Kluwer Arbitration Blog

Joinder and Consolidation Provisions under 2021 ICC Arbitration Rules: Enhancing Efficiency and Flexibility for Resolving Complex Disputes

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Multi-party and multi-contract complex disputes are now ubiquitous in international arbitration practice. This is unsurprising given the increasingly complex nature of international trade and commerce. Institutional statistics show substantial growth in the number of disputes involving multiple parties and multiple contracts. The 2019 International Chamber of Commerce ("ICC") Dispute Resolution Statistics reveal that out of the 2,498 parties involved in cases filed in 2019, approximately a third of the cases involved multiple parties (31%), of which the majority (59%) involved several respondents, 24% several claimants, and 17% several claimants and respondents. Although most multi-party cases involved three to five parties (87% of multi-party cases), cases involving six to ten parties represented 11% of multi-party cases. Three cases involved 10 to 30 parties while in two cases, the number of parties exceeded 100.

In order to meet the challenge of administering complex and sophisticated international disputes, the world's leading arbitral institutions have adopted new rules or introduced amendments in recent years. Joinder and consolidation are two key procedural mechanisms that have been incorporated in leading institutional arbitration rules in order to save time and costs and avoid parallel proceedings and inconsistent decisions.

On 1 December 2020, the ICC officially launched its 2021 Arbitration Rules, which entered into force on 1 January 2021. The new rules make important changes to the 2017 ICC Arbitration Rules including enhancements to the joinder and consolidation provisions, which will be the focus of this blog post. The changes to the rules advance the ICC's mission of delivering efficient and flexible arbitration services.

Article 7: Joinder of Additional Parties

The ICC in its 2012 Arbitration Rules introduced wide-ranging changes in relation to both joinder and consolidation, which were fully maintained in its 2017 Arbitration Rules. In the 2021 version, there is a significant amendment to the joinder provision.

An application to join additional parties after the constitution of the arbitral tribunal is not infrequent in arbitrations. In the 2017 Arbitration Rules, no additional party could be joined after

the confirmation or appointment of any arbitrator, unless the consent of all parties, including the additional party, was obtained. This limitation has, to some extent, been relaxed under the 2021 Arbitration Rules by adding a new exception, namely Article 7(5) which states that

> "*Any Request for Joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party having accepted the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable.*"

In this regard, even if a party at the commencement of the arbitration objects to the joinder of an additional party, the arbitral tribunal now has the power and discretion to permit the joinder where the conditions are met. The possibility of such joinder may arise as the case progresses, particularly where procedural efficiency and the relevance of the final award is bolstered by the joinder of the consenting additional party. The additional party may have evidence central to the dispute or a vested interest in the outcome of the dispute. Such joinder of a relevant party can facilitate the expansion of the scope of the award to cover that additional party's own prayers for relief. It can also ensure the efficacy of the award by ensuring that the proceedings take into account the effect of the award on other parties. This reduces the need for satellite or parallel proceedings in national courts that dilute the utility and impede the enforcement of the final award.

The requirement that the joined party accept the composition of the arbitral tribunal and the Terms of Reference, where applicable, avoids unnecessary delay, ensures the equality of treatment for all parties in the selection and appointment of the tribunal by way of the joined party's consent, and eliminates the risk of non-enforcement or setting aside of the award. This also assists to respond to the issues that arose in the case of *Siemens AG/BKMI Industrienlagen GmbH v Dutco Construction Company*. In this case, the French Cour de Cassation set aside an award, holding that the principle of equality in the appointment of arbitrators was violated. It further held that, as a matter of public policy, the party's right to nominate an arbitrator by way of agreement to arbitration rules can only be waived after the dispute has arisen.

The new Article 7(5) also sets out a non-exhaustive list of relevant circumstances which should be considered by the arbitral tribunal, including "*whether the arbitral tribunal has prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure.*"

Prima facie jurisdiction over the additional party is a paramount condition. Article 7 should be read with Article 6(4), which similarly specifies the requirement that the ICC Court is *prima facie* satisfied that an arbitration agreement may exist. The new Article 7(5) clarifies that "*any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party.*" The introduction of other relevant factors provides the tribunal with clear guidance and adequate flexibility to make decisions.

Article 10: Consolidation of Arbitrations

The amendments on consolidation of arbitrations under Article 10 of the 2021 ICC Arbitration Rules are less substantial and focus more on sharpening and clarifying the rule.

According to consolidation provisions under Article 10(b) of the 2017 ICC Arbitration Rules, consolidation is possible where all the claims in the arbitration were made under "*the same arbitration agreement*", namely the same contract. In addition, the original Article 10(c) only permitted consolidation of arbitrations under "*more than one arbitration agreement*" when the arbitrations involved the same parties, the disputes in the arbitrations arose in connection with the same legal relationship, and the ICC Court found the arbitration agreements to be compatible.

The new Article 10 of the 2021 ICC Arbitration Rules maintains the substance of its prior iteration but broadens the scope to include the circumstance of "*same arbitration agreements*". In this regard, the ICC Court may consolidate arbitrations when all the parties to the arbitration have signed the same arbitration agreement or arbitration agreements. Such consolidation does not have to be done between multiple parties to the same and single arbitration agreement. The new Article 10(c) clarifies that consolidation may be available even if the claims are "*not made under the same arbitration agreement or agreements"*.

This proposed amendment aims at achieving a balance between the necessary flexibility in complex arbitrations and the need to maintain the required predictability by avoiding giving the ICC Court excessive discretion. As a consequence, consolidation will be possible when:

1. All parties agree – Article 10 (a);
2. The parties in the arbitrations are not the same but have all signed the same arbitration agreement or arbitration agreements – Article 10 (b);
3. The parties in the arbitrations are the same, the disputes in the arbitrations arise from the same legal relationship and the ICC Court finds the multiple arbitration agreements under which the claims are made to be compatible – Article 10 (c).

In practice, this revision will be instrumental for managing complex disputes in the construction and energy sector where multiple parties, such as the employer, designer, engineer, main contractor and various subcontractors, are involved and multiple agreements are entered into among these multiple parties, as well as mergers and acquisitions disputes which usually involve a series of transaction documents, and multiple buyers and sellers, or shareholders.

An example of a situation captured by the new Article 10(b) is as follows. Parties A, B, C and D have signed both a Share Purchase Agreement and a Shareholders Agreement. Parties A and B are parties to the first arbitration based on the Share Purchase Agreement and parties A, C and D are parties to a second arbitration based on the Shareholders Agreement. In this scenario, if the Share Purchase Agreement and a Shareholders Agreement contain the same arbitration agreements, consolidation of arbitrations can occur, despite the parties in both arbitrations not being the same.

As to "compatible" arbitration agreements under Article 10(c), the lack of definition of what makes agreements "compatible" provides much needed flexibility and will assist to ensure that the Rules continue to be relevant as commercial disputes evolve. The typical circumstances of incompatible arbitration agreements have thus far included agreements with different mechanisms for the selection and appointment of arbitrators, seat of arbitration, language of arbitration and number of arbitrators. It demonstrates the importance of drafting arbitration agreements in multi-contract situations in identical terms as far as possible.

Conclusion

The 2021 ICC Arbitration Rules reinforce the ICC's position as a premier global arbitral institution that is nimble and responsive to a rapidly changing economic landscape. By enhancing the efficiency and flexibility of its arbitration rules with carefully considered and well framed amendments, users continue to have their commercial disputes administered with integrity, certainty and transparency.

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