

The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room

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I. INTRODUCTION

This paper examines the interests of third parties in arbitration and discusses their relevance to proceedings between parties bound by an

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arbitration agreement.¹ The consensual nature of arbitration lies at the heart of this discussion: only those persons that have clearly consented to an arbitration agreement may participate in arbitration proceedings.² This constitutes the fundamental difference between litigation and arbitration. In litigation, the parties to court proceedings are determined on the basis of interest(s). Any legal or natural person is entitled to commence court proceedings to protect its legal or financial interests.³

By contrast, parties to arbitration proceedings are exclusively determined on a contractual basis.⁴ Entering into an arbitration agreement is the indispensable requirement for a person to participate in arbitration proceedings and to be bound by the ensuing arbitral award.

The principle of “procedural party autonomy” provides parties with the freedom to contractually determine the circle of persons entitled to participate in the arbitration proceedings. Thus, the principle of procedural party autonomy and the contractual foundations of arbitration make arbitration a flexible dispute resolution mechanism, allowing parties to design a system of dispute resolution in accordance with their commercial needs.

This ability has proved to be a significant advantage of arbitration over litigation, and it has contributed to the increasing popularity of the former amongst members of the international commercial community, particularly in the last thirty years. By the same token, however, the

1. The term “third party” is used in this paper as referring to a person who never consented to an arbitration agreement concluded between two other parties. The term “third party” is preferred over the term “non-signatory party,” often used in legal discourse, albeit not always accurately or consistently. A non-signatory party should be distinguished from a third party, as, strictly speaking, the former is a person that has consented to an arbitration agreement and thus is bound by it, notwithstanding the fact that the person failed to sign it.

2. See J. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 141 (Kluwer Law Int’l 2003); P. FOUCHARD ET AL., *ON INTERNATIONAL COMMERCIAL ARBITRATION* 298 (Emmanuel Gaillard & John Savage eds., Kluwer Law Int’l 1999).

3. Consider, for example, the United States Federal Rules of Civil Procedure (“FRCP”). Rule 17 in part states:

Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action *shall* be prosecuted in the name of the real party in interest.

FED. R. CIV. P. 17 (emphasis added). Cf. English Civil Procedure Rules (“CPR”) Rule 19.6:

Representative parties with *same interest*

(1) Where more than one person has the *same interest* in a claim -

(a) the claim may be begun; or

(b) the court may order that the claim be continued,

by or against one or more of the persons who have the *same interest* as representatives of any other persons who have that interest.

Eng. Civ. P. R. 19.6 (emphasis added).

4. See FRANCIS RUSSELL, *ON ARBITRATION* ¶ 3-002 (D. Sutton et al. eds., Sweet & Maxwell 2007).

contractual and thus relative nature of arbitration frequently leads to unfavourable results. This is particularly the situation in the context of multiparty commercial relationships, where the consensual limitations of arbitration preclude any person not bound by an arbitration agreement from taking part in arbitration proceedings. Third parties are altogether excluded from the arbitration process, notwithstanding legal or financial interests they might have in the pending dispute. In short, third parties are considered aliens, with interests that are largely irrelevant to arbitration.

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

The main aim of this paper is to present the theoretical premises justifying the participation of third parties (or at least to show that their interests should be taken into account) in the arbitration process. Absent, however, are any suggestions as to how third parties should participate in arbitration proceedings. Whether, for example, third parties could participate through an analogous application of third party mechanisms, such as consolidation or intervention, is beyond the scope of this work.⁵

II. THE INTERESTS OF THIRD PARTIES

Modern business transactions, particularly in the international context, have become extremely complicated, requiring the participation of several parties for the delivery of large-scale projects. For example, a typical construction project may involve the employer and the main contractor but also an engineer or an architect, several subcontractors, suppliers, and financiers. Similarly, the complicated structure of many multinational groups of companies requires several affiliates or subsidiary companies, directors or stockholders of the same group to

5. This issue will be given greater attention in S. BREKOUAKIS, *ARBITRATION AND THIRD PARTIES* (OUP, forthcoming 2010).

become actively involved in the execution of a contract concluded by only one company of the group.

However, multiparty commercial projects are usually executed through several bilateral contracts which contain bilateral dispute resolution arrangements, usually in the form of either arbitration or choice of courts agreements. This practice leads to the “jurisdictional fragmentation of the multiparty project,” where the several parties involved are subject to the jurisdiction of different adjudicatory *fora* (arbitral tribunals or national courts). Thus, a dispute arising between two persons bound by an arbitration agreement in connection with a multiparty project will have to be resolved by arbitration exclusively between these two parties. Other parties cannot participate in the resolution of the dispute through arbitration, even if they have played an active role in the actual project. Notwithstanding any legitimate interest they might have in the outcome of the dispute, these parties will remain *third parties* both to the arbitration proceedings and the ensuing arbitral award. Consider the following examples:

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

6. In a guarantee contract, the guarantor undertakes an obligation that is dependent upon and collateral to the main obligation. This is accepted equally in England, *see* Halsbury's, *Laws of England*, ¶ 101 (Lexis Nexis Butterworths 2007); *see also* *Re Conley, ex p Trustee v. Barclays Bank Ltd.*, [1938] 2 All E.R. 127, at 130 (CA); in the United States, *see* RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 1 et seq. (1996); and in France, *see* French Code Civil art. 2288 (as amended by the recent Ord. No3 46 of 23 March 2006) and *Delebecque*, in *Rèp. Civ.* (2007), *Cautionnement*, art. 2288 et seq.

latter has effectively caused damages to the parent company itself.

Inevitably, in all the above examples, the determination of a dispute in bilateral arbitration proceedings will take place against the backdrop of the multilateral commercial project. Consequently, it is likely that the bilateral arbitration proceedings will adversely affect the legal or financial interests of third parties that are closely related to the dispute. This risk is generally recognized in litigation. Thus, the vast majority of national civil procedures provide for extensive third party mechanisms, which give interested third parties the opportunity to participate in the bilateral proceedings and prevent possible adverse effects.⁷ Furthermore, under specific circumstances, some national civil procedures give a third party the right to challenge the judgment issued in bilateral proceedings even though the third party never participated in the original proceedings.⁸

In some jurisdictions, third-party recourse is provided against arbitral awards.⁹ This remedy, however, is usually limited to domestic

7. For example, for joinder, in England *see* the CPR, Rule 6.20(3)(b); in the United States, *see* the FRCP, Rules 19 and 20; and in Germany, *see* the German Civil Procedure Statute ("ZPO"), §§ 59-61. For intervention, in England, *see* the CPR, Rule 19(2)-(3); in the United States, *see* the FRCP, Rule 24(a); in France, *see* the New Code of Civil Procedure ("NCPC"), art. 325 et seq.; and in Germany, *see* the ZPO, § 66. For consolidation, in the United States *see* FRCP, Rule 42(a); in Germany *see* the ZPO, § 147; and in France *see* the NCPC, art. 367.

8. This effect is more of an adverse effect or a prejudice vis-à-vis third parties rather than the full effect of *res judicata*. The rule usually requires previous notice of the proceedings to the third party, which, if the party does not intervene in the ongoing proceedings, loses the right of recourse against the judgment. For example, in France, the NCPC, art. 581 provides for "tierce opposition," a means by which a third party may attack a judgment that merely affects the third party (i.e., prejudices its interest) rather than binds it with a *res judicata* effect. *See* Code de procédure civile, 100th ed. (2009 Dalloz) under art. 583, para.7, for information on those parties that may use the "tierce opposition," or only those that are neither parties to the proceedings nor represented by the real parties. *Cf.* Cass. 2e civ. [court of ordinary jurisdiction], 16 May 1973, Bull. civ. II, No. 165. A similar means of recourse available to third parties against a judgment issued between two other persons is also provided in the Greek Code of Civil Procedure, art. 92 and art. 583 et seq., where again a third party may attack a judgment by which it is not bound by *res judicata*.

9. Tierce opposition is also provided against an arbitral award in Article 1481 of France's NCPC. The same is accepted in Greece. *See* G. Pantazopoulos, *I Tritanakopi kata tis Diatitikis Apofasis* ["Third Party Recourse against an Arbitral Award"], ARMEANOPOULOS, at 513 (1988) [in Greek]; *cf.* S. KOUSOULIS, DIATHSIA ["Arbitration"], at 125 (Sakkoulas Athens-Thessalonica 2004) [in Greek], who also accepts that third parties can attack an arbitral award although on the basis of a different provision of the Greek Code of Civil Procedure. This has also been recently accepted by some courts in the United States, despite the fact that Section 10 of the Federal Arbitration Act ("FAA") expressly reserves this right to parties in arbitration proceedings. *See* Westra Constr., Inc. v. U.S. Fid. & Guar. Co., 2006 U.S. Dist. LEXIS 27887 (M.D. Pa. 2006); *see also*

arbitrations, mainly for policy purposes seeking to protect the finality of international arbitral awards.¹⁰ Nevertheless, the fact that third-party recourse against domestic awards has been accepted in some jurisdictions provides evidence that the interests of a third party might well be adversely affected by arbitration proceedings.¹¹ In addition, it illustrates that third party interests are in general worthy of protection.

More conclusive evidence suggesting that third party interests are worth protecting in arbitration can be found in the plethora of national judgments and arbitral awards extending the scope of arbitration agreements and proceedings to include “non-signatory” parties based upon various, sometimes innovative, theoretical constructions such as equitable estoppel,¹² incorporation by reference,¹³ assumption,¹⁴

Ass’n of Contracting Plumbers, Inc. v. Local Union No. 2 United Ass’n of Journeymen & Apprentices of Plumbing & Pipefitting Industry, 841 F.2d 461, 467 (2d Cir. 1988) (holding that third parties to arbitration may nevertheless challenge an award where they would have the right to intervene by reference to United States Fed. R. Civ. P. 24(a)); cf. Amina Dammann, *Vacating Arbitration Awards for Mistakes of Fact*, 27 REV. LITIG. 441, 468 (2008).

10. In France, see the NCPC, art. 1507; see also A. Mourre, *L’Intervention des Tiers à l’Arbitrage*, Recueil Vol.I (2000-2002) Les Cahiers de l’Arbitrage, at 104. The same is accepted in Greece. See KOUSOULIS, *supra* note 9, at 267 et seq.

11. Cf. A. REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL ARBITRATION ¶ 8-75 (4th ed. 2004) (acknowledging that arbitral awards may have a “significant” albeit “indirect” effect upon third parties, for example, in the case where one person is jointly liable with another who is a party to the arbitration. If an award is given against one of the parties it will then be at least of persuasive significance against the other person. Redfern et al. also provide the example of an award that orders performance in relation to the delivery of property by one of the jointly liable parties which award will necessarily affect the other jointly liable third party.).

12. United States courts have on several occasions estopped signatory parties to arbitration agreements from initiating court proceedings against “non-signatory” parties, ordering the signatories to submit their dispute with the “non-signatories” to arbitration. See, e.g., *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l Inc.*, 198 F.3d 88, 98 (2d Cir. 1999), *cert. denied*, 531 U.S. 815 (2000); *Thomson-CSF v. Am. Arb. Ass’n*, 64 F.3d 773, 779 (2d Cir. 1995); *Choctaw Generation Ltd. P’ship v. Am. Home Assurance Co.*, 271 F.3d 403 (2d Cir. 2001); *Hughes Masonry v. Greater Clark County Sch. Bldg.*, 659 F.2d 836 (7th Cir. 1981).

However, on various occasions the doctrine of equitable estoppel has equally applied to estop a “non-signatory” party from avoiding arbitration with the signatory party. See *Denney v. BDO Seidman L.L.P.*, 412 F.3d 58 (2d Cir. 2005); *Int’l Paper v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411 (4th Cir. 2000); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999); *In re Weekley Homes*, 180 S.W.3d 127 (Tex. 2005); *Carlin v. 3V Inc.*, 928 S.W.2d 291, 296 (Tex. App. 1996); *Merrill Lynch, Pierce, Fenner & Smith v. Eddings*, 838 S.W.2d 874 (Tex. App. 1992).

13. See the judgments of the Canadian courts in the cases of *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R.3d 299 (Ont. S.C.J. 2002) and *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd.*, 113 D.L.R. 4th 536 (Fed. Ct. 1994).

14. ICC award in case no. 7453 of 1994, ICC case no. 4504 of 1985-1986, and ICC case no. 4972 of 1989; cf. *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100 (2d Cir. 1991).

agency,¹⁵ alter ego or piercing the corporate veil,¹⁶ and the doctrine of “group of companies.”¹⁷ Therefore, it follows that (1) arbitration proceedings between two parties may potentially have *collateral effects* on third parties and (2) when this occurs it is reasonable to argue that third parties should be given the right to protect their interests.

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

The prevailing view in jurisprudence and legal discourse is that third parties bear no relevance to arbitration,¹⁸ which naturally leaves their interests unprotected.¹⁹ Three arguments are typically put forward in support of the prevailing view. The first, and probably strongest argument, is related to the principle of the contractual nature of arbitration, which has acquired the status of an inviolate and sacrosanct arbitration rule.²⁰ Allowing a party that is not bound by an arbitration agreement to participate in the arbitration process would simply not be in line with the above principle. The second argument supporting the view that third parties are irrelevant to arbitration is that third parties get what they bargained for, or rather what they failed to bargain for. Here, it is presumed that third parties have made a considered decision not to enter into an arbitration agreement and have therefore excluded themselves from the arbitration process altogether.²¹ The third argument

15. See *Arnold v. Arnold Corporation-Printed Comm'ns for Bus.*, 920 F.2d 1269 (6th Cir. 1990).

16. In the United States, see *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993); *Mag Portfolio Consultant GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58, 63 (2d Cir. 2001). In Canada, see *Transam. Life Ins. Co. of Canada v. Canada Life Assurance Co.*, 28 O.R. 3d 423 (Ont. Ct. of Justice 1996).

17. Interim award in ICC case no. 4131 of 1982, *Dow Chemical v Isover-Saint-Gobain*, (1984) Rev. Arb. 137; (1983) 110 Clunet 899, with note Derains; see ICC case no. 5103 of 1988, 2 (1991) 2 *ICC Bull.*, at 20; ICC case no. 5920 of 1989, 2 (1991) 2 *ICC Bull.*, at 27; ICC case no. 10758 of 2000, 16 (2005) 2 *ICC Bull.*, at 87.

18. See, e.g., Giorgio Bernini, *Arbitration in Multi-Party Business Disputes*, in YEARBOOK COMMERCIAL ARBITRATION 295 (Kluwer Deventer 1980); Commission on International Arbitration, *Final Report on Multi-party Arbitrations*, Paris, June 1994, by the Working Group under the Chairmanship of M. Jean-Louis Delvolvé, in (1995) 6 *ICC Bull.* 26, ¶ 5 [hereinafter Delvolvé Report]; P. Fouchard, *Multi-Party Business Disputes*, Institute of International Business Law and Practice, ICC Doc. No. 359, 1980, at 57; F. Nicklisch, *Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects*, 11 J. INT'L ARB., No. 4, at 57 (1994); REDFERN ET AL., *supra* note 11, at ¶¶ 3-73; Leboulanger, *Multi-Contract Arbitration*, 13 J. INT'L ARB., No. 4, at 43 (1996).

19. Cf. MOURRE, *supra* note 10, at 100 (analysis of the third parties' interests, arguing for the analogous application of national intervention mechanisms in arbitration).

20. See Delvolvé Report, *supra* note 18.

21. Cf., Nicklisch, *supra* note 18, at 69 (who argues that even when two contracts in the context of a single project between different parties contain identical clauses this does

underscores the importance of confidentiality in arbitration proceedings—confidentiality will be compromised by multi-party arbitration proceedings.²² It is arguable whether confidentiality is an inherent procedural feature of arbitration, and thus always applicable.²³ Nevertheless, where confidentiality does apply, it will indeed have a role to play, militating against the participation of third parties in arbitration proceedings where the original parties wanted to remain confidential.

In spite of these valid arguments, the following sections of this paper suggest that the interests of third parties should be taken into account in arbitration proceedings, and that a procedural mechanism of communication between the arbitration proceedings and third parties should be established. Although it is a private dispute resolute system, arbitration should not remain a closed system, exclusively reserved for those parties that are contractually bound by an arbitration agreement. Instead, arbitration should be a dispute resolution system which, under particular circumstances, is flexible and able to communicate with third parties that have legitimate interests in a dispute pending before a tribunal.

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

A. *The Interests of the Parties to Arbitration*

So far this paper has focused on the interests of *third parties*. This section examines the interests of the *actual parties* to an arbitration agreement and arbitration proceedings. Would parties who have made a conscious decision to provide for bilateral arbitration have any interest at a later stage to allow a third party to join the arbitration proceedings? It is almost impossible to answer this question from the perspective of both

not alter the fact that the parties have in essence negotiated and concluded two “individual contracts” which “are two-way reciprocal agreements”).

22. See Leboulanger, *supra* note 18, at 65.

23. See J. LEW ET AL., *supra* note 2, at 177 (“Without an explicit agreement between the parties there will be no binding obligation of confidentiality under most arbitration laws.”); see also [Supreme Court] 2000-10-27 (Swed.), 51(11) *Mealey’s IAR*, B 1, cited therein.

parties, claimant and respondent, as their interests on this issue will be invariably divergent.

Some parties might benefit from the presence of a third party in their arbitration proceedings. This will typically be the case for the “middle party” in a string sale of goods or a construction contract. A contractor, for example, will be interested in having a subcontractor joined to its arbitration proceedings against the employer, so that the subcontractor will be bound by the determinations of the final award. In this way, the contractor could avoid wasting money and time initiating separate proceedings *with an uncertain outcome* against the subcontractor to recover any damages the contractor would have to pay the employer for defective work actually delivered by the subcontractor.²⁴

Similarly, albeit not in the context of successive contracts, an employer will have an interest in joining the architect or project manager to its arbitration proceedings against the contractor, and in having that contractor bound by the determinations of the final arbitral award.²⁵ The same applies to guarantee transactions. Here, for example, the debtor will have an interest in joining the guarantor to its arbitration proceedings against the creditor, especially when the final award is favorable to the debtor. Otherwise, the creditor will be free to initiate second proceedings against the guarantor and to recover the debt, in which case the guarantor will have a recourse claim against the debtor. Eventually, the debtor might have to pay the guarantor for a debt he was found not liable for in the first arbitration.

However, other parties will have no interest in joining a third party to their arbitration proceedings. In a construction contract, for example, this party will typically be the employer, whose interests would be better served if the dispute against the contractor were resolved privately and as quickly as possible. The involvement of a subcontractor in the pending dispute would complicate the proceedings and would increase the time and the cost of arbitration.

Overall, there is insufficient evidence to generally suggest that the presence of a third party will equally serve the interests of both parties to an arbitration. However, there will be occasions where the interests of one of the parties and, possibly the interests of a third party, will be better served by multiparty arbitration proceedings. In such a case, the

24. Cf. Nicklisch, *supra* note 18, at 63 (noting that the main purpose of multi-party arbitration is to save time and money and to avoid inconsistent findings on identical facts, “as can occur in separate proceedings to the advantages of having a subcontractor taking part in the proceedings between the employer and the contractor”).

25. Cf. Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 478 (1987).

question is whether the multiparty arbitration would be possible, despite the non-agreement of the other party to the arbitration. This would not be a previously unheard of proposition. There are indeed arbitration laws and rules taking the approach that multiparty proceedings will not require the consent of all the relevant parties; the agreement between a third party and one of the parties to the arbitration would suffice for the third party to be joined to the pending arbitration.²⁶ This approach has also been endorsed by some national courts.²⁷

26. For example, the Netherlands Code of Civil Procedure ("Rv"), art. 1046, provides for compulsory consolidation to be ordered by the President of the Amsterdam District Court. This is also provided in Section 6B of the Hong Kong Arbitration Ordinance (relating to consolidation or concurrent hearings) and Section 7 (relating to interpleading), both of which are applicable for domestic arbitrations. *See* Hong Kong Arbitration Ordinance, No. 341 (1997) 3 O.H.K. §§ 6B, 7; *see also* Italian Arbitration, art. 816 (*quinquies* providing that the intervention, or joining, of a third party who is considered to "be necessary by law" (*'litisconsorzio necessario'*), will always be admissible, irrespective of the consent of the original parties to the arbitration proceedings).

Similar third party mechanisms can also be found in Section Two, Schedule Two of the New Zealand Arbitration Act and in Australia in Section 26 of the Queensland Commercial Arbitration Act. In addition, in the United States, see Section 10 of the U.S. Revised Uniform Arbitration Act. *See* NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ARBITRATION ACT § 10 (2000). Under the Uniform Arbitration Act, however, if the arbitration agreement expressly prohibits consolidation, the court would have no power to violate the agreement. *See id.* at § 10(c). A number of U.S. state laws also include third party mechanisms similar to those previously mentioned. *See, e.g.,* WASH. REV. CODE ANN. § 7.04A.100 (LexisNexis 2008) (consolidation); GA. CODE ANN. § 9-9-6(e) (2008) (consolidation); ALASKA STAT. § 09.43.370 (2008) (consolidation); S.C. CODE ANN. § 15-48-60 (LexisNexis 2007) (joinder).

The same approach is also taken by the following arbitration rules:

(1) Article 22.1(h) of the arbitration rules of the London Court of International Arbitration ("LCIA"). Applying article 22.1(h), the tribunal will decide, upon the application of a real party whether a third party will be joined in the arbitration. LCIA requires only the consent of the applicant and the third party, but not the consent of the other real party.

(2) Article 11 of the Belgian Centre for Mediation and Arbitration ("CEPINA") arbitration rules. Under CEPINA article 11, the decision on consolidation, at the request of one of the parties or the tribunal or upon the CEPINA's own motion, will be taken by the CEPINA's appointment committee or the chairman of the tribunal.

(3) Also, in the Swiss Rules, the decision for consolidation of two proceeding is taken by the administrative body (Chambers) (art. 4(1)), whereas the decision for intervention or joinder is taken by the arbitral tribunal (art. 4(2)). *Cf.* The innovative provision art. 10. Vienna rules will also permit joinder in cases where the substantive applicable law "positively provides that the claim is to be directed against several persons" (art. 10(1)(a)).

This "non-consensual approach" is more frequent in arbitration rules related to specific industries, such as construction, commodities, securities, or maritime. *See, e.g.,* AAA Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes) R-7 (consolidation) or the AAA New Jersey Residential Construction Lien Arbitration Rules, § 5 (Joinder), the AAA

Should an agreement between a third party and one of the original parties to the arbitration be enough for multiparty proceedings, or would this stretch the consensual nature of arbitration beyond its limits? The following sections seek to shed some light on this question.

B. Maximizing the Efficiency of Arbitration

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

Supplementary Procedures for Securities Arbitration, § 2 or the NASD Uniform Code of Arbitration § 10314(d) or the New York Stock Exchange Arbitration Rules § 612(d).

Of course, as regards arbitration rules it could be argued that the consensual principle is not actually violated, even when the rules allow for multiparty proceedings on a non-unanimous basis. The fact that the parties have initially referred to a set of arbitration rules in their arbitration agreement means that they have consented to all the provisions included therein. Although in theory this is a valid argument, it is arguable whether all parties agreeing on a set of rules are perfectly aware of the existence of non-consensual third-party mechanisms.

27. Case law has also taken this approach. Here, specific mention should be made to the particularly well-known case *Compañía Española de Petróleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975) (ordering the consolidation of arbitration proceedings between a ship-owner and its charterer, on the one hand, and the ship-owner and the guarantor of the charterer on the other hand). In *Nereus*, the 2nd Circuit applied Fed. R. Civ. P. 42(a) to arbitration proceedings by virtue of Rule 81(a)(3), which has been amended. The new rule, 81(a)(6), contains language similar to that of Rule 81(a)(3), and provides: "Other Proceedings. These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures: . . . (B) 9 U.S.C., relating to arbitration. The *Nereus* case triggered extensive debate on the issue of compulsory consolidation in arbitration. See, e.g., ISAAK DORE, THEORY AND PRACTICE OF MULTIPARTY COMMERCIAL ARBITRATION, Graham & Trotman/Marinus Nijhoff London/Dordrecht/Boston (1990); Stipanowich, *supra* note 25, at 478; J. LEW ET AL., *supra* note 2, at 379. The *Nereus* case was recognized as authority in *Marine Trading Ltd. v. Ore Int'l Corp.*, 432 F. Supp. 683 (S.D.N.Y. 1977); *Sociedad Anonima de Navegacion Petrolera v. Cia de Petroleos de Chile*, 634 F. Supp. 805 (S.D.N.Y. 1986); *Cable Belt Conveyors, Inc. v. Alumina Partners of Jamaica*, 669 F. Supp. 577 (S.D.N.Y. 1987), *aff'd mem.*, 857 F.2d 1461 (2d Cir. 1987); *North River v. Phila. Reinsurance*, 856 F. Supp. 850 (S.D.N.Y. 1994) (refused to order consolidation on other grounds); and *Specialty Bakeries v. Robhal*, 1997 WL 379184 (E.D. Pa. 1997) (also refused to order consolidation). However, more recent authority suggests that it is at least doubtful whether *Nereus* is still good law. In particular, the following decisions refused to follow *Nereus*: *Phila. Reinsurance v. Employers of Wausau*, 61 Fed. Appx. 816 (3d Cir. 2003); *Cavalier Mfg. v. Clarke*, 862 So. 2d 634 (Ala. 2003); *Hartford Accident and Indem. v. Swiss Reinsurance Am.*, 87 F. Supp. 2d 300 (S.D.N.Y. 2000); *cf. Weyebaeuser v. Western Seas Shipping*, 743 F.2d 635 (9th Cir. 1994); *United Kingdom of Great Britain v. Boeing*, 998 F.2d 68 (2d Cir. 1993); and *Ore & Chemical v. Stinnes Interoil*, 606 F. Supp. 1510 (S.D.N.Y. 1985).

1. Regulating Overlapping Proceedings

Multiparty arbitration proceedings will prevent the commencement of several bilateral proceedings with overlapping subject matters. Parallel overlapping proceedings create the risk that the determinations of an arbitral award between the two parties to an arbitration agreement might be irreconcilable, not to say conflicting,²⁸ with those of a subsequent award or judgment between a third party and one of the parties to the first arbitration.²⁹

When several parties are intertwined in a multi-party commercial project, it is likely that the same issues will arise in more than one set of proceedings.³⁰ For example, in the context of construction contracts, the issue of causation or liability will likely arise both in the proceedings between an employer and a contractor and in the proceedings between the same contractor and a subcontractor. Similarly, defects or delay in the work of a subcontractor will affect the liability of the contractor against the employer.

Fortunately, it is the case that inconsistent awards do not occur often.³¹ However, when they do occur they raise doubts about arbitration's reliability and the authority of arbitral awards. An arbitral award is *presumed* to be an authoritative determination of the pending

28. The term "irreconcilable" is preferred here to the term "conflicting": as the latter is stricter, referring to decisions with *mutually exclusive legal consequences* between the same two parties, whereas the former is wider referring to merely contradictory decisions in the case of multiparty relationships. However, both "conflicting" and "irreconcilable" decisions result in problematic, and thus unacceptable, situations. For example, in the context of the European Regulation (Brussels I) 44/2001, see Article 34.4, which precludes the recognition of "irreconcilable" rather than merely "conflicting" judgments. Commission Regulation 44/2001, art. 34.4, 2000 O.J. (12) 1.

29. *Cf. McAlpine Constr. v Unex*, [1994] 38 Con LR 63 (CA). "It is clear that to a considerable extent the issues in the arbitration and in the action, if it is fought, will overlap. Clearly this is undesirable, and there is a strong case for preventing duplication of proceedings. The parties have chosen arbitration to decide the issues which do overlap, and there is thus a presumption that the same issues should not be decided in an action also, with the possible risk that the judge in the action will arrive at a different decision from the arbitrator on some of those issues." *Id.* at 77.

30. *See Cable Belt Conveyors*, 669 F. Supp. at 577 (consolidation of arbitration proceedings was appropriate where both disputes centered on same construction project, principal issue in both proceedings was a question of who was responsible for extra costs incurred in completion of the project, and resolution of disputes in separate proceedings could lead to inconsistent findings).

31. *See, e.g., CME Czech Rep. v Czech Rep.*, 15 WORLD TRADE AND ARB. MATERIALS 171 (Svea Ct. of Appeals (Sweden) 2003); *R. S. Lauder v Czech Rep.*, 14 WORLD TRADE AND ARB. MATERIALS 35 (UNCITRAL Arb. Trib. 2002) (Final Award); *CME Czech Rep. v Czech Rep.*, 14 WORLD TRADE AND ARB. MATERIALS 109 (UNCITRAL Arb. Trib. 2001) (Partial Award).

dispute; hence arbitral awards are granted a *res judicata* effect.³² However, when two conflicting awards are rendered, one of them clearly has to be wrong.

Of course, it is not argued that arbitral awards can never be wrong. As with any decision, arbitral awards are indeed fallible, which is precisely why they are safeguarded with the authority of *res judicata*.³³ A fallible decision, i.e., a *potentially* wrong decision, is tolerable as long as this decision *is* never exposed as *clearly* wrong. However, the issuance of two irreconcilable awards with inconsistent determinations on the same factual or legal issues turns *potentially wrong* awards into *clearly wrong* ones. Therefore, irreconcilable awards negate the purpose of *res judicata* and expose the whole legal system as defective. In fact, irreconcilable awards constitute a legal sore.³⁴ More importantly, irreconcilable awards may frustrate the expectations of the parties to arbitration, who might find their award unenforceable as it conflicts with another arbitral award or national judgment.³⁵

In litigation, multiparty proceedings concentrate all the intertwined parties and claims before a single forum to prevent the risk of conflicting determinations. By contrast, in arbitration, the lack of third-party mechanisms permit parallel overlapping proceedings, thus increasing the risk of irreconcilable awards.

2. Increasing the Material Scope of Arbitration

The failure of arbitration to allow for the interests of third parties restricts its material scope. This is an issue usually linked with the discussion of inarbitrability. However, it is more closely related to the inability of arbitration to effectively deal with multiparty disputes and the interests of third parties. For example, national laws often provide that insolvency disputes must collectively be submitted to the exclusive

32. See, e.g., Stavros Brekoulakis, *The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited*, 16 AM. REV. INT'L ARB. 177 (2005).

33. "[Decisions] are not final because [they] are infallible but [they] are infallible only because [they] are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).

34. Cf. *Abu Dhabi Gas Liquefaction Co. Ltd. v. Eastern Bechtel Corp.*, [1982] 2 Lloyd's Rep. 425, 427 ("As we have often pointed out, there is a danger in having two separate arbitrations in a case like this. You might get inconsistent findings if there were two separate arbitrators. This has been said in many cases . . . it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question, such as causation. It is very desirable that everything should be done to avoid such a circumstance.").

35. See, e.g., Stefan Kröll, *ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE* § 1061 (Karl-Heinz Böckstiegel et al. eds., Kluwer Law Int'l 2007).

jurisdiction of specially designated national courts.³⁶ In essence, insolvency disputes³⁷ are excluded from the arbitration domain because arbitration is not an open dispute resolution system, able to accommodate for collective proceedings. An insolvency dispute would most likely involve several claims (some unsecured, some secured or preferred, some even contested) and several parties (for example, the insolvent, the trustee, and several creditors).³⁸ The resolution of an insolvency dispute might implicate third parties (other creditors not bound by an arbitration agreement), affecting their claims and interests. Consequently, insolvency disputes are reserved for the exclusive jurisdiction of national courts, as national courts provide for multiparty proceedings and take into account the interests of all the parties involved in the dispute. Therefore, the inarbitrability of insolvency disputes stems more from the current inability of arbitration to break its bilateral restraints than from public policy considerations.³⁹

A similar theory underpins the inarbitrability of some intra-company disputes: an arbitral award will only bind some of the several shareholders that are parties to the arbitration agreement.⁴⁰ Thus, an arbitration award may not be able to resolve all the multiparty implications of an intra-company dispute, taking into account the interests of the shareholders not bound by the arbitration agreement. It follows that the issue of inarbitrability is closely linked to the character of arbitration as a closed dispute resolution system unable to provide an effective solution to disputes that implicate third parties. This inability limits the jurisdictional purview of arbitration and curtails its material scope.

If arbitration proceedings allowed for the interests of third parties, they would have a far-reaching dispute resolution impact, which would

36. See, e.g., Austrian Bankruptcy Code § 43(5) and § 111(1); C. COM., R. 662-3 (Fr.).

37. To the extent that insolvency disputes are considered inarbitrable, see, for example, Christoph Liebscher, *Insolvency and Arbitrability*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 165 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., Kluwer Law Int'l 2009). See also Stefan M. Kröll, *Arbitration and Insolvency Proceedings—Selected Problems*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 357-76 (Loukas A. Mistelis & Julian D.M. Lew eds., Kluwer Law Int'l 2006).

38. See Liebscher, *supra* note 37, at 165-67.

39. See Stavros Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 32-37 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., Kluwer Law Int'l 2009); DANIEL COHEN, *ARBITRAGE ET SOCIÉTÉ* ¶ 243 (1993).

40. See Pilar Perales Viscasillas, *Arbitrability of (Intra-) Corporate Disputes*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, *supra* note 39, at 273; see also Rolf Trittman & Inka Hanefeld, *Arbitrability*, in *ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE* 120-21 (Karl-Heinz Böckstiegel et al. eds., 2007).

be welcome in the context of multiparty projects. Arbitrators would thus have a wider jurisdictional remit and would be able to consider the full picture of a multiparty project, which would better position them to assess and to determine the pending dispute.

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

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

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

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

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

Contractual arrangements, especially in contemporary commerce, can be multifaceted and complicated. Often, several parties conclude several bilateral contracts, which refer back to each other. This type of intertwined contract will usually set out a wide network of rights and duties binding all the parties to the several bilateral contracts. Thus, a

party to one contract may have a right or assume a duty against a party to another contract (“cross-contract rights and duties”).

Take, for example, the case where the main construction contract between an employer and a contractor, including a bilateral arbitration agreement, contains a clause according to which the employer would be directly liable to the subcontractor for the payment of work. At the same time, the subcontract contains a clause giving the employer the right to request modifications or variations of the work directly from the subcontractor. In such a scenario, the two contracts create a network of contractual rights and duties that is wider than the boundaries of each of the bilateral arbitration agreements included in the main contract and the subcontract. All three parties (employer, contractor, and subcontractor) constitute an intertwined substantive group, while the scope of the two arbitration agreements remains bilateral. In other words, there is a discrepancy between the substantive group of parties and the arbitration group of parties.

Similarly, take the example of two parallel contracts, one concluded between two parent companies and the other concluded between their affiliates. Suppose that the contract between the two parent companies, including a bilateral arbitration agreement, provides that:

[I]n the event [that] any party (“the non-performing party”) shall . . . default in the payment . . . the other party (“the performing party”), shall have the right . . . to set-off, counterclaim or withhold payment in respect of any default by the non-performing party or any affiliate of the non-performing party under this agreement or any other agreement between the parties or their affiliates. . . .⁴¹

At the same time, suppose that the contract between the two affiliates, including a different bilateral arbitration agreement, provides for a similar set-off clause.⁴² Here, the substantive arrangements of the several parties create a network of interlinked contractual rights and duties that is wider than the boundaries of each of the two bilateral arbitration agreements included in the two substantive contracts. Thus, on a substantive level, each of the parent companies will have the right to set-off a claim that this company or its affiliate might have against the other parent company or its affiliate. However, on an arbitration level,

41. *Sinochem Int’l Oil (London) Co. v. Mobil Sales & Supply Corp.* [2000] 1 Eng. Rep. 758 (Q.B.). In *Sinochem* the parties had agreed on two jurisdiction (choice of courts) agreements rather than two arbitration agreements. *See id.*

42. *See id.*

the two parent companies and the two affiliates will be bound as a pair by separate bilateral arbitration agreements.⁴³

2. Discrepancy Arising from a Statute

A similar situation may arise from the application of a statute. For example, French law⁴⁴ and the law of some countries⁴⁵ influenced by French law provide that, under certain conditions, a sub-contractor may have a direct action, not only against the contractor, but also against the employer. Under this type of legislation, the employer could be liable directly to the sub-contractor. However, it is questionable whether the tribunal constituted under the bilateral arbitration agreement between the contractor and the subcontractor would have jurisdiction to allow for the presence of the employer in the arbitration proceedings. The bilateral arbitration arrangements would seem to fall short of the substantive rights and duties accorded to the several parties by law.

3. Discrepancy Arising from the Conduct of a Third Party

Multiparty substantive relationships that extend beyond the boundaries of a bilateral arbitration agreement may arise from the conduct of a third party. This is typical in the context of transactions involving a group of companies. Often, one of the several companies of the group will enter into a contract, containing an arbitration agreement; other companies of the same group may also become involved in the contract, by, for example, actively taking part in the negotiation, performance, or termination of the contract which they never signed.⁴⁶ The conduct of the third party company might give rise to rights or liability of this third party in relation to the contract containing the bilateral arbitration agreement. Thus, the group of parties linked with substantive rights or duties will include the third party and will therefore be wider than the group of parties bound by an arbitration agreement,

43. For more examples of several bilateral contracts creating a wide network of several interrelated parties, see ICC tribunal in case No. 5894, *Bank X v. Company Trade France* (Fr., U.S. v. Fr.) 1997 Int'l Comm. Arb. 25 (1989). See also No. 8817, *Agent v. Principal* (Spain v. Den.), 1999 Int'l Comm. Arb. 75 (1997).

44. Law No. 75-1334 of December 31, 1975, *Journal Officiel de la Republique Francaise* [J.O.] [Official Gazette of France], art. 12, amended by Law No. 94-475 of 10 June 1994, *Journal Officiel de la Republique Francaise* [J.O.] [Official Gazette of France], June 11, 1994, art. 5(II). See also Christopher R. Seppala, *French Law on Subcontracting*, 1991 INT'L CONSTR. L. REV. 78.

45. See, e.g., Commercial Code art. 565 (1996) (Alg.); Civil Code art. 662 (1949) (Egypt); Commercial Code art. 661 (1953) (Libya).

46. See, for the example, the facts in the well-known ICC case No. 4131, *Dow Chemical v. Isover-Saint-Gobain*, 9 Int'l Comm. Arb. 131 (1982).

which most likely will exclude the third party.⁴⁷ The same will apply when a third party interferes with a transaction between two signatory parties by committing a fraud or some other legal wrong.⁴⁸

In all the above cases, the crux of the matter is that there will be a conflict between commercial reality and the scope of the arbitration proceedings. The freedom of the parties to choose whom they will arbitrate with (i.e. procedural party autonomy) may create an *artificial discrepancy* between the *substantive* and the *procedural* aspect of the same multiparty relationship: the number of the parties bound by an arbitration agreement may be less than that of the parties actually bound by a wide network of substantive rights and duties. In principle, parties are allowed to make dispute resolution arrangements with a scope that is narrower than the background of their substantive relationships. This is exactly the essence of procedural party autonomy. However, the question is whether there should be any limits on procedural party autonomy. Should two parties involved in an intertwined multiparty relationship be completely free to provide for bilateral proceedings in isolation from the wider substantive background, which involves several parties? The question becomes particularly pertinent when the discrepancy between the *substantive* and the *procedural* aspect of the same multiparty relationship might hamper the efficient resolution of the dispute in the bilateral arbitration proceedings.

To return to the above example of two interlinked contracts between two parent and two affiliate companies:⁴⁹ it is doubtful whether, in arbitration proceedings between the two parent companies, either of them could rely on the set-off clause and invoke claims of its affiliate against the affiliate of the other parent company. Such a claim would most likely go beyond the scope of the bilateral arbitration agreement that binds the two parent companies. Eventually, the narrow scope of the arbitration proceedings will, in essence, overturn the substantive arrangements made by the same parties.

As already mentioned, in litigation national procedural systems provide for extensive third-party mechanisms. A review of these third-

47. Unless the doctrine of group of companies will apply to “extend” the arbitration agreement to the third party. See *supra* note 17. However, this will be far from certain.

48. See, e.g., *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342, 342-43 (11th Cir. 1984). In *McBro*, a construction manager contracted with the owner of a hospital with regard to renovation work on the hospital, while an electrical engineer executed a separate agreement with the owner to perform electrical work on the same hospital. The electrical engineer filed a suit against the construction manager, alleging that the latter had “harassed and hampered its [electrical] work.” *Id.* at 343. The construction manager invoked the arbitration clause included in its contract with the owner and moved for an order to compel the electrical engineer to arbitrate with it. *Id.*

49. See *supra* note 41 and accompanying text.

party mechanisms shows that the procedural rights accorded to the parties depend on *how closely a party is interrelated to the dispute on a substantive level*: in particular, when a third party is strongly associated in terms of interests with one of the original parties to the proceedings, third-party mechanisms of *mandatory nature* are usually provided by national litigation systems.⁵⁰ Here, the presence of the third party is considered indispensable for the resolution of the dispute between the two original parties in the proceedings. On the other hand, when a third party is *contractually linked only but not strongly associated* with one of the original parties to the proceedings, third-party mechanisms of *permissive or ancillary character* are provided by national litigation systems.⁵¹ Here the presence of the third party is considered helpful but not absolutely necessary for the resolution of the dispute between the two original parties in the proceedings.⁵² This is an overarching principle common to almost all procedural systems.

In this way, national procedural systems ensure that a *functional equilibrium* between the *substantive* and the *procedural* aspect of a dispute is always sustained. Accordingly, when it is necessary, they all allow for the scope of the dispute resolution proceedings to extend and adjust to the substantive background of the pending dispute.

It is only logical that the procedural arrangements will have to follow and adjust to the substantive arrangements of the parties. The aim of a dispute resolution mechanism set in a contract is to give effect to the substantive rights and duties of the parties. The substantive contract is the main reason that the parties initially contacted one another, negotiated, and finally entered into, an agreement. The dispute resolution agreement of the parties was concluded in view of the main contract. Therefore, procedure is considered—by nature—ancillary to substance.⁵³

50. See, e.g., U.S. FED. R. CIV. P. 24(a)(2) (providing for intervention as a matter of right “when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest . . .”); see also FED. R. CIV. P. 19(1) (providing for mandatory joinder of the third party that is “required”); French NCCP, art. 331 (providing for mandatory intervention (“intervention forcée”)).

51. U.S. FED. R. CIV. P. 20 (providing for permissive joinder of a third party); French NCCP, art. 330 (providing for ancillary intervention (“intervention accessoire”)).

52. “Persons having interest in subject-matter of litigation which may conveniently be settled therein are ‘proper parties,’ whereas those whose presence is essential to determination of entire controversy are ‘necessary parties.’” *Texas & Pac. Ry. Co. v. Bhd. of R.R. Trainmen*, 60 F. Supp. 263, 268 (W.D. La. 1945).

53. For a more detailed discussion on the relation between substance and procedure, and some legislative efforts to free procedure from its generally auxiliary character, see K. Kerameus, *Procedural Unification: the Need and the Limitations*, in INTERNATIONAL

This proposition should equally apply to the dispute resolution mechanism of arbitration. It is true that unlike litigation, arbitration borders on contractual law due to its contractual origins. However, once arbitration commences the tribunal assumes jurisdictional powers similar to that of a national court.⁵⁴ Moreover, the resulting arbitral award has the same jurisdictional power as a national judgment: it is enforced as a national judgment rather than as a contract and it is vested with the power of *res judicata*.⁵⁵ Overall, arbitration has the same purpose as litigation: to effectively resolve a specific dispute.⁵⁶ Consequently, this functional equilibrium between substance and procedure in principle should also apply to arbitration.

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

PERSPECTIVES ON CIVIL JUSTICE: ESSAYS IN HONOUR OF SIR JACK I. H. JACOB Q. C. 53 (I.R. Scott ed., 1990).

54. Indeed, arbitrators are granted wide jurisdictional powers by the relevant arbitration laws and rules that are very similar to the power granted to national judges. *See, e.g.*, English Arbitration Act, 1996, c. 23, §§ 33, 34, 37, 38, 39, 41 (Eng.); *cf.* also Model Law, art. 19 (2) (providing that the arbitral tribunal may “conduct the arbitration in such manner as it considers appropriate”) and art 26 (where arbitrators are granted the power to appoint an expert). Arbitrators may even have the right to summon third parties. *See, for example*, Section 7 of the U.S. Federal Arbitration Act, which provides: “The arbitrators . . . may summon in writing *any person* to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.” 9 U.S.C. § 7 (2006) (emphasis added).

55. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 84, ¶ 1 (1982) (“... a valid and final award by arbitration has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court.”). In England, *see* *Fidelitas Shipping Ltd v. V/O Exportchleb*, [1965] 1 Lloyd’s Rep. 13. *See also* ROBERT MERKIN, *ARBITRATION LAW* § 16.116 (Informa 1991). In France, *see* Article 1476 of the NCPC (for domestic arbitration) and Article 1500 (for international arbitration). *See also* Cass. soc., March 19, 1981, (1982) *Rev Arb.* 44. In the Netherlands, *see* Arbitration Act 1986, art. 1059. In Belgium, *see* Article 1703(1) of the Belgian Judicial Code. In Austria, *see* the new Austrian CCP § 607. In Hong Kong, *see* Section 2GG of the Hong Kong Arbitration Ordinance (applicable to both domestic and international arbitration), Section 40B.2 (domestic only), and 42 (international only). *See* Hong Kong Arbitration Ordinance, No. 341 (1997) 3 O.H.K. §§ 2GG, 40B.2, and 42.

56. *But cf.* EAA § 1(a) (stating that “*the object of the arbitration* is to obtain the fair resolution of disputes. . . .” (emphasis added)).

This realization finds further support in two arguments. The first relates to equity and due process considerations. In particular, it has been argued that the interests of the third parties should be taken into account on the basis of the principle of “equality of the parties,” which should “be read to include all parties to the contract, not just those who are participating in the arbitration.”⁵⁷ Such a wide meaning of the term “parties” will include third parties to arbitration that are substantively intertwined in the dispute pending before the tribunal. Furthermore, it has been argued that third parties should be allowed to intervene or to be joined to arbitration proceedings by reference to due process.⁵⁸ This should be the case in particular, whenever the presence of the third party is indispensable for one of the parties to the arbitration proceeding to make its case before the tribunal.⁵⁹ Unless the third party is allowed to participate in the arbitration, the existing party to the proceedings will be unable to present its case and therefore due process will be violated.

The second argument is the suggestion that when two parties enter into arbitration agreements, it is reasonable to infer that they are, or at least should be, aware of the surrounding substantive circumstances. In particular, parties must know that more parties are implicated in the commercial project they are getting involved in; as they also must know that the rights and duties of the several parties are substantively interdependent.

For example, all the parties involved in a transaction with a group of companies are aware of, and apparently accept, the fact that the third-party company of the group becomes actively involved in the actual performance of the contract. Similarly, an employer and a contractor, when concluding a bilateral arbitration agreement, are aware of the several parties (engineer, project manager, subcontractor, suppliers, sureties) and contracts involved in the execution of the construction work.

57. See James Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469 (2004); Nana Japaridze, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 36 HOFSTRA L. REV. 1415, 1432 (2008); S.I. Strong, *Intervention And Joinder As of Right in International Arbitration: an Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915, 981 (1998).

58. See Strong, *supra* note 57, at 927.

59. For case law that has by analogy applied national participatory provisions to arbitration on similar considerations, see *Ass'n of Contracting Plumbers v. United Ass'n of Journeymen*, 841 F.2d 461, 466 (2d Cir. 1988); *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union*, 629 F.2d 1204, 1213 (7th Cir. 1980); *Holborn Oil Trading Ltd. v. Interpetrol Bermuda Ltd.*, 658 F. Supp. 1205, 1206-09 (S.D.N.Y. 1987); *Litton Bionetics Inc. v. Glen Constr. Co., Inc.*, 437 A.2d 208 (Md. 1981); *Plaza Dev. Services v. Joe Harden Builder, Inc.*, 365 S.E.2d 231 (S.C. Ct. App. 1988).

Whether awareness in this context equals consent, as has been held by some national courts, is difficult to argue.⁶⁰ One “should be extremely cautious about forcing arbitration,”⁶¹ overlooking the fine line between awareness and consent.⁶² Nevertheless, the parties’ clear awareness of the wider substantive background of their bilateral arbitration arrangements should be a factor accounted for in this delicate situation.⁶³

IV. CONCLUSION

The aim of this paper was to explore the relevance of the interests of third parties to an arbitration. It would be unrealistic, and indeed wrong, for one to arrive at certain conclusions on such a thorny topic.⁶⁴

60. French national courts have held that awareness in this context equals consent. See Cour d’appel [CA] [court of appeal] *Korsnas Marma v. Durand-Auzias*, Nov. 30, 1988, (1989) *Rev. Arb.* 691 (P.-Y. Tschanz holding that “. . . an arbitration clause included in an international contract has an autonomous validity and effectiveness, which calls for the clause to be extended to parties directly involved in the performance of the contract and in the disputes arising out of the contract, provided that it is established that [the parties’] activities raise the *presumption* that [the parties] were *aware* of the existence and the scope of the arbitration clause, and irrespective of the fact that they did not sign the contract including the arbitration agreement” (in French; translation of the author) (emphasis added)); see also Cour d’appel (CA), *Ofier Bros v. Tokyo Marine and Fire Ins.*, Feb. 14, 1989, (1989) *Rev. Arb.* 691 (note P.-Y. Tschanz); Cour d’appel (CA), *Orri v. Lubrifiants Elf Aquitaine*, January 11, 1990, (1992) *Rev. Arb.* 95 (note D. Cohen) (1991); 118 J.D.I., p.141 (note B. Audit).

61. See *InterGen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003) (“the courts should be extremely cautious about forcing arbitration in situations in which the identity of the parties who have agreed to arbitrate is unclear”) (quoting *McCarthy v. Azure*, 22 F.3d 351, 354-55 (1st Cir. 1994)); see also *E.I. Dupont de Nemours & Co. v. Rhone Poulenc & Resin Intermediaries*, 269 F.3d 187, 204 (3d Cir. 2001); *Comer v. Micor, Inc.*, 436 F.3d 1098 (9th Cir. 2006).

62. See J. Hosking, *Non-Signatories and International Arbitration in the United States: the Quest for Consent*, 24 *ARB. INT’L* 303 (2004) (“A review of the theories, principles and procedures employed to bind non-signatories, reveals—perhaps unsurprisingly—that the ‘touchstone’ for this determination is whether or not the relevant entities consented to arbitrate with one another.”); see also *Thomson-CSF v. Am. Arb. Ass’n*, 64 F.3d 773, 779-780 (2d Cir. 1995) (“A non-signatory may not be bound to arbitrate except as dictated by some accepted theory under agency or contract law.”).

63. “An agreement implied in fact is founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.” *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996) (quoting *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923)); see also *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991) (noting that “the clear weight of authority holds that the most minimal indication of the parties’ intent to arbitrate must be given full effect, especially in international disputes”). The Ninth Circuit in *Republic of Nicaragua* relied in part on *Bauhinia Corp. v. China Int’l Mach. and Equip. Co.*, 819 F.2d 247 (9th Cir. 1987).

64. See Stephen Bond, *Recent Developments in International Chamber of Commerce Arbitration*, in *PRACTISING LAW INSTITUTE, INTERNATIONAL COMMERCIAL ARBITRATION*:

Nevertheless, the above analysis has yielded some cautious results. The starting, and less controversial, point made in this paper was that arbitration proceedings and arbitral awards can touch upon and even adversely affect the legal and financial interests of third parties.

Whether this adverse effect would justify the participation of third parties in the arbitration proceedings is not equally clear. Examining the issue from the viewpoint of the actual parties to a set of arbitration proceedings, it would be difficult to suggest that the presence of a third party will equally serve the interests of both the claimant and the respondent. Most frequently, one of the parties to the arbitration will have no interest in having a third party join the proceedings.

However, support for the proposition that arbitration should allow for the interests of third parties can be found in other arguments. To begin with, multiparty arbitration proceedings would enhance the efficiency of arbitration. If arbitration was able to accommodate multiparty arbitration proceedings, the risk of conflicting awards resulting from overlapping parallel proceedings would be more effectively controlled.

Equally important, third-party proceedings would expand the material scope of arbitration to include disputes that are in principle considered inarbitrable. As was argued here, in many cases inarbitrability is linked more with the inability of arbitration to take the interests of third parties into account than with public policy prohibitions.

However, the most convincing argument for third-party arbitration proceedings is that arbitration arrangements should remain in tune with their substantive background. As was shown, in many cases, the scope of bilateral arbitration proceedings falls short of the implications of a dispute involving several parties. Here, it is questionable whether two parties should be totally free to make bilateral arbitration arrangements against a multiparty substantive backdrop. This may result in an *artificial discrepancy* between *the substantive and the procedural* aspect of the same multiparty relationship, eventually hampering the efficient resolution of the dispute in the bilateral arbitration proceedings.

It was not the aim of this paper to determine the exact limitations of procedural party autonomy; however, the paper argued that in principle there should be limits imposed on procedural party autonomy when several parties are involved in a single commercial project. As was submitted, procedural party autonomy could not overturn the multiparty

RECENT DEVELOPMENTS 89 (1988). "No generally acceptable solution to the manifold issues arising from multiparty arbitrations has yet been found by either the ICC or any of the dozens of other scholars, lawyers and arbitral institutes working on this issue." *Id.*

substantive background and leave out of the arbitration proceedings third parties that are substantively intertwined in a dispute before the tribunal. Otherwise, the functional equilibrium between substance and procedure, which should apply not only to litigation but to arbitration as well, would be disturbed. Eventually, the focus of arbitration proceedings should widen to include all the substantive implications of a dispute before a tribunal and all the third parties involved therein. Third parties with an interest in the outcome of the arbitration are not necessarily aliens and therefore they should not be altogether excluded from the arbitration process.

Overall, there is more merit in the argument that arbitration should be a dispute resolution system, which—under particular circumstances—would be able to allow for the interests of necessary third parties. Thus, arbitration would be better equipped to deal with multiparty disputes arising out of multiparty projects, which become increasingly frequent in modern commercial practice.