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Complex (Multi-Party and Multi-Contract) Arbitrations in Articles 7-10 of ICC Arbitration Rules

ICC Tahkim Kuralları Madde 7-10 Kapsamında Karmaşık (Çok Taraflı ve Birden Fazla Sözleşmeye Dayanan) Tahkimler

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Abstract

Complex arbitrations are one of the most complicated issues in the arena of international arbitration. ICC Arbitration Rules adopted in 2012 and 2017 contain detail provisions to resolve several procedural and jurisdictional problems arising from multi-party and multi-contract arbitrations, joinder of parties and consolidation of arbitrations. These provisions need to be evaluated together with the effect of arbitration agreement between all related parties and claims. This article aims to explain the structure of the rules, and the requirements set forth under these provisions.

Keywords

International arbitration, complex arbitrations, ICC Arbitration Rules, multiparty arbitration, arbitration with multiple parties, multi-contract arbitration, arbitration with multiple contracts, joinder of additional parties, consolidation of arbitrations, effect of arbitration agreement, *prima facie* assessment

Öz

Birden fazla tarafın yer aldığı veya birden çok sözleşmeye dayanan tahkimler, uluslararası ticari tahkimin en karmaşık konularındandır. 2012 ve 2017 yılında yürürlüğe giren ICC Tahkim Kuralları, birden fazla tarafın yer aldığı ve/veya birden fazla sözleşmeye dayanan tahkimler, üçüncü kişinin davaya dahil edilmesi ve davaların birleştirilmesinden kaynaklanan yetkiye veya usule dair pek çok soruna çözüm getiren detaylı hükümler içerir. Ancak bu düzenlemeler, tahkim anlaşmasının tüm taraflar ve talepler açısından hükümleri ile birlikte değerlendirilmelidir. Bu makalenin amacı, ICC Tahkim Kurallarının, karmaşık tahkimlere ilişkin hükümlerinin yapısını ve bu kurallarda aranan şartları açıklamaktır.

Anahtar Kelimeler

Milletlerarası tahkim, karmaşık tahkimler, ICC Tahkim Kuralları, çok taraflı tahkim, birden fazla sözleşmeye dayanan tahkim, üçüncü kişinin davaya dahil edilmesi, davaların birleştirilmesi, tahkim anlaşmasının hükümleri, *prima facie* değerlendirme

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Complex (Multi-Party and Multi-Contract) Arbitrations in Articles 7-10 of ICC Arbitration Rules

I. Introduction

Complex arbitrations are one of the most complicated issues in the arena of international arbitration. The need to resolve complex disputes that arise out of commercial transactions with multiple contracts and multiple parties, on the one hand, and the consensual nature of arbitration agreements, on the other hand, raise several procedural and jurisdictional problems.

In 2012, the International Chamber of Commerce (“ICC”) updated its arbitration rules (“ICC Rules”) to regulate complex arbitrations. The rules adopted in 2017 preserved the perspective that had been adopted in 2012¹.

Prior to entry into force of the 2012 ICC Rules, the ICC International Court of Arbitration (“Court”) already had extensive and established practices on these issues. However, these issues were dealt with using the broad interpretation of arbitration agreements, particularly with extensions of arbitration agreements to non-signatories, using the Court’s discretion on *prima facie* assessments as to jurisdiction. The 2012 ICC Rules, which codified the existing practices of the Court under the 1998 ICC Rules², brought predictability to the arbitration community and also provided the Court, the arbitral tribunals, and the parties with a procedural framework.

The main reason for these complex arbitration provisions is the rise in the number of cases extending beyond the classic model of arbitration with two parties. This is a natural consequence of rapidly increasing complex transactions in which multiple parties are involved and the parties to transactions concluding more than one contract³. In such relations, the outcome of these types of arbitrations may affect third parties. Also, there may be direct claims, counterclaims, and cross claims as well as recourse claims between parties.

According to the 2019 dispute resolution statistics of the ICC⁴, 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 multiparty cases involved three to five parties (87% of

1 The ICC announced in October 2020 that it revised its arbitration rules. The 2021 ICC Rules are subject to editorial corrections until their official launch in December 2020 and will apply to cases submitted from 1 January 2021 onwards. This article is drafted according to 2017 ICC Rules and relevant revisions in the 2021 ICC Rules are mentioned in the footnote.

2 Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration* (ICC 2012) para. 3-287. For the Court’s practice under the ICC 1998 Rules, please see Simon Greenberg, José Ricardo Feris and Christian Albanesi, “*Consolidation, Joinder, Cross-Claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience*”, in Bernard Hanotiau and Eric A. Schwartz (eds), *Multiparty Arbitration* (ICC 2010).

3 Thomas H. Webster and Michael W. Bühler, *Handbook of ICC Arbitration*, (4th edn, Sweet & Maxwell 2018) (n 7-3) 157.

4 <https://iccwbo.org/publication/icc-dispute-resolution-statistics/> (Access: 25.08.2020).

multiparty cases), cases involving six to ten parties represented a significant 11% of multiparty cases. Three cases involved 10 to 30 parties while in two cases the number of parties exceeded 100.

II. The Structure of the ICC Rules Related to Complex Arbitrations

The ICC Rules cover complex arbitrations that fall into the provisions as (i) Article 7 as to the joinder of additional parties; (ii) Article 8 as to the claims between multiple parties; (iii) Article 9 as to arbitrations that are based on multiple contracts; and (iv) Article 10 concerning the consolidation of arbitrations.

Articles 7 and 8 may be referred to as the basis for multi-party arbitrations whereas Article 9 may be classified as the basis of multi-contract arbitrations. Article 10 may apply to all pending arbitrations.

The provisions of the ICC Rules on complex arbitrations make clear reference to Article 6 of the ICC Rules that regulate the effect of arbitration agreements. Although the ICC Rules regulate provisions on “multi-party arbitrations” and “arbitration with multiple contracts,” the alternative dispute resolution nature of arbitrations, based on the consent of the parties, should not be forgotten⁵. Particularly, Article 6(4)(i) relates to multi-party arbitrations whereas Article 6(4)(ii) sets forth the requirements for multi-contract arbitrations if there are multiple arbitration agreements. For this reason, when the rules of complex arbitrations on multi-contract and multi-party arbitrations are examined, Article 6 and its subparagraphs 3 to 7 (more precisely Article 6(4) and its subparagraphs (i) and (ii)) should always be taken into consideration, as well.

Under the provisions of complex arbitrations, Article 10, which regulates the consolidation of arbitrations, stands alone by not making any reference to Article 6(3)-6(7). This is conceivable as Article 10 covers the period after the *prima facie* assessment as to jurisdiction is made by the Court, and the subject matter concerning consolidations concerns arbitrations that are pending.

In addition to Articles 7-10 and 6(3)-(7) of the ICC Rules, Article 4(3) on Request for Arbitration, Article 5(5) on Answer to the Request for Arbitration, Article 12 on Appointment of Arbitrators, and Article 36 on Advance on Costs are also influenced by the provisions on complex arbitrations. However, in this article, only Articles 7-10 and 6(3)-(7) of the ICC Rules will be examined.

III. Articles 6(3)-(7) of the ICC Rules

The consensual nature of arbitration as a dispute resolution mechanism is emphasized again via the references to Article 6(3)-6(7) in Articles 7-10. These

⁵ Webster / Bühler (n 7-7) 159.

references reiterate two basic principles of arbitration in addition to its consensual nature: *prima facie* assessment of the Court and competence-competence (Article 6(3) and 6(5) set forth that the jurisdictional issues are decided by the Court on a *prima facie* basis and will finally be resolved by the arbitral tribunal)⁶.

The provisions of Article 6(3)-(7) follow a specific order. Article 6(3) and Article 6(5) regulate the authorities in assessing matters of jurisdiction. This article grants a gatekeeping role to the Secretary General⁷. Unless the Secretary General refers the matter to the Court, jurisdictional issues do not prevent arbitrations from proceeding, and the arbitral tribunal decides, in its sole discretion, either in the final award or in a separate preliminary award, its findings as to jurisdiction. The Secretary General shall not refer the matter to the Court unless he/she is uncertain as to the *prima facie* jurisdiction of the arbitral tribunal⁸. With this authority, the Secretary General's rendering of a positive decision is the first step as to *prima facie* jurisdiction of the arbitral tribunal. However, the Secretary General is not authorized to render a negative decision with respect to jurisdiction.

Article 6(4) regulates the authority of the Court to decide as to jurisdiction and to what extent the arbitration shall proceed in cases the matter is referred to the Court⁹. If the Court renders a negative decision, the arbitration shall not proceed, and Articles 6(6)-(7) of the ICC Rules will be applicable; otherwise, the arbitration shall proceed. In such case, the Court's decision is only administrative and temporary, and any arguable questions as to jurisdiction are to be dealt with by the arbitral tribunal (Article 6(5)). What is remarkable in Article 6(4) is that unlike the 1998 ICC Rules, the Court may decide to allow arbitrations only for some parties and for some claims rather than declaring a negative jurisdictional decision for all of the parties and claims.

Article 6(4)(i) relates to multi-party arbitrations whereas Article 6(4)(ii) sets forth the requirements for multi-contract arbitrations if there are multiple arbitration agreements. It should be underlined that "multiple contracts" and "multiple arbitration agreements" are separate issues and have different legal effects. Article 6(4)(ii) applies only in cases where there are multiple arbitration agreements. If there are multiple contracts but only one arbitration agreement, only Article 9 applies, and the requirements set forth under Article 6(4)(ii) will not be sought.

As a reflection of the competence-competence principle, Article 6(5) states that the arbitral tribunal is the final authority to decide on jurisdictional issues except in cases where the Court has granted a negative decision that prevents the arbitration

⁶ 2012 Secretariat's Guide, para. 3-196.

⁷ Webster / Bühler (n 6-22) 112.

⁸ 2012 Secretariat's Guide, para. 3-200.

⁹ *ibid*, para. 3-210.

from proceeding. As mentioned above, upon the Court's negative decision as to jurisdiction, the arbitration shall not proceed, the proceedings shall be concluded, and the file shall not be transmitted to the arbitral tribunal.

Article 6(6) and Article 6(7) regulate the stages following the Court's negative decision on jurisdiction. Article 6(6) relates to the *parties* that are excluded from the arbitration by the Court's negative decision as to jurisdiction whereas Article 6(7) relates to *claims* excluded by the Court. Pursuant to Article 6(6), where the Court has decided that the arbitration cannot proceed in respect of some or all of them, any party retains the right to ask any court having jurisdiction whether or not and in respect of which of them there is a binding arbitration agreement. Article 6(7) sets forth that where the Court has decided that the arbitration cannot proceed in respect of any of the claims, such a decision shall not prevent a party from reintroducing the same claim at a later date in other proceedings.

IV. Joinder of Additional Parties – ICC Rules Article 7

Article 7 of the ICC Rules regulates the joinder of additional parties to arbitration. While evaluating the joinder of additional parties as per Article 7, three points should be kept in mind. Firstly, the ICC Rules, unlike some other institutional rules, regulate only the joinder and not the intervention¹⁰. In other words, a third party cannot intervene in an existing arbitration under the ICC Rules on its own discretion¹¹. One of the parties to the arbitration must join that additional party to the arbitration. Secondly, the party who seeks to join an additional party must address a claim against the additional party¹². A party cannot seek to join an additional party without addressing any claim against it, merely to defend or support its position against the counterparty's position. Thirdly, for a joinder to be effective, there must be an existing arbitration. Filing a new arbitration using Article 7 as its basis is not allowed. In light of this information, the provisions of Article 7 are examined, below.

There are four subparagraphs in Article 7. The first subparagraph covers the request for joinder ("RfJ"). It sets out how an additional party may be joined to an existing arbitration. The second subparagraph details the content of the RfJ. The third and fourth subparagraphs deal with the references to the request for arbitration, answer to the request for arbitration, and set out the *mutatis mutandis* application of relevant articles as they have common points with the RfJ and answer thereto.

¹⁰ Webster / Bühler (n 7-19) 161.

¹¹ 2012 Secretariat's Guide, para. 3-292.

¹² *ibid*, para. 3-302.

Firstly, an additional party¹³ may be joined by any of the parties (claimant, respondent, or an additional party)¹⁴. Although it is conceivable that the claimant might address the request for arbitration to all relevant parties from the outset of arbitration and there may be no need to allow the claimant to join an additional party, it is possible that, during the course of the proceedings, the circumstances might give rise to the need for the claimant, as well¹⁵.

The party wishing to join an additional party shall submit its request for arbitration to the Secretariat against the party which it wished to join, and this request is defined as a request for joinder. The legal effects of a RfJ are equivalent to those of a request for arbitration. The date on which the RfJ is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party¹⁶. Thus, once the RfJ is submitted to the Secretariat, the additional party, immediately and automatically, becomes a party to the arbitration¹⁷. This rule is different than the ICC 1998 Rules, under which the Court must, firstly, decide whether to join an additional party to the arbitration.

The additional party may be any third party who is not already a party to the arbitration. Although that third party becomes an additional party to the arbitration, immediately and automatically upon submission of the RfJ, this does not mean that it will remain as such¹⁸. As per the reference to Article 6(3)-6(7) and 9 of the ICC Rules, the additional party must be a third party whom might also be bound by the arbitration agreement. It must be one of the signatories of the arbitration agreement, or the agreement could be extended to it. Otherwise, the additional party may be excluded from the arbitration as a result of the *prima facie* assessment by the Court or by the arbitral tribunal in one of its decisions¹⁹.

Once the RfJ is notified to the additional party, it has the same rights and obligations as any other party. It may submit an answer, raise jurisdictional objections, file claims, and request joinders of additional parties. However, the ICC Rules do not have a provision on an additional party's right to submit counterclaims. The ICC Rules clearly stated that the additional party may make claims as per Article 8, which regulate claims between multiple parties.

Another important point with regard to the joinder of an additional party is its timing. As per Article 7(1), no additional party may be joined after the confirmation

13 The term "additional party" was preferred over the more commonly used term "third party" (Webster / Bühler (n 7-15) 162).

14 2012 Secretariat's Guide, para. 3-200.

15 Webster / Bühler (n 7-9) 160.

16 2012 Secretariat's Guide, para. 3-310.

17 Webster / Bühler (n 7-16) 162.

18 2012 Secretariat's Guide, para. 3-319.

19 Webster / Bühler (n 7-20/24) 163-64.

or appointment of any arbitrator unless all parties, including the additional party, otherwise so agree²⁰. This provision is a clear reflection of the ICC Rules' approach to the importance of the parties' participation in the constitution of the arbitral tribunal, which has become a very important topic, particularly following the *Dutco* case²¹.

The last phrase of Article 7(1) sets out that the Secretariat may establish a time limit for the submission of a RfJ. It is arguable that the Secretariat may not know if any party is planning to submit a RfJ. This argument would be acceptable. However, the ICC Rules relate to cases where the Secretariat could understand or one of the parties notifies that it is planning to submit a RfJ. With this phrase, the ICC Rules aim to prevent delays that can be caused by one of the parties in submitting a RfJ²².

V. Claims between Multiple Parties – ICC Rules Article 8

First of all, Article 8 applies if there is a multi-party arbitration. This means that either as respondent or as claimant, or as an additional party, there must be more than two parties involved in the arbitration²³. If there is only one claimant and only one respondent, Article 8 shall not apply.

There are three subparagraphs in Article 8 of the ICC Rules. The first paragraph sets forth general rules regarding claims between multiple parties. The second paragraph defines the content of the claims, and the third paragraph is related to the procedure for making the claim and answering it.

As seen in the title of Article 8, as well as in Article 8(1), this Article regulates the *claims* between multiple parties. As per Article 2 of the ICC Rules, “claim” or “claims” include any claim by any party against any other party. Considering the use of “may” in the Article, it is understood that raising claims is not an obligation for the parties but rather an authority to do so. It should also be stated that Article 8 does

20 The 2021 ICC Rules adopts more flexible approach as to the timing. Article 7(5), which is added to Article 7 in the 2021 revisions, allows Parties to submit requests seeking the joinder of additional parties once any arbitrator is appointed or confirmed. Such requests are decided by the arbitral tribunal, subject to the joining party accepting the constitution of the arbitral tribunal and the terms of reference. In deciding, the arbitral tribunal will take all relevant circumstances into consideration and in particular (i) whether it has prima facie jurisdiction or not; (ii) the timing of the Request for Joinder; (iii) possible conflicts of interest and (iv) the impact of joinder on the arbitral procedure. The decision to join an additional party will not mean that the arbitral tribunal acknowledges jurisdiction with respect to that party.

21 French Supreme Court's (Cour de Cassation) decision rendered on 7 January 1992 is one of the cornerstone decisions of multiparty arbitration and is known as the *Dutco* case. In brief, the case was as follows: three companies (*Dutco*, *BKMI* and *Siemens*) entered into a consortium agreement for the construction of a factory on behalf of their common employer in the Middle East. The consortium agreement contained an ICC arbitration clause expressly providing for the settlement of disputes by an arbitral tribunal composed of three arbitrators. The *Dutco* company as claimant filed a request for arbitration against *BKMI* and *Siemens*, and nominated its arbitrator. The two defendants had been requested to agree on a joint arbitrator. They did so under protest and challenged subsequently the proper composition of the tribunal. The Paris Court of Appeal saw no problems with the appointment procedure which had been standard practice at the time and rejected the challenge. The Cour de Cassation by contrast considered the appointment process to be contrary to public policy stating that the “equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the dispute has arisen” and annulled the award.

22 Webster / Bühler (n 7-28) 165.

23 2012 Secretariat's Guide, para. 3-322; *ibid.*, (n 8-1) 169.

not seek to make counterclaims between the parties. Any party may make any claim against any party irrespective of whether that party has made a claim against it. One or more claimants, defendants, and additional parties may make claims against each other. However, the party against which a claim is addressed must already be a party to the arbitration; otherwise, the claiming party must refer to Article 7 of the ICC rules and join the additional party to the arbitration by filing its claim against that party.

Although the Article entitles the parties to make claims against each other, there is a time limit in which to do so²⁴. According to Article 8(1), no new claims may be made after the terms of reference are signed by the parties and the arbitral tribunal or approved by the Court²⁵. As is pointed out, the time to make claims is not limited to the constitution of the arbitral tribunal (unlike Article 7 on the joinder of parties) but to the finalization of the terms of reference. If any party files a claim after the terms of reference is finalized, such claim will be subject to authorization by the arbitral tribunal, and the latter shall rule taking into consideration Article 23(4) of the ICC Rules.

When making a claim between multiple parties, Article 8(3), which clarifies how the claims will be made according to the different stages of the proceedings, should also be taken into consideration. According to this sub-paragraph, if the claims are made prior to the Secretariat transmitting the file to the arbitral tribunal, the provisions related to request for arbitration and answer to the request for arbitration shall apply *mutatis mutandis*. If the claims are to be made after the Secretariat transmits the file to the arbitral tribunal, then the latter shall determine the procedure²⁶. There is no restriction or guideline as to how the arbitral tribunal shall make such determination.

Article 8(1) makes reference to the provisions of Articles 6(3)-6(7) and Article 9. As per these references, it should be kept in mind that all parties against which a claim will be made must be a party with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the Rules binds it. Thus, if a claim is made by one of the parties against any of the parties, the Court shall decide whether such claim may be made against that party as per the relevant arbitration agreement. If the claims are based on a different arbitration agreement, then Article 9 shall apply.

VI. Multiple Contracts – ICC Rules Article 9

Article 9 of the ICC Rules regulates arbitrations with multiple contracts. This Article makes clear that claims under different contracts and different arbitration agreements may be brought in the same arbitration. It should not be thought that the claims in a multi-contract arbitration must be made by the same party. For instance,

24 Webster / Bühler (n 8-8) 171.

25 2012 Secretariat's Guide, para. 3-334.

26 Webster / Bühler (n 8-9) 171.

the respondent may make a claim under a different contract or different arbitration agreement. What is important here is that the parties must specify which claim is made under which arbitration agreement (ICC Rules Article 4(3)(e-f)).

At this point, it should be repeated that this provision of Article 9 starts with the references to Articles 6(3)-6(7) and Article 23(4)²⁷. These references mean that the claims must be made until the terms of reference are established and the jurisdiction is upheld by the Court as a consequence of its *prima facie* assessment. The second important result of these references is the application of Article 6(4)(ii), which will be elaborated upon, below.

Article 9 clearly specifies that, for a multi-contract arbitration, the claims do not need to be made under the same arbitration agreement. The claims may be made either under one, or more than one, arbitration agreement.

It is also important to note that “multiple contracts” and “multiple arbitration agreements” are separate issues and have different legal effects. More specifically, Article 6(4)(ii) applies only in multi-contract cases where there are multiple arbitration agreements. If there are multiple contracts but only one arbitration agreement, only Article 9 will apply, and the requirements set forth under Article 6(4)(ii) will not be sought; this sub-paragraph does not apply to multiple contracts with only one arbitration agreement.

Accordingly, if the claims are made under more than one contract but with one arbitration agreement, only Article 9 shall apply, and the *prima facie* assessment will be made according to Article 6(3) together with the first sentence of Article 6(4); no examination as to Article 6(4)(ii) will be made. However, if more than one arbitration agreement is at stake, then Article 6(4)(ii) shall also apply.

Article 6(4)(ii) stipulates two conditions for making claims under more than one arbitration agreement. Firstly, the arbitration agreements must be compatible, and secondly, it must be established by the Court that all parties to the arbitrations may have agreed that those claims can be decided together under a single arbitration. For making such evaluation, no guidance is provided. There is no definition or explanation under the ICC Rules provided for “more than one arbitration agreement,” “compatibility,” and the constructive consent of the parties who “may have agreed” to a single arbitration.

The Court has discretion to decide on these matters. It is generally accepted that the compatibility test, which is also made for consolidation of arbitrations as per Article 10 of the ICC Rules, refers mostly to procedural aspects of the arbitration agreements, such as the place of arbitration, the number of arbitrators, and the language, etc. The

²⁷ 2012 Secretariat's Guide, para. 3-343.

law applicable to the merits is not seen as an incompatible matter as the arbitral tribunals may decide on the claims according to different substantive laws²⁸.

Although the arbitration agreements do not need to be identical for being compatible²⁹, it is important that the arbitration agreements do not contradict. On the other hand, it is not clear how to decide, if the arbitration agreements do not contradict but one of them is silent on some matters, which matters are regulated under the other one. Having said that, it should not be forgotten that the parties are always free to rectify any incompatibilities of arbitration agreements, if any.

Another challenging requirement in Article 6(4)(ii) is to determine whether all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration. The Article requires establishing that the parties *may have agreed* and not *have agreed*. This is constructive consent. The determination is at the discretion of the Court, and it may take into consideration all elements that might lead to such conclusion³⁰. For instance, it is asserted that identical arbitration agreements would be a sign for constructive consent and different arbitration agreements may lead to the opposite. The Court may take into consideration the identity of the parties to different arbitration agreements and their relation, dates of the contracts containing the arbitration agreements, and similarities in the wording of the arbitration agreements. The Court may also take into consideration whether the contracts containing the arbitration agreements relate to the same legal relationship and/or the same economic transaction (as provided for consolidation of arbitrations as per Article 10 of the ICC Rules), whether the relationship between the contracts are horizontal or vertical, etc.

As is seen above, Article 9 appears to be a simple Article with one phrase only, but with the references to Article 6(4)(ii), the evaluation may become more complicated.

In light of the foregoing, it might be helpful to summarize the application of Article 6(4) of the ICC Rules in the case of multi-contract and multi-party arbitrations: (i) if there are two parties and the claims are based on one arbitration agreement only, the first sentence of Article 6(4) applies; (ii) if there are more than two parties and the claims are based on only one arbitration agreement, the requirements of Article 6(4)(i) also apply; (iii) if there are two parties and the claims are based on two or more arbitration agreements, the requirements of Article 6(4)(ii) also apply; (iv) if there are more than two parties and the claims are based on two or more arbitration agreements, the specific requirements under both Article 6(4)(i) and Article 6(4)(ii) apply. As a final note: The Court does not apply the requirements separately; rather, it makes a holistic assessment of the case.

28 Webster / Bühler (n 6-43) 117.

29 2012 Secretariat's Guide, para. 3-243.

30 *ibid*, para. 3-249.

VII. Consolidation of Arbitrations – ICC Rules Article 10

Article 10 of the ICC Rules regulates consolidation of arbitrations. Consolidation, as referred to under the Rules, is a procedural mechanism to merge two or more pending ICC arbitrations. If the arbitrations are consolidated, one single arbitral tribunal decides on all issues. The main purposes of consolidation are, amongst others, providing procedural efficiency, lowering the costs, elimination of risks that may arise from inconsistency between decisions granted in separate proceedings, and enabling arbitral tribunals to have a better understanding and fuller view of the transaction at issue.

The competent authority to consolidate arbitrations is the Court. The decision on consolidation is administrative, not legal. It is not *prima facie*, unlike the Court's decisions as to jurisdiction. Accordingly, the Court's decision on consolidation is final, and arbitral tribunals cannot decide again as to consolidation thereafter³¹.

The Court cannot make such a decision on its own initiative³²; the will of the parties still count³³. The Court shall decide on consolidation only if one of the parties has submitted a request. However, the Court is entitled to decide on consolidation at its own discretion. With the usage of the word 'may,' the ICC Rules clarify that the Court is not obliged to consolidate the arbitrations or not even if the conditions have been met³⁴. 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 individuals have been confirmed or appointed.

The conditions for consolidation are set out in Article 10 of the ICC Rules. This article does not specify the form and content of the request for consolidation; thus, the request may be made even with a simple letter addressed to the Court. Moreover, this article does not establish a time limit. The Court will consider the phases of the arbitration and will decide on the matter without any time limitation.

As is pointed out in this article, among the provisions on complex arbitrations, Article 10 stands alone by not making any reference to Article 6(3)-6(7). This is conceivable as Article 10 covers the period after the *prima facie* assessment as to jurisdiction is made by the Court, and the subject matter concerning consolidations concerns arbitrations that are already pending.

31 Webster / Bühler (n 10-2) 177.

32 2012 Secretariat's Guide, para. 3-351.

33 Stephen R. Bond, "Dépeçage or Consolidation of the Disputes Resulting from Connected Agreements: the Role of the Arbitrator", in Bernard Hanotiau and Eric A. Schwartz (eds), *Multiparty Arbitration* (ICC 2010)

34 2012 Secretariat's Guide, para. 3-358.

The first condition for consolidation is the presence of two or more arbitrations. These arbitrations must be conducted according to the ICC Rules. The Court cannot consolidate the arbitrations governed by any rules other than the ICC Rules. Once the arbitrations are consolidated, the dispute shall continue to be discussed in one arbitration proceeding only (in the first one that had been initiated unless the parties agree otherwise)³⁵. Three conditions must be met for consolidation. These three conditions are to be evaluated separately, and a holistic assessment is not required. If one of these conditions is met, the Court may proceed with consolidation.

The first condition set out in Article 10 is the parties' consensus as to consolidation. If the parties agree to consolidate, the Court does not need to evaluate any other conditions. However, as stated above, consolidation is at the Court's discretion, and it is not obliged to consolidate the arbitrations despite the parties' agreement to that end.

As a second condition, the Court may consolidate the arbitrations if all of the claims in the arbitrations to be consolidated are based on the same arbitration agreement³⁶. As is clear, the provision mentions the existence of the "same arbitration agreement" and not the "same contract." It should be underlined that "same arbitration agreement" and/or "more than one arbitration agreement" are separate issues than the "same contract" and/or "multiple contracts." They all have different legal consequences. For instance, disputes might arise from several contracts but be subject to one arbitration agreement between the parties.

The third condition contains three sub-conditions: If the claims are made under more than one arbitration agreement, (i) the arbitrations must be between the same parties, (ii) the disputes in the arbitrations have arisen in connection with the same legal relationship, and (iii) the Court finds the arbitration agreements to be compatible. Under this third condition, the Court shall make a holistic assessment; meeting just one of the criteria would not suffice to consolidate the arbitrations.

As stated, above, the Court has broad discretion as to consolidation. In parallel, the conditions set out above, under the third condition, state the words '*same legal relationship*' and '*compatibility*,' which entitle the Court with broad interpretation³⁷. The same legal relationship is interpreted by the Court as the same economic transaction and, as well, may be the same project. For the sake of compatibility, the Court has no restrictions in taking even just procedural issues into consideration when deciding whether or not the arbitrations are compatible. As to the '*same parties*' requirement, it can be said that the Court strictly evaluates whether the parties are the same or not.

35 *ibid*, para. 3-362.

36 According to 2021 ICC Rules, the arbitrations may be consolidated if all of the claims in the arbitrations to be consolidated are based on the same arbitration agreement or agreements.

37 2012 Secretariat's Guide, para. 3-357.

VIII. Conclusion

As has been set forth in this article, complex arbitrations are one of the most complicated issues in the arena of international arbitration. The need to resolve complex disputes that arise out of commercial transactions with multiple contracts and multiple parties, on the one hand, and the consensual nature of arbitration agreements, on the other hand, raises several procedural and jurisdictional problems. However, the ICC Rules contain specific regulations as to these matters that have been adopted as a consequence of long-lasting experiences.

In any event, particularly if the parties will be involved in complex transactions, it might be vital for their success in arbitration to consider the provisions on complex arbitrations not only at the dispute stage but also at the negotiation stages of the contracts and the arbitration agreements.

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