

Review of ICDR Article 9: Consolidation

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	ICDR	IRP Supplemental Rules Considerations
Who decides application for consolidation (NOT the IRP decision itself)	Single Consolidation Arbitrator	Current rules: Procedures Officer Small team proposal: Full 3-person IRP Panel of the first-commenced of the affected IRPs Do we revert to the single arbitrator concept?
Who can request	Any party to an IRP, or the Administrators initiative: <i>9.1 At the request of a party or on its own initiative, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration</i>	Any party to an IRP – implied but not expressly stated Amend our rules to expressly state
Process for Appointment of Consolidation Arbitrator	Parties to agree, absent which the Administrator appoints: <i>9.2 A consolidation arbitrator shall be appointed as follows:</i> <i>a. The Administrator shall notify the parties in writing of its intention to appoint a consolidation arbitrator and invite the parties to agree upon a procedure for the appointment of a consolidation arbitrator.</i> <i>b. If the parties have not within 15 days of such notice agreed upon a procedure for appointment of a consolidation</i>	Current rules: PO appointed from the Standing Panel. If no Standing Panel, the ICDR process is followed. Small team proposal: because the proposal is for this to be a decision of the full 3-person IRP Panel, there is no process proposed. If we revert to the single arbitrator concept we will need a process for with or without the Standing Panel: <ul style="list-style-type: none"> • Adopt process aligned with current rules? i.e. appointed from the Standing Panel, unless none in

	<p><i>arbitrator, the Administrator shall appoint the consolidation arbitrator.</i></p> <p><i>c. Absent the agreement of all parties, the consolidation arbitrator shall not be an arbitrator who is appointed to any pending arbitration subject to potential consolidation under this Article.</i></p> <p><i>d. The provisions of Articles 14-16* of these Rules shall apply to the appointment of the consolidation arbitrator.</i></p> <p>[* relate to impartiality, challenge and replacement]</p>	<p>place or there are no eligible Standing Panelists, in which case the ICDR process.</p> <ul style="list-style-type: none"> • Standing Panelists to be appointed in turn? • No Standing Panelists who are already appointed to an IRP Panels of one of the affected IRPs, unless all agree (9.2c) • Retain the impartiality, challenge and replacement provisions
<p>Eligibility for Consolidation</p>	<p>Quite narrow eligibility:</p> <p><i>9.1 At the request of a party or on its own initiative, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration where:</i></p> <p><i>a. the parties have expressly agreed to appoint a consolidation arbitrator; or</i></p> <p><i>b. all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement; or</i></p> <p><i>c. the claims, counterclaims, or setoffs in the arbitrations are made under more than one arbitration agreement; the arbitrations involve the same or related parties; the disputes in the arbitrations arise in connection with the same legal relationship; and the arbitration agreements may be compatible.</i></p>	<p>Eligibility specific to the nature of the IRP, in both current rules and small team proposal:</p> <p><i>7.5 Consolidation of DISPUTES may be appropriate when the DOMINANT IRP PANEL 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.</i></p> <p>Also a presumption in 7.2 that consolidation will be permitted where all parties agree.</p> <p>Retain IRP-specific language?</p>

<p>Factors taken into consideration</p>	<p><i>9.3 In deciding whether to consolidate, the consolidation arbitrator shall consult the parties, may consult the arbitral tribunal(s), and may take into account all relevant circumstances, including:</i></p> <p><i>a. applicable law;</i></p> <p><i>b. whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed;</i></p> <p><i>c. the progress already made in the arbitrations;</i></p> <p><i>d. whether the arbitrations raise common issues of law and/or facts; and</i></p> <p><i>e. whether the consolidation of the arbitrations would serve the interests of justice and efficiency</i></p>	<p>Current rules silent.</p> <p>Small team proposal sets out similar factors, having considered ICDR Rules.</p> <p>Applicable law considered not to be relevant to the IRP.</p> <p>Common issues of fact and fostering of more just and efficient resolution are not listed as relevant factors which may be taken into consideration because they are a requirement for consolidation (s7.5, 7.7).</p> <p><i>7.10 ...In considering whether to consolidate, the DOMINANT IRP PANEL should consider all relevant circumstances, including, without limitation:</i></p> <p><i>a. The views of all the parties</i></p> <p><i>b. The progress already made in the IRPs, including whether allowing the request would require previous decisions to be reopened, steps to be repeated, or other duplication of work.</i></p> <p><i>c. Whether an IRP PANEL has been appointed in more than one of the IRPs and, if so, whether the same or different panelists have been appointed.</i></p> <p><i>d. Whether granting a request to consolidate would create a conflict of interest for an already-appointed panelist.</i></p> <p><i>e. How consolidation better furthers the Purposes of the IRP generally, as compared to the proceedings continuing independently.</i></p> <p>Retain and review IRP-specific language</p>
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Stay of proceedings	<p>9.4 <i>The consolidation arbitrator may order that any or all arbitrations subject to potential consolidation be stayed pending a ruling on a request for consolidation.</i></p>	<p>Silent.</p> <p>Consider specifically including</p>
How the consolidation is effected	<p>Into the first-commenced arbitration unless all parties agree otherwise or CA decides otherwise:</p> <p>9.5 <i>When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties or the consolidation arbitrator decides otherwise.</i></p>	<p>Current rules silent</p> <p>Small team proposal – same as ICDR</p> <p>Retain and review</p>
Impact on IRP Panel Appointment	<p>All parties considered to have waived rights to choose the Panel. Administrator appoints:</p> <p>9.6 <i>Where the consolidation arbitrator decides to consolidate an arbitration with one or more other arbitrations, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. The consolidation arbitrator may revoke the appointment of any arbitrators and may select one of the previously-appointed tribunals to serve in the consolidated proceeding. The Administrator shall, as necessary, complete the appointment of the tribunal in the consolidated proceeding. Absent the agreement of all parties, the consolidation arbitrator shall not be appointed in the consolidated proceedings.</i></p>	<p>Current rules silent</p> <p>Small team proposal: IRP Panel for first-commenced IRP continues in place, subject to any withdrawals required for conflict of interest.</p> <p>7.12 <i>The DOMINANT IRP Panel shall continue in place for the consolidated IRP proceedings unless one or more of the panelists is unable to continue and withdraws due to conflict of interest, in which case the Party whose panelist withdraws will select a further panelist in accordance with Rule 3.</i></p> <p>If we revert to the single arbitrator concept we will need to agree whether we adopt ICDR process for panel appointment or retain proposed process whereby the first-commenced IRP panel continues in place, perhaps with all Claimants endeavouring to agree “their” panelist if IRP Panel is not yet in place. Fall back of the Rule 3 process.</p>
Timing of decision	<p>15 days from final submissions, no reasons:</p> <p>9.7 <i>The decision as to consolidation, which need not include a statement of reasons, shall be rendered within 15 days of the date for final submissions on consolidation.</i></p>	<p>Current and small team proposal silent.</p> <p>Consider specifically including</p>

