CONSOLIDATION OF ARBITRATIONS - A NEW RULE EMERGING?

By

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I. Introduction

Consolidation of multiple disputes into a single arbitration proceeding is a major issue with respect to the efficiency of the arbitration process. Consolidation may be of various types: 1. multiple reinsurers on the same contract; 2. the same reinsurer on multiple layers of the same program; 3. multiple reinsurers and insurers on the same contract; and 4. the same reinsurer on unrelated contracts. The first three types of consolidation are particularly efficient in that they involve the same facts. The fourth is less so when many contracts are involved since there is a point at which it is difficult for counsel to explain, and the panel to absorb, many disputes in which the facts and issues are disparate.

A minority of reinsurance contracts deal with consolidation of disputes with multiple reinsurers on the same contract.[i] Few, if any, deal with the other forms of consolidation.

Until very recently, the great majority of case law has not been supportive of consolidation, absent specific contractual authorization. A few *contra* decisions have resulted from odd fact situations or activist judges. However, a new line of cases, much more favorable to consolidation, seems to be emerging from the Supreme Court's decision in Howsam v. Dean Witter Reynolds, 537 U.S. 79 (2002). The purpose of this article is to explore this new line of cases to suggest the course of future consolidation efforts.

II. Traditional, Anti-Consolidation Case Law

By way of example, a traditional ruling on consolidation is represented by American Centennial Ins. Co. v. National Casualty Co., 951 F.2d 107 (6th Cir.1991). The cedent and reinsurer had disputes under numerous reinsurance contracts, none of which provided for consolidation. The cedent sought to consolidate and the district court denied the motion. The court of appeals confirmed holding:

The underlying motivation for the Federal Arbitration Act was to ensure that district courts enforce the agreement of parties to arbitrate. Because the Act was designed to overrule the historical refusal of the judiciary to enforce agreements to arbitrate, it follows that a court is not permitted to interfere with private arbitration agreements in order to impose its own view of speed and economy. This is the case even where the result would be the possibly inefficient maintenance of separate proceedings. (citation omitted) Accordingly, we align ourselves with the view taken by the Fifth, Eighth, Ninth and Eleventh Circuits, and hold that a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation.[ii]

In the Matter of the Arbitrations between Clarendon National Ins. Co. and John Hancock Life Ins. Co., 2001 U.S. Dist. 13736 (S.D.N.Y.) produced a similar holding. The parties had disputes over ten separate contracts. The cedent wanted to consolidate into three arbitrations by program. The reinsurer wanted to consolidate into one proceeding. The court denied consolidation on either basis ruling:

The general rule in the Second Circuit with respect to consolidation is that the FAA does not empower the district court to consolidate arbitrations, absent language in the parties' contract authorizing such consolidation.

(citations omitted) In coming to this general rule, the Second Circuit has relied on a number of Supreme Court decisions which concluded that the purpose of the FAA is not to expedite resolution of claims, but rather, to enforce private agreements. (citations omitted) Thus, if consolidation is not explicitly authorized in the contract signed by the parties, a district court cannot subsequently authorize it.[iii]

III. Exceptions to Traditional Case Law

Connecticut General Life Ins. Co. v. Unicover Managers, Inc., 210 F.3d 771 (7th Cir. 2000) was a dispute involving multiple reinsurers, multiple cedents and Unicover Managers as the manager for the cedents. The contract allowed consolidation of multiple reinsurers (*see* endnote 1*)* but did not allow consolidation of the cedents and their manager. The court noted that this gap in the contract suggested that the parties simply did not think about the issue but went on to speculate that the reinsurers would not want to arbitrate separately with each cedent. The court further cited the duplication of effort of multiple arbitrations and the res judicata and collateral estoppel issues they would raise. The court allowed consolidation noting: "All these problems are avoided by interpreting the contract to allow the reinsurers to demand a single arbitration, provided there is a single dispute . . . ."[iv] This type of results oriented reasoning clearly is inapposite to the case law noted in Section II, *supra.*

Environmental claims on a series of treaties spanning 60 years provided the factual backdrop for Hartford Accident and Indemnity Co. v. Swiss Reinsurance American Corp., 246 F.3d 210 (2nd Cir. 2000). The treaties did not contain consolidation clauses. The cedent sought to arbitrate multiple claims on a consolidated basis but the reinsurer sought to arbitrate just one. The court ordered a consolidation of claims on the basis that the reinsurer had consented to the consolidation of multiple claims before a single arbitration panel in a conference call before the court.

IV. Emerging Case Law on Consolidation

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) involved an NASD arbitration. The NASD Code of Arbitration Procedure required that an arbitration demand be filed within 6 years of the time the issue arose and Dean Witter claimed that the petitioner missed this deadline. The issue to the Supreme Court was whether the NASD arbitrator or the court should resolve this threshold issue. The Court determined that this was an issue for the arbitrator. Quoting comments to the Uniform Arbitration Act the Court stated: "[I]ssues of procedural arbitrability, *i.e.* whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide (emphasis in the original)."[v]

Howsam was followed in a case involving union grievances under three separate contracts in Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union, 321 F.3d 251 (1stCir. 2003). The court held:

The issue before us is who should make the determination as to whether to consolidate the three grievances into a single arbitration: the arbitrator or a federal court. Since each of the grievances is itself concededly arbitrable, we think the answer is clear. Under Howsam . . . , this is a procedural matter for the arbitrator.[vi]

Employers Ins. of Wausau v. First State Ins. Group, 2004 U.S. Lexis 12712 (D.Mass.) was an effort to consolidate multiple disputes before a single AAA arbitration panel. The first stage of this dispute was a denial of consolidation by the district court in a decision handed down prior to Howsam and Shaw's Supermarket. The district court followed decisions in other circuits disfavoring consolidation due to lack of clear precedent in the First Circuit. After the Howsam and Shaw's Supermarket decisions were rendered, First State petitioned the AAA to consolidate the arbitrations on the basis that the district court's decision was no longer good law. Wausau requested an emergency order from the district court blocking this effort. The court granted the order but noted: "While First State may be correct in its assessment of the holding in Shaw's, its exhortation to panels of private arbitrators to take it upon themselves to unilaterally overturn a district court's ruling on a matter of law, is very troubling."[vii] In other words, First State should have asked the court for a reconsideration of its ruling based on subsequent case law rather than taking the issue to the AAA. The court's opinion might be read as implicitly agreeing with First State's substantive position on consolidation.

V. Practical Considerations of Consolidation

Assuming that the emerging line of cases will allow arbitration panels to determine consolidation issues as a matter of procedure, practical problems remain. As one court noted: "Arbitral panels are ad hoc, making it difficult to coordinate their decisions on such a question. And there are no contractual or statutory provisions for transferring cases between panels, should multiple arbitrations be commenced when the contract envisaged a single consolidated one."[viii]

Multiple panels may be formed before the consolidation issue is raised. Likewise, the parties may not agree on a panel(s) until the consolidation issue is resolved. Partial consolidation may be more practical than total consolidation for case management purposes. There is no ready means of resolving such issues short of a court order. Perhaps ARIAS - US could develop protocols to address consolidation issues in light of emerging case law on point.

ENDNOTES

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[i]. For instance, some contracts contain language in the arbitration clause similar to the following: "If more than one reinsurer is involved in an arbitration where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results, all such reinsurers will constitute and act as one party for purpose of this clause."

[ii]. 951 F.2d 107 at 108.

[iii]. 2001 U.S. Dist. Lexis 13736 *7 - 8.

[iv]. 210 F.3d 771 at 776.

[v]. 537 U.S. 79 at 85 (emphasis in the original).

[vi]. 321 F.3d 251 at 254.

[vii]. 2004 U.S. Dist. Lexis 12712 *8.

[viii]. Connecticut General Life Ins. Co. v. Unicover Managers, Inc., 210 F.3d 771 at 773 (7th Cir. 2000).