

FEDERAL COURTS LACK THE POWER TO CONSOLIDATE  
ARBITRATION PROCEEDINGS

*Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990)

The Federal Rules of Civil Procedure allow a federal court to order the consolidation of all actions pending before it that involve common questions of law or fact.<sup>1</sup> Because parties often attempt to settle their disputes privately, the question naturally arises whether federal courts may consolidate arbitration proceedings when petitioned by one of the parties. In *Baesler v. Continental Grain Co.*,<sup>2</sup> the Eighth Circuit held that a district court may not consolidate arbitration proceedings absent a provision in the arbitration agreement authorizing consolidation.<sup>3</sup>

In *Baesler*, the defendant, Continental Grain Co. (Continental), entered into standard safflower contracts with several producers including the plaintiff, LeRoy Baesler.<sup>4</sup> Each contract contained a clause requiring

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

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

3. *Id.* at 1195. Arbitration refers to a private dispute resolution process whereby parties voluntarily submit their proofs and arguments to a neutral third party who has the power to issue a binding settlement based on objective standards. S. GOLDBERG, E. GREEN, & F. SANDER, *DISPUTE RESOLUTION* 189 (1985).

Consolidation of arbitration proceedings involves the merger of two or more separate arbitration hearings when at least one party is common to the arbitrations and the issues are substantially the same. M. DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 1:01 (G. Wilner rev. ed. 1984).

The scope of this Case Comment is limited to the question of consolidation by federal courts under Chapter One of the Federal Arbitration Act, 9 U.S.C. §§ 1-15 (1970 & Supp. 1989). The Federal Arbitration Act applies only to maritime transactions and transactions involving commerce. 9 U.S.C. § 2. However, satisfaction of this condition alone does not furnish an independent basis of federal jurisdiction. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 408 (2d Cir. 1959), *cert. denied*, 364 U.S. 801 (1960). Thus, subject-matter jurisdiction must rest upon rights arising under a federal statute other than the Federal Arbitration Act, or upon diversity jurisdiction. 271 F.2d at 408-09. Diversity of citizenship is the most common source of federal jurisdiction for the enforcement of arbitration agreements. *Id.*

For discussion of the issue of consolidation under the Federal Arbitration Act, see generally Annotation, *State Court's Power to Consolidate Arbitration Proceedings*, 64 A.L.R.3d 528 (1988) (outlining various state court positions on the consolidation of arbitration proceedings); Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 528 (1987) (legislative improvements to modern statutes effectuating arbitration are needed to eliminate "grey areas" between arbitration and litigation); Note, *Federal Circuit Conflict Regarding Consolidation of Arbitration*, 40 U. FLA. L. REV. 411 (1988) (parties should outline specific procedures in the arbitration agreement to counter the uncertainty surrounding the consolidation issue); Comment, *Compulsory Consolidation of Commercial Arbitration Disputes*, 33 ST. LOUIS U.L.J. 495 (1989) (multiparty arbitration not advantageous to all parties).

4. 900 F.2d at 1194. Each producer bought safflower seed from Continental and then offered to sell Continental the resulting crop. *Id.*

arbitration of any controversy or claim arising out of the agreement.<sup>5</sup> The contracts were silent on the issue of consolidation.<sup>6</sup> A dispute arose over Continental's lack of performance under the contracts and the various producers entered into separate arbitration proceedings with Continental.<sup>7</sup>

Baesler brought suit against Continental seeking consolidation of the several arbitration proceedings.<sup>8</sup> The United States District Court for the District of North Dakota granted Continental's motion for summary judgment on the ground that the court lacked the authority to consolidate arbitration hearings.<sup>9</sup> The Eighth Circuit affirmed, and *held*: absent a provision in an arbitration agreement authorizing consolidation, a district court may not consolidate arbitration proceedings.<sup>10</sup>

Congress enacted the Federal Arbitration Act (FAA or the Act)<sup>11</sup> in 1925 to validate and enforce private arbitration agreements.<sup>12</sup> By rendering arbitration agreements enforceable Congress hoped to significantly reduce the costs and delays of litigation.<sup>13</sup> Accordingly, section four of the FAA allows federal district courts to compel arbitration upon the petition of an aggrieved party.<sup>14</sup> Congress, however, failed to specify

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5. *Id.*

6. *Id.*

7. *Id.* The disputes involved Continental's refusal to accept some of the safflower crop and its discounting of the price of other portions because of alleged sprout damage. *Id.*

8. *Id.* Baesler originally brought suit in a North Dakota state court, but Continental removed the action to federal court, where it filed a motion for summary judgment. *Id.*

9. *Id.*

10. *Id.* at 1195.

11. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925), codified and made positive law in Act of July 30, 1947, ch. 392, § 1, 61 Stat. 669 (codifying statute in its current form as 9 U.S.C. §§ 1-15 (1970 & Supp. 1989)).

12. The Act proclaims that private arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2 (1970).

13. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924); S. REP. NO. 536, 68th Cong., 1st Sess. 2 (1924). The act was codified and made positive law by § 1, act of July 30, 1947, 61 Stat. 669 and codified at 9 U.S.C. §§ 1-14.

14. Section 4 of the Federal Arbitration Act provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (1970).

Other provisions of the FAA address issues such as staying judicial proceedings, selecting arbitra-

whether federal courts have the power to consolidate arbitration proceedings. Consequently, the circuits are divided over whether courts may order consolidation when the contracts are silent on the matter.<sup>15</sup>

The leading case disapproving consolidation is *Weyerhaeuser Co. v. Western Seas Shipping Co.*<sup>16</sup> In *Weyerhaeuser*, a charterer involved in two separate arbitrations—one with a subcharterer and the other with a shipowner—petitioned for consolidation of the two proceedings.<sup>17</sup> Noting that the FAA “narrowly circumscribe[d]” its authority,<sup>18</sup> the Ninth Circuit held that federal courts are authorized only to determine whether

tors, subpoena powers, confirming an arbitrator's award, revoking fraudulent awards, and modifying incorrect awards. See 9 U.S.C. §§ 3, 5, 7, 9, 10, 11. Despite these provisions, parties, courts and arbitrators still must struggle with practical difficulties such as preemption, the arbitrability of statutory claims, and the allocation of authority between the court and the arbitrator to determine questions regarding default, laches, and time-bar defenses. See Note, *supra* note 3, at 412.

15. See *infra* notes 16, 22. Four states, California, Florida, Georgia and Massachusetts, authorize courts by statute to consolidate arbitrations. These statutes generally provide that courts may consolidate arbitration proceedings when the disputes arise from the same transactions or series of related transactions and a common issue or issues of law or fact exist. See CAL. CIV. PROC. CODE § 1281.3 (West 1990); FLA. STAT. § 684.12 (1990); GA. CODE ANN. § 9-9-6(e) (1990); MASS. ANN. LAWS ch. 251, § 2A (Law. Co-op. 1990).

Interestingly, the American Arbitration Association's Commercial Arbitration Rules do not include a consolidation clause. When the rules of federal agencies engaged in commercial arbitration do not expressly provide for nor prohibit consolidation, courts will make the decision whether to order consolidation, not the agencies or the arbitrator. M. DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 27:02, at 414 (G. Wilner rev. ed. 1984).

16. 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984). In addition to *Weyerhaeuser*, courts disapproving consolidation of arbitration proceedings under the Federal Arbitration Act include: *Protective Life Ins. v. Lincoln Nat. Life Ins.*, 873 F.2d 281 (11th Cir. 1989) (parties may bargain for and include provisions for consolidation, but absent such provisions federal courts may not read them into the contract); *Del. E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987) (absent a consolidation agreement it is improper to consolidate arbitrations even though they involve common questions of law and fact); see also, *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 9 (1st Cir. 1988) (Seyla, J., dissenting) (ordering consolidation when the arbitral clause omits reference to consolidation improperly trumps the choice of the parties), *cert. denied*, 109 S. Ct. 1527 (1989); *Ore & Chemical Corp. v. Stinnes Interoil, Inc.*, 606 F. Supp. 1510 (S.D.N.Y. 1985) (if the Second Circuit was to reconsider the question, it would hold that federal courts lack authority to order consolidation); see also *Bay County Bldg. Auth. v. Spence Bros.*, 140 Mich. App. 182, 362 N.W.2d 739, 741-42 (1984) (courts cannot consolidate under state arbitration act); *Pueblo of Laguna v. Cillessen & Son, Inc.*, 101 N.M. 341, 682 P.2d 197 (1984) (court refused to consolidate under state arbitration act).

17. 743 F.2d at 636.

18. *Id.* at 637. The FAA states in part:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or failure to comply therewith is not in issue, the court shall make an order directing the parties to *proceed to arbitration in accordance with the terms of the arbitration agreement* . . . .

9 U.S.C. § 4 (1970) (emphasis added).

a written arbitration agreement exists and, if so, to enforce it in accordance with its terms.<sup>19</sup> Because neither of the arbitration agreements provided for consolidated proceedings, the court concluded that it lacked authority to compel consolidation.<sup>20</sup> Moreover, the court observed that its interpretation conformed with the FAA's premise that arbitration is a creature of contract and that an agreement to arbitrate is simply a kind of forum-selection clause.<sup>21</sup>

The Second Circuit took the opposite view and allowed consolidation in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*<sup>22</sup> In *Nereus*, the court consolidated two arbitration proceedings, one between a shipowner's agent and a charterer, the other between the agent and the

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19. 743 F.2d at 637. See also *Protective Life Ins. v. Lincoln Nat. Life Ins.*, 873 F.2d 281, 282 (11th Cir. 1989) (agreeing with *Weyerhaeuser* that the FAA "narrowly circumscribe[s]" the power of federal courts to enforce arbitration agreements only in accordance with their terms); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) (agreeing with the Ninth Circuit that under § 4 of the FAA the sole question for the court is whether the written agreement provides for consolidated arbitration).

20. 743 F.2d at 637. See also *Del E. Webb Constr.*, 823 F.2d at 150 (reversing district court's order compelling consolidation because the parties did not consent in writing to consolidated arbitration).

21. 743 F.2d at 637. The court cited with approval *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974), wherein the Supreme Court stated: "[a]n agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Id.* (emphasis added).

22. 527 F.2d 966 (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976). The following courts have also permitted consolidation of arbitration proceedings under the Federal Arbitration Act: *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 7 (1st Cir. 1988) (district court may order consolidation when state law specifically authorizes such action), cert. denied, 109 S. Ct. 1527 (1989); *Maxum Foundations, Inc. v. Salus Corp.*, 817 F.2d 1086, 1087-88 (4th Cir. 1987) (holding that contracts between project owner and general contractor, and between general contractor and subcontractor, adequately revealed intention to consolidate in order to further policy of encouraging efficiency and averting inconsistent arbitrations); *Gavlick Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 787-89 (3d Cir. 1975) (consolidation allowed when contracts at issue specifically provided for consolidation of arbitration). See also *Hoover Group, Inc. v. Probala & Assoc.*, 710 F. Supp. 677 (N.D. Ohio 1989) (consolidation allowed when both arbitrations present common questions of law and fact and potential danger of conflicting findings and awards exists); *Elmarina, Inc. v. Comexas, N.V.*, 679 F. Supp. 388 (S.D.N.Y. 1988) (applying *Nereus* standard despite contrary case law in other circuits); *Cable Belt Conveyors, Inc. v. Alumina Partners of Jamaica*, 669 F. Supp. 577, 580 (S.D.N.Y. 1987) (consolidation promotes the liberal goals of the Federal Arbitration Act and avoids inconsistent findings); *Sociedad Anónima de Navegación Petrolera v. Cia. de Petroleos de Chile, S.A.*, 634 F. Supp. 805, 809 (S.D.N.Y. 1986) (consolidation is appropriate when common questions of law or fact are at issue and a possibility of conflicting awards or inconsistent results exists); *Transportación Marítima Mexicana, S.A. v. Companhia de Navegação Lloyd Brasileiro*, 636 F. Supp. 474, 476 (S.D.N.Y. 1983) (asserting in dicta equitable authority to consolidate arbitrations); *Marine Trading Ltd. v. Ore Int'l Corp.*, 432 F. Supp. 683, 685 (S.D.N.Y. 1977) (Federal Arbitration Act authorizes consolidation even if other party objects).

charterer's guarantor.<sup>23</sup> The court relied on both the liberal purposes of the FAA to authorize and promote arbitration<sup>24</sup> and the Federal Rules of Civil Procedure.<sup>25</sup> Rule 81(a)(3) states that the Federal Rules apply in arbitration proceedings to the extent such procedures are not provided for in the FAA.<sup>26</sup> Because the FAA does not mention consolidation, the court turned to Rule 42(a), which authorizes a federal district court to consolidate all actions before it involving common questions of law or fact.<sup>27</sup> Since the two arbitrations at issue involved common questions of law and fact, the court held that the trial judge properly consolidated the proceedings.<sup>28</sup> The Supreme Court considered the consolidation issue

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23. 527 F.2d at 974.

24. *Id.* at 975. See also *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 365 (2d Cir. 1965) (any doubts as to the construction of the FAA should be resolved in line with its liberal purposes of encouraging arbitration so as to correspond with the intentions of the parties and to relieve the current congestion of the court dockets); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d Cir.) (same), *cert. granted*, 362 U.S. 909 (1959), *cert. dismissed pursuant to stipulation*, 364 U.S. 801 (1960); *Necchi S.P.A. v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 697 (2d Cir. 1965), *cert. denied*, 383 U.S. 909 (1966); *Children's Hosp. of Phila. v. American Arb. Ass'n*, 231 Pa. Super. 230, 234-36, 331 A.2d 848, 850-51 (1974) (the intent of the parties must be viewed as contemplating consolidation in a proper case); *County of Sullivan v. Edward L. Nezelek, Inc.*, 43 N.Y.2d 123, 366 N.E.2d 72, 75 (1977) ("parties signing an agreement to arbitrate must be held to do so in contemplation of the . . . authority of the courts . . . to direct consolidation"). However, the benefits of consolidation that flow to a party in a complex dispute in terms of time and money saved must be balanced against the increased cost to those parties who would otherwise have avoided consolidated proceedings. See *Stipanowich*, *supra* note 3 at 505-06. Nevertheless, because consolidation is proper only in cases involving common questions of law and fact, the same evidence will be presented regardless of the number of parties. *Id.* Moreover, parties need not be present every day of the hearings simply because overlapping disputes exist. Consolidation orders may be tailored to distinct issues unrelated to other multiparty disputes. Thus, the increased expense connected with consolidated proceedings should not be substantially greater than the cost of litigation. *Id.*

25. 527 F.2d at 975.

26. The Rule states that "[i]n proceedings under Title 9 relating to arbitration, . . . these rules apply only to the extent that matters of procedure are not provided for in those statutes." FED. R. CIV. P. 81(a)(3).

27. 527 F.2d at 975. Rule 42(a) states that "[w]hen actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." FED. R. CIV. P. 42(a).

28. 527 F.2d at 975. The court also noted that consolidation was proper because of the danger of conflicting findings in separate arbitration proceedings. *Id.*

In a series of decisions, the United States District Court for the Southern District of New York has delineated several factors it finds helpful in deciding whether to consolidate arbitration proceedings. See *Hoover Group, Inc. v. Probala & Assoc.*, 710 F. Supp. 677, 681 (N.D. Ohio 1989) (listing factors set forth by the New York court); *Elmarina, Inc. v. Comexas, N.V.*, 679 F. Supp. 388, 391 (S.D.N.Y. 1988) (collecting the New York cases); *Sociedad Anónima de Navegación Petrolera v. Cia. de Petroleos de Chile, S.A.*, 634 F. Supp. 805, 809 (S.D.N.Y. 1986) (when "there are common

in a somewhat different context in *Dean Witter Reynolds, Inc. v. Byrd*.<sup>29</sup> In *Byrd*, an investor sued a securities broker alleging violations of federal securities law and state law.<sup>30</sup> The district court denied the defendant's motion to compel arbitration of the pendent state law claims as per the parties' agreement, and to stay that arbitration pending resolution of the federal securities law cause of action.<sup>31</sup> The Supreme Court reversed, holding that the FAA required the district court to compel arbitration of the state law claims despite the inefficiency of maintaining separate proceedings in different forums.<sup>32</sup> The Court asserted that the FAA's principal purpose is to ensure judicial enforcement of private arbitration agreements and not to promote the expeditious resolution of claims.<sup>33</sup> Thus, the Court concluded that compelling arbitration of the state law claims protected the parties' contractual rights as mandated by the FAA.<sup>34</sup> While the Court did not decide the precise consolidation question at issue in *Baessler v. Continental Grain Co.*,<sup>35</sup> it did provide some

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questions of law or fact and a possibility of conflicting awards or inconsistent results"); In re Czarnikow-Rionda Co., Inc., 512 F. Supp. 1308, 1309 (S.D.N.Y. 1981) (when the issues in dispute are substantially the same or a substantial right might be prejudiced if separate proceedings occur); In re General Navigation, Inc., 1981 A.M.C. 1781, 1783 (S.D.N.Y. 1981) ("when there are common questions of law and fact or to avoid undue prejudice, delay or cost"); In re Marine Trading Ltd., 432 F. Supp. 683, 684 (S.D.N.Y. 1977) (look to the possibility of conflicting findings and to which parties have access to the relevant information).

29. 470 U.S. 213 (1985).

30. *Id.* at 214.

31. The parties signed a written agreement to arbitrate any disputes arising from the plaintiff's investment of \$160,000 in a securities fund. *Id.* at 214-15. Assuming that the federal securities law claim was not subject to the arbitration provision, the plaintiff did not seek arbitration of that claim. *Id.*

32. *Id.* at 217. Attempts to provide for arbitration of federal securities law claims traditionally spark controversy. See *Wilko v. Swan*, 346 U.S. 427 (1953) (refusing to enforce an agreement to arbitrate claims arising under § 12(2) of the Securities Act of 1933 because Congress' policy of protecting shareholders' rights overrides the policy underlying the FAA of allowing parties to arrange alternative methods of dispute resolution); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (questioning the applicability of *Wilko* to claims arising under § 10(b) of the Securities Exchange Act of 1934 or under rule 10b-5); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978) (holding that *Wilko* rationale applies to § 10(b) claims and therefore agreements to arbitrate such claims are unenforceable); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 833-35 (7th Cir. 1977) (same); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 & n.3 (5th Cir. 1976) (same), *cert. denied*, 434 U.S. 824 (1977). In *Byrd*, the Court declined to decide the issue of the applicability of *Wilko* to § 10(b) and rule 10b-5 claims because the defendant did not seek arbitration of the federal securities law claims and thus the issue was not properly before the Court. 470 U.S. at 215 n.1; see *supra* note 31 and accompanying text.

33. 470 U.S. at 219.

34. *Id.* at 221.

35. The Court in *Byrd*, however, did not precisely address the issue in *Baessler* of whether a

guidance for the *Baesler* court.

In *Baesler*,<sup>36</sup> the Eighth Circuit joined the Ninth, Fifth, and Eleventh Circuits in holding that the FAA precludes federal courts from ordering consolidation of arbitration proceedings in the absence of a contractual provision allowing such consolidation.<sup>37</sup> The court, guided by the Supreme Court's decision in *Byrd*,<sup>38</sup> explicitly rejected the assertion that the FAA's principal purpose is to promote the expeditious resolution of claims.<sup>39</sup> Instead, the court found that Congress' first and foremost motivation for passing the FAA was to enforce private contractual agreements.<sup>40</sup> Thus, the court interpreted the FAA as requiring federal courts only to enforce arbitration agreements as they are written.<sup>41</sup> If the agreement contains no provision authorizing consolidation, the Eighth Circuit concluded, a federal court lacks the authority to consolidate arbitration proceedings.<sup>42</sup>

The dissent asserted that district courts have the power to consolidate arbitration proceedings.<sup>43</sup> The dissent argued that consolidation would further the trend toward expanding the use and scope of the arbitration

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court has the authority to compel consolidation of two related arbitration proceedings. See *Hoover Group, Inc. v. Probala & Assoc.*, 710 F. Supp. 677, 680 (N.D. Ohio 1989) (*Byrd* offers no holding on the issue of compelling consolidation of two related arbitration proceedings); *Elmarina, Inc. v. Comexas, N.V.*, 679 F. Supp. 388, 391 (S.D.N.Y. 1988) (*Byrd* does not reverse *Compania*); *Cable Belt Conveyors, Inc. v. Alumina Partners of Jamaica*, 669 F. Supp. 577, 579 (S.D.N.Y. 1987) (*Byrd* did not consider whether a district court can compel consolidation of otherwise separate arbitration proceedings); *Sociedad Anónima de Navegación Petrolera v. Cia. de Petroleos de Chile, S.A.*, 634 F. Supp. 805, 808 (S.D.N.Y. 1986) (*Byrd* presents no holding on the issue of compelling consolidation of two related arbitration proceedings).

36. 900 F.2d 1193 (8th Cir. 1990).

37. *Id.* at 1195. See *supra* note 16 and accompanying text.

38. See *supra* notes 29-34 and accompanying text.

39. 900 F.2d at 1195. See also *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 63 (8th Cir. 1984) (efficiency is not an adequate reason for finding an otherwise valid arbitration provision unenforceable).

40. 900 F.2d at 1195 (citing *Byrd*, 470 U.S. at 220).

41. 900 F.2d at 1195.

42. *Id.*

43. *Id.* at 1195 (Brown, C.J., dissenting). Judge Brown noted that the circumstances in *Baesler* were unlike previous consolidation cases decided by the circuit courts because those cases involved primarily vertical consolidations. *Id.* at 1196. Judge Brown described a vertical consolidation as one in which, for example, A has an arbitration agreement with B and B has an arbitration agreement with C. The question becomes whether a court may consolidate the concurrent A/B and B/C arbitrations? *Id.* Judge Brown distinguished the situation in *Baesler* because it involved the consolidation of several proceedings revolving around a single party. *Id.* Thus, he concluded, the rationale of the Second Circuit in *Nereus* of promoting efficient dispute resolution was even more applicable. *Id.* See *supra* notes 22-24 and accompanying text.

process<sup>44</sup> and would make the arbitration process more economical and efficient.<sup>45</sup> Moreover, it would not obstruct the autonomy of arbitrators, who would remain free to decide the merits of the issue before them.<sup>46</sup>

The Eighth Circuit erroneously relied on the proposition advanced in *Byrd*—that the FAA's principal purpose is not to promote speedy and economical dispute resolution—to support its holding that federal courts lack the authority to consolidate arbitration proceedings.<sup>47</sup> While informative as to the legislative history of the FAA, the *Byrd* Court did not directly address the issue of consolidated arbitration.<sup>48</sup> In *Byrd*, the Court refused to consolidate arbitration and judicial proceedings because of Congress' strong desire to enforce arbitration agreements.<sup>49</sup> Unlike the situation in *Byrd*, the consolidation of two related arbitration proceedings does no violence to Congress' intention of validating arbitration agreements. Thus, *Byrd*'s reasoning does not apply to the situation in *Baesler*.

The *Byrd* Court recognized that the Act's "secondary" purpose is to foster the speedy and economical resolution of disputes.<sup>50</sup> *Byrd* stands for the proposition that the policy of enforcing private arbitration agreements overrides the policy of efficiency *when the two conflict*. In cases involving the consolidation of related arbitration proceedings, however, these policies do not conflict: the decision to arbitrate has already been made. Thus, the policy favoring efficient dispute resolution should control and consolidation should be ordered in proper cases.<sup>51</sup>

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44. 900 F.2d at 1196. Arbitration should continue to be a prevalent form of dispute resolution, its use increasing and expanding as parties seek to escape crowded court calendars and the publicity associated with litigation. See S. LEESON & B. JOHNSTON, ENDING IT: DISPUTE RESOLUTION IN AMERICA—DESCRIPTIONS, EXAMPLES, CASES, AND QUESTIONS 53 (1988).

45. 900 F.2d at 1196.

46. *Id.*

47. See *supra* notes 33, 38-42 and accompanying text.

48. See *supra* note 40 and accompanying text.

49. See *supra* notes 30-34 and accompanying text.

50. Dean Witter Reynolds v. Byrd, 470 U.S. 213, 219-20 (1985) (Congress was not blind to the FAA's potential for expediting dispute resolution).

51. See Booth v. Hume Pub., Inc., 902 F.2d 925 (11th Cir. 1990) (purpose of the FAA is to relieve congestion in the courts and to provide parties with a speedier and less costly alternative to litigation for resolving disputes).

Moreover, parties intend speedy dispute resolution when they enter arbitration agreements. See Furnish, *Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CALIF. L. REV. 317, 319-20 (1979) (arbitration of disputes avoids the animosity of litigation and helps preserve business relationships). Thus, in a tortured attempt to literally interpret the FAA, the *Baesler* court not only disregards Congress' intent, but the parties' as well.



The *Baesler* court also failed to give due weight to the Federal Rules of Civil Procedure.<sup>52</sup> Rule 81(a)(3) explicitly states that the Federal Rules apply to arbitration proceedings under the FAA to the extent such procedures are not addressed by the Act.<sup>53</sup> The issue of consolidation is not addressed in the FAA.<sup>54</sup> Therefore, the Federal Rules arguably control this issue.<sup>55</sup> Rule 42(a) provides that a court may consolidate all actions before it involving a common question of law or fact.<sup>56</sup> Thus, the Federal Rules provide strong authority for the proposition that the Act allows consolidation.<sup>57</sup>

Finally, the *Baesler* court failed to recognize that consolidation of arbitration proceedings involving common questions of law and fact fulfills the intentions of parties who include arbitration clauses in their contracts. Parties intend speedy dispute resolution when they enter arbitration agreements.<sup>58</sup> Consolidation of similar arbitration proceedings saves the parties the time and expense they sought to avoid by entering into the agreement.<sup>59</sup> If the parties do not wish to engage in consolidated proceedings, they can simply include a non-consolidation clause in their agreement.<sup>60</sup> Thus, compulsory consolidation actually enhances the con-

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52. 900 F.2d 1193, 1194-95 (8th Cir. 1990).

53. See *supra* note 26 and accompanying text. See also *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 931 (11th Cir. 1990) (when the FAA is silent regarding a procedural matter, Federal Rules are applicable); *Protective Life Ins. v. Lincoln Nat. Life Ins.*, 873 F.2d 281 (11th Cir. 1989) (though holding that district courts lack power to order consolidation, recognizing applicability of Federal Rules to arbitration proceedings).

54. See *supra* notes 14, 27 and accompanying text.

55. See *supra* notes 25-27 and accompanying text.

56. See *supra* note 27 and accompanying text.

57. *But see Ore & Chem. Corp. v. Stinnes Interoil, Inc.*, 606 F. Supp. 1510, 1513-15 (S.D.N.Y. 1985) (because parties were in court for the limited purpose of enforcing the arbitration agreement, the action was not "pending before the court for all purposes" as required by Rule 42(a) and thus that rule was inapplicable). Cf. *Sociedad Anónima de Navegación Petrolera v. Cia. de Petroleos de Chile, S.A.*, 634 F. Supp. 805, 809 (S.D.N.Y. 1986) (criticizing *Stinnes* rationale).

58. See *supra* note 24.

59. *But see Note, Federal Circuit Conflict Regarding Consolidation of Arbitration, supra* note 3 at 428 (compelling consolidation when the contract does not expressly provide for it may destroy the consensual nature of arbitration and discourage parties from entering into arbitration agreements).

60. Though it is not settled whether federal courts will honor a non-consolidation clause, judicial enforcement seems likely. See Comment, *supra* note 3, at 511; *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150-51 (5th Cir. 1987) (upholding portion of arbitration clause exempting architects from consolidation absent written consent); *Stipanowich, supra* note 3, at 489 ("The trend in judicial decisions under both federal and state statutes is to allow consolidation of arbitrations that involve common issues of law and fact, at least when none of the pertinent arbitration provisions expressly excludes consolidation . . .") (emphasis added).

sensual nature of arbitration by encouraging parties to be more explicit in their agreements if they wish to avoid consolidation.

In adopting the majority view delineated by the Ninth Circuit in *Weyerhaeuser*, the *Baesler* court interprets too broadly the Supreme Court's decision in *Byrd* and neglects both the intent of Congress and the intent of the contracting parties.<sup>61</sup> Moreover, the court overlooked the Federal Rules of Civil Procedure as a basis for resolving procedural issues under the FAA.<sup>62</sup> Nevertheless, because the view adopted in *Baesler* is at least sustainable on formalistic grounds and enjoys the support of a clear majority of the circuits,<sup>63</sup> it seems likely that it will continue to prevail until either the Supreme Court resolves the issue or Congress undertakes to amend the Federal Arbitration Act.<sup>64</sup>

*S. Douglas Kerner*

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61. See *supra* notes 50-51, 58-60 and accompanying text.

62. See *supra* notes 52-57 and accompanying text.

63. See *supra* notes 16, 22 and accompanying text.

64. For a proposed amendment to modern arbitration statutes dealing with the consolidation of separate arbitration proceedings, see Stipanowich, *supra* note 3, at 529.