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MANDATORY ARBITRATION, LIMITATION ON PARTY AUTONOMY PRINCIPLE AND EFFECT OF ARBITRAL AWARD ON NON-SIGNATORIES

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ABSTRACT

The growing inclination for fast settlement of disputes and differences between parties has led to the people opting for arbitration as the Dispute Resolution Method more often than approaching the courts. For parties to opt for arbitration as a Dispute Resolution method, the parties are required to have a pre-dispute arbitration agreement or a clause in the existing agreement referring the parties' disputes to arbitration, thus making the agreement as the foundation of an arbitration process. The freedom of the parties to choose the process of resolving disputes is known as party autonomy. The doctrine of party autonomy gives the right to the parties to choose the laws applicable to the arbitration process and these laws shall govern the process, the seat of arbitration, the, language that should be used during the arbitration process etc. Consent given by parties plays an important role in the whole arbitration process. The consent given by the parties is the proof that they are ready to be bound by the arbitral award. The article deals with the cases where consent has been obtained forcefully from the contracting parties and also whether the non-signatories to the contract could be bound by the arbitral award. The article also seeks to highlight the restrictions, if any, on the doctrine of party autonomy.

INTRODUCTION

The globalization and expansion of cross border trade led to complex commercial relationships between the states. With increased trade and commerce, the problem of expeditious resolution of commercial disputes between business entities arose. The fact that resolution of disputes through juridical method is considered time consuming and the business communities seek a global freedom of contract independent of intervention of courts to choose their own law and procedures, settling the disputes outside the court seemed to be an easy alternative for people, and the most acceptable technique of Alternative Dispute resolution (hereinafter referred to as ADR) was arbitration. ADR has now become a global

phenomenon in over 35 years of its development and has been gradually introduced into the justice delivery system globally.[801] Since, the disputes are resolved amicably in ADR models; the compliance level of disputes resolved through this mechanism is higher than those resolved through the juridical method of dispute resolution. As international trade has expanded in the recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade.[802] It begins as a private agreement between the parties, yet it ends with an award that has a binding legal force and effect and which the courts of most countries will recognize and enforce. There should be an arbitration clause in the contract or an arbitration agreement mutually agreed between the parties so as to opt for arbitration to settle the disputes but there is also prevalence of mandatory or forced arbitration which hampers the parties' interests. One of the essential features of international commercial arbitration is parties' autonomy. On one hand, where this characteristic enables the parties to decide the manner in which arbitration should be conducted, it also has certain limitations imposed through legislations and judicial processes, on the other hand. The researchers will highlight the issues regarding the scope of limitations imposed on the parties' autonomy in arbitration, forced arbitration and the effect of an arbitral award on third parties.

Research Problem

Settling disputes outside the court has proved to be a boon in some cases but it has also posed problems for many. It has become very common to include pre-dispute arbitration clauses in the standard form of contracts. Arbitration agreements reflect the party autonomy to settle their disputes through arbitration than the court of law. However, the principle of party autonomy has certain limitations to it which will be studied in the paper. In cases where there is no power parity between the parties, the party who is in the superior position than the other party, causes the latter to settle their disputes through arbitration making the dispute resolution method to be 'mandatory or forced arbitration'. Mandatory arbitration mechanism is where one party coerces the other to opt for arbitration, and frame rules for the process of arbitration making the whole procedure unilateral, thus defeating the whole objective of

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[801] Richard Chernick, "ADR Comes of Age: What Can We Expect in the Future?'' 4 *Pepperdine Dispute Resolution Law Journal* 187 (2012).

[802] *Mitsubishi Motors v Soler Chrysler Plymouth* 473 US 614, 638 (1985).

arbitration. The purpose of this research is to study the limitations the party autonomy principle has, the role of consent in arbitration and the binding nature of an arbitral award on third parties.

PARTY AUTONOMY

Recognition of Principle of Party Autonomy

The principle of Party Autonomy confers on the parties' the freedom to determine laws, place of arbitration, selection of arbitrators etc. The fundamental principle governing arbitration is party autonomy. According to Ansari, it is the backbone or a cornerstone of arbitration proceedings.[803] When parties draft an arbitration agreement, they enjoy freedom to choose the process to solve the dispute. Article II (1) of the New York Convention[804] requires inter alia that each contracting state shall recognise an agreement in writing in which the parties undertake to submit to arbitration their disputes. An arbitration agreement, therefore, derives its power from party autonomy. The principle of party autonomy is recognized under UNCITRAL Model Law[805] which has been adopted by several countries, including India[806], either holistically or with modification.

The principle of party autonomy, in the general sense, started to develop in the 19th century.[807] However, this principle has broader meaning in international commercial arbitration than in domestic arbitration. In international commercial arbitration, the parties to the arbitration agreement are free not only to conduct the arbitration process but also choose laws governing the arbitration.

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[803] Jamshed Ansari, ''Party Autonomy in Arbitration: A Critical Analysis'' 6 *Researcher* 47 (2014).

[804] Article II (1) of Convention on Recognition and Enforcement of Arbitral Awards (New York, 1958) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

[805] Article 19: Determination of rules of procedure
(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

[806] Section 19(2) of Arbitration and Conciliation Act, 1996
Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

[807] Dicey and Morris and Collins, *The Conflict of Laws* (5th Supplement, 15th edn, Sweet & Maxwell 2018).

Recently, the Supreme Court of India has discussed this principle in *Centrotrade Minerals and Metal Inc. v. Hindustan Copper Limited*[808],

"Party autonomy being the brooding and guiding spirit in arbitration, makes the parties free to agree on application of different laws governing their entire contract."

Almost all international arbitration laws, rules, and conventions recognize the principle of party autonomy. The concept is recognised under the New York Convention[809], UNCITRAL Model Law[810], Indian Arbitration and Conciliation Act, 1996[811] and the International Chamber of Commerce (ICC) Arbitration Rules[812], just to mention a few. The provisions of the above laws and rules, summarises that the parties' have the right to choose the procedural provisions.

Party Autonomy under the Indian Arbitration and Conciliation Act, 1996

The principle of party autonomy can be drawn from Part I of the Indian Arbitration and Conciliation Act 1996. The arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute and, failing any such designation, the rules of law the tribunal considers appropriate will prevail, given all the circumstances[813]. While interpreting this provision, the Indian Supreme Court in the case of *Bhatia International v. Bulk Trading SA*[814], held that Part I of the Indian Act applied to arbitrations which took place outside India, including foreign awards, unless the parties expressly or impliedly excluded all or any of its provisions.

It can thus be concluded that the arbitration clause, being an integral part of the contract must be construed as the agreement which does not depend on the other terms and conditions of the contract than the will of the parties to it. Although, the doctrine of party autonomy is a

[808] (2017) 2 SCC 228; *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552.

[809] The New York Convention 1958, art V (1) (d).

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

[810] The UNCITRAL Model Law 1985, art 19 (1).

[811] Part I of the Indian Arbitration and Conciliation Act, 1996.

[812] The International Chamber of Commerce (ICC) Arbitration Rules 2012, art 21.

[813] Indian Arbitration and Conciliation Act, 1996, s 2(4).

[814] (2002) 4 SCC 105.

recognized concept in commercial arbitration worldwide, there are limitations imposed on the autonomy of party in international commercial arbitration.

LIMITATIONS TO THE PRINCIPLE OF PARTY AUTONOMY

Party Autonomy was meant to promote general autonomy to parties which should be balanced with safeguards in the form of mandatory provisions that could not be contracted out on the basis that these were considered to be essential to the arbitration. Party autonomy was recognized by the English Court for the first time in the *Robinson case*[815] to determine the judicial enforceability of a contract. Nonetheless, many scholars argue that the application of this principle should be subjected to the limitation of "public policy", "State sovereignty", and "mandatory laws" of the *lex loci arbitri* traditionally before and after the establishment and commencement of the arbitration tribunal and its process respectively[816]. The grounds of restricting the scopes of this doctrine have been discussed the following:

Party Autonomy Principle and Public Policy

The term public policy is a wider concept which comprises the society's culture, moral values, belief etc., which is accepted and applied in the society. Public policy is dynamic in nature and it varies with time and place. The Supreme Court of India in the case of *Bharat Heavy Electricals v C.N. Garg*[817], has interpreted "contrary to public policy" to mean any agreement that is against "the fundamental policy of the country", "interest of the country", "morality", "justice" and "legal norms".

The role of public policy is essentially three-fold: firstly, the freedom of the parties can be limited by the rules that govern the arbitrability of the arbitration agreement; secondly, an award can be set aside if it violates the public policy; and finally, if the award infringes the public policy its recognition and enforcement can be refused[818]. There is a general tendency

[815] *Robinson v Bland* (1760) I Wm BI 234 z Burr 1077.
[816] A. F. M. Maniruzzaman, ''International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview'', 7 *Journal of International Arbitration* 53 (1990).
[817] Civil Writ Appeal No. 4190 of 1998.
[818] Bernhard Hanotiau and Olivier Caprasse, ''Public Policy in International Commercial Arbitration'' in Gaillard/Di Pietro ed., Enforcement of arbitration agreements and international arbitral awards p. 787(2008).

of the States to reduce or even abolish the limits of public policy under the international arbitration to a minimum extent due to the issue of it being universally accepted[819].

In the *Egerton* case[820], the House of Lords described "public policy" as 'a principle of law which holds that no subject can lawfully do that which has the tendency to be injurious to the public or against public good'. Later, in the *Peh Teck Quee* case[821], the Singapore Court of Appeal interpreted public policy referring to the contract and its enforcement instead of the choice of law itself. This obiter dictum infers that the parties are free to govern their arbitration agreement unless the contract itself or its enforcement is in contrast with the public policy.

Recently, in the *Thomas* case[822], the US Court of Appeals (11th Circuit) did not hesitate to draw the line of limitation of party autonomy to maintain the "equality and fairness" between the contracting parties. This decision requires putting a limitation on party autonomy even in the selection of the dispute resolution process, at least in the US, under the guise of maintaining equity and fairness.

Due to the importance of public policy as a limitation to party autonomy in commercial arbitration, the following reasons in its favour[823]:

1. It prevents parties from using arbitration to legitimize illegal and immoral contracts, thus protecting the integrity of arbitration.
2. It acts as a limit to party autonomy, which may likely be abused by the parties.
3. It protects the society from any violation of its fundamental principles.
4. It serves the purpose of permitting the judge of a state not to give effect to an award that would contradict the fundamental principles of the judges' social system. It serves as a ground for the non-recognition and non-enforcement of an award.

Party Autonomy Principle and Mandatory Provisions

Under the purview of the party autonomy principle, the contracting parties have a broad freedom to construct an arbitration agreement of their choice. However, such freedom of the

[819] Karl-Heinz Bockstiegel, ''Public Policy as a Limit to Arbitration and its Enforcement'', *IBA Dispute Resolution International* 125 (2008).
[820] *Egerton v Brownlow* (1853) 4 HLC 1
[821] *Teck Quee v Bayerische Landesbank Girozentrale* (2000) ISLR 148 (CA)
[822] *Puliyurumpil Mathew Thomas v Carnival Corp* (2009) Case No. 08-10613
[823] Supra.

parties' is subjected to certain mandatory rules for example the arbitration agreement must be valid as per the governing law applicable to such arbitration agreement.

Generally, the law governing the arbitral procedure must be in compliance with the rule of the lex arbitri, the place of the seat of arbitration[824]. Hence, there are some mandatory provisions which the parties are not allowed to exclude or modify such as:

- Article 18[825] and 36 of the UNCITRAL Model Law
- Article 5 of Convention on the Recognition and Enforcement of Foreign Arbitral Awards[826]

In the question of the nature of the mandatory rules or laws, there is absolutely no doubt that both the procedural law and the substantive law are included within the realm of the same[827]. Nonetheless, even if the parties choose the law(s) as per the party autonomy principle, such law(s) may not be absolutely welcomed by the arbitral tribunal.

Party Autonomy Principle and State Sovereignty

The question of predominant conflict between the party autonomy principle and State sovereignty arises because the Courts often consider the arbitration as a threat to their jurisdiction and violation of the sovereignty and public policy of the States[828].

To respond to this concern, in the *Volt Information Science case*[829], the US Supreme Court recognised the importance of party autonomy principle included in the Federal Arbitration Act 1925 (hereinafter referred to as 'FAA'). The Court depicted that the FAA would simply enforce the terms of the private agreements to arbitrate confirming the party autonomy principle whereas the Court would ensure that the private agreements to arbitrate have been enforced as per their terms.

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[824] Pinsent Masons, UK, *available at*: https://www.pinsentmasons.com/out-law/guides/international-arbitration-substantive-procedural-and-mandatory-rules (Visited on February 12, 2020)

[825] Article 18 Equal treatment of parties: The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case

[826] The Convention defines five grounds upon which recognition and enforcement may be refused at the request of the party against whom it is invoked. The grounds include incapacity of the parties, invalidity of the arbitration agreement, due process, scope of the arbitration agreement, jurisdiction of the arbitral tribunal, setting aside or suspension of an award in the country in which, or under the law of which, that award was made. The Convention defines two additional grounds upon which the court may, on its own motion, refuse recognition and enforcement of an award.

[827] Pierre Mayer, ''Mandatory Rules of Law in International Arbitration'', 2 *Arbitration International* 275(1986)

[828] Sunday A. Fagbemi, ''The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?'' *Journal of Sustainable Development Law & Policy* 222 (2015)

[829] *Volt Information Science, Inc. v Board of Trustees of Leland Stanford Junior University* (1989) 489 US 468,479

However, in the *Vita Food Products case*[830], Lord Wright very lucidly pointed out that in terms of choice of law if the parties made the choice in "good faith" complying with the "public policy", the decision of the parties is regarded as conclusive even if the chosen law is not related to the parties or the transaction. It is certain that the parties may act according to the arbitration agreement entered into by them but cannot be enforced if there is threat to the state sovereignty.

Thus, the principle of party autonomy encourages people to solve their disputes through arbitration as they are free to choose the procedure and the laws applicable to the arbitration. However, the said principle has limitations imposed on it namely, public policy, state sovereignty and mandatory provisions in the laws which the parties are subject to.

CONSENT

The enforceability of any particular contract depends on whether the parties to that contract have given free consent to it. If there is lack of consent, it would infringe the parties' freedom to enforce the contract against them; while if the parties gave their consent, it might be just as much of an infringement not to enforce the contract. Significantly, though, not just any form of consent would bind a party under this theory. Instead, the consent must be voluntary, and under most conceptions of autonomy the consent must also be adequately informed.[831]

Consent as an essential element in arbitration agreements

When arbitration is mutually agreed upon through an equal bargaining process, there are unique protections for both parties that minimize the risk of unfairness or error by the arbitrator. One of the essential principles in the arbitration agreements is *consensus ad idem* (mutual consent), which is the mainstay of all contracts.

In the case of *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal*[832], the Singapore Court of Appeal stated that: 'an arbitral award binds the parties to the arbitration because the parties have consented to be bound by the consequences of agreeing to arbitrate their dispute.'

[830] *Vita Food Products Inc v Unus Shipping Co. Ltd* (1939) AC 277, 270.
[831] Richard Craswell, ''Remedies When Contracts Lack Consent: Autonomy and Institutional Competence'', 33 *University of Chicago Law School* 210 (1995).
[832] [2013] 226 SGCA 57.

In the case of *Indowind Energy Ltd v Wescare (I) Ltd* [833] the court held that in the absence of ratification, approval, adoption or confirmation of the agreement, a company could not be said to be a party to a contract containing an arbitration agreement when it did not sign the agreement, with reference to its subsequent conduct.[834] The court examined this and held that the existence of an arbitration clause is a necessary requirement, and disputes may be referred to an arbitrator only if the clause contains the attribute of mutual consent[835].

The pro arbitration approach used by the courts has been misused by commercial businesses[836] as the companies have found techniques through involuntary imposition of arbitration by force or compulsion via unilateral or non-negotiable standard terms of contract. Forced arbitration is one-sided, and requires either of the parties to waive their rights to vindicate statutory protections in court. Forced arbitration is not consensual due to the inherent inequality in the relationship between the parties.

Instances where forced arbitration is prevalent

A. Consumer contracts

Arbitration clauses in consumer contracts are commonly observed. Generally, the seller has his standard terms pre-drafted which is presented to the buyer on a 'take it or leave it' basis. One of the provisions of the standard terms includes the mandatory arbitration clause that the buyer has to accept if he wishes to buy the product or avail any service. In the jurisdictions of the United States, the consumer contracts having mandatory arbitration clauses used to be treated like any other arbitration agreement due to the pro-arbitration approach adopted by the Judiciary and legislations in order to expand the use of arbitration for settlement of disputes but this scenario has been changed after the enactment of the Forced Arbitration Injustice and Repeal Act in the year 2019. EU legislations prohibits pre-dispute binding arbitration agreements in consumer contracts as it considers forcing consumers to arbitration as unfair and presumes that arbitration agreement is unfair if the parties did not individually negotiate the same after the dispute

[833] (2010/4) UJSC1961.
[834] International Law Office, *available at:* https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/India/Khaitan-Co/Courts-confirm-key-ingredients-of-arbitral-agreements#3 (Visited on February 9, 2020).
[835] *Jagdish Chander v Ramesh Chander* (2007/6) SCALE325.
[836] *Transport mutual INS Association (Eurasia) Ltd. V New India Assurance Company Ltd.* (2004) EWCA Civil 1598.

arose. In India, however, the Supreme Court laid down that consumer disputes are not arbitrable in the case of *Emaar MGF v Aftab Singh*.[837]

B. Employment contracts

It is very common for employers to draft the employment contract and include an arbitration clause in the contract itself which defines the procedure rules and location of the arbitration for settlement of future disputes. Traditionally, arbitration has not been widely used in the UK to resolve employment disputes, unlike in the US. There is a perception that arbitration clauses are ineffective due to the inability of employees to contract out of their statutory employment rights.[838] The Supreme Court of the United States held that it is legal for an employer to mandate that an employee sign an arbitration agreement, and, if the employee refused, to not hire the employee[839]. This was seen as a huge victory for employers. However, the mandatory arbitration practice was banned by the passing of the Forced Arbitration and Injustice Repeal Act in the year 2019. The Act lays down that forced arbitration is invalid and thus is unenforceable.[840] In India, however, there is no such legislation which prohibits the practice of mandatory arbitration in employment contracts.

C. Investment Contracts

Investors are increasingly turning to investor-state arbitration to challenge a wide range of government measures, including laws, regulations and administrative decisions. Less than 20 years ago this form of international arbitration was rarely used to settle disputes between foreign investors and host states. Now it is used frequently, and the number of cases is increasing rapidly. It has become common for states to agree to arbitration in advance through their treaties, their domestic laws or the contracts they negotiate with foreign investors. Typically, it is left to the investor who brings a claim against a state to choose the arbitral rules from the options specified in the individual treaty. This also depends on whether the arbitration will be conducted by an arbitral institution and, if so, in which one.

[837] 6 IJCLP (2018) 41.
[838] Peter Frost, ''Arbitration of Employment Disputes'', 21*Employment Lawyers Association* 13 (2014).
[839] *Epic System Corp. v. Lewis,* 138 S. Ct 1612 (2018).
[840] Forced Arbitration Injustice and Repeal Act, 2019 s 402 (a).

Consent as an Essential element in international commercial arbitration

In the latest White & Case survey, undertook amongst private practitioners, in-house counsels, experts and other stakeholders, an overwhelming majority of 97 percent of respondents stated that arbitration is the preferred method in case of international commercial disputes settlement. Compared to state litigation, the most important advantage remains the same, broad enforceability of an arbitral award.[841]

Without doubt, one of the principles is universally respected truth that arbitration is based on consent. [842] Given that arbitration is a consensual dispute resolution method, the cornerstone of arbitration is the agreement of the parties. An arbitration agreement is substantively valid when it fulfils the ordinary requirements for the conclusion of a contract. Therefore, consent to arbitration is given when the parties have reached agreement with regard to the essential elements of the arbitration agreement and their agreement is not vitiated by related external factors (e.g. error, duress, misrepresentation). In order to determine the existence of parties' consent, arbitrators will resort— particularly in commercial arbitration—to the general principles of contractual interpretation.

Difference in interpretation of consent between commercial and investment arbitration

An arbitration agreement in a contract is specific by its very nature, as it is shaped to meet the needs of a given transaction. Moreover, both drafters are present in the arbitration and may thus explain their intentions. Whatever the contents of the applicable law, the arbitration will take ample account of these intentions. Therefore, it has been observed that when contracts are interpreted in international commercial arbitration one may say that the search for the real intentions dominates. However, when it is not possible to establish the true and common intent of the parties, the parties' declarations will normally be interpreted following a prima facie test. In contrast, dispute resolution provisions in treaties define jurisdiction in the abstract for an unlimited number of future investments. The greatest difference between investment arbitration and commercial arbitration is the source of the arbitral tribunal's

[841] White & Case, *available at:* https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration (Visited on February 13, 2019).

[842] Slavomír Halla, ''Non-Signatories in International Commercial Arbitration: Contesting the Myth of Consent'', 18 *International and Comparative Law Review* 9 (2018)

power: while commercial arbitration requires an arbitration agreement between the parties, investment arbitration may also be possible without such an arbitration agreement in the ordinary sense. Indeed, the consent to arbitration can have three origins: an arbitration clause in an investor-State contract, a provision in an investment code or law or the dispute-settlement clause of a bilateral or multilateral investment treaty. Often, before consent can be perfected through a request of arbitration, investment treaties require other preconditions that are normally absent in the field of commercial arbitration to be met. In fact, investment treaties may contain fork-in-the-road provisions, provisions dealing with waiver of local remedies, or amicable negotiation period provisions.[843]

However, the expansion of the use of arbitration in fields other than the traditional commercial arbitration, i.e. in the fields of investment and sport arbitration has changed the perception of the consensual nature of arbitration.

INTERPRETING PARTIES' CONSENT

Arbitration agreements are, in general, subject to the same type of rules of interpretation as all other contracts, and all relevant circumstances have to be taken into account. Several principles of interpretation might be applied for interpreting parties' consent.

Interpretation in good faith

The first and most widely accepted principle of interpretation applied to arbitration agreements is the principle of interpretation in good faith. This rule of interpretation means that a party's true intention should always prevail over its declared intention— where the two are not the same. Thus, declarations should be interpreted in good faith and the parties' conduct, both at the time of contracting and subsequently, considered.

Effective interpretation

A second principle of interpretation of arbitration agreements is the principle of effective interpretation. This common-sense rule whereby, if in doubt, one should 'prefer the

[843] Oxford University Comparative Law Forum, *available at:* https://ouclf.law.ox.ac.uk/the-mutable-and-evolving-concept-of-consent-in-international-arbitration-comparing-rules-laws-treaties-and-types-of-arbitration-for-a-better-understanding-of-the-concept-of/#52_Investment_arbitration (Visited on February 13, 2020).

interpretation which gives meaning to the words, rather than that which renders them useless', is widely accepted not only by the courts but also by arbitrators who readily acknowledge it to be a "universally recognised rule of interpretation". The principle of effective interpretation has, for instance, been applied by the Swiss Federal Tribunal in where it held that, when it is clear that the parties wanted to oust State's courts in favour of arbitration, the arbitration agreement should be interpreted in accordance to the principle of effective interpretation so as to uphold the arbitration agreement.

Interpretation contra proferentem:

The third major principle of interpretation, less frequently encountered in arbitral case laws but widely recognised in comparative law, is the principle that the agreement should be interpreted contra proferentem, or against the party that drafted the clause in dispute. Indeed, it is not unusual to find that one party has simply signed contractual documents drafted by the other party, and that a question has subsequently arisen as to whether various provisions of that contract constitute an arbitration agreement or, more commonly, as to the scope of that arbitration agreement. It is perfectly reasonable that the party responsible for drafting the ambiguous or obscure text should not be entitled to rely on that ambiguity or obscurity (in claiming, for example, that a particular disputed matter is not covered) and that, consequently, the agreement should be interpreted contra proferentem. The principle of privity to contract stipulates that the contract binds only the people who are parties to the contract and not the third parties or the non-signatories in any manner. However, there are some exceptions to this principle which has been discussed in the following chapter.

NON-SIGNATORIES

The usual practice in arbitration is that the award is binding on the parties to the arbitration agreement as they have consented to the arbitration process. Arbitration follows the principle of privity of contract i.e., rights and obligations arising out of the arbitration agreement apply only to the parties who consented to it, but in the recent times commercial reality have outgrown the idea of bilateral contractual arbitration, and even the non-signatory parties are bound to follow the arbitral award. One of the first awards dealing with non-signatories can

be traced back to 1970s.[844] The non-signatories have been bound by the arbitral award on the basis of doctrines like agency and apparent authority, assignment, estoppel, alter ego and lifting the corporate veil, and the doctrine of 'group of companies'[845]. These theories are based of implied consent, i.e., a non-signatory is bound to arbitral award if it is found to have implicitly consented to it by conduct.

Piercing of the corporate veil

The Company law provides that the company is different from its members and the liability of its members is limited to their acts instead to the acts of the company. Piercing the corporate veil essentially means disregarding the separation between entity and its members. The concept of piercing the corporate veil in international commercial arbitration means bringing the parties that have not signed an arbitration agreement be bound by it. These could be parent companies, subsidiaries, private individuals, states. The intent of the doctrine is to regulate the behaviour of third parties which enters the contract with other entities through their subsidiaries which are partially/ fully controlled by the third party. Both common law and civil law jurisdictions recognise this protective approach.[846] One of the first decisions which applied piercing of corporate veil test in the arbitration was the Fisser's case[847]. In this case the claimant alleged that respondent is just an alter ego of its parent company. Therefore, if there is a valid arbitration agreement between claimant and respondent, but respondent is a mere puppet of the parent company; such parent company must be bound by arbitration as well. The US court admitted this hypothesis to be applicable also to arbitration and provided for a three prong test which justifies lifting of the corporate veil and arbitral extension:[848]

(1) full formal or functional control of mother company which was used to

(2) commit fraud, avoid legal obligation or to induce other illegal state of affairs, which was

(3) the basis of the alleged claim for damages.

Thus, the the doctrine of lifting the corporate veil is used to deal with non-signatories in arbitration and is an exception to the principle of privity of contract in arbitration.

[844] Stavros Brekoulakis, ''Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories'', 8 *Journal of International Dispute Settlement* (2017).
[845] Supra.
[846] Vanderkerckhove K., ''Piercing the corporate veil'', 4 *European Company Law*, 191 (2007).
[847] United States Court of Appeals, Second Circuit. Decided on 1. 8. 1960.
[848] Supra.

Group of companies

The group of companies' doctrine means that if one part of the group of companies play a significant role in a business transaction, other companies will also be held liable to certain extent. In arbitration, through the application of this doctrine, other non-signatory members of the group to the arbitration agreement would also be bound by the arbitral award. The group of companies' idea was first articulated by the celebrated *Dow Chemical v Isover-Saint-Gobain*[849] award in the early 1980s. Two subsidiaries of the Dow Chemical Company group entered into two separate distribution agreements with Boussois-Isolation, whose rights and obligations were subsequently assigned to Isover-Saint-Gobain. When a dispute arose out of the distribution agreements, which contained a provision for arbitration under the rules of the International Chamber of Commerce (ICC), the two Dow Chemical subsidiaries together with the non-signatory parent company (Dow Chemical USA) and another non-signatory subsidiary (Dow Chemical France) initiated arbitration proceedings against Isover-Saint-Gobain in France. The respondent argued that the tribunal lacked jurisdiction over the non-signatory parties, and that the non-signatory claims were non-admissible. The tribunal applied substantive rules of international commerce, which—according to the tribunal—included the 'group of companies' doctrine, and found that it had jurisdiction not only over the two signatories but also over the two non-signatory companies of the Dow Chemical group on the basis that first, all claimants, including the non-signatories, were companies of the same group; secondly, the non-signatory companies had assumed an active role in the conclusion, performance and termination of the distribution agreements, which contained an arbitration clause; thirdly, the factual circumstances of the case demonstrated common intention for arbitration between the claimants, including the non-signatories and the respondents. The Dow Chemical award marked a genuine moment of progress in the law of international arbitration, which came about because of the fortunate coincidence of two circumstances: First, the reformist Nouveau Code of Proce´dure Civile of 1981 that had introduced a progressive arbitration law in France, which was the seat of the Dow Chemical arbitration. Secondly, the Dow Chemical dispute was decided by a 'strong' arbitration tribunal with intellectual confidence and distinct international outlook.

[849] ICC award no. 4131 of 1982.

The doctrine is not accepted universally and English court that the group of companies' doctrine 'forms no part of English law'.[850] The Swiss Supreme Court in X., Y. & A. vs. Z[851] reconfirmed that if a non-signatory takes an active role in the performance of a contract which contains arbitration clause, such clause may then be applicable even to such non-signatory. This basically mirrors the decisions in the later stage of group of companies' doctrine. In another decision *A.C., A.D., A.E vs K.*[852], Swiss Supreme Court analysed a more traditional group of companies setting, where the contract contained the names of all companies within the group but was signed only by one of them. Even though the court did also apply Dow Chemical test, the analysis relied heavily on objective interpretation and applying the principle of protection of good faith expectations and rejected the group of companies' doctrine. Thus, the application of the doctrine is not stable.

Thus, it can be summarized that though the consent is an essential element in international commercial arbitration there are exceptions to the principle of privity of contract in International Commercial Arbitration i.e., piercing of corporate veil, 'Group of companies' doctrine following which the non-signatories to the arbitration agreement are also bound by the arbitral award.

CONCLUSION

The arbitration process is a boon for the overburdened courts to solve the disputes. The process of international commercial arbitration is based on the principle of party autonomy i.e. the parties have the freedom to determine the procedure of arbitration, the laws applicable to the arbitration process, etc. The principle of party autonomy was meant to promote general autonomy to parties but should also balance the mandatory provisions provided by the law that was considered to be essential to the arbitration. Thus, the principle is subjected to the limitation of "public policy", "State sovereignty", and "mandatory laws" of the lex loci arbitri. International Commercial Arbitration is indeed a creature of consent between the parties through the creation of an arbitration agreement or arbitration clause and without a valid arbitration agreement, there can be no arbitration. The process of arbitration is based on consensual nature of parties but in the recent times with the outgrowth of commercial reality, the arbitral award is made binding even to non-signatories to the arbitration through the

[850] Peters Farms case, [2004] EWHC 121 (Comm).
[851] Case number 4P 115/2003.
[852] Case number 4A_244/2007.

doctrines such as estoppel, piercing of corporate veil, group of companies' principle etc. Thus, the arbitral award has a binding effect on the third party i.e., the person who is not a party to the arbitration agreement.