Extending the application of an arbitration clause to third-party non-signatories: which law should apply?

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Abstract

Arbitration law imposes strict form requirements on arbitration agreements, but once these are met, the subsequent question of who is a proper party to the agreement may be determined without reference to similar requirements. One such question is whether a third party, which is not a party (or 'signatory') to the contract containing the arbitration agreement, may nevertheless be bound to arbitrate. While various legal doctrines in various jurisdictions permit third party non-signatories to be bound to contracts, arbitral tribunals encounter difficulty deciding which law, rule or principle should ultimately determine the matter.

As long as this question is determined by reference to national laws, transnational business actors face a juridical framework that is complex, but predictable nonetheless. However, some arbitral tribunals have decided this question by reference to a broader set of principles including *lex mercatoria*, *bona fides*, or agreement of the parties.

The availability to arbitral tribunals of divergent laws, principles and approaches to resolving this question creates considerable uncertainty for transnational actors.

1. Introduction

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The availability to arbitral tribunals of divergent laws, principles and approaches to resolving this question creates considerable uncertainty for transnational actors.

This paper considers these issues in the context of three doctrines for extending the scope of the arbitration agreement: "group of companies", estoppel and assignment. To commence, some basic matters of arbitration theory are examined.

1.1 Third Party Involvement: General Considerations

Requirements for the formal validity of an arbitration agreement are principally established by international arbitration's two most important treaties: the New York Convention[1] and the United Nations Commission on International Trade Law (UNCITRAL) Model Law.[2] They may be supplemented by national laws. However, these strict requirements relate only to the question of whether there is a valid agreement, not to the subsequent question of whether a third party may be bound.[3]

The Model Law also empowers a tribunal to decide matters relating to its own jurisdiction.[4] Arguably, deciding who is a proper party to the arbitration proceedings is a question of jurisdiction, and falls to the Tribunal to decide. But which law should the tribunal apply? Although arbitral agreements often nominate a substantive law to govern the arbitration, this is not relevant to the question of jurisdiction, which is usually characterized as a question of procedure, not substance.[5]

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1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

2 UNCITRAL Model Law on International Commercial Arbitration (1985), United Nations document A/40/17, Annex I).

3 Philipp Habegger, 'Extension of arbitration agreements to nonsignatories and requirements of form', ASA Bulletin Vol. 22(2) 2004, 398 at 404.

4 Art. 16(1).

5 Daniel Busse, 'Privity to an arbitration agreement', International Arbitration Law Review, Vol. 8(3), 2005, pp. 95-102 at 95; see also I.C.C Award No. 4131, 23 September 1982, Yearbook of Commercial Arbitration, Vol. IX (1984), p. 131, at

As a matter of procedure, the question is to be resolved by applicable institutional rules, and the *lex arbitri* or law of the seat.[6] This provides tribunals with a wide array of rules, laws and principles upon which to base their decisions.

Turning to institutional rules, most provide that the question of the applicable law is, in the first instance, to be decided by reference to the intentions of the parties. For example, the ICC Rules provide:

> The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.[7]

Interpreting this provision literally, the Tribunal might consider it 'appropriate' to have regard not only to the *lex arbitri*, but also to the *lex mercatoria*, or even to broader considerations such as "good faith" or "agreement of the parties". Ultimately such a broad choice can engender problems of certainty, as discussed below.

133-4. This view is disputed in *Peterson Farms Inc. v C&M Farming Ltd* [2004] All E.R. (D) 50, at 64.

6 Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, 'Law and Practice of International Commercial Arbitration', Fourth Edition, London, 2004. The authors characterize the following as issues of procedure: the question of arbitrability; the entitlement of the Tribunal to rule on its jurisdiction; and the constitution of the Tribunal (p. 95). The question of the extension of the agreement to third parties is analogous.

7 Art. 17; many other institutional rules apply a similar provision: e.g. UNCITRAL Arbitral Rules (1976), Art. 33; Australian Centre for International Commercial Arbitration (ACICA) Rules, Art. 34.1; Swiss Rules of International Arbitration, Art. 33(1); International Centre for the Settlement of Investment Disputes (ICSID) Rules, Art. 42(1). For exceptions, see Singapore International Arbitration Centre (SIAC) Rules, Rule 32.

2. The Group of Companies Doctrine

Perhaps the best-known theory of extending the scope of the arbitral agreement is the "group of companies" doctrine. This doctrine provides that several companies that form part of a larger corporate group may be regarded as a single legal entity or "une réalité économique unique".[8] Consequently, the doctrine permits a parent company to become a party to an arbitral proceedings, in circumstances where its subsidiary is a signatory to the relevant arbitral agreement.

In *Dow Chemical*, an ICC Tribunal sitting in Paris decided that the parent company, Dow Chemical Company (USA) should become a party to an agreement applying to its subsidiary Dow Chemical France,[9] for the following reasons:

> Considering that it is indisputable – and in fact not disputed – that DOW CHEMICAL COMPANY (USA) has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like DOW CHEMICAL FRANCE, effectively and individually participated in their conclusion, their performance and their termination:[10]

The ICC Tribunal noted in *Dow Chemical* that the parties had adopted ICC Rules. Under these, the Tribunal held the authority to decide as to its own jurisdiction, "which provisions do not refer to the application of any national law. The reference to French law could therefore concern only the merits of the dispute."[11]

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8 ICC no. 4131, *op. cit.*, at 36.

9 Dow Chemical France was an assignee of the original agreement but not a signatory: *Dow Chemical, op. cit.*, at 132-33.

10 *Ibid*.

11 *Op. cit.*, at 133.

While indicating that it could consider both general considerations relating to the agreement of the parties, and French case law, the Tribunal appeared to cite only other arbitral awards in reaching its decision, suggesting that its decision was made primarily on the basis of the "agreement of the parties".[12]

In a similar decision, a Singapore International Arbitration Centre (SIAC) tribunal extended an arbitration clause to a parent company non-signatory on the basis of "the true intent of the parties on the basis of the evidence before it".[13] And in *Sarhank v Oracle Corporation*,[14]a tribunal sitting in Cairo decided, as a matter of Egyptian law:

> despite their having separate juristic personalities, subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in [the contract] because contractual relations cannot take place without the consent of the parent company owning the trademark by, and upon which transactions proceed.[15]

The Second Circuit reconsidered this decision when enforcement was sought pursuant to the New York Convention, and overturned it, on the basis that under American law, the arbitral agreement may only be extended to a non-signatory third party on the basis of doctrines such as veil-piercing, estoppel and incorporation by reference.[16] The Court considered that these doctrines all rely on "objective intention to agree

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12 ICC no. 4131, *op. cit.*, at 134.
13 John Savage and Tan Ai Leen, 'Family ties: when arbitration agreements bind non-signatory affiliate companies', Asian Dispute Review (2003), p. 16 at 17.
14 See 404 F.3d 657 (2d Cir. 2005).
15 *Sarhank, op. cit.,* at 662.
16 *Ibid.*

to arbitrate" by the non-signatory to be bound – a curious view, given that estoppel was included in the list.[17]

The Swiss Federal Tribunal Decision of *X, Y et A v Z*[18] involved the question of whether Mr A should be a party to an arbitration clause entered by one of his companies. The arbitration agreement provided for arbitration in Switzerland, applying Lebanese law. It was decided that, although Lebanese law applied to the substance of the contract, whether the contract extended to Mr A should be decided on the basis of "the real intent of the parties" or "good faith", as permitted under Swiss law.[19]

Examining the facts, the Tribunal decided that factual matters such as Mr A's holding of necessary construction permits, even until after the work was completed, and his personalization of the project in the media, did not warrant extension of the agreement. Rather,

> It is only based on documents…evidencing the willful intervention of Mr A in the management of the companies in relation to the construction project and the performance of the contract in dispute, as well as the fact that the companies in question were nothing but vehicles for the personal activities of Mr A, that the arbitral tribunal in application of the principle of good faith held for the extension of the arbitration clause to Mr A.[20]

In *Peterson Farms*,[21] a tribunal sitting in London under ICC auspices followed reasoning similar to *Dow Chemical*: a third party inviting its

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17 O*p. cit*., at 662.
18 Tribunal Federal, decision dated October 16, 2003; see Habegger *op. cit*., at 403.
19 Habegger, *op. cit*., at 403.
20 *Ibid.*
21 *Op. cit,* n. 5.

corporate veil to be lifted may be accommodated on the basis of general considerations of "agreement of the parties", without reference to the laws of any particular jurisdiction.[22] This finding was subsequently overturned by the English courts. The Court considered that the question of whether a third party can be a party to the arbitration proceedings is a question not of procedure, but of substance.[23] Furthermore, it reasoned, the matter needed to be decided by reference to the governing law of the contract, which was Arkansas (U.S.) law.[24] The Court ruled that the "group of companies doctrine" is part of neither English nor Arkansan law.[25] Nor American Federal law according to *Sarhank*, meaning that the doctrine is largely confined to civil law jurisdictions.

In a similar vein, several tribunals have ruled that where this or similar doctrines are invoked on the basis of fraud, strict tests are likely to apply.[26]

Habegger notes that scholarly debate of this issue continues, particularly among French commentators. While one school of thought favours a stricter approach relying predominantly on national laws, the other is more lenient, allowing extension based on principles such as *bona fides* or good faith, *lex mercatoria* or other principles of private international law.[27]

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22 *Peterson Farms*, *op. cit*., at 63.
23 *Peterson Farms*, *op. cit*., at 64.
24 *Ibid*.
25 *Peterson Farms*, *op. cit*., at 67.
26 See: *Technical know-how buyer P (India) v Engineer/Seller A (Austria)*,ICC Award No. 7626 of 1995, Yearbook of Commercial Arbitration Vol. 22 (1997); see also *International Triathlon Union v Pacific Sports Corp. Inc.*, cited in Busse *op.cit*., at 4. For a contrary application of the related 'alter ego' doctrine, see *Bridas S.A.P.I.C. v Turkmenistan* 345 F.3d 347 (5th Cir. 2003).
27 Habegger, *op. cit*., at 399.

Some commentators look unfavourably on tribunals extending the scope of the agreement on the basis of "general principles" only:

> …though it might be a great deal easier to base a decision on abstract considerations such as the "intentions of the parties", than to identify and examine the substantive law applications, legal certainty will only be achieved by applying the appropriate state law.[28]

Perhaps the main problem for the "liberal" school is that, by empowering a tribunal with such a wide array of juridical tools with which to infer consent (law of the seat, agreement of the parties, good faith, *lex mercatoria*), they render unpredictable and inconsistent decision making more likely. As one leading practitioner comments:

> Any system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness. Ultimately, there must be a right answer.[29]

Whilst courts might be tempted to accommodate the wishes of companies like C&M Farming Ltd and Dow Chemical Company, who invited their own corporate veil to be pierced on liberal grounds such as "consent of the parties", this ultimately leads to uncertainty. Nor is it sensible to distinguish between voluntary and involuntary applications of the doctrine. While a company's voluntary submission to the tribunal's jurisdiction ameliorates concerns relating to the tribunal's powers, it should not be ignored that in many instances the third party seeks to join arbitration proceedings to avoid litigation – as

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[28] Busse, *op. cit*., at 9; see also Roger Alford, 'Binding sovereign non-signatories', Mealey's International Arbitration Report, Vol. 19(3), March 2004, p. 14 at 14.

[29] Attrib. Nigel Blackaby; see Michael D. Goldhaber, 'Wanted: a world investment court', The American Lawyer: Focus Europe, Summer 2004

did the Dow Chemical Company. While the third party non-signatory might agree to waive its right to litigate, this does not necessarily mean that other parties to the litigation similarly agreed.

Given the unpredictability such a liberal approach can engender, a more circumspect approach is recommended.

3. Estoppel

Estoppel is fundamentally different from the "group of companies" doctrine because the third party does not (necessarily) agree to be a party to the arbitration. This is a concern because arbitration theory tells us that it is only the agreement of the parties (or the existence of an investment treaty) that displaces the jurisdiction of the courts. Perhaps alarmingly, the doctrine has been described as an 'alternative to consent'.[30]

Although the principles of estoppel are widely recognized and might even be characterized as *lex mercatoria*,[31] only American courts have applied the doctrine to extend the scope of an arbitration clause to a non-signatory. Thus, its importance in an international context relates mainly to arbitrations whose seat is the United States. In such instances, the tribunal would probably apply American law to determine whether a third party non-signatory may be bound.[32]

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30 James M. Hosking, 'The third party non-signatory's ability to compel international commercial arbitration: doing justice without destroying consent', Pepperdine Dispute Resolution Law Journal, Vol. 4 (2004), p. 469 at 509.

31 Hosking, *op. cit*., at 514.

32 See: *International Paper Company v Schwabedissen Maschinen & Anlagen GMBH* 206 F.3d 411; *Smith/Enron Cogeneration Limited Partnership v. Smith Cogeneration International Inc.,* 198 F. 3d 88 (1999) ; *The Republic of Ecuador v ChevronTexaco Corporation*, 376 F.Supp.2d 334 (S.D.N.Y 2005).

Estoppel was applied in the leading international case, *International Paper*,[33] which stated:

> Equitable estoppel precludes a party from asserting rights "he otherwise would have had against another" when his own conduct renders assertion of those rights contrary to equity.
>
> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.[34]

American courts recognize two distinct grounds for estopping a litigant from denying the application of an arbitration clause. Under the first, a non-signatory is estopped from refusing to comply with an arbitration clause "when it receives a 'direct benefit' from a contract containing an arbitration clause".[35]

One of the contentious arguments in relation to this limb of the doctrine is of what constitutes a 'direct benefit'. In *International Paper*, the benefit was realized because each of the grounds for the court action brought by International Paper relied on the contract containing the arbitration clause. For this reason, International Paper was estopped from denying the applicability to it of the arbitration clause contained in the same contract.[36] In *A.B.S. v Tencara Shipyard*

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33 *International Paper*, *op. cit*.
34 O*p. cit*., at 415-6.
35 *International Paper*, *op. cit*., at 416; more recently, see *American Bankers Insurance Group v Long*, 453 F.3d (2006), p. 623.
36 *International Paper*, *op. cit*., at 417.

S.P.A.,[37] a "direct benefit" flowing from the contract containing the arbitration clause was received in the form of (1) significantly lower insurance rates; and (2) the ability to sail under the French flag.[38] In *Thomson-C.S.F. v. A.A.A.*,[39] by contrast, the benefits Thomson received from allegedly eliminating a competitor were not considered a "direct benefit"; hence the test was not satisfied.[40]

A second ground for establishing estoppel is also recognized. In its decision in *Grigson v Creative Artists Agency L.L.C.*,[41] the Fifth Circuit approved the following formulation:

> Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.[42]

However, Dennis J argued in his dissenting judgment that estoppel, may be invoked only in circumstances where:

> The signatory reasonably should have expected that, because of his statements or conduct, the nonsignatory would be induced to rely justifiably on the contract and would be injured thereby if the

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37 *American Bureau of Shipping v Tencara Shipyard S.P.A.*, 170 F.3d 349 (1999).
38 *Op. cit.*, at 352.
39 *Thomson-CSF v American Arbitration Association*, 64 F.3d 773 (1995).
40 *Op. cit.*, at 778-9.
41 210 F.3d 524 (5th Cir. 2000).
42 *Op. cit.*, at 533; the Court in *Grigson* moved away from the stricter formulation of *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, allowing (at 758) estoppel where the charges against parent and (signatory) subsidiary are "inherently inseparable".

> signatory refused to recognize the nonsignatory's rights or entitlements with respect to the contract.[43]

The majority view in *Grigson* has been affirmed in two subsequent Fifth Circuit decisions: *Hill v GE Power Systems Inc.*[44] and *Westmoreland v Sadoux.*[45] In *Hill*, the court emphasized that the first ground of estoppel – the non-signatory's reliance on the contract in its claims – is more important than the second, and that an estoppel argument may not be sustained on the second alone.[46]

Casting further doubt on the expanded estoppel doctrine, the Illinois Court of Appeal, applying Illinois law, refused to allow a non-signatory to compel arbitration in *Ervin v Nokia Inc*.[47]

Finally, the permissive attitude of American Federal Appeal courts may decline following the Supreme Court's ruling in *EEOC v Waffle House Inc*.[48] The Supreme Court held that as a non-signatory to the arbitration agreement, EEOC could not be compelled to arbitrate without consent.[49] The Supreme Court emphasized that nothing in the statute empowering the EEOC stated that its powers to bring a matter would be affected by an arbitration clause in an agreement to which the EEOC was not party.[50]

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43 *Op. cit*., at 532; see Frank Z. LaForge, 'Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under *Grigson v Creative Artists'*, Texas Law Review Vol. 84, p. 225, at 237.
44 282 F.3d 343 (5th Cir. 2002).
45 299 F.3d 462 (5th Cir. 2002).
46 See LaForge, *op. cit*., at 238.
47 812 N.E.2d 534, 542-43 (Ill. App. Ct. 2004).
48 534 U.S. 279 (2002).
49 See Jaime Dodge Byrnes and Elizabeth Pollman, 'Arbitration, Consent and Contractual Theory: The Implications of *EEOC v Waffle House'*, Harvard Negotiation Law Review Vol. 8, Spring 2003, p. 289, at 293.
50 Byrnes and Pollman, *op. cit*., at 294.

Academic commentators have suggested that the *Grigson* decision violates arbitration's general premise of consent[51], and moves way from the two traditional requirements of estoppel, misrepresentation and detrimental reliance by the party seeking the estoppel.[52] Commentators also note that in many estoppel cases, the same result could have been obtained by applying the ordinary laws of contract.[53]

4. Assignment

The issue of whether an arbitration agreement remains valid if the contract containing it is assigned to another party is not dealt with in any of the main international conventions – the New York Convention, the UNCITRAL Model Law and the European Convention on International Commercial Arbitration.[54] Consequently, the issue remains one for domestic law,[55] to be determined by reference to the law governing the assignment, as well as the law governing the arbitration agreement.[56]

Given the separability of the arbitration agreement from the rest of the contract, it might be supposed that special requirements apply to the assignment of the arbitration clause. And indeed this does appear to be the case, particularly in English law (see below). By contrast, German law makes the assumption that the arbitration clause will be assigned along with the main contract.[57]

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51 LaForge, *op. cit*., at 241; Hosking *op. cit*., at 515.
52 LaForge, *op. cit*., at 246.
53 Hosking, *op. cit*., at 515.
54 See Hosking, *op. cit*., at 489.
55 *Ibid*.
56 Redfern *et. al., op. cit*., at 179.
57 See Bundesgerichtshof decision (1978) 71 BGHZ 162 at 164-165; see also Redfern *et. al., op. cit*., at 179.

4.1 English Law

Assignment under English law is governed by the *Law of Property Act* (1925); s. 136 provides that the assignment must be absolute, in writing by the assignor, and express notice must have been given to the other party.[58] Where these conditions are met, the assignee has the right to compel arbitration in his name. This is a legal assignment – in other circumstances, Courts may find that an equitable assignment has occurred. In the case of an equitable assignment, the assignor must join the assignee to bring the action.[59]

4.2 American Law

Under American law, assignment in the arbitration context is governed by the ordinary law of contracts, subject to the general policy favouring arbitration:[60]

Illustrating this principle, in *Cedrela Transport Ltd v Banque Cantonale Vaudoise*,[61] a shipping charter originally existed between Cedrela and Knotts Shipping, which included a broad ranging arbitration clause. Knotts subsequently refinanced the chartered vessel to Cantonale, and informed Cedrela of this change. A dispute arose between Cedrela and Banque Cantonale as to payment, and Cantonale sought to arbitrate the dispute. Cedrela challenged this in the 2nd Circuit, arguing that Cantonale was not a signatory to the contract containing the arbitration agreement. In particular, Cedrela claimed that a non-signatory could only compel arbitration in one of the five

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58 Hosking, *op. cit.*, at 484.
59 *Ibid.*
60 Hosking, *op. cit.*, at 485.
61 67 F. Supp. 2d 353 (1999).

circumstances outlined in *Thomson-CSF v American Arbitration Association*.[62] In the alternative, Cedrela claimed that the assignment from Knotts to Cantonale was limited to the right to receive monies due under the Charter.[63]

The Court rejected Cedrela's first argument, holding that the rights of third party assignees to compel arbitration are additional to the five theories outlined in Thomson-CSF.[64] In relation to the second argument, the Court examined the terms of the assignment, under which Knotts assigned:

> Absolutely all its rights, title and interest, both present and future, in and to the Charter and all moneys whatsoever…[65]

In relation to this argument, the Court found:

> This language is consistent with Cantonale's position that Knotts and Cantonale contemplated a broad transfer of rights under the Charter. Accordingly, the Court concludes that Cantonale obtained the right to demand arbitration pursuant to the Charter and the Assignment.[66]

American law allows both rights and obligations to be assigned. If the assignment is valid, the arbitration clause binds both the original promise and the assignee.[67] The validity of the assignment may be affected by its exact wording: *Bell-Ray, Company Inc. v Chemrite (Pty) Ltd*.[68]

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62 *Op. cit*., at 355.
63 *Op. cit*., at 356.
64 *Ibid.*
65 *Ibid*.
66 *Ibid.*
67 Hosking, *op. cit*., at 486.
68 181 F.3d 435 (1999).

This case concerned an American company (Bel-Ray) which entered into a series of trade agreements with a South African company, Chemrite. Each of the trade agreements included an arbitration agreement. Each agreement also included a term requiring Bel-Ray's agreement to any assignment of Chemrite's rights and obligations under the contract. Chemrite assigned its rights to another company, Lubritene Pty Ltd. Although Bel-Ray did not formally agree to the assignment, the companies continued to deal with each other on the same footing.

Bel-Ray subsequently sought to arbitrate against Lubritene and four of its directors. Lubritene argued that, since Bel-Ray had not agreed to the assignment, it could not compel Lubritene to arbitrate.[69] The Court disagreed. Applying New Jersey State law, the Court held:

> …contractual provisions limiting or prohibiting assignments operate only to limit a parties' [sic] right to assign the contract, but not their power to do so, unless the parties' [sic] manifest an intent to the contrary with specificity.[70]

The Court considered that to "manifest an intent to the contrary with specificity", the contract would need to stipulate that any assignment would be void or invalid without Bel-Ray's consent.[71]

After reviewing the relevant clauses in the trade agreements, the Court noted:

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[69] *Op. cit.*, at 439.
[70] *Op. cit.*, at 441.
[71] *Ibid.*

> None contain terms specifically stating that an assignment without Bel-Ray's written consent would be void or invalid.[72]

The Court then reasoned:

> The Trade Agreements' assignment clauses do not contain the requisite clear language to limit Chemrite's "power" to assign the Trade Agreements. Chemrite's assignment to Lubritene is therefore enforceable, and Lubritene is bound to arbitrate claims "relating to" the Trade Agreements pursuant to their arbitration clauses. We therefore agree that Bel-Ray was entitled to an order compelling Lubritene to arbitrate.[73]

5. Conclusion

Perhaps acknowledging the controversy surrounding this issue, UNCITRAL has recently suggested the following possible amendments to the Model Law:

> The Swiss Rules, for instance, expressly provide, under Article 4, paragraph (2) that: "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".
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> The Working Group might wish to consider whether an express provision on third party intervention should be included in any revised version of the UNCITRAL Rules.[74]

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72 *Ibid.*
73 *Ibid.*
74 Settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules, note by the Secretariat, A/CN.9/W.G.II/WP.143, UNCITRAL, Vienna, 20 July 2006; see § 70 -71.

This formulation would not require the application of the law of any particular jurisdiction to resolve this question; consequently, its enactment (and incorporation into national laws) would not necessarily clarify some of the main concerns in this area.

Perhaps, as Professor Stephen Schwebel has observed, the only solution to this and other problems of uncertainty in international arbitration is to create a world court of arbitration.[75] Until then, uncertainty is likely to persist.

[75] Michael D. Goldhaber, 'Wanted: a world investment court', The American Lawyer: Focus Europe, Summer 2004.