Document information

Publication

The Evolution and Future of International Arbitration

Bibliographic reference

Nathalie Voser, 'Chapter 9: The Swiss Perspective on Parties in Arbitration: "Traditional Approach With a Twist regarding Abuse of Rights" or "Consent Theory Plus"', in Stavros Brekoulakis , Julian David Mathew Lew , et al. (eds), The Evolution and Future of International Arbitration, International Arbitration Law Library, Volume 37 (© Kluwer Law International; Kluwer Law International 2016) pp. 161 - 182

Chapter 9: The Swiss Perspective on Parties in Arbitration: "Traditional Approach With a Twist regarding Abuse of Rights" or "Consent Theory Plus"

Nathalie Voser

(*)

I INTRODUCTION

9.1 Who the parties of an arbitration agreement are is obvious when signatories of an arbitration agreement are concerned. However, whether or not "non-signatories" are also bound by an arbitration agreement and thus are parties to it is a difficult and complex question.

9.2 There seems little doubt that in certain cases it is necessary and justified that an individual or entity shall be bound by an arbitration agreement, thereby becoming a party to the arbitration, even though there is no signature by such individual or entity in the agreement containing the arbitration clause. However, the criteria for when this should be the case vary from jurisdiction to jurisdiction. (1)

9.3 This issue is regularly discussed under the heading of "extension to non-signatory parties". (2) Thus, the term "extension" refers to an individual or entity which falls within the personal scope of an arbitration agreement although such individual or entity has not signed the arbitration agreement. This being said, it is questionable whether the term "extension" is justified as the arbitration agreement cannot be "extended"; rather, non-signatories in particular constellations are either parties to the arbitration agreement or they are not.

9.4 National and international civil procedure codes usually provide for the possibility of extending the jurisdiction to a third party over which the court would normally not have jurisdiction. Courts can, based on their statutory rules of jurisdiction, simply join a third individual or entity to the proceedings, usually based on the request of a party already involved in the pending court proceedings. This occurs especially when the parties wish to avoid multiple proceedings in multi-party situations (in particular when there are multiple defendants) or with regard to so-called recourse claims. (3)

P 161
P 162

9.5 On the one hand, the question whether or not a third party can be a party to proceedings before a court or a tribunal whose jurisdiction is already established for the "main dispute" is inherently procedural. On the other hand, with regard to arbitration there is also a substantive element, in that in arbitration the jurisdiction of the arbitral tribunal does not derive from statutory procedural laws and provisions but rather from the arbitration agreement. The arbitration agreement is a "normal" private or substantive agreement to which general consent theories about the declarations of intent apply. However, unlike other agreements the arbitration agreement has a procedural effect in that a dispute is submitted to arbitration instead of state courts.

9.6 This "double nature" – i.e. the mainly substantive nature but with a procedural effect – of the arbitration agreement does not cause any particular problems as long as there is a congruency between the parties signing the agreement and, in case of a dispute, the parties in the arbitration. But this is the root cause for the difficulties and complexities surrounding the jurisdiction of arbitral tribunals over non-signatories.

II EXTENSION OF AN ARBITRATION AGREEMENT TO NON-SIGNATORIES WHEN THE SEAT OF THE ARBITRAL TRIBUNAL IS IN SWITZERLAND

A Introduction

9.7 Following is an explanation of the principles applied under the Swiss *lex arbitri,* i.e. the 12th Chapter of the Conflicts of Law Statute of 1989 (Swiss Private International Law Act, "SPILA"). First, the legal basis (section B) will be explained and second, the application of the principles for establishing the consent to arbitrate (section C).

9.8 Thereafter will be an analysis of how the Swiss Federal Supreme Court ("Supreme Court") in its case law has dealt with the issue of non-signatory parties (section D), what principles have been developed and which conclusions can be drawn from such case law (section E), and finally whether or not the Supreme Court has gone beyond the consent theory (section F).

B The Basis: Article 178 SPILA

9.9 Under Swiss arbitration law, an arbitral tribunal has jurisdiction if the following

cumulative requirements are met: (i) the dispute is arbitrable, (ii) the arbitration agreement is valid, (iii) the dispute is within the scope of the arbitration agreement, and (iv) the parties had the capacity and authority to enter into the arbitration agreement.

9.10 With regard to the validity of the arbitration agreement, the arbitral tribunal must determine whether a valid arbitration agreement under Article 178 SPILA exists.

P 162
P 163

9.11 Article 178 SPILA paragraphs (1) and (2) provide as follows:

(1) The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

(2) Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.

9.12 With regard to the formal requirement, Article 178(1) SPILA establishes its own substantive rule which means that, differently from typical international private law rules, it does not "simply" refer to a specific national law but sets out its own substantive rule.

9.13 Pursuant to Article 178(2) SPILA, an arbitration agreement is valid with regard to its substance if it complies either with the law chosen by the parties (specifically to govern the arbitration agreement) or with the law governing the subject matter of the dispute (in particular the law governing the main contract), or if it complies with Swiss law. Other than Article 178(1) SPILA, Article 178(2) SPILA is a typical conflict of laws rule in that it refers to a specific national law. At the same time, it reflects the principle of *favor validitatis* in that it offers three alternatives whereby it suffices if the arbitration agreement fulfills one of these alternatives.

C Consent to Arbitrate and Interpretation of Arbitration Agreements under Swiss Law

1 The Principles of Consent and Interpretation under Swiss Law

9.14 When having to assess matters of both consent and interpretation of contracts under Swiss law, a court or arbitral tribunal has a primary duty to establish, if it can, the true and common intent of the parties. (4)

9.15 On that basis, the Supreme Court has established a two-step method that it describes as follows:

The objective of interpreting the contract is primarily to determine the parties' true and common intent [...]. Only if an actual consensus remains unproven, the declarations of the parties must be interpreted on the basis of the principle of confidence in the way they should have and must have been understood according to their wording and context as well as based on all the circumstances in order to determine the constructive intent of the parties. (5)

9.16 In other words, the two steps involve the following:

P 163
P 164

9.17 As a first step, the parties may submit evidence of their "true and common intent" at the time of the conclusion of the contract (so-called subjective or empirical interpretation). (6) If the "true and common intent" of the parties can be ascertained based on the evidence provided, the court or arbitral tribunal is bound by it and no further interpretation is necessary.

9.18 If, however, the court or arbitral tribunal is unable to ascertain the "true and common intent" of the parties, it then must, in a second step, proceed to determine the constructive intent of the parties at the time of the conclusion of the contract (so-called objective or normative interpretation). 7 This requires the court or arbitral tribunal to interpret the provisions of the contract according to the meaning that reasonable and loyal parties, i.e. parties acting in good faith, would have given to them under the same circumstances. This process is therefore also called interpretation according to the principle of good faith or confidence. (7) This requires the court or arbitral tribunal to interpret the provisions of the contract according to the meaning that reasonable and loyal parties, i.e. parties acting in good faith, would have given to them under the same circumstances. This process is therefore also called interpretation according to the principle of good faith or confidence. (8) To the best of the author's understanding, this corresponds to what is referred to by Prof. Brekoulakis as "implied consent" or "functional consent". (9) It is also sometimes referred to as "constructive consent", which the author considers the most descriptive nomenclature.

2 Application to the Arbitration Agreement

9.19 The two-step method under the general principles of Swiss contract law described above also applies to the interpretation of an arbitration agreement governed by Swiss law. This corresponds to the firm practice of the Supreme Court. (10)

9.20 In other words, if matters of consensus to, or the content of, an arbitration agreement are at issue, a court or arbitral tribunal must, as a first step, attempt to ascertain the "true and common intent" of the parties on the basis of the evidence presented. (11) Only if this turns out to be impossible, the court or arbitral tribunal shall proceed to establish the constructive intent of the parties at the time of the alleged conclusion of the arbitration agreement.

P 164
P 165

3 Supplementary Standards Applied by the Supreme Court

9.21 According to the Supreme Court's long-standing practice, specific supplementary standards apply to interpreting arbitration agreements if, and only if, the court or arbitral tribunal has to revert to the objective method of determining the parties' constructive consent. The supplementary standards for interpreting arbitration agreements require that a court or arbitral tribunal must approach the interpretation of a purported arbitration agreement in two steps:

- Initially, a restrictive "arbitration-skeptical" approach must be observed when the formation, conclusion or existence of an arbitration agreement is at issue, i.e. when determining whether the parties have indeed expressed their agreement to arbitrate. (12) This is due to the far-reaching consequences of an arbitration agreement, which include a waiver of the constitutional right of access to courts, the generally higher costs of proceedings, and limited remedies against the award. Against this background, there should be no doubt about the parties' consent to refer their dispute to arbitration. Accordingly, the parties' common intent to submit their dispute (s) to arbitration as opposed to state courts must arise clearly and unequivocally from their agreement. (13)

- In a second step, i.e. once the parties' constructive intent to agree on arbitration is established, the Supreme Court considers a restrictive approach no longer justified and instead adopts a liberal, "arbitration-friendly" approach to meet the needs of international commerce. (14) This means that, as long as the arbitration agreement does not contain any restrictions to its scope, it is to be assumed that, in terms of subject matters to be submitted to arbitration, the parties wished to vest the arbitral tribunal with comprehensive jurisdiction over the entirety of their dispute(s). (15) Accordingly, such clauses must be construed pursuant to the principles of *favor validitatis* or *effet utile,* i.e. in a manner that seeks to give an arbitration agreement its full effect, and not render it invalid or ineffective. (16)

P 165
P 166

9.22 Legal doctrine has received the Supreme Court's approach that restrictively assesses the conclusion of arbitration agreements in a first step with support and criticism. It has been put forward that the existence of any kind of agreement should never be assumed lightly, but only when the pertinent requirements of the applicable law for admitting the existence of an agreement are met. (17) Some legal scholars take the view that no such restrictive interpretation should apply. (18) The explanations given for this more liberal view vary: for some authors, the "guarantees of neutrality" implied in an arbitration agreement, namely the neutrality of the forum, are equivalent to, (19) or even better than, (20) the "guarantees of neutrality" to be expected from state court litigation; yet other scholars call upon the Supreme Court to abandon its practice since it is difficult to reconcile this restrictive approach with the predominant role of arbitration as *"justice de droit commun du commerce international"*. (21)

9.23 The restrictive versus the liberal approach regarding the conclusion of an arbitration agreement is of relevance also in the discussion concerning the approach to non-signatory parties. Notwithstanding the persuasive argument that arbitration has become the preferred method of dispute resolution for companies with regard to international contracts, the conclusion of an arbitration agreement usually implies a considerably more costly dispute resolution and a waiver of remedies that would be available if the decisions were rendered by state courts. Thus, the author tends to agree with the Supreme Court's restrictive approach. (22)

P 166
P 167

4 Application of these Principles to Non-Signatory Parties

I . Formal Validity

9.24 As mentioned above, Article 178(1) SPILA provides that the arbitration agreement be concluded in writing.

9.25 Under this provision, it is commonly understood that the text does not need to bear a signature in order to comply with the requirement of written form. (23) Some scholars have taken the view that the form requirement applies not only to the initial parties to the arbitration agreement, but also to any third party that is not named as a party in the initial agreement. This has the consequence that a third party can only be affirmed if a submission to arbitration complies with the conditions of form provided for in Article 178(1) SPILA. (24) Other scholars have expressed a more liberal view with regard to this requirement of form. (25)

9.26 In a landmark decision rendered in 2003, (26) the Supreme Court established that the form requirement provided for in Article 178(1) SPILA applied only to parties in the initial agreement but not to third parties not named in the agreement. To reach this decision, the Supreme Court referred to other situations where it has always been accepted that a non-signatory could be bound by the arbitration agreement such as in the situation of (i) an assignment of an obligation, (ii) a transfer of a debt or (iii) the transfer of the position as a party to an agreement. (27)

9.27 This decision was criticized by some authors who maintained that the submission of the non-signatory party to the arbitration between the initial parties should, in order to comply with the formal requirements of Article 178(1) SPILA, be derived from documents manifesting the intent of the third party to arbitrate. (28) It was also pointed out that the law contains sufficient mechanisms to overcome the absence of written consent when it appears necessary, for instance in cases where reliance on such an absence would be an abuse of rights. (29) Furthermore, criticism has been voiced that this decision creates a special status for non-signatory parties which is not provided for by legislation, and that it is not appropriate for a non-signatory party not to have the same guarantees as the initial parties. (30) Others appreciated the liberal approach and approved of this change by the Supreme Court, arguing that the requirement of writing merely serves to evidence the existence and contents of the arbitration agreement. (31)

P 167
P 168

9.28 Notwithstanding the criticism expressed, since this case of 2003, the Supreme Court has consistently held that the issue of a non-signatory party to an arbitration agreement is in the subjective scope of the arbitration agreement and is thus an issue of the substantive validity of the arbitration agreement governed by Article 178(2) SPILA as opposed to Article 178(1) SPILA.

ii *Substantive Validity*

9.29 As already mentioned above, the issues of substantive validity can be analyzed by the arbitral tribunal based on three different laws. (32) Indeed, in the leading case by the Supreme Court regarding the extension to third parties discussed above in the context of the formal validity, (33) the arbitral tribunal had based its analysis of the jurisdiction of the third party (a Lebanese businessman) on Lebanese law, which was the law to which the parties had submitted their arbitration agreement and also the law applicable to the contract. (34) In addition, the parties had broadened the applicable law by inviting the arbitral tribunal to apply international trade usage. (35)

D. Practice of the Supreme Court

9.30 The Supreme Court has rendered several cases dealing with the issue of extension to non-signatory parties. The following is not exhaustive but points out some cases which are typical for Swiss case law and discusses cases which have become landmark decisions, for reasons of fundamental considerations. (36)

1 Group of Companies

"Butec Case"

9.31 In the *Butec* Case of 1996, (37) the Supreme Court held that the mere fact that the non-signatory party belonged to the same group of companies as one of the companies which signed the contract was not per se sufficient to justify extending the arbitration clause. Rather, such an extension could only be granted (i) if the non-signatory party had created an appearance of being bound by the underlying contract and the arbitration clause, and (ii) where the reliance of the other party deserved protection based on the principle of good faith.

P 168
P 169

9.32 The Supreme Court refused to consider that the parent company would be bound by representation merely because it had created a subsidiary to satisfy legal requirements in the country in which the work was to be carried out. Also, the fact that the subsidiary had been referred to several times as the parent company's "representative" did not establish sufficient grounds to directly bind the parent company. The Supreme Court considered that the key point was that, at the time of the conclusion of the contract, the other parties knew that they were dealing with the subsidiary and not the parent company.

9.33 In addition, the Supreme Court rejected the group of companies doctrine, stressing that such doctrine should be viewed with caution. It should only be applied if the other party had been deceived by the appearances created. In this case, the arbitral tribunal clearly established that the other parties were aware that they were dealing with the subsidiary and that the parent company had not interfered in the performance of the contract in any significant way.

9.34 The Supreme Court's restrictive approach to groups of companies has been approved by the prevailing legal doctrine in Switzerland. (38) As a result, in Switzerland, a company within the same group of companies can be subject to an arbitration agreement only if there are circumstances which, under general principles of Swiss law, would lead to the binding of the affiliated company. Such circumstances derive in particular from the principle of the prohibition of abuse of rights, justifying the piercing of the corporate veil. (39)

2 Participation in Conclusion and/or Performance of the Contract

9.35 When applying the principle of confidence, as mentioned above, according to Swiss case law a restrictive approach has to be followed. The practical application focuses on non-signatory parties that intervened in the conclusion and/or performance of the main contract in such a way that it can be assumed that the non-signatory party intended to become a party to the contract including the arbitration clause contained therein. (40)

P 169
P 170

"Lebanese Case"

9.36 In a leading case of 2003, (41) which became known as the "Lebanese Case", a Lebanese construction company had entered into a contract for the construction of a building complex with two other Lebanese companies. The latter were controlled by a Lebanese businessman who had provided the financial means with which the two companies operated. The work contract was governed by Lebanese law and provided for arbitration in Switzerland under the ICC Rules of Arbitration. When the Lebanese construction company started the arbitration, its request for arbitration also named the Lebanese businessman as respondent, although he was not a party to the work contract. Although the respondents objected to such extension, the arbitral tribunal affirmed its jurisdiction over the Lebanese businessman.

9.37 Upon an application to challenge the award brought by the two companies and the individual, the Supreme Court upheld the arbitrators' decision.

9.38 First, the Supreme Court established that the formal requirements were satisfied given that the original parties had concluded a formally valid arbitration agreement. (42) The Supreme Court ruled that the extension of an arbitration clause to a non-signatory was an issue of the substantive validity of the arbitration clause and was to be determined in accordance with Article 178(2) SPILA, i.e. based on the three alternatives offered by this provision. (43)

9.39 Second, with regard to the substantive validity, the Supreme Court ruled that under Lebanese arbitration law, international usage in arbitration, and French law, joining a non-signatory party is admissible if the non-signatory party "immersed" itself in the performance of the contract, and thereby (implicitly) demonstrated that it was willing to be bound by the arbitration agreement contained in the contract. (44)

Bank as Financing Entity ("Czech Beer Case")

9.40 The background of a case decided by the Supreme Court in 2005 (45) involved the purchase of a Czech beer production company in the late 1990s. Three business people decided to buy shares of the company which was for sale. For this purpose, they created a company in order to hold the shares in trust. The respective rights and duties of the buyers were provided for in a shareholder agreement which contained an arbitration clause. One of the three business people was also a board member of one of the largest state-controlled banks in the Czech Republic. This bank granted considerable loans to the buyers for the purchase of the shares of the beer company and also issued guarantees for the purchase price in favor of the sellers of the shares.

9.41 A dispute among the purchasers and shareholders arose and an arbitration ensued based on the arbitration clause in the shareholders agreement. The claimant also filed its claim against the bank. However, the arbitral tribunal refused to extend the arbitration clause to the bank.

P 170
P 171

9.42 The Supreme Court upheld the decision of the arbitral tribunal, holding that the finding withstood scrutiny whereby the bank had merely acted as the financing entity and as a guarantor to the buyers. By guaranteeing the payment of the purchase price and financing the acquisition of the shares, the bank had not expressed an intention to be bound by the shareholders agreement. (46)

"Parent Guarantee"

9.43 In a case decided by the Supreme Court in August 2008, (47) a Cypriot company signed a service contract for the construction of an industrial complex in Qatar with a company incorporated under the laws of Qatar. The parties agreed that the Italian parent company of the Qatari company would provide a parent guarantee.

9.44 A dispute arose and the Cypriot company filed a request for arbitration against the Qatari company and its Italian parent company. The arbitral tribunal considered that while it had jurisdiction *ratione personae* regarding the Qatari company, it lacked jurisdiction over the parent company. The Supreme Court upheld the arbitral tribunal's refusal to extend the arbitration clause.

9.45 The Supreme Court discussed in some length the situation of an assumption of debt by a second debtor joining the first (*"reprise cumulative de dette", "kumulative Schuldübernahme"*) where the Supreme Court accepted that the second debtor would be bound by the arbitration clause in the underlying contract. However, the Supreme Court held that a guarantee was not comparable mainly because it constituted a different obligation. The fact that the underlying contract contained an arbitration clause was not in itself sufficient to apply the arbitration clause to the guarantor. (48)

9.46 The Supreme Court relied on the Lebanese Case (although not rendered under Swiss

law) and the Czech Beer Case and held that "a third party that intervenes in the performance of the contract containing the arbitration agreement is deemed to have adhered to the latter, by conclusive conduct, if its intent to be a party to the arbitration agreement can be inferred from this intervention". (49)

"Employment Contract and Rated Sales Contract for Shares of Company"

9.47 Only four months after it rendered the case mentioned above, in December 2008, the Supreme Court took a further decision on the issue of the extension of an arbitration agreement to a third party. (50)

P 171
P 172

9.48 The background of this case involved a sales contract by which A was to buy shares from C Ltd. in a B Ltd. company (the "Company"). As C Ltd. wanted to maintain control over the Company until full payment by A, an employment contract was also signed between A and the Company whereby C Ltd., although not formally party to this employment agreement, had the effective power to manage the Company and to nominate A as manager at such time when the purchase price was paid.

9.49 The parties to the share purchase agreement and the parties to the employment contract were not the same. The arbitration clauses were, however, identical.

9.50 The Company initiated arbitration on the basis of the arbitration clause stipulated in the employment contract, on the grounds that A had violated its obligations by competing against the interests of the Company. A requested the ICC to extend the arbitration proceedings to D (who was the former beneficial owner of the Company and for whom C Ltd. acted as a trustee), C Ltd. (the former owner of the shares in the Company) and B (an individual who was the director and creditor of the Company). D, C Ltd. and B had signed the sales contract. The ICC refused to join D, C Ltd. and B in the arbitration and so did the sole arbitrator.

9.51 The Supreme Court, however, found that the arbitration clause contained in the employment contract should extend to these parties. The Supreme Court referred to its practice according to which conduct alone can suffice to bind non-signatories to an arbitration clause *("actes concluants")*, and held that, considering the intensive involvement of the parties in the conclusion of the employment contract, and considering the role they had reserved for themselves with regard to the performance of the employment contract, they were deemed, by their conduct, bound by the arbitration clause. (51)

9.52 It was the first time that the Supreme Court set aside an award on the ground that the extension of the arbitration clause to a non-signatory had been refused by the arbitrators.

3 *Piercing the Corporate Veil*

9.53 The Supreme Court rendered a decision in August 2009 on the issue of piercing the corporate veil. (52) The background involved a sales agreement between A and Y pursuant to which A sold the corporation X to Y. B, the respondent, was a majority shareholder in Y. Four years later, A initiated arbitration proceedings against Y in Sweden, claiming the outstanding purchase price under the sales agreement. Before A initiated arbitration, however, B had liquidated Y and the arbitration therefore never took place.

9.54 Subsequently, A filed a claim against B before the state courts in Switzerland, to which B argued that the claim should be submitted to arbitration. The court of first instance decided that it did not have jurisdiction. A appealed this decision but the cantonal court of second instance dismissed A's appeal.

P 172
P 173

9.55 A, in his claim, requested that the corporate veil of Y be pierced and that B be held responsible for the payment of the remaining sum. A also argued that the arbitration clause did not apply to B as it was not a party to the sales agreement and that it therefore could only be held responsible before the state courts.

9.56 The courts at both instances held that the piercing of Y's corporate veil resulted in the sales agreement, including the arbitration clause, becoming binding upon B. A filed an appeal to the Supreme Court which confirmed that a corporate veil can be pierced where a corporation and its majority shareholder are operating as a single economic entity although they are not formally identical (due to the corporate veil) and where it would be inequitable (against good faith) to uphold the legal distinction between them. The Supreme Court further confirmed that the arbitration clause was binding upon B, reasoning that by piercing the corporate veil, all rights and obligations from the relevant agreement, including the arbitration clause, become binding on the shareholder.

9.57 However, in view of the specific circumstances, the Supreme Court did not confirm the lower court's decision but concluded that the decisions were incorrect and – in application of Article 7 SPILA – sent the case back to the court of lower instance for further consideration. (53)

4 Confusion about Spheres of Activity between Parent Company and Subsidiary

9.58 Six years after the last case where the Supreme Court extended the jurisdiction to a non-signatory party that did not want to be joined, (54) i.e. in April 2014, the Supreme Court partially upheld an application from an aluminum company to set aside an arbitral award on grounds that it incorrectly declined jurisdiction over another party in the proceedings.

(55)

9.59 The case involved a dispute between company A ("Party A") specialized in the production of aluminum sheets as well as aluminum wrapping for food products, and a group of companies involved in the construction of industrial facilities. The parties entered into three separate contracts (the "Contracts") for the turnkey delivery of an aluminum sheet factory by one company within the group of companies ("Party B1"). The contracts, which all contained ICC arbitration clauses, were signed only by Party B1 ● and Party A. The project was subsequently suspended with the parties each blaming one another for alleged failures.

P 173
P 174

9.60 A long period of negotiation ensued between Party A, Party B1 and one or more entities related to the latter. A range of relevant documents were prepared within this period. Among these was an unsigned Plan of Execution which recorded that Party A no longer wished to pursue the project with Party B1. Instead, a specific division within Party B1's direct parent ("Party B2") would become responsible for the project.

9.61 Party B1 initiated arbitral proceedings pursuant to the ICC Rules of Arbitration against Party A, which then brought counterclaims not only against Party B1, but also another entity which acted as the successor of Party B2 ("Party B3"). A majority of the arbitral tribunal concluded that Party B2, instead of accepting full responsibility for the project, had merely become involved as a representative of Party B1, and was therefore not a party to the Contracts.

9.62 The Supreme Court then undertook a careful analysis of all the above-listed documents and pieces of evidence and of the parties' behavior to determine whether Party B2 had become a party to the arbitration agreement. The Supreme Court considered the theory of the involvement in the conclusion and execution, the piercing of the corporate veil as well as the assignment but none of those provided a sufficiently clear basis for jurisdiction over Party B2.

9.63 The Supreme Court first noted that while arbitration agreements generally bind the parties to the contract alone, there are situations under Swiss law that would allow a non-signatory to also be bound. The most classic situation involves a formal act such as debt assignment, transfer of contractual relationship or assumption of debt. Another is where a third party involves itself in the execution of a contract containing an arbitration agreement to the extent that such party's actions demonstrate an intention to be bound by the arbitration agreement.

9.64 Finally, contractual obligations could in certain circumstances also be imputed to the parent of a signatory where there is confusion about those two entities' respective spheres of activity. This extension of the arbitration agreement can have several conceptual justifications. One is the so-called *"Durchgriff"*, a concept similar but not identical to the common law notion of piercing the corporate veil. The other is liability deriving from the *appearance* of being bound. Based on the principle of reliance under Swiss law, this type of liability is intended to protect a party's erroneous but reasonable belief that it entered into a contract with the parent rather than the subsidiary, or with both.

9.65 But in the end, the Supreme Court's finding did not rely on the theories developed so far. It chose to stress that Party A could not be faulted for being unable to identify its true partner in the project. The structure of the group of companies that included Parties B1, B2 and B3 was extremely complicated. The Supreme Court raised the principle of good faith enshrined in Art. 2 of the Swiss Civil Code. In its view, Parties B1 and B2 behaved in such a way that Party A could have believed in good faith that it had a legal relationship with Party B2.

9.66 However, the Supreme Court could not confirm the arbitral tribunal's jurisdiction over Party B3. Having decided that Party B2 was a party in the arbitration, the Supreme Court had to send the award back down to the arbitral tribunal for a decision on Party B3, i.e. whether Party B3 was the successor of Party B2 which had not been decided by ● the arbitral tribunal. (56)

P 174
P 175

E Summary and Conclusion from Supreme Court's Case Law

9.67 As a general rule, an arbitration agreement binds only the parties that have originally agreed to it. However, according to the Supreme Court's established practice, arbitration agreements may, under specific circumstances, be "extended" to non-signatory parties.

1 *Formal "Transfer" of Arbitration Agreement*

9.68 Under Swiss law, there have always been certain situations in which the substantive validity of an arbitration agreement was accepted although the individual or entity at issue had not been a formal party (and thus also not a signatory) of the original arbitration agreement. This is in particular the case for the assignment of an obligation, the transfer of a contractual relationship, a third-party beneficiary and the assumption of a debt. (57) However, in Swiss case law these situations are not typically considered as extension under consent theories, but rather the fact that the arbitration agreement is binding on the non-signatory is viewed to be the consequence of other non-consensual legal mechanisms. (58)

2 *Implied or Constructive Consent*

9.69 Based on the general principles of contract interpretation under Swiss law, (59) the focus for arbitral tribunals in Switzerland, when confronted with a party requesting extension of an arbitration agreement to a non-signatory party, lies on whether sufficient evidence for an implied consent exists. In other words, such evidence enables the arbitral tribunal to conclude – based on the principle of confidence – that the non-signatory party's declarations or behavior can be understood as that party's consent to become a party to the contract and the arbitration clause contained therein. (60)

9.70 In particular, the extension of the arbitration clause to a non-signatory is granted if the third party has interfered in the conclusion, and/or performance, and/or termination of the contract in such a way that either the third party showed its intention, by its conduct, to be a party to the contract and thus be bound by its arbitration clause, or it created, in the eyes of the opposing party, an appearance to be a party to the contract, which should not be betrayed.

3. Abuse of Rights /Principle of Good Faith and Principle of Reliance ("Rechtsscheinhaftung ")

9.71 In two instances in the Supreme Court's case law, the general principle of abuse of rights has been used as a corrective to the implied consent theory and created appearance, respectively.

P 175
P 176

9.72 The first instance is based on the concept of *"Durchgriff"*, which is similar but not identical to the common-law notion of piercing the corporate veil. Under Swiss law, ● the corporate veil will only be pierced in case of abuse of rights, and the Swiss courts are very reluctant to do so. (61) An abuse of rights would be conceivable, for example, if a parent company were to appropriate the shareholders' equity from the subsidiary or if it mixed the assets of the subsidiary with its own in a way that made no sense in accounting terms. (62) When the corporate veil is pierced, the arbitration agreement is extended to a non-signatory party. (63)

9.73 Second, although the Supreme Court held that the mere fact that a company belongs to the same group as the company bound by the arbitration agreement does not constitute sufficient grounds under Swiss law for the extension of an arbitration agreement, the Supreme Court has more recently recognized that a company could become liable for the contractual obligations of another company in the same group in case of confusion of the companies' respective spheres of activity. Relying on the principle of good faith, the Supreme Court drew the conclusion that in such cases the arbitration agreement could also be extended to such company within the same group which had not formally concluded the arbitration agreement. The Supreme Court held in its 2014 decision that the parent, by virtue of its statements and behavior, had given the appearance that it was a party to the contract. The party having concluded a contract with a subsidiary could therefore believe in good faith that the parent was bound by the contract's terms, including the arbitration agreement. Relying on the contractual principles of reliance and good faith, the Supreme Court found, therefore, that the parent was indeed a party to the arbitration agreement. (64)

9.74 It is not (yet) clear from the practice of the Supreme Court whether or not the principle of reliance on an appearance constitutes a method independent from the abuse of rights and/or good faith in order to extend the arbitration agreement to a third party. In the Supreme Court's case law so far and in particular in its decision rendered in 2014, the principle of reliance did not seem to have been put forward as an independent method to justify the extension to a non-signatory party. Based on the general principle according to which legal liability can derive from an appearance *("Rechtsscheinhaftung")*, one can, however, assume that an extension of an arbitration agreement to a non-signatory under Swiss law may be justified where the third party, by its conduct, creates the appearance of intending to be bound by the arbitration agreement, without necessarily having implicitly agreed to it or creating a situation of an abuse of rights under Article 2 Swiss Civil Code. (65) Whether in practice this would lead to a broadening of the so far prevalent implied consent basis is rather unlikely but remains to be seen.

F Has the Supreme Court Gone beyond the Consent Theory?

P 176
P 177

9.75 It follows from the case law explained above that in Switzerland, besides the "formal" transfer of the arbitration clause by operation of general rules (assignment, assumption of debt, agency/rules of representation, third-party beneficiary, succession, ● transfer of relationship), the issue of "non-signatories" is approached using the general principles developed in contract law. In particular the theory of consent and constructive/implied consent comes into play.

9.76 Swiss methodology of constructive consent and its resulting case law is in line with the applicable usages or, more generally, the practice in international arbitration:

Arbitral jurisdiction based on implied consent involves a non-signatory that should reasonably expect to be bound by (or benefit from) an arbitration agreement signed by someone else, perhaps a related party. In such circumstances, no unfairness results when arbitration rights and duties are inferred from behavior. Implied consent focuses on the

parties' true intentions. Building on assumptions that permeate most contract law, joinder extends the basic paradigm of mutual assent to situations in which the agreement shows itself in behavior rather than words. (66)

9.77 In particular, a non-signatory party's substantial involvement in the negotiation and performance of the contract and the knowledge of the existence of the arbitration has been considered to constitute a substitute for express consent. (67) It results that individuals and entities are bound by an arbitration agreement by analyzing whether by their words and actions, objectively and on the basis of good faith in commercial relations, such individuals and entities can be considered to have expressed their intention to be a party to the arbitration agreement. (68)

9.78 As the Supreme Court emphasized in the case decided in April 2014, this means that if an individual or an entity does not want to run the risk of becoming a party to arbitral proceedings in a situation that might prompt confusion as to the identity of the contracting party, the individual or entity must clearly express that it has *not* adhered to the contract containing the arbitration clause or the arbitration agreement, respectively. (69)

9.79 Swiss courts have gone beyond consent not based on an arbitration-specific rule formed out of typical situations but rather by applying the general principle that each party, when exercising its right, is limited by general principles of the prohibition of abuse of rights enshrined in Article 2 Swiss Civil Code. These principles lead to the application of the arbitration clause to non-signatories in case of piercing the corporate veil as developed in corporate law based on abuse of rights principles. The focus here, however, is not on the arbitration clause but rather the standing to be sued and thus the substantive liability of the non-signatory. If such liability is enforced by means of arbitration based on the underlying contract, then the arbitration clause applies as well. The piercing principle resolves the cases where "it would be unfair for an individual to escape arbitration, when he fraudulently uses a corporation, which he totally controls, to frustrate the interests of a claimant in arbitration". (70)

P 177
P 178

9.80 The latest case relating to the application of the principles of abuse of rights was based on the creation of confusion between a parent and its daughter companies. Although in this case it appears that the Supreme Court went beyond its established ● practice of relying on the assumed consent of a third (non-signatory) party, the Supreme Court again ruled based on the principle of abuse of rights and good faith. However, the Supreme Court, in doing so, did not rely on any precedent in the relevant section of its considerations, which shows that this was a somehow novel application of the principle of the abuse of rights. Also the considerations regarding the principle of reliance on expectations created by one party to which the Supreme Court referred in this case, seem to indicate a further development of the consent-based approach. (71)

9.81 Certain categories of cases of abuse of rights under Article 2 Civil Code have emerged in other areas of the law. It can be assumed that a counterparty's confusion of identity will form in the future (next to the piercing of the corporate veil) such a typical case to be called upon in similar situations with regard to the extension of the arbitration agreement.

III SIX REASONS WHY WE SHOULD NOT DEPART FROM STANDARD CONSENT-BASED THEORIES

9.82 It has been submitted by Prof. Brekoulakis that consent-based theories should be substituted by "a more consistent, more inclusive and, eventually, intellectually more honest approach to non-signatories". (72) The focus should not be on consent but on the "scope of the dispute" submitted to arbitration and the "scope of the original arbitration clause". The (only) test seems to be whether a "dispute strongly implicates a non-signatory and is covered by a broad arbitration clause". (73)

9.83 The present author is skeptical regarding such an approach for various reasons explained below and submits that we should not dispose of the basic principle that party autonomy and therefore the consent to submit to arbitration determines whether or not a non-signatory can be a party in a particular arbitration.

A Consent Is the Fundament of Arbitration and the Main Distinguishing Feature from State Court Proceedings

9.84 Consent is the fundament of arbitration. It is what distinguishes arbitration from state court litigation which is based on existing procedural rules. If we dispose of the principle of consent (also if only partly), we are blurring this distinction. In other words, arbitral tribunals become like courts which have objective statutory criteria to determine jurisdiction. How alike the approach would be can be shown by comparing the suggested objective criteria based on the "scope of the dispute" with one of the most important rules within the EU, mentioned at the outset, which relies on whether "claims are so closely connected" that they can reach out to third parties. (74) Supposedly, the "scope of the dispute" would include such closely connected claims. ●

P 178
P 179

9.85 The present author believes that we would do a disfavor to the users of arbitration and reduce the attractiveness of arbitration if arbitrators were to substitute the subjective, consent-based approach with a purely objective approach.

9.86 In addition, it is submitted that such a rule could not be introduced by arbitral tribunals themselves but only applied based on legal provisions contained in the applicable arbitration laws. (75)

B Consent Theories Are Adequate and Sufficiently Flexible to Capture Situations Where Fairness Calls for the Inclusion of a Non-Signatory Party Even if There Are Differences in Various Jurisdictions

9.87 Consent theories are not "nothing more than legal fictions" which can be adapted as we wish in order to "accommodate commercial reality". (76) Rather, consent theories, including constructive consent, are well established and tested principles which are applied in any type of dispute over contractual interpretation. They are based on the principle of confidence and contain an objective element (i.e. "how could an objective good faith recipient of a declaration and/or a specific behavior understand such declaration and/or behavior") which is also adequate to the issue of a dispute over the question whether or not a non-signatory has implicitly consented to arbitration.

9.88 Such dispute is by nature not different to other disputes about the interpretations of implicit or explicit expressions of intent. The fact that they were not developed specifically for arbitration does not make the theory of implied consent unsuitable for arbitration. (77) To the contrary, because the fundament of arbitration is consent, it is a mandatory requirement that the same rules apply.

9.89 As one of the reasons to depart from consent theories and mentioning the *Dallah* experience, Prof. Brekoulakis has put forward that different jurisdictions have different approaches to implied consent: While a number of jurisdictions were keen to endorse the theory of implied consent, others, notably common law jurisdictions, have consistently opposed it. (78)

9.90 The present author doubts that the differences of approach among the jurisdictions are especially important. However, differences can never be avoided since there will always be variations in interpretation even if the underlying rules are the same.

9.91 More importantly, within jurisdictions differences can be found with regard to various issues concerning the arbitration procedure, such as in particular setting aside procedures (How many instances exist? How long do they generally take to render awards/ decisions? What are the grounds for setting aside and what are the costs involved?). When parties know about these differences, they can make an informed choice when selecting their seat. Any differences of the rules and practices applied by state courts, and thus also by arbitral tribunals sitting in a particular jurisdiction applying these rules, in how to approach the extension of arbitration agreements to non-signatory parties are among the factors that influence the parties' choice of a particular seat for the arbitration.

P 179
P 180

C The Scope of an Arbitration Agreement (79) Is Not Relevant

9.92 While the first leg of the approach developed by Prof. Brekoulakis is based on the "scope of the dispute", the second relies on the wording of the arbitration clause which often refers to "any dispute ... between the parties in connection with this contract". (80)

9.93 Interestingly, the two cases to which Prof. Brekoulakis refers and where apparently such wording was the basis for jurisdiction *ratione personae* and not only *ratione causae* (as is usually the case), are both from the United States. (81) However, it seems that the jurisdiction *ratione personae,* and thus the extension to non-signatory parties, cannot rely on such wording since the limitation to the parties of the contract, which contains the arbitration clause, is given by the words "between the parties". Therefore, to use the wording "in connection with this contract" as an argument to justify an extension to non-signatory parties seems difficult to follow.

D Users Want Simple Proceedings and Certainty

9.94 The arbitration process should accommodate the needs of its users. Besides, as already mentioned, users wanting a process which honors party autonomy and is distinct from state court proceedings usually also want to avoid complex arbitration with multiple parties. The main reason is that these factors, among other aspects, raise the costs significantly.

9.95 In the course of the revision of the ICC Rules, the users represented in the drafting sub-committee were adamant that the basic principle would remain the implied consent to the same arbitration as it is now enshrined in Article 6(4)(ii) ICC Rules. This provision was drafted in such a way in order to exclude that possible recourse claims, for example against a subcontractor or third parties, could be adjudicated in one arbitration even without a proper multi-party arbitration agreement. (82) In fact, users sometimes also expressly exclude the possibility of joinder of non-signatory parties in their arbitration clause for fear that certain institutional rules have already gone too far in allowing the joinder of non-signatory parties.

9.96 If the binding effect of an arbitration agreement on third parties was based on "commercial reality", (83) as suggested by Prof. Brekoulakis, would this include the

possibility of recourse claims? An objective evaluation based on the "scope of the dispute" and the broad wording of the arbitration clause as suggested by Prof. Brekoulakis probably leads to an affirmative answer. (84)

9.97 In any event, such a purely objective approach would create a lot of uncertainty for the parties in the arbitration as well as for third parties. Could, for example, a third party which is involved in the negotiations and execution of a contract expressly state that it does *not* want to be bound by the contract and the arbitration clause therein, or would such a declaration no longer be relevant?

P 180
P 181

E Parties Are Usually Responsible and Sophisticated Entities

9.98 Parties, as responsible business entities, must evaluate their risks when entering into a business transaction. Thus, it is not "awfully self-comforting when it is offered with the reassuring benefit of the hindsight" (85) that an entity – whether a commercial entity or a state – should have been included in the arbitration agreement. Rather, considering whether to include a third party or not, or to ask for other security for example from the parent company, is a business risk that any entity runs and must balance against the benefit it takes from the commercial transaction even without the additional "safety belt" of having a non-signatory party as a formal party to the contract and thus bound by the arbitration clause.

9.99 Sometimes, a party purposely avoids putting the issue of a non-signatory party being bound by the arbitration agreement on the table, maybe for fear that this issue would then be clarified in the negative. In other words, a party may prefer to leave the issue open, hoping that a non-signatory party theory applied by the arbitral tribunal or the state court will assist it to join the non-signatory in case of a dispute. This could sometimes be the situation for example in connection with the involvement of states which gave a "statement of comfort or general support" to the investor.

F Abuse of Rights Theories Can Take Care of Situations Where Consent Theories Cannot Assist and/or Need Adaptation

9.100 The fact that the abuse of rights theories are "legal rules of clear equitable, rather than consensual, nature" (86) does not render them less useful for arbitration if one considers that an arbitration is, in essence, a private agreement between two or more entities to which general legal principles apply.

9.101 In any event, there is no reason why abuse of rights theories cannot be used in conjunction and complementary to consent theories. Furthermore, the need to rely on such complementary principles does not give sufficient reasons for the creation of another "arbitration-oriented" theory.

9.102 The fact that presumably not all jurisdictions recognize such corrective measures, as already mentioned, creates differences which allow the parties to make a real choice when they select their seat.

IV CONCLUSION

9.103 In Switzerland, the issue of non-signatory parties to an arbitration agreement is dealt with based on general principles of contract law. A two-step method has been developed by the Supreme Court for interpreting contracts including arbitration agreements governed by Swiss law: (i) If, in a first step, no "true and common intent" of the parties can be established, then, (ii) in a second step, an objective interpretation based on the principle of confidence applies.

9.104 Supplementary standards that come into play if the objective interpretation of determining the parties' constructive intent is applied involve first a restrictive "arbitration-skeptical" approach when it comes to determining the consent of the parties to arbitrate, and second a liberal "arbitration-friendly" approach when determining the scope of the disputes that fall under the arbitration agreement.

P 181
P 182

9.105 Since 2003, the Supreme Court has consistently held that the issue of joinder of non-signatories is within the arbitration agreement's subjective scope, thus an issue of the arbitration agreement's substantive validity governed by Article 178(2) SPILA, and that the form requirement provided for in Article 178(1) SPILA applies only to parties in the initial agreement but not to third parties.

9.106 Swiss case law demonstrates that under specific circumstances, an arbitration agreement may also bind non-signatory parties, in particular when such parties have implicitly consented to arbitrate. In very rare instances, the Supreme Court has supplemented its consent-based approach, and admitted that non-signatories were bound by an arbitration agreement, when there has been a situation involving an abuse of rights.

9.107 Prof. Brekoulakis has explained based on cases that certain arbitral tribunals and/ or state courts have relied on "equitable" (i.e. non-consensual) considerations or treated consent as a functional legal construct, which is markedly different from the concept of consent normally used to test whether two signatories have agreed to arbitration. (87)

Whether these cases have to be interpreted in such a way is questionable but if this is the case, since the arbitration agreement which is the justification and basis for the jurisdiction of the arbitral tribunal is in essence a private agreement based on party autonomy, for the reasons mentioned in this paper it would not be justified to depart from the methodologically correct approach which is to establish true or implied consent to arbitrate.

9.108 Prof. Brekoulakis seems to concede that the problem is not primarily inherent to or typical for civil law jurisdictions which "have been keen to endorse the theory of implied consent". (88) Rather, it seems notably to be a problem of common law jurisdictions which have been "consistently opposed to it". (89)

9.109 Parties in arbitration must accept, and have so accepted in the past, that arbitration is not detached from any legal system or the applicable legal concepts. The differences in the legal systems are not necessarily negative but rather offer the parties the possibility to choose between different options.

9.110 Since the issue of joining non-signatory parties has a strong procedural angle, in the interest of legal certainty and predictability, the present author is as a matter of principle not opposed to try to create universal rules for the jurisdiction of arbitral tribunals over non-signatory parties as this is the case in international conventions on jurisdiction over third parties before state courts. (90) However, if and insofar as a common understanding of the principles of joining non-signatory parties could really be established within the arbitration community, which is doubtful, the creation of such universal rules goes beyond the mandate of the arbitrators and must be introduced by the *lex arbitri* (e.g. prepared by a change of the UNCITRAL Model Law) or by an international legal instrument such as an international convention.

P 182

References

*) Partner at Schellenberg Wittmer Ltd, Zurich and can be contacted at nathalie.voser@swlegal.ch. The author would like to thank Bianca Kremer and Katrin Brunner for their assistance and diligent review in preparing and editing this paper.

1) They have been very aptly described by Stavros Brekoulakis in: "Parties in International Arbitration: Consent v. Commercial Reality" in the 30th Anniversary of the School of International Arbitration Celebration Conference: The Evolution and Future of International Arbitration: The Next 30 Years, Chapter 8 of this volume.

2) For the terms used in the context of multi-party arbitration and joinder of third parties in general, see Nathalie Voser, "Multi-party Disputes and Joinder of Third Parties", in Albert Jan van den Berg (ed.), *50 Years of the New York Convention: ICCA International Arbitration Conference,* ICCA Congress Series No. 14, Kluwer Law International, 343, 346–348 (2009).

3) It is useful in this context to point out, for example, the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (and the identical Lugano Convention), Art. 6 which provides as follows:

   A person domiciled in a Member State may also be sued:

   1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

   2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seized of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

4) See, e.g., DFT 123 III 35 of 20 August 1996, cons. 2.b: "In Swiss contract law, for questions of consensus or of interpretation, the principle of the primacy of that which is subjectively intended by both parties supersedes that which is objectively declared [...]" (own translation). This hierarchy is based on Art. 18(1) of the Swiss Code of Obligations (CO) which requires contractual interpretation to aim, in the first instance, at ascertaining the "true and common intention of the parties" at the time they concluded the contract. Art. 18(1) CO reads as follows: "When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement." Translation taken from http://www.admin.ch/ch/e/rs/2/220.en.pdf (accessed on 10 July 2015).

5) DFT 132 III 626 of 20 June 2006, cons. 3.1 (own translation).

6) See, e.g., DFT 121 III 118 of 26 April 1995, cons. 4b/aa.

7) See, e.g., DFT 121 III 118 of 26 April 1995, cons. 4b/aa.

8) See, e.g., Bernhard Berger & Franz Kellerhals, *International and Domestic Arbitration in Switzerland* 160–161, paras 478 and 481 (3rd ed., Stampfli Publishers 2015), with reference to DFT 132 III 626 of 20 June 2006, cons. 3.1; this principle rests on Art. 2(1) of the Swiss Civil Code (CC) which stipulates that "[e]very person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations". Translation taken from http://www.admin.ch/ch/e/rs/2/210.en.pdf (accessed on 10 July 2015).

9) Brekoulakis, above n. 1, para. 8.10. See also William W. Park, "Non-Signatories and International Contracts: An Arbitrator's Dilemma", in Permanent Court of Arbitration (ed.), *Multiple Party Actions in Arbitration,* 1, 3, para. 1.11 (Oxford University Press 2009).

10) See, e.g., DFT 130 III 66 of 21 November 2003, cons. 3.2: "The interpretation of an arbitration agreement follows the principles generally applicable to the interpretation of private declarations of intent. The actual mutual understanding of the parties in respect of the declarations exchanged by them is of primary significance here. If no such common actual intent of the parties can be identified, the arbitration agreement must be interpreted in an objective manner, i.e. the constructive intent of each of the parties must be ascertained, in good faith, as it should and must have been understood by the relevant recipient of the declaration." (own translation).

11) See, e.g., Christoph Müller, "Chapter 2, Part II: Commentary on Chapter 12 PILS, Art. 178, Section III: Arbitration Agreement", in Manuel Arroyo (ed.), *Arbitration in Switzerland* 65, paras 47–49 (Kluwer Law International 2013), with reference to additional elements which may be required depending on the circumstances.

12) The leading case for the restrictive approach is DFT 116 Ia 56 of 15 March 1990, cons. 3/b where the Supreme Court held: "Supplementary rules of interpretation arise from the particular nature of the arbitration agreement. With an arbitration agreement, the parties waive the possibility of decisions for any disputes by state courts, a waiver that has great significance in light of the associated restriction of the possibilities of appeal and in light of the significantly higher costs regularly arising compared to state court proceedings; therefore, in case of dispute, it may not be lightly presumed that such an agreement has been reached. Where it has been established that there is an arbitration agreement, there are no longer grounds for a particularly restrictive interpretation; on the contrary, it must be assumed that the parties desire a comprehensive jurisdiction of the arbitral tribunal, if they have stipulated an arbitration agreement [...]" (own translation). See also DFT 140 III 134 of 27 February 2014, cons. 3.2: "When interpreting an arbitration agreement its legal nature must be considered, in particular that renouncing the state court significantly reduces the available remedies. Such intent to renounce [state courts] must, according to Supreme Court case law, not be assumed lightly [...]" (own translation); see also DFT 129 III 675 of 8 July 2003, cons. 2.3. The Supreme Court most recently confirmed this practice in DFT 4A_560/2013 of 30 June 2014, cons. 2.2.2: "It is decisive for the parties' intent to be expressed that certain disputes be decided in a binding manner by a private arbitral tribunal to the exclusion of state courts [..] In doing so, the intent to exclude state courts must, according to Supreme Court case law, be derived clearly and unambiguously from the parties' agreement [...]" (own translation).

13) See, e.g., DFT 4A_560/2013 of 30 June 2014, cons. 3.3.3: "There is no clear and unequivocal declaration of intent by the parties to subject disputes arising from their consortium agreement to the decision of an arbitral tribunal to the exclusion of state jurisdiction." (own translation).

14) See, e.g., DFT 140 III 134 of 27 February 2014, cons. 3.2; DFT 138 III 681 of 6 August 2012, cons. 4.4.

15) See, e.g., DFT 140 III 134 of *27* February 2014, cons. 3.2; DFT 138 III 681 of 6 August 2012, cons. 4.4; DFT 4C.40/2003 of 19 May 2003, cons. 5.3; see also Berger & Kellerhals, above n. 8, 162–165, paras 484 and 489, and the references contained therein.

16) See DFT 4A_376/2008 of 5 December 2008, cons. 7.1; DFT 130 III 66 of 21 November 2003, cons. 3.2; DFT 138 III 29 of 7 November 2011, cons. 2.2.3 and 2.3.3; DFT 4P.226/2004 of 9 March 2005, cons. 4.2.

17) See Pierre-Yves Tschanz, *Commentaire Romand: Loi sur le droit international privé, Convention de Lugano* (Helbing Lichtenhahn Verlag 2011), Art. 178 SPILA, 1546, paras 121–122.

18) See, e.g., Dieter Gränicher, in Heinrich Honsell et al. (eds.), *Basler Kommentar: Internationales Privatrecht,* Art. 178,1759, para. 52. (3rd ed., Helbing Lichtenhahn Verlag 2013), referring in particular to Sébastien Besson & Julia Xoudis, "Conventions d'arbitrage pathologiques: la volonté d'arbitrer peut-elle tout guérir?" in Python & Peter (ed.), *L'éclectique juridique, Recueil d'articles en l'honneur de Jacques Python* (Schulthess et al.), 201,211–212 (2011) and Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* 264, para. 304 (2nd ed., Sweet & Maxwell 2007); Gabrielle Kaufmann-Kohler & Antonio Rigozzi, *Arbitrage international: Droit et pratique à la lumière de la LDIP,* 135, para. 252 (2nd ed. Editions Weblaw 2010) in support of an "interprétation libérale" as far as commercial arbitration is concerned.

19) See Gränicher, above n. 18, Art. 178, 1759, para. 52.

20) See Poudret & Besson, above n. 18, 264, para. 304.

21) See, e.g., Kaufmann-Kohler & Rigozzi, above n. 18, 135, para. 252, with further references; see also Matthias Scherer, *Quelques remarques à propos de Vinterprétation de la clause compromis-soire et de son efficacite,* 18 ASA Bulletin 350, para. 2 (2000).

22) Similar Tschanz, above n. 17, Art. 178 SPILA, 1546, paras *121–122.*

23) See Berger & Kellerhals, above n. 8, 139, para. 422.
24) See Poudret & Besson, above n. 18, 220–221, para. 258; see also Jean-François Poudret, *Note – Tribunal fédéral, 1re Cour Civile, 16 octobre 2003, (4P. 115/2003); Un statut privilégié pour Vextension de Varbitrage aux tiers?,* 22 ASA Bulletin 390 (2004).
25) See Marc Blessing, "Introduction to Arbitration – Swiss and International Perspectives", in Stephen V. Berti (ed.), *International Arbitration in Switzerland, An Introduction to and a Commentary on Articles 176–194 of the Swiss Private International Law Statute,* 180, para. 504 (Helbing & Lichtenhahn and Kluwer Law International 2000).
26) See DFT 129 III 727 of 16 October 2003; also published in 22 ASA Bulletin 364 (2004), with notes by Jean-François Poudret and Philipp Habegger; Rev. arb. 695 (2004), with a note by Laurent Lévy & Blaise Stucki. See also the critical analysis by Otto Sandrock, *Die Aufweichung einer Formvorschrift und anderes mehr: Das Schweizer Bundesgericht erlässt ein befremdliches Urteil,* 3 SchiedsVZ1 (2005).
27) See DFT 129 III 727 of 16 October 2003, cons. 5.3.1.
28) See Poudret & Besson, above n. 18, 221, para. 258; Poudret, above n. 24, 396–397. In support of this decision but with a different reasoning: Philipp Habegger, *Note – Federal Tribunal (1st Civil Court), 16 October 2003 (4P. 115/2003), Extension of arbitration agreements to non-signatories and requirements of form,* 22 ASA Bulletin 398 (2004).
29) See, e.g., Habegger, above n. 28, 406 and 410, with reference to DFT 121 III 38, cons. 3.
30) See Poudret & Besson, above n. 18, 221, para. 258; see also Poudret, above n. 24, 390; Jean-François Poudret, *L'extension de la clause d'arbitrage: approches française et suisse,* 122 JDI 893 (1995).
31) See Berger & Kellerhals, above n. 8, 196–197, para. 564, with further references.
32) See section 2.2 above.
33) See DFT 129 III 727 of 16 October 2003.
34) See DFT 129 III 727 of 16 October 2003, cons. 5.3.2. The Supreme Court rejected the objections of the appealing party as not warranted and thus did not have to consider whether or not, as the second alternative, the extension was valid under the principles of Swiss law.
35) Based on this, the arbitral tribunal interpreted the Lebanese arbitration law in light of the *lex mercatoria* and also referred to French law as showing the trend in international arbitration law; see DFT 129 III 727 of 16 October 2003, cons. 5.3.2.
36) The list is not exhaustive and the factual background as well as the conclusions of the Supreme Court are reported in a simplified and condensed way.
37) See DFT 4P.330 + 332/1994 of 29 January 1996 *(Saudi Butec Ltd et Al Fouzan Trading v. Saudi Arabian Saipem Ltd),* also published in 14 ASA Bulletin 496 (1996). On this case, see Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International 2006), 59, para. 121; Poudret & Besson, above n. 18, 223–224, para. 258; Tobias Zuberbühler, *Non-Signatories and the Consensus to Arbitrate,* 26 ASA Bulletin 18, 26 (2008).
38) See, e.g., Poudret & Besson, above n. 18, 223–224, paras 258–260; Berger & Kellerhals, above n. 9, 200, paras 574–575; Werner Wenger, "Art. 178 SPILA", in Stephen V. Berti (ed.), *International Arbitration in Switzerland: An Introduction to and a Commentary on Articles 176–194 of the Swiss Private International Law Statute* (Helbing & Lichtenhahn and Kluwer International 2000), 351, para. 57.
39) This is supported in legal writing, see, e.g., Wenger, above n. 38, 350–351, para. 56; for a different view, see Frank Vischer, Lucius Huber & David Oser, *Internationales Vertragsrecht* (2nd ed., Stampfli Verlag 2000), 661, para. 1452.
40) See, e.g., Berger & Kellerhals, above n. 8, 197, para. 565; DFT 4A_627/2011 of 8 March 2012, cons. 3.2; DFT 4A_44/2011 of 19 April 2011, cons. 2.4.1; DFT 4A_376/2008 of 5 December 2008 cons. 8.4; DFT 134 III 565 of 19 August 2008, cons. 3.2; DFT 4P.48/2005 of 20 September 2005, cons. 3.4.1; DFT 129 III 727 of 16 October 2003, cons. 5.3.2.
41) See DFT 129 III 727 of 16 October 2003.
42) See DFT 129 III 727 of 16 October 2003, cons. 5.3.1; see section 2.3.4.a. above.
43) See DTF 129 III 727 of 16 October 2003, cons. 5.3.1.
44) See DFT 129 III 727 of 16 October 2003, cons. 5.3.2.
45) See DFT 4P.48/2005 of 20 September 2005.
46) See DFT 4P.48/2005 of 20 September 2005, cons. 3.4.3. Interestingly, in its findings the Supreme Court did not refer to the Lebanese Case although the arbitral tribunal apparently had; see cons. 3.4.1. It neither raised the issue that the Lebanese Case was not decided under Swiss law but simply accepted it as a principle also valid under Swiss law.
47) See DFT 134 III 565 of 19 August 2008 (the full reasoning can be found in DFT 4A_128/2008 of 19 August 2008). See also case comment by Georg Naegeli & Chris Schmitz, *Switzerland: Strict Test for the Extension of Arbitration Agreements to Non-Signatories,* 7 SchiedsVZ 185 (2009).
48) See DFT 134 III 565 of 19 August 2008, cons. 3.2. Indeed, this would otherwise have the impracticable consequence that a guarantor would always submit himself to an arbitration clause by merely providing a guarantee to a party to the contract.

49) DFT 134 III 565 of 19 August 2008, cons. 3.2 (own translation; "le tiers qui s'immisce dans l'exécution du contrat contenant la convention d'arbitrage est réputé avoir adhéré, par actes concluants, à celle-ci si l'on peut inférer de cette immixtion sa volonté d'être partie à la convention d'arbitrage [...]"). See also DFT 4A_627/2011 of 8 March 2012, cons. 3.2; DFT 4A_376/2008 of 5 December 2008, cons. 8.4; DFT 4P.48/2005 of 20 September 2005, cons. 3.4.1.

50) See DFT 4A_376/2008 of 5 December 2008; see translation of Italian language decision in 27 ASA Bulletin 762 (2009). See also case comment of Christopher Koch, *Judicial activism and the limitsof institutional arbitration in multiparty disputes,* 28 ASA Bulletin 380 (2010).

51) Indeed, the Supreme Court found that (i) D had the effective power to terminate the contract and to receive accounting information for B Ltd., (ii) B had the right to resume acting as managing director of B Ltd. in the event of defaults by A, and (iii) C Ltd. had the obligation to cause B Ltd. to name A as managing director and to remove B from this position. See DFT 4A_376/2008 of 5 December 2008, cons. 8.4, 8.5.2, 8.5.3 and 8.6.

52) See DFT 4A_160/2009 of 25 August 2009.

53) See DFT 4A_160/2009 of 25 August 2009, cons. 5.2, 5.2.1, 5.2.2; the relevant provision of Art. 7 SPILA provides the following:

> "If the parties have entered into an arbitration agreement with respect to an arbitrable dispute, any Swiss court before which such dispute is brought shall deny jurisdiction, unless:
>
> a. [...];
>
> b. the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> c. the arbitral tribunal cannot be appointed for reasons that are obviously attributable to the defendant in the arbitration." (own translation).

This provision is very rarely applied but, as seen in this case, is very useful to give the courts some (limited) discretion when rendering a decision on their jurisdiction based on a valid arbitration agreement.

54) See section 2.4.2 "Employment Contract and Rated Sales Contract for Shares of Company" above; DFT 4A_376/2008 of 5 December 2008.

55) See DFT 4A_450/2013 of 7 April 2014. In between these cases, there was another decision that dealt with a non-signatory third-party beneficiary who wished to join the arbitration which was held between the promisor and promisee. The Supreme Court held that a third-party beneficiary becomes an obligee by operation of law and also becomes a party to an arbitration agreement binding the promisor and the promise, see DFT 4A_44/2011 of 19 April 2011.

56) See DFT 4A_450/2013 of 7 April 2014, cons. 3.5.1 and 3.6.

57) See, e.g., DFT 129 III 727 of 16 October 2003, cons. 5.3.1; DFT 4A_450/2013 of 7 April 2014, cons. 3.2; Berger & Kellerhals, above n. 8, 184–186, paras 538–539.

58) That these circumstances are discussed as something different or separate from the typical cases of extension to non-signatory party has apparently never been considered a problem.

59) See section 2.3.1 above.

60) See Berger & Kellerhals, above n. 8, 197, para. 565; see also DFT 4A_450/2013 of 7 April 2014, cons. 3.2.

61) See, e.g., Marc Bauen & Robert Bernet, *Swiss Company Limited by Shares* (Bruylant and Schulthess 2007), 226, para. 673; Berger &Kellerhals, above n. 9, 199, para. 571; Andrea Meier, "Chapter 13, Part I: Multi-party Arbitrations", in Manuel Arroyo (ed.), *Arbitration in Switzerland,* 1330, para. 20 (Kluwer Law International 2013).

62) Bauen & Bernet, above n. 61, 226, para. 673.

63) See DFT 4A_160/2009 of 25 August 2009, cons. 5.2.2.

64) See DFT 4A_450/2013 of 7 April 2014, cons. 3.2.

65) See Berger & Kellerhals, above n. 8, 198, para. 567.

66) Park, above n. 9, 4, paras 1.12–1.13.

67) See in particular Hanotiau, above n. 37, para. 76, on the basis of a comparative law research.

68) See Gary B. Born, *International Commercial Arbitration,* 1485 (2nd ed., Kluwer Law International 2014).

69) See DFT 4A_450/2013 of 7 April 2014, cons. 3.5.5.1.1.

70) Brekoulakis, above n. 1, para. 8.103. Indeed, this almost reads like a definition of the piercing theory under Swiss law.

71) See DFT 4A_450/2013 of 7 April 2014, cons. 3.5.5.1.1. As already mentioned, it is not clear whether the reliance principle will, in the future, be an independent basis for extending an arbitration clause. However, even if it was, it is still based on already existing legal principles and, when it comes to the extension of the arbitration agreement, is very close, if not identical, to the issue of constructive consent.

72) Brekoulakis, above n. 1, para. 8.138.
73) Brekoulakis, above n. 1, para. 8.139–140.
74) See above n. 3, Art. 6(1) Council Regulation (EC) No. 44/2001 (and the identical Lugano Convention).
75) Some jurisdictions provide for joinder and consolidation rules in their *lex arbitri,* see, e.g., Voser, above n. 2, 402–403.
76) Brekoulakis, above n. 1, para. 8.10.
77) Brekoulakis, above n. 1, para. 8.133.
78) Brekoulakis, above n. 1, para. 8.127.
79) Brekoulakis, above n. 1, para. 8.17 and 8.142.
80) Brekoulakis, above n. 1, para. 8.142.
81) Brekoulakis, above n. 1, para. 8.144 et seq.
82) See, e.g., Nathalie Voser, *Overview of the Most Important Changes in the Revised ICC Arbitration Rules,* 29 ASA Bulletin 783, 791 (2011). Such claims would be permissible under Art. 6(2) of the Council Regulation (EC) Nr. 44/2001 (see above n. 3).
83) Brekoulakis, above n. 1, para. 8.10.
84) Brekoulakis, above n. 1, para 8.142.
85) Brekoulakis, above n. 1, para 8.04.
86) Brekoulakis, above n. 1, para 8.106.
87) Brekoulakis, above n. 1, para. 8.10.
88) Brekoulakis, above n. 1, para. 8.12 and 8.127.
89) Brekoulakis, above n. 1, para. 8.12 and 8.127.
90) See above n. 3, Art. 6 of the Council Regulation (EC) Nr. 44/2001 (and the identical Lugano Convention); see section 1 above.

KluwerArbitration