12 Am. Rev. Int'l Arb. 335

American Review of International Arbitration
2001

Article

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*335 ABSENCE OF CONSENT TRUMPS ARBITRAL ECONOMY: CONSOLIDATION OF ARBITRATIONS UNDER U.S. LAW

I. INTRODUCTION

This article examines the extent to which courts and arbitral tribunals may order consolidation of related arbitrations under federal and state laws in the United States without the consent of all parties involved.

Based on an analysis of recent case law, the authors conclude that U.S. courts are unlikely to compel consolidation, unless they find a basis for such in an agreement between the parties (pre-dispute--express or implied--or post-dispute), governing law, or the applicable arbitration rules. The law remains unsettled, however, with regard to the power of a court to order consolidation in the face of a party's objection, even where there is a statutory basis for consolidation. Parties can reduce uncertainty if they address consolidation issues when they enter into an arbitration agreement; the authors will address how parties can deal with consolidation issues at the drafting stage.

II. CONSOLIDATION SCENARIOS

Consolidation issues may arise in two-party and in multiparty relationships. In both situations, the issue may come up either when parties initiate separate arbitrations for various disputes under the same contract, or when the parties' disputes arise from separate but related contracts.

The multiparty context presents a variety of contractual situations. In the first situation, the same parties (A, B and C) are all signatories to the same agreements. [1] In the second

situation, the "horizontal contractual relationship," A enters into a contract with B, a second contract with C, and a third contract with D. [2] The third situation is the "vertical contractual relationship": A contracts with B, B with C and C with D. [3]

***336** In both the two-party and the multiparty context, separate but related contracts may (i) contain identical arbitration clauses that refer to the same arbitration rules and venues, (ii) contain arbitration clauses that refer to different rules and/or venues, (iii) have an arbitration clause in one contract to which reference is made in all related contracts, or (iv) be silent on the subject of dispute resolution.

III. CONSOLIDATION UNDER U.S. LAW

A. *The FAA: Generally No Consolidation Absent the Parties' Agreement*

In the United States, the Federal Arbitration Act (the "FAA") authorizes district courts to compel arbitration "in the manner provided for in [the arbitration] agreement." [4] Currently, the federal courts of appeals that have considered the issue seem to be in agreement that consolidation may not be compelled under the FAA in the absence of the parties' express consent. Recent developments, however, suggest that the Seventh and the Second Circuits may allow for court-ordered consolidation where implied consent is found or where the disputes arise out of identical contracts that are silent on the question of consolidation.

1. *Nereus: "Liberal Purposes of the FAA"*

In 1975, the Second Circuit Court of Appeals decided *Compania Española de Petroleus, S.A.* v. *Nereus Shipping, S.A.* [5] Nereus, a Liberian corporation, and Hideca, a Venezuelan corporation, had entered into a maritime contract of affreightment. [6] This contract included an arbitration clause, which was silent on consolidation. [7] Later, Nereus, Hideca and Cepsa, a Spanish company that served as guarantor for Hideca, signed an addendum under which Cepsa assumed the rights and obligations of Hideca "on the same terms and conditions as contained in the [first agreement]." [8] The arbitration clause provided, among other things: "Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party, to specify further disputes or differences under the charter for hearing and determination." [9]

***337** Upon Hideca's default, Nereus demanded arbitration with Hideca and then Hideca served its demand for arbitration on Nereus. [10] Subsequently, Nereus demanded arbitration with Cepsa. Nereus' strategy was to have the Cepsa arbitration proceed first and the Hideca

arbitration occur later. [11] Cepsa rejected the demand, claiming it had not agreed to arbitrate, and started an action in a federal district court seeking a declaratory judgment that it had not agreed to arbitrate and an injunction enjoining Nereus from arbitrating its dispute with Cepsa. [12] Hideca moved in a separate action to stay the Nereus/Cepsa arbitration. [13] On December 18, 1974, the district court found that Cepsa was bound to arbitrate. [14] On March 21, 1975, the district court ordered consolidation of the two arbitrations. [15] Cepsa appealed from the first order, and Nereus appealed from the second order. [16]

On appeal, the Second Circuit affirmed the order of the district court, holding that, where a contract is silent on the issue of consolidation, courts have authority to order consolidated arbitrations involving common questions of fact or law, at least where separate arbitrations would pose a risk of inconsistent awards. [17] The court also stated that Rules 42(a) and 81(a)(3) of the Federal Rules of Civil Procedure were applicable. [18] More importantly, the court also based its decision on the "liberal purposes" of the FAA. [19]

*338 2. *From Weyerhaeuser to Boeing: More Restrictive Interpretation*

a. *Weyerhaeuser: No compelled consolidation*

In *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, [20] the Ninth Circuit rejected the *Nereus* approach. In this case, Trans-Pacific Shipping chartered two ships to Weyerhaeuser. [21] Subsequently, Weyerhaeuser subchartered the ships to Karlander Ltd. A dispute arose, and Karlander demanded arbitration with Weyerhaeuser under the standard arbitration clause in the subcharter. Subsequently, Weyerhaeuser demanded arbitration with Trans-Pacific over Weyerhaeuser's right to indemnity from Trans-Pacific for any losses that Karlander might recover in its arbitration. Weyerhaeuser petitioned the district court to compel consolidation of the two arbitrations, and Trans-Pacific and Karlander opposed the petition. The district court denied the petition, and Weyerhaeuser appealed. [22]

The Ninth Circuit affirmed, holding that the FAA only empowered a court to "enforce [an arbitration agreement] 'in accordance with its terms.'" [23] Subsequently, the Fifth, Sixth, Eighth, Ninth and Eleventh Circuits followed the *Weyerhaeuser* decision. [24] Moreover, the *Weyerhaeuser* reasoning has been ***339** adopted in certain decisions of district courts in the Southern District of New York, one of which speculated that *Nereus* was no longer valid law. [25]

b. *Boeing: Partial overruling of Nereus*

In 1993, the Second Circuit partially overruled *Nereus* in *United Kingdom* v. *The Boeing Company*.[26] The Second Circuit described the facts as follows: "This case ... arises from a January 1989 ground testing incident in which a military helicopter owned by the United Kingdom was damaged. The incident occurred ***340** during Boeing's testing of a new electronic fuel control system (FADEC) that had been designed by Textron and installed in the helicopter by Boeing."[27] Boeing and Textron had separate contracts with the United Kingdom. In addition, they were parties to a separate Interface Agreement between them defining their respective responsibilities for the FADEC project.[28]

The United Kingdom filed Demands for Arbitration with the American Arbitration Association ("AAA") against Boeing and Textron, and then requested that Boeing and Textron consent to consolidation of the arbitration proceedings. Boeing took the position that, given the relative simplicity of the issues involved in its arbitration as compared to the Textron arbitration, consolidation would impose undue expense and effort. The district court ordered consolidation of the proceedings.[29]

The Second Circuit reversed, holding that consolidation could not be compelled under these facts.[30] The court distinguished *Nereus* on its facts because in *Nereus* all three of the parties had signed the addendum agreement under which the third party in the case had "'assume[d] the rights and obligations' of [one of the original parties], including the obligation to participate in arbitration over any disputes."[31]

In addition, the court distinguished *Nereus* on the basis that it relied on the implicit consent of the parties to the consolidation. The Second Circuit stated that the signatories' intention in *Nereus* was "most closely adhered to with a single arbitration proceeding."[32] In the agreements at issue in *Boeing,* however, the court found "no grounds to conclude that the parties consented to consolidated arbitration."[33]

The Second Circuit implicitly overruled one basis for the *Nereus* decision in holding that "[t]he district court is without authority to consolidate the two actions based upon the mere fact that the disputes contain similar or identical issues of fact and law."[34] The court expressly overruled *Nereus*' conclusion that the FAA's "liberal purposes" and the Federal Rules of Civil Procedure allowed consolidation of arbitration proceedings absent consent.[35] The Second Circuit based its decision on three cases decided by the Supreme Court after *Nereus,* namely ***341** *Volt Information Sciences, Inc. v. Bd. of Trustees of*

Stanford University, [36] *Dean Witter Reynolds Inc.* v. *Byrd,* [37] and *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.* [38] The Second Circuit found that "[t]hese cases concluded that the FAA was intended merely to assure the enforcement of privately negotiated arbitration agreements, *despite* possible inefficiencies created by such enforcement." [39] The Second Circuit cited *Byrd*: "The legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims." [40]

However, the court also held that it did "not disturb *Nereus* to the extent it is based on the general equitable powers of the court and principles of contract law." [41]

c. *North River: Equitable powers of the court*

In *North River Ins. Co.* v. *Philadelphia Reinsurance Corp.*, [42] the Second Circuit confirmed that it had not overruled *Nereus* insofar as that decision was based on the general equitable powers of the court. North River had entered into reinsurance contracts with several reinsurers (the "U.S. Reinsurers") and several foreign reinsurers (the "London Reinsurers"). [43] The contracts contained identical arbitration provisions and were part of a single reinsurance treaty program. [44] The U.S. Reinsurers and the London Reinsurers had agreed to two separate arbitrations between all members of each group and North River. However, when North ***342** River sought to consolidate the two arbitrations, the U.S. Reinsurers and the London Reinsurers objected. The district court ordered consolidation of the two proceedings, relying on *Nereus*. The reinsurers did not appeal. On June 29, 1993, the Court of Appeals issued its *Boeing* decision. The parties proceeded with the consolidated arbitration and an award was rendered on October 21, 1993. [45]

North River, after winning the arbitration, petitioned the district court to confirm the award under Section 9 of the FAA. [46] The reinsurers cross-moved under Section 10 of the FAA to vacate the award. The district court, finding that *Boeing* represented a "fundamental change in the governing law," granted the reinsurer's motion. [47] It vacated the order compelling a consolidated arbitration and the resulting arbitration award, and ordered two new, separate arbitrations. [48]

The Second Circuit reversed. [49] Despite lack of consent by all of the parties to consolidate the arbitrations, the court found that the district court had abused its discretion in reopening its decision to order consolidation and in vacating the arbitration award, and remanded the

case to the district court.[50] The Second Circuit found that "in a very real sense, *Boeing* did not overrule *Nereus*."[51] First, the facts in those cases were different: "In *Boeing,* the parties had entered into separate contractual agreements to arbitrate, while in *Nereus* the parties were bound by the same arbitration agreement."[52] The court found that "it is entirely unclear whether the outcome of a case factually similar to Nereus would, after *Boeing,* be any different than it was in *Nereus* before *Boeing*."[53] Second, the court stressed that *Nereus* was overruled only to the extent that it relied on the Federal Rules of Civil Procedure and the "liberal purposes" of the FAA, and that *Nereus* remained good law to the extent it was based on the general equitable powers of the court and principles of contract law.[54] The Second Circuit held that "equitable principles allow for confirmation of an award in a consolidated proceeding already had, especially when the parties did not appeal from the order of consolidation."[55]

The Second Circuit concluded that, "because *Boeing* did not, in a real sense, change the law of this circuit *and because the reinsurers chose not to appeal the district court's original order consolidating the arbitrations*, and because a ***343** balance of the equities requires that the award stand, the district court abused its discretion in reopening its prior order and vacating the arbitration award."[56] It is unclear, however, whether consolidation would have been upheld had the reinsurers timely appealed the consolidation order, as the Second Circuit found the case to fall "somewhere between *Nereus* and *Boeing*."[57]

d. *Glencore: Boeing reaffirmed*

In *Glencore, Ltd.* v. *Schnitzer Steel Products Co.*,[58] the Second Circuit reaffirmed *Boeing* and extended its reasoning to joint hearings. In this case, Glencore had entered into a purchase contract with Schnitzer Steel and into a charter party agreement with Halla. The purchase contract provided for arbitration under the American Arbitration Association Rules, while the charter party agreement provided for arbitration under the Society of Marine Arbitrators Rules.[59]

After Glencore suffered damages, for which it alleged either Schnitzer Steel or Halla was liable, Glencore initiated an American Arbitration Association arbitration against Schnitzer Steel and a separate Society of Marine Arbitrators arbitration against Halla. Glencore then petitioned the district court for an order consolidating the two arbitrations or, in the alternative, requiring a joint hearing. Schnitzer Steel filed a motion to dismiss the petition, arguing that the district court was without authority to order the relief requested by Glencore. The district court found that it was without authority to order consolidation of the two arbitrations and granted Schnitzer Steel's motion to dismiss the petition insofar

as it requested consolidation. However, the district court denied Schnitzer Steel's motion to dismiss the request for a joint hearing, and it ordered a joint hearing. Schnitzer Steel appealed. [60]

Agreeing with Schnitzer Steel that the district court was without authority to order a joint hearing, the Second Circuit vacated this part of the district court's order. [61] The Second Circuit reiterated *Boeing*'s holding that federal courts have no power to order consolidation of two or more arbitration proceedings "unless doing so would be 'in accordance with the terms of [an] agreement' ... between the parties." [62] In addition, the Second Circuit cited *Boeing*'s observation that "the FAA 'simply requires courts to enforce privately negotiated agreements to ***344** arbitrate, like other contracts, in accordance with their terms.'" [63] Finding that the terms of the agreements before the district court did not provide for a joint hearing, the Second Circuit concluded that the district court was without the power to order a joint hearing. [64]

e. *Home Insurance: Boeing applied*

The district court for the Southern District of New York applied *Boeing* in *Home Ins*. v. *New England Reinsurance Corp*. [65] At issue were four reinsurance agreements between two parties, The Home and New England Reinsurance. The first two contracts, entered into on June 28, 1961, contained identical arbitration clauses. [66] However, the court found no indication that the contracts were interrelated or interdependent. [67] In 1972, the parties entered into two additional agreements, effective on, respectively, January 1 and February 1 of 1972, containing similar (but not identical) arbitration provisions venued in New York City. [68]

The Home initiated four separate arbitration proceedings against New England Reinsurance. New England Reinsurance refused to proceed with the arbitrations, demanding consolidation. The Home then petitioned the district court to compel four separate arbitrations. [69] New England Reinsurance cross-moved for an order consolidating the four arbitrations or, in the alternative, to consolidate two of the arbitrations and stay the other two until completion of the consolidated arbitration. [70]

The district court found consolidation of the arbitrations impermissible under *Boeing*. It rejected New England Reinsurance's argument that the four contracts should be treated as one on the basis that they were all part of a comprehensive reinsurance plan. The court found that "New England Re cannot escape the fact that it entered into four separate agreements with The Home, none of which provides for consolidation." [71]

The district court found *North River* inapposite. It observed that "[i]n *North River* ... the Second Circuit exercised [its] equitable powers to prevent the reinsurers from vacating a final arbitration award; it did not use its equitable ***345** powers to order consolidation, as New England Re urges the Court to do in the instant matter ... In fact, the Second Circuit could not have ordered consolidation, because such an act cannot be undertaken by a court absent consent of all parties involved." [72]

The court also rejected The Home's argument that it could order consolidation under New York law, which the parties had chosen as the governing law in the first two contracts. [73] The court held that "even if, as New England Re asserts, New York arbitration law allows courts to order consolidation without the consent of all parties involved, such a law would be preempted by the FAA." [74] It found that the Second Circuit had declared in *Boeing* that the "goals and policies were to ensure that privately negotiated arbitration agreements are enforced according to their terms," and that based on these goals and policies, "a district court could not compel arbitration without the consent of all parties involved." [75] The district court found that for this reason, "any New York arbitration law that permits consolidation without the consent of all parties would conflict with federal law as pronounced by the Second Circuit and be preempted." [76] The court granted The Home's petition to compel four separate arbitrations. [77]

346 3.** ***Recent Developments in the Seventh and Second Circuits: More Liberal Approach to Court-Ordered Consolidation?

a. ***Seventh Circuit: Contractual interpretation and implied agreements to consolidate***

In *Connecticut General Life Ins. Co.* v. *Sun Life Assur. Co. of Canada*, [78] the Seventh Circuit decided a consolidation dispute between two (overlapping) sets of companies, "insurers" and "reinsurers," based on a single reinsurance contract to which all were parties. Two reinsurers had served a demand for arbitration on a middleman (who had negotiated the contract on behalf of the insurers) and the insurers, alleging fraud and seeking rescission of the contract and damages. Four insurers responded by filing their own demands, each seeking a separate arbitration between itself, on the one hand, and the two reinsurers, on the other. The district court ordered separate arbitrations, and the reinsurers appealed. [79]

The Seventh Circuit reversed, holding that the reinsurers were entitled to consolidation of the arbitrations. [80] The court reiterated that a court cannot consolidate arbitration proceedings "in defiance of the parties' wishes or contractual undertakings." [81] However, the court found

that in interpreting the parties' contract, there was no reason to disfavor consolidation. And it held that, while the parties' agreement was a necessary condition for consolidation, no special standard of proof applied: "But we cannot see any reason why, in interpreting the arbitration clause for purposes of deciding whether to order consolidation, the court should (as the language we quoted from the *American Centennial* case might, if read literally, be thought to suggest) place its thumb on the scale, insisting that it be 'clear,' rather than merely more likely than not, that the parties intended consolidation." [82]

The Seventh Circuit discussed how courts should go about interpreting the parties' agreement with regard to consolidation: "In deciding whether the contract does authorize it [to order consolidation] the court may resort to the usual methods of contract interpretation, just as courts do in interpreting other provisions in an arbitration clause." [83]

The contract at issue was silent on the issue of consolidation. The court analyzed the structure of the parties' contract and the way certain words such as "party" and "dispute" were used. Although there were multiple parties to the contract, the contract essentially treated them as two groups, with each group ***347** being considered a "party" for the purpose of either the contract or the arbitration, thus suggesting that they would have wanted to resolve their disputes in one proceeding. [84] The contract also provided: "If more than one [reinsurer] is involved in an arbitration where there are common issues of law or fact and a possibility of conflicting awards or inconsistent results, all such [reinsurers] will constitute and act as one party for purposes of [this arbitration provision] ...." [85] Additionally, the contract mandated that "*any* dispute" under the contract would be sent to a panel of three arbitrators. [86] The Seventh Circuit found that the word "dispute" does not normally exclude a dispute involving multiple parties. Finally, all of the separate arbitration proceedings involved the same "identical" dispute. The Seventh Circuit found that these textual inferences, while not conclusive, supported the conclusion that the parties intended "to have a single arbitration proceeding when there is a single dispute." [87]

The court then turned to practical considerations, "which are relevant to disambiguating a contract, because parties to a contract generally aim at obtaining sensible results in a sensible way." [88] The Seventh Circuit noted that "[t]o have the identical dispute litigated before different arbitration panels is a formula for duplication of effort and a fertile source, in this case, of disputes over esoteric issues in the law of res judicata ..." [89] Concluding that "the balance of both the textual and the practical arguments favor the reinsurers," the Seventh Circuit reversed the judgment of the district court. [90]

b. *Application of Connecticut General*

An Illinois district court applied the *Connecticut General* decision in *Rolls-Royce Indus. Power, Inc.* v. *Zurn EPC Services, Inc.*[91] The parties' dispute arose out of two contracts relating to the fabrication and purchase of a boiler system: a main contract, to which Rolls-Royce and Zurn EPC were parties, and a subcontract, entered into by Rolls-Royce and CPC.[92] The arbitration clause in the main contract was incorporated by reference into the subcontract. Therefore, both contracts contained identical arbitration provisions.[93] After Zurn EPC terminated the main contract, Rolls-Royce terminated the subcontract with CPC. Rolls-Royce ***348** then filed a demand for arbitration against Zurn EPC with the American Arbitration Association in Atlanta (rather than in Chicago, the "exclusive" arbitral location set forth in the arbitration agreement). CPC filed suit against Rolls-Royce in a state court in California. Eventually, CPC and Rolls-Royce stipulated to arbitrate their disputes, and CPC filed a demand for arbitration with the American Arbitration Association in Chicago.[94] Rolls-Royce requested the district court to consolidate the arbitrations. CPC and Zurn EPC objected.[95]

The district court refused to consolidate. It observed that the parties had not explicitly provided for consolidation of arbitrations. It noted that, while this fact would end the inquiry in most other circuits, *Connecticut General* required that the district court examine whether the parties have impliedly consented to consolidation.[96]

The district court distinguished the facts at issue in *Rolls-Royce* from the *Connecticut General* situation, in that "*Connecticut General* involved a single agreement whereas this case and the other circuit cases cited above involved multiple agreements."[97] The court continued, "Petitioner has cited to no case - and we have found none - holding that the parties impliedly consented to consolidated arbitration where there were two separate arbitration agreements with different parties signing each agreement."[98]

According to the court, it is less likely that the parties intended consolidation in a multiple agreement situation than when there is a single agreement.[99] In addition, it is harder to argue that "efficiency" considerations support consolidation. For Rolls-Royce, one arbitration would be more efficient, but this would not be the case for Zurn EPC and CPC.[100] Therefore, the district court dismissed the petition to compel consolidated arbitration.[101]

349 c.** ***Second Circuit leaves open whether Boeing prevents non-consensual court-ordered consolidation when there are similar claims, identical parties and nearly identical contracts

After the Seventh Circuit decided *Connecticut General Life Ins.*, the Second Circuit revisited the consolidation issue in *Hartford Accident and Indem. Co*. v. *Swiss Reinsurance America Corp*. [102]

In this case, Hartford, an insurer, and Swiss Reinsurance America ("SRA"), a reinsurer, each initiated separate arbitrations on different but related disputes regarding reimbursement of environmental pollution claims under a series of blanket contracts containing very similar or identical arbitration clauses. Each party refused to participate in the arbitration demanded by the other. Each party then filed an action in the district court to compel arbitration on its own terms. Hartford sought arbitration of a common calculation issue (the "Count 1 Claim"), billings made by Hartford to SRA for payments made to insureds (the "Count 2 Claims"), and payments made by Hartford which had not yet been billed to SRA (the "Count 3 Claims"). Hartford sought a bifurcated proceeding in which the Count 1 Claim would be resolved in the first phase of the arbitration and the other claims, taken together, in the second phase. [103] The district court found the unbilled claims to be not yet ripe for arbitration, compelled arbitration of some of the other claims before it, and ordered the arbitrations to proceed "claim-by-claim" unless the parties consented to consolidation. [104]

The Second Circuit found that all claims were arbitrable and that various claims could be brought in a single arbitration because SRA had consented to the joinder of an unlimited number of billed (and rejected) claims before the arbitration panel. [105] Therefore, the Second Circuit ordered consolidation of the Count 2 Claims for a threshold determination of the billing method issue posed by the Count 1 Claim. [106] The Second Circuit held further that, if such determination would cause the unbilled claims contained in Count 3 to become billable, the same arbitration panel should proceed to determine the amounts due Hartford under all pertinent claims, whether billed or unbilled. [107]

In *dicta*, the Second Circuit suggested that *Boeing* did not completely overrule *Nereus*, when it noted: "We need not decide, however, whether our precedent proscribes consolidation of similar claims arising between the same parties under ***350** a series of nearly identical contracts that are silent on the question of consolidation ...." [108]

d. ***Clarendon: Under Hartford, no consolidation absent express agreement***

A district court in the Southern District of New York recently had the opportunity to consider the Second Circuit's *dicta* in *Hartford* when it decided *Clarendon National Insurance Company* v. *The John Hancock Life Insurance Company*. [109] The district court concluded that it could not order consolidation of arbitrations between two parties in a dispute concerning ten different agreements, divided into three groups, which were part of a contractual scheme. [110] The court held that "[t]he general rule in the Second Circuit with respect to consolidation is that the FAA does not empower the district court to consolidate arbitrations, absent language in the parties' contract authorizing such consolidation." [111]

In addition to rejecting Clarendon's request for consolidation of the disputes under all ten agreements, the court found that the arbitration agreements did not permit Clarendon to bring the dispute in three "grouped arbitrations." It held that, without Hancock's clear consent to consolidation of the proceedings, Clarendon would have to start ten separate proceedings. [112]

The district court rejected Hancock's argument that *Hartford* would mandate consolidation under the facts as presented. The court found that "the [Second Circuit] in *Hartford Accident* did not overrule *Boeing*, but instead, specifically relied on the rationale of the *Boeing* court. ... Most importantly, the Second Circuit reiterated the underlying purpose of the FAA-- that is, that the FAA 'mandates enforcement of the bargains struck by the parties and nothing more.'" [113]

*351 *B. Explicit Statutory Consolidation: State Statutes*

Several states have provisions on consolidation in their arbitration statutes. Massachusetts, Nevada, New Mexico and Utah have provisions in their arbitration acts allowing for court-ordered and non-consensual consolidation. These acts do not distinguish between domestic and international arbitrations.

California, Florida, Ohio, Oregon, North Carolina and Texas have included consolidation provisions in their international arbitration acts, and Georgia and Hawaii have consolidation provisions in their arbitration acts which appear to apply to both domestic and international arbitrations. California has a separate consolidation provision in its domestic arbitration act. The Florida, Georgia and Hawaii acts and the domestic California act provide for non-consensual consolidation.

1. *Consolidation Provisions in Arbitration Acts which Apply to Domestic and International Arbitrations*

Massachusetts has a consolidation provision in its Uniform Arbitration Act for Commercial Disputes (the "MUAA") that appears to provide for non-consensual consolidation by a court. [114]

The Revised Uniform Arbitration Act (the "RUAA"), drafted in 2000 by the National Conference of Commissioners on Uniform State Laws, provides for consolidation of separate arbitration proceedings. This provision grants authority to a court to order consolidation, unless the arbitration agreement prohibits consolidation. [115]

***352** Recently, Nevada, New Mexico and Utah have adopted consolidation provisions modeled after the RUAA's provision. [116] All of these provisions are currently in effect, with the Utah provision having become effective on May 15, 2003.

2. *Consolidation Provisions Applicable Specifically to International Arbitrations*

Florida provides for non-consensual consolidation by the arbitral tribunal where disputes to be arbitrated under its international arbitration act have common questions of law or fact or arise out of a single transaction or enterprise. [117]

***353** Under the Texas provision, a Texas district court may order consolidation only if the parties agree. If the parties agree to consolidate but cannot agree on the tribunal for the consolidated arbitration or other procedural issues, the court may make these determinations. [118] The North Carolina, Ohio and Oregon provisions are very similar to the Texas provision. [119]

Georgia has a non-consensual consolidation provision in its Arbitration Code, which applies to both domestic and international arbitrations. [120] This provision contains relatively elaborate procedures for consolidation. Most interestingly, the Georgia statute authorizes the court to resolve any conflicts between different arbitration agreements, and to determine the rights and duties of various parties. [121]

***354** Hawaii has a non-consensual consolidation provision in its Arbitration Act which appears to apply to international arbitrations as well as domestic arbitrations. [122] Hawaii has adopted the consolidation provision of the RUAA. [123]

3. *California: Non-Consensual Consolidation Only in Domestic Arbitrations*

California has a clause in the Arbitration Chapter of its Code of Civil Procedure that provides for non-consensual consolidation by a court if three conditions are met: (i) there are separate arbitrations between the same parties or one party is a party to a separate arbitration with a third party; (ii) the disputes arise from the same transactions or series of related transactions; and (iii) there is a common issue or issues of law or fact creating the possibility of conflicting ***355** rulings.[124] However, in the event of arbitrations of an international commercial dispute, California provides for consolidation only by agreement of the parties.[125]

***356** 4. *The Scope of a Court's Authority to Order Non-Consensual Consolidation under State Statutes*

A court's authority to consolidate arbitrations under the MUAA over the objections of a party was addressed in *CRS Sirrine Engineers, Inc.* v. *Aetna Casualty and Surety Co.*,[126] where Party A sought consolidation of related disputes under two related contracts, one between Party A and Party B and one between Party A and Party C. In this case, the Massachusetts district court remarked "[t]hat authority may be available where the parties have not provided otherwise ... but it may not be exercised to vary the parties' agreements about arbitration."[127]

Applying this rule to the case before it, the Court found that even though the arbitration clauses contained no explicit references to consolidation, such consolidation would vary the parties' agreement.[128] "The Massachusetts Uniform Arbitration Act requires consolidation/severance decisions to be made according to the standards applicable in civil litigation under Mass. R. Civ. P. 42. It thus provides a different standard of reference than these parties agreed to [namely the AAA's Construction Industry Arbitration Rules], and it may not be used to change the rules which the parties stipulated should apply to their arbitration proceedings."[129] Although the parties' agreements and the AAA Construction Rules were silent on consolidation, the court based its ruling on the fact that the two related contracts under which consolidation was sought provided for three arbitrators, and gave each of the two parties to each of the two contracts the power to nominate one arbitrator. In a consolidated arbitration, parties B & C would have had to cooperate in nominating a single arbitrator.[130] Thus, although there was no explicit mention of consolidation, the court seemed to rule out consolidation based on an implicit agreement not to consolidate, *e.g.*, agreed-upon procedures that would require modification in the event of consolidation.

Interestingly, the First Circuit appeared to suggest a somewhat broader interpretation of a court's authority to consolidate under the MUAA in New *England Energy, Inc*. v. *Keystone Shipping Co*.[131] The Court also held that the FAA did not pre-empt state law on consolidation. In *New England Energy* there were two contracts at issue. In the first agreement, NEEI and Keystone created a joint venture named NECCO, which became owner and operator of a coal-carrying ship named the Energy Independence. In the second agreement, NEP chartered the Energy Independence from the joint venture. Both NEEI and NEP ***357** were part of the New England Electric System, an electric utility holding company.[132]

Two arbitrations were commenced: one between NEEI and Keystone (the joint venturers) and one between NEP and NECCO. NEEI and NEP filed suit in a Massachusetts state court seeking consolidation of the two arbitrations pursuant to the MUAA, and Keystone removed the action to federal court based on diversity jurisdiction. The federal district court ruled that the factual circumstances were appropriate for consolidation under the MUAA, but that it lacked the power to join the cases under the FAA.[133]

On appeal, the First Circuit found that the FAA had never been held to preempt state law on arbitration.[134] Since the FAA is silent on the issue of consolidation, the court concluded that the Massachusetts provision allowing consolidation of arbitrations was not in conflict with the FAA.[135] The First Circuit concluded that the district court had not abused its discretion in concluding that the two arbitrations should be consolidated under the MUAA and remanded the case for further proceedings in accordance with its ruling.[136] The First Circuit stated in dicta:

> Because the parties' agreements in this case do not refer to consolidation, we need not address whether federal law bars the state statute from superseding a contractual provision expressly prohibiting consolidation. Supreme Court precedent strongly indicates, however, that state law should not prevail over such a privately negotiated contractual provision.[137]

Thus, while the Massachusetts court in *CRS* found that silence on consolidation coupled with procedures inconsistent with consolidation would bar consolidation under the MUAA, the First Circuit appeared to find consolidation appropriate absent an explicit agreement to exclude consolidation. Given the unsettled nature of the law in this regard, relying on a state statute for non-consensual consolidation may prove a perilous cause of action, even more particularly so in the case of an international arbitration.

*358 IV. ENFORCEABILITY OF AN AWARD UNDER THE NEW YORK CONVENTION: *KARAHA*

Objections to consolidation imposed by courts or national law are based on the position that such consolidation overrides the parties' agreement, even if such agreement does not explicitly exclude consolidation. Therefore, an arbitration proceeding so consolidated could arguably result in awards that are unenforceable on the basis of Article V(1)(d) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), which provides that recognition and enforcement of an award may be refused on the basis that "[t]he composition of the arbitral authority, or the arbitral procedure was not in accordance with the agreement of the parties ..." [138]

Recently, a Texas district court faced this issue in *Karaha Bodas Co*. v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*. [139] While the basis for consolidation was Swiss law, the decision offers an interesting analysis by a U.S. district court on the enforceability of an award under the New York Convention where the tribunal has consolidated arbitration proceedings without the consent of all parties.

The dispute involved three parties: Karaha Bodas Company ("KBC"), a Cayman Islands company, Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), a corporation owned by the Government of the Republic of Indonesia, and PLN, a state-owned Indonesian company. These parties entered into two contracts relating to the development of a geothermal project in West Java, Indonesia. KBC and Pertamina were parties to a Joint Operations Contract (the "JOC"), and KBC, Pertamina, and PLN were parties to an Energy Sales Contract (the "ESC"). Both contracts contained almost identical provisions providing for arbitration of disputes in Geneva, Switzerland, under the UNCITRAL Arbitration Rules. [140]

After the Indonesian government postponed the project indefinitely, Pertamina and PLN did not fulfill their contractual obligations. KBC initiated a single arbitration proceeding against Pertamina and PLN under the JOC and the ESC. [141] PLN and Pertamina objected, claiming that "KBC had improperly attempted to consolidate claims against different parties arising under separate agreements or putative agreements and that the [t]ribunal had been improperly ***359** constituted ..." [142] The tribunal rejected these arguments. [143] Eventually, the tribunal found for KBC on the merits, holding that Pertamina had breached the ESC and the JOC and that PLN had breached the ESC. [144]

KBC brought an action in the district court, seeking enforcement of the award under the New York Convention. [145] Pertamina moved to block enforcement of the award, asserting various defenses under the New York Convention. Pertamina argued, among other things, that the award was unenforceable under Article V(1)(d) of the New York Convention because the tribunal had improperly consolidated the disputes under the JOC and EXC into one arbitral proceeding. [146] The district court rejected this argument, finding that the basis for the tribunal's decision to consolidate was the Swiss law concept of "connexity" of KBC's claims and the integration of the two contracts. [147] The district court held that, since the parties agreed to arbitration in Switzerland, there was a legal foundation for the tribunal's application of Swiss law to the consolidation issue. [148] Finding that "the consolidation did not violate the parties' agreements," the court concluded that Pertamina had failed to show a violation of Article V(1)(d) of the New York Convention. [149] Interestingly, in language reminiscent of the Second Circuit's decision in *Nereus*, the court also observed: "[T]he tribunal concluded that the nature of the contracts at issue is such that the parties contemplated arbitration in a single proceeding. This Court strongly concurs." [150]

The court rejected Pertamina's other defenses to enforcement as well, and confirmed the award. [151]

V. DRAFTING CONCERNS

When disputes involve common issues of law and fact, the advantages of consolidating related court proceedings apply with equal force to arbitrations. From the perspective of efficiency, multiple arbitrations often mean a duplication of efforts. Also, justice may be better served if an arbitrator has a more complete picture of related disputes. The possibility of initiating separate proceedings may ***360** be used or abused strategically. Finally, separate arbitration proceedings may lead to incompatible outcomes.

Of course, these advantages may not apply equally to each party to a contract. Under certain circumstances, some parties may want to exclude the possibility of consolidation, whereas others may have an interest in consolidation. However, even if only to reduce uncertainty and to avoid duplicative expenses, it is advisable for the parties to consider whether they want to include a consolidation provision (or a provision excluding consolidation) at the time they enter into a contract.

In drafting a consolidation clause, parties should ideally provide for the following:

- The scope of the consolidation clause (*i.e.*, identify the agreements and parties covered by it);

- A procedure for the tribunal to determine whether consolidation is appropriate;

- Standards for consolidation (*e.g.*, consolidation is appropriate when there are issues of fact or law common to the proceedings and a consolidated proceeding would be more efficient, and no party would be unduly prejudiced as a result of consolidation);

- A solution in case different tribunals reach different decisions on consolidation;

- A procedure for determining which tribunal will serve as the arbitral tribunal for the consolidated arbitration (including designating an institution that has ultimate authority to make this determination in case the parties fail to agree);

- Joinder of parties or claims.

The following consolidation clause is an example of a provision that addresses all these issues:

CONSOLIDATION

In order to facilitate the comprehensive resolution of related disputes, all claims between any of the parties to this Agreement that arise under or in connection with the [A] Agreement, the [B] Agreement, or the [C] Agreement (collectively "Other Agreements") may be brought in a single arbitration. Upon the request of any party to an arbitration proceeding constituted under this Agreement or any of the Other Agreements, the arbitral tribunal shall consolidate such arbitration proceeding with any other arbitration proceedings involving any of the parties hereto relating to this Agreement or to any of the Other Agreements if the arbitrators determine that (i) there are issues of fact or law common to the ***361** proceedings so that a

consolidated proceeding would be more efficient than separate proceedings, and (ii) no party would be prejudiced as a result of such consolidation through undue delay or otherwise. In the event of different rulings on this question by an arbitral tribunal constituted hereunder and an arbitral tribunal constituted under any of the Other Agreements, the ruling of the arbitral tribunal constituted first in time shall control, and such arbitral tribunal shall serve as the arbitral tribunal for any consolidated arbitration.

VI. CONCLUSION

While some U.S. jurisdictions have enacted legislation that provides for consolidation of related disputes, most state statutes do not provide for consolidation. In addition, federal courts have found that the FAA does not allow them to order consolidation unless they find that an express or implied agreement by the parties authorizes them to do so. Therefore, to avoid uncertainty and increase efficiency, it is important that in appropriate circumstances the parties agree on a procedure for consolidation of arbitrations at the time they negotiate pre-dispute arbitration agreements.

Footnotes

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1 Bernard Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts- Parties- Issues*, 18 J. INT'L ARB. 251, 299 (2001).

2 *Id.*

3 *Id.*

4 9 U.S.C. § 4.

5 527 F.2d 966, (2d Cir. 1975) *cert. denied*, 426 U.S. 936 (1976), *partially overruled by* United Kingdom v. The Boeing Company, 998 F.2d 68 (2d Cir. 1993).

6 527 F.2d at 968-69.

7 *Id.* at 969.

8 *Id.* at 969-70.

9 *Id.* at 970.

10 *Id.*

11 *Id.*

12 *Id.* at 971.

13 *Id.* at 971-72.

14 *Id.* at 971.

15 *Id.* at 971-72.

16 *Id.* at 972.

17 *Id.* at 974.

18 *Id.* at 975.

19 *Id.* Shortly before the *Nereus* decision, the Third Circuit had addressed a similar situation in *Gavlik Constr. Co.* v. *H.F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975). While the Third Circuit ordered consolidation, it based its decision on the language used in the relevant contractual provisions, which the subcontractor, while not initially a party to the agreements, had accepted as valid and binding. *Id.* at 788-89. The Third Circuit declined to decide whether there was a basis for such consolidation under the FAA and the Federal Rules of Civil Procedure. *Id.* at 789.

20 743 F.2d 635 (9th Cir.), *cert. denied,* 469 U.S. 1061 (1984).

21 743 F.2d at 636.

22 *Id.*

23 *Id.* at 637, *quoting* the FAA, 9 U.S.C. § 4.

24 *See, e.g.,* Del E. Webb Const. v. Richardson Hosp. Authority, 823 F.2d 145, 150 (5th Cir. 1987)("under § 4 of the Federal Arbitration Act the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration"); Protective Life Ins. Corp. v. Lincoln Nat'l Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989) ("[p]arties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in"); Baesler v. Continental Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990) ("absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); American Centennial Ins. Co. v. Nat'l Casualty Co., 951 F.2d 107, 108 (6th Cir. 1991) ("a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation"). However, the Fourth Circuit found implied consent in a case where, while the arbitration provision "does not unambiguously proclaim a willingness to consolidate arbitration, it does so when read in the context of the interlocking contracts between Owner, General Contractor and Subcontractor. Both of the contracts at issue here conferred rights and imposed obligations on *all three parties." See* Maxum Foundations v. Salus Corporation, 817 F.2d 1086, 1087 (4th Cir. 1987) (emphasis in original).

In a recent decision, *Philadelphia Reinsurance Corp.* v. *Employers Insurance of Wausau*, 2003 U.S. App. Lexis 6198 (3rd Cir. March 31, 2003), the Third Circuit, although upholding the district court's order that the parties' disputes be consolidated into a single arbitration on the basis that the parties had an "informal agreement" between them to do so, appeared to adopt the majority view of consolidation in a footnote. The court noted, "We agree with Wausau that a district court cannot compel consolidation of arbitration absent an explicit agreement between the parties. We expressly disavow the district court's alternative holding that 'the interests of justice and judicial economy are best served' by consolidating the arbitrations." *Id.* at *12 n. 4.

To date, the Tenth Circuit and the D.C. Circuit have not decided the issue, and few lower courts in these circuits have addressed consolidation of arbitrations. *See* Painewebber v. Fowler, 791 F.Supp. 821, 824 (D. Kan. 1992) (following *Weyerhaueser* after mentioning that "the Tenth Circuit has not yet passed on this question"); Kanuth v. Precott, Ball & Turben, No. 88-1416, 1989 U.S. Dist. LEXIS 5425, at *7 (D.D.C. 1989) ("the more recent cases ... do not support [the] argument that this court lacks the authority to order the consolidation of separate arbitration proceedings").

In *New England Energy Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), *cert. denied,* 489 U.S. 1077 (1989), discussed in more detail below, the First Circuit declined to decide whether a federal court has the power to order consolidation in the absence of a state law providing for it. 855 F.2d at 3. *See also* Seguro de Servicio de Salud de Puerto Rico v. McAuto Systems Group, Inc., 878 F.2d 5, 8, 9 (1st Cir. 1989) ("[w]e do not need to resolve [the issue reserved in *New England Energy*] here,

however, because we conclude that even if the trial court had the power to consolidate arbitration proceedings, it should not have exercised that power in this particular instance").

25 In *Ore & Chemical Corporation* v. *Stinnes Interiol, Inc.,* 606 F.Supp. 1510, 1512-13 (S.D.N.Y. 1985), a federal district court in the Southern District of New York reached the conclusion that "if the Court of Appeals for the Second Circuit were to reconsider the issue, it would overrule *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." *See also* In re Arbitration between Coastal Shipping Limited and Southern Petroleum Tankers Ltd., 812 F.Supp. 396, 402 (S.D.N.Y. 1993) ("absent an agreement to consolidate disputes, federal courts are powerless to compel consolidation"). *But see* Elmarina, Inc. v. Comexas, N.V., 679 F.Supp. 388, 391 (S.D.N.Y. 1988) ("this Court should abide by the Second Circuit's opinion in *Nereus*"); *see also* P/R Clipper Gas v. PPG Industries, Inc., 804 F.Supp. 570, 575 (S.D.N.Y. 1992) ("despite Judge Edelstein's arguments [in *Ore*] to the contrary, this Court is bound to abide by the overwhelming weight of authority in this circuit and follow *Nereus*").

26 998 F.2d 68 (2d Cir. 1993).

27 *Id.* at 69.

28 *Id.*

29 *Id.*

30 *Id.* at 74.

31 *Id.* at 70, *quoting* Nereus.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.* at 71.

36 489 U.S. 468 (1989).

37 470 U.S. 213 (1985).

38 460 U.S. 1 (1983).

39 998 F.2d at 72 (emphasis in original).

40 *Id., citing* 470 U.S. at 219.

41 *Id.* at 74. After the Second Circuit decided *Boeing*, the Seventh Circuit decided *Champ* v. *Siegel Trading Co. Inc.*, 55 F.3d 269 (7th Cir. 1995). The Seventh Circuit considered whether a district court had the authority to certify a class arbitration when the parties' arbitration agreements were silent on the issue. In answering this question, the court looked at the cases addressing consolidation of arbitral claims because there is "no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Id.* at 275. Adopting the rationale of the Second, Fifth, Sixth, Eight, Ninth and Eleventh Circuits' decisions on consolidation of arbitrations, the Seventh Circuit held that "section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter." *Id.*

42 63 F.3d 160 (2d Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996).

43 63 F.3d at 162.

44 *See* North River Ins. Co. v. Philadelphia Reinsurance Corp., 856 F.Supp. 850, 851-52 (S.D.N.Y. 1994).

45 63 F.3d at 162-63.

46 *Id.* at 163.

47 856 F. Supp. at 853, 855.

48 *Id.* at 856.

49 63 F.3d at 166.

50 *Id.*

51 *Id.* at 165.

52 *Id.*

53 *Id.* (citation omitted).

54 *Id.*

55 *Id.*

56 *Id.* at 166 (emphasis added).

57 *Id.* at 165 n.2.

58 189 F.3d 264 (2d Cir. 1999).

59 *Id.* at 265-66.

60 *Id.* at 266.

61 *Id.* at 268.

62 *Id.* at 266 (*citing* Boeing, 998 F.2d at 71 (*quoting* §4 of the FAA)).

63 *Id.* at 267 (*citing* Boeing, 998 F.2d at 72 (*quoting* Volt Info. Sciences, 489 U.S. at 478)).

64 *Id.* at 267-68.

65 No. 98-5772, 1999 U.S. Dist. LEXIS 13421 (S.D.N.Y. 1999).

66 1999 U.S. Dist. LEXIS 13421 at *2-3.

67 *Id.* at *3.

68 *Id.* at *3-4.

69 *Id.* at *5-6.

70 *Id.* at *1.

71 *Id.* at *14-15.

72 *Id.* at *17-18 (citation omitted).

73 *Id.* at *18-19. While there is no statutory authority for the claim that New York law permits court-ordered consolidation, New England Reinsurance based this argument on cases decided by New York state courts. *See* Memorandum of Law of Respondent, New England Corporation, in Opposition to Petitioner's Petition to Compel Separate Arbitrations and in Support of its Cross-Motion for Consolidated Proceedings, 13-15. The most recent case cited by *New England Reinsurance* was *Gershen* v. *Hess,* 558 N.Y.S.2d 14 (N.Y. 1990), a case decided before *Boeing*. In *Gershen*, the appellate division held that consolidation could be ordered "in light of the existence of at least one common party, common issues, the possibility of

inconsistent judgments should separate proceedings be conducted and since the [party opposing consolidation] ha[s] failed to demonstrate that [it] would be prejudiced by such consolidation." 558 N.Y.S.2d at 19.

74 *Id.* at *19. The First Circuit, in dicta, appeared to reach the opposite conclusion. *See infra* notes 134-36 and accompanying text.

75 *Id.*

76 *Id.*

77 *Id.* at *20.

78 210 F.3d 771 (7th Cir. 2000).

79 *Id.* at 772-73.

80 *Id.* at 776.

81 *Id.* at 774.

82 *Id.*

83 *Id.*

84 *Id.* at 774-75.

85 *Id.* at 774.

86 *Id.* at 775 (emphasis added).

87 *Id.*

88 *Id.* at 776.

89 *Id.*

90 *Id.*

91 No. 01-5608, 2001 U.S. Dist. LEXIS 18278 (N.D. Ill., November 7, 2001).

92 *Id.* at *2.

93 *Id.* at *3.

94 *Id.* at *4.

95 *Id.* at *5-6.

96 *Id.* at *6.

97 *Id.* at *14.

98 *Id.*

99 *Id.* at *16-17.

100 *Id.* at *18.

101 Another district court in the Northern District of Illinois had earlier ordered consolidation, citing *Connecticut General,* in *Interstate Fire & Casualty Company* v. *Ameristar Insurance Services, Inc.*, No. 99-7590, 2000 U.S. Dist. LEXIS 10436, *3-4 ("[the provision] expressly provides for arbitration of multiple questions in the same arbitration, and we think the sensible

construction is that the parties consented to a single panel arbitrating whatever arbitrable disputes they might have under that agreement").

102 246 F.3d 219 (2d Cir. 2001).

103 *Id.* at 221-22.

104 *Id.* at 223-24.

105 *Id.* at 230.

106 *Id.* at 228.

107 *Id.*

108 *Id.* at 230. In *Boeing*, the Second Circuit had distinguished *Nereus,* where all three parties signed an addendum which incorporated the provisions of the main contract, including the arbitration provision. *Id.* The Second Circuit interpreted its decision in *Nereus* as one based on implied agreement of the parties, stating that in *Nereus,* "the intention of the signatories to [the addendum] would be most closely adhered to with a single arbitration proceeding." Boeing, 998 F.2d at 71. The Second Circuit had reiterated the importance of the particular facts in *Nereus* in *North River*, where it held that "it is entirely unclear whether the outcome of a case factually similar to *Nereus* would, after *Boeing*, be any different than it was in *Nereus* before *Boeing*." North River, 63 F.3d at 165 (citation omitted).

109 No. 00-9222, 2001 U.S. Dist. LEXIS 13736 (S.D.N.Y. 2001).

110 *Id.* at *11-12.

111 *Id.* at *7.

112 *Id.* at *11-12.

113 *Id.* at *10 (*quoting* Hartford, 246 F.3d at 229).

114 *See* MASS. GEN. LAWS ANN. Ch. 251 § 2A (West 1992):
2A. Consolidation or Severance of Arbitration Proceedings.
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 for 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.

115 *See* § 10 of the REVISED UNIFORM ARBITRATION ACT (RUAA), 7 U.L.A. (Supp. 2002):
(a) Except as otherwise provided in subsection (c), upon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:
(1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;
(2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;
(3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and
(4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.
(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.
The text of the RUAA is also available at www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm.

116 *See* NEV. REV. STAT. ANN. §38.224 (Michie 2002); N.M. STAT. ANN. § 44-7A-11 (Michie 2002 Supp.); UTAH CODE ANN. §78-31a-111 (Supp. 2002).

117 *See* FLA. STAT. ANN. § 684.12:
614.12. Consolidation of arbitrations
(1) If two or more disputes have common questions of law or fact or arise out of a single transaction or enterprise and if at least one of those disputes is to be arbitrated under this chapter, the disputes may be consolidated and determined by one arbitral tribunal if consolidation is not prohibited by the arbitral law or the rules otherwise applicable to the separate disputes and:
(a) All affected parties agree to the consolidation; or
(b) All of the disputes are to be submitted to the same tribunal, and the tribunal determines that consolidation will serve the interests of justice and the expeditious resolution of the disputes.
(2) The consolidated proceedings shall be conducted under such rules as the parties agree upon or, in the absence of agreement, as determined by the arbitral tribunal.

118 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 172.173:
§ 172.173. Consolidation
(a) If the parties to two or more arbitration agreements agree, in the respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of the agreements, a district court, on application by a party with the consent of each other party to the agreements, may:
(1) order the arbitrations consolidated on terms the court considers just and necessary;
(2) if all the parties cannot agree on a tribunal for the consolidated arbitration, appoint an arbitration tribunal as provided by Section 172.055; and
(3) if all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order the court considers necessary.
(b) The arbitration tribunal or the party shall select the district court in the manner provided by Section 171.096.
(c) This section does not prevent the parties to two or more arbitrations from agreeing to consolidate those arbitrations and taking any step necessary to effect that consolidation.

119 *See* N.C. GEN. STAT. § 1-567.57 (1996); OHIO REV. CODE ANN. § 2712.52 (West 1994); OR. REV. STAT. § 36.506 (Supp. 2002).

120 Georgia's arbitration code has two parts. Part 1 contains general provisions, whereas Part 2 contains special provisions for the resolution of conflicts arising out of international transactions. GA. CODE. ANN. § 9-9-30 (Supp. 2002) provides that Part 2 merely supplements Part 1. As a result, Georgia's consolidation provision, which is located in Part 1, applies to international arbitrations.

121 *See* GA. CODE. ANN. § 9-9-6 (Supp. 2002):
§ 9-9-6. ... Consolidation of Proceedings
(e) Unless otherwise provided in the arbitration agreement, a party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:
(1) Separate arbitration agreements or proceedings exist between the same parties or one party is a party to a separate arbitration agreement with a third party;
(2) The disputes arise from the same transactions 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.
(f) If all the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation under subsection (e) of this Code section, shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties. If the applicable arbitration agreements name separate arbitrators, panels, or tribunals,

the court, if it orders consolidation under subsection (e) of this Code section, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator.
(g) In the event that the arbitration agreements in proceedings consolidated under subsection (e) of this Code section contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of various parties.
(h) If the court orders consolidation under subsection (e) of this Code section, the court may exercise its discretion to deny consolidation of separate arbitration proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings.

122 Unlike Georgia, Hawaii's chapter on international arbitration does not expressly state that it is supplementary to Hawaii's Uniform Arbitration Act. However, this appears to be the case since the Uniform Arbitration Act applies to "an agreement to arbitrate," *i.e.*, agreements relating to international transactions are not excluded from its scope. *See* HAW. REV. STAT. ANN § 658A-3 (Michie 2002). Also, the provisions in the chapter on international arbitration seem to be of a supplementary character.

123 *See* HAW. REV. STAT. ANN § 658A-10 (Michie 2002).

124 *See* CAL. CIV. PROC. CODE § 1281.3 (West 1982):
§ 1281.3. Consolidation of separate arbitration proceedings; petition; grounds; procedure
1281.3. A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings 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 disputes arise from the same transactions or series of related transactions; and
(3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators. If all of the applicable arbitration agreements name separate arbitrators, panels, or tribunals, the court, if it orders consolidation, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator in accord with the procedures set forth in Section 1281.6. In the event that the arbitration agreements in consolidated proceedings contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of the various parties to achieve substantial justice under all the circumstances. The court may exercise its discretion under this section to deny consolidation of separate arbitration proceedings or to consolidate separate arbitration proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings ....

125 *See* CAL. CIV. PROC. CODE § 1297.272 (West Supp. 2002):
§ 1297.272. Consolidations of arbitrations; actions of superior court
Where the parties to two or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the superior court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:
(a) Order the arbitrations to be consolidated on terms the court considers just and necessary;
(b) Where all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with Section 1297.118.
(c) Where all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

126 No. 96-11749-GAO, 1997 U.S. Dist. LEXIS 3449 (D. Mass. 1997).

127 *Id.* at *10-11 (citation omitted).

128 *Id.* at* 9-10.

129 *Id.* at *11.

130 *Id.* at *10-11.

131 855 F.2d 1 (1st Cir. 1988), *cert. denied,* 489 U.S. 1077 (1989).

132 *Id.* at 3.

133 *Id.*

134 *Id.* at 4.

135 *Id.* at 5.

136 *Id.* at 9. As discussed *supra,* note 74 and accompanying text, a district court in the Southern District of New York later reached a different conclusion in *Home Ins.* v. *New England Reinsurance Corp.*, finding that New York law, if it would provide for consolidation absent the parties' consent, was preempted by the FAA. *See* 1999 U.S. Dist. LEXIS 13421 at *19.

137 855 F.2d at 5, n.3.

138 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, Art. V(1)(d), 21 U.S.T. 2517, 2520, 330 U.N.T.S. 38, 42.

139 190 F.Supp.2d 936 (S.D. Tex. 2001).

140 *Id.* at 939-40.

141 *Id.* at 940-41.

142 *Id.* at 941.

143 *Id.*

144 *Id.* at 942.

145 *Id.*

146 *Id.* at 945.

147 *Id.* at 946.

148 *Id.* at 946 n.9.

149 *Id.* at 947.

150 *Id.* at 946.

151 *Id.* at 957-58.

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