Arbitration consolidation in the US and UK

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Contracting parties often spend considerable time drafting dispute resolution mechanisms. These contractual clauses address a multitude of questions, such as: should disputes be litigated or arbitrated? What is the best jurisdiction or seat? Which law and rules (if any) should govern? Should there be some form of mediation? Indeed, for many years, legal advisers have been pressing this point and it is now reasonably rare to find a contract with an incoherent dispute resolution mechanism.

But what of parties to a related series of contracts? This scenario is fairly common in reinsurance contracts, which are often structured with multiple reinsurers, each having its own contract with the cedent. These contracts often contain a well-drafted dispute resolution clause which viewed unilaterally would operate effectively to resolve a dispute. However, parties to such a series of contracts in the US and the UK[2] should consider at the outset whether and under what circumstances they would agree to consolidate a dispute arising from the contract with another related dispute or with several other related disputes.

Multiple disputes presenting common questions of fact or law are likely to be consolidated under the Federal Rules of Civil Procedure if they proceed in US federal court.[3] However, the same is not true for disputes which proceed in arbitration. Historically, US courts interpreted the Federal Arbitration Act to give them jurisdiction to decide whether consolidation of two or more related arbitrations was appropriate.[4] However, following a 2002 Supreme Court decision, this is now an issue decided by arbitrators. Under English law, the principle of party autonomy has always been king and consolidation in arbitration requires the express consent of the relevant parties.

Early US consolidation cases

Early US cases held that courts could order consolidation in appropriate circumstances.[5] A split in the circuits emerged over what those circumstances were. Initially, the Second Circuit Court of Appeals held that the Federal Rules of Civil Procedure combined with the "liberal purposes" of the Federal Arbitration Act ('the FAA') supported court ordered consolidation absent express consent.[6] However, following several Supreme Court decisions[7] which emphasised that the FAA was intended merely to assure the enforcement of privately negotiated arbitration agreements, despite possible inefficiencies created by such enforcement, the Second Circuit later held that the courts were without the power to order consolidated arbitration in the same circumstances they would if the dispute were before a court. Therefore, the "mere fact that the disputes contain similar or identical issues of fact and law" was not sufficient grounds to order consolidated arbitration.[8] The emerging consensus was that courts could order consolidation only if the court found evidence that the parties agreed to consolidation. Similar to the position under English law, the fifth, sixth, eighth, ninth, and 11th US circuits all held that the agreement had to be 'express.'[9]

In contrast, in *Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Can.*,[10] the Seventh Circuit held that the agreement to consolidate need not be 'express.' Instead, an arbitration clause should be interpreted just like any other contractual provision and an agreement to consolidate might be found even if not express.[11] In Connecticut General, the Seventh Circuit ordered consolidation over the objection of the members of a pool of cedents. The arbitration clause in the contract provided that the reinsurers would be consolidated, but was silent as to consolidation of the pool members. Noting that the "arbitration provision in this case neither clearly permits nor clearly forbids consolidation," the Court concluded on the "balance of both the textual and the practical arguments" favour ordering consolidation.[12]

A similar position in favour of consolidation was reached by the Third Circuit in *Philadelphia Reinsurance Corp. v. Employers Ins. of Wausau*[13] (arbitration could be ordered on the basis of an informal agreement) and the First Circuit in *New England Energy, Inc. v. Keystone Shipping Co.*[14] (lower courts were not precluded by the FAA from consolidating arbitrations under state law).

The Supreme Court's Howsam and Green Tree decisions

The tide changed in the US after the Supreme Court decided *Howsam v. Dean Witter Reynolds, Inc.*,[15] in 2002 and *Green Tree Financial Corp. v. Bazzle*[16] in 2003. Although neither of these decisions directly address the topic of consolidation, they set the stage for courts to remove consolidation from the purview of the courts.

In *Howsam*, an investor demanded arbitration

pursuant to a clause within the parties' client service agreement. The investor chose the National Association of Securities Dealers ('NASD') as the forum for the arbitration in accordance with the forum selection clause in the agreement.[17] The NASD code included a six-year time limit for submitting controversies to arbitration. The respondent filed suit in the US District Court for the District of Colorado seeking to stay the arbitration based on the expiration of the time limit.[18] The issue was who should interpret and apply the NASD code: the court or the arbitrator?[19]

The Court held that this was a "matter presumptively for the arbitrator" and not for the court.[20] In reaching this conclusion, the court outlined the differences between "gateway" and "procedural" matters. Gateway matters involve 'questions of arbitrability' for the court to decide.[21] Such questions include "whether the parties are bound by a given arbitration clause," or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy."[22] In contrast, procedural matters are broader and larger in number than gateway matters and include "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met."[23]

Subsequently, in *Green Tree*, the Court considered who decides whether an arbitration provision permits class arbitration: the arbitrator or the court? A plurality of the Court held that the issue was for the arbitrator: "the relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures. It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question."[24]

The circuit courts have read *Howsam* and *Greentree* as directing them to delegate all matters concerning "neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties" to the arbitrators.[25] Applied to questions about consolidation, the appellate courts have consistently held that such issues should be resolved by the arbitrators.[26]

Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union,[27] was the first Court of Appeals decision to consider arbitration consolidation post-*Howsam*. There, the First Circuit affirmed a district court's refusal to prohibit the unilateral consolidation of arbitration proceedings. The Court of Appeals agreed with the district court that "[l]eaving 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."[28]

Similar conclusions were reached by the third, seventh and ninth circuits.[29] Relying primarily on *Howsam*, these appellate courts held that consolidation is a procedural issue, which is for the arbitrators to decide.

The English position

Under English law, the matter is governed by the Arbitration Act 1996 ('the Act') which provides that unless the parties to a contract agree to confer such powers on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings[30]. The principle of party autonomy overrides the potential benefits of having a general power of consolidation in the hands of the arbitrators. This explains the lack of case-law on consolidation in England and Wales in contrast to the US position.

The English court has no jurisdiction to compel parties to arbitration to consolidate disputes. The general principles of the Act make clear that the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.[31] The Act also restricts the court's powers in respect of arbitrations to the role of providing limited supervision and assistance[32].

What if there are exceptional circumstances? For example, if a party refused to consolidate 3000 separate but related disputes which are all subject to arbitration, is there any power available to the English Court? In such circumstances, it may be open to a party to apply for an anti-suit injunction under Section 37 of the Supreme Court Act 1981. The Court will only exercise this jurisdiction if two conditions are satisfied: a) the injunction will not cause injustice to the claimant in the arbitration; and b) that the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process. This is, however, a high bar. The English courts have stated:[33]

"the Court's power to restrain arbitration proceedings is to be exercised only very sparingly and with due regard to the principles upon which the [Arbitration Act 1996] was expressly based, particularly respect for party autonomy and self-restraint by the courts when intervening in the arbitral process."

There has been some academic debate about whether in the absence of an express agreement to consolidate; it may be possible to infer such agreement from the fact that all the contracts in question have arbitration agreements and therefore the parties have shown an intention to submit the whole economic transaction to a single arbitral tribunal. Whilst this argument is somewhat appealing, to date, no English Court has adopted this view. Alternatively, in some cases, parties have sought a back-door method of consolidation by simply appointing the same arbitrator to a series of disputes.

Lack of consolidation is often cited as a key weakness of arbitration in England and Wales as it may result in a multiplicity of actions, increased costs and delays, the possibility of different verdicts on similar questions of law and fact, and the fact that an award/evidence in one arbitration may not be admissible in later arbitrations.

However, when the Act was being drafted, the Department Advisory Committee expressly rejected conferring power on tribunals to consolidate as it would undermine principle of party autonomy.

So is there an appetite for change? A survey[34] conducted on the 10th anniversary of the enactment of the Act found that 43% of respondents thought the position on consolidation should remain as it is; 42% thought it should be changed. The Committee who initiated the survey concluded:

"But no evidence or argument was provided to suggest that the conceptual difficulties which the Department Advisory Committee encountered could be overcome at all, let alone satisfactorily, by statutory provision which, of necessity, would be of universal application... If consolidation is required in a particular area of arbitral life, applicable arbitral rules can be drawn to provide for it, as has happened in the Swiss Arbitration Rules and those of the Society of Maritime Arbitrators (New York) and CIMAR. And in any individual case, parties can agree that it should be allowed. In our view, that is how the situation should be left."

Practical problems and unfair results?

Given the post-Howsam decisions, it now appears that in the US consolidation is an issue to be decided by the arbitrators. This creates some practical difficulties and the potential for unfair results. Consider the facts of the *Connecticut General* case. There, each of the pool members issued its own demand for arbitration and each named its own arbitrator. Were that case decided today, the court would defer to the arbitrators to resolve the consolidation issue. But, which arbitrators? The panel formed first? The first panel to issue a decision? What about each party's right to name its own arbitrator? Does this right disappear - at least --as to the decision on whether or not consolidation will be allowed?

These concerns have been somewhat ignored by the post-Howsam decisions. While certain of these decisions direct a specific panel[35] to decide the consolidation issue, others simply direct the parties to arbitration - leaving all these questions open.[36]

The impracticality of having multiple panels decide similar or identical issues was raised by the court in the *Connecticut General* case.[37] The Court noted:

"To have the identical dispute litigated before different arbitration panels is a formula for duplication of effort and a fertile source, in this case, of disputes over esoteric issues in the law of res judicata (the kind of dispute that would also arise if the question of consolidation were for the arbitrators rather than the district court to answer). If separate arbitrations are ordered and the reinsurers lose the first one, will the decision by that arbitration panel have res judicata or collateral estoppel effect in the other arbitrations?"

Given the current state of the law in the US and the UK, one thing is clear: Parties to reinsurance contracts should at least consider the issue of consolidation at the same time they address dispute resolution and choice of law. Under English law, consolidation will only occur if the parties expressly agree. The position is straightforward, although inflexible compared to the US where there is room for argument in favour of consolidation even absent an express agreement.

If a party is confident in its position on consolidation at the outset, it should bargain for a provision in the arbitration clause that expressly states whether and under what circumstances consolidated proceedings are allowed. If a party is unsure of it whether it will want consolidated proceedings, it should at least set out the procedure for resolving a dispute over consolidation in its arbitration clause. This may avoid the risk of multiple arbitration panels ruling on the consolidation question.

The drafting of such provisions is not without difficulty - the parties will need to consider the nature of the disputes that may arise in the future and which of those are likely to benefit from consolidation. This could lead to a clause which is complex and will need to cover matters such as the appointment of the arbitration panel, the need to waive confidentiality and the enforceability of an award particularly in multi-party consolidations. It will also remove the possibility of strategic posturing over whether or not to consolidate when disputes arise.

One practical solution may be to consider an umbrella agreement which provides for one dispute resolution procedure binding on all the parties linked to each contract, with each party agreeing to be bound by that dispute resolution procedure. Such an agreement should expressly grant the arbitrators the power to order consolidation and state the factors which they must take in to account when exercising that power. As with all contractual dilemmas, a party's position is likely to be enhanced if it has at least considered the issues at the outset of the contractual negotiations.

Notes:

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[2] In this article, we have set out the position in relation to the law of England and Wales. The position under Scottish law is different as, *inter alia*, Scotland is not subject to the Arbitration Act 1996.

[3] Rule 42 of the FRCP provides in pertinent part: (a) Consolidation. If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

[4] Section 4 of the FAA provides in pertinent part:
A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any US district court which, save for such agreement, would have jurisdiction...in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. 9 U.S.C.A. § 4.

[5] *Del E. Webb Constr. V. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A* 527 F.2d 966, (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976).

[6] *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, Supra.* 975.

[7] See *Volt Info. Sciences*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

[8] *United Kingdom v. Boeing Co., 998 F.2d 68, 70 (2d. Cir. 1993).*

[9] *Am. Centennial Ins. Co. v. Nat'l Casualty Co.*, 951 F.2d 107 (6th Cir. 1991). See also *Del E. Webb Constr. V. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989).

[10] 210 F.3d 771 (7th Cir.2000).

[11] Id. 774.

[12] Id. 774, 776.

[13] 61 Fed.Appx. 816 (3d Cir. 2003).

[14] 855 F.2d 1 (1st Cir. 1988).

[15] 537 U.S. 79 (2002).

[16] 539 U.S. 444 (2003).

[17] *Howsam.* Supra. 82.

[18] Id.

[19] Id. 81.

[20] Id. 85.

[21] Id. 83-4.

[22] Id.

[23] Id.

[24] *Green Tree. Supra.* at 452-3 (emphasis in original) (citations omitted).

[25] *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580 at 586 (3d Cir. 2007) (citation omitted).

[26] See *Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union*, 321 F.3d 251 (1st Cir. 2003); *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580 (3d Cir. 2007); *Davis v. ECPI College of Technology, L.C.*, 227 Fed.Appx. 250 (4th Cir. 2007), *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573 (7th Cir. 2006); *Certain Underwriters at Lloyds v. Cravens Dargan & Co.*, 197 Fed. Appx. 645 (9th Cir. 2006); *Blimpie Int'l, Inc. v. Blimpie of the Keys*, 371 F. Supp. 2d 469 (S.D.N.Y. 2005).

[27] 321 F.3d 251 (1st Cir. 2003).

[28] Id. 254.

[29] *Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union*, 321 F.3d 251 (1st Cir. 2003); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573 (7th Cir. 2006); *Certain Underwriters at Lloyds v. Cravens Dargan & Co.*, 197 Fed. Appx. 645 (9th Cir. 2006).

[30] Section 35 which provides:
"(1) The parties are free to agree -
(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
(b) that concurrent hearings shall be held, on such terms as may be agreed.
(2) Unless the parties agree to confer such ower on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings"

[31] Section 1 (b).

[32] Section 1 (c).

[33] *J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd.* [2007] EWHC 1262 (TCC)

[34] Report on the Arbitration Act 1996, dated November 1996 prepared for the Commercial Court Users' Committee, the British Maritime Law Association, the London Shipping Law Centre and other bodies.

[35] *Markel Int'l Ins. Co. v. Westchester Fire Ins. Co.*, 442 F.Supp. 2d 200 (D.N.J. 2006); *Dorinco Reinsurance Co. v. Ace Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 4593 (E.D. Mich. 2008).

[36] *Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union*, 321 F.3d 251 (1st. Cir. 2003).

[37] 210 F.3d 771, 774 (7th Cir.2000).

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