CONSOLIDATION IN ARBITRATION: A PRACTICAL MECHANISM FOR DISPUTES ARISING FROM MULTI-PARTY CONTRACTS

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Executive Summary:

- Consolidation promotes procedural efficiency, allowing related arbitration proceedings (by parties, subject matter, or legal consequences) to be merged, reducing costs and time while avoiding contradictory awards.
- Consent is essential but challenging: Consolidation requires the express consent of all involved parties, which can be difficult when arbitration clauses differ or parties have conflicting interests.
- Arbitral institutions offer solutions: Rules from institutions like the ICC and LCIA allow consolidation under specific conditions; it's advisable to align arbitration clauses in related contracts to enable consolidation and avoid unenforceable awards.

Consolidation is the procedural mechanism by which an Arbitral Tribunal joins two or more arbitral proceedings to be conducted jointly and, eventually, render a single arbitral award that is binding upon all parties involved.

The objective of this mechanism is to centralize proceedings that share a connection, whether by the parties involved, the contractual subject matter, or the potential consequences of the award that may affect third parties. Its fundamental purpose is to optimize the arbitral process by reducing time and costs and avoiding contradictory decisions.

In the economic sector, consolidation has become a necessity and has been employed in situations such as: (i) multiple contracts entered with the same company; (ii) contracts entered into by one company with different parties; or (iii) repeated contractual relationships between the same parties. In all such cases, the aim is to jointly address related disputes while prioritizing procedural consistency and efficiency.

It is crucial to bear in mind that consent is a cornerstone of arbitration. By waiving their right to litigate before national courts, the parties voluntarily agree to submit their disputes to arbitration. Accordingly, consent may be jeopardized where the consolidation of proceedings is sought in relation to different contracts containing differing arbitration clauses[1].

What obstacles must be overcome to successfully consolidate arbitral proceedings?

First and foremost, consolidation often faces challenges related to the consent of all involved parties. Consent is a cornerstone of arbitration and likewise essential for consolidation, as all parties must

express their willingness to resolve their disputes within a single arbitral proceeding.

Consent may be compromised if there is an attempt to consolidate proceedings governed by differing arbitration clauses derived from different contracts. In practice, not all parties may be willing to consent to consolidation. One party may oppose for various reasons, such as having only a limited role in the dispute or due to additional procedural complications.

What solutions have been implemented?

Arbitral institutions have adapted their rules to permit consolidation, generally requiring compatibility between the arbitration agreements and a connection among the disputes. In this regard, arbitration agreements are considered incompatible when they differ in essential aspects (such as the seat, number of arbitrators, or type of arbitration), although the distinction between essential and secondary elements is not always clear.

For instance, the current Rules of the International Chamber of Commerce (ICC) allow for the consolidation of arbitrations, as set out in Article 10:

> **"Article 10 – Consolidation of Arbitrations**
> **The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:**
> **(a) the parties have agreed to consolidation; or**
> **(b) all of the claims in the arbitrations are made under the same arbitration agreement(s); or**
> **(c) the claims in the arbitrations are not made under the same arbitration agreement(s), but the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible. (…)"**

Likewise, the London Court of International Arbitration (LCIA) Rules also provide for consolidation in Article 22:

> **"Article 22.7 – The Arbitral Tribunal shall have the power, with the approval of the LCIA Court, upon the application of any party and and after giving all affected parties a reasonable opportunity to state their views, and on such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:**
> **(i) to consolidate the arbitration with one or more other arbitrations into a single arbitration under the LCIA Rules, where all parties to the arbitrations to be consolidated so agree in writing;**
> **(ii) to consolidate the arbitration with one or more other arbitrations under the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement and either between the same disputing parties or arising out of the same transaction or series of related transactions, provided that no Arbitral Tribunal has yet been formed for such other arbitrations or, if already formed, that such tribunals are composed of the same arbitrators; and**
> **(iii) to conduct two or more arbitrations under the LCIA Rules commenced under the same or compatible arbitration agreements simultaneously, provided that the same Arbitral Tribunal has been constituted in respect of each arbitration.(…)".**

In this sense, arbitral institutions around the world have evolved and improved their approaches to provide effective solutions where disputes arising from different contracts need to be jointly resolved through consolidated arbitration. This is done with a view to ensuring the enforceability of the arbitral award and safeguarding the parties from the risk of annulment.

Practical Recommendations for Companies When Drafting Arbitration Clauses

Given the current landscape, it is advisable that parties entering into multiple contracts with the same counterparty, or who share common contractual agents, align their arbitration clauses by agreeing on consistent elements: arbitral institution, seat of arbitration, lex arbitri, language, and number of arbitrators.

An initial, well-designed and consistently implemented strategy in this type of contractual structure facilitates the legal feasibility and practical effectiveness of arbitral consolidation in the event of a dispute.

This is particularly relevant for companies operating as global economic agents, as the lack of strategic planning in drafting dispute resolution clauses may not only prevent the consolidation of arbitral proceedings, but, in the worst-case scenario, may result in the annulment or unenforceability of the arbitral awards.

[1] Vlavianos, G et al (2019) Consolidation of International Commercial Arbitral Proceedings in the Energy Sector. Global Arbitration Review. Third Edition. Available at: https://www.lexology.com/library/detail.aspx?g=425d0485-ad65-44be-b679-916347209fad

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