

Question of consolidation for the arbitrator

Employers Insurance Company of Wausau v. Century Indemnity Company, 443 F.3d 573 (7th Cir. 2006). Today's column discusses an issue of first impression in the 7th U.S. Circuit Court of Appeals.

Century Indemnity Co. insured Aqua-Chem Inc. and paid liability claims for asbestos bodily injury and, thereafter, sought to recover from its reinsurers, including Employers Insurance Co. of Wausau. Wausau had two reinsurance agreements with Century: the First Excess Agreement and the Second Excess Agreement. Each agreement provided coverage for a different layer.

Both the First Excess Agreement and the Second Excess Agreement contained an arbitration clause requiring "any dispute arising out of this agreement" be submitted to arbitration.

Century wanted to consolidate in one arbitration the First and Second Excess Agreements and threatened to name an arbitrator for Wausau if Wausau did not name an arbitrator within 60 days, as required by the arbitration agreement in the First and Second Excess Agreements.

Wausau filed suit in federal court seeking a declaration that it was entitled to two separate arbitrations — a separate arbitration on each agreement.

In its declaratory judgment action, Wausau contended it was entitled to separate arbitration proceedings and that the question of consolidation of arbitrations was a question of "arbitrability" for the court — not a question for the arbitrator.

Century countered arguing that the issue of consolidation of the arbitrations was a procedural question to be resolved by the arbitrator, unless the arbitration agreement states the court must resolve it.

U.S. District Judge John C. Shabaz of Western District of Wisconsin granted summary judgment, requiring arbitration and holding that the arbitrator, not the court, should decide whether consolidation was permitted.

The 7th Circuit, in an opinion written by Chief Judge Joel M. Flaum, affirmed. The court noted this was a matter of first impression in the 7th Circuit. Relying upon the rationale of the Supreme Court in *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), the 7th Circuit held:

"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. It does not involve whether Wausau and Century are bound



Federal Courts

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by an arbitration clause or whether the arbitration clause covers the Aqua-Chem policies."

Beginning the court's discussion of who decides the issue of consolidation of arbitrations: the arbitrator or the court, the court set out the "Arbitration" clause that appeared in both the First and Second Excess Agreements:

"As a condition precedent to any right of action hereunder, any dispute arising out of this agreement shall be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire meeting in New York, N.Y., unless otherwise agreed.

"The members of the board of arbitration shall be active or retired disinterested officials of insurance or reinsurance companies or Underwriters at Lloyd's, London, not under the control of either party to this agreement. Each party shall appoint its arbitrator and the two arbitrators shall choose an umpire before instituting the hearing. If the respondent fails to appoint its arbitrator within 60 days after being requested to do so by the claimant, the latter shall also appoint the second arbitrator. If the two arbitrators fail to agree on the appointment of an umpire within 60 days after their nomination, each of them shall name three of whom the other shall decline two, and the decision shall be made by drawing lots."

Flaum first looked to the Supreme Court for guidance on the question of who decides if a dispute is arbitrable:

"The Supreme Court has established a framework for analyzing the issue we are presented with. In *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), the Supreme Court considered the question of who should determine whether a given dispute is arbitrable — the court or the arbitrator. The court held that, unless

the arbitration agreement is clear and unmistakable that the issue of arbitrability is for the arbitrator, it should be resolved by the court."

The court noted that Wausau's contention that the "question of arbitrability" was too expansive and the meaning has been limited by the Supreme Court:

"In *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), the court explained: 'Linguistically speaking, one might call any potentially dispositive gateway question a "question of arbitrability," for its answer will determine whether the underlying controversy will proceed to arbitration on the merits. The court's case law, however, makes clear that, for purposes of applying the interpretive rule, the phrase "question of arbitrability" has a far more limited scope. The court has found the phrase applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.'"

Flaum looked to type of issues — questions of arbitrability — to be determined by the court as discussed in *Howsam*:

"The *Howsam* court provided two examples of 'a gate-way dispute' that would raise a question of arbitrability and thus should be decided by a court: 1) a dispute regarding 'whether the parties are bound by a given arbitration clause'; and 2) 'a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.' The court also explained that '[t]he phrase "question of arbitrability" is not applicable in other kinds of general circumstances where parties would likely expect that an arbitrator would decide the gateway matter.' For example, "'procedural' questions which grow out of the dispute and bear on its final disposition" are presumptively not for the judge, but for an arbitrator, to decide.' The *Howsam* court decided that a question regarding the applicability of a National Association of Securities Dealers time-limit rule was presumptively for the arbitrator. The court explained that 'such a dispute seems an "aspect[t] of the [controversy] which called the grievance procedures into play.'"

Finding the arbitration clause did not

forbid consolidation and that the issue of consolidation did not involve a question of whether the two companies were bound by the arbitration clause or whether the clause covered the Aqua-Chem policies, the 7th Circuit held that the consolidation question was for the arbitrator and not the court:

"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. It does not involve whether Wausau and Century are bound by an arbitration clause or whether the arbitration clause covers the Aqua-Chem policies. Instead, the consolidation question concerns grievance procedures — i.e., whether Century can be required to participate in one arbitration covering both the agreements, or in an arbitration with out reinsurers."

The court also noted that its decision was supported by similar decisions in the 1st and 4th circuits:

"Our holding is consistent with the decisions of our sister circuits in similar cases. For instance, in *Shaw's Supermarkets Inc. v. United Food and Commercial Workers Union, Local 791*, 321 F.3d 251 (2003), the 1st Circuit relied on *Howsam* in deciding that the arbitrator, not a court, should determine if arbitrations can be consolidated. The court found that consolidation is a procedural issue.

"Similarly, in *Dockser v. Schwartzberg*, 433 F.3d 421 (4th Cir. 2006), the 4th Circuit determined that the arbitrator, rather than the court, should determine whether one arbitrator, rather than three, should preside over the arbitration.

"We agree with the approach of the 1st and 4th circuits. Using the same analysis, we find that consolidation is a procedural issue. Wausau and Century agree that their underlying dispute regarding the Aqua-Chem claims is subject to arbitration. Thus, the only question is the kind of arbitration proceeding their agreements allow. This comes down to a matter of contract interpretation, which the arbitrator is well qualified to address. See *We Care Hair Dev. Inc. v. Engen*, 180 F.3d 838, 844 (7th Cir. 1999) ('Once the court determines that an arbitration clause is enforceable, the status of the other contract terms is for the arbitrator to decide.'). *George Watts & Son Inc. v. Tiffany & Co.*, 248 F.3d 577, 581 (7th Cir. 2001) ('[T]he arbitrator has considerable leeway so long as he respects the limits the parties' contract and public law place on his discretion.')."

Flaum explained that the 7th Circuit Consolidation — page 24

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relied upon *Howsam* and not the plurality decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), because of the limited precedential value of a plurality decision and the conflicting interpretations given to such plurality decision:

"Although we reach our decision based on *Howsam*, we recognize that the district court based its decision on *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). In *Green Tree*, the Supreme Court addressed whether a court or an arbitrator should determine if the parties' arbitration agreements allowed for class arbitration. See *id.* at 447, 123 S.Ct. 2402. A plurality of the court decided that the issue was for the arbitrator.

"Fortunately, in this case we need not rely on *Green Tree*. The Supreme Court made clear in *Howsam* that procedural issues are presumptively for the arbitrator to decide. Consolidation is a procedural issue. Thus, Wausau now has the burden to show that the agreements require the court, rather than the arbitrator, to address the consolidation issue. ('[T]he onus is on the party seeking litigation on a procedural issue to show that the agreement somehow excludes that issue from arbitration.')

"Wausau has not met its burden. The agreements make no mention of consolidation, as Wausau necessarily concedes. The arbitration clause in each agreement states, in relevant part, that 'any dispute

arising 'out of this agreement shall be submitted' to arbitration. This court has found that the 'any dispute arising out of' language 'does not address the question of who decides' — the court or the arbitrator. *Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co.*, 210 F.3d 771 (7th Cir. 2000). The agreements do not discuss who decides disputes regarding consolidation, so we presume the arbitrator decides."

Having concluded that the question of consolidation was for the arbitrator to resolve, thereby, affirming the judgment of the district court, the 7th Circuit concluded by noting that Wausau could raise its contention that arbitration of the First and Second Agreements required separate, not consolidated, arbitrations before the arbitrator:

"The question before us is whether the parties' agreements specify who is to decide whether consolidated arbitration is allowed — the court or the arbitrator. We have determined that the agreements do not specify and that questions regarding consolidation are presumptively for the arbitrator. Wausau is free to argue at the arbitration that separate arbitrations for the First Excess Agreement and Second Excess Agreement are required under the contracts' terms. If the arbitration panel agrees, it can require the parties to proceed as it deems appropriate."

The court affirmed the decision of the district court.