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MULTI PARTY DISPUTES: THE JOINDER OF THIRD PARTIES TO INTERNATIONAL ARBITRATION AGREEMENTS

Kavya Bhardwaj[*]

Abstract

The issue of multi-party arbitration has become a part of the contemporary jurisprudence on international commercial arbitration. Scholarly conflict has often revolved around the need to balance the doctrine of privity of contract and terms of agreement with the "extension" of the arbitration agreement. This has given rise to the applicability of new principles in determining the scope of the arbitration agreement. The hurdles of a consensual agreement, confidentiality obligations, enforceability and form requirement are often termed as the 'stumbling blocks' to the joinder of third parties to an international arbitration agreement. In an era of complex business transactions, the need for efficiency in alternate dispute resolution has time and again encouraged the joining of third parties to the arbitration agreement. This paper is an attempt to bring forward the conceptual nature, purposive interpretation and technicalities involved in third party intervention, extension of the arbitration agreement and joinder of parties. It begins with the conceptual terminology and goes on to discuss at length the legal basis of binding non-signatories, theories of extension to the arbitration agreement under the backdrop of the consent to arbitration per se. The article primarily revolves around the recurrent debate of whether extending the scope of the arbitration agreement is an infringement of the individual contractual rights or an efficacious remedy. This paper encapsulates the jurisprudential principles, model law's approach, concept of implicit consent, arbitral awards and hindrances as to confidentiality and agreed upon terms by the parties, to explain the very 'joinder of third parties'.

[*] The author is a student at the Rajiv Gandhi National University of Law, Patiala.

"*The reality of international commercial disputes has dramatically changed. Before, the great majority of disputes seemed to be bipolar disputes. Presently, an important number of disputes are multiparty and even multi-polar disputes.*" – Eduardo Silva Romero[1]

I. Introduction

The advent of commercial interdependence, complex contractual relationships and global proliferation of cross border business has given rise to disputes involving more than two camps with more than two diverging interests, whereby third parties step in with separate claims and grounds. Although considerable jurisprudence has been developed for addressing third party claims yet there are still complex unresolved issues faced by the international arbitration community in the domain of joinder and non- joinder of parties to the arbitration agreement. 'Third party' refers to any party which intervenes in arbitration with a claim as a matter of right it asserts an interest in the subject matter of the dispute, or, the disposition of the arbitration may, as a practical matter, impair or impede the third party's ability to protect that interest or when the original parties will not be able to represent adequately the claims of the third parties.[2]

The complexity is further strengthened via the interplay between domestic arbitration laws, international principles of commercial arbitration, lex fori and the lex arbitri in the procedural applicability of the "extension" of arbitration agreement. Continental scholars refer to it as "extending" the arbitration clause[3] and Anglo Saxon lawyers ascribing the same as "joining

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[1] Eduardo Silva Romero, *Brief Report on Counterclaims and Cross-claims: The ICC Perspective in Arbitral Procedure at the Dawn of the New Millennium*: *Reports of the International Colloquium of CEPANI*, Brulyant, 73 (2005).

[2] Jean L. Doyle, *Federal Rule 24: Defining Interest for Purposes of Intervention of Right by an Environmental Organization*, 22 VALPARAISO UNIVERSITY LAW REVIEW, 109, (1987).

[3] Pierre Mayer, *Extension of The Arbitration Clause to Non-Signatories under French Law*, 180, OXFORD UNIVERSITY PRESS, (2008).

non-signatories.[4]" Lord Collins aptly remarked, "The extent to which a non-signatory may be bound by an arbitration agreement is among the most complex and delicate issues in international commercial arbitration."[5]

The complex issue as to the identity of the parties is often referred as a question of subjective scope of arbitration agreement or jurisdiction *ratione personae*.[6] In other legal systems, such as the United Sates, the impetus lies upon the formulation of the arbitration agreement.

II. Complexity due to the Consensual Nature of Arbitration

The consensual nature of arbitration is often referred as the 'heart and soul' of the alternate dispute resolution mechanism. Only the parties to an arbitration agreement are bound to or benefited from the same. Article 1(1) of the 2010 UNCITRAL Rules provides that the Rules apply "where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration."[7] Many commentators have remarked that since arbitration rests upon 'consent' only parties to an arbitration agreement are bound by it. Many arbitration legislations and conventions concur with this opinion. For instance, Article II (2) of the New York Convention illustrates, Contracting States "shall recognize an agreement in writing under which the parties undertake to submit their disputes to arbitration."[8] Article 7(1) of the UNCITRAL Model Law defines an arbitration agreement as "an agreement by

[4] John M. Townsend, *Non-Signatories in International Arbitration: An American Perspective*, KLUWER LAW INTERNATIONAL (2007).
[5] Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan, UK SC 46 (2010).
[6] X v. Y & Z, DFT 4A,128 (2008).
[7] UNCITRAL Model Law Rules on International Commercial Arbitration, 2010, 24 ILM 1302.
[8] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10th June 1958 330 UNTS 38.

the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them."[9] The basic premise that evolves is that arbitration rests upon consent of the parties and only recognizes the parties to an arbitration agreement and not to other entities.

III. Form Requirement for Binding Non-Signatories

Three possibilities usually exist when the question is related to the scope of arbitration agreement-: (1) a contract that expressly allows for joinder or intervention of third parties; (2) a contract that expressly prohibits joinder or intervention of third parties; and (3) a contract that is silent or vague regarding joinder or intervention of third parties.[10] 'Joinder' is a term which is used to refer to the circumstance when a third party is asked to join an already pending arbitration proceeding.[11]

The issue of non-signatories to an arbitration agreement is a matter of rampant debate and dilemma with many scholars remarking that 'signature' of a party to an agreement to arbitrate is a "customary mode of implementation of agreement to arbitrate."[12] In complex commercial transactions, like manufacturing contracts, construction assignments, it is most vividly seen that an agreement/contract is executed by agents, contractors and other "middle" executing parties. The law will usually, but not necessarily, provides that signatories are parties to the agreements that they execute. It has laid down that persons other than the formal signatories may be parties to the arbitration agreement by application of the theory of apparent mandate or

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[9] UNCITRAL Model Law on International Commercial Arbitration, 21st June 1985, 24 ILM 1302.

[10] Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INTERNATIONAL LAW JOURNAL, 89 (1995).

[11] B. Hanotiau, *Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law*, A.J. VAN DEN BERG, 341 (2006).

[12] Republic Of Ecuador v. Chevron Texaco Corp, 376 F. Supp. 2d 334, 351, 3 56 S.D.N.Y (2005).

ostensible authority or because they are third-party beneficiaries or on other grounds.[13] There are many legal systems such as the United States and Switzerland, which do not require a 'form' requirement of an agreement to arbitrate and cover many unwritten contracts and unsigned agreements. New York Convention covers agreements to arbitrate concluded through unsigned exchanges of letters and telegrams.[14] Even amendment to Article 7 of UNCITRAL Model Law, 2006 bears testimony to the aforementioned stance. It refers to the factual reality that agreement to arbitrate requires some other condition/circumstance other than the formality of a signature. There is a degree of assent to arbitrate that is either express or implied that needs to be derived from "chain of transactions" and other documents. This doctrine as illustrated and developed by the French law, talks about connecting the substantive obligation with the procedural framework. This was first explained in a *Cour de cassation* case[15] which talked about the involvement of non-signatory in a series of contracts and therefore deduced its involvement in the subject matter of the dispute binding the non-signatory

In more modern arbitration legislations, for instance, Switzerland[16] other forms of communication which permit the consent to an arbitration agreement to be witnessed by a text have been put on the same footing as signing an agreement to arbitrate. In the light of these considerations, it is concluded that the form

[13] Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues – An Analysis*, 18 JOURNAL OF INTERNATIONAL ARBITRATION, 253, 256 (2001); Whitesell & Silva-Romero, *Multiparty and Multicontract Arbitration: Recent ICC Experience, in ICC, Complex Arbitrations* ICC Ct. Bull. Spec. Supp. (2003).

[14] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article II, 10th June 1958 330 UNTS 38; Sphere Drake Ins. PLC v. Marine Towing, Inc. 16 F.3d 666, 669 (1994).

[15] Société Alcatel Business Systems (ABS), Société Alcatel Micro Electronics (AME) et Société AGF v. Amkor Technology et al, Cass 1e civ., JCP [2007] I 168, No. 11(2007).

[16] Federal Code on Private International Law, 1987 Art.178, (1987).

requirement under the New York Convention as well as those under the national legislations are applicable only to the original arbitration agreement and not to the legal bases for extending the arbitration agreement to non-signatories. The status quo, therefore, provides little or no justification for extending the form requirement beyond the initial agreement.

IV. Legal Basis for Binding Non-Signatories to an Arbitration Agreement

The issue that persons or parties that are not expressly named in the arbitration clause can take advantage of arbitration agreement needs to be scrutinized from case to case basis and thus, cannot be subjected to a straight-jacket formula. Rather what need to be ascertained are the circumstances under which non-signatories become involved in the performance, execution and negotiation of the subject matter of the agreement and in the dispute arising from it.[17] The issue of the extension of the arbitration agreement to non-signatories has engendered a wealth of comments and literature.[18] 'Extension' refers to a process whereby a party/ person maybe bound to an arbitration agreement even though there is no reference of the party in the agreement. It refers to a party which is covered within the personal scope of the arbitration agreement. [19] The real focus lies upon the intentions of the parties contracting to the agreement and the consent of the non-signatory party to be bound by the terms of subject matter per se.[20] However even the issue of consent has been contradicted by legal scholars and case law jurisprudence under the non-consensual theories of veil piercing (alter ego), estoppel, apparent

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[17] Case No. 9517 of 1992, Y.B. Comm. Arb. 46 (lCC lnt'l Ct. Arb.).

[18] Anne Marie Whitesell, *Non-signatories in ICC Arbitration,* KLUWER LAW INTERNATIONAL (2006).

[19] B Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties* Issues – *An Analysis*, 18 JOURNAL OF INTERNATIONAL ARBITRATION, 253, 256 (2001).

[20] Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753 (11th Cir. 1993); J.J. Ryan & Sons v. Rhône Poulenc Textile SA, 863 F.2d 315 (1988).

authority, or succession. Some authorities have characterized the issue of extension as one concerning the scope of the agreement to arbitrate (e.g., to what persons does the agreement extend to?).[21] Other legal scholars say that the question whether a non-signatory is bound by an arbitration agreement is determined through contract formation (e.g., has an arbitration agreement been formed between parties A and C?).[22]

V. Legal Theories for Extension of Arbitration Agreement

A. GROUP OF COMPANIES DOCTRINE

The doctrine emerged in the French law which binds together companies under the same ownership, control and management to any contractual relationship. The most explanatory of the same being the Dow Chemical Award whereby it was held that the arbitration clause being accepted by some companies in the group also binds other companies by virtue of their presence in the conclusion, performance, or termination of the contracts containing said clause.[23] The Swiss Federal Supreme Court's position with regard to group of companies has been approved by the prevailing legal doctrine in Switzerland.[24] In ICC case no. 6610,[25] the tribunal found no evidence of intent to add other parties to the contract under a 'group of companies' theory.

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[21] W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION ¶11.05 (3d ed. 2000).
[22] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).
[23] Dow Chemical v. Isover Saint Gobain, Interim Award of 23 September 1982 in ICC Case No. 4131, Yearbook IX (1984).
[24] Marc Blessing, *Introduction to Arbitration – Swiss and International Perspectives*, INTERNATIONAL ARBITRATION IN SWITZERLAND, An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute, HELBING & LICHTENHAHN AND KLUWER (2000).
[25] Case No. 6610 of 1991, 19 Y.B. Comm. Arb.(lCC lnt'l Ct. Arb.).

B. REPRESENTATION AND AGENCY

The law of agency is often invoked to bind the non-contracting principal to disclose the mandate of the principal to the given contractual relationship. The Swiss Federal Tribunal cancelled an award applying this theory to bind a sovereign state to an arbitration clause. The arbitral tribunal opined that four Middle Eastern states were bound by the arbitration clause, which had been entered into by an international organization that the four states had founded.[26] Some scholarly authorities have illustrated that even an agent may invoke an arbitration agreement contained in a contract which it executes on behalf of a principal, notwithstanding the fact that the agent would not be bound by the substantive terms of the underlying the contract.[27]

C. APPARENT AUTHORITY

This is close knit to the theory of agency which rests upon the principles of contract law and good faith.[28] This is often remarked as the 'principle of appearance' or 'mandate apparent' in some jurisdictions.[29] The party is considered to be bound by another entity's acts purportedly entered into on its behalf even if those acts were unauthorized, if the putative principal created the impression of authorization or legitimization through either words or conduct, leading the opposite party to believe that authorization actually existed.[30] The apparent or ostensible authority (commonly termed) theory does not rests upon the consensual nature of the arbitration but upon the representation made by the principal to the third party which is intended to convey the real 'participation'. However, the theory raises

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[26] Case No. 3879 of 1986, 9 Y.B.Comm. Arb. 148 (lCC lnt'l Ct. Arb.).
[27] Lerner v. Amalgamated Clothing & Textile Workers Union, 938 F.2d 2 (2d Cir. 1991).
[28] Case No. 1050 of 1992, 19 Y.B.Comm. Arb. 146 (lCC lnt'l Ct. Arb.).
[29] J. HERBOTS, INTERNATIONAL ENCYCLOPAEDIA OF LAW CONTRACTS, 477 (1999).
[30] BOWSTEAD & REYNOLD, AGENCY, 8-014 (19th ed.2010).

questions as to the choice of laws like for instance, law governing the arbitration agreement, the law of the state where the principal's or agent's conduct occurred, and the law of the state where the opposite party apprehends the putative principal's conduct. In order to resolve these hurdles, it is suggested that specialized rule of international law governing apparent authority should be applicable to international arbitration agreements. This would not raise issues like the choice of law given that apparent authority does not rely upon the principles of consent.

D. ALTER EGO THEORY

Commonly referred as the theory of 'piercing of corporate veil,' the purpose of which is to extend the arbitration agreement to the actual controlling parent companies. German authors and courts have often relied on piercing the corporate veil (*Durchgriff*) in order to determine that a non-signatory was bound by an arbitration agreement.[31] In many legal systems, this theory is restricted to find out the situations of abuse of rights and fraud.[32] In ICC case no. 5730[33] and 5721[34], the theory was applied to find out the misrepresentation caused by the non-signatory parent company and thus, was brought under the contract. Such practice is often done when the company and its owners form a single economic entity and when the corporate structure has been established with the sole purpose of avoiding justified claims by creditors or of circumventing any kind of contractual obligation or duties. In ICC case no. 8385[35] it was decided to pierce the veil of the insolvent subsidiary due to 'illegitimate conduct' (fraud) by the subsidiary at the instigation of the parent company.

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[31] KARL-HEINZ BOCKSTIEGEL, GERMANY AS A PLACE FOR INTERNATIONAL AND DOMESTIC ARBITRATIONS – GENERAL OVERVIEW, WOLTERS KLUWER, 29 (2007).
[32] Bernard Hanotiu, *Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Actions*, KLUWER LAW INTERNATIONAL, 178 (2005).
[33] Case No. 5730 of 1990, 9 Y.B. Comm. Arb. lCC lnt'l Ct. Arb.).
[34] Case No. 5721 of 1990, 9 Y.B.Comm. Arb. (lCC lnt'l Ct. Arb.).
[35] Case No. 85355 of 1991, 9 Y.B. Comm. Arb. (lCC lnt'l Ct. Arb.).

E. THIRD PARTY BENEFICIARIES

Non-signatories to an arbitration agreement often derive certain benefits from a contract and are therefore termed as third party beneficiaries. As explained in an arbitral award, "it is generally accepted that if a third party is bound by the same obligations stipulated by a party to the contract and this contract contains an arbitration clause or, in relation to it, an arbitration agreement exists, such a third party is also bound by the arbitration clause, or arbitration agreement, even if it did not sign it."[36] Many national courts as well as tribunals have held that the non-signatory third party claiming benefits within the contractual matter is bound by the terms of the agreement.[37]

Since this is an exceptional rule to the generally applicable principle, that the contract does not guarantee enforceable rights to non-parties, therefore it is the burden of the signatory to the agreements to clearly establish benefit derived by such a third party. In some cases, an arbitration clause on third party beneficiary may be invoked on the grounds akin to estoppel.[38] This issue as addressed by scholarly authorities should be decided by the laws applicable to the arbitration agreement and the contract since it involves issues of formation and interpretation of the agreement.

F. STATE NON-SIGNATORIES

Many contractual relationships involve state entities which do not expressly participate in the arbitration proceedings but in reality, the contract is concluded for their ultimate benefit. One leading example is the *Pyramids case*[39] wherein an agreement to construct

[36] Case No. 9726 of 2004, 29 Y.B. Comm. Arb. (lCC lnt'l Ct. Arb.).
[37] Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc., 138 F.3d 160, 166 (5th Cir. 1998); Newby v. Enron Corp., 391 F.Supp.2d 541, 561 (S.D. Tex. 2005); Bevere v. Oppenheimer & Co., 862 F.Supp. 1243 (1994).
[38] Thomson-CSF, SA v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir.1995).
[39] Case No.3493 of 1980, 29 Y.B. Comm. Arb. (lCC lnt'l Ct. Arb.).

a complex tourist resort was entered into between foreign investors and an Egyptian state entity. In principle, the same rules should apply on state actors; however, many national legal systems are reluctant in enforcing awards binding such state actors. For example, U.K. Supreme Court refused to recognize an award, rendered in Paris by a distinguished arbitral tribunal against a Ministry of the Pakistan government.[40]

VI. Issue of Consent: A Legal Basis for Binding Non-Signatories to an Agreement

Scholarly authorities have often cited consent, be it expressed or implied to be the cornerstone of an arbitration agreement. The premise rests upon the principles of good faith in commercial transactions. This implies that the real focus should lie upon the intentions, both actual and presumed, and conduct of the parties to an arbitration agreement to bind a third party to a contractual ensemble. One of the most frequent ways for binding a non-signatory party is the involvement of the third party in the underlying contractual relationship.[41] A signatory to an arbitration clause will be precluded from refusing to arbitrate with a non-signatory when the essence of the dispute is intertwined with, or derived from the subject matter of the dispute

Many national courts have defaulted by applying principles of equity and efficiency[42] rather than those of a contractual analysis while joining parties to an arbitration agreement such as the US courts in binding parties on the basis of 'congruent interests'[43]

[40] Dallah Estate & Tourism Holding Co. v. Ministry of Religious Affais, Gov't of Pakistan UK SC 46 (2010).
[41] Tobias Zuberbühler, *Non-Signatories and the Consensus to Arbitrate*, 26 ASA BULL,18 (2008).
[42] Blessing, *Extension of the Arbitration Clause to Non-Signatories, in The Arbitration Agreement: Its Multifold Critical Aspects,* ASA, 151, 162 (1994).
[43] Isidor Paiewonsky Assoc., Inc. v. Sharp Prop., US Court of Appeals Inc., 998 F.2d 145, 155 (3d Cir. 1993).

and 'nexus between relations'.[44] These remain insufficient grounds for the joinder of third parties since these theories overlook the criterion of 'consent' that forms the legal basis of joining third parties and since arbitration rests upon consent of parties, principles like equity need to be given up. It is only in the non-consensual theories of extension such as alter ego, estoppel that consent may be overlooked. The courts and tribunals need to reconsider that formalistic approaches to bind third parties, need to be undermined and the presumption of separability of arbitration agreement should be upheld which is the reason as to why the parties have resorted to international commercial arbitration rather than settlement via courts. It is appropriate to apply a liberal standard of proof of consent that takes into account the pro-arbitration policies of the New York Convention and national arbitration legislation.[45] The reason for the same could be attributed to the pro-arbitration tendencies that have formed a part of the present national legal policies of nations, the purpose of which is to reduce burden on courts, encourage efficient resolution of disputes and facilitate the ease of cross border business.

A. SPECIFIC PROVISIONS AGREED UPON BY THE PARTIES

The consensual nature of arbitration is often termed as its Achilles heels.[46] This serves to be the foremost obstacle to multi-party proceedings. This implies that consent given at the beginning of the arbitration proceeding binds only those parties to the arbitration proceeding. The apt solution is that these parties and their lawyers to be aware of possible solutions of joinder

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[44] Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 758 (11th Cir. 1993).

[45] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2818 (2 ed, Kluwer Law International 2014).

[46] Kristina M. Siig, *Multi-party Arbitration in International Trade: Problems and Solutions*, 1 INT'L J. LIABILITY AND SCIENTIFIC ENQUIRY, (2007).

facilitating efficiency and redressal against genuine parties. The arbitration institutions should provide assistance for this by drafting standard arbitration clauses for the joinder of third parties.[47] In ICC case 4504,[48] the tribunal refused to extend the arbitration agreement due to lack of reference of the non-signatory. In ICC case no. 10758;[49] the tribunal found no evidence of consent to arbitrate merely because the non-signatory participated in the contract negotiation and thus, joinder was refused. After the revision in the UNCITRAL Model Rules in 2010, the position of joinder under Article 17(5) has provided an impetus for extension of multi-party arbitration and much has changed on the forefront of institutional arbitration relating to joinder of third parties. Article 7 of SIAC Rules,[50] 2016 bear testimony to the same.

B. IMPLIED CONSENT

An entity/party can become a party to an arbitration agreement, impliedly – typically, either by conduct or non-explicit declarations, as well as by express agreement or formal execution of an agreement. In ICC case no. 8910[51] and 11160[52], non-signatories played a critical role in the performance of the contract and therefore the agreement was extended to them. The intention of other parties to be bound by the agreement to arbitrate with the non-signatory is also necessary. There are five common scenarios to deduce implied consent (1) non-signatory participation in contract formation[53] often confused created by

[47] Andrea Meier, *Einbezug Dritter vor internationalen Schiedsgerichten*, SCHULTHESS, 322 (2007).
[48] Case No. 4504 of 1986, 9 Y.B. Comm. Arb. 46 (lCC lnt'l Ct. Arb.).
[49] Case No. 10758 of 2001, 9 Y.B. Comm. Arb. 46 (lCC lnt'l Ct. Arb.).
[50] Rule 7, Arbitration Rules of the Singapore International Arbitration Centre (6th Edn. 2016).
[51] Case No. 8910 of 2000, 9 Y.B. Comm. Arb. 146 (lCC lnt'l Ct. Arb.).
[52] Case No. 11160 of 2001, 19 Y.B. Comm . Arb. (ICC Int'l Ct. Arb).
[53] Case No.5332 of 1990, 21 Y.B. Comm. Arb. (ICC Int'l Ct. Arb).

mention of the non-signatory in contract documents[54]; (2) a single contract scheme constituted by multiple documents[55]; (3) acceptance of the contract or arbitration agreement by the non-signatory, whether in the particular arbitration itself or in another forum; (4) ab initio absence of corporate personality; and (5) fraud or fraud-like abuse of the corporate form.[56] There may be instances in which a party's conduct after a dispute arises evidencing its implied consent to an arbitration clause.

VII. Types of Claims Arising in Multi-Party Disputes

In a multi-party arbitration, generally the following types of claims arise when joinder is sought-:

A. PRELIMINARY REMARKS

This is generally a common situation where the claimant alleges that more than one party is jointly and severally liable.

B. CLAIMS BY THE RESPONDENT AGAINST A NON-SIGNATORY

This situation has earlier been a matter of scholarly debate whereby the controversy is whether it is possible to extend the counterclaim to a third non-party. Under the German Civil Law, this situation has been referred as *Drittwiderklage.*[57]

C. CLAIMS BY RESPONDENTS AGAINST OTHER RESPONDENTS (CROSS CLAIMS)

In this situation, there is no joining of a third party, only a claim is raised by the respondent against another respondent which is

[54] Case No. 7155 of 1999, 46 Y.B. Comm. Arb .(ICC Int'l Ct. Arb).
[55] Case No. 1434 of 2000, 19 Y.B. Comm. Arb .(ICC Int'l Ct. Arb).
[56] William W. Park, Non-Signatories and International Contracts: An Arbitrator's Dilemma, OXFORD PUBLISHING PRESS (2009).
[57] Jens Kleinschmidt, *Die Widerklage gegen einen Dritten im Schiedsverfahren*, 4 SCHIEDSVZ, 143(2006).

termed as cross claim.[58] A cross-claim generally is a claim in guarantee or in damages, for instance, a claim raised by one subcontractor against another where the main contractor has initiated arbitration proceedings against both of the parties.

D. CLAIMS FOR RECOURSE AGAINST A THIRD PARTY

A claim for recourse is generally raised by the respondent against a third party to be joined as a party to the arbitration proceeding if it loses its cases against the original counterparty. In some situations, claims for recourse can be raised even by the claimants.[59]

E. CLAIMS BY THIRD PARTIES

This is a situation where a third party wishes to join proceedings on its own motion, without being requested to do so by a claimant or a respondent. In France, the intervention of a party is possible with the *intervention volontaire principale*, which permits the adjudication of related third-party claims. If an intervention is permitted it generally does not make any difference whether it is raised against a claimant or the respondent.

VIII. Obstacle of Confidentiality To Joinder Of Third Parties

The common view in English jurisprudence is that the parties' arbitration agreement gives rise to an implied duty of confidentiality. The purpose of ADR encapsulates within its ambit an inherent duty of confidentiality whereby the information exclusive between the parties and the arbitrator(s) cannot be disclosed. However, this duty is not absolute and there are limitations imposed on this duty, which are:

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[58] Bernard Hanotiu, *Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Actions*, KLUWER LAW INTERNATIONAL, 178 (2005).

[59] Andrea Meier, *Einbezug Dritter vor internationalen Schiedsgerichten*, SCHULTHESS, 23,68 (2007).

1. Disclosure by consent
2. Disclosure due to public interest and interests of justice
3. Disclosure due to statutory obligations and increased public transparency.[60]

Confidentiality of arbitral proceedings is considered to be an obstacle to the joinder of third parties. Third parties involved in arbitration proceedings would have no express obligation to prevent disclosure. This creates a hindrance that can endanger the confidentiality of the proceedings and weaken the protection granted to confidential information. Even the third-party funders, including litigation funders, are non-signatories the arbitration agreement and can hardly ever be joined in the arbitration as a party.[61] It was also elucidated in *Oxford Shipping Company*[62] that "strangers" would be excluded from the proceedings and despite any matter similarity between the cases; the court found that neither the parties nor the tribunal could join and hear disputes together. The Model Law's drafting history bears testimony that the parties' agreements with regard to the confidentiality of international arbitrations would be given effect.[63] A Party shall disclose to third parties the documents produced by the opposing Party and shall use them only for the purpose of participating in the arbitration except where these documents are already disclosed and out in the public domain or the opposing Party has expressed its consent to their disclosure.[64] Prof. Gary Born has also summarized that the disclosure of detailed information relating to the arbitration proceedings to non-parties carries with

[60] Denoix de Saint Marc, *Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations*, 20 JOURNAL OF INTERNATIONAL ARBITRATION, 211 (2003).
[61] Milsom and others v. Ablyazov, 955 EWHC 36 (2011).
[62] Ali Shipping Corporation v Shipyard Trogir [CLC 566(1998) .
[63] Report of the Secretary-General on Possible Features of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/207, ¶17 (1981).
[64] Beccara and Others v. Argentina, ICSID Case No. ARB/07/5 (2016).

it the risk of "'trial by press release," distractions from the mutually-agreed, centralized dispute resolution mechanism, aggravation of the parties' dispute and the loss of important efficiency benefits.[65] However, it has been laid down that the interests of decreasing confidentiality and increasing transparency are more compelling with respect to arbitrations involving a third State party than with respect to arbitrations involving private commercial parties.[66]

IX. Concerns Regarding the Enforceability of an Arbitral Award

The extension of an arbitration agreement to a third party also creates a hurdle in the enforceability of the arbitral award. The New York Convention presupposes an agreement in writing as elucidated in Article II r/w Article V (1) (a). Additionally, Article V(1)(c) of the New York Convention which deals with the issue of ultra petita, and Article. V(1)(d) of the New York Convention, which talks about the parties' agreement regarding the composition of the arbitral tribunal and the manner so laid, are further hindrances in the way of enforcing an arbitral award involving multiple parties. However, as illustrated in the case of *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*,[67] a party may be precluded from claiming that the absence signature hindered the recognition of an award if the party relied on the contract by requesting other provisions to be enforced to its benefit.

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[65] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2818 (2 ed, Kluwer Law International 2014).

[66] Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT. ARB, 121, 134 (2003);Born & Shenkman, *Confidentiality and Transparency in Commercial and Investor-State International Arbitration* in C. ROGERS & R. ALFORD (eds.), THE FUTURE OF INVESTMENT ARBITRATION, OXFORD UNIVERSITY PRESS, (2009).

[67] Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH 206 F.3d 411 (2000)

X. Conclusion

Complex contractual relationships and the disputes arising therein are often resolved by permitting joinder of additional parties for preventing conflicting awards and loss of efficiency. The underlying purpose is augmenting the efficiency of the dispute resolution process. With contemporary debate revolving around the joinder of additional parties against the backdrop of privity of contract, much of the solution focuses upon addressing such possibilities during the drafting of the arbitration agreement. Arbitration institutions should draft standard arbitration clauses for multiparty contracts and pertinent provisions for joinder. A recent statistical analysis provided that mostly 40% of disputes involved more than two parties.[68] Thus, the issue of joinder of third parties serves to be a matter of modern jurisprudence in the field of international commercial arbitration which needs to be addressed during the very framing of the arbitration clause. With institutional rules providing for joinder and consolidation proceedings, the position of third parties to an agreement has drastically evolved.

[68] Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis*, 25 ASA BULL., 444 (2003).