In a previous Note, Dr. Albert Jan van den Berg considered whether arbitration awards resulting from court ordered consolidations would be enforceable under the 1958 New York Arbitration Convention. He concluded that neither ground (a) nor (d) of Article V (1) of the Convention could be invoked by the party resisting enforcement. His argument as regards (d) is in my opinion somewhat short; and I disagree with his general conclusion that a court ordered consolidation would not raise problems at the enforcement stage. Dr. van den Berg's conclusions are based on the assumption that the parties have agreed to arbitrate in a given jurisdiction and that the law of that jurisdiction allows for court ordered consolidation of related arbitrations. His conclusion would apparently be different if one of the parties involved had not agreed to arbitration at all or if the parties had wished to arbitrate in different jurisdictions.

From the point of view of an arbitral institution the question of consolidation is of growing importance, because like the ICC Court of Arbitration, an institution often has to fix the place of arbitration and to compose all or part of the arbitration tribunal. Indeed, an arbitral institution often has to decide whether the arbitration tribunal is to be composed of one or three arbitrators. In discharging these functions, the institution must be influenced by the parties' wishes (express or implied) regarding possible consolidation of their case with other cases under its rules as well as by the overall objective that the award should be enforceable, in particular under the New York Convention. I suggest that by agreeing on (say) the ICC Rules of Arbitration, the parties cannot be considered as having agreed to the place of arbitration which the ICC will fix in the absence of an express agreement. I further suggest that although the parties have not agreed upon the individual arbitrators by agreeing to the arbitral rules of an institution, the parties have nevertheless agreed on the method for the appointment of the arbitrators by referring to those rules; and that this agreement is relevant to Article V (1)(d) of the New York Convention.

We must, as I see it, distinguish between four different situations which arise in practice. The first is one where the parties have agreed on a place of arbitration and on a method of selecting arbitrators (e.g. by reference to a set of arbitral rules). The second is where no agreement has been made on the place of arbitration but the parties have agreed on the method of selecting arbitrators. The third is where the parties have agreed on the place of arbitration but not on how to compose the arbitration tribunal. The fourth is one where there is neither agreement on the place, nor on how to compose the arbitration tribunal.

In the first case, where there is agreement between the parties as to the jurisdiction where the arbitration is to be held and on how the arbitration tribunal is to be composed, there may or may not be an agreement as to the applicability of the arbitration law at the place of arbitration, including the possibility of courts consolidating individual arbitrations. It is quite feasible to think that if the parties have agreed by reference to a set of arbitral rules on how to compose the arbitration tribunal, they want that agreement implemented and no other method of composing the tribunal. One cannot imply, as does Dr. van den Berg, that the parties have accepted the possibility of consolidation because they have selected the place of arbitration in a country where the law provides for the possibility of a court consolidating arbitrations. Even where the parties have agreed on the applicability of the local law, it is doubtful whether they have agreed by implication to the method of composing the arbitral tribunal should be different (as a consequence of consolidation) from the one provided by their agreement to arbitrate. One may presume that the possibility of court ordered consolidation is not a public policy matter that must prevail in all instances over the parties' agreement. In my opinion, only if they agreed `that the law at the place of arbitration should apply in case the parties' own agreement as to the composition of the arbitral tribunal were inapplicable could one infer an acceptance by the parties that arbitrations be consolidated. In the presence of an agreement by the parties on the method of selecting the arbitrators, e.g. by reference to the ICC Rules of Arbitration, any change in the composition of the arbitration tribunal brought about by a court order could be construed as a violation of the parties' agreement and be a ground for refusing enforcement of the award under Article V (1)(d) of the New York Convention.

In the second situation we suppose there is no agreement on the place of arbitration but an agreement on the composition of the arbitration tribunal. There may or may not exist an agreement as to the law applicable. Since the place has not been agreed upon between the parties, it will be fixed by the arbitrators or the institution administering the arbitration. If the place of arbitration is ultimately fixed in a country the law of which provides for consolidation and if the parties have not agreed on the application of the law of that country, a modification of the arbitration tribunal caused by court ordered consolidation would violate the parties' agreement on the composition of the tribunal and would be a ground for refusal under Article V (1)(d) of the New York Convention. If, on the other hand, the parties had agreed on a law which allows for consolidation and agreed that such law might be applied if the agreed appointment procedure became inapplicable, then consolidation would be acceptable under the New York Convention.

The third situation is where the parties have agreed on the place of arbitration but
not on the composition of the arbitration tribunal. In such a case it seems that the
court's consolidation of two arbitrations into one, and the ensuing changes of the
persons appointed as arbitrators, would not encounter problems under Article
V(1)(d). The main reason for this would be that there was no agreement between the
parties on the composition of the arbitration tribunal, but not that there is an implied
acceptance of the law applicable at the place of arbitration. If the parties agreed that
the law at the place of arbitration should not apply as regards consolidation of cases,
then again one cannot presume that a consolidation would not be a ground for refusal
under Article V (1)(d).

The fourth case is one where there is no agreement at all, neither on the place of
arbitration nor on the composition of the tribunal (nor on an applicable law). If then
the local law at the place of arbitration, which place will be fixed by the arbitrator or the
institution administering the arbitration, provides for consolidation, a party could
hardly oppose enforcement of the award resulting from such a consolidation on the
ground that the composition of the tribunal or the procedure was not in accordance
with the agreement of the parties.

The Dutch Arbitration Act 1986, Article 1046, provides for the possibility of court
consolidation of two or more arbitral proceedings unless the parties have agreed
otherwise. Analysing this provision, it seems that there is no limit to the number of
proceedings which may be consolidated and that it is of no importance whether the
Netherlands have been chosen as a place of arbitration by the parties or by an
arbitrator or by an institution administering arbitrations. The new Dutch Act
therefore goes further than Dr. Van den Berg's premise that the parties have chosen
the jurisdiction in which to arbitrate with the result that consolidation should not be an
obstacle under the New York Convention. The Act leaves it to the discretion of the
President of the District Court of Amsterdam to order consolidation between a case
where, for example, the ICC Court fixed the place of arbitration in the Netherlands
not knowing that a subsequent connected dispute would arise in which the parties or
the arbitrator chose to fix the same place of arbitration. If the consolidation were to
lead to a modified composition of the arbitral tribunal, it seems to me that a problem
may very well arise under Article V (1)(d) of the New York Convention.

Under the new Dutch Act the parties can opt out of consolidation. But it is not very
clear when and by whom. A consolidation case involves at least three parties. Is it
sufficient that the parties in the first arbitration agreed between themselves that there
shall be no consolidation, or must the agreement be made between all three (or more)
parties? It is obviously not enough for one party to oppose consolidation; there must
be an agreement between two or even more parties. To leave it to the parties (whomever
they are) to opt out appears reasonable, but will it be a very practical solution? When
disputes have arisen and the request for consolidation has been made by one party, it is
unlikely that the parties will be able to agree to exclude consolidation. The requesting
party will certainly not like the idea of opting out, he will pursue his request for
consolidation and there will be no agreement to opt out. At an earlier stage, when
drawing up the various contracts related to a big project, the chances of reaching an
agreement to exclude consolidation are greater. This presupposes that the parties are
aware of the risk of consolidation, not knowing perhaps at this stage where the
arbitration will take place. It also supposes that these parties are aware of who will be
parties to the connected arbitration with whom they want to avoid consolidation (if I
am right in thinking that all parties concerned with a consolidation must reach
agreements to opt out). Since contracts are negotiated at different times and in
different places, it will not always be possible to agree in advance; parties may be
unknown to each other until the question of consolidation arises. And then it is too late
to agree, as explained above.

Should a careful party, who dislikes the idea of consolidation with others of whom
he knows little, or who for other legitimate reasons does not want to be involved in a
multiparty arbitration, henceforth adopt a modified standard arbitration clause
expressly rejecting consolidation? This would change drafting practices, but would it
be effective if the arbitration takes place in the Netherlands?

Sigvard Jarvin

Consolidated Arbitrations, the New York Arbitration Convention
and the Dutch Arbitration Act 1986 – A Replique to Mr Jarvin

It was not my 'general conclusion', as Mr. Sigvard Jarvin writes, that 'a court ordered
consolidation would not raise problems at the enforcement stage' under the 1958 New
York Convention. Skillful lawyers are as a rule able to raise problems at any stage,
particularly on enforcement. I merely concluded my Note by saying that I was
'inclined to consider an award which is the result of a judicially ordered consolidation
of arbitrations enforceable under the New York Convention'. Mr. Jarvin's learned
comment has not convinced me that this view is necessarily erroneous.

Mr. Jarvin's comment focuses on the parties' agreement with respect to the place of
arbitration and the composition of the arbitral tribunal in conjunction with article
V(1)(d) of the New York Convention. He distinguishes between four categories in
which permutations are made as to whether or not the parties have agreed on the place
of arbitration and on the composition of the arbitral tribunal. The four categories are:
(1) the parties have agreed on the place of arbitration and on a method of selecting
arbitrators;
(2) no agreement has been made on the place of arbitration but the parties have agreed
on the method of selecting arbitrators;
(3) the parties have agreed on the place of arbitration but not on how to compose the
arbitration tribunal; and
(4) there is neither agreement on the place of arbitration nor on how to compose the
arbitration tribunal.

Mr. Jarvin concludes that in the third and fourth categories no problem will arise
under Article V(1)(d) of the Convention. His adverse conclusion regarding the first
and second categories, however, raises questions concerning the possible effect of the
mandatory rules of an arbitration law on the parties' agreement and the construction
of Article V(1)(d) of the Convention.

As far as the applicable arbitration law is concerned, Mr. Jarvin suggests under his

1 See Mr. Sigvard Jarvin's Note, supra.
first category that an agreement on the place of arbitration 'may or may not be an agreement as to the applicability of the arbitration law at the place of arbitration'. It is my opinion that an agreement on the place of arbitration as a rule implies a choice for the applicability of the arbitration law of that place. It rarely happens that parties expressly provide in their contract that the arbitration law of a certain country applies to the arbitration. Such choice is considered to be included in the designation of the place of arbitration. Almost no practitioner would doubt that if, for instance, Athens is agreed by the parties as the place for arbitration, Greek arbitration law is applicable. According to Mr. Jarvin, this provision would impede enforcement of arbitral awards resulting from court ordered consolidation in those cases where the parties have agreed on a specific method of selecting arbitrators because court ordered consolidation would not be in accordance with the agreement of the parties. A literal reading of Article V(1)(d) would indeed suggest that the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first and that only in the absence of such agreement, the arbitration law of the place of arbitration is to be taken into account. It may, however, be doubted whether such a literal reading of Article V(1)(d) is justified.

As a preliminary matter, it should be made clear that the New York Convention is limited to enforcement of an arbitral award made in another (Contracting) State. It is only in a foreign country where the question of Article V(1)(d) can arise. In the country where the arbitration took place, the New York Convention does not apply. In that country, only its arbitration law applies.

The drafting history of Article V(1)(d) of the New York Convention may shed some light on this troublesome provision. Under the New York Convention's predecessor, the Geneva Convention of 1927, enforcement of a foreign award could be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with both the agreement of the parties and the arbitration law of the country where the arbitration took place. The ICC, which took the initiative in establishing the New York Convention, considered one of the main defects of the 1927 Geneva Convention to be that it provided for enforcement of only those awards which were strictly in accordance with the procedural law of the country where the arbitration took place. The ICC proposed in 1955 a draft Convention on the enforcement of truly international awards, i.e., arbitral awards which are not governed by any national arbitration law. In the draft Convention, the present text of Article V(1)(d) was inserted. The concept of truly international arbitration, however, was subsequently rejected by draftsmen of the New York Convention. They substituted 'foreign awards' for the wording 'international awards', thereby making reference in Article V(1) to an applicable national arbitration law. Thereafter, long discussions regarding the text of Article V(1)(d) evolved as to whether enforcement should be refused in cases where the composition of the arbitral tribunal and the arbitral procedure agreed upon by the parties did not follow in all details the requirements of a national arbitration law. As no adequate solution could be found, the New York Convention retained the ICC text.

This non-solution inevitably gives rise to problems in practice. This happened in particular with respect to enforcement outside England of arbitral awards made in London. Various standard forms of charter-party provide that each party is to appoint one arbitrator and that the two arbitrators so chosen shall appoint a third arbitrator. Notwithstanding such agreement on the composition of the arbitral tribunal, some respondents decline to appoint their own arbitrator. What then happens under English arbitration law may be surprising for those who live outside England. According to Section 7(b) of the English Arbitration Act 1950, if there is a reference to

\[\text{Article V(1)(d) of New York Convention provides that the enforcement of a foreign arbitral award may be refused if the party against whom enforcement is sought asserts and proves that:} \]

'\text{the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.}'

\[\text{According to Mr. Jarvin, this provision would impede enforcement of arbitral awards resulting from court ordered consolidation in those cases where the parties have agreed on a specific method of selecting arbitrators because court ordered consolidation would not be in accordance with the agreement of the parties. A literal reading of Article V(1)(d) would indeed suggest that the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first and that only in the absence of such agreement, the arbitration law of the place of arbitration is to be taken into account. It may, however, be doubted whether such a literal reading of Article V(1)(d) is justified.}\]

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Consolidated Arbitrations - A Reflection in the Mirror

...
One may go, in my view, a step further. Since Article 13 of the Internal Rules provides for one form of consolidation, a contrario the parties to ICC arbitration can be deemed to have implicitly excluded other forms of consolidation (for example, consolidation of an arbitration between an employer and the main contractor with an arbitration between the same main contractor and the sub-contractor). As a result, ICC arbitration in the Netherlands would not be subject to any court ordered consolidation under Article 1046 of the new Dutch Act.

It should be added that the President of the District Court in Amsterdam has discretionary power whether or not to order consolidation in the absence of any exclusion agreement. It is expected that the President of the Amsterdam Court will exercise the power granted by Article 1046 cautiously, and only order consolidation when it is beyond doubt that the consolidation arbitration will be in the interest of all parties involved.

Dr. Albert Jan van den Berg