



“KIEV ARBITRATION DAYS 2014” : Think Big!

November 6, 2014

Joinder and Involvement of Third Parties in International Arbitration

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REASONS TO INVOLVE OR INTERVENE TO ARBITRATION

- Cross-border business transactions become more complex and involve different instruments and different parties required for performance thereof.
- Third party has a direct interest in or leverage over the transaction or assets transferred thereunder being the subject of the arbitration, or otherwise benefits from such transaction
- Actual behavior & assurances vs legitimate expectations
- Principle of granting parties the full opportunity to present their cases
- Principle of Good Faith being driven by Equity / Justice (top reason for Ukrainian companies while choosing International Arbitration)
- ✓ *to establish actual facts and circumstances, and to make appropriate findings;*
- ✓ *to render a fair award*

JOINING PROCEEDINGS AND PARTIES

- Consolidation of the arbitration proceedings
 - Joinder
 - Intervention
 - Other similar tools:
- ✓ *Practical approaches and solutions can be (sometimes, occasionally) found in the most unlikely or unexpected places*

EXTENDING ARBITRATION TO THIRD PARTY (1)

- Multiple Contracts / Incorporation by reference
- Implied consent [of a party to be bound by an arbitration agreement through the negotiation, correspondence or performance of the contract, or related agreements].
- Assignment, transfer or succession (*In its 2014 Judgment the Belarus Supreme Court overruled the appellate court's finding by accepting the notion of the assignment of an arbitration clause and granted an SCC award in case ICOR vs Minskvodstroj, and accepted the notion of the assignment of an arbitration clause*)
- Third - Party Beneficiaries , i.e., parties actually performing a contract (with arbitration clause) and obtaining advantages from such contract
- Group of Companies (*Dow Chemical France v. Isover Saint Gobain (ICC Case No. 4131, Interim Award of 23 September 1982)*) / Piercing the corporate veil

(See Marc Blessing's Summary on Extension of an Arbitration Clause to Non-Signatories (Third Parties) prepared for the 2013 Kyiv Arbitration Days).

EXTENDING ARBITRATION TO THIRD PARTY (2)

- Agency, representation and apparent authority

Peterson Farms Inc v C & M Farming Ltd [2004] APP.L.R. 02/04, (Mr Justice Langley):

“The principles of the law of agency in Arkansas law are also in substance the same as those of English law. The questions whether there is a relationship of principal and agent and whether an agent acted as such are questions of fact. Unsurprisingly, as agency was not alleged or addressed in the evidence before the tribunal, there was no evidence to establish either fact...”

- Equitable Estoppel. *Comer v. Micor Inc.* [436 F.3d 1098, 1101] (9 Cir. 2006) provides for two line of cases arisen out of this concept:

"Under the first of these lines, non-signatories have been held to arbitration clauses where the non-signatory knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement. Under the second line of cases, signatories have been required to arbitrate claims brought by non-signatories at the non-signatory's insistence because of the close relationship between the entities involved."

ARBITRATION RULES ON JOINDER (UKRIANE)

- Ukraine

- Ukrainian arbitration law is silent on the issue of a third party's participation in international arbitration.

- Article 43 of the Rules of the ICAC at UCCI:

“1. A third party may join in the arbitral proceedings only under the consent of the parties in dispute. Invitation of a third party to participate in the arbitration shall require, apart from the consent of the parties in dispute, the consent of the person invited. The consent of a third party to the invitation shall be in writing.

2. The invitation of a third party may only be requested before the end of the period for the Statement of Defence to be submitted.”

- Ukrainian courts and arbitral tribunals follow the formal approach that does not allow the extension of the arbitration agreement to a non-signatory.

ARBITRATION RULES ON JOINDER (UNCITRAL, ICC, VIAC)

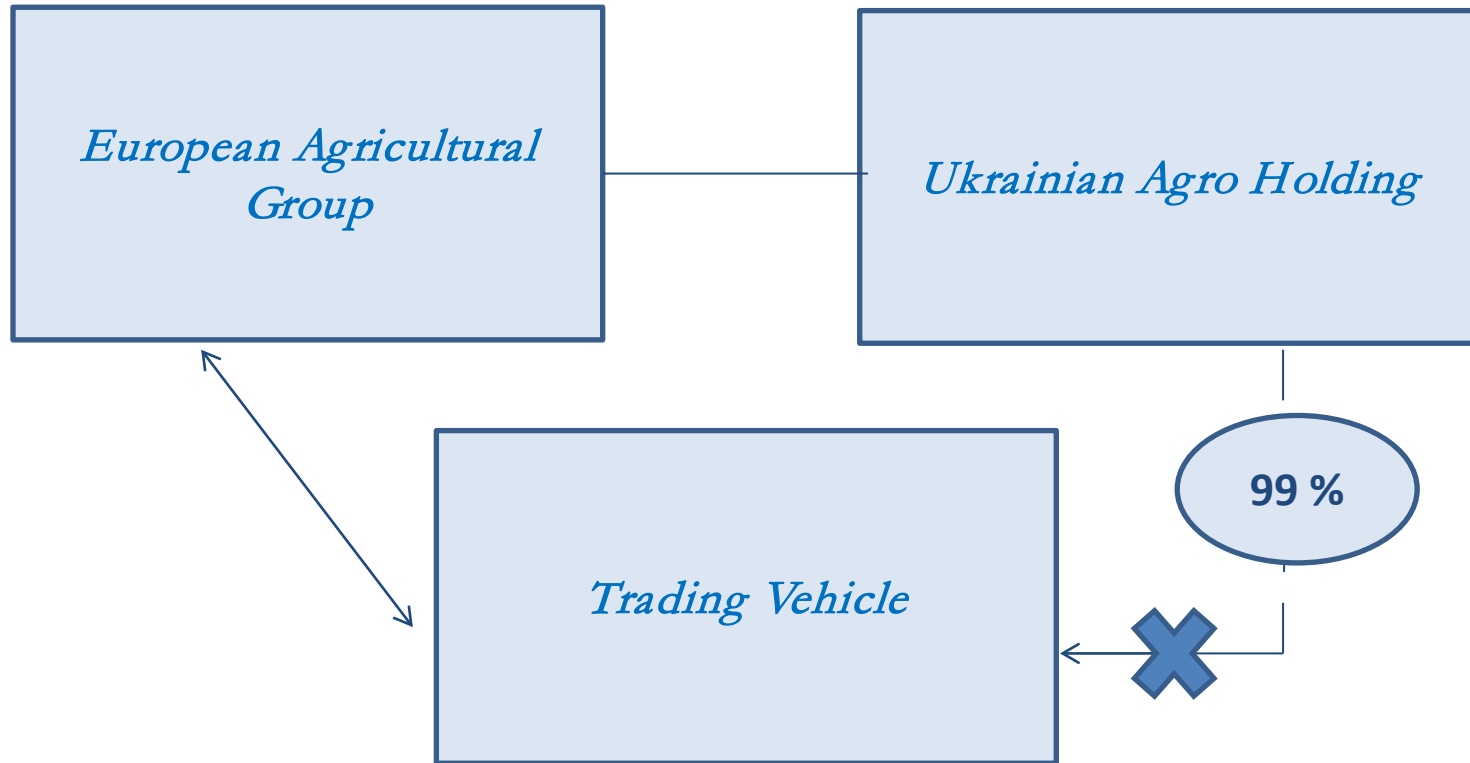
- **2010 UNCITRAL Rules, Article 17(5)**: *“the arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including 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 several awards in respect of all parties so involved in the arbitration”*.
- **2012 ICC Rules of Arbitration, Article 7** allows a party to request for a Joinder of Additional Parties, and if such request is granted, the additional parties are entitled to file claims against any other party in arbitration proceeding.
- **New 2013 Vienna (VIAC) Rules** provides for a wide discretion of the arbitral tribunal to join third parties even when they are non-signatories to the arbitration agreement in question. Article 14 (1) of the Vienna Rules: *“[t]he joinder of a third party in an arbitration, as well as the manner of such joinder, shall be decided by the arbitral tribunal upon the request of a party or a third party after hearing all parties and the third party to be joined as well as after considering all relevant circumstances”*.

RULES ON JOINDER (ENGLAND AND SWITZERLAND)

- **England.** *Peterson Farms Inc v C & M Farming Ltd* [2004] APPL.R. 02/04, *Fortress Value Recovery Fund I LLC & Ors v Blue Skye Special Opportunities Fund LP & Ors* [2013] EWCA Civ 367
- New 2014 LCIA Rules, Article 22 (viii) permits joinder of one or more third parties to the arbitration upon the application of a party provided, however, that any such third person and the applicant party have consented to such joinder in writing.
- **Switzerland.** Article 4 of the Swiss Rules of International Arbitration, provides that “[w]here 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.”

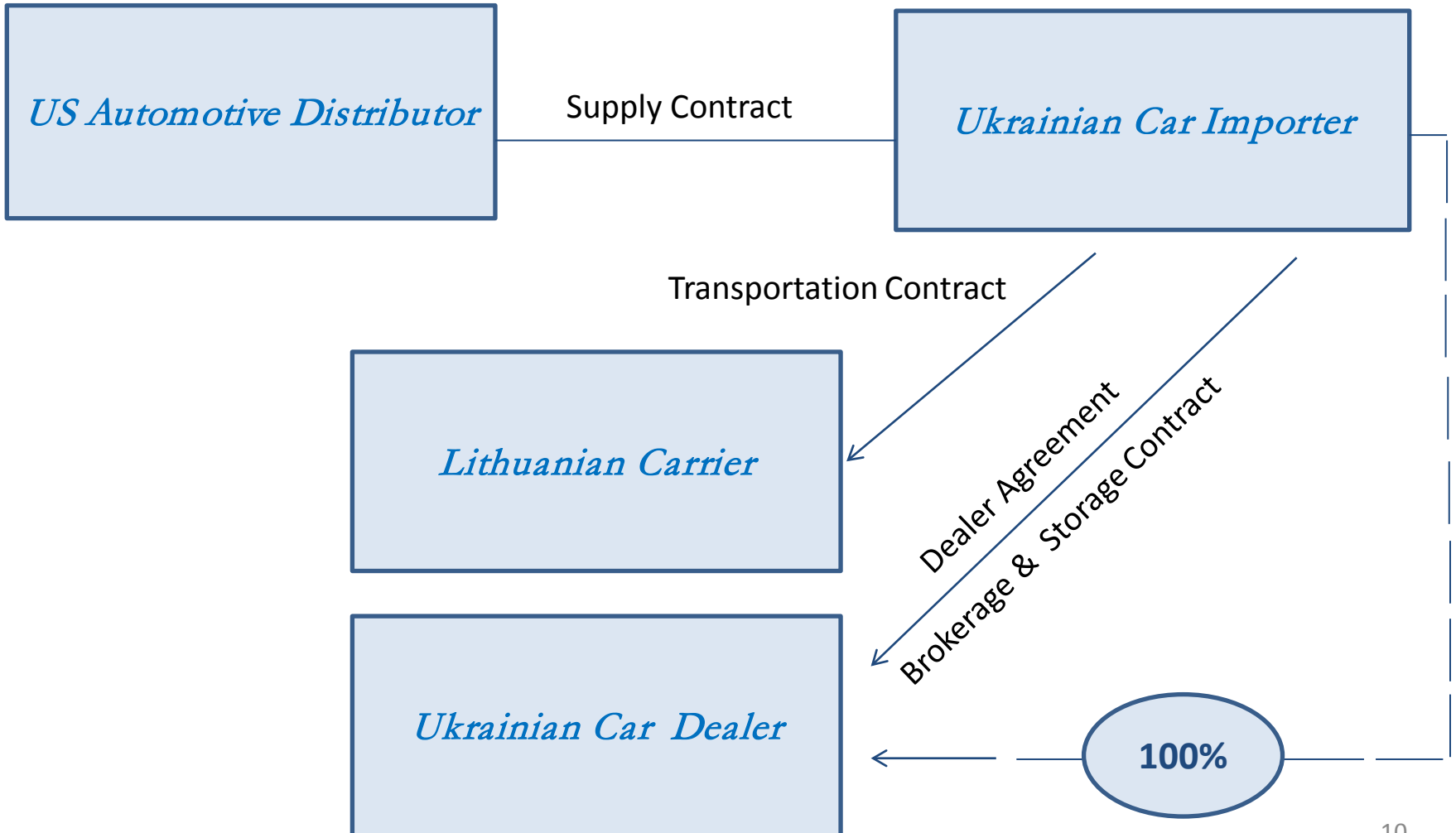
“Swiss case law has already acknowledged the possibility of extending the arbitration agreement to non signatories, in spite of the fact that the written form is one of the requirements for the validity of the arbitration agreement pursuant to Article 178 PILA. Such an extension can occur in cases of assignment, or transfer of a debt. It has also been admitted that, in particular cases, the requirement of form can be satisfied by the conduct of the parties involved. For example, when the third party has interfered in the performance of the contract including the arbitration agreement, its conduct allow to conclude, on the basis of conclusive factual evidence, that such party intended to accept the arbitration agreement...” (The Swiss Federal Tribunal’s decision of 5 December 2008, case No. 4A_376/2008)

CASE STUDY (1): GAFTA ARBITRATION



- October 2013 GAFTA Preliminary Award on Jurisdiction
- May 2014 English Court Order on Arbitration Appeal

CASE STUDY (2): ICAC UKRAINE ARBITRATION



CASE STUDY (2): Practical Approach

➤ ICAC Ukraine: *a Ukrainian car dealer vs an US exclusive distributor*

FCA Bremerhaven. «Free Carrier» means that the seller delivers the goods, cleared for export, to the carrier nominated by the buyer at the named place (Incoterms 2010).

Under Article 43 of the Rules of the ICAC at UCCI, the invitation of a third party may only be requested before the end of the period for the Statement of Defence to be submitted.

Article 42 of the ICAC Rules

“1. The parties shall be required to prove the circumstances they rely upon in support to their claims or defence. The Arbitral Tribunal may require the parties to produce further evidence. It also may, in its discretion or at the request of either of the parties, order inspection by an expert, and also call and hear witnesses”.

ABOUT US

The Firm

- **Aequo** is a Ukrainian law firm of talented and experienced attorneys, who work proactively to reach the client's business goals. Specific and unique expertise, know-how and strong practical skills, knowledge of the environment and solid theoretical background allow us to develop innovative strategies and provide efficient solutions in the most complex and challenging matters.
- In our work we are guided by the following **principles**:
 - ✓ Highest ethical and professional standards
 - ✓ Aiming at the client's commercial result
 - ✓ Efficient resource management and cost control
 - ✓ Providing complex and innovative solutions
 - ✓ Knowledge management
 - ✓ Maximum responsiveness
 - ✓ Flexible fee policy
 - ✓ Universal spectrum of services
 - ✓ Using innovative technologies

The Team

- Today we are over **25 qualified and experienced lawyers** focusing on particular practice areas, having excellent expertise, best education, highest professional and technical skills, which allows us handling matters of eventually any complexity. Our partners and lawyers have been continuously recognized as leading experts in their practice areas according to peer reviews and international legal markets researches such as **Chambers, Legal 500, PLC Which Lawyer?, IFLR1000, Best Lawyers**, etc.

MANY THANKS FOR YOUR KIND ATTENTION !

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