THE EXTENSION OF ARBITRATION AGREEMENTS TO NON-SIGNATORIES – A GLOBAL PERSPECTIVE

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Abstract

The present article is aimed at analysing the various modes by which a non-signatory may be bound by an arbitration agreement, and the varying positions adopted by different jurisdictions across the globe on this issue. In the opinion of the authors, this aspect has gained particular importance in the wake of the popularity that arbitration has gained as the most preferred mode of dispute resolution – especially with respect to disputes between parties or corporations of different nationalities. Undoubtedly, the first step towards initiating arbitration is ensuring that a valid arbitration agreement exists between the parties. The scheme of dispute resolution has seen an evolution over the years but it remains undecided whether the archaic formalistic requirements of writing and signature in relation to arbitration agreements still hold water, or whether other factors may be considered to ascertain the intention of the parties. Lastly, given the consensual nature of arbitration, it is not uncommon for parties to choose a foreign governing law – in fact choosing the most arbitration friendly jurisdiction as the seat of arbitration is the foremost consideration in drafting an arbitration clause. It is for this purpose that the authors have considered the position taken by a few of the more popular arbitration venues in their analysis.

I. Introduction

Founded on the principle of *l'autonomie de la volonté*, arbitration law finds its sanction in the consent of parties. This is so much so that the Supreme Court of Texas has described "*consent*" as the "*first principle*" of arbitration.[1] This consent is found in the arbitration agreement entered into by the parties. It is for this reason that the position of non-signatories to arbitration agreements has led to much debate in the arbitration world.

The importance of consent in arbitration proceedings may be gauged by the adumbration of the United States ["**U.S.**"] Supreme Court in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*[2] wherein it stated that arbitration "*is a matter of consent, not coercion*". Accordingly, when interpreting

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[1] Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[2] 559 U.S. 662 (2010).

an arbitration agreement, efforts must be made to give effect to the parties' common intention rather than being restricted to the literal wordings used in the agreement[3]. Further, arbitration agreements are to be interpreted in *good faith*. Therefore, to ascertain and respect the common intention of the parties, the consequences of the commitments the parties may be considered as having been reasonably and legitimately envisaged.[4] While there are numerous impediments that may arise as regards the enforcement of arbitration agreements, the focus of this article is on the enforceability of arbitration agreements on non-signatories.

To this end, this article seeks to analyse the position of law on the touchstone of the following:

a. The formalistic requirements of a valid and binding arbitration agreement as per (a) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [the "**NYC**"]; and (b) UNCITRAL Model Law on International Commercial Arbitration, 1985 [the "**Model Law**"];
b. The position taken by national courts with respect to the enforcement of arbitration agreements as against non-signatories;
c. The enforcement of awards where non-signatories have been joined to the proceedings;
d. The position of 'third party beneficiaries' with respect to arbitration agreements; and
e. The position of third parties during the conduct of arbitral proceedings.

II. The 'Arbitration Agreement' under international legal instruments

In the international context, the most authoritative definitions of an arbitration agreement have been embodied in the NYC and in the Model Law. The NYC is the primary instrument governing the recognition and enforcement of arbitration agreements and foreign arbitral awards on an international scale. The definition of an arbitration agreement as embodied in Article II of the NYC essentially mandates that an arbitration agreement must be "*in writing*" in order to be recognized by States and goes further to state that an agreement would be deemed to be "*in writing*" if it were an arbitral clause or agreement signed by the parties.

The Model Law (as amended in 2006), much like the NYC, requires an arbitration agreement between parties to submit to arbitration all or certain disputes which have arisen or which may arise between them to be "*in writing*". However, the language employed is of a far wider import in that Article VII(3) clarifies that an arbitration agreement shall be in writing if its contents are

[3] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 257 (Emmanual Gaillard et al. eds., 1999).

[4] Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, (Sep. 25, 1983), 23 I.L.M. 351, 359 (1984).

recorded in any form, whether orally, by conduct or by other means. It therefore follows that where a "non-signatory" may be bound to arbitrate, the requirement of an arbitration agreement is not dispensed with but only that the agreement gains force by a means other than signature. Seeing as how little guidance is available in the applicable international instruments as to whether non-signatories can be bound to arbitrate, it is necessary to look to the position taken by different national legal systems.

III. The Position taken by National Courts 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[5] and the 2014[6] versions) provide for third parties to the arbitration to be joined provided that such third party and the applicant party have consented to such joinder in writing. 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 party to the arbitration with the written consent of such third party, it may only be done 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

5 *See* London Council of International Arbitration, Arbitration Rules, *LCIA Arbitration Rules, 1998,* Rule 22.1(h) (Jan. 1, 1998).

6 *See* London Council of International Arbitration, Arbitration Rules, *LCIA Arbitration Rules, 2014*, Rule 22.1(viii) (Oct. 1, 2014).

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.

As discussed below, 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.

A. France

France, being an arbitration friendly jurisdiction, was among the first to extend an arbitration agreement to non-signatories forming part of a larger group of companies involved in a dispute which formed the subject matter of an arbitration. When confronted with a challenge to an interim award extending an arbitration agreement to a parent company and an affiliate concern, issued by an ICC Tribunal, the French Court of Appeal refused to set aside that award.[7] In this case, a claim was brought before an ICC Tribunal not only by the signatories to the disputed agreements, but also by their American parent Company, Dow Chemical Company and their French affiliate, Dow Chemical France. When the jurisdiction of the Tribunal was contested on the footing that neither Dow Chemical Company nor Dow Chemical France were signatories to the arbitration agreement, the Tribunal found that Dow Chemical Company, being the parent, exercised *deep and pervasive control* over Dow Chemical A.G. (which was party to the agreement). As regards Dow Chemical France, the Tribunal acknowledged that it played a crucial role in the negotiation of the disputed contract itself and was also involved in the conclusion, performance and termination of the disputed agreement. It became apparent that the companies, though separate legal entities formed a single economic reality and any distinction would only be cosmetic. Further, the Court of Appeal also took into consideration the need for speedy and efficacious resolution of disputes in deciding against setting aside the award.

French Courts have also cited with approval the doctrine of "*lifting the corporate veil*" with reference to the extension of arbitration agreements to non-signatories. The leading case in this

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[7] Dow Chemical v. Isover St. Gobain, ICC Award No. 4131; Dow Chemical v. Isover St. Gobain, Y. B. Comm. Arb. 131, 146.

regard is *Orri v Societe des Lubrifiants Elf Aquitaine*.[8] In this case, the court permitted piercing of the corporate veil and extension of the arbitration clause to a non-signatory since the appellant, a party to the arbitration agreement, had perpetrated fraud to avoid paying its creditors by using several marionette companies which were not, in fact, party to the arbitration agreement. The Court's decision was based on the fact that the appellant was the sole decision maker in the particular association of companies and it would be inequitable to permit it to cower away from its obligation to pay on a mere formality.

B. United Kingdom

While the *Dow Chemical*[9] approach has received widespread acceptance, the law applicable to the dispute cannot be ignored, as was the case in *Peterson Farms Inc. v. M. Farming Ltd.*[10] The specific issue that was raised in appeal before the English Commercial Court was that the 'group of companies' doctrine was not recognized under Arkansas law, being the applicable law chosen by the parties. While it could have been argued that English law permits extension of arbitration agreements in agency contracts, this plea had not been raised and the ICC award was consequently set aside. The Commercial Court, without ascribing any reasons for its opinion, also opined that the group of companies doctrine did not form a part of English law.

In another case, the Chancery Division granted a stay of court proceedings in favour of arbitration notwithstanding that the stay had been sought by a subsidiary which was not a party to the arbitration agreement. The subsidiary in question had also entered into a distribution agreement with its parent for the performance of the disputed contract. When an action in Court was brought against both the companies, the parent company invoked the arbitration clause and the subsidiary contended that it was claiming 'through' or 'under' its parent and ought to be joined to the arbitration proceedings. The Chancery Division reasoned that the claims against the parent and the subsidiary were so closely connected that the subsidiary could establish a claim in arbitration as a party claiming "through or under" the signatory.[11] Further, the Chancery Division also expressed the view that a wholly owned subsidiary subcontracting from its parent could also be joined in an arbitration concerning the main agreement.[12]

However, in *The City of London v Sancheti*,[13] the English Court of Appeal overturned the decision

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8 *Orri v Societe des Lubrifiants Elf Aquitaine*, Cour de cassation, First Civil Chamber, 11 June 1991 (France).
9 *Id.*
10 [2004] EWHC (Comm.) 121 (U.K.).
11 UCLAF v. G.D. Searle & Co. Ltd. and G.D. Searle & Co. Ltd., (1978) 1 Lloyd's Rep. 225 (U.K.).
12 *Id.*
13 The City of London v Sancheti, (2008) EWCA Civ. 1283 (U.K.).

in *Roussel-Uclaf v G.D. Searle*[14] and held that a mere legal or commercial connection to the relevant agreements, which contain an arbitration clause, is not sufficient to bind a non-signatory claiming through or under a party to an arbitration agreement.

C. The United States of America

As to U.S. law, the application of the 'group of companies' doctrine remains uncertain. The Second Circuit has expressly rejected the 'group of companies' doctrine while stating that group companies cannot be bound to an arbitration agreement merely by assisting in the conclusion, performance or termination of the disputed agreement.[15] The Second Circuit carved out that the only situations in which arbitration agreements could be extended to non-signatories were incorporation by reference, agency and related contracts.[16]

The Fifth Circuit, on the other hand, has acknowledged the "*alter ego*" theory and permitted extending an arbitration agreement to state entities that exercised "*total dominion and control*" over the signatory party.[17] The U.S. Court of Appeals, Fifth Circuit, in *Bridas S.A.P.I.C. v. Government of Turkmenistan*,[18] held, in the context of the government being held responsible for its instrumentality, that a non-signatory may be bound to an arbitration agreement if it is an "*alter ego*" of the signatory. In so holding, the Court of Appeals deviated from the well settled doctrine that a parent corporation is not liable for the acts of its subsidiaries. The Court of Appeals culled out cases where the corporate form of organisations was being used as a sham to perpetrate fraud as an exception to the doctrine. It was further explained that in order to attract the "*alter ego*" exception, the conduct of the parent *vis-á-vis* its subsidiary was to be looked into and it must be in complete control of its subsidiary, which control was being used to perpetrate fraud.

The Ninth Circuit (Court of Appeals), in *Paracor Finance Inc. & Ors.v. General Electric Capital Corporation*,[19] followed the ratio of *Britton v. Co-op Banking Group*[20] where it was held that an arbitration clause is like a contractual right and may not be invoked by a non-signatory, except in accordance with the ordinary principles of contract and agency. The Court held that where the

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14 (1978) 1 Lloyd's Rep. 225 (U.K.).

15 Sarhank Group v. Oracle Corporation, 404 F. 3d 657 (2d Cir. 2005) (U.S.).

16 Similar is the stand taken by the US Court of Appeals, Second Circuit in Choctaw Generation Limited Partnership v. American Home Assurance Company, 271 F. 3d 403 (2d Cir. 2001), wherein the Court of Appeals held that the signatory was estopped from claiming that the non-signatory could not claim any remedies by way of arbitration when the claims and relief sought by the non-signatory are intertwined with the subject matter of the agreement containing the arbitration clause [hereinafter "*Home Assurance Company Case*"].

17 Bridas S.A.P.I.C. v. Government of Turkmenistan, 447 F. 3d 411 (5th Cir 2006) (U.S.).

18 *Id.*

19 Paracor Finance Inc. & Ors.v. General Electric Capital Corporation, 96 F.3d 1151 (U.S.).

20 *Britton v. Co-op Banking Group*, 4 F.3d. 742 (9th Cir. 1993).

wrongdoing by the agent related to the contract containing the arbitration clause, the non-signatory agent may be bound by it.

American Courts have also accepted the principle that arbitration agreements may be extended to non-signatories where the arbitration clause has been incorporated by reference into an agreement binding the non-signatory. The test laid down was, in the first instance, whether the agreement contains the requisite words of incorporation and in the second instance whether the arbitration clause is broad enough to encompass the non-signatory and the concurrent controversy.[21]

Another principle on the basis of which arbitration agreements may be extended to non-signatories which has been enunciated by American Courts is that of "'*equitable estoppel*'. Under the principle of issue estoppel, if a non-signatory knowingly accepts the direct benefits of a contract containing an arbitration agreement, he may be compelled to arbitrate by a signatory.[22] Joinder has also been permitted where a non-signatory seeks to resolve an issue which is inherently inseparable from or inextricably intertwined with an agreement containing an arbitration clause and the non-signatory is closely related to the signatory to that agreement.[23] Under the principle of equitable estoppel a non-signatory[24] as well as a signatory[25] may compel arbitration.

D. Singapore

The Singapore High Court has ruled that a non-signatory can be joined in arbitration only with the consent of all the parties concerned.[26] In this case, a holder of a bill of lading for shipment of fuel oil on board the vessel 'Titan Unity' filed court proceedings against the charterer and owner of the vessel. The Singapore High Court stayed the proceedings against the charterer on the ground that the bill of lading had an arbitration agreement. The owner then applied to the High Court to set aside and strike out proceedings against it filed by the holder of the bill of lading or alternatively, to order that the owner be joined as party to the arbitration proceedings between the charterer and the holder of the bill of lading. Relying on the principles of *kompetenz-kompetenz* and that of party autonomy, the High Court dismissed the owner's application. The High Court noted that the owner was not a party to the bill of lading. While the Singapore International

21 Upstate Shredding, LLC v. Carloss Well Supply Co., 84 F. Supp. 2d 357 (N.D.N.Y 2000) (U.S.).

22 American Bureau of Shipping v. Tencara Shipping SPA, 170 F.3d 349 (2nd Cir 1999) (U.S.).

23 *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir 1999) (U.S.).

24 Sunkist Soft Drinks, Inc. v. Sunkist Growers Inc., 10 F.3d 753 (11th Cir 1993) (U.S.).

25 McBro Planning and Development Co. v. Triangle Electronic Construction Co., Inc., 741 F.2d 342 (11th Cir 1984) (U.S.).

26 The Titan Unity, [2013] SGHCR 28 (Singapore).

Arbitration Act was silent on the issue of joinder of parties, the High Court relied upon the Model Law and held that consent of all concerned parties was required to join a non-signatory to arbitration proceedings. Holding that it was for the tribunal to decide on the issue of joinder of parties, the High Court held that the owner had by conduct, consented to the arbitration agreement. The High Court also observed that the holder of the bill of lading by commencing a joint action against the owner and charterer, had considered both parties on the same economic footing. While the charterer did not object to the arbitration being extended to the non-signatory, the High Court noted that it had not provided an implied or express approval either. The High Court also observed that a single arbitration is more advantageous than parallel arbitrations and court proceedings and recommended that the parties consult each other on whether the owner ought be a party to the arbitration.

E. Germany

In a 2014 judgment, the German Federal Supreme Court,[27] while overruling the decision of the Regional Court, permitted the extension of an arbitration agreement to a non-signatory on the basis that the non-signatory had accorded its implied consent to be so bound.

The Claimant, a Denmark based company, was in the business of producing casings for electrical equipment. The Managing Director and sole shareholder of the Claimant, a certain "L", held a patent to a three-dimensional frame design. The Respondent, on the other hand, was a company based in India, engaged in the same market as the Claimant. Sometime in 2010, the Claimant initiated proceedings against the Respondent in the Regional Court. These proceedings were opposed by the Respondent on the strength of an arbitration agreement contained in a License agreement ["**Agreement**"] between IPH (a Mauritius based company represented by "L") and BIP (the Respondent's legal predecessor). The Respondent pointed to the close connection between IPH and L, but the Regional Court did not accept that this relationship was enough to bind the Claimant to an agreement it was not a signatory to. The Respondent appealed the order before the Higher Regional Court of Braunschweig which dismissed the appeal on the ground that Danish law did not recognize the "group of companies doctrine" and to permit reliance on the same would be violative of German public policy. It was then that the Respondent filed an appeal before German Federal Supreme Court. While remitting the order of the Regional Court, the Supreme Court placed reliance on the "conflict of law" provision in Article VII of the NYC and held that the applicable law, if not provided for in the arbitration agreement, must be determined in accordance with the law that would be most appropriate. In doing so, the

[27] Docket No III ZR 371/12, May 8, 2014 (Federal Supreme Court) (Germany).

Supreme Court noted that "L" having been involved in the conclusion of the arbitration agreement between IPH and BIP, did not need to be protected and thus extended the law applicable to the arbitration agreement (Indian law) to determine whether the ambit thereof could be extended to "L". The Supreme Court also noted that "L" was not only the assignor of the claim, but had also been involved in the conclusion of the arbitration agreement. As such, it was trite for the arbitration agreement signed by IPH be extended to the Claimant. Finally, the Supreme Court clarified that the result obtained after applying the applicable foreign law was not contrary to German public policy and thus must be respected.

F. India

The Indian law pertaining to the position of non-signatories has evolved drastically over the years. The Arbitration & Conciliation Act, 1996 [the "**Act**"] which governs arbitrations in India has recently undergone significant changes in view of the Arbitration & Conciliation (Amendment) Act, 2015 [the "**Amendment Act**"]. The authors will first discuss the arbitration law as it stood prior to the Amendment Act and then deal with the Amendment Act and its implications.

Section 2(1)(h) of the Act defines a "party" as "*a party to an arbitration agreement*". Section 8 of the Act also empowers courts to refer parties to arbitration where a valid arbitration agreement between the parties exists, in the realm of domestic arbitration. The definition of an arbitration agreement under Section 7 of the Act, in turn, mirrors that of the Model Law. Section 7 reads as follows:

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. *An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*

3. *An arbitration agreement shall be in writing.*

4. *An arbitration agreement is in writing if it is contained in-*

    a. *a document signed by the parties;*
    b. *an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or*

c. *an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*

5. *The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*

Much like the Model Law, therefore, an arbitration agreement may extend to a non-signatory but it would have to be formalized by non-conventional means, i.e. other than in writing. The Supreme Court of India considered the position of non-signatories to arbitration agreements for the first time in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya &Anr.*[28] In that case, Sukanya Holdings attempted to enforce an arbitration agreement against *inter alia* non-signatories by filing an application under Section 8 of the Act[29] before the Bombay High Court. However, in view of the fact that not all the parties were signatories to the arbitration agreement, the Bombay High Court rejected the application. While doing so, the Court remarked that arbitration was a viable option only as against some of the parties and the Act did not confer any power on the judiciary to add non-signatories to arbitration agreements. Sukanya Holdings then preferred an appeal against the order of the Bombay High Court before the Supreme Court of India. This appeal was dismissed and it was held that "[where]*, however, 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 S.8.*"

Consistent with *Sukanya Holdings*,[30] the Supreme Court of India has declined to appoint an arbitrator under Section 11 of the Act where a non-signatory was proposed to be added to the arbitration proceedings in *Indowind Energy Ltd. v. Wescare (I) Ltd. &Anr.*[31] The judgment of the Supreme Court was notwithstanding that the non-signatory was an alter-ego of the signatory and they shared a registered office. Applying strict rules of construction to various provisions of the Act, the Supreme Court held that the existence of an arbitration agreement between the parties to the dispute and covering the dispute was fundamental to the invocation of arbitration. The Supreme Court further held that an arbitration agreement will only satisfy the 'writing' requirement if it is contained in a document signed by the parties, in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, in an

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28 A.I.R. 2003 S.C. 2252 (India).

29 Section 8 allows a court, before which an action is brought which is the subject of an arbitration agreement, to refer the matter to arbitration on an application by one of the parties.

30 *Id.*

31 (2010) 5 S.C.C. 306 (India).

exchange of statements of claim and defence in which the existence of an arbitration agreement is alleged and not denied or in a contract between the parties which incorporates by reference another document containing an arbitration clause. The Supreme Court did not, therefore provide any leeway to the parties to extend the operation of an arbitration agreement to non-signatories, save and except for arbitration agreements incorporated by reference.

The Supreme Court of India has applied the *Sukanya Holdings*'[32] reasoning even when deciding petitions under Section 45 of the Act, which pertains to the enforcement of arbitration agreements under the NYC i.e. in cases of international commercial arbitration. Illustratively, in *Sumitomo Corporation v. CDS Financial Services*,[33] the Supreme Court declined to refer non-signatories to arbitration stating that any reference to arbitration necessarily had to be between 'parties' as defined by Section 2(1)(h) of the Act. The error in this decision lies in the wording of Section 45 itself which provides for reference to arbitration upon a request of "*one of the parties or any person claiming through or under him*". The only basis available for refusing referral under Section 45 is if the agreement in question is found to be null and void, inoperative or incapable of being performed. None of these carve outs were attracted in the case at hand.

A Division Bench of the Supreme Court, however, remedied the injustice caused by the *Sumitomo* case[34] in *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*[35] The main consideration before the Supreme Court in *Chloro Controls* was to define the ambit of Section 45 of the Act and to determine whether a composite reference to arbitration under Section 45 was permissible under multiple arbitration agreements (some of which contain an arbitration clause) and where there is no identity of parties. At the outset the Supreme Court noted that the wording employed in Section 45 of the Act was on the same lines as that in Article II of the NYC and at a substantial variance to the wording of Section 8 of the Act. This is so, since both Section 45 and Article II of the NYC permit reference upon a request being made by a party or "any person" claiming "through or under" it whereas Section 8 merely refers to a party simpliciter. The use of the term "any person" was construed as evincing the intention of the legislature to broaden the scope of Section 45. Further the Supreme Court stressed that it was mandatory for courts to make a reference as requested, subject only to the arbitration agreement

32 Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya & Anr., A.I.R. 2003 S.C. 2252 (India).
33 A.I.R. 2008 S.C. 1594 (India).
34 *Id.*
35 (2013) 1 S.C.C. 641 (India) [hereinafter "*Chloro*"].

being agreement "null and void, inoperative or incapable of being performed" owing to the use of the word "shall" in Section 45[36].

To tackle the involvement of multiple parties and multiple contracts, the Supreme Court analyzed the case of *Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corporation*.[37] Where separate agreements (containing incompatible arbitration clauses) had been executed with a contractor and a subcontractor, and disputes arose between both the agreements, the Abu Dhabi Gas Liquefaction Co. instituted separate actions against each of the contractor and the sub-contractor. When both the disputes came before the English Court of Appeal, Lord Denning remarked on the imminent possibility of the two tribunals arriving at incompatible conclusions and stated that "…*it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the selfsame question, such as causation. It is very desirable that everything should be done to avoid such a circumstance*". The Supreme Court reiterated the need to avoid multiplicity of litigation and the application of the principle of 'one-stop action'. Turning then to the language employed in Section 44 of the Act (as also Article I(3) of the NYC), which qualifies all *"differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India*" as amenable to arbitration, the Supreme Court further expanded the scope of arbitration agreements.

In essence, the *Chloro Controls* case[38] is a high watermark of judicial insistence in the sphere of extension of arbitration agreements to non-signatories. The Supreme Court, applying the group of companies doctrine, examined the proximity of the relationship between the parties. It was recognized that even though multiple agreements had been entered into, they all formed part of one composite transaction and the performance of one was intrinsically linked to the others. It was for these reasons that the Supreme Court permitted a single reference to arbitration. However, while doing so the Supreme Court also added the caveat that each case would have to be decided on its peculiar factual matrix and no straitjacket formula could be arrived at.

The subsequent Amendment Act, which substantially amends the arbitration regime in India and is aimed at reformation of the Indian arbitration law at power with global standards to ensure an effective, speedy mechanism to resolve disputes, is noteworthy.

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[36] The Supreme Court relied on General Electric Company v. Renusagar Power Co., (1987) 4 S.C.C. 137 (India) in support of its finding.

[37] (1982) 2 Lloyd's Rep. 425 (CA) (U.K.)

[38] *Chloro*, (2013) 1 S.C.C. 641 (India).

In relation to non-signatories, taking heed from the Supreme Court in *Chloro Controls*,[39] the wording "party to an arbitration agreement" under Section 8(1) of the Act was amended to include any party claiming through or under such party to an arbitration agreement. Section 8(1) now provides:

> *8. Power to refer parties to arbitration where there is an arbitration agreement.—*
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> *(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.*
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> […]

Thus now, an arbitration agreement may extend to non-signatories too in domestic or Indian seated international arbitrations if they are claiming through or under a signatory.

Interestingly, the Law Commission in its *246th Report on the Amendments to the Arbitration and Conciliation Act, 1996* had proposed an amendment to the definition of 'party' under Section 2(1)(h) of the Act so as to include 'any person claiming through or under' such party.[40] The Law Commission clarified that this was to ensure that 'party' included any person who derives his interest from such party in light of the decision in *Chloro Control*.[41] However, the Amendment Act omitted this amendment although it amends Section 8 in this regard.

The inclination of Indian law towards permitting arbitration between non-signatories can be gathered from the provisions of the Code of Civil Procedure, 1908 [the "**Code**"] as well. Section 89 of the Code provides:

> *89. Settlement of disputes outside the Court.*
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> *(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-*
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> *(a) arbitration;*
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> *(b) conciliation*

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39 *Id.*

40 LAW COMMISSION OF INDIA, REPORT NO. 246 – AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 31 (2014), *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.

41 *Chloro*, (2013) 1 S.C.C. 641 (India).

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute had been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act […]

However, the Supreme Court of India, in *Afcons Infrastruture Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*[42] held that in light of the consensual nature of arbitration, where both the parties to the proceedings do not agree to the court's reference to arbitration, it is bound to respect the choice of the parties and refer them to any of the other means of settlement listed out in Section 89(1) Therefore, the Supreme Court's ruling further makes it abundantly clear that absent a written agreement providing for arbitration, non-signatories can only be bound to arbitrate where their consent is either expressly or impliedly given.

IV. 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. *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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[42] (2010) 8 S.C.C. 24 (India).

(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; or

[…]

2. *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:*

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

(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*.[43] 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)[44] of the English Arbitration Act to

43 Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan, [2008] EWHC 1901 (Comm.) (U.K.).

44 Section 103 - Refusal of recognition or enforcement.
[…]

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 *kompetenz-kompetenz* 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*[45] 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[46] under Article 1502(1) of the French Code of Civil Procedure.[47] The Paris Court of Appeal also applied French Law i.e. looking into the parties' intentions and the decision in *Dalico*,[48] but, unlike the UK Supreme Court, the Paris Court of

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(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—
that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

45 121 J.D.I.432, 20 Dec. 1993 (1994) (France) [hereinafter "*Municipalite*"].

46 Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company (Case No. 09/28533).

47 Article 1502 of the French Code of Civil Procedure:
Appeal of a court decision granting recognition or enforcement is only available on the following grounds:
if the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired;
if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;
if the arbitrator has not rendered his decision in accordance with the mission conferred upon him;
if due process 11 has not been respected;
if recognition or enforcement is contrary to international public policy.

48 *Municipalite*,, 121 J.D.I.432, 20 Dec. 1993 (1994) (France).

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.[49] 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 non-signatories 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

49 PT First Media TBK v. Astro Nusantara International BV and Others, [2013] SGCA 57 (Singapore).

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 non-signatories 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.[50] 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.

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[50] Section 3 of the Singapore International Arbitration Act:-
Model Law to have force of law;
(1) Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.
(2) In the Model Law —
"State" means Singapore and any country other than Singapore;
"this State" means Singapore.

While the decision in *Chloro Control*[51] 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.

V. 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"],

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[51] *Chloro*, (2013) 1 S.C.C. 641 (India).

(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. Section 1 reads:

Right of third party to enforce contractual term.

(1) Subject to the provisions of this Act, a person who is not a party to a contract [a "third party"] *may in his own right enforce a term of the contract if—*

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

(6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.

(7)In this Act, in relation to a term of a contract which is enforceable by a third party—

"the promisor" means the party to the contract against whom the term is enforceable by the third party, and

"the promisee" means the party to the contract by whom the term is enforceable against the promisor.

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

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52 [2003] EWHC 2602 (U.K.).

53 Fortress Value Recovery Fund LLC v. Blue Skye Special Opportunities Fund LP, [2013] EWCA (Civ.) 367 (U.K.).

54 991 F.2d 1012 (2d Cir. 1993) (U.S.).

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 Authority*[56] 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 Authority*[59] 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.

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55 STAVROS L. BREKOULAKIS, THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION 64 (2010).
56 ICC Awards No. 11825 and 12174.
57 Feb. 14, 1989, [1989] Rev. arb. 695 (France).
58 Cour de Cassation [Cass.] [Supreme Court for Judicial Matters], Jul. 25, 1991, [1991] Rev. arb. 453.
59 Y Turkish GSM Operator v The Telecommunication Authority, ICC Awards No. 11810 and 12195.

VI. 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.[60] 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.*,[61] 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

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[60] M/s Value Advisory Services v. M/s ZTE Corporation & Ors., 2009 (3) Arb. L.R. 315 (Delhi) (India).

[61] 2014 S.C.C. OnLine Bom. 1119 (India).

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**"].

First, with respect to requests for production of documents from third parties, Article 3(9) of the IBA Rules provides as under:

> *If a Party wishes to obtain the production of Documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Article 9.2 applies.*

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

> *If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal*

[62] *Chloro*, (2013) 1 S.C.C. 641 (India).

> *shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.*

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 in certain 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 provides:

> *27. Court assistance in taking evidence.*
>
> 1. *The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.*
> 2. *The application shall specify-*
>   a. *the raises and addresses of the panics and the arbitrators,*
>   b. *the general nature of the claim and the relief sought,-*

63 THOMAS H. WEBSTER, OBTAINING EVIDENCE FROM THIRD PARTIES IN INTERNATIONAL ARBITRATION 143 (2nd ed. 2001).

64 IBA Working Party, Commentary on the New IBA Rules of Evidence in International Commercial Arbitration, (2000) 2 Business Law International 14 at pp. 21-22.

65 WEBSTER, *supra* note 63.

c. the evidence to be obtained, in particular,-

1. the name and addresses of any person to be heard as witness or expert witness and a statement of the subject- matter of the testimony required;

ii. the description of any document to be produced or property to be inspected.

3. The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.

4. The Court may, while making an order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.

5. Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of 12 the arbitral tribunal as they would for the like offences in suits tried before the Court.

6. In this section the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

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.*[66]

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.

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[66] Delta Distilleries Ltd. v. United Spirits Ltd., (2014) 1 S.C.C. 113 (India).

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')*.[67] 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*[68] 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*[69] 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.[70] 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.[71]

Recourse to courts for assistance in collecting evidence from third parties is far more clearly codified and extensive in the U.S. than in any other country. A two-fold remedy is available to the parties, one for arbitrations seated in the U.S. and one in aid of foreign or international tribunals. Consistent with the pro-discovery stand followed in the U.S., Section 1782 of Title 28 of the U.S. Code confers discretionary powers of the widest import on the U.S. Courts with respect to the provision of assistance in the taking of evidence for use by an international tribunal, even if such

67 Sunderland Steamship P & I Association v. Gatoil International Inc. (The 'Lorenzo Halcoussi'), [1988] 1 Lloyd's Rep. 180 (U.K.).

68 Wakefield v. Outhwaite, [1990] 2 Lloyd's Rep. 157 (U.K.).

69 Norwich Pharmacal Co. V. Customs and Excise Commissioners, [1974] A.C. 133 (U.K.).

70 *Id.*

71 BNP Paribas v. Deloitte and Touche LLP, [2004] 1 Lloyd's Rep. 233 (Q.B) (U.K.).

evidence is from third parties to the arbitration. The only requirement is that the request must be made in "[the] *district court of the district in which a person resides or is found*". The powers of the district court extend to issuing an order compelling such 'person' to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. Needless to say, this provision is highly contested, specifically its applicability to arbitration proceedings. The powers conferred on courts to aid the taking of evidence with respect to arbitrations seated in the U.S. have been codified in Section 7 of the Federal Arbitration Act. In essence, in the first instance, Section 7 grants an arbitral tribunal having its seat in the U.S. the power to summon any person (including a third party) as a witness and to produce documents before it. In the second instance, Section 7 provides for judicial assistance from the court at the seat where the person summoned by the tribunal fails to comply with that order. The section also imposes a penalty for contempt of the order of the state court.

VII. Conclusion

Much can be said about the position of national legislations as regards the position of non-signatories to arbitration agreements, but for the present suffice it to say that a general trend is emerging in favor of extending arbitration agreements to non-signatories. The only bar to such extension is that the parties must have intended it to be so and that an arbitration agreement was concluded by the parties either expressly or impliedly.

Much of the uncertainty behind the reluctance of courts allowing non-signatories to be joined to arbitration proceedings can be traced to their having resort to a strict approach to interpret the arbitration agreement. As the Supreme Court of India observed in *Enercon (India) Ltd. &Ors.v. Enercon GMBH and Anr.*[72] "*courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause."*. The Supreme Court, relying upon a gamut of Indian as well as foreign cases, concluded that courts must arrive at an interpretation which gives effect to the parties' intention to arbitrate, rather than one that defeats it. While the opinion of courts cannot be forcibly harmonized, it is imperative that an approach conducive to arbitration is adopted. This is largely necessitated to ensure that the rights of parties (who may be non-signatories) who have obtained an award in their favour, possibly against non-signatories, are not defeated at the enforcement stage. One way in which this conflict could be avoided would be if there was an international instrument governing the

[72] Enercon (India) Ltd. & Ors. v. Enercon GMBH and Anr., (2014) 5 S.C.C. 1 (India).

position of non-signatories to arbitration agreements. Having said that, national courts would also have to maintain a precarious balance between not getting embroiled in interpreting an arbitration agreement in a formalistic and technical way and importing consent to arbitrate where, in fact, none existed. After all, "*like consummated romance, arbitration rests on consent*"[73], and such consent must be evident whether in the arbitration agreement or by the conduct of the parties.

[73] WILLIAM W. PARK, *Non-signatories and International Contracts: An Arbitrator's Dilemma*, *in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 1 (2009).