# COMMENTS

## COMPULSORY CONSOLIDATION OF INTERNATIONAL ARBITRAL PROCEEDINGS: EFFECTS ON *PACTA SUNT SERVANDA* AND THE GENERAL ARBITRAL PROCESS



### I. INTRODUCTION

Submission of disputes to arbitration has become a common practice among parties to international commercial transactions. Arbitration provides a sense of predictability as to where and under what

circumstances claims may be brought.[1] Arbitration also provides a neutral forum in which parties can resolve their disputes.[2] Parties may choose whether to proceed in an international forum and adopt its rules of procedure,[3] or whether to establish their own arbitral tribunal and mechanisms of procedure.[4] Parties can also decide what substantive law is applied in the event of a dispute.[5] In addition, submitting disputes to international commercial arbitration affords the parties the opportunity to select experts in the subject matter underlying the dispute to serve as arbitrators. Furthermore, allowing parties to select arbitrators, one of which is neutral, enhances the appearance of neutrality provided by arbitration.[6]

Underlying the parties' authority to create a self-governing mechanism of dispute resolution is the notion of party autonomy, meaning, parties are free to contract in any manner.[7] The doctrine of

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1. UNCITRAL Model Law on International Commercial Arbitration, Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, U.N. GAOR 40th Sess., Supp. No. 17, art. 19, Annex I, U.N. Doc. A/40/17, art. 19 (1985) [hereinafter UNCITRAL].

2. *See* Howard M. Holtzman, *The Geopolitics of Arbitration*, 3 AM. REV. INT'L ARB. 72 (1992).

3. International arbitration institutions that have been established include the London Court of Arbitration, the International Chamber of Commerce, and the American Arbitration Association.

4. UNCITRAL, *supra* note 1, art. 19. When the parties have failed to agree to the procedure to be followed, UNCITRAL authorizes the arbitral tribunal to conduct the proceedings in such a manner as it considers appropriate. *Id.*

5. UNCITRAL, *supra* note 1, art. 28. When the parties have failed to agree which substantive law should be applied, the arbitral tribunal has the authority to select the applicable law. Many factors are considered when deciding what substantive law to adopt, such as: where the arbitration tribunal sits; where the contract was formulated; where the arbitral award will be enforced; and general law of merchantability (*lex mercatoria*).

6. *See* Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1992) [hereinafter FAA]; UNCITRAL, *supra* note 1, art. 11 (explicating how arbitrators are selected).

7. UNCITRAL recognizes the importance of party autonomy in formulating arbitration agreements. Party autonomy is reflected in Articles 1 and 2 of UNCITRAL. Article 2(e) of UNCITRAL provides:

> [W]here a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.

*pacta sunt servanda*, however, dictates that parties to an agreement are bound by that agreement.[8]

Pursuant to the Federal Arbitration Act (FAA), either party can petition United States courts to order compliance with the terms of an arbitration clause.[9] Consequently, courts have rigorously enforced arbitration agreements.[10] Parties in multi-party disputes have often petitioned courts under the FAA to order consolidation of separate arbitral proceedings to which one party is subject. Although the general rule is that courts cannot order consolidation absent express consent by the parties,[11] some courts have gone beyond merely enforcing arbitration agreements to effectively reformulating them. On occasion, consolidation has been ordered unilaterally, regardless of express consent of the

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UNCITRAL, *supra* note 1, art. 2. Thus, Article 2 implies that the parties' choice of law will be binding.

8. BLACK'S LAW DICTIONARY 1108 (6th ed. 1990).

9. FAA § 4.

10. *See, e.g.*, Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983). The *Moses H. Cone* Court maintained that it was bound to enforce the arbitration agreement pursuant to the FAA even when it would bifurcate the proceedings. Because one of the parties was not a party to the arbitration clause, the Court ordered one proceeding be submitted to arbitration and the other proceeding to be submitted to state court. *Id.*

Courts have rigorously enforced arbitration agreements, even when piecemeal litigation would result. *See, e.g.*, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (permitting severance of claims for securities fraud that were not arbitrable from state law claims that were arbitrable). Courts have gone further to enforce arbitration agreements in instances when litigation could have a precedential impact upon the growth of United States antitrust law. *See* Mitsubishi Motors Corp. v. Soler, 473 U.S. 614 (1985) (international case in which Court submitted issue subject to United States antitrust laws to arbitration).

11. *See, e.g.*, Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984); Ore & Chemical Corp. v. Stinnes Interoil, Inc., 606 F. Supp. 1510 (S.D.N.Y. 1985).

parties.[12] Other courts, however, hold that consolidation can be ordered only upon a finding of implicit consent by the parties.[13]

Proponents of unilaterally ordered consolidation of arbitration agreements argue that consolidation is more efficient and less costly than holding separate arbitral proceedings, thus conforming to the goals of arbitration.[14] In actuality, unilateral court orders to consolidate arbitral proceedings in multi-party situations undermine the doctrine of party autonomy and disrupt the notion of *pacta sunt servanda*.[15] Parties are no longer bound by their agreements, but rather, to what courts order, regardless of whether the order contradicts the actual intent of the parties.

Currently, only a few jurisdictions in the world allow judicial compulsion of consolidation of arbitration proceedings.[16] Both the Netherlands[17] and Hong Kong[18] statutorily provide courts with the authority to compel consolidation. Other jurisdictions, such as France, refuse to authorize compulsory consolidation of arbitral proceedings.[19] Although unilaterally ordering consolidation may seem an efficient

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12. *See, e.g.*, Compania Espanola de Petroleos S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976); Cable Belt Conveyors, Inc. v. Alumina Partners of Jamaica, 669 F. Supp. 577 (S.D.N.Y.), *aff'd*, No. 87-7215 (2d Cir.), *cert. denied*, 108 S. Ct. 161 (1987). *See also* David J. Branson & Richard E. Wallace, Jr., *Court-Ordered Consolidated Arbitrations in the United States: Recent Authority Assures Parties the Choice*, 5 J. INT'L ARB. 89, 93 (1988).

13. *See, e.g.*, Gavlik Constr. Co. v. H.F. Campbell Co., 526 F.2d 777 (3d Cir. 1975); Maxum Foundations, Inc. v. Salus Corp. 817 F.2d 1086 (4th Cir. 1987); The Government of the United Kingdom of Great Britain and Northern Ireland v. The Boeing Company, 998 F.2d 68 (2d Cir. 1993).

14. Parties agree to arbitrate because of the efficiency and independence arbitration provides. Arbitration is also presumably less costly than judicial proceedings. *See* Richard E. Wallace, Jr., *Consolidated Arbitration in the United States: Recent Authority Requires Consent of the Parties*, 10 J. INT'L ARB. 5, 17 (1993).

15. *See* Dominique T. Hascher, *Consolidation by American Courts: Fostering or Hampering International Commercial Arbitration?*, 1 J. INT'L ARB. 127 (1984).

16. Matthew D. Schwartz, *Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?*, 22 CASE W. RES. J. INT'L L. 341, 365 (1990).

17. The Netherlands Arbitration Act, IV C. civ. p., art. 1046 (1986) (Neth.), *reprinted in* Van den Berg, *The Netherlands, in* 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, Annex I (Supp. 7 1987) [hereinafter Dutch Arbitration Act].

18. Arbitration Ordinance, ch. 341, § 6B (H.K.), *reprinted in* Miller, *Consolidation in Hong Kong: The Shui On Case*, 3 ARB. INT'L 87, 88 (1987).

19. *See* Mahir Jalili, *French Setback to Multiparty Arbitration*, 7 INT'L ARB. REP. 20 Feb. 1992).

solution to resolving multi-party disputes through arbitration, such a solution interferes with the goals of arbitration. When the parties in a multi-party transaction are not privy to the same contract, court-ordered consolidation of the several arbitral proceedings undermines the doctrine of *pacta sunt servanda*, creates uncertainty and unpredictability of the resolution of disputes that arbitration was designed to alleviate, and jeopardizes the enforceability of arbitral awards in foreign jurisdictions.

## II. UNILATERALLY ORDERED CONSOLIDATION OF ARBITRAL PROCEEDINGS BY UNITED STATES COURTS

### A. *Introduction*

The FAA defers to an arbitration agreement when the agreement binds the parties, and ensures that the agreement is enforced according to its terms.[20] Section 3 of the FAA requires courts to stay proceedings pending arbitration.[21] Section 4 authorizes any party to arbitral proceedings to petition the United States district court to adjudicate any "alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration."[22] The court can then compel arbitration pursuant to the terms of the agreement.[23] Generally, the party seeking to consolidate arbitral proceedings will invoke the court's authority of Sections 3 and 4 of the FAA as grounds for ordering consolidation.

Consolidation is most evident in multi-party disputes.[24] Although it is impossible to list each circumstance in which multi-party disputes

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20. FAA § 3-4.

21. *Id.* § 3.

22. *Id.* § 4.

23. *Id.*

24. *See, e.g.*, J. Gillis Wetter, *Overview of the Issues of Multi-party Arbitration*, MULTI-PARTY ARB. 7 (ICC/Dossier of the Institute of International Business Law and Practice, 1991). Several scenarios by which multi-party disputes may arise are identified, including:

a. A and B are linked in different disputes under different contracts;
b. Different disputes arise out of the same facts; multiplicity is created as the transaction evolves;
c. Project multiplicity;
d. Exactly the same dispute engages more than two parties;
e. Multiple disputes of exactly the same kind engage a multitude of parties.

may arise, a few typical variations exist. For example, disputes may arise between parties who are signatories to the same arbitration clause, or between parties who are signatories to different arbitration clauses in the same overall transaction.[25] These situations typically arise in maritime or construction contracts.[26]

Courts in the United States have been divided on the issue of consolidation of multi-party arbitrations without an express agreement of the parties. In the past, courts have ordered consolidation pursuant to the FAA and the Federal Rules of Civil Procedure (FRCP), rather than the terms of the agreement and the specific intent of the parties to the contract.[27] Moreover, courts have unilaterally ordered consolidation based on a finding of implied consent.[28] In effect, ordering consolidation based on implied consent allows the courts to redraft arbitration clauses, contrary to the intent of the parties and in violation of the doctrine of *pacta sunt servanda.*

### *B. Analysis of United States Court Actions*

Until recently, some federal courts have relied on the Second Circuit's holding in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*[29] as authority for unilaterally ordering consolidation of arbitration proceedings. That decision, however, was overruled in *The*

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*Id.* at 9. Multi-party arbitration is defined more simply: arbitration that involves more than one party on either side. *Id.* at 10.

25. W. LAURENCE CRAIG, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 102, pt. II, § 5.08-5.11 (2d ed. 1990). Procedurally, consolidation of multi-party disputes arises when a third party, C, is brought into an arbitration proceeding pending between A and B when C is in privity with either A or B. Hascher, *supra* note 15, at 127. The issue of consolidation can arise when an arbitration clause has expressly been embodied in C's contract or when C has impliedly agreed to arbitrate only with B. Or, as mentioned above, consolidation may arise from disputes between many parties to the same contract. These scenarios were the main focus of the 1980 ICC Arbitration Interim Meeting in Warsaw. *Id.*

26. *See* New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1 (1st Cir. 1988); In the Matter of Hornbeck Offshore, 981 F.2d 752 (5th Cir. 1984); *Gavlik*, 526 F.2d at 777; In the Matter of Coastal Shipping Ltd., 812 F. Supp. 396 (S.D.N.Y. 1993); Clipper Gas v. PPG Industries, Inc., 804 F. Supp. 570 (S.D.N.Y. 1992).

27. *See, e.g., Nereus*, 527 F.2d at 966; *Cable Belt Conveyors*, 669 F. Supp. at 577.

28. *Boeing*, 998 F.2d at 68.

29. *Neureus*, 527 F.2d at 966.

*Government of the United Kingdom v. The Boeing Company.*[30] To crystallize the issues involved in consolidation, the evolution of court-ordered consolidation must be analyzed.

*Nereus* involved an arbitration agreement among three parties: Nereus Shipping, S.A., a Liberian corporation that was an agent for owners; Hidrocarburos Derivados, S. A. (Hideca), a Venezuelan corporation engaged in the oil business; and Compania Espanola de Petroleos, S.A. (Cepsa).[31] Nereus and Hideca entered into a three-year maritime charter party for the transportation of petroleum products.[32] The charter party included an arbitration clause stating that "any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration."[33] Six months later, an addendum guaranteeing the charter party was signed by Nereus, Hideca and a third party, Cepsa.[34] Dispute ensued when Nereus claimed that Hideca was in default.[35] As a result, Nereus brought action against both Cepsa and Hideca in separate arbitration proceedings.

Although Cepsa did not explicitly agree to submit any dispute to arbitration, the Second Circuit upheld the district court's ruling that

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30. *Boeing*, 998 F.2d at 74.

31. *Nereus*, 527 F.2d at 968.

32. *Id.* at 969. A charter party is a "contract by which a ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places." BLACK'S LAW DICTIONARY 236 (6th ed. 1990).

33. *Nereus*, 527 F.2d at 968.

34. *Id.* What was known as "Addendum 2" provided, in pertinent part:

> In connection with the contract of affreightment embodied in the Charter Party drawn up at New York and dated 27th January, 1971, between Nereus Shipping S.A. as Agents for Owners (hereinafter called the Owner), and Hidrocarburos y Derivados, C.A. (HIDECA) (hereinafter called the Charter), being that the Charter shall use the tonnage contracted under the present Charter Party for the transportation, during the period of three years commencing November 1971/ January 1972, of crude oil under a CIF contract to be signed with Compania Espanola de Petroleos, S.A. (CEPSA) we, Compania Espanola de Petroleos, S.A., hereby agree that, should HIDECA default in payment or performance of its obligations under the Charter Party, we will perform the balance of the contract and assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party.

*Id.* at 969.

35. *Id.* at 970.

subjected Cepsa to arbitration.[36] The court found that because all three parties had signed the Addendum, and the Addendum incorporated the charter party and the accompanying arbitration clause by reference,[37] the guarantee effectively provided that Cepsa would perform the "balance of the contract" and "assume the rights and obligations of Hideca."[38] The court held that the duty to arbitrate was one of the rights and obligations under the headcharter that Cepsa, as guarantor, agreed to assume.[39]

The Second Circuit also upheld the district court's order consolidating the two arbitral proceedings,[40] reasoning that consolidation would serve the interest of justice.[41] Nereus claimed that "the district court was without power to consolidate the arbitrations, and that consolidation in any case is improper unless the party who has arbitration agreements with the other two parties consents to that procedure."[42] The Second Circuit, however, dismissed Nereus' argument and held that the district court had authority to consolidate arbitral proceedings pursuant to FRCP 42(a) and 81(a)(3), and Sections 3 and 4 of the FAA.[43] FRCP

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36. *Id.* at 971-72. In a declaratory judgment action brought by Cepsa against Nereus, the district court held that Cepsa did agree to arbitrate. Although Cepsa had not consented to arbitration, the district court held that Cepsa had consented expressly upon notice by Nereus of any default by Hideca. *Id.*

37. *Id.* at 974.

38. *Nereus*, 527 F.2d at 973-74.

39. *Id.* at 974.

40. *Id.* In a second action brought by Hideca, Hideca sought an injunction against Nereus and Cepsa to restrain them from proceeding with arbitration until after the arbitration proceedings between Nereus and Hideca were completed. Hideca also filed a petition against Nereus to compel Nereus to appoint a third arbitrator in their proceedings. During the proceedings, one of the parties suggested that the two arbitrations be consolidated. Despite Nereus' strong opposition to consolidation, the district court so ordered. Nereus appealed. *Id.*

41. *Id.* at 974. The court was referring to Nereus' desire to proceed with arbitration with Cepsa before it proceeded with Hideca. The arbitral proceeding with Hideca would determine whether Hideca was in fact in default. The court found that arbitrating the claim between Nereus and Cepsa first would be "gravely prejudicial" to both Hideca and Cepsa. *Id.*

42. *Id.* at 974-75.

43. *Id.* Rule 42(a) of the Federal Rules of Civil Procedure provides:

> 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

42(a) and 81(a)(3) grant authority to consolidate when common questions of law and fact are present.[44] Moreover, the court ruled that "the liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases."[45] Thus, the court found it proper to consolidate proceedings in the absence of a contractual relationship between the parties and regardless of consent.[46] The court thereby disregarded the parties' intentions as promulgated by their agreements as well as their obligation to be bound by the contract under the doctrine of *pacta sunt servanda.* The court further intervened by ordering the parties to nominate five arbitrators instead of the agreed upon three.[47] The Supreme Court denied certiorari in *Nereus* in 1976, thereby allowing the Second Circuit's decision to stand.

Shortly after *Nereus,* the issue of consolidation came before the Third Circuit in *Gavlik Constr. Co. v. H.F. Campbell Co..*[48] *Gavlik* addressed two areas of concern: a conflict between a building owner, Wickes, and the general contractor, H.F. Campbell; and a conflict between the general contractor and the subcontractor, Gavlik.[49] Wickes petitioned the court to consolidate the resulting arbitration proceedings. The contract between the owner and the general contractor provided that "all disputes arising out of or relating to" the agreement would be

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consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

FED R. CIV. P. 42(a). FED. R. CIV. P. 81(a)(3) provides that "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."

44. *Nereus*, 527 F.2d at 974-75.

45. *Id.*

46. *Id. See also* Schwartz, *supra* note 16, at 353.

47. *Nereus*, 527 F.2d at 975-76. The court went so far as to decree the manner in which the arbitrators were to be selected. In the event that the five arbitrators were not selected in a given amount of time, the district judge would then nominate them. *Id.*

48. *Gavlik*, 526 F.2d at 777.

49. *Id.* The subcontractor brought a claim against the contractor for payment of construction work completed. In turn, the contractor brought an action against the owner for indemnification and contribution. The district court denied consolidation based on the contractual language. The court reasoned that because the contract provided that one arbitrator was to be selected by the general contractor, another by the subcontractor, and he third by the two arbitrators selected, the parties did not intend to consolidate the rbitration proceedings. The district court further reasoned that this language "clearly mpl[ied] that only those two parties expected to participate in any arbitration." *Id.*

submitted to arbitration.[50] In the subcontract, the subcontractor agreed to "be bound to the Contractor by the terms and provisions of all of the Contract Documents," and to assume respective obligations similar to those of the general contractor toward the owner.[51] Furthermore, the contract between the owner and the general contractor provided for a subcontract whereby the rights of the owner would be protected.[52]

The Third Circuit did not address the underlying issue of whether the court had the authority to order consolidation when the parties had not expressly consented to consolidation.[53] Instead, it based its decision on the contractual language and found that the interrelation of the contracts amounted to an implicit consent by all of the parties to consolidate arbitration.[54] Thus, the court purported to be merely enforcing the parties' agreement and not ordering consolidation absent agreement of the parties.[55]

In 1984, the Ninth Circuit in *Weyerhaeuser Co. v. Western Seas Shipping Co.*[56] adhered to the doctrine of *pacta sunt servanda* and held that federal courts are not authorized to compel arbitration unless it is explicitly provided in the agreement.[57] *Weyerhaeuser* arose from disputes over a maritime agreement in which the subcharterer claimed that the stowage provisions were unreasonable. In response, the charterer brought an action for indemnification against the owner of the vessel. Both the charter party and the subcharter contained identical arbitration clauses.[58] The Ninth Circuit, however, refused to follow the decision in *Nereus* on the ground that it was "clear that the parties here did not consent to joint arbitration."[59] The two separate agreements, each with

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50. *Id.* at 781.

51. *Id.*

52. *Id.*

53. *Gavlik*, 526 F.2d at 781.

54. *Id.* at 789. *See* Branson & Wallace, *supra* note 12, at 90. The Third Circuit found that the subcontractor's claim against the general contractor for payment arose out of or was related to the owner's contract. Further, the subcontract gave the general contractor the right to withhold any payment until the owner tendered the money to the general contractor. *Gavlik*, 526 F.2d at 789.

55. Branson & Wallace, *supra* note 12, at 90.

56. *Weyerhaeuser*, 743 F.2d at 635.

57. *Id.*

58. *Id.* at 636.

59. *Id.*

its own arbitration clause, did not explicitly provide for consolidation.[60] Furthermore, the court reasoned that because the charterer signed an indemnity agreement with the owner, which insulated the owner from "any increase in its obligations of any subcharter [the charterer] might execute," the parties did not intend to consolidate the arbitral proceedings.[61]

In contrast to the *Nereus* court, the Ninth Circuit construed the Federal Arbitration Act narrowly. It interpreted the FAA literally to mean that the court was only authorized to compel arbitration in accordance with the terms of the agreement.[62] The *Weyerhaeuser* court held:

> [W]e can only determine whether a written arbitration agreement exists, and if it does, enforce it "in accordance with its terms." As the district court noted, this provision "comports with the statute's underlying premise that arbitration is a creature of contract, and that "[a]n agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute."[63]

Thus, the Ninth Circuit held that the FAA only authorizes the judiciary to determine whether an arbitration clause exists and whether the parties were privy to an arbitration agreement allowing consolidation.[64] In the absence of an agreement, the court found that it had no authority to order consolidation of arbitration proceedings between parties not privy to a particular agreement.[65]

Shortly after the *Weyerhaeuser* decision, the United States District Court for the Southern District of New York declined to follow its own circuit court's decision in *Nereus* and instead followed the Ninth Circuit's decision in *Weyerhaeuser*.[66] The district court in *Ore & Chemical Corp.*

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60. *Id.*

61. *Weyerhaeuser*, 743 F.2d at 637.

62. *Id.*

63. *Id.* (citing Weyerhaeuser Co. v. Western Seas Shipping Co., 568 F. Supp. 1220 (N.D. Cal. 1983)).

64. *Weyerhaeuser*, 743 F.2d at 637.

65. *Id. See* Schwartz, *supra* note 16, at 357.

66. *See* Branson & Wallace, *supra* note 12, at 91.

*v. Stinnes Interoil, Inc.*[67] held that neither the FAA nor the FRCP authorize courts unilaterally to order the consolidation of arbitration proceedings when parties did not provide for consolidation in their agreements.[68]

Referring to FRCP Rules 42(a) and 81(a)(3), the court found that "[t]hese rules...do not provide sufficient basis for a court, in effect, to reform the parties' contracts and force them to arbitrate their disputes in a manner not provided for in the arbitration agreements."[69] The court further held that FAA Section 4 "precludes the use of the Federal Rules in a manner that would alter the terms of the arbitration agreements. The court could only compel consolidated arbitration if the arbitration agreements provided for consolidation."[70] Thus, the FAA is to be construed narrowly.[71]

Two years later, the Second Circuit reaffirmed *Nereus* by ordering consolidation despite the absence of express consent of the parties, contrary to the doctrine of *pacta sunt servanda*. In *Cable Belt Conveyors, Inc. v. Alumina Partners of Jamaica*,[72] the parties to the subcontract, Cable Belt Conveyors, Inc. and Paul N. Howard Company, moved to consolidate two pending arbitration proceedings pursuant to the FAA Section 2, and FRCP Rules 42(a) and 81(a)(3).[73] One of the proceedings was between the subcontractor, Paul Howard, and the general

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67. *Ore & Chemical*, 606 F. Supp. at 1510.

68. *Id.* at 1512-13.

69. *Id.* at 1513.

70. *Id.* at 1514.

71. *Id.* at 1513 (citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983)). *See Dean Witter* in which the Court held:

> We...are not persuaded by the argument that the conflict between the two goals of the Arbitration Act -- enforcement of private agreements and the encouragement of efficient and speedy dispute resolution -- must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which the parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation.

*Dean Witter*, 470 U.S. at 221.

72. *Cable Belt*, 669 F. Supp. at 577.

73. *Id.* Alpart, in its cross motion for an order dismissing the petition, claimed that the court lacked authority to order consolidation of the two arbitrations and that consolidation would be highly prejudicial. *Id.*

contractor, Cable Belt;[74] the other was between Cable Belt and the owner, Alpart.[75] The primary contract provided that Alpart consent to the subcontracting by Cable Belt of any part of the contract work. Cable Belt, in turn, was required to make the terms and conditions of the main contract the terms and conditions of the subcontract. Thus, both the main contract and the subcontract contained similar arbitration clauses.[76]

The district court held that the *Nereus* decision was controlling in the Second Circuit in matters concerning consolidation of arbitration.[77] Based on the *Nereus* decision, the court held that consolidation was proper.[78] Numerous questions of law and fact were identical in both disputes.[79] Thus, if these actions were not consolidated, a high risk of inconsistent results would exist.[80] The court reasoned that FRCP Rules 42(a) and 81(a)(3), in conjunction with a liberal interpretation of the FAA, authorize courts to consolidate multiple arbitration proceedings.[81]

The Fourth Circuit, in *Maxum Foundations, Inc. v. Salus Corp.*,[82] refused to follow the *Nereus* approach and instead followed the Third Circuit's approach in *Gavlik*.[83] The court in *Maxum Foundations* also found that the parties implicitly agreed to consolidate their arbitration claims.[84] The arbitration agreement at issue in *Maxum Foundations* read:

> No arbitration shall include by consolidation, joinder or in any other manner, parties other than the Owner, the Contractor and any other persons substantially involved in a common question of fact or law, whose presence is

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74. *Id.* at 577-78. The subcontract between Cable Belt and Paul Howard was "for the installation and commissioning of a conveyor system." *Id.*

75. *Id.* at 577-78. Cable Belt and Alpart entered into an agreement whereby Cable Belt agreed to supply and install a conveyor system to transport minerals from the mine to Alpart's storage dome. *Id.*

76. *Id.*

77. *Cable Belt*, 669 F. Supp. at 579.

78. *Id.* at 580.

79. *Id.* at 579.

80. *Id.*

81. *Id.* at 580.

82. *Maxum*, 817 F.2d at 1086.

83. *Gavlik*, 526 F.2d at 777.

84. *Id.* *See* Branson & Wallace, *supra* note 12, at 93.

> required if complete relief is to be accorded in the arbitration.[85]

Because this language was contained in the contract between the contractor and the subcontractor as well, the court held that there was an implicit agreement to consolidate the arbitration proceedings.[86]

In 1993, the Second Circuit in *The Government of the United Kingdom of Great Britain and Northern Ireland v. Boeing Co.*,[87] addressed consolidation once again. This time, the court upheld the doctrine of *pacta sunt servanda* by holding that "a district court cannot order consolidation of arbitration proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such consolidation."[88] In *Boeing*, Boeing contracted with the government to manufacture a helicopter, whose engine was manufactured by Textron, Inc.[89] Boeing and Textron each had separate contracts with the United Kingdom and both were parties to a separate agreement defining their respective responsibilities for the helicopter project.[90] The United Kingdom filed demands for separate arbitration against both Boeing and Textron for damages, and later filed a petition to compel consolidated arbitration in the United States District Court for the Southern District of New York.[91] The district court granted the United Kingdom's petition from which the parties appealed.[92]

The *Boeing* court faulted the *Nereus* court's reliance on the FAA and the FRCP. The Second Circuit held that neither the FAA nor the FRCP allows district courts to unilaterally order the consolidation of arbitration proceedings unless doing so would be "in accordance with the

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85. *Maxum*, 817 F.2d at 1087.

86. *Id.* at 1088. As in *Gavlik*, the court did not address whether the relevant provisions in the Federal Rules of Civil Procedure together with a liberal interpretation of the FAA authorize courts to compel consolidation. Also, note that the court in *Weyerhaeuser* did not find implicit consent to consolidate even though the respective contracts contained identical arbitration agreements. *Weyerhaeuser*, 743 F.2d at 635.

87. 998 F.2d 68 (2d Cir. 1993).

88. *Id.* at 69.

89. *Id.* Boeing manufactured the damaged helicopter in a ground testing incident. Textron manufactured the helicopter's engine. Both manufacturers had long-standing relationships with the United Kingdom on various military projects. *Id.*

90. *Id.*

91. *Id.*

92. *Boeing*, 998 F.2d at 69.

terms of the agreement" pursuant to FAA Section 4.[93] This is consistent with Congress' intent in drafting the FAA which "was...merely to assure the enforcement of privately negotiated arbitration agreements, despite possible inefficiencies created by such enforcement."[94] Circuit courts have also recognized that a court is not permitted to interfere with private

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93. *Id.* at 72.

94. *Id.* (citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Volt Information Sciences v. Board of Trustees, 489 U.S. 468 (1989)). In *Moses H. Cone*, the Supreme Court affirmed an order requiring enforcement of an arbitration agreement, even though arbitration would result in bifurcated proceedings. It did so because not all of the parties to the dispute were parties to the arbitration agreement. The Supreme Court reasoned that an arbitration agreement "must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone*, 460 U.S. at 20. As a result, one claim was submitted to arbitration and the other was brought in the state court. *Id.*

In *Dean Witter*, the Court allowed the 2 claims to proceed separately. The securities fraud claims, which were not arbitrable, were presented to the Court and the others were submitted to arbitration. The *Boeing* court's reliance on *Dean Witter* assumes that arbitration agreements can be enforced regardless whether piecemeal litigation results. See Richard E. Wallace, Jr., *Consolidated Arbitration in the United States: Recent Authority Requires Consent of the Parties*, 10 J. INT'L ARB. 5, 14 (1993), for the theory that the *Boeing* could have satisfied both the efficiency aspect of arbitration and the policy requiring the enforcement of arbitration agreements by consolidating the 2 arbitrable claims. The author further contends that the *Boeing* court followed *Dean Witter* too strictly, to the extent that the FAA requires strict enforcement of arbitration agreements. *Id.*

The *Boeing* court also cited *Volt Information Sciences*, in which the Court determined that the FAA "'simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.'" *Boeing*, 998 F.2d at 72. See Wallace, *supra* note 14, for the theory that the *Boeing* court would have authority to consolidate pursuant to *Volt Information Sciences* as well. Wallace contends that the Supreme Court acknowledges the court's discretion in construing arbitration agreements: "[A]s with any other contract, the parties' intentions control, but those intentions are generally construed as to issues of arbitrability." *Id.* (citing Mitsubishi Motors Corp. v. Soler, 473 U.S. 614, 626 (1985)). *See also* Thomas E. Carbonneau, *American and Other National Variations on the Theme of International Commercial Arbitration*, 18 GA. J. INT'L & COMP. L. 143 (1988) (discussing federalism and arbitral process).

The Second Circuit also cited the legislative history of the FAA to affirm that the purpose of the FAA was to place arbitration agreements "upon the same footing as other contracts, where it belongs." *Boeing*, 998 F.2d at 73 (citing H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924)). Furthermore, the court endorsed the belief that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* (citing Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 478 (1989)).

arbitration agreements merely to "impose its own view of speed and economy."[95]

Contrary to *Nereus* and its progeny, the Second Circuit held that the FRCP Rules 42(a) and 81(a)(3) do not grant courts the authority to compel consolidation.[96] The court held:

> Rule 81(a)(3) merely allows the application of the Federal Rules of Civil Procedure to judicial proceedings that are before a court pursuant to U.S.C. Title 9, to the extent that Title 9 does not provide appropriate procedural rules. Rule 81(a)(3) clearly does not import the Federal Rules of Civil Procedure to the private arbitration proceedings that underlie the Title 9 proceedings pending before a court....Therefore, although a district judge considering related petitions to compel arbitration can have all of the petitions heard at once pursuant to Rule 42(a), he or she could not use Rule 42(a) to order that the underlying arbitrations, once compelled, be conducted together.[97]

Although the United Kingdom's concerns regarding the rendition of inconsistent awards by dual arbitration tribunals were valid, the *Boeing* court ruled that such concerns did not provide a substantial ground upon which to grant the district court authority to "reform the private contracts which underlie this dispute."[98] The court reasoned that "[i]f contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party."[99]

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95. *Boeing*, 998 F.2d at 72 (citing American Centennial Ins. Co. v. National Casualty Co., 951 F.2d 107, 108 (6th Cir. 1991)).

96. *Id.* at 73. The court rejected the United Kingdom's argument that FRCP 42(a) as incorporated through FRCP 81(a)(3) allows the district court to consolidate private arbitration proceedings in appropriate situations.

97. *Id.* at 73-4.

98. *Id.*

99. *Id.* at 73-4 (citing Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 479 (1989)). The Court in *Volt Information Sciences* held that:

> [a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will

In conclusion, the court held that district courts do not have the authority to unilaterally order consolidation of arbitration proceedings absent the parties' consent to consolidate.[100] Moreover, the court stated that the use of the FRCP and the liberal reading of the FAA in *Nereus* is no longer good law. The equitable principles and general contract law analysis was permitted to stand.[101]

### C. *The Future Role of United States Courts in Unilaterally Ordering Consolidation of Arbitration Proceedings*

The general rule as it stands in the Second, Third, and Fourth Circuits, after the *Boeing* decision, is that neither the FAA nor the FRCP allow courts to unilaterally order consolidation absent an express agreement. Courts may still, however, order consolidation upon a finding of implied consent.

When the arbitration agreement is silent, some experts contend that "it is reasonable, fair and fitting to enforce consolidation as a means of achieving the main objective of parties who choose arbitration, and a recognized objective of the [FAA]: to provide an efficient and equitable resolution."[102] Experts argue that the underlying rationale for the courts' refusal to compel consolidation is based on the parties' inability to consolidate, and not because consolidation is objectionable per se.[103] Consolidation promotes efficiency, economy, and expedience because multiple related disputes are resolved in a single proceeding. Furthermore, consolidation promotes equity and fairness in awards, in the form of one uniform award rather than inconsistent awards from multiple proceedings.[104] Moreover, consolidating arbitration proceedings is consistent with the underlying purpose of arbitration.[105] If the main

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> arbitrate...so too may they specify by contract the rules under which that arbitration will be conducted.

*Volt Information Sciences*, 489 U.S. at 479.

100. *Boeing*, 998 F.2d at 74.

101. *Id.*

102. Wallace, *supra* note 94, at 5. Note that the author's underlying premise is that the *Boeing* court should have compelled consolidation. In general, Wallace argues that the court misinterpreted the authority upon which it relied. *Id.* at 13-16.

103. *Id.* at 17.

104. *Id.*

105. *Id.*

objective of arbitration is to provide expeditious and equitable resolutions, then consolidation furthers that objective and is consistent with Congressional intent: placing arbitration clauses on equal footing with other contracts.[106]

Aside from a policy-based finding of implied consent, the "general equitable powers of the court" allow courts to order "discretionary consolidation" under particular circumstances.[107] Courts have used the following factors to find implicit consent to consolidation: "(1) the language of the arbitration clause; (2) the amendments or addenda to the agreement; (3) the course of dealing between the parties; or (4) [the] incorporation of rules that permit consolidation."[108]

Ordering consolidation based on a finding of implied consent, however, is equally as injurious to the "psychological climate of arbitration" as reaching such a decision in the absence of express consent.[109] Courts tend to overlook the intention of the parties when interpreting arbitration agreements pursuant to the general rules of contract interpretation.[110] In doing so, the courts ignore Congress' objective of placing arbitration "upon the same footing as other contracts" in an effort to combat judicial hostility toward arbitral proceedings.[111] As a result, discretionary consolidation based on a finding of implicit consent undermines the general arbitral process and the doctrine of *pacta sunt servanda.*

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106. *Id.*

107. Note, *Arbitration--Consolidation of Separate Proceedings--Second Circuit Holds that Consolidation is Governed by the Terms of the Parties' Agreements: Government of the United Kingdom of Great Britain v. Boeing Co. 998 F.2d 68 (2d Cir. 1993),* 107 HARV. L. REV. 499, 502 (1993) [hereinafter *Consolidation of Separate Proceedings*] (citing In re Coastal Shipping & S. Petroleum, 812 F. Supp. 396, 402 (S.D.N.Y. 1993)).

108. *Id.*

109. Hascher, *supra* note 15, at 133.

110. *Consolidation of Separate Proceedings, supra* note 107, at 503.

111. *Id.* (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)).

## III. COMPARATIVE ANALYSIS OF COURT-ORDERED CONSOLIDATION OF ARBITRATION AGREEMENTS

### A. *Introduction*

Few jurisdictions, aside from the United States, authorize the judiciary to compel consolidation of arbitration proceedings. Among these are the Netherlands and Hong Kong, both of which have statutorily authorized compulsory consolidation of arbitration proceedings. In contrast, the courts and legislature in France have refused to authorize court-ordered consolidation of arbitration proceedings on the ground that doing so would violate international public policy.

Since few countries have considered or actually implemented statutes regarding consolidating arbitration proceedings, an analysis of the underlying rationale for such policies is helpful. Moreover, it is important to consider why countries have not implemented or enforced a statute or policy promoting the consolidation of arbitral proceedings. Whether international public policy has played a role in inhibiting other countries from implementing such a rule or enforcing such a policy can only be determined by examining the role of consolidation in each country individually.

### B. *Compulsory Consolidation in the Netherlands*

The Dutch Arbitration Act[112] statutorily compels the Dutch judiciary to consolidate certain arbitral proceedings. The Act provides that parties to arbitration may submit a request for consolidation of multiple arbitral proceedings to the President of the District Court in Amsterdam, even when the contract in question is silent on the issue.[113] Parties can petition for consolidation when the subject matter of two or more arbitral proceedings is connected.[114] After the parties and the arbitrators are heard, the President can grant consolidation in whole or in part.[115]

If the President orders consolidation in full, the parties may appoint an uneven number of arbitrators and determine the procedural

112. Dutch Arbitration Act, *supra* note 17.

113. *Id.* annex I, art. 1046, ¶ 1.

114. *Id.*

115. *Id.* ¶ 2.

rules applicable to the consolidated proceedings.[116] In the event that the parties do not reach a decision on these issues, the President, at the request of any of the parties, shall appoint the arbitrator, and may subject the arbitral tribunals to rules of procedure selected by the President.[117]

The Dutch Arbitration Act also permits the President to order partial consolidation.[118] If partial consolidation is ordered, the President determines which disputes are to be consolidated. At the request of the parties, the President can appoint the arbitrators who will preside and the procedural rules that will govern the proceedings.[119] If arbitration proceedings have already commenced, the Act requires that such proceedings be suspended until a decision is rendered in the consolidated proceeding.[120] Then, other arbitral tribunals may continue their proceedings in accordance with the judgment rendered by the tribunal in the consolidated proceeding.[121]

Pursuant to the Dutch Arbitration Act, the parties have the right to opt out of the consolidation provision by contractual agreement.[122] Commentators argue that the election to opt out should be made at the time of the dispute, and not at the time of contracting.[123] If parties were to elect the opt out provision at the time of contracting, then the parties to the contract must already know the risks of consolidating and what parties may become involved in a particular dispute.[124] Other commentators suggest that requiring parties to opt out at the time of the dispute would be unrealistic.[125] If full agreement were required at the time of the dispute, the decision whether to exercise the consolidation provision would effectively rest entirely with the party not seeking to opt

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116. *Id.* ¶ 3.

117. Dutch Arbitration Act, *supra* note 17, annex I, art. 1046, ¶ 3.

118. *Id.* ¶ 4.

119. *Id.*

120. *Id.*

121. *Id.*

122. Dutch Arbitration Act, *supra* note 17, annex I, art. 1046, 7 ¶ 1.

123. Schwartz, *supra* note 16, at 365.

124. *Id.* The commentators further criticize the opt out provision for lack of clarity as to when a party can opt out or who can opt out. Whether it is sufficient for 2 parties to agree to consolidation or whether all parties must consent to consolidation under these circumstances is unclear under the statute. *Id.*

125. *Id.* at 366.

out.[126] Thus, the opt out provision may have been included in the Dutch Arbitration Act to ensure the parties' freedom to contract, and allow any party to unilaterally opt out in the event of a consolidated proceeding.[127]

### C. *Compulsory Consolidation in Hong Kong*

Hong Kong statutorily compels the judiciary to order the consolidation of arbitration agreements, even in the absence of a contractual agreement to do so.[128] Section 6B of the Hong Kong Arbitration ordinance reads:

> (1) Where in relation to two or more arbitration proceedings it appears to the court:
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> (a) that some common question or law or fact arises in both or all of them; or
>
> (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
>
> (c) that for some other reason it is desirable to make an order under this section the court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time, or in one immediately after another, or may order any of them to be stayed until after the determination of any other of them.[129]

Although Section 6B does not distinguish between domestic and international cases, it has primarily been applied to domestic cases.[130]

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126. *Id.*

127. Schwartz, *supra* note 16, at 366. Schwartz suggests that "any other interpretation would, in practical terms, nullify the provision and thus not comport with the legislative purpose in enacting the statute." *Id.* Furthermore, Schwartz notes that "[i]nsofar as the statute seeks to preserve freedom of contract, it must be read to allow any party to unilaterally opt out at the time of the proceeding or require the parties to exercise their opt out right at the time of contracting when they are on equal terms and can bargain at arms length." *Id.*

128. Van den Berg, *Hong Kong, in* 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, annex I (Supp. 15 1993).

129. Arbitration Ordinance, *supra* note 18.

130. *See* Schwartz, *supra* note 16, at 367.

Hong Kong, however, precludes the judiciary from ordering compulsory consolidation of arbitration agreements in international cases.[131]

### D. *Court-Ordered Consolidation in France*

Although France has not enacted a provision authorizing the judiciary to compel the consolidation of arbitration agreements, French courts have addressed the issue and have declined to authorize court-ordered consolidation. In 1989, the Cour d'Appel of Paris authorized consolidation of arbitration proceedings in *BKMI Industrieanlagen GmbH and Siemens AG v. DUTCO Construction Co.*[132] The Cour de Cassation, the highest civil court in France, however, overturned the Paris court's decision in January of 1992.[133]

The Paris court in *BKMI* held that the arbitral tribunal was properly formed in accordance with the agreement between the parties.[134] BKMI entered into a general contract agreement to build a

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131. V.V. Veeder, *Consolidation: More News from the Front-Line: The Second Shui On Case*, 3 ARB. INT'L 262, 265 (1987).

> In Hong Kong itself, the Law Reform Commission's recent Report on the Uncitral Model Law has advised against including in Hong Kong's enactment of the Model Law any compulsory consolidation procedure. This advice is stated to have been influenced by five considerations: first, the unattractive element of court control into the arbitration process created by such a compulsory procedure, inconsistent with 'one of the fundamental features' of the Model Law; second the difficulties in devising a workable procedure 'in the international context' as opposed to the domestic context; third, the risk that parties might not select Hong Kong as a venue if the compulsory procedure were mis-understood to mean that the Hong Kong Courts interfered with international arbitrations; fourth, the violation by a compulsory procedure of the secrecy of the arbitral process chosen by the parties; and fifth, 'it has been suggested in some jurisdictions that [Article V(I)(d) of the New York Convention] may make an award made in a consolidated arbitration unenforceable in other New York Convention countries.' Thus in Hong Kong, the existing compulsory procedure under Section 6B may soon be limited to domestic arbitrations only, if the Law Reform Commission's advice is accepted.

*Id.* at 265-266.

132. XV Y.B. COMM. ARB. 124 (1990) [hereinafter YEARBOOK].

133. Jalili, *supra* note 19, at 20.

134. YEARBOOK, *supra* note 132, at 124.

factory for an Omani company.[135] BKMI also entered into a "silent consortium agreement" with Siemens and DUTCO for these companies to perform different portions of the construction work.[136] The agreement contained an arbitration clause referring all disputes to the International Chamber of Commerce Court of Arbitration (ICC).[137] DUTCO brought claims against BKMI and Siemens in a single arbitration proceeding with the ICC.[138] BKMI and Siemens initiated an action in the Cour d'Appel to set aside the interim award, upholding the arbitral tribunal's jurisdiction.[139]

The Court d'Appel held that the arbitral tribunal was properly constituted because the parties had implicitly agreed to multi-party arbitration pursuant to the ICC rules.[140] The Court held that since the tripartite agreement provided for the submission of all disputes to arbitration, it was foreseeable that a dispute involving all three parties could arise.[141] The ICC rules provide that one arbitrator is appointed by the claimant, one by the defendant, and a third by the ICC Court

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135. *Id.*

136. *Id.*

137. *Id.* The arbitration clause reads:

> All disputes arising out of the Agreement, which cannot be settled amicably among the Members, shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with those rules. The seat of the Arbitration Court shall be Paris.

Jalili, *supra* note 19, at 23.

138. *Id.*

139. YEARBOOK, *supra* note 132, at 125. The defendants, BKMI and Siemens, challenged the composition of the arbitral tribunal claiming that each was entitled to appoint their own arbitrator in the ICC Court. Jalili, *supra* note 19, at 23. The ICC rejected the jurisdictional challenge of the defendants and ordered them to jointly nominate an arbitrator. Under protest, the defendants appointed one arbitrator. *Id.* at 23-25. Later, the arbitral tribunal, however, dealt with BKMI and Siemens' challenge to jurisdiction once again. *Id.* at 25. The arbitral tribunal rendered an interim award holding that the 3 parties to the consortium agreement had implicitly waived their right to nominate their own arbitrator by agreeing to resolve all disputes under the ICC Rules by 3 arbitrators appointed in accordance with the Rules. The Rules provide for the appointment of one arbitrator by the claimant, a second arbitrator by the defendant, and a third arbitrator by the chairman of the ICC Court. *Id.*

140. Jalili, *supra* note 19, at 25.

141. *Id.*

chairman.[142] In accordance with the ICC rules, one arbitrator was appointed by the claimant, DUTCO, one arbitrator was jointly appointed by the defendants BKMI and Siemens pursuant to the interim order, and a chairman was appointed by the Court of Arbitration.[143] The court held that "the procedure thus instituted according to the arbitration clause [did] not violate any principle of international public policy concerning the fundamental rights of the parties to due process and equal treatment and their right to defend themselves."[144]

The defendants appealed the Paris court's decision to the Cour de Cassation on the ground that the arbitral tribunal was improperly constituted, claiming that each of the defendants had the right to nominate its own arbitrator.[145] The Cour de Cassation set aside the judgment of Cour d'Appel and held that submitting multi-party claims to one arbitral tribunal, composed of three arbitrators, violates France's concept of international public policy, which entitles each party to nominate his own arbitrator.[146]

Thus, the Cour de Cassation not only deferred to the parties' agreement, thereby upholding the doctrine of *pacta sunt servanda*, but also gave deference to the international parties involved. Consequently, the Court could not impose its notions of fairness on the proceedings, contrary to what was intended by the parties.

## IV. IMPLICATIONS OF COURT-ORDERED CONSOLIDATION OF ARBITRAL PROCEEDINGS

### A. *Proponents and Opponents of Court-Ordered Consolidation of Arbitral Proceedings*

Proponents of consolidation consistently argue that consolidated proceedings are necessary in multi-party situations. Consolidation

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142. *Id.*

143. YEARBOOK, *supra* note 132, at 126.

144. *Id.* at 126-127.

145. Jalili, *supra* note 19, at 25.

146. *Id.* at 20, 26. Commentators suggest that the ICC Rules requiring multiple defendants to appoint 1 arbitrator among them is put in jeopardy as a result of the ruling by the Cour de Cassation. *Id.* at 27. It is submitted that defendants "may find it convenient" to delay arbitration by challenging jurisdiction on these grounds and challenging the award that would be rendered by a consolidated proceeding. Such commentators suggest that "courts should engage in some judicial creativeness to devise practical solutions to complicated problems." *Id.*

minimizes the risk of obtaining inconsistent judgments from separate arbitral tribunals.[147] Consolidation is an economical device, saving the time and expense of separate proceedings. It is also efficient in that the same issues are discussed, the same evidence is presented, and the same witnesses are called by the consolidated arbitration panel.[148] As a result of its efficiency, consolidation is consistent with the underlying goals of arbitration.[149]

When determining whether to order consolidation, courts analyze factors similar to those analyzed for American judicial consolidation.[150] Courts determine whether judicial "consolidation is a practical, economical, convenient and preferred method of proceeding in the matters before the court,"[151] and consolidate arbitration when "the interests of justice so require."[152] Critics, however, suggest that the "interest of justice" is in actuality the interest of judicial administration because consolidation of judicial proceedings reduces the number of cases on the court dockets.[153]

Opponents of consolidation suggest that consolidation is not more efficient. They assert that consolidated proceedings are more time consuming and more costly, because additional arbitrators and parties are involved.[154] Immense difficulties arise when attempting to assemble an arbitral tribunal composed of five or more arbitrators at the convenience of the parties and arbitrators. Moreover, enlarged panels raise problems in the coordination of the arbitrators' activities because, generally, arbitrators have other occupations.[155] Furthermore, "[m]atters are enormously complicated by the incorporation of separate disputes in a single arbitration proceeding."[156] Each party assumes the burden of hearing claims, giving evidence, and discussing testimony with all parties involved. In addition, a higher probability of delays exists, and

147. Hascher, *supra* note 15, at 133.

148. *Id.*

149. Wallace, *supra* note 94, at 17.

150. Hascher, *supra* note 15, at 133.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 136. Higher costs accrue because of the heightened complication of the case and the increased time needed to argue the merits of the case. *Id.*

155. Hascher, *supra* note 15, at 136.

156. *Id.*

arbitrators need additional time to learn of all of the contentions and claims involved in reaching a decision on the merits.[157] "The dangers of confusion which stem from consolidated hearings is only abated by the high qualifications of the arbitrators generally involved in international commercial arbitration."[158]

Opponents of compulsory consolidation of arbitration proceedings ultimately argue that if the parties had intended to submit their disputes to consolidated arbitration, they would have stated so in the contract.[159] In general, they assert that the aim of the parties is to establish a self-governing system to serve their needs, not a system imposed by lawyers, judges, and arbitrators.[160]

### B. *The Effect of Court-Ordered Consolidation on Enforcement of Awards*

In addition to arguments regarding efficiency of consolidation, proponents submit that if claims are not consolidated, the individual arbitral tribunals may render inconsistent awards. Critics, however, argue

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157. *Id.*

158. *Id.*

159. *Id.* at 134. It can be presumed that parties to an international contract are sophisticated. Such parties are on an equal bargaining level in that they are informed and knowledgeable of the contents of the provisions upon which were agreed.

160. Hascher, *supra* note 15, at 134. Moreover, Hascher contends that:

> Courts have left parties with a cumbersome procedure which makes it difficult for consolidated arbitration to ever get off the ground. By multiplying the possibilities of court intervention during the course of the arbitration proceedings, consolidation offers a unique opportunity for a party to evade, complicate and delay the arbitration to which it had originally agreed. From private remedy designed to furnish a prompt and inexpensive method of dispute settlement, arbitration has been totally altered through the consolidation policy devised by the courts. Their decisions have not respected any of the factors that have made it so universal in the international trade community. Such irresponsible results have been caused by the judiciary's lack of practical experience with commercial arbitration.

*Id.* at 136-37. These comments are readily applicable today even though the courts have determined that consolidation of arbitration proceedings may not be compelled absent express consent of the parties. Courts are still able to interfere in the arbitral process by reformulating the contract in such a way that points to a finding of implicit consent by the parties.

that jurisdictions subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) will not enforce a judgment that is rendered by a proceeding not explicitly agreed to by the parties.[161]

Article V of the New York Convention provides in pertinent part:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:...(d) 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.[162]

Parties to international contracts will most likely seek enforcement of an arbitral award in a jurisdiction other than the United States.[163] Article V of the New York Convention prohibits courts from enforcing an award rendered by an arbitral tribunal when the conditions and terms agreed to by the parties were not followed.[164] A foreign jurisdiction may not enforce an award that has been rendered pursuant to a consolidated arbitral tribunal, because the United States is one of only a few countries that authorize judicial intervention to compel consolidation.[165] In response to the implications of the enforcement of an award rendered by a consolidated arbitral tribunal, it must be noted that attempts at foreign enforcement of judgments rendered in consolidated proceedings may result in additional litigation, thereby defeating the efficiency goals of

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161. *Id.*

162. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, *opened for signature*, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (codified at 9 U.S.C. §§ 201-208 (1988) [hereinafter New York Arbitration Convention].

163. Hascher, *supra* note 15, at 137.

164. *Id.*

165. *Id.* Hascher is silent with respect to the implications of enforcing an award in a foreign jurisdiction where the court compelled consolidation based on a finding that the parties implicitly consented to consolidation. Whether this distinction is relevant such that Article V of the New York Arbitration Convention cannot be invoked is not discussed. It is arguable that finding implied consent is a subjective determination.

arbitration and breaking down international confidence in international commercial arbitration.[166]

## V. CONCLUSION

Arbitration is a creature of contract.[167] Under the policy of freedom of contract, parties choose to submit their claims to arbitration. Arbitration provides a speedy, inexpensive, congenial, informal, and equitable way to adjudicate disputes.[168] Arbitration also decreases the contract risk by providing predictability in knowing that one will not be subjected to a disfavorable foreign court.

Consolidating arbitration proceedings in no way facilitates the underlying purposes of arbitration.[169] It reinstates the uncertainty and unpredictability of adjudicatory proceedings that arbitration was designed to mitigate. Consolidation of arbitration also frustrates the economic and time efficiency envisioned for arbitration. Moreover, compulsory consolidation infringes on freedom of contract and undermines the doctrine of *pacta sunt servanda*. Compulsory consolidation not only creates unpredictability, in that the provisions in the contract may seem valueless, but also enables the judiciary to intervene and to reformulate the contract contrary to the parties' intent.

Although courts in the United States have agreed consolidation of arbitral proceedings cannot be compelled absent express consent of the parties, unpredictability and judicial intervention in the contractual relation still exists. Courts may still unilaterally order the consolidation of proceedings upon a finding of implicit consent by the parties. Implicit consent is a subjective finding and a vague basis upon which to compel consolidation. Additionally, a finding of implicit consent may contradict the parties' intentions.

Furthermore, when the court authorizes consolidation based on a finding of implied consent to consolidation, judicial interference is equally as injurious to the "psychological climate of arbitration"[170] as it is to parties who have not expressly consented to consolidation. "The

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166. *Id.* at 138.

167. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986); Southland Corp. v. Keating, 465 U.S. 1 (1984).

168. Hascher, *supra* note 15, at 134.

169. *Id.*

170. *Id.* at 138.

role of the courts is to enforce the expectations of the trade community by advancing its aims, not to surprise it by rulings based on an ideology not germane to that of the business world."[171]

Allowing one party to petition the court for a method of resolving a dispute contrary to the method explicitly agreed upon by the parties "undermines the fundamental concept that the arbitration clause is voluntarily entered into by a contractual allocation of risk."[172]

The solution to whether consolidation should be compelled is a basic: one should look to the contract. If the parties to a multi-party dispute have not explicitly agreed to submit their disputes to a consolidated tribunal, then they have chosen to submit their disputes to separate arbitral tribunals despite the fact that the awards rendered may be inconsistent. Under the doctrine of *pacta sunt servanda*, the parties are only bound by what is in the contract. Moreover, international public policy concerns should be at the forefront when courts are faced with the issue of whether to interfere and reformulate an international multi-party contract for procedural convenience.

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171. *Id.* Reforming the rules of arbitral institutions to provide for consolidation in multi-party disputes has also been suggested. Schwartz, *supra* note 16, at 372. The rules, however, would have to provide for an opt out provision to maintain the concept of freedom of contract. This would be consistent with the self-governing aspects of arbitration. Another commentator has noted that the International Chamber of Commerce, through a working group, has determined that multi-party arbitration can be resolved by coordinating the arbitral procedures. Hascher, *supra* note 15, at 141. Hascher suggests that coordinating arbitral procedures would be consistent with the voluntary nature of submitting claims to arbitration and minimizing the risk of inconsistent awards. Difficulties in coordinating arbitral proceedings also may arise. *Id.*

172. Schwartz, *supra* note 16, at 373.