

PART II
Chapter 8

**Consolidation of Claims: A Promising Avenue
for Investment Arbitration?***

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Introduction

The multiplication of investment agreements with investor-state dispute settlement provisions has raised the risk of multiple and conflicting awards, as the same dispute can lead to awards under different treaty regimes as well as under different contracts. Investors are sometimes able to claim breaches of different BITs and to seek relief through different arbitration proceedings under each of the invoked treaties in respect of a single investment and regarding the same facts. The two “Czech cases”, (*CME/Lauder v. the Czech Republic*)¹ and the approximately 40 cases currently pending against Argentina and arising from the same events demonstrate the increasing complexity of such situations.

Hence, the host state may face multiple arbitrations under different BITs in relation to essentially the same set of facts. Although the experience up to now does not show major inconsistencies among arbitral awards, some decisions are considered inconsistent by certain parties.

In this evolving landscape of investment arbitration, consolidation of claims might be considered as an avenue for the avoidance of possible inconsistent and conflicting awards emanating from the multiplicity of proceedings, and agreed to review the issue further.

The present paper provides factual elements of information on the application of the consolidation of claims.. For a better understanding of the origin of this device, first it examines the way it has been used in commercial arbitration. Second, it looks at its application to investment arbitration, and third drawing from both experiences it highlights the advantages and disadvantages of such an application and proposes a set of action.

1. Consolidation of claims in commercial arbitration

Consolidation is a procedural device which denotes the process whereby two or more claims are united into one single procedure concerning all parties and all disputes. Although it is a recent concept in investment arbitration, it is not a new one in the commercial arbitration context where it is being used when multiple and parallel arbitral proceedings have been initiated.

Issues relating to consolidation of claims carry a particular concern to the business community as business relationships, and disputes which arise therein, can and do often involve a multiplicity of parties and contracts. When two or more disputes arise, it may prove beneficial to one or more parties to

hear all disputes in one hearing. This can be contrasted with “*de facto* consolidation” where each individual arbitration is heard by the same panel of arbitrators or with a similar procedure² in which two or more arbitrations are heard simultaneously by the same panel of arbitrators but an award is rendered separately for each individual proceeding.

In the context of commercial arbitration, consolidation can involve the uniting of two or more court proceedings, consolidation of two or more arbitral proceedings or the consolidation of court and arbitral proceedings. Issues relating to consolidation of court proceedings will not be addressed in this paper as such a situation raises different issues or concerns and is often regulated under a different legal regime. In the latter two scenarios, however, consolidation raises much the same issues and thus will be treated in the same manner.

In situations where consolidation of claims may be relevant, it must be determined whether such a course of action is permissible under the relevant legal regime and if so, whether it is appropriate in the given circumstances. The questions which arise are: i) under what circumstances is consolidation of claims an appropriate measure; ii) what is the legal basis for such a consolidation. These issues or questions are not present where parties agree to consolidation; such an agreement falls within the doctrine of party autonomy and courts and tribunals will ordinarily respect any such agreement.³ Thus, the questions that arise do so in connection with court ordered or tribunal ordered consolidation.

1.1. Under what circumstances is consolidation of claims an appropriate measure?

A number of different situations arise where consolidation of claims can be envisaged as pertinent. The most common such situations are: i) where a party raises claims against two or more parties, based on the same or a related fact pattern and where the claims are subjected to different arbitration agreements or arise under different contractual arrangements; ii) when several parties raise similar claims against the same defendant based on the same or a related fact pattern; iii) where a defendant or respondent to a claim itself has cross-claims which are subjected to a different dispute resolution arrangement; iv) where the defendant or respondent to a dispute itself has a claim against a third party based on the same factual pattern;⁴ or; v) where two or more disputes arise out of the same fact pattern or raise the same or related questions of law or fact and such disputes are not linked by a common party.⁵ In essence, consolidation of claims may arise between two parties where there is a multiplicity of contracts or claims, or between a multiplicity of parties based on a single claim or a multiplicity of claims⁶ (Annex 8.A1).

1.2. Legal basis for consolidation

As the typical commercial arbitral process is premised upon notions of party autonomy, the power to order consolidation of claims in the absence of an agreement between the parties necessarily requires an appropriate legal basis. Three potential legal bases are suggested in the literature: i) the arbitration agreement itself; ii) rules of arbitral institutions; and iii) provisions of national arbitration laws.

1.2.1. The arbitration agreement

The contractual solution would only be plausible in a narrow set of circumstances. First, there would need to be symmetry between the relevant arbitration agreements as to seat of arbitration, applicable law, appointment mechanisms and procedural rules. Without such symmetry, it would necessarily need to be decided which agreement prevailed, an undertaking which has been described as “an impossible task”.⁷ Second, the relevant arbitration agreements must each empower a tribunal to assume jurisdiction over other disputes and other parties; the power to order consolidation thus derives from the will of the parties themselves. Where a two-party multi-dispute situation is consolidated in this manner, fewer problems arise than where a multipartite arbitration is envisaged as, from a theoretical point of view, it is arguable that no contractual relationship from which obligations arise exists between certain parties to the arbitration.⁸

1.2.2. Rules of arbitral institutions

Similar theoretical difficulties arise where the legal basis for consolidation is a set of institutional rules. Here again, the power to order consolidation arises from exercise of party autonomy through agreement on applicable procedure rules. As a necessary precondition, each relevant arbitration agreement would need to refer to the same institutional rules. Few institutional rules empower an arbitrator to order consolidation of proceedings; where such a power does exist, exercise of the arbitrators’ discretion to order consolidation is generally tempered by a requirement that the disputes arise out the same set of facts or legal issues.⁹ While many institutional rules contain provisions regulating the procedure to be used in multiparty arbitrations,¹⁰ few contain provisions empowering a tribunal to coerce consolidation of proceedings (Annex 8.A2).

1.2.3. National arbitration laws

The most commonly used basis for consolidation of claims in commercial arbitration, is a provision in national arbitration law. Three variants in approach are discernible from a comparison of national arbitration laws: i) those that allow for court ordered or coerced consolidation even absent

consent between the parties; ii) those that contain provisions on consolidation but precondition its application on consent of the parties; and iii) those that make no reference to consolidation (Annex 8.A3).

i) Court ordered consolidation

At present, only the **Netherlands**,¹¹ **Hong Kong**¹² and **Colombia** provide for court ordered consolidation of claims. Article 1046 of the **Netherlands** CCP makes no distinction between the legal regime applicable to domestic and international arbitrations although there exists two restrictions on court ordered consolidation. First, all relevant arbitrations must have their seat in the territory of the Netherlands. Second, parties may “opt out” of Article 1046. Exclusive jurisdiction over a request for consolidation is vested in the President of the District Court in Amsterdam.

By contrast, Section 6B of the **Hong Kong Ordinance** applies only to domestic arbitrations. However, parties to an international arbitration may “opt in” to the domestic arbitration regime, including the provision on consolidation.¹³

In the case of **Colombia**, the 1989 decree on arbitration renders invalid an arbitration agreement between two parties where a dispute may have effects on a third party that is not party to this agreement and refuses to be joined in the arbitration. In such a case, the arbitration proceedings are effectively consolidated with any related court proceedings despite the absence of all agreements of all parties in this respect.¹⁴

ii) Consolidation with the consent of the parties

Section 35 of the **English Arbitration Act** preconditions consolidation on consent of the parties. When reviewing arbitration law and procedure prior to adoption of the 1996 Act, the Departmental Advisory Committee (“DAC”) considered the obstacles to consolidation insurmountable and thus no provision for consolidation of claims absent the agreement of the parties was introduced.¹⁵ These obstacles were, in particular, concerns over protection of confidentiality and enforceability of an award rendered by a consolidated tribunal.

This approach can also be seen in the **British Columbia International Commercial Arbitration Act 1996**¹⁶ which provides for court ordered consolidation on terms it considers “just and necessary” and where the parties have agreed to consolidation.¹⁷ The **Australian International Commercial Arbitration Act 1989** also conditions application of the provision on consolidation on agreement of the parties insofar as parties must “opt in” to its application. In contrast to the approach taken in Canada, however, the decision to consolidate is taken by the arbitrators.¹⁸

iii) No reference to consolidation

The **Spanish Arbitration Law 2003** contains no reference to consolidation of claims.¹⁹

The legislative drafting history from both **Sweden** and **Germany** indicates provisions on consolidation of claims were purposefully omitted as the issue was considered too complex for resolution in their respective arbitration laws.²⁰

The **Swiss Private International Law (PIL)** contains few provisions on regulation of the arbitral procedure and no specific provision on consolidation of claims.²¹

The **United States Federal Arbitration Act (FAA)** is also silent on the issue of consolidation of claims. Through statutory interpretation, certain District Courts had read into the FAA a power to coerce consolidation absent the agreement of the parties;²² this interpretation has subsequently been overruled. As a result, court ordered consolidation of claims is presently not possible under the FAA.²³

2. Consolidation of claims in investment arbitration

Consolidation of claims in investment arbitration is a more recent phenomenon. It is first seen in NAFTA and first applied in 2005. The need for consolidation arises when there are multiple arbitration proceedings filed with common questions of law or fact which raise the possibility of inconsistent or even conflicting awards. In this context, it is often raised when there are two or more claims arising from the same governmental measure. The *Lauder/CME v. the Czech Republic* cases might have reached a different result if the claims had been consolidated; in this case however, the respondent was unwilling to agree to consolidate the claims.²⁴

2.1. State practice and international rules

The **UNCITRAL Rules**,²⁵ the **ICSID Convention**,²⁶ and the **Additional Facility Rules**, do not have any provision allowing for consolidation of claims. The **draft MAI**²⁷ had provided for consolidation of multiple proceedings in its Article 9 of the chapter of Investor-State Procedures. A provision worth mentioning under the draft MAI, which is not found in any agreement in force, gave the investor who objected to consolidation ordered by a consolidation tribunal, the right to withdraw the arbitration request but without prejudice to his non arbitration dispute settlement options, e.g. local courts.²⁸

The first multilateral agreement in force which provided for consolidation of claims was **NAFTA**. Its Article 1126 provides that where a Tribunal established under this Article is satisfied that claims submitted to arbitration *have a question of law or fact in common* the Tribunal may, in the interests of fair and efficient

resolution of the claims, and after hearing the disputing parties, order that the Tribunal assume jurisdiction over and hear and determine together, all or part of the claims, the determination of which it believes would assist in the resolution of the others²⁹ (see Annex 8.A4). Since NAFTA, provisions of consolidation have been included in investment chapters of Free Trade Agreements of all three NAFTA Parties, such as in US FTAs with Chile,³⁰ Morocco,³¹ Central America-Dominican Republic (CAFTA-DR)³² and in the FTAs between Canada and Chile (Article G-27)³³ and between Mexico, Bolivia, Costa Rica³⁴ and Japan.

A novel element which appears in the **Mexico-Japan FTA**,³⁵ is the possibility given to an investor who considers that his claim raises questions of fact and law common to those upon which the consolidation has been requested, but has not been named in the request of consolidation, to ask the Tribunal to consider the consolidation of its claim.

Consolidation provisions can be found for the first time in **BITs** in the new US Model BIT³⁶ as well as the new model Canada FIPA.³⁷ As is the case with NAFTA and the US FTAs, these new model agreements provide for consolidation upon request by a disputing party and concern multiple claims having a question of law or fact in common and arise out of the same events or circumstances, usually a state measure alleged to be in breach of the State's obligation.³⁸ The requested consolidation should be in the interest of fair and efficient resolution of claims. However, although they are very similar, one difference is noted. Under Canada's new model FIPA, only treaty claims and not claims based on an investment contract, may be referred to arbitration and possibly consolidated under the BIT provisions.

All the above agreements provide for consolidation in full or in part.³⁹ If consolidation in full is ordered, the Tribunals constituted to hear each of the claims cease to function. If partial consolidation is ordered, then these tribunals no longer have jurisdiction over the part over which the consolidation tribunal has assumed jurisdiction.⁴⁰

2.2. Jurisprudence

2.2.1. Consolidation "stricto sensu"

The first application of the NAFTA provision on consolidation was the consideration of a request by Mexico for consolidation of three claims by a Tribunal constituted to this effect.⁴¹ *Corn Products International, Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc.* ("The High Fructose Corn Syrup cases/HFCS cases", HFCS thereafter), three US based companies, had submitted requests for institution of arbitration proceedings to ICSID against Mexico, for alleged breaches of NAFTA arising from the imposition of an excise tax on soft drinks containing high fructose corn syrup. A "Consolidation Tribunal" was constituted upon agreement of all the parties on

both the membership and its mandate, to rule upon Mexico's request and decided against this consolidation in its Order of May 20th, 2005. It held that although there were some common questions of fact and law, there were several reasons to reject the claim: the direct and major competition between the claimants which would require complex confidentiality measures throughout the arbitration process and the numerous distinct issues of state responsibility and quantum.

On March 7, 2005, the United States filed a request⁴² with ICSID pursuant to NAFTA Article 1126 to consolidate three claims: *Canfor Corp. v. United States of America*, *Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America*, ("the Softwood lumber" cases, thereafter), related to losses allegedly suffered as a result of certain US antidumping, countervailing duty and material injury determinations on softwood lumber. The United States made this request "in the interest of a fair and efficient resolution of those claims and to avoid the possibility of conflicting determinations", claiming that relevant issues of fact and law in the three notices of arbitration are nearly identical. A Tribunal was constituted to this effect by the Secretary General of ICSID and held its hearing on June 16, 2005.⁴³ On 7 September 2005, the Tribunal issued its Order⁴⁴ agreeing to the request of consolidation after having found after having found that all four conditions of Article 1126(2) of the NAFTA were met. First, the claims in question had been submitted to arbitration under Article 1120; second, many questions of law and fact were common in the three Article 1120 arbitrations (including the similar jurisdictional objections raised by the United States); third, the interests of fair and efficient resolution of the claims merit the assumption of jurisdiction over all of the claims; and fourth, the parties to the proceedings had been heard. The interests of avoiding conflicting awards and enhancing "procedural economy" were also important factors in its decision. The Tribunal disagreed with the statements found in the "HFCS cases" related to the major competition among the claimants and the respect of confidentiality as the main impediments for such a consolidation. After the Tribunal issued its decision, Tembec has voluntarily withdrawn its claim from the consolidation tribunal and is seeking to set aside the consolidation award in the US courts.

2.2.2. "De facto" consolidation

In order to avoid inconsistencies in the findings of different tribunals, parties could also appoint the same arbitrators. There have been some recent cases filed at ICSID in which the parties agreed to have their claims against a particular state consolidated *de facto*, when two or three claims were brought by different investors against the same host State for similar actions taken by that State.⁴⁵ For instance, the ICSID Secretariat recommended such an action in the

cases *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*⁴⁶ and *Consortium R.F.C.C. v. Kingdom of Morocco*⁴⁷ based both on the same BIT between Italy and Morocco and on similar factual and legal backgrounds. Although the two procedures were conducted separately, the identical tribunal was named to hear both and, naturally avoided issuing inconsistent decisions.⁴⁸

In the context of the ICSID claims pending against Argentina a single Tribunal has been appointed to hear two independent claims. In March 2004 *Sempre Energy International* and *Camuzzi International* agreed to set up a single Tribunal to hear their claims registered within a three month time period and raised under two different BITs (US-Argentina for *Sempre* and Belgo-Luxembourg Economic Unit-Argentina for *Camuzzi*). The *Sempre Energy International v. Argentina*⁴⁹ and *Camuzzi International A.A. v. Argentina*⁵⁰ cases were heard by one Tribunal.⁵¹ One set of arbitrators has also been appointed to hear two disputes against Argentina involving electricity distribution companies in *Electricidad Argentina, S.A., and EDF International S.A. v. Argentina*⁵² and *EDF International S.A., SAUR International S.A. and Léon Participations Argentinas S.A. v. Argentina*.⁵³ The same Tribunal was also constituted in three cases involving water services concessions: *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. Argentine Republic*,⁵⁴ *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*⁵⁵ and *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*.⁵⁶

3. Rationale for the Consolidation of Claims

In situations where a consolidation of claims is possible, it remains to be determined whether such a course of action is appropriate in the circumstances of the case at hand. To make this determination, a balancing of the advantages and disadvantages of consolidation of claims as compared to separate proceedings is undertaken. The only arbitral tribunal which decided in favour of such a consolidation thereafter the “Softwood lumber tribunal”, Mexico and the United States, which have argued in their submissions in favour of consolidation, as well as several commentators, generally identify two main benefits to consolidation of claims: i) increase in the efficiency of arbitration; and ii) avoidance of conflicting or contradictory awards.⁵⁷ On the other hand, the arguments against consolidation made by objecting parties and some commentators focus on: i) lack of the parties’ consent; ii) non-participation in the appointment of the arbitral tribunal; iii) potential infringements of a party’s substantive rights; and iv) apportionment of arbitral fees and other costs.

3.1. Arguments in favour of consolidation

3.1.1. Efficiency

Efficiency considerations concern legal efforts, time and cost. When claims arise from the same measures, it is likely that they would present common issues of treaty breach and treaty interpretation and require common grounds of defence. Time and financial expenditures can be reduced through having a unified process; repetition or duplication of the same evidentiary materials is avoided as is litigation or arbitration related costs such as expert witness fees. A second source of costs-savings relates to the single payment of arbitrators fees, an expenditure which often constitutes a significant portion of the cost of arbitration.⁵⁸ Here the necessity of balancing the “overall” efficiencies becomes apparent.⁵⁹ On 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.⁶⁰

However, it is possible that an individual arbitration may be more efficient for an individual disputing investor.⁶¹ The investor may have small or indirect claims, the determination of which is likely to take longer and be more expensive in a consolidated arbitration than in a purely bilateral resolution of the dispute. In contrast, consolidated proceedings may be more efficient for a respondent State Party.⁶²

Article 1126 of NAFTA provides for consolidation “in the interests of fair and efficient resolution of claims”. The “Softwood lumber” consolidation tribunal in making the determination of efficiency also considered what is “fair”. It noted that “the interests of all parties involved should be balanced in determining what is the procedural economy in the given situation...it includes the consideration that all parties shall continue to receive the fundamental right of due process...”. It found as a guiding test for measuring efficiency the comparison with the existing situation, if no consolidation were ordered.

3.1.2. Avoidance of inconsistent or contradictory awards

The second and often cited as the most important, justification for consolidation is the avoidance of inconsistent or contradictory awards.⁶³ In the context of investment arbitration, the concern over inconsistent or contradictory awards gains a heightened importance because of the public interest issues raised and insofar the grounds for review of arbitral awards are narrow and do not allow for re-examination of questions of law or fact. The grounds for such review under the ICSID Convention are limited to annulment procedures on limited grounds and for non-ICSID awards through challenge procedures or through resisting recognition and enforcement of an award based on the Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (The New York Convention)

pertaining primarily to breaches of due process and a few other narrow exceptions.⁶⁴ As a consequence, inconsistent or contradictory awards risk not being reconciled or set aside by annulment committees or judicial authorities.

The consolidation tribunal in the “Softwood lumber” cases acknowledged that inconsistent results do occur, making reference to the Czech cases. It added that although arbitral awards do not constitute binding precedent, they do constitute persuasive precedent and the effective administration of justice requires the avoidance of conflicting results. Consolidation, both full and partial, would work in favour of avoiding conflicting results: “... if a total consolidation occurs, no conflicting decisions can arise. But if a partial consolidation under that provision occurs, no conflicting decisions can arise either since a decision by an Article 1126 Tribunal must be deemed to be binding to the Article 1120 Tribunals to the extent of the questions chosen for determination in the partial consolidation.”⁶⁵

Some argue that the risk of inconsistent awards is easily over-emphasized from a theoretical point of view whereas arbitral practice shows this risk has rarely materialised and thus does not pose a substantial problem.⁶⁶ Others have argued that the risk of inconsistent or contradictory awards in and of itself detracts from or diminishes the confidence of the international community in arbitration as an effective means of dispute resolution as it may result in an unjust or inequitable solution, in particular where issues of public interest are at stake.⁶⁷

3.2. Arguments against consolidation of claims

Arguments against the consolidation of claims relate to: i) the intention and consent of the parties to submit their claims to arbitration; ii) non-participation in the appointment of the arbitral tribunal; iii) potential infringements of a party's substantive rights; iv) apportionment of arbitral fees and other costs.⁶⁸

3.2.1. Parties' consent

In the context of commercial arbitration, it is argued that when the parties to a dispute have not expressly provided for consolidation, to impose such a course of action runs counter to the intent and consent of the parties as expressed in the dispute resolution mechanism provided for in each individual arbitration agreement.⁶⁹ Critics of consolidation consider the nature of arbitration as a consensual process as paramount and thus as outweighing all suggestions that a court or tribunal may revise an arbitration agreement to provide for or allow consolidation.⁷⁰

The situation might be different in investment arbitration. One argument raised in the NAFTA Softwood lumber consolidation case against unifying claims into a single procedure was that it would be against the consensual nature of arbitration (or the principle of party autonomy). Although this might

be true for commercial disputes where the parties' consent is the guiding force for such a consolidation, it might not necessarily be the same on investment arbitration where the guiding consolidation principles are the unity of the economic transaction affected by the same State measure. As the Softwood Lumber consolidation tribunal noted on this point, by submitting their dispute to arbitration under NAFTA Chapter 11, the investors accept the conditions set by the three NAFTA States who negotiated the treaty. Therefore, "*party autonomy is not relevant for considering a consolidation request under Article 1126*". It supported this point by citing H. Alvarez:

*"Although mandatory consolidation is not widely accepted in private commercial arbitration, it makes good sense in the case of Chapter 11 of NAFTA, which is not the usual private, consensual context of international commercial arbitration. Rather, Chapter 11 creates a broad range of claimants who have mandatory access to a binding arbitration process without the requirement of an arbitration agreement in the conventional sense, nor even the need for a contract between the disputing parties. In view of this, some compromise of the principles of private arbitration may be justified."*⁷¹

A different view was held by the Consolidation tribunal in the "HFCS cases". The Tribunal considered that the opposition of the claimants to consolidation was a factor weighing against it:

"It would appear to follow that since party autonomy at least for certain limited purposes, has been read into Article 1126 and accepted by three NAFTA treaty states as well as by the private parties in this consolidation proceeding... should be a relevant consideration to be taken into account in the interpretation and application of Article 1126; in this case... three of the four parties before it do not wish to have the claims consolidated... the Tribunal views those wishes as a relevant consideration in evaluating the fairness of the proposed consolidation."

3.2.2. Non-participation in the appointment of the Tribunal

It is often stated that one of the primary advantages of arbitration over judicial remedies is the ability of the parties to appoint the arbitrators. Arbitration agreements and investment treaties in the case of investment arbitration can expressly prescribe the method of appointment or do so by reference to institutional arbitration rules. These methods of appointment, however, may not be practicable or appropriate to a consolidated tribunal where there is to be a panel of arbitrators and the claim involves multiple parties. Where the tribunal is to be composed of three arbitrators, a typical arrangement is to provide for each party to nominate or appoint one arbitrator while the chair or neutral arbitrator is to be appointed by agreement of the party-appointed arbitrators.⁷² Where claims are consolidated to the effect that the consolidated claim is raised against or by multiple parties, enabling each party to appoint an arbitrator may prove more difficult.

On the other hand, it has been suggested that non-participation in the appointment process may not necessarily prove fatal to consolidations, since what is important is equality of treatment between the parties.⁷³ This could, for instance, be effectuated through the appointment of all the arbitrators by an appointing authority, e.g. the Secretary General in the case of ICSID for instance.

3.2.3. *Infringement of a party's substantive rights*

Potential infringements of a party's substantive rights – in particular the investor's – include two separate considerations. First is whether consolidation is liable to increase the likelihood of arbitrator error; second is the issue of confidentiality.

As regards the question of arbitrator error, it has been suggested that the increased complexity of a consolidated proceedings may increase the likelihood of arbitrator error.⁷⁴ Against this proposition is the suggestion that errors of fact are less likely to occur in a consolidated procedure as the arbitrators are presented with a more complete set of facts or a wider perspective from which to draw their conclusions.⁷⁵

Confidentiality is often advanced as a primary advantage of arbitration over court proceedings⁷⁶ although it has been strongly debated and increasingly bypassed in the context of investment arbitration. It is argued that consolidation proceedings may affect confidentiality with regard to additional parties to a dispute. A typical example where issues of confidentiality are pertinent is in the sphere of investors who are direct competitors where, for example, they may not wish to disclose to their sub-contractors, details as to the nature of their investments, business strategies, production costs, plant design or profit margins.⁷⁷ Some commentators, Mexico in the “HFCS cases” and the consolidation tribunal in the “Softwood lumber cases”, argued that confidentiality concerns can be protected through other means such as protective orders, imposition of confidentiality undertakings, partially separate hearings *in camera*, classifying submissions, documents and testimony; appointment of a confidentiality advisor, arbitral orders restricting access, while ensuring that each party is afforded a full opportunity of presenting its case. As the tribunal in the Softwood lumber cases noted, “*in many international arbitrations, parties negotiate and execute an appropriate confidentiality agreement among themselves*”.⁷⁸ It also noted that protecting confidentiality is a balancing act for the tribunal which is called to make its decision based on due process considerations for the parties:

“The exceptional cases where confidentiality would defeat efficiency of process or would infringe the principle of due process enunciated in Article 1115 of the NAFTA, if proceedings were consolidated, are not likely often to occur. Such a

situation may be present in the event that clearly identified and significant confidentiality issues are bound to arise in the proceedings, if consolidated; that these issues outweigh all three factors (time, cost and avoidance of conflicting results); and that these issues are such that, if the proceedings are consolidated, they are manifestly counterproductive to an effective administration of justice.”⁷⁹

Other commentators argue that confidentiality concerns should not prevent the consolidation of claims *ipso facto* but rather should operate to guide the discretion of the court or tribunal as to whether consolidation is appropriate in the specific case.⁸⁰

3.2.4. Apportionment of the costs of arbitration

Another issue raised regarding consolidation of claims is the appropriate or correct apportionment of fees and costs of arbitration. Some rules require each party to pay its own arbitration costs. Others, however, may require the losing party to pay all costs or apportion costs between the parties.⁸¹ As no generalised formula exists, equitable distribution of costs remains a discretionary function of the arbitral tribunal having regard to the particular circumstances of each individual case.⁸²

4. Summing up

Consolidation of claims has its roots in commercial arbitration where it is based essentially on the party autonomy principle, i.e. the parties’ consent, except in a few cases where national arbitration laws provide for court-ordered consolidation. In investment arbitration, NAFTA as well as a number of recent US, Canada and Mexico FTAs and the US model BIT and Canada model FIPA, provide for consolidation of claims when there are questions of law and fact in common. Two NAFTA consolidation tribunals issued their opinions on this issue which differ in their conclusions as to the fairness of consolidation in the circumstances. A number of arguments have been advanced to favour consolidation and counter arguments to dispute its legitimacy.

In the field of investment arbitration, where public interest issues are at stake, the risk of inconsistent decisions, although not often observed, remains a significant consideration. The result could be for a State to be exposed to two opposite decisions in regard to the same measure (one decision condemning it for having violated its international obligations, the other not finding any responsibility, see for instance the Czech cases). Consolidation of claims emanating from the same state measure and based on similar factual and legal elements could protect against such a risk. However, there is no consensus that the advantages of consolidation provisions in investment agreements exceed *versus* its disadvantages. The consent of the parties as a prerequisite for a request for consolidation and concerns about confidentiality still weigh strongly against the advantages of this measure.

Only few treaties presently provide for consolidation. In the absence of such provision, the disputing parties who wish to do so could take the initiative to ask for consolidation or “*de facto*” consolidation, and arbitral institutions such as ICSID could facilitate the process by appointing the same panel of arbitrators – which has already been done in some of the cases against Argentina.

Notes

1. *CME Czech Republic B.V. v. Czech Republic*, Partial Award (September 13, 2001), available at <http://mfcz.cz/Arbitraz/en/PartialAward.doc> and *Lauder v. Czech Republic* (Final Award) (3 September, 2001) available at www.mfcz.cz/scripts/hpe/default.asp.
2. Available under the Australian International Commercial Arbitration Act 1989.
3. Leboulanger, “Multicontract Arbitration” (1996), 13:4 *J. Int. Arb.* 43. See also Gaillard, “L’affaire Sofidif ou les difficultés de l’arbitrage multipartite” (1984), 3 *Revue de l’arbitrage*, 274 at 284: “En l’état de la législation française, le seul moyen de consolider les procédures ou de rapprocher les clauses, est de découvrir dans l’intention de toutes les parties concernées le souci que la procédure arbitrale se déroule de cette manière. A défaut, l’une des parties serait fondée à soutenir que le tribunal arbitral s’est prononcé, à son égard, hors des termes du compromis.”
4. See *e.g.* *The Vimeira* [1983] 2 Lloyd’s Rep 424 (see Annex 1).
5. See the “Soya Bean Embargo” cases where a number of arbitrations were initiated in the wake of the 1973 US embargo on exports of soybeans, cited in Mustill, “Multipartite Arbitrations: An Agenda for Lawmakers” (1991), 7:4 *Arb. Int.* 393 at 393.
6. E. Gaillard, “Consolidation of Arbitral Proceedings and Court Proceedings”, in *Complex Arbitrations: Perspectives on their Procedural Implications*, *Special Supplement – ICC International Court of Arbitration Bulletin*, December 2003, pp. 35-42.
7. Mustill, *supra* note 5 at p. 396.
8. For example, in consolidated proceedings between A and B and between B and C, from a theoretical standpoint there is no contractual relationship between A and C.
9. Arbitration Rules of the New York State Insurance Department (11 NYCRR 65); 2000 Arbitration Rules of the Chartered Institute of Arbitrators; 1997 Rules of the Belgian Centre for the Study and Practice of National and International Arbitration (CEPANI).
10. *E.g.* ICC Rules Article 10 on Multiple Parties: “Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9. In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate.”
11. Article 1046 Netherlands Code of Civil Procedure 1986.
12. Section 6B Hong Kong Arbitration Ordinance 1997.

13. Four alternatives are available under Section 6B; the Court may order consolidation, or the arbitrations to be heard together, are to be heard immediately one after another or may order a stay of arbitration pending the resolution of the other arbitration. In the majority of cases, measures that fall short of full consolidation are ordered. Kaplan and Morgan, *International Handbook on Commercial Arbitration*, supp. 29, December 1999.
14. See F. Mantilla Serrano, "La nouvelle législation colombienne sur l'arbitrage", *Revue de l'arbitrage*, 1992, p. 54 as referred to by E. Gaillard see *op. cit.*, No. 6.
15. Appendix C to the DAC's Second Report: Consolidation, 1991 (1991), 7:4 Arb. Int. 389; see also South African Law Commission Project 94, Report of July 1998, "Arbitration: An International Arbitration Act for South Africa", which rejected a proposal to include a provision on consolidation of claims on the basis of difficulties in enforcement and confidentiality of proceedings.
16. *E.g.* Article 27 British Columbia International Commercial Arbitration Act 1996.
17. The Canadian International Commercial Arbitration Laws of the common law provinces and territories contain largely similar provisions.
18. While no problems arise where the arbitrations are being heard by the same panel of arbitrators, Section 24(5) provides a mechanism for consultation and joint deliberation between panels of arbitrators where the arbitrations are being heard by different panels. In such a case, consolidation can only proceed where the arbitrators reach consensus. Subsection (6)(c) provides an appointment mechanism for the appointment of the consolidated tribunal. Subsection (1) empowers the tribunal(s) to order consolidation, to hear the proceedings simultaneously or in a specified sequence, or to stay proceedings pending resolution of a specified claim.
A similar approach is taken in Florida Stat. s.684.12.
19. The Spanish Arbitration Law creates one regime for both domestic and international commercial arbitration.
20. Cited in Weigand, "The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden" (1995), 11:4 Arb. Int. 397.
21. Article 182 details the regulatory regime for determining the applicable procedure. The choice of applicable procedure is primarily submitted to party autonomy. In the absence of a determination by the parties, the arbitral tribunal is accorded the power to so determine. The lack of procedural rules results from an intention on the part of the legislator to accord the greatest degree of flexibility to the parties and arbitrators so as to tailor the arbitral process to their specific needs. Blessing, "The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism" (1988), 5:2 J. Int. Arb. 9.
22. See *e.g.* *Compañía Española de Petroleos S.A v. Nereus Shpiing, S.A.*, 527 F. 2d 966 (2d Cir. 1979).
23. *UK v. Boeing 998 F. 2d 68, 72 (2d Cir. 1993)*.
24. *The CME v. Czech Republic Tribunal*, in its Final Award ordering the Czech Republic to pay damages, reiterated the respondent's repeated rejection of CME's offer to structure the two cases so as to avoid potentially conflicting arbitral awards:
"At the hearing the Respondent declined anew to accept any of the Claimant's alternative proposals... i) to have the two arbitrations consolidated into a single proceeding; ii) to have the same three arbitrators appointed for both proceedings; iii) to accept the Claimant's nomination in this proceeding of the same arbitrator that Mr. Lauder nominated in the London proceeding;

- iv) to agree that the parties to this arbitration are bound by the London Tribunal's determination as to whether there has been a Treaty breach; v) that after the submission of the parties' respective reply memorials and witness statements in this arbitration, the hearing be postponed until after the issuance of an award in the London Arbitration."
25. When reviewing possible improvements to the 1985 UNCITRAL Model Law, the Secretariat proposed work on a provision on consolidation of claims. The Working Party, however, could not reach agreement on the importance to attach to this issue nor whether this issue was capable of resolution at that time. Ultimately, the UNCITRAL Model Law 2002 contained no reference to consolidation of claims.
 26. A. Crivellaro suggests that "Article 26 of the ICSID Convention" which stipulates that "consent of the parties to arbitration under this Convention... be deemed consent to arbitration to the exclusion of any other remedy... is an important reference point as a policy of consolidation since it excludes the parallel referral of the dispute to domestic courts and serves to avoid duplication of proceedings". See "Consolidation of Arbitration and Court Proceedings in Investment Disputes", presentation at the ICC Institute of World Business Law, 24th Annual Meeting, Paris, 15 November 2004. Professor Schreuer also suggests that the function of Article 26 is to create a "rule of priority vis-à-vis other systems of adjudication in order to avoid contradictory decisions and to preserve the principle of 'ne bis in idem'" in "The ICSID Convention: A Commentary", Cambridge University Press 2001, p. 359.
 27. DAF/MAI(98)7REV1, www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.
 28. Article 9e of the draft MAI: "An investor may withdraw the dispute from arbitration under this paragraph 9 and such dispute may not be resubmitted to arbitration under paragraph 2c. If it does so no later than 15 days after receipt of notice of consolidation, its earlier submission of the dispute to that arbitration shall be without prejudice to the investor's recourse to dispute settlement other than under paragraph 2c."
 29. www.dfait-maeci.gc.ca/nafta-alena/chap11-en.asp?#article_1125.
 30. US-Chile Free Trade Agreement (Article 10.24) signed on 1 March 2004.
 31. US-Morocco Free Trade Agreement (Article 10.24) signed on 15 June 2004.
 32. US-CAFTA-DR (Article 10.25) signed on 5 August 2004.
 33. www.dfait-maeci.gc.ca/tna-nac/cda-chile/chap-g26-en.asp#II.
 34. www.sice.oas.org/cp_bits/english/fta7c2e.asp.
 35. Article 83 of the Japan-Mexico Free Trade Agreement in www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf.
 36. Article 33 in www.state.gov/documents/organisation/38710.pdf.
 37. Article 32 in www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf.
 38. Usually, the same fact is a State measure which is allegedly in breach of the State's obligation. "This concept is a more precise criterion for consolidation than the 'same dispute' requirement under the traditional *lis pendens/res judicata* theories". See A. Crivellaro, *op. cit.*, No. 26.
 39. NAFTA Article 1126(2)(b), Article 33(6)(b) of the US Model BIT and 32(2)(b) of the Model FIPA.
 40. Partial consolidation further raises the question whether, and if so, to what extent, the individual claim tribunals should adjourn the proceedings before them, pending resolution by the consolidation tribunal. The consolidation tribunal in the softwood lumber cases (see below) has raised but not examined the question. See

- Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2007, paragraph 158, at <http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf>.
41. *Corn Products International, Inc. v. United Mexican States and Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc. v. United Mexican States*, Order of the Consolidation Tribunal, May 20, 2005.
 42. Request on consolidation by the United States, 7 March 2005, www.state.gov/documents/organisation/43492.pdf.
 43. See transcript of the consolidation hearing, www.state.gov/documents/organisation/48508.pdf.
 44. *Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2007, at <http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf>.
 45. E. Obadia, "ICSID, Investment Treaties and Arbitration: Current and Emerging Issues", in *Investment Treaties and Arbitration*, ASA Swiss Arbitration Association Conference on 25 January 2002, pp. 67-77.
 46. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 in 42 ILM 609 (2003).
 47. *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6 in www.worldbank.org/icsid/cases/rfcc-decision.pdf.
 48. See Antonio Crivellaro, *op. cit.*, No. 26.
 49. *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on Objection to Jurisdiction, 11 May, 2005.
 50. *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction, 11 May, 2005. Camuzzi has also raised a second claim in relation to its electricity distribution and transportation enterprise, *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/7; this claim is being heard by a different Tribunal, separately and independently of its other claim.
 51. One arbitrator was appointed jointly by Sempra and Camuzzi, Argentina appointed the second arbitrator and the president of the tribunal was appointed by the Secretary General of ICSID. Other procedural matters also appear to have been agreed by the parties, including the time-table for submissions and, where appropriate, submission of consolidated pleadings (Decision, paragraphs 9-14).
 52. *Electricidad Argentina, S.A., and EDF International S.A. v. Argentina*, ICSID Case No. ARB/03/22.
 53. *EDF International S.A., SAUR International S.A. and Léon Participations Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23. No procedural history of these two cases is available, thus the degree of integration and the procedures adopted, are, at present, unclear.
 54. *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. Argentine Republic*, ICSID Case No. ARB/03/17.
 55. *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/18.

56. *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19.
57. For a detailed discussion on the advantages and disadvantages to consolidation in the context of commercial arbitration see Chiu, "Consolidation of Arbitral Proceeding and International Arbitration", (1990), 7:2 J. Int. Arb 53.
58. On the other hand, it is similarly possible that a party's costs may actually increase through consolidation of claims; this may arise, for example, where the increased complexity of the case results in a longer procedure than would have occurred had a party been required to be present only at a single unconsolidated arbitration. See Gaillard, *op. cit.*, No. 6 at 35; Born, "International Commercial Arbitration" (2nd ed. 2001), at p. 674; Chiu, *op. cit.*, No. 57.
59. Platte, "When Should an Arbitrator Join Cases?" (2002), 18:1 Arb. Int. 67.
60. Chiu, *op. cit.*, No. 57.
61. An issue for reflection is whether in the case the treaty contains an umbrella clause, consolidation should extend to claims and counterclaims under covered contracts, *e.g.*, for additional costs, delay, or unpaid invoices. Would it be possible or desirable to permit the consolidation of proceedings under a BIT (in which an investor is pursuing contractual claims through an umbrella clause) with proceedings under a contract (where a State is pursuing contractual claims or counterclaims against the same investor), provided of course that all claims arise out of the same contractual relationship?
62. See Order of the Consolidation Tribunal in the Softwood lumber cases, Antonio Crivellaro *op. cit.*, No. 26.
63. E. Gaillard as President to the Canfor Tribunal said that "... a consolidation tribunal established pursuant to NAFTA Article 1126 could dispose of these issues for the sake of consistency and for the sake of fair and efficient resolution of the claims..." "... consolidating similar claims is a very important issue for the integrity of NAFTA, for the integrity of the process, for the sake of consistency, and the way the whole treaty works". *Canfor Corporation v. United States of America*, HEARING ON JURISDICTION, Hrg. Tr. ("Canfor Hrg. Tr."), Vol. 1 at 15:20-21 (December. 7, 2004). *Idem* at 16:4-8.
64. See *e.g.* UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law) Articles 34 and 36; Article V New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; Netherlands Code of Civil Procedure 1986 Articles 1062 to 1068; French Code of Civil Procedure 1981 Articles 1502 and 1504 ; English Arbitration Act 1996 s.68, 69 and 103.
65. Order of the Consolidation Tribunal in the Softwood lumber cases, paragraph 131.
66. Platte, *op. cit.*, No. 59; Position of Tembec in Order of the Consolidation Tribunal: *Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America*, paragraph 42.
67. Leboulanger *op. cit.*, No. 3 at p. 62.
68. Another argument advanced against the consolidation of claims in particular in the context of commercial arbitration is the difficulty in ensuring enforceability of the award. Doubts have been raised over the enforceability of an award rendered by a consolidated tribunal where consolidation was not agreed upon by the parties. Relevant literature suggests the following grounds upon which recognition and enforcement of an award rendered by a consolidated tribunal could be resisted under Article V of the New York Convention: i) absence of an agreement in writing; and ii) irregular composition of the arbitral tribunal. For a detailed discussion on this

issue, see Chiu *op. cit.*, No. 56; Van den Berg, “Consolidated Arbitration and the 1958 New York Arbitration Convention (1986)”, 2:4 *Arb. Int.* 367; Jarvin, *Consolidated Arbitration and the 1958 New York Arbitration Convention – A Critique of Dr. Van den Berg (1987)*, 3:3 *Arb. Int.* 254; Van den Berg, *Consolidated Arbitration and the 1958 New York Arbitration Convention – A Replique to Mr. Jarvin (1987)*, 3:3 *Arb. Int.* 257.

69. A number of authors, however, suggest that the absence of a consolidation clause is not of itself indicative of intent on the part of the contracting parties to exclude consolidation. Rather, they posit this omission may merely reflect that such a possibility had not been considered during their negotiations. Further, drafting a consolidation clause before a dispute arises may prove difficult or impossible where the issues and parties are not yet known. Consequently, these authors argue the absence of an arbitration agreement does not necessarily suggest intent to preclude consolidation of claims. As regards judicial modification of the arbitration agreement, Chiu argues this is not precluded by application of the doctrine of sanctity of contracts. See *op. cit.*, No. 57.
70. Hascher describes consolidation as reflecting the will of the courts rather than of the disputing parties, “Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?” (1984), 1 *J. Int. Arb.* at pp. 133-134.
71. Order of the Consolidation Tribunal, at paragraph 78 citing Henri Alvarez, “Arbitration under the North American Free Trade Agreement”, 16 *ARB’N INT’L* 393, 414 (2000).
72. See *e.g.* UNCITRAL Model Law Article 11(3)(a).
73. Gaillard *op. cit.*, No. 6; see also Platte, *op. cit.*, No. 59, “... the right to nominate an arbitrator need not be treated as sacrosanct”.
74. Hascher, *op. cit.*, No. 70 at p. 135: “... Matters are enormously complicated by the incorporation of separate disputes in a single arbitration proceeding. Each party assumes the additional burden of hearing claims, giving evidence and discussing testimonies with all the other parties involved. There is a higher probability of delays. Risks of omission and error are multiplied”.
75. See Chiu *op. cit.*, No. 57.
76. See Platte *op. cit.*, No. 59.
77. *Corn Products v. United Mexican States*, Order of the Consolidation Tribunal, paragraph 7.
78. In the context of commercial arbitration, notwithstanding these arguments, and the few legislative acts which provide for consolidation, many jurisdictions have found this consideration insurmountable. Concerns over confidentiality formed a determinative factor in the English legislature’s rejection of a provision providing for court ordered consolidation.
79. Order of consolidation, paragraph 147.
80. Diamond, “Multi-Party Arbitrations: A Plea for a Pragmatic Piecemeal Solution”, (1991) 7:4 *Arb. Int.* 403.
81. See *e.g.* Articles 40 and 41 Stockholm Chamber of Commerce Arbitration Rules 1999; Article 31(3) ICC Arbitration Rules 1998.
82. Leboulanger *op. cit.*, No. 3 at p. 67.

ANNEX 8.A1

*Jurisprudence in Commercial Arbitration***Karaha Bodas company, L.L.C. (Cayman Island) v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara¹**

The dispute related to a contractual relation between a state-owned oil and gas exploration company and a private company as the sole contractor for the exploration and development of geothermal energy. The question raised here was whether an award rendered by a consolidated tribunal, where consolidation of claims arose under separate contracts (two-party multi-contract situation), could be refused recognition and enforcement under Article V of the New York Convention. As a preliminary point, the Court referred to previous case law in which it had been held that because of the clear “pro-enforcement” bias of the New York Convention, an objection to enforcement could only be sustained where two hurdles were met: i) it must be shown that there was a violation of the arbitration agreement; and ii) that such violation caused “substantial prejudice” to the parties seeking to avoid enforcement of the award.

Two grounds relevant to the present discussion were raised as potential barriers to enforcement. First, it was argued under Article V(1)(d) that the procedure was not in accordance with the agreement of the parties due to consolidation. The district court upheld the Tribunal’s conclusion that the two independent contracts formed part of a single transaction and that consolidation was “appropriate due to the integration of the two contracts and the fact that the Presidential Decree, the consequences of which are at the origin of the dispute, affected both of them, the initiation of two separate arbitrations would be artificial and would generate the risk of contradictory decisions. Moreover, it would increase the costs of all the parties involved, an element of special weight in the light of difficulties faced by the Indonesian economy, to which counsel for the Respondents legitimately drew the Arbitral Tribunal’s attention”. The Tribunal concluded the unity of contract was of such a nature as to enable it to conclude that the parties had contemplated

arbitration in a single proceeding. This unity of contract was found to exist on the basis of several factors, including that both contracts had been concluded on the same day; that one of the contracts referred to the other contract as an “integral part of this contract and... shall be deemed to be incorporated into this contract for all purposes”. The district court therefore concluded that the consolidation of claims did not violate the agreement of the parties, nor did they consider that the claimant had satisfied its burden of proof in establishing substantial prejudice.

A second ground upon which recognition and enforcement was sought to be resisted was that the constitution of the Tribunal was not in conformity with the agreement of the parties. Both contracts contained appointment procedures which differed slightly however, the Tribunal reconciled the two clauses on the basis of identical default provisions in the event one party failed to fulfil its obligation to appoint an arbitrator, as was the case here. The Court considered this as a question of contract interpretation which fell to be arbitrable by the Tribunal, nor did they find any reason to reject the analysis of the Tribunal. Further, pointing to the unanimous finding and awards rendered by the consolidated Tribunal, the Court did not consider that the party resisting enforcement of the award had discharged its burden of proof in establishing substantial prejudice suffered.

This decision was upheld by the Fifth Circuit Court of Appeal. Furthermore, the reasoning of the Arbitral Tribunal was endorsed by both the Alberta Court of Queen’s Bench² and the High Court of the Hong Kong Special Administration Region in enforcement proceedings.³

Siemens AG (Germany) and BKMI Industrienlagen GmbH (Germany) v. Dutco Construction Company (Dubai)

The three parties in this case had entered into a consortium agreement for the construction of a cement plant in Oman. The agreement provided for arbitration under the ICC Rules and appointment of three arbitrators in accordance with the provisions of the ICC Rules. Dutco filed a claim against the other two parties to the agreement in respect of separate claims. Under the provisions providing for multiparty arbitration, Dutco appointed one arbitrator while the two respondents jointly and under protest and reservation, appointed a single arbitrator. On appeal, it was held the agreement unambiguously expressed the intent of the parties to resolve any dispute that might arise between them by arbitration and that if followed from the multiparty nature of the agreement itself that the parties had accepted the possibility of a multiparty arbitration. The Cour de Cassation, however, concluded that as a matter of public policy each party enjoyed equality in the appointment of the Tribunal and that this right could not be renounced in an

arbitration agreement before a dispute arose.⁴ Accordingly, it appears that under French doctrine two or more parties may not be required to jointly appoint an arbitrator while the opposing party has the opportunity to appoint an arbitrator.

It has been argued that the *Dutco* decision is not as wide reaching as it may first appear to be.⁵ The respondents in this case were two autonomous and independent entities with separate and potentially conflicting interests. This can be contrasted to a situation where two or more entities form part of a single business structure or share a common interest. On the basis of these facts Schwartz argues the principle of equality in appointment of the arbitrators will not ipso fact be violated where there is a degree of commonality between the parties. As an extension to this argument, Schwartz even suggests where two or more parties share a common interest, were these parties entitled each to appoint an arbitrator the principle of equal treatment in respect of the individual party may in fact be violated as the representation of the joint parties' interests would be greater than the individual party's.

“The *Vimeira*”

The disputes in this case arose out of damage suffered by the vessel *The Vimeira* and have been presented as a situation where consolidation of claims would have proved beneficial. Upon discovery of damage to *The Vimeira* the owners of the vessel raised a claim against the Time Charterers to whom they had chartered the vessel (the head arbitration.) The Time Charterers had sub-chartered the vessel to another party, the Voyage Charterers; when the claim by the owners was raised against the Time Charterers in turn raised a separate claim against the Voyage Charterers under the terms of the sub-charter (the sub-arbitration.) While the facts and legal issues raised in both arbitrations were identical or substantially similar, English law does not provide for court ordered or tribunal ordered consolidation of claims in related proceedings. Furthermore, the sub-arbitration had not been instituted until three months after the head-arbitration and thus was at a different stage of proceedings. Accordingly the two proceedings were to be heard and decided separately. The head arbitration was to be heard by a panel of three arbitrators; the sub-arbitration was to be heard by the same arbitrators but under the English Umpire system. Despite being heard by the same arbitrators, the awards, although consistent in terms of result, were based on different conclusions of fact.

In the sub-arbitration, the factual conclusions reached in the head arbitration as to the cause of the damage were rejected in favour of an alternate theory. Through application of English rules of procedure, the award in the head arbitration had been published prior to conclusion of the

sub-arbitration; this enabled the respondents in the sub-arbitration to focus their arguments according to the reasons adduced in the head arbitration. Separate legal proceedings were raised in respect of both these awards on the ground that both losing respondents argued the findings of fact had not been raised in the arbitral proceedings against them; both awards were remanded back to the Tribunals for further consideration and to allow the respondents to argue their defence against these findings. The owners were thus in the position that the basis of the decision in their favour had been rejected in the sub-arbitration, as such they attempted to introduce new evidence and argue a new point in support of their claim. This, and subsequent claims were rejected by the English courts as not satisfying the high requirements needed to introduce new evidence at a late stage of the procedure. Ironically, the Time Charterers had opposed this application but made a similar application in respect of its arbitration with the Voyage Charterers; the court consolidated these two proceedings. Upon rejection of the application, the Court ordered the Owner's to bear the legal costs of the proceedings, including those incurred in respect of the application relating to the sub-arbitration. This order had the effect of requiring the Owners' to bear the costs in respect of a party with which they had no dispute and no contractual relationship. Further, the inability of the Owners' to adduce fresh evidence meant that after five years of litigation and arbitration, they were left with no arguments capable of supporting their claim. The facts of *The Vimeira* bring into sharp relief the advantages of consolidation of claims over separate proceedings where the disputes are based on the same set of facts.⁶

The Shui On Cases

Two separate requests for consolidation have arisen under Section 6B of the Hong Kong Arbitration Ordinance involving a common party to both requests. The reasons of the court for arriving at divergent results provide a good basis for analysis of the difficulties in enforcing consolidation and the conditions for exercise of this power even where domestic law permits the courts to enforce consolidation of claims in the absence of an agreement between the parties. The first *Shui On case*⁷ involved a string dispute; the court considered consolidation impossible as there could be no single claimant or defendant, although the court did use an alternative tool found in Section 6B and ordered the disputes be "heard together".

In the Second *Shui On case*⁸ the Hong Kong Court ordered consolidation of claims in relation to two disputes in which Shui On was the claimant in each arbitration. Having satisfied itself that the jurisdictional hurdles of Section 6B(1) were satisfied in that both arbitrations raised "common questions of law and fact" as per Section 6B(1)(a) the Court went on to consider whether consolidation would be appropriate. The most significant hurdle to

consolidation was that the two arbitrations were at substantially different stages, the second arbitration having been initiated nearly three years after the first. Shui On's application for consolidation had requested the second arbitration be subjected to the timetable of the first arbitration however, the court considered this unrealistic and stated in its decision that it would not have ordered consolidation had the timetable not been altered so that the hearings were to take place at a much later date than originally envisaged. Consolidation was then ordered on the ground that the powers of the sole arbitrator would be increased and the issues in dispute would be better resolved. Importantly, both Shui On cases show restraint in applying Section 6B and a reluctance on the part of the judiciary to interfere with the powers of the arbitrators.

Notes

1. US 482, United States Court of Appeal, Fifth Circuit, 2004.
2. Alberta Court of Queen's Bench, 8 September 2004.
3. Hong Kong 17. High Court of the Hong Kong Special Administrative Region, Court of First Instance, Construction and Arbitration Proceedings No. 28 of 2002.
4. Le principe de l'égalité des parties dans la désignation des arbitres est d'ordre public ; on ne peut y renoncer qu'après la naissance du litige – at p. 471, *Revue de l'arbitrage*, 1992, No. 3, p. 470.
5. Schwartz, "Multiparty Arbitration and the ICC in the Wake of Dutco", (1993) 10:3 *J. Int. Arb.* 5.
6. The Vimeira [1983] 2 *Lloyd's Rep* 424 and Veeder QC, Multiparty Disputes: consolidation under English law, *The Vimeira - a Sad Forensic Fable* (1986), 2:4 *Arb. Int.* 310.
7. *Re Shui On Construction Co Ltd. And Schindler Lifts (HK) Ltd.* (1986) HKLR 1177.
8. Veeder, "Consolidation: More News from the Front-Line- The Second Shui On Case" (1987), 3:3 *Arb. Int.* 262.

ANNEX 8.A2

Institutional Rules

New York State Insurance Department Arbitration Rules (11 NYCRR 65)

Article 65-4.4 – Insurance Department Arbitration (IDA) forum procedure

(b) Consolidation. The IDA may consolidate disputes if the claims arose out of the same accident and involve common issues of fact.

Article 65-4.5 – No Fault Arbitration Procedure

(c) Consolidation. The designated organisation shall, except where impracticable, consolidate disputes for which a request for arbitration has been received, if the claims involved arose out of the same accident and involve common issues of fact.

Chartered Institute of Arbitrators, Arbitration Rules 2000

Article 7 – Powers of the Arbitrator

7.3. Where the same arbitrator is appointed under these Rules in two or more arbitrations which appear to raise common issues of fact or law, whether or not involving the same parties, the arbitrator may direct that such two or more arbitrations or any specific claims or issues arising therein be consolidated or heard concurrently.

7.4. Where an arbitrator has ordered consolidation of proceedings or concurrent hearings he may give such further directions as are necessary or appropriate for the purposes of such consolidated proceedings or concurrent hearings and may exercise any powers given to him by these Rules or by the Act either separately or jointly in relation thereto.

7.5. Where proceedings are consolidated the arbitrator will, unless the parties otherwise agree, deliver a consolidated award or awards in those proceedings which will be binding on all the parties thereto.

7.6. Where the arbitrator orders concurrent hearings the arbitrator will, unless the parties otherwise agree, deliver separate awards in each arbitration.

7.7. Where an arbitrator has ordered consolidation or concurrent hearings he may at any time revoke any orders so made and give such further orders or directions as may be appropriate for the separate hearing and determination of each arbitration.

Belgian Centre for the Study and Practice of National and International Arbitration (CEPANI) Rules 1997

Article 20 – Multiparty Arbitration

When several contracts containing the Cepani arbitration clause give rise to disputes that are closely related or indivisible, the Chairman of Cepani is empowered to order the consolidation of the arbitration proceedings.

This decision shall be taken, either at the request of the arbitrator or arbitrators, or, prior to any other measure, at the request of the parties or the earliest petitioner, or even *ex officio*.

If the request is granted, the Appointments Committee or the Chairman of Cepani shall appoint the arbitrator or arbitrator to rule on the dispute arising from the consolidation decision. If necessary, the said Committee or said Chairman shall increase the number of arbitrators to a maximum of five.

The Appointments Committee or the Chairman of Cepani shall reach a decision after having summoned the parties, and, if need be, the arbitrators already appointed, by registered letter.

The said Committee or the Chairman may not order the consolidation of disputes for which a decision prior to the ruling, a decision on admissibility or a decision on the substance of the request has already been taken.

ANNEX 8.A3

National Arbitration Laws

Hong Kong Arbitration Ordinance 1997

Section 6B – Consolidation of Arbitration

- (1) Where in relation to two or more arbitration proceedings it appear to the Court –
 1. that some common question of law or fact arises in both or all of them, or
 2. that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or
 3. that for some other reason it is desirable to make an order under this section, the Court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time, or one immediately after another, or may order any other them to be stayed until after the determination of any other of them.
- (2) Where the Court orders arbitration proceedings to be consolidated under Subsection (1) and all parties to the consolidated arbitration proceedings are in agreement as to the choice of arbitrator or umpire for those proceedings the same shall be appointed by the Court but if all parties cannot agree the Court shall have power to appoint an arbitrator or umpire for those proceedings.
- (3) Where the Court makes an appointment under Subsection (2) of an arbitrator or umpire consolidated arbitration proceedings, any appointment of any other arbitrator or umpire that has been made for any of the arbitration proceedings forming part of the consolidation shall for all purposes cease to have effect on and from the appointment under Subsection (2).

Netherlands Code of Civil Procedure, Book Four: Arbitration (1986)

Article 1046 – Consolidation of arbitral proceedings

1. If arbitral proceedings have been commenced before an arbitral tribunal in the Netherlands concerning a subject matter which is connected with the subject matter of arbitral proceedings commenced before another arbitral tribunal in the Netherlands, any of the parties may, unless the parties have agreed otherwise, request the President of the District Court in Amsterdam to order a consolidation of the proceedings.
2. The President may wholly or partially grant or refuse the request, after he has given all parties and the arbitrators an opportunity to be heard. His decision shall be communicated in writing to all parties and the arbitral tribunals involved.
3. If the President orders consolidation in full, the parties shall in consultation with each other appoint one arbitrator or an uneven number of arbitrators and determine the procedural rules which shall apply to the consolidated proceedings. If, within the period of time prescribed by the President, the parties have not reached agreement on the above, the President shall, at the request of any of the parties, appoint the arbitrator or arbitrators and, if necessary, determine the procedural rules which shall apply to the consolidated proceedings. The President shall determine the remuneration for the work already carried out by the arbitrators whose mandate is terminated by reason of the full consolidation.
4. If the President orders partial consolidation, he shall decide which disputes shall be consolidated. The President shall, if the parties fail to agree within the period of time prescribed by him, at the request of any of the parties, appoint the arbitrator or arbitrators and determine which rules shall apply to the consolidated proceedings. In this event the arbitral tribunals before which arbitrations have already been commenced shall suspend those arbitrations. The award of the arbitral tribunal appointed for the consolidated arbitration shall be communicated in writing to the other arbitral tribunals involved. Upon receipt of this award, these arbitral tribunals shall continue the arbitrations commenced before them and decide in accordance with the award rendered in the consolidated proceedings.
5. The provisions of Article 1027(4) shall apply accordingly in the cases mentioned in paragraphs (3) and (4) above.
6. An award rendered under paragraphs (3) and (4) above shall be subject to appeal to a second arbitral tribunal if and to the extent that all parties involved in the consolidated proceedings have agreed upon such an appeal.

US Uniform Arbitration Act (2000)

Consolidation of Separate Arbitration Proceedings

Except as otherwise provided in Subsection (c), upon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

- there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;
- the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;
- the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and
- prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

The court may order consolidation of separate arbitration proceedings as to certain claims and allow other claims to be resolved in separate arbitration proceedings.

The court may not order consolidation of the claims of a party to an agreement to arbitrate which prohibits consolidation.

International Commercial Arbitration Act (RSBC 1996) Chapter 233

Article 27 Court Assistance in Taking Evidence and Consolidating Claims

(2) If the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitration arising out of those arbitration agreements, the Supreme Court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:

- (a) order the arbitrations to be consolidated on terms the court considers just and necessary;
- (b) if all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with Section 11 (8);
- (c) if all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

(3) Nothing in this section is to be construed as preventing the parties to 2 or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation.

Australia International Arbitration Act 1989

s.24 – Consolidation of arbitral proceedings

(1) A party to arbitral proceedings before an arbitral tribunal may apply to the tribunal for an order under this section in relation to those proceedings and other arbitral proceedings (whether before that tribunal or another tribunal or other tribunals) on the ground that:

- (a) a common question of law or fact arises in all those proceedings;
- (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
- (c) for some other reason specified in the application, it is desirable that an order be made under this section.

(2) The following orders may be made under this section in relation to 2 or more arbitral proceedings:

- (a) that the proceedings be consolidated on terms specified in the order;
- (b) that the proceedings be heard at the same time or in a sequence specified in the order;
- (c) that any of the proceedings be stayed pending the determination of any other of the proceedings

(3) Where an application has been made under Subsection (1) in relation to 2 or more arbitral proceedings (in this section called the “related proceedings”), the following provisions have effect.

(4) If all the related proceedings are being heard by the same tribunal, the tribunal may make such order under this section as it thinks fit in relation to those proceedings and, if such an order is made, the proceedings shall be dealt with in accordance with the order.

(5) If 2 or more arbitral tribunals are hearing the related proceedings:

- (a) the tribunal that received the application shall communicate the substance of the application to the other tribunals concerned; and
- (b) the tribunals shall, as soon as practicable, deliberate jointly on the application.

(6) Where the tribunals agree, after deliberation on the application, that a particular order under this section should be made in relation to the related proceedings:

- (a) the tribunals shall jointly make the order;

- (b) the related proceedings shall be dealt with in accordance with the order, and
 - (c) if the order is that the related proceedings be consolidated – the arbitrator or arbitrators for the purposes of the consolidated proceedings shall be appointed, in accordance with Articles 10 and 11 of the Model Law, from the members of the tribunals.
- (7) If the tribunals are unable to make an order under Subsection (6), the related proceedings shall proceed as if no application has been made under Subsection (1).
- (8) This section does not prevent the parties to related proceedings from agreeing to consolidate them and taking such steps as are necessary to effect that consolidation.

English Arbitration Act 1996

s.35 – Consolidation of Proceedings and Concurrent Hearings

- (1) The parties are free to agree:
- (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings; or
 - (b) that concurrent hearings shall be held, on such terms as may be agreed.
- (2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.

Swiss Private International Law

Article 182

- (1) The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.
- (2) If the parties have not determined the procedure, the Arbitral Tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.
- (3) Regardless of the procedure chosen, the Arbitral Tribunals shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings.

ANNEX 8.A4

*Investor-state Arbitration***Draft MAI****9. Consolidation of Multiple Proceedings**

a. In the event that two or more disputes submitted to arbitration with a Contracting Party under paragraph 2.c have a question of law or fact in common, the Contracting Party may submit to a separate arbitral tribunal, established under this paragraph, a request for the consolidated consideration of all or part of them. The request shall stipulate:

1. the names and addresses of the parties to the proceedings sought to be consolidated,
2. the scope of the consolidation sought, and
3. the grounds for the request.

The Contracting Party shall deliver the request to each investor party to the proceedings sought to be consolidated and a copy of the request to the Parties Group.

b. The request for consolidated consideration shall be submitted to arbitration under the rules chosen by agreement of the investor parties from the list contained in paragraph 2.c. The investor parties shall act as one side for the purpose of the formation of the tribunal.

c. If the investor parties have not agreed upon a means of arbitration and the nomination of an arbitrator within 30 days after the date of receipt of the request for consolidated consideration by the last investor to receive it:

1. the request shall be submitted to arbitration in accordance with this article under the UNCITRAL rules, and
2. the appointing authority shall appoint the entire arbitral tribunal, in accordance with paragraph 7.

d. The arbitral tribunal shall assume jurisdiction over all or part of the disputes and the other arbitral proceedings shall be stayed or adjourned, as

appropriate if, after considering the views of the parties, it decides that to do so would best serve the interest of fair and efficient resolution of the disputes and that the disputes fall within the scope of this paragraph.

e. An investor may withdraw the dispute from arbitration under this paragraph 9 and such dispute may not be resubmitted to arbitration under paragraph 2.c. If it does so no later than 15 days after receipt of notice of consolidation, its earlier submission of the dispute to that arbitration shall be without prejudice to the investor's recourse to dispute settlement other than under paragraph 2.c.

f. At the request of the Contracting Party, the arbitral tribunal established under this paragraph may decide, on the same basis and with the same effect as under paragraph 9.d, whether to assume jurisdiction over all or part of a dispute falling within the scope of paragraph 9.a which is submitted to arbitration after the initiation of consolidation proceedings.

NAFTA

Article 1126 – Consolidation

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules, and shall conduct its proceedings in accordance with those Rules, except as modified by this Subchapter.

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, order that the Tribunal:

- (a) shall assume jurisdiction over, and hear and determine together, all or part of the claims; or
- (b) shall assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General of ICSID to establish a Tribunal and shall specify in the request:

- (a) the name of the disputing Party or disputing parties against which the order is sought;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

4. The disputing party shall give to the disputing Party or disputing parties against which the order is sought a copy of the request.

5. Within 60 days of receipt of the request, the Secretary-General of ICSID shall establish a Tribunal consisting of three arbitrators. The Secretary-

General shall appoint the presiding arbitrator from the roster described in paragraph 4 of Article 1124. In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint a presiding arbitrator, who is not a national of any of the Parties, from the ICSID Panel of Arbitrators. The Secretary-General shall appoint the two other members from the roster described in paragraph 4 of Article 1124, and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of the Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing party that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

- (a) the party's name and address;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

7. A disputing party described in paragraph 6 shall give a copy of its request to the parties named in a request made under paragraph 3.

8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

9. A disputing Party shall give to the Secretariat of the Commission, within 15 days of receipt by the disputing Party, a copy of:

- (a) a request for arbitration made under paragraph 1 of Article 36 of the ICSID Convention;
- (b) a notice for arbitration made under Article 2 of the Additional Facility Rules; or
- (c) a notice of arbitration given under the UNCITRAL Arbitration Rules.

10. A disputing Party shall give to the Secretariat of the Commission a copy of a request made under paragraph 3 of this Article:

- (a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;
- (b) within 15 days of making the request, in the case of a request made by the disputing Party.

11. A disputing Party shall give to the Secretariat of the Commission a copy of a request made under paragraph 6 of this Article within 15 days of receipt of the request.

12. The Secretariat of the Commission shall maintain a public register consisting of the documents referred to in paragraphs 9, 10 and 11.