Consolidation of Disputes by Arbitration Panels

By

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I. Introduction

Reinsurance disputes can involve multiple contracts between the same parties, related parties and unrelated parties. In addition, they can involve multiple distinct claims under one or more contracts. The great majority of such contracts, including the contracts in the cases cited below, do not contain provisions allowing consolidation of claims and/or parties.

Panelists (particularly non-lawyer panelists) may question whether they or the courts should decide whether to consolidate such disputes and if so how to do it. The purpose of this article is to give such panelists some confidence as to their authority in a variety of factual circumstances.

First, some background is helpful. The great majority of insurance and reinsurance arbitrations are governed by he Federal Arbitration Act.

> The underlying motivation for the Federal Arbitration Act was to ensure 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 arrangements 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.[1]

The United States Supreme Court has handed down two opinions that are helpful on consolidation issues. They are *Howsam v. Dean Witter Reynolds,* 537 U.S. 79 (2002) and *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003). A highly simplified description of the holdings in these cases is that the courts decide "arbitrability" (whether there is an agreement to arbitrate and whether the dispute falls within that agreement) and panelists decide "procedural" issues. Just what is a procedural issue was not entirely clear from the decisions but subsequent case law has helped to elucidate this term with respect to consolidation.

II. Same Issue between Same Parties on Layers of Same Program

This very common fact situation was at issue in *Employers Ins. Co. v. Century Indem. Co.* 443 F.3d 573 (7th Cir. 2006). Century ceded two layers of reinsurance to Employers which declined to pay a claim that penetrated both layers. Wausau acknowledged its obligation to arbitrate the claim but opposed Century's effort to arbitrate the dispute in one proceeding. Wausau argued that the issue of consolidation was one of arbitrability to be addressed by the court but the court disagreed and found it is one of procedure for the panel:

> We find based on *Howsam* that the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve. It does not involve whether Wausau and Century are bound by an arbitration clause or whether the arbitration clause covers the Aqua-Chem policies. Instead, the consolidation question concerns grievance procedures – i.e., whether Century can be required to participate in one arbitration covering both Agreements, or in an arbitration with other reinsurers.[2]

III. Same Issue Under Multiple Contracts Between Same Parties

A union had the same grievance under three different contracts with the same party in *Shaw's Supermarket, Inc. v. United Food & Commer. Workers Union Local 791*, 321 F.3d 251 (1st Cir. 2003). The union asked that the American Arbitration Association consolidate the grievances into one proceeding on the same issue and Shaw's asked the court to prohibit it. The court ruled that the issue of consolidation was for the arbitrator:

> Leaving the decision whether to consolidate the three proceedings in the hands of the arbitrator comports with long-standing precedent resolving ambiguities regarding the scope of arbitration in favor of arbitrability. "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to Arbitrability."[3]

Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co., 489 F.3d 580 (3rd Cir. 2007) involved two sets of reinsurance treaties between the parties. The cedent, Westchester, demanded a consolidated arbitration for each set of treaties and Underwriters contested this effort. The court ordered Underwriters to appoint an arbitrator for each demand and for the arbitrators to consider the consolidation issue:

> The Underwriters protest that there is no contractual authority for a threshold proceeding before an arbitrator on consolidation under each program. Yet, Westchester Fire's demands for arbitration under the . . . treaties are based on express contractual language between the parties that calls for tri-partite

> arbitration. Whether requiring the Underwriters to select an arbitrator for each program is consistent with the contractual language will be appropriately resolved by the arbitrators once the panels are convened.[4]

See also American Centennial Ins. Co. v. National Casualty Co., 951 F.2d 107 (6th Cir.).

IV. Multiple Contracts and Multiple Affiliates

Employers Ins. Co. of Wausau v. Hartford, 2018 U.S. Dist. LEXIS 205345 (C.D. Cal. 2018) involved 19 reinsurance contracts and multiple Hartford affiliates. Hartford wanted to consolidate all disputes under all contracts and parties into a single proceeding. The court ruled that consolidation in this fact situation was a procedural matter for an arbitration panel and ordered Hartford to proceed with umpire selection on the one treaty in which it was the cedent.

V. Multiple Contracts with Managing General Agency

In *Certain Underwriters at Lloyds v. Cravens Dargen & Co.,* 197 Fed. Appx. 645 (9th Cir. 2006), a managing general agent filed for arbitration and asked the arbitrator to consolidate disputes under a number of contracts. Underwriters opposed this and sought multiple arbitrations. The court declines to prohibit the arbitrator from considering the issue of a consolidated arbitration as it was a procedural issue.

VI. Multiple Disputes under Same Contract

A series of union grievances under the same collective bargaining agreement were at issue in *Avon Products, Inc. v. International Union, United Auto Workers,* 386 F.2d 651 (8th Cir.). The agreement called for grievances to be referred to an arbitrator but did not specify whether the grievances should be heard individually or consolidated into one proceeding. The court found that this was a procedural issue for the first arbitrator appointed:

> [T]he first arbitrator must determine whether the grievances are to be resolved in a single or in multiple proceedings. The arbitrator clause is not so clear that it can be said with positive assurance that disputes must be submitted individually, nor is it so clear that it can be said that the union has a right to insist on hearing all grievances in one proceeding.[5]

VI. One or More Arbitrators

The issue was whether the AAA rules called for one or three arbitrators in *Dockser v. Schwartzbert,* 433 F3d 421 (4th Cir. 2006). The court ruled that this was a procedural issue for the arbitrators: "We conclude that the question of the number of arbitrators is one of arbitration procedure, and that the parties' agreement does nothing to overcome the presumption that such questions are for arbitral, rather than judicial, resolution."[6]

VII. Consolidation with a Third Party

In *Protective Life Ins. Corp. v. Lincoln National Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989), one the parties to a dispute subject to arbitration objected to consolidations of a dispute with a third party. The district court issued a consolidation order but the court of appeal overruled stating: "Parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in."[7] It is not evident from the decision whether or not the court believed the panel had the power to consolidate under these facts.

VIII. Comments

Arbitrators can feel confident that as long as there is no consolidation provision in the relevant contract, the issue of consolidation of disputes is one for the arbitration panel and not for the court. This is not to say an arbitrator panel can make any consolidation it chooses to make. For instance, if disputes involving multiple treaties are consolidated, which wording takes precedence? If parties are consolidated into an existing dispute, do those parties lose a contractual right to appoint an arbitrator? Are objections to such eventualities a basis to overturn a panel's "procedural" decision on consolidation? Perhaps such issues will be the next chapter in the saga of consolidation litigation.

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1 *American Centennial Ins. Co. v. National Casualty Co.*, 951 F.2d 107 at 108, (6th Cir. 1991).
2 443 F.3d at 577.
3 321 F.3d at 254 quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 68 n. 8 (1995).
4 489 F.3d at 587 – 8.
5 386 F.2d at 210.
6 433 F. 3d. at 425.
7 873 F. 2d at 282.