



ICC (INTERNATIONAL CHAMBER OF COMMERCE)

ICC Case No. 22466/ASM/JPA (C-22967/JPA)

**(1) GRUPO UNIDOS POR EL CANAL, S.A., (2) SACYR S.A., (3) SALINI-IMPREGILO S.P.A,
AND (4) JAN DE NUL N.V. V. AUTORIDAD DEL CANAL DE PANAMA (IV)**

**DECISION OF THE ICC COURT ON CONSOLIDATION OF ICC CASES NO. 22967/JPA AND
22466/ASM/JPA INTO CASE 20910/ASM/JPA**

06 December 2017

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Decision of the ICC Court on Consolidation of ICC Cases No. 22967/JPA and 22466/ASM/JPA into Case 20910/ASM/JPA

Dear Mesdames, Dear Sirs,

At its session of 30 November 2017, the International Court of Arbitration of the International Chamber of Commerce ("Court") decided not to consolidate cases 22967/JPA and/or 22466/ASM/JPA into Case 20910/ASM/JPA (C-20911/ASM) (Article 10).

As per the parties' agreement, the Court has accepted to communicate the reasons for its decision pursuant to [Article 10 of the Rules](#).

Accordingly, we inform you as follows:

1. The Court considered Claimants' application of 17 October 2017 to consolidate cases 22967/JPA and 22466/ASM/JPA into case 20910/ASM/JPA (C-20911/ASM) under Articles 10(b) and/or 10(c) ("**the Application**").
2. Pursuant to Sections 11 and 12 of the Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules ("Secretariat's Note"), the parties have agreed for the Court to provide reasons for its decision, and the Court has accepted to communicate the reasons for its decision on the Application to consolidate.
3. The parties have exchanged a series of submissions on this matter: *viz* Claimants' Application of 17 October 2017 ; Respondent's reply of 10 November ("**Response**"); Claimants' reply of 23 November ("**Rejoinder**"); and Respondent's rejoinder of 28 November ("**Rejoinder**").
4. The Court has examined with care all of those submissions (including their attachments). A summary of the main points of the Application, as well as the reasons for the Court's decision, are set out below.

I OVERVIEW OF THE APPLICATION

5. The Application is related to various claims which have arisen in relation to a project involving the Panama Canal, in which First Claimant undertook to provide various services to Respondent regarding the installation of a third set of locks ("**the Contract**"). It is alleged that, under two further contracts, Second to Fourth Claimants: (i) guaranteed First Claimant's performance under the Contract ("**the JSG**"); and (ii) agreed to respect any arbitral award rendered under the Contract ("**the GAA**").

6. The mother proceedings, for these purposes, are themselves consolidated. However, that consolidation was achieved through agreement between the parties, after the Court rejected (twice) an earlier application to consolidate in those cases. Claimants now request that two further extant arbitrations, viz 22967/JPA and 22466/ASM/JPA ("the Other Proceedings"), are consolidated into this action.
7. Cases 22967/JPA and 22466/ASM/JPA were commenced in December 2016 and July 2017 respectively. Case 20910/ASM/JPA (C-20911/ASM), meanwhile, was commenced in March 2015.
8. Claimants' Application proceeds under Article 10(b) and/or Article 10(c). Each of the heads are considered in turn below. After doing so, consideration is given to whether (were either or both of the heads to apply, in principle) the Court should nevertheless exercise its discretion to reject the Application to consolidate on the facts of this case.

II REASONS FOR THE COURT'S DECISION

9. The Court concludes that the conditions of Article 10(b) are not met, but that – on the facts of this case – the conditions of Article 10(c) are in principle met. Nevertheless, the Court then exercises its discretion to decide not to consolidate the proceedings, given their differing stages and in light of the risk of disruption and delay that is likely to arise should consolidation proceed.

Application of Article 10(b) of the Rules

10. Article 10(b) provides, in principal part, that:
"The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where.. all of the claims in the arbitrations are made under the same arbitration agreement".
11. Claimants allege that each of the three arbitrations *"are all based on the same three arbitration clauses"* (emphasis in original; para. 7(a); Application). Those three arbitration agreements are found in the Contract, the JSG and GAA respectively. In particular, *"while there are three arbitration clauses, the Parties have made all of their claims in the three arbitrations under the exact same Arbitration Clauses"* (para. 8; Application).
12. Respondent disputes this. It maintains that the Rules require there to be *"one arbitration agreement in play"* (para. 30; Response). Moreover, it explains that the different Claimants make different claims under different arbitration agreements in the various proceedings. In particular, Respondent argues that, *"while the Claimants claim pursuant to the Contract and the [JSG] in [this arbitration], they make no claims pursuant to the [GAA]. However, in the [Other Proceedings], all of the Claimants pursue claims under all three agreements...."* (para. 33; Response).
13. Claimants do not appear to dispute the factual basis of this objection – viz that different claims are brought by different parties under different arbitration agreements in the various proceedings.

Their Rejoinder refers to this "*aver [ment]*", and notes simply that "*the fact that not all of the claims brought in the arbitrations to be consolidated are brought under all of the arbitration clauses is a circumstance internal to each of the arbitrations and is totally irrelevant to the Court's decision to consolidate*".

14. In other words, Respondent's argument is said to be immaterial to the Court's decision under Article 10(b): "*The number of arbitration clauses on which the Parties rely is irrelevant for the purposes of consolidation where the arbitration clauses are the same in all arbitrations and that they are all invoked " en bloc " in each of them, as is the case here..... What is relevant to consolidation under Article 10(b) is that each of the arbitrations to be consolidated (and not each of the claims raised therein) be brought under the same arbitration agreement*" (page 2; Rejoinder).
15. The Court disagrees with Claimants' analysis. The language of sub-Article (b) is straightforward and clear. Whilst the principal focus of the parties' submissions has been on the final phrase "*the same arbitration agreement*", the answer is most readily found by reading the sub-clause in full:

"*all of the claims in the arbitrations are made under the same arbitration agreement*" (emphasis added).
16. As such, and contrary to Claimants' argument at page 2 of the Rejoinder, the Court does need to consider "the claims" raised in each arbitration. Indeed, it needs to consider "all" of them, and identify whether they are made under *the same* arbitration agreement (with emphasis on the definite article). Not whether they are made under different, but (*arguendo*) compatible, arbitration agreements.
17. Given that certain of the claims are raised under different arbitration agreements under different contracts, the fact that those arbitration agreements might be compatible (a point discussed further below) does not matter in the context of Article 10(b).
18. In short, the situation before the Court does not fall under [Article 10\(b\) of the Rules](#). Consolidation is not therefore possible thereunder.

Application of Article 10(c) of the Rules

19. For its part, Article 10(c) provides as follows:

"*The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, 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 Courts finds the arbitration agreements to be compatible*".
20. It is common ground that: (a) the arbitrations are between the same parties; and (b) the relevant disputes arise in connection with the same legal relationship. Given that "*the claims in the arbitrations are made under more than one arbitration agreement*", and subject to the question of

the Court's discretion, the only issue before the Court was whether the arbitration agreements were compatible.

21. The three arbitration agreements are similar, but not identical. The parties have raised a number of points on this topic. We address the principal grounds of alleged incompatibility relied upon by Respondent (and relevant to our decision) below.
22. Two of Respondent's objections are set out in paragraph 35 of its Response: *viz* a difference in a threshold requirement before the commencement of proceedings, and a distinction between the likely impact of the IBA Rules on the proceedings. In the Court's opinion, neither are "differences" of sufficient relevance and/or importance to make the arbitration agreements "incompatible" in this case, for the reasons set out in page 3 of Claimants' Rejoinder. They would not impact materially the effective running of the consolidated proceedings (and would be unlikely to affect them at all).
23. The more pertinent point is the argument (from paragraph 36 of the Response) that two of the arbitrations are being conducted in accordance with the 2012 Rules, whereas one falls under the 2017 revision.
24. In that context, the only potentially material area of difference identified by Respondent is that concerning the timetable for drawing up the Terms of Reference. It is, indeed, difficult to identify which of the other new Rules might be pertinent on the facts of this case. However, the Court does not consider that there is any real incompatibility caused by the differences in versions of the Rules in this particular case.
25. Respondent goes further to suggest that the Court would be acting outside its powers by allowing consolidation in these circumstances (paragraphs 38 and 39; Response). This is said to be because the parties had agreed, under Article 6(1), to submit their arbitration to the Rules prevailing on the date that the arbitration commences. However, both versions of the Rules allow the Court to consolidate proceedings. By definition, consolidation will always involve later proceedings being merged into earlier claims – and this does not necessarily exclude proceedings commenced under earlier versions of those Rules. The decision would need to be taken against the relevant facts of each case.
26. In short, the question before the Court is whether the arbitration agreements are "compatible". Whilst the clauses under consideration in this case are not identical, they need not be. On the basis of the facts before us, and the circumstances of this particular case, none of the differences identified are likely to render the clauses substantively incompatible such as to prevent the Court from ordering consolidation.
27. As such, and on the facts of this case, the Court decides that [Article 10\(c\) of the Rules](#) would in principle apply.

Should the Court nevertheless exercise its discretion to consolidate the proceedings?

28. Although the Court considers that Article 10(c) is, in principle, applicable, it does not follow that the Court must consolidate the proceedings. As noted in the parties' submissions, this is a discretionary process ("*may...*, *consolidate*"), a concept which is developed further in Article 10 in the following terms:

"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".

29. Both parties accept that the Court has discretion *not* to consolidate, despite the engagement of one of the heads under Article 10. Indeed, both sides addressed this at some length in their submissions. Given the nature of the exercise, the Court focuses below on those matters that it considers most relevant to the Court's discretion on the facts of this case.

30. In particular, the Court has focused on the practical impact of consolidation on the efficient and effective conduct of the original arbitration (i.e. Case 20910/ASM/JPA (C-20911/ASM)). The first arbitration was commenced some time ago – in March 2015. Terms of Reference were signed on 7 July 2016. A partial award on jurisdiction has been rendered; the full Statement of Claim has been filed; and the full Statement of Defence is due shortly. The merits hearing has been scheduled for early 2019. The Court therefore disagrees with Claimants' argument that the various proceedings are all at any early stage. They are not: the first arbitration is now well-advanced, whereas the Other Proceedings have yet to see their tribunals constituted.

31. Moreover, having already decided various jurisdictional matters in their partial award, the tribunal in Case 20910/ASM/JPA (C-20911/ASM) – were the arbitrations to be consolidated – will have to resolve new jurisdictional claims arising from the Other Proceedings. The interaction between those various decisions may themselves create further disruption to the proceedings, should they be consolidated into a single action.

32. Beyond that, Claimants' proposal is that the issues relevant to the Other Proceedings will run, essentially, on a parallel track, without any impact on the earlier claims (and timetable). For example, "*... these are case management issues for the tribunal to address, which the tribunal could treat separately, whenever it finds it suitable, without disrupting the ongoing proceedings, and without questioning the decision on jurisdiction in the First Arbitration....*" (page 4; Rejoinder). However, were that the case, then there is little difference in having the proceedings move forward separately, but without the risk that the original arbitration (or, for that matter, either of the Other Proceedings) being disrupted by any consequences of consolidation.

33. The fact is that, on the facts of this case, it is now too late to bring the Other Proceedings into the original action, without running the risk of disrupting all of the arbitrations materially.

34. Given that risk, the Court decides to exercise its discretion to decline the application to consolidate.

For these reasons, the Court rejects the application to consolidate the proceedings under Article 10.