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Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma

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Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?

I. INTRODUCTION

While arbitration in international commercial transactions has come of age,¹ the resolution of multiparty disputes continues to present problems for both domestic and international practitioners alike. In an effort to make multiparty disputes more manageable, several jurisdictions have considered the propriety of consolidated arbitration proceedings.² This Note examines consolidated arbitrations compelled by court order or legislative decree in the context of construction contracts and maritime charter party agreements.³

The paradox of compulsory consolidation is manifest in the goals of the arbitral process itself. On one hand, there is the duty to enforce private agreements as they are written, while on the other hand, there is the need for efficient proceedings and consistent awards. Although compulsory consolidation may result in more efficient proceedings, it frustrates


² By consolidation is meant the act or process of uniting several pending arbitrations into one hearing before the same panel of arbitrators. Although the parties may not necessarily be the same, we do find the same or similar subject matter, common questions of law and fact, and substantially similar issues and defenses. G. Aksen, Multi-Party Arbitrations in the United States 2 (1980) (paper presented at the International Arbitration Symposium in Warsaw, available in the American Arbitration Association Library).

³ A charter party is defined as
[a] contract by which a ship, or some principle part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. The term “charter party,” often shortened to “charter,” designates the document in which are set forth the arrangements and contractual agreements entered into when one person (the “charterer”) takes over the use of the whole of a ship belonging to another (the “owner”). BLACK'S LAW DICTIONARY 214 (5th ed. 1979).
contractual relationships by requiring parties who are not in privity of contract to arbitrate their disputes in a single forum. In this respect, this Note considers whether compulsory consolidation is consistent with the goals of the arbitral process.

Based on an analysis of compulsory consolidation in the United States and abroad, and considering the potential barriers to the recognition and enforcement of the resulting awards, this Note concludes that compulsory consolidation is inappropriate insofar as it undermines the predictability in proceedings, interferes with binding contractual relationships, and jeopardizes the enforceability of arbitral awards in foreign jurisdictions.

II. COMPULSORY CONSOLIDATION: THE BASIC ISSUES

Arbitration is a creature of contract. Deeply rooted in the arbitral process is the notion that: An arbitration can validly take place only if the parties have specifically and expressly agreed to use this method for the settlement of their disputes. . . . The voluntary nature of arbitration is based on the principle that the agreement to arbitrate has not been compelled by a third party. Where consolidation is imposed by court order or legislative decree, the basic character of arbitration as a voluntary agreement is undermined.

A significant factor in the prominence of international arbitration as a mechanism of dispute resolution is the parties' right to self-governance of disputes. In arbitration, the parties have the right to choose the procedural rules and substantive law which will govern the proceedings in the event of a dispute. Thus, opponents of compulsory consolidation argue that the imposition of such a procedural device violates the parties' substantive contractual rights and that, absent the express consent of all parties, consolidation is an impermissible intrusion on the parties' agreements.

Among the primary objectives in creating a contractually based system for dispute resolution is the desire to limit the time, delay, and expense ordinarily associated with litigation. Contrary to these objectives,
however, critics argue that:

Consolidated proceedings are more time-consuming and more costly than unconsolidated proceedings, since additional parties and arbitrators are involved. Matters are enormously complicated by the incorporation of separate disputes in a single arbitration proceeding. Each party assumes the additional burden of hearing claims, giving evidence and discussing testimonies with all the other parties involved. There is a higher probability of delays. Risks of omission and error are multiplied. Additional time is needed for all arbitrators to acquire acknowledgment of the contentions and claims of all parties, and to reach a decision on the merits of the dispute.\(^1\)

In addition, the complexity inherent in compulsory consolidation, may encourage parties seeking to avoid arbitration to use consolidation as a dilatory tactic to coerce the settlement of disputes. This tactic takes advantage of the fact that the party claiming damages may opt to "settle-out" rather than face the time and expense of the long, drawn out proceedings which would result from consolidation. Hence, compulsory consolidation could be used by the party seeking to avoid separate proceedings as a sword rather than a shield.

Advocates of compulsory consolidation argue that a single proceeding avoids duplicative arbitrations and inconsistent results.\(^11\) The argument is made that consolidation is appropriate in multiparty disputes because similar issues of fact will require access to the same witnesses and documentary evidence if consistent results are to be achieved.\(^12\) Although advocates of consolidation contend that the identity of the individual disputes remains separate and that consolidation does not authorize the arbitrator to hear disputes between parties who are not in privity,\(^13\) they fail to recognize that the effect of consolidated proceedings is to rewrite fundamental provisions of the arbitration clause. Since arbitration clauses typically contain agreements on such subjects as choice of law, choice of procedural rules, method of panel selection, and situs of the proceeding the opportunity for frustration of one or more of the provisions in the arbitration clause exists when arbitration proceedings are consolidated.\(^14\)

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\(^1\) In arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation. BLACK'S LAW DICTIONARY 55 (5th ed. 1983)(emphasis added).


\(^12\) See id. at 505.

\(^13\) See id. at 506.

\(^14\) For a survey on the relative importance of the various provisions contained in an arbitration
III. CONSTRUCTION CONTRACTS AND MARITIME CHARTER PARTY AGREEMENTS

The need for consolidation and the difficulties such a procedural device creates are clearly demonstrated in construction contracts and maritime charter party agreements. Both construction projects and maritime charter party agreements typically involve three or more parties who enter into independent contractual relationships with respect to the same venture.\textsuperscript{15}

In an international construction project, there are often webs of independent contractual relationships between parties of different nationalities.\textsuperscript{16} For example, a project owner will usually have separate contractual relationships with the architect, the engineer, and the general contractor.\textsuperscript{17} Likewise, the general contractor will have independent contractual relationships with both the project owner and the various sub-contractors.\textsuperscript{18} Because of the interdependent nature of these separate contractual relationships, a dispute arising out of a construction contract will have a ripple effect which will precipitate separate, but related, actions.\textsuperscript{19} Assuming binding arbitration clauses exist in all of the relevant contracts, it is evident that there is a potential for inconsistent findings and duplicative proceedings if the actions are separately arbitrated. If they are consolidated, however, the parties' agreements are necessarily rewritten.

For example, consider the project owner who seeks compensation for the cost of additional work that needs to be done as a result of construction defects.\textsuperscript{20} Because the arbitration clause is a creature of contract, if the project owner is not in privity with the responsible party (i.e., a sub-contractor), he will have to seek compensation from the general contractor under the arbitration clause contained in the primary contract.\textsuperscript{21} In that type of case, the contractor will usually seek indemnification from the subcontractor, who will in turn seek to place liability on another party or back on the original parties.\textsuperscript{22} In any event, the general contractor faces the "man-in-the-middle" problem.\textsuperscript{23}

\textsuperscript{15} INTERNATIONAL COMMERCIAL ARBITRATION, supra note 8, at 1.
\textsuperscript{16} Devitt, Multiparty Controversies in International Construction Arbitrations, 17 Int'l Law. 669 (1983).
\textsuperscript{17} INTERNATIONAL COMMERCIAL ARBITRATION, supra note 8, at 1.
\textsuperscript{18} See Devitt, supra note 16, at 669-70.
\textsuperscript{19} See Stipanowich, supra note 11, at 478.
\textsuperscript{20} All hypothetical assume the existence of separate and binding arbitration agreements.
\textsuperscript{21} INTERNATIONAL COMMERCIAL ARBITRATION, supra note 8, at 76.
\textsuperscript{22} See Devitt, supra note 16, at 670.
\textsuperscript{23} The "man-in-the-middle" is bound to two or more arbitration agreements. Thus, unless
Like construction contracts, maritime charter party agreements involve contractual relationships between several parties with respect to a single vessel. For example, A, a shipowner, may make a charter party with B, a time charterer, to lease a ship for a fixed period of time. B may in turn make a charter party with C, the voyage charterer, to lease the ship for a particular voyage. The result of this relationship is to make B the middleman between A and C. Due to the unique nature of this relationship, the charter party agreement between B and C will usually contain provisions identical to those contained in the agreement between A and B, thus imposing the same rights and obligations on each party. Hence, parallel contractual relationships are created and the potential for multiparty disputes is heightened.

Suppose A seeks compensation for structural damage to the ship which is allegedly caused by C. Because A cannot demand an arbitration proceeding with C, since the two are not in privity of contract, A will seek compensation for the damage to the ship under his charter party agreement with B. B, in turn, will seek indemnification from C under their respective charter party agreement. Like the contractor in the construction hypothetical above, B faces the "man-in-the-middle" problem. If the arbitration proceedings between the respective parties take place separately, B will face duplicative proceedings and risk inconsistent results inasmuch as B's liability to A will be determined on the issue of C's alleged damage to the ship. If C, the party who allegedly caused the damage to the ship, is not present at both proceedings, different findings of fact could result in inconsistent awards. It is in this and similar contexts that consolidation is considered in the resolution of multiparty maritime disputes.

IV. CONSOLIDATION AND THE MAJOR ARBITRAL INSTITUTIONS AND RULES


consolidation can be effected, the contractor will be forced to arbitrate the same issue of liability in two or more separate proceedings and face the possibility of inconsistent results. See Devitt, supra note 16, at 670. It is in an effort to ease this predicament that compulsory consolidation has arisen in the context of construction contracts.

24 See Miller, Consolidated Arbitrations in New York Maritime Disputes, 14 INT'L BUS. LAW. 58 (1986) [hereinafter Miller, Maritime Disputes].

25 Id. at 59.

26 See id.

27 In this situation, the shipowner will demand arbitration with the time charterer because the ship was returned in a damaged condition.

London Court of Arbitration ("LCA"), have enacted rules which would allow an arbitrator to consolidate arbitrations in multiparty disputes.

In accordance with its purpose of promoting arbitration as a voluntary process based on the agreement of all the parties, the AAA has refused to order consolidation without the express consent of all of the parties. However, the AAA will administer consolidated arbitrations when they are ordered by the court. As a result opponents of compulsory consolidation have criticized the AAA for being inconsistent and have challenged the institution to amend its rules to include a prohibition against compulsory consolidation.

While the ICC has not adopted any general provisions providing for consolidated arbitrations, in 1982 the institution published a guide to multiparty arbitration which included proposed rules for the administration of multiparty disputes. "Two basic assumptions accompanied the drafting of the proposed rules: Multiparty arbitration must be freely agreed upon by all parties concerned, and it must be provided for in advance by the contracts." While the guide has since been adopted, the ICC Rules do not currently provide for consolidation without the consent of all parties.

One institution that has amended its rules to address the issue of consolidation is the American Institute of Architects ("AIA"). The AIA, which subscribes to the AAA Construction Industry Arbitration Rules, amended its form documents in 1976 to bar consolidated arbitrations without the express consent of the architect. Because construction contracts often incorporate the provisions of the AIA form

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29 **INTERNATIONAL CHAMBER OF COMMERCE, ICC RULES OF CONCILIATION AND ARBITRATION (1988).**

30 It should be noted that the rules of the International Arbitration Centre of the LCA do provide for joinder of parties in certain circumstances. *London Court of Arbitration International Arbitration Centre, 7 Y.B. Com. Arb. (Int’l Council for Com. Arb.) 227 (1982).*

31 However, the AAA Grain Arbitration Rules, and arbitrations administered by the AAA under the 1974 New York Insurance Law § 671 (recodified as Insurance Law § 5102) does provide for consolidated arbitrations under the appropriate circumstances.

32 *See Litton Bionetics, Inc. v. Glen Constr. Co., 292 Md. 34, 437 A.2d. 208 (1981).*

33 *See Hascher, supra note 10, at 139. "Consolidation wrecks the whole arbitral procedure and the AAA does absolutely nothing to include in its Arbitration Rules provisions through which consolidation, absent specific agreement of the parties, would be precluded." Id.*


35 Hascher, supra note 10, at 141.

36 ICC GUIDE, supra note 34.

37 Section 7.9.1 of AIA Document A201 provides in pertinent part:

No arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, the Architect, his employees or consultant's except by written consent containing a specific reference to the Owner-Contractor Agree-
documents, the effect of the recent amendment is to specifically preclude consolidation and thus, prevent the court from inferring an intent to consolidate.\textsuperscript{38}

In light of the current conflict regarding the propriety of compulsory consolidation, the major arbitral institutions should place priority on drafting amendments to their arbitration rules stating whether proceedings will be consolidated in multiparty disputes. These amendments would require parties to opt in or out of consolidation by a specific stipulation in the contract. This would allow the parties to bargain over the inclusion of a consolidation clause, thus giving full recognition to the parties' freedom to contract while addressing the potential problem of multiparty disputes.

V. CONSOLIDATED ARBITRATION IN THE UNITED STATES

In the United States, compulsory consolidation in both domestic and international commercial disputes originated in New York.\textsuperscript{39} Although international commercial disputes fall explicitly under the jurisdiction of the federal courts at the present time,\textsuperscript{40} the development of compulsory consolidation in New York remains significant in two respects. First, federal courts which have ordered consolidation have adopted the same underlying analysis as New York courts. Second, where parties have stipulated in the arbitration clause that New York law will govern the resolution of disputes, the question of whether the parties \textit{intended} the courts to have the power to order consolidation in accordance with state law may arise. Thus, a meaningful discussion of compulsory consolidation in the United States must be preceded by an examination of New York law.

A. Consolidation Under New York Law

Until the Civil Practice Act was repealed in 1962, New York state courts had express statutory authority to order consolidated arbitrations.\textsuperscript{41} The courts' authority to order consolidation in the absence of...
the Civil Practice Act, however, is largely the result of judicial legislation and exists only at common law. The adoption of compulsory consolidation by the New York courts is illustrated in the landmark case of Vigo Steamship Corp. v. Marship Corp. of Monrovia, in which the Court of Appeals held that state courts could order consolidation of separate arbitration proceedings under appropriate circumstances. The Vigo case involved a charter party dispute where a shipowner alleged that structural damage had been done to his let ship while it was in the possession of a sub-charterer. The respective charter party agreements provided for arbitration between the shipowner and the charterer and between the charterer and the sub-charterer, but not between the shipowner and the sub-charterer. The shipowner, unable to compel arbitration with the sub-charterer due to lack of privity, demanded arbitration with the charterer to recover for the damage to the ship. The charterer, in turn, demanded arbitration with the sub-charterer for indemnity of any awards resulting from the first arbitration.

Faced with two separate arbitration proceedings, the charterer petitioned the court for an order of consolidation. The sub-charterer opposed the application on the grounds that: (1) such an order would compel arbitration between the sub-charterer and the shipowner, a party with whom the sub-charterer had no contractual relationship; (2) the added complexity of a consolidated proceeding would increase the risk of arbitral error; and (3) the arbitrations were governed by the Federal Arbitration Act ("FAA") and thus not susceptible to consolidation under state law.

Overruling the Appellate Division, the Court of Appeals held that New York courts did have the power to order consolidated arbitrations to "avoid the possibility of conflicting awards as well as the additional time and expense of separate proceedings" when: (1) common issues of law and fact exist; and (2) no substantial right would be prejudiced. Addressing the contention that the court lacked authority to order consoli-

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proceeding' and that under section 96 of the Civil Practice Act there was judicial power to consolidate special proceedings 'whenever it can be done without prejudice to a substantial right'. County of Sullivan v. Edward Nezelek, Inc., 42 N.Y.2d 123, 127, 366 N.E.2d 72, 74, 397 N.Y.S.2d 371, 374 (1977).

With the repeal of the Civil Practice Act in 1962 and the enactment of the Civil Practice Law and Rules ("CPLR"), the classification of arbitration as a "special proceeding" was discarded. N.Y. CIV. PRAC. L. & R. 7501-04 (McKinney 1980). As a result, New York courts no longer had express statutory authority to order consolidation of arbitrations.


43 A sub-charterer may also be referred to as a voyage charterer.


45 Vigo, 26 N.Y.2d at 162, 257 N.E.2d at 626, 309 N.Y.S.2d at 168.
dation since the FAA did not provide for such a procedure, the court concluded that:

[A]ssuming the applicability of Federal law to the issue of consolidation, it is not at all clear that the Federal courts would be powerless to or would refuse to order consolidation were they faced with this factual situation. Indeed, the contention as to a lack of power to do so flies in the face of the provisions of the Federal Rules of Civil Procedure. Rule 42 (subd. [a]) provides expressly for consolidation in situations involving common questions of law or fact and the Federal Rules generally are made applicable to the Federal Arbitration Act as to matters of procedure not covered by the latter (rule 81, subd. [a], par. [3]) and the Arbitration Act is silent as to the question of consolidating arbitration proceedings. There is thus explicit authority for such consolidation.\textsuperscript{46}

In holding that the Federal Rules of Civil Procedure provided authority to order consolidated arbitrations, the New York Court of Appeals laid a foundation on which many federal courts now rely.

The court's holding in \textit{Vigo} merits examination in two respects. First, in enunciating the threshold requirement for consolidation, the court held that the burden of proving prejudice to a substantial right was on the party seeking to avoid consolidation. In so holding, however, the court failed to define what constituted a substantial right and under what circumstances such a right would be prejudiced.\textsuperscript{47} With respect to the sub-charterer in \textit{Vigo}, the court merely stated that, "The mere desire to have one's dispute heard separately does not, by itself, constitute a 'substantial right'."\textsuperscript{48} This summary analysis of the prejudice standard means the contractual relationship between the parties and merely serves as a "bootstrap" to fulfill its own threshold requirement for effecting consolidation. The court neglected to address the fact that an order of consolidation would not only compel arbitration between two parties who had no contractual relationship, but would also dilute the parties' power to appoint the arbitral tribunal in accordance with the terms of their respective arbitration clauses.\textsuperscript{49} Contrary to the court's contentions, the

\textsuperscript{46} \textit{Id.} at 162-63, 257 N.E.2d 626-27, 309 N.Y.S.2d 169. For a brief discussion on the use of Rules 81(a)(3) and 42(a) as mentioned in \textit{Vigo}, see Miller, \textit{Maritime Disputes, supra} note 24, at 59.

\textsuperscript{47} See Hascher, \textit{supra} note 10, at 131 & n.23 (objecting that the court's two part test ignores the question of privity, and fails to adequately define the standards for determining whether a substantial right has been prejudiced).

\textsuperscript{48} \textit{Vigo}, 26 N.Y.2d at 162, 257 N.E.2d at 626, 309 N.Y.S.2d at 168.

\textsuperscript{49} The respective arbitration clauses all provided for the two-to-one method of panel appointment in stating that, "the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen." \textit{Id.} at 160, 257 N.E.2d at 625, 309 N.Y.S.2d at 167 (1970).

Courts dealing with the issue of panel selection at the federal level have recognized the parties' right to appoint the arbitrators in accordance with the provisions of the arbitration clause. For a
order of consolidation clearly affected the parties substantive rights by altering the method of panel selection provided for in the arbitration clauses.

The court's cursory analysis is troublesome because it raises the issue of whether the right to have one's dispute heard in accordance with the terms of the arbitration agreement would ever be considered a substantial right. Indeed, one commentator has suggested that "such lack of precision leaves the party objecting to consolidation with an impossible burden of proof to meet since it will never be in a position to demonstrate how prejudice would result from a consolidation order." The second aspect of the Vigo opinion which merits examination is the court's reliance on the Federal Rules of Civil Procedure. In holding that the Federal Rules of Civil Procedure provided authority for court ordered consolidation, the court not only failed to consider section four of the FAA, which requires that arbitration proceed in the manner provided for in the parties' agreement, but also whether it was "within the competence of the promulgator of the Federal Rules of Civil Procedure to have legislated in the field of the substantive rights of the parties." In this respect, reliance on the Federal Rules of Civil Procedure appears to be a pretext used by the courts to find the authority to order consolidation.

The significance of the court's holding in Vigo, although arguably flawed, should not be overlooked. The analysis of the Vigo court supplied the foundation that the federal courts ultimately used to find the authority to order consolidated arbitrations. While the court's holding in Vigo is still good law in New York, its basis, continues to foster heated debate at the federal level. For this reason, the wisdom of the court's decision and the propriety of its reliance on the Federal Rules of Civil Procedure can only be properly assessed after a discussion of the treatment of the problem at the federal level.

B. Consolidation in the Federal Courts

Following the lead of the New York courts, the general rule in the United States was that a court had the power to consolidate arbitration proceedings as long as common issues existed and no substantial right

complete discussion on consolidated arbitrations and panel selection at the federal level, see infra text accompanying notes 81-84.

50 See Hascher, supra note 10, at 132.

51 Id. at 132 n.23.

52 Miller, Maritime Disputes, supra note 24, at 59 (questioning the validity of the courts reliance on the Federal Rules of Civil Procedure in finding power to ordered consolidation).

53 "[A] new procedural road was now open for the convenience of middlemen such as ship charterers, and it soon became well traveled." Id.
would be prejudiced. However, in the absence of express statutory authority for consolidated arbitrations and in light of recent Supreme Court decisions on the sanctity of an arbitration clause and the scope of the FAA, disputes have arisen over the authority of federal courts to order consolidation. As a result of this dispute, the federal circuit courts are split on the question of whether the judiciary has the power to order consolidated arbitrations absent the express consent of all parties.

While consolidation clearly compels arbitration between parties who are not in privity of contract, separate hearings present the possibility of inconsistent awards and inefficient proceedings. The result is a fundamental conflict in the goals of the arbitral process which has resulted in a split among the federal courts.

At the federal level, the question of a court's power to order consolidation in maritime disputes was first addressed in Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A. In that case the Second Circuit Court of Appeals held that a district court could order consolidation under the appropriate circumstances.

The dispute in Nereus involved a shipowner, a charterer, and a guarantor. Nereus (the shipowner) had a charter party with Hidrocarburos y Derivados (the charterer) which Compania Espanola de Petroleos (the guarantor) agreed to guarantee. The charter party between the shipowner and the charterer provided for arbitration of "[a]ny and all differences and disputes of whatsoever nature arising out of [the] charter." The arbitration clause further provided that disputes would be decided by a three member panel, with one arbitrator to be appointed by each party while the third would be appointed by the two arbitrators so chosen.

In a separate agreement, referred to as addendum number two,

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54 See M. Domke, supra note 6, § 27.02, at 413-14.
58 The first, second, third, fourth, and sixth circuits have all recognized authority for judicially ordered consolidation under appropriate circumstances, while the fifth and ninth circuits have refused to order consolidation absent written authority in the arbitration clause.
60 Id. at 975.
61 The Charter Party was a three year maritime contract for the transportation of 600,000 long tons of petroleum products. The contract provided for transport from the Persian Gulf to Europe and the Mediterranean. Id. at 969.
62 Id.
which was signed by all three parties, the guarantor agreed that "should HIDECA [the charterer] 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."  

Upon the alleged default of the charterer, the shipowner notified the guarantor as required in addendum number two. Ultimately, the shipowner demanded arbitration with both the charterer and the guarantor under their respective contracts. Through a series of procedural maneuvers and tactical considerations, the shipowner manipulated the proceedings so that the arbitration with the guarantor would take place before the arbitration with the charterer. As the court pointed out:

If successful this strategy would be very advantageous to Nereus [the shipowner] and very prejudicial to Hideca [the charterer] and Cepsa [the guarantor] as the critical question or congeries of questions to be decided by the arbitrators relative to the alleged default by Hideca would first be decided in an arbitration to which Hideca was not a party, despite the fact that Hideca had access to the evidence relative to the alleged default and Cepsa did not. Since the liability of the guarantor was contingent on whether or not the charterer had defaulted, the court reasoned that separate proceedings would almost certainly result in prejudice and inconsistent results. Finding that the district court's order of consolidation would alleviate this problem, the court of appeals upheld the order. Although the court did not need to go further after finding that addendum number two created privity between all parties, the court adopted the reasoning of Vigo, which held that Rules 42(a) and 81(a)(3) of the Federal Rules of Civil Procedure provided authority to order consolidation where common questions of law and fact were present. The

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63 Id. at 969-70. This provision was subject to the requirement that the shipowner provide the guarantor with written notice of the charterer's default.

It should be noted that the court found that addendum number two created a contractual relationship between the parties whereby all were bound to arbitrate with each other. In this respect the court reasoned that the parties had consented to consolidated arbitrations.

64 Although the guarantor denied that it was bound to enter into arbitration with the shipowner, the court held that by assuming all of the rights and obligations of the charterer in addendum number two, the guarantor had in fact agreed to be bound to arbitration with the shipowner. Id. at 974.

65 Id. at 970.

66 Id. at 974.

67 Id. at 975.

68 See Miller, Maritime Disputes, supra note 24, at 59.

69 Rule 42(a) states:

[w]hen 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
court reasoned that use of the Federal Rules of Civil Procedure was completely consistent with the FAA in that "the liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit . . . consolidation of arbitration proceedings in proper cases, such as the one before us."\(^7\)

By applying the Federal Rules of Civil Procedure via a liberal interpretation of the FAA, the court held that consolidation could be ordered even in the absence of a contractual relationship between the parties.\(^7\) While this proposition has since been disputed, those courts which have found power to order consolidation continue to apply a liberal interpretation of the FAA.\(^7\)

To its credit, the *Nereus* court, unlike the court in *Vigo*, addressed the importance of the terms and conditions of the arbitration clause. Chief among the court's concerns was the arbitrators selection provision.\(^7\) Because the arbitration clause provided that any disputes should be heard by a three member panel, with each party to select one of the members, the court found that this provision could not be equitably applied where the arbitration would involve more than two parties.\(^7\) The court was cognizant of the fact that strict adherence to this provision, as in *Vigo*, would lead to the dilution of the parties' power and in effect rewrite the arbitration clause.

In an effort to achieve the most equitable results, the court ordered that the consolidated proceeding be heard by a five member panel.\(^7\) Under this method, each party would select one arbitrator and the remaining two arbitrators would be selected jointly by the three arbitrators duly appointed by each party. In ordering the arbitrations to proceed before a five member panel, the court stated that:

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may order all the actions 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).**

Rule 81(a)(3) states:

[i]n proceedings under Title 9, USC, relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), USC, Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

**FED. R. CIV. P. 81(a)(3).**

\(^7\) *Nereus*, 527 F.2d at 975.

\(^7\) *Id.* at 975-75.

\(^7\) *Id.*

\(^7\) *Id.* at 975.

\(^7\) *Id.*

\(^7\) *Id.*
Having considered at length a variety of alternatives for the composition of the panel and for the selection of the panel members, we are convinced that the method we have chosen is the only method that will give each of the parties fair and equitable treatment. . . . We believe that it is important that each party have its own representative, a provision which also appears in the contract . . . .

The court's attempt to give effect to the parties' contracts, while admirable, has a limited effect at best.

Although the decision of the Nereus court kept the parties' power to appoint the arbitrators intact, many questions have been raised with respect to both the propriety and practicability of expanding the size of the arbitration panel.

While a five member panel may prove efficient in the case where only three parties are involved in the dispute, the scenario becomes more complicated as the number of parties to the dispute increases. A good illustration of the problem is provided by a hypothetical construction contract. When an owner contracts with both an architect and a contractor and the contractor in turn contracts with various subcontractors for particular jobs, any dispute which arises could involve an infinite number of parties. Thus, the concept of the five member panel is limited by the number of parties to the dispute.

Some commentators have appropriately inquired whether the court would be willing to expand the size of the arbitration panel infinitely to accommodate all of the parties. "Should the system be infinitely multiplied so as to have, say, seven or nine arbitrators when four or five parties are ordered to consolidate their arbitration proceedings?" Because such a solution is impractical, it would appear that the court would have to deal with these situations on an ad hoc basis. This creates uncertainty and makes it unclear whether the parties could retain any power to appoint an arbitrator if consolidation were ordered in multiparty disputes involving more than four parties.

In addition to the problems inherent in the methodology of using the five member panel, use of the panel under conditions similar to the facts in the Nereus case create additional questions. Where a court orders a five member panel to preside over the proceedings, the panel selec-

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76 Id.
77 Id. See Hascher, supra note 10, at 136, stating that, "If assembled, the enlarged panel will have to face the difficulties and technicalities of multiparty hearings."
78 Consider the case of construction delays. Typically, when faced with a delay, the owner will seek damages from either the architect, the contractor, or both. The architect may in turn seek indemnity from the contractor, or vice versa, and the contractor may seek indemnification from any number of subcontractors. Thus, the number of parties to the dispute is not predictable.
79 See Hascher, supra note 10, at 136.
80 Id.
tion provision provided for in the bilateral arbitration contract is necessarily altered. Therefore, when the arbitration clause provides for a specific method of panel appointment, the composition of the five-member arbitral tribunal is not in accordance with the provisions of the arbitration clause. The question thus becomes whether an arbitration award which is not rendered in strict accordance with the provisions of the arbitration clause could be enforced abroad under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

This problem is inherent in the issue of compulsory consolidation and is not unique to the five member panel.

Since Nereus, courts in the first, third, fourth and sixth circuits have found authority for judicially ordered consolidation. While not all of these courts have used the five member panel method, all have agreed that consolidated arbitrations are essential if inconsistent awards and duplicative proceedings are to be avoided. However, the scope of a court's power has not been adequately defined and it is unclear how far the proponents of consolidation would be willing to go in the name of economy and efficiency. Basic differences in arbitration clauses, such as reference to the rules of different institutions, different choice of law

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The New York Convention has approximately 77 signatories and provides for the enforcement of arbitral awards rendered in foreign jurisdictions.

Article V of the New York Convention provides that:

1. 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.]


For an in depth discussion on the potential problems of enforcement of consolidated awards under the New York Convention see infra text accompanying note 137.


84 See Maxum Founds., Inc. v. Salus Corp., 817 F.2d 1086 (4th Cir. 1987) (related contracts between project owner and general contractor and between general contractor and subcontractor sufficiently revealed parties' intention to consolidate arbitrations).


86 See supra notes 74-77 and accompanying text.

87 See Hascher, supra note 10, at 128. "American courts have usually held that consolidation cannot be ordered when the arbitration clauses refer to the arbitration rules of different arbitration institutions." Id.
provisions, or conflicts as to the situs of the proceeding, may present insurmountable obstacles to compulsory consolidation. Due to the absence of statutory authority to guide the courts at the federal level, the conflicts which arise because of conflicting provisions in the arbitration clauses will have to be dealt with on an ad hoc basis. In this respect, court ordered consolidation may undermine the predictability of results which has been a stabilizing feature of the arbitral process.

The need for efficiency and consistency in the arbitral process, while important, has not been the paramount issue to the courts which have refused to order consolidated arbitrations. Those courts and opponents of court ordered consolidation, argue that an arbitration clause represents a contractual allocation of risk which may not be disturbed, unless the same conditions that would allow reformation of an ordinary contract exist.

As previously noted, courts ordering consolidated arbitrations have held “that the liberal purposes of the Federal Arbitration Act . . . require that [the] act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases.” In this respect, a liberal reading of the FAA has been the cornerstone on which the courts have relied for the power to order consolidated arbitrations.

Courts which have refused to order consolidation maintain that section four of the FAA prohibits them from consolidating proceedings without the express consent of the parties. These courts argue that inasmuch as the arbitration clause is a creature of contract, arbitration between parties who are not in privity may not be imposed absent the express consent of the parties. Thus, they maintain that reliance on the “liberal purposes” of the FAA is misplaced.

At the heart of the controversy currently surrounding the issue of

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88 But see infra, note 128, arguing that “consolidation is not barred when the contracts involved are governed by different laws.”
89 For a discussion of the importance of predictability, see M. Domke, supra note 6, § § 1:03, 8:02 at 9.
92 Use of the Federal Rules via a liberal interpretation of the FAA may be inferred to mean that pro-consolidation courts place a greater emphasis on the efficiency of proceedings, rather than on the sanctity of the arbitration contract. To this extent, one commentator has suggested that, “Arbitration is what the parties are interested in. Consolidation is merely a device that lessens litigation problems for lawyers, judges and arbitrators.” Hascher, supra note 10, at 134.
93 See also G. Aksen, supra note 2, at 5-7; Stipanowich, supra note 11, at 511.
94 See Weyerhaeuser, 743 F.2d at 637; Stinnes I, 606 F. Supp. at 1512.
consolidated arbitrations is the decision of the Ninth Circuit Court of Appeals in *Weyerhaeuser Co. v. Western Seas Shipping Co.* Rejecting the reasoning of *Nereus,* the *Weyerhaeuser* court held that under the FAA its authority was narrowly circumscribed and thus an order of consolidation was precluded absent the express consent of all parties. Applying a literal construction of the FAA, the court held that:

[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 suit but also the procedure to be used in resolving the dispute." In holding that judicial authority was narrowly circumscribed under the FAA, the court determined that the only issue properly before the bench was whether all of the parties were privy to a written arbitration agreement providing for consolidation. In the absence of such an agreement, the court found that it did not have the power to compel arbitration between non-contracting parties.

Two years after *Weyerhaeuser,* the reasoning of the Ninth Circuit Court of Appeals was adopted by the District Court for the Southern District of New York in *Ore & Chemical Corp. v. Stinnes Interoil, Inc.,* when it declined to follow the *Nereus* precedent and denied a petition to

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94 743 F.2d 635 (9th Cir.), cert. denied, 469 U.S. 1061 (1984).
95 *See supra* text accompanying notes 59-76.
96 Section 4 of the FAA provides:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the [fact-finder] find[s] that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

97 *Weyerhaeuser,* 743 F.2d at 637 (quoting *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519 (1974)).
98 Finding the paramount issue to be that arbitration is a creature of contract, the district court pointed out that:

*Weyerhaeuser*’s argument, that consolidation would not force respondents to arbitrate disputes they had not agreed to arbitrate since consolidation does not eradicate the identity of the individual matters consolidated, misses the point. The agreement to arbitrate only certain disputes or only in a certain manner represents a contractual allocation of risk that the Court may not disturb absent the kind of showing required for reformulation of an ordinary contract. The standards for consolidation under Rule 42(a) are therefore irrelevant.

compel consolidated arbitration.\textsuperscript{100}

Citing \textit{Weyerhaeuser}, the court in \textit{Stinnes} held that section four of the FAA prohibited the court from ordering consolidation where the parties were not in privity or did not provide for consolidation in the respective arbitration clauses. To hold otherwise, the court reasoned, would be contrary to recent decisions of the U.S. Supreme Court,\textsuperscript{101} which had interpreted the scope of the FAA and "reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."\textsuperscript{102} The court's decision is clearly supported by the Supreme Court's holding in \textit{Dean Witter Reynolds v. Byrd}, where Justice Marshall writing for the court stated that:

\begin{quote}
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. \textit{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 . . . .}\textsuperscript{103}
\end{quote}

In finding that the court's authority was narrowly circumscribed under the FAA, Judge Edelstein stated that "the Second Circuit's reliance in \textit{Nereus} on the 'liberal purposes' of the Arbitration Act was misplaced. 9 U.S.C. § 2 is a congressional declaration of a liberal policy favoring arbitration agreements, not of reforming them."\textsuperscript{104}

The \textit{Stinnes} court also took issue with \textit{Nereus}' use of the Federal Rules of Civil Procedure to effectuate consolidation in the absence of an

\textsuperscript{100} In rejecting \textit{Nereus}, the court stated that: A district court . . . should not rely on older precedents that have been rejected in later decisions. The \textit{Nereus} decision has been rejected by a district court and Court of Appeals for the Ninth Circuit, and is contrary to recent Supreme Court pronouncements on the scope of the Federal Arbitration Act. Accordingly, this court opines that if the Court of Appeals for the Second Circuit were to reconsider the issue, it would overrule \textit{Nereus}, and hold that a district court does not have the power under 9 U.S.C. § 4 to compel consolidated arbitration, where the parties did not provide for consolidated arbitration in the arbitration agreement. \textit{Stinnes I}, 606 F. Supp. at 1512-13 (citations omitted).


"[P]assage of the [FAA] was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principle objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation." \textit{Byrd}, 470 U.S. at 220.

\textsuperscript{102} \textit{Byrd}, 470 U.S. at 219.

\textsuperscript{103} \textit{Byrd}, 470 U.S. at 221 (emphasis added).

\textsuperscript{104} \textit{Stinnes I}, 606 F. Supp. at 1513 (citation omitted).
agreement between the parties. The court held that Rule 81(a)(3) was
precluded by 9 U.S.C. § 4 insofar as it would alter the terms of the arbi-
tration agreement. With respect to Rule 42(a), the court held that:

[I]t is well established that '[w]hen contracting parties stipulate that
disputes will be submitted to arbitration, they relinquish the right to
certain procedural niceties which are normally associated with a for-
mal trial.' One of those 'procedural niceties' is Rule 42(a)'s provision
for consolidation of related actions. Indeed, Rule 42(a) by its express
terms only applies to 'actions pending before the court.' For the court
to consolidate cases, the actions to be consolidated must both be pending
before the court for all purposes. The 'actions' which petitioners seek to
consolidate are the arbitrations, which are not now 'pending before the
court.' Accordingly, Rule 42(a) does not provide authority for the
court to order consolidation of the arbitration proceedings.\(^\text{105}\)

In light of the court's analysis, use of the Federal Rules to effectuate
consolidation in the absence of an agreement between the parties is
inappropriate.

Upon denial of Ore & Chemical Corporation's petition for an order
of consolidation, the court in *Stinnes* gave the parties a specified time
period in which to reach an agreement for the selection of arbitrators.
Having failed to agree on the selection of the arbitrators within the speci-
fied time period, Ore & Chemical Corporation petitioned the court to
appoint the same arbitrator to both proceedings.\(^\text{106}\) Because the arbitration
clause was only one sentence and contained no reference to the selec-
tion of arbitrators, the court held that it was bound by section five to

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\(^{105}\) *Id.* at 1514-15 (footnotes omitted) (emphasis added).

A further analysis of Rule 42(a) indicates that the rule was intended for convenience and econ-
omy of administration, as well as to provide justice to the parties. Indeed, under Rule 42(a) the
court has broad discretion, and need not obtain the consent of the parties to order consolidation.
Rather, the court alone weighs the benefits and the cost of consolidating actions. In this respect,
Rule 42(a) is contrary to the goals of the arbitral process as it is a device for the convenience of
judges conferring only incidental benefit upon the parties. *See* 9 C. *Wright & A. Miller, Federal

What is a useful device in litigation, such as Rule 42(a), may be wholly inappropriate in arbitra-
tion. Proponents of the use of Rule 42(a) fail to differentiate between arbitration and litigation. As
one commentator has pointed out:

"Arbitration suffers from a comparison with the courts . . . . It isn't 'just like the courts.'
In fact, its strongest points lie in those areas where it most widely differs from the courts.
Arbitration and litigation have a similar goal. The proceedings of the two processes are
somewhat alike, principally because the arbitration proceeding has been altered to accom-
modate the lawyer . . . The major difference is the framework within which these questions
are examined. The rules of law which provide such a framework in litigation are at most a
minor part of the arbitration process."

* M. Domke, *supra* note 6, § 1:01, at 3 (quoting *American Management Association, Resolv-
ing Business Disputes: The Potential of Commercial Arbitration* 102 (1965)).

\(^{106}\) Ore & Chemical Corp. v. Stinnes Interox, Inc., 611 F. Supp. 237 (S.D.N.Y. 1985) [hereinaf-
ter *Stinnes II*].
appoint a single arbitrator to hear each of the separate disputes. The court further held that although it had no authority under 9 U.S.C. § 4 to order consolidation, the statute did not bar it from appointing the same arbitrator to preside over the separate proceedings. The court avoided overstepping its authority by ordering consolidation, but remained mindful of the need for consistent results and efficiency in the proceedings.\(^\text{107}\)

Stating that "[o]ne arbitrator will be in a better position to determine whether the two actions should be consolidated,"\(^\text{109}\) the court left unanswered the question of whether it would enforce an arbitration award resulting from a consolidated proceeding not provided for in the arbitration clauses. Insofar as the arbitration agreements provided that any disputes would be settled under the laws of New York, it is possible that the court intended that the arbitrator would have the authority to order consolidation in accordance with state law. However, if this is the case, the court may have jumped the gun by overlooking the fact that under New York law it is the court and not the arbitrator who must make the decision to order consolidation in the "sensitive and wise exercise of judicial discretion."\(^\text{110}\)

In addition, this solution may not be practical in arbitrations which are administered by one of the major institutions. As previously discussed, none of the major arbitral institutions have general consolidation provisions which would allow the arbitrator to order consolidation absent the express consent of the parties. Therefore, the court's suggestion in the *Ore & Chemical Corp.* case that the arbitrator should order consolidation may not be possible absent a source of statutory or contractual authority.\(^\text{111}\) While the court failed to provide a detailed plan regarding how the arbitrator could effect consolidation, its determination that only the arbitrator is in a position to order consolidation would probably be better received by opponents of court ordered consolidation who argue that "procedural matters such as consolidation are properly the concern

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111 Should the arbitrators order consolidation of their own volition, the resulting award may encounter enforcement difficulties under both domestic and international law. Such an award could be attacked on the basis that the arbitrator lacked authority to order consolidation, and thus create obstacles to enforcement and uncertainty as to the usefulness of an arbitration clause. Inasmuch as the objective of the arbitral process is to eliminate uncertainty where it exists, it would not be prudent to allow an arbitrator to order consolidation absent some source of power which would enable the order to withstand collateral attack.
of the duly-appointed arbitration panel."\textsuperscript{112}

The court's holding in \textit{Stinnes} that a district court does not have the power to order consolidation has created a dispute within the Southern District of New York.\textsuperscript{113} Although \textit{Nereus} is still good law in the Second Circuit, the district courts in the Southern District remain divided. In this respect, the Southern District of New York, has become a micro-cosm of the conflict which currently exists among the federal circuit courts.\textsuperscript{114}

As a result of the conflict among the federal circuit courts, one commentator has suggested that "court ordered consolidation [in the United States] is no longer predictable."\textsuperscript{115} Other commentators have responded that rules relating to court ordered consolidation are predictable, so long as the practitioner is familiar with the rules of the various circuits.\textsuperscript{116} These commentators treat the \textit{Stinnes} case as an anomaly and point out that the Second Circuit Court of Appeals has subsequently affirmed an order of consolidation by a district court in \textit{Cable Belt Conveyors, Inc. v. Alumina Partners of Jamaica}.\textsuperscript{117} However, these commentators fail to remember that the purpose of the FAA and the arbitral system in general is to eliminate the confusion surrounding different state laws, and set forth a comprehensive body of law that could be selected and relied on by the parties.

The current split among the federal circuit courts rests entirely on the construction given to the FAA. Thus, either Congress must amend the FAA to provide clear guidance on this issue, or the U.S. Supreme Court must grant certiorari and clearly construe the FAA. Until either Congress of the Supreme Court acts, international practitioners should pay careful attention to the rules in the various circuits to ascertain the various positions as precisely as possible. It should be noted, however, that anything other than a strict construction of the FAA would be counter-intuitive inasmuch as the statute seeks to create uniformity and predictability where parties of different nationalities are concerned.

\textbf{C. State Statutes}

Two states, Massachusetts and California, have amended their arbitration statutes to provide statutory authority for court ordered consolidation.

\begin{footnotes}
\item[112] \textit{Stipanowich}, supra note 11, at 509.
\item[114] See \textit{id.} at 388 (S.D.N.Y. 1988); \textit{In re Reefer Express Lines Pty. Ltd., No. 86 Civ. 4490} (S.D.N.Y. 1987).
\item[115] \textit{Barron}, supra note 107, at 81.
\item[117] No. 86 Civ. 7980 (S.D.N.Y. 1989).
\end{footnotes}
1. Massachusetts

The Massachusetts Uniform Arbitration Act\(^\text{118}\) was amended in 1977 to provide that:

A party aggrieved by the failure or refusal of another to agree to consolidate one arbitration proceeding with another or others, for which the method of appointment of the arbitrator or arbitrators is the same, or to sever one arbitration proceeding from another or others, may apply to the superior court for an order for such consolidation or such severance. The court shall proceed summarily to the determination of the issue so raised. If a claimant under section twenty-nine of chapter one hundred and forty-nine applies for an order of consolidation or severance of such proceedings, the issue shall be decided under the applicable provisions of said section twenty-nine of said chapter one hundred and forty-nine governing consolidation or severance of such actions; otherwise the issue shall be decided under the Massachusetts Rules of Civil Procedure governing consolidation and severance of trials and the court shall issue an order accordingly. No provision in any arbitration agreement shall bar or prevent action by the court under this section.\(^\text{119}\)

Two important aspects of the statute are the provisions which stipulate that (1) the method of appointment for arbitrators must be the same in the respective agreements; and (2) that the parties are not free to opt out of consolidation by contractual agreement. These provisions are somewhat inconsistent with respect to their intended goals. On the one hand, the statute seeks to preserve the parties' rights to freely determine and contract for a specific method of panel selection. On the other hand, the statute frustrates freedom of contract by not allowing the parties to contractually opt out of the provision. In prohibiting the parties from opting out of the consolidation provision by contractual agreement, the statute goes further than Nereus and its progeny and serves to totally frustrate the basic principle of freedom to contract.\(^\text{120}\) Indeed, no court has ordered consolidation where such a procedure was specifically excluded by contractual agreement.\(^\text{121}\)

The Massachusetts statute was drafted by the Associated Subcontractors of Massachusetts in direct response to the 1976 amendment of the AIA standard form document which prohibits consolidation absent

\[^{118}\text{MAss. GEN. LAWS ANN. ch. 251, § 1-19 (West 1988).}\]

\[^{119}\text{Id. § 2A (emphasis added).}\]


\[^{121}\text{See Del E. Webb Constr. v. Richardson Hosp. Authority, 823 F.2d 145 (5th Cir. 1987) (refusal to order consolidation because parties' agreement incorporated the AIA provision prohibiting consolidation absent the express consent of the parties).}\]
the express written consent of the Architect.\textsuperscript{122}

The Massachusetts statute is particularly important to international practitioners in light of the recent decision of the First Circuit Court of Appeals in *New England Energy, Inc. v. Keystone Shipping Co.*\textsuperscript{123} In *Keystone Shipping*, the court held that the Massachusetts consolidation provision was applicable to arbitrations governed under the FAA.\textsuperscript{124} Although the court did not make a definitive holding on the language in the statute which prohibits parties from contractually opting out of consolidation, it gave a strong indication that state law could not prevail over a contractual provision in the parties' agreement. In a footnote, the court stated in dicta that:

The statute states that "[n]o provision in any arbitration agreement shall bar or prevent action by the court under this section." Mass. Gen. Laws Ann. ch. 251, § 2A. Because the parties' agreements in this case do not refer to consolidation, we need not address whether federal law bars the statute from superseding a contractual provision expressly prohibiting consolidation. Supreme Court precedent strongly indicates, however, that state law should not prevail over such privately negotiated contractual provision.\textsuperscript{125}

The court's language in this footnote indicates that for the time being, the boilerplate provision in section 7.9.1 of AIA Document A201, which prohibits consolidation, should prevail over state law in arbitrations governed under the FAA.

In addressing that portion of the court's opinion which held state law applicable under the FAA, Judge Selya dissented stating:

In leaving the dimensions of the changed bargain to the vagaries of state law, the majority demeans the quintessentially [sic] federal nature of the rule of decision. In my mind, judicial recourse to a salamagundi of differing state arbitration laws countervails the objectives of the Federal Arbitration Act. Put another way, superimposing Massachusetts' pro-consolidation policy on the expressed wishes of the contracting parties unduly exults state law and, in the process subverts the concept of "creating a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." In my estimation, Congress did not intend that the state-law camel could so obstructively stick its nose into the federal-law tent.\textsuperscript{126}

\textsuperscript{122} See Hascher, supra note 10, at 138-39.

\textsuperscript{123} 855 F.2d 1 (1st Cir. 1988) (Selya, J., dissenting), cert. denied, 109 S. Ct. 1527 (1989).

\textsuperscript{124} While this analysis deals only with that portion of the court's opinion which found state law applicable under the FAA, it should be noted that the court, although not making any determinations on the appropriateness of the use of the Federal Rules, reviewed the basic positions as outlined in *Nereus* and *Weyerhaeuser* and agreed with the *Nereus* interpretation of the FAA.

\textsuperscript{125} *Keystone Shipping*, 855 F.2d at 5 n.3 (citations omitted).

\textsuperscript{126} *Id.* at 10 (citations omitted).
The reasoning in Judge Selya’s dissent seems to be the most persuasive. Since arbitration laws vary throughout the fifty states, the international practitioner, or for that matter the domestic practitioner dealing with arbitrations governed under the FAA, would be unable to rely on the FAA in drafting an arbitration clause. This would introduce great uncertainty into the arbitration process, because in drafting the arbitration clause lawyers would be unable to ascertain in advance the applicable law which would govern the resolution of disputes. In this respect, it would seem that the intent of the FAA to create a uniform body of law would be frustrated. As Judge Selya points out, practitioners should have the right to rely on the FAA in arbitrations which are governed by that Act.

2. California

In 1978 the California legislature amended its arbitration statute to provide for consolidation. Under the California statute, the court may order consolidation when:

1. Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and
2. The dispute arises from the same transaction or series of related transactions; and
3. There is a common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

Unlike the Massachusetts statute, the California state courts have held that a party may not preclude consolidation provisions by contractual agreement.

Whether or not the California statute would be applied to arbitrations governed under the FAA has not yet been determined. However, given the Ninth Circuit’s opposition to compelled consolidation in Weyerhaeuser, it is unlikely that the federal courts in California would apply the consolidation provision absent the express consent of the parties. If faced with the California statute, it is likely that the Ninth Circuit would rule that section four of the FAA preempts state law, thereby making the state statute irrelevant. Such a ruling would be in accordance with the Weyerhaeuser holding that the court’s power is narrowly circumscribed under the FAA. However, since this issue has not been decided practitioners who wish to avoid consolidation altogether should incorporate an opt out provision in the arbitration clause.

127 CAL. CIV. PROC. CODE § 1281.3 (West 1982).
128 Id.
V. CONSOLIDATION OUTSIDE THE UNITED STATES

A. Jurisdictions Permitting Consolidation

Currently, only two jurisdictions other than the United States permitted compulsory consolidation. These jurisdictions are Hong Kong and the Netherlands.

Article 1046 of the Dutch Arbitration Act of 1986 empowers the president of the District Court in Amsterdam to "order consolidation of the proceedings, unless the parties have agreed otherwise." The president may grant the parties' request for consolidation in whole or in part. If the president orders consolidation of the entire proceeding, the parties may jointly appoint the arbitrators and determine the rules which shall apply. If the parties are unable to agree on the appointment of arbitrators or the selection of the rules, the president will, at request of the parties, make these decisions. If the president orders partial consolidation, he shall determine the issues to be consolidated. As in the case of total consolidation, the president will choose the arbitrators and rules to be applied if the parties are unable to agree.

Unlike the California and Massachusetts statutes, the Dutch Arbitration Act gives the parties the right to opt out of the consolidation provision by contractual agreement. However, even with the opt out provision the Dutch Act has been criticized. One author has commented that:

Under the new Dutch Act the parties can opt out of consolidation. But it is not very clear when and by whom. A consolidation case involves at least three parties. Is it sufficient that the parties in the first arbitration agreed between themselves that there shall be no consolidation, or must the agreement be made between all three (or more) parties? To leave it to the parties (whoever they are) to opt out appears reasonable, but will it be a very practical solution? At an earlier stage, when drawing up various contracts related to a big project, the chances of reaching an agreement to exclude consolidation are greater. This presupposes that the parties are aware of the risk of consolidation. It also presupposes that the parties are aware of who will be parties to the connected arbitration. Since contracts are negoti-

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131 See id., art. 1046.
133 Id., Annex I, art. 1046, para. 2 at 7.
134 Id., para. 3 at 7.
135 Id., para. 4 at 7.
136 Id.
137 Id., para. 1 at 7.
ated at different times and in different places, it will not always be possible to agree in advance; parties may be unknown to each other until the question of consolidation arises. And then it is too late...

While these concerns are legitimate, it would seem unrealistic to require that all of the parties must agree to opt out of the proceeding at the time of the dispute. Nor does it seem likely that the parties would know, in advance, all of the possible participants of a future consolidated proceeding. Rather, it appears that the opt out provision was included in the Dutch Arbitration Act as an attempt to ensure the parties' freedom to contract, by allowing them to unilaterally opt out in the event of a consolidated proceeding. Any other interpretation would, in practical terms, nullify the provision and thus not comport with the legislative purpose in enacting the statute.

If all parties were required to opt out at the time of the dispute, the freedom which the provision contemplates would almost never be realized insofar as it would always be to the advantage of one of the parties to consolidate the proceedings. As one commentator has noted, "Axiomatically, if arbitration is perceived to promote the interest of one party, it may be seen to damage the interests of the other." This axiom applies with equal force to compulsory consolidation. If the statute required full agreement at the time of the dispute, the decision to exercise the consolidation provision would rest entirely with the party who was not seeking to opt out. Surely the legislature did not intend the application of the provision to lie at the discretion of an adverse party.

Rather, a realistic interpretation of the opt out provision must be considered in the entire context of the statute. Insofar 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. Like any other part of the arbitration clause, an agreement to opt out represents a contractual allocation of risk which requires parties to negotiate the provision before the event occurs.

In 1982, Hong Kong enacted a new Arbitration Ordinance which included provisions for judicially ordered consolidation. Section 6B of the Ordinance provides:

138 Jarvin, Consolidated Arbitrations, the New York Arbitration Convention and the Dutch Arbitration Act 1986 - a Critique of Dr. van den Berg, 3 ARB. INT'L 254, 256-57 (1987) [hereinafter Critique of Dr. van den Berg].

139 Stipanowich, supra note 11, at 489 n.78 (quoting J. ACRET, CONSTRUCTION ARBITRATION HANDBOOK, § 5.02, at 132-35 (1985)).

(1) Where in relation to two or more arbitration proceedings it appears to the court;
(a) that some common question of 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.

To date, the Hong Kong Ordinance has only been applied in domestic arbitrations. Whether the courts in Hong Kong would apply the compulsory consolidation statute to international arbitrations taking place in that jurisdiction is uncertain. However, recent trends indicate that Hong Kong would not use the compulsory consolidation provision in international arbitrations. Because the application of the Hong Kong compulsory consolidation provision is uncertain in the context of international arbitrations, the international practitioner should take steps to include a contractual opt out provision in the arbitration clause to prevent any surprises.

B. Consolidation Under English Law

In contrast to the previously mentioned jurisdictions, English courts have not found authority to order consolidation absent the express consent of the parties. The propriety of consolidation was considered at length by the English Commercial Court's Arbitration Sub-Committee in 1985. Although the Committee recognized strong support for a compul-

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141 Id. at 88.
142 For a discussion of the two domestic cases which have involved consolidation in Hong Kong, see Veeder, Consolidation: More News from the Front-Line, 3 ARB. INT'L 262 (1987).
143 Id. at 265-66.

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; 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 of the 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(1)(d) of the New York Convention] may make an award made in a consolidated arbitration unenforceable in other New York Convention countries.'
sory consolidation statute, it found two obstacles which could not be overcome. Specifically, the Committee found that:

(a) any imposition of a unified dispute-settling mechanism will invariably mean a breach of contractual rights of at least one of the parties;
(b) an award which embodies the decision of the tribunal insofar as it falls outside the scope of the arbitration agreement is likely to encounter serious difficulties when it comes to enforcement under the New York Convention.\textsuperscript{144}

As a result of the Sub-Committee's report, consolidation is only permissible in England when specifically agreed to by the parties.

Although sympathetic to the need for consolidation, the English courts have been unwilling to order consolidated arbitrations in the absence of contractual or statutory authority.\textsuperscript{145} The English courts' position was clearly articulated in \textit{Oxford Shipping}, where the court stated that:

The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated with each other the disputes in question may be.\textsuperscript{146}

This would seem to be a reasonable analysis. Clearly, in opting to avoid the litigation process by contracting for arbitration, parties often contemplate confidentiality in the context of the arbitral procedure.

For these reasons and the reasons stated in the Sub-Committee report, the basic position of the English courts has been that compulsory consolidation constitutes an impermissible intrusion into the parties' agreements and therefore should not be ordered.\textsuperscript{147}

\section{VII. Consolidated Arbitrations and Enforcement of Awards Under the New York Convention}

The recognition and enforcement of foreign arbitral awards is essen-

\textsuperscript{144} Working Paper of 1 February 1985 at 2, 14, 15 (prepared under the chairmanship of Sir Michael Mustill).


\textsuperscript{146} \textit{Oxford Shipping Co.}, 2 Lloyd's Rep. at 379.

\textsuperscript{147} For a more in depth discussion of English case law and the problem of multiparty disputes see Veeder, \textit{Multi-Party Disputes: Consolidation Under English Law, "The Vimeira" - a Sad Forensic Fable}, 2 ARB. INT'L 310 (1986).
tial to the use of arbitration as a mechanism for dispute resolution in the context of international commercial transactions. Arbitration would be an unacceptable method of dispute resolution if the enforceability of awards was uncertain or determined on an ad hoc basis. Clearly, it would not make sense for a party to enter into an arbitration agreement if the arbitration award would not have a binding effect. Consequently, the success of international arbitration is largely dependent on the enforceability of the resulting award. To this end the United States, in addition to approximately seventy-six other nations and jurisdictions, has adopted the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

The introduction of compulsory consolidation into an international arbitration proceeding creates an element of uncertainty with respect to the recognition and enforcement of foreign arbitral awards. Specifically, it is uncertain whether an award arising out of compulsory consolidation is enforceable under the terms of the New York Convention. If such an award is not enforceable, compulsory consolidation would become a destabilizing feature in the realm of international arbitration, thus frustrating the goals of the arbitral process itself.

Enforcement of an award arising out of a compulsory consolidation proceeding has not been sought in the United States or abroad to date. Due to the dearth of case law in this area, this discussion centers on the language of the Convention and the construction it has been given by the contracting states where the enforcement of bilateral awards has been sought.

An examination of the New York Convention reveals two provisions which may provide barriers to the recognition and enforcement of foreign arbitral awards. Specifically, jurisdictions not favoring compulsory consolidation could deny enforcement of such awards under articles V(1)(d) or V(2)(b). While the majority of the commentary in this area has focused almost exclusively on article V(1)(d), consideration of the latter provision is equally important.

Article V(1)(d) of the New York Convention provides that:

148 See Aksen, American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 Sw. U.L. Rev. 1, 26 n.99 (1971)[hereinafter Aksen II]. "International arbitration '... provides a sort of 'Esperanto' language of law that only needs standardized enforcement measures to make it both acceptable and understandable to businessmen, no matter to what system of national law they are accustomed.'" Id. (quoting Peck, N.Y.L.J. Mar. 17, 1967, at 1, col. 3).


1. 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[.]\textsuperscript{151}

The effect of article V(1)(d) is clear and unambiguous. Where the composition of the arbitral panel or the procedure governing the proceedings is not in conformity with the parties' agreement, a State may refuse enforcement of the resulting award. As previously noted, compulsory consolidation necessarily rewrites the parties' contracts. If a panel selection clause is provided in the arbitration clause, it is necessarily rewritten when compulsory consolidation is effected. Thus, neither the composition of the arbitral panel nor the procedure governing the proceeding is in accordance with the parties' agreements.

Arguing that article V(1)(d) will not prevent enforcement of a consolidated award, proponents of compulsory consolidation maintain that, "When parties agree to arbitrate in a given jurisdiction, the agreement implies that they also agree on the applicability of the arbitration law of that jurisdiction. If the arbitration law includes the possibility of judicially ordered consolidation of related arbitrations, that possibility forms part of their agreement."\textsuperscript{152} While this argument appears to be persuasive at first glance, a closer examination reveals a serious flaw in its reasoning. Specifically, this argument presupposes that the choice of law provision and the forum selection provision contained in an arbitration agreement are one and the same. However, this is clearly not the case. The choice of law and forum selection provisions are separate and distinct and represent independently negotiated clauses.\textsuperscript{153} This fact is clear from the language of article V(1)(d) itself, which provides that the law of the country where the arbitration took place is only to be looked to in the absence of an agreement by the parties. Where the agreement of the parties provides for the composition of the arbitral tribunal, the enforcing state is not free to disregard that agreement. Rather, the enforcing state may only look to the law of the forum when the parties are silent with respect to the composition of the arbitral tribunal.

Proponents of compulsory consolidation attempt to obfuscate the meaning of article V(1)(d) by disregarding the actual language of the limitation and focusing their attention on the construction it should be

\textsuperscript{151} New York Convention, supra note 149, art. V(1)(d).
\textsuperscript{152} van den Berg, 1958 Convention, supra note 150, at 368.
\textsuperscript{153} Coulson, supra note 14, at 359.
given. This appears to be an oxymoron, as the construction of the provision must necessarily start with its language. However, even if the provision is given a liberal reading, it is difficult to imagine how one could advance against the explicit language contained in the article itself.

The next potential obstacle to the enforcement of an award under the New York Convention is article V(2)(b). It provides that:

(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

\[ b \] The recognition or enforcement of the award would be contrary to the public policy of that country.\(^{155}\)

Under this provision, countries that perceive court ordered consolidation as an infringement on the contractual rights of the parties may refuse to enforce the award on the ground that public policy is to give effect to freedom of contract.

Addressing the public policy provision, one commentator has noted that:

There really is no practical limit to the type[s] of situations which each country would include within its own public policy. Certainly the phrase “public policy” will provide considerable latitude for the ingenuity of defense counsel, and it is quite likely that a variety of interpretations will be forthcoming from the courts of different countries.\(^{156}\)

The construction of the public policy provision will necessarily vary from one jurisdiction to the next,\(^{157}\) but it should not be a surprise if some jurisdictions find that rewriting the parties’ contracts is violative of public policy.

In view of the potential obstacles to the enforcement of awards under the New York Convention, a logical question is whether consolidation should be compelled if the award cannot be recognized in the concerned jurisdiction. Although federal courts in the United States have answered this question affirmatively in dealing with other issues,\(^{158}\) it


\(^{155}\) New York Convention, supra note 149, art. V(2)(b).

\(^{156}\) Aksen II, supra note 148, at 13.

\(^{157}\) The public policy limitation in the New York Convention is narrowly construed in the United States to refuse recognition only when enforcement of the award would violate basic notions of “morality and justice.” See Fotochrome, Inc. v. Cope Co., Ltd., 517 F.2d 512 (2d Cir. 1975). This construction is not required by the New York Convention, nor is it necessarily shared by contracting states. Clearly, contracting states that have refused to order compulsory consolidation may find the intrusion on the parties’ contractual rights contrary to the public policy favoring freedom of contract.

\(^{158}\) See Becker Autoradio v. Becker Autoradiowerk GmbH, 585 F.2d 39 (3d Cir. 1978); Rhone
would seem senseless to employ a procedural device which would deny any effect to the resulting award.

In the final analysis, one commentator has stated that:

The shortcomings of consolidation where enforcement is sought abroad increase the risk of additional litigation, run counter to the goals of easing and smoothing the enforcement and recognition process of arbitral awards which inspire the New York Convention, and, in the long run, break down... confidence... in international commercial arbitration.\(^{159}\)

VIII. Conclusion

While multiparty disputes continue to present difficulties for the international practitioner, the solution does not lie in compulsory consolidation. Such a device runs counter to the fundamental goals of the arbitral process, which seeks to limit judicial intervention and establish a self-governing mechanism for dispute resolution.

Multiparty disputes are a fairly common feature of construction contracts and maritime charter party agreements.\(^{160}\) As a result, multiparty disputes should be anticipated and provided for in the respective arbitration clauses. Parties to such agreements should be required to decide in advance whether or not arbitrations should be consolidated in the event of a multiparty dispute. Allowing a party who has contracted for one method of arbitration to petition the court for an alternative method when they later determine that the method they have agreed upon no longer serves their particular interests undermines the fundamental concept that the arbitration clause is voluntarily entered into by a contractual allocation of risk.

A more acceptable method of guarding against the problems of multiparty disputes would be for the parties to include or exclude consolidation in the arbitration clause at the time of contracting. Such an agreement could be made in the primary contract and incorporated by reference in the various subcontracts.

Another alternative to compulsory consolidation would be for the major arbitral institutions to include provisions in their rules providing for consolidation in the event of a multiparty dispute.\(^{161}\) However, in keeping with the fundamental principle of freedom of contract, such pro-

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\(^{160}\) Hascher, supra note 10, at 138.

\(^{161}\) INTERNATIONAL COMMERCIAL ARBITRATION, supra note 8, at 74.

\(^{161}\) In this respect, both foreign and domestic statutes providing for consolidation could be used where the parties explicitly provide for the law of that state to govern the resolution of disputes, and the statute provides for an opt out provision in the arbitration clause.
visions would have to include an opportunity for the parties to opt out of the rule at the time of contracting. The opt out requirement, rather than an opt in requirement, would not place an onerous burden on any of the parties or pose any surprises at the time of the dispute. All parties who bargain at arms length are assumed to have read and understood the rules that are incorporated into a contract which they have signed. Thus, if the institutional rules contain a consolidation provision and if the parties do not specifically contract out of the provision, the courts may order consolidation in the event of a multiparty dispute.

The foreseeability of multiparty disputes in construction contracts and maritime charter party agreements affords the parties an opportunity to avoid unnecessary complications and makes court ordered consolidation unnecessary. An arbitration agreement represents a contractual allocation of risk for which both parties have bargained and should not be disturbed merely because one party is dissatisfied with the bargain he or she has struck. The need for uniform recognition and enforcement of awards and the sanctity of the parties' contract outweigh the minimal benefits that court ordered consolidation confers.

In the final analysis, if consolidation is to be effected in accordance with the underlying principles of the arbitral process, it must be voluntarily entered into by the parties at the time of contracting. Where the parties intend to contract for consolidated proceedings in the event of a multiparty dispute practitioners should take care to provide for contingencies such as alternate panel selection methods, alternate choice of law, and alternate choice of procedure. In addition, parties should consider limiting how far down the chain of privity they wish to have disputes consolidated and set clear and unambiguous limits on how far removed a party may be from the original contract to be eligible to participate in a consolidated proceeding. In this manner the basic characteristics of self governance and predictability can be preserved to the greatest extent possible.

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