

Implied Consent and Tacit Acceptance in Arbitration Agreements: The Boundaries of Legal Fiction

Ma Yiyang^{1*}

Article History:

Received 27 December 2024

Accepted 17 May 2025

Keywords:

Arbitration Agreement Extension;

Implied Consent;

Tacit Acceptance;

Procedural Fairness;

Party Autonomy

Abstract

The question of whether arbitration agreements can extend their binding effect to non-signatory parties has long been a point of theoretical and practical debate, particularly in the context of international commercial arbitration. This article focuses on the doctrines of implied consent and tacit acceptance, and conducts a comparative analysis of their judicial application across major jurisdictions, including the United Kingdom, the United States, France, Singapore, and China. Based on this comparative analysis, the paper proposes a "Three-Principle Model"-namely, a) behavioral directness, b) knowledge and opportunity to object, and c) substantial procedural participation-as a normative framework for delineating the boundaries of arbitration agreement extension. Through an in-depth analysis of recent landmark cases decided by Chinese courts, the article reveals that while the rationale for implied consent has been progressively adopted in judicial reasoning, the lack of unified and substantive standards has led to inconsistencies in adjudication and potential risks to procedural fairness. Accordingly, the study advocates for legislative clarification and regulatory reform by arbitral institutions, with the aim of striking an appropriate balance between party autonomy and institutional efficiency in the evolving landscape of arbitration practice.

1. Introduction

Arbitration has become the predominant dispute resolution mechanism in international commercial practice, owing to its confidentiality, procedural flexibility, and cross-border enforceability. At the heart of the arbitral system lies the principle of party autonomy, which underpins the formation and enforcement of arbitration agreements. Respect for the parties' consensual choice of arbitral procedures is a foundational tenet. Nevertheless, in the context of increasingly complex transaction structures, issues concerning the extension of arbitration agreements-particularly to parties who did not formally sign the arbitration clause-have emerged with growing frequency.

^{1*} Ma Yiyang, Institute for Social and Cultural Research of Macau University of Science and Technology, PhD Candidate, is mainly engaged in search on International Arbitration, International Relations and Global Governance. E-mail: 1002458297@qq.com

Within this discourse, the concepts of implied consent and tacit acceptance have become key points of contention. How should courts and tribunals determine whether a non-signatory is bound by an arbitration clause? Can conduct alone constitute sufficient evidence of consent to arbitrate? These questions pose not only jurisprudential challenges but also bear directly on the enforceability of arbitral awards and the realization of procedural justice.

Under mainstream international legal thought, arbitration agreements serve as the jurisdictional cornerstone of arbitration, with the principle of consent being central. The maxim "no arbitration without consent" is widely acknowledged. As Gary Born has persuasively argued, "in the absence of valid and genuine party consent, arbitral awards are unlikely to be recognized or enforced."² However, in the context of group companies, contractual chains, agency, subcontracting, or de facto performance, it is not uncommon for parties who have not signed the arbitration agreement to participate in the performance of the contract or the arbitration process. Whether such conduct can be construed as implied acceptance of the arbitration clause constitutes a pivotal issue in arbitral jurisprudence.

Implied consent typically refers to a non-signatory party manifesting an intent to accept an arbitration clause through affirmative conduct—such as accepting performance, participating in dispute resolution procedures, or failing to object within a reasonable period—whereas tacit acceptance permits consent to be inferred from passive behavior, such as silence or acquiescence, absent express actions.³ In certain legal systems, courts or arbitral institutions have accepted the extension of arbitration agreements to non-signatories based on doctrines such as the group of companies, substituted performance, or exceptions to the prohibition against abuse of rights. For example, in the landmark French case *Dow Chemical*, the court held that a group member, though not a signatory to the arbitration clause, had participated so extensively in negotiations and performance that it should be deemed to have consented to arbitration.⁴ Conversely, in the *Dallah v. Pakistan* decision, the UK Supreme Court unequivocally rejected the proposition that conduct alone could suffice to infer consent to arbitration by a non-signatory, emphasizing the necessity of clear and unequivocal consent.⁵

These doctrinal divergences reveal the varying conceptualizations of "consent" among legal traditions and underscore the persistent tension between arbitral efficiency and procedural justice. From the perspective of efficiency, extending arbitration agreements to non-signatories may prevent procedural evasion and enhance the enforceability of arbitral awards. However, from a due process standpoint, excessive reliance on legal fiction risks infringing upon the rights of non-signatory parties, including their right to be informed and to present a defense. This inherent conflict necessitates a more rigorous demarcation of the boundaries within which implied consent may operate.

This article attempts to systematically analyze the legal basis, practical pathways, and theoretical dilemmas of "implied consent" and "tacit acceptance" in international arbitration against the backdrop of the increasingly prominent issue of the expansion of arbitration agreement validity. The discussion will first sort out the theoretical origins and classificatory framework of the expansion of arbitration agreements, then analyze the application

² Gary B. Born, *International Commercial Arbitration*, Kluwer Law International, p. 1297-1305, (2020).

³ A. M. Steingruber, *Consent in International Arbitration*, Oxford University Press, p. 137-146, (2012).

⁴ *Dow Chemical France v. Isover Saint Gobain*, ICC Case No. 4131 (1982); See Emmanuel Gaillard, *Group of Companies Doctrine in ICC Arbitration*, ICC International Court of Arbitration Bulletin, Vol. 6, No. 1 (1995), p. 14-21.

⁵ *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Pakistan*, [2010] UKSC 46, p. 30-34.

logic of these two types of non-explicit pathways in practice. Through a comparative study of relevant judicial precedents and arbitral awards from major jurisdictions such as the UK, the US, France, and Singapore, it will reveal the degree of judicial acceptance of "presumption of consent" across different countries. Subsequently, the article will assess the compatibility between Chinese judicial practice and international rules. Finally, this article will propose a "Three-Principle Boundary Model" for the application of "implied consent" on the basis of respecting party autonomy, so as to regulate the scope of application of "legal fiction" and balance institutional efficiency with the protection of parties' procedural rights.

Ultimately, this study aims to furnish a coherent and practicable analytical framework for assessing the extension of arbitration agreements. It aspires to align Chinese arbitral theory with global norms while guarding against the unprincipled proliferation of presumptive consent that may erode the very legitimacy of arbitration as a voluntary mechanism for dispute resolution.

2. Typologies and Theoretical Foundations of Arbitration Agreement Extension

Arbitration is fundamentally a dispute resolution mechanism based on the voluntary agreement between parties, and as such, it strongly adheres to the principle of party autonomy. The arbitration agreement, which confirms the tribunal's jurisdiction, is in principle only binding on its signatories, in accordance with the doctrine of privity of contract. However, as international commercial transactions grow increasingly complex-especially in contexts involving corporate groups, affiliated enterprises, subcontracting arrangements, and similar structures-traditional notions of privity face significant challenges. These evolving commercial practices have compelled both arbitral tribunals and courts to explore potential legal paths for extending the binding force of arbitration agreements, particularly with regard to non-signatory parties. Over time, a series of doctrines and applicable rules have emerged to guide such determinations.

2.1 Legal Nature of the Arbitration Agreement

Arbitration agreements are generally treated as severable clauses within the principal contract, and they are considered procedurally autonomous from the substantive contract itself. Pursuant to Article II of the New York Convention and Article 7 of the UNCITRAL Model Law, arbitration agreements are typically required to be in writing and must clearly reflect the parties' mutual intention to submit to arbitration.⁶ Similarly, Article 16 of the Arbitration Law of the People's Republic of China mandates that an arbitration agreement must be in writing and specify both the subject matter of arbitration and the selected arbitral institution.

However, in judicial practice, while written form remains an important element, it is not the sole criterion for determining validity. An increasing number of disputes center on whether the parties have "genuinely consented" to entering into arbitration proceedings. For instance, in the Chinese case (2024) Jing 04 Min Te No. 1296, the Beijing No. 4 Intermediate People's Court held that "even if a party did not directly sign the contract containing the arbitration clause, if it was aware of the existence of the clause without raising objections and participated in matters related to the performance of the contract, it may be legally recognized as having consented to be bound by the arbitration clause." Such cases reveal that beyond "formal signature," the substantive judgment of parties' conduct and intent by courts or arbitral tribunals has increasingly become the core pathway for the expansion of arbitration agreements.

⁶ United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration*, Article. 7, (2006).

2.2 Typologies of Arbitration Agreement Extension

In both international and domestic arbitration practice, the mechanisms for extending the binding force of arbitration agreements can be broadly categorized into four types:

- a) Express Consent
- b) Implied Consent
- c) Tacit Acceptance
- d) Legal Fiction

Although these categories may occasionally overlap in form and legal logic, they exhibit significant differences in evidentiary standards, application thresholds, and judicial receptiveness.

2.2.1 Express Consent: Signature or Written Confirmation

Express consent remains the traditional and most uncontroversial basis for determining the binding effect of arbitration agreements. It typically manifests through a party's signature on the contract, the signing of annexes to the agreement, or confirmation via electronic communication. This form of consent is legally clear and constitutes the foundation for any further extension analysis.

2.2.2 Implied Consent: Inferring Agreement from Conduct or Facts

Implied consent refers to situations where a non-signatory party has not signed the arbitration agreement in writing, but nonetheless exhibits conduct during the course of a transaction that indicates acceptance of the arbitration clause. A representative example is ICC Case No. 4131 (Dow Chemical), in which a French court endorsed the "group of companies" doctrine, ruling that although the parent company had not signed the arbitration clause, its involvement in negotiations and performance constituted sufficient grounds to consider it an "internal party" to the arbitration agreement.⁷

A similar approach exists in China. In a case heard by the Pudong District People's Court of Shanghai, where a industrial company sued a garment manufacturing company, the court held that "even if a party has not signed the arbitration agreement, it may be deemed to have accepted it if it has performed the main obligations under the principal contract, or has participated in the arbitration proceedings without raising objections." This ruling reflects the recognition by Chinese judicial authorities of the presumption of consent derived from "conduct and implication."

2.2.3 Tacit Acceptance: Presumption from Silence or Inaction

Tacit acceptance further relaxes the evidentiary burden by allowing consent to be inferred from inaction, such as failure to object to an arbitration clause despite knowledge of its existence, or passive participation in proceedings. For instance, in *PT First Media TBK v. Astro Nusantara International B.V.*, the Singapore courts held that where a respondent fails to object to the arbitration clause after the arbitration has commenced and instead submits defense documents, this may amount to tacit acceptance.⁸ However, unlike implied consent, tacit acceptance demands a stricter evidentiary review to ensure that such behavior can reasonably be linked to an intent to arbitrate, thereby minimizing the risk of procedural abuse.

⁷ ICC Case No. 4131, *Dow Chemical v. Isover Saint Gobain*, ICC International Court of Arbitration (1982).

⁸ *PT First Media TBK v. Astro Nusantara International BV*, [2013] SGCA 57, p184-203.

2.2.4 Legal Fiction: Institutional Presumption of Constructive Consent

Legal fiction constitutes the most expansive and controversial pathway for extending arbitration agreements. Under this theory, the focus shifts from the subjective will of the party to the systemic rationale of legal coherence, efficiency, or institutional convenience. Typical examples include the group of companies doctrine or the doctrine of estoppel in U.S. jurisprudence. In *Thomson-CSF v. American Arbitration Association*, the U.S. court found the parent company to be bound by the arbitration agreement based on indirect control and active participation in performance, despite the absence of formal execution.⁹ Although this approach enhances arbitral efficiency, it also presents considerable risks to procedural justice.

2.3 Evidentiary Standards and Judicial Divergence

It is noteworthy that the application of the above typologies varies significantly across jurisdictions. Civil law countries such as France and Brazil are more receptive to treating corporate groups as substantive parties, thus favoring implied or fictional consent. Common law jurisdictions such as the UK and the U.S. adopt a more cautious approach, emphasizing evidentiary integrity and actual control. Chinese courts lie somewhere between these positions, typically applying a compound assessment that includes knowledge, performance, and absence of objection.

Courts commonly examine the following factors:

- a) Whether the party knew or should have known about the existence of the arbitration clause;
- b) Whether the party substantially performed or participated in contract execution;
- c) Whether the party raised timely objections following receipt of an arbitration notice;
- d) Whether the party took affirmative steps to participate in the arbitral proceedings.

2.4 Tensions at the Boundaries of Extension

The above analysis demonstrates that arbitration agreement extensions are not solely contingent upon written signature but increasingly rely on the doctrine of constructive consent. Although implied consent, tacit acceptance, and legal fiction all have valid justifications in practice, they also raise significant concerns regarding ambiguity and potential overreach. On the one hand, such doctrines help prevent circumvention of arbitration obligations in complex contract structures; on the other hand, if applied indiscriminately, they may lead to procedural coercion and substantive injustice. Therefore, clear classification and well-defined application standards are urgently needed and will be addressed in the following chapters.

3. Legal Dilemmas of Implied Consent and Tacit Acceptance

At the core of the arbitration regime, consent not only functions as the procedural trigger for initiating arbitration but also serves as the normative foundation of its legitimacy. However, consent is not invariably expressed through formal, written, or explicit manifestations. With the growing complexity of cross-border transactions, layered corporate structures, and multi-tiered contractual chains, the extension of arbitration agreements to non-signatory parties has become increasingly common in practice. While implied consent and tacit acceptance offer viable alternatives to formalized consent, they also give rise to a series of jurisprudential challenges-particularly where procedural fairness and institutional efficiency are in tension.

⁹ *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773 (2d Cir. 1995).

3.1 Tensions under the Principle of Party Autonomy

As a dispute resolution mechanism rooted in private law, arbitration derives much of its legitimacy from the principle of party autonomy. Both the United Nations Commission on International Trade Law (UNCITRAL) and the New York Convention emphasize that arbitration agreements must be based on genuine and voluntary consent.¹⁰ Accordingly, under traditional doctrine, only those parties who have unequivocally expressed their willingness to arbitrate should be subject to the arbitration clause.

Nonetheless, as American scholar Alan Rau observes: "In the absence of formal consent, arbitral regimes are compelled to construct a framework of constructive consent in order to prevent the arbitration agreement from degenerating into mere formalism."¹¹ Within this framework, doctrines such as implied consent and tacit acceptance serve as key mechanisms for remedying the absence of formal consent. Yet, this gives rise to a central paradox: when the arbitral system relies on constructive mechanisms to safeguard its effectiveness, does it not simultaneously erode the voluntariness upon which it fundamentally depends?

3.2 Doctrinal Distinctions and Evolutionary Trajectories

While implied consent and tacit acceptance are closely related in textual formulation, they are subject to differing standards and applications in international arbitration practice.

3.2.1 Implied Consent

Implied consent refers to a non-signatory party's affirmative conduct—such as contract performance, participation in negotiations, execution of annexes, or raising substantive claims in arbitration—which may be construed as an acceptance of the arbitration clause. For example, in ICC Case No. 5103, the arbitral tribunal found that the non-signatory parent company's continuous involvement, invoice approvals, and provision of guarantees constituted implied acceptance.¹²

This form of consent does not require express declarations. Rather, it may be inferred from contextual evidence and the totality of conduct, in accordance with the principles of contract interpretation. The doctrinal basis is grounded in civil law approaches to intentional inference from conduct.¹³

3.2.2 Tacit Acceptance

Tacit acceptance, by contrast, focuses on passive conduct, such as failing to object to the arbitration clause within a reasonable period, remaining silent during the arbitral proceedings, or submitting substantive arguments without jurisdictional objections. Because the underlying behavior lacks affirmative content, the associated legal risks are higher. For example, in the Singapore case *PT First Media*, the respondent did not explicitly accept arbitration, but its failure to object in a timely manner was deemed as tacit acceptance of the arbitral process.¹⁴

The key doctrinal distinction between the two lies in the nature of the conduct: implied consent arises from active engagement, while tacit acceptance is typically inferred from silence or non-resistance.

¹⁰ United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration*, Article. 7, (2006).

¹¹ Alan S. Rau, *Arbitral Jurisdiction and the Dimensions of "Consent"*, *Arbitration International*, 24 (2008), p. 199, 204.

¹² ICC Case No. 5103, *Partial Award on Jurisdiction*, ICC International Court of Arbitration, (1988).

¹³ *Civil Code of the People's Republic of China*, Articles. 142, 466, (2020).

¹⁴ *PT First Media TBK v. Astro Nusantara International B.V.*, [2013] SGCA 57, p. 197-203.

3.3 Legal Fiction and Risks to Procedural Justice

To resolve the challenges posed by complex multi-party structures, arbitral regimes have introduced legal fiction, i.e., a presumption of consent that is not based on explicit will but rather on systemically constructed inferences. However, this presumption carries serious procedural justice risks:

3.3.1 Information Asymmetry and Right to Be Informed

In many cases, non-signatory parties are not even aware of the existence of the arbitration clause, particularly in large-scale cross-border mergers or supply chain transactions where contracting and performance entities may differ. If a party is deemed to have accepted arbitration solely based on performance conduct, this may deprive them of their right to informed participation and procedural objection.¹⁵

Chinese judicial practice has responded to this issue. For instance, in Case No. (2021) Jing 04 Min Te 290 heard by the Beijing Financial Court, the court held that "an arbitration clause, which excludes the parties' right to litigate, must be based on the parties' clear and genuine mutual assent; where the party providing the contract fails to fulfill its obligation to prompt, and there is no evidence proving that the other party has noticed and understood the arbitration clause, the parties cannot be presumed to have accepted arbitration merely on the basis of their performance of contractual obligations."

3.3.2 Participation Does Not Equate to Consent

In practice, a non-signatory may passively participate in the early stages of arbitral proceedings, or respond solely due to being mistakenly named as a party. Arbitral tribunals may then incorrectly infer acceptance of jurisdiction based on such procedural interaction.

For example, in the UK Supreme Court case *Dallah*, the Court held that the Pakistani government's representatives merely responded to arbitral correspondence and that such conduct did not amount to substantive confirmation of the arbitration clause. The court emphasized: "Replying to the tribunal's letters does not constitute acceptance of the arbitration clause's essence."¹⁶

3.4 Efficiency versus Due Process

From a functionalist standpoint, implied and tacit consent mechanisms serve as effective tools to prevent strategic evasion of arbitration obligations. For instance, in the *Thomson-CSF* case, the U.S. court applied the principle of estoppel to bar a parent company from avoiding arbitration after having benefited from the contract containing the clause.¹⁷ However, from a due process perspective, if such extensions are applied without clear standards, they may amount to compulsory jurisdiction.

German scholar Dr. Silja Schorr-Hanefeld has cautioned: "Any inference of consent based on conduct, in the absence of explicit intent, must satisfy three cumulative conditions: behavioral directness towards the arbitration clause; possibility of knowledge; and opportunity for procedural objection."¹⁸ These conditions form the conceptual foundation of the "Three-Principle Model" introduced in the following chapter.

¹⁵ A. M. Steingruber, *Consent in International Arbitration*, Oxford University Press, p. 154-156, (2012).

¹⁶ *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of Pakistan*, [2010] UKSC 46, para. 34-38.

¹⁷ *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773 (2d Cir. 1995).

¹⁸ S. Hanefeld, *The Application of Arbitration Agreements to Non-Signatories*, in *Austrian Yearbook on International Arbitration*, 2013, p. 154-155.

3.5 Necessity of Delimiting the Scope of Extension Mechanisms

This chapter illustrates that while implied consent and tacit acceptance have certain functional legitimacy, their application must be approached with caution. Only where the conduct demonstrates clear directionality, the party possesses reasonable knowledge, and procedural safeguards are preserved, should courts or tribunals cautiously infer that a non-signatory is bound by the arbitration agreement.

4. Comparative Case Law and Jurisdictional Approaches

The application of implied consent and tacit acceptance in international arbitration is heavily dependent on how various legal systems conceptualize the notion of "consent" and the extent to which their judicial systems tolerate presumptions in this regard. While the New York Convention establishes a framework for the cross-border recognition of arbitration agreements, it does not unify the criteria for determining who is bound by such agreements. Courts in different jurisdictions adopt divergent attitudes when faced with the question of whether non-signatory parties should be included in arbitration, giving rise to a bifurcation between restrictive and expansive interpretative paths.

4.1 United Kingdom: Emphasis on Explicit Consent

The United Kingdom adopts a consistently conservative stance toward the extension of arbitration agreements. English courts emphasize the contractual nature of arbitration clauses and the critical importance of express and actual consent. In *Dallah Real Estate v. Pakistan*, despite the Pakistani government's involvement via affiliated entities in aspects of the contract's performance and correspondence, the UK Supreme Court unequivocally held that "consent must be affirmatively demonstrated and cannot be presumed."¹⁹

The Court clarified that unless a non-signatory is directly involved in the negotiation, assumption of obligations, or explicitly linked behavior concerning the arbitration clause, such a party cannot be bound. English courts rarely apply doctrines like the group of companies theory or estoppel, unless there is clear evidence of a direct and intentional connection between the party's conduct and the arbitration clause.

4.2 United States: Emphasis on Conduct-Based Logic

Compared to the UK, U.S. courts are more permissive in extending arbitration agreements to non-signatories, often relying on equitable doctrines such as estoppel,²⁰ agency, and alter ego. In *Thomson-CSF v. AAA*, the U.S. Court of Appeals held that "if a parent company benefits from an arbitration agreement signed by a subsidiary and participates in contract performance, it may be deemed bound by that agreement."²¹

U.S. courts generally evaluate whether the non-signatory a.derived direct benefit from the contract and b.acted in a manner consistent with the agreement. This behavior-based approach reflects an emphasis on substantive fairness over strict formalism.

¹⁹ *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs, Pakistan*, [2010] UKSC 46.

²⁰ George Bermann, *Recognition and Enforcement of Foreign Arbitral Awards*, *Arbitration International*, 28 (2012), p. 161, 173.

²¹ *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773 (2d Cir. 1995).

4.3 France: Group of Companies Doctrine

France is among the most expansive jurisdictions with regard to extending arbitration agreements. Since the 1982 *Dow Chemical v. Isover Saint Gobain* case, French courts have embraced the Group of Companies Doctrine, holding that even absent a formal signature, a party may be bound if it has played a decisive role in negotiation, performance, or control of the contract.

The French Supreme Court argued that "a corporate group should be treated as a unified economic entity,"²² and thus the signatory requirement may be satisfied by internal functional relationships. This doctrine significantly lowers the formal thresholds and prioritizes economic integration and functional coherence.

4.4 Singapore: A Hybrid Approach of Contract and Conduct

Singaporean courts adopt a balanced approach, weighing both contractual structure and conduct. In *PT First Media v. Astro*, the Singapore Court of Appeal stated that "a non-signatory must demonstrate conduct that indicates awareness of the arbitration clause and an absence of objection in order to infer consent."²³

In this case, the respondent failed to object to the arbitration agreement at the commencement of the arbitration and submitted substantive responses. The court concluded that these actions amounted to tacit acceptance, though it emphasized that such inference should be confined to the specific facts and should not serve as a general rule.

4.5 China: Progressive Acceptance via Behavior and Non-Objection

The aforementioned case heard by the Shanghai Pudong District People's Court, involving a certain industrial company suing a Shanghai garment manufacturing company, has already been elaborated, so it will not be repeated here. Meanwhile, Article 13(1) of The Supreme People's Court's Interpretation on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China stipulates: "Where a party fails to raise an objection to the validity of an arbitration agreement before the first session of the arbitral tribunal and continues to participate in the arbitration proceedings, it shall be deemed to have waived its right to object." However, Chinese courts have also emphasized the "clarity" of conduct and the "possibility of being informed," adopting a moderately conservative stance towards the path of legal fiction.

4.6 Global Trends and China's Normative Integration

The above comparative analysis reveals marked differences among jurisdictions in their approaches to implied consent and tacit acceptance. The UK and US focus primarily on contractual clarity and equitable conduct, respectively; France employs functional integration doctrines; Singapore and China pursue middle paths that attempt to balance procedural efficiency with consent integrity.

At the global level, implied consent has been widely acknowledged as a legitimate doctrine. However, most jurisdictions remain cautious toward tacit acceptance, often requiring strong evidence of awareness and procedural engagement. In this context, China's current interpretation provides a basis for application but lacks uniformity

²² *Dow Chemical France v. Isover Saint-Gobain*, ICC Case No. 4131 (1982); See E. Gaillard, *Group of Companies in Arbitration*, ICC Bulletin, Vol. 6, No. 1 (1995), p. 14-21.

²³ *PT First Media TBK v. Astro Nusantara International B.V.*, [2013] SGCA 57, p. 184-203.

in evidentiary standards-particularly regarding how to assess whether a party "ought to have known" about the arbitration clause.

Going forward, the adoption of a normative framework such as the Three-Principle Model-consisting of behavioral directness, knowledge and opportunity to object, and substantial procedural participation-would contribute to greater coherence in judicial determinations and promote procedural fairness in arbitration clause extensions.

5. The Three-Principle Model and Institutional Recommendations

As previously discussed, while implied consent and tacit acceptance serve as necessary doctrinal mechanisms to address the evasion of arbitration by non-signatories, the absence of clear standards for their application risks undermining the balance between procedural justice and institutional efficiency. Given the evident divergence in international jurisprudence and the relative doctrinal vacuum in China's arbitration practice, it is essential to develop a unified evaluative framework.

5.1 Principle One: Behavioral Directness

Behavioral directness refers to whether the conduct of the non-signatory party clearly indicates an intention to accept the arbitration clause. Not all commercial activities can be presumed to amount to acceptance. The conduct must exhibit a logical and substantive nexus with the arbitration agreement. Examples include:

- a) Participation in contract negotiations with knowledge of the arbitration clause;
- b) Direct performance of obligations under the principal contract (e.g., payment, receipt of goods, project management);
- c) Explicit reliance on or invocation of the arbitration clause in contractual execution.

This principle is intended to prevent non-purposeful conduct from being mischaracterized as acceptance of arbitration. For instance, neither the New York Convention nor the UNCITRAL Model Law regards commercial contact alone as proof of consent. Instead, both stress affirmative indicia of willingness to arbitrate found within the contract or related instruments.²⁴

5.2 Principle Two: Knowledge and Opportunity to Object

A necessary condition for extending the arbitration agreement is whether the non-signatory knew or reasonably ought to have known of the arbitration clause. Courts should evaluate:

- a) Whether the party received a contract or document containing the arbitration clause;
- b) Whether the clause was communicated through email, platform systems, or third-party notifications;
- c) Whether the party occupied a key role in the contractual chain or acted as a controlling entity, thus having a duty to inquire.

More critically, once arbitration is initiated, the party must be afforded a meaningful opportunity to object. This includes:

- a) Whether the arbitral tribunal issued formal notices of proceedings;
- b) Whether the party had adequate time and procedural channels to file jurisdictional objections;

²⁴ United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration*, Article. 7, (2006); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article. II, (1958).

c) Whether substantial engagement occurred before the objection was raised.

As affirmed by the UK Supreme Court in *Dallah*, "an arbitration proceeding that fails to offer a party both awareness and a genuine opportunity to object cannot satisfy the requirement of legitimacy, regardless of the award's content."²⁵

5.3 Principle Three: Substantial Procedural Participation

This principle serves to narrow the scope of tacit acceptance by requiring that a party's procedural conduct demonstrate material engagement in the arbitration. Acts such as the following may qualify:

- a) Submission of detailed defenses addressing the merits;
- b) Filing of counterclaims;
- c) Introduction of evidence or participation in hearings.

By contrast, informational replies, logistical responses, or submissions for clarification should not be deemed acceptance of arbitral jurisdiction.

Therefore, "substantial procedural engagement" should become the evidentiary standard for establishing tacit acceptance and must be demonstrably linked to the arbitration's core issues.

6. Conclusion

The extension of arbitration agreements to non-signatories represents one of the most pressing challenges in modern international arbitration. While implied consent and tacit acceptance are valuable instruments for curbing evasive tactics and reinforcing award enforceability, their application without a clear framework can itself become a form of procedural coercion. Arbitration, as a mechanism premised on voluntariness, draws its legitimacy from party acceptance.

This article has examined divergent approaches to consent across leading jurisdictions—including the UK, US, France, Singapore, and China—highlighting how legal cultures differ in balancing contract formalism and functional justice. Despite these differences, a common denominator is emerging: the need for evidentiary clarity and procedural safeguards.

The proposed Three-Principle Model seeks to contribute a practical, jurisprudentially grounded methodology to address this doctrinal void. It aspires to safeguard institutional efficiency while affirming core values such as party autonomy and procedural fairness.

As a rising hub of international arbitration, China should prioritize the comprehensive revision of its Arbitration Law, particularly with respect to non-signatory participation, and support arbitral institutions in refining operational rules. These steps are essential to ensure that China's arbitration regime remains aligned with global norms—especially in the context of the Belt and Road Initiative and beyond.

²⁵ *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs, Pakistan*, [2010] UKSC 46.