ARBITRATION INTERNATIONAL, Vol. 3, no. 3, July 1987

NOTES

Consolidated Arbitrations, the New York Arbitration Convention and the Dutch Arbitration Act 1986 – a Critique of Dr. van den Berg

In a previous Note[1], 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.[2] 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

1 'Consolidated Arbitrations and the 1958 New York Arbitration Convention' (1986) 2 Arbitration International 367. For other materials on consolidation published in this journal, see Wetter, (1987) 3 Arbitration International 2 ('A multi-party arbitration scheme for international joint ventures'); Miller (1987) 3 Arbitration International 87 ('Consolidation in Hong Kong – the Shui On Case'); and Veeder, (1986) 2 Arbitration International 310 ('Multi-party disputes: Consolidation under English law')

2 Article V (1)(a) & (d) provide that recognition and enforcement of the award may be refused where the arbitration agreement '(a) . . . is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;' or where '(d) 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'.

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 that 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 (whoever 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 exc lude 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.[1] Skilful 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 posible 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. An exception to this rule is a truly international arbitration which is governed by an international convention alone (for example, an ICSID arbitration under the Washington Convention of 1965).

Contrary to what Mr. Jarvin seems to suggest under his second category, the foregoing also applies if the parties have expressly or impliedly entrusted the designation of the place of arbitration to an arbitral institution (such as the ICC) or to the arbitrators themselves. By doing so, the parties jointly give a mandate to the arbitral institution or the arbitrators to make the designation *on their behalf*, which is legally tantamount to a designation by the parties themselves. Consequently, since parties can in principle be deemed to have chosen either directly or indirectly for the applicability of an arbitration law, court ordered consolidation of related arbitrations forms part of their agreement in those cases where that law provides for such consolidation.

Even if it is not accepted that court ordered consolidation forms part of the parties' agreement, court ordered cosolidation will prevail over the parties' agreement on the composition of the arbitral tribunal for the following reason. It cannot be doubted that mandatory provisions of the arbitration law of the place of arbitration prevail over an agreement of the parties which deviates thereform. For example, if the parties have ageed to an even number of arbitrators but the arbitration law of the place of arbitration prescribes mandatorily an odd number of arbitrators, the parties' agreement on the number will be superseded. If nevertheless they appoint an even number of arbitrators, the ensuing award may be set aside on this ground by the courts of the country where the arbitration took place.

The same applies to court ordered consolidation in the sense that the parties' agreement on the composition of the arbitral tribunal is replaced by another method of appointment of arbitrators for the consolidated arbitration. In this case too, the arbitration law of the place of arbitration prevails over that part of the parties' agreement which is concerned with the composition of the arbitral tribunal.

Are the principles outlined above altered by Article V(1)(d) of the New York Convention? Mr. Jarvin seems to be of this opinion because he treats the agreement of the parties independently from the arbitration law of the place of arbitration. In my opinion these two cannot be considered separately. Since Mr. Jarvin regarded my argument on Article V(1)(d) in my Note 'somewhat short', I shall examine this provision in more detail.

Article V(1)(d) of New York Covention provides that the enforcement of a foreign arbitral award may be refused if the party against whom enforcement is sought 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'.

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 readig 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.[2] 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

2 For an important step in this initiative by the ICC, see Eisemann's Note in Volume 4, Number 4 Arbitration Journal (1949) of the American Arbitration Association, reprinted in (1986) 2 Arbitration International 73 (with an introduction by Paulsson).

two arbitrators and the respondent does not appoint an arbitrator, the claimant may appoint this nominee as *sole* arbitrator. This provision seems still to be good law after the Arbitration Act 1979; see Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (London 1982) pp. 146–150.

Should enforcement abroad of an English award by a sole arbitrator appointed by the claimant only in the circumstances described above be refused on the basis of Article V(1)(d) of the New York Convention? A literal reading of the text of Article V(1)(d) would indeed lead to an affirmative answer as two Italian courts were minded to do. Without reference to English arbitration law, enforcement of the English award was refused on the grounds that the parties' agreement on the composition of the arbitral tribunal was not complied with (Court of Appeal of Florence, 13 April 1978, reported in IV Yearbook Comm. Arb. (1979) 294; Court of Appeal of Genoa, 2 May 1980, reported in VIII Yearbook Comm. Arb. (1983) 381). The Spanish Supreme Court and the US District Court in New York reached an opposite conclusion. Notwithstanding the agreement of the parties on the composition of the arbitral tribunal, these courts upheld the appointment of the sole arbitrator with specific reference to English arbitration law. (Spanish Supreme Court, 3 June 1982, reported in XI Yearbook Comm. Arb. (1986) 527; US District Court, SDNY, 30 January 1980, reported in IX Yearbook Comm. Arb. (1984) 462).

It seems to me that the Spanish and US Courts represent the better view, i.e., the mandatory rules of the arbitration law of the place of arbitration override the agreement of the parties on the composition of the arbitral tribunal (and the arbitral procedure) under Article V(1)(d) of the New York Convention. If the Italian view were followed, a Scylla and Charybdis situation could arise. Where the parties' agreement on the composition of the arbitral tribunal is not followed but the mandatory rules of the arbitration law of the place of arbitration are followed, enforcement abroad of the award can (by virtue of the Italian interpretation) be refused under Article V(1)(d). Conversely, if the parties' agreement on the composition of the arbitral tribunal is followed and hence the mandatory rules of the arbitration law of the place of arbitration are not followed, the award can be set aside at the place of arbitration. The setting aside at the place of arbitration will mean that enforcement abroad can be refused under Article V(1)(e) of the New York Convention ('the award . . . has been set aside . . . by a competent authority of the country in which . . . that award was made').

The Italian view, therefore, places international arbitration in a no-win situation: whether the agreement of the parties on the composition of the arbitral tribunal or the mandatory rules of the arbitration law of the place of arbitration are followed, ultimately enforcement can be refused under the New York Convention. Such an unsatisfactory result – which is at odds with the system and purpose of the Convention – will not result from the interpretation of the Spanish and US Courts; namely, that under Article V(1)(d) of the Convention the mandatory rules of the law of the place of arbitration prevail over the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure. According to this interpretation, when the parties and the arbitrators observe these mandatory rules in deviation from the parties' agreement, enforcement will not be shipwrecked in other countries on Article V(1)(d) of the New York Convention.

The foregoing observations with respect to Article V(1)(d) of the Convention can be applied *mutatis mutandis* to court ordered consolidation. Even if parties have agreed on a method of selecting arbitrators, the mandatory rules of the arbitration law of the

place of arbitration relating to court appointed arbitrators in case of consolidation will prevail. The same applies to an arbitral procedure in consolidated arbitration which is different from the arbitral procedure contemplated by the agreement of the parties.

Turning to Article 1046 of the new Dutch Arbitration Act 1986, these provisions are designed to *assist* parties drowned in the problems of multi-party proceedings. They essentially play a role in the Dutch domestic context. The President of the District Court in Amsterdam can be approached with a request for consolidation only if the arbitrations are pending within the Netherlands. They are mainly intended for the Dutch building industry in order to avoid conflicting decisions concerning the same project in an arbitration between the employer and the main contractor and an arbitration between the same main contractor and the sub-contractor.

Furthermore, the Dutch legislator respected the freedom of the parties by allowing them to exclude court ordered consolidation. To answer a query of Mr. Jarvin: such an opting out is already achieved if the exclusion is contained in only one of the arbitration agreements involved. The standard phrase of the Act appearing in Article 1046(1) for according freedom to parties to arrange their arbitration, provides: 'unless the parties have agreed otherwise'. There is no doubt that this phrase in Article 1046(1) should be read as 'unless two or more parties have excluded by agreement such consolidation or have agreed otherwise'. (See Pieter Sanders and Albert Jan van den Berg, *The Netherland Arbitration Act 1986*, Text and Notes in English, French and German, note 52 (Kluwer 1987)).[3]

In addition, Article 1046 provides expressly that when the President of the Amsterdam Court orders consolidation, the parties should first try to agree amongst themselves on the arbitrators to be appointed and the procedure to be followed. Only if the parties are unable to reach agreement on these matters, will the President appoint the arbitrators and (to the extent necessary) determine the arbitral procedure for the consolidated arbitration.

As regards ICC arbitration and consolidation under Article 1046 of the Dutch Act, it can be argued that an exclusion agreement within the meaning of Article 1046 of the Act is contained in Article 13 of the Internal Rules of the ICC Court of Arbitration.[4] Article 13 concerns the joinder of claims by the ICC Court of Arbitration in two ICC arbitration proceedings between the same parties in respect of the same legal relationship. There is little doubt that Article 13 of the Internal Rules embodies an agreement within the meaning of the phrase 'unless the parties have agreed otherwise' appearing in Article 1046(1) of the new Dutch Act. Thus, if the ICC arbitrations take place in the Netherlands between the same parties concerning the same contract (a rather exceptional case), no consolidation can be ordered by the President of the District Court in Amsterdam.

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3 The text for an exclusion agreement as recommended by the Netherlands Arbitration Institute (NAI) reads: 'Consolidation of the arbitral proceedings with other arbitral proceedings pending in the Netherlands, as provided in Article 1046 of the Netherlands Code of Civil Procedure, is excluded'.

4 Article 13 of the Internal Rules of the Court of Arbitration (in force as of 1 January 1988) provides on joinder of claims in arbitration proceedings: 'When a party presents a request for arbitration in connection with a legal relationship already submitted to arbitration proceedings by the same parties and pending before the Court of Arbitration, the Court may decide to include the claim in the existing proceedings, subject to the provisions of Article 16 of the ICC Rules of Arbitration.' Article 16 of the ICC Rules restricts the making of new claims and counter-claims to the limits fixed by the parties' Terms of Reference and any rider thereto.

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