

ADDITION OF PARTIES: A VACUUM LEFT BY THE MODEL LAW IN NEED OF INTERNATIONALLY APPROVED RULES

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INTRODUCTION

The purpose of the present text is to consider an extremely sensitive matter within *subjectively complex arbitrations*. Multiparty arbitrations, in general, are well known and extensively dealt with in arbitration laws and rules — although neither by the current UNCITRAL arbitration rules nor by Model Law. But intervention and joinder — i.e., addition of parties — have the characteristic of either transforming an otherwise “two-party” arbitration into a multiparty arbitration or of giving a new dimension to multipartism, *after the proceedings have started* — multipartism is *subsequent*. The main issue becomes the one of the relationship between addition of parties and the composition of the arbitral tribunal.

I shall try to show that not only, by the very nature of international arbitration, some kind of uniform solution is convenient for the subject of addition of parties, but that such solution should ultimately be placed at a legal level — regarding UNCITRAL, in Model Law.

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ADDITION OF PARTIES AND UNCITRAL RULES AND MODEL LAW

1. Concepts.

- 1.1. This paper refers to and includes what is normally called, in the English legal language, *intervention* and *joinder of parties*. In other legal languages, one word is enough: for example, in French *intervention*, in Portuguese *intervenção*, in Italian *intervento*, in German *Intervention*. There, the specification of modalities operates by the use of *adjectives*: « *intervention volontaire* » and « *intervention forcée* »; “*intervenção espontânea*” and “*intervenção provocada*”; “*intervento su istanza di parte*” and “*intervento per ordine del giudice*”.

Obviously, whenever a third person comes to the proceedings to which it was not originally a party, such event corresponds to a legal phenomenon with a certain unity, irrespective of who took such initiative — the third person, someone already a party, or even the court or the tribunal. There are other possible relevant distinctions according to the status the one added to the proceedings takes within them. One important issue is whether it will be, or not, bound, as a party, by *res judicata*².

¹ I am only mentioning distinctions explicitly made in the respective laws and relating to the origin of the “addition of parties”.

² A very illuminating discussion, at the international level, on the possible kinds of intervention and their respective requirements developed with regard to Article 62 of the Statute of the International Court of Justice (“1. *Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request*”). By its judgment of 13 September 1990, in the *Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, regarding Nicaragua’s request for intervention, the Chamber of the Court decided that the intervening State did not become a party, without the agreement of the existing parties. Therefore, not becoming a party, no *jurisdictional link* between the State intervening and the parties was necessary (*I.C.J. Reports*, 1990, paras. 94 ff. at pp. 131 ff.). Hence, the judgment on the merits does not constitute *res judicata* in relation to the intervening State (*Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua*

To express the phenomenon of third persons coming to the proceedings as parties, I use, in English, *addition of parties*.

1.2. Linked with the concept of *addition of parties* is the concept of *additional parties*: such are the persons added to the proceedings. The notion of additional parties opposes the one of *initial* or *original parties*: the claimant or claimants, who started proceedings; the respondent or respondents, against whom claims were initially made.

2. **The need for a jurisdictional link, of an arbitral nature, between the original and the added parties.**

2.1. For the admissibility of the addition of one party to an arbitration it is surely necessary that there be a jurisdictional link of an arbitral kind between the additional and the original parties³. A trend to consider, in certain circumstances, non signatories as bound by arbitration agreements is well known⁴. The possibility

intervening), Judgment of 11 September 1992, *I.C.J. Reports*, 1992, paras. 421-424 at pp. 609-610). This ruling was confirmed by the full Court when it, unanimously, admitted the intervention of Equatorial Guinea, lacking jurisdictional link to the parties, as a non-party, by the Order of 21 October 1995 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria, Application to Intervene*, *I.C.J. Reports*, 1999, pp. 1029 ff.. See, on these points, as well as on intervention under Article 63, Christine Chinkin, *Third Parties in International Law*, Clarendon P., 1993, pp. 147 ff., and Comment to Article 62 and to Article 63, in A. Zimmerman, C. Tomuschat and K. Oellers-Frahm, *The Statute of the International Court of Justice, A Commentary*, O.U.P., 2006, pp. 1331 ff.. There are also well known examples of non-party or non-full party intervention in domestic systems. All those kind of situations are excluded from the concept of addition of parties and, therefore, from the subject matter of the paper.

³ See, in developed terms, Paula Costa e Silva, “A intervenção de terceiros em procedimento arbitral voluntário no direito português”, in Paula Costa e Silva e Marco Gradi, “A intervenção de terceiros em procedimento arbitral voluntário nos direitos português e italiano”, 2.3 a 2.6, in *Estudos em Homenagem ao Ministro Athos Carneiro de Gusmão*, Ed. Terzo Millennio, 2009.

⁴ In particular, *Multiple Party Action in International Arbitration*, ed. by the Permanent Court of Arbitration, O.U.P., 2009, pp. 3-199 (articles by William Park, Bernard Hanotiau, Alan Scott Rau, Timothy Tyler, Lee Kovarsky and Rebecca Stewart, and Pierre Mayer); and Bernard Hanotiau, *Complex Arbitrations – Multiparty*,

of the addition of a party assumes either that it is bound, together with the initial parties, by an agreement to arbitrate or that it becomes so (at least in what regards the case submitted to arbitration). The issue of the subjective scope of the arbitration agreement is different from and preliminary to the one of parties' addition.

2.2. What can be and has been discussed⁵ is whether one only arbitration agreement between the additional party and the original parties is necessary or if intervention or joinder are possible on the basis of an arbitration agreement just with one of the original parties, when the substantive relationship at stake is directly only with it (f. ex., the relationship between contractor and subcontractor). In my view, the situation corresponds to an issue not of parties' addition, but of consolidation of arbitrations based on different, although possibly compatible, arbitration agreements, and should be dealt with as such.

3. Some existing provisions on addition of parties.

The circumstance of the addition of parties requiring an agreement to arbitrate binding the initial and the additional parties limits in practice its use.

Beyond that, people feel a certain kind of discomfort with intervention and joinder. Such discomfort is expressed not only in the circumstance of UNCITRAL Model Law, even after the 2006 amendments, saying nothing on the matter, but in that

Multicontract, Multi-issue and Class Actions, Kluwer Law International, 2005, pp. 7 ss.. In Portugal, see Carla Borges, "Pluralidade de partes e intervenção de terceiros em arbitragem", *Themis*, VII, 13 (2006), pp. 122 ff.

⁵ See J. F. Poudret et S. Besson, *Comparative Law in International Arbitration*, 2nd ed., Sweet and Maxwell, 2007, pp. 198-199. In Portugal, in particular José Lebre de Freitas, "Intervenção de terceiros em processo arbitral", paper, to be published, submitted to the 3rd Congress of the Centre for Commercial Arbitration of the Lisbon Commercial Association, 2009.

few national laws provide for it: the Dutch Code of Civil Procedure (1986)⁶, the *Code Judiciaire Belge* (1998 Reform)⁷ and the Italian *Codice di Procedura Civile* (2006 reform)⁸. The Portuguese project of a new arbitration law, submitted to the Government by APA, the Portuguese Arbitration Association (on the basis of a remarkable pre-project by António Sampaio Caramelo), as it stands now, deals with the subject.

The issue is considered in some arbitration rules: for example LCIA rules⁹, Swiss Rules¹⁰ and Portuguese 2008 rules of the Lisbon Centre of Commercial

⁶ Article 1045:

“1. At the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit such party to join the proceedings, or to intervene therein. The arbitral tribunal shall send without delay a copy of the request to the parties.

2. A party who claims to be indemnified by a third party may serve a notice of joinder on such a party. A copy of the notice shall be sent without delay to the arbitral tribunal and the other party.

3. The joinder, intervention or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties, if the third party accedes by agreement in writing between him and the parties to the arbitration agreement.

4. On the grant of a request for joinder, intervention, or joinder for the claim of indemnity, the third party becomes a party to the arbitral proceedings. Unless the parties have agreed thereon the arbitral tribunal shall determine the further conduct of the proceedings.”

⁷ Article 1696 bis:

«1 Tout tiers intéressé peut demander au tribunal arbitral d'intervenir dans la procédure. Cette demande est adressée par écrit au tribunal arbitral qui la communique aux parties.

2 Une partie peut appeler un tiers en intervention.

3 En toute hypothèse, pour être admise, l'intervention nécessite une convention d'arbitrage entre le tiers et les parties en litige. Elle est, en outre, subordonnée à l'assentiment du tribunal arbitral qui statue à l'unanimité.»

⁸ Article 816-quinques:

“L'intervento volontario o la chiamata in arbitrato di un terzo sono ammessi solo con l'accordo del terzo e delle parti e con il consenso degli arbitri.

Sono sempre ammessi l'intervento previsto dal secondo comma dell'articolo 105 e l'intervento del litisconsorte necessario.

Si applica l'articolo 111.”

Article 105 states:

“Ciascuno può intervenire in un processo tra altre persone per far valere, in confronto di tutte le parti o di alcune di esse, un diritto relativo all'oggetto o dipendente dal titolo dedotto nel processo medesimo. Può altresì intervenire per sostenere le ragioni di alcuna delle parti, quando vi ha un proprio interesse.”

On the interpretation of those articles, see Marco Gradi, “L'intervento dei terzi nel processo arbitrale secondo il diritto italiano”, in *Estudos em Homenagem ao Ministro Athos Carneiro de Gusmão* cit..

⁹ Article 22.1 (h):

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

(...)

Arbitration¹¹. The current UNCITRAL Rules are silent, but their revision under way considers the matter. I will come back to them later on.

4. The relationship between addition of parties and equality regarding the appointment of arbitrators.

4.1. The discomfort with the addition of parties in arbitration, and the difficulty of the subject, arises from a tension between the convenience, in many cases, of intervention or joinder and the value and principle of *equality regarding the appointment of arbitrators*. The issue of such equality is well known: it was an answer to it that constituted the main basis of the *Cour de Cassation*'s decision in the *Dutco* case¹².

The decision made the ICC, in its 1998 revision of the Arbitration Rules, introduce a provision allowing the Court to appoint all of the arbitrators in the event that multiple claimants or multiple respondents are unable to make a joint nomination¹³.

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

¹⁰ Article 4 (2):

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

¹¹ See below footnote 21.

¹² See the text of the judgment of January 7, 1992, in *Revue de l'Arbitrage*, 1992, 3, pp. 470-472.

¹³ Article 10:

"1. Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9.

2. In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate."

The norm is now being replicated by arbitration laws¹⁴ and, in particular, by arbitration rules¹⁵.

The provision that, claimant and respondent having the right to appoint one arbitrator each, when claimant or respondent are multiple parties resort is made to joint nomination corresponds already to an expression of equality¹⁶. The provision that, when multiple claimants or multiple respondents are not able to agree on the name of an arbitrator, the appointing authority nominates all the arbitrators expresses a higher dimension of equality.

- 4.2. It should be noted that joint nomination together with the *Dutco* rule are not the only ways of applying equality. The Italian Code of Civil Procedure, f. ex., determines that, if multiple parties do not agree on the appointment of an arbitrator, the arbitration is split into several proceedings¹⁷. In arbitrations under Annex VII to the United Nations Convention on the Law of the Sea, the rule is that the arbitral tribunal is comprised of five arbitrators: each party appoints one and the other three are nominated by agreement of the parties or, lacking agreement, in the whole or in part, by the President of the International Tribunal for the Law of the Sea. However, if there are more than two parties with different interests, each one is allowed to appoint one arbitrator, the number of non-party appointed arbitrators increasing, so that there is always one more than the sum of the party appointed arbitrators (Article 3). At least for commercial arbitration, the joint appointment plus the *Dutco* rule is the most practiced and practicable system.

¹⁴ Spanish Law (Article 15, 2). It is included in the Portuguese APA project.

¹⁵ See Ricardo Ugarte and Thomas Bevilacqua, “Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration and Update on the Governing Provisions”, *Journal of International Arbitration*, 27:1 (2010), pp. 9 ff.. To the list referred to by the authors should be added, the Arbitration Rules, version 2008, of the Lisbon Centre of Commercial Arbitration (Article 25).

¹⁶ On the relationship between multiparty arbitration and the issue of equality see, in Portugal, Manuel Botelho da Silva, “Pluralidade de Partes na Arbitragem Voluntária”, *Estudos em Homenagem à Prof. Doutora Isabel Magalhães Collaço*, Vol. II, Almedina, 2002, pp. 499 ss..

¹⁷ *Codice di Procedura Civile*, Article 816-quater.

Now, the addition of parties necessarily converts the arbitration into multiparty arbitration, if it is not already so, or reinforces its multiparty character. And, as referred to above, there is a supplementary complication, from which the particulars of party addition derive: the circumstance that the multiparty nature or the multiparty improvement are *subsequent* to the starting of the proceedings.

5. UNCITRAL 1976 rules, Model Law and UNCITRAL draft revised Rules on multiparty arbitration.

The Model Law determines nothing on intervention or on joinder. It does not even regulate specifically multiparty arbitration. The current UNCITRAL Rules are also silent on both points. Multiparty and joinder issues are being addressed within the ongoing procedure of the revision of the Rules. Draft Article 10, regarding the hypothesis of three arbitrators, establishes, in paragraph 1, the joint appointment by a multiple party of the arbitrator corresponding to it, and paragraph 3 determines that, *“in the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal, and in doing so, may revoke any appointment already made, and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator”*¹⁸. Joinder is dealt with in Draft Article 17 (5), in terms that will be analyzed later.

6. The addition of parties to arbitration.

6.1. Let us come now specifically to the addition of parties.

¹⁸ A/CN.9/WG.II/WP.157, pp. 11-12, and A/CN.9/688, p. 17.

A fundamental distinction has to be made according to whether a request for addition is submitted *before* or *after* the arbitral tribunal is constituted¹⁹. If the arbitral tribunal is not yet constituted, things, at least in institutional arbitrations, may be organized so that the rules on appointment of arbitrators in multiparty arbitration apply, with the participation of the added party. To the contrary, in the event that the arbitral tribunal is already constituted and assuming that nobody would demand that it should be “de-constituted”, the only way to respect the equality of parties in the appointment of arbitrators is to make the addition of parties dependent on the consent of the party to be added, unless the arbitral tribunal has been constituted without interference of the parties.

The consent requested is not for intervention or joinder themselves, but for the composition of the arbitral tribunal. If someone submits to an arbitral tribunal a request to intervene (*intervention volontaire*) it may be presumed that he accepts the composition of the tribunal. But, in what concerns joinder (*intervention forcée*), the acceptance may not be presumed, although it may be tacit.

- 6.2. I know that the UNCITRAL working group on the revision of the rules is adopting a different view. Draft Article 17 (5), as it stands, not only does not deal explicitly with intervention (considering probably that its admissibility is not controversial), but determines that *“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. The arbitral tribunal may make a single award or*

¹⁹ The expression “the arbitral tribunal is constituted” has to be understood with a certain indeterminacy. Literally, it means that all members of the tribunal are vested in their duty. If, in institutional arbitrations, members have to be confirmed, confirmation occurs normally simultaneously. But it may occur in different moments and, in such cases, the relevant reference, for the purposes of addition of parties, may be the first confirmation.

several awards in respect of all parties so involved in the arbitration". It is explained that the draft "*seeks to reflect the decision made by the Working Group that the arbitral tribunal may decide that a party be joined in the arbitration without the consent of that party...*"²⁰.

Let me point out just that: exactly the reasons of equality that justify the French *Cour de Cassation* judgment in the *Dutco* case would lead to setting aside an award concerning an additional party joined to the proceedings without its consent.

One may purport to insert the provision in law in order to avoid illegality. It would be the wrong reason for locating it there. And, at least in some countries, an issue of unconstitutionality would remain. If I were a judge, I would possibly consider a provision admitting joinder, without the agreement of the person to be joined to the composition of the arbitral tribunal, contrary to the Portuguese Constitution, on the basis of the principle of equality (Article 13), together with the constitutional recognition of arbitral tribunals, as tribunals exercising jurisdiction (Article 209, 2). And, in any event, it may be asked whether a decision on such basis may not contradict the country of recognition's public policy, excluding therefore the recognition and enforcement of the award (New York Convention, Article V, 2, (b)).

- 6.3.** I believe that the path for the legal regulation of the addition of parties to arbitration lies in the above referred distinction between request for addition submitted before or after the arbitral tribunal is constituted. I claim for Portugal the first use of such distinction (and, without false modesty, for me to have proposed it). The distinction has been used in the 2008 Rules of Arbitration of the Lisbon Centre of Commercial Arbitration. Article 25 governs the addition of parties before the arbitral tribunal is constituted. It is up to the President of the Centre to accept

²⁰ A/CN.9/WG.II/WP.157/Add. 1, p. 3, and A/CN.9/688, p. 19.

or not the addition. Intervention implies the acceptance of the arbitrators appointed by the party to which the new party associates itself. In the event of joinder, the President of the Centre will fix a term for the joint appointment of the arbitral tribunal, the *Dutco* rule being applicable if no joint appointment is made²¹. The division between addition of parties prior or after the constitution of the arbitral tribunal is also adopted by the Portuguese Association Arbitration project as it stands at the moment.

²¹ Full text of Article 25 is the following:

“1 – If, prior to the constitution of the arbitral tribunal, third persons bound to all the parties by the same arbitration agreement or similar arbitration agreements wish to take part as principal parties in the proceedings, or if, in the event of there being third persons bound by such arbitration agreements, any of the parties requests that such third persons be joined in the proceedings as principal parties in association with the requesting party, the Chairman of the Arbitration Centre shall decide on whether to admit such addition of parties.

2 – The addition will not be admitted if the requirements established by law for it are not met and the Chairman of the Centre shall also reject the addition when he considers that the request was brought to disrupt or will disrupt the normal course of the proceedings.

3 – In the event of intervention, the intervening parties shall be deemed to have accepted the appointment of the arbitrator designated by the party to which it associates itself.

4 – In the event of joinder, the appointment of the arbitrator designated by the party that applied for the joinder shall be considered ineffective, and the Chairman of the Centre shall set the time limit for the party that requested the joinder and the new parties to jointly designate their arbitrator; if such parties fail to reach agreement on the appointment of the arbitrator, the provisions of paragraphs 2 and 3 of Article 8 shall apply.”

In Portuguese:

“1 – Se, antes de se encontrar constituído o tribunal arbitral, terceiros vinculados a todas as partes pela mesma convenção de arbitragem ou convenções de arbitragem semelhantes pretenderem intervir, a título principal, no processo, ou se, verificando-se os requisitos de vinculação mencionados, alguma das partes requerer a intervenção principal de terceiros vinculados pela convenção de arbitragem como partes a si associadas, compete ao Presidente do Centro de Arbitragem decidir sobre a admissão da intervenção.

2 – A intervenção não pode ser admitida se não se verificarem os requisitos que a lei para ela fixar e o Presidente do Centro deverá ainda recusar a admissão designadamente quando se convença de que o requerimento de intervenção se destina a perturbar ou de que perturba o normal andamento do processo.

3 – A intervenção espontânea implica a aceitação da designação de árbitro que tenha sido feita pela parte a que os intervenientes se associem.

4 – Tratando-se de intervenção provocada, fica sem efeito a nomeação de árbitro que haja sido efectuada pela parte que requereu a intervenção, fixando o Presidente do Centro prazo para que a parte que requereu a intervenção e as intervenientes designarem, em conjunto, árbitro; se as partes não chegarem a acordo quanto à designação de árbitro, aplicar-se-á o disposto nos n.ºs. 2 e 3 do artigo 8.º.”

Paragraphs 2 and 3 of Article 8 establish the *Dutco* rule.

Although the text is in good part my responsibility, within the works of the revision of the rules headed by Prof. Calvão da Silva, I would now propose to amend it in some points, what should be done after the new arbitration law is published. But the implied distinction between addition requested before or after the arbitral tribunal is constituted should absolutely be kept.

7. Cases where addition of parties is particularly justified.

Precisely because of the link with the tribunal's composition, addition of parties is much more susceptible of bringing inconvenience and is much more delicate in arbitration than in state jurisdiction. It is therefore justified to limit the addition of parties to cases where the reasons in its favor are particularly weighty. But the evaluation has to be left to the organ administering institutional arbitration or to the arbitral tribunal.

Some kind of *relatedness* will be necessary. In any event, I believe that the situations which strongly justify the addition of parties are those (a) where someone claims the same object as the claimant or invokes a right incompatible with the one pretended by the claimant; (b) where the claimant claims the whole of a credit that can be characterized as joint and several and the respondent wishes to be sure that the co-creditors are bound by the decision or the co-creditors want to be sure of their right of recourse; (c) when the respondent wishes to have at least other people bound by the award for the purpose of possible exercise of right of recourse (joint and several debts, guarantees, subcontracts...). There is also the hypothesis of the indispensable party, but if it is to be associated with the respondent, claimant should have thought about it when filling the claim. The situation is different in counterclaim. I do not consider here transfer of rights or assignment of "contractual positions"²².

²² See, on the matter, Paula Costa e Silva, *loc. cit.*, para 2.7.

8. Claims by and against additional parties; declaratory claims.

The addition of parties normally involves new claims by the additional party or against it. In the event of intervention, the new claim will be made *by* the additional party. In the case of joinder, the claim will be made *against* the additional party. It is of the nature of the addition of parties that some person already a party be involved in the claim. To start with at least, no claim is possible just between additional parties.

The scheme of addition of parties is, by itself, susceptible of never ending. The administering authority of institutional arbitration or the arbitral tribunal must have the power to, at a certain point in time, exclude the addition of new parties and the submission of new claims.

In certain cases, it seems that the addition of parties may be justified without the need for a new claim — by the mere purpose of enlarging the subjective scope of *res judicata*. But it is possible to always find a claim, at least for just a (maybe, conditional) declaratory judgment.

9. The need to include provisions on multiparty arbitration and addition of parties in Model Law.

- 9.1.** International private relations and, particularly, international trade, demand that, as much as possible, uniformity of rules exist. Regarding international commercial arbitration the notion of such a need is vivid, at least as from just after the 1st World War. UNCITRAL work on arbitration had precedents, in particular the studies and projects developed within *Unidroit*, starting under the auspices of the League of Nations and continuing until 1956. UNCITRAL started by preparing

rules for *ad hoc* arbitration, approved in 1976. The great achievement, however, has been Model Law. It is a big accomplishment not only because it corresponded to an acceptable uniform regulation, but especially because it was clearly ahead of all or (I say it for prudence) almost all the national legal sets of provisions on arbitration. Some time afterwards, one of the standards of national law's evaluation was their conformity or unconformity with the Model Law.

The success of Model Law makes UNCITRAL naturally conservative as regards amendments. It approved a modification, in 2006, concentrated especially on interim measures and interim orders. I believe that, in some years, the time will come for the Model Law to deal with multiparty arbitration and with the addition of parties.

- 9.2. Possibly for reasons of prudence, UNCITRAL is dealing with multiparty arbitration and with the addition of parties in the rules.

But, first of all, multiparty arbitration issues should be considered at the level of law. Imagine an arbitration agreement which is silent on how to appoint the arbitrator corresponding to a multiple party and of the consequences of parties included in a multiple party not conveying in a name in particular being an agreement for an *ad hoc* arbitration not referring to (future) UNCITRAL Rules. On which ground should the questions of what to do be decided? If the applicable law also says nothing, the point is whether the response will come by filling a gap in the arbitration agreement or in the applicable law. Very probably, hypothetical will or something of the kind, regarding the arbitration agreement, shall, without a normative basis, say nothing. If a normative basis has to be found, one comes to fill a gap in the applicable law. This implies that the matter is a matter of law.

Rules on multiparty arbitration are a presupposition for the rules to be applied to addition of parties. In what specifically concerns the latter, only law, not rules for an *ad hoc* arbitration, can cover the whole matter, both in institutional arbitration, prior to the constitution of the arbitral tribunal, and, in any kind of arbitration, after such constitution — unless the decision remains in allowing joinder without the need of the additional party to agree at least with the arbitrator appointed by the one or by those with whom he will be associated. If such is the solution, it is better to keep it just in the rules.

10. The challenge of equality of parties.

The fundamental challenge today regarding arbitration relates to new dimensions of equality of parties. The classic dimension is the one concerning the opportunity of any party to present its case, the equal arms principle. Now, the field of the application of the principle of equality is expanding to the appointment of arbitrators in simple multiparty arbitrations; to the relationship between the appointment of arbitrators and the addition of parties; and even to the arbitrator's appointment in general.

Let us not forget, concerning this last point, the provisions of Article 1028 of the *Dutch Code of Civil Procedure*²³ and of § 1034 (2) of the *Zivilprozessordnung*²⁴, according to which the method of appointment of arbitrators, if unequal, may be disregarded

²³ “If the arbitration agreement gives one of the parties a privileged position with regard to the appointment of the arbitrator or arbitrators, the other party may, despite the method of appointment laid down in that agreement, request the President of the District Court within one month after the commencement of the arbitration to appoint the arbitrator or arbitrators. The other party shall be given an opportunity to be heard. The provisions of article 1027(4) shall apply accordingly.”

²⁴ “Gibt die Schiedsvereinbarung einer Partei bei der Zusammensetzung des Schiedsgerichtes ein Übergewicht, das die andere Partei benachteiligt, so kann diese Partei bei Gericht beantragen, den oder die Schiedsrichter abweichend von der erfolgten Ernennung oder der vereinbarten Ernennungsregelung zu bestellen. Der Antrag ist spätestens bis zum Ablauf von zwei Wochen, nachdem der Partei die Zusammensetzung des Schiedsgerichts bekannt geworden ist, zu stellen. § 1032 Abs. 3 gilt entsprechend.”

by a court's decision upon request of the damaged party — meaning that the arbitration agreement clause may, in this regard, become ineffective. And let us not forget also Article 1678 of the *Code Judiciaire* belge, which simply states that “*the arbitration agreement is not valid if it attributes to one party a privileged position in what concerns the appointment of the arbitrator or arbitrators*”²⁵.

Issues of this kind, so fundamental, claim for internationally accepted standards. UNCITRAL should again take lead. Prudence may advise starting at a low level, by the Rules. But the subject is of too much importance to remain with them.

Above all, equality possesses the dignity of law. Ultimately the issue is *due process*.

Summing up:

- Intervention and joinder of parties, collectively addition of parties, if the request is admitted in a case, convert the arbitration in such case into multiparty arbitration or increase its multiparty nature.
- In the event of addition of parties, multipartism is not original, but subsequent, which creates a tension with the principle of equality of parties regarding the appointment of arbitrators.
- The respect of such fundamental principle requires a distinction between addition of parties requested prior to or after the constitution of the arbitral tribunal, coupled with the one between institutional and non institutional arbitration.

²⁵ « 1. *La convention d'arbitrage n'est pas valable si elle confère à une partie une situation privilégiée en ce qui concerne la désignation de l'arbitre ou des arbitres.*
2. (...)».

- In institutional arbitration, if application for addition of parties is submitted prior to the constitution of the arbitral tribunal and it is admitted by the body administering the arbitration, the added party will participate in the appointment of arbitrators, in the general terms.
- In all other cases, the addition of parties must depend, besides the fulfillment of whatever other prerequisites, on the agreement of the person to be added to the name of the arbitrator or arbitrators appointed by, or with the cooperation of, the party to whom they are to be associated, such agreement being implied in a firm request for intervention after the appointment of the arbitrators.
- Multiparty arbitration is a matter of law and only law can cover the several possibilities on addition of parties.
- Sooner or later, not just the UNCITRAL Rules, but the Model Law will have to provide, not only on multiparty arbitration, but also on addition of parties.

Lisbon, 5 April, 2010