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Third Parties in Arbitration: For the Sake of Fairness

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THIRD PARTIES IN ARBITRATION: FOR THE SAKE OF FAIRNESS

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Abstract

The role of third parties remains one of the most controversial topics in commercial arbitration. Whilst the fundamentally contractual nature of arbitration typically dictates the exclusion of third parties, numerous theories have been developed to enable third-party involvement in arbitration. However, the significant practical implications of third parties highlight the desirability for a more coherent regime to address this issue. Appreciating the diverse legal cultures across different jurisdictions, this paper does not attempt to propose a unifying theory for universal adoption. Instead, it aims to establish a guiding principle that provides doctrinal underpinning for all theories whilst allowing liberty and flexibility for their specific applications. After having critically examined the rationales behind several prominent theories, it is this paper's central submission that the notion of fairness should serve as the overarching guiding principle for all theories. Given the primacy of party autonomy in arbitration, joinder of third parties should only be permitted when it aligns with the goal of promoting fairness. Accordingly, it is argued that theories not fitting within this fairness-oriented framework should be eradicated.

I INTRODUCTION

Arbitration, as a private dispute resolution mechanism, is underpinned by the parties' agreement to arbitrate.[1] Therefore, third parties are generally not allowed to participate in an arbitration if they did not sign the relevant arbitration agreement. However, when a dispute involves both signatories and non-signatories to an arbitration agreement, contention may arise as to whether the non-signatory should also be bound to arbitrate (the 'Third-Party Issue'). Indeed, the Third-Party Issue was described as "the source of much

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1 Nigel Blackaby, Constantine Partasides and Alan Redfern, *Redfern and Hunter on International Commercial Arbitration* (Oxford University Press, 7th ed, 2023) [1.83].

controversy”,[2] yet the two most profound international instruments for arbitration – the *New York Convention*[3] and the *Model Law*[4] – are both silent on this issue.[5] Nonetheless, there are numerous theories developed and applied in various jurisdictions that enable third parties to either bring actions under or be bound by an arbitration agreement. Nonetheless, these theories are frequently subject to challenge and scrutiny due to their inherent tension with the notion of party autonomy and the doctrine of privity.

Therefore, this paper aims to establish a guiding principle applicable to all theories that accommodate third-party involvement in arbitration. To this end, several prominent theories will be examined, and their underlying rationales will be scrutinised. Part II discusses the practical implications stemming from the involvement of third parties in arbitration, focusing on the impacts on pre-arbitration stay applications and post-arbitration enforcement of awards proceedings. Part III explores and evaluates some well-established theories applied in the United Kingdom, France, the United States, and Australia. Part IV has three components. First, it will explain why the notion of fairness, as opposed to consent, should be treated as the guiding principle for all theories. On this basis, it will advocate for the elimination of the ‘intertwined’ limb of estoppel and the Australian *Rinehart*[6] approach due to their inconsistency with the fairness-oriented framework. Finally, this part will critique the procedural efficiency rationale that underpins the ‘intertwined’ limb of estoppel and the Australian *Rinehart* approach, highlighting its erroneous attempt to conflate litigation and arbitration – two markedly different dispute resolution mechanisms. Part V concludes.

II WHY THE THIRD-PARTY ISSUE MATTERS?

Before delving into the theories that deal with the Third-Party Issue, it is pertinent to first explain the practical implications that a third party may bring to the arbital process. Putting aside the procedural issues such as appointment of arbitrators, which are usually covered under institutional

[2] Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law* (Schulthess Polygraphischer Verlag, 1989) 101. See also Stavros Brekoulakis, ‘Parties in International Arbitration: Consent v Commercial Reality’ in Stavros Brekoulakis et al (eds), *The Evolution and Future of International Arbitration* (Wolters Kluwer, 2016) 119, 120 (‘Consent v Commercial Reality’).

[3] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) (‘*New York Convention*’).

[4] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17 (21 June 1985) annex I (‘Model Law’).

[5] See, eg, *GE Energy Power Conversion France. SAS Corp v Outokumpu Stainless USA LLC*, 140 S Ct 1637, 1645 (2020): the Supreme Court reasoned that the Convention was ’simply silent on the issue of nonsignatory enforcement’.

[6] *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 (‘*Rinehart*’).

rules,[7] this part will primarily focus on the impact of third-party involvement on (1) pre-arbitration stay applications, and (2) the enforceability of arbitral awards.

A *Third Parties and Stay Applications*

Professor Garnett provides a comprehensive historical study of how common law courts decide on stay and referral to arbitration applications when third parties are involved.[8] His overview commences from the period before the *New York Convention* and the *Model law* were widely implemented, when courts retained the discretion to grant or deny stay applications in favour of arbitration. During this period, where a third-party non-signatory was involved in a dispute subject to a valid arbitration agreement, courts were often confronted by the competing policy considerations of 'holding commercial parties to their bargain' and 'promoting efficient dispute resolution by having all related disputes resolved in one place at one time'.[9]

This dilemma was resolved by the implementation of the New York Convention and the Model Law, which mandated that courts stay court proceedings in the presence of a valid arbitration agreement.[10] Consequently, fragmentation of proceedings often became inevitable when third parties are involved, resulting in the same disputes being addressed both in the court and before the arbitral tribunal.[11]

However, in exceptional circumstances a third party may be deemed equivalent to a signatory party to the arbitration agreement and thus also be bound to arbitrate its claims. For example, a third-party defendant may apply to stay a court proceeding brought against it and request that the matter be referred to arbitration instead. Conversely, when a third-party claimant brings an action in court against a party to an arbitration agreement, the latter party may resist the claim by alleging that the third party should be bound by the arbitration agreement for certain reasons. Therefore, it is crucial for parties to understand the factors and circumstances that may cause their arbitration agreement to be extended to third parties under different legal systems. Such appreciation could effectively inform their drafting of arbitration clauses, as

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7 See, eg, Arbitration Rules of the China International Economic and Trade Arbitration Commission (2024) r 18.5 ('CIETAC Arbitration Rules'); Arbitration Rules of the Australian Centre for International Commercial Arbitration (2021) r 17.12 ('ACICA Arbitration Rules'); Arbitration Rules of the Singapore International Arbitration Centre (2016) r 12 ('SIAC Rules'); Arbitration Rules of the London Court of International Arbitration (2020) art 8.1 ('LCIA Arbitration Rules').

8 See generally Richard Garnett, 'Third Parties and International Commercial Arbitration: Reframing the Debate' (2023) 47(1) *Melbourne University Law Review* 152

9 *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419, 439 [81] (Bell P) cited by Garnett (n 8) 158.

10 New York Convention (n 3), art II(3) and Model Law (n 4) art 8(1), which are implemented in, eg, *Commercial Arbitration Act 2010* (NSW) s 8(1), *International Arbitration Act 1974* (Cth) s 7(2), *Arbitration Act 1996* (UK) s 9(4), *Federal Arbitration Act*, 9 USC. § 3, and *Code Civil* [Civil Code] (France) arts 1448 (for domestic arbitration) and 1506 (for international arbitration).

11 Garnett (n 8) 160.

well as the choice of applicable laws, so as to mitigate the potential risks of having to resolve their disputes inefficiently, or in an undesirable forum.

B *The Third-Party Issue and Award Enforcement*

An essential benefit of arbitration lies in the finality and enforceability of arbitral awards. This advantage is further amplified by the New York Convention, which facilitates the transnational enforcement of arbitral awards across its 172 contracting states.[12] The grounds for refusing recognition and enforcement of an arbitral award are limited, which are exhaustively set out in Article V of the New York Convention.[13] However, the involvement of a third party in arbitration could potentially affect the enforceability of an arbitral award due to its implications for both Article V(1)(a) and Article V(1)(c) of the New York Convention.

1 *Validity of the Arbitration Agreement*

Pursuant to Article V(1)(a), recognition and enforcement of an award may be refused if 'the agreement … is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.[14]

The validity of the arbitration agreement may be challenged if a third party is compelled to participate in arbitration to which it is not a signatory. Such a challenge was made in UK Supreme Court's decision in *Dallah*.[15] In this case, the Government of Pakistan ('GoP') established the Awami Hajj Trust ('the Trust') and used it to contract with Dallah Real Estate & Tourism Holding Co. ('Dallah') for the construction of housing for Pakistani pilgrim in Mecca ('the Housing Contract'). Therefore, the signatories to the Housing Contract, including the arbitration agreement contained therein, were Dallah and the Trust, whereas the GoP was a third-party non-signatory. However, since the Trust was established by a temporary ordinance, it ceased to exist when the ordinance lapsed, before a dispute arose under the Housing Contract. Consequently, Dallah had to commence arbitration against the GoP, alleging that the GoP was a party to the Housing Contract, and thus should be bound to arbitrate. Although the GoP denied agreeing to the arbitration agreement and refused to submit to the jurisdiction of the arbitral tribunal, an award was made against it. When Dallah sought to enforce the award in London, the GoP resisted enforcement on the basis that there was no valid arbitration

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12 'Contracting States: List of Contracting States', *New York Convention* (Web Page) <https://www.newyorkconvention.org/contracting-states>.

13 These grounds are replicated in art 36 of the *Model Law* (n 4), which also mirrors the exclusive grounds for annulment of arbitral awards under art 34.

14 *New York Convention* (n 3) art V(1)(a).

15 *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 ('*Dallah*').

agreement pursuant to s 103(2)(b) of the *Arbitration Act 1996* (UK) ('*Arbitration Act*').[16]

Relevantly, the court held that the issue regarding the validity of an arbitration agreement under s 103(2)(b) depended on whether the party against whom the award is enforced is bound by the arbitration agreement.[17] Moreover, since the arbitration agreement did not specify which law the parties had subjected the arbitration agreement to, the validity of the arbitration agreement was to be determined by French law, being the law where the award was rendered.[18] Applying French law, the UK Supreme Court found the GoP, as a third-party non-signatory to the arbitration agreement, was not bound by the agreement due to the lack of intention evinced by the parties to the contrary.[19] Therefore, the GoP succeeded with its application for refusing recognition and enforcement of the award.

The same issue arose a decade later in *Kabab-Ji v Kout Food Group,*[20] in which Kabab-Ji sought to enforce an arbitral award against Kout Food Group ('KFG') although the signatory parties to the relevant arbitration agreement were Kabab-Ji and KFG's subsidiary. Accordingly, KFG applied for an order refusing recognition and enforcement of the award pursuant to s 103(2)(b) of the *Arbitration Act*, alleging the arbitration agreement was invalid because KFG was not a party to it. In parallel, KFG also applied for annulment of the award before the Paris Court of Appeal.[21]

Whilst the validity of the arbitration agreement is primarily determined by the law governing the arbitration agreement, the parties did not make an express choice of such law in this case. Following each jurisdiction's own precedence, the UK Supreme Court held the arbitration agreement should be governed by English law, being the substantive law of the underlying contract, whereas the French Court of Cassation held it should be governed by French

16 *Arbitration Act 1996* (UK) s 103(2)(b), which implements art V(1)(a) of the *New York Convention* (n 3).

17 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 [77] ('*Dallah EWHC*'), citing *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [8]-[15] (Mance LJ), affirmed in *Dallah* (n 15) 802 [2], 807–8 [18], 812 [29] (Lord Mance JSC, Lord Hope DPSC agreeing at 849 [149], Lord Clarke JSC agreeing at 851 [163], Lord Saville JSC agreeing at 851 [162]), 828–9 [77] (Lord Collins JSC), 849–50 [155] (Lord Saville JSC). See also *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1, 14 [45]–[46] (Greenwood J), 27–8 [126]–[133] (Beach J, Dowsett J agreeing at 3 [1]).

18 *Dallah EWHC* (n 17) [3] affirmed in *Dallah* (n 15) [14].

19 *Dallah* (n 15) [66]. By contrast, the French Court of Appeal made the opposite finding that the Government of Pakistan should be bound by the arbitration agreement: *Gouvernement du Pakistan - Ministère des Affaires Religieuses v. Société Dallah Real Estate and Tourism Holding Company*, Cour d'appel de Paris [Paris Court of Appeal], 09/28533, 09/28535 and 09/28541, 17 February 2011 [20] ('*Dallah* Paris Court of Appeal').

20 *J (Lebanon) v K (Kuwait)* [2019] EWHC (Comm) 899; *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6; *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 ('*Kabab-Ji*').

21 *Kout Food Group Company v. Kabab-JI Sal Company*, Cour d'appel de Paris, 17/22943, 23 June 2020 ('*Kabab-JI* Paris Court of Appeal').

law, being the law of the arbitral seat.[22] Consequently, the two jurisdictions also reached opposite decisions as to the validity of the arbitration agreement in question. As a matter of English law, KFG was considered a third party to the arbitration agreement, and thus the arbitration agreement was found to be invalid.[23] By contrast, the French courts applying French law found that the arbitration agreement could be extended to KFG by virtue of KFG's direct involvement in the performance of the Agreement.[24] Ultimately, the award at issue ended up with a 'double life' – it was found valid in France, the arbitral seat, yet unenforceable in the United Kingdom.

2 *Personal Scope of the Arbitration Agreement*

In addition to its implications on Article V(1)(a) of the New York Convention concerning the validity of an arbitration agreement, the Third-Party Issue could also result in the refusal of enforcement on the 'ultra vires' ground under Article V(1)(c) of the New York Convention. Under Article V(1)(c), enforcement of an award will be refused if it 'deals with a difference not contemplated by or not falling within the terms of the submission to arbitration'.[25] Relevantly, the inclusion of a third party as a party to the arbitration proceedings may lead to the contention that any award rendered may have exceeded the 'personal' scope of the arbitration agreement, such that the award was made outside the tribunal's jurisdiction *ratione personae*.[26] If this is found to be the case, the award will be unenforceable to the extent that exceeds the scope of the arbitration agreement, whilst the remaining part of the award would still be enforceable.[27]

Of note, since both Articles V(1)(a) and (c) involve objections to the jurisdiction of the tribunal, the party resisting enforcement of an award may be barred from relying on these grounds if it did not raise a timely objection to the jurisdiction of the arbitral tribunal in the course of the arbitration.[28]

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22 The UK Supreme Court found the arbitration agreement should be governed by the law governing the main contract, whereas the French courts found it should be governed by the law of the seat: *Kabab-Ji* (n 20*)* [39], [48], [52], [53], [93] following *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38; *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*, Cour de cassation [French Court of Cassation], K 20-20.260, 28 September 2022, [8].

23 *Kabab-Ji* (n 20) [69], [75], [93].

24 *Kabab-JI* Paris Court of Appeal (n 21) [46].

25 *New York Convention* (n 3) article V(1)(c); Gary B Born, *International Commercial Arbitration* (3rd ed, 2021), §26.05 [C][4][a].

26 Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (4th ed, 2021), [1714a]; United Nations Commission on International Trade Law, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016) art V(1)(c) paras (20)-(23) ('*UNCITRAL Secretariat Guide on New York Convention*').

27 Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (4th ed, 2021) [1714a]; *UNCITRAL Secretariat Guide on New York Convention* (n 26) art V(1)(c) para (33).

28 Born (n 25) §26.05 [C][1][i], §26.05 [C][4][I]. See, eg, *AO Techsnabexport v. Globe Nuclear Services. & Supply Ltd,* 656 F Supp 2d 550 (D Md 2009), affirmed in 404 F App 793 (4th Cir 2010).

III THE THIRD-PARTY ISSUE – A COMPARATIVE ANALYSIS

Considering the practical significance of the Third-Party Issue, this part delves into several prominent theories used to extend arbitration agreements to third-party non-signatories, that are applied in the United Kingdom, France, the United States, and Australia, respectively. Whilst some of these theories are accepted cross-jurisdictionally, the others are limited to specific jurisdictions. To preface, due to the numerosity of such theories, only the most representative and pertinent ones will be discussed.

A *The United Kingdom*

In the United Kingdom, an arbitration agreement may be extended to third-party non-signatories by virtue of s 82(2) of the *Arbitration Act*, which provides:

> References in this Part to a party to an arbitration agreement include any person <u>claiming under or through</u> a party to the agreement.[29]

However, under the strong influence of the doctrine of privity, English courts have typically interpreted this provision narrowly, owing to the contractual nature of arbitration agreements.[30] To be considered 'claiming under or through' an original party, the third party must effectively 'step into the shoes' of the original party and be able to pursue the same claims that the original party could invoke.[31] This would typically occur through traditional contractual principles like novation, assignment, and subrogation, or other common law principles such as agency. Nonetheless, the operation of English statutes, including the *Contracts (Rights of Third Parties) Act 1999* (UK),[32] practically expands the narrow scope for extending arbitration agreements to third parties under the English common law. Notably, as will be seen, there is a common touchstone for all principles – a third party is not allowed to unconscionably take the substantive benefits of a contract without also taking the attached burden to arbitrate.

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29 *Arbitration Act 1996* (UK), s 82(2) (emphasis added).

30 Audley Sheppard, 'Third Party Non-Signatories in English Arbitration Law' in Stavros Brekoulakis et al (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) 183, 185; James Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 469, 510 ('Non-Signatory's Ability to Compel International Commercial Arbitration'), citing *Dunlop Pneumatic Tyre Co. v. Selfridge & Co. Ltd.*, [1915] AC 847, 853 (Viscount Haldane).

31 Garnett (n 8) 163. This is in contrast to a third party that only has 'a mere connection' with the original party: *City of London v Sancheti* [2009] Bus LR 996, 1003 [30] (Collins LJ, Richards LJ agreeing at 1005 [40], Laws LJ agreeing at 1005 [41]).

32 *Contracts (Rights of Third Parties) Act 1999* (UK) ('*CRTPA*').

1 *Novation*

A third party will be deemed to be a party to an arbitration agreement pursuant to s 82(2) of the *Arbitration Act* when the third party replaces an original party to the contract through novation. When a contract is novated, all the rights and obligations of the original party are transferred to the third party, who thereby becomes bound by the arbitration agreement incorporated in the novated contract.[33]

Relevantly, it is also possible for the third-party novatee to join an arbitration proceeding that has already been commenced by the original parties, provided that the novatee gives notice to the other parties to the arbitration and the arbitrators, thereby submitting to the jurisdiction of the tribunal that is already in place.[34]

2 *Assignment*

A third-party may also become a 'party' to the arbitration agreement under s 82(2) of the *Arbitration Act* by way of assignment. Assignment of arbitration agreements may be 'direct' or 'automatic'.[35] Under a direct assignment, the right to arbitration, or an accrued claim in arbitration may be expressly assigned to an assignee.[36] Although direct assignments will usually be accompanied by an assignment of rights with which the assigned arbitration agreement is associated, it is also possible for the arbitration agreement to be assigned as a 'bare right' if the assignee has a 'genuine commercial interest' in taking the assignment to arbitrate.[37]

More commonly, arbitration agreements are assigned automatically as a package of rights assigned under the main contract.[38] This is because under English law, the duty to arbitrate is considered an 'inseparable component of the subject-matter transferred' such that where a contract containing an arbitration agreement is assigned, the assignee will be automatically bound by the arbitration agreement.[39] Accordingly, the assignee who takes the benefits of the assigned right must also take the burden of the arbitration clause.[40]

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33 Sheppard (n 30) 187; Born (n 25) §5.01 [E].

34 *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd ('The Smaro')* [1998] EWHC (Comm)1206 (Rix J).

35 Ying Khai Liew, 'Explaining Assignments of Arbitration Agreements' (2021) 80(1) *Cambridge Law Journal* 101, 103.

36 Ibid 103; *Kaukomarkkinat O/Y v Elbe Transport-Union GmbH* ('*The Kelo*') [1985] 2 Lloyd's Rep. 85, 89.

37 Liew (n 35) 103: assigning a 'bare right' to arbitrate would otherwise be invalid as a matter of public policy. *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 696-697; 703 (Roskill LJ).

38 Liew (n 35) 103.

39 *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* ('*West Tankers*') [2005] 2 Lloyd's Rep. 257, [33] (Colman J) citing *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Wiener Allianz Versicherungs AG* [1997] 2 C.L.C. 993, 1000 ('*The Jay Bola*').

40 *The Jay Bola* (n 39) 1000.

Although this approach may seem as overlooking the separable nature of the arbitration agreement,[41] it can be justified by considering that the doctrine of separability serves to promote the efficacy of arbitration. Thus, the doctrine of separability should not impede the automatic transfer of an arbitration agreement when the main contract is assigned.[42]

However, 'automatic assignment' of an arbitration agreement will not be possible if the assignment takes place after the arbitration has commenced. In this situation, the assignee will not be deemed a party of the arbitration proceedings until written notice of the assignment is given to all parties to the arbitration proceeding as well as the tribunal.[43] Moreover, if such a notice is not given within a reasonable time from the date of the assignment, courts may exercise the discretion to terminate the arbitration agreement.[44]

3 *Subrogation*

Subrogation typically occurs where an insurer pays out an insured and thereby takes up the insured's rights and claims against third parties. As with assignment, upon subrogation the insurer will be bound by any arbitration agreement in relation to the subrogated rights to which the insured was a party, as the insurer cannot only take the benefit of the subrogated rights without the burden of the arbitration agreement.[45] Accordingly, a subrogor will be deemed a 'party' under s 82(2) of the *Arbitration Act.*[46]

4 *Statutory Provisions*

Whilst the English common law provides a relatively narrow scope for extending an arbitration agreement to third parties, it is supplemented by the operation of two English statutes.

The *Third Parties (Rights against Insurers) Act* provides for a mechanism akin to 'statutory assignments',[47] allowing third parties to 'step into the shoes' of an insured and bring proceedings directly against the insurer when the insured is insolvent and the insured's liability to the third party is covered

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41 See, eg, Daniel Girsberger, 'The Law Applicable to the Assignment of Claims Subject to an Arbitration Agreement' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (De Gruyter, 2010) 379, 384, 390.

42 Ibid 390–1; Daniel Girsberger and Christian Hausmaninger, 'Assignment of Rights and Agreement to Arbitrate' (1992) 8(2) *Arbitration International* 121, 139.

43 *Baytur SA v Finagro Holdings SA* [1991] 4 All ER 129, 132 (Lloyd LJ), citing *Montedipe SpA v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11, 18 (Hobhouse J).

44 *NBP Development v Buildko & Sons (in liq)* (1992) 8 Const LJ 377, 383: since the legal assignee failed to provide notice of the assignment to the arbitrator within 12 months, which was said to be a reasonable time, the arbitration agreement was ordered to cease to have effect.

45 *West Tankers* (n 39) 245–8 [15]–[31] (Colman J); *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] 2 CLC 440, 446 (Cooke J) ('*Starlight Shipping'*).

46 *Through Transport Mutual Insurance Association (Euroasia) Ltd. v New India Assurance Co. Ltd.* ('*The Hari Bhum*') [2005] EWHC (Comm) 455, [25].

47 *Third Parties (Rights against Insurers) Act 2010* (UK) ('*Third Parties (Rights against Insurers) Act*'), replacing the *Third Parties (Rights against Insurers) Act 1930* (UK).

under the relevant insurance policy.[48] Therefore, consistent with other types of assignment, where the insurance contract between the insurer and the insured contains an arbitration agreement, the third party will also be bound by the arbitration agreement.[49]

Furthermore, the *CRTPA* effectively codifies the 'third-party beneficiary' doctrine that was previously rejected in the UK.[50] Under s 1 of the *CRTPA*, a third party is allowed to 'in his own right enforce a term of the contract if the term purports to confer a benefit on him',[51] unless 'the proper construction of the contract reveals the parties' intention to not allow the third party to enforce such a term in question'.[52] In the context of arbitration, s 8(1) provides that if the relevant term enforceable by the third party under s 1 is subject to an arbitration agreement, the third party shall be treated as a party to the arbitration agreement.[53]

The interplay of these provisions was illustrated in *Nisshin Shipping Co Ltd v Cleaves & Co Ltd & Ors*.[54] In this case, the court found that by expressly agreeing under the charterparty to pay a prescribed commission to the chartering broker (i.e. a third party to the charterparty), the parties clearly manifested an intention to confer a substantive benefit on the broker. Moreover, since the arbitration clause in the charterparty encompassed any claim against the ship owners for failing to pay commission to the broker, the court held that the broker, despite being a third party to the charterparty, was nonetheless entitled to invoke the arbitration clause under the conjunctive operation of s 1(1)(b) and s 8(1) of the *CRTPA*.[55] As observed by Coleman J, the operation of the *CRTPA* in relation to third parties in arbitration is analogous to the case of assignment, that the assignee cannot 'unconscionably take a substantive benefit free of its procedural burden [to arbitrate]'.[56]

B *France*

In contrast with the UK, the French jurisprudence takes a more liberal approach towards third-party involvement in arbitration. As a civil law jurisdiction, French arbitration law is largely codified. Nonetheless, many French statutory provisions resemble principles under the common law. Relevantly, article 2601 of the French civil code provides for the doctrine of privity in relation to arbitration agreements:

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48 *Third Parties (Rights against Insurers) Act 2010* (UK), s 1; *Firma C-Trade SA v Newcastle Protection and Indemnity Association ('The Fanti')* [1991] 2 AC 1, 29.

49 *The Fanti* (n 48) 5-6.

50 Hosking, '*Non-Signatory's Ability to Compel International Commercial Arbitration*' (n 30) 510.

51 *CRTPA* (n 32) s 1(1)(b).

52 Ibid s 1(2).

53 Ibid s 8(1).

54 [2003] EWHC 2602 ('*Nisshin Shipping*').

55 Ibid [44] (Colman J), followed by *Christina Mulchrone v Swiss Life (UK)* [2005] EWHC (Comm)1808.

56 *Nisshin Shipping* (n 54) [38] (Colman J), citing *The Jay Bola* (n 39) 1000.

> The arbitration clause must have been accepted by the party against whom it is opposed, unless the latter has succeeded to the rights and obligations of the party who initially accepted it.[57]

Notwithstanding this provision, there are numerous theories in France that could facilitate extension of arbitration agreements to third parties. Besides the traditional contractual approaches that largely resemble the English position, French law stands out for endorsing the 'group of companies' doctrine, which could significantly expand the scope for third-party involvement in arbitrations.

1 *Assignment*

There is a rebuttable presumption under the French law that by accepting the assignment of the main contract, the assignee is taken to have also accepted the arbitration agreement contained therein, because it forms 'part of the economics' of the main contract.[58] At the same time, the third-party assignee will also be able to enforce the arbitration agreement against the other original party due to the presumption that contracting parties have implicitly accepted the assignment of the arbitration agreement to any third party, unless the arbitration agreement was formed *instuitus personae*.[59] Therefore, similar to the English position, where substantive contractual rights are transferred under French law, the arbitration clause will also simultaneously be transferred to the third party as 'accessories attaching thereto', unless the arbitration agreement specifies the identities of the parties to whom it applies.[60]

2 *Subrogation*

French courts have consistently held that when a subrogee's (e.g. an insured's) rights are legally transferred to a subrogor (e.g. an insurer), the latter party will be bound by the arbitration agreement that is attached to the subrogated rights and claims.[61] Nonetheless, different from the English position, under French law the subrogor 'retains the right to commence arbitration against the party with whom it concluded an arbitration agreement'.[62] Conversely, the other original party would also be able to bring claims against a subrogor even after the subrogation of the main contract. This slightly different approach can be seen as a double-edged sword: whilst the original party gains

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57 *Code Civil* [Civil Code] (France) art 2061.

58 Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999), §§ 711-712.

59 Ibid §§ 716, 721-2.

60 *Alcatel Business Systems (ABS),* Cour de cassation [French Court of Cassation], 04-20.842, 27 March 2007, [5] ('*ABS*'); Girsberger and Hausmaninger (n 42) 131.

61 *Axa France IARD,* Cour d'appel de Paris, 18/20873, 26 November 2019.

62 Fouchard, Gaillard and Goldman (n 58) § 719. See also Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 520 [7.6.6].

additional avenues for recovery (i.e. from both the subrogor and subrogee), it also faces potential exposure to additional claims.[63]

3 *The Group of Companies Doctrine*

The continuous recognition and application of the 'group of companies' doctrine by French law marks the largest point of distinction between French law and English law with respect to third parties in arbitration. *Dow Chemical v Isover Saint Gobain* is often cited as the authority for the group of companies doctrine.[64] In *Dow Chemical*, the parent company (Dow Chemical Company) together with its three subsidiaries (Dow Chemical France, Dow Chemical AG and Dow Chemical Europe) commenced an arbitration against Isover. Among the four claimants, Isover had only entered into contracts containing arbitration agreements with Dow Chemical AG and Dow Chemical Europe, but not with Dow Chemical Company nor Dow Chemical France. On this basis, Isover objected to the jurisdiction over the two non-signatories' claims. However, the tribunal upheld its jurisdiction over all claimants, highlighting the 'undivided economic reality' of the Dow Chemical company group, as well as the non-signatory companies' direct involvement in the 'conclusion, performance, and termination' of the relevant contracts.[65] Specifically, Dow Chemical France played a critical role throughout the precontractual negotiations with Isover and was the only supplier actually performing the distribution agreements.[66] Similarly, the Dow Chemical Company as the parent company of the group was directly involved in the negotiation and conclusion of the contracts with Isover.[67] In light of these factual circumstances, the tribunal found the non-signatory companies manifested the "mutual intention" to be bound by the arbitration agreements.[68] This decision was affirmed by the Paris Court of Appeal when Isover sought to challenge the award.[69]

The impact of the *Dow Chemical* decision was profound, and is consistently cited by tribunals and courts.[70] However, the 'group of companies' doctrine should not be misinterpreted as a general rule binding all members of a company group to an arbitration agreement as long as it is signed by one

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63 Waincymer (n 62) 520 [7.6.6].

64 *Dow Chemical v Isover Saint Gobain* (International Commercial Court Case No 4131, 23 September 1982)(1984) 131.

65 Ibid 135-7.

66 Ibid.

67 Ibid 136-7.

68 Ibid.

69 *Dow Chemical v. ISOVER*, Cour d'appel de Paris, ICC Case No. 4131, 21 Oct 1983.

70 *Doosan v. DIPCO and KGLPI*, Cour d'appel de Paris, 18/22323, 23 November 2021; *Alcatel Business Systems (ABS),* Cour de cassation [French Court of Cassation], 04-20.842, 27 March 2007; *Sponsor A.B v. Lestrade*, Cour d'appel de Pau, 26 November 1986 reported in [1988] Rev arb 153. See also ICC cases cited fn 8 of Bernard Hanotiau and Leonardo Ohlrogge, '40th Year Anniversary of the Dow Chemical Award' (2022) 40(2) *ASA Bulletin* 300, 305 ('40th Year Anniversary').

member of that group.[71] Similarly, it should not be considered as a doctrine only applicable to cases involving company groups, despite its somewhat misleadingly name.[72] Indeed, the tribunal in *Dow Chemical* when applying this doctrine did not base its decision merely on the fact that the non-signatories and the signatories belonged to the same group of companies. The finding of the 'undivided economic reality' was not directly attributable to the Dow Chemical group structure. By contrast, the tribunal grounded its decision on the non-signatories' direct participation in the performance of the contract, as well as their common intention to be bound.[73]

For some commentators, the gist of the 'group of companies' doctrine lies within the assessment of the non-signatory's consent, although such consent often has to be inferred from the non-signatory's conducts.[74] However, in a number of later cases, the French courts when applying the 'group of companies' doctrine seemed to have only focused on the extent of the non-signatories' involvement in the performance of the contracts, without specifically considering their intention or consent.[75] For example, the Court of Cassation in *Abela* found the non-signatories acted as if they were the true shareholders by entering into a liquidation agreement (a formal act normally reserved to actual shareholders), and thus could not legitimately claim to be strangers to the arbitration agreement.[76] Similarly, the French Court of Appeal in *Dallah* affirmed the tribunal's finding that the GoP should be bound by the arbitration agreement since it 'behaved as the true party during the transaction', without directly referring to the element of consent.[77]

Indeed, in cases like *Dallah*, it would be an implausible stretch to argue for the existence of consent. By deliberately stipulating the Trust, in lieu of the GoP, as the named party to the Housing Contract, there was a clear intention between the parties to not bind the GoP, which therefore gave no consent to arbitrate. Instead, a more plausible rationale for the application of the 'group of companies' doctrine in this case would be that a party cannot inequitably rely on its non-signatory status to avoid arbitration, if it has assumed a 'signatory' role by directly participating in the contract.

The group of companies doctrine has not been widely endorsed outside of France.[78] The UK, for example, has expressly rejected this doctrine as a part

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71 Hanotiau and Ohlrogge, '40th Year Anniversary' (n 70) 306.

72 Ibid; Waincymer (n 62) 523 [7.6.12].

73 Hanotiau and Ohlrogge, '40th Year Anniversary' (n 70) 302; Waincymer (n 62) 523 [7.6.12].

74 See generally Hanotiau and Ohlrogge, '40th Year Anniversary' (n 70); Waincymer (n 62) 524 [7.6.12].

75 Jacob Grierson and Mireille Taok, 'Dallah: Conflicting Judgments from the UK Supreme Court and the Paris Cour d'Appel' (2011) 28(4) *Journal of International Arbitration* 407, 418, citing *ABS* (n 60). See also *Abela*, Cour de cassation [French Court of Cassation], 08-20.563, October 6, 2010 ('*Abela*'); *Axa France IARD,* Cour d'appel de Paris, n°18/20873, 26 November 2019; *LBCI v. Kingdom 5-KR-170*, Cour d'appel de Paris, 18/16891, 2 March 2021.

76 *Abela* (n 75) [2].

77 *Dallah* Paris Court of Appeal (n 19) [20].

78 Waincymer (n 62) 522 [7.6.12]; Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8(4) *Journal of*

of English Law in *Peterson Farms Inc. v. C & M Faming Ltd*.[79] The United States, on the other hand, whilst not expressly rejecting this doctrine, has clearly demonstrated reluctance to adopt it by choosing to apply other theories even in cases that provided suitable opportunities for the group of companies doctrine to be applied.[80]

It is also worth noting, when other jurisdictions are bound to apply French law, the 'group of companies' doctrine may not be applied in the same manner as it would be by French courts. In the *Dallah* proceedings, for example, Dallah sought to enforce the arbitral awards against the GoP in the UK, whilst the GoP applied to annul the awards in France. Despite both jurisdictions were bound to apply French law, being the law where the award was made, the English court and French court reached contradictory conclusions as to whether the GoP, as a third party to the arbitration agreement, should be bound.[81] This divergence may be attributed to the different analytical approaches employed by the English and French courts.[82] The English courts focused primarily on the parties' conducts *leading up to* the signing of the Housing Contract, and concluded that the deliberate choice for the Trust rather than the GoP to be named party evinced a clear intention for the latter to not be bound.[83] By contrast, the French court took into account *the entire lifecycle* of the transaction, including the GoP's involvement in the precontractual negotiation, as well as its issuance of the termination notice with the GoP's Ministry of Religious Affair letterhead.[84]

The divergence between the two courts naturally raises the question of which jurisdiction applied the 'group of companies' doctrine better. Answering this necessitates evaluating which approach better fulfills the doctrine's underlying purpose. As discussed above, a key rationale behind the 'group of companies' doctrine is to prevent a party from deliberately using separate entities to circumvent the obligation to arbitrate and potentially evade unfavourable awards.[85] If the 'group of companies' doctrine is applied in an overly restrictive manner without having regard to the post-signing conducts of the parties, the court would not be able to analyse the circumstances holistically in order to make a fair judgement on what a fair

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International Dispute Settlement 610, 617 ('Rethinking Consent in International Commercial Arbitration'). Notably, however, the Supreme Court of India has recently validated the 'group of companies' doctrine as a part of Indian arbitration law in *Cox and Kings Limited v. SAP India Private Ltd*., Arbitration Petition (Civil) No. 38 of 2020, Judgment dated 6 December 2023 (The Supreme Court of India).

79 [2004] 1 Lloyd's Rep 603, 612 [59] (Langley J).

80 *Sarhank Group v Oracle Corp*., 404 F.3d 657, 658-9 (2nd Cir 2005): the Second Circuit refused to extend the arbitration agreement to the non-signatory parent company despite the tribunal's finding to the contrary on the basis of the group of companies doctrine. See also Alexandre Meyniel, 'That Which Must Not Be Named: Rationalizing the Denial of US Courts with Respect to the Group of Companies Doctrine' (2013) 3(1) *The Arbitration Brief* 18, 32-3.

81 *Dallah* (n 15); *Dallah* Paris Court of Appeal (n 19).

82 Grierson and Taok (n 75) 416–418.

83 *Dallah* (n 15) [40] (Lord Mance).

84 *Dallah* Paris Court of Appeal (n 19) [20].

85 See, eg, Waincymer (n 62) 524 [7.6.12].

outcome should be. This would result in the doctrine's purpose not being fully achieved, as the court would not be able to assess whether the parties' overall conducts have made it unfair for the arbitration agreement to be rigidly enforced. Therefore, the French approach that engages with a more comprehensive and holistic review of the transaction should be preferred when applying the 'group of companies' doctrine.

C *The United States*

In the United States, there is a strong pro-arbitration policy established under the Federal Arbitration Act.[86] With this, US courts have developed an extensive list of theories to facilitate joinder of third parties to arbitration.[87] In the limited space, this section will focus specifically on the theory of estoppel – one of the most representative theories that has been widely applied by US courts.

1 *Estoppel*

Estoppel in the context of arbitration has been applied in two circumstances. First, estoppel is used to compel a signatory to arbitrate its claims with a willing non-signatory. Second, estoppel is used to compel an unwilling signatory to arbitrate with a signatory.[88]

a. The 'Intertwined' Limb

In the first scenario, a non-signatory who is sued in court may argue that the matter should be referred to arbitration because its claims are 'intimately founded in and intertwined with' a contract that contains an arbitration agreement, to which the other party of the court proceeding is a signatory.[89] As illustrated in *Sunkist*, Del Monte Corporation ('Del Monte') acquired Sunkist Soft Drinks ('SSD'), which has a license agreement with Sunkist Growers ('Sunkist') containing an arbitration clause, to which Del Monte is a non-signatory. However, after Sunkist commenced an action against both Del Monte and SSD for alleged breach of the license agreement, Del Monte applied for a stay by relying on the arbitration clause. Both the district court

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[86] 9 USC. §§ 1-14, 201-208 (2006) ('FAA').

[87] *Arthur Anderson v Carlisle,* 556 U.S. 624, 631 (2009); *Thomson-CSF S.A. v. American Arbitration Association*, 64 F3d 773, 776 (2nd Cir 1995) ('*Thomson-CSF*'); James Hosking, 'Non-Signatories and International Arbitration in the United States: the Quest for Consent' (2004) 20(3) *Arbitration International* 289, 291.

[88] Garnett (n 8) 170; Andrijana Mišović, 'Binding Non-Signatories to Arbitrate: The United States Approach' (2021) 37(3) *Arbitration International* 749, 763; Alexandra Hui, 'Equitable Estoppel and the Compulsion of Arbitration' (2007) 62(2) *Vanderbilt Law Review* 711, 714.

[89] *Sunkist Softdrinks, Inc v Sunkist Growers Inc*, 10 F3d 753 (Fed Cir, 1994),757-8 (Morgan SJ) ('*Sunkist*'), citing *McBro Planning Development v Triangle Electrical Construction* 741 F 2d 342 (11th Cir 1984) 344 (Smith J) ('*McBro*'), followed by *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942(11th Cir 1999) 947; *Grigson v. Creative Artists Agency, LLC,* 210 F.3d 524(5th Cir. 2000) 527; *JLM Indus, Inc v Stolt-Nielsen SA, 387 F3d 163* (2nd Cir 2004); *Choctaw Generation Ltd. Partnership v. American Home Assurance Co*., 271 F.3d 403 (2nd Cir 2001).

and the Eleventh Circuit granted Del Monte's motion to stay considering the integral corporate link between SSD and Del Monte and that Del Monte's defence was closely intertwined with the license agreement between SSD and Sunkist.[90] Therefore, it was held that Sunkist, the unwilling signatory, was equitably estopped from refusing to arbitrate against Del Monte.[91]

b. The 'Direct Benefit' Limb

Under the second limb of estoppel, a third-party non-signatory who has knowingly derived a 'direct benefit' from a contract containing an arbitration agreement will be estopped from simultaneously attempting to avoid the burdens to arbitrate.[92] In *Tencara Shipyard*, America Bureau of Shipping ('ABS') entered into a Classification Contract with Tencara, under which ABS provided Tencara with a certificate of classification for a yacht designed and constructed by Tencara. The Classification Contract contained an arbitration clause. When the yacht was later found defective, the purchasers of the yacht sued ABS, but ABS successfully compelled arbitration against the yacht purchasers based on the estoppel theory. According to the court, the ship purchasers received two direct benefits from the Classification Contract between Tencara and ABS. Namely, with the certificate of classification, the ship purchasers were able to obtain significantly lower insurance rates and were able to sail under the French flag.[93] Therefore, the ship purchasers were precluded from suing ABS in court and bound to arbitrate their claims under the 'direct benefit' limb of estoppel.[94]

However, what exactly constitutes a 'direct' benefit could sometimes be contentious. In *Thomson-CSF*,[95] Rediffusion Simulation Limited ('Rediffusion') had a Working Agreement with Evans Sutherland Computer Corporations ('ES') for purchase and supply of computer-generated image equipment. The Working Agreement provided for all disputes arising from it to be resolved by arbitration. Rediffusion was eventually acquired by Thomson, but when ES commenced an arbitration against both Rediffusion and Thomson, the Second Circuit rejected the ES's claim that Thomson, being a third-party non-signatory, should be bound under the 'direct benefit' limb of estoppel.[96] It was held that the benefit Thomson received from the Working Agreement through the acquisition of Rediffusion was merely an 'indirect' benefit, and thus not one that the court 'envisioned as the basis for estopping a non-signatory from

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90 *Sunkist* (n 89).

91 Ibid.

92 *American Bureau of Shipping v Tencara Shipyard*, 170 F.3d 349, 353 (2d Cir 1999) ('*Tencara Shipyard*') (Calabresi J); Mišović (n 88) 762, citing *Comer v Micor Inc* 436 F3d 1098(9th Cir 2006) 1101. See also *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 68-69 (Menashi J) (2d Cir. 2021), citing *MAG Portfolio Consult, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58(2d Cir. 2001) 62.

93 *Tencara Shipyard* (n 92) 353.

94 Ibid.

95 *Thomson-CSF* (n 87).

96 *Thomson-CSF* (n 87) 779.

avoiding arbitration'.[97] With respect, by mechanically distinguishing between the benefits Thomson received from the Working Agreement itself and from the acquisition of Rediffusion, the court failed to appreciate the commercial reality of the transaction. Arguably, Thomson received all benefits and rights Rediffusion had under the Working Agreement, by virtue of its acquisition of Rediffusion. Therefore, the benefits Thomson obtained from acquiring Rediffusion should be considered far more substantial, albeit less direct, compared to the benefits obtained by the yacht purchasers from the Classification Contract in *Tencara Shipyard*. For this reason, the court's reluctance to apply the 'direct benefit' estoppel in *Thomson-CSF* arguably failed to fulfill the intended purpose of the estoppel theory.

Nonetheless, the point here is not to advocate for adopting a lower threshold for the 'direct benefit' limb of estoppel. Instead, it argues that the focus should be placed not only on the directness of the benefit received by the third party, but also on its substantiality. Bearing in mind the primacy of freedom of contract and party autonomy, [98] an involuntary non-signatory should not be easily forced to arbitrate unless significant practical injustice would ensue. Therefore, a unwilling non-signatory should only be compelled to arbitrate if the benefit it received was highly direct and substantial such that it cannot fairly rely on its non-signatory status to circumvent arbitration.

c. One 'Estoppel', Two Rationales

Despite using the same label, the two estoppel theories are supported by different rationales. On the one hand, the 'intertwined limb' aims to *promote procedural efficiency* by consolidating all interdependent claims into one arbitral proceeding, regardless of the parties' status being signatory or non-signatory. This aim is also in line with the federal policy in favour of arbitration in the United States.[99] On the other hand, the 'direct benefit' limb aims to *prevent practical injustice* by allowing a third party to directly benefit from a contract whilst simultaneously avoiding the associated burden to arbitrate.

D *Australia*

1 *The Australian Interpretation of 'Claiming through or Under'*

Australia has not been particularly receptive to the theories regarding third parties in arbitration that have been adopted in other jurisdictions.[100] Under Australian law, a third party may join an arbitration or be bound by an

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97 Ibid.

98 Garnett (n 8) 172-174, citing William W Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in Permanent Court of Arbitration (ed), *Multiple Party Actions in International Arbitration* (Oxford University Press, 2009) 3, 23–4 [1.75]–[1.79].

99 Hui (n 88) 740.

100 Garnett (n 8) 166: alternative theories in relation to the issue of third parties in arbitration such as the group of companies doctrine and equitable estoppel have not been adopted by Australian courts.

arbitration agreement if it is 'claiming through or under' a party to an arbitration agreement.[101] Traditionally, this 'claiming through or under' provision had been interpreted as a narrow exception to the doctrine of privity, consistent with the English common law. Under this interpretation, a third party would only be considered as 'claiming through or under' an original party to the arbitration agreement if its claim is directly 'derived' from the latter.[102] This requires the third party to effectively 'step into the shoes' of an original party, which can only be achieved through traditional common law theories such as novation, assignment, subrogation, and agency.[103] However, in a relatively recent decision, the Australian High Court reformulated its interpretation of the 'claiming through or under' provisions, and thereby broadened the scope for third-party joinder in Australia.[104]

In *Rinehart,* the beneficiaries of the HFMF Trust brought actions against Gina Rinehart, the trustee of the HFMF Trust, for her alleged breach of the trustee's duties by transferring trust assets to third-party companies controlled by her. The beneficiaries also commenced proceedings against the third-party companies for knowing receipt. Nonetheless, both Rinehart and the third-party companies applied to stay the court proceedings in favour of arbitration on the basis that the disputes were subject to the arbitration agreements contained in the trust deeds, which provided for any dispute arising under the deeds to be resolved by confidential arbitration. Critically, the third-party companies, despite being non-signatories to the trust deeds containing the arbitration agreements, argued that they were 'claiming through or under' the trustee (i.e. Rinehart) pursuant to s 2(1) of the *Commercial Arbitration Act 2010* (NSW), such that they should also be bound by the relevant arbitration agreements.

This application was clearly an attempt to expand the then narrower scope of the 'claiming through or under' provisions.[105] Although rejected at first instance and again by the Full Federal Court through the application of the traditional 'derived rights' test,[106] it was eventually upheld by the majority of the High Court.[107] The High Court majority held that the relevant test was 'whether an essential element of the [third-party companies' claim] is vested

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[101] *International Arbitration Act 1974* (Cth), s 7(4); *Commercial Arbitration Act 2010* (NSW), s 2(1).

[102] *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, 342 (Brennan and Dawson JJ, Toohey J agreeing at 354) ('*Tanning Research*').

[103] Garnett (n 8) 163-4, citing *Smith v Pearl Assurance Co Ltd* [1939] 1 All ER 95; *Shayler v Woolf* [1946] 1 Ch 320; *Tensioned Concrete Pty Ltd v Munich Re* [2020] WASC 431; *Filatona Trading Ltd v Navigator Equities Ltd* [2020] 2 All ER (Comm) 851.

[104] *Rinehart* (n 6). See also Garnett (n 8) 166-8.

[105] *Tanning Research* (n 102) 342 (Brennan and Dawson JJ, Toohey J agreeing at 354), 350 (Deane and Gaudron JJ)

[106] *Rinehart v Rinehart (No 3)* (2016) 257 FCR 310, 417 [535], 418 [540], [541] (Gleeson J); *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, 522-3 [323] (Allsop CJ, Besanko and O'Callaghan JJ).

[107] *Rinehart* (n 6) 540 [66] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

in or exercisable by the party to the arbitration agreement'.[108] In this case, the High Court majority found the defence of the third-party companies, as the alleged knowing recipient of misapplied trust property, did share an 'essential element' with the defence of the trustee.[109] Specifically, it was a common defence for both the trustee and the third-party companies that the transfer of trust property was lawful rather than a breach of trust.[110] Moreover, they also both sought to rely on the releases of claims and covenants not to sue contained in the trust deeds as their defences.[111]

One may wonder why the High Court majority decided to deviate from the long line of precedents. The answer appears to lie within the desirability for procedural efficiency. According to their Honours, excluding the third-party assignees from the scope of the arbitration agreement would

> give the arbitration agreement an uncertain operation. It would jeopardise orderly arrangements, potentially lead to duplication of proceedings and potentially increase uncertainty as to which matters of controversy are to be determined by litigation and which by arbitration.[112]

Nonetheless, the majority also appeared to be cautious of the potentially far-reaching implications of this decision as their Honours expressly noted that no submissions were made in relation to the broader and complex issues of arbitral consent and privity of contract.[113] In this regard, Edelman J in dissent was strongly opposed to the expansive interpretation of the 'claiming through or under' provisions because it would undermine the fundamental notion of privity, regardless of 'however efficient, however convenient, and however practical it might be for an arbitration to include all disputes'.[114] By insisting on the stricter application of the 'claiming through or under' provision, Edelman J also rejected its applicability in this case because his Honour found the legal nature of the claim against Rinehart was technically distinct and independent from that of the claim against the third-party companies, such that their respective defence were also technically distinct.[115]

Notwithstanding Edelman J's strong dissent, the treatment to third parties under Australian law has been moved to its next chapter by the majority in *Rinehart*. Following *Rinehart*, the Queensland Supreme Court in a construction dispute found the superintendents as parties 'claiming through or under' a principal with whom the plaintiff contractor had an arbitration agreement when the contractor made a negligence claim against the superintendents.[116] Likewise, the New South Wales Supreme Court of Appeal

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108 Ibid.
109 Ibid.
110 Ibid 543–4 [73].
111 Ibid 542 [70]–[71].
112 Ibid 543–4 [73].
113 Ibid 546 [78].
114 Ibid 553 [94] (Edelman J).
115 Ibid 553 [102].
116 *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd* [2019] QSC 173, [27]–[30] (Bowskill J) ('*Bulkbuild*').

held that a company director was a party claiming through or under the company, because the director's defence shared an 'essential element' with the company's defence when the former was sued for his accessory liability for the company's breach of the Australian Consumer Law.[117]

It is worth noting, however, that all these cases involved willing third parties seeking to join an arbitration, rather than unwilling third parties being forced to arbitrate. The latter scenario, however, could potentially spark greater controversy. Where a third-party defendant voluntarily seeks to join an arbitration, it gives arbitral consent implicitly. By contrast, where a third-party claimant is forced to arbitrate its claims, there is a more apparent consent deficit, and the third party would essentially be deprived of its fundamental civil right to access the courts.[118] This concern, however, may be alleviated by a refinement to the *Rinehart* approach as proposed by Garnett, which has recently received extra-curial judicial endorsement.[119] According to Professor Garnett, a distinction should be drawn between third-party claimants and third-party defendants, and the *Rinehart* approach should only be applied in cases where a third-party defendant voluntarily seeks to join an arbitration.[120] By contrast, the previous 'derivative rights' approach should be retained for cases involving third-party claimants who chose to litigate, such that the consensual nature of arbitration can be optimally preserved.[121]

One may consider Garnett's approach overly complex for its differential treatments of consenting and non-consenting third parties. However, it is crucial to emphasise that the administration of justice is rarely a simple task, and the aim to promote procedural efficiency should not be achieved at the expense of undermining the fundamental notion of party autonomy if no greater justification exists. It therefore remains to be seen whether the High Court will consider refining or overturning the *Rinehart* approach when confronted with the broader issues of privity and arbitral consent.

117 *King River Digital Assets Opportunities SPC v Salerno* [2023] NSWSC 510, [30]-[32] (Rees J) ('*King River*').

118 Garnett (n 8) 169–70, citing *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(1) ('ECHR'); *Rinehart* (n 6) 551 [89] (Edelman J); *The Titan Unity (No 2)* [2014] SGHCR 4, [24] (Shaun Leong Li Shiong AR).

119 Kristina Stern, 'The Courts and Arbitration' (Speech, Court of Appeal, Supreme Court of NSW, 22 April 2024), 21–22, 28–9.

120 Garnett (n 8) 169–70.

121 Ibid.

IV DISCUSSION: USING FAIRNESS AS THE GUIDING PRINCIPLE FOR THE THIRD PARTY ISSUE

A *Consent is Not the Common Touchstone*

As argued by some commentators, the common touchstone for all theories is the 'parties' intention' or 'consent' to be bound by the arbitration agreement.[122] However, in many cases the parties' consent to arbitrate is merely putative and may even contradict reality. For example, where the 'group of companies' doctrine is invoked, a third party's conduct such as their direct involvement in the performance of the contract, is taken as proxy for their consent.[123] However, such a substitution would be inappropriate if the contrary intention of the parties is readily discernible. For instance, a company may wish to take part in the contract but does not want to be bound by the arbitration agreement therein. To this end, it may establish a special purpose vehicle and designate it as the named party to the relevant contract, in a manner that allows it to rely on its non-signatory status to evade arbitration. In such a scenario, the assertion that this party has implicitly intended or consented to arbitrate would be clearly unrealistic and far-fetched. If consent is found, it would be at most a functional legal construct employed by courts and tribunals to address the apparent consent deficit as a matter of principle. The so-called 'implicit consent' in such cases is artificially imposed on the third parties in a backhanded way in order to justify for them to be bound by the arbitration agreement that they have never actually consented to.

Furthermore, in the application of some other theories, consent plays no role at all. For example, the relevant test for the 'intertwined' limb of estoppel is concerned entirely with the nexus between the third party's claim and the contract containing the arbitration agreement, or the third party's relation with a party to the arbitration agreement.[124] These inquiries are completely irrelevant to whether the third party has manifested any intention or consent to be bound by the arbitration agreement.

Therefore, the perspective that 'consent' is the common touchstone for all theories is not only implausible but also "intellectually dishonest".[125] Instead, it is submitted that the notion of fairness is, and should be, the overarching guiding principle for all these theories.

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[122] See generally, Hanotiau and Ohlrogge, '40th Year Anniversary' (n 70); Hosking, '*Non-Signatory's Ability to Compel International Commercial Arbitration*' (n 30) 565.

[123] Hanotiau and Ohlrogge, '40th Year Anniversary' (n 70) 304–5, citing *Dow Chemical Group v. Isover Saint-Gobain*, Cour d'appel de Paris, ICC Case No. 4131, 21 October 1983, reported in Revue de l'Arbitrage, 1984(1), 98114; *Société CNAN v. Société CTI*, Cour d'appel de Paris, n° Y 21-24.968, 23 June 2015, reported in Revue de l'Arbitrage, 2017(2), 597-604.

[124] *Sunkist* (n 89) 757-8; *McBro* (n 89) 344.

[125] Brekoulakis, 'Consent v Commercial Reality' (n 2) 121 [8.16].

B *The Notion of Fairness as the Overarching Guiding Principle*

A common theme that can be identified in almost all theories discussed in Part III is that fairness would not be achieved if the only criterion applied to determine a party's entitlement or obligation to arbitrate was whether that party has signed the arbitration agreement. Therefore, it is these theories' common functional goal to prevent unfair outcomes resulting either from a third party's inability to participate in arbitration due to formalistic arguments, or from a third party's unconscionable reliance on its non-signatory status to circumvent arbitration. Arbitration agreements rarely exist standalone,[126] in most cases they would form a part of a larger agreement that may be represented by a 'bundle of rights'. Making any changes to the agreed 'bundle of rights', including the right to arbitrate, would alter the overall *quid pro quo* of the transaction that was carefully negotiated and ultimately agreed by the contracting parties. Accordingly, in the event of third-party involvement, the notion of fairness requires preservation of the original *quid pro quo* to the greatest extent possible, such that no party will receive an unfair advantage or be unfairly prejudiced in relation to their right and obligation to arbitrate the dispute arising from the same 'bundle of rights'.

In the case of assignment, novation or subrogation, arbitration agreements are generally treated as an 'inseparable component' from or 'accessories' to the substantive rights and obligations under the main contract.[127] Therefore, the transfer of the main contract will typically result in the simultaneous transfer of the arbitration agreement, such that the transferee cannot just take the substantive benefits without also taking the attached burden to arbitrate. The same rationale was identified by Coleman J in relation to the operation of the *CRTPA* in the context of binding a third-party beneficiary to the arbitration agreement.[128] As such, what all these approaches aim to do is to preclude a transferee from 'enjoying the gain without enduring the pain'. To do otherwise would not only give the transferee an unfair advantage, but also potentially disadvantage the other original party to the contract, who may have only contemplated to arbitrate the disputes that may arise out of the relevant contract. Due to the largely distinct nature of arbitration and litigation, forcing such an original party to litigate instead of arbitrate would be unfairly detrimental to its position *vis à vis* the overall dynamics of the contract.

Similarly at the heart of the 'direct benefit limb' of estoppel is also the notion of fairness.[129] Allowing a non-signatory to take a direct benefit from a

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[126] Born (n 25) 251 'Part I: International Arbitration Agreements'.

[127] *West Tankers* (n 39*)* [33] (Colman J) citing *The Jay Bola* (n 39) 1000; *ABS* (n 60) [5].

[128] See above n 55 and accompanying text.

[129] Mišović (n 88) 762.

contract but simultaneously circumvent the burden to arbitrate would be a 'disregard of equity'.[130]

Furthermore, accepting the notion of fairness as the underpinning rationale behind the 'group of companies' doctrine would also better explain why French courts in several instances focused solely on the third parties' direct involvement in the contract rather than insisting on finding any artificial consent by such third parties.[131]

Last but not least, fairness, as a notion akin to the equitable jurisdiction in common law systems, could also provide doctrinal underpinning for all theories that allow third-party involvement in arbitration. One key role of equity is to supplement the common law where its operation may lead to undesirable or irrational outcomes, hence where there is inconsistency between equity and the common law, equity would prevail. Therefore, when exceptions to privity of contract and party autonomy are made by extending arbitration agreements to third parties, principled justifications would be provided by the notion of fairness.

If fairness is accepted as the overarching principle underpinning all these theories, then logically any theory that does not serve to uphold fairness should not be applied. With this, it will be argued that the 'intertwined' limb of estoppel and the new Australian *Rinehart* approach both fall outside of the fairness-oriented framework and should therefore be eradicated.

1 *'Intertwined' Estoppel and the Rinehart Approach are Not Consistent with the Guiding Principle of Fairness*

The relevant tests for 'intertwined' estoppel and the *Rinehart* approach are substantially similar. The 'intertwined' estoppel depends on whether the non-signatory's claim is 'intimately founded in and intertwined with' a contract containing an arbitration agreement.[132] The *Rinehart* test similarly asks whether the non-signatory's claim is 'vested in or exercisable' by the party to the arbitration agreement.[133] However, the fact that a non-signatory's claim is intertwined with the relevant contract, or is exercisable by a party to the contract, could be merely circumstantial, which does not in and of itself demonstrate any perceivable unfairness that warrants intervention by the court or tribunal.[134] This is in contrast with the 'direct benefit' limb of estoppel or the 'group of companies' doctrine, *arguendo*, which are triggered by the third party's deliberate conducts such as knowingly taking a benefit from or

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130 Brekoulakis, 'Consent v Commercial Reality' (n 2) 130 [8.58], citing *Avila Group, Inc v Norma J of California*, 426 F Supp 537, 542; *International Paper v Schwabedissen Maschinen & Anlagen Gmbh* 206 F 3d 411 (4th Cir 2000).

131 See above nn 75–7 and accompanying text.

132 *Sunkist* (n 89)757-758; *McBro* (n 89) 344.

133 *Rinehart* (n 6) 540 [66].

134 For example, the claims against the third-party companies in *Rinehart* (n 6) are merely incidental to the alleged breaches by the trustee. Similarly, Edelman J considered a 'common central issue' in dispute is insufficient to justify for the departure from the doctrine of privity: *Rinehart* (n 6) 554 [96] (Edelman J).

directly participating in the underlying contract. Therefore, the approaches that merely rely on the third party's strong, yet circumstantial, connections with the underlying contract are not only inconsistent with the guiding principle of fairness but may also lead to indeterminate applications.[135]

However, it may be argued that a third party may incidentally obtain some benefits from the relevant contract due to its close connection with it, and thus the third party should be bound by the arbitration agreement contained therein. However, the paramountcy of party autonomy and freedom to contract dictates that they cannot be compromised lightly, and such incidental benefits would not be sufficient to justify for extending an arbitration agreement to a third party. If this 'incidental benefit' rationale could be used to support the 'intertwined' estoppel and the *Rinehart* approach, then the 'direct benefit' limb of the estoppel theory would be effectively redundant. Party autonomy would also be too easily overridden.

In fact, the operations of 'intertwined' estoppel and the *Rinehart* approach could contradict the fairness framework as they may unfairly interfere with the parties' freedom to contract. In *McBro*,[136] St Magaret's Hospital ('Hospital') entered into two separate contracts with its electrical contractor ('Contractor') and its construction manager ('Manager'), with each containing an arbitration agreement. However, the contract between Hospital and the Contractor explicitly stated that 'nothing contained in the Contract documents shall create any contractual relationship between the Manager and the Contractor'. Therefore, there was no contractual relationship nor arbitration agreement between the Contractor and the Manager. However, when the Contractor sued the Manager for intentional interference with contract and negligence, the court compelled the parties to arbitrate due to the close contractual relationships among all three parties and the intimacy between the Contractor's claims and the underlying contract obligations.[137] With respect, this decision seemed to have disregarded the parties' freedom to contract and unjustifiably rewrote the parties' bargain in a way completely contrary to what they agreed to. As Professor Garnett correctly argued, for a known third party not to have been made subject to an arbitration clause at the time of drafting may suggest that it was consciously excluded,[138] let alone the fact that the specific exclusion was expressly stipulated by the parties in this case.

For these reasons, it is argued that the 'intertwined' limb of estoppel and the *Rinehart* approach should be completely eradicated as they are completely inconsistent with the notion of fairness. However, advocates for these approaches would argue for them to be maintained because they may promote procedural efficiency by consolidating separate forums for dispute resolution and thereby avoiding inconsistent findings. In response, it will be

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135 However, as suggested by Professor Garnett, distinguishing legal similarity from factual similarity may alleviate this concern: see Garnett (n 8) 169.

136 *McBro* (n 89).

137 *McBro* (n 89) 342–3.

138 Garnett (n 8) 175.

demonstrated that this 'procedural efficiency' argument is logically flawed and thus merely a myth.

2 *The Myth about Procedural Efficiency*

The applications of 'intertwined' estoppel and the *Rinehart* approach are often perceived as advantageous for their ability to prevent fragmentated proceedings when a dispute involves both signatories and non-signatories.[139] Indeed, it was for this very reason the majority of the Australian High Court took the initiative to expand the previously narrower interpretation of the 'claiming through or under' provision.[140] Whilst Edelman J's dissenting opinion was based largely on the doctrine of privity, it was not the only reasons expressed in His Honour's judgment. Rather, there was a more nuanced counterargument to the majority's view made implicitly by Edelman J, which was regrettably overlooked by the majority. According to Edelman J,

> [h]owever laudable may be the pragmatic considerations of reducing expense and increasing convenience, there is no basis for an extended meaning of 'party' in s 2(1) that would compel a third party to submit its independent claim or defence to arbitration, without the third party having consented to the procedure, without an arbitrator to whose appointment the third party had consented in the exercise of its own 'voice in the choosing of the arbitrators', and possibly by a reference to a legal system that would not have been chosen by and would not otherwise have applied to the third party.[141]

Indeed, it is well recognised that arbitration and litigation are inherently distinct means of dispute resolution. Unlike court proceedings, parties in arbitration have the liberty to tailor almost every aspect of their dispute resolution process, from the identity and number of arbitrators to the choices of institutional rules and procedural laws. These factors could all have some influence on the ultimate outcome. Additionally, while judges tend to focus predominantly on black-letter laws arising from complex factual circumstances, they may sometimes lack the specialised knowledge and skills or the technical insights that arbitrators possess pertinent to the ultimate decision-making, and vice versa. Further, in the context of international arbitration, the jurisdictional background of arbitrators may also impact their familiarity with the relevant domestic laws. Therefore, the possibility of inconsistent decisions between a court and an arbitral tribunal should not be overly concerning, even when the exact same legal and factual matters are concerned. Such differences flow naturally from the parties' informed choice of the forum and procedures. Therefore, the argument that inconsistent

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[139] However, in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64 ('*Flint Ink*'), the application of the *Rinehart* approach actually was the very reason of causing fragmentation of proceedings, and thereby burdening the third party with a foreign-seated arbitration: see Garnett (n 8) 177–8.

[140] See, eg, *Rinehart* (n 6) 543–4 [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ), cf *Rinehart* (n 6) 549 [86] (Edelman J).

[141] *Rinehart* (n 6) 549 [86] (Edelman J) (emphasis added).

findings between a court and a tribunal are principledly undesirable comes with a lack of appreciation to the distinct nature and characteristics of arbitration and litigation.

Therefore, whilst the application of the 'intertwined' limb of estoppel and the *Rinehart* approach may seem to be capable of promoting procedural efficiency, such a perspective relies on a false postulation that court proceedings and arbitral proceedings are of the same nature and thus interchangeable. On the contrary, the distinct characteristics of litigation and arbitration dictate that the two different means for resolving disputes shall not be conflated. Accordingly, there is simply no sound justification for the 'intertwined' limb of estoppel or the expansive *Rinehart* approach to be maintained, especially considering their lack of compatibility with the fairness-oriented framework.

Thus, the estoppel theory should have no scope to allow a willing third party to enforce an arbitration agreement against on the basis of 'intertwined' estoppel, no matter how motivated the US courts may be to effectuate the pro-arbitration policy under the FAA. Australia, on the other hand, should return to the pre-*Rinehart* position and only treat a third party as 'claiming through or under' a party when the 'derived right' test can be satisfied. However, this would significantly reduce the scope to accommodate third-party involvement in Australia, making it an anomaly from other pro-arbitration jurisdictions.[142] Therefore, Australia could, and should, consider adopting theories such as the 'direct benefit' estoppel, the 'group of companies' doctrine, or the 'third-party beneficiary' doctrine either through the development of Australian common law or the legislative process like the United Kingdom has done in relation to the third-party beneficiaries doctrine.

V CONCLUSION

Due to the fundamentally contractual nature of arbitration, binding third parties to arbitration remain one of the most controversial issues in commercial arbitration. With the variety of theories that exist, the treatments to third-party involvement in arbitration differ across different legal systems. However, given the significant practical implications the Third-Party issue may bring to the arbitral process, achieving greater coherence in the theories addressing third-party involvement is desirable, at least at their doctrinal level. While the practical value of doctrinal coherence for these theories may not be immediately apparent, it becomes crucial when one views the laws in the area of international arbitration as being intended to maintain a level playing field whilst safeguard the common good of all parties regardless of their

[142] Pre-*Rinehart*, Australia's scope for third-party joinder was even narrower than the UK, because Australia has no equivalent statutory frameworks like the *CRTPA*, that allow for extension of arbitration agreements to third parties; see Garnett (n 8) 175 citing Brekoulakis 'Rethinking Consent in International Commercial Arbitration' (n 78) 626. Brekoulakis contends that maintaining narrow arbitral joinder rules is commercially unrealistic and will diminish the attractiveness of international commercial arbitration.

jurisdictional backgrounds. Therefore, decisions in international arbitration should strive to be coherent at the level of principle, since consistency with the common good is a 'central virtue of legal reasoning'.[143] Accordingly, this paper sought to analyse and evaluate the underlying rationales behind several prominent theories, in order to distil and establish an overarching guiding principle applicable to all.

Among the selected theories, all but two demonstrated a common theme – fairness would not be achieved if the only criterion applied to determine a party's obligation to arbitrate was whether that party has signed the arbitration agreement. Not only could the notion of fairness provide stronger justifications for certain theories than the concept of consent, but it also provides doctrinal underpinning for all theories that accommodate third-party involvement in contradiction to the privity of contract and the notion of party autonomy. In contrast, the two outliers that do not rely on the fairness rationale include the 'intertwined' limb of estoppel applied predominantly in the United States, and the Australian *Rinehart* approach. Whilst the development of these two approaches largely stemmed from the desirability for procedural efficiency, this rationale erred in postulating the equivalence and interchangeability of litigation and arbitration – two markedly distinct means of dispute resolution.

Therefore, it is proposed that both the 'intertwined' limb of estoppel and the Australian *Rinehart* approach be eradicated, because they are not only incompatible with the guiding principle of fairness but also lack plausible justification altogether. Whilst this would leave Australia with a much narrower scope for accommodating third-party involvement, adopting theories from other jurisdictions, either through the development of Australian common law or legislative processes, remains a feasible option.

[143] Jonathan Crowe, 'Coherence and Acceptance in International Law: Can Humanitarianism and Human Rights be Reconciled?' (2014) 35 *Adelaide Law Review* 251, 259.