ROLL OF ATENEO LAW JOURNAL
Faculty Advisers

1951 – 54	Jesus de Veyra
1954 – 56	Jeremias U. Montemayor
1956 – 59	Amelito R. Mutuc
1959 – 63	Federico B. Moreno
1973 – 68	Rodolfo U. Jimenez
1970 – 71	Reynaldo G. Geronimo
1974 –	Hector L. Hofilena
	Exequiel B. Javier

COURT-ARBITRATION INTERFACE:

Consolidation, Attachment and Discovery

Manuel A.J. Teehankee*

CONTENTS

1.0 Introduction

The topic of court-arbitration interface broadly deals with the matter of resort to judicial remedies by parties bound under an arbitration agreement. As was aptly stated by one court:

> Arbitration is not a separate proceeding independent of the courts, as was sometimes thought. The courts are brigaded with the arbitral tribunal in proceedings to compel arbitration, or stay judicial trials, proceedings to enforce or quash subpoenas issued by arbitrators and proceedings to enforce or set aside arbitral awards.

Bigge Crane and Rigging Co. v. Docutel Corp., 371 F. Supp. 240, 246 (E.D.N.Y. 1973).

The court mentioned examples of established court-arbitration interface and went on to allow discovery procedure in aid of arbitration, a practice theretofore not accepted.

---

* *L.L.B. 1983, Ateneo College of Law.*

This paper restricts itself to the field of non-traditional court-arbitration interaction, namely at the pre-hearing stage. This gray area had led, in some instances, to courts construing any application before it, other than to stay the action or arbitration, as constituting an implied waiver of the parties' right to arbitration.[1]

The Rules of Commercial Arbitration of the American Arbitration Association were thus amended to include the following provision:

> 47. Applications to Court and Exclusion of Liability (a) No judicial proceedings by a party relating to the subject matter of arbitration shall be deemed a waiver of the party's right to arbitrate.

It was, and is not, clear, though, what judicial proceedings were being referred to and are available to parties in an arbitration. The judiciary has come a long way from its initial hostility to the arbitral process and its concern in limiting court-arbitration interface has delved mainly into the consistency of imposing litigation mechanisms in an area intended to operate, precisely, as an alternative to the litigation system, a system once described as "too costly, too painful, too destructive, too inefficient for a truly civilized people."[2]

2.0 Consolidation of Arbitration

In the context of contemporary commercial dealings, it is often the case that more than two parties are involved, whether the transaction involves multinational shipping companies or some newlywed couple arranging for the construction of their new home. The legal consequences of these transactions is the execution of more than one, if not several, related contracts or agreements some or all of which may or may not contain arbitral clauses.

As with regular judicial remedies, consolidation of proceedings in multiparty arbitrations can readily provide advantages in terms of efficiency and cost-saving. However, as will be seen in the discussion of the cases below, there are two basic issues which the courts confront in ordering consolidation of arbitration proceedings:

> the *contract basis* of arbitration; and
> the lack of express *statutory basis*
> for consolidation of arbitration
> proceedings.

2.1 Federal Cases

According to Domke:

[1] *See generally, Waiver of Arbitration,* Lawyers' Arbitration Letter, Vol. 3, No. 25 (March 1979).

[2] C.J. Warren E. Burger, Annual Report to the Midyear meeting of the American Bar Association (Feb. 12, 1984), reprinted in 70 A.B.A. Journal 62, 66 (April 1984).

> The general rule is that a court *may* order consolidation of arbitration proceedings where the parties are not the same if the issues are substantially the same and if no substantial right is prejudiced.

Domke on Commercial Arbitration at 272 (1968).

No specific authority was footnoted by the author in support of the above general rule but acceptance of the statement is evidenced by a direct quotation in the case of *Robinson v. Warner,* 370 F. Supp. 828 (D.R.I. 1974). The case involved two separate contracts, both containing broad arbitration clauses and which resulted in a tripartite dispute between an architect, a contractor and a home owner. The court posed the issue as follows:

> The American Arbitration Association has refused to proceed with a consolidated arbitration since, pursuant to their policy, disputes arising under separate contracts containing arbitration clauses cannot be heard before a single arbitration panel if one of the parties objects to such consolidation. By letter, however, the AAA has indicated that it will abide by the Court's order in the event a consolidated arbitration is deemed appropriate.
>
> The jurisdictional questions have been dealt with in earlier decisions by this Court, and the issue now presented is whether a Federal Court, acting under Title 9 U.S.C., can compel a consolidated arbitration when the agreements to arbitrate are embodied in separate contracts (although there is one common party to both agreements), and neither of the separate contracts provide for consolidated arbitration.

Robinson at 829.

After citing Domke and determining that a consolidated proceeding is clearly "preferred" the court addressed the lack of statutory authority to order consolidation. Adopting the reasoning in a state case, *Vigo v. Steamship Corp. v. Marship Corp.,* 26 N.Y.2d 157, 309 N.Y.S.2d 165 (1970), the court held:

> . . . in light of Rules 81 (a) (3) and 42(a) of the Federal Rules of Civil Procedure, and in the absence of decisional law to the contrary, I find an ample legal basis under 9 U.S.C. $ 4 to compel a joint arbitration of the disputes here in question.[3]

Robinson at 831.

[3] Rule 42(a)(3), Fed. R. Civ. Pro., 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.

Rule 81 (a), Fed. R. Civ. Pr., in pertinent parts states:

> (3) In proceedings under Title 9, USC, relating to arbitration, or under the Act of May 21, 1926, ch. 347, § 9 (44 Stat. 585), USC, Title 45, § 9 (44 State. 585) USC, Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedures are not provided for in those statutes.

This view was to be in turn adopted and confirmed by the United States Court of Appeals for the Second Circuit in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F. 2d 966 (2d Cir. 1975), *cert. dented*, 426 U.S. 936, 49 L.Ed. 2d 387 (1976). The *Nereus* decision had far-reaching legal consequences in the field of arbitration and served as the definitive ruling on consolidation of arbitration proceedings[4] until it was strongly questioned by a decision of the United States Court of Appeals for the Nith Circuit in the case of *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F. 2d 635 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 544, 83 L.Ed. 2d 431 (1984). In denying certiorari[5] for the *Weyerhaeuser* case, the United States Supreme Court has again allowed a conflict of decisions among the circuits to stand and a brief discussion of the two cases is appropriate.

The Nereus case:

A charter party was signed by Nereus Shipping, S.A. (as owner) and Hidrocarburos y Derivados, S.A. (as charterer) on January 27, 1971 at New York. The contract contained a broad arbitration clause which specified in detail the procedure for appointing a board of three arbitrators.

At Madrid on June 24, 1971, Compania Española de Petroleos, S.A. (as guarantor) as well as the original parties signed "Addendum No. 2" to the agreement of January 27, 1971, which, in part, reads:

> . . . we, Compania Espanola de Petroleos, S.A., hereby agree that should HIDECA default in payment or performance of its obligations under the Charter Party, we will perform the balance of the contract and assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party.

527 F.2d at 969-970. The addendum did not contain an arbitration clause. Two issues arose as to whether the guarantor was bound to arbitrate at all in the absence of an express agreement and if so bound, whether the arbitration proceedings could be consolidated. A corollary issue also arose as to the method of appointment of the arbitrators should consolidation be ordered.

[4] *See* Matter of Czarnikow-Rionda Co., Inc., 512 F. Supp. 1308 (1981), citing *Nereus* and stating:

> Enforcement of an arbitration clause in federal court is controlled by the federal Arbitration Act ("Act"), 9 U.S.C. §§ 1-14. Although the Act does not specifically provide for consolidated arbitrations, 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.

Id. at 1309. *See also* excerpts, unreported case of the U.S.C.A. 2d Circuit which reasoned that the New York Convention does not bar consolidation of arbitrations, VIII Yearbook Comm. Arbitration 423, 425 (1983).

[5] White, J. voted to grant certiorari, *see* 105 S. Ct. at 544.

After finding that the broad language of the addendum implied consent on the part of the guarantor to the terms of the main agreement and that the guarantor was therefore bound to arbitrate, the court went on to hold:

> Nereus claims that the District Court was without power to consolidate the arbitrations, and that consolidation in any case is improper unless the party who has arbitration agreements with the other two parties consents to that procedure. However, there is more than ample support in the case law for the propriety of a court's consolidation of arbitrations under the federal statute. *See, e.g., Robinson v. Warner*, 370 F. Supp. 828 (D.R.I. 1974);
>
> . . .
>
> We agree that Fed.R.Civ.P., Rules 42(a) and 81(a) (3), are applicable. Moreover, we think the liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases, such as the one before us.
>
> And, if this flexible and desirable remedy is to encompass consolidation, we hold this must include the essential implementation of the consolidated proceeding by moulding the method of selection and the number of arbitrators so as to fit this new situation.

527 F.2d at 974-975.

The court then proceeded to formulate an order specifying in detail the mode of selecting and appointing the arbitrators for the consolidated arbitration which involved the constitution of a five-man arbitration panel, three of whom were to be appointed by the respective parties and two of whom were to be appointed by unanimous selection of the arbitrators first appointed.

It can be seen that the Nereus decision not only found some implied statutory basis for consolidation but considerably expanded the powers of the courts to act in respect of such consolidation. Assuming *arguendo* that the court sufficiently overcame the obstacle of *statutory basis*, the *Nereus* as well as the *Robinson* court failed, however, to directly address the *contract basis* argument, i.e. that arbitration is essentially a "creature of contract" and rights thereunder must necessarily flow from and be delimited by the aagreement of the parties to arbitrate; and that the role of the courts is only to enforce such agreement. This is not to say that had the courts addressed these issues, a different outcome should or may have resulted but rather that this failure could have served to weaken the persuasive influence of the decision and thus lead to the *Weyerhaeuser* decision.

The *Wyerhaeuser* case:

Weyerhaueser Company (as charterer) time chartered two ships owned as successor in interest by TransPacific Shipping Co. Subsequently, a second for subcharter was signed between the charterer and Karlander Australia Party Ltd. (as subcharterer). The two separate contracts both contained standard arbitration clauses which were identical. At the time of the subcharter, TransPacific secured

in their favor an addendum from Weyerhaeuser stipulating a "hold free and harmless" clause for any added losses or expenses arising from the subcharter. When a dispute arose due to cargo stowage restrictions, Karlander demanded arbitration against Weyerhaeuser and the latter demanded arbitration against TransPacific alleging its right to indemnity. Weyerhaeuser, in view of TransPacific's and Karlander's opposition, sought a judicial order compelling consolidation citing as principal authority the *Nereus* case's application of the Federal Rules of Civil Procedure.

In affirming the denial of consolidation, the Ninth Circuit said:

> Insofar as *Compania Espanola* rests on the consent of the parties, it is distinguishable from the present case. It is clear that the parties here did not consent to join arbitration. As Weyerhaeuser admits, there are two separate agreements between the headcharter and subcharter parties.
>
> . . .
>
> Insofar as *Compania* holds that federal courts may order consolidation in the absence of consent, we decline to follow it. Instead, we adopt the reasoning of the district court in this case. The district court correctly held that our authority under the United States Arbitration Act is narrowly circumscribed.
>
> . . .
>
> Thus, we can only determine whether a written arbitration agreement exists, and if it does, enforce it "in accordance with its terms." As the district court noted, this provision "comports 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.' *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 [94 S.Ct. 2449, 2457, 41 L.Ed.2d 270] (1974)."

743 F.2d at 637.

The decision affirmed was more sweeping in its criticism of the *Nereus* line of cases:

> It must be noted that the court also relied on the District Court's asserted power to consolidate under Rules 81(a) (3) and 42(a) even without contractual agreement among the parties.
>
> . . .
>
> These cases ignore the limitation on the authority granted the District Court under the federal Arbitration Act.
>
> . . .
>
> The agreement to arbitrate only certain disputes or only in a certain manner represents a contractual allocation of risk that the Court may not disturb absent the kind of showing required for reformation of an ordinary contract. *See* 9 U.S.C. § 2. The standards for consolidation under Rule 42 (a) are therefore irrelevant.

568 F. Supp. 1220, 1222 (N.D. Cal. 1983).

The facts of the two cases are distinguishable and *Weyerhaeuser* points this out, however, the court did not limit its ruling to the facts and takes advantage of

the weak spot of the *Nereus* decision, i.e. its failure to address adequately the contract concern.

Thus, it seems that the general rule stated by Domke has come under serious question, and what used to be the settled and least controversial aspect of allowable court-arbitration interface has become unpredictable. In fact, *Weyerhaeuser's* effects are now being felt even in *Nereus* territory. In *Ore & Chemical Corp. v. Stinnes Interoil, Inc.*, 606 F. Supp. 1511 (S.D.N.Y. 1985), *see also* related proceeding, 611 F. Supp. 237 (S.D.N.Y. 1985), the district court refused to apply the *Nereus* ruling and denied consolidation of two related arbitration proceedings. Citing the *Weyerhaeuser* ruling and *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. ——, 105 S.Ct. 1238, 84 L.Ed. 2d 158 (1985), the court opined that:

> if the Court of Appeals for the Second Circuit were to reconsider the issue, it would overrule *Nerus,* and hold that a district court does not have the power under 9 U.S.C. § 4 to compel consolidated arbitration where the parties did not provide for consolidated arbitration in the arbitration agreement.

606 F. Supp. at 1512-1513.

The denial of consolidation has been appealed and is pending resolution.[6] Thus, the Second Circuit will, if it deems it proper, have an opportunity to reexamine its *Nereus* ruling.

2.2 The States

Relative to the federal cases, the situation in state jurisdictions is not as fluid. The issue of consolidation of arbitration proceedings has not arisen too often and there are basically two representative views regarding the authority of state courts to order consolidation.

The First View:

New York is the leading jurisdiction which supports the view that consolidation of arbitration proceedings is proper provided no substantial prejudice is caused to the parties. The court of appeals summed up the history of the New York rule in *Country of Sullivan v Nezelek,* 42 N.Y. 2d 123 (1977).

> It is quite true that we initially based our conclusion that the courts had authority to consolidate arbitration proceedings on the theory that under section 1459 of the then Civil Practice Act an arbitration proceeding was a "special proceeding" and that under section 96 of the Civil Practice Act there was judicial power to consolidate special proceedings "whenever it can be done without prejudice to a substantial right." (*Matter of Symphony Fabrics Corp.* [*Bernson Silk Mills*], 12 NY2d 409). With the enactment of our present Civil Practice Law and Rules in

---

[6] Ironically though, the same court, in the related proceeding (611 F. Supp. 237) on the strength of Section 5 of the Federal Arbitration Act. 9 U.S.C. § 5, appointed a *single* arbitrator to preside at the two arbitration proceedings and leaving to the said arbitrator the decision to consolidate the proceedings or not.

in their favor an addendum from Weyerhaeuser stipulating a "hold free and harmless" clause for any added losses or expenses arising from the subcharter. When a dispute arose due to cargo stowage restrictions, Karlander demanded arbitration against Weyerhaeuser and the latter demanded arbitration against TransPacific alleging its right to indemnity. Weyerhaeuser, in view of TransPacific's and Karlander's opposition, sought a judicial order compelling consolidation citing as principal authority the *Nereus* case's application of the Federal Rules of Civil Procedure.

In affirming the denial of consolidation, the Ninth Circuit said:

> Insofar as *Compania Espanola* rests on the consent of the parties, it is distinguishable from the present case. It is clear that the parties here did not consent to join arbitration. As Weyerhaeuser admits, there are two separate agreements between the headcharter and subcharter parties.
>
> . . .
>
> Insofar as *Compania* holds that federal courts may order consolidation in the absence of consent, we decline to follow it. Instead, we adopt the reasoning of the district court in this case. The district court correctly held that our authority under the United States Arbitration Act is narrowly circumscribed.
>
> . . .
>
> Thus, we can only determine whether a written arbitration agreement exists, and if it does, enforce it "in accordance with its terms." As the district court noted, this provision "comports 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.' *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 [94 S.Ct. 2449, 2457, 41 L.Ed.2d 270] (1974)."

743 F.2d at 637.

The decision affirmed was more sweeping in its criticism of the *Nereus* line of cases:

> It must be noted that the court also relied on the District Court's asserted power to consolidate under Rules 81(a) (3) and 42(a) even without contractual agreement among the parties.
>
> . . .
>
> These cases ignore the limitation on the authority granted the District Court under the federal Arbitration Act.
>
> . . .
>
> The agreement to arbitrate only certain disputes or only in a certain manner represents a contractual allocation of risk that the Court may not disturb absent the kind of showing required for reformation of an ordinary contract. *See* 9 U.S.C. § 2. The standards for consolidation under Rule 42 (a) are therefore irrelevant.

568 F. Supp. 1220, 1222 (N.D. Cal. 1983).

The facts of the two cases are distinguishable and *Weyerhaeuser* points this out, however, the court did not limit its ruling to the facts and takes advantage of

the weak spot of the *Nereus* decision, i.e. its failure to address adequately the contract concern.

Thus, it seems that the general rule stated by Domke has come under serious question, and what used to be the settled and least controversial aspect of allowable court-arbitration interface has become unpredictable. In fact, *Weyerhaeuser's* effects are now being felt even in *Nereus* territory. In *Ore & Chemical Corp. v. Stinnes Interoil, Inc.*, 606 F. Supp. 1511 (S.D.N.Y. 1985), *see also* related proceeding, 611 F. Supp. 237 (S.D.N.Y. 1985), the district court refused to apply the *Nereus* ruling and denied consolidation of two related arbitration proceedings. Citing the *Weyerhaeuser* ruling and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. ——, 105 S.Ct. 1238, 84 L.Ed. 2d 158 (1985), the court opined that:

> if the Court of Appeals for the Second Circuit were to reconsider the issue, it would overrule *Nerus*, and hold that a district court does not have the power under 9 U.S.C. § 4 to compel consolidated arbitration where the parties did not provide for consolidated arbitration in the arbitration agreement.

606 F. Supp. at 1512-1513.

The denial of consolidation has been appealed and is pending resolution.[6] Thus, the Second Circuit will, if it deems it proper, have an opportunity to reexamine its *Nereus* ruling.

2.2 The States

Relative to the federal cases, the situation in state jurisdictions is not as fluid. The issue of consolidation of arbitration proceedings has not arisen too often and there are basically two representative views regarding the authority of state courts to order consolidation.

The First View:

New York is the leading jurisdiction which supports the view that consolidation of arbitration proceedings is proper provided no substantial prejudice is caused to the parties. The court of appeals summed up the history of the New York rule in *Country of Sullivan v Nezelek*, 42 N.Y. 2d 123 (1977).

> It is quite true that we initially based our conclusion that the courts had authority to consolidate arbitration proceedings on the theory that under section 1459 of the then Civil Practice Act an arbitration proceeding was a "special proceeding" and that under section 96 of the Civil Practice Act there was judicial power to consolidate special proceedings "whenever it can be done without prejudice to a substantial right." (*Matter of Symphony Fabrics Corp.* [*Bernson Silk Mills*], 12 NY2d 409). With the enactment of our present Civil Practice Law and Rules in

---

[6] Ironically though, the same court, in the related proceeding (611 F. Supp. 237) on the strength of Section 5 of the Federal Arbitration Act. 9 U.S.C. § 5, appointed a *single* arbitrator to preside at the two arbitration proceedings and leaving to the said arbitrator the decision to consolidate the proceedings or not.

in their favor an addendum from Weyerhaeuser stipulating a "hold free and harmless" clause for any added losses or expenses arising from the subcharter. When a dispute arose due to cargo stowage restrictions, Karlander demanded arbitration against Weyerhaeuser and the latter demanded arbitration against TransPacific alleging its right to indemnity. Weyerhaeuser, in view of TransPacific's and Karlander's opposition, sought a judicial order compelling consolidation citing as principal authority the *Nereus* case's application of the Federal Rules of Civil Procedure.

In affirming the denial of consolidation, the Ninth Circuit said:

> Insofar as *Compania Espanola* rests on the consent of the parties, it is distinguishable from the present case. It is clear that the parties here did not consent to join arbitration. As Weyerhaeuser admits, there are two separate agreements between the headcharter and subcharter parties.
>
> . . .
>
> Insofar as *Compania* holds that federal courts may order consolidation in the absence of consent, we decline to follow it. Instead, we adopt the reasoning of the district court in this case. The district court correctly held that our authority under the United States Arbitration Act is narrowly circumscribed.
>
> . . .
>
> Thus, we can only determine whether a written arbitration agreement exists, and if it does, enforce it "in accordance with its terms." As the district court noted, this provision "comports 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.' *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 [94 S.Ct. 2449, 2457, 41 L.Ed.2d 270] (1974)."

743 F.2d at 637.

The decision affirmed was more sweeping in its criticism of the *Nereus* line of cases:

> It must be noted that the court also relied on the District Court's asserted power to consolidate under Rules 81(a) (3) and 42(a) even without contractual agreement among the parties.
>
> . . .
>
> These cases ignore the limitation on the authority granted the District Court under the federal Arbitration Act.
>
> . . .
>
> The agreement to arbitrate only certain disputes or only in a certain manner represents a contractual allocation of risk that the Court may not disturb absent the kind of showing required for reformation of an ordinary contract. *See* 9 U.S.C. § 2. The standards for consolidation under Rule 42 (a) are therefore irrelevant.

568 F. Supp. 1220, 1222 (N.D. Cal. 1983).

The facts of the two cases are distinguishable and *Weyerhaeuser* points this out, however, the court did not limit its ruling to the facts and takes advantage of the weak spot of the *Nereus* decision, i.e. its failure to address adequately the contract concern.

Thus, it seems that the general rule stated by Domke has come under serious question, and what used to be the settled and least controversial aspect of allowable court-arbitration interface has become unpredictable. In fact, *Weyerhaeuser's* effects are now being felt even in *Nereus* territory. In *Ore & Chemical Corp. v. Stinnes Interoil, Inc.*, 606 F. Supp. 1511 (S.D.N.Y. 1985), *see also* related proceeding, 611 F. Supp. 237 (S.D.N.Y. 1985), the district court refused to apply the *Nereus* ruling and denied consolidation of two related arbitration proceedings. Citing the *Weyerhaeuser* ruling and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. ——, 105 S.Ct. 1238, 84 L.Ed. 2d 158 (1985), the court opined that:

> if the Court of Appeals for the Second Circuit were to reconsider the issue, it would overrule *Nerus*, and hold that a district court does not have the power under 9 U.S.C. § 4 to compel consolidated arbitration where the parties did not provide for consolidated arbitration in the arbitration agreement.

606 F. Supp. at 1512-1513.

The denial of consolidation has been appealed and is pending resolution.[6] Thus, the Second Circuit will, if it deems it proper, have an opportunity to reexamine its *Nereus* ruling.

2.2 The States

Relative to the federal cases, the situation in state jurisdictions is not as fluid. The issue of consolidation of arbitration proceedings has not arisen too often and there are basically two representative views regarding the authority of state courts to order consolidation.

The First View:

New York is the leading jurisdiction which supports the view that consolidation of arbitration proceedings is proper provided no substantial prejudice is caused to the parties. The court of appeals summed up the history of the New York rule in *Country of Sullivan v Nezelek*, 42 N.Y. 2d 123 (1977).

> It is quite true that we initially based our conclusion that the courts had authority to consolidate arbitration proceedings on the theory that under section 1459 of the then Civil Practice Act an arbitration proceeding was a "special proceeding" and that under section 96 of the Civil Practice Act there was judicial power to consolidate special proceedings "whenever it can be done without prejudice to a substantial right." (*Matter of Symphony Fabrics Corp.* [*Bernson Silk Mills*], 12 NY2d 409). With the enactment of our present Civil Practice Law and Rules in

[6] Ironically though, the same court, in the related proceeding (611 F. Supp. 237) on the strength of Section 5 of the Federal Arbitration Act. 9 U.S.C. § 5, appointed a *single* arbitrator to preside at the two arbitration proceedings and leaving to the said arbitrator the decision to consolidate the proceedings or not.

in their favor an addendum from Weyerhaeuser stipulating a "hold free and harmless" clause for any added losses or expenses arising from the subcharter. When a dispute arose due to cargo stowage restrictions, Karlander demanded arbitration against Weyerhaeuser and the latter demanded arbitration against TransPacific alleging its right to indemnity. Weyerhaeuser, in view of TransPacific's and Karlander's opposition, sought a judicial order compelling consolidation citing as principal authority the *Nereus* case's application of the Federal Rules of Civil Procedure.

In affirming the denial of consolidation, the Ninth Circuit said:

> Insofar as *Compania Espanola* rests on the consent of the parties, it is distinguishable from the present case. It is clear that the parties here did not consent to join arbitration. As Weyerhaeuser admits, there are two separate agreements between the headcharter and subcharter parties.
>
> . . .
>
> Insofar as *Compania* holds that federal courts may order consolidation in the absence of consent, we decline to follow it. Instead, we adopt the reasoning of the district court in this case. The district court correctly held that our authority under the United States Arbitration Act is narrowly circumscribed.
>
> . . .
>
> Thus, we can only determine whether a written arbitration agreement exists, and if it does, enforce it "in accordance with its terms." As the district court noted, this provision "comports 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.' *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 [94 S.Ct. 2449, 2457, 41 L.Ed.2d 270] (1974)."

743 F.2d at 637.

The decision affirmed was more sweeping in its criticism of the *Nereus* line of cases:

> It must be noted that the court also relied on the District Court's asserted power to consolidate under Rules 81(a) (3) and 42(a) even without contractual agreement among the parties.
>
> . . .
>
> These cases ignore the limitation on the authority granted the District Court under the federal Arbitration Act.
>
> . . .
>
> The agreement to arbitrate only certain disputes or only in a certain manner represents a contractual allocation of risk that the Court may not disturb absent the kind of showing required for reformation of an ordinary contract. *See* 9 U.S.C. §2. The standards for consolidation under Rule 42 (a) are therefore irrelevant.

568 F. Supp. 1220, 1222 (N.D. Cal. 1983).

The facts of the two cases are distinguishable and *Weyerhaeuser* points this out, however, the court did not limit its ruling to the facts and takes advantage of

the weak spot of the *Nereus* decision, i.e. its failure to address adequately the contract concern.

Thus, it seems that the general rule stated by Domke has come under serious question, and what used to be the settled and least controversial aspect of allowable court-arbitration interface has become unpredictable. In fact, *Weyerhaeuser's* effects are now being felt even in *Nereus* territory. In *Ore & Chemical Corp. v. Stinnes Interoil, Inc.*, 606 F. Supp. 1511 (S.D.N.Y. 1985), *see also* related proceeding, 611 F. Supp. 237 (S.D.N.Y. 1985), the district court refused to apply the *Nereus* ruling and denied consolidation of two related arbitration proceedings. Citing the *Weyerhaeuser* ruling and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. ——, 105 S.Ct. 1238, 84 L.Ed. 2d 158 (1985), the court opined that:

> if the Court of Appeals for the Second Circuit were to reconsider the issue, it would overrule *Nerus*, and hold that a district court does not have the power under 9 U.S.C. § 4 to compel consolidated arbitration where the parties did not provide for consolidated arbitration in the arbitration agreement.

606 F. Supp. at 1512-1513.

The denial of consolidation has been appealed and is pending resolution.[6] Thus, the Second Circuit will, if it deems it proper, have an opportunity to reexamine its *Nereus* ruling.

2.2 The States

Relative to the federal cases, the situation in state jurisdictions is not as fluid. The issue of consolidation of arbitration proceedings has not arisen too often and there are basically two representative views regarding the authority of state courts to order consolidation.

The First View:

New York is the leading jurisdiction which supports the view that consolidation of arbitration proceedings is proper provided no substantial prejudice is caused to the parties. The court of appeals summed up the history of the New York rule in *Country of Sullivan v Nezelek*, 42 N.Y. 2d 123 (1977).

> It is quite true that we initially based our conclusion that the courts had authority to consolidate arbitration proceedings on the theory that under section 1459 of the then Civil Practice Act an arbitration proceeding was a "special proceeding" and that under section 96 of the Civil Practice Act there was judicial power to consolidate special proceedings "whenever it can be done without prejudice to a substantial right." (*Matter of Symphony Fabrics Corp.* [*Bernson Silk Mills*], 12 NY2d 409). With the enactment of our present Civil Practice Law and Rules in

---

[6] Ironically though, the same court, in the related proceeding (611 F. Supp. 237) on the strength of Section 5 of the Federal Arbitration Act. 9 U.S.C. § 5, appointed a *single* arbitrator to preside at the two arbitration proceedings and leaving to the said arbitrator the decision to consolidate the proceedings or not.

> 1962, the classification of arbitration as a special proceeding was intentionally discarded (contrast CPLR 7502 with Civ Prac Act, $1459). It was then contended that, the basis therefor having been demolished, the courts no longer had authority to consolidate arbitration proceedings. That argument was accepted at the Appellate Division but rejected in our court (*Matter of Chariot Textiles Corp. [Wannaancit Textile Co. – Kute Kiddies Coats*, 21 AD (2d 762 revd 18 NY2d 793). Thereafter, in *Matter of Vigo S.S. Corp. (Marship Corp of Monrovia)* (26 NY2d 157), we reinstated a Supreme Court order directing consolidation of arbitration proceedings which had been reversed at the Appellate Division. Thus, it is no loneger open to serious dispute that there is judicial power to order consolidation of arbitration proceedings *(Mount Sinai Hosp. of Hartford v. Wheeler*, 45 AD2d 934).

Id. at 127. It should be noted that the *Sullivan* case involved *four* parties and two related contracts. The court concluded that lack of identity of the parties, *per se*, would not preclude consolidation.

California (in 1978) and Massachusetts (in 1977) enacted legislation expressly authorizing courts to consolidate arbitrations.[7] In Massachusetts, prior to said amendment, their highest court had ruled against consolidation of. arbiration proceedings in the absence of consent of the parties and stating that the court was required to "adhere to the method established by the contract and forego the rewriting of the contract for the parties." *Stop & Shop Companies, Inc. v. Gilbane Building Co.*, 304 N.E.2d 429, 431 (Mass. 1973). In California, the retroactive application of the new law allowing for consolidation was upheld, there being no substantive right created or affected by the new procedure.[8] California may also be taking the lead in the new development of classwide arbitrations, a question discussed and positively encouraged by the Supreme Court of California *Keating v. The Superior Court of Alameda County*, 31 Cal. 3d 584, 608-614 [1982], *rev'd on another matter, Southland Corporation v. Keating*, 79 L.Ed.2d 1 [1984].[9]

Other state courts, usually faced with construction disputes, have followed the New York rule. Minnesota's Supreme Court ordered consolidation in *Grover Diamond Associates v. American Arbitration Association*, 297 Minn. 324, 211 N.W. 2d 787 (1973), a case involving a building owner's claim against an architect and contractor for unauthorized expenditures.[10]

---

[7] *See* Cal. Code of Civil Procedure § 1281.3 (West 1982); and Mass. Ann. Laws ch. 251 § 2A (Law. Coop. 1980).

[8] Conejo Valley United School District v. Blurock & Partners, Inc., 169 Cal. Rptr 102 (Cal. Ct. App. 1980).

[9] *See* Southland Corporation v. Keating, 79 L.Ed.2d 1, 11 n.4 (1984) where the *ponente* interpreted the California decision as permitting class-wide arbitration "as a matter of state law."

[10] *See* generally, Annot., 64 A.L.R.3d 528 and Lawyers' Arbitration Letter, Vol. 2, no. 24 (1978).

The Second View:

In most cases wherein the state courts deny consolidation of arbitration proceedings, the two primary reasons advanced are (i) the absence of statutory authority therefor, and (ii) the fact that the parties did not contract or agree to arbitrate in such manner, and to order consolidation would, in effect, alter the contract between the parties."

This echoes the *Weyerhaeuser* ruling and would rather leave the matter to the parties or to the legislatures for determination.

2.3 In sum, the general trend can be said to be in favor of consolidation of arbitration proceedings when no prejudice will result. Valid concerns, however, are raised by the contrary decisions and should be squarely faced both by the courts and legal practitioners. Further, court intervention in this aspect has already expanded dramatically as to include revision of the method of appointment of arbitrators and the possible use of class action procedures. The future trend will perhaps depend on the resolution of the conflict between the federal cases of *Nereus* and *Weyerhaeuser*.

Much as *Weyerhaeuser* has rational appeal, consolidation of arbitration proceedings has undeniably immense practical value.[12] It is difficult to predict what the courts will do, but, perhaps a balance may be struck by upholding *Nereus'* finding of statutory basis for consolidation while requiring stricter contractual consent requirements in line with *Weyerhaeuser*. Whatever guidelines are eventually formulated by the courts, only by addressing the concerns expressed in these two cases can a stable general rule evolve.

3.0 Attachment and Provisional Remedies

The second aspect of court-arbitration interface to be discussed refers to attachments and other interim relief that a court may grant to preserve the status quo or the effectiveness of a future award. In agreeing to submit their disputes to arbitration, parties' main concern may be to avoid the delays and expenses of litigation, but the efficiency and expeditiousness of arbitral proceedings will all be for naught if the award turns out to be a mere scrap of paper due to defendant's dissipation or removal of assets or the subject matter of the dispute. Understandably then, this matter has more serious implications on the substantive rights of the parties than consolidation of proceedings first discussed above.

---

[11] *See* J. Brodie & Son, Inc. v. George A. Fuller Company, 167 N.W.2d 886 (Mich. Ct. App. 1969); *see also n. 10.*

[12] *See* Bernini, *Arbitration in Multi-Party Disputes*, V Yearbook Comm. Arbitration 291 (1980).

3.1 Federal Cases

In view of the fact that Section 8 of the Federal Arbitration Act (9 U.S.C. § 8)[13] provides specifically for prearbitration attachment in admiralty cases, the federal courts seem to make much of the nature of the action, as maritime or non-maritime, in its decision to order an attachment. This uncanny standard is of relatively recent vintage and is traceable (perhaps unjustly) to the accession by the United States to the New York Convention[14] which took effect in the United States on December 29, 1970.

Prior to this date, the authority of courts to grant attachments or provisional relief was not in dispute. The Second Circuit (Learned Hand, J.) in *Murray Oil Products Co. v. Mitsui & Co.*, 146 F.2d 381 (2d Cir. 1944) had long ago justified prearbitration attachment by the view that arbitration, being merely another "form of trial," state provisional remedies were equally applicable. The United States Supreme Court, in the same year, had construed Section 8 of the Federal Arbitration Act (9 U.S.C. § 8) as completely preventing the parties to an arbitration from consensually eliminating resort to the courts for attachment or security in traditional admiralty procedure, *The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42 (1944). In *Boys Markets v. Clerks Union*, 398 U.S. 235 (1970), as regards the use of injunctions and equitable remedies in the labor arbitration context, the High Court speaking through Justice Brennan reasoned:

> The injunction, however, is so important a remedial device, particularly in the arbitration context, that its availability or non-availability in various courts will not only produce rampant forum shopping and maneuvering from one court to another but will also greatly frustrate any relative uniformity in the enforcement of arbitration agreements.
>
> . . .
>
> While the underlying purposes of Congress in providing for federal question removal jurisdiction remain somewhat obscure, there has never been a serious contention that Congress intended that the removal mechanism be utilized to foreclose completely remedies otherwise available in the state courts.
>
> . . .

[13] 9 U.S.C. § 8 reads:

> § 8. Proceedings Begun by Libel in Admiralty and Seizure of Vessel or Property. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

[14] The United States Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. § 17, T.I.A.S. No. 6887, hereinafter "the Convention." *See also* 9 U.S.C. § 201.

> Even if management is not encouraged by the unavailability of the injunction remedy to resist arbitration agreements, the fact remains that the effectiveness of such agreements would be greatly reduced if injunctive relief were withheld.

Id. at 246, 249.

The cases decided after the adoption of the Convention assumed a different line of thinking. The Third Circuit, questioning the *Murray Oil* decision, held in *McCreary Tire & Rubber Co. v. CEAT, S.p.A.*, 501 F.2d 1032 (3d Cir. 1974), that the Convention and the Federal Arbitration Act precluded a party to an arbitration agreement from "continued resort to foreign attachment in breach of the agreement." *McCreary* involved a distributorship agreement between a Pennsylvania Corporation and an Italian Company with provisions for arbitration in Brussels, Belgium under the Rules of the International Chamber of Commerce (ICC). The Pennsylvania Corporation filed suits in U.S. courts and sought attachment. Defendant moved to stay the action as well as enforce the arbitration agreement. The district court denied the stay and granted the foreign attachment. On the facts, the defendant was clearly entitled to a stay pending arbitration and in discharging the attachment the court conceded the following:

> We pointed out above that an order refusing to vacate an attachment is interlocutory and unappealable. That order is before us, however, since it is incorporated in the same order denying the stay.
>
> . . .
>
> Quite possibly foreign attachment may be available for the enforcement of an arbitration award. This complaint does not seek to enforce an arbitration award by foreign attachment. It seeks to bypass the agreed upon method of settling disputes. Such a bypass is prohibited by the Convention if one party to the agreement objects.

McCreary at 1037 and 1038.

In view of the broad invocation by McCreary of the Convention and its purposes as basis for discharging the attachment rather than merely finding the attachment as inappropriate or unnecessary, under the facts of the case, subsequent litigants as well as the courts were faced with the added burden of dealing with its precedential value in the context of prearbitral attachments.

Having dealt with a non-maritime matter, the effect of *McCreary* on maritime related attachments was to be eventually dispelled, *but*, not without much argument and at the unexpected cost and result of strengthening *McCreary's* value in said non-maritime matters.

A year later, *Metropolitan World Tanker Corp. v. P. N. Pertambangan*, 427 F. Supp. 2, (S.D.N.Y. 1975), citing *McCreary*, laid the basis for distinguishing between maritime and non-maritime attachments. Finding the application of plaintiff for attachment not to be within the "traditional admiralty procedure,"[15] the court held *The Anaconda*, the 1944 decision of the U.S. Supreme Court

[15] *The Anaconda*, at 46.

mentioned earlier, to be inapplicable and instead relied on *McCreary* to declare: "there is no such indication that prearbitration attachment is warranted under the convention." *Pertambangan* at 4.

Subsequent decisions on maritime related attachments, although, in general strongly questioning the rationale of *McCreary* and *Pertambangan*, would capitalize on this distinction and invoke the statutory basis of Section 8 in relation to Section 208 of the Federal Arbitration Act to uphold the prearbitral attachment. As was held in two maritime-related cases:

> Thus, in both *McCreary* and *World Tankers* (sic), the attachments at issue – by contrast to the attachment in the present case–had been effected pursuant to the provisional-remedy allowances of State law. Moreover, in neither case could the plaintiff have colorably invoked – as Andros does herein – the aid of Section 8 of the Federal Arbitration Act, 9 U.S.C. §8.

Andros Compania Maritima S.A. v. Andre & Cie, 430 F. Supp. 88, 90-91 (S.D. N.Y. 1977).

> The Convention itself makes no provision for pre-arbitration attachment, and it has been held, at least in non-maritime disputes or when attachment is sought pursuant to state law, that pre-arbitration attachment is unavailable in actions arising under the Convention. *McCreary Tire & Rubber Co. v. CEAT, S.p.A.*, 501 F.2d 1032 (3d Cir. 1974) (nonmaritime transaction); *Metropolitan World Tank, Corp. v. P.N. Pertambangan, etc., supra*, 427 F. Supp. 2 (state law attachment).
>
> However, in 9 U.S.C. §208, the Convention expressly provides that the provisions of the United States Arbitration Act (the "Act"), 9 U.S.C. §§1-14, apply in actions under the Convention "to the extent [they] [are] not in conflict with" the Convention. Under Section 8 of the Act, 9 U.S.C. §8, pre-arbitration attachment is permitted where, as here, "the basis of jurisdiction be a cause of action otherwise justiciable in admiralty."

Atlas Chartering Services v. World Trade Group, 453 F. Supp. 861, 863 (S.D.N.Y. 1978).

Thus, as much as *Andros* and *Atlas* had contained arguments reviving *Murray Oil* and *The Anaconda* to render *McCreary* and *Pertambangan* inapplicable to maritime cases, they served to affirm McCreary's relevance in non-maritime attachments. A California district court would squarely face the issue of non-maritime attachments in the case of *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977).

As backgrounder, a North Carolina corporation had entered into a contract for the purchase of uranium from a French conglomerate. The contract provided for arbitration in New York. After a dispute over the agreed contract price arose, arbitration was initiated in New York by the North Carolina Company which also filed an action in California to secure an *ex parte* attachment of an 85 million dollar debt owned by a San Francisco based corporation to the French conglomerate.

In discussing the issue of the Convention's preclusive effect on "prejudgment" attachments, *Carolina Power*, as did Andros and Atlas cited the *Anaconda* and *Murray Oil* cases. The court further pointed out the inaccuracy of *McCreary* in alleging that *Murray Oil* "was rejected by the Supreme Court in a diversity context,"[16] thus reestablishing the Learned Hand decision. After a well-grounded, point by point, analysis of *McCreary*, the court straightforwardly concluded:

> Finally, it should be noted that in other contexts the Supreme Court has concluded that the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate. *See Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970).
>
> In sum this court will not follow the reasoning of *McCreary Tire & Rubber Company v. CEAT, S.p.A., supra*. There is no indication in either the text or the apparent policies of the Convention that resort to prejudgment attachment was to be precluded.

Carolina Power at 1052.

The *McCreary*[17] and *Carolina Power*[18] cases would have their adherents and the scorecard would affect the state jurisdictions, to be discussed below, while admiralty related attachments continue to be upheld by reliance on its distinguishability from *McCreary*.[19]

In analogous interim relief cases, the Second Circuit has, fortunately, had occasion to confirm its availability in the arbitration context. In *Sperry International Trade v. Government of Israel*, 532 F. Supp. 901 (S.D.N.Y. 1982), aff'd, 689 F.2d 301 (2d Cir. 1982) a "Solomonic resolution" by the arbitrator to put in escrow the 15 million dollars in controversy that was subject of a court attachment (eventually vacated in view of its no longer being necessary) was confirmed as a "final award on a clearly severable issue."[20] In its discussion of the attachment issue, the affirmed decision in guarded language seemed to imply the possible availability of a prejudgment attachment where the purpose was not to ground jurisdiction.[21] Development of this theory may provide a viable alternative to the *McCreary* and *Carolina* Power approaches.

---

[16] *See Carolina Power* at 1051 n.3.

[17] *See*, e.g., *I.T.A.D. Associates, Inc. v. Podar Brothers*, 636 F.2d 75 (4th Cir. 1981), which adopted *McCreary* without discussion.

[18] *See*, e.g., Compania de Navegacion y Financiera Bosnia S.A., 457 F. Supp. 1013 (S.D.N.Y. 1978).

[19] *See*, e.g., *Matrenard, S.A. v. Zokor International Ltd.*, No. 84-C- 1639, slip op. (N.D. Ill. Dec. 19, 1984), *Irinikos Shipping Corp. v. Tosco Corp.*, No. 84-519- 2, slip op. (D. Mass. April 6, 1984), *Construction Exporting Enterprises v. Nikki Maritime Ltd.*, 558 F. Supp. 1372 (S.D.N.Y. 1983).

[20] 532 F. Supp. at 909, this, in effect, treats are intended interim relief as a valid final award rendering the issue as one of confirmation and enforcement rather than availability of provisional remedies in the arbitration context.

[21] *See, id.* at 908:

> Even assuming but not conceding that the Award as enforced were viewed as operating in the same manner as a prejudgment attachment, it is clear that Sec-

Another recent Second Circuit decision granted a preliminary injunction prohibiting a large New York company from terminating a distributorship pending completion of the arbitration, *Roso-Lino Beverage Distributors, Inc. v. The Coca Cola Bottling Company of New York,* 749 F.2d 124 (2d Cir. 1984). The court in its *per curiam* decision held:

> We reverse the denial of the preliminary injunction because it appears, from the record before us, that the district court believed its decision to refer the dispute to arbitration stripped the court of power to grant injunctive relief. The fact that a dispute is to be arbitrated, however, does not absolve the court of its obligation to consider the merits of a requested preliminary injunction; the proper course is to determine whether the dispute is "a proper case" for an injunction. *Ervying v. Virginia Squires Basketball Club,* 468 F. 2d 1064 1067 (2d Cir. 1972); *See Boys Markets, Inc. v. Retail Clerk's Union,* 398 U.S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970). There is no indication in the case before us that the district court made such a determination.

Id. at 125.

Carolina Power, aside from citing the *Boys Market* case, adopts pretty much the same logic and there seems to be no clear basis for the variance in treatment courts have accorded applications for prejudgment attachments and other provisional remedies like injunctions.

3.2 *The States*

State Courts until recently generally recognized their authority to grant attachments and provisional remedies in the arbitration context. *American Reserve Ins. Co. v. China Ins. Co.,* 297 N.Y. 322, 79 N.E.2d 425 (1948), held that the "stay" remedy provided by the then existing state legislation was the "exclusive remedy against whom an action has been brought in violation of an agreement to arbitrate," 79 N.E.2d at 427. From this, the court concluded that the jurisdiction of the court as to other matters such as provisional remedies were fully preserved. A lower court ruling in New York, citing *American Reserve* among others, unequivocally upheld a party's right to bring a replevin action despite an agreement to arbitrate, *Lease Plan Fleet Corp. v. Johnson Transportation, Inc.,* 324 N.Y.S.2d 928 (Sup. Ct. 1971).

However, *McCreary* was to rear its head before the state courts in the now famous case of *Cooper v. Ateliers de la Motobecane, S.A.,* 57 N.Y.2d 408, 442 N.E.2d 1239 (1982). In this case a foreign party entered into a contract for the establishment of a New York Corporation to distribute the foreign company's products. Arbitration of disputes was to be held in Switzerland. Quite similar to

---

tion 1610 (d) of FSIA would not be violated as the GOI explicitly waived its immunity in the contract between the parties. The purpose of the Award is obviously to secure the party entitled to the $15-million rather than to ground jurisdiction of a controversy which is not permitted by the statute.

McCreary was the plaintiff's repeated efforts to avoid arbitration altogether by filing a money judgment action and securing an *ex parte* attachment while seeking in a separate action a permanent stay of arbitration.

In a 4-3 vote, the New York Court of Appeals made a broad pronouncement of the preclusive effects of the Convention expressly following the decisions of the Third and Fourth Circuits in *McCreary* and *I.T.A.D. v. Podar Brothers,*[22] respectively, as the better rule over that of *Carolina Power.* The court did not stop there. The court, in *dicta,* conceded the *non-Convention* availability of attachments pronounced by *American Reserve* but sought by its reading of the case to curtail its scope.

> The provisional remedy of attachment is, in part, a *device to secure the payment of a money judgment* (see McLaughlin, Practice Commentaries, McKinney's Cons Law of NY. Book 7B, CPLR 6201:1,p. 11). It is available only in an action for damages (see CPLR 6201; McLaughlin, op. cit.). Under the appropriate circumstances, it can be obtained in a matter that is subject to arbitration: an order of attachment will remain valid if it was obtained with notice or has been confirmed in a contract action *before* a defendant obtains a stay of proceedings because the underlying controversy is subject to arbitration *(see American Reserve Ins. Co. v. China Ins. Co.,* 297 NY 322, 326-327). It should be noted, however, *that attachment would not be available in a* proceeding *to compel arbitration* (see CPLR 7503, subd [a], as that is not an action seeking a money judgment.

Cooper at 413 (emphasis supplied).

As to the availability of injunctive relief, two recent state courts display the divergence of opinions. Both cases involved securities dealers' application to the courts for injunctive relief against a former employee to prevent solicitation of customers and appropriation or use of confidential materials pending arbitration of the dispute. The Court of Appeals of Texas held injunctive relief as not available pending the arbitration[23] while a New York Supreme Court granted a *restraining order* to allow the party time to apply for the proper injunction or any other interim relief before the arbitral panel.[24] The New York court reasoned:

> Arbitrators have the right to issue permanent injunctions [Matter of Sprinzen, 36 N.Y.2d 623, 415 N.Y.S.2d 974, 389 N.E.2d] 456 and conceptually they may issue temporary restraining orders [*Shay v. 746 Broadway Corp.,* 96 Misc. 2d 346, 409 N.Y.S.2d 69] and preliminary injunctions.
> ...
>
> Furthermore, the power of the Court "to enforce" the arbitration agreement [CPLR 7501] includes the power to see that the arbitration is not rendered a nullity by reason of arbitral and judicial impotence.

---

[22] *Supra* n. 17.

[23] *Merrill Lynch, Pierce, Fenner and Smith v. Maghsoudi,* 682 S.W.2d 593 (Tex. Ct. App. 1974).

[24] *J. Brooks Securities, Inc. v. Vanderbilt Securities and Richard Brent,* 484 N.Y.S.2d 472 (Sup. Ct. 1985).

> On the uncontroverted facts submitted here, temporary restraint to maintain the status quo . . . . at least until an application for a preliminary injunction can be made to the arbitration panel is indicated [*Shay v. 7-46 Broadway Corp.*, supral]. In such fashion the parties' choice of forum is preserved and that forum's ability to provide a remedy is likewise preserved.

J. Brooks Securities, Inc. v. Vanderbilt Securities and Richard Brent, 484 N.Y.S.2d 472, 474 (Sup. Ct. 1985).

The New York decision adopts a more balanced approach to the matter of court-arbitration interface, in general, and hopefully represents the future trend.

3.3 One can only add that legal scholars have criticized the *McCreary* and *Cooper* decisions especially as to its reliance on international commitments under the Convention,[25] as most studies on arbitration practice in Europe yield the fact that attachments and provisional remedies in aid of arbitration are available by court action.[26] Further, Article 8 (5) of the Rules of Conciliation and Arbitration of the ICC[27] and Article 26 (3) of the Arbitration Rules of the United Nations Commission of International Trade Law (UNCITRAL)[28] specifically contemplate interim remedies in aid of arbitration.

4.0 Discovery in Aid of Arbitration

The final aspect of court-arbitration interface that will be discussed involves the availability of discovery procedures in advance of the arbitral hearings. Discovery practice in civil cases involves a whole panoply of devices which afford the parties an opportunity to gather evidence in advance of the trial as well as provide a method for knowing the range of facts and issues that will be raised. In theory, the parties are thus better prepared and the danger of surprise at the trial is lessened. A system of discovery, undoubtedly, provides benefits in terms of more efficient and expeditious litigation but it can also serve as an instrument of abuse, as when used for "fishing expeditions' or to force settlement. Whether this is consistent with the traditional purposes of arbitration, i.e. the avoidance of extended, complex (and costly) procedures attendant to litigation, has been a consideration in the courts' determination of its availability in the arbitration context.

[25] *See* Committee on Arbitration and Alternative Dispute Resolution, *The Advisability and Availability of Provisional Remedies in the Arbitration Process*, 39 The Record 625, 632-635 (1984) and Fitzpatrick, *Attachment Prior to the Enforcement of International Awards Under the New York Convention*, 6 Fordham International Law Journal 556 (1982-83).

[26] *See* International Business Lawyer, March 1984, special series of articles, *Attachments and Other Interim Court Remedies in Support of Arbitration* (in U.K., France, Germany, Italy and Switzerland), at 100-123.

[27] Article 8(5) of the ICC Rules provides: "Before the file is transmitted to the arbitrators . . . the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by doing so be held to infringe the agreement to arbitrate or to affect the relative powers reserved by the arbitrator."

[28] Article 26(3) of the UNCITRAL Rules states: "A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."

4.1 The Federal Cases

Early on, the U.S. Supreme Court had declared in a case involving arbitration that a federal court having diversity jurisdiction must look to state law in enforcing the substantive rights of the parties, *Berhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956).

This would imply the relevance of state statutory and common law to the federal courts' allowance of pretrial discovery procedures in arbitration cases.

However, among the initial cases that confronted this issue, *Commercial Solvents Corportion v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957),[29] argued that discovery "clearly involves a matter of procedure which is within the power of the federal courts or Congress to prescribe." The court in *Commercial Solvents* also held that the Federal Rules of Civil Procedure could not be invoked to support use of discovery. It reasoned and concluded:

> By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations. "A main object of a voluntary submission to arbitration is the avoidance of formal and technical preparation of a case for the usual procedure of a judicial trial." 1 Wigmore, Evidence § 4(e) (3d ed. 1940).
>
> The fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pretrial discovery in the one and its superfluity and utter incompatibility in the other.
>
> Reason and authority compel that in federal courts pre-hearing examinations under court aegis in matters pending before arbitration tribunals are unwarranted.

The federal courts' attitude was eventually altered and state decisions would influence this evolution, more particularly the New York decisions. In *Penn Tanker Co. of Delaware v. C.H.Z. Rolimpex, Warszawa,* 199 F. Supp. 716 (S.D.N.Y. 1961), the court, although denying the application for discovery, cited the leading New York case on the matter.

> But I do not think that Rule 81 (a) is designed to allow judicially imposed and controlled discovery as to the merits of a controversy which will be referred to arbitra-

[29] Accord Foremost Yarn Mills, Inc. v. Rose Mills, Inc. v. Rose Mills, Inc., *25 F.R.D. 9 (E.D. Pa. 1960).*

> tion under 9 U.S.C. § 4.1 except, perhaps, upon a showing of true necessity because of an exceptional situation – which this case does not appear to be. *Cf. Application of Katz*, 3 A.D.2d 238, 160 N.Y.S. 2d 159 (1957).

Penn Tanker at 718.

By conceding the existence of an exception to the blanket prohibition adopted by *Commercial Solvents, Penn Tanker* later served as basis for the grant of limited discovery.

> The *Penn Tanker* case, far from supporting defendants' position in unequivocal terms, demonstrates that discovery is not inappropriate in every instance, and supports to an extent this Court's conclusion that in some instances it is proper for a court to allow limited discovery in a matter which is subject to arbitration.

Ferro Union v. S.S Ionic Coast, 453 F.R.D. 11, 13 (S.C. Tex. 1967).

In 1970, the U.S. Court of Appeals for the Fifth Circuit, without discussion of the above cases, held:

> Also, the District Court did not err when it specifically made available to the parties federal discovery procedures "to the extent necessary for the presentation of matters submitted for Trade Board and Arbitration determination." Such order is consistent with the District Court's retention of jurisdiction and effectuates the policy favoring arbitration.

International Association of Heat and Frost Insulators v. Leona Lee Corp., 432 F.2d 192, 194 (5th Cir. 1970).

The transition to a more liberal attitude towards providing discovery in aid of arbitration would be completed in the now leading case of *Bigge Crane and Rigging Co. v. Docutel Corporation*, 371 F. Supp. 240 (E.D.N.Y 1973). In a thorough discussion of the issue, the court in *Bigge Crane* interpreted Section 3 of the Federal Arbitration Act (9 U.S.C. §3), as mandating courts to stay only *the trial* of the action, and, as not affecting the courts' discretion to grant discovery in aid of arbitration. Citing federal as well as prevailing New York decisions, the court declared:

> The court recognizes the federal policy to interpret the United States Arbitration Act "so as to further rather than impede, arbitration. . . ." *Signal Stat Corp. v. Local 475*, 235 F.2d 298, 303 (2d Cir. 1956). It must also be recognized, however, that the present federal rules governing pretrial discovery were initiated, after the original Arbitration Act, as an aid in reaching the truth and as a means of reducing both the length of trials and the element of surprise. These goals may be of equal help in arbitration, as well as court trials.
>
> Under the principles outlined above, the court believes that it should exercise discretion to permit discovery in this case because (1) discovery is particularly necessary in a case where the claim is for payment for work done and virtually completed, and the nature of any defense is unknown; (2) the amounts involved are so substantial that any expense in taking depositions is relatively small; (3) the action has proceeded to such a point that the taking of depositions can probably be accomplished without delaying the arbitration, and (4) only one of the five defendants has joined in the motion to stay the trial.

Bigge Crane at 246.

Bigge Crane, in citing the above four reasons why discovery was warrnted in the instant case, modified the "necessity" rule previously relied upon the grant discovery, and thereby allowing a broader basis for the courts to exercise their discretion. However, necessity or "special need" would remain the main factor in subsequent cases following the *Bigge Crane* rule. In *Bergen Shipping Co., Ltd. v. Japan Marine Services, Ltd.*, 386 F. Supp. 430 (S.D.N.Y. 1974), the fact that the crew of a ship were about to leave the United States, was considered by the court as a case of "extraordinary circumstances" justifying the use of discovery procedures. Another court allowed pre-trial discovery. "under the Federal Rule of Civil Procedure until such time as the parties have selected and agreed upon an arbitrator, or panel of arbitrators, . . .in order to insure that any delay which may occur will not work undue hardship," *Vespe Contracting Co. v. Aswan Corp.*, 399 F. Supp. 516, 522 (E.D. Penn. 1975). The latter case had involved a construction dispute and the court noted that evidence of the work in dispute was "disappearing" as construction work continued, and would be "inaccessible" for future inspections."[30]

The federal courts have thus evolved a more or less uniform and progressive approach in determining the availability of discovery in aid of arbitration, unlike the subsisting conflicts in cases involving consolidation and provisional remedies in the arbitration context.

4.2 The States

New York has been the leading source of state cases involving the use of discovery in aid of arbitration, and their state law expressly provides:

> (c) Before action commenced; real property actions. Before an action is commenced, disclosure to aid in bringing an action, to preserve information or *to aid in arbitration*, may be obtained, but only by court order. The court may appoint a referee to take testimony. Where such disclosure is obtained for use in an action involving title to real property the deposition or other document obtained shall be promptly recorded in the office of the clerk of the county in which the real property is situated.

N.Y.C.P.L.R. § 3102 (emphasis supplied).

Despite the above statutory authority, courts have consistently restricted the availability of discovery procedure. The leading and oft-cited case provides the general rule:

---

[30] *See also Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980); *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876 (E.D. Penn. 1976); *Mississippi Power Co.v. Peabody Coal Co.*, 69 F.R.D. 558 (S.D. Miss. 1979).

> We are of the view that examinations before trial under court aegis should not be granted in such proceedings except under extraordinary circumstances such as the demonstrated need of reaching a witness or evidence which is unavailable without a court order. Necessity rather than convenience should be the test.
>
> This view is dictated by the consideration that an arbitration proceeding is, except in specified particulars, outside the court realm and jurisdiction – deliberately so taken out of the court by choice and commitment of the parties. Arbitration is subject to its own rules and practices at variance with court procedures. It is supposed to be a complete proceeding, without resort to court facilities, for handling and disposing of a controversy submitted to arbitration. It would be generally incompatible with the nature and scope of an arbitration proceeding to allow a shift to the court forum of that part of a proceeding relating to the examination of witnesses or collection of evidence.

Application of Katz (Burkin), 3 App. Div. 2d 238, 160 N.T.S. 2d 159, 159-160 (1st Dept. 1957).[31]

In *State Farm Mut. Auto Ins. Co. v. Wermick,* 455 N.Y.S.2d 30 (A.D.2 Dept. 1982), the court upheld the lower court's order compelling an insurance claimant to submit to a physical examination by a designated physician in relation to arbitration of the dispute, as delay may cause prejudice.

Although New York law does not grant arbitrators the power to order pre-hearing discovery,[32] the New York Court of Appeals refused to disturb an interlocutory award by the arbitrators that allowed for discovery pursuant to the amended arbitration rules of the ICC, *Mobil Oil v. Asamera Oil,* 43 N.Y.2d 276 (1977).

Section 2711.07 of the Ohio Arbitration Act and Section 16 of the Pennsylvania Arbitration Act require as a condition-precedent to court ordered discovery a favorable request from the arbitrator. The adoption of a similar rule for New York has been proposed in a bar association committee report.[33]

In some jurisdictions like California, the courts have considered discovery as inconsistent with the purposes of arbitration.[34]

In Washington, the New York rule requiring "exceptional circumstances" has been followed. *Balfour, Guthrie & Co.,* 607 p. 2d 856 (Wash. 1980).

[31] *Accord De Sapio v. Kohlmeyer,* 35 N.Y.2d 402 (1974); *Motor Vehicle Accident Indemn, Corp. v. McCabe,* 243 N.Y.S.2d 495 (A.D. 1 Dept. 1963). *Application of Moock, 473* N.Y.S.2d 793 (A.D. 1 Dept. 1984); *Guilford Mills, Inc. v. Rice Pudding, Ltd.,* 455 N.Y.S.2d 89 (A.D. 1 Dept. 1982).

[32] *De Sapio v. Kohlmeyer, id.*

[33] Committee on Arbitration, *The Use of Discovery in Arbiration,* 33 The Record 231 (April 1978).

[34] *See McRae v. Sup. Ct. of Los Angeles Country,* 221 Cal. App. 2d 166, 34 Cal. Rptr. 346 (1963); *see also Cavanaugh v. McDonnel & Co., Inc.,* 357 Mass. 452 (1970).

4.3 Whether under federal or state jurisdiction, the courts have kept the use of discovery in aid of arbitration as limited as possible and the facts and circumstances of the particular case weighs heavily in the court's determination. There appears to be a slight loosening of the necessity rule so long as no delay will be caused to the arbitration proceedings. However, the courts rightly point out that arbitration proceedings are chosen by the parties freely and are intended to do away with the formalized and technical rules, part and parcel of any litigation process. Perhaps, more can be achieved by amending existing rules of arbitration to allow pre-hearing gathering of evidence as well as drafting more detailed arbitration agreements which contemplate limited discovery procedures consented to by the parties.

5.0 Conclusion

By virtue of the sheer lack of legislation and the rapid growth and acceptance of arbitration as a mode of dispute resolution, the various courts have not been able to provide a uniform approach to the matter of court-arbitration interface. Much can be done in terms of legislation, amendment of the Commercial Arbitration Rules of the American Arbitration Association and improved drafting of arbitral clauses and agreements. Such actions would provide the courts with a workable standard.

The courts have assumed an increasingly larger role in the conduct of arbitration and this interface, if properly defined and delimited, could enhance the effectiveness and efficiency of the arbitration process. More importantly, arbitration, if it is to progress, must remain attuned to the changing needs of the times. Otherwise, as was concluded by one author:

> Arbitration, intended to be the method for utilizing expert knowledge to resolve such questions, without involving the full panoply of the law, fails in precisely the circumstances in which in theory it should be most useful.[35]

[35] Franks, *An Approach to the Resolution by Arbitration of Disputes Involving More than Two Parties by Means of a Multilateral Arbiration Code,* IVth Int'l Congress of Arb., Moscow (Oct. 3-6, 1972), cited in Bernini, *supra* n. 12, at 300.