

ARBITRATING CONSTRUCTION DISPUTES – THE PROBLEM OF CONSOLIDATION

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Introduction

Construction disputes often involve more than one party and more than one contract. This can lead to so-called "parallel proceedings" and is frequently cited as a source of concern by users of arbitration in the industry. In recent years, a number of arbitration institutions have included joinder and consolidation provisions in their arbitration rules (including, most recently, the *Singapore International Arbitration Centre* (the "SIAC") in the 6th Edition of the *SIAC Rules* (the "SIAC Rules 2016")). Rob Palmer and Sinyee Ong discuss the issue of consolidation in construction arbitration, the relevant provisions contained in the *SIAC Rules 2016*, and the implications for those drafting construction contracts.

Construction Disputes and Parallel Proceedings

Construction disputes frequently involve multiple parties and multiple contracts. This is simply a reflection of the contracting structure used in the industry; in construction projects, it is common for an owner to enter into separate contracts with various parties (for example, architect(s), engineer(s) and contractor(s)), who may in turn sub-contract their works.

In the event of a dispute, there may therefore be claims under several different contracts. For example:

- (a) a structural defect that emerges shortly after completion of a project may be attributed to a design fault (being the responsibility of the architect) or a construction fault (being the responsibility of a contractor); and
- (b) if that defect is determined to result from a fault in construction, the defective work may have been performed by a contractor or by its sub-contractor.

Litigation can cope well with situations such as these; judges will usually have power under the relevant court rules to compel parties to resolve related claims in a single set of proceedings.

Traditionally, arbitration does not provide that option. Arbitration is a consensual dispute resolution mechanism between contracting parties. Arbitration proceedings may be commenced only against other contracting parties (but not against non-contracting parties). On complex construction projects, involving a number of different contracts, this can lead to a number of different sets of arbitration proceedings relating to the same underlying situation (that is, "parallel proceedings").

The result is that disputes may be more costly and time consuming to resolve than would be the case if dealt with in a single set of proceedings, and that there is a risk of inconsistent outcomes. For instance, in the scenario above, if the Tribunal in a claim

against the architect determines the architect not liable (perhaps because the Tribunal considers the contractor responsible), and another Tribunal in a claim against the contractor determines the contractor not liable (perhaps because that Tribunal considers the architect responsible), the owner would be left without a remedy.

Consolidation in Arbitration

It is of course possible that, after a multi-party, multi-contract dispute arises, all of the parties agree to have matters resolved in a single arbitration. However, in our experience, such instances are rare.

Instead – and unless express provision for consolidation has been made in the arbitration agreements concerned – parties wishing to consolidate are left to fall back on the applicable law (which in some very rare instances provides for consolidation of arbitration without consent) or the arbitration rules selected. In recognition of this, a number of institutions now provide for consolidation of related disputes and joinder of third parties in their arbitration rules.

The *SIAC Rules*

The SIAC has now adopted this approach in its SIAC Rules 2016, discussed here (note that the SIAC Rules 2016 will come into force on 1 August 2016).

The SIAC Rules 2016 contemplate various changes. Perhaps most significant are the provisions for joinder (Rule 7) and consolidation (Rule 8). Under the (current) 5th edition of the SIAC Rules, joinder is only possible where the third party concerned is a party to the arbitration agreement. Consolidation is not addressed and so is available only with the consent of all parties. However, under the changes proposed:

(a) additional parties may be joined to existing arbitration proceedings (i) where the additional party is a party to the arbitration agreement, or (ii) with consent of all parties involved regardless of whether the additional party is party to the arbitration agreement (and contract); and

(b) if multiple arbitration proceedings have been commenced, these may now be consolidated (with the consent of all parties involved) regardless of whether the disputes arise under the same arbitration agreement or where different tribunals have been appointed in all the arbitrations. Proceedings may also be consolidated without consent of all parties concerned in other specified situations, including where claims are made under the same arbitration agreement, or where arbitration agreements are compatible and the disputes arise out of the same transaction or series of transactions.

The process for parties to file disputes arising out of multiple contracts has also been streamlined, with the option of filing a single Notice of Arbitration in respect of all such contracts.

The benefits for users in the construction industry are clear, given the increased scope to have multi-party or multi-contract disputes resolved in a single arbitration.

Drafting Arbitration Agreements for Construction Projects

The provisions in the SIAC Rules 2016 (and in other institutional rules which provide for joinder and consolidation, such as the ICC 2012 Rules) do not cater for every eventuality. Furthermore, consent of all parties concerned may still be required in many situations.

Therefore, to ensure effective joinder and consolidation, we recommend that parties wanting to use arbitration to resolve disputes on a project should consider carefully the drafting of the arbitration agreements concerned:

- (a) In most such cases, all contracts used on a project should, at the very least, contain identical arbitration clauses, with reference to an institution whose rules provide for joinder and consolidation.
- (b) It may also be appropriate for parties to include bespoke drafting (perhaps in a project-wide "umbrella agreement") which expressly provides for joinder and consolidation of all related disputes on the project concerned.