

Arbitration Rulesets

IRP Interim Supplementary Procedures

The current draft of Rule 7 addresses consolidation as follows:

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.¹

This rule permits consolidation of related matters that share common underlying facts but does not envision consolidation of IRPs that present different underlying facts yet share common questions related to interpretation of the ICANN bylaws. This provision is also silent as to how consolidation will occur and how an IRP Panel in a consolidated matter is appointed. The IRP Interim Supplementary Procedures supplement the ICDR Rules and govern instead of the ICDR rules where the two are inconsistent.²

*ICDR Arbitration Rules*³

Among the rules for arbitrations, the ICDR Rules are the most comprehensive with respect to rules and guidelines concerning the consolidation of related matters and provides a reasonable outline of issues to be considered when drafting updated IRP procedures. The ICDR Rules direct the appointment of a “consolidation arbitrator” who is responsible for deciding issues related to the consolidation of disputes. These rules envision consolidation where:

- (a) the parties have expressly agreed to consolidation,
- (b) all of the claims in the arbitration are made under the same arbitration agreement,
or
- (c) the claims are made under different agreements but involve the same parties in connection with the same legal relationship and the consolidation arbitrator finds the arbitration agreements to be compatible.⁴

¹ ICANN IRP Interim Supplementary Procedures Rule 7.

² See ICANN IRP Interim Supplementary Procedures, Rule 2 & n.1.

³ Available at https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf.

⁴ ICDR Rules Article 8 ¶ 1.

The ICDR Rules also direct the consolidation arbitrator to consider “all relevant circumstances,” including the following five additional factors when deciding whether consolidation is appropriate:

- (a) applicable law,
- (b) whether one or more arbitrators have been appointed (and whether the same or different arbitrators have been appointed in each matter),
- (c) the progress already made in the arbitrations,
- (d) whether the arbitrations raise common issues of law and/or fact, and
- (e) whether consolidation would serve the interests of justice and efficiency.⁵

If the consolidation arbitrator determines that the disputes should be consolidated, the default rules specify that the separate arbitrations will be consolidated into the arbitration that commenced first.⁶ However, either a unanimous agreement of the parties or a finding by the consolidation arbitrator may specify otherwise.⁷

When arbitrations under the ICDR Rules are consolidated, the parties are deemed to have waived their rights to appoint an arbitrator and the consolidation arbitrator may revoke the appointment of any arbitrators, may select one of the previously-appointed tribunals, or may, as necessary, appoint a tribunal to oversee the consolidated proceeding.⁸ The ICDR Rules do not permit the consolidation arbitrator to be appointed in the consolidated proceeding without consent from all parties.⁹

JAMS Rules

The JAMS Rules are similar, but enumerate fewer explicit considerations than the ICDR Rules. The JAMS Rules permit consolidation where there are common issues of fact or law, especially where a single party has filed more than one arbitration with JAMS or if an arbitration is filed against a party already engaged in JAMS arbitration.¹⁰ The JAMS Rules, however, do not permit consolidation of multiple disputes where the parties’ arbitration agreement prohibits consolidation.¹¹ When deciding whether consolidation is appropriate, the JAMS Rules account for “all circumstances, including the links between the cases and the progress already made in the existing arbitrations,” but do not further enumerate specific considerations.¹²

⁵ *Id.* ¶ 3.

⁶ *Id.* ¶ 5.

⁷ *Id.*

⁸ *Id.* ¶ 6.

⁹ *Id.*

¹⁰ JAMS Comprehensive Arbitration Rules and Procedures, Rule 6(e).

¹¹ *Id.*

¹² *Id.*

Where consolidation is appropriate, newer arbitrations are consolidated into older arbitrations. Like the ICDR Rules, parties to consolidated arbitrations are deemed to waive their rights to appoint an arbitrator.¹³ Unlike the ICDR Rules, the consolidated action must be referred to one of the arbitrators or panels already serving, as there is no “consolidation arbitrator” function to appoint a new panel.¹⁴

ICC Rules

The ICC Rules are identical to the first section of the ICDR Rules, permitting consolidation where:

- (1) the parties have agreed to consolidate,
- (2) all claims are made under the same arbitration agreement, or
- (3) the disputes involve the same parties; arise in connection with the same legal relationship; and the consolidation arbitrator finds the arbitration agreements to be compatible.¹⁵

The ICC rules do not include any provisions outlining additional considerations in deciding when to consolidate or procedures for how consolidated arbitrations will operate or the selection of arbitrators for the consolidated proceeding.

AAA and IBA Rules

The arbitration rules of the AAA and the IBA do not cover consolidation of disputes. AAA omits consolidation from its rules, relying instead on the substantive content of the parties’ arbitration agreement to determine if consolidation is appropriate.

Judicial Rules

The Federal Rules of Civil Procedure exist to ensure “the just, speedy, and inexpensive determination of every action and proceeding,”¹⁶ and district courts have broad authority to manage their dockets in a way that promotes efficiency. To that end, there are several mechanisms that serve to promote the efficient resolution of claims. Courts may consolidate multiple cases into a single case, certain claims may be brought as a “class action” to adjudicate the rights of large groups at once, and courts may also engage Multi District Litigation (“MDL”) for complex litigation that is filed across multiple judicial districts. Each of these mechanisms are similar to the consolidation rules for IRPs because they look to gain efficiency by consolidating multiple actions to provide a single answer where the actions share common questions of fact (or law).

Consolidation

¹³ *Id.*

¹⁴ *Id.*

¹⁵ ICC Rules of Arbitration Article 10.

¹⁶ Fed. R. Civ. P. 1.

Under Rule 42 of the Federal Rules of Civil Procedure, a court may consolidate multiple cases that “involve a common question of law or fact.”¹⁷ Courts have broad discretion to decide whether and how to consolidate cases, and will weigh the risk of prejudice and confusion that might accompany a consolidated action against the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses, and judicial resources that might result in separate actions.¹⁸

The court also has a large array of possible methods of consolidation at its disposal—it can order that cases be fully consolidated such that each individual case loses its individual identity and becomes a single case. Unlike the rules for consolidating multiple arbitrations, which allow only for the consolidation of the entire proceeding, the court has significant flexibility to craft an efficient outcome. It may choose to consolidate entire cases or to consolidate only with respect to a particular subset of issues.¹⁹ A court may also consolidate cases for certain phases of litigation but decide to sever the cases for others including for separate trials. It might also choose to de facto consolidate without actually merging cases either by staying all but a single case that will have preclusive effect on others or by ordering separate cases be tried together.²⁰

Consolidation may be triggered by a motion from a party or of the court’s own volition. A consolidated case might retain the same judge it was assigned when filed, but it might instead be transferred to a different judge who has prior experience with the issues presented by the consolidated case.²¹ Unlike under many arbitration rulesets, parties litigating in federal courts do not have the right to choose a particular judge, so the assignment or reassignment of a case does not affect the rights of the parties.

Class Actions

Class actions are a mechanism for efficiently adjudicating a large number of similar claims. As with consolidated cases, class actions require that the class share one or more common questions of law or fact, but also must satisfy additional requirements.²² In a class action, an aggrieved party may bring an action against a defendant “on behalf of” themselves and other similarly situated persons who are absent from the litigation. A class action settlement or judgment affects the rights of absent class members who may not have been aware of the litigation, so the applicable class action rules are designed to protect the interests of the absent class members, a consideration that is not present in the IRP context. Class actions are brought by a lead plaintiff seeking to represent a class of individuals and are not designated by the court, although the court must affirmatively certify that the class meets the requirements of the Federal Rules.

¹⁷ Fed. R. Civ. P. 42.

¹⁸ See *Arnold v. E. Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982), on reh’g, 712 F.2d 899 (4th Cir. 1983).

¹⁹ For example, it may be appropriate to consolidate cases when determining liability for a mass tort but to treat cases separately with respect to damages because the individual plaintiffs may share a single theory of liability but have each been uniquely harmed.

²⁰ See Wright & Miller, 9A Fed. Prac. & Proc. Civ. § 2382 (3d ed.).

²¹ See, e.g., *A.S. ex rel. Miller v. SmithKline Beecham Corp.*, 769 F.3d 204, 213 (3d Cir. 2014).

²² See Fed. R. Civ. P. 23.

To proceed as a class, the court must find that the following requirements are met:

- (1) the number of plaintiffs is so numerous that it is impractical to join each as a party individually,
- (2) the class shares common questions of law or fact,
- (3) the claims of the lead plaintiffs are “typical” of those of the class members, and
- (4) the lead plaintiffs adequately and fairly represent the class.

The court must also find that proceeding as a class action

- (1) is a means to avoid prosecution of separate individual actions by class members that would create a risk of inconsistent or incompatible adjudications or individual adjudications that would impair the interests of absent class members, or
- (2) is a superior method for efficiently adjudicating the controversy because common questions of law or fact predominate over questions affecting the individual class-members.

Each class action is filed as a single case by one or more representative plaintiffs. Although multiple class actions may be consolidated under the normal consolidation rules discussed above, a class action itself is not usually formed by consolidating multiple cases and will generally remain before the judge it was assigned when filed for the duration of the litigation.

MDLs

MDL is a procedure where a panel of judges²³ may transfer a group of related cases that “involv[e] one or more common questions of fact” that are pending simultaneously in different judicial districts to a single district for “coordinated or consolidated pretrial proceedings.”²⁴ Discovery, the phase of litigation where litigants gather evidence from each other and from third parties, can be a time-consuming and costly process, and may be especially frustrating to defendants who simultaneously litigate in multiple jurisdictions where different courts may set different limits on the scope of information that may be discovered. MDL allows the court to centralize this process so that one court is responsible for all pretrial rulings, shielding parties from inconsistent rulings and reducing the inefficiency that would otherwise accompany simultaneous litigation on identical issues.

An MDL court oversees all pretrial rulings including discovery disputes, but also controls the scheduling and pace of the cases it handles. If appropriate, the MDL court may elect to designate a small number of “bellweather” trials that will proceed while the bulk

²³ The Panel on Multi District Litigation is a group of seven federal judges designated by the Chief Justice of the United States.

²⁴ 28 U.S.C. § 1407.

of the cases are stayed. This process may push the parties to settle claims without need for duplicate trials. The MDL court only oversees pretrial matters. Once a case is ready for trial the court where each case was originally filed will re-assert jurisdiction and will conduct the trial and any oversee any post-trial litigation.