

## 2021 ICC ARBITRATION RULES – WHAT THE REVISED JOINDER AND CONSOLIDATION RULES MEAN FOR CONSTRUCTION DISPUTES

By Bernd Ehle and Sam Moss

### What's new in the 2021 ICC Rules on joinder and consolidation?

The most notable changes in the new 2021 ICC Rules of Arbitration, which are applicable to all ICC arbitrations initiated from 1 January 2021, make it easier to join an additional party to a pending arbitration and to consolidate separate ongoing proceedings.

Under Article 7 in the 2017 ICC Rules, a request for **joinder** made after the confirmation or appointment of any arbitrator was subject to the unanimous consent of all parties. The new Article 7(5) now gives the arbitral tribunal the discretion to grant a request for joinder even without such unanimous consent, provided that the additional party accepts the constitution of the arbitral tribunal and agrees to the Terms of Reference. In exercising its discretion, the arbitral tribunal must take into account all relevant circumstances, including (i) whether it has *prima facie* jurisdiction over this new party; (ii) the timing of the request; (iii) possible conflicts of interests; and (iv) the impact of the joinder on the procedure.

With respect to **consolidation**, the 2017 ICC Rules did not expressly give the ICC Court of Arbitration the power to consolidate arbitrations initiated under multiple contracts unless all the parties agreed or the arbitrations were between the same parties. The new Article 10 of the 2021 ICC Rules now clarifies that the ICC Court can consolidate arbitrations involving different parties and different contracts if they contain the “same” arbitration agreements. This means that arbitrations arising from interrelated contracts between different parties – for instance a main contract and a subcontract, or a joint venture/consortium agreement and a main contract – can now be consolidated if the arbitration agreements in the contracts are effectively identical.

**Are these changes different to what already existed under other arbitral rules?**

Institutional arbitration rules have long included provisions allowing for joinder and consolidation but have typically imposed restrictive conditions such as requiring the unanimous consent of all concerned parties or requiring that the relevant proceedings arise out of the same arbitration agreement.

However, in the context of a push over the past years to enhance the efficiency of arbitral proceedings, many arbitral rules have adopted a more permissive approach to joinder and consolidation. Indeed, joinder and consolidation can in certain circumstances increase efficiency and eliminate the risk of conflicting decisions, as they avoid the need for different tribunals to decide separately on common factual and legal issues. The 2012 Swiss Rules of International Arbitration were among the first sets of rules to introduce a more liberal regime. More recently, the 2020 LCIA Arbitration Rules also adopted more flexible rules with respect to joinder and consolidation similar to those in the 2021 ICC Rules.

**Why are these changes relevant for construction arbitration?**

The main idea behind joinder and consolidation is to avoid parallel proceedings and prevent conflicting decisions in multi-party and multi-contract disputes, which commonly arise from construction projects. It is questionable, however, whether joinder and consolidation really would enhance efficiency in the context of most construction disputes.

**Is the more flexible approach to joinder and consolidation a good thing for construction disputes?**

Consolidation and joinder are controversial, particularly in the context of construction disputes. While they can improve efficiency in some cases, there are many reasons why these procedural tools may not be in the interests of one or several of the parties to a multi-party and/or multi-contract construction dispute.

For instance, a party may have a legitimate interest in keeping certain documentation or aspects of its relationship with another party, such as the price of a contract, confidential.

Consolidation or joinder could also prevent a party from fully defending itself. For example, if an employer brings a claim against a contractor for defects that the contractor considers to be attributable to a subcontractor, the contractor would normally seek to defend itself against the employer's claim, while also in parallel or subsequently bringing separate proceedings against the subcontractor. If, however, all three are parties to the same arbitration, it would be difficult for the contractor to both deny the employer's allegations and simultaneously bring a claim for the same defect against the subcontractor. Parties may also have an interest in disputes being resolved in a certain sequence, for example for insurance purposes.

Consolidation and joinder can also significantly complicate an arbitration from a procedural and substantive point of view, adding to its duration and cost.

They can in particular widen the scope of the factual and legal issues to be addressed in an arbitration. For instance, they may introduce into an arbitration additional issues that are relevant only to the legal relationship of two of the parties, but not the other(s). Arbitral tribunals may also, depending on the differences in the relevant contracts, have to apply different standards to address what may initially seem like the same issues, such as defects or delays.

In addition, consolidation (if it introduces a new party) and joinder can lead to tricky procedural issues common to all multi-party proceedings, such as how to structure the exchange of written submissions and how to organise hearings in a manner that ensures that the parties are treated equally, and that their right to be heard is preserved, on all issues.

In sum, the more flexible approach to consolidation and joinder in the 2021 ICC Rules may well be ill-adapted to many construction disputes.

**What should parties look out for in light of the 2021 ICC Rules' more permissive approach to consolidation and joinder?**

When negotiating contracts, actors on construction projects should carefully assess whether the more permissive approach to consolidation and joinder in the 2021 ICC Rules is desirable in the context of their project and contracts. If not, they may want to consider agreeing to superseding

procedural rules, or even excluding consolidation and joinder altogether. If so, parties are well advised to strive for consistency among the dispute resolution clauses in their contracts (including where they are multi-tiered), in order to ensure that they can seek joinder or consolidation if and when a multi-party or multi-contract dispute arises.

Once a dispute has arisen, parties should be mindful both of the possibility to seek joinder or consolidation, but also carefully assess the impact either would have on the proceedings and the parties' ability to adequately argue their case.

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