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## Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?

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# Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?

S. I. Strong\*

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## I. INTRODUCTION

Arbitration has long been called a creature of contract, a dispute resolution mechanism that has no form or validity outside the four corners of the parties' arbitration agreement.<sup>1</sup> Some feel, however, that it may be time to change this narrow interpretation of arbitration's function and scope, and nowhere is this need for reform more apparent than in the realm of multi-party international disputes. Arbitration has taken on an increasingly important role in international commercial transactions and has become the preferred dispute resolution mechanism in many types of transnational contracts. Although there are any number of reasons why this may be so, many commentators claim that the increase is the result of parties' desire to control the choice of forum; absent an arbitration clause, they might not be able to predict where and under which law any disputes under the contract might be resolved.<sup>2</sup> Other experts claim that parties choose to arbitrate rather than litigate in order to avoid the potential bias of national courts.<sup>3</sup> However, most

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1. See W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 8 (1995); Hiroshi Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 29, 44-45 (1988); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 476 (1987). For an excellent history of international commercial arbitration, see Craig, *supra*, at 1-16; Henry T. King, Jr. & James D. Graham, *Origins of Modern International Arbitration*, DISP. RES. J., Jan.-Mar. 1996, at 42.

2. See Karl-Heinz Bockstiegel, *The Role of Party Autonomy in International Arbitration*, DISP. RES. J., Summer 1997, at 24; Craig, *supra* note 1, at 2-4; Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 BUS. LAW. 577, 581-85 (1990); Camille A. Laturno, Comment, *International Arbitration of the Creative: A Look At the World Intellectual Property Organization's New Arbitration Rules*, 9 TRANSNAT'L LAW. 357, 370-71 (1996).

3. See Bockstiegel, *supra* note 2, at 28; Craig, *supra* note 1, at 2-4; Lecuyer-Thieffry & Thieffry, *supra* note 2, at 581-85; James M. Michali, *Practical Issues in Modern Arbitration*, in II AMERICAN BAR ASSOCIATION DIVISION FOR PROFESSIONAL EDUCATION, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICAL APPROACHES AND CONSIDERATIONS 209, 210-12 (1987) (discussing pros and cons of international arbitration); Laturno, *supra* note 2, at 370-71. *But see* William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135, 167 (1995) [hereinafter Park, *Illusion*] (noting that simple disputes may be referred to national courts without undue effect).

practitioners and scholars attribute international arbitration's growing popularity to the ease with which international arbitral awards may be enforced.<sup>4</sup> Most international awards are enforced via the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention,<sup>5</sup> but awards may also be enforced under other conventions or bilateral treaties as well as under national law.<sup>6</sup> In fact, enforcement of arbitral awards is far more certain and well-regulated than enforcement of judgments from domestic courts, which may be a difficult and risky business.<sup>7</sup>

As international transactions become more complex, certain procedural problems are becoming more common. One of the most troubling issues in this area of law concerns joinder or intervention of third parties into an existing arbitration. Many courts have held—and commentators have argued—that third parties have no right to intervene or join in an arbitration absent the consent of the existing parties.<sup>8</sup> However, the frequency with which multi-party

4. See Craig, *supra* note 1, at 3, 10-11; Samuel A. Haubold, *Opting Out of the U.S. Legal System—The Case for International Arbitration*, 10 INT'L L. PRACTICUM 43, 43-44 (1997); Lecuyer-Thieffry & Thieffry, *supra* note 2, at 585-88.

5. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention], reprinted in ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION app. 15 (2nd ed. 1991). One hundred thirteen states have currently ratified, acceded, or succeeded to the New York Convention. See 1 INTERNATIONAL COMMERCIAL ARBITRATION, Doc. I.6.1 (Eric E. Bergsten ed., 1998) (listing the state parties to the New York Convention).

6. See, e.g., European Convention on International Commercial Arbitration, Apr. 21, 1964, 484 U.N.T.S. 364; Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention), Pub. L. No. 101-369, 104 Stat. 448 (1990); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159; Bockstiegel, *supra* note 2, at 26; William K. Slate II, *International Arbitrations: Do Institutions Make A Difference?*, 31 WAKE FOREST L. REV. 41, 45-46 (1996). In fact, the New York Convention merely sets the most stringent conditions that states can impose regarding the enforcement and recognition of arbitral awards; states may always provide for more liberal methods of enforcement. See 2 W. LAURENCE CRAIG ET AL., INTERNATIONAL COMMERCIAL ARBITRATIONS: INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION addendum 1 to app. V at 13 (1994) (including a summary and extract of the *Norsolor S.A. (France) v. Pabalk Ticaret Ltd. Sirketi (Turkey)* case in the French domestic courts); see also *id.* at 71 (including a summary and extract of *Denysiana S.A. v. Jassica S.A.*, wherein the Swiss Federal Tribunal held that where there is more than one international arbitration enforcement mechanism, parties are entitled to rely on whichever treaty is most favorable to them).

7. See Haubold, *supra* note 4, at 43; Lecuyer-Thieffry & Thieffry, *supra* note 2, at 585-88. However, some would argue that the facility with which arbitral awards are enforced owes less to the existence of international treaties and more to the consensual nature of the proceedings. See Craig, *supra* note 1, at 7-8.

8. See, e.g., 1 GEORGES R. DELAUME, TRANSNATIONAL CONTRACTS 310 (1988); REDFERN & HUNTER, *supra* note 5, at 184; Charles S. Baldwin, IV,

transactions are beginning to occur suggests the growing need to consider whether third parties should be granted some ability to intervene or be joined in an arbitral proceeding. The need seems highest in complex international transactions, where not every interested party is a signatory of the same arbitration provision.<sup>9</sup> The question raised by this Article is whether the intervention or joinder

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*Protecting Confidential and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451, 467 (1996); John Milligan-Whyte & Mary Cannon Veed, *Bermudian, English and American Reinsurance Arbitration Law and Practice and Alternative Dispute Resolution Methods*, 25 TORT & INS. L.J. 120, 139 (1989); Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 91 (1995); Stipanowich, *supra* note 1, at 506.

9. For example, international construction projects often involve "webs of independent contractual relationships between parties of different nationalities." Matthew D. Schwartz, Note, *Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?*, 22 CASE W. RES. J. INT'L L. 341, 344 (1990). Multi-party disputes also arise in maritime, insurance/reinsurance, and franchise cases. See Michael F. Hoellering, *Consolidated Arbitration: Will it Result in Increased Efficiency or an Affront to Party Autonomy?*, DISP. RES. J., Jan. 1997, at 41; Stipanowich, *supra* note 1, at 481-82 (noting various ways in which multi-party disputes may arise). Indeed, the routine use of arbitration provisions in international agreements has created a situation where the most complex issues of law and fact are determined by arbitration, not litigation. See Craig, *supra* note 1, at 8; see also Rau & Sherman, *supra* note 8, at 108 n.104 (discussing incidence of multi-party arbitration); Stipanowich, *supra* note 1, at 476 (noting that classic arbitration "involves one or more disputes between two signatories to a written agreement").

The types of cases in which a need for joinder of or intervention by a third party in an ongoing arbitration might arise are numerous, and include, *inter alia*:

- (1) vertical construction contracts (i.e., owner-contractor-third party subcontractor);
- (2) horizontal construction contracts (i.e., contractor-engineer-third party architect);
- (3) indemnification contracts (i.e., injured party-liable party-third party indemnifactor);
- (4) reinsurance contracts (i.e., injured party-insurer-third party reinsurer);
- (5) intellectual property contracts (i.e., patent holder-manufacturer-third party distributor);
- (6) copyright distribution contracts (i.e., copyright holder-distributor in country A-third party exclusive distributor in country B which has experienced parallel imports from country A);
- (7) employment contracts (i.e., employee-employer-third party subcontractor);
- (8) securities contracts (i.e., seller-buyer-third party financier);
- (9) franchise contracts (i.e., franchise owner-franchise holder in country A-third party franchise holder in country B); and
- (10) tort cases referred to arbitration by consent or contract (i.e., injured party-product distributor-third party manufacturer).

Notably, in the modern global market, each of these parties may be from different states.

of third parties<sup>10</sup> as of right in an arbitral proceeding is wise, necessary, and legally possible under current laws.<sup>11</sup>

Before beginning any analysis, it is important to define terms. For the purpose of this Article, a third party is said to have a claim to intervene in an arbitration as of right when (1) it asserts an interest relating to the property or transaction that is the subject of the arbitration, (2) it is so situated that the disposition of the arbitration may, as a practical matter, impair or impede the third party's ability to protect that interest, and (3) the third party's interest will not be adequately represented by the original parties to the arbitration.<sup>12</sup> The mere existence of common questions of law or fact does not constitute a sufficient reason to intervene.<sup>13</sup>

Similarly, for the purpose of this Article, an existing party is said to have a claim to join a third party into an arbitration as of right when (1) in the third party's absence, complete relief cannot be accorded among those already parties to the arbitration or (2) the third party asserts an interest relating to the subject of the arbitration and is so situated that the disposition of the arbitration in the third party's absence may (a) as a practical matter impair or impede the third party's ability to protect that interest or (b) leave any of the persons already parties to the arbitration subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.<sup>14</sup> As in U.S. federal practice, "joinder" refers to the technique used by an existing party to bring a third party into an arbitration, while

10. This Article will focus solely on the right of willing third parties to intervene or be joined in an arbitration. The problems associated with joining an unwilling third party into an arbitration will not be discussed at length. See *infra* note 87 and accompanying text.

11. See Coleen C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 TUL. L. REV. 1519, 1534 (1991) (noting that "one may wonder whether the next step, consistent with a pro-arbitration policy, could be ordering that disputes of third parties neither bound contractually by any arbitration nor linked to any agency to the dispute be consolidated"); Rau & Sherman, *supra* note 8, at 108-10 (discussing scenarios in which intervention might be wise and/or necessary); Stipanowich, *supra* note 1, at 476 (noting that "in opting for arbitration of disputes, parties to a complex commercial transaction may be deemed to have sacrificed procedural advantages critical to expeditious resolution of a multiparty controversy").

12. See FED. R. CIV. P. 24(a) (defining intervention as of right).

13. See FED. R. CIV. P. 24(b).

14. See FED. R. CIV. P. 19(a). Opponents to joinder of third parties in arbitration might note that Rule 19 only allows joinder of persons "whose joinder will not deprive the court of jurisdiction," see *id.*, and might therefore claim that Rule 19 cannot provide a model for joinder of parties in arbitration, since to do so would deprive the arbitral tribunal of jurisdiction. However, there are numerous rebuttals to that argument, which will be discussed herein.

“intervention” refers to the device used by outsiders to make themselves parties to the arbitration.<sup>15</sup>

The structure of this Article is straightforward. Part II discusses arbitration’s contractual roots and the differences between arbitration and civil litigation. Part II also outlines some of the measures that have been used up until this time to facilitate multi-party arbitration. Although issues of joinder and intervention are becoming more important in international arbitration, until now most scholars and practitioners have focused on the problem of consolidation: whether arbitrators or courts should consolidate two existing arbitrations into one.<sup>16</sup> In some ways, the theoretical debate on the propriety of consolidation illuminates the issue of joinder and intervention as of right and provides a helpful backdrop to the current discussion. For example, many commentators support consolidating arbitrations in order to increase efficiency, save costs, and avoid inconsistent awards.<sup>17</sup> Because many of these rationales can also be used to justify intervention and joinder as of right, a brief discussion of consolidation and its pros and cons is useful. In addition, recent reforms in the area of consolidation<sup>18</sup> may suggest ways in which the law on joinder and intervention might change.

However, before one can suggest ways in which the law might change, one must understand the current condition of the law. Part III of this Article outlines the relevant provisions of a variety of national laws on arbitration as well as the rules promulgated by several arbitral institutions and United Nations bodies. This survey is not meant to be comprehensive, but will discuss a number of provisions (some unusual, some more common) from popular arbitral institutions and forum states as well as some of the more innovative administrative agencies and states. It should be noted that this study is intended to be primarily a

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15. See GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 261 (2nd ed. 1994).

16. See, e.g., Hoellering, *supra* note 9, *passim*; Rau & Sherman, *supra* note 8, at 108-10; Stipanowich, *supra* note 1, *passim*.

By consolidation is meant the act or process of uniting several pending arbitrations into one hearing before the same panel of arbitrators. Although the parties may not necessarily be the same, we do find the same or similar subject matter, common questions of law and fact, and substantially similar issues and defenses.

Schwartz, *supra* note 9, at 341 n.2 (citation omitted).

17. See Stipanowich, *supra* note 1, at 474-75, 493. *But see* Rau & Sherman, *supra* note 8, at 94 (noting some “parties and lawyers . . . sometimes find that arbitration is neither cheaper nor speedier than litigation”); G. Hans Sperling, Comment, *New London Arbitration Rules: Paradise Regained?*, 21 TUL. MAR. L.J. 557, 559 (1997) (noting the cost and duration of average international arbitration).

18. See Rau & Sherman, *supra* note 8, at 108 (noting that “consolidation of related proceedings is now ‘a fashion whose time has come’”) (citation omitted).



statutory analysis since the goal is to see if existing laws will support arguments in favor of intervention and joinder. However, case law will be introduced to the extent it is relevant and available.<sup>19</sup>

Although radical legal change is often most effectively instituted through the adoption of explicit rules and laws, reform is far more likely to occur gradually, based on new interpretations of existing texts. Therefore, Part IV suggests the various ways in which intervention and joinder as of right might be effected using existing legal precepts and language. This section also discusses the theoretical legitimacy of each suggested method and the likelihood that courts and arbitral tribunals will use each of these measures.

## II. ARBITRATION: A CONTRACTUAL CONSTRUCT

### A. Arbitration's Contractual Roots

To many scholars and practitioners, the question of third party intervention and joinder is quite easy to answer. Relying on an interpretation of arbitration as a contractual construct, these people argue that if the parties to the arbitration do not agree to joinder or intervention, neither the courts nor the arbitral tribunal can order such measures. As the argument goes, to allow joinder or interest in would be akin to rewriting the contract and upsetting the dispute resolution mechanism bargained for by the parties.<sup>20</sup> In addition, strict contractualists argue that because arbitral authority is limited to the terms of the contract, an arbitrator would have no power to hear the joined dispute unless the party to be joined either expressly or impliedly agreed to arbitrate.<sup>21</sup>

As shall be seen, however, such analyses merely beg the question. Although arbitration is an old and respected institution, it, like many other areas of the law, is constantly changing to adapt to

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19. Admittedly, the weight of case law in consolidation cases suggests that most courts and arbitral tribunals would oppose joinder or intervention by third parties over the objection of one or more existing parties to the arbitration in all but the most extreme cases. See, e.g., Lecuyer-Thieffry & Thieffry, *supra* note 2, at 608-09. Rather than accepting the status quo, however, this Article discusses how change might be implemented in appropriate cases.

20. See REDFERN & HUNTER, *supra* note 5, at 186; Gerald Aksen, *Multi-Party Arbitrations in the United States*, in ARBITRATION AND THE LICENSING PROCESS 5-3, 5-14 (Robert Goldscheider & Michel de Haas eds., 1984); Rau & Sherman, *supra* note 8, at 111-18; Stipanowich, *supra* note 1, at 494.

21. See Aksen, *supra* note 20, at 5-14 to 5-15. This problem is easily overcome by permitting courts whose powers are not limited by the parties' contracts to order joinder or intervention of third parties.

the realities of modern commercial practice.<sup>22</sup> Now may be the time for arbitrators to take advantage of court systems' vast experience with multi-party disputes and adopt rules of joinder or intervention similar to those found in national laws of civil procedure.<sup>23</sup> In fact, because courts are now commonly upholding mandatory arbitration agreements—such as those found in employment contracts—it may be even more necessary to offset the hardships associated with mandatory arbitration provisions with a recognized right to join or intervene in an arbitration.<sup>24</sup>

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22. See Stephen R. Bond, *Multi-Party Arbitration: The Experience of the ICC Court of Arbitration*, in 2 CRAIG ET AL., *supra* note 6, app. VI, at 29, 30 [hereinafter Bond, *ICC Experience*].

23. See Stipanowich, *supra* note 1, at 475-76 (discussing reasons behind courts' rules regarding, *inter alia*, intervention and joinder of third parties); see also Motomura, *supra* note 1, at 79 (noting that rules on joinder in arbitration may soon evolve to resemble those found in civil litigation).

24. See Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 53-58 (1997) (discussing how courts in the U.S. have upheld mandatory arbitration agreements). In upholding mandatory arbitration agreements, courts may be creating a class of third parties who have no effective remedy for their claims if they are not permitted to intervene in the arbitration.

For example, an employer may require all disputes arising out of employment or in connection with an employment contract to be arbitrated. If an employee with such an arbitration agreement claims to have been subjected to sexual or racial harassment by a subcontractor whose actions were known to and/or condoned by the employer, the employee would have to submit those claims to arbitration with the employer. If the subcontractor's contract had no arbitration clause but did include an indemnification to the employer for any damages arising out of the subcontractor's actions while working for the employer, the subcontractor could be left without any reasonable way to defend itself against the harassment claim. The employee could pursue an award against the employer directly for harassment under a theory of *respondeat superior*, and if the employer lost, it would be entitled to indemnification from the subcontractor. Although the subcontractor could be called as a witness at the arbitration, there is no way to ensure that the subcontractor's interests (which might be similar but not identical to those of the employer) would be properly or vigorously represented at the hearing. In this type of situation, the subcontractor would be left defenseless if it had no right to intervene in the arbitration. See also Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT'L L.J. 121, 127 (1995) (discussing problems associated with serial dispute resolution proceedings). Requiring the consent of one or both of the existing parties to the arbitration is no solution, since there will be times when it is in neither party's interest to have the third party present. See also Rau & Sherman, *supra* note 8, at 108-12 (discussing scenarios in which intervention might be wise or necessary but unavailable in a jurisdiction requiring consent of the existing parties).

Proponents of a pure contract theory of arbitration will argue that the subcontractor should negotiate for the right to participate in the arbitration, but the subcontractor would be unable to do so in most circumstances, since a large number of employment contracts would already be in effect and could not be unilaterally altered to incorporate a right by the subcontractor to participate in the employee-employer arbitration. This is, of course, assuming that the subcontractor even knew of the mandatory arbitration clause in the employment contracts.

## 1. Contractual Language Regarding Arbitration

Because arbitration is a voluntary dispute resolution mechanism, the arbitrator's authority and jurisdiction is generally considered to derive solely from the specific contractual language in the arbitration agreement.<sup>25</sup> Arbitrators who are faced with a request for a third party to join or intervene in an arbitration will therefore look first to the arbitration agreement to see what, if anything, the contracting parties contemplated with respect to third parties. Three possibilities exist: (1) a contract that expressly allows for joinder or intervention of third parties; (2) a contract that expressly prohibits joinder or intervention of third parties; and (3) a contract that is silent or vague regarding joinder or intervention of third parties.<sup>26</sup>

The first situation, although incredibly rare, is obviously the most simple to resolve: if the parties have agreed to permit strangers to the contract to intervene in certain or all cases, then the courts and arbitral tribunals should give effect to that language.<sup>27</sup> It is the second and third situations that cause the most problems.

Many would argue that respect for contracts and party autonomy requires arbitrators to uphold explicit prohibitions on intervention and joinder such as those contained in the second category of contracts.<sup>28</sup> Certainly, it would be difficult to overcome such language, although some jurisdictions, such as the state of Massachusetts, have reserved the right to do so in appropriate circumstances.<sup>29</sup> Such language might be also disregarded based on efficiency arguments,<sup>30</sup> public policy,<sup>31</sup> or equitable grounds.<sup>32</sup>

By far the most common situation involves a contract that is silent on the issue of intervention or joinder of third parties.<sup>33</sup> Although an

25. See, e.g., Craig, *supra* note 1, at 8; Higgins, *supra* note 11, at 1542; Motomura, *supra* note 1, at 38; Stipanowich, *supra* note 1, at 476-77.

26. See Rau & Sherman, *supra* note 8, at 110-18.

27. See *id.* at 110-11.

28. See *id.* at 111.

29. See MASS. GEN. LAWS ANN. ch. 251, § 2A (West 1988); Rau & Sherman, *supra* note 8, at 111.

30. See Rau & Sherman, *supra* note 8, at 111-12 (noting that some U.S. states have adopted this approach, although it may not be available in U.S. federal courts).

31. See *infra* notes 427-37 and accompanying text (describing public policy rationales that would establish third party joinder and intervention as of right as a mandatory, unwaivable principle of law).

32. See *infra* notes 418-25 and accompanying text. It seems appropriate, however, that Courts and arbitrators should require the equities in favor of joinder or intervention to be much higher in cases where the contract prohibits third-party participation than in cases where the contract is silent on the subject.

33. See Rau & Sherman, *supra* note 8, at 112-13; Stipanowich, *supra* note 1, at 476. One reason why contracts are often silent regarding third party rights

arbitrator might try to rely on contractual rules of interpretation in order to decide whether to permit third parties to join or intervene in the arbitration, those rules provide very little real guidance, as they are often both vague and conflicting.<sup>34</sup> The currently preferred default position is to bar intervention or joinder in situations where the contract does not expressly grant third parties the ability to participate in the arbitration.<sup>35</sup> However, as shall be discussed in Part IV, there are a number of jurisprudentially acceptable ways to mitigate this harsh rule.

## 2. Differences Between Arbitration and Civil Litigation

In many ways, the debate about whether to permit joinder and intervention of third parties in arbitration arises from two different ways of looking at arbitration. Those who believe that third parties, as aliens to the arbitration agreement, have absolutely no right to intervene or be joined in the proceedings generally view arbitration as a purely contractual matter separate from civil litigation. Those who believe that there should be some limited right of joinder or intervention are more likely to view arbitration as an individualized dispute resolution mechanism that respects party autonomy, but that is also influenced by the pragmatic and procedural due process concerns that arise in the context of civil litigation.<sup>36</sup>

However, the analogy between arbitration and civil litigation is imprecise because arbitration's contractual underpinnings create several important differences.<sup>37</sup> In fact, supporters of third party

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is the inability to anticipate *ex ante* who those third parties might be. See Rau & Sherman, *supra* note 8, at 115 n.139.

34. See Rau & Sherman, *supra* note 8, at 112-18. For example, one rule of contractual construction states that parties will be assumed to have decided against intervention and joinder in the absence of express language permitting such actions. See *id.* at 113. Another rule of contractual construction suggests that parties will be assumed to have agreed to permit intervention and joinder in the absence of express language prohibiting such actions. See *id.* at 113-14; see also Stipanowich, *supra* note 1, at 498-501 (discussing judicial presumptions in the absence of contractual language regarding consolidation and joinder, including the presumption that parties' agreement to arbitrate includes the intent to pursue the most efficient and economical means of commercial justice, which would include consolidation and, presumably, joinder and intervention when appropriate). Therefore, under traditional rules of contract interpretation, there is no clear resolution when the parties are silent on an issue.

35. See, e.g., REDFERN & HUNTER, *supra* note 5, at 186-87; Aksen, *supra* note 20, at 5-3, 5-15; Rau & Sherman, *supra* note 8, at 111-18; Stipanowich, *supra* note 1, at 494.

36. See Motomura, *supra* note 1, at 77-78, 80-81 (arguing against certain approaches to arbitration that make arbitration more like civil litigation, but noting that there is a trend to view arbitration as a substitute for, rather than an alternative to, litigation).

37. See Bompey et al., *supra* note 24, at 27-30 (discussing similarities and differences between arbitration and civil litigation).

participation cannot rely solely on comparisons to civil procedure to win their point because arbitration is often perceived as an alternative to formal, legalistic approaches to dispute resolution and is not supposed to replicate court proceedings.<sup>38</sup> A brief discussion of some of the more interesting nexus points between arbitration and litigation will not only show why advocates of joinder and intervention cannot rely blindly on analogies to civil procedure, but will also highlight some of the theoretical problems of joinder and intervention in arbitration.

#### a. Restrictions on Party Autonomy

Because arbitration is a consensual dispute resolution mechanism, courts and commentators constantly emphasize the priority traditionally given to the autonomy of the parties when creating a procedure by which an arbitration is to be conducted.<sup>39</sup> However, there are at least two instances in which courts will restrict the parties' ability to act autonomously.<sup>40</sup> Both restrictions are based on concerns that have traditionally been raised in civil litigation.

First, courts will limit parties' ability to decide the procedure of the arbitration when allowing them to do so would violate the fundamental principles of equal treatment between the parties and the opportunity to fully present one's case.<sup>41</sup> Therefore, one argument in favor of joinder or intervention of third parties is that third party entry into the proceeding should be allowed when joinder

38. See 1 W. LAURENCE CRAIG ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 271 (1997) (discussing Swiss law); Collins, *supra* note 24, at 128 (discussing English law); Craig, *supra* note 1, at 18; Rau & Sherman, *supra* note 8, at 91 n.7; see also James J. Tansey, *The Principal Differences Between Arbitration and Litigation*, in *COMMERCIAL ARBITRATION FOR THE 1990S* 41 (Richard J. Medalie ed., 1991). However, at least one country, Israel, has given arbitrators extraordinary powers similar to those given to courts. See Israel Arbitration Law, 1968, S.H. 118, § 13(a) [hereinafter Israel Arbitration Law], translated and reprinted in 4 *INTERNATIONAL COMMERCIAL ARBITRATION*, IV.Israel.2.a (Kenneth R. Simmonds ed., 1998). For example, an Israeli arbitrator can compel witnesses to give testimony or produce documents, *see id.*, as well as grant various types of injunctions or other interim relief, *see id.* at Sched. 2, § Q. Still, even Israeli law does not equate arbitration with litigation. *See id.* § N ("The arbitrator shall act in such matter as appears to him most conducive to a just and speedy determination of the dispute, and . . . shall not be bound by the substantive law, the rules of evidence or the rules of procedure obtaining in the courts.")

39. See, e.g., REDFERN & HUNTER, *supra* note 5, at 186-87; Aksen, *supra* note 20, at 5-3, 5-14; Rau & Sherman, *supra* note 8, at 111-18; Stipanowich, *supra* note 1, at 494 (noting that modern arbitration statutes limit courts' roles to implementation of the parties' contract).

40. See REDFERN & HUNTER, *supra* note 5, at 292-94.

41. See *id.* at 292-93 (noting that the principle of equality restricts party autonomy).

or intervention is necessary to effectuate equality between the parties or to assist one party in making its case.<sup>42</sup>

Opponents of joinder and intervention would argue that permitting a third party to enter the arbitration, even in situations where it is necessary to ensure equality between the parties or to guarantee each party the opportunity to fully present its case, (1) affirmatively damages an existing party's bargained-for right to arbitrate its claim without the presence of a third party and (2) prejudices one of the existing parties by helping the other party make its case, thus violating the principle of equality between the parties.

Both of these arguments have problems. The first argument is either circular, i.e., party autonomy should not be curtailed because party autonomy should prevail, or requires a court to permit one party to use its greater contractual strength to force a weaker party to surrender procedural safeguards in a binding dispute resolution forum.<sup>43</sup> Obviously, courts cannot let this kind of "might makes right" philosophy prevail. The second argument ignores the fact that every decision by a court or tribunal favors one party's position over the others. The claim that allowing third parties into an arbitration is per se unequal treatment of the parties would make sense only if arbitrators allowed third parties to participate on an unequal basis such as, for example, only permitting joinder of third parties when they helped the respondent's case or setting an arbitrary limit on the number of third parties that could participate in the proceedings.

Second, courts will curtail the parties' right to autonomy in arbitration when to do so would violate domestic or international public policy.<sup>44</sup> Not only does this notion tie into the principle of equality between the parties and the full opportunity to present one's case (since both are public policy concerns), it also provides its own argument in favor of permitting joinder and intervention as of right.<sup>45</sup>

For example, intervention or joinder should be permitted if failing to allow such measures would violate public policies, such as laws stating that no party's rights or interests may be adjudicated without

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42. See FED. R. CIV. P. 19(1); *infra* notes 404-17 and accompanying text.

43. Some states explicitly prohibit such actions. See, e.g., German Code of Civil Procedure art. 1025, *translated and reprinted in* 3 INTERNATIONAL COMMERCIAL ARBITRATION, IV.Germany.2.a. (Kenneth R. Simmonds ed., 1993) ("The arbitration agreement is not valid if one of the parties has used any superiority it possesses by virtue of economic or social position in order to constrain the other party to make this agreement or to accept conditions therein, resulting in the one party having an advantage over the other in the procedure . . ."). *But see* Bompey et al., *supra* note 24, at 55 (discussing U.S. case law dismissing claims that mandatory arbitration agreements are unconscionable due to differences in bargaining power).

44. See REDFERN & HUNTER, *supra* note 5, at 293-94, 443-46 (discussing domestic and international public policy).

45. See *infra* notes 418-25 and accompanying text.

the party being present.<sup>46</sup> Because every state's public policy is different, the outcome under this analysis can vary from state to state, despite the similarities of the underlying facts.

#### b. Naming the Arbitrator

Perhaps the most revered aspect of contractually agreed-upon arbitration is the ability of the parties to appoint their own arbitrator.<sup>47</sup> Although a number of contracts state that only a single arbitrator shall be appointed, many others establish the traditional three-person panel, with each party appointing one arbitrator and a neutral third being appointed by any one of a variety of methods.<sup>48</sup> Opponents to third party intervention or joinder often argue that allowing a third party to participate in the arbitration disrupts the fundamental principle of equality of the parties as it is applied to selection of the arbitrators, because the contractually bargained-for selection procedure is destroyed if the new party is allowed to appoint its own arbitrator and, conversely, there is a lack of equality among the parties if the third party is not allowed to appoint its own arbitrator.<sup>49</sup>

However, these arguments appear to be based on the belief that a party may only expect true justice from an arbitrator it has appointed. If true, this argument destroys the notion that arbitration

46. Although arbitrators have no right to directly affect third parties' rights or interests, they often have significant indirect influence on how well and how easily a third party can pursue a related claim. See *infra* note 85.

47. See Laurie A. Kamaiko, *Reinsurance Arbitrations*, 557 PLI/LIT 201, 234-35 (1997) (noting that although some see the ability to choose an arbitrator as "a positive difference that allows technical issues to be decided by experts in the subject," while others view it as "limiting the likelihood of a truly impartial decisionmaker," almost all agree on the importance of the selection process); *id.* at 271 n.52 (noting courts' recognition that "a party's right to choose its own arbitrator is a valuable one").

48. See *id.* at 234, 239-47; see also Rau & Sherman, *supra* note 8, at 92 (noting neutral arbitrators' influence over party-appointed arbitrators). However, the ability of a party to choose an arbitrator who can or will vigorously advocate its position is diminished in institutionally-administered arbitrations, where arbitrators are bound by ethical standards of behavior that do not distinguish between party-appointed arbitrators and "neutral" arbitrators. See Slate, *supra* note 6, at 58; see also International Bar Association Ethics for International Arbitrators, reprinted in REDFERN & HUNTER, *supra* note 5, app. 14 (containing international arbitrators' code of ethics).

49. See REDFERN & HUNTER, *supra* note 5, at 186-7, 292-93; Lecuyer-Thieffry & Thieffry, *supra* note 2, at 609-10; Rau & Sherman, *supra* note 8, at 110 n.115 (discussing in the context of the French *Dutco* case the principle of equality of the parties and whether every party in an arbitration has a right to name an arbitrator); Eric A. Schwartz, *Multi-Party Arbitration and the ICC: In the Wake of Dutco*, in 2 CRAIG ET AL., *supra* note 6, app. vi, *passim* [hereinafter Schwartz, *Dutco*]; Stipanowich, *supra* note 1, at 523 (discussing the "race to arbitration" in order to have the right to name an arbitrator).

can provide any sort of objective, non-biased resolution of disputes.<sup>50</sup>

If arbitration is to be considered a legally sanctioned and legally enforceable dispute resolution mechanism, then we must believe that arbitrators rule on the facts and legal or equitable principles before them, not on party affiliation.<sup>51</sup> If a third party's right to join or intervene in an arbitration is limited merely because of concerns about the selection of the arbitral tribunal, then we are abandoning the notion that arbitration can be objective and embracing the notion that party affiliation is determinative.

In fact, experience suggests that party affiliation is not as important as some practitioners and commentators believe it to be. For example, the way in which arbitrators are selected often eliminates much of the parties' supposed freedom of choice. Most of the time, practitioners are forced to choose "their" arbitrator from a list of names supplied to them by the institution administering the arbitration.<sup>52</sup> Many of these potential arbitrators will be personally unknown to counsel and will only be distinguishable by the short professional biographies that are found in legal publications or are attached to the list submitted by the administering agency. In cases such as these, the most counsel can do is make an educated guess, based on each candidate's professional background, as to who might be more inclined toward a particular perspective.<sup>53</sup> In any event, nothing is certain, and the composition of the arbitral tribunal will often come down to the luck of the draw, just as it does in litigation.

If we believe that arbitrators are required to decide on the basis of the law and the facts, and if the practical reality of the tribunal selection process contains little real choice for counsel, then there

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50. See Kamaiko, *supra* note 47, at 240-43 (comparing the view that all arbitrators should be neutral with the view that party-appointed arbitrators can act as advocates for their party's perspective); see also Rau & Sherman, *supra* note 8, at 92-93 (noting the influence a neutral third arbitrator can have on party-appointed arbitrators).

51. See REDFERN & HUNTER, *supra* note 5, at 221 (noting that "[m]ost non-neutral arbitrators will not allow the fact of their appointment by one party to dictate the outcome of the proceedings"); *id.* at 222 (noting that American Arbitration Association Code of Ethics requires even non-neutral arbitrators to "act in good faith and with integrity and fairness"). *But see* 1 CRAIG ET AL., *supra* note 38, at 545 (noting that "impartiality has often proved unrealistic with respect to party-appointed arbitrators"); REDFERN & HUNTER, *supra* note 5, at 372 (noting that "it is not improper for a party-nominated arbitrator to ensure that the arbitral tribunal properly understands the case being advanced by that party").

52. See REDFERN & HUNTER, *supra* note 5, at 210-11 (describing the list system of choosing arbitrators); Netherlands Arbitration Institute Arbitration Rules, *reprinted in id.* at app. 10, art. 14.

53. See DELAUME, *supra* note 8, at 315 (noting that in "institutional arbitration, the parties are not always given the same opportunity to express their preference as to the choices of arbitrators" and that most attorneys select international arbitrators on the basis of the arbitrator's language ability, familiarity with the applicable law, business experience, and nationality).



appears to be little need to give third parties the right to appoint their own arbitrator if they intervene or are joined in an arbitration.<sup>54</sup> Although some third parties may want the right to appoint an arbitrator, they should realize that their choices may come down to (1) participating in the arbitration without selecting an arbitrator or (2) not participating at all. Given that scenario, most third parties will willingly surrender the opportunity to participate in the selection of the tribunal, barring a situation where a potential arbitrator has a personal interest in the third party or its claim.<sup>55</sup> This solution not only appears logical but respects the original parties' agreement concerning the selection process.<sup>56</sup>

### c. Payment of Arbitrators

Unlike civil litigation, which is administered by the state and supported by state funds, arbitrators, or the arbitral institution which is administering the arbitration, are paid for their efforts.<sup>57</sup> Often the cost of the arbitration is split between the parties, although in some cases the English or "loser pays" rule applies.<sup>58</sup> The issue that is raised in cases of joinder or intervention is whether the original parties to the arbitration should share in the costs associated with hearing the claims of the third party or whether the third party should bear those costs alone.

On the one hand, it makes sense to require payment from the intervening party, who has at least a nominal choice between proceeding in the arbitral forum and pursuing its remedy in subsequent arbitrations or litigation.<sup>59</sup> Alternatively, a contracting party that joins a third party may be assessed the additional costs. This approach acknowledges the fact that the existing parties never agreed to take on the costs associated

54. See Schwartz, *Dutco*, *supra* note 49, at 7 & n.20. But see Stipanowich, *supra* note 1, at 523.

55. Similarly, third parties should not be able to object to the constitution of a sitting tribunal unless one of the arbitrators has an interest in the third party. In such a case, the arbitrator should step down and whoever appointed that arbitrator should be allowed to choose again.

56. Some procedural rules are already attempting to address the problems of selecting a tribunal in multi-party disputes. For example, the International Chamber of Commerce (ICC) grants the right to appoint an arbitrator to the group of claimants or respondents, not to individual parties. See International Chamber of Commerce: Rules of Arbitration, art. 10, effective Jan. 1, 1998 [hereinafter New ICC Rules]. The rules of the World Intellectual Property Organization also include a multi-party selection procedure. See World Intellectual Property Organization: Mediation, Arbitration, and Expedited Arbitration Rules, art. 18, 34 I.L.M. 559, 571 [hereinafter WIPO Rules].

57. See Bompey et al., *supra* note 24, at 28.

58. See 1 CRAIG ET AL., *supra* note 38, at 339.

59. As discussed above, in some cases this "right" to pursue a later remedy is nothing more than an empty shell. See *supra* note 24.

with the third party's claim and should not be required to suffer what could potentially be a significant financial burden.

On the other hand, there is some logic to making the party who requested the right to intervene or to join another party pay only for its portion of the new costs, with its opponent(s) absorbing the remainder. This second approach would be justified if the original parties had a contract stipulating that "all disputes" arising out of a certain contract, relationship, or transaction were to be submitted to arbitration.<sup>60</sup> Under this type of arbitration agreement, the contracting parties could be said to have implicitly consented to take on the risks and costs associated with third-party arbitration.<sup>61</sup> This latter method might also be appropriate when the party attempting to intervene or be joined in the arbitration is an individual or small company unable to pay the large fees associated with complex arbitration.<sup>62</sup>

#### d. Equitable Principles

Arbitration also differs from civil litigation in that arbitrators are often less bound by strict legal rules and more influenced by equitable principles.<sup>63</sup> In fact, one of the reasons why parties choose

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60. See 1 CRAIG ET AL., *supra* note 38, at 108-09 (discussing an English court case recognizing that language referring "all claims . . . arising out of or in connection" with the contract permitted tort claims to be arbitrable); REDFERN & HUNTER, *supra* note 5, at 151-54 (discussing the scope of agreement arising under certain types of contractual language); Milligan-Whyte & Veed, *supra* note 8, at 134 (discussing scope of arbitration agreements); Stipanowich, *supra* note 1, at 477 (noting the common arbitral language of "all claims, disputes and other matters arising out of, or relating to the contract between the parties"). Arbitration agreements must have some defined boundaries, however; "[p]arties cannot enter into an unlimited agreement that any controversy that should ever arise between them is subject to arbitration." 1 CRAIG ET AL., *supra* note 38, at 108; see also *The Final Report on Interim and Partial Awards by a Working Party to the Commission on International Arbitration*, in 2 CRAIG ET AL., *supra* note 6, app. V, at 5, 8 (discussing the breadth of terms such as "any" or "all" disputes "arising in connection with" a particular transaction).

61. See Stipanowich, *supra* note 1, at 500-01 (discussing judicial presumptions in the absence of contractual language regarding consolidation and joinder, including the presumption that parties' agreement to arbitrate includes the intent to pursue the most efficient and economical means of commercial justice, which would include consolidation and, presumably, joinder and intervention when appropriate). Similarly, some courts have held that, where multiple parties have signed identical arbitration clauses in different contracts, the parties can be found to have consented to joint administration of a single arbitration. See Rau & Sherman, *supra* note 8, 109 n.112 (discussing the French *Dutco* case).

62. See Bompey et al., *supra* note 24, at 37 (noting that some people "cannot afford to hire a private arbitrator"); Sperling, *supra* note 17, at 559.

63. See 1 CRAIG ET AL., *supra* note 38, at 271 (discussing Swiss law); Bompey et al., *supra* note 24, at 28; Collins, *supra* note 24, at 128 (discussing

arbitration over litigation is to avoid excess legalism in the resolution of their disputes and resolve their differences in a more common sense manner.<sup>64</sup> Equitable considerations can be introduced through the fundamental principles established by an arbitration's procedural rules or through contractual language granting the arbitrators the ability to decide "in accordance with principles of equity," *ex aequo et bono*, or as *amiable compositeurs*. Although such language certainly does not give arbitrators the ability to decide cases *carte blanche*, it can give them more discretion to allow third parties to intervene or join the arbitration in the interest of equity.

As the concepts of *amiable compositeurs* and ruling *ex aequo et bono* are seldom encountered in the United States, a short explanation is in order. Some people think that an arbitrator who decides as an *amiable compositeur* or *ex aequo et bono* can disregard all legal principles and decide issues on her personal whim.<sup>65</sup> This is not true, however, as the scope of both powers is well-defined.

*Amiable composition* allows arbitrators to decide cases in accordance with customary principles of equity and international commerce. This power permits arbitrators to arrive at an award that is fair in light of all circumstances, rather than in strict conformity with legal rules.<sup>66</sup> However, *amiable compositeurs* depart from strict legal principles only when the outcome under the law would be unfair or inequitable.<sup>67</sup> Legal principles must be considered first, even by *amiable compositeurs*.<sup>68</sup> In addition, *amiable compositeurs* generally may not disregard mandatory provisions of substantive law or the public policy of the forum state.<sup>69</sup> If an *amiable compositeur*

English law); Craig, *supra* note 1, at 18; Motomura, *supra* note 1, at 43; Rau & Sherman, *supra* note 8, at 91 n.7.

64. See Bompey et al., *supra* note 24, at 28; Craig, *supra* note 1, at 18; Rau & Sherman, *supra* note 8, at 91 n.7.

65. See Milligan-Whyte & Veed, *supra* note 8, at 131.

66. See Higgins, *supra* note 11, at 1544; William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 648 n.1 (1989) [hereinafter Park, *National Law*].

67. See REDFERN & HUNTER, *supra* note 5, at 36; Lecuyer-Thieffry & Thieffry, *supra* note 2, at 592. Some commentators believe that, in practice, arbitrators empowered to act as *amiable compositeurs* are more able to adapt a contract's terms or fill a gap, at least "so long as they [act] with procedural fairness." REDFERN & HUNTER, *supra* note 5, at 183. This suggests that arbitrators acting as *amiable compositeurs* should be allowed to permit joinder or intervention of third parties when not doing so would result in unfairness and when the contract is silent on the issue.

68. See Lecuyer-Thieffry & Thieffry, *supra* note 2, at 592.

69. See REDFERN & HUNTER, *supra* note 5, at 35-38; Lecuyer-Thieffry & Thieffry, *supra* note 2, at 592; see also 2 CRAIG ET AL., *supra* note 6, addendum 1 to app. V at 74 (including a summary and extract from *Pesquerias Espanolas de Barcaloa S.A. v. Alsthom Atlantique S.A.*, in which the Chambre des Recourse of

does disregard such laws, there is the risk that the award will not only be unenforceable within the forum state but elsewhere as well.<sup>70</sup>

Arbitrators who decide *ex aequo et bono* have slightly broader discretion than *amiable compositeurs* in that they are able to disregard even mandatory provisions of substantive law in order to reach an equitable outcome.<sup>71</sup> Although some countries, particularly England, have been hesitant to recognize arbitrators' ability to act as *amiable compositeurs* or *ex aequo et bono*, other countries, particularly those with a civil law perspective, expressly recognize arbitrators' ability to act in these capacities.<sup>72</sup>

#### e. Confidentiality

Unlike court proceedings, which are, for the most part, open to the public, arbitrations are usually private affairs.<sup>73</sup> In fact, many parties choose to arbitrate their disputes rather than litigate them precisely because they do not want certain information, such as trade secrets, revenue, and other sensitive data, to become public.<sup>74</sup> Opponents to third party participation in arbitration often argue that when third parties are allowed to enter an arbitration through joinder or intervention, courts and arbitrators destroy the confidentiality that the parties thought so important.<sup>75</sup>

However, confidentiality may not be the insurmountable obstacle some commentators make it out to be.<sup>76</sup> The reality is that many potential third party participants will already have full or partial knowledge of the affairs at issue, thus eliminating many of the

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the Tribunal Cantonal du Canton de Vaud (Switzerland) held that an *amiable compositeur* was "bound only by those mandatory rules of procedure which were set up by the Swiss Concordat on Arbitration").

70. See 1 CRAIG ET AL., *supra* note 38, at 272.

71. See Lecuyer-Thieffry & Thieffry, *supra* note 2, at 592 & n.75.

72. See REDFERN & HUNTER, *supra* note 5, at 37; Milligan-Whyte & Veed, *supra* note 8, at 131.

73. See Bompey et al., *supra* note 24, at 28; Collins, *supra* note 24, at 121-22, 134.

74. See Baldwin, *supra* note 8, at 453.

75. See Collins, *supra* note 24, at 122-23, 134.

76. Some arbitral institutions have already addressed the issue in favor of third party participation. For example, the Commercial Arbitration Rules of the Japan Commercial Arbitration Association expressly state that "[a] person having a direct beneficial interest in the case under arbitration may attend the hearing." See Commercial Arbitration Rules of the Japan Commercial Arbitration Association (as amended and in effect February 1, 1971), *reprinted in* Charles R. Ragan, *Practical Issues in Modern Arbitration*, in II AMERICAN BAR ASSOCIATION DIVISION FOR PROFESSIONAL EDUCATION, *supra* note 3, at 243, 347-54.

parties' confidentiality concerns *ab initio*.<sup>77</sup> Privacy concerns can also be addressed by bifurcating proceedings or discovery or by requiring intervenors and joined third parties to sign confidentiality agreements that carry strict penalties for noncompliance.<sup>78</sup>

There is also a question about whether confidentiality is as momentous an issue as it is made out to be. Many parties who claim that they want to keep proceedings secret often engage in public press wars, leaking confidential documents and pleadings to the media in order to put pressure on their opponents or destroy their adversaries' public image.<sup>79</sup> In the light of such behavior, it is difficult to see why confidentiality concerns should bar third party joinder or intervention as of right if proper precautions are taken to protect the existing parties' legitimate privacy issues.

#### f. Finality of Arbitral Awards

One of the elements that weighs most heavily in favor of permitting intervention or joinder of parties into an existing arbitration is the finality of arbitral awards.<sup>80</sup> Increasing numbers of jurisdictions are limiting the ability of parties to vacate or otherwise challenge an arbitral award, a move which may have dire consequences for third parties.<sup>81</sup> However, it is unclear whether or to what extent a third party has grounds to challenge any award, especially in systems where intervention and joinder are not permitted as of right, even when an award (1) requires indemnification from that third party; (2) makes a declaratory judgment regarding ownership of an item in which the third party has an interest; (3) identifies causation of an event in which the third party has an interest; or (4) allocates fault in a transaction or event in which the third party has an interest.

Usually, courts allow modification or dismissal of an award only upon evidence of: (1) corrupt, fraudulent, or other misbehavior on the

77. For example, most parties who have some sort of interest in the outcome of a commercial arbitration are linked to the parties through contract or other business contacts.

78. See Baldwin, *supra* note 8, at 453, 460-61. Interestingly, there could be a reciprocity problem for third parties concerned with confidentiality, as at least one commentator has argued that intervenors may not be entitled to the same level of confidentiality as the initial parties. See Baldwin, *supra* note 8, at 467.

79. See, e.g., Collins, *supra* note 24, at 132, 134.

80. See Motomura, *supra* note 1, at 50 & n. 102, 76-77 (citing section 84(3)(a) of the Restatement (Second) of Judgments, which discusses collateral estoppel effect of arbitral awards); see also Daniel M. Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 INT'L LAW. 693 *passim* (1988) (discussing the finality of international arbitral awards in several different states); Park, *Illusion*, *supra* note 3, at 181-88 (discussing how judicial review affects the finality of arbitral awards in several different states).

81. See Bompey et al., *supra* note 24, at 29-30.

part of the arbitrator; (2) lack of impartiality on the part of the arbitrator; (3) an arbitrator's exceeding her power; (4) an arbitrator's manifest disregard of applicable law or failure to follow agreed-upon procedures; or (5) an arbitrator's refusal to delay the hearing or to receive evidence upon demonstrated good cause.<sup>82</sup> In addition, awards traditionally can be attacked on grounds of national or international public policy, or for caprice, arbitrariness, or irrationality.<sup>83</sup>

Even if a third party is permitted to challenge an arbitral award on one of these grounds, its practical ability to do so will be severely hampered by its lack of access to the arbitral proceedings. Most of the bases upon which a challenge may be made turn on a misapplication of arbitral procedures or a misinterpretation of the law or facts—elements that cannot be attacked without an in-depth knowledge of what went on before, during, and after the hearing. Unless the third party is involved in the proceedings, it cannot make an effective challenge to the award, despite the fact that the arbitral results may irrevocably affect the third party's interests. Obviously, this creates a number of due process concerns.

#### g. Rights of Third Parties

Although third parties have usually been considered not to have any sort of "right" to intervene in or join an arbitration, some effort has ostensibly been made to protect their interests in their absence. According to generally accepted international law and practice, parties may not grant the arbitrator any power that directly affects a third party.<sup>84</sup> The problem is, of course, when arbitrations indirectly affect third party rights, a situation that is far more common than that of direct effect, as third parties are often effectively stripped of their rights when they are prohibited from intervening in ongoing arbitrations.<sup>85</sup>

Most decisions concerning an arbitrator's inability to make a ruling concerning a third party involve procedural niceties such as the

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82. *Id.* The problem, of course, is that the third and fourth factors provide grounds for challenge of an award by parties who objected to the joinder or intervention of third parties but whose objections were overruled.

83. *See id.*

84. *See* 1 CRAIG ET AL., *supra* note 38, at 416; REDFERN & HUNTER, *supra* note 5, at 294. For example, an arbitrator cannot compel an absent third party to pay a contractual termination fee to one of the parties to an arbitration.

85. *See, e.g.,* REDFERN & HUNTER, *supra* note 5, at 397-98 (discussing the "significant" though "indirect" effect of arbitral awards on third parties). An arbitrator may affect a third party's rights indirectly by, for example, holding that a party to an arbitration is liable for damages arising out of a certain action, despite the fact that the paying party has an indemnification agreement with an absent third party; *see also supra* note 9 (containing a list of situations which implicate a third party's rights).

production of documents or witnesses for use in the arbitration.<sup>86</sup> The consensus is that arbitrators have no power over third parties in these situations. However, the value of these decisions as precedent is twofold. First, these decisions can be read as demonstrating that an arbitrator may not reach beyond the ambit of the arbitration to join an unwilling third party.<sup>87</sup> Second, these decisions can be read as indicating that arbitrators should take heed of third parties' rights. It therefore follows that if an arbitral tribunal must take into account a third party's interest in being free from discovery orders, then it must also take into account a third party's interest in the outcome of the arbitral proceedings, as a third party's interest in the outcome of the arbitral proceeding is even more compelling than its interest in being free of the burden of discovery. This principle would require arbitrators to allow third parties to intervene or be joined in arbitration when the third parties have sufficient interest in the outcome of the arbitration.<sup>88</sup>

### B. Measures Used to Facilitate Multi-Party Arbitration

Although courts and commentators have paid minimal attention to the problems associated with intervention and joinder, far more consideration has been given to issues involving consolidation of arbitrations.<sup>89</sup> This may be because consolidation is a far less controversial subject due to the fact that all the parties are contractually linked through one or more arbitration agreements. Because many of the arguments for and against consolidation are also used to support or oppose joinder and intervention, a brief discussion of consolidation is in order.

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86. See REDFERN & HUNTER, *supra* note 5, at 294.

87. This, in fact, makes sense even to those who support third parties' right to intervene or be joined in an arbitration. For example, if the third party does not want to join the arbitration, the other parties can agree not to resolve their dispute through arbitration but instead to take their disagreement to court, where all necessary parties can be joined and all related conflicts resolved at one time. Third parties who want to join an arbitration over the existing parties' objections have no similar opportunity to unify all claims in a single forum. Conversely, arbitrators, who have the inherent power to control the arbitral proceedings and require parties to the contract to adhere to certain procedural requirements such as equality of the parties and other mandatory rules of law, should be allowed to permit a willing third party to join or intervene in the arbitration even over the objection of the parties, since the arbitrators are then merely retaining jurisdiction over the resolution of the dispute pending before them.

88. See, e.g., FED. R. CIV. P. 19, 24; *supra* notes 12-14 and accompanying text.

89. Consolidation differs from intervention and joinder in that instead of permitting third parties to join an arbitration, it unites several existing arbitrations into a single proceeding in front of the same arbitral tribunal. See Schwartz, *supra* note 9, at 341 n.2; *supra* note 16.

Generally, consolidated arbitrations, like consolidated trials, share similar subject matter, involve common questions of law and fact, and determine similar issues and defenses.<sup>90</sup> Unlike cases involving joinder and intervention, wherein third parties may or may not have signed an arbitration agreement, all potential parties to a consolidated proceeding have signed an enforceable arbitration agreement, though not necessarily with every other party.

If all parties agree to consolidation, there is no legal or philosophical problem, since an agreement to consolidate is itself a contract and thus comports with arbitration's fundamental contractual nature. However, obtaining agreement among the parties is rare—as it is in situations involving intervention and joinder—because at least one party will usually perceive itself to be disadvantaged by consolidation.<sup>91</sup> Therefore, most of the controversy arises in connection with compulsory consolidation, wherein either a court or an arbitral tribunal orders several arbitral proceedings to be combined over the objection of one or more parties.

Advocates of compulsory consolidation claim that by going forward with a single hearing in a single forum, parties avoid duplicative arbitrations, inconsistent results, and increased costs.<sup>92</sup> These rationales are also used to justify intervention and joinder of parties as of right. Consolidation can be for all purposes or for only a few discrete issues, thus decreasing the need for all parties to present evidence on all issues or attend all hearing dates. However, most supporters of compulsory consolidation draw the line at allowing parties who are not in contractual privity to join the arbitration.<sup>93</sup>

Opponents to compulsory consolidation focus on the contractual nature of arbitration and emphasize the impropriety of forcing parties to submit to a proceeding to which they did not agree.<sup>94</sup> In addition, those who oppose compulsory consolidation claim that consolidated proceedings are invariably longer and more complex than non-consolidated proceedings.<sup>95</sup>

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90. See Schwartz, *supra* note 9, at 341 n.2; Stipanowich, *supra* note 1, at 505-06.

91. See Higgins, *supra* note 11, at 1533; Rau & Sherman, *supra* note 8, at 108-10.

92. See Rau & Sherman, *supra* note 8, at 109 n.110; Schwartz, *supra* note 9, at 343; Stipanowich, *supra* note 1, at 502 (noting the possibility that it is more important to consolidate related disputes in arbitration than it is in litigation); Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 166 (1994) (discussing the "empty chair syndrome").

93. See Schwartz, *supra* note 9, at 343.

94. See Rau & Sherman, *supra* note 8, at 109-11; Schwartz, *supra* note 9, at 342-43.

95. It is unclear whether this argument takes into account the necessity of at least some parties having to undergo arbitration *seriatim* in several forums. See Rau & Sherman, *supra* note 8, at 109; Schwartz, *supra* note 9, at 343.



Consolidation has not been universally accepted by either national courts or the major arbitral institutions. For example, neither the American Arbitration Association (AAA), the International Chamber of Commerce (ICC), nor the London Court of International Arbitration (LCIA) permits arbitrators to consolidate arbitrations over the objection of the parties.<sup>96</sup> The AAA will, however, administer consolidated proceedings if ordered to do so by a court of competent jurisdiction.<sup>97</sup>

Courts have also been reluctant to consolidate arbitrations without the parties' consent. Although some U.S. courts have been known to permit consolidation, others have not.<sup>98</sup> European courts have generally been disinclined to consolidate arbitrations without the consent of the parties unless they can identify a theoretically acceptable alternative to express consent.<sup>99</sup> Lack of privity of contract is typically the obstacle to consolidation, as it is with joinder and intervention.<sup>100</sup> However, several courts have managed to avoid the problems associated with consent and privity of contract by finding implied consent or a consent to arbitrate within a group of companies. Two interesting cases that deal with non-signatories are discussed below.

#### 1. ICC Case 2272

ICC Case 2272 involved a dispute that arose out of an exclusive manufacturing contract between a patent holder and a manufacturer that contained an ICC arbitration clause.<sup>101</sup> The manufacturer had also signed an exclusive distribution contract with a third party; that contract stipulated that all disputes were to be brought in front of a court in Brussels.<sup>102</sup>

When the patent holder filed a request for an arbitration under the contract, the manufacturer claimed that the ICC should decline jurisdiction based on the manufacturer's having initiated litigation against both the patent holder and the distributor in Brussels, which was the only place where all three parties could be heard.<sup>103</sup> The manufacturer argued that the interrelatedness of the two contracts required all claims to be heard together.<sup>104</sup>

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96. See Schwartz, *supra* note 9, at 345-46.

97. See *id.* at 346.

98. See Hoellering, *supra* note 9, at 44-45; Lecuyer-Thieffry & Thieffry, *supra* note 2, at 608-09 n.168.

99. See Lecuyer-Thieffry & Thieffry, *supra* note 2, at 609.

100. See *id.*

101. See 1 CRAIG ET AL., *supra* note 38, at 102-03 (summarizing ICC Case 2272, 1975 award).

102. *Id.* at 102.

103. *Id.*

104. *Id.*

The ICC disagreed, noting that consolidation in the Brussels court was not a legal requirement, but a matter of convenience for the manufacturer.<sup>105</sup> Moreover, because the patent holder had a binding arbitration agreement with the manufacturer, the dispute with the manufacturer had to be resolved in front of the ICC.<sup>106</sup> If the manufacturer could not obtain the patent holder's and the distributor's agreement to proceed in a single forum, it must bear the burden itself.<sup>107</sup>

This case demonstrates how efficiency arguments concerning dispute resolution are not always enough to overcome the original parties' agreement to arbitrate. In addition, the case illustrates how the ICC will not bring a third party into an arbitration without the agreement both of that party and the original parties.

## 2. *Abu Dhabi Gas Liquefaction Co. v. Eastern Bechtel Corp.*

Another case that involved a party "in the middle" was heard in the English courts.<sup>108</sup> In this case, one arbitration was begun by Abu Dhabi Gas Liquefaction Company Limited against Eastern Bechtel Corporation and Chiyoda Chemical Engineering and Construction Company, Limited (Chiyoda), alleging defective construction of several natural gas storage tanks.<sup>109</sup> A second arbitration was begun by Chiyoda against one of its subcontractors.<sup>110</sup> The issue was whether the two arbitrations should be consolidated or allowed to proceed separately.<sup>111</sup>

The English Court of Appeals acknowledged that, on the one hand, separate proceedings were desirable because evidence in one case might affect the arbitrator's opinion in the other, thus causing prejudice to one or more of the parties.<sup>112</sup> On the other hand, separating the arbitrations created the potential for inconsistent findings of fact and results.<sup>113</sup> Although the Arbitration Act 1950 prohibited courts from consolidating arbitrations or imposing conditions on appointed arbitrators, the English Court of Appeals held that it could appoint the same arbitrator in both proceedings to avoid the possibility of inconsistent findings of fact.<sup>114</sup> In dicta, the

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105. *Id.* at 103.

106. *Id.*

107. *Id.*

108. *See* Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corp., [1982] 2 Lloyd's Rep. 425, available in 21 I.L.M. 1057; DELAUME, *supra* note 8, at 312-13.

109. *See* Abu Dhabi, 21 I.L.M. at 1054 (introductory note).

110. *See id.*

111. *Id.* at 1059.

112. *Id.* at 1059-60.

113. *Id.* at 1060.

114. *See id.* at 1061. Lord Justice Watkins noted in his opinion that "[t]he ideal solution" would be to consolidate all actions in a single hearing, but

Court of Appeals suggested that the arbitrator should hold a conference with the parties early on to identify issues to be decided separately and then hold separate hearings on those issues.<sup>115</sup> Only at that point could the arbitrator begin to hold hearings on the shared issues of fact.<sup>116</sup> If the arbitrator thought "it right to be relieved from arbitrating any further," a new arbitrator would be named to avoid prejudice to the parties regarding the shared issues of fact.<sup>117</sup>

### III. INTERVENTION AND JOINDER AS OF RIGHT IN NATIONAL LAWS, THE RULES OF ARBITRAL INSTITUTIONS, AND INTERNATIONAL CONVENTIONS

#### A. National Laws on Arbitration

Because arbitration is a creature of contract, parties can choose the applicable procedural law with relative ease. However, these agreements among the parties do not exist in a legal vacuum, as every arbitration agreement is set within the backdrop of one or more national legal systems.<sup>118</sup> These national laws can affect the arbitral process in a number of ways. For example, even if the arbitral procedure is not based on a state's arbitration framework, national law might be implicated as a defense to the arbitration proceeding itself or during enforcement of the final award. National laws are important to the current discussion because they provide possible bases for courts and arbitrators to permit joinder or intervention as of right, arguably even over the objections of the existing parties to the arbitration.

The question of which state's law controls or influences the arbitral procedure is a difficult one. In fact, different states' laws may apply at different points of the proceedings.<sup>119</sup> For example, one state's laws may be implicated by virtue of the arbitration being held within that state's boundaries, while a second state may claim an interest in the arbitral proceedings by virtue of the arbitral award's being enforced in its territory. At other times, application of a particular state's law may be a matter of choice, such as when the

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concluded that such a solution was impossible in the absence of the parties' consent. *See id.* at 1063 (Watkins, L.J.).

115. *See id.* at 1061.

116. *See id.* at 1062.

117. *Id.* at 1062.

118. *See* 1 CRAIG ET AL., *supra* note 38, at 439; REDFERN & HUNTER, *supra* note 5, at 58-60 (discussing the interaction between arbitration and national legal systems); Slate, *supra* note 6, at 60-61.

119. *See* 1 CRAIG ET AL., *supra* note 38, at 132-33; REDFERN & HUNTER, *supra* note 5, at 58-60.

parties decide to designate one state's law as controlling all questions of procedure.

For many years, the law of the arbitral seat was considered paramount in deciding issues of procedure. Recently there has been a shift in international law and practice, with arbitration becoming increasingly "delocalized," meaning that parties are permitted to choose how the arbitration will be conducted and under which obligatory procedural law, or *lex arbiti*, regardless of where the arbitration proceeds.<sup>120</sup> Because issues such as consolidation are controlled by the *lex arbiti*,<sup>121</sup> it is not too much of a stretch to conclude that questions of intervention and joinder would be decided by the *lex arbiti* as well.

Although delocalization was intended to increase party autonomy in the choice of arbitral procedures and decrease judicial interference with arbitral awards, the procedural law of the forum state has nevertheless continued to be important<sup>122</sup> because states have refused to accept the idea that they should have no right or ability to intercede in arbitrations held in their territory.<sup>123</sup> Instead,

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120. See 1 CRAIG ET AL., *supra* note 38, at 271; Park, *National Law*, *supra* note 66, at 650, 684-85. Many states have begun to pass laws that they believe are favorable to international arbitration in an attempt to induce parties to conduct arbitrations within the state. See Craig, *supra* note 1, at 28; Park, *National Law*, *supra* note 66, at 689-90. For a discussion of the differences between (1) the law giving obligatory force to the proceedings (i.e., the *lex arbiti*); (2) the arbitration's procedural rules; and (3) the conflict of laws rules used to identify the substantive laws governing the contract, see Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 INT'L & COMP. L.Q. 358, 360-64 (1981).

121. See REDFERN & HUNTER, *supra* note 5, at 79 (noting that the ability to consolidate arbitrations falls under *lex arbiti*), 187; Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 238-39, 242 (1986) (noting deviations on the question of which procedural law to apply under *lex arbiti*); Rau & Sherman, *supra* note 8, at 112 n.126.

122. See 1 CRAIG ET AL., *supra* note 38, at 132-33 (noting how the laws of several different states may affect the arbitral mechanism); REDFERN & HUNTER, *supra* note 5, at 77-80; Craig, *supra* note 1, at 24, 41; Lecuyer-Thieffry & Thieffry, *supra* note 2, at 600-01, 622 (quoting the Secretary General of the ICC Court of Arbitration regarding the importance of the arbitral forum).

123. See REDFERN & HUNTER, *supra* note 5, at 58-60 (discussing the connection between arbitration and national legal systems); Craig, *supra* note 1, at 23, 37-38; Danilowicz, *supra* note 121, at 243-51; Emmanuel Gaillard, *The UNCITRAL Model Law and Recent Statutes on International Arbitration in Europe and North America*, 477 PLI/COM. LAW & PRACTICE COURSE HANDBOOK 15 (1988), available in 1998 WL 471 PRI/COMM \*15, \*19-20; see also Craig, *supra* note 1, at 17 (arguing that delocalization constitutes "a misguided attempt to free the arbitration from the application of any national procedural law"); Park, *National Law*, *supra* note 66, at 652-53 (questioning the wisdom of a fully delocalized arbitral regime). However, some classicists continue to argue that parties should be able to choose one state as the locus of the arbitration but choose another state's law to control the arbitral procedure. See Craig, *supra* note 1, at 37; Danilowicz, *supra* note 121, at 251-56.

many states continue to believe that they have an interest in arbitrations that are conducted within their boundaries in order "to ensure that certain minimum standards of justice are met particularly in procedural matters."<sup>124</sup> To that end, most states still require parties to comply with certain mandatory procedural norms.<sup>125</sup>

Delocalization of arbitration has not necessarily resulted in the harmonization of domestic laws addressing international arbitration; indeed, some commentators believe that such laws vary more widely now than they ever have before.<sup>126</sup> These variations have led to several states being identified as more desirable forums, either because of their long-standing experience in international legal matters or because of their approach to the enforcement and reviewability of arbitral awards.<sup>127</sup> Some of the more popular forums have traditionally been, and continue to be, England, France, Sweden, and Switzerland.<sup>128</sup>

Because national law has such an impact on arbitration, a short review of various domestic laws on international arbitration is in order. This discussion is not meant to be comprehensive, but is intended only to highlight the laws of some of the more popular or more innovative arbitral forums. Because of space limitations, it is impossible to discuss each law *in toto*, so the focus will therefore be on those provisions that explicitly or implicitly affect third parties' ability to intervene or be joined in an existing arbitration as of right. This section will concentrate primarily on setting forth the various provisions as they currently stand; Part IV will integrate the laws into arguments for and against the availability of joinder and intervention.

Although specific language on consolidation, intervention, and joinder would obviously be most relevant to this Article, few states have adopted such explicit provisions. However, arguments for and against joinder and intervention may be based on, *inter alia*, mandatory

124. REDFERN & HUNTER, *supra* note 5, at 59.

125. See I CRAIG ET AL., *supra* note 38, at 440.

126. See Gaillard, *supra* note 123, at \*18-19. Although some experts believe that this variance is due to states' competition for arbitration, *see id.* at \*19, others believe that most parties choose the arbitral site in ignorance of local procedural rules, *see* Craig, *supra* note 1, at 16-17.

127. See generally Craig, *supra* note 1, at 11-16 (discussing the advantages and disadvantages of various forums). For a discussion of the reviewability of arbitral awards in various countries, see Kolkey, *supra* note 80, at 693. However, because so many states have signed the New York Convention, enforcement of arbitral awards is not as momentous an issue as it once was.

128. See Craig, *supra* note 1, at 13-14. However, Australia, Hong Kong, Japan, and Korea have all set up arbitral institutions in an attempt to accommodate arbitrations arising out of the growing amount of international business being conducted within their borders. See Michali, *supra* note 3, at 218-19.

principles of arbitral procedure; the role of equity in the proceedings and determination of the award; the availability of interim relief from courts and arbitral tribunals; limits on arbitrators' powers; and the public policies behind arbitration. The following discussion will focus on these provisions.

## 1. Australia

Australia has implemented a number of international arbitration laws, one on the federal level and several at the territorial level.<sup>129</sup> The federal legislation, which will be discussed here, adopts the United Nations Commission on International Trade Law (UNCITRAL) Model Law, with a few minor variations.<sup>130</sup> One of the few changes Australia has made to the UNCITRAL Model Law is to expressly state that an arbitral award conflicts with the public policy of Australia if "a breach of the rules of natural justice occurred in connection with the making of the award."<sup>131</sup> This phrase could be used to allow joinder and intervention if, in any particular case, Australia considered the absence of a certain third party in an arbitration to be a breach of natural justice.

Although the parties are free to determine the basic procedure to be followed by the arbitral tribunal, that procedure must treat the parties equally and give them a full opportunity to present their case.<sup>132</sup> If the parties cannot agree on a procedure, the tribunal is permitted to conduct the arbitration as it sees fit,<sup>133</sup> and the arbitrator or arbitrators may act as *amiable compositeurs* or rule *ex aequo et bono* if the parties have expressly authorized such actions.<sup>134</sup>

According to the Australia Act, it "is not incompatible with an arbitration agreement for a party to request" interim relief from a court before or during the arbitration.<sup>135</sup> However, the arbitral

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129. See, e.g., 2 INTERNATIONAL COMMERCIAL ARBITRATION, IV. Australia.2.a-i (Eric E. Bergsten ed., 1995) (containing texts of Australian federal and territorial arbitration acts). Many of these enactments are based on the UNCITRAL Model Law on International Arbitration, which is described *infra* in Part III.C.1. See International Arbitration Act, 1974, § 15 (reprinted 1992) [hereinafter Australia Act], reprinted in 2 INTERNATIONAL COMMERCIAL ARBITRATION, IV. Australia.2.a, *supra*; Michael C. Pyles, *Australia*, 14 TUL. MAR. L.J. 263, 265 (1990).

130. See Australia Act, *supra* note 129, § 15(2).

131. *Id.* § 19(b). In addition, an award may be set aside if "the subject-matter of the dispute is not capable of settlement by arbitration under the law" of Australia. See *id.* at sched. 2, art. 34(2)(b)(i). This, too, is grounds for third party intervention and joinder if an arbitrator were to consider a dispute incapable of settlement by virtue of the absence of any particular third party.

132. See *id.* at sched. 2, arts. 18-19.

133. See *id.* at sched. 2, art. 19(2).

134. See *id.* at sched. 2, art. 28(3).

135. See *id.* at sched. 2, art. 9.

tribunal is also empowered to grant whatever interim relief it considers "necessary in respect of the subject-matter of the dispute," unless the parties agree otherwise.<sup>136</sup> If, for some reason, the arbitral tribunal finds it "impossible" to continue with the proceedings, it has the authority to issue an order terminating the arbitration.<sup>137</sup>

Australia's position on consolidation bears noting, as certain principles may extend to situations involving joinder and intervention. Although the parties may agree otherwise, arbitral tribunals in Australia are expressly permitted to consolidate arbitrations upon application of a party.<sup>138</sup> This apparently allows one party to consolidate over the objection of another, because consolidation may be precluded only by *agreement* of the parties.<sup>139</sup> The arbitrator may order consolidation if (1) a common question of law or fact arises in all proceedings; (2) the right to relief arises out of the same transaction or series of transactions; or (3) consolidation is "desirable."<sup>140</sup> The various arbitrations may be consolidated, heard at the same hearing, heard in a specific sequence, or stayed.<sup>141</sup> As liberal laws on consolidation may be a precursor to recognizing a right to intervention by or joinder of third parties in international arbitrations, observers should look to Australia as a potential innovator in this area of law.

## 2. Canada

International arbitration appears to have had a late start in Canada,<sup>142</sup> and, although addressed by the Commercial Arbitration Act at the federal level,<sup>143</sup> is also regulated by each Canadian

136. *Id.* at sched. 1, art. 17.

137. *See id.* at sched. 2, art. 32(2)(c).

138. *See id.* §§ 22, 24; Collins, *supra* note 24, at 126 n.29; Pyles, *supra* note 129, at 270.

139. *See infra* notes 334-38 and accompanying text (discussing LCIA rules on joinder).

140. Australia Act, *supra* note 129, § 24(1).

141. *See id.* § 24(2).

142. *See* Sidney N. Lederman, *Canada Enters the International Arbitration Scene*, in II AMERICAN BAR ASSOCIATION DIVISION OF PROFESSIONAL EDUCATION, *supra* note 3, at 487, 488 (noting that international arbitration was virtually unheard of in Canada as of the mid-1980s).

143. *See* Commercial Arbitration Act, R.S.C., ch. c-34.6 (1986) (Can.), *reprinted in* 3 INTERNATIONAL COMMERCIAL ARBITRATION, IV.Canada.2.b (Kenneth R. Simmonds & Paul J. Davidson eds., 1994). The Commercial Arbitration Act applies only to "matters where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters." *Id.* art. 5(2); *see also* Shelly P. Battram, *Canada Adopts the New York Convention*, in II AMERICAN BAR ASSOCIATION DIVISION OF PROFESSIONAL EDUCATION, *supra* note 3, at 499, 508. Therefore, the

province.<sup>144</sup> In fact, most commercial arbitration is controlled by provincial legislation.<sup>145</sup> The law enacted by the province of British Columbia (B.C. Act) was among the first to be implemented, and, as it appears representative, will be reviewed below.<sup>146</sup>

The fundamental due process requirements under the B.C. Act are typical, in that arbitral tribunals must ensure that the parties are treated equally and are given a full opportunity to present their case.<sup>147</sup> Beyond these requirements, the parties may agree upon the procedure to be utilized; failing an agreement, the arbitrators have the right to conduct the proceedings in any manner they consider appropriate.<sup>148</sup> Parties may agree to grant an arbitrator the ability to act as an *amiable compositeur* or to rule *ex aequo et bono*.<sup>149</sup>

Although judicial intervention is strictly limited under the B.C. Act,<sup>150</sup> a party may request interim relief from the court before or during arbitration without being considered to have acted in a manner "incompatible with an arbitration agreement."<sup>151</sup> Arbitral tribunals are also capable of making interim orders that they consider "necessary in respect of the subject matter of the dispute," unless the parties agree not to give the arbitrators this authority.<sup>152</sup> Generally, a plea that the arbitrators are acting beyond the scope of their authority must be raised as soon as it appears that they are doing so.<sup>153</sup>

Termination by the arbitral tribunal is proper if the continuation of the arbitration is "impossible."<sup>154</sup> This provision may provide an interesting argument that, in instances where joinder or intervention as of right would be appropriate, it would be "impossible" to proceed.<sup>155</sup>

vast majority of commercial arbitration will fall outside the Commercial Arbitration Act.

144. See Battram, *supra* note 143, at 499, 502, 508.

145. See, e.g., 3 INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 143, at IV.Canada.2.d-Canada.2.y (reprinting the texts of various provincial arbitration acts); Battram, *supra* note 143, at 508-12.

146. See International Commercial Arbitration Act, S.B.C., ch.14 (1986) (Can.) [hereinafter B.C. Act], reprinted in 3 INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 143, at Canada.2.e; Battram, *supra* note 143, at 511. In fact, British Columbia is one of the jurisdictions that changed its law in order to make itself more hospitable to international commercial arbitrations. See B.C. Act, *supra*, at pmbl.

147. See B.C. Act, *supra* note 146, § 18.

148. See *id.* § 19.

149. See *id.* § 28(4).

150. See *id.* § 5.

151. *Id.* § 9.

152. *Id.* § 17(1).

153. See *id.* § 16(3).

154. *Id.* § 32(2)(c).

155. See *infra* note 456 and accompanying text. Conversely, however, an award may be unenforceable if it "contains decisions on matters beyond the scope



Canadian courts will order consolidation of two or more arbitrations with the consent of all parties and "on terms the court considers just and necessary."<sup>156</sup> Although the B.C. Act initially requires the parties' consent to consolidation, parties have very little control over the form of consolidation once it has taken place, as the statute gives the Canadian Supreme Court the ability to make any order necessary to conduct the consolidation, even if the parties cannot agree on what that order should be.<sup>157</sup>

### 3. England and Wales

In 1996, England and Wales adopted a new arbitration law that superseded several earlier enactments.<sup>158</sup> The Arbitration Act 1996 is founded on three basic procedural principles: (1) "the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;" (2) the parties' ability to "be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;" and (3) limited intervention by the court.<sup>159</sup> The first two of these provisions appear to be especially helpful as possible bases for joinder or intervention of a third party in an arbitration on grounds of either due process, equity, or public policy.<sup>160</sup> The Act also includes a number of mandatory provisions which may not be waived or amended by the parties and a number of non-mandatory default rules.<sup>161</sup> Arbitral procedure is one of the areas where party autonomy prevails, possibly even taking

of the submission to arbitration," which might preclude an arbitrator from hearing disputes concerning third parties. B.C. Act, *supra* note 146, § 36(1)(iv).

156. See B.C. Act, *supra* note 146, § 27(2); Gaillard, *supra* note 123, at \*22-23 (noting that the B.C. Act departs from the UNCITRAL Model Law by providing for consolidation); Hoellering, *supra* note 9, at 48; Rau & Sherman, *supra* note 8, at 111 n.116.

157. See B.C. Act, *supra* note 146, § 27(2)(c).

158. See Arbitration Act, 1996, ch. 23 (Eng.), reprinted in 5 INTERNATIONAL COMMERCIAL ARBITRATION, IV.UK (England).2.c (Eric E. Bergsten ed., 1997) [hereinafter Arbitration Act 1996]. The Arbitration Act of 1950 was amended to incorporate references to the Arbitration Act 1996 while the Arbitration Acts of 1975 and 1979 were repealed. See *id.* at sched. 3-4. Notably, the Arbitration Act 1996 applies only to arbitrations taking place in England or Wales; Scotland, which has a separate legal system, has its own laws on arbitration. See 1 CRAIG ET AL., *supra* note 38, at 465.

159. Arbitration Act 1996, *supra* note 158, § 1.

160. See *id.* § 81(1)(c) ("[n]othing in this Part shall be construed as excluding the operation of any rule of law . . . as to . . . the refusal of recognition or enforcement of an arbitral award on grounds of public policy"); see also Toby T. Landau, *Introductory Note to United Kingdom: Arbitration Act 1996*, available in 36 I.L.M. 155, 159 (discussing breadth of the language in section 1 of the Arbitration Act 1996).

161. See Arbitration Act 1996, *supra* note 158, § 4; Landau, *supra* note 160, at 158-59.

precedence over the arbitrator's duty to manage the process properly.<sup>162</sup>

In the past, English arbitration law required disputes to be decided in strict accordance with English law.<sup>163</sup> However, with the passage of the Arbitration Act 1996, parties may now include "equity clauses" to allow arbitrators to decide disputes under equitable, rather than strictly legal, principles.<sup>164</sup> This departs from the previous approach, which had been particularly hostile to the concept of *amiable compositeurs* and deciding *ex aequo et bono*.<sup>165</sup> Nevertheless, despite the passage of the new Act, parties may deem it wise not to hold their arbitration in England or Wales if they want the arbitrator to have the full use of these equitable powers.<sup>166</sup>

Under the Arbitration Act 1996, the arbitral procedure should balance party autonomy with the state's interest in a just and fair proceeding. For example, the tribunal is to "act fairly and impartially" and give "each party a reasonable opportunity of putting his case and dealing with that of his opponent" while also "adopt[ing] procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."<sup>167</sup> The tribunal has the right to decide all procedural matters, "subject to the right of the parties to agree any matter."<sup>168</sup> Neither joinder nor intervention is mentioned in the list of procedural matters, which includes when and where the proceedings are to be held, in what language, and under what evidentiary rules.<sup>169</sup>

Although the Arbitration Act 1996 was intended to limit judicial interference, English courts have retained some authority to supervise and assist arbitral procedures.<sup>170</sup> For example, a court may enforce a

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162. See Arbitration Act 1996, *supra* note 158, §§ 34-41; Landau, *supra* note 160, at 158-59.

163. See Landau, *supra* note 160, at 156.

164. See Arbitration Act 1996, *supra* note 158, § 46(1)(b) (including, by implication, the ability to act as *amiable compositeurs* and *ex aequo et bono*); Landau, *supra* note 160, at 156.

165. See 1 CRAIG ET AL., *supra* note 38, at 310-11, 481.

166. See *id.* at 311.

167. Arbitration Act 1996, *supra* note 158, § 33(1).

168. *Id.* § 34(1). Neither the parties' nor the tribunal's power is absolute, however, as "[n]othing in this Part shall be construed as excluding the operation of any rule of law . . . as to . . . the refusal of recognition or enforcement of an arbitral award on grounds of public policy." *Id.* § 81(1).

169. *Id.* § 34(2).

170. See *id.* §§ 42, 44; Craig, *supra* note 1, at 52; Landau, *supra* note 160, at 157. Under case law developed under the Arbitration Acts of 1950 and 1979, interlocutory judicial assistance to arbitration usually consisted of one of three types of orders: (1) Mareva injunctions (pre-award attachment of assets); (2) discovery orders for documents or witnesses; or (3) orders requiring the claimant to provide security for costs. See 1 CRAIG ET AL., *supra* note 38, at 470-71.

peremptory order of the arbitral tribunal upon a request by the tribunal, upon a request made by a party, or “where the parties have agreed that the powers of the court . . . shall be available.”<sup>171</sup> In these cases, parties must exhaust their options in the arbitral forum before petitioning a court.<sup>172</sup> In addition to enforcing peremptory orders, both a court and a tribunal may grant interim relief, including ordering security for costs to be paid and entering injunctions regarding “any property which is the subject of the proceedings . . . and which is owned by or is in the possession of a party to the proceedings.”<sup>173</sup> Consolidation of arbitrations is permitted under the Arbitration Act 1996, but only with the consent of the parties.<sup>174</sup>

If a third party were to attempt to intervene or be joined under the Arbitration Act 1996, it might try to do so through application of paragraph 68 of that law. According to paragraph 68, a party may challenge an award under the Act by alleging a serious procedural irregularity and substantial injustice.<sup>175</sup> Although this clause could easily be used to preclude joinder and intervention because such nonconsensual arbitral measures might be considered “serious procedural irregularities,” joinder or intervention might be attained if to not do so would cause “substantial injustice.” Unfortunately, this clause is limited to (1) enforcement of awards and objections by parties, meaning that any claims for intervention or joinder must wait until the conclusion of arbitration<sup>176</sup> and (2) third parties (as outsiders to the arbitration) may be left without recourse to object.

English courts did address the propriety of joining third parties to arbitration proceedings under prior arbitration laws. For example, in *Roussel-Uclaf v. G.D. Searle & Co. et al.*, a French plaintiff brought suit against a U.S. company and its U.K. subsidiary.<sup>177</sup> The U.S. company, which had an arbitration agreement with the French company stipulating that all disputes would be resolved by arbitration in the ICC, requested the English High Court to stay the action pending

171. Arbitration Act 1996, *supra* note 158, § 42(2). When a request is made by a party, the arbitral tribunal must consent and notice must be given to the other parties. *See id.*; Landau, *supra* note 160, at 157.

172. *See* Arbitration Act 1996, *supra* note 158, § 42(3).

173. *Id.* §§ 38, 44.

174. *See id.* § 35. Some commentators have noted potential problems with the interaction of English and European Union law in the realm of multi-party arbitration. *See* Landau, *supra* note 160, at 161. For a pre-1996 application of the English courts’ right to consolidate arbitrations under the Arbitration Act of 1950, *see supra* note 110-19.

175. *See* Arbitration Act 1996, *supra* note 158, § 68(2); Landau, *supra* note 160, at 158.

176. *But see* Arbitration Act 1996, *supra* note 158, § 40(2)(b) (requiring parties to take “without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law”).

177. *See Roussel-Uclaf v. G.D. Searle & Co.*, [1978] 1 Lloyd’s Rep. 225(Ch.), summarized in 1 CRAIG ET AL., *supra* note 38, at 96 n.100.

arbitration.<sup>178</sup> The High Court agreed to do so for the U.S. party but questioned whether doing so was appropriate for the U.K. subsidiary in light of the absence of an agreement to arbitrate.<sup>179</sup> Ultimately, the High Court held that “[t]he two parties and their actions are . . . so closely related . . . that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it claiming [sic] ‘through or under’ the parent.”<sup>180</sup> Therefore, the court granted a stay in favor of both defendants.<sup>181</sup> This type of interpretation, which relies on the relationship between the parties or potential parties, could be used to support arguments for joinder or intervention of third parties in similar cases.

#### 4. France

For many years, France has provided international arbitrations with special status in French arbitration law, often according a high priority to party autonomy and minimal court intervention.<sup>182</sup> Therefore, it is not surprising that the French Code of Civil Procedure (French Code) allows the parties to decide the arbitral procedure with the arbitrators having the right to do so in the absence of an agreement by the parties.<sup>183</sup> Arbitrators may act as *amiable compositeurs* if the parties consent to a grant of such authority.<sup>184</sup> However, in choosing their arbitral procedure, parties may not violate international public policy or basic due process rights.<sup>185</sup>

Because arbitrators are not bound by procedural rules established by the courts,<sup>186</sup> there can be no arguments for joinder or intervention based on an analogy to judicial civil procedure. However, the French Code specifically states that the “guiding principles of litigation,” as set

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178. See CRAIG ET AL., *supra* note 38, at 96 n. 100.

179. See *id.*

180. *Id.* (quoting English High Court).

181. *Id.* Similarly, the House of Lords, England’s highest court, held in dictum that an arbitration clause in a partnership agreement would be binding on disputes between partners as well as disputes between the partnership and any of the individual partners. *Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei GmbH (FRG)*, [1977] 1 Lloyd’s Rep. 163, summarized in IV Yearbook 314 (1979).

182. See 1 CRAIG ET AL., *supra* note 38, at 483-84.

183. See French Code of Civil Procedure [hereinafter French Code], translated and reprinted in REDFERN & HUNTER, *supra* note 5, app. 17 arts. 1460, 1494.

184. See French Code, *supra* note 183, arts. 1474, 1497; 1 CRAIG ET AL., *supra* note 38, at 491.

185. See 1 CRAIG ET AL., *supra* note 38, at 491, 496.

186. See French Code, *supra* note 183, arts. 1460, 1494. *But see* 1 CRAIG ET AL., *supra* note 38, at 492 (noting that the French courts’ power to grant provisional measures when sitting *en référé* “derive[s] from the general rules of civil procedure, which case law has held compatible with enforcement of an arbitration agreement”).

forth in certain specific articles, "shall always be applicable to arbitral proceedings."<sup>187</sup> Among these guiding principles is the notion that "the object of the dispute may be modified by incidental claims provided they are sufficiently connected to the original claims."<sup>188</sup> This suggests that joinder of claims, if not parties, is possible. However, in the right circumstances, joinder of additional claims might require the participation of additional parties.

Another of the "guiding principles" of French litigation is the notion that "[n]o party may be judged unless it has been heard or summoned."<sup>189</sup> In the context of international arbitration, this would appear to mean that a third party's rights could not be affected without its becoming party to the arbitration, most probably through the consent of all concerned. However, one might argue that a significant, though indirect, effect on an absent third party would also be impermissible.<sup>190</sup>

The French law on international arbitration contains no provisions specifically permitting domestic courts to intervene in the arbitral process, suggesting that joinder of or intervention by third parties would not be possible absent consent of the parties.<sup>191</sup> However, the courts do have the ability to grant interim relief *en référé* (on an urgent basis), in accordance with the corresponding rules of civil procedure, without affecting the ultimate determination of the dispute.<sup>192</sup> The court retains the right to exercise this sort of extraordinary jurisdiction even after the arbitral tribunal has been named.<sup>193</sup>

French court cases involving joinder of third parties emphasize the sanctity of contract, in accordance with the general approach of limiting arbitral authority to the terms of the contract.<sup>194</sup> In one

187. French Code, *supra* note 183, art. 1460.

188. *Id.* art. 4.

189. *Id.* art. 14.

190. *See supra* note 85.

191. *See Craig, supra* note 1, at 52.

192. *See French Code, supra* note 183, art. 1479; 1 CRAIG ET AL., *supra* note 38, at 424 n.7 (citing a case in the French Court of Cassation which held that the court could order provisional measures intended to preserve or establish evidence); *id.* at 492. This provision applies despite the existence of article 1458, which requires any court to which an arbitrable dispute is submitted to decline jurisdiction. *See French Code, supra* note 183, art. 1458; 1 CRAIG ET AL., *supra* note 38, at 424.

193. *See* 1 CRAIG ET AL., *supra* note 38, at 424-25.

194. *See Higgins, supra* note 11, at 1542. French case law also prohibits non-consensual consolidation of arbitrations, although the French code is silent on the issue. *See Juliska M. Aponte, Comment, Compulsory Consolidation of International Arbitral Proceedings: Effects on Pacta Sunt Servanda and the General Arbitral Process*, 2 TUL. J. INT'L & COMP. L. 223, 244 (1994) (discussing BKMI Industrianlagen GmbH & Siemens AG v. DUTCO Constr. Co., XV Y.B. COMM. ARB. 124 (1990)).

case, a French plaintiff sued a French ship building company, who then filed a third party complaint against the seller of the engine.<sup>195</sup> The seller of the engine then attempted to join a Danish company who had acted as a sub-contractor for the manufacture of various engine parts, despite the fact that those two parties had a binding arbitration agreement.<sup>196</sup> The Court of Cassation reversed the lower courts and held that French jurisdictional rules—which were designed to avoid possible inconsistent results—were inapplicable in the context of arbitration and could not override the arbitration clause.<sup>197</sup> This result reinforces the likelihood that French courts will look only to the terms of the contract when deciding issues of joinder and intervention, and will permit neither the courts nor the arbitrators to extend their powers to address third party claims.

## 5. Hong Kong

In its law, Hong Kong differentiates between domestic and international arbitrations, although parties to an international arbitration may agree to abide by the rules that apply to domestic disputes.<sup>198</sup> For international arbitrations in which the parties have not agreed to be bound by the domestic arbitration law of Hong Kong, the Hong Kong Arbitration Ordinance states that the UNCITRAL Model Law is to apply.<sup>199</sup> As the Model Law is discussed in Part III.C.1, *infra*, the international section of the Hong Kong arbitration law will not be reviewed here. Instead, the discussion will focus on the domestic provisions, some of which are quite forward-looking.

One innovative feature of the Hong Kong Arbitration Ordinance permits non-consensual consolidation of “domestic” arbitrations, which can include international arbitrations where the parties have agreed in writing to submit to the rules controlling domestic arbitrations.<sup>200</sup> Under this rule, a party to an arbitration taking

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195. See *Société Burmeister et Wain Engineering Cie. Lit. v. Société Ceusot Loire et al.*, Cass., Nov. 8, 1982, Cluent 1984, 151, as cited in DELAUME, *supra* note 8, at 313.

196. See DELAUME, *supra* note 8, at 313-14.

197. See *id.* at 314.

198. See Hong Kong Arbitration Ordinance, art. 34C, reprinted in 3 INTERNATIONAL COMMERCIAL ARBITRATION, IV.Hong Kong.2.a, art. 2M (Eric E. Bergsten ed., 1995).

199. See *id.* art. 34C(1); *infra* notes 365-87 and accompanying text (discussing the UNCITRAL Model Law).

200. See Hong Kong Arbitration Ordinance, *supra* note 198, arts. 2L (application to domestic arbitrations), 2M (application to international arbitration agreements), 6B (consolidation of arbitrations). Some commentators have argued that the provision on consolidation applies only to domestic arbitration by virtue of its being placed in Part II, “Arbitration Within the Colony.” See Collins, *supra* note 24, at 126 n.29. However, the text of the ordinance states that it applies to certain international arbitrations as well. See Hong Kong Arbitration Ordinance,

place outside of Hong Kong cannot apply to a Hong Kong court for consolidation with a Hong Kong arbitration, regardless of that party's contacts with Hong Kong.

To consolidate, the Hong Kong High Court needs to find that there are common questions of law or fact, that the rights claimed arise out of the same transaction or series of transactions, or that such an order is "desirable" for some other reason.<sup>201</sup> The High Court may consolidate arbitrations "on any terms as it thinks just," stay any of the arbitrations, or cause them to be heard in a particular order.<sup>202</sup>

The domestically applicable provisions of the Hong Kong Arbitration Ordinance are silent on the question of joinder or intervention of third parties. However, it is possible that joinder or intervention as of right could be ordered as a type of interim relief. This option exists, in the absence of an agreement to the contrary, because every arbitration agreement shall "be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award."<sup>203</sup> The court also has the ability to grant interim injunctions and other relief, although that power shall not be taken to prejudice any power vested in the arbitrator.<sup>204</sup>

In 1996, Hong Kong amended its arbitration law by setting forth certain general powers and responsibilities of the arbitral tribunal and special powers of the court concerning arbitral proceedings.<sup>205</sup> These new provisions cover certain fundamental principles of procedure and expressly recognize the powers of both the court and the arbitral tribunal to grant interim relief.<sup>206</sup> In addition, arbitrators are expressly charged "to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents" while using "procedures that are appropriate to the particular case, avoiding unnecessary delay and expense, so as to provide a fair means for resolving the dispute to which the proceedings relate."<sup>207</sup>

*supra* note 198, art. 2M; Walter Sterling Surrey & Nancy J. Kellner, *International Arbitration in Hong Kong Law*, 406 PLI/COM. 173, 183-84 (1986).

201. See Hong Kong Arbitration Ordinance, *supra* note 198, art. 6B(1); Surrey & Kellner, *supra* note 200, at 183.

202. Hong Kong Arbitration Ordinance, *supra* note 198, art. 6B(1).

203. *Id.* art. 16. The 1996 Hong Kong Ordinance makes it clear that arbitrators may grant interim relief as well as interim awards. See Hong Kong Ordinance No. 75 of 1996 [hereinafter 1996 Hong Kong Ordinance], art. 7, reprinted in 3 INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 198, Hong Kong 2.a.1.

204. See Hong Kong Arbitration Ordinance, *supra* note 198, art. 14(6).

205. See 1996 Hong Kong Ordinance, *supra* note 203, art. 7.

206. See *id.*

207. See *id.*

## 6. Mexico

Following the passage of the North American Free Trade Agreement (NAFTA)<sup>208</sup> in 1993, business opportunities between United States and Mexican entities have expanded rapidly, leading to a concurrent increase in the number of actual and potential international commercial disputes.<sup>209</sup> However, as NAFTA does not set forth any particular dispute resolution mechanism, parties must resort to traditional forms of litigation or arbitration.<sup>210</sup>

Under the Mexican law of international arbitration, parties have a great deal of discretion in shaping the procedures they will follow, although they are required to comply with basic notions of due process such as equal treatment of the parties and the opportunity for each party to present its case.<sup>211</sup> Arbitrators can decide the case according to law or equity and are permitted to act as *amiable compositeurs* or *ex aequo et bono*.<sup>212</sup> However, the parties cannot establish a procedure that conflicts with a mandatory provision of Mexican law.<sup>213</sup>

Interim relief from the court is available, either before or during the arbitration.<sup>214</sup> Such relief is also available from the tribunal "as is necessary in respect of the subject-matter of the dispute."<sup>215</sup> As has been mentioned in the context of discussions of other countries' arbitration laws, a claim to intervene or join a third party as of right could be based on either the court's or the tribunal's right to grant interim relief. However, as in other countries, such an order could be subject to immediate challenge by a disgruntled party or parties.<sup>216</sup> It may be better to allow such challenges to be raised immediately because requiring parties to wait until after the award has been

208. See North American Free Trade Agreement, Dec. 17, 1993, 32 I.L.M. 605.

209. See William E. Mooz, Jr. & Alejandro Ortega, *Options for Resolving Commercial Disputes in the NAFTA Era*, in 1 DOING BUSINESS IN MEXICO 3-1, 3-2 (Philip T. von Mehren ed., 1997).

210. See *id.* at 3-2 to 3-3.

211. See Code of Commerce, Title IV, Book V, Commercial Arbitration [hereinafter Mexican Code], art. 1434, translated and reprinted in 4 INTERNATIONAL COMMERCIAL ARBITRATION, IV.Mexico.2.a (Eric E. Bergsten ed., 1996) (noting the requirement of equality and opportunity to present one's case); *id.* art. 1435 (noting the freedom to agree to arbitral procedure); Mooz & Ortega, *supra* note 209, at 3-23 to 3-24.

212. See Mexican Code, *supra* note 211, art. 1445; Mooz & Ortega, *supra* note 209, at 3-24 n.111.

213. See Mexican Code, *supra* note 211, art. 1457(I)(d).

214. See *id.* art. 1425.

215. *Id.* art. 1433.

216. "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." *Id.* art. 1432.



handed down often results in unnecessary expenditures of time and money.

Mexico also follows the approach used by other nations and allows arbitrations to be terminated if the arbitrators find that the proceedings have "become unnecessary or impossible," thus suggesting that an arbitrator may halt an arbitration if it is impossible to proceed without a third party.<sup>217</sup> Intervention and joinder of third parties over the objection of existing parties is not without risk, however, as an award may be set aside if the "arbitral procedure [is] not in accordance with the agreement of the parties."<sup>218</sup>

## 7. The Netherlands

Procedures for arbitrations taking place in The Netherlands are determined by the parties or, in the absence of the parties' agreement, by the arbitrator.<sup>219</sup> Whatever the procedure, however, parties must be treated equally and be given an opportunity to substantiate their claims and present their cases.<sup>220</sup> The arbitrator is permitted to act as an *amiable compositeur* upon the agreement of the parties.<sup>221</sup>

Interim measures are available from both the court and the arbitral tribunal.<sup>222</sup> Interestingly, the Netherlands Arbitration Act of 1986 (Netherlands Act) appears to expressly recognize Dutch courts' ability to grant interim relief in arbitrations taking place outside the state's territorial boundaries.<sup>223</sup> This authority will obviously be helpful to parties with some sort of contact with The Netherlands, since they can apply to Dutch courts for assistance as well as to courts in the forum state and state of enforcement.

One of the most novel aspects of the Netherlands Act is its approach to consolidation of arbitrations.<sup>224</sup> If two (or more) arbitrations are taking place in The Netherlands and are somehow "connected," then they may be consolidated by request of one of the parties, even over the objection of other parties.<sup>225</sup> Consolidation is

217. *Id.* art. 1449.

218. *Id.* art. 1457(I)(d).

219. See Netherlands Arbitration Act 1986 [hereinafter Netherlands Act], art. 1036, 26 I.L.M. 921, translated and reprinted in REDFERN & HUNTER, *supra* note 5, app. 18.

220. See *id.* art. 1039(1).

221. See *id.* art. 1054(3).

222. See *id.* arts. 1022(2), 1049.

223. See *id.* art. 1074.

224. See *id.* art. 1046; Collins, *supra* note 24, at 126 n.29; Craig, *supra* note 1, at 52; Hoellering, *supra* note 9, at 48.

225. See Netherlands Act, *supra* note 219, art. 1046; Hoellering, *supra* note 9, at 48. However, prior to consolidation, the President of the District Court in

not automatic upon request; the court may grant the request wholly or in part, or even reject it.<sup>226</sup> In addition, the parties may opt out of this provision.<sup>227</sup> Nevertheless, this is a noteworthy innovation for those who support joinder and intervention, because a liberal consolidation policy could eventually lead to liberal treatment of third parties. One of the many positive aspects of the Netherlands Act's consolidation provision is that the issue of consolidation is decided by a court at a very early stage, thus avoiding the possibility that the award will be set aside later on the grounds that the arbitrators exceeded their authority by consolidating the arbitrations.<sup>228</sup> This will avoid unnecessary cost and delay if the consolidation order is overturned.

The Netherlands is also among the few states to address third parties' interests in an arbitration. According to article 1045, "a third party who has an interest in the outcome of the arbitral proceedings" may ask to intervene in the proceedings.<sup>229</sup> Similarly, a party seeking indemnification from a third party may serve a notice of joinder on that third party.<sup>230</sup> The arbitrators will decide whether to permit the third party to participate in the proceedings, but they must obtain all parties' consent in writing before joinder or intervention is allowed.<sup>231</sup> If the arbitrators allow the third party to participate in the arbitration, the third party becomes a party to the arbitral proceedings and the arbitrators determine the further conduct of the proceedings.<sup>232</sup>

## 8. Sweden

Sweden has two separate arbitration acts, one concerning domestic arbitrations and one concerning foreign arbitrations. The Swedish Arbitration Act of 1929 (Swedish Act) concerns any arbitration that takes place or is to take place in Sweden.<sup>233</sup> According to the Swedish Act, arbitrators are to conduct the

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Amsterdam (who has the sole power to consolidate arbitrations) will hear the views of the parties and of the arbitrator. See Netherlands Act, *supra* note 219, art. 1046(2).

226. See Netherlands Act, *supra* note 219, art. 1046(2).

227. See *id.* art. 1046(1); Hoellering, *supra* note 9, at 48.

228. See Gaillard, *supra* note 123, at 24-25.

229. See Netherlands Act, *supra* note 219, art. 1045(1).

230. See *id.* art. 1045(2).

231. See *id.* art. 1045(3).

232. See *id.* art. 1045(4).

233. See The Swedish Arbitration Act of 1929 [hereinafter Swedish Act], § 4 (also taking jurisdiction over Swedish residents), translated and reprinted in 4 INTERNATIONAL COMMERCIAL ARBITRATION, IV.Sweden.2.a (Kenneth R. Simmonds ed., 1992). The Swedish Act was amended in 1976. See 1 CRAIG ET AL., *supra* note 38, at 516.

arbitration "as far as possible, in accordance with the instructions of the parties and shall otherwise deal with the case in an impartial, practical and speedy manner."<sup>234</sup> An award may be set aside "if, through no fault of the party, any . . . irregularity of procedure has occurred, which in probability may be assumed to have influenced the decision."<sup>235</sup>

The Swedish Act of 1929 Concerning Foreign Arbitration Agreements and Awards addresses arbitrations taking place outside Sweden.<sup>236</sup> According to this second act, the law of the forum state applies to these arbitrations.<sup>237</sup> Swedish courts have no jurisdiction if the agreement is (1) valid under both Swedish and the relevant foreign law and (2) at least one party objects to the intervention of the Swedish courts.<sup>238</sup>

Although there is no express provision in Swedish arbitration law concerning interim relief, district courts in Sweden may order interim measures in order to aid domestic arbitration and compel the production of evidence.<sup>239</sup> However, it is unclear to what extent such interim measures are available to parties whose arbitrations are pending outside Sweden.<sup>240</sup> Indeed, the Swedish courts' role in arbitration is very limited. They are not permitted to interfere with arbitral proceedings, but they may assist in the resolution of the dispute.<sup>241</sup>

In order to give full effect to party autonomy, Sweden has declined to enact a law requiring compulsory consolidation.<sup>242</sup> There is also no provision extending any equitable powers to arbitral tribunals or courts in Sweden.<sup>243</sup>

234. Swedish Act, *supra* note 233, § 13.

235. *Id.* § 21(4); *see also* 1 CRAIG ET AL., *supra* note 38, at 523 (discussing voidable awards).

236. *See* Swedish Act of 1929 Concerning Foreign Arbitration Agreements and Awards § 1 (as amended and in force on 1 January 1984) [hereinafter Swedish Foreign Arbitration Act], *translated and reprinted in* 5 INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 235, at IV.Sweden.2.a.

237. *See id.* § 2.

238. *See id.* § 3.

239. *See* Swedish Foreign Arbitration Act, *supra* note 236, § 7; 1 CRAIG ET AL., *supra* note 38, at 519-21, 526.

240. *See* 1 CRAIG ET AL., *supra* note 38, at 520 (noting that the Swedish Justice Department has issued an opinion stating that orders for attachments may be based on suits "before a foreign court or other foreign authority if its decision may be enforced here").

241. *See id.* at 521.

242. *See* Hoellering, *supra* note 9, at 48.

243. *See* Swedish Foreign Arbitration Act, *supra* note 236, § 7; *see also* 1 CRAIG ET AL., *supra* note 38, at 526.

## 9. Switzerland

International arbitration in Switzerland is currently governed by the Private International Law Act 1987 (Swiss Act).<sup>244</sup> Under the Swiss Act, the parties may determine the arbitral procedure themselves through the use of various arbitral rules or by submitting to the procedural law of the state of their choice.<sup>245</sup> Where there is a lack of agreement, the arbitral tribunal shall determine the arbitration procedure but shall in any event “assure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure.”<sup>246</sup>

Arbitral tribunals may order interim protective relief, and, if the parties do not comply with the tribunal’s order, may request the assistance of the court.<sup>247</sup> The court is also empowered to provide judicial assistance in the first instance; there is no need for a party to seek relief from the arbitrator before resorting to the courts.<sup>248</sup>

The parties can agree to permit the arbitrators to decide *ex aequo et bono*.<sup>249</sup> Awards may only be challenged for limited reasons, such as the failure to respect the equality of the parties, encroachment on the right of the parties to an adversarial procedure, or incompatibility with international public policy.<sup>250</sup>

## 10. Taiwan

Arbitration in Taiwan is governed by the Commercial Arbitration Act of 1961, a somewhat brief statute in comparison with other nations’

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244. See Switzerland Private International Law Act 1987 [hereinafter Swiss Act], 27 I.L.M. 37, translated and reprinted in REDFERN & HUNTER, *supra* note 5, app. 19. Although the Swiss Act does not formally supersede the Intercantonal Arbitration Convention of March 27, 1969 (Swiss Convention), which had applied to international arbitration before passage of the Swiss Act, the provisions of the Swiss Convention are applicable to international arbitrations if the parties so choose. See Swiss Act, *supra*, art. 176(2); 1 CRAIG ET AL., *supra* note 38, at 541; Charles Poncet & Emmanuel Gaillard, *Introductory Note*, 27 I.L.M. 37, 37-39. Most people will avoid invoking the Swiss Convention, however, since by so doing they open the arbitral award up to broad judicial review and challenge on the ground of “arbitrariness.” See 1 CRAIG ET AL., *supra* note 38, at 542-43. Therefore, the provisions of the Swiss Convention will not be discussed here.

245. See Swiss Act, *supra* note 244, art. 182.

246. See *id.*; see also 1 CRAIG ET AL., *supra* note 38, at 545.

247. See Swiss Act, *supra* note 244, art. 183(1)-(2).

248. See *id.* art. 185; 1 CRAIG ET AL., *supra* note 38, at 425, 545.

249. See Swiss Act, *supra* note 244, art. 187(2); 1 CRAIG ET AL., *supra* note 38, at 546.

250. See Swiss Act, *supra* note 244, art. 190(2)(e); 1 CRAIG ET AL., *supra* note 38, at 548-59.

laws.<sup>251</sup> Party autonomy is encouraged under Taiwanese law, and the parties are permitted to establish the arbitral procedure, with the arbitrator doing so if the parties cannot agree.<sup>252</sup> In contrast to nations that explicitly separate procedures for arbitration and litigation, the Taiwanese arbitration law states that, “[c]oncerning the proceedings of arbitration, a court shall apply, apart from the provisions of this Act, the stipulations of the Non-Litigation Act, and apply *mutatis mutandis* the provisions of the Code of Civil Procedure, if no relevant provisions can be found in the Non-Litigation Act.”<sup>253</sup> Notably, the Commercial Arbitration Act is silent regarding both joinder and intervention.

This link between litigation and arbitration procedure is explicitly recognized with respect to discovery, as courts assisting arbitral tribunals are given the same powers they have in civil litigation concerning the search for evidence.<sup>254</sup> Interestingly, even if an arbitrator or court were to order third party intervention or joinder in accordance with Taiwanese civil procedure, that act may not be appealable, at least not immediately, because “[a]rbitration proceedings are not subject to objections and exceptions by either party. The arbitrator or arbitrators may proceed with the arbitration and make an award notwithstanding the raising of an objection or exception by any party.”<sup>255</sup> In addition, the grounds for overturning or refusing to execute an arbitral award, though numerous, do not include any that would provide a basis for overturning an award following an objection to joinder or intervention of a third party.<sup>256</sup>

## 11. United States

In the United States, international arbitration is addressed at the federal level through the Federal Arbitration Act (FAA), the second chapter of which implements the New York Convention.<sup>257</sup> Various states have also passed their own international arbitration measures, which apply to the extent that they do not conflict with the FAA.<sup>258</sup>

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251. See Commercial Arbitration Act, 1961 (as amended 1982) [hereinafter Taiwan Act], translated and reprinted in 3 INTERNATIONAL COMMERCIAL ARBITRATION, IV.China (Taiwan).2.a (Kenneth R. Simmonds ed., 1992).

252. See *id.* art. 12.

253. *Id.* art. 35.

254. See *id.* art. 16.

255. *Id.* art. 17.

256. See *id.* arts. 22-23.

257. See Federal Arbitration Act, 9 U.S.C. §§ 201-02 (1990) [hereinafter FAA], reprinted in REDFERN & HUNTER, *supra* note 5, app. 20; 1 CRAIG ET AL., *supra* note 38, at 567; David E. Wagoner, *Interim Relief in International Arbitration: Enforcement Is A Substantial Problem*, DISP. RES. J., Oct. 1996, at 68, 70.

258. See 1 CRAIG ET AL., *supra* note 38, at 567-68; Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 475-79 (1989); Hoellering, *supra* note 9, at 45; George K. Walker, *Trends in State Legislation*

Since the FAA is silent on the issue of intervention and joinder, state statutes appear to be permitted to fill the gap.<sup>259</sup>

The FAA is, when compared with other countries' legislative enactments, rather sparse. Even though domestic arbitration rules are allowed to fill certain holes,<sup>260</sup> there is still considerably less statutory language than in other nations' codes.

Because the U.S. statute on arbitration is not very explicit, there is a discernible link between arbitral procedure and civil procedure, and some elements of U.S. civil procedure have been incorporated into international arbitration taking place in the United States. For example, most U.S. courts deem the right to cross-examination to be essential to the right to a fair hearing and will not permit arbitrations operating under U.S. procedure to adopt a civil-law approach to the examination of witnesses.<sup>261</sup> Arbitrators should obviously take these elements into consideration, as awards may be vacated for violation of procedural fairness if that violation prejudices a party's right.<sup>262</sup> U.S. courts are given this power of annulment to "control the basic integrity of the arbitral process where one of the parties feels that the procedure was not what was bargained for in the agreement to arbitrate."<sup>263</sup> Obviously, these policies raise concerns for those who would like to introduce intervention and joinder as of right into U.S. arbitration law, as a party to the original arbitration can easily argue that it did not bargain for an arbitration that included a third party.<sup>264</sup>

U.S. law on arbitration seems to be leaning in favor of consolidation where common issues of law and fact exist and, for the most part, this policy has been based on efficiency, economy, expedience, and equity.<sup>265</sup> However, the federal courts are not united in their approach, and a number of jurisdictions have held

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*Governing International Arbitration*, 17 N.C. J. INT'L L. & COM. REG. 419, 423-24 (1992).

259. See 1 CRAIG ET AL., *supra* note 38, at 568 (noting that "[t]he simple rule that federal law pre-empts conflicting state law is not always simple to put into practice . . . . Particularly obscure is the impact of a state law with no corresponding provision in the federal statute"); *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988); Hoellering, *supra* note 9, at 45; Wagoner, *supra* note 257, at 70. For a full discussion of federal preemption in arbitration law, see Carlos E. Loumiet's *Introductory Note* to the Florida International Arbitration Act, 26 I.L.M. 949.

260. See 9 U.S.C. § 208 (1990).

261. See 1 CRAIG ET AL., *supra* note 38, at 585.

262. See *id.* at 585-86 (noting also that awards may be vacated for exceeding arbitral authority). The FAA does not explicitly allow an award to be voided for violation of public policy. See *id.* at 586.

263. *Id.*

264. Parties may also argue that the arbitral award should be annulled due to the arbitrator exceeding his authority by allowing third parties to join or intervene in the arbitration over the objections of the existing parties. See *id.*

265. See Hoellering, *supra* note 9, at 44.

that non-consensual consolidation constitutes a violation of the fundamental contractual characteristics of arbitration.<sup>266</sup>

Several federal cases have addressed intervention and joinder as of right, at least in the context of domestic arbitration, thus suggesting the circumstances under which third party participation would be permitted in international arbitrations. The standard for intervention is based on Rule 24 of the Federal Rules of Civil Procedure and appears to be interpreted as it is in civil litigation. Cases often deal with the review of arbitral awards and whether non-parties to the arbitration should be allowed to intervene in the appeal, even though they are not technically bound by the award.<sup>267</sup> Where the court finds that the arbitration "directly" affects the third parties' interests, it will generally allow intervention under Federal Rule of Civil Procedure 24(a).<sup>268</sup> Where intervention under Rule 24(a) is sought, "no independent ground of jurisdiction need be asserted."<sup>269</sup>

Conversely, intervention by a third party under Rule 24(a) may be denied if the court finds that the third party's interest is "adequately represented by existing parties."<sup>270</sup> A third party's

266. See *id.* The Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits prohibit non-consensual consolidation. See *United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baessler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (*per curiam*); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984); *Hoellering*, *supra* note 9, at 45. Several states have passed legislation regarding consolidation of arbitration. See, e.g., CAL. CIV. PROC. CODE §§ 1281.3, 1297.23 (West 1982 & Supp.); FLA. STAT. ANN. § 684.12 (West 1992) (noting when consolidation of arbitrations is permitted in international arbitrations); GA. CODE ANN. 9-9-6(e)-(h) (1993); MASS. GEN. LAWS ANN. ch. 251, § 2A (West 1997); OHIO REV. CODE ANN. § 2712.52 (West 1994) (allowing consolidation only where all parties consent); DELAUME, *supra* note 8, at 313.

267. See, e.g., *Association of Contracting Plumbers v. Local No. 2, United Ass'n of Journeymen*, 841 F.2d 461, 466 (2d Cir. 1988); *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781*, 629 F.2d 1204, 1213 (7th Cir. 1980). Other cases involve whether third parties who are judgment creditors of a party to an arbitration can assert an interest in an arbitral award in favor of that party. See *Holborn Oil Trading Ltd. v. Interpetrol Bermuda Ltd.*, 658 F. Supp. 1205, 1206-09 (S.D.N.Y. 1987) (decided under section 203 of the United States Arbitration Act). Courts have held that in such situations, intervention as of right under Rule 24 is proper. *Id.* at 1209.

268. See, e.g., *Association of Contracting Plumbers*, 841 F.2d at 467 (noting the existence of "substantial interest in the arbitrations"); *F.W. Woolworth Co.*, 629 F.2d at 1213.

269. *Association of Contracting Plumbers*, 841 F.2d at 467 (citing 3B JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 24.18, at 198-99 (2d ed. 1987)).

270. *Acuff v. United Papermakers & Paperworkers*, 404 F.2d 169, 171-72 (5th Cir. 1968); see, e.g., *Liz Claiborne, Inc. v. Mademoiselle Knitware, Inc.*, No. 96-C2064 (RWS), 1996 WL 346352, at \*2-3 (S.D.N.Y. 1996).

request to intervene will also be denied if its interest is only indirectly affected by the arbitration.<sup>271</sup>

Joinder of third parties in arbitration is decided under Rule 19, just as it is in civil litigation. The analysis typically focuses on whether the third party's absence will deny complete relief to the parties and whether the third party has an interest in the arbitration.<sup>272</sup> The mere fact that a party will have to undergo piecemeal litigation in the absence of a third party does not make the third party indispensable to the arbitration.<sup>273</sup>

At the state level, two jurisdictions, South Carolina and Utah, have passed legislation providing for joinder of necessary third parties to an arbitration.<sup>274</sup> Unusually, the South Carolina law does not require the party being joined to consent to the process.<sup>275</sup> The Utah law avoids this problem by requiring joined parties to be "a party to the arbitration agreement."<sup>276</sup> However, neither provision discusses the right of a non-party to intervene in the arbitration, and the Utah law, by requiring a joined party to be a signatory to the arbitration agreement, may preclude intervention by a stranger to the contract.

### B. Rules of Arbitral Institutions

When parties are drafting their arbitration agreements, they have two choices before them: they can provide for an ad hoc arbitration (i.e., an arbitration in which the parties create their own procedural rules and handle the administration of the arbitration themselves) or they can provide for an arbitration under the auspices

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271. See *Liz Claiborne, Inc.*, 1996 WL 346352, at \*3.

272. See *Conntech Dev. Co. v. University of Conn. Educ. Properties, Inc.*, 102 F.3d 677, 682 (2d Cir. 1996).

273. See *Snap-on Tools Corp. v. Mason*, 18 F.3d 1261, 1267 (5th Cir. 1994); see also *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238, 1242-43 (1985) (rejecting arguments based on efficiency in the context of the joinder of arbitrable and non-arbitrable claims and ruling that "the preeminent concern of Congress in passing the [Arbitration] Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation").

274. See *Stipanowich*, *supra* note 1, at 522. Florida's International Arbitration Act has also been cited for its provisions on consolidation, although it is silent on the issue of joinder and intervention. See *Florida International Arbitration Act*, FLA. STAT. ANN. ch. 684 (West 1990). Nevertheless, the Florida International Arbitration Act allows parties to grant arbitrators the power to act as *amiable compositeurs* or *ex aequo et bono*, which increases their equitable power to allow joinder or intervention. See *id.* § 684.17; *Lecuyer-Thieffry & Thieffry*, *supra* note 2, at 592-93.

275. S.C. CODE ANN. § 15-48-60 (Law. Co-op. Supp. 1985); *Stipanowich*, *supra* note 1, at 522-23.

276. UTAH CODE ANN. § 78-31a-9 (1997); *Stipanowich*, *supra* note 1, at 523.



of any one of a number of international arbitral institutions.<sup>277</sup> Most parties wisely choose to have their arbitration administered by a professional body, as the benefits of utilizing the rules set forth by one of these institutions include heightened predictability and uniformity of arbitral procedures and awards.<sup>278</sup>

As a result of the increasing importance of international arbitration and the push for delocalization, many administering institutions have developed where once there were but a few well-known and well-respected institutional bodies. During the last decade or so, many arbitral institutions have amended their rules to adapt to changing circumstances and, in some instances, have acted as the initiators of important procedural change.<sup>279</sup> In many ways, it is because of arbitral institutions' unique position—private bodies specializing in international arbitration, accountable to no constituency other than the parties they serve—that they are able to educate parties about potential reforms in arbitral procedure and provide default rules about novel aspects of arbitration law that legislatures or courts are unwilling or unable to implement.<sup>280</sup> Therefore, a change in the rules on joinder or intervention of parties might begin with these international arbitral organizations.

Because a full review of every provision of every arbitral body's procedural rules would exceed the scope of this Article, this section will highlight only the relevant rules of some of the more important or innovative administrative agencies. As with the discussion of national laws, the primary focus will be on those provisions that provide an explicit or implicit basis for granting or denying intervention and joinder in an existing arbitration. In addition, this section will concentrate primarily on setting forth the rules of the arbitration institutions as they currently exist; Part IV will then integrate the rules into arguments for and against joinder and intervention.

### 1. American Arbitration Association

According to published reports, the AAA is the largest arbitral institution in the world in terms of facilities and caseload, taking on over 60,000 cases a year.<sup>281</sup> Although the vast majority of the AAA's cases involve purely U.S. domestic disputes, as many as 200 per year

277. See 1 CRAIG ET AL., *supra* note 38, at 50-52 (describing problems with ad hoc arbitration); Slate, *supra* note 6, at 52-53 (describing ad hoc arbitration and noting that the parties may create their own set of procedures or incorporate by reference the rules of a domestic legal system).

278. See Haubold, *supra* note 4, at 45; Slate, *supra* note 6, at 43, 47, 52-59.

279. See Rau & Sherman, *supra* note 8, at 94, 119.

280. See *id.* at 99, 117-18; Slade, *supra* note 6, at 60-61.

281. See Laturno, *supra* note 2, at 383 n.200 (citing 1990 figures).

are international in scope.<sup>282</sup> The AAA has promulgated several sets of arbitration rules, each focusing on a different industry or practice area. The bulk of this discussion will focus on the AAA International Rules.

Issues concerning joinder of third parties arise relatively frequently in AAA-administrated arbitrations, and the AAA's unwritten policy is to proceed with the arbitration as filed by the claimant, even if separate contracts are involved, so that parties may proceed jointly if they so desire.<sup>283</sup> However, if a party objects to proceeding jointly, the arbitration will be separated unless a court orders otherwise.<sup>284</sup> The AAA's experience has been that joinder is more likely in vertical disputes (such as those involving an owner, a general contractor, and a subcontractor) than in horizontal disputes (such as those involving an owner, a contractor, and an architect).<sup>285</sup>

The problem faced by the AAA is that although it permits non-consensual consolidation if ordered by a court, many courts view the absence of explicit language in the AAA Rules concerning consolidation as evidence that they cannot order consolidation without the AAA's permission.<sup>286</sup> This creates an unfortunate "catch-22" situation for third parties who would like to intervene or be joined in an existing AAA arbitration.<sup>287</sup> The AAA Case Administration Advisory Committee is beginning to address this situation, however, and has proposed certain amendments to the rules that would permit not only consolidation of arbitrations but joinder of parties in certain circumstances.<sup>288</sup>

One of the fundamental principles of arbitration under the AAA International Rules is that "the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."<sup>289</sup> To carry out these ends, the tribunal "may take whatever interim measures it deems necessary in respect of the subject-matter of the dispute."<sup>290</sup> However, parties need not rely solely on the arbitrator for provisional relief, as the AAA International Rules do not consider

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282. See 1 CRAIG ET AL., *supra* note 38, at 6 (estimating that the AAA handles about 120 international arbitrations annually); Laturno, *supra* note 2, at 383 (stating that in 1990 the AAA handled 200 international arbitrations).

283. See Hoellering, *supra* note 9, at 46; Stipanowich, *supra* note 1, at 497 n.130.

284. See Hoellering, *supra* note 9, at 46.

285. See *id.*

286. See Stipanowich, *supra* note 1, at 497-98.

287. See *id.*

288. See Hoellering, *supra* note 9, at 49.

289. AAA International Rules, art. 16(1), *reprinted in* REDFERN & HUNTER, *supra* note 5, app. 4 [hereinafter AAA International Rules].

290. *Id.* art. 22(1).

a request for relief from a court to be inconsistent with or constitute a waiver of the arbitration agreement.<sup>291</sup> The tribunal may decide as an *amiable compositeur* or *ex aequo et bono* only if the parties have authorized it to do so.<sup>292</sup>

Interestingly, the AAA International Rules state that if the continuation of the arbitration becomes "impossible," then the arbitral tribunal shall terminate the proceedings.<sup>293</sup> This provision might be effective in persuading recalcitrant parties to consent to intervention by or joinder of a third party, if arbitrators were willing and able to hold that it would be impossible to proceed fairly without the participation of the third party.<sup>294</sup> In such a situation, the original parties would then have the choice of allowing the third party to participate in the arbitration or having the arbitration terminated and the dispute litigated.

## 2. International Chamber of Commerce

Although the AAA is utilized primarily by North Americans, the International Chamber of Commerce has a much more global appeal and is, in fact, one of the most popular and most respected arbitral institutions in existence today.<sup>295</sup> With sixty years of experience in international arbitration, the ICC has overseen well over 5,000 arbitrations<sup>296</sup> and handles several hundred new cases a year, with claims ranging from several million to the tens of thousands of U.S. dollars.<sup>297</sup> According to some commentators, the ICC is "frequently" asked to join in an arbitral proceeding non-signatories to the arbitration agreement.<sup>298</sup>

291. *Id.* art. 22(3).

292. *Id.* art. 29(3).

293. *Id.* art. 30(2).

294. *See, e.g.*, FED. R. CIV. P. 19, 24; *supra* notes 12-19 (defining joinder and intervention as of right) and accompanying text.

295. *See* Laturno, *supra* note 2, at 385.

296. *See* 1 CRAIG ET AL., *supra* note 38, at 4; Stephen R. Bond, *Recent Developments in International Chamber of Commerce Arbitration*, 477 PLI/COMM 55, 57-58 (1988); Laturno, *supra* note 2, at 385.

297. *See* 1 CRAIG ET AL., *supra* note 38, at 5 (noting that 300 new requests for arbitration are filed each year on average); Bond, *Recent Developments*, *supra* note 298, at 59 (citing 1987 figures); Jim Kelly, *Warring Andersen Sisters Keep Mum Ahead of Paris Court Case*, FIN. TIMES, May 13, 1998, at 14 (noting the costs of large arbitration cases and citing the number of new cases in 1997).

298. 1 CRAIG ET AL., *supra* note 38, at 95; *see also* Bond, *ICC Experience*, *supra* note 22, at 33 (noting that the ICC Court refused to approve certain Terms of Reference where the arbitral tribunal had permitted a potential intervenor to sign the Terms, in contravention of the rule that only "parties" are permitted to sign the Terms); *infra* notes 318-21 (discussing the ICC's group of companies approach).

As of January 1, 1998, the ICC's amended Rules of Arbitration (New ICC Rules) came into effect.<sup>299</sup> However, the rules that were previously in force (Old ICC Rules)<sup>300</sup> still apply to arbitrations commenced prior to January 1, 1998, and to arbitrations of contracts that state that the ICC rules in effect at the time of the signing of the contract are to apply.<sup>301</sup> Although there are several differences between the New and Old ICC Rules, only some are relevant to this discussion. Both sets of rules will be reviewed below.

Under both the old and the new approach, the arbitral procedure is governed by the ICC rules; where the rules are silent, the parties (or, in the absence of agreement, the arbitrator) may decide the applicable procedure, either with or without reference to any procedural law.<sup>302</sup> The New ICC Rules contain additional language requiring the arbitrators to "act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."<sup>303</sup> In carrying out their duties, arbitrators under either set of rules may act as *amiable compositeurs* if the parties so agree, a somewhat common event.<sup>304</sup>

Both sets of rules are subject to the general proviso that, "[i]n all matters not expressly provided for in these Rules, the [ICC] and the [arbitrator] shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law."<sup>305</sup> This language could have a deleterious effect on the development of a third party right to intervene or be joined in an ICC arbitration, as an argument may be made that joinder or intervention by third parties constitutes an unwarranted extension of the arbitrator's authority, and thus would make an arbitral award unenforceable.

Interim relief from the courts is expressly made available under the Old ICC Rules, either before or after the case file has been transmitted to the arbitral tribunal.<sup>306</sup> The New ICC Rules make it more clear that interim relief is available from the arbitral tribunal as

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299. See New ICC Rules, *supra* note 56.

300. See International Chamber of Commerce Rules of Conciliation and Arbitration in force as of January 1, 1988, *reprinted in* REDFERN & HUNTER, *supra* note 5, app. 6 [hereinafter Old ICC Rules].

301. See New ICC Rules, *supra* note 56, art. 6(1).

302. See New ICC Rules, *supra* note 56, art. 15(1); Old ICC Rules, *supra* note 302, art. 11.

303. New ICC Rules, *supra* note 56, art. 15(2).

304. See *id.* art. 17(3) (permitting arbitrators to assume powers of *amiable compositeur* or *ex aequo et bono* upon agreement of the parties); Old ICC Rules, *supra* note 300, art. 13(1)(g); 1 CRAIG ET AL., *supra* note 38, at 312.

305. New ICC Rules, *supra* note 56, art. 35; Old ICC Rules, *supra* note 302, art. 26.

306. See Old ICC Rules, *supra* note 300, art. 8(5). The Old ICC Rules allow application for interim relief after the file is transmitted to the arbitrator only in "exceptional circumstances." *Id.*

well as the courts.<sup>307</sup> Judicial relief may be sought either before the case file is sent to the arbitral tribunal or, in extraordinary circumstances, after the file is sent.<sup>308</sup>

Although the Old ICC Rules are silent on the issue of joinder, the Internal Rules of the International Court of Arbitration (as set forth as appendix II to the Old ICC Rules) include language on the joinder of claims, permitting additional claims to be brought between the same parties when those new claims have a "connection" with the legal relationship already at issue in arbitration.<sup>309</sup> This may be interpreted as constituting the first step toward a right of third parties to intervene or be joined in an ICC arbitration. However, under both sets of ICC rules, the presence of "persons not involved in the proceedings" at the hearing is strictly prohibited in the absence of the parties' and arbitrators' consent.<sup>310</sup> This will necessarily limit third parties' ability to attend hearings and thus to join or intervene in cases. In addition, the ICC places a strong emphasis on the existence of a binding arbitration agreement between the parties naming the ICC as the arbitral forum.<sup>311</sup> This preoccupation is reflected in the fact that both sets of rules state that no arbitration can proceed in the ICC in the absence of a *prima facie* arbitration agreement binding all parties.<sup>312</sup> Under this analysis, any third party that is not a party to an enforceable arbitration agreement with all other parties has no hope of joining or intervening in the arbitration.<sup>313</sup> Therefore, third parties to an ICC arbitration may intervene or be joined only if all parties, both existing and incoming, agree. This rule seems to apply despite the fact that consolidation of arbitrations is possible, in some cases, over the objection of the parties and may be due to the fact that the ICC rules "do not foresee the administration under contentious circumstances of triangular or multi-polar disputes."<sup>314</sup>

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307. See New ICC Rules, *supra* note 56, art. 23(1).

308. See *id.* art. 23(2). Seeking relief from a court does not constitute an infringement or waiver of the arbitration agreement under either set of rules. See *id.* art. 23(2); Old ICC Rules, *supra* note 302, art. 8(5).

309. See Old ICC Rules, *supra* note 300, app. II ¶ 13; *cf.* New ICC Rules, *supra* note 56, art. 19 (discussing new claims).

310. New ICC Rules, *supra* note 56, art. 21(3); Old ICC Rules, *supra* note 302, art. 15(4).

311. See Schwartz, *Dutco*, *supra* note 49, at 1, 3.

312. See New ICC Rules, *supra* note 56, art. 6; Old ICC Rules, *supra* note 302, art. 7.

313. See Bond, *ICC Experience*, *supra* note 22, at 35 (noting the possibility of finding implied consent in some cases); Schwartz, *Dutco*, *supra* note 49, at 3-5 (noting a narrow ICC interpretation of what constitutes a single arbitration agreement).

314. Joachim A. Kuckenburg, *Presenting Claims in ICC Arbitration*, 10 INT'L L. PRACTICUM 34, 41-42 (1997).

Unlike the Old ICC Rules, the New ICC Rules make specific provision for arbitration with multiple parties.<sup>315</sup> However, this language deals specifically with the problems associated with naming arbitrators and does not discuss joinder or intervention of third parties.

Despite the apparent harshness of the ICC toward third parties, the ICC's actual practice concerning joinder of non-signatories to the arbitration agreement has followed a "common-sense" approach.<sup>316</sup> For example, a respondent in an arbitration cannot object when claimants are parents and/or subsidiaries of a company with which the respondent has a signed arbitration agreement, particularly if the evidence demonstrates that the parties intended there to be no difference in a practical business sense between the parent and subsidiaries.<sup>317</sup>

In those instances where the ICC has permitted a non-signatory company to join an arbitration, the non-signatory has wanted to participate; it may be more difficult or, indeed, impossible to join an unwilling non-signatory entity in an ICC arbitration. For example, the ICC will not force a company within a group of companies to comply with the provisions of an arbitration agreement signed by another company in the group where it cannot be demonstrated that the non-signatory company "would have accepted the arbitration agreement."<sup>318</sup>

The idea that once a company signs an arbitration agreement it has bound not only itself, but also all companies that it controls, is called the "group theory," and it has a number of supporters.<sup>319</sup> In fact, the ICC has utilized the group theory to join a number of seemingly remote parties in an arbitration.<sup>320</sup> When deciding whether to apply the group theory to a particular case, the ICC will look not only to the express contractual language linking the companies, but also at the intent of the parties to see if there was an intention to

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315. See New ICC Rules, *supra* note 56, art. 10.

316. See 1 CRAIG ET AL., *supra* note 38, at 95-96.

317. See *Isover St. Goain v. Dow Chemical France*, ICC Case 4131, cited in 1 CRAIG ET AL., *supra* note 38, at 96-97; DELAUME, *supra* note 8, at 310. In this case, the respondent had signed an arbitration agreement with the Swiss subsidiary of Dow Chemical, although that subsidiary was not a party to the arbitration. See 1 CRAIG ET AL., *supra* note 38, at 96-97. Instead, claimants were the Dow Chemical parent company and the French subsidiary. See *id.* After reviewing the parties' correspondence, the ICC concluded that the respondent had intended to enter into an arbitration agreement with the entire Dow group. See *id.*

318. ICC Case 1975 JDI 934, quoted in 1 CRAIG ET AL., *supra* note 38, at 98 (citing several ICC cases in accord).

319. See 1 CRAIG ET AL., *supra* note 38, at 98; see also DELAUME, *supra* note 8, at 310 (discussing the "group of companies" concept in international trade).

320. See 1 CRAIG ET AL., *supra* note 38, at 99-100 (discussing various ICC cases in which the group theory has been used).

create an “integrated contractual relationship subject to one single arbitration.”<sup>321</sup>

However, despite the growing acceptance of joinder in group contract cases, joinder of non-signatories to ICC arbitrations, especially in non-consensual situations, remains controversial.<sup>322</sup> Indeed, the ICC’s position on joinder is not the only issue to be resolved, since the national courts must also decide whether to enforce an award in which non-signatories to the contract were joined.<sup>323</sup>

### 3. International Centre for the Settlement of Investment Disputes

Although the International Centre for the Settlement of Investment Disputes is not as widely used as more general arbitral institutions such as the ICC, it has set forth a number of very detailed Rules of Procedure for Arbitration Proceedings (ICSID Rules).<sup>324</sup> In this system, the arbitral tribunal retains a great detail of discretion and is given the power to “make the orders required for the conduct of the proceeding,” although it is also charged to “apply any agreement between the parties on procedural matters.”<sup>325</sup> This wide grant of residual discretion may facilitate joinder or intervention of third parties in situations where the contract is silent or where only one party objects to a third party’s participation.

The ICSID Rules recognize that interim or provisional measures (such as, possibly, intervention or joinder of third parties) may be necessary during the pendency of the arbitration “for the preservation of [a party’s] rights.”<sup>326</sup> Upon a party’s request or on its own initiative, the arbitral tribunal may recommend that provisional measures be taken.<sup>327</sup> The use of the term “recommend” may mean that the tribunal has only the power to suggest that the parties comply with interim orders and that application to a court may be necessary to enforce an order against a non-compliant party. Parties

321. *Id.* (discussing ICC Case 1434, 1976 JDI 978).

322. Indeed, one ICC arbitral tribunal has stated that “[u]nder the ICC rules, the Arbitrators once they have been nominated, have no discretion to add as parties to the arbitration Claimant(s) or Defendant(s) who were not identified as such.” *See* Bond, *ICC Experience*, *supra* note 22, at 32 (quoting 1987 ICC case 5625). Although the opinion of one arbitral tribunal has no precedential effect on other tribunals, commentators note that this “appears to represent the general position and practice of the ICC Court.” *Id.* at 33.

323. *See* 1 CRAIG ET AL., *supra* note 38, at 100.

324. *See* International Centre for the Settlement of Investment Disputes Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings [hereinafter ICSID Rules], *reprinted in* REDFERN & HUNTER, *supra* note 5, app. 7; *see also* 1 CRAIG ET AL., *supra* note 38, at 5.

325. ICSID Rules, *supra* note 324, Rule 19, 20(2).

326. *Id.* Rule 39(1).

327. *See id.* Rule 39(1), (3).

may also make a request to a judicial authority for provisional relief if the parties have consented to that procedure in their arbitration agreement.<sup>328</sup>

Parties are permitted to present ancillary claims as long as those claims are within the scope of the arbitration agreement and the jurisdiction of the ICSID.<sup>329</sup> However, the ICSID Rules are silent with respect to joinder or intervention of additional parties. Efforts to allow third parties to join or intervene in the proceedings may be hampered by the ICSID's rules on confidentiality. These rules permit the arbitrators to decide who—besides the parties and their counsel, witnesses, and experts—may attend the hearing, although the rules also require that the arbitrators make this decision “with the consent of the parties.”<sup>330</sup>

#### 4. London Court of International Arbitration

The London Chamber of Arbitration (which changed its name in 1981 to the LCIA) was established in 1892 to provide arbitration services in commercial disputes.<sup>331</sup> The LCIA receives approximately sixty to seventy new matters a year (approximately one-third of which involves at least one non-U.K. party), with the amount in dispute varying from forty thousand to over one hundred million U.S. dollars.<sup>332</sup>

The current arbitration rules were adopted in 1985<sup>333</sup> and state that although the “parties may agree on the arbitral procedure, and are encouraged to do so,” in the absence of such an agreement the arbitral tribunal “shall have the widest discretion allowed under such law as may be applicable to ensure the just, expeditious, economical, and final determination of the dispute.”<sup>334</sup> The breadth of this language suggests that the LCIA might be among the few arbitral institutions willing and able to allow joinder or intervention of third parties without the consent of existing parties to the arbitration, at least where it would be just, expeditious, and economical to provide a single forum for the issues in dispute. In fact, the LCIA expressly permits the joinder of third parties over the objection of existing

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328. See *id.* Rule 39(5).

329. See *id.* Rule 40(1).

330. *Id.* Rule 32(2).

331. See Alan C. Geolot, *Arbitration Under the Rules of the London Court of International Arbitration*, C495 ALI-ABA 161, 163 (1990) (explaining the history and role of the court).

332. See 1 CRAIG ET AL., *supra* note 38, at 5-6; Geolot, *supra* note 331, at 163-64.

333. See London Court of International Arbitration Arbitration Rules [hereinafter LCIA Rules], reprinted in REDFERN & HUNTER, *supra* note 5, app. 8; Geolot, *supra* note 331, at 164.

334. See LCIA Rules, *supra* note 333, arts. 5.1, 5.2.



parties to the arbitration, although it requires the consent of the party to be joined.<sup>335</sup>

Under the LCIA Rules, joinder is a type of interim relief that may be granted by the arbitrators on the application of any party or *sua sponte*, unless the parties “at any time” agree otherwise.<sup>336</sup> Although this final clause appears at first to emasculate any attempt to fashion creative relief or join third parties, the arbitrators’ ability to join third parties is dependent only on (1) the consent of the third party and (2) the *absence* of the existing parties’ agreement to the contrary. In other words, if one existing party wants to allow joinder and the third party agrees to be joined, the other party to the arbitration cannot block the joinder.<sup>337</sup> It is unclear whether under the LCIA Rules a third party could intervene over the objections of all parties signatory to the arbitration, but such a result might be consistent with the LCIA rule on joinder.

The specificity of the LCIA rule on joinder makes it difficult to criticize. Under normal circumstances, one way that opponents to intervention and joinder may attack the rule is to claim that principles of confidentiality in arbitration prohibit third parties from joining or intervening in an arbitration. However, those hoping to avoid joinder of a third party cannot point to the confidentiality provisions in the LCIA Rules to win their point, even though the LCIA Rules appear to suggest, at first glance, that a single party is allowed to bar joinder of a third party.<sup>338</sup> Obviously, such an outcome is impermissible in light of the rule’s explicit provision on joinder. Because the LCIA rule on confidentiality does not apply to situations involving joinder of a third party, it is logical to argue that other rules and laws on confidentiality should not be allowed to prohibit joinder or intervention of third parties as of right.

## 5. The Netherlands Arbitration Institute

The Netherlands Arbitration Institute (NAI) was established in 1949 to promote arbitration as a method of dispute resolution.<sup>339</sup> The NAI

335. See *id.* art. 13.1(c); Rau & Sherman, *supra* note 8, at 118; Schwartz, *supra* note 9, at 346 n.30.

336. LCIA Rules, *supra* note 333, art. 13.1 (noting that “[u]nless the parties at any time agree otherwise,” the arbitral tribunal “shall have the power . . . to . . . allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes between them”). Article 13 also lists other types of interim relief available to the parties from the arbitrator. See *id.* art. 13.

337. See 1 CRAIG ET AL., *supra* note 38, at 96 n.100.

338. See LCIA Rules, *supra* note 333, art. 10.4 (stating that all hearings shall be confidential unless the parties agree otherwise).

339. See Netherlands Arbitration Institute Arbitration Rules [hereinafter NAI Rules], *reprinted in* REDFERN & HUNTER, *supra* note 5, app. 10.

Rules were revised in 1986 to take account of certain changes in Dutch arbitration law and, like the substantive law of The Netherlands, do not distinguish between domestic and international arbitration.<sup>340</sup> However, for international arbitrations, the NAI Rules have reversed the normal Dutch practice of giving the arbitral tribunal the ability to act as an *amiable compositeur* as a matter of law unless the parties agree otherwise.<sup>341</sup> Instead, the NAI Rules allow the tribunal to acquire the powers of an *amiable compositeur* only upon the agreement of the parties.<sup>342</sup>

As is the case with the rules of other arbitral institutions, the general framework of the NAI Rules requires the arbitrators to “ensure the equal treatment of the parties” and to “give each party an opportunity to substantiate his claims and to present his case.”<sup>343</sup> However, within these general restrictions, the tribunal is empowered to determine the arbitral procedure, “taking into account the provisions of these Rules, arrangements, if any, between the parties, and the circumstances of the arbitration.”<sup>344</sup> It is arguable that under a proper fact scenario, an arbitral tribunal could decide that “the circumstances of arbitration” required intervention by or joinder of a third party as of right.

In addition to this broad grant of discretion in deciding the arbitral procedure, the arbitral tribunal is empowered to grant a party’s request for interim relief at any time, at least to the extent that such relief is “consider[ed] necessary or desirable as to the matters in dispute.”<sup>345</sup> However, in asking the tribunal to grant provisional relief, a party does not lose its right to apply to a court for interim protection.<sup>346</sup>

Although consolidation is not specifically mentioned in the body of the NAI Rules, it is addressed in the introductory section, which notes that consolidation of arbitrations is permitted under Dutch arbitration law, despite the silence of the NAI Rules on the subject.<sup>347</sup> However, the introduction to the NAI Rules also notes that consolidation can be excluded by agreement of the parties at any time.<sup>348</sup>

Implicit in the NAI Rules is the understanding that consolidation is not barred per se if the different arbitrations are initiated under different agreements. This conclusion is based on the fact that the

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340. See *id.* Introduction, 5(e), art. 45.

341. See *id.*

342. See *id.*

343. *Id.* art. 23(1).

344. *Id.* art. 23(2).

345. *Id.* art. 37(1).

346. See *id.* art. 37(4).

347. See *id.* Introduction, 5(d).

348. See *id.*

Rules permit counterclaims if they “fall under the same arbitration agreement as that on which the request for arbitration is based, or if the same arbitration agreement is expressly or tacitly made to apply to [the counterclaims] by the parties.”<sup>349</sup> This latter phrase also appears to approve of methods designed to overcome problems with privity of contract, such as the group theory or implicit consent.<sup>350</sup>

However, the NAI Rules’ most unique provision appears in article 41. According to that article, “[a] third party who has an interest in the outcome of arbitral proceedings to which these Rules apply may request the arbitral tribunal for permission to join the proceedings or to intervene therein.”<sup>351</sup> This recognition of third parties’ interests in arbitration is particularly encouraging to those who support the right of third parties to join and intervene in international arbitrations, especially as The Netherlands is often at the forefront of legal innovations.<sup>352</sup> Third parties are not the only ones who benefit from this rule; a party to an arbitration who has a right of indemnification from a third party may also serve a notice of joinder on that third party.<sup>353</sup> However, joinder or intervention may only be permitted if the third party “accedes to the arbitration agreement by an agreement in writing between him and the parties to the arbitration agreement.”<sup>354</sup> Therefore, in contrast to the LCIA Rules, third party participation may be thwarted by a single objecting party.<sup>355</sup> Once agreement is obtained, the third party becomes a party to the arbitration and is liable for its share of costs in accordance with the NAI Rules.<sup>356</sup>

## 6. Stockholm Chamber of Commerce

The Stockholm Chamber of Commerce<sup>357</sup> has instituted its own Arbitration Rules (Stockholm Arbitration Rules), which are much less

349. *Id.* art. 25(2).

350. *See supra* notes 61, 318-21 and accompanying text (discussing group theory and implicit consent in arbitrations).

351. NAI Rules, *supra* note 339, art. 41(1).

352. For example, The Netherlands was among the first countries to recognize patients’ right to die with dignity and to allow physician-assisted suicide. *See, e.g.,* Gay Alcorn & Celia Hall, *Cancer Patient Ends His Life at the Push of a ‘Death Machine’ Button*, DAILY TELEGRAPH (London), Sept. 26, 1996, at 4 (noting that Australia’s Terminally Ill Act was based on an earlier law passed by The Netherlands).

353. *See* NAI Rules, *supra* note 339, art. 41(3).

354. *Id.* art. 41(4).

355. *See supra* notes 335-38 and accompanying text (discussing third party joinder under the LCIA Rules).

356. *See* NAI Rules, *supra* note 339, arts. 41(4), 41(6).

357. Far fewer arbitrations are filed with the Stockholm Chamber of Commerce Arbitration Institute than with older, more established administrative institutions, which is surprising in light of Sweden’s traditional popularity as an arbitral forum. *See* 1 CRAIG ET AL., *supra* note 38, at 5, 515-16; Craig, *supra* note 1, at 13-14.

detailed than the rules of other institutional bodies. The arbitral procedures are to be determined by the arbitral tribunal, although in so doing, the tribunal should comply with provisions in the parties' arbitration agreement and have regard to the parties' wishes.<sup>358</sup> In addition, the tribunal should act "in an impartial, practical and speedy fashion."<sup>359</sup> This last provision seems to give arbitrators the ability to add third parties to the arbitration if it is "practical" to do so, but the earlier provision requiring the arbitrators to have regard for the parties' wishes may cancel out that interpretation if there is an objection by an existing party or parties.

## 7. Specialized Industry Rules

Unlike many of the larger arbitral institutions, several industry-specific arbitral bodies specifically address consolidation of claims and seem likely to permit intervention and joinder of third parties over the objection of existing parties. Some believe that this result may come about because it is easier for industry-specific bodies to anticipate the kinds of cases that will come before them and because these bodies believe themselves to be more capable of anticipating the potential risks of consolidation, joinder, and intervention than the more general arbitral institutions are.<sup>360</sup> For example, consolidation of arbitrations is permitted by the AAA Grain Arbitration Rules,<sup>361</sup> the National Association of Securities Dealers,<sup>362</sup> and the New York Stock Exchange.<sup>363</sup>

Still, industry bodies are not universally in favor of third party participation in existing arbitrations. Some specialty bodies specifically forbid joinder of parties. For example, the American Institute of Architects' General Conditions prohibit non-consensual joinder of an architect in any arbitration between an owner and a contractor.<sup>364</sup> Although a detailed discussion of the procedural rules

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358. See Rules of the Arbitration Institute of the Stockholm Chamber of Commerce [hereinafter Stockholm Rules], reprinted in REDFERN & HUNTER, *supra* note 5, app. 11 art. 16.

359. *Id.* art. 16.

360. See Rau & Sherman, *supra* note 8, at 118.

361. See AMERICAN ARBITRATION ASSOCIATION, GRAIN ARBITRATION RULES, Rule 7 (March 1, 1994) (describing the circumstances under which arbitrations should be consolidated), reprinted in 5 INTERNATIONAL COMMERCIAL ARBITRATION, IV.U.S.1.k (Eric E. Bergsten ed., 1997); Hoellering, *supra* note 9, at 48; Stipanowich, *supra* note 1, at 517.

362. See UNIFORM CODE OF ARBITRATION § 10314(d) (National Association of Securities Dealers (NASD), 1996), in NATIONAL ASSOCIATION OF SECURITIES DEALERS, MANUAL (1996); Bompey et al., *supra* note 24, at 60 n.250.

363. See New York Stock Exchange, Arbitration Rules § 600(d); Bompey et al., *supra* note 24, at 60 n.250.

364. See Thomson, *supra* note 94, at 139 n.4, 165 (citing AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A201: GENERAL CONDITIONS OF THE CONTRACT FOR

of these industry-specific institutions is not necessary, it is worth highlighting their existence because their innovations may subsequently gain the acceptance of the general arbitral institutions.

### C. *International Conventions on Arbitration*

As has been discussed above, international arbitration procedures, for the most part, are regulated by laws and rules passed by various states and arbitral institutions. However, some non-governmental organizations have also contributed to the growing number of proposed arbitral procedures. As before, this section will highlight only those provisions that are relevant to the discussion.

#### 1. UNCITRAL Model Rules and Model Law

In 1976, the United Nations Commission on International Trade Law developed a set of arbitration rules known as the UNCITRAL Model Rules to facilitate ad hoc arbitrations of international trade disputes.<sup>365</sup> Although the UNCITRAL Model Rules were created to provide ad hoc arbitrators with an established set of guidelines, the Rules can also be used in an administered arbitration in lieu of the institution's procedural rules.<sup>366</sup> Because many ad hoc arbitrations are private, it is difficult to identify how many arbitrations have used the UNCITRAL Model Rules, but experts believe that the number is less than the number of arbitrations proceeding in front of the ICC.<sup>367</sup>

As is the case in other arbitral regimes, parties operating under the UNCITRAL Model Rules must be treated equally and have a full opportunity to present their case.<sup>368</sup> Beyond this basic principle, the tribunal is permitted to conduct the arbitration in any way it

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CONSTRUCTION ¶ 4.5.5 (14th ed. 1987)). A contractor may be joined without its consent, however, in an arbitration between an owner and architect. *See id.* In a survey of 387 construction arbitrators, the consensus was that the rules should be changed to join architects in appropriate cases. *See id.* at 139-40, 166-67. This suggests that some arbitrators might support consolidation being more widely available, even outside construction cases.

365. *See* REDFERN & HUNTER, *supra* note 5, at 480; John D. Franchini, Note, *International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement*, 62 *FORDHAM L. REV.* 2223, 2223-24, 2226 (1994); Laturno, *supra* note 2, at 384.

366. *See* Laturno, *supra* note 2, at 384.

367. *See* REDFERN & HUNTER, *supra* note 5, at 497.

368. *See* UNCITRAL Arbitration Rules, *reprinted in id.*, app. 12, art. 15; *see id.* at 486.

considers appropriate.<sup>369</sup> Hearings are generally private unless the parties agree otherwise.<sup>370</sup>

Interim awards and relief from the arbitrator are permitted under article 26 at the request of either party, but only when deemed "necessary in respect of the subject-matter of the dispute."<sup>371</sup> Parties may also apply to the courts for interim relief without being considered to have violated or waived their rights under the arbitration agreement.<sup>372</sup> In addition, arbitrators may act as *amiable compositeurs* or *ex aequo et bono* if the parties so agree and if the applicable law so permits.<sup>373</sup>

Although parties may amend or supplement a claim or defense at virtually any time, claims may not be amended "in such a manner that the amended claim falls outside the scope of the arbitrator clause or separate arbitration agreement."<sup>374</sup> This seems to prohibit an existing party from pursuing a claim against a third party who has not agreed, implicitly or explicitly, to participate in the arbitration or to whom an existing party objects.

In 1985, the United Nations followed the UNCITRAL Model Rules with the UNCITRAL Model Law on international arbitration.<sup>375</sup> The UNCITRAL Model Law, which was intended to help liberalize international commercial litigation by minimizing the role of domestic courts<sup>376</sup> and by giving full effect to party autonomy, has been adopted by a large number of countries and U.S. states.<sup>377</sup> In establishing the Model Law, the United Nations also intended to create a core of mandatory provisions that would ensure fairness and procedural due process, as well as facilitate the enforceability of arbitral awards.<sup>378</sup> States reforming their legislative approach to international arbitration can look to the Model Law as one potential alternative.

Under the Model Law, parties are free to determine the arbitral procedure, although the arbitral tribunal will conduct the arbitration as it sees fit if the parties cannot reach an agreement.<sup>379</sup> Whatever

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369. See *id.* art. 15(1).

370. See *id.* art. 25(4).

371. See *id.* arts. 26, 32; REDFERN & HUNTER, *supra* note 5, at 491.

372. See UNCITRAL Model Rules, *supra* note 368, art. 26(3).

373. See *id.* art. 33(2); REDFERN & HUNTER, *supra* note 5, at 37.

374. UNCITRAL Model Rules, *supra* note 368, art. 20.

375. See REDFERN & HUNTER, *supra* note 5, at 509; see also UNCITRAL Model Law, *reprinted in* REDFERN & HUNTER, *supra* note 5, app. 21.

376. See UNCITRAL Model Law, *supra* note 375, art. 5 ("In matters governed by this Law, no court shall intervene except where so provided in this Law."). *But see id.* art. 6 (listing several functions which are to be completed pursuant to court authority).

377. Gaillard, *supra* note 123, at \*17 n.1.

378. See REDFERN & HUNTER, *supra* note 5, at 509.

379. See UNCITRAL Model Law, *supra* note 375, art. 19.

the procedure, the parties are to be treated with equality and given a full opportunity to present their case.<sup>380</sup> Despite the precedence given party autonomy, the UNCITRAL Model Law does not give it absolute priority, and parties are only able to agree on procedures that do not contravene the public policy considerations contained in article 18.<sup>381</sup> Like the UNCITRAL Model Rules, the UNCITRAL Model Law expressly permits arbitrators to act as *amiable compositeurs* or *ex aequo et bono* if the parties agree to grant the arbitrators such power.<sup>382</sup>

At this point, the UNCITRAL Model Law is silent on the subject of consolidation, intervention, and joinder.<sup>383</sup> Article 17, however, allows arbitrators to order interim measures of relief when "necessary in respect of the subject-matter of the disputes."<sup>384</sup> Courts may also order interim relief, as the Model Law states that "[i]t is not incompatible with an arbitration agreement for a party to request" interim measures of relief from the courts, either before or during the arbitration.<sup>385</sup>

As is the case in some other arbitral systems, the UNCITRAL Model Law states that if the continuation of the arbitration becomes "impossible," then the tribunal shall terminate the proceedings.<sup>386</sup> This provision might be effective in persuading recalcitrant parties to consent to joinder of or intervention by a third party, if the arbitrators take the position that it would be impossible to proceed fairly without the participation of the third party.<sup>387</sup> The existing parties would then have the choice of allowing the third party to join the arbitration or having the arbitration terminated and the dispute litigated.

## 2. World Intellectual Property Organization

Because most intellectual property is protected on a national, rather than an international, basis, international disputes regarding infringement of intellectual property rights are quite common.<sup>388</sup> In 1967, the United Nations established the World Intellectual Property

380. See *id.* art. 18.

381. See *id.* arts. 18-19; REDFERN & HUNTER, *supra* note 5, at 517.

382. See UNCITRAL Model Law, *supra* note 375, art. 28(3); REDFERN & HUNTER, *supra* note 5, at 37.

383. See Gaillard, *supra* note 123, at \*22; Hoellering, *supra* note 9, at 48.

384. See UNCITRAL Model Law, *supra* note 375, art. 17; REDFERN & HUNTER, *supra* note 5, at 517.

385. See UNCITRAL Model Law, *supra* note 375, art. 9.

386. *Id.* art. 32(2)(c).

387. See, e.g., FED. R. CIV. P. 19 (noting the impossibility of continuing with an action in the absence of certain indispensable parties); FED. R. CIV. P. 24 (regarding intervention as of right).

388. See Laturno, *supra* note 2, at 358, 362.

Organization (WIPO), which was intended to increase the worldwide protection of intellectual property by (1) encouraging international treaties on the subject and (2) centralizing the administration of those treaties.<sup>389</sup> WIPO currently administers some of the world's most important copyright conventions.<sup>390</sup> Because some of these conventions do not include efficient dispute settlement procedures, WIPO has adopted a set of arbitration rules to facilitate resolution of intellectual property disputes, and, in 1994, began to administer international arbitrations at the WIPO Arbitration Center.<sup>391</sup> However, the WIPO Arbitration Rules, which were influenced by both the UNCITRAL Model Rules and the AAA International Arbitration Rules, are not designed solely to resolve intellectual property disputes, but can arguably be used in any type of commercial arbitration.<sup>392</sup>

Unlike many other arbitration rules and laws, there is no specific statement in the WIPO Rules that the arbitrators must take into account the procedural preferences of the parties. Instead, the WIPO Rules state that they apply to the arbitration except to the extent that they conflict with mandatory provisions of law, at which time the Rules do not apply.<sup>393</sup> The arbitrators are to "conduct the arbitration in such matter as [they] consider appropriate," subject only to the requirement that the parties be treated equally, that each party be given a fair opportunity to present its case, and that the arbitration complies with the mandatory provisions of law cited in article 3 of the Rules.<sup>394</sup> An arbitrator may decide as an *amiable compositeur* or *ex aequo et bono* only if the parties expressly authorize such actions.<sup>395</sup>

The arbitral tribunal is expressly granted the authority to issue any provisional orders and other sorts of interim relief it "deems necessary, including injunctions and measures for the conservation of the goods which form part of the subject-matter in dispute."<sup>396</sup> The parties may request judicial assistance regarding "interim

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389. See *id.* at 372-73.

390. For example, WIPO administers the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 102 Stat. 2853, 828 U.N.T.S. 221, as revised July 24, 1971; the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305, as revised July 14, 1972; and the Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 23 U.S.T. 1353, 828 U.N.T.S. 389, as revised July 14, 1967. See Laturno, *supra* note 2, at 373.

391. See WIPO Rules, *supra* note 56, at 559. WIPO has also adopted rules of conciliation and expedited arbitration. See *id.* 562-66 arts. 127, 586-89 arts. 14.

392. See Laturno, *supra* note 2, at 379, 382.

393. See WIPO Rules, *supra* note 56, 34 I.L.M. 568 art. 3(a).

394. 34 I.L.M. 568, 571, arts. 3, 38.

395. See *id.* art. 59(a), at 578.

396. *Id.* art. 46(a), at 575.



measures," security on a claim, or implementation of any of the arbitrator's orders without such a request being deemed incompatible with or constituting a waiver of the agreement to arbitrate.<sup>397</sup> As in other arbitral procedures, the arbitration may be terminated if it becomes "unnecessary or impossible" to proceed.<sup>398</sup>

As confidentiality is a major concern in intellectual property matters,<sup>399</sup> it is not surprising that the WIPO Rules contain detailed provisions defining confidential information and how it is to be treated.<sup>400</sup> Unlike other procedural rules, which often focus on the inability of the arbitrators to disclose confidential information learned during the arbitration process, the WIPO Rules' confidentiality provisions bind the parties as well as the arbitrators.<sup>401</sup> Hearings are to be private unless the parties agree otherwise.<sup>402</sup>

#### IV. INTERVENTION AND JOINDER OF THIRD PARTIES AS OF RIGHT: A PRAGMATIC AND PHILOSOPHICAL ANALYSIS

Obviously most states, arbitral institutions, and non-governmental organizations are not yet ready to recognize the right of third parties to intervene or be joined in an arbitration over the objection of existing parties. With a few notable exceptions,<sup>403</sup> the most that these bodies are willing to do for third parties is to permit consolidation of arbitrations. In many cases, even this is not possible without the consent of all concerned.

Nevertheless, the time may be ripe to consider whether there should be a right for third parties to intervene or be joined in an arbitration proceeding. The question is whether this right can develop under the existing arbitration regimes—be they established by states, arbitral institutions, or non-governmental organizations—or whether the laws and rules will need to be amended before the right can be established. The following is an analysis of the provisions described in Part III, identifying what arguments can be made for and against intervention and joinder under existing laws and rules.

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397. *Id.* art. 46(d), at 575-76.

398. *Id.* art. 65(c), at 580.

399. See Baldwin, *supra* note 8, at 458; Laturno, *supra* note 2, at 362.

400. See WIPO Rules, *supra* note 56, art. 52, at 576-77.

401. See *id.* arts. 73-76, at 582-83. Some commentators have argued that confidentiality provisions that bind the arbitrators but not the parties are illusory at best. See Collins, *supra* note 24, at 133.

402. See WIPO Rules, *supra* note 56, art. 53(c), at 577.

403. See, e.g., Netherlands Act, *supra* note 219, art. 1045(1); LCIA Rules, *supra* note 333, art. 13.1; NAI Rules, *supra* note 339, art. 41(1).

A. *Intervention and Joinder Under the Principle of Equality Between the Parties*

As set forth above, the vast majority of states and arbitral institutions require arbitrators to ensure equality between the parties during arbitral proceedings.<sup>404</sup> Most analyses of what constitutes equality between the parties have focused on the selection of the arbitral tribunal and concluded that it is impossible to ensure equality of the parties during the selection process if third parties intervene or are joined over the objection of existing parties.<sup>405</sup> However, problems involving equality of the parties and the selection of the arbitral tribunal can easily be overcome.<sup>406</sup> Therefore, the equality principle may be available as a possible basis for intervention or joinder of third parties as of right.

The principle of equality of the parties arises out of two different legal theories. First, equality of the parties in arbitration is based on the presumption that parties would not agree to a dispute resolution procedure that is inherently biased in favor of one party, absent extraordinary coercion or fraud by one side.<sup>407</sup> This approach recognizes that there are certain limits to party autonomy in arbitration that are similar to the restrictions placed on contracts of adhesion. These limits exist even in jurisdictions that emphasize the contractual nature of arbitration. Second, the principle of equality of the parties is based on the premise that states require all dispute resolution procedures—even those created by contract—to conform to certain general standards of due process, including equality between the parties. This interpretation is based more on concerns about public policy, which will be discussed at length in Part IV.D, *infra*, than concerns related to party autonomy. However, the autonomy argument is worth considering.

Because the principle of equality between the parties demonstrates that party autonomy does not control all aspects of arbitration, critics of joinder and intervention who claim that party

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404. See *supra* notes 132, 167, 207, 211, 220, 246, 289, 303, 343, 368, 380, 394 and accompanying text; see also Park, *National Law*, *supra* note 66, at 660-63 (noting that both courts and arbitrators have the responsibility to ensure that minimal procedural requirements are met).

405. See REDFERN & HUNTER, *supra* note 5, at 187, 292; Lecuyer-Thieffry & Thieffry, *supra* note 2, at 609-10; Rau & Sherman, *supra* note 8, at 110 n.115 (discussing in the context of the French *Dutco* case the principle of equality of the parties and whether every party in an arbitration has a right to name an arbitrator); Schwartz, *Dutco*, *supra* note 49; Stipanowich, *supra* note 1, at 523 (discussing “race to arbitration” in order to have the right to name an arbitrator).

406. See *supra* notes 49-56 and accompanying text.

407. In Germany, creating an arbitration procedure that favors one party is expressly disallowed. See *supra* note 43. In the U.S., however, differences in bargaining power do not make mandatory arbitration agreements unconscionable. See *id.*

autonomy must take precedence over all other considerations in arbitration are effectively silenced. In this way, autonomy is overcome in order to ensure that disputes between the parties are resolved on equal terms, no matter what the parties' relative bargaining positions were before they entered into the contract.

Once it is agreed that equality of the parties "trumps" party autonomy, the question is whether a court or tribunal can order joinder of or intervention by third parties in order to uphold equality of treatment of the parties to an arbitration. The classic case of a party "in the middle"<sup>408</sup> suggests that there may be times when a party will lose certain claims or defenses or be subjected to inconsistent judgments and multiple proceedings if it cannot bring certain third parties into the arbitration. Therefore, it could very well be argued that to ensure equality of the parties, an arbitrator or court should permit a willing third party to be joined to the arbitration, even over the objections of one party, to ensure that the party in the middle will not lose possible claims and defenses or be forced to reprove the same facts in multiple proceedings. This approach would also eliminate the possibility that the party in the middle would be forced to settle merely because it could not afford to re-litigate the same matter numerous times with no hope of a single, final resolution. Because the possibility of piecemeal litigation puts unequal pressures and limitations on the different participants, "equality of the parties" might be read to allow all parties to join in a single forum to resolve their disputes.

Opponents of joinder and intervention will claim that by letting an outsider into the arbitration to aid one of the existing parties, the arbitral tribunal is actually favoring that party and violating the principle of equality between the parties. That would be true if the arbitrator created some sort of unequal rule of participation, such as only allowing respondents to join third parties or only allowing entry of one third party per arbitration. However, if claimants and respondents are treated equally with respect to the ability to join necessary third parties, then the principle of equality between the parties has been respected.

This argument is admittedly novel in that equality of the parties is measured not just by how the parties are treated in the immediate arbitration (including the potential loss of claims and defenses), but also by how external forces (including the cost of subsequent litigations, the possibility of inconsistent results, etc.) affect the relative position of the parties.<sup>409</sup> Nevertheless, just because the

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408. A party might find itself "in the middle" if it has contracts with two different parties, only one of which is a party to the arbitration, and both contracts are implicated with respect to the single dispute in arbitration. See, e.g., 1 CRAIG ET AL., *supra* note 38, at 102-03.

409. The argument is not as far-fetched as it initially seems, however, especially when one considers that "[a]n arbitrator's view of disputes is much broader than a judge's because an arbitrator is more likely to assess the entire

argument is novel does not mean it should be disregarded. Even if the argument is not strong enough to stand on its own, it still may be used to bolster other arguments in favor of joinder.

The classic "party in the middle" is not the only time that issues of third party participation arise in arbitration. Sometimes a third party will want to intervene, even over the objections of both parties, because it fears that its rights and interests will be negatively affected if the arbitration proceeds in its absence. The question, therefore, is whether the principle of equality between the parties can be extended to protect third parties who wish to intervene in the arbitration.

"Equality of parties" can be interpreted in one of two ways, requiring either equality of the parties to the arbitration or equality of the parties to the contract. The more narrow view of the equality principle requires arbitrators to look only at the relative position of the parties to the arbitration, with no consideration of whether there are other signatories to the contract containing the arbitration agreement. However, an argument may be made that, because (1) arbitration is contractually based and (2) the arbitral parties' relationship is created and defined by the contract, "equality of the parties" should be read to include all parties to the contract, not just those who are participating in the arbitration. Where there are multiple parties to a contract and not all are involved in the arbitration, a broad interpretation of "equality of the parties" requires any signatories to the contract who are not participating in the arbitration to be allowed to intervene to protect their rights with respect to the other parties to the contract. Of course, the intervenor would have to possess some interest in or connection with the subject matter of the arbitration.<sup>410</sup>

Finally, there will be times when third parties wish to intervene in an arbitration even though they are not signatories to the contract at issue<sup>411</sup> or, indeed, of any relevant contract. Under both a broad and a narrow interpretation of "equality of the parties," third parties who are strangers to both the contract and the arbitration have little ground to claim equality with the signatories. Indeed, they are in a distinctly different position. Therefore, an equality of the parties argument will not

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relationship between the parties, rather than to confine the inquiry to the particular claim asserted." Motomura, *supra* note 1, at 38. *But see id.* at 77-78 (noting that arbitration's efficiency stems from the exclusion of claims and parties outside the arbitration agreement).

410. *See supra* notes 12-13 and accompanying text (defining intervention as of right).

411. If the third party is somehow linked to one of the parties to the arbitration via a different contract than the one primarily at issue, we again must decide whether to take a broad or narrow view of whether "equality of the parties" must take into account external factors such as one of the parties' related contracts. *See supra* note 409 and accompanying text.

provide a non-signatory any grounds for intervening in an arbitration over the objections of the existing parties to the arbitration.

*B. Intervention and Joinder Under the Principle of Granting Parties the Full Opportunity to Present Their Cases*

In addition to requiring that arbitrators respect the equality of the parties, many states and arbitral institutions also demand that arbitrators ensure that all parties to the arbitration are given a full opportunity to present their case during the proceeding.<sup>412</sup> This requirement is based on one of three grounds. First, the right to a full opportunity to present one's case presumes that parties could not and would not contract for a dispute resolution proceeding that intentionally curtailed their ability to present their claims and defenses. Second, the requirement that all parties have a full opportunity to present their case relies on the possibility that unless all relevant entities are made party to a single proceeding, some parties may lose certain claims or defenses.<sup>413</sup> Although this concept is not often discussed in the context of intervention, it is mentioned in connection with joinder and consolidation. Third, the requirement that the parties be given the full opportunity to present their case is based on a public policy argument that states will not allow parties to contract around certain fundamental due process protections.<sup>414</sup> The first two arguments will be discussed here, while the public policy issues will be dealt with in Part IV.D, *infra*.

Parties to an arbitration have a good argument for joining consenting third parties to the arbitration if they can demonstrate their inability to present their full claims or, more likely, their full defenses without those third parties. This argument does not rely solely on the desire to prevent inconsistent judgments that may result when all the parties are not brought before a single trier of fact; instead, the power of the argument is that one of the original parties to the arbitration may not be able to make its offensive or defensive case without joining a third party to the arbitration.

For example, a dispute may arise between an owner and a contractor. Arbitration is initiated and the contractor wants to join the subcontractor over the owner's objection. Without the subcontractor as a party, the contractor may not be able to effectively

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412. See *supra* notes 132, 167, 207, 211, 220, 246, 289, 303, 343, 368, 380, 394 and accompanying text.

413. Some commentators describe this as the "empty chair" syndrome. See Thomson, *supra* note 92, at 166.

414. See Park, *National Law*, *supra* note 66, at 660-63 (noting that both courts and arbitrators have the responsibility to ensure that minimal procedural requirements are met).

assert certain defenses.<sup>415</sup> In addition, if the subcontractor is not joined and the contractor loses the arbitration because of an act or omission for which the subcontractor is ultimately responsible, the contractor may not be able to recover those damages from the subcontractor at a later date.

The unavailability of recovery sometimes has nothing to do with the possibility that a second trier of fact may view the situation differently than the arbitrator (a risk that some opponents to joinder and intervention argue is foreseeable and thus not remediable by an arbitrator). It can result from extrinsic forces as well. For example, the subcontractor could go bankrupt between the time of the first arbitration and the resolution of later proceedings between the contractor and subcontractor. There is no reason why the contractor should have to bear the brunt of the financial loss just because the subcontractor could not be joined to the first proceeding by virtue of a procedural technicality. The inequity of this result increases in jurisdictions where courts routinely stay or dismiss litigation (such as that between a contractor and a subcontractor) pending the outcome of the first arbitration, because there is a possibility that the litigation will be moot as a result of the arbitration.

Once the issue of whether a party to the arbitration can bring in a willing third party is decided, the question becomes whether outsiders to the arbitration can rely on "full opportunity" language to intervene in an arbitration where their participation does not affect an existing party's ability to present its case. As discussed in the previous section on equality of the parties, there is a broad view and a narrow view of the interpretation of what constitutes a "party." Under a broad view, signatories to the contract who are not parties to the arbitration should be allowed to intervene as of right if they need to preserve their opportunity to fully present their case regarding the subject-matter of the dispute. Under a narrow view, signatories to the contract who are not parties to the arbitration have no more rights than non-signatories to the contract.

However, the question of whether non-signatories to the contract should be allowed to intervene in an ongoing arbitration under a "full opportunity" argument is slightly more complex than under an

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415. Some critics may claim that the subcontractor could be called as a voluntary witness in the contractor's case, but this may not always be possible. The subcontractor may be willing to attend an arbitration where its rights are being finally determined as a joined party but may not be willing to take the time or risk to participate as a mere witness, since it will then have to go through the same process if and when it is sued by the contractor. Because third parties cannot be compelled to act as witnesses or provide documents in an arbitration, any discovery or taking of evidence must be voluntary. Indeed, joining a third party may be the only way to obtain access to certain documents in that entity's possession, since there is usually at least a limited right of discovery of parties to an arbitration.

“equality of the parties” analysis. “Equality of the parties” focuses on the relationship between the parties and the need to guarantee parity among similarly situated entities. The principle of a full opportunity to present one’s case recognizes that arbitration should not be allowed to be binding if one’s right to present one’s case is curtailed. However, states’ concerns about an entity’s ability to make its offensive or defensive case should not be limited to the parties to an arbitration or contract; all entities should be guaranteed the right to make their full case, and if an arbitration affects a third party’s right or interest—either directly or in a significant though indirect manner<sup>416</sup>—then that third party should be allowed the opportunity to protect itself, even if it is not a party to the arbitration or contract. The third party may choose not to do so, but it should not be precluded as a matter of law from taking this opportunity.

The ability to protect one’s rights “piecemeal” is not necessarily a sufficient method of guaranteeing a “full opportunity to present one’s case.” One problem involves obtaining evidence (both documentary and testamentary) from third parties. If the dispute is resolved through a series of arbitrations, one or more parties may experience difficulties in marshalling evidence for their case from third party sources.<sup>417</sup> Another problem concerns costs. In many cases, the price tag associated with multiple proceedings will be at least double what it would be if the issue were resolved in a single arbitration. This elevated expense could prevent a party with limited financial resources from fully protecting its rights.

### C. *Intervention and Joinder as an Equitable Principle*

Both courts and arbitrators have certain equitable powers in an arbitral proceeding, although the scope of those powers varies in different jurisdictions.<sup>418</sup> Indeed, many states’ and arbitral

416. See *supra* notes 12-13, 86 and accompanying text.

417. This problem is due to the fact that evidence adduced in one arbitration is not always available in another proceeding, since there are often confidentiality orders restricting what use can be made of testimony and documents arising out of an arbitration. See also *supra* note 415 (noting the difficulty of obtaining evidence from third parties to the arbitration).

418. See 1 CRAIG ET AL., *supra* note 38, at 416 (noting that an arbitrator’s power to grant interim relief is independent of the power of the court to do the same); Higgins, *supra* note 11, at 1544; Michael F. Hoellering, *Interim Relief in International Arbitration*, in ARBITRATION AND THE LICENSING PROCESS, *supra* note 20, at 3-55 to 3-56 [hereinafter Hoellering, *Interim Relief*]; Park, *National Law*, *supra* note 66, at 660-63 (noting that both courts and arbitrators have the responsibility to ensure that minimal procedural requirements are met).

For example, French courts allow arbitrators to act as *amiable compositeurs* or rule *ex aequo et bono* only if the contract so permits. See Higgins, *supra* note 11, at 1543-45; see also French Code, *supra* note 183, art. 1497. French arbitrators must therefore rely on the parties to grant them equitable powers, in contrast

institutions' procedural rules grant arbitrators equitable powers, either permitting or requiring arbitrators<sup>419</sup> to decide issues in accordance with equitable principles, act as *amiable compositeurs*, or rule *ex aequo et bono*.<sup>420</sup> In addition, contract language may permit arbitrators to consider principles of equity or grant arbitrators the ability to act as *amiable compositeurs* or to decide *ex aequo et bono*.<sup>421</sup>

The way in which equitable principles can be used to permit joinder and intervention of third parties is straightforward. Where adding an additional party places a minimal burden on the original parties<sup>422</sup> and the risk or cost to an existing or third party of not permitting joinder or

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with U.S. arbitrators, who have certain inherent equitable powers. See Higgins, *supra* note 11, at 1544; Milligan-Whyte & Veed, *supra* note 8, at 133. U.S. courts also have certain inherent equitable capabilities. Although these powers are not limitless, they could be utilized to give effect to the policies and purposes of arbitration, namely economy and finality of the resolution of disputes. See Stipanowich, *supra* note 1, at 512. Under English law, parties have traditionally been unable to allow arbitrators to decide issues "in fairness and equity" and not in accordance with legal provisions. See Craig, *supra* note 1, at 29 n.151; see also Michael R.E. Kerr, "Equity" Arbitration in England, 2 AM. REV. INT'L L. 377 (1991) (advocating full recognition of equity clauses in the English courts). However, the Arbitration Act 1996 may have altered this approach somewhat. See *supra* note 164.

419. Some governing bodies grant arbitrators equitable powers as a default mechanism by using language such as "unless the parties agree otherwise." At other times, arbitrators' equitable powers are unwaivable, as when the law or arbitration rule states that arbitrators shall have certain equitable powers or shall decide according to the law and principles of equity.

420. See *supra* notes 134, 149, 164, 184, 212, 221, 249, 292, 304 and accompanying text. Interestingly, most laws and rules discussing arbitrators' power to act as *amiable compositeurs* or *ex aequo et bono* are found in sections referring to the substantive law of the arbitration. Therefore, some might argue that an arbitrator's equitable powers, including the power to act as an *amiable compositeur* or *ex aequo et bono*, only extend to principles of substantive law and not to procedural matters such as joinder or intervention. But see 2 CRAIG ET AL., *supra* note 6, addendum 1 to app. V at 74 (including a summary and extract from *Pesqueras Espanolas de Barcaloa S.A. v. Alsthom Atlantique S.A.*, in which the Chambre des Recourse of the Tribunal Cantonal du Canton de Vaud (Switzerland) held that an *amiable compositeur* was "bound only by those mandatory rules of procedure which were set up by the Swiss Concordat on Arbitration"). However, it could also be said that, in many cases, joinder and intervention become substantive issues by virtue of their closing off certain claims or defenses.

421. See Motomura, *supra* note 1, at 43. Reinsurance contracts often give arbitrators the power to act *ex aequo et bono*. See Milligan-Whyte & Veed, *supra* note 8, at 131. However, powers to decide *ex aequo et bono* are seldom conferred in other circumstances, see REDFERN & HUNTER, *supra* note 5, at 38, although arbitrators are more often given other equitable powers, see *id.* at 121-22.

422. Notably, even what may initially appear to be a substantial burden can be lessened significantly through routine measures such as bifurcating the hearing or requiring the third party to bear the costs of hearing the additional claims.



intervention is high, the arbitral tribunal should strongly consider letting the third party into the action.

As is the case in other equitable determinations, courts or arbitrators must balance the equities for and against third party participation. Equitable factors in favor of prohibiting joinder or intervention include: (1) increased cost; (2) increased delay; (3) disclosure of confidential matters; and (4) the existence of express contractual provisions precluding third party participation.

Equitable factors in favor of permitting joinder or intervention include: (1) common issues of law or fact; (2) claims arising out of the same transaction or series of transactions; (3) significant or irreparable harm to an existing or third party if joinder or intervention is refused;<sup>423</sup> (4) the existence of a contractual link between an existing party and the third party; and (5) recognition of third party rights or interests (such as a third party beneficiary clause) in the original parties' contract.<sup>424</sup> The arbitrator should also take into account traditional concerns about the efficiency of arbitration as a dispute resolution mechanism, the cost (in money, time, judicial resources, etc.) of having multiple hearings, the opportunity for any party (including a third party) to present its full case if third party participation is denied, the ability to give full relief to any party (including a third party) if third party participation is denied, and the likelihood of inconsistent awards. Finally, although the arbitral tribunal should not give absolute primacy to party autonomy, it also should not forget that arbitration is primarily a contractual remedy.

Obviously, there is no precise formula for balancing the equities in cases involving requests for third parties to intervene or be joined in an arbitration. Different jurisdictions and arbitral institutions will give different weight to different elements, and some will be hostile to the idea of introducing equitable considerations into what is considered a strictly contractual matter. Others may be inclined to go too far in the other direction and equate intervention and joinder in international arbitration with intervention and joinder in domestic civil litigation. The solution, therefore, is to avoid both extremes and steer a middle path, balancing both law and equity. This approach is appropriate, as arbitration has long been cited as a method of dispute resolution that is intended to avoid strict legalism and introduce more equitable, commonsense remedies into business disputes.<sup>425</sup>

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423. See *supra* notes 12-14.

424. Contractual silence on the issue of third party rights can weigh either for or against third party involvement, although it seems as if it should favor third party participation rather than third party exclusion. See *supra* note 33 and accompanying text.

425. See Bompey et al., *supra* note 24, at 28; Craig, *supra* note 1, at 18; Rau & Sherman, *supra* note 8, at 91 n.7.

#### D. *Intervention and Joinder as a Public Policy Issue*

International arbitrations raise issues not only of domestic public policy, but international public policy as well.<sup>426</sup> As noted above, many states and arbitral institutions will limit arbitral procedures or awards that contravene public policy and often will overturn or refuse to enforce such awards.<sup>427</sup>

There are a number of public policy concerns that arise at the domestic level, with due process taking a position of primary importance. "Due process," in this context, means ensuring that the parties to the arbitration (or all parties to the contract, or all interested parties, depending on how "parties" are defined within the jurisdiction) are being treated properly and in accordance with the state's mandatory provisions of law. Subsumed within due process are the principles of equality of the parties and the opportunity for each party to fully present its case.

States and arbitral institutions usually comply with fundamental due process norms in international arbitration because by so doing they encourage respect for the law and the sanctity of contracts within their respective jurisdictions. Upholding due process also increases the likelihood that the parties will voluntarily comply with whatever award is eventually handed down. Therefore, if the state or arbitral institution believes that respect for law, contracts, and arbitral awards will be increased by permitting joinder and intervention of third parties, then it will establish rules that allow courts and arbitral tribunals to take such actions. Alternatively, if the state or arbitral institution believes that these public policies will not be furthered by a liberal approach to joinder and intervention in arbitrations, then it will limit courts' and arbitral tribunals' ability to utilize due process arguments to justify third party participation in arbitration.

Due process concerns are not the only types of public policy concerns that affect international arbitration. Courts and arbitral institutions also focus on public policies involving party autonomy and the deference given to arbitration as a consensual dispute resolution procedure, two issues that can affect whether entities choose to arbitrate their disputes in a certain jurisdiction. However, respect for arbitration and party autonomy does not necessarily require a state to prohibit joinder or intervention of third parties as of right, either as a matter of principle<sup>428</sup> or as a method of increasing the number of arbitrations held in the state. Indeed, there will be a number of parties who believe that

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426. See REDFERN & HUNTER, *supra* note 5, at 293-4, 444-46.

427. See *supra* notes 134, 159-60, 185, 189, 250, 261-63 and accompanying text.

428. As has been described above, courts often limit party autonomy to further public policies. See Craig, *supra* note 1, at 29 n.151; *supra* notes 406-18 and accompanying text.

third party joinder and intervention are improvements on the current system and will seek out states that allow such practices. When deciding whether to encourage or allow joinder and intervention as of right, a state needs to balance the number of parties who will avoid that forum because they do not want to accede to such practices against the number of parties who will come to that state because of its liberal policies on intervention and joinder.<sup>429</sup>

States must also decide whether and to what extent they want to encourage the resolution of disputes in single versus multiple procedures. In the context of civil litigation, domestic public policies have generally favored single-hearing resolutions.<sup>430</sup> Arbitrations, however, are not the same as civil litigations. Nevertheless, the public policies that supported the development of joinder and intervention in the domestic laws of civil procedure might support similar developments in the law of international arbitration.<sup>431</sup> Typically, these policies include concerns about due process, time and cost efficiencies, and avoidance of inconsistent judgments.

The final domestic public policy concern—which is also an international policy concern—is the enforceability of arbitral awards. One of the primary duties of the state and arbitral institution is to ensure that the final award can be enforced. Some have argued that compulsory joinder of parties or claims may result in an unenforceable award under the New York Convention.<sup>432</sup> Critics of intervention as of right have also used this argument, focusing on the portion of the New York Convention that states that enforcement of an award may be refused if the award is outside the scope of agreement or is granted pursuant to an arbitral procedure not in accordance with the agreement of the parties.<sup>433</sup> Similar language is found in the laws and rules of many states and arbitral institutions.<sup>434</sup> However, this approach fails to take notice of language stating that an award is enforceable if it was “in accordance with the law of the country where the arbitration took place,” even if it fails to comply with the agreement among the parties.<sup>435</sup> In fact, an arbitration that did not join an indispensable party could result in an

429. See Rau & Sherman, *supra* note 8, at 35-37.

430. See Stipanowich, *supra* note 1, at 475-76.

431. See *id.* at 501-02 (discussing judicial presumptions in the absence of contractual language regarding consolidation and joinder, including the presumption that parties' agreement to arbitrate includes the intent to pursue the most efficient and economical means of commercial justice, which would include consolidation and, presumably, joinder and intervention when appropriate).

432. See REDFERN & HUNTER, *supra* note 5, at 186-87; Higgins, *supra* note 11, at 1534; Lecuyer-Thieffry & Thieffry, *supra* note 2, at 593. *But see* Stipanowich, *supra* note 1, at 513-14.

433. See New York Convention, *supra* note 5, art. V(1)(c)-(d).

434. See *supra* notes 153, 155, 175-76, 216, 255-56 and accompanying text.

435. See New York Convention, *supra* note 5, art. V(1)(d).

unenforceable award if conducted or enforced in a country where absolute prohibitions on joinder or intervention are contrary to public policy.<sup>436</sup> In addition, problems with enforceability under the New York Convention are not insurmountable, as an award that permits joinder or intervention of a third party may still be enforceable under another international treaty or the domestic law of the place where enforcement is to take place.<sup>437</sup>

Although enforcement of international arbitral awards is obviously one type of international public policy concern, there are others, many of which parallel domestic policy concerns. For example, international arbitration policy is cognizant of claims regarding party autonomy and the sanctity of contract, as well as arguments for efficiency, savings of time and costs, and avoidance of inconsistent results. To a large extent, though, international public policy is much less developed than domestic public policy. Therefore international policy has more room to grow, meaning that arguments in favor of joinder and intervention may be more likely to occur within the framework of international, rather than domestic, public policy. Similarly, the absence of national or partisan ties may mean that international public policy can take a more global perspective about whether it is fair and desirable to subject parties to piecemeal litigation around the world, rather than to permit third party joinder and intervention in appropriate circumstances.

#### E. *Intervention and Joinder as a Form of Interim Relief By the Courts or Arbitral Tribunal*

Many states and arbitral institutions grant either the courts, the arbitral tribunals, or both, the power to enter various types of interim relief.<sup>438</sup> As a practical matter, requests for joinder or intervention of third parties will most likely be made in the form of a request for interim or provisional relief.<sup>439</sup> The question, of course, is whether and to what extent applications for that sort of relief would be allowed.<sup>440</sup>

In most cases, interim relief is granted to preserve or otherwise respect the rights of the parties.<sup>441</sup> Several factors enter into the decision on whether interim relief is necessary or permissible: (1) the

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436. See *id.* art. V(2)(b).

437. See 1 CRAIG ET AL., *supra* note 38, at 255.

438. See *supra* notes 136, 151-52, 173, 192, 203-06, 215, 222, 239-40, 247, 290-91, 306-07, 326, 334-45, 371, 384 and accompanying text.

439. Because courts and tribunals have begun to classify consolidation as a type of interim relief, see Higgins, *supra* note 11, at 1524, intervention and joinder could easily fall under the general rubric of "interim relief" as well.

440. In general, obtaining provisional relief is difficult as both a substantive and a procedural matter. See Wagoner, *supra* note 257, at 68.

441. See Higgins, *supra* note 11, at 1524.

urgency of the relief requested; (2) the need to protect the status quo between the parties during the pendency of the arbitration; (3) the need to stop one party from increasing the gravity or duration of the arbitration; and (4) the need to ensure the enforceability of the arbitral award.<sup>442</sup> Several of these criteria could be used as a basis for a request for intervention or joinder. For example, a party in the middle might know that a third party indemnifactor was on the brink of disposing of all of its assets and might need to join that third party immediately to protect its right to indemnification. Provisions permitting interim relief may be found in national law, the rules of the administering institution, or the language of the contract. However, authority for interim relief cannot be based solely on the need to enforce the award, since the primary enforcement mechanism, the New York Convention, makes no express provision for interim remedies in aid of arbitration.<sup>443</sup>

Although some people believe that resort to domestic courts for provisional aid violates the arbitration agreement, others disagree, claiming that courts at the arbitral seat as well as at the enforcement site have certain powers over an arbitration.<sup>444</sup> Certainly, the more common position is that courts and arbitral tribunals both have authority to grant interim relief, including, potentially, the ability to order intervention and joinder of third parties.<sup>445</sup> This means that interim or provisional

442. See *id.* at 1524, 1544-45; Wagoner, *supra* note 257, at 71.

443. See Baldwin, *supra* note 8, at 461; Higgins, *supra* note 11, at 1527. In fact, some argue that granting interim judicial relief may violate the New York Convention's requirement that all matters be referred to arbitration. See Baldwin, *supra* note 8, at 461-62 (noting a split in U.S. courts but recognizing almost universal acceptance by non-U.S. courts that the New York Convention does not prohibit interim relief being ordered prior to arbitration); see also DELAUME, *supra* note 8, at 329 (noting that most European courts hold that interim measures of judicial relief are not incompatible with arbitration); Wagoner, *supra* note 257, at 71 (quoting a recent case from the English House of Lords that noted the split in U.S. case law and the absence of authority from other jurisdictions suggesting that interim relief was inappropriate under the New York Convention).

444. See Craig, *supra* note 1, at 50 (claiming that, as a practical matter, it is "unrealistic" to expect that interim measures can or should only be taken by courts at the arbitral seat); D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection—Is the Tide About to Turn?*, 30 TEX. INT'L L.J. 71, 82-86 (1995) (discussing the possibility of turning to courts for interim relief where there is no arbitral tribunal or the tribunal has no appropriate powers); see also Park, *National Law*, *supra* note 66, *passim*.

445. See REDFERN & HUNTER, *supra* note 5, at 307-08 (noting that arbitrators and courts share power to order some types of interim relief, but arguing that only courts have power over third parties); Higgins, *supra* note 11, at 1525 (noting "no clearcut line of demarcation delimiting jurisdictional authority over interim measures as between the domestic court or the arbitral tribunal"); see also Baldwin, *supra* note 8, at 460 n.40 (noting that although arbitral tribunals may order interim relief, such relief may be delayed while the tribunals are being impanelled); Craig, *supra* note 1, at 48 (noting two points of contact

measures can be entered not only by the arbitral tribunal, but also by courts in several different states.<sup>446</sup> Some commentators have noted that the variety of potential sources of relief suggests that some harmonization of the law regarding interim relief is necessary if inequitable results are to be avoided.<sup>447</sup>

The authority of courts and arbitral tribunals to order provisional measures arises from different sources, which may lead to instances where one, but not the other, is able to grant interim relief such as joinder and intervention of third parties. Courts' power to involve themselves in the arbitral process stems from their need to ensure that the award will become enforceable and to uphold the public policies of the state.<sup>448</sup> As has been discussed above, both of these bases can be used to allow third party participation in an arbitration. Once a court recognizes that it has the authority to grant provisional relief, it must identify the standard by which the decision to grant or deny the request is to be measured. At that point, the court looks not to the *lex arbiti* but to its own law of civil procedure.<sup>449</sup> Currently, there is little harmony among various nations as to when provisional relief is appropriate.<sup>450</sup>

An arbitral tribunal's ability to grant interim relief stems from its inherent power to control the arbitral proceedings and from the authority granted to it by the contract.<sup>451</sup> In addition, the arbitrator is often considered the one who must ensure that justice between the parties is done.<sup>452</sup> Although both of these rationales can certainly be used to permit third party participation, they can also be interpreted in a much more restrictive manner. For example, opportunities for joinder and intervention will be very limited in a system that holds that arbitrators' power comes only from the contract. In most cases, such an arbitral system will consider allowing third parties into the

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between the courts and the arbitration: "judicial supervision of the arbitral process" and "judicial assistance to the arbitral process itself").

446. Some states, however, decline to exercise jurisdiction over foreign arbitrations. See, e.g., *supra* note 237 and accompanying text.

447. See Craig, *supra* note 1, at 50, 54, 58 (noting a wide variance with respect to interim measures allowed under national laws).

448. See *id.* at 50; Stipanowich, *supra* note 1, at 512. Courts often find the legal authority to intervene in arbitrations in their nation's arbitration laws, in provisions authorizing the courts to act in situations requiring immediate, short-term relief, or arising out of certain residual powers of the judiciary. See 1 CRAIG ET AL., *supra* note 38, at 423.

449. See Craig, *supra* note 1, at 50; Wagoner, *supra* note 257, at 69 (claiming that *lex arbiti* addresses whether a court has the power to issue interim relief).

450. See Craig, *supra* note 1, at 50.

451. See 1 CRAIG ET AL., *supra* note 38, at 416 (noting that an arbitrator's power to grant interim relief is independent of the power of the court to do the same); Wagoner, *supra* note 257, at 3-56.

452. See Stipanowich, *supra* note 1, at 509.

arbitration to exceed the arbitrators' explicit grant of authority.<sup>453</sup> However, an arbitral system that places a high value on the need for the arbitrator to control the proceedings may be more likely to give arbitrators broader discretion in this area.

When both courts and arbitral tribunals have the ability to grant interim relief, parties usually resort to the courts prior to the convening of the arbitral tribunal.<sup>454</sup> Once the tribunal has been established, requests for provisional relief are typically referred to the tribunal first, although the parties may apply to a court to confirm or enforce the tribunal's order.<sup>455</sup>

#### F. *Intervention and Joinder Under an Impossibility Argument*

In some states and administered arbitrations, an arbitrator can terminate the proceedings if it becomes "impossible" to continue.<sup>456</sup> This provides a possible solution to the joinder-intervention problem for those people who do not believe that considerations regarding equity or public policy justify overcoming arbitration's contractual basis.

Essentially, the argument is that in certain cases the absence of a third party makes it impossible for the arbitrator to continue with the proceedings. Because the arbitrator has an obligation to conduct the hearings in a way that ensures equality among the parties and a fair opportunity for each party to present its case, the arbitrator can refuse to continue the proceedings unless those third parties are present. By threatening to terminate the proceedings—and thereby forcing the parties to litigate the dispute—the arbitrator can exert considerable pressure on the original parties to waive their objections to third party involvement.

This approach respects the dignity of the arbitral contract in both word and deed while still taking into account third parties' legitimate interests in the arbitration. The parties are not forced to undergo an arbitration that they did not contemplate, but are permitted to choose whether they wish to arbitrate the matter in the circumstances which now present themselves (i.e., with a third party) or whether they wish to litigate. This may be an excellent compromise between considerations of law and equity in arbitration.

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453. See REDFERN & HUNTER, *supra* note 5, at 6; Slate, *supra* note 6, at 60; Wagoner, *supra* note 257, at 69. This is due to the fact that an arbitrator has fewer options than a court. See Milligan-Whyte & Veed, *supra* note 8, at 147; Slate, *supra* note 6, at 61.

454. See Wagoner, *supra* note 257, at 69.

455. See *id.*

456. See *supra* notes 137, 154, 217, 294, 398 and accompanying text.

### G. Intervention and Joinder Under Pure Contract Theory

#### 1. Implied Consent

Courts and arbitrators also respect the parties' contractual positions under a theory of joinder or intervention that relies on implied consent.<sup>457</sup> Under this approach, the arbitral tribunal looks at the circumstances of each case and decides whether the parties to the original arbitration agreement impliedly consented to participation of third parties, not only in general, but with respect to the particular third party who is to intervene or be joined. A narrow view of implied consent would limit third party participation to those who had signed some sort of arbitration agreement with one or both of the parties. A broad view would permit non-signatory third parties to be brought into the arbitration as well.

In looking for implied consent, courts and arbitrators should analyze the interrelatedness of the parties and transactions at issue, the existence or absence of any contractual link between the parties, and the breadth of the arbitration agreement itself. For example, a very broad agreement covering "any and all disputes" arising out of a contract will be more likely to lead to a finding of implied consent than a very narrow agreement covering only one specific type of dispute. Although those who demand strict compliance with the terms of the contract would obviously be most pleased with an approach that relied solely on the existence of a signed arbitration agreement between every party and potential party to an arbitration, the theory of implied consent extends the right to join or intervene only to those third parties whom the original parties to the arbitration presumably intended to be able to participate. Because the original parties are deemed to have contemplated the potential inclusion of a third party, use of the implied consent doctrine upholds party autonomy to a high degree.

#### 2. Group Theory

The other type of strict contractual approach to joinder and intervention relies on the group of companies theory that has developed in the context of consolidation of arbitrations.<sup>458</sup> Under this argument, third parties should be allowed to join or intervene in an arbitration if they belong to a group of companies, at least one of whom signed an arbitration agreement that was intended to bind its

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457. This theory has been used in consolidation cases. *See supra* note 317 and accompanying text.

458. *See supra* notes 319-22 and accompanying text.



sister, parent, or subsidiary companies. In deciding whether to apply the group theory, courts and arbitrators should look at the express contractual language as well as the intent and behavior of the parties to see if there was an intent to create an "integrated contractual relationship subject to one single arbitration."<sup>459</sup> Again, those who demand strict compliance with the terms of the contract would prefer to uphold contracts on their face and not introduce measures intended to mitigate the harsh effect of such strict construction. However, the group theory, like implied consent, is no more novel or objectionable in the context of joinder and intervention than it is in the context of consolidation.

#### H. *Intervention and Joinder Under Confidentiality Provisions*

Some opponents to joinder and intervention argue that allowing third parties into the arbitral procedure infringes on the parties' confidentiality.<sup>460</sup> Certainly, a number of commentators and arbitral institutions such as WIPO are highly concerned with the confidentiality of the arbitral procedure.<sup>461</sup> However, as has been discussed above, third parties who wish to join or intervene in an arbitration are already in possession of many of the relevant facts.<sup>462</sup> To the extent that confidentiality continues to be an issue, the arbitrator can require the new party to sign a confidentiality order or bifurcate the hearings and distribution of discovered documents. In actuality, the confidentiality issue is less of a problem than is commonly perceived. Not only do parties leak information to the media despite their alleged concern for privacy, but the types of third parties that would wish to and would have a right to join or intervene in an arbitral proceeding usually are not the types of parties that would cause confidentiality concerns. In addition, as suggested by the LCIA Rules, the mere existence of provisions on confidentiality does not necessarily preclude third party participation.<sup>463</sup>

### V. CONCLUSION

Obviously, not every third party should be allowed entry into an existing arbitration. However, chanting "party autonomy" like some sort of mantra does little to advance the discussion regarding whether and to what extent third parties have an arguable right to

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459. See 1 CRAIG ET AL., *supra* note 38, at 99-100 (discussing ICC Case 1434, 1976 JDI 978).

460. See *supra* notes 73-79 and accompanying text.

461. See, e.g., *supra* notes 74-80, 401 and accompanying text.

462. See *supra* notes 73-79 and accompanying text.

463. See *supra* note 358 and accompanying text.

participate in an arbitration, since courts have long recognized that arbitration's respect for party autonomy does not mean that every agreement is or should be upheld as written.<sup>464</sup> As in many areas of the law, it is necessary to balance the parties' desires against the requirements of law and equity. In fact, a balancing approach is particularly appropriate in arbitrations, which are often supposed to avoid the imposition of harsh legal rules.<sup>465</sup>

Certain commentators, eager to uphold the contractual aspect of arbitration, argue that consent to joinder and intervention can be obtained during contract negotiations and that this is the most appropriate way to deal with the problems of multi-party disputes.<sup>466</sup> However, this tactic ignores the reality of the negotiation costs that accompany such an approach<sup>467</sup> as well as the probability that parties will be unable or unwilling to create arbitration clauses that protect the rights of third parties, some of whom will be unknown at the time the transaction is completed. Although proponents of pure contract theory may applaud this result, it is at odds with modern notions of procedural fairness and equity, especially when bifurcating disputes based on the mere existence of an arbitration clause can injure legitimate rights and interests.

In the last twenty to thirty years, international arbitrations have become more important as the globalization of business and finance has increased the number of transnational contracts exponentially. However, because there is no single body regulating international arbitrations, each state and arbitral institution must create procedures that not only suit its own individual needs but that take into account the unique circumstances of modern transnational law and practice. Creating narrow interpretations of arbitration agreements that limit the ability of third parties to join or intervene as of right may uphold party autonomy but may not be wise as a matter of equity or sound business practice.

This Article has attempted to identify how courts and arbitral tribunals can justify intervention and joinder of third parties under existing rules of procedure. It may be that these arguments are ultimately unpersuasive. Nevertheless, it is important to begin to focus on whether and to what extent third parties should be allowed to participate in international arbitrations, since traditional notions

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464. See REDFERN & HUNTER, *supra* note 5, at 289 (noting that parties' freedom to dictate arbitral procedure is not totally unrestricted).

465. See Park, *National Law*, *supra* note 66, at 661-62 (noting that arbitration seeks fairness in the sense of "equite" in continental systems); Stipanowich, *supra* note 1, at 505. *But see* Park, *National Law*, *supra* note 66, at 663 (arguing that decisions based solely on principles of "fairness" or "equite" may appear arbitrary and may violate the principle of *nulle poena sine lege*).

466. See REDFERN & HUNTER, *supra* note 5, at 187.

467. See Rau & Sherman, *supra* note 8, at 116 n.141 (discussing the Coase theorem in the context of arbitration).

of what an arbitration should be—based as they are on the classic two-party paradigm—are quickly being undermined by the realities of global multi-party transactions. As this problem will only increase in the coming years, the international legal community, including courts and commentators, practitioners and politicians, should try to identify a fair and workable approach to the issue of third party joinder and intervention in arbitral proceedings.