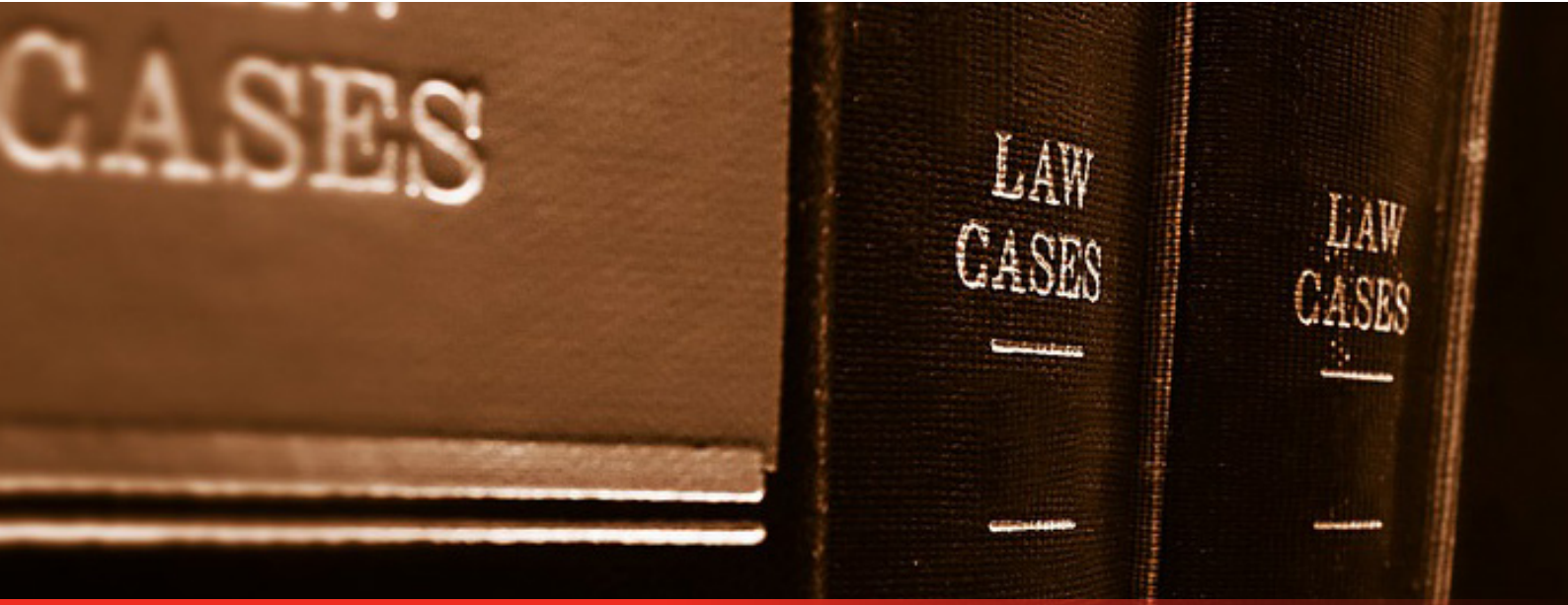

Parallel arbitral proceedings: the case for consolidation

By Catherine Green and Melt Strydom

The recent case of A v AW is a cautionary tale of what could go wrong when related arbitral proceedings are not consolidated.

Consolidation of proceedings in international commercial disputes may be appropriate where two arbitrations deal with the same or similar questions of fact and law and involve the same parties.

Consolidation combines two or more proceedings into a single proceeding in an attempt to reduce inefficiencies by streamlining the dispute process and avoiding duplication. Importantly, it also mitigates the risk of inconsistent awards. Although a court can order consolidation in some jurisdictions, consolidation of arbitral proceedings typically requires the parties' agreement.

In this recent Hong Kong decision,[1] the High Court held that a second arbitral award was *manifestly invalid* because the tribunal's findings in that award were inconsistent with those in an award from an earlier arbitration involving the same parties, a common arbitrator, and common issues of fact.

1 W v AW [2021] HKCFI 1701.

The facts

The dispute in W v AW [2021] HKCFI 1701 arose from two separate arbitrations involving two agreements relating to the same broader transaction. The same parties were involved in both arbitrations, with each arbitration commenced under one of the two agreements, respectively. AW appointed the same arbitrator to both proceedings. There was no further commonality between the two arbitral tribunals.

In the first proceeding, the tribunal published its award, dismissing an argument raised by AW for misrepresentation. In the second proceeding, the tribunal published its award, upholding AW's claim for misrepresentation. The misrepresentation claim was factually the same in both proceedings. The second award came some four months after the first. Accordingly, the common arbitrator would have known the finding in the first arbitration when dealing with the second.

W applied to the High Court of Hong Kong to set aside the second award on two grounds: apparent bias and issue estoppel. Focusing on the second ground, the argument presented by W was that the second award conflicted with Hong Kong public policy in that, *contrary to principles of fairness, due process and*

justice, the tribunal in the second arbitration had ignored the findings of the first tribunal in terms of common issues (the misrepresentation claims). In response, AW applied for leave to enforce the second award and sought an order that W pay security. It is these applications that were the subject of the decision of Mimmie Chan J.

The decision

Mimmie Chan J rejected the application for security on the basis that W had a strong case to set aside the second award, that award being *manifestly invalid*. In reaching this conclusion, the Court accepted that the two tribunals made inconsistent findings on the same issues of fact and law, which formed the necessary ingredients for the cause of action for misrepresentation.

In reaching her decision, Mimmie Chan J confirmed that the Court may set aside an arbitral award on public policy grounds where there is conduct that is *serious, or egregious, such that due process is undermined*.

In this (slightly unusual) case, the common arbitrator did not issue any dissenting decision in either. This meant that he agreed with all of the findings in both awards despite their obvious inconsistencies. Noting this, the Court held that the common arbitrator's failure to deal with and explain those inconsistent findings constituted an injustice and grave unfairness to W. The award in the second arbitration was therefore manifestly invalid.

Takeaways

W v AW may be an unusual case. However, it is a good reminder for parties involved in parallel proceedings to consider the benefits of consolidation and, more importantly, to ensure consistency in terms of the provision for any reference to arbitration in the future to be made to the same institution.

Absent legislation allowing for consolidation to be ordered by the courts (which is relatively rare), the starting point is that consolidation cannot be ordered or mandated without the parties' agreement. However, there are now many examples of institutional rules which include provisions with respect to consolidation.

The standard approach seen in those institutional rules that provide for the consolidation of two or more arbitral proceedings is only to permit such an application (and subsequent order) where those proceedings are pending under the same institutional rules.

To the extent parties are engaged in complex contractual arrangements, there is merit in ensuring each of those related transactions is subject to the same institutional rules to permit consolidation of proceedings in the future.

NZIAC Arbitration Rules

The New Zealand International Arbitration Centre (**NZIAC**) provides a forum for the settlement of international trade, commerce, investment, and cross-border disputes in the Trans-Pacific region.

Under Rule 21.0 of the NZIAC Arbitration Rules, two or more arbitrations pending under those rules may be consolidated into a single arbitration where:

(a) a common question of law or fact arises in all the arbitration proceedings;

(b) the rights to reliever claimed in the arbitration proceedings are in respect of, or arise out of, the same transaction or series of transactions; or

(c) for some other reason, it is desirable to make the order.

In deciding whether to consolidate, any relevant circumstances may be taken into account, including, without limitation, whether there is sufficient information to make a conclusive determination, whether the consolidation might result in a loss of confidentiality, and the Purpose and Overriding Objective of the Rules.

Further information on NZIAC's Arbitration Rules can be found here or by getting in touch with the NZIAC Registry: registrar@nziac.com.

About the authors

Catherine is the Executive Director at NZIAC. Her background in commercial and civil litigation and dispute resolution, working in leading law firms both onshore and offshore, has been a stepping stone to her current role as a barrister, arbitrator, mediator and adjudicator.

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