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COMMENT

Consolidation of Separate Arbitration Proceedings: The Effect of the United States Arbitration Act on the District Court's Power under Federal Rules of Civil Procedure 42(a) and 81(a)(3)

Arbitration is an extra-judicial dispute resolution technique whereby parties agree to have an impartial third person, or panel of persons, decide a dispute.¹ The agreement to arbitrate may occur before the dispute arises, usually by including an arbitration clause in the contract, or after the dispute arises.² Arbitration clauses frequently designate the location of the potential arbitration and the agency (such as the American Arbitration Association ("AAA")) that will administer the arbitration and by whose rules the arbitration will proceed.³

The trend toward arbitration in the commercial setting stems from the desire to have disputes resolved quickly and inexpensively.⁴ Most states have recognized this desire and will enforce arbitration agreements.⁵ Federal law provides that "A written provision in . . . a contract evidencing a

1. M. DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 1:01 (G. Wilner rev. ed. 1984).

2. *Id.*

3. *See id.* § 5:02.

4. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 474 (1987).

5. M. DOMKE, *supra* note 1, at § 1:01.

transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁶ Almost all arbitration agreements, therefore, are enforceable.

Even though the applicable law directs a court to enforce the arbitration agreement, disputes may arise regarding how the agreement will be enforced. This Article will discuss the differing federal court decisions on the issue of whether separate arbitrations may properly be consolidated under the United States Arbitration Act (the "Act").⁷ Assume that an Owner discovers defects in his building which has just been constructed and is unsure whether the defects are design defects or construction defects. His separate contracts with the general contractor and the Architect both contain arbitration clauses. For both tactical and procedural reasons the Owner would rather proceed against both parties in a consolidated arbitration. First, if the arbitrations proceed separately, the Owner could receive adverse judgments in both forums, leaving him with a defective building and no compensation. Second, the Owner may be faced with simultaneous arbitrations in separate forums where identical evidence is needed. For similar reasons, a general contractor seeking delay damages might wish to proceed against both the Architect and the Owner. The obvious solution is to have one arbitration in which all parties who may be liable are present.

For one or more reasons, however, certain parties may object to such a consolidation. First, a party such as the Architect in the examples above may object to the increased costs of a consolidated arbitration.⁸ Second, if the Owner elects to arbitrate the claim against the general contractor first and the Owner wins, the Architect could avoid arbitration completely. Third, the separate arbitration agreements could specify different fo-

6. 9 U.S.C. § 2 (1988). The Supreme Court has liberally construed the term "commerce" in this statute stating that "the control over interstate commerce . . . reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401-02 n.7 (1967). For a fuller discussion of the scope of the United States Arbitration Act, see M. DOMKE, *supra* note 1, at § 4:04.

7. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-15, 201-208 (1988)).

8. See, e.g., *Reefer Express Lines Pty. v. Mediteranska Plovidba, Banana Servs.*, No. 86 Civ. 4490 (S.D.N.Y. May 28, 1987) (WESTLAW, 1987 WL 11685) (court found that "the interests of justice would [not] be served by requiring [a party] to make the additional expenditure of time and resources which consolidation would require"). *Contra Robinson v. Warner*, 370 F. Supp. 828 (D.R.I. 1974) (weighing the added cost of consolidated arbitrations to Architect against the Owner's cost of two separate arbitrations and the possibility of inconsistent results and ordering consolidation).

rum, ⁹ arbitration agencies,¹⁰ or even methods of choosing the arbitrators;¹¹ thus, a court ordered consolidation could deprive one party of the benefit of the bargain in his contract.¹²

The advantages of consolidation, though, are considerable. Especially as to the party common to both separate arbitrations, consolidation increases the efficiency of the proceedings and reduces the costs and risk of inconsistent results.¹³ Consolidation will frequently serve the "interest of justice" by bringing into the proceeding the only party with access to relevant evidence¹⁴ and allowing the arbitrators to evaluate all of the facts fully.¹⁵ In short, consolidation of arbitrations serves the same purposes as Federal Rule of Civil Procedure 42(a).¹⁶

9. *Seguro de Servicio de Salud v. McAuto Sys. Group, Inc.*, 878 F.2d 5, 9 (1st Cir. 1989) (reversing order consolidating arbitrations since "consolidation would obviously force [one of the parties] to forego the arbitration locale mandated by their contracts").

10. *Jamaica Commodity Trading Co. v. Connell Rice & Sugar Co.*, 1988 A.M.C. 1011 (S.D.N.Y. 1988) (court refused to consolidate arbitrations where the separate arbitration agreements specified different arbitration agencies, but did order joint evidentiary hearings). *Accord S.L. Sethia Liners, Ltd. v. Egyptian Co. for Maritime Transport*, 1988 A.M.C. 68 (S.D.N.Y. 1988).

11. When consolidation is ordered, a new method of choosing arbitrators usually must also be ordered. For example, a common method of choosing arbitrators in the two party arbitration is for each party to choose one arbitrator and for the two chosen to choose the third. This arrangement will obviously not work in a consolidated arbitration. A common solution chosen by the courts is for the three parties each to choose one arbitrator and for the three chosen to choose two more. *See, e.g., Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976). *Compare Rijn Maas en Zeescheepvaartkantoor v. Orinoco Shipping Co.*, 1989 A.M.C. 2713 (S.D.N.Y. 1989) (when party common to both arbitrations consolidated agreed to waive right to choose arbitrator in favor of party resisting consolidation, court denied petition of resisting party asking for five arbitrators).

12. *See Stipanowich, supra* note 4, at 495-508.

13. A showing of the possibility of inconsistent results is a prerequisite to an order compelling consolidation. *See, e.g., Cable Belt Conveyors v. Alumina Partners of Jamaica*, 669 F. Supp. 577, 578-79 (S.D.N.Y. 1987) ("Consolidation has been deemed to be proper when there are common questions of law or fact and a possibility of conflicting awards or inconsistent results.").

14. *See, e.g., Compania Espanola de Petroleos v. Nereus Shipping*, 527 F.2d 966, 970 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).

15. *See, e.g.*, 527 F.2d at 974 ("Only after a full scale survey of the complicated facts could the arbitrators make an informed judgment . . .").

16. The rule provides for consolidation of "actions involving a common question of law or fact" and gives district courts power to "make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." FED. R. CIV. P. 42(a). In addition to avoiding costs and delay, a goal of the rule is, "to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to all the parties." 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2381 (1971).

A dispute exists among the circuits concerning the interaction of one statute,¹⁷ two rules of civil procedure,¹⁸ and quotes from two Supreme Court cases.¹⁹ The discussion which follows will show that those circuits which hold that federal courts lack the power to consolidate arbitrations unless the parties have expressly or impliedly agreed to consolidated arbitrations have unduly narrowed the liberal policy of the United States Arbitration Act, misapplied the Federal Rules of Civil Procedure, and applied the quoted language from the Supreme Court cases out of context.

I. THE POLICY OF THE UNITED STATES ARBITRATION ACT

According to the Supreme Court, "[t]he United States Arbitration Act . . . , reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place the arbitration agreements 'upon the same footing as other contracts'"²⁰ To counteract judicial hostility to arbitration clauses, the Act provided that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce . . . [to arbitrate disputes arising out of the contract] . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²¹ The Act further prohibits the district court from adjudicating a claim referable to arbitration, providing that "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, [the court shall] stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement"²² The Act next enables those parties who have entered into arbitration agreements to petition a district court "for an order directing that such arbitration proceed in the

17. 9 U.S.C. § 4 (1988).

18. FED. R. CIV. P. 81(a)(3), 42(a).

19. 1) "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

2) "The preeminent concern of Congress in passing the [United States Arbitration] Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

20. *Scherk*, 417 U.S. at 510-11 (footnote omitted) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924)).

21. 9 U.S.C. § 2 (1988). For a definition of a "transaction involving commerce," see *supra* note 6.

22. 9 U.S.C. § 3 (1988).

manner provided for in such agreement."²³ When the court is satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."²⁴

By making arbitration agreements as enforceable as other contracts,²⁵ the Act abrogated the common law rule that agreements to arbitrate were revocable by either party at any time before the award had been made.²⁶ By providing a forum for specific performance of an arbitration agreement involving maritime transactions or interstate commerce,²⁷ the Act insured those entering arbitration agreements that they could not be forced to waive the contractual right of arbitration.

II. THE ROLE OF THE FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 81(a)(3) provides in pertinent part: "In proceedings under Title 9, U.S.C., relating to arbitration . . . these rules apply only to the extent that matters of procedure are not provided for in those statutes."²⁸ Since the Act does not provide for consolidation of arbitrations, some courts have applied Federal Rule of Civil Procedure 42(a), providing for consolidation of actions, to the arbitration setting.²⁹ Rule 42(a) provides:

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.³⁰

23. *Id.* § 4.

24. *Id.*

25. Note that the Act made arbitration agreements "as enforceable as" other contracts and *not more enforceable than* other contracts. The arbitration agreement is "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (1988) (emphasis added).

26. 3 FEDERAL PROCEDURE: LAWYERS EDITION § 4:1.

27. *American Sugar Refining Co. v. The Anaconda*, 138 F.2d 765, 767 (5th Cir. 1943), *aff'd*, 322 U.S. 42 (1944).

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

29. See, e.g., *Compania Espanola de Petroleos v. Nereus Shipping*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976); see also *Robinson v. Warner*, 370 F. Supp. 828 (D.R.I. 1974).

30. FED. R. CIV. P. 42(a).

Four circuits, the Fifth, Ninth, Eleventh, and most recently the Eighth, reject this reasoning outright.³¹ Although three of the opinions may have rested on a finding that the parties expressly agreed against consolidation,³² all four nonetheless specifically stated that district courts were without power under Federal Rule of Civil Procedure 42(a) to consolidate arbitration proceedings absent the consent of all parties.³³ An examination of these opinions will show that each is flawed in its decision on the federal rule issue.

Of the four cases, *Del E. Webb Construction v. Richardson Hospital Authority*³⁴ provides the strongest case for non-consolidation. The case arose from the expansion and renovation of a medical center owned by Richardson Hospital Authority (the "Authority"). The Authority contracted with L.D.W.A./Buford & Work, Inc. ("LDWA"), an Architect, to supervise the project.³⁵ The Authority also contracted with Del E. Webb Construction ("Webb"), the general contractor, to construct the expansion. Both contracts contained arbitration clauses;³⁶ the Authority-Webb contract specifically excluded the Architect from an arbitration arising out of that contract without the Architect's consent.³⁷ When disputes arose regarding who should bear the cost of construction delays, Webb

31. *Baessler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Protective Life Ins. v. Lincoln Nat'l Life Ins.*, 873 F.2d 281 (11th Cir. 1989); *Del E. Webb Const. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984).

32. In *Del E. Webb*, 823 F.2d at 150, the court quoted the arbitration clause from the Owner-Architect contract: "No arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder, or in any other manner, the Architect, his employers or consultants except by written consent. . . ." In *Weyerhaeuser*, neither the opinion of the court of appeals nor that of the district court, 568 F. Supp. 1220 (N.D. Cal. 1983), reproduce the arbitration clauses. The court of appeals states, however, that "[e]ach agreement contains its own arbitration clause and each clause requires *only* arbitration between the parties to the agreement. In fact, Trans-Pacific specifically secured an addendum to its agreement with Weyerhaeuser insulating Trans-Pacific from any increase in its obligations by reason of any subcharter Weyerhaeuser might execute." *Weyerhaeuser*, 743 F.2d at 637 (emphasis added). The court in *Protective Life*, states only that "each clause requires arbitration *only* between the parties to that agreement." 873 F.2d at 282 (emphasis added).

33. *Continental Grain*, 900 F.2d at 1195 ("absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to order consolidation"); *Protective Life*, 873 F.2d at 282 n.1 ("we reject Protective's argument that district courts have the power to consolidate arbitration proceedings under Fed. Rules Civ. Proc. 42(a) and 81(a)(3)"); *Del E. Webb*, 823 F.2d at 150 ("sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration"); *Weyerhaeuser*, 743 F.2d at 637 ("Insofar as [*Compania Espanola*] holds that federal courts may order consolidation in the absence of consent, we decline to follow it.").

34. 823 F.2d 145 (5th Cir. 1987).

35. *Id.* at 146.

36. *Id.* at 147.

37. Paragraph 7.9.1 of the contract stated, in part:

brought an action in federal district court against the Authority. After the Authority counterclaimed and joined LDWA as third party defendants, Webb moved for an order to compel arbitration and for an order to consolidate its action against LDWA and the arbitration proceeding between Webb and the Authority. LDWA appealed the district court's order to compel consolidation.³⁸

In determining whether consolidation was proper, the court drew guidance from the Supreme Court case of *John Wiley & Sons v. Livingston*: "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."³⁹ Further guidance in the Supreme Court's opinion indicated that "procedural prerequisites to arbitration do not arise in a vacuum," and that the question of whether the prerequisites have been met "cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration."⁴⁰ The circuit court recognized that once a court ordered a separate arbitration the ability of the arbitrator to then consolidate was "unclear."⁴¹ Acknowledging that if consolidation was to occur, it must be compelled by court order⁴² and considering the *Wiley & Sons* precedent above (determination of procedural prerequisites to arbitration "cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration"), the court held that "the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration."⁴³ By necessary implication, the court held that consolidation of arbitrations when there is no express agreement suffered the same defect as the "procedural prerequisite" to arbitration in *Wiley & Sons*.

No arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, the Architect, his employees or consultants except by written consent containing a specific reference to the Owner-Contractor Agreement and signed by the Architect, the Owner, the Contractor and any other person sought to be joined.

Id. at 150.

38. *Id.*

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

40. *Id.* at 150 (quoting *John Wiley & Sons v. Livingston*, 376 U.S. 543, 556-57 (1964)).

41. *Id.* For example, the AAA, the nation's primary sponsor of commercial arbitration, will only consolidate arbitrations against the consent of parties when under a court order. Stipanowich, *supra* note 4, at 496-97. Furthermore, "[i]f arbitrators order consolidation or joinder over the objections of a party or parties, those seeking to enforce or resist the order will probably seek judicial assistance," *id.* at 514, the result of which is even more "unclear." See *id.* at 514 & n.225.

42. "Moreover, it is unclear how separate arbitrations could be consolidated by one of the arbitrators." 823 F.2d at 150; see also *supra* note 40.

43. 823 F.2d at 150.

A comparison of the respective inquiries involved though, indicates that the inquiry into the propriety of consolidation under rule 42(a) and the inquiry at issue in *Wiley & Sons* are different. Under rule 42(a), the arbitrations could be consolidated if they involve common issues of law or fact and there exists a possibility of inconsistent results absent consolidation; the resisting party must demonstrate prejudice which would substantially outweigh the advantages of the consolidated proceeding.⁴⁴ The question of common issue of law or fact could usually be gleaned from the motions themselves or the nature of the claims. In contrast, in *Wiley & Sons*, a labor union arbitration, the action was brought to determine whether the arbitration agreement survived a corporate merger, so as to be operative against the party resisting arbitration.⁴⁵ The inquiry required to decide the "procedural prerequisite" argument "depends to a large extent on how one answers questions bearing on the basic issue, the effect of the merger; e.g., whether or not the merger was a possibility considered by Interscience and the Union during the negotiation of the contract."⁴⁶ This inquiry necessarily involves a "consideration of the merits of the case"⁴⁷ while the consolidation inquiry does not.

The sole remaining ground then, upon which *Del E. Webb* rests as to the federal rules issue is on section four of the United States Arbitration Act⁴⁸ citing the Ninth Circuit's decision in *Weyerhaeuser Co. v. Western Seas Shipping Co.*⁴⁹ In that case, Western Seas Shipping's successor in interest Trans-Pacific Shipping Company ("Trans-Pacific") owned two ships that were time chartered by Weyerhaeuser who subchartered to Karlander Australia Party Ltd. ("Karlander"). Both contracts contained arbitration clauses "requir[ing] only arbitration between the parties to the agreement."⁵⁰ Karlander demanded arbitration with Weyerhaeuser (subcharter) alleging losses resulting from cargo stowage restrictions. Weyerhaeuser demanded arbitration with Trans-Pacific (head-charter)

44. See, e.g., *Sociedad Anonima v. Cia. de Petroleos de Chile*, 634 F. Supp. 805, 809 (S.D.N.Y. 1986). See generally M. DOMKE, *supra* note 1, at § 27.02.

45. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546 (1963).

46. *Id.* at 557.

47. *Id.*

48. 9 U.S.C. § 4 (1988). See *Del E. Webb Const. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987). Regarding the determination whether the contract provided expressly for consolidation, the court held that since the LDWA-Authority contract contained a non-consolidation clause which expressly required LDWA's written consent, there could be no consolidation. *Id.*

49. 743 F.2d 635 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984).

50. 743 F.2d at 635. Since the court does not reproduce the arbitration clauses, it is uncertain whether the clauses were non-consolidation clauses as in *Del E. Webb* (see *supra* note 37) or were simply silent on the issue of consolidation as in *Baessler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990) (see *supra* text accompanying note 60).

for indemnity, and then petitioned for consolidation.⁵¹ The court found that no implied consent to consolidation could be found since Trans-Pacific and Weyerhaeuser executed an addendum to their contract "insulating Trans-Pacific from any increase in its obligations by reason of any subcharter Weyerhaeuser might execute."⁵²

The decision as to the issue of consolidation by way of rule 42(a) rested on section four of the Act. The court found that the statute "narrowly circumscribed" the authority of the courts, holding that "we can only determine whether a written arbitration agreement exists, and if it does, enforce it 'in accordance with its terms.'"⁵³

The Eleventh Circuit's opinion in *Protective Life Insurance Corp. v. Lincoln National Life Insurance Corp.*⁵⁴ also rests on section four of the Act.⁵⁵ The court states in the course of its opinion that "[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."⁵⁶ This court expressly refused to consolidate arbitrations where both clauses are *silent* on the issue. Although the court could have conceivably limited the holding to situations in which the contract expressly precluded consolidation, it did not. It is unclear whether the contracts at issue were silent on consolidation; however, the court stated that both contracts contained arbitration clauses and that "each clause require[d] arbitration only between the parties to that agreement."⁵⁷ By narrowly interpreting section four, the court has limited the effect of rule 42(a) to situations in which the parties have expressly agreed to consolidated arbitration.

The most recent opinion addressing this issue is also the most far reaching. The Eighth Circuit's opinion in *Baesler v. Continental Grain Co.*⁵⁸ is no more far reaching in its language than the opinions just discussed from the Fifth, Ninth, and Eleventh Circuits. Unlike the contracts in those cases,⁵⁹ however, the several contracts involved in *Continental Grain* were "*silent* on the issue of consolidation."⁶⁰ Continental Grain Co. ("Continental") entered into standard contracts with several safflower producers. When the producers' crops were ready, however, Continental claimed part of the crops were damaged and refused to accept them; as

51. 743 F.2d at 636.

52. *Id.* at 637.

53. *Id.* (quoting 9 U.S.C. § 4 (1988)).

54. 873 F.2d 281 (11th Cir. 1989).

55. *Id.* at 282.

56. *Id.*

57. *Id.*

58. 900 F.2d 1193 (8th Cir. 1990).

59. See *supra* text accompanying notes 37, 50, 56.

60. *Continental Grain*, 900 F.2d at 1194.

for the rest of the crop, Continental discounted the contract price.⁶¹ When the individual producers commenced separate arbitration proceedings against Continental, Baesler, one of the producers, brought an action seeking to have all the arbitrations consolidated. The district court ruled that it did not have the power to consolidate, and Baesler appealed.⁶² The Eighth Circuit Court of Appeals affirmed, holding that "absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings."⁶³ According to the reasoning in these cases, since section four of the Act directs the court to "make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement,"⁶⁴ rule 42(a) has no real effect.

III. THE SUPREME COURT QUOTES

In support of this narrow reading of section four, courts have quoted language from two Supreme Court cases. In *Weyerhaeuser Co. v. Western Seas Shipping Co.*⁶⁵ the district court, in support of the proposition that the narrow reading of section four "comports with the statute's underlying premise"⁶⁶ quotes *Scherk v. Alberto-Culver Co.*: "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute."⁶⁷ The arbitration agreement in *Scherk v. Alberto-Culver Co.*⁶⁸ raised special concerns that are not presented when a party seeks consolidation of separate arbitrations. In *Scherk* an American company wished to have an international arbitration agreement *invalidated* on the precedent expressed in *Wilko v. Swan*⁶⁹ that "an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933."⁷⁰ The Court found that "crucial differences" existed between a domestic agreement and "a truly international agreement" in this context.⁷¹

61. *Id.*

62. *Id.*

63. *Id.* at 1195.

64. 9 U.S.C. § 4 (1988) (emphasis added).

65. 568 F. Supp. 1221 (N.D. Cal. 1983), *aff'd*, 743 F.2d 635 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984).

66. 568 F. Supp. at 1222.

67. *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)); *see also* *Protective Life Ins. v. Lincoln Nat'l Life Ins.*, 873 F.2d 281, 282 (11th Cir. 1989).

68. 417 U.S. 506 (1974).

69. 346 U.S. 427 (1953).

70. 417 U.S. at 510.

71. *Id.* at 515.

"Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*."⁷² The Court found that the most significant consideration here was the uncertainty at the time of contracting as to which country's law would apply to the resolution of disputes arising under the contract.⁷³ "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."⁷⁴

The court made no reference in the opinion to a procedure-substance dichotomy, and in the context of the opinion the reference to "the procedure to be used in resolving the dispute"⁷⁵ refers only to the fact that the parties chose arbitration rather than litigation as the "procedure" of resolution. According to commentators, it is doubtful, if not highly improbable, that in specifying arbitration as the dispute resolution technique, the parties made a conscious choice as to whether consolidation would be available:

Surveys suggest that although businesspersons generally know that arbitration affords advantages, they have little specific knowledge or understanding of the procedural niceties of this form of dispute resolution. Practically speaking, the absence of a provision specifically addressing multiparty arbitration probably signifies only that the parties did not consider the matter.⁷⁶

When the parties have made a conscious choice, the court should honor it, for then they have chosen "the procedure to be used in resolving the dispute."⁷⁷ Section four's provision that the court direct the parties "to proceed to arbitration in accordance with the terms of the agreement,"⁷⁸ however, should not be read as narrowing the district court's power under rule 42(a) to consolidate arbitrations when there has been no choice. "While parties who elect to waive their day in court for the more informal procedures of arbitration must be content with a "rougher" form of justice, the decision to arbitrate should not represent a complete rejection of the civil litigation features that promote the same ends fostered by arbi-

72. *Id.*

73. *Id.* at 515-16.

74. *Id.* at 516.

75. *Id.* at 519.

76. Stipanowich, *supra* note 4, at 496 (footnotes omitted); see also *supra* note 40 and accompanying text.

77. 417 U.S. at 519.

78. 9 U.S.C. § 4 (1988).

tration."⁷⁹ Thus, reliance on this quote to establish that, by choosing arbitration, the parties have rejected consolidation, is misplaced.

Another Supreme Court quote which courts have used to support the proposition that consolidation is foreclosed by section four is taken from *Dean Witter Reynolds, Inc. v. Byrd*.⁸⁰ "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute."⁸¹ Further reference is usually made to another statement of that court that the primary purpose behind the Act is "to ensure judicial enforcement of privately made agreements to arbitrate," rejecting the contention that the "overriding goal" was to "promote the expeditious resolution of claims."⁸² An examination of the issue presented in that case shows that reliance on these quotes out of context is misplaced and that consideration of the posture of the entire case supports the view that consolidation of arbitration is within the power of district courts.

In *Byrd* the issue before the Court was whether "when a complaint raises both federal securities claims and pendent state claims, a Federal District Court may deny a motion to compel arbitration of the state-law claims despite the parties' agreement to arbitrate their disputes."⁸³ Some claims are not "arbitrable," that is, federal policy requires that certain claims be litigated in federal court *despite* an agreement to arbitrate those claims.⁸⁴ The issue was whether the district court should include pendent arbitrable claims in its order of non-arbitrability. Thus the issue presented was not whether two *arbitrable* claims should remain separate, but whether the United States Arbitration Act would allow the district court to assert jurisdiction over a pendent *arbitrable* claim when it found a federal claim *non-arbitrable*.

79. Stipanowich, *supra* note 4, at 501 (footnotes omitted).

80. 470 U.S. 213 (1984).

81. *Id.* at 221. See, e.g., *Baessler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Ore & Chem. Corp. v. Stinnes InterOil, Inc.*, 606 F. Supp. 1510 (S.D.N.Y. 1985) (citing *Byrd* to bolster its opinion that "if the Court of Appeals for the Second Circuit were to reconsider the issue, it would overrule [*Compania Espanola de Petroleos v. Nereus Shipping*, 527 F.2d 966 (2nd Cir. 1975), *cert. denied*, 426 U.S. 936 (1976)], 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." *Ore & Chemical*, 606 F. Supp. at 1512-13).

82. 470 U.S. at 219.

83. *Id.* at 214.

84. See, e.g., *Wilko v. Swan*, 346 U.S. 427 (1953). A discussion of this issue is beyond the scope of this Article.

The Court held that the arbitrable state-law claim should be arbitrated, and that the overriding policy was enforcement of arbitration agreements and not the expeditious resolution of claims.⁸⁵ In *Byrd* these two policies were at odds: to enforce the private agreement to arbitrate would bifurcate the state and federal claims. When consolidation of two arbitrable claims is at issue, the two policies are not at odds; indeed to order consolidation, at least absent an express choice against consolidation, would further both policies. As one commentator has noted: "[W]hile it is clearly desirable to establish statutory bounds for court involvement in the arbitration process, these statutory bounds should not hamper judicial action designed to further the policies and goals of arbitration: liberal enforcement of arbitration agreements and speed, economy and finality in dispute resolution."⁸⁶ A refusal to consolidate arbitration proceedings results in the sacrifice of one goal of the Arbitration Act (expeditious resolution of claims) for the purpose of sanctifying unduly the other goal (rigorous enforcement of private agreements to arbitrate). Such action actually violates the spirit of the Act, and its "liberal policy."⁸⁷ When the parties have not expressly provided against consolidation, therefore, the district court has adequate power under the Federal Rules of Civil Procedure and the United States Arbitration Act to compel consolidation of the proceedings and then to "direct[] the parties to proceed to arbitration in accordance with the terms of their agreement."⁸⁸

IV. CONCLUSION

Therefore, the apparent support that some courts have found in certain Supreme Court opinions for a narrow reading of section four is simply nonexistent. Even so, the trend among the circuits is to refuse to consolidate separate arbitrations absent express or implied consent. If this trend is to become the rule, however, the courts should base their decisions on language not taken out of context, and should explain why the rigorous enforcement of arbitration agreements that are silent on the issue of consolidation must result in the sacrifice of the goal of expeditious dispute resolution.

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85. 470 U.S. at 219.

86. Stipanowich, *supra* note 4, at 512.

87. See *Compania de Espanola de Petroleos v. Nereus Shipping*, 527 F.2d 966 (2nd Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).

88. 9 U.S.C. § 4 (1988).

