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Arthur W. Rovine
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Between the idea
And the reality
Between the motion
And the act
Falls the Shadow
— T.S. Eliot, The Hollow Men (1925)

I. INTRODUCTION

Often in a case under adjudication, one or more persons implicated by the dispute have not been named as either a plaintiff or defendant. Bringing such absent parties into the case may avoid the wastefulness of multiple legal actions relating to the same dispute as well as the risk of inconsistent outcomes. Those are the main justifications for permitting “joinder” of a further party to an existing proceeding.

When the adjudication is being handled by a national court, the judge will usually have the power to order joinder of a party whose presence would enhance the fair and efficient resolution of the dispute, so long as the party to be joined is within the court’s jurisdiction.¹ In an ideal system of international arbitration, it might be desirable for arbitrators to have the same

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¹ See, e.g., Principle 12.1 of the Principles of Transnational Civil Procedure, adopted (2004) by the American Law Institute and the International Institute for the Unification of Private Law (UNIDROIT) (“A party may assert any claim substantially connected to the subject matter of the proceeding against another party or against a third person subject to the jurisdiction of the court”).
power of joinder that judges exercise. However, a shadow does fall between the idea of joinder in international arbitration and achieving its reality.

The primary reason is that arbitration—unlike court adjudication—is a consensual process, based on a contract between or among parties that often confers on each of them a right to participate in selecting the arbitrators. These realities greatly complicate the task of facilitating joinder in arbitration, where limitations of contractual privity, principles of party autonomy and particular questions of procedural fairness must be addressed.

In view of these difficulties, most rules of arbitration—until fairly recently—remained silent on the possibility of joinder. Yet, arbitration practitioners continued to search for a workable joinder mechanism as the number of multi-party disputes being referred to international arbitration increases. That is why provisions for joinder have slowly begun to appear in a few rules of international arbitration, beginning with revision of the London Court of International Arbitration Rules (LCIA Rules) in 1998 and promulgation of the Swiss Rules of International Arbitration (Swiss Rules) in 2004. This development has now been strengthened by the inclusion of joinder provisions in the newly revised Arbitration Rules of the United Nations Commission on International Trade Law (2010 UNCITRAL Rules) and in the latest version of the Arbitration Rules of the International Chamber of Commerce’s International Court of Arbitration (2012 ICC Rules).

This essay offers a comparative analysis of these new joinder provisions and examines the constraints that limit their scope. Since UNCITRAL’s recent work in developing joinder provisions for its 2010 Rules is a matter of public

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See, e.g., Nathalie Voser, Multi-party Disputes and Joinder of Third Parties, in 50 Years of the New York Convention (International Council for Commercial Arbitration Congress series no. 14) 343 & n. 1 (Albert Jan van den Berg, ed., 2009) (asserting that “in the field of international arbitration . . . over the last decade the number of proceedings in which more than two parties are involved has increased rapidly,” citing inter alia a statistical analysis of 221 challenges to awards brought before the Swiss Federal Tribunal, among which group the percentage of multiparty cases had grown over time from roughly 25% of the cases giving rise to challenges in the early 1990s to 40 percent of such cases in 2005, with the overall percentage of multiparty cases being 34%); 21(1) ICC Int’l Ct. Arb. Bull. vol. 9 (2010) (summary of annual ICC Court statistics indicating that the number of ICC arbitrations filed in 2009 involving more than two parties “continued to account for slightly less than one third of all cases,” and that the average number of parties in such multi-party cases was four); Adrian Winstanley, Multiply Parties, Multiple Problems: A View from the London Court of International Arbitration, in Multiple Party Actions in International Arbitration 213 & n. 1 (Permanent Ct. of Arb., ed., 2009) (stating that “around a quarter of the arbitrations commenced at the [LCIA] in 2006 involved multiple parties” and that just under 20% of all cases being administered by the LCIA in 2007 involved multiple parties).
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record,\(^3\) that work particularly lends itself to critical examination. Therefore, the 2010 UNCITRAL Rules form a focal point of the discussion and the comparison that follow, but all four of the joinder provisions inserted over the last 15 years in these leading arbitration rules (i.e., the UNCITRAL, LCIA, Swiss, and ICC Rules) are considered. While they differ in certain respects, they also have something in common: each provides for a more limited scope of joinder than would be permitted before most national courts.

II. FROM IDEA TO REALITY: FACILITATING JOINDER IN ARBITRATION

When UNCITRAL, in 2006, began revision of its Rules, one objective was to adapt them to multi-party disputes.\(^4\) It was understood that this might require new provisions expressly authorizing joinder of parties or consolidation of related cases.\(^5\) Delegates knew that these objectives had already been addressed during revision of two other sets of arbitration rules.\(^6\)

\(^3\) The reports from each session of UNCITRAL’s Arbitration Working Group that was devoted to the Rules revision (as well as the Working Papers prepared in advance of those sessions) are available on the UNCITRAL web site: www.uncitral.org (see documents relating to the 45th through the 52nd sessions of Working Group II).


Maximizing Possibilities for Joinder in International Arbitration

The starting point for revisions at UNCITRAL was the existing text of the 1976 Arbitration Rules, which do not contain any provision on joinder. That absence was not unusual either in the era when those Rules were drafted or thirty years later, when their revision began; indeed, even in 2006, other contemporary rules of arbitration, such as the AAA’s International Dispute Resolution Procedures (ICDR Rules) and the 1998 ICC Rules of Arbitration did not contain express provisions on joinder.

Of course, the absence of a joinder provision from a set of arbitration rules does not necessarily mean that tribunals acting under those rules cannot authorize joinder. For example, in his comprehensive study of multi-party and multi-contract arbitrations, Bernard Hanotiau cites an UNCITRAL arbitration from more than twenty years ago in which the tribunal allowed a claimant to add a respondent after the arbitration had commenced, relying on Article 20 of the 1976 UNCITRAL Rules, which authorizes parties to amend their claims. The ICC also developed a limited practice of permitting joinder under its 1998 Rules, even though no express provision catered for this.

But, obviously, if one seeks to facilitate joinder under rules governing international arbitrations, it is preferable to add a provision directly conferring this authority, rather than to rely on an indirect and uncertain method of achieving it.

With this background, the drafters at UNCITRAL approached the task of adding provisions on joinder from two vantage points. The first was to consider the possible need for adding another party when the arbitration is just starting. One can assume that the claimant initiating arbitration names in its notice of arbitration every party that it wants to include—at least as of that stage of the arbitration. But what about the respondent? For a long time in international arbitration, the prevailing answer to that question was essentially: “So what about the respondent? This is the claimant’s arbitration.”

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As a result, until about ten years ago, the practice of (for example) the ICC International Court of Arbitration was to reject the request of any respondent that sought (when filing its Answer to a Request for Arbitration) to join another person or entity to the proceeding—even if that person or entity had signed the same arbitration agreement. The justification for such refusal was that only a claimant could designate the parties to arbitration.  

That approach has now been modified, and the ICC Court’s more recent practice (even before this change was confirmed in its 2012 Rules, as discussed below) permits respondents to add a party to the arbitration provided that the added party is a signatory to the arbitration agreement, that the respondent files a claim against that new party, and that the request for joinder is made before the tribunal has been established. This last requirement relates to each party’s right to have an equal role in selecting the tribunal, which is also discussed further below.

This new approach recognizes that, as arbitration is a creature of contract, both parties to that contract are entitled to equal treatment. While it has always been presumed that a claimant gets to shape its arbitral claims in the way that it wishes, when a party enters into an arbitration agreement with multiple other parties, that party has arguably accepted that it may end up arbitrating any given dispute relating to that agreement with each of those other parties, not just with the party or parties it wants to arbitrate against.

Moreover, the identity of the party initiating arbitration can be as much a product of happenstance as necessity, since more than one party in the dispute may regard itself as aggrieved and thus could launch arbitration. In such circumstances, the identity of the claimant may be a function of who...

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12 *Id.*


15 See Gary Born, *International Commercial Arbitration* 2084 (2009) (“Where all the parties have expressly accepted the possibility of arbitration about a particular legal relationship with one another, it is difficult to presume that they meant to require that arbitrations proceed with the involvement of only some, and not other, parties to the arbitration agreement”); see also Voser, *supra* note 2, at 357 (“any signatory of a common agreement with a common arbitration clause has given its anticipated consent to being included in only one arbitration proceedings” (footnote omitted)).
drafts the notice of arbitration first.\textsuperscript{16} For all of those reasons, it seems fair and consistent with efficient dispute resolution to allow a respondent to add to an arbitration one or more parties that may be implicated by the underlying dispute and that are bound by the same arbitration agreement.

When might this occur? The 1976 UNCITRAL Rules make no provision for the filing of a “response” to the notice of arbitration. As a result, under those Rules, the respondent’s first pleading is usually the statement of defense, which could be submitted quite awhile after the arbitration commences. During the recent revision, UNCITRAL’s Arbitration Working Group decided—for reasons wholly unrelated to concerns about joinder—that the Rules should provide for an earlier submission from the respondent.\textsuperscript{17} Thus, the new Article 4 of the 2010 UNCITRAL Rules requires each respondent to submit a response (similar to what other arbitration rules designate as an “answer”) within 30 days of receiving the notice of arbitration.

Once the UNCITRAL Working Group decided to add this new requirement to the Rules, it became the logical vehicle for allowing the respondent, as well, to add another party to the arbitration.\textsuperscript{18} Accordingly, Article 4(f) of the 2010 UNCITRAL Rules permits a respondent to include with its response “a notice of arbitration . . . in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.”\textsuperscript{19} Because this will happen at a very early stage in the arbitral proceedings—only 30 days after the arbitration is commenced—this further notice of arbitration may be filed before the arbitral tribunal is yet constituted, in which case the new party may be able to participate in the formation of the tribunal. But, even if that party is unable to do so, the 2010 UNCITRAL Rules now contain a default provision (much like the default appointment regime in other major arbitration rules) for selection of the entire arbitral tribunal by an appointing authority in case multiple parties in a proceeding are otherwise unable to constitute the tribunal in a mutually agreed fashion.\textsuperscript{20}

Article 4(f) of the 2010 UNCITRAL Rules does not state whether the newly added third party is to be treated as a respondent or a claimant; indeed,

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\textsuperscript{16} See Voser, \textit{supra} note 2, at 357.

\textsuperscript{17} Report of the Working Group on Arbitration and Conciliation, 45th Sess., \textit{supra} note 4, paras. 56-57.


\textsuperscript{20} Article 10(3), 2010 UNCITRAL Rules, \textit{supra} note 19.
the newly added party is in some respects neither fish nor fowl, since it is a respondent to a claim by a respondent. This may complicate other aspects of the arbitration, such as determining a pleading schedule for the parties or allocating costs of arbitration at the end of the proceeding, but the tribunal has full authority to resolve such questions as it sees fit.21

Because Article 4(f) permits addition of a party at such an early stage of the proceeding, it might be more accurate to describe the party being added as an original party to the arbitration rather than a “joined” party to an ongoing proceeding. However, a second provision inserted in the 2010 UNCITRAL Rules authorizes an actual “joinder” to a proceeding already being conducted by an established tribunal and thus potentially implicates all of the difficulties associated with joinder in arbitration.

Why might joinder be sought at that later stage? Among other possibilities, an original party to arbitration may not realize the need to add another party to the proceeding until the claimant has more fully developed its claims. Only then might a party recognize that, for the sake of efficient adjudication or to make sure that each of the implicated persons is bound by the same resolution of the dispute, it would be prudent to add another party.

III. THE “SHADOW” LIMITING FULL USE OF JOINDER IN ARBITRATION

When the UNCITRAL Working Group considered how joinder of parties might be accommodated once arbitration is underway, it recognized that this “would constitute a major modification to the Rules.”22 Nonetheless, in view of the increasing number of multi-party disputes being submitted to international arbitration, delegates forged ahead and considered more than one

21 See, e.g., Article 17 of the 2010 UNCITRAL Rules, which (like Article 15 of the 1976 Rules) provides in relevant part that, “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality…”; Article 42(1) of the 2010 Rules, which (like Article 40(1) of the 1976 Rules) provides in relevant part that, “the arbitral tribunal may apportion each of such costs [of arbitration] between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”

possible approach. As noted, two existing sets of arbitration rules already furnished examples of how joinder might be handled: a provision in the LCIA Rules and one in the Swiss Rules, each differing somewhat in scope.

Under Article 22.1(h) of the LCIA Rules (1998), a tribunal may allow, upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing.

This provision includes important innovations. First, it allows a party to be joined to arbitration even if one of the original parties to the arbitration—more often the claimant—does not agree to the joinder. If arbitration is considered to be consensual between or among the parties, the proposed addition of a further entity or person to arbitration over one of the original parties’ objection is a fairly significant new step. Those who support this approach would say that it is misleading to characterize such joinder as occurring without consent because the original parties to the arbitration entered into an arbitration agreement adopting the LCIA Rules, by which they have consented to be bound by Article 22.1(h) of those Rules. In that sense, then, each party to the original arbitration proceeding will have previously consented to the possibility that a third party may be joined, without necessarily knowing which party or parties would actually join.

Some practitioners may feel that this type of “consent” is more attenuated than is desirable, particularly in light of a second innovative feature of Article 22.1(h) of the LCIA Rules—which is that there is no requirement that the added third person be a party to the arbitration agreement. Consenting to this type of possible joinder (simply by agreeing to arbitrate under the LCIA Rules) might be regarded as insufficient to authorize the subsequent addition of a particular party that lacks any privity with the contract on

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26 Cf. id. (describing the basis for Article 22.1(h) as follows: “the non-consenting party can be taken to have consented in theory by having agreed to arbitration under the LCIA Rules”).
which the arbitration is based. Of course, one can imagine circumstances in which adding such a person or entity might well ensure an efficient and comprehensive resolution of a given dispute, but the addition may not be one that the parties to the arbitration agreement contemplated when they signed their agreement.

It should be emphasized that Article 22.1(h) of the LCIA Rules requires the express consent of the third person to be joined to the proceeding. As a result, any concerns relating to the inability of this joined party to participate in the selection of the tribunal members (if joinder is proposed after the tribunal has been established) will be moot. However, precisely for that reason, a third party may be reluctant to agree to be joined under these conditions.

As mentioned, the other rules provision on joinder that the UNCITRAL drafters had before them was Article 4(2) of the Swiss Rules (2004). This Article provides:

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

Like Article 22.1(h) of the LCIA Rules, this provision appears to authorize joinder of third persons or entities whether or not they are parties to the underlying arbitration agreement. However, at least two features distinguish this provision from its counterpart in the LCIA Rules. First, under the Swiss Rules provision, the third person may itself seek to be joined, thus initiating what in many legal systems would be called an “intervention.” As a result, the third person or entity does not depend upon one of the original parties to the arbitration for its possible joinder.

Secondly, there is no express requirement that any implicated party or parties consent to the joinder. Of course, it is unlikely that a tribunal would order a third person or entity to be joined as a party against its will in the absence of any form of prior consent. Accordingly, as a leading Swiss

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28 Turner & Mohtashami, supra note 25, at 150 (opining that the “better” reading of Article 4(2) of the Swiss Rules “must be” that it allows a tribunal to join
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practitioner explains, one should probably “read this provision primarily as a declaratory norm intended to point to competences that the arbitral tribunal already has.” In other words, Article 4(2) appears to frame the authority for joinder very broadly in order to provide maximum flexibility but, in a given case, the tribunal would likely order joinder only of a party that consented either expressly (at the time the joinder is proposed) or by prior adoption of an arbitration agreement under the Swiss Rules with one or more of the original arbitration parties. As for the original arbitration parties, even if one (or more) of them does not expressly consent to a proposed joinder, those parties will have previously accepted the possibility of such a joinder by agreeing to arbitrate under the Swiss Rules. Thus, notwithstanding its failure to require any party’s consent, the joinder provision of Article 4(2) of the Swiss Rules appears to be very similar in effect to Article 22.1(h) of the LCIA Rules.

However, the Swiss Rules provision may also be designed to accommodate the joinder of a third person or entity as a less than full participant in the arbitration proceeding, along the lines of what is permitted in Swiss courts. A third person or entity may participate in Swiss court proceedings not only as a formal party (one that brings its own claims or is the object of claims brought against it) but also as a “side party” (Nebenpartei) for the purpose of supporting an original party in the case—often, at the instance of that original party, but sometimes at the third party’s own instance. Although a third person or entity that participates in this capacity cannot claim against—or be claimed against by—another party, it is said to be bound by the result of the proceeding. It appears that Article 4(2) is drafted to permit joinder

a third party without that party’s consent “only...if the third party was already a party to the arbitration agreement, without which the element of consent would be totally missing”); see also Philippe Gilliérón & Luc Pittet, Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties, in Swiss Rules of International Arbitration: Commentary 36, 44 (Tobias Zuberbühler et al. eds., 2005) (noting that, if Article 4(2) were applied to permit nonconsensual joinder of a third person or entity after the tribunal had been established, this "could raise problems with regard to the requirement of equality of the parties in connection with the constitution of the arbitral tribunal").

Voser, supra note 2, at 386.

30 See Gilliérón & Pittet, supra note 28, at 44.

31 Turner & Mohtashami, supra note 25, at 150 (construing the absence from Article 4(2) of any requirement for "consent" from the original parties to the proceeding as meaning that those parties have already "consented" to such joinder by consenting to arbitration under the Swiss Rules).

Voser, supra note 2, at 381.
in the capacity of a “side party,” and it may be argued that for this type of joinder the consent of the party to be joined may not be so necessary.\(^{33}\)

The UNCITRAL Working Group deliberated for some time on whether to follow the approach to joinder reflected in the LCIA Rules or, to a lesser extent, in the Swiss Rules. Ultimately, the Working Group was wary of abandoning the principle of specific consent to joinder, which it believed most parties and practitioners regarded as a fundamental feature of international arbitration.\(^{34}\)

Concerns were expressed about the possibility that a party might be added to the arbitration over the objection of one of the original parties to the arbitration agreement or proceeding. One might attribute this reluctance to embrace the LCIA or Swiss approach to the inherent conservatism of the UNCITRAL process—the Working Group has always proceeded by a process of consensus, and thus any new provision to be added to the UNCITRAL Rules requires nearly unanimous support within the Working Group.\(^{35}\)

But it would be wrong to attribute UNCITRAL’s reluctance to embrace the LCIA or Swiss approach entirely to stodginess. The Working Group did recognize that adding parties to an arbitration whose participation would

\(^{33}\) Compare Bernhard Berger & Franz Kellerhals, International and Domestic Arbitration in Switzerland 147 (2d ed. 2010) (expressing the view that, with respect to joinder or intervention of Nebenpartei, “international arbitral tribunals with their seat in Switzerland do not have to require an arbitration agreement between the third party and the litigants”) with Daniel Wehrli, Arbitration under the Swiss Rules, in International Commercial Arbitration: Different Forms and Their Features (G. Cordero-Moss ed., forthcoming) (similarly noting that a joined “side party” need not consent to the arbitration agreement). However, it has been suggested that, even in for the joinder of a “side party,” the express consent should be obtained from the original parties to the arbitration to avoid infringement of the confidentiality of their proceedings. See Voser, supra note 2, at 382 (stating that, “in order to maintain privacy, the [original] parties must agree to the participation of a side party” and citing a decision to this effect by an ICC tribunal seated in Zurich, 23(2) ASA Bulletin 270, 273 (2005)); see also Wehrli, op. cit. (to same effect). On the other hand, it might be argued that parties to an arbitration under the Swiss Rules have waived any confidentiality objections to the joinder of a third party by having agreed to the text of Article 4(2) of those Rules. This is the same reasoning invoked to support operation of Article 22.1(h) of the LCIA Rules (1998). See also Voser, supra note 2 at 352 (“The issue of confidentiality should not be overemphasized: the parties often have a real interest in joining third parties, who, in such cases are usually familiar with the underlying business transaction”).


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enhance effective resolution of the dispute could be desirable. And so, in trying to resolve how far it should go in pursuing such a change, the Working Group asked UNCITRAL’s Secretariat to ascertain other institutions’ experiences with joinder provisions under their Rules. The results of those inquiries were rather surprising. It was reported to the Secretariat that, in the years since the then-current version of the LCIA rules had gone into effect (in 1998), there had been only ten applications to add a party pursuant to Article 22.1(h) and no more than half of them had succeeded.

The Working Group was very much struck by that low usage rate compared to the alleged need to expand joinder opportunities.

The record under the Swiss Rules was even more striking. The Secretariat reported that apparently “[n]o decisions on joinder under article 4(2) of the Swiss rules have yet been reported.” This conclusion must be qualified, since it is uncertain whether any data on this question is collected. Similarly, with respect to the LCIA practice, a recent treatise on the LCIA Rules gives somewhat higher figures for the incidence of joinder—the treatise authors assert that, as of 2007, there had been 21 cases in which the joinder provision had “been used by a tribunal.” Nevertheless, this is still a low figure and, more importantly, the same authors—who had access to sanitized case files from the LCIA—believe that “there has not yet been a case in which the third party has been joined against the wishes of one of the original parties.” This effectively means that each of the joined parties in these LCIA cases was joined by unanimous consent among both the original parties to the proceeding and the party being joined. There would seem to be little need for a provision in the Rules authorizing such a result, since presumably this type of joinder can be affected simply by party agreement.

One might draw either of two conclusions from this data. On the one hand, the putative need for joinder of parties in the modern era of more complex, multi-party arbitrations may be overstated. One reason could be that an increased awareness of the availability of multi-party arbitration by

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38 Id.
39 Turner & Mohtashami, supra note 25, at 150. In the most recent years, the number of applications under Article 22.1(h) has increased. According to the LCIA’s Director General (correspondence on file with the authors), more than 30 applications were received in 2009-2011, but these numbers were boosted by the inclusion of 20 applications originating from two clusters of related cases.
40 Id. at 150-51 (emphasis added).
parties initiating such proceedings may diminish the need to add parties at a later stage through joinder. Alternatively, one might regard the meager use of the LCIA and Swiss Rules’ joinder provisions as further evidence of how difficult it is to cater for joinder through contractually adopted rules and within the limits of procedural fairness. Many members of the UNCITRAL Working Group may have taken the latter view. Yet, the cold facts about how rarely the LCIA and Swiss Rules provisions had been used gave delegates further pause about the risks of innovating too far on the subject of joinder.

One of the risks that most troubled the Working Group was the problem of adding a third person or entity to an arbitration at a point in the proceedings when that new party can no longer participate in the selection of the tribunal. This problem was highlighted by the decision of France’s highest court (Cour de cassation) in early 1992 in what has become known as the Dutco case. Although the reasoning of that decision is somewhat Delphic and has been subject to academic dispute, it is widely taken to stand—at the very least—for this proposition: (1) where a three-member arbitral tribunal is to be chosen in the usual way (such that the claimant and respondent each nominates or appoints one of the arbitrators), (2) where there are multiple parties on one side of the arbitration and a single party on the other, (3) where the single party selects its party-appointed arbitrator but the multiple parties on the other side can’t agree on a nominee and, (4) where the multiple parties are required by their pre-dispute arbitration agreement to compromise on a choice of arbitrator or to accept an arbitrator appointed by someone else on their behalf, then (5) the arbitral tribunal so constituted will have been created in violation of the principal of equal treatment of the parties, given the parties’ unequal participation in selecting the tribunal, and an award issued by that tribunal could be set aside.

The solution to the Dutco problem adopted in all the major arbitration rules requires that, when the parties in a multi-party arbitration can’t select a three-member tribunal in a mutually agreed way, the relevant administering authority will appoint the entire tribunal and in this way every party will be on an equal footing as to the level of its participation (or non-participation) in constituting the tribunal. Since the UNCITRAL Arbitration Rules had not been updated since 1976, they were the last among the major rules of arbitration to be modified to reflect the result in Dutco. Having resolved to

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42 See, e.g., Derains & Schwartz, supra note 14, at 180-81; Born, supra note 15, at 2100-01.
43 See Article 10(3) of the 2010 UNCITRAL Rules.
make this revision in the 2010 Rules, the UNCITRAL Arbitration Working Group was thus particularly sensitive to the difficulties of adding a joinder provision like the one contained in the Swiss Rules, since it could in theory permit a new party to be joined in the midst of proceedings without requiring that third party’s contemporaneous consent. This might mean that any subsequent award in such a case could be attacked on the ground that the parties had not received equality of treatment.

On the other hand, the Working Group did not want their new joinder provision to require the contemporaneous consent of the third party being added, since this might exclude from joinder a party already bound to the arbitration agreement who then unreasonably resists joinder when it is actually proposed. Such a party’s participation in the proceeding might be essential to efficient resolution of the dispute.44

Faced with these somewhat conflicting concerns, UNCITRAL’s Arbitration Working Group took the relatively conservative approach of inserting a single sentence in Article 17(5) of the UNCITRAL Rules, which reads as follows:

The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties.45

This sentence may seem more complicated than its limited objective warrants. But a careful reading of the text reveals a fairly straightforward purpose: the new clause permits joinder only of persons or entities that are bound by the underlying arbitration agreement, such joinder must be proposed by an existing party to the proceedings46 (i.e., the provision excludes intervention), and such joinder will mean that the joined party will be a full participant in

45 Article 17(5), 2010 UNCITRAL Rules.
46 The text of Article 17(5) uses the word “parties” only to refer to the original parties to the arbitration and refers to parties sought to be joined as “third persons” instead of “third parties,” because delegates feared that the latter term might erroneously suggest that the person or entity being joined was not a party to the arbitration agreement. See Report of the Working Group on Arbitration and Conciliation, 49th Sess., supra note 23, para. 129.
The arbitration, capable of making claims and being claimed against. The key phrase, of course, is the last one, which conditions any decision to permit joinder upon a finding as to possible prejudice to any party.

The holding in Dutco prompts the following question about the operation of the new Article 17(5): in what circumstances—after the tribunal has been established—could a third person or entity be added to arbitration without a finding that it has been prejudiced? Such circumstances could exist. First, in cases like those to which the LCIA joinder provision has been applied—i.e., where all parties agree to the joinder—no prejudice is likely to result. Secondly, when the tribunal that already exists has been selected by an appointing authority, a newly joined party might not be disadvantaged by not participating in that selection, since it is possible that no party so participated.

Similarly, there may be cases in which the added party is so closely aligned with one of the original parties to the arbitration that the new party’s interests were adequately represented by a party that did participate in the tribunal’s selection. Matthieu de Boisséson has written about (and quoted from) an unpublished ad hoc award in which the claimant’s request to add several respondents during an arbitration was upheld over those parties’ objection that they had been deprived of participating in formation of the tribunal. As Mr. de Boisséson describes the reasoning underlying this result, the tribunal considered that the respondent that had signed the arbitration agreement and the other respondents formed a consortium subject to the ‘required cohesion’ provided by Swiss law and that consequently the four respondents formed a single party which had agreed in advance to the constitution of the arbitral tribunal.47

Finally, there may even be cases in which (for example) a respondent seeking to join a jointly and severally liable co-respondent would be willing to replace its previously designated party-appointed arbitrator with a jointly-appointed new arbitrator.48 Such an arrangement might forestall any finding

48 See Nathalie Voser & Andrea Meier, Joinder of Parties or the Need to (Sometimes) be Inefficient, AUSTRIAN ARB. Y.B. 115, 121-22 (suggesting that a belated joinder in an arbitration already underway may in some circumstances be accommodated by replacing only one arbitrator on the tribunal).
of “prejudice” (and presumably the original, rather than the reconstituted, tribunal would make that determination). In sum, the flexible standard in the new article 17(5) of the 2010 UNCITRAL Rules, which allows the tribunal to order joinder unless it concludes that this “should not be permitted because of prejudice to any” party, can be expected to limit such joinder to relatively unusual circumstances where this should not be problematic.

As the UNCITRAL Working Group entered the last year of revising the 1976 UNCITRAL Rules, delegates were aware that a similar revision process was already underway for the 1998 ICC Rules. And, it was further known that one of the most likely areas of revision in those ICC Rules was the treatment of multi-party arbitrations, particularly in relation to joinder of parties and consolidation of cases. However, it was not until a year after the new 2010 UNCITRAL Rules were adopted that the ICC unveiled its revised Rules, which then took effect on January 1, 2012. Article 7(1) of these Rules includes an express provision on joinder, which states the following:

A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the “Request for Joinder”) to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)-6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder.

According to this provision, either the Claimant or the Respondent in arbitration may file a Request for Joinder against an additional person or entity sought to be joined as long as this occurs prior to the confirmation or

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49 See, e.g., Alison Ross, “Under Scrutiny: Changes at the ICC,” Global Arbitration Review, October 2009, at 15-16 (interview with Jason Fry, Secretary-General of the ICC International Court of Arbitration, who states that, among “certain developments in international arbitration . . . at the moment not properly catered for in the rules,” were “the growing phenomenon of multiparty arbitration and attempts by parties to join third parties”).

appointment of any arbitrator. The Request must state the same elements of
a claim against the joined party as are required to be set forth in a Request
for Arbitration and must be accompanied by the appropriate fee.52

The claims encompassed by this expanded arbitration (i.e., including the claims against the joined party) will be forwarded to the tribunal only if the ICC Court of Arbitration “is prima facie satisfied that an arbitration agreement under the [ICC] Rules that binds them all [i.e., both the original and the joined parties] may exist.”53 In those circumstances, the final decision as to jurisdiction over all the parties will be made by the tribunal.54 If, instead, a party to the arbitration seeks to join an additional party after a member of the tribunal has been confirmed or appointed, all of the parties must consent.

These provisions in the 2012 ICC Rules largely codify the ICC’s practice on joinder under the 1998 Rules, as described above. They are notable for being more limited in scope than other recently adopted provisions. Unlike those in the LCIA and Swiss Rules, the ICC Rules provisions limit joinder to persons or entities that are already parties to the arbitration agreement; unlike the Swiss Rules, the ICC provisions do not permit joinder at the instance of the joining party (i.e., intervention); and, unlike the LCIA, Swiss and 2010 UNCITRAL Rules, they do not permit joinder after any member of the tribunal has been appointed (unless all parties agree). In sum, the joinder provisions of the 2012 ICC Rules accept numerous practical constraints on joinder in arbitration and do not seek to redefine or expand its scope.

IV. CONCLUSION

The revisions relating to joinder in several major sets of arbitration rules strive to create a new reality for multiparty cases in international arbitration. The intent is to come closer to the idea of joinder as developed in the national courts. But a “shadow” of practical constraints looms over this project—limitations arising from arbitration’s contractual basis, from concerns for party autonomy, and from the need to ensure procedural fairness. It remains to be seen how far these new joinder provisions—limited as they are—will change the reality of multiparty arbitration.

51 See id. Article 7(2).
52 See id. Article 7(3).
53 See id. Article 6(4)(i).
54 See id. Article 6(5).