SCOPE FOR FORCED JOINDER OF THIRD PARTIES IN INTERNATIONAL ARBITRATION WITHOUT RESORTING TO THE GROUP OF COMPANIES DOCTRINE.

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Introduction

The specific question that this paper would like to examine is, if third-parties to an arbitration agreement can be forced to participate in the arbitration proceeding. Their participation would be by virtue of their importance to the proceedings in a substantive manner, and not as a signatory to the arbitration agreement. In other words, the question is if the scope of a bilateral arbitration agreement can be expanded to include a third-party.

It must be clarified that third-parties may be added in different capacities to the arbitration.[1] Care must also be had in mind that the consent of the party sought to be joined would have to be taken in addition to the opposite party in the original proceedings, owing to the principle of party autonomy. In the context of this paper, what is being examined is if a third-party can be added to the proceeding in such a capacity as if they were a proper or necessary party to the original arbitration, at the insistence of one party to the proceeding, without the express consent of the other two parties. This is as opposed to the party being added in a supportive capacity to either of the signatory parties. In result, the substantive rights of the third-party is also being determined in a proceeding warranted by an arbitration agreement that the third-party was not signatory to.

It is understood that there would have to be a non-negligible nexus between the third-party and the arbitration agreement between the original parties to the proceedings ["**the original agreement**"].[2] There is an abundance of literature as to when tribunals have extended the scope of the arbitration to include entities that constitute a "group of companies". The justification for such extension is the fact that while companies may be legally independent juridical entities, they are linked in various capacities that make these independent entities subject to central management by a parent company. Related arguments for extending the scope of an arbitration agreement include a principal-ancillary relationship between multiple contracts, at least one of which contain

[1] Dorothee Schramm & Manuel Arroyo, Arbitration in Switzerland: The Practitioner's Guide (2nd edn, Kluwer Law International 2018) 497
[2] See n 21

a valid arbitration agreement. This is also known as the "group of contracts doctrine".[3] Both these arguments will not be discussed in this paper.

Therefore, the question is one of determining when the "threshold" can be said to be satisfied to proceed with a "forced" joinder, in such a manner that the tribunal is acting within the bounds of its competence and jurisdiction. Departure from this rule may lead to the arbitral award being annulled under Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["the New York Convention"].[4]

Several jurisprudential and procedural questions arise in this regard. For example, the principle of party equality is one of the cornerstones of International Commercial Arbitration. Therefore, when a third-party is sought to be added to a proceeding that has already been commenced, care must be had in mind that the arbitral tribunal has already been constituted in accordance with the terms of the original arbitration agreement. Therefore, there is always the chance that while the signatory parties had the opportunity to nominate their arbitrators, the third-party is not afforded such right, failing the reconstitution of the tribunal by mutual consent.[5] It may be argued that the principle of party-equality is offended in this manner in ad-hoc arbitrations only, since it is common practice for institutional arbitrations to have a tribunal that is appointed by the institution itself. Yet, it has also been common practice for parties to argue that the principle of party equality is being violated still since the third-party had no part to play in negotiating and arriving at an institutional arbitration clause in the first place.[6]

Issues of party autonomy and equality aside, questions also arise as to the implications of the chosen curial law. For instance, while the London Court of International Arbitration Rules (2014) requires express written consent from the third party sought to be joined,[7] the language of other bodies of rules such as the Swiss Chambers' Arbitration Association's ["SCAI"], indicate that a forced joinder may be permitted without any defect to the jurisdiction of the tribunal.[8] Consequentially, issues arise as to whether the curial law, by virtue of consent implied by the choice of such curial law, (or the rules of procedure similarly placed to the SCAI Rules) may be allowed to override the *Lex Arbitri* of a jurisdiction that recognizes principles such as party autonomy and

[3] Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* (2nd edn, Kluwer Law International 2020) ch 2, 95
[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 Art V(1)(d)
[5] *Thomson-CSF, SA v Am Arbitration Ass'n* 64 F.3d 773, 776 (2d Cir. 1995); *CLOUT Case No. 365*; *Achilles (USA) v Plastics Dura Plastics* [2006] QCCA 1523
[6] See n 1.
[7] *CJD v CJE* [2021] SGHC 61
[8] Swiss Chambers' Arbitration Institution Rules 2014 Rule 4

consent as foundational cornerstones of International Commercial Arbitration. These arguments will be examined in the forthcoming sections.

The Arbitration Agreement – The Concept of Privity of Contract

It is settled that the tribunal derives its powers from the arbitration agreement itself.[9] Absent such express agreement, consent would be a necessary pre-requisite for the joinder in any jurisdiction that has adopted the UNCITRAL Model Law on Arbitration ["**the Model Law**"].[10] This is because international arbitration is a creature of contracts. Therefore, privity, one of the fundamental principles of contract law, seems to pose a fundamental defect to the concept of forced joinder.[11] The rationale is that a party shall not be forced to bear the burden of an agreement which it was not party to.[12]

It is submitted that this principle is enshrined within Article 7 of the Model Law, which requires a "legal relationship, whether contractual or otherwise" between the parties for the arbitration to be without defect. Although Article 7 has been called a "formal" requirement, it is clear that the waiving away of the formal requirement can be done only in the manner provided in Article 7 itself.[13]

Broad wording of the arbitration agreement – *Indian v. U.S. Standards*

Therefore, to satisfy this formal requirement and proceed with a forced joinder, it is submitted that we must resort to the language of the arbitration agreement. This is because it is common practice for arbitration clauses to be broad and expansive in scope, using words such as "Any controversy or claim arising out of or relating to this contract", satisfying the nexus for the relationship requirement contained within Article 7.[14] Especially if there is a similarly worded arbitration agreement between the party sought to be joined and one of the original parties to the arbitration, the tribunal may be able to compel the third party to participate in the proceedings by virtue of the doctrine of *pacta sunt servanda* – This is because the third party is bound by such arbitration agreement to arbitrate *"any dispute in relation to"* the contract to which it is party. The

[9] See n 1
[10] Dongdoo Choi, 'Joinder In International Commercial Arbitration' (2019) 35 Arbitration International
[11] *Canada Moon Shipping Co. Ltd. v Companhia Siderurgica Paulista-Cosipa* 2012 FCA 284
[12] Pedro J. Martinez-Fraga, 'The Dilemma Of Extending International Commercial Arbitration Clauses To Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization A Bridge To Nowhere' (2013) 46 Cornell International Law Journal
[13] See n 11 at 34-36
[14] *Ibid*

joinder is further facilitated by compatible curial law in similarly worded provisions, such as those adopting the model arbitration clause of institutions such as the SCAI. Where the tribunal is seized of the jurisdiction to compel a party to arbitrate, failure to participate in the proceedings would tantamount to breach of contract.

In a series of rather radical decisions, various United States Courts have allowed forced joinder of non-signatories to the agreement, because they were bound under other arbitration agreements which were "in relation to" the original arbitration agreements. It has been opined that the words "in relation to" suggest a broader scope that "arising out of".[15] On one such decision, the Court reasoned that what matters is whether the factual matrices of the different matters touch each other. Even such a distant nexus would provide a tribunal with the jurisdiction to compel the non-signatory to arbitrate, on the basis of its obligations under the second, albeit similarly placed arbitration clause.[16] In another decision, the Court held that since the "origin and genesis of the present dispute" emanated from another arbitration agreement, such non-signatory could be forced to participate in proceedings.[17] It has also been held by U.S. Courts that ambiguity in this regard would call for a resolution in favour of arbitrability, given the obligations of the signatories to the New York Convention.[18]

Insofar as India is concerned, prior to the amendments made to the Arbitration and Conciliation Act, 1996, there had to be a tangible, express reference between two agreements for there to be any scope for joinder. In accordance with the language of Article 7, the Supreme Court in *Chloro Controls India (P) Ltd. v Severn Trent Water Purification Inc.*[19] held that there would have to be an express reference to the other arbitration agreement for the two contracts to be linked in any manner as to facilitate joinder or consolidation. In a more recent decision[20] however, referring to the amendments made to the Arbitration and Conciliation Act of 1996, the Supreme Court of India revisited its decision in *Chloro Controls*. The Court noted that amendments to Section 8(1) of the Act entitles persons claiming through or under a party also to seek arbitral reference.[21]

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[15] *Good (E) Business Systems, Inc v Raytheon Co* 614 F. Supp. 428 (W.D. Wis. 1985); *Chloro Controls India (P) Ltd v Severn* Trent Water Purification Inc (2013) 1 SCC 641

[16] *Mitsubishi v Soler Chrysler-Plymouth* 473 U.S. 614 (1985)

[17] *Simula Inc v Autoliv Inc* 175 F.3d 716 (9th Cir 1999)

[18] *Genesco, Inc v T. Kakiuchi and Co* 815 F.2d 840 (2d Cir. 1987); *J.J. Ryan and Sons, Inc. v Rhone Poulenc Textile; S.A.* 863 F.2d 315

[19] *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641

[20] *Ameet Lalchand Shah v Rishabh Enterprises* AIR 2018 SC 3041

[21] Ritvik Kulkarni, 'India'S Treatment Of Interconnected Agreements To Arbitrate' <http://arbitrationblog.kluwerarbitration.com/2018/08/09/indias-treatment-interconnected-agreements-arbitrate/> accessed 3 April 2022

However, a forced joinder does not often happen in practice, for parties raise the argument that the joinder of the third party to the proceeding could not have been foreseen, either by the opposing party or the party sought to be joined.

Subjectivity in International Commercial Arbitration – Striking a balance

It is common practice, and even advisable for parties to choose the UNIDROIT Principles of International Commercial Contracts ["**UPICC**"] to be the law governing the contract. Further, it is advisable and standard practice for parties to adopt the UN Convention on the International Sale of Goods ["**CISG**"] as the substantive law of the contract, since they provide mutually balanced obligations Both of these instruments call for interpreting the contract using a subjective, reasonable business person standard, as opposed to any objective standards of interpretation.[22] Especially when the CISG applies, the CISG is also applicable for the interpretation of the arbitration clause contained within the substantive agreement. In result, not only the words manifest on the contract are to be considered by the tribunal in determining the scope of the arbitration agreement, but the intent of the parties. This provides scope for the argument that the parties may not have expected the joinder of a third party, or the third party may object that it did not foresee participation in the proceedings.

However, it is humbly submitted by the author that this defeats the principle of *pacta sunt servanda.* This is because arbitration agreements are made in the first place to refer *any* dispute that may arise in the future to arbitration. The *raison d'etre* of such an agreement is that parties cannot accurately foresee and list all the permutations of problems that may arise over the course of any transaction. This is a markedly different position from when parties make the agreement to arbitrate after the dispute has arisen. Therefore, when an all-encompassing arbitration agreement to subject all future disputes to arbitrate is made, to insist upon the foreseeability element in an attempt to repel arbitration must be treated as nothing but an "extravagant form of question-begging."[23]

The Impact of the choice of Curial Law

If the facts are such that the tribunal cannot compel the third party to participate in the proceedings, the crux of the issue becomes one of consent of the parties – Since they are not bound by an agreement to arbitrate, consent to arbitrate the matter must be found before the

[22] UNIDROIT Principles of International Commercial Contracts Art 4.2; UN Convention on the International Sale of Goods Art. 8

[23] Alan Scott Rau & Edward F. Sherman, 'Tradition and Innovation in International Arbitration Procedure' (1995) 30 Tex Int'l L J 89

tribunal can be competent to hear the merits of the matter. When rules that allow forced joinder are adopted by the parties, it could be argued that parties consented to such forced joinder by virtue of tacit acceptance of the procedural rules. For example, when the SCAI Rules are adopted, parties often argue that the entire body of rules are adopted, including Article 4 of the rules, which allows the tribunal to proceed with joinder without express consent of parties.

Conclusion

Despite having received much attention in the recent past, the question of forced joinder remains a moot point in international commercial arbitration. On the first count, it is clear that one of two things must be established to proceed with the joinder: Either the jurisdiction of the tribunal to compel the third party to arbitrate by virtue of nexus with the arbitration agreement, or by consent of parties. On the second count, it is also clear that consent can be either express, as in the case of submitting a dispute that has arisen for arbitration along with the terms of reference, or implied, such as adopting curial law that permits the tribunal to proceed with forced joinder.

The debate does not end here, for the curial law concerns itself with the regulation of the proceedings once the tribunal is seized of jurisdiction. Doubt has been expressed as to whether facultative rules such as the SCAI rules may be allowed to override the Model Law or similarly placed *Lex Arbitri*.[24] Parties seeking to repel arbitration must also bear in mind that they cannot act absolutely arbitrarily, since there may be obligations under the general duty to act in good faith to cooperate and resolve the dispute amicably.

[24] See n 11