Consolidation of disputes is key

STUART JORDAN* discusses why it is important to consolidate disputes when there are different contract parties to a project, and indicates that the way to facilitate this is to write it into each contract, as part of compatible arbitration provisions.

THIS is a question which crops up often in the Gulf, due to the heavy reliance on arbitration in this region. And as we know, construction disputes tend to spread themselves across many contractual relationships.

Let's consider a simple example: some driven piles are found to have insufficient load-bearing capacity. This could be due to poor design from the civil/structural engineers, poor workmanship from the piling subcontractors, poor planning and supervision from the main contractors, incorrect geotechnical information (which was employer-warranted information in the main contract) or a combination of these causes.

The issue of liability for this problem could go to arbitration under (at least) four contracts: the main contract, the piling subcontract, the civil/structural engineer's appointment and the geotechnical surveyor's appointment – and we could get four answers, each pointing to a different liability. Where do the parties go from there? Added to that is the cost of multiple proceedings all independently gathering and presenting largely the same material.

So we would all agree, at least in theory, that parallel proceedings on the same issues can be costly and unhelpful – and that another way is to consolidate these questions into one arbitration. So why are all related disputes not disposed of in a consolidated arbitration?

The reality is that parties tend not to be able to agree to consolidate once the disputes have arisen. Once disputes have arisen, at least one of them may see an advantage in refusing! The prospect (for all concerned) of cost, delay and uncertainty becomes a tactical weapon. The obvious answer is to avoid this situation by getting everyone's agreement to consolidation in the original contracts and to make that agreement stick. That requires all contracts across the project to contain compatible arbitration provisions, including effective agreements to consolidate. A typical provision might state:

"The parties agree that any dispute arising under this contract may, at the instance of the arbitral tribunal [or the employer] be consolidated for disposal together with one or more other disputes ("Related Disputes") arising and referred to arbitration under one or more other contracts related to the Project if:

***1.** The said dispute under this contract raises issues which are substantially the same as, or are connected with, issues raised under any Related Dispute; or*

***2.** The said dispute under this contract and any Related Dispute arise out of substantially the same facts."*

The objective is to describe the connection in wide enough terms to avoid procedural arguments about whether the disputes are sufficiently related. Some clauses go to a lot more effort than this one, to facilitate that goal. Enforceability of the clause is always something to be confirmed if you know where the arbitration is seated and any award is likely to be enforced.

Unfortunately, the goal of ensuring compatible clauses across the suite of project contracts is sometimes not achieved because it is just not prioritised during contract drafting and negotiation. Even where the initial distribution of project contracts includes uniform disputes resolution provisions, that position may not be defended in negotiations. As we know, "negotiation fatigue" has often set in by the time parties get to dispute resolution!

Jordan ... consolidation of disputes is a solution.

Can the chosen arbitration rules bring about consolidation without advance consent? It depends on the rules:

For instance, Article 10 of the 2017 International Chamber of Commerce (ICC) Rules of Arbitration provide (in summary) that the ICC can order consolidation if (i) the parties are all agreed or (ii) the claims are all under the same arbitration agreement or (iii) they are under different agreements but the claims are between the same parties and arise in connection with the same legal relationship.

Since our above piling scenario involves different parties to each contract, and different legal relationships in each one, these rules do not appear to fix our problem if consolidation has not been pre-agreed.

In similar fashion, Article 22.1 (ix) and (x) of the London Court of International Arbitration (LCIA) Rules 2014 allow for consolidation to be ordered either on the basis of agreement by all parties or where (among other considerations) the separate arbitrations are between the same parties.

In contrast, Article 28.1 of the Hong Kong International Arbitration Centre (HKIAC) Rules allow the centre to order consolidation of disputes under different (but compatible) arbitration agreements (and not limited to the same parties) so long as common questions of law or fact arise in each dispute and the claims arise in relation to the same transaction or series of transactions.

So the lesson is simple: don't leave it to the arbitration rules. The way to facilitate consolidation is by writing it into each project contract, as part of compatible arbitration provisions. ■

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