The Participation of the Third Parties in the Arbitration Proceedings

by

Assel Kazbekova

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Faculty of Law
University of Toronto

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Abstract

The arbitration legislation of Kazakhstan has no direct answer to the problem of possible participation of the third parties therein. The analysis of the Kazakhstani legislation and practice, as well as the comparison of the Kazakhstani approach with international approaches regarding the problem of the third parties have revealed the necessity in the legislative reforms to be taken in Kazakhstan. These reforms are required for stabilization and equilibration of the position of third parties with all rest parties of the arbitration proceedings. Thus, the main aim of this thesis is to elaborate a series of suggestions on the potential development of the arbitration procedural legislative system and to address some of the gaps in the existing arbitration legislation.
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Introduction

The arbitration legislation of Kazakhstan is rather new, as it has been established only in 2004. During the recent years the arbitration legislation has passed through numerous amendments and changes; however, it is still not complete. This paper argues that the third parties’ participation in the arbitration proceedings is omitted in the arbitration legislation of Kazakhstan, and, currently, legislative reforms for stabilization and equilibration of the third parties with all rest parties in the arbitration proceedings are required.

This paper analyzes the legal approaches and other mechanisms employed in Kazakhstan and in the international arbitration practice for achieving a workable solution to the above stated problem. In so doing it touches on the larger more complex question, like the position of the third party in the civil legislation of Kazakhstan in comparison with thereof position in the international jurisdictions. Further, the paper presents the legal and theoretical premises justifying the occurrence of the problem of the third parties in the legislation of Kazakhstan. In the conclusion the paper proposes an alternative solution on how third parties should participate in the arbitration proceedings: whether third parties could participate through the application of analogous third party mechanisms, such as joinder and intervention and/or consolidation of the arbitration proceedings.

This paper has been divided into four parts: (i) reviewing of the situations in which a third party has permitted to join the arbitration proceedings, whereas thereof legal and financial interests might be affected during the arbitration proceedings, to which such a third party has no direct relation; (ii) investigation of the position of a third party in the arbitration proceedings in Kazakhstan, the existing legislative approach to this problem, as well as the current developed
solutions to the stated problem; (iii) examination of the international approaches as to the problem of the third parties, legal theories, as well as the existing mechanisms provided thereby; and finally (iv) offering some observations on the likelihood of the problem of the third parties being resolved by the Kazakhstani legislation, and, optionally, by reliance on rules of relevant international institutions.

The consensual nature of the arbitration proceeding is fundamental to this discussion – only those parties that have agreed to an arbitration proceeding can participate in it.¹ In absence of a valid arbitration agreement between the parties to arbitrate there are no generally grounds for requiring a party to arbitrate a dispute, or enforcing an arbitration award against a party.² The arbitration agreement constitutes the fundamental difference between litigations and arbitrations. In the former the parties to court proceeding are determined on the basis of interest(s) - any legal or individual is entitled to commence court proceedings to protect its legal interests, whereas in the latter the parties to arbitrations are exclusively determined on a contractual basis.³ Thus, the main principle of the arbitrations is respect for the parties’ autonomy and the contractual basis of the arbitration makes it a flexible dispute resolution mechanism providing parties with the ability to resolve their disputes in accordance with their commercial needs.⁴

Yet, due to the increasing complexity of international commercial transactions, parties face situations when third parties (non-signatories of an arbitration agreement) are involved in the

⁴ Ibid.
arbitration proceedings. This is a particular situation in the context of multiparty commercial transactions - where multiple parties and multiple contracts are involved in the arbitration process. However, the consensual limitations preclude a party that is not bound by the arbitration agreement from participating in the arbitration proceedings. Third party is excluded from the arbitration process; notwithstanding, such third party might have legal and financial interests in the arbitration proceedings.

1 General Overview of the Problem of the Third Parties in the Arbitration Proceedings

1.1 The Parties’ Autonomy and the Consensual Nature of the Arbitration Proceedings

International arbitration has a fundamentally consensual nature; moreover, the cornerstone of the international arbitration is a party autonomy: only those parties – who have clearly agreed to arbitrate their dispute by means of an express consent - may participate in the arbitration proceedings. Indeed, this is the first and most important principle of arbitration – the autonomy of the parties’ will. The principle of the party’s autonomy provides parties with freedom to contractually determine the circle of persons entitled to participate in the arbitration proceedings.

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5 William Park, “Non-Signatories and International Contracts: An Arbitrator’s Dilemma” (2009), Multiple Party Actions in International Arbitration, Permanent Court of Arbitration at 3.
6 Ibid at 4.
8 Ibid.
proceedings.\textsuperscript{10} These principles constitute the primary difference between arbitration and litigation. Thus, the basis of the jurisdiction in arbitrations is the will of the parties, whereas in litigation it is legislation - the parties are determined on the basis of the interests of the forum as set out in the forum’s jurisdictional law, and owe their competence to the procedural norms of a state or international convention. Moreover, the courts in litigation have a constitutional role.\textsuperscript{11}

As of today, usually nearly every written commercial agreement contains a mandatory pre-dispute arbitration agreement\textsuperscript{12} precluding party from going to court, and requiring that disputes to be settled in the arbitrations.\textsuperscript{13} In the arbitrations, in comparison with the courts, the claim is ordinarily resolved by private arbitrators who are generally not bound by most rules of law or evidence, and with no jury or a right of appeal. Arbitrations usually are more expensive than a trial in civil courts, and the decision of the arbitrations likely will be unpublished, secret, and not binding on any other arbitrator hearing an identical claim.\textsuperscript{14}

Thus, the perceived advantage of the arbitration, as a form of dispute resolution, is that it is chosen consensually by the contracting parties. It would therefore seem logical that only the parties to the arbitration agreements can be bound to the arbitration proceedings, and that any arbitration proceedings necessarily involve only the parties to the arbitration agreements. Entering into the arbitration agreement is a compulsory prerequisite for a person to participate in the arbitration proceeding, and to be bound by the arbitration award. Eventually, the principle of

\textsuperscript{10} Ibid.


\textsuperscript{13} Ibid.

\textsuperscript{14} Ibid at 590.
party autonomy and the contractual nature of arbitration proceeding provide for a flexible mechanism of the dispute resolution allowing the parties to design the dispute resolution system in accordance with their expectations.\(^\text{15}\)

Nonetheless, in some circumstances, the third parties (the non-signatories of the arbitration agreement) may be held to be parties to the arbitration agreements;\(^\text{16}\) or international commercial transactions do not always occur with disputes between a claimant and a respondent, but also may involve several parties in a dispute.\(^\text{17}\) Accordingly, the problem of the third party exists in the light of the arbitration proceedings.

1.2 The Problem of the Third Parties’ Participation in the Arbitration Proceedings

The practical issues, involved in a third party’s participation in the arbitrations, manifest themselves in different ways and at different times. The most significant problems are: first, whether a third party is bound to arbitrate; second, whether a third party is entitled to arbitrate at that party's discretion; and third, whether a third party is excluded from an arbitration agreement and should proceed with litigation.\(^\text{18}\) Moreover, due to the increasing number and complexity of commercial transactions between and among national and international groups of companies, there is no always a connection between the parties that entered into the arbitration agreement,


\(^{16}\) Andrea Marco Steingruber, “Consent in International Arbitration” supra note 11 at 12.


and those who actually perform it. Also parties can be involved in the arbitration proceedings in case of transfer of contractual rights together with the arbitration agreement, like, for example: assignment of rights and obligations of the party-signatory to a third party non-signatory.

Accordingly, the integration of several parties into one project, i.e. multiparty commercial projects, is usually executed through several bilateral contracts containing bilateral dispute resolutions, respectively. Usually such dispute resolutions’ arrangement is done in a form of either arbitration or litigation. This practice leads to the jurisdicitional division of the multiparty commercial projects where several parties are subject to different dispute resolution regimes.

Thus, a dispute arising between the parties in connection to one multiparty commercial project can be resolved only between the parties signed the arbitration agreement, whereas other parties cannot participate in the dispute resolution, even if their legal and financial interests will be or already being affected.

The third party’s legal and financial interest can be affected in a different context. The problem of the third parties can appear where the third party finds that its interests are affected by the decision in an arbitration in which it did not even participate, or where a state-party is obliged to arbitrate with an investor-party that has designed its deal to take advantage of an investment treaty. Notwithstanding, any legitimate interest of the third parties might have in the outcome of the dispute, these parties will remain third parties both to the arbitration proceedings and the

19 Bernard Hanotiau, “Multiple Parties and Multiple Contracts in International Arbitration” (2009), Multiple Party Actions in International Arbitration, Permanent Court of Arbitration at 35.
issued arbitral award. The actual situations involving the third parties are as varied as the legal theories employed to address the third party’s problem.

In accordance with academic researches and international cases in recent years, the following situations can be distinguished in the field of the third party’s problem: one of the original parties to the contract/agreement seeks to compel the third party to the arbitration proceedings, or the third party seeks to compel arbitration against the signatories of the arbitration agreement.  

With this in mind, it is possible to distinguish the third party using a definite example. Usually, the third parties’ position in the arbitration proceedings arises in the context of specific areas of practice, *inter alia*: construction industry arbitrations, maritime arbitrations, arbitrations involving state entities, investment treaty arbitrations, guaranteed debt arbitrations, arbitrations involving disputes in the field of corporate entities related to stockholders, parent company affiliates, and finance leasing arbitrations.

The most common and well-spread example is a construction project. There are several parties in the construction project: an employer, a prime-contractor and a sub-contractor(s). Usually,

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28 A terminology distinction needs to be made at the outset. The term “employer” is being used to refer to someone who initially orders construction of a construction project from a prime-contractor, who maintains the construction. This term is used by most of the authors, like James M. Hosking in “The Third Party Non-Signatory's Ability to
there are separate bilateral contracts between the prime-contractor and the employer and the prime-contractor and the sub-contractor, respectively. If the employer has any complaints regarding the work done, he must arbitrate against the prime-contractor, who then must seek to recover from the sub-contractor responsible for the defective work, by way of a separate arbitration proceeding. In this situation the sub-contractor is a third party. Any issues of the sub-contractor against the employer or the employer against the sub-contractor are excluded from the arbitration agreement made between the employer and the prime-contractor. Indeed, on the basis of this example the following five scenarios can be identified.

1) The employer brings an arbitration claim against the sub-contractor (and maybe the prime-contractor). The sub-contractor opposes jurisdiction of the arbitral tribunal on the basis that it is a non-party to the arbitration agreement, i.e. the burden is on the employer to establish that the sub-contractor is a party.

2) The sub-contractor sues the employer (and/or the prime-contractor) in a court. The employer (and/or the prime-contractor) seeks stay of a litigation claiming that the sub-contractor is a party to an arbitration agreement clause, i.e. seeks to compel the sub-contractor to arbitrate.


31 The example is made in accordance with five scenarios provide by James M. Hosking at “The Third Party Non-Signatory’s Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent”, supra note 18 at 488.
3) The employer sues the sub-contractor in a court. The sub-contractor seeks to stay of litigation, claiming benefit of the arbitration agreement clause with the prime-contractor, and compelling arbitration against the employer (and maybe the prime-contractor).

4) The sub-contractor brings an arbitration claim against the employer (and maybe the prime-contractor). The employer (and maybe the prime-contractor) opposes jurisdiction on the basis that the sub-contractor is a non-party to the arbitration agreement clause.

5) The employer commences arbitration proceedings against the prime-contractor. The sub-contractor seeks to join the arbitration proceedings on the basis that it is a party to the arbitration agreement clause.

In situations (1) and (2) the employer and the prime-contractor want to compel the sub-contractor to arbitrate. In situations (3) and (4) the sub-contractor, as a third party, seeks to compel the arbitration proceeding; and in situation (5) the sub-contractor wants to join the arbitration proceeding. On anecdotal evidence, situations (1) and (2) above are the most common.\(^\text{32}\)

Inevitably, in all provided above scenarios the determination of the dispute will take place against a multilateral commercial project. As a consequence, the arbitration proceeding will adversely affect the legal and financial interests of the third party.

The solution of the third party’s problem depends on the legislative and procedural mechanism of the country, where the problem occurs. Thus, the international approach in the resolution of the problem of third parties provides for various opinions. For example, English common law has traditionally been hostile to general contracting third party’s rights and restrictive of

\(^{32}\) Ibid.
arbitrations, but it has been subject to the fairly recent reforms; the United States offers an example of a less restrictive general contract law and a strong judicial pro-arbitration policy; the France’s approach is more liberal in binding the third parties to the arbitration agreements. In general, both Western European countries and the United States have a common approach. Continental scholars refer to extending the arbitration clause, whereas lawyers in Anglo-American traditions tend to speak of joining non-signatories. Moreover, it is often desirable, in such situation, to bring all parties into the same set of arbitration proceeding - to consolidate several arbitration proceedings into one arbitration proceeding - so as to save time and expense and avoid the risk of inconsistent awards.

Whereas, the Kazakhstani approach regarding the third party issues in the arbitration proceeding is controversial to the international approach; moreover, the Kazakhstani approach is quite uncertain on this problem. The uncertainty of the Kazakhstani approach in resolving of the stated problem is that Kazakhstan has no clear mechanism for dealing with the problem of third party rights in the arbitrations, either on the legislative or on a practical level.

The following chapters shall analyze the Kazakhstani approach and international approaches regarding resolving the third party’s problem.

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2 The Kazakhstani Approach as to the Third Parties’ Problem

2.1 The Third Parties in the Kazakhstani Legislation

Kazakhstan is a civil law country and its national legislation is codified. The national legislation of Kazakhstan consists of the Constitution, international treaties, codes, laws and normative legislative acts. The Kazakhstani approach as to whether the third party can be bound by the arbitration proceeding is derived from the civil law principles, namely the Civil Code of Kazakhstan No. 409 dated 1 July 1999 (hereinafter, the “Civil Code”), Civil Procedure Code No. 411 dated 13 June 1999 (hereinafter, the “Civil Procedure Code”), Law of Kazakhstan No. 23 dated 28 December 2004 “On International Commercial Arbitration” (hereinafter, the “Law on International Commercial Arbitration”) and Law of Kazakhstan No. 22 dated 28 December 2004 “On Arbitration Tribunal” (hereinafter, the “Law on Arbitration Tribunal”).

According to the Kazakhstani legislation, the arbitration proceeding is one of the way to protect the rights of the parties arising from the civil law contracts. Thus, according to Article 2.2 of the Civil Code ³⁷ individuals and legal entities acquire and exercise their civil rights ³⁸ of their own

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³⁷ Civil legislation regulates commodity-money relations and other property relations based on the equality of the participants, and also personal non-property relations which are associated with property relations. Citizens, legal entities, state, and also administrative and territorial units shall be participants of the relations regulated by civil legislation (Article 1.1 of the Civil Code).
free will and in their own interests. They are free to establish their rights and obligations under the contract, and to identify any terms and conditions of the contract not contradicting to the legislation. By virtue of Article 8.1 of the Civil Code, individuals and legal entities at their sole discretion shall dispose of their civil rights, including the right to their defense. This defense in accordance with Article 9.1 of the Civil Code is conducted through a court, commercial arbitration court or the arbitration tribunal.

Therefore, in relation to the matter of third parties, this means that only parties - proper signatories of the arbitration agreement – can initiate the arbitration proceeding in order to defense thereof right and obligations under the Kazakhstani legislation. Kazakh lawyers note, “the panel of the plaintiffs and the defendants cannot go beyond the signatories of arbitration agreement”, 39 as the arbitration agreement of the parties in resolving the matter in the arbitration court/tribunal is an obligatory condition for initiating of the arbitration proceedings. No one can

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38 Civil rights and obligations arise:
1) out of agreements and any other transactions provided for by legislation, and also from transactions which although are not specified in it, do not contradict legislation;
2) form the administrative acts which give rise to civil rights consequences by virtue of legislation;
3) from court decisions which establish civil rights and obligations;
4) as a result of creating or acquiring assets on the bases which are not prohibited by legislative acts;
5) as a result of creating inventions, industrial samples, works of science, literature and art and any other results of intellectual activity;
6) as a result of causing harm to any other person, and equally as a result of the unfair acquisition or saving of assets at the expense of another person (unfair enrichment);
7) as a result of any other acts of citizens and legal entities;
8) as a result of events to which legislation conditions the emergence of civil rights.
(Article 7 of the Civil Code).

be brought to the arbitration court/tribunal as a plaintiff or a defendant without his or her consent, expressed by signing of the arbitration agreement or in any other legal condition.\textsuperscript{40}

Pursuant to both arbitration laws, namely Law on International Commercial Arbitration and Law on Arbitration Tribunal, a dispute can be resolved by the arbitration court/tribunal only in the presence of duly signed arbitration agreement too.\textsuperscript{41} The difference between the Law on International Commercial Arbitration and the Law on Arbitration Tribunal\textsuperscript{42} is that the former applies to disputes arising from the civil-law contracts signed between residents and non-residents/residents of Kazakhstan\textsuperscript{43}, while the latter applies only between residents of Kazakhstan.\textsuperscript{44} In other words, the Law on International Arbitration governs - international arbitrations, whereas the Law on Arbitration Tribunal governs only – domestic arbitrations. Given this limitation on resident issues, the Kazakhstani arbitration courts/tribunals commonly join the functions of both arbitration courts, like for example the Kazakhstan International Arbitrage (KIA).\textsuperscript{45}

Another important point regarding difference between two stated laws is a limitation on subject of disputes that can be resolved by the arbitration courts/tribunals. It means that the definite disputes can be resolved only by a state court, and such disputes are out of competence of both

\begin{footnotes}
\item[40] Ibid.
\item[41] Article 6.1 of the Law on International Commercial Arbitration and article 7.1 of the Law on Arbitration Tribunal.
\item[42] There is no proper translation of the Treteysky Court (Третейский суд) in English, therefore in this paper I refer it to “Arbitration Tribunal”. In general Treteysky Court (Третейский суд) means: domestic arbitration.
\item[43] Article 6.4 of the Law on International Commercial Arbitration.
\item[44] Article 7 of the Law on Arbitration Tribunal.
\item[45] \url{http://www.arbitrage.kz/eng} The Kazakhstani International Arbitrage is a permanent arbitration institute considering disputes not only according to the legislation of Kazakhstan but as well as according to the rules of law chosen by the parties to arbitration. The Kazakhstani International Arbitrage can act as arbitration tribunal as well as international commercial arbitration. The procedures of dispute consideration are equal.
\end{footnotes}
arbitration court and arbitration tribunal. Thus, under the Law on the International Commercial Arbitration, the arbitration courts cannot resolve: disputes related to infants issues\(^\text{46}\), and under the Law on Arbitration Tribunal, the arbitration tribunal cannot resolve: disputes related to interests of the state, state enterprises, infants, disable persons, parties which are not participants to the arbitration agreement, any disputes arising out of contracts for services, works, production of goods by natural monopolies entities holding a dominant position in the market of goods and services, as well as the bankruptcy or rehabilitation disputes.\(^\text{47}\) These limitations mean that the scope of the capabilities of the arbitration courts and arbitration tribunal are limited by the Kazakhstani legislation.

The most important result from the above is that under the Kazakhstani legislation the parties to the arbitration proceedings shall be individuals/legal entities, who entered into the arbitration agreement, i.e. the bproper signatures of the arbitration agreement. However, as it was discussed in the first chapter in the relevant cases, the subject of the arbitration proceedings may be the third parties (the non-signatories to the arbitration agreement). These eliminations are true for Kazakhstani practice as well.

For example, in the case of a construction project, the employer and the prime-contractor shall enter into the construction contract; simultaneously, the prime-contractor enters into the sub-construction contract with the sub-contractor. Both contracts typically have separate arbitration agreement clauses. In case of occurrence any complaints regarding the work done, the employer must arbitrate against the prime-contractor, who must then seek to recover from the sub-contractor concerned with the defective work by way of separate arbitration proceedings.

\(^{46}\) Article 6.7 of the Law on International Commercial Arbitration.

\(^{47}\) Article 7.5 of the Law on Arbitration Tribunal.
The sub-contractor in accordance with Article 8.1 of the Civil Code at its own discretion can dispose its right to defense. This defense in accordance with Article 9.1 of the Civil Code can be conducted through, *inter alia*, commercial arbitration court or the arbitration tribunal.

So, when the main construction contract provides for an arbitration agreement clause, the question arises whether the sub-contractor has the right, being neither a party to the construction contract, nor party to the arbitration agreement clause of such contract, to bring arbitration claims against the employer (and maybe the prime-contractor) and *vise versa* in relation to the employer? According to Kazakhstani legislation - the answer is negative, due to the absence of the arbitration agreement between the sub-contractor and the employer. However, in this case another problem arises - if the sub-contractor brings a suit against the prime-contractor (or employer against the prime-contractor) before the arbitration tribunal, there is a risk that the arbitration tribunal might refuse to resolve such claim on the basis of Article 24.1(2) of the Civil Code, which states that arbitration tribunal shall return the claim in case if the interest of a third party (i.e the employer or the sub-contractor) is to be affected. \(^{48}\)

Moreover, the Kazakh lawyers agree with the international approach that “during the arbitration proceeding there is a risk of infringement of the rights of third parties in the arbitration proceedings”. \(^{49}\) Russian lawyers agree too, stating that “ineffectiveness of the arbitration proceeding in disputes with the plurality of persons considered as one of the major limitations

\(^{48}\) Article 24.1(2) of the Civil Code.

of the arbitration proceedings." In this case, the ineffectiveness of the arbitration proceeding is among other things, because of the lack of a theoretical background of the problem and, secondly, the lack of proper legal regulation.

Consequently, Kazakhstani approach regarding the possibility of the third parties to participate in the arbitration proceeding clearly omits the ability that the third party could join the arbitration proceeding. Moreover, the arbitration legislation has a direct statutory bar for resolving disputes involving the parties, who are non-participants to the arbitration agreement. Simply, the legislation is silent with regard to the third party’s issue. Accordingly, it is quite difficult to determine whether the Kazakhstani approach either prohibits, or allows the participation of the third parties in the arbitration proceeding. In spite of these arguments, further review of the Kazakhstani legislation reveals that third parties are foreseen thereat.

### 2.2 The Discrepancy in Relation of Third Parties’ Participation in the Arbitration Proceeding in the Kazakhstani Legislation

In spite of the fact that the Kazakhstani legislation states that only parties - proper signatories of the arbitration agreement – can initiate the arbitration proceeding in order to defense thereof right and obligations, the legislation, simultaneously, empowers such third parties with the right to appeal the award that was rendered by the arbitral tribunal. Thus, the Law on Arbitration Tribunal refers to third parties issues in Articles 24.1 and 44.2., according to which parties can

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apply for annulment of the arbitral tribunal award to the state courts, when the rights of such third parties have been affected.

In particular, Article 24.1 of the Law on Arbitration Tribunal provides that the arbitration tribunal ought to refuse a request for an arbitration proceeding if such proceedings affects the interests of third parties, who are not parties to the arbitration agreement. However, the Law on Arbitration Tribunal does not specify the concept in defining such interest of the third parties. The law just requires to provide the arbitration tribunal with evidence of a real interest with a material substantive content.\(^52\) If the parties provide for such evidences, the arbitration tribunal shall take the decision for returning a request for an arbitration proceeding.\(^53\) If parties take corrective actions referred in Article 24.1, i.e. eliminate affecting the interests of the third parties, such parties shall be able to apply again with a request to the arbitration proceeding to the arbitration tribunal. The arbitration tribunal shall be entitled to review such request, since by virtue of Article 24.2 of the same law: refusing the request for arbitration proceeding shall not prevent a plaintiff from applying to the arbitration tribunal as the same defendant, on the same subject, and on the same grounds.

In respect of Article 44.2 of the Law on Arbitration Tribunals, the arbitration tribunal provides for the third parties with the right to appeal the arbitration awards of the arbitration tribunal if their interests are affected. Moreover, the stated article refers to Article 331-1 of the Civil Procedure Code, which states that the application for appealing against an arbitral award to the state courts may be submitted not only by the parties of the arbitration proceedings, but


\(^{53}\) Ibid.
additionally by the third parties not involved in the arbitration proceeding. This appeal can be done with regard to the arbitration award affecting the rights and responsibilities of such third parties.54

By contrast, the Law on International Commercial Arbitration has neither provision related to third parties or any interested parties, nor reference to Article 331-1 of the Civil Procedure Code. The law clearly states that the disputes are to be resolved only between the parties entered into the arbitration agreement.55 Nonetheless, Article 426-2 of the Civil Procedure Code applies to both laws that stipulates that third parties have rights to submit applications for annulment of an award issued by arbitration court.56

Thus, it seems reasonable to argue that the statutory approach as to regard the position of the third parties in the Kazakhstani laws is vague. According to the Kazakhstani legislation the arbitration award, issued by either the arbitration court or arbitration tribunal, is aimed only to the parties-signatories of the arbitration agreement. In fact, the legislation enshrines the principle when the arbitration award should not affect or somehow involve the interests of third parties. Yet, simultaneously, the legislation foresees that third parties’ interest might be affected. By the stated provisions the legislation attempts to enlarge the scope of the persons eligible to appeal the arbitration award of the arbitration tribunal/court in order to defense the right of such third parties.

54 Article 331-1 of the Civil Procedure Code. The term, during which third party can appeal, is thirty (30) days from the date when the party learned that there are grounds for appeal to the arbitration tribunal.
55 See supra note 41.
56 Article 426-2 of the Civil Procedure Code.
However, such “enlarging of the scope of persons is not in accordance with the procedural nature and the procedure for submission of the dispute for its resolution under the arbitration”.\textsuperscript{57} The Kazakhstani civil legislation is out of a straightforward answer to the given discrepancy. Simultaneously, the legal practice provides for multiplicity approaches with regard of solving the entrenched legal ambiguity.

### 2.3 The Kazakhstani Approach as to the Possible Solution of the Problem the Third Parties’ Participation in the Arbitration Proceedings

As of today, Kazakhstan has at least two practical approaches regarding resolving the ambiguity entrenched in the arbitration legislation on the third parties’ participation in the arbitration proceedings. The first approach is provided by the arbitration courts/tribunals through supplementing the rules of such arbitration courts/tribunals with the omitted provisions regarding the third parties’ issue. The second approach is provided by the Kazakhstani civilians, according to which “the arbitration courts/tribunal may apply the rules of general civil procedural law of the country which deals with a relevant arbitration dispute by analogy, if there are gaps related to the regulation of the arbitration in the international legal procedures and regulations of arbitration courts/tribunals.”\textsuperscript{58}


\textsuperscript{58} U. Basin, M. Suleymenov, “Protection of arbitration (arbitration tribunals) courts the rights of participants of foreign trade transactions according to the legislation of the Republic of Kazakhstan”, (2007) \textit{supra} note 39 at 104.
First approach

Currently, almost all arbitration courts/tribunals have introduced relevant amendments regarding the third parties’ issue into thereof existing rules or regulations with a relevant provision regulating the third party’s possible participation in the arbitration proceedings.59 Thus, for example, the Rules of the Kazakhstan International Arbitrage states: “Those third parties shall be allowed to participate in the arbitration proceedings only with the consent of the parties. A consent of such third party is required in addition to the parties consent for joining by the third party to the arbitration proceeding. The third party is allowed to file a request for joining to the arbitration proceedings only before expiration of the period allowed for presentation of statement of defense. The consent of the third party is provided in a written form”.60

The Rules of the Chamber of Commerce and Industry of the Republic of Kazakhstan is almost identical to the Rules of the Kazakhstan International Arbitrage, except one provision. According to this provision third party must be a participant of the arbitration agreement.61

The Rules of the International Arbitrage Court “IAC” and International Arbitrage Tribunal “IAC” have also similar provisions regarding the participation of the third parties in the arbitration proceedings: “The participation of a third party in arbitration proceedings is permitted only if the third party is a party to the arbitration agreement. Application for participation of a third party, as well as the deposition of an arbitration agreement with the third

59 All arbitration institutions have their own internal rules/ regulations, like for example the ICC Rules of Arbitration, the LCIA Rules of Arbitration, the SIAC Rules, the UNCITRAL Arbitration Rules, etc.
party, is allowed only up to the first session of the arbitration court”. This approach is also not clear with regard to the mechanism of defining participation of that the third party in the arbitration agreement.

The only rules that leave out this question open is the Rules of the International Arbitrage “IUS”, which omits any provision on the participation of the third parties in the arbitration proceeding.63

The review of the above rules indicate that the most significant arbitration courts/tribunals of Kazakhstan disclose several concepts: first, the participation of the third party is permissible in the presence of a written consent of all parties, including third party; second, the participation of the third party is possible only if such party is a participant of the arbitration agreement; and third, participation of third party in the arbitration agreement is prohibited.

The comparison of these concepts reveals that the first and the second concepts differ only with regard to the necessity of joining the third party to the arbitration agreement in order to permit its participation in the arbitration proceeding. According to Duisenova, “both approaches can exist in the absence of the legislative regulation of the legal status of third parties in arbitration process”.64 At the same time, she defines that the volume of the procedural rights and obligations of third parties should differentiate from the volume of the procedural rights and obligations of the parties-signatories. For example, a third party shall not be entitled to participate in the selection of an arbitrator(s) and to challenge an arbitrator(s) - as a third party joins the existing

arbitration proceeding, when an arbitral panel have already being formed; and to change and to amend any claim or statement of defense, etc.\textsuperscript{65}

Consequently, the general approach of the arbitration courts and arbitration tribunals is that third parties may join the arbitration proceedings with consent of all parties of the arbitration agreement either as a participant of the arbitration agreement, or a non-participant of the arbitration agreement. Only International Arbitrage “IUS” has a ban on the participation of the third parties in the arbitration proceedings. Although, when the rules of arbitration courts and arbitration tribunals allow the participation of the third parties in the arbitration proceedings, none of them specifies the procedural status of third parties in the event of such participation in the arbitration proceeding.

Given that Kazakhstan is the civil law country, the rules of the arbitration courts and arbitration tribunals have to be in compliance with the national legislation of the country. As it is stated in chapter 1, all parties have right to appeal against an arbitral award;\textsuperscript{66} therefore, even the inclusion of the proper provision regarding the involvement of a third party to the arbitration proceeding shall not guarantee due enforcement of the arbitration award under the national legislation of Kazakhstan. This means, despite the inclusion of the relevant provision into the rules of the arbitration courts/tribunals, the parties still have right to appeal any award related to the third parties, as positive so negative.

\textsuperscript{65} Ibid.
\textsuperscript{66} See chapter 2.2 above.
Second approach

The second approach as to resolving the ambiguity entrenched in the arbitration legislation regarding the third parties’ participation is the possibility of applying the rules of the general civil procedural law to the arbitration proceedings by analogy. In other words, this approach considers that the third party could participate through existing analogous mechanisms provided by the civil legislation of Kazakhstan. In order to understand whether such approach is worth attention, it is necessary to analyze the provisions of the civil procedural law of Kazakhstan in the context of the third parties’ issue.

The Civil Procedure Code, in the light of the civil proceedings, defines the third parties in two categories: (i) the third party declaring independent demands on the subject of the dispute, and (ii) the third party not declaring independent demands on the subject of the dispute.

The first category of the third parties is those, who may enter into the civil process prior to making any first decision by the state court by way of filing a claim against one or both parties. Such third party enjoys all rights and bears all duties as a plaintiff.67

The second category of third parties is those, who do not declare independent demands with regard to the subject matter of a dispute. Such third parties may enter into the civil process prior to making the first decision by the state court on the side of both: a plaintiff or a defendant, when such decision could affect the rights or obligations of the third party towards one of the parties. The third party may be compelled to participate in the process pursuant to an application of the parties, other persons participating in the process or pursuant to the court’s order. Such third

67 Article 52 of the Civil Procedure Code.
party enjoys the procedural rights and bears procedural obligations as the original parties of the arbitration process, except for the right: to change the grounds and subject matter of the claim; to increase or decrease of the amount of the claim; to reject the claim; to admit the claim or conclude an amicable settlement agreement, the dispute settlement agreement pursuant to mediation; to set-up a counterclaim; and to seek enforcement of the court’s decision.  

In overall, two categories of third parties have more characteristics that distinguish them from each other, rather than similarities. Therefore, such the third parties differ significantly in their procedural position.

Review of the second approach shows that irrespective of its attractiveness, it is quite problematic to use it, due to the following reasons:

(i) The arbitration court and arbitration tribunals have right to arbitrate disputes only of the signatories-parties to the arbitration agreement, who directly provided consent for the arbitration proceedings. The Kazakhstani legislation has no provision allowing the third party to be compelled to the arbitration proceeding by either the arbitration court or the arbitration tribunals. This is the primary distinction between the state court and the arbitration court/tribunal.

(ii) The arbitration legislation directly states that the arbitration dispute is subject to the arbitration only between the parties-signatories of the arbitration agreement. The legislation omits the right of the third party to join the arbitration proceeding at its own discretion.

*68 Article 53 of the Civil Procedure Code.  
Further, it is important to distinguish the legal status of third parties participating in the arbitration proceedings from the legal status of third parties participating in the civil proceedings. These two legal statuses of third parties are too specific for giving a direct answer to the question on the possible use of Articles 52 and 53 of the Civil Procedure Code by analogy. Inevitably, the question arises whether it is necessary to provide third parties with a relevant legal status similar to the legal status of third parties fixed in the civil legislation or not. The legislation is silent on this question.

It is also important to mention that none of the analyzed two approaches provide for compulsory joinder of third parties to the arbitration proceedings at their own discretion against any party’s will during the arbitration proceeding (i.e. without consent of the parties), as well as for consolidation of the multiparty arbitrations. Notably, Continental and Anglo-American approaches provide for opposite orientation in respect of the participation of the third party in the arbitration proceeding. The following section seeks to shed light on international approaches on this question.

3 The International Approaches as to the Problem of the Third Parties in the Arbitration Proceedings

3.1 Joinder of the Third Parties to the Arbitration Proceeding in the U.S., France and England

As already mentioned in chapter 1 above, the parties to the arbitration agreement are usually its formal signatories. Conversely, parties that have not formally executed an arbitration agreement or the underlying contract containing the arbitration agreement clause may be bound by the agreement to the arbitration proceeding under relevant approaches. A variety of legal approaches
have been invoked under different legal systems to bind parties that have not executed the arbitration agreement. Thus, various national laws permit joinder of the third party even though there may be no strict contractual relationship between the parties. This section shall examine: (i) joinder of a third party in the U.S.; (ii) joinder of a third party in France; and (iii) joinder of a third party in England. These selections were made due to wealthy practice in related countries with regard to the third party’s participation in the arbitration proceedings.

The U.S.

The U.S. approach as to whether the third party to the arbitration agreement can be bound is principally governed, at both federal and state court levels, by common-law principles of contract and agency. This was set out in the 1995 U.S. decision of Thomson-CSF, S.A. v American Arbitration Association and Evans & Sutherland Computer Corporation: “Arbitration is contractual by nature…It does not follow, however, that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. This court has made clear that a non-signatory party [third party] may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency”.

70 Gary Born, “International Arbitration: Law and Practice” supra note 2 at 95.
72 Ibid.
The court recognized five doctrines whereby a third party could be bound by the arbitration agreement: (i) estoppels; (ii) incorporation by reference; (iii) assumption; (iv) agency; and (v) veil piercing/alter ego.74

*Estoppel:* Estoppel is a legal principle, due to which a party is prevented from denying representation arising out of words or deed on which another party has relied to its damage. In case if there is no damage reliance, the party making representation can also be estopped from denying them, in circumstances, when such denial would be unprincipled.75 The U.S. federal courts draw on the doctrine of equitable estoppel to bind the third parties to the arbitration agreements on the two grounds: first, a theory of intertwined issues, and second, a theory of direct benefits.76

The intertwined theory asks whether the party that seeks to bind the other party is a signatory or a non-signatory. When a claim involving a third party has become inextricably intertwined with the contractual obligations under the agreement signed by the parties-signatories, and such third party seeks to bind the party-signatory to the arbitration proceeding – the court is much more willing to bind the signatory. The theory of direct benefits states that third party can be estopped from denying the obligations to the arbitration proceeding if it has received direct benefit by knowingly exploiting contract that contained the arbitration agreement.77

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75 Ibid.
77 Ibid.
Incorporation by reference: This theory is applied in those situations when there are several agreements; and one of the contracts or the main contract does not explicitly contain the arbitration agreement provision on the parties’ willingness to go to the arbitration proceedings in case of arising a dispute in the future.

Applying ordinary principles of incorporation by reference, state courts have incorporated an arbitration agreement from one document into another merely by reference. According to this approach the arbitration agreement provision can be incorporated by merely reference to the other contract, or terms of an earlier agreement containing the arbitration agreement provision, and compel the third party to arbitrate, despite the fact that it has not signed the contract containing the arbitration agreement.78

Assumption: The compulsory effect of the arbitration agreement provision may be extended to the third party in the case the latter ones subsequent indicates that it has assumed the obligation to arbitrate. If both the third party and the parties-signatories have evidenced a willingness to arbitrate, then the arbitration may proceed.79

Agency: An agent, who signs the agreement on behalf of the principal, binds that principal to the agreement. Such agent must act within the scope of provided authority, and there must be evidence that the agent had actual authority to act on behalf of the principal. However, in certain cases a principal may be bound if the agent had an apparent authority.80 The principal is bound by the actions of his or her agent within such apparent authority. Accordingly, the third party’s

80 Moses Margaret, “The Principles and Practice of International Commercial Arbitration” supra note 1 at 36.
principal can be compelled to arbitrate when his or her agent, acting in the scope of authority granted by the principal, signs a contract containing the arbitration agreement provision.\textsuperscript{81}

\textit{Veil piercing/alter ego}: If a party-signatory to the arbitration agreement is merely the alter ego of a third party, the U.S. courts have allowed the piercing of the corporate veil of such party, so that the third party shall be bound by the arbitration agreement. This occurs in order to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary. For example, a subsidiary has signed an arbitration agreement on its own behalf, but in fact its parent company is controlling and directing the subsidiary in respect of the commercial transaction to which the arbitration agreement relates.\textsuperscript{82}

\textit{France}

Under French law it is possible for a third party to the arbitration agreement to join the arbitration proceeding either as a claimant or a respondent under the “\textit{group of companies}” doctrine. This doctrine has not been extensively accepted in the countries other than France.\textsuperscript{83}

According to this doctrine, if a party-signatory to the arbitration agreement is part of a group of companies then the arbitration agreement shall be extended to one or more companies in the same group. However, the arbitration courts have only agreed to extend arbitration agreements to another company – third party – in the same group if both are true: (i) the third party has played a part in the conclusion, performance or termination of the contract containing the arbitration

\textsuperscript{81} Anne Whitesell, “Multiparty Arbitration: The ICC International Court of Arbitration Perspective” \textit{supra} note 66 at 723.
\textsuperscript{82} Richard Bamforth, Irina Tymczyszyn, Olswang, and Allan Van Fleet, Mark A Correro, Greenberg Traurig “Joining Non-Signatories to an Arbitration: Recent Developments” \textit{supra} note 71 at 10.
\textsuperscript{83} Franz Schwarz and Christian Konrad, “The Vienna Rules: A Commentary on International Arbitration in Austria” \textit{supra} note 17 at 333.
agreement; and (ii) it was the common intention of the parties that the third party shall be bound by the contract and the arbitration agreement within it.  

Further, the third party can be consolidated to the arbitration proceedings under “assignment” doctrine. Assignment is a legal term that refers to the transfer of rights like: contractual benefits and obligations to another party. This other party may be a third party that was previously not relate to the contract. So, where a contract, containing the arbitration agreement provision, is assigned then the third party ordinary does not sign such contract with the arbitration agreement provision. The French courts have a long tradition of so-called “automatic” transmission of the arbitration agreement as part of the assignment of the entire agreement.

The doctrine of “incorporation by reference” has also been accepted by the French courts. This doctrine is judged on normal principles of the contract law; therefore, the primary focus is on confirming the true intention of the parties to arbitrate. The only cases in which the French courts rejected to recognize this doctrine were those, where the French court found out that factual circumstances left doubt as to the existence of the consent between parties.

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84 Richard Bamforth, Irina Tymczyszyn, Olswang, and Allan Van Fleet, Mark A Correro, Greenberg Traurig “Joining Non-Signatories to an Arbitration: Recent Developments” supra note 71 at 11.
87 Ibid at 544.
88 Ibid at 543.
England

Unlike the French courts, the English courts have rejected the “group companies” doctrine, and, affirmatively, held that this doctrine does not form part of the English law. It is the substantive law rather than the procedural law of an agreement, which is applied to identify the parties to a contract. Nevertheless, even if the English law is the substantive law, other considerations can be taken into account by the arbitration court in determining whether joinder of the third parties to the arbitration proceedings is appropriate (Section 46(1)(b), Arbitration Act 1996 (1996 Act)). Thus, according to Section 46(1)(b) the “group of companies” doctrine could conceivably be applied by an arbitration court even where the English law is the substantive law of the dispute. For example, if all parties, both parties-signatory and third parties, agree to the application of such doctrine.

“Assignment” doctrine is another doctrine that can be applied in England. According to this doctrine the assignee is bound by the arbitration agreement in the sense that it cannot assert the assigned right without accepting the obligation to arbitrate. Accordingly, the assignee has the benefit of the arbitration provision, as well as other provisions of the contract. An assignment may be either legal or equitable. In order to be legal, it must be absolute, must be done in writing form by the assignor, and the other party must receive the express notice from the assignee (Section 136 of the Law of Property Act 1925).

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90 Richard Bamforth, Irina Tymczyszyn, Olswang, and Allan Van Fleet, Mark A Correro, Greenberg Traurig “Joining Non-Signatories to an Arbitration: Recent Developments” supra note 71 at 11
In overall, in all three countries the third part’ joinder approach exists. The U.S. approach has a less restrictive general contract law and a strong judicial pro-arbitration policy. France, as the sole civil law representative, has a more liberal approach on binding third parties to the arbitration agreements. The English common law has traditionally been hostile to general contractual third party rights and restrictive of arbitration proceeding; however, it has recently introduced reforms in both areas (i.e., the Contracts (Rights of Third Parties) Act 1999 and the Arbitration Act 1996).  

In all analyzed countries the joinder of the third party is permissible under certain circumstances, even in the absence of the strict contractual relationship between the parties.

In sum, arbitration proceeding, requiring between the parties-signatories and the third parties, is not an issue that arbitration courts are eager to resolve. Instead, the arbitration court will compel such involved third party to arbitrate. Thus, the reviewed international approaches permit joinder of the third party even though there may be no strict contractual relationship between the parties.

The following section shall examine the procedural mechanism of the third party’s joinder to the arbitration agreement in the international approaches.

92 Ibid at 490.
93 Moses Margaret, “The Principles and Practice of International Commercial Arbitration” supra note 1 at 42.
3.2 The Mechanism of Joinder of the Third Parties to the Arbitration Proceedings

Generally, the concept of participation of the third parties can be done through the following three mechanisms: joinder and intervention of the third parties into the arbitration proceeding; consolidation of several arbitration proceedings into one arbitration proceeding; and, finally, third party notices. 94

Joinder and Intervention

The question of joinder and intervention are the same. Both deal with the participation of the third party to the existing arbitration proceeding; however, they are opposite sides of one coin. Joinder refers to a situation when one of the parties to the arbitration proceeding seeks to add a third party, whereas intervention is when a third party wants to become a party to the existing arbitration proceeding. These two mechanisms relate fundamentally to the consent of the parties, 95 and the arbitral tribunal consent - as the consent of all parties is compulsory due to the contractual nature of the arbitration proceeding and its confidentiality. 96

If all parties to an existing arbitration proceeding, including a third party, agree to joinder and intervention, there should be no concerns. Instead, when at least one party – either a party-signatory of the arbitration agreement or a third party – does not agree, then the arbitration court or the arbitration institution must consider whether the parties have previously provided for their

95 Ibid at 175.
96 Andrea Marco Steingruber, “Consent in International Arbitration” supra note 11 at 166.
consent, and whether that is sufficient. Given that, the most of the arbitration agreements and arbitral rules do not contemplate joinder and intervention issues. The arbitration court decides at their own discretion these issues on the basis of the doctrine of “competence –competence”. At the same time, whereas the arbitral rules provide for the joinder and intervention provisions, the arbitration courts have to consider the mechanism and elements of such provisions. However, the solutions adopted in the arbitration rules of different institutions are different.

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

The stated Article 7 of the ICC Rules provides for the a mechanism for enabling a third party, who is not yet a party of the arbitration proceedings to join the arbitration by submitting “Request for Joinder” to the Secretariat. This request for Joinder can be addressed by any existing party to the arbitration proceedings at any time before the confirmation of the appointment of

98 Ibid at 176.
any arbitrator has been done by the ICC court.\textsuperscript{100} Accordingly, both a claimant and a respondent may request the joinder of an additional party. The major issue related to joinder of additional parties is in the composition of the arbitration court, which will not be allowed to join a third party unless all parties agree.\textsuperscript{101}

LCIA Rules provides that in order for a new party to join the arbitral proceedings the consent expressed by the third party, is required. Such third party may be a non-signatory to the relevant arbitration agreement intending to join the arbitration proceedings.\textsuperscript{102} Such joinder procedure is possible on the basis of the application of one party to the arbitration agreement; notwithstanding, the objection of another party to the arbitration agreement.\textsuperscript{103} Thus, according to Article 22(1)(h) on “Additional Powers of the Arbitral Tribunal”: “\textit{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: ...}(h) 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...}”\textsuperscript{104}

\begin{thebibliography}{9}
\bibitem{100} Ibid.
\bibitem{101} Andrea Marco Steingruber, “Consent in International Arbitration” \textit{supra} note 11 at 167.
\bibitem{102} Anne Marie Whitesell, “Multiparty Arbitration: The ICC International Court of Arbitration Perspective” (2009), Oxford University at 217.
\bibitem{103} Ibid.
\bibitem{104} Article 22(1)(h) of the LCIA Rules of Arbitration.
\end{thebibliography}
The SIAC Rules describes the conditions for joinder too.\footnote{Simon Greenberg, Christopher Kee & Romesh Weeramantry, “International Commercial Arbitration: an Asia-Pacific Perspective” \textit{supra} note 74 at 176.} According to Article 24(b) an arbitration court may “…allow other party to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties…”\footnote{Article 24(b) of the SIAC Rules.}

The 2010 UNCITRAL Arbitration Rules also permits joinder; thus, in Article 17(5) thereof: “\textit{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’’}.

Accordingly, the arbitration court may at the request of any party join a third party if such third party agrees to be joined to the arbitration agreement, and only after giving existing parties the opportunity to object on the basis of prejudice.\footnote{Article 17(5) of the UNCITRAL Arbitration Rules.}

According to Article 4(2) of the Swiss Rules of: “\textit{Where one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting}”\footnote{Simon Greenberg, Christopher Kee & Romesh Weeramantry, “International Commercial Arbitration: an Asia-Pacific Perspective” \textit{supra} note 74 at 176.}
with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances”.

The Swiss Rules allows a third party to intervene in pending arbitration proceeding, i.e. the parties provide their consent for the intervention of third parties when selecting the Swiss Rules for the relevant future arbitration. Consequently, none of the parties can object if a third party is willing to join the arbitration proceedings. However, it does not mean that any third party can become a participant of the arbitration proceeding, as the only effect of this assumption is that the initial parties to the arbitration proceeding need not consent expressly to the joinder, but it remains at the discretion of the arbitration court to allow the intervention. Moreover, the rules also authorizes the arbitration court to cause the third party to participate in the arbitration proceedings upon a request made by party: either by a claimant or a respondent.

The national laws of some countries also provide for joinder and intervention mechanisms. Thus, according to Article 1696 of the Belgian Judicial Code:

“1) Any interested third party may request from the Arbitral Tribunal an ex parte intervention in the proceedings. The request must be put to the Arbitral Tribunal in writing, and the tribunal shall communicate it to the parties.

2) A party may call upon a third party to intervene in the proceedings.

109 Article 4(2) of the Swiss Rules Art.
110 Andrea Marco Steingruber, “Consent in International Arbitration” supra note 11 at 168-169.
In any event, the admissibility of such interventions requires an arbitration agreement between the third party and the parties involved in the arbitration. That agreement is subject, moreover, to the unanimous consent of the Arbitral Tribunal..."\(^{111}\)

According to Article 1045 “Third Parties” of the Code of Civil Procedure of Netherlands:

“…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 there on the arbitral tribunal shall determine the further conduct of the proceedings..."\(^{112}\)

Thus, both national legislations confirm the possibility for the third parties to intervene or to be joined as parties in the arbitration proceeding. At the same time, it is important to mention that

\(^{111}\) Article 1696 of the Belgian Judicial Code

\(^{112}\) Article 1045 of the Code of Civil Procedure of Netherlands.
both of them require that the participation of a third party is subject to an agreement with the parties in dispute and to the consent of the arbitral tribunal.\textsuperscript{113}

Finally, as a general principle of all reviewed rules and national legislations is that the parties, wishing to ensure that third parties can be joined the arbitration proceeding, should consider this question during drafting of the arbitration agreement,\textsuperscript{114} especially since different rules and national legislations provide for different scope of the authorities as to regard possible joinder of a third party to an arbitration proceeding. Thus, for example, the field of application of the Swiss Rules is broader than all other systems with respect to allowing third parties to participate in the arbitration proceedings.

\textit{Consolidation of the Arbitrations Proceedings}

The consolidation involves merger of two or more separate and independent arbitration proceedings into one. The consent of all parties is required in order to simplify the process of consolidation. Problems arise if at least one party to one of the arbitration proceedings does not agree to consolidate the arbitration proceedings.\textsuperscript{115} Thus, the consolidation of arbitration proceedings between different parties is possible in two ways: (i) with the parties’ consent: the party may expressly agree to consolidate by setting a relevant provision in the contract, or implicitly by setting a relevant reference to the appropriate arbitration rules; (ii) without the parties’ consent: when national laws shall provide for judicial-ordered consolidation.\textsuperscript{116}

\begin{flushright}
\textsuperscript{113} Andrea Marco Steingruber, “Consent in International Arbitration” supra note 11 at 170. \\
\textsuperscript{114} Simon Greenberg, Christopher Kee & Romesh Weeramantry, “International Commercial Arbitration: an Asia-Pacific Perspective” supra note 74 at 178. \\
\textsuperscript{116} Andrea Marco Steingruber, “Consent in International Arbitration” supra note 11 at 171.
\end{flushright}
The power of the courts to force consolidation without the consent of the parties incorporated into the arbitral arbitration agreement has been frequently used in the U.S and some English courts. In this regard there are different opinions against forcing consolidation by the courts, these opponents state that the imposed consolidation by the courts impairs inevitably the party-autonomy principle, which is a fundamental principle of the arbitration, and this procedural measure exercised by the courts violates basic contractual rights of the parties stated in their arbitration agreement.

The consolidation with the consent of the parties is not a very easy choice, as drafting of the multiparty arbitration clause requires a close understanding of the nature of the relationship between the parties and differentiate the type of probable dispute of a future arbitration. The question of whether the consolidation shall be possible depends on the interpretation of the different related contracts, and, it is up to the arbiter(s) to decide such question. The recent arbitration case, like Lafarge Redland v. Shepard Hill Civil Engineering Ltd [2000] 1 WLR 1621 (Lew, Mistelis and Kroll, para 15-53) revealed the difficulty of this approach.

A reference to the arbitration rules as method of consolidation works only in the case of proper selection of the arbitration institution. As for example, the LCIA Rules makes no reference to the possible consolidation of the arbitration proceeding of the different parties, while several other

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118 Franz Schwarz and Christian Konrad, “The Vienna Rules: A Commentary on International Arbitration in Austria” supra note 17 at 341
119 Andrea Marco Steingruber, “Consent in International Arbitration” supra note 11 at 172.
arbitration institutions have adopted provisions permitting the consolidation, for example, ICC Rules, Swiss Rules, CEPANI Rules, JCAA Rules, and CIMAR. 120

Thus, for example under Article 8(1) of the ICC Rules provides:

“The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

a) the parties have agreed to consolidation; or

b) all of the claims in the arbitrations are made under the same arbitration agreement; or

c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.” 121

120 Ibid at 174-175.
121 Article 8(1) of the ICC Rules.
This article provides the ICC court the power to consolidate two or more ICC arbitration proceedings into a single arbitration proceeding upon the request of the party wishing to do so.\footnote{122}

Meantime, the national legislation on consolidation provides for two approaches: (i) opt-in provisions and (ii) opt-out provisions.\footnote{123} For example Section 35 “Consolidation of Proceedings and Concurrent Hearings” of the English Arbitration Act 1996 states:

\begin{quote}
(1) \textit{The parties are free to agree:} (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or (b) that concurrent hearings shall be held, on such terms as may be agreed.
\end{quote}

\begin{quote}
(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings...\footnote{124}
\end{quote}

Section 24 of the Australian International Arbitration Amendment Act 1989 provides:

\begin{quote}
“24. (1) A party to arbitral proceedings before an arbitral tribunal may apply to the tribunal for an order under this section in relation to those proceedings and other arbitral proceedings (whether before that tribunal or another tribunal or other tribunals) on the ground that:

\begin{itemize}
\item[(a)] a common question of law or fact arises in all those proceedings;
\item[(b)] the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
\end{itemize}
\end{quote}

\footnotesize{\begin{itemize}
\item[122] Ibid.
\item[123] Ibid 179.
\item[124] Section 35 of the English Arbitration act 1996.
\end{itemize}}
(c) for some other reason specified in the application, it is desirable that an order be made under this section.

(2) The following orders may be made under this section in relation to 2 or more arbitral proceedings:

(a) that the proceedings be consolidated on terms specified in the order;...

Thus, the Australian International Arbitration Amendment Act 1989 provides for opt in provision, whereas the English Arbitration Act 1996 – for opt out provision. The difference is that in the opt out provision the consent of all parties concerned by a specific consolidation is necessary, while in the opt in provision all parties to a particular arbitration agreement to give their consent in advance by opting-in to the possibility that any consolidation can be ordered when the consolidation requests are fulfilled. So, in the opt in solution, the consolidation is not possible if the parties of the related arbitration have not provided for their consent for consolidation of the arbitration proceeding.125 Given the difference the opt in solution is more advantageous for national legislation as “with opt in solution the parties are consciously selecting the same national arbitration law - providing for consolidation - in different, but possibly related, arbitration agreements”.126

If there is no agreement between parties, the consolidation can take place on the basis of law governing the arbitration process. Thus, several countries of the Asia-Pacific region have incorporated specific consolidation provisions into their international arbitration laws. Those

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125 Andrea Marco Steingruber, “Consent in International Arbitration” supra note 11 at 177.
126 Ibid.
consolidation provisions require parties expressly to choose the consolidation regime. Thus, consolidation regime can be found in the English Arbitration Act, 1996; the Netherlands CCP; the Hong Kong Arbitration Ordinance 1997; the Australian International Arbitration Amendment Act 1989; and the New Zealand Arbitration Act 1996.

Finally, a general principle of all the rules and the national legislations reviewed above is the same as in the joinder section is that if parties wish to ensure that the third parties’ dispute can be consolidated to the arbitration proceeding in the future, they should consider this question during drafting of the arbitration agreement, i.e. the parties shall have a relevant provision in the arbitration agreement clearly stating that the consolidation of the arbitration proceedings is permissible. A properly drafted consolidation provision in the contract or in each related contract is the best way to ensure that the consolidation shall be made as the part of the parties wills.

Third Party Notices

Third party notices address the situation where an existing party, usually, a respondent party supposes that it has a right to pursue a third party for any liability to be awarded against it in the arbitration proceeding. Some national laws provide that by inviting the third party to participate in the arbitration proceeding - the respondent party - defends the initial case properly: and, therefore, the third party will lose its right to challenge the outcome. In order to give effect to this principle, the courts have introduced the mechanism of “third party notices”. However, even in

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128 Andrea Marco Steingruber, “Consent in International Arbitration” supra note 11 at 175-177.
129 Ibid.
this mechanism the general suggestion is that the third party can only be admitted to the arbitration proceeding if all parties to such proceeding provide for consent to joinder of the third party.\footnote{131}

Summing up, the participation of the third parties in the arbitration proceeding is a complex procedure requiring different considerations and depending on many factors that must be selected by the parties during the drafting of the arbitration agreement, including: selection of the arbitration institution, defining governing law of the arbitration agreement and the relevant contract, as well as the law of dispute resolution of the future arbitration. The international approach educed that in spite of the issue’s complexity, the third party’s participation in the arbitration proceeding is possible. The third party’s intervention could be done through either court, or provided in the relevant arbitration rules, and national legislation; and there is no strict ban on the third party participation in the arbitration proceeding.

As a general rule there is an inherent conflict between the consensual nature of arbitration proceeding and a statutory joinder not based on the consent. Perhaps due to stated reasons the Kazakhstani law does not contain provision dealing with the joinder and intervention of third parties and consolidation of the arbitration proceedings. The following chapter shall render a possible alternative solution to the problem of the third party’s participation in the arbitration proceeding in Kazakhstan. The solution shall be considered with the due consideration of the international approaches analyzed in this chapter.

\footnote{Ibid at 178-179.}
4 The Possible Solution as to the Problem of the Third Parties in the Arbitration Proceedings in Kazakhstan

4.1 Should National Legislation allow for the Interest of the Third Parties?

The fundamental principles of the contract law are a “contractual freedom” and a “party autonomy”, pursuant to which each party has right to make contracts in accordance with their commercial interests, and decide with whom and how they want to resolve any disputes. Therefore, the limitation of these principles infringes the equilibrium of the party’s autonomy. At the moment there is no proper way to resolve this problem in the Kazakhstani legislation. Indeed, in legal literature, expressed different views on the issue, from a categorical objection as to possible including of provisions into the national legislation providing a third party the right to joinder and intervene that shall be considered by the arbitral tribunal,\textsuperscript{132} to \textit{vice versa} necessity in the development of proper legal regulations on this issue.\textsuperscript{133}

I suppose that the legislative reforms are required measure in order to stabilize and equilibrate the position of all parties in the arbitration proceedings. I argue that the Kazakhstani approach regarding the third party issues in the arbitration proceeding is uncertain. The uncertainty of the Kazakhstani approach in resolving of the stated problem is that: first, as Kazakhstan is a civil law country it has to apply to the codified legislation, which in its turn does not properly regulate the


\textsuperscript{133} O. Skvortsov “The Arbitration Proceedings Are Business Disputes in Russia: Problems, Trends and Prospects” \textit{supra} note 51 at 296-305.
third party’s participation in the arbitration proceedings; and second, there is no mechanism for resolving the third party’s problem either on the legislative level, or on the practical level.

Furthermore, the provided analyze revealed that the existing Kazakhstani two approaches on the third party’ problem are ineffective. The first approach on the amendments to the rules of the arbitration courts and arbitration tribunals is insufficient measure, due to contradiction to the national legislation, and absence of the legislative support governing the relevant question. By the same token, the second approach in the use of the civil legislation by analogy omits proper solution of the problem, due to the following: the arbitration system and the litigation system are opposite to each other, and the legislation does not endue the arbitration proceedings with an authority of the state courts.

If one compares the litigation and the arbitration processes in Kazakhstan, it is easy to notice that in the litigation: the multiparty proceedings join all the intertwined parties and the claims before a single tribunal; whereas in the arbitration: the lack of the third party mechanisms requires parallel overlapping proceedings. Eventually, this leads to enlargement of the risk of irreconcilable awards and ineffectiveness of the arbitration institutions. The parallel overlapping procedure establishes the risk that the arbitral awards between parties can conflict with those subsequent awards or judgment between the parties-signatories and third parties. Therefore, I believe that permitting the multiparty arbitration proceeding is a necessary preventive measure to deal with the third party’s problem in Kazakhstan. Moreover, in case of erasing third party’s interest, the arbitration award can become conflicting due to the right of third parties to appeal such award.

At the same time, the international approaches demonstrate flexibility on the third party’s problem. This flexibility is evidenced by the increasing trend to recognize that “the interest of
third parties should be taken into account in the arbitration proceedings, and that a procedural mechanism of communication between the arbitration proceedings and the third parties should be established”. 134 Thus, the arbitration proceedings in Kazakhstan should be a flexible process willing to communicate with the third parties and providing the parties with a fair decision.

However, as Kazakhstan is a civil law country, it is not practicable to expect that the approaches of the common law countries shall be fully adopted at the national level. The state courts cannot intervene and opine on the arbitration mechanism; therefore, only a legislative solution is available in Kazakhstan. The reference to the arbitration rules as a method for joinder and intervention, and consolidation can only work in case of proper selection of the arbitration institutions.

Consequently, in my opinion, the most suitable way to resolve this issue is to amend the national legislation on arbitration by bringing it into compliance with the international approaches. Moreover, the rules of the arbitration courts and arbitration tribunals might also need to be amended in order to provide for more effective mechanisms of a dispute resolution of the third party’s participation in the arbitration proceedings.

It is worth mentioning that not all international approaches could be embraced on the Kazakhstani level. It is clear that due to the civil law model, the model of the common law countries cannot be fully used in Kazakhstan. Moreover, such mechanisms as equitable estoppels, group of companies, assignment, etc. directly contradicts to the national legislation of Kazakhstan. Therefore, I suggest to take as a model for amending of the national legislation the international approaches of the countries like Belgium, Netherland, United Kingdom and

134 Stavros Brekoulakis, “The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room” supra note 3 at 1172
Australia. This selection is made due to the similarity of the legislations of these countries with the national legislation of Kazakhstan. As to regard the rules of the arbitration institution, I suggest taking into account the most substantial international arbitration institution, like ICC arbitration. This suggestion is made due to the doubtless significance of the sated institution within the arbitration institutions.

The national legislation can be amended by two ways: either by introduction amendments and changes into the Civil Procedure Code, or into the Laws on International Commercial Arbitration and the Laws on Arbitration Tribunals. Given that the laws are more specific and are specifically aimed to regulate arbitration process, I suppose that the amendments should be introduced into the laws.

4.2 The Alternative Solution: amending the National Legislation of Kazakhstan

Having accepted the existence of the third party’s problem, I concluded that this problem threatens the efficiency and finality of the arbitration as a tool for the resolution of commercial disputes. Therefore, I suggest amending the existing national legislation of Kazakhstan. The following section provides for alternative solution as to the third party’s problem in Kazakhstan in the light of the international approaches.

Given that national laws omit regulation of the third party’s problem, this paper suggests to introduce the relevant amendments and changes into the existing national arbitration legislation, namely: the Law on the International Commercial Arbitration and the Law on Arbitration Tribunals. As a model this paper suggests to take the legislation of Belgian, Netherland, United Kingdom and Australia and the Rules of the ICC Arbitrage. The amendments are suggested to be
introduced with regard of two issues: (i) joinder and intervention of a third party to the arbitration proceeding; and (ii) consolidation of the different independent arbitration proceedings related to the same subject or with dependent parties.

The following assumptions with regard to the suggested amendments must be taken into account:

1) Due to consensual nature of the arbitration proceedings, any joinder and intervention, as well as consolidation of the arbitration proceedings, must be done only with the consent of all parties. Therefore, proof of the consent of all parties shall be required; and in the absence of such proof no one can be compelled to participate in the arbitration proceeding. Normally, if all parties agree to the arbitration agreement – the final award shall be enforceable.

2) As the arbitration courts and arbitration tribunals are entitled to arbitrate only disputes of the parties-signatories of the arbitration agreement, who directly provided consent for the arbitration proceedings (whereas in the litigation the court can resolve any disputes), the arbitration courts and arbitration tribunals cannot compel the third party at their own initiative to the arbitration proceedings. In other words, the arbitration courts and arbitration tribunals have no power to force the third parties to join the arbitration proceedings.

3) In the case of the presence of consent of the parties, both the arbitration courts and arbitration tribunals are to be provided with more flexibility and power in resolving questions of the third party’s participation. This permission must be done, in order to prevent abusive actions of one party over another. The arbitration courts and arbitration
tribunals shall resolve this issue with due care on the basis of “competence-competence” rule.\textsuperscript{135}

Thus, the safe answer to the third party’s problem is simply to insert relevant clause explicitly negating any possible extension to the third party. However, this mechanism must be accompanied by the national legislation and rules of the relevant arbitration institutions. Otherwise, such provision shall not work due to contradiction to the national legislation.

Eventually, I suggest the following wording of the amendment into the legislation of Kazakhstan with regard to joining and intervention:

"Joining and Intervention” article

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 arbitration court/arbitration tribunal shall send without delay a copy of the request to the parties.

\textsuperscript{135} The “competence –competence” rule means that an arbitration court/tribunal may be authorized to determine its own jurisdiction. The competence-competence rule can be considered as a rule of temporal priority, empowering the arbitration court/tribunal on its jurisdiction in the first instance. (Simon Greenberg, Christopher Kee & Romesh Weeramantry, “International Commercial Arbitration: an Asia-Pacific Perspective” supra note 61 at 215-217).

The competence-competence rule is set out in Article 16(1) of the Model Law:

“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”
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 arbitration court/arbitration tribunal and the other party.

3. The joinder or intervention for the claim of indemnity may only be permitted by the arbitration court/arbitration 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 or intervention for the claim of indemnity, the third party becomes a party to the arbitration proceedings. Unless the parties have agreed there on the arbitration court/arbitral tribunal shall determine the further conduct of the proceedings.

5. In any event, the admissibility of such joinder, intervention requires an arbitration agreement between the third party and the parties involved in the arbitration. That agreement is subject, moreover, to the unanimous consent of the arbitration court/arbitration tribunal.

As with regard to the consolidation issue the opt in provision, describe in chapter 3, shall correspond better to the requirement of parties’ consent than opt out provision. Indeed, with opt in provision the parties are consciously selecting the same national arbitration law-providing for consolidation provision- in different, but possibly related arbitration agreements. The consent requirement is very important, as when different arbitration proceedings are consolidated by applying a provision contained in a national arbitration law, it is not only the composition of the arbitration court that could change, but also the relevant arbitration rules applicable to the relevant arbitration proceeding.

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Please see p. 43 of the Thesis.
Therefore, I suggest taking as a model the following wording of the amendments to the legislation with regard to the consolidation process:

“Consolidation of Arbitration Proceedings” article

1. A party to arbitration proceedings before an arbitration court/arbitration tribunal may apply to the court/tribunal for an order in relation to those proceedings and other arbitration proceedings (whether before that arbitration court/arbitration tribunal or another arbitration court/arbitration tribunal) on the ground that:

   a. a common question of law or fact arises in all those arbitration proceedings;

   b. the rights to relief claimed in all those arbitration proceedings are in respect of, or arise out of, the same transaction or series of transactions; or

   c. for some other reason specified in the application, it is desirable that an order be made under this article.

2. The following orders may be made under this article in relation to 2 or more arbitration proceedings:

   a. that the arbitration proceedings be consolidated on terms specified in the order;

   b. that the arbitration proceedings be heard at the same time or in a sequence specified in the order;

   c. that any of the arbitration proceedings be stayed pending the determination of any other of the arbitration proceedings.
3. Where an application has been made under subsection (1) in relation to 2 or more arbitration proceedings (in this article called the “related arbitration proceedings”), the following provisions have effect:

4. If all the related arbitration proceedings are being heard by the same arbitration court/arbitration tribunal, the arbitration court/arbitration tribunal may make such order under this article as it thinks fit in relation to those arbitration proceedings and, if such an order is made, the arbitration proceedings shall be dealt with in accordance with the order.

5. If two or more arbitration court/arbitration tribunal hears the related proceedings:

a. the arbitration court/arbitration tribunal that received the application shall communicate the substance of the application to the other arbitration court/arbitration tribunal concerned; and

b. the arbitration court/arbitration tribunal shall, as soon as practicable, deliberate jointly on the application.

6. Where the arbitration courts/arbitration tribunals agree, after deliberation on the application, that a particular order under this section should be made in relation to the related arbitration proceedings:

a. the arbitration courts/arbitration tribunals shall jointly make the order; and

b. the related arbitration proceedings shall be dealt with in accordance with the order.

7. If the arbitration courts/arbitration tribunals are unable to make an order under subsection (6), the related arbitration proceedings shall proceed as if no application has been made under subsection (1).
8. *This section does not prevent the parties to related arbitration proceedings from agreeing to consolidate them and taking such steps as are necessary to effect that consolidation.*

The amendments into the rules or regulations of the arbitration institutions shall be optional. However, I suggest that the last wording of the ICC Rules shall be taken into consideration by the arbitration institutions of Kazakhstan.

**Conclusion**

The main aim of this thesis was to explore the problem of third parties’ participation on the legislative and the procedural levels in Kazakhstan. The executed analyze has revealed that the Kazakhstani legislation has a gap regarding the third party’s possible participation in the arbitration proceedings. Therefore, this paper has made an argument for the necessity of the legislative reforms to be taken in order to stabilize and equilibrate the position of the third parties with all other parties in the arbitration proceedings in Kazakhstan.

One of the obvious advantages of the arbitration proceeding is that it can be chosen as a form of dispute resolution voluntary by the parties. As a general rule, only a party to the arbitration agreement can be compelled to the arbitration proceeding with another party(ies) to that agreement. Nevertheless, the above analysis has revealed that arbitration proceedings and arbitral awards can affect the legal and financial interests of the third parties.

The paper compares the Kazakhstani and international approaches as to the possible participation of the third parties in the arbitration proceedings. In Kazakhstani legislation, currently, the situation of participation of third parties in the arbitration proceedings is uncertain. The existed practical approaches in Kazakhstan do not clarify the position of the third parties too.
By contrast, the existing international approaches have yielded that in some circumstances a party which is not signatory to the arbitration agreement can participate in the arbitration proceedings: either as a claimant, or a respondent. Various national laws permit joinder and intervention, as well as consolidation of the arbitration proceedings even though there may be no strict contractual relationship between the parties. In particular, the paper examines joinder of the third parties in the US, France and England, as well as the common mechanism of the joinder and intervention, and consolidation of the arbitration proceedings in Belgian, Netherland, United Kingdom and Australia, and relevant approaches of the arbitration institutions to this issue.

After due consideration of the Kazakhstani and international approaches, this paper attempted to recommend specific draft language for national legislation, namely the Law on the International Commercial Arbitration and the Law on Arbitration Tribunals.

Overall, through this research, the aim of this thesis was to develop a series of suggestions on the potential development of the arbitrage procedural legislative system, and attempt to address some of the gaps in the existing arbitration legislation of Kazakhstan.
1. Civil Code of Kazakhstan No. 409 dated 1 July 1999


5. The Belgian Judicial Code


12. The SIAC Rules.


15. The Kazakhstani International Arbitrage Rules of Arbitration date 9 March 2010,
http://www.arbitrage.kz/145

16. The Rules of the Chamber of Commerce and Industry of the Republic of Kazakhstan,

17. The Rules of the International Arbitrage Court “IAC” dated 25 October 2008,

18. The Rules of the International Arbitrage “IUS” dated 3 November 1992,


27. Bernard Hanotiau, “Multiple parties and Multiple Contracts in International Arbitration” (2009), Multiple Party Actions in International Arbitration, Permanent Court of Arbitration.


40. Peterson Farms Inc. v C&M Farming Ltd [2004] EWHC 121 (Comm), Langley J.


44. [http://www.arbitrage.kz/eng](http://www.arbitrage.kz/eng)