties contrary to their consent, would the resultant award be amenable to challenge? Would enforcement be stalled?

The aforesaid questions suggest that the current regime of institutionalized arbitration suffers from critical infirmities. Whilst contentious issues of joinder of parties, intervention by third parties and consolidation have been recognized and catered to by majority institutional rules, there is no existing mechanism to consolidate and bring together disputes prescribing different institutional rules. In such a scenario, there is an emerging need to create a legal framework to consolidate multi-party, multi-contract disputes with multi-institutional rules. The fundamental answer lies in the question: if disputes can 'otherwise be consolidated', why must consolidation be refused solely on the ground of differing choice of institutional rules?

III. SIAC Proposal on Cross-Institution Consolidation Protocol:

The SIAC's Proposal on Cross-Institution Consolidation Protocol ('SIAC Proposal / Consolidation Protocol') provides a breakthrough in the existing regime. It is one of the most innovative mechanisms, simple in rationale yet carefully designed to plug gaps that have so far prevented cross-institution consolidation from seeing the light of the day.

Honoring every party choice in related disputes would make it difficult, almost impossible, to achieve consolidation. Cases of consolidation certainly take a bite off party autonomy from some angle, if not entirely. The SIAC Proposal recognizes that consent is important to arbitration. To that extent, the SIAC Proposal provides two options for cross-institutional consolidation.

In Option 1, SIAC proposes that the Consolidation Protocol could be a set of new rules arrived at jointly by institutions to decide consolidation applications. The consolidation applications would be decided upon by a joint committee with cross-institutional representation. In Option 2, it provides that the Consolidation Protocol could be a set of objective criteria (such as number of disputes under particular institutional rules, aggregate value of disputes, timing of application amongst others). This criteria would then lead to selection of one out of the existing choice of institutional rules to govern consolidation.

IV. Does SIAC Proposal mitigate weakness of arbitration?

It can be argued that the SIAC Proposal removes a stumbling block in consolidation of related disputes. Option 1 endeavors to bring the institutions together. As a first step, it seeks to achieve consolidation of institutions to remove incompatibility. The second step is consolidation of disputes. Constitution of a joint committee involving members of institutions is a plausible way to respect party choice. It is akin to equal representation from institutions chosen on behalf of parties for deciding consolidation applications. It can thus be argued that Option 1 offers the closest route to parties to effectuate party autonomy. The SIAC Proposal seeks to find a via media by bringing divergent institutions to create a set of new consolidation provisions and work through a joint committee.

Proponents of Option 2 can contend that it is easier to continue with the existing regime that arriving at a multi-lateral arrangement as in Option 1. Option 2 makes consolidation less cumbersome than Option 1. As a first step, Option 2 envisages the criteria for selection of one institution over the other. It then allows the selected institution to proceed with the consolidation application, and administer related disputes. The criteria refers to logical standards such as highest number of disputes under a particular institution, aggregate value of disputes with each chosen institution, timing of application, amongst others. The introduction of criteria and the objectivity thereof helps place sufficient confidence in the mechanism. Option 2 therefore appears to be an objective solution to the issue at hand.

In terms of applicability of the Consolidation Protocol under Option 1 or Option 2, SIAC suggests that the Protocol be applied only to arbitration agreements signed by parties after entry into force of the Protocol. This is fair, and offers a sense of predictability. In addition, the Proposal recommends that the Protocol be made part of institutional rules and be accorded contractual force. As such, when parties make a choice of institutional rules, they also choose the Consolidation Protocol.

In this regard, it is argued that an opt-out mechanism must be offered to parties, rather than imposing the Consolidation Protocol through choice of institutional rules. However, an opt-out mechanism has greater potential to create chaos. It can result in partial consolidation, or removal of some disputes from consolidation where parties have not exercised the opt-out option. Situations involving implied exercise of opt-out options might emerge, necessitating additional level of arguments or preliminary evidence to prove the same, depending on the peculiarities of the case. Also, granting an opt-out mechanism to parties brings the situation to square-one position, where consolidation could be precluded again by way of consent. The SIAC Proposal has not made room for an opt-out mechanism. This reflects largely on the intent of the Proposal to foster efficiency of arbitral proceedings and rule out any potential for limiting consolidation of otherwise consolidation-worthy disputes. In light of the above, it can be argued that the SIAC Proposal indeed seeks to mitigate weakness of arbitrations in dealing with multi-party, multi-contract disputes to a great extent.

V. Issues deserving express inclusion in Consolidation Protocol

It is imperative that any form of consolidation – even through the SIAC Proposal - will place some fetter on party autonomy. The natural corollary to arbitral proceedings conducted with lack of consent is challenge to the resultant award, and roadblocks in enforcement. This could render the arbitration proceedings futile and ultimately, bring resolution to a standstill. Consolidation of proceedings without party consent can thus place a hanging sword on the arbitral award. The Consolidation Protocol must expressly cater to this contingencies, than leave it to the individual institutional rules.

Majority of national laws provide that an award can be challenged by a party if it furnishes proof that the "*composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of (this Part) from which the parties cannot derogate, or, failing such agreement, was not in accordance with (this Part*)."[4] The same ground also exists as objection to enforcement of arbitral award under the Convention for Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).

This ground of challenge and objection has two limbs. One is appointment of arbitrator, and second is arbitration

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procedure. Some institutional rules provide that consolidation of proceedings may result in waiver of party right to appoint an arbitrator, when not so appointed.[5] Some institutional rules also provide that consolidation would result in revocation of the mandate of arbitrators already appointed.[6] As a consequence, consenting to such institutional rules would prevent parties from challenging the award on the ground that the composition of the tribunal was not in accordance with the parties' agreement.

The second limb is conduct of arbitration proceedings in accordance with the agreed procedure. Adoption of the SIAC Protocol i.e. selecting a single arbitral institution over the other chosen rules to decide consolidation application is certainly contrary to arbitration procedure originally agreed upon by the parties. It can therefore be amenable to challenge or objection to enforcement. In such cases, it would be helpful to have express terms in the Consolidation Protocol to the effect that parties waive their right to challenge the validity and enforcement of the resulting award on grounds emanating from decision to consolidate, on adoption of the Consolidation Protocol. This would sufficiently safeguard the resultant awards from challenge or objection to enforcement. Such provisions are prevalent in certain existing institutional rules.[7]

Thus, the Consolidation Protocol ought not to leave certain key issues such as status of arbitrator appointment, safeguard from challenge and objection to enforcement to individual institutional rules. These issues are fundamental to the workability of the Consolidation Protocol and must be incorporated in the same either with the new stand-alone mechanism suggested in Option 1, or the objective criteria suggested in Option 2. The most optimal solution would be to have the best of both options. A joint committee represented by members of each chosen institution must decide on the consolidation application as under Option 1 on the basis of a basic Consolidation Protocol covering the aforesaid issues. It must then use the objective criteria in Option 2 to select an individual institution to administer the arbitral proceedings. The impact of choice of different seats form a distinct set of enquiry and ramifications on incompatibility, and are therefore beyond the scope of the SIAC Proposal. Further, the Proposal will need to be tested since it is not based on any statistical data but rationally expects that such issues arise in present day contracts.

VI. Conclusion

The Consolidation Protocol is practical and futuristic. If adopted, it would remove a major stumbling block in present day complex arbitrations. Consolidation may affect free flow of consent in a limited manner. However, the impact on efficiency of arbitral proceedings would be significant and certainly, worthy of the limitation on party autonomy. The SIAC Protocol serves as a promise to adjudicate disputes in an effective and harmonized manner. If adopted with certain fundamental safeguards, it would immensely mitigate the risk of inconsistent decisions and challenges that frequent multi-party, multi-contract dispute resolution. The Consolidation Protocol is a promising, pioneering mechanism. Innovations such as these could significantly propel the commercial arbitration regime towards streamlined, consolidated performance of transactions and resolution of disputes. The SIAC proposal recognizes that while consent, neutrality and finality constitute pillars of arbitration, so do efficiency, consistency and harmonization in an increasingly complex global arena.

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[1] 2017 ICC Rules, Article 10; 2016 SIAC Rules, Rule 8; 2013 HKIAC Rules, Article 28; 2017 SCC Rules, Article 15; 2015 CIETAC Rules, Article 19

[2] B. Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions (Kluwer Law International, 2006), at para. 296.

[3] Gary Born, International Commercial Arbitration (Kluwer Law International, 2nd ed., 2014), at p. 2584 by selecting divergent arbitration procedures (e.g., ICC Rules in one arbitration and CIETAC Rules in another), arbitral seats and/or appointing authorities, the parties (wisely or unwisely) expressed their preference for incompatible dispute resolution mechanisms, which ordinarily do not admit the possibility of mandatory consolidation…").

[4] UNCITRAL Model Law, Section 34; Indian Arbitration & Conciliation Act, 1996, Section 34

[5] 2013 HKIAC Rules, Article 28.6

[6] 2017 SIAC Rules, Rule 8.10

[7] HKIAC, SIAC, ICC