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INTRODUCTION

Lawrence H. Tribe in his seminal work on “constitutional choice” prefaced the significance of assigned relative merit to “competitive value” of permissible legal choices. Copiously, the American Apex court, unlike our Supreme Court deals broadly with singularly significant constitutional questions and the approach of adjudication is bound to differ, but, what makes the analogy resembling is the feature of “philosophy of adjudication." More often than not, the jurisprudence developed by our court across all branches of law, if scanned considering unearthing the philosophy of dispute resolution, it is seen to have travelled too far a distance from “the court as a center of legalese” to “the court as a dispenser of justice." This specific attribute is oft-described as “ demosprudence of Indian Supreme Court." Over 2500 years ago in the prosperous commercial center of Rome, contracts were entered into daily. At that time, the contracts were formed orally through the correspondence of questions and answers from the two parties. The questions and answers had to be a precise reflection of one another; otherwise the contract would be null and void. The importance of the precise congruence was upheld through the meeting of the parties. If the parties did not meet, no contract could be formed, as it was not clear that the parties had the exact same intentions. The meeting of the minds was by that the essence of contract making in the Roman Empire. Today however, parties to a contract do not need to meet for a contract to be formed, however the concept of consent would seem to be equally important. Arbitration is today the only forum outside of courts where a dispute can be settled with the result in an enforceable award. The only way to waive your fundamental right to a fair trial is by writing a contract to arbitrate. A contract in which you can state the terms of this alternative dispute settlement procedure, choose where the dispute should be settled, by whom and with reference to which national laws and/or international principles. The most fundamental principle of arbitration is therefore consent.

Problems can thus arise when non-signatories to the arbitration agreement, who in absence of consent either wants to join the arbitration proceedings or has arbitration invoked against them. Today, several methods have been invented through case law through which non signatories either can be allowed or forced to take part in arbitral proceedings without their explicit consent. When applying these methods, courts and arbitral tribunals presume that consent from the non-signatories impliedly is at hand. However, this application may by that contravene the most basis principle of arbitration, consent.

This shift is not the sole variant of social action litigation or constitutional adjudication, it has percolated and spilled over all sorts of adjudications performed by the court. Arbitration law is no exception. The widening ambit of ever expanding notion of “public policy” from Renusagar-I to Associate Builders bears a testimony to this trend. Thus, the notions of “justice as a larger doctrine than the case in hand”, “ sense of justness of decision in terms of existing law” and “ non-negation as far as possible to the precedent” are few such driving considerations which shapes the growth of law including the arbitration law. The situation become perplexing when certain dominant considerations.

1. Third Party Arbitration- Precept.

Traditionally the adjudication of dispute is thought to be the essential function of sovereignty, but as the contractual bonafide had its root in social acceptance, the freedom to contract become key to a orderly economic order. The historics associated with such feature can be traced back to the days of Lard Mansfied and his contribution to common law or commercial law in form of Lex mercatoria . This has given recognition to autonomy to decide the mode of dispute settlement. In popular conception, the self same is crystallised as " autonomy and choices to determine" the, all transactions between the parties including the freedom, to dispute resolution. The detailed historical backdrop of arbitration is beyond the scope of this work but wherever necessary insight into history signifies a probable impact of discourse, the same will be appropriately referred. Contextually, all function of adjudication is an out come of surrender of certain interest which an individual by virtue of his existence possess . Adjudication either in rem or personam is a product of conferment of political power to the court-which hitherto the existence of political system, belong to the individual. It is a quest to orderly social behaviour which determines the sphere and pattern of adjudication.

Put in that context, let us evaluate the arbitration as a concept and how far a third party fits into it. As stated aforesaid, the sine qua non of arbitration is dispute as it is primarily a mode of dispute resolution. The reference for arbitration ipso facto presupposes a dispute-absent that no arbitration can exist or need be arise. Thus if a claim is made before the company court under liquidation and the same is either in parts or in whole is pending before a tribunal-the winding up claim qua the same, would not be entertained as there is a dispute as regard the claim. Similarly, the insolvency action cannot be triggered on an action which is under arbitral reference. Secondly, there must be an arbitral agreement preordaining the dispute resolution qua a particular claim. This second conditions determines the subject of present discourse under thesis. Logically, only the parties who have consciously chosen to be subjected to arbitration qua certain pre-determinable class of dispute, can only by their own take recourse to arbitration proceeding and none else. But what would be the position in case at the sesine or post conclusion of arbitration but before enforcement of award, the parties approaches the court for grant of interim relief. Can it be, fairly, said then- that the court being repository of sovereign power and resort to power which it being ordinarily a civil court had-or on the same parity can an arbitral tribunal is a tribunal relatable to supervisory jurisdiction which the Higher court has over other tribunals. Both such issues takes us ahead of twin judgments of Delhi and Calcutta High courts –on which the Apex court, is yet to rule conclusively. Even the closure glance to other common law jurisdiction presents a copiously hazy picture and such determination is subjective genre of objective principle-just like the objectivity in "essential legislative function" and gravest judgment is decisive on what constitutes the essential legislative function. It essentially begs a question as to who is a third party? –the genunity is not a discourse of law- it is a concept of social relation – what law seek to unfathom is which sort of "interest" qualifies an individual to assail the entrustment of an arbitral award/order- being an order beyond vires of arbitral tribunal. Can that behold same position, if the arbitral award would have trapping of court decree –once the same is put to execution- is another primordial segment of contestation in which this thesis posits to answer.

An agreement by the parties to submit to arbitration any disputes or differences between them is the foundation stone of modem international commercial arbitration. If there is to be

a valid arbitration, there must first be a valid agreement to arbitrate. This is recognized both by national laws and by international treaties.

Arbitration is contractual by nature -

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a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit....

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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 may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency.

Most of the

situations discussed in international arbitral practice where one or more parties had not themselves formally signed or countersigned the arbitration clause have one element in common: namely the element

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that justice would not seem to be done if the only criterion

applied and considered was the criterion that a particular third party did not itself sign or countersign the arbitration clause. It is because ... reliance on the merely formalistic argument.. that no arbitration clause had been signed by a particular party... would result in such a manifestly wrong and unjust solution that more subtle and more appropriate thoughts had to be given to appropriately consider the situations as they occur in international business practice.

As encapsulated in the first quote above, it is irrefutable that the arbitration agreement is the "cornerstone of the arbitration process" and thus "[the existence of both parties' consent to submit the dispute to arbitration is clearly a necessity." Yet, the second quote, drawn from the leading United States case, envisages permitting the arbitration agreement to be extended to a "non signatory," although only where this is in accordance with "ordinary principles of contract and agency." Turning now to the third quote, how can we rationalize the commentator's willingness to apply the arbitration agreement to a non signatory merely because otherwise "justice would not seem to be done" with our initial proposition: that without a valid agreement manifesting the parties' consent there can be no valid arbitration? This THESIS analyzes the legal theories and other mechanisms employed in international commercial arbitration to achieve a workable compromise among the above-cited propositions. In so doing it touches on larger, more complex questions like the position of third parties in contract law, the jurisdictional foundations of arbitration, and the role of choice-of-law issues in determining the validity of the arbitration agreement. However important these broader concerns may be, they should not undermine the importance of the issue in its own right. As stated by Dr. Blessing, in introducing a seminar on the topic: " [T]his now brings us to the middle of our most difficult topic of our Conference: the topic of the extension of the arbitration clause to non-signatories - probably one of the most difficult topics in international arbitration, a topic which gains more and more importance as a consequence of the globalization of international business and trade."

2. Anatomy

This thesis, holistically revisits the "interest" discourse which Lord Denning had established across the common law, to formulate the tests as yardsticks for subjecting the holder of interest to arbitration and also when can they legitimately claim immunity from private adjudicatory functions. It is profusely contended that it is perhaps the discourse near to "perfection and just" which illumines any conundrum of "subjecting the non [arbitral] agreement part to arbitral adjudication". In this way, the shift is from "party" to "interest" because it is across Atlantic phenomenon that the interest per se is subject matter of legal protection and so of its holder and not the other way round. The incidental questions of distinctions in public tribunal and private tribunal in right discourse and attributes of adjudication which is hallmark of clothing the binding rule of conduct-are delineated. Another segment of this thesis analyses the pre-disposed "interest" phenomenon from the perspective of commercial viability-without even iota of undulation to the notion that arbitration need not always be commercial. Beginning with epoch of Justice Mehmood (1887 -1893) on infusion of public law element to private law- the third party arbitration is analysed in the context of future of commercial law across globe.

Indubitably, no work on such issues of significance can be complete unless the jurisdictional complexities are properly evaluated-it is so done in future segment. In The another segment presents Chief Justice Marshal's ubiquitous style of legal analysis where impact of third party trapping in myriad way inclusive of third party funding, is analysed in the context of "diffusion" of rights. The penultimate discourse sums up the position in law and outlines the semantics of juridical cleavage on subject and holds that it so exists because of over-judicial activity on the

front of section 34 and 37 of arbitration act proceedings which, is perhaps classical case of "unique tend of arbitration review" which is peculiar feature of Indian law. The opinion in great arbitration cases are explicated to magnify the discontent with global pace of outlining the "interest" to subject it, to arbitration. Conclusion is mapping of two discourse threading over six hexagon with slant of "third party" right in arbitrability of disputes. It so begins: 3. ARBITRATION AND THIRD PARTIES: SETTING OUT THE FRAMEWORK OF THE DISCUSSION

The interrelation between arbitration and third parties is an integral part of any study discussion that touches upon the elements of arbitration. This owes to the very definition of arbitration i.e it is a consensual dispute resolution mechanism binding only those persons that have unequivocally consented to an arbitration agreement. The contractual foundations of arbitration constitute the fundamental difference between arbitration and litigation. In litigation the capacity to become a party to court proceedings is determined on the basis of interest(s). Provided that it is subject to the territorial jurisdiction of the particular national court, a legal or a natural person is entitled to commence court proceedings whenever it needs to protect its legal or financial interest.

By contrast, in the context of arbitration, it is generally accepted that the capacity to take part in proceedings is exclusively determined on a contractual basis. Entering into an arbitration agreement is the indispensable requirement for a person to participate into the arbitration proceedings and be bound by the resulting arbitral award. The principle of procedural party autonomy provides parties with the freedom to determine in their contract the circle of the persons that can participate in the arbitral proceedings. Parties not bound by an arbitration agreement, i.e. third parties, are excluded from the arbitration process. Any legal or financial interest that a third party might have in the dispute between the parties bound by the arbitration agreement is in principle irrelevant.

In the context of multiparty commercial relationships,it can be said that Modern international transactions have become extremely complicated, requiring the participation of several parties for the delivery of large-scale projects and as such the contractual, and thus relative, nature of arbitration frequently leads to unfavourable results.. For example, a typical construction project will usually involve, apart from the employer and the main contractor, an engineer and/or an architect, several subcontractors, suppliers, financiers and possibly more commercial parties. Multiparty situations may also result from finance and security agreements, such as guarantees, indemnities or performance bonds, where a bank, an insurance company or a protection and indemnity association will come into play providing security for the main contract exclusively concluded between two other parties. Thus, several companies (affiliates, or subsidiary companies, or officers, directors, stockholders and members of that legal entity) of the same group will often take part in the execution of a contract concluded by only one company of the group. However, multiparty commercial projects are invariably executed through several bilateral contracts rather than through a single agreement applicable to the several parties to the project. Accordingly, the several bilateral substantive contracts will usually provide for bilateral dispute resolution arrangements. Thus, it often happens that the several parties make jurisdictional arrangements on a bilateral basis, against the backdrop of a multiparty commercial project. In

other words, the parties will opt for a scheme of several bilateral proceedings rather than a single set of multiparty proceedings. This practice leads to what is called, here, "jurisdictional fragmentation of the multiparty commercial project", which occurs when the several parties of a single business project are subject to the jurisdiction of different adjudicatory fora .

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dispute arising between two persons bound by an arbitration agreement in connection with the multiparty project will have to be resolved exclusively by arbitration between these two parties,

which for the purposes of the thesis are named genuine or original parties to an arbitration agreement and arbitration proceedings. Other persons than the genuine

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parties cannot participate in the resolution of the dispute, even if they play an active role in the actual business project, and, therefore, they have an interest in the outcome of the dispute. These persons will remain third parties both to the arbitration agreement and the arbitral award

between the genuine parties.

Therefore, procedural fragmentation leads to a discrepancy between the circle of persons taking part to the resolution of a dispute by arbitration, and the circle of persons not entitled to participate therein despite the fact that they have a legal and financial interest in the dispute.

To give some examples:

• The arbitrator may remain outside the arbitration between a creditor and a debtor. • A subcontractor may not take part in the arbitration between an owner and a contractor, although this arbitration may well determine that the work actually delivered by the subcontractor is defective.

Conversely, the parties to the arbitration process are denied the chance to confront other parties that play an active role in the actual business project:

• a parent company of one of the parties to an arbitration agreement would stay out of the arbitration between its subsidiary and the other genuine party, although the parent company might have taken a decisive role in the performance of the contract.

Consequently, jurisdictional fragmentation of multiparty commercial transactions excludes parties with a significant interest in a particular transaction from taking part in the resolution of the disputes arising out of this transaction. Additionally, it leads to multiplicity of legal

proceedings, either arbitral or judicial, which in turn, may result in a considerable waste of legal and financial resources. More importantly, though, jurisdictional fragmentation may result in inconsistent, if not conflicting, decisions. This outcome will eventually frustrate parties' expectations from arbitration and may well undermine the tribunal's main goal, namely the effective resolution of the dispute. 4. SCOPE OF THE THESIS- RESEARCH QUESTIONS

This study focuses on the wide group of third parties with an interest in the dispute pending before a tribunal between two genuine parties. Third parties of this group are not bound by an arbitration agreement, but they are not strangers to the dispute and the arbitration proceedings either. Since their interests are related to the outcome of the dispute, any factual or legal determination in the arbitral proceeding may well affect their legal position. Therefore, third parties having an interest in the dispute between to other parties bound by an arbitration agreement are labeled by the thesis "false third parties".

The main research questions that will be addressed here are: • " The role and the interests of false third parties • " Whether an arbitration agreement can have an effect on any persons not contractually bound by it • " If yes, under which circumstances this would come into effect and what potential results would arise • " Whether an arbitral award can affect any person that has not participated in the arbitration proceedings • " If yes, what would the specific conditions and possible outcomes of such circumstances be,

Generally speaking, the thesis explores whether it is possible for arbitration to interact with persons that are neither contractual parties to an arbitration agreement, nor parties to arbitration proceedings. Ultimately, the thesis tests the consensual boundaries of arbitration. Thus, the thesis will not be looking into cases where all the parties involved in the same commercial project have consented to arbitration. Equally, the thesis will not focus on matters that, although touch on arbitration and involve more than two parties, predominantly relate to general contract law. Thus, for example, problems concerning the succession of arbitration agreements or the conclusion of arbitration agreements by an agent are more relevant to general principles of succession applicable to all substantive contracts than to principles of arbitration law. However, these issues are in the periphery of the conceptual boundaries of this work, and therefore, they will only briefly be mentioned in the thesis.The discussion in the thesis is based on the assumption that a third party has not consented to arbitration.

5. THEORETICAL BACKGROUND OF THE DISCUSSION ON ARBITRATION AND THIRD PARTIES- SUGGESTIONS OF THE THESIS

Arbitration and third parties, or multiparty arbitration as is usually referred to, is one of the most pervasive topics in arbitration law and practice. However, in spite of the extensive relevant literature, the issue is far from settled. In particular, further study pertains to three relative areas, namely the notion of "false third parties", the effect of arbitration agreements upon third parties and the effect of arbitration awards upon third parties. At this stage, it is useful to explain and briefly discuss the existing theoretical background of these issues and, at the same time, outline the main suggestions of this study, which will be then presented in analytical detail in the main part of the thesis.

Firstly, determining genuine or false third parties

As opposed to the concept of third parties in general, It is essential to establish a theoretical basis for defining the notion of "false third parties". Strictly speaking, every person not bound by an arbitration agreement is a third party. However, not all third parties would be relevant in an arbitration between the two original parties. Only third parties that have a legal or financial interest in the dispute pending before the tribunal may be relevant, namely the "false third parties". Thus, the interest that a third party may have in the pending dispute is a key factor to determine which persons are pertinent to the discussion on arbitration and third parties. From this perspective, the thesis explores in detail the notion of "false third parties". The aim here is to canvass the interests of false third parties, and, on that basis, distinguish between different types of false third parties. The analysis takes a substantive viewpoint, focusing on the association between the genuine and the false third parties, in terms of contractual rights, duties and liabilities. In the light of the findings of this analysis, it will be argued that we should distinguish between two groups of false third parties: those that share the same rights, duties and liabilities with the genuine parties to the arbitration, and those that are merely contractually interrelated with them. It will be shown that the interests of the former in the arbitration between the two genuine parties are stronger and, thus, more relevant than the interests of the latter.

This distinction is essential for the purposes of the thesis, as it provides the conceptual grounds for the working hypothesis of the thesis, namely whether arbitration agreements and arbitral awards may have any effect upon false third parties depends on the degree of the association between the genuine and the false third parties, in terms of substantive liability and interests.

Second, the effect of arbitration agreements upon third parties

To date, the legal discourse and arbitral practice have opted for two different viewpoints on this matter. The first suggests that arbitration agreements cannot have any impact whatsoever on any person who has not clearly consented to arbitration, as this consent is evidenced by their signature. According to this view, non-signatory parties are total strangers to an arbitration agreement and the ensuing proceedings between the signatories.

The second stance proposes that arbitration agreements, as substantive contracts, may be "extended", under certain circumstances, even to persons that have not signed them. This is the view taken by what is called in the thesis "extension doctrines", the most prominent of which are the "group of companies" doctrine in the European continent and the "equitable estoppel" in the USA. According to extension doctrines, signature should be distinguished from consent to arbitrate though in India “group of companies” doctrine has been predominantly applied while extending the arbitration agreement to the third party which will be discussed later on with the help of cases. Thus, it is possible under certain conditions for non-signatories to enter into an arbitration agreement, notwithstanding the fact that they have failed to sign it. In the context of "group of companies" doctrine, in particular, it has been argued that the existence of consent of a non-signatory party to arbitrate may even be presumed.

As will be demonstrated, neither of the above mentioned views succeed in giving satisfactory answers to the problem of arbitration agreements and third parties. This is largely because they both take a strict contractual approach to the issue, focusing exclusively on the contractual characteristics of arbitration agreements. In this contractual context, the main question is whether a non-signatory, rather than a stricto-sensu third party can be contractually bound by an arbitration agreement. As will be explained, not even the extension doctrines challenge "consent" as an indispensable requirement for the participation of the non-signatory party to the arbitration between the signatories. The core argument of the extension doctrines is merely that signature on an arbitration agreement is not the only means to assert consent to arbitrate.

Third, the effect of arbitration awards upon third parties

This issue has been relatively overlooked since the interest of academic doctrine and jurisprudence has focused principally on the effect of arbitration agreements rather than the effect of arbitral awards upon third parties. The sole viewpoint here is that arbitral awards should be equated to national decisions. Accordingly, the question of whether the arbitration award may have any sort of impact upon third parties depends on the national provisions regarding res-judicata. As will be shown, national provisions invariably provide that the res-judicata effect is strictly limited to the persons taking part in the proceedings. The only persons, apart from the parties to the proceedings, which are bound by the res judicata effect of a national judgment and, therefore, an arbitral award are third parties with identical interests with the parties to the proceedings, namely the privies to the parties to the proceedings.

The thesis challenges the prevailing view on the grounds that it overlooks the differences, in nature and purpose, between international awards and national decisions. Most importantly though, the prevailing view fails to accommodate the systemic problems arising in international arbitration with regard to multiparty commercial relationships. Instead, the thesis argues for a third warty effect of arbitral awards specially designed for the needs of international arbitration. The case is made for the application of an arbitral effect different from that of res judicata, both in terms of quality and intensity, which is nevertheless conclusive.

Accordingly, it is argued that arbitral awards should be able to affect a wider circle of third parties than the one affected by national judgments. A wider arbitral effect would compensate for the lack of unification mechanisms at an earlier stage analogous to the mechanism provided in the context of litigation. It is suggested, in particular, that arbitral awards should somehow affect the false third parties rather than just the privies to the parties in the proceedings.

However, it is noted that the substantive links between the privies and the original parties to the proceedings are stronger than those between the false third parties and the original parties. Therefore, it is argued that the third-party arbitral effect vis-ä-vis false third parties should be different and certainly less drastic than the res judicata effect upon privies. This suggestion accords to the overarching argument of work here, namely that the procedural

relationships between several parties must correlate to their relationships in substantive terms.

More specifically, it is submitted that arbitral awards should have both conclusive and preclusive effects on false third parties. Thus, the preclusive effect of the award between two parties will prevent the re-litigation of any factual and legal issue that might arise again in the second set of proceedings between a false third party and one of the parties in the first set of proceedings. In addition, the conclusive effect of the award between two parties will provide the logical and legal basis for the second forum, be that a national court or an arbitral tribunal, to reach a decision in accordance with the determination of the first award. Applied in this way, the combination of preclusive and conclusive effects of an arbitral award will harmonise the several sets of proceedings, in the context of a multiparty relationship, and it will ensure that any conflicting awards are avoided.

Despite its conclusive and preclusive consequences, the third-party arbitral effect suggested here is less effective than the res judicata effect. The award will merely affect rather than bind a false third party, and, therefore, any issues in terms of due process will not arise. The award given in proceedings between the two genuine parties will not be able to be enforced by or against the false third parties. Thus, this third-party effect will not pre-empt rights or duties of the third party. A second trialwill still be indispensable for the claims of the third party to be determined.

6. RESEARCH METHODOLOGY

The basic methods employed in this study were research and qualitative analysis of primary and secondary legal sources, including national and international laws and rules, caselaw of national courts and arbitral tribunals, and academic treatises. More specifically, as far as arbitration rules are concerned, the rules of all the major arbitration institutions are examined. Attention, of course, is particularly focused on

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the United Nations

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Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York

Convention),

the international arbitration treaty that has been enjoying an unprecedented success, and has been immensely influential to the development of arbitration doctrine and practice.

In terms of national jurisdictions, the research takes an international comparative viewpoint. The legislation and case law of different countries are reviewed, although emphasis is especially placed on England, the USA, France, and to a lesser extent on Switzerland, Germany and the European Union. The selection of the above jurisdictions was mainly made for two reasons.First, it provides equilibrium between common and civil law legal traditions. Second, it covers almost all the major arbitration centres with advanced arbitration laws and procedural systems.

The following notes should also be made with regard to the methodological approach of the thesis:

First, as already indicated, despite the fact that the literature on "third parties in arbitration" is extensive, the discussion is still largely open. Additionally, regulation on the topic is lacking in a national, regional or international level. Accordingly, the analysis performed here is policy orientated, whereas the final suggestions go beyond black letter law.

Secondly, the analysis on arbitration agreements draws to some extent on material regarding jurisdiction agreements. Arbitration and jurisdiction are very similar, if not identical, in nature, while they also have the same objective. In particular, they are both of contractual origins and they both serve procedural party autonomy. Procedural party autonomy provides the parties with the ability to choose in advance the forum that suits them best, instead of having their disputes resolved by the default forum, which in many cases is difficult to predict. Arbitration and jurisdiction agreements give effect to procedural party autonomy and, thus, constitute fundamental tools for commercial parties to establish an effective dispute resolution policy. Therefore, case law on jurisdiction agreements is occasionally used to support, by analogy, suggestions regarding arbitration agreements.

Similarly, part of the research focuses on national and regional civil procedural systems. It is true that arbitration is in many respects a very different adjudicatory system from litigation, and an arbitral tribunal will normally try the case differently from a national court. Nevertheless, both arbitral tribunals and national courts are, in principal, equal adjudicatory fora vested with the same power: jurisdiction to determine the dispute and issue an authoritative binding decision. Therefore, in jurisdictional terms, national courts and arbitral tribunals perform a very similar function. Accordingly, the thesis makes an in-depth comparative analysis of national litigation systems with regard to the participation of third parties in court proceedings.

The aim of this comparative study is to reveal the rationale behind third-party mechanisms in dispute resolution systems in general. The outcome of this analysis is used as a policy guideline in order for the thesis to determine the right impact of arbitration agreements and awards upon third parties. It should be highlighted that the thesis merely seeks guidance from the study of litigation procedural systems to arbitration. It does not suggest the ad hoc

application of litigation systems to arbitration. Due attention is always paid to the existing differences between the two dispute resolution systems.

GENUINE

PARTIES TO ARBITRATION AGREEMENTS NOTION AND RELEVANCE TO THE THESIS

Now to start with the discussion the aim of this Part is to define the notion of false/ less than obvious third parties and delimitate the group of persons that are relevant for the discussion on arbitration and third parties for the purposes of this study. It tries to distinguish the group of false third parties from that of genuine parties to arbitration agreements. The focus here is on particular types of persons whose status in relation to arbitration agreements is not clear. This is, for example, the case with a principal, whenever an agent concludes an arbitration agreement, an assignee, after the assignment of an arbitration agreement, a consignee in a bill of lading containing an arbitration agreement and a successor in a contract containing an arbitration agreement. These types of persons are sometimes regarded as `third parties'.

However, the thesis will revisits this view, arguing that all persons, such as the above, who are bound by an arbitration agreement by reference to general principles of contract law should be regarded as genuine rather than third parties to an arbitration agreement. In effect, the question of which parties are contractually bound by an arbitration contract is a matter that mainly relates to contract law, and, therefore, it falls outside of the scope of this work. Here, the only question pertinent to arbitration law is whether separate consent to arbitrate is required for the above types of persons to become bound by the arbitration agreement included in a substantive contract, or general consent to the latter as a whole would suffice.

This

Chapter will look into this issue in the light of the principle of separability and the principle of autonomy of arbitration agreements and will try to define and understand the problem of adding the third party to arbitration or effect when such parties are not added . And differentiate the notion of false third parties from that of third parties in general. Strictly speaking, every person not bound by an arbitration agreement is a third party. However, not all third parties would be relevant in an arbitration between the two original parties. Only third parties that have a legal or financial interest in the dispute pending before the tribunal may be relevant, namely the "false third parties".

A. GENUINE PARTIES TO ARBITRATION AGREEMENTS :NOTION AND RELEVANCE

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. 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. The arbitration agreement constitutes the fundamental difference between litigation and

arbitration.

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 arbitration are exclusively determined on a contractual basis. Thus, the main principle of the arbitration 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. 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 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.

Arbitration agreements must meet specific requirements of formal and substantive validity. While the formal requirements are determined by specific arbitration provisions, the substantive requirements of validity of arbitration agreements are governed by ordinary principles of contract law. As a rule, any individual or corporate body validly entering into an arbitration agreement becomes a party thereto. In effect, the question of whether a person is a party to an arbitration agreement is relevant to principles of contract rather than arbitration law. Therefore, it would be fair to argue that arbitration law becomes pertinent only after contract law rules have irrevocably determined which parties are contractually bound by an arbitration agreement.

1. PARTIES TO ARBITRATION

One fundamental cornerstone of arbitration is surely the notion that arbitration is only binding on the parties of the arbitration agreement. This view is provided in

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Section 7 in THE ARBITRATION AND CONCILIATION ACT, 1996, stating that "arbitration agreement" means an

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agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them

in respect of a defined legal relationship, whether contractual or not" (

emphasis added). This universally accepted position is also backed up by the New York Convention and the UNCITRAL Model Law , both of which provide for the recognition of arbitration agreements "by the parties". Also the leading international arbitration institutions provide in their rules for arbitration between the parties.

The arbitration and conciliation Act 1996 does not address

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the capacity of parties to enter into an arbitration agreement.

However, the

general rule is that all natural and legal persons and entities that are able to enter into a valid agreement can also enter into an arbitration agreement. The question "who are the parties of the arbitration agreement?" refers to the scope ratione personae of arbitration, the subjective scope. The question is easy to answer in the typical arbitration process which involves two adversary parties. As presented by an ad hoc arbitral tribunal, "in arbitration only those who are parties to the arbitration agreement expressed in writing could appear in the arbitral proceedings either as claimants or as defendants. This basic rule, inherent to the essentially voluntary nature of arbitration, is recognised internationally by virtue of Article II of the New York Convention". (emphasis added)

Despite this presumption, there are many situations in which the usual premise does not work. Such situation might arise when a signatory company's parent company has been actively involved in setting up the business deal which includes an arbitration agreement. In the event that a dispute arises, the opposing signatory company may want to include the rich parent company in the arbitration proceedings as well, e.g. to increase the likelihood of receiving damages. For this purpose, there are sometimes circumstances which enable the opposing party to invoke the group of companies doctrine against the non-signatory parent company, making it bound to the arbitration as well.

Especially in international commercial arbitration, it has become a generally recognized rule that there are multiple ways in which third parties may be bound to arbitration, even if not as signatories of the arbitration agreement. Moreover, such involvement of outside parties occurs more and more frequently. For this purpose, there are several doctrines deriving from different legal systems, such as agency, veil-piercing, group of companies, alter ego, implied consent, succession, estoppel and third party beneficiary, apparent mandate and ostensible authority. However, calling them "special mechanisms of law" above is a fairly superficial concept as several of them are merely constructs used in other areas of law, e.g. general private law (agency) and company law (veil piercing). Moreover, the use of any such doctrines has been criticized as superfluous and unnecessary surrogates of private law: "irrelevant [...] is the need for any doctrinal apparatus whatever other than the law of private agreement".

Nevertheless, whatever the instrument, limiting arbitration to the signatory parties only is not altogether so clear after all.

As Hanotiau mentions, it may be contemplated whether equity and justice have in some decisions and awards been the ultimate reason for the conclusions and these aforementioned doctrines only used as ex post facto tools. However, the whole subject of binding non-signatories to arbitration in general revolves around the notion of finding the “right” decision in a situation where the non-signatory would be able to avert the effect of an otherwise valid arbitration clause. Moreover, the issue of binding non-signatories is in general considered to be governed by ordinary principles of contract (and agency) law. In other words, the doctrines merely provide useful tools for contract interpretation. They are applied in accordance with the facts and circumstances of each case and contract to analyze the parties’ intentions and consequences thereof. These doctrines have been readily used in foreign case law . However, in the few cases concerning the subject in India, none of these doctrines have been used as such.

Even though the Supreme Court decision in recent chloro controls pvt. Vs severn trent water purification inc. address the same question, the reasoning of the court relies on general contract interpretation instead. However, due to the lack of legal sources in India or the lack of reasoning in the previous Supreme Court precedents, there is no reason not to seek guidance from foreign case law and legal literature as tools of interpretation. Furthermore, due to the transnational nature of arbitration, international practices are relevant.

Naturally, thus, the discussion about which persons are bound by an arbitration agreement in accordance with principles of contract law is only peripheral to this study, which principally focuses on jurisdictional issues related to arbitration rather than contract law. Although the issue of substantive validity of arbitration agreements and the requirement of consent, in particular, are touched upon in many chapters, the scope of the thesis goes beyond them.

Nonetheless, it would be useful to look briefly into some particular types of parties, whose status in relation to arbitration agreements is not clear. This is in particular the case for a • " Principal, when an arbitration agreement is concluded by an agent • " Assignee, after the assignment of an arbitration agreement • " Consignee in a bill of lading containing an arbitration agreement • " Successor in a contract containing an arbitration agreement

The above types of persons are sometimes incorrectly regarded as `third parties'. However, as this section shows a principal, an assignee, a consignee and a successor should be considered genuine rather than third parties to arbitration agreements, since they are contractually bound by the arbitration agreements by reference to rules of contract law. Here, the term "genuine party" equally applies to persons who have not personally concluded an arbitration agreement, but who nevertheless are bound by it in accordance with general principles of contract law. More specifically.

1. AGENCY – REPRESENTATION

Here the position is reasonably straightforward. It is a well-established principle in the theory of contract law that the person in whose name and on whose behalf the contract was made is bound by all the rights and obligations deriving from this contract. An agent is not ordinarily liable under the contract he executes on behalf of his principal, so long as his agency is disclosed. ' This fundamental principle of agency will equally apply to arbitration agreements. As is generally accepted both by legal discourse and case law, it is the principal rather than the agent who is entitled to enforce an agreement to arbitrate by referring the dispute to arbitration in his own name. It is clear, thus, that the principal becomes the genuine party to the arbitration agreement from the time this agreement is concluded, while the agent is in essence a third party thereto.

2. ASSIGNMENT

Although was disputed for some time, it is generally accepted nowadays that arbitration agreements can be transferred by way of assignment. ' Thus, after the assignment of the main contract including the arbitration agreement is completed, the assignee is entitled to enforce the arbitration agreement on its own name and in its own right. In other words, the assignee becomes a genuine party to the arbitration agreement. This is the view taken by the courts in several countries. This is for example the case in England, the USA, France, Switzerland and other jurisdictions.

However, unlike the principal, the assignee becomes a genuine party to an arbitration agreement only after the assignment of the arbitration agreement is completed rather than from the time of its conclusion. It is the assignor who is the original real party to the arbitration agreement. However, according to the most convincing view, once the assignment is completed, the assignor ceases to be a party to an arbitration agreement, since he also ceases to be a party to the substantive contract containing the arbitration agreement. The same applies to the case of an arbitration agreement contained in a bill of lading. Here, a consignee, according to the prevailing view, is considered an assignee of the shipper. Accordingly, the former by holding the bill of lading becomes the new genuine party to the arbitration agreement incorporated thereto, taking the place of the shipper.

3. SUCCESSION - NOVATION Here the position is also relatively straightforward. Whenever a person succeeds either by law or by contract in the rights and obligations of another person, who is a party to an arbitration agreement, the former becomes the new party to that arbitration agreement. As in the case of assignment, here the original party cannot enforce the arbitration agreement, as he no longer has any status in the contractual relationship. Thus, a successor takes the place of the original party to the arbitration agreement and becomes a genuine party thereto.

SPECIFIC CONSENT TO ARBITRATE AND GENUINE PARTIES TO ARBITRATION AGREEMENTS Agency, assignment and succession are sometimes wrongfully considered as cases involving third parties. However, as was explained, a principal, an assignee, a consignee and a successor are genuine parties to an arbitration agreement by reference to rules of contract law. These persons become parties to the substantive contract and, therefore, genuine parties to the arbitration agreement included therein. In this discussion, the only question pertinent

to arbitration law is whether separate consent to arbitrate is required for the above persons to be bound by the arbitration agreement in the main contract, or general consent to the main contract as a whole would suffice. Here, arbitration principles such as the principle of `separability' or the principle of `autonomy of arbitration agreements' will come into play. According to one view, evidence for distinct intention to arbitrate of a principal, an assignee etc is required rather than just evidence for general intention to be bound by the main contract. Otherwise, this view argues, the principles of separability and `autonomy of arbitration agreements' would be violated, and the independent status of the arbitration agreement from the main contract would be undermined.

However, the prevailing view in arbitration is that general consent of the above persons to the whole transaction would be enough for them to become parties to the arbitration agreement too. This is especially the case with regard to assignment where the rule of "automatic transfer of the arbitration agreement" seems to prevail in the context of international transactions, in particular. According to this rule an arbitration agreement, due to its subsidiary character is transferred automatically to an assignee alongside the substantive rights of the contract. The rule of automatic assignment effectively means that no specific consent of an assignee to arbitrate is required. An assignee will be bound by an arbitration agreement automatically. Otherwise it would possible for the assignee to escape an otherwise valid arbitration clause unilaterally by the mere fact of the assignment. Similarly, no previous consent of a debtor to arbitrate with the specific assignee is required either. Therefore, a debtor cannot argue that it has agreed to arbitrate specifically with the assignor "but not with some outsider". The automatic transfer of an arbitration agreement can only be prevented if the latter has been concluded in view of a specific assignor (intuitu personae).

However, arbitration agreements are in general considered not to be personal covenants (intuitu personae). The rule of "automatic transfer of the arbitration agreement" applies equally to bills of lading. Although there is a view arguing that a consignee must be aware of the arbitration agreement and must specifically accept the arbitration agreememnt before he takes delivery of the goods, the prevailing view dispenses with the prior consent of the consignee. Thus, arbitration agreements are transferred to the holder of the bill of lading automatically together with the substantive rights on the goods. Otherwise, the negotiability and commercial effectiveness of the bill of lading would be compromised.

It follows from the above that the principle of separability or "autonomy of arbitration agreement" does not create any theoretical difficulties to the automatic transfer of the arbitration agreement. In effect, an assignee, a consignee or a successor gets into the shoes' of the original party to the main contract as a whole. Therefore, the former assumes the contractual position of the latter in exactly the same terms, which of course include the arbitration clause. In all the above cases, the transfer of an arbitration agreement is mainly linked with the transfer of the substantive contract including the arbitration agreement and, therefore, it remains predominately a question of contract law. Accordingly, the thesis will not discuss the issue of `genuine parties' to arbitration agreements any further. It will focus on the impact of arbitration upon persons not contractually bound by arbitration agreements. The

following section defines the notion of `third parties' and determines which particular groups of persons will be examined by the thesis.

2. NOTION OF THIRD PARTIES

The thesis focuses on "false third parties", i. e. third parties with an interest in the dispute between two other persons bound by an arbitration agreement. False third parties are typically found in the context of multiparty contractual relationships, which are jurisdictionally fragmented. Jurisdictional fragmentation occurs when several parties involved in a single commercial project conclude bilateral dispute resolution agreements. Thus, a person participating in a multiparty commercial project may be left unable to participate in the arbitration proceedings between two other persons involved in the same project, if the former is not party to the arbitration agreement binding the latter.

In other words, persons with an active role and a significant interest in a project might not be able to take part in the resolution of the dispute arising out of the project, the outcome of which might affect their own interests. These persons cannot take part in the determination of the dispute since they are not parties to the arbitration agreement, which has exclusively been concluded between two other persons (genuine parties). Nevertheless these persons are not strangers to the dispute between the genuine parties, as they are closely involved in the execution of the project from which the dispute arises. Hence, they can be named false third parties.

Here we will examine in detail the notion of false third parties. The analysis takes a substantive viewpoint, focusing on the contractual rights, duties and liabilities of the several parties involved the same commercial project. From this substantive perspective, the chapter distinguishes between two different groups of false third parties: those who share the same rights, duties and liabilities with the genuine parties to the arbitration, and those who are merely contractually interrelated with them . It will be shown that the interests of the former group in the arbitration between the two genuine parties are stronger and, thus, more relevant than the interests of the latter group. Furthermore, the chapter looks into each of the two groups in detail and presents some typical examples of false third parties. These typical examples are used throughout the thesis as case studies in order to test and demonstrate its main arguments. The emphasis on the substantive status of the parties is a key point for this work.

As will be argued, there is a direct relevance between the substantive and the jurisdictional status of the several persons in a multiparty commercial relationship: the closer the several persons are associated in substantive terms the less likely is for them to be separated in terms of jurisdiction. Whenever several persons constitute a substantive unit, they should also be regarded as a jurisdictional unit, and, therefore, they should be subject to the jurisdiction of a single adjudicatory forum. Therefore, the findings on the interests of false third parties and their substantive association with genuine parties will provide the conceptual basis for the final suggestions of the thesis regarding the impact of arbitration on third parties. In fact, the analysis performed here provides the groundwork for the whole thesis.

3. DIFFERENT GROUPS OF THIRD PARTIES

Depending on how closely they are associated with the genuine parties, in terms of interests and liability, the false third parties may be distinguished in the following two groups: The first group includes persons that are strongly associated with a genuine party to an arbitration agreement or arbitral proceedings, in terms of contractual interests and liability. Here, genuine and false third party will have concurrent interests in the pending dispute and the commercial project they are both involved in. In particular, genuine and false third party will usually be co-liable or co-holders of rights or duties (community of rights and liability). They will typically be joint or joint and severally liable vis-ä-vis the other genuine party to the arbitration proceedings. These two types of liability, joint and joint and several, are similar in that in both cases the co-promisers are jointly rather than cumulatively liable, so that the performance of the obligation by one promiser will discharge all them. It should be noted however, that the terms "joint" and "joint and several liability" have a very strict technical meaning which varies, sometimes significantly, from jurisdiction to jurisdiction.

Thus, for the purposes of the thesis, which adopts an international viewpoint, reference to `joint' or `joint and several' liability should be should be understood as a reference to 'coliability'. Typical examples of this group are: • " Co-holders of rights in property • " Partners in a legal entity • " Persons involved in the making and transfer of the same negotiable instrument (e. g. promissory notes, bills of exchange, bonds etc).

The second group includes persons that are contractually linked but not strongly associated with a genuine party to an arbitration agreement or arbitration proceedings, in terms of contractual interests and liability. Here, genuine and false third party will have related but not concurrent interests in the pending dispute and the commercial project they are both involved in. In particular, genuine and false third party will be contractually linked but they will not be sharing the same rights or duties. They will not be co-liable vis-ä-vis the other genuine party to the arbitration agreement and the proceedings. Either they will be liable in the alternative or one of them only will be liable vis-ä-vis the other genuine party. Here, the contractual obligations of genuine and false third party relate to the same commercial project. However they will assume distinct duties to deliver distinct performances. In short, genuine and false third party will be "commercial partners" but not co-liable or co-holders of the same rights and duties. Consequently, although contractually associated, the degree of their association, in terms of contractual interests and liability will be lesser than in the first group. Typical examples of this group are: 1. " Several persons contractually linked by bilateral contracts with regard to the same construction project. Here, the several persons may be linked • Either, in several string contractual relationships, where for example an owner is contractually related with a contractor who in turn is contractually related with a subcontractor. • Or, in web type contractual relationships, where an owner is contractually related an architect/engineer, a contractor and a financial institution regarding the same construction work. 2. " Several persons contractually linked in the context of security agreements. A typical example here is the contractual relationships between a creditor, a debtor and a guarantor. 3. Several corporate entities with close corporate links, as for example the links between the several companies belonging in the same group.

Arbitration agreements are very frequently used in the context of all the above types of contractual relationships that involve several parties. Naturally, thus, the question of whether, for example, a subcontractor will be bound or in some way affected by an arbitration agreement or arbitral proceedings between an owner and a contractor arises very often. The same question arises In the context of web-type construction contracts: will a contractor, for example, be bound or affected by an arbitration agreement or proceedings between an owner and an architect? In the context of security agreements: will a guarantor be bound or affected by an arbitration agreement or arbitral proceedings between a debtor and a creditor? In the context of several companies with close corporate links: will a parent company by bound by an arbitration agreement or proceedings between a subsidiary and another party?

In more general terms, the question here would be whether a false third party (in the above scenarios: a subcontractor, a contractor, a guarantor or a parent company respectively) would be bound or in any way affected by an arbitration agreement or proceedings between the genuine parties?

4. DEFINING THE THIRD PARTY PROBLEM

1. Traditional Approach to the Problem

If it is necessary in some cases to extend an arbitration agreement to a non-signatory, then one view of private international law and international arbitration holds that choice of law/ rules should answer any questions regarding when this is appropriate. Professor Sandrock advocates what he calls the "traditional approach:" [E]ach commercial contract is governed by a set of definite national proper law rules. The same is true of the arbitration agreement. Therefore the question of whether or not an arbitration agreement binds not only a company which is a signatory to it, but also one of several other companies which have not attached their signatures to it, but which belong to the same group as the signatory company, has to be answered under the respective rules of the proper law of contract. In other words: the exceptions to the principle of privity of contract have to be derived from precise, well-defined and largely recognized rules of the respective domestic law to which the arbitration agreement in question is subject.

However , Dr. Sandrock acknowledges that the "precise well-defined"' rules he envisages may not be so easy to discern. Further, the traditional approach assumes that substantive contract law is the correct model to apply, does not consider whether this is suited to the consensual nature of arbitration and dismisses any transnational or anational dimension to the third party problem.' While Professor Sandrock's conclusion has an appealing logical purity, this part seeks to analyze the problem by remaining sensitive to the constraints imposed by the nature of arbitration as well as the practical need for international commerce to permit a degree of business flexibility but not so as to undermine the certainty required of international transactions

2. An Approach Constrained by the Nature of Arbitration

Two fundamental characteristics of general arbitration law that frames the third party problem debate. These two characteristics define the substantive dimension of arbitration (e.g., does a valid agreement exist to arbitrate the dispute?) and the jurisdictional dimension of arbitration (e.g., does a valid agreement exist to confer jurisdiction on the tribunal and foreclose other jurisdictional rights to litigate?). These are explained by way of introduction below, applied in the course of the comparative project, and their relevance reassessed in the conclusion.

• Substantive Dimension: Arbitration is Contractual by Nature

"Arbitration is the creature of a contract between the parties." Thus, any solution to the third party problem must be based on, or at least take into account, the contractual nature of the agreement that binds the signatories. However, despite Professor Sandrock's theory that the proper law of the contract will provide a sure result on all third party issues, it is not at all clear that general principles of contract law alone will suffice.

• Jurisdictional Dimension: Basis of Arbitration is Consent (Intentions of the Parties)

As a leading commentator notes, "party autonomy is certainly the differentia specifica of the arbitration process." In other words, the "crucial differencebetween arbitration and courts lies in the fact that the basis of the jurisdiction ofan arbitral tribunal is the will of the parties, while courts owe their competenceto procedural norms of state or of an international convention."

Any solution to the third party problem must also be consistent with the consensual nature of arbitration-the fundamental feature distinguishing the position of third parties in arbitration from third parties in litigation. In courts, substantive law and rules of civil procedure (backed by the jurisdictional authority of the court) create procedural rights, not contingent upon consent, enforceable by and against a third party. A third party has the power to bring an action against an entity to which it has no contractual relationship (e.g. alleging a tort); may intervene in proceedings merely on the basis that it is an interested party; or may itself be compelled to join a proceeding by way of a third party joinder application. None of these situations involve "consenting" to the jurisdiction of the court. The threshold question in arbitration is: did the parties consent to resolving their substantive dispute by arbitration?

Under normal circumstances, consent to arbitrate is manifested in the arbitration agreement, most often by way of a clause compromissoire contained within a larger contract. Sometimes a signatory may argue that she did not infact intend to consent, or her consent may have been induced by fraud, or given under duress, or is otherwise imperfect. In such a case, in most jurisdictions outside of the United States, the Kompetenz/Kompetenz principle is usually applied to empower the arbitral tribunal to determine the genuineness of this claim. Thus, some form of prima facie consent (e.g. a signature) is sufficient to empower the arbitral tribunal to undertake this investigation. However, sometimes a court or arbitral tribunal is asked to look beyond the question of who signed the arbitration agreement to ascertain whether a third party (i.e. a non signatory) has in fact given its consent to be bound by the arbitration agreement and that the parties (i.e. the signatories) have also consented to the third party being bound. This can be seen as a corollary to the situation where the signatory

claims its signature is not conclusive evidence of consent to arbitrate. Here, the argument is that the signatures of the parties to the contract containing the arbitration agreement are not conclusive evidence of all those who have consented to have their disputes determined by arbitration. If willing to accept the validity of the former inquiry, then why not also the validity of the latter?

3. Practical Significance of the Third Party Problem

The issue of how to deal with the third party non-signatory was described in 1992 as being "among the most delicate and critical aspects in international arbitration." Other commentators have referred to it as "the source of much controversy" and it has been the focus of demands for reform in various businesses, especially construction and reinsurance. The problem is not limited to the classic scenario of arbitration with state entities, as the third party problem has also manifested itself in areas such as software distribution agreements, in which non-signatory purchasers of software have been implicated in arbitration agreements between distributors and manufacturers. Meanwhile, perennial problem areas like bills of lading remain subject to conflicting doctrinal approaches and inconsistent decisions. The practical significance of the third party problem manifests itself in different ways and at different times. Most frequently, it arises in the context of a dispute in which it must be decided whether the third party is bound to arbitrate; is entitled to arbitrate at that party's discretion; or is excluded from the arbitration agreement and should proceed with litigation. However, it also can be an issue in a range of commercial transactions in which, for example, parties require certainty that when they transfer contractual rights they are also transferring the arbitration agreement. In a different context, the problem may appear where a third party finds that it is affected by the decision in an arbitration in which it did not even participate or where a state finds that it is obliged to arbitrate with an investor that has structured its deal to take advantage of an investment treaty.

• The practicle issue involved in the Problem

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. 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, 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 jurisdictional 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 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, 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.

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. 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 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.

Chapter-2

ARBITRATION VIS A VIS INTEREST DISCOURSE: A REQUIEM FOR THIRD PARTY PROTECTION.

A. Preliminary Note.

Arbitration as a form of dispute resolution mechanism has existed from centuries ago and was used extensively in the area of commercial and labour management sectors . Traditionally, entities with relatively equal bargaining power used arbitration primarily in specialised industries, only later when the social contract between collective bargain and industrial bargain had attained an equilibrium, it has become a part of industrial relation as much as part of dispute resolution. By very nature Arbitration relationship is hybrid, albeit, it arises from a contract, the parties to the contract waive their right to come before a competent court and bestow the power to resolve the dispute to a neutral third party and

agree to abide by decision rendered by the third party(s). This makes arbitration more than a simple contractual relationship, converting it into a true jurisdictional relationship. The process of arbitration is relatively faster, simpler and less expensive within a neutral council. The factum of its being less expansive may be doubted –given the post arbitral challenge which encompasses the varied principles of civil revision-albeit, hesitantly. Most importantly, arbitration provides for internationally recognized method for enforcing awards, which is the New York Convention. Hence with the advent of the global economy and the increasing number of international commercial transactions, arbitration has become an important dispute resolution option. It is being increasingly used as a mechanism of dispute resolution in the form of arbitration contracts between corporate entities and their customers, patients, or employees. With the rise of the use and demand for arbitration, there rose a corresponding market of professional arbitrators and an industry of private businesses that the perceived misconduct of the arbitrators, the arbitration process has come under increasing attack through civil actions against arbitrators. This has resulted in the questioning of justification and ambit of arbitral immunity.

Currently, different countries and arbitration institutions deal with arbitral immunity in their own myriad ways and even the watershed, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration, does not contain any provision in detail regarding the immunity of arbitrators. Thus, there is a startling lack of international harmonization regarding the scope of liability for arbitrators.

B. Relevance of arbitral immunity

The concept of arbitral immunity assumes significance in the backdrop of protection of third party rights because the risk inherent in binding a third person who is not a suiter before private tribunal will go to “equal protection of law” clause which guarantees the citizen to be not prejudiced to their rights save by the authority of law. Arbitral immunity developed from the concept of judicial and quasi-judicial immunity. It was argued that this is so because of the inherent similarities between arbitrators and judges and hence arbitrators must be extended the same privilege. In common law countries the doctrine of judicial immunity can be traced to Lord Coke’s 1607 judgement in Floyd & Barker , which held that judges of England’s principle common law court, the King’s Bench , were immune from being sued in competing courts for acts performed in their judicial capacity. This rule of immunity is subject to two important riders. It was held in the Marshal sea Case , when actions are taken in complete absence of jurisdiction the judge can be subject to personal liability. In Floyd & Barker, the court came to the conclusion that a judicial immunity is only for “judicial actions” and does not extend to acts which are administrative, legislative or personal. Also, immunity is not extended to protect the judges for their immunity to all judges. The policy justifications underlying the doctrine are to ensure finality of judicial decisions, to preserve judicial independence, and to protect the integrity of the judicial process by preventing interference in judicial decision making that arises from harassment or intimidation by parties.

Another set of justifications given is the remedies that are available against judicial decisions are impeachment and appeals. In civil law jurisdictions, judges are liable for wrongful acts and

parties can recover damages caused from judicial wrongdoing. Judicial immunity existed not just to protect people holding judicial offices but also to protect litigants and litigation process. It is a means to an end and not an end in itself. In line with these principles, the courts have extended judicial immunity to arbitrators due to the functional similarities between the two positions. Arbitrators are neutral parties that are appointed to adjudicate on disputes submitted before them and render binding and final decisions.

In this process, arbitrators determine the rights of the parties to the arbitration agreement. Similar to the public policy argument given to justify judicial immunity, the grounds of independence and finality holds true for arbitral immunity. Thus, the courts have justified the granting of judicial immunity to arbitrators. However the analogy is not perfect and eventually the functional similarity between the two break down. An arbitrator derives his powers from private contracts and receives remuneration in return for his professional service; however, a judge is appointed by the State from which they derive their power and remuneration.

The judiciary is one of the three limbs of the government and is essential for the working of a democracy; the profession of arbitrators is less noble. Arbitrators need not follow precedents and do not create it. Arbitration proceeding are not public like courts, but are private and confidential. Also, unlike court proceedings, arbitration proceedings cannot determine the rights and obligations of non parties to the arbitration contract. They lack rigid procedural formality and arbitral awards are subject to very limited judicial review. However, despite all these differences arbitrators are bestowed with blanket immunity, which even judges performing a noble profession are not honoured with. Thus, this near absolute immunity renders them more powerful than judges in specified areas. Also, today, due to great demand for arbitrators, it has developed into a profession like doctors, lawyers, accountants, where they are hired for their professional services. There are situations where arbitrators, like other professionals, act negligently or even maliciously.

In other professions such misconduct would result in liability. Yet the blanket immunity granted to arbitrators' shields them from any accountability for their wrongful conduct and denies the aggrieved parties any remedies for the damage suffered. Without any form of substantial liability imposed on them, arbitrators are most likely to commit or fail to commit an increasingly diverse array of acts which will test the limits of parameters arbitral immunity in new ways. Hence, there is a need to question not only the ancient justifications but also the relevance of arbitral immunity in light of today's globalised economy where arbitration is an important dispute resolution mechanism in the international scene.

Under most arbitration institutions, neither 'serious misconduct' nor 'bias' is defined. They state that the arbitrator would be merely removed and replaced in case of existence of justifiable doubts of the arbitrator's independence or impartiality. All the institutions impose the duty to disclose on the arbitrator of any circumstances that is likely to result in justifiable doubts. Few of them have extent of this arbitral immunity is different under different institutions.

Under the International Centre for Alternative Dispute Resolution, India (ICARD), the institute is under the duty to obtain a confirmation from the potential arbitrator that under no

circumstance would there be justifiable doubts with regard to the arbitrator's independence or impartiality. Also he should possess other qualifications as specified in the arbitration agreement. Under the rules, it is also given that a challenge to the arbitrator can be made only when the above stated rule is not complied with. There is no question of liability of the arbitrator and 'serious misconduct' or 'bias'.

As per the Singapore International Arbitration Centre (SIAC) Rules 2010, challenge to the appointment of the arbitrator can be made only on the ground of justifiable doubt with respect to his impartiality and independence or when the arbitrator does not possess the qualifications that the parties agreed upon. They also have a blanket immunity clause under Rule 34.1, wherein arbitrators, among officers, employees and directors shall not be held liable for any arbitration proceedings governed under these rules. The SIAC has also adopted the Rules of Ethics for International Arbitrators drafted by the International Bar Association (IBA). Though there is absolute arbitral immunity, in the Rule of Ethics, bias is discussed under Rule 3.42 Bias here is considered on the terms of impartiality and independence. Partiality occurs when the arbitrator favours one party over the other or when he is prejudiced about the subject matter of dispute, and dependence refers to a close relationship between one of the parties and the arbitrator or with someone close to the parties. The relationship can be a personal, direct or indirect professional business relationship and past relationships are important only if they are of a high magnitude that could disclose all facts and circumstances which might lead to such justifiable doubts.

Under the China International Economic Trade Arbitration Centre (CIETAC), the arbitrator is under a similar duty to disclose in writing any facts or circumstances that are likely to lead to justifiable doubts with regard to his independence and impartiality. On being successfully challenged before the Chairman, the arbitrator will be withdrawn by the Centre. There is no rule on 'serious misconduct', 'bias', arbitral immunity or a general exclusion of liability clause. Pursuant to Article 11 of the Hong Kong International Arbitration Centre, (HKIAC), Arbitration Rules, the arbitrator is under a duty to disclose existence of facts leading to justifiable doubts regarding impartiality or independence. They also have under Article 40, exclusion of liability, where arbitrators are to be liable for any act or omission in connection with arbitration conducted under these Rules, save where the act was done or omitted to be done dishonestly. Though this section does not refer to serious misconduct or bias, liability still exists for acts or omissions done dishonestly, hence, there is no blanket arbitral immunity as under other arbitration institutions.

The Arbitration Rules of the Arbitration Institute of Stockholm Chamber of Commerce, 1999, (SCC) states that the arbitrator is under a duty to be independent and impartial and should immediately disclose such circumstances if and when they arise. And on finding the arbitrator disqualified the SCC Institute would only remove him. The SCC Institute grants itself absolute immunity under Article 42 of the Rules. However, this absolute immunity is only granted to the Institute itself whereas an arbitrator under the Rules is liable for damages caused due to wilful conduct or gross negligence.

The London Court International Arbitration, (LCIA), Rules 1998, impose a similar duty on the arbitrator to remain independent and impartial at all times. The arbitrator should not act in the capacity of an advocate to any party and should not advice any party on the merits or outcome of the case, either before or after appointment. The arbitrator is liable to be removed in the event he acts in deliberate violation of the arbitration agreement or the LCIA Arbitration Rules or acts unfairly or impartially. A party can also challenge the appointment of arbitrator in an episode of impartiality or independence. Though there is an exclusion of liability clause in the Rules, it does not endow the arbitrator with blanket immunity. The arbitrator remains liable, when he acts or omits to act with the intention of conscious or deliberately wrongdoing.

As per Articles 14 and 15 of the International Chamber of Commerce (ICC) Arbitration Rules, 2012, the arbitrator can be challenged and removed on the grounds of lack of impartiality and independence.The allegation has to be made in writing. Liability of the arbitrator is limited under Article 40. However, it is clearly stated in the Article that where limitation of liability is prohibited by law, there the arbitral immunity under Article 40 would not apply. Hence, it does not provide for blanket immunity to the arbitrator.

The UNCITRAL also came up with Arbitration Rules popularly known as Model Law in 1976. It was recently revised in 2010. Under the Model Law, the arbitrator's duty to disclose is given under Article 11 and in Article 12, whereby parties can challenge the mandate of the arbitrator on grounds justifiable doubts of partiality or dependence. Though there is a provision for arbitral immunity, it has been limited to the laws applicable and to intentional wrongdoing. The working group shared the view that a certain degree of immunity or exoneration from liability in favour of arbitrators was advisable to reinforce the independence and impartiality of the arbitrators with a free spirit rather than being concerned about later liability lawsuits. These sanctions though act to spurn on the indolent arbitrator, they do nothing to compensate a party who has suffered financial loss as a result of delay in proceeding with the arbitration.

In the aforesaid backdrop, the corresponding position under Indian law may be delineated, Arbitration in India is governed by the Arbitration and Conciliation Act, 1996. This Act replaced the existing regime of three legislation, namely the Arbitration and Conciliation Act of 1940, the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act, 1937. The Act is based on the UNCITRAL Model Law, 1985. No provision under the Act of 1996 explicitly defines either 'serious misconduct' or 'biases' though misconduct was the basis for challenge to arbitrators under the Act of 1940.

However, its implication can be inferred from a reading of sections 12, 13, 14, 15 and 34 of the Act. Though there is no direct provision or case law on arbitral immunity in India, a combined reading of these provisions and relevant case law, gives us a clearer picture of the extent of this protection in India. Under these sections suspicion by itself could not be made a ground for conclusion that the arbitrator would not act impartially or fairly. The court also said that there must be minimum intervention as per section 5 of the Act and hence must be slow in terminating the mandate of the arbitrator. Hence, termination of the mandate is not allowed

only on the basis of apprehension of bias. To apply for a termination of a mandate, there must be actual bias.

In Ranjit Thakur v. Union of India, this court laid down that “the test of likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias as “likely” and whether the person concerned “was likely to be disposed to decide the matter only in a particular way”. This test could also apply to an arbitrator. But while considering the reasonable ground for apprehension that the arbitrator will be biased, the court should be satisfied that substantial miscarriage of justice will take place in the event of its refusal of the said application.

The same principle was reiterated in Maheshwari Eng. & Associates v. Union of India, International Airports Authority of India and Sachinandan Das . In the former, the court said that there must be acceptable evidence to substantiate the indictment of bias for it to accept it. In the latter cases, the court said that “the apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person”.

On this issue, the Supreme Court said with prudence that not every mistrustful thought of a party should be taken into account. However, the remedies against this misconduct are the removal of the arbitrator, setting aside the arbitral award or the non-payment or partial payment of the arbitrator’s fees. Reasonable apprehension or likelihood of bias of the arbitrator is sufficient ground for the removal of the arbitrator while actual bias must be proved for the setting aside of the award. The standard of a reasonable and average point of view should be taken into consideration and not the ramblings of a fanciful person. If there is reasonable ground for the apprehension of the applicant that the arbitrator will be likely to be biased or if there is little chance of receiving impartial justice from him or if there would be failure of justice if the arbitration was allowed to proceed or if the arbitrator has disclosed actual bias against a party , the mandate of the arbitrator may be terminated. However, relationships to a party are not a disqualification if the arbitrator is not likely to be biased. Also, there can be no interference if the appointment is made with full knowledge of the relationship. In no manner can the position of arbitrators be equated to that of judges.

Hence though arbitral immunity has its roots from judicial immunity, it can in no situation supersede judges’ immunity. In the process of arbitration, private arbitrators, not necessarily skilled in law, render final and binding determinations as to not only the parties’ contractual rights, but also statutory rights and liabilities, including the possibility of collective and class action claims. Where the lapse is serious like that of bias, it seems right that the party who has suffered loss should be entitled to recover that loss from the offending arbitrator, even in countries that traditionally confer immunity from liability of arbitrators.

On the flipside, it is equally important to protect the arbitrators from harassing parties and also to ensure their independence and impartiality in the interests of the Such a fine distinction has been drawn in the Indian law where the arbitral immunity though wide is not absolute and there exists recourse against the arbitrator when he is biased under arbitration law and under tort law in all circumstances. Such is the case in most of the arbitration

institutions discussed above with the exception of ICADR. Hence, ultimately a balance must be struck between imposing sanctions on arbitrators to deter them from wilfully and recklessly abusing their functions and simultaneously making it possible for them to fulfil their quasi-judicial role without fear of non-meritorious attacks.

C. Interest Discourse- Third Party-Perspective.

The central feature to precede the arbitral immunity before discourse of " determination of legal entitlement" of third party in arbitral proceedings, has necessitated regard being had to the peculiar feature that in any frontal attack to "arbitral determination" binding the third party is bound to ramify on "propriety of arbitral tribunal" in its determination. Be it noted:

a) In any commercial dispute arising out of written contract- the doctrine of privity of contract and privity of consideration can throw light on determining who is necessary "interest holder" in dispute resolution.

b) The cases may be ominous especially the tender disputes with public bodies or a likes where public law elements posits another obligation upon an contracting parties to act fairly even to those are non parties.

Qua first type of issues, the law governing contract of particular lex curi will determine the "interested party" which may or may not coincide with parties to arbitration. In such cases, the broad feature of determination once premised upon the law of contract of particular country –gives sufficient indication to find out who is genuine receipt of boon or curse of arbitral outcome. In so far as right to hearing to these parties, who may be genuine parties but a non parties to arbitral agreement, will depend if the statute governing arbitration affords them this opportunity or not. In India, the position is clear-it is thus stated: "Only parties to the arbitration are necessary and proper parties before an arbitral tribunal having Indian law as lex curi may be locus of arbitration ie, the situs, may lie elsewhere; but the court of law are not subjected to this rigours – it may in the interest of justice in any proceedings arising out of arbitral proceedings –may hear and subject any third party to its judgment being the civil court of original jurisdiction". The genesis for such understanding is crafted in judgment of Endlaw J In Value Advisory Services v. ZTE Corporation and Ors. , the Delhi High Court was called upon to decide whether a S. 9 interim award could be passed and enforced against an entity not party to the original contract or to the arbitral proceedings (a third party). It was also claimed that the relief sought was in the nature of a garnishee order available under S. 9 (ii)(b) of the Act or that, alternatively, provisions of the CPC dealing with attachment before judgment – which were admittedly applicable against third parties – could be invoked.

Numerous conflicting judgments were referred. Following References were made to: i) Arun Kapur Vs. Vikram Kapur where it was held in para 44 thereof that while a petition under Section 17 of the Act is moved before the Arbitral Tribunal for an order against a party to the proceedings, Section 9 vests remedy in a party to arbitration proceedings to seek interim measures of protection against the person who need not be either party to the arbitration agreement or to arbitration proceedings.

ii) CREF Finance Limited vs. Puri Construction Ltd. where in exercise of powers under Section 9 of the Act orders were made against a third party, of course holding the said third party to be not a stranger to the covenants between the parties to the agreement containing an arbitration clause; in that case the third party against whom orders were made was an agent of the party to the agreement.

iii) Mikuni Corporation Vs UCAL Fuel Systems Ltd where it was held that since no arbitration proceedings could take place vis-à-vis the party against whom orders were sought, application under Section 9 did not lie against such party.

The judgment in CREF Finance Limited was distinguished since in that case the third party was an agent of a party to the arbitration agreement and reliance was placed on National Highways Authority of India Vs. China Coal Construction Group Corporation holding that an interim order could be passed in respect of parties to arbitration and in connection with subject matter thereof and no interim order could be passed in respect of a party who had no privity of contract with the petitioner. Thus the petition seeking interim measures against a non party to the arbitration was held to be not maintainable.

iv) Smt. Kanta Vashist Vs. Shri Ashwani Khurana also holding that no injunction could be issued even against companies which though of the family, members whereof were parties to the arbitration, were independent legal entities and not parties to the arbitration agreement.

The points of controversy which arise for determination in this petition can be framed as:- A. Whether in exercise of powers under Section 9 of the Act, the court can make an order against or with respect to any party other than a party to the arbitration.

J. ENDLAW- further observed that “A conspectus of the judgments aforesaid on Section 9 would show that the court in each case has made the observation with regard to maintainability/applicability of Section 9 qua third parties depending upon facts of each case and depending upon feasibility of the order sought/required therein. In my view, no general principle of maintainability / applicability or non-maintainability / non- applicability can be laid down. It will have to be determined by the court in the facts of each case whether for the purpose of interim measure of protection, preservation, sale of any goods, securing the amount in dispute, an order affecting a third party can be made or not.”

Further observed that “if as a general rule it is laid down that in exercise of power under Section 9, no direction can be issued to parties not parties to agreement containing an arbitration clause or not parties to arbitration proceedings, the same will hamper the efficacy of the said provision. Under clause (i) thereof, the guardian to be appointed may not be such a party; similarly the goods under clause (ii) (a) may be or may be required to be in custody of or delivered to or sold to such third parties – further orders against such third parties may also be required in connection with such sale; under clause (ii) (b) the amount to be secured may be in the form of money payable or property in hands of such third party – the scope cannot / ought not to be restricted to securing possible with orders against parties to arbitration only. Similar examples can be given with respect to other clauses also.”

The proceedings during a court, as distinct from those before an arbitrator, also are between parties to an agreement/transaction only. Still, the practice of issuing interim orders/ directions qua third parties exists; not only in execution proceeding, provisions wherefor exists in Sections 47, 60 and Order 21 Rules 46 and 46A to F but also in pre-decretal stage, as provided for so as 38 Rules 6 to 11A of CPC. It is difficult to fathom and there's no indication whatsoever of it within the Act, that the legislature while empowering the court under Section 9 to grant interim measures has restricted the facility aforesaid of the court in any manner. On the contrary, Section 9 provides that the court for the needs of Section 9 “shall have an equivalent power for creating orders because it has for the aim of, and in reference to , any proceedings before it”. The conclusion is thus inescapable that if the court, in reference to proceedings before it could have made an order against/qua third parties, similar order are often made under Section 9 as well.

However, considering the nature of proceeding under Section 9, court found that the court is not bound to, where the third party, with respect to property/money in whose hands attachment is issued, denies liability and such denial raises disputed questions of fact which can't be adjudicated without trial, to conduct trial. The court, in such cases in its discretion can on a prima-facie view of the matter, either refuse to exercise powers under Section 9 or pass other appropriate order to protect the interest of all parties concerned. Thus the primary point of controversy framed above is answered accordingly. Axiomatically, interim measure within the nature of attachment before judgment are often sought by petitioner against respondent.”

Thus, The Court after considering numerous conflicting judgments held that interim orders both could and could not be made against third parties. After examining prior law on the point, Endlaw J. came to the conclusion that “no general principle of maintainability / applicability or non-maintainability / non- applicability can be laid down. It will have to be determined by the court in the facts of each case whether for the purpose of interim measure of protection, preservation, sale of any goods, securing the amount in dispute, an order affecting a third party can be made or not.” He reasoned that if a general rule prohibiting issuance of interim orders was accepted, it would “hamper the efficacy” of S. 9.

With due respect while holding that the decision of when to issue an interim order against a third party must be determined on a case-to-case basis, Endlaw J. did not provide any guidance on what factors should aid the Court in making such a determination. Should the Court proceed with a traditional adjudication of whether the provisions of S. 9 are attracted, because it seems to possess wiped out the last a part of the above case? Are C.P.C. principles of attachment-before-judgment orders against third parties relevant? Are there some specific rules governing the degree of involvement that a 3rd party must have (a contention that was raised, but not addressed) with the arbitration agreement and the main dispute?

With due respect to the Learned Judge holding the absence of omission to exclude the powers vested in civil court in subjecting the third parties at pre-decree stage to the jurisdiction of court, as conferring a positive power to pass an order binding the third –if accepted- the more ingenious issue would be if under the amended provisions of section 17 of 1996 Act, the

arbitral a tribunal is also clothed with like power. Absent any decision direct on the point, it is not conclusive to opine either way-but the consequence which ZTE corporation infuses makes this judgment little unsound in reasoning, as from the perspective of courts as sovereignty entity –if the section 17 power vested in private tribunal confers it with all powers which a court has, then the concept of “parties autonomy” will have virtual impact on “abnegation of freedom to be excluded from the domain of private tribunal” which is inherent in any body polity having Bill of rights, in its complete destruction.

In another case of Embassy Property Developments Limited v. Jumbo World Holdings Limiteddecided by the Madras High Court on 20 June 2013. The case is interesting because it deals in detail with the availability of interim measures under Section 9 against third parties. The availability of interim measures against third parties is a topic of great interest with there emerging a bit of clarity on the law , the Division Bench of the Madras High Court held that interim measures could be ordered even against third parties to the arbitration agreement under Section 9 of the 1996 Act. On the contours of such power, the court held: "We are of the view that the power of this court, under Section 9 of the Arbitration and Conciliation Act, 1996, is wide in scope and it would extend even to third parties in whom the properties or goods are vested, even though such parties may not be a party to the arbitration clause in an agreement. Even though section 9 of the Arbitration and Conciliation Act, 1996, could be invoked only by a party to the arbitration agreement, the interim relief could be granted by this court even against the third parties.Unless such a power is available, under section 9 of the Arbitration and Conciliation act, 1996, the parties to the arbitral agreement could be frustrated even if they succeed in the arbitral proceedings before the Arbitration Tribunal concerned."

As the emphasized words clearly suggest, the High Court held that where the goods or properties that pertain to the arbitration, interim measures would be available against third parties who claim/ enjoy rights relating to such goods or properties. The court also observed that since Section 9 aims at preserving and protecting the subject matter of the arbitration, relief would be available even if the subject matter is in the hands of third parties. As long as a nexus is available between the subject matter and the parties to the arbitration agreement, the court could order interim measures even against third parties.

Notwithstanding the legal efficacy of private tribunal in vogue under a parliamentary legislation, it cannot be disputed that the freedom to subject to it is constitutional. A party which has not exercised the freedom of contract to subject itself to a particular mode of dispute resolution cannot be compelled to be governed by its dicta. The loaves and fish under an arbitral award cannot be enjoyed against a person who is not heard or chosen not to be subjected to a private tribunal. The solemn principles concerning it, are found its imprint in Census Commissioner vs Krishnamoorty 63 , it thus reads: “The appellant, the real aggrieved party, was not arrayed as a party-respondent. The issue was squarely raised in the subsequent writ petition where the Census Commissioner was a party and the earlier order was repeated. There can be no shadow of doubt that earlier order is not binding on the appellant as he was not a party to the said list. This view of ours gets fructified by the decision in H.C. Kulwant Singh and others V. H.C. Daya Ram and others wherein this Court, after referring to the

various judgments has ruled thus: “….. if a person who is likely to suffer from the order of the court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice.”

But, what if an arbitral tribunal decides to implead a third party as party to arbitral proceedings, will that party is under legal obligation to submit it to the jurisdiction of that tribunal. In view of the basis assumption of freedom to contract which clones the private tribunal of adjudicatory function and a third party’s rights to not exercise freedom, makes the issue perplexing one. But one thing is certain, the consent of all parties including the third parties can be sufficient to confer power of adjudication of inter-se disputes by the arbitral tribunal. The creation of “rights” and “interest” in such a way based on equitable principles often blurs another side of composite understanding of rights emanating from “arbitral proceedings”.

Thus, submission is the expensive interpretation to “interest” discourse based on equitable principles are not the sure guide of protection of interest of individuals nay it confers powers to a tribunal which by its inherent limitation in existence defunct to adjudicate or give effect to such interest –if at all it can be said that exist.

CHAPTER 3: THIRD-PARTY MECHANISMS

A. UNDERSTANDING

THE THIRD-PARTY MECHANISMS

1:- THIRD-PARTY MECHANISMS AND CONSENT

There is a plethora of legal discourse and case law relating to third party mechanisms, particularly consolidation, in the context of international arbitration. The prevailing view as taken by the majority of the authorities is that third-party mechanisms are not applicable to arbitration. This view is generally based on two argument

The principal argument relates to the contractual character of international arbitration. The principle of arbitration's contractual character has acquired among scholars the status of a sacred doctrine, which would forbid any third-party involvement in the exclusively bilateral arbitration process, unless all relevant parties have consented thereto either expressly or impliedly.

The second argument emphasises the practical problems that usually result from the participation of third parties in arbitration proceedings. Third-party mechanisms will, normally, make arbitral proceedings more complicated, which in turn will make arbitration more expensive and time-consuming. Issues concerning confidentiality or, even, the payment of the arbitrators? will also arise when third parties intervene in arbitration. Therefore, the prevailing contractual view is that a person not bound by an arbitration agreement, i. e. a third party, cannot participate into the arbitration process. If the parties want the application of third-party mechanisms to their arbitration resulting to multiparty proceedings they have to provide for them in the arbitration agreement. The principle of procedural party autonomy

gives the parties the freedom to design multiparty proceedings specifically designed to accommodate the particular needs of their commercial agreement.

Thus, the several parties may incorporate multiparty dispute resolution clauses in the several contracts, conferring jurisdiction over the several parties on a single arbitral tribunal. In this regard, the parties have the exclusive discretion to provide for the application of third-party mechanisms, be that consolidation or intervention or joinder. This is a well-established right of the parties particularly in the context of international business transactions and, accordingly, courts and arbitral tribunals must honour parties' preference to multiparty proceedings

The case where the several parties provide for multiparty proceedings in their arbitration agreement is a clear-cut caseof multiparty arbitration and should not raise any difficult issues. Whether or not several parties have consented to multiparty proceedings, in these cases, is a matter of interpretation of the relevant arbitration agreements. Strictly speaking, when several parties conclude multiparty arbitration agreements, all the several parties are genuine rather than third parties. Therefore, the thesis will not examine in detail the matter of multiparty arbitration agreements. It is for the sake of completion, that the next two sessions will briefly look into two issues that often arise in the context of dispute resolution clauses providing for multiparty proceedings: first, the issue of equal treatment of the several co-respondents or co-claimants in the constitution of the tribunal and, second, the issue of effective interpretation of these clauses

1.1. Equal treatment of the several parties in the constitution of the tribunal

The issue of equal treatment of the several parties in the constitution of the tribunal has been the subject matter of an exhaustive discussion in literature, particularly in the last decade. The well-know decision of the French Cour de cassation in the Siemens AG v Dutco Construction Co. case laid down the theoretical premises of the discussion. It should be briefly reminded that in Dutco, upon threats by the ICC Court to appoint an arbitrator on behalf of the several respondents, the latter jointly nominated an arbitrator. At the same time, however, they reserved their right to challenge the appointment procedure. The two co-respondents argued that their interests in the particular case were conflicting and, therefore, each one of them should have been given the right to appoint its own arbitrator. The highest court of France held that the appointment procedure had violated the principle of equality of the parties in the appointment of arbitrators, which is a matter of public policy. Thus, the Cour de cassation disapproved of ICUs practice under its previous rules to allow for one side to choose its own arbitrator while obliging the other party to agree on a single arbitrator despite their conflicting interests. The Dutco dictum was not unanimously acclaimed. There have been voices of concern, noting that it is not always workable to provide every party involved in a multiparty arbitration with the right to appoint its own arbitrator. Nonetheless, the principles set out by the French Cour de cassation have been in general accepted by the arbitration community. As has rightly been observed: "the French Cour de cassation simply requires that all the parties should have the same rights with regard to the appointment of the arbitrators, not that they should all have a right to appoint "their" arbitrator". Accordingly, many arbitration institutions modified their rules in accordance with the Dutco principles, providing

at the same time for a more workable solution. In particular, the new arbitration rules give the multiple claimants and respondents the opportunity to nominate a single arbitrator, but in case they fail to do so, the institution will appoint the tribunal on behalf of both the sides. This solution is in general considered the best possible compromise in the delicate issue of the equal treatment of the several parties in the appointment of arbitrators.

1.2. Effective interpretation of multiparty arbitration clauses

As regards the issue of the effective interpretation of the multiparty arbitration clauses the following notes should be made. In practice, the parties often fail to draft clear dispute resolution clauses, explicitly providing for multiparty proceedings. Thus, very often the several parties instead of concluding one multilateral arbitration agreement will conclude several bilateral contracts, containing bilateral arbitration clauses, with no cross-references. In such cases, it is difficult to infer multilateral consent for multiparty arbitration proceedings, even if the several contracts are drafted in view of the same commercial project, and the arbitration clauses are drafted in identical terms.

Whenever the contractual provisions of the parties are ambiguous or unclear, the courts will normally apply general contract interpretation principles to lift the ambiguity and give effect to the agreement of the parties. Thus, provided that the clauses are otherwise valid in terms of form and substance, courts and tribunals will favour an effective interpretation, which accords with the obvious commercial purpose of the agreement.

B:- ARBITRATION RULES AND LAW :WITH RESPECT TO THE ENFORCEMENT OF ARBITRATION AGREEMENTS AS AGAINST NON SIGNATORIES

Given the increasing popularity of institutional arbitrations, before delving into the position taken by national courts, it would be worthwhile to look at some of the more frequently used institutional rules. The LCIA Arbitration Rules (both the 1998 and the 2014 versions) provide for third parties to

This consent is required to be accorded after the date on which the request is received by the Registrar of the LCIA. The ICC Arbitration Rules, which came into force in 2012, also contain succinct provisions permitting the extension of arbitration agreements to non-signatories under Article 7.1 by filing of a request for arbitration against _additional parties' before the constitution of the tribunal. The ICC Rules, under Rule 9, go further to permit a composite reference to arbitrate disputes under multiple contracts irrespective of whether they are covered by more than one arbitration agreement, where claims arise out of or are in connection with multiple agreements.

While Rule 24.1(b) of the SIAC Arbitration Rules, 2013 allows parties to submit a request to join a third

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party to the arbitration with the written consent of such third party,

it may only be done

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provided that such person is a party to the arbitration agreement. The

SIAC Arbitration Rules, 2016, however, have included comprehensive provisions permitting a party or a non-party to the arbitration to file an application, before or after the tribunal is constituted, for additional parties to be joined to the arbitration. Rule 7.1 specifies that such application may be made where the additional party is either prima facie bound by the arbitration agreement or all the parties, including the additional parties, have consented to the joinder.

Much like the SIAC Arbitration Rules, 2013, the 2013 edition of the Honk Kong International Arbitration Centre Arbitration Rules, under Rule 17, permits a party to arbitration to request the inclusion of an additional party' to arbitration, provided that prima facie an arbitration agreement exists with such additional party. However, Rule 17 makes allowance for a third party' to file a request to be joined to an existing arbitration.

A general trend that has emerged through case law is to widen the scope of arbitration agreements to cases where the third party was involved in the negotiations or performance of the contract, where the contract has been assigned to a third party, where an arbitration agreement has been incorporated by reference, where the third party is part of a group of companies involved in a dispute or is an alter-ego of a party and to third party beneficiaries. The position is, however, far from settled.

Even if the parties have failed to provide for multiparty proceedings in their arbitration agreements, third-party mechanisms may still apply by reference to the applicable lex arbitri. This section gives a brief overview of the arbitration rules and laws regarding third-party mechanisms. As will be shown, the vast majority of the arbitration rules and the national laws adhere to the prevailing contractual approach providing that third-party mechanisms, such as joinder or consolidation, may not apply to arbitration unless all the relevant parties have given their consented thereto. Starting from the arbitration rules, there are only few of them providing for third party mechanisms. In general, the majority of the arbitration rules leave the exclusive decision on such a delicate issue to the parties. For example, no relevant provision is found in the ICC, the AAA ICDR, the UNCITRAL Rules, the Stockholm Chamber of Commerce Arbitration Rules (2007), or the CIETAC Rules.

When arbitration rules expressly provide for third-party mechanisms, they usually require consent of all the relevant parties (genuine and third ones). This is, for example, the case with the Vienna Rules or the Netherlands Arbitration Institute rules. There are only a few exceptions to the principle requiring consent of all the relevant parties for the application of third-party mechanisms. For example, in some institutional rules, such as the LCIA, the CEPANI or the Swiss

two pending arbitrations between several parties, or the joinder of a third party. In these cases, the decision for the consolidation or the joinder is entrusted either to the arbitral tribunal or the administration body. This "interventionist approach" is more frequent in arbitration rules related to specific industries, such as construction, commodities, securities or maritime.

National arbitration laws also opt for party autonomy, the majority of which avoids to include any fall back provisions, let alone any mandatory ones, providing for thirdparty mechanisms. Indeed, no relevant provisions can be found in the US Federal Arbitration Act, the Swiss PILA, the French NCCP, the German ZPO or the Model Law. Even when national laws expressly provide for third-party mechanisms, they usually take the contractual approach, requiring the agreement of all the parties, original and third, to multiparty proceedings. This is the legislative model followed for example by the EAA, and the Belgian Judicial Code, where the final decision on the application of the joinder or intervention needs to be taken by the tribunal. Some other national laws empower the national courts rather than the tribunal decide whether a third party will take part in the arbitration proceedings, although they still require the consent of the all relevant parties as an indispensable condition.

Only as a rare exception arbitration laws deviate from the contractual approach, and provide for compulsory third-party mechanisms ordered exclusively by national courts, even without the unanimous consent of the relevant parties. The classic example here is the Netherlands Code of Civil Procedure art. 1046, which provides for compulsory consolidation to be ordered by the President of the Amsterdam District Court. Finally, an interesting approach is taken by the New Italian Arbitration Law: echoing analogous provisions in Italian litigation proceedings, art. 816 quinquies distinguishes between "voluntary intervention or joining" of a third party, which will be admissible only with the agreement of the third party and the original parties with the arbitrators' consent, and the intervention or joining of a third party who is considered to "be necessary by law" , which will always be admissible, irrespective of the consent of the original parties to the arbitration proceedings.

c. Effects regarding signatories and

non-

signatories Business transactions in international commerce have become complex and often are not easy to carry out. In many cases, there are more than two parties involved, each performing part of the agreement, which also means that it will be necessary to draw up elaborate and intertwined contracts, trying to consider all the possible scenarios that the parties involved in the transaction could eventually have to face. On the other hand, business relationships, especially international ones, are quite unpredictable, since there are many variables in play, and it is likely that difficulties or even disputes will arise that the involved entities had not or could not have foreseen. As a reaction to the internationalization of business transactions, and for protection of their national interests, States require in a constantly growing number of cases that a company that wants to do business in a certain country opens up a subsidiary or starts the business with an associated local company. In fact, many times it will be indispensable to prepare the main business that the parties intend to achieve by concluding preparation contracts. To do so can be convenient for many reasons, e.g., the State law requires the establishment of a local company or it is a multi-party transaction. Most likely, all of the contracts signed will contain an arbitration agreement. However, those clauses often lack coherence, which eventually will become a source of conflict.

The perfect contract probably would be the one foreseeing all possible scenarios and their solutions, regarding the beginning of the business relationship, its performance and finally its termination . Unfortunately, such a contract does not exist. It is not that the parties' do not want to have a clear arrangement regarding all the possible problems that could arise at the different stages of the relationship. The difficulty is rather that it is almost impossible to foresee every situation that could affect the business transaction and the signatory and non-signatory parties involved in it. It is also important to consider the moment when the arbitration agreement is written and included in the contract. It generally happens at a time when the parties have the best possible relationship, just starting their business transaction, and still agreeing on the issues that eventually later on could end up weakening or bringing trouble into the relationship.

Without any doubt, arbitration agreements grow in importance at the same pace as the volume of international business transactions. A growing number of parties involved in international transactions include an arbitration agreement in the contracts, precisely because of the advantages dispute resolution offers. Also contributing to that phenomenon is the fact that there are already international standards relating to arbitration proceedings quite broadly accepted by many countries. An important contribution to this matter is the Model Law on International Commercial Arbitration designed by the United Nations Commission on International Trade Law , since many States with little or no modifications adopted it, which helps to achieve uniformity in this matter, a characteristic it lacked not too long ago.

1. Effects regarding signatories and non-signatories

Theoretically, a contract signed by two parties, e.g., company A and company B, will only produce effects regarding these parties, in this case A and B, because of the privity established between these parties of the contract. Nobody else should have to fulfill

obligations contained in that document, neither have any rights to claim because of that contract having been signed. Nevertheless, and similar to other situations in life, there are exceptions to the rule.

1.1. Principle of relativity of contracts

One of the most important principles applicable to a contract is the relativity of it. The privity of contract only affects the signatory parties. In simple terms, it means that only the parties that signed the contract will be obliged by it and will be able to claim rights based on it. On the other hand, it also means that only the signatory parties will be able to compel the other party to fulfill its obligations emanating from the agreement that was signed by both. The privity of contract has a tremendous strength. A demonstration of that strength is that in case one of the signatory parties is not willing to comply voluntarily, the other one will be able to claim its rights in court, based on the agreement that was signed. Assuming that the claimant has fulfilled all the requirements established in the contract, the court will oblige the other party to comply with its obligations, if necessary even through public force.

1.2. Extension of the arbitration agreement to non-signatories

Arbitration promises a relatively relaxed, flexible procedural surrounding, swift delivery of the final award and very limited opportunities for review . It also has the advantage of being resolved by a neutral arbitral tribunal and the possibility of enforcing the award in a great number of countries. Thus, it has several characteristics that make this procedure attractive and an interesting alternative to litigating in ordinary courts. In some cases a party to the arbitration agreement brings a claim against a non-signatory before the arbitral tribunal, or vice versa, i.e., a non-signatory pleas against a signatory party of the agreement forcing the tribunal to make a decision whether to extend the arbitration agreement, and under what grounds. The extension of arbitration agreements refers to the situation when a company that has not signed an arbitration clause is nevertheless obliged to participate as defendant in arbitration proceedings initiated pursuant to that clause by another company in the group to which it belongs. It also refers to the opposite situation, namely when a non-signatory company of the arbitration agreement signed by one or more of the companies belonging to the group is allowed to initiate arbitration proceedings. Both situations could be applicable eventually also to a natural person who owns all or the greater part of a company´s shares .

The jurisprudence regarding the extension of the arbitration agreement to non-signatories, and the amount of decisions allowing an extension, develop constantly, as arbitral tribunals are faced with the problem more and more frequently, due to the fast growing amount of international commercial transactions. Arbitration has a contractual nature, and represents a voluntary alternative to litigation in state courts; an arbitration agreement actually may only be binding for a party that has either explicitly or impliedly consented to it. Therefore, whenever the question arises whether or not to extend an arbitration agreement to a party that did not sign it, the logical answer should be to take into account the legal rules applicable to that specific agreement as defined by the parties that signed it.

Generally there would be no obstacle for joinder or consolidation, if all the parties involved or somehow related to the matter agreed on having related disputes resolved in a single arbitration. In a carefully drafted arbitration clause the parties can determine under what circumstances they want to allow for joinder or consolidation, who would have the authority to decide on these issues, and how to deal with the appointment of a tribunal in case of a consolidated proceeding . Such a clause could be included at the moment the main agreement is drafted, or negotiated afterwards as a separate agreement, or even once a dispute has arisen.

Another solution could be to include rules of one of the institutions that provide them for arbitration and that consider different solutions to the matter, e.g., the American Arbitration Association rules, the International Chamber of Commerce rules of arbitration, or the United Nations Commission on International Trade Law arbitration rules. In most countries, according to the law, it is possible for the defendant to bring a third party into the trial. However, that is not the case in arbitration since it rests basically on consent.

The principle of procedural party autonomy provides parties with the freedom to contractually determine the circle of persons entitled to participate in the arbitration proceedings. Thus, that principle and the contractual foundations of arbitration make it a flexible dispute resolution mechanism, allowing parties to design a system for resolving differences in accordance with their particular commercial needs. That is one of the reasons for the increasing popularity of arbitration in international commerce.

Seen from a different point of view, while the consensual nature of arbitration has proved to be an impediment to obtaining consolidated arbitration that same nature provides great leeway for the parties to structure their contracts to assure consolidated arbitration . Due to the development of international commerce during the last decade, multi-party arbitrations are no longer the exception. There are usually two possible scenarios for the entities not appearing to be parties to the arbitration agreement to enter the stage: one is as the claimant, alone or alongside the party whose participation is non-contestable; another is at the receiving end, as the sole or additional respondent. Those parties are generally referred to as “non-signatories”.

Thus, what was until recently an unbreakable rule, today steps more and more aside leaving space for new solutions, which are necessary for many reasons, among others, due to legal aspects of the participating countries in international commerce. Undoubtedly, arbitral practice has to consider those recent developments when it comes to making decisions. In fact, the extension of arbitration agreements to non-signatory parties has become a critical matter in arbitral practice. Actually the question whether an arbitration agreement can or cannot be extended to third non-signatory parties is not the issue anymore. Proof of it is the considerable amount of awards that include non-signatories in the arbitral proceedings and final decisions. We will refer below to some of these awards. The discussion today rather is centered in what characteristics a non-signatory should have in order to be able to extend the arbitration agreement to it, and what considerations are taken into account by the arbitral tribunal, i.e., on what grounds it brings the non-signatory into arbitration proceedings. Some

of the factors arbitral tribunals should take into account in general when it comes to take a decision are the language of the arbitration provisions and the underlying agreement, the circumstances under which the parties entered into the agreements and the legal relationship between the parties, the purpose of the arbitration agreements and considerations of efficiency, the parties´ obligation to act in good faith and consequences of consolidated proceedings for the constitution of the arbitral tribunal . Nevertheless, as clearly stated by diverging arbitral decisions and awards, so far it has not been possible to reach consent in this matter. d. How do arbitral tribunals solve the problem?

Sometimes an arbitral tribunal is asked to look beyond the question of who signed the arbitration agreement to ascertain whether a non-signatory has in fact given its consent to be bound by the arbitration agreement and whether the signatories have also consented to the non-signatory being obliged . There are different ways to consolidate arbitrations including non-signatories before disputes arise. One possibility is to draft an agreement separate from the main contract or subcontracts establishing consolidated arbitration, involving signatories as well as non-signatories, and make all parties sign it. Another way is to choose applicable arbitration rules that will allow the arbitral tribunal to consolidate all proceedings into one. Arbitration should operate as an open dispute resolution system that takes into account the interests of third parties that are strongly associated on a substantive level with the parties to an arbitration agreement, rather than a closed one, limited to the signatory parties only .

One of the advantages of multi-party arbitration, bringing into the proceedings also third non-signatory parties, is that it avoids in consequent or even conflicting decisions that could be taken by different arbitral tribunals in case of initiating several arbitral proceedings, making them more efficient. Another advantage of multiparty arbitration is that it avoids the problems that could arise when trying to enforce those inconsistent awards. Further, those inconsistent awards could eventually prove the arbitral tribunals wrong, and that could affect the prestige of international commercial arbitration, which would be a very undesirable effect. The parties' intentions should be the first and most important guideline for the arbitral tribunal once a case is submitted for its decision, especially considering the great amount of economic operations that involve several contractual relationships between multi-party operations.

Whenever there is a third party seeking to get involved with the arbitration proceedings, or a party trying to bring a non-signatory into the proceedings, and the arbitral tribunal has to make a decision as whether to include it or not, it should consider the substantive background of the arbitration arrangements made. Also the arbitral tribunal should consider that including third parties somehow related to the matter would eventually provide valuable information allowing the tribunal to make a better founded and therefore most likely more just decision.

However, including a non-signatory eventually could have some disadvantages too. For instance, if the non-signatory is only related to a small part of the business transaction, consolidated proceedings would probably be more expensive and time consuming than a separate arbitration for it. Additionally, the possibility exists that a party would use the threat

of bringing into arbitration a non signatory to force the other to settle the dispute. Further, some of the parties involved could be concerned about giving away confidential information to third parties through the consolidated proceedings. Nevertheless, there is a solution to that problem, making all the parties involved in a consolidated proceeding sign a confidentiality agreement .

Analysing the arbitral jurisprudence, it is not difficult to distinguish several situations involving entities and individuals that never signed an arbitration clause . The first one is that the signatory or signatories could sue a non-signatory before the arbitral tribunal, together with another signatory or even alone, trying to bring it into the arbitration proceedings. In general this would occur when the claimant would estimate the non-signatories´ patrimony as more attractive as the one of the other signatory concluding that the enforcement of an eventual favourable award would be easier. In that case, the non-signatory probably would defend itself highlighting such character and adding that therefore it could not be considered as bound by the arbitration agreement. It also could happen the other way around, i.e., the non-signatory suing one or all of the signatories, and those opposing to the pretensions of the non-signatory on the basis that it is not a party to the arbitration agreement.

In both situations the possibility exists that the respondent agrees on entering into arbitral proceedings accepting that the counterpart is bound by the arbitration agreement, even though it had not signed the agreement or was not part of it in any other way. In those cases, the arbitral tribunal´s task would be easier, considering that an arbitration agreement is based on consent, and whenever all the parties involved, whether signatories or non-signatories, accept that they are bound by it, the most important impediment for arbitration is overcome.

Lawyers often speak of “extending” the arbitration clause, or “joining non-signatories”, but in Park’s opinion, neither expression accurately captures what happens when arbitrators hear claims by or against someone who never signed the relevant contract. The author sustains that for arbitrators, motions to join non-signatories create a tension between two principles: maintaining arbitration´s consensual nature, and maximizing an award´s practical effectiveness by binding related persons . It is also important to consider that the whole arbitration process is intended to serve justice and equity, so it would be unfair to marginalize a third party, that even if it did not sign the agreement, it is in some way related to the business transactions. For example, when a contractor signs a contract with his client agreeing to build a bridge, most likely it will have to sign one or more subcontracts in order to be able to fulfill its contractual obligations. Of course the client will not sign the contracts celebrated between the contractor and the subcontractors. However, it would be difficult to deny that the client would be aware of the fact that besides the contractor there will be other parties related to the business transaction, e.g., as subcontractors or suppliers, because of the interdependence of all theparties involved in the project and its complexity, and therefore eventually those other parties could be part in a dispute resolution process through arbitration.

The conditions usually required to consider a non-signatory as party to a contract are that it took an active and substantial part in the negotiation or performance of the main contract,

which on the other hand allows the arbitral tribunal to presume that it was aware of the arbitration agreement . Nevertheless, if the cases including non-signatories would be limited to that scenario, a great number of them would be margined from the possibility to seek arbitration with a signatory . This eventually could lead to an unjust decision, e.g., a small subcontractor that signed a contract only with the main contractor, not with the client, and didn´t get paid the salaries that he had agreed on with the contractor, would not be able to seek arbitration as a party, since he does not fulfil the criteria mentioned above.

At least five common scenarios are often present in cases where an arbitrator´s analysis leads to joinder of a non-signatory, which are the following : a) Non-signatory participation in contract formation or mentioning of the non-signatory in contract documents; e.g. ICC Case No. 7155, denying extension because of the absence of involvement at the time the contract was concluded; ICC Case No. 11160, joining a non-signatory that played a significant role at the time of contract formation; and ICC Case No. 5730, where a corporation serving as group leader intentionally created and maintained confusion; b) a single contract scheme constituted by multiple documents; e.g., ICC

contracts; and ICC Case No. 8910, where multiple contracts were found to constitute a single contractual relationship; c) implied or expressed acceptance of the arbitration agreement by the non-signatory, whether in the particular arbitration itself, or in another forum; e.g., ICC Case No. 4131, granting corporate affiliates the benefit of an arbitration clause contained in agreements concluded by another member of the corporate family; ICC Case No. 6519, refusing the request of companies of the same group to join the arbitration based on the fact that the group leader and the signatory never intended to commit them to the agreement in their capacity “as a separate legal entity”; and ICC Cases No. 7604 and 7610, where a non-signatory respondent admitted its acceptance of the arbitration agreement. In some cases, we find deemed consent, which according to Park operates simply as a way to objectify assent for fact patterns where an agreement exists, even though traditional formalities may be absent or unclear . In those cases, the circumstances of the parties´ relationship will be seen as equivalent to an agreement, even if the conduct does not fit squarely within the contours of classic contract doctrine . In a business operation of a certain scope it could easily occur that in some of the contracts the signature of an entity that actually is going to be acting as a party

to the agreement was omitted. In these cases should it be understood that it is not a party just because of the lack of signature, even though everything else expresses the contrary? Obviously not, rather the circumstances and the participation of that party should be considered, understanding that it is a part of the agreement even without signature.

Nowadays, a growing number of economic projects require for their execution several contracts or subcontracts, all interrelated and destined to regulate all the details of the relationships between the parties and also to avoid problems or inconveniences in the future due to its scope. The best solution regarding the arbitration agreement would be to include the same clause in all of the contracts and subcontracts, since it avoids contradictions. However, in practice it sometimes occurs that the parties use different clauses, or even omit the arbitration clause completely in one of the documents that they signed. Obviously, in that situation it will be more difficult to resolve problems that might arise, as there is no clause defining how such problems would have to be resolved. The process of finding a solution definitely would be more expensive and time consuming, which are very undesirable circumstances in any business relation, and especially in the ones that went bad. As Park states, no magic formula tells arbitrators what legal principles apply in the determination of joining non-signatories . Often, the decision to join a third non-signatory party rests on more than one factor, and in that situation it is important that the arbitral tribunal considers and analyses all of them. Otherwise there is a danger of taking a decision that will not do justice to the entities involved, whether signatories or non-signatories. Standards articulated in published arbitral awards, supplemented by scholarly comment, often provide intellectual coherence and practical merit for arbitral tribunals seeking guidance on questions related to non-signatory parties, because they reach for common sense notions and the real motives parties had to celebrate the contract.

e. Theories employed by arbitral tribunals to solve the problem of extension If an application is made to bind a non-signatory, the very basis of arbitral jurisdiction would normally be lacking, and the party sought to be bound would argue that it never agreed to arbitrate with anyone at all, thus requiring arbitrators to look for clear manifestation of assent . Nevertheless, due to the growing amount of business transactions that involve not only the usual two parties, but also whole groups of companies, nowadays it is no longer possible for arbitral tribunals to simply deny extension based on the lack of consent. Rather the tribunal will have to analyse the arguments and circumstances very carefully before deciding on the matter.

It is worth mentioning that there might be what arbitrators call “consenting non-signatories”, which seek to arbitrate, and have to be distinguished from those who don´t, which are also called “non consenting non-signatories”. Obviously, it is easier to justify allowing a willing party to join the arbitration proceedings then the other way around; for example, in the ICC Cases No. 7604 and 7610, a non-signatory defendant accepted, in a national court action, that it was bound by the arbitration agreement .

A number of legal theories have been urged for compelling a non-signatory to participate in arbitration, widely commented by scholars and professionals dedicated to the subject , like

estoppel, incorporation by reference, third party beneficiary, subrogation, veil piercing, group of companies, alter ego, assumption and agency.

It should be noted that in some cases, when a party intends to include a non-signatory in arbitration through one of those figures, the primary purpose of any arbitration proceeding which is a cost efficient and fast resolution of the differences that arose, might not be achieved. However, it should also be noted that in the long run it could be more convenient to operate that way, since it probably will avoid an additional procedure, eventually even in court, against the non signatory.

a. Compilation of Legal Theories

The following are the most important theories that are applied in a constantly growing number of cases in which third parties are somehow involved but are non-signatories. With this in mind, a review of published arbitral awards, case law and secondary materials reveals an extensive list of legal theories claimed to bind nonsignatories to arbitration agreements. The starting point in compiling the following list is the leading United States case of Thomson-CSF S.A. v. American Arbitration Association, in which the court "recognized a number of theories under which non-signatories may be bound to the arbitration agreements of others. Those theories arise

out of common law principles of contract and agency law."

The theories identified in Thomson are the first five listed below, with the rest from other sources: (1) Incorporationby reference:"a non-signatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the non-signatory which incorporates the existing arbitration clause."

(2) Assumption of obligation:"in the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate."

(3) Agency: "traditional principles of agency law may bind a non-signatory to an arbitration agreement.

(4) Veil piercing/alterego/group of companies/consortium/joint venture: "In some circumstances, the corporate relationship between the parent and its subsidiary are sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other. As a general matter, however, a corporate relationship alone is not sufficient to bind a non-signatory to an arbitration agreement." Similarly, the so-called "group of companies doctrine" provides a precedent for treating a group of companies as a single economic unit for the purposes of being bound by an arbitration agreement to which not all individual companies within the group are signatories. The arbitral tribunal will "consider closely the structure and organization within a Group of

Companies. The fact that such a group ... may form a so-called unite economique would be a significant element and as such may justify a conclusion that not only a particular subsidiary "C"must be considered bound by the arbitration clause, but also its sister "B" or its parent "A"etc." A similar argument is made in cases of "consortium," partnerships and joint ventures.

(5) Estoppel: "This Court has also bound non-signatories to arbitration agreements under an estoppel theory ...by knowingly exploiting the agreement, the [plaintiff] was estopped from avoiding arbitration despite having never signed the agreement." The Court also referred to "an alternative estoppels theory" where "[a] signatory was bound to arbitrate with a non-signatory and the non-signatory's insistence because of the 'close relationship' between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and [the fact that] the claims were '

intimately founded in and intertwined with the underlying contract obligations.'

(6)

Assignment: "This situation frequently arises in practice. The claimant or the defendant party is the assignee of the rights and benefits of a contract, including its arbitration provision." (7) Novation: "In this situation the claimant or defendant in the arbitration is a person who has replaced the original party to the arbitration agreement; the original person has ceased to have any rights or liabilities under the contract." (8) Succession by operation of the law:"This situation occurs in bankruptcy. The receiver adopts the contract and seeks as claimant in an arbitration to enforce it in the place of a bankrupt party, named in the contract. Or the receiver is attacked as defendant.., and has to answer in the arbitration since he has succeeded in the place of the bankrupt party." This may also arise in certain testamentary and similar disputes. (9) Subrogation: Closely related to the above, this arises mainly in the insurance and reinsurance in which the subrogee "stands in the shoes" of the original party to the agreement containing the arbitration clause.

(10) Third party beneficiary:"The parties to a contract may expressly stipulate that, in addition to themselves, a third party shall acquire rights there under. Even if no express stipulation has been made by the parties to a contract whereby a party acquires rights, including the right to arbitrate, circumstances may indicate that the parties have such intention. The third party beneficiary will then derive his right to be a party to the arbitration from a tacit agreement.

4.1-THE GROUP OF COMPANIES : EXTENSION DOCTRINE

Now , we know different type of extension doctrine that are prevalent but, since in India apex court has mostly defined explained and expanded the scope of third party with respect to

group of companies doctrine, so we will be discussing mainly the scope of group of companies doctrine in detail.

To date, the discussion on arbitration and third parties has been limited to issues of "consent". A strict contractual approach to the subject has been adopted by legal discourse and case law focusing exclusively on the contractual characteristics of arbitration agreements as substantive contracts. From this contractual viewpoint, the answers to the above questions depend on whether a person is bound by an arbitration agreement as an ordinary contract or not. Any party not bound by an arbitration agreement, i. e. third party, may not take part into the arbitration process irrespective of any legal or financial interest that this third party might have in the dispute between the parties bound by an arbitration agreement. Therefore, according to the contractual approach, third-party mechanisms, such as joinder, intervention or consolidation, may not apply to arbitration unless all the relevant parties bound by an arbitration agreement. This approach is echoed in the vast majority of the existing arbitration rules and arbitration laws, which usually hinge the application of third-party mechanisms to arbitration proceedings on the condition that both genuine and third parties to an arbitration agreement have consented to the joinder or the consolidation.

Consequently, according to the prevailing contractual approach, the discussion on arbitration and third parties relates only to the boundaries of the arbitration agreement as a substantive contract. Within this contractual approach two different views have been suggested. According to the first, arbitration agreements cannot have any impact whatsoever on any person, who has not clearly consented to arbitration, as this consent is evidenced by his signature. ' Thus, only those persons that have signed the arbitration agreement will have the right to take part in arbitration proceedings. This view is quite straightforward relating to the formal requirement of signature and, thus, the thesis will not explore it any further.

By contrast, particular attention will be given to the second view taken by what is known as "extension doctrines". According to the extension doctrines, it is possible under certain conditions for non-signatory parties to enter into an arbitration agreement, notwithstanding the fact that they have failed to sign it. As is argued, the arbitration agreement between two signatory parties may be "extended" to non signatories. Hence, the thesis refers to these doctrines as "extension doctrines". As will be shown, the extension doctrines do not challenge "consent" as a requirement for the participation of the non-signatory party to the arbitration between the signatories. The core argument of the extension doctrines is that signature on an arbitration agreement is not the only means to assert consent to arbitrate. Consent, which is necessary for a non-signatory party to participate in the arbitral proceedings, may be inferred, or even presumed by reference to other factual circumstances. Therefore, extension doctrines are in accord with the prevailing contractual approach.

This chapter examines the `group of companies' doctrine, arguably the most prominent, and controversial of the extension doctrines. The idea that large multinational groups, operating through several subsidiaries, associated or holding companies, should be regarded as a whole rather than as strictly independent legal entities was originally developed in the context of company and tax law. Indeed, under the law of many countries, groups of companies are

treated as one unit for tax and accounting purposes. The doctrine has, however, acquired a particular relevance in the context of international arbitration: it has been employed mainly by international arbitral tribunals as the theoretical basis for the `extension' of arbitration agreements signed by one or more of the several companies to non-signatory parties in the same group. The `group of companies' doctrine was introduced into arbitration by the seminal award in Dow Chemical v Isover-Saint-Gobain, and has subsequently been developed as one of the most challenging theories in the area. For more than two decades, the doctrine has been the subject matter of extensive literature, and has repeatedly been dealt with by arbitral tribunals and national courts in different jurisdictions. Despite the fact that it has been widely debated for many years, the discussion on the group of companies is by no means settled yet. Thus, the thesis revisits the `group of companies' doctrine and provides an analysis of its conceptual characteristics. This chapter first gives a brief overview of the history and the legal premises of the doctrine. It then studies the relevant case law of arbitral tribunals and national courts. Finally, it identifies the conditions required for the doctrine to apply. Particular emphasis is placed on the role of `consent'. The question here is whether the `consent' of the non-signatory party is required by the tribunals and the courts for the application of the doctrine, or whether alternative non-consensual factors may be used as a substitute for the requirement of `consent'.

The Group of Companies Doctrine in Theory

The group of companies doctrine is the method where courts or tribunals can bind a non signatory on the basis of that company’s strings to, or parent/sibling relationship with, another company. In short, the result is that the court or tribune infers common intention of the parties on the basis of the corporate structure and the active involvement of the non-signatory. This involvement is for example negotiation, performance, or termination of the contract containing the arbitration agreement.

The initial intention when the doctrine was developed in France was, as we will see, that when dominant parent companies take active part in for example the negotiation of a subsidiary’s contract, over which subsidiary it has absolute control, it should become bound to the arbitration agreement existing within that contract. If the parent has such absolute control over the subsidiary and works for the contracts creation, it should be seen as a party to the agreement. This method by that targets dominant companies in corporate groups. The signatory and non-signatory have to be members of the same corporate group and also have strong administrative, executive, and/or financial links for the doctrine to apply. It is not only that the companies belong to the same economic reality that play a role in determining the scope of the companies’ closeness, other factors such as if they share financial or human resources, trademarks, assets, ownership titles, shares the same office or premises etc. Points in the direction of the existence of close corporate ties.

To sum up, the requirements for the application of this method is that the non-signatory company belongs to the same group of companies as one of the signatories to the arbitration agreement. Furthermore, the non-signatory company has to take active part in the negotiation, performance, or termination of the contract containing the arbitration clause. By

fulfilling these requirements the idea is that it shows the common intentions of the parties to be bound by the arbitration agreement. This common intention is a question of if the other signatory (not part of the group of companies) believed that the non-signatory was in fact a party to the contract, even though it hadn't signed it.

This method of binding non-signatories is, as of today, the method that is the basis for far most controversy throughout the world. Some scholars have even held the method to be non existing. The reason for this controversy is, according to scholars, that it is clear that this doctrine is used by the courts or arbitral tribunals to be able to extend the arbitration agreement outside of the actual signatories to the contract. The method is also controversial in regard to one dominant principle of contract law, which states that an agreement signed by one company within a group of companies, only is binding upon that company. If a company within a group of companies is not acting within the scope of traditional contract law principles (i.e. through an agreement about agency or representation) to bind other companies in the same corporate group, the parent or siblings to that company will never be bound by that contract. The same contract principle should apply to arbitration agreements. As the method of group of companies doctrine is intended to bind non-signatories without these agency or representation being present, it has led to big controversy.

2 LEGAL BASIS OF THE DOCTRINE

It is not uncommon for companies with strong financial, business and corporate ties to maintain separate legal personalities. National laws generally provide for the principle of limited liability of the stockholders and the principle of separate liability of the parent company. Therefore the several companies of the same group are largely treated as separate legal personalities. This, in terms of contract law, means that a parent or any other company of the group lacks the capacity to bind contractually another company in the same group, except from itself Unless acting in accordance with traditional contract law principles, such as agency for example, the company concluding a contract will be the only entity of the group to assume any contractual duties and rights from that contract. This equally applies to arbitration agreements: only the company entering into an arbitration agreement, rather than any other company in the group, will be bound by that agreement. No national or international law provides for any exception from the traditional contract law rules with regard to group of companies. No national or international contract law provides for the ability of a company to have other companies in the group bound by a contract concluded by the former. Equally, no express arbitration rule in national law or international treaty provides for an exception from the traditional contract law rules, with regard to arbitration contracts. Accordingly, the "group of companies doctrine" in arbitration applies on the basis of arbitral case law and international arbitral practice.

This explains why tribunals will normally apply the `group of companies' doctrine on the basis of international rules rather than national law. Indeed, the tribunals, in order to assume jurisdiction over the several companies in the same group, will not apply the national substantive law applicable to the merits of the case or, indeed, any national law at all. Based on the doctrine of separability and the principle of autonomy of arbitration agreements', the

tribunals have on many occasions determined the boundaries of the arbitration agreement and, therefore, the boundaries of their jurisdiction, on the basis of `usages of international trade', the `common intention of the parties', `transnational substantive rules' and `lex mercatoria'.

3. The Group of Companies Doctrine in Practice

The Requirements of The Group Of Companies Doctrine Explained

The three requirements seen above will now be explained, but first an introduction of how the doctrine came into existence.

When discussing the method's application in practice, a statement from 1987 and the Paris Court of Appeals states the main point regarding the non-signatory issue: "The law of arbitration, based on the consensual nature of the arbitration clause, does not allow to extend to third parties, foreign to the contract [...]" What then followed is with regard to that statement quite peculiar.

It all began with the case of Dow Chemical v Isover Saint Gobain where the company Isover Saint Gobain (Isover) had entered into different contracts with various siblings of the Dow Group. A dispute arose and Isover brought up several claims relating to faults in the products Isover were to distribute. The Dow Chemical Group wanted to invoke arbitration to settle the dispute, this with reference to an arbitration clause in a distribution agreement signed by Isover and one of the siblings in the Dow Group. It is for the following discussion important to note that the contract that contained the arbitration clause made specific reference to other companies of the Dow Group in that way that it stated that any of those companies could deliver goods to Isover. The question for the tribune in the case was if they had jurisdiction over all of the companies concerned or not.

For the tribune to tackle this question they first stated that despite the fact that the subsidiary companies had not signed the relevant contract or arbitration agreement, nor worked for the contracts fulfilment, the entire group should be seen as a whole as it was a part of the same economic reality . They also established that the Dow Chemical Company, the parent of the group, had absolute control over the subsidiary companies and the tribune therefore held that it had jurisdiction to hear all four Dow-companies claims based on the arbitration clause only signed by one of the siblings.

The reasons for binding the non-signatory siblings were several. The court stated: "Considering that it is indisputable – and in fact not disputed – that Dow Chemical Company has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like Dow Chemical France [one of the subsidiary companies], effectively and individually participated in their conclusion, their performance, and their termination" [... and] "

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irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality of which the arbitral tribunal should take account when it rules on its own jurisdiction [...]"

The tribune by that determined that it had jurisdiction over all of the companies in the Dow Group and it based its decision on the fact that the parent exercised absolute control over the subsidiaries and had been involved in all the contracts concerned. Even though the companies were separate from each other on paper, the tribune held that in practice so was not the case and resumed jurisdiction over all companies.

Relating this decision to the requirement of finding the common intention of the parties, binding all the companies of the Dow Group would be acceptable if Isover was not clear in regard to which of the companies it had dealt with at different points in time. If the same people within the Dow Group would have acted in accordance with the contracts and it was uncertain what company those people represented, it would somewhat justify that implied consent was at hand. This for the reason that if Isover were to accept the delivery of goods from all of the subsidiaries at different times, it would show that all companies were aware of the distribution agreement containing the arbitration clause. As all subsidiaries performed in accordance with the distribution contract, implied consent through this conduct could be present and show the common intentions of the parties to become bound by the distribution agreement. In this award however, there was no explicit reference to these continued deliveries as basis for implied consent or justification for the same. A fact that one could argue is a deficiency in regard to the requirement of consent.

The tribune additionally expanded their reasoning further and may have went way beyond the scope of arbitration when they stated, "it is neither sensible nor practical to exclude [from the arbitral jurisdiction] the claims of companies who have an interest in the venture and who are members of the same corporate family" . This is of course true but is not in line with the basis of arbitration. It would instead point towards a jurisdictional approach on jurisdiction when the dispute is the center of attention, not the consent from the parties to be bound by the arbitration agreement. A jurisdictional approach might be the more practical and efficient mean to deal with these types of questions, however no justification to do so is found in the regulations of international commercial arbitration.

The also required close relationship between the companies was discussed in the case of Astra Oil Co Inc. v Rover Navigation Ltd . Here, the question was if Astra Oil Co Inc. (Astra), the non-signatory to a charter party containing an arbitration clause, could invoke arbitration against one of the signatories, Rover Navigation Ltd (Rover). The charter party was originally signed by Astra's subsidiary, Astra Oil Trading NV (AOT) and Rover but as Astra and AOT both had acted throughout the entire performance of the contract as being parties to the contract and with regard to the close ties between Astra and AOT, Astra could invoke arbitration. Even though AOT formally had signed it, Astra was both the owner of AOT and the holder of the bill

of lading. Rover had also treated Astra as if it were a signatory to the charter party by accepting instructions from Astra during the trip. This, the court stated, was enough to find the common intention by all of the parties to become bound by the arbitration agreement within the charter party.

With regard to the other requirement, that the non-signatory need to take active part in the contract, the ICC award no 6519 is a good example. Here, Mr. X and Company Y entered into a contract containing an arbitration clause with the purpose that Mr. X and Company Y were to transfer their shares in different companies to Company XB. Mr. X then transferred his shares of the companies XC and XD but when doing so, Company Y withdrew from the contract. Mr. X, together with company XB, XC and XD then tried to invoke arbitration against Company Y and claimed damages for breach of contract. The question for the tribune was by that if all four entities (Group X) could proceed with arbitration steaming from the contract between Mr. X and Company Y and it was stated:

As things stand, the arbitration clause can only be applied to the companies of group [X] which did effectively take part in the negotiations which led to the signature of the Protocol or which are directly concerned by it, to the exclusion of those which were nothing but instruments of a financial transaction between the hands of a majority shareholder. It was decided that only Mr. X and Company XB within the group were so related to the contract that they could invoke arbitration. The case by that clarified that only those companies taking active part in the negotiation, conclusion or termination of the contract containing the arbitration agreement or that are directly concerned by it, can by reference to conduct become parties to the agreement and invoke arbitration. Those companies of the group that did not take this active part in the contract, i.e. Companies XC & XD, which were only being transferred to Company XB, could not proceed with arbitration.

This section has in short explained the three initial requirements for applying the method of group of companies in international arbitration and so far, the requirement of the companies taking active part in the contract concerned is being upheld. The application of this requirement will however change.

The Continued Development Of The Group Of Companies Doctrine

For a different take on the subject of the group of companies doctrine, the ICC Case No 5103 is an interesting example. The tribunal here stated, “the security of international commercial relations requires that account should be taken of its economic reality and that all the companies of the group should be held liable one for all and all for one for the debts of which they either directly or indirectly have profited at this occasion” . This reasoning clearly departs from the previously stated rule of finding the common intention of the parties, a rule that is considered as being “the flagship and fundamental prerequisite of the group of companies doctrine”.105

This reasoning would also defeat the purpose of having separate companies in a corporate group. As stated in the American case of Sarhank Group v Oracle Corporation it holds to the importance of having separate companies in corporate groups: To hold otherwise would

defeat the ordinary and customary principles of experienced businesspersons. The principal reason corporations form wholly owned foreign subsidiaries are to insulate themselves from liability for the torts and contracts of the subsidiary and from the jurisdiction of foreign courts. The practice for dealing through a subsidiary is entirely appropriate and essential to our nation's conduct of foreign trade.

As indicated, it is the normal conduct in today's business world to separate legal entities within the same group from each other. They should not easily be held to each other's contracts or obligations. Not even the parent to its subsidiaries'. The method of group of companies is therefore in many jurisdictions, due to this fact, foreign to the views on company law.

Furthermore, in Korsnas Marma v Durand Auzias108 , the court expanded the view once more. It first concluded, in congruence with the ICC award no 6519109, that an

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> arbitration clause contained in an international contract has its own validity and effectiveness, which require its extension to all parties directly involved in the performance of the contract.

It additionally held that once it has been established that the parties' situations and activities allow the court to presume that the companies

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> were aware of the existence and the scope of the arbitration clause,

they could use the arbitration agreement to invoke arbitration even if they were not signatories of the contact containing it.

If all parties concerned by a dispute could become parties to the same arbitration proceeding, it would be an efficient mean to solve international disputes. Even so, it is not based in the current requirements of arbitration, i.e. consent. If awareness of an arbitration clause were enough to bind a non-signatory performing in accordance with the main contract to the arbitration agreement, it would seem to be presumed that the party also accepts the clause. The signature of, and consent to, the actual arbitration agreement would by that loose its importance. This might be a positive result. However, it would not be in line with the current rules of arbitration.

The discussion in Korsnas was later adopted and used in the case of ABS v Amkor . The dispute concerned a contract containing an arbitration agreement between Alcatel Micro Electronics (AME) and Amkor Technology, the first a Belgian company and the latter an American. AME sold goods purchased from Amkor to the French company of Alcatel Business Systems (ABS). When problems with the goods arose, AME and ABS sued Amkor and its subsidiaries but Amkor wanted the court to refer the case to arbitration. AME and ABS once belonged to the same corporate group but had since long before the arising of the dispute at hand, been two entirely separate companies. Even so, the court held that both AME and ABS were parties to the contract as they both had acted in accordance with it. The court held that "the effect of an international arbitration clause extends

> to parties that are directly involved in the performance of the contract and the disputes that may arise out of

it" .

The cases of Korsnas and ABS, one could argue, might have led to an entire new approach to the group of companies doctrine. In the case of ABS it was no longer companies within a corporate group that were bound to the agreement, but instead two separate companies working together as business partners of which only one had signed the arbitration agreement. The group of companies in the group of companies doctrine would by that no longer be a requirement for the application of the doctrine.

This new view on arbitration clauses was also seen in the case of Compagnie Tunisienne de Navigation Cotunav v Comptoir Commercial André , where two organizations from the Tunisian and French governments signed an agreement containing an arbitration clause. A third company, Cotunav, was to deliver food as the carrier for the French government. Thecourt however held the Cotunav bound to the entire agreement, solely on the fact that theytook active part in the performance of the contract. Cotunav had taken no part in rest of the main contract, besides from the performance, and was neither affiliated with the French government. Even considering that, Cotunav were bound by the arbitration clause. The reasoning were that "by accepting to intervene in the performance of the contract as carrier appointed by one of the parties in the framework of the contract, Cotunav necessarily assumed the obligations defined by the contract [...] and accepted its modalities, including the arbitration agreement" .

In the doctrine, it has been held that the Cotunav case has "led to an enlargement of the previous case law, since it recognized such tacit acceptance outside of a group of companies. Tacit acceptance that results solely from the performance of a contract concluded by other parties." . This would, as previously indicated, mean that the group of companies has

expanded to a method that deems it enough that a third party performs in accordance with a contract to become bound by the same. The mere knowledge of an arbitration agreement could as a result be enough to interpret implied consent from the third party. One could question this result and the implications it brings. Even if this way of solving the non signatory problem could be seen as the most efficient one, the basis of arbitration makes such an application impossible. To further note is that the last case of Cotunav could suggest that even if the awareness of the arbitration clause is not at hand, third parties could anyways be bound to arbitration agreements. The company in the case was bound to the agreement by merely taking part in the performance of the contract. Nothing was stated as to the fact if the company has been aware of the arbitration clause. This could not be held for sure but if that would be the case, it would extend the scope of the arbitration agreement way beyond what was initially intended. Future cases on the area will by that be interesting.

POSITIVE CONTRIBUTION OF EXTENSION DOCTRINES

"Extension doctrines" have been developed to address the intrinsic difficulties arising out of multiparty relationships that are "procedurally fragmented For all their conceptual flaws and practical difficulties, which will be shown in this chapter, extension doctrines constitute a radical and, thus, intriguing attempt to accommodate the perplexing issues of multiparty transactions in the context of arbitration. Extension doctrines provoked a fruitful debate on the role of `third parties' in arbitration, showing that a party that has neither signed nor ever consented to an arbitration agreement may not necessarily be a total stranger to arbitration proceedings between two other parties.

Extension doctrines shifted the focus of the discussion on the contractual interrelatedness between the genuine and the third parties. In other words, extension doctrines highlighted the fact that those third parties that are commercial partners of two genuine parties to an arbitration agreement should not be overlooked in the arbitration proceedings. In sum, extension doctrines have drawn attention to the relevance of third parties in the context of arbitration, and, thus, their overall contribution to the "third parties" discussion is regarded as positive.

Criticism of extension doctrine

As several countries of today have criticized the doctrine, it is for this thesis interesting why they have done so. Switzerland for example has in large refused to invoke arbitration based on the group of companies doctrine. This, with the reasoning that the “extension of an arbitration agreement to a party which does not appear therein can be envisaged only if it can be established (by any means) that such a party was validly represented by one of the other parties – which does not result solely from membership in a group of companies – or if there was subsequent ratification or, finally, in the attempt to evade arbitration constitutes an abuse of rights allowing a piercing of the corporate veil” . It would by that seem as if the group of companies doctrine would apply outside of the boundaries of Switzerland’s contract law, due to the reference made in the quote to the importance of either representation, or that the company afterwards explicitly accepted the arbitration clause. It seems to be outside of the

boundaries to establish that representation is at hand only with based on the fact that the company is part of a group of companies.

Furthermore, in England, the group of companies is said to be inconsistent with the principle of privity of contract, which states that only the two actual contracting parties to a contract are parties to that contract. As explained above, the contract law of England has deep roots in case law and it seems as if the courts would be reluctant in changing one of the fundamental principles of contract law, i.e. the principle of privity of contract. To take the case of Peterson Farms v C&M. Farming for example, the view of the group of companies doctrine was made clear as the court stated that it does not form a part of English law. It stated that, “where an arbitration agreement (or the contract of which it is contained) is subject to English law [...] an ICC arbitral tribunal has no jurisdiction to apply the group of companies doctrine” .

In the U.S. the application of the doctrine has both been accepted and refused. When enforcement was sought in the case of Sarhank v Oracle , where the basis for bringing in a non-signatory was the group of companies doctrine, the enforcement was denied. The court held that under American law, the only ways of binding a non-signatory was through veil piercing, estoppel and incorporation by reference. The court also held that in regard to arbitration, the evidence should show an objective intention to arbitrate, which was not seen in the case at hand. It also made direct reference to contract- and agency law as the only sources in which the basis of binding non-signatories can be found, and the group of companies doctrine was not a part of that law.

Opposite opinion was however reached in the case of Map Tankers v Mobil Tankers. Here, the court reached a conclusion based on an efficiency approach, and in accordance with that stated, “it was not reasonable and practical to prevent a signatory party from including in the arbitration the claims of its group of subsidiaries or partners” This decision however does not seem to reflect the current view. The judgment of Sarhank is more recent and one could hold that it therefore overrides the decision of Map Tankers. However, it is possible that the efficiency reasons stated in Map Tankers is more in line with the conduct of international trade of today. It would still seem as uncertainty regarding this matter exists.

Whether The extension doctrines fail to distinguish

Some argument are that Extension doctrines do not distinguish between the various types of `third parties. ' As was shown previous part of this thesis, not every person not bound by an arbitration agreement is relevant to the discussion on arbitration and third parties. Only those third parties with an interest in the dispute pending before a tribunal would be relevant, i. e. the false third parties. Furthermore, false third parties should be distinguished into different groups, on the basis of the difference in the degree of association between the genuine and the false third parties. The degree of contractual inter relatedness between the third and the real parties is a key factor for determining whether these parties should be brought before the same arbitral tribunal. However, courts and tribunals have applied extension doctrines to different types of false third parties indiscriminately. The "group of companies" doctrine for example has applied to extend the arbitration agreement to a parent company, to a subsidiary and to the chairman of a group of companies.

There are, however, fundamental differences between the above multiparty contractual relationships. It is true that whether arbitration agreements should be extended to third parties is a question depending to a large extent on the particular factual circumstances of each case. Nonetheless, a rough identification of the types of false third parties that are, in principle, conducive to the application of extension doctrines, would help the extension doctrines to be applied in a consistently rather than indiscriminatingly. In this regard, it would be helpful to determine a priori the minimum degree of contractual interrelatedness between the genuine and the false third parties that would warrant the participation of a third party in the arbitration proceedings between the two genuine parties.

CONCLUSION ON THE EXTENSION DOCTRINE

As indicated above, the initial view that consent only can be established through a group of companies common intention to be bound by the contract has changed. Here, the view taken was that if a group of companies all took part in the negotiations, performance, or termination of the contract, and they all had the intentions to be bound by that contract (or if that couldn’t be established, at least that they formed a part of a economic reality and all participated in the contract), all companies in that group was seen as one and implied consent was then presumed.

The basis for this was those companies’ acts in accordance with that specific contract, and one could argue that to be a legitimate way to stop involved companies, that belong to the same economic system, from avoiding the burdens of a contract to which they have taken substantial part. This way of invoking arbitration against a group of companies so related to the dispute, that it is clear that more than the signatory of that contract intended to be bound by it, is perhaps a necessary way to uphold justice in the system of arbitration.

Current case law instead points to the direction that merely tacit or presumed acceptance should be enough to bind a third party. This would extend the arbitration clause in a much broader sense than seems to have been initially intended. One can never escape the fact that arbitration has its basis in consent. It therefore has to be the goal to find that consent in the party’s conduct or acts. The purpose should not be to try to extend the arbitration agreement to other than the signatories with basis in the current dispute at hand, even if effective. The view should be to define the consenting parties to the dispute, not to drag companies with relation to the dispute into it. The current international law behind arbitration does not allow such a view as it can be considered ignorant to the importance of consent, and thereby the predictability of arbitration. It therefore seems that the group of companies doctrine is not consistent with the requirement of consent. In the light of the above discussion, it can be concluded that the main weakness of the extension doctrines is the fact that, although they aim to apply to arbitration, they are not underpinned by rationale relating to arbitration in particular. More specifically, the `extension doctrines' based on consent fail to explain why consent of non-signatories to arbitrate should be more easily ascertained with regard to arbitration agreements than with regard to any other contract. Equally, the versions of `extension doctrines', deviating from the requirement of consent fail to explain why arbitration agreements, as opposed to ordinary contracts, may dispense with the requirement

of consent or the principle of privit. However, from a contractual point o view, arbitration agreements have clear constraints: only those parties that have consented to arbitration may be bound by arbitration agreements. Moreover, consent of the parties has to be deduced in the same way as in any other contract. Any exception to these rules is exclusively provided by general principles of contract law. However, the latter provides for no exception from the principle of privity in relation to arbitration agreements as opposed to any other ordinary contract. No exception is provided either from the general contract interpretation principles applied to deduce or consent, which exception would allow consent to arbitration agreements to be ascertained more easily than in any other agreement. Therefore, the contractual approach to the issue of arbitration agreements and third parties is constrained by the limitations of arbitration agreements as ordinary contacts.

CHAPTER 4.

IMPACT ON THIRD PARTY TRAPPING-INDIAN DISCOURSE

The issue confounds the legislative framework for “roping the third party” interest in arbitral proceedings and consequent judicial pronouncement –giving effect to the same and the view of author of its pros and cons. Let us dilate sequentially.

The present discourse proceeds upon following lines: • Firstly, the legislative scheme of “third party” right qua arbitration proceeding is examined. • Secondly, the judicial pronouncement is scanned, on the subject. • Thirdly, the crystallisation of settled legal principle in suggestive manner is examined. • Fourthly, the conclusion that will follow on afore-noted discussion with view of authors.

I. HISTORIC LINEAGE OF LEGISLATIVE SCHEME UNDER THE ARBITRATION AND CONCILITAION ACT 1996.

Arbitration as a practice of settling disputes can be traced back to ancient times. Almost all scores of prime cultures and civilizations have adorned themselves with the art of settling disputes. However where one or the other has limited the ambit of this use to mainly commercial matters on the other hand some have treatise written on such topics of law. Say for instance in Hindu Law the Brihadaryanka Upanishad is a full-fledged treatise on arbitration.

The modern roots of arbitration in india are embedded in the soil of English law. The regulation act of 1772 set the way for evolution of the current Arbitration Act in india. Earlier the ambit of the regulating act was only limited to the presidency towns viz. bombay, calcutta and madras. However in the current scenario the growth of international trade and the effect of globalisation is such that there has arisen a global need of arbitration as a method of dispute resolution.

The arbitration law in India saw its first sunrise when The Arbitration Act was first promulgated for the first time in 1940 in a full-fledged way. Thereafter it was followed by the first major amendment of it, in 1996. The 1996 amenment was in the light of technical and interpretational difficulties that the 1940 Act posed in front of the courts of law. The 1996

amendment rendered the Arbitration act to be a law that actually facilitated the imparting of justice in its true sense. Although, even after this the act was amended in 2002 and 2005 and 2015 followed by cases that placed the law under sufficient light so that the ambit of provisions, bounds of which were not defined, could be seen within definite bounds.

These judgements removed the confusions with regards to the ambit of jurisdiction as well as the powers of the court that enabled the court to order for arbitration of a way prior to furthur proceedings in the court, without the need for the parties to file a separate application for invoking the arbitration proceedings. The Hon'ble Supreme Court of India in the case of Bharat Aluminum and Co. vs. Kaiser Aluminium and Co. (BALCO) held that: "Part I of the Arbitration & Conciliation Act, 1996 is applicable only to the arbitrations which take place within the territory of India"

The Hon'ble Apex Court had observed as under: "In our opinion, the provision contained in Section 2 (2) of the Arbitration & Conciliation Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration & Conciliation Act, 1996 is applicable only to the arbitrations which take place within the territory of India "Differences we shall always have but we must settle them all, whether religious or other, by arbitration." - Mahatma Gandhi.

The industrial revolution has led to rapid escalation in

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global trade and commerce. To correspond with the economic process and avoid prolonged litigation, the parties resort to arbitration because the preferred dispute resolution mechanism. Not only in India but cohesive global growth strategies and economies have realized that arbitration happens to be a favourable way out for all. Cross border transactions and bilateral trade relations have fostered affiliations between countries thereby increasing legal intricacies. Needless to mention , disputes have also become inevitable and there's a requirement for methodology to expedite legal remedies.

The earliest evolution of arbitration are often traced back to the age when King Solomon during his rule followed the biblical theory when he settled the difficulty between two mothers where each one was claiming the right on the baby boy and the issue was who the true mother of a baby boy was. Thereafter, arbitration was used by the rulers to settle territorial disputes and also for commercial disputes. According to historical references, arbitration has been in situ even before the days of Christ. There has been references that prove the same. For instance, the Arabic word for arbitration is Tahkeem and arbitrator is Hakam. Similarly, in case of Persian language, an arbitrator is called as Salis and the party to same is known as Salisee . Moreover, the primary law for arbitration came into force in England within the year 1697.

Hindu Law: Glimpse into ancient Arbitration

As per the Hindu Law, one of the earliest known treatise that mentions about arbitration is “Brhadaranayaka Upanishad”. It elaborates about the various types of arbitral bodies which consists of 3 primary bodies name “Puga”; the local courts, “Srenis” the people engaged in the same business or profession and the “Kulas”, who were members concerned with the social matters of a particular community and all these three bodies were cumulatively known as Panchayats. The members of the same were the Panchas, the then arbitrators, used to deal with the disputes under a system, we now refer to as Arbitration. It has been seen that the disputes which were referred to the Panchas and the courts have been duly recognised and have received credence to the awards passed by them. The same was observed by the Privy Council in the case of Vytla Sitanna vs. Marivada Viranna .

The Modern Arbitration Law was enacted in India as early as 1772 by Bengal Regulation Act of 1772. This was a result of successful resolution of disputes amongst parties by choosing a tribunal. Thereafter, the same was promulgated to other presidency towns namely Bombay and Madras through Bombay Regulations Act of 1799 and Madras Regulation Act of 1802.

Birth of India’s 1st Legislative Council

The 1st Legislative Council for India was formed in 1834, followed by the First Indian Arbitration Act on 1st July, 1899. It came into force and said act was fundamentally based on British Arbitration Act, 1889 but the application of the Indian Arbitration Act was confined only to the presidency towns’ i.e Calcutta, Bombay and Madras. A unique feature in the Act was that the names of the arbitrators were to be mentioned in the agreement, the arbitrator at that point can also be a sitting judge, as was in Nusserwanjee Pestonjee and Ors. v. Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor . In the case of Gajendra Singh vs. Durga Kunwar it was observed that the Award as passed in an arbitration is nothing but a compromise between the parties. In Dinkarrai Lakshmiprasad vs. Yeshwantrai Hariprasad , the Hon’ble High Court observed that the said Indian Arbitration Act, 1889 was very complex, bulky and needed reforms.

Arbitration Act 1940 – Unveiling Controversies

Under the British Regime a more specific arbitration act was enacted on 11th March 1940, which came into force on 1st July 1940. termed as ‘The Arbitration Act, 1940’. It was applied to the whole of India (including Pakistan, Baluchistan) . The same was modified vide an ordinance, post Independence.

The Act of 1940, was referred to many disputes but the same was also under many criticisms. In some of the cases, it was observed that the Arbitration Act, 1940, distinguishes between an application for setting aside an award and one for a decision that the award is a nullity. This implies that it does not legally exist and contemplates that an application for setting aside an award may be made under Section 30 and an application of that award is a nullity under Section 33. Further, it was also observed that the said act fails in recognizing that the arbitration will fail in-case of non-existence and invalidity of an arbitration agreement .

The Act was silent about the shortcomings inherent in individual private contracts. The rules providing for filing awards differed from one High Court to another. The lack of provisions prohibiting an arbitrator or umpire from resigning at any time in the course of the arbitration proceedings, exposed the parties to heavy losses particularly where the arbitrators or umpire acted mala fide. It was also seen that if an arbitrator appointed by the Court dies during the arbitration proceedings, there was no other provision in the said act for appointment of a new arbitrator, which was also seen as a major flaw in the 1940 Act . Another concern in the act was that the Marginal Notes were not regarded as part of an Act .

Enforcement of the Arbitration Act, 1996

The Arbitration Act of 1940 had been facing a lot of criticisms and lacked in quite a lot of areas when it came to implementation in the real sense. Although it brought uniformity in law across the nation, it needed to be replaced by The Arbitration and Conciliation Act 1996, which came into force from 22nd August 1996. The basic intent of the legislation was toprovide for a speedy solution to disputes between the parties and also to limit the judicial intervention. The main intention of the Legislation was primarily to cover the international and domestic commercial arbitration and conciliation. It was also to make the arbitral tribunal fail, provide them reasons to pass awards, minimize the role of courts, enforce the arbitral award as the decree of the court.

In certain cases, there arose a dispute between the parties and applications were filed before the enactment of the 1996 Act but the arbitrators were appointed after the enactment. In such a given scenario, the arbitrators and the parties also agreed that the proceedings for the said dispute will be governed by the New Law.

The Act of 1996 consolidated and amended laws relating to Arbitration, International Commercial Arbitration and also for enforcement of the Foreign Arbitral Awards. Initially, in the Act of 1996, it was held that the Court can pass interim orders under Section 9 of the Act, where Section 9 contemplates two stages, firstly, court can pass order during arbitral proceedings and secondly, that court can pass order before commencement of arbitral proceedings .

The Arbitration Act, 1940 vs.1996 – Contrasting Scenarios

The basic difference in 1940 and 1996 Act was that in the former one a party could commence proceedings in court by moving an application under Section 20 for appointment of an arbitrator and simultaneously could also move an application for interim relief under the Schedule read with Section 41(b) of the 1940 Act. The later one does not contain any provision similar to Section 20 of the 1940 Act but the court can pass orders even before the commencement of the arbitration proceedings. Another difference was that in the former act, there was no requirement to give reasons for an award until and unless agreed by the parties to arbitration. However, in the later Act, the award has to be given with reasons, which minimized the Court's interpretation on its own. There were changes with respect to the award passed by the arbitral tribunal in the 1940 and 1996 Act.

The 1996 Act since its enactment faced many challenges and the Courts brought out what was actually intended by the Legislation, the Courts clarified the said Act and the intention by various landmark judgments. In particular, the landmark case of Bharat Aluminium Co., saw at least three phases before the Hon'ble Supreme Court of India since the year 2001 till now i.e 2016 carrying from two Hon'ble Judges to the Constitution Bench.

In the first case, the Hon'ble Supreme Court was of the view that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions, it was also held that the Arbitration Act of 1996 was not a well drafted act and had some lacunas .

The Second Round of Amendments in 2005 The second round started around 2005, when there was a difference of opinion between the two Hon'ble Judges of the Hon'ble Supreme Court of India and the said matter was thereafter, placed before a three Judge Bench, which by its order directed the matters to be placed before the Constitution Bench. The Constitution Bench was of the view that Section 2(2) makes it clear that Part I is limited in its application to arbitrations which take place in India and that the Parliament by limiting the applicability of Part I to arbitrations which take place in India has expressed a legislative declaration. The Bench further went ahead with a distinction between the arbitration in India and outside India. It held that Section 2(2) merely reinforces the limits of operation of the Arbitration Act, 1996 to India and it was further held that if Part I of the Act were applicable to arbitrations seated in foreign countries, certain words would have to be added to Section 2(2). The section would have to provide that "this part shall apply where the place of arbitration is in India and to arbitrations having its place out of India.

Another interesting question which was considered was whether Section 2(2) is in conflict with Sections 2(4) and 2(5). It was held that the language as used by the legislature in Sections 2(4) and 2(5) of the 1996 Act, means the arbitration, that take place in India. It was further clarified that the provision does not admit an interpretation that any of the provisions of Part I, would have any application to arbitration which takes place outside India. The 1996 Act, was basically designed to give different treatments to the awards made in India and those made outside India. The distinction is necessarily to be made between the terms "domestic awards and foreign awardS". It was also clarified that Part I and Part II are exclusive of each other and the same is also evident from the definitions. The issues relating to the interim reliefs in an Inter-Parte Suit filed by the parties pending arbitration was held to be non- maintainable, as the pendency of the arbitration proceedings outside India would not provide any cause of action for a suit where the main prayer is for injunction.

Third Round of Amendments in 2015 The question as to whether part I of the Arbitration and Conciliation Act, 1996 would apply to foreign arbitrations was first examined by the Hon'ble Supreme Court of India in a celebrated judgment by a three Judge bench in the year 2002 titled Bhatia International vs. Bulk Trading SA ("Bhatia International"). The core issue before Hon'ble Supreme Court was the interpretation of Section 2(2) of the un-amended Act which stated that, "This Part shall apply where the place of arbitration is in India." The Hon'ble Apex Court had compared the said provision with the UNCITRAL Model Law, which clearly stated in

its preamble that, “the provisions of this Law... apply only if the place of arbitration is in the territory of this State.”

The Hon’ble Supreme Court of India in the case of Bharat Aluminum and Co. vs. Kaiser Aluminium and Co. (BALCO) had reconsidered the law laid down in Bhatia International and overruled the same. In the landmark judgment pronounced by the Constitution Bench of Hon’ble Supreme Court of India on September 06, 2012 it was concluded that “Part I of the Arbitration & Conciliation Act, 1996 is applicable only to the arbitrations which take place within the territory of India.”

The Hon’ble Apex Court had observed as under: “In our opinion, the provision contained in Section 2 (2) of the Arbitration & Conciliation Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration & Conciliation Act, 1996 is limited to all arbitrations which take place in India.”

Only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India would continue to be governed by the said principle.

Even the world’s two most prominent countries (India and Pakistan) also agreed to refer the dispute to Arbitration and had referred the dispute relating to the Indus Water Treaty 196015 to The Permanent Court of Arbitration. This move clarified and supported the importance of arbitration globally.

With the economic growth of the nation, the foreign entities started business through their 100% subsidiaries. Eventually, an exciting question of law came for consideration before the Hon’ble Apex Court which was whether it is permissible under the Arbitration Act, 1996 for two Indian Companies to agree to refer their commercial disputes to a place of arbitration outside India with governing law being English law. It was observed that as one of the entities indirectly involved in the matter is a foreign entity, therefore, there is some foreign element and secondly, as Section 28(1)(b) of the 1996 Act expressly recognizes such autonomy to choose the governing law, therefore the said clause is valid.

The 2015 Act can be looked as a boon for the party who succeeded before the arbitral tribunal, as in the earlier act of 1996 if the award passed by the arbitral tribunal was challenged before the court, even on issuance of notice by the court would tantamount as a stay but by virtue of the amendment in the 2015 Act, a specific stay has to be granted.

It is to be noted that not all matters/disputes can be referred to arbitration even if the agreement/contracts etc. contain an arbitration clause, its being noted that the disputes relating to Trust, trustees and beneficiaries arising out of the Trust Deed and the Trust Act are not capable of being decided by the arbitrator .

Focus on the “Public Policy of India”

The interpretation of the word “Public Policy of India” was sought to be narrowed by the said Amendment with the intention to give importance to the award of the arbitral tribunal and accord finality to the same, which was avowed intention of the 1996 Act. It was also recommended and accepted that the arbitration proceedings have to start within a period of maximum 90 days by the party obtaining any interim order from the court. The amendment also restricted the courts’ interference in any arbitration proceedings. By virtue of the said amendments, no application was allowed or would be entertained by any court in a matter where arbitration proceedings had already commenced.

The amendment also confirmed that any interim orders passed by the arbitral tribunal are enforced effectively, as the said interim orders which were passed at the time of 1996 Act were not effectively enforced since the provisions of Civil Procedure Code were not made specifically applicable to them. Thus, in summation- it is evident that arbitration has evolved over the years as the ideal tool for resolution of disputes that saves the court’s time and largely instrumental in assisting the parties to resort to quick remedial measures. Every arbitration is based on insightful application of law and its evolution is proof of its significance in the actual proceedings.

Thus, arbitration has emerged as the most preferred platform for quick resolution of disputes especially in the industrial and the corporate realm.

II.

Having stated the historic alluding the present statutory framework, it is pristinely important-if certain recent decisions are visited and their significance be analysed.

II. A Caveat

Barring all decisional laws on point, the best propositions are summerised by the judgment of Bhakru J. in Balmer Lawrie &Co. Ltd. Vs. Saraswathi Chemicals Proprietors Saraswathi Leather Chemicals (P) Ltd . relating the “applicability of arbitrability” on third party. What he says, assumes significance de hors the factual conspectus before him, he tells us:

“In the first instance, it is doubtful whether this Court could enforce the arbitral award against non parties to the arbitration agreement. It is trite law that an arbitral Tribunal draws its jurisdiction from the agreement between the parties and persons who are not party to the arbitration agreement cannot be proceeded against by an arbitral Tribunal. Thus, an arbitral award made by an arbitral Tribunal against any person who is not a party to the arbitration agreement would be wholly without jurisdiction and unenforceable. There may be exceptional cases where a Court may compel persons who are not signatories to an arbitration agreement to arbitrate provided it is established that the non-signatory(ies) are either claiming through signatory(ies) or there was clear intention to be bound as parties . However an arbitrator cannot lift the corporate veil and proceed against non parties. An arbitration is consensual. It is based on the agreement between parties. The arbitrator derives his jurisdiction to adjudicate disputes from the consent of parties, therefore, he is not in a position to enlarge

the scope of his influence and extend his jurisdiction to non-parties by exercise of his limited jurisdiction based on the consent of parties."

The survey of case laws, in one form or other reiterates the above positions. Predominantly it has, building on Chloro Controls, ruled that "third party arbitration" is "permissible only when exceptional case finding its solace in either –claiming through any party to arbitration or clear intent of parties to bind the third party" is made out. Henceforth, we will put our discourse on "tenability of this view across all other High Court".

III. SITUATION BEFORE CHLORO CONTROLS INDIA PVT. LD .

The issue regarding the position of third parties or non- parties under the Indian Arbitration and Conciliation Act, 1996 needs to be looked into with respect to the sections 7, 8, 9, 11, 34, 44 and 45 of the Indian arbitration and Conciliation Act, 1996. Section-7 of the Indian arbitration and Conciliation 1996 Act which provides for an arbitration agreement, when read with the section-8, provides for a judicial authority to refer the parties to arbitration, who have, in a well defined legal relationship agreed to arbitrate any dispute arising between them to. The question which often arises while interpreting section-7 with section-8 is that whether a third party or non-parties which is not a signatory to the arbitration agreement and not in a well defined legal relationship can ask a judicial authority before whom an action has been brought to refer the matter to arbitration. "As long as this question is determined by reference to national laws, transnational business actors face a juridical framework that is complex, but predictable nonetheless. However, some arbitral tribunals have decided this question by reference to a broader set of principles including 'lex mercatoria' , bona fides, or agreement of the parties."

A. Sukanya Holdings Pvt. Ltd. v. Jayesh Pandya (AIR 2003 SC 2252) (14.04.2003)

The availability to Arbitral Tribunals of divergent laws, principles and steps to resolving this question creates considerable uncertainty for trans-national actors. The Supreme Court tried to answer this question in Sukanya Holdings Pvt. Ltd. v Jayesh H. Pandya & Anr. and held that whenever a suit is commenced – 'as to a matter' which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section-8. The judgment in this case, however, was concerned more with bifurcation of the cause of action and not directly dealt with the position of third parties. The court finally held that section-8 cannot be interpreted in a manner so as to allow bifurcation of the cause of action or the subject-matter of the suit. Bifurcation of the suit between parties who are parties to the arbitration agreement and others is not possible. Moreover, such bifurcation of the suit in two parts, one to be decided by the Arbitral Tribunal and other to be decided by a civil court would cause delay to the proceedings.

A Division Bench of the Supreme Court consisting of MB Shah & Arun Kumar, JJ (of the ONGC v SAW Pipes fame) held that where a dispute contains arbitrable and non-arbitrable claims, the dispute should not be referred to arbitration. Their reasoning is summarized below:

• The Act does not oust the jurisdiction of the civil court in case parties don't take steps to get the matter referred to arbitration (such as applying under Section 8). The Act contains no express provision answering the question in hand. It does not provide for splitting of the causes of action or the parties and referring some of them to arbitration. Further, it does not address a situation where one or few of the parties to the court proceedings were not subjected to an arbitration agreement. In the absence of such provisions, • The phrase 'a matter' used in Section 8 implies that the matter in its entirety should be referable to arbitration. • Since Section 8 of the Act does not speak of bifurcation of cause of action. If section 8 is interpreted to allow such a recourse, it would be equivalent to laying a wholly new procedure not provided for under the Act. If that was the intention, the Legislature would have used appropriate language permitting such bifurcation. • Even so, bifurcation of the suit into parts to be decided by the arbitral tribunal and by the courts would lead to delay, increase in costs and the possibility of conflicting judgements by two different forums. It is also worth noting that the Supreme Court did not consider that Section 8 was discretionary in nature- it differentiated the said provision with Section 34 of the 1940 Act which gave discretion to the court to refer the dispute to arbitration. Therefore, under Section 8, the court had to mandatorily refer a matter which is the subject of an arbitration agreement to arbitration.

In Sukanya Holdings (P) Ltd v Jayesh H Pandya(1) the Supreme Court held that, despite the existence of an arbitral agreement between parties, courts might not refer disputes to an arbitral tribunal where: • the topic matter of a suit also includes disputes that lie outside the arbitration agreement; and • a number of the parties to the suit aren't parties to the arbitration agreement.

However, the courts are cautious in implementing this rationale and have frowned on parties' efforts to avoid arbitration by filing suits that implead unnecessary parties.

Facts

The plaintiff and one among the defendants (who was impleaded as second defendant to the suit) had entered into an agreement. Clause 11 of the agreement required that the parties settle their disputes under the aegis of the International Chamber of Commerce, along side its applicable rules, with Washington DC as the venue of arbitration. Despite the existence of this arbitration agreement, the plaintiff filed a lawsuit against the second defendant after impleading two more defendants that weren't party to the arbitration agreement. The plaintiff requested relief against these three defendants.

Decision

After examining the facts, the court observed that in terms of the agreement entered into between the plaintiff and therefore the second defendant, any relief might be claimed only against the second defendant. It observed that there was no privity of contract between the plaintiff and the first defendant. It also held that the third defendant had no part to play within the explanation for action under which the suit was filed and wasn't a necessary party to the suit. It observed that the primary and third defendants had been added so as to negate the article , with the aim of avoiding referral of the suit to arbitration (as a number of the

defendants would then not be parties to the contract containing the arbitration clause). The suit was finally dismissed by the supreme court at the preliminary stage on the grounds (among other things) that the primary defendant and therefore the third defendant were unnecessary parties and therefore the suit against them didn't get up . The court also mentioned the bar under Section 69(2) of the Partnership Act 1932 in its grounds for dismissal.

B. Deutsche Post Bank Home Finance Ltd. v Taduri Sridhar & Anr Some of the clarity regarding the position of the third parties or non-parties was provided by the Supreme Court in Deutsche Post Bank Home Finance Ltd. v Taduri Sridhar & Anr. The owners of certain land entered in to a development agreement with a developer") for construction of houses and apartments on the Land. Taduri Sridhar wanted to acquire an apartment on the Land and entered in to an agreement for sale with the Landowners. For the said purpose the Buyer took a loan from the Deustsche Post Bank Home Finances Ltd. and paid the entire sale price to the Developer through the Lender.

The Buyer had entered into a construction agreement with the Developer under which the Developer acknowledged the receipt of the total cost of construction from the Buyer and agreed to complete construction of the apartment and deliver the same to the Buyer with a grace period of 3 months. The Agreement contained an arbitration clause according to which parties agreed to settle disputes relating to the Agreement by arbitration. Thereafter the Buyer issued notice to the Developer; alleging delay in construction and delivery of the apartment and invoking the arbitration clause in the Agreement. Since there was no response from the Developer the Buyer filed a petition in the Andhra Pradesh High Court for the appointment of arbitrator to settle the dispute. The Buyer added the Lender in the dispute by impleading it as a respondent. The Buyer alleged that Lender had released the loan amount to the Developer without ensuring that there was sufficient progress of construction and without verifying the 'ground realities' and therefore failed to perform its minimum obligations as a Lender.

The Lender

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argued that it was not a party to the arbitration agreement and thus could not be

included in the dispute between the Buyer and the Developer. Since the High Court appointed an arbitrator without considering the above contention of the Lender, the Lender appealed to the Supreme Court.

DECISION

The Supreme Court held that if a person who is not a party to the arbitration agreement is impleaded as a party to the petition under Section 11 of the Act (for the appointment of arbitrator), the court should either delete such party from the group of the parties, or when appointing the arbitrator make it clear that the arbitrator is appointed only to decide the

disputes between the parties to the arbitration agreement. As the Lender was not a party to the arbitration agreement between the Developer and the Buyer the petition filed in the Andhra Pradesh High Court was not maintainable against it.

Though the appointment of the arbitrator by the High Court remained undisturbed the Supreme Court made it clear that since the Lender was not a party to the arbitration agreement no arbitration proceeding can be instituted against it.

Thus, This judgment of the Supreme Court reiterated the position that arbitration proceedings can resolve disputes only between

Example – "If 'X' enters into two different contracts, one with 'M' and another with 'D', each containing an arbitration clause providing for settlement of disputes arising under the respective contract, in a claim for arbitration by 'X' against 'M' in regard to the contract with 'M', 'X' cannot implead 'D' as a party on the ground that there is an arbitration clause in the agreement between 'X' and 'D'. In this case, the Court took a strictly contractual view of the arbitration agreement and held that non-signatories cannot be made a party to the arbitral proceedings." "The existence of an arbitration agreement between the parties to the petition under section 11 of the Arbitration and Conciliation Act, 1996 and existence of dispute/s to be referred to arbitration are conditions precedent for appointing an Arbitrator under section 11 of the Act. A dispute can be said to arise only when one party to the arbitration agreement makes or asserts a claim/demand against the other party to the arbitration agreement and the other party refuses/denies such claim or demand. If a party to an arbitration agreement, files a petition under section 11 of the Act impleading the

as respondents, and the court merely appoints an Arbitrator without deleting or excluding the non-party, the effect would be that all parties to the petition under section 11 of the Act (including the nonparty to arbitration agreement) will be parties to the arbitration. That will be contrary to the contract and the law. If a person who is not a party to the arbitration agreement is impleaded as a party to the petition under section 11 of the Act, the court should either delete such party from the array of parties, or when appointing an Arbitrator make it clear that the Arbitrator is appointed only to decide the disputes between the parties to the arbitration agreement."

C. Indowind Energy Ltd. v Wescare Ltd. & Anr

In Indowind Energy Ltd. v Wescare Ltd. & Anr. , the same position was adopted by the Supreme Court that as per the definition of 'party' u/s 2(h) read with sections 7 and 2(b), Indowind, not being a signatory to the arbitration agreement between Wescare and Subuthi, could not be made a party to the arbitration proceedings. Indowind and Wescare were two different companies having a distinct legal identity from the other. Since Indowind had not entered into any arbitration agreement with Wescare, it could not be made a party to the proceedings commenced by Wescare against Subuthi.

D. P.R. Shah Shares and Stock Brokers v B.H.H. Securities

A slightly liberal approach regarding the position of third parties to an arbitration agreement was taken by the Supreme Court inP.R. Shah Shares and Stock Brokers v B.H.H. Securities . As per the facts of this case, the appellant and the second respondents were sister concerns and had a common director. The director had approached the first respondent for a 'sauda' on the Stock Exchange. The first respondent secured the 'sauda', delivered the bill and contract to the second respondent and only the second respondent's name was on the contract. A dispute arose regarding full payment to the first respondent not made by the appellant and the second respondent which led to arbitration proceedings as per the Bye-laws of the Mumbai Stock Exchange. An award was made which was challenged by the appellant before the Bombay High Court on the grounds that there was no arbitration agreement between itself and the first respondent. The appellant also contended that there could not have been a single arbitration as per the Bye-Laws of the Stock Exchange between two members and a member and a non-member. The High Court dismissed the petition and on appeal to the Supreme Court the appellant contended that as the provisions for arbitration are different in regard to a dispute between a member and a non-member and in regard to a dispute between two members, there cannot be a common arbitration in regard to a claim or dispute by a member against another member and a non-member. Under Bye Law 248, there can be arbitration only in regard to a dispute between a member and a non- member. A dispute between two members will have to be decided under Bye Law 282. The constitution of the Arbitral Tribunal, the procedure followed and remedies available were completely different in regard to a claim of a member against a non-member and claim of a member against another member. Therefore, there could not be a single arbitration in regard to a claim of a member against a non-member and another member. Reliance was placed by the Appellant on Sukanya Holdings wherein it was held that where a suit is commenced in respect of a matter

which falls partly within the arbitration agreement and partly outside and which involves the parties, some of whom are parties to the agreement while some are not, Section 8 of the Act was not attracted and the subject- matter of the suit could not be referred to arbitration, either wholly or by splitting up the causes of action and the parties. The Supreme Court rejected the contention of the appellants by distinguishing Sukanya Holdings and held that the decision in Sukanya Holdings will not apply as we are not concerned with a suit or a situation where there is no provision for arbitration in regard to some of the parties.

In this case the court further explained the position that if A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B & C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration. In this case though the arbitration in respect of a non-member is under Bye-law 248 and arbitration in respect of the member is under Bye Law 282, as the Exchange has permitted a single arbitration against both, there could be no impediment for a single arbitration It is this principle that has been applied by the learned Single Judge, and affirmed by the division bench. As first respondent had a single claim against second respondent and appellant and as there was provision for arbitration in regard to both of them, and as the Exchange had permitted a common arbitration, it is not possible to accept the contention of the appellant that there could not be a common arbitration against appellant and second respondent. The court thereafter, refused to set aside the award. The decision in P.R. Shah further clarifies the position of non signatories or third parties to an arbitration agreement and the position after this judgment can be summed up as being that a third party cannot be made a party to the arbitration proceedings where there is no agreement to arbitrate between such a party and the claimant. However, in case such an agreement does exist, such a party can still be made a party to the arbitration proceedings commenced on claims arising from another party and both claims can be heard in a single arbitration in case of a joint claim against both the parties.

IV. Chloro Controls India Private Limited-Master Law: Analysis

In a long judgment comprising of three Judges, Chloro Chemical presented the labyrinth of “multi-layered” agreements between various corporates, in this process of “inter –linking of arbitral agreements”- some entity was missing, albeit, given the nature of their “interest” the missing party has considerable stake. The question arose if the missing entity could be allowed participation in arbitral proceedings-notwithstanding it being non-party to

agreement. The Supreme Court, while answering in affirmative –heavily relied upon the "doctrine of group of companies" to deduce the fact that "parties clearly intended the missing entity to part of arbitral process". There are certain other concerns which are yet to unearth and any foundation on the bedrock of Chloro may not redress it, but discourse on application of "group of companies doctrine" is apposite.

Also, the three judge Bench of the Supreme Court of India had the occasion in Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. & Others, Supreme Court of India, dated September 28, 2012 before SH Kapadia, CJ, AK Patnaik & Swatanter Kumar, JJ. to consider an important question related to reference of disputes to arbitrations arising out of a composite transaction involving several agreements and several affiliates of the parties. The decision is significant because it authoritatively deals with several aspects such as those pertaining to the interpretation of Section 45 of the Arbitration and Conciliation Act, 1996, incorporation of an arbitration agreement by reference, applicability of arbitration agreement to non-signatories, consolidation of arbitration proceedings, scope of enquiry under Sections 11, 8 and 45, etc. This series of posts analyses the decision and related aspects.

Facts:

Chloro Controls Company, Inc., USA were involved in the manufacture and sale of chlorination related equipments. Its Indian distributor was Chloro Controls Equipment Company, a sole proprietary concern, owned by MB Kocha (Respondent or R9). Chloro Controls Company, Inc., USA changed its name to Severn Trent Water Purification Inc. (STWP or R1). R9 and CCC entered into a letter of intent and a letter of understanding by which a Joint Venture company called Capital Controls (India) Pvt. Ltd. (Capital CI or R5) was formed for selling chlorination related equipments. Another Company Capital Control (Delaware) Inc. (CCD or R2) merged in STWP and CCD ceased to exist. Prior thereto, R1 & R2 sold electrochemical equipments under the brand name "Hypogena" which was replaced by ""Sanilec" and "Omnipure". Titanor components Ltd. (Titanor or R3) is a company floated as JV with an Italian Company. Hi Point Services Ltd (R4) is an Indian company engaged in the business of electro-chlorination and has a tie up with an American Company called Excel Technologies Inc. The Petitioner (Choloro Control (I) Pvt. Ltd- "Chloro CI") was entirely held by Respondents 9 to 11 (Kocha Group).

R5 is an Indian joint venture company with shares held by the Petitioner and R9 on the one hand and R1 and R2 on the other. 50% of the shares is held each by the Petitioner Chloro CI and R2. The primary agreement is the Shareholders Agreement by which R 1 and R2 together agreed with the Petitioner and R9 to manufacture, market, etc. electro-chlorination equipments. In furtherance of these objectives, various agreements, such as the Financial and Technical Know-How Licence Agreement, International Distributor Agreement, Supplementary Collaboration Agreement, were executed.

Agreement & Execution Date Parties Arbitration Clause Shareholders Agreement (16.11.95) R2, ,Chloro CI, R9 Construed according to Indian laws ICC Arbitration at London subject to English laws. Three arbitrators International Distributor Agreement (16.11.95) R1,R5 No arbitration clause Managing Directors Agreement (16.11.95) R1, R9 No arbitration clause Financial & Technical Know-How Licence Agreement (16.11.95) R1, R5 Construed according to

Indian laws ICC Arbitration at London subject to English laws. Three arbitrators Export Sales Agreement (16.11.95) R1, R5 American Arbitration Association Arbitration at Pennsylvania, USA and courts at Pennsylvania. Trademark Registered User Licence Agreement (16.11.95) R1, R5 No arbitration clause Supplementary Collaboration Agreement (August 1997) R1,R5 No arbitration clause

Certain disputes pertaining to the joint venture arose between the parties. STWP (R1) wrote on 21.07.04 to the Petitioner, R5 and R9 that since the issues were not resolved, it was terminating the JV agreements with effect from 22.07.04.

Consequently, the Petitioner (Choloro Control (I) Pvt. Ltd- "Chloro CI") filed a derivative suit in the High Court of Bombay for declaration that (a) the Joint Venture Agreement and the Supplementary Collaboration Agreement were valid, subsisting and binding, and (b) the said agreements included within their scope manufacture, sale, distribution etc of the entire range of chlorination and electro chlorination equipments. Subsequently, the Defendant terminated the said agreements and therefore the Petitioner sought to amend its plaint to the effect that such termination was invalid. The defendants moved a notice of motion (778/2004) by which they prayed the court to refer the matter to arbitration in view of the existence of the arbitration clause. This was dismissed by the Single Judge of the High Court but allowed by a Division Bench of the High Court on appeal. The Petitioner/ Plaintiff appealed to the Supreme Court seeking special leave. The fundamental question before the Supreme Court was whether the disputes could be referred to arbitration.

Arguments:

On Behalf of the Petitioner/ Appellant/ Chloro CI (Mr. Fali S. Nariman):

1) Every person has an inherent right to approach the civil court under Section 9 Code of Civil Procedure, 1908 (CPC) and arbitration is merely an exception to such a right and not an alternative. Pursuant to that right, Chloro CI had approached the Bombay High Court and there is no bar under any statute which prevents it from doing so. 2) The Appellant, who has the real interest in the case, had included R3 and R4 not merely to overcome the arbitration clause but because R3 and R4 are necessary parties, against whom substantive relief has been claimed. 3) Under Section 45 of the 1996 Act, the request to refer the dispute to arbitration must come from all the parties to the suit. If not, request only by some of the parties and consequent reference would result in multiplicity of proceedings and further mischief. Therefore, "a party" in Section 45 should be construed as "all parties". Consequently, the reference by the Division Bench of the High Court ("Division Bench") of the entire suit to arbitration meant that even the non-parties and those against whom cause of action did not arise from the arbitration agreement were to be a part of arbitration proceedings. 4) The law prior to the 1996 Act was that the court could merely stay the suit and not actually refer the parties to arbitration. After the 1996 Act, it cannot be contended that some parties and some matters in a suit can be referred to arbitration. 5) The judgement in Sukanya Holdings binds the court. Bifurcation would lead to conflicting decisions. 6) In the facts and circumstances, reference to arbitration is impermissible as some agreements do not have arbitration clause and among those agreements that have arbitration clause the venue and the applicable rules

are different. Composite reference to arbitration where some agreements provide for arbitration clause while others do not is impermissible as there should be a clear intent to arbitrate. Hence, the Petitioner argued that the Division Bench was wrong to refer the matter to arbitration.

On Behalf of R1: (Mr. Harish Salve) 1) Part II is in favour of reference to arbitration and therefore the provisions are to be interpreted in favour of referring the dispute to arbitration. 2) The entire dispute relates to the scope of business of the joint venture and therefore the Shareholders Agreement is the principal agreement. Execution of different agreements would not make any difference. 3) Filing of the suit in the form of a derivative action and the joinder of R3 and R4 was only to prevent reference to arbitration. 4) Clause 21.3 of the Shareholders Agreement provided that in the event of termination, the JV company would be wound up and all obligations undertaken by the Petitioner would cease to exist. Hence, despite the existence of several agreements, the dispute is centered on the Shareholders Agreement. 5) The judgement in Sukanya Holdings would not be applicable to the facts of the present case which covers Part II of the 1996 Act. Severability of cause of action and parties is permissible in law. 6) Court is competent to pass any orders as it deem fit and proper under Section 151 of CPC. Further, 1996 Act does not restrict or limit on reference to arbitration as compared to the 1940 Act. 7) Under Section 45 of 1996 Act, the applicant seeking reference can either be a party to arbitration agreement or a person claiming through or under such party.

Hence, the Respondent argued that the Division Bench was correct in referring the matter to arbitration.

Judgement: The Judgement of the Supreme Court is summarized below: 1. The operation of Parts I and II of the Act do not arise directly for consideration in this case and are not dealt with (Note: This judgement was probably written prior to the judgement of the Supreme Court in BALCO v. Kasier Aluminium though not on extension of arbitration agreement and delivered on a later date as their has been a paradigm shift after the balco case.) 2. Section 44, Chapter I, Part II of the 1996 Act prescribes the conditions of validity of arbitration agreements for the purpose of enforcing foreign arbitral awards under such agreements. 3. The language and purpose of Section 45 mandates a construction of relevant provisions that favours reference to arbitration. 4. Part I of the Act has been drafted to bring the arbitration law in line with the UNCITRAL Model Law on International Commercial Arbitration, 1985. Chapter I, Part II has been enacted to give filip to international commercial arbitration by incorporating

the

Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).

Chapter II, Part II incorporates the Protocol on Arbitration Clauses in the scheme of the law. 5. Considering the structure of the Act, provisions of Chapter I, Part II are to be interpreted are to be construed along with Schedule I to the Act (Conditions on the Recognition and Enforcement of Certain Foreign Arbitral Awards). Failure to do so would be inappropriate. 6. Section 45 has been enacted along the similar lines to that of Artice II of the New York Convention. International Council for Commercial Arbitration had come up with a Guide to the Interpretation of the New York Convention. According to the Guide, when there is a challenge to the validity of the arbitration agreement, the following questions arise: a. Does the Arbitration Agreement fall under the Scope of the Convention? b. Is the arbitration agreement evidenced in writing? c. Does the arbitration agreement exist and is substantively valid? d. [If] there a dispute, does it arise out of a defined relationship, whether contractual or not, and did the parties intend to have the dispute settled by arbitration? e. Is the arbitration agreement binding on the parties to the dispute that is before the Court?Is this dispute arbitrable? 7. In addition to the above, if the respondent challenges the application under Section 45 on the ground that the arbitration

agreement is null and void, inoperative or incapable of being performed,

the court has to consider the same. If the answer for the above questions is in the affirmative, the court must refer the matter to arbitration. 8. The court should bear in mind three characterestics of arbitration- "(1) arbitration is consensual. It is based on the parties' agreement; (2) arbitration leads to a final and binding resolution of the dispute; (3) arbitration is regarded as substitute for the court litigation and results in the passing of [a] binding award." 9. The discretionary language "may" used in Arbitration Act, 1940 in the context of domestic arbitration is absent both in Sections 8 and 45. However, the right to reference under Section 45 is conditioned by the pre-requisites which are to be satisfied for the reference. Under Section 45, an obligation is cast on the courts to determine at the threshold as to whether the agreement is valid, operative and capable of performance. This view is reinforced by the fact that there is no provision in Section 45 akin to Section 8(3) (“Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”) 10. In exceptional cases, a non-signatory to the arbitration clause may nevertheless be subject to arbitration. The intention of the parties is critical. To examine if a non-signatory would be so subject, the following factors would be relevant: (a) whether there is a direct relationship between the non-signatory and

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the signatory to the arbitration agreement, (b) commonality of subject matter, and (c) whether the transaction contemplated is composite. 11. A transaction is composite where the performance of the "mother agreement" is not feasible "without aid, execution and performance of the supplementary or ancillary agreements"

and all the agreements are aimed towards achieving a "common object" and have a collective bearing on the dispute. Here, the performance of one agreement is interlinked to the other agreements that they are "incapable of being beneficially performed without performance of the others or severed from the rest". Another important factor is whether the parties intended to refer all disputes to arbitration. Apart from the above, the court is to determine if "ends of justice" would be met if the parties to the composite transaction are referred to arbitration. Thus, "[t]he principle of 'composite performance' would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other." 12. Some jurisdictions such as Switzerland have not been unequivocal in accepting the above but some, such as USA, have. 13. In cases where there are several agreements relating to different parties, the dispute resolution terms might vary with such agreements. For example, one agreement might designate a particular law as the substantive law while another might designate a different substantive law. In such cases, having different arbitrations may lead to multiplicity of proceedings and inconsistent findings by different tribunals. In such cases, it would be prudent to strike off unnecessary parties and even cause of action in terms of the provisions of CPC. If parties cannot be struck off, the proceedings should continue before the court. 14. A comparison of Sections 8 and 45 below reveals that reference to arbitration under Section 8 can be made only if a party to the arbitration agreement applies to the judicial authority to refer the matter to arbitration. Section 45 allows, in addition, any person claiming through or under a party to the arbitration agreement to request the court to refer the parties to arbitration.

Section 8 Section 45 A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall,

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at the request of one of the parties or any person claiming through or under him,

refer the parties to arbitration, unless it finds that the said

agreement is null and void, inoperative or incapable of being performed. (

emphasis added)

• This being so, if "[e]xamined from the point of view of the legislative object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers." However, the onus is heavy on the person who seeks to establish that he is claiming through or under a party to the arbitration agreement. Examples of such situations are: o (i) The plaintiff has acquired the rights, which the action is brought to enforce, from someone who is a party to an arbitration agreement with the Defendant; o (ii) The plaintiff is bringing the action on behalf of someone else, who is a party to an arbitration agreement with the Defendant. o (iii) When the expression used in the provision, the words 'claiming under Plaintiff' relative to substantive right which is being asserted. • In fact, joinder of non-signatories is not unknown to arbitration. One prominent theory is the contractual right transfer theory wherein the contractual right is transferred to the non-signatory who can be brought in into the arbitration proceedings. Such transfer takes place due to several means such as implied consent, third party beneficiary, guarantee, assignment, etc. Another important theory is the group of companies doctrine where arbitration agreement executed with a company can bind its affiliate. The question as to the formal validity of arbitration agreement is different from the question as to whether the parties are bound by that agreement. The New York Convention does not prevent a party from giving consent on behalf of another person. • "[W]hen a third party i.e. non –signatory party is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is a signatory to the subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration." • A party may not be a signatory to an agreement but the performance contemplated by the agreement would be through an affiliate of a signatory. In such cases, parties may opt to sign different agreements through different affiliates for various reasons. In such cases, reference to arbitration could be made even of such a non-signatory but there is a heavy onus on the person seeking reference of such a party to arbitration. • On facts, the intra-legal relationship between the parties is directed towards one particular object - successful implementation of joint venture. The joint venture is not dependent on one single agreement but several agreements which is "one single chain consisting of different components". 4. All the five agreements signed by the parties were primarily to fulfill their obligations and ensure performance of the Principal Agreement. (Para 138,139). Further, all the agreements were executed simultaneously on the same date which implies that parties intended to have all these agreements as a composite transaction.(para 147) . It being a composite transaction gives the parties the right to opt for any remedy from all the remedies provided under the agreements.(para 151,154) 5. The arbitration clause in the Principal agreement is

comprehensive enough to include the disputes arising 'under and in connection with' the agreement. The word 'connection' has been added by the parties to expand the scope of the disputes under the agreements.(para 144). The other agreements originate from the Principal Agreement and are covered under the arbitration clause contained in the Mother/ Shareholders agreement.(para 146) 6. As per the "Group of Companies Doctrine", a party being non-signatory to one or other agreement may not be of much significance as performance of one may be quite different with the performance and fulfillment of the Principal/mother agreement(para 150). 7. In certain agreements, there are arbitration & jurisdiction clauses. These clauses are restricted to disputes arising under those agreements. The real intention of the parties was to refer to arbitration disputes not only arising under those agreements in which the arbitration clauses were agreed to but even disputes which arose under the mother agreement. (152-154) Thus, the court held that in case of composite transactions involving on 'mother' agreement followed by a series of other agreements, a party claiming under the party to the arbitration agreement has the right to apply to the court to get the matter referred to arbitration even if such party is not a party to some of the several agreements in the composite transaction, in which case the arbitration clause in the mother agreement will prevail.

Interpretation of Section 45 of the 1996 Act

For proper interpretation and application of Chapter I of Part II, it is necessary that those provisions are read in conjunction with Schedule I of the Act. To examine the provisions of Section 45 without the aid of Schedule I would not be appropriate as that is the very foundation of Section 45 of the Act. The International Council for Commercial Arbitration prepared a Guide to the Interpretation of 1958 New York Convention, which lays/contains the Road Map to Article II. Section 45 is enacted materially on the lines of Article II of this Convention. When the Court is seized with a challenge to the validity of an arbitration agreement, it would be desirable to examine the following aspects : • Does the arbitration agreement fall under the scope of the Convention? • Is the arbitration agreement evidenced in writing? • Does the arbitration agreement exist and is it substantively valid? • Is there a dispute, does it arise out of a defined legal relationship, whether contractual or not, and did the parties intend to have this particular dispute settled by arbitration? • Is the arbitration agreement binding on the parties to the dispute that is before the Court? • Is this dispute arbitrable?"

According to this Guide, if these questions are answered in the affirmative, then the parties must be referred to arbitration. Of course, in addition to the above, the Court will have to adjudicate any plea, if taken by a non-applicant that the arbitration

agreement is null and void, inoperative or incapable of being performed. In

these three situations, if the Court answers such plea in favour of the non-applicant, the question of making a reference to arbitration would not arise and that would put the matter at rest. If the parties are referred to arbitration and award is made under these provisions of the Convention, then it shall be binding and enforceable in accordance with the provisions of Sections 46 to 49 of the 1996 Act. The procedure prescribed under Chapter I of Part II is to

take precedence and would not be affected by the provisions contained under Part I and/or Chapter II of Part II in terms of Section 52. This is the extent of priority that the Legislature had intended to accord to this Chapter 1 of Part II. Amongst the initial steps, the Court is required to enquire whether the dispute at issue is covered by the arbitration agreement. Stress has normally been placed upon three characteristics of arbitrations which are as follows – (1) arbitration is consensual. It is based on the parties' agreement; (2) arbitration leads to a final and binding resolution of the dispute; and (3) arbitration is regarded as substitute for the court litigation and results in the passing of an binding award. We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45, the expression 'any person' clearly refers to the legislative intent of enlarging the scope of the words beyond 'the parties' who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the Court shall refer them to arbitration. The use of the word 'shall' would have to be given its proper meaning and cannot be equated with the word 'may', as liberally understood in its common parlance. The expression 'shall' in the language of the Section 45 is intended to require the Court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the pre-requisites stated under Sections 44 and 45 read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/ limitations.

Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming 'through' or 'under' the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (Second Edn.) by Sir Michael J. Mustill: "1. The claimant was in reality always a party to the contract, although not named in it. 2. The claimant has succeeded by operation of law to the rights of the named party. The claimant has become a part to the contract in substitution for the named party by virtue of a statutory or consensual novation. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

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Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the “Group of Companies Doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [‘Russell on Arbitration’ (Twenty Third Edition)]. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, ‘intention of the parties’ is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

The

Ratio and import of Chloro Controls While much has been made of multi-party arbitrations post the judgement in Chloro Controls, it is important to revisit its ratio and its import. The facts in Chloro Controls involved a dispute between an Indian and foreign party. There was a network of several inter-linked agreements, each dealing with a different aspect of the commercial relationship between the parties. The Shareholders Agreement was the principal or parent agreement. The Shareholders Agreement had an arbitration clause, which provided for London as the seat of arbitration and English law as the governing law. The other agreements included an International Distributor Agreement (jurisdiction of court in Pennsylvania), Managing Director’s Agreement (no arbitration clause), Financial and Technical Know-how License (ICC arbitration London), Export Sales Agreement (AAA arbitration in Pennsylvania), Trademark Registered User License Agreement (No arbitration clause). Not all these agreements had the same parties, but were part of a composite transaction, all stemming from the Shareholders Agreement or the mother agreement. A suit was filed by Plaintiff (Severn Trent Water Purification) before a single judge. Defendant No. 1 (Chloro Controls) filed an application (notice of motion) under s.8 of the ACA. During the hearing, it was conceded by Defendant No. 1, that the same be treated under s.45. The single judge relying on Sukanya Holdings held that different parties are signatories to different agreements and several parties to the suit are not parties to the agreements and that bifurcation of the subject matter of the suit is not contemplated, splitting of cause of action is not permissible, therefore jurisdiction under s.8/45 cannot be exercised. In appeal, it was submitted on behalf of the Appellant/defendant that if Sukanya Holdings was made applicable to each and every case it would defeat ‘legislative policy in favour of a reference of disputes to arbitration where the parties have entered into a private bargain in that behalf. The Appellant/ defendant’s counsel went on to argue that Defendants 6 to 11 being directors against whom no relief is claimed were neither necessary nor proper parties. The Plaintiff, Defendant Nos. 1,

2 and 5 which were parties to the arbitration agreement along-with Defendant Nos. 3 and 4 (non-signatory parties) should be referred to arbitration, provided that Defendant Nos. 3 and 4 consent to the arbitration. The division bench of the High Court of Bombay overruled the Single Judge's order holding, 'Under these circumstances, in our considered opinion, the law laid down by the Apex Court in the case of Sukanya Holdings (supra) and relied upon by the learned Single Judge is not applicable in the facts of the case in hand. The concept of separation of parties, separation of reliefs or separation of cause in the suit on making a reference to arbitration would not arise in the instant case. Hence, the application filed by the appellant under section 45 of the Act must succeed'. Agreeing with the decision of the division bench, the Supreme Court held that the facts in Chloro Controls fell within the ambit of s.45, which was different from s.8. The court referred to Sukanya Holdings, but did not over-rule it. Instead, the court held, 'the expression 'person claiming through or under' appearing in s.45 could be given a liberal interpretation and 'would mean and take within its ambit multiple and multiparty agreement, though in exceptional cases'. A liberal view it certainly was. From a bare perusal of s.45 such an interpretation is not apparent on the script of the language. S.45 reads, 'Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall,

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at the request of one of the parties or any person claiming through or under him,

refer the parties to arbitration, unless it finds that the said

agreement is null and void, inoperative or incapable of being performed.' [

Emphasis supplied] On a plain reading of the section, it appears that the request for arbitration must be from

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one of the parties or any person claiming through or under him.

But, once such a request is made the court can then only refer the 'parties' (i.e. parties to the arbitration agreement) to arbitration. It appears that the court was aware of the limitations imposed by the language and therefore liberally construes it, and justifies such an interpretation by using the expression 'liberal' over half a dozen times. According to the court s.45 has to be read in conjunction with s.44 and Article II (1) and (3) of the New York Convention, and when so read the words person claiming through or under a party to an arbitration agreement can mean non-signatories. According to the court:. • the words 'agreement referred to in section 44' would include 'an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies..', which in turn would mean an 'agreement in writing .... in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.' • there is an inextricable nexus between the scope of the concept of 'legal relationship' (as incorporated in Article II(1) of the New York Convention) and the expression 'any person claiming through or under him' (appearing in Section 45 of the 1996 Act) and therefore they need to be read in conjunction. Once they are so read, it will be evident that the expression "legal relationship" connotes the relationship of the party with the person claiming through or under him. A person may not be signatory to an arbitration agreement, but his cause of action may be directly relatable to that contract and thus, he may be claiming through or under one of those parties'. The ratio (in regard to non-signatory parties) laid down in Chloro Controls was that non-signatory parties to agreements that constitute a composite transaction could seek to be referred to arbitration provided they satisfy the pre-requisites of ss.44 and 45 read with Schedule I of the ACA. Heavy onus lies on the party to show that in fact and in law, it is claiming under or through a signatory party, as contemplated under s.45. The court was vested with the power to delete the names of parties, who are neither necessary nor proper, to the proceedings before the court. The 'discretion of the Court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously' and normally only parties to the arbitration agreement could be referred to arbitration. The court referred to Sukanya Holdings, but did not overrule it. Obiter in Chloro Controls The above analysis would not be complete without some introspection to the court's observation, that reference of such non-signatory can be a result of implied or specific consent or judicial determination. [Emphasis supplied] In support of its observations on 'implied consent' and 'judicial determination' the court relies on two broad theories: •

The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. • The second theory includes the legal doctrines of of agent-principal relations, apparent authority, piercing of

veil (also called the “alter-ego”), joint venture relations, succession and estoppel. They do not rely on the parties’ intention but rather on the force of applicable law.

This is what the court presumably meant by judicial determination. The expression specific consent and implied consent requires no elaboration, but it would be important to understand the context of the phrase ‘judicial determination’, which appears to mantle unto the court the power to compel non-signatories to arbitrate. AFTERMATH OF CHLORO. Necessity of discourse on recent decisions emanating from the principles of chloro, impels us to refer to the expanding dimensions of arbitration in India, Indian courts have maintained their stance in referring parties to arbitration, besides ensuring minimal interference in the same.

1. AMEET LAL CHAND Ameet Lalchand Shah and Others (“Appellants”) v. Rishabh Enterprises and Another (“Respondents”) ,

With the expanding dimensions of arbitration in India, Indian courts have maintained their stance in referring parties to arbitration, besides ensuring minimal interference in the same. Recently, the Supreme Court of India (“Supreme Court”), in the case of Ameet Lalchand Shah and Others (“Appellants”) v. Rishabh Enterprises and Another (“Respondents”)1, had the opportunity to interpret Section 82 of the Arbitration and Conciliation Act 1996 (“Act”), as amended by the Arbitration and Conciliation (Amendment) Act 2015 (“Amendment Act”). The Supreme Court applied the principles laid down in

Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.

and others3 (“Chloro Controls”) in relation to domestic arbitrations. It ruled that in cases where the agreements are inter-connected and several parties are involved in a single commercial project executed through several agreements, all the parties can be made amenable to arbitration. Further, on examining the facts of the case, the Supreme Court followed the principles laid down in A. Ayyasamy v. A. Paramasivam (“Ayyasamy”) in concluding that mere allegations of fraud would not prevent arbitration.

Analysis The Supreme Court passed a vital judgment in the Ameet Lalchand Shah Case, thereby setting aside the finding of the Delhi High Court concerning the impact of an allegation of fraud in an Arbitration arising out of a commercial contract.

Both the Division Bench and the Single Judge

of the Delhi High Court, while dismissing an application under Section 8 of the Arbitration and Conciliation Act, 1996 (“

Act”), held that since the agreement in question was not interconnected with the Principal Agreement, the parties can’t be referred to Arbitration in view of the ratio in the Sukanya Holding case. Rejecting this finding, the Supreme Court held that the arbitrator appointed can thoroughly examine the allegations regarding fraud. The Apex Court further concluded that all agreements are interrelated, and therefore, the dispute is to be adjudicated by an arbitrator. For the last twenty years, the jurisdiction of an arbitrator concerning an allegation of fraud has been a debatable issue. In the Ayyasamy judgment, the Supreme Court dealt with the issue in detail. However, in the Ayyasamy case, the topic matter of assessment was a partnership deed. What makes the present case significant is the fact that it concerns four business commercial contracts. Also, in this case, one of four commercial contracts does not have an Arbitration clause.

Factual Matrix of the case When a dispute arose between the parties, one of the contracting parties (“Party A”) filed a police complaint on the basis of which an FIR was registered. There was also an Income Tax investigation. This FIR was sought to be quashed by the other party (“Party B”), which is pending adjudication. Party B meanwhile issued notice invoking Arbitration and nominated a retired judge as the sole arbitrator. To counter this Arbitration notice, Party A filed a civil suit (commercial) before Delhi High Court, leveling various allegations including fraud and misrepresentation. In this suit, besides recovery, the main prayer was to seek a declaration of the contract as void due to serious fraud committed by Party B. An application under Section 8 of the Arbitration and Conciliation Act was preferred by Party B, seeking for reference of the dispute with regard to all four agreements to arbitration. The Delhi High Court declared that the Section 8 application filed by Party B was not maintainable. Issues before Supreme Court The Supreme Court framed two issues. The first issue is whether the four agreements are inter-connected to refer the parties to arbitration though there is no arbitration clause in one such agreement. The second issue is whether Arbitration can be refused on the ground of fraud inflicted. Before analysing the judgment any further, a short digression is required. It is imperative to first understand the background which led to the adjudication of the Ayyasamy case. The Supreme Court had relied heavily on Ayyasamy case while deciding the present case. Ayyasamy case On October 04, 2016, the Supreme Court dealt with the dispute between two brothers, arising out of the partnership concerning running a hotel. In this case, one side filed a suit for permanent injunction in 2012, restraining the other side from interfering with their right to participate in the administration of the hotel. After the receipt of summons, the other side moved an application under Section 8 of the Act, objecting to the maintainability of the suit. Both the

lower court and the High Court, while dismissing the Section 8 application adopted the dicta laid down inN Radhakrishnan v. Maestro Engineers and Ors. It was held that as there are serious allegations of fraud and malpractice, the case does not warrant to be tried and decided by the arbitrator and a civil court would be more competent. Key take always from Ayyasamy judgment: I. Mere allegation of fraud simplicitor is not a ground to nullify the Arbitration agreement. II. Court should over look arbitration agreement only if: ? There is very serious allegation of fraud; ? It is absolutely essential to get such complex allegation adjudicated by Civil Court; and/or ? Allegation is of such nature where fraud is alleged against the arbitration provision is itself or is of such a nature that permeates the entire contract, including the agreement to arbitration. III. Arbitration Act itself or the statutory scheme does not specifically exclude any category of cases as non-arbitrable. IV. Such categories of non-arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature and not adjudicatable by the Arbitrators. The Supreme Court rejected the reasoning given by the High Court and the lower court, concluding that a mere allegation of fraud in the present case was not sufficient to detract from the obligation of the parties to submit their disputes to arbitration. Justice AK Sikri even took note of the Law Commission's observations contained in its 246th report. He observed that the Law Commission has recognized that in cases of serious fraud, courts have entertained civil suits. The Law Commission also tried to make a distinction in cases where there are allegations of serious fraud and fraud simplicitor. The Supreme Court distinguished applicability of the judgment in N Radhakrishnan, as it does not subscribe to the broad proposition that a mere allegation of fraud is ground enough not to compel parties to abide by their agreement to refer disputes to arbitration. The Court observed further that only in cases where there is a serious issue of fraud involving criminal wrongdoing, the exception to arbitrability carved out in N Radhakrishnan may come into existence. With this background in place, it is time to evaluate the Ameet Lalchand Shah case.

ONE OF THE MAIN ISSUE WAS concerning interconnectivity of the four agreements, especially when one agreement does not have an Arbitration clause.

Decision: The Apex Court concluded that this is a case where several parties are involved in a single commercial project executed through several agreements/contracts. It was observed that these four agreements are inter-connected, and despite there being no arbitration clause in one of them, all four contracts can be referred for Arbitration.

Extracts from the Judgment: "38. It is only where serious questions of fraud are involved, the arbitration can be refused. In this case, as contended by the appellants there were no serious allegations of fraud; the allegations levelled against Astonfield is that appellant no. 1 - Ameet Lalchand Shah misrepresented by inducing the respondents to pay higher price for the purchase of the equipments. There is, of course, a criminal case registered against the appellants in FIR No. 30 of 2015 dated 05.03.2015 before the Economic Offences Wing, Delhi. The appellant no. 1 - Ameet Lalchand Shah has filed Criminal Writ Petition No. 619 of 2016 before the High Court of Delhi for quashing the said FIR. The said writ petition is stated to be pending and therefore, we do not propose to express any views in this regard, lest, it would prejudice the parties. Suffice to say that the allegations cannot be said to be so serious to

refuse to refer the parties to arbitration. In any event, the Arbitrator appointed can very well examine the allegations regarding fraud." (Emphasis supplied) Reasons by Apex Court: 1. All the four agreements were for the single purpose to commission Photovoltaic Solar Plant at one particular location only. 2. Controlling parties on both sides are common; 3. Supreme Court extracted various clauses of these contracts to show that all the four agreements are inter-connected. 4. Though there are four different contracts, the Equipment Lease Agreement for commissioning of Solar Plant is the principal/main agreement. 5. Court distinguished Sukanya Holding Judgment in present circumstances. The issue before the court related to whether the principles laid down in Chloro Controls case could be applied to refer non-signatories to domestic arbitrations under section 8 of the Act. The Chloro Controls case provided for reference of non-signatories to foreign seated arbitration under Section 45 of the Act in certain circumstances such as in case of inter-connected agreements meeting certain criteria. The High Court had held that even post the Amendment Act, the ruling provided in Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya5 ("Sukanya") would continue to hold good in context of section 8. In the Sukanya case, it had been held that where a suit contains matters which are beyond the scope of the arbitration agreement and is also between parties who are not parties to the arbitration agreement, then such suits cannot be referred to arbitration. The Supreme Court discusses the amendments made to Section 8 and what had been proposed in the 246th Report of the Law Commission. Further while, not stated expressly, the Supreme Court applies the Chloro Controls case and analyses the facts in the context of principals laid down in the said case. It found that though there were different agreements involving several parties, it was for a single commercial project, i.e. the commissioning of the Photovoltaic Solar Plant project. The averments made in the underlying plaint gave prima facie indication that all the four agreements are inter-connected. After going through the clauses of different agreements, it held that the Equipment Lease Agreement was the principal/main agreement and the remaining three agreements were ancillary agreements. So even though the Sale and Purchase Agreement between Rishabh and Astonfield did not contain arbitration clause, it was integrally connected with the commissioning of the solar plant. Further, all the agreements contained clauses referring to the main agreement. Thus, the Supreme Court referred to "the facts and intention of the parties" which was "to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy, and concluded that all the parties could be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement. The Supreme Court ruled that in cases where the agreements are inter-connected and several parties are involved in a single commercial project executed through several agreements, all the parties can be made amenable to arbitration. This would hold true even where one of the agreements does not contain an arbitral clause or a party to one agreement is a third party to another agreement. The Supreme Court also referred to the recommendations of the 246th Law Commission Report that a prima facie existence of an arbitration agreement was sufficient to refer the parties to arbitration unless it was null and void. Conclusion The Supreme Court adopted an efficient and pragmatic view in the Ameet Lalchand Shah case. The Court virtually stonewalled the attempts to wriggle out of arbitration clauses by leveling "routine" allegations of fraud which parties do not contest or lead any evidence to support. This way, the Court has ensured that the very purpose or objective of Arbitration and Conciliation Act should not get defeated. The

SC has interpreted Section 8 in the light of the Amendment Act, in allowing any party, “claiming through or under” a party who was party to an arbitration agreement, to refer the dispute to arbitration. With such an interpretation, the SC has preferred to follow the principles laid down in Chloro Controls case. Further, in conjunction with the language of Section 8(1) that “notwithstanding any judgment, decree or order of the Supreme Court or any Court”, it may be considered that the SC has restricted the applicability of the Sukanya case to the amended Section 8. While not stated expressly, SC’s reference to the 246th Report of Law Commission also reflects, that the Sukanya case may no longer be applied to proceedings under Section 8 of the Act. Law Commission had recommended incorporation of principles laid down in the Sukanya case within the statute. However, this was not accepted and instead language like that of Section 45 was introduced in Section 8 of the Act. Accordingly, parties may now be referred to arbitration even if only the principal agreement contained an arbitration clause and ancillary agreements did not. If the parties’ intention is to not resolve disputes through arbitration, then it may be advisable for the parties to exclude arbitral clauses from all agreements forming part of the same transaction. 2. Case name: Cheran Properties Limited v. Kasturi and Sons Limited and Ors. Date of Judgment: April 24, 2018 In the case while deciding the issue whether a non-signatory to an arbitration agreement is bound by the same or not, the Apex Court has held that

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that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well.

The Court’s observation was that

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the fact that the appellant was not a party to the arbitral proceedings would not contest the question as to whether the award can be enforced against it.

Brief Facts of the case: In the case

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an arbitration agreement was entered into between KC Palanisamy (KCP), KSL and SPIL and a company by the name of Hindcorp Resorts Pvt. Ltd. (Hindcorp).

Later on

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disputes arose between the parties resulting in the commencement of arbitral proceedings.

Under

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the terms of the award, a direction was issued under which KCP and SPIL were required to return documents of title and share certificates contemporaneously with KSL paying an amount of Rs 3,58,11,000 together with interest at 12% p.a. on a sum of Rs 2.55 crores. KCP challenged the award of the arbitral tribunal under Section 34 of the Arbitration and Conciliation Act, 1996 on the

ground that

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the arbitral award could not be executed against the appellant which is admittedly not a signatory to the agreement.

ISSUES AND FINDINGS . The two issues before the SC in this case were as follows: a) Whether the Appellant

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was bound by the Award, though it was neither a party to the arbitration

agreement, nor a party in the arbitral proceedings; b) Whether proceedings for enforcement of the Award would be maintainable before the NCLT Bench's Verdict. The Three-Judge Bench of the Supreme Court headed by Chief Justice Dipak Misra dismissed the appeal and made the subsequent observations within the case: Whether a non-signatory to arbitration agreement is bound by the same? The Court opined that

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in holding a non-signatory bound by an arbitration agreement, the Court approaches the matter by attributing to the transactions a meaning according to the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The

Court also made reference to the group of companies' doctrine to state that the

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doctrine essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

The Court further observed and held that the mandate to have

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a written agreement is to exclude the jurisdiction of national courts. Where parties have agreed to resolve their disputes by arbitration, they try to seek to substitute a personal forum for dispute resolution in situ of the adjudicatory institutions constituted by the state.

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Does the requirement, as in Section 7 that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities?

With respect to the above issue, the SC relied on the decision of “Chloro Controls Pvt. Ltd. v. Severn Trent Water Purification Inc.1 and the English “group of companies doctrine”, whereunder, depending on the nature of the transaction,

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an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of parties to bind both signatories and non-signatories. The SC stated that the law

has evolved to recognise that modern business transactions are increasingly carried out through multiple agreements, and there may be intrinsically related transactions within a corporate

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group. In holding a non-signatory bound by an arbitration agreement,

factors such as relationship of a third party to the signatory party, commonality of the subject matter, and the composite nature of the transaction must be taken into account.

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The group of companies doctrine has been applied to pierce the corporate veil

of the company

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to locate the “true” party in interest, and more significantly, to focus on the creditworthy member of a group of companies. Though the extension of this doctrine is met with resistance on the idea of the legal imputation of corporate

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personality, the application of the doctrine turns on a construction of the arbitration agreement and therefore the circumstances that concerning to the entry into and performance of the underlying contract.

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While the alter ego principle is a rule of law which disregards the effects of incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intentions of parties and does not disturb the legal personality of the entities in question.

The SC also relied on section 35 of the Arbitration and Conciliation Act, 1996 (“Act”), which states

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that an arbitral award “shall be final and binding on the parties and

the persons claiming under them respectively”. The SC found that the Letter had contained

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a clear reference to the Agreement, and it was in pursuance of that Agreement that the group companies had agreed to purchase the 1 (2013) 1

SCC 641 Page 2 of 2 shares of SPIL. KCP had been acting in the capacity of the authorised signatory of the Appellant and therefore, the Appellant had clear knowledge and intention that it would be bound by the terms of the Agreement. Further, the Agreement itself provided that KCP could

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transfer shares to its nominees only on the express condition that the nominee would abide by the terms of the Agreement.

Therefore, the SC found that the elements of section 35 of the Act were sufficiently met, and that the Appellant was claiming under KCP. In the circumstances, the Appellant would be

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bound by the Award, notwithstanding the fact

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that it was not a party to the

arbitration agreement or proceedings. Insofar as the maintainability of

proceedings before the NCLT was concerned, the SC opined that the terms of the Award required transmission of the shares back to KSL, which could only be effectuated by rectification of the register of SPIL. The Court rejected the Appellant's submission that, in light of section 42 of the Act, the Respondent could only enforce the Award in Madras High Court, which had previously heard and decided applications under section 9 and 34 of the Act. The SC relied on its judgment in Sundaram Finance Limited v. Abdul Samad2, wherein it was held that section 42 has no application to execution proceedings since the arbitral proceedings stand terminated once the Award is passed, and that proceedings for execution of an arbitral award can be initiated in the most apposite court – usually having jurisdiction over the assets. Transposing this principle to the case at hand, the only recourse available to KSL for giving effect to the Award was an application to the NCLT under Section 111 of the Companies Act, 1956 for the rectification of the register. Thus, the proceedings before the NCLT were held to be maintainable. Now regarding to the issue i.e binding the third party Section 35 of Arbitration and Conciliation Act – The Apex Court also made reference to Section 35 of the Arbitration and Conciliation Act 1996 to state that the statutory provision

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> postulates that an arbitral award “shall be final and binding on the parties and persons claiming under them respectively”. The expression ‘claiming under’, in its ordinary meaning, directs attention to the source of the right. The expression includes cases of devolution and assignment of interest. The expression “persons claiming under them” in Section 35 widens the net of those whom the arbitral award binds. It does so by reaching out not only to the parties but to those who claim under them, as well.

That

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> the expression “persons claiming under them” is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it. The issue in every such a case is whether the person against whom the arbitral award is sought to be enforced is one who claims under a party to the agreement.

The SC also relied on section 35 of the Arbitration and Conciliation Act, 1996 (“Act”), which states

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SCC 641 Page 2 of 2 shares of SPIL. KCP had been acting in the capacity of the authorised signatory of the Appellant and therefore, the Appellant had clear knowledge and intention that it would be bound by the terms of the Agreement. Further, the Agreement itself provided that KCP could

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transfer shares to its nominees only on the express condition that the nominee would abide by the terms of the Agreement.

Therefore, the SC found that the elements of section 35 of the Act were sufficiently met, and that the Appellant was claiming under KCP. In the circumstances, the Appellant would be

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Transposing this principle to the case at hand, the only recourse available to KSL for giving effect to the Award was an application to the NCLT under Section 111 of the Companies Act, 1956 for the rectification of the register. Thus, the proceedings before the NCLT were held to be maintainable. The Apex Court in the case has eventually held that

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the fact that the appellant was not a party to the arbitral proceedings will not conclude the question as to whether the award can be enforced against it on the ground that it claims under a party.

Thus, in such cases

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the Court is called upon to consider whether the test embodied in Section 35 is fulfilled so as to bind the

non-signatory party to the agreement. The judicial block created by Sukanya Judgement in referring non-signatories to arbitration has been done away with by the 2015 Amendments to 1996 Act. Post-2015 Amendments, in a domestic arbitration, even a non-signatory party, who is claiming through or under the signatory party can seek reference of disputes to arbitration. However, what remains to be tested is the scenario wherein a non-signatory moves the court/ arbitral tribunal to be impleaded as a party on the strength of 2015 Amendments. Such a non-signatory may argue that if a non-party can seek reference of disputes to arbitration, it can also be a part of the arbitration as a necessary party, subject to satisfying the “through and under” test. The reverse proposition, i.e., compelling a non-signatory in a domestic arbitration, to take part in arbitration and its impact on enforcement of the resultant award, post the 2015 amendments remains to be tested. Further, the issue of allowing/ refusing a non-signatory party to an arbitration if decided by a Court may operate as res judicata and may therefore not impact enforcement of the resultant award. However, if such a determination is done by an arbitral award, it is likely that the Court deciding the enforcement/ objection to the resultant award may take a contrary view to that taken by the arbitral tribunal. The issue of whether two Indian parties can opt for a foreign-seated arbitration may arise and will be required to be answered by the SC in view of the conflicting judgments of High Courts on the

issue. The adjudicating authority dealing with the request to consolidate arbitrations may be called to answer multiple side issues before ruling on the such a request. Questions that may arise are: 1.Whether there is an express clause permitting consolidation? 2.Whether there is an implied consent of parties for consolidation? 3.The permissibility of request to consolidate would be decided as per which law? 4.Whether all the disputes are covered under the arbitration agreement? 5.Who would be a 'party' to arbitration? 6.Whether all the parties are signatories to the arbitration agreement? 7.Whether the arbitration clause is incorporated by reference into another agreement? 8.Whether non-signatories can be compelled to arbitrate? 9.Is there a novation of the original agreement due to subsequent agreements? 10.Whether the disputes are categorised as a domestic arbitration or an international arbitration or both? 11.Whether the interests of all the parties, including the right to confidentially, cost sharing, etc., would be protected if consolidation is ordered? 12.Whether consolidation would be against the public policy of India? Further, consolidation of arbitrations may not bode with other concepts like confidentiality, party autonomy, and consensuality. Therefore, the forum adjudicating the request to consolidate arbitrations may have to answer some of the above questions before allowing a party to be joined in an arbitration or refusing to consolidate arbitral proceedings. The best shot for a party seeking consolidation will be by establishing express or implied agreement for the same. Insofar as cases where there is a mix of domestic and international arbitration, consolidation may be difficult as has been held in the Duro case. However, where there are multiple agreements, all in the domain of international arbitration, essentially flowing from a main/ mother agreement, parties can seek consolidation on the strength of Chloro Controls judgment.

VI. SILENCE IN Chloro

Necessarily, Chloro has established that third party can be roped into arbitration provided it is claiming under any party to the arbitration or there exist an intendment of it, to subject it to such arbitration. But there are certain points, where it is manifestly deficient in its approach:

Firstly, it doesn't rule conclusively if the said third party can be roped in notwithstanding its contrary –consent. Nor does any other decision-so far-handed down by Indian Court answers the said issue. The reasoning map of Chloro basing its reliance on "Group of companies doctrine" –if adopted, goes on show that same is permissible, as the essence of doctrine of "group of companies" postulates following norms of its application:

a)

certain cases, also applied the “Group of Companies Doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. .

b) This evolves the principle that a non-signatory party might be subjected to arbitration provided these transactions were with group of companies and there was transparent intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words

we can say, that ‘

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intention of the parties’ is a very significant feature which must be established before

so that the

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arbitration can be said to include both the signatory as well as the non-signatory parties.

c)

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A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from

> the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

d) In a case like the present one, where origin and end of all is with the Mother or the Principal Agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfillment of the Principal or the Mother Agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the Court would normally hold the parties to the bargain of arbitration and not encourage its avoidance.

In cases involving execution of such multiple agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically inter- linked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to refer all the disputes between all the parties to the arbitral tribunal is one of the determinative factor.

We may notice that this doctrine does not have universal acceptance. Some jurisdictions, for example, Switzerland, have refused to recognize the doctrine, while others have been equivocal. The doctrine has found favourable consideration in the United States and French jurisdictions. The US Supreme Court in Ruhrgos AG v Marathon Oil Co. discussed this doctrine at some length and relied on more traditional principles, such as, the non- signatory being an alter ego, estoppel, agency and third party beneficiaries to find jurisdiction over the non-signatories.

The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically inter-mingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of ‘composite performance’ would have to be gathered from the conjoint reading of the principal and supplementary agreements on the

one hand and the explicit intention of the parties and the attendant circumstances on the other.

e) As already noticed, an arbitration agreement, under Section 45 of the 1996 Act, should be evidenced in writing and in terms of Article II of Schedule 1, an agreement in writing shall include an arbitral clause in a contract or an arbitration

agreement signed by the parties or contained in an exchange of letters or telegrams.

Thus, the requirement that an arbitration agreement be in writing is an expression incapable of strict construction and requires to be construed liberally, as the words of this Article provide. Even in a given circumstance, it may be possible and permissible to construe the arbitration agreement with the aid and principle of 'incorporation by reference'. Though the New York Convention is silent on this matter, in common practice, the main contractual document may refer to standard terms and conditions or other standard forms and documents which may contain an arbitration clause and, therefore, these terms would become part of the contract between the parties by reference. The solution to such issue should be case-specific. The relevant considerations to determine incorporation would be the status of parties, usages within the specific industry, etc. Cases where the main documents explicitly refer to arbitration clause included in standard terms and conditions would be more easily found in compliance with the formal requirements set out in the Article II of the New York Convention than those cases in which the main contract simply refers to the application of standard forms without any express reference to the arbitration clause.

For instance, under the American Law, where standard terms and conditions referred to in a purchase order provided that the standard terms would have been attached to or form part of the purchase order, this was considered to be an incorporation of the arbitration agreement by reference. Even in other countries, the recommended criterion for incorporation is whether the parties were or should have been aware of the arbitration agreement. If the Bill of Lading, for example, specifically mentions the arbitration clause in the Charter Party Agreement, it is generally considered sufficient for incorporation. Two different approaches in its interpretation have been adopted, namely, (a) interpretation of documents approach; and (b) conflict of laws approach. Under the latter, the Court could apply either its own national law or the law governing the arbitration.

f) In India, the law has been construed more liberally, towards accepting incorporation by reference. In the case of Owners and Parties Interested in the Vessel M.V. "Baltic Confidence" & Anr. v. State Trading Corporation of India Ltd. & Anr. , the Court was considering the question as to whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Lading and what the intention of the parties to the Bill of Lading was. The primary document was the Bill of Lading, which, if read in the manner provided in the incorporation clause thereof, would include the arbitration clause of the

Charter Party Agreement. The Court observed that while ascertaining the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by giving it a literal, pedantic and technical reading. This Court, after considering the judgments of the courts in various other countries, held as under : “From the conspectus of the views expressed by courts in England and also in India, it is clear that in considering the question, whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Lading, the principal question is, what was the intention of the parties to the Bill of Lading? For this purpose the primary document is the Bill of Lading into which the arbitration clause in the Charter Party Agreement is to be read in the manner provided in the incorporation clause of the Bill of Lading. While ascertaining the intention of the parties, attempt should be made to give meaning to the incorporation clause and to give effect to the same and not to invalidate or frustrate it giving a literal, pedantic and technical reading of the clause. If on a construction of the arbitration clause of the Charter Party Agreement as incorporated in the Bill of Lading it does not lead to inconsistency or insensibility or absurdity then effect should be given to the intention of the parties and the arbitration clause as agreed should be made binding on parties to the Bill of Lading. If the parties to the Bill of Lading being aware of the arbitration clause in the Charter Party Agreement have specifically incorporated the same in the conditions of the Bill of Lading then the intention of the parties to abide by the arbitration clause is clear. Whether a particular dispute arising between the parties comes within the purview of the arbitration clause as incorporated in the Bill of Lading is a matter to be decided by the arbitrator or the court. But that does not mean that despite incorporation of the arbitration clause in the Bill of Lading by specific reference the parties had not intended that the disputes arising on the Bill of Lading should be resolved by an arbitrator.”

h) Reference can also be made to the judgment of this Court in the case of Olympus Superstructure Pvt. Ltd. v. Meena Vijay Khetan & Ors. , where the parties had entered into a purchase agreement for the purchase of flats. The main agreement contained the arbitration clause (clause 39). The parties also entered into three different Interior Design Agreements, which also contained arbitration clauses. The main agreement was terminated due to disputes about payment and non-grant of possession. These disputes were referred to arbitration. A sole arbitrator was appointed to make awards in this respect. Inter alia, the question was raised as to whether the disputes under the Interior Design Agreements were subject to their independent arbitration clauses or whether one and the same reference was permissible under the main agreement. It was argued that the reference under clause 39 of the main agreement could not permit the arbitrator to deal with the disputes relating to Interior Design Agreements and the award was void. The Court, however, took the view that parties had entered into multiple agreements for a common object and the expression ‘other matters...connected with’ appearing in clause 39 would permit such a reference. The Court held as under : “If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to “other matters” “connected” with the subject-matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of

the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled." Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, — (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) — it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. "There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement."

A case containing two agreements with arbitration clauses arose before this Court in Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co. There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the "sole repository" of the sale transaction of the two machines. Krishna Iyer, J. Held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and "later purchases", other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents.

The Court also took the view that a dispute relating to specific performance of a contract in relation to immoveable property could be referred to arbitration and Section 34(2)(b)(i) of the 1996 Act was not attracted. This finding of the Court clearly supports the view that where the law does not prohibit the exercise of a particular power, either the Arbitral Tribunal or the Court could exercise such power. The Court, while taking this view, has obviously rejected the contention that a contract for specific performance was not capable of settlement by arbitration under the Indian law in view of the statutory provisions. Such contention having been rejected, supports the view that we have taken.

THRESHOLD REVIEW

Where the Court which, on its judicial side, is seized of an action in a matter in respect of which the parties have made an arbitration agreement, once the required ingredients are satisfied, it would refer the parties to arbitration but for the situation where it comes to the conclusion that

the agreement is null and void, inoperative or incapable of being performed.

These expressions have to be construed somewhat strictly so as to ensure that the Court returns a finding with certainty and on the correct premise of law and fact as it has the effect of depriving the party of its right of reference to arbitration. But once the Court finds that the agreement is valid then it must make the reference, without any further exercise of discretion . These are the issues which go to the root of the matter and their determination at the threshold would prevent multiplicity of litigation and would even prevent futile exercise of proceedings before the arbitral tribunal.

The issue of whether the courts are empowered to review the existence and validity of the arbitration agreement prior to reference is more controversial. A majority of the countries admit to the positive effect of kompetenz kompetenz principle, which requires that the arbitral tribunal must exercise jurisdiction over the dispute under the arbitration agreement. Thus, challenge to the existence or validity of the arbitration agreement will not prevent the arbitral tribunal from proceeding with hearing and ruling upon its jurisdiction. If it retains jurisdiction, making of an award on the substance of the dispute would be permissible without waiting for the outcome of any court action aimed at deciding the issue of the jurisdiction. The negative effect of the kompetenz kompetenz principle is that arbitrators are entitled to be the first to determine their jurisdiction which is later reviewable by the court, when there is action to enforce or set aside the arbitral award. Where the dispute is not before an arbitral tribunal, the Court must also decline jurisdiction unless the arbitration agreement is patently void, inoperative or incapable of being performed.

This is the position of law in France and in some other countries, but as far as the Indian Law is concerned, Section 45 is a legislative mandate and does not admit of any ambiguity. We must take note of the aspect of Indian law that Chapter I of Part II of the 1996 Act does not contain any provision analogous to Section 8(3) under Part I of the Act. In other words, under the Indian Law, greater obligation is cast upon the Courts to determine whether the agreement is valid, operative and capable of being performed at the threshold itself. Such challenge has to be a serious challenge to the substantive contract or to the agreement, as in the absence of such challenge, it has to be found that the agreement was valid, operative and capable of being performed; the dispute would be referred to arbitration..

Alan Redfern and Martin Hunter in Law and Practice of International Commercial Arbitration, (Fourth Edition) have opined that when several parties are involved in a dispute, it is usually considered desirable that the dispute should be dealt with in the same proceedings rather than in a series of separate proceedings. In general terms, this saves time, money, multiplicity of litigation and more importantly, avoids the possibility of conflicting decisions on the same

issues of fact and law since all issues are determined by the same arbitral tribunal at the same time. In proceedings before national courts, it is generally possible to join additional parties or to consolidate separate sets of proceedings. In arbitration, however, this is difficult, sometimes impossible, to achieve this because the arbitral process is based upon the agreement of the parties.

Where there is multi-party arbitration, it may be because there are several parties to one contract or it may be because there are several contracts with different parties that have a bearing on the matter in dispute. It is helpful to distinguish between the two. Where there are several parties to one contract, like a joint venture or some other legal relationship of similar kind and the contract contains an arbitration clause, when a dispute arises, the members of the consortium or the joint venture may decide that they would each like to appoint an arbitrator. In distinction thereto, in cases involving several contracts with different parties, a different problem arises.

They may have different issues in dispute. Each one of them will be operating under different contracts often with different choice of law and arbitration clauses and yet, any dispute between say the employer and the main contractor is likely to involve or affect one or more of the suppliers or sub-contractors, even under other contracts. What happens when the dispute between an employer and the main contractor is referred to arbitration, and the main contractor wishes to join the sub-contractor in the proceedings, on the basis that if there is any liability established, the main contractor is entitled to pass on such liability to the sub-contractor?

This was the issue raised in the Adgas case {Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corp. [1982] 2 Lloyd's Rep. 425, CA}. Adgas was the owner of a plant that produced liquefied natural gas in the Arabian Gulf. The company started arbitration in England against the main contractors under an international construction contract, alleging that one of the huge tanks that had been constructed to store the gas was defective. The main contractor denied liability but added that, if the tank was defective, it was the fault of the Japanese sub-contractor. Adgas brought ad hoc arbitration proceedings against the main contractor before a sole arbitrator in London. The main contractor then brought separate arbitration proceedings, also in London, against the Japanese sub- contractor. There is little doubt that if the matter had been litigated in an English court, the Japanese company would have been joined as a party to the action. However, Adgas did not agree that the Japanese sub-contractor should be brought into its arbitration with the main contractor, since this would have lengthened and complicated the proceedings. The Japanese sub-contractor also did not agree to be joined. It preferred to await the outcome of the main arbitration, to see whether or not there was a case to answer. Lord Denning, giving judgment in the English Court of Appeal, plainly wished that an order could be made consolidating the two sets of arbitral proceedings so as to save time and money and to avoid the risk of inconsistent awards: "As we have often pointed out, there is a danger in having two separate arbitrations in a case like this. You might get inconsistent findings if there were two separate arbitrators. This has been said in many cases...

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it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question,

such as causation.

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It is very desirable that everything should be done to avoid such a circumstance [

Abu Dhabi Gas, op.cit.at 427]"

Notably, the provisions of Section 45 of the 1996 Act are somewhat similar to Article II(3) of the New York Convention and the expression 'parties' in that Section would mean that 'all parties to the action' before the Court have to be the parties to the arbitration agreement. If some of them are parties to the agreement, while the others are not, Section 45 does not contemplate the applicable procedure and the status of the non- signatories. The consequences of all parties not being common to the action and arbitration proceedings are, as illustrated above, multiplicity of proceedings and frustration of the intended 'one stop action'. The Rule of Mischief would support such interpretation. Even if some unnecessary parties are added to the action, the Court can always strike out such parties and even the cause of action in terms of the provisions of the CPC. However, where such parties cannot be struck off, there the proceedings must continue only before the Court.

Thus, the provisions of Section 45 cannot be effectively applied or even invoked. Unlike Section 24 of the 1940 Act, under the 1996 Act the Court has not been given the power to refer to arbitration some of the parties from amongst the parties to the suit. Section 24 of 1940 Act vested the Court with the discretion that where the Court thought fit, it could refer such matters and parties to arbitration provided the same could be separated from the rest of the subject matter of the suit. Absence of such provision in the 1996 Act clearly suggests that the Legislature intended not to permit bifurcated or partial references of dispute or parties to arbitration. Without prejudice to this contention, it was also the argument that it would not be appropriate and even permissible to make reference to arbitration when the issues and parties in action are not covered by the arbitration agreement. Referring to the consequences of all parties not being common to the action before the Court and arbitration, the disadvantages are: a) There would be multiplicity of litigation; b) Application of principle of one stop action would not be possible; and c) It will frustrate the application of the Rule of Mischief. The Court can prevent the mischief by striking out unnecessary parties or causes of action.

It would, thus, imply that a stranger or a third party cannot ask for arbitration. The expression 'claiming through or under' will have to be construed strictly and restricted to the parties to the arbitration agreement.

Another issue raised before the Court is that there is possibility of the arbitration proceedings going on simultaneously with the suit, which would result in rendering passing of conflicting orders possible. This would be contrary to the public policy of India that Indian courts can give effect to the foreign awards which are in conflict with judgment of the Indian courts.

Joinder of non signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

Various

may also notice the Canadian case of The City of Prince George v. A.L. Sims & Sons Ltd. wherein the Court took the view that an arbitration agreement is neither inoperative nor incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties. The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. Third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope. Furthermore, the Convention does not prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theory of implied consent.

If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.

In the present case, the corporate structure of the respondent companies as well as that of the appellant companies clearly demonstrates a legal relationship which not only is inter-legal relationship but also intra-legal relationship between the parties to the lis or persons claiming under them. They have contractual relationship which arises out of the various contracts that spell out the terms, obligations and roles of the respective parties which they were expected to perform for attaining the object of successful completion of the joint venture agreement. This joint venture project was not dependant on any single agreement but was capable of being achieved only upon fulfillment of all these agreements. If one floats a joint venture company, one must essentially know-how to manage it and what shall be the methodology adopted for its management. If one manages it well, one must know what goods the said company is to produce and with what technical knowhow. Even if these requisites are satisfied, then also one is required to know, how to create market, distribute and export such goods. It is nothing but one single chain consisting of different components. The parties may choose to sign different agreements to effectively implement various aforementioned facets right from managing to making profits in a joint venture company. A party may not be signatory to an agreement but its execution may directly be relatable to the main contract even though he claims through or under one of the main party to the agreement. In such situations, the parties would aim at achieving the object of making their bargain successful, by execution of various agreements, like in the present case.

The New York Convention clearly postulates that there should be a defined legal relationship between the parties, whether contractual or not, in relation to the differences that may have arisen concerning the subject matter capable of settlement of arbitration. We have referred to a number of judgments of the various courts to emphasize that in given circumstances, if the ingredients above-noted exist, reference to arbitration of a signatory and even a third party is possible. Though heavy onus lies on the person seeking such reference, multiple and multi-party agreements between the parties to the arbitration agreement or persons claiming through or under such parties is neither impracticable nor impermissible.

CHAPTER 5

THE RELEVANCE OF THE INTERESTS OF THIRD PARTIES IN ARBITRATION:

INTRODUCTION

This Part examines the interests of so called third parties in arbitration process and discusses their relevance to proceedings between parties bound by an arbitration agreement. The consensual nature of arbitration lies at the heart of this discussion and only those persons that have clearly consented to an arbitration agreement may participate in arbitration proceedings. This constitutes the fundamental difference between litigation and arbitration. In litigation, the parties to court proceedings are determined on the basis of interest(s). Any legal or natural person is entitled to commence court proceedings to protect its legal or financial interests.

By contrast, parties to arbitration proceedings are exclusively determined on a contractual basis. Entering into an arbitration agreement is the indispensable requirement for a person to participate in arbitration proceedings and to be bound by the ensuing arbitral award. The principle of “procedural party autonomy” provides parties with the freedom to contractually determine the circle of persons entitled to participate in the arbitration proceedings. Thus, the principle of procedural party autonomy and the contractual foundations of arbitration make arbitration a flexible dispute resolution mechanism, allowing parties to design a system of dispute resolution in accordance with their commercial needs.

This ability has proved to be a significant advantage of arbitration over litigation, and it has contributed to the increasing popularity of the former amongst members of the international commercial community, particularly in the last thirty years. By the same token, however, the contractual and thus relative nature of arbitration frequently leads to unfavourable results. This is particularly the situation in the context of multiparty commercial relationships, where the consensual limitations of arbitration preclude any person not bound by an arbitration agreement from taking part in arbitration proceedings though his or her interest may be effected directly or indirectly. Such Third parties are altogether excluded from the arbitration process, notwithstanding legal or financial interests they might have in the pending dispute. In short, third parties are considered aliens, with interests that are largely irrelevant to arbitration.

It will further explores the role of third parties in arbitration, showing that on many occasions the outcome of a dispute pending before an arbitral tribunal may adversely affect their financial or legal interests. This realization leads to the primary inquiry of this paper, namely whether legitimate interests of third parties should be taken into account in arbitration proceedings . In this part it will be argued that in principle they should be included in the process of arbitration. In particular, arbitration should operate as an open dispute resolution system that takes into account the interests of third parties that are strongly associated on a substantive level with the parties to a bilateral arbitration agreement. Thus, arbitration would become better equipped to deal with all the substantive implications of multiparty disputes, which are becoming more frequently used in modern commercial practice. Eventually, this would enhance arbitration's efficiency and would widen its material scope.

The main aim of this part is to present the premises where it can be justified that the participation of third parties or at least to show that their interests should be taken into account in the arbitration process. Absent, however, are any suggestions as to how third parties should participate in arbitration proceedings. Whether, for example, third parties could participate through an analogous application of third party mechanisms, such as consolidation or intervention, is beyond the scope of this work.

II. THE INTERESTS OF THIRD PARTIES

Modern business transactions, particularly in the international context, have become extremely complicated, requiring the participation of several parties for the delivery of large-scale projects. For example, a typical construction project may involve the employer and the main contractor but also an engineer or an architect, several subcontractors, suppliers, and financiers. Similarly,

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the complicated structure of many multinational groups of companies requires several affiliates or subsidiary companies, directors or stockholders of the same group to become actively involved in the execution of a contract

concluded by only one company of the group.

However, multiparty commercial projects are usually executed through several bilateral contracts which contain bilateral dispute resolution arrangements, usually in the form of either arbitration or choice of courts agreements. This practice leads to the "jurisdictional fragmentation of the multiparty project," where the several parties involved are subject to the jurisdiction of different adjudicatory fora (arbitral tribunals or national courts). Thus, a

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dispute arising between two persons bound by an arbitration agreement in connection with a multiparty project will have to be resolved by arbitration exclusively between these two

> parties. Other parties cannot participate in the resolution of the dispute through arbitration, even if they have played an active role in the actual project. Notwithstanding any legitimate interest they might have in the outcome of the dispute, these parties will remain third parties both to the arbitration proceedings and the ensuing arbitral award.

Consider the following examples: •A guarantor may not take part in an arbitration between a creditor and a debtor. This may be the case despite the fact that the arbitration may well determine that the guaranteed debt has been extinguished, in which case the guarantor would cease to be liable against the creditor.6 •A subcontractor may not take part in an arbitration between an employer and a contractor, notwithstanding the fact that the arbitration may well determine that the work actually delivered by the subcontractor is defective. •A team of stockholders may not take part in an arbitration between their corporation and another party, notwithstanding the fact that the arbitration may find against the corporation with considerable financial repercussions for the stockholders. •A parent company may not take part in an arbitration between one of its affiliates and another party, notwithstanding the fact that the breach of contract by the latter has effectively caused damages to the parent company itself.

Inevitably, in all the above examples, the determination of a dispute in bilateral arbitration proceedings will take place against the backdrop of the multilateral commercial project. Consequently, it is likely that the bilateral arbitration proceedings will adversely affect the legal or financial interests of third parties that are closely related to the dispute. This risk is generally recognized in litigation. Thus, the vast majority of national civil procedures provide for extensive third party mechanisms, which give interested third parties the opportunity to participate in the bilateral proceedings and prevent possible adverse effects. Furthermore, under specific circumstances, some national civil procedures give a third party the right to challenge the judgment issued in bilateral proceedings even though the third party never participated in the original proceedings.

In some jurisdictions, third-party recourse is provided against arbitral awards. This remedy, however, is usually limited to domestic arbitrations, mainly for policy purposes seeking to protect the finality of international arbitral awards. Nevertheless, the fact that third-party recourse against domestic awards has been accepted in some jurisdictions provides evidence that the interests of a third party might well be adversely affected by arbitration proceedings. In addition, it illustrates that third party interests are in general worthy of protection. More conclusive evidence suggesting that third party interests are worth protecting in arbitration can be found in the plethora of national judgments and arbitral awards extending the scope of arbitration agreements and proceedings to include “non-signatory” parties based upon various, sometimes innovative, theoretical constructions such as equitable estoppel, and the doctrine of “group of companies.”

Therefore, it follows that (1) arbitration proceedings between two parties may potentially have collateral effects on third parties and (2) when this occurs it is reasonable to argue that third parties should be given the right to protect their interests

III. SHOULD ARBITRATION ALLOW FOR THE INTERESTS OF THIRD PARTIES?

The prevailing view in jurisprudence and legal discourse is that third parties bear no relevance to arbitration, which naturally leaves their interests unprotected. Three arguments are typically put forward in support of the prevailing view. The first, and probably strongest argument, is related to the principle of the contractual nature of arbitration, which has acquired the status of an inviolate and sacrosanct arbitration rule. Allowing a party that is not bound by an arbitration agreement to participate in the arbitration process would simply not be in line with the above principle. The second argument supporting the view that third parties are irrelevant to arbitration is that third parties get what they bargained for, or rather what they failed to bargain for.

Here, it is presumed that third parties have made a considered decision not to enter into an arbitration agreement and have therefore excluded themselves from the arbitration process altogether. The third argument underscores the importance of confidentiality in arbitration proceedings—confidentiality will be compromised by multi-party arbitration proceedings.22 It is arguable whether confidentiality is an inherent procedural feature of arbitration, and thus always applicable.23Nevertheless, where confidentiality does apply, it will indeed have a role to play, militating against the participation of third parties in arbitration proceedings where the original parties wanted to remain confidential. In spite of these valid arguments, the following sections suggest that the interests of third parties should be taken into account in arbitration proceedings, and that a procedural mechanism of communication between the arbitration proceedings and third parties should be established. Although it is a private dispute resolute system, arbitration should not remain a closed system, exclusively reserved for those parties that are contractually bound by an arbitration agreement.

Instead, arbitration should be a dispute resolution system which, under particular circumstances, is flexible and able to communicate with third parties that have legitimate interests in a dispute pending before a tribunal. First, this paper will examine the interests of the actual parties to an arbitration. Second, it will demonstrate how third-party mechanisms will increase the efficiency of arbitration by preventing overlapping proceedings and expanding the material scope of arbitration. Finally, and perhaps more importantly, this paper will show that the scope of arbitration proceedings should remain in tune with the multiparty scope of the dispute pending before the tribunal. Otherwise, the necessary functional equilibrium between arbitration proceedings and the multiparty substantive background of these proceedings will be disturbed, hampering the resolution of the dispute.

A. The Interests of the Parties to Arbitration

So far in this part we advocated and also focused on the interests of third parties. This section examines the interests of the actual parties to an arbitration agreement and arbitration proceedings. Would parties who have made a conscious decision to provide for bilateral arbitration have any interest at a later stage to allow a third party to join the arbitration proceedings? It is almost impossible to answer this question from the perspective of both parties, claimant and respondent, as their interests on this issue will be invariably divergent.

Some parties might benefit from the presence of a third party in their arbitration proceedings. This will typically be the case for the “middle party” in a string sale of goods or a construction

contract. A contractor, for example, will be interested in having a subcontractor joined to its arbitration proceedings against the employer, so that the subcontractor will be bound by the determinations of the final award. In this way, the contractor could avoid wasting money and time initiating separate proceedings with an uncertain outcome against the subcontractor to recover any damages the contractor would have to pay the employer for defective work actually delivered by the subcontractor.

Similarly, albeit not in the context of successive contracts, an employer will have an interest in joining the architect or project manager to its arbitration proceedings against the contractor, and in having that contractor bound by the determinations of the final arbitral award. The same applies to guarantee transactions. Here, for example, the debtor will have an interest in joining the guarantor to its arbitration proceedings against the creditor, especially when the final award is favorable to the debtor. Otherwise, the creditor will be free to initiate second proceedings against the guarantor and to recover the debt, in which case the guarantor will have a recourse claim against the debtor. Eventually, the debtor might have to pay the guarantor for a debt he was found not liable for in the first arbitration.

However, other parties will have no interest in joining a third party to their arbitration proceedings. In a construction contract, for example, this party will typically be the employer, whose interests would be better served if the dispute against the contractor were resolved privately and as quickly as possible. The involvement of a subcontractor in the pending dispute would complicate the proceedings and would increase the time and the cost of arbitration. Overall, there is insufficient evidence to generally suggest that the presence of a third party will equally serve the interests of both parties to an arbitration. However, there will be occasions where the interests of one of the parties and, possibly the interests of a third party, will be better served by multiparty arbitration proceedings. In such a case, the question is whether the multiparty arbitration would be possible, despite the non-agreement of the other party to the arbitration. This would not be a previously unheard of proposition. There are indeed arbitration laws and rules taking the approach that multiparty proceedings will

not require the consent of all the relevant parties; the agreement between a third party and one of the parties

to the arbitration would suffice for the third party to be joined to the pending arbitration. This approach has also been endorsed by some national courts. Should an agreement between a third party and one of the original parties to the arbitration be enough for multiparty proceedings, or would this stretch the consensual nature of arbitration beyond its limits? The following sections seek to shed some light on this question.

B. Maximizing the Efficiency of Arbitration From a policy standpoint, to increase its efficiency standards, arbitration has to be able to interact with third parties and allow for their interests. This interaction will prevent overlapping parallel proceedings and expand the material scope of the arbitration.

1. Regulating Overlapping Proceedings

Multiparty arbitration proceedings will prevent the commencement of several bilateral proceedings with overlapping subject matters. Parallel overlapping proceedings create the risk that the determinations of an arbitral award between the two parties to an arbitration agreement might be irreconcilable, not to say conflicting, with those of a subsequent award or judgment between a third party and one of the parties to the first arbitration. When several parties are intertwined in a multi-party commercial project, it is likely that the same issues will arise in more than one set of proceedings. For example, in the context of construction contracts, the issue of causation or liability will likely arise both in the proceedings between an employer and a contractor and in the proceedings between the same contractor and a subcontractor. Similarly, defects or delay in the work of a subcontractor will affect the liability of the contractor against the employer.

Fortunately, it is the case that inconsistent awards do not occur often. However, when they do occur they raise doubts about arbitration's reliability and the authority of arbitral awards. An arbitral award is presumed to be an authoritative determination of the pending dispute; hence arbitral awards are granted a res judicata effect. However, when two conflicting awards are rendered, one of them clearly has to be wrong. Of course, it is not argued that arbitral awards can never be wrong. As with any decision, arbitral awards are indeed fallible, which is precisely why they are safeguarded with the authority of res judicata. A fallible decision, i.e., a potentially wrong decision, is tolerable as long as this decision is never exposed as clearly wrong. However, the issuance of two irreconcilable awards with inconsistent determinations on the same factual or legal issues turns potentially wrong awards into clearly wrong ones. Therefore, irreconcilable awards negate the purpose of res judicata and expose the whole legal system as defective. In fact, irreconcilable awards constitute a legal sore. More importantly, irreconcilable awards may frustrate the expectations of the parties to arbitration, who might find their award unenforceable as it conflicts with another arbitral award or national judgment. In litigation, multiparty proceedings concentrate all the intertwined parties and claims before a single forum to prevent the risk of conflicting determinations. By contrast, in arbitration, the lack of third-party mechanisms permit parallel overlapping proceedings, thus increasing the risk of irreconcilable awards.

2. Increasing the Material Scope of Arbitration

The failure of arbitration to allow for the interests of third parties restricts its material scope. This is an issue usually linked with the discussion of inarbitrability. However, it is more closely related to the inability of arbitration to effectively deal with multiparty disputes and the interests of third parties. For example, national laws often provide that insolvency disputes must collectively be submitted to the exclusivejurisdiction of specially designated national courts. In essence, insolvency disputes are excluded from the arbitration domain because arbitration is not an open dispute resolution system, able to accommodate for collective proceedings. An insolvency dispute would most likely involve several claims (some unsecured, some secured or preferred, some even contested) and several parties (for example, the insolvent, the trustee, and several creditors). The resolution of an insolvency dispute might implicate third parties (other creditors not bound by an arbitration agreement), affecting their claims and interests. Consequently, insolvency disputes are reserved for the exclusive

jurisdiction of national courts, as national courts provide for multiparty proceedings and take into account the interests of all the parties involved in the dispute. Therefore, the inarbitrability of insolvency disputes stems more from the current inability of arbitration to break its bilateral restraints than from public policy considerations.

A similar theory underpins the inarbitrability of some intracompany disputes: an arbitral award will only bind some of the several shareholders that are parties to the arbitration agreement. Thus, an arbitration award may not be able to resolve all the multiparty implications of an intra-company dispute, taking into account the interests of the shareholders not bound by the arbitration agreement. It follows that the issue of inarbitrability is closely linked to the character of arbitration as a closed dispute resolution system unable to provide an effective solution to disputes that implicate third parties. This inability limits the jurisdictional purview of arbitration and curtails its material scope. If arbitration proceedings allowed for the interests of third parties, they would have a far-reaching dispute resolution impact, which would be welcome in the context of multiparty projects. Arbitrators would thus have a wider jurisdictional remit and would be able to consider the full picture of a multiparty project, which would better position them to assess and to determine the pending dispute.

To conclude, policy reasons suggest that arbitration would be a more effective dispute resolution system if operated as an open dispute resolution mechanism whereby the interests of relevant third parties could be taken into consideration. This would reduce the risk of conflicting determinations and would expand arbitration’s domain.

C. The Need for a Functional Equilibrium Between Arbitration Proceedings and the Multiparty

Finally, and most importantly, allowing for the interests of third parties would ensure that arbitration is never conducted outside of its multiparty substantive context. On the one hand, the principle of “contractual freedom” permits commercial parties to make contractual arrangements in accordance with their commercial interests. Parties are free to choose their contractual partners, i.e., they may decide with whom they wish to do business. On the other hand, parties are equally free to make dispute resolution arrangements in accordance with their commercial interests. Here, the principle of “procedural party autonomy” permits parties to enter into an arbitration agreement and thus choose with whom they want to arbitrate.

Usually, those parties bound by a substantive contract will coincide with those parties bound by the arbitration agreement concluded in view of that substantive contract. This occurs simply because the arbitration agreement will most likely be incorporated into the main contract. However, there are cases where the group of parties bound by the same substantive rights and duties (“the substantive group”) is wider than the group of parties bound by the arbitration agreement (“the arbitration group”). This discrepancy between the substantive group and the arbitration group may be the product of cross-contract arrangements among several parties, a statute, or the conduct of a third party.

1. Discrepancy Arising From Cross-Contract Arrangements of Several Parties

Contractual arrangements, especially in contemporary commerce, can be multifaceted and complicated. Often, several parties conclude several bilateral contracts, which refer back to each other. This type of intertwined contract will usually set out a wide network of rights and duties binding all the parties to the several bilateral contracts. Thus, a party to one contract may have a right or assume a duty against a party to another contract ("cross-contract rights and duties"). Take, for example, the case where the main construction contract between an employer and a contractor, including a bilateral arbitration agreement, contains a clause according to which the employer would be directly liable to the subcontractor for the payment of work. At the same time, the subcontract contains a clause giving the employer the right to request modifications or variations of the work directly from the subcontractor. In such a scenario, the two contracts create a network of contractual rights and duties that is wider than the boundaries of each of the bilateral arbitration agreements included in the main contract and the subcontract. All three parties (employer, contractor, and subcontractor) constitute an intertwined substantive group, while the scope of the two arbitration agreements remains bilateral. In other words, there is a discrepancy between the substantive group of parties and the arbitration group of parties. Similarly, take the example of two parallel contracts, one concluded between two parent companies and the other concluded between their affiliates. Suppose that the contract between the two parent companies, including a bilateral arbitration agreement, provides that: [I]n the event [that] any party ("the non-performing party") shall . . . default in the payment . . . the other party ("the performing party"), shall have the right . . . to set-off, counterclaim or withhold payment in respect of any default by the non-performing party or any affiliate of the non-performing party under this agreement or any other agreement between the parties or their affiliates. . . .

At the same time, suppose that the contract between the two affiliates, including a different bilateral arbitration agreement, provides for a similar set-off clause. Here, the substantive arrangements of the several parties create a network of interlinked contractual rights and duties that is wider than the boundaries of each of the two bilateral arbitration agreements included in the two substantive contracts. Thus, on a substantive level, each of the parent companies will have the right to set-off a claim that this company or its affiliate might have against the other parent company or its affiliate. However, on an arbitration level,the two parent companies and the two affiliates will be bound as a pairby separate bilateral arbitration agreements.

2. Discrepancy Arising from a Statute

A similar situation may arise from the application of a statute. For example, French law and the law of some countries influenced by French law provide that, under certain conditions, a sub-contractor may have a direct action, not only against the contractor, but also against the employer. Under this type of legislation, the employer could be liable directly to the sub-contractor. However, it is questionable whether the tribunal constituted under the bilateral arbitration agreement between the contractor and the subcontractor would have jurisdiction to allow for the presence of the employer in the arbitration proceedings. The bilateral arbitration arrangements would seem to fall short of the substantive rights and duties accorded to the several parties by law.

3. Discrepancy Arising from the Conduct of a Third Party

Multiparty substantive relationships that extend beyond the boundaries of a bilateral arbitration agreement may arise from the conduct of a third party. This is typical in the context of transactions involving a group of companies. Often, one of the several companies of the group will enter into a contract, containing an arbitration agreement; other companies of the same group may also become involved in the contract, by, for example, actively taking part in the negotiation, performance, or termination of the contract which they never signed. The conduct of the third party company might give rise to rights or liability of this third party in relation to the contract containing the bilateral arbitration agreement. Thus, the group of parties linked with substantive rights or duties will include the third party and will therefore be wider than the group of parties bound by an arbitration agreement, which most likely will exclude the third party. The same will apply when a third party interferes with a transaction between two signatory parties by committing a fraud or some other legal wrong.

In all the above cases, the crux of the matter is that there will be a conflict between commercial reality and the scope of the arbitration proceedings. The freedom of the parties to choose whom they will arbitrate with (i.e. procedural party autonomy) may create an artificial discrepancy between the substantive and the procedural aspect of the same multiparty relationship: the number of the parties bound by an arbitration agreement may be less than that of the parties actually bound by a wide network of substantive rights and duties. In principle, parties are allowed to make dispute resolution arrangements with a scope that is narrower than the background of their substantive relationships. This is exactly the essence of procedural party autonomy. However, the question is whether there should be any limits on procedural party autonomy. Should two parties involved in an intertwined multiparty relationship be completely free to provide for bilateral proceedings in isolation from the wider substantive background, which involves several parties? The question becomes particularly pertinent when the discrepancy between the substantive and the procedural aspect of the same multiparty relationship might hamper the efficient resolution of the dispute in the bilateral arbitration proceedings. To return to the above example of two interlinked contracts between two parent and two affiliate companies:49 it is doubtful whether, in arbitration proceedings between the two parent companies, either of them could rely on the set-off clause and invoke claims of its affiliate against the affiliate of the other parent company. Such a claim would most likely go beyond the scope of the bilateral arbitration agreement that binds the two parent companies. Eventually, the narrow scope of the arbitration proceedings will, in essence, overturn the substantive arrangements made by the same parties.

As already mentioned, in litigation national procedural systems provide for extensive third-party mechanisms. A review of these third- party mechanisms shows that the procedural rights accorded to the parties depend on how closely a party is interrelated to the dispute on a substantive level: in particular, when a third party is strongly associated in terms of interests with one of the original parties to the proceedings, third-party mechanisms of mandatory nature are usually provided by national litigation systems. Here, the presence of the third party is considered indispensable for the resolution of the dispute between the two original parties in the proceedings. On the other hand, when a third party is contractually linked only

but not strongly associated with one of the original parties to the proceedings, third-party mechanisms of permissive or ancillary character are provided by national litigation systems. Here the presence of the third party is considered helpful but not absolutely necessary for the resolution of the dispute between the two original parties in the proceedings. This is an overarching principle common to almost all procedural systems. In this way, national procedural systems ensure that a functional equilibrium between the substantive and the procedural aspect of a dispute is always sustained. Accordingly, when it is necessary, they all allow for the scope of the dispute resolution proceedings to extend and adjust to the substantive background of the pending dispute.

It is only logical that the procedural arrangements will have to follow and adjust to the substantive arrangements of the parties. The aim of a dispute resolution mechanism set in a contract is to give effect to the substantive rights and duties of the parties. The substantive contract is the main reason that the parties initially contacted one another, negotiated, and finally entered into, an agreement. The dispute resolution agreement of the parties was concluded in view of the main contract. Therefore, procedure is considered—by nature—ancillary to substance.

This proposition should equally apply to the dispute resolution mechanism of arbitration. It is true that unlike litigation, arbitration borders on contractual law due to its contractual origins. However, once arbitration commences the tribunal assumes jurisdictional powers similar to that of a national court. Moreover, the resulting arbitral award has the same jurisdictional power as a national judgment: it is enforced as a national judgment rather than as a contract and it is vested with the power of res judicata. Overall, arbitration has the same purpose as litigation: to effectively resolve a specific dispute. Consequently, this functional equilibrium between substance and procedure in principle should also apply to arbitration.

Thus, it seems reasonable to argue that the principle of procedural autonomy should be subject to certain limitations, namely that arbitration arrangements cannot altogether overturn the substantive arrangements involving several parties. When several parties have created a multiparty substantive network, the principle of procedural party autonomy should be in tune with the wider substantive background. To conclude, arbitration should allow for interests of third parties, especially when the third parties are an integral part of the substantive background of the arbitration.

This realization finds further support in two arguments. The first relates to equity and due process considerations. In particular, it has been argued that the interests of the third parties should be taken into account on the basis of the principle of “equality of the parties,” which should “be read to include all parties to the contract, not just those who are participating in the arbitration.” Such a wide meaning of the term “parties” will include third parties to arbitration that are substantively intertwined in the dispute pending before the tribunal. Furthermore, it has been argued that third parties should be allowed to intervene or to be joined to arbitration proceedings by reference to due process. This should be the case in particular, whenever the presence of the third party is indispensable for one of the parties to the arbitration proceeding to make its case before the tribunal. Unless the third party is

allowed to participate in the arbitration, the existing party to the proceedings will be unable to present its case and therefore due process will be violated. The second argument is the suggestion that when two parties enter into arbitration agreements, it is reasonable to infer that they are, or at least should be, aware of the surrounding substantive circumstances. In particular, parties must know that more parties are implicated in the commercial project they are getting involved in; as they also must know that the rights and duties of the several parties are substantively interdependent.

For example, all the parties involved in a transaction with a group of companies are aware of, and apparently accept, the fact that the third party company of the group becomes actively involved in the actual performance of the contract. Similarly, an employer and a contractor, when concluding a bilateral arbitration agreement, are aware of the several parties (engineer, project manager, subcontractor, suppliers, sureties) and contracts involved in the execution of the construction work. Whether awareness in this context equals consent, as has been held by some national courts, is difficult to argue. One “should be extremely cautious about forcing arbitration,”61 overlooking the fine line between awareness and consent. Nevertheless, the parties’ clear awareness of the wider substantive background of their bilateral arbitration arrangements should be a factor accounted for in this delicate situation.

IV. CONCLUSION

The aim of this part was to explore the relevance of the interests of third parties to an arbitration. It would be unrealistic, and indeed wrong, for one to arrive at certain conclusions on such a thorny topic. Nevertheless, the above analysis has yielded some cautious results. The starting, and less controversial, point made in this paper was that arbitration proceedings and arbitral awards can touch upon and even adversely affect the legal and financial interests of third parties. Whether this adverse effect would justify the participation of third parties in the arbitration proceedings is not equally clear. Examining the issue from the viewpoint of the actual parties to a set of arbitration proceedings, it would be difficult to suggest that the presence of a third party will equally serve the interests of both the claimant and the respondent. Most frequently, one of the parties to the arbitration will have no interest in having a third party join the proceedings. However, support for the proposition that arbitration should allow for the interests of third parties can be found in other arguments. To begin with, multiparty arbitration proceedings would enhance the efficiency of arbitration. If arbitration was able to accommodate multiparty arbitration proceedings, the risk of conflicting awards resulting from overlapping parallel proceedings would be more effectively controlled.

Equally important, third-party proceedings would expand the material scope of arbitration to include disputes that are in principle considered inarbitrable. As was argued here, in many cases inarbitrability is linked more with the inability of arbitration to take the interests of third parties into account than with public policy prohibitions. However, the most convincing argument for third-party arbitration proceedings is that arbitration arrangements should remain in tune with their substantive background. As was shown, in many cases, the scope of bilateral arbitration proceedings falls short of the implications of a dispute involving several

parties. Here, it is questionable whether two parties should be totally free to make bilateral arbitration arrangements against a multiparty substantive backdrop. This may result in an artificial discrepancy between the substantive and the procedural aspect of the same multiparty relationship, eventually hampering the efficient resolution of the dispute in the bilateral arbitration proceedings. It was not the aim of this paper to determine the exact limitations of procedural party autonomy; however, the paper argued that in principle there should be limits imposed on procedural party autonomy when several parties are involved in a single commercial project. As was submitted, procedural party autonomy could not overturn the multiparty substantive background and leave out of the arbitration proceedings third parties that are substantively intertwined in a dispute before the tribunal. Otherwise, the functional equilibrium between substance and procedure, which should apply not only to litigation but to arbitration as well, would be disturbed. Eventually, the focus of arbitration proceedings should widen to include all the substantive implications of a dispute before a tribunal and all the third parties involved therein. Third parties with an interest in the outcome of the arbitration are not necessarily aliens and therefore they should not be altogether excluded from the arbitration process. Overall, there is more merit in the argument that arbitration should be a dispute resolution system, which—under particular circumstances—would be able to allow for the interests of necessary third parties. Thus, arbitration would be better equipped to deal with multiparty disputes arising out of multiparty projects, which become increasingly frequent

in modern commercial practice.

CHAPTER 6:

THE EFFECT OF AN ARBITRAL AWARD AND THIRD PARTIES IN INTERNATIONAL ARBITRATION

Until now, the thesis has been focusing on the effect of arbitration agreements upon third parties. In this chapter, the attention is shifted to the effect that arbitral awards may produce on third parties. Accordingly, the focus will be on persons who have not taken part into the arbitration proceedings resulting in an arbitral award: third parties to an arbitral award. The main question here is whether third parties with a significant interest in the dispute determined by an arbitral award can and should be affected by the determinations of this award.

The discussion on the effects of arbitral awards is inescapably related to the doctrine of res judicata. Res judicata has been the main, if not the only, effect recognised in relation to arbitral awards. Hence, it was considered necessary to look first into the existing international framework relating to the res judicata effect of arbitral awards. In particular, this part undertakes a comparative analysis of several arbitral rules and national laws, showing that the current national and international framework relating to the effect of an arbitral award is,

where it exists at all, divergent and incomplete; in any event, it fails to meet the particular needs of international arbitration. The results of this examination provide the conceptual basis for defining the appropriate effect of an arbitral award on third parties.

Further this part will outlines the problems and limitations of the application of the doctrine of res-judicata vis-ä-vis third parties, namely persons that have not taken part in the arbitral proceedings. Here the thesis challenges the practice according to which an international award, once it is recognized by a national jurisdiction, is equated to a national judgment in terms of its effect. It is argued that this practice overlooks the international character of an international award, which character should survive even after an award is incorporated into the national legal system. Most importantly, though, this practice fails to accommodate the systemic problems arising in international arbitration with regard to intertwined multiparty relationships.

In particular, it is argued that arbitral awards should be able to affect a wider circle of third parties than the one affected by national judgments in order to compensate for the lack of third-party mechanisms at an earlier stage analogous to the mechanisms provided in the context of litigation. Thus, it is suggested that arbitral awards should somehow affect parties with an interest in the dispute (those have been named in the thesis false third parties) rather than just the parties to the proceedings and their privies. In other words, the case for a third-party effect of arbitral awards is made. However, as is explained, an arbitral award should affect only some specific groups of third parties, and in a different, and certainly less drastic, way than privies , set out the content, the boundaries and the qualifications of this third-party effect of arbitral awards

Finally, completes the discussion on the suggested third-party arbitral effect by exploring the legal basis of the effect of an arbitral award at an international level. Here, the focus is on the need for a harmonized regulation of the arbitral effect, instead of the current fragmented and, on many occasions, conflicting national regimes. It is essential at the outset to clarify the sense in which resjudicata will be used in the thesis. The term res judicata is often used to describe the effect produced both by a judgment and an arbitral award. However, as will be shown, resjudicata is a term of art developed in the context of national civil procedures, where it refers to a particularly technical and sophisticated procedural mechanism.

It is thus debatable whether the term should be used to describe the effect of an award in the fundamentally different context of international arbitration. Accordingly, the descriptive term "arbitral effect" is used in the thesis with regard to the arbitration award, while the term resjudicata is confined to national judgments.

1. THE ARBITRAL AWARD AND ITS EFFECT

Despite the great divergence in national jurisdictions, the principle that a valid determination, either judgment or award, produces a conclusive effect with regard to the subject matter and the parties of the dispute constitutes a fundamental legal principle embedded in every legal system. In the context of international arbitration, in particular, the arbitral effect comes as a legal and logical corollary of the jurisdictional nature of an arbitral award. It is true that

arbitration begins as a contractual phenomenon, with an arbitration agreement binding only those parties that have manifestly submitted to its jurisdiction. The result of the arbitral proceedings is an award, which is enforceable worldwide. It has authoritative clout and it demands recognition against any natural, legal or state entity. This is why an award is not enforced as a simple contract, but is enforced with the aid of a state's coercive mechanism as would any other judicial judgment. Irrespective of any theoretical debate on the nature of the arbitral award, there are important practical implications relating to the arbitral effect. It is generally suggested that the conclusive effect of a decision, in general, serves both public and private interests. Parties resort to arbitration to have their disputes finally resolved by the award. If the issues determined in the first award were open to a fresh determination, possibly leading to conflicting awards, parties' expectations of finality and repose of their dispute would be thwarted and the effectiveness of arbitration would be compromised.

1.1 Legal Framework Regarding Arbitral Effect

The current arbitration rules and laws constitute a suggested rather than a clear and comprehensive legal framework regarding the conclusive effect of an arbitral award. In particular, most arbitral rules merely state that "the award shall be binding on the parties."' Similarly unsatisfactory is the way in which national arbitration laws address the issue, lacking, as they do, any regulation regarding an arbitral effect specifically designed for international arbitration. Instead, it is accepted in both civil and common-law jurisdictions that international arbitral awards, after their recognition by the national domestic jurisdiction, have the same effect as domestic judgments: that is, they have the national res judicata effect. Nor can adequate regulation regarding the effect of an international award be found in the New York Convention, which deals with the enforcement rather than the conclusiveness of arbitral awards. This explains the lack of any detailed provision in the New York Convention with respect to the arbitral effect of an international award, apart from the brief statement in Article III that: "[e]ach Contracting State shall recognize arbitral awards asbinding... " Laconic, almost cryptic, the above national and international laws and rules fail to address a series of important issues with regard to the effect of an arbitral award. Thus, a series of questions remains unanswered-

" To what extent, if at all, does the arbitral award prevent the relitigation of the issues that have been determined therein? Does it merely cover the legal claims or does it extend to the facts? " Does the arbitral effect apply only to the dispositive part of the award or does it extend to the reasoning as well? To what extent is a subsequent arbitration tribunal or a national court bound by the findings of an award previously rendered? " Does the arbitral effect cover any issue that was not raised in the arbitral proceedings, but which ought to have been raised?

More importantly, though, for the purposes of the thesis, the existing legal framework regarding the effect of an international award fails to address the question of " Which persons are bound by the arbitral effect, or " Whether an arbitral award can extend to, or in any other way, affect any third party'

No answer can be given to any of the above questions, since the current arbitral framework falls short of providing a sufficient and autonomous regulation of the effect of international arbitral awards. Instead, the issue is referred, either expressly or impliedly, to the domestic provisions on resjudicata that apply to national judgments. However, as the following two sections show, the national res judicata regimes are not only divergent, but also designed for domestic litigation and national judgments. They are thus unsuitable in practical terms for application to international arbitration and arbitral awards.

1.2 National Regimes on Res Judicata: Differences and Constituent Elements

The doctrine of res judicata has developed as one of the most sophisticated, technical and over regulated doctrines in national civil procedures. A detailed consideration of the different national regimes on res judicata goes far beyond the scope of the thesis. The aim of this brief comparative overview is first to highlight the divergent approaches taken by legal systems with regard to res judicata, and second to ascertain the constituent elements of the meaning of resjudicata.

1.2.1 Differences

There is a great divergence among national legal regimes with regard to res judicata. The difference is particularly marked between common and civil law jurisdictions. The basic difference in their approach may be summarised as follows

• In common-law countries, case law has developed a broader notion of res judicata which prevents the re-litigation not only of the claims but also that of the issues, factual and legal, adjudicated in the judgment. From this it appears that common-law countries consider that a judgment represents a judicial record of what actually happened with regard to the dispute. Resjudicata in this sense has a fact-determination purpose. It is considered as a means of evidence, as an authoritative assertion of the whole "story" of the dispute. The term estoppel per rem judicata comes from the term estoppel by record in common law and reflects exactly this common-law approach to resjudicata, which is closer to the Roman rule that "res judicata pro veritate accipitur".

• " In contrast, in modern civil procedural systems, the codified res judicata15 is normally confined to the claims rather than the issues determined in ajudgment. The prevailing view here is that the res judicata effect does not apply to the factual findings in a judgment. Civil-law countries seem to subscribe to the view that a judicial determination is fallible by nature and, in that sense, can only determine the legal consequences of what seems to have happened rather than determine what actually happened, that is, the facts. Parties are thus free to relitigate facts determined in a judgment simply because resjudicata does not bear any evidentiary significance for them.

1.2.2 Constituent Elements of ResJudicata Having briefly outlined the differences in the approach of the national legal regimes to res judicata, it is now necessary to explore conceptual features of res judicata which are common to different legal jurisdictions. This common denominator will effectively provide the constituent elements of the concept of res

judicata which, in turn, is essential to determining, which is the right effect of an international arbitral award. The raison d'etre of res judicata is the preservation of a decision's authority. While a decision determines the legal status of the dispute in question, res judicata ensures that this determination is not circumvented or overturned by subsequent conflicting determinations.

To achieve this objective, res judicata produces different kinds of effects:

1. Prohibits reassertion: this kind of effect comes into play in a case where the subject matter and the parties to the second set of proceedings coincide with those of the first set. In these cases resjudicata precludes the reassertion of the cause of action adjudicated in the first judgment, prohibiting a party to the first set of proceedings from even filing an action based on the cause already determined. This type of effect reflects the fundamental principle of the ne bis in idem in accordance with which a party cannot be granted relief twice on the same

cause of

action.

2. Preclusive effect: this kind of effect comes into play in relation to pleas rather than the causeof action of the first set of proceedings. In particular, it prevents the relitigation of any plea which was determined in the judgment and which plea arises in the second set of proceedings not as the main subject matter (cause of action) but as an issue necessary to determine the main subject matter. The preclusive effect follows from the ne bis in idem principle, but applies only in a casewhere the subject matter in the two sets of proceedings to some extent overlap, rather than coincide.

3. Conclusive effect: Resjudicata does not simply prohibit relitigation of an issue or a claim that have been litigated in a prior action (negative effect). It ensures that the determinations in the first decision will be followed by the second one, whenever the same issues arise in the second set of proceedings as issues necessaryto determine the main subject matter of the second action (positive effect). Thus, in a casewhere a previously determined issue is raised in the second set of proceedings, the second forum should accept the determination of the first judgment one these issues as conclusive and thus accept this determination as a logical and legal basis of the second decision. In other words the determinations of the first decision are binding on the second forum. In this sense, res judicata has a harmonising effect, ensuring that the two overlapping decisions. Only the combination of preclusive and conclusive effects can effectively preserve the authoritative status of the first decision.

4. Enforcement: The res judicata effect is interrelated with the enforcement of a judgment. Res judicata and enforcement are two sides of the same coin and their boundaries, in terms of ratione personae, necessarily coincide. Thus, in principle, a judgment is enforceable against those parties and only those parties that are bound by res judicata. Thus, the enforcement is a legal and logical corollary of the conclusiveness of the decision. The converse is also the case: res judicata is a condition precedent for enforcement.

2.2 RES JUDICATA AND THIRD PARTIES

2.2.1 The "Same Parties" Requirement: Rule and Exceptions

The above four different kinds of effect explain how the resjudicata effect should apply. It is also important, however, to determine the parties that should be affected by resjudicata. Hence, this subsection examines the "same parties" requirement, the analysis of which will define who is bound by res judicata, including the extent to which third parties may be affected. The "same parties" requirement means that, as a rule, a decision affects only those persons who took part in the proceedings that resulted in the decision, namely the parties in action (genuine parties) as opposed to any third party.

This requirement serves the fundamental principle of due process, that is, the right of the party to be heard. This rule, however, is by no means without exceptions. Almost every legal system under certain circumstances provides for exceptions to the "same parties" requirement, so that even persons not taking part in the proceedings are bound or somehow affected by the decision. This is true in common, civil and even Shari'a law. The extent of these exceptions, of course, differs among jurisdictions, but the extension of the effect of a judgment to a "circle" of parties other than the real parties constitutes a general principle common to almost every legal system. In civil-law countries this circle of third parties, to which resjudicata is extended, is limited and is normally determined a priori, by civil and procedural codes. In contrast, in common-law countries the circle consists of the so-called privies, i.e. persons that are in privity with one of the parties in an action. Defining the concept of privy is difficult, not least because it has a different meaning in the U. S. from that which it has in England.

In general, the test of whether the resjudicata will be extended to a third party is the "community of interest" test between this third party and one of the parties to the action. More specifically it is required that the third party and one of the parties to the action are so closely associated in terms of interests that the third party's interests "are represented by a party to the action." In fact, for the resjudicata effect to be extended to a third-party, the latter and the party to the action must have identical interests.

Two conclusions may be drawn from above analysis: First, the exception to the "same parties" rule is so well-established in almost every legal system that it may be argued that the fact the exception is also a constituent element of res judicata. It follows that the "same parties" rule in resjudicata should read: resjudicata applies mainly to the parties to the action but also, in exceptional circumstances, to third parties. Second, the circle of the third parties bound by res judicata is extremely narrow, since the extension of res judicata to a third party requires a substantial degree of identification, in terms of interests, between the third party and one of the parties to action. As the "identification test" is so strict, it is only in very limited circumstances that the resjudicata effect is extended to a third party.

This strict test thus leaves all other third parties beyond the reach of any judgment effect. This rule, in principle, applies to arbitration as well, since awards and judgments are equated in terms of effect. Thus, the effect of an arbitral award may not bind or even affect any person other than one substantially identified with the parties to the arbitration proceedings. In effect, only privies to the parties to the arbitral proceedings will be bound by the resjudicata

effect of an arbitral award. By contrast, false third parties, who are neither genuine parties to the arbitral proceedings nor privies to the parties thereto, will not be bound by the res judicata effect of an arbitral award. This applies to both groups of false third parties identified in the thesis discussed previously. False third parties may be contractually interrelated to, or even co-liable with, the parties to the action, however, their interests are not identical to those of the parties in the proceedings, and therefore they fall short of privity.

The following sections show in detail why the res judicata effect recognised for arbitral awards is not sufficient to address the problems related to multiparty contractual relationships in arbitration. As it will be argue the circle of third parties that may be affected by an international arbitral award should be wider than that affected by resjudicata resulting from a judgment. By the same token, however, the kind of third-party effect produced by an international award should be different from the resjudicata effect produced by

a judgment.

2.2.2

False Third Parties: The Problem

As was already mentioned, false third parties fall short of privity with the genuine parties. The interests of false third parties in the multiparty project, although interlinked, are not identical to those of the parties to the arbitral proceedings. This applies to both groups of false third parties, namely false third parties that are coliable or simply contractual interrelated to the genuine parties. Nevertheless, there is a strong substantive nexus between false third parties and genuine parties. They might not be privies, but their contractual rights are inextricably intertwined with the rights of at least one of the parties to the arbitral proceedings. This most likely means that many of the legal and factual issues arising in the bilateral arbitral proceedings will also arise in subsequent proceedings between false third parties and one of the parties to the first set of proceedings. There is thus the risk of inconsistent, if not conflicting, decisions arising out of the several sets of proceedings in relation to the samemultiparty commercial project.

As has repeatedly been argued in the thesis, there is a clear need for the communication between parallel overlapping proceedings, so that ensuing the decisions are to the extent possible harmonised.

2.2.2.1: Solutions in the context of litigation:

In the context of litigation, there are two ways in which two or more parallel proceedings involving the same legal and factual issues are regulated so that conflicting decisions are avoided:

First, by third-party mechanisms that bring all the relevant parties before a single forum. This type of third-party mechanisms can be named unification mechanisms. Examples of unification mechanisms are: common jurisdictional bases, class actions, intervention and joinder, interpleading and consolidation. In this way parallel proceedings are avoided

altogether, and regulation of multiparty relationships is achieved in an early stage, namely in a pre-judgment stage. Unification mechanisms bring all the relevant parties in the same set of proceedings in a rather intrusive and drastic way. Parties are not allowed to litigate their disputes bilaterally. Instead, through unification mechanisms, third parties are brought in the proceedings between two other parties, at some times even against the will of the original parties or even against the will of the third parties themselves.

Secondly, by mechanisms that merely harmonise the outcomes of the parallel proceedings, rather than bring all the several parties before a single forum. Typical examples of harmonisation mechanisms are lis pendens and res judicata. Here, the several set of proceeding remain parallel, instead of being consolidated. However, lis pendens and resjudicata regulate the parallel proceedings, so that conflicting findings and decisions are avoided. In particular, lis pendens prevents the continuation of the second set of proceedings until a decision in the first set of proceedings is granted. Res judicata, either prevents the second set of proceedings to commence at all or ensures that the second forum is bound by the determinations of the first decision. Both lis pendens and res judicata ensure that the second proceedings do not continue without taking the determinations of the first decision into account. In this way, the results of the first proceedings are communicated with the second trial so that conflicting judgments are avoided. Thus, harmonisation mechanisms are designed to prevent conflicting decisions in a different way than bringing all the relevant parties before the same court. Harmonisation mechanisms bring the several decisions into accord, rather than they consolidate the several proceedings. As a matter of general policy, national civil procedures give precedence to the application of unification over harmonisation mechanisms. The former, as explained above, are more drastic, achieving the maximum results in terms of preservation of procedural recourses and consistency in the determination of the multiparty dispute.

Thus, in general, third-party unification mechanisms are more broadly applicable than harmonisation mechanisms. Indeed, the right of intervention or joinder is accorded to a wide circle of third parties, whereas the application of lis pendens or res judicata to third parties usually hinges on more stringent conditions, namely the "same parties" requirement and the strict test of identification of interests explained above. Thus, for example, in proceedings between an employer and a contractor, a subcontractor may either intervene on its own or be interpleaded by one of the real parties . However, a subcontractor will typically not be bound by the res judicata effect of the decision between a contractor and an employer, since contactor and subcontractor have interrelated but certainly not identical interests in the dispute, and therefore they can never be taken as the "same parties". It, therefore, seems clear that, whereas unification mechanisms are designed to apply to third parties, harmonisation mechanisms are applicable to third parties only as a limited exception. The precedence of unification over harmonization mechanism is based on sound reasons.

• First, as a matter of general policy, procedural harmonisation of multiparty relationships is welcome at as early a stage as possible. It is difficult to resolve any inconsistency after conflicting judgments have been given, since at that stage both judgments enjoy the status of authority and are presumed to be enforceable. Thus, it is preferable to apply unification

mechanisms, which are available even from the beginning of the proceedings, rather than harmonisation mechanisms that are available at a later stageor even after one decision is issued. • Secondly, issues of violation of due process may arise with regard to harmonisation mechanisms, and res judicata in particular. The extension of the drastic effect of resjudicata to third parties raises the question of violation of the constitutional right of the third party to be heard. On the other hand, participation of a third party in the proceedings, via unification mechanisms, ensures that the third party is, at least, given the opportunity to present its case. However, efficient as unification mechanisms may be, their application is not always possible. In many cases impediments of jurisdictional nature preclude a court from assuming jurisdiction over all the relevant parties or claims. Therefore, multiparty proceedings are not possible. In these cases,unification mechanisms fail to work and the duty to prevent conflicting judgments passes down to the harmonisation mechanisms.

For example, in the US, the US Federal Rules providing for joinder or intervention are not applicable where joinder or intervention of third parties would deprive court of jurisdiction by destroying diversity of citizenship. For the third party to be joined or intervene all the several parties must be submitted to the jurisdiction of different states. Here, the lack of diversity of citizenship constitutes a "jurisdictional impediment", precluding the application of unification mechanisms. Similarly in the context of the European Regulation 44/2001, a creditor by virtue of art.6(l) of the Regulation can bring ajoint action against a debtor and its guarantor as co-defendants before a single national court, even if the debtor and the guarantor domicile in different Member States. However, as is generally accepted, the joinder of a guarantor and a debtor in a single action is not possible where a bilateral jurisdiction agreement between the creditor and the debtor exists. In such a case,the creditor will have to file two different actions before two different courts in different Member States: one against the debtor in accordance with the jurisdiction agreement, and another against and the guarantor in accordance with the general rules on jurisdiction (Chapter II of the Reg. 44/2201). Here, the joinder of a debtor and a guarantor in a single action before a single court will not be possible. The exclusive jurisdiction agreement between the creditor and the debtor will constitute a "jurisdictional impediment", precluding the application of the unification mechanism of Reg. 44/2001 art-6(1) e.

However, when the regulation of the several proceedings by reference to unifications mechanisms is not possible, harmonisation mechanisms may come into play to avoid conflicting decisions. Indeed, even if the application of Reg. 44/2001 art. 6(1) fails to apply and a creditor has to bring two separate actions against a debtor and a guarantor, the two sets of proceedings will not necessarily result into conflicting decisions. The harmonisation mechanism of lis pendens, provided by Reg.44/2001 arts. 27 and 28 will come into play, in order to harmonise the two parallel proceedings so that conflicting judgments are avoided. Thus, the second proceedings, say between a creditor and a guarantor, will most likely be stayed until the first proceedings between the creditor and the debtor are completed and a decision is finally given.

Thus the conclusion that can be drawn from the above is that unification third-party mechanisms are, indeed, given precedence over harmonisation mechanisms. However, when

unification is not possible due to an overriding jurisdictional impediment, such as the existence of an exclusive jurisdiction agreement between two only of the several parties, harmonisation mechanisms may take over and regulate the parallel proceedings

2.2.2.2 Solutions in the context of Arbitration

As has been shown in detail in the previous chapters, third parties cannot in general be brought before arbitral proceedings between two genuine parties thereto . The principle of party autonomy expressed in the form of an arbitration agreement will, as a matter of rule, prevail over the desirability to bring the several parties before a single arbitral tribunal. The existence of an arbitration agreement between two of the several parties involved in a multiparty commercial project constitutes a overriding "jurisdictional impediment", which precludes the application of unification mechanisms to international arbitration. Therefore, the policy of an early regulation of the parallel proceedings applicable in litigation will normally not apply to arbitration.

In this way, arbitration is left without any means of regulation for multiparty disputes at all. False third parties, namely third parties with a significant interest in the outcome of the arbitration between two other parties, are left totally outside the arbitration both during the proceedings and after the award is given - " At the pre-award stage, intervention or joinder or consolidation is generally not allowed, due to the principle of party autonomy. Also " At the stage after the award has been made, the arbitral award obtains the status of a judgment and thus has limited third-party effects, or at least third-party effects that do not extend to false third parties. Hence a subcontractor, a surety, a partner, an affiliated company and many other cases of false third parties remain, as a rule, unaffected, both by the arbitral proceedings and the award, between the genuine parties.

It can be argued thus that the regulation of multiparty disputes should be passed down to harmonisation mechanisms: lis pendens and res judicata or another type of arbitral effect. In the context of multiparty disputes, the arbitral proceedings and the arbitral award should affect a wider circle of persons than those who are parties to the arbitration agreement. In this way, arbitration can accommodate the intrinsic problems arising out of multiparty relationships and disputes and compensate for the lack of third-party mechanisms at an earlier stage analogous to the mechanisms provided in the context of litigation

It suffices to say, that pending arbitration proceedings between the two parties to an arbitration agreement, national courts may stay proceedings between a party to an arbitration agreement and a false third party, on the ground that the second action is inextricably involved with the subject matter of the pending dispute before the tribunal.

Thus, the parallel interrelated proceedings are attuned. The same should be accepted with regard to arbitral awards. Arbitral awards should have an effect extending the genuine parties to arbitration proceedings in order to harmonise the parallel proceedings. However, as explained, any third-party effect of arbitral awards is not possible, because arbitral awards obtain the status of a national judgment, whose res judicata effect is limited only to the parties in action and their privies.

It follows that an arbitral award should obtain a different status from that of a national judgment, which would allow an arbitral award to produce a different kind of effect on false third parties, than the res judicata effect. This arbitral effect on false third parties should be analogous to the degree of association between false third parties and parties to the arbitral proceedings, in terms of interests.

As was explained, a party in an action and its privy are considered to have identical interests and therefore the res judicata effect is extended to the privy. False third parties, however, have interlinked, but certainly not identical interests with the parties to arbitral proceedings. If the res judicata effect extended to false third parties, issues related to due process and their right to be heard would arise Consequently, a full res judicata effect of an award to false third parties should be rejected as excessive and thus inappropriate for arbitration.

Therefore, an arbitral award should affect the false third parties, in a way that reflects the degree of their association in terms of interests with the parties to the proceedings. The next section argues for a suitable and thus proportional third-party effect of arbitral awards, which would simultaneously keep intact the principle of due process and accommodate the desirability to regulate the outcomes of the several proceedings arising out of multiparty relationships.

2.3. THE LEGAL BASIS OF THE EFFECT OF AN INTERNATIONAL AWARD This section makes a tentative rather than an exhaustive suggestion as to the legal basis of the effect of an arbitral award, which suggestion is not necessarily limited to the third-party arbitral effect. In fact, it extends beyond this to the legal basis of the effect of international arbitral awards in general.

As has been mentioned above, the international arbitration framework lacks a harmonised regulation of the effect of an international award. Instead, different national regimes result in a confusing divergence in this respect. This falls short of the unparalleled uniformity that the New York Convention has established with regard to the enforcement of international arbitral awards.

The New York Convention abolished national technicalities and created a self regulated international arena where arbitral awards have achieved independence from national regimes. The validity and enforceability of an international award are generally examined in accordance with uniform and international standards established by the Convention, rather than national standards set out in domestic legislation. This policy has promoted equality and predictability in international business, and has enhanced the effectiveness of the arbitral award as a means of international dispute resolution.

This unrivalled success of the New York Convention has strengthened the argument in favor of de-nationalisation of international arbitration. Thus, harmonised a-national procedural and substantive standards develop and become more relevant in international arbitration than ever before. In fact, one of the few aspects of international arbitration that remains in the exclusive domain of national jurisdictions is the regulation of the effect of an arbitral award. The practice whereby an arbitral award is equated to a national judgment in terms of its effect causes unpredictability and undermines the effectiveness of the international award. Thus,

the effects of an international arbitral award depend on the different, and, in many cases conflicting, regulations of the different national jurisdictions. For example, an international award between a creditor and a debtor, depending on which jurisdiction will be enforced: • " May have no effect vis-ä-vis a surety; or • " May be res judicata vis-ä-vis a surety, in a case where it is favorable to the debtor, but not in a casein which it is favorable to the creditor; or • " Maybe used asprima facie evidence vis-ä-vis a surety. Because of the lack of international regulation on the effects of arbitration awards, the international status of an arbitration award disappears after it is recognised and enters the national jurisdiction. Thus, the harmonised effects of the New York Convention do not extend further than the conditions for the recognition of an international arbitral award. This, however, is in conflict with the spirit of the Convention, which has created an international arena where the enforcement and, thus, the free movement of awards is facilitated. It follows that enforceable awards should obtain the maximum degree of effectiveness within the international arena.

Allowing divergent regulation of the arbitral effect by national systems reduces the effectiveness of the international award and hampers the free movement of international awards. National states are reluctant to relinquish their right to control and regulate the effects of a judgment or an award, the consequences of which are "felt" within their own jurisdiction. This may be a reasonable argument as far as national judgments are concerned, where enforcement is effected by divergent domestic standards rather than by reference to uniform standards determined by an international convention such as the New York Convention. Allowing foreign judgments, from several different jurisdictions to carry their own national status and effect into the country of enforcement, would cause chaotic divergence and uncertainty. It is necessary, therefore, that the enforcing country should regulate and determine the effects of foreign judgments, assimilating their effects with those of domestic judgments.

The argument, however, is less persuasive in the context of international arbitration. An international arbitration, by definition, has no national forum. Thus, the arbitral award is not the product of a particular national legal system, and, in any case, the seat of arbitration bears no relation to the effect of an arbitral award. An international arbitral award does not carry any national res judicata status. It is "given" the status of res judicata only after it enters national jurisdictions. It seems contradictory that an international award rendered and recognised exclusively according to international standards should be given a national status with regard to its conclusiveness and effect. Instead, international awards should have an international harmonised effect, designed for the particular needs of international arbitration, an effect which an arbitral award should carry into national jurisdictions.

There should be a shift from a national to an international viewpoint as regards the effects of arbitral awards. National jurisdictions should retain, as a safety net, the right to reject the effect only if this violates the international public policy of the country in question. This, in fact, is the real scope of the N.Y. Convention, Article V(2)(b). Enforcement is the judicial process that gives effect to the mandate of the award. In other words, enforcement is the vehicle by which the effects of the award are transplanted to the enforcement country. In cases where the

courts of the enforcement country consider that the effects of the award to be enforced manifestly violate its public policy, they will not allow the enforcement process to proceed.

Thus, the New York Convention, in Article V(2) (b), determines the boundaries of the legitimate authority of the national state over an international award regarding the effects of the award. The national state has, indeed, a legitimate interest in reviewing, rather than determining as a whole, the effects of an international award. The legitimacy of this interest, however, is strictly related to public policy considerations and cannot be extended beyond public policy boundaries.

2.5 The Enforcement of Awards where Non-Signatories have been Joined to the Proceedings

While a non-signatory to an arbitration agreement may be able to participate in arbitration proceedings and obtain an award as discussed above, one of the challenges it is likely to face is in enforcing the award. As seen above, there are several inconsistencies amongst different countries in the usage of theories to extend arbitrations to third parties. Such inconsistency is likely to affect parties to the dispute. Enforcement issues arise when the law used to pass the award is inconsistent with the law of the place where the award is sought to be enforced. Illustratively, if the arbitration agreement has been extended to a non-signatory by use of the _group of companies' doctrine and an award is passed, if the country of enforcement does not accept the _group of companies' doctrine, the enforcement of the award may be refused. This would render the award useless.

In this context,

Article V of the NYC is relevant. Article V reads: 1.

or [...]

2.

0: https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/25249/Brekoulakis%20Rethinking%20Consent%20in%20International%20Commercial%20Arbitration%3A%20A%20General%20Theory%20for%20Non-signatories%202017%20Accepted.pdf?sequence=1&isAllowed=y 100%

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought

0: https://lirias.kuleuven.be/retrieve/336478 92%

finds that:

(

a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country;

or

(

0: https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/25249/Brekoulakis%20Rethinking%20Consent%20in%20International%20Commercial%20Arbitration%3A%20A%20General%20Theory%20for%20Non-signatories%202017%20Accepted.pdf?sequence=1&isAllowed=y 100%

b) The recognition or enforcement of the award would be contrary to

the public policy of that country.

Thus, enforcement can be refused if the country of enforcement does not find that the applied method is part of its own laws. The leading case in this regard is that of Dallah v. Pakistan. In this case, Dallah Real Estate and Tourism Holding Co. [—Dallah||] entered into a Memorandum of Understanding with the Government of Pakistan under which it agreed to purchase land and provide accommodation to pilgrims from Pakistan in Mecca. The Pakistan Government created a trust and subsequently Dallah entered into a formal agreement with the trust. The formal agreement contained an arbitration clause and disputes arose between parties. Dallah invoked arbitration against the Pakistan Government before a French arbitral tribunal. The Pakistan Government argued that it was not party to the arbitration agreement since it had not signed the agreement. The arbitral tribunal held that since the Pakistan Government was involved in the negotiation of the contract, there was a presumption that common intentions of parties existed and the Pakistan Government was deemed as a party to the arbitration.

Dallah applied for enforcement of the award in England under the NYC and the English Arbitration Act, 1996 [—English Arbitration Act‖]. Thereafter, Dallah also sought exequatur of the award in France. Contending that in terms of Article V(1)(a) of the NYC there was no valid arbitration agreement between the Pakistan Government and Dallah, the Pakistan Government resisted enforcement before the English Courts. It also sought annulment of awards in the French Courts. Before the English Courts, Dallah contended that even if it was found that the Pakistan Government was not bound by the arbitration agreement, the Courts must exercise discretion under Article V(1) of NYC and Section 103(2) of the English Arbitration Act to enforce the award. The English High Court and English Court of Appeal refused to enforce the award. Finally, Dallah appealed to the UK Supreme Court. The UK Supreme Court dismissed Dallah's appeal. The UK Supreme Court while acknowledging the principle of kompetenzkompetenz i.e. that the tribunal can decide on its own jurisdiction, observed that Courts were not bound by the Tribunal's reasoning and findings. It held that when a party resists enforcement under Article V(1)(a) of NYC the Court must —revisit the tribunal's decision on jurisdiction‖. The UK Supreme Court applying French Law referred to the decision of the French Cour de Cassation in Municipalite de Khoms El Mergeb v. Dalico and held that there was no —common intention‖ between parties that the Government of Pakistan would be a party to the arbitration agreement. The UK Supreme Court observed that there was (i) a clear change in the proposed transaction from the Government (who was a party to the Memorandum of Understanding) to an agreement with the trust (ii) the Pakistan Government's only role under the agreement was to act as a guarantor for the trust's loan obligations which was backed by a counter guarantee from the trust (iii) the trust was a corporate body capable of holding property and of suing and being sued.

Soon after the English Court's decision, the Paris Court of Appeal rejected the Government of Pakistan's application for annulment under Article 1502(1) of the French Code of Civil Procedure. The Paris Court of Appeal also applied French Law i.e. looking into the parties' intentions and the decision in Dalico, but, unlike the UK Supreme Court, the Paris Court of Appeal had no difficulty in holding that the Government of Pakistan was intended to be a party to the arbitration agreement. The Paris Court of Appeal noted that the Pakistan Government was the sole direct negotiator of the contract, that the Pakistan Government was involved in the performance as well as in termination of the contract. The Paris Court of Appeal held that the Pakistan Government —behaved as if the Contract was its own‖ and in the absence of evidence that the Trust was involved, the true party to the agreement was the Pakistan Government. Interestingly, both the English and French Courts held that they had the power to review the tribunal's decision on jurisdiction. However, the English decision was formalistic and sought a high standard of proof to show that the Pakistan Government had consented to the arbitration agreement. The French decision looked into the circumstances surrounding the contract.

Another interesting case on enforcement is a recent decision by the Singapore Court of Appeal. The Court of Appeal rejected an application for enforcement of a USD 250 million award on the ground that there was no arbitration agreement between parties. The disputes arose on a joint venture between certain companies in the Lippo group [—Lippo‖] and companies of the Astro group [—Astro‖]. The joint venture terms were provided in a

Subscription and Shareholders' Agreement [—SSA||] which contained an arbitration clause. Pending fulfilment of certain conditions precedent, three Astro group companies provided funds and services to the joint venture company, these three Astro group companies were not parties to the SSA. The condition precedents were not met and disputes arose. The Astro companies including the non-signatories to the SSA, commenced arbitration against Lippo in Singapore under SIAC Rules. Astro also filed a joinder application to bring the non-signatories to arbitration relying upon Article 24(1)(b) of the 2007 SIAC Rules. Lippo disputed the application but the tribunal passed a preliminary award determining that it had jurisdiction and that it would use its discretion to join the nonsignatories to arbitration. Lippo did not challenge this award but proceeded with the arbitration objecting to the jurisdiction of the tribunal. The tribunal finally permitted the joinder and passed an award of USD 250 million, majority of which was in favour of the non-signatories. Astro applied for enforcement in Singapore. Lippo resisted the enforcement of the grounds that there was no arbitration agreement between Lippo and the non-signatories. The Singapore High Court held in favour of Astro for two reasons. One, it drew a distinction between international awards and those awards deemed to be international awards but made in Singapore, a domestic international award. Two, it held that Lippo ought to have challenged the tribunal's decision on jurisdiction. Since it did not do so, it could not now resist enforcement on jurisdictional grounds. On appeal filed by Lippo, the Court of Appeal overruled the High Court decision on the grounds that the grounds for resisting enforcement of a foreign award also applied to a domestic international award and the tribunal did not have power under the then SIAC Rules to join nonsignatories to arbitration. Notably, Section 3 of the Singapore International Arbitration Act [—SIAA||] makes the Model Law applicable to Singapore except the provisions of Chapter VIII which deal with refusal to enforce and recognise of arbitral awards. The SIAA does not contain any express grounds for refusing enforcement of domestic international awards seated in Singapore. Section 19 of SIAA provides:

Enforcement of awards 19. An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

While Part III of SIAA mirrors Article V of the NYC, it applies only to foreign awards. The Court of Appeal held that in terms of Section 19, Singapore Courts had an inherent power to refuse enforcement of domestic international awards passed in Singapore. The Court of Appeals then went on to hold that the Model Law had in built in it the —choice of remedies|| principle, which applied equally to foreign and domestic awards. Reconciling the SIAA with the Model Law, the Court of Appeals observed that the object of excluding Chapter VIII of the Model Law from SIAA was to avoid a conflict with the NYC and the —choice of remedies|| concept from the Model Law was never excluded. Thus, although Lippo never exercised its —active right|| to challenge the award, it had a —passive remedy|| available to resist enforcement.

From the above decisions, it is evident that there is uncertainty and unpredictability in international commercial arbitrations. Thus, when there is an international dispute, problems are likely to arise. While the French courts are open minded to extend arbitration agreements

to non-signatories, other jurisdictions are not. Thus, one must be cautious while taking the argument to bind a non-signatory to arbitration.

While the decision in Chloro Control and the recent statutory amendments recognise that arbitration agreements may extend to non-signatories, Indian Courts are yet to deal with the issues in enforcing these awards.

2.6 The Position of Third Party Beneficiaries with Respect to Arbitration Agreements

Often, parties to a contract may stipulate that in addition to themselves a third party shall acquire rights under the contract. The question that then arises is whether these rights include the right to arbitrate. Generally, the view followed, as discussed below, is that merely because it acquires rights under the contract, the third party beneficiary is not bound by the arbitration agreement and has no duty to arbitrate. However, if the third party beneficiary seeks to enforce its benefits under the contract, it will be bound by the arbitration clause in the agreement. Thus, when a party chooses the benefits under the contract it must assume the burdens too.

This concept has been followed by the United Kingdom which enacted the Contracts (Right of Third Parties) Act, 1999 [—CRTP Act||]. The CRTP Act revolutionised the common law doctrine on privity of contract by allowing a third party to enforce rights under the contract. Section 8 of the CRTP Act deals with circumstances in which the enforceability of a term of the contract conferring benefits upon a third party may be subject to an arbitration agreement. Section 8 of the CRTP Act reads: (1) Where— (a) a right under section 1 to enforce a term [—the substantive term||] is subject to a term providing for the submission of disputes to arbitration [—the arbitration agreement||], and (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party. (2) Where— (a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration [—the arbitration agreement||],

(b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, and (c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement, the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right. In this context it is also relevant to note Section 1 of the CRTP Act which sets the test for enforceability of rights by a third party.

The English Courts dealt with the issue of third party beneficiaries and the implication of Section 8 of the CRTP Act in Nisshin Shipping Co. Ltd. v. Cleaves & Company Ltd. 52 In this case, the chartering broker, although not a party to the arbitration agreements in charter-parties, invoked arbitration under the charter-parties against the Owner. The arbitral tribunal held that it had jurisdiction under Section 1 and 8 of the CRTP Act. The Owner appealed the

decision to the English Commercial Court. The question before the Commercial Court was (i) whether the chartering broker was a third party beneficiary under Section 1 of the CRTP Act and (ii) if the chartering broker was a third party beneficiary, whether under Section 8, the rights were subject to the arbitration agreement in the charter-parties. The Commercial Court held that since the charter-parties contained a commission clause providing for payment of 1% commission to the chartering broker, the parties clearly intended to provide a substantive benefit to the chartering broker who was entitled enforce the substantive benefit under the charter-parties. The Owner contended that Section 8 of the CRTP Act ought to be interpreted in accordance with the principle of party autonomy and whether the parties intended the arbitration clause to apply to disputes with third party beneficiaries. Interpreting Section 8 of the CRTP Act the Commercial Court held that the section is based on a —conditional benefit approach‖ and a third party who enforces his substantive benefit does so conditionally on the basis that he is —bound‖ to enforce his right by arbitration. However, the Court of Appeals, while interpreting Section 8 of the CRTP Act in a case where a third party was enforcing its rights under an exclusion clause by arbitration, took a more pragmatic approach and held that whether the right to enforce the exclusion was subject to the arbitration agreement was a matter of construction.53 The Court of Appeals ascertained the parties' intentions in this regard. Finally, it was held that the right to enforce the exclusion clause was not subject to the right to arbitrate.

U.S. law, despite the doctrine of privity of contracts, has recognized the rights of third parties. In Cargill P.V. v. M/T Pavel Dybenko & Novorossiysk Shipping Co,54 the Court of Appeals for the Second Circuit had to decide whether a third party beneficiary was created by a bill of lading which could then enforce an arbitration agreement. The case was remanded back to the district court and it was held that to enforce a right as a third party under a contract, the third party must show that contracting parties intended to confer a benefit on it. The Court of Appeals stated that if the third party was found to be a third party beneficiary under the contract, the District Court may then enforce the arbitration agreement against a party to the contract. The U.S. Courts have also extended arbitration agreements against third party beneficiaries on the principles of equitable estoppel which essentially lays down that when a third party relies upon a substantive part of a contract containing an arbitration clause, the third party would be estopped from denying that it was bound by the arbitration clause.55

Apart from the decisions of the Courts, decisions of ICC Tribunals are also relevant. In X Turkish GSM Operator v The Telecommunication Authority56 in terms of a concession agreement between Turkish GSM Operators and the Turkish Telecommunication Authority, the GSM Operator had to pay 15% of gross revenue from all subscribers monthly. Following communications on whether —interconnection fees‖ would be included in gross revenue, the GSM Operator invoked arbitration based on the arbitration agreement signed separately from the concession agreement. While observing that it was mandatory to have an arbitration agreement to refer disputes to arbitration, the arbitral tribunal framed the issue as whether arbitration agreements extended to third party beneficiaries.

Relying on the decision of the Court of Appeals, Paris in Societe Ofer Bros v. The Tokyo Marine & Fire Insurance Co.57 and the decision of the Cour de Cassation dated July 25, 1991,58 the

arbitral tribunal held that the Treasury was a third party beneficiary. The Court went on to further state that since under the concession agreement the Treasury has the right to monitor the financial statements of the GSM Operator, the Treasury stood at a higher footing than that of a third party beneficiary and was deemed to be a party to the arbitration.

Contradicting this stance, in Y Turkish GSM Operator v. The Telecommunication Authority59 when another GSM Operator invoked arbitration in the same subject matter, the ICC Tribunal held that the arbitration agreement could not be extended to the Treasury. The ICC Tribunal's reasoning was that merely being a third party beneficiary does not extend the arbitration agreement to the third party. The Treasury did not fall within the meaning of the term —parties‖ under the concession or arbitration agreement. Moreover, the arbitration agreement was signed much later than the concession agreement. Thus, arbitration agreements may be extended to third party beneficiaries in certain cases. Notably, while Indian law recognises that a stranger to a contract which is to his benefit is entitled to enforce the agreement to his benefit, the law is unsettled and whether arbitration agreements are extended to third party beneficiaries still remains undecided.

2..6 The Position of Third Parties During the Conduct of Arbitration Proceedings

Thus far, the authors have discussed the possibility of joining non-signatories to arbitration proceedings. However, even in situations where third parties are not joined to the proceedings, they may be called upon to give evidence or appear as witnesses or even have interim measures issued against them. The question of whether interim measures against third parties can be issued by the courts exercising their jurisdiction under Section 9 of the Act has also come before the Indian Courts on a number of occasions. The Delhi High Court, after considering a plethora of judgments on the point, concluded that it was not possible to arrive at a general principle as to whether interim reliefs can be granted against non-signatories to arbitration agreements but that each case would turn on the facts involved. The Delhi High Court did, however, look at the wording employed in Section 9 of the Act which empowers courts to issue the same orders as it is empowered to do in relation to civil disputes. The Code of Civil Procedure, 1908 confers wide powers on the court to issue interim reliefs against third parties to proceedings and as such, the court would be within its powers to issue orders against a third party to the arbitration. In the facts of the case at hand, however, the Court found that the claimant was adequately protected and no measures of protection were necessitated.

In a more recent decision, Rakesh S. Kathotia v. Milton Global Ltd., the Bombay High Court afforded a lenient interpretation to arbitration agreements and stated that arbitration agreements, being commercial documents, ought to be interpreted in a —broad and common sense manner‖ and so as to encourage arbitration rather than avoid reference. Ultimately, a Division Bench of the Bombay High Court reversed the decision of a Single Judge dismissing an application for interim relief on the ground that there was no identity of parties between the arbitration agreement and the application brought before the court. It was upon the application of a wide interpretation as such that the Bombay High Court arrived at the conclusion that a joint venture agreement entered into between individuals described as the

representatives of the ‗Vaghani Group' and the ‗Subhkam Group' and conferring rights and obligations on the groups as a collective, included not only the named individuals or entities but also their immediate relatives and other entities controlled by them, whether directly or indirectly. Seeing as how the joint venture agreement itself was deemed to include related persons and entities within its ambit, the Bombay High Court opined that there was no need to apply the ‗group of companies' doctrine as was the case in Chloro Control.62

Tribunals have not been granted any similar power under Indian law, as Section 17 of the Act expressly circumscribes the power of the Tribunal to issue interim measures as against parties to the arbitration proceedings only. It is also not uncommon in arbitrations for parties to seek the production of documents from third parties or require third parties to the arbitration to testify as witnesses. However, the power of the arbitral tribunal to order such disclosure or compel such testimony is quite restricted, or uncertain at the very least. This can be seen from the IBA Rules of Evidence in International Commercial Arbitration [the ―IBA Rules‖].

Similarly, Article 4(9),provides with respect to obtaining the testimony of third party or unwilling witnesses.

In either case, however, the steps to be taken by the tribunal or by the requesting party have not been set out and the measures ―legally available‖ would differ based on the seat of arbitration. It has been opined that the provisions of the IBA Rules to obtain evidence from third parties are subject to the relevant national legislation permitting it.63 The notes of the Working Committee also seem to suggest this as the committee stated that ―(s)ome arbitration laws permit arbitral tribunals to take or apply for certain steps, such as a subpoena, to obtain such documentation from non-parties. Therefore, Article 3.8 permits an arbitral tribunal 'to take whatever steps are legally available to obtain the requested documents', as long as the arbitral tribunal determines that such documents would be 'relevant and material to the outcome of the case.'‖64 As far as institutional rules go, they do not contain provisions for the collection of evidence from third parties in keeping with the consensual nature of arbitration.65 Accordingly, it is relevant to turn to the different legal regimes that permit collection of evidence from third parties. It is for these reasons that under some national laws, the tribunal, on its own initiative, or incertain cases the parties themselves, may approach national courts to seek assistance in the collection of evidence.

Indian law permits national courts to issue orders against third parties requiring them to produce evidence or to appear as witnesses in arbitration proceedings. To that intent, Section 27 of the Act is to be seen.

The Supreme Court of India has clarified that the relief provided for in Section 27 may be issued against third parties to the proceedings in Delta Distilleries Ltd. v. United Spirits Ltd. The position in the U.K. has been set out in Section 43 of the English Arbitration Act, 1996 which provides as follows: (1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before die tribunal of a witness in order to give oral testimony or to produce documents or other material evidence. (2) This may only be done with the permission of the tribunal or the agreement of the other parties. (3) The court procedures may only be used if - (a) the witness

is in the United Kingdom, and (b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.

The circumstances under which the attendance of a witness to give testimony could properly be compelled by the English courts were set out by Steyn J. in Sunderland Steamship P & I Association v. Gatoil International Inc. (The _Lorenzo Halcoussi'). The first condition was that the Court was to satisfy itself that the request was not one for discovery, but that the documents were required as relevant and admissible evidence or could at least arguably and reasonably come under that category. The second condition was that the description of the documents must clearly indicate which documents were, in fact, requested to be produced. In the event that the request is for a number of documents, then each document must be separately identified. Finally, the court would have to satisfy itself that the request was issued for a legitimate purpose and was not merely a fishing expedition. That the request for production must be specific and not a guise for speculative inspection of a large number of documents, was reinforced in the Wakefield v. Outhwaite case.

It is therefore clear that the English Courts do not permit discovery against third parties. The only exception to this general rule is the existence of exceptional cases. The best example of such an exceptional case has been set out by the House of Lords in the Norwich Pharmacal Co. v Customs and Excise Commissioners case where the production of documents and information from an independent third party was permitted in order to enable the requesting party to bring its claim. The assumption on which this production is allowed is that but for this information or these documents, the requesting party would not be able to bring its claim and that would be contrary to justice. Even though this remedy relates essentially to court proceedings, the courts consider them equally applicable to arbitrations as well. Moreover, the Queen's Bench has held that document disclosure from third parties under Section 43 would be allowed on the same grounds as in proceedings before the English Court.

2.7 Concluding remarks The purpose of this Chapter has been to show that the technical mechanism of res judicata recognised in relation to national judgments is not always suitable for international awards. The principal argument outlined here has been that the arbitral award should produce a third-party effect, which differs from the res judicata effect, and is designed for the needs of international arbitration. The content and boundaries of this third-party effect, as well as the conditions of its application have also been considered here. Finally, a tentative suggestion as to the legal basis of the arbitral effect, in general, has been made. The suggested third-party effect of an international arbitral award strikes a satisfactory compromise between the several conflicting interests: • It accommodates the problems arising out of multiparty contractual relationships in the context of international arbitration. • It reduces the chances of conflicting awards. • It is consistent with the principle of party autonomy. • It is flexible, giving the courts and tribunals the discretion to recognise a third party effect, on a case by a case basis. • It promotes the efficiency of international commercial arbitration.

The problems arising out of the relationship between arbitration and third parties are arguably the most complicated and delicate problems in the area of international arbitration.

On many occasions the scholar or the practitioner finds himself in a "catch-22" situation. On the one hand, bringing all the parties in a multiparty situation before a common arbitral forum may violate the fundamental principle of procedural party autonomy. On the other hand, allowing the several parties to bring overlapping claims before different fora leaves the door open for conflicting decisions.

This may undermine the effectiveness of international arbitration and frustrate parties' expectations. The suggestion lying behind this Chapter is that the problems of a multiparty situation may be addressed more effectively by the arbitral award than by an arbitration agreement. In other words, in international arbitration, unlike litigation, the necessary harmonisation of parallel proceedings may be achieved more effectively at the stage after the first award is issued rather than at the stage of the hearings.

COMPARATIVE ANALYSIS: CONCLUSIONS

Now coming towards the end of the thesis the following section will offer a broader conclusion addressing the questions posed in the Introduction. The purpose of this study was to examine the role of the third parties in relation to the arbitration. The result of the discussion was twofold ie, first the existing views on the topic were challenged and some new suggestion were made. To start this part first we will determine whether the problem of third party exist or not.

A.

Does The "Third PartyProblem" Exist?

The comparative analysis done in above part recognizes certain problems that arise within each of the jurisdictions and also problems that arise across various legal systems. These problems are manifested in five key ways. First, there is inconsistency within each jurisdiction's application of specific legal theories. Even on such a common issue as whether an arbitration clause is incorporated by reference, the position in England remains unclear. While the Arbitration Act 1996 sought to resolve the inconsistent opinions expressed in Aughton the statutory reform itself leaves unanswered several questions about how to apply the doctrine. So too in the United States with respect to the split between those circuits which apply the "direct benefit" test to establishing that a party is estopped from refusing to arbitrate and those which rely on the "twoprong" test. These distinctions could well produce different outcomes.

Second, there is inconsistency of approach between the

different

jurisdictions in this study. Different overarching jurisprudential notions, such as the French position affected by a less formalistic notion of the "party" to a contract, the application of the "principle of validity, and the automatic transmission of the arbitration clause along with the transfer of the main contract by assignment or succession exacerbate these differences.

Similarly, what might appear to be only minor differences in the details of applying the doctrine can in fact have major potential consequences.

Third , transnational differences are exacerbated by conflicting choice of law rules and uncertain division of responsibility between courts and arbitral tribunals." The former encourages forum shopping, may create difficulties in enforcement, makes it difficult to contract with certainty and, even if the parties have addressed the issue, may ultimately lead to a court imposing a different law on the parties than that intended (e.g. by applying

a national

principles). As to the latter, the United States position of having such "arbitrability" issues determined by the courts is in stark contrast to the standard position in France in which the issue is left to the arbitrators. Such differences create in applicable law and jurisdiction creates uncertainty in dealing with third party issues.

Fourth, many of the aforementioned inconsistencies and uncertainties also result in the marginalization of the concept of consent to the arbitration agreement. This has already been identified and discussed above, however it is a striking characteristic of many of the cases examined. To take just one example, a case such as Enron reveals a doctrinal confusion that results in non-parties being bound to arbitrate where this does not appear to have been the intention of any of the parties or non parties at the time of entering in to the contract. This issue will be the focus of the final section.

In conclusion, more than just an academic abstraction, the third party problem is of real significance. Not only does it create uncertainty in conducting international transactions but it also has serious implications for international dispute resolution. This is seen most graphically in the third party who, although not having participated in the arbitration, finds itself constrained by the factual or legal findings in the resulting award and is equally evident in the infamous decade-long battle to obtain an enforceable award due to third party complications in the Westland Helicopterscase.

1. Common Concerns Expressed In Third Party Situations Despite the inconsistencies identified above, the various jurisdictions do share certain common policy concerns in trying to deal with the third party problem, even if methods for resolving them may differ.

First, there is a concern for the position of the original promisor whose consent to the arbitration agreement may have been conditioned on the prospects of an arbitration with the original promisee (not the third party). Such concerns come to light where it is the third party claiming against the promisor, either by way of arbitration (in which case the court is concerned that the promisor did not bargain on arbitrating with the particular third party) or by litigation (in which case the court is concerned that the promisor bargained on resolving disputes by arbitration). These concerns are all the more pressing where the third party may be more (or less) financially able to meet the costs of international commercial arbitration and honor any award, e.g. where the promisee international corporation assigns its interest to a nominee shelf company or, conversely, where the rights of a small time operator are

subrogated to a well-financed internationally savvy and litigious insurance company. Another concern identified by Girsberger and Hausmaninger is that the third party may be more advantageously placed in the arbitration, e.g. where he is a national of the pre-chosen arbitral seat, is more conversant in the applicable law originally chosen for its neutrality, or has some kind of relationship with a

pre-selected

arbitrator.

Second, there is a concern for the position of the third party who has been "dragged into" an arbitration, either as respondent in an arbitral claim by the promisor or as a plaintiff in litigation that she is subsequently compelled to arbitrate. The justification here is the obvious one that the third party did not enjoy the opportunity to negotiate the original agreement, may not have enjoyed the collateral benefits of other terms in the main contact which justified including the arbitration provision, or may not even have been aware of the arbitration agreement.

In the jurisdictions included in this study, courts and arbitrators have increasingly marginalized these concerns. With respect to the promisor's concerns, especially in the United States, the logic seems to be that "you reap what you sow," i.e. having chosen to arbitrate all disputes arising out of a contract these extend also to disputes with the third party (as seen most dramatically in the equitable estoppel cases). Often this is justified by focusing on the broad scope of the subject matter anticipated by the arbitration agreement rather than probing the parties' intention to extend the agreement to the particular third party.

As to concern for the third party, in the United States and France the analysis of claims by signatories centers on the relationship between the third party and the promisee, i.e. is it reasonable for the third party to fulfill the promisor's expectation it would arbitrate with the promisee? Where it is the third party who has sought to sue and is being compelled to arbitrate, the courts have looked at the subject matter of the third party's claim and whether it falls within the scope of the arbitration agreement, the third party's relationship to the promisee, and whether the third party has received any benefit from the main contract which contains the arbitration agreement. Such analysis proceeds under various labels: estoppel; third party beneficiary; group of companies doctrine; or is simply applied without relying on any stand alone doctrine (e.g. the V2000 test). Addressing these concerns ultimately is a matter of establishing what were the intentions of the parties. As will be discussed shortly, all three jurisdictions use this as the yardstick for measuring the appropriateness of extending the arbitration agreement. However, this analysis has been compromised by frequent reliance on a blanket "policy" to uphold arbitration agreements.

2. Parties'Intention As A Common Touchstone

All jurisdictions have as their Grundnorm for extending the arbitration agreement a test based on whether this would be in accordance with the intentions of the parties. The importance of "intention" differs across the jurisdictions. At one end of the spectrum, is the French position

that intention is enough in and of itself to extend the arbitration agreement to a third party. In the United States, intention to include a third party is but one (albeit necessary) element in various of the legal theories employed to extend the arbitration agreement. In England, intention is also important but is more likely to be associated with other legal requirements (e.g. the sufficient designation test in the new C(RTP) Act 1999) or constrained by formality requirements (e.g. section 126 of the Law of Property Act 1925). A similar spectrum exists with respect to the fundamental issue of the scope of the inquiry permitted to ascertain intention. France, as seen in the V2000 case, enjoys the most "liberal" policy, in that even mere "direct involvement" with the performance of the contract "can raise the presumption that the contracting parties' true intention was that the non-signatory party would be bound by the agreement. " The French approach also judges the third party's intent on his or her "involvement" with the main contract as a whole, rather than requiring some separate indication of consent to the arbitration agreement.

In the United States, the court in Thomson emphasized that the arbitration agreement "[c] ould not be so broadly construed as to encompass claims and parties that were not intended by the original contract. '' Yet courts have been willing to venture into the "close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contractual obligations." Indeed, much of the United States courts' expansive use of the estoppel doctrine in this context is really a backhanded way of inferring intent from the parties' representations (particularly in the case where a non-signatory seeks to establish that the signatory held itself out as willing to arbitrate). United States courts are also willing to undertake some economic analysis, e.g. in probing the "close relationship" between the promisee and third party. However this is usually justified on some other legal doctrine (e.g. "piercing the corporate veil") rather than being part of an intention inquiry for its own sake.

Compare the position in France As in France, courts and tribunals are willing to gauge intent based on the parties' intention to be bound to the main contract rather than focusing on the arbitration agreement itself. Finally, critics also contend that the "

pro arbitration

policy" operates sometimes as a substitute for contractual intent.

In England the position is less clear. In applying the "through or under" mechanism for obtaining a stay in the earlier Arbitration Act, courts were willing to undertake relatively broad inquiries into, for example, corporate structure and proximity to the dispute. 47' A similar analysis may be undertaken in finding that an ad hoc arbitration agreement had arisen between the original promisor and/or promisee and the third party. 472 However, these cases are few and of limited application. Rather, the more common approach is that seen in the "incorporation by reference" cases, in which analysis of the parties' intentions takes place only within the "four comers" of the documents at issue. 473 A similar desire to restrain the scope of inquiry into the parties' intent was evidenced in the drafting of the C(RTP) Act 1996, although this has yet to be judicially discussed. 474 Perhaps consistent with this, with some

exceptions ,... in considering the parties' intentions to expand the arbitration agreement to a third party English law still appears to focus separately on intention to be bound by the arbitration agreement itself.

However, the "spectrum" identified above should not detract from the observation that there is a discernible convergence of sorts in the treatment of third party situations in arbitration law. 476 Similarly, the rise of the broader intention test has been accompanied by a decline in the importance of formal validity requirements in all three jurisdictions. This convergence will be further discussed in the next section in the context of options for reform.

Finally, the touchstone of "intent" is also a feature of the principles of international law and the institutional rules analyzed as part of the comparative law project. Certainly a theory based on the intention of the parties falls squarely within such important transnational concepts as "good faith" and "pacta sunt servanda". Moreover, arbitral tribunals applying international law concepts have been more willing on the whole than those applying national substantive law to extend third party agreements.

Reliance on

Contract Law

Principles

Finally, a comment in answer to the introductory question: to what degree does the arbitral law applied to the third party problem mirror the general contract law position on third parties? Courts in all three jurisdictions have clearly stated that contract law determines whether a person is bound to a valid arbitration agreement. In the United States, the Supreme Court has directed that courts "apply ordinary state-law principles that govern the formation of contracts."

In France, "the principles of interpretation that apply to arbitration agreements are the same as the general principles frequently adopted with regard to all contracts." In England, "English law respects the parties' freedom to enter into arbitration agreements in the same way it respects the freedom to enter into other contracts."" Yet one could argue that the third party context is different: the question is not whether a person is necessarily a "party" to the arbitration agreement but rather whether the person is bound thereto despite not having signed the agreement. This is a distinction courts and commentators have not been willing to make. Rather, the comparative analysis untertaken in Section LII evidences a clear decision to apply third party contract principles on the basis that the problem involves the same application of substantive contract law as is required for determining the parties to the agreement. The final section discusses the correctness of this approach. Before doing so, however, note that despite the courts' frequent declaration that an arbitration agreement will be treated like any other contract, this is not always so. Sometimes the arbitration clause may be subject to a more restrictive interpretation than would otherwise apply. In other cases, the court is more willing to extend the arbitration clause a more liberal interpretation."' On occasion, the courts have even applied a specially tailored test based on the commercial

nature of arbitration provisions. Thus, there is some truth to the observation that the arbitration agreement is "governed by special rules." The final section of this article will return to the relationship between arbitration, contract law, the "intention test," and the notion of the arbitration agreement as a "special" contract.

VI. Possible SOLUTIONS To THE THIRD PARTY PROBLEM

Having accepted the existence of a "third party problem" and concluded that this impedes the efficiency and certainty of international commercial arbitration as a tool of international commerce, this section compiles alternative solutions to the problem.

A. Relying On Individual Contract Drafters

In the absence of a uniform identical rule, some standard form contracts provide their own contractual term delineating the boundaries of third party involvement in any arbitration. Ultimately, of course, the ideal outcome is exactly that: parties should turn their minds to the problem and create a clear allocation of responsibility in the event of a dispute arising. Indeed, in complex networks of contracts this may be the norm. However, in most instances this is unlikely simply because, as a "matter of psychology," it is difficult in negotiating an agreement to "contemplat[e] in detailed terms the problems" that may attend the breakdown of a successfully completed relationship. 8'

Furthermore, parties may well be unable to predict legal variables that may ultimately impact on the issue such as the applicable law of a subsequent third party claim or factual variables like the later insolvency of a party. Indeed, the third party problem arises in part due to the unpredictability of international transactions and, in particular, long term contracts. This business uncertainty combined with the legal uncertainty already identified has prompted some commentators to suggest that the "safest answer" to the third party arbitration problem is simply to insert a clause explicitly negating any possible extension to third parties. This "safe option" may have not only unintended circumstances (e.g. in a subsequent insolvency) but may also represent a missed opportunity to include some explicit mechanism for dealing with third party issues, e.g. explicitly incorporating a subcontract. Acknowledging the practical restrictions on contract drafters, reliance on individual action to resolve third party issues is unwise.

B.

Piecemeal Reform

Certain statutory and common law exceptions have been developed to clarify whether third parties are entitled to rely on an arbitration agreement despite a lack of privity, e.g. case law arising out of the Third Party (Rights Against Insurers) Act 1930 in England;49' and the autonomy of a bank guarantee from any arbitration agreement in France.492 While these examples reflect domestic law, there is no reason why international treaties could not undertake a similar role to effect universal piecemeal reform. 493 While something is better than nothing, such piecemeal efforts may in fact be counter-productive as they may usurp the urgency of obtaining a comprehensive solution.494 Furthermore, piecemeal reform may

create injustices where the underlying business transaction does not fit entirely within the recognized subject matter for third party arbitration rights. For example, a trustee in bankruptcy may be able to compel arbitration of a dispute arising out of the bankrupt's contract but the dispute may also involve another third party unable to avail itself of such procedures (e.g., a guarantor of a loan). Further complications could arise where there are questions of the applicable law, such that a trustee in bankruptcy in one jurisdiction may not have the same rights as in another. In short, piecemeal reform is an unattractive option for establishing a long term workable rule of general application.

C. Procedural Protections/Powers

The complexity and uncertainty of "protections" for third parties contained in arbitration legislation, civil procedure rules, and arbitral institution rules have already been outlined. Importantly, these "procedural protections" are usually nothing more than mechanisms to ameliorate the procedural complications that arise specifically because non-signatories are not permitted to participate in arbitration. Therefore, this seems an inappropriate basis for addressing the third-party problem.

A variation on this would be to empower arbitrators or the courts to make orders analogous to civil litigation joinder or consolidation to address some of the circumstances where third parties seek involvement in a hearing. However, applying such reforms could undermine the consensual basis for arbitration and call into question the legitimacy of the arbitrator's jurisdiction. For the reasons developed in this Section, it seems preferable to have a jurisdiction-creating rule premised on an inquiry into consent rather than some more unrestrained discretion enjoyed by the arbitrators or courts. This allows parties to conduct themselves, including their initial contracting, with more certainty. It also maintains the appropriate distinction between arbitration (based on consent) and litigation(based on compulsion).

D. Strengthening The Choice of Law/Applicable Law Rules A less radical option for reform is to accept Professor Sandrock's contention that the resolution of the third party problem lies in the application of the "respective rules of national proper laws of contract." However, the inconsistency of proper law makes it difficult to meet the needs of international commerce on this issue. Thus, one option is to clarify and harmonize choice of law rules so that parties can contract with a level of predictability in knowledge of what rules will apply to decide (a) the validity of an agreement vis-a-vis the third party, (b) the validity of the contract creating the right in the third party(e.g. an assignment agreement); and (c) who will decide (a) and (b), i.e. the arbitral tribunal or the courts. Of course, pursuing such an option would require international coordination, e.g. a treaty promulgating conflict of laws rules or a model law (or amendment to the existing UNCITRAL Model Law or the New York Convention)providing a blueprint for national legislation. This is an attractive option in as much as it uses the existing "traditional" tool of private international law to resolve the problem. Indeed, there have been advocates of developing a specific"conflict of laws" set of rules for international arbitration. However, there arefour qualifications to the feasibility and desirability of approaching the problemthis way.

First, this theory represents only a "partial solution" in that it would notachieve harmony of outcome, i.e. an enforceable agreement in one state mightstill be unenforceable in another. Rather, it simply clarifies whose law should determine the issue and by whom that law should be applied. Second, the enormity of the task cannot be underestimated. Other attempts at developing uniform rules for the law applicable to arbitration agreements have been unsuccessful4 Although this does not apply to all such attempts, third party issues canarise in legal fields as diverse as corporate law (group of companies doctrine)and the law governing assignment. As such, is it even feasible to fashion onerule for all? Third, and related to the above, if this option were to be pursued, itcould better be made part of a broader project of harmonization by internationalagreement (e.g. the Rome Convention) or by lex mercatoria. Fourth, to theextent that any clarified or harmonized conflicts rules were to be based on othermore traditional doctrines (e.g. supremacy of lex fori), this has the potential toundermine the parties' intentions and to encourage forum shopping. Both areresults inimical to the attractiveness of international commercial arbitration.

Creating A Formal Test For Third Party Arbitration This option could take many different forms. One possibility is a test that has as its foundation the principle that an arbitration agreement will bind a third party non-signatory if this is consistent with the intention of all parties. The justification for this test stems from the use of intention as a touchstone in various forms in all three jurisdictions examined and applied (albeit inconsistently) under all of the legal theories analyzed. Arguably, it is the rule that already applies generally in French law.

Pursuing this option requires formalizing it into a substantive rule of arbitration law. Ideally, this would be achieved in an international agreement (e.g. an amendment to the New York Convention) or a model law that provides a basis for harmonization at domestic law (e.g. an amendment to the UNCITRAL Model Law). The desirability of this approach depends greatly on the exact wording of the mooted law. Ideally, the rule should address all the concerns identified in the conclusion to the comparative project above. In some respects, the rule must also achieve a compromise between these concerns, e.g. theEnglish courts' hesitancy to apply an intention test as widely as that accepted inFrance. The drafter of such a rule also faces the daunting task of overcomingthe differences between dissimilar factual situations identified as giving rise to disparate legal theories, e.g. the range of legal theories applied to the charter party/bill of lading situation."

However, the fundamental objection to such an approach is that present conventions do not seek to lay down substantive laws for determining who is a party, so why should they seek to create rules for third parties? Moreover, the formulation of such a rule raises a host of ancillary questions. Must the dispite still arise out of "a defined legal relationship, whether contractual or not?"

Should the parties ignore the requirement of "an agreement in writing" or does it act as a useful constraint on the extension to third parties? Must the parties manifest their intent in writing? Should one set some bounds on the extent to which one is entitled to refer to documents outside the four corners of the contract containing the arbitration agreement? What consequential amendments are necessary to address appointment of the arbitral

tribunal etc? Must there be a prohibition on amending the arbitration agreement after its formation, i.e. does the third party have rights to prevent the arbitration agreement from being altered?

While these ancillary questions are complex, it is possible that such a rule could develop over time. However, it would seem incongruous for a principle to be established applying only to the narrow issue of third parties in arbitration. It would be more conceivable for this task to be undertaken as part of a broader project of harmonization of substantive arbitral law, possibly in conjunction with a more ambitious effort to harmonize general contract law in transnational commerce.

F. Relying Upon (And Developing) Anational/Transnational Rules

In the conclusions section to the comparative analysis, it was already noted that the rise of a test premised on "the intention of the parties" is consistent with that the "good faith" principle found in the lex mercatoriaand other anational or transnational legal regimes. Therefore, a further option for resolving the third party problem would be to encourage arbitrators and courts to deal with non-signatory issues by reference to such a principle. This differs from the previous reform option in that it does not depend on international agreements or domestic legislation but rather operates as part of a transnational or anational body of rules "[d]erive[d] from the convergence of the main legal systems from which they are drawn.

There would be two ways to invoke the rule. First, where the parties explicitly have chosen to have their dispute governed by transnational rules and the arbitral tribunal or court extends those rules to the determination of the validity of the agreement as it concerns a third party. Second, and more controversially, an arbitral tribunal could exercise its powers to apply the law determined by the conflict of laws rules it considers applicable 7 in order to determine the validity of the agreement as it concerns a third party on the basis of transnational rules (regardless of

the law applicable to the substance of the dispute). The validity of

such "transnational" approaches has been the subject of much debate. For present purposes, it suffices to say that there is some appeal to the idea that transnational rules regarding the role of third parties to the arbitration agreement could be crystallized from the partial convergence of the rules applied in the legal systems discussed above. Further, instead of being a "formalistic" rule of the sort envisaged in the previous section, a transnational rule could be premised on the "broader" principles of good faith and pacta sunt servanda as generally accepted "principles of international commercial law.

Indeed, arbitral tribunals have previously applied these principles to the interpretation of a contract in order to determine its validity, tied also to the touchstone of the parties' intentions:

The requirement that contracts be interpreted in good faith is merely another way of saying that a literal interpretation should not prevail over an interpretation reflecting a party's true intentions. As observed in an earlier award, 'the fundamental principle of good faith ...entails searching for the common intention of ...the parties.

This formulation sounds remarkably close to the proposition put in the last of the quotes introducing this article: justice demands that a formalistic interpretation of the agreement not prevent the extension of the arbitration agreement to a third party if that is what the parties intended.

However, such an approach is inherently dangerous. To pick just one of the critical commentators:

[B]roadly speaking the problems associated with the new lex mercatoriamay be divided into three categories. First, there is no clear consensus on its sources, although a number of sources have been identified with some consistency in the literature and elsewhere. Second, it is unclear where the new lex will be applied. Third, the new lex mercatoriais simply lacking in content.

In this instance, the same lack of convergence in the details of the various intent based tests plus the diversity of third party situations raise concerns about whether any rule really has crystallized as a truly a national norm. Moreover, it is doubtful whether such a transnational rule would achieve the certainty necessary for efficient risk allocation in international contract making. Finally, adoption of such a vague standard may impede developing a more precise rule as part of any general contract harmonization.

G. Relying Upon General ContractLaw

As discussed in the conclusion to the comparative section, careful application of general contract law principles can solve many third party scenarios. Therefore, one option would involve strictly treating third party issues as a matter of contract law and applying the "general principles of contract and agency" to govern the extension of the arbitration agreement to a non-signatory third party. This approach differs from "creating a formal test for third party arbitration" because there it was sought to fashion an "intention of the parties" test which would not directly be constrained by contract doctrine. With the instant option, the "ordinary principles of contract and agency" would constrain the ability of a third party to compel and to be compelled to arbitrate. While the intention of the parties may be a fundamental part of the principles of contract and agency, the more doctrinally sound approach is to adhere to existing general legal doctrine rather than create a special third party test for international commercial arbitration agreements. Accordingly, such principles as assignment, third party beneficiary and subrogation should all be applied on the same basis as with any other contract.

Thus, for example, English courts should abandon the last vestiges of the rule of strict interpretation of arbitration agreements historically linked to a fear of "ousting the jurisdiction of the courts." However, so too should United States courts forego the vague "pro-arbitration policy of the Federal Arbitration Act" and reliance on the uncertain "equitable estoppel" theory (at least in its broad hybrid sense). The French position is somewhat harder to criticize in a system where the nature of the agreement (i.e. international arbitration) seems to be a fundamental part of the general law of obligations, however the applicable test should remain anchored to the touchstone of consent to be bound by the agreement, and eschew the

dangers of fabricating "intention" based on economic proximity or interrelatedness of business transactions. The obvious disadvantage of such an approach would be that it foregoes the advantages of an internationally harmonized approach, leaving the parties at the mercy of the vagaries of choice of law issues. Further, one would lose the opportunity to provide a unified rule for all the different sorts of third party scenarios (if that is possible). However, the doctrinal and policy advantages to a more constrained contractual approach outweigh these disadvantages, as are discussed in the following section.

CONCLUDING REMARKS

Even though historically the arbitral tribunals would not easily accept the joinder of non-signatories in an arbitration proceeding, but the treatment of this matter has changed drastically. Indeed, it can be said that the commercial community has witnessed a profound change in the approach of this issue, starting from total rejection to include a non-signatory party just a few decades ago, through gradual joinder of non-signatories to the arbitration agreement or arbitration process. First there were only isolated cases in which arbitral tribunals would address the problem, but the number of cases kept increasing continuously, until today where there is no longer discussion whether it is possible or not.

The question today clearly is under what circumstances a non signatory party should be included in the arbitration process and what criteria should be taken into consideration before deciding on the matter. To consider nowadays the consent of a third party or non-signatory still as an indispensable condition in order to be able to bring it into arbitration, would prepare the path for avoiding justice done through arbitration. Actually, to defend itself it would be enough to claim that as a third non signatory party it never agreed to arbitration whatsoever and it would end there. As a solution to the problem, tribunals and authors have elaborated different theories regarding the subject. Those theories make it possible for the arbitral tribunal to oblige a third party that did not sign the agreement to arbitrate. The most important ones are estoppel, third party beneficiary, incorporation by reference, subrogation, veil piercing, group of companies, alter ego, assumption and agency. There are even cases in which the arbitral tribunal does not limit its decision on only one of the theories used to extend the arbitration agreement to non-signatory parties. An example for such a proceeding is the Thomson CSF S.A. v American Arbitration Association case, where the arbitral tribunal rendered the award taking into consideration issues like incorporation by reference, agency, veil piercing, alter ego and estoppel doctrine168 .

No doubt, up to date consent remains the foundation of relationships between parties involved in international commercial arbitration. The arbitration agreement, either included in the primitive contract signed, or agreed and signed afterwards in a separate document, reflects its contractual nature and of course also that the signatories reached an agreement. However, the non-signatories and their eventual inclusion in arbitral proceedings even though they did not sign the arbitration agreement, is a fact in the field of international dispute resolution today. Of course, reaching for the other extreme and trying to include a third non-signatory party under any circumstances, has to be avoided. Doing so would be as wrong as still sustaining that such a party should not be obliged to arbitrate. Therefore, it is important

to consider the particular circumstances of each case when the arbitral tribunal has to decide whether to bring into the arbitration proceedings a non-signatory party. The advantages and disadvantages of such a decision have to be balanced very carefully, for the signatories as well as for the nonsignatories involved. Arbitral tribunals will have to analyse in detail the arguments of each party, signatory or non-signatory, before deciding on the subject. Usually arbitral tribunals also consider decisions made by other tribunals before it, using it as a kind of precedent, which in practice actually contributes to the uniformity of arbitral awards. Such arbitral case law in general is characterized by common scenarios, like non-signatory participation in contract formation, a single contract scheme constituted by multiple documents, acceptance of the contract or arbitration agreement by the non-signatory, whether in the particular arbitration itself or in another forum; ab initio absence of corporate personality, and fraud or fraud-like abuse of corporate form. The first three relate principally to arguments based on implied consent, while the last two factors address disregard of corporate veil.

Definitely, in our opinion, the most important element to consider today due to the development of international business relationships and its unique characteristics should be the economic reality behind the transaction performed by signatory and non-signatory parties. In fact, in the emblematic Isover Saint Gobain v. Dow Chemical France case, the arbitral tribunal held that international arbitration has to be receptive to the uses and necessities of international commerce especially when there are groups of companies involved, since those represent an economic reality as a whole that cannot be ignored . Companies doing international business transactions have certain expectations when it comes to arbitration proceedings, which they want to see fulfilled, like for instance a faster and cost-effective procedure, and also that adequate protection of their rights. On the other hand, and not necessarily contradictory, there are many reasons for favouring the extension of arbitration agreements to non-signatory parties, among others because the efficiency of the procedures is increased, and also because it widens the range of justice and allows reaching for the ones really responsible, so that justice will be better served. Maintaining today the “signatories model” and ignoring the reality behind clear manifestations of willingness to arbitrate, would mean that the tribunal would not really be arbitrating the proper controversy in its whole dimension, but instead just a fragment of it. Further, one of the dangers when forcing a non-signatory party to arbitrate separately regarding a matter in which it is involved is that there could be inconsistencies between one award and the other. Obviously there would have to be arguments that would justify bringing the third non-signatory party into arbitration.

However, the efficiency or any other reason or argument cannot be used indiscriminately and without limits, putting in danger the precise objective that is to be achieved: justice. It is also necessary to bear in mind that the further one gets from the notion of consent and firm legal reasoning, the slimmer the chances are that the award will fare well after being rendered. It has become more and more relevant for arbitral tribunals to analyse, understand and reveal the economic reality behind an international business transaction, since on many occasions, especially on the ones of bigger scope, there are multiple entities involved. Those entities decided to participate in the transaction due to certain reasons, and regarding a company in

general the main reason of its existence is to make a profit. Therefore, and considering that business decisions are motivated by economic considerations, the arbitral tribunal taking those into account most likely will have very solid grounds for rendering an award regarding also third non-signatory parties.

The discussion regarding the subject is far from coming to an end. Actually, today there are probably as many awards that sentence non signatory parties to respond for damages caused by signatories, as awards considering that non-signatories cannot be made responsible. The challenge remains since to this date the solutions to the problem are not consistent; arbitral tribunals all over the world still apply different criteria, and also different legislations according to the particular case. However, in many cases non-signatories already have seen themselves bound to arbitration proceedings, and there is clearly a trend to keep on going in this direction. Definitely, the question is no longer whether the arbitration agreement should or should not be extended, but under what circumstances it should be extended. Therefore, it would be convenient to reach for internationally accepted standards, to avoid uncertainty and inconsistent decisions. As a recommendation, companies that do international business should choose very carefully the applicable law, bearing in mind also that there could eventually arise third party issues along the way making it convenient to foresee a solution to the problem. On the other hand, as the creation of a set of rules applicable to third non-signatories parties is just wishful thinking for now, due to the important differences in national legislations and lack of a common view regarding this matter, to find creative solutions applying the doctrines treated in this thesis whenever it is asked to decide about bringing into arbitration a non-signatory, remains an arbitral tribunal´s biggest challenge.

It is only natural that a company tends to protect its interests. Nevertheless, there is a fine line between protection of legitimate interests and abuse. Therefore, it is the arbitral tribunal's task to find that line. Arbitral tribunals should not be afraid of rendering an award extending the arbitration agreement to a non-signatory party, especially considering the economic reality of the particular case, whenever justice is properly served by that decision despite the consequences, like for instance that maybe the seat of arbitration could become unpopular or that a member of the tribunal eventually would not be chosen anymore by entities in similar circumstances. Justice should prevail.

211

Hit and source - focused comparison, Side by Side:

Left side: As student entered the text in the submitted document.
Right side: As the text appears in the source.

Instances from: 9a5b8605-541a-4287-be0d-d1a7630604e7

12	84%	12: 9a5b8605-541a-4287-be0d-d1a7630604e7	84%
Section 7 in THE ARBITRATION AND CONCILIATION ACT, 1996, stating that “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not” (		Section 7 of the Arbitration and Conciliation Act, 1996 provides thus: 15 "7 Arbitration agreement. -- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2)	

29	63%	29: 9a5b8605-541a-4287-be0d-d1a7630604e7	63%
parties to an arbitration agreement, therefore reference to arbitration or appointment of an arbitrator can only be with respect to the parties to arbitration agreement and not non-parties.		parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties." 16	

32	70%
other party to the arbitration agreement as also a non-party to the arbitration agreement	

32: 9a5b8605-541a-4287-be0d-d1a7630604e7	70%
other parties to the arbitration agreement as also non- parties to the arbitration agreement,	

38	53%
the signatory to the arbitration agreement, (b) commonality of subject matter, and (c) whether the transaction contemplated is composite. 11. A transaction is composite where the performance of the “mother agreement” is not feasible “without aid, execution and performance of the supplementary or ancillary agreements”	

38: 9a5b8605-541a-4287-be0d-d1a7630604e7	53%
the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements,	

41	100%
at the request of one of the parties or any person claiming through or under him,	

41: 9a5b8605-541a-4287-be0d-d1a7630604e7	100%
at the request of one of the parties 'or any person claiming through or under him',	

44	97%
Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through	

44: 9a5b8605-541a-4287-be0d-d1a7630604e7	97%
Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through	

them, the Courts under the English Law have, in certain cases, also applied the “Group of Companies Doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [‘Russell on Arbitration’ (Twenty Third Edition)]. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, ‘intention of the parties’ is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

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The

47 100%

47: 9a5b8605-541a-4287-be0d-d1a7630604e7 100%

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50 100%

50: 9a5b8605-541a-4287-be0d-d1a7630604e7 100%

one of the parties or any person claiming through or under him.

one of the parties 'or any person claiming through or under him',

53 91%

53: 9a5b8605-541a-4287-be0d-d1a7630604e7 91%

The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. • The second theory includes the legal doctrines of of agent-principal relations, apparent authority, piercing of veil (also called the “alter-ego”), joint venture relations, succession and estoppel. They do not rely on the parties’ intention but rather on the force of applicable law.

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56 100%

56: 9a5b8605-541a-4287-be0d-d1a7630604e7 100%

Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.

Chloro Controls India Private Limited v Severn Trent Water Purification Inc.8

59 68%

of the Delhi High Court, while dismissing an application under Section 8 of the Arbitration and Conciliation Act, 1996 (“

59: 9a5b8605-541a-4287-be0d-d1a7630604e7 68%

of the Madras High Court inter partes in an application under Section 9 of the Arbitration and Conciliation Act, 1996.

62 100%

that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well.

62: 9a5b8605-541a-4287-be0d-d1a7630604e7 100%

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65 89%

the fact that the appellant was not a party to the arbitral proceedings would not contest the question as to whether the award can be enforced against it.

65: 9a5b8605-541a-4287-be0d-d1a7630604e7 89%

The fact that the appellant was not a party to the

arbitral proceedings will not conclude the question as to whether the award can be enforced against it

68 78%

an arbitration agreement was entered into between KC Palanisamy (KCP), KSL and SPIL and a company by the name of Hindcorp Resorts Pvt. Ltd. (Hindcorp).

68: 9a5b8605-541a-4287-be0d-d1a7630604e7 78%

an agreement was entered into between KC Palanisamy5 (the third respondent), KSL (the first respondent) and SPIL and a company by the name of Hindcorp Resorts Pvt. Ltd. (Hindcorp).

71	100%

disputes arose between the parties resulting in the commencement of arbitral proceedings.

71: 9a5b8605-541a-4287-be0d-d1a7630604e7	100%

disputes arose between the parties resulting in the commencement of arbitral proceedings.

74	94%

the terms of the award, a direction was issued under which KCP and SPIL were required to return documents of title and share certificates contemporaneously with KSL paying an amount of Rs 3,58,11,000 together with interest at 12% p.a. on a sum of Rs 2.55 crores. KCP challenged the award of the arbitral tribunal under Section 34 of the Arbitration and Conciliation Act, 1996 on the

74: 9a5b8605-541a-4287-be0d-d1a7630604e7	94%

the terms of the award, a direction was issued under which KCP and SPIL were required to return documents of title and share certificates relating to 2.43 crore shares contemporaneously with KSL paying an amount of Rs 3,58,11,000 together with interest at 12% p.a. on a sum of Rs 2.55 crores. 4 KCP challenged the award of the arbitral tribunal under Section 34 of the Arbitration and Conciliation Act, 1996. The

77	81%

the arbitral award could not be executed against the appellant which is admittedly not a signatory to the agreement.

77: 9a5b8605-541a-4287-be0d-d1a7630604e7	81%

the arbitral award dated 16 December 2009 cannot be executed against the appellant which is admittedly not a signatory to the agreement

81	95%

in holding a non-signatory bound by an arbitration agreement, the Court approaches the matter by attributing to the

81: 9a5b8605-541a-4287-be0d-d1a7630604e7	95%

In holding a non-signatory bound by an arbitration agreement,

transactions a meaning according to the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The

the Court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The

84 99%

doctrine essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

84: 9a5b8605-541a-4287-be0d-d1a7630604e7 99%

doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory. 18

87 62%

a written agreement is to exclude the jurisdiction of national courts. Where parties have agreed to resolve their disputes by arbitration, they try to seek to substitute a personal forum for dispute resolution in situ of the adjudicatory institutions constituted by the state.

87: 9a5b8605-541a-4287-be0d-d1a7630604e7 62%

a written agreement to arbitrate? The reason is simple. An agreement to arbitrate excludes the jurisdiction of national courts. Where parties have agreed to resolve their disputes by arbitration, they seek to substitute a private forum for dispute resolution in place of the adjudicatory institutions constituted by the state.

90	100%

Does the requirement, as in Section 7 that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities?

90: 9a5b8605-541a-4287-be0d-d1a7630604e7	100%

Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities?

93	87%

an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of parties to bind both signatories and non-signatories. The SC stated that the law

93: 9a5b8605-541a-4287-be0d-d1a7630604e7	87%

an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories. In applying the doctrine, the law

96	100%

group. In holding a non-signatory bound by an arbitration agreement,

96: 9a5b8605-541a-4287-be0d-d1a7630604e7	100%

group.

In holding a non-signatory bound by an arbitration agreement,

99	100%

The group of companies doctrine has been applied to pierce the corporate veil

99: 9a5b8605-541a-4287-be0d-d1a7630604e7	100%

The group of companies doctrine has been applied to pierce the corporate veil

102	88%

to locate the “true” party in interest, and more significantly, to focus on the creditworthy member of a group of companies. Though the extension of this doctrine is met with resistance on the idea of the legal imputation of corporate

102: 9a5b8605-541a-4287-be0d-d1a7630604e7	88%

to locate the "true" party in interest, and more significantly, to target the creditworthy member of a group of companies12. Though the extension of this doctrine is met with resistance on the basis of the legal imputation of corporate 10

105	75%

personality, the application of the doctrine turns on a construction of the arbitration agreement and therefore the circumstances that concerning to the entry into and performance of the underlying contract.

105: 9a5b8605-541a-4287-be0d-d1a7630604e7	75%

personality, the application of the doctrine turns on a construction of the arbitration agreement and the circumstances relating to the entry into and performance of the underlying contract.13

108	100%

While the alter ego principle is a rule of law which disregards the effects of incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intentions of parties and does not disturb the legal personality of the entities in question.

108: 9a5b8605-541a-4287-be0d-d1a7630604e7	100%

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111	100%

111: 9a5b8605-541a-4287-be0d-d1a7630604e7	100%

that an arbitral award “shall be final and binding on the parties and

that an arbitral award "shall be final and binding on the parties and

114 58%

a clear reference to the Agreement, and it was in pursuance of that Agreement that the group companies had agreed to purchase the 1 (2013) 1

114: 9a5b8605-541a-4287-be0d-d1a7630604e7 58%

a specific reference to the share purchase agreement dated 19 July 2004. It was in pursuance of that agreement that KCP indicated, as authorised signatory of the appellant, that his group of companies had agreed to purchase the

117 73%

transfer shares to its nominees only on the express condition that the nominee would abide by the terms of the Agreement.

117: 9a5b8605-541a-4287-be0d-d1a7630604e7 73%

transfer of shares by KCP to his nominees was to be on the express condition that the nominee would abide by the terms of the agreement

120 76%

bound by the Award, notwithstanding the fact

that it was not a party to the

120: 9a5b8605-541a-4287-be0d-d1a7630604e7 76%

bound by the award.

The fact that the appellant was not a party to the

124 95%

124: 9a5b8605-541a-4287-be0d-d1a7630604e7 95%

postulates that an arbitral award “shall be final and binding on the parties and persons claiming under them respectively”. The expression ‘claiming under’, in its ordinary meaning, directs attention to the source of the right. The expression includes cases of devolution and assignment of interest. The expression “persons claiming under them” in Section 35 widens the net of those whom the arbitral award binds. It does so by reaching out not only to the parties but to those who claim under them, as well.

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127 100%

127: 9a5b8605-541a-4287-be0d-d1a7630604e7 100%

the expression “persons claiming under them” is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it. The issue in every such a case is whether the person against whom the arbitral award is sought to be enforced is one who claims under a party to the agreement.

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130 100%

130: 9a5b8605-541a-4287-be0d-d1a7630604e7 100%

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133 58%

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136 73%

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139 76%

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that it was not a party to the

143 100%

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133: 9a5b8605-541a-4287-be0d-d1a7630604e7 58%

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136: 9a5b8605-541a-4287-be0d-d1a7630604e7 73%

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139: 9a5b8605-541a-4287-be0d-d1a7630604e7 76%

bound by the award.

The fact that the appellant was not a party to the

143: 9a5b8605-541a-4287-be0d-d1a7630604e7 100%

the fact that the appellant was not a party to the arbitral proceedings will not conclude the question as to whether the award can be enforced against it on the ground that it claims under a party.

The fact that the appellant was not a party to the

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146 90%

the Court is called upon to consider whether the test embodied in Section 35 is fulfilled so as to bind the

146: 9a5b8605-541a-4287-be0d-d1a7630604e7 90%

the Court is called upon to consider whether 27 the test embodied in Section 35 is fulfilled in the present case, so as to bind the

149 96%

Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the “Group of Companies Doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to

149: 9a5b8605-541a-4287-be0d-d1a7630604e7 96%

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b) This evolves the principle that a non-signatory party might be subjected to arbitration provided these transactions were with group of companies and there was transparent intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words

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152 100%

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152: 9a5b8605-541a-4287-be0d-d1a7630604e7 100%

intention of the parties" is a very significant feature which must be established before

155 90%

arbitration can be said to include both the signatory as well as the non-signatory parties.

155: 9a5b8605-541a-4287-be0d-d1a7630604e7 90%

arbitration can be said to include the signatory as well as the non-signatory parties."

158 99%

A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter

158: 9a5b8605-541a-4287-be0d-d1a7630604e7 99%

A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to

and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements,

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164 97%

legal basis may be applied to bind a non-signatory to an arbitration agreement. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle.

They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent- principal relations, apparent authority, piercing of veil (also called the “alter ego”), joint venture relations, succession and estoppel. They do not rely

164: 9a5b8605-541a-4287-be0d-d1a7630604e7 97%

legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court held thus: "

The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer 20 mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and

on the parties’ intention but rather on the force of the applicable law. We

estoppel. They do not rely on the parties' intention but rather on the force of the applicable law. ..

We

167 100%

We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties. The

167: 9a5b8605-541a-4287-be0d-d1a7630604e7 100%

We

have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties." The

Instances from: https://www.coursehero.com/file/p4inu20/Ans-Arbitration-Agreement-The-foundation-of-arbitration-is-the-arbitration/

9	92%

agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them

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agreement between the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them.

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7 84%	7: https://www.lexisnexis.co.uk/legal/arbitration/arbitration-act-1996/the-arbitration-agreement 84%
Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York...
13 100%	13: https://www.lexisnexis.co.uk/legal/arbitration/arbitration-act-1996/the-arbitration-agreement 100%
the capacity of parties to enter into an arbitration agreement.	the capacity of parties to enter into an arbitration agreement
34 91%	34: https://www.lexisnexis.co.uk/legal/arbitration/arbitration-act-1996/the-arbitration-agreement 91%
the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York...

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3 96%

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 may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency.

Most of the

3: https://mitchellhamline.edu/dispute-resolution-institute/wp-content/uploads/sites/18/2016/05/DOC-37-Hosking_Non_Signatories.pdf 96%

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 may be bound to an arbitration agreement if so dictated by the ‘ordinary principles of contract and agency’. (4) Of course, the

4 100%

that justice would not seem to be done if the only criterion

4: https://mitchellhamline.edu/dispute-resolution-institute/wp-content/uploads/sites/18/2016/05/DOC-37-Hosking_Non_Signatories.pdf 100%

that ‘justice would not seem to be done if the only criterion’

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Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York

35: https://mitchellhamline.edu/dispute-resolution-institute/wp-content/uploads/sites/18/2016/05/DOC-37-Hosking_Non_Signatories.pdf 92%

the arbitration). 62 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’), 330

Convention).

159 96%

agreement signed by the parties or contained in an exchange of letters or telegrams.

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agreement be ‘signed by the parties or contained in an exchange of letters or telegrams’. (62)

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1 100%

a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit....

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a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'. 35

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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.

2: https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/25249/Brekoulakis%20Rethinking%20Consent%20in%20International%20Commercial%20Arbitration%3A%20A%20General%20Theory%20for%20Non-signatories%202017%20Accepted.pdf?sequence=1&isAllowed=y 100%

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.'

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Convention),

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the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) 129

21 100%

intimately founded in and intertwined with the underlying contract obligations.'

(6)

21: https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/25249/Brekoulakis%20Rethinking%20Consent%20in%20International%20Commercial%20Arbitration%3A%20A%20General%20Theory%20for%20Non-signatories%202017%20Accepted.pdf?sequence=1&isAllowed=y 100%

intimately founded in and intertwined with the underlying contract obligations

22 94%

irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality of which the arbitral tribunal should take account when it rules on its own jurisdiction [...]”

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irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (une réalité économique unique) of which the

arbitral tribunal should take account when it rules on its own jurisdiction [...]

23 57%

arbitration clause contained in an international contract has its own validity and effectiveness, which require its extension to all parties directly involved in the performance of the contract.

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arbitration clause included in an international contract has an autonomous validity and effectiveness, which calls for the clause to be extended

to parties directly involved in the performance of the contract

24 100%

were aware of the existence and the scope of the arbitration clause,

24: https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/25249/Brekoulakis%20Rethinking%20Consent%20in%20International%20Commercial%20Arbitration%3A%20A%20General%20Theory%20for%20Non-signatories%202017%20Accepted.pdf?sequence=1&isAllowed=y 100%

were aware of the existence and the scope of the arbitration clause,

25 60%

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to parties that are directly involved in the performance of the contract and the disputes that may arise out of

%20General%20Theory%20for%20Non-signatories%202017%20Accepted.pdf?sequence=1&isAllowed=y 60%

to parties directly involved in the performance of the contract

and in the disputes arising out of

173 100%

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(

a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

173: https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/25249/Brekoulakis%20Rethinking%20Consent%20in%20International%20Commercial%20Arbitration%3A%20A%20General%20Theory%20for%20Non-signatories%202017%20Accepted.pdf?sequence=1&isAllowed=y 100%

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34

174 100%

174: https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/25249/Brekoulakis%20Rethinking%20Consent

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought

finds that:

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Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: [....] (

176 100%

b) The recognition or enforcement of the award would be contrary to

the public policy of that country.

176: https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/25249/Brekoulakis%20Rethinking%20Consent%20in%20International%20Commercial%20Arbitration%3A%20A%20General%20Theory%20for%20Non-signatories%202017%20Accepted.pdf?sequence=1&isAllowed=y 100%

b) The recognition or enforcement of the award would be contrary to the public policy of that country." 130

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dispute arising between two persons bound by an arbitration agreement in connection with the multiparty project will have to be resolved exclusively by arbitration between these two parties,	dispute arising between two persons bound by an arbitration agreement in connection with a multiparty project will be resolved by arbitration exclusively between these two parties.
6 56%	6: https://www.russianlawjournal.org/jour/article/download/274/164 56%
parties cannot participate in the resolution of the dispute, even if they play an active role in the actual business project, and, therefore, they have an interest in the outcome of the dispute. These persons will remain third parties both to the arbitration agreement and the arbitral award	parties cannot participate in the resolution of the dispute through arbitration, even if they have played an active role in the actual project. Notwithstanding any legitimate interest, they might have the outcome of the dispute; these parties will remain alien both to the arbitration proceedings and an arbitral award.
33 95%	33: https://www.russianlawjournal.org/jour/article/download/274/164 95%
the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York	the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York:
168 84%	168: https://www.russianlawjournal.org/jour/article/download/274/164 84%

the complicated structure of many multinational groups of companies requires several affiliates or subsidiary companies, directors or stockholders of the same group to become actively involved in the execution of a contract

the complicated structure of many multinational groups and companies requires several affiliates, subsidiary companies, directors or even stockholders of the same group to become actively involved in the execution of the contract. 2

169 87%

dispute arising between two persons bound by an arbitration agreement in connection with a multiparty project will have to be resolved by arbitration exclusively between these two parties. Other parties cannot participate in the resolution of the dispute through arbitration, even if they have played an active role in the actual project. Notwithstanding any legitimate interest they might have in the outcome of the dispute, these parties will remain third parties both to the arbitration proceedings and the ensuing arbitral award.

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dispute arising between two persons bound by an arbitration agreement in connection with a multiparty project will be resolved by arbitration exclusively between these two parties.

Other

parties cannot participate in the resolution of the dispute through arbitration, even if they have played an active role in the actual project. Notwithstanding any legitimate interest, they might have the outcome of the dispute; these parties will remain alien both to the arbitration proceedings and an arbitral award.

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THE EFFECT OF AN ARBITRAL AWARD AND THIRD PARTIES IN INTERNATIONAL ARBITRATION

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The Effect of an Arbitral Award and Third Parties in International Arbitration:

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Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

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recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that

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Case No. 1434, extending the arbitration clause based on consent, manifested by inconsistent designation of the party contracting on behalf of the non-signatory in a series of

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case ICC No. 1434 15 , extending the arbitration clause to bind a non-signatory was based on consent, which consent was manifested by inconsis- tent designation of the party contracting on behalf of the non-signatory in a series of

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Case No. 1434, extending the arbitration clause based on consent, manifested by inconsistent designation of the party contracting on behalf of the non-signatory in a series of

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case ICC No. 143415, extending the arbitration clause

to bind a non-signatory was based on consent, which consent was manifested by inconsis-

tent designation of the party contracting on behalf of the non-signatory in a series of

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10	84%

Section 7 in THE ARBITRATION AND CONCILIATION ACT, 1996, stating that “arbitration agreement” means an

agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them

in respect of a defined legal relationship, whether contractual or not” (

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Section 7 of the Arbitration and Conciliation Act, 1996 provides thus: 15

“7 Arbitration agreement. — (1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2)

27	63%

parties to an arbitration agreement, therefore reference to arbitration or appointment of an arbitrator can only be with respect to the parties to arbitration agreement and not non-parties.

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parties to the arbitration agreement,

reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties.” 16

30	70%

other party to the arbitration agreement as also a non-party to the arbitration agreement

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other parties to the arbitration agreement as also non-

parties to the arbitration agreement,

36	53%

the signatory to the arbitration agreement, (b) commonality of subject matter, and (c) whether the transaction contemplated is composite. 11. A transaction is composite where the performance of the “mother agreement” is not feasible “without aid, execution and performance of the supplementary or ancillary agreements”

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the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements,

39	100%

at the request of one of the parties or any person claiming through or under him,

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at the request of

one of the parties ‘or any person claiming through or under him’,

42	97%

Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the “Group of Companies Doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to

42: https://indiankanoon.org/doc/86950356/?type=print	97%

Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the “group of companies doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the

bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. ['Russell on Arbitration' (Twenty Third Edition)]. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, 'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

The

signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a 19 signatory to the contract containing the arbitration agreement.

[Russell on Arbitration (23rd Edn.)] This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "

intention of the parties" is a very significant feature which must be established before

the scope of

arbitration can be said to include the signatory as well as the non-signatory parties."

The

45 100%

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at the request of one of the parties or any person claiming through or under him,

at the request of

one of the parties 'or any person claiming through or under him',

48 100%

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one of the parties or any person claiming through or under him.

one of the parties ‘or any person claiming through or under him’,

51 91%

The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. • The second theory includes the legal doctrines of of agent-principal relations, apparent authority, piercing of veil (also called the “alter-ego”), joint venture relations, succession and estoppel. They do not rely on the parties’ intention but rather on the force of applicable law.

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54 100%

Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.

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Chloro Controls India Private Limited v Severn Trent Water Purification Inc.8

57 68%

of the Delhi High Court, while dismissing an application under Section 8 of the Arbitration and Conciliation Act, 1996 (“

57: https://indiankanoon.org/doc/86950356/?type=print 68%

of the Madras High Court inter partes in an application under Section 9 of the Arbitration and Conciliation Act, 1996.

60	100%

that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well.

60: https://indiankanoon.org/doc/86950356/?type=print	100%

that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well.

63	89%

the fact that the appellant was not a party to the arbitral proceedings would not contest the question as to whether the award can be enforced against it.

63: https://indiankanoon.org/doc/86950356/?type=print	89%

The fact that the appellant was not a party to the

arbitral proceedings will not conclude the question as to whether the award can be enforced against it

66	78%

an arbitration agreement was entered into between KC Palanisamy (KCP), KSL and SPIL and a company by the name of Hindcorp Resorts Pvt. Ltd. (Hindcorp).

66: https://indiankanoon.org/doc/86950356/?type=print	78%

an agreement was entered into between KC Palanisamy5 (the third respondent), KSL (the first respondent) and SPIL and a company by the name of Hindcorp Resorts Pvt. Ltd. (Hindcorp).

69	100%

disputes arose between the parties resulting in the commencement of arbitral proceedings.

69: https://indiankanoon.org/doc/86950356/?type=print	100%

disputes arose between the parties resulting in the commencement of arbitral proceedings.

72	94%

72: https://indiankanoon.org/doc/86950356/?type=print	94%

the terms of the award, a direction was issued under which KCP and SPIL were required to return documents of title and share certificates contemporaneously with KSL paying an amount of Rs 3,58,11,000 together with interest at 12% p.a. on a sum of Rs 2.55 crores. KCP challenged the award of the arbitral tribunal under Section 34 of the Arbitration and Conciliation Act, 1996 on the

the terms of the award, a direction was issued under which KCP and SPIL were required to return documents of title and share certificates relating to 2.43 crore shares contemporaneously with KSL paying an amount of Rs 3,58,11,000 together with interest at 12% p.a. on a sum of Rs 2.55 crores. 4 KCP challenged the award of the arbitral tribunal under Section 34 of the Arbitration and Conciliation Act, 1996. The

75 81%

75: https://indiankanoon.org/doc/86950356/?type=print 81%

the arbitral award could not be executed against the appellant which is admittedly not a signatory to the agreement.

the arbitral award dated 16 December 2009 cannot be executed against the appellant which is admittedly not a signatory to the agreement

79 95%

79: https://indiankanoon.org/doc/86950356/?type=print 95%

in holding a non-signatory bound by an arbitration agreement, the Court approaches the matter by attributing to the transactions a meaning according to the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The

In holding a non- signatory bound by an arbitration agreement,

the Court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The

82 99%

82: https://indiankanoon.org/doc/86950356/?type=print 99%

doctrine essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.

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85 62%

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88 100%

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94 100%

94: https://indiankanoon.org/doc/86950356/?type=print 100%

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103 75%

103: https://indiankanoon.org/doc/86950356/?type=print 75%

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141: https://indiankanoon.org/doc/86950356/?type=print	100%

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144	90%

the Court is called upon to consider whether the test embodied in Section 35 is fulfilled so as to bind the

144: https://indiankanoon.org/doc/86950356/?type=print	90%

the Court is called upon to consider whether 27 the test embodied in Section 35 is fulfilled in the present case, so as to bind the

147 96%

Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the “Group of Companies Doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. .

b) This evolves the principle that a non-signatory party might be subjected to arbitration provided these transactions were with group of companies and there was transparent intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words

147: https://indiankanoon.org/doc/86950356/?type=print 96%

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[Russell on Arbitration (23rd Edn.)] This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, “

150 100%

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153 90%

arbitration can be said to include both the signatory as well as the non-signatory parties.

153: https://indiankanoon.org/doc/86950356/?type=print 90%

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156 99%

A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

156: https://indiankanoon.org/doc/86950356/?type=print 99%

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162 97%

legal basis may be applied to bind a non-signatory to an arbitration agreement. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle.

They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent- principal relations, apparent authority, piercing of veil (also called the “alter ego”), joint venture relations, succession and estoppel. They do not rely on the parties’ intention but rather on the force of the applicable law. We

162: https://indiankanoon.org/doc/86950356/?type=print 97%

legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court held thus: “

The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer 20 mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called “the alter ego”), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law. ..

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165 100%

We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties. The

165: https://indiankanoon.org/doc/86950356/?type=print 100%

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Instances from: https://indiankanoon.org/doc/86950356/

11	84%

Section 7 in THE ARBITRATION AND CONCILIATION ACT, 1996, stating that “arbitration agreement” means an

agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them

in respect of a defined legal relationship, whether contractual or not” (

11: https://indiankanoon.org/doc/86950356/	84%

Section 7 of the Arbitration and Conciliation Act, 1996 provides thus: 15

“7 Arbitration agreement. — (1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2)

28	63%

parties to an arbitration agreement, therefore reference to arbitration or appointment of an arbitrator can only be with respect to the parties to arbitration agreement and not non-parties.

28: https://indiankanoon.org/doc/86950356/	63%

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reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties.” 16

31	70%

other party to the arbitration agreement as also a non-party to the arbitration agreement

31: https://indiankanoon.org/doc/86950356/	70%

other parties to the arbitration agreement as also non-

parties to the arbitration agreement,

37 53%

the signatory to the arbitration agreement, (b) commonality of subject matter, and (c) whether the transaction contemplated is composite. 11. A transaction is composite where the performance of the “mother agreement” is not feasible “without aid, execution and performance of the supplementary or ancillary agreements”

37: https://indiankanoon.org/doc/86950356/ 53%

the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements,

40 100%

at the request of one of the parties or any person claiming through or under him,

40: https://indiankanoon.org/doc/86950356/ 100%

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one of the parties ‘or any person claiming through or under him’,

43 97%

Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the “Group of Companies Doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to

43: https://indiankanoon.org/doc/86950356/ 97%

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46 100%

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49 100%

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52: https://indiankanoon.org/doc/86950356/ 91%

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55 100%

Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.

55: https://indiankanoon.org/doc/86950356/ 100%

Chloro Controls India Private Limited v Severn Trent Water Purification Inc.8

58 68%

of the Delhi High Court, while dismissing an application under Section 8 of the Arbitration and Conciliation Act, 1996 (“

58: https://indiankanoon.org/doc/86950356/ 68%

of the Madras High Court inter partes in an application under Section 9 of the Arbitration and Conciliation Act, 1996.

61 100%	61: https://indiankanoon.org/doc/86950356/ 100%
that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well.	that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well.
64 89%	64: https://indiankanoon.org/doc/86950356/ 89%
the fact that the appellant was not a party to the arbitral proceedings would not contest the question as to whether the award can be enforced against it.	The fact that the appellant was not a party to the arbitral proceedings will not conclude the question as to whether the award can be enforced against it
67 78%	67: https://indiankanoon.org/doc/86950356/ 78%
an arbitration agreement was entered into between KC Palanisamy (KCP), KSL and SPIL and a company by the name of Hindcorp Resorts Pvt. Ltd. (Hindcorp).	an agreement was entered into between KC Palanisamy5 (the third respondent), KSL (the first respondent) and SPIL and a company by the name of Hindcorp Resorts Pvt. Ltd. (Hindcorp).
70 100%	70: https://indiankanoon.org/doc/86950356/ 100%
disputes arose between the parties resulting in the commencement of arbitral proceedings.	disputes arose between the parties resulting in the commencement of arbitral proceedings.
73 94%	73: https://indiankanoon.org/doc/86950356/ 94%

the terms of the award, a direction was issued under which KCP and SPIL were required to return documents of title and share certificates contemporaneously with KSL paying an amount of Rs 3,58,11,000 together with interest at 12% p.a. on a sum of Rs 2.55 crores. KCP challenged the award of the arbitral tribunal under Section 34 of the Arbitration and Conciliation Act, 1996 on the

the terms of the award, a direction was issued under which KCP and SPIL were required to return documents of title and share certificates relating to 2.43 crore shares contemporaneously with KSL paying an amount of Rs 3,58,11,000 together with interest at 12% p.a. on a sum of Rs 2.55 crores. 4 KCP challenged the award of the arbitral tribunal under Section 34 of the Arbitration and Conciliation Act, 1996. The

76 81%

76: https://indiankanoon.org/doc/86950356/ 81%

the arbitral award could not be executed against the appellant which is admittedly not a signatory to the agreement.

the arbitral award dated 16 December 2009 cannot be executed against the appellant which is admittedly not a signatory to the agreement

80 95%

80: https://indiankanoon.org/doc/86950356/ 95%

in holding a non-signatory bound by an arbitration agreement, the Court approaches the matter by attributing to the transactions a meaning according to the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject matter and the composite nature of the transaction weigh in the balance. The

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86 62%

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86: https://indiankanoon.org/doc/86950356/ 62%

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126 100%

the expression “persons claiming under them” is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it. The issue in every such a case is whether the person against whom the arbitral award is sought to be enforced is one who claims under a party to the agreement.

126: https://indiankanoon.org/doc/86950356/ 100%

The expression “persons claiming under them” is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it. The issue in every such a case is whether the person against whom the arbitral award is sought to be enforced is one who claims under a party to the agreement.

19

129 100%

that an arbitral award “shall be final and binding on the parties and

129: https://indiankanoon.org/doc/86950356/ 100%

that an arbitral award “shall be final and binding on the parties and

132 58%

a clear reference to the Agreement, and it was in pursuance of that Agreement that the group companies had agreed to purchase the 1 (2013) 1

132: https://indiankanoon.org/doc/86950356/ 58%

a specific reference to the share purchase agreement dated 19 July 2004. It was in pursuance of that agreement that KCP indicated, as authorised signatory of the appellant, that his group of companies had agreed to purchase the

135	73%

transfer shares to its nominees only on the express condition that the nominee would abide by the terms of the Agreement.

135: https://indiankanoon.org/doc/86950356/	73%

transfer of shares by KCP to his nominees was to be on the express condition that the nominee would abide by the terms of the agreement

138	76%

bound by the Award, notwithstanding the fact

that it was not a party to the

138: https://indiankanoon.org/doc/86950356/	76%

bound by the award.

The fact that the appellant was not a party to the

142	100%

the fact that the appellant was not a party to the arbitral proceedings will not conclude the question as to whether the award can be enforced against it on the ground that it claims under a party.

142: https://indiankanoon.org/doc/86950356/	100%

The fact that the appellant was not a party to the

arbitral proceedings will not conclude the question as to whether the award can be enforced against it

on the ground that it claims under a party.

145	90%

the Court is called upon to consider whether the test embodied in Section 35 is fulfilled so as to bind the

145: https://indiankanoon.org/doc/86950356/	90%

the Court is called upon to consider whether 27 the test embodied in Section 35 is fulfilled in the present case, so as to bind the

148 96%

Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the “Group of Companies Doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. .

b) This evolves the principle that a non-signatory party might be subjected to arbitration provided these transactions were with group of companies and there was transparent intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words

148: https://indiankanoon.org/doc/86950356/ 96%

Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the “group of companies doctrine”. This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a 19 signatory to the contract containing the arbitration agreement.

[Russell on Arbitration (23rd Edn.)] This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, “

151 100%

intention of the parties’ is a very significant feature which must be established before

151: https://indiankanoon.org/doc/86950356/ 100%

intention of the parties” is a very significant feature which must be established before

154 90%

arbitration can be said to include both the signatory as well as the non-signatory parties.

154: https://indiankanoon.org/doc/86950356/ 90%

arbitration can be said to include the signatory as well as the non-signatory parties.”

157 99%

A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

157: https://indiankanoon.org/doc/86950356/ 99%

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discussed.”

163 97%

legal basis may be applied to bind a non-signatory to an arbitration agreement. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle.

They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent- principal relations, apparent authority, piercing of veil (also called the “alter ego”), joint venture relations, succession and estoppel. They do not rely on the parties’ intention but rather on the force of the applicable law. We

163: https://indiankanoon.org/doc/86950356/ 97%

legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court held thus: “

The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer 20 mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called “the alter ego”), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law. ..

We

166 100%

We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties. The

166: https://indiankanoon.org/doc/86950356/ 100%

We

have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.” The

Instances from: https://core.ac.uk/download/pdf/48678043.pdf

14 66%	14: https://core.ac.uk/download/pdf/48678043.pdf 66%
the arbitration to be joined provided that such third party and the applicant party have consented to such joinder in writing.	the arbitration as a party, provided that such third person or persons and the applicant party have consented to such joinder in writing. 236
15 95%	15: https://core.ac.uk/download/pdf/48678043.pdf 95%
party to the arbitration with the written consent of such third party,	party to the arbitration agreement, with the written consent of such third party,
16 95%	16: https://core.ac.uk/download/pdf/48678043.pdf 95%
provided that such person is a party to the arbitration agreement. The	provided that such person is a party to the arbitration agreement, with the
17 76%	17: https://core.ac.uk/download/pdf/48678043.pdf 76%
Rules, consent of all the parties is not required for the consolidation of	rules, the consent of all of the related parties is not required for the possibility of

Instances from: https://lirias.kuleuven.be/retrieve/336478

20 100%	20: https://lirias.kuleuven.be/retrieve/336478 100%
out of common law principles of contract and agency law."	out of common law principles of contract and agency law: 1.
26 84%	26: https://lirias.kuleuven.be/retrieve/336478 84%
argued that it was not a party to the arbitration agreement and thus could not be	argued that it was not a party to the arbitration agreement and therefore the award could not be
78 75%	78: https://lirias.kuleuven.be/retrieve/336478 75%
was bound by the Award, though it was neither a party to the arbitration	was prejudiced by the award, even though it was not a party to the arbitration
121 61%	121: https://lirias.kuleuven.be/retrieve/336478 61%
that it was not a party to the arbitration agreement or proceedings. Insofar as the maintainability of	that it was not a party to the arbitration agreement. In annulment proceedings, however, the Court of
140 61%	140: https://lirias.kuleuven.be/retrieve/336478 61%

that it was not a party to the

arbitration agreement or proceedings. Insofar as the maintainability of

that it was not a party to the arbitration agreement. In annulment proceedings, however, the Court of

160 100%

it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question,

160: https://lirias.kuleuven.be/retrieve/336478 100%

it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question. “

161 100%

It is very desirable that everything should be done to avoid such a circumstance [

161: https://lirias.kuleuven.be/retrieve/336478 100%

It is very desirable that everything should be done to avoid such a circumstance”.

171 100%

THE EFFECT OF AN ARBITRAL AWARD AND THIRD PARTIES IN INTERNATIONAL ARBITRATION

171: https://lirias.kuleuven.be/retrieve/336478 100%

The effect of an arbitral award and third parties in international arbitration:

175 92%

finds that:

(

175: https://lirias.kuleuven.be/retrieve/336478 92%

finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country.

a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country;
