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ATTORNEYS AT LAW

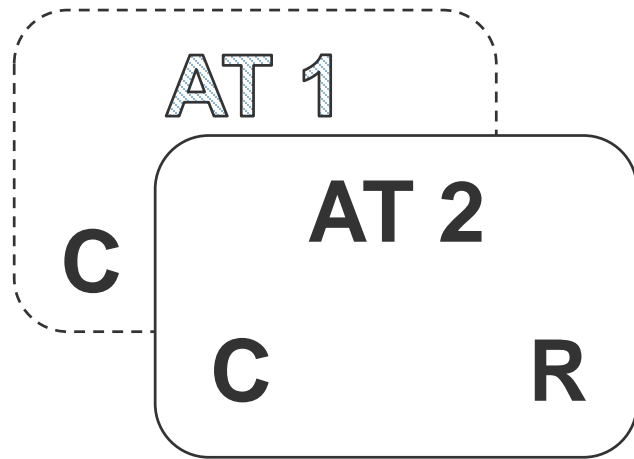


Joinder of Third Parties in International Arbitration – Recent Reforms and Developments

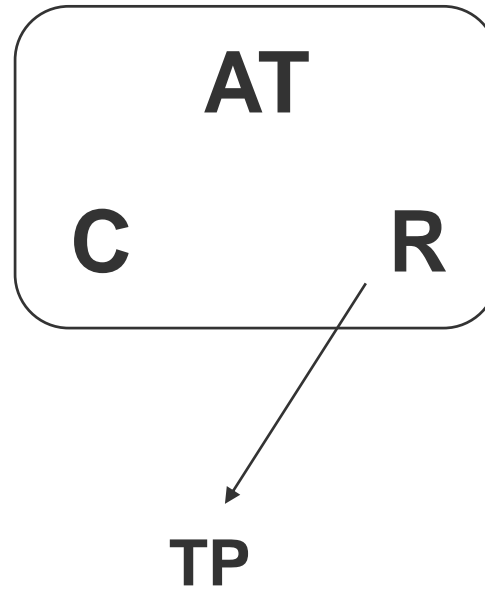
MAA Inaugural Speaker Series, 24 February 2021
Lukas Rusch, Pestalozzi, Zurich

I Setting the scene: third parties in arbitration proceedings

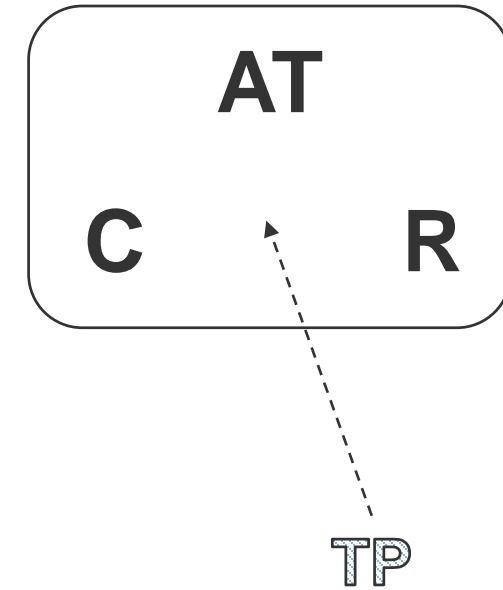
Consolidation



Joinder



Third-party intervention



II Why request a joinder?

Pros	Cons
<ul style="list-style-type: none">• Procedural economy: saving time and costs• Avoiding conflicting decisions resulting from parallel proceedings	<ul style="list-style-type: none">• Consent to the arbitration agreement as source of jurisdiction of the arbitral tribunal• Bipolar set-up of arbitration• Equal treatment of parties regarding the constitution of the arbitral tribunal• Confidentiality concerns• Concerns regarding setting aside proceedings and enforceability of the final award• Increased complexity / decreased efficiency of the proceedings

III Consent, consent, consent – but how?

- Consent by all parties
- Agreement with multiple parties and uniform arbitration clause
- Extension of arbitration agreement to non-signatory third parties
 - Intervention / assumed consent based on conduct
 - Group of companies doctrine / piercing the corporate veil
 - Assignment of a claim, assumption of debts
- Joinder under the *lex arbitrii*

III Procedural issues regarding joinder

- Appointment of arbitrator
- Equal treatment of parties regarding constitution of the arbitral tribunal
- Dutco decision, French Court de cassation in 1992
- Joinder of third parties after the constitution of the arbitral tribunal
- Advance on costs, allocation of costs

III The arbitrator's perspective

- No subsequent consent required by the arbitrator
- Right to resign?
- Search for potential conflict of interest and disclosure obligations
- Decision on admissibility of joinder early in the proceedings – jurisdictional or procedural issue?

IV 2021 ICC Rules

Article 7 Joinder of Additional Parties

- 1) A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the “Request for Joinder”) to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. ~~No~~ **Unless all parties, including the additional party, otherwise agree, or as provided for in Article 7(5), 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 fix a time limit for the submission of a Request for Joinder.
- 2) The Request for Joinder shall contain the following information: [...].
The party filing the Request for Joinder may submit therewith such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute.
- 3) The provisions of Articles 4(4) and 4(5) shall apply, *mutatis mutandis*, to the Request for Joinder.

IV 2021 ICC Rules

Article 7 Joinder of Additional Parties

- 4) The additional party shall submit an Answer in accordance, *mutatis mutandis*, with the provisions of Articles 5(1)–5(4). The additional party may make claims against any other party in accordance with the provisions of Article 8.
- 5) Any Request for Joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable. In deciding on such a Request for Joinder, the arbitral tribunal shall take into account all relevant circumstances, which may include whether the arbitral tribunal has *prima facie* jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure. Any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party.

IV 2012 Swiss Rules

Article 4 Consolidation and Joinder

1. [...]
2. Where one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the **arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances.**

IV 2020 LCIA Rules

Article 22 Additional Powers

22.1 The Arbitral Tribunal shall have the power, upon the application of any party or (save for subparagraph (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:

[...]

- (x) to allow one or more third persons to be joined in the arbitration as a party **provided any such third person and the applicant party have consented expressly to such joinder in writing** following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;

[...]

IV 2018 HKIAC Rules

Article 27 Joinder of Additional Parties

- 27.1 The arbitral tribunal or, where the arbitral tribunal is not yet constituted, HKIAC shall have the power to allow an additional party to be joined to the arbitration provided that:
- (a) prima facie, the additional party is bound by an arbitration agreement under these Rules giving rise to the arbitration, including any arbitration under Article 28 or 29; or
 - (b) all parties, including the additional party, expressly agree.**
- 27.2 Any decision pursuant to Article 27.1 is without prejudice to the arbitral tribunal's power to decide any question as to its jurisdiction arising from such decision.
- 27.3 Any Request for Joinder shall be raised **no later than in the Statement of Defence**, except in exceptional circumstances.
- 27.4 Before the arbitral tribunal is constituted, a party wishing to join an additional party to the arbitration shall communicate a Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators.
- 27.5 After the arbitral tribunal is constituted, a party wishing to join an additional party to the arbitration shall communicate a Request for Joinder to the arbitral tribunal, HKIAC and all other parties.
- 27.6 The Request for Joinder shall include the following: [...].
- 27.7 Within 15 days of receiving the Request for Joinder, the additional party shall communicate an Answer to the Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators. The Answer to the Request for Joinder shall include the following: [...].

IV 2018 HKIAC Rules

- 27.8 HKIAC or the arbitral tribunal may vary any of the requirements in Article 27.6 and 27.7 as it deems appropriate.
- 27.9 An additional party wishing to be joined to the arbitration shall communicate a Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators. The provisions of Article 27.6 shall apply to such Request for Joinder.
- 27.10 Within 15 days of receiving a Request for Joinder, the parties shall communicate their comments on the Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators. Such comments may include (without limitation): [...].
- 27.11 Where an additional party is joined to the arbitration, the arbitration against that additional party shall be deemed to commence on the date on which HKIAC or the arbitral tribunal once constituted, received the Request for Joinder.
- 27.12 **Where an additional party is joined to the arbitration, all parties to the arbitration shall be deemed to have waived their right to designate an arbitrator.**
- 27.13 Where an additional party is joined to the arbitration before the arbitral tribunal is constituted, HKIAC may revoke any confirmation or appointment of an arbitrator, and shall appoint the arbitral tribunal with or without regard to any party's designation.
- 27.14 The revocation of the confirmation or appointment of an arbitrator pursuant to Article 27.13 is without prejudice to: [...].
- 27.15 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) after a Request for Joinder has been submitted.

IV Arbitration Rules: main features in comparison

	2021 ICC Rules	2012 Swiss Rules	2020 LCIA Rules	2018 HKIAC Rules
Specific provision on joinder	✓	✓	✓	✓
Joinder after constitution of the arbitral tribunal	✓	✓	✓	✓
Consent requirement	third person	x	third person and applicant	all parties
Time-limit to joinder?	x	x	x	SoD

VI 4A_124/2020 of 13 November 2020

- Joinder of subcontractor to arbitration based on power plant construction agreement?
 - Partial award on jurisdiction, implied consent doctrine
 - Grounds for extension of arbitration agreement to third parties (settled case law):
 - Assignment;
 - Assumption of debt or of contract;
 - Implied consent: interference with execution of the contract?
 - Objective contract interpretation (principle of good faith):
 - Involvement of subcontractors and direct communication with customer [*here because of defect of supplied engines*] is neither surprising nor unusual ≠ implied consent
 - Subcontractor and contractor distinctly separate legal entities ≠ implied consent
- **Subcontractor not bound by arbitration agreement, Swiss Supreme Court **set aside** the partial award on jurisdiction**

VI 4A_528/2019 of 7 December 2020

- Extension of arbitration agreement to third party beneficiaries of a contract?
- Descendants of family-owned private bank sued managing partners based on two succession planning agreements from 1982 and 1988 between the historical partners of the bank
- Swiss Supreme Court partially set aside the award on jurisdiction
 - Swiss Supreme Court **confirmed** that the agreement qualified as a third-party beneficiary contract and that the claimants could rely on the arbitration clause, despite not being parties to it
 - Swiss Supreme Court **set aside** the award with regard to one respondent who has not signed the 1988 agreement

VI OGer ZH LB190029 of 12 March 2020

- Extension of arbitration agreement to general partner of limited partnership? Under Swiss law, the general partner has subsidiary, unrestricted and collective liability for the debts of the limited partnership
- General partner initiated state court proceedings based on a loan agreement that the limited partnership had granted to borrower and which contained an arbitration clause
- Court of Appeal Zurich **declined jurisdiction** of state courts in favor of arbitration
 - In case of the assumption of a debt, the arbitration agreement in the initial agreement extends to the third party (cf. leading case BGE 134 III 565)
 - The general partner automatically assumes debt of limited partnership by way of statute



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