

## Consolidation of Arbitral Proceedings

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## Consolidation of Arbitral Proceedings

### I. Overview

Most modern disputes involve more than just two parties (a plaintiff and a defendant) and many more than one or two issues.<sup>1</sup> Complex cases or disputes such as class actions, cases that involve insurance claims, large construction projects, corporate cases and regulatory matters always involve more than two parties. Through the last three decades many scholars have devoted time and effort in writing and doing research about the possibility of bringing two or more arbitral proceedings into one single dispute. Certain international dispute settlement mechanisms provide for consolidation of proceedings that have a common question of law or fact. The International Center for Settlement on Investment Dispute (ICSID) and the North American Free Trade Agreement (NAFTA) are prominent examples.<sup>2</sup>

Rules regarding consolidation, joinder, and intervention in national court proceedings are intended to permit proceedings to occur more efficiently and to avoid the possibility of inconsistent results.<sup>3</sup> In general, however, consolidation and joinder in international arbitration is far less common and much more difficult than in national court litigation.<sup>4</sup> Even though much has been written about the topic, not many conclusions have led to accurate answers about its admissibility or desirability. International arbitral tribunals (and appointing authorities) sometimes must resolve disputes over consolidation, joinder and intervention. If all parties agree

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<sup>1</sup> *See* Carrie Menkel-Meadow Et. al., *Dispute Resolution, Beyond the Adversarial Model*, 679 (Aspen Publishers, Inc. ed. 2005).

<sup>2</sup> Colloquy, *Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently? Final Report*, ICSID Rev. Foreign Investment L. J'l. 21, 1 (2006).

<sup>3</sup> Gary B. Born, *International Commercial Arbitration*, 672 (Transnational Publishers Inc. and Kluwer Law International, 2 Ed. 2001).

<sup>4</sup> *Id.*

to the consolidation, then, that will virtually be permitted by the arbitrators. On the other hand, if there is no agreement among the parties to consolidation, institutional arbitration rules generally do not permit it.<sup>5</sup> In unusual cases, the parties' arbitration agreement will specifically contemplate multi-party arbitration and will include workable provisions for commencing arbitration, appointing arbitrators, and the like.<sup>6</sup> In the absence of either contractual provisions or institutional rules dealing expressly with the consolidation of arbitrations, the subject is governed principally by national law.<sup>7</sup>

The topic still raises many questions which are the subject of this work. Among those, and to mention only some of the questions that will be dealt with through this work are the following: Is consolidation a matter of arbitrability or is it a procedural issue? Who decides upon consolidation, the court or the arbitral tribunal? what should the requirements for consolidation be? What are the advantages and disadvantages of having two or more arbitral proceedings consolidated? Can the consolidation be ordered in a partial way? In addition, some scholars have addressed the problems that consolidation can bring with respect to the consensual nature of arbitration, to confidentiality or to the constitution of the tribunal that will deal with the consolidated case.

This discussion begins by defining the term of consolidation, analyzing the advantages and disadvantages, and discussing the arguments for and against it. Then it goes on to review the legal instruments currently available to deal with situations involving more than two parties in arbitration. It analyzes treaties, national legislation, institutional rules and case law that provide for consolidation.

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<sup>5</sup> *Id.* at 673.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

Thereafter, it seeks to establish or recommend the requirements that must be met for consolidation to be ordered in arbitration. Finally it examines how the consolidation practice has been developed in different countries and the treatment that arbitration providers have given to consolidation before reaching some conclusions that intend to provide certain guidance to arbitral institutions, arbitral tribunals, parties to arbitrations and their respective counsel.

## **1. Definition**

Consolidated arbitration is now a well established and rather unique feature of New York arbitration and is also provided for in certain other foreign laws.<sup>8</sup> The term consolidation can be understood in different ways.<sup>9</sup> For purposes of this work, consolidation is defined as the joinder of two or more proceedings that already are pending before different courts or arbitral tribunals. This situation occurs where a judge makes an order that parties to admittedly separate arbitration agreements be compelled to have their disputes heard before the same panel of arbitrators.<sup>10</sup> Consolidation could also occur if the arbitration institution ordered (assume it had such authority) or the parties agreed to the consolidation of the issues.<sup>11</sup> This paper focuses on consolidation of proceedings pending before arbitral tribunals in commercial and investment disputes. It attempts to be a guide on consolidation for consideration by parties, counsel and arbitral institutions.

Consolidation is available if there is a connection between the proceedings and if it contributes to efficient dispute settlement. Requirement like consent is more controversial when it is given or not in consolidated proceedings.<sup>12</sup>

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<sup>8</sup> Julian D.M. Lew, *Multi-Party Arbitration: Practice and Problems*, 5 (1989).

<sup>9</sup> Bernard Hanotiau, *Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Actions* 179 (Dr. Julian D.M. Lew QC ed., Kluwer Law International 2005).

<sup>10</sup> Julian Lew, *supra* note 8, at 4.

<sup>11</sup> *Id.*

<sup>12</sup> International Center for Settlement of Investment Disputes (ICSID), *Final Report on the Geneva Colloquium held on 22 April 2006*, 21, ICSID Rev., 59, 81-83, (Spring 2006).

## **2. Advantages of consolidation**

Consolidation primarily presents advantages related to the efficient administration of justice and cost savings.<sup>13</sup> First, a single arbitration can be more efficient than two or more separate arbitration proceedings. A single proceeding permits the same savings of attorney's fees, other litigation expenses, witness's time, preparation efforts, and the like that exist in litigation. Also, a single arbitration proceeding avoids the unique expenses associated with multiple arbitral panels (each of whose members must be compensated by the parties).

### **A. Consistency and avoidance of contradictory decisions**

The most compelling factor in favor of consolidating related proceedings is the risk of inconsistent or even contradictory decisions in separately held proceedings, with respect to both the facts involved and the application of the governing law.<sup>14</sup> Cases with different parties may present the same legal issues arising out of the same event or related to the same measure. Conflicting results may take place if the findings with respect to those issues differ in two or more cases.<sup>15</sup>

The recent decisions in the CME/Lauder cases have shown that the risk of contradiction is real.<sup>16</sup> It has been said that this risk increases when the substantive and procedural laws applied in the different cases are not the same.<sup>17</sup>

Consolidation is generally deemed to avoid conflicting decisions. While the objective of avoiding conflicting outcomes through consolidation prevailed in *Softwood Lumber* and in other

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<sup>13</sup> *Id.*

<sup>14</sup> Emmanuel Gaillard, *The Consolidation of Arbitral Proceedings and Court Proceedings, Complex Arbitrations*, 35, 35-42 (Special Supplement of the ICC Intl. Ct. Bulletin) (2003).

<sup>15</sup> See the Order of Consolidation of the Arbitral Tribunal in *Softwood Lumber* available at <http://www.state.gov/s/l/c14432.htm>

<sup>16</sup> See generally the special comment on the case available at <http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article134a.pdf>.

<sup>17</sup> ICSID, *supra* note 12, at 82.

cases, there are other factors that must be weighed against the objective of consistency.<sup>18</sup> For example, the U.S. Court of Appeals for the Second Circuit held in *United Kingdom v. Boeing* that even though inconsistent determinations may be a valid concern, it could not allow the tribunal to reform the parties' contract and that the parties should have provided for consolidation in the arbitration clauses. In other words, the enforcement of the contract prevailed over the avoidance of inconsistent decisions.

Another factor against which the objective of consistency must be weighed is the fairness (or lack of fairness) of consolidated proceedings.<sup>19</sup> This is a consideration that led the *Corn Products* tribunal to rule against consolidation in the following terms:

The risk of unfairness to Mexico from inconsistent awards resulting from separate proceedings cannot outweigh the unfairness to the claimants of the procedural inefficiencies that would arise in consolidated proceedings....<sup>20</sup>

## **B. Efficiency**

It is the opinion of many authors and scholars that consolidation saves time and costs for the party that is involved in all the proceedings being consolidated.<sup>21</sup> With consolidation, every disputed matter is litigated only once. This applies to the allegations of facts, the production of evidence, and the presentation of legal arguments. In terms of costs, the parties may share certain expenses, such as expert or legal fees.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*, at 83. *See also*, Order of the Consolidation Tribunal, May 20, 2005, refusing the consolidation of cases in *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01.

<sup>21</sup> [o]n the whole it seems reasonable to conclude that the consolidation of closely-related disputes, where essentially the same evidence will be presented, will result in significant savings of both time and money". Chiu, *Consolidation on Arbitral Proceedings and International Commercial Arbitration*, 7 J.Int'l Arb. 53, 55 (1990), accord, Gary B. Born, *supra* note 3, at 675. It may also serve procedural efficiency and the 'good administration of justice' by saving time and cost, and particularly by coordinating the taking of evidence, see E. Gaillard *supra* note 14, at 36.

For example, in ICC arbitrations, one of the main advantages of either introducing a single arbitration request on the basis of multiple contracts or consolidating two or more cases is no doubt that the arbitration costs are lower.<sup>22</sup>

### **C. Confidentiality**

Most institutional arbitration rules require or suggest that arbitral proceedings will be confidential to the parties, absent contrary agreement.<sup>23</sup> The consolidation of related proceedings is further likely to raise the problem that confidential information, such as trade secrets, information regarding intellectual property, know-how, cost margins, or more general financial information, risks being disclosed to parties from which this information was normally to be kept secret.<sup>24</sup> This risk is especially important if the parties joined are competitors.<sup>25</sup> Concerns over confidentiality were the basis for English decisions refusing to permit consolidation without the parties' unanimous consent.<sup>26</sup> According to some authors this risk can be avoided, the proceedings can be structured so as to restrict a party's access to information that it is not relevant to its own case. Furthermore, measures can be taken to protect privileged information.<sup>27</sup>

### **D. Due process and case administration**

Multiparty arbitration processes may raise due process concerns in the sense that an individual party's fundamental procedural rights may not be as well-protected in a collective or mass

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<sup>22</sup> Anne Marie Whitesell and Eduardo Silva-Romero, *Multiparty and Multicontract Arbitration; Recent ICC Experience*, in *Complex Arbitrations*, 14 Special Supplement, ICC Ct. Bulletin 2003, 7. "When either the parties or the ICC decide(s) to consolidate two or more cases, and the provisional advances fixed by the Secretary General for each of those cases have not been paid in full, the Secretary General may fix a 'consolidated' provisional advance, so as to take advantage of the regressive character of the cost scales. The amount of the 'consolidated' provisional advance will consequently be lower than the sum of the provisional advances previously fixed for the now consolidated cases."

<sup>23</sup> Gary B. Born *supra* note 3, at 676.

<sup>24</sup> E. Gaillard, *supra* note 14, at 37.

<sup>25</sup> ICSID, *supra* note 12, at 84.

<sup>26</sup> *See* Veeder, *Multi-party Disputes: Consolidation Under English Law*, 2 Arb. Int'l 310 (1986).

<sup>27</sup> The issue of confidentiality arose in *Corn Products* and the *Softwood Lumber* proceedings, in which the Arbitral Tribunals reached contradicting conclusions, *see* ICSID, *supra* note 12, at 84.

process than in a bipolar or bilateral one.<sup>28</sup> The peril of due process violations exists with respect to the rights of both parties. On the one hand, for the multiple individual claimants whose individual case may be buried by a mass of other arguments, which may derive a breach of their opportunity to be heard.<sup>29</sup> On the other hand, for the sole respondent who may fight against many, which may give rise to equal treatment concerns. Adequate case management is expected to prevent these problems.<sup>30</sup> One aspect of due process that cannot be resolved through appropriate case management is the constitution of the arbitral tribunal. As a rule, the parties have an equal right to participate in the constitution of the arbitral tribunal. In the event of consolidation, there are different ways of avoiding such a violation of equal rights.

### **3. Disadvantages of Consolidation**

Consolidation also has drawbacks, mainly risks of violation of due process and of confidentiality,<sup>31</sup> which may outweigh the aforementioned benefits. Some authors opine that the consolidation of related proceedings is by no means always the ideal answer to the difficulties arising in complex international disputes.<sup>32</sup>

First, requiring consolidation or joinder without the parties' agreement, runs counter to the consensual character of arbitration.<sup>33</sup>

Second, consolidating arbitrations involving multiple parties, raises very significant problems with respect to the appointment of arbitrators and composition of the tribunal.<sup>34</sup> Many arbitration proceedings involve three-person tribunals. If there are three or more parties with distinct interests, the normal procedure to appoint them cannot work and the appointing authority will

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<sup>28</sup> ICSID, *supra* note 12, at 85.

<sup>29</sup> *Id.*

<sup>30</sup> ICSID, *supra* note 28, at 85.

<sup>31</sup> *Id.*

<sup>32</sup> E. Gaillard, *supra* note 14, at 36.

<sup>33</sup> G. B. Born, *supra* note 3, at 676.

<sup>34</sup> *Id.*

have to choose all the members of the panel, denying the parties' right to participate directly in selecting the tribunal. Some appointing authorities have chosen to expand the size of the tribunal which costs at least 66% more than a three-person panel.<sup>35</sup> In terms of cost, cost savings will not always be distributed evenly among the parties, indeed, in some instances, a particular party's costs may actually increase because of consolidation –for example, if it is required to be present throughout a lengthy consolidated arbitration rather than only at a single unconsolidated arbitration.<sup>36</sup> Some scholars opine that consolidated proceedings are bound to last longer than a separate arbitration and that even with effective case management, such proceedings are likely to be more time-consuming and cumbersome than each individual proceeding, which may not always be the case, it will depend totally on the complexity of the case.

They may also leave more room for dilatory tactics. Furthermore, parties who seek a decision on certain matters may have to bear increased costs, subject to a well-balanced final allocation, and may have to sit through a long and complex procedure on matters of no interest to them. If only their individual claims were considered, the procedure would be shorter and less expensive.<sup>37</sup>

It worth noting that when considering requesting to consolidate arbitration cases, care must be taken to ensure that the remedy [is not] worse than the evil.<sup>38</sup>

## **II. Legal Basis for Consolidation and Authority that rules upon Consolidation**

### **1. Legal Provisions**

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<sup>35</sup> *Id.*

<sup>36</sup> G. B. Born, *supra* note 33, at 676.

<sup>37</sup> G.A. Born, *supra* note 3, at 675.

<sup>38</sup> Bernini, *Overview of the Issues*, in ICC, Multi-Party Arbitration 161, 163 (1991).

The absence of a sufficient legal basis for consolidation is one of the main difficulties encountered by judges and arbitrators faced with a consolidation request.<sup>39</sup> Although some legal texts provide such a basis, they often fail to resolve all the procedural problems that consolidation may cause. In arbitration, statutory provisions are one possible basis for consolidation.<sup>40</sup> A few national legislations provide a basis.

Ad hoc arbitration is the tool for choice for consolidation, if the parties agree on the procedures and conditions for consolidation and empower the courts or tribunals to consolidate.<sup>41</sup> Ideally, the provisions for consolidation should be included in the arbitral agreement, and should specify the method for appointing arbitrators.

Consolidation is provided for in a number of legal texts, including:

A. National Laws:

(i) Dutch Law: The Netherlands Arbitration Act 1986 provides for both consolidation and joinder of arbitrations and for court ordered consolidation of related arbitrations.<sup>42</sup> This possibility is restricted in two ways. First the parties have the freedom to agree to exclude court ordered consolidations; such exclusion agreement may be contained in arbitration rules adopted for the proceedings. Second, no court ordered consolidation is possible unless both arbitral proceedings are taking place within the Netherlands.<sup>43</sup>

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<sup>39</sup> ICSID, *supra* note 12, at 91.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Articles 1045 and 1046.

<sup>43</sup> [T]he President of the District Court of Amsterdam is vested with jurisdiction over requests for consolidation. He may order full or partial consolidation but before doing so he will give the parties and the arbitrators the opportunity to express their opinion about consolidation... *See* Julian Lew, *supra* at note 8, at 6.

(ii) Hong Kong Law. Under this law the High Court can order consolidation of two or more arbitration proceedings on terms as it thinks just. This can occur in three situations:

- If some common questions of law or fact arises in both or all of the arbitrations;
- If the claims for relief arise out of the same transactions or series of transactions; or
- If, for some other reason, it is desirable to make an order for consolidation.<sup>44</sup>

(iii) Australian Law. The Commercial Arbitration Acts of 1984 adopted in Victoria and New South Wales provide for consolidation of arbitrations. The relevant provision is Article 26, is the same in both of these acts and is almost identical to that in Hong Kong Law.<sup>45</sup> The Court will only consolidate the cases if there is a common question of law or fact in all proceedings, if the claims for relief arise out of the same transactions, or if there is another reason making such an order desirable. It is noteworthy to mention that section 26 (3) expressly recognizes the right of parties to agree to consolidate two or more arbitrations independently of the Court and taking the necessary steps to effect the consolidation. Thereby, recognizing parties' autonomy in international arbitration.

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<sup>44</sup> *Id.* The Court is not bound to order consolidation: instead, it may order that separate arbitration proceedings are to be heard at the same time, or one immediately after another.

<sup>45</sup> Article 26 states that the Court has the option to make the following orders: (i) consolidation of two or more arbitration proceedings on terms as it thinks just, or (ii) the arbitrators be heard at the same time, or immediately after one another, or (iii) any particular arbitration be stayed until after the determination of any other particular arbitration.

(iv) US Law: The Federal Arbitration Act (FAA)<sup>46</sup> makes no provision for multi-party arbitration. In the absence of clear guidance from the FAA’s text, lower United States courts have reached divergent results in cases involving requests for court-ordered consolidation.<sup>47</sup> Although not directly addressing the subject of consolidation, two provisions of federal law have figured in most lower court decisions.<sup>48</sup> First, Section 4 of the FAA requires U. S. courts to “make and order directing the parties to proceed to arbitration in accordance with the terms of [their arbitration] agreement”.<sup>49</sup> Second, Rule 81 (a) (3) of the Federal Rules of Civil Procedure provides for the application of the Federal Rules in proceedings relating to arbitration, including Rule 42 (a) which permits the consolidation of district court actions.<sup>50</sup>

B. National Arbitration Statutes Few institutional arbitration rules provide for consolidation of arbitration proceedings. Such as Article 1446 of the Netherlands Arbitration Act 1986, Section 24 of the Australian International Arbitration Act, Section 35 of the English Arbitration Act, Section 9 of the Ireland Arbitration (International Commercial) Act, among others.

C. Institutional Rules: only a few contain a provision in regards to consolidation. Article 4 of the Swiss International Arbitration Rules, Article 7 of the Centre for Arbitration

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<sup>46</sup> The FAA does not expressly address the subject of court-ordered consolidation but also nothing expressly forbids court-ordered consolidation. In contrast to the FAA, several states have enacted statutes that deal expressly with the consolidation of arbitrations, including California, Florida, Georgia, Massachusetts and Michigan. All of these statutes permit court-ordered consolidation even without the parties’ agreement.

<sup>47</sup> Gary B. Born, *supra* note 3, at 679.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

of Mexico (CAM) and Article 7 of the Arbitration Rules of the American Land Title Association.

- D. International Treaties: recent investment treaties incorporate rules on consolidation. These include Article 1126 of the NAFTA, Article 33 of the US Model BIT and Article 32 of the Canadian Model BIT.

### **III. Authority that decides upon consolidation**

Consolidation can be ordered by the courts, the arbitrators or the arbitral institution chosen by the parties.<sup>51</sup> The most widespread option is for consolidation to be ordered by the state courts. Depending on the relevant statutes and rules, consolidation may be granted by the courts either with or without the parties' consent.<sup>52</sup> In rare cases, the power of the courts is absolute and exists even if the parties have agreed to rule out court-ordered consolidation. A number of objections have been raised against court-ordered consolidation. One of the main objections is the fact that it is limited to arbitral proceedings held in the country of the court ruling on consolidation. For instance, the Dutch Arbitration Act limits consolidation to proceedings commenced in the Netherlands. The power to consolidate may also be vested in the arbitrators, either because the parties expressly confer such power to the arbitral tribunal, or by operation of law. Where both courts and arbitrators have the power to consolidate, the issue arises of whether these powers are concurrent or whether one prevails.<sup>53</sup>

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<sup>51</sup> *See* Article 12 of the CEPANI Rules, Article 4 of the Swiss Rules and Article 33 of the U.S. BIT Model, among others.

<sup>52</sup> *See* Netherlands Arbitration Act 1986, Article 1046.

<sup>53</sup> *See generally* ICSID, *supra* note 12, at 94.

## 1. Consolidation by the Institution<sup>54</sup> (ICC and CEPANI Rules)

If the envisaged arbitration is an institutional arbitration, consolidating into one procedure two or more already-initiated arbitration proceedings presupposes that these different proceedings are administered by the same institution.<sup>55</sup> Consolidation is viable in different cases. First, the parties may agree to the joinder of the proceedings, or consolidation may be ordered, in certain cases, by the arbitral institution to whose rules the parties have adhered in their agreement or by the arbitral tribunal appointed in accordance with those rules.<sup>56</sup>

### A. ICC Rules

Article 4 (6) of the ICC Rules allow the parties to include claims in pending proceedings as follows:

[w]hen a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings, provided that the Terms of Reference have not yet been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19.

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<sup>54</sup> In institutional arbitration, the institution may have the power to consolidate, the parties giving their consent to consolidation by submitting to the institutional rules. *E.g.*, Article 4 (1) of the Swiss Rules.

<sup>55</sup> B. Hanotiau, *supra* note 9, at 180.

<sup>56</sup> *Id.* Such a joinder is organized by various arbitration rules, such as the Rules of the International Chamber of Commerce (Article 4.6), the CEPANI Rules (Article 12), the Rules of the Swiss Chambers of Commerce (Article 4) (and previously the Rules of the Chambers of Commerce of Zurich and Geneva, Articles 13 and 14 and 16-18, respectively).

Article 19 provides:

[a]fter the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall have regard to the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.

In accordance to the aforementioned provisions, the arbitrators have no authority to decide to join or consolidate arbitration cases, it requires an affirmative decision by the Court. The Court's authority to join an arbitration with another arbitration that is already pending depends, pursuant to Article 4 (6) on the satisfaction of the following conditions:

- the joinder is requested by a party;
- the arbitration proceedings are between the same parties;
- the cases must pertain to the same "legal relationship"<sup>57</sup>; and
- the terms of reference have not yet been signed or approved by the Court (or, if they have been signed or approved, the claims that are sought to be added must be admissible under Article 19 of the Rules).<sup>58</sup>

For the purposes of Article 4 (6), 'same legal relationship' would appear to mean the same economic transaction. In any case, the consent of all parties is not required as a condition to consolidate or join the arbitral proceedings. A recent article by Whitesell and Silva-Romero proves that recently the Court has been reluctant to consolidate to proceedings when one of

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<sup>57</sup> A. Whitesell, *supra* note 22, at 16.

<sup>58</sup> B. Hanotiau, *supra* note 9, at 182.

the parties refuses the joinder of the proceedings or when the arbitral proceedings are to be conducted in different seats.<sup>59</sup>

## **B. CEPANI Rules**

A different option for consolidation is foreseen by the CEPANI Rules in its Article 12:

When several contracts containing the Cepani arbitration clause give rise to disputes that are closely related or indivisible, the Appointment Committee or the Chairman of Cepani is empowered to order the joinder of the arbitration proceedings. This decision shall be taken, either at the request of the arbitral tribunal, or, prior to any other measure, at the request of the parties or of the most diligent party, or even on Cepani's own motion.

Within the framework of the CEPANI Rules, consolidation is possible, even if the parties to the different disputes are not the same in whole or in part. All that is required is some link of connexity or indivisibility.<sup>60</sup> This approach seems to be more flexible and wide than that of the ICC.

Even though Article 12 does not define the term of closely related disputes, a definition is contained in the Belgian Judicial Code: “[c]laims can be handled as connected claims when they are so closely related that it is desirable to consolidate them and judge them together, in order to avoid an outcome that would be incompatible, if said disputes would have been handled separately”.<sup>61</sup>

## **2. Consolidation by the Court or the Arbitrator**

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<sup>59</sup> A. Whitesell, *supra* note 22, at 16. They highlight a case in which where one of the parties seek to have two arbitral proceedings consolidated and the opposing party refused to it. Even though the request for consolidation met all the requirements contained in Article 4 (6), each arbitration agreement referred to a different place of arbitration, one to Paris and the other to Amsterdam. It was understood that the parties' intention was to have different arbitrations conducted in different seats. *See* also, B. Hanotiau, *supra* note 9, at 182-183.

<sup>60</sup> *Id.*

<sup>61</sup> Article 30.

The consolidation of parallel or simultaneous arbitration proceedings can be a court initiative. This has been the practice in the United States. For many years, the New York State courts have effectively allowed the possibility of consolidating separate arbitration proceedings when they raised the same issues of law or fact.<sup>62</sup> Since 1993 this position has been questioned by the federal district courts: consent of the parties seems to be necessary.<sup>63</sup>

In several recent decisions, federal and state courts have decided, relying on *Green Tree*, that since the issue of consolidation was a matter of contract interpretation, it was not for the Court but for the arbitrators to decide.<sup>64</sup>

In a recently decided case *Employers Ins. Co. of Wausau*<sup>65</sup> the Seventh Circuit held that an arbitrator, rather than a court, should determine whether an arbitration agreement allows consolidation of the proceedings.

In this case, the claimant is an insurance company that entered into reinsurance agreements with a number of reinsurers, including two with the defendants. The reinsurance agreements contained mandatory arbitration provisions, but were silent as to consolidated arbitration.

After the claimant paid money to its insureds, it sought reimbursement from the respondent and other reinsurance companies. When payment was contested, the claimant demanded that all the

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<sup>62</sup> In application of the Federal Rules of Civil Procedure, Rule 42 (a) and Rule 81 (a).

<sup>63</sup> *See Government of the United Kingdom of Great Britain v. The Boeing Company* and *Glencore, Ltd. v. Schnitzer Steel Products Co.* 998 F.2d 68 (2<sup>nd</sup> Cir. 1993) and 189 F.3d 264 (2<sup>nd</sup> Cir.1999). In the first case, the Court of Appeals held that a District Court cannot order consolidation of arbitration proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such consolidation, even when the proceedings involve the same questions of fact and law. In the second the Circuit Court held not only that consolidation was not possible given the absence of an agreement between the parties, but also that it lacked authority to order joint hearings. The Court also added that even though duplication, delay and the risk of inconsistent decisions may be valid concerns, they do not provide courts with the authority to reform the private contracts which underlie a dispute.

<sup>64</sup> *Blimpie International, Inc. V. Blimpie of the Keys*, 371 F. Supp. 2d 469 (S.D.N.Y. 2005), *Yuen v. The Superior Court of Los Angeles County*, 121 Cal. App. 4<sup>th</sup> 1133.

<sup>65</sup> *Employers Ins. Co. of Wausau v. Century indemnity Co.*, No. 05-3437 available at <http://www.wislawjournal.com/archive/2006/0412/arbitration.html>.

reinsurers participate in a consolidated arbitration. The defendants acknowledged that it must arbitrate the dispute, but objected to the consolidation of arbitration of its two policies, and to arbitration involving any other insurers.

The defendant then filed suit in the Western District of Wisconsin, seeking a declaration that the arbitrations not be consolidated. Both claimant and respondent moved for summary judgment. It was granted in part, holding that the arbitrator, not the court, should decide whether consolidation is permitted citing *Green Tree*. The respondent appealed, but the Seventh Circuit affirmed in a decision by Judge Joel M. Flaum, although it cited a different precedent.

The court relied on *Howsam v. Dean Witter Reynolds, Inc.*<sup>66</sup>, in which the Supreme Court found that only two types of disputes are proper for the court to consider, rather than the arbitrator:

- 1) a dispute regarding “whether the parties are bound by a given arbitration clause”; and
- 2) “a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.” Procedural questions, on the contrary, are for the arbitrator to decide in the first instance.

Applying *Howsam*, the Seventh Circuit held that the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve. The consolidation question concerns grievance procedures — *e. g.*, whether complainant can be required to participate in one arbitration covering both the agreements, or in an arbitration with other reinsurers.<sup>67</sup>

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<sup>66</sup> 537 U.S. 79, 84 (2002).

<sup>67</sup> *Id.*

After noting that its position was consistent with other circuits that have considered the issue, the court added, “the only question is the kind of arbitration proceeding their Agreements allow. This comes down to a matter of contract interpretation, which the arbitrator is well qualified to address.”<sup>68</sup>

Finally, the court noted its position was consistent with federal policy favoring arbitration.

In certain countries, the harmonization or the forced consolidation of connected proceedings has been organized in the law, at the behest of the courts.<sup>69</sup> Accordingly, the court affirmed the district court’s order that the case proceed to arbitration.

Either the court or the arbitral tribunal decides upon consolidation, if it takes place, the parties will eventually have to harmonize the various arbitration agreements, in particular in relation to the conditions of constitution of the arbitral tribunal, the place of arbitration and the applicable rules of law.<sup>70</sup>

### **3. Total or partial consolidation**

First, it should be decided whether the consolidation is to be total or partial. A few texts expressly allow for partial consolidation, while others remain silent in this respect.<sup>71</sup> Assuming partial consolidation is available, the question arises whether and when partial or total consolidation should prevail. It appears reasonable to argue that total consolidation should prevail over partial consolidation, because the latter does not serve procedural efficiency as well as total consolidation, since with partial consolidation, different proceedings continue to run

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<sup>68</sup> *Id.*

<sup>69</sup> *See generally* B. Hanotiau, *supra* note 9, at 185. This is notably the case of Canada, United States, Hong Kong and The Netherlands.

<sup>70</sup> *Id.*

<sup>71</sup> ICSID, *supra* note 12, at 97.

parallel even after the consolidation. It should be noted that both are not exclusive, they can be combined.<sup>72</sup> For example, two claimants have identical claims against respondent and a third claimant share some with the first two and have some others of his own. The first two can be subject of total consolidation and the third of partial consolidation. Or even, the court or tribunal deciding consolidation can decide to consolidate some issues and others not.

#### **4. Stage in the proceedings when it is appropriate to consolidate**

Primacy purpose of consolidation is efficiency and time is a key to efficiency.<sup>73</sup> Because there are many case configurations, it is difficult to set hard and fast rules that can apply in all possible circumstances. Relevant considerations to take in consideration:

- Arbitral panels must have the discretion to oppose to any untimely request.
- A request for consolidation must be made “at the earliest convenient moment: in that way, unnecessary expense and effort can be saved from the outset.”<sup>74</sup>
- In institutional arbitration, a request for consolidation filed before the relevant issues can be sufficiently identified is untimely and should be denied. (*E.g.*, In ICC arbitration, before signing the terms of reference).
- Level of progress of each case is another factor. The further apart they are, the less likely it is that consolidation will produce efficient results.<sup>75</sup>
- Proceedings should not be consolidated if a jurisdictional objection is pending. This rule does not apply if the jurisdictional objection is common to all cases.<sup>76</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> ICSID, *supra* note 12, at 98.

<sup>74</sup> *Id.*

<sup>75</sup> *See* Art. 4 of the Swiss Rules and *see also* Art. 7 of the Arbitration Rules of the Mexican Arbitration Centre.

<sup>76</sup> ICSID, *supra* note 12, at 98-99.

- A request for consolidation filed after the time when the tribunal has closed the proceedings should be deemed untimely, and refused, in order to avoid dilatory tactics and last minute maneuvers to delay the issuance of the decision on jurisdiction.
- When a partial award has been rendered that carries *res judicata* the request for consolidation is untimely when the partial award resolves the common issues.<sup>77</sup>

## 5. ICSID and NAFTA

The ICSID Rules do not contain any provision for consolidation of related arbitrations. Nevertheless, it has focused its practice in harmonizing as much as possible the procedures and the procedural calendars by appointing the same arbitrators in related proceedings.<sup>78</sup>

The possibility of consolidating connected cases is also provided in Article 1126 of the NAFTA Rules as well as in more recent bilateral investment treaties.<sup>79</sup>

There are two prominent cases under NAFTA in which requests for consolidation were filed. In the first case, *Corn Products International*, the Mexican Government filed a request for consolidation in connection with two controversies filed against Mexico by two foreign American investors alleging in both cases breaches of the same Mexican tax provision. Even though the parties agreed on consolidating the two proceedings and presented briefs and evidence to support their position, the Consolidation Tribunal rejected the request arguing that even though the claims had certain questions of law or fact in common for purposes of Article 1126 (2), the Tribunal estimated that it could not issue a consolidated order “in the interests of

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<sup>77</sup> *Id.*

<sup>78</sup> *E.g.*, three ICSID arbitrations filed on July 17, 2003, relating to disputes over a concession contract relating to water supply and sewage service, the same tribunal members were appointed in all cases. *Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentina* ICSID case no. ARB/03/17; *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentina* ICSID case no. ARB/03/18 and *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina* case no. ARB/03/19.

<sup>79</sup> *See generally* B. Hanotiau, *supra* note 9, at 189. *See* Article 33 of the 2004 US Model Bilateral Investment Treaty and in Article 11 of Annex A (Investor-State Dispute Settlement) of the 2005 draft Model International Investment Agreement prepared by the International Institute for Sustainable Development.

fair and efficient resolution of the claims”. The Tribunal considered that the significant direct competition among the claimants and the consequent need for complex confidentiality measures throughout the arbitration process would render consolidation extremely difficult and might adversely affect the ability of claimants to fully present their case.<sup>80</sup> It finally pointed out that the risk of unfairness to Mexico from potentially inconsistent awards resulting from separate proceedings could not outweigh the unfairness to the claimants of the procedural inefficiencies that would arise in consolidated proceedings. It therefore rejected Mexico’s request for consolidation on May 20, 2005.<sup>81</sup>

In the same year, a few days earlier, on May 6, 2005, a second Consolidation Tribunal was assembled to hear a request filed by the United States for consolidation of three simultaneous investment arbitrations initiated by three different Canadian softwood lumber producers against the United States. To the contrary of *Corn Products International*, the Softwood Lumber Tribunal ordered consolidation of the three procedures, it concluded that all four conditions of Article 1126 (2) had been met and in particular that the three arbitrations involved many common questions of law and fact and that the interests of fair and and efficient resolution of the claims (taking into consideration procedural economy, as well as time, costs and avoidance of conflicting decisions) were in favor of consolidation of all claims.

#### **IV. Requirements for Consolidation**

##### **1. Connexity or common questions of law and fact**

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<sup>80</sup> B. Hanotiau, *supra* note 9, at 189-190.

<sup>81</sup> *Id.*

The primary requirement for consolidation is *connexity*, the existence of a connection between the cases to be consolidated or the existence of a ‘legal relationship’<sup>82</sup>. Some provisions define *connexity* as implying “questions of law and fact in common” adding that these common questions “arise out of the same events or circumstances.” Other texts require that there be a risk of conflicting decisions if the matters are handled separately.<sup>83</sup> Still others simply refer to cases concerning the same subject matter on account of the connection between them without specifying the nature of this connection and consolidation is allowed whenever there are reasons that make it desirable.

## **2. Fair and efficient dispute resolution**

Fair and efficient dispute resolution is a necessary condition for consolidation.<sup>84</sup> Certain national statutes or institutional rules require that the prejudice arising from a failure to consolidate not be outweighed by the risk of undue delay, hardship or prejudice to the rights of parties opposing consolidation. The requirement is that an order of consolidation be fair and efficient in and of itself.<sup>85</sup>

## **3. Consent of the parties**

According to many authors this requirement is one of the most heavily debated ones. The first question is whether consent is necessary. If it is, must it be expressed or implied? There is not an absolute rule that establishes that consent is a requirement. For instance, the Dutch Arbitration Act requires no consent, but it gives the possibility to the parties to opt out.<sup>86</sup> Similarly, the Hong Kong Arbitration Act<sup>87</sup> makes no reference to the parties’ consent to consolidate, but only

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<sup>82</sup> Article 4 (6) of the ICC Rules.

<sup>83</sup> ICSID, *supra* note 12, at 86.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Art. 1046.1 of the Netherlands Code of Civil Procedure.

<sup>87</sup> Section 6HB.

to their agreement to designate arbitrators. In the absence of an agreement, the Court of First Instance appoints an arbitrator or umpire for the consolidated arbitration proceedings.<sup>88</sup> On the contrary, certain texts require the express consent of the parties.<sup>89</sup>

In the United States, the case law is not uniform. While some federal circuits hold that an express agreement of the parties on consolidation is necessary,<sup>90</sup> others accept an implied agreement to consolidate, and still others consider that the Federal Arbitration Act and the Federal Rules of Civil Procedure authorize court-ordered consolidation even without consent.<sup>91</sup> In commercial arbitration based on institutional arbitration rules containing a consolidation provision, the consent given to the rules is deemed to include consent to consolidation. For instance, such rules are incorporated into the arbitration agreement and are enforceable.

The English Arbitration Act 1996 provides conditions under which proceedings can be consolidated:

- The arbitrations are by agreement to take place in the same country;
- The same law governs the related disputes;
- The same procedural rules govern the related disputes;
- The two tribunals are constituted in the same way.<sup>92</sup>

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<sup>88</sup> Section 6B.2 of the Hong Kong Arbitration Ordinance.

<sup>89</sup> *E.g.*, Section 27 of the International Commercial Arbitration Act of British Columbia (BCICAA), for example, requires a double consent: first, it requires that the parties to two or more arbitration agreements agree to consolidate; second, it provides that the Supreme Court may consolidate upon applications by one party with the consent of all the parties. *See* in ICSID Law Review, p. 87.

<sup>90</sup> *E.g.*, *United Kingdom of Great Britain and Northern Ireland v. The Boeing Company*, 998 F.2d 68 (2d Cir. 1993), in this case the Second Circuit held that a district court cannot order consolidation of arbitration proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such consolidation.

<sup>91</sup> *Robert Lawrence Co. V. Devonshire Fabrics*, 271 F.2d 402 (2d Cir. 1959), *Compañía Española de Petróleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975). *E.g.*, *New England Energy Inc. v. Keystone Shipping Company*, 855 F. 2d 1 (1<sup>st</sup> Cir. 1988), in this case, the district court ruled that the factual circumstances were appropriate for consolidation, but it nevertheless denied the application for consolidation on the ground that it lacked the power to join the cases.

<sup>92</sup> ICSID, *supra* note 12, at 89.

## V. CONCLUSION

Arbitration is still arbitration even if it is consolidated arbitration.<sup>93</sup> In addition, consolidation of arbitral proceedings is a procedural matter and not a question of arbitrability, therefore it must be the arbitral tribunal who must decide upon consolidation. If 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 or agreements to which they are a party.

As it was stated in *New England Energy Inc* complete identity of the cases is not a prerequisite to consolidation.<sup>94</sup> Consolidation may be a good device to increase the efficiency and consistency of international adjudication. These goals can only be met if the consolidation regime is well designed and sufficiently flexible.

Finally, the decision to consolidate as well as the consolidated proceedings must be compatible with the human right to a fair trial. A fair trial implies the right of each claimant to have his or her claims properly addressed and adjudicated.

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<sup>93</sup> Gary B. Born, *supra* note 3, at 691.

<sup>94</sup> *New England Energy Inc. v. Keystone Shipping Company*, 855 F.2d 1 (1<sup>st</sup> Cir. 1988).

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