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48-13

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court house in the City of New York, on the third day of June, one thousand nine hundred and eighty-one.

June 3 1981

PRESENT:

HON. STERRY R. WATERMAN,
HON. WILLIAM H. TIMBERS, *Circuit Judges,*

HON. MORRIS E. LASKER, *District Judge,*
Sitting by Designation.

81-7118

In the Matter of the Arbitration
—between—
BURMAH OIL TANKERS, LTD.,

Petitioner,

—and—
MARLUCIDEZ ARMADORA S.A.,
—and—

ORE SEA TRANSPORT,

Respondents.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is *affirmed* substantially for the reasons stated in Judge Griesa's opinion dated January 22, 1981.

This case arises out of the shipment of a cargo of crude oil by the M/S FILIATRA LEGACY to Durban, South Africa, in July, 1979. The vessel was operated by its owner, Marluidez Armadora, chartered to appellee, and subchartered to appellant.

Both charter parties provided for arbitration in New York by a three-person panel. The disputes between Marluidez, appellant, and appellee arose from a delay when the vessel refused to enter the port of Durban to deliver the cargo on behalf of appellant. A separate arbitration was commenced under each of the two charter parties.

The instant appeal is from the district court's order granting appellee's motion to compel a partial consolidation of the two arbitrations for the determination of one issue, on the grounds that this issue involves common questions of law and fact in the two arbitrations and that the potential prejudice to appellee from inconsistent determinations is great.

The district court had discretion to order consolidation of arbitrations to avoid potential prejudice to the parties. *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975) (Medina, J.), cert. denied, 426 U.S. 936 (1976). In directing a consolidated proceeding, the district court may "[mould] the method of selection and the

number of arbitrators so as to fit this new situation." *Id.* We hold that the district court did not abuse its discretion in this case. Its determination was reasonable that the potentially irreparable prejudice to appellee from inconsistent determinations was not outweighed by countervailing considerations. The contrary has not been demonstrated on appeal.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, as implemented by the Federal Arbitration Act, 9 U.S.C. §§ 201 *et seq.* (1976), does not require a contrary result. This is not a proceeding in which enforcement or recognition has been requested. Moreover, because appellee waived objections to enforcement of any future award on the ground that it was not rendered in accordance with the intent of the parties to the arbitration agreements, this Convention will not apply to such an award. Assuming *arguendo* that the Convention did apply to this case, it still would not deprive the district court of its discretion to order consolidation. The Convention empowers, but does not require, a district court to refuse enforcement of an award rendered in a manner other than strictly within the terms of the agreement to arbitrate. This is an acknowledgement of the role of the law of the arbitral forum, in addition to the agreement of the parties, in determining arbitral procedures.

STERRY R. WATERMAN

Sterry R. Waterman
United States Circuit Judge

WILLIAM H. TIMBERS

William H. Timbers
United States Circuit Judge

MORRIS E. LASKER

Morris E. Lasker
United States District Judge
Sitting by Designation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
80 Civ. 5354

OPINION

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MARLUCIDEZ ARMADORA S.A.,

—and—

ORE SEA TRANSPORT,

Respondents.

GRIESA, *J.*

I.

Petitioner has brought this motion to consolidate two arbitrations in which it is involved. The motion is granted and a partial consolidation is ordered.

On May 22, 1973 petitioner time chartered the M/S Filiatra Legacy from respondent Marlucidez Armadora ("Marlucidez") for ten years. This charter party ("head charter") provided that the ship could "be employed in any part of the World, excluding . . . places prohibited . . . to vessels of Liberian . . . Registry."

Petitioner then sub-chartered the ship to respondent Ore Sea Transport ("OST") for six months. Pursuant to OST's instructions, the vessel loaded a cargo of oil. Eventually, the vessel was directed to discharge the cargo in the port of Durban, South Africa.

During the time the vessel was scheduled to arrive at South Africa, Liberia announced a prohibition against Liberian flag vessels from carrying cargo to and from South Africa. Marluidez thus took the position that the vessel was not required to enter ports in South Africa. As a result, petitioner called for arbitration under the head charter.

Marluidez interposed three defenses in the arbitration. One related to the trading restrictions in the head charter; the second related to whether Durban was a safe port; the third related to an underlying "illegality" of the carriage of the oil cargo.

About one month after the start of the head charter arbitration, respondent OST invoked the arbitration clause of the sub-charter. OST claims that petitioner is liable for damages arising from the delay associated with delivering the cargo.

Petitioner attempted to have the head charter arbitration panel rule that evidence of illegality of the shipping contract was irrelevant to the charter arbitration. On July 22, 1980 the panel ruled that it would receive evidence on the illegality question. Petitioner then requested respondent OST to consent to consolidation of the two arbitrations. OST refused by letter dated September 3, 1980. Petitioner then brought this motion to compel consolidation.

II.

No party denies that the court has power to order consolidation. The motion is addressed to the discretion of the court. The court has broad authority to deal with the question of consolidation and can fashion an arbitration panel as necessary to effect the remedy even though such a consolidated panel is not provided for in the original charter parties. *Compania*

Espanola de Pet. v. Nereus Ship., 527 F.2d 966, 975 (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976).

I rule that there should be a consolidated hearing on the illegality question. The principal reason is the possible prejudice from inconsistent rulings if the illegality question is arbitrated by two panels.

Contrary to the arguments of respondents, petitioner has neither waived, nor unduly delayed the making of, the request for partial consolidation.

Each party is to select one arbitrator, and those three should select two more. That five-person panel should deal with and decide the illegality issue. The other panels can decide, in an appropriate manner and time, the separate issues.

So ordered.

THOMAS P. GRIESA

Thomas P. Griesa
U.S.D.J.

Dated: New York, New York
January 22, 1981

US 43
No. 81-385

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

ORE SEA TRANSPORT,

Petitioner,

—v.—

BURMAH OIL TANKERS, LTD. and
MARLUCIDEZ ARMADORA, S.A.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

THE QUESTION PRESENTED

In international commercial cases governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the United States Arbitration Act may the federal courts relegate parties to multi-party arbitral tribunals created by the courts without regard to the contractual procedure adopted by the parties themselves, or to the Convention, or to the Act, in order to effect consolidation even when the result is fragmentation and proliferation of proceedings?

Certiorari denied November 2, 1981.

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United States
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THOMAS P. GRIESA

Thomas P. Griesa
U.S.D.J.

Dated: New York, New York
January 22, 1981

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