

1994

## Consolidation of Separate Arbitration Proceedings: Liberal Construction versus Contractarian Approaches - United Kingdom of Great Britain v. Boeing Co.

Michael L. DeCamp

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>

 Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Michael L. DeCamp, *Consolidation of Separate Arbitration Proceedings: Liberal Construction versus Contractarian Approaches - United Kingdom of Great Britain v. Boeing Co.*, 1994 J. Disp. Resol. (1994)

Available at: <https://scholarship.law.missouri.edu/jdr/vol1994/iss1/11>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository.

# NOTES

## Consolidation of Separate Arbitration Proceedings: "Liberal Construction" versus "Contractarian" Approaches

*United Kingdom of Great Britain v. Boeing Co.*<sup>1</sup>

### I. INTRODUCTION

The Federal Arbitration Act (F.A.A.)<sup>2</sup> provides arbitration agreements with the validity and enforceability afforded other contracts under the law. The F.A.A. does this by vesting the United States district courts with the authority to compel parties to arbitrate according to their agreements. However, when a court must decide whether to consolidate separate arbitration proceedings because they involve common questions of fact and law and common parties, the F.A.A. is silent as to the court's authority. This silence has resulted in courts either allowing consolidation under a liberal interpretation of the act ("liberal construction" approach), or refraining from granting consolidation under traditional contract principles ("contractarian" approach). With its decision in *Boeing*, the Second Circuit Court of Appeals has provided a strong argument in favor of the "contractarian" approach, and further, one that is consistent with the holdings of other circuits addressing this procedural issue.

### II. FACTS AND HOLDING

In *Great Britain v. Boeing*,<sup>3</sup> the Ministry of Defense, a branch of the Government of the United Kingdom of Great Britain [hereinafter United Kingdom], filed separate Demands for Arbitration with the American Arbitration Association (AAA) against both the Boeing Company (Boeing) and Textron, Inc. (Textron).<sup>4</sup> The arbitration proceedings initiated by the United Kingdom arose from losses incurred when a military helicopter, owned by the United Kingdom,

---

1. 998 F.2d 68 (2nd Cir. 1993).

2. 9 U.S.C. §§ 1-15 (1988).

3. 998 F.2d 68.

4. *Id.* at 69.

was damaged during a ground test on a newly installed fuel injection system.<sup>5</sup> Boeing manufactured the helicopter and installed the fuel injection system, while Textron manufactured the helicopter's engine and designed the fuel injection system.<sup>6</sup>

All military projects undertaken by Boeing and Textron for the United Kingdom were executed under separate contracts governing long-standing relationships between the parties.<sup>7</sup> The respective arbitration agreements relevant to this case were contained in a 1981 Boeing-United Kingdom base contract for services, as well as a 1985 Textron-United Kingdom contract relating to the design and development of the fuel injection system.<sup>8</sup> Each contract contained the following identical arbitration clause:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in New York City by three Arbitrators in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.<sup>9</sup>

The United Kingdom sought to consolidate the Boeing and Textron arbitration proceedings because the proceedings were based on the same questions of fact and law.<sup>10</sup> Boeing, however, refused to agree to the United Kingdom's consolidation efforts.<sup>11</sup> Boeing alleged that the simplicity of the issues involved in their arbitration proceeding, as compared to the issues involved in the Textron-United Kingdom arbitration proceeding, would lead to undue expense.<sup>12</sup> The AAA held that the consolidation of the Boeing-United Kingdom arbitration proceeding with the Textron-United Kingdom arbitration proceeding could not occur without the consent of all the parties involved.<sup>13</sup>

The United Kingdom, relying on *Compania Espanola de Petroleos, S.A. v. Nereus*,<sup>14</sup> filed a petition in the United States District Court for the Southern District of New York seeking to compel the consolidated arbitration proceeding denied by the AAA.<sup>15</sup> The district court granted the United Kingdom's

---

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 69-70.

11. *Id.* at 69.

12. *Id.*

13. *Id.*

14. 527 F.2d 966 (2nd Cir. 1975) (holding that the consolidation of arbitration proceedings, where the same questions of fact and law are involved, is authorized under the Federal Arbitration Act and Federal Rules of Civil Procedure).

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

petition,<sup>16</sup> and applying *Compania*, held that the F.A.A.,<sup>17</sup> along with the Federal Rules of Civil Procedure,<sup>18</sup> authorized it to compel the consolidation of the separate arbitration proceedings, despite a lack of agreement between the parties, because the proceedings involved the same questions of fact and law.<sup>19</sup>

On appeal by Boeing, the United States Court of Appeals for the Second Circuit<sup>20</sup> distinguished *Compania* from the case at hand<sup>21</sup> and reversed the district court.<sup>22</sup> The Second Circuit held that the consolidation of arbitration proceedings arising from separate agreements to arbitrate cannot occur without the agreement of the parties involved, even when the proceedings involve the same questions of fact and law.<sup>23</sup>

### III. LEGAL BACKGROUND

The Federal Arbitration Act<sup>24</sup> generally establishes that arbitration agreements are to be given the same legal weight afforded other privately negotiated contracts.<sup>25</sup> Justice Rehnquist articulated this principle in *Volt Information Sciences, Inc. v. Leland Stanford Junior University*,<sup>26</sup> stating that "[t]he [F.A.A.] was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts."<sup>27</sup>

Section 2 of the F.A.A. provides for the validity and enforceability of arbitration agreements,<sup>28</sup> while Section 4 outlines the authority that courts have

16. *Id.*

17. 9 U.S.C. §§ 1-15 (1988).

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

19. *Boeing*, 998 F.2d at 69. The parties agreed that both of the arbitration proceedings would be stayed pending the district court's ruling. *Id.* Judge Stanton issued a Memorandum Endorsement granting the United Kingdom's Petition and denying Boeing's Motion to Dismiss. *Id.*

20. The Second Circuit's jurisdiction over the appeal was invoked through 28 U.S.C. § 1291. *Boeing*, 998 F.2d at 69.

21. *Id.* at 70.

22. *Id.* at 74.

23. *Id.* The Second Circuit added that they were overruling *Compania* as it was "based on the Federal Rules of Civil Procedure and the 'liberal purposes' of the Federal Arbitration Act." *Id.* The court did not overrule *Compania* "to the extent it is based on the general equitable powers of the court and principles of contract law." *Id.*

24. 9 U.S.C. §§ 1-15 (1988).

25. *Boeing*, 998 F.2d at 72.

26. 489 U.S. 468 (1989).

27. *Id.* at 474.

28. Section 2 states:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such

to compel arbitration.<sup>29</sup> The F.A.A. is silent, however, regarding the propriety of consolidating separate arbitration proceedings arising from common questions of law and fact. In addressing the issue of consolidation, courts have historically reached different conclusions and results.<sup>30</sup> These differences can be categorized for analysis by determining whether a court construed the F.A.A.'s purpose and its provisions under a "liberal construction" view of the F.A.A. or under a "contractarian" view of the F.A.A.

The leading "liberal construction" case is the Second Circuit decision *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*<sup>31</sup> *Compania* involved a maritime freight contract whereby *Compania*, as guarantor of a charterer under contract with *Nereus*, agreed to assume "the rights and obligations [of the charterer] on the same terms and conditions as contained in the [contract]."<sup>32</sup> The district court that decided the case ordered consolidation despite *Nereus*' objections.<sup>33</sup> Upholding the district court ruling, the Second Circuit, relying on its previous decision in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*,<sup>34</sup> held that "the liberal purposes of the [F.A.A.] clearly require that this act be interpreted so as to permit and even encourage the consolidation of arbitration proceedings in proper cases . . . ."<sup>35</sup> In *Compania*, all interested parties were before the district court, the parties had "ample opportunity . . . to express their views and present any testimonial or documentary evidence," "the consolidation was in the interest of justice," and there were "common questions of law and fact."<sup>36</sup>

The Second Circuit adhered to the belief that "any doubts as to the construction of the [F.A.A.] ought to be resolved in line with [the F.A.A.'s] liberal policy of promoting arbitration both to accord with the original intention of the

grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1988).

29. Section 4 states:

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 which, save for such an agreement, would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties, 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 (1988).

30. See Scott E. Blair, Note, *The Struggle Over Consolidation of Arbitration Proceedings Continues: The Eighth Circuit Chooses Sides*, 1991 J. DISP. RESOL. 161, 163.

31. 527 F.2d 966 (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976). See Blair, *supra* note 30, at 165.

32. *Compania*, 527 F.2d at 969.

33. *Id.* at 968.

34. 271 F.2d 402 (2d Cir. 1959), cert. dismissed per stipulation, 364 U.S. 801 (1960).

35. *Compania*, 527 F.2d at 975 (emphasis added).

36. *Id.* at 974.

parties and to help ease the current congestion of court calendars."<sup>37</sup> This belief was consistent with the theory that the "overriding goal of the [F.A.A.] was to promote the expeditious resolution of claims."<sup>38</sup> Coupling this construction of the F.A.A. with the Federal Rules of Civil Procedure, the Second Circuit arguably established grounds to support the desired result of consolidation.<sup>39</sup>

The applicability of the Federal Rules of Civil Procedure in arbitration proceedings is based on Rule 81(a)(3), which states:

In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes . . . .<sup>40</sup>

Because Title 9 did not provide otherwise,<sup>41</sup> it appeared to the Second Circuit that the "expeditious resolution of claims" could be accomplished by consolidating proceedings under Rule 42(a), which provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.<sup>42</sup>

While the First Circuit, in the 1988 decision *New England Energy, Inc. v. Keystone Shipping Co.*,<sup>43</sup> appeared to also adhere to a "liberal construction" of the F.A.A., it made a significant departure from *Compania*.<sup>44</sup> In *New England Energy*, the First Circuit refused to hold that Federal Rule 42(a) specifically granted courts the power to consolidate,<sup>45</sup> and in so doing, reversed a district court ruling refusing to consolidate two arbitration agreements. One of the arbitration agreements arose out of a breach of fiduciary duty between New England Energy and Keystone as joint venturers, while the other arose from a

37. *Robert Lawrence*, 271 F.2d at 410.

38. *Boeing*, 998 F.2d at 72. See also *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983).

39. *Compania*, 527 F.2d at 975; Blair, *supra* note 30, at 168.

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

41. See Blair, *supra* note 30, at 168.

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

43. 855 F.2d 1 (1st Cir. 1988). But cf. *Seguro de Servicio de Salud de Puerto Rico v. McAuto Systems Group, Inc.*, 878 F.2d 5 (1st Cir. 1989) (refusing to compel consolidation of separate arbitration proceedings because the costs of consolidation outweighed the benefits to be achieved from consolidation).

44. *New England Energy*, 855 F.2d at 5.

45. *Id.*

question regarding the proper rate of hire between a ship operator and the joint venture.<sup>46</sup> The district court interpreted the F.A.A. and Supreme Court precedent as not authorizing consolidation absent any express agreement between the parties.<sup>47</sup> The First Circuit, in reversing, held that the consolidation could occur pursuant to Massachusetts law without violating the F.A.A.<sup>48</sup> The court concluded that "neither the [F.A.A.] nor Supreme Court precedent mandates . . . a narrowly circumscribed role for the courts [in interpreting the F.A.A.]."<sup>49</sup> The First Circuit failed "to see why a state should be prevented from enhancing the efficiency of the arbitral process, so long as the state procedure does not directly conflict with a contractual provision."<sup>50</sup>

The majority of circuit courts determining the propriety of consolidating separate arbitration proceedings have departed from the "liberal construction" view of the F.A.A. in *Compania* and *New England Energy* in favor of a "contractarian" view of the Act.<sup>51</sup> The preference for the "contractarian" view arose mainly from the Supreme Court's holding in *Dean Witter Reynolds, Inc. v. Byrd*,<sup>52</sup> which stated that "the [F.A.A.] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."<sup>53</sup> The Supreme Court considered the legislative history of the F.A.A. and held "that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate,"<sup>54</sup> not "to promote the expeditious resolution of claims."<sup>55</sup>

In *Weyerhaeuser Co. v. Western Seas Shipping Co.*,<sup>56</sup> the Ninth Circuit departed from the "liberal construction" holding in *Compania* in favor of a "contractarian" view of the F.A.A.<sup>57</sup> Weyerhaeuser, a ship charterer, sought to compel consolidation of two arbitration proceedings, one which arose under a subcharter contract and another which arose under a headcharter contract.<sup>58</sup> Both

46. *Id.* at 3.

47. *Id.*

48. *Id.* at 4-5.

49. *Id.* at 6.

50. *Id.* at 7.

51. See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *American Centennial Ins. Co. v. National Casualty Co.*, 951 F.2d 107 (6th Cir. 1991); *Baessler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Authority*, 823 F.2d 145 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984).

52. 470 U.S. 213 (1985).

53. *Id.* at 218.

54. *Id.* at 219.

55. *Id.*

56. 743 F.2d 635 (9th Cir. 1984).

57. *Id.* at 637.

58. *Id.* at 636.

contracts contained identical arbitration clauses.<sup>59</sup> The arbitration clauses, however, were silent as to consolidation.<sup>60</sup> The Ninth Circuit, in declining to follow *Compania*, held that its "authority under the [F.A.A.] is narrowly circumscribed."<sup>61</sup> According to the Ninth Circuit, the only authority granted to a court under the F.A.A. was to "determine whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms."<sup>62</sup>

The Fifth Circuit signaled its departure from the "liberal construction" view in *Del E. Webb Construction v. Richardson Hospital Authority*.<sup>63</sup> Webb, a general contractor, sought to consolidate the arbitration of separate disputes it had with an architect and with the owner of a medical center, Richardson Hospital Authority, arising out of the expansion and renovation of the Richardson Medical Center.<sup>64</sup> The district court previously held that paragraph 7.9.1 of the owner-contractor agreement required consolidation of the architect-contractor dispute.<sup>65</sup> Paragraph 7.9.1 provided that "an arbitration action shall include the owner and the contractor, and any other persons substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration."<sup>66</sup> The Fifth Circuit, in reversing the district court holding, noted that the district court had ignored a portion of paragraph 7.9.1 that explicitly excluded the architect from the arbitration absent any written consent to be joined.<sup>67</sup> Adhering to the "contractarian" view of the F.A.A., the Fifth Circuit held that "under the grant of authority in § 4 [of the F.A.A.], the district court was limited to enforcing arbitration agreements according to their terms, and since the parties agree that the architect has not consented in writing, the district court should not have ordered consolidation."<sup>68</sup>

The Eleventh Circuit, focusing on the Ninth Circuit's holding in *Weyerhaeuser*, established its adherence to the "contractarian" view in *Protective Life Insurance Corp. v. Lincoln National Life Insurance Corp.*<sup>69</sup> In *Protective Life*, the district court ordered the consolidation of arbitration proceedings between Lincoln National Life Insurance and Protective Life Insurance and between Protective Life Insurance and a third party.<sup>70</sup> The Eleventh Circuit, in

59. *Id.*

60. *Id.* at 637.

61. *Id.*

62. *Id.*

63. 823 F.2d 145 (5th Cir. 1987).

64. *Id.* at 147. The Fifth Circuit also ruled on issues concerning the applicability of the F.A.A. to this case and whether the district court or the arbitrator should decide the question concerning satisfaction of contractual prerequisites of the arbitration demand. *Id.* at 146.

65. *Id.* at 150.

66. *Id.*

67. *Id.*

68. *Id.*

69. 873 F.2d 281 (11th Cir. 1989).

70. *Id.* at 282.

overturning the district court ruling, adopted the Ninth Circuit's interpretation that Section 4 of the F.A.A.:

[C]omports with the statute's underlying premise that arbitration is a *creature of contract*, and that '[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.'<sup>71</sup>

The Eleventh Circuit held that because the agreements between the parties contained separate arbitration clauses that were silent as to consolidation, the three parties had never agreed to consolidated arbitration.<sup>72</sup> In a footnote, the court specifically rejected Protective Life Insurance's argument that district courts have the power to consolidate arbitration proceedings under Rules 42(a) and 81(a)(3) of the Federal Rules of Civil Procedure.<sup>73</sup>

Finally, in *Baessler v. Continental Grain Co.*,<sup>74</sup> the Eighth Circuit joined the Ninth, Fifth, and Eleventh Circuits in holding that the "contractarian" view of the F.A.A. did not give district courts the power to consolidate arbitration proceedings absent a provision requiring consolidation in the agreements.<sup>75</sup> Continental Grain was a party to several standard contracts, whereby producers purchased safflower seed from Continental Grain and then offered the resulting crop to Continental Grain at discounted prices.<sup>76</sup> Although these contracts contained similar arbitration agreements, the agreements were silent as to the propriety of consolidation.<sup>77</sup> After reviewing both the "liberal construction" view under *Compania* and *New England Energy*, and the "contractarian" view under *Weyerhaeuser*, *Webb*, and *Protective Life*, the Eighth Circuit stated that "[w]e agree with the majority view that the [F.A.A.] precludes federal courts from ordering consolidation of arbitration proceedings. The Supreme Court has explicitly rejected the assertion that the overriding goal of the Act is to promote the expeditious resolution of claims."<sup>78</sup>

71. *Id.* (emphasis added) (quoting *Weyerhaeuser*, 743 F.2d at 637 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974))).

72. *Id.*

73. *Id.* at 282 n.1.

74. 900 F.2d 1193 (8th Cir. 1990).

75. *Id.* at 1195.

76. *Id.* at 1194.

77. *Id.*

78. *Id.* at 1195. In his dissent, Circuit Judge John R. Brown held that the proper approach to follow was that developed in *Compania*. *Id.* at 1196. Judge Brown believed that the courts' proper role in the arbitration process was to support arbitration by making it more economically feasible and efficient through holdings consistent with the "liberal construction" view. *Id.*

## IV. THE INSTANT DECISION

The Second Circuit, in the instant case, reversed the district court's decision granting the United Kingdom's Petition to Compel Consolidated Arbitration.<sup>79</sup> Recognizing *Compania* as precedent, the Second Circuit distinguished *Compania* from the facts presented on the record,<sup>80</sup> and overruled *Compania* insofar as it established the "liberal construction" view of the F.A.A. as valid law.<sup>81</sup>

According to the court, the distinguishing feature of *Compania*, absent in the instant case, was that the three parties in *Compania* all signed a single addendum to the original charter contract.<sup>82</sup> Whereas the parties in *Compania* had therefore agreed to arbitrate according to the terms of a sole arbitration agreement, the United Kingdom-Boeing and the United Kingdom-Textron agreements were "two distinct agreements to arbitrate in two distinct contracts."<sup>83</sup> Given this distinction, the Second Circuit held that while the intent of the parties in *Compania* was best effectuated by ordering a single arbitration proceeding, the court could not make a similar determination in the instant decision without frustrating the parties' intentions.<sup>84</sup>

Although the holding in *Compania* was distinguishable from *Boeing* on the facts, the Second Circuit deemed it necessary to overrule the portion of *Compania*'s holding that required a "liberal construction" of the F.A.A.<sup>85</sup> The court recognized that the decisions by its companion circuits and by the Supreme Court subsequent to *Compania* had "undermined [the] previous conclusion that the FAA's 'liberal construction' and Federal Rules of Civil Procedure allow [consolidation of] arbitration proceedings absent consent."<sup>86</sup> In an effort to comply with consistent circuit court application, the Second Circuit strictly construed the language in Section 4 of the F.A.A. as not authorizing "consolidation of arbitration proceedings unless doing so would be 'in accordance with the terms of the agreement.'"<sup>87</sup> The Second Circuit accepted the conclusion of the post-*Compania* cases that "the FAA was intended merely to assure the enforcement of privately negotiated arbitration agreements, *despite* possible inefficiencies created by such enforcement."<sup>88</sup>

The Second Circuit also ruled on the applicability of the Federal Rules of Civil Procedure in cases involving the consolidation of arbitration proceedings.<sup>89</sup> The court limited the reach of Rule 81(a)(3) "to judicial proceedings that are

79. *Boeing*, 998 F.2d at 74.

80. *Id.* at 70.

81. *Id.* at 74.

82. *Id.* at 70.

83. *Id.*

84. *Id.*

85. *Id.* at 71.

86. *Id.*

87. *Id.* (quoting 9 U.S.C. § 4).

88. *Id.* at 72 (alteration in original).

89. *Id.* at 73.

before a court pursuant to U.S.C. Title 9, to the extent Title 9 does not provide appropriate procedural rules."<sup>90</sup> The effect of this limitation was that "although a district judge considering related petitions to compel arbitration can have all the petitions heard at once pursuant to Rule 42(a), he or she could not use Rule 42(a) to order that the underlying arbitrations, once compelled, be conducted together."<sup>91</sup>

Finally, the court dismissed the United Kingdom's argument that inefficiencies and inconsistent rulings might result from a failure to compel consolidation of the arbitration proceedings.<sup>92</sup> Adhering to the "contractarian view" of the F.A.A., the court stated that "[i]f [the] contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party."<sup>93</sup>

## V. COMMENT

The Supreme Court of the United States has yet to grant a writ of certiorari on the issue of consolidation of arbitration proceedings.<sup>94</sup> Although an argument exists that the issue of consolidation is "ripe for a writ of certiorari,"<sup>95</sup> the "smorgasbord of circuit court decisions"<sup>96</sup> addressing the issue of consolidation have adopted logical, consistent, and uniform approaches to determining the propriety of this "predominately procedural issue."<sup>97</sup> With the *Boeing* court's abrogation of the "liberal construction" view of *Compania*,<sup>98</sup> the Second Circuit has further confirmed that consolidation of separate arbitration proceedings cannot occur absent an agreement by the contracting parties.<sup>99</sup> Additionally, it is doubtful that the process of judicial review will result in an overruling of the "contractarian" approach to consolidating separate arbitration proceedings, given that the "contractarian" view comports with the Supreme Court's interpretation of the federal court's limited role mandated by the F.A.A.<sup>100</sup>

Similar to the reasoning of the other circuit courts that have adopted a "contractarian" approach to the consolidation issue, the Second Circuit, in *Boeing*, established its reasoning under the traditional contract policy of effectuating the

---

90. *Id.*

91. *Id.* at 73-74.

92. *Id.* at 74.

93. *Id.*

94. *See New England Energy*, 855 F.2d at 7. *See also Blair*, *supra* note 30, at 170.

95. *See Blair*, *supra* note 30, at 170.

96. *Id.*

97. *Id.*

98. *Boeing*, 998 F.2d at 74.

99. *Id.*

100. *See Byrd*, 470 U.S. at 218.

intent of the parties to an agreement.<sup>101</sup> Thus, most district courts today are without authority to compel consolidation, absent an agreement by the parties to consolidate separate arbitration proceedings.<sup>102</sup> District courts are also without discretion to consider the existence of common questions of fact or law<sup>103</sup> or policy considerations such as judicial efficiency and the avoidance of inconsistent determinations.<sup>104</sup>

The desired result of the Second Circuit's decision in *Boeing* was to place all arbitration proceedings "upon the same footing as other contracts."<sup>105</sup> It can be argued, however, that the intentions of the parties to separate arbitration agreements would not be frustrated if consolidation was ordered by a district court in order to avoid inefficiencies and inconsistent determinations where common questions of fact or law exist.<sup>106</sup> Although federal courts are reluctant to extend their authority under Title 9 of the F.A.A. beyond compelling parties to arbitrate in accordance with an agreement,<sup>107</sup> specialists in the arbitration field do not necessarily share the federal courts' reluctance.<sup>108</sup> As long as exigent factors are present, such as a common party to separate arbitration proceedings, similarity in the issues presented to the arbitrator, and the absence of risk of prejudice to the other parties, consolidation may be a proper method to avoid the risks of piecemeal litigation.<sup>109</sup> Federal courts would need not return to the "liberal construction" view of the F.A.A. that appears to have been abandoned.<sup>110</sup> Instead, a federal court could consider these exigent factors, while still effectuating the intentions of the parties, as required under the "contractarian" view of the

101. *Boeing*, 998 F.2d at 70.

102. *Id.*

103. *Id.*

104. *Id.* at 74.

105. *Boeing*, 998 F.2d at 72 (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924)).

106. "The arbitrators' decision in [*Compania*] held that 'the court did not err in consolidation of two separate arbitrations which have common issues of law and fact and issues so intertwined and overlapping that separate arbitration could have caused great and irreparable injustice.'" F.B. MacKellar, *To Consolidate or Not to Consolidate: A Study of Federal Court Decisions*, ARB. J., Dec. 1989, at 15, 22 (emphasis added).

107. See *Boeing*, 998 F.2d at 72 (citing cases decided by the Supreme Court that undermine the decision in *Compania*).

108. It has been stated that:

Two or more separate arbitration proceedings may be ordered to be consolidated by the Courts when at least one party is common to the arbitrations to be held and the issues are substantially the same, as long as no substantial right of a party is prejudiced by the consolidation. Thus, for example, where two contracts containing broad arbitration clauses have different provisions as to the amount of goods and the price, but where the same witnesses would be called and the same testimony heard by the same persons in each proceeding, the arbitrations may be consolidated.

MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION (THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION)*, § 27.02, at 413-17 (Gabriel M. Wilner ed., rev. ed. 1988).

109. *Boeing*, 998 F.2d 68. See generally DOMKE, *supra* note 108.

110. See cases cited, *supra* note 51. See generally *Boeing*, 998 F.2d 68.

F.A.A.<sup>111</sup> The court could consolidate separate arbitration proceedings as long as there is an absence of an agreement to *not* consolidate, as opposed to where there is an absence of an agreement *to* consolidate.<sup>112</sup>

## VI. CONCLUSION

The *Boeing* court's adoption of the "contractarian" approach to consolidation of separate arbitration proceedings is consistent with the holdings of other circuit courts that have addressed the issue *vis a vis* the F.A.A. These holdings reveal an effort by the courts to insure that parties entering arbitration proceedings will have their intentions effectuated by a court in a manner similar to other contract proceedings. They also reveal the costs associated with strictly adhering to the parties' intentions, namely the loss of court discretion in considering policy matters such as judicial efficiency and the avoidance of inconsistent determinations.

MICHAEL L. DECAMP

---

111. See *supra* note 51. See generally *Boeing*, 998 F.2d 68.

112. See *supra* note 51. See generally *Boeing*, 998 F.2d 68.