

IBA Investment Arbitration Subcommittee: Report and recommendations on third-party participation in investment arbitration

Annex 5 – Amicus curiae: definition and acceptance by jurisdiction

Jurisdiction	Definition	Acceptance
<p>United States of America</p>	<p><u>Supreme Court</u></p> <p>Rule 37 of the Supreme Court Rules: “An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored. An amicus curiae brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5”</p> <p><u>US Federal Courts</u></p> <p>Rule 29 of the Federal Rules for Appellate Procedure foresees in the ability to submit <i>amicus curiae</i> briefs both (a) during initial consideration of a case on the merits; and (b) during consideration of whether to grant rehearing:</p> <ul style="list-style-type: none"> - Rule 29(a)(2): “When Permitted. The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge’s disqualification.” - Rule 29(b)(2): “When Permitted. The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.” 	<p>Widely accepted, diverse and multifaceted.</p> <p><u>Supreme Court</u></p> <p>The amicus curiae participation may both be solicited or unsolicited.</p> <p>From the ‘Guide to Filing <i>Amicus Curiae</i> Briefs’ (January 2023) it follows that there is no longer a requirement to consent in order to file an <i>amicus curiae</i> brief. Whereas before parties would have to consent to such submission, and in absence of this consent, there amicus would have to file a motion for leave to file the brief from the Court.</p> <p><u>US Federal Courts</u></p> <p>From a reading of the US Federal Court Rules, this seems to be contrary to the <i>amicus curiae</i> submissions in US Federal Courts for parties that are not (i) the United States or its officer or agency or (ii) a state.</p>
<p>Australia</p>	<p>Although mostly recognised in case law, the High Court Amendment Rules of 2010, under its ‘Part 44 Written and oral submissions’ includes <i>amicus curiae</i> as an</p>	<p>The concept of <i>amicus curiae</i> is recognised in Australian jurisdiction.</p>

IBA Investment Arbitration Subcommittee: Report and recommendations on third-party participation in investment arbitration

Annex 5 – Amicus curiae: definition and acceptance by jurisdiction

Jurisdiction	Definition	Acceptance
	<p>'intervener'; and further sets out the rules for such an intervener's submission (see Form 27C as a template)</p>	<p>The role of an amicus curiae ('friend of the court') is to assist the court 'by drawing attention to some aspect of the case which might otherwise be overlooked.' An amicus curiae may 'offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted'. This role does not extend to introducing evidence to the court, although an amicus may be permitted to lead non-controversial evidence in order to 'complete the evidentiary mosaic'. An amicus curiae is not a party to the proceedings and is not bound by the outcome of the proceedings.</p>
<p>Hong Kong</p>	<p>Generally, the acceptance of <i>amicus curiae</i> in Hong Kong is based on principles derived from common law, with influence from English legal tradition.</p>	<p>Amicus curiae in Hong Kong is based on common law practice, mostly on the practice in England, although not as widespread as in England.</p> <p>The cases where amicus curiae are submitted largely fall into four categories:</p> <ul style="list-style-type: none"> (i) Where the parties to the proceedings were represented, but a legal point of public importance had been raised and hence an amicus was appointed to offer impartial assistance to the courts (ii) Where a party was absent or unrepresented; an amicus was appointed to present

IBA Investment Arbitration Subcommittee: Report and recommendations on third-party participation in investment arbitration

Annex 5 – Amicus curiae: definition and acceptance by jurisdiction

Jurisdiction	Definition	Acceptance
		<p>arguments for the absent or unrepresented party;</p> <p>(iii) Ex party applications;</p> <p>(iv) Where an amicus was appointed to safeguard the interest of someone who was not a party to the proceedings.</p>
<p>Brazil</p>	<p><i>Amicus curiae</i> is constitutionally recognised and formalised in the Civil Code for all civil proceedings:</p> <ul style="list-style-type: none"> - Article 103 of the Brazilian Constitution: “<i>The following may file direct actions of unconstitutionality and declaratory actions of constitutionality: (CA No. 3, 1993; CA No. 45, 2004)</i> <ol style="list-style-type: none"> I – the President of the Republic; II – the directing board of the Federal Senate; III – the directing board of the Chamber of Deputies; IV – the directing board of a state legislative assembly or of the federal District Legislative Chamber; V – a State Governor or the Federal District Governor VI – the Attorney-General of the Republic; VII – the Federal Council of the Brazilian Bar Association; VIII – a political party represented in the National Congress; IX – a confederation of labour unions or a professional association of a nationwide nature. 	<p><i>Amicus curiae</i> is constitutionally recognised, widely accepted and frequently used in Brazil.</p>

IBA Investment Arbitration Subcommittee: Report and recommendations on third-party participation in investment arbitration

Annex 5 – Amicus curiae: definition and acceptance by jurisdiction

Jurisdiction	Definition	Acceptance
	<ul style="list-style-type: none"> - Article 138 of the Brazil Civil Procedure Code provides a full provision on the admissibility of amicus curiae: “The judge or judge-rapporteur, considering the relevance of the matter, the specificity of the subject-matter of the claim or the social impact of the dispute, may, by an unappealable decision, ex officio or at the request of the parties or the person who wishes to file a brief, request or allow the participation of a natural or legal person, authority or specialised entity, with adequate representation, within fifteen (15) days of being served with notice.” - Law 9.868/1999 governs Direct Actions of Unconstitutionality (ADI) and Declaratory Actions of Constitutionality (ADC), allowing amicus curiae participation in constitutional matters before the Supreme Federal Court (STF). (no English version available) 	
<p>Thailand</p>		<p>The use of <i>amicus curiae</i> seems to be rather limited, however not unrecognised:</p> <ul style="list-style-type: none"> - Amnesty International has submitted an <i>amicus curiae</i> brief before the Bangkok Civil Court on 3 September 2024. - Lawyers’ Rights Watch Canada and the ICJ jointly submitted an <i>amicus curiae</i> brief to Thailand’s Nakhon Ratchasima Provincial Court on 1 February 2024

IBA Investment Arbitration Subcommittee: Report and recommendations on third-party participation in investment arbitration

Annex 5 – Amicus curiae: definition and acceptance by jurisdiction

Jurisdiction	Definition	Acceptance
		<p>However, abovementioned cases are purely on the submissions of such briefs, and there is no proof of the extent in which the briefs will be taken into account. Simply because NGO's are submitting amicus briefs, does not mean that the receiving court has formally recognised <i>amici curiae</i>.</p>
<p>South Korea</p>	<p>Article 74 of the Constitutional Court Act is titled "Submission of Opinion by Interested Agencies", and provides as follows: "State agencies or public organisations who have interests in an adjudication on a constitutional complaint, and the Minister of Justice may submit to the Constitutional Court a written opinion on the adjudication".</p>	<p>The use of <i>amicus curiae</i> is more limited but still recognised.</p> <ul style="list-style-type: none"> - The possibility is explicitly foreseen in the Constitutional Court Act. - Additionally, Amnesty International has submitted an amicus curiae in a Supreme Court case of South Korea
<p>EU law</p>	<p><u>European Council regulations</u></p> <p>EU-Members must recognise a form of <i>amicus curiae</i> participation under EU Regulation 01/2003 (competition).</p> <p>It relates to requests for information. the antitrust authorities of the member states as well as the European Commission may submit written observations to national courts on proceedings related to antitrust. The antitrust authorities or the Commission may also provide oral</p>	<p>Apart from the EU-regulation requiring <i>amicus curiae</i>, it has also been a growing practice over the years in civil law countries in general.</p> <p>Although historically <i>amicus curiae</i> did not appear in civil law jurisdictions, there is now a rise in several EU-countries that do regulate and apply it.</p>

IBA Investment Arbitration Subcommittee: Report and recommendations on third-party participation in investment arbitration

Annex 5 – Amicus curiae: definition and acceptance by jurisdiction

Jurisdiction	Definition	Acceptance
	observations with court permission. In addition, the national courts may request amicus submissions from competition authorities or the Commission in antitrust proceedings.	