feature

Consolidation of Arbitration Proceedings

Teresa Snider

Teresa Snider

In the years since *Howsam* and *Bazzle* were decided, the federal Courts of Appeals that have considered the issue have all held that the issue of whether to consolidate multiple arbitration proceedings should be decided by the arbitrators.

Teresa Snider is a partner at Butler Rubin Saltarelli & Boyd LLP. Her practice is concentrated in the areas of reinsurance litigation and arbitration.

Consolidation is the process by which multiple disputes are combined into a single proceeding. In the reinsurance arbitration context, the disputes might involve (1) two or more reinsurers on the same contract; (2) the same reinsurer on two or more layers and/or underwriting years of a single program; (3) the same reinsurer on unrelated contracts; (4) two or more reinsurers on different layers of a single program; or (5) a combination of these. Some reinsurance contracts explicitly address the consolidation of disputes with multiple reinsurers on the same contract.[2] But there are few arbitration provisions in reinsurance contracts that address any other types of situations where the issue of consolidation might arise, and most arbitration clauses in reinsurance contracts are silent on the issue of consolidation.

The Supreme Court's decisions in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588 (2002) and *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 5. Ct. 2402 (2003), both of which are discussed here, have been interpreted by a number of lower courts to mean that arbitrators, not courts, have the authority to decide whether multiple disputes should be consolidated into a single proceeding. However, the Supreme Court's April 27, 2010 decision in *Stolt -Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. —-„ 130 S. Ct. 758 (2010), likely means that courts will need to reconsider whether courts or arbitrators have the authority to resolve disputes over consolidation of arbitration proceedings and what standard should be applied in deciding whether the parties have agreed to consolidation.

The *Howsam* case arose out of an NASD arbitration proceeding instituted by a customer against her brokerage firm, Dean Witter. 537 U.S. at 81-82. Dean Witter filed a court action seeking to enjoin the arbitration, contending that the arbitration was time-barred because the NASD Code of Arbitration Procedure required that an arbitration demand be filed within six years of the time of the event giving rise to the dispute and the dispute was more than six years old. *Id.* The issue for the Supreme Court to resolve was whether the NASD arbitrator or the court should decide whether to apply the time bar rule to the underlying dispute. The Court characterized the time bar issue as an aspect of the underlying controversy to be arbitrated that was presumptively for the arbitrator to decide, as opposed to an issue as to whether the parties agreed to arbitrate in the first place, which a court would need to resolve. *Id.* at 85. The Court explained:

> "in the absence of an agreement to the contrary, issues of substantive arbitrability. . . are for a court to decide and issues of procedural arbitrability, i.e. whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."

Id. (quoting Revised Uniform Arbitration Act, § 6, comment 2 (adding emphasis)).

In *Bazzle*, the issue was whether a court or an arbitrator should decide whether an arbitration agreement permitted arbitration of a class action, where the agreement was silent on the issue. 539 U.S. at 447. Four justices concluded, in an opinion by Justice Breyer, that the arbitrator should decide whether class arbitration was permissible, because the arbitration agreement included all disputes "relating to this contract" and the issue of a class action arbitration had to do with "what kind of arbitration proceeding the parties agreed to," not whether the parties had agreed to arbitrate in the first place. *Id.* at 451-53. The plurality opinion did not, however, offer any guidance for arbitrators on how to decide whether to order that the arbitration proceed on a class action basis. In view of the plurality nature of the *Bazzle* decision, some courts have declined to rely on *Bazzle* in addressing the issue of consolidation of arbitration proceedings, instead focusing on the reasoning in *Howsam*.

In the years since *Howsam* and *Bazzle* were decided, the federal Courts of Appeals that have considered the issue have all held that the issue of whether to consolidate multiple arbitration proceedings should be decided by the arbitrators. *Shaw's Supermarkets, Inc. v. United Food & Commercial Workers Union*, 321 F.3d 251 (1st Cir. 2003) (whether to consolidate three separate disputes between the same parties was a procedural matter to be decided by the arbitrator); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 100 (2d. Cir. 2008) (holding that arbitrators must approach consolidation, joint hearings, and class representation "as issues of contract interpretation to be decided under the relevant substantive contract law"); *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580 (3rd Cir. 2007) (consolidation is for arbitrators to decide); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 577 (7th Cir. 2006) ("We find based on Howsam that the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve."); *Certain Underwriters at Lloyds v. Cravens Dargan & Co.*, 197 Fed. Appx. 645 (9th Cir. 2006) (affirming the district court's decision that it was for the arbitrators to decide whether a single arbitration panel should resolve multiple reinsurance disputes). *See also Dockser v. Schwartzberg*, 433 F.3d 421, 427 (4th Cir. 2006) (dictum stating that procedural questions, including consolidation, should be directed to the arbitrators). Although the Sixth Circuit Court of Appeals has not yet ruled on the issue, a district court in the Sixth Circuit has also held that arbitrators rather than courts are to decide if consolidation should be ordered. *See Dorinco Reinsurance Co. v. ACE Am. Ins. Co.*, No. 07-12622, 2008 WL 192270 (E.D. Mich. Jan. 23, 2008) (the arbitrators should determine the structure of the parties' arbitration absent an express provision in-the arbitration. agreement); *but see ReliaStar Life Ins. Co. v. Canada Life Assur. Co.*, No. 04-74, 2005 WL 615830 (D. Minn. March 14, 2005) (granting motions by five reinsurers to compel separate two-party arbitration proceedings with ceding company where the arbitration provisions did not contain a consolidation clause).

Despite these decisions by the First, Second, Third, Fourth, Seventh, and Ninth Circuit Courts of Appeals, it now appears not to have been definitely resolved whether arbitrators have the authority to decide whether to consolidate disputes. On April 27, 2010, the U.S. Supreme Court issued its opinion in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).[3] The Supreme Court reversed the Second Circuit's decision upholding the arbitrators' decision to allow class arbitration and remanded the case. Id. at 1777. The Court held that imposing class arbitration where an arbitration clause was "silent" on the issue was inconsistent with the Federal Arbitration Act. *Id*. at 1775.

In reaching its decision, the Court expressly addressed the impact of the *Bazzle* plurality opinion. The Court explained that the *Bazzle* plurality and Justice Stevens (who joined in the judgment) addressed three questions:

> The first was which decision maker (court or arbitrator) should decide whether the contracts in question were "silent" on the issue of class arbitration. The second was what standard the appropriate decision maker should apply in determining whether a contract allows class arbitration. (For example, does the FAA entirely preclude class arbitration? Does the FAA permit class arbitration only under limited circumstances, such as when the contract expressly so provides? Or is this a question left entirely to state law?) The final question was whether, under whatever standard was appropriate, class arbitration had been properly ordered in the case at hand.

130 S. Ct. at 1771. Although the plurality and Justice Stevens addressed all three questions in *Bazzle*, the *Stolt-Nielsen* court ruled that the *Bazzle* plurality "decided only the first question, concluding that the arbitrator and not a court should decide whether the contracts were indeed 'silent' on the issue of class arbitration." *Id.* Justice Stevens did not endorse the majority's rationale, however, and "his analysis bypassed the first question noted above and rested instead on his resolution of the second and third questions." *Id*. at 1772. As a result, the *Stolt-Nielsen Court* held that *Bazzle* does not require that arbitrators, and not courts, decide whether a contract permits class arbitration. *Id*. However, because Stolt-Nielsen and AnimalFeeds had stipulated that the arbitrators would decide whether the contract permitted class arbitration (having mistakenly assumed that was what *Bazzle* required), the Court declined to address the question and thus left open the possibility that it might be up to the courts and not arbitrators to decide whether a contract permits class arbitration. *See id.*

Because "*Bazzle* did not establish the rule to be applied in deciding whether class arbitration should be permitted," the majority laid out the principles to be applied (whether by a court or arbitrator) in deciding that question. *Id*. at 1772-1776. The Court first emphasized that "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is 'a matter of consent, not coercion." *Id*. at 1773 (citations omitted) The Court then reiterated some of the principles it had expressed in prior decisions:

> • "[T]he central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms." *Id.* at 1773 (citations omitted).
>
> • "Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.' In this endeavor, 'as with any other contract, the parties' intentions govern." *Id*. at 1773-1774

CONTINUED ON PAGE 16

Because the *Stolt-Nielsen* decision leaves open the issue of whether class-action arbitration is a matter for the courts or the arbitrators to resolve, the Supreme Court's ruling may result in court battles over consolidation of arbitration proceedings even in those Circuits where the Courts of Appeals have previously held that consolidation is a matter of procedure for the arbitrators to resolve.

CONTINUED FROM PAGE 15

(citations omitted).

• "[P]arties are 'generally free to structure their arbitrations as they see fit.' For example, we have held that parties may agree to limit the issues they choose to arbitrate, and may agree on the rules under which any arbitration will proceed. They may choose who will resolve specific disputes." *Id.* at 1774 (citations omitted).

The Court concluded: "[w]e think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes." *Id.* Such contractual limitations must be given effect by courts and arbitration and, "when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Id*. at 1774-1775.

Turning to the specific question presented in the *Stolt-Nielsen* case, the Court rejected the arbitrators' decision to require class arbitration where the agreement was silent as to the issue.[4] The Court explained that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id*. at 1775. The Court held that, although some procedural matters are for the arbitrator to decide even if not explicitly addressed in the arbitration agreement, class arbitration is not one of them: "[t]his is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id*. The Court pointed out "crucial differences", *id*. at 1776, between class and bilateral arbitration that led to its conclusion that the class arbitration is required only when the parties *agreed to authorize* class arbitration:

> An arbitrator chosen according to an agreed upon procedure. no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. Under the Class Rules, "the presumption of privacy and confidentiality" that applies in many bilateral arbitrations "shall not apply in class arbitrations...., thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited. We think that the differences between bilateral and class action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.

Id. (citations omitted).

Because the *Stolt-Nielsen* decision leaves open the issue of whether class-action arbitration is a matter for the courts or the arbitrators to resolve, the Supreme Court's ruling may result in court battles over consolidation of arbitration proceedings even in those Circuits where the Courts of Appeals have previously held that consolidation is a matter of procedure for the arbitrators to resolve. Leaving aside the issue of who decides, several other important questions arise as a result of the *Stolt-Nielsen* decision. First, are there "crucial differences" implicated by consolidating arbitration proceedings such that it is improper to infer an agreement to consolidate from the mere existence of an agreement to arbitrate? Whether such crucial differences are found to exist may depend on such factors as the number of parties and contracts involved in the proposed consolidated proceedings, the dollar value of the disputes, whether the method(s) of arbitrator selection in the contracts vary, and whether different procedures are established by the different arbitration clauses. Second, if courts or arbitrators apply the reasoning of *Stolt -Nielsen* to decide it is improper to infer an agreement to consolidate from an agreement to arbitrate, "what contractual basis may support a finding that the parties agreed to authorize" consolidation? *Id*. at n. 10. Depending on the law applicable to interpreting the arbitration agreement and the terms of the arbitration agreement itself,

courts may look to expert evidence of custom and practice in order to establish intent.

Many of the practical problems that, at least prior to *Stolt -Nielsen*, fell to the arbitrators to decide remain unresolved by the court cases that have addressed consolidation of arbitration. Such practical problems include which of multiple panels should decide the issue of consolidation, what happens if multiple panels are constituted and reach differing conclusions on consolidation, how cases are to be transferred among panels, and what criteria arbitrators should apply in determining whether consolidation is appropriate.

The courts have reached differing conclusions as to whether one panel or multiple panels should be charged with deciding consolidation, although the trend seems to be appointment of a single panel to resolve the threshold issue of consolidation. In the *Employers v. Century* case, the parties were at odds over proper interpretation of the district court's decision on how to proceed with arbitration:

> Century maintains that the opinion requires Wausau to appoint one arbitrator, for one arbitration covering both Agreements. Wausau maintains that the opinion requires it to appoint two arbitrators, one for each of two arbitrations (one under the First Excess Agreement, and one under the Second).

443 F.3d at 581. The Seventh Circuit Court of Appeals held that the district court had ruled that a single panel be constituted — even though there were two separate arbitration agreements — and that panel would decide whether separate arbitrations were required. *Id*. Similarly, both the Third Circuit and Ninth Circuit Courts of Appeals have upheld district court orders requiring the parties to constitute a single arbitration panel, which would then resolve the issue of consolidation. *Underwriters at Lloyd's v. Westchester* 489 F.3d at 584, 589; *Underwriters at Lloyd's v. Craven Dargen*, 197 Fed. Appx. at 646. *See also Dorinco v. Ace*, 2008 WL 192270 at * 11 (ordering Respondents "to collectively select a single arbitrator to appoint to each of the demanded panels to determine the sole issue of consolidation…"). .

In contrast, in the *Lloyd's v. Century* case, the Pennsylvania district court ordered that five separate arbitrations proceed under the five contracts in dispute and that if a party "desire[s] consolidation, they must direct such a request to the respective arbitration panels." *Certain Underwriters at Lloyd's v. Century Indem. Co,* Case Nos. Civ.AA.05-2809, Civ.A.05-2810, Civ.A.05-2811, Civ.A.05-2812, Civ.A.05-2813, 2005 WL 1941652, at *2 (E.D. Pa. Aug. 1, 2005). On its face, the Pennsylvania district court's order requires that each panel be asked to decide the issue of consolidation, leading to the possibility of conflicting decisions on whether to consolidate and which panel would hear a consolidated arbitration. In another Pennsylvania district court case, *Argonaut Insurance Co. v. Century Indemnity Co*., Case No. 05- 5355, 2007 WL 2668889 (E.D. Pa. Sept. 5, 2007), the court refused to decide which of four panels should resolve the question of consolidation. In that case, the cedent had issued four different arbitration demands, but contended that the fourth demand superseded the prior three demands by incorporating the claims that were the subject of those demands. The reinsurer objected to the consolidation of the parties' disputes into a single proceeding. The parties agreed that, under a recent Third Circuit decision, "the choice between separate or consolidated proceedings is one of arbitral procedure that must be decided by the arbitration panel itself," but asked that the court resolve which panel should decide the issue of consolidation. *Id*. at * 1. Both parties contended that the "first-in-time" rule should govern the decision as to which panel was authorized to decide consolidation;[5] the parties disagreed, however, on which of the four panels was the first to be formed. The cedent argued that the panel formed under the fourth arbitration demand was really the "first in time" because it had been formed pursuant to a demand that revoked the prior demands and was the only panel in which both parties had actually appointed a party-arbitrator *Id*. at *4 The reinsurer disagreed. The court held that the issue of which panel or panels were fully formed, and whether the first three demands were effectively withdrawn, was "a question of procedure arising out of the process of arbitration, and not a question of arbitrability." *Id*. at *6. Although the court noted that "principles of efficiency strongly favor a single arbitration panel's determination of whether consolidation of reinsurance claims is appropriate," it held that unless the parties "can sensibly jointly design a procedural roadmap," all four arbitration panels "will have to agree upon a reasonable solution as to which panel must decide the issues." *Id*. (citation omitted).

Where there are no contract terms expressly addressing consolidation and the parties do not agree on consolidation,[6] the parties — and the arbitrators — may have different criteria that they believe should be applied in deciding whether consolidation is appropriate. Among the criteria that might be considered in deciding whether to consolidate disputes are:

> (1) whether the arbitration agreements provide different venues for the hearing;
>
> (2) whether the arbitration agreements have the same procedural provisions;
>
> (3) whether there are choice of law provisions calling for the application of the law of different states;
>
> (4) whether the same claim has been ceded to more than one reinsurance contract;
>
> (5) whether there are common legal or factual issues;
>
> (6) whether there is a possibility of conflicting results if separate arbitrations are held;
>
> (7) whether the contracts involved are multiple years or layers of the same program;
>
> (8) whether the contracts reinsure the same underlying business;

CONTINUED ON PAGE 18

The parties agreed that, under a recent Third Circuit decision, "the choice between separate or consolidated proceedings is one of arbitral procedure that must be decided by the arbitration panel itself," but asked that the court resolve which panel should decide the issue of consolidation.

CONTINUED FROM PAGE 17

(9) whether the same underwriter(s) wrote the contracts;

(10) whether a single broker was used to place all of the contracts;

(11) whether more than one reinsurer is involved;

(12) the inception and expiration dates of the various contracts;

(13) whether the parties will be unable to obtain complete relief in the absence of a consolidated proceeding; and

(14) what the parties intended with respect to consolidation.

The relative importance of these factors is also likely to be a matter of debate between the parties and among the arbitrators. However, the Supreme Court's decision in Stolt-Nielson makes clear that the most important factor is the intent of the parties.

CONCLUSION

Because reinsurance arbitrations tend to be governed by confidentiality agreements, there is little other than anecdotal evidence as to how arbitration panels have elected to address consolidation. Some possible solutions may include, alone or in combination:

- Constituting multiple panels, which would hold concurrent hearings but individually reach decisions as to the claims involved;[7]
- Having all claims resolved by a single panel;
- Staying one or more sets of proceedings pending a decision in the other proceedings;
- Sequencing the hearings;
- Entering a confidentiality order that permits the parties to use discovery and the award in other proceedings involving the parties so long as the same claims and/or contracts are involved; and
- Requiring the parties to work out a proposed consolidation protocol to be presented to and approved by the Panel(s).▼

The views expressed in this paper do not necessarily reflect the views of Butler Rubin Saltarelli & Boyd LLP or any of its attorneys, or those of its clients.

2 For example, the arbitration clause may provide that "[i]f more than one reinsurer is involved in an arbitration where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results, all such reinsurers will constitute and act as one party for purpose of this clause." *See also* Brokers & Reinsurance Markets Association ("BRMA") Arbitration Provision 6Q, ¶H2 ("Consolidated Hearing. Upon request of the Company. . . , the Board may order a consolidated hearing between Company and all affected Reinsurers to this Agreement if the Board is satisfied in its discretion that the issues in dispute affect more than one Reinsurer and a consolidated hearing would be in the interest of fairness and a prompt resolution of the issues in dispute. If the Board orders a consolidated hearing, all other affected participating Reinsurers shall join and participate in the arbitration at the Company's request under time frames established by the umpire and shall be bound by the Board's decision and award unless excused by the Board in its discretion. . . ."). This sample Arbitration Provision can be found on BRMA website, www.brma.org.

3 Justice Alito delivered the opinion of the Court, in which Justices Roberts, Scalia, Kennedy, and Thomas joined. Justice Ginsburg filed a dissenting opinion, in which Justices Stevens and Breyer joined. Justice Sotomayor did not take part in the decision.

4 Stolt-Nielsen and AnimalFeeds stipulated that the contract was silent as to whether it permitted class arbitration and that the contract was not ambiguous so as to call for parol evidence. 130 S. Ct. at 1770.

5 In considering which of multiple panels should decide the issue of consolidation, parties may argue, *inter alia*, that the decision should be made by (1) the panel that is constituted under the first arbitration demand to be served; (2) the first panel that is constituted; (3) the first panel to rule on the issue of consolidation; and/or (4) the panel with the claim(s) with the highest dollar value.

6 Because arbitration is a matter of consent, the parties are free to agree to consolidate their disputes into a single proceeding.

7 It appears from comments at recent ARIAS conferences that this method has been used where a number of parties had disputes involving the same reinsurance program. Multiple panels were constituted, with one panel designated as the lead panel to rule on overarching discovery and evidentiary issues. Each panel deliberated separately and issued its own award.