THEORY AND PRACTICE OF MULTIPARTY COMMERCIAL ARBITRATION

ISAAK I DORE

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Theory and Practice of Multiparty Commercial Arbitration

with special reference to the UNCITRAL Framework

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Theory and Practice of Multiparty Commercial Arbitration

For my brother, Mohammed.

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Preface

This book is a companion volume to the author's previous work, *Arbitration and Conciliation under the UNCITRAL Rules: A Textual Analysis*, (Boston: Martinus Nijhoff, 1986). As its title suggests, that book dealt with the UNCITRAL rules and procedures for international commercial arbitration generally. The present book assesses the potential of the UNCITRAL framework for one particular type of arbitration, namely, that involving more than two parties. References to relevant provisions of the Arbitration Rules of 1976 (see Appendix 2) and the Model Law on International Commercial Arbitration of 1980 (see Appendix 3) are made where appropriate; however, the interpretations of the rules and the model law from textual and historical viewpoints that were offered in the earlier book are not repeated here.

Since the UNCITRAL framework is of fairly recent origin, its use in multiparty commercial arbitration is necessarily a relatively new phenomenon. Indeed, case law involving multiparty arbitration is itself quite sparse. Thus, some of the elements of multiparty proceedings must be presented in a largely theoretical perspective. The practical aspects of these proceedings, illustrated by such case law and national legislation as do exist and by analogies with the law and procedure of bilateral arbitration, are analyzed to indicate possible difficulties that could interfere with the smooth and speedy resolution of multiparty commercial disputes. These difficulties as well as techniques that could minimize or avoid them are discussed in chronological order of the stages of multiparty arbitration. First is the pre-arbitral phase of consolidation of related disputes, including the problems of joinder and intervention. The next phase is the commencement of proceedings: establishing the arbitral tribunal, determining its jurisdiction, and resolving challenges to its jurisdiction. This is followed by a discussion of procedural and evidentiary issues that are of special importance in a multiparty arbitration: choice of law, procedural equality, place and language of arbitration, and the gathering of expert and nonexpert testimony. The study then examines certain problems likely to arise in the post-arbitral phase, concerning requests for provisional relief before the award, the award itself, and procedural and substantive recourses against the award available under the UNCITRAL framework. Finally, the arbitral award is discussed from the point of view of its transnational recognition and enforcement under national and international treaty law.

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Chapter 1

Consolidation of Multiparty Arbitrations: an Anglo-American Perspective

Disputes involving more than one party present unique problems to the arbitration process as early as the negotiation of the prime contract as well as in the pre-arbitral phase immediately after a dispute has arisen. These problems will vary from case to case, depending on the number of parties, the nature and subject matter of their contract, and the forum in which resolution of the dispute is attempted. Multiparty controversies can arise over a variety of domestic and international commercial relationships, including sales contracts, licensing or distributorship arrangements, investment contracts, building and construction contracts, maritime contracts involving shipping or charterparties, and contracts for the construction of large-scale industrial works, of the kind often sought by governments of developing countries.

Taking as an example a typical construction project, the owner would ordinarily look to his prime contractor to remedy defects in performance and would be unconcerned with whether the latter could pass on responsibility to a third party—e.g., the prime subcontractor or another subcontractor. However, if a subcontractor, particularly the prime subcontractor, is predesignated, perhaps even at the insistence of the owner, there may be a *pro tanto* reduction in the responsibility of the prime contractor to the owner. In such cases, the owner will need not only an arbitral agreement with the nominated subcontractor but also a provision therein for joinder or consolidation of arbitral proceedings between owner and prime contractor and owner and subcontractor. Similar agreements for arbitration and consolidation would be necessary between the owner and a nominated supplier, the prime contractor and the supplier, and the prime contractor and any subcontractors.

All these potential arbitrations, of course, depend on the agreement of the parties to submit their dispute to arbitration—agreement which may not be readily forthcoming. If the parties agree to separate arbitrations, the likelihood of delay, high and duplicative costs, and inconsistent findings is great.

Difficulties such as these are often sought to be alleviated through voluntary or court ordered joinder of parties or consolidation of disputes. Voluntary agreements—i.e., agreements to consolidate in advance of a dispute—would require identical arbitral clauses as well as careful identification of and cross-referencing to the disputes that are intended to be consolidated. Provisions for those purposes have been included in section 2.1 of the model multiparty arbitration agreement in appendix 1.[1]

In the absence of voluntary agreement to consolidate, the response of courts to petitions for arbitral consolidation will vary from one national jurisdiction to another. In an international multiparty controversy, the likelihood of court-ordered consolidation is remote at best. This is because it would require, first, the existence of an arbitration clause in *each* contract and, second, that each of these contracts designate the same situs as the place of arbitration. If some or even one of the contracts designates a place (or places) of arbitration different from the place designated in the others, a court may not be able to order full consolidation either due to lack of jurisdiction or out of respect for the principle of party autonomy.

Even if all the contracts designate the same place of arbitration, judicial consolidation will by no means be a certainty, because a mandatory consolidation order may still be seen as undermining the principles of consensualism and party autonomy. Other considerations militating against mandatory consolidation are that it might upset the appointment-and-challenge procedure regarding arbitrators as agreed to by the parties; that it might create uncertainty as to the jurisdiction of the tribunal, the exchange of pleadings, and the choice of the procedural and substantive law that will govern the multiparty arbitration; and that it might thwart party expectations as to the language of the arbitration.

Consolidation in U.S. Courts

Most leading centers of international commercial arbitration, particularly in Europe, are therefore hostile to the idea of court ordered consolidation.[2] Although a somewhat more liberal approach has been shown by U.S. courts, even those decisions in which consolidation has been ordered have acknowledged that the law is unsettled or in a state of flux. Moreover, the main national professional organization in the United States, the American Arbitration Association, adheres to the policy that disputes arising under separate contracts containing arbitration clauses cannot be consolidated

[1] *See* Lloyd, *Multi-Party Clauses and Agreements*, unpublished paper presented at a seminar on Multi-Party Arbitration under the auspices of the Court of Arbitration of the International Chamber of Commerce (ICC) and the ICC Commission on International Arbitration, and organized by the Swedish National Committee of the ICC and the ICC Institute of International Business Law and Practice, Stockholm (May 29-30, 1989).

[2] T. Devitt, *Multiparty Controversies in International Construction Arbitrations*, 17 Int'l L. 669, 673-74 (1983) (referring to French, Swiss, Swedish, German, and Italian law).

before a single arbitral panel if one of the parties objects to the consolidation.[3] The principal federal statute, the Arbitration Act,[4] is silent as to the consolidation of arbitration proceedings. Thus, U.S. courts, when faced with requests for consolidation, have been able to grant these requests only through the circuitous route of using Federal Rule of Civil Procedure 81(a)(3),[5] which makes Rule 42(a)—authorizing courts to order consolidation in judicial proceedings—applicable to proceedings under the Arbitration Act.[6]

In *Compañía Española de Petróleos, S.A. v. Nereus Shipping, S.A.*, a shipowner, Nereus Shipping, S.A., chartered its vessel to a Venezuelan corporation, HIDECA. These two parties signed an arbitration agreement. A third party, Compañía Española, was a guarantor of the contractual obligations of the Venezuelan corporation. Although Compañía Española signed no express agreement to arbitrate, the guaranty stated unequivocally that in the event of any default by HIDECA, the guarantor would "assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party" as well as "perform the balance of the contract."[7] After a dispute arose and Nereus and HIDECA sought arbitration, Nereus demanded that the guarantor also arbitrate, a demand which the guarantor resisted on the ground that it had not agreed to arbitrate. It further sought a declaratory judgment from the U.S. district court to the effect that it had not agreed to arbitration, as well as an injunction restraining

[3] *Robinson v. Warner*, 370 F. Supp. 828, 829 (D.R.I. 1974). In *Gavlik Constr. Co. v. H.F. Campbell Co.*, 389 F. Supp. 551 (W.D. Penn. 1975), *aff'd in part, rev'd in part*, 526 F.2d 777 (3d Cir. 1975), the district court, in denying consolidation, specifically mentioned the principle that "arbitration is a matter of contract, and parties cannot be forced to arbitrate matters they have not agreed to arbitrate." 389 F. Supp. at 555. The district court also construed the method of selection of arbitrators indicated in the subcontracts—one arbitrator to be selected by the general contractor and one by the subcontractor, with the third arbitrator being chosen by the first two arbitrators—as "clearly impl[ying] that only those two parties were expected to participate in any arbitration." *Id.* at 556. The court also feared that if the general contractor's request for consolidation was granted it would be prejudicial to the plaintiff subcontractor. *Id.* On appeal the Court of Appeals for the Third Circuit affirmed in part and reversed in part. *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975). Although the court reversed the denial of consolidation, its reasoning turned largely on factual issues: not only did the contract between the owner and prime contractor contain an arbitration clause, but it also contained numerous provisions relating to subcontracts, pursuant to which the prime contractor entered into subcontracts with subcontractors. Under the terms of these subcontracts, the subcontractor agreed to "be bound to the Contractor by the terms and provisions of" the owner-prime contract and assumed toward the prime contractor all obligations which the contractor had to the owner. *Id.* at 788. The subcontracts also provided for arbitration. In view of these facts, and since the court construed the dispute between the prime contractor and subcontractor as a "dispute . . . arising out of, or relating to" the owner-prime contract—which, by its express terms, was to be arbitrated—consolidation was appropriate. *Id.* Had the contractual links between the owner-contractor and contractor-subcontractor contracts not been stated in such express and forthright terms, and in particular, if the owner-prime contract had not so clearly established the requisites of subcontractor performance, or if the subcontractor had not expressly undertaken to be bound by the terms of the owner-prime contract, or if the arbitration clause in the latter contract had been less clearly drafted or drafted in more restrictive terms, or indeed, if the arbitration clause in the subcontracts had been couched more restrictively, the court might not have ordered consolidation.

Nereus from going ahead with the arbitration.[8] This relief was denied by the court, which found that the guarantor had implicitly consented to arbitration. The district judge then consolidated the two arbitrations between the three parties.[9]

On appeal, this portion of the decision of the district court was affirmed. The court of appeals held that whether a guarantor is bound by an arbitration clause contained in the original contract depends on the language of the guaranty. The court further found ample authority for the principle that if an arbitration clause is not limited to disputes between the two original parties, then it binds all parties who subsequently consent to be bound by the terms of the original contract.[10] In accordance with these principles, the court found that the broad language of the guaranty (quoted above)[11] justified an inference that the guarantor had agreed to do more than guaranty the mere "performance" of the original contract.[12] Thus, not only did the court affirm the district court's order of consolidation, but it also modified the method of appointment of arbitrators originally agreed to between Nereus and HIDECA.[13] The court of appeals also affirmed the lower court's finding that the latter had the authority to consolidate the arbitrations under Fed.R.Civ.P. 42(a) and 81(a)(3), which provide as follows:

> *Rule 81(a)(3)*: In proceedings under Title 9, U.S.C., relating to arbitration . . . these rules apply only to the extent that matters of procedure are not provided for in those statutes.
>
> *Rule 42(a)*: *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.[14]

[4] 9 U.S.C. secs. 1-208 (1982).

[5] Fed. R. Civ. P. 81(a)(3).

[6] *Robinson*, 370 F. Supp. at 829-30 (D. R.I. 1974); *Compañía Española de Petróleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).

[7] *Compañía Española*, 527 F.2d at 973.

[8] *Id.* at 971. [9] *Id.*

[10] *Id.* at 973. [11] *See supra* text preceding n.7.

[12] *Compañía Española*, 527 F.2d at 974.

[13] *Id.* at 975.

[14] The court's reasoning in this instance did not originate with *Compañía Española*. Rather, it cited "ample support in the case law" for its decision, *citing Robinson v. Warner*, 370 F. Supp. 828 (D.R.I. 1974); *Lavino Shipping Co. v. Santa Cecilia Co.*, 1972 A.M.C. 2454 (S.D.N.Y. 1972); and *In re Arbitration Between Chilean Nitrate & Iodine Sales and Intermarine Corp.*, 1972 A.M.C. 2460 (S.D.N.Y. 1971). For examples of such reasoning in lower courts after *Compañía Española*, *see Brownko International Inc. v. Ogden Steel Co.*, 585 F. Supp. 1432 (S.D.N.Y. 1983), and *Marine Trading Ltd. v. Ore International Corp.*, 432 F. Supp. 683 (S.D.N.Y. 1977). For a detailed history of consolidation of arbitral proceedings by U.S. courts, see D.T. Hascher, *Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?* 1 J. Int'l Arb. 127, 129-33 (1984).

These rules, as well as *Compañía Española*, were invoked to compel consolidation in another principal U.S. case, *Weyerhaeuser Co. v. Western Seas Shipping Co.*[15] In this case, Trans-Pacific Shipping Co. time-chartered two ships to Weyerhaeuser, which subsequently subchartered them to Karlander Australia Party Ltd. The head-charter and the subcharter contained identical arbitration clauses. When Karlander demanded arbitration against Weyerhaeuser, Weyerhaeuser in turn demanded arbitration against Trans-Pacific; Weyerhaeuser also petitioned the court to consolidate these two arbitrations. Both Karlander and Trans-Pacific objected to consolidation. The court, refusing to follow *Compañía Española*, denied the petition for consolidation.

The court reasoned that, under the Arbitration Act, its authority to interfere in arbitral proceedings was limited. A court could only determine if an arbitration agreement existed and, if it did, enforce the agreement *according to its terms.*[16] To go beyond these boundaries and order consolidation where the parties have not agreed to it would be contrary to the statute's underlying premise that arbitration is a creature of contract.

The court refused to follow *Compañía Española* only insofar as the latter could be understood to have held that federal courts may order consolidation in the absence of consent. However, the court in *Weyerhaeuser* specifically referred to the finding of implicit consent to consolidation by the *Compañía Española* court and so found that case easily distinguishable. Indeed, whereas in *Compañía Española* the parties had signed an addendum to the original charterparty to the effect that the guarantor would undertake all the charterer's duties upon default, the court found that, in the case before it, the terms of the head-charter in fact *denied* consent to consolidate: Trans-Pacific had specifically secured an addendum to its head-charter insulating itself from any addition to its obligations by reason of the subcharter.[17]

Thus, it would be reasonable to conclude that both *Compañía Española* and *Weyerhaeuser* hold that judicial consolidation will be ordered in the final analysis only if the parties had previously consented thereto. *Compañía Española* establishes that consent can be *inferred* from the terms of the contracts if the language is broad enough, but *Weyerhaeuser* further establishes that consent not only will not be inferred but will be negated if the terms or language of the contracts suggests that the parties did not

[15] 743 F.2d 635 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984).

[16] The Arbitration Act states that if a court determines that there is a valid arbitration clause, it "shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the arbitration agreement.*" 9 U.S.C. sec. 4 (1982) (emphasis added).

[17] *Weyerhaeuser*, 743 F.2d at 637.

consent to joint arbitration or that each arbitration was to occur only between the parties to the agreements in question.

Since *Weyerhaeuser*, several district courts, dealing with the question of consolidation have weighed the merits of *Compañía Española* and *Weyerhaeuser*. The cases reached differing results, and so some uncertainty remains. In *Ore & Chemical Corp. v. Stinnes Interoil, Inc.*,[18] the court followed *Weyerhaeuser* and denied a petition for consolidation. The court reasoned that *Compañía Española* was no longer good law because it conflicted with the reasoning of the Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd*.[19] The *Compañía Española* court had ordered consolidation partly because it believed that one purpose of the Arbitration Act was to expedite the resolution of claims. However, in *Byrd*, the Supreme Court rejected the idea that "the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."[20]

A further ground on which the court in *Stinnes* criticized *Compañía Española* was the latter's interpretation of rules 81(a)(3) and 42(a) of the Federal Rules of Civil Procedure. The court in *Stinnes* observed that, since Rule 81(a)(3) does not apply to procedural questions covered by the Arbitration Act, and since section 4 of the act requires a court to enforce arbitration agreements "in accordance with [their] terms," consolidation cannot be judicially ordered if those terms do not provide for it.[21] The court further held that, since Rule 42(a) was expressly applicable to "actions . . . pending before the court," the actions to be consolidated must also be pending before the court for all purposes. Actions pending before arbitral tribunals would not be actions pending before the court and therefore could not be consolidated by the court.[22]

While the above interpretations of the *Stinnes* court of rules 81(a)(3) and 42(a) were presumably intended to stand regardless of whether there was consent from the parties to consolidate, the main reason for the court's denial of the request to consolidate was that the terms of the contracts in question did not show any intent to consent to consolidated arbitration.[23] Indeed, the negotiating history of the contracts showed that one of the original contracting parties specifically rejected a clause for consolidated arbitration and prevailed in excluding it from the final arbitration agreement.[24]

Thus, on the question of consent at least, *Gavlik*, *Compañía Española*, *Weyerhaeuser* and *Stinnes* seem to be consistent. However, the second district court case since *Weyerhaeuser* suggests a bolder departure from the requirement of consent. In *Sociedad Anónima de Navegación*

[18] 606 F. Supp. 1510 (S.D.N.Y. 1985).
[19] 470 U.S. 213 (1985).
[20] *Stinnes*, 606 F. Supp. at 1513.
[21] *Id.* at 1514.
[22] *Id.* at 1514-15.
[23] *Id.* at 1515.
[24] *Id.* at 1514 n.2.

Petrolera v. Cía. de Petróleos de Chile S.A.,[25] the court took issue with *Stinnes* in the following terms:

> [W]e believe *[Compañía Española]* is still good law. The *Byrd* Court never considered whether a district court can compel consolidation. Rather, it stressed the Congressional intent in passing the Arbitration Act to overcome some courts' reluctance to enforce agreements to arbitrate, a problem not present in the instant case. Even if not the primary purpose of the Act, the efficient and speedy resolution of disputes was clearly among the desired effects of that legislation. In the absence of an express provision prohibiting consolidation, we find nothing in *Byrd* that overrules *[Compañía Española's]* holding permitting courts to order consolidated arbitration in appropriate circumstances.[26]

The court then considered whether the circumstances in the case before it were appropriate for consolidation. The test applied by the court to determine "appropriateness" was, however, based not on the consent or intention of the parties but on the likelihood of substantial prejudice to a party. According to this test, when two or more arbitrations involve common questions of law or fact, consolidation will be allowed unless an objecting party shows prejudice that "is sufficiently substantial to outweigh the advantages of resolving th[e] dispute in a consolidated proceeding."[27] The court further held that the mere desire to have one's case heard separately was not a sufficient ground to bar consolidation.[28] While the court did indicate its willingness to consider whether one party had greater access to relevant information in deciding the appropriateness of consolidation,[29] this element also bore no relationship to the consent of the parties. Thus, *Sociedad Anónima* represents a radical departure from the traditional approach to court-ordered consolidation in that not only does it not require a showing of consent of the parties to consolidate, but it appears to reverse the burden of proof by requiring the objecting party to convince the court that consolidation would be inappropriate because of the likelihood of "substantial" prejudice.

A recent decision of the Court of Appeals for the Second Circuit suggests a potentially even more open-ended extension of the doctrines of *Compañía Española* and *Sociedad Anónima*. In order to avoid such an extension, its holding should be construed strictly and confined to maritime indemnity cases only. In *SCAC Transport (USA) Inc. v. S.S. Danaos*,[30] the court held that, absent a particularized showing of prejudice, a charterer may compulsorily join a stevedore to an owner-charterer arbitration involv-

[25] 634 F. Supp. 805 (S.D.N.Y. 1986).

[26] *Id.* at 809 (citation omitted).

[27] *Id., quoting from Insco Lines, Ltd. v. Cypromar Navigation Co.*, 1975 A.M.C. 2233, 2235 (S.D.N.Y. 1975).

[28] *Sociedad Anónima*, 634 F. Supp. at 809.

[29] *Id.*

[30] 845 F.2d 1157 (2d Cir. 1988).

ing claims against the stevedore that the latter would have a duty to indemnify, even though the stevedore had not consented to arbitration.[31] Such compulsory joinder in maritime cases is known as "vouching-in." The court found no evidence of prejudice in light of the fact that in maritime cases, such as the one before it, arbitration (in London) was the prevalent means of resolving disputes; moreover, the stevedore had not shown that the charterer had not adequately represented the stevedore's interests in the arbitration. The court thus found no reason to deny preclusive effect to the vouching-in notice. In doing so, the court analyzed the consent requirement by explicitly drawing an analogy with the use of voucher in judicial proceedings, where there is neither consent by nor personal jurisdiction over the indemnitor.[32] The reasons for permitting voucher in judicial proceedings—namely, efficiency and avoidance of multiple proceedings—applied to make voucher possible in arbitration.[33]

This analogy may well be inappropriate, however, because of the coercive impact on an indemnitor. Indeed, the impact of voucher on an indemnitor would be much more drastic than a compulsory judicial order consolidating the charterer-indemnitor arbitration with the main arbitration under the charterparty. Even though the indemnitor would be forced into an arbitration to which he did not consent under both voucher and judicial consolidation, there is a more flagrant violation of the principle of consent under voucher. Under consolidation, the indemnitor would at least have an agreement to arbitrate with someone, namely, the charterer, so that its concern thereafter would be with issues peripheral to the consent requirement—e.g., the place of arbitration, the composition of the tribunal, and the identity of the parties.[34] On the other hand, the party that is vouched into an arbitral proceeding never agreed to arbitrate at all. Granting preclusive effect to a vouching-in notice would therefore be a clear disregard of the principle of consent in arbitration. It was perhaps for this reason that the court strongly emphasized that the matter before it was a maritime dispute, that such disputes were generally resolved by arbitration, that the London arbitrators had highly sophisticated knowledge of maritime matters, that there was a strong adjudicatory component to such arbitral proceedings, and that appellate review was available. Given this emphasis, and given also the far-reaching and adverse implications for the principle of consensualism in arbitration, the vouching-in procedure should not be available to nonmaritime and nonindemnity arbitrations. That Danaos

[31] *Id.* at 1163. Under common law, the practice of voucher enables a defendant in a legal action to serve a notice to defend upon a third party who may be liable to indemnify the defendant. The indemnitor would then be bound by the result of the action regardless of whether he chose to defend, and, if he elects not to defend and the defendant is held liable, the latter may bring a separate action against the indemnitor to recover under the indemnity. *See* J.C. Scowcroft *Case Note* on the *Danaos* case, *supra* n.30, in 19 J. Mar. Law and Com. (No. 4) 605 (Oct. 1988).

[32] 845 F.2d at 1163.

[33] *Id.*

[34] J.C. Scowcroft, *supra* n.31, at 614.