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Global Legal Group

The International Comparative Legal Guide to: International Arbitration 2011

A practical cross-border insight into international arbitration work

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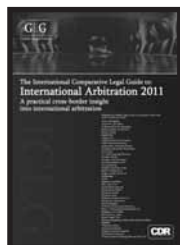
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Participation of Third Parties in International Arbitration: Thinking Outside of the Box

Sidley Austin LLP

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Introduction

Large multinational firms frequently involve more than one corporate entity in the performance of cross-border contracts. It is likewise common for a number of parties to participate in a single economic transaction through multiple contracts, or for contracts to continue in force following the sale or other disposition of a business. These scenarios can generate complex disputes which involve the conduct of multiple parties, some not signatories to an arbitration agreement, or at least not to the same arbitration agreement. In these circumstances, the involvement of third parties in an arbitration may be essential to the twin goals of efficiency and justice, and can even lead to the early resolution of a dispute. Joining such third parties to an arbitration, however, can be procedurally complex, particularly when they are unwilling participants.

Unlike national courts, which often can focus directly on whether a right to relief arises out of the same transaction, occurrence or series of transactions or occurrences, jurisdiction of arbitrators in international commercial arbitration derives from the agreement of the parties. A corollary of this fundamental principal is that arbitral tribunals have no jurisdiction over third parties absent their consent. The need for consent can raise substantial hurdles to the participation of third parties in an arbitration, as well as to the consolidation of disputes involving multiple contracts under one arbitral roof. Even where a litigant has been successful in joining third parties, this can lead to interim appeals or judicial challenge to the resulting award.

Modern arbitration rules increasingly provide tools to facilitate the intervention of third parties, and consolidation of related arbitrations. The Rules of the London Court of International Arbitration (“LCIA Rules”) provide for the joinder of third parties to the arbitration upon the application of any party, but only with the consent of all. The Swiss Rules of International Arbitration (“Swiss Rules”) go further and permit both a third party to request to participate in a pending arbitration and an existing party to cause a third party to participate. The Swiss Rules provide arbitral tribunals broad discretion to rule on such requests after consulting with all parties and taking into account all “relevant and applicable” circumstances. The revised ICC Rules, which will reportedly come into force in January 2012, include new provisions concerning third party practice as well, with a suite of new rules designed to facilitate the intervention and participation of third parties and the consolidation of multiple arbitrations.

From counsel’s perspective, the successful joinder or intervention of a third party can have significant consequences for the ultimate determination of the merits of a dispute, and can even lead to its

resolution. This article briefly discusses the theoretical bases for involving third parties in an arbitration, reviews approaches taken in different arbitration rules, and then illustrates the practical results that can be achieved when practitioners “think outside of the box” to take full advantage of these procedural devices.

Theoretical Bases for Involving Third Parties

Implied consent. In the absence of an express agreement to arbitrate, litigants can sometimes involve third parties in an arbitration by implying consent. This includes “extending the arbitration clause” to parties which may have ratified or otherwise manifested an intent to be bound by an arbitration agreement, for example through the negotiation or performance of the contract, or related agreements. It is likewise relevant that such third parties may have benefitted from the contract, or acted in such a way that it would be inequitable for a party to avoid arbitration of the dispute [see Endnote 1].

Assignment or succession. In cases of assignment, and statutory or contractual succession, an arbitration agreement may be deemed transferred or found binding on the successor even absent express agreement to the arbitration agreement [see Endnote 2].

Third party beneficiaries. The principles applicable to succession may be extended to a party which actually exercises rights of the original contracting party. The underlying rationale is that a party that has obtained advantages from a contract must also accept what may be disadvantages of the contractual relationship it has stepped into [see Endnote 3].

Estoppel/Abuse of right (venire contra factum proprium). A third party may be bound to an arbitration agreement under principles of estoppel or abuse of right. This may occur, for example, where a party asserts that the lack of its signature on a contract precludes enforcement of the arbitration clause contained therein, but has at the same time maintained that other provisions of the contract should be enforced for its benefit, or where a non-signatory has received a direct benefit from the contract containing the arbitration clause [see Endnote 4].

Piercing the corporate veil. A subsidiary or affiliate’s separate identity may be disregarded and a parent or affiliate bound by an arbitration agreement where that company has used its subsidiary or affiliate to commit a fraud or has otherwise abused the corporate form [see Endnote 5].

Group of companies doctrine (Dow Chemical v Isover St. Gobain). The group of companies doctrine has its origin in France, but has not been widely accepted elsewhere. This doctrine allows a non-signatory company to benefit from or be bound by an arbitration

agreement signed by another company within the same group. The analysis focuses on the relations and dealings between separate corporate entities within the group, and their respective roles in the conclusion, performance and termination of the relevant contract [see Endnote 6].

These various theories are typically used to overcome a lack of consent, for example, in situations where a third party is not a signatory to an arbitration agreement or where there is opposition to such party's involvement in an arbitration proceeding. These legal bases remain necessary in third party practice given that most institutional rules, including those which expressly allow for the participation of third parties, continue to require an element of consent. As will be demonstrated below, in the case of the Swiss Rules, such consent may be implied from a party's initial acceptance of the rules in the arbitration agreement.

Arbitration Rules Providing for Participation of Third Parties

Modern arbitration rules have sought to provide new mechanisms to facilitate the participation of third parties in arbitrations, and the consolidation of related arbitrations. Consent of the parties, however, remains a touchstone of most such institutional rules. We briefly review some of the approaches taken below.

LCIA Rules

Article 22.1

Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views . . .

(h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.

The LCIA Rules thus allow for joinder of third parties on application of a party to the arbitration but require the consent of all parties, as well as the joining third party [see Endnote 7].

2010 UNCITRAL Rules

Article 17(5)

The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

The newly-revised UNCITRAL Rules allow one or more third parties to be joined to the arbitration provided they are a party to the arbitration agreement, unless such joinder would result in prejudice to any of the parties. This provision takes into account the practice of SIAC (Singapore) and the HKIAC (Hong Kong) arbitration institutions and is based on Article 22.1 LCIA [see Endnote 8].

2010 Netherlands Arbitration Institute Rules ("NAI Rules")

Article 41 - Third Parties

1. A third party who has an interest in the outcome of arbitral proceedings to which these Rules apply may request the arbitral tribunal for permission to join the proceedings or to intervene therein.

* * * *

3. A party who claims to be indemnified by a third party may serve a notice of joinder on such a party. A copy of the notice shall be sent without delay to the arbitral tribunal, the other party and the Administrator.

4. The joinder, intervention or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties and the third party, if the third party accedes to the arbitration agreement by an agreement in writing between him and the parties to the arbitration agreement. On the grant of request for joinder, intervention or joinder for the claim of indemnity, the third party becomes a party to the arbitral proceedings.

The 2010 NAI Rules go further than the LCIA and UNCITRAL Rules, in allowing a third party with an interest in the outcome of the arbitration, such as an "imminent loss of rights, a prejudice or the risk of conflicting decisions," to request permission to join [see Endnote 9]. The NAI joinder provision nonetheless requires the third party to accede to the arbitration agreement, with the consequence that all parties must consent, in writing, to such accession [see Endnote 10]. Intervention and joinder of a third party must be distinguished under the NAI Rules, since the former allows a third party to fully participate in the proceedings, whereas the latter only allows the third party the possibility to support one of the existing parties [see Endnote 11].

2006 Vienna Rules

Article 15 – Multiparty Proceedings

1. A claim against two or more Respondents shall be admissible only if the Centre has jurisdiction for all of the Respondents, and, in the case of proceedings before an arbitral tribunal, if all Claimants have nominated the same arbitrator, and:

- a) If the applicable law positively provides that the claim is to be directed against several persons; or*
- b) If all Respondents are by the applicable law in legal accord or are bound by the same facts or are joint and severally bound; or*
- c) If the admissibility of multiparty proceedings has been agreed upon; or*
- d) If all Respondents submit to multiparty proceedings and, in the case of proceedings before an arbitral tribunal, all Respondents nominate the same arbitrator; or*
- e) If one or more of the Respondents on whom the claim was served fails or fail to provide the particulars mentioned in Article 10 paragraph 2, b) and c) within the thirty-day time-limit (Article 10 paragraph 1).*

* * * *

8. In cases other than those mentioned in paragraph 1 of the present Article, the consolidation of two or more disputes shall be admissible only if the same arbitrators have been appointed in all the disputes that are to be consolidated and if all parties and the sole arbitrator (arbitral tribunal) agree.

9. The decision whether multiparty proceedings, as per paragraph 1 of this Article, are admissible, shall be taken by the sole arbitrator (the arbitral tribunal) upon application of one of the Respondents.

If the admissibility of multiparty proceedings is denied, the arbitral proceedings return to the stage they were in for the Respondents before the sole arbitrator (the arbitral tribunal) was appointed.

Article 15 of the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber (“Vienna Rules”) also offers the possibility of joining third parties, even when they are non-signatories to the arbitration agreement in question. Following the predominant view, however, joinder under the Vienna Rules requires the consent, whether implied or express, of all parties [see Endnote 12].

New ICC Rules

Revised ICC Rules are slated to become effective in January 2012, and are close to final as this article goes to press. The revisions have for the first time dealt at length with arbitrations involving multiple parties, multiple contracts and consolidation of arbitrations. In particular, a new proposed Article 7 will allow a party to submit a “Request for Joinder” to the Secretariat to join an additional party to the arbitration. The revised rules also allow for claims arising out of more than one contract to be asserted in a single arbitration, regardless of whether such claims are made pursuant to one or more arbitration agreements. Further, the revised rules provide the opportunity to consolidate two or more pending arbitrations, even where the claims in the arbitrations are made pursuant to more than one arbitration agreement. Despite these innovations, the existence of an arbitration agreement binding all parties, and thus the consent of all parties to arbitrate, remains a fundamental requirement.

Swiss Rules of International Arbitration

Article 4 - Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties

1. Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Chambers may decide, after consulting with the parties to all proceedings and the Special Committee, that the new case shall be referred to the arbitral tribunal already constituted for the existing proceedings. The Chambers may proceed likewise where a Notice of Arbitration is submitted between parties that are not identical to the parties in the existing arbitral proceedings. When rendering their decision, the Chambers shall take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings. Where the Chambers decide to refer the new case to the existing arbitral tribunal, the parties to the new case shall be deemed to have waived their right to designate an arbitrator.

2. Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.

The Swiss Rules, which came into force on 1 January 2004, are based primarily on the previous UNCITRAL Rules, but Article 4(2) continues to represent an “important innovation” in the area of third party practice [see Endnote 13]. Unlike the other institutional rules, there is no requirement under the Swiss Rules that the initial parties to the arbitration consent to the participation of a third party at the time of joinder or intervention. This is because, according to some commentators to the Swiss Rules, parties electing these rules are deemed to have already consented to the intervention of third

parties, and cannot thereafter object if a third party applies to join the proceedings [see Endnote 14].

Likewise, the issue of extending the arbitration agreement to a third party can be viewed in light of the election of the Swiss Rules by the parties. According to Gilliéron and Pittet, “a third party requesting to participate in a pending arbitration is thereby deemed to have fulfilled the formal and substantive conditions to become a party to the arbitration” [see Endnote 15].

Under the Swiss Rules, the decision to allow a third party to intervene in a pending arbitral proceeding is at the discretion of the tribunal, which should consult with all parties and take into account all relevant circumstances. The Swiss Rules thus provide a flexible approach, in which the circumstances of each individual case are considered [see Endnote 16].

Among the circumstances that may be taken into account in the exercise of a Swiss Rules arbitral tribunal are, *inter alia*, the object of the contract, the intensity of the relationship of the third party toward the object of the contract, the links between the already pending claim and the claim raised by or made against the third party, the role a party has played in the negotiation or performance of the agreement, the existence between the parties of a community of obligations and interest, procedural efficiency, confusion and fraud [see Endnote 17].

Swiss law has also become more friendly to the extension of arbitration agreements. In its landmark October 2003 decision (DFT 129 III 727), the Swiss Federal Tribunal considered the extension of an arbitration agreement to a non-signatory to be admissible given the third party’s significant involvement in the performance of the contract, and demonstration that it was fully aware of its contents [see Endnote 18]. More recently, the Swiss Federal Tribunal partially annulled a decision by a sole arbitrator in an ICC arbitration forbidding non-signatories from taking part in the arbitration. The Federal Tribunal allowed the three non-signatories to join the arbitration given their intense involvement in the preparation and performance of the contract [see Endnote 19].

Thinking Outside the Box

The participation of third parties can have a significant impact on the conduct of an arbitration, and even change the fundamental leverage of the parties, thereby promoting early settlement of the dispute. Moreover, the Swiss Rules provide for the possibility of third party participation even absent the express consent of all parties involved. The authors have recently acted as counsel in two arbitrations that illustrate this point. We have altered the facts to preserve confidentiality.

In the first case, a large multinational was defrauded by a distributor which had falsely represented that it was supplying product for humanitarian purposes to NGO’s. In fact, the distributor was reselling the product on the grey market in the manufacturer’s home market, and outside of its specified territory, causing the manufacturer to lose sales. The distribution agreement, which called for arbitration under the Swiss Rules, was not concluded between the manufacturer and the distributor, but between the distributor and a distribution centre affiliated with the manufacturer and located outside of the manufacturer’s home market. Arbitration was thus commenced by the distribution centre, and the defence advanced that the claimant had not been injured by the grey market sales, since the centre did not sell in the market in question. While the claimant had various rescission-based remedies available, it was decided that it would be advantageous for the manufacturer to intervene in the arbitration, so it could assert its own damage claims directly. Notwithstanding that the manufacturer was not a signatory

to the arbitration agreement, it had played an integral role in the performance of the contract, had been a target of the fraud, and had suffered substantial damages as a result of the grey market sales. Although the respondent vigorously objected to the manufacturer's participation in the arbitration, and refused its consent, it was argued that such consent could be implied from the respondent's acceptance of a Swiss Rules arbitration clause. Intervention was upheld by the arbitral tribunal, and as a result, respondent's principal defence was rendered ineffective. The case settled not long thereafter.

In the second case, an Asian-based supplier lodged a claim against a European customer which had failed to pay for goods shipped and received. The Asian supplier had in the meantime sold its business, and was faced with counterclaims related to the sale, and the performance of the successor corporation. While the claimant's position was that the counterclaims were misdirected, it was faced with having to defend such claims without the presence of the successor company, which had in the meantime acquired many of the key witnesses and documents. The claimant thus applied for the successor company to be joined to the arbitration, again under the Swiss Rules. The successor, which had a different arbitration agreement with the claimant related to the sale of the business, resisted. The joinder motion, however, led the respondent to assert its claims directly against the successor company, making continued resistance to joinder futile. With all of the affected parties in the case, the matter was quickly brought to resolution by settlement.

In both cases, the legal bases for third party participation was disputed – in the first case by the respondent, and in the second case by the third party – so that consent to participation could not be obtained. The Swiss Rules, however, provide a significant measure of discretion in matters of third party intervention, and it must have been obvious to the arbitrators in both cases that the participation of the third party would contribute to the ultimate resolution of the dispute. In fact, in each case that participation contributed to a settlement. In both cases, the flexibility of the Swiss Rules provided a powerful tool that allowed advocates to think outside of the box and achieve resolution of their clients' disputes through the participation of a third party.

Endnotes

- 1 *Jean-François Poudret/Sébastien Besson*, *Comparative Law of International Arbitration*, 2nd Ed., London 2007, para. 251 *et seq.*
- 2 *Gary B. Born*, *International Commercial Arbitration*, 2009, p. 1184 *et seq.*; *Franz T. Schwarz/Christian W. Konrad*, Article 15: Multi-Party Arbitration in *The Vienna Rules: A Commentary on International Arbitration in Austria*, London 2009, para. 15-085.
- 3 *Gary B. Born*, p. 1178.
- 4 *William W. Park*, *Non-Signatories and International Contracts: An Arbitration's Dilemma in Multiple Parties in International Arbitration*, Oxford 2009, para. 1.48 *et seq.*; *Franz T. Schwarz/Christian W. Konrad*, para. 15-095.
- 5 *Sébastien Besson*, *Piercing the Corporate Veil: Back on the Right Track in ICC Dossier: Multiparty Arbitration*, Paris 2010.
- 6 *William W. Park*, para. 1.70 *et seq.*; *Franz T. Schwarz/Christian W. Konrad*, para. 15-109 *et seq.*; *Nathalie Voser*, *Multi-party Disputes and Joinder of Third Parties in 50 Years of the New York Convention: ICCA International Conference, ICCA Congress Series, Vol. 14, Dublin 2009, 372 et seq.*
- 7 *Luca Beffa*, *Joinder of Non-Signatories at the Respondent's Request in ICC Arbitration: A New Path?*, 2010, p. 1; *Franz T. Schwarz/Christian W. Konrad*, para. 15-081.
- 8 *Matthew Skinner/Sam Luttrell/Tom Levi*, *The UNCITRAL Arbitration Rules 2010 in Asian International Arbitration Journal*, 2011, Vol. 7 Issue 1, pp. 76-96, p. 81.
- 9 *Bommel Van der Bend/Marnix Leijten/Marc Ynzonides*, Part II: A Commentary to the NAI Rules, Section 4: Procedure (Articles 20-42) in *A Guide to the NAI Arbitration Rules including a Commentary on Dutch Arbitration Law*, The Netherlands 2009, p. 72.
- 10 *Id.*, p. 73.
- 11 *Id.*, p. 72.
- 12 *Franz T. Schwarz/Christian W. Konrad*, para. 15-075 and 15-077.
- 13 *Philippe Gilliéron/Luc Pittet*, *Commentary ad Article 4 Swiss Rules in Swiss Rules of International Arbitration, Commentary*, Schulthess 2005, p. 37; *Nathalie Voser*, p. 384.
- 14 *Id.*, p. 41. *See also, Julian D M Lew/Loukas A Mistelis/Stefan M Kröll*, *Commercial Arbitration*, The Hague 2003, para. 16.41-16.42, "a third party wishing to intervene in arbitration proceedings cannot do so without the consent of all the parties to the arbitration (...). Such consent may be given at an earlier stage in the contract itself, for example by agreeing to arbitration under one of the few arbitration rules which allow for joinder or the intervention of third parties"; *see also Richard Bamforth/Katerina Maidment*, "All join in" or not? How well does international arbitration cater for disputes involving multiple parties or related claims? in *ASA Bulletin*, Vol. 27 No. 1 (2009), pp. 3-25, p. 12: "the Swiss Rules would permit a tribunal to order the joinder of a third party at the request of the third party, even where the third party is not a signatory to the arbitration agreement, and even where all existing parties to the arbitration object to the joinder. That of itself can be "justified" as parties choosing to arbitrate under the Swiss Rules are arguably deemed to have given their consent. If the third party is willing to be joined to the proceedings, there should therefore be no objection from the parties".
- 15 *Philippe Gilliéron/Luc Pittet*, p. 41; *see also DFT 129 III 727*, an October 16, 2003 Swiss Federal Tribunal decision, in which the court upheld the award of an ICC arbitral tribunal with seat in Switzerland which extended an arbitration clause to a non-signatory to the contract. With respect to the formal requirements of Article 178(1) Swiss Private International Law Act, which requires a valid arbitration clause to be in written form, the Swiss Federal Tribunal pointed to the liberal approach in Swiss case law, and took the position that the form requirement applies only to the original arbitration agreement, by which the initial parties manifested their common intent to arbitrate (cons. 5.3.1). The fulfillment of such formal requirement is therefore unnecessary with regard to the extension of the arbitration clause to a third party.
- 16 *Wolfgang Peter*, *Some Observations of the New Swiss Rules of International Arbitration in The Swiss Rules of International Arbitration, ASA Special Series No. 22*, 2004, p. 6.
- 17 *Richard Bamforth/Katerina Maidment*, p. 12; *Philippe Gilliéron/Luc Pittet*, p. 42 *et seq.*
- 18 *DFT 129 III 727*.
- 19 *DFT 4A_376/2008 of 5 December 2008*.

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MARC PALAY, co-chair of Sidley's International Arbitration practice and co-Managing Partner of the Geneva office, has extensive experience in international commercial arbitration and complex transnational litigation. He has practiced in these areas for more than 30 years, including the last 18 years from Geneva. Mr. Palay is experienced in all types of business disputes, including complex contract, fraud, insurance, products liability, securities, construction, competition, trade disputes, IP, joint ventures and the drafting and negotiation of international commercial agreements. Mr. Palay has acted as lead counsel before a wide variety of international arbitral and judicial forums, including the International Chamber of Commerce, the Swiss Chambers of Commerce, the Stockholm Chamber of Commerce, and the Iran-U.S. Claims Tribunal. He also represents multinational companies before various state and federal courts throughout the U.S. and has acted as counsel in leading U.S. cases involving the recognition and enforcement of international arbitral agreements and awards.

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Ms. Landon also regularly provides advice on international judicial assistance matters in Switzerland and in other European jurisdictions.



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