178 Cal.App.4th 1020
Court of Appeal, Sixth District, California.

BERG & BERG ENTERPRISES, LLC, Plaintiff and Appellant,
v.
John BOYLE et al., Defendants and Respondents.

No. H031591.
|
Oct. 29, 2009.
|
Rehearing Denied Nov. 24, 2009.
|
Review Denied Feb. 3, 2010.

Synopsis

Background: Creditor of insolvent corporation brought breach of fiduciary duty action against the individual members of corporation's board of directors. The Santa Clara County Superior Court, No. CV044686, Neal Cabrinha, J., sustained directors' demurrers to creditor's third amended complaint without leave to amend, and creditor appealed.

Holdings: The Court of Appeal, Duffy, J., held that:

California did not recognize a broad fiduciary duty that directors of an insolvent corporation owed creditors solely because of a state of insolvency;

directors did not breach fiduciary duties owed to creditors under the trust-fund doctrine by effecting an assignment for the benefit of creditors, rather than investigating a bankruptcy;

even if creditor pled a cognizable breach of fiduciary duty claim, directors' actions were immune from liability under the business judgment rule; and

trial court did not abuse its discretion by sustained demurrers without leave to amend.

Affirmed.

See also 131 Cal.App.4th 802, 32 Cal.Rptr.3d 325.

Attorneys and Law Firms

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Winston & Strawn, Robert A. Julian, Nicole P. Dogwill, San Francisco, for Defendant and Respondent John Boyle.

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Opinion

DUFFY, J.

***1024** Appellant Berg & Berg Enterprises, LLC, the largest creditor of the failed Pluris, Inc., challenges the trial court's sustaining, without leave to amend, respondents' demurrers to Berg's third amended complaint. Respondents were individual members of Pluris's board of directors. After ***1025** they challenged Berg's prior pleadings by successful demurrers and an anti-SLAPP motion, Berg's operative pleading alleged a single cause of action for breach of fiduciary duty. Pluris had experienced financial difficulties and had as a result entered into an assignment for the benefit of creditors under Code of Civil Procedure sections 493.010 and 1802.[1] The thrust of Berg's claim, as finally pleaded, was that the individual directors owed a fiduciary duty to Berg and other Pluris creditors on whose behalf Berg is purportedly proceeding. The duty allegedly arose when Pluris either became insolvent or entered into the "zone of insolvency" at some point before the assignment. The directors allegedly breached that duty by electing to make the assignment, thereby extinguishing Berg's plan to use the corporation's alleged $50 ****881** million of net operating losses through a chapter 11 bankruptcy reorganization that, according to Berg, would have benefitted it and the other creditors by deriving value from the losses. Berg alleged that the directors had failed to conduct a reasonable investigation into its proposed plan before proceeding with the assignment and had they investigated, they would have seen that pursuing Berg's bankruptcy plan was the only viable way to protect, and thereby satisfy their fiduciary duty to, Pluris's creditors.[2]

We conclude that Berg failed to plead a cognizable claim for breach of fiduciary duty against the individual directors. And even if a cognizable claim had been alleged, on the pleaded facts the business judgment rule insulated the directors from personal liability on the alleged claims for breach of fiduciary

duty as a matter of law. We accordingly affirm the judgment of dismissal.

*1026 STATEMENT OF THE CASE

I. *Prior Pleadings and the Trial Court's Rulings on Challenges Thereto* [3]

Berg's initial complaint, on which it proceeded directly on its sole behalf (as opposed to derivatively), named as defendants the respondents here—John Boyle, David Britts, Tony Daffer, Barry Eggers, Diana Everett, John Gerdelman, Cliff Higgerson, Joseph Kennedy, and Bob Williams—all members of Pluris's board of directors at some point. The pleading alleged a single cause of action for breach of fiduciary duty. Underlying the claim was the allegation that at all relevant times, Pluris was operating "in a zone of insolvency" during which its board of directors owed its creditors a fiduciary duty. This alleged duty included "the obligation not just to protect the assets of PLURIS but to affirmatively examine a range of possible courses of action to maximize the value of its remaining assets, not merely to take the course of action most expedient to [the individual directors] and make an Assignment [for the benefit of creditors]." This duty was alleged to have been primarily breached by the directors' having "fail[ed] to explore whether BERG's proposed reorganization [in bankruptcy] would or might have yielded greater assets [than the assignment] for [Pluris's] creditors."

The pleading also alleged as background that some six months before the assignment for the benefit of creditors in July 2002, Pluris and a Berg-related entity had entered into a settlement that liquidated and partially secured what came to be Berg's claim by assignment, and allowed Pluris to seek additional outside financing. In conjunction with the settlement, Berg's **882 principal, Carl Berg, allegedly informed the Pluris directors that if the financing effort failed, Berg "would want to explore ways to derive value from PLURIS beyond the obvious hard and soft assets, including the possibility of obtaining value from the millions of dollars in net operating losses ... PLURIS ha[d] accumulated. To obtain that value, PLURIS would need to be reorganized under the bankruptcy laws." [4] The pleading further alleged that it was not until after the assignment—during the course of later involuntary bankruptcy proceedings initiated by Berg and two other creditors—that Carl Berg offered the details of his plan to use the company's net operating losses. These details included *1027 that through a bankruptcy reorganization: (1) Berg would make a $150,000 cash contribution to Pluris for the benefit of its unsecured creditors; (2) Berg would reduce the unsecured portion of its claim by $1.5 million in consideration for 100 percent of the stock in the reorganized entity plus the assignment of all claims or causes of action that Pluris had the right to pursue; and (3) Berg would further reduce its unsecured claim by $2.5 million in consideration for all of Pluris's non-cash assets, including its intellectual property, software, and inventory. All told, the pleading alleged, these plan details would result in the reduction of Berg's unsecured claim by $4 million plus its infusion of $150,000 for the benefit of other unsecured creditors. The import of these background allegations of the initial complaint as relevant here was that they alleged that it was only *after* the assignment for the benefit of creditors had been made and "during" later involuntary bankruptcy proceedings that Berg provided the details of its plan to use Pluris's net operating losses.

Apparently before any responsive pleadings were filed, Berg filed a first amended complaint. The new pleading restated the breach-of-fiduciary-duty claim and added two causes of action for fraudulent and negligent misrepresentation, respectively. It reiterated that before the assignment, Berg had only generally informed Pluris's directors of his desire to explore the use of Pluris's net operating losses through a petition in bankruptcy if Pluris's outside financing efforts failed and that it was only later, during involuntary bankruptcy proceedings, that Berg provided the details of this plan.

Defendant John Boyle demurred to the amended pleading on various grounds. The other directors likewise demurred and some filed an anti-SLAPP motion (under Code Civ. Proc., § 425.16) to the new misrepresentation causes of action, which the other defendants joined. In the face of the anti-SLAPP motion, Berg voluntarily dismissed its two misrepresentation causes of action leaving only its claim for breach of fiduciary duty as the target of the demurrers. [5] The court (Judge C. Randall Schneider) sustained the demurrers with leave to amend. The basis of the order was, in essence, lack of standing—Berg's claim of injury was not unique to itself or to a particular class of creditors but rather incidental to injury that all of Pluris's creditors might have suffered as a result of the assignment for **883 the benefit of creditors. Therefore, the claim was not direct and particular to Berg but rather derivative and assertable only on behalf of all of Pluris's creditors. [6] The court further noted that in light of its dispositive ruling, it need not directly address *1028 another ground raised by demurrer—that the Pluris directors were insulated from liability by the business judgment rule.

But, "for the guidance of the parties," the court nevertheless observed that particular allegations of the first amended complaint appeared "sufficient to rebut the business judgment presumption."

Berg filed a second amended complaint, this time on "behalf of [itself] and all other Pluris, Inc. creditors," consistently with the court's prior ruling. The new pleading in substance restated the allegations of Berg's previously asserted breach-of-fiduciary-duty claim, including that before the assignment for the benefit of creditors, Berg had informed Pluris of its desire to explore use of Pluris's net operating losses through bankruptcy in the event Pluris could not obtain outside financing but after the assignment and during later involuntary bankruptcy proceedings, Berg provided details of this plan.

The directors demurred to Berg's second amended complaint on numerous grounds. The court (Judge Neal A. Cabrinha) determined that while the pleading could be "reasonably be interpreted as alleging a creditors' claim under common law," Berg had failed to allege specific facts to rebut the business judgment rule—"affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching, or an unreasonable failure to investigate material facts"—and thus had not stated a viable claim for breach of fiduciary duty. The court ruled that Berg's allegations that the directors did not conduct a "reasonable inquiry into alternative methods of financing or alternative ways to derive additional value in Pluris for its creditors, but instead took the easiest path for themselves and assigned all of Pluris's assets to an assignee" did not establish "that [the] defendants acted with an improper motive and a conflict of interest.... [¶] ... [¶] At first blush, the allegation that defendants did not explore alternative avenues of financing or alternative ways to derive additional value in Pluris for its creditors pleads around the business judgment rule. However, it is not sufficient to generally allege the failure to conduct an active investigation without (1) alleging facts which would reasonably call for such an investigation, or (2) alleging facts which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment.... [¶] ... The Second Amended Complaint does not allege facts establishing the existence of any alternative methods of financing or means to increase the ***1029** value of Pluris's assets for the benefit of creditors ****884** generally. As a result, it fails to establish a breach of fiduciary duty."

Thus, the court determined that because Berg had failed to plead specific facts to rebut the presumption of nonliability afforded by the business judgment rule, it had failed to adequately plead a cognizable claim for breach of fiduciary duty against the directors. As a result, the court sustained the demurrers with leave to amend.

II. *Berg's Third Amended Complaint*

This brings us to the operative pleading—Berg's third amended complaint.[7] In it, Berg, for itself and purportedly on behalf of all Pluris creditors, restated its single cause of action for breach of fiduciary duty against the Pluris directors.[8] The pleading alleged in conclusory fashion and without supporting facts that "[a]t least from January 2002, and continuing thereafter, PLURIS was either insolvent or operating within the 'zone of insolvency.' During this time, PLURIS's Board of Directors and each director individually owed a fiduciary duty to act for the benefit of PLURIS's creditors." That duty, as alleged, included "the obligation not just to protect the assets of PLURIS but to affirmatively examine a range of possible courses of action to maximize the value of the remaining assets, not merely to take the course of action most expedient to [the directors] and make an Assignment."

As background, the pleading, like its superseded predecessors, went on to allege that in 2001, one of Pluris's creditors was a Berg-related entity that had entered into a lease with Pluris, which Pluris repudiated, resulting in litigation. That dispute was settled in February 2002 when Pluris informed Berg's principal, Carl Berg, that it was attempting to obtain outside financing to continue operations and that settlement of Berg's claim was a condition to receiving that financing. In the course of these discussions, Carl Berg then informed Pluris, allegedly through its board of directors, that if its financing efforts failed, the Berg-related entity or its assignee "wanted to derive value" or "want[ed] to explore ways to derive additional value" from the $50 million in net operating losses that Pluris had accumulated and that one of Berg's plans for doing so required a reorganization of Pluris through federal bankruptcy laws.[9] The settlement between Pluris and the Berg-related entity ***1030** liquidated and partially secured the claim, which was then assigned to Berg making it Pluris's largest creditor.

Pluris's efforts to obtain outside financing did not result in its getting sufficient funds to continue operations, as a result of which, on July 11, 2002, Pluris, through its

board of directors, made an assignment for the benefit of creditors. According to Berg, in doing so, the directors "failed, refused or neglected to seek or to find any alternative financing or to make a reasonable inquiry into alternative financing even though they knew or reasonably should ****885** have known there were a number of potential sources available." The board also "failed to make any reasonable inquiry into alternative ways to derive additional value for the PLURIS creditors other than making an assignment for the benefit of creditors ... despite the fact that [the directors] were specifically advised there were alternatives that might generate greater value. For example, [Carl] Berg [had] explained [that] if Pluris w[ere] unsuccessful [at obtaining sufficient outside financing], he intended to seek [to benefit from] the value of PLURIS's $50 million [in net operating losses through] a bankruptcy reorganization. Pursuant to the reorganization, there would [be] additional benefits to creditors such as [those] incorporated in the proposed Berg plan." These benefits included the same reduction of Berg's unsecured claim and a cash contribution to the bankruptcy estate of $150,000 for the benefit of other unsecured creditors that we noted from prior pleadings. [10] But, Berg further alleged, "[r]ather than exploring alternative forms of financing, including Berg's plans, ... the Directors took the easiest path for themselves, and made an assignment of all PLURIS's assets to an assignee for the alleged benefit of creditors, and then 'washed their hands' of the matter." Said yet another way, the directors, as shareholders, "[h]aving determined that their own investment in PLURIS essentially had no value, they looked no further and ignored their continuing duties to the PLURIS creditors by, among other things, refusing to examine alternatives which were specifically brought to their attention or to explore other options, all of which would have enhanced the value to the PLURIS creditors. Instead, they assigned PLURIS's assets to an assignee, and walked away." Berg still further alleged that the directors "did not explore and had no intention of exploring alternative avenues of financing or ways to maximize PLURIS's assets, but instead chose to 'cut ***1031** their losses' " by the assignment "without any reasonable inquiry concerning other ways to protect the interests of Berg and the other creditors, despite that several possible alternatives had specifically been brought to their attention by Berg, and other possible alternatives might have been found with modest inquiry."

The pleading then alleged that from the date of the assignment in July 2002 until August 16, 2002, when Berg and two other Pluris creditors filed an involuntary petition in bankruptcy on its behalf, Berg "tried unsuccessfully to contact PLURIS's BOARD OF DIRECTORS" and no member of the board contacted Berg "to explore ... identifying alternative ways to achieve greater value in PLURIS. Nor did any [director] conduct [a] reasonable inquiry to determine how to protect or enhance the value of PLURIS [or how] to protect BERG's interests, including an inquiry concerning BERG's ability to use PLURIS's [net operating losses]. [¶] ... At no time between January 2002 and the Assignment ... did PLURIS's BOARD OF DIRECTORS ever examine means to increase the value of PLURIS's assets for the benefit of creditors generally other than by making an Assignment...."

In the penultimate allegations of the cause of action as relevant here, Berg pleaded that the directors had breached their fiduciary duties by selecting a course ****886** of action that was "easiest for them by ignoring alternatives specifically brought to their attention, including BERG's proposed reorganization[,] and [by] failing to make any reasonable inquiry into other possible approaches that would or might have yielded greater assets for the creditors;" and by failing "to explore BERG's articulated plan to maximize the value of PLURIS's [net operating losses for] the benefit [of] creditors." [11]

The pleading further alleged that "[o]n August 16, 2002, in order to protect their interests and the interests of other creditors, three of PLURIS's creditors, including BERG, filed an involuntary petition for bankruptcy [under 11 U.S.C § 303] concerning PLURIS's estate. During the bankruptcy proceeding, Berg continued to offer his plans for [Pluris's] reorganization." [12] In January 2003, at the request of Sherwood, the assignee, the bankruptcy court ***1032** abstained from exercising jurisdiction under title 11 United States Code section 305, subdivision (a)(1) and dismissed the involuntary petition. [13]

The third amended complaint finally alleged that as a proximate result of the directors' breach of fiduciary duty, which Berg alleged to be willful, malicious, and oppressive so as to justify an award of punitive damages, Berg and the other Pluris creditors were damaged in a sum "in excess of $50 million which includes, but is not limited to, the loss of use of PLURIS's [net operating losses]."

III. *The Directors' Demurrers and the Trial Court's Ruling*

The directors all demurred to the third amended complaint for its failure to state facts sufficient to constitute a cause of action, reprising many arguments they had raised in previous pleading challenges. On December 21, 2006, the court (Judge Neal A. Cabrinha) issued its order sustaining the demurrers without leave to amend. The court's rationale was that the third amended complaint failed to allege a viable claim for breach of fiduciary duty against the directors. The court relied on *CarrAmerica Realty Corp. v. nVIDIA Corp.,* No. 05–00428, 2006 WL 2868979, 2006 U.S. Dist. LEXIS 75399 (N.D.Cal. Sept. 29, 2006) (*CarrAmerica*), a recent federal Northern District of California that had not been cited by the parties in their papers.

According to the court, *CarrAmerica* determined that California follows the " 'trust fund doctrine' " with respect to duties owed by corporate directors to creditors that arise upon the corporation's insolvency. The scope of this duty is to avoid " 'divert[ing], dissipat[ing] or unduly risk[ing] assets necessary to satisfy' " ****887** creditors' claims. The court observed that because this duty can be characterized as the obligation to avoid the squandering of an insolvent corporation's assets, "recovery for breach of this fiduciary duty generally concerns cases [in which] the directors of an insolvent corporation improperly divert corporate assets. [Citations.] Although no California cases expressly limit the 'fiduciary duty under the trust fund doctrine to the prohibition of self-dealing or the preferential treatment of creditors, the scope of the trust fund doctrine in California is reasonably limited to cases [in which] directors or officers have diverted, dissipated, or unduly risked the insolvent corporation's assets.' [Citation.]"

***1033** The court noted that the third amended complaint did not meet this standard as it did not allege that the Pluris directors "improperly assigned assets for their own interests, or assigned assets knowing the assignee would breach its fiduciary duty to the creditors." Instead, the pleading alleged only that the directors had failed "to explore a plan suggested by [Berg] that may have made better use of the assets.... [Berg's] allegations relating to the conduct of the assignee are irrelevant absent an allegation that the directors were aware that the assignee was unscrupulous or that the directors have an interest in the assignee." The court concluded that because Berg "cannot allege defendants breached their duty not to 'divert, dissipate or unduly risk assets' by [having assigned] the assets for the benefit of [Pluris's] creditors, the demurrers are sustained without leave to amend."

Berg moved for reconsideration of the order under Code of Civil Procedure section 1008, citing *CarrAmerica* as new law and asserting that its claim was not based on the directors' failure to make the best use of Pluris's assets as the court had concluded but rather on their having "knowingly squandered Pluris ['s] largest asset"—its net operating losses. This breach of duty, it argued, fell squarely within the parameters of a permissible breach-of-fiduciary-duty claim as defined in *CarrAmerica*—the diversion, dissipation, or undue risking of assets. Moreover, Berg contended, it could plead additional facts to state such a claim as set out in the court's order, namely that the directors had used a "portion of [Pluris's] remaining cash to pay preferred creditors (employee severance payments made days before the assignment)" and that after the assignment, Berg contacted the directors, "reminded them of his plan, complained about the unscrupulous acts of the assignee, and was ignored."

Over defendants' opposition, the court granted reconsideration of its prior order because the court had relied on *CarrAmerica*—a case not initially cited or briefed by the parties. Upon reconsideration, the court affirmed its prior order sustaining the demurrers to Berg's third amended complaint without leave to amend.

Judgment of dismissal was entered on May 7, 2007 and Berg's timely notice of appeal followed.

DISCUSSION

I. *Berg's Contentions on Appeal and Standard of Review*

Berg's overarching contention on appeal is that the trial court erred in sustaining the demurrers to its third amended complaint because Berg had stated a viable claim for breach of fiduciary duty and had pleaded facts to ***1034** rebut the business judgment rule. Its subsidiary contentions include that the court lacked the power to determine that a claim for breach of fiduciary duty against the directors had not been stated in light of prior demurrer rulings and that Berg should have been ****888** granted leave to file a fourth amended complaint.

"A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]" (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316, 21 Cal.Rptr.3d 246.) Thus, the standard of review on appeal is de novo. (*Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152, 2 Cal.Rptr.3d 396.) "In reviewing the sufficiency of a complaint against a general

demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citations.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58; see also *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 5, 40 Cal.Rptr.3d 205, 129 P.3d 394; *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 82, 76 Cal.Rptr.3d 73.) Where, as here, a demurrer is to an amended complaint, we may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making " ' "contradictory averments, in a superseding, amended pleading." ' " (*People ex. rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957, 70 Cal.Rptr.3d 501.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213, 197 Cal.Rptr. 783, 673 P.2d 660.) Thus, as noted, in considering the merits of a demurrer, "the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]" (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604, 176 Cal.Rptr. 824; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496, 86 Cal.Rptr. 88, 468 P.2d 216 [court reviewing propriety of ruling on demurrer not concerned with the "plaintiff's ability to prove ... allegations, or the possible difficulty of making such proof"].)

On appeal, we will affirm a "trial court's decision to sustain the demurrer [if it] was correct on any theory. [Citation.]" (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808, 50 Cal.Rptr.2d 736, fn. omitted.) Accordingly, "we do not review the validity of the trial court's reasoning but ***1035** only the propriety of the ruling itself. [Citations.]" (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757, 62 Cal.Rptr.2d 778.)

Where a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. (*Williams v. Housing Authority of City of Los Angeles* (2004) 121 Cal.App.4th 708, 719, 17 Cal.Rptr.3d 374.) The plaintiff bears the burden of establishing that it could have amended the complaint to cure the defect. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320, 25 Cal.Rptr.3d 320, 106 P.3d 976.)

****889** II. *The Trial Court Was Free to Consider Whether Berg Had Stated Facts Sufficient to State a Cause of Action For Breach of Fiduciary Duty on Demurrer to the Third Amended Complaint*

As a preliminary matter, we dispense with Berg's claim that because of prior rulings on demurrers to its superseded pleadings, the trial court lacked jurisdiction to consider whether the third amended complaint alleged a viable cause of action for breach of fiduciary duty. Citing *Bennett v. Suncloud* (1997) 56 Cal.App.4th 91, 65 Cal.Rptr.2d 80 (*Bennett*), Berg contends that the jurisdictional components of Code of Civil Procedure section 1008, the statute governing motions for reconsideration of prior rulings and renewed motions, [14] precluded the court from considering the viability of the breach-of-fiduciary-duty claim and that the only ground open for consideration on demurrer to the third amended complaint was that the claim was barred by the business judgment rule. Berg is mistaken.

Bennett did hold that where a prior demurrer was sustained as to some causes of action but overruled as to others, a defendant may not demur again on the same grounds to those portions of an amended pleading as to which the prior demurrer was *overruled.* (*Bennett, supra,* 56 Cal.App.4th at pp. 96–97, 65 Cal.Rptr.2d 80.) But here, there was only one cause of action and the prior demurrers to that cause of action were *sustained*—a critical difference. And *Bennett* also affirmed the principle that when a plaintiff files an amended pleading in response to an order sustaining a prior demurrer to a cause of action with leave to amend, the amended cause of action is treated as a new pleading and a defendant is free to respond to it by demurrer on any ground. (*Ibid;* ***1036** *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1232, 271 Cal.Rptr. 72.) Accordingly, because defendants here demurred to the single cause of action of the new, third amended complaint as to which no prior demurrer had been overruled, the restrictive provisions of Code of Civil Procedure section 1008 are inapplicable. [15]

It also bears noting that in spite of *Bennett,* we have previously concluded that a party is within its rights to successively demur to a cause of action in an amended pleading notwithstanding a prior unsuccessful demurrer to that same cause of action. (*Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 389, 102 Cal.Rptr.2d 125.) Citing earlier case law, we so concluded on the rationale that the " 'interests of all parties are advanced by avoiding a trial and reversal for a defect in pleadings. The objecting party is acting properly in raising the point at his first opportunity, by general demurrer. If the demurrer is ****890** erroneously overruled, he is acting properly in raising the point again, at his next opportunity. If the trial judge made the former ruling himself [or herself], he [or she] is not bound by it. [Citation.] And, if the demurrer was overruled by a different judge, the trial judge is equally free to reexamine the sufficiency of the pleading. [Citations.]' [Citation.]" (*Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 Cal.App.4th 1414, 1420, fn. 3, 17 Cal.Rptr.2d 68.) [16]

Moreover, the role of this court entails review of the trial court's ruling, not its rationale. Thus, even if the trial court here were constrained by its prior rulings in its consideration of the grounds raised on demurrers to the third amended complaint, on review of the judgment, we are not so constrained and are free to render an opinion based on the correct rule of law. (*Bennett, supra,* 56 Cal.App.4th at p. 97, 65 Cal.Rptr.2d 80.)

For all these reasons, we reject Berg's contention that the trial court erred by disposing of the third amended complaint based on Berg's failure to state a viable claim for breach of fiduciary duty and by not limiting its consideration of the pleading challenge to the bar of the business judgment rule.

***1037** III. *The Demurrer to Berg's Third Amended Complaint Was Properly Sustained*

A. *The Question of a Duty Owed by Individual Directors to Creditors*

Berg contends that the individual members of Pluris's board of directors owed Berg, and all of Pluris's creditors, a paramount fiduciary duty. The alleged duty arose beginning at a point in time when Pluris entered into that ill-defined sphere known as the "zone of insolvency." Respondent directors appear to accept that they owed creditors a duty of due care upon Pluris's actual insolvency. We begin our analysis by focusing on the question whether the individual directors owed creditors a duty and if so, when the duty arose and its scope.

It is without dispute that in California, corporate directors owe a fiduciary duty to the corporation and its shareholders and now as set out by statute, must serve "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders." (Corp.Code, § 309, subd. (a).) [17] This duty—generally to act with honesty, loyalty, and good faith—derived from the common law. (*Lehman v. Superior Court* (2006) 145 Cal.App.4th 109, 120–121, 51 Cal.Rptr.3d 411 [director's fiduciary duty ****891** is not liability created by statute]; *Jones v. H.F. Ahmanson & Co., supra,* 1 Cal.3d at pp. 106–110, 81 Cal.Rptr. 592, 460 P.2d 464 [discussing common law development of directors' fiduciary duty]; C.f., *Pittelman v. Pearce* (1992) 6 Cal.App.4th 1436, 1446–1447, 8 Cal.Rptr.2d 359 [corporate bondholders, unlike shareholders, not owed fiduciary duty; obligations owing are defined by contractual terms of bond].)

There is no analogous statutory authority in California establishing or recognizing that upon a corporation's insolvency, or more vaguely when it enters into a "zone of insolvency," directors instead or also owe a duty to the corporation's creditors. And it is easy to see that especially when a corporation is in financial distress, the interests of the shareholders and the corporation itself may inherently collide with those of the creditors, making any ***1038** respective duties owed by directors to each constituency potentially in conflict and making the scope of each respective duty elusive and difficult to ascertain.

The modern common-law notion that the individual directors of a financially distressed corporation operating in the zone of insolvency or even upon insolvency owe a duty of care to its creditors finds its genesis in *Credit Lyonnais Bank Nederland N.V. v. Pathe Communications Corp.,* 1991 WL 277613, 1991 Del. Ch. Lexis 215, (Del. Ch. Dec. 30, 1991) (*Credit Lyonnais*), which arose out of the leveraged buyout of MGM and which laid the ground for the insolvency exception to the general rule that directors owe exclusive duties to the corporation and its shareholders, but not to creditors. While the Delaware chancellor in *Credit Lyonnais* did not find a breach of any duty in that case, he did posit in a well known footnote that "[a]t least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise," i.e., the "community of interests" of those involved with the corporation, including

its creditors. (*Credit Lyonnais, supra,* 1991 WL 277613, *34 and fn. 55, 1991 Del. Ch. Lexis 215 at p. *34 & *108, fn. 55.) The recognition of such a duty was seen to minimize the risk to creditors of directors' "opportunistic behavior" like the disposition of corporate property at "fire-sale prices" or unreasonable risk-taking with corporate assets for the sole benefit of shareholders. (*Id.* at p. *34.)

Subsequent federal and out-of-state decisions discussing *Credit Lyonnais* and grappling with the question and scope of a duty owed to creditors upon insolvency have underscored that when managing a corporation that is insolvent, directors must consider the best interests of the whole "corporate enterprise, encompassing all its constituent groups, without preference to any. That duty, therefore, requires directors to take creditor interests into account, but not necessarily to give those interests priority. In particular, it is not a duty to liquidate and pay creditors when the corporation is near insolvency, provided that in the directors' informed, good faith judgment there is an alternative. Rather, the scope of that duty to the corporate enterprise is 'to exercise judgment in an informed, good faith effort to maximize the corporation's long-term wealth creating capacity.' " (*In re Ben Franklin Retail Stores, Inc.* (1998) 225 B.R. 646, 655 (*Ben Franklin*); see also, e.g., *Geyer v. Ingersoll Publications Co.* (1992) 621 A.2d 784, 789–791; *In re Hechinger Inv. Co. of Delaware, Inc.* (2002) 274 B.R. 71, 89; *In re RSL Com Primecall, Inc.* (2003) 2003 WL 22989669, *8, 2003 Bankr.Lexis 1635, pp. *24–25; *Production Resources v. NCT Group* (2004) 863 A.2d 772, 787–803, overruled in part in *NACEPF v. Gheewalla* (2007) 930 A.2d 92, 103.)

****892** ***1039** As generally discussed by the court in *Ben Franklin,* the rationale for the general rule of no duty owed to creditors is that it is the shareholders who own a corporation, which is managed by the directors. In an economic sense, when a corporation is solvent, it is the shareholders who are the residual claimants of the corporation's assets and who are the residual risk-bearers. As long as the corporation remains solvent, the business decisions made by management directly affect the shareholders' income; management accordingly owes fiduciary duties to those shareholders as well as to the corporation. The corporation's creditors, on the other hand, are free to protect their interests by contract. As long as the corporation is solvent, no matter how badly managed it might be, it is able to satisfy its contractual obligations to creditors who are therefore unaffected by management's business decisions. But when insolvency arises, the value of creditors' contract claims may be affected by management's business decisions in a way it was not before insolvency. At the same time, as long as insolvency persists, shareholder value is essentially worthless and shareholders no longer occupy the position of residual claimants. Because insolvency shifts the residual risk of management decisions from shareholders to creditors, at least some of the duties formerly owed by directors only to shareholders are owed also to creditors upon that circumstance, or so the theory goes. (*Ben Franklin, supra,* 225 B.R. at pp. 652–656; see also *In re Verestar, Inc.* (2006) 343 B.R. 444, 471–472.) [18]

***1040** There are apparently no published cases in California that rely on or postdate *Credit Lyonnais* and determine, based on acceptance or rejection of its rationale, whether or not in this state, corporate insolvency triggers the existence of fiduciary duties of due care and loyalty owed by directors to creditors. But, as observed by federal cases, there are older California cases that, consistently with *Pepper v. Litton* (1939) 308 U.S. 295, 306–307, 60 S.Ct. 238, 84 L.Ed. 281, [19] apply the ****893** " 'trust fund doctrine' " where " 'all of the assets of a corporation, immediately upon becoming insolvent, become a trust fund for the benefit of all creditors' " in order to satisfy their claims. [20] (*CarrAmerica, supra,* 2006 WL 2868979, *5, 2006 U.S. Dist. Lexis 75399, at p. *16, citing *Saracco Tank & Welding Co. v. Platz* (1944) 65 Cal.App.2d 306, 313–318, 150 P.2d 918 [trust-fund doctrine applied for statutory liability for dereliction imposed on directors for wrongful distribution of all assets of insolvent foreign corporation for payment to preferred creditors]; *Commons v. Schine* (1973) 35 Cal.App.3d 141, 145, 110 Cal.Rptr. 606 [trust-fund doctrine applied to a controlling partner's preference in paying insolvent partnership's debt to his own creditor corporation]; *Title Ins. & Trust Co. v. California Development Co.* (1915) 171 Cal. 173, 206–207, 152 P. 542 [trust-fund doctrine applied to a company controlling an insolvent development corporation's preferential payment of the corporation's debts]; *Bonney v. Tilley* (1895) 109 Cal. 346, 351–352, 42 P. 439 [trust-fund doctrine applied to directors of an insolvent corporation, who were also creditors of the corporation and who secured a preference to their claims over other creditors' claims]; *In re Wright Motor Co.* (1924) 299 F. 106, 109–110 [trust fund doctrine applied based on California law to a director's fraudulent transfer of corporate assets to himself]; see also *In re Jacks* (9th Cir. BAP 2001) 266 B.R. 728, 736, [trust-fund doctrine applied under California law to a director's use of an insolvent corporation's assets to guarantee a personal debt].)

As observed in *CarrAmerica* and by the trial court here, recovery for breaching the fiduciary duties imposed under the trust-fund doctrine in California "generally pertains to cases where the directors or officers of an insolvent corporation have diverted assets of the corporation 'for the benefit ***1041** of insiders or preferred creditors.' [Citations.]" (*CarrAmerica, supra,* 2006 WL 2868979, *6, 2006 U.S. Dist. Lexis 75399, at p. *6.) While no California cases "expressly limit the fiduciary duty under the trustfund doctrine to the prohibition of self-dealing or the preferential treatment of creditors, the scope of the trustfund doctrine in California is reasonably limited to cases where directors or officers have diverted, dissipated, or unduly risked the insolvent corporation's assets." (*Ibid.*) In other words, the doctrine is not applied to create a duty owed by directors to creditors solely due to a state of corporate insolvency. Application of the doctrine requires, in addition, that directors have engaged in conduct that diverted, dissipated, or unduly risked corporate assets that might otherwise have been used to satisfy creditors' claims.

Accordingly, based on this established doctrine, we conclude that under the current state of California law, there is no broad, paramount fiduciary duty of due care or loyalty that directors of an insolvent ****894** corporation owe the corporation's creditors solely because of a state of insolvency, whether derived from *Credit Lyonnais* or otherwise. And we decline to create any such duty, which would conflict with and dilute the statutory and common law duties that directors already owe to shareholders and the corporation. We also perceive practical problems with creating such a duty, among them a director's ability to objectively and concretely determine when a state of insolvency actually exists such that his or her duties to creditors have been triggered. We accordingly hold that the scope of any extra-contractual duty owed by corporate directors to the insolvent corporation's creditors is limited in California, consistently with the trust-fund doctrine, *to the avoidance of actions that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors claims.* This would include acts that involve self-dealing or the preferential treatment of creditors.[21] Further, because all the California cases applying the trust-fund doctrine appear to have dealt with actually insolvent entities, and because the existence of a zone or vicinity of insolvency is even less objectively determinable than actual insolvency, we hold that there is no fiduciary duty prescribed under California law that is owed to creditors by directors of a corporation solely by virtue of its operating in the "zone" or "vicinity" of insolvency.[22]

***1042** Applying the scope of duty defined by the trust-fund doctrine, and according truth to the well-pleaded facts of Berg's third amended complaint while ignoring its contentions, deductions, and conclusions of fact or law, we, like the trial court, conclude that the pleading fails to state facts constituting a cognizable claim for breach of fiduciary duty. Assuming a state of actual insolvency, which is not well pleaded here by facts,[23] and apart from the speculative and contingent nature of Berg's or Pluris's ability to actually carry forward and use Pluris's net operating losses against future income,[24] the thrust ****895** of Berg's claim, pleaded repeatedly, is as follows: The directors effected the assignment for the benefit of creditors, a recognized statutory alternative to liquidation through bankruptcy ***1043** (*Credit Managers Assn. v. National Independent Business Alliance* (1984) 162 Cal.App.3d 1166, 1169–1170, 209 Cal.Rptr. 119), rather than investigating, exploring or pursuing a bankruptcy reorganization, through which Berg theoretically could have maximized the value of Pluris's accumulated net operating losses and the other creditors could have benefited from Berg's reorganization plan.[25]

These facts do not involve self dealing or prohibited preferential treatment of creditors and further do not constitute the actual diversion, dissipation, or undue risking of Pluris's assets that were otherwise available to pay creditors' claims. At most, and contrary to Berg's contentions on appeal, these facts allege that another course of action, if explored and pursued, might have offered more value in the end ****896** or that beneficial, maximum, or more valuable use could thereby have been made of Pluris's net operating losses, assuming that the many contingencies required to successfully do so all would have transpired favorably. And to the extent the claim asserts that the breach was the failure to have contacted Berg in order to more fully explore the details of its reorganization plan before making the assignment, that failure alone cannot, as a matter of law, have constituted the diversion, dissipation, or undue risking of assets that could have otherwise been used to pay creditors' claims. Because of the inherently speculative and contingent nature of the plan, with or without its details, the obvious risks and costs associated with pursuing it would not have been eliminated by discussions with Carl Berg or anyone else.

Moreover, Berg did not plead facts that identified sources of funds or financing through which Pluris could have continued to operate even in bankruptcy, and thereby potentially generate profit within the allowed time period, which was

necessary to successfully carrying forward and using the ***1044** net operating losses; it did not plead facts identifying options other than bankruptcy and reorganization according to its own plan through which Pluris could have carried forward its net operating losses; and it did not plead facts alleging just how, if they had not been squandered or had been better protected, the carry-forward of Pluris's accumulated net operating losses through bankruptcy could have been actually used *to pay or satisfy Berg's or its other existing creditors' claims*—the operative standard. (*CarrAmerica, supra,* 2006 WL 2868979, *7, 2006 U.S. Dist. Lexis 75399, *20 [secret agreement by directors unrelated to protecting corporate assets in order to satisfy creditors' claims cannot form basis of breach-of-fiduciary-duty]; *Ben Franklin, supra,* 225 B.R. at pp. 655–656 [existence of duty not to divert, dissipate, or unduly risk assets is only to protect creditors' contractual and priority rights and is only there to guard against risk that creditors' claims would be defeated by directors giving shareholders preferred rights to assets, which did not occur by prolongation of corporate life that did not result in creditors receiving less than full value for their claims].) Nor, as noted by the trial court, did Berg allege facts about the assignee, Sherwood Partners, Inc., that would have been discovered by reasonable inquiry and that would have foretold any breach by it of a fiduciary duty to creditors or other misconduct detrimental to them.

No matter how Berg now characterizes or packages the basic factual underpinnings of its claim, its allegations fail to state a cognizable cause of action for breach of fiduciary duty against the directors based on the trust-fund doctrine, i.e., that the directors of the insolvent Pluris engaged in misconduct, self-dealing, or the prohibited preferential treatment of creditors, or that they diverted, dissipated, or unduly risked corporate assets that otherwise could have been used to pay or satisfy creditors' claims. The trial court was therefore correct in sustaining the demurrers to Berg's third amended complaint. Notwithstanding its many allegations about the directors' conduct while Pluris was in the zone of insolvency or even actually insolvent, the pleading still fails to state facts sufficient to constitute a cause of action for breach of fiduciary duty by the directors, having diverted, dissipated, or unduly risked corporate assets that might otherwise have been available to satisfy creditors' claims.

B. *The Bar of the Business Judgment Rule*

Even if we had determined that Berg had otherwise pleaded a cognizable claim for breach of fiduciary duty, we ****897** would still conclude that the directors are immune from liability on the claim based on the business judgment rule and, therefore, that the demurrers were correctly sustained. [26]

***1045** As noted, the business judgment rule has been codified in California at Corporations Code section 309. But the common law rule "has two components—one which immunizes directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest. [Citation.] Only the first component is embodied in Corporations Code section 309." (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 714, 57 Cal.Rptr.2d 798 (*Lee*); *Lambden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 257, 87 Cal.Rptr.2d 237, 980 P.2d 940.) The broader rule is " ' "a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions." ' (*Barnes [v. State Farm Mut. Auto. Ins. Co.* (1993) 16 Cal.App.4th 365,] 378 [, 20 Cal.Rptr.2d 87] [(*Barnes*)]; *Gaillard v. Natomas Co.* [(1989) 208 Cal.App.3d 1250,] 1263[, 256 Cal.Rptr. 702] [(*Gaillard*)].) [It] is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. (*Barnes, supra,* 16 Cal.App.4th at p. 378[, 20 Cal.Rptr.2d 87]; *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776[, 230 Cal.Rptr. 815].) The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest. (*Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366[, 27 Cal.Rptr.2d 681]; *Barnes, supra,* 16 Cal.App.4th at pp. 379–380 [, 20 Cal.Rptr.2d 87].)" (*Lee, supra,* 50 Cal.App.4th at p. 711, 57 Cal.Rptr.2d 798.) " 'A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be "attributed to any rational business purpose." [Citation.]' " (*Katz, supra,* 22 Cal.App.4th at p. 1366, 27 Cal.Rptr.2d 681.)

An exception to the presumption afforded by the business judgment rule accordingly exists in "circumstances which inherently raise an inference of conflict of interest" and the rule "does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest." (*Everest Investors 8 v. McNeil Partners, supra,*

114 Cal.App.4th at p. 430, 8 Cal.Rptr.3d 31; *Lee, supra,* 50 Cal.App.4th at p. 715, 57 Cal.Rptr.2d 798.) But a plaintiff must allege sufficient facts to establish these exceptions. To do so, more is needed than "conclusory allegations of improper motives and conflict of interest. Neither is it sufficient to generally allege the failure to conduct an active investigation, in the absence of (1) allegations of facts which would reasonably call for ***1046** such an investigation, or (2) allegations of facts which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business ****898** judgment." (*Lee, supra,* at p. 715, 57 Cal.Rptr.2d 798.) In most cases, "the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts. [Citation.] Interference with the discretion of directors is not warranted in doubtful cases." (*Ibid.*)

And contrary to Berg's contention, the failure to sufficiently plead facts to rebut the business judgment rule or establish its exceptions may be raised on demurrer, as whether sufficient facts have been so pleaded is a question of law. (*Lee, supra,* 50 Cal.App.4th at pp. 711–717, 57 Cal.Rptr.2d 798 [judgment of dismissal following sustaining of demurrer affirmed on appeal for complaint's failure to have pleaded facts establishing exception to business judgment rule]; *Barnes, supra,* 16 Cal.App.4th at pp. 378–379, 20 Cal.Rptr.2d 87 [judgment of dismissal after sustaining of demurrer affirmed in part due to failure to allege facts rebutting business judgment rule]; *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 177–179, 240 P.2d 421 [affirmance of sustained demurrer as pleading failed to allege fraud or bad faith as exception to business judgment rule].)

Berg acknowledges the elements of the business judgment rule but contends that it has sufficiently pleaded facts to rebut it. Specifically, it contends that it alleged facts that the directors failed to conduct a reasonable investigation into ways to protect Berg's interests when Pluris was in the zone of insolvency; and that given the information the board initially had about Berg's intention to use Pluris's net operating losses, it failed to investigate the details of Berg's bankruptcy reorganization plan or any other plan that would have facilitated such use, instead eliminating the possibility of deriving value from the losses by entering into the assignment. But what Berg has essentially alleged are not facts but the conclusion that the board simply did nothing by way of investigation of alternatives to the assignment. And the facts that are alleged—Pluris being in the zone of insolvency and the directors' knowledge of Berg's intention to explore ways to use Pluris's net operating losses—do not, without more, rebut the presumption.

First, as we have already concluded, in this state, corporate directors do not owe a fiduciary duty to creditors by reason of the corporation being in the zone or vicinity of insolvency. Under the trust-fund doctrine, upon actual ***1047** insolvency, directors continue to owe fiduciary duties to shareholders and to the corporation but also owe creditors the duty to avoid diversion, dissipation, or undue risk to assets that might be used to satisfy creditors' claims. Under these circumstances, and even accepting as true Pluris's state of actual insolvency at the time of the assignment for the benefit of creditors and the directors' knowledge that Berg wished to use Pluris's net operating losses through a bankruptcy reorganization, the directors were not obliged to contact Berg or to pursue speculative, contingent and potentially risky and costly alternatives to the assignment simply in order to facilitate Berg's plan. The directors did not owe a paramount duty of loyalty to Berg over and above shareholders or other constituencies comprising the collective interests in the corporate enterprise that gave rise to an obligation to put Berg's interests above these other constituencies or to explore ways to facilitate Berg's desires above all else. This is particularly so when the asset—the net operating losses—the value of which Berg claims was not maximized was not a source of actual payment of creditors' claims.

****899** Moreover, Berg did not plead facts demonstrating the availability of viable alternate sources of financing or facts that made the board's decision to enter into the assignment irrational, unsound, or unreasonable had the directors merely conducted an adequate investigation into alternatives before doing so. Although Berg alleged the conclusion that the details of its reorganization plan would have benefited creditors, it did not allege facts establishing that its plan could have practically and reasonably been implemented or that its plan was less risky, less costly, or likely to succeed so as to enable Pluris or Berg and other creditors to benefit from its net operating losses. Nor did Berg allege facts identifying any other viable alternatives. Although Berg alleged in conclusory fashion a failure by the directors to investigate its plan, the pleading fails to state facts that reasonably called for further investigation or facts about its plan that if discovered by such investigation would have been material to the questioned exercise of business judgment. (*Lee, supra,* 50 Cal.App.4th at p. 715, 57 Cal.Rptr.2d 798.)

Berg suggests that it has pleaded a total abdication by the directors of their corporate responsibilities and an utter failure by the directors to diligently exercise their business judgment. (*Gaillard, supra,* 208 Cal.App.3d at pp. 1263–1264, 256 Cal.Rptr. 702 [business judgment rule does not immunize directors for abdication of duty by closing their eyes to what is going on in the conduct of the business].) But the mere fact of the assignment and the failure by the directors to pursue Berg's bankruptcy reorganization plan or some other unidentified alternative do not, as a matter of fact or law, establish abdication of duty; the failure to have exercised judgment with reasonable care, skill, and diligence; or even an unreasonable failure to have investigated so as to rebut or allege exceptions to the business judgment rule.

***1048** As noted, the business judgment rule has two components—immunization from liability that is codified at Corporations Code section 309 and a judicial policy of deference to the exercise of good-faith business judgment in management decisions. We conclude that based on the allegations of Berg's third amended complaint that do not rebut the presumption afforded by the rule, both components apply here. Even if an otherwise cognizable claim for breach of fiduciary duty against the directors had been pleaded, the claim would still be barred by the business judgment rule. Accordingly, the demurrers would have properly been sustained on this ground as well.

IV. *The Court Did Not Abuse its Discretion in Denying Leave to Amend*

As noted, a reviewing court must determine whether there is a reasonable possibility that a pleading as to which a demurrer has been sustained without leave to amend is capable of amendment to cure the defect. And it is the plaintiff who bears the burden of establishing that it is. (*Williams v. Housing Authority of Los Angeles, supra,* 121 Cal.App.4th at p. 719, 17 Cal.Rptr.3d 374; *Campbell v. Regents of University of California, supra,* 35 Cal.4th at p. 320, 25 Cal.Rptr.3d 320, 106 P.3d 976.)

Berg contends in its opening brief[27] that its third amended complaint can be still further amended to state new allegations ****900** establishing a viable cause of action for breach of fiduciary duty. The new allegations are: (1) The directors knowingly dissipated an asset—the net operating losses—by ceasing operations and making the assignment knowing that it would destroy the "creditors' ability to obtain" the losses; (2) Before the assignment, the directors paid preferred claims to employees with remaining cash; [28] (3) After the assignment, the directors became aware of the assignee's unscrupulous conduct in wasting Pluris's assets and did nothing about it. None of these allegations would cure the pleading defects we have identified so as to state a cognizable claim.

The first proposed allegation alleges nothing more or new in factual substance from that which is already alleged in the third amended complaint. Moreover, the directors' acts of knowingly ceasing operations and making the assignment, without more, do not constitute the intentional dissipation of an ***1049** asset that could otherwise be used to pay or satisfy creditors' claims. Accordingly, the allegation does not cure the existing failure to state a viable claim for breach of fiduciary duty under the trust-fund doctrine.

As to the second allegation that the directors paid unidentified preferred employee wage or severance claims of unstated amounts just before the assignment, such claims are generally entitled to legal preference under state law governing assignments for the benefit of creditors (Code Civ. Proc., § 1204) and under federal bankruptcy law (11 U.S.C. § 507(a)(4)), as respondents point out. Thus, without other facts, such payments would not constitute the diversion, dissipation, or undue risking of assets that would amount to a cognizable claim for breach of fiduciary duty.

Berg's third and final proposed new allegation is conclusory in that it states without specific facts that the directors became aware of the assignee's "unscrupulous" behavior in wasting Pluris's remaining assets after the assignment but did nothing about it, without specifically stating just what the directors could or should have done. Even more problematic is that the allegation does not state that the directors knew of facts *before* the assignment suggesting that the assignee would commit waste yet proceeded with the assignment anyway to the detriment of creditors. After the assignment, the assignee assumed the duty to marshal and protect Pluris's assets and the directors were thus no longer managing Pluris's affairs. (*Sherwood Partners, Inc. v. EOP–Marina Business Center, L.L.C., supra,* 153 Cal.App.4th at p. 983, 62 Cal.Rptr.3d 896.) It follows that they, as individuals, ceased to owe any duty as directors to Pluris's creditors and were not legally responsible for acts of the assignee. Finally, as respondent Boyle argues, the factual allegation that Berg contacted the directors after the assignment to inform them of the assignee's unscrupulous conduct directly contradicts existing allegations of the third amended complaint to the effect that after the assignment, Berg was not in contact with the directors, and indeed was

unable to contact them, and that Pluris then had no functioning board. Under the sham pleading doctrine, we are free to disregard inconsistent allegations offered for amendment and we do so here.

In sum, Berg has not demonstrated that it can allege new facts that would cure the defects we have concluded exist in its third ****901** amended complaint. Based on the proposed new allegations, we remain unconvinced of the possibility that Berg's pleading can be amended to overcome these defects. Accordingly, we further conclude that the trial court did not abuse its discretion in sustaining the demurrers without leave to amend.

***1050** DISPOSITION

The judgment is affirmed.

WE CONCUR: MIHARA, Acting P.J., and McADAMS, J.

All Citations

178 Cal.App.4th 1020, 100 Cal.Rptr.3d 875, 09 Cal. Daily Op. Serv. 13,305, 2009 Daily Journal D.A.R. 15,513

Footnotes

1 An assignment for the benefit of creditors is a recognized but less than comprehensive statutory procedure that is an alternative to liquidation in bankruptcy. (Code Civ. Proc., §§ 493.010 & 1802; *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 829, fn. 13, 32 Cal.Rptr.3d 325; *Sherwood Partners, Inc. v. EOP–Marina Business Center, L.L.C.* (2007) 153 Cal.App.4th 977, 981–982, 62 Cal.Rptr.3d 896; 1 Witkin, Summary of Cal. Law (10th Ed.2005) Contracts, §§ 710 & 711, pp. 795–798.)

2 In a previous separate but related action, Berg also sued the assignee for the benefit of creditors, Sherwood Partners, Inc., and its counsel, SulmeyerKupetz, alleging, among other claims, an attorney-client conspiracy to deplete Pluris's assets by generating and paying from them unconscionable attorney fees. Concluding that Berg had failed to plead a viable conspiracy claim against a party and its lawyers and further that the assignee's counsel owed no independent fiduciary duty to Pluris's creditors, we rejected Berg's claims in *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc., supra,* 131 Cal.App.4th 802, 32 Cal.Rptr.3d 325. On remand, the case apparently settled, with Sherwood assigning whatever claims it had against the individual Pluris directors to Berg, or so Berg alleged below. We express no opinion on the validity of any such assignment and we need not do so in light of our opinion.

3 While only the third amended complaint as the operative pleading is directly relevant to our review of the judgment, we briefly discuss the pleading history as certain prior allegations and court rulings bear on the issues pertinent to that review. We more thoroughly relay the pleaded background facts in conjunction with our discussion of the third amended complaint.

4 As observed by defendant Boyle at oral argument, Berg references no authority for the proposition that Pluris was required to proceed in bankruptcy in order to use the net operating losses in the manner proposed by Berg because it could not do so through an assignment for the benefit of creditors. For our purposes, we accept as true Berg's allegation that a bankruptcy proceeding was required in order to implement its plan.

5 The court nevertheless concluded that the anti-SLAPP motion was well taken and later awarded defendants statutory attorney fees per this determination.

6 “An action is derivative, that is, in the corporate right, ‘ “if the gravamen” of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.’ (*Jones [v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106, 81 Cal.Rptr. 592, 460 P.2d 464].)” (*Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 425, 8 Cal.Rptr.3d 31.) On the other hand, a creditor's individual or direct claim is one for which the creditor does not seek to recover on behalf of the corporation for injury done to it. The injury need not be different from that suffered by a class of shareholders or be unique to the plaintiff and it still may affect a substantial number of shareholders or in this case, creditors. But the direct claim is simply one that reflects an injury that is not incidental to an injury to the corporation as a whole. (*Id.* at pp. 425–428, 8 Cal.Rptr.3d 31.)

7 We include here only seemingly relevant facts alleged in the 17–page pleading containing a single cause of action.

8 For the first time, Berg also named Pluris as a defendant but this is not relevant to the issues on appeal.

9 This is a bit different from prior pleadings, which had alleged that at this point in time, Berg had only expressed a general desire to “explore” ways to derive value from Pluris's net operating losses, an allegation that is also included in the

third amended complaint. As Berg's counsel later explained, in order to "derive value" from Pluris's net operating losses according to Berg's plan, the corporation had to reorganize through a bankruptcy proceeding and allow Carl Berg "to put a skeleton staff together, run it for a period of time, and take advantage of the net operating losses." Just how this activity by Pluris as a separate business entity could inure to Berg's benefit is not exactly clear.

10 These were the plan details that prior pleadings had alleged were first proposed by Berg only later, during involuntary bankruptcy proceedings. The third amended complaint alleges, inconsistently with those prior pleadings, that during the involuntary bankruptcy proceedings, Carl Berg "*continued* to offer his plans for reorganization," as if the plan details, or some of them, had been previously put forth before the July 2002 assignment. (Italics added.)

11 Berg also pleaded as part of these allegations that the directors had breached their duty by prohibiting Berg from timely using or otherwise disposing of Pluris's assets that secured its obligation to Berg, and, without reference to any specific facts, by "using the remaining PLURIS assets for themselves." But Berg did not pursue these particular allegations below and does not pursue them here. Any claim regarding them has accordingly been forfeited or waived.

12 See footnote 10, *ante.*

13 The primary bases of the court's order were that creditors and the debtor would be "better served" by a dismissal of the involuntary petition because Pluris, as a "non-operating company" with "no employees, no ongoing business activities, no accounts receivables or any other source of revenue, and no customers" had already entered into an assignment for the benefit of creditors through which it was being liquidated, not reorganized, and because Carl Berg was not motivated to ensure a fair distribution to Pluris's creditors but rather to gain "control of Pluris and its assets for his potential advantage," which the court viewed as "self serving."

14 These components are generally that an application for reconsideration of a prior ruling or a renewed motion must be made on new or different facts, circumstances, or law. (Code Civ. Proc., § 1008.)

15 We further observe that none of the court's prior rulings actually turned on a determination that Berg had stated a viable claim for breach of fiduciary duty. Its order on demurrer to the first amended complaint narrowly determined that Berg could not proceed with its claim directly but must do so derivatively. Its order sustaining the demurrers to the second amended complaint determined that a viable claim for breach of fiduciary duty had not been stated because on the face of the pleading, the business judgment rule barred the claim. In other words, the court did not separate the viability of the breach-of-fiduciary-duty claim from the presumption of the business judgment rule, concluding that a viable claim must plead facts to rebut the presumption.

16 We have not had occasion to reassess this conclusion in light of *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096–1097, 29 Cal.Rptr.3d 249, 112 P.3d 636, which in essence clarified that parties requesting reconsideration of a ruling or filing a renewed motion must comply with Code of Civil Procedure section 1008.

17 Corporations Code section 309, subdivision (a) provides that "[a] director shall perform the duties of a director ... in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." A director "who performs the duties of a director in accordance with" this subdivision, as well as other subdivisions that permit reliance on information provided by others under certain circumstances not relevant here, "shall have no liability based upon any alleged failure to discharge the person's obligations as a director." (Corp.Code, § 309, subd. (c).) Accordingly, this section sets forth the standard of care owed by directors and accords directors immunity if they comply with that standard by codification of the common law business judgment rule, which we discuss *post.*

18 The establishment of a general duty owed by corporate directors to creditors has generated controversy and has not been without a steady stream of broad criticism from commentators. Their writings on the subject focus on matters such as the difficulty of perceiving insolvency, or worse, the zone of insolvency, which is when such duties arise, and the practical difficulties and inefficiencies inherent in directors managing conflicting duties owed to disparate interests, thereby diluting the continuing and historic duty owed by directors to shareholders. Some commentators have even called for the abolition of the duty to creditors. (See, e.g., Lin, *Shift of Fiduciary Duty upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors* (1993) 46 Vand. L.Rev. 1485; Stilson, *Reexamining the Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors' Duties to Creditors* (1995) 20 Del. J. Corp. L. 1; Schwarz, *Rethinking a Corporation's Obligation to Creditors* (1996) 17 Cardozo L.Rev. 647; Lipson, *Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation* (2003) 50 UCLA L.Rev. 1189; Sahyan, *The Myth of the Zone of Insolvency: Production Resources Group v. NCT Group* (Fall, 2006) 3 Hastings Bus. L.J. 181; Bainbridge, *Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency* in 1 Journal of Business and Technology Law (2007) at p. 335; Westbrook, *Abolition of the Corporate Duty to Creditors* (2007) 107 Colum. L.Rev. 1321; Tung, *The New Death of Contract: Creeping Corporate Fiduciary Duties For Creditors* (2008) 57 Emory L.J. 809; McLaughlin, *The Uncertain Timing of Directors'*

Shifting Fiduciary Duties in the Zone of Insolvency: Using Altman's Z–Score to Synchronize the Watches of Courts, Directors, Creditors, and Shareholders (Winter, 2008) 31 Hamline L.Rev. 145; See also, *NACEPF v. Gheewalla, supra,* 930 A.2d at p. 99, fn. 28 [listing many articles on the topic of duties owed to creditors on corporate insolvency].)

19 *Pepper v. Litton* is a seminal United States Supreme Court case that established, among other things, that controlling shareholders, like directors, owe fiduciary duties that are "designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders." (*Pepper v. Litton, supra,* 308 U.S. at p. 307, 60 S.Ct. 238, fn omitted.) Transactions by such fiduciaries with the corporation therefore are rigorously scrutinized and must meet standards of good faith and inherent fairness from the viewpoint of the corporation and its interested constituencies, which include creditors. Such transactions must under all the relevant circumstances "carry the earmarks of an arm's length bargain." (*Id.* at pp. 306–307, 60 S.Ct. 238, fn. omitted.) Transactions that fail to meet this standard may be set aside in a bankruptcy court under its equity powers. (*Ibid.*) The factual context of the case involved fraud and misconduct by the dominant shareholder amounting to self-dealing, none of which is even alleged here.

20 For an excellent discussion of the trust fund doctrine under Delaware law, see *In re JTS Corp.* (Bankr.N.D.Cal.2003) 305 B.R. 529, 535–536.

21 As Berg has not pleaded facts supporting fraud or concealment by the directors, we have no occasion to address that circumstance in our discussion. Nor does our conclusion displace the general obligation owed by all persons under Civil Code section 1708, which recognizes that "[e]very person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights."

22 And we observe that the "vicinity of insolvency" breach-of-fiduciary-duty theory of liability was recently rejected, along with that of direct (as opposed to derivative) individual claims by creditors against directors of an insolvent corporation for breach of fiduciary duty, by the Delaware Supreme Court in *NACEPF v. Gheewalla, supra,* 930 A.2d 92 at pages 101–103. We further observe that when an insolvent corporation files for relief in bankruptcy, duties owed to creditors as beneficiaries of the bankruptcy estate are then governed by the federal bankruptcy laws.

23 There are multiple definitions of insolvency. Corporations Code section 501 provides, for example, that a corporation is insolvent, if, as a result of a prohibited distribution, it would "likely be unable to meet its liabilities ... as they mature." But there is also insolvency in the balance sheet sense in which the value of liabilities exceeds the value of assets. (*In re Kallmeyer* (9th Cir.BAP1999) 242 B.R. 492, 496–497 [affirming bankruptcy court's use of balance-sheet test for corporate insolvency in applying Oregon's trust-fund doctrine in 11 U.S.C. § 523(a)(4) context].) Berg did not plead any facts establishing Pluris's insolvency at any specific point in time under any test, only the conclusion that at all relevant times, the corporation was insolvent or in the zone of insolvency. In the Ninth Circuit Court of Appeals, a finding of insolvency by the standard of a debtor not paying debts when they become due requires more than merely establishing the existence of a few unpaid debts. (*In re Dill* (9th Cir.1984) 731 F.2d 629, 632.)

24 Net operating losses, whose value depends on future income against which to apply them, have been considered property of a bankruptcy estate for purposes of title 11 United States Code sections 541, subdivision (a)(1) and 548, subdivision (a)(1). (*In re Russell* (8th Cir.1991) 927 F.2d 413, 416–417; *In re Prudential Lines Inc.* (2d Cir.1991) 928 F.2d 565, 571–573.) In order to obtain benefit from net operating losses, an entity must comply with title 26 United States Code section 382 concerning ownership, control, and continuity-of-business-enterprise and may not run afoul of title 26 United States Code section 269, which prohibits the use of net operating losses when control of a company is acquired principally to evade taxes. Treasury Regulations also limit and define an entity's ability to carry forward and use net operating losses. (See Trower, *Federal Taxation of Bankruptcy and Workouts* (1993) ¶ 7.08[6] at pp. 7–91–7–96; Weil, Gotshal & Manges, *Reorganizing Failed Businesses,* V. II (rev. ed.2006) pp. 22–12–22–21.) We need not decide whether Pluris would have been able to comply with the complex federal statutes and IRS regulations concerning a taxpayer's ability to carry forward net operating losses in order to offset future gain, particularly in the context of a bankruptcy organization. Nor could we, given all the practical contingencies associated with that course of action, including but not limited to Pluris's ability to continue operations as a debtor in bankruptcy and its ability to generate future income against which to offset accumulated net operating losses. It suffices to say that directors contemplating a course of action such as a bankruptcy reorganization in an inherently speculative attempt to benefit from the corporation's net operating losses by carrying them forward to offset against potential gain would be engaging in a complex exercise of business judgment involving much risk that the endeavor would not ultimately be successful.

25 We consider the new allegations of Berg's third amended complaint, that in February 2002, well before the assignment, Carl Berg informed the Pluris directors of some details of his reorganization plan, i.e., reduction of Berg's unsecured claim and its contribution of $150,000 to be apportioned among those other creditors, to be sham. Berg's superseded pleadings, of which we take judicial notice, clearly alleged that in February 2002, Carl Berg expressed *only* his desire to explore the

use of Pluris's net operating losses if it was unable to obtain outside financing and that it was *only after* the assignment and during involuntary bankruptcy proceedings that Berg first offered any details of his plan. The later amendments to these allegations are inconsistent with these prior allegations. Under the sham-pleading doctrine, admissions in an original complaint that has been superseded by an amended pleading remain within the court's cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff's case will not be accepted. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425–426, 42 Cal.Rptr.3d 807, fn. 3 [if a party files an amended pleading and attempts to avoid defects of original complaint by either omitting facts that rendered prior complaint defective or adding facts inconsistent with prior allegations, court may take judicial notice of prior pleadings and disregard inconsistent allegations or read into amended complaint the allegations of the superseded complaint]; *Patane v. Kiddoo* (1985) 167 Cal.App.3d 1207, 1213, 214 Cal.Rptr. 9.) We accordingly disregard the subject allegations of the third amended complaint and read into the operative pleading the previous allegations on the matter.

26 And based on these dispositive conclusions, we need not address respondents' other bases for challenging Berg's third amended complaint, including lack of standing, the failure to plead recoverable damages, and what appears to be a form of collateral estoppel based on the bankruptcy court's prior dismissal of the involuntary petition.

27 To the extent Berg offered that it could allege other additional or different facts in its motion for reconsideration below, the same have been waived or forfeited on appeal for Berg's failure to raise them in its briefing.

28 Berg does not identify these allegedly preferred creditors as employees in its opening brief but they were identified by Berg as such in the court below.

Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation

By
Eugenia Levine*

INTRODUCTION

The rapid rise to prominence of international investment arbitration in the international legal order has been accompanied by mounting public concern regarding the system's legitimacy and accountability. The controversy stems from the fact that while arbitration is traditionally a largely confidential and private dispute resolution mechanism, the involvement of a State in the investment context can lead to arbitral decisions that affect a significantly broader range of actors than the two parties to the dispute. As one author highlights, "investor-State arbitration involves challenges to governmental measures, sometimes measures of general application intended to promote or achieve important public policy goals."[1] Commentators and civil society groups have called for increased public involvement in investment arbitration proceedings, in order to incorporate broader policy considerations into the dispute resolution process and add a measure of transparency.[2] Many now view procedural and structural changes to the "secretive" private process in investor-

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1. Kenneth Kinyua, *Assessing the Benefits of Accepting Amicus Curiae Briefs in Investor-State Arbitrations: A Developing Country's Perspective* (Stellenbosch Univ. Faculty of Law, Working Paper Series No. 4, 2009), *available at* http://papers.ssrn.com/sol3/ papers.cfm?abstract _id=1310753.

2. Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2008); *see also* Andrew Newcombe and Axelle Lemaire, *Should Amici Curiae Participate in Investment Treaty Arbitrations?*, 5 VINDOBONA J. INT'L L. & ARB. 22 (2001).

State arbitration as necessary to correct the system's perceived democratic deficit and lack of openness to public scrutiny.[3]

One avenue, which interested parties now increasingly rely on to include broader interests in investor-State arbitration is amicus curiae, or third party, intervention in arbitral proceedings. Arbitrators in investment disputes have over the last decade begun showing greater willingness to provide third parties with a very limited mandate to participate by way of written amicus briefs. In a number of high-profile arbitrations, nongovernmental organizations (NGOs) have intervened in order to provide expertise on thematic issues of public policy implicated in the dispute. More recently, the range of potential interveners has expanded beyond civil society groups. For example, in the pending case of *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary* (AES),[4] proceeding under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), the European Commission (Commission) has gained amicus curiae status to represent the European Community's (EC or Community) interest in enforcing competition law.[5] The increase in and diversification of third parties seeking amicus standing raises complex questions regarding the nature of the interests that these third parties may represent, the positive and negative consequences of their involvement, and the different forms that their participation should take in the future.[6]

This paper seeks to analyze these issues, focusing on the potential for arbitration regimes to strike an appropriate balance between maintaining the key features of the arbitral institution and allowing relevant third-party input. Part I of this paper provides a broad overview of the international investment arbitration regime and the extent to which it embodies disputing parties' rights to privacy and confidentiality. Part II discusses in closer detail the rationale for third-party intervention in investment arbitration, focusing on the need for greater legitimacy and public participation in this area of dispute settlement, as distinct from commercial arbitration. Part III traces recent developments in amicus participation in international investment arbitration and the institutional changes that have allowed for greater third-party involvement. Part IV focuses

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3. Choudhury, *supra* note 2, at 807-821.

4. AES Summit Generation Ltd. and AES-Tisza Erőmű Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22 (2010).

5. Luke Eric Peterson, *European Commission Seeks to Intervene as Amicus Curiae in ICSID Arbitrations to Argue that Long-term Power Purchase Agreements Between Hungary and Foreign Investors are Contrary to European Community Law,* INV. ARB. REP., Sept. 17, 2008, at 14 [hereinafter *European Commission as Amicus Report*].

6. Meg Kinnear, *Transparency and Third Party Participation in Investor-State Dispute Settlement, Making the Most of International Investment Agreements: A Common Agenda,* Symposium Co-Organized by ICSID, OECD and UNCTAD (Sept 12, 2005); *see also* Epaminontas Triantafilou, *A More Expansive Role for Amici Curiae in Investment Arbitration?,* KLUWER ARB. BLOG (May 11, 2009), http://kluwerarbitrationblog.com/blog/2009/05/11/a-more-expansive-role-for-amici-curiae-in-investment-arbitration/.

on the implications of the rise in amicus participation and considers the need to develop more specific criteria to determine whether amicus curiae participation should be permitted in particular circumstances, and the form and extent of such involvement in particular contexts.

I.
INTERNATIONAL INVESTMENT ARBITRATION—AN OVERVIEW

In discussing the nature of third-party participation in investment arbitration, it is first necessary to highlight the rationale and key features of this system. Historically, international investment regimes have gained popularity in large part due to investor concerns about "being subject to arbitrary and discriminatory treatment by developing-country governments,"[7] such as expropriation, as well as national governments' recognition of the need to attract investment opportunities by providing investors with greater protection.[8] As Kinyua notes, "[t]his is especially true of developing countries, which possess the necessary human and natural resources, but lack the capital and technological know-how possessed by most industrialized states . . . [their] search for foreign investment is an openly declared goal."[9] Thus, numerous governments seeking to attract investors have entered into international investment agreements that incorporate "standards of behavior for host states," which ordinarily include provisions that direct investor-State disputes to arbitration.[10] These provisions "essentially give an investor from a State party to the treaty the right to initiate binding arbitration against another State party when the investor has suffered an injury as a consequence of a measure of the other State party that is inconsistent with the treaty's substantive obligations."[11]

The international investment system is undergoing fast normative development through a number of different regional, sectoral, and bilateral regimes. There is an ever-increasing number of bilateral investment treaties (BIT) being enacted by governments to regulate the flow of foreign direct investment (FDI)—at present, there are an estimated 2,500 such agreements.[12] Apart from BITs, prominent foreign investment regimes include regional

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7. J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 688 (2007).

8. *Id.* at 688. For a more in-depth discussion of this issue, see generally, Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67, 77-79 (2005).

9. Kinyua, *supra* note 1.

10. *See* Luke E. Peterson, *All Roads Lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties*, International Sustainable and Ethical Investment Rules Project, Nautilus Institute for Security and Sustainable Development 5 (2002), *available at* www.iisd.org/pdf/2003/investment_nautilus.pdf.

11. VanDuzer, *supra* note 7, at 688.

12. *Id.*

arrangements, such as the North American Free Trade Agreement (NAFTA),[13] as well as sector-specific arrangements, such as the Energy Charter Treaty (ECT).[14] Investor-State arbitral proceedings initiated pursuant to various treaty mechanisms are carried out under the auspices of different arbitral institutions and procedural rules.[15] For example, in investment disputes initiated under NAFTA Chapter 11, an investor may choose to proceed on the basis of three different sets of arbitral rules: ICSID Arbitration Rules (ICSID Rules),[16] the ICSID Additional Facility Rules,[17] with proceedings in both of these cases being conducted under the institutional auspices of ICSID, or under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules)[18] on an ad hoc basis.[19] Although arbitration under ICSID is now the predominant forum specified in BITs,[20] some agreements continue to refer to different procedural rules. The United Kingdom-Bolivia BIT, for example, currently makes reference to the Arbitration Rules of the International Chamber of Commerce.[21] Pursuant to the ECT, the investor can also initiate proceedings in several forums, including ICSID.[22] As such, there are a growing number of different regimes governing investment arbitration, each with its own idiosyncratic provisions.

Despite their variations, investment arbitration regimes share common features that appeal to investors. First, arbitration is considered to provide

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13. North American Free Trade Agreement, U.S.-Can.-Mex., Dec.17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

14. Energy Charter Treaty art. 26, Dec. 17, 1994, 2080 U.N.T.S. 102 [hereinafter ECT].

15. *See, e.g.,* International Chamber of Commerce Rules of Arbitration, *available at* http://www.iccwbo.org/court/english/arbitration/rules.asp; London Court of International Arbitration Rules of Arbitration, *available at* www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf; Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, *available at* www.sccinstitute.com/_upload/shared_files/regler/ web_A4_vanliga_2004_eng.pdf.

16. ICSID Rules of Procedure for Arbitration Proceedings, *available at* http://www.sice.oas.org/dispute/comarb/icsid/icsid2a.asp [hereinafter ICSID Rules].

17. ICSID Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes, *available at* http://www.sice.oas.org/dispute/comarb/icsid/icsid3.asp [hereinafter ICSID Rules].

18. UNCITRAL Arbitration Rules, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.

19. *See* North American Free Trade Agreement, *supra* note 13, ch. 11, art. 1120 (stipulating that a disputing investor may submit a claim against a host State to arbitration under either the Rules of the ICSID Convention, if both the host State and the home State of the claimant are parties to the Convention, or the Additional Facility Rules of ICSID, if either the host State or the investor's home State is a party to the ICSID Convention, but not both, or the UNCITRAL Rules).

20. William D. Rogers, Senior Partner, Arnold & Porter, Remarks at Inter-American Development Bank Conference on Commercial Alternative Dispute Resolution in the XXI Century: The Road Ahead for Latin America and the Caribbean (Oct. 26, 2000) (notes on file with author).

21. *See, e.g.*, Agreement Between the United Kingdom of Great Britain and the Government of the Republic of Bolivia for the Promotion and Protection of Investments art. 9, May 24, 1988, Gr. Brit.-Bol., GR. BRIT. T.S. NO. 34 (1990) (Cm. 1071).

22. ECT, *supra* note 14, art 26.

parties with a more efficient and, in the investor-State context, perhaps more impartial outcomes, by proceeding outside national judicial systems.[23] Because arbitral awards are normally not subject to any appeal except for those provided in the arbitration rules, the determination of these awards largely bypasses the judicial process.[24] The other key attraction is "[t]he implication . . . that what proceeds in the arbitration will not only be kept private between the parties but will remain absolutely confidential."[25] This concept of privacy and confidentiality originates primarily from the foundational underpinnings of international commercial arbitration, but it has also to a considerable extent been translated into the investment context.[26]

Investment arbitral proceedings frequently rely on the same procedural rules that govern commercial arbitration, and contain certain privacy and confidentiality rights.[27] For instance, the UNCITRAL Rules, which are frequently used in investment arbitration disputes, ensure the parties' rights to privacy by guaranteeing in-camera proceedings without access by third parties unless the disputing parties consent otherwise.[28] The rules also restrict the publication of any awards without the parties' consent.[29] Although the existence of a general duty of confidentiality that would prohibit access to documents remains an unsettled question, arbitral panels proceeding under the UNCITRAL rules tend to accept parties' rights to prohibit third-party access to relevant documents by express agreement.[30] There are also similar privacy and confidentiality rights in the investment-specific ICSID regime. For instance, the ICSID Convention disallows publication of the award without the consent of the parties[31] and the ICSID Rules prohibit attendance of third parties at arbitral

23. VanDuzer, *supra* note 7, at 668-690.

24. *See, e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 53, Mar. 18, 1965, 575 U.N.T.S. 159, 4 I.L.M. 532 [hereinafter ICSID Convention] (expressly stipulating that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.").

25. Loukas Mistelis, *Confidentiality and Third-Party Participation: UPS v. Canada and Methanex Corp. v. USA in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION 169, 169 (Todd Weiler ed., 2005).

26. *See generally* Cindy Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121 (2003); Mistelis, *supra* note 25.

27. Mistelis, *supra* note 25.

28. UNCITRAL Arbitration Rules, *supra* note 18, art. 25(4).

29. *Id.* art. 32(5).

30. Mistelis, *supra* note 25; *see also* Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, Jan. 15, 2001, ¶¶ 43-46 [hereinafter *Methanex*, Amicus Curiae Decision].

31. ICSID Convention, art. 48 (5), *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

hearings without the parties' consent.[32] As such, the institutional rules and the consent-based nature of arbitration have traditionally provided disputing parties with the advantage of fashioning the investment arbitration proceedings to preserve privacy and confidentiality.

II.
THE RATIONALE FOR THIRD-PARTY PARTICIPATION IN INVESTMENT ARBITRATION

Unlike commercial arbitration, which ordinarily involves disputes affecting two private contracting parties, investor-State arbitration frequently concerns the public services sector, such as water, oil and gas, or waste management, and implicates "government regulation aimed at the protection of public welfare [such as] human rights, health and safety, labor laws, [or] environmental protection."[33] At the same time, there is growing awareness that in many respects, the investor-State dispute resolution system is "transfer[ring] decision-making from the national to the international level."[34] One scholar, for instance, expresses the following concern:

> The growth in investment arbitration has also extended the powers of the international bodies governing [investor-State] disputes. In particular, the arbitrators governing these disputes are now regularly reviewing domestic public interest issues due to their expanded role. In fact, in some cases arbitrators are effectively striking down national regulations.[35]

Some academics have gone as far as describing international investment arbitration as a developing species of "global administrative law": they suggest that investment arbitration obligates host-states to arbitrate disputes that stem from sovereign acts, and thus function as a control mechanism over the exercise of governmental authority.[36] It has therefore been argued that "investment arbitration is best analogized to domestic administrative law rather than to international commercial arbitration."[37]

The perception that international investment arbitration has the potential to usurp national decision-making powers and even aspects of state sovereignty in areas of considerable public significance has led to growing questions about the system's legitimacy. Critics underscore the idea that the element of state participation and the potential significance of the decision for a host state and its

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32. ICSID Rules, *supra* note 16, art. 32(2).

33. Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16 REV. EUR. CMTY. & INT'L ENVTL. L. 230, 230 (2007).

34. Choudhury, *supra* note 2, at 775.

35. *Id.*

36. *See, e.g.*, Gus Van Harten and Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 121 (2006).

37. *Id.*

population "render several issues of public nature and thus public interest."[38] A further consideration in investment arbitration proceedings is that "adverse decisions leading to monetary awards will likely be paid by out of the public's tax revenues."[39] In light of these factors, commentators have argued that dispute settlement procedures in investment arbitrations lack public openness and scrutiny, and delegitimize outcomes arrived at in secrecy by private decision-makers.[40] Beyond ensuring legitimacy through transparency, some authors have also highlighted that the public nature of these arbitrations may create a situation where third parties have substantial legal interests in the dispute and should be granted broader rights of participation.[41]

In the seminal NAFTA case of *Methanex Corporation v. United States of America*, the U.S. government acknowledged that investment disputes are "to be distinguished from a typical commercial arbitration on the basis that a State [is] the Respondent, the issues [have] to be decided in accordance with a treaty and the principles of public international law and a decision on the dispute could have a significant effect extending beyond the two Disputing Parties."[42] At the same time, however, no one can ignore that arbitration is inherently based on a certain degree of party autonomy and privacy, and arbitration cannot be invested with all the features of a court process without reducing its attractiveness to investors and its key role in promoting the foreign investment regime.[43] As such, it is necessary to appropriately balance the attractive features of investment arbitration, such as privacy and efficiency, with acknowledgment of and accommodation for the impact of investor-State arbitration on broader public policy and third-party interests. Nevertheless, on the whole there appears to be a more compelling case for introducing a degree of third-party participation into investor-State arbitration proceedings than into international commercial arbitration.

III.
RECENT DEVELOPMENTS IN THIRD-PARTY PARTICIPATION IN INVESTMENT ARBITRATION—THE RISE OF THE AMICUS CURIAE

A. The Concept of an "Amicus Curiae"

Third parties, or non-disputing parties, often participate in dispute resolution mechanisms as amicus curiae. The term is broadly translated as

38. Mistelis, *supra* note 25, at 178.

39. Choudhury, *supra* note 2, at 809.

40. *See, e.g.*, Newcombe & Lemaire, *supra* note 2.

41. *See, e.g.*, Triantafilou, *supra* note 6.

42. *Methanex* Amicus Curiae Decision, *supra* note 30, ¶ 17.

43. Jorge E. Viñuales, *Amicus Intervention in Investor-State Arbitration*, 61 DISP. RESOL. J. 72 (2007).

"friend of the court."[44] Amicus participation is ordinarily justified on the basis that this friend of the court is in a position to provide the court or tribunal its special perspective or expertise in relation to the dispute.[45]

The concept of amicus curiae is accepted in a number of domestic legal systems and has more recently gained some recognition in various international proceedings. Amicus curiae participation in domestic court cases is, for instance, well developed in U.S. jurisprudence, and is also present in other common law and some civil law jurisdictions.[46] On the domestic level, amicus intervention has not been limited to any one particular kind of group, and has frequently involved a range of participants, including individuals and foreign governments.[47] On the international plane, the practice relating to third-party participation varies among different forums, although several international tribunals specifically contemplate third-party involvement.[48] For instance, while the International Court of Justice has a rather restrictive practice in relation to third-party participation,[49] the European Court of Human Rights (ECHR) includes specific provisions for amicus curiae in its governing convention.[50] Further, the World Trade Organization (WTO), a body whose practices in adjudicating international trade disputes are perhaps most relevant for investor-State disputes, also allows for a limited form of third-party intervention by way of amicus briefs.[51]

Amicus participation in dispute resolution proceedings ordinarily takes the form of written submissions addressed to the decision-maker;[52] however, third-party involvement is not by definition limited to written submissions.[53] For instance, the ECHR has previously permitted third parties to participate in the oral hearings stage of the proceedings.[54] The court justified such broad rights of

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44. Lance Bartholomeusz, *The Amicus Curiae Before International Courts and Tribunals*, 5 NON-STATE ACTORS & INT'L L. 209, 211 (2005).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See* European Convention on Human Rights art. 36(2), Nov. 4, 1950, 213 U.N.T.S. 222, stating: "The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings."

51. *See, e.g.*, WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art.17(9), *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm; *see also* Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, Jean Monnet Working Paper 2/01, *available at* www.worldtradelaw.net/articles/mavroidisamicus.pdf.

52. Bartholomeusz, *supra* note 44.

53. *Id.*

54. *See*, Timothy R. West and Matthew M.C. Roberts, *Amicus Curiae Participation in U.S. Supreme Court Oral Arguments*, ALL ACADEMIC RESEARCH (2003), *available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/0/8/3/4/1/pages83411/p83411-

intervention on the basis that it highlighted "the general importance of the issue in the territories of all Contracting Parties."[55] U.S. courts have also on occasion extended amicus rights to participation in the oral part of the proceedings.[56] As such, the concept of amicus curiae is not inherently restricted to any one form of participation and could, in appropriate cases, include attendance and participation at oral hearings, access to the disputing parties' documents and even cross-examination of witnesses.[57]

B. Amicus Curiae Participation in Investment Disputes: The Recent Trends

Investment arbitration tribunals initially refused to allow third-party participation on account of the inherent difference between arbitration proceedings and those before domestic or international courts.[58] In *Aguas del Tunari SA v. The Republic of Bolivia*, known as the *Bechtel* case,[59] which took place pursuant to the provisions of the Netherlands-UK BIT, the tribunal denied citizens and environmental groups standing at the arbitration due to the parties' unwillingness to consent to their participation.[60] The tribunal, which was operating under the auspices of ICSID, found that the "interplay of the ICSID Convention and the BIT, and the consensual nature of arbitration" left the decision as regards amicus participation in the hands of the parties to the arbitration. Since the parties did not consent, the tribunal lacked the power to allow any form of third-party intervention.[61] The decision in *Bechtel* has been subjected to considerable criticism and suggestions that the approach adopted by the tribunal would "deprive the public of reasonable expectations."[62]

In recent years, there has been an undeniable shift in investor-State arbitration toward greater tolerance of limited third-party participation, perhaps in response to continuing public pressure and criticism.[63] The NAFTA parties have expressly supported this shift: the Free Trade Commission issued a *Statement on Non-Disputing Party Participation* (FTC Statement), that empowers NAFTA Chapter 11 tribunals to embrace nonbinding criteria for

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55. *Id.*

56. *See*, Timothy R. West and Matthew M.C. Roberts, *supra* note 54.

57. Choudhury, *supra* note 2; Viñuales, *supra* note 43.

58. *See, e.g., Secretive World Bank Tribunal Bans Public and Media Participation in Bechtel Lawsuit over Access to Water*, CIEL.ORG, http://www.ciel.org/Ifi/Bechtel_Lawsuit_12Feb03.html (last visited Oct. 8, 2010).

59. *Aguas dal Tunari SA v. The Republic of Bolivia*, ICSID Case No. ARB/03/02 (Oct. 21, 2005).

60. Choudhury, *supra* note 2, at 814.

61. *Id.*

62. *See, e.g.*, Mistelis, *supra* note 25, at 185.

63. VanDuzer, *supra* note 7, at 681.

accepting written submissions from third parties.[64] Further, US and Canadian model BITs have included provisions that allow tribunals to consider granting third parties the rights to submit briefs in investment arbitration.[65] Finally, the ICSID Rules have been amended to provide ICSID tribunals with the discretion to allow interested third parties to make written submissions in arbitral proceedings.

In terms of application, in several recent high-profile cases, tribunals have permitted non-disputing parties to submit amicus curiae briefs in investment arbitration proceedings. These briefs have been governed by either UNCITRAL or ICSID rules. While third-party involvement originally centered on NGOs, in recent cases more varied amicus curiae have sought intervention rights.

1. NGOs as Amicus Curiae

The early cases to grant third-party intervention rights in investment disputes overwhelmingly involved NGOs and civil society groups. These groups sought amicus standing to represent public interests in the subject matters of the disputes, including health and sustainable development.

Methanex was the first case to recognize the "privilege" of third parties to participate as amicus curiae in investment arbitration proceedings.[66] The case involved a NAFTA dispute and proceeded under the UNCITRAL Rules.[67] The dispute concerned the legality of a governmental public regulation; the right of the Government of California to ban substances produced by a Canadian investor on the basis of potential health risks to local populations.[68] Several Canadian NGOs, including the International Institute for Sustainable Development, petitioned the arbitral tribunal to submit an amicus brief on critical legal issues of public concern, and to request access to documents in the dispute as well as access to hearings as an observer.[69] The *Methanex* tribunal considered the relevant provisions of NAFTA and the UNCITRAL Rules, and ultimately held that it had the implied procedural authority to permit or prohibit amicus access.[70] Specifically, the tribunal relied on Article 15(1) of the UNCITRAL Rules, which states:

Subject to these Rules, *the arbitral tribunal may conduct the arbitration in such*

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64. NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-Disputing Party Participation*, Oct. 7, 2003, 16 W.T.A.M. 167 (2004) [hereinafter *FTC Statement*].

65. *See* Canada Model Foreign Investment Protection Agreement, art. 39 [hereinafter Canadian Model BIT], *available at* http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf; United States Model Bilateral Investment Treaty, art. 28(3) [hereinafter US Model BIT], *available at* http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html.

66. Choudhury, *supra* note 2; *see also* Methanex Amicus Curiae Decision, *supra* note 30.

67. *Methanex* Amicus Curiae Decision, *supra* note 30.

68. *Id.*

69. *Id.*

70. *Id.*

> *manner as it considers appropriate*, provided the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.[71]

The tribunal emphasized that this case concerned a matter of public interest "not merely because one of the Disputing Parties is a State," but because it concerned provision of public services and matters of human health, and the amicus could bring a new perspective on the issues.[72] At the same time, the tribunal considered itself bound by Article 25(4) of the UNCITRAL Rules—the in camera provision—not to allow third-party access to hearings, and disallowed access to documents on the basis of privacy.[73] The tribunal generally underscored that it was not granting any substantive right of participation to the NGOs, as this was beyond its power, and so there were not additional burdens placed on the disputing parties.[74]

The following case to consider the amicus issue under the UNCITRAL Rules, *United Parcel Services*, largely followed the approach of the *Methanex* tribunal.[75] The proceedings in *UPS* concerned a claim by United Parcels of America that Canada Post was inappropriately using its monopoly in letter mail to compete unfairly against private-sector courier and parcel services in breach of several NAFTA provisions.[76] The Canadian Union of Postal Workers and the Council of Canadians sought to represent Canadian postal workers' labor interests as *amicus curiae*.[77] The tribunal in *UPS* accepted the request, but limited the NGOs to submission of written briefs, although the parties ultimately agreed to render the hearings and relevant documents public.[78] Notably, the *UPS* tribunal explicitly stated that the amicus would not be able to raise any new issues not raised by the parties.[79] In granting the amicus rights, the *UPS* tribunal again placed considerable emphasis on the need to legitimize arbitral proceedings by allowing for greater public intervention.[80]

In the ICSID context, the cases of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*[81] and *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentina* also extended amicus curiae

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71. *Id.* (emphasis added).

72. *Id.* ¶ 49.

73. *Id.* ¶ 42.

74. *Id.* ¶ 27.

75. *See United States Parcel Service of America v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (Oct.17, 2001) [hereinafter *UPS* Amicus Curiae Decision].

76. *Id*; Choudhury, *supra* note 2; VanDuzer, *supra* note 7.

77. *UPS* Amicus Curiae Decision, *supra* note 75; Mistelis, *supra* note 25, at 192.

78. *UPS* Amicus Curiae Decision, *supra* note 75, ¶ 50.

79. Mistelis, *supra* note 25.

80. *UPS* Amicus Curiae Decision, *supra* note 75, ¶ 70.

81. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (Feb. 2, 2007) [hereinafter *Biwater* Amicus Curiae Decision].

rights to third-party NGOs.[82] The *Biwater* arbitration concerned Tanzania's privatization of its water supply and sewage services in the country's capital, Dar es Salaam, and the subsequent termination by the Tanzanian government of a supply services contract with a UK company.[83] Five NGOs, representing human rights and sustainable development concerns, filed a joint "Petition for *Amicus Curiae* Status," requesting access to key documents submitted by the parties and permission to attend any hearing and to reply to any of the tribunal's written questions. In support of their submissions, the NGOs claimed that the *Biwater* arbitration proceedings involved issues of great concern to the local community in Tanzania, and a variety of potential issues of concern to developing countries that have privatized water or other infrastructure, from the perspective of sustainable development.[84] The *Biwater* tribunal decided the issue of amicus participation under the newly introduced Rule 37(2) of the ICSID Rules, which grants the arbitral tribunal discretion to allow third-party submission of written briefs.[85] Rule 37(2) requires the arbitral tribunal to consider whether, among other things:

> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; and (c) the non-disputing party has a significant interest in the proceeding.[86]

The Tribunal held that the Rule 37(2) criteria were satisfied such as to allow the NGOs to submit amicus briefs.[87] The tribunal also did not allow the NGO petitioners any active participation, partly on the basis that Rule 32(2) requires party consent to attend hearings and partly due to the tribunal's view that the third parties did not require access to the record in order to submit meaningful and informed briefs.[88] As in the previous cases decided under the UNCITRAL Arbitration Rules, the tribunal emphasized that amicus curiae are

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82. *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae in Suez (July 30, 2010) [hereinafter *Suez*].

83. *Biwater* Amicus Curiae Decision, *supra* note 81; Andrew de Lotbiniere McDougall and Ank Santens, *ICSID Tribunals Apply New Rules on Amicus Curiae*, 22 MEALEY'S INT'L ARB. REP. 69 (2007).

84. *Biwater* Amicus Curiae Decision, *supra* note 81, at 7.

85. *Id.* at 2.

86. Note that the first two criteria in Rule 37(2) of the ICSID Rules of Arbitration are somewhat similar to the considerations discussed by the *Methanex* and *UPS* tribunals in determining whether to grant amicus participation under the UNCITRAL Rules. Notably, under the ICSID Rules, amicus curiae are not limited to participating solely in disputes concerning a question of "public interest." In contrast, tribunals adjudicating under the UNCITRAL Rules emphasize this criterion in deciding whether to allow amicus participation.

87. *Biwater* Amicus Curiae Decision, *supra* note 81, at 14-15.

88. *Id.* ¶¶ 62-68.

not entitled to any kind of substantive rights.[89] Notably, the tribunal stated that "allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal's mandate, and in securing wider confidence in the arbitral process itself."[90] In its order, the tribunal highlighted the presence of public interest in the arbitration.[91]

Finally, the ICSID tribunal in the *Suez* case also made reference to the new procedural standards on *amicus* participation, even though the proceedings were not officially governed by these standards, as they were initiated prior to the amendments.[92] The proceeding, which concerned a dispute regarding water privatization and water supply services in Argentina, considered a petition for *amicus curiae* participation by five NGOs, representing issues of human rights and public services access.[93] As in the cases already discussed, the third parties sought access to documents and hearings as well as the right to submit legal briefs. The tribunal, perhaps not surprisingly, did not extend participation rights beyond submission of briefs.[94] Although the decision-makers in this case emphasized that the *amicus curiae* could bring new perspectives to the proceeding, they also highlighted the importance of not unduly burdening the disputing parties with broad third-party intervention.[95]

A review of the manner in which tribunals have allowed NGOs to participate in investment arbitrations to date reveals that the rationale driving their intervention has been more procedural than substantive. Given the public interest in the proceedings, the need to promote a level of public involvement and transparency appears to have influenced arbitral tribunals. At the same time, the arbitral tribunals, perhaps because they perceived that these third parties were not able to materially impact the merits of the disputes, granted them very limited rights.

2. *Moving beyond NGOs in Amicus Curiae Participation*

In analyzing the role of *amicus curiae* in investment arbitration, it is necessary to recognize that this domain is not always limited to public interest advocacy groups. In fact, the field has been progressively expanding to include a broader range of potential third-party actors. In 2005, the NAFTA Chapter 11 case of *Glamis Gold Ltd. v. United States of America*, a dispute governed by the UNCITRAL Rules and concerning reclamation requirements for open-pit mines

89. *Id.*; McDougall & Santens, *supra* note 83, at 73.

90. *Biwater* Amicus Curiae Decision, *supra* note 83, ¶ 50.

91. *Id.* ¶¶ 51-52.

92. McDougall & Santens, *supra* note 83, at 69.

93. *Id.* at 74.

94. *Id.* at 80.

95. *Suez, supra* note 82, ¶ 21

in California, expanded the concept of potential third-party interveners beyond civil society groups.[96] The tribunal accepted amicus briefs from the Quechan Indian Nation, which made submissions regarding the government's alleged duty under international law to preserve sacred lands on which the mines were located. In addition, as the tribunal accepted a brief from the National Mining Association, a business association representing the American mining sector, which submitted materials regarding the need to ensure that the State's regulation did not undermine the interests of miners.[97] The tribunal did not allow any of the third parties to actively participate in the case.[98] While the dispute is presently unresolved on the merits, the amicus curiae in this case, at least the Quechan Indian Nation, appear to have represented a more concrete interest in the outcome of the proceedings than the NGOs that had intervened in previous disputes. For instance, the substantive outcome of the case appears to affect the amicus curiae in this case because they have rights directly connected to the land on which the mines are located.

The pending case of *AES*, discussed above, is another illustration of the diversification of third-party interveners in investment arbitration. It is also perhaps an even more striking example of amicus curiae representing a direct legal interest in the outcome of the dispute as opposed to a broad public interest mandate. The ECT dispute concerns "alleged breaches by Hungary of commitments contained in long term power purchase agreements (PPAs) between [AES and Electrabel] and a Hungarian entity, Magyar Villamos Muvek (MVM)."[99] Although case details are not publicly available, it has been reported that the Commission "wishes to intervene in the ICSID arbitrations out of a desire to see that EC law is enforced."[100] The Commission believes that PPAs negotiated prior to a State's accession to the European Union (EU) are "illegal as a matter of European Community Law" because they constitute illegitimate aids to that country.[101] One source explains that "[w]hile the EC acknowledges the need to compensate power generators for their investments in Hungary prior to that country's EU accession, it says that the PPAs are not an appropriate means insofar as they shelter incumbent operators from competition, rather than assist them in adapting to open competition."[102] Thus, the Commission may seek to fulfil its mandate as the enforcer of EU competition law by making amicus submissions regarding illegal aspects of Hungary's PPAs, in order to influence the decision on the merits, particularly the extent to which AES should

96. Kinnear, *supra* note 6, at 6.

97. Tienhaara, *supra* note 33, at 238-239.

98. *See, e.g., Glamis Gold Ltd. v. U.S.*, Decision on Application and Submission by Quechan Indian Nation (Sept. 16, 2005).

99. *European Commission as Amicus Report*, *supra* note 5, at 14.

100. *Id.* at 14.

101. *Id.* at 14-15.

102. *Id.* at 15.

be compensated for any breaches following Hungary's accession to the EU. In light of this background, in September 2008, the Commission filed an application to participate as an amicus in the proceedings pursuant to ICSID Rule 37(2),[103] and in November 2008, the tribunal issued its procedural order ruling in favour of the Commission.[104] Although it is unknown whether the Commission sought broader participation rights, such as access to documents or hearings, the tribunal only extended amicus involvement to submission of a written brief. This was similar to the approach taken by tribunals in the previous cases.[105]

A review of amicus participation to date certainly highlights the increase in both the interest in participation as well as the institutional tolerance towards this phenomenon. At the same time, it is evident that the participation rights of third parties remain extremely limited. Overall, the current institutional and practical approach to amicus intervention in investment arbitration can be categorized as discretionary and largely not formalized.

IV.
THE IMPLICATIONS OF RECENT TRENDS IN *AMICUS CURIAE* PARTICIPATION

The recent trends in amicus curiae involvement in investment arbitration raise complex questions regarding the manner in which tribunals should approach third-party intervention in the future. First, the recent application for amicus standing by the Commission implicates the issue of whether institutional rules and tribunals need to expressly take into account the nature, significance, and directness of a third party's claimed interest in a dispute when deciding upon rights of intervention. In determining the nature of amicus rights in investment arbitration, it is of course also necessary to consider the potential benefits and drawbacks of expanding the process beyond the disputing parties. The overarching question centers on the various forms that amicus curiae participation should take in different circumstances, and the criteria that should be developed to achieve a more predictable and systematic approach to granting third-party participation rights.

A. Considering the Nature of the Legal Interests Represented by Amicus Curiae

The contrast between NGO participation and that of third parties such as

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103. *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Procedural Details, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C114&actionVal=viewCase (last viewed Nov. 2, 2010).

104. *Id.*

105. Triantafilou, *supra* note 6.

the Commission raises a crucial issue regarding the need for investment tribunals to recognize that certain third parties may have more significant legal interests in the outcome of the dispute, and as such, may merit broader participation rights.

In this regard it is significant that the NGO amicus curiae participants discussed earlier did not have direct legal interests in the outcomes of the dispute. Rather, they represented broad concerns with key thematic issues. For instance, a review of the amicus submissions in the *Methanex* case indicates that the NGOs focused primarily on human rights, such as the right to potable water and general health concerns.[106] The briefs submitted by these NGOs were somewhat "opinion-driven" in nature, and not directly connected with the primary and substantive legal issues implicated in the proceedings.[107]

On the other hand, the Commission appears to have "a significant, direct, and legally protectable interest" in the outcome of disputes involving EU law.[108] Within the EC system and throughout EU territory, the Commission has the specific mandate of a "public prosecutor," particularly in competition law matters.[109] Moreover, the Commission has frequently intervened as amicus curiae in a range of proceedings: it routinely participates as a third party in arbitral EC competition law proceedings,[110] and has previously appeared before U.S. courts in matters that had implications for the Commission's enforcement of European competition law and policy.[111] Commentators have highlighted that there is a strong Community interest in the correct and uniform application of Community law.[112]

Thus, there is an argument that the Community has a particular mandate to ensure that Community law is interpreted consistently in all forums, which justifies giving greater weight to its submissions in the *AES* proceedings than those of NGO third parties in previous investment arbitrations. One scholar argues that the nature of the EC's interest in this case was more significant than informing the tribunal of narrow environmental or cultural implications of a

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106. *See Methanex*, Submission of Non-Disputing Parties Bluewater Network, Communities for A Better Environment and Centre for International Environmental Law (Mar. 9, 2004), *available at* http://www.state.gov/s/l/c5818.htm.

107. For a discussion of the "opinion-driven" nature of many amicus curiae submissions, *see* Andrea K. Bjorklund, *The Participation of Amicus Curiae in NAFTA Chapter Eleven Cases*, Essay Papers on Investment Protection (2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/participate.aspx?lang=en.

108. Triantafilou, *supra* note 6.

109. Gordon Blanke, *The Role of the European Commission as Amicus Curiae in EC Merger-Remedy-Related Arbitrations*, *in* THE USE & UTILITY OF INTERNATIONAL ARBITRATION in EC COMMISSION MERGER REMEDIES: A NOVEL SUPRANATIONAL PARADIGM IN THE MAKING? 155 (Gordon Blanke ed., 2006).

110. *Id.*

111. *See, e.g.*, Calvin S. Goldman et al., International Antitrust: Developments After Empagran and Intel – Comity Considerations, Am. Bar Ass'n Antitrust Mtg. (Mar. 31, 2005).

112. Blanke, *supra* note 109, at 161.

decision. "The EC sought to assert the relevance of its legally prescribed mandate, which is replete with policy implications for the entire European Union, and to address the consequences of a conflict between that mandate and the tribunal's jurisdiction."[113]

There is, of course, the counter-argument that the proper forum for the Commission to redress any violations of Community law would be through Community law mechanisms, such as prosecuting Hungary before the European Court of Justice (ECJ).[114] However, such an approach remains problematic from the viewpoint of securing the integrity and consistency of Community law. The ECJ process is lengthy, meaning that the arbitral tribunal could issue an award inconsistent with Community law while the judicial process at the EC level is pending.[115] States party to the ICSID Convention must enforce a final award on their territory.[116] Under the ICSID Convention, State parties must recognize an ICSID award in the same manner as a final judgment of a court of that State.[117] Notably, the ICSID Convention does not include public policy exceptions to enforcing an award.[118] As such, an EU Member State may be required to actively enforce on its territory an award that may not be entirely consistent with EU law. Such an outcome could certainly undermine the integrity of the Community system. Notably, Judge Richard Posner has argued, admittedly in a domestic law context, that amicus curiae participation is particularly warranted where the outcome of the proceedings could affect the party's interest in another case.[119] By analogy, an award against Hungary might affect EU Member State and Commission interests in enforcing, and thereby legitimizing, awards based on agreements that may be illegal under Community law.

In light of these significant interests, some argue the Commission, and amicus curiae applicants in similar circumstances, should be permitted "a more effective legal recourse" than submission of an amicus brief, and that the arbitration rules governing the issue of third-party participation should contemplate broader involvement.[120]

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113. Triantafilou, *supra* note 6.

114. *See* The Treaty Establishing the European Community, 2006 O.J. (C321) E37, 179, art. 226 (allowing the Commission to initiate enforcement actions against Member States for alleged violations of Community law).

115. *See, e.g.*, Ian S. Forrester, *The Judicial Function in European Law and Pleading in the European Courts*, 81 TUL. L. REV. 647 (2007).

116. *See, e.g.*, ICSID Convention, *supra* note 24, arts. 53-54.

117. *Id.*

118. *Id.* arts. 50-52 (stipulating the narrow grounds for annulling the award and which do not include a public policy exception).

119. Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997); Bjorklund, *supra* note 107.

120. Triantafilou, *supra* note 6.

B. The Potential Benefits Stemming from Amicus Curiae Participation in Investment Disputes

Another issue to consider in evaluating amicus participation in investment disputes concerns the kinds of benefits that third parties could bring to awards, and to the system as a whole.[121] In this regard, an analysis of amicus involvement to date suggests that different amicus curiae might contribute to the procedural legitimacy of the arbitral process, as well as to the substantive quality of the awards.

First, as highlighted earlier, amicus curiae participation can promote a general interest in procedural openness and ensure that the broader public does not perceive the arbitration process as "secretive." As already highlighted, there is a public interest in the enhancement of procedural legitimacy of investment arbitration by means of greater participation. At the same time, the NGO amicus curiae have not, to date, made submissions that were "determinative to the awards rendered."[122] For instance, the *Methanex* final award referred to the "well-reasoned" nature of the amicus submissions but did not indicate whether the perspectives offered by the public interest groups in any way impacted on the outcome.[123] As such, some amicus curiae may be limited to contributing a level of public legitimacy to arbitral proceedings.

Nevertheless, there may in fact be instances where third-party involvement actually serves both to improve the legal quality of the award and to assist in the systemic development of international investment law as a whole. As to the first point, in some cases parties to a proceeding may have a specific vested interest in not disclosing all the facts pertinent to the issues in dispute.[124] For instance, in *AES* it is possible that neither Hungary nor the investor would have an interest in emphasizing the fact that the contracts between them may violate the EC's restrictions on State aid.[125] The claimant would certainly not wish to emphasize that a contract may be based on an illegality, as this may impact their ability to claim damages. As for Hungary, the State may consider it detrimental to emphasize this issue as its primary defence, since its acknowledgement of engaging in State aid may give rise to further actions by the Commission within the EU sphere. In this regard, the Commission's involvement could potentially highlight relevant legal issues that may not otherwise have prominence.

In a similar context, Kinyua suggests that amicus curiae may have a role to play in bringing forward "[i]ssues of bribery or corruption."[126] The problem of bribery arose in the prominent investor-State arbitration case *World Duty Free v.*

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121. Kinyua, *supra* note 1.

122. Kinnear, *supra* note 6, at 7.

123. *Methanex*, Final Award (Aug. 3 2005), ¶ 11.

124. Triantafilou, *supra* note 6.

125. *Id.*

126. Kinyua, *supra* note 1.

Republic of Kenya.[127] In that case, the State and the claimant both acknowledged the claimant's payment of a cash bribe to the previous government.[128] However, there are likely to be circumstances where neither party would consider it advantageous to disclose that their agreement was founded on official State corruption.[129] In this situation, informed amicus curiae can play an important role in bringing relevant allegations of corruption to the arbitral tribunal.[130] Notably, the issue of agreements based on an illegality is significant since "[t]here is a strongly held view within the arbitration community that an arbitral tribunal has the power and jurisdiction to consider issues of illegality and can do so of its own motion, if the issue has not been put before it by the parties."[131]

Further, participation by representatives of supranational regimes, such as the Commission, could specifically assist in preventing the "fragmentation" of international law, whereby conduct that is illegal under one international regime is nevertheless sanctioned under another international law regime.[132] Several commentators have expressed the concern that "investment law must evolve and be interpreted consistently with international law, including human rights law, multilateral environmental treaties and WTO law."[133] It is notable that the Professor Ernst-Ulrich Petersmann specifically identified "fragmentation and conflicts between different special international treaty regimes."[134] A lack of coordination at the international level may lead to national authorities increasingly becoming subject to conflicting commands from different supranational systems. As already suggested in the discussion of the *AES* case, the Commission's interest, and potentially its capacity, to prevent fragmentation of Community law and enforcement on EU territory of awards contrary to EC public policy is a case on point. As a mechanism to minimize fragmentation of international law, it may be necessary as a matter of best practice to allow representatives of interested supranational regimes to participate in arbitral proceedings in order to inform the tribunal of the extent to which the laws of a

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127. *World Duty Free Company Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7 (Oct. 4, 2006) (award not publicly available).

128. Kinyua, *supra* note 1.

129. *Id.*

130. *Id.*

131. *Id.*

132. For a general discussion of the concept of "fragmentation" in international law, see Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273 (2006).

133. *See, e.g.*, Anna van Aaken, *Fragmentation of International Law: The Case of International Investment Protection* 1 (University of St. Gallen Law School, Law and Economics Research Paper Series, Working Paper No. 2008-1, 2008).

134. Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273, 280 (2006).

different international regime are implicated. For instance, legal representatives from the ECHR or the WTO could assist investment arbitration tribunals in rendering awards that do not create conflicting obligations for national governments and thereby fragment international law. This approach would be highly relevant in ensuring that the international system of laws develops "not as a rigid and fractured discipline where the right hand does not know what the left is doing, but [as] a broad whole in which the workings of its branches inform each other."[135]

In light of these considerations, there are compelling reasons to allow third parties to participate in State-investor arbitrations. Perhaps decision-makers should consider introducing potentially broader participation rights than merely making written submissions, on the basis that amicus contributions could create substantial benefits for the arbitral proceedings and for the investment arbitration regime in the wider context of international law.

C. *Considering the Stakes: The Negative Aspects of Allowing Expanded Third-Party Participation*

In considering the role that amicus curiae can play in investment arbitration proceedings, and in contemplating whether broader intervention rights may be warranted in certain circumstances, it is of course necessary to also reflect on the potential negative consequences of third-party involvement in State-investor arbitral proceedings. There are in fact a number of possible, and somewhat compelling, arguments against a sweeping or radical expansion of the State-investor arbitration mechanism to encompass broader third-party participation.

First, third-party intervention can increase the practical burdens on the disputing parties. In fact, the *Methanex* tribunal emphasized the need to ensure that third-party participation does not impose any additional burdens on the parties or the arbitral process more generally.[136] Several commentators have in fact highlighted that allowing greater third-party intervention in State-investor disputes could potentially lead to rising costs and delays.[137] Arbitration specialist Noah Rubins suggests, for example, that there are even considerable "costs and time involved in the *parties*' review and [potential] response to nonparty submissions."[138] This consideration is central given that "[i]nvestor-State disputes already run, on average, several years and entail large costs for both claimants and respondent States."[139] Obviously, if the level of third-party participation moves beyond submission of written briefs, and third parties seek

135. Kinyua, *supra* note 1.

136. *Methanex*, Amicus Curiae Decision, *supra* note 30, ¶50

137. Tienhaara, *supra* note 33; Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?* TRANSNAT'L DISP. MGMT., June 2006.

138. Rubins, *supra* note 137.

139. Tienhaara, *supra* note 33.

discovery of documents, evidence-taking, and participation in oral arguments, there could be extra burdens placed on the efficiency of the process. In effect, there is a risk that opening up the process in this manner would result in the arbitration procedure becoming "court-like" and losing the attributes of more cost-efficient and speedy adjudication that parties perceive as a significant advantage.

Furthermore, the loss of confidentiality and privacy, which is associated with increased third-party participation, can also have considerable negative side effects. First, some commentators have suggested that investors may feel threatened by the fact that increased openness could jeopardize the need to keep certain information, such as trade secrets, confidential, although it appears that this issue is most easily resolved through "redaction" or other techniques commonly used by the courts.[140] A more serious issue is that opening the doors to third-party interveners could potentially "re-politicize" disputes.[141] The concern here is that third-party involvement could lead to the arbitration becoming a "court of public opinion."[142] Rubins suggests that the resolution "of disputes in conditions of complete publicity does not lend itself to such principled outcomes" and points out the possibility of parties making exaggerated claims in order to "obtain 'nuisance value' compensation."[143] Increased publicity could also lead to a lessening of settlement opportunities: as claims gain exposure to the public domain, the parties could face increased pressure to continue to the substantive outcome of the case. The State, especially, could face additional pressure, given its perceived obligation to protect the right to regulate and the public good generally.[144] This is especially a risk where a strong public interest lobby supports one side of the dispute.[145] As Rubins concludes, such "increased publicity (particularly one-sided and argumentative) can . . . form a significant barrier to amicable settlement in investor-State disputes."[146]

On a more systemic level, there is certainly some concern that infusing the arbitral process with the perceived disadvantages of costs, delays, loss of confidentiality, and the corollary of potential politicization could lead to less investor confidence in the mechanism. As a consequence, there could be a chilling of FDI flows to less stable nations, which are often the developing

140. Tienhaara, *supra* note 33.

141. *Id.*

142. Rubins, *supra* note 137.

143. *Id.*

144. *Id.*

145. Tienhaara, *supra* note 33.

146. Rubins, *supra* note 137.

countries most in need of the investments. Professor Viñuales poignantly summarizes the dilemma:

> [P]ublic legitimacy is a double-edged sword in that, if badly used, *amicus* intervention could undermine the very arbitration regime it is supposed to strengthen. Whereas *amicus* intervention may help legitimize the overall arbitration system, such intervention may also erode the traditional basis of arbitral proceedings, namely the consent of the parties.[147]

As the preceding discussion highlights, there are a number of competing considerations that need to be taken into account in determining whether, and to what extent, third parties should be permitted to participate in arbitral proceedings. The broader implication of this discussion is that the current approach to granting amicus standing, which is largely ad hoc and discretionary, is not satisfactory to capture the range of issues that are involved.

D. Striking a Balance: Developing Formalized Criteria for Third-Party Participation in Investment Disputes

At present, there is no formalized or systematic approach to dealing with the issue of amicus participation in State-investor arbitration. The only attempts to create any kind of criteria for third-party participation are evidenced in amendments to the ICSID Rules, the FTC Statement, and the Canadian Model BIT. However, these are limited to the submission of briefs, and the FTC Statement is also not legally binding.[148] In terms of the criteria involved, all three documents focus on the potential of the amicus brief to assist the tribunal, the extent to which it would address a matter within the scope of the dispute and whether the third party has a "significant" interest in the proceedings.[149] The FTC Statement and the Canadian Model BIT also direct the tribunal to consider whether a "public interest" exists in the dispute.[150] While the UNCITRAL Rules are currently under review to include explicit third-party participation provisions, it appears that the proposals under consideration are also limited to submission of written briefs, and comprehensive criteria for amicus participation will not be included.[151] As such, a number of commentators have described the current approach as piecemeal and have emphasized the need to further formalize the status of amicus in investment proceedings.[152]

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147. Viñuales, *supra* note 43, at 75.

148. Choudhury, *supra* note 2, at 809.

149. *See* FTC Statement, *supra* note 64; ICSID Rules, *supra* note 17, art. 37(2); Canadian Model BIT, *supra* note 65, art. 39; US Model BIT, *supra* note 65, art. 28(3).

150. FTC Statement, *supra* note 64; Canadian Model BIT, supra note 65, art. 39.

151. Tienhaara, *supra* note 33.

152. Choudhury, *supra* note 2; VanDuzer, *supra* note 7.

Given the range of different arbitral rules and investment regimes currently in place, it will undoubtedly be difficult to create a harmonized approach to third-party participation. However, certain steps can be taken to increase consistency. First, a set of clear guidelines should be included in the major regimes and rules that are utilized in investment arbitration: the NAFTA, the ICSID Convention and/or arbitration rules, the UNCITRAL Rules and the key model BITs. Notably, in order to distinguish between the rights of amicus curiae in commercial and in investment arbitration, arbitration rules which are applicable to both kinds of process, such as the UNCITRAL Rules, should stipulate that any new provisions on third-party participation apply only where a State is a party to the arbitration.[153] While the processes of amendment for different instruments involved in the investment arbitration regime are independent, they tend to be influenced by one another. For instance, the FTC Statement appears to have had an impact on the amendments to the amicus provisions in the ICSID Rules.[154] Thus, once some of the central regimes begin adopting more comprehensive guidelines on amicus participation, there is a strong chance that a degree of "cross-fertilization" and harmonization will follow.

In terms of the criteria that should be adopted for third-party intervention, it is first of all necessary to develop standards that will allow for guaranteed or mandatory, rather than purely discretionary, right of participation as amicus curiae. These applicants must be able to satisfy criteria similar to those already addressed in the ICSID Rules, such as the presence of a significant interest in the merits of the dispute. Such an approach would certainly require significant revision to the provisions of many prominent rules, such as the ICSID Rules. At the same time, it will genuinely address the fact that in circumstances where a third party has a sufficient interest in the proceedings, it may be necessary from the perspective of legitimacy to formalize their status rather than leaving the possibility of participation subject to an ad hoc process.

The tribunal should also be empowered with a *structured* discretion to allow for different forms of amicus participation: (a) submission of written briefs; (b) attendance at hearings, and potentially the making of oral arguments; and (c) access to some or all of the documents on the record. In determining whether or not to exercise the discretion to extend participation rights beyond submission of written briefs, the tribunal should be directed to assess whether an amicus curiae applicant can demonstrate a direct legal interest in the dispute.

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153. See Fiona Marshall & Howard Mann, Revision of the UNCITRAL Arbitration Rules: Good Governance and the Rule of Law: Express Rules for Investor-State Arbitrations Required, INT'L INST. FOR SUSTAINABLE DEV. INT'L (2006), *available at* http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf.

154. Choudhury, *supra* note 2.

Other relevant considerations would include the extent to which a third party can contribute substantively to the quality of a final award and the extent to which such contribution is dependent on more extensive intervener rights. Finally, the criteria should stipulate that the interests and benefits of amicus participation should not outweigh factors such as unjustifiable burdens of cost and delay.[155] Any amendments to the rules should also specifically empower the tribunal to redact inherently confidential materials, such as trade secrets, as well as to limit the length of written submissions and access to the record, the time allowed for any oral arguments or for cross-examination of witnesses. Ultimately, beyond guaranteeing a minimal level of participation where an amicus curiae can satisfy the tribunal that they have a particular interest, even if only a broad public interest, in the dispute, arbitrators should be considered competent to weigh up competing considerations and to determine in particular cases whether "the added burdens of [broader] *amicus* involvement are justified."[156]

Although this approach of expanding third-party participation rights should be adopted with caution, it appears to represent an appropriate balance between preserving the traditional features of arbitration and enhancing the systemic legitimacy of State-investor dispute resolution.

V.
CONCLUSION

In considering the role to be played by third-party interveners in investor-State arbitral disputes, it is necessary to remain conscious of the fact that the investment arbitration regime fundamentally differs in character from traditional commercial arbitration. In many instances, it is imperative for State-investor arbitration to "satisfy high standards of transparency and openness to non-disputing party participants."[157] In addition, as the *AES* case pending before ICSID highlights, there may be instances where amicus curiae may represent substantial legal interests that they are mandated to represent, and where their participation could have broader benefits for both the specific arbitration and the system as a whole. It is also necessary to be mindful of the ever-present concern that "should the acceptance of *amicus* briefs in investor-State arbitration become widespread, it could render arbitration less attractive to investors."[158] A review of current trends in third-party participation reveals that there is, at present, no formalized or predictable process to address the interplay of these issues. A

155. Marshall & Mann, *supra* note 154.

156. Choudhury, *supra* note 2, at 817.

157. VanDuzer, *supra* note 7, at 721.

158. Viñuales, *supra* note 43, at 75.

reassessment of the current frameworks for third-party participation is necessary in order to formalize amicus curiae status in investment arbitration, and thereby promote the procedural and substantive legitimacy of State-investor dispute resolution mechanisms.

UNCITRAL
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UNCITRAL Arbitration Rules

(with new article 1, paragraph 4, as adopted in 2013)

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

UNITED NATIONS

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UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

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Contents

Resolution adopted by the General Assembly on 16 December 2013

[on the report of the Sixth Committee (A/68/462)]

68/109. United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations and the wide use of arbitration for the settlement of treaty-based investor-State disputes,

Recalling its resolutions 31/98 of 15 December 1976 and 65/22 of 6 December 2010, in which it recommended the use of the Arbitration Rules of the United Nations Commission on International Trade Law,[1]

Bearing in mind that the Arbitration Rules are widely used for the settlement of treaty-based investor-State disputes,

Recognizing the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

Believing that rules on transparency in treaty-based investor-State arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient

[1] *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17), chap. V, sect. C; and ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), chap. III and annex I.

settlement of international investment disputes, increase transparency and accountability and promote good governance,

Noting that the Commission, at its forty-sixth session, adopted the Rules on Transparency in Treaty-based Investor-State Arbitration[2] and amended the Arbitration Rules as revised in 2010 to include, in a new article 1, paragraph 4, a reference to the Rules on Transparency,[3]

Noting also that the Rules on Transparency are available for use in investor-State arbitrations initiated under rules other than the Arbitration Rules or in ad hoc proceedings,

Noting further that the preparation of the Rules on Transparency was the subject of due deliberation in the Commission and that they benefited from consultations with Governments and interested intergovernmental and international non-governmental organizations,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having prepared and adopted the Rules on Transparency in Treaty-based Investor-State Arbitration[2] and the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013),[3] as annexed to the report of the Commission on the work of its forty-sixth session;[4]

2. *Requests* the Secretary-General to publish, including electronically, and disseminate broadly the text of the Rules on Transparency, both together with the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) and as a stand-alone text, and to transmit them to Governments and organizations interested in the field of dispute settlement;

3. *Recommends* the use of the Rules on Transparency in relation to the settlement of investment disputes within the scope of their application as defined in article 1 of the Rules, and invites Member States that have chosen to include the Rules in their treaties to inform the Commission accordingly;

4. *Also recommends* that, subject to any provision in relevant treaties that may require a higher degree of transparency

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[2] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), chap. III and annex I.

[3] Ibid., chap. III and annex II.

[4] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17).

than that provided in the Rules on Transparency, the Rules be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to treaties providing for the protection of investors or investments concluded before the date of coming into effect of the Rules, to the extent that such application is consistent with those treaties.

68th plenary meeting
16 December 2013

UNCITRAL Arbitration Rules
(with new article 1, paragraph 4, as revised in 2013)

Section I. Introductory rules

*Scope of application**

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

2. The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.

3. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

4. For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency.

Notice and calculation of periods of time

Article 2

1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.

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*A model arbitration clause for contracts can be found in the annex to the Rules.

2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.

3. In the absence of such designation or authorization, a notice is:

(a) Received if it is physically delivered to the addressee; or

(b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.

5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Notice of arbitration

Article 3

1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall communicate to the other party or parties (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

(a) A demand that the dispute be referred to arbitration;

(b) The names and contact details of the parties;

(c) Identification of the arbitration agreement that is invoked;

(d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

(e) A brief description of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;

(b) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;

(c) Notification of the appointment of an arbitrator referred to in article 9 or 10.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Response to the notice of arbitration

Article 4

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:

(a) The name and contact details of each respondent;

(b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 *(c)* to *(g)*.

2. The response to the notice of arbitration may also include:

(a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;

(b) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;

(c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;

(d) Notification of the appointment of an arbitrator referred to in article 9 or 10;

(e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought;

(f) A notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

3. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Representation and assistance

Article 5

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

Designating and appointing authorities

Article 6

1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name

or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. Where these Rules provide for a period of time within which a party must refer a matter to an appointing authority and no appointing authority has been agreed on or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.

4. Except as referred to in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority.

5. In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and they shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority and the Secretary-General of the PCA shall also be provided by the sender to all other parties.

6. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

7. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 7

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

2. Notwithstanding paragraph 1, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.

Appointment of arbitrators (articles 8 to 10)

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

Article 10

1. For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.

3. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

*Disclosures by and challenge of arbitrators** (articles 11 to 13)*

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified

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**Model statements of independence pursuant to article 11 can be found in the annex to the Rules.

of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

Replacement of an arbitrator

Article 14

1. Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views: *(a)* appoint the substitute arbitrator; or *(b)* after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Repetition of hearings in the event of the replacement of an arbitrator

Article 15

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Exclusion of liability

Article 16

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

Section III. Arbitral proceedings

General provisions

Article 17

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

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.

Place of arbitration

Article 18

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.

2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

Language

Article 19

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statement of claim

Article 20

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within

a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.

2. The statement of claim shall include the following particulars:

(a) The names and contact details of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought;

(e) The legal grounds or arguments supporting the claim.

3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.

4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Statement of defence

Article 21

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration referred to in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.

2. The statement of defence shall reply to the particulars *(b)* to *(e)* of the statement of claim (art. 20, para. 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

4. The provisions of article 20, paragraphs 2 to 4, shall apply to a counterclaim, a claim under article 4, paragraph 2 *(f)*, and a claim relied on for the purpose of a set-off.

Amendments to the claim or defence

Article 22

During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Pleas as to the jurisdiction of the arbitral tribunal

Article 23

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Further written statements

Article 24

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Periods of time

Article 25

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Interim measures

Article 26

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 *(a)* to *(c)* shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 *(d),* the requirements in paragraphs 3 *(a)* and *(b)* shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Evidence

Article 27

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Hearings

Article 28

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.

4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

Experts appointed by the arbitral tribunal

Article 29

1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it,

in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings.

Default

Article 30

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:

(a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining

matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;

(b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Closure of hearings

Article 31

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of right to object

Article 32

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

Section IV. The award

Decisions

Article 33

1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Form and effect of the award

Article 34

1. The arbitral tribunal may make separate awards on different issues at different times.

2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.

5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

Applicable law, amiable compositeur

Article 35

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

Settlement or other grounds for termination

Article 36

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 34, paragraphs 2, 4 and 5, shall apply.

Interpretation of the award

Article 37

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 34, paragraphs 2 to 6, shall apply.

Correction of the award

Article 38

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.

2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

3. Such corrections shall be in writing and shall form part of the award. The provisions of article 34, paragraphs 2 to 6, shall apply.

Additional award

Article 39

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.

2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The

arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.

3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

Definition of costs

Article 40

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 *(b)* to *(f)*, but no additional fees.

Fees and expenses of arbitrators

Article 41

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If there is an appointing authority and it applies or has stated that it will apply a schedule or particular method for determining the fees for arbitrators in international cases, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case.

3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.

4. (a) When informing the parties of the arbitrators' fees and expenses that have been fixed pursuant to article 40, paragraphs 2 *(a)* and *(b)*, the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;

(b) Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;

(c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;

(d) Any such adjustments shall either be included by the arbitral tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply.

5. Throughout the procedure under paragraphs 3 and 4, the arbitral tribunal shall proceed with the arbitration, in accordance with article 17, paragraph 1.

6. A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal's fees and expenses; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal's fees and expenses.

Allocation of costs

Article 42

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

Deposit of costs

Article 43

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 40, paragraphs 2 *(a)* to *(c)*.

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon or designated, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal that it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Annex

Model arbitration clause for contracts

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note. Parties should consider adding:

(a) The appointing authority shall be . . . [name of institution or person];

(b) The number of arbitrators shall be . . .. [one or three];

(c) The place of arbitration shall be . . . [town and country];

(d) The language to be used in the arbitral proceedings shall be . . . .

Possible waiver statement

Note. If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.

Waiver

The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.

Model statements of independence pursuant to article 11 of the Rules

No circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there

are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of *(a)* my past and present professional, business and other relationships with the parties and *(b)* any other relevant circumstances. [Include statement.] I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

Note. Any party may consider requesting from the arbitrator the following addition to the statement of independence:

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Article 1. Scope of application

Applicability of the Rules

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty")* concluded on or after 1 April 2014 unless the Parties to the treaty** have agreed otherwise.

2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:

(a) The parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or

(b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

Application of the Rules

3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:

(a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;

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*For the purposes of the Rules on Transparency, a "treaty" shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.

**For the purposes of the Rules on Transparency, any reference to a "Party to the treaty" or a "State" includes, for example, a regional economic integration organization where it is a Party to the treaty.

(b) The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

Discretion and authority of the arbitral tribunal

4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:

(a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and

(b) The disputing parties' interest in a fair and efficient resolution of their dispute.

5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.

6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

Applicable instrument in case of conflict

7. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

8. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

Application in non-UNCITRAL arbitrations

9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

Article 2. Publication of information at the commencement of arbitral proceedings

Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.

Article 3. Publication of documents

1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.

Article 4. Submission by a third person

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

(a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);

(b) Disclose any connection, direct or indirect, which the third person has with any disputing party;

(c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);

(d) Describe the nature of the interest that the third person has in the arbitration; and

(e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) Whether the third person has a significant interest in the arbitral proceedings; and

(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

4. The submission filed by the third person shall:

(a) Be dated and signed by the person filing the submission on behalf of the third person;

(b) Be concise, and in no case longer than as authorized by the arbitral tribunal;

(c) Set out a precise statement of the third person's position on issues; and

(d) Address only matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

Article 5. Submission by a non-disputing Party to the treaty

1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the

scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.

Article 6. Hearings

1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.

2. Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

3. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

Article 7. Exceptions to transparency

Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred

to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.

2. Confidential or protected information consists of:

(a) Confidential business information;

(b) Information that is protected against being made available to the public under the treaty;

(c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

(d) Information the disclosure of which would impede law enforcement.

3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate:

(a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents;

(b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and

(c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2.

Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

Integrity of the arbitral process

6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 7.

7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

Article 8. Repository of published information

The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.

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*Part II: The Process of an Arbitration, Chapter 7: Complex Arbitration**

Chapter 7 Complex Arbitration (*)

7.1 Introduction

One of the most challenging areas for arbitration design, both theoretical and practical, is the treatment of multi-party, multi-claim and multiple proceedings disputes. There are a range of questions that typically arise. (1) These include, who are the parties to the relevant contract and/or arbitration clause; when may non-signatories be included; when can several contracts be described as a single economic transaction such that one arbitration agreement will apply to all; how broadly may a tribunal interpret an arbitration clause to encompass claims under other contracts; where there are separate proceedings, when and why may they be consolidated; where consolidation is not possible, how are the proceedings otherwise to be coordinated; to what extent are decisions in one proceeding binding on the other both as to final outcome and as to questions of fact and law decided along the way; when can third parties be joined to an existing arbitration; how will multi-person tribunals be appointed where there are more than two parties involved; to what extent do questions of enforceability inform these questions?

This chapter separates the discussion into a discrete analysis of multi-party and multiple claim scenarios as questions of interpretation of arbitration agreements and secondly, applications for joinder and consolidation. The division is in part artificial as similar policy issues arise in each case and these can be differing routes to the same ultimate outcome, being a single award or series of awards covering all persons and claims. Determining the optimal approach may also
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● involve a comparison and ranking of the alternatives. There is also the question of whether there is some unifying theory that can be applied in resolving each issue. Nevertheless, there are distinct laws and principles that apply and in many cases even different persons making the determination. This is because an analysis flowing from the arbitration agreement itself flows from separability and competence and is primarily determined by the tribunal. Joinder and consolidation applications are more purely procedural and such determinations are at times to be made by institutions or courts rather than the tribunal itself.

The chapter begins with some overarching discussion of policy, as well as autonomy and conflict of laws questions before turning to the various forms of complex arbitration. Specific issues of policy, autonomy, rules and conflict of laws will be revisited in more detail on a topic-by-topic basis. Counterclaims and set-off rights were also discussed in section 4.4 in the context of the opening stages of proceedings.

7.2 Policy Issues in Complex Arbitration

There will obviously be numerous permutations that may apply on a case-by-case basis in complex scenarios where multiple claims and persons may be involved. Policy issues may vary significantly within each scenario. Nevertheless, it is useful to consider some overriding policy questions before considering how to respond to various permutations as some factors will be common. The following discussion looks at fairness and efficiency questions in that context and in respect of both multi-person and multi-claim scenarios.

A preliminary observation is that a policy analysis of questions such as whether the law should allow an arbitration clause to be extended, a third party joined or proceedings consolidated, should not only consider these questions expressly, but should also consider the merits of alternative scenarios and solutions. Any such application is dealing with a potential claim that may, if denied, be brought in other fora. A related aspect of the policy debate is to consider how to best deal with situations where even if a third party is not included, its commercial interests may be adversely affected by a case which is heard in its absence. While the tribunal's decision does not bind third parties, it may make orders which effectively undermine the value of the third party's alleged rights. This would certainly be the case if there is a dispute over physical possession of an asset and a decision is made to order specific performance in favour of a named party.

7.2.1 A Single Efficient Forum

There are a number of efficiency arguments in favour of multi-party, multi-claim, consolidated or joined proceedings. It seems sensible to presume that resolving all questions in the one proceeding is likely to be more timely and less costly than separate proceedings. A single proceeding also removes the possibility of
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● conflicting awards. Derivative proceedings would be particularly wasteful when the findings of the first tribunal would need to be reconsidered afresh. While restrictive principles of res judicata are unlikely to apply where parties are technically distinct, in some cases related

companies may be so close as to be argued to be identical parties. There are also scenarios where there would be timing problems in identifying damages if inter-related claims were separated, for example, when a contractor is threatened with claims by a subcontractor which have not yet crystallised, but where recourse is sought against the owner. (2) A tribunal may also get a better understanding of what truly occurred if all relevant parties are present, although that may be less relevant as they can give evidence as witnesses in any event.

Conversely, it is important to understand that there can also be efficiency losses where multi-party, multi-claim, consolidation and joinder are involved. There can be problems with tribunal composition, parties being physically present in relation to issues that truly do not concern them and greater difficulty in coordination. This can all be affected by the stage at which applications for inclusion are made. The later in the proceedings, the more likely that there will be problems with the impact on previous steps and due process generally.

7.2.2 Resolving Admissibility via a Consent-Based Paradigm

Even if the efficiency argument is persuasive in some cases at least, inclusion of multiple persons and claims cannot occur without some legal basis for this. Ultimately it is a question of consent, either by reason of express agreement of the parties, or by some implied indication of intent and/or under the laws and rules made applicable by their arbitration agreement. Even that is contentious in some multi-party scenarios where it is harder to fit a theory of inclusion into a traditional consent paradigm. Examples considered below include lifting the corporate veil or ostensible authority under agency law. Nevertheless, it is generally the case that consent is the key and this is the position maintained throughout this chapter. Even then, many of the differences in view as to admissibility of complex claims can be explained by differences in approach to the determination of consent. A tribunal that works from a strong albeit rebuttable presumption that, a priori, parties would always want an efficient resolution of their disputes is likely to find that admissibility is justified in many instances. (3) Conversely, some tribunals would want to see some express provision allowing for admissibility within the arbitration clause, the *lex arbitri* or the procedural rules selected by the parties. Between the extremes, ● different arbitrators might wish to see differing levels of direct or indirect evidence of actual intent before making conclusions either way.

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7.2.3 Procedural Rules as Guides to Consent

If the primary question is that of consent, one must begin with the arbitration agreement as supplanted by the *lex arbitri* and any procedural rules agreed upon. Where the latter expressly deals with the admissibility question and where the parties have consented to those rules applying, evidence of consent is clear. (4) Nevertheless, the consent logic flowing from express references in the *lex arbitri* varies significantly if an institution, appointing authority or tribunal selects the Seat rather than the parties, as this is one step removed from the parties actual or implied consent. At times the choices made may have a fundamental impact on admissibility of claims. For example, an appointing authority has a particular challenge where it has the discretion to nominate a Seat and where it is aware that a party wishes to bring a set-off defence. Should one select a Seat that is favourably disposed to such claims? Even here, if the likely choices by the independent entity would be known, inferences as to the parties legitimate expectations can still be contended for.

Even where procedural rules are not clear, consent might be found through waiver or acquiescence, for example, via a claimant not objecting to a claim by the respondent when it is pleaded. Consent could also be inferred if a party objects to a matter being raised in court on the basis of an allegation that it is subject to an arbitration clause. A tribunal already invested with jurisdiction under that clause might then consider that the assertion in court is effectively evidence of an agreement to arbitrate. (5)

7.2.4 Efficiency and Implied Consent

While some authors and practitioners work from a presumption that business people should be taken to have intended to have efficient proceedings and efficient solutions to any jurisdictional questions, (a reasonable presumption in and of itself), that will at best be a rebuttable presumption. (6) To the extent that a tribunal ● is interested in considering subjective evidence, the presumption is weaker as it presumes certain objective features of the parties that may not be evident in the instant case. Even if the entire analysis is to be limited to objective evidence and inferences, an efficiency paradigm might be more complex than would at first appear to be the case. For example, would all parties simply wish to allow counterclaims and set-off on the basis of efficient resolution of the disputes between all parties and as a bar to duplicity of proceedings? One countervailing criterion is that by accepting a counterclaim or set-off, the amount in dispute and hence the costs of arbitration will increase. Most rule systems will add the amount of the claim and reverse claims together to determine the advance on costs unless they truly overlap in substance. This can be a particular concern if it is foreseeable that at times there will be inflated counterclaims that are tactically aimed at frightening the claimant into taking a reduced settlement. Disparity in costs is not only problematic from a general fairness perspective but impacts significantly on any consent analysis. This is further complicated by the fact that tribunals have discretions as to costs and may or may

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not seek to use these to counter the potential stumbling blocks. Berger notes the use of possible counterclaims as delaying tactics or as retaliatory devices. Ulmer notes the practical inspiration for many counterclaims to have something to bargain with and set parameters for arbitrators who might try and find mid-position solutions. (7) Craig, Park and Paulsson point out that the requirement to include this in the advance of costs can act as a deterrent to such strategic claims (8) although, if there is enough in dispute, a costs advance obligation would have little deterrent effect, particularly where this might provide for differential hardship in cases where the parties are in vastly differing financial circumstances.

In addition to the costs implications of multiple claims there is also the question of tribunal composition. Consider an extreme example where the primary claim is essentially about complex questions of law where the parties have selected a tribunal that is expert on such issues. Now envisage reverse claims that deal only with challenges as to the quality of professional building or engineering activities. The parties might prefer different experts for the latter claims. In some cases preferred arbitrators for the second dispute might be professional engineers, builders or architects who are not legally trained and thus may be unsuitable for the first dispute. While this is not necessarily so, the example simply highlights the fact that one cannot necessarily presume that the wish to bring finality to all disputes between the parties and the wish to avoid duplication in costs will necessarily mean that an existing tribunal formed in response to the first dispute can confidently presume implied intent to allow it to claim a mandate over a broad category of claims.

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A realistic assessment of the likely thinking of the parties at the outset might raise some counter-intuitive hypotheses. Parties do not hope to have disputes from the outset. More often than not, if an individual party envisages the possibility of a future dispute it would most likely be envisaged as either one brought on reasonable grounds by it or one brought on unreasonable grounds by the other contracting party. This is because if the other party's claim was reasonable, the first party would believe it would honour it without the need for an adjudicated dispute. The contentious case, therefore, is to consider how each might have wished at the outset to defend against claims they do not agree with. In this event, there is at least a possible hypothesis that they might be presumed from the outset to want whatever strategic advantage that may be permissible to a defendant, subject to ethical and good faith duties. As Hanotiau has pointed out in the context of multi-contract and multi-party arbitrations, '(t)he absence of co-ordination of dispute resolution clauses, therefore, is not necessarily pathological. It is sometimes intended deliberately. The same goes for the possible refusal to consolidate the proceedings.' (9) Tribunals should thus be particularly careful not to stretch existing principles to try and promote efficiency in the face of some of arbitration's more intractable problems. Those problem areas may well be a small but important group of cases where parties might genuinely prefer litigation over arbitration or where these matters have to be raised and dealt with carefully in the parties agreement to arbitrate, particularly in multi-contract circumstances. It is naturally the case that courts have greater opportunity to allow counterclaims, consolidation or joinder than do tribunals. That perspective, suggested by Leboulanger (10) is supported by Poudret and Besson. (11)

Having said this, much can be gained from a consideration of efficiency perspectives within ambiguous or uncertain consent scenarios. Parties can certainly be presumed to want an efficient resolution of meritorious disputes from the outset. Even if some business people would not want this, arbitration ought to be built on good faith approaches. Hence if a party is trying to destabilise proceedings or promote inefficiency, perhaps in order to frustrate a claimant, such tactical endeavours in the face of a dispute should not colour the determination of implied good faith consent from the outset. Attention should be focused on a priori implied consent rather than behaviour after the dispute has arisen, although the latter may help our understanding of ambiguous original intent. Where subsequent behaviour is concerned, in some legal systems there will be a further need to consider whether there has been an abuse of rights through a party either blocking or relying on an extension of the powers to cover multiple claims. Tribunals should not be quick to reach such conclusions. Many tactical considerations are perfectly reasonable and would not offend against notions of good faith.

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Converse presumptions of intent include that if set-offs are not readily allowed, there may be additional expense, delay and even financial disaster for a party truly entitled to a net benefit in circumstances where they had paid out on one claim and the other party is insolvent before they can be forced to pay on the reverse claim. Craig, Park and Paulsson also note that in these circumstances there may be increased pressure on the respondent to settle for less than a reasonable amount. (12) Thus there should be a concern to enhance the interpretation of the arbitration agreement, where necessary, with a careful assessment of all factors that might help a tribunal draw conclusions as to the likely a priori intent of the parties. Implied intent to promote efficient solutions is an important working hypothesis, as long as it is seen as one factor that needs to be looked at alongside others and within the paradigm of consent, not tribunal paternalism. Efficiency should simply be one of a range of factors to be considered by tribunals that are faced with

uncertain guidance from the arbitration agreement and the rules themselves. It is important to understand how it should be utilised. It is right for tribunals to consider efficiency factors as a means of identifying a good faith a priori intent of the parties. It should not simply be that tribunals look at efficiency per se from their own post-dispute perspective, regardless of other evidence of parties intent.

7.2.5 Applicable Law and Conflicts Methodologies

Some would resolve multi-party and multi-contract issues via a broad-ranging consent analysis while others would be strongly guided by a conflicts analysis. Any conflicts analysis can see differences depending on whether a direct choice or conflicts rules approach applies and can also see differences in classification. For example, in a multi-contract scenario, if the question is pursued from the perspective of the ambit of any one of the arbitration agreements, then this is a partly procedural, partly substantive issue given the dual nature of arbitration agreements and the need to interpret them. Applicable law issues were dealt with in section 3.2.2. Conversely, where there is a distinct application for joinder or consolidation, this is a procedural question in the context of the laws and rules as agreed. (13) Treating it as either an interpretation question or a procedural matter can also alter the person making the decision. In virtually all cases of interpretation of the arbitration agreement, that would be a matter for the tribunal. Conversely, in some legal systems, applications for consolidation must be made to a court. Other questions of applicable law and conflicts methodologies are left to discrete sections. The balance of the chapter now turns to these discrete topics.

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7.3 Multi-Party Scenarios

This section deals with multi-party disputes. Because of globalisation of trade and commerce, multi-site and multi-party manufacturing processes, increased foreign investment and complex corporate groups, there are now a significant number of commercial endeavours that inevitably involve the activities of more than two parties. This is a significant practical issue. In 2002, the LCIA reported that more than 50% of its cases involved more than two parties. (14) It has since been suggested that approximately 40% of arbitration cases do indeed involve more than two parties. (15) A far greater percentage have implications for third persons even if they are not directly involved as parties.

While the commercial trends are clear, early views of arbitration argued that it was essentially bipolar and was not naturally able to accommodate multi-party scenarios. (16) Even where that was thought to be the better view theoretically, the negative implications for the utility of arbitration became obvious and some practitioners and institutions sought to provide new mechanisms to accommodate such scenarios. Other practitioners and scholars argued for power within existing broad discretions or under theories of consent, good faith and estoppel. It is beyond the scope of this book to attempt a definitive and comprehensive critical analysis of the various theories by which multi-party situations are dealt with in arbitration. There have of course been excellent treatises and articles led by those of Professor Hanotiau (17) and numerous conferences and conference presentations that have highlighted the issues in great detail and with great sophistication. (18) In any event, this book is concerned more with issues of procedure and evidence and it is in that context that the topic is discussed, although some observations are also made about the theories themselves, given that they are essentially theories as to the ambit of arbitration agreements and notions of consent, in no small part procedural and evidentiary matters.

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There are indeed many questions of procedure and evidence that arise which make the topic contentious in theory and challenging in practice. Many of these questions have indeed informed scholars and practitioners in their suggestions about the proper conceptual treatment of multi-party scenarios, proper approaches to drafting and ideal elements in rules. (19) Questions include how should a tribunal approach such scenarios? What if the rules or *lex arbitri* are silent? Is it simply a matter of consent? How is consent integrated with what is found in the law and rules? What flows from the various permutations of express consent in arbitration agreements? How are these to be interpreted? To what extent is contemporaneous evidence relevant to determine what the signatories truly intended vis-à-vis third parties and vice versa? Where applicable tests look to the behaviour and/or the degree of connection between the third party and the existing parties and/or various claims and circumstances, by what evidence and analysis will a tribunal make such determinations? At what stage will such determinations be made? If it is to occur before tribunal composition, who is to make the determination and on the basis of what evidence? Would those determinations be binding on a subsequent tribunal? If the questions are to be raised after establishment of the tribunal, how will this impact retrospectively on tribunal composition, given that the proposed third party has not been privy to its establishment?

It is important to distinguish between the preliminary question as to who may be a party to an arbitration and subsequent questions as to how an arbitration may proceed from the outset when more than two parties are involved. Many commentators speak of 'extension' of the arbitration agreement to third parties although it is widely acknowledged that this is an unfortunate expression. The real question is whether the third party is properly within

the agreement. Hence, it is better to speak of inclusion rather than extension. Nevertheless, because many use the term as a simple short-hand expression, this will at times be used here as well. Another issue is whether it can ever be said that all relevant persons must be included to make a particular proceeding valid. It is certainly possible for parties to agree that disputes can only be brought to arbitration when all signatories are to be included. In other cases, a failure to include all relevant persons may simply impact upon the decision on the merits.

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7.3.1 Typology of Multi-party Scenarios

Answers to the questions posed in the previous section may vary depending on a range of factors, including who is trying to be involved as a party or who is trying to involve another against their will. In a major study, Voser has listed a number of scenarios where disputes may typically involve more than two parties. These include construction and major industrial projects, in particular through the involvement of sub-contractors; guarantees, insurance and reinsurance; supply chains, back-to-back purchases and commodities transactions where the same asset may be sold many times, including defective product claims; joint venture, merger and acquisition and shareholder transactions; trust arbitrations; and sports-related disputes. (20) Third-party problems also typically arise with transport and software.

The various permutations can be classified in ways other than in respect of subject matter and commercial endeavour and the different classifications may themselves throw up theoretical and practical concerns. While there are different scenarios, each ultimately requires valid consent to justify the third-party involvement, although even that is contentious. In some cases, consent might be deemed via some estoppel. Some scholars also assert a non-consensual basis for inclusion. (21) These questions are addressed when considering the individual grounds that are asserted to support inclusion. Furthermore, because there are differing notions of consent and the evidence on which it can be based, different theories can be applied to multi-party situations, which in part explains differing views as to their optimal treatment. Less contentious is the fact that each scenario must meet the same mandatory procedural rules of due process.

An important distinction is between cases where multi-parties are required to be involved as an essential element of an express arbitration agreement and others where there is a disputed issue as to whether multiple parties can be brought within the one arbitration. A distinction might also be made between persons who are mentioned in an arbitration clause but unlike other persons, did not sign it and alternatively, those who are neither mentioned nor are signatories. There may even be a situation where there is a signature of a person but no mention of them or the entity that they represent. This might arise where an arbitration clause is signed by an employee of a related party to the named party or endorsed by a governmental official in an investment joint venture. Another possible classification is between those persons that have the essential character of claimants and those that have the essential character of respondents. Such a classification will be relevant to tribunal selection and early documentary stages where formal requests and answers are required. In some cases, it is easy to divide multiple parties into claimant and respondent groups with common interests and arguments while in many other situations, multiple parties may have varying interests and unique claims or defences, regardless of whether they concur with other parties on some issues. This raises added problems with tribunal selection.

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In addition to the differing interests of multiple parties, the nature of their claims against each other may also be classified differently. One typical scenario is where a respondent wishes to join a third party on the basis that it asserts no primary liability to claimant, but in the event that there is, the joined party is argued to be ultimately responsible. These are described as claims for recourse. (22) Another scenario is a cross-claim, being a claim by one respondent against another. Another scenario is described as intervention, where a third party seeks to join existing arbitral proceedings. (23) Motivation may also be relevant. Unwilling non-signatories may be sought to be brought in because the signatory is thought to have insufficient funds or because there would be separate claims against a non-signatory, perhaps under guarantees that would more efficiently be dealt with at one and the same time. (24) Scenarios could also be classified depending on whether extension notions are being argued by a claimant in arbitration against an unwilling respondent, whether they are being used by a respondent in court proceedings to argue that the claim itself should instead be brought in arbitration or whether the non-signatory is itself a claimant in arbitration. A non-signatory might also wish to be party to arbitral proceedings where it believes the determination will significantly affect its interests, for example, where decisions are to be made on treatment of intellectual property over which it claims some entitlement.

Another important distinction is between cases where multiple parties are all sought to be involved from the outset and conversely, cases where a party seeks or is sought to be added to an existing arbitration. Claimants will typically join multiple respondents from the outset, either because of an assertion of joint and several liability, or because of uncertainties as to causation. In the latter scenario, the claimant runs the risk of being successful against one party but failing against others, with possible commensurate cost

orders as a result. Joinder arises where a third party is added to arbitral proceedings that have already commenced. The latter scenario still must consider questions of consent and due process but adds other theoretical and practical problems in terms of tribunal composition and impact on the prior events in the existing arbitration. Other timing and evidentiary ● questions may also be relevant. There may be differences as to whether the multi-parties are mentioned in the arbitration agreement or not. Some may be mentioned but did not sign the contract. Some may be related companies from the outset, while others may have been established after the contract was begun. Some may be legitimate commercial entities while others may be asserted to be mere shells created to avoid arbitral liability or shift assets out of enforcement reach. Claims may be brought at the outset, before tribunal establishment or before, during or after key hearings. The inter-party claims and defences may relate solely to the same issues or to similar issues. There may be significant differences as to the knowledge of each party of the involvement of others in the essential commercial transaction.

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The point to the above discussion is simply that attention may need to be given to any legitimate criterion by which separate classification may occur and that general theories may not lead to common conclusions in each factual permutation even within certain categories.

7.3.2 Policy Issues in Multi-party Scenarios

Previous sections looked generally at some policy questions in relation to complex arbitrations. Some additional comments are appropriate in relation to the discrete topic of multi-party scenarios. As noted, arguments in favour of admissibility or consolidation include general efficiency, reducing the transaction costs of parallel proceedings, overall timeliness, and the avoidance of some of the pitfalls flowing from the composition of multiple tribunals where overlap may raise questions of prejudice or undue influence. Because of the many permutations of counterclaims and cross-claims and numerous scenarios where multiple parties do not neatly fall into twin camps of claimant and respondent interests, it is quite possible that there will be particular issues that are not of interest to each and every participant. From their perspective, this can needlessly extend the proceedings and add to costs if they nevertheless have to witness issues being addressed that are beyond their concern. Where there are claims of recourse by a respondent or cross-claims between respondents, a claimant may need to sit through arguments that have no immediate relevance to it. It simply seeks to show that the primary respondent owes it relief. If it is successful in that regard and the respondent has the ability to comply, the latter's attempt to seek reimbursement is a commercial side issue from claimant's perspective, albeit one that may benefit it if respondent is impecunious. However, where joint signatories are concerned, claimant must have impliedly consented to this scenario on the understanding that single proceedings would have overriding efficiency and fairness gains. Having an excessive number of parties involved may also confuse matters. A tribunal may be wrongly coloured in its view as to the reasonableness of one party simply when considering the actions of a related entity. Many third persons can best assist as witnesses without their own counsel making submissions and adding to cross-examination time. Efficiency questions are also impacted upon by discretionary decisions as to ● costs and interest. If multi-party proceedings delay finality and there are no interest awards, that may be more problematic. A similar scenario arises if a tribunal is reluctant to award costs to the winning party. Where a primary respondent is held liable but is successful in its claim for recourse, it may also be more problematic as to how it will be treated in terms of allocation of costs. (25) There are also added logistical concerns with finding mutually convenient times for key stages. There can be particular problems if a third party is joined to existing proceedings where a schedule was developed based on the wishes of the initial parties and where this is not of equal convenience to the joined party.

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While there are thus efficiency arguments for and against, a sophisticated analysis would look at the cost benefit of alternative scenarios, one where the third party is included and the other where claims by or against the third party are conducted in other proceedings. With this caveat in mind, it might be presumed in most cases that a well organised joint proceeding would be more efficient than the alternative, notwithstanding some undesirable transaction costs. This can be impacted on by the proactivity and planning of the tribunal aiming to reduce transaction costs.

7.3.3 Consent

As noted throughout, all arbitration is based on consent. Hence any justifiable theory of the proper treatment of multi-party scenarios must be consistent with the evidence of consent in the instant case. Mere efficiency is not sufficient, although efficiency may be factored in by some as an element of implied consent where the parties have not clarified their attitude clearly. As noted in Chapter 3, consent may arise from express or implied terms in the arbitration agreement, from the *lex arbitri* invigorated by selection of the Seat and/or by selection of institutional or ad hoc rules that expressly or impliedly cover such scenarios. There may also be individual specific agreements on procedural issues. Within this broad context, the adjudicator must be able to say that each of the relevant persons can be taken to have consented to mutual rights and obligations under the relevant arbitration agreement. Mantilla-Serrano concludes that consent is the essential issue in

each case. (26) Derains also sees it as essentially dependent on intent. (27) Stephen Bond also argues strongly that the question is essentially that of consent. (28) Rubins considers the issue to be one of establishing a 'meeting of the minds' but ● acknowledges that contractual consent is not purely subjective, nor can it be described as fixed and formulaic. (29)

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While it is difficult to generalise, Rubins highlights an in principle difference between the common law and civil law approaches to consent. He suggests that common law legal systems tend to view the question of binding non-signatories to an arbitration agreement as one of general contract law, 'permitting the application of a wide range of exceptions to the rule of privity'. (30) As will be discussed further in this chapter, these exceptions may include incorporation by reference, agency, estoppel and piercing the corporate veil. Rubins contrasts this with a strict formal approach maintained in many civil law jurisdictions. (31) The Dutch, German and Russian courts for example, have traditionally shared the view that arbitral agreements should be limited in their reach to the parties that sign them. (32) At this stage it should simply be noted that while most argue that consent is the key, some of the bases involve third persons who subjectively would never have wished to be involved. An example is a shareholder using an asset free shell company to protect against recourse. In some cases, extension applies because of that third person's behaviour and the signatories' reasonable expectations. There may then be differences in view as to whether this is a form of deemed consent or whether it is better to describe this as a distinct category where consent is not determinative. This is again discussed after individual scenarios are analysed.

Important questions are who is to determine parties' intent, by what evidence, what presumptions might apply, for example, separate legal identity and privity of contract, and what applicable law such as in relation to contract, corporations, agency, public and international law rights of States should be brought to bear on this analysis? (33) These matters are considered in detail in section 7.7 which seeks to make concluding remarks after analysing individual bases for extension and after considering some specific logistical and due process concerns where extension is contemplated.

The final preliminary observation is that original consent is the key where consent is the basis for inclusion. (34) After all, a claimant need not obtain additional consent to bring a case against a respondent who is already within the arbitration agreement. Similarly, a respondent in an arbitration agreement with a third party could bring a new case against it based on the consent in that original agreement. ● Hence the consent involved in extension, joinder and consolidation cases is aiming to identify consent to that possibility from the outset. The analysis of actual implied intent is also best undertaken in the context of seeing intent as presumed to be in good faith. (35) The simplest case is where multiple parties are all party to the same arbitration agreement. Here they have either expressed an agreement to multi-party arbitration or this could be implied from the common signature of the agreement. A contrary view to the effect that in some cases there needs to be common issues of fact or law or appropriate connection of the multiple claims is not to be preferred. (36)

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7.4 *Lex Arbitri* and Rules

Arbitral laws and rules may seek to express principles of inclusion, leave the question to general procedural powers or constrain a tribunal as to certain powers. Because of the conceptual challenges, most arbitral laws do not deal expressly with multi-party situations. The questions are thus more commonly dealt with under general principles.

A further problem is that many rules are built on a bipolar model, simply adding the notion that there may be more than one claimant or respondent respectively. (37) Yet as noted above, in many instances it is difficult to easily classify multiple parties into claimant and respondent camps.

7.5 Tribunal Appointment and Multi-Parties

Before looking at the reasons for including multi-parties, one important due process hurdle should be examined as it has had a significant impact on the policy analysis and has led to challenges and rule changes. This relates to the selection of multi-person tribunals. It is important to keep in mind that Article V(1)(d) of the New York Convention provides as a ground for refusal of recognition and enforcement of the award that the composition of the arbitral tribunal was not in accordance with the parties' agreement. Due process and public policy norms also require equal treatment which would encompass equal treatment as to tribunal appointment. Ensuring as a preliminary matter that the appointment of arbitrators accords with the parties' wishes will thus avoid costly disputes about the enforceability of an award. Difficult issues of appointment primarily arise with multi-person tribunals where multiple parties are involved. Where there is to be a sole arbitrator, the parties will either agree on a single appointment or not regardless of ● how many voices must be heard. If not, there will be a fallback mechanism with appointment by an independent authority. There may still be problems if a new party is sought to be brought in after a sole arbitrator is already appointed, where the new party would argue that they have been denied a right to be involved in the selection process, particularly where there was a consensus among the prior parties that the new party would not have concurred in. Nevertheless, the key concerns remain with multi-person tribunals.

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Historically, rules have been simply inadequate to deal with multi-party scenarios. Arbitral rules for multi-person tribunals were traditionally built on a bipolar model, with two parties each typically selecting one arbitrator, and the two appointees then selecting a Chair. Even where rules do seek to expressly deal with multi-party scenarios, they are premised on the view that the parties can nevertheless be divided into a claimant group and a respondent group. This is clearly simplistic as on a range of issues, parties seeking to all defend claims may have strongly varying interests. (38)

There is no ideal model when more than two parties are involved in selecting a multi-person tribunal. Such appointment raises difficult policy questions. From the perspective of simple numerical equality, if there is an imbalance between parties on either side of the dispute, that form of equality can never be optimised in multi-party scenarios. Furthermore, and as noted, there remains a problem of identifying which side each party is truly on when their interests may vary from issue to issue. Where substantive equality is concerned, one might look to see what are the true similarities in relation to their interests and issues, but this would involve contentious qualitative assessment early on in proceedings, with no natural independent adjudicator at that stage. Due process and enforceability issues must also be considered, with practitioners and rule makers all taking note of the *Dutco* decision where two respondents could not agree on a joint appointment, leading to nomination by an institution. The claimant's appointment was accepted. The respondents successfully challenged enforcement on the basis that they were denied equal treatment at the appointment stage. (39)

Where agreement is not possible, one possibility is to have more than three arbitrators where there are multiple parties involved, although there still is no mechanism that would be beyond criticism. Simply providing each party with one selection would lead to an imbalance when there are distinct claimant and respondent groups of differing numbers. That would be particularly problematic if parties on the majority side were able to appoint some or all parochial arbitrators as ● this might guarantee a favourable outcome. Another option is to allow each truly distinct party to appoint their own arbitrator where those on one technical side have conflicting interests. Such an approach will often lead to an even number of arbitrators and the need for one to have a casting vote. It will add to the expense. The most significant problem is that there would be a need to make a determination at the outset as to whether the interests truly conflict or not. There is no easy way for such a decision to be made in advance of the tribunal's appointment, the very occurrence that flows from the necessary determination. It would be problematic for an institution to make such a determination. While institutions will at times make significant preliminary decisions such as in relation to jurisdiction, these are generally provisional and allow for a revision by the tribunal. In addition, a decision would have to be made on allegations in early pleadings and not be based on assessment of evidence. It would be too easy for multiple parties to plead conflicting views to generate an entitlement to an extra arbitrator. It would thus be highly problematic.

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While these inherent problems are significant, if there truly is jurisdiction, then some process must apply. The first question is whether a multi-party arbitration clause provides for an express appointment mechanism. If so, that should obviously be employed. Some arbitration clauses may indicate that if two or more respondents are unable to agree on a joint nomination, the proceedings against them must be separated. (40) Even specific agreements for joint appointments may be problematic where a supervisory court employs logic such as in *Dutco* to the effect that the right to equal treatment is a matter of public policy which cannot be waived in advance. (41) Poudret and Besson criticise the view that this cannot be waived before the dispute has arisen. (42) Acceptance of waiver is based on party autonomy, although the argument is circular. There seems no valid reason to distinguish between pre-dispute waiver and post-dispute waiver. Either the mandatory due process argument prevails or it does not. There is no reason to argue that it operates differentially in the two scenarios. Nevertheless, waiver may not be the best logic. Express mechanisms in the arbitration agreement should be upheld unless their terms are problematic from a substantive equality perspective. Provisions that are conditions of the arbitral agreement cannot readily be discarded on due process grounds without undermining the entire agreement. If they are so problematic, then a reasonable prospective appointee would not accept the mandate.

Consent may also be found through the laws and rules applicable. Post *Dutco*, many rules now provide that if such a joint appointment cannot be made, the ● institution or appointing authority will appoint all members. (43) This is a second-best solution in the context of removing from all parties one of the suggested values of arbitration, being the right to appoint one's arbitrator, although that has been criticised by some at least in terms of its incentive to parochialism. There may even be inequality in the post *Dutco* situation in the sense that the unitary party on one side has done nothing to create the failure, while the parties on the other may have failed to agree in good faith on a joint appointment. As Voser points out, the post *Dutco* responses also do not accept the case's logic in full in terms of the court's view that parties could not waive their right to appoint their own arbitrator in advance. She rightly makes the point that accepting new institutional rules that allow for fallback institutional appointment of all three is such a waiver. (44) There are also differences between rules that simply provide a discretion to the institution to appoint all members and those that stipulate this as mandatory. Where an institution merely warns the parties that it will make an appointment in their stead, this

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may encourage them to reach agreement. A further problem with the post *Dutco* solution is that it could even be a disincentive to claimants bringing action against a number of respondents. In such circumstances, the claimant would be aware that if the respondents cannot agree on an arbitrator, it will itself lose its right to make an appointment. It would be problematic if because of this fear, the claimant strategically brought proceedings against one respondent, had the tribunal constituted and then immediately brought a claim against a second respondent, seeking consolidation. A further problem with the *Dutco* logic that there can be no advance waiver is that a failure to recognise such a waiver could itself be a failure to respect the choice of procedure of the parties and hence be a ground for blocking enforcement under Article V(1)(d). (45) Of course, the *Dutco* logic is dependent on Article V(1)(b) in the context of the right to participate in the constitution of the tribunal. Hence there is again no easy solution.

Where an institution makes an appointment, in some cases it will disregard the previous claimant's nomination, but in other cases will reconfirm claimant's appointee. (46) In considering whether it is appropriate to retain the single party's nomination where multiple opposing parties cannot agree on their selection, Voser ● divides situations into three categories. The first two are where the multiple parties have common or similar interests respectively, and a third category arises where they have conflicting interests. She argues that in the first two categories the single appointment should be upheld as the failure to make a joint nomination 'must be considered an attempt to obstruct the smooth commencement of the arbitration.' (47) While there is much to be said in support of the single party's nomination being retained in most instances, there are problems with any rule of reason to that end. First, it would be difficult to analyse and categorise the parties' interests as either common, similar or conflicting in advance of hearing all claims and cross-claims. In most situations, multiple parties will have common interests on some issues, but will fundamentally divide on others. Even closely related entities are often treated as separate cost and profit centres and may have differing legal issues in the arbitration that could call for different appointments. (48) In many multi-party scenarios, the parties may also have differing views as to choice of arbitrator, at the very least as between those who take an expansive view of extension of arbitration agreements and those who do not. Secondly and relatedly, one cannot presume that both parties are equally attempting to obstruct the process by failing to agree. One might want a parochial appointment while the other might want to appoint a person of impeccable character. One might have experience of arbitral processes and the other be ignorant, refusing to agree on a non-contentious appointment. There can be no confident presumption that each of the parties failing to agree is equally culpable for the failure. Finally, where appointment is only for the member not agreed, there may be a debate as to which side the various persons are on as there may be a gateway issue as to who actually must agree with whom. Finally, where an institution would make the preliminary determination as to inclusion, because of the implications for composition, its prima facie determination of validity has more significant practical implications than simple cases of challenges to jurisdiction.

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A further problem with subsequent joinder of third parties is that previously appointed tribunals who were accepted as independent and impartial could have some relationship with the newly joined party or its counsel that could lead to challenges. The more that an arbitrator is aware that there may be third-party involvement, the more that a conflicts search prior to acceptance of an appointment might include such potential third parties. (49) Conflicts situations could be particularly problematic when there is joinder of a reluctant third party who might then seek to select counsel with the specific aim of creating a conflict scenario and ● disrupting the proceedings. As argued in section 9.7, a tribunal ought to have power of control in such circumstances and be able to bar the involvement of such counsel.

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Section 7.13 below looks at a range of practical options where extensions, consolidation or joinder are not possible. As to tribunal appointment, where it is not possible to bring all the parties to the same arbitral hearing, another possibility is to appoint the same arbitrators in different arbitrations. Hanotiau suggests that this will minimise the risk of conflicting decisions. (50) Another possibility is at least some common arbitrators. This option has been criticised on the grounds that the participation of one arbitrator in parallel proceedings with different arbitrators will have access to documents or facts to which the other arbitrators may not. (51) Once again, there is no perfect and unassailable solution.

7.6 Inclusion of Multi-Persons or Extension of Arbitration Agreements

As noted at the outset, commentators tend to speak of 'extension' when considering when and why arbitration agreements can bind non-signatories. It has rightly been observed that the term is misleading. Nothing is actually extended. Instead, a determination is made as to whether a non-signatory nevertheless falls within an arbitration agreement on some theoretically and factually valid basis and hence can be said to be included in the agreement. (52) While most cases will involve an attempt to bring in a non-signatory, in some cases a non-signatory will itself seek to rely on an arbitration clause as a bar to court proceedings, or simply as the basis for a claim. (53) In an inclusion/extension scenario, there are actually two questions, first whether the agreement can apply to the non-signatory and secondly whether the agreement still applies to the original named party with whom the third party has a particular connection. In many cases such as group of

companies, this will be so, but in other instances, for example agency, assignment, subrogation or cases involving piercing of the corporate veil, even if a claim is validly made against the third party, it might be seen as having overtaken and replaced the original arrangement. If it is extended, there will then be further questions as to the optimal procedure to adopt to promote both fairness and efficiency.

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As noted at the outset, while most accept that extension must be based on some theory of consent, differing views may be argued for, leading to polarised views on the proper approach to non-signatories. Different practitioners and scholars have differing views as to the importance of actual, implied or constructive consent or whether one can rely on particular notions of good faith and reliance such as estoppel or abuse of rights. (54) While there are different theories and categories of inclusion, all rely to some degree on notions of reasonableness and good faith considered in the context of original consent. A procedure contrary to the legitimate expectations of the original parties is for that reason unreasonable. Instead, the categories are concerned to respond to some valid but technical reasons why parties who in substance ought to be involved, have some technical barrier through distinct legal forms, contractual limitations or differences in property ownership.

There are a number of theories or fact typologies underlying claims to apply arbitration agreements to non-signatories or parties not otherwise expressly referred to. These include the group of companies doctrine, agency, piercing the corporate veil, and agreement or estoppel by conduct, incorporation by reference, assumption, third-party beneficiary, subrogation, novation and guarantee scenarios. (55) The categories can overlap. However, noting the commonality of features of the different categories does not necessarily point to a solution. To some adjudicators, a legal barrier is a mere technicality and should not prevent an efficient and comprehensive resolution of the true substance of the dispute. To others, sophisticated parties exercising their free will to create such complex relationships are entitled to do so in a way which prevents arbitral jurisdiction just as they are entitled to create jurisdiction in the first place through consent. Some adopt an entirely different methodology and would argue for a conflicts approach looking to the proper law of the arbitration agreement or the legal categories listed above, to determine how to deal with each situation. (56) The following sections deal with each potential category, after which some concluding remarks are made as to the proper approach that is recommended.

7.6.1 Agency

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Legal systems accept that in appropriate circumstances, an agent can bind a principal. It is accepted that this can include binding a principal to an arbitration agreement. The most common and non-controversial agency scenario is where a corporate officer signs an arbitration agreement in that capacity in order to bind the company. When acting in this way, the company is bound but not the company executive. (57)

In other cases where a non-signatory is asserted to be a principal bound by the acts of a signatory agent, the first question will be what law of agency is applicable. Questions will arise as to whether it should be considered under conflicts rules contained within the *lex arbitri*, or be based upon national laws on legal capacity and agency of the persons involved. Because of the separability of the arbitration agreement, there is not even consensus as to whether this is a procedural or a substantive issue. There is thus a question whether the separability of the arbitration agreement calls for resort to the law applicable to the arbitration agreement itself. (58) Other choice of law options are to look to the place where either the alleged principal or agent acted or had its business establishment (59) or the law where acts were performed or the law of the place where the holding out occurred leading to some detrimental reliance. Because none of these is obviously preferable, Born argues for an international solution. (60) He also suggests that a validation principle should apply whereby the non-signatory should be bound if either the law governing the arbitration agreement or the law governing the agency relationship would subject the principal to jurisdiction. (61) A contrary view would be that a validation concept is most justified when determining jurisdiction as between signatories under interpretation *effete utile*. (62) Parties who entered an arbitration agreement can be presumed to intend it to be effective. Similar logic is not readily maintainable where a non-signatory is concerned. The preliminary question is whether that party can be said to have agreed to arbitrate at all. (63)

Where agency is involved there is also a distinction between actual authority and ostensible authority. Where the latter is concerned, similar principles are raised to estoppel discussed below. This generally requires some culpable action in holding out that authority is in existence where it does not actually exist. There is usually also a need for detrimental reliance. Again there are choice of law questions, but more fundamentally, in an arbitral context, some would find it difficult to accept consent to arbitrate purely as a result of estoppel type scenarios for two main reasons. The first is conceptual in that there was no actual intent to be bound. The second is factual, in that the more the non-signatory acts in a way that holds out authority, the more likely that they have held out an intent to be party to the agreement in other ways. Hence there may not be a need for a distinct category of apparent or ostensible authority. That will not always be so, however, and there will be circumstances where the only holding out is as to the supposed agent's

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authority.

In the US, non-signatories have relied upon agency theory as a basis by which to claim the benefit of an agreement to arbitrate. This led one US Court to decide that '[w]here the parties to [an arbitration] clause unmistakably intend to arbitrate all controversies which might arise between them, their agreements should be applied to all claims against agents or entities related to the signatories'. (64) However the theory has not always been followed. For example, in *Merrill Lynch Inv. Managers v. Optibase Ltd* (65) the claimant Optibase commenced arbitration proceedings against Merrill Lynch and one of its sister companies Merrill Lynch Investment Managers (MLIM). Optibase claimed compensation for the losses it had suffered through an investment fund recommended by Merrill Lynch, with which Optibase had an agreement to arbitrate. MLIM served as an investment adviser for the fund, however Optibase had no arbitration agreement with MLIM. The Court of Appeals held that Optibase had failed to adduce facts that supported the contention that MLIM should be forced to arbitrate in the absence of an agreement. The Court specifically rejected the argument that MLIM could be bound to the arbitration agreement between Optibase and Merrill Lynch by virtue of it being an agent of Merrill Lynch.

7.6.2 Assignment

Most legal systems accept the possibility of assignment of a contract together with its arbitration clause. Some presume that the agreement automatically transfers with the underlying contract. (66) Some consider that this may not be so because of separability of the arbitration agreement. Conversely, separability also means that if the assignment of the underlying contract is invalid, it is at least arguable that the assignment of the arbitration clause itself may be accepted, although that may be somewhat strained logic. Separability is intended to make true consent to arbitrate meaningful and should not be a means to find valid consent where it otherwise does not exist.

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There are a number of subsidiary questions. The first is whether the contract itself may be validly assigned. The second relates to the evidence of intent of the various parties to allow for arbitral rights and obligations to transfer in this way. There are again choice of law issues as to the validity of the assignment. (67) Born again argues for the validation principle to uphold assignment if either the law of the arbitration agreement or the law of assignment would lead to validity. (68) This may make sense for the assignor and assignee, but not *ipso facto* for the other signatory who must separately be seen to have intended to allow the assignment to occur. This is particularly so if the assignor would be taken out of the picture if the assignee is included as assignment is one of the examples like subrogation where one party is at times seen as being replaced by another. This would be particularly problematic from a consent perspective where an assignment might have been made to avoid liability or shield assets, in which case the other signatory would not have been supportive.

There appears to be increasing agreement across common law and civil law legal systems that a contract will automatically transfer to the assignee any rights contained within it to submit disputes to arbitration. (69) Sinclair examines case law in a number of countries, including the UK, the US, Italy and France, concluding that we have 'almost arrived' at a uniform rule of international arbitration by which an arbitration agreement is automatically assigned together with the main contract. (70) However, he cautions that the issue is not completely settled and that in the absence of express approval of the assignee, the counterparty or both, the assignment of arbitration agreement together with the main contract may be challenged. (71) However certain US Courts have denied the assignment of the arbitration clause for lack of an independent consent on the part of the assignee to be bound by the arbitration clause. (72) The English Arbitration Act does not contain an express provision with regard to the rights of assignees. However, section 82(2) of the Act defines a party to an arbitration agreement as including 'any person claiming under or through a party to the agreement'. The prevailing view in the courts is that as a matter of English law, an assignee of a contract may become a party to the arbitration agreement contained in that contract, whether the assignment is legal or equitable. (73)

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Assignments may occur before the commencement of arbitral proceedings or even afterwards, in which case there may be a requirement of tribunal consent. (74) There would also be issues as to the assignee's acceptance of the earlier stages in the proceedings.

7.6.3 Assumption

Assumption involves conduct showing acceptance. Here there is still a need to find implied consent from the other parties. One form of conduct indicating assent is simply to rely on the agreement in bringing a claim, although the person's own behaviour cannot prove consent from the other party.

7.6.4 Third-Party Beneficiaries

Some legal systems consider that rights and obligations conferred on third parties in a contract will allow those parties to have direct rights in that regard. Traditional notions of privity would hold against this view and would simply consider the express treatment of the third party to be a term to be performed between the two signatories. Most legal

systems have moved away from strict notions of privity as there are many situations where efficiency demands that such rights be afforded. (75) Where this occurs, the question is then whether the third-party beneficiary of the contract rights is also subject to an arbitration clause within the contractual agreement.

As always it is a question of intent and will depend in part on the drafting of the arbitration agreement and the surrounding circumstances. There are again choice of law issues as to whether the treatment of third-party beneficiaries should be as per the law applicable to the arbitration agreement or the law applicable to the underlying contract. (76) Consideration of the contract itself can only show the intent of the signatories. Separate attention would need to be given to the actions of the third party. The situation may vary depending on whether the third party is seeking to rely on the arbitration agreement or is instead challenging jurisdiction. The distinction is simply because if the third party brings a claim which is not rejected jurisdictionally, that may itself be considered a separate arbitral agreement or separate evidence of consent. In other circumstances it is simply a question of intent regardless of whether the third party brings or defends a claim. The Iran–US Claims Tribunal accepted such a claim in *Land Serve Inc.* (77)

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7.6.5 Incorporation by Reference

An agreement may be extended where a signatory enters into a separate relationship with the non-signatory and in doing so incorporates the existing arbitration clause by reference. That would show the consent of those two persons but not the other original signatory. The law applicable to that second agreement would determine whether there had in fact been incorporation by reference. (78) Incorporation by reference cases must be looked at alongside formal validity principles.

7.6.6 Subrogation

Subrogation involves one party having the right to take over contractual rights of another party. This commonly arises in insurance contracts where the insurer may pay out a claim but then wishes to take over the rights of the insured against persons who were at fault. There are a number of instances where tribunals and courts have considered the insurer to be party to the arbitration agreement as a result. As between the insurer and insured, it will essentially be a question of contractual drafting as to whether this was their intent. As to the other signatory, that will depend on the circumstances. In most instances they may be benefited by the inclusion, hence a priori intent may be presumed. However, there is nothing to stop the insurer assisting the insured other than as a distinct party. Hence, there may be circumstances where involvement as a party would not be ideal from the perspective of the original signatory. Where the other contracting party knows that there will be an insurance policy and can reasonably presume rights of subrogation, this can add to the evidence of *ex ante* intent.

The general view would be that the party subrogated would have the same rights and obligations as the original party. In some legal systems, claims can still be brought against the original promisee. (79) Where national law varies as to whether the original promisee remains a party, this would also impact upon analysis of consent. Even then, presumptions are not clear cut. On the one hand, the other contracting party may have further options of recovery but on the other, may be subject to additional cross-claims.

7.6.7 Novation

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Novation occurs where one person ceases to have obligations and is replaced by another. This typically arises in cases where a new individual assumes an obligation to pay or perform an act that was incurred by the original party to the contract. The general view would be that the party novated would have the same rights and obligations as the original party.

7.6.8 Ratification

Legal systems will commonly consider that there are consummated agreements when a particular party entitled to do so, ratifies the behaviour of others. A party may ratify an assignment or subrogation or novation. (80) Again there would be choice of law issues. Born again argues for a validation principle which would be particularly sensible if the ratifying person was the other original signatory.

7.6.9 Legal Succession

There are also cases where entities are bound by operation of law regardless of intent. These include succession such as through mergers or similar doctrines. (81) The dominant view is that this may lead to conclusion. (82) Problems may arise where a contract expressly calls for consent to any variation in corporate identity. There may also be issues with interpretation of choice of law clauses as to whether these purport to apply to questions of succession and the like.

One situation where the law provides for a successor is insolvency. Here the question is whether receivers, administrators or liquidators may or must engage in the insolvent company's arbitral processes. Insolvency may also be a bar to the arbitration itself. This is

discussed in section 7.15.

7.6.10 Guarantors

Courts and tribunals have taken different views as to whether guarantors should be considered parties to arbitration agreements in the underlying contract. Again it is a question of intent. In some cases this would not be possible as the guarantee would have a separate and conflicting dispute resolution clause. As a general rule, it should be difficult to incorporate a guarantor into the underlying contract. Well drafted guarantees are quite distinct in their legal basis and do not afford rights to normal contractual defences. Even where defences are possible, guarantees will generally not allow the guarantor to raise them directly. If there are subrogation rights, that itself would be a separate reason to consider inclusion. If the guarantor has had a significant role in the history and conduct of the transaction such as a holding company which is heavily involved in the transaction, it might be included for that reason and not simply because of its specific guarantor position.

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7.6.11 Parent Companies and Significant Shareholders

Under some company law systems, shareholders may bring actions to protect their interests. It has been suggested that where the applicable national corporate law allows the shareholder to act on behalf of a company signatory to an arbitration agreement, a shareholder might be permitted to invoke the arbitration clause. (83)

7.6.12 Company Groups

There has been much debate about the circumstances, if any, where a related non-signatory company can rely on or be included in an arbitration agreement signed by its related entity. The most famous instance of the application of a supposed group of companies doctrine occurred in the *Dow Chemical* case reviewed by French courts. An arbitration clause was extended to other companies in a group where they, 'by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to [the] contracts or to have been principally concerned by them and the disputes to which they may give rise.' (84) The tribunal considered that the group of companies constituted 'one and the same economic reality…'. (85) This case and cases that have followed it are highly controversial, although it is difficult to critically evaluate decisions without a careful analysis of the facts in issue. The group of companies approach has had less support in other jurisdictions although one should be careful to distinguish comments which simply suggest that a group of companies alone is not sufficient from those that are at least prepared to consider the surrounding circumstances. (86)

One reason why it is more controversial is that it has simply developed in the arbitral context unlike some of the other concepts that are merely transplants from or applications of contract, agency and abuse of rights laws. (87) Importantly, it is something of a misnomer to describe it as a group of companies 'doctrine', suggesting that simply because a company is part of a group, extension is for that reason permissible. That would be wholly improper, ignoring the essential requirement of consent and ignoring the purpose and status of separate legal entities. (88) Group of company scenarios leading to inclusion should simply be those where contemporaneous evidence and circumstances make it reasonable to conclude that related companies were sufficiently involved to be reasonably assumed by all to be subject to arbitral rights and obligations. (89) It is generally a question of intent in the circumstances. Even in *Dow Chemicals* the tribunal made its comments in the context of noting that it should 'reach its decision regarding jurisdiction, by reference to the common intent of the parties to these proceedings, such as it appears from the circumstances that surround the conclusion and characterise the performance and later termination of the contracts in which they appear.'

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If it is a question of intent, attention then needs to be given to the relevant evidence, given that the issue will only arise when contested. Bernard Hanotiau argues persuasively that the issue is not whether there is a group of companies but instead whether both signatories and non-signatory parties intended to be bound by the arbitration clause. (90) Mantilla-Serrano suggests that intent is to be determined by 'examining the parties' positions and actions' and that this involves a subjective analysis where the non-signatory's conduct plays a paramount role in determining whether it has agreed to be bound by the arbitration agreement. (91) Derains suggests that a group of companies provides no objective rule to resolve multi-party scenarios and is nothing more than a relevant factor in assessing intent. He notes that it is an ambiguous factor as the mere presence of a group of companies could allow for conflicting arguments as to whether there was true intent to be bound by an agreement signed by one only. (92) In some cases it will show that the parties treated all companies as being part of the one transaction. In other circumstances there may be an intent to only contract with a subset of the group. (93) Rubins suggests that the most important factual circumstances supporting intent are 'the non-signatory is part of a group of companies including at least one signatory entity; the companies within the group are so intertwined in their activities and (more importantly) responsibilities that they constitute a single economic reality; and the non-signatory played an active role in the conclusion, performance, and/or termination of the contract', (94)

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It is important to note that the *Dow Chemical* case dealt with the issue of whether non-signatories may be claimants in arbitration rather than whether non-signatories can be drawn into arbitration as respondents. In this regard, Rubins notes that the Tribunal cited in support of the group of companies doctrine the decision of a US arbitral tribunal that explicitly limited its reasoning to cases where an arbitral clause is to be extended to claimant non-signatories. (95) This ought not be presumptively easier. Because it is essentially a factual question, there should be no presumption either for or against jurisdiction depending on whether the non-signatory is a willing claimant or a reluctant respondent. (96) Craig, Park, Paulsson suggest that it is more easily established when they are claimants. This should certainly not be taken as a doctrinal position. It is simply different because it changes the focus onto the likely intent of the signatory rather than the non-signatory.

Nevertheless, actual consent will not be the key in many cases. Group of company scenarios could also be dealt with via agency, including ostensible authority, alter ego or piercing the corporate veil. In that sense it is important to understand that it is not truly limited to separate companies but involves the consideration of any circumstance where arguably related entities are sufficiently similar to all justifiably be involved. There could be different legal persons such as companies, partnerships and in some jurisdictions trusts, or also the involvement of individuals such as dominant shareholders. It may involve corporate officers or States or State entities. (97) It may also arise in trust situations or estoppel scenarios where there was conduct leading to reliance. There may also be situations of abuse of rights or acceptance by conduct. The group of companies scenario should thus be asked to fit into one of two conceptual models, inclusion where there is sufficient evidence of implied consent or extension where unreasonable behaviour on the part of the non-signatory makes it only fair and just that it be brought into the proceedings. In some cases it is reasonable to presume that all members of a group intended to be bound and it may only have been an oversight that the written contract was drafted the way it was. At the other extreme, parties may have deliberately sought to use related entities to shield themselves from any adverse arbitral awards. It is inappropriate as some cases have done, to simply look at the commercial relationship, the degree of
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control and the supposed needs of ● international commercial relations. (98) Notwithstanding the better view of the bulk of commentators, a more efficiency-oriented logic of this nature was utilised by a US Court of Appeal in *Ryan*. (99) In *Ryan* the Court found that if a company has to start two proceedings, one in court and one before an arbitral tribunal in relation to 'inherently inseparable facts', the arbitration proceedings would be rendered 'meaningless and the federal policy in favour of arbitration effectively thwarted'. (100) In deciding to extend the arbitration clause to a non-signatory parent company, the Court stated that '[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement'. (101)

In the *Jaguar* case, the principle was also used by the non-signatory as a shield to court proceedings. The Cour d'appel held that the clause can 'extend to parties directly involved in the performance of the contract provided that their respective situations and activities raise the presumption that they were aware of the existence and the scope of the arbitration clause, so that the arbitrator can consider all economic and legal aspects of the dispute.' (102) The principle was applied to subsidiaries involved in contract performance in *Alcatel*. (103) It may be that the articulation of the principle was overly broad as it concentrated on the intent of the non-signatory. For it to be used as a bar to court proceedings, it ought to be necessary to show that the claimant in those proceedings ought to have understood the non-signatory to be party to the arbitration agreement. Other methodologies have also been proposed. In *Arthur Andersen v. Carlisle*, the US Supreme Court considered that State contract law would be determinative as to whether a non-signatory has rights under a contract containing an arbitration clause. (104) Trade usage was seen as a justification where the common law was thought to otherwise exclude
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extension in ICC Case No 6000 (105) where an arbitration clause was extended to a related entity that was involved in the execution of the contract ● but was not a party to it. (106) In that case, the related entity was fully involved with the conclusion, performance and termination of the contracts in dispute. Nevertheless, the logic is problematic. It is particularly strange to argue in favour of a group of companies theory based on international trade usage, (107) given that separate corporate identity must surely be one of the most significant elements of such usage.

A similar issue to a group of companies scenario is a joint venture situation. Joint ventures may often be required as a precondition to approved foreign investment. The very existence of the joint venture shows strong involvement by the non-signatory, but under a consent analysis, there is again the need to consider why only one entity in the venture executed an arbitration agreement.

7.6.13 Estoppel by Conduct, Good Faith and Related Concepts

At the outset, it was suggested that while extension/inclusion situations should be analysed from the perspective of consent, a number of categories clearly lack subjective intent by the third party but circumstances may nevertheless support contentions that they should be bound. Different legal families use different concepts to deal with what is

said to be the justice in such scenarios where persons act in unreasonable ways leading to detrimental reliance by others. In many cases, legal systems will suggest that if a person induces a misapprehension and causes detrimental reliance, it might be bound in those circumstances. Civilian legal systems rely on principles such as abuse of right, good faith or *venire contra factum proprium*. (108) Common law systems tend to utilise concepts such as estoppel, acquiescence and waiver. In most cases, such concepts are used to justify lifting the corporate veil or asserting that a third person is an alter ego of a signatory. Specific comment on this is left to the sections dealing with those categories. Only some general observations are made at this stage.

From a conceptual level, it is first necessary to consider whether expanding coverage in this way is consistent with the essential nature of arbitration. To some, that could only be so where consent can be validly implied. Because consent should be *ab initio* consent identified objectively on the assumption that actions are deemed in good faith, extension can be said to be impliedly consent based in some such cases. For example, this could be justified where the evidence pointing to involvement outweighs sham elements seeking to point to a contrary conclusion. Another scenario is where there is some inadvertence. An example is the *Deloitte* case where an international accounting firm entered into contracts containing ● arbitration clauses with regional affiliates. The entitlement to use the international firm's name was conditional upon acceptance of the agreement. One affiliate did not sign the agreement but used the name nonetheless. Estopping the affiliate from denying consent is simply another way of asserting that the decision to use the firm's name knowing that it was conditional upon acceptance, is evidence of acceptance by conduct. (109) Similarly, where a non-signatory purports to use an arbitration clause or does not object to jurisdiction when defending a claim under it, this could either be looked at as evidence supporting *ab initio* implied consent or could be looked at as a new agreement to arbitrate. Where the non-signatory brings a claim, if the other party does not object, then the claims and defences could be argued to be a new arbitration agreement. The important distinction is the fact that a non-signatory bringing a claim may not be valid proof that it always intended to be bound, but simply that it sees a strategic value at the time the dispute is known. Hence a tribunal needs to be more circumspect in its analysis.

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In other cases there remains the need to decide the conceptual validity of jurisdiction via estoppel and then consider whether the elements of the inclusion principle being relied on are made out on the facts. There are particular choice of law difficulties in applying such doctrines given that it would be hard to determine which of the relevant States' laws ought to apply. Born again argues for international principles of estoppel and good faith. (110) It may be easier to justify inclusion conceptually if the law applied was no more expansive than the law which the third party might reasonably expect to apply to its conduct. This remains a challenging question. Even when the law is known there are then a host of evidentiary issues. The important question, rarely articulated in the literature, is exactly what kind of conduct ought to lead to arbitral jurisdiction. If the assertion is that it would be unjust not to include, what is the factual basis for the conclusion? It cannot simply be that a person with funds who would benefit if the deal was successful, should be liable if it is not. That could have been factored into the contract price. This is also the essential motivation for the development of limited liability companies. Hence the situation will be less contentious where the facts show the person led the signatory to reasonably believe that they would accept responsibility. Where arbitral jurisdiction and non-signatories are concerned, the behaviour has to be looked at as against the reasons why the non-signatory was not included in the contract in the first place. The more contentious cases are where tribunals simply concentrate on the third person's involvement and control and draw broad estoppel type conclusions the more these factors are present. For example, in *Hughes Masonry Co v. Greater Clark County School Building Corp* (111) a construction manager interfered in a contract between a masonry contractor and a building owner. The contractor's ● agreement with the owner contained an arbitration clause, however the manager's did not. The Court of Appeals for the Seventh Circuit found that the contractor, in bringing a suit against the manager, was equitably estopped from refusing to arbitrate because the basis of its claim was that the manager had breached the duties and responsibilities assigned and ascribed to the manager under the agreement that contained the arbitration clause.

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Hanotiau notes that equitable estoppel has only rarely been applied to compel a non-signatory to arbitrate. (112) For example, in *Thomson-CSF, S.A. v. Am. Arbitrations Association* (113) a parent company sought a declaration that it was not bound by an arbitration agreement between one if its subsidiaries and a supplier. The supplier cross-moved to compel arbitration with the parent. The United States District Court for the Southern District of New York denied the parent company's request. This decision was overturned by the Court of Appeals. The Court of Appeals stated that the parent company could not be estopped from denying the existence of an arbitration clause to which it is a signatory, because no such clause existed. (114)

Again as noted above, some of the more contentious decisions could be looked at from the perspective of objective evidence of consent outweighing the contrary factors. The degree to which a party has been involved in the development and performance of the underlying agreement and the extent to which its conduct has led to reliance by the other party, are two factors commonly referred to in cases looking at extension via conduct. It is important that the factors considered are consent related. Stated differently, if there is to be an

estoppel, it is important to consider exactly what the third party is being estopped from denying. Often they cannot deny that they wished to have control over the transaction but equally, they may legitimately have wished to impose a limited liability company to shield themselves from recourse.

Finally, Born notes the debate as to whether estoppel should apply more as a shield or as a sword, operating differently depending on whether it is used by a signatory or non-signatory. He argues persuasively that this should not be the case. (115) Consent logic certainly cannot have any a priori presumptions of this nature.

7.6.14 Corporate Veil and Alter Ego

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Courts will at times ignore a corporate edifice if it is considered to be a facade or sham. This can otherwise be described as an alter ego scenario. (116) Born suggests ● that '(t)he essential theory of the "alter ego" doctrine is that one party so dominates the affairs of another party, and has sufficiently misused such control, that it is appropriate to disregard the two companies' separate legal forms, and to treat them as a single entity.' (117) Lifting the corporate veil has been accepted under international law in the *Case Concerning the Barcelona Traction, Light & Power Co.* (118) While a corporate veil analysis is commonly used to bring in a person with a controlling interest, the logic may be used by such a person in support of a stay of litigation application. The third party may be more litigious, have deeper pockets and may be advantaged by the place of arbitration or the selected tribunal. (119)

Where the principle is being used to include a reluctant controller, piercing the corporate veil will be closely related to situations of abuse of rights. Corporate veil scenarios could also be dealt with under other mechanisms of extension such as agency, (120) third-party beneficiary, assumption or estoppel. (121) Similarly corporate veil theories need to be distinguished from group of companies doctrine, although the latter is often argued in such circumstances. The logic is different however. A corporate veil approach is based on company law theories and whether separate legal identity can be ignored. Group of companies logic operates on contract theories and intent. (122) Besson makes the observation that there would be complex choice of law issues that arise. Which company law should be looked at for notions of piercing the corporate veil, that of the signatory company or the non-signatory? (123) In deciding on applicable law, some look to the law of the State of the company whose corporate veil is sought to be pierced. (124) Born argues

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against and in favour of an international solution. (125) A national solution can pose particular problems when the aim is to look behind a State-controlled entity ● with a view to bringing the State in as a party to proceedings. Besson has also made the important point that a corporate veil may be pierced for liability but not necessarily for jurisdiction. (126) That may naturally apply where only recognised courts are able to provide remedies through a judicial determination of abuse of the corporate form.

Where inclusion is based on notions of intent, there would rarely be sufficient evidence to justify piercing the corporate veil to afford arbitral jurisdiction. Under a consent theory, there needs to be appropriate evidence that all parties intended to be bound. Yet if a party established a shell company to protect those with deeper pockets from recourse, its subjective intent is to the contrary and objective evidence points in the same direction. Hence, consent must arise by some deeming theory based on fraud, abuse of rights, misrepresentation or lack of good faith. The difficulty is to identify what constitutes misuse, fraud or other injustice vis-à-vis arbitral jurisdiction. Simple control is not enough, although if control and involvement is sufficient, there may be an intent logic and a group of companies scenario rather than piercing of the corporate veil. Once again, the mere fact that the signatory has no assets should have little, if any, significance. The very essence of separate corporate identity is to alter the risk/reward matrix in commercial transactions, offering contracting parties in their dealings with corporations' greater resources and greater potential profits in return for limited recourse in some scenarios at least.

While mere control should thus not suffice, inevitably some cases will concentrate on these issues. In *Bridas*, (127) a US enforcement court dealt with an attempt to bring in a State as liable for its State-owned entity signatory. The US court considered a range of factors, namely, whether the national law would consider the entity an arm of the State; the source of its funding; its level of autonomy; whether it has a local or State-wide focus; whether it can sue and be sued under law; whether it may hold or use property; and where corporate relationship is concerned, common stock ownership; common directors or other key officers; common business departments; consolidated financial statements; source of funds; cause of incorporation; inadequacy of capital; payment of salaries and expenses; whether there is any external business not sourced from the parent; how the parties use the subsidiary's property; whether daily operations are kept separate; observance of corporate formality; whether the directors of the subsidiary can be said to act primarily in the interest of the parent; guarantors and payment of debts; and generally whether dealings are at arm's length. (128)

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In some cases, solutions are sought in one area of arbitral practice because of potential inadequacies in others. For example, where a corporate controller seeks to siphon off the assets of a defendant company in the face of litigation, interim ● injunctions can more readily be sought and a national court will have jurisdiction over the shareholders as well as the corporation. The same cannot be said where arbitration is concerned. An interim

measure against the company itself is problematic until jurisdiction is determined. No award can be made against a controlling shareholder unless it is a party to the agreement. In many instances a tribunal has no interim measure powers in any event. (129)

7.6.15 State Entities and States

While most would see the involvement of non-signatory States or State entities in multi-party scenarios as raising the same questions of consent, there are other complex questions of law that might impact upon the analysis. There would be issues of the public law of the country concerned, both as to constitutional allocation of powers, administrative law ambit of authority, and the ability of State entities to bind the State. In that context there is an important distinction between administrative law principles of delegation of powers to grant authorisations on the one hand and conferring of contractual entitlements including in relation to arbitration agreements on the other. A government may properly authorise the right to enter into a discrete arbitration agreement without taking on jurisdictional obligations itself. (130) International law principles of attribution would not naturally apply in commercial arbitration but might be raised in investment disputes where international law is itself stated to be applicable. (131) The relevance of the State and international law principles may also be complicated in privatisation scenarios where it may be a matter of timing as to whether the substantive rights are with the government or instead with a privatised agency. In due course it is certainly the natural corollary that the State is sheltered where it has privatised certain functions. (132)

In addition to these legal questions, there are also distinct factual questions such as the way decisions are actually made, the control that government ministers and other officials have over entities and the use to which revenues are put and the ● source of expenditures. Close control and consolidated revenue can add to the factual matrix of intent. There may also be problems where the State can simply liquidate an entity either for honourable regulatory reasons or as a means to avoid arbitral liability. (133) Petrochilos suggests that where States are concerned, the evidence should be as to a contractual intent rather than simply an intent to exercise administrative supervision. (134) This distinction led to the setting aside of the award in the *Pyramids* case where the Paris Court of Appeal considered that the relevant Ministry's notation that an agreement was 'approved, agreed and ratified' was simply an administrative step and not an agreement to itself be bound. (135) In ICC Case No 8035, a tribunal took a similar view and refused to consider Libya a party simply because its representative had noted on a suspension agreement that it was 'approved and endorsed'. (136) Conversely, Born criticises the decision in *Pyramid* as being inconsistent with international authority and difficult to reconcile with the language used by the Ministry. (137) Neither view is inherently preferable. Problematic drafting and ambiguous facts will always lead to understandable divergences of view.

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The recent case of *Dallah* has also been controversial. Enforcement was refused in England when an ICC award issued in Paris had sought to include a non-signatory State. (138) Dallah was a company which provided services for pilgrims travelling to holy places in Saudi Arabia. In July 1995, Dallah signed a memorandum of understanding with the Pakistani Government in relation to the construction of certain housing for Pakistani pilgrims. In 1996, Dallah executed a contract with the Awami Hajj Trust, a body which had been established by an Ordinance promulgated by the then President of Pakistan. The contract contained an arbitration agreement, under which all disputes were to be referred to ICC arbitration in Paris. The Government was not a signatory to the contract, although the contract made reference to a guarantee to be provided by the Government and included a provision by which the Trust could assign its rights and obligations to the Government without the permission of Dallah. The housing project was never commenced and a change in government occurred shortly after the contract was executed and relationships deteriorated rapidly. In May 1998, Dallah commenced ICC arbitration proceedings against the Government of Pakistan. Dallah ● successfully argued that the tribunal had jurisdiction over the government. The tribunal awarded Dallah approximately USD 20 million in damages and costs. Dallah endeavoured to have the award enforced in the UK and in Paris. The UK Supreme Court was ultimately faced with the question of whether the Government should be considered a party to the arbitration agreement. The Court held that there was no material sufficient to justify the tribunal's conclusion that the Government was a party to the arbitration and therefore refused to enforce the award in the UK.

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The outcome in *Dallah* might be justified on the basis of the distinction between administrative control and contractual intent alluded to above. However, if too artificial a distinction is made, States might be put in a privileged position as against group of companies scenarios, requiring explicit evidence of intent to be bound. (139) That might more readily apply where the State is given rights and obligations under the contract and there is an acknowledgment that it intends to be bound. (140) In ICC Case No 9762, a tribunal considered that the fact that the agreement was entered into by a Minister, subsequently replaced by another Ministry, led to attribution to the State under international law and agency principles. (141)

Problems may arise with State entities when key evidence of the State's involvement occurs after the consummation of the agreement. The intention to be bound should be found at the outset. The fact that a State has the legal power to frustrate an existing

contract it is not privy to should not give rise to an ex post facto extension of jurisdiction. That potential is always part of sovereign risk and the contracting parties could have made that a negotiating feature from the outset. (142)

7.7 Concluding Remarks

The following discussion attempts some concluding observations in relation to multi-party scenarios.

7.7.1 Consent-Based Analysis and the Nature of Consent

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As noted at the outset, all arbitration is based on consent. Hence any justifiable theory of multi-party scenarios must be consistent with the evidence of consent in ● the instant case. Even when there is some consensus that consent is required, an important question is whether that is actual subjective consent, whether it is subjective consent proven by objective features or whether purely objective consent is the required factor. The latter may more readily allow for estoppel or corporate veil type scenarios. There is also a significant difference between evidence of *ex ante* intent and instead evidence of subsequent behaviour that might be explicable for a range of reasons. Original consent is the key. (143) Furthermore, there is a fundamental difference between evidence of the actual thinking of the persons concerned and arguments based on the likely intentions of the parties when presumed to be acting in good faith. Arguments based on presumed intent are particularly problematic in this context. While the logic in favour of inclusion is that persons would prefer efficient dispute resolution avoiding the possibility of conflicting decisions and abusive behaviour, nevertheless the mere decision to set up a separate corporate entity for the benefit of publicly afforded limited liability cannot be seen as abusive and must a priori be an equally valid presumption of modern business persons.

7.7.2 Party Autonomy and Drafting

Problems can be overcome if appropriate arbitration clauses are well drafted. Where a group of companies is concerned there would still be a need to have every company in the group sign to be sure that there is valid jurisdiction. Where a group of contracts is concerned, there would be a central arbitration agreement, express indication that related contracts are to have an identical clause and a requirement that parties to the ancillary contract agree to be bound by the framework agreement. Thought might be given to an umbrella clause or an umbrella arbitration agreement that all parties to the various contracts are required to sign. (144) While that may be an ideal, it is unlikely to be practical in most circumstances and in any event the vagaries of international transactions will inevitably throw up permutations beyond the contemplation of the transactional lawyers. (145) Finally, parties might wish to consider whether there should be a cut-off point beyond which applications for consolidation or joinder should not be made.

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7.7.3 Interpretation of Ambiguous Clauses

While the natural conclusion is to try and deal with multi-party scenarios in drafting, complex factual permutations will still require interpretation of intent and determinations as to the relevance of good faith. Furthermore, the more elaborate an attempt to draft an agreement covering multi-party situations, the more that an adjudicator may be loath to fill gaps based on good faith, arguing that the parties went to great bother to articulate exactly which categories were to be included. While a contrary approach is equally possible, it is salutary to remember this potential problem with any form of elaborate legal drafting. Notions of consent are also bound up in the question of the proper interpretation of an arbitration agreement. While consent must be looked at in the context of the presumption of separability, meaning a distinct intent to be bound by the arbitration agreement itself, (146) nevertheless determinations of consent must be looked at in the context of commercial reality. It would rarely by the case that a party wishes to be bound by an arbitration agreement without being bound to some underlying commercial transaction.

Where interpretation is concerned, there ought to be no presumption either in favour of or against inclusion, consolidation or joinder. Pro-arbitration or provalidity presumptions should not apply in inclusion scenarios. Categories based on consent must look for that fact. The absence of a signature to an arbitration agreement tells against any factual presumptions in favour. Similarly, extension via good faith and justice analysis requires very strong evidence of culpable behaviour. Hence again there can be no presumptions in favour. There can however be pro-efficiency assumptions at least in circumstances where it makes no real sense to separate proceedings. *Effete utile* is a logical presumption with pathological clauses where the signature shows a good faith willingness to arbitrate but where the terms are unclear. The same logic does not hold for a non-signatory. If the analysis is truly consent based and parties could have resolved the situation one way or another in their drafting, a tribunal may need to turn its attention to the reasons why that has not occurred and what reasonable expectations can be inferred from the contractual negotiations. Privity may no longer be as binding a legal norm as it once was, but it is still relevant evidence of intent.

In some cases the means by which a party is alleged to have consented may be dependent on ambiguous terminology used. For example, in *Arab Republic of Egypt v. Southern Pacific Properties Ltd & Southern Pacific Properties (Middle East) Ltd* (147) an ICC Award was set aside by a French court where it had held that Egypt was a party to an arbitration agreement by reason of the Minister of Tourism's signature appearing at the end of the main contract under the words 'approved, agreed and ratified'. To the extent that an adjudicator is willing to look at all extraneous circumstances to discern what the parties intended in good faith, the involvement of non-signatories in central roles in bringing the transaction to fruition may support a broader analysis. There may also be circumstances where the consent analysis is complicated in circumstances where there might be no good faith reason to refuse consent. Voser uses the example of a disputed ownership of property where a third party claims better title to that of the original disputants. (148)

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Where a signatory respondent seeks to raise claims against a third signatory party, the better view is that this should be allowed for a range of reasons. First, signatories to joint agreements must have understood that they could be included in single proceedings. Secondly, if claimants are allowed to bring actions against multiple respondents privy to the arbitration agreement, the same right should be afforded respondents. That is particularly so as it will often be simply a question of timing as to who commenced proceedings first and hence who has the natural claimant's right to assert against as many parties as are subject to the arbitration agreement. (149)

7.7.4 Consent to Laws and Rules

Arguments as to consent become complicated where the parties do not agree at the time of the multi-party request but have selected a Seat or arbitral rules that give tribunals broad powers to bring in third parties. On one view, true consent requires consent at an earlier time. On another view, the consent to the procedural framework acknowledges the discretion and contemplates the inclusion. Even on the latter view, this is conceptually different as at most it is consent to consideration of the question. If that party is nevertheless reluctant to allow third-party involvement, its views and reasons ought to be a relevant factor in the exercise of tribunal discretion.

7.7.5 Choice of Law

If multi-party determinations and application to non-signatories are dependent on implied consent, problems arise with selection of applicable law. Utilising the law of the contract or the law of the arbitral situs 'may involve a circular exercise that presumes its conclusion when identification of who agreed to arbitrate constitutes the very question to be decided. In addition, the contract's applicable law, and the law of the arbitral Seat, will be foreign to an entity that remained a stranger to the transaction.' (150) The relevance of choice of law questions to this analysis, whether the application of national laws or international principles is bound up in broader debates as to the approach one takes to contentious arbitral matters. Rather than opt uniformly for national or international approaches, it might be preferable to consider both under a cumulative logic, feeling confident in inclusion where each key system would support that conclusion. Where this would not be so, attention might then be given as to which legal system the parties might reasonably have expected to be determinative in these scenarios. Born argues that implied consent should be determined by the same law as governs the arbitration agreement. Born has also argued for an international approach rather than a domestic conflicts analysis. (151) Adopting an international approach then requires attention as to the methodology by which international principles are to be discerned. Here there is a great difference between an expansive approach, on the one hand purporting to establish principles thought to be appropriate for international markets and on the other hand, a conservative perspective, which would only identify an international principle where it has been recognised by a significant number of national systems. In the latter event, there may be little difference to a national approach where the relevant jurisdictions adopt those norms.

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Whether one adopts national or international solutions to inclusion would naturally follow one's predisposition to interpretation of arbitration agreements generally. (152) If general principles of good faith are involved these might not be limited to the countries of incorporation and may also be impacted upon where there is a choice of law clause in the contract, although that agreement does not a priori bind the non-signatory. An alternative strategy is to consider which international principles could form part of *lex mercatoria.*

7.7.6 The Evidence of Consent

The various reasons why non-signatories may come within an arbitration agreement are all fact dependent. ICC Case No 9517 noted:

The question of whether persons not named in an agreement can take advantage of an arbitration clause incorporated therein is a matter which must be decided on a case-by-case basis, requiring a close analysis of the circumstances in which the agreement was made, the corporate and practical relationship existing on one side and known to those on the other side of the bargain, the actual or presumed intention of the parties as regards right of non-signatories to participate in the arbitration agreement, and the extent to which and the circumstances under which non-signatories subsequently became

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involved in the performance of the agreement and in the dispute arising from it. (153)

Tribunals and courts have looked at reference to the third party in the contract clauses, awareness by the party of the arrangement, involvement in negotiations, approval and control, performance of the contract, frustration of the contract and termination. At all times the question should not simply be what involvement the party had but whether that involvement goes far enough to indicate implied consent on its behalf. In some cases consent of one party may be imputed to another, for example, where consent of an agent may be imputed to a principal. A similar scenario is where there is succession or assumption. (154)

There is also a danger in simply looking at what tribunals say about consent as compared to analysing what they are actually doing on a case-by-case basis. Too often consent language is simply used to mask what is in essence a subjective view about the respective equity of the persons involved. (155) In some cases, merely resorting to articulations by courts or tribunals in previous cases would lead to principles that cannot truly be identified as consent. (156) While most pay lip service to consent, much depends on the evidence that is required. As noted, if consent is determinative, it should be *ex ante* consent, except in circumstances where it can be argued that the parties have assumed the rights and obligations under a contract with an arbitration clause. (157) This was a problem with over-use of the *Dow Chemicals* verbal formulations in later cases. These comments refer to the non-signatory's involvement in the conclusion, performance *or* termination of the contract. There is nothing wrong with the tribunal's logic as long as it is always seen within the context of intent to be bound *by arbitration*. There is a significant difference between taking actions to frustrate a contract that one is not privy to and engaging in a transaction in a way that demonstrates an intent to be bound. A transport company can simply refuse to carry goods subject to a sale of goods contract, but does not become privy to that contract by reason of doing so.

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In some cases intent has been found by way of trade usage. (158) If trade usage is to be referred to, it ought to be based on appropriate evidence. Trade usage is highly problematic in most scenarios as the very use of limited liability companies to shield recourse is a most central usage of international trade and investment. While claimants may often wish to extend arbitration clauses to non-signatories who have the funds to meet an award, it is extremely difficult to justify this under a consent paradigm. The whole notion of limited liability companies is to alter the risk/ reward ratio in commercial scenarios. A corporation may afford greater potential profits to a contracting partner on the understanding that if circumstances are less than satisfactory, there will be limits on recourse. On this logic, there would need to be some evidence of fraud, abuse or subterfuge that would allow the concepts to come in aid of finding a party with deeper pockets.

7.7.7 Two-Way Consent Analysis

Hanotiau has made the important observation that one should consider whether consent could also have been found in a reverse situation, where the parties are swapping positions as claimant and respondent. (159) A more strained implied consent scenario is to consider what will happen if inclusion is denied. The more that the outcome would be seen as problematic on an *ex ante* basis, the easier it is to imply consent to inclusion. The converse is true where the non-signatory clearly gets an adjudicatory advantage in such circumstances but would not go so far as to be seen as an abuse of rights or lack of good faith.

7.7.8 Estoppel-Based Approaches to Consent or in Place of Consent

Actual or even implied consent is not particularly relevant to some of the scenarios such as estoppel or piercing the corporate veil. In these circumstances the behaviour of the targeted party is such that the law will not accept its denial of consent. Consent theories are also strained where equitable notions give rise to contractual liability such as where there is an agent for an undisclosed principal. One can certainly argue that there was implied consent where that scenario arose, although that may not be so given that jurisdictional rights are a two-way street.

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Where the frustrating behaviour of the related corporation could not have been reasonably anticipated at the outset, is this a basis for extending jurisdiction? There is also some uncertainty as to whether the logic is based on actual mutual intent or is instead based on reliance through the involvement of the non-signatory. (160) While detrimental reliance may be a tenable logical construct, one would rarely find that the extraneous circumstances were so strong as to override the decision to not include the non-signatory. Examples of improper behaviour leading to at least arguable justifiable confusion by a signatory might be refraining from publicising some of the complexities of a corporate group, particularly where assets are shielded; corporate officers who are senior members of a range of related companies who fail to adequately distinguish on what basis they are acting; express misrepresentation and subsequent behaviour to strip the signatory of assets purely as a defence against enforcement; or negotiations being conducted on behalf of the group with a last minute and not heavily publicised change of name in the written documentation presented for signature.

7.7.9 Confidentiality

One concern with broad inclusion is in relation to confidentiality and the inherently private nature of arbitration. There are both conceptual and practical reasons why this should be less of a concern. First, if there is truly a valid basis to find implied consent to multi-party arbitration, that implied consent must include implied agreement to be engaged with the other parties and to give them access to confidential material. From a practical point of view, the third party is typically aware of much of the information in any event. (161) In addition, specific orders as to confidentiality might be made.

7.7.10 Jurisdiction and Liability

As noted by Petrochilos and Besson, (162) separate attention must be given to extension of jurisdiction and extension of substantive liability. If jurisdiction extends to a third party, one might normally expect that substantive rights and obligations would flow as a matter
P 540 of course. That is not necessarily so and the converse is also ● not inherently true. A third
P 541 party could be bound in relation to the underlying economic transaction but may nonetheless be outside the ambit of the arbitration clause. (163) While it may be correct to say that in most instances where a claimant bothers to seek to introduce a non-signatory, substantive liability will follow jurisdiction, there is no conceptual link and it must be possible that a non-signatory could be within the jurisdictional ambit of an arbitration clause but not itself be found to be substantively liable. Classic examples would be construction disputes where the search is for who is truly at fault in the building work. Differences may also apply because of differing evidentiary standards for jurisdictional and substantive determinations and also because of separability of the arbitration agreement, where intent to be bound by the latter does not necessarily connote an intention to be bound by the underlying contract. (164) Differences between jurisdictional consent and substantive liability may also arise where parties have made an effort to draft their arbitration clauses to bring all related disputes together in one forum but have at the same time expressly denied certain substantive rights and obligations as between one person and another. For example, one agreement might create a partnership while another may deny it. The same may be so with agency. It may even be that it is expressly stated that two of the parties are not in any contractual relationship. Thus jurisdiction may be found but substantive rights and remedies may vary.

7.7.11 Tribunal Consent

A question has been raised as to whether the tribunal must also consent to a multi-party scenario. Here there are a range of permutations. If the matter has commenced as a multi-party arbitration, acceptance of an appointment naturally constitutes consent to that process. A second scenario is where an arbitrator accepts an appointment in relation to a multi-party clause where there are initially only two parties involved. Here the better view is that the arbitrator has properly understood the implications of the multi-party clause and has accepted that further signatories may be joined in due course, although in extreme cases logistical issues may justify an arbitrator resigning when the joinder is not intended on terms that would be within the arbitrator's reasonable expectations. (165)
P 541 Another scenario is where a tribunal has a general discretion whether to allow for joinder
P 542 or consolidation in ● all the circumstances. Here it is not a matter of consent per se but simply the proper exercise of the discretion.

7.7.12 Form Requirements

Even where there is a consent-based logic to extending an arbitration agreement to a non-signatory, consideration must also be given to the form requirements for valid arbitration, typically a writing requirement where it exists. There may also be form requirements emanating from the particular law dealing with the relevant transfer of rights. In some cases this might require written agreement in any event. Where the arbitration agreement must be in writing there are added problems with inclusion of non-signatories. In some scenarios, such as corporate veil, the controlling party goes to great lengths not to be party to any agreement.

As outlined in section 3.6.1.6 some *lex arbitri* require a signature in certain circumstances for valid arbitration. Others simply require some form of written agreement or mere evidence to that effect. Others have followed Option 2 of the UNCITRAL Model Law 2006 reforms and have removed the writing requirement. Where there is some writing requirement there are two schools of thought. The more restrictive will assert that the full express writing requirement must be found vis-à-vis each and every party sought to be brought within the ambit of the agreement. The contrary school of thought is that as long as the underlying arbitration agreement meets the writing requirement, even where third parties are not mentioned, the underlying agreement satisfies all matters of form. (166) The treatment of form requirements in inclusion scenarios is distinctly problematic. If they were required in full, there would be virtually no circumstances where inclusion would be possible. If they are effectively ignored by arguing that there simply needs to be one valid arbitration agreement vis-à-vis the original signatories, then the form requirement is effectively ignored where extension parties are concerned, which goes against the logic of the requirement itself, requiring written evidence that someone has given away litigation rights. Because the dominant view is that form requirements have been overly restrictive, the more supportive position has been preferred. (167)

7.7.13 Enforceability

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Questions of enforceability are particularly important in this context as inclusion decisions are jurisdictional decisions where an arbitrator's positive determination ● will be subject to challenge before a supervisory court. However, whatever approach a tribunal takes, enforceability challenges might be made on the basis that an agreement has wrongly been extended to a non-signatory and hence from the latter's perspective, there is no agreement in writing, (168) or the tribunal has decided *ultra petita* (169) or there are problems with composition and agreed procedure when additional parties are involved. (170) There is also diversity between those who would simply look for an implied intent based on all available circumstances and those who would adopt a conflicts analysis which could play out again before an enforcement court. Where conflicts are concerned, there are complexities as to which law from which jurisdiction will apply. (171) As a general rule, however, if a tribunal has followed one of the recognised categories of inclusion of non-signatories, a respected enforcement court is not likely to interfere. Even where enforceability may be a problem in some jurisdictions, section 2.7.14.3 argues that because of the possibility of numerous places of enforcement and the fact that most awards are honoured voluntarily, potential enforcement challenges should not dissuade a tribunal from acting in ways that are otherwise thought appropriate.

There are still other enforceability issues. Even where it is appropriate to consider extending an arbitration agreement, the target entity must be properly informed of the application against it and be given every opportunity to make its submissions and be involved in the proceedings if a positive decision on jurisdiction is taken. In *Altain Khuder*, enforcement was blocked when neither the arbitration agreement nor the request for arbitration expressly referred to a sister company of the respondent where the award made orders against both. (172)

7.7.14 Logistics

There are important issues of timing where third-party claims are made. To the extent that any discretion is required, often an attempt will be made to join before the constitution of the tribunal. Documents may be filed with the ultimate determination to be made by a constituted tribunal, although for reasons noted above, that may be problematic in terms of multi-party appointment. In an ad hoc arbitration there might also be recourse to a court. Where an institution is involved, either express or broad discretions would be

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utilised to determine how to deal with such requests. It is particularly important that decisions are made in a timely ● manner as to third-party involvement. If parties are not to be included, there may be a need for separate proceedings which in turn may need to keep an eye on elapsing limitation periods. Thus the norm is to render preliminary awards on such questions. Such decisions may themselves be challenged in a supervisory court. (173) If there are to be separate proceedings, thought should be given as to how they might be coordinated if that would be desirable. This is discussed in section 7.13

Where there are multi-parties, the tribunal will need to consider in what proportion advances on costs should be paid. Modern institutions will interpret their rules to allow for case-by-case allocations. (174) Article 43 of the UNCITRAL Rules 2010 merely refers to requests to parties to deposit equal amounts. Where one or more parties does not pay their share, the party pursuing claims against them will be required to pay their share of the advance with the possibility of reimbursement through a subsequent award. While this will normally be an obligation on claimant, simply because the claimant failing to pay its share will usually lead to proceedings being seen as abandoned, in multi-party scenarios this could also operate against respondents where there are cross-claims between them or counterclaims against a third party.

7.8 Multiple Claims and Contracts (175)

7.8.1 Introduction

A similar logic to multiple party scenarios is at times applied when a range of interrelated contracts are involved. Problems arise where the contracts do not have a comprehensive mechanism to bring all of the individual contracting parties into the one dispute resolution forum. However, the evidentiary analysis in a group of contracts scenario will be different to that of group of companies. Where a group of contracts is concerned the analysis will tend to look at the wording of the arbitration agreement relied upon from one of the contracts, how broadly it defines matters related to that contract and the extent of inconsistency with dispute resolution clauses in other contracts sought to be incorporated. The actions and intentions of the relevant persons may still be relevant but will have less

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impact on the final decision. Conversely, where group of company scenarios are concerned it will be the actions and intentions of the relevant persons that will best indicate ● whether all wish the arbitration agreement to apply to non-signatories. (176) Of course it is possible that the two scenarios are combined, with multiple arguably related contracts dealing with multiple arguably related entities. (177) Where circumstances are mixed, there may be good faith or estoppel type arguments as above, but this would not flow from the presence of multiple related contracts alone. Hence this section looks at the discrete question of multiple claims and contracts between non-related entities where consent must be found.

When a dispute arises between parties there may be a multitude of claims which are made. In part this is because international commercial relations are becoming ever more complex. Often there are long-term relationships involved, perhaps with framework and ancillary contracts. More than one might give rise to disputes. At times there are differing contracts relating to trade and investment on the one hand and payment and guarantees on the other. Within any contract there may also be multiple claims flowing backwards and forwards as to the performance of each party. (178) At times these may be non-contractual claims that nevertheless relate to the central transaction. Where the parties have agreed to arbitrate disputes a question therefore arises as to whether all the claims between them, or only some, can be referred to the arbitral tribunal which has been constituted. It is thus of fundamental importance to consider how arbitration can or should deal with the entire range of multiple claims that might be brought between the same parties.

The question posed presumes that the parties are not in agreement, as they may of course agree between themselves to allow or bar claims or consolidated tribunal hearings. As a question of consent, the various persons could make this clear either way, choosing to incorporate identical arbitration clauses and expressly defining their ambit to cover the group of contracts concerned. To similar effect they could enter an umbrella arbitration agreement that covers a range of listed contracts. Conversely they could expressly reject such broader ambit or show this intent by utilising incompatible dispute resolution clauses. Hence the real challenge arises where the parties have been less than clear in their intentions. This is then a question of interpreting consent in all the circumstances, in particular the wording of the clause or clauses used. Because of this, only general theoretical perspectives ● can be posed. Where arbitrators are asked to decide on such disputed preliminary questions, there is a need to identify the principles by which such determinations should be made. At times, arbitrators are given some discretionary leeway, in which case they will naturally consider the practical ramifications of their decisions. It is immediately obvious that if all claims are not dealt with in one arbitration between the two parties, and if two or more proceedings are commenced, there may be much less efficiency in terms of expense and time as well as the risk of inconsistent decisions. However, if distinct claims are brought together against the wishes of one party, this might offend against the very foundations of consent as the basis of arbitration. It may also lead to a tribunal dealing with an issue in situations better suited to a differently constituted tribunal.

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Even if the different claims ought to be heard before different dispute resolution bodies, each tribunal might then have additional procedural decisions it must make in order to promote the greatest fairness and efficiency between the matter before it and the parallel or sequential proceedings. At the very least, each tribunal cannot ignore as a matter of course, the existence and procedural implications of parallel proceedings. Parallel proceedings are discussed in section 7.13.

7.8.2 Policy Reasons behind Admissibility of Multi-contract Claims

From a policy perspective key general reasons to allow multiple claims include efficiency (including cost savings), speed and the desirability of avoiding conflicting decisions or conflicting evidence and the avoidance of some of the pitfalls flowing from the composition of multiple tribunals where overlap may raise questions of prejudice or undue influence. Arguments against allowing multiple claims include the possibility that there was lack of real consent and the consequent negative implications for enforceability and the encouragement of spurious reverse claims to add to the costs of the initial hearing with a view to promoting more favourable settlement. In addition it cannot be presumed in all cases that involve multiple claims that consolidation will indeed be speedy and more efficient.

Scholars and practitioners have tended to either caution against multiple claims or advocate broad inclusion. Rather than contending for one school of thought over the other in terms of expansive versus restrictive admissibility, the aim instead is to look at the kinds of factors and methods that should guide the analysis on a case-by-case basis. As argued throughout, procedural challenges in dispute resolution are inevitably about balancing certainty against flexibility and fairness against efficiency. We aspire to all four values but they will inevitably conflict. Hence trade-offs need to be made, ideally on some coherent and logical basis. In terms of a logical approach, the differing methodologies that have been applied are a conflicts approach, an efficiency-based approach or an approach based on a broad analysis of actual and implied consent. The working hypothesis is to consider whether consistency would best be promoted by first analysing the issue as a question of consent. In this way, flexibility is allowed for by eschewing ● any strong evidentiary presumptions one way or another. A tribunal would instead look at all factors in any individual case to see how confident it can truly be as to the express or implied consent to admissibility. Consideration of questions of fairness and efficiency and conflicts analysis should be seen as merely means by which consent can be implied, rather than alternative paradigms.

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7.8.3 Interpretation of the Arbitration Agreement

In any consent paradigm, the starting position should be the words of the arbitration agreement itself. At times the words of the arbitration agreement should be supplanted with the *lex arbitri* and arbitral rules derived through that agreement. If the parties are in

agreement at the outset, they can articulate the desired treatment of multiple claims in their arbitration agreement. For example, the Model Arbitration Clause of the Netherlands Arbitration Institute encompasses 'all disputes arising in connection with the present contract and further contracts resulting thereof.' (179) Where there are multiple contracts with differing dispute resolution clauses, another possible approach is to provide for a clear hierarchy between them. (180) If the arbitration clause does not cover this but the parties are in agreement at the time of the dispute, they can express agreement by way of a distinct compromis which would itself be a revised agreement to arbitrate.

If there is more than one contract and arbitral clause, the interplay between each must also be considered. This draws attention to the express comments made by the parties on the issue. Unfortunately in many instances, the drafting is less than perfect. It is important to understand that determinations of intent based solely on ambiguous drafting are dangerous. While this is an obvious proposition, it is particularly important when considering multi-contract situations and the interplay between differing permutations of dispute settlement provisions. It also provides a caution against too ready a willingness to come up with some theory that purports to cover all scenarios or too rigid a set of propositions to that end.

7.8.4 Avenues of Management in Arbitral Laws and Rules

Unfortunately, if consent is the determining factor, insufficient guidance is given by most procedural rules. As noted above, this is because most arbitral rules simply refer to counterclaims and set-off in a procedural timing sense rather than identifying the typology of cross-claims that can be brought.

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The difficulty with any solution in institutional rules is that the solution must be drafted before disputes have arisen. Thus it must be of a general nature and be ● able to deal fairly and efficiently with all permutations of facts. Here the difficulty is that the drafter must consider what trade-offs would be appropriate between flexibility and certainty. If issues of consent are to be resolved by express provisions either in statutes establishing the *lex arbitri* or institutional or ad hoc rules, there are three broad possibilities. The rules could be drafted on an opt-in basis. They could indicate that the tribunal may deal with certain issues where the parties expressly agree. Such a provision adds nothing in terms of initial consent and would prevent inclusion if the parties could not agree once a dispute arose. A second approach would be to express the view that claims from multiple contracts plus multi-contract set-off and counterclaim rights would never be mandatory save where they are truly dealing with inherent defences central to the initial claim, in which case they fall within the arbitration agreement which underpins the initial claim. Hence, they would in all other cases be subject to distinct consent of the parties on a case-by-case basis.

An alternative approach is an opt-out provision which allows the tribunal to consider multiple claims and set-off and counterclaim rights except where the parties agree otherwise. Even if an opt-out approach is adopted, there is a need to consider just how to define claims, counterclaims and set-off that are presumptively included. Should it be any form of counterclaim or set-off recognised by the applicable law or should it expressly be limited to claims that could be brought within the original arbitration agreement? Even in the latter event, should the tribunal be given a discretion not to include the reverse claim where the circumstances of the case suggest that the benefits of separate proceedings outweigh the savings of a consolidated hearing? An example would be where the tribunal as initially constituted may not have appropriate expertise to deal with the multiplicity of claims. Perhaps counterclaims or set-off rights should be notified prior to the composition of the tribunal so the claimant can turn its mind to similar considerations to the respondent in selecting the tribunal. Actual pleadings can be left to differing time limits. Respondents who refrain from giving such notification to try and gain tactical advantages would in most cases be found out in terms of when the likely counterclaim and set-off came to their attention.

At the other extreme, the rules might allow for the broadest category of reverse claims. An example is Article 21.5 of the Swiss Rules of International Arbitration 2012 which states:

The arbitral tribunal shall have jurisdiction to hear a set-off defence where the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum selection clause.

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Pavić suggests that the drafters had procedural economy as their prime consideration. (181) Wolfgang Peter suggests instead that the justification for ● Article 21(5) is the right to defence. (182) Rules as to counterclaim and set-off rights were discussed in section 4.4.

7.8.5 Group of Contracts and Presumptions of Intent

A question which has arisen is whether a claimant is confined to putting forward claims with respect to the contract that is referred to in the arbitration agreement or can also put forward claims with respect to other contracts. This matter has been analysed, primarily from the perspective of French law by Philippe Leboulanger. (183) This matter is also addressed by Bernard Hanotiau. (184) It is important to again understand that if the parties are clear in their intentions, this will be determinative. Hence, scholarly commentary is more about reasonable presumptions or approaches in ambiguous

circumstances. According to Leboulanger, the classic theory of contract holds that each individual agreement within a group of contracts is a completely independent agreement. But he goes on to say that this traditional notion does not correspond to current contractual practice. He says that whenever there is an economic link between contracts, ensuing from the contracts' nature and mutual function, these agreements should not be regarded as autonomous agreements but should be analysed together with all the other related contracts. As an example he refers to the ICSID award delivered in *Klockner v. Cameroon*. (185) There the tribunal adopted a 'commercial reality' analysis and, applying the law of the Republic of Cameroon, considered that the reciprocal obligations constituted a single legal relationship despite the existence of separate and successive instruments governing the rights and obligations of the parties. (186)

Leboulanger proceeds to provide guidelines for determining whether multi-contract situations should be treated as a whole. The first criterion is to see whether the agreements make up one single business transaction in the sense that the obligations are undertaken for the accomplishment of a single goal and are economically inter-
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dependent. Leboulanger considers that this may arise where there is an 'economic and operational unit "hidden" behind a multi-contract façade ...', ● and where 'the obligations undertaken under the different agreements are reciprocal, having a common origin, identical sources and an operational unit.' (187) Relevant surrounding circumstances might include whether the various agreements were concluded on the same day, have the same purpose and duration, whether they are drafted as master and subsidiary agreements, and contractual evidence may involve comments in preambles or definitional sections and other cross-referencing. (188) A 'same relationship' or 'same economic transaction' test obviously allows for at least some multi-contract situations but is also likely to lead to differing responses from Tribunals, with some looking to an expansive interpretation, while others might take a more circumspect approach to controversial fact situations. Even with a broader formulation, admissibility under multi-contract situations would still need to be linked back to an agreement to arbitrate found within one contract that, because of the integrated nature of the various contracts, is held to be broad enough to encompass claims under distinct contracts.

A second criterion is the wording of the contracts concerned. Leboulanger also says that agreements may be considered to be inter-related when they were concluded on the same date, for the same duration and for the same purpose. Another indication of inter-relationship is the presence of a master agreement outlining the obligations undertaken by the parties which are more particularly described in ancillary agreements. Sometimes the recitals to an agreement will refer to other agreements and thereby establish their inter-dependence. Hanotiau examines a number of French cases where the courts have uniformly considered that if two agreements between the same parties are closely connected and one finds its origin in the other or is the compliment or implementation of the other, the absence of an arbitration clause in one of the contracts does not prevent disputes arising from the two agreements being submitted to an arbitral tribunal and being decided together. (189)

Essentially, these authors and cases are addressing the evidentiary factors in light of which a tribunal might accept that there was consent to multiple claims. While it will often be easy to say that the various contracts were part of one underlying economic transaction, it does not follow as a matter of logical necessity that the parties therefore would have intended the same dispute resolution methodology. For example, some construction matters are best left to independent arbitrators while others may best be resolved by owner-appointed engineers or dispute resolution boards. In some cases the parties might believe that only matters of significance should go to arbitration, with alternative dispute
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resolution being the preferred means in other circumstances. Even where all disputes ought to go to ● international arbitration, the parties might want very different arbitrators depending on which contract is involved. Guarantee and finance disputes may call for expertise in that regard, while the underlying construction contract might call for engineering expertise. It may be false efficiency to have less experienced arbitrators dealing with matters that could readily be resolved by those with greater familiarity in each area. (190) If the essential question is that of intent, a tribunal will consider why there were separate contracts and why these do not have a common and consolidating dispute resolution clause. This can be impacted upon by evidence of intent where there is a great difference between those who would consider the negotiating circumstances and those who feel bound by applicable law or principles of certainty to concentrate on the drafting itself. This may be impacted upon by the law applicable to each of the contracts, including the law applicable to the arbitration agreement under notions of separability. In this regard it is necessary to distinguish a number of situations. There are a number of permutations that arise in multi-contract situations which are discussed separately below. This is not to refute the traditional presumption, but instead point to the potential for a more nuanced analysis on a case-by-case basis.

7.8.6 Admissibility under Related Contracts

This section separates out the various permutations; namely where one contract with an arbitration clause is argued to be closely related to other contracts with no dispute resolution clauses; secondly where different contracts have identical arbitration clauses; thirdly where different contracts have differing arbitration clauses; and finally where

different contracts have arbitration clauses in some cases and choice of forum clauses in others. The analysis is divided in this way so that the implications as to consent in each of these permutations can be considered and then see how that would impact upon the treatment of discrete claims and counterclaims. (191)

In addition to considering whether all claims should be allowed, tribunals must also consider how to conduct proceedings even if some claims are rejected. They must still consider the appropriate elements of due process within each arbitral process, at least with an eye to what is happening with the other. In either circumstance tribunals also have to consider the potential impact on enforceability of their decisions as to admissibility. (192) Parallel proceedings are considered in section 7.13.

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7.8.6.1 Claims under Closely Related Contracts without Their Own Dispute Settlement Clauses

The first case is where one contract contains an arbitration agreement and the second contract does not contain any dispute resolution clause. In this situation in some cases at least, the claimant may put forward claims founded on both contracts in the one arbitration. The lack of an arbitration agreement in the other contract is presumably seen as more of an oversight or explained on the basis that repetition was unnecessary given the intended closeness of the contracts, rather than evidence that the parties prefer litigation over arbitration for disputes arising under it. Where there is one overriding agreement, (a framework agreement or heads of agreement), which contains an arbitration clause and where there is no arbitration clause in related contracts emanating from the first, most would agree that the most likely intent was to cover all disputes under the one arbitration agreement. (193) Poudret and Besson note the developments in French law allowing extension of an arbitration agreement to a dispute arising from a group of contracts if there are sufficient economic links between the various agreements and also if the aspects of the dispute are 'inseparable', although the authors question whether the courts which articulated this standard were truly faced with facts that would ground such a test. (194) Where attention is given to the closeness of the relationship, this draws attention to principles such as *ensemble économique* and *ensemble légale*. Here there are again a number of permutations depending upon whether the second contract has its own dispute settlement clause or not and if so, whether it is arbitral or court based. This section presumes that there are no such clauses in the other contracts.

Another complex situation is where amendments are made from time to time to extend contracts. Are these variations of the original agreement, perhaps undermining an original arbitration clause, or are they separate promises not subject to an arbitration agreement, or are they merely contemplated steps to be taken in performance of the original contract and hence subject to its dispute settlement provisions? This should again be a question of determining a priori intent after a consideration of all relevant circumstances.

7.8.6.2 Admissibility of Claims Subject to Contracts Each with Their Own Identical Dispute Settlement Clause

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Many commentators work from the presumption that if the same parties have two contracts with arbitration clauses in identical terms, they can be presumed from the outset to have wanted a global settlement of mutual claims. However, Fouchard, Gaillard and Goldman correctly note that 'the answer depends on the interpretation of the parties' intention at the outset.' Nevertheless, they suggest that it is 'generally legitimate to presume' that the identical clauses signify an intent to submit the entire operation to a single tribunal. (195) Even here such a presumption might readily be rebutted. Hanotiau contrasts ICC Award No 5989 (196) where the parties signed two related contracts on the same day and the case of *Abu Dhabi Gas Liquefaction Co Ltd v. Eastern Bechtel Corporation*. (197) Leboulanger says that it is reasonable to infer that the parties intention was to consider the two agreements as one unified and indivisible transaction 'and this is the reason why the arbitration clause was repeated, in identical terms, in each one of the agreements'. (198) The practice of the ICC International Court of Arbitration under the pre-2012 Rules was explained by Anne Marie Whitesell and Eduardo Silva-Romero. (199) Whitesell and Silva-Romero observe that for the ICC Court to decide that a single arbitration shall proceed on the basis of multiple contracts, three criteria must be fulfilled. The first is that all contracts must have been signed by the same parties. The second is that all contracts must relate to the same economic transaction. Thirdly the dispute resolution clauses contained in the contracts must be compatible. ICC Rules 2012 Article 9 now indicates that subject to the various challenge rights, claims arising out of or in connection with more than one contract may be made in a single arbitration irrespective of whether they are made under one or more than one arbitration agreement under the rules.

One reason why the parties might nevertheless wish to have different tribunals under identical arbitration clauses relates to composition, a matter addressed above and which is simply a countervailing factor to a blanket efficiency presumption. For example, if the claimant was unaware of the potential respondent's claim at the time of constituting the first tribunal and believed that it would have picked a different expert if that claim was known, from its perspective at least, there is no necessary intent to have the same tribunal

deal with both. At most it is a question of the trade-off between efficiency and duplication on the one hand, against optimal tribunal composition on the other. If composition is a problem, the best solution might not be rejection of admissibility but instead, requirement of early notification of reverse claims to allow this to be taken into account at the time of tribunal selection as is the case with a number of institutional rules.

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7.8.6.3 Admissibility of Claims Subject to Contracts Each with Similar But Not Identical Dispute Settlement Clauses

This category deals with cases where the arbitration clauses are identical in most respects, but have some key differences. Examples might be differing Seats for each and/or differing number of arbitrators. In such circumstances Hanotiau suggests that separate proceedings must be initiated. 'Mere concern for the good administration of justice cannot prevail over the intent of the parties.' (200) Even here is it logical to presume *conclusively* that they would not have wanted consolidation in the event that claims and reverse claims were both brought? A more expansive approach might be based on a view that where there are differing dispute resolution clauses, it is at least arguable that the intent of each was simply to explain what to do with *single* claims but not multiple claims. Under such an alternative approach the aim might be to interpret the second dispute settlement clause to see if it was showing *exclusive* intent about disputes regardless of whether they arose by way of claim or counterclaim, or instead, whether the only intent was in relation to *primary* claims. The latter argument suggests that where parties say that certain claims will be brought in one forum, they are only speaking of the obligations of the *claimant* in commencing an action. Such clauses, the argument proceeds, say nothing about when and why that same issue could instead be brought as a counterclaim in a matter already brought elsewhere. Even if this view is appealing, it does not presume that there is automatic jurisdiction to hear the counterclaim under the first clause. All it says is there is no presumptive evidence of a lack of intent to allow this to occur.

On this logic, parties' identification of different Seats may have been relevant on the presumption that there was only one claim, but the clause might still be capable of being interpreted to the effect that they have not given any indication of the preferred Seat if there were multiple claims. For example, in a construction contract with a side loan agreement, the parties might have selected a neutral and conveniently located seat for loan disputes but a different seat under the construction contract, being where the building work is taking place. This might have been simply to make it cheaper for the arbitrators to take a view of the physical building where appropriate or because that is the Seat that is demanded by the host State of the building works. Even with such provisions, they may still have preferred from the outset that a claim under the loan would simply piggyback on the construction Seat in the event of concurrent disputes. The suggestion is not that arbitrators should always accept this as valid, but simply that irrebuttable presumptions to the contrary from inadequately drafted clauses make little sense within a consent paradigm.

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Similarly if the two contracts call for differing numbers of arbitrators, perhaps because disputes under one were presumed to be likely to be dealing with bigger amounts than under the other, it might still be cheaper to consolidate the smaller claim in front of the panel of three rather than force a three-person hearing plus a separate single-person hearing. This will not always be the case but to again presume a lack of consent as a matter of course flowing from a separate arbitration agreement would not be a presumption that one could confidently predict to be commercially sound in all circumstances. If reverse claims would clearly save time and money and if the party arguing against consolidation cannot articulate any fairness or efficiency factors in its favour, that may be telling.

It is also possible to envisage cases where parties would not have intended differing arbitration clauses to automatically block reverse claims on essentially related matters. For example, differing clauses cannot wholly overcome the policy arguments in relation to true defences. Arguably the second clause is only a promise about what to do with respect to *primary* claims and not a waiver of a right to raise true defences as and when needed. As Fouchard, Gaillard and Goldman note, where cross-claims are not allowed, fairness and efficiency arguments would also be complicated if a party in one arbitration claims that it refused to perform its obligations because of a breach by the other party in the matter being considered under a second arbitration. The same logic may apply with ensemble contracts where claims under one contract still fit within the wording of different arbitration agreements in other contracts. (201) As always, the parties could resolve these ambiguities by carefully delineating in their arbitration agreement which counterclaims, if any, are permitted.

7.8.6.4 Reverse Claims with Contracts Combining Arbitration Clauses and Jurisdiction Clauses

While most authors treat the situation of differing arbitration clauses and jurisdiction clauses together, they need to be considered separately under an intent paradigm. It was suggested above that any presumptions flowing from differences in arbitration clauses should be rebuttable at most. The situation is different where arbitration and forum clauses are brought together. A separate contract with a jurisdiction clause indicates an

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intent to litigate and not arbitrate such disputes. The parties may simply be saying that for that type of dispute they want a ● completely different type of adjudicator, with a differing conflicts methodology and a different procedural model. (202)

7.8.7 Conclusions

The following broad principles are suggested. These incorporate comments previously made as to counterclaim and set-off rights in section 4.4 and some comments made in relation to counterclaims in this chapter.

1. The first question is to consider a priori consent to multiple claims.

2. The starting point in discerning consent to multiple claims is always the arbitration agreement before the initial tribunal, together with the *lex arbitri* and the procedural rules if any, agreed to by the parties. The Tribunal must analyse the agreement and applicable law and rules to discern what the parties truly intended at the outset, in the circumstances that have in due course arisen. It is a question of construction and not a discretionary matter, unless an express discretionary power has been granted via the rules. If extra claims by the claimant are permitted because these come within the arbitration clause, these should be allowed unless there are significant concerns about the prior constitution of the tribunal being inappropriate in the circumstances. That is unlikely to be the case. If the claimant was unaware of the additional claim at the time of the initial appointment, then there is no difference in its approach to that choice and the respondent's. If the claimant was aware of the future potential claim, it is first selecting an arbitrator it believes to be suitable. Here however the respondent did not have the same opportunity, nor did the two arbitrators in selecting the Chair.

3. Assuming there is only one contract involved, it is obviously the case that if it expressly provides for or denies the opportunity for additional claims, this is the end of the matter.

4. If it is an attempt by Claimant to add a new claim after the arbitration has commenced, the arbitration agreement is still the gateway. Arbitral rules deal with timing issues and provide a discretion as to late acceptance of new claims, for example, where Terms of Reference are required, but this would still be provided the claims otherwise fall within the subject matter of the agreement to arbitrate.

5. However, even if a late claim is within the agreement, the *lex arbitri* or procedural rules agreed to may place time limits on additional claims and/or may add a discretion to deny otherwise admissible claims. Difficulties may arise with late claims in ad hoc arbitrations without any guidance in any rules. ●

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6. Rules which merely address process issues should not be taken to be providing clear jurisdictional tests. For example, rules which simply indicate the time periods within which counterclaims and set-offs are to be brought, notwithstanding that they refer to these concepts expressly, add little if anything to the analysis as they do not purport to define the parameters within which such claims are permissible.

7. A consent-based paradigm will vary if parties have selected the Seat and the rules, or if instead an institution or other appointing authority does so. In the latter event, presumptions of intent one way or another based on statements within the *lex arbitri* and the rules would be more problematic.

8. If the arbitration clause is unclear, it should be interpreted in good faith but without presumptions either way. The tribunal should consider all relevant factors, including good faith a priori efficient intent, but not efficiency per se from the tribunal's post-dispute perspective, even if the two would usually be identical. Presumptions such as *effete utile* do not usually apply naturally to the question of multiple claims. Their natural utility is in relation to express indications of arbitral consent that are nevertheless flawed and need some recrafting. If the parties truly wanted some form of arbitration but they express themselves in a way which might render that choice invalid, they are presumed to have preferred validity over invalidity. Hence, they are presumed to have wanted an arbitrator to try and find a better meaning of their express but flawed choice. Conversely, where multiple claims are concerned, even if there is some ambiguous reference in the arbitration agreement, it is often not a question of validity but simply a question of scope. The parties definitely wanted arbitration of primary claims. The question is whether they also wanted arbitration of reverse and additional claims. At the very least, a presumption of efficiency is a more honest articulation of likely intent than a presumption of validity.

9. Additional claims need to be sufficiently linked to the primary arbitration clause under which they are sought to be introduced. Merely calling some or all of them 'defences', particularly as that term is viewed in domestic legal systems, or defining them as substantive as opposed to procedural rights, should not replace a careful analysis of the sufficiency of the linkage to the consent to arbitration. The challenge for those wishing to have a more expansive ambit of inclusion is to consider why we would countenance a link to a claim that is broader than any linkage that would naturally fit within the arbitration clause itself.

10. Multiple contract situations raise a number of permutations that would profit by being addressed separately, simply because the consent logic differs, although all should be dealt with under the same methodology as outlined above. The added complication is merely that a true contextual approach to interpretation of one clause needs to consider what is being said in any other contractual arrangement between the parties. This not ● only involves all of the foregoing questions such as choice of interpretation method and the evidentiary basis of identifying consent, but also must take into account the particular articulation of rights and obligations between the differing contracts and the timing of each. It is typical in such interpretative conflicts that adjudicators might employ such additional presumptions as, for example, that specific rules are normally presumed to override general rules and later rules can be taken to override earlier ones. Once again these should not be used as fixed presumptions but merely aids to try and discern the true intent from contradictory documentation.

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11. Once again, clear drafting will resolve any problems in multi-contract situations.

12. In the absence of clear drafting, the inevitable ambiguities are a dangerous basis upon which to draw confident presumptions about the presence or lack of consent; either the presence of consent because of identical arbitration clauses or the lack of consent because of differences. As to the first, some cases may raise legitimate procedural justice concerns as to composition even where clauses are identical. Where there are different clauses, the historical drafting of model clauses simply leads to confusion. Such clauses may say nothing more than that *isolated* claims must go to different places. They may give no clear indication of what was intended for *concurrent* reverse claims.

13. In these circumstances, tribunals should analyse all of the factors, accepting that the differences in clauses are at least relevant and might require extra caution before allowing multiple claims that appear to go against a direction in favour of separate proceedings.

14. Turning to respondent's claims, because a counterclaim remains alive even if the primary claim is withdrawn or invalid, it must be based on its own independent evidence of consent. As always, such consent should be found to emanate from the arbitration agreement itself, either directly or through a *lex arbitri* or rules that expressly allow for counterclaims.

15. The rules vary from those which give no guidance as to the type of counterclaims that may be brought to those defining the linkage. Defined linkages are either to the contract or the arbitration agreement or the same relationship. Even then it is important to construe these rules alongside the arbitration agreement as there may be variances between the two. For example, if the arbitration agreement expressly allowed for a broader range of counterclaims than the rules, most would consider that the express reference was the better indication of the true intent of the parties. The same would hold if the arbitration agreement was expressed to be narrower.

16. Where set-off is concerned, section 4.4.3.1 argued against the view that being defences, all set-offs must be admissible on the basis that justice demands that any defence must be allowed. They are seen as defences in ● domestic systems. These systems display very different approaches to the treatment of set-off even if all describe them as defences. Furthermore, domestic litigation treatment is built on many policy considerations not relevant to arbitration.

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17. For arbitration, it is suggested that a similar approach should be taken to counterclaims. Is the set-off within the agreement and/or the applicable *lex arbitri* and rules? If so it should be permitted. If not, for example an independent set-off in an ad hoc arbitration, the mere description as a defence should not suffice. All additional claims need to be sufficiently linked to the primary arbitration clause under which they are sought to be introduced. Merely calling some or all of them 'defences', particularly as that term is viewed in domestic legal systems, or defining them as substantive as opposed to procedural rights, should not replace a careful

analysis of the sufficiency of the linkage to the consent to arbitration.

18. If parties agree on rules which expressly address an issue, this is again clear evidence of consent. For example, adoption of the Swiss Rules 2012 and Article 21.5 is clear consent to allow a broad range of set-offs.

19. In any event, admissibility of counterclaims under multi-contract situations would still need to be linked back to an agreement to arbitrate found within one contract that, because of the integrated nature of the various contracts, is held to be broad enough to encompass claims under distinct contracts.

20. Additional counterclaims and set-offs after the initial stages again draw attention to the rules selected and the potential for time limits and/or express discretionary powers in an institution or Tribunal.

21. Principles of consolidation build upon similar issues and are discussed more fully in section 7.11. At this stage some general observations are made in the context of consolidation as a means to allow additional claims. In most cases the decision to order consolidation is discretionary.

22. Where discretions are expressly provided for additional claims or consolidations, many matters could be considered in the exercise of the discretion including:

- How closely are the two disputes linked in terms of their facts? Obviously if they are sufficiently linked, then the entitlement comes about directly under the arbitration clause and not via discretion of a tribunal, but even circumstances that do not fit directly into the agreement can have various degrees of connection to the primary claim.

- In terms of efficiency, are there clear transaction cost savings to be made by having one tribunal?

- Are there questions of evidence that would best be heard by a single tribunal, either to prevent inconsistency or to promote confidentiality?

- Do the facts show that it would be both fair and efficient to try to find the net payment obligations, if any, between the parties rather than to separate these out through more than one tribunal hearing? ● Alternatively, could cash flow issues simply be dealt with via awards that are timed to allow netting out mutual payment obligations?

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- Is the tribunal composition adequate to deal with each of the matters both in terms of expertise and in terms of cost benefit as to number of arbitrators?

23. Finally, a question arises as to how to resolve those multiple claims disputes where an analysis of the agreement and rules leaves a Tribunal in doubt. Some suggest a conflicts approach; some suggest that efficiency considerations are the best evidence of the presumed intent of the parties. As to the latter, a contentious question would be whether all or any of the aforementioned factors relevant to express discretions can also be considered in determining the likely intent of the parties in cases not clearly resolved by the agreement and rules. In such circumstances the concern should be to aid the interpretation of the arbitration agreement, where necessary, with a careful assessment of all factors that might help a tribunal draw conclusions as to the likely a priori intent of the parties. Implied intent to promote efficient solutions is an important working hypothesis, as long as it is seen as one factor that needs to be looked at alongside others.

24. As noted, arguments in favour of admissibility or consolidation include general efficiency, reducing the transaction costs of parallel proceedings, overall timeliness, and the avoidance of some of the pitfalls flowing from the composition of multiple tribunals where overlap may raise questions of prejudice or undue influence. Countervailing factors include the concern that reverse claims might be brought on spurious grounds to actually delay proceedings, frighten the claimant into settlement and add immediate financial burdens through the arbitral advance on costs. In addition, admissibility or consolidation may raise questions as to the suitability of the tribunal to deal with all of the multiple claims and might provide undesirable tactical advantages in tribunal selection. Presumptions based on general efficiency alone are only a small part of a commercially realistic analysis of likely intent in the hopefully small number of troublesome cases where the agreement and rules are still

ambiguous.

7.9 Joinder and Consolidation

The following sections separately examine issues of joinder and consolidation. The latter was also considered in the previous section where discretionary issues pertaining to multiple claims were considered. As with most of the topics in this chapter, policy and process issues overlap considerably. As always, there is a need to consider question of consent and applicable laws and rules. Where discretions apply there is a need to consider efficiency and due process norms. Joinder and consolidation can also be looked at alongside each other as they may constitute ● differing approaches to achieving similar outcomes. Nevertheless, because arbitral laws and rules tend to treat them distinctly, they are analysed separately below.

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Under some national laws, consolidation or joinder decisions must be made by the courts and not tribunals. (203) Some rules direct that the institution is the appropriate entity to make decisions as to joinder or consolidation. Others devolve these decisions on the tribunal. (204) Even where an institution makes the initial determination, this will not aim to preclude a tribunal which can make a final determination of validity as is the case with any jurisdictional challenge.

7.9.1 Introduction to Joinder and Policy Considerations

Problems with joinder were suggested as a concern that users have with international arbitration. (205) While some have used the term joinder generally in multi-party situations, it is preferable to limit its use to cases where a third party asks or is asked to join arbitral proceedings that have already commenced. (206) Sometimes rules or commentators also speak of joinder of proceedings to cover what would otherwise be described as consolidation. (207) Some commentators distinguish between joinder, being a request by a party to include a third person and 'intervention' being a request by the third person to join existing proceedings. (208) Some would define the notion of intervention differently in the context of some involvement that is less than being a full party. (209) One scenario of intervention of this nature would be intervention as an amicus curiae. It is important to distinguish between these cases. The chapter separately considers joinder, consolidation and non-party intervention but these options must often be considered alongside each other as in some cases, a consolidation decision may be a preferable means to reach similar outcomes to joinder requests. Consolidation and joinder can also both be looked at from the perspective of interpretation of the arbitration agreement where they are all sought to be included.

As to joinder, the most likely scenario is that a respondent wishes to bring a derivative claim against a third party or wishes to counterclaim against such a party alongside a counterclaim against claimant. Claimant itself could seek to join an ● additional party when it concludes after commencement that an additional respondent ought to be included. From a claimant's perspective, joinder will typically be sought when a detailed defence to the statement of claim or subsequent document production or witness statements show why the claims ought to also be brought against a third party or in some cases should only have been brought against that entity. This will commonly arise when there are multiple related entities or it was not apparent which employee acted for which entity or which entity has side agreements to honour obligations under the main contract or which entity technically holds rights, licences and intellectual property. (210) These situations could be further divided into those where the claimant ought to have known of the structure at the outset, in which case the later joinder application will meet less sympathy, and those where there is no fault on claimant's part. In the extreme, there may even be cases where the other party has created a complex corporate web for no other purpose than to wreak havoc with legal proceedings. Cases can further be divided into those where the joined party truly would have distinct contentions on its behalf and others where the same essential facts and law will be considered and their inclusion simply ensures a binding and consistent determination against all relevant parts of a corporate group with res judicata effect.

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A number of questions arise when joinder is considered. The first is whether joinder is arguably permissible. If so, the second question is what impact there is on existing tribunal composition. The third is the impact on the existing proceedings and whether any previous stages must be revisited, in part to afford due process rights to the joined party. All joinder and consolidation scenarios must find their basis in consent, either direct consent of the persons involved or via agreement to arbitral laws or rules which provide a discretion to do so. Enforceability concerns can arise in relation to queries as to consent, and proper composition of the tribunal. From a policy perspective efficiency suggests that if all of the claims and cross-claims are sufficiently connected, then one proceeding is likely to be preferable, although it was argued above that it may be a complex cost/benefit analysis where one party incurs costs in being party to matters of less interest to them. A key issue is that of potentially conflicting decisions if multiple proceedings ensue. There is not only the prospect of inconsistent final awards but also inconsistent interim measures, with one tribunal demanding that a party do something while another demands that it refrains from doing so. (211) Efficiency considerations are also dependent on the tests that are applied. The more that these are restrictive, limiting consolidation or joinder to identical issues,

the more there are natural efficiencies and less likelihood that one of the signatories will be forced to sit through matters of no interest to it. Fairness considerations can be dependent on the motivation of the person seeking to effect or block joinder. Where there are legitimate grounds to ● do so that itself seems a fairness consideration. Fairness may still be a problem even where there are significant efficiency gains. While overall cost savings are likely, these will not flow proportionally to all parties. Indeed some may have their costs increase as a result of consolidation or joinder.

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One particular problem relates to tribunal composition. There are significant problems in attempting to join a third party after the tribunal has been constituted. The key issue is whether the joined party will accept the existing tribunal or whether there would be a need for the tribunal to be reconstituted. Where the third party itself seeks to join, it may be accepting the existing appointment at the same time as making the joinder application. Where a reluctant third party is concerned, it would be more likely to raise issues of due process in being denied its equal right to participate in tribunal selection. The degree of the relationship between the new party and existing parties and the commonality of claims and issues should also impact upon questions of tribunal composition and whether a new party can truly raise concerns that it was not privy to the establishment of the tribunal. The more the joined party can be seen as part of a group with an existing party, the less justification for complaining about prior constitution of the tribunal, although it is hard to make confident conclusions in that regard at preliminary stages. It may be easier for an institution to make a prima facie joinder determination if this will occur prior to tribunal appointment and overcome one of the significant challenges in this arena.

Where a claimant seeks to join a third related party after discovering that the respondent has little in the way of assets and looks for a related entity with deeper pockets, in most cases claimant needs to stretch liability arguments to encompass that entity with the commensurate need to add new and significant issues. In cases where the claimant is fault free, Voser suggests that a starting presumption ought to be to allow joinder and reconstitute the tribunal or at least that part that would have been subject to third-party rights if included from the outset. Conversely, where the claimant simply failed to include an appropriate person from the outset through it own oversight, joinder should only be allowed with consent of all parties.

7.10 Legal Provisions as to Joinder

There are two separate scenarios – requests by a third party to be included as a party, or requests by a party to join a third person. The policy and consent issues are the same but at times laws and rules address each separately or only refer to one scenario.

Lew, Mistelis and Kröll suggest that generally speaking, joinder is only possible if all parties consent. (212) Such consent could be direct or via selection of arbitral laws or rules that provide broad discretionary powers to institutions or tribunals. Even then, the relevant test must look for a reason to join that raises ● all of the questions of the theoretical basis for multi-party arbitration discussed in previous parts of this chapter. It was strongly argued that a priori implied good faith consent is the gateway. Where a third party seeks to intervene, the relevant consent should be considered from the outset and should not require a new express agreement by the existing parties, (213) although the situation is easy where the parties all consent at the time of a dispute. Here there is a separate submission agreement in any event. Nevertheless, there are numerous reasons why parties may not consent at the time of the dispute. From the claimant's perspective, if the original respondent has the funds to honour an award, it gains no benefit from bringing in a third party against whom respondent may seek recourse. That party may wish to delay or avoid liability or may only have a concern with some of the claims. Conversely, if it is claimant seeking to join, the respondent may have concerns in bringing a subcontractor in if it had not wished to disclose its financial relationship with the owner. (214)

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If a relevant decision maker will consider whether there is an implied agreement to joinder or consolidation, this will raise all of the questions of the means of discerning such intent. In the extreme, this chapter has noted in a range of scenarios that some tribunals might conclude that parties can be presumed to have impliedly agreed where efficiency concerns would make this a desirable outcome. The conclusion is more likely where all persons are signatories to the one agreement. (215) Even where an implied term is possible, it does not necessarily suggest that consolidation or joinder should always occur. The a priori implied intent would only be where circumstances suggest that it is reasonable for this to occur. Analysis of consent is also impacted upon by whether the joinder provisions are found in the *lex arbitri* or in ad hoc or arbitral rules. If they are in the *lex arbitri* and the parties have selected the Seat, then similar consent issues apply to where they have selected the rules. If instead, the tribunal or an institution selected the Seat, it is more problematic to attempt an original consent logic based on broad discretions in those laws. Another question is what law should apply. Considering it as purely a procedural matter would look to the *lex arbitri* or agreed rules. Considering it from the perspective of consent would potentially look to the law applicable to the arbitration agreement. There will be no difference, of course, if the law of the arbitral Seat was selected for that purpose. (216) Another question is ● whether the provision simply leads to inclusion in the same proceedings of claims and counterclaims between applicant and

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third parties or whether it also involves claims for and against the non-consenting party. (217) In addition to express rules covering questions of joinder and consolidation, other rules may indirectly limit the power to achieve such outcomes. An example would be a strict requirement to identify all respondents in a request for arbitration. (218) This could also be impacted upon by definitions of who is a party. There is also a question as to whether form requirements need to be satisfied to allow for joinder or consolidation. Born suggests that this would appear to apply but notes decisions to the contrary. (219)

The New York Convention has no express provisions dealing with joinder. The UNCITRAL Model Law also does not expressly deal with joinder. The UNCITRAL Model Law drafters considered but rejected proposals to cover consolidation and joinder both in the 1985 version and the 2006 revisions. (220) While it has no specific provisions in that regard, to the extent that consolidation or joinder flows from the parties' agreement, it comes within power in any event. Some arbitral laws allow a request by a third party to intervene where there is an arbitration agreement between that party and the disputants. (221) Article 35 of the English Arbitration Act 1996 simply allows for consolidation by agreement of all parties. Where institutions are involved, once a tribunal is appointed, the first question is whether any subsequent joinder application must involve institutional consideration or is left for the tribunal itself. This will obviously be dependent on the rules, if any, in relation to these matters. Voser argues in relation to the previous version of Article 6(2) of the ICC Rules that the gateway analysis should still occur as the mere constitution of the tribunal should not take away the third party's right to have the first hurdle of court scrutiny. (222) That presumes that the intent of the rules and in turn the intent of the parties when the Rules were chosen, was indeed to have such continuing scrutiny even when the tribunal is present. A further question is whether some express power given to the institution interferes with the tribunal's right to subsequently consider the same matter. That should not be so as institutions typically take preliminary views on such matters, allowing for the tribunal to reconsider after hearing directly from the parties and perhaps after hearing witnesses and perusing a broader range of documents.

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Previously, the ICC Rules did not expressly deal with respondents' cross-claims or counterclaims against third parties. ICC practice moved from a strict position only allowing this where all parties agreed to a modified position allowing third-party joinder at respondent's request if:

1. the third party has signed the arbitration agreement;

2. the respondent introduces a counterclaim or cross-claim;

3. the request for joinder must have been made before the arbitrators were appointed or confirmed. (223)

It is interesting that the shift in the ICC approach occurred without any changes in the rules. The new ICC Rules are more expansive in this regard, although care should be taken as there will always be situations where a party's arbitration agreement is interpreted to call for arbitration pursuant to older versions of institutional rules. The ICC Rules 2012 now contains a specific provision on joinder of additional parties in Article 7. A request is made to the Secretariat, the date of which is deemed the date of commencement of the arbitration against the additional party. The request is subject to the provisions of Article 6(3) to (7) which indicate that jurisdictional questions are considered by the tribunal unless the Secretary-General refers the matter to the court for a decision pursuant to Article 6(4). The request for joinder is to follow the requirements that pertain to an original notice and the additional party is to submit an answer in similar form. The additional party may also make claims against any other party as per Article 8. Article 7(1) indicates that no additional party may be joined after the confirmation or appointment of any arbitrator unless all parties including the additional party otherwise agree. The Secretariat may also fix a time limit for the submission of the request for joinder. The Article does not indicate the criteria by which joinder decisions are to be made. ICC Rules 2012 Article 8 indicates that where there are arbitrations with multiple parties, claims may be made by any party against any other party.

Article 4.2 of the Swiss Rules 2012 requires the tribunal to decide on joinder requests ‘after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances.’ Article 4.2 allows for the request to be made independently by a third party. The Rules do not require that the third party be a signatory to the agreement or that there be express consent by the third party where it is sought to be joined. The Swiss Rules do not expressly require consent from existing parties. The tribunal ultimately exercises a discretion based on ‘all circumstances it deems relevant and applicable.’ This would include the nature of the relationship and the timing vis-à-vis the existing proceedings. It has been suggested that the revised Hong Kong International Arbitration Centre Administered Arbitration Rules effective from 1 September 2008 were largely modelled on the Swiss Rules 2006 but chose not to incorporate the equivalent of Article 4.2 of the Swiss Rules. (224)

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Article 22.1(h) LCIA Arbitration Rules 1998 speaks of a 'third person to be joined in the arbitration of the parties.' Article 22.1(h) deals with a request or application by an existing party after all existing parties are given a reasonable opportunity to state their views. Article 22.1 allows a tribunal upon the application of a party to join a third party provided that the applicant and third party have consented in writing. The provisions do not call for consent by the other party to the proceedings. The power remains unless the original parties agree otherwise in writing. While the provision only covers applications by a party and not applications by a third party, given the requirement for consent between them, little turns on this restrictive language as where the agreement is there, there is no need for the separate application by the third party. Once again there may be a debate as to whether that party's acceptance of the LCIA Rules was consent to arbitral jurisdiction in that regard. Certainly if the rules tell the original parties that they could remove the power and they did not do so, there is consent to the discretionary power. Nevertheless, that consent is not blanket consent to a particular outcome, but instead, to a reasonable methodology. A relevant factor before the tribunal's considerations ought to be whether that other party does in fact wish to have the third party joined or not.

Article 24(b) of the SIAC Rules entitles the tribunal 'to allow other parties to be joined in the arbitration with their express consent …'. It is not clear whether the term 'their' references consent by all parties or only by the prospective joined party. (225) Article 41 of the NAI Arbitration Rules allows a third party who has an interest in the outcome of arbitral proceedings to request the tribunal to join the proceeding or to intervene therein. All parties must have an opportunity to be heard and the third party must accede in writing. The Netherlands provision is limited to situations where there are two or more arbitral tribunals in the Netherlands. Other laws following the Netherlands model include New Zealand and Hong Kong. (226) Born suggests that the Netherlands provision was introduced as a result of proposals from the Netherlands construction industry. (227)

In ad hoc arbitration the tribunal will typically consider joinder within its broad discretionary rights subject to due process mandatory norms. In some instances of ad hoc arbitration, provisions such as Article 20 of the previous UNCITRAL Rules allowing for amendment of claims and defences have been ● used to allow for third-party joinder. (228) UNCITRAL gave considerable attention to this issue in its 2010 Rules revision process. Draft UNCITRAL Rules Article 7*bis* (2) required joint appointments by multiple claimants or respondents. Where a joint appointment did not occur, draft Article 7*bis* (3) gave the appointing authority at the request of a party the discretion to make a default appointment of the arbitrator who was to be jointly appointed or alternatively, revoke prior appointments and appoint all three arbitrators afresh. Divergent views were presented at the Working Group's 46th Session in February 2007. (229) The Secretariat had sought advice from arbitral institutions on their experiences with joinder. (230) The Working Group did not consider that the non-applicant party needed to consent. (231) However, the Working Group seemed to contemplate that there will be claims and counterclaims between the non-consenting party and the third party. (232) Roos refers to the draft revised UNCITRAL Article 15(4) from the 49th Session using differing language requiring that the third persons are a party to the arbitration agreement and have consented to be joined. (233) Draft Article 15(4) states first that a tribunal may on the application allow third persons to be joined and only then states 'and, provided …' there is consent, it may then make an award in respect of all parties. On plain meaning this departs from the more restricted model of Article 22.1(h) of the LCIA Rules separating the power to join and limiting the need for consent to scenarios where the award intends to be in respect of all parties involved. (234) Article 17(5) of the UNCITRAL Rules 2010 now provides that the tribunal may at the request of any party allow one or more third persons to be joined as a party provided such person is a party to the arbitration agreement. All parties including the person or persons to be joined must be given the opportunity to be heard. The tribunal may reject the application because of prejudice to any of those parties.

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Another question where terms of reference are involved or documents to similar effect are used, is whether a subsequent request to join a third party should ● be treated as raising a new claim requiring the tribunal's concurrence. (235) A contrary argument would be that the new claims provisions are discussing claims that are new between the parties as articulated in the terms of reference. It would certainly be true that if arguments as between the third party and either existing party are matters that both originating parties would have to consider, then they are certainly new claims from their perspective. In any event, even if such provisions applied, the same principles ought to be taken into account as under a joint consideration of the joinder application. (236) Where terms of reference have previously been completed, and a new party is joined, there will need to be new terms of reference covering its claims and defences as well. If the rules do not expressly cover this, the existing provisions covering terms should be applied *mutatis mutandis*. It would be even simpler to allow for an addendum to the original terms, (237) although care will need to be taken that the addendum does not contradict elements of the original terms.

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7.11 Consolidation (238)

7.11.1 Introduction and Policy Considerations

Sometimes, after an arbitration has been commenced, a party to that arbitration will seek to start a second arbitration concerning the same or a related contract or legal relationship. It may be the Respondent in the first arbitration who seeks to put forward a claim in a second arbitration rather than by way of a counterclaim in the first arbitration. Alternatively the Claimant in the first arbitration may, for various reasons, put forward additional claims in a second arbitration. A question which then arises is whether the two sets of proceedings are desirable or whether they can and should be consolidated. Consolidation involves bringing together two or more arbitrations into the one proceeding. Consolidation is generally considered in the context of multiple contracts but can also arise where separate proceedings are instituted in relation to the one agreement. Consolidation may cover circumstances where separate proceedings have the same or different arbitrators. In some cases only one tribunal has been constituted. Consolidation generally arises where the same parties are engaged in more than one arbitration, although it can also be considered in multi-party scenarios.

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7.11.2 Legal Provisions as to Consolidation

Consolidation can always occur if the parties agree to do so. But this is unlikely because one of the parties has taken a deliberate decision to commence a second arbitration. The legal position can be analysed in two distinct ways, the first is to look at the arbitral laws and rules applicable to see whether there is an express provision allowing for consolidation. If so, attention will obviously be given to the preconditions that are articulated. Alternatively, a tribunal can approach the question as a matter of interpretation of the arbitration agreement before it to decide whether it is broad enough to cover the other matters. The two are not mutually exclusive and as invariably arises also bring into play the complex resolution of consent versus jurisdictional paradigms. If a tribunal approaches the question from an interpretational perspective, attention may also need to be given to the circumstances behind the second proceedings as the party contending for a broader ambit of the first clause might be argued to have waived the right to so argue based on its actions in bringing or defending the second proceedings.

Some might see interpretation as a fallback only where the laws and rules do not expressly deal with consolidation. The contrary view would be that the laws and rules must always be considered in the context of the parties' intentions in their arbitration agreement and the proper competence of a tribunal in relation to each and every arbitration clause before it. On that view, in some circumstances at least, a tribunal might interpret the clause broadly enough to cover other contracts in circumstances where the preconditions in arbitral rules have not been satisfied. That makes logical sense in that broadly drafted arbitration clauses allow for multiple claims and issues to be decided if they all ‘relate to’ or ‘arise out of the essential commercial transaction. However, regulatory preconditions to consolidation are more conservative and look to sufficient identity between the two proceedings to justify consolidation. Even then there are questions of tribunal appointment where that has already occurred in at least one proceeding and the relevance of evidentiary stages where one is partly heard.

The New York Convention has no express provisions dealing with consolidation. The UNCITRAL Model Law also does not expressly deal with consolidation. The UNCITRAL Model Law drafters considered but rejected proposals to cover consolidation and joinder both in the 1985 version and the 2006 revisions. (239) As noted, while it has no specific provisions in that regard, to the extent that consolidation or joinder flows from the parties' agreement, it comes within the principles in any event.

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Some legal systems leave it to the courts to determine whether consolidation should be allowed. (240) Where institutions are involved, some afford the right to consolidate to the institution or an institutional court where that is involved. (241) Absent specific agreement of the parties it would not seem possible to consolidate arbitrations in different arbitral Seats. (242) It has been suggested that compulsory consolidation negates party autonomy and may jeopardise enforceability. (243) Born also suggests that non-consensual consolidation or joinder is contrary to the New York Convention. (244) That may depend on the circumstances. If the parties have selected an arbitral law or rules that allow for an application on that basis, then they have consented to the mechanism even if not to the conclusion as to the particular application made.

Under Article 1046 of the Netherlands Arbitration Act 1986, the President of the District Court of Amsterdam may, upon request of a party, order consolidation unless the parties otherwise agree. The NAI Rules have not included a similar provision. Article 30 of the Belgian Judicial Code adds further criteria in inviting consideration as to the degree of connection and whether the claims ‘are so closely related that it is desirable to consolidate them and judge them together, in order to avoid an outcome that would be incompatible, if said disputes would have been handled separately.’ Consolidation is allowed for under Article 1126 of the NAFTA Rules and Article 33 of the 2004 US Model Bilateral Investment Treaty. Conversely, the Departmental Advisory Committee on Arbitration Law whose report inspired the change to English legislation, considered that it was inappropriate to allow a tribunal to order consolidation regardless of party agreement, seeing that power as a negation of party autonomy. Section 35 of the Arbitration Act 1996 (UK) now provides:

35. (1) The parties are free to agree –

(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or

(b) that concurrent hearings shall be held,

on such terms as may be agreed.

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(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.

The Australian legislation is seen as being one of the most far-reaching. Australia's International Arbitration Act allows a party to make an application for consolidation where 'a common question of law or fact arises in all those proceedings ... a right to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions ... (or) for some other reason specified in the application, it is desirable that an order be made ...' This even allows for an application when the proceedings are not before the same tribunal. It calls on the tribunals to communicate with a view to a joint order of consolidation and otherwise calls for their coordination where consolidation is not to occur. Orders may be made:

(a) that the proceedings be consolidated on terms specified in the order;

(b) that the proceedings be heard at the same time or in a sequence specified in the order;

(c) that any of the proceedings be stayed pending the determination of any other of the proceedings.

It has been suggested that this may limit the parties' autonomy to craft their arbitration agreement to prevent consolidation, (245) although this would depend on how the provision is interpreted. The operation of this provision is more limited than it looks. In the first place, section 24 is part of Division 3 of Part III of the International Arbitration Act. Part III gives effect, in Australia, to the UNCITRAL Model Law. Division 3 contains certain additional provisions which are optional. Division 3 only applies if the parties to the arbitration agreement have agreed that the division applies. Moreover if there is more than one tribunal appointed, both tribunals must agree to the consolidation or else the application lapses. (246) It does not appear to be a mandatory norm and in any event, there is only an entitlement to make application and no guarantee that either tribunal will accede to a request. If the parties have expressed sufficient intent not to allow for consolidation in their arbitration agreement, then a tribunal facing an application might hold that the agreement waives the right to make that application or the contrary intent is a relevant factor in deciding against the exercise of the discretion.

The ICC Rules 2012 Article 10 provides an express provision in relation to consolidation. Unlike joinder, where requests are made to the Secretary-General who will then leave it for tribunal determination unless it is thought that a court ruling is more appropriate, consolidation decisions are taken by the court alone. The court has no authority to do so on its own volition but requires the request of a party. The stipulated criteria for consolidation are that:

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(a) the parties have agreed to consolidation; or

(b) all of the claims in the arbitrations are made under the same arbitration agreement; or

(c) 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 Court finds the arbitration agreements to be compatible.

In addition to these criteria, Article 10 indicates that the court may take into account any circumstances it considers to be relevant including whether any 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. Article 10 further provides that if arbitrations are to be consolidated, they will be consolidated in the arbitration that commenced first unless otherwise agreed by all parties. (247)

This is not uniformly so. Article 4.1 of the Swiss Rules 2012 allows consolidation where the

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parties are not the same. This may arise where underlying contracts are closely connected. The Swiss Chambers' Arbitration Court may order ● consolidation on its own motion and does not require request of the parties. The parties must be consulted. Article 4 of the 2012 Rules, however, provides little guidance as to what must be considered by these bodies, save noting that the link between the cases in respect of which consolidation is proposed must be the subject of deliberation, as well as calling for 'all relevant circumstances' surrounding the disputes. (248) The Cepani Rules allow the tribunal itself to call on the appointments committee or chairman to order consolidation. (249) Article 12 of the Cepani Rules allows for joinder of proceedings (another way to describe consolidation) where several contracts containing the Cepani arbitration clause 'give rise to disputes that are closely related or indivisible …'. An order can be made by the appointments committee or the chairman of Cepani either at the request of the tribunal or a party or on Cepani's own motion. Consolidation is possible in the Cepani Rules even if the parties are not the same in whole or in part. Furthermore, all that is required is some link or connection between the disputes.

Article 11 of the SCC Rules allows for the board of the SCC Arbitration Institute to consolidate where the two arbitrations involve the same parties and concern the same legal relationship. JCAA Rules allow for consolidation where the claims are 'essentially and mutually related …' provided that all parties consent. Consent is not required where the multiple requests arise out of the same agreement. The SIAC Arbitration Rules may provide the tribunal with a power to consolidate proceedings, but only on a broad interpretation of the wording of Article 24:

In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:...

b. upon the application of a party, allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties.

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ICSID Rules do not allow for consolidation applications. Nevertheless, the practice has emerged to seek to have the same arbitrators appointed and harmonise approaches as much as possible. (250) A unique provision on consolidation is contained in the NAFTA. The decision on consolidation is not taken by an administering body but by a separate tribunal established under Article 1126 to decide consolidation. Article 1126(2) of the NAFTA provides:

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

   (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or

   (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others. (251)

7.12 Joinder and Consolidation Practice

Given that there may be reasons for or against joinder or consolidation, it is preferable to give a Tribunal a discretion. In most cases any power to order consolidation is discretionary. Many matters could be considered in the exercise of the discretion including:

- the degree to which the second case can be linked to the connecting test within the first arbitration agreement. Stated another way, to what extent could the separate action have instead been brought as an element of the primary claim.
- the desire for efficiency and the avoidance of inconsistent results.
- the nature of the two disputes and whether efficiency would in fact be served by hearing them together (for example, if one dispute is much more complex than the other).
- whether the parties have provided for arbitration in different venues.

- whether the *lex arbitri* and/or the *lex causae* in the two matters differ.
- potential for irreconcilable decisions and delays.
- impact on relevant evidence, whether evidence part heard in the first case or admissibility from one to the other.

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- If the applicant for joinder or consolidation has delayed unduly without just excuse, that alone might be grounds for denial, particularly if there would be some prejudice to another party.

These issues must be considered in the context of due process norms and potential challenges where a later joined party might argue that due process requires some earlier issues to be revisited. While it will normally be desirable to consolidate related proceedings, this will not always be the case, for example, if one matter is close to the end when the second proceedings are commenced or if one is far more complex and costly than the other.

Where a discretion is being exercised, the tribunal or institution ought to consider whether the non-requesting party has been prejudiced by a late request. This could be so for a range of reasons. Not only has at least one party not been involved in tribunal composition but existing parties may have made a different selection if the full range of participants was known from the outset. A party might not have defended the original request or may have approached settlement negotiations in a different way if it understood the intended broader involvement. The degree of the relationship between the new party and existing parties and the commonality of claims and issues should also impact upon questions of tribunal composition and whether a new party can truly raise concerns that it was not privy to the establishment of the tribunal. The more the consolidation party can be seen as part of a group with an existing party, the less justification for complaining about prior constitution of the tribunal.

Consolidation and joinder may lead to new impartiality challenges. The circumstances should not vary between the Chair or sole arbitrator and party-appointed arbitrators. In the context of majority decision-making each arbitrator has an equal a priori vote. Each vote should be based on a presumption of independence and impartiality. Either the involvement in the other arbitration impacts upon this or it does not. Any adverse impact relates to decisions already made or views already formed rather than the reasons for appointment.

Another possibility is an anti-suit injunction by a tribunal. It is not clear whether tribunals may make such orders and even if they do, how enforceable they may be. A more conceptual concern is the extent to which one tribunal can seek to pre-empt a jurisdictional decision of another. (252) This is discussed in section 8.2.10.5.

7.13 Case Management of Parallel Proceedings

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Because of the restrictive preconditions for application of lis pendens, res judicata and consolidation, attention needs to be given to the best way to coordinate the many other overlapping scenarios where related questions of fact and law may apply. Typical examples include construction and shipping activities where there may be a multiplicity of parties and contracts. There are a range of practical circumstances where there may be multiple arbitral proceedings. A complex commercial transaction may have a number of agreements each with separate arbitration clauses. There may be a dispute as to which dispute resolution clause applies to an individual transaction, for example, where a battle of forms has arisen. The first award may not have dealt with all issues or may have refused to allow certain issues to be raised. The parties may be required to commence differing actions, for example, where insurance or guarantees are concerned. (253) If a second arbitration is instituted, and it is not possible to consolidate the two arbitrations, is some form of harmonisation or coordination between the two sets of proceedings possible and desirable?

7.13.1 Same Tribunal

Even where there is no consolidation, appointment of common arbitrators may lead to practical harmonisation of processes although there will still be questions of admissibility of evidence, confidentiality and duties of expediency. Where each dispute involves a sole arbitrator, it makes sense to appoint the same person. This situation is more difficult with multi-person tribunals if the methodology of appointment is to allow each to select the nominee of their choice. If they freely choose to select the same tribunal well and good but it would be difficult to impose this upon them against their wishes where this is possible. Philippe Leboulanger (254) describes this as 'de facto consolidation'. By way of illustration he refers to the decision of the English Court of Appeal which avoided the risk of contradictory awards by appointing the same arbitrator in two parallel proceedings. In *Abu Dhabi v. Eastern Bechtel* (255) the parties referred to court the question of whether separate arbitrators or the same arbitrator should be appointed to the two arbitrations. The Court of Appeal held that it had power to appoint the same arbitrator to both arbitrations. While

this elegant solution largely avoids the risk of inconsistent decisions, it is still not as efficient as consolidating the arbitrations in one proceeding. However the Tribunal can, by appropriate orders, direct that hearings be held sequentially and therefore manage costs. In some cases courts may have the authority to order that proceedings in two arbitrations
P 577 be heard together. (256) If a joint tribunal is to be appointed, it is suggested that there be
P 578 a coordination ● conference to sort out how the parties would expect coordination to occur and so as to clarify the arbitrator's mandate. (257)

In order to have the same personnel on two tribunals it is necessary for the parties, and sometimes the administering authority, to make identical appointments. This does not always happen. The second Tribunal may consist of different personnel or there may be some overlap of personnel between the two tribunals but not complete identity. Anne Marie Whitesell and Edwardo Silva-Romero (258) discuss ICC practice. They say that where the parties have not agreed to have the same tribunal in parallel proceedings and one side decides to nominate an arbitrator already acting in a related matter to which the opposing party objects, the Court must decide whether to confirm that arbitrator. The Court takes into account various factors including whether the parties, counsel and the issues to be decided are identical and the stage that the arbitral proceedings have reached. They say that the Court assesses whether the arbitrator would have access to information that would not be available to other members of the arbitral tribunal and also considers whether a decision has been rendered in one of the matters that might cause the arbitrator to prejudge the related case. Each case is evaluated separately and decisions can therefore go either way depending on the circumstances. Whitesell and Silva-Romero give as an example a case where the Respondent nominated an arbitrator acting in a related case and the Claimant objected on the ground that the arbitrator would have access to information not available to other members of the arbitral tribunal. Counsel in both cases were the same, the claimants were the same and the respondents were related companies. No award had been rendered in the related case and there were no overlapping issues. The Court decided to confirm the co-arbitrator. In consequence the claimant changed its mind and decided to nominate the same co-arbitrator in the second case. However, in two more recent cases the Court decided not to confirm a co-arbitrator even though the parties and counsel were the same. The Court was influenced by the advance stage of the first proceedings and the possibility the co-arbitrator could obtain privileged information in the second proceedings.

Leboulanger (259) raises a question of good faith. He asks whether a party can be considered to be acting in good faith when, on the basis of the existence of two distinct but identical arbitration clauses contained in two inter-related agreements, it seeks the constitution of two distinct arbitral panels and thereby increases the costs and creates the
P 578 risk of contradictory awards. He says that an arbitration clause is nothing but one of the
P 579 clauses of an agreement and the principle of good faith ● should apply to the constitution of the arbitral tribunal, which corresponds to the performance of the obligations assumed under the arbitration clause. In his view a party who refuses to designate the same arbitrator in parallel arbitral proceedings might be considered in violation of its obligation to perform, in good faith, its undertakings assumed under the arbitration clause.

7.13.2 Exchange of Information

Where the two tribunals are not identical, the risk of inconsistent decisions may be reduced if there is an exchange of information or documentation between the two arbitrations. Such coordination to avoid duplication will be impacted upon by confidentiality issues. There are questions of admissibility in the face of confidentiality and the view that a tribunal will take of the evidence from the other proceedings. There is also a question whether statements in the two proceedings will be compared to try and undermine the veracity of witnesses or submissions. The better view is that there should not be obligations of confidentiality where the same parties and arbitrators are involved. (260) In one situation there were parallel ICSID and ICC arbitrations. The respondent in both cases was the same but the claimants differed. The claimant in the ICSID case was a shareholder of the claimant in the ICC case. The two tribunals were different and there was no common member. The Tribunal in the ICSID case ordered the respondent to produce all the documentation in the ICC case. The ICC tribunal issued a corresponding order requiring the respondent to produce all the documentation in the ICSID case.

Even where the parties are the same, but the tribunals differ and contain a common member, an interesting question may arise. Can the common arbitrator refer to or otherwise have regard to a document produced in arbitration A in arbitration B? If the arbitrator discloses it, is it a breach of a duty of confidentiality? As confidentiality belongs to the parties and as the parties are the same in both proceedings, it might be thought that there was no breach. But disclosure is being made to the other members of the Tribunal. Bernard Hanotiau (261) says that the principle of neutrality, independence and impartiality of the arbitrator is of paramount concern and the duty of confidentiality will lead the arbitrator in some cases to reach the conclusion that it is no longer possible to fulfil the arbitrator's duties in total independence or impartiality and may have to resign. However, in other cases the arbitrator may simply make a full disclosure of the problem to the co-arbitrators and the parties.

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7.13.3 Joint Sittings

If confidentiality issues can be overcome there may be efficiencies through joint sittings. Another possibility is to have a joint preliminary conference between the two cases, perhaps leading to an agreement on joinder or consolidation. (262)

7.13.4 Other Issues

The ILA Recommendations also touch on general questions of case management. Paragraph 6 of the Recommendation on *lis pendens* covers circumstances where the issues or parties may be different, but where issues in one proceeding may influence the second, again inviting the second tribunal to consider staying proceedings where appropriate, as long as the objecting party's interests are not substantially affected.

A tribunal must be concerned with the interests of the parties before it. (263) General societal concern for the avoidance of duplication or efficient resolution of disputes should not determine a tribunal's behaviour except where these can be said to be part of the intent of the parties before the tribunal. A tribunal should not take decisions for the benefit of third parties. The parties themselves should be consulted as to mechanisms aimed at promoting efficiency where there are parallel proceedings. (264)

If there are to be a multiplicity of proceedings, it is also necessary to consider the impact on quantum to ensure that an identical or related claimant in both is not overly compensated. That may be more problematic when a first award has not been satisfied or where the type of remedy is different in nature. Complexities may arise depending on the hierarchy of companies. As has been pointed out, compensation to a subsidiary should reduce any claims by a holding company for damage to its shareholding. The converse does not hold as compensation to a holding company does not necessarily filter down to a subsidiary. (265)

One problem if all parties are not heard in each proceeding is if events in one could be used to support an argument of denial of an adequate right to be heard in the other. (266) A problem in having a third party involved as a witness rather than a party is where they have expertise but also a vested interest. Their lack of independence may prevent them being given the status of an expert witness.

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7.14 Class Arbitration

Arbitration is conceptualised as a dispute resolution process defined by consent and direct participation of discrete parties in the relevant dispute. However, particularly in the US, some interest in arbitration on a 'class-wide' basis has developed in recent years. The development is highly contentious. Class litigation has emerged in the US and in other common law countries. In a 'class-wide', or simply 'class' action, one party claims to represent a class, with the outcome able to bind and benefit the entire class. There will be rules as to fee contribution, notice of class members and due process concerns. Where litigation is concerned, such actions are seen as appropriate where issues are identical and the costs to an individual as a percentage of potential relief benefits are too high. Pooling resources aims to promote justice without unduly interfering with the rights of the party that the class is opposed to. Where litigation is involved, gateway issues such as identification of a definable class and ensuring due process protections are under court control. Civilian jurisdictions have tended to deal with the same regulatory concerns by affording standing to consumer organisations. (267)

A question then arises as to whether this may or ought to apply in international arbitration. Key questions include: can parties expressly agree on class arbitration; if the agreement is silent, can class arbitration be commenced under a broad clause, akin to a consolidation application; what notice requirements are appropriate; must the other class members opt-in for arbitral consent or can there be opt-out presumptions, i.e., they are covered unless they advise to the contrary; what due process rights do the class members have from tribunal composition onwards; will procedural and jurisdictional issues be determined by the courts or by the tribunal?

It is inevitable that these questions are in part analysed in the context of US experience to date although it is important to understand the particular context in which it has arisen as it arises from a quite unique scenario. In most cases, the possibility of class arbitration has arisen after providers of goods and services sought to avoid the potential of class litigation by including mandatory arbitration clauses in their contracts. Hence they purported to avoid class actions, but found their contracting parties seeking to argue that broad arbitration clauses allowed for class actions in any event. US courts dealing with these issues had to consider what attitude to take to parties in stronger commercial positions attempting to undermine class litigation entitlements of their customers. The courts also had to consider questions of control in the context of pro-class action regulations, where some might wish to have more control over tribunal discretion under mandatory substantive law notions.

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Class arbitration attempts to follow the same model as litigation; the party initiating the arbitration claims to do so as a class representative; that is, on behalf of a group of claimants. The members of the group are not necessarily individually named; rather, at

least in the US, the members of the group will be defined as those potential claimants meeting a certain description (e.g., a person who is party to an arbitration agreement with the respondent on the same terms as the class representative, and to whom facts apply that are comparable to those applying to the class representative). If the class arbitration goes ahead, then members of the class will be bound by the award delivered by the arbitral tribunal despite having taken no initiative to commence the arbitration, choose the arbitrators, or in any other way participate in the proceeding (although a party may avoid being bound by an award if it has expressly indicated that it does not wish to be considered as a member of the class - that is, it has 'opted-out' of the class proceeding). This may seem to run counter to some of the basic principles underpinning arbitration, and indeed in some jurisdictions the mechanism might be considered to undermine important legal rights. As a result, class arbitration as a procedural mechanism remains the subject of considerable discussion and disagreement. Differing views in US state courts (268) also show that there would not be uniform views worldwide if the phenomenon was more broadly utilised.

Critics of class arbitration cite various factors to support the contention that arbitration is an inappropriate mechanism for class-wide dispute resolution. Conceptually, they would argue that in most cases, there is inadequate consent by the class. The concerns may also be practical, such as the long delay involved in class arbitration, (269) its necessary complexity given the large number of class members, and its high cost as a result both of that complexity and of the extended period of the arbitration. There is also the added costs of the uncertainty as to its validity and hence further transaction costs while its legal parameters are worked out. An additional concern for potential respondents is that class arbitrations can involve very large awards with no possibility of appeal, presenting an additional layer of risk for respondents. Given that the class is often very large and the individuals within the class may not always be known, and due also to the need to publicly notify potential members of the class of the pending arbitration, confidentiality will necessarily be compromised. Indeed, the Supplementary Rules on Class Arbitration of the American Arbitration Association (AAA) do away with confidentiality altogether in a class arbitration, and in cases that bear on the public interest, governments or the public may require that the confidentiality usually associated with an arbitration be lifted. It is also suggested that class arbitration results in a formal, legalistic process, and that it has been colonised by statutory procedural requirements applicable to class litigation. (270) Accordingly, detractors argue, class arbitration undermines the perceived classical
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characteristics of arbitration: its ● speed, informality, low cost and amenity to commercial imperatives including confidentiality. Indeed, these kinds of factors contributed to the US Supreme Court's position in the case of *AT&T Mobility LLC v. Concecion* (271) that class arbitration is an animal which is 'not really arbitration'. (272)

However, proponents of class arbitration emphasise its policy benefits and argue that many of the concerns raised against class arbitration can be addressed with appropriate procedural measures, or are illusory. For example, although class arbitration will be lengthier and costlier than bilateral arbitration, it may still be quicker and cheaper than class litigation. Total costs of class arbitration will be vastly less than individual awards where res judicata could not apply as between different litigants. In relation to considerations of formality and confidentiality, it has been argued that these are not essential, or even necessarily characteristic elements of arbitration, as parties to arbitration are free to choose procedures of varying formality, and confidentiality is not necessarily one of the cornerstones of arbitration that it is often held up to be. (273) In response to the suggestion that class arbitration, with its potential for high awards and inability to appeal, presents unacceptable risk to respondents, it is noted that arbitration has for a long time been used to determine disputes with awards of very high amounts. (274) In addition, its supporters argue that class arbitration (like class litigation) serves important twin policy goals. First, it enables potential claimants whose claims are too small individually to justify the expense of initiating arbitration to defend their interests by combining their claims with others in a similar situation to make arbitration economically feasible. Second, the ability of claimants to do this, even for individual claims of very low value, (275) discourages companies from engaging in wrongdoing. This acts as a kind of de facto regulation that is seen as beneficial in a jurisdiction like the US that emphasises a light regulatory regime. However, in jurisdictions that tend toward greater regulatory supervision and within which an aggrieved party might expect relief though regulation (such as within Europe), the policy benefits described above are less valuable and carry lesser weight in offsetting due process concerns.

7.14.1 Autonomy and Arbitral Laws and Rules

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There is no reason why a large group of individuals cannot expressly agree on a comprehensive class arbitration methodology, although that is unlikely to occur in ● practice. If an attempt was made to do so, there would still be due process issues and the need to ensure that the agreement was not in violation of the mandatory due process norms of the relevant Seat. Concerns may arise if members of the group waived their rights to make submissions or to engage in tribunal selection. Views would differ as to whether this was permissible or whether this was antithetical to arbitration per se.

Parties can also select arbitral rules that support class-wide actions although this would need to be on an opt-in basis. Conversely, if parties prohibit class-wide applications in

their arbitration clauses, this should be respected. Such an agreement may contradict a national law supporting class actions for protective reasons but unless that law covered arbitration and was thought to be mandatory, the waiver should apply to that form of dispute resolution at least. A contrary view is that the ban on class arbitration is illegal and severable and the balance of the arbitration promise stands, hence allowing for class arbitration in any event. That would still need some logic in finding arbitral consent via a clause that certainly did not expressly support it. Some US courts, having first found that the class action waiver in an arbitration clause is unconscionable, have then determined that the class action waiver is not severable from the arbitration agreement. As a result, the arbitration agreement itself has become invalid and the parties have proceeded with class litigation rather than class arbitration. (276) It has been suggested that arbitration agreements aimed at avoiding class arbitration should seek to be seated in a jurisdiction that gives them effect (or, perhaps even better, does not recognise class actions generally). Furthermore, it may be useful to set out in the arbitration agreement the consequences for the agreement if the class arbitration waiver is considered unconscionable or the arbitration agreement is otherwise found to allow class arbitration. (277)

The more common situation as noted above, is where a claimant purports to establish a class action under a broad arbitration clause in favour of others who have similar clauses. The difference to joinder or consolidation applications is that the latter bring the others in as full parties with equal rights, while class actions bring them in on a full basis as to outcome but on a representative basis as to process. Class arbitration in the US came into the mainstream following the 2003 Supreme Court ruling in *Green Tree Fin. Corp v. Bazzle*. (278) In *Bazzle*, the US Supreme Court considered whether class arbitration was permitted under an arbitration agreement that contained no mention of class arbitration. The Supreme Court determined that the arbitration agreement did not *prohibit* class arbitration, and that the question related to how the arbitration should proceed rather than to the validity of the arbitration agreement itself. Accordingly, as interpretation of the
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arbitration agreement was properly a matter for the arbitrator, the matter was returned to the arbitrator for determination. The arbitrator interpreted the arbitration agreement as allowing class arbitration and the arbitration proceeded on that basis. Following *Bazzle*, some US arbitrators tended to interpret arbitration agreements that are silent as to class arbitration as allowing class arbitration, and class arbitration is now specifically accommodated in the procedural rules of the American Arbitration Association, JAMS and the National Arbitration Forum. Indeed, the AAA's public docket of class arbitration reportedly lists several hundred arbitrations. (279)

However, two recent Supreme Court cases have created a climate much more hostile to class arbitration. In *Stolt-Nielsen S.A. v. Animalfeeds International Corp* (280) the Supreme Court noted that *Bazzle* had been a plurality decision, and espoused the view that class arbitration is a fundamentally different process to bilateral arbitration. As a result, the Court considered class arbitration is only permissible where the parties have consented to it. This consent was to be evaluated according to applicable principles of contractual interpretation, and mere silence would not be sufficient. *In AT&T Mobility LLC v. Concepcion*, the Supreme Court reconfirmed its view that 'requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the [Federal Arbitration Act]', (281) deepening the climate of hostility toward class arbitration. Accordingly, the future of class arbitration in the US is unclear.

However, it is probably worthwhile, and at least instructive, to consider the procedural framework developed by the AAA for class arbitration. Following *Bazzle*, the AAA introduced its Supplementary Rules for Class Arbitration. The rules provide for three distinct steps in the initiation of class arbitration. First, the tribunal considers the arbitration agreement and issues a 'clause construction award' determining whether the parties' agreement allows for class arbitration. After the award is delivered, the proceedings are stayed in order to let any party seek judicial review of the clause construction award. In the next stage the tribunal determines whether the arbitration should proceed as a class arbitration. This stage is analogous to the class certification undertaken by courts in class litigation. In making its 'class determination award', the tribunal must consider a wide variety of characteristics of the proposed action, with a view to preserving the due process rights of the parties affected. This analysis may include consideration of the following criteria applied in US class litigation legislation:

(a) 'numerosity': is the class so numerous that the joinder of separate arbitrations on behalf of all members is impracticable?

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(b) 'commonality': are there questions of fact or law common to the class?

(c) 'typicality': are the claims of the representative parties typical of those of the class?

(d) 'adequacy' of representation: will the representative parties and class counsel fairly and adequately protect the interest of the class?

(e) ‘similarity’: has each class member signed an agreement with an arbitration clause substantially similar to that signed by the other class members? (282)

Following this, notice is issued to the class and the dispute proceeds to consideration of the merits. The staged procedure allows for judicial oversight and input at various critical stages and is intended to protect the interests of the parties and also to reduce the possibility of the award being challenged later.

A critical perspective might make the following comments about these criteria. As to numerosity, if the parties have not expressly agreed to class arbitration, how are theories of consent to due process arbitration consistent with a view to saying there are too many for joinder; why couldn't a sensible arbitrator allow joinder and/or consolidation and manage the process in a cost effective way e.g. via representative evidence, options to add individual evidence, with warnings about individual costs awards for time-wasting additions etc; if the arbitration agreements and issues are only similar and not identical, by what theory of arbitration could class arbitration absent express agreement be justified in going beyond principles of joinder and consolidation; as to adequacy of representation, when can this be a basis for accepting or denying jurisdiction as opposed to determining that a party should be warned when its representation is inadequate? Absent express agreement, it would be hard to see why an arbitrator could find a power for mass arbitration where joinder or consolidation could not occur if only one of the class was sought to be included. Furthermore, if the tribunal must treat all parties to an arbitration equally or fairly and give each an adequate opportunity to be heard, at most a tribunal can accept a waiver of direct rights when it concludes that the procedures it adopts and the adequacy of counsel who will appear means that these due process norms are not violated. It would be hard to accept such a waiver without the class expressly considering this and agreeing, in which case they are consenting to the proposed arbitration in any event.

However, it seems equally problematic to argue for a hybrid court supervised model. If the tribunal can find jurisdiction, then it can adequately control the process, including making adequate decisions on competence and jurisdiction. (283)

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7.14.2 Class Arbitration outside the US

Class arbitration has occurred outside the US but, like class litigation, it is rare. However, versions of class arbitration that are adapted to meet the particular needs of a jurisdiction's legal culture are being developed. In particular, Stacie Strong argues that ‘collective’, rather than class arbitration, holds significant promise in European jurisdictions. Under this model, a representative organisation (e.g., a trade association or public interest group) (284) represents claims of its members against a respondent. However, it seems unlikely that class arbitration based on the US model will gain much acceptance outside that jurisdiction.

However, there is precedent for a form of class arbitration (styled ‘mass arbitration’) emerging from an investor-State dispute between Italian bondholders and the Argentine Republic (285) flowing from sovereign debt restructuring by Argentina. The tribunal's determination (with a 2 to 1 majority) in relation to procedural aspects in this dispute is ‘historic in its holding that there is no impediment to mass claims under the ICSID Convention and Arbitration Rules and that ICSID tribunals have the power under ICSID Arbitration Rule 19 to adopt procedures to handle mass claims’. (286) Effectively, the tribunal considered that there was no bar to mass claims in the ICSID Arbitration Rules, and that fairness and practicality compelled the conclusion that the mass claim procedure should be employed. The tribunal summarised the relevant considerations as follows:

[...] the Tribunal holds that the mass aspect of Claimants' claims does not constitute an impediment to their admissibility. In particular:

(i) The silence of the ICSID framework regarding collective proceedings is to be interpreted as a gap and not as a qualified silence;

(ii) The Tribunal has, in principle, the power under Article 44 ICSID Convention to fill this gap to the extent permitted under Article 44 ICSID Convention and Rule 19 ICSID Arbitration Rules;

(iii) The procedure necessary to deal with the collective aspect of the present proceedings concern the method of the Tribunal's examination, as well as the manner of representation of Claimants. However, it does not affect the object of such examination. Thus, the Tribunal remains obliged to examine all relevant aspects of the claims relating to Claimants' rights under the BIT as well as to Respondent's obligations thereunder subject to the Parties' submissions;

(iv) Such procedure is admissible and acceptable under Article 44 ICSID Convention, Rule 19 ICSID Arbitration Rules, as well as under the more general spirit, object and aim of the ICSID Convention;

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(v) Respondent's policy arguments regarding the appropriateness of ICSID proceedings in the context of sovereign debt restructuring are irrelevant for the determination of the admissibility of the claims. (287)

The longer-term impact of the *Abaclat* dispute is unclear (the dispute remained pending at the time of writing). It has been suggested that in its award on jurisdiction the majority of the *Abaclat* tribunal was 'very clear in that it was not setting up general rules of procedure for mass dispute resolution within the ICSID framework. Instead, the tribunal limited itself to creating a procedure to be used in this particular dispute. However, in so doing, the tribunal had to have been aware that ICSID awards are often considered to have some sort of precedential or persuasive value, particularly with respect to matters of procedure' and therefore 'it may very well be that future ICSID tribunals will look to this award as persuasive authority regarding the procedures to be used in mass investment arbitrations.' (288)

7.14.3 Notice Considerations

A complication facing class proceedings is the need for provision of adequate notice to the members of the class, even though the identities of some of those members may be unknown. The AAA Supplemental Rules (at article 6) require that 'class members be provided the best notice practicable under the circumstances (the "Notice of Class Determination"). The Notice of Class Determination shall be given to all members who can be identified through reasonable effort.' Additional guidance as to what constitutes 'the best notice practicable' is not provided in the rules, but given that adequate notice (or the lack of it) is likely to have a significant bearing on the extent to which the final award is viewed as observing due process standards, an arbitrator would therefore be well advised to consider adhering to at least the class action notice requirements of enforcement jurisdictions (to the extent that such requirements exist in those jurisdictions).

7.14.4 Enforcement Considerations

As noted above, much of the acceptance of class arbitration in the US stems from the policy benefits that it is considered to bring. In other jurisdictions, the US form of class arbitration may be viewed as offending certain fundamentals of arbitration as well as due process rights (in particular of absent members of a class). As a result, parties may have an arguable case before a court in a jurisdiction unfriendly toward class action that the award should not be enforced. Accordingly, when considering whether to pursue class arbitration, P 588
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consideration should be given ● to the positions on class arbitration of countries relevant to enforcement of the eventual award, and to whether it would be possible, for example, for a dissatisfied party to challenge the award by arguing that the class arbitration was contrary to the public interest in that country.

7.15 Insolvency in Arbitration

7.15.1 Introduction

Commercial activity sometimes results in insolvency, and accordingly commercial arbitration will sometimes encounter the insolvency of a party to an arbitration agreement. Insolvency can affect the very entitlement to arbitral proceedings, the person who may make decisions in relation to them, the procedural conduct, the claims that may be heard, and the nature and content of any award. (289)

The intersection of insolvency and arbitration throws up various issues. These stem primarily from the inherent inconsistency between the goals and nature of these two areas of law: insolvency law is concerned with equitable management and disposal of the insolvent party's assets among its creditors. The law allows for the overriding of autonomy for three key reasons: ensuring maximum total return to creditors; providing for equal return where there is an insufficiency of assets save for certain ordained priorities; and concern for innocent third parties, such as employees. (290) Insolvency law will typically seek to restructure debts and defer claims where there is a reasonable prospect of the entity surviving. At a particular point in time, an insolvency regulator will consider the interests of the debtor to be irrelevant. Once they are considered terminal in terms of an ability to trade out of difficulty, the concern is instead to protect creditors and other third parties. This is particularly important with insolvent corporations where the controlling shareholders have a conflict in trying to maximise their own returns at the expense of P 589
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corporate creditors. (291) Conversely, arbitration rests on the private agreement ● between the parties and is concerned with resolving a particular dispute considering their interests alone. Insolvency law is therefore motivated by public interest considerations whereas arbitration is not. Not only is autonomy contrary to the essence of insolvency regulation but it could also be easily abused. Insolvency laws will typically seek to ensure that an impending insolvent is not able to preference certain creditors over others for personal gain. Insolvency laws may seek to invalidate an entire transaction where it occurred at a point in time when the entity was unlikely to be able to continue in viable form. Such laws would purport to be mandatory and would typically wish to leave it to domestic courts to rule on their application. Optimal insolvency regulation would not wish to see the mere presence of an arbitration agreement removing key transactions from insolvency control. However, there would be problems if a particular country had an

unduly parochial insolvency regime or purported to have comprehensive jurisdiction contrary to legitimate rights of other regulators. Furthermore, it might be equally problematic if an organised insolvency could be used as a simple means to avoid prior promises to arbitrate. Here there may be an argument that the insolvency is an abuse of right. (292)

Furthermore, certain 'core' aspects of insolvency law (such as, for example, a consideration of whether an entity is insolvent) are beyond the reach of arbitration. All would agree that the key functions of insolvency administrators are not arbitrable. These include decisions to impose an administrator, winding-up decisions, rescheduling of debts and determination of pro rata distributions to creditors. (293) Instead, arbitral tribunals are typically asked to consider what implications insolvency has for the ongoing rights and obligations of the parties and/or for the underlying contract or transaction.

Another challenge is that insolvency law has a particular territorial dimension from an adjudicatory perspective. As insolvency law is concerned with protecting creditors, it may seek to restrain the activities of the insolvent entity even beyond the borders of the country in which the insolvency proceedings take place to prevent an insolvent from redistributing assets beyond the reach of the courts overseeing the insolvency or preferencing creditors contrary to the dictates of the applicable insolvency law. Where
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arbitration is concerned, because the Seat of arbitration is typically a neutral venue, invariably this will require consideration ● of the relevance or otherwise of foreign insolvency laws. Some countries may consider that the observation of insolvency laws constitute part of their international mandatory law, which has implications for arbitrations seated in those jurisdictions or for situations where there is an attempt to enforce an award in them. Alternatively, insolvency regimes may be implemented in a defined international area by specific legislation such as the European Insolvency Regulation.

For the purposes of this book, most acutely, domestic insolvency law often purports to limit the activity of the insolvent entity in order to facilitate the administration of the insolvency, and this may extend to suspending or staying legal proceedings (potentially including arbitration proceedings) in which the entity is involved. Some countries have legislated specifically to preclude an insolvent party from engaging in arbitration. These factors (which, among others, are discussed in more detail below) purport to limit the scope of an arbitral tribunal's jurisdiction or competence where an insolvent party is involved. In addition to legal considerations, there are also practical questions to consider when dealing with an insolvent party, such as ability to pay the costs of arbitration or even satisfy an award against it. These policy concerns imply that a harmonised international solution is preferable but differences in domestic regimes and differing views about who should ultimately control insolvency has made this difficult to achieve. There is harmonisation in Europe through EU Council Regulation 1346/2000 (294) and an UNCITRAL Model Law on Cross-Border Insolvency more generally but only a modest number of countries have adopted the latter. Hence in most instances, an arbitral tribunal must determine how to proceed by consideration of an amalgam of issues including questions as to the scope of the arbitration agreement, capacity, arbitrability, application of mandatory laws and applicable law generally. Because views can differ on each of these issues and *lex arbitri* rarely provide directions, differing tribunals have adopted inconsistent methods and solutions.

7.15.2 Legal Issues Raised Where an Insolvent Party Is Involved in Arbitration

There are a number of different permutations as to the impact of insolvency on an arbitration. An arbitration could be brought by a person or corporation that is already insolvent. The second scenario is that an arbitration is brought against such a person. A third scenario is that the claimant becomes insolvent after the arbitration is commenced. The fourth scenario is that the respondent becomes insolvent after the arbitration has commenced. The final scenario is that the parties themselves are not insolvent but some assets under consideration by the tribunal are claimed by an insolvency regulator.

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The first and third scenarios are relatively straightforward. It generally seems unreasonable to consider the arbitration agreement itself to be invalid simply as a result of insolvency. As Kröll points out, this view would mean that the administrator could not bring claims under that agreement. (295) An insolvent entity is entitled to seek recovery of its debts whether it is insolvent before or after commencement of the arbitral proceedings. In each case it is simply a question of who can speak on behalf of the relevant corporation. It is not a question of capacity in the classical sense, namely the capacity of a particular entity to enter into arbitration but instead who can make decisions for the corporation, its traditional board of directors or instead some insolvency administrator. Where the law applying to that corporation would designate an insolvency administrator as the key decision maker, a tribunal should normally defer to that designation. If the claimant becomes insolvent after the arbitration has commenced, it is important to ensure that the insolvency administrator wishes to continue with the proceedings. There may also be complications in terms of advances on costs where that might be seen as an improper priority. That should not be so under any well developed insolvency law that grants broad powers to the administrator to make such payments. Once an administrator is in place, it

would normally be the case that this person is the only one who could enter into new arbitration agreements.

The key challenges arise where the insolvent is the respondent and insolvency law is used as a means to block the arbitral proceedings themselves or enforceability of any award that would prioritise the arbitral creditor. Of course, the situation is more complex where a counterclaim or set-off rights are involved. (296) Differing arbitral solutions have tended to arise because arbitrators have applied different methodologies to dealing with these questions. Some have considered the broad question of arbitrability and what kinds of insolvency matters should properly be before an arbitral tribunal. Some have sought to question whether an insolvency invalidates an arbitration agreement. Others have instead considered questions of capacity. In each scenario, different tribunals may have differing approaches to identifying the relevant law. Should the laws of insolvency or corporate control and capacity be those of the place of incorporation, the place of performance or that of the Seat? Given a tribunal's broad discretion as to applicable law, that can again lead to differing outcomes. While it is generally the case that there is also a tension between tribunals that are more concerned with implied intent rather than a pure conflicts analysis, this is less applicable in this scenario as the key issue is to determine when conflicting domestic insolvency laws should override clear consent to arbitrate. (297)

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7.15.3 Arbitral Law and Arbitral Agreements

As noted above, an express agreement by the parties to continue arbitration in the face of insolvency does not solve the issue as party autonomy may need to defer to mandatory insolvency laws. *Lex arbitri* rarely seek to resolve the issue. Set out below are several of the most critical aspects of domestic law that may seek to constrain the jurisdiction of an arbitral tribunal. This is followed by a consideration of the choice of law analysis which a tribunal may employ to determine the extent to which such domestic requirements will be considered as part of the arbitration.

The English Arbitration Act 1996 introduced a provision into the insolvency legislation allowing a trustee in bankruptcy the choice whether to adopt or reject an arbitration agreement. If the trustee does not accept the agreement it is still possible for the creditors and the court to agree to do so. (298) Where the European Union is concerned, EC Council Regulation 1346/2000 provides that the law of the country where insolvency proceedings are commenced is determinative of the impact of such proceedings on other proceedings, including arbitration. An exception is made for pending proceedings where it is the law of the State where proceedings are pending that will be determinative. In arbitrations with the Seat in the EU, a failure to apply the EU Regulation might lead to similar annulment or enforcement concerns as arose in the competition law context in *Eco Swiss*. (299)

7.15.4 Arbitrability

As noted above, 'core' aspects of insolvency law will generally not be arbitrable. Born provides the following list of such 'core' aspects:

(a) commencement, administration and winding-up of insolvency proceedings (including proceedings that liquidate an insolvent company);

(b) rescheduling of the insolvent company's liabilities;

(c) operating the company under some form of receivership or administration; or

(d) distributing pro rata payments to designated creditors. (300)

Levy notes that in any case these kinds of issues would not be referred to arbitration because there would be no arbitration agreement governing them, and because they do not constitute disputes having an adversarial nature. (301) However, where the insolvency of a party is not the question before the tribunal, and rather the tribunal faces the issue of how the insolvency of a party affects consideration of a dispute that does not itself relate to the insolvency, then an arbitral tribunal may be able to resolve the dispute.

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7.15.5 Jurisdictional Attempts to Limit the Arbitrability of Claims Involving Insolvent Parties

Different States have differing views as to the degree to which they wish to centralise insolvency claims. The less they are inclined to do so, the more they are likely to accept party autonomy where arbitration is concerned. Some countries (e.g., Spain, (302) Latvia, (303) The Netherlands (304) and Poland (305)) purport to render an arbitration agreement void or inoperative in the event of insolvency of a party to it. Other jurisdictions require a stay, and provide that arbitration may commence or continue with consent from the trustee, the creditors' committee or by court order. Stay of proceedings may be required in Italy although this is unclear. (306) At the most liberal extreme (307) are countries such as Switzerland, France (308) and Germany (309) where insolvency will not affect arbitrability

under domestic law. (310) The US courts apply a rule of reason and will generally allow an arbitration to proceed 'unless doing so would seriously jeopardise the objectives of the [Bankruptcy] Code.' (311)

Where restrictive laws apply, if these do not emanate from the Seat, a tribunal will need to consider whether they apply as mandatory substantive laws. (312)

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Less clear is whether arbitration proceedings should be stayed even if the agreement is not invalidated by the bankruptcy. Some would argue that this is a discretionary matter for the tribunal. Certainly the parties themselves could agree to stay their arbitration pending the outcome of insolvency determinations. Where the parties are not in agreement, a tribunal's consideration of a stay application would depend on the attitude of the Seat and whether it would consider this to be a matter of public policy. (313) While some commentators consider that allowing a stay may be 'contrary to the goal of arbitration' (314) it may also be useful in particular cases to allow a brief stay to enable a trustee to become familiar with the issues in the arbitration. Where such a stay is necessary to ensure that procedural fairness norms are upheld, then it may be considered compulsory. (315) Alternatively, a stay may be required to allow domestic courts to decide a core issue which is non-arbitrable. (316)

7.15.6 Choice of Law: To What Extent, and in What Manner, Should the Tribunal Take into Account the Insolvency of a Party?

Where domestic insolvency laws exist that would seek to confine the tribunal's jurisdiction (e.g., by providing that an insolvent entity cannot be a party to arbitration), the arbitral tribunal may undertake a choice of law analysis to determine whether it is bound by those laws. Section 13.8 looks more generally at the problem of the application of supposedly mandatory substantive laws. There are diverse views on this more general question. Attitudes to that question will obviously impact on one's views about the proper methodology for dealing with insolvency scenarios.

Because of differing views on this issue, differences between conflicts and direct choice regimes, different approaches to characterisation and overriding discretions as to applicable law, one would not expect consistent approaches by tribunals. Some of the uncertainties are well shown by the 2009 dispute between Vivendi SA and Elektrim SA. The
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case demonstrates the importance of the characterisation stage. In summary, *Elektrim* concerned the acquisition by Vivendi, a French company, of an interest in a Polish telecommunications company in which Elektrim, a Polish company, had a significant interest. The transaction failed and arbitrations were initiated in both England and Switzerland. After the proceedings had been initiated, Elektrim was declared insolvent (by its own petition). (317) The English proceeding related to an alleged breach by Elektrim of an investment agreement where the subsidiary interest was sought to be acquired. The Swiss proceeding related to a settlement agreement of a prior dispute which itself contained an arbitration clause. Elektrim argued in both the English and Swiss arbitrations that, due to a provision of Polish law, it could not continue with the arbitrations. The provision (being Article 142 of the Polish Bankruptcy and Reorganisation Law) provides as follows:

Any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued.

Thus Polish law purported to apply as a mandatory norm to remove the validity of each arbitration clause. The English and Swiss tribunals took different approaches to the characterisation of the question raised by this provision. The Swiss approach was to characterise the issue as one relating to Elektrim's capacity to participate in an arbitration. Swiss law provided that capacity was a question determined according to a party's law of incorporation, and accordingly applied the prohibitive Polish provision. Accordingly, the arbitration was discontinued. This position was upheld by a split decision in Swiss courts (318) when Vivendi challenged the award on the basis that the tribunal had wrongly refused jurisdiction. However, the English tribunal applied English law to determine the choice of law rule relevant to the effect on arbitration proceedings of the insolvency of a party. The parties were in agreement that the arbitration agreement was governed by English law while the balance of the contract was subject to Polish law. The relevant choice of law rule was found in Article 15 of the European Insolvency Regulation, which states:

The effects of insolvency proceedings on a lawsuit pending concerning an asset or right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

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That provision is an exception to the general norm of the insolvency regulation to the effect that the law of the State where insolvency proceedings has been opened governs the effect of such proceedings. (319) As the 'lawsuit pending' (a term held in the instant case to include arbitrations) was seated in England, the tribunal used this choice of law rule to identify English law as relevant to determining the effect of Elektrim's insolvency on the arbitration. English law did not prevent the arbitration continuing despite the insolvency

of a party, and accordingly, the tribunal considered that the arbitration should proceed. The trustee for Elektrim took this issue to the English courts, and, broadly speaking, the tribunal's position was upheld.

The differing approaches in the *Elektrim* dispute accordingly resulted in diametrically opposing outcomes and demonstrate the critical role of characterisation in initially charting the tribunal's course of reasoning. Responses to the case tend to be based on commentators' views as to whether party autonomy should in most instances be supported. For example, it is suggested that 'the whole conflict of law process should be governed by the idea that party autonomy should be restricted as little as possible'. (320) However, there is no recipe for ensuring that the 'correct' characterisation is arrived at. As a starting point, Kröll suggests considering first whether what needs to be characterised is a 'particular rule of law pleaded by one of the parties', or 'the more general question of the effects of a foreign insolvency on an ongoing arbitration'. (321) Markert points out that the Swiss case could have come to a different conclusion if it began with the question of the validity of the arbitral agreement and not capacity per se. When considering validity under Article 178(2) of SPILA, the relevant law would be that chosen by the parties, the law governing the dispute or Swiss law. The provision allows for application of whichever law will provide for validity. (322) This may help to guide the tribunal toward deciding which conflict of law rule to choose, and from there the matter becomes more straightforward. Any approach building solely on validity and capacity will be problematic. As has been pointed out, the approach in the Swiss case which looks at capacity will effectively apply any national law that purports to interfere with arbitration. (323) It has also been argued that national laws that purport to undermine ● arbitration agreements could run counter to a State's obligations under Article II(3) of the New York Convention. (324) New York Convention provisions have to be considered in the context of subject matter being capable of settlement by arbitration.

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7.15.7 The Role of the Seat

If a specific rule is contained in the *lex arbitri*, that would prevail. If it is contained in the insolvency law of the Seat, there are more ambiguous jurisdictional and consent issues that arise. If the parties selected the Seat, were they selecting the insolvency regime or only the arbitral regime? From a jurisdictional perspective, did the legislature in the Seat intend the insolvency rules to apply to neutral arbitrations under its international arbitration regime?

One other variable is whether the government in the Seat has at least adopted a provision such as the EU Insolvency Regulation or the UNCITRAL Model Law on Cross-Border Insolvency. (325) Where the latter is concerned, it merely refers to 'proceedings' but does not otherwise expressly indicate whether it intends to cover or leave out arbitration. Where provisions of this nature apply, the Seat has indicated how it wishes to deal with the conflict between arbitral consent and universality in insolvency regulation. Where the *lex arbitri* is clear that should be determinative. Where there is deference to universality generally, but ambiguity as to whether this applies to arbitration, one might generally presume that jurisdiction supporting universality would not wish to distinguish between litigation and arbitral proceedings. That is only a policy presumption and it is entirely possible that a particular jurisdiction wants to promote its arbitral neutrality with commensurate financial gain and would not want the same solution applying to each.

7.15.8 Other Practical Issues

7.15.8.1 Insolvency and the Entity Relevant to the Arbitration

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Declaration of insolvency has varying consequences for the insolvent entity and the legal characterisation of its connection with its assets. The trustee of those ● assets may continue to deal with them as if it stood in the shoes of the insolvent, or the estate may take an assignment or transfer of those assets. This may raise a question of which entity is party to the arbitration agreement. For example, where an estate takes a transfer or assignment of the insolvent's assets, the assignee may argue that it is not bound by arbitration agreements entered by its predecessor. However, it is generally considered that an insolvency trustee may be a party to an arbitration in just the same way as the now-insolvent entity. More troubling is whether the insolvency trustee has an election as to whether to be bound or not. As noted above, this can vary between jurisdictions.

In addition, the appointment of a trustee should prompt a review of the arbitral tribunal (where one has already been established) to ensure that the arbitrators have no relationship or association with the trustee that could constitute a conflict of interest. Similarly, it should be confirmed that counsel for the insolvent party may continue to act. (326) A further administrative point to consider is whether the insolvency precipitates any change in notice details or requirements as a failure to give proper notice may leave the award vulnerable to challenge. Staying proceedings to notify the trustee is also highly relevant from a due process perspective if that person becomes the one who will now speak for the arbitral party. Proceedings may be stayed to allow an administrator to form a view where the latter has a discretion as to which cases to settle and which to proceed with. Arbitral proceedings might also need to be stayed while the creditor registers claims under domestic insolvency norms. (327) Registration of claims may be required as a matter of public policy to ensure that the administrator's rights are not undermined through

ignorance. (328)

7.15.8.2 Ability to Pay Costs

Generally, costs of arbitration will be equally shared between the parties until such time as final costs orders are made. However, where one of the parties is or becomes insolvent, it may be unable to pay such costs, either because it simply does not have sufficient funds or because it is prevented from making payments that prejudice other creditors. In these cases, the tribunal may invite the other (solvent) party to pay the insolvent party's costs in order to keep the arbitration on foot. The insolvent party may then be considered to be indebted to the solvent party in the amount of the costs, but again, the solvent party will need to join the other creditors in order to have this debt satisfied.

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If the solvent party refuses to pay the insolvent party's costs, then the tribunal may withdraw from the arbitration and the arbitration agreement will be considered unworkable. Cost determinations may be problematic from a due process perspective where an insolvent respondent wishes to bring counterclaims or have set-off defences considered. Where a company is solvent, a tribunal will often be entitled to say that it will only adjudicate claims and counterclaims by those funding the arbitration. It would be more problematic in an insolvency scenario where the insolvent is simply unable to do so. To hear the claims but not the cross-claims in such circumstances might lead to a general due process challenge or challenge on public policy grounds, although views may differ as to whether this ought to succeed.

A solvent party may wish to apply for security for costs as against an insolvent party that brings claims. As with an order to pay under an award, this may amount to a requirement for an unfair preferential payment at the expense of other creditors and may therefore be vulnerable to challenge. Where security is sought against a claimant, that should not be problematic as decisions by the relevant administrator are generally protected under the relevant national law. A difficulty would arise if an insolvent respondent sought to bring counterclaims or set-off entitlements that were subject to a distinct security for cost application. A tribunal would again have to consider due process implications in such circumstances. As noted above, many may feel reluctant to allow the claims but not the counterclaims in such circumstances, regardless of whether the respondent has the ability to pay or not.

7.15.8.3 General Due Process and Timing Issues

Depending on timing there may also be problems in terms of nomination of an arbitrator by the insolvent. Insolvency proceedings also aim at transparency, (329) which may pose problems for confidential arbitration. Other problems will arise if an insolvent simply refuses to take part in proceedings. Here a tribunal will simply treat the party in the same way as it would treat any other non-appearing respondent.

Complicated timing issues may also apply particularly where the arbitral proceedings are likely to take longer than consolidated insolvency proceedings in the governing jurisdiction. It would be problematic to delay the latter while arbitral proceedings are finalised. However, unduly constricting the timeframe for the arbitral proceedings could offend against due process norms. The procedural scenario may be different if the administrator is merely joined as a party rather than taking over the rights of the debtor entity. A tribunal might also need to consider the issue in the context of parallel proceedings where it is requested to recognise the foreign insolvency actions.

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7.15.8.4 Enforcement

In determining the extent to which it heeds domestic requirements in relation to insolvent entities, the tribunal may wish to consider the effect of its decisions on the likelihood that its award will be enforced in the countries where the insolvent entity has assets. In particular, aspects of insolvency law may be considered to be part of a given jurisdiction's public policy or mandatory law. Also, on a practical level, the insolvent party may not have sufficient assets to satisfy the eventual arbitral award. As is argued throughout, however, the duty to render an enforceable award should not cause a tribunal to act differently on questions of arbitral validity and capacity where they arise from time to time.

Where the claimant wishes to continue with the arbitration regardless of the possibility that the insolvent entity might be unable to satisfy the award, or the possibility that the award will be blocked in its country of enforcement due to relevant laws considered mandatory in that country, it is suggested that the tribunal should accept this, as ‘no one knows best what suits the party's interests than the party itself’. (330) Effectively, the claimant ought to be allowed to accept the risk that the arbitral award will not be enforceable (whether from a practical or a legal standpoint). Furthermore, a tribunal may simply choose to make a determination on the merits without doing so in an immediately enforceable manner. It might simply make an order or direction as to entitlement or could specifically indicate that enforcement is not to take priority over the rights of creditors. This would also be contentious as the pro-arbitration proponents could naturally argue that the agreement was to have a final and binding award and a tribunal should not refrain

from producing this outcome without clear legal justification for doing so. (331)

7.15.8.5 Executory Contracts

A tribunal might also need to consider what attitude it will take to the underlying rights and obligations of the parties where there are still aspects of the contract to be performed. While the insolvency issues typically apply to jurisdiction and procedural questions, they can also apply to the merits. For example, insolvency laws may indicate what is to occur with executory contracts or may consider the underlying contract in its entirety and improper dealing where it arises after there is de facto insolvency. It may also apply if the insolvency laws granted an administrator the right to cancel contracts in appropriate circumstances.

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7.15.8.6 Determination in Relation to Assets Subject to the Insolvency Proceedings

The final scenario is where neither party is insolvent but insolvency proceedings purport to claim rights over assets subject to the arbitration itself. In many cases, a tribunal is simply identifying the inter-party rights. A tribunal certainly cannot make determinations binding on third parties although this will be the practical implication if an inter-party determination allows one to deal with an asset in a way contrary to the desires of an insolvency administrator.

7.16 Amicus Curiae

An 'amicus curiae', or literally 'friend of the court', is an entity which is not a party to a proceeding but which requests an opportunity to provide (or is invited to provide) information or perspective to the adjudicator in order to round out the adjudicator's understanding of the dispute and its broader context. The concept originates in common law courts, applying to a '"neutral bystander" engaged by a court to provide impartial assistance', (332) but it is not uncommon for third parties to now seek to make submissions to international arbitration tribunals, in particular in investor–State investment disputes. In such circumstances the tribunal will need to consider whether to allow the third party's involvement, and in doing so will need to consider how this may affect the parties (at least one of which may object to the involvement of the third party).

7.16.1 What is an Amicus Curiae?

The amicus curiae, as noted above, is not a party to the arbitral proceeding. (333) The amicus curiae is an entity (e.g., non-governmental organisations, academic institutions, not-for-profit organisations (334) or governmental organs such as competition or antitrust regulators, (335) as well as indigenous groups and business associations) (336) that has an interest in the outcome of the dispute, and which also has expertise in an aspect of the subject matter related to the dispute. The amicus' interest and expertise may involve aspects of public policy, regulation or environmental protection, and in any case has tended to revolve around questions of the public interest on which the arbitral proceedings have some bearing and which the actual parties to the dispute may not bring to the tribunal's attention.

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7.16.2 Apparent Tension between Acceptance of Submissions from Amici Curiae and the Goals of Arbitration

The potential involvement of amicus curiae airing public interest considerations in international commercial arbitration may seem to be at odds with the generally private nature of such proceedings. In particular, it will generally be the case that at least one of the parties to the arbitration will object to the tribunal's acceptance of submissions or evidence from third parties. (337) The parties are likely to find themselves arguing a broader range of points than would have been necessary if there was no third-party intervention, the arbitration will take longer as the submissions of the amicus curiae are considered and argued and the tribunal may need to exert some additional effort in order to reflect its consideration of the amicus' submissions in its award. These consequences of amicus curiae involvement will increase costs for all parties involved, and may raise points of fact or law that are disadvantageous for one or more parties to the dispute. Costs orders cannot be made against an amicus and it is not necessarily clear whether the parties would bear the additional costs associated with the amicus' participation equally or whether the losing party would bear them. Furthermore, the acceptance of amicus curiae submissions is not generally explicitly countenanced within rules of arbitral procedure, and accordingly it could be argued that acceptance of such submissions goes beyond the tribunal's mandate as implied by the parties' consent.

However, in certain circumstances tribunals may feel significant pressure, or consider that there is significant benefit, in at least considering the acceptance of amicus submissions. Specifically, amicus submissions have been accepted in disputes which have a strong public interest dimension, in particular investor-State and competition law disputes, as tribunals may feel that allowing involvement of third parties who will advocate broader public interest considerations may mitigate a public perception that private arbitration is not a desirable method for resolving disputes involving sovereign States.

Amicus submissions had their arbitration debut in the 2001 *Methanex* case. This was an investor-State dispute brought by a Canadian producer of ethanol (Methanex Corporation) against the US in respect of a ban in California on an ethanol-derived fuel additive. The ban was motivated by public health and environmental considerations. Methanex
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considered that the ban was 'arbitrary, unfair ● and not based on credible scientific evidence' (338) and that it would cost Methanex close to USD 1 billion. An arbitral tribunal was established pursuant to Chapter 11 of NAFTA using the UNCITRAL arbitration rules. The International Institute for Sustainable Development (USD), an NGO, petitioned the tribunal requesting the ability to submit an amicus curiae brief, and also to be granted observer status and to make oral submissions. The USD wished to raise 'critical legal issues of public concern', including environmental considerations, and also suggested that the acceptance of its brief would help to create a perception of transparency and stakeholder involvement in the outcome of the dispute. (339) From a technical perspective, USD argued that the tribunal had jurisdiction to accept its brief under what is now Article 17(1) of the UNCITRAL rules (340) (at the time of the *Methanex* dispute the relevant article was Article 15(1)). Broadly speaking, the tribunal found that it had jurisdiction to accept USD's written amicus submission under the UNCITRAL rules. (341) The tribunal also considered that any extra burden on the parties flowing from acceptance of the amicus brief would not be 'inevitably excessive' and that its acceptance did not appear to present any immediate risk of unfairness.

7.16.3 Considerations for Tribunals when Deciding whether to admit amicus briefs

A petition from an aspiring amicus curiae raises a variety of issues for consideration by the tribunal. First, the tribunal will need to determine whether it has jurisdiction to accept the brief (as well as other requests that the amicus might have, such as a request for observer status, or for access to key arbitral documents) under its procedural rules. Most arbitral rules will probably not include specific provisions allowing a tribunal to accept submissions from third parties. In such cases, a tribunal might rely upon a general power to conduct the proceedings in a manner that does justice between the parties. Indeed, as noted above, in *Methanex* the tribunal considered that the general power to preserve
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equality and fairness under what is now Article 17(1) of the UNCITRAL rules provided sufficient jurisdiction for the acceptance of written submissions in the absence of any ● contrary rule. However, following the advent of amicus briefs in various investor–State arbitrations, the International Centre for the Settlement of Investment Disputes (ICSID) changed its arbitration rules in 2006 to provide specifically for the possibility of admitting amicus submissions, and also set out various criteria for the tribunal to consider when deciding whether to accept the submission. Rule 37(2) of the ICSID Arbitration Rules provides:

> (2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Also of interest is Article 32(2) of the ICSID Rules, which relates to participation in oral hearings:

> (2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

If a tribunal determines that the relevant procedural rules allow, in principle, for the admission of third-party submissions or other third-party involvement, it will then need to consider various practical aspects, most of which are included in paragraphs (a) to (c) of

Rule 37(2). Those considerations include an evaluation of the likely value of any insight that the aspiring amicus will provide. Part of this evaluation could include the apparent competence of the aspiring amicus as part of consideration of whether the proposed entity is suitable for inclusion as an amicus. In particular, the tribunal should consider the 'background and accountability of potential amici curiae'. (342)

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A potential amicus may also request access to key arbitral documents. This occurred in the *Methanex* dispute, where the tribunal declined such access on the basis that it did not have jurisdiction to release those documents, and in another dispute (the *Biwater v. Tanzania* (343) dispute) on confidentiality grounds. The tribunal in *Biwater* further noted that it expected the amicus to provide its perspective on 'broad policy issues' (344) and not on specific legal or factual points. This should not be a blanket rule as the distinction is somewhat hard to maintain. If a broad policy issue has no relevance to questions of law or fact, it should not trouble a tribunal. More contentious is access to documents. All other things being equal, the quality and relevance of an amicus submission is likely to be enhanced if an aspiring amicus is allowed to see key arbitral documents. It has been argued (345) that this is the preferred position and that confidentiality concerns could be dealt with using appropriate and commonplace measures for ensuring confidentiality, but apparently a tribunal is yet to allow such access.

In order to limit the additional burden on the proceedings exerted by the admission of an amicus brief, the tribunal may set out specific requirements in relation to the brief and its format, including a page limit. The tribunal may set out specific requirements for petitioners, as occurred in the *Biwater v. Tanzania* dispute. In that dispute the tribunal required that the petitioners provide: (346)

(a) The identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the parties in the dispute.

(b) The nature of the petitioner's interest in the case.

(c) Whether the petitioner has received financial or other material support from any of the parties or from any person connected with the parties in this case.

(d) The reasons why the Tribunal should accept the petitioner's amicus curiae brief.

7.17 Third-Party Funding in International Arbitration

7.17.1 Introduction

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Recent times have shown a significant increase in third-party funding of domestic litigation and international arbitration. There are strong policy arguments either way that will not be explored to any degree in this book. Those in favour suggest that it may promote access to justice by parties without funds, allows risk to be spread and allows for expert appraisers to ensure that claims are properly valued. Contrary arguments are that there may be conflicts of interest, ignorant parties may be faced with unfair funding contract terms and may lose control over their own adversarial process. Whatever the arguments at the domestic level, international arbitration would have less in the way of regulatory mechanisms to maximise the benefits and minimise problems if such mechanisms are to be pursued, hence the debate is more problematic again.

In any event, it is already a phenomenon and the aim in this section is simply to highlight the procedural and evidentiary issues that may flow as a result. Section 15.12.4 deals separately with the question of whether a successful party seeking costs recovery may have this evaluated in the context of its third-party funding arrangements. A tribunal would not normally consider itself as having a power to award costs as against a third-party funder, not a party to an arbitration agreement.

7.17.2 Powers, Rights and Obligations of Third-Party Funders

This section simply seeks to highlight potential problems facing a tribunal, as it is an area of some uncertainty. (347) The issues should be looked at from a range of perspectives. A number of important questions arise as between the party and a third-party funder that it enters into any relationship with. The first question is whether such an arrangement is legal under the relevant domestic law, whichever that may be. Other issues are whether the third-party funder will have ultimate control over what claims can be brought or defended, over what resources to allocate and whether and on what terms settlement may be effected. Where resources are concerned, there is a question as to whether advances to be provided by the third-party funder are to be conditional on any demands made by them. In relation to all matters, funders may vary from those who seek to exercise ultimate control, to those who demand consultation at each stage, to those at the other extreme that wish to distance themselves from the conduct of the proceedings once the investment decision has been taken. Another question is whether the third-party funder will have access to confidential information pertaining to an arbitration while first vetting the case

for investment purposes and during the currency of the proceedings.

In some cases, the contractual relationship between the third-party funder and an investor in an investment arbitration may even lead to the funder arguing that it itself has investor rights under the relevant BIT. Other than in relation to this question, most issues are as between the party and the funder and would not directly constrain a tribunal. For example, if a claimant is unable to provide advances refused by a third-party funder, the normal responses should pertain ● as the claimant would presumably have been in a worse position absent the original funding decision. Where confidentiality is concerned, a tribunal would presumably apply the appropriate confidentiality rules as between the parties, although it would have little power to sanction any breach. Where settlement is concerned, in the extreme, if the tribunal thought that a settlement was unreasonable, it need not give it the imprimatur of an award.

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Where obligations are concerned, once again there are questions of confidentiality although the tribunal does not directly control the third-party funder. Because a tribunal may be asked to deal with document production requests, there may also be requested documents in the possession of the funder. If these meet the normal tests of materiality then there is no reason why an order should not be made, although again direct control may not be possible. Adverse inferences would be potentially applicable where the party had sufficient control over the third-party funder. Where the funder is acting in a way that displays a clear conflict of interest, a tribunal would presumably respond in the same way as if counsel acted in that manner.

7.17.3 Rights and Obligations of the Parties

The most important question is whether the parties would have a duty to disclose the presence and/or terms of a third-party funding arrangement to either other parties and/or the tribunal. One issue the parties need to consider is whether the disclosure of confidential material to a third-party funder could be said to be a waiver of privilege under the relevant law.

7.17.4 Rights and Obligations of the Tribunal

The most important issue from the tribunal's perspective is whether any links between an arbitrator and the third-party funder could compromise the tribunal in terms of impartiality and independence. (348) Given that the IBA Guidelines deal with shareholder interest in parties, because third-party funding arrangements are essentially investments, similar principles can readily apply.

The second key issue is in relation to the potentially negative impact on the tribunal's control over parties and counsel if behind the scenes third-party funders are making the key decisions. Once again a proactive tribunal can make the necessary orders against parties and counsel and may not need to directly involve themselves with third-party funders.

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References

*) The title to this chapter uses the descriptor from Bernard Hanotiau, *Complex Arbitrations, Multi Party, Multi Contract, Multi-Issues and Class Actions* (The Hague: Kluwer Law International, 2005).

1) These questions have largely been drawn from Bernard Hanotiau, 'Introduction', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010) 7.
2) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 350.
3) This is the purpose behind the express mandate to bring set-off claims under the Swiss Arbitration Rules 2012 Art. 21.5.
4) Parties can also always agree to modifications and tribunals sometimes will invite agreement but cannot force it. An example of such an invitation was in the *Sofidis* case. Interim Award No. 2 in ICC Case No. 5124 (unpublished) cited in Klaus Peter Berger, 'Setoff in International Economic Arbitration', (1999) 15 *Arbitration International* 53, at 65 (fn. 88).
5) ICC Case No. 7453 of 1994 (1997) 124 Jnl du Droit Int'l (Clunet) 107.
6) For example, if an arbitration clause provides that claims are to be brought in an arbitration where the respondent's country is to be the seat, should a counterclaim also have that seat or was the intent to have any defender of a claim to be at 'home' during proceedings? See Vladimir Pavić, 'Counterclaim and Set-Off in International Commercial Arbitration', *Annals International Edition*, 2006, 105.
7) Nicholas Ulmer, 'Winning the Opening Stages of an ICC-Arbitration', *Journal of International Arbitration* 8 (1991): 33, 42; Fletcher, 'Unrealised Expectations – The Root of Procedural Confusion of International Arbitrations', *Arbitration International* 4 (1988): 1, 40, 42.

8) Laurence Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn (2000), 150.
9) Bernard Hanotiau, 'Complex Arbitrations: Multi-Party, Multi-Contract, Multi-Issue and Class Actions', *Arbitration International* 14 (1998): 369, 371.
10) Philippe Leboulanger, 'Multi-Contract Arbitration', 13(4) *J Int'l Arb* 43 (1996), 43.
11) Jean-Francois Poudret & Sebastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), ¶ 312.
12) Laurence Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn (2000), 150, 647.
13) ICC Case No. 12171, Award on Third Person Notice, 7 April 2004, *B., Claimant v. K., Respondent, ASA Bulletin* 23 (2005), 271.
14) Martin Platte, 'Multi-party Arbitration: Legal Issues Arising out of Joinder and Consolidation', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. Emmanuel Gaillard & Domenico Di Pietro (London: Cameron May, 2008), 481.
15) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 343.
16) Eric A. Schwartz, 'Concluding Remarks', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 235, 236.
17) Bernard Hanotiau, *Complex Arbitrations, Multi Party, Multi Contract, Multi-Issues and Class Actions* (The Hague: Kluwer Law International, 2005); Bernard Hanotiau, 'Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law', in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics*, ICCA Congress Series No. 13, Alphen aan den Rijn: Kluwer Law International, 2006, 341; see also Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 343.
18) See, e.g., l'Arbitrage et les tiers, in *Revue de l'Arbitrage* 3 (July–September 1988): 429–556. *Multi-Party Arbitration: Dossiers of the Institute of International Business Law and Practice*, ICC Pub No. 480/1; Final Report of the ICC Commission on Arbitration, *Multi-Party Arbitrations* (Chairman Jean-Louis Delvolvé), ICC Court of Arbitration Bulletin 6 no. 1 (May 1995); *Complex Arbitrations: Perspectives on their Procedural Implications*, ICC International Court of Arbitration Bulletin, Special Supplement (2003).
19) See, e.g., the comprehensive analysis in Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 343–410.
20) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 344–345.
21) See, e.g., Karin Youssef, 'The Limits of Consent: The Right or Obligation to Arbitrate of Non-Signatories in Group of Company', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010) 71, 93; Bernard Hanotiau, *Complex Arbitrations, Multi Party, Multi Contract, Multi-Issues and Class Actions* (The Hague: Kluwer Law International, 2005), 8–9.
22) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 347.
23) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 348.
24) John M. Townsend, 'Extending an Arbitration Clause to a Non-signatory Claimant or Non-signatory Defendant: Does It Make a Difference?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010) 111, 114.
25) Costs are considered in Chapter 15.
26) Fernando Mantilla-Serrano, 'Multi Parties and Multiple Contracts: Divergent or Comparable Issues?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010) 25.
27) Yves Derains, 'Is There a Group of Companies Doctrine?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 138.
28) Stephen R. Bond, 'Dépeçage or Consolidation of the Disputes Resulting from Connected Agreements: The Role of the Arbitrator', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 35.
29) Noah Rubins, 'Group of Companies Doctrine and the New York Convention', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. E. Gaillard & D. di Pietro (London: Cameron May, 2008), 450.
30) *Ibid.*, 459.
31) *Ibid.*, 466.
32) See *ibid.*, 466–468.
33) A number of these questions were raised by Eric A. Schwartz, 'Concluding Remarks', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 235, 238.

34) Cristián Comejero Roos, 'Multi-Party Arbitration and Rule-Making: Same Issues, Contrasting Approaches', in *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 411, 415.
35) Marc Blessing, 'Extension of the Arbitration Clause to Non-signatories', *The Arbitration Agreement – Its Multifold Critical Aspects* (ASA Special Series No. 8, 1994), 151, 162.
36) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 354–355.
37) Swiss Rules 2012 Art. 3 contemplates multiple parties but only as 'claimants' or 'respondents'. A broader articulation is found in Art. 8.1 of the LCIA Rules.
38) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 351.
39) Judgment of 7 January 1992, *Société BKMI & Siemens v. Dutco*, French Cour de Cassation, *Revue de l'Arbitrage* (1992): 470. Platte suggests that where the parties who must jointly appoint an arbitrator reach an agreement, equality of treatment is maintained. In such cases, the right for each party to appoint an arbitrator need not be treated as sacrosanct. Martin Platte, 'Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, E. ed. Gaillard & D. di Pietro (London: Cameron May, 2008), 493.
40) Anne Marie Whitesell & Eduardo Silva-Romero, 'Multi-Party and Multi Contract Arbitration: Recent ICC Experience', in *Complex Arbitrations, Perspectives on their Procedural Implications*, ICC Ct. Bull, Special Supplement (2003), 7 at 12.
41) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 363.
42) Jean-Francois Poudret & Sebastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 202.
43) In addition to the ICC Rules, other rules that follow a similar post-*Dutco* approach include Art. 13 DIS Rules; Art. 8 LCIA Rules; and Art. 8.5 Swiss Rules 2012. Art. 10 of the UNCITRAL Rules 2010 allows for whatever method the parties have agreed and absent specific agreement, multiple parties as claimant or respondent shall appoint an arbitrator. Where there is a failure to constitute the tribunal the appointing authority shall, at the request of any party, constitute the tribunal and may revoke any appointment already made and appoint or re-appoint each of the arbitrators and designate one of them as presiding arbitrator.
44) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 363–364.
45) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2102.
46) Anne Marie Whitesell & Eduardo Silva-Romero, 'Multi-Party and Multi Contract Arbitration: Recent ICC Experience', in *Complex Arbitrations, Perspectives on their Procedural Implications, ICC* Ct. Bull., Special Supplement 2003, 7 at 12.
47) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 365.
48) For the proposition that they might be treated as one and would normally be expected to agree upon an arbitrator, see Yves Derains, 'Is There a Group of Companies Doctrine?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010) 143.
49) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 356; as to conflicts enquiries, see section 5.10.5.
50) Bernard Hanotiau, Complex Arbitrations, *Multi Party, Multi Contract, Multi-Issues and Class Actions* (The Hague: Kluwer Law International, 2005), 218.
51) The problems that may arise with parallel arbitrations and some potential solutions are examined by Hanotiau. Bernard Hanotiau, *Complex Arbitrations, Multi Party, Multi Contract, Multi-Issues and Class Actions* (The Hague: Kluwer Law International, 2005), 218–225.
52) Bernard Hanotiau, 'Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law', *ICCA Congress Series No. 13*, 341, 343. Born also notes that extension is an inappropriate expression as the question is to determine who has truly consented to an identified arbitration agreement. Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1139.
53) See, e.g., *Motorola Credit Corp. v. Uzan* 388 F. 3d 39 (2d Cir 2004).
54) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 348.

55) James M. Hosking, 'The Third Party Non-signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent', *Pepp. Disp. Resol. L.J.* 4 (2003): 483–485.
56) See, e.g., Dr Otto Sandrock, 'Extending the Scope of Arbitration Agreements to Non-signatories', in *The Arbitration Agreement – Its Multifold Critical Aspects*, A.S.A. Special Series No. 8 (December 1994): 169. The US case of *Thomson-CSF S.A. v.American Arbitration Association* has sought to articulate the various theories that flowed from traditional notions of contract, privity, agency and corporate law. 64 F. 3d 773 (2d Cir 1995).
57) There are some cases particularly in the US where the corporate officer has been accepted as party to the arbitration clause largely to provide it with personal protection. Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1146–1147. It could also be sought to be extended where the officer is also the controlling ultimate owner.
58) Born notes but criticises the view that the law applicable is that of the alleged agency agreement. Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1147.
59) This is the approach adopted under the Hague Convention of 14 March 1978 on the Law Applicable to Agency, Art. 11.
60) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1150.
61) *Ibid.*, 1148.
62) This approach to interpretation was discussed in section 3.2.4.
63) In the absence of other evidence, that person's intent might even be best demonstrated by the law of agency they believe they are subject to, if that could be known with confidence.
64) *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith* 7 F. 3d 1110 (3d Cir 1993), 1112.
65) 337 F. 3d 125 (2d Cir 2003).
66) Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 344, para. 716.
67) Daniel Girsberger & Christian Hausmaninger, 'Assignment of Rights and Agreement to Arbitrate', *Arbitration International* 8 (1992): 121. The authors note the complex choice of law problems where assignment arises.
68) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1192.
69) Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 147.
70) Anthony C. Sinclair, 'The Assignment of Arbitration Agreements', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. E. Gaillard & D. di Pietro (London: Cameron May, 2008), 413.
71) *Ibid.*
72) *Kaufman v. William Iselin & Co. Inc.* 272 A.D. 578, 74 N.Y.S. 2d 23 (1947); *Lachmar v. Trunkline LNG Co.*, 753 F. 2d 8, 9–10 (2d Cir 1985).
73) Anthony C. Sinclair, 'The Assignment of Arbitration Agreements', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. E. Gaillard & D. di Pietro (London: Cameron May, 2008), 394 and cases cited in fn. 61.
74) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1191.
75) See the *English Contracts (Rights of Third Parties) Act 1999*.
76) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1180.
77) *Sea-Land Service, Inc. v. The Islamic Republic of Iran*, Award No. 135-33-1 of 20 June 1984, 6 Iran–US Claims Tribunal Reports 149, 160–161.
78) Different results were obtained in the Swiss Federal Tribunal and an English court in *Tracomin S.A. v. Sudan Oil Feeds Co Ltd* [1983] 1 WLR 1026 and Swiss Tribunal Fédéral ATF 111 1b253 (1982) cited in Chartered Institute of Arbitrators: Guidelines for Arbitrators Dealing with Jurisdictional Problems in International Cases 119.
79) See, e.g., Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 344, para. 719.
80) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1198.
81) *Ibid.*, 1209.
82) *Ibid.*; Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 105; Jean-François Poudret & Sébastien Besson, *Comparative law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 290.
83) *Ibid.*, 1202.
84) *Dow Chemical v. Isover Saint Gavain*, Interim Award of 23 September 1982, ICC Case No. 4131, Yearbook IX (1984), 131; confirmed by the Paris Court of Appeal, Judgment of 21 October 1983, Rev Arb (1984), 98.
85) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1175.

86) Derains explores the Swiss response in that regard. Yves Derains, 'Is There a Group of Companies Doctrine?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 131, 136–137.
87) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1167.
88) While there had been some debate, the better view is that there is no distinct group of companies doctrine. An English court considered that the group of companies doctrine forms no part of English law in *Peterson Farms Inc. v. C & M Faming Ltd* [2004] 1 Lloyd's Rep 603 (QB).
89) Stephan Wilske, Laurence Shore & Jan-Michael Ahrens, 'The Group of Companies Doctrine – Where Is It Heading?', *Am Rev Int'l Arb* 17 (2006): 73.
90) Bernard Hanotiau, *Complex Arbitrations, Multi Party, Multi Contract, Multi-Issues and Class Actions* (The Hague: Kluwer Law International, 2005), 50.
91) Fernando Mantilla-Serrano, 'Multi Parties and Multiple Contracts: Divergent or Comparable Issues?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 13.
92) Yves Derains, 'Is There a Group of Companies Doctrine?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 142–143.
93) *Ibid.*, 140.
94) Noah Rubins, 'Group of Companies Doctrine and the New York Convention', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. E. Gaillard & D. di Pietro (London: Cameron May, 2008), 459.
95) *Ibid.*, citing Society of Maritime Arbitrators Partial Final Award No. 1510 of 28 November 1980, VII *Yearbook of Commercial Arbitration* 151 (1982).
96) Laurence Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn (2000), 150, para. 11.05.
97) Fernando Mantilla-Serrano, 'Multi Parties and Multiple Contracts: Divergent or Comparable Issues?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 13.
98) As to the latter see Award in ICC Case No. 5103, 115 J.D.I. (Clunet) 1206 (1988) and criticised in Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1169.
99) *J.J. Ryan & Sons v. Rhone Poulenc Textile, SA*, 863 F. 2d 315 (4th Cir 1988).
100) *J.J. Ryan & Sons v. Rhone Poulenc Textile, SA*, 863 F. 2d 315, 321 (4th Cir 1988).
101) *J.J. Ryan & Sons v. Rhone Poulenc Textile, SA*, 863 F. 2d 315, 320 (4th Cir 1988).
102) *Société V2000 v. Société Project XJ220ITD et Autie*, Paris Cour d'appel, 7 December 1994, Review de 1'Arbitrage (1996), 250, as translated in Fernando Mantilla-Serrano, 'Multi Parties and Multiple Contracts: Divergent or Comparable Issues?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 16–17.
103) *Société Alcatel Business Systems (AbS) et al. v. Société Ankor Technologies et al.*, Cour de Cassation, 27 March 2007, Pourvoi no. 04-20842, Revue de 1'Arbitrage (2007): 785 with a commentary by Jalal el-Ahdab, cited in Fernando Mantilla-Serrano, 'Multi Parties and Multiple Contracts: Divergent or Comparable Issues?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 17.
104) 129 S. Ct. 1896 (2009).
105) ICC International Court of Arbitration Bulletin 2 no. 2 (1991), 31, 34.
106) *Société V2000 v. Société Project XJ220ITD et Autie*, Paris Cour d'appel, 7 December 1994, Review de l'Arbitrage (1996), 245, Commentary by Charles Jarrosson, cited in Fernando Mantilla-Serrano, 'Multi Parties and Multiple Contracts: Divergent or Comparable Issues?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 16.
107) Partial Award in ICC Case No. 60, ICC Ct Bull 2 No. 2 (1991) 31, 34.
108) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1194.
109) *Deloitte Noraudit A/S v. Deloitte Haskins and Sells, US* 9 F. 3d at 1060 cited in James M. Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent', *Pepp. Disp. Resol. L.J.* 4 (2003–2004): 469, 531.
110) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1198.
111) 659 F. 2d 836 (7th Cir 1981).
112) Bernard Hanotiau, *Complex Arbitrations, Multi Party, Multi Contract, Multi-Issues and Class Actions* (The Hague: Kluwer Law International, 2005), 24.
113) 64 F. 3d 773 (2d Cir 1995).
114) See in the same vein *E.I. Dupont de Nemours v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F. 3d 187 (3d Cir 2001).
115) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1196-1197.
116) Corporate veil scenarios should not be confused with investment treaties that expressly grant shareholders status as investors. Here claims by the shareholder would relate to a distinct investment in law from that of the corporation, although the commercial essence may be identical.
117) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1154.
118) *Case Concerning the Barcelona Traction, Light & Power Co.* [1970] ICJ Rep 3, 38–39.

119) Daniel Girsberger & Christian Hausmaninger, 'Assignment of Rights and Agreement to Arbitrate', *Arbitration International* 8 (1992): 145–146.
120) Chartered Institute of Arbitrators: Guidelines for Arbitrators Dealing with Jurisdictional Problems in International Cases 119.
121) Sébastien Besson, 'Piercing the Corporate Veil: Back on the Right Track', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 147, 149.
122) *Ibid.*
123) Should national law apply or should it be based on some transnational standards? Sébastien Besson, 'Piercing the Corporate Veil: Back on the Right Track', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010) 147, fn. 15 and cases cited which take differing approaches.
124) England and Switzerland have been less inclined to look behind the corporate veil. As to Switzerland see ICC Case No. 4402/1983 1 Collection of ICC Arbitral Awards 153; ICSID Award on Jurisdiction in *Takios Takelés v. Ukraine* (Case No. ARB/02/18 available at <http://www.worldbank.org/icsid/cases/awards/htm>).
125) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1164–1165.
126) Sébastien Besson, 'Piercing the Corporate Veil: Back on the Right Track', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 147, 154.
127) For a discussion of the inconsistent *Bridas* cases see Derains and Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd edn (The Hague: Kluwer Law International, 2005), 86.
128) *Bridas SAPIC*, 345 F. 3d at 360; *Bridas SAPIC*, 447 F. 3d at 418.
129) Section 8.6 looks at pre-arbitral relief but this is consent based and is not relevant to this concern.
130) Georgios Petrochilos, 'Extension of the Arbitration Clause to Non-Signatory States or State Entities: Does it Raise a Difference?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 119, 122; see also *Svenska Petroleum Exploration AB* v. *Lithuania* [2006] EWCA Civ 755.
131) Georgios Petrochilos, 'Extension of the Arbitration Clause to Non-signatory States or State Entities: Does It Raise a Difference?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 119, 120.
132) Petrochilos criticises the case of *Zeevi Holdings v. Bulgaria and the Privatisation Agency of Bulgaria*, Final Award, 25 October 2006, available at <http://www.investmentclaims.com>, Georgios Petrochilos, 'Extension of the Arbitration Clause to Non-signatory States or State Entities: Does it Raise a Difference?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010) 119, 121–122, where the Republic of Bulgaria was accepted as a party alongside the privatisation agency.
133) Dissolution of the signatory State entity was seen as the key factor in ICC Case No. 7245. Interim Award of 28 January 1994 and cited in Karin Youssef, 'The Limits of Consent: The Right or Obligation to Arbitrate of Non-signatories in Group of Company', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 71, 95.
134) Georgios Petrochilos, 'Extension of the Arbitration Clause to Non-signatory States or State Entities: Does It Raise a Difference?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010) 119, 124.
135) Court Appeal of Paris, 12 July 1984, *République Arabe d'Egypte v.Southern Pacific Properties (SPP)* [1986] Rev Arb 75.
136) Award in ICC Case No. 8035, 124 J.D.I, (Clunet) 1040 (1997).
137) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1204.
138) *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755.
139) Georgios Petrochilos, 'Extension of the Arbitration Clause to Non-signatory States or State Entities: Does It Raise a Difference?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 119, 126.
140) *Svenska Petroleum Exploration AB v. Lithuania* [2006] EWCA Civ 755.
141) Final Award in ICC Case No. 9762, *Yearbook of Commercial Arbitration* 29 (2004), 38. The reasoning is criticised by Petrochilos on the basis of mixing private law and international law concepts. Georgios Petrochilos, 'Extension of the Arbitration Clause to Non-signatory States or State Entities: Does It Raise a Difference?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 119, 123.
142) But see the contrary outcome in *Bridas SAPIC et al. v. Turkmenistan et al. (Bridas II)* 447 F. 3d 411 (5th Cir 2006) paras 26–20.
143) Cristián Comejero Roos, 'Multi-Party Arbitration and Rule-Making: Same Issues, Contrasting Approaches', in *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer 2009), 411, 415.
144) Richard Bamforth & Katerina Maidment, '"All Join In" or Not? How Well Does International Arbitration Cater for Disputes Involving Multiple Parties or Related Claims?', *ASA Bulletin* 27, no. 1 (2009), 3:20.
145) James M. Hosking, 'The Third Party Non-signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent', *Pepp. Disp. Resol. L.J.* 4 (2003–2004): 469, 569.

146) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1152.
147) Cour de Cassation, 26 Int'l Legal Material 1004 (1987). (Commonly referred to as the 'Pyramids' case.)
148) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 405.
149) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 357.
150) William W. Park, 'Arbitrators and Accuracy', *Journal of International Dispute Settlement* 1, no. 1 (2010): 25, 46–47.
151) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1164.
152) This is discussed in section 3.2.3.
153) Interim Award in ICC Case No. 9517, cited in Bernard Hanotiau, *Complex Arbitrations, Multi Party, Multi Contract, Multi-Issues and Class Actions* (The Hague: Kluwer Law International, 2005), 97.
154) John M. Townsend, 'Extending an Arbitration Clause to a Non-signatory Claimant or Non-signatory Defendant: Does It Make a Difference?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 111, 117.
155) Karin Youssef, 'The Limits of Consent: The Right or Obligation to Arbitrate of Non-signatories in Group of Company', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 71, 93; Bernard Hanotiau, *Complex Arbitrations, Multi Party, Multi Contract, Multi-Issues and Class Actions* (The Hague: Kluwer Law International, 2005), 8–9.
156) See generally Karin Youssef, Consent in *Context: Fulfilling the Promise of International Arbitration* (Minneapolis: West, 2009).
157) Noah Rubins, 'Group of Companies Doctrine and the New York Convention', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. E. Gaillard & D. di Pietro (London: Cameron May, 2008), 449, 457.
158) The *Orri* case cited in Yves Derains, 'Is There a Group of Companies Doctrine?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 139, Cour de Cassation, 11 June 1991, Review de 1'Arbitrage (1992), 73 with a note by D Cohen.
159) Bernard Hanotiau, 'Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law', in *International Arbitration – Back to Basics?*, ICCA Congress Series No. 13, ed. Albert Jan van den Berg (Alphen aan den Rijn, Kluwer Law International, 2007), 341, 353.
160) Karin Youssef, 'The Limits of Consent: The Right or Obligation to Arbitrate of Non-signatories in Group of Company', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 71, 81.
161) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 352; Kristina M. Siig, 'Multi-Party Arbitration in International Trade: Problems and Solutions', *International J Liability and Scientific Inquiry* 1, no. 1/2 (2007): 72, 76.
162) Georgios Petrochilos, 'Extension of the Arbitration Clause to Non-signatory States or State Entities: Does It Raise a Difference?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 119, 121; Sébastien Besson, 'Piercing the Corporate Veil: Back on the Right Track', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 147, 154.
163) Sébastien Besson, 'Piercing the Corporate Veil: Back on the Right Track', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 147, 154; Georgios Petrochilos, 'Extension of the Arbitration Clause to Non-signatory States or State Entities: Does it Raise a Difference?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 119, 121.
164) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1142.
165) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 355.
166) Poudret and Besson support the more restrictive argument 221 criticising a more liberal interpretation by the Swiss Federal Supreme Court, 16 October 2003, Av Z Sarl and Arbitral Tribunal ATF 129 III 727, in 22 ASA Bull (2004, no.2): 364.
167) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 1210–1211.
168) Articles II and V(1)(a) of the New York Convention.
169) Article V(1)(c) of the New York Convention.
170) Article V(1)(d) of the New York Convention.

171) Even an enforcement court, considering public policy questions may be found to prefer its own domestic notions of good faith, abuse of rights and veil piercing than those of the jurisdictions of the parties concerned. Separability may also mean that a different law applies to the extension of the arbitration agreement. See, e.g., *Eurosteel Ltd v. Spinnes AG* [1999] All ER 1394 (Con Ct).

172) *Altain Khuder LLC v. IMC Mining Inc and Anor* [2001] VSC 1.

173) Article 190(3) Swiss PILA.

174) Anne Marie Whitesell & Eduardo Silva-Romero, 'Multi-Party and Multi Contract Arbitration: Recent ICC Experience', in *Complex Arbitrations, Perspectives on their Procedural Implications*, ICC Ct. Bull., Special Supplement 2003, 7 at 12–14.

175) The following sections include material from Michael Pryles & Jeff Waincymer, 'Multiple Claims in Arbitrations Between the Same Parties', in Albert Jan van den Berg (ed.), International Council for Commercial Arbitration Congress Series 14, *Fifty Years of the New York Convention: ICCA International Arbitration Conference* (Alphen aan den Rijn: Kluwer Law International, 2009), 437–499 with the consent of the co-author.

176) Fernando Mantilla-Serrano, 'Multi Parties and Multiple Contracts: Divergent or Comparable Issues?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 14.

177) Mantilla-Serrano sought to analyse the similarities and differences between group of contracts and group of companies theory from the perspective of doctrinal questions, economic issues and procedural scenarios. Fernando Mantilla-Serrano, 'Multi Parties and Multiple Contracts: Divergent or Comparable Issues?', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 11.

178) Some commentators describe claims flowing in both directions between claimant and respondent as 'cross-claims'. This chapter refrains from using this term as others limit it to the quite discrete question of whether one respondent is able to bring separate claims as against other existing respondents or third parties. See, e.g., Eduardo Silva-Romero, 'Brief Report on Counterclaims and Cross-Claims: The ICC Perspective', in *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI*, 15 October 2004, 73.

179) That may raise semantic debates about the difference between a contract that 'relates' to another or which 'results' from another. There may still be problems if later contracts have incompatible clauses.

180) Jean-Francois Poudret & Sebastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), 268.

181) Pavić implies that this at first glance goes against the will of the parties but it depends whether the express agreement to arbitrate under the Swiss Rules provides the necessary consent per medium of the Article itself: Vladimir Pavić, *Counterclaim and Set-Off in International Commercial Arbitration*, Annals International Edition, (2006), 108.

182) Wolfgang Peter, 'Some Observations on the New Swiss Rules of International Arbitration', *ASA Special Series* 22 (2004): 1, 9.

183) Phillipe Leboulanger, 'Multi-contract Arbitration', *Journal of International Arbitration* 13 (1996): 43.

184) Bernard Hanotiau, 'Problems Raised by Complex Arbitrations Involving Multiple Contracts, Parties and Issues: An Analysis' *Journal of International Arbitration* 18 (2001): 253; Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (The Hague: Kluwer Law International, 2005).

185) Award of 21 October 1983 (1986) 2 ICSID Reports 9.

186) In another arbitration an arbitral tribunal, applying the law of Luxembourg, came to a different conclusion on the facts and did not consider two agreements as a single legal relationship because 'both the intentions of the parties and the language of the relevant legal instruments do not permit such an application'. ICC Award No 6829 of 1992.

187) Phillipe Leboulanger, 'Multi-contract Arbitration', *Journal of International Arbitration* 13 (1996): 46–47, 52–53.

188) Martin Platte, 'Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. Emmanuel Gaillard & Domenico Di Pietro (London: Cameron May, 2008), 489.

189) Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (The Hague: Kluwer Law International, 2005), 132.

190) An expert on banking law may take much more time to understand how a Hudson formula works in a construction damages dispute. A non-legally trained engineer may have more difficulty in considering the exceptions to immediate operation of a demand guarantee.

191) These issues can also apply to consolidation applications discussed in section 7.11.

192) Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 303–304 (fn. 262).

193) Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 301–306 (fns 264–267). *hover v. Dow Chemical Co.* (1984) Rev de l'Arb 137. An example is the award of 1 October 1980. In this case a set-off under a loan agreement was accepted in a claim under a sales contract that alone had an arbitration clause.

194) Jean-Francois Poudret & Sebastien Besson, *Comparative Law of International Arbitration*, 2nd edn (London: Sweet & Maxwell, 2007), ¶ 309.
195) Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 302–304 (fn. 255).
196) [1990] *Yearbook of Commercial Arbitration* 74.
197) (1983) Rev L'Arb 119. See also Paulsson and Veeder's comments on '*The Vimiera*' in (1986) 2 *Arbitration International* 310; Hanotiau, *supra* n. 3, 274–275 (fns 22, 23).
198) 198 Phillipe Leboulanger, 'Multi-contract Arbitration', *Journal of International Arbitration* 13 (1996): 77.
199) Anne Marie Whitesell & Eduardo Silva-Romero, 'Multiparty and Multi-contract Arbitration: Recent ICC Experience', in *ICC International Commercial Arbitration Bulletin Special Supplement* (2003) 7.
200) Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (The Hague: Kluwer Law International, 2005), 375.
201) For example, in ICC Case No. 5971, 13 *ASA Bulletin* 4 (1995), 728 a tribunal concluded that three separate agreements with differing arbitration clauses nevertheless all referred to the same purpose of the construction and operation of a new facility to be operated as a joint venture. They therefore formed a *unité économique.* As such, set-off claims arising in relation to the separate agreements could nevertheless come to be directly covered under the broad scope of the joint venture agreement. The only challenging conceptual question was in relation to set-off claims that exclusively arose from the agreements. The tribunal considered that because of the close interrelatedness of the three agreements, set-off claims arising under either one must be heard and considered by the tribunal under the principle *le juge de l'action est le juge de l'exception.* The tribunal did not pass on the conclusion it would have drawn if the set-off claims originated from a more 'distant' contract. Because of the closeness, the tribunal felt it would have needed a clear indication that the parties had the real intention to keep the three agreements totally separate from each other if it was to rule against set-off claims.
202) For example, ICC Case No. 4392, 110 *J.D.I. (Clunet)* 907 (1983) refused to extend an arbitration clause to a related agreement that had a jurisdiction clause.
203) Dutch Code of Civil Procedure Art. 1046. In Australia, the different Commercial Arbitration Acts of each State grant arbitral tribunals the power to consolidate arbitrations where the arbitrations share an arbitrator. Where the International Arbitration Act applies, consolidation may also be ordered under the UNCITRAL Model Law.
204) Article 22.1(h) LCIA Rules; Art. 4.2 Swiss Rules. At the other extreme, the rules might allow for the broadest category of reverse claims. An example 2012.
205) Price Waterhouse Report, 'international Arbitration: Corporate Attitudes and Practices', (2006):7.
206) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 346–347.
207) See, e.g., Art. 12 Cepani Rules.
208) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2068 fn. 4.
209) See, e.g., Art. 41 NAI Arbitration Rules.
210) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 389.
211) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2070.
212) Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 388.
213) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 359. For a contrary observation see Bernard Hanotiau, *Complex Arbitrations, Multi-Party, Multi-Contract, Multi-Issue and Class Actions* (Kluwer Law International, 2005), 165.
214) Martin Platte, 'Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. Emmanuel Gaillard & Domenico Di Pietro (London: Cameron May, 2008), 487.
215) Gary B. Born, *International Commercial Arbitration* (The Hague:Kluwer Law International, 2009), 2084.
216) *Ibid.*, 2076.
217) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 398.
218) Bernard Hanotiau, *Complex Arbitrations, Multi-Party, Multi-Contract, Multi-Issue and Class Actions* (The Hague: Kluwer Law International, 2005), 168.
219) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2087.
220) *Ibid.*, 2077.
221) See, e.g., Art. 1045 Dutch Code of Civil Procedure; Art. 1696*bis* Belgian Judicial Code.

222) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009): 387–388.
223) Anne Marie Whitesell & Eduardo Silva-Romero, 'Multi-Party and Multi Contract Arbitration: Recent ICC Experience', in *Complex Arbitrations, Perspectives on Their Procedural Implications*, ICC Ct. Bull., Special Supplement 2003, 7 at 11.
224) Richard Bamforth & Katerina Maidment, '"All Join In" or Not? How Well Does International Arbitration Cater for Disputes Involving Multiple Parties or Related Claims?', *ASA Bulletin 21, no.* 1 (2009): 3:13.
225) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 400.
226) New Zealand Arbitration Act Schedule 2 Art. 2; Hong Kong Arbitration Ordinance Art. 6B(1).
227) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2087.
228) Bernard Hanotiau, *Complex Arbitrations, Multi-Party, Multi-Contract, Multi-Issue and Class Actions* (The Hague: Kluwer Law International, 2005), 166–168.
229) Report of the Working Group on Arbitration and Conciliation on the work of its forth-sixth session, UN Doc. A/CN.9/619.
230) Secretariat Note A/CN.9/WG.II/NP.147/Add.1.
231) Working Group Report 619 para. 122; Markus Wirth, 'The Current Revision of the UNCITRAL Arbitration Rules', in *New Developments in International Commercial Arbitration*, ed. Christoph Müller (Zurich: Schulthess, 2007), 12 but contrast J. Paulsson & G. Petrochilos, para. 138 who argue to the contrary.
232) Markus Wirth, 'The Current Revision of the UNCITRAL Arbitration Rules', in *New Developments in International Commercial Arbitration*, ed. Christoph Müller (Zurich: Schulthess, 2007), 12; Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 408–409.
233) Secretariat Note A/CN.9/WG.II/NP.147/Add.1 para. 5.
234) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer 2009):409.
235) This is the view taken by Yves Derains, 'The Limits of the Arbitration Agreement in Contracts involving more than Two Parties', in *Complex Arbitrations, Perspectives on Their Procedural Implications*, ICC Ct. Bull. Special Supplement 2003: 25, 33.
236) Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 391.
237) *Ibid.*, 394.
238) This section again extracts and draws from Michael Pryles & Jeff Waincymer, 'Multiple Claims in Arbitrations Between the Same Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), and is reproduced with permission of the co-author.
239) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2077.
240) See, e.g., Art. 1046 Netherlands Code of Civil Procedure; Hong Kong Arbitration Ordinance Schedule 2, s. 2.
241) The courts in New York had, until recently, allowed the possibility of court-ordered consolidation of separate arbitral proceedings where they raised the same issues of law or fact. However in 1993 the position changed and consent is now necessary for consolidation. In *Government of the United Kingdom of Great Britain v. The Boeing Company*, 998 F. 2d 68 (1993), the Court of Appeals for the Second Circuit held that a District Court cannot order consolidation of arbitration proceedings arising from separate arbitration agreements, even where the proceedings involve the same questions of fact and law, unless the parties have consented to such consolidation.
242) *Ibid.*, 2090.
243) Martin Platte, 'Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. Emmanuel Gaillard & Domenico Di Pietro (London: Cameron May, 2008), 490; Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), paras 16–66.
244) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2073.
245) Stephen R Bond, 'Dépeçage or Consolidation of the Disputes Resulting from Connected Agreements: The Role of the Arbitrator', in *Multi-Party Arbitration*, Dossier of the ICC Institute of World Business Law (2010), 37.
246) Section 24(7).

247) Article 4(6) of the ICC Rules of Arbitration 1976 previously provided for consolidation as follows: 'When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19.' Schäfer, Verbist and Imhoos suggested that the discretion to consolidate goes against the principle of party autonomy but argue nevertheless that where there is a 'genuine connection' between the cases, consolidation will result in more effective proceedings and avoid the risk divergent decisions. Erik Schäfer, Maître Verbist & Christophe Imhoos, *Die ICC Schiedsgerichtsordnung in der Praxis* (Bonn: Economica Verlag, 2000), 34. If the parties have expressly selected the earlier version of the ICC Rules and if one concentrates on consent at the outset, one cannot necessarily view a decision by the ICC Court to consolidate as going against party autonomy. There was also a debate as to whether the court had the sole power to rule on consolidation or whether in cases where the terms of reference have already been signed or approved, indirect joinder can be effected by a tribunal under former Article 19, dealing with acceptance of late claims. On its plain meaning, Article 19 allowed for such a discretion. A converse argument would be that such an application is in essence a consolidation application which should have been dealt with solely under Art. 4(6). Schäfer, Verbist and Imhoos suggested that the tribunal might make a decision under Art. 19 and then convey the decision to the parties and the court for the latter to rule on the matter. *Ibid.* It is not clear how that procedure can easily be derived from the express rules. If the tribunal does not have the power under former Art. 19, then all the court would be doing is determining that the tribunal has improperly applied Art. 19. If it does have that power, there is no express jurisdiction for the court to have supervisory jurisdiction over the tribunal's determination. Where there are multiple claimants, the ICC practice moved from an earlier strict position which held that common proceedings could not be conducted if only one of the claimants could not validly be incorporated with the rest, to a more relaxed position allowing some to be consolidated. Anne Marie Whitesell & Eduardo Silva-Romero, 'Multi-Party and Multi Contract Arbitration: Recent ICC Experience', in *Complex Arbitrations, Perspectives on Their Procedural Implications*, ICC Ct. Bull., Special Supplement 2003, 7 at 10. Voser rightly criticises the previous ICC practice in demanding that the third party be a signatory when considering respondent's position as this puts it in a less favourable position than claimant where extension arguments are presented. Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties', *Fifty Years of the New York Convention: ICCA International Arbitration Conference*, Congress Series No. 14, ed. Albert Jan van den Berg (Alphen aan den Rijn: Wolters Kluwer, 2009), 394.

248) 'Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Court may decide, after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings. The Court may proceed in the same way where a Notice of Arbitration is submitted between parties that are not identical to the parties in the pending arbitral proceedings. When rendering its decision, the Court shall take into account all relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings. Where the Court decides to consolidate the new case with the pending arbitral proceedings, the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator, and the Court may revoke the appointment and confirmation of arbitrators and apply the provisions of Section II (Composition of the Arbitral Tribunal).'

249) Cepani Arbitration Rules 2005 Art. 12.

250) Bernard Hanotiau, *Complex Arbitrations, Multi-party, Multi-contract, Multi-issue and Class Actions* (The Hague: Kluwer Law International 2005) p 188.

251) If a Tribunal established under Art. 1126 assumes jurisdiction then other Tribunals previously established under Art. 1120 cease to have jurisdiction with respect to the claim or part of the claim over which the Art. 1126 Tribunal has established jurisdiction. Art. 1120 Tribunal will ordinarily adjourn its proceedings or they can be stayed by order of the Art. 1126 Tribunal.

252) Kaj Hobér, 'Parallel Arbitration Proceedings – Duties of the Arbitrators', in *Parallel State and Arbitral Procedures in International Arbitration*, ed. Bernardo N. Cremades & Julian D.M. Lew (Paris: ICC Publishing, 2005), 259.

253) Audley Sheppard, 'The Scope and *Res Judicata Effect of Arbitral Awards', in Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of Cepani*, 15 October 2004 (Brussels: Bruylant, 2005), 274.

254) 254 Phillipe Leboulanger, 'Multi-contract Arbitration', *Journal of International Arbitration* 13 (1996): 60.

255) [1982] 2 Lloyds Law Reports 425.

256) 256 Phillipe Leboulanger, 'Multi-contract Arbitration', *Journal of International Arbitration* 13 (1996) citing the former Arbitration Ordinance 1982 of Hong Kong.

257) Kaj Hobér, 'Parallel Arbitration Proceedings – Duties of the Arbitrators', in *Parallel State and Arbitral Procedures in International Arbitration: Dossiers of the ICC Institute of World Business Law*, ed. Bernardo N. Cremades & Julian D.M. Lew (Paris: ICC Publishing, 2005), 258.
258) Whitesell and Silva-Romero,, 'Multi-Party and Multi Contract Arbitration: Recent ICC Experience', in *Complex Arbitrations, Perspectives on their Procedural Implications*, ICC Ct. Bull, Special Supplement 2003.
259) Phillipe Leboulanger, 'Multi-contract Arbitration', *Journal of International Arbitration* 13 (1996): 90–91.
260) *Associated Electric and Gas Insurance Services Ltd (AEGIS) v. European Reinsurance Co of Zurich (European Re)* [2003] 1 WLR 1041.
261) Hanotiau, *Complex Arbitrations, Multi-Party, Multi-Contract, Multi-Issue and Class Actions* (The Hague: Kluwer Law International, 2005), 350.
262) Martin Platte, 'Multi-Party Arbitration: Legal Issues Arising out of Joinder and Consolidation', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. Emmanuel Gaillard & Domenico Di Pietro (London: Cameron May, 2008), 498.
263) Kaj Hobér, 'Parallel Arbitration Proceedings – Duties of the Arbitrators', in *Parallel State and Arbitral Procedures in International Arbitration*, ed. Bernardo N. Cremades & Julian D.M. Lew (Paris: ICC Publishing, 2005), 250.
264) *Ibid.*
265) *Ibid.*, 243, 247.
266) *Ibid.*, 258.
267) See, e.g., EU Directive 2009/22/EC, which requires EU Member States to recognise an injunction 'aimed at the protection of the collective interests of consumers' issued by an EU Member State.
268) See generally Bernard Hanotiau, 'A New Development in Complex Multiparty-Multicontract Proceedings: Classwide Arbitration', *Arbitration International* 20, no. 1 (2004): 39.
269) The Supreme Court noted in *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740 (2011) that, of the approximately 300 class actions on the AAA's class arbitration docket as at 2011 (which is made publicly available under the AAA rules) not one had yet resulted in a final award 'on the merits' (although some had been settled).
270) In the US, the AAA and JAMS procedural rules for class arbitrations mirror Rule 23 of the Federal Code of Civil Procedure.
271) *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740 (2011).
272) Gary B. Born, describing the court's position in *Concepcion, "The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*' on the Kluwer Arbitration Blog, 1 July 2011.
273) Gary B. Born, "*The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*' on the Kluwer Arbitration Blog, 1 July 2011.
274) For examples of high-value arbitrations in the past, see Gary B. Born, '*The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*' on the Kluwer Arbitration Blog, 1 July 2011.
275) For example, in *Concepcion* the amount claimed by the Concepcions was around USD 30.
276) For example, see *Vasquez-Lopez v. Beneficial Oregon, Inc.* 210 Or. App 553 (2007), referred to in Philip Lacovara, 'Class Action Arbitrations – The Challenge for the Business Community', *Arbitration International* 24, no. 4 (2008): 554.
277) Philip Lacovara, 'Class Action Arbitrations – The Challenge for the Business Community', *Arbitration International* 24, no. 4 (2008): 558–559.
278) *Green Tree Fin. Corp. v. Bazzle* 123 S. Ct. 2402 (2003).
279) The AAA's amicus brief to the Supreme Court in *Concepcion* listed 283 class arbitrations opened with the AAA.
280) *Stolt-Nielsen S.A. v. Animalfeeds International Corp.* No. 08-1198, U.S. Sup (2010).
281) *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740, 9.
282) Gerald Aksen, 'Class Action in Arbitration and Enforcement Issues: and Arbitrator's Point of View', in *Dossier of the ICC Institute of World Business Law: Multiparty Arbitration* (Paris: ICC Publishing, 2010), 215–216.
283) Bernard Hanotiau, 'A New Development in Complex Multiparty-Multicontract Proceedings: Classwide Arbitration', *Arbitration International* 20, no. 1 (2004): 39, 54.
284) Stacie Strong, 'Class Arbitration Outside the United States: Reading the Tea Leaves', in '*Dossier VII – Multiparty Arbitration*' *183* (ICC Institute of World Business Law, 2010): 191.
285) *Abaclat and Others v. The Argentine Republic* (ICSID Case No. ARB/07/5).
286) Andrew Newcombe, 'Mass Claims and the Distinction between Jurisdiction and Admissibility', *Kluwer Arbitration Blog*, 24 October 2011.
287) *Abaclat and Others v. The Argentine Republic*, para. 551.
288) Stacie Strong, 'Guest-Post: ICSID Accepts First-Ever Class-Type Arbitration', *Karl Bayer 'Disputing' blog*, 29 August 2011, <www.karlbayer.com/blog/?p=15468>.
289) Domitille Baizeau, 'Arbitration and Insolvency: Issues of Applicable Law', in *New Developments in International Commercial Arbitration*, ed. Christoph Müller & Antonio Rigozzi (Université de Neuchâtel, Schultheff editions Romands, 2009), 98. This book is not concerned with proceedings before an insolvency court where a creditor seeks to bar proceedings on the basis of the arbitration clause.

290) A US court has described the relation of arbitration and insolvency law as 'a conflict of near polar extremes ...'. *U.S. Lines, Inc. v. An. S.S. Oweners Nut. Prot. & Indem. Ass'n Inc* (*In re United States Lines, Inc*) 197 F. 3d 631 (640) (2d Cir 1999).

291) See generally Gabrielle Kaufmann-Kohler & Laurent Levy, 'Insolvency and International Arbitration', in *The Challenges of Insolvency Law Reform in the Twenty-First Century*, ed. H. Peter, N. Jeandin & J. Kilborn (2006), 257; Mantilla-Serrano, 'International Arbitration and Insolvency Proceedings', *Arbitration International* 11 (1995): 51; Vesna Lazic, *Insolvency Proceedings in Commercial Arbitration* (The Hague: Kluwer Law International, 1998); Doug Jones, 'International Dispute Resolution in the Global Financial Crisis', *The Arbitrator and Mediator* (October 2009): Doug Jones, 'Insolvency and Arbitration: An Arbitral Tribunal's Perspective', presented at the INSOL Asia Pacific Rim Annual Conference, Singapore, 13–15 March 2011; Darius Chan, Singapore Apex Court Lays Down Clear Framework for Arbitrability of Insolvency Related Claims (Kluwer Arbitration Blog, 23 May 2011) <http://kluwerarbitrationblog.com/blog/2011/05/23/singapore-apex-court-lays-down-clear-framework-for-...>.

292) Domitille Baizeau, 'Arbitration and Insolvency: Issues of Applicable Law', in *New Developments in International Commercial Arbitration*, ed. Christoph Müller & Antonio Rigozzi (Université de Neuchâtel, Schultheff editions Romands, 2009), 106 referring to ICC Award No. 5954 of 1991 and an unpublished ICC Award of 2009 where tribunals refused trustees the right to intervene and even refused to recognise the trustees' power to represent the insolvent party.

293) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 809.

294) EC Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings, OJ L 160, 30 June 2000.

295) Stefan Kröll, 'Arbitration and lnsolvency – Selected *Conflict of Laws Problems*', *in Conflict of Laws in International Arbitration*, ed. Franco Ferrari & Stefan Kröll (Germany: Sellier, 2010), 243.

296) From an insolvency regulator's perspective, they might want to bring these claims on behalf of respondent unimpeded, but still block claims against the respondent that would preference an arbitral creditor.

297) One could of course hypothesise that general arbitration agreements could impliedly be limited to cases of solvency with an understanding that applicable insolvency laws will override party autonomy.

298) English Arbitration Act 1996 ss 107 and 349A English Insolvency Act 1986.

299) *Eco Suisse v. Benetton* [1999] ECR I 3055.

300) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 808.

301) Laurent Levy, 'Insolvency in Arbitration (Swiss Law)', *International Arbitration Law Review* 8, no. 1 (2005): 28.

302) Spanish Insolvency Act Art. 52(1); Alejandro Lopez Ortiz, 'Legislative Comments, Spain: The New Insolvency Act and Arbitration', *International Arbitration Law Rev* 8, no. 2 (2005): 22.

303) Latvian Civil Procedure Law Art. 478(8). Stefan Kröll, 'Arbitration and Insolvency – Selected Conflict of Laws Problems', in *Conflict of Laws in International Arbitration*, ed. F. Ferrari & S. Kröll (Germany: Sellier, 2010), 216.

304) Netherlands Bankruptcy Act Art. 122.

305) As set out in Art. 142 of the Polish Bankruptcy and Reorganisation Law and explored in the *Elektrim* dispute discussed below.

306) Domitille Baizeau, 'Arbitration and Insolvency: Issues of Applicable Law', in *New Developments in International Commercial Arbitration*, ed. Christoph Müller & Antonio Rigozzi (Université de Neuchâtel, Schultheff editions Romands, 2009), 102.

307) For a comparative summary of positions taken by various selected countries, see J. Sutcliffe & J. Rogers, 'Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times', *Arbitration* 76 no. 2 (2010): 277–290.

308) Emmanuel Gaillard & John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 344, para. 577.

309) Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), 130.

310) Laurent Levy, 'Insolvency in Arbitration (Swiss Law)', *International Arbitration Law Review* 8, no. 1 (2005): 23.

311) In *Re United States Wines Inc.* 197 F. 3d 631, 640 (2d Cir 1999).

312) This is not typically the result in arbitration but there are exceptions. See, e.g., Award in ICC Case No. 9163, 2003 *Rev Arb* 227.

313) As has been considered in France. Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 814, fn. 1266.

314) Laurent Levy, 'Insolvency in Arbitration (Swiss Law)', *International Arbitration Law Review* 8, no. 1 (2005): 30.

315) *Ibid.*, 32, suggesting that a stay will be compulsory where a failure to impose a stay would 'prevent the trustee from putting his case (for lack of time to prepare the files). More specifically, a failure to stay proceedings in France, for example, will be considered a violation of France's public law and accordingly leaves the award vulnerable to challenge' (see at 30, and Domitille Baizeau, 'Arbitration and Insolvency: Issues of Applicable Law', in *New Developments in International Commercial Arbitration*, ed. Christoph Müller & Antonio Rigozzi (Université de Neuchâtel, Schultheff editions Romands, 2009), 102).

316) Domitille Baizeau, 'Arbitration and Insolvency: Issues of Applicable Law', in *New Developments in International Commercial Arbitration*, ed. Christoph Müller & Antonio Rigozzi (Université de Neuchâtel, Schultheff editions Romands, 2009), 101.

317) For a more detailed review of the *Elektrim* case, see I. Fletcher, 'Josef Syska, as Administrator of Elektrim SA *v.* Vivendi Universal SA: the EU Insolvency Regulation and pending arbitration proceedings – The Court of Appeal Ruling on Article 15', in *Insolvency International* 22, no. 10 (2009): 155–157, and in relation to choice of laws, see M. Robertson, 'Cross-Border Insolvency and International Commercial Arbitration: Characterisation and Choice of Law Issues in Light of Elektrim SA. and Vivendi S.A. and Analysis of the European Insolvency Regulation', *International Arbitration Law Review* 12, no. 6 (2009): 125–135.

318) Domitille Baizeau, 'Arbitration and Insolvency: Issues of Applicable Law', in *New Developments in International Commercial Arbitration*, ed. Christoph Müller & Antonio Rigozzi (Université de Neuchâtel, Schultheff editions Romands, 2009), 114; Arts 154 and 155(c) SPILA.

319) Article 4.1 EU Insolvency Regulation.

320) Stefan Kröll, 'Arbitration and Insolvency – Selected Conflict of Laws Problems', in *Conflict of Laws in International Arbitration*, ed. Franco Ferrari & Stefan Kröll (Germany: Sellier, 2010), 253. For other comments that support the outcome see Philipp K. Wagner, 'When International Insolvency Law Meets International Arbitration', *Disp Res Int'l* 3 (2009): 56, 62.

321) Stefan Kröll, *ibid.*, 244. For a thorough exploration of characterisation in this context, see Kröll, 244–251.

322) Lars Markert, 'Arbitrating in the Financial Crisis: Insolvency and Public Policy versus Arbitration and Party Autonomy – Which Law Governs?', *Contemporary Asia Arbitration Journal* 2, no. 2 (2009): 217, 234.

323) Lars Markert, 'Arbitrating in the Financial Crisis: Insolvency and Public Policy versus Arbitration and Party Autonomy – Which Law Governs?', in *Contemporary Asia Arbitration Journal* 2, no. 2 (2009): 217, 236–237. While it may not be appropriate to consider it as a question of capacity, there was some expert opinion that this was the approach under Polish law. Domitille Baizeau, 'Arbitration and Insolvency: Issues of Applicable Law', in *New Developments in International Commercial Arbitration*, ed. Christoph Müller & Antonio Rigozzi (Université de Neuchâtel, Schultheff editions Romands, 2009), 115, fn. 73. A capacity-based analysis might also limit itself to capacity at the time of commencement of the proceedings. See, e.g., Pierre Karrer, 'Views on the Decision by the Swiss Supreme Court of March 31, 2009, in Re Vivendi et al v. Deutsche Telekom et al', *ASA Bulletin* 28 (2010): 111.

324) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 815.

325) Available at <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>; UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation, <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html>. The Model Law on Cross-Border Insolvency has not been adopted by many States to date. Even those adopting the law may apply a different rule as to applicable law. Philipp K. Wagner, 'When International Insolvency Law Meets International Arbitration', *Disp Res Int'l* 3 (2009): 56, 64.

326) Laurent Levy, 'Insolvency in Arbitration (Swiss Law)', *International Arbitration Law Review*, 8, no. 1 (2005): 32.

327) Stefan Kröll, 'Arbitration and Insolvency - Selected Conflict of Laws Problems', in *Conflict of Laws in International Arbitration*, ed. Franco Ferrari & Stefan Kröll (Germany: Sellier, 2010), 217.

328) See, e.g., French Cour de Cassation decision in Société Almira Files v. Pierrel (Almira Films) 5 February 1991, *Rev Arb* 37 (1991): 625 with note by Idot cited in Stefan Kröll, 'Arbitration and Insolvency – Selected Conflict of Laws Problems', in *Conflict of Laws in International Arbitration*, ed. Franco Ferrari & Stefan Kröll (Germany: Sellier, 2010), 222.

329) Doug Jones, 'International Dispute Resolution in the Global Financial Crisis', *The Arbitrator and Mediator* (October 2009), 3,

330) Gary B. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 814.

331) Jonathan Sutcliffe & James Rogers, 'Effect of Party Insolvency on Arbitration Proceedings: Pause for Thought in Testing Times', *Arbitration* 76, no. 2 (2010): 283.

332) Amokura Kawharu, 'Part III Chapter 11: Participation of Non-Governmental Organisations in Investment Arbitration as Amici Curiae', in *The Backlash against Investment Arbitration*, ed. Michael Waibel et al. (The Hague: Kluwer Law International, 2010), 282.

333) Loukas Mistelis, 'Confidentiality and Third Party Participation', *Arbitration International* 21, no. 2, (The Hague: Kluwer Law International, 2005), 223.
334) *Ibid.*, 218.
335) Renato Nazzini, 'A Principled Approach to Arbitration of Competition Law Disputes: Competition Authorities as *Amici Curiae* and the Status of the Their Decisions in Arbitral Proceedings', in *European Business Law Review Special Edition – Arbitrating Competition Law Issues* 19, no. 1, ed. Gordon Blanke (The Hague: Kluwer Law International, 2008): 105.
336) Eugenia Levine, '*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation', *Harv. E.U.L.A.W.P.S.* (2010): 15.
337) If the parties are in agreement, there is no problem.
338) Patrick Dumberry, 'The Admissibility of Amicus Curiae Briefs in the Methanex Case: a Precedent Likely to be Followed by other NAFTA Chapter 11 Arbitral Tribunals', *ASA Bulletin* 19, no. 1 (2001).
339) Patrick Dumberry, 'The Admissibility of Amicus Curiae Briefs in the Methanex Case: A Precedent Likely to Be Followed by other NAFTA Chapter 11 Arbitral Tribunals', *ASA Bulletin* 19, no. 1 (2001).
340) Article 17(1) of the UNCITRAL Arbitration Rules 2010 provides as follows: '1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'
341) However, the tribunal did not consider that it had jurisdiction to grant USD observer status or to make oral submissions. Also, it should be noted that the US supported the USD petition.
342) Amokura Kawharu, 'Part III Chapter 11: Participation of Non-Governmental Organisations in Investment Arbitration as Amici Curiae', in *The Backlash Against Investment Arbitration*, ed. Michael Waibel et al. (The Hague: Kluwer Law International, 2010): 286, 293.
343) *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* (ICSID Case No. ARB/05/22).
344) Nathalie Benasconi-Osterwalder, 'Chapter 9: Transparency and Amicus Curiae in ICSID Arbitrations', in *Sustainable Development in World Investment Law*, Global Trade Law Series, vol. 30, ed. Marie-Claire Cordonier Segger et al. (The Hague: Kluwer Law International 2011): 204.
345) *Ibid.*, 205.
346) *Ibid.*, 201.
347) See *Transnational Dispute Management* 8, no. 4 (2011) which devoted an entire issue to the question of third-party funding.
348) Mark Kantor, 'Third-Party Funding in International Arbitration: An Essay about New Developments', *ICSID Review – Foreign Investment Law Journal* 24, no. 1 (2009): 44 and S. Khouri, K. Hurford & C. Bowman, 'Third Party Funding in International Commercial and Treaty Arbitration – A Panacea or a Plague? A Discussion of the Risks and Benefits of Third Party Finding', *Transnational Dispute Management* 8, no. 4 (2011): 1.

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