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PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION: CONSOLIDATION OF MULTIPARTY AND CLASSWIDE ARBITRATION

OKUMA KAZUTAKE*

I. INTRODUCTION

Dispute settlement is an important area in international contract and trade. Settlement either by litigation in court or by alternative dispute resolution (ADR) is contemplated by contractual parties in international transactions. Each system presents its own problems.

Effective litigation requires a judge to be an impartial, legal expert; however, is that always true, especially in the international context? A party litigating in another country is often concerned about whether he can achieve a fair judgment there. Decisions can sometimes be based on patriotic or parochial grounds, and even if a party receives a fair judgment, will he be able to enforce it in the other country?

While litigation is a fundamental right of citizens under the constitutions of most countries nowadays, in civil cases there are alternatives. It is possible to settle a dispute by an ADR method, but only if the parties to

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the dispute have clearly and effectively agreed to ADR, thereby implying a waiver of litigation.

A. ARBITRATION

Arbitration is the usual ADR mechanism that is used for dispute settlement in international commercial transactions. In contrast to the public nature of litigation, arbitration is a private and closed procedure limited to the parties concerned. In considering the relationship between litigation and arbitration, there is also a need to refer to the role of the state court in arbitration, particularly regarding the extent of assistance and intervention in the process of arbitration and enforcement of awards.

Arbitration officially recognized. In the U.S. the Federal Arbitration Act (FAA) was enacted in 1925, "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" and secures arbitration in accordance with the terms agreed by the parties. Therefore, an arbitration agreement is an indispensable requirement. An arbitration agreement can either be entered into with a primary transaction agreement such as a sales or construction agreement, or can be included as an arbitration clause in the primary agreement.

A fundamental premise of arbitration is the necessity for the parties to agree to arbitrate a dispute rather than proceed to litigation. An arbitral award is final and binding.

Arbitration has also been recognized by the international business community as a useful and important device for resolving disputes. The arbitrators are private individuals selected by the parties on a case-by-case basis. An arbitrator is usually a specialist in the field of dispute, such as an engineer for building and construction disputes, an accountant for monetary disputes, and a medical doctor for medical malpractice. In almost all cases, however, a lawyer is also selected as one of the arbitrators.

B. EXPANDING PARTY AUTONOMY

As mentioned, arbitration is a private dispute settlement mechanism. In contrast to litigation with a judge acting as a state organ, arbitration is settled by a private individual. However, does an arbitrator have the necessary power to settle all cases? The arbitrator is delegated authority by the parties who select the arbitrator. Within the ambit of the delegated authority, the arbitrator can exercise the discretion for settling disputes. Even within this ambit, however, the arbitrator is under some limitation by law and public policy. Where is the line set dividing these

limits from the agreement of the parties and discretion of the arbitrator? Taking into consideration recent case law, this line is moving, and the sphere of party autonomy is gradually expanding.

But how is this expansion taking place? More specifically, how are regulatory statutes and public policy being relaxed to govern arbitration in such fields as antitrust laws, securities regulations, RICO, patent acts, taxes, punitive damages, bankruptcy, labor, the Carriage of Goods by Sea Act (COGSA), and others? By reviewing many aspects of case law, particularly by focusing on U.S. case law, these tendencies can be scrutinized.[1]

C. CONSOLIDATING ARBITRATION

An arbitration agreement is usually made by two parties such as a seller and buyer in a sales agreement, an owner and contractor, or a contractor and subcontractor in a construction agreement. In the case of a construction project, if a subcontractor claims against a contractor to extend the completion date in an arbitration between the two parties, the contractor will not determine by itself because it relates to the completion date in the prime contract with the owner. The contractor then asks the owner to participate in the arbitration between the contractor and the subcontractor. The owner may refuse to participate in the arbitration because the owner he did not agree to arbitration with the subcontractor, though the owner agreed to arbitration with the contractor. The facts and the law may be similar in the two arbitrations, and if they are consolidated, a conclusion can be reached in one procedure. Otherwise, with separate arbitration procedures, different conclusions may be reached.

In such a case, if one party asks the court to consolidate the arbitration between the owner and the contractor, and the arbitration between the contractor and the subcontractor, how does the court decide the case? Does the court agree to consolidate the arbitrations or deny consolidation? In the U.S., there is no uniform procedure; some states allow consolidation under a state act, and others. Most state and federal courts require an agreement by parties on consolidation of arbitration. The parties themselves decide the method and scope of arbitration; party autonomy is recognized.

1. This article, which is one chapter of a doctoral dissertation on party autonomy in international commercial arbitration, will discuss multiparty and classwide arbitration, which is only one area of within the scope of the dissertation.

D. CLASSWIDE ARBITRATION

Classwide arbitration is a counterpart of class action in litigation, and is a kind of extended style of multiparty arbitration, which usually involves fewer than ten parties. On the other hand, there may be a great many members, such as 800, involved in classwide arbitration. As in a class action, many arrangements need to be made in classwide arbitration. Should the parties set all requirements and procedures? These details require scrutiny; sometimes court involvement may be necessary.

II. CONSOLIDATION OF ARBITRATION IN MULTIPARTY ARBITRATION

With regard to multiparty arbitration, first, three cases of the U.S.,[2] U.K.[3] and France[4] will be reviewed, and then the tendencies of U.S. case law will be examined.

A. THE *BOEING* CASE[5] (U.S. SECOND CIRCUIT)

The U.S. courts have not uniformly decided on the consolidation of arbitration. The case law of federal circuit courts, especially, the Second Circuit, differs from those of other circuit courts. The Second Circuit has held that the court has authority to compel consolidation of arbitration where the facts and the law are common to the cases. Other courts do not permit consolidation of arbitration unless the parties agreed to the consolidation. The First Circuit permits consolidation of arbitration under a state act. In 1993, the Second Circuit issued the *Boeing* case, which overruled former precedent.

The facts of *Boeing* are as follows: An accident occurred during the test run of the electric fuel control devices of a military helicopter of the UK Government. The devices, which were designed and manufactured by Textron Inc., were installed in the helicopter manufactured by Boeing. The UK Government has two separate long-term contracts for developing military projects with Boeing and Textron Inc. with arbitration agreements, which are similar provisions subject to the arbitration rules of American Arbitration Association (AAA) by three

2. United Kingdom v. Boeing Co., 998 F.2d 68 (2d Cir. 1993).

3. Erith Contractors Ltd v Costain Civil Engineering Ltd., [1994] ADR LJ 123 Official Referees His Honour Judge John Loyd Q.C., unreported; White & Case, 7 INT'L ARBITRATION NEWSLETTER 1, 11 (Jan.1994).

4. Siemens AG and BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co., Cass. Civ. 7 Jan. 1992 (French Cour de Cassation); 119 J. DROIT INT'L (CLUNET) 712 (1992); 1992 REV. ARB. 479 (1992) (commented by Pierre Bellet at 473-82; 18 Y.B. COM. ARB. 140 (1993).

5. *See Boeing*, 998 F.2d at 68.

arbitrators, the place of arbitration being New York. Two years after the accident, the UK Government filed arbitration with AAA claiming damages against two companies. Before and after filing the arbitration, the UK Government asked the two companies to agree on consolidation of arbitration, but Boeing would not agree to it, considering that the cost would increase in the consolidation and the problem would be simpler in the case of independent proceedings. AAA notified the UK Government that it would not consolidate arbitration unless all parties agreed to do so.

The UK Government filed in the U.S. District Court for the Southern District of New York to compel consolidation of arbitration. The District Court admitted the filing based on the case law of the Second Circuit and the Federal Rules of Civil Procedure (FRCP) and dismissed the motion filed by Boeing. There was no further action taken in this case.

The Court of Appeals for the Second Circuit distinguished this case from the *Nereus* case,[6] which the District Court referred to as precedent. In the *Nereus* case, after the signing of a Charter Party agreement between a ship owner and a charterer, there was a memorandum, agreed to by the owner, charterer and guarantor, which referred to the Charter Party with an arbitration clause. Therefore, the court interpreted that three parties agreed on a single arbitration. However, there were two separate agreements between the UK Government and Boeing, and between the UK Government and Textron Inc., and neither agreement contained a provision of to consolidate arbitration. Neither Boeing nor Textron Inc. agreed to participate in another party's arbitration procedure. The District Court does not have the authority to consolidate two arbitrations based merely on the fact that the dispute contains the same or similar facts and legal issues.

The UK Government made its claim based on the Federal Arbitration Act (FAA) and the FRCP. The Second Circuit has held that FRCP 42(a) and 81(a) (3)[7] apply to consolidation of arbitration, and liberal interpretation of the purpose of the FAA clearly allows, and in fact recommends, consolidation of arbitration. Recent decisions of the U.S. Supreme Court, however, question this conclusion, which is no longer correct law. The FAA does not admit consolidation of arbitration

6. Compania Espanola de Petroleos v. Nereus Shipping, 527 F.2d 966 (2d Cir. 1975).

7. FED. R. CIV. P. 42(a): "Consolidation. When actions involving a common question of law or fact are pending before the court, [...] it may order all the actions consolidated ...;" FED. R. CIV. P. 81(a)(3): "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."

without a provision in the agreement. The claim by the UK Government regarding Articles 42(a) and 81(a) (3) of the FRCP is not correct. Article 81(a) (3) of the FRCP only allows application of the FRCP in court proceedings when the FAA brings the case and does not stipulate to a procedure. It is apparent that 81(a) (3) of the FRCP is interpreted so that the FRCP does not apply to a private arbitration procedure pending under the FAA procedure.

The U.S. Supreme Court has concluded, by referring to three previous decisions, that the FAA intended only to secure enforcement of a privately negotiated agreement, even though enforcement was inefficient. The FAA, in sum, does not always order arbitration regarding a claim, but enforces the filing of a privately negotiated agreement even though the result may be a piecemeal procedure.

The UK Government was concerned that inefficiency and inconsistency would result from separate arbitration procedures. However, contractual parties may stipulate to consolidation of arbitration in an arbitration clause if they wish to settle disputes arising out of the same facts through a single arbitration procedure.

The Second Circuit held that the district court may not consolidate arbitrations arising from separate arbitration clauses to a contract, where there is no clause permitting consolidation of arbitration in the parties' agreement. The court scrutinized the precedent of the Second Circuit and other circuits, and mentioned that the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits do not compel consolidation of arbitration unless the parties agree to consolidate.

In this decision, the Second Circuit changed its case law which compelled consolidation of arbitration by a court even if there was no agreement by the parties to consolidate.

B. THE *ERITH* CASE[8] (UK HIGH COURT)

A dispute arose regarding the fulfillment of an engineering subcontract in a construction contract. The prime contract stipulated the terms of a

8. Erith Contractors Ltd v Costain Civil Engineering Ltd., [1994] ADR LJ 123 Official Referees His Honour Judge John Loyd Q.C., *supra* note 3.

contract of the Fifth Edition of the English Institution of Civil Engineers (ICE),[9] and the subcontract also used the ICE terms for civil works.

The subcontractor sued contractor for delay in payment and collapse of land on the construction site. The contractor also sued the owner for an extension of time and additional payment, and asked the engineer to decide under the prime contract, which was conditioned on filing arbitration.

Clause 18 of the subcontract was an arbitration clause, which stipulated that a single arbitrator be selected by the parties, and if the parties do not so agree, the Chairman of ICE would appoint the arbitrator. The sub-clause stipulated that

> if any dispute arises in connection with the main contract and the contractor is of the opinion that such dispute touches or concerns the subcontract works, then provided that an arbitrator has not already been agreed or appointed in pursuance of the preceding sub-clause, the contractor may by notice in writing to the subcontractor require that any such dispute under this subcontract shall be dealt with jointly with the dispute under the main contract in accordance with the provisions of clause 66 thereof. In connection with such joint dispute the subcontractor shall be bound in like manner as the contractor by any decision of the engineer or any award by an arbitrator.

The contractor claimed that almost all disputes under the prime contract related to the subcontract, and problems under the subcontract would be settled at the same time as problems under the prime contract; however, the contractor agreed to select an arbitrator, and one was selected. The subcontractor asked the Chairman of the ICE to appoint an arbitrator regarding disputes under the subcontract, but the Chairman of ICE did not do so. The subcontractor then asked the High Court to appoint an arbitrator and to declare that the arbitrator had jurisdiction of the arbitrator over the dispute relating to the subcontract.

The Court found that a dispute had arisen regarding the prime contract, the contractor had been notified of the dispute under Clause 66, and had then requested joint settlement of the dispute under the subcontract. At the time of notice the arbitrator had not yet been selected regarding the

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9. Institution of Civil Engineers (ICE), *The Federation of Civil Engineering Contractor's Form of Subcontract*, ICE CONDITIONS OF CONTRACT (7th ed. 1999), *available at* http://www.ice.org.uk (last visited Feb 24, 2003).

dispute under the subcontract. The Court held, therefore, that a contractor could claim three-party arbitration regarding a dispute under the prime contract which relates to a subcontract. The Court allowed multiparty arbitration with appropriate notice pursuant to the contract.

C. THE *DUTCO* CASE[10] (FRENCH COUR DE CASSATION)

BKMI, a German company, entered into a turn-key contract for construction of a cement production plant in Oman, and formed a consortium with Dutco, UAE, and Siemens, Germany, to share the work. The arbitration clause of the consortium agreement provided that all disputes arising in connection with the agreement which were not settled amicably should be settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) by three arbitrators appointed in accordance with the Rules. The place of arbitration would be Paris. Dutco filed against two German companies for default of performance under the contract, for arbitration with ICC under the arbitration clause, claiming separate payment from each company. BKMI and Siemens opposed a single arbitration procedure, and requested separate proceedings.

ICC decided to proceed by a single arbitral tribunal with three arbitrators, with one arbitrator selected by Dutco, and one by BKMI and Siemens jointly. Two German companies, though reserving a right of opposition, selected one arbitrator. The third arbitrator was appointed by the President of ICC. By the time of the interim award, the ICC confirmed that arbitration proceedings had begun appropriately, and were allowed to proceed with multiparty arbitration.

BKMI and Siemens filed in the Cour d'Appel of Paris to vacate the arbitral award, claiming irregularity of composition of the arbitral tribunal, and that recognition and enforcement of the award were against international public policy.

The Cour d'Appel of Paris dismissed the filing, reasoning that the Rules of Arbitration of the ICC did not preclude the possibility of multiparty arbitration. By agreeing to the consortium, the parties created close cooperation and, as a result, permitted the possibility of multiparty arbitration. Clause 2(4) of the Rules of Arbitration of ICC stipulates that each party should select one arbitrator. The right of each party to select

10. Siemens AG & BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co., Cass. ass. plén., Jan. 7, 1992 (French Cour de Cassation); 119 J. DROIT INT'L (CLUNET) 712 (1992); 1992 REV. ARB. 479 (1992) (commented by Pierre Bellet at 473-82; 18 Y.B. COM. ARB. 140 (1993).

its "own" arbitrator is fundamental but not absolute. In this case, there was no clear imbalance in exercising the right to compose the arbitral tribunal. It was not against the principle of equal treatment of the parties or public policy. Multiparty arbitration, by its nature, is not inconvenient, and does not affect equal treatment of the parties or domestic and international rules of public policy. The court decided that the arbitral tribunal was composed properly through the intent of the parties and the ICC Rules. The plaintiff, appealed.

The Cour de Cassation (the Supreme Court) reversed the decision of the Cour d'Appel, finding that the arbitration clause by which the parties clearly expressed their intent to refer a dispute under the contract to three arbitrators, permitted the possibility of a single arbitral tribunal consisting of three arbitrators. This finding, however, was against the provision of the act.[11] The court referred to the provisions of the act which did not allow proceedings by an irregularly composed arbitral tribunal, or waiver by private agreement or public policy considerations, and decided that the principle of equality of the parties for selecting the arbitrator may be waived only after a dispute arises.

D. ISSUES RAISED IN THE PRECEDING THREE CASES

The decisions rendered by the three countries discussed above relate to multiparty arbitration. The specific issues were different, but the ultimate issues were the same. The issues raised are discussed below.

In the U.S. case, although Boeing and Textron Inc. participated in the project of the UK Government, the contracts were concluded separately by each company, and the arbitration clause in each contract was the same, but neither contract contained a provision of consolidation of arbitration. After the accident occurred, the UK Government asked both companies to agree on consolidation of arbitration, but they refused to do so.

Based on this fact, the court decided it did not have the authority to consolidate arbitration simply because of the same or similar facts and legal issues involved in the dispute. In other words, the court concluded that, whereas the parties did not intend to consolidate arbitration, the court could not compel it.

In the UK case there was a prime contract and a subcontract involved in the project, and the dispute settlement clause in the subcontract stipulated

11. *Id.*

that when a dispute arose out of the prime contract related to the subcontract, the prime contractor could ask the subcontractor to settle the dispute jointly. In particular, there was an expression of "any dispute" under the subcontract, and there was also a procedure regarding notice of occurrence of a dispute before selection of an arbitrator.

The court considered the background and spirit of the dispute settlement clause in the subcontract, and found the intention of the parties to be avoidance of dispute settlement for both the prime contract and the subcontract. The expression of any dispute under the subcontract could be interpreted so that when a dispute arising under the prime contract relates to a dispute under the subcontract in accordance with the conditions of the prime contract, joint settlement can be requested. The court found that when a dispute arose under the prime contract, and the notice requirement was satisfied, the prime contractor may ask the owner and subcontractor for a single arbitration by the three parties.

The critical issue was therefore what did the parties agree in the contracts? The court recognized the agreement of the parties, and decided to authorize multiparty arbitration.

In the French case, BKMI contracted with the Oman owner and subcontracted with Dutco and Siemens; however, they established a consortium to share the work. As the arbitration was filed by Dutco, BKMI and Siemens were in the position of respondents. Under the Rules of ICC, in the case of three arbitrators, the claimant and respondent nominate one arbitrator each, with the third to be appointed by ICC, unless the parties have agreed otherwise. As BKMI and Siemens became respondents, the two companies were to jointly nominate one arbitrator. BKMI and Siemens claimed they were entitled to separate arbitrations, and that each had the right to nominate one arbitrator apiece. ICC did not allow their claim, stating that if they did not nominate one arbitrator, according to the Rules, ICC would appoint the arbitrator.

The Cour d'Appel (the Court of Appeals) affirmed, but the Cour de Cassation (the Supreme Court) reversed, reasoning that the principle of equality of the parties in selecting the arbitrator was an issue of public policy.

Thus, the ultimate issue in the above cases is the same: What is the intent of the parties? When the parties agree on consolidation of arbitration, the court will respect their intent and allow consolidation of arbitration.

May a court compel consolidation of arbitration even if the intent of the parties is not clear? When the intent of the parties is not clear, separate proceedings are required from parties whose intent is clear. But if the conclusions from the separate proceedings become different, then how should the situation be considered? It might be better and more efficient to settle the cases jointly when there are facts and legal issues in common. This issue will be examined later with reference to U.S. case law.

The French court held in *Dutco* that the content of the parties' agreement was against public policy, and that practices under the ICC rules were against the rules in France. Moreover, the principle of the equality of the parties was public policy and could not be waived before a dispute arose. This was shocking, considering the status of the ICC in the area of international commercial arbitration. An arbitration clause is usually negotiated and agreed upon at the time of concluding the underlying contract (as in a sales or construction contract) and is included in the contract; so as it naturally is concluded before a dispute arises, this type of waiver is in vain.

The French court decision in the *Dutco* case has been criticized by many commentators. Seppala[12] mentioned that ICC arbitration rules require an arbitrator to be independent from the party who selected him or her. The party who selects the arbitrator expects the arbitrator to sympathize with that party. If a party is deprived of the right to select an arbitrator, or given a lesser right than another party, the first party may believe he is prejudiced. The principle of equal treatment in selecting an arbitrator does not necessarily mean that each party has a right to select each arbitrator; rather it is implied that each party has an equal right to the procedure of composing the arbitral tribunal. Sooner or later the Supreme Court will limit this decision to the particular facts of the *Dutco* case, recognizing that the principle of equal rights applied in this case is extreme. That is the desire of French commentators. This decision will be against the case law decided by the Supreme Court over twenty years in favor of international commercial arbitration. The unavailability of the equal right to select an arbitrator after a dispute arises is reminiscent a case of 150 years ago,[13] where an arbitration clause could not be enforced unless the name of the arbitrator and the dispute were

12. Christopher Seppala, *French Supreme Court Nullifies ICC Practice for Appointment of Arbitrator in Multi-Party Arbitration Cases*, 10 INT'L CONSTR. L.REV. 2, 222 (1993).

13. L'Alliance v. Prunier, Cour de Cassation (Chambre Civile), juillet 10, 1843, 1843 Bull. Civ. I, No. 10.

identified. Seppala admits, however, that the Supreme Court's limiting application of this principle may be risky.

ICC has been examining the issue of multiparty arbitration. Regarding the *Dutco* case, Mr. Schwartz,[14] then Secretary General of ICC, offered his private opinion that the *Dutco* decision did well in establishing the equal treatment of the parties in composing an arbitral tribunal; however, it is unfortunate that it frustrated promotion of multiparty arbitration. The case influenced the drafting of agreements and the established practices of the ICC. Though only one section[15] of the Rules of the ICC allows for the possibility of multiparty arbitration, about 20% of the cases filed each year involve multiparty arbitration, and two-thirds of pending cases are arbitrated outside of France. He also mentions that consideration of filing of arbitration depends on whether it occurs inside or outside of France, and it is a matter of course to treat the party equally in composing the arbitral tribunal. It is critical to consider the arbitration by interpreting the parties' agreement, *i.e.*, whether it calls for single or multiparty arbitration, and the substance of the *Dutco* case should not be overlooked. If the parties agree on multiparty arbitration, they must so stipulate clearly in the agreement.

Regarding composition of the arbitral tribunal under the ICC Rules of Arbitration, *Westland* case[16] rendered in Switzerland should be examined. This case should also be considered from the viewpoint of the relationship between the procedures under the arbitration rules of the arbitration institution and the statutes of the place of arbitration. However, in this paper, only the present subject will be considered.

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14. Eric A. Schwartz, *Multi-Party Arbitration and the ICC in the Wake of Dutco*, 10 J. INT'L ARB. 3, 5 (1993). It is obvious from the ICC publication that ICC has been scrutinizing multi-party arbitration for many years recognizing that it is a problem. ICC Guide to Multi-Party Arbitration (ICC Publication No. 404/1, 1982). Dossier of the Institute of International Business Law and Practice, Multi-Party Arbitration (ICC Publication No. 480/1, 1991). The ICC scrutinized multiparty arbitration at the Working Committee of International Arbitration Committee and published its final report in April 1994.

15. 1988 INT'L. CHAMBER COM. R. ARB., art. 30(3) (Advance to Cover Costs of the Arbitration). "The advance on costs shall be payable in equal shares by the Claimant or Claimants and the Defendant or Defendants."

16. Westland Helicopters Ltd. (UK) v. Arab Republic of Egypt, Arab Organization for Industrialization, Arab British Helicopter Co. (Egypt), *Tribunal Federal*, 10 Sept. 1985, 24 Sept.1986, reported in ATF 112, Ia 344, 109 *La Semaine Judiciaire* 1(1987), XII YB Comm.Arb'n(1987) at 186, and ICC Interim award of 5 March 1984 in case No.3879, Westland Helicopters Ltd. (UK) v. Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Co. (Egypt), *in* 23 I.L.M. 1071 (1984), 11 Y.B. COMM. ARB. 127 (1986). Swiss Federal Tribunal, May 16, 1993. 89 ILM 687 (1989). Note, *Swiss Tribunal says it may rule on competence of ICC arbitrator*, 1 Int. Arb. Rep. 435 (1986).

Four countries, the United Arab Emirates (UAE), Saudi Arabia, Qatar and Egypt established the Arab Organization for Industrialization (AOI), with its head office in Cairo, and a branch office in Riyadh. AOI is under the control of the Administration Committee consisting of Ministers as representatives of four countries. The Administration Committee and the UK Government wrote a memorandum guaranteeing an agreement to be executed by and between the four countries and an English company. In the next month, the four countries and the English company, Westland, executed a joint venture agreement and established Arab British Helicopter Co. (Egypt)(ABH). Under the arbitration clause in the joint venture agreement, the place of arbitration was to be Geneva, Switzerland, with the governing law to be the laws of Switzerland. After execution of the agreement, the Camp David agreement was reached by Egypt and Israel, and UAE, Saudi Arabia and Qatar announced their intent to dissolve AOI. Egypt, however, issued a decree declaring the AOI's continuation.

Westland filed arbitration with ICC claiming damages against AOI, four member countries, and ABH. The arbitral tribunal was composed of three arbitrators.[17] No respondent other than Egypt and ABH attended the proceedings, and these two respondents filed a motion objecting to the jurisdiction of the tribunal. EAOI, though it was not named a respondent, attended the proceedings, to which Westland filed an objection. The tribunal stated in June 1982 that EAOI was not a respondent, and rendered an interim decree in March 1984 that the tribunal had jurisdiction over the parties as set forth in the filing. The Court of Appeals in Geneva vacated the decision of the tribunal as of June 1982, and remanded to the tribunal for reconsideration. Egypt and others filed in court for dismissal of the arbitrators based on Article 40 of the Swiss Arbitration Accord.[18] The Swiss Supreme Court decided in September 1985 that the Canton court had jurisdiction over dismissal of the arbitrator.

Westland filed in the Supreme Court requesting trial on Articles 32 and 40 (4) of the Swiss Arbitration Accord, and confirmation of continuation of the arbitrator. The Supreme Court examined the history of the legislation and reasoning of Article 40 (4), and decided it was applicable

17. The three arbitrators were a judge of the Supreme Court in Paris, Pierre Bellet; a judge of Stockholm, Nils Mangard; and a Professor from Berne, Eugene Bucher, who also served as chairman of the tribunal.

18. Concordat sur l'arbitrage du 27 mars 1969, RO 1969 1117, Art. 40 (Prononcé). The Swiss Arbitration Accord, Article 40: Where the award is annulled, the arbitrator shall rehear the case; unless objection is made on the ground that they participated in the previous proceedings, or on some other ground.

only in the event of an annulment of the final award. This was not such a case.

Regarding multiparty arbitration in the interim award rendered by the arbitral tribunal in April 1984, Egypt claimed that filing arbitration by Westland against six respondents with different interests was inappropriate. The arbitral tribunal permitted the beginning of the proceedings against multiparty respondents by a claimant in a case in which there was among them "a community at law" or a "claim of the same character, founded on essentially common cause of substance and law constitute the subject of the disputes" under the Federal Procedure Act in accordance with the application of Article 24 of the Swiss Arbitration Accord, though there were no guidelines in the laws of the Canton of Geneva or the Swiss Arbitration Accord. The arbitral tribunal decided that as these conditions were satisfied in this case, it had to allow multiparty arbitration. Egypt claimed that Westland contracted with AOI; not with the other four countries; therefore, they were not bound by the arbitration clause of the contract, nor did they owe any obligation regarding AOI. The arbitral tribunal, however, decided that under certain circumstances a party who had not signed an arbitration agreement is nevertheless bound by it. As the nature of AOI was similar to a partnership, the partners were bound by the arbitration agreement which the partnership signed; therefore, the filing by Westland was justified, considering the situation in which the four countries established the Administration Committee and signed a memorandum for a guarantee with the UK Government.

Excessive intervention by the Swiss court in the Westland case caused industries to hesitate to pursue arbitration in Switzerland. As an effort to remedy this situation, Switzerland enacted a new act on international arbitration in 1987, *i.e.*, it secured the finality of an arbitral award where an exclusion agreement is expressly stipulated by the contractual parties in addition to an arbitration clause in the underlying contract.[19]

E. TRENDS IN U.S. CASE LAW

Regarding multiparty arbitration, the trends in case law in the U.S. federal circuit courts are reviewed here.

In a construction contract, a typical example of multiparty arbitration, even without a direct expression of "consolidation of arbitration" in

19. Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP), RO 1988 1776. The Swiss Federal Statute on Private International Law (Dec.18, 1987).

either the prime contract or the subcontract, consolidation of arbitration been allowed in cases through interpretation of other clauses considering the relationship between the two contracts. In a case in which one clause of the subcontract stipulated that the subcontractor assumed an obligation to the contractor under the contract for general conditions, drawings and specifications, and all obligations which the contractor assumed to the owner under these documents,[20] although the arbitration clause was not in the subcontract, the prime contract was referred to in several clauses in Clause 1 of the subcontract, the arbitration clause in the prime contract was incorporated as a part of the subcontract,[21] and the contractor was obligated to submit to arbitration under the prime contract, the subcontractor was considered to assume "all obligations"; thus the court interpreted and permitted consolidation of arbitration.

Though the arbitration clauses in both the prime contract and the subcontract stipulate that "no arbitration shall include by consolidation, joinder or in any other manner, party other than the owner, the contractor and any other persons substantially involved in a common question of fact and law, whose presence is required if complete relief is to be accorded in the arbitration," did not mention consolidation of arbitration clearly, it was interpreted so that "the inter-related nature of this construction project, and common questions of law and fact lead the court to find that the identical arbitration clauses in the agreement include the duty to arbitrate in one action" and that "while the general contractor contracted with both the owner and the subcontractor, neither of whom directly contracted with each other, this formality should not obscure the dynamic interplay between all these participants in the venture."[22]

In a case in which both contracts used the standard form between owner and architect of the American Institute of Architecture (AIA) for retaining an architect for supervision of the construction, and the standard form between owner and contractor of the AIA, stipulated to an arbitration clause; and the prime-contract clause stipulated that the owner, the contractor and the "other party who substantially relates to common issue of fact and law" are the parties to arbitration, and other clauses before and after those clauses stipulated that "no arbitration ... 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

20. Uniroyal, Inc. v. A. Epstein and Sons, Inc., 428 F.2d 523 (7th Cir. 1970).
21. Gavlik Constr. Co. v. H .F. Campbell Co., 526 F.2d 777 (3rd Cir. 1975).
22. Maxum Found., Inc. v. Salus Corp., 779 F.2d 974, 1088 (4th Cir. 1985).

signed by the architect, the owner, the contractor and any other persons sought to be joined;"[23] the court held that, to the extent the architect did not agree, it could not enforce arbitration, even with regard to the architect.

The underlying theory is that the Federal Arbitration Act (FAA) enforces private contracts agreed upon by the parties, and it "rigorously enforces agreements to arbitrate, even if the result is 'piecemeal litigation.'"[24]

The Second Circuit had allowed the enforcement of consolidation of arbitration; however, twelve years after the important precedent of the *Nereus* case, in the *Cable Belt* case,[25] which was denied *certiorari* by the United States Supreme Court, a dispute arising out of a prime contract and a subcontract related to the same construction, and the issue was who was responsible for additional costs; the facts and the law of the dispute were the same. If this dispute were settled by separate arbitrations, it could lead to inconsistent findings. The *Weyerhaeuser* case[26] and the *Byrd* case[27] on which the owner relied were wrongly decided in light of the *Nereus* case,[28] the controlling precedent of the Second Circuit. Considering the circumstances of this case and the controlling case law of the Second Circuit, it was apparent that consolidation of arbitration was required.

F. CASE LAW OF THE SECOND CIRCUIT

The *Nereus* case, on which the *Cable Belt* case relied, and cases from other circuits criticizing the *Nereus* case are reviewed below.

The *Nereus* case of 1975 involved a guarantee agreement to a charter-party, where the agent of the ship owner and the charterer agreed on a three year charter-party, and a half year later a guarantee agreement was concluded by three parties including the former two and the guarantor. The guarantee agreement referred to the charter-party, and when charterer was in default of the conditions of the charter-party or of payment, the guarantor agreed to correct the default, and agreed to same rights and obligations under charter-party. A problem arose due to an oil crisis.

23. Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 148 (5th Cir. 1987).
24. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).
25. Cable Belt Conveyers v. Alumina Partners, 669 F. Supp. 577 (S.D.N.Y. 1987), *aff'd*, 857 F.2d 1461 (2d Cir. 1987), *cert. denied*, 488 U.S. 855 (1987).
26. Weyerhaeuser Co. v. W. Seas Shipping Co., 743 F.2d 635 (9th Cir. 1984).
27. *Byrd*, 470 U.S. 213.
28. Compania Espanola de Petroleos v. Nereus Shipping, 527 F.2d 966 (2d Cir. 1975).

The U.S. Court of Appeals for the Second Circuit affirmed the decision of the district court, which admitted the arbitration agreement as an interpretation of the guarantee agreement. The guarantee agreement not only guaranteed the performance of the charterer but also agreed to correct the default, and agreed to the same rights and obligations under charter-party. The obligation to arbitrate was one of the rights and obligations under charter-party which the guarantor undertook. Consolidation of arbitration as a matter of fairness was demonstrated. There were common issues of fact and law in two arbitrations, and there was a risk of conflicting findings regarding the alleged default by the guarantor. There was case law which allowed the court to consolidate arbitration under the federal law. This court agrees Articles 42 (a) and 81 (a) (3) of the FRCP apply. This court agreed that the liberal purpose of the FAA clearly required it to interpret the Act allowing and even promoting consolidation of arbitration under an appropriate case such as this. Therefore, the court affirmed the district court's decision ordering consolidation of arbitration, and amended its decision regarding the arbitrators so that the three parties selected each arbitrator and the three chosen arbitrators selected two arbitrators.

In a case in which a dispute arose out of the limitations of loading cargo during the sublease period of a ship chartered under the time charter-party, the charterer filed a motion to compel consolidation of arbitration of the ship owner, charterer and sub-charterer, relying on the precedent of the *Nereus* case; however, the district court in *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 568 F. Supp. 1220 (N.D. Cal. 1987) dismissed the motion.

In *Weyerhaueser*, the U.S. Court of Appeals for the Ninth Circuit held that a guarantee agreement was an implied agreement of joint arbitration for the dispute which arose in the *Nereus* case. However, to the extent that the case was based on the agreement, it was distinguishable from this case where there was no agreement by the parties. If the court could order to compel the consolidation of arbitration even in a case in which there was no agreement, the court did not wish to follow the case. The court could only decide as to whether there was an arbitration agreement, and if there was an agreement, the court could compel it "according to the conditions." The only issue in this case was whether there was an agreement on the consolidation of arbitration among three parties, and

there was not. Therefore, the Court affirmed the decision of the district court.[29]

In *Beasler v. Continental Grain Co.,*[30] several manufacturers purchased safflower seeds from Continental Grain Co., and sold back the resulting crop to Continental using separate contracts, each containing a standard language. Continental requested a discount and refused to accept some of the safflower, claiming there were defects in the buds. Pursuant to a motion filed by Beasler, the district court decided it did not have authority to order consolidation of the arbitrations hearings, and subsequently granted Continental's motion for summary judgment.

The issue before the U.S. Court of Appeals for the Eighth Circuit was whether or not the district court had the authority to consolidate arbitration when the parties' contract did not stipulate to consolidation of arbitration in an arbitration clause. The circuits were in conflict; that is, the Second Circuit held that the source of authority to settle disputes in an expeditious and economic manner was in the FAA and Rules 42 (a) and 81 (a) (3) of the FRCP, and the district court had the authority to consolidate arbitration. The First Circuit decided the issue under the state act. The Fifth, Ninth and Eleventh Circuits held that a district court did not have the authority to consolidate arbitration based on the purpose of the FAA and Rule 4 are to secure judicial enforcement of a privately negotiated arbitration agreement. The *Beasler* Court followed the majority of the circuits: if an arbitration agreement does not provide for consolidation of arbitration, it is considered that the district court lacks the authority to consolidate arbitration.

The Courts of Appeals for the Eighth Circuit[31] and the Sixth Circuit[32] decided that where there was no provision for consolidation of arbitration regarding insurance and reinsurance contracts, a district court lacked the authority to consolidate arbitration because the court did not have the authority to circumvent the order of the FAA requiring the parties "to proceed to arbitration in accordance with the conditions" of the contract.

29. *Weyerhaeuser*, 743 F.2d at 637.
30. Beasler v. Cont'l Grain Co., 900 F.2d 1193 (8th Cir. 1990).
31. Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (8th Cir. 1989).
32. Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 107 (6th Cir. 1991).

G. STATE ARBITRATION ACTS

The joint venture New England Collier Company (NECCO), which was formed by New England Energy Inc. (NEEI) and Keystone Shipping Co. (Keystone), owns and operates coal shipping vessels. NECCO concluded a charter-party with New England Power Company (NEP), a sister company of NEEI under the same stockholding company. Each contract had an arbitration clause. A dispute arose between NEEI and Keystone regarding the fiduciary duty of the joint venture, and between NEP and NECCO regarding the fee of the charter party. Each filed for arbitration. NEEI and NEP filed a motion in state court for the consolidation of arbitration under the Massachusetts Uniform Arbitration Act.[33] Keystone filed for transfer of the case to the federal district court based on diversity of citizenship. The federal district court dismissed the motion, reasoning that it lacked authority, under the FAA and U.S. Supreme Court case law, to consolidate arbitration unless there was a provision for consolidation of arbitration in the parties' contract. It was implied that the FAA preempted the Massachusetts Arbitration Act, which stipulated for consolidation of arbitration, and the FAA deprived the court of the authority to order the consolidation of arbitration under Rule 42 (a) of the FRCP.[34]

The U.S. Court of Appeals for the First Circuit decided that a court may order the consolidation of arbitration under the Massachusetts Arbitration Act, after carefully reviewing the U.S. Supreme Court case law and considering the FAA policy. It was not necessary to decide whether a federal court may order the consolidation of arbitration under Rule 42 (a) of the FRCP in the case where the state act does not stipulate to the consolidation of arbitration. The court did not hold that the FAA does not preempt all state acts regarding arbitration, even where the FAA applies to the arbitration agreement. There was no preemptive issue between the FAA and the Massachusetts Arbitration Act, which stipulates to the consolidation of arbitration. As the FAA does not stipulate to the consolidation of arbitration, the Massachusetts Arbitration Act did not conflict with the provisions of the FAA.

33. MASS. GEN. LAWS ANN., ch. 251, § 2A (West 2003) (The relevant part of the Act is that a party aggrieved by the failure or refusal of another to agree to consolidate one arbitration proceeding with another or others, for which the method of appointment of the arbitrator or arbitrators is the same... may apply to the superior court for an order such consolidation ... [T]he 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 present action by the court under this section).

34. New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 3 (1st Cir. 1988).

Recent case law of the U.S. Supreme Court holds that state acts aimed at expediting the settlement of disputes do not conflict with the FAA policy. The consolidation of arbitration provision of the Massachusetts Arbitration Act does not limit "the principle of compelling" a private arbitration agreement. The state act only calls for more efficient arbitration procedures. The appellant asserted that the arbitration clause of "pursuant to the law relating to arbitration in enforce" in the City of Boston expressed the intent to consolidate arbitration. The arbitration act enforced in the City of Boston included not only the FAA but also the provision of consolidation of arbitration of the Massachusetts Arbitration Act. The court did not need to decide based upon the provision of the contract; the agreement was not the premise of the application of the provision of consolidation of arbitration of the Massachusetts Arbitration Act. Therefore, the court examined whether the district court correctly decided if two arbitrations were in accordance with the requirements of consolidation of arbitration. The Massachusetts Arbitration Act permits the consolidation of arbitration where there is a common question of law and fact, in accordance with the FAA.

The facts of the case were that regarding the fee of the charter-party between and New England Power and NECCO, Keystone claimed that New England Energy breached the fiduciary duty it owed to Keystone since New England Energy could decide the fee of the charter-party in his favor with two voting rights. Keystone had only one voting right in the joint venture NECCO. Such decision led to the preferential interest of charter-party New England Power, a sister company of New England Energy under the same stockholding company. Both arbitrations related to settlement of the fee issue. There was a risk of reaching conflicting results by separate arbitrations. The court held that the district court did not abuse its discretion in concluding that the arbitrations should be consolidated.

H. THE TREND TOWARD UNIFYING DECISIONS OF THE U.S. CIRCUIT COURTS

The First Circuit has held that the district court has the authority to consolidate arbitration when the state arbitration act particularly authorizes it, and in this regard, the FAA does not preempt a state arbitration act.

The Second Circuit had held that a court may compel consolidation of arbitration in order to settle disputes in an expeditious and economic manner; however, the law was changed by the *Boeing* case as mentioned above.

Other circuits have held that the FAA stipulates to arbitration based on an arbitration agreement, and the court may not compel the consolidation of arbitration unless there is agreement to consolidate. These courts reached decisions by considering how the U.S. Supreme Court interprets the FAA. That is, as the FAA intended to overturn the historic judicial refusal to compel an arbitration agreement, the court is not permitted to intervene in a private agreement "in order to impose its own view of speed and economy."[35] It is so interpreted, even if separate proceedings prove to be inefficient. The U.S. Supreme Court has clearly denied the assertion that the purpose of the FAA is to expedite the settlement of claims. Instead, the U.S. Supreme Court has held that the enactment of the FAA was primarily intended by Congress to compel the parties' agreement;[36] and according to this purpose, the FAA has been interpreted to require the federal courts to compel an arbitration agreement reached by the parties. Unless there is an agreement to consolidate arbitration, the court does not have the authority to compel arbitration.

In this writer's opinion as to party autonomy in commercial arbitration, the trend of U.S. case law which allows for the consolidation of arbitration in multiparty arbitration where the parties have expressed their intention to do so, or it can be interpreted as such, is a welcome development.

Regarding whether the FAA has two purposes of compelling private agreements and of promoting the quick and efficient settlement of claims, or whether the former supersedes the latter, there is an opinion[37] which admits two purposes and if appropriate, allows a court to compel consolidation of arbitration, even if there is no agreement to do so; however, that opinion also admits that there is a uniform rule in the U.S. for not compelling the consolidation of arbitration unless there is an agreement to do so.

I. THE UNITED STATES SUPREME COURT DECISIONS

1. Cases Denied *Certiorari* by the U.S. Supreme Court

Of the federal circuit court cases reviewed in the previous sections, *Nereus* (2nd Cir.1976), *Weyerhauser* (9th Cir. 1984), *Cable Belt* (2nd Cir.1987) and *New England* (1st Cir.1989) were appealed to the U.S. Supreme Court, but all were denied *certiorari*. As a result, the Supreme

35. *Am. Centennial Ins. Co.*, 951 F.2d. at 108.
36. *Beasler*, 900 F.2d at 1195; *Byrd*, 470 U.S. at 220.
37. Richard. E. Wallas, Jr., *Consolidated Arbitration in the United States: Recent Authority Requires Consent of the Parties*, 10 J. INT'L. ARB. 4, 5 (1993).

Court has not expressed an opinion on these cases, so differences in case law in the federal circuit courts have not been resolved.

Therefore, with the exception of the First Circuit which permits consolidation of arbitration based on a state act, there are two lines of case law; the Second Circuit Court permitted the consolidation of arbitration even without an agreement, and the other circuits do not permit the consolidation of arbitration without an agreement by the parties. In the *Boeing* case, the Second Circuit decided by overruling its own precedent, that the parties' agreement on the consolidation of arbitration is required, as mentioned above. Boeing referred to three cases of the Supreme Court which are not directly related to the consolidation of arbitration. Boeing examined these cases as to how the Supreme Court considers arbitration, and decided to overrule *Nereus*, as precedent for the Second Circuit. These Supreme Court cases are briefly reviewed below.

2. The *Moses* Case[38] of 1983

This case involved the constructing additions onto a hospital building in North Carolina. An architectural firm designed and supervised construction, which was contracted to Mercury, a firm from Alabama. The construction contract contained an arbitration clause to the effect that all disputes involving interpretation of the contract or performance of the construction work were to be referred to in the first instance to the Architect. With certain stated exceptions, any dispute decided by the Architect (or not decided by it within a stated time) could be submitted by either party to binding arbitration under the Rules of Arbitration of the Construction Industry of the American Arbitration Association (AAA) within a specified period. There was no arbitration agreement between the hospital and the architect. During the construction period, disputes arose regarding the increase of costs and expenses of construction by Mercury due to delay or nonfeasance by the hospital. (Issues in the case concerned an order to stay litigation and appealability).

The U.S. Supreme Court held that under the FAA, an arbitration agreement shall be enforced irrespective of the existence of a third party who is a party to the underlying contract disputes but is not a party to the arbitration agreement.[39]

38. Moses H. Cone Mem'l Hosp. v. Mercury Constr., 460 U.S. 1 (1983).
39. *Moses*, 460 U.S. at 20.

3. The *Byrd* Case[40] of 1985

The case involved the purchase of securities in the amount of $160,000 by Byrd through a broker-dealer. The value of the securities decreased by more than $100,000 one half of a year later. Byrd filed an action in the federal district court against the broker-dealer under the Securities Exchange Act of 1934. The broker-dealer filed a motion to compel arbitration of the pendant state claims under the arbitration clause of the Customer Agreement, and to stay arbitration until resolution of the federal action. The District Court dismissed the filing and the Ninth Circuit affirmed. The U.S. Supreme Court reversed.

The Supreme Court discussed the legislative history of the FAA, stating that the purpose of its enactment was to ensure the judicial enforcement of privately negotiated arbitration agreements. The court denied the suggestion that the purpose of the FAA was to promote the expedited solution of claims. The FAA does not, after all, order arbitration of all claims, but orders arbitration only upon application by the parties for the enforcement of privately negotiated arbitration agreements. The Congressional Report for the enactment of the FAA makes clear that the purpose of the FAA is to give arbitration agreements the same status as other contracts, and also to overrule the longstanding judicial refusal of enforcing arbitration agreements. The Court was not persuaded by the argument that the conflict between the two purposes of the FAA; the enforcement of private arbitration agreements and the promotion of efficient and expedited solutions of claims, should be settled in favor of the latter in order to realize the intent of the drafters of the Act. The particular interest of Congress at the time of the enactment of the FAA was to enforce private agreements by the parties, and that interest requires courts to rigidly enforce arbitration agreements. As to the extent of the conflicting policy, other federal law is not made clear, even if the result is 'piecemeal' litigation.[41]

4. The *Volt Information* Case[42] of 1989

This case involves the construction of underground electric conduits on a University campus. The contract, using the American Institute of Architecture (AIA) Standard Form (AIA 201), contained both an arbitration and choice-of-law clause (law of the place where the project is located). A dispute arose relating to the payment of additional work.

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40. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985).
41. *Byrd*, 470 U.S. at 221.
42. Volt Info. Sciences, Inc. v. Bd. of Trustees, 489 U.S. 468 (1989).

The Supreme Court held that the FAA required the court to enforce the privately negotiated arbitration agreement like any other contract in accordance with the conditions of the agreement. Arbitration under the FAA was a matter of consent, not a matter of enforcement; generally, the parties may freely structure an arbitration agreement as they consider appropriate.[43]

Regarding the choice of governing law, the court stated, in a footnote, that the FAA itself does not contain particular provisions to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate.[44]

J. AGREEMENTS ON MULTIPARTY ARBITRATION

As is clear from the previous discussion, when the parties wish to arbitrate disputes by multiparty arbitration, they must make their agreement to do so clear.

Regarding construction contracts, citing one example of multiparty arbitration by the owner, contractor and subcontractor, there are two methods for agreeing to multiparty arbitration; the first is agreement by the three parties, and the second is agreement by each of two parties, *i.e.*, the prime contract between the owner and contractor stipulates the multiparty arbitration clause, and the subcontract between the contractor and subcontractor also stipulates to a multiparty arbitration clause.

An example of the selection of the clauses to be stipulated to in the prime contract and subcontract are attached to the ENAA Model Form International Contract for Process Plant Construction drafted by the Japan Engineering Advancement Association (ENAA);[45] that is, (A) as to the arbitration clause in the prime contract, when the contractor makes the subcontract, the intention of multiparty arbitration and its draft clause is to stipulate that if any dispute or difference to be referred to arbitration under the prime contract, (i) raises issues which are substantially the same as or connected with issues raised in any dispute between contractor and subcontractor, (ii) arises out of substantially the same facts as are the subject of any dispute between contractor and subcontractor, or (iii) is such that the owner and contractor declare that a dispute or difference between the contractor and subcontractor to be one

43. *Id.* at 479.
44. *Id.* at 476, n.5.
45. ENAA Model Form International Contract for Process Plant Construction, Vol.3, Guide Notes. The writer of this paper was one of the drafting members of the ENAA.

of interest to them in connection with the resolution of any dispute or difference under the prime contract, the owner and contractor agree that the contractor may refer any related dispute as is mentioned in (i) or (ii) above, and that the contractor shall refer any related dispute as is mentioned in (iii) above, to the arbitral tribunal. The arbitral tribunal shall have the power to make all necessary directions as to the joinder of the parties as the arbitral tribunal considers appropriate to achieve such purpose, and any award made by such arbitral tribunal shall be final and binding. (B) As to the arbitration clause in the subcontract, (i) and (ii) are to stipulate replacing the subcontract by the prime contract, and (iii) is to stipulate to the relationship of the prime-contract; thereby establishing three-party relationships.

K. SUMMARY ON MULTIPARTY ARBITRATION

Multiparty arbitration is allowed in cases in which interested parties agree to arbitrate in one arbitral procedure, or their agreements are so construed (as in the *Erith* case of the UK). Under the governing law, when multiparty arbitration is enforced (as by the Massachusetts Arbitration Act), it must be followed, but in other cases, the parties' agreement is respected. Party autonomy is recognized in this area.

Regarding selection of the arbitrator, under the *Dutco* case of France and arbitration procedures, selection of the same number of arbitrators as that of the parties is not considered appropriate because the arbitrator is not the representative of the party but is impartial and independent of the party. In multiparty arbitration, if the claimants or respondents do not agree on one arbitrator each, they may make a rule that the arbitration institution is given the authority to appoint at its discretion one arbitrator for the party who disagrees. This is analogous to a case in which the parties cannot agree on one arbitrator, and the arbitration institution is given authority to appoint an arbitrator under arbitration rules.[46] Does equality of the parties for selection of an arbitrator refer only to selection of the same number of arbitrators as of the parties? Equality of the parties ensures the opportunity for each party to participate in selecting the arbitrator, considering the status, nature, and function of the arbitrator as impartial and independent.

In the above section, which reviewed relatively recent cases, the focus has been on agreements as to multiparty arbitration. It may be preferable to clarify agreements for multiparty arbitration where there

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46. 1988 INT'L. CHAMBER COM. R. ARB., art. 9 (Appointment and Confirmation of the Arbitrators); 2001 AM. ARB. ASSN. INT'L ARB. R., art. 6(5).

are many parties to several related contracts of which the purpose is the same; thereby leading to efficient settlement of disputes and non-conflicting awards. The principle of party autonomy may underlie the scheme.

III. CLASSWIDE ARBITRATION

A. INTRODUCTION

Article 4 of the Federal Arbitration Act (FAA) requires the federal courts to enforce arbitration agreements as agreed by the parties. On the other hand, the Court of Appeal of the State of California in the *Blue Cross* case[47] decided on October 6, 1998 that class-wide arbitration can be compelled under the California Code of Civil Procedure[48] where the parties did not agree to arbitrate, and the Code is not preempted by the FAA. The U.S. Supreme Court denied certiorari in the *Blue Cross* case on June 14, 1999.[49]

The U.S. Supreme Court has not expressed its opinion as to whether the FAA precludes classwide arbitration under the Act of the State of California. The term "classwide arbitration" is used by the Supreme Court of the State of California[50] as the counterpart of class action in litigation

The provision of the California Code of Civil Procedure on which the California Supreme Court based its decision in *Blue Cross* is that of consolidation of arbitration, and it refers to cases of consolidation of arbitration, in particular, cases of the U.S. Court of Appeals for the First Circuit cases based on the Act of the Commonwealth of Massachusetts which has provisions on consolidation of arbitration.[51]

On the other hand, the U.S. Court of Appeals for the Seventh Circuit has held that it cannot order certification of a class for an arbitration proceeding unless the class action arbitration is not agreed in the

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47. Blue Cross of Cal. v. Superior Court, 78 Cal. Rptr. 2d 779 (Ct. App. 1998).

48. CAL. CIV. PROC. CODE §1281.3 (West 2003).

49. *Blue Cross of Cal.*, 78 Cal. Rptr. 2d 779, *cert. denied*, 527 U.S. 1003 (1999).

50. Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982). *Blue Cross of Cal.*, 78 Cal. Rptr. 2d at 785 n.2.

51. *Blue Cross of Cal.*, 78 Cal. Rptr. 2d at 789-90; *New England Energy Inc.*, 855 F.2d at 4-5. MASS. GEN. LAWS ANN. ch. 251, § 2A (West 2003). Uniform Arbitration Act for Commercial Disputes - Consolidation or Severance of Arbitration Proceedings.

arbitration agreement of the parties,[52] and this upholds the precedents of the Circuit after *Blue Cross* was decided.[53]

The cases regarding the necessity of an agreement on classwide arbitration will be examined in state and federal courts, as they were with consolidation of multiparty arbitration. It is also necessary to examine the substance of the arbitration agreement with regard to agreement on classwide arbitration.[54]

B. THE *BLUE CROSS* CASE

The facts of this case are that F and W concluded an agreement on health plans with Blue Cross. The parties stipulated to such conditions as pre-existing conditions, waiting period exclusions, waived condition exclusions, and temporary exclusions. F and W claimed that these exclusions were illegal, and filed a class action in the Superior Court of Los Angeles County, California. Blue Cross counterclaimed that the dispute had to be settled under the arbitration clause in the plans. Though there were some differences in the arbitration clause depending on the plan, "Any dispute or claim, of whatever nature, arising out of, in connection with, or in relation to this Agreement or breach thereof, or in connection to care or delivery of care, including any claim based on contract, tort or statute, must be resolved by arbitration if the amount sought exceeds the jurisdictional limit of the small claims court. The arbitration findings will be final and binding except to the extent that California or federal law provided for the judicial review of arbitration proceeding." Blue Cross filed a petition in the trial court to compel arbitration of the individual plaintiff's claim and to stay litigation. The trial court granted Blue Cross's petition to compel arbitration, but denied its motion to stay litigation as a whole, and discovery continued as to class claims for purposes of a possible class certification motion. If a class were certified, the class claims would be referred to classwide arbitration. The court concluded that the arbitration provision at issue, drafted by Blue Cross, was one of adhesion.

Blue Cross appealed to the California Court of Appeals claiming that the trial court erred in denying the motion to stay the judicial action as a whole, because the FAA preempts California law allowing for classwide arbitration. The California Court of Appeals did not address an issue

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52. Champ v. Siegel Trading Co., 55 F.3d 269 (7th Cir. 1995).

53. Iowa Grain v. Brown, 171 F.3d 504 (7th Cir. 1999).

54. The American Bar Association (ABA) at the 1998 Annual Meeting Business Law Section agenda, *Consumer Bankruptcy, Consumer Credit Services* (Aug.3, 1998 at Toronto), CONFERENCE REPORT, 67 U.S.L.W. 2089 (8-18-89) relates to this issue. But reference is not made in this paper.

which Blue Cross had not raised in its petition specifically concerning the court limited discovery order or its finding the arbitration provision was one of adhesion, but stated that the sole question the court had to consider was whether the act prohibited classwide arbitration in this case. The court scrutinized the precedents regarding the relationships between the FAA and the state act, and concluded that the California classwide arbitration rule was not preempted by the FAA.

C. THE *KEATING* CASE

The main precedent for classwide arbitration in California is the *Keating* case[55] decided by the California Supreme Court. The issue of classwide arbitration, one of several issues in the case, is discussed below.

An arbitration clause in a franchise agreement stated that any controversy or claim arising out of or relating to the agreement or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association (AAA), and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Four franchisees individually filed an action, between September 1975 and January 1977, in the superior court of Alameda County, California, against the franchisor, alleging fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the Franchise Investment Law. The defendant filed an answer, but did not allege there was the arbitration clause in the agreement. In May 1977, Keating, a franchisee, filed a class action on behalf of about 800 franchisees in California, alleging claims substantially similar to other claims and also unfair and inaccurate accounting procedures of the defendant. The defendant filed a motion to remove the case to federal court, and a few days later filed an amended answer asserting arbitration as a defense. When the case remained in state court at the plaintiff's request, the defendant petitioned to compel arbitration in all pending cases. The trial court granted the defendant's motion to compel arbitration without ruling on the plaintiffs request for class certification, except for the claims under the Franchise Investment Law. Upon appeal by the defendant, the California Court of Appeals reversed the trial court's decision to compel arbitration of the claims under the Franchise Investment Law, which did not invalidate arbitration agreements, and ordered the trial court to conduct class certification proceedings. The defendant appealed to the California Supreme Court,

55. *Keating*, 645 P.2d at 1206-10.

and the Supreme Court reversed the trial court's order and remanded the case to the trial court for consideration of the appellees' request for class certification.

The California Supreme Court held as follows:

> Keating stated that the franchise agreement was given to it by Southland, the franchisor, with no opportunity to negotiate and no explanation of the arbitration agreement. The franchise agreements were standard in form at least as regards the arbitration provision; however, it did not follow that the contract was unenforceable. To describe a contract as adhesive in character is not to indicate its legal effect. A contract of adhesion is fully enforceable according to its terms unless certain other factors, such as a contract or a provision, does not fall within the reasonable expectations of the weaker party, or a contract or provision is unduly oppressive or unconscionable. A provision for arbitration in a commercial context is quite common, and reasonably to be anticipated. Keating knew the arbitration provision and the AAA pamphlet-making reference to the applicable rules. In that situation, neither Keating nor the other franchisees were in a position to claim that the arbitration provision itself, or the fact that it would entail a waiver of jury trial, did not fall within their reasonable expectations. Thus, the California Supreme Court concluded that the arbitration provisions of the franchise agreement were, in general, binding and enforceable.[56]

The apparent purpose of the FAA was to remove judicial hostility to arbitration generally, and to make the benefits of arbitration generally available to the business world. In this respect, California law is entirely in accord. In 1927, two years after the FAA was enacted, California adopted its first modern arbitration statute, declaring arbitration agreements to be irrevocable and enforceable in terms identical to those in Section 2 of the federal act, and since that time California courts and its legislature have consistently reflected a friendly policy toward the arbitration process.

The trial court did not expressly rule on the motion by Keating for class certification. The franchisees contended that if arbitration were to proceed, the trial court should be instructed to determine the preliminary

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56. *Id.*

issues regarding class certification so that it could proceed on a classwide basis. California courts have repeatedly emphasized the importance of the class action device for vindicating rights asserted by large groups of persons. As the parties acknowledge, there is an absence of direct authority either supporting or rejecting classwide arbitration, but analogous authority exists with respect to the consolidation of arbitration proceedings. The FAA does not specifically provide for consolidated arbitration, but courts have frequently ordered consolidated arbitration proceedings when the interests of justice so require, either because the issues in dispute are substantially the same and/or because a substantial right might be prejudiced if separate arbitration proceedings are conducted.

An order for classwide arbitration in an adhesion context would call for considerably less intrusion upon the contractual aspects of a relationship. The members of a class subject to classwide arbitration would all be parties to an agreement with a party against whom their claim is asserted; each of those agreements would contain substantially the same arbitration provision; and if any members of the class were dissatisfied with the class representative or with the choice of arbitrator, or would prefer to arbitrate on their own, they would be free to opt out and do so. The interest of justice be served by ordering classwide arbitration is likely to be even more substantial in some cases than the interests that are thought to justify consolidation. The court concluded that it had the authority to do so.

A judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration. The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation in the event of dismissal or settlement. Classwide arbitration must be evaluated, not in relation to some ideal, but in relation to its alternatives. If the alternative in a case of this sort is to enforce hundreds of individual franchisees each to litigate its cause with a franchisor in a separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution. Where that is so, and gross unfairness would result from the denial of an opportunity to proceed on a classwide basis, then an order structuring arbitration on that basis would be justified.

Whether such an order would be justified in a case of this sort is a question appropriately left to the discretion of the trial court. In making

that determination, the trial court would be called upon to consider not only the factors normally relevant to class certification, but the special characteristics of arbitration as well, including the impact upon an arbitration proceeding of whatever court supervision might be required, and the availability of consolidation as an alternative means of assuring fairness. Whether classwide proceedings would prejudice the legitimate interest of the party which drafted the adhesion agreement must also be considered, and that party should be given the option of remaining in court rather than submitting to classwide arbitration.

In this case, the trial court did not consider the franchisees' request for classwide arbitration at all, and *a fortiori* did not consider the factors which the court found to be relevant. Since they were unable to make the determination on this record as a matter of law, the case was remanded to the trial court on this issue. The California Supreme Court had interpreted the Franchise Investment Law to require judicial consideration of claims brought under the California statute, and held it did not contravene the Federal Act. The court then remanded the case to the trial court for consideration of the appellees' request for classwide arbitration.

The Southland appealed to the U.S. Supreme Court, which considered two issues: (a) Whether the California Franchise Investment Law, which invalidates certain arbitration agreements covered by the FAA, violates the Supremacy Clause; and (b) whether arbitration under the federal act is impaired when a class action structure is imposed on the process by a state court. The U.S. Supreme Court held as follows: The FAA created a body of federal substantive rules applicable in state as well as federal courts, thereby the Congress intended to foreclose State legislative attempts to undercut the enforceability of arbitration agreements.[57]

Regarding the first issue, the Court held that section 31512 of the California Franchise Investment Law violates the Supremacy Clause.

Regarding the latter issue, the California Supreme Court ruled that imposing a class action structure on the arbitration process was permissible as a matter of state law, but the record did not show that the California Supreme Court ruled on the question of whether superimposing class action procedures on a contract arbitration was

57. Southland Corp. v. Keating, 465 U.S. 1 (1984) (Do not confuse with Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982)). *See* also, Doctor's Associate, Inc. v. Casarotto, 517 U.S. 681 (1984) (The U.S. Supreme Court reversed the judgment of the Montana Supreme Court, holding on the State first-page notice requirement).

contrary to the federal act. As to the question of whether the FAA precludes class action arbitration, and other issues not raised in the California courts, no decision was appropriate. The case was remanded for further proceedings not inconsistent with the opinion.

D. THE U.S. SEVENTH CIRCUIT CASES

1. The *Iowa Grain* Case

The U.S. District Court for the Northern District of Illinois held that in the *Iowa Grain* case,[58] which involved a waiver of the right to arbitrate, class action arbitration may not proceed unless the parties clearly agreed on it. The Court followed the precedent of the Seventh Circuit, even after the California Supreme Court allowed classwide arbitration in the *Blue Cross* case.

In the *Iowa Grain* case, Brown and Miller, both customers of Iowa Grain Co., lost substantial sums of money trading commodities through an Iowa Grain guaranteed broker. Brown and Miller then filed a class action lawsuit against the defendant company in the U.S. District Court for the District of South Carolina, alleging that the broker had violated federal and state securities laws, as well as, the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. Iowa Grain filed a motion to enforce the forum-selection clause of the Customer Agreement, requiring all causes of action to be brought in Cook County, Illinois courts. Finding the forum-selection clause valid, the South Carolina Court dismissed the action.

In addition to filing a motion for reconsideration and clarification, Brown and Miller also individually filed for arbitration at the American Arbitration Association (AAA) in the State of South Carolina. A class representative was not designated. Iowa Grain filed a suit in the U.S. District Court for the Northern District of Illinois alleging that Brown and Miller waived their right to arbitrate as a result of their filing suit in the District of South Carolina.

The U.S. District Court for the Northern District of Illinois rejected Iowa Grain's allegation, reasoning that since class actions cannot be arbitrated absent an explicit agreement, Brown and Miller did not act inconsistently with their contractual obligation to arbitrate by filing the class action and thus there was no waiver. The Court directed the parties to pursue their disputes in arbitration proceedings under the agreement.

58. *Iowa Grain*, 171 F.3d at 504.

On appeal by Iowa Grain, the U.S. Court of Appeals for the Seventh Circuit affirmed the District Court decision, reasoning that the arbitration agreement signed by the Brown and Miller did not contain a consolidation clause or a provision for class treatment. The District Court interpreted the customers' intent in filing the South Carolina action as an effort to structure the case -- change its shape -- which was fundamentally incompatible with arbitration. It declined to infer waiver from this course of conduct. Finding that the customers had diligently pursued their arbitration rights by filing their demand promptly after the South Carolina Court dismissed the class suit, and filing a timely motion to compel arbitration in the declaratory judgment action, the Court ordered the arbitration to proceed. The District Court correctly looked at the totality of the circumstances before it and decided that no waiver had occurred. Iowa Grain had not shown that the District Court clearly erred when it found that the customers had not waived their right to arbitrate.

2. The *Siegel Trading* Case

Customers Perera and Champ filed several claims under the Commodity Exchange Act and the RICO Act against the defendant, Siegel Trading Co., in the U.S. District Court for the Northern District of Illinois. Siegel filed a motion to proceed to arbitration of these claims, and Perera filed a motion for class certification. The District Court granted the defendant's motion to compel arbitration of Perera's claim, but refused to compel arbitration of Champ's claim, and later certified Perera as a class representative for arbitration. Upon Siegel's motion for reconsideration, five months later the court revoked its certification of Perera as a class representative, and held that it lacked authority to certify a class arbitration where the parties had not agreed to such procedure in their arbitration agreement. The court determined that as Perera's and Champ's claims were distinct,[59] they were to proceed in a separate forum.

On appeal by the plaintiff, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's decision.[60] The court found no meaningful basis to distinguish between the failure to provide for consolidation and class arbitration. The court adopted the rational of several other circuits[61] and held that Section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter. The U.S. Supreme Court has

59. Perera v. Siegel Trading Co., 951 F.2d 780 (7th Cir. 1992). *Champ*, 55 F.3d at 269 (7th Cir. 1995).

60. *Id.*

61. *Boeing* , 998 F.2d 68; *Del E.Webb Contsr.*, 823 F.2d 145; *Am. Cent'l Ins.* , 951 F.2d 107; *Beasler*, 900 F.2d 1193; *Weyerhaeuser*, 743 F.2d 635; *Protective Life Ins.*, 873 F.2d 281.

repeatedly emphasized that the Federal Courts must rigorously enforce the parties' agreement as written, even if the result is "piecemeal" litigation.[62] Rule 81(a) (3) only applies to judicial proceedings under the FAA, not to the actual proceedings before the arbitration panel. This means that absent an express provision in the arbitration agreement requiring class arbitration, the District Court would not be able to invoke Rule 81(a)(3) as a source of authority to certify a class arbitration under Rule 23. The order of the district court denying class certification was affirmed.

E. AGREEMENTS ON CLASSWIDE ARBITRATION

The California courts have decided that classwide arbitration is enforceable by California statute, so that an agreement by the parties on classwide arbitration is not needed. On the other hand, the U.S. Court of Appeals for the Seventh Circuit requires the parties' agreement on classwide arbitration as is required in general principle in an arbitration agreement.

In the California *Blue Cross* case, the court did not apply the theory of the *Siegel Trading* case of the Seventh Circuit, but it applied the *New England Energy* case of the First Circuit, which was said to be more suited to its facts and better reasoned.[63] In the latter case, the Commonwealth of Massachusetts statute allowed the consolidation of arbitration even if there was no agreement as to consolidation.

The basis of the California statute is California Code of Civil Procedure section 1281.3,[64] which stipulates that 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: (a) separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceedings with a third party; (b) the disputes arise from the same transactions or series of related transactions; and (c) there are common issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

Both the California and Massachusetts statutes contain provisions on consolidation of arbitration agreements. The FAA does not stipulate to the consolidation of arbitration. Consolidation is not identical to class

62. *Byrd*, 470 U.S. at 221.
63. *Blue Cross of Cal.*, 78 Cal. Rptr. 2d at 790.
64. CAL. CIV. PROC. CODE § 1281.3 (West 2003).

treatment. Upon a claim of classwide arbitration, courts apply the same basis and theory of consolidation of arbitration to consider whether to conclude to the same effect.[65]

The Federal Rules of Civil Procedure (FRCP) section 81(a)(3),[66] stipulates that these rules apply only to the extent that matters of procedure are not provided for in those statutes. Rule 42(a) stipulates to consolidation so that "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 [or] it may order all the actions consolidated." Rule 23(a) states the prerequisites to a class action that "one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class."

Whereas these FRCP rules supplement the deficit of provisions on consolidation in the FAA and become the basis for the consolidation of arbitration,[67] the FAA only enforces an arbitration agreement in accordance with the terms the parties agreed upon.[68] The U.S. Court of Appeals for the Seventh Circuit has held that a court cannot order class arbitration when the parties' arbitration agreement is silent on the matter.

The circuit courts are divided as to whether to allow class arbitration. As to state courts, both California and Pennsylvania allow for class arbitration.

The Pennsylvania case which allowed classwide arbitration is the *Dickler* case.[69] In the *Dickler* case, the court allowed classwide arbitration, but reversed because it did not allow certification of a class, and remanded to the trial court for class certification proceedings, holding that the court must compel arbitration for the class if it has been certified.[70] It is clear from this that the court was involved in the certification proceedings.

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65. Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993).
66. FED. R. CIV. P. 23(a), 42(a), 81(a)(3).
67. *Keating*, 645 P.2d at 1208.
68. 9 U.S.C. § 4 (2003).
69. Dickler v. Shearson Lehman Hutton, 596 A.2d 860 (Pa. Super. Ct. 1991).
70. *Id.* at 861.

The facts are that the Dale Dickler and others similarly situated (the "Dickler Group") purchased securities from Shearson, but Shearson failed to deliver the securities or pay dividends. The Dickler Group filed a suit, individually and as class representatives, against Shearson in the Court of Common Plea (Philadelphia), alleging breach of fiduciary duty, breach of contract and tortious conversion. Shearson filed a motion to stay claims and compel arbitration based on the arbitration agreement. The Dickler Group amended the claims to include equitable relief and argued that the claims were not arbitrable because of the request for equitable relief. Shearson argued that the agreement was broad enough to address all disputes. The trial court ruled that the dispute presented was outside the terms of the Shearson-client agreement, and equitable relief cannot be awarded through arbitration. Shearson filed an appeal to the Superior Court of Pennsylvania. The Superior Court held that the amended Uniform Arbitration Act allows an arbitrator to declare injunctive relief, and the Shearson client agreement was comprehensive enough and encompassed equitable relief. The trial court erred in refusing to compel arbitration.

The Dickler Group raised a concern that if each customer was relegated to individually proceeding in arbitration only, the costs involved would effectively bar most, if not all, from obtaining the relief to which they were entitled and this class action sought to achieve. The court agreed with the California Court of Appeal, which was the first to allow class actions in arbitration proceedings.[71] The Pennsylvania Supreme Court has given approval at least to the concept of class action arbitration proceedings, although it has never ruled on the applicability of such procedures when the arbitration agreement does not specifically call for it. The Pennsylvania Supreme Court held that a class action claim before the State's Board of Arbitration of Claims was proper.[72]

In finding that the arbitration agreement by the parties encompassed a class action dispute, the court was merely giving full weight to the wording of agreement of "any controversy." The availability of class suits in arbitration proceedings precludes either party from being forced to litigate in a position less advantageous than that for which they contracted. The Court reversed the trial court and remanded for class certification proceedings. The Court must compel arbitration if a class has been certified, or individually if it has not been certified.

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71. *Keating*, 645 P.2d at 1208.

72. Stevenson v. Com. Dept. of Revenue, 413 A.2d 667 (Pa. Super. Ct. 1980); PA. R. CIV. P. 1701-16 (class action rule).

In the State of New York, the state courts decided that arbitration was deemed a special proceeding, and special proceedings may be consolidated whenever it can be done without prejudice to substantial rights, even without the parties' consent.[73] The U.S. Court of Appeals for the Second Circuit, which is situated in the State of New York, has also decided that arbitrations may be consolidated by the court unless the parties agree in their agreement;[74] however, in the *Boeing* case[75] the court held that unless the parties agree to consolidation of arbitration, they may not consolidate separate arbitration proceedings.

Before the decision of the *Boeing* case by the Second Circuit, the decisions of the federal circuits were split; as mentioned above, the Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have decided that consolidation of arbitration proceedings may not be compelled unless the parties have agreed.[76] The Seventh Circuit joined this line in the *Siegel* case.

IV. CONCLUSION

Although both multiparty and classwide arbitrations are available based on the same theory of consolidation of arbitration, the arbitrations may be difficult to handle in the same procedure.

With regard to multiparty arbitration, there may be as many as ten parties who have contractual relationships with each other, and the contracts are closely related.

With classwide arbitration, as in a class action, many parties are involved in the proceedings, and there are many issues to be solved, such as certification of members, notice to members, representation, identification of members, opt out from the proceedings, treatment of a non-member, and application of the award to a non-member.

A clearly written arbitration agreement allows parties to delegate dispute settlement authority to a private arbitrator. Contracting parties agree on arbitration with the expectation of flexibility, expeditiousness and

73. Symphony Fab. Corp. v. Bernson Silk Mills, 12 N.Y.2d 409 (1963); Bock v. Drexel Burnham Lambert, Inc., 541 N.Y.S.2d 172 (Sup. Ct. 1989) (Special proceedings may be consolidated whenever it can be done without prejudice to substantial right); N.Y. C.P.L.R. 7502 (2002).

74. *Nereus*, 527 F.2d at 966.

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

76. *Boeing* , 998 F.2d 68; *Del E.Webb Contsr.*, 823 F.2d 145; *Am. Cent'l Ins.*, 951 F.2d 107; *Beasler*, 900 F.2d 1193; *Weyerhaeuser*, 743 F.2d 635; *Protective Life Ins.*, 873 F.2d 28; *Champ*, 55 F.3d at 276.

privacy. If the parties try to perform up to the substantive terms of the contract, and also attempt to settle disputes, to the extent possible, in accordance with the contractual terms regarding the settlement of disputes, then expanding the scope of the party autonomy is welcomed. The tendency of U.S. case law also seems favorable to this view.