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Federal Circuit Conflict Regarding Consolidation of Arbitration

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NOTE

FEDERAL CIRCUIT CONFLICT REGARDING CONSOLIDATION OF ARBITRATION*

I. INTRODUCTION

Congress enacted the United States Arbitration Act[1] in 1925 to quash judicial speculation that American courts would not enforce

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Author's Note: I would like to dedicate this Note to my parents, Bob and Ruth Chastain, who have given me much love and support, and have made law school possible for me.

1. 9 U.S.C. §§ 1-14 (1987).

private arbitration agreements.[2] Before the 1925 Act, courts held that public policy[3] prohibited enforcing unofficial persons' contractually created private dispute resolutions.[4] Although Congress elevated arbitration agreements to "the same footing as other contracts,"[5] Congress failed to fully delineate procedures by which the federal policy favoring arbitration[6] could occur. Parties to the arbitration agreement, courts, and arbitrators struggle with practical difficulties such as preemption,[7] statutory claims' arbitrability,[8] and power allocation between courts and arbitrators regarding default,[9] laches,[10] and time-bar defenses.[11] A newer arbitration issue is whether the United States Arbitration Act grants federal courts the power to consolidate arbitrable claims embodied in separate contracts when the disputes arise out of a single transaction, and the parties refuse to consolidate the proceedings.[12]

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2. H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924).

3. *See infra* notes 17 & 18 and accompanying text.

4. BLACK'S LAW DICTIONARY 96 (5th ed. 1979) (arbitration is an informal dispute resolution process where parties stipulate in advance to refer disputes to third person(s) for resolution and parties agree to follow the award after third person(s) holds a hearing).

5. H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924).

6. Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1025 (11th Cir. 1982).

7. *See, e.g.*, Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61 (1985); Note, *Preemption of State Law Under the Federal Arbitration Act*, 15 U. BALT. L. REV. 129 (1985); Comment, *Commercial Arbitration*: Southland Corp. v. Keating — *Section 2 of the Federal Arbitration Act Preempts State Law in the Field of Commercial Arbitration*, 10 J. CORP. L. 767 (1985).

8. *See, e.g.*, Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987) (customers could properly arbitrate disputes under § 10(b) of the Securities Exchange Act and any RICO claims); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (international antitrust claims were arbitrable); Wilko v. Swan, 346 U.S. 427 (1953) (parties may not arbitrate disputes regarding the Securities Act of 1933). *See also* Bedell, Harrison & Grant, *Arbitrability: Current Developments in the Interpretation and Enforceability of Arbitration Agreements*, 13 J. CONTEMP. L. 1 (1987) (discussing traditionally problematic statutory areas in arbitration law such as the Securities Act of 1933, the Securities Exchange Act of 1934, antitrust, RICO, and bankruptcy).

9. *See* Calkins, *Waiver of the Right to Arbitrate: An Issue for the Court or the Arbitrator?*, ARB. J., Mar. 1982, at 10, 3 (generally, the court determines if party waived arbitration when party participates in actions at law).

10. *Id.* at 12 (arbitrator determines if party has waived arbitration because of excessive delay).

11. *Id.* at 13 (arbitrator determines if party failed to comply with express time limit in the contract). *See, e.g.*, Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1028 (11th Cir. 1982) (arbitrator determines if request for arbitration is made timely as provided by the contract terms).

12. *Compare* Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir.) (a court may not consolidate arbitration), *cert. denied*, 469 U.S. 1061 (1984) *with* Sociedad Anonima

This note explores whether federal courts may consolidate arbitration agreements among non-consenting parties, or if the arbitrator must decide to consolidate. The note begins with a historical perspective of arbitration, and next describes the differing approaches to the consolidation issue. The note further explores problems each approach presents, and suggests solutions compatible with each approach.

II. HISTORY OF ARBITRATION

A. *English Common Law*

Before Congress enacted the United States Arbitration Act in 1925, American courts reluctantly followed the English common law's refusal to recognize private agreements to arbitrate.[13] English courts enforced arbitration agreements after controversies ripened into awards,[14] but refused to enforce the arbitration process while agreements were merely executory.[15] Thus, English courts refused to specifically enforce arbitration agreements or stay contemporaneous judicial proceedings in courts of equity.[16] The English judiciary believed arbitration violated public policy by ousting courts' jurisdiction;[17] therefore, the courts' jealousy barred enforcement of arbitration contracts.[18]

B. *Early American Arbitration*

Early American courts accepted English precedent, refusing to enforce agreements to arbitrate or refusing to bar simultaneous judicial proceedings because of an arbitration agreement.[19] Various policies supported the American courts' refusal to compel the arbitration pro-

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de Navegacion Petrolera v. CIA. de Petroleos de Chile S.A., 634 F. Supp. 805 (S.D.N.Y. 1986) (court may consolidate arbitration) *and* Ore & Chem. Corp. v. Stinnes Interoil, Inc., 611 F. Supp. 237 (S.D.N.Y. 1985) (court may not consolidate arbitration, but it may make consolidation easier for the arbitrator to effectuate).

13. *See* United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (S.D.N.Y. 1915). *See also* Note, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270 (1926) [hereinafter *New Law*].

14. *See* Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942).

15. *Id.*

16. *Id.* at 983.

17. *Id.* Commentators suggested that the judges feared a loss of income resulting from arbitration ousting the court's jurisdiction. *Id.*

18. H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924).

19. *See* Tobey v. County of Bristol, 23 F. Cas. 1313, 1320 (D. Mass. 1845) (No. 14,065).

cess.[20] A primary reason focused on arbitration agreements' inchoate character. Courts would face problems enforcing executory agreements when the parties failed to outline arbitration procedures.[21] Common law's antagonism towards enforcing arbitration agreements also left the arbitrator powerless to investigate a grievance because the arbitrator lacked power to subpeona witnesses and discover evidence without a specific grant of authority.[22]

American courts eventually recognized arbitration agreements' value.[23] However, these courts felt bound by English courts' precedential hostility towards arbitration.[24] Although American courts criticized the old-fashioned rule, they refused to enforce arbitration agreements without a legislative policy change.[25]

C. *Congressional Validation of Arbitration*

Congress addressed the American arbitration problem in 1925. Citing New York's statutory success legitimizing the arbitration process,[26] Congress enacted the United States Arbitration Act. Although the Act's legislative history is relatively sparse, Congress stated several reasons for its passage. First, Congress abolished the "very old law that the performance of a written agreement to arbitrate would not be enforced in equity."[27] Congress diverged from the common law

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20. *See, e.g.*, United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1008 (S.D.N.Y. 1915) (Courts refused to enforce arbitration agreements for the following reasons: the contract is revocable, the contract is against public policy, the arbitration clause is merely collateral to the main contract and thus may be disregarded, private parties may not diminish statutorily created judicial power, and arbitration is only a condition precedent to a lawsuit.).

21. *Tobey*, 23 F. Cas. at 1319 (addressing the inchoate nature of arbitration agreements; for example, how, when, and to whom are the grievances submitted?).

22. *Id.* at 1321. The court also feared that each party's legal rights may not be fully protected during arbitration. *Id.*

23. *See United States Asphalt Ref. Co.*, 222 F. at 1007. By this time, England had created the English Arbitration Act of 1889 (Chapter 49, 52-53 Victoria) to validate arbitration agreements. *Id.*

24. *See, e.g., id.* at 1012 (court would not enforce the arbitration agreement even though "inferior courts may fail to find convincing reasons" for the common law rule).

25. *Id.* at 1011 (the court calls upon the New York Legislature or Congress to modernize arbitration law). *See* H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924) (noting courts believed the precedent was "too strongly fixed" to be overturned without legislative enactment); *New Law, supra* note 13, at 283 (arguing American courts "did not feel themselves free" to begin enforcing arbitration agreements).

26. *See* S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924). *See also* 1920 N.Y. Laws 275 (Congress modeled the United States Arbitration Act after the New York Act).

27. S. REP. No. 536, 68th Cong., 1st Sess. 2 (1924).

because arbitration panels needed the means to grant full redress, courts should not be jealous of losing jurisdiction over disputes,[28] and the old rule lacked reason in modern society.[29] A second reason is based upon equitable principles.[30] If the parties carefully drafted an arbitration agreement and subsequently honored it, Congress would not have created the Act.[31] However, parties more commonly escaped arbitration agreements rather than honoring them.[32] Because the judiciary lacked power to enforce arbitration provisions, the breaching party frequently escaped punishment.[33] When Congress placed arbitration agreements on the same level as other contract provisions, parties could no longer escape arbitration promises when performance became disadvantageous.[34] Thus, courts had power to specifically enforce arbitration agreements like any other contract provision against a breaching party.[35] Specific performance may be the only true remedy for arbitration agreements because compensatory damages are generally deemed insufficient.[37] Finally, Congress desired to expedite grievance resolution.[37] Congress validated private dispute resolution as an alternative to litigation to minimize technicalities, delay, and expenses.[38] The Act allows the expert arbitrator to settle a grievance quickly[39] and to minimize judicial interference.[40] Parties will more likely

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28. *Cf. New Law, supra* note 13, at 282 (attorneys should not fear loss of fees due to the Arbitration Act since well informed attorneys regarding the Act will be in high demand).

29. S. REP. NO. 536, 68th Cong., 1st Sess. 2-3 (1924).

30. *See New Law, supra* note 13, at 269-70 (general discussion of the creation of specific enforcement remedies for arbitration agreements).

31. *Id.*

32. *Id.*

33. *Id.*

34. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924).

35. *New Law, supra* note 13, at 278.

36. *Id.*

37. *See* H.R. REP. NO. 96, 68th Cong., 1st Sess. 2 (1924). *See also* Atwood, *supra* note 7, at 76 (legislative history reveals Congress' desire to regulate federal court procedure in enforcing arbitration agreements); *New Law, supra* note 13, at 269 (judicial economy and expedition of the grievance procedure were Congress' primary motivations in passing the Act). *But see* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (Congress' primary motivation in creating the Arbitration Act was to enforce the parties' arbitration agreements; judicial economy was a secondary consideration that is served once the arbitration clauses were held valid by courts of law).

38. H.R. REP. NO. 96, 68th Cong., 1st Sess. 2 (1924).

39. *See, e.g., New Law, supra* note 13, at 269 ("in the ordinary jury trial, the parties do not have the benefit of the judgment of persons familiar with the peculiarities of the given controversy").

40. H.R. REP. NO. 96, 68th Cong., 1st Sess. 2 (1924) ("If the parties to the arbitration

be satisfied with an arbitrator's award because the arbitrator's decision uses the parties' relevant community standards.[41]

D. *Provisions of the Act*

The United States Arbitration Act remains substantially unchanged since its enactment.[42] The Act's provisions reflect Congress' authority to create arbitration processes through its power to regulate admiralty, interstate commerce, and tribunals inferior to the Supreme Court.[43] The Act declares that agreements arbitrating maritime or commercial disputes shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract."[44] The Act also provides for a stay in judicial proceedings upon a party's application if a court finds an arbitration agreement exists.[45] Section 4 of the Act empowers courts to compel arbitration after a party petitions a United States district court.[46] The court shall compel arbitration after determining that an agreement to arbitrate is not at issue.[47] The court then shall order the "parties to proceed to arbitration in accordance with the terms of the arbitration agreement."[48] F'inally, the Act addresses issues that previously prevented courts from enforcing arbitration agreements.[49] These issues include arbitrator selection,[50] subpeona powers,[51] judicial confirmation of an arbitrator's

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are willing to proceed under it, they need not resort to the courts at all . . . . Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court.").

41. *See New Law, supra* note 13, at 269 (the business and maritime communities desired adjudications commensurate with each community's respective standards).

42. *See* S. REP. NO. 2498, 83d Cong., 2d Sess. 1, *reprinted in*, 1954 U.S. CODE CONG. & ADMIN. NEWS 3991, 3998 (Congress made technical changes to § 4 of the Act).

43. *See New Law, supra* note 13, at 275. *See also* Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1314-15 (1985).

44. 9 U.S.C. § 2 (1947).

45. *Id.* at § 3.

46. 9 U.S.C. § 4 (1954).

47. *Id.*

48. *Id.*

49. *See, e.g.*, Healy, *An Introduction to the Federal Arbitration Act*, 13 J. MAR. L. & COM. 223, 224-30 (1982) (discusses each section of the Act).

50. 9 U.S.C. § 5 (1947) (section 5 gives effect to parties' chosen method to select arbitrators; if a contract is silent, a court may select arbitrators on a party's petition).

51. 9 U.S.C. at § 7 (1951) (arbitrator may petition district court to compel attendance of witness or hold witness in contempt).

award,[52] judicial revocation of a fraudulent award,[53] and judicial modification of an incorrect arbitration award.[54] Congress addressed some of the common law's criticisms of private agreements to arbitrate, but the Act failed to answer all the practical administrative matters arising since its enactment.[55]

III. THE CONSOLIDATION CONFLICT

Since Congress enacted the United States Arbitration Act, recalcitrant parties to arbitration agreements sought various methods to avoid their contractual agreement. Generally, disputes over administration of procedural rather than substantive arbitration issues have abounded.[56] Currently, the circuits are split whether courts have power to consolidate arbitration proceedings among non-consenting parties.[57] The courts have developed three theories. First, a court may not consolidate arbitration among non-consenting parties.[58] Second, a court has the inherent power to consolidate proceedings arising out of a single transaction.[59] Finally, the third theory, a hybrid of the first

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52. 9 U.S.C. at § 9 (1947) (if non-prevailing party refuses to honor arbitrator's award, prevailing party may petition court to enter an order confirming arbitration award).

53. *Id.* at § 10 (court may vacate arbitrator's award if "the award was procured by corruption, fraud, or undue means," or the arbitrators were corrupt or biased, or the arbitrators misbehaved during the proceedings so as to prejudice a party's rights, or the arbitrators exceeded their powers such as overstepping the subject matter of arbitration). *See also* Healy, *supra* note 49, at 230 (Section 10 will not overturn arbitration award based only upon a technicality; defect must be substantive in nature, such as an arbitrator's manifest disregard of the law.).

54. 9 U.S.C. § 11 (1947) (district court may correct or modify arbitration award where arbitrators miscalculated the amount or erred in another matter not affecting the dispute's merits).

55. *See supra* notes 6-11 and accompanying text.

56. *Id.*

57. *See, e.g.*, Maxum Founds., Inc. v. Salus Corp., 817 F.2d 1086 (4th Cir. 1987) (courts may consolidate only if interrelated nature of the contracts impute consent of parties to arbitration); Weyehaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir.) (courts may not consolidate arbitration without consent of parties), *cert. denied*, 469 U.S. 1061 (1984); Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975) (courts may consolidate arbitration). One illustration of the problem involves an arbitration clause in a contract with the owner and the contractor, and another arbitration clause in a separate contract between the contractor and the subcontractor. If a dispute arises triggering one of the arbitration agreements, must the interested third person join the arbitration proceedings absent his consent? *See, e.g.*, Maxum Founds., Inc. v. Salus Corp., 817 F.2d 1086, 1086-87 (4th Cir. 1987).

58. *See* Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635, 637 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984).

59. *See* Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966, 974-75 (2d Cir. 1975).

two theories, holds that a court may consolidate arbitration proceedings if it determines that all parties consented due to broadly drafted arbitration clauses.[60]

A. *Courts May Not Consolidate Arbitration*

The Ninth Circuit holds that the judiciary may not compel consolidation of arbitrable claims when contracts are silent regarding consolidation, and the parties do not consent.[61] *Weyerhaeuser Co. v. Western Seas Shipping Co.*[62] is a maritime case involving an arbitration clause between the ship owner, Trans-Pacific Shipping Co., and the time charterer, Weyerhaeuser.[63] In the contract, the parties agreed to arbitrate Weyerhaeuser's right to indemnity if a third party recovered damages in another arbitration proceeding.[64] A separate contract between Weyerhaeuser and the sub-charterer, Karlander, contained a standard maritime arbitration clause to settle disputes for loss or damage to the ship or cargo.[65] A dispute arose between Karlander and Weyerhaeuser regarding Weyerhaeuser's alleged unreasonable neglect in examining the storage area.[66] Weyerhaeuser sought to consolidate its arbitration proceedings with Trans-Pacific on the indemnity issue and Weyerhaeuser's negligence dispute with Karlander.[67] Weyerhaeuser asserted that federal courts could compel the parties to consolidate arbitration under the United States Arbitration Act.[68]

On appeal, the court adopted the trial court's reasoning[69] and refused to compel consolidation.[70] The court stated that the United States Arbitration Act limited the judiciary's power to oversee arbitration

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60. *See Maxum*, 817 F.2d at 1087 ("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 required if complete relief is to be accorded in the arbitration.*") (emphasis in original).

61. *See Weyerhaeuser*, 743 F.2d at 635.

62. *Id.*

63. *Id.* at 636.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* Weyerhaeuser Co. cited Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975) for support. *Id.* at 636-37.

69. Weyerhaeuser Co. v. Western Seas Shipping Co., 568 F. Supp. 1220, 1222 (N.D. Cal. 1983).

70. 743 F.2d 635, 637 (9th Cir. 1984).

procedures.[71] Section 4 of the Act only allows courts to determine whether an arbitration agreement exists.[72] If an agreement exists, the court shall order the parties to arbitrate according to the arbitration agreement terms.[73] This holding recognizes that arbitration is based on the parties' contract, which determines the forum and procedure for grievance adjudication.[74] In dictum, the court stated that its decision might have been different if the parties had consented to consolidation in the contracts.[75] The court, however, found no implied consent in the instant case.[76]

The Fifth Circuit in *Del E. Webb Construction v. Richardson Hospital Authority*[77] adopted the *Weyerhaeuser* rationale and decided that courts may not consolidate arbitration without a contract specifically authorizing judicial action.[78] The court also acknowledged that the Arbitration Act required the judiciary to vigorously enforce arbitration agreements,[79] even if the result is "piecemeal litigation."[80] The court further held that "once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."[81] The court concluded that the judiciary could not compel consolidation because contract provisions explicitly rejected consolidation between the owner, contractor, and architect.[82] Because section 4 of the Act limits the court's power to enforce the arbitration agreement's terms,[83] the court could not consolidate arbitration as a matter of congressional mandate.[84]

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71. *Id.* The circuit court declined to follow the Second Circuit's case law cited by Weyerhaeuser. *Id.*

72. *Id.*

73. *Id.* Thus, the Act circumscribes the court's power to only determine if an agreement exists, and then to compel arbitration. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* The circuit court distinguished its holding from *Nereus* by stating that the parties in *Nereus* signed an addendum implying their consent to consolidation. *Id.*

77. 823 F.2d 145 (5th Cir. 1987). In *Webb Constr.*, the owner and architect signed a standard contract agreeing to arbitrate any disputes arising during construction, and the owner and contractor signed a similar standard contract. *Id.* at 146-47.

78. *Id.* at 150.

79. *Id.* at 148.

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

81. *Id.* at 149 (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964)).

82. *Id.* at 150.

83. *Id.*

84. *Id. Cf.* Bay County Bldg. Auth. v. Spence Bros., 140 Mich. App. 182, 186-88, 362 N.W.2d 739, 742 (1984) (courts may not consolidate under state arbitration act); Pueblo of Laguna v. Cillessen & Son, Inc., 101 N.M. 341, 344, 682 P.2d 197, 200 (1984) (court would not consolidate under state arbitration act).

B. *Courts May Consolidate Arbitration*

The second arbitration consolidation theory is discussed in *Compania Espanola de Petroleos v. Nereus Shipping*.[85] This maritime case involved an arbitration agreement between Nereus (the owners) and Hideca (the charterers).[86] An addendum to the contract provided that Cepsa, the charterers' guarantors, would perform the balance of the contract if Hideca defaulted.[87] Although Nereus and Hideca clearly obligated themselves to arbitrate disputes, Cepsa's obligation to arbitrate remained uncertain.[88] The Second Circuit upheld the district court's finding that Cepsa agreed to arbitrate[89] and upheld the consolidation of arbitration proceedings.[90] The circuit court reasoned that the parties' rights were safeguarded in the equitable proceeding, which determined the parties' intent to consolidate, because they had the opportunity to present evidence.[91] The court stated that consolidation served justice. Common questions of law and fact existed in both arbitrations, and Hideca could avoid conflicting findings on the default issue in a consolidated proceeding.[92] The circuit court based its authority to consolidate arbitration on the liberal purposes behind the Arbitration Act[93] and on Federal Rules of Civil Procedure 42(a) and 81(a)(3).[94] Rule 81(a)(3) states that the Federal Rules of Civil Procedure apply to Title 9 arbitration only when the statute does not discuss procedural matters.[95] Title 9 does not mention consolidation. Rule 42(a) allows courts to consolidate actions involving common questions of law or fact to avoid unnecessary expense or delay.[96] Thus, the court held that the trial court correctly consolidated arbitration.[97]

Several district court cases accept the *Nereus* principle, and suggest additional factors courts should consider when consolidating arbitration.[98] The first consideration to compel consolidation is when

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85. 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).
86. *Id.* at 968-69.
87. *Id.* at 969-70.
88. *Id.* at 970.
89. *Id.* at 971 (district court only intended to determine that Cepsa agreed to arbitrate).
90. *Id.*
91. *Id.* at 974.
92. *Id.*
93. *Id.* at 975.
94. *Id.*
95. FED. R. CIV. P. 81(a)(3).
96. FED. R. CIV. P. 42(a).
97. *Nereus*, 527 F.2d at 975.
98. *See* Elmarina, Inc. v. Comexas, N.V., 679 F. Supp. 388, 390-92 (S.D.N.Y. 1988) (court upholds *Nereus* despite contrary case law in other circuits); Cable Belt Conveyors, Inc. v.

one party has greater access to relevant information.[99] Another factor is whether a party opposing consolidation can show prejudice to the case which outweighs the advantages of a consolidated hearing.[100] Finally, consolidation should occur before substantive arbitration on the merits begins, and the United States Arbitration Act allows courts to intervene before arbitration begins.[101] These additional considerations place consolidation in a preferred position due to the practicality of adjudicating all parties' rights simultaneously.[102]

C. *Contract Interpretation as a Means for Court-Ordered Consolidation*

Some courts take a middle approach to consolidation.[103] These courts recognize that section 4 of the Act does not specifically empower the judiciary to consolidate arbitrable claims, yet consolidation would

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Alumina Partners of Jamaica, 669 F. Supp. 577, 579-81 (S.D.N.Y. 1987) (consolidation in appropriate circumstances accomplishes the liberal purposes of the Federal Arbitration Act and avoids inconsistent findings); Sociedad Anonima de Navegacion Petrolera v. CIA. de Petroleos de Chile, S.A., 634 F. Supp. 805, 809 (S.D.N.Y. 1986) (court found nothing in the Supreme Court's holding in Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985), requiring piecemeal ligitation that overrules *Nereus*'s holding allowing court-ordered consolidation in proper circumstances); Transportacion Maritima Mexicana, S.A. v. Companhia de Navegacao Lloyd Brasileiro, 636 F. Supp. 474, 475 (S.D.N.Y. 1983) (courts have power to consolidate); Marine Trading Ltd. v. Ore Int'l Corp., 432 F. Supp. 683, 684 (S.D.N.Y. 1977) (federal arbitration statute authorizes court-ordered consolidation even over party's objection).

99. *See* Marine Trading Ltd. v. Ore Int'l Corp., 432 F. Supp. 683, 684 (S.D.N.Y. 1977).

100. *See* Sociedad Anonima de Navegacion Petrolera v. CIA. de Petroleos de Chile, S.A., 634 F. Supp. 805, 809 (S.D.N.Y. 1986) (the standard is prejudice, not party's desire to have dispute heard separately). *See also* Robinson v. Warner, 370 F. Supp. 828, 831 (D.R.I. 1974) (balancing test for prejudice).

101. *See* Transportacion Maritima Mexicana, S.A. v. Companhia de Navegacao Lloyd Brasileiro, 636 F. Supp. 474, 475 (S.D.N.Y. 1983) ("The Federal Arbitration Act permits judicial intervention before the arbitration begins and after the award has been rendered. There is no statutory authority for judicial intervention during the course of arbitration proceedings.").

102. *Cf.* Laborer's Int'l Union v. W.W. Bennett Constr. Co., 686 F.2d 1267, 1276 (7th Cir. 1982) (courts may consolidate arbitration in labor disputes); Columbia Broadcasting Sys. v. American Recording & Broadcasting Ass'n, 414 F.2d 1326, 1329 (2d Cir. 1969) (court-ordered consolidation of labor disputes); James Stewart Polshek & Assocs. v. Bergen County Iron Works, 142 N.J. Super. 516, 525-29, 362 A.2d 63, 68 (N.J. Super. Ct. Ch. Div. 1976) (court-ordered consolidation under New Jersey arbitration act); Vigo S.S. Corp. v. Marship Corp., 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165 (New York courts may consolidate under state arbitration act), *cert. denied*, 400 U.S. 819 (1970).

103. *See, e.g.*, Maxum Founds., Inc. v. Salus Corp., 817 F.2d 1086 (4th Cir. 1987); Ore & Chem. Corp. v. Stinnes Interoil, Inc., 611 F. Supp. 237 (S.D.N.Y. 1985); Higley S., Inc. v. Park Shore Dev., 494 So. 2d 227 (Fla. 4th D.C.A. 1986); Kalman Floor Co. v. Jos. L. Muscarelle, Inc., 196 N.J. Super. 16, 481 A.2d 553 (N.J. Super. Ct. App. Div. 1984), *aff'd*, 98 N.J. 266, 486 A.2d 334 (1985).

provide the most efficient and practical disposition of the disputes.[104] These courts take a hybrid approach and construe the parties' broad arbitration clauses to authorize courts to consolidate the claims.[105]

The Fourth Circuit used this approach in *Maxum Foundations v. Salus Corp.*[106] The 8201 Corporation (8201) owned an office development and agreed with Salus to perform general contracting work.[107] Salus contracted with Maxum Foundations to install the foundation.[108] Each contract contained an arbitration agreement.[109] Grievances later erupted and arbitration proceedings began as provided by the contract between Salus and Maxum.[110] Salus moved for consolidation to bring 8201 into the same proceeding.[111]

The circuit court compelled consolidation because each contract contained the same broad clause: "No arbitration shall include by consolidation . . . parties other than the Owner, the Contractor and any other persons substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration."[112] The court concluded that both contracts "conferred rights and imposed obligations on *all three parties*."[113] The court consolidated because of the interrelated nature of the parties' contracts.[114]

The Southern District of New York took another approach to consolidate arbitration in *Ore & Chemical Corp. v. Stinnes Interoil, Inc.*[115] The court appointed the same arbitrator for two separate proceedings.[116] The trial court ultimately concluded that section 4 of the Act does not give courts power to force consolidation, but does not prevent courts from enabling arbitrators to consolidate easily.[117] In *Ore &*

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104. *See* cases cited *supra* note 103.

105. *Id.*

106. 817 F.2d 1086 (4th Cir. 1987).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1086-87 (arbitration began after Maxum instituted various actions in federal district court).

111. *Id.*

112. *Id.*

113. *Id.* (emphasis in original).

114. *Id.* at 1088.

115. Ore & Chem. Corp. v. Stinnes Interoil, Inc., 611 F. Supp. 237 (S.D.N.Y. 1985), *modifying*, 606 F. Supp. 1510 (S.D.N.Y. 1985).

116. *Id.* at 237.

117. *Id.* at 241.

Chemical Corp., OCC purchased oil from SOG.[118] The contract contained a broad arbitration agreement.[119] OCC then contracted to sell the oil to Stinnes,[120] and included a broad arbitration clause in their contract.[121] The dispute arose when SOG failed to deliver the oil to OCC, causing OCC to fail to deliver the oil to Stinnes.[122] OCC desired consolidation because common issues of fact and law existed, and they faced the potential prejudice of inconsistent verdicts if the two proceedings remained separate.[123]

The trial court held when arbitration agreements do not provide for consolidation, section 4 of the Act does not authorize court orders to compel consolidated arbitration.[124] The trial court also reasoned that federal policy mandated this result "because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement."[125] The court concluded that arbitrators, not courts, must decide procedural matters.[126]

A few months later, OCC petitioned the court to appoint one arbitrator to preside at both the OCC-SOG and OCC-Stinnes proceedings.[127] The court granted OCC's request because appointing one arbitrator to both proceedings was consistent with each contract.[128] The court determined that the arbitration clauses expressed the parties' belief that a single arbitrator familiar with both transactions could most easily settle the dispute.[129] One arbitrator would also better determine if consolidation is the preferred procedure.[130] This middle approach neither grants carte blanche authority on courts to consolidate nor prevents court ordered consolidation in all circumstances.[131]

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118. 606 F. Supp. 1510, 1511.

119. *Id.* at 1512.

120. *Id.* at 1511-12.

121. *Id.* at 1511. The contract stated: "Laws of the State of New York to govern with arbitration in New York." *Id.*

122. *Id.* at 1511-12.

123. *Id.* at 1512.

124. *Id.* at 1513.

125. *Id.* (emphasis in original).

126. *Id.* at 1515. "It is more efficient to let the arbitrators, the ones who will be deciding the merits of the matter, decide how the issues are to be adjudicated." *Id.*

127. Ore & Chem. Corp. v. Stinnes Interoil, Inc., 611 F. Supp. 237, 239 (S.D.N.Y. 1985).

128. *Id.* at 241.

129. *Id.*

130. *Id.*

131. *Cf.* Higley S., Inc. v. Park Shore Dev., 494 So. 2d 227, 229 (Fla. 4th D.C.A. 1986) ("the authority of a trial court to consolidate arbitration proceedings must be found in at least one of three sources, i.e., a statute, judicial policy or contract"); Kalman Floor Co. v. Jos. L.

IV. ADDITIONAL CONSIDERATIONS FOR EACH CONSOLIDATION APPROACH

Congress enacted Title 9 U.S.C. §§ 1-14 for many reasons.[132] Congress desired to abrogate the common law hostility towards arbitration agreements by validating provisions for private dispute resolution.[133] Congress believed courts should specifically enforce arbitration agreements rather than allow the breaching party to avoid the promise when performance became disadvantageous.[134] Congress also recognized speedy dispute resolution in private forums was desirable.[135]

The various approaches to consolidation each implement Congress' intent. Courts refusing to consolidate arbitration emphasize that the legislative intent legitimizes the arbitration contract.[136] Courts consolidating arbitration emphasize that Congress desires to provide efficient dispute resolution.[137] Finally, courts interpreting the contract as implicitly authorizing consolidation attempt to balance enforcing the arbitration contract with creating efficient dispute resolution.[138] Because Congress failed to prioritize its reasons for the Arbitration Act, the differing consolidation approaches validly emphasize a particular legislative intent to support varying conclusions.

Although each view has merit, several other considerations affect the arbitration process. First, parties create arbitration by contract.[139] Generally, parties arbitrate only what they contractually agreed to arbitrate.[140] Second, arbitration works well only in a consensual atmosphere.[141] Unlike a judicial process where a party unwillingly partakes in a proceeding, the arbitration process is created before a problem

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Muscarelle, Inc., 196 N.J. Super. 16, 481 A.2d 553 (N.J. Super. Ct. App. Div. 1984) (New Jersey arbitration laws require that arbitration decide procedural issues, although the trend is moving towards judicial consolidation of arbitration in appropriate circumstances), *aff'd*, 98 N.J. 266, 486 A.2d 334 (1985).

132. *See* H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924); S. REP. No. 536, 68th Cong., 1st Sess. 1 (1924).

133. S. REP. No. 536, 68th Cong., 1st Sess. 2 (1924).

134. H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924); S. REP. No. 536, 68th Cong., 1st Sess. 2 (1924).

135. H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924); S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924).

136. *See supra* text accompanying notes 71-74.

137. *See supra* text accompanying notes 92-96.

138. *See supra* text accompanying notes 103-26.

139. *See supra* text accompanying note 74.

140. *See, e.g.*, AT & T Technologies, Inc. v. Communications Workers, 106 S. Ct. 1415, 1418 (1986).

141. *See* Rubino-Sammartano, *Multi Party Arbitration*, 9 INTL BUS. L. 436, 437 (1981).

exists. Parties create the informal arbitration procedure to avoid litigation.[142] Third, parties choose arbitration for reasons peculiar to the transaction. For instance, private dispute resolution may be preferred to litigation, an arbitrator's expertise in the relevant business community may be preferred to the views of a judge and jury, or arbitration's speed and efficiency may be preferred to clogged court dockets and delaying pre-trial motions.[143] The effects of collateral estoppel or the delaying effect of an arbitrator's award could place one party in potentially inconsistent positions.[144] Although courts dispute whether the collateral estoppel doctrine applies to private dispute forums,[145] inconsistent arbitration awards still place the party in a difficult position. Resolving inconsistent awards only increases the delay the parties originally sought to avoid. Finally, the Supreme Court has ruled on analogous procedural situations, although it has not specifically addressed consolidation.[146] Thus, particular considerations justify each approach to consolidation based on the facts of each case.

A. *Courts May Not Consolidate Arbitration*

Courts refusing to consolidate arbitration emphasize Congress' intent to validate and enforce arbitration agreements.[147] These courts also emphasize enforcing the contract's terms.[148] The Supreme Court stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[149] Section 4 of the Act compels judicial deference to the contract,[150] but if the agreement does not address specific procedures, then determining arbitration procedure will be difficult.

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142. *See, e.g., New Law, supra* note 13, at 269.

143. *Id.*

144. *See supra* text accompanying note 92. *See also* Brownko Int'l, Inc. v. Ogden Steel Co., 585 F. Supp. 1432, 1437 (S.D.N.Y. 1983) (consolidated arbitration's primary benefit is avoiding the "danger of conflicting findings"). These additional reasons fill gaps that Congress overlooked when it created the Arbitration Act in 1925. *See also* Cable Belt Conveyors, Inc. v. Alumina Partners of Jamaica, 669 F. Supp. 577, 579 (S.D.N.Y. 1987) (separate arbitration proceedings may result in inconsistent findings).

145. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 222 (1985) (the preclusive effect of arbitration proceedings is not settled).

146. *See, e.g.*, Calkins, *supra* note 9, at 10.

147. *See* 9 U.S.C. § 2 (1947). *See also supra* text accompanying notes 44 & 69-76.

148. *See supra* text accompanying note 74; *see also* Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CALIF. L. REV. 1059 (1987).

149. Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

150. 9 U.S.C. § 4 (1954).

Courts refusing to consolidate enforce arbitration agreements by limiting the judiciary's power. These courts only allow courts to determine if an arbitration agreement exists, and then compel arbitration as the parties' contract provides.[151] The Supreme Court has generally stated that the arbitrator decides substantive and procedural issues while hearing the dispute because section 4 of the Act limits courts' power.[152] However, this general proposition has not been easily accomplished.[153]

Without legislative guidance, courts have difficulty distinguishing courts' and arbitrators' authority regarding substantive and procedural aspects of arbitration. Arbitrators clearly have power to decide substantive issues in arbitration proceedings,[154] but specific procedural issues have not been as clear. The United States Supreme Court addressed this issue in *John Wiley & Sons, Inc. v. Livingston.* [155] The Court acknowledged that disputes are not easily separated into "procedural" and "substantive" categories. However, "once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."[156] The Court also stated that courts could deny arbitration if the procedural claim completely bars, rather than limits or modifies, the arbitration process.[157] These rare procedural cases are within the court's jurisdiction.[158]

Since *Wiley*, lower courts have struggled to apply its general principle to specific situations.[159] Courts generally first determine if an arbitration agreement exists, and then allow the arbitrator to resolve procedural issues.[160] Consolidation, like other procedural issues such as waiver, may be subject to *Wiley*'s language. Consolidation alone will not bar arbitration at the outset, however, it may modify the

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151. *See supra* text accompanying notes 71-74.

152. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

153. *See supra* notes 9-12 and accompanying text.

154. *See* Transportacion Maritima Mexicana, S.A. v. Companhia de Navegacao Lloyd Brasiliero, 636 F. Supp. 474, 475 (S.D.N.Y. 1983) (courts may not interfere with substantive arbitration process).

155. 376 U.S. 543 (1964).

156. *Id.* at 557 (procedure may affect substantive merits).

157. *Id.* at 558.

158. *Id.*

159. *See supra* notes 7-12 & 153 and accompanying text.

160. *Id.*

arbitration process by adding new parties to those originally included in the contract. Thus, applying *Wiley* to consolidation implies that courts lack power to consolidate arbitration proceedings.

Recent trends indicate that courts prefer enforcing arbitration agreements rather than resorting to the courts. Certain statutory grievances previously unamenable to arbitration are now allowed in proper circumstances.[161] The United States Supreme Court specifically rejected the theory that complex issues are not well adapted to arbitration.[162] The Court also prefers piece-meal litigation to not enforcing arbitration contracts because of the overriding federal policy favoring arbitration.[163]

The Court extended judicial enforcement of arbitration agreements regardless of the efficiency costs in *Dean Witter Reynolds, Inc. v. Byrd.*[164] The Court held that section 4 divests the district courts' discretion regarding arbitration in cases involving "intertwined" arbitrable and non-arbitrable claims.[165] Even though Congress did not anticipate bifurcated proceedings, a district court must sever and then compel arbitration of arbitrable claims to enforce the parties' contract.[166] The Court concluded that Congress primarily intended to ensure judicial enforcement of private arbitration agreements.[167] The Court rejected expeditious claim resolution as Congress' overriding goal,[168] but acknowledged that enforcing arbitration agreements eases the judiciary's dockets and serves the secondary goal of efficiency.[169] The view disapproving arbitration consolidation, therefore, finds support in Congress' primary desire to validate arbitration contracts and in analogous "procedural/substantive" case law.

Additional considerations suggest that courts may not consolidate arbitration. The first consideration is based on the premise that arbi-

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161. *See, e.g.*, Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987) (arbitration is proper for resolving Rule 10b-5 and RICO disputes); Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985) (arbitration is an appropriate dispute resolution for certain anti-trust issues).

162. *See Mitsubishi Motors Corp.*, 473 U.S. at 633-34 (1985).

163. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983).

164. 470 U.S. 213 (1985).

165. *Id.* at 217. The doctrine of intertwining occurs when arbitrable and non-arbitrable claims arise from the same transaction, and the legal and factual issues are so inseparable that the court may deny arbitration and try all the claims in federal court. *Id.* at 216.

166. *Id.* at 217.

167. *Id.* at 219.

168. *Id.* at 218-19.

169. *Id.* at 219-20.

tration works in a consensual atmosphere. Compelling arbitration undermines arbitration's effectiveness; thus, courts should not force consolidated arbitration on unwilling parties. Additionally, parties may refuse consolidation for reasons peculiar to a particular transaction.

This view, however, ignores other considerations important to the arbitration process. One consideration is the value of efficiency. Additionally, although the Supreme Court stated that efficient dispute resolution is secondary to contract enforcement,[170] this conclusion ignores the fundamental contract principle of enforcing the parties' intent. Parties to two distinct contracts could include consolidation clauses. However, if they fail to outline every possible contingency, they do not necessarily intend to subject themselves to inefficient, duplicative proceedings. Although the arbitrator may decide the procedural consolidation issue after reviewing the facts, court ordered consolidation at the outset would save time. If a party does not expressly consent to consolidation once a dispute arises, the party does not necessarily intend to preclude efficient dispute resolution during the contract's execution. The view prohibiting courts from consolidating arbitration also reads *Byrd* too broadly. The Supreme Court authorized the inefficiency of separate arbitration and judicial proceedings,[171] but did not discuss the separation of two arbitration proceedings. Consolidating two separate arbitration proceedings meets the goal of enforcing arbitration contracts. The Act does not specifically require separation to validate arbitration agreements. A final consideration is that one party may be subject to inconsistent awards, which may further delay resolution of the dispute and adversely effect the parties' transaction.[172]

B. *Courts May Consolidate Arbitration*

Courts consolidating arbitration agreements emphasize efficient dispute resolution in responding to the maritime and business communities' demand for speedy judgments relative to the communities' respective standards.[173] Judicial authority to consolidate is found in Federal Rules of Civil Procedure 81(a)(3), providing that the rules apply to Title 9 proceedings when Title 9 is otherwise silent.[174] Because

170. *Id.* at 219.
171. *See supra* text accompanying notes 165-70.
172. *See supra* text accompanying notes 92-97.
173. *See New Law, supra* note 13, at 269.
174. *See supra* text accompanying notes 94-96.

the Arbitration Act fails to address arbitration procedure, courts may invoke Federal Rules of Civil Procedure 42(a) to consolidate arbitration.[175]

Courts consolidating arbitration reason that consolidation efficiently resolves complex grievances,[176] and avoids inconsistent verdicts.[177] Consolidating complex grievances effectuates the parties' intent to resolve quickly disputes arising from the contract. For instance, parties may wish to consolidate if the contract concerns volatile business transactions or if the parties desire efficiency above all other considerations. Consolidation also avoids inconsistent awards.[178]

Although the Supreme Court recognized that collateral estoppel's role is not settled in arbitration proceedings, the Court implied that collateral estoppel would not apply because arbitration is not a court process.[179] Thus, a party facing inconsistent awards does not have the additional onus of adverse collateral estoppel consequences prejudicing further litigation. Collateral estoppel may not apply to arbitration, however, a party receiving inconsistent decisions in separate proceedings cannot abide by one award without violating the other. Inconsistent awards could only be resolved in another arbitration forum or through litigation. However, additional proceedings settling inconsistent findings may add further delay to the dispute resolution process and ignore the parties' original intent of efficient dispute resolution. Consolidation, therefore, provides a practical method to resolve efficiently all interrelated disputes at one time.[180]

Arbitration, as a litigation substitute, can become unmanageable due to the risk of inconsistent verdicts or other unforeseen circumstances.[181] Consolidation may be an appropriate solution to effectuate efficient dispute resolution; however, efficiency alone does not authorize district courts to compel consolidation. Compelling consolidation is "in conflict with the contractual — and therefore voluntary basis of arbitration."[182] Parties voluntarily arbitrate, and agree in advance how to resolve disputes arising out of a contract.[183] Compelling

175. *See supra* text accompanying notes 94-97.

176. *See supra* text accompanying note 92.

177. *Id.*

178. *Id.*

179. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 222 (1985).

180. *See supra* text accompanying notes 92-102.

181. *Cf.* Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 (1960) ("There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties" for labor arbitration.).

182. Rubino-Sammartano, *supra* note 141, at 437.

183. *See supra* notes 74 & 148 and accompanying text.

procedures that the parties did not agree to perform undermines the effectiveness of the arbitration process. Furthermore, case law and section 4 of the Act suggest that arbitrators, not courts, determine pretermitted procedural arbitration issues.[184] Although a literal reading of Federal Rules of Civil Procedure 81(a)(3) and 42(a) authorizes courts to consolidate, the Supreme Court has not addressed the consolidation issue in any "procedural/substantive" arbitration cases.

C. *Court Interpretation of the Contract Authorizes the Courts to Consolidate*

Courts consolidating arbitration because the contracts' interrelated nature imply the parties' consent subscribe to both enforcing the arbitration agreement and efficient dispute resolution.[185] These courts recognize that section 4 of the Act limits the judiciary's involvement in the arbitration process;[186] however, courts are authorized to consolidate when parties implicitly consent through broadly stated arbitration agreements.[187]

This middle approach is subject to both the advantages and disadvantages applicable to the previous views.[188] However, this middle route may be the approach least subject to criticism under the status quo. Courts stay within their authority to interpret contract provisions in determining whether an arbitration agreement exists, and then compel arbitration according to the agreement's terms. Because the arbitration contract creates the parties' rights in the arbitration process,[189] court enforcement of the implied consent to consolidate is valid under the United States Arbitration Act. This middle approach, however, further blurs the "substantive"/"procedural" distinction the *Wiley* Court attempted to delineate.[190] When courts interpret the contract to authorize consolidation, they determine procedural issues potentially affecting the dispute's outcome. The *Wiley* Court held that the arbitrator, not the court, determines these procedural issues. Furthermore, when district courts stretch a broad arbitration clause to its limits compelling consolidation, efficiency is served but the parties' intent may not be given full effect.

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184. *See supra* notes 9-11 & 71-73 and accompanying text.
185. *See supra* text accompanying notes 112-14.
186. *See supra* text accompanying notes 103 & 124.
187. *See supra* text accompanying notes 112-14.
188. *See supra* notes 139-46 & 154-71 & 178-84 and accompanying text.
189. *See supra* text accompanying notes 74, 148 & 183.
190. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

D. *Resolving the Consolidation Conflict*

Problems abound with each approach to consolidating arbitration. Without legislative enactment or a Supreme Court ruling, no solution currently covers every situation because arbitration is fact-specific. Because parties mutually consent to arbitration in their contract, the ultimate source of each party's rights is found in that contract.[191] Consolidation is a difficult issue for the judiciary,[192] and forces courts to determine whether authority exists to consolidate multiple claims.

Many procedural issues have arisen since Congress passed the Arbitration Act, but Congress has not refined the Act to address specific issues of waiver, preemption, or consolidation.[193] Although an amendment allocating procedural duties between the arbitrator and the district court would immediately solve these issues, Congress cannot sufficiently address or foresee all the details of each situation. Furthermore, Congress should not intrude upon the parties' right to create and choose dispute resolution procedures.

A more immediate solution compatible with the Act's primary purpose[194] requires parties to outline specific procedures in the arbitration agreement. Obviously, the parties cannot foresee and address every potential problem in an arbitration clause, but a general understanding of the ramifications of broad or narrow arbitration clauses in a particular judicial district could avoid surprise when disputes arise.[195] Unless parties desire compelled consolidation, narrowly drafted arbitration clauses should replace broad boilerplate arbitration clauses.[196] By specifying their intent and consent to consolidation and other procedural issues, courts and arbitrators may not easily interfere with the parties' contract. Although parties cannot foresee every situation, parties to interrelated transactions can foresee possible multiple dis-

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191. *See supra* text accompanying notes 74 & 148.

192. *See* Rubino-Sammartano, *supra* note 141, at 436.

193. *See supra* notes 7-12 and accompanying text.

194. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (the Act's primary purpose is to enforce arbitration agreements).

195. *See* Lord, *Arbitration in the United States*, 8-9 MAR. L. 227, 229 (1983-84) (discussing broad versus narrow arbitration clauses).

196. *See, e.g.*, Maxum Founds., Inc. v. Salus Corp., 817 F.2d 1086, 1087 (4th Cir. 1987) (The contract stated, "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* . . . .") (emphasis in original); Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966, 969 (2d Cir. 1977) (arbitration clause began "Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration . . . .").

putes arising out of a single occurrence. Clearly in interrelated arbitration contracts, parties should address consolidation according to their intent rather than having courts or arbitrators force consolidation. Using narrowly drafted clauses rather than broad arbitration clauses also prevents a court from inferring the parties' intent to consolidate. In any jurisdiction, the parties are in the best position to protect their interests.[197]

V. THE FUTURE OF CONSOLIDATION

The arbitration procedure's future is uncertain because of the varying theories behind the Act's purpose. When Congress enacted Title 9, it desired to remedy judicial hostility towards enforcing arbitration agreements by creating efficient dispute resolution. However, Congress failed to address the practicalities of enforcing arbitration. Parties to complex transactions should be aware of the various holdings regarding consolidation to avoid unwanted procedures to resolve their disputes. If the transaction requires speedy resolution, parties should specifically authorize the district court to consolidate all claims arising from the dispute. If, on the other hand, a party desires to confine arbitration to the other party in the contract, the contract should specifically forbid courts and arbitrators to consolidate. Parties in this latter situation should beware of broad boilerplate arbitration clauses because some courts interpret them as authorizing consolidation. Until Congress amends the United States Arbitration Act to specify procedural rules, the parties to an arbitration agreement are best suited to protect their interests rather than relying on tradition or their unstated intent in the contracts.

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197. *See* Oehmke, *Commercial Arbitration Submission Agreements: No More "Jack in the Box,"* CASE & COM., Mar./Apr., 1988, at 3 (recommending arbitration clauses tailored to clients' particular needs rather than blind reliance on the American Arbitration Association's standard arbitration clause). This article explores many considerations pertinent to creating a contractual arbitration clause. The drafter should consider the impact of deviating from the standard rules to avoid surprises. *Id.* at 6.