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JOINDER, MULTIPLE PARTIES, MULTIPLE CONTRACTS AND CONSOLIDATION UNDER THE ICC RULES

Marily Paralika, Associate, White & Case LLP, Paris

Alexander G. Fessas, Counsel, ICC International Court of Arbitration, Paris

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INTRODUCTORY

International commercial transactions are frequently multi-party in nature

- Due to growing commercial, financial and technological specialization.

The multi-party character of international business transactions makes it likely that international commercial disputes will also be multi-party in nature

- Multi-party disputes are common in construction, insurance, maritime, energy and sales contexts

INTRODUCTORY

1. Identifying the problem

- Change in number and demographic of ICC Arbitration
- Increase of multi-party arbitrations: 30% of total caseload

2. Identifying the solution

- Development of practices
- Crystalizing practices into transparent rules

3. Implementing the solution

- Specific provisions dealing with complex procedural issues
- Comprehensive and simple provisions

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JOINDER

JOINDER




Where an additional party is added to an already pending arbitration


Parties on equal footing: both Claimant and Respondent may join

No limitation to number of additional parties that may be joined

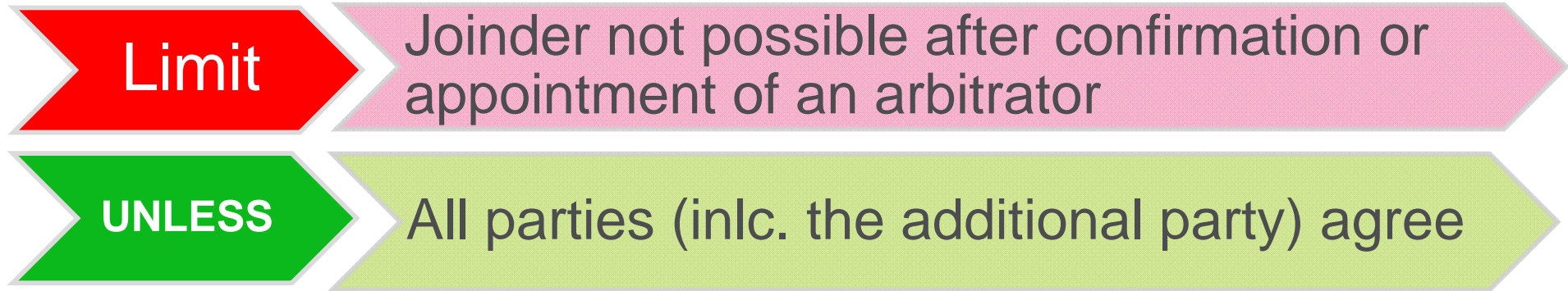
JOINDER

- 
- Party files a Request for Joinder
 - Party must file **claims** against the additional party

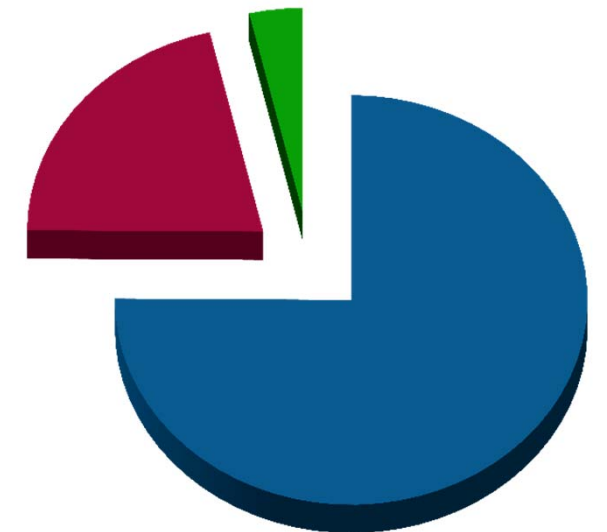
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- Joinder is **automatic**, *i.e.* no Court decision allowed 

- 
- Additional party has the **same rights and obligations** as any other party:
 - Submits an Answer;
 - Raises jurisdictional objections;
 - Files claims;
 - Requests joinder of additional parties

JOINDER: LIMITS



JOINDER: ARBITRAL TRIBUNAL



- Parties / Co-arbitrators
- Court upon proposal of a NC
- Court direct appointment

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CLAIMS BETWEEN MULTIPLE PARTIES

MULTI-PARTY: HOW DOES A CASE PROCEED?

Article 6(4)(i)

- “where there are more than two parties to the arbitration, the arbitration shall proceed between those parties, including any additional parties joined pursuant to Article 7, with respect to which the Court is prima facie satisfied that an arbitration agreement under the Rules that binds them all may exist”.

Article 6(3)

- “[i]f any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4)”.

MULTI-PARTY: ARTICLE 6(4)

WHEN?

- Respondent fails to file Answer; OR
- Plea on existence/validity/scope of the arbitration agreement is raised; OR
- Pleas on whether all claims may be determined together

Case will go forward if all parties are participating and no plea has been raised

As a plea can be raised by any party, the mechanism is not restricted to Respondents and may be applied by the Court to Claimants, Respondents or Additional Parties

MULTI-PARTY: ARTICLE 6(4)

Fairly low threshold: ~~does exist~~ “may” exist

The matter will generally proceed to the extent that evidence indicates that an arbitration agreement that binds all parties may exist

A mere allegation that 6(4) conditions are met will not suffice

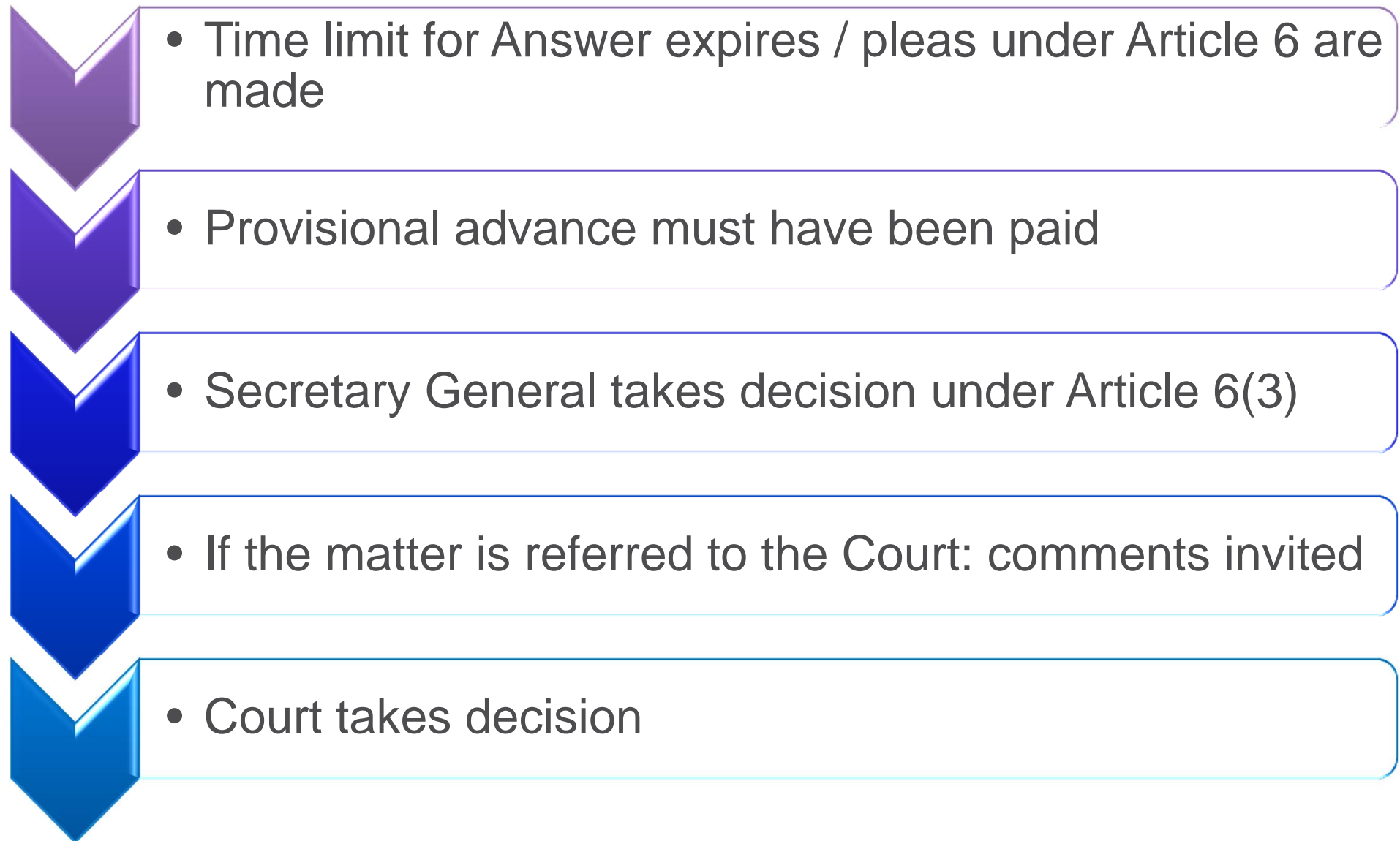
MULTI-PARTY: ARTICLE 6(4)

Court takes decisions on a case-by-case basis

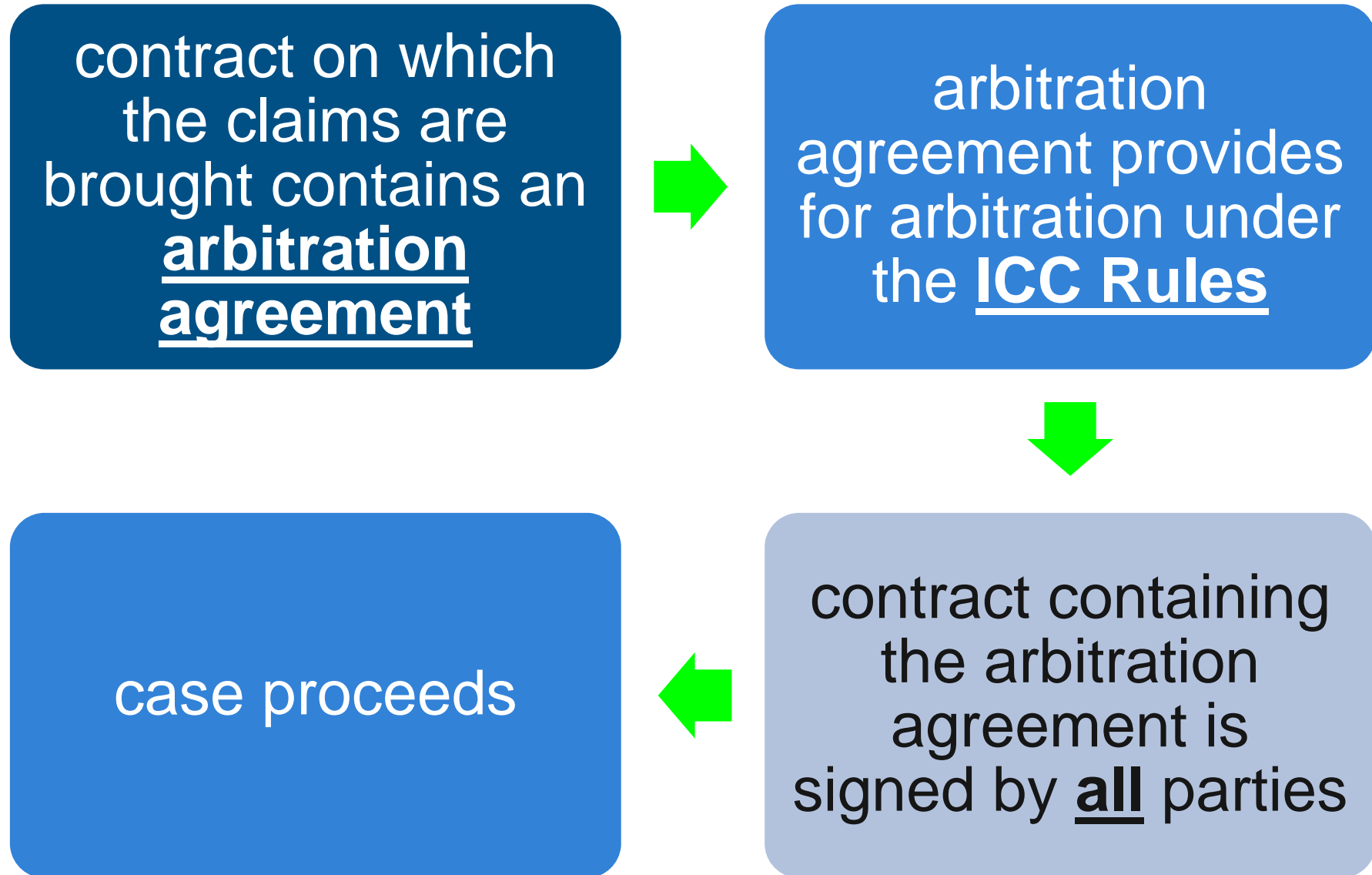
Court's decisions based on information provided by the parties: no separate investigation carried out by the Court itself

Terminology:
positive 6(4); negative 6(4); partially negative 6(4)

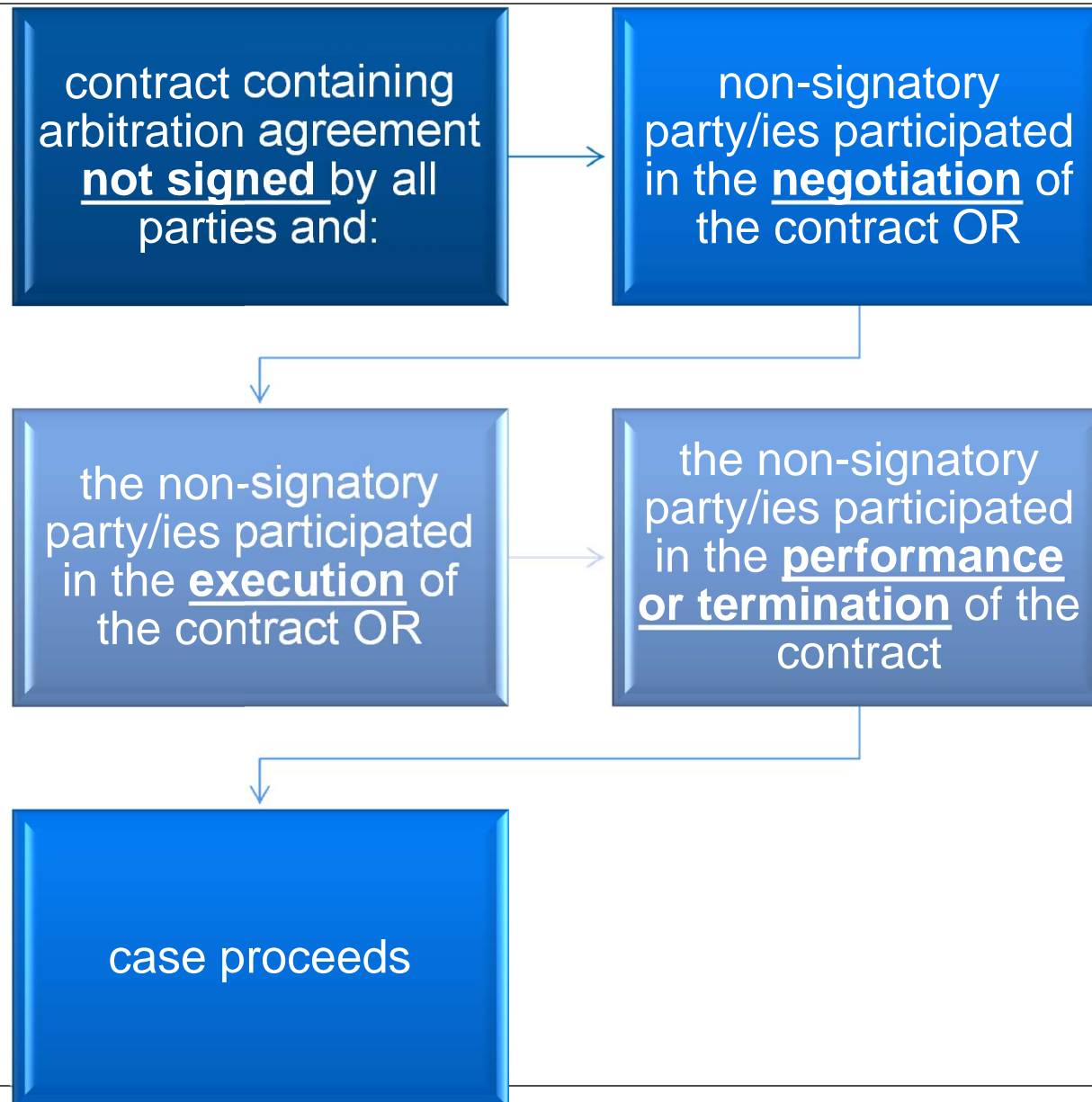
MULTI-PARTY: ARTICLE 6(4) PROCEDURE



MULTI-PARTY: WHEN DOES THE CASE PROCEED?



MULTI-PARTY: WHEN DOES THE CASE PROCEED?



MYLTI-PARTY: TYPOLOGY

1

- The non-signatory appears to have been involved in the negotiation, performance or termination of the contract; documentary evidence exists to that effect and expressly refers to the non-signatory

2

- The non-signatory is the successor, assignee, or has been subrogated into the rights of a signatory party

3

- The non-signatory is a member of a consortium or joint venture which has signed the contract

4

- The non-signatory is a beneficiary or trustee of a signatory party

MULTI-PARTY: TYPOLOGY

5

- The non-signatory is a guarantor and (i) the contract obliges the guarantor, (ii) the purported arbitration agreement refers to or incorporates the guarantee, or (iii) there are allegations that the applicable law binds the guarantor

6

- The non-signatory is an affiliate of a signatory and there is an indication in the purported arbitration agreement or contract that purports to bind such affiliate

7

- The claims are filed on the basis of a law or treaty that refers disputes to ICC arbitration

MULTI-PARTY: EXAMPLES

One Claimant,
three Respondents;

Respondents 1 and 3
objected that
Respondent 2 did not exist;

Claimants did not deny the
above and failed to produce
any evidence to the contrary.

MULTI-PARTY: EXAMPLES

One Claimant,
two Respondents;

Respondents alleged
Claimant was a non-signatory;

The original signatory was restructured in
two entities, one of which was Claimant;

Claimant alleged it had succeeded in the
original signatory's rights and obligations;

Claimant adduced proof that Respondents
had been notified of said restructuring.

MULTI-PARTY: EXAMPLES

- One Claimant, six Respondents;
- Claimant and Respondent 1 signatories;
- Respondents 2-4 affiliates of Respondent 1;
- Respondents 5 and 6 spouses, and shareholders and directors of Respondents 2-4;
- Contract ambiguous as to whether it provided for rights and duties with respect to Respondent 1 only, or certain or all of its affiliates as well;
- Respondent 2 owned certain trademarks used by Respondent 1;
- Respondents 3 and 4 invoiced customers and sold products of Respondent 1;
- Respondents 5 and 6 were allegedly “the controlling minds” of Respondent

MULTI-PARTY: EXAMPLES

- One Claimant (entity), four Respondents (natural persons); Respondent 4 was a non-signatory;
- Claimant alleged that Respondent 4 was “*a secret participant*” who “*actually controlled the entire transaction behind the scenes*”;
- The Court took a negative decision with regard to Respondent 4;
- The Court was invited to examine whether to reconsider its decision twice later, and decided not to do so in the absence of any new elements that would justify its so doing;
- Claimant initiated state court proceedings and eventually obtained judgment compelling arbitration against Respondent 4 in this case;
- By partial award, the Arbitral Tribunal found that it did not have jurisdiction over Respondent 4.

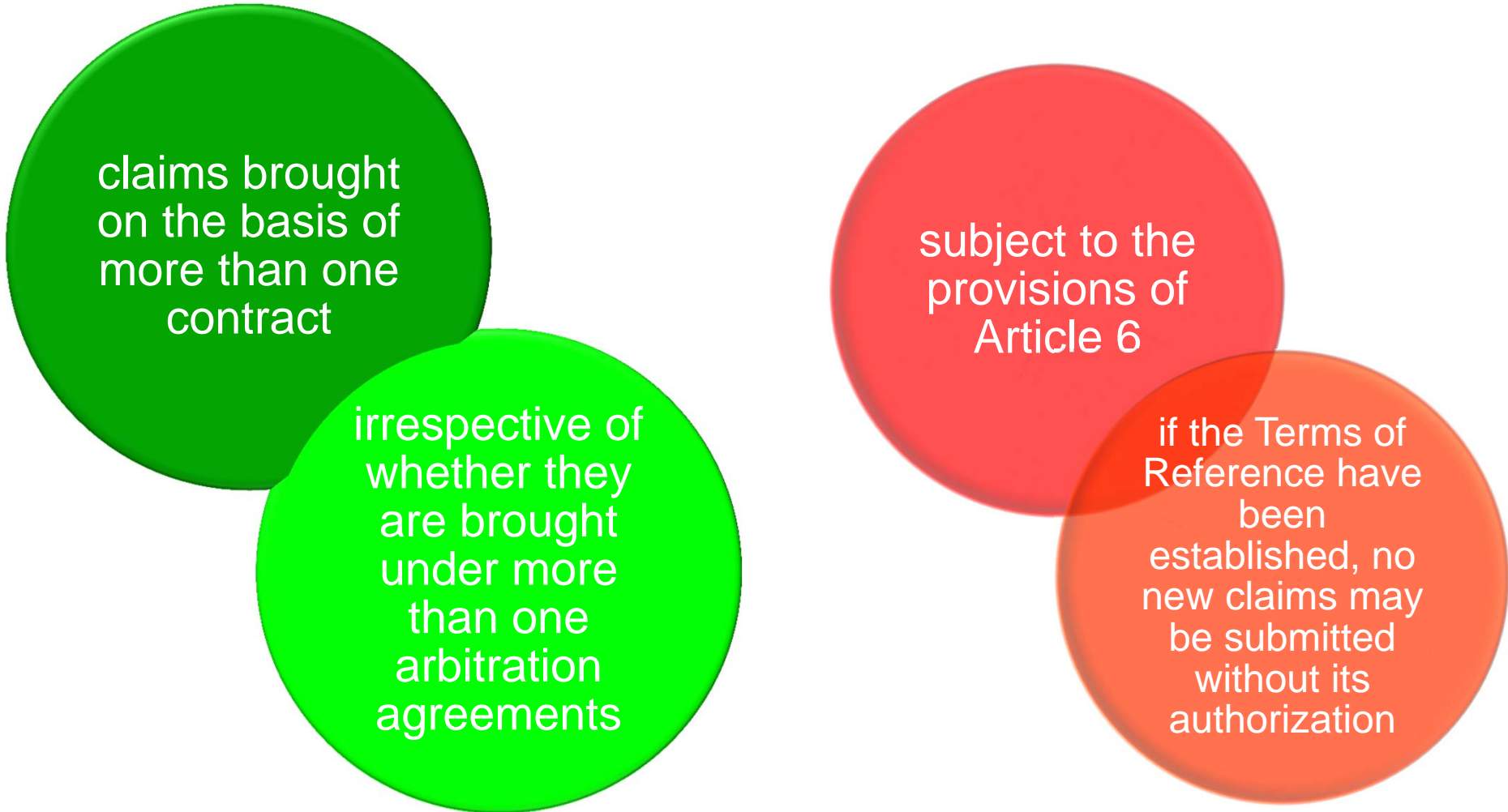
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MULTI-CONTRACT ARBITRATION

MULTI-CONTRACT ARBITRATIONS



The diagram consists of five overlapping circles. On the left, there are three circles: a dark green one at the top, a bright green one at the bottom, and a light green one in the middle overlapping both. On the right, there are two circles: a red one at the top and an orange one at the bottom overlapping it. The text is placed inside these circles.

claims brought
on the basis of
more than one
contract

irrespective of
whether they
are brought
under more
than one
arbitration
agreements

subject to the
provisions of
Article 6

if the Terms of
Reference have
been
established, no
new claims may
be submitted
without its
authorization

MULTI-CONTRACT

the Rules codify the test, previously established by the Court's practice:

could all the parties have agreed to have their claims heard together in a single arbitration?

where claims pursuant to Article 9 are made under more than one arbitration agreement, such claims are subject to Articles 6(3) and (4)

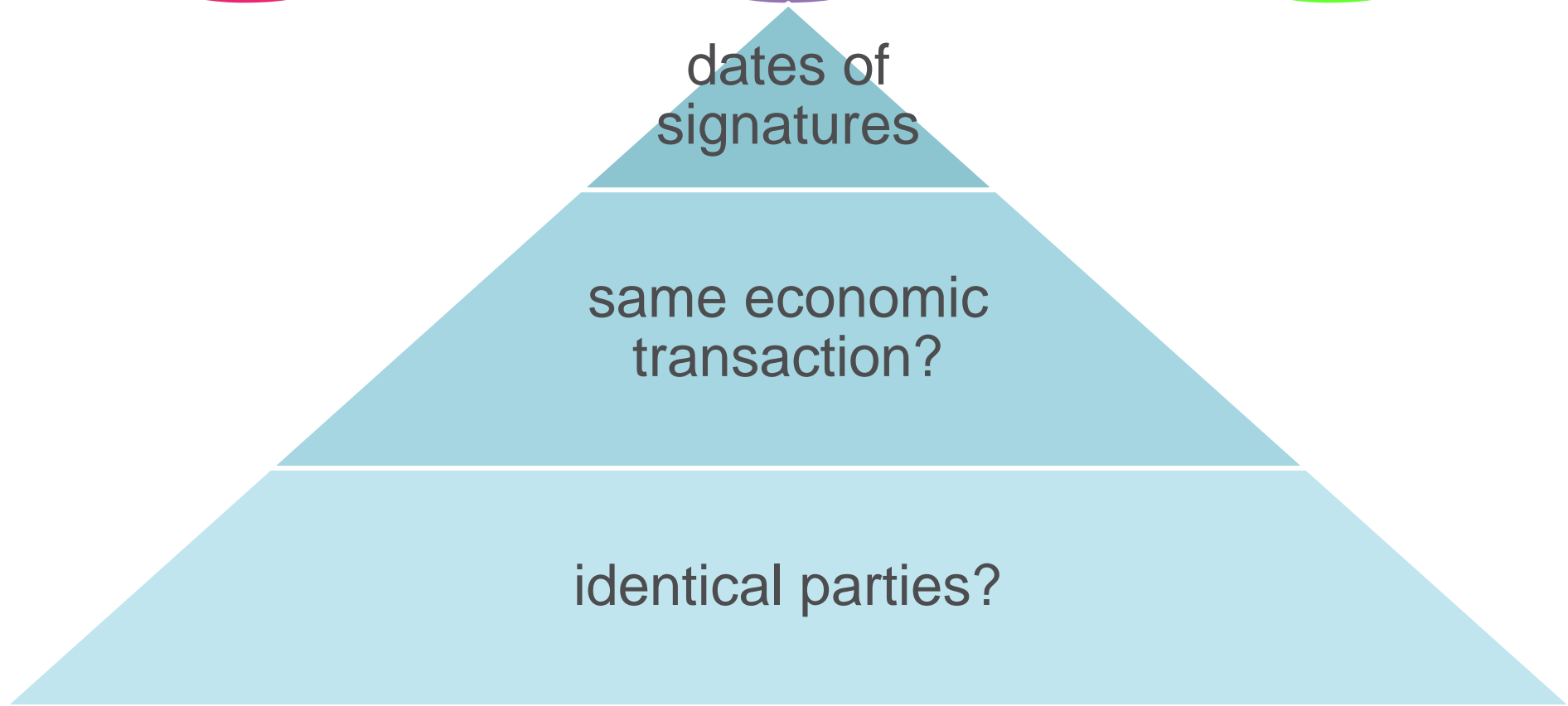
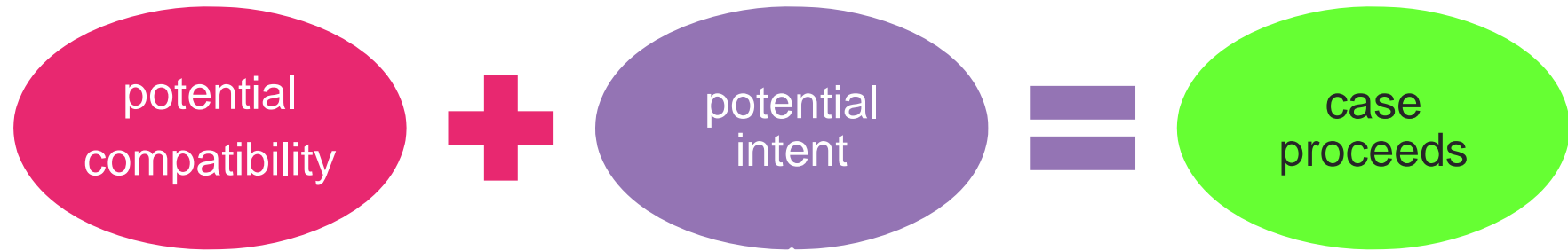
MULTI-CONTRACT: ARTICLE 6(4)

“the arbitration shall proceed as to those claims with respect to which the Court is **prima facie** satisfied

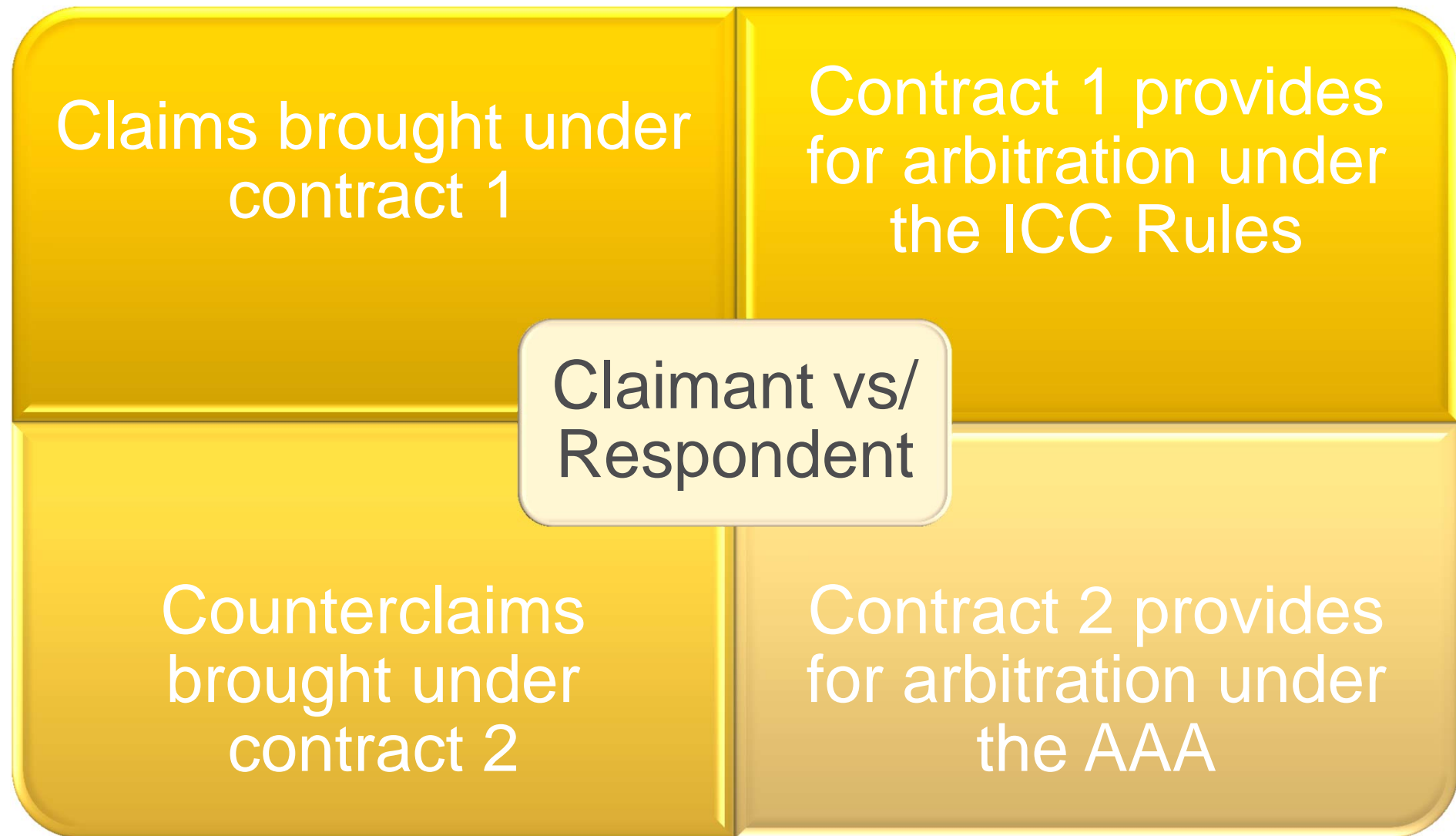
(a) that the arbitration agreements under which those claims are made **may be compatible**, and

(b) that all parties to the arbitration may have agreed that those claims can be **determined together in a single arbitration**”

MULTI-CONTRACT: ARTICLE 6(4)



MULTI-CONTRACT: EXAMPLES



MULTI-CONTRACT: EXAMPLES

- 4 Claimants, 2 Respondents and two contracts
- Claimants 2-4 non-signatories;
- Arbitration agreements compatible
- Pleas raised against Cs 2-4 (=Claimant 1's subsidiaries);
- Contracts grant rights to C 1's affiliates, allegedly unrelated to dispute and not exercised by Cs 2-4;
- Cs 2-4 involved in the underlying transaction; no direct elements on participation in the negotiation or performance of the contracts;
- Rs alleged that Cs 2-4 exercised domination and control over C 1;
- One of the two contracts provided that all disputes may be brought by the parties, also "*on behalf of*" their affiliates

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CONSOLIDATION

CONSOLIDATION



What is consolidation?

Where there are at least two separate ICC arbitrations pending and one or more parties to one of the arbitrations wants them to be merged into a single proceeding

CONSOLIDATION

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, in 3 instances:

1. The parties have agreed to consolidation; **or**
2. All claims are made under the same arbitration agreement; **or**
3. Where the claims in the arbitrations are made under more than one arbitration agreement,
 - the arbitrations are between the same parties, **and**,
 - the disputes arise in connection with the same legal relationship, **and**
 - the Court finds the arbitration agreements to be compatible.



CONSOLIDATION

Claims under one arbitration agreement – Art. 10(b)

- Different parties
- Same legal relationship
- Same arbitration agreement

Claims under several arbitration agreements – Art. 10(c)

- Same parties
- Same legal relationship
- Compatible arbitration agreements

CONSOLIDATION

Where the two contracts contain different arbitration clauses, the Court might find arbitration agreements to be incompatible when:

- Place of arbitration is different
- Language is different
- Mechanism for selecting arbitrators is different
- Number of arbitrators is different

Consolidation under Article 10 is a final administrative decision that cannot be reversed by the arbitral tribunal

CONSOLIDATION



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
- Any circumstance it considers relevant
 - Procedural stage of the proceedings
 - Terms of Reference established

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THANK YOU!