

a matter of the internal law of the United States with little (in light of the preceding point) practical effect on the foreign relations of the United States.¹³

The terminology of the amendment derives from the present text of chapter two and is harmonious with it. Such expressions as 'the Convention', 'this chapter', 'district court of the United States', and 'State court' may be found in various sections of present chapter two.¹⁴ The expressions 'under the circumstances and in the manner provided by law' and 'however designated' are essentially derived from Rule 64 of the Federal Rules of Civil Procedure, which governs federal practice in respect of several provisional remedies granted by state law.

The effort to enact the amendment is now under way.

Joseph D. Becker

Consolidated arbitrations and the 1958 New York Arbitration Convention

The English Commercial Court's Arbitration Sub-Committee considered at length the need for new legislation with the object of improving the efficiency and acceptability of commercial arbitration in England and Wales. In its working report of February 1985 – which is fascinating reading – it observed that there is a strong support for legislation enabling 'consolidation' of arbitrations arising out of the same events. The Sub-Committee reported, however, that a workable solution has yet not been proposed. The objections noted by the Sub-Committee are two-fold, though interrelated:

- (a) any imposition of a unified dispute-settling mechanism will invariably mean a breach of the contractual rights of at least one of the parties;
- (b) an award which embodies the decision of the tribunal insofar as it falls outside the scope of the arbitration agreement is likely to encounter serious difficulties when it comes to enforcement under the New York Convention.

The desirability of consolidation of related arbitrations is indeed significant in a number of areas, in particular maritime and construction arbitration. Some institutions, like the International Chamber of Commerce, are designing schemes to be incorporated in special arbitration clauses and their rules. However, such schemes will work only if all arbitration clauses in question refer to the same institution.

A more effective way of dealing with the problem of related arbitrations is a consolidation ordered by the courts. That possibility exists at present in a few countries only. In the United States, consolidation of related arbitrations by the courts is developed by case law. In 1982, Hong Kong enacted a new Arbitration Act which contains specific provisions on judicially ordered consolidation. The latest development in this field is the new Dutch Arbitration Act, which will become effective on 1 December 1986. The new Dutch Act provides for consolidation of related arbitrations ordered by the President of the District Court in Amsterdam.

Outside the United States, Hong Kong and the Netherlands, judicially ordered

¹³ *Restatement of Foreign Relations Law of the United States (Revised)*, Tent. Draft No. 6, §135 (Apr. 12, 1985); *Whitney v. Robertson*, 124 U.S. 190 (1888).

¹⁴ *See, eg*, 9 U.S.C.A. §§201, 205 (1986 Supp.).

consolidation of related arbitrations is, to my knowledge, not yet known. However, the recent development in these countries may signal a new trend. This trend indicates that the solution of the problem of related arbitrations is preferably to be provided by the legislator in the various countries.

Until now, no enforcement of an award resulting from judicially ordered consolidation arbitrations has been sought under the New York Convention. As is well known, the New York Convention applies to the enforcement of an arbitral award in a country other than the country in which it is made. Would such an award be unenforceable under the Convention?

A party against whom enforcement of a Convention award is sought can resist it if he asserts and proves one or more of the grounds listed in Art. V(1) of the Convention. Two grounds could be asserted against an award which is the result of a judicially ordered consolidation: ground (a) the lack of an arbitration agreement, and ground (d) irregularity in the agreed constitution of the arbitral tribunal and/or arbitral procedure.

With respect to ground (a), if an arbitration law (including case law) of a country provides for judicially ordered consolidation of related arbitrations, the resulting award will not be set aside for lack of an arbitration agreement. In the terms of ground (a), it cannot be said that there was not an 'agreement . . . not valid . . . under the law of the country where the award was made'.

A specific aspect of consolidation is that the award is not the result of one specific arbitration agreement. However, all parties did agree to *arbitration* in the respective arbitration agreements. Accordingly, all parties involved had the will to go to arbitration. From the pure theoretical point of view, the consolidation therefore can be considered to have the legal effect of merging two or more arbitration agreement into one.

Ground (d) of Art. V(1) of the Convention provides that enforcement of an award may be refused if the respondent asserts and proves that:

'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'.

If parties have agreed on a specific manner of appointing arbitrators and/or on specific arbitral proceedings to evolve between themselves – which agreement is usually made by reference in the arbitration agreement to arbitration rules – it is likely that, in case of consolidation, arbitrators are appointed and/or arbitral proceedings take place in a manner other than envisaged by the respective agreements of the parties. Would then an award which is the result of a judicially ordered consolidation of related arbitrations fall under the above ground (d)?

The answer is, in my opinion, again in the negative. When parties agree to arbitrate in a given jurisdiction, that agreement implies that they also agree on the applicability of the arbitration law of that jurisdiction. If the arbitration law includes the possibility of judicially ordered consolidation of related arbitrations, that possibility forms part of their agreement. Depending on the arbitration law in question, the possibility of consolidation is likely to prevail over an agreed method of appointed arbitrators and conducting arbitral proceedings.

In conclusion, I am inclined to consider an award which is the result of a judicially ordered consolidation of arbitrations enforceable under the New York Convention. This conclusion is based on the assumption that all parties involved have agreed one

way or the other to arbitration within the same arbitral jurisdiction. The conclusion would be different if one or more of the parties involved had not agreed to arbitration at all or had agreed to arbitration in arbitral jurisdictions.

Finally, I set out the solution for judicially ordered consolidation of related arbitrations offered by the new Dutch Arbitration Act 1986 (which will be incorporated in a new Book IV of the Code of Civil Procedure, Arts 1020-1076). Art. 1046 provides:

'Article 1046 -- Consolidation of arbitral proceedings

'1. If arbitral proceedings have been commenced before an arbitral tribunal in the Netherlands concerning a subject matter which is connected with the subject matter of arbitral proceedings commenced before another arbitral tribunal in the Netherlands, a party may request the President of the District Court in Amsterdam to order a consolidation of the proceedings, unless the parties have agreed otherwise.

'2. The President may grant the request wholly or partially or refuse the request, after he has given all parties and the arbitrators the opportunity of expressing their opinion. His decision shall be communicated in writing to all parties and the arbitral tribunals involved.

'3. If the President orders consolidation in full, the parties shall jointly appoint the arbitrators in an uneven number and determine the rules which shall apply to the consolidated proceedings. If, within the period of time determined by the President, the parties have not reached agreement on the foregoing, the President shall, at the request of a party, appoint the arbitrator or arbitrators and, if necessary, determine the rules which shall apply to the consolidated proceedings. The President shall determine the remuneration for the work carried out so far by the arbitrators whose mandate is terminated by reason of the consolidation.

'4. If the President orders partial consolidation, he shall decide which disputes fall thereunder. The President shall, at the request of a party, appoint the arbitrator or arbitrators and determine which rules shall apply to the consolidated proceedings if, within the period of time determined by the President, the parties have not reached agreement thereon. In that event the arbitral tribunals before which arbitrations have already commenced shall suspend those arbitrations. The award of the arbitral tribunal appointed for the consolidated arbitrations shall be communicated in writing to the other arbitral tribunals involved. Upon receipt of this award, these arbitral tribunals shall continue the arbitrations commenced before them and decide in accordance with the award rendered in the consolidated proceedings.

'5. Article 1027(4) applies to the cases mentioned in the third or fourth paragraph accordingly.

'6. An award rendered under the third or fourth paragraph shall be subject to appeal to a second arbitral instance if and to the extent that all parties involved in the consolidated proceedings have agreed to such appeal.'

It is interesting to note that the first paragraph of the above quoted Art. 1046 of the new Dutch Arbitration Act offers parties the faculty of opting out of a consolidation of their arbitration with another arbitration ('unless the parties have agreed otherwise'). That option was not provided in the original draft of the new Act. The question was raised before the passing of the Act whether a consolidated arbitration would run counter to the Netherlands Constitution which provides in Article 17 that nobody can be deprived of the right accorded him by law to litigate his case in court. The Dutch Government expressed the opinion that it did not consider the consolidation as provided in the draft of the Act to be at odds with such constitutional right, but for the sake of alleviating any doubt and affording parties the maximum freedom in matters of arbitration, it amended the draft by including the faculty of opting out. □

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