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The Singapore International Arbitration Centre's proposal on cross-institutional consolidation of arbitrations

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For parties and counsel to arbitrations alike, it is unfortunate that one dispute may require battles on many battlefields: Disputes about similar or identical factual and/or legal questions may arise under several contractual layers providing for different means of dispute resolution, but forming one commercially uniform project or transaction. In practice, this is common in large construction or industrial projects involving a main contract and several sub-contracts or a framework agreement and several contracts for its implementation as well as guarantees for performance of payments. Frequently, such contracts contain arbitration clauses with different arbitration rules or seats of arbitration. The result is a fragmentation of the dispute.

This is unfortunate for many reasons: First, more than one arbitral institution/tribunal will hear the dispute, creating additional administrative efforts. Second, these administrative efforts coincide with additional costs for the parties. Third, a harmonised dispute strategy must be adopted, possibly impacting the prospects of success that would have existed, had the dispute been brought before only one arbitral institution/tribunal. Fourth, the dispute may yield conflicting decisions.

The Singapore International Arbitration Centre ("**SIAC**") has recently made a proposal for a mechanism of cross-institutional consolidation of arbitrations that addresses such fragmentation of disputes ("**Proposal**"). The Proposal is a thought-provoking and noteworthy contribution to the development of international arbitration that deserves further consideration and discussion. Most notably, the Proposal's reception in practice will depend on the right balance between increased efficiency and constraints on party autonomy as will be outlined below.

Currently, many rules of arbitral institutions provide for consolidation of arbitrations. Under the majority of the rules, however, this only applies to arbitrations under the same respective rules. Arbitrations under different rules may mostly not be consolidated (See, however, e.g. Art. 15 of the 2018 VIAC Rules, allowing consolidation under differing rules.). Therefore, only few arbitrations benefit from the status quo of consolidation. For example, Art. 10 of the ICC Rules provides:

> "*The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration […]*".

Similarly, Art. 8.1 of the SIAC Rules provides:

> "*Prior to the constitution of any Tribunal in the arbitrations sought to be consolidated, a party may file an application with the Registrar to consolidate two or more arbitrations pending under these Rules into a single arbitration […]*".

The Proposal envisages a consolidation protocol ("**Protocol**") that arbitral institutions could incorporate into their arbitral rules. Parties would not have to give their express consent to the application of the Protocol. Rather, an arbitration clause referring to institutional rules that have incorporated the Protocol would suffice.

Pursuant to the Proposal, there are two options for the design of the Protocol: First, a new, standalone mechanism for cross-institutional consolidation ("**Option 1**"). Such mechanism would have to provide rules for the timing of respective applications, the appropriate decision-maker and the criteria applicable to the decision for or against consolidation. The Proposal further envisages a joint committee appointed from members of the concerned institutions. Such committee would be appointed for each application and decide on the consolidation. The joint committee would decide on the appropriate institution(s) which would administer the arbitration alone or jointly.

Second, the Protocol could provide for a mechanism to determine one single institution that would be authorised to decide on any application for cross-institutional consolidation based upon its own rules ("**Option 2**"). In order to determine such institution, the Protocol would have to set out objective selection criteria.

If the Protocol is adopted, Option 1 seems preferable, despite efficiency constraints from involving another decision-making body: These constraints are unlikely to compare to those of a fragmented dispute. Option 1 is mindful of the multiple arbitration rules that the parties deemed applicable to their project and/or transaction by involving representatives of all such arbitral institutions. It may appeal to parties that the entirety of an economically uniform project and/or transaction receives due consideration and that contractual stipulations are honoured. Appointing a joint committee may thus most reflect the principle of party autonomy and foster arbitration's integrity. While Option 2 appears more efficient on its face, the compromise in efficiency seems well worth pursuing Option 1, giving greatest effect to the parties' will.

Upon consolidation, the joint committee would have to decide on the actual administration of the arbitrations. Once again, there are two options: First, new rules that the parties have not stipulated could be applicable and the arbitral institutions could jointly administer the arbitration under those rules. Second, one set of arbitral rules stipulated by the parties could be applicable and the respective arbitral institution administer the arbitration. It seems preferable for the arbitration to be governed by one set of arbitration rules and be administered by one institution. Such approach mostly reflects party autonomy. Furthermore, the joint administration of an arbitration by a number of arbitral institutions appears impractical and is likely to create unnecessary administrative hurdles. Lastly, parties are even less likely to accept the efficiency constraints of a joint committee, if the final result is an administration of the arbitration by all involved arbitral institutions. The final result would practically contradict the aim of cross-institutional consolidation. Rather, parties are likely to accept such efficiency constraints if the result is a consolidated arbitration that is then administered by one institution.

The success of the Proposal will depend on the proper balance between efficiency and party autonomy: The Proposal is a viable route to address the fragmentation of disputes outlined above. At the same time, however, there is a non-neglectable impact on the parties' autonomy to choose the applicable arbitration rules. Any deliberate decision for or against certain arbitration rules becomes subject to review and, possibly, alteration. Party autonomy thereby transforms from an absolute to a relative concept in international arbitration. Cross-institutional consolidation may certainly increase international arbitration's efficiency. Practice will show, however, if parties are attracted by the increase in efficiency or deterred by the potential impact on their autonomy.

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