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Lara M. Pair

Paul Frankenstein

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THE NEW ICC RULE ON CONSOLIDATION: PROGRESS OR CHANGE?

*Lara M. Pair**

*Paul Frankenstein***

INTRODUCTION

In September 2011, the International Chamber of Commerce (“ICC”) published the tenth revision of its Arbitration Rules. A task force of more than 175 members from forty-one countries revised the ICC Rules, starting in October 2008.¹ These new rules will enter into effect on January 1, 2012, replacing the current ICC Rules that entered into force on January 1, 1998.² Numerous changes were made, ranging from the trivial to the significant. This Article analyzes the expansion of the provision on consolidation in an attempt to predict whether there will be material improvement in the consolidation process or whether the changes made will have only a superficial effect.

The ICC is the leading institution of its kind and one of the oldest.³ Its case statistics are staggering. In 2007, the ICC administered 599 cases; in 2008, 663 cases; and in 2009, 817.⁴ The ICC Rules, despite flexible directives, follow “a Continental approach to procedure.”⁵ The ICC is not an interstate chamber of commerce and industry or an international organization, but rather is a privately run organization that aims to improve conditions for companies and

* Arbitration Practitioner, Europe; Adjunct Professor, Emory University School of Law and University of St. Gallen.

** Attorney, New York; Visiting Lecturer, Leibniz Universität Hannover. The authors welcome comments to this Article.

¹ See *Task Force on the Revision of the ICC Rules of Arbitration*, ICC, <http://www.iccwbo.org/policy/arbitration/index.html?id=28796> (last visited Nov. 9, 2011).

² KLAUS LIONNET & ANNETTE LIONNET, *HANDBUCH DER INTERNATIONALEN UND NATIONALEN SCHIEDSGERICHTSBARKEIT* 491 (3d ed. 2005).

³ DANIEL GIRSBERGER & NATHALIE VOSER WITH SIMONE FUCHS, *INTERNATIONAL ARBITRATION IN SWITZERLAND* 46 (2008).

⁴ For verification and additional information, see *Facts and Figures on ICC Arbitration: 2007 Statistical Report*, ICC, <http://www.iccwbo.org/court/arbitration/id18648/index.html> (last visited Nov. 9, 2011); *Facts and Figures on ICC Arbitration: 2008 Statistical Report*, ICC, <http://www.iccwbo.org/court/arbitration/index.html?id=26612> (last visited Nov. 9, 2011); *Facts and Figures on ICC Arbitration—2009 Statistical Report*, ICC, <http://www.iccwbo.org/court/arbitration/index.html?id=34704> (last visited Nov. 9, 2011).

⁵ STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* 145 (2002).

merchants operating internationally.⁶ The ICC International Court of Arbitration and its Secretariat were established in 1923⁷ for the same purpose: to provide smooth dispute resolution in the international context.⁸

Smooth procedures rarely occur when multiple parties or claims are involved in the traditionally two-party-based arbitration field. Nonetheless, arbitrations are increasingly multi-party or multi-claim cases, and tools such as consolidation of cases and joinder of parties and claims gain in importance. Multiple institutions have tried their hands at joinder and consolidation provisions, and even the 2010 United Nations Commission on International Trade Law (“UNCITRAL”) Rules were almost drafted with a provision for consolidation.⁹ These provisions have not yet succeeded in creating a smooth and uniformly acceptable standard for consolidation or joinder. This Article explores whether the revision of the ICC Rules has advanced the process.

Progress can only be measured in relation to the goal and the *point d'appuis*. To this end, this Article first discusses what consolidation is and outlines the previous and current ICC rule. This Article then discusses whether the changes constitute progress.

I. WHAT IS CONSOLIDATION?

Expressed at the most basic level, dispute resolution employs a variety of procedural tools to decide claims collectively rather than in parallel or as successive two-party disputes. Claims arising out of the same transaction or occurrence appear from a layman’s perspective as a natural whole artificially torn asunder by two-party dispute resolution. To maintain the connection between the claims and parties, procedural tools are used to alleviate the seemingly fragmented approach, allowing separate (two-party, one-claim) cases to be treated as one.¹⁰

⁶ ERIK SCHÄFER, HERMAN VERBIST & CHRISTOPHE IMHOOS, ICC ARBITRATION IN PRACTICE 13 (2005).

⁷ *Id.*

⁸ *Id.* at 13–20.

⁹ Garth Schofield, The 2010 UNCITRAL Arbitration Rules: Changes and Implications for Practice 5 (Mar. 21, 2011) (unpublished manuscript), available at <http://www2.americanbar.org/calendar/section-of-international-law-2011-spring-meeting/Documents/Friday/Changing%20the%20Rules/THE%202010%20UNCITRAL%20ARBITRATION%20RULES.pdf>.

¹⁰ One of the tools employed to hear all parties and issues at the same time in front of a single adjudicator is consolidation. Other tools include joinder, amendment of claims, counterclaim, set off, interpleader, and impleader. While some use the terms interchangeably, each of these tools is employed in slightly different circumstances.

This “holistic” approach of combining all connected two-party, one-claim cases into one case is based on the assumption that each aspect of an event affects another. Thus, each procedurally separate claim has an effect on every other claim because they are all connected. Adjudicating one claim at a time does not take into account the remaining claims. Influences exerted by the other claims will not be perceptible, potentially resulting in the arbitrators missing crucial details or not grasping the bigger picture. While missing the bigger picture may result in an unjust result, the alternative of considering every aspect of the whole event for each claim individually—i.e. disputing the same facts multiple times—is not only wasteful, but may lead to inconsistent results. Hearing all claims at the same time in one proceeding appears to be an adequate and efficient solution.

There exist various interpretations of the meaning of the procedural mechanism of consolidation as it is known in international commercial arbitration.¹¹ This analysis will follow Philippe Giliéron and Luc Pittet, who define consolidation as the act or process of uniting into one case several independent proceedings that are pending or have been initiated.¹² Consolidation is not an end in itself. It is a tool in the service of efficiency, fairness, and avoidance of contradictory judgments.¹³

¹¹ See, e.g., STAVROS L. BREKOULAKIS, *THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION* 108–09 (2010); BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* 179 (2005); Simon Greenberg, José Ricardo Feris & Christian Albanesi, *Consolidation, Joinder, Cross-claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience, in MULTIPARTY ARBITRATION, DOSSIER VII, ICC INSTITUTE OF WORLD BUSINESS LAW* 161, 163 (2010); Michael F. Hoellering, *Consolidated Arbitration: Will It Result in Increased Efficiency or an Affront to Party Autonomy?*, 52 *DISP. RESOL. J.* 41 (1997); Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 *U. ILL. L. REV.* 1; S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 *MICH. J. INT’L L.* 1017, 1039 (2009); Patricia Izquierdo Piña, *Consolidation of Arbitral Proceedings* 4 (unpublished manuscript), available at <http://www.camex.com.mx/nl35-cont.pdf>.

¹² Philippe Giliéron & Luc Pittet, *Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties, in SWISS RULES OF INTERNATIONAL ARBITRATION: COMMENTARY* 36, 37 (Tobias Zuberbühler, Christoph Müller & Philipp Habegger eds., 2005).

¹³ See *id.*; ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 146 (2003) (“A rule that reaps large benefits in error cost reduction might still be undesirable if its implementation adds substantially to process costs.”); GARY B. BORN, 2 *INTERNATIONAL COMMERCIAL ARBITRATION* 2069 (3d ed. 2009); JOHN W. COOLEY WITH STEVEN LUBET, *ARBITRATION ADVOCACY* 49 (2d ed. 2003); ADOLF BAUMBACH, WOLFGANG LAUTERBACH, JAN ALBERS & PETER HARTMANN, *ZIVILPROZESSORDNUNG* 737–39 (67th ed. 2009); KOMMENTAR ZUR ZIVILPROZESSORDNUNG MIT GERICHTSVERFASSUNGSGESETZ 697 (Hans-Joachim Musielak ed., 7th ed. 2009); Wolfgang Hahnkamper, *Der Ablauf von Ad-hoc Schiedsverfahren—Teil I: Die Ersten Schritte im Schiedsverfahren, in PRAXISHANDBUCH SCHIEDSGERICHTSBARKEIT* 113, 134 (Hellwig Torggler ed., 2007); Bernard Hanotiau, *Complex-Multicontract-Multiparty-Arbitration*, 14 *ARB. INT’L* 369, 391 (1998).

There are a number of situations in which cases are begun separately despite the availability of other procedural tools,¹⁴ allowing for claims and parties to be added to the traditional two-party, one-claim case.¹⁵ Consolidation is distinguishable from these other procedural tools because the unification takes place after two separate cases have been filed.¹⁶

Usually consolidation is not a necessity.¹⁷ Without consolidation, both cases would simply be continued as independent and, more importantly, self-contained matters. Lack of consolidation does not prevent either the individual disputes or the larger dispute from coming to a conclusion. Each individual case is complete and capable of independent adjudication. The various concepts of necessary parties, without whom a case cannot be decided due to substantive or procedural law and must therefore be dismissed, address the question of joinder, not consolidation.¹⁸ Claims contained in a previously filed case cannot be added to another case by the use of joinder or other procedural tools due to the prohibition of *lis pendens*.¹⁹

Consolidation has not been accepted universally by either national courts adjudicating arbitration-related matters or major arbitral institutions.²⁰ Only a few offer solutions for consolidation.²¹

¹⁴ These include an accumulation of claims, addition of counterclaims, and other situations.

¹⁵ Roger S. Haydock, *Mediation and Arbitration for Now and the Future*, in *THE ARBITRATION PROCESS* 1 (Dennis Campbell & Susan Meek eds., 2002).

¹⁶ This Article does not use the term “pending” because there is at least one case under the Swiss Rules where the second case was not yet formally pending when the provision on consolidation was applied.

¹⁷ See, e.g., THOMAS RÜEDE & REIMER HADENFELDT, *SCHWEIZERISCHES SCHIEDSGERICHTSRECHT NACH KONKORDAT UND IPRG* 255 (2d ed. 1993); ROLF A. SCHÜTZE, *SCHIEDSGERICHT UND SCHIEDSVERFAHREN* 342 (4th ed. 2007). When rights or obligations are indivisible and the other holder of the right or obligation is not part of the proceeding and furthermore cannot be added by consolidation or other means, the case will have to be dismissed. Under such circumstances, consolidation (or any other tool) would be necessary for the case to continue. This situation is addressed in Part 3.C, *infra*.

¹⁸ Although it may be possible to use consolidation to affect joinder, this is not the true nature of consolidation. Ordinarily, joinder would have to be performed and the second case dismissed for *lis pendens* reasons. See generally CAMPBELL MCLACHLAN, *LIS PENDENS IN INTERNATIONAL LITIGATION* (2009).

¹⁹ See generally *id.*; Norah Gallagher, *Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 329, 340–47 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

²⁰ S. I. Strong, *Intervention and Joinder As of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 *VAND. J. TRANSNAT'L L.* 915, 938 (1998).

²¹ Nayla Comair-Obeid, *Consolidation and Joinder in Arbitration—The Arab Middle Eastern Approach*, in *50 YEARS OF THE NEW YORK CONVENTION* 500, 503 (Albert Jan Van Den Berg ed., 2009); Michael Pryles & Jeffrey Waincymer, *Multiple Claims in Arbitration Between the Same Parties*, in *50 YEARS OF THE NEW YORK CONVENTION*, *supra*, at 437, 466; Nathalie Voser, *Multi-party Disputes and Joinder of Third Parties*, in *50 YEARS OF THE NEW YORK CONVENTION*, *supra*, at 343, 360.

II. INTERNATIONAL CHAMBER OF COMMERCE RULE ON CONSOLIDATION

The ICC rarely forcibly consolidates cases.²² In most related cases before the ICC, the parties either agree on consolidation²³ or raise claims together from the outset.²⁴ As already suggested in 2005 by Erik Schäfer, Herman Verbist, and Christophe Imhoos,²⁵ this difficult topic, formerly contained in Article 4(6), is now treated in a separate article. Even though there are a number of changes, which this Article discusses below, some things remain unchanged.

A. *The Provisions*

The current ICC Rules contain a provision on consolidation in Article 4(6). The article is limited in scope,²⁶ which is one of the reasons it was chosen for this analysis. Article 4(6) of the ICC Rules provides:

When 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 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 19.²⁷

The new provision on consolidation is not only in a different place, giving it its own article, but also changes the ICC Rules drastically. The new Article 10 reads:

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

²² MICHAEL W. BÜHLER & THOMAS H. WEBSTER, *HANDBOOK OF ICC ARBITRATION: COMMENTARY, PRECEDENTS, MATERIALS* 63 (2d ed. 2008); Greenberg, Feris & Albanesi, *supra* note 11, at 164 (stating that in the two years between January 1, 2007, and December 31, 2009, the court dealt with twenty-four contested requests for consolidation, eight of which were accepted and the remainder rejected).

²³ Anne Marie Whitesell & Eduardo Silva-Romero, *Multiparty and Multicontract Arbitration: Recent ICC Experience*, in *COMPLEX ARBITRATIONS: PERSPECTIVES ON THEIR PROCEDURAL IMPLICATIONS* 7, 16 (2003).

²⁴ W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 183 (3d ed. 2000).

²⁵ SCHÄFER, VERBIST & IMHOOS, *supra* note 6, at 33–34.

²⁶ BÜHLER & WEBSTER, *supra* note 22, at 62.

²⁷ Int'l Chamber of Commerce Rules of Arbitration art. 4(6) (1998).

- a) the parties have agreed to consolidation; or
- b) all of the claims in the arbitrations are made under the same arbitration agreement; or
- c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.²⁸

As is imminently apparent, the rule on consolidation has gained in prominence, detail, and scope. First, this Article discusses features that remain the same, and second, the changes.

B. Continuous Features

The features discussed in this Subpart exist in both the current and new ICC Rules on consolidation. Inclusion in this Subpart requires continuance not only in actual practice, but also in the rules themselves.

1. Appointment of Arbitrators

One of the issues most discussed when it comes to consolidation is the choice of arbitrators. Neither the old nor the new ICC Rules directly addresses the question of the number of arbitrators. Rather, each rule grants the power to add Case B to Case A, which will only result in the same number and identity of arbitrators for Case B as there were in Case A, regardless of the provisions of Case B.²⁹

²⁸ Int'l Chamber of Commerce Rules of Arbitration art. 10 (2011).

²⁹ It is possible under the new rules that the parties may, by agreement, deviate whether Case A is merged with Case B or the other way around. *Id.* art. 10(6). The principle of one set of parties losing its possibility of influencing the choice of arbitrators remains.

Technically, the proviso that the agreements need to be compatible, which was implicit in the current rules and is explicit in the new rules, prevents the convergence of different numbers of arbitrators. Also, the ICC will be unlikely to try to consolidate cases with different arbitrators; the new rule specifically states that the number and identity of any preexisting arbitrators are to be taken into account before making a decision on consolidation.³⁰ Indeed, as is discussed in Part II.C.3.c, *infra*, the chances of consolidation occurring when the arbitration clause mandates differing numbers of arbitrators are extremely low. Nevertheless, the possibility of difficulties exists and will continue to exist.

It is possible that cases may be consolidated before arbitrators in either of the consolidated proceedings have been appointed, which would obviate this issue.

2. Initiation Procedure

Initiation procedures address the *appropriate participant* as well as the *appropriate procedure* for initiating consolidation. Litigation allows parties to move for consolidation.³¹ Consolidation *sua sponte* by the judge is also a possibility.³² Options in institutional arbitration encompass three choices for

³⁰ *See id.*

³¹ BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [CODE OF PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, SR 291, art. 185 (Switz.), English translation *available at* https://www.sccam.org/sa/download/IPRG_english.pdf (“For any further judicial assistance the state judge at the seat of the Arbitral tribunal shall have jurisdiction.”). German Law requires either express consent of the parties or express permission in the law for courts to act. This strict interpretation is based on § 1026 of the German Code of Civil Procedure (“GCCP”), which provides that no court shall intervene except where so provided in the tenth book of the GCCP, which refers to arbitration and codifies the UNCITRAL Model Law. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, § 1026 (Ger.). There is no suggestion that arbitrators would have discretion to order consolidation without prior consent. *See id.*

³² Article 125 of the Swiss Code of Civil Procedure provides for consolidation in a list of potential actions by a court to streamline and simplify litigation: “Zur Vereinfachung des Prozesses kann das Gericht insbesondere: a. das Verfahren auf einzelne Fragen oder auch einzelne Rechtsbegehren beschränken; b. gemeinsam eingereichte Klagen trennen; c. selbstständig eingereichte Klagen vereinigen; d. eine Widerklage vom Hauptverfahren trennen.” BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [CODE OF PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, SR 291, art. 125 (Switz.), *available at* <http://www.admin.ch/ch/d/sr/2/272.de.pdf>. Comparatively, the GCCP provides for consolidation in Section 147: “Das Gericht kann die Verbindung mehrerer bei ihm anhängiger Prozesse derselben oder verschiedener Parteien zum Zwecke der gleichzeitigen Verhandlung und Entscheidung anordnen, wenn die Ansprüche, die den Gegenstand dieser Prozesse bilden, im rechtlichen Zusammenhang stehen oder in einer Klage hätten geltend gemacht werden können.” ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, § 147 (Ger.). Finally, consolidation is found in Rule 42(a) of the United States Federal Rules of Civil Procedure. It states: “If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all

the appropriate participant: institutions, arbitrators, and courts. The procedure remains unchanged from the current to new ICC Rules.

Under the ICC Rules, consolidation is initiated by the request of a party. No *sua sponte* consolidation is permitted.³³ The addressee for the initial request is the ICC, which makes a decision without giving reasons.³⁴ The arbitral panel has no jurisdiction to consolidate cases.³⁵

3. *Secrecy*

Secrecy is used here to refer jointly to the terms privacy and confidentiality. Privacy refers only to a lack of the public in arbitrations.³⁶ Confidentiality refers to the enforceable duty not to disclose any information gleaned during the arbitration or the fact of the arbitration itself.³⁷

No specific provisions exist to provide for general secrecy. Under the ICC Rules, when only the same parties are involved in cases for consolidation, the concern for information leakage is minimal concerning parties to the new case. In ICC arbitrations, secrecy is up to the parties' agreement. Current Article 20(7) states only: "The Arbitral Tribunal may take measures for protecting trade secrets and confidential information."³⁸ The new Article 22(3) contains a similar provision.³⁹

matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." FED. R. CIV. P. 42(a).

³³ See JENS-PETER LACHMANN, *HANDBUCH FÜR DIE SCHIEDSGERICHTSPRAXIS* 670 (3d ed. 2008); LIONNET & LIONNET, *supra* note 2, at 414.

³⁴ CRAIG, PARK & PAULSSON, *supra* note 24, at 25–26, 145–49.

³⁵ BÜHLER & WEBSTER, *supra* note 22, at 62. An example for a legal framework with court-driven consolidation is the Netherlands. Article 1046 of the Dutch Civil Code of Procedure gives the judge the authority to consolidate arbitration procedures seated in the Netherlands on request of one party if the subject matters of the different procedures are connected. *BURGERLIJK WETBOEK [BW] [CIVIL CODE]* § 1046(1). Moreover, the judge has extensive competence to bindingly define the procedure should the involved parties not reach an agreement in a set time period. *Id.* § 1046(3). However, the parties can expressly exclude court-ordered consolidation in their arbitration agreement. *Id.* § 1046(1).

³⁶ KYRIAKI NOUSSIA, *CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, GERMAN AND FRENCH LAW* 39 (2010).

³⁷ *Id.* at 40; PETER TURNER & REZA MOHTASHAMI, *A GUIDE TO THE LCIA ARBITRATION RULES* 220 (2009).

³⁸ Int'l Chamber of Commerce Rules of Arbitration art. 20(7) (1998).

³⁹ "Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information." Int'l Chamber of Commerce Rules of Arbitration art. 22(3) (2011).

A protective order under the ICC Rules is not intended to give confidentiality inside the proceedings, but only from outsiders. This is known as relative confidentiality.⁴⁰

Even the new ICC Rules, which permit additional parties, did not alter the ICC's general stance and, in the authors' opinion, is not a problem.

Generally speaking, one of the core values of arbitration is secrecy.⁴¹ According to S.I. Strong, “[m]any parties choose to arbitrate their disputes rather than litigate them precisely because they do not want certain information, such as trade secrets, revenue, and other sensitive data, to become public.”⁴² The private character of arbitration is often viewed as a good reason not to consolidate because it may violate the secrecy of the process.⁴³ Some authors have gone so far as to claim secrecy to be an obstacle to consolidation.⁴⁴ The authors of this Article, however, do not agree.

Generally, protection for arbitral confidentiality is actually quite minimal.⁴⁵ In most countries, non-publicity is not found in the law and is instead treated as a principle.⁴⁶ As Strong notes, “privacy and confidentiality are only protected under the New York Convention to the extent such requirements are reflected in the parties’ arbitration agreement.”⁴⁷

⁴⁰ Yves Derains, *Evidence and Confidentiality*, in CONFIDENTIALITY IN ARBITRATION 67 (2009).

⁴¹ Edward Brunet, *The Core Values of Arbitration*, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 3, 8 (Edward Brunet et al. eds., 2006); JULIAN D M LEW, LOUKAS A MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 457, 660 (2003).

⁴² Strong, *supra* note 20, at 933; *see also* Michael P. Daly, Note, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 124 (2007).

⁴³ *See* Richard Bamforth & Katerina Maidment, “All Join in” or Not? *How Well Does International Arbitration Cater for Disputes Involving Multiple Parties or Related Claims?*, 27 ASA BULL. 3, 5–6 (2009); Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT’L L.J. 121 (1995); Phillip Leboulanger, *Multi-contract Arbitration*, 13 J. INT’L ARB. 43, 65 (1996); Fritz Nicklisch, *Multi-party Arbitration and Dispute Resolution in Major Industrial Projects*, 11 J. INT’L ARB. 57, 69 (1994); Marie Öhrström, *Stockholmer Regeln*, in INSTITUTIONELLE SCHIEDSGERICHTSBARKEIT: KOMMENTAR 869, 879–80 (Rolf A. Schütze ed., 2d ed. 2011).

⁴⁴ *See* Bamforth & Maidment, *supra* note 43, at 6; Cristián Conejero Roos, *Multi-party Arbitration and Rule-making: Same Issues, Contrasting Approaches*, in 50 YEARS OF THE NEW YORK CONVENTION, *supra* note 21, at 411, 432. The private nature of international commercial arbitration is thus “at odds” with adding parties after commencement of the proceedings. Bamforth & Maidment, *supra* note 43, at 6.

⁴⁵ Strong, *supra* note 11, at 1088.

⁴⁶ PHILIPP RITZ, DIE GEHEIMHALTUNG IM SCHIEDSVERFAHREN NACH SCHWEIZERISCHEM RECHT 57 (2007).

⁴⁷ Strong, *supra* note 11, at 1088.

What arbitration does is exclude the public.⁴⁸ Excluding the public is said to be one of the reasons for arbitration.⁴⁹ Parties to arbitration often wish to keep the fact of the dispute and its details between themselves and the panel.⁵⁰ A non-public proceeding is less hard on business relationships than a public proceeding.⁵¹

Michael P. Daly notes that “[a]rbitrations have generally been more secretive than litigation because arbitral decisions have traditionally been unpublished and commercial arbitral proceedings usually occur in the private confines of rented hotel rooms rather than in public courtrooms.”⁵² However, “publicly held corporations that become involved in arbitral proceedings may have to disclose information about any such disputes to its shareholders and to the general public under securities regulations.”⁵³

Privacy is not violated when the same parties participate in the consolidated proceeding because parties are, by definition, not the public. Similarly, additional parties are hardly members of the public when they become parties. There should not be a concern about privacy on account of the numbers involved. It is hard to imagine that a consolidated case would reach the proportions of a class arbitration, so additional parties are highly unlikely to threaten the private nature of the proceedings.

Confidentiality is not violated when the same parties participate in the old and consolidated arbitrations.⁵⁴ When new parties from differing contracts are added, these parties will receive access to information that was previously unknown to them. However, this is not a violation of confidentiality.

Confidentiality applies between the parties, including new parties. These parties are bound by the same confidentiality as the previous parties.⁵⁵ The wish to protect certain information from another party is not protected in arbitration.

⁴⁸ Bamforth & Maidment, *supra* note 43, at 6 (stating that only the notion that international commercial arbitration is essentially private, rather than public, is universally accepted).

⁴⁹ RITZ, *supra* note 46, at 56.

⁵⁰ Bamforth & Maidment, *supra* note 43, at 5.

⁵¹ RITZ, *supra* note 46, at 57.

⁵² Daly, *supra* note 42, at 124.

⁵³ *Id.* at 125.

⁵⁴ LEW, MISTELIS & KRÖLL, *supra* note 41, at 405.

⁵⁵ Alexander Jolles & Maria Canals de Cediell, *Confidentiality*, in INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 89, 100 (Gabrielle Kaufmann-Kohler & Blaise Stucki eds., 2004).

Even though an English case, *Oxford Shipping Co. v. Nippon Yusen Kaisha*, forbade nonconsensual consolidation due, at least in part, to concerns about confidentiality and the assumption that additional parties would be strangers to the proceedings,⁵⁶ this cannot apply in general.

The ICC Rules do not contain generalized secrecy arrangements, but only contain protection for specific business secrets. Given the shift toward increased transparency in bilateral arbitration, particularly in cases involving matters of public interest, as exemplified by *Esso Australia Resources v Plowman*, where the High Court of Australia held that confidentiality is not inherent in the nature of arbitration,⁵⁷ it would be difficult to oppose joint arbitration simply on the grounds that the consolidation procedure violates principles of privacy or confidentiality.⁵⁸

C. Differences

The differences in the consolidation provision are considerable, even more so when practices that had evolved or rules that were “understood” are not taken into account.

1. Discretionary Consolidation

Consolidation of cases by the ICC is and remains discretionary. This means that one party does not have a right to demand consolidation. However, the new Article 10(a) now clarifies that consolidation by joint agreement of all parties is permissible.⁵⁹ In theory, the ICC may reject consolidation of cases even when all parties concerned agree, but that seems improbable.

2. Timing

In both arbitration and litigation, there are time frames in which certain procedural acts must be performed.⁶⁰ In German litigation, for example, cases

⁵⁶ [1984] 3 All E.R. 835.

⁵⁷ (1995) 183 CLR 10.

⁵⁸ Strong, *supra* note 11, at 1089; cf. MATTI S. KURKELA, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 71 (2005); Hartmut Hamann & Thomas Lennarz, *Parallele Verfahren mit Identischem Schiedsgericht als Lösung für Mehrparteienkonflikte?*, 2006 NEUE ZEITSCHRIFT FÜR SCHIEDSVERFAHREN 289, 291.

⁵⁹ Int'l Chamber of Commerce Rules of Arbitration art. 10(a) (2011).

⁶⁰ These include appeals within a certain timeframe, responses, and pleadings.

that have already progressed to the point where judgment can be rendered may not be consolidated.⁶¹

Under the current ICC Rules, the ICC may order consolidation as long as the terms of reference in either case have been neither signed nor approved.⁶² As the terms of reference form an early stage of arbitration, the window for consolidation is narrow under the ICC Rules.⁶³

Terms of reference are intended to provide an agreed-upon framework and to give the parties the possibility to shape the proceedings according to their own gusto.⁶⁴ After the terms of reference are signed or approved, claims may only be added by the use of current Article 19.

Article 19 provides:

After 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 consider the nature of such new claims or counter-claims, the stage of the arbitration and other relevant circumstances.⁶⁵

This means that once the terms of reference are signed or approved, the arbitrators are both the addressee for and the authority to decide the addition of new claims. From this moment on, the ICC Court of Arbitration loses jurisdiction over the procedure.⁶⁶

The reference to Article 19 was added to clarify that the addition of claims is possible under certain circumstances even when, strictly speaking, consolidation is no longer possible. However, new claims under Article 19

⁶¹ Reinhard Greger, *Mündlich Verhandlung §§ 128–165*, in ZÖLLER ZIVILPROZESSORDNUNG 615, 662, § 147(5) (Richard Zöller ed., 27th ed. 2009); BAUMBACH, LAUTERBACH, ALBERS & HARTMANN, *supra* note 13, at 738; KOMMENTAR ZUR ZIVILPROZESSORDNUNG MIT GERICHTSVERFASSUNGSGESETZ, *supra* note 13, at 238–39.

⁶² Michael W. Bühler & Sigvard Jarvin, *The Arbitration Rules of the International Chamber of Commerce (ICC)*, in PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 1133, 1186 (Frank-Bernd Weigand ed., 2d ed. 2009) [hereinafter PRACTITIONER'S HANDBOOK]; Richard E. Speidel, *Common Legal Issues in American Arbitration Law*, in ARBITRATION LAW IN AMERICA, *supra* note 41, at 29. Brunet argues that party autonomy and privacy, as a rule, trump efficiency. Brunet, *supra* note 41, at 4–7.

⁶³ BÜHLER & WEBSTER, *supra* note 22, at 63; CRAIG, PARK & PAULSSON, *supra* note 24, at 182–83.

⁶⁴ BÜHLER & WEBSTER, *supra* note 22, at 259; Andreas Reiner & Werner Jahnel, *ICC-Schiedsgerichtsordnung*, in INSTITUTIONELLE SCHIEDSGERICHTSBARKEIT: KOMMENTAR, *supra* note 43, at 21, 87.

⁶⁵ Int'l Chamber of Commerce Rules of Arbitration art. 19 (1998).

⁶⁶ CRAIG, PARK & PAULSSON, *supra* note 24, at 182–83; BÜHLER & WEBSTER, *supra* note 22, at 280–81.

should be distinguished from consolidation; while consolidation necessarily extinguishes the second proceeding, new claims under Article 19 do not require that any previous proceeding existed.⁶⁷

In theory, it would have been possible under the old rules for parties, if all parties agreed, to effectively consolidate two cases after the terms of reference were signed. The parties could use Article 19 as a backdoor to introduce “new” claims in Case A while at the same time withdrawing the claims in Case B. This would bypass the provisions of Article 4(6). It is unclear if this was ever done, however.

The new Article 10 disposes of both the timing restriction and the reference to current Article 19, permitting for a far broader timeframe in which consolidation can take place. The only allusion to timing is made by stating:

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.⁶⁸

Taking into account the time of appointment or confirmation does not establish a definite time limit.

3. *Connection Between Cases*

The connection requirement offers the largest difference between the old and the new ICC rule on consolidation.

The connection required for consolidation under Article 4(6) of the old ICC Rules is rather strict: the same parties must be involved in both cases,⁶⁹ and the same legal relationship must be concerned.⁷⁰

The new Article 10(c) is more inclusive, but also requires strict connectivity. When different agreements are the subject of claims to be consolidated, Article 10(c) imposes three requirements: the same parties, the same legal relationship, and compatible agreements. The first two are also

⁶⁷ Generally, Article 19 gives arbitrators wide discretion to allow claims not within the terms of reference.

⁶⁸ Int'l Chamber of Commerce Rules of Arbitration art. 10 (2011).

⁶⁹ BÜHLER & WEBSTER, *supra* note 22, at 63; Reiner & Jahnel, *supra* note 64, at 40. It is interesting to note the overlap with the group of companies doctrine.

⁷⁰ BÜHLER & WEBSTER, *supra* note 22, at 63; Reiner & Jahnel, *supra* note 64, at 40.

found in the old ICC rule, while the third reflects ICC practice as it referred to language and seat. In addition, the ICC takes into account the subsequent will of the parties as indicated by the choice of arbitrators for all proceedings.

The following analysis of the connection between cases is not relevant when the same contract forms the basis of the arbitrations to be consolidated, as indicated in Article 10(b).⁷¹ The fact that the same contract and arbitration clause are involved in the arbitrations to be consolidated is sufficient connection.

a. Parties

Under the old Article 4(6), the most common reason for the ICC Court to reject an application for consolidation was, by far, the non-satisfaction of identical parties.⁷² That requirement can sometimes appear restrictive in situations where two parties are intricately related. Doctrines such as the group of companies doctrine were not accepted.⁷³

Case law bears out this restrictive view. The ICC refused to consolidate three arbitrations in which all of the parties to the first two arbitrations were involved in the third arbitration because the parties in the first two cases were not identical.⁷⁴

In two arbitrations filed in 2008, the parties were closely related but not identical.⁷⁵ While the respondents were identical in both cases, the claimants were slightly different members of the same group of companies with the same corporate address but had different names and company identification numbers.⁷⁶

The ICC refused to consolidate when the respondents to both cases were not the same, even though the group of companies doctrine was argued.⁷⁷ However, the ICC Court does consider the same parties to be involved even

⁷¹ Int'l Chamber of Commerce Rules of Arbitration art. 10(b) (2011).

⁷² It has been suggested that this is even narrower, requiring the same "economic transaction." Anne Marie Whitesell, *Multiparty Arbitration: The ICC International Court of Arbitration Perspective*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 203, 209–10 (Permanent Court of Arbitration ed., 2009).

⁷³ Greenberg, Feris & Albanesi, *supra* note 11, at 164; BÜHLER & WEBSTER, *supra* note 22, at 63.

⁷⁴ Greenberg, Feris & Albanesi, *supra* note 11, at 164.

⁷⁵ *Id.*

⁷⁶ *Id.* at 165.

⁷⁷ Whitesell, *supra* note 72, at 210.

when groups of claimants and respondents are not identical (i.e., the roles are interchangeable⁷⁸) as long as no additional parties are involved.

b. Legal Relationship

The requirement of “connection with a legal relationship” is a more undefined term.⁷⁹ It may include a legal or factual connection,⁸⁰ and it has been suggested that this means “the same economic transaction” in the ICC context.⁸¹ Unfortunately, this is a vague term as well and must be regarded in light of previous cases.

The same legal transaction was found to exist when two separate agreements between the same parties, signed the same day and relating to products with the same definition, were subject to a dispute.⁸² In both cases the matter turned on whether the claimant had terminated the contracts.⁸³ Relief sought was identical and most of the evidence involved both contracts.⁸⁴ In a different instance, the ICC consolidated two cases based on the same project, in which one claim was based on the original contract and the second on the amended contract.⁸⁵

Thus, while this phrase needs to be evaluated on a case-by-case basis, the existing case law suggests that the requirement will continue to be interpreted broadly.

c. Compatible Arbitration Clauses

The new ICC Rule 10(c) expressly requires compatible arbitration clauses, while the old rule does not explicitly state this requirement. In practice, the ICC did require compatible clauses in order to consolidate cases.⁸⁶ Even though this is a change in wording rather than procedure, it will nonetheless be discussed here.

⁷⁸ Bühler & Jarvin, *supra* note 62, at 1186.

⁷⁹ YVES DERAIS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 74 (2d ed. 2005)

⁸⁰ *Id.*

⁸¹ *Id.* at 61.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Reiner & Jahnel, *supra* note 64, at 40; Whitesell, *supra* note 72, at 210.

⁸⁵ Whitesell, *supra* note 72, at 210.

⁸⁶ *Id.* at 209.

In cases of a single arbitration agreement, incompatible clauses cannot occur. In multi-contract situations, there are two arbitration clauses to consider. Conceptually speaking, there are fewer problems consolidating proceedings if the different arbitration agreements contain identical language.⁸⁷ Indeed, “it is generally legitimate to presume that by including identical arbitration clauses in the various related contracts, the parties intended to submit the entire operation to a single arbitral tribunal.”⁸⁸

What exactly constitutes incompatibility is not uniformly agreed upon. Michael W. Bühler and Thomas H. Webster do not require that the arbitration agreements have identical, invariant wording.⁸⁹ However, the clauses may not be significantly different.⁹⁰ Under Julian D M Lew’s definition, all contracts have to contain identical clauses.⁹¹ Bernhard Berger and Franz Kellerhals define incompatibility as either concurring or identical.⁹² Concurring means that there is no difference between the clauses with respect to certain core features, such as applicable rules, place of arbitration, number of arbitrators, and language of arbitration.⁹³ Certainly, for consolidation, all parties must have agreed to the same arbitral institution.⁹⁴

The Swiss Federal Court decided a case in which two companies had concluded a number of related contracts, two of which were exclusive delivery agreements and the others general delivery agreements. Each agreement contained its own incompatible arbitration clause, choosing different institutions, seats, and applicable laws.⁹⁵ The panel declined to hear the cases together, and the Swiss Federal Court agreed that the inconsistencies of the two

⁸⁷ Hanotiau, *supra* note 13, at 376; Whitesell & Silva-Romero, *supra* note 23, at 15.

⁸⁸ Strong, *supra* note 11, at 1041; *see also* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 521 (Emmanuel Gaillard & John Savage eds., 1999).

⁸⁹ BÜHLER & WEBSTER, *supra* note 22, at 63.

⁹⁰ *Id.*

⁹¹ LEW, MISTELIS & KRÖLL, *supra* note 41, at 394.

⁹² BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND 133–34 (2d ed. 2010).

⁹³ *Id.*

⁹⁴ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 153 (5th ed. 2009); LACHMANN, *supra* note 33, at 341–42; LIONNET & LIONNET, *supra* note 2, at 295; JUSTUS WILKE, INTERESSENKONFLIKTE IN DER INTERNATIONALEN SCHIEDSGERICHTSBARKEIT: UNPARTEILICHKEIT, UNABHÄNGIGKEIT UND OFFENLEGUNGSPFLICHTEN 71 (2006).

⁹⁵ Tribunal federal [TF] [Federal Court] Feb. 29, 2008, 4A.452/2007, http://www.polyreg.ch/i/informationen/bgeunpubliziert/Jahr_2007/Entscheide_4A_2007/4A.452_2007.html

contracts between the same parties indicated that no consolidation was intended.⁹⁶

This view is supported by a number of scholars such as Gary B. Born⁹⁷ and Jans-Peter Lachmann.⁹⁸ Other scholars expand the idea of incompatibility even further. Incompatibility can be found when “the seat, the constitution of the arbitral tribunal or the applicable procedure differ.”⁹⁹ Different seats can give rise to incompatibility, even when they are located in the same country.

Incompatibility is found when the arbitration panels have different constitutions: this may arise from different numbers of arbitrators, when different qualifications of arbitrators are required, or even when different methods of selecting the tribunals are chosen. Different selection of arbitrators after the cases have commenced is not an indicator of incompatibility. Subsequent absence of the wish to consolidate does not denote lack of foreseeability of consolidation at the conclusion of the contract.¹⁰⁰

This Article concludes, therefore, that in multiple contract scenarios, consolidation by reference to institutional rules is superseded by party agreement in the following circumstances: 1) incompatible seats; 2) incompatible languages; 3) incompatible choice of institutions; 4) incompatible choice of procedures within the institutions; 5) incompatible applicable law either on the merits or procedurally; and 6) different number, qualification, or selection procedures for arbitrators.¹⁰¹ This, however, does not mean that all compatible clauses result in consolidation.

III. PROGRESS OR CHANGE

In order to determine whether there is improvement or change, there are two levels to discuss. First, the level of practicality and, second, the level of enforceability.

⁹⁶ *Id.* pt. C. 2.5.3.

⁹⁷ BORN, *supra* note 13, at 2090.

⁹⁸ LACHMANN, *supra* note 33, at 877.

⁹⁹ JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 199 (2d ed. 2007); *see also* PAUL D. FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* 135 (2d ed. 2007); LEW, MISTELIS & KRÖLL, *supra* note 41, at 395.

¹⁰⁰ *Cf.* LEW, MISTELIS & KRÖLL, *supra* note 41, at 408. It will be a rare occurrence in any case that in the narrow time permissible for consolidation under the ICC Rules both sole arbitrators will have been chosen. In the face of the appointment of two different arbitrators, the will of the parties not to consolidate is so clear that the ICC is unlikely to force the issue.

¹⁰¹ BLACKABY ET AL., *supra* note 94, at 195–99; Daly, *supra* note 42, at 112.

A. *Practicality*

One of the most frequent criticisms of the existing ICC rule on consolidation has been its limited scope. Specifically, the requirement that the parties be identical and the timing requirements have been criticized as too narrow. From this perspective, the new ICC rule is far broader and more inclusive. Frequent scenarios, such as indemnity, sub-contractor, or string contract scenarios are now covered.¹⁰² From this perspective, the new rule certainly provides more opportunities for consolidation. It also permits contracts between the same parties to be solved together so that any disputes between the parties can be handled “in one go.” Adding the requirement of compatible contracts and taking it away from mere practice is also commendable because it provides guidance for the practitioner.

Unfortunately, one of the major issues of consolidated cases has not been addressed by the rules, and may only be addressed by the practice of the ICC. This is the issue of the appointment of arbitrators.

B. *Enforceability Under the New York Convention*

Under the current Article 4(6), requiring identical parties in both cases, enforcement has not been an issue.¹⁰³ However, the new Article 10 may pose some issues—specifically regarding the appointment of arbitrators—that cannot be outweighed by the positive practical implications.¹⁰⁴ This Article argues that a simple reference to Articles 12(6)–(8) and 13 of the new rules would have rectified the issue.¹⁰⁵ As it currently stands, only the practice of the ICC can ameliorate the potential hazard of lack of enforcement.

In order to explain the issue of appointment of arbitrators, this Article returns to the case that gave rise to the issue.

I. *Dutco*

In *Siemens AG v. Dutco*,¹⁰⁶ BKMI, Siemens, and Dutco had entered into a consortium agreement for the execution of a construction contract to build a

¹⁰² See Int'l Chamber of Commerce Rules of Arbitration (2011).

¹⁰³ See Int'l Chamber of Commerce Rules of Arbitration art. 4(6) (1998).

¹⁰⁴ See Int'l Chamber of Commerce Rules of Arbitration art. 10 (2011).

¹⁰⁵ See *id.* arts. 12(8)–(10), 13.

¹⁰⁶ Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Jan. 7, 1992, Bull. civ. I, No. 2 (Fr.).

cement plant for which BKMI was the main contractor.¹⁰⁷ Dutco alleged that it incurred additional cost due to BKMI's delay in providing the drawings for the design of the project and the changes made by Siemens in the design of electrical equipment.¹⁰⁸ Dutco had very distinct claims against BKMI and Siemens due to the nonperformance of their respective obligations under the agreement.¹⁰⁹ Dutco filed a single case with the ICC to avoid conflicting awards.¹¹⁰ Siemens and BKMI did not want to arbitrate as one because they also had diverse interests, and they initially refused to nominate a joint arbitrator.¹¹¹ After not obtaining bifurcation from the ICC, they reserved their rights and proceeded with the arbitration.¹¹² The interim award on proper constitution was then challenged.¹¹³ The challenge went through the instances and was finally decided by the Cour de cassation, the highest French civil court, on January 7, 1992.¹¹⁴

The court held that agreements must, in addition to covering the applicability of arbitration, cover the parties, the substantive claim, and an agreement to arbitrate cases together.¹¹⁵ While the court did not object to the joint proceeding or that the parties had agreed thereto by signing a single contract, it did object to the parties being permitted to consent to institutional rules that, in these circumstances, would result in inequality in the selection of arbitrators.¹¹⁶ The court held that such agreement was impermissible when made in advance.¹¹⁷

This does not mean that the parties could not have chosen the rules and joint proceedings—only that the unequal selection of the arbitrators that resulted was against public policy and could not be agreed to. Or, to put it another way, an advance waiver of equal treatment is not permissible.¹¹⁸

¹⁰⁷ Eric A. Schwartz, *Multi-party Arbitration and the ICC in the Wake of Dutco*, 10 J. INT'L ARB. 5, 11 (1993).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 12.

¹¹⁴ *Id.* at 5.

¹¹⁵ *Id.* at 13–15.

¹¹⁶ *Id.* at 13.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

While *Dutco* addresses joinder of parties rather than consolidation, its holding and reasoning are important for any multi-party case. The case concerned a single agreement and three parties and originated with the ICC. The French court held that agreement to consolidation is not possible before the actual dispute has arisen.¹¹⁹ Thus, following the rule of *Dutco*, cases consolidated under Article 10(b) might be heard by improperly constituted tribunals or have parties that might not have been given equal treatment.

Some scholars have expressed doubts as to whether *Dutco* is good law.¹²⁰ Born questions the interpretation of the *Dutco* decision in a way that prohibits all advance waivers, especially because the parties in international commercial transactions are often savvy and sophisticated.¹²¹ Nathalie Voser explicitly condemns the *Dutco* decision as too broad.¹²² Even though *Dutco* is not binding on all courts, it had a dramatic impact, and many jurisdictions adopted its holding.¹²³

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“NY Convention”) allows challenges of awards for a variety of reasons. The grounds implicated here are Articles V(1)(d) and V(2)(b).

2. *Improper Constitution—Article V(1)(d) of the NY Convention*

Article V(1)(d) of the NY Convention provides that enforcement of an award may be refused when the agreement of the parties or the law applicable to the procedure was violated.¹²⁴ It is permissible under the NY Convention for the parties to select the procedure of the appointment of arbitrators by

¹¹⁹ Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Jan. 7, 1992, Bull. civ. I, No. 2 (Fr.).

¹²⁰ See, e.g., GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 143 (2004) (finding *Ducto* to be relevant only to its specific circumstances).

¹²¹ BORN, *supra* note 13, at 2101–02.

¹²² Voser, *supra* note 21, at 363.

¹²³ See Bundesgerichtshof [BGH] [Federal Court of Justice] March 29, 1996, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1753 (1755), 1996 (Ger.).

¹²⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(d), *adopted* June 10, 1958, 21 U.S.T. 2517 [hereinafter NYC Convention]; see also Stefan Kröll, *Die Vollstreckbarerklärung von Schiedssprüchen nach Deutschem Recht—Rechtsgrundlagen und Prozessuale Fragen des Exequaturverfahrens*, in DIE VOLLSTRECKUNG VON SCHIEDSSPRÜCHEN 105, 75 (Gerhard Wagner & Peter Schlosser eds., 2007); Bayerisches Oberstes Landesgericht [BayObLG] [Bavarian Higher Regional Court] February 24, 1999, NEUE JURISTISCHE WOCHE-RECHTSPRECHUNGSREPORT 361, 1999.

reference to institutional rules:¹²⁵ “if consolidation is based on the parties’ implied consent, then article V(1)(d) [of the NY Convention] would presumably not be offended.”¹²⁶ Article V(1)(d) may be precluded if not raised according to the law of the seat.¹²⁷ Article V(1)(d) states that enforcement could be refused if “[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”¹²⁸ Whether refusal of recognition and enforcement is proper is determined using the law applicable to the procedure.¹²⁹ Party autonomy concerning the arbitrator selection is only limited by certain articles of the NY Convention, notably Articles V(2)(a) and (b), which discuss arbitrability and public policy, respectively; Article V(1)(d), however, does not limit party autonomy in arbitrator selection.¹³⁰

While preponderant influence of one or more parties over the composition of the panel would serve as improper constitution in principle on the basis of lack of equality,¹³¹ this is not so when the agreed-upon procedure is followed. Mandatory law of the enforcement country is irrelevant for Article V(1)(d) of the NY Convention. This does not mean that a violation of Article V(2)(b) could have occurred.¹³² Lack of protection against certain procedural agreements is balanced by Article V(2) of the NY Convention.¹³³ An award that violates due process or public policy cannot be enforced.¹³⁴ When the panel is chosen in accordance with the institutional rules, and subject to the

¹²⁵ Patricia Nacimiento, *Article V(1)(d)*, in *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION* 281, 283 (Herbert Kronke et al. eds., 2010).

¹²⁶ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS* 695 (2d ed 2001).

¹²⁷ Thomas Henkel, *Konstituierungsbezogene Rechtsbehelfe im Schiedsrichterlichen Verfahren nach der ZPO* 1, 413 (2007) (unpublished J.D. dissertation, Humboldt University of Berlin), available at <http://edoc.hu-berlin.de/dissertationen/henkel-thomas-2007-05-08/HTML>.

¹²⁸ NY Convention, *supra* note 124, art. V(1)(d).

¹²⁹ See LACHMANN, *supra* note 33, at 330; Henkel, *supra* note 127, at 413.

¹³⁰ Nacimiento, *supra* note 125, at 284; Bundesgericht [BGer] [Federal Supreme Court] Feb. 26, 1982, 108 ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [ATF] Ib 85, 4(a) (Switz.).

¹³¹ Kröll, *supra* note 124, at 92.

¹³² Nacimiento, *supra* note 125, at 291.

¹³³ Giorgio Gaja, *Introduction*, in *INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION I.C.3* (Giorgio Gaja ed., 1987).

¹³⁴ Ulrich Haas, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *New York, June 10, 1958*, in *PRACTITIONER’S HANDBOOK ON INTERNATIONAL ARBITRATION* 399, 508 (Frank-Bernd Weigand ed., 2002); Kröll, *supra* note 124, at 89; Nacimiento, *supra* note 125, at 286.

limitations outlined above, Article V(1)(d) of the NY Convention is not violated.

In conclusion, all variations of consolidation under the ICC that are foreseeable to the parties would be proper under Article V(1)(d) of the NY Convention.

3. *Public Policy—Article V(2)(b) of the NYC*

Article V(2)(b) is *lex generalis* to the provisions of Article V(1), even though some courts consider public policy grounds simultaneously with other grounds.¹³⁵ Article V(2)(b) has to be considered *ex officio*.¹³⁶ Although often raised,¹³⁷ Article V(2)(b) fails more often than other grounds for refusal of recognition and enforcement.¹³⁸

Only when the enforcement of the award, and not the award itself, would violate public policy will enforcement be denied.¹³⁹ Procedural mistakes also must have the potential for an impact on the award to be objectionable.¹⁴⁰

Much literature exists concerning the question of whether a domestic or internationalized standard for public policy needs to be applied.¹⁴¹ According to the authors Loukas A. Mistelis, Domenico Di Pietro, and Margaret L. Moses, the only relevant public policy is that of the enforcing state.¹⁴² This view is correct because Article V(2)(b) states: “The recognition or enforcement

¹³⁵ Dirk Otto & Omania Elwan, *Article V(2)*, in *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION* 345, 366 (Herbert Kronke et al. eds., 2010).

¹³⁶ Kröll, *supra* note 124, at 111.

¹³⁷ Wolfgang Kühn, *Aktuelle Fragen zur Anwendung der New Yorker Konvention von 1958 im Hinblick auf die Anerkennung und Vollstreckung Ausländischer Schiedssprüche*, 2009 *SCHIEDSVZ* 53, 57.

¹³⁸ ANDREW TWEEDDALE & KEREN TWEEDDALE, *ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE* 425 (2007); Loukas A. Mistelis & Domenico Di Pietro, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958*, in *CONCISE INTERNATIONAL ARBITRATION* 1, 17 (Loukas A. Mistelis ed., 2010); Otto & Elwan, *supra* note 135, at 365; Peter Bowman Rutledge, Rachel Kent & Christian Henel, *United States*, in *PRACTITIONER'S HANDBOOK*, *supra* note 62, at 877.

¹³⁹ Otto & Elwan, *supra* note 135, at 365–66.

¹⁴⁰ MARÍA ELENA ALVAREZ DE PFEIFLE, *DER ORDRE PUBLIC-VORBEHALT ALS VERSAGUNGSGRUND DER ANERKENNUNG UND VOLLSTRECKBARERKLÄRUNG INTERNATIONALER SCHIEDSSPRÜCHE* 161 (2009); LACHMANN, *supra* note 33, at 621; Kröll, *supra* note 124, at 112; Otto & Elwan, *supra* note 135, at 389.

¹⁴¹ See Otto & Elwan, *supra* note 135, at 366.

¹⁴² MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 218 (2008); TWEEDDALE & TWEEDDALE, *supra* note 138, at 430; Mistelis & Di Pietro, *supra* note 138, at 17.

of the award would be contrary to the public policy of that country.”¹⁴³ Each country applies its own version of this standard, but variations are a question of degree rather than of substance due to the narrow notion applied.¹⁴⁴ Enforcement countries are bound by the determinations of neither the panel nor a court in the seat country.¹⁴⁵

Yves Derains describes public policy as the safety valve of domestic courts.¹⁴⁶ Article V(2)(b) is narrow and applies only when the “most basic notions of morality and justice” are violated.¹⁴⁷ Procedural public policy is directed at the proper constitution of the panel, the independence of the arbitrators, the limits and extent of the arbitral mandate, principles of equal treatment, and the right to be heard.¹⁴⁸ Equal influence of the composition of the arbitral panel forms part of public policy.¹⁴⁹ Violation of domestic or foreign procedural law is insufficient in this regard.¹⁵⁰ A certain severity is required.¹⁵¹ Only the principles behind the laws are applied.¹⁵²

In principle, the parties’ freedom to agree on an appointment procedure exists; however, public policy limits this right.¹⁵³ Equal treatment, at its core, requires equal opportunities.¹⁵⁴ It is not unequal when a party defaults and, as a result, the party arbitrator renders a decision. It is, however, unequal when

¹⁴³ NY Convention, *supra* note 124, art. V(2)(b).

¹⁴⁴ See *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004), *cert. denied*, 543 U.S. 917 (U.S. Oct. 4, 2004) (No. 03-1688); *Ukrvneshprom State Foreign Econ. Enter. v. Tradeway Inc.*, No. 95 Civ. 10278, 1996 WL 107285, at *16–18 (S.D.N.Y. Mar. 11, 1996); Reinhard Bork, *Internationale Schiedsgerichtsbarkeit in Deutschland*, in *INTERNATIONALE SCHIEDSGERICHTSBARKEIT* 283, 310 (Peter Gottwald ed., 1997); Kröll, *supra* note 124, at 111; Kühn, *supra* note 137, at 57. The basis for the international standard remains the law of the country where enforcement is sought.

¹⁴⁵ Otto & Elwan, *supra* note 135, at 368.

¹⁴⁶ Yves Derains, *State Courts and Arbitrators*, in *ARBITRATION IN THE NEXT DECADE: PROCEEDINGS OF THE INTERNATIONAL COURT OF ARBITRATION’S 75TH ANNIVERSARY CONFERENCE* 27, 31 (Fabien Gelinat ed., 1999).

¹⁴⁷ Mistelis & Di Pietro, *supra* note 138, at 21; see also Otto & Elwan, *supra* note 135, at 389.

¹⁴⁸ HOMAYOON ARFAZADEH, *ORDRE PUBLIC ET ARBITRAGE INTERNATIONAL À L’ÉPREUVE DE LA MONDIALISATION: UNE THÉORIE CRITIQUE DES SOURCES DU DROIT DES RELATIONS TRANSNATIONALES* 52 (Nouvelle ed. 2006); see also ALVAREZ DE PFEIFLE, *supra* note 141, at 160; LACHMANN, *supra* note 34, at 320.

¹⁴⁹ Bundesgerichtshof [BGH] [Federal Court of Justice] May 5, 1986, *NEUE JURISTISCHE WOCHENSCHRIFT [NJW]* 3027, 1986; Kröll, *supra* note 124, at 124.

¹⁵⁰ Kröll, *supra* note 124, at 120.

¹⁵¹ Otto & Elwan, *supra* note 135, at 389.

¹⁵² ALVAREZ DE PFEIFLE, *supra* note 140, at 160.

¹⁵³ Rolf Trittman & Inka Hanefeld, § 1029—*Definition*, in *ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE* 94, 96–97 (Karl-Heinz Böckstiegel, Stefan Michael Kröll & Patricia Nacimiento eds., 2007); Henkel, *supra* note 127, at 413; LACHMANN, *supra* note 33, at 330.

¹⁵⁴ LACHMANN, *supra* note 33, at 321.

there has been no default.¹⁵⁵ Any actual inequality is sufficient. It is irrelevant whether the inequality was actually known or foreseeable.¹⁵⁶

The problem of unequal treatment may arise only under new Article 10(b).¹⁵⁷ In this situation, the parties may not be the same, even though the same arbitration agreement is implicated. The problem is the divergence of parties; the paradox is that the very same element that makes the revision so acclaimed also creates a major drawback.

Assume that Arbitration 1 is between A and B and Arbitration 2 is between C and D, all subject to the same arbitration agreement. If one or both of the panels has been chosen, and the arbitrators are not the same, the parties to Case B lose their right to influence the appointment of arbitrators. This creates a preponderant influence that would not be permissible and cannot be waived.

It is fruitless to point out that the ICC will take into account whether the same arbitrators have been chosen and will be unlikely to deprive certain parties of their right to influence the choice of arbitrators, as long as that possibility exists. A simple solution would be to make reference to the appointment of multi-party provisions or disallow consolidation after appointment of divergent panels or one of the panels, but the revised rules do not do so. The utter lack of time limitations for consolidation appears, at first glance, to make things more practicable, but it actually creates more problems than it solves.

This Article recognizes that the rules on multiple parties were intended to apply as guidelines and limitations on the provision on consolidation as well, thus creating more of the desired limits. However, there is no reference to those rules in the provision on consolidation. A losing party may find itself in a strong position to argue that it was not accorded equal treatment.

SUMMARY

In summary, the ICC rule on consolidation has become at once more specific and more flexible. Both these traits are an improvement. However, in making these improvements, the ICC has lost sight of the implications *Dutco* has on consolidation cases.

¹⁵⁵ Kröll, *supra* note 124, at 124; LACHMANN, *supra* note 33, at 248.

¹⁵⁶ LACHMANN, *supra* note 33, at 250; *cf.* Oberlandesgericht [OLG] [Frankfurt Court of Appeals] Nov. 24, 2005, 26 RECHTSPRECHUNG DER OBERLANDESGERICHE IN ZIVILSACHEN [OLGZ] Sch. 13/05.

¹⁵⁷ See Int'l Chamber of Commerce Rules of Arbitration art. 10(b) (2011).

The answer to the question “progress or change?” can thus not be a single answer, but must be answered in a lawyerly fashion: it depends. It will depend on how parties, arbitrators, and the ICC apply this new provision in the future.