

The 2021 ICC Arbitration Rules – what revised joinder and consolidation rules mean for construction disputes



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

The most notable change in the new 2021 International Chamber of Commerce (ICC) Arbitration Rules, which are applicable to all ICC arbitrations initiated from 1 January 2021, is to make it easier to join an additional party to a pending arbitration.

Under Article 7 of 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. However, the new Article 7(5) of the 2021 rules 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 consider all relevant circumstances, including:

- whether it has *prima facie* jurisdiction over this new party;
- the timing of the request;
- possible conflicts of interest; and
- the impact of the joinder on the procedure.

With respect to consolidation, Article 10(c) of the 2017 ICC rules provided, among other things, that the ICC Court of Arbitration could consolidate arbitrations where "all of the claims in the arbitrations are made under the same arbitration agreement". In the 2021 ICC rules, this provision was amended to refer to "the same arbitration agreement or agreements". This has been interpreted in some commentaries on the 2021 ICC rules as clarifying that the ICC Court of Arbitration can consolidate arbitrations involving different parties and different contracts if they contain arbitration agreements that are effectively identical. However, this interpretation does not seem to be supported by the wording of the revised provision. The reference to the "same arbitration... agreements" appears to be merely intended to apply to situations in which individual arbitrations are commenced under more than one arbitration agreement, not where two arbitrations are commenced under arbitration agreements in different contracts.

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 they have typically imposed restrictive conditions such as requiring the unanimous consent of all concerned parties or that the relevant proceedings arise out of the same arbitration agreement.

However, in a push over the past few 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 London Court of International Arbitration rules also adopted more flexibility with respect to joinder and consolidation. For instance, the rules provide in Article 22A that the arbitral tribunal or the London Court of International Arbitration can order consolidation of arbitrations commenced under any compatible arbitration agreements and involving different parties if they arise "out of the same transaction or series of related transactions". However, as noted above, the 2021 ICC rules appear to remain more restrictive with respect to consolidation.

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. However, it is questionable whether joinder and consolidation really would enhance efficiency in the context of most construction disputes.

Is a 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 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 can 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. However, if 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.

In particular, consolidation and joinder can widen the scope of the factual and legal issues to be addressed in an arbitration. For instance, they may introduce additional issues into an arbitration that are relevant only to the legal relationship of two of the parties, but not other parties. 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 which are 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.

The more flexible approach to joinder in the 2021 ICC rules may well be ill-adapted to many construction disputes. However, with respect to consolidation, the 2021 ICC rules appear to maintain a more restrictive approach than some other arbitral rules and therefore may be the better choice for construction disputes.

What should parties look out for in light of the 2021 ICC rules' approach to consolidation and joinder?

When negotiating contracts, actors on construction projects should carefully assess whether the approach to consolidation and joinder in the rules of arbitration that they intend to adopt is desirable in the context of their project and contracts. The 2021 ICC rules' more restrictive approach to consolidation – as compared with other commonly used rules of arbitration – may well be better adapted to construction disputes. However, parties might want to consider amending the new more flexible approach to joinder in the 2021 ICC rules, or even excluding joinder altogether.

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

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