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## C Case Notes

### Judicial activism and the limits of institutional arbitration in multiparty disputes

CHRISTOPHER KOCH\*

On December 5, 2008, the Swiss Federal Tribunal rendered an interesting decision in which it extended the scope of the arbitration agreement to non-signatories, even though the arbitrator and the arbitral institution, in this case the ICC, had refused the respondent's demands to include those non-signatories in the arbitral proceedings.<sup>1</sup> To my knowledge, this is the first time that the Federal Tribunal ordered the inclusion of non-signatories to existing arbitral proceedings, annulling the arbitrator's jurisdictional award to the contrary. The decision has already been ably commented and summarized by others and my purpose here is not to do the same again but rather, within the context of multiparty and multi-contract arbitration, to focus on the interplay between institutional arbitration as it results from the 1998 ICC Rules of Arbitration and the jurisprudence of the Federal Tribunal in the matter.<sup>2</sup>

The case involved the sale of a company (B Ltd.) "the Company". The transaction was structured in two contracts entered into on the same date. The first, a "Sales Contract" by which the buyer (A), an Italian individual, acquired 100% of the shares of the Company, and the second, an "Employment Contract" by which the buyer became managing director of the Company. The signatories of the contracts were not identical. On the one hand, the Sales Contract was signed by the buyer (A) and "C. Ltd", acting as trustee for (D) the beneficial owner of the shares as well as (B), the then managing director of the Company. The parties to the Employment Contract, on the other hand, were B.

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<sup>1</sup> Federal Court Decision 4A\_376/2008 of December 5, 2008 in ASA Bull. 4/2009, p. 745. An English translation of the decision, which was published in Italian, can be found at page 762 of the same issue.

<sup>2</sup> Case note by Philip Landolt at: "Extension of subjective scope of arbitration clauses under Swiss law upon request of respondent" at <http://www.charlesrussell.co.uk/LatestContent.aspx?type=Legal-Updates>; Georg von Segesser, Schellenberg Wittmer, comment of 27 April 2009 on the Kluwer Arbitration Blog at <http://kluwerarbitrationblog.com/blog/2009/04/>; case summary by Jean Margerat, in "New Developments in International Commercial Arbitration 2009", Christopher Müller & Antonio Rigozzi (Eds) Université de Neuchâtel, Schultess Editions Romandes, p. 77; Mattias Scherer, ASA Bull.4/2009 p. 745 ff.

Ltd as employer and the buyer A as future employee and managing director of the Company. The proceeds of the sale were intended to reimburse the loans that B and D had made to the Company. Both agreements contained the following arbitration agreement, the only difference being that the Employment Contract arbitration clause lacked the word “Sales”

*“In case of any disputes deriving from the [Sales] Contract, the parties agree that it should be competence of the Arbitration Court of the International Chamber of Commerce of Zurich in Lugano. The language of arbitration will be Italian. The law applied will be Swiss law.”*

A dispute arose and the Company filed a request for arbitration with the ICC in Paris against A. In its request for arbitration, which was based solely on the Employment Contract, the Company alleged that A had used company assets without having the necessary powers to do so and had competed with the Company in violation of a non-competition clause contained in the Employment Contract. A, the respondent, contested the ICC’s jurisdiction, contending that the parties had intended to arbitrate under the auspices of the Zurich Chamber of Commerce and also requested that the signatories of the Sales Contract, C Ltd., B and D, be joined to the arbitral proceedings. He argued that their joinder was necessary because both the Sales and the Employment Contract were part of the same economic transaction. Issues arising out of the Employment Contract could not be decided without simultaneously affecting the rights and obligations under the Sales Contract. According to respondent, the Employment Contract was merely a device to allow B and D, as directors of B. Ltd., to retain sufficient control over the Company to ensure that the buyer did not operate the Company to his exclusive advantage before he had fully paid the purchase price.

The ICC International Court of Arbitration (“the Court”) had no problem finding that, *prima facie*, it had jurisdiction under Article 6.2 of the ICC Rules of Arbitration but it refused to join to the arbitration the signatories of the Sales Contract, i.e. C. Ltd., B and D, who were not parties to the Employment Contract. The Court thus set in motion the arbitration with the Company B. Ltd. as claimant and A as respondent and appointed a sole arbitrator to decide the matter.

In addition to his jurisdictional objection, A reiterated his request that the signatories of the Sales Contract, C. Ltd., B and D, be joined to the arbitration before the Arbitrator. While the arbitrator found that the parties had indeed agreed to arbitrate under the ICC Rules and that he was, therefore, competent to decide the case, he declined to join the additional parties to the arbitration. The arbitrator found that the respondent had not alleged that they were necessary and

indispensable parties (*consorts nécessaires / notwendige Streitgenossen*), and that the consensual nature of arbitration restricted the proceedings to the parties to the arbitration agreement so that the intervention of third parties was only possible with the agreement of all concerned under the ICC Rules. Finally, the arbitrator determined that he had no jurisdiction in the matter because the question of whether new parties could be joined to a pending ICC arbitration fell within the exclusive jurisdiction of the ICC's Court of arbitration. The sole arbitrator thus declared A's request to join C. Ltd., B and D as new parties to the arbitral proceedings inadmissible and rejected it.

The Federal Tribunal disagreed. It found that the two contracts were indeed inextricably linked and that B, D and C. Ltd. had retained important decision making powers within the Company and under the Employment Contract. Applying the principles established by the Federal Tribunal in previous cases (ATF 134 III 565 at 3.2), it decided that the non-signatories were sufficiently involved in the negotiation and performance of the Employment Contract to warrant extending the scope of its arbitration clause to them. The Federal Tribunal thus quashed the arbitrator's decision not to join the non-signatories. However, instead of referring the matter back to the arbitrator, the Federal Tribunal modified the arbitral award to include B, D and C. Ltd. as parties to the arbitral procedure.

What is novel here is not the reasoning by which the Federal Tribunal extended the arbitration agreement to the non-signatories but the fact that the Federal Tribunal's decision explicitly states that, when it comes to determining who is party to an ICC arbitral proceeding, arbitrators sitting in Switzerland cannot simply defer to the ICC's decision in the matter but will have to exercise their own discretion in determining the scope *ratione personae* of the arbitration agreement. Arbitrators in Switzerland must therefore be prepared to contradict the Court's determination of how an arbitration is structured and who can be considered or joined as a party to the arbitration proceeding.<sup>3</sup> According to the Federal Tribunal:

*The Petitioner's complaint is admissible. Called upon to decide on his jurisdiction to determine the dispute brought before him, the sole*

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<sup>3</sup> Here it may be useful to distinguish between being a "party to the arbitral procedure" and a "party to the arbitration clause". The first results from the parties' freedom to structure the arbitration as they wish, or from an administrative determination by the ICC and the second concerns the scope of an arbitration agreement. While V, X, Y and Z may be parties to an arbitration clause, if X commences arbitration against Y, then only X and Y will be parties to the arbitral procedure. If Y contests being bound by the arbitration agreement, the arbitrator's jurisdictional decision determines whether Y is a party to the arbitration agreement, not whether it is a party to the proceedings. The Federal Tribunal does not seem to make the distinction.

*arbitrator must determine the scope of application of the arbitration agreement *ratione personae*; he must determine the parties bound by the arbitration agreement and assess whether the arbitration agreement may be extended to third parties who did not sign it and are not mentioned in it. Such question is therefore covered by the ground for setting aside in article 190(2)(b) PILA. (Emphasis added.)*

This, in turn, raises some interesting questions concerning the interplay between the ICC and the arbitrator under the ICC Rules, the constitution of the arbitral tribunal in a multiparty setting, as well as questions of party autonomy concerning the parties' right to conduct arbitral proceedings within the contractual framework they chose.

For a better understanding of the issues at stake here, I will briefly retrace the evolution of the ICC's practice regarding the introduction of new parties in ongoing arbitral proceedings.

### **The ICC's practice in joining parties to arbitral proceedings**

In a recent conference, Professor Tercier explained that one of the essential differences between ad hoc and institutional arbitration was the fact that, in an institutional setting, the parties contractually devolve to the arbitral institution certain powers that, in ad hoc proceedings, either the arbitrators or the court of the place of arbitration would exercise.<sup>4</sup> Thus, under Article 6.2 of the ICC Rules, the parties have empowered the Court to determine *prima facie* whether there is an agreement to arbitrate or not, when jurisdiction is contested. In ad hoc proceedings, this issue would be decided by the arbitrators after the tribunal has been set up, or by a court. Similarly, if there is a problem in constituting the arbitral tribunal in ad hoc proceedings in Switzerland, Article 179.2 PILA foresees that the judge at the place of arbitration appoints the tribunal. In proceedings under the ICC Rules, the parties have transferred this power to the ICC. When it comes to deciding how an ad hoc arbitration is to be structured, i.e. who the parties to an arbitration are or whether they should be considered claimant or respondent or whether new parties should be joined into existing proceedings, those issues, depending on the situation, may be decided by the arbitrators or the

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<sup>4</sup> Prof. Pierre Tercier, former Chairman of the International Court of Arbitration, "The Role and Importance of Arbitral Institutions", unpublished speech given on 13 November 2009 in Neuchâtel at the conference: NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2009, organized by the Faculty of Law of the University of Neuchâtel.

state court at the place of arbitration.<sup>5</sup> Under the ICC Rules, those decisions would normally be taken by the Court.<sup>6</sup>

When discussing under what conditions new parties can be joined to existing arbitral proceedings, it is important to remember that the ICC Rules contain no provision that would allow the Court or the arbitral tribunal to join a new party to an existing arbitration against its own will or against the will of the existing parties.<sup>7</sup> There is, therefore, no rules-based mechanism for joining parties that could replace an express agreement of all involved.

Until fairly recently, the prevailing view was that, under the ICC Rules, the claimant determined who the parties to the arbitral proceedings should be. This view was based on the interpretation of Article 4.3 let. (a) which foresees that the Request for Arbitration should contain “*the name in full, description and address of each of the parties;*” (emphasis added), and the fact that Article 5, dealing with the Answer to the Request for Arbitration, does not foresee that Respondent/s should answer any claims other than those raised against it/them and should not itself raise any claims other than against claimants (counterclaims).<sup>8</sup> Thus, the claimant not only defined who participated in the arbitral proceedings on its side, but also which parties were to be included on the respondent’s side.<sup>9</sup> It was therefore not possible for a respondent to force the extension of the arbitral proceeding to a new party, even if that person had signed the arbitration agreement.

The Court interpreted the ICC Rules as precluding the addition of new parties once the proceedings had commenced, and took the view that arbitrations under the ICC Rules were necessarily bi-polar, with all claimants in one camp and all respondents in the other. For the Court, the bi-polar nature

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<sup>5</sup> ATF of January 4, 1995 in ASA Bulletin 13, 1995 pp. 51ff. and 210 ff. concerning a case in which the court at the place of arbitration had to determine whether one of the parties was a claimant or a defendant in order to decide whether the claimants had made a valid nomination of an arbitrator.

<sup>6</sup> Bernard Hanotiau: “Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Action”, Kluwer Law, 2005, Nr. 366 at p. 166.

<sup>7</sup> Article 4.6 of the ICC Rules allows the Court to join cases at the request of a party when there is another case involving the same legal relationship and the same parties pending. This, however, is not the same as joining a new party to an existing arbitration.

<sup>8</sup> Anne Marie Whitesell & Eduardo Silva Romero: “Multiparty and Multicontract Arbitration: Recent ICC Experience” in Complex Arbitrations, Special Supplement 2003 ICC International Court of Arbitration Bulletin p. 7.

<sup>9</sup> This view was forcefully expressed in a partial award issued in ICC Case 5625 in 1987, where the tribunal rejected respondent’s request to join parties that had signed the arbitration agreement but had not been named by claimant. “*There is one way only in which one can become a party in an arbitral procedure under the ICC Rules; that is by way of Article 3 (1975 Rules) by a request by which one constitutes oneself claimant or being identified by such claimant as a defendant.*” Collection of ICC Arbitral Awards 1986-1990, Kluwer, 1994, p. 493 Para. 8

of the ICC's arbitration rules resulted from Article 8.4 which provides: "Where the dispute is to be referred to three arbitrators, each party shall nominate in the Request and Answer respectively one arbitrator for confirmation", and also from the manner in which the rules apportioned the payment of the advance on costs, as Article 30.3 provides that "the advance on costs fixed by the Court shall be payable in equal shares by the Claimant and the Respondent." Limiting the ICC Rules to a bi-polar constellation meant that a respondent could only raise a counterclaim against the claimant/s but not a cross-claim against a fellow respondent or against a new party.<sup>10</sup>

This conservative interpretation of the Rules was increasingly criticized as more cases involving multiple parties were referred to ICC arbitration.<sup>11</sup> Allowing only the claimant's side to determine who was to be a party to the arbitral proceedings was seen to violate the respondent's side to equal treatment and elevated procedural considerations over the legal effects of the arbitration clause.<sup>12</sup>

By 2003, the Court had changed its approach. In their article on multiparty and multicontract arbitrations, Anne Marie Whitesell and Eduardo Silva-Romero, the Secretary General and Deputy Secretary General of the Court, reported that the Court had allowed the joinder of a new party upon the request of a respondent in three cases. In doing so, the Court required that two *sine qua non* material conditions be met: First, the new party had to be a signatory of the contract containing the arbitration agreement upon which the arbitration was based. Second, the respondent had to effectively raise claims against the new party.<sup>13</sup> When it came to setting in motion a single arbitration on the basis of multiple contracts the Court required that (a) the parties to all contracts be the same, (b) all contracts relate to the same economic transaction and (c) the dispute resolution clauses of all contracts be compatible.<sup>14</sup>

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<sup>10</sup> Yves Derains & Eric Schwartz: "A Guide to the New ICC Rules of Arbitration" Kluwer Law International, 1998, p.74

<sup>11</sup> According to the ICC's statistics, roughly a third of the cases filed every year involve more than two parties. In 2008, the ICC registered 192 such cases representing 29% of the cases filed that year. In 2007, it was 186 cases or 31%. This proportion seems to have stayed more or less constant within this decade. In 2002, 185 multiparty cases were filed with the ICC which represented 31% of all cases filed that year. (ICC International Court of Arbitration Bulletin, Vol. 20, Nr. 1, 2009, p. 9 and Special Supplement of ICC International Court of Arbitration Bulletin 2003: "Complex Arbitrations" p. 7, footnote 2)

<sup>12</sup> Matthieu de Boissésou: Joinder of Parties to Arbitral Proceedings: Two Contrasting Decisions in Complex Arbitrations, Special Supplement 2003 ICC International Court of Arbitration Bulletin pp 20-21.

<sup>13</sup> Whitesell & Silva-Romero, *op. cit.* p. 11, also Hanotiau *op. cit.* p. 169

<sup>14</sup> Whitesell & Silva-Romero, *op. cit.* p. 15

If the joined party was a signatory of the agreement containing the arbitration clause or if the conditions for combining a multicontract dispute into one arbitral proceeding were fulfilled, the Court was merely giving effect to the parties' intention to have all disputes related to that agreement or economic transaction decided in one arbitral proceeding.<sup>15</sup>

However, in considering whether the third party was bound by the agreement to arbitrate, the Court has remained conservative. It will only allow a joinder if the party to be joined has actually signed the contract containing the arbitration agreement. As in the case before the Federal Tribunal that we are dealing with, the Court has refused to extend the arbitration to a new party when it was alleged that the new party was bound by the arbitration agreement not because it signed the agreement but because of its involvement in the performance of the agreement. The Court thus applies a stricter standard when deciding on the joinder of a new party to an existing arbitration than when it sets in motion the arbitration in the first place.<sup>16</sup> It is precisely this restrictive approach that resulted in the ICC's refusal in this case to join the parties of the Sales Contract, C Ltd., B and D, to the arbitral proceedings brought under the Employment Contract. As Philip Landolt pointed out, the Federal Tribunal's decision may mean that the ICC will have to adopt a less conservative policy on joining new parties and leave the final decision of whether or not a party should be included in arbitral proceedings to the arbitrator, at least in cases where the place of arbitration is in Switzerland.<sup>17</sup>

Finally, the ICC will not allow the inclusion of a new party without the consent of all concerned if the request is made after the arbitral tribunal has been constituted and the Terms of Reference have been signed.

### **Constitution of the arbitral tribunal in a multiparty setting**

In a multiparty arbitration, the constitution of the arbitral tribunal poses due process challenges, particularly since 1992, when the French Cour de Cassation found, in the famous *Dutco* case, that when multiple parties entered into an arbitration agreement they had equal rights in the constitution of the arbitral tribunal. These could not be waived before the dispute arose. *Dutco* was a landmark decision which fundamentally changed the institutional approach to setting up arbitral tribunals in multiparty proceedings.

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<sup>15</sup> Whitesell & Silva-Romero, *op. cit.* p. 11, also Hanotiau *op. cit.* p. 169

<sup>16</sup> Whitesell & Silva-Romero, *op. cit.* p. 11

<sup>17</sup> Philip Landolt, Case Note c.f. footnote Nr. 2

In a multiparty setting, there is no problem constituting a three-member arbitral tribunal if the group of claimants and the group of respondents each nominate one arbitrator. The situation gets more complex if the group of respondents cannot or do not want to jointly nominate an arbitrator. Prior to *Dutco*, the Court would confirm the nomination of the claimant's group under Article 2.4 of the 1988 ICC Rules (today Article 8.4) and simply appoint an arbitrator on behalf of all respondents if they failed to make a joint nomination. However, in *Dutco*, the French Cour de Cassation concluded that this practice violated the respondents' right to an equal say in the constitution of the tribunal. The fact that the claimant's group got to have the arbitrator whom it nominated and the respondents' group had one imposed on it by the ICC, was a violation of respondents' right to due process, regardless of whether all parties had signed the same arbitration clause and had agreed to arbitration rules which clearly dealt with the case of default in arbitrator nomination. The parties could not waive their equal right in constituting the tribunal before a dispute had arisen because, as the Cour de Cassation put it: "*Le principe de l'égalité des parties dans la désignation des arbitres est d'ordre public; qu'on ne peut y renoncer qu'après la naissance du litige.*"<sup>18</sup>

The *Dutco* decision cast a shadow over the future of multiparty arbitration under the ICC Rules in France, at least in cases that called for three arbitrators. If the parties had not determined the number of arbitrators or had foreseen a sole arbitrator, the Court could get around *Dutco* by appointing a sole arbitrator. That way none of the parties had a preponderant influence in the constitution of the tribunal. The ICC addressed this situation in the 1998 revision of its arbitration rules. Article 10 now foresees that, when an arbitration agreement calls for a three-member tribunal and multiple claimants jointly or multiple respondents together cannot make a nomination, the Court will appoint all three arbitrators. Equality is thus established by depriving all parties of their right to nominate an arbitrator.

The fact that Article 8.5 of the Swiss Rules contains a similar clause, and Article 8 of the LCIA Rules (London Court of International Arbitration) and Section 13.2 of the DIS Rules (Deutsche Institution für Schiedsgerichtsbarkeit) also adopted the same solution, shows that the concern for equal treatment of the parties in the constitution of the arbitral tribunal is not a local French foible, but has evolved into a fundamental

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<sup>18</sup> Sociétés BKMI et Siemens c/ société Dutco Construction, Cour de Cassation (Jan. 7, 1992) Rev. Arb. (1992) p. 470.

concern of due process in international commercial arbitration, which might have achieved the status of a principle of international public policy.<sup>19</sup>

### **Joining Parties under the ICC Rules**

The Court's power to shape arbitral proceedings under its auspices derives from Article 6.2 of the ICC Rules, which states.

*If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.*

Article 6.2 provides for a screening process which allows the Court to weed out those cases where it considers that there is not even *prima facie* an agreement to arbitrate under the ICC Rules. However, since this refusal to proceed is an administrative decision only, the ICC Rules foresee that this determination can be examined and reviewed by a competent state court. Thus, under the rules, the arbitrator does not have the power to review the institution's negative *prima facie* finding. The phrase: "*In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself*" clearly indicates that the tribunal's mission to determine jurisdiction only exists with respect to cases where the Court has found that there is *prima facie* an agreement to arbitrate. In all other cases, the ICC Rules attribute the authority to review the Court's refusal to set in motion an arbitration or to allow an arbitration to proceed with respect to a certain party to the competent state courts.

In the case where the Court finds that the arbitration as requested by Claimant cannot be set in motion, there is no problem with a state court reviewing the ICC's decision. If that court finds that there is an agreement to arbitrate, the ICC will set in motion the proceedings. However, in a case like the one before the Federal Tribunal, where the ICC Court allows the case to

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<sup>19</sup> If that were the case, awards rendered by tribunals constituted in violation of the principle of the parties' equality in the constitution of the tribunal might not be enforceable under Article V.1 (d) and V.2 (b) of the New York Convention.

proceed with some parties but excludes others, the intervention of a state court pursuant to Article 6.2 is problematic. As we have seen, the window of opportunity for joining a party to an existing arbitration is limited between the time the request of arbitration is notified and the Court constitutes the arbitral tribunal.

Under the *Dutco* due process considerations, it is difficult to join a new party to arbitral proceedings if that party does not accept the tribunal as it stands. If a three-member tribunal was set up with each side at the time nominating its co-arbitrator and the ICC appointing the chairman, the Court would not be able to forcibly join a new party without violating that party's rights in having an equal say in constituting the panel of arbitrators. The argument is scarcely less pertinent if the tribunal was set up under Article 10 of the ICC Rules, or if the Court appointed a sole arbitrator. Although no party may have had an obviously preponderant influence by nominating "its" arbitrator, the parties may normally express their desiderata to the ICC as to the qualities and characteristics of the arbitrator(s), such as linguistic abilities, nationality, and professional experience prior to any appointment. To the extent possible, the Court will strive to find arbitrators that fit the desired characteristics. In other words, the ICC constitutes the arbitral tribunal in view of a certain constellation of parties in a given case. Once the arbitrators are in place, the constellation is fixed. A party being joined to a pending arbitration after the tribunal has been appointed will have had no chance of any input in the making up of the tribunal which may, arguably, violate its procedural right to equal treatment in the setting up of the tribunal.

This brings us back to the Federal Tribunal's decision as to whether other parties to the Sales Contract should have been joined. While at first blush it would seem logical to include in the arbitration based on the Employment Contract the signatories of the Sales Contract, at a second glance it may appear as an unwarranted judicial intervention. The facts retained by the Federal Tribunal do seem to paint a compelling picture of one economic transaction which could efficiently be dealt with in one arbitration. However, the Federal Tribunal does not really deal with the parties' intent in concluding two distinct contracts with parties that were not identical. Had the parties to the two agreements really intended to have all disputes decided in the same arbitration, they might conceivably have expressed that intent in their contracts. They did not. The ICC therefore set in motion an arbitral procedure which corresponded to the contractual structure that the parties had themselves adopted. Nor was the Federal Tribunal unduly concerned by the fact that the parties had chosen to arbitrate under a set of arbitration rules which delegates to the institution extensive powers to determine the structure and composition of the arbitral

proceedings that it administers; or the fact that the ICC Rules do not contain any joinder provision. Indeed, it seems that the Federal Tribunal was happy to sacrifice party autonomy on the altar of expediency.

Moreover, by finding that the arbitrator should have assumed jurisdiction over the parties to the Sales Contract, which the Court had excluded, the Federal Tribunal thrust on the arbitrator powers which he did not have under the arbitration rules that the parties had adopted. The Federal Tribunal's decision puts ICC arbitrators in Switzerland in the uncomfortable position of having, by judicial decree, to assume jurisdictional powers that the Court, as a supervisory institution, does not consider within their purview.

Since the case was decided by a sole arbitrator, the due process issue in the third party having an equal say in the constitution the arbitral tribunal was not as salient as it would have been if three arbitrators had heard the dispute. Nevertheless, the newly joined parties will have to live with an arbitrator without having had any input in the choice of that person. As the Federal Tribunal does not deal with this aspect at all in its decision, it is not clear whether a *Dutco* type due process considerations will in future joinder cases trouble its mind or not.

## Conclusion

The Federal Tribunal's recent decision to extend an arbitrator's jurisdiction to those parties that the Court had excluded under Article 6.2 of the ICC Rules does not sit easily with the institutional framework in which that arbitration is conducted. The Federal Tribunal's decision to require ICC arbitrators in Switzerland to review the Court's Article 6.2 exclusion decisions is not only contrary to the ICC Rules but also raises questions concerning due process in the constitution of the arbitral tribunal.

The case, however, also shows that, under the current rules, the ICC needs to be more flexible and be less restrictive in extending the reach of an arbitration agreement to related parties, in order to ensure that even complex multiparty and multicontract cases can be dealt with expeditiously and as cost effectively as possible.

Finally, it points out the need for a clear and effective joinder provision in the ICC Rules. Such provisions can already be found. Article 22.1.h of the LCIA Rules of Arbitration<sup>20</sup> and Article 376.3 of the new Swiss Federal Code

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<sup>20</sup> *Article 22 Additional Powers of the Arbitral Tribunal (LCIA Rules)*

of Civil Procedure,<sup>21</sup> allow for joinder and stipulate that a joinder is only possible if there is an arbitration agreement between the third party and the existing ones. By contrast, Article 4.2 of the Swiss Rules of International Arbitration allows the tribunal to join a third party if it is satisfied that a joinder is justified after “*taking into account all circumstances it deems relevant and applicable.*”<sup>22</sup> The absence of any reference to the agreement to arbitrate can be interpreted to mean that third parties may be joined to an arbitration even if there is no arbitration agreement between them and the existing parties.<sup>23</sup> Since arbitration is a contractual process of resolving disputes and should remain anchored in the arbitration agreement, it may be preferable to opt for a joinder rule which explicitly requires that a third party can be joined only if it is bound by the arbitration agreement.

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

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

<sup>21</sup> **Art. 376 Joinder of Parties, Plurality of Claims and Participation of Third Parties (new Swiss Code of Civil Procedure)**

3. The intervention of a third party and the requested joinder of a third party require the existence of an arbitration agreement and the agreement of the arbitral tribunal.

<sup>22</sup> **Article 4 Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties (Swiss Rules)**

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

<sup>23</sup> The author is aware of one case where an arbitrator held that a third party could be voluntarily joined to an existing arbitration over the opponent's objections even in the absence of an agreement to arbitrate, because Article 4.2 did not require such an agreement. The arbitrator's decision was referred to the Federal Tribunal. However, as the parties appear to have settled the case, no decision will be forthcoming. Otherwise Article 4.2 has not been tested yet by the Federal Tribunal.



### **Submission of Manuscripts**

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

### **Aims & Scope**

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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