

Dr. Marc Blessing

Attorney-at-Law

Chartered Arbitrator (CI Arb)

Of Counsel c/o Bär & Karrer AG

Brandschenkestrasse 90

CH – 8027 Zürich

Tel. +41 (0)58 261 5000

Mobile +41 (0)79 402 5510

Fax +41 (0)58 261 5001

marc.blessing@baerkarrer.ch

**Extension of an Arbitration Clause to
Non-Signatories (Third Parties)**

Summary/Hand-out by Marc Blessing, of counsel, Bär & Karrer AG, Zürich

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Introduction - The Starting Point, and The Problem:

The starting point is simple, or perhaps too simple, i.e.: a contract only binds the parties signing it; this trifle statement is known as the "**privity of contracts**".

And this notion is taken seriously, very seriously, in all jurisdictions.

Yet, nevertheless, as we will see (and indeed often times!), **notions of the (overriding) principle of good faith** may come into play, and may suggest or militate for extending the scope e.g. of a bilateral arbitration clause to a so-called "non-signatory", i.e. a third party (irrespective of the fact that such party did not itself sign the arbitration agreement or contractual arbitration clause).

But let us see: What are the most typical scenarios?

A FACT PATTERNS

I Assignment - Powerpoint Slides: Case 1

- 1 CASE 1: Where a claim is **assigned** (a claim which arose under a contract in respect of which there was an arbitration clause), the assigned claim carries with it the arbitration clause embedded in the original contract "**like a shadow**", accompanying it the assignment.
- 2 Here, the doctrine and court practices seem to be unanimous; the arbitration clause follows the destiny of the assigned claim as an ancillary right. Many decisions have confirmed this (e.g. in Switzerland: Swiss Federal Supreme Court in BGE 134 III 565 cons 3.2; also Decision of 19 April 2011, 4A 44/2011, cons. 2.4.1.).

II Third-Party Beneficiary - Powerpoint Slides: Case 2

- 3 CASE 2: Cross-license "Kiano" and "Sung-sam": Kiano anticipated that it might wish to sell or spin-off the manufacturing division for DRAMs (dynamic random access memories) and agreed with the cross-license partner Sung-sam that the Acquiror X (acquiring the division) shall be entitled to access the cross-license IP-portfolio on FRAND terms. As a third-party beneficiary, the Acquiror X may be entitled to invoke the arbitration clause between Kiano and Sung-sam, although the Acquiror it is not at all a party to the original cross-license contract between Kiano and Sung-sam.

The applicable law might however require that the undertaking between A and B must have intended as providing an independent right to X, unless this would be inferred by customary practice (see e.g. Article 112 (2) of the Swiss Code of Obligations).

- 4 The underlying rationale for binding a third-party beneficiary to the arbitration clause is, for instance, the argument that a third-party beneficiary cannot have the benefits only; it also must be bound by the corresponding obligations arising under the contract (including the commitment to arbitrate).

III Guarantor / Financing Institution - Powerpoint Slides: Cases 3 and 4

- 5 Extension to a **guarantor**, or **lender**, or other party in interest:

CAVEAT: The lender (such as a parent company assisting one of its subsidiaries), or a lending bank, where they factually "*pulls the strings*" – as in many financing schemes by big lending institutions, such as EBRD and World Bank/International Finance Corp!) – might be held liable or co-liable with the principal debtor, and the arbitration clause might get extended to them; I will describe two scenarios from my practice:

- 6 **Parent Company Guarantee** – CASE 3: Deutz (Parent Co) specifically endorsed a few specific contractual provisions in a Contract of its Subsidiary with GE General Electric. However, the arbitration clause was not among those provisions endorsed by the Deutz Parent Co. GE wants to sue in arbitration not only the Deutz Sub, but also the Deutz Parent Co?

Is this possible? Or would GE have to initiate separate State court proceedings against the Parent Co, in parallel to suing the Deutz Sub before the arbitral tribunal?

In my opinion, each and every provision of the Contract between Deutz Sub and GE had to be read **with a mental *asterix**, i.e. an asterix saying "*in case of dispute in respect of this particular provision: arbitrate, not litigate!*"

It was however decisive to note that the Parent Co was aware of the existence of an arbitration clause, it just did not mention it in the short list of clauses which the Parent Company specifically endorsed, but the latter was irrelevant.

- 7 **Lending institution** – CASE 4: KAISER (a large US steel-group) has entered into a contract with Nova-Hut, a failing and practically insolvent Czech steel-plant, for the purpose of rehabilitating Nova-Hut's steel-plant, for modernizing its facilities, and for making it fit for steel production.

Nova-Hut had no money to pay for the very costly rehabilitation. However, it obtained financing from the World-Bank, paid out via IFC International Finance Corp. IFC itself

granted the money as a loan to a consortium of Czech Banks (controlled by the State), and the banking consortium provided the loan to Nova-Hut.

A dispute arose regarding the rehabilitation program, and KAISER threatened to initiate proceedings not only against Nova-Hut, but also against the Czech Banking consortium, against the Czech Republic (responsible for its state-controlled banks) and against IFC in Washington.

KAISER's argument: the contract chain provided that Nova-Hut can decide virtually nothing itself, except after prior approval by the Czech Banks. And the Czech Banks could decide virtually nothing without the former approval by IFC. And, hence, KAISER argued that the IFC/World Bank **is pulling all the strings**, and therefore must be taken as the co-liaible party, alongside with the Czech banking consortium and Nova-Hut.

Economically, therefore, KAISER proceeded against the World Bank as the financing institution.

If you want to avoid this: explicitly draft against this in the contractual documents!

IV Typical Joint-Venture Situations

- 8 Extension from a **joint-venture co.** to the partners controlling it (ex.: type: Westland Helicopters Case (ICC 3879), and many others). Typical issue: are the partners/shareholders of a JV-Co personally bound and liable towards a third party, or only the fronting JV-Company (which might have totally insufficient means to meet any "serious" claims, for instance by the Employer)?

Of course, this is the overall most crucial issue in thousands of joint-ventures formed for a particular project.

V Multiple Contracts: - Powerpoint Slides: Case 5

- 9 CASE 5: Group of Contracts: Extension in the frame-work of **group of contracts** (see the ICSID case in SOABI, and similar types of situations: parallel contracts between the same parties, only one contains an arbitration clause, not the other; the arbitration clause in one contract may however suffice to also cover claims under the parallel contract, if an **unité économique** would justify that, or if overriding notions of good faith would justify it.
- 10 See hereto the example in ICC 7375, Iran v/ Westinghouse: 9 separate contracts were concluded between 1971 and 1978 for erecting and operating a radar protection system in Tehran, covering in stages the entire territory of Iran. Only the first contract contained an arbitration clause in favour of ICC arbitration seated in Switzerland.

Was the arbitration clause "good enough" to also cover (and become extended) to Contracts 2 to 9? This was one of the jurisdictional issues before us. See the discussion on the slides.

VI "Marionette" Companies, and Extension to Organs of a Company

- 11 Looking behind the curtain, i.e. behind a mere „marionette-company": the principal is held responsible, not the „slave"! [This, by the way, is also a *dictum* of the European Commission and the ECJ when holding a party responsible for antitrust violations.]
- 12 Extension to the **CEO** or other persons who served as organs (directors) and **factual organs** of the company bound by an arbitration clause (type: ICC 5730 and 5721 etc.; Swiss Federal Supreme Court in BGE 129 III 727; BGE of 5 Dec 2008).
- 13 Sometimes, **also States** use clandestine marionette-structures to conceal non-official dealings. I got involved in one of these, where the Panamanian company (controlled by one State) initiated arbitration proceedings against the Liberian company (controlled by another State), and the claim was extended to the State behind the Liberian company.

VII Group of Companies - Powerpoint Slides: Case 6 - 12

1 General Comments

- 14 Extension from the subsidiary (party to a contract) to the **parent** co., or even to the entire Group, and vice versa, or to a sister co. (type: Isover St.Gobain/ Dow Chemical; Andersen Worldwide Organization, many other cases, particularly in the USA, France, other civil law countries -- but rare under English law, which is traditionally hostile to the concept). See further references below and under the bibliography.
- 15 My comment: Under French law, the economic notion of a group of companies seems to suffice for affirming the extension of an arbitration clause to a parent company, whereas under Swiss law (and many others) and extension must not be assumed or affirmed lightly; instead, the law allows to recognize the judicial independence of legal entities to prevail over the economic notion of a Group, but - however - subject to the notions and requirements of the good faith-principle/bona fides.
- 16 However, an extension (e.g. to a parent co.) on the basis of the *bona-fides* principle is excluded where the claiming party knew that it is only bargaining with the sub., or must be taken to have known this, and - under the circumstances - must be taken to have accepted this. E.g. my "Kazachstan decision" (CASE 7).
- 17 Compare also the extremely robust and "sporty" practice in holding a parent company liable in **antitrust cases**; see e.g. the decisions of the Commission and ECJ in *Commercial Solvents*, *Stora Kopparbergs Berglas AG*, *Feldmühle*, and more recently: *Akzo Nobel NV* - ECJ Decision of 10 Sept 2009.

[In *Stora*, for instance, the parent company argued before the European Court of Justice that it in no way exercised and kind of influence on its subsidiary, and thus was not responsible/liable; however, the ECJ rejected that argument and basically said that Stora (Parent Co) did not deny that it could have taken influence on its subsidiary, which it failed to do, and - by the way - that it also benefitted from the dealings of its subsidiary by cashing dividends! - hence, the parent co was held liable.
- 18 Looking at **US case law**: the following *indicia* were considered **sufficient** to pierce the corporate veil, or otherwise to extend the scope and reach of an arbitration clause:

- the parent and subsidiary have common directors;
- the parent and subsidiary have common business departments;
- the parent and subsidiary file consolidated financial statements and tax returns;
- the parent finances the subsidiary;
- the parent caused the incorporation of the subsidiary;
- the subsidiary operated with grossly inadequate capital;
- the parent pays the salaries and other expenses of the subsidiary;
- the subsidiary receives no business except that given to it by the parent;
- the parent loses the subsidiary's property as its own;
- the daily operations of the two corporations are not kept separate; and
- the subsidiary does not observe the basic corporate formalities such as keeping separate books and records and holding shareholders' and board meetings.

19 **Factual parameters** to be looked at when considering whether such extension to non-signatories can (or under the circumstances must be) operated; one *indiciu* will not be sufficient, but multiple *indicia* will; e.g.:

- What were the **prequalification requirements** for (e.g.) choosing a particular company, supplier; in other words: what were the expectations of the other side when entering into the contract?
- Was a particular "**Konzernvertrauen**" nourished? ➔ see in Switzerland e.g. the *Swissair* case (BGE 120 II331); *Motor-Columbus* (BGE 124 III 297); and: should the contract be qualified as a so-called "*Konzernvertrag*"? (*Konzernvertrag* or Group-Contract means a contract or contractual commitment which, by its nature and size, not only ties a particular subsidiary, but indeed ties the resources of entire Group. Numerous cases had to be analysed under this concept in the aftermath of Dow Chemical/Isover St. Gobain Case (ICC 5721). I am specifically discussing this concept in connection with the Ceska Sporitelne/UNISYS arbitration which I had to chair.
- Hence, a general *caveat* is justified where the importance of a contract requires means beyond the capabilities of the particular subsidiary.
- Further elements to be considered: Where did the contract **negotiations** take place? If at the premises of the Parent Co, this might create a certain understanding and expectation!
- Discussions during contract negotiations: were certain **expectations** created? ➔ For instance, the representatives of a subsidiary should not speak on behalf of the

Group or the Parent Co., in order not to nourish an expectation that the parent company will also be involved.

- For all negotiators, it is important to make sure that there is a clear understanding as to the parties that should be bound!
- *Caveats* are also justified where **assurances** are given which only the Group as such, or the parent co., can fulfill (such as in case of guarantees, use of or access to IP, marketing services etc.).
- After the conclusion of the contract: the **actual behaviour during contract implementation** is very important and may be legally significant, because **behaviour can step up to creating obligations**.
- **Creating (legitimate) expectations** (in the mind of the other contracting party) **may translate into obligations** (as this was the case in numerous arbitration cases!).
- Moreover: **Tolerating** a certain behaviour without objections may create a legitimate expectation, and a legitimate expectation may create liability (like in the Leobersdorfer/China case; or in the Bridas/Turmenistan case referred to below).
- **Interference** by the Parent co., or other subsidiary, may create liability, and may step up to making it a party to the arbitration agreement; cases in Germany: "*existenzvernichtende Eingriffe*" (interferences by the parent which might ruin the existence of its subsidiary), for instance by imposing on the subsidiary to provide onerous up-stream guarantees, or stiffening-off all liquidity into a cash-pool etc.
- A typical interference we have seen is the **silent liquidation of a party** during the implementation of a contract, or during an arbitral process (many examples in practice!), which may directly entail the liability of those orchestrating such steps. Similar situations have occurred in arbitrations with State controlled entities; see below regarding the Libya-case.
- Agency concepts are used for the purpose of analyzing the legal implications, such as the concepts in Germanic/Swiss law of "**Duldungsvollmacht**" (granting an implicit power of attorney, or power to represent, by tolerating that someone, the agent, acts on behalf of a principal), "**Anscheinsvollmacht**" (granting an implicit power of attorney, or power to represent, by creating an appearance that someone, the agent, has the power and authority to act on behalf of a principal), "**ostensible authority**" under English law, *le mandat apparent* (under French law), all of which provide indicators that not only the agent or mandatory will be bound, but also the principal instructing the "fronting" person (agent) or party.
- Hence, a subsidiary concluding a particular contract could - under the circumstances - be considered as **being the agent for the Parent Co.**, or for the entire Group (an argument which frequently was used in the USA).
- And similar concepts also apply in State arbitration cases; see below.

- 20 However, for lawyers, there is a **very simple "recipe"** to avoid any such (undesired) situations to occur: ➔ if you want avoid any such undesired extension, just draft against it! If you want the opposite, require appropriate language!

2 Some Further Comments Regarding Particular Cases - Powerpoint Slides Cases 6 - 10

- 21 In CASE 6: Ceska Sporitelna Banka/Unisys International B.V., we as arbitrators affirmed that the huge contract entered into by Ceska Sporitelna Banka (for providing computer systems, hardware and software for more than 1'000 banking branches in the Czech Republic) not only bound the Dutch subsidiary Unisys International BV (essentially a letter-box company), but indeed tied the entire resources of the Unisys Group. Of course, many factual elements were considered, but in essence we considered Unisys USA, i.e. the parent company as being bound. Contract negotiations had taken place at the Unisys headquarters in the USA.
- 22 In CASE 7, Air Kazakhstan, on the basis of the facts, reached the opposite decision, and declined the extension of the arbitration clause from the Panamanian (or Aruba Island) SPC (special purpose company) to its deep-pocket US sister company belonging to General Electric, because evidence was shown that, in the aircraft leasing business, it was/is customary (in similar situations) that for each and every aircraft a "Banana-Republic"-company is used as the lessor. This was clearly known to the legal advisors of Air Kazakhstan (which were the most prominent US lawyers for aviation law, based in New York), and their knowledge had to be imputed on their client, i.e. on Air Kazakhstan. Hence, if Air Kazakhstan and/or its lawyers had concerns, or had intended to extend any potential liability to a deeper-pocket entity, they should have bargained for that in the contract.
- 23 In CASE 8, Leobersdorfer (Austria) vs. a Chinese industry (as buyer), located in the Anhui Province, negotiations for the Contract had taken place in the premises of the Chinese parent organization in Peking (CMEC). All subsequent contract correspondence was addressed to the nationwide organization CMEC in Beijing, was received there and was answered there (on behalf of AMEC/Anhui). Business cards of the representatives also hardly allowed a distinction as to whether a person is acting for CMEC or for AMEC.

In a detailed factual analysis, the Arbitral Tribunal reached the decision that an overriding confidence was nourished, in the minds of the Austrian executives representing Leobersdorfer, and that the nationwide organization would be responsible for the correct implementation of the Contract. AMEC unsuccessfully argued that the signatories of the Contract were only representatives of the provincial organization AMEC and that AMEC on the basis of its organizational charter had no authority whatsoever to act for or bind the nationwide organization CMEC.

Hence, the Arbitral Tribunal affirmed the liability of the nationwide organization, as an emanation of the good faith principle.

The Arbitral Award was then attacked by a setting aside procedure before the Swiss Federal Supreme Court, but the Swiss Federal Supreme Court discarded the challenge and clearly confirmed the decision of the Arbitral Tribunal in its published decision of 1 September 1993.

- 24 In CASE 9, Saudi Butec vs. Saudi Arabia Saipem and Saipem SpA, the Lebanese company Butec had entered into a construction contract with Saudi Saipem (a local company of Saipem SpA (Italia) established in Saudi Arabia). All negotiations took place in Milan. In that case, the Arbitral Tribunal, on the basis of some very particular factual elements, did not allow Butec to extend its claims to the Saipem parent company. However, absent such particular elements, an extension would most probably have been justified because, in fact, the local Saudi Arabian Saipem company only had to be formed as a matter of Saudi law requirements, which were known to the parties, but as such was merely an empty shell and “post-office” which could be served with the Saudi governmental mailings.
- 25 In CASE 10, BW/Murabblack and an Indian Buyer, the situation basically was as follows: Murabblack Ltd operated a carbon black plant in Switzerland which, due to high operating costs, was no longer commercially viable. However, an Indian company agreed to buy the entire plant, such that the plant in Switzerland had to be dismantled and had to be re-erected in India (in an industrial area of Mumbai). EW (headquartered in Basle, today known as IMPLENIA) had a 60% shareholding in Murabblack, and agreed to provide some guarantees in favour of the Indian buyer.

What actually happened was that the supervision of the re-erection of the carbon black plant in India (which supervision had to be performed by Murabblack) proved to be much more difficult than anticipated by Murabblack, and more and more BW (as the 60% shareholding company) had to deploy its own resources in terms of financing and personnel to supervise the erection in India and to make the plant fit for accepting tests. Based on this situation, the Indian buyer not only directed its monetary claims (in an LCIA arbitration) against Murabblack, but also against BW.

- 26 In CASE 11, Peterson Farms v/ C&M Farming, the US seller Peterson Farms sold infected products to the Indian buyer C&M, i.e. to the Indian parent company holding numerous subsidiaries all over India. The infected products were distributed by C&M parent company to its subsidiaries.

Due to the defectiveness, C&M did not pay the outstanding purchase price to Peterson Farms. Peterson Farms initiated arbitral proceedings in London against C&M. C&M, thereafter, counterclaimed not only its own damage but also raised a counterclaim for the damages suffered by its numerous subsidiaries.

In its decision, the Arbitral Tribunal, sitting in London and applying English law, however, denied to exercise jurisdiction over the counterclaim insofar as the damages suffered by the subsidiaries are concerned, thereby ruling that a group of companies doctrine is not part of English law. That decision gave rise to intensive debates, and many articles were written on the subject.

I was not involved in that arbitration. From an economical point of view, however, the decision of the Arbitral Tribunal appears to be wrong, for a very simple reason: If the numerous Indian subsidiaries suffered a damage due to the defective deliveries, the losses also translate into losses of the parent company C&M, be it that the parent company may have had to support the subsidiaries, or got less upstream dividends, or suffered a loss in the value of its shareholding in the subsidiaries. However, obviously, much depends on how C&M did plead its case before the Arbitral Tribunal (of which I am not sufficiently informed).

- 27 In CASE 12, Mouawad v/ Radian and URS, the situation basically was as follows: Right in the center of Beirut, a large area had to be rehabilitated by removing huge quantities of waste so as to make the area fit for new urban development. The Lebanese Government, via Solidère, invited tender offers from international contractors which (as usual) had to satisfy detailed prequalification requirements. The US firm Dames & Moore, with its subsidiary Radian USA did win the campaign, and the Prime Contract was then entered into between Solidère and Radian USA.

Having been awarded this major contract, Radian USA, in turn, delegated the waste-cleaning and earthworks to a local Lebanese company, i.e. Mouawad, and a sub-contract was concluded. Mouawad performed a huge waste-cleaning job during which it started to claim for additional payments on numerous grounds (including, for instance, that much more work had to be undertaken than contractually agreed etc.). As such claims for additional payments were not satisfied, Mouawad initiated ICC arbitration against Radian USA (and its local subsidiaries in Beirut), and also against URS CORP (USA), which meanwhile had taken over the Dames & Moore Group.

Could Mouawad extend the scope and reach of the arbitration clause in its Contract with Radian to the new parent company URS CORP (a Fortune 500 company). This question had to be analyzed very carefully in a jurisdictional award rendered by the Arbitral Tribunal having its seat in Paris.

In its jurisdictional Award, the Arbitral Tribunal identified three reasons why extension of the arbitration clause and a liability of the new parent company UAS Corp. should be denied, against almost twenty strong reasons suggesting that, indeed, an extension of the scope and reach of the arbitration clause to the new parent company UAS Corp. would appear to be justified. Without setting out all of these reasons in detail, it suffices here to mention that, for instance, URS Corp during the ongoing earthworks in Beirut, reduced the staff of the local Radian company from several thousands to half a dozen, and removed the financial strength of Radian as such. Furthermore, the parent company (URS CORP) exchanged the Radian directors, and caused the election of its own appointees (such that most directors served in both, in URS and in Radian). Salaries and expenses of Radian became paid by the parent company (since the subsidiary was virtually stripped of its assets, and was carried along with an inadequate capital-base). Moreover, URS CORP channeled new business to other group companies, no longer to Radian.

Hence the expectations and confidence which initially had inspired Solidère (and the Lebanese Government) to select Radian as a qualified contractor on the basis of the prequalification documentation, became frustrated due to acts of the parent company. These are some of the elements which the Arbitral Tribunal considered when affirmed arbitral jurisdiction over the US parent company URS CORP.

An interesting aspect is that, unbeknownst to the Arbitral Tribunal deciding the Mouawad/Radian case, a parallel arbitration took place between Solidère and Radian (presided by a Belgian chairman), which other tribunal reached exactly the same conclusions, although with some different motivations.

VIII Extension to the State

- 28 Already in one of the most famous cases, in **SPP v/Egypt** (ICSID Case No. ARB/84/3, Award of 20 May 1992, ICSID Review Vol 8 (1993), at p 351), it was held:

*"Whether legal under Egyptian Law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authorities of the Government. These acts, which are now alleged to have been in violation of Egyptian municipal law, **created expectations protected by established principles of international law**. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on these acts. If the municipal law does not provide a remedy, the denial of any remedy whatsoever can not be the final answer."*[emphasis added]

29 Let us note here from this landmark decision: **creating expectations may entail liability**; we will see this in the next case to be discussed, in BRIDAS.

30 In CASE 13, Bridas (Argentina) had secured an oil drilling concession for the exploitation of an oil field in Turkmenistan. It had entered into the Contract with Balkanbebitgazsenegat as a joint venture partner. Disputes arose, and Bridas initiated ICC arbitration not only against Balkanbebitgazsenegat, but also against the State of Turkmenistan. For numerous reasons, the Arbitral Tribunal affirmed the extension of the scope and reach of the arbitration clause to the State of Turkmenistan; see the detailed comments on this decision in Marc Blessing, State Arbitration: Predictably Unpredictable Solutions?, Journal of International Arbitration, Vol. 22/December 2005, at pp. 466.

Most essentially, the Arbitral Tribunal considered that the local partner Balkanbebitgazsenegat undertook numerous commitments which in fact only the Government itself could undertake (including for instance guaranteeing tax exemptions, exemptions from customs duties, exchange control protection, and guaranteeing certain rights including access to state owned pipelines). The Tribunal, in its core *dictum*, concluded that the contractual assurances and commitments of Balkanbebitgazsenegat **"reflect the direct hand of the Government of Turkmenistan"**.

In a further core *dictum*, the Tribunal said:

"The rational good faith conclusion is that the Government intended the Claimants to rely on these commitments and to be bound to ensure, as only it could, that they would be fulfilled. ... They are contractual commitments of the Government to the Claimants that the vehicle in which they are investing, will have certain rights and privileges ... the legitimate expectation of a party can translate into intention. That is, the legitimacy of the expectation reflects the intention of the representor for the representee to have an expectation. The expectation reflects the intention of the representee. The Claimants were entitled to have a legitimate expectation that what was represented and guaranteed to them in the Joint Venture Agreement would be fulfilled. Only the Government could fulfill those requirements."

In reaching this decision, the Arbitral Tribunal did not confine its analysis to merely looking at the plain text of the Joint Venture Agreement, but looked backwards and explored in detail how the relevant Contract came about, from the bidding process to the first preliminary negotiations up to the signing of the Contract. Hence, the entire negotiation history was of importance for reaching a proper understanding of the parties' intentions.

Furthermore, the Tribunal not only looked at the plain text of the Joint Venture Contract, but analyzed the true intentions and the behaviour manifested by the parties during the implementation phase. Hence, the Bridas Tribunal examined conclusive behaviour of the parties during performance, and evaluated the involvement of government officials, reach-

ing a conclusion that indeed the Turkmenistan Government wanted to keep its hands on the project.

- 31 The similarities of approaches taken by the Arbitral Tribunal in the Lebanese case (CASE 12) and in the Bidas case (CASE 13) are truly obvious, and we note that these approaches are entirely **consistent with key-notions of the UNIDROIT Principles 2004**.

For instance:

- In the sense of Article 1.8 UNIDROIT Principles 2004, a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably had relied.
- Under Article 2.1.1 UNIDROIT Principles, contractual obligations may also arise *"by conduct of the parties that is sufficient to show agreement"*.
- According to Article 4.1.1, contract interpretation must be based on the common intentions of the parties.
- Also under Article 4.2, the conduct of a party is a relevant aspect for interpreting the scope and reach of contractual obligations.
- Under Article 4.3 UNIDROIT Principles, for the purpose of properly interpreting a contract, the common intentions of the parties must be researched, all circumstances are to be explored, including specifically the preliminary negotiations between the parties, the practices which the parties may have established, the conduct of the parties subsequent to the conclusion of the contract, the nature and purpose of the contract, the meaning commonly given to terms and expressions in the trade concerned, and usages.
- According to Article 4.8 UNIDROIT Principles, in case of a lacuna, regard is to be had to the intentions of the parties, the nature and purpose of the contract, good faith and fair dealing as well as reasonableness, and
- finally, Article 5.1.2 of the UNIDROIT Principles specifically refer to imply obligation which may stem from the nature and purpose of the contract, from practices established between the parties, from usages, from good faith and fair dealing and from reasonableness.

- 32 In CASE 14, Sogea v/The Ethiopian Road Authority and the State of Ethiopia, three contracts were signed for the purpose of rehabilitating a major road connecting the capital Addis Ababa to the ports in the red sea. The Contract was signed between Sogea and the "Government of Ethiopia/Ethiopian Road Authority". There was no signature as such by the Government or the State of Ethiopia.

Essentially, the Arbitral Tribunal considered two different scenarios which had to be distinguished: First, the scenario where a state-controlled entity - as an independent organ of the State - performs a task of the State itself, and second, a scenario where a state-controlled entity engages in ordinary commercial activities.

In the first case, the Tribunal reasoned, the "actor" is clearly the State itself (and not only the state-controlled entity or organization). In the second case, the "actor" is in the first

instance the state-controlled entity, and it will largely depend on the very particular circumstances to determine whether or not the State standing behind and controlling that entity would either (i) not be engaged at all, or else (ii) would have to be regarded as being a co-responsible party under any given contractual regime, or (iii) would at least have to be regarded as being a financial co-liable party for any monetary sum awarded to the award creditor.

In the case at hand, the Tribunal argued that the Ethiopian Road Authority had to fulfill a main/core task of the State itself, i.e. to maintain a vital access road for enabling a vital traffic-flow from the port facilities to the capital. In its very detailed analysis (in an award of 402 pages) the Tribunal considered that - quite in the sense of numerous writings on state responsibility - the legal distinctiveness of the state organization and the State itself had to be disregarded, if justified under the "*alter ego*", notions of the piercing of the corporate veil and general principles of international law, and references were made to similar cases where state organizations simply acted as direct agents of the State, justifying an application of the very basic notions of agency law, in the sense that not only the agent but also the principal (i.e. the State) may be bound.

IX Mergers; Dissolution

- 33 In numerous **merger** cases, de-mergers, legal succession: a third party will "inherit" the obligation to arbitrate, without ever having signed an arbitration clause.
- 34 After a **dissolution** of a subsidiary bound by an arb. Clause: does the parent co. winding up the sub become bound under the arb. clause of its former subsidiary? YES, of course, where the dissolution was engineered in violation of the fair and reasonable expectations of the other party! (several cases)

X Consequences of Interventions (e.g. by a Parent Company, or by a State)

- 35 Extension due to **significant interventions** by the parent company "X": Sub A (a sub of X) has concluded a contract with B: during negotiations and/or during performance, X repeatedly intervened in the negotiations and or performance; hence, the question arises whether by so doing X adhered to the contract A-B **by way of conclusive conduct**, based on the principle of good faith (there is an abundance of materials on this – and I had several cases affirming the extension, also supported by Supreme Court Judgments). See also the Swiss Fed supreme Court Decision cited below (requiring however constant or at least repeated interventions).
- 36 Extension to the controlling individual/shareholder (particularly where there was an **interference** or **immixion** (French term), either into the contractual performance itself, or into the affairs of the subsidiary.
- 37 For instance, in **ICC Case No. 7245 between Claimant NTA (France) and the Municipality of Jabal Alakhawar (Libya)**, the Libyan administration aimed to frustrate the arbitral process by simply dissolving the initial respondent such that, in fact, the claimant party no longer had anybody "to look at". However, the ICC Arbitral Tribunal consisting of Youssef Takla as Chairman, Mohammed Bedjaoui and Hassan Eddinali, unanimously decided that the next higher state organization (i.e. the one that decided to dissolve the respondent) had to be considered as the (new) respondent in the arbitral process in a jurisdictional award rendered in Geneva on 28 January 1994.

- 38 In the 1970s, a similar situation occurred in **Bangladesh**, where the government had dissolved the State controlled entities which had been taken to arbitration by foreign investors. As a consequence, the arbitrator sitting in Geneva held that the State of Bangladesh must be docketed as the responding party. [The decision was however challenged in proceedings to the Swiss Federal Supreme Court, which annulled the decision, prompting a hefty outcry in the arbitration communities; see e.g. Marc Blessing, Sovereign Immunity – a Pitfall in Sate Arbitration?]

XI Investment Treaty Arbitration - "Arbitration Without Privity"

- 39 I will just mention in passing the importance of "investor-host State arbitrations", which typically are initiated by an investor on the basis of the some 2000+ Bilateral and Multilateral Investment Treaties. These Treaties (BITs etc) all contain an arbitration commitment of the signatory States, in the sense that the Host State shall accept arbitration to settle any claims which an investor might assert, for instance on the basis of an allegation of unfair treatment, or alleging to have suffered measured akin to expropriation etc.
- 40 I cannot explore this vast subject further in the present context. Suffice it to realize that investors are initiating such investment treaty arbitrations without having signed any arbitration agreement with the opposing state, simply based on the *erga omnes* offer to which the Host State has agreed on the basis of the bilateral (or multilateral) Investment Treaty.

XII Behavioural Commitment Arbitration (Under Reg1/2003 and EU Merger Control)

- 41 A similar type of arbitration without privity, i.e. arbitration procedures which are initiated without the parties having contractually signed a neutral arbitration clause, is provided for - indeed rather typically - in the framework of EU merger control, i.e. in all those cases where the merging parties, in order to get the merger approved by the EU Commission, had to concede commitments (i.e. commitments in most cases of a behavioural nature, exceptionally also of a structural nature).

In 90% of the EU Merger Control Decisions, in the framework of which such commitments are imposed, are "access-cases", i.e. cases in which the merged entity will be required to grant access to some essential facilities, and to keep those facilities open and accessible to any third parties that wish to make use of them. And, again, typically, such access will have to be granted/conceded on a FRAND-terms (fair, reasonable and non-discriminatory terms). In the framework of its approval of such commitments, the EU Commission regularly requests an arbitration commitment, in the sense that the merging parties or merged entity commit themselves to accept international arbitration which may be initiated by any third party that might complain or raise claims alleging that the merging parties did not comply with the commitments imposed by the Commission.

For details, see my book Marc Blessing, Arbitrating Antitrust and Merger Control Issues, Swiss Commercial Law Series Vol 14., 215 pages.

A similar situation exists for this type of regulatory arbitration in the framework of commitments under Article 9 of the EU Regulation 1/2003, i.e. in connection with commitments which, for instance, are imposed by the EU Commission on dominant parties, with the focus to ascertain that, for instance abuses of dominance under Article 102 TFEU would be adjudicated by an independent private arbitral tribunal.

In all these cases, arbitration procedures take place without the claiming party ever having signed an arbitration clause with the respondent (i.e. either the merging party, or the party investigated in connection with Articles 101/102 TFEU).

B Jurisdictional Aspects to be Looked at When Evaluating Such Situations

- 42 Typical objections raised by the non-signing party: it will argue that it did not sign an arbitration clause, and hence can not be bound by it; this, however, is **often of no avail!**
-
- 43 in Switzerland: Art. 178 (1) and (2) of the Swiss Private International Law: the fact that an arbitration clause exists with, for instance, a subsidiary may be sufficient to satisfy the "in writing"-requirement; once there exists an arbitration clause or arbitration agreement, it will then be a matter of analysis (under Article 178 (2) PIL) to determine ***ratione personae*** whether that arbitration clause will also bind a non-signing party, such as the Parent Co.
- 44 There is an interrelatedness of the *lex arbitri* and the *lex incorporationis* regarding the capacity and authority of representatives of the non-signatory: in practically all cases, a party arguing that it is not bound by an arbitration clause will refer to the *lex incorporationis* for arguing, for example,
- that the company was not authorized to enter into an arbitration agreement, or
 - that its officers or representatives had no authority whatsoever to sign an arbitration clause,
 - or that double signatures would have been required,
 - or that no Board Resolution had been passed which would be required under the domestic law applicable to the company.

However, those arguments are – in the end – not controlling, because – ultimately – the law at the seat of the arbitral tribunal, the ***lex arbitrii***, will have to determine whether or not such pleas/defenses are meritorious. This approach also ties in with the perception of the New York Convention 1958. The *lex arbitrii* in the end controls not only the jurisdictional question, but also certain issues touching on the substance, for instance – ultimately! – capacity-issues, issues regarding valid representation etc; see the next title.

C Substantive Law Issues

When is it justified to hold a non-signatory co-liable with the signatory?

What are the legal notions applied?

What are their sources?

- 45 Legal sources for determining the issue whether or not to hold that a non-signatory person or company shall be a party in arbitration proceedings: first, parties will refer to their national law, for instance to the *lex incorporationis*. Hence, for instance, in-house counsel will almost always plead and argue that, under (say) Maryland Law, the parent company (or sister company) could not be sued for liabilities of one of the subsidiaries (in the same way as a State will argue that it is not directly liable for acts of a State controlled organization).

However, the *lex incorporationis* is **not at ultimately controlling** (for very good reasons!)

- 46 As a second tier, parties will then argue such liability issues under the terms of the *lex causae* (i.e. under the substantive law chosen by the parties in the relevant contract), and may very well argue that, also under such law, there would be no legal basis for affirming a liability of (say) the parent company for acts or shortcomings of one of its subsidiaries.

But already here, a new "playground" is opened, because indeed, already under the *lex causae*, a particular behaviour of a parent co. may be considered to fall under *culpa in contrahendo*, and this might trigger a contractual liability.

- 47 And yet, **ultimately** controlling is not even the *lex causae*, but the *lex arbitri* (many cases have shown that arbitrators will ultimately take a distant look to both, the *lex incorporationis* and to the *lex causae*, but instead they will reflect - under notions of the *lex arbitri* - whether it is admissible for a party to raise a jurisdictional plea before the arbitral tribunal. This solution was also backed up by the Swiss Federal Supreme Court.

This, obviously, has very far-reaching - and very positive - consequences (and we should no longer see the many bad cases which had been reported involving parties from Indonesia, Syria, Egypt, Saudi Arabia, etc.).

➔ It is thus a very important aspect to note that the home-country law of a company is largely irrelevant. If a party steps out into the field of international business and trade, it must accept to be treated according to internationally recognized standards, and can not invoke e.g. flaws or defenses originating from municipal law to deny its obligations vis-à-vis **bona fide third parties** who had acted in reliance of the validity of the acts etc.

This, for instance, applies to powers of representation, capacity and - as we see from the cases discussed here - **also applies to expectations created (which may translate into obligations)**.

- 48 Sometimes, tribunals have adopted a de-nationalized approach, by applying transnational law, *lex mercatoria*, general principles of law, or the UNIDROIT Principles in support of their conclusions.

Regarding the validity of an arbitration clause, the **French** solution (since the *Dalico* decision and the *Bomar Oil* decision of the French *Cour de Cassation*, see *Revue de l'arbitrage*

1994, 116 ss, and 108 ss) is to state that there is **no requirement at all to resort to a particular national law**. Instead, it suffices to look at the factual circumstances to determine whether a valid agreement to arbitrate was concluded.

Summarizing, tribunals apply

- the **effects doctrine** regarding matters of **agency** and **representation**,
 - taking a **distant look** to narrow national legislations and defenses grounding in purely municipal/domestic laws, [reflect why this approach is indeed justified!],
 - and applying the **bona fides principle, which may be prevailing and over-riding** for instance the limitations of authorities grounding in the local laws or articles of association (ICC 5730, ICC 7375 and many other cases),
-
- considering essentially for instance the **behaviour of a non-signatory party**, such as for instance its active participation prior to the conclusion of the contract, active participation during the contracting phase, and conclusive behaviour during contract implementation;
 - and in this context, arbitral tribunals will have to consider very carefully what level of involvement would indeed justify an extension, for instance to the parent company; hence, the Tribunal's analysis must very carefully analyse all factual elements, from the perspectives of both parties or all parties, and thus any answer will be **heavily fact-related**.
 - An important element is the liability/responsibility of, for instance, a parent company, where a certain understanding or expectation was created, for instance the expectation that not only the signatory but also its parent company would stand behind (in German: so-called „**Haftung aus erwecktem Konzernvertrauen**“).
 - An important legal notion is the so-called instrumental theory („**Instrumentaltheorie**“), and its application, in the sense that a parent company may well (as indeed often times is the case) use one of its subsidiaries as an instrument to conclude a contract with a third party, with the effect, however, yet according to the factual circumstances, that the parent company might be considered co-responsible together with the subsidiary.
 - Sometimes, tribunals have referred to the so-called unity theory („**Einheitstheorie**“), in the sense that separate entities must be seen as one single group. The "**single economic entity**"-approach (**unite économique doctrine**), is upheld particularly by the ECJ in its practice in the **last 35 years**; see e.g. the 9 Sept 2009-Judgment in Akzo Nobel NV.
 - Regarding bundled contracts where not all of them contain an arbitration clause, the standard issue will be to determine whether or not they altogether must be considered as forming a "**single uniform business transaction**".
 - Extension of an arbitration clause might also be operated to a **third party beneficiary** (many cases under US laws).
 - **Tolerating** an apparent or ostensible authority of representatives may easily lead to a conclusion that the party so represented (i.e. the principal)

will be validly bound. Defenses by the principal grounding in local law, e.g. alleging lack of actual authority, lack of a valid contractual or statutory power, may be of no avail vis-à-vis bona fide third parties.

- In particular, the tacit approval (or indeed the ratification by **conclusive behaviour** of the non-signatory) will normally lead to the conclusion that the party represented (i.e. the principal) will be bound.
- National laws and court practices may have established particular **alter ego** notions, and notions pertaining to the principles for **piercing the corporate veil**. See also the concepts of **agency by estoppel**, or **acquiescence** under English law.
- National laws and court practices may also have established particular notions regarding mere **dummy** – companies, or **strawmen**-structures.

49 **The overall criteria:**

- (i) Was, under the prevailing circumstances, a **particular confidence** built up in the mind of Party A to the effect that not only Party X but moreover Party Z will be bound? **and**
- (ii) (ii) does this confidence deserve an **overriding protection** (e.g. overriding the privity of contract – notion)?

Numerous cases have discussed these elements. For instance, a **landmark** case in Switzerland is the supreme Court's Decision published in **BGE 4A_376/2008 of 5 Dec 2008**: In this case, the Sole Arbitrator rejected the request for extension as inadmissible, but the Swiss Federal Supreme Court disagreed and reformed the Award by extending the scope and reach of the arbitration clause to a non-signatory party; quite a **unique** (but certainly correct!) **decision**!

D The Essential Factual and Legal Obstacles Which Would Speak Against an Extension

50 But now, what speaks against?

- Of course, **the important notion of privity** of contracts, as a very strong basic notion.
- the deeply rooted notion of the **separateness** of legal entities, separate from its shareholders or Parent Co.
- legal certainty and legal **foreseeability** of the contractual regime to be considered

51 Hence, you must have an indeed **very good answer** to the question:

„Why did you not require, when negotiating the contract, that the [parent co.] shall also be or become a party to the contract?“

- Yet, sometimes (but probably in the minority of cases only!) a party has a very good answer.

52 Express provisions in the relevant Contract must be considered very carefully and must be applied as negotiated terms of the business; and if they suggest that **only and exclusively** the signing party/parties shall be bound, and the claiming party must be taken to have accepted this aspect of the deal, then the question to extend the clause to others would seem to be misplaced to begin with;

- a mere guarantee, e.g. issued by the Parent Co., would as such not be sufficient (DFT 134 III 565; ASA Bull 2008, 777; **but** a more active intervention could easily justify an extension.
- *Idem*, if there is a recognized custom of the trade or of the business: e.g. the use of an SPC (single purpose company) for the purpose of selling or leasing an aircraft (see the example of Air Kazachstand).

53 Moreover, **a strong integration clause** - as used in the typical US-style boiler-plate provisions - might be an effective shield against any desires to extend the arbitration clause to a third non-signatory party.

For instance a clause like this one:

"No term or provision of this Contract shall be varied, extended or modified by any prior or subsequent oral or written statement, conduct, or act of either Party, except by a written document referring to this Contract and properly executed in writing in the same manner as this Contract."

E To Conclude: There is No Easy Answer!

- decisions will be heavily be fact-related;
- and all elements of those facts, including the history up to and behind a contract, must be analyzed with the greatest care - one of the most difficult tasks in today's arbitral practice!
- **Hence, all „hard and fast“ answers are likely to be either overly superficial, or wrong.**

F Lessons to be Learned From Practice: Drafting Checks While Making/Negotiating a Contract.

- 54 If you consider that not only your opposite contract partner (being a subsidiary etc) should be bound, but also - more than that, e.g. the Parent Co. - you must ask for it and **bar-gain for it** during contract negotiations!
- 55 Similarly, if you want to **avoid** – when acting for a sub – that also your Parent Co. would risk to be sued and seized in an arbitration, **you should draft against it**, by indicating: *"the parties bound hereunder are only those signing this Contract, and no other person, or related company, or parent company etc"* (or some similar language).
- 56 Often times, however, the latter is not done, because - if this is made a point of discussion - there will be no agreement between the parties, and the contractual relationship will be dead!

this is why I am **confident** that I - for the better or worse - will have to solve such issues some more times in the future as chairman or arbitrator!

G Just a Few Indications to Recent Articles and Cases

[There exist 100+ articles and case notes on this topic, and hundreds of decisions, many of them reported; hereinafter just of few of them which I happen to have on my desk.]

William W. Park: Non-Signatories and International Contracts: an Arbitrator's Dilemma, in: Multiple Party Actions in International Arbitration, Oxford University Press, 2009; ISBN: 9780199551729;

Pierre Mayer: Extension of the Arbitration Clause to Non-Signatories under French Law (Oxford University Press, same volume, pp. 189 ss);

Alan Scott Rau: Consent to Arbitral Jurisdiction: disputes with Non-signatories; same volume, pp. 69 ss;

Adrian Winstanley: Multiple Parties, Multiple Problems; same volume, pp. 213 ss;

John M Townsend: Non-Signatories in International Arbitration: An American Perspective, 13 ICCA Congress Series, 359 ss;

William W. Park: The Arbitrator's Jurisdiction to Determine Jurisdiction, 13 ICCA Congress Series, 55 ss;

Georg Naegeli/Chris Schmitz: Switzerland: Strict Test for the Extension of Arbitration Agreements to Non-Signatories, SchiedsVZ Juli/Aug 2009, 185-188;

Stephan Wilske/ Laurence Shore/Jan-Michael Ahrens: the Group of Companies Doctrine – Where is it Heading? The American Review of International Arbitration, 2006, 73-88;

Richard Bamforth/Irina Tymczysyn (Olswang): Joining Non-signatories to an Arbitration: Recent developments, Cross-Border Handbooks Dispute Resolution vol 2: Arbitration 2007/2008, 9-13

BGE 129 III 727 (discussed in Richard Bamforth' Article);

BGE vom 8. Dec. 2008 (see Attachment); ASA Bulletin 4/2009, 745-779

BGE 4 A_160/2009 vom 25. August 2009: [Bei einem Durchgriff verlagert sich eine Schiedsklausel auf die dahinterstehende beherrschende Person]

Werner Müller/ Annette Keilamann: Beteiligung am Schiedsverfahren wider Willen, SchiedsVZ 2007, 113-121

Alice Broichmann/Julian Burmeister: Konzernvertrauenshaftung – zahnloser Tiger oder tragfähiges Haftungskonzept? NZG – Neue Zeitschrift für Gesellschaftsrecht 18/2006, 687-691

Handel C H Lee/David Blumental: Parent Company and Shareholders Liability: Piercing the Veil of Chinese Subsidiaries, Business Law International 2004, 221-239

John D Briggs/Sarah Jordan: Presumed Guilty: Shareholders' Liability for Subsidiary's Infringements of Article 81 EC Treaty, Business Law International 2007, 1-37

Redfern/Hunter, Law and Practice of International Commercial Arbitration, 176 ff

Pietro Ferrario: The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist? Journal of Int Arbitration 2009, 647-673

Tobias Zuberbühler: Non-signatories and the Consensus to Arbitrate, ASA Bulletin 2008, 24

Marc Blessing: Introduction to International Arbitration, 1999, 185-192; see also ASA Special Series No.7, 160ss;

Bernard Hanotiau: Complex Arbitration, 2005

Otto Sandrock: The Group of Companies Doctrine Forms No Part of English Law – Ein bemerkenswertes Urteil der Queen's Bench (zum Peterson Farms Inc. v/ C&M Farming Ltd. – Entscheidung), Journal of International Dispute Resolution 2005, 51-56; see Lloyd's Law Reports [2004] Vol.1, 603-613

Nathalie Voser: Multi-party Disputes and Joinder of Third Parties, ICCA Congress Series Vol 14 (2009), 343-410

Andrew Foyle/Saira Singh: Peterson Farms v/ C&M Farming: More than just a Rejection of the Group of Companies Doctrine, IBA Section on Business Law, Arbitration and ADR Newsletter October 2004, 54 ss.

Berger / Kellerhals: International and Domestic Arbitration in Switzerland, 2011, para. 521 (affirming that the underlying concept is an emanation of the principle of good faith)

Nathalie Voser: Multi-party Disputes and Joinder of Third Parties, ICCA Series 2009, pp 371/372 (affirming that the concept is an emanation of the principle of good faith)

Naegeli/Schmitz: Switzerland, Strict Test for the extension of an Arbitration Agreement to Non-Signatories, SchiedsVZ 2009, 188 (discussing actions of a third party that reveal an intent to be involved in the contract; Note, however: while the Swiss Fed Tribunal applies the *bona fides* principle, it rejects the extremely liberal French approach taken by French courts in the discussion of the Group of Companies Doctrine); for the latter, see **Fouchard/Gaillard/Goldman**, International Commercial Arbitration, 1999 N 440.

My comment: Under French law, the economic notion of a group of companies seems to suffice for affirming the extension of an arbitration clause, whereas under Swiss law (and many others) the law allows to recognize the judicial independence of legal entities to prevail over the economic notion of a Group, but – however – subject to the notions and requirements of the good faith-principle/*bona fides*.

Kaufmann-Kohler/Rigozzi: Arbitrage International, 2nd ed., 2010, N 260s, re strict conditions for extending the scope and reach of an arb clause

Pfisterer, Ausdehnung von Schiedsvereinbarungen im Konzernverhältnis, 2011.

Some ICC Cases: Cases 1434, 3879, 4131 (Dow Chemical), 4504, 5721, 5730, 6519, 6610, 6673, 7155, 7604, 7610, 7626, 8163*, 8385, 8910, 9517*, 9719*, 9762, 9839, 9873*, 10758*, 10818*, 11209, 11160*, 11209*, 11405, 14434 etc (* = cases discussed in the ICC Bulletin)

Some Court Cases: Swiss Federal Tribunal ("BGE"):

Supreme Court Decision 129 III 727 re Art. 178 (2) Swiss Arbitration Act, which controls the issue *ratione personae* and *ratione materiae*; hence, it is not a good argument to invoke that the third party did not sign an arbitration clause (supporting earlier publications/views of Marc Blessing, but discarding an opposite ("formalistic") view numerous times expressed by Professor Poudret – a discussion spanning over 15 years prior to this landmark decision of the Swiss Federal Supreme Court

Supreme Court Decision 129 III 727 re third-party intervention, **adherence by conduct**;

Supreme Court Decision 134 III 565;

Supreme Court Decision of 5 Dec 2008, 4A_376/2008.

Supreme Court Decision of 20 Sept 2005, 4P.48/2005, cons. 3.4.1

Further Notes:

Parental Liability according to Decisions of the European Court of Justice (ECJ); sSee e.g. the short reference in the Herbert Smith Bulletin of 14 Sept 2009 in re *Akzo Nobel NV*.

Zürich, 2 October 2013

Dr Marc Blessing

marc.blessing@baerkarrer.ch