

Commentary

'Wither' Or 'Whether' To Consolidate International Arbitration Proceedings

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Introduction*

At an international arbitration conference held recently, the on-stage remark by a practicing arbitration lawyer that the beauty of international arbitration lay in its diversity led to a flurry of questions from the audience. Not surprisingly, these questions related to the underlying uniformity which international commercial arbitration strives to create so that parties choosing arbitration as their dispute resolution mechanism for their international contracts are not thrown into unpredictable scenarios under a national court system.¹ However, the reality is that because of the various arbitration procedural laws and rules and the varying interplay between substantive and procedural laws, international arbitration procedures are far from uniform.²

An issue, which appears to be procedural in nature but has been said to transgress on the substantive rights of the arbitrating parties, relates to the consolidation of multi-party disputes. The common adjudication of multi-party disputes, which is part and parcel of most civil litigation statutes, is well recognised for saving time and costs, as well as negating the possibility of inconsistent findings when common questions of law and fact arise between multiple, but

not necessarily, directly related parties.³ These reasons, similarly arise in arbitration proceedings, where a dispute may involve multiple parties. However, despite the advantages that common adjudication offers, the acceptance for consolidating arbitral disputes has been inconsistent with the basis stemming from the differing positions adopted by different jurisdictions on the effect that consolidation has to the rights of the adjudicating parties.

This article goes into the varying jurisprudential developments on the issue, highlighting the basis for the divergent opinions and show-casing why, without the express consent of parties, it may not be ideal to consolidate arbitration proceedings. As the article will set out, despite the advantages of consolidation, the divergent opinions on the effect that consolidation has towards a non-consenting party's right to arbitrate allows for possible causes for non-enforcement of the arbitral award.⁴ Interestingly, the divergence is not only found in the opinions rendered by courts called upon to deal with the issue,⁵ but also by legislative draftsmen while drafting arbitral rules and statutes.⁶

Substantive Or Procedural Right: An Overview Of The Judicial Approach To Consolidation

The issue of consolidating arbitration disputes through orders of the Court is not a recent phenomenon, having been the subject of decisions by the New York courts from as early as the 1960s.⁷ While the very basis of judicial consolidation was

subjected to discussion in various international arbitration symposiums in the early 1980s,⁸ the debate which the courts grappled with while deciding applications for consolidation essentially stemmed from determining whether allowing non-consensual consolidation would deprive the opposing party of its procedural or substantive right. In a conference held in 1980, Gerald Asken succinctly pointed out that:

“Although the court may have the authority to order consolidation, the question of whether it will exercise that authority is often vigorously disputed. There is a split among the courts as to whether consolidation should be ordered in the absence of a specific agreement to that effect by the parties, or some clear authority in statute. The majority of courts find that they have inherent power to consolidate disputes, based on the theory that the power to enforce an agreement to arbitrate include the authority to control the method of enforcement, such as consolidation. Thus in the absence of substantial prejudice to one of the parties, or an express agreement not to have disputes consolidated, these courts, in the interest of avoiding conflicting results, and saving time and expense, will direct consolidation where common issues are involved.”⁹

An often cited case on consolidation is the decision of the New York Court of Appeals in *Vigo Steamship Corporation v Marship Corporation of Monrovia*,¹⁰ where the appellant Vigo had time chartered a vessel from Marship and in turn voyage chartered the vessel to Snare. On completion of the voyage charter, Marship claimed that Vigo was liable for damages to the ship and demanded arbitration. Vigo in turn initiated arbitration proceedings against Snare, seeking an indemnification for any liability imposed on Vigo as a result of the Vigo-Marship arbitration. Consolidation was opposed on the ground that parties had the right to have their disputes heard separately. However, this argument was rejected, with the Court of Appeals holding that “*the mere desire to have one’s dispute heard separately does not, by itself, constitute a substantial right.*”¹¹

The test which developed was essentially two-pronged, (i) firstly the right to have one’s dispute heard and decided pursuant to the conditions set forth in the arbitration clause was not a substantive right and, (ii) there would be no prejudice to any substantive right by directing consolidation and, if the issues were substantially the same, reference to privity of contract was irrelevant.¹² This was also the basis for the decision by the New Jersey court in *Polshek v. Bergen*¹³ which stated that “*consolidation is merely a procedure controlling the manner of arbitration and does not affect the parties’ contractual right to arbitrate, which remains valid, enforceable and irrevocable.*” The recent decision of the United States Court of Appeal of the Fifth Circuit, in a dispute involving *Karaha Bodas Co., L.L.C. (Cayman Islands)* and *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Indonesia), et al.*,¹⁴ known both in Singapore and the United States, takes the view that consolidation does not violate a substantive right.

However, not all courts in the U.S. adopted this approach and a number of courts have taken the view that despite the presence of common issues of law and fact, the lack of statutory authority or the lack of an agreement between the parties disabled them from consolidating arbitral proceedings.¹⁵ The recent judgment of Second Circuit Court of Appeals in *The Government of the United Kingdom of Great Britain v. the Boeing Company*¹⁶ is an example of the Court refusing to consolidate arbitration proceedings, taking the view that absent consent, the Court had no power to order consolidation based on the mere fact that the dispute contained similar or identical issues of fact and law.

The English position can be nomenclated as the *Diplock v Denning* approach, which was the divergent position under English law prior to the promulgation of the 1996 English Arbitration Act. The position shows the differences in the approach adopted by two of England’s most well respected judges on the issue of arbitral consolidation. In *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation*,¹⁷ Lord Diplock, not acceding to Lord Denning MR’s general proposition that “*the High Court has an inherent jurisdiction to supervise the conduct of arbitrators*”¹⁸ stated:

“For the moment I confine myself to rejecting the notion that the High Court has a generally supervisory power over the conduct of arbitrations more exten-

sive than those that are conferred on it by the Arbitration Acts; nor do I suppose that the assertion of such an open-ended power of intervention in the conduct of consensual private arbitration would be likely to encourage resort to London arbitration under contracts between foreigners which have no other connection with this country than the arbitration clause itself.”¹⁹

On the other hand, Lord Denning in *Abu Dhabi v Eastern Bechtel*,²⁰ using the power of the court to appoint arbitrators, proceeded to appoint a common arbitrator in two related disputes by taking the view that “It is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question, such as causation. It is very desirable that everything should be done to avoid such a circumstance.”²¹

The French *Cour de Cassation*, in its 1992 judgment in *Societes BKMI et Siemens c/societe Dutco*,²² held that negating a party’s right to appoint its nominee arbitrator while allowing the counter-party to proceed with its appointment violated the equal treatment provision under the ICC Rules because all parties enjoyed the right to equality in the constitution of the tribunal.²³ This judgment reflects an approach which

upholds the right to appoint an arbitrator as a substantive right accruing to the arbitrating parties, the deprivation of which would amount to a breach of the equal treatment required to be accorded to the arbitrating parties. In similar vein, but following a rather unique approach, was the solution adopted by some courts in the U.S., an example of which is reflected in the judgment of the Supreme Court of New York in *Re Showa*.²⁴ The Court, in that case, consolidated the arbitration but allowed the expansion of the Tribunal to allow for each of the three parties to nominate their own arbitrators and for the nominated arbitrators to appoint two more arbitrators, so as to obtain an odd numbered Tribunal.

The lack of judicial consistency and the divergent approaches only makes it unpredictable for parties who can never be sure how issues of consolidation are going to be decided.

An Overview Of Statutory Consolidation

While the UNCITRAL Model Law is silent on the issue of consolidation, it is interesting to see the different approaches adopted by certain statutory or arbitral rules which address the issue of consolidation. Set out below, as examples, are three statutory rules dealing with the issue of consolidation of arbitration proceedings:

United States: California Civil Procedure Code	Australian International Arbitration Act 1974	United Kingdom Arbitration Act 1996
<p>§ 1281.3: “A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when: (4) separate arbitration agreements or proceedings exist between the parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; (5) the disputes arise from the same transactions or series of related transactions; and</p>	<p>Section 22: “If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that the other provisions, or any of the other provisions, of this Division are to apply in relation to the settlement of any dispute (being a dispute that is to be settled in accordance with the Model Law) that has arisen or may arise between them, those provisions apply in relation to the settlement of that dispute.”</p>	<p>Section 35(1): (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 power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.”</p>

United States: California Civil Procedure Code	Australian International Arbitration Act 1974	United Kingdom Arbitration Act 1996
<p>(6) there is a common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.”</p>	<p>Section 24(1): “A party to arbitral proceedings before an arbitral tribunal may apply to the tribunal for an order under this section in relation to those proceedings and other arbitral proceedings (whether before that tribunal or another tribunal or other tribunals) on the ground that: (a) a common question of law or fact arises in all those proceedings; (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or (c) for some other reason specified in the application, it is desirable that an order be made under this section.”</p>	

At one end of the spectrum, exemplified under the Californian Civil Code, consolidation is allowed so long as common questions of fact and law arise, regardless of the parties’ intention to consolidate. This provision is not set out under the California International Arbitration and Conciliation Act, which interestingly under §1297.272 provides for consolidation with consent. However, section §1281.3 serves as a clear example of a particular statutory stance. The provision shifts the debate from whether courts have the authority to compel consolidation to, if a certain set of facts warrant consolidation, the parties’ intention to arbitrate is best realized through consolidation.²⁵ At the other end of the spectrum is the position adopted under the English Arbitration Act 1996, which stipulates that consolidation will be allowed only with the consent of all parties and, to that extent, arguably disables the *Denning* approach from being adopted. In the middle is the Australian position which allows consolidation if common questions of fact

and law arise but permits parties to contractually exclude the provision if they so desire.

The Californian approach has not only been adopted by various other state laws in the U.S., it has also been adopted in the arbitral rules governing International Centre for Settlement on Investment Dispute (ICSID) and the North American Free Trade Agreement (NAFTA) arbitrations.²⁶ Interestingly, the Hong Kong domestic law on arbitration adopts a similar position and a recent court judgment has taken the view that this position may also apply to international arbitrations.²⁷ On the other hand, the English position finds support in the UNCITRAL Arbitration Rules²⁸ and the Singapore Arbitration Act (Cap. 10) which governs domestic Singapore arbitrations, though the Singapore International Arbitration Act (Cap 143A), based on the UNCITRAL Model Law, is silent on the issue. The opt-in Australian position has similarly been adopted in the Netherlands. It is apparent from this that the statu-

tory approach to consolidation across the various jurisdictions is far from uniform.

The Effect Of Non-Uniformity

One of the reasons for consolidating arbitrations is to avoid parties having to be subjected to multiple dispute proceedings. However, the divergence in the law allows for thwarting this very purpose, when one considers this issue from the perspective of the enforcement of the arbitral award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Article V(1)(d) of the New York Convention states that recognition and enforcement of the award may be refused upon proof 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.*" (emphasis added).

While commentators have noted that there exists strong support for the view that a judicially consolidated arbitration would be enforceable under the New York Convention, this may not always be the outcome.²⁹

This issue played itself out in *Karaha Bodas*,³⁰ when the Respondent appealed against the enforcement of the arbitral award in the United States on two grounds: (i) firstly, that consolidation was improper because there were separate contracts with separate arbitration clauses, neither of which expressly allowed for the consolidation of claims; and (ii) second, that giving the Appellant the power to appoint the arbitrator violated the contracts requirement that the Appellant and another Indonesian company, Pertamina would jointly make the nomination.

The Court of Appeal dismissed Pertamina's first contention on the ground that the parties could not have contemplated "*the performance of two independent contracts, but the performance of a single project consisting of two closely related parties*"³¹ even though two separate contracts had, in fact, been executed. The Court made the following finding:

"Pertamina has failed to meet its burden of showing that the Tribunal was improperly constituted. The Tribunal reasonably interpreted the ESC's arbi-

tration provisions and reasonably applied the UNCITRAL arbitration rules. Despite numerous opportunities, Pertamina failed to challenge the Tribunal's composition until after the arbitrators were selected. The procedural infirmities Pertamina alleges do not provide grounds for denying enforcement of the Award."³²

However, whether a similar scenario would have played itself out before the French *Cour de Cassation* which has taken the view that depriving a party of its right to nominate the arbitrator is a violation of equal treatment, is anybody's guess.

In fact, the following sets out an interesting situation if the application of §1281.3 of the Californian Civil Code is extended to this hypothetical matrix: assume that the Silicon Valley subsidiary of a Singaporean company, engages an English company to assist it in performing certain hardware processing work in Silicon Valley. The governing law of the contract is English law, but the place of arbitration is California. Assume that the English company engages a sub-contractor to do the work and has a contract which also sets out the governing law as English law and the place of arbitration as California. The Singaporean party refuses to pay the English company for alleged breaches of contract, following which, the English party refuses to pay the Californian sub-contractor. Arbitrations ensue and the English and the Californian parties seek consolidation of disputes, which is opposed by the Singaporean party on the ground that it never agreed to consolidation of disputes. Assuming a Californian court allows consolidation on the ground that consolidation is a question of procedure and the Californian law, which is the law of the situs applies, it would still not close the issue. If the Singaporean party loses and the only place it has property is in Singapore, when enforcement of the Award is sought in Singapore, it would be open for the Singaporean party to argue that the Award is not enforceable because it is in breach of Article V(1)(d) of the New York Convention. If the Singaporean Court takes the view that consolidation leads to deprivation of a substantive right and applies the governing English law as the basis for determining the issue, it may well refuse enforcement on the ground that consolidation was in breach of the New York Convention.

Conclusion

Consolidation of arbitration disputes certainly has its advantages and uniformity of the law on this issue would relieve parties from multiple dispute adjudication and possible inconsistent outcomes. The foreseeable future does not, however, indicate the possibility of such uniformity. Recent additions to the issue from two decisions of the US Supreme Court in *Howsam v Dean Witter Reynolds*³³ and *Green Tree Financial Corporation v Bazzel*³⁴ indicates a preference that questions of consolidation be left to the disposition of the arbitrator and not the courts.³⁵ However, that still does not solve the issue. The fool-proof solution appears to be to only proceed with consolidation with consent, by either expressly setting out the intention under the arbitration agreement or, expressly providing for it once a dispute arises. On the other hand, attempts to consolidate sans such an agreement may, in the existing scenario, leave a party high and dry at the stage of enforcement and possibly stand to wither.

Endnotes

- * The views expressed in this article are the individual views of the authors. Sections 2 and 3 have been theorised from a larger discussion on the subject which have been set out in Edwin Tong and Nakul Dewan, "Drafting Arbitration Agreements with Consolidation in Mind?" (to be published in the Asian International Arbitration Journal in 2009).
1. While attempts have been made to unify arbitration proceedings through the enactment of the UNCITRAL Model Law on International Arbitration (the "Model Law") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10th June 1958 (the "New York Convention"), not all countries have uniform interpretations of the the New York Convention. For example, while courts in most countries have said that public policy must be narrowly defined, certain courts such as those in India have given an expansive interpretation to public policy.
 2. This is because of the complex interaction of laws that comes into play in each arbitration. As Redfern & Hunter describes "any international commercial arbitration is a forensic minefield. During its course, as many as five or six different national systems of law, or legal rules, may come into play." Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 2d ed. (Sweet & Maxwell: London, 1991) at 72.
 3. Order 4 Rule 1 of the Singapore Rules of Court provides that "where two or more causes or matters are pending, then, if it appears to the Court that some common question of law or fact raises in both or all of them or that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions or that for some other reason it is desirable to make an order under this Rule, the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them." Similarly, Order 3 Rule 10 of the English Rules of the Supreme Court provides for consolidation of litigation disputes under similar circumstances.
 4. *Allied Bruce Terminix Companies Inc. and Terminix Interional Company v G. Michael Dobson*, 513 U.S. 265 (1995) per Scalia J.
 5. *Ibid.*
 6. Michael Marks Cohen, "A Missed Opportunity to Revise the Arbitration Act 1996" (2007) 23 Arb. Int'l 461 at 461. In the 1996 Report about the English Arbitration Act issued by an ad hoc Steering Committee, substantial levels of dissatisfaction with certain aspects of the arbitration statutory regime were documented. Yet the Report ended up declaring that no amendments were required or desired. Specific to the issue of consolidation, the Committee, like the Department Advisory Committee ("DAC") before it, was not receptive to authorising consolidation in the statute because of concerns that conceptual difficulties could not be overcome. In the Committee's view "it would amount to a negation of the principle of party autonomy" if the court possessed the power to order consolidation of arbitral proceedings. Indeed, despite having been

- the subject of active debate and discussion over the years, the 1996 English Arbitration Act only recognises consolidation of proceedings or the holding of concurrent hearings with the consent of the parties. See also the UNCITRAL Model Law 2006 amendments.
7. Dominique T. Hascher, "Consolidation by American Courts: Fostering or Hampering International Commercial Arbitration?" (1984) 1 J. Int'l Arb. 127.
 8. Julie C. Chiu, "Consolidation of Arbitral Proceeding and International Arbitration" (1990) 7 J. Int'l Arb. 53 at n. 2.
 9. Dennis Thompson, "The Same Tribunal for Different Arbitrations" (1987) 4 J. Int'l Arb. 111 at 113 to 114.
 10. *In the Matter of Vigo Steamship Corporation* 309 N.Y.S. 2d 165 (1970).
 11. *Ibid.* at 168.
 12. *Supra* note 7 at n. 23. Such lack of precision leaves the party objecting to consolidation with an impossible burden of proof to meet since it will never be in a position to demonstrate how prejudice would result from a consolidation order. Some courts have thought that prejudice to a substantial right had to be contemplated from the side of the party moving for consolidation. The violated right is no longer that of the litigant compelled to arbitrate under conditions it has never agreed to, but the right to demand consolidation. (*In the Matter of the Arbitration between Czanikow and Manumante and Reyes Compania Naviera*, 512 F. Supp. 1308 (S.D.N.Y. 1981); 527 F. 2d 966 (2d Cir. 1975); 331 A.2d 848 (1974)).
 13. *Supra* note 7 at n. 24. 362 A. 2d 63 (1976).
 14. *Karaha Bodas Co., L.L.C. (Cayman Islands) v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Indonesia)*, et al., (2004) Vol. XXIX Yearbook Commercial Arbitration at 1262.
 15. Edwin Tong and Nakul Dewan, "Drafting Arbitration Agreements with Consolidation in Mind?" (to be published in the Asian International Arbitration Journal in 2009). See also *supra* note 7 at n. 14. *Consolidated Pacific Engineering v. Greater Anchorage Area Borough*, 563 P. 2d 252 (1977); *The Stop and Shop Companies Inc. v. Gilbane Building Co.*, 304 N.E. 2d 429 (1973). A number of other courts have held that they did not have the power to order consolidation of arbitrations despite the presence of common legal or factual issues in the absence of an agreement by all parties to multiparty arbitration. See, e.g., *Stop & Shop Co. v. Gilbane Bldg. Co.*, 304 N.E.2d 429 (1973); *J. Brodie & Son, Inc. v. George A. Fuller Co.*, 16 Mich. App. 137, 167 N.W.2d 886 (1969); *Balfour, Guthrie & Co. v. Commercial Metals Co.*, 93 Wash.2d 199, 607 P.2d 856 (1980). Some of these decisions have acknowledged that they regard themselves as powerless to effect consolidation in the absence of contractual or legislated authority, and that "if consolidation is a desirable public policy . . . the legislature should empower the court to so hold." *S.K. Barnes, Inc. v. Valiquette*, 23 Wash. App. 702, 706, 597 P.2d 941, 943 (1979) (citing authority for this proposition). Also see *Supra* 4 FN 15 *Balfour, Guthrie and Company Ltd. v. Commercial Metals Company*, 607 P. 2d 856 (1980); *Cumberland Perry Area Vocational Technical School Authority v. Bogar and Bink*, 396 A. 2d 433 (1978); *Atlas Plastering v. Superior Court, County of Alameda*, 140 Cal. Rptr. 59 (1977); *Louisiana Stadium v. Huber, Hunt and Nichols, Inc.*, 349 So. 2d 491 (1977); *William C. Blanchard Co. v. Beach Concrete Co. Inc.*, 297 A. 2d 587 (1972); *J. Brodie and Sons Inc. v. George A. Fuller Company*, 167 N.W. 2d 886 (1969); *Greenwich Marine v. SS. Alexandra*, 225 F. Supp. 671 (S.D.N.Y. 1964). Also see the Uniform Arbitration Act 201, Section 10.
- American courts which have proceeded on the basis that the right to consolidate is merely procedural, have required the party opposing consolidation to prove that consolidation would undermine their stated expectations, especially regarding the arbitrator selection procedure See also, *Revision Of Uniform Arbitration Act*, National Conference Of Commissioners On Uniform State Laws February 19, 1999 online: <www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/uaa55.pdf>. See also *Continental Energy Assoc. v. Asea Brown Boveri, Inc.*, 192 A. D.2d 467, 596 N.Y.S.2d 416 (1993) (holding that denial of consolidation not an abuse of discretion where parties' two arbitration agreements

- differed substantially with respect to procedures for selecting arbitrators and manner in which award was to be rendered)
16. *The Government of the United Kingdom of Great Britain and Northern Ireland, Acting Through the United Kingdom Defense Procurement Office, Ministry of Defense, v. The Boeing Company, Boeing Defense & Space Group, Helicopters Division, Formerly Known As Boeingvertol Company, Respondents-Appellants, Textron, Inc.* 998 F.2d 68.
 17. *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation* [1981] 1 All ER 289.
 18. *Ibid.* at 296.
 19. *Ibid.* at 296.
 20. *Abu Dhabi v Eastern Bechtel* [1982] 2 Lloyd's Law Rep. 425.
 21. *Ibid.* at 427. A similar approach was adopted in the 1964 judgment of *Taunton-Collins v Cromie and Anor* [1964] 1 WLR 633. There, the panel, of which Lord Denning was a party, ordered that court proceedings between multiple parties be permitted despite the existence of an arbitration clause in the contract between the plaintiff and one set of the Respondents. Pearson LJ said, "It can be said in support of the application here that that is what the parties have agreed and that, when the question is brought before the court, the court should be willing to say by its decision what the parties have already said by means of their own contract. That is one principle. The other principle is that a multiplicity of proceedings is highly undesirable for the reasons which have been given. It is obvious that there may be different decisions on the same question and a great confusion may arise."
 22. Yves Derains & Eric A. Schwartz, *A Guide to ICC Rules of Arbitration*, 2d ed. (The Netherlands: Kluwer Law International, (1992).
 23. *Ibid.* at 180. However, see Buhler & Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 2d ed. (Sweet & Maxwell) at 164 to 165, para 10-13.
 24. *Re Showa* 1975 A.M.C 2654 (Sup. Court. N.Y. 1975).
 25. *Supra* note 8 at 65, FN 48. *Conejo Valley Unified School Dist v. William Blurock*, 111. Cal. App. 3d 983, 169 Cal. Rptr. 102, 104 (2d Dist. 1980) and FN 49 The California Supreme Court may even expand the notion of consolidation to encompass class action. *Keating v. Superior Court*, 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 (1982) (remanded for determination of feasibility of class-wide arbitration), appeal dismissed in part, rev'd in part (on other grounds), 465 U.S. 1 (1984). See affirmation of the reasoning in *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.*, 140 Cal. App. 3d 251, 191 Cal. Rptr. 15 (4th Dist. 1983).
- Also see Clive M. Schmitthoff, ed., *International Commercial Arbitration*, Binder 2, Part V, p. 118, 1974 – present (ongoing publication). "However, it appears that only a few cases have applied this provision since its enactment and, in fact, in one case, the Court applied § 1281.3 retroactively and consolidated an arbitration agreement which predated the enactment of the Statute on the ground that "no substantive or procedural contractual rights or obligation are affected."

26. Patricia Izquierdo Piña, "Consolidation of Arbitral Proceedings," online: <<http://www.camex.com.mx/nl35-cont.pdf>>.
27. *Linfield Limited v Brooke Hillier Parker*, [2003] 2 HKC 624.
28. Markus Wirth, "The Current Revision of the UNCITRAL Rules," online: <http://www.homburger.ch/fileadmin/publications/UONO26O_01.pdf>.
29. Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4 ed. (Sweet & Maxwell: London, 2004) at 174. It was suggested that enforcement of an arbitral award would be more likely under the New York Convention provided that the parties have at least agreed to arbitration and to the same arbitral jurisdiction.
30. *Supra* note 14.
31. *Supra* note 14 at 1277 to 1278.
32. *Supra* note 14 at 1278.
33. 537U.S. 79, 84 (2002)
34. 539 U.S. 444, 451 (2003)
35. This approach was followed by the seventh circuit in *Employers Insurance Company of Wausau v Century Indemnity Company* where the Court held that "the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve." Also see Consolidation of Arbitrations: Courts have Punted to Arbitrators; Now What?, Molly L. Pease and David J. Grais, **Mealey's Litigation Report: Reinsurance** Vol 18, #5, July 6, 2007. ■