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EDITORIAL

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THE AUTONOMY OF INTERNATIONAL ARBITRATION REVISITED

Toni Marzal[*]

Abstract

This Editorial seeks to describe how international arbitral practice, and its various claims to autonomy, have been shaped by competing visions, whose influence varies depending on changing environments, in ways that ultimately determine the field's development and driving preoccupations. The concept of autonomy is omnipresent in arbitration scholarship and touted as central to the field's existence. Common accounts tend however to only emphasise the degree to which international arbitration evolves freely from State control. In so doing, they pass over the specific and evolving visions that support claims to autonomy from national legal systems, as well as how such claims serve to re-embed arbitral practice in alternative non-State normativities. Two such competing visions will be identified: the first, more prevalent in an earlier period, presented autonomy as the reflection of a distinct sociological reality (that specific to commercial actors engaged in cross-border trade); the second, more popular today, largely understands autonomy as a function of self-sustaining legal principles that are not specific to international arbitration, but the expression of globally extensive and universally valid ideas of justice.

I. Introduction

We frequently hear about the 'autonomy' of international arbitration, to either describe the current state of the law with regards to arbitral practice, trace the course of its past evolution, or express a certain aspiration about its future development. It is a term that has long been used in this field, and dominated discussions about its development and basic legitimacy. It does

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not tend to be seen as just another legal doctrine or general principle, among the many available in the toolbox of the arbitration lawyer. Authors have identified it as "*existential*," both for the very possibility of arbitration,[1] and for its international character.[2] Its importance is therefore seemingly constitutional. In other words, it is believed that, if there is such a thing as international arbitration, it cannot but be autonomous.

What, however, does autonomy actually mean? In the sense in which the term is most often used, it mainly applies to the relationship between international arbitration and States. Specifically, to qualify the extent to which international arbitral practice evolves beyond the control of domestic legal systems, and in particular of national courts and national laws. This makes autonomy a matter of degree,[3] in both the descriptive and normative uses of the term. Arbitration can be described as more or less autonomous, depending on whether arbitral awards are subject to a stricter or laxer standard of judicial review, the extent to which arbitrators are empowered to adjudicate the dispute beyond the reach of national regulations, courts at the seat able to interfere with the conduct of the arbitral proceedings, etc. Similarly, the evolution of the law of international arbitration, both generally and in relation to its key components (the arbitration agreement, the arbitral procedure, the arbitral award), can be described as tending towards more or less autonomy. And consequently, to describe arbitral practice as wholly autonomous would mean that it has attained a complete emancipation from State control – a state-of-affairs that all will agree has not materialised, nor is it ever likely to.[4]

Nevertheless, autonomy does not only serve a descriptive purpose, it is also a normatively loaded concept. Indeed, it has been taken up as a defining

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1 George A. Bermann, *The Self-Styled 'Autonomy' of International Arbitration*, 36(2) ARB. INT'L 221 (2020).

2 Philippe Fouchard, *L'autonomie de l'arbitrage commercial international*, 1965 REVUE DE L'ARBITRAGE 99, 100 (1965).

3 Jean-Baptiste Racine, *Réflexions sur l'autonomie de l'arbitrage commercial international*, 2005(2) REVUE DE L'ARBITRAGE 305, 307 (2005).

4 *Id.*

commitment of the international arbitration community, which has thus traditionally pushed for ever greater degrees of arbitral freedom from State control. Total autonomy is, thus, seen as a "*dream*" or a "*utopia*," towards which this field should be constantly advancing.[5] The commitment is so central to international arbitration that its current era of development can be described as "*the age of autonomy*,"[6] or even claimed that the history of this area of law is that of its gradual progress towards greater autonomy.[7] As put by Julian Lew in a famous article: "*The ideal and expectation is for international arbitration to be […] free from the controls of parochial national laws, and without the interference or review of national courts. Arbitration agreements and awards should be recognised and given effect, with little or no complication or review, by national courts*."[8] All of this suggests that autonomy is absolutely central to international arbitration, perhaps this field's *key idea*.

Our aim in this Editorial is to sketch a somewhat more complicated picture. The history of international arbitration is not simply that of its autonomisation. With this, we are not simply wishing to emphasise that the resistance on the part of States sometimes results in a pause or even a retreat in the drive towards ever greater autonomy. Important as these national resistances may be, they are not the focus of this Editorial. We will also not engage with the criticisms of international arbitration's quest for emancipation from State control, which have been already effectively done from analytical[9] and political[10] perspectives. Our concern is instead with autonomy as a framing device, which pushes us to consider the concrete legal configuration of international arbitration solely in terms of a conflict

5 Ralf Michaels, *Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature*, 1(1) LONDON REV. INT'L L. 35 (2013).

6 MIKAËL SCHINAZI, THE THREE AGES OF INTERNATIONAL COMMERCIAL ARBITRATION (2021).

7 *Supra* note 3, at 307.

8 Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22(2) ARB. INT'L 179 (2006).

9 Guilherme Vasconcelos Vilaça, *Why a Theory of International Arbitration and Transnational Legality?*, 29(2) CAN. J. L. & JURISPRUDENCE 495 (2016).

10 ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW ch. 4 (2005).

between State control and arbitral emancipation. It is certainly true that this remains a useful way to understand certain aspects of international arbitral practice, particularly at certain periods in time. Nevertheless, the explanatory and normative potential of the framework of autonomy is less than commonly assumed.

So, what exactly is the problem with autonomy, at least as it is commonly understood? We will focus on two issues. The first is that it is often taken for granted that the case for autonomy, or the 'dream' of autonomous arbitration, is both invariable and self-propelling. To put it otherwise, that autonomy has a fixed meaning over time, and that it is inherently a good thing (even if, when concretely implemented, it needs to be balanced with the kind of interests that States are responsible for preserving, which explains why autonomy can never be complete). In reality, as we will see below, neither thing is completely accurate. There have been important shifts in the way the case for autonomy has been articulated over time. Each of these has imagined the autonomy of arbitration in particular way, and provided a different justification for it. Autonomy does not derive its strength from its intrinsic qualities, but from the broader visions within which it is inserted, concerning arbitration's basic legitimacy and relationship to law.

The second issue relates to the fact that this notion is used, in international arbitration, to refer solely to its relationship with State law. Autonomy does not normally feature in an absolute sense, to describe or push for international arbitration's isolation from any sort of external interference. The law of this area is only described as autonomous from only one particular interference, that of national legal systems. Such a tendency disregards the fact that it also has possible relationships with other legalities or normativities, which can be structured more or less hierarchically, and with regards to which international arbitration can also be characterised as

more or less autonomous.[11] If we take these other relationships into account, the picture already becomes considerably more complicated, as international arbitration comes to potentially enjoy not just one but several 'autonomies.' Or, as we will see below when we examine the different visions that have emerged over time of the basic legitimacy and distinctiveness of international arbitration, the various configurations that they have produced can be only be said to be autonomous in some partial or incomplete sense.

Thus, we do not wish here to go against the idea of State-related autonomy, but both behind it (on what basic visions is it based?) and beyond it (how is arbitration positioned with regards to other non-State normativities?). In what follows, we will seek to identify what these differing visions are, and how they come into conflict with one another, focusing mainly on two of them. The Editorial will focus on each of these successively. We will begin by presenting what we consider to be the traditional case for the autonomy of international arbitration. It emerged during its early period of development during the 50s, 60s and 70s, where the ability and competence of arbitrators to adjudicate disputes free from State control was gradually asserted against territorialist or State-centred views of the law. Even though this period was marked by high-stakes and politically-charged disputes over oil contracts in newly-independent ex-colonies, the case for autonomy was decidedly built on a certain de-politicised model of cross-border commercial relations (to which State contracts were assimilated). This view presented itself as sociological: it placed a great emphasis on an observation of the social distinctiveness of such relations, by characterising them as spatially, functionally and practically distinct from those typically covered by State law. From such social differentiation followed a claim to legal differentiation, i.e. that they be carved out from the normally competent State, and subject to the specialised system of dispute resolution and

[11] *See, however*, ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION 30 (2017), which considers in depth the arbitral order's external interactions.

substantive regulation that emerged from international commercial relations. This move supported important doctrines such as the *lex mercatoria*, the so-called theory of 'delocalisation', and a stronger, more qualitative conception of autonomy – one that sees it as the property of self-standing legal orders.

This early period was never, however, completely dominated by a focus on the sociology of commercial relations. Oppetit has offered a different account, by describing how celebrated arbitrators were able, during international arbitration's "*heroic*" era of early of development, to pacify through law what to others may have seemed like irresolvable political conflicts.[12] Even if equally de-politicising, the emphasis was on the capacity of international arbitration to deliver justice and serve the goals of the rule of law. Thus, arbitral autonomy followed from its ability to perform these functions better than national courts, rather than any claim to sociological differentiation. More contemporary practice has seen this alternative vision of arbitration's legitimacy grow in importance. The context since the late 80s and early 90s has been favourable to such a shift. Since then, the autonomy of international arbitration is largely taken for granted – the State's control has become largely exceptional, as enshrined in international treaties and national regulations. The key concern is no longer that of justifying international arbitration's detachment from domestic legal systems, but for arguing in favour of its ability to adequately perform the significant power it has acquired in the governance of cross-border relations[13] (particularly with the rise of investor-State dispute settlement, which, even if less statistically important than its commercial counterpart, has come to dominate discussions). In this new scenario, we observe a fundamental shift in the way international arbitration is understood and justified. As argued earlier by Oppetit, the focus is no longer on the necessary correspondence between law and social practices, but rather on the integration of abstract standards and principles of global law, whose

12 BRUNO OPPETIT, THEORIE DE L'ARBITRAGE 10-11 (1998).

13 *Supra* note 1, at 230-231.

validity and authority largely transcend this particular domain (such as due process, transparency, or the protection of legitimate expectations). These norms are not simply incorporated in order to compensate for some of the perceived deficiencies or excesses of the field, when left too unchecked by State control. Their incorporation signals a more profound transformation in international arbitration's self-identity – from the natural forum for adjudicating the specialised norms of cross-border merchants, to an expression of the rule of law and aspiring form of superior justice.

II. The autonomy of international arbitration as social differentiation

As already stated, the traditional case for the autonomy of international arbitration, both in its positive (self-governance) and negative dimensions (freedom from external control by States), was a sociological one. It was anchored in a certain understanding of cross-border commercial relations, as constitutive of a separate social field. Such relations were assumed to be internally cohesive (they shared similar practices, needs and values), but also externally distinctive (i.e. they constrasted with other social domains). Whether this sociological claim is convincing or not is not our focus here.[14] The point is that, on this basis, autonomy was understood and promoted as the legal reflection of social differentiation. Because those particular relations are distinct, so goes the argument, the norms to which they are subject should also be distinct, and therefore free from the grip of domestic legal systems. In brief, law should be coupled to actual social arrangements. Through his theory of the *lex mercatoria*, Berthold Goldman can be credited for most famously articulating the case for the autonomy of international arbitration in this way.[15]

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[14] The most powerful critique is Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society, in* GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997).

[15] *See* the landmark piece, Berthold Goldman, *Frontières du droit et "lex mercatoria*," 9 ARCHIVES DE PHILOSOPHIE DU DROIT 177 (1964) [*hereinafter* "Goldman Lex Mercatoria"]. The title given to Goldman's Festchrift, The Law of International Economic Relations, captures

The argument for social differentiation has been emphasised in three main ways, each of which has served to support autonomy in a particular manner. The first is practical: it is said that the practices that commercial actors, when engaging in cross-border transactions, spontaneously engage in are distinctive, and in any case contrast with those found in a purely national context. In some cases, such patterned behaviour is said to constitute a form of custom, usually referred to as international trade usages,[16] which structure the relations of actors engaged in particular sectors. Further evidence is the elaboration and international dissemination of model contracts, usually produced by professional associations, which again serve to shape and interpret the rights and obligations of cross-border exchanges. And of course, arbitration itself, including the creation of arbitration institutions, is presented as a practice that distinguishes cross-border economic relations – as international arbitral tribunals are said to be uniquely placed to discover and implement the customary practices of cross-border commerce.[17] Thus, the traditional case for autonomy was built, first of all, on the claim that cross-border commercial relations have developed distinctive normative patterns. From this follows the proposition that that State law ought to respect the consistency and distinctiveness of these practices, notably by allowing arbitrators to resort to non-national standards to adjudicate disputes, granting greater self-governance through arbitral institutions, and preserving awards from being excessively scrutinised for their compliance with national norms.

The second dimension to social differentiation is functional, since it relates to the functions that law is said to have to perform. It was said that international commercial relations have particular needs, such as predictability, flexibility, or confidentiality, which orient and distinguish the practices that emerge within this field. Importantly, it was suggested that

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well this aspect of his work: BERTHOLD GOLDMAN, LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES. ETUDES OFFERTES À BERTHOLD GOLDMAN (1982).

16 *Supra* note 11, at 140; JOSHUA KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION ch. 4 (2013).

17 Goldman Lex Mercatoria, *supra* note 16, at 183.

domestic legal systems do not take those needs into account, or are somehow unable to do so. This would perhaps derive from the different social constituency that informs and is targeted by national legal orders. The invocation of the needs of international commerce[18] thus commonly has served to justify that the regulation of such relations, and jurisdiction over them, be carved out of national legal systems – in order to, for instance, argue for the desirability of allowing arbitrators freedom in selecting or constructing the applicable law, support the emergence of a specialised body of law (the *lex mercatoria*), interpret contracts according to notions of commercial reasonableness rather than national principles,[19] or minimise the review of an award by national courts. It has also been used as the basis for the emergence of an arbitral case law as a distinct source of law, as famously in the ICC Dow Chemical award of 1982, per which: "*The decisions of […] tribunals progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successfully elaborated should respond*".[20]

The third and final dimension of social differentiation is spatial. International commercial relations have been said to occupy a distinct space, in a way that again sets them apart from the relations that are at the basis of national regulations. Thus, international arbitration "*exists in its own space*".[21] Such a space is one that lies beyond national territories, and sits across State borders. Even if there has been a lot of talk of autonomous arbitration being "*delocalised*",[22] the more precise term would be *re-localised*, as international arbitration is imagined as taking place in a transnational

18 Philippe Leboulanger, *La notion d'"intérêts" du commerce international*, 2005(2) REVUE DE L'ARBITRAGE 487 (2005).

19 Joshua Karton, *The Arbitral Role in Contractual Interpretation*, 6(1) J. INT'L DISP. SETT. 4 (2015).

20 *ICC Case No. 4131 (1982), in* COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 146 (Sigvard Jarvin & Yves Derains eds., 1994).

21 *Supra* note 8, at 181.

22 Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32(1) INT'L & COMP. L. QUART. 53 (1983).

space rather than a national one. From the strictly State-centred perspective that historically has informed conflict of laws methodology, such a distinct space simply cannot exist: cross-border relations can only be located in a national territory, even if they may present connections to multiple jurisdictions.[23] The very possibility of international arbitration as an autonomous legal field is predicated on the opposite view – that cross-border relations do occupy a separate social space from that of purely national ones, one that is characterised by specific needs (most importantly, to mediate across of national differences) and the emergence of cross-cultural practices. Accordingly, the significance of the choice of a certain country as the seat of the arbitration will be downplayed, in relation to the applicability of that country's law[24] – arbitration is ultimately grounded in a space that is not that of any particular national jurisdiction. It will also be pointed out that national legal systems are radically misaligned with cross-border realities: such realities are characterised by the difficulty, non-existent in a purely domestic setting, of finding a neutral and mutually-agreeable legal basis on which to ground the relation and adjudicate possible disputes. Similarly, the authority of national legal systems will also commonly be undermined by being described as "*parochial*" in outlook, i.e. approaching commercial dealings only from their own, purely domestic perspective, without consideration of the unique needs and perspectives of parties to international transactions.[25] These observations have again fuelled calls for a more autonomous arbitral practice, for instance by by arguing that arbitrators should be encouraged to elaborate procedural standards that transcend local particularities, and that awards should be liberated from any excessive dependence on the law of the country of the seat.

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23 Horatia Muir Watt, *Private International Law's Shadow Contribution to the Question of Informal Transnational Authority*, 25(1) INDIANA J. GLOBAL LEGAL ST. 37 (2018).

24 *See, e.g.,* the famous award Sapphire v. NIOC, reproduced and commented in Jean-Flavien Lalive, *Contracts between a State or a State Agency and a Foreign Company. Theory and Practice: Choice of Law in a New Arbitration Case*, 18 INT'L & COMP. L. QUART. 987 (1964).

25 The concept of parochiality appears in the more famous pro-arbitration decisions of the US Supreme Court, *see, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974).

In sum, the case for the autonomy of international arbitration is traditionally based on claims about the social reality and distinctiveness of international commerce.[26] To legally maintain and enhance autonomy follows from the need to recognise such realities, whereas to undermine would amount to imposing upon this field the product of different social configurations. Underlying the principle of autonomy, therefore, one finds, not only a certain (and very debatable) understanding of international commerce as socially cohesive, but also an ideal of alignment between law and society. In this sense, and from the perspective of legal theory, the case for autonomy is inevitably pluralistic in outlook – it views law as generated by concretely situated social institutions.[27] The normative question of whether the content of this law is good or bad is explicitly sidelined in favour of its correspondence to actual social arrangements.[28]

This prompts a concluding thought about the nature of autonomy. We explained earlier that it is common to see autonomy in quantitative terms – international arbitration can be more or less autonomous, depending on whether it is subject to a tighter or laxer control by national legal systems. The traditional case for autonomy that we have described, however, rests on a qualitative understanding of this concept. From this perspective, the term serves to describe the very existence and basis for international arbitration as a legal field, rather than the degree of manoeuvre it is afforded. There are two sides to such a qualitative understanding. On the one hand, to describe international arbitration as autonomous implies that arbitral practice cannot be reduced to the ad hoc resolution of contractual disputes – a 'contractual' or 'transactional' view that was more common view in its initial period of development.[29] Rather than the ephemeral creation of two parties agreeing to subject their disputes to this form of

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26 There are, of course, exceptions. Authors sometimes refer to a more utilitarian calculus. *See, e.g.,* Thomas Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16(2) AM. REV. INT'L ARB. 213, 258 (2007) (discussing the promotion of arbitration as a trade-off between effective dispute resolution and the integrity of substantive legal guarantees).

27 JAN PAULSSON, THE IDEA OF ARBITRATION 45 (2014).

28 *Supra* note 16.

29 *Supra* note 11, at 26.

alternative dispute resolution, international arbitration should be seen, if understood as autonomous, as a principled or rules-based practice, and therefore one that is bound by and inserted within a broader and coherent system of law. On the other hand, however, autonomy implies a second and more decisive quality. It is the idea that such a system of law is one that is specific to international commercial relations, as adjudicated through arbitration, and possesses a self-standing character. In other words, its existence and validity is its own rather than derivative; it does not depend on the position of other legal orders, such as those of individual States or even of public international law.[30] Such a view of autonomy is, again, not simply of theoretical interest – it may justify a quantitatively more autonomous approach to resolving practical issues. For instance, an arbitral tribunal may choose to not apply the laws of any particular State, or disregard an anti-arbitration injunction issued by the courts of the seat of arbitration, by arguing that an international arbitral tribunal's competence does not derive from State law, but rather from the arbitration agreement and principles specific to arbitral practice.[31] Conversely, of course, to refuse arbitration any self-standing character may lead to a more stringent form of review, as where a court considers only the extent to which arbitral autonomy may compromise the effectiveness and validity of the territorially or otherwise competent legal system.[32]

III. The integration of international arbitration within global law

As various authors such as Ralf Michaels have pointed out, the drive towards autonomy has tended to develop more strongly in its negative dimension. [33] By this is meant that it has been effective with regards to liberating international arbitration from the hold of national legal systems,

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30 EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 39 (2010).

31 Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Arbitration No. 10623/AER/ACS, *Award*, 7 December 2001, pt. II.

32 This type of argument is prevalent in EU law, *see, e.g.,* Case C-284/16, Slowakische Republik v. Achmea BV, ECLI:EU:C:2017:699.

33 *Supra* note 5, at 59-61.

both in terms of governing laws and competent courts, but much less so in facilitating the positive emergence of a clear substitute regime, made up of transnational rules and principles. While the general concept of the *lex mercatoria* remains intuitively powerful to describe the reality of international arbitral practice operating, both procedurally and substantively, under original norms that cannot be traced to any particular national legal order, it is much less clear where those norms can be found, how they may be legitimately elaborated, or what is their actual foundation. One of the most often heard critiques of the *lex mercatoria* or similar concepts is precisely their inability to produce anything other than vague propositions such as *pacta sunt servanda*, which are of little help in actually solving concrete disputes.[34]

It is not the author's intention here to rehash this traditional debate. What we wish to focus on here is the argumentative strategies that have been used to fill in the void left by State law, due to the liberating effect of arbitral autonomy. Our argument is that these strategies have gradually evolved in a very different direction from the ones that, as described in the previous section, had driven the original case for autonomy. In fact, they are actually diametrically opposed in two important respects. First, contemporary arbitral practice is characterised, not by its emphasis on carving out a separate domain for itself, but by its eagerness to re-embed itself, not back into State law, but within a broader, global legal structure, one that largely transcends the particular social enclave of transnational commercial relations.[35] The drive is therefore towards the integration of international arbitration, rather than its differentiation. And second, modern-day international arbitration tends to no longer be interested in grounding legal standards in concrete social practices, but searches instead for legitimacy and practical orientation in the abstract domain of universal values and

[34] Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-Five Years, in* LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 149 (Maarten Bos & Ian Brownlie eds., 1987); Paul Lagarde, *Approche critique de la lex mercatoria, in* LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES. ETUDES OFFERTES À BERTHOLD GOLDMAN 125 (1982).

[35] *Supra* note 11, at 31.

reason. In other words, its outlook has become idealistic, rather than sociological. Whilst it is true that scholars sometimes still speak in the theoretical language of legal pluralism, and describe the law of international arbitration as emanating from a certain "*community*" that is separate from States,[36] that community is no longer that of economic operators, but that of the lawyers themselves (the so-called "*arbitration community*"),[37] who engage in effective international arbitral practice, as arbitrators and arbitration lawyers and scholars, through their use of deliberative reason.[38] Autonomy is thus liberated from society as much as from States, and based instead on self-sustaining legal principles.[39]

Such a tendency can be seen, first of all, in the use of comparative law.[40] This has been promoted in international arbitral practice, notably by the late Emmanuel Gaillard, as part of a renewal of the *lex mercatoria*.[41] Per this updated version of the theory, arbitrators should reach out, when confronted with substantive or procedural issues, not for a list of nebulous standards emanating from concrete commercial practice, but for 'general principles' that enjoy broad support across nations. Identifying these principles is largely the work of comparative law – by comparing relevant legal systems or instruments, it is argued, it is possible to identify a strong consensus around a certain principle, or at least a general convergence or a certain trend in that direction. Thus, it has been said that comparative analysis can serve to identify basic jurisdictional principles of international arbitration (such as competence-competence),[42] approaches to evidentiary issues that bridge the civil law/common law divide (as for instance with

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36 Stavros Brekoulakis, *International Arbitration Scholarship and the Concept of Arbitration Law*, 36(4) FORDHAM INT'L L. J. 745 (2013).

37 *Id.*

38 *Supra* note 27, at 45.

39 KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA (1999).

40 Joanna Jemielniak, *Comparative Analysis as an Autonomization Strategy in International Commercial Arbitration*, 31(4) INT'L J. SEMIOT. L. 155 (2018).

41 Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?* 17(1) ARB. INT'L 51 (2001). More recently, 1 Emmanuel Gaillard, *Comparative Law in International Arbitration, in* IUS COMPARATUM 1 (2020).

42 *See, e.g., supra* note 31, at ¶¶ 129-134.

discovery procedure),[43] or even substantive standards of contract law (such as good faith).[44]

It is certainly possible to doubt the actual viability of this method to actually identify any such consensus and therefore circumvent national law. What matters here, however, is that this renewed approach implies that the ultimate validity of the norms that can be elaborated in this way no longer rests on their correspondence with the concrete practices and needs of merchants engaged in cross-border economic activities. The existence of a transnational consensus or convergence is ultimately evidence of the universal (and therefore acontextual) acceptability of the norm in question, as a form of 'better law' or 'best practices'.[45] The fact that such norms tend to be described as "*principles*" is revealing, for the word is here used, not to describe broadly applicable standards or normative propositions that can be extracted from a variety of legal settings, but to signal that their validity is ultimately grounded in reason – a "*modern law of nature*".[46] Even if trade usages and general principles are often lumped together under a single reference, the two concepts actually point in very different directions.[47]

This logic is even more explicit in the tendency to resort to such universal norms directly, without the mediation of comparative analysis. This tendency was already decisive in the early development of international investment law in the middle of the century,[48] but more contemporary practice has seen it accelerate and spread across the entire field of international arbitration. The applicability of a certain standard will be presented as self-evident and inescapable, as a matter of general rationality or uncontroversial basic values. Arbitrators will thus resort to broad

43 *See, e.g.,* Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure,* 36(4) VANDERBILT L. REV. 1313 (2003).

44 *See, e.g.*, *ICC Case No. 3896 (1982), in* JOURNAL DU DROIT INTERNATIONAL 58, 79 (1984).

45 *Supra* note 11, at 126.

46 Andrea Leiter, *Protecting Concessionary Rights: General Principles and the Making of International Investment Law*, 35 LEIDEN J. INT'L L. 55 (2022).

47 *Supra* note 11, at 140.

48 *Supra* note 46.

principles such as party autonomy, proportionality or full reparation, without needing to ground them in any system of positive law or transnational convergence. This is particularly evident in the emergent notion of a "*transnational*" or "*truly international*" public policy, which empowers arbitrators to enforce certain core norms against the agreement of the parties, while preventing courts from applying purely national conceptions of public policy in their review of arbitral awards. Here are included principles such as the prevention of terrorism or corruption – as already proclaimed in Lagergren's famous 1963 ICC award, where he refused jurisdiction in a bribery affair, for reasons not grounded in any particular national law: "*corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations*."[49] In this way, international arbitration "*integrates fundamental values and superior interests*" that are said to generate a strong consensus among nations.[50] We find here no reference at all to the particular needs of commerce – on the contrary, it is implied that these may well be overridden on behalf of a form of "*higher justice*."[51] Nor is there a sense of spatial limitation – transnational public policy is always relevant, without the need for any form of territorial connection to a particular polity,[52] since it is restricted to "*matters triggering global ignominy*."[53] It is only in this current context that we can speak, with precision, of the 'delocalisation' of international arbitration.

In any case, the clearest example of this idealistic tendency is found, not in the substantive norms applied by arbitrators and possibly monitored by national courts, but in the development of arbitral procedure and institutional organisation. Some authors have for some time identified a tendency towards the '*judicialisation*' of international arbitration, by which it is meant that it has gradually integrated principles and values considered to

49 *ICC Award No. 1110 (1963)*, 10 ARB. INT'L 282 (1994).

50 Pierre Lalive, *Ordre public transnational (ou réellement international) et arbitrage international*, 1986(3) REVUE DE L'ARBITRAGE 329 (1986).

51 *Id.* at 365.

52 *Id.* at 365-366.

53 Andrea Bjorklund, *Enforcement, in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 204 (Thomas Schultz & Federico Ortino eds., 2020).

be essential to courts or court-like bodies.[54] This means that, rather than evolving as an alternative mode of dispute resolution, international arbitration is seen more and more as a form of parallel justice, subject to the same basic expectations as national judges, or indeed any system that can aspire to qualify as properly legal.[55] Thus, it is increasingly viewed as unacceptable for arbitrators to be subject to laxer rule of law standards, such as due process, transparency, adequate reasoning or independence and impartiality, than those applicable in a court setting.[56] The recent work of Jan Paulsson is representative of this trend, as he places great emphasis on the "*common values*" shared by courts and arbitral tribunals alike[57] (but this precise view was already present in the work of earlier authors such as Oppetit, who saw the two as operating under common principles of "*natural justice*").[58] Also representative is the growing interest in arbitration from scholars of constitutional law,[59] who have tended to approach it through constitutional theories of adjudication.[60] Thus, the rule of law tends to be touted as the most defining feature of international arbitration, which is now often promoted as an expression[61] of that principle.[62] This is particularly evident in the context of international investment disputes,

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54 *Supra* note 11, at 11.

55 Thomas Schultz, The Concept of Law in Transnational Arbitral Legal Orders and its Consequences, 2(1) J. INT'L DISP. SETT. 59 (2011). The author develops further this argument in his book, THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION (2014).

56 Sundaresh Menon, *Arbitration's Blade: International Arbitration and the Rule of Law*, 38(1) J. INT'L ARB. 1 (2021).

57 *Supra* note 27, at 265.

58 *Supra* note 12, at 29.

59 VÍCTOR FERRERES COMELLA, THE CONSTITUTION OF ARBITRATION (2021).

60 *See, e.g.,* Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4(1) L. & ETHICS HUM. RIGHTS 47, 48 (2010); Víctor Ferreres Comella, *Arbitration, Democracy and the Rule of Law: Some Reflections on Owen Fiss' Theory*, YALE SELA PAPERS (2014); Paolo Esposito & Jacopo Martire, *Arbitrating in a World of Communicative Reason*, 28(2) ARB. INT'L 325 (2012).

61 INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY, ICCA CONGRESS SERIES NO. 19 (Andrea Menacker eds., 2017); David W. Rivkin, *The Impact of International Arbitration on the Rule of Law*, 29(3) ARB. INT'L 327 (2013).

62 But also its guarantor, in the context of international investment law. *See, e.g.*, VELIMIR ZIVKOVIC, FAIR AND EQUITABLE TREATMENT AND THE RULE OF LAW (2023).

where arbitration is regularly promoted in these terms.[63] But it is also apparent in the purely commercial domain, where scholarship regularly compares one form of justice to another in terms of how well they meet the requirements of the rule of law.[64]

All of this betrays a significant remoteness from any concrete social practices that could be said to be characteristic of international commerce, and a shift in the opposite direction, towards abstract ideals and values, in particular a universal principle of "*fair process*,"[65] from which operational norms are claimed to be deduced.[66] Where previous practice asserted the autonomy of international arbitration by emphasising the non-delegated and self-standing nature of its authority, more contemporary scholarship tends instead to position arbitration as an agent of a broader legal structure. That structure is not, however, that of national legal orders, as in the past. What we are witnessing is, instead, a turn to what a variety of scholars refer to as "*global law*." As Neil Walker explains in his book,[67] this notion seeks to capture, not so much the proliferation of legal sources or law-giving institutions at a global or international level (even if this is certainly also of some relevance), but rather the transformation undergone by discursive legal practices, in their increasing tendency, even at a very local level, to express and implement a commitment to legal norms of a globally extensive reach, however precarious or indeterminate these may appear to be. Such spatially un-constrained commitments are exactly what we observe in

63 RIVKIN, supra note 61.

64 PAULSSON, supra note 27, at ch. 9.

65 OPPETIT, *supra* note 12, at 25.

66 BREKOULAKIS, *supra* note 36, at 782 (procedural "norms in arbitration practice have not developed accidentally. They have developed by reference to the fundamental legal principle of fair process. The principle of fair process requires that each arbitration party must be treated equally and must be given the opportunity to present each case, as well as that the arbitration will be conducted in a manner that avoids unnecessary delays. The principle of fair process and the ensuing sub-principles apply in arbitration not because they are stipulated in all arbitration laws and arbitration rules. Rather, the fact that these principles universally feature in arbitration laws and rules is evidence of their wide institutional support").

67 NEIL WALKER, INTIMATIONS OF GLOBAL LAW (2015).

arbitral practice, with its novel focus on self-sustaining rule of law-type values, rather than the particular patterns of behaviour that one may hope to observe in commercial trade across borders.

IV. Conclusion

This Editorial has sought to describe how international arbitral practice, and its various claims to autonomy, have been shaped by competing visions, whose influence varies depending on changing environments, in ways that ultimately determine the field's development and driving preoccupations. Our overview has shown the explanatory and normative limits of the traditional accounts of autonomy, which tend to only emphasise the degree to which international arbitration evolves freely from State control. As we have argued, these accounts tend to pass over the specific and evolving visions that support claims to autonomy from national legal systems, whilst failing to consider how such claims serve to re-embed arbitral practice in alternative normativities that are are not arbitration-specific. We have thus sought to identify how, in contrast to its early development, where it was presented as the reflection of a distinct social reality (that of the social differentiation and internal cohesion of international commercial actors), autonomy today is largely represented as a function of self-sustaining legal principles, which structure and define the field of international arbitration. For the most part, however, those principles are not specific to international arbitration, but the expression of globally extensive and universally valid ideas of justice.

What does this turn to global law mean, for the very notion of autonomy? What are the implications of the claim to arbitral autonomy been transformed into an argument about this technology of dispute resolution being a form of superior or more perfect justice than that dispensed by national courts? We will sketch out two concluding thoughts. The first is that the autonomy of international arbitration vis-à-vis States becomes somewhat more precarious. If it is based on its claim to deliver justice more competently than national courts, as a more perfect expression of the rule

of law, then autonomy will always be conditional on this being the case, and therefore open to erosion whenever arbitral tribunals do not live up to these high expectations. The second thought relates to international arbitration's changing positioning vis-à-vis other non-State legal orders. The traditional case for autonomy was inherently defensive – it sought to resist any intrusiveness on the part of State law, by clearly delineating the perimeter of what properly belonged within the arbitral domain. By contrast, the global turn means that this dividing line is now much more porous. This may nevertheless allow for a different, more offensive case for autonomy. Indeed, even though the norms deployed by arbitrators are no longer claimed as specific to international arbitration, this does not mean that arbitral practice is reduced to a passive receptacle for the interpretations developed elsewhere. Arbitrators can now engage in a more open and two-way dialogue with other areas of legal practice, including those found in national settings, as long as they share in the same basic commitments.[68] They can therefore now hope to influence global legal practice through their own interpretations of shared standards.[69] Integration of global norms thus goes both ways – it certainly serves to embed international arbitration within broader legal structures, but it is also the gateway for international arbitration's own global projection and ambition.

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68 "Global law also refers to the emergence or to the prospect of the emergence of a trans-systemic and often explicitly inter-systemically engaged common sense and practice of recognition and development of jurisdictionally unrestricted common ground on particular rules, case precedents, doctrines or principles, or even with regard to background legal orientations." *Id.* at 19-20.

69 *See, e.g.,* the jurisprudence of international arbitral tribunals in relation to the calculation of compensation, which has largely evolved by reference to standards that are presented as universal: Toni Marzal, *Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS*, 22 J. WORLD INV. & TRADE 249 (2021); in a way that has had considerable influence across international legal practice: Christian J. Tams & Eleni Methymaki, *The world court's influence on contemporary investment law, in* INTERNATIONAL INVESTMENT LAW: AN ANALYSIS OF THE MAJOR DECISIONS 37 (Hélène Ruiz Fabri & Edoardo Stoppioni eds., 2022).

BALANCING JUSTICE AND EFFICIENCY: ANALYSING THE WAIVER OF NULLITY REMEDY IN THE POST-AWARD STAGE AND ITS COMPATIBILITY WITH DUE PROCESS

Bruno Balbiani[*] *& Federico Fernández de León*[†]

Abstract

*There are a considerable number of legislations that expressly admit the possibility for parties to exclude, by mutual agreement, the right to submit an application for setting aside a future award. Instead, other jurisdictions have chosen to expressly deny this possibility. However, the reality indicates that most legal systems in comparative law, including the United Nations Commission on International Trade Law Model Law ["**Model Law**"], still do not contain an explicit normative solution regarding the validity of these agreements. Therefore, in cases where we do not find an express solution to this matter, should we admit the validity of these agreements?*

The question of the validity of agreements waiving the right to challenge arbitral awards is a complex issue that touches upon fundamental principles of party autonomy, public policy, and international human rights. Through a careful analysis of jurisprudential and doctrinal arguments, both for and against such agreements, this note seeks to shed light on the delicate balance between justice and efficiency in international arbitration.

I. Introduction

It is common to refer to arbitration by alluding to its essentially contractual nature, a characteristic that has led certain national courts to the extreme position of maintaining that it "*is a creature that owes its existence to the will of the*

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parties alone."[1] These ideas reflect the importance of party autonomy as the cornerstone of arbitration,[2] allowing parties to shape the arbitral procedure to fit their needs as a tailor-made mechanism to resolve disputes.

There are extensive doctrines regarding the influence of party autonomy throughout the arbitration process. However, there is not as much doctrine on the value of party autonomy in the post-award stage. It is perfectly possible, and indeed occurs in arbitral practice, for parties to agree to waive the recourse of nullity before the courts of the arbitral seat. This would logically imply the exclusion of judicial control over the award, at least in the nullity stage.

The existence of such agreements has led the arbitral community into a legal and theoretical debate about their validity and effectiveness, reflecting an ontological tension between party autonomy and judicial control over awards, and between party autonomy and an effective pursuit of justice.

This note aims to delve into this debate with the objective of providing a critical analysis of the validity and effectiveness of such agreements.

II. A brief summary of the international experience

In comparative law, there are a considerable number of legislations which expressly grant parties the power to exclude, in advance and by mutual agreement, the right to seek the annulment of a future award.

Undoubtedly, France stands out as a prime illustration where the emphasis on the legal significance of party autonomy permits a renunciation of the right to contest the nullity of the award. The reform of the French arbitration law in 2011 granted parties this right through Article 1522 of the

1 Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, ¶¶ 13-16 (Can.).

2 NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & J. MARTIN H. HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 12 (7d ed. 2022).

French *Code de procédure civile*, which states: *"By special agreement, the parties may expressly waive the right to challenge the award at any time*."[3]

As mentioned above, France is not alone in this regard. Other States have adopted similar solutions, although they condition the validity of such agreements to certain requirements, that are absent in the French law. This is the case with Belgium,[4] Switzerland,[5] and Peru,[6] where these regulations require that the parties have no connection to the country of the arbitral seat for the waiver to be enforceable. In other words, they will be valid if the parties are not nationals or residents of those countries, or if they do not have a branch in the said country.

Other jurisdictions take an intermediate stance, as is the case with England. While advanced agreements excluding the right to annul arbitral awards are allowed when expressly agreed upon by the parties, it is limited to specific grounds. In fact, only the ground provided in Section 69 of the English

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3 CODE DE PROCEDURE CIVILE [C.P.C.] [Civil Procedure Code] art. 1522 (Fr.). It states, "*Par convention spéciale, les parties peuvent à tout moment renoncer expressément au recours en annulation*."

4 Code Judiciaire [C.Jud.] art. 1718 (Belg.). It states, "*By an explicit declaration in the arbitration agreement or by a later agreement, the parties may exclude any application for the setting aside of an arbitral award, where none of them is a natural person of Belgian nationality or a natural person having his domicile or normal residence in Belgium or a legal person having its registered office, its main place of business or a branch office in Belgium*."

5 Bundesgesetz über das Internationale Privatrecht [IPRG], Loi fédérale sur le droit international privé [LDIP], Legge federale sul diritto internazionale privato [LDIP] [Federal Act on Private International Law] Dec. 18, 1987, SR 291, art. 192(1) (Switz.). It states, "*If none of the parties has their domicile, habitual residence or seat in Switzerland, they may, by a declaration in the arbitration agreement or by subsequent agreement, wholly or partly exclude all appeals against arbitral awards; the right to a review under Article 190a paragraph 1 letter b may not be waived.".* Article 190a paragraph 1 letter b states: "*A party may request a review of an award if: b. criminal proceedings have established that the arbitral award was influenced to the detriment of the party concerned by a felony or misdemeanour, even if no one is convicted by a criminal court; if criminal proceedings are not possible, proof may be provided in some other manner*." The ground prescribed in article 190a paragraph 1 letter b cannot be waived.

6 Legislative Decree No. 1071, art. 63(8) (Peru). It states, "*When neither of the parties involved in the arbitration is of Peruvian nationality or has their domicile, habitual residence, or main business activities within Peruvian territory, an express agreement can be reached to waive the annulment recourse or to restrict such recourse to one or more grounds established in this article*." (free translation).

Arbitration Act,[7] which refers to substantive issues of the matter, can be excluded.

In contrast with the above-mentioned jurisdictions, there are other jurisdictions that expressly stipulate that agreements excluding the right to annul arbitral awards are not valid and, therefore, are unenforceable. Examples of these include Argentina,[8] Portugal[9], Italy,[10] and India.[11]

The rationale behind these provisions, that allow the waiver of the recourse of nullity before the courts of the arbitral seat, lies in party autonomy. It has been argued that, just as parties can waive their right to access national courts through an arbitration agreement or decide that the arbitral dispute be resolved *ex aequo et bono*,[12] they should also be allowed to waive judicial review of the award in a nullity proceeding, if they express it unequivocally in the arbitration agreement.

In this regard, Gary Born states:

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7 Arbitration Act 1996, c. 23, § 69 (Eng.).

8 CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL PROCEDURE CODE] art. 760 (Arg.). It states, "*If the appeals have been waived, they shall be denied without any substantiation. However, the waiver of the appeals shall not prevent the admissibility of the request for clarification and annulment, based on a fundamental procedural defect, the arbitrators having ruled beyond the deadline, or on issues not submitted for arbitration*." (free translation).

9 Law on Voluntary Arbitration No. 63/2011, art. 46(5) (Portugal). It states, "*Without prejudice to the provisions of the preceding paragraph, the right to request the annulment of the arbitral award is non-waivable*." (free translation).

10 Codice di procedura civile [C.p.c.] [Code of Civil Procedure] art. 828 (It.). It states, "*The appeal for nullity is admissible, notwithstanding any prior waiver, in the following cases*." (free translation).

11 *See* Indian Contract Act, 1872, No. 09, Acts of Parliament, 1872, § 28.

12 The possibility for the Tribunal to decide *ex aequo et bono* when there is an agreement between the parties is recognised by Article 28(3) of the UNCITRAL Model Law: "*The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so*." *See* United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006), art. 28(3) [*hereinafter* "UNCITRAL Model Law"].

> "*[I]n particular, there seems to be little question that commercial parties are – and long have been – free to agree to arbitration ex aequo et bono, and to arbitration without a reasoned award, both of which effectively exclude any meaningful right of judicial review. If this is permitted, then there is little justification for holding that parties cannot waive judicial review of a tribunal's substantive decision, reasoning, procedures and other actions*." [13]

In conclusion, given that arbitration, as mentioned before, is a "*contractual creature*,"[14] parties have the right to waive their right to annul the award in the local courts of the seat of the arbitration, as long as the waiver is free, lawful, unambiguous, and agreed unequivocally by both parties.

III. Wait a minute: Are these clauses compatible with due process? The problems posed by the enforceability of these agreements.

Most legal systems in comparative law do not contain an explicit normative solution regarding the validity of these agreements. The UNCITRAL Model Law has made no mention of them.[15] It becomes imperative, therefore, to analyse their validity in the absence of an explicit legal authorisation. And precisely, that is the case in most jurisdictions.

It has been claimed that judicial control through annulment is an essential element for the legal protection of the parties, the national legal system, and of the respect and enforceability of the fundamental right to due process.

In this regard, Kerr states:

> "*[judicial review of awards is a necessary] bulwark against corruption, arbitrariness, bias, ... and ... sheer incompetence, in relation to acts and decisions*

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13 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3664 (3d ed. 2020).

14 Hall Street Associates, L.L.C. v. Mattel, Inc., 128 U.S. 1396, 1399 (2008).

15 *See* GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 86 (2004) ("*The preparatory materials of the Model Law would surely discuss the possibility of exclusion agreements had the drafters contemplated it. And the drafters did not contemplate that possibility, because in the system of the Model Law the imperative procedural provisions reflect procedural public policy*").

> *with binding legal effect for others. No one having the power to make legally binding decisions in this country should be altogether outside and immune from this system.*" [16]

Indeed, the absence of judicial control in the annulment stage can lead, for example, to the parties themselves determining the concept of arbitrability. It is entirely possible for parties to submit a matter to arbitration that is not arbitrable under the laws of the seat, but due to the effect of such a clause, no judge would be able to review that award. Thus, in such cases the concept of arbitrability is not defined by the law of the seat, rather it is defined by the parties themselves. In these cases, a clause of this nature could permit parties to modify public laws to their convenience, excluding judicial control in the post award stage, at least excluding the nullity stage.

Regarding this point, it could be argued that this argument is invalid, as it would be the arbitral tribunal itself, and not the courts of the seat of the arbitration, responsible for recognising such a situation by ruling on a plea of lack of jurisdiction and declaring itself incompetent due to the dispute not being capable of resolution through arbitration. Although the authors concur that these should invariably be the prescribed steps, it remains conceivable that the arbitral tribunal may overlook this circumstance and still rule that it has jurisdiction. This position finds support in Article 34(2)(b)(i) of the UNCITRAL Model Law,[17] which stipulates that an arbitral award may be set aside if it is determined that "*the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State*." Thus, the inclusion of such a ground for annulment in the Model Law acknowledges the possibility that the arbitral tribunal may have failed to recognise that the object of the dispute was not arbitrable.

The same could be said in the case of a manifest violation of due process or an award contrary to public policy, in the sense that it is theoretically

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16 Michael Kerr, *Arbitration and the Courts: The Uncitral Model Law*, 34(1) INT'L & COMP. L. Q. 1, 15 (1985).

17 UNCITRAL Model Law, art. 34(2)(b)(i).

possible that an award rendered by an arbitral tribunal that violates due process could never be attacked, and 'lives' *ad eternum* as a valid decision, binding the parties.

In other words, emphasising that an award is characterised as final and binding, we could be facing an arbitral award that has been rendered in violation of a fundamental right, such as due process, but which would still be valid due to the absence of any judicial control that remedies such a violation.

This argument has been countered by pointing out that waiving judicial control in the annulment stage does not intrinsically imply the absence of judicial control over the proceedings, and that could be true. The protection of public policy and the rights of the parties will also be protected in the enforcement stage of the award,[18] considering the symmetry between Article V of the New York Convention which sets forth the grounds for refusal of recognition and enforcement of foreign arbitral awards, and Article 34 of the UNCITRAL Model Law which sets forth the grounds for annulment of the award.

To wit, the contention is that the existence of these agreements does not entail the absence of judicial oversight, but rather, it facilitates the consolidation of the two judicial controls, i.e., those of annulment and enforcement into a single entity. Given the near-perfect symmetry between the grounds for annulment and those for refusal of recognition and enforcement, the notion that one of these two controls would be entirely redundant gains even greater strength, as there already exists the prior possibility to resort to an alternative review mechanism that has precisely examined these identical elements. The role of the second control would be to simply reexamine what was already analysed in the first control, thus rendering the existence of a dual control dispensable and unnecessary.

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18 Maxi Scherer, *The fate of parties' agreements on judicial review of awards: a comparative and normative analysis of party-autonomy at the post-award stage*, 32(3) ARB. INT. 437, 452 (2016) [*hereinafter*, "Scherer"].

Consequently, eliminating one of the two controls results in the arbitration process being characterised by greater efficiency and expediency, while still maintaining a judicial oversight mechanism.

However, this argument does not completely resolve the aforementioned conflicts. It is a partial and insufficient solution, as it is based on a flawed logical premise: that there is always an award to be enforced. Indeed, it is possible for the tribunal to dismiss all claims and for there to be no enforceable award. In such cases, we are faced with an arbitral award that has no judicial control, continuing to exist even when the subject matter of the award is non-arbitrable or even when blatant violations of due process have occurred in the arbitral process.

It has been argued that these situations rarely occur and are not frequent.[19] However, the mere fact that these situations do not occur frequently does not solve the problem. This argument, which is undoubtedly pragmatic, does not resolve the ontological problem in dispute: How do we resolve those situations where the recourse of nullity of the award is excluded and, likewise, there is no award to be executed?

That these situations do not occur often in practice is not a valid response to the problem at hand. However, this problem could be fixed by specific statutory provisions,[20] that contemplate this particular situation.

In connection with the aforementioned, to always ensure the existence of at least one control mechanism regarding the validity of the award, one potential solution is to include a specific statutory provision. This provision would stipulate that when there is no award to be enforced, the agreement wherein parties have agreed to waive the right to challenge the award would not be seen as valid. Another solution could also involve including a different statutory provision, such as creating a special legal remedy—specifically designed for these particular situations—that ensures there will

19 *Id.* at 451.
20 *Id.*

still exist the possibility to analyse the validity of the award when no award is to be enforced.

IV. What about human rights? Are these clauses compatible with international human rights law regarding due process?

The possibility for the parties, through express agreement, to exclude judicial review of awards has raised issues regarding its compatibility with the fundamental right of due process. It should be noted that this right is recognised by various international treaties, which is part of international human rights law.[21]

There is a highly relevant precedent from the European Court of Human Rights ["**ECtHR**" or "**Court**"]. In the case of *Tabanne* v. *Switzerland*,[22] the ECtHR held that an agreement by which the parties freely waive their right to exclude in advance the remedy of annulment before local courts at the seat of arbitration does not violate the right to a fair trial guaranteed by Article 6(1) of the European Convention on Human Rights ["**ECHR**" or "**Convention**"]. This decision is an important endorsement of international arbitration, taking into account the significance that the ECtHR has in international human rights law. Also, it could have a relevant effect on future political decisions of European countries, as there is now a precedent that states that this kind of agreements are compatible with due process and Article 6(1) of the ECHR.

At first, the Court recalled that the right of access to courts, as recognised by Article 6(1) of the ECHR, is not absolute.[23] Therefore, the contracting States, in this case Switzerland, have the possibility to impose certain limitations on this right. The ECtHR also emphasises that parties, by freely agreeing to an arbitration clause, voluntarily waive certain rights guaranteed

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21 *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 8; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 6.

22 Noureddine Tabbane v. Switzerland (Dec.), no. 41069/12, Mar. 01, 2016.

23 *See id.*, at § 24.

by the Convention. Such a waiver does not conflict with the ECHR as long as it is made freely, lawfully, and unequivocally.[24]

Moreover, the Court observed that if the parties choose to exclude all recourse against an award in accordance with Article 192(1) of the Swiss Private International Law Act (PILA), paragraph 2 of which stipulates that if the"*awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.*"[25] As it can be seen, this provision guarantees to the parties that even if they have chosen to waive their right to recourse, there will still be at least some judicial control over the arbitral process.[26]

This decision may be questionable, given that one of the key characteristics of human rights is that they are inalienable. Nevertheless, in support of those who uphold this position, it can be argued that parties generally have a specified time limit, i.e., three months in the case of the Model Law to submit an application for setting aside an award.[27] From this perspective, it could be understood that once the interested party allows this period of time to lapse without submitting a set aside application, they are effectively waiving that possibility without it constituting a violation of due process.

However, regarding the last point, it could also be contended that the situation is different in practice. When we refer to these types of agreements, the waiver is made by the parties before any irregularities that could jeopardise the effective application of the right to due process arise.

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24 *See id.*, at § 27.

25 Bundesgesetz über das Internationale Privatrecht [IPRG], Loi fédérale sur le droit international privé [LDIP], Legge federale sul diritto internazionale privato [LDIP] [Federal Act on Private International Law] Dec. 18, 1987, SR 291, art. 192(2) (Switz.). It states, "*Where the parties have excluded all setting aside proceedings and where the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.*"

26 *See* Noureddine Tabbane v. Switzerland (Dec.), no. 41069/12, § 35, 1 Mar. 2016.

27 Article 34(3) of the UNCITRAL Model Law states, "*An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.*"

In other words, there is a distinction between waiving the possibility of setting aside an award with full awareness of the defects that affect the award and doing so at a prior stage when the extent and significance of such waiver are unknown. The issue then shifts from a substantive aspect to the moment in which the waiver takes place. In this context, it could be argued that the waiver would not be valid, not because renouncing the right to bring an action to set aside a future award inherently affects due process, but rather because it would be impermissible to allow parties to waive something they are unaware of. At that moment, before the arbitration procedure even commences, it is impossible to foresee the potential grounds for annulment that may arise.[28]

In this way, the agreements excluding the right to annul arbitral awards evoke a sense of stepping into uncertainty because both parties are unaware of what they are relinquishing. This lack of clarity further casts doubts on the validity of these clauses.

V. Conclusion

As discussed throughout this work, there are both arguments in favour and against allowing parties to exclude judicial control of the annulment of an award when there is no legislative pronouncement on the matter.

It is argued in favour that the essence of arbitration lies in the principle of party autonomy. By waiving the possibility of bringing an action for annulment, the parties seek to ensure that the final solution to the dispute will be none other than the one reached by the arbitral tribunal, preventing judicial courts from altering it. In this sense, these agreements would become crucial to fully respect and ensure the enforcement of the 'negative effect' attributed to arbitration and developed in the principle of *kompetenz-kompetenz*.

[28] Manuel de Lorenzo Segrelles, *La renuncia anticipada a la impugnación del laudo*, 27 SPAIN ARB. REV. 95, 98-101 (2016).

However, granting such power to the parties, in an effort to protect their private interests, can lead to the unintended consequence of an arbitral award that is theoretically invalid, such as when it is rendered in violation of procedural guarantees for one of the parties. But that this invalidity, under the argument that the parties have agreed to it, can never be applied in practice unless it is raised in the refusal of enforcement. And there is a chance, as we have previously seen, that no enforcement proceedings take place, as the arbitral tribunal could dismiss all claims.

It can also be held that the issue of admitting agreements of this kind does not lie in the possibility of admitting or denying the existence of an award subject to annulment that still produces legal effects, but rather in the moment in which the waiver takes place. When the parties agree to waive the possibility of filing a nullity action, they do so without fully understanding the extent of what they are giving up, as it is impossible to anticipate all possible irregularities that may occur during the arbitration procedure. This is why it could be said that the analysis when determining the invalidity or validity of these agreements does not hinge on a substantial element in relation to whether it is appropriate or not to give the parties such power, but rather on the moment when the waiver is executed.

As a final conclusion, it can be seen that in order to determine whether these agreements should be valid or not, there are arguments both against and in favour, all of which are equally valid. The solution the authors offer in this debate will strictly depend on personal points of view. From a pro-arbitration perspective, it could be said that the wise choice is to accept these kinds of agreements because they contribute to the goals of arbitration. From a state perspective, it could be argued that, due to a matter of public policy, there always needs to be judicial control, regardless of the circumstances. Finally, it still remains a main priority to analyse whether these clauses are compatible or not with international human rights law regarding due process, highlighting the difficulty of doing so when these agreements take place prior to the commencement of the arbitral

procedure, at a moment when the parties cannot even imagine what they are waiving.

ARBITRATOR BIAS AND EVIDENT PARTIALITY: THE UNITED STATES PERSPECTIVE

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Abstract

Some of the world's most renowned arbitrators have faced challenges to awards they issued based on claims of evident partiality. Those challenges are typically last-ditch efforts to vacate an unfavourable award. Similarly, challenges to confirmation of an award based on the New York Convention's public policy defence or arguments that the tribunal was not formed in accordance with the agreement of the parties typically fail. This article analyses challenges centered on arbitrator conflicts of interest or bias under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["New York Convention"] and the Federal Arbitration Act ["FAA"] pursuant to the United States of America ["US"] law. Consistent with international norms, US law emphasises the importance of arbitration as an alternative means of dispute resolution and leans strongly in favour of upholding arbitration awards when issues of arbitrator impartiality are raised. It is the rare case that results in the vacatur of an award issued in the US, or refusal to confirm an award issued elsewhere when US law confronts the issue as a secondary jurisdiction. The inquiry is always fact-intensive, and the rise in such challenges, demonstrated most recently by a challenge to an international arbitration award involving the expansion of the Panama Canal, leads to increased cost and inefficiency in the very process meant to streamline the resolution of commercial disputes.

This article discusses a recent analysis of the issue by the Eleventh Circuit Court of Appeal (part I) then turns to an overview of cases holding vacatur was not warranted pursuant to Section 10 of the FAA (part II) before discussing cases holding vacatur was warranted (part III). Next, the article looks at decisions in which US courts with

secondary jurisdiction examine bias or conflict pursuant to Article V of the New York Convention (part IV) before offering some closing remarks (part V).

I. The High Standard to Vacate an International Arbitration Award in the U.S.

It is beyond serious dispute that US courts strongly favour arbitration as a means of dispute resolution. That policy is underscored in the realm of international arbitration. Great deference is given to confirmation of arbitral awards, and review is typically "*quite circumscribed*."[1] Within that framework, attempts to vacate awards based on evident partiality of the arbitrators also face a high bar. That bar was addressed most recently by the Eleventh Circuit Court of Appeal in a case involving the expansion of the Panama Canal.[2] While each case turns on the specific facts and disclosures (or lack thereof) made by the arbitrators *and their impact*, this recent case highlights the difficulty of prevailing on such a claim, absent direct and definite evidence of an arbitrator's "*substantial or close personal relationship to a party or counsel*."[3]

In *Grupo Unidos por el Canal, S. A. et al.* v. *Autoridad del Canal de Panama*,[4] ["**Grupo Unidos**"] the Eleventh Circuit analysed Grupo Unidos' motion

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1 *See, e.g.,* Productos Roche S.A. v. Iutum Servs. Corp., No. 20-20059-Civ-Scola (S.D. Fla. Apr. 10, 2020), 2020 WL 1821385, at 2, *quoting* Four Seasons Hotel & Resorts B.V. v. Consorcio Barr, S.A., 613 F. Supp. 2d 1362 (S.D. Fla. 2009), at 1366-1367 (U.S.).

2 Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama, 78 F.4th 1252 (11th Cir. 2023) *petition for certiorari filed,* (Dec. 15, 2023) (No. 23-660) (U.S.) [*hereinafter* "Grupo Unidos 2023"].

3 Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama, No. 20-24867-Civ, 2021 WL 5834296 (S.D. Fla. Dec. 9, 2021), at 4 (U.S.) [*hereinafter* "Grupo Unidos"].

4 On December 15, 2023, Grupo Unidos filed a petition for writ of certiorari before the U.S. Supreme Court. The response is due on February 20, 2024: *see* Grupo Unidos 2023, 78 F.4th 1252 (11th Cir. 2023).

to vacate two arbitral awards issued in favour of the Panama Canal Authority related to the construction of new locks for the Canal. The arbitrations were seated in Miami, Florida, and conducted pursuant to the International Chamber of Commerce ["**ICC**"] Rules. The two arbitrations related to the excavation and use of basalt (Panama 1 Arbitration) and delays related to concrete production and earthwork (Panama 2 Arbitration). Both panels were comprised of the same arbitrators: Dr. Robert Gaitskell (appointed by the Panama Canal Authority), Claus von Wobeser (appointed by Grupo Unidos), and Chair Yves Gunter (appointed by the parties and confirmed by the ICC).

After five years of arbitral proceedings, the Tribunal awarded approximately $238 million to the Panama Canal Authority. Following the issuance of the adverse partial award, Grupo Unidos asked the Tribunal to provide updated disclosures. After receipt of those disclosures, Grupo Unidos raised the Tribunal's untimely disclosures as a challenge to the ICC Court, which it denied.[5] Then, Grupo Unidos moved to vacate the awards in the Southern District of Florida based on evident partiality of the arbitrators as contrary to the public policy, pursuant to Article V(2)(b) of the New York Convention.[6] The District Court denied the motion to vacate, and confirmed the awards.[7]

On appeal, Grupo Unidos renewed its arguments that all three arbitrators were biased. In the period intervening the appeal, the Eleventh Circuit adopted the domestic vacatur standards set forth in Section 10 of the FAA for international arbitration awards in cases where the US exercises primary jurisdiction.[8] As a result, the Court addressed evident partiality as a primary

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5 *See* Grupo Unidos, 2021 WL 5834296, at 3.

6 Grupo Unidos, 2021 WL 5834296, at 4, Grupo Unidos also argued the awards violated Article V(1)(b), minimal due process; and Article V(1)(d) (panel was not in accordance with the parties' agreement); *See Id.,* at 8, the court dispensed with both arguments.

7 *Id.* at 12.

8 Chapter 1 of the FAA applies generally to domestic arbitration proceedings. Section 10(a)(2) provides for vacatur on application of a party "where there was evident partiality or corruption in the arbitrators, or either of them." Chapter 2 of the FAA incorporates the

means of vacatur pursuant to Section 10(a)(2) of the FAA, and as a public policy defence to confirmation, ultimately holding that neither basis was warranted.[9]

Primarily, the subsequent disclosures that formed the basis of the challenges consisted of the following: (1) while Gaitskell served as an arbitrator in the Panama 1 arbitration, he and another co-arbitrator appointed Gunter as president in an unrelated arbitration that provided lucrative fees to Gunter; (2) von Wobeser served as co-arbitrator with one of the Panama Canal Authority's counsel during the Panama 1 arbitration; (3) years before Panama 1, Gaitskell served as co-arbitrator with one of the Authority's counsel in an unrelated arbitration; and (4) Gaitskell served as arbitrator in a pending arbitration where one of the Authority's counsel represented a different party.[10] The Court dispensed with Gaitskell's appointment of Gunter as a basis to justify vacatur, finding no evidence of bias or influence in Panama 1 resulting from the appointment, but rather that the appointment was due to Gunter's extensive construction arbitration experience.[11] Notably, Grupo Unidos even challenged the arbitrator it nominated, von Wobeser, on arguably the weakest basis. The Court dispensed with that challenge, noting the substantial difference between acting as co-arbitrators, and acting as co-counsel representing a common client.[12] Next, the Court found that the limited overlap between Gaitskell and the counsel for the Authority on a separate case where they

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United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [*hereinafter* "New York Convention"] into the Federal Arbitration Act. Notably, Chapter 2 provides that the provisions of Chapter 1 apply to international awards to the extent they are not in conflict with Chapter 2 or the Convention. *See* 9 U.S.C. § 208. Because Chapter 2 and the Convention do not provide for vacatur standards, Section 10's vacatur provision applied to the *Grupo Unidos* matter because the U.S. was the primary jurisdiction; Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A., 66 F.4th 876, 886 (11th Cir. 2023) (U.S.), only primary jurisdiction that issued award has power to vacate it under New York Convention.

9 Grupo Unidos 2023, 78 F.4th, at 1267.

10 *Id.* at 1259.

11 *Id.* at 1263.

12 *Id.* at 1263-1264.

shared a specialised area of construction law did not rise to the large number of contacts that would imply "*an inappropriately close association between arbitrator and counsel*."[13] The final challenge, sitting as arbitrator where counsel for the Authority appeared as counsel for a different party, also failed to rise to the level of bias. While the Court noted that repeated appearance may exhibit familiarity, it "*does not indicate bias*."[14]

The opinion outlines the heavy burden placed on parties to set aside an international arbitration award.[15] The Court noted that both the ICC Rules and US arbitration law require liberal disclosure of "*any dealing that might create an impression of possible bias*," and vacatur may be warranted when an arbitrator "*knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists*."[16] But the Court found the challenges asserted were based on "*mere indications of professional familiarity*" that were not "*reasonably indicative of possible bias*."[17]

> *"It is little wonder, and of little concern, that elite members of the small international arbitration community cross paths in their work. As one of the canal authority's expert witnesses testified, '[w]orld wide, there are only several dozen arbitrators who would be attractive candidates' for 'a proceeding such as the Panama 1 Arbitration.' We refuse to grant vacatur simply because these people worked together elsewhere. The record reveals no evidence of actual bias in the Panama 1 Arbitration. And as to possible bias, Grupo Unidos has established only that some of the arbitration's participants were otherwise familiar with each*

13 *Id.* at 1264.

14 *Id.*

15 The District Court described judicial review of foreign arbitration awards as "quite circumscribed" due to the "pro-enforcement bias of the [New York] Convention [that] parallels that of the [Federal Arbitration Act]." *See* Grupo Unidos, 2021 WL 5834296, at 3 (citations omitted).

16 Grupo Unidos 2023, 78 F.4th at 1263. (citations omitted).

17 *Id.* at 1262.

> *other, and familiarity due to confluent areas of expertise does not indicate bias.'"*[18] *(emphasis added)*

As fallback grounds, Grupo Unidos challenged the confirmation of the awards under Article V of the New York Convention based on the same circumstances. For the same reasons, the Court denied the challenge to confirmation of the award pursuant to Article V(1)(d) as the tribunal formation being incompatible with the parties' agreement and Articles V(2)(b) as contrary to public policy.[19]

II. Cases Finding Vacatur Was Not Warranted Pursuant to Section 10

Given the prevailing view that the evident partiality standard may be applied to international arbitration awards when the US is the primary jurisdiction, a review of domestic challenges is informative. As one Court framed the issue, evident partiality requires vacatur of an award pursuant to the FAA when:

> *"either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists."*[20]

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18 *Id.* at 1264-65, *quoting* University Commons-Urbana, Ltd. v. Universal Constructors Inc., 304 F.3d 1331, 1340 (11th Cir. 2002) (U.S.) [*hereinafter* "University Commons"].

19 Grupo Unidos 2021 also asserted a due process challenge pursuant to Article V(1)(b) which was denied; Grupo Unidos 2021, at 8-10.

20 Gianelli Money Purchase Plan and Trust v. ADM Investor Serv., Inc., 146 F.3d 1309, 1312 (11th Cir. 1998) (U.S.), reversing vacatur based on retention of arbitrator's law firm by respondent's president where relationship pre-existed arbitrator's employment at the law firm with one exception which was disclosed prior to appointment; *see also* University Commons, 304 F.3d 1331 at 1339. *Compare* Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 149 (1968), vacatur of award is supportable where arbitrator fails to disclose "any dealings that might create an impression of possible bias"; Monster Energy Co. v. City Beverages, *LLC,* 940 F.3d 1130, 1135-36 (9th Cir. 2019) (U.S.), "under our case law, to support vacatur of an arbitration award, the arbitrator's undisclosed interest in an entity must be substantial, *and* that entity's business dealings with a party to the arbitration must be nontrivial."; Belize Bank Ltd. v. Government of Belize, 852 F.3d 1107, 1113 (D.C.

For example, in *University Commons-Urbana, Ltd.* v. *Universal Constructors, Inc.*,[21] the Court determined that one of the arbitrators' contacts with an entity related to a party and counsel for that party were sufficient to require an evidentiary hearing on remand. Notably, the arbitrator, an experienced construction lawyer, disclosed at the outset of hearings that he knew and worked with and against counsel representing both parties. He subsequently disclosed that he met with an entity related to one of the parties in connection with an effort to obtain legal work.

The Court held that both circumstances required additional factual development and remanded the case for discovery, and an evidentiary hearing to determine whether the contact was sufficiently "*direct, definite and capable of demonstration rather than remote, uncertain and speculative*."[22] That determination turned, in part, on when the contacts occurred.[23] The Court reasoned that multiple contacts within the construction field preceding the arbitration may not be indicative of bias; concurrent contacts did raise a potential conflict sufficient to conduct further review.[24] The second issue, holding a meeting with a party that owned nearly half of one of the parties to the arbitration, required further investigation into the timing of the disclosure, particularly whether it was made so far along in the case to

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Cir. 2017) (U.S.) [*hereinafter* "Belize Bank"], confirming international award and rejecting argument that award violated public policy due to evident partiality of arbitrator where challenging party failed to "establish[ ] specific facts that indicate improper motives on the part of the arbitrator," internal citation omitted; Freeman v. Pittsburgh Glass Works, *LLC,* 709 F.3d 240, 253 (3d Cir. 2013) (U.S.), evident partiality requires showing that "a reasonable person would have to conclude that [the arbitrator] was partial to one side"; Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 64 (2d Cir. 2012) (U.S.) [*hereinafter* "Scandinavian Reinsurance"], evident partiality may be found "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration" (internal citation omitted).

21 University Commons*,* 304 F.3d 1331.

22 *Id.* at 1339, *quoting,* Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1202 (11th Cir. 1982) (U.S.) [*hereinafter* "Levine"].

23 *Id.*

24 *Id.* at 1340.

effectively preclude objection.[25] On remand, the District Court denied the motion to vacate based on an advisory jury's finding that the arbitrator was not aware of the facts comprising the potential conflicts.[26]

As the case law demonstrates, potential conflicts that may result in vacatur rest on specific, fact-intensive analysis raised in a variety of circumstances. In one case, an arbitrator's failure to disclose that he previously upheld the validity of the form liquidated damages clause in a prior arbitration did not establish bias.[27] In another, the Second Circuit reversed the Southern District of New York's vacatur of an international arbitration award where two arbitrators failed to disclose their subsequent appointments to a concurrent arbitration that raised common contract issues with an affiliated corporate party and involved testimony from a common principal witness.[28] The Court did not find any of the factors indicative of bias despite its recognition that the better practice would have been to provide timely disclosure to avoid the post-award challenges.[29]

Finally, in seeking vacatur of an International Centre for Settlement of Investment Disputes award, the Court rejected the Republic of Argentina's argument that one of the arbitrators exhibited evident partiality because she

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25 *Id.* at 1344. Also, the Court found no conflict from the disclosure at the hearing on seeing a principal witness that he recognized from a matter in which the arbitrator served as counsel and the witnesses had testified as an expert for the opposing party; *Id.* at 1345.

26 University Commons, 301 F. Supp. 2d 1297, 1299 (N.D. Ala. 2004) (U.S.). The predicate finding eliminated the need to reach the remaining issues, namely whether the alleged conflicts would be recognized by a reasonable person and whether the arbitrator failed to make the requisite disclosures; *Id.* at 1300.

27 Federal Vending, Inc. v. Steak & Ale of Florida, Inc., 71 F. Supp. 2d 1245 (S.D. Fla. 1999) (U.S.). Finding a lack of partiality, the court framed the issue as suggesting "that the arbitrator, in an earlier arbitration considered a particular issue and made a legal determination on the merits. That he might likely decide the same issue the same way in a later arbitration does not mean that he has a bias for or against either party, or that he is motivated for an improper reason to decide the issue or the case one way or the other;" *Id.* at 1250. Notably, Federal Vending was presumably aware of the arbitrator's prior ruling on the issue and had it been unfavourable, would likely have objected to the arbitrator's appointment.

28 Scandinavian Reinsurance, 668 F.3d, at 64.

29 *Id.* at 78.

was a board member of a company with investments in two of the parties.[30] There, the consortium/claimant nominated Professor Gabrielle Kaufmann-Kohler. Three years into the arbitration, the financial services company,UBS AG appointed Kaufmann-Kohler to serve on its board. Given the extensive interests of UBS AG, the arbitrator was unaware of its interest in two of the consortium member parties, but nonetheless resigned from the board upon learning of that interest. Finding no basis for vacatur, the Court cautioned:

> *"If the interest presented here could disqualify an arbitrator who did not disclose it, parties would hesitate to select arbitrators associated with financial companies that invest broadly. The risk would be too high that 'evident partiality' challenges, like Argentina's, could uproot results of decade-long arbitrations without any evidence of bias beyond a diversified portfolio."*[31] *(emphasis added)*

The Court found that the passive interest of UBS AG ($2 billion) in the consortium members was not significant, given its total portfolio of $3.6 trillion and, therefore, did not trigger a duty of disclosure.[32]

III. Cases Finding Vacatur for Evident Partiality Warranted

Commonwealth Coatings Corp. v. *Continental Cas. Co.*[33] is the landmark case on vacatur based on evident partiality of an arbitrator. In that case, the US

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30 Republic of Argentina v. AWG Group, LTD., 894 F.3d 327, 333 (D.C. Cir. 2018) (U.S.).

31 *Id.* at 336; *see also* Al-Harbi v. Citibank N.A., 85 F.3d 680, 683 (D.C. Cir. 1996) (U.S.) (arbitrator's failure to conduct search of former law firm's clients to determine representation of one of the parties did not require vacatur for evident partiality pursuant to 9 U.S.C. § 10(a)(2)).

32 *Id.* at 336; *see also* Ploetz for Laudine L. Ploetz, 1985 Tr. v. Morgan Stanley Smith Barney LLC, 894 F.3d 894, 898 (8th Cir. 2018) (U.S.) (no evident partiality under most lenient standard of creating "even an impression of possible bias" where chair disclosed eight prior cases in which he served as arbitrator with Morgan Stanley as party but failed to disclose a case in which he served as mediator involving Morgan Stanley); Lucent Technologies, Inc. v. Tatung Co., 379 F.3d 24, 30 (2d Cir. 2004) (U.S.) (arbitrator in three-arbitrator panel who disclosed prior service as an expert for the party appointing him in an unrelated, materially concluded action did not suggest bias nor did co-ownership of airplane with co-arbitrator a decade earlier).

33 Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968).

Supreme Court set aside an arbitration award where the arbitrator failed to disclose a close long-term financial relationship with the Respondent/contractor in a dispute with a subcontractor. The tribunal chair was an engineering consultant who periodically did business with the Respondent/contractor. The plurality opinion addressed the practical implications arising from perceived bias:

> *"It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."*[34]

Based on the determination that evident partiality may be found where arbitrators "*might reasonably be thought biased against one litigant and favorable to another*,"[35] the Court vacated the award. The concurrence framed the holding as "*where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed*."[36]

In another case, an international arbitration seated in New York involved a joint venture for distribution of petroleum coke purchased by a US company for distribution through its Turkish partner.[37] The chair was the CEO and president of a "*multi-billion dollar company with 50 offices in 30 countries*."[38] During the initial liability phase of the proceedings, the US

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34 *Id.* at 148-49.

35 *Id.* at 150.

36 *Id.* at 151-152. Three dissenting justices rejected the "formalism" of the opinion in favour of protection of "the integrity of the process with a minimum of insistence upon set formulae and rules" given that "the arbitrator was innocent of 'evident partiality' or anything approaching it." *Id.* at 154-155.

37 Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi AS, 492 F.3d 132 (2d Cir. 2007) (U.S.) [*hereinafter* "Applied Indus"].

38 *Id.* at 135.

company representative advised the Tribunal that it was being sold to Oxbow Industries, which, at that time, triggered no additional disclosures. Two years later, the chair disclosed that one of his offices had contracted to carry petroleum coke with an Oxbow affiliate, and that he asked to be walled off from learning any information regarding any of those dealings. After the issuance of an unfavourable award on liability and retention of new counsel, the Turkish company asked the chair to withdraw, which he declined to do.[39]

The Second Circuit upheld vacatur of the award. In doing so, the Court emphasised that the failure to investigate a non-trivial conflict or, alternatively, to inform the parties that no investigation would be undertaken "*is indicative of evident partiality*."[40] By foreclosing internal discussion of the relationship between his company and the purchaser, the arbitrator did not identify the existence of the prior relationship between them that generated $275,000, determined to be a non-trivial conflict.[41]

Similarly, in *New Regency Productions, Inc.* v. *Nippon Herald Films, Inc.,*[42] the Court set aside an award despite the arbitrator's lack of knowledge of a conflict, finding that he had a duty to investigate potential conflicts arising from his new employment, which failed to do. During the arbitration, the arbitrator accepted a new position with a company that was in negotiation to finance and co-produce a film developed by the Respondent production company. The Court held that the arbitrator had a duty to investigate any potential conflicts when he accepted the new employment. Further, the Court examined the source of conflict alleged and found it significant, not trivial, and sufficient to warrant vacatur.[43]

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39 *Id.*
40 *Id.* at 138.
41 *Id.* at 139.
42 New Regency Productions, Inc. v. Nippon Herald Films, Inc, 501 F.3d 1101 (9th Cir. 2007) (U.S.).
43 *Id.* at 1110.

An arbitrator's undisclosed ownership interest in the administering institution was sufficient to vacate an award for evident partiality in *Monster Energy Co.* v. *City Beverages, LLC*.[44] There, a manufacturer, Monster, filed an arbitration against its distributor based on a dispute involving the manufacturer's termination of the agreement. The arbitration was administered by Judicial Arbitration and Mediation Services ["**JAMS**"]. The initial disclosures advised that the arbitrator had a financial interest in JAMS; and given its size, it was likely that he had participated in other cases with the parties or counsel and may do so in the future.[45] The arbitrator failed to disclose that his financial interest in the administering body was an ownership interest.[46]

The Court examined evident partiality as a two-part inquiry: whether the arbitrator's ownership interest in the administering body was "*sufficiently substantial*" and, if so, whether the administering body and the manufacturer "*were engaged in nontrivial business dealings*."[47] The Court found that both elements met. First, because the arbitrator held an ownership interest in the administrator, he received profits from all the arbitrations it conducted, not just the ones he personally conducted.[48] Second, the manufacturer's form contract was provided for arbitration by JAMS in Orange County. During the five previous years, JAMS had administered 97 arbitrations for Monster that were deemed "*hardly trivial*."[49] As a result, the Court vacated the award based on the "*reasonable impression of bias*" and cautioned in favour of more fulsome disclosures.[50]

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44 Monster Energy Co. v. City Beverages, LLC., 940 F.3d 1130 (9th Cir. 2019) (U.S.).

45 *Id.* at 1133.

46 *Id.* at 1134.

47 *Id.* at 1136.

48 *Id.*

49 *Id.*

50 *Id.* at 1138; *see also* Levine, 675 F.2d at 1202 (arbitrator's failure to disclose ongoing adversarial proceeding between arbitrator's family-owned business in which he served as general counsel and respondent insurance company involving uncollected premiums held by business, trust account dispute and resulting bar investigation into arbitrator created reasonable appearance of bias to vacate award); Continental Ins. Co. v. Williams, No. 84-

IV. US as Secondary Jurisdiction: Arbitrator Bias under Article V

As in *Grupo Unidos*, parties have continued to challenge confirmation of international awards under Article V of the New York Convention on comparable grounds. In *Tafneft* v. *Ukraine*,[51] Ukraine relied on Article V(1)(d) to argue that confirmation of a $112 million award in favour of Russia following an investment treaty arbitration should be denied because the Tribunal was not formed in accordance with the parties' agreement. The argument centred on the chair's failure to disclose his appointment for unrelated matters by both parties after his appointment as chair. The arbitration agreement incorporated the United Nations Commission on International Trade Law Rules requiring disclosure of "*any circumstance likely to give rise to justifiable doubts as to [an arbitrator's] impartiality or independence*."[52]

The Court distinguished the issue from domestic arbitration, which required a showing of evident partiality in fact. Instead, the Court examined the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ["**IBA Guidelines**"], which did not address the specific situation – two arbitral appointments, one from each parties law firm.[53] The Court found the single appointment by the opposing party over the seven-year duration of the arbitration insufficient to constitute justifiable doubt as to his impartiality, particularly where the arbitrator was also appointed by the challenging party's counsel. In line with the French

2646-Civ. (S.D. Fla. 1986), 1986 WL 20915, at 5 *aff'd without opinion,* 832 F.2d 1265 (11th Cir. 1987) (U.S.) (award vacated where arbitrator failed to disclose current representation in unrelated ongoing court proceeding against respondent/insurer where arbitrator had contingency fee at risk on appeal which, if disclosed, would have allowed respondent meaningful opportunity to weigh conflict and decide whether to object).

51 Tafneft v. Ukraine, 21 F.4th 829 (D.C. Cir. 2021) (U.S.).

52 *Id.* at 838.

53 The applicable Int'l Bar Assoc. [IBA], *IBA Guidelines on Conflicts of Interest in International Arbitration* (Oct. 23, 2014) [*hereinafter* "IBA Guidelines"], contained on the "Orange List" pt. II, art. 3.1.3, triggers a disclosure requirement when "[t]he arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties" including counsel. *Id.* at 839.

and UK courts, the Court dismissed the basis of the challenge as "*an apparently common practice*."[54]

Similarly, a challenge to confirmation on public policy grounds was rejected when the Government of Belize argued that an arbitrator failed to disclose that his chambers previously did work for the opposing party bank against Belize.[55] The case involved the enforcement of a guarantee by Belize in favour of the Bank of Belize Limited, pursuant to the terms of a settlement agreement. The arbitration was seated in London, pursuant to the Rules of the London Court of International Arbitration ["**LCIA**"].[56] The LCIA nominated the arbitrator for Belize due to its early non-participation in the proceedings. Belize then challenged the arbitrator some five years later, contending that another member of his Chambers had represented a party adverse to the Government.[57]

When Belize failed to pay, the bank sought confirmation of the award in the US. The District Court granted confirmation, and the appellate court affirmed, rejecting imputation of conflicts among chambers' members:

> *"We believe an allegation that an arbitral tribunal member is a member of the same chambers as another barrister who, in proceedings unrelated in fact and time, represented a conflicting interest, is insufficient to meet that burden, let alone to*

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54 *Id.* at 839-40 ("Indeed, other courts have found no ethical breach. The Court of Appeal of Paris concluded that 'a single appointment in the course of the seven years that the arbitration lasted, which did not characterize a history of business between this arbitrator and this law firm, [did not have] the potential to raise a reasonable doubt about the independence and impartiality of Mr Orrego Vicuña.' The United Kingdom's High Court of Justice 'd[id] not consider that it can at all be said that a single appointment in the course of the seven years the arbitration lasted would or might provide the basis for a reasonable apprehension about the independence or impartiality of Professor Vicuña; and still less that they were likely to give rise to justifiable doubts so as to trigger the duty of disclosure.' Nonetheless, we emphasize the narrowness of our holding—Vicuña was not required to disclose his appointment because it did not raise 'justifiable doubts' regarding his impartiality.") (internal citations omitted).

55 Belize Bank, 852 F.3d at 1114.

56 *Id.* at 1108.

57 *Id.* at 1109.

> *demonstrate that enforcement would violate the United States' 'most basic notions of morality and justice' as required to set aside an award under the New York Convention. First, 'barristers are all self-employed … precisely in order to maintain the position where they can appear against or in front of one another.' … Because the chambers model is designed to protect a barrister's independence—a fact acknowledged by English courts, … and scholars, … we are aware of no ethical rule that would require conflict imputation in these circumstances."*[58] (emphasis added)

The Court further reasoned that the appearance of neutrality must be analysed from the parties' perspective. Given Belize's historical dealings with the British justice system and its prior involvement in a case where the same Chambers opposed it without objection, the Court confirmed the award.[59]

V. Conclusion

While Circuits may vary in how they articulate it, as one Court aptly summarised the issue, "[*t]he First, Second, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits have adopted the reasonably construed bias standard, albeit not under that name*."[60] An arbitrator's duty to investigate potential conflicts is consistent with approaches of IBA, American Arbitration Association, and American Bar Association ethics for arbitrators in commercial disputes.[61]

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58 *Id.* at 1113 (internal citations omitted).

59 *Id.* at 1114.

60 HSM Constr. Servs., Inc. v. MDC Systems, Inc., 239 Fed.Appx. 748, 753 (3d Cir. 2007) (U.S.).

61 *See, e.g.,* IBA Guidelines, General Standard 7(d) ("An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries."). Notably, the IBA Guidelines place a similar duty on the parties; *id.,* General Standard 7(c); *see also* American Arbitration Association [AAA], *Code of Ethics for Arbitrators in Commercial Disputes* (Mar. 1, 2004), Canon II ("An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality."); Canon II(B) (b) ("Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any

While institutions and international guidelines require arbitrators to conduct an investigation to determine whether conflicts exist, US courts have been hesitant to directly impose such a duty.[62] Clearly, a duty to disclose what is known exists. However, at most, arbitrators have a duty to disclose that they have not conducted such an investigation.[63] As the foregoing discussion demonstrates, when faced with a challenge involving the failure to make a disclosure, the critical issue remains focused on the significance of the underlying contact – whether the non-disclosed information is trivial or meaningful.

To limit challenges to an award and advance arbitration as a means of dispute resolution, a minimum standard should mandate that arbitrators investigate potential conflicts or advise the parties that they will not do so.

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interests or relationships described in paragraph A."); Canon II(C) (c) ("The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.") [*hereinafter*, "The Code of Ethics for Arbitrators in Commercial Disputes"]. These obligations are incorporated in the International Centre for Dispute Resolution [ICDR], *Rules of the International Centre for Dispute Resolution*, art. 14 (Jan. 1, 2022) ("Impartiality and Independence of Arbitrator (1) Arbitrators acting under these Rules shall be impartial and independent and shall act in accordance with these Rules, the terms of the Notice of Appointment provided by the Administrator, and with The Code of Ethics for Arbitrators in Commercial Disputes.").

62 *See* Kathryn A. Windsor, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes,* 6 SETON HALL CIRCUIT REV. 191, 214-17 (2009) (analysing the lack of a uniform judicial standard and calling for the imposition of an affirmative duty on the arbitrator to investigate potential conflicts).

63 *See,* Applied Indus., 492 F.3d at 138; *compare* Ometto v. ASA Bioenergy Holding A.G., No. 12 Civ. 1328, 2013 WL 174259, at 4 (S.D.N.Y. Jan. 9, 2013) (U.S.) [*hereinafter* "Ometto"] (declining to vacate two ICC arbitration awards nearing $110 million where the chair's law firm was retained, after his appointment, in three matters impacting one of the parties despite fact that chair's "lack of awareness was largely the product of his own administrative carelessness in the manner he undertook a conflicts check at the advent of the arbitration") *aff'd*, Ometto") *aff'd*, 549 Fed.Appx. 41, at 42 (2d Cir. 2014) (U.S.) (affirming district court finding arbitrator had no duty to investigate where he "had no reason to believe a nontrivial conflict might exist" and his "carelessness does not rise to the level of wilful blindness"). However, recognition of the award was subsequently denied in Brazil.

In practice, most arbitrators likely do so. However, given the varied rules that may apply, counsel can rely on the flexibility inherent in the arbitration process itself to address this issue and limit potential challenges to an arbitration award. Transaction counsel can draft arbitration clauses that require arbitrators to investigate potential conflicts of interest and provide those disclosures upon nomination. Many institutions already require such a practice. Barring or supplementing that, upon receipt of arbitrator disclosures, arbitration counsel can inquire as to whether the tribunal investigated potential conflicts and will commit to doing so during the pendency of the case. Once armed with that information, counsel can determine whether to request further investigation or proceed with the arbitrator without objection. Simply requesting sufficient detail as to the scope of investigation and disclosures from the arbitrators at the outset of the proceeding can substantially minimise any potential enforcement or confirmation issues that may arise with respect to a subsequent award.

This discussion should provide some comfort that arbitration awards are typically upheld in the US despite challenges claiming arbitrator bias. However, there are circumstances where vacatur is warranted, or confirmation is denied based on evidentiarily supported claims that are "*direct, definite and capable of demonstration*."[64] While this discussion focuses on the application of US law, international norms are generally consistent.[65] The assertion of evident partiality claims to derail high dollar awards may foreshadow increased usage that would benefit from more concrete institutional guardrails. For example, the IBA Guidelines require disclosures for a three-year period, preceding an appointment with a continuing duty to disclose subsequent conflicts.[66] The international community may benefit from a wider adoption of similar limitations. Given the lack of meaningful movement in that direction and the reality that bias turns on such fact-specific situations, counsel can take steps at the outset of

64 University Commons, 304 F.3d at 1339.

65 *See, e.g.*, *supra* note 61.

66 IBA Guidelines, Orange List (Aug. 2015).

proceedings to affirmatively determine the scope of investigation undertaken by the nominated arbitrators. Ultimately, assessment of later disclosed or discovered contacts as a basis for vacatur turns on whether the contact can be reasonably construed to rise to the level of bias under the facts and circumstances of the particular case.

EXTENSION OF THE ARBITRAL AGREEMENT TO THIRD PARTIES – THE EVER-PRESENT ROLE OF THE APPLICABLE LAW TO THE ARBITRATION AGREEMENT BY THE EXAMPLE OF RECENT JUDGMENTS ON DIFFERENT LEGAL CONCEPTS OF EXTENDING THE AGREEMENT TO ARBITRATE

Jennifer Bryant[*] *& Johannes Hagmann*[†]

Abstract

The parties' consent to arbitrate is the cornerstone of arbitration. Yet, there are scenarios where it might be appropriate to include a non-signatory in the arbitration, based on an extension of the personal scope of the arbitration agreement. Some of the most discussed legal concepts to justify such an extension beyond the signatories of the arbitral agreement are notions of implied consent, the group of companies doctrine, and the theory of piercing the corporate veil. While all these legal theories are applied to extend arbitration agreements in different jurisdictions, their acceptance and the specifics vary considerably across jurisdictions. Recent supreme court decisions from Switzerland, Germany, France, and India addressed these concepts and thereby, reflected the general approach of each jurisdiction while, at the same time, clarifying the requirements and limitations of extending arbitration agreements in each jurisdiction. This article depicts six recent decisions in that context, relates them to the respective legal concepts addressed, as well as to the general approach in each jurisdiction, and shows the fundamental differences which parties and arbitral tribunals need to bear in mind when dealing with cross-border arbitrations, in light of the recent case law related to extending arbitration agreements.

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I. Introduction

Few topics in the field of international arbitration are discussed as controversially, and dealt with as differently, as the extension of the arbitration agreement to non-signatories. The difficulty of applying a uniform approach in this respect is not without reason as the extension of arbitration agreements touches the very foundations of arbitration – the parties' consent to refer their disputes to arbitration. Or, as a much-cited dogma puts it: *"Arbitration is a creature of contract*."[1]

Thus, more than 40 years after the precedent-setting arbitral award in *Chemical Company and others* v. *ISOVER Saint Gobain* ["**Dow Chemical**"] was rendered,[2] the development of uniform standards and limitations as to extending arbitral agreements continues. This is driven by general developments in international business and the cosmos of international arbitration. Despite all odds, global trade volumes continue to grow,[3] leading to ever more complex cross-border interweaving of corporations and, in parallel, the centre of gravity in international arbitration keeps shifting away from its traditional hubs.[4] These developments, amongst other reasons, lead to scenarios which eventually result in a continuing growth of case law on the topic by high courts from different jurisdictions. Those decisions give rise to general discussions in the field of international arbitration. Recent attention-raising cases show that the question of extending the arbitration agreement and the law applicable to the arbitration agreement are intrinsically interconnected.[5] Depending on which law is

1 *See, e.g.*, Steelworkers v. American Mfg. Co., 363 U.S. 570 (1960) (J. Brennan, concurring).

2 Case No. 4131, 9 ICCA Y.B. COM. ARB. 131 (1984), at ¶¶ 131 et seqq.

3 World Trade Organisation, *Global Trade Outlook and Statistics 2023*, at 3, *available at* https://www.wto.org/english/res_e/booksp_e/gtos_updt_oct23_e.pdf.

4 White & Case and Queen Mary University of London, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, *available at* https://www.whitecase.com/sites/default/files/2023-05/qmul-international-arbitration-survey-2021-web-single-final-v3.pdf.

5 Kabab-Ji SAL (Lebanon) v. Kout Food Grp. (Kuwait), [2021] UKSC 48, 1-2 (Eng.); Kabab-Ji SAL v. Kout Food Grp. [2020] EWCA Civ. 6; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sep. 28, 2022, No. 21-11.846 (Fr.); Cour d`appeal [CA]

applied, and which forum is chosen to determine the respective questions, the approaches to address an extension of the arbitration agreement can differ considerably.

In light of the above, this article will show reasons for the intent to extend arbitration agreements to non-signatories in Part II, and outline some of the most discussed legal concepts in this respect under Part III, in order to assess recent decisions from Switzerland, Germany, France, and India dealing with these legal concepts, as discussed in Part IV.

These jurisdictions recently further refined and clarified their positions on implied consent, the group of companies doctrine, and piercing the corporate veil. Yet, it will become apparent that there is no internationally uniform approach in this regard. Rather, the jurisdictions continue on their own respective paths and deepen the differences between their approaches.

II. Need to Extend Arbitration Agreements to Third Parties

In today's reality of globalised and distinguished trade and investment relationships, there are manifold scenarios in which an extension of the arbitration agreement to a third party appears beneficial, at least for one of the parties to such an agreement.

One prominent advantage of such an extension is the enhanced efficiency of having one concentrated arbitration instead of initiating several proceedings in different fora against different counterparties. Apart from serious efficiency deficiencies, the latter approach runs the risk of conflicting decisions, given the limited means to establish a binding effect of arbitral awards on parallel arbitral or state court proceedings. Particularly where recourse claims are concerned or in cases of an "*alternative*" liability

[regional court of appeal] Paris, June 23 2020, Numéro d'inscription au répertoire général [RG] No. 17/22943; Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 9, 2023, Beck-Rechtssachen [BeckRS] 2023, 7724 (Ger.); *see* Maxi Scherer & J. Ole Jensen, *Towards a Harmonized Theory of the Law Governing the Arbitration Agreement*, 10(1) IND. J. ARB. L. 1, 3 (2021), for further recent decisions dealing with the law applicable to the arbitration agreement.

of either one or the other respondent, the materialisation of such a risk can result in highly unsatisfying outcomes.[6]

The commercial realities of multinational corporate groups – having sophisticated structures of various legal entities, out of which several might be involved in the negotiation or performance of a contract – contribute to the significance of questions related to the extension of arbitration agreements. To elaborate, if different entities of a corporate group are involved in the pre-negotiation stage or the negotiation stage (as financiers or guarantors, amongst others), or in the actual performance of the contract, but only one entity is a signatory to the contract, then the necessity for an extension of the agreement beyond the signatory becomes apparent. Particularly, in the cross-border context, such an extension to closely related group companies may be the only viable route for the counterparty to reach an internationally enforceable title within reasonable time.

III. Approaches to Extending Arbitration Agreements

Yet, arbitration is traditionally bilateral in its set-up. The agreement to submit a dispute to arbitration requires, in principle, the unequivocal consent of the parties involved. Approaches to extend the personal scope of an arbitration agreement beyond its signatories, therefore, raise fundamental questions of contract law, and with respect to the basic principles underlying arbitration.

The outstanding importance of party autonomy, being the foundation of arbitration, stems, not least, from the fact that an agreement to arbitrate not only offers the contracting parties the opportunity to have a forum tailored to their contractual relationship and to enjoy the often-mentioned benefits

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

of arbitration,[7] but also constitutes a waiver of the basic right to the lawful judge, i.e., from an often times constitutionally guaranteed right.[8] Where an arbitration agreement is in place, the parties can be ordered to refrain from taking recourse to state courts – even from courts of a state different from the one where relief is sought,[9] and even through an application by non-signatories.[10] In light of this, as a general rule, arbitral tribunals and state courts only allow for the extension of the arbitration agreement under rather exceptional circumstances.

Few national arbitration laws lay down the extension of an arbitration agreement to non-signatories,[11] or allow for a direct inference from its wording.[12] In legal literature and the case law of arbitral tribunals and courts,

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7 *Cf.* ALAN REDFERN, NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION recitals 1.122-1.128 (7d. ed. 2022).

8 *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, ¶ 1, Nov. 4, 1950, 213 U.N.T.S.221, Europ. T.S. No. 5; GRUNDGESETZ [GG] [BASIC LAW], *translation at* https://www.gesetze-im-internet.de/englisch_gg/, art. 101, ¶ 1, sent. 2 (Ger.); INDIA CONST. art. 14, 39A (1950); U.S. CONST. amend. XIV, § 2.

9 Recent example of an anti-suit injunction by the English courts restraining a party from circumventing an arbitration agreement by seeking interim relief from local Brazilian courts: Aquavita International SA v. Indagro SA, [2022] EWHC 892 (Eng.).

10 Confirmation by the US Supreme Court that a non-signatory to an arbitration agreement may rely on US state-law principles of equitable estoppel to compel arbitration instead of Alabama state courts: GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, 140 S. Ct. 1637 (2020), at ¶ 5.

11 In Article 14 of the Peruvian Arbitration Act, 2008, the arbitration agreement is explicitly extended to "those whose consent to arbitration, in good faith, is determined by their active and determining participation in the negotiation, conclusion, execution or termination of the contract which comprises the arbitration agreement or to which the agreement is related. It also extends to those who intend to derive rights or benefits from the contract, according to its terms." Peruvian Arbitration Act, Decreto Legislativo No. 1071, El Peruano, June 28, 2008, art. 14.

12 Until its recent decision in Cox and Kings v. SAP India of Dec., 06, 2023 (*see, infra* note 71), the Indian Supreme Court read the possibility of extending the arbitration agreement to third parties into the following wording: "a judicial authority, […] shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration." *See*, The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 45; For domestic arbitration, *see,* The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 8; Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42, at ¶ 25 (India).

however, various legal concepts are subsumed under the term of *extending* arbitration agreements. Some of the legal concepts in this context, like agency or succession, are to a large extent a matter of general principles of contract law. They depend strongly on the particularities of domestic agency laws,[13] or company laws.[14]

By contrast, other legal doctrines are rather specific to international arbitration and lead to a great variety of arbitration-related case law across jurisdictions. Three approaches to extend agreements to arbitrate beyond their signatories will be outlined in the following: An extension based on the "implied consent" of the non-signatory (A.), and the "group of companies doctrine" (B.) as well as an extension through the "piercing of the corporate veil" (C.).

It is to be noted that these approaches are not always clear-cut and overlap to some extent, given that they are based on case law and that they all result in the same finding – the creation of the non-signatories' consent to arbitrate where there is no such consent or acceptance by way of a written (or oral) arbitration agreement. Even where two arbitral tribunals or state courts seemingly apply the same concept of extending the arbitration agreement, the underlying issue is always one of contract interpretation and, as such, depends heavily on the parties' intentions and the facts that can be established.[15]

Other forms of third party participation in arbitral proceedings, excepting through the extension of the arbitration agreement, will not be part of this

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13 For examples for national particularities regarding concepts of agency: *see*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 5.03 [F] (3d. ed. 2020).

14 *See, e.g.*, Joseph Schwartz, Julian Bickmann & Lukas Buchholz, *The Application of Sec. 25(1) HGB to Arbitration Agreements*, Zeitschrift für Schiedsverfahren [SchiedsVZ] 154 (2023) on the German laws of succession in case a commercial entity continues a business under its prior name; BGH Nov. 12, 1990 Neue Juristische Wochenzeitschrift Rechtsprechungs-Report [NJW-RR] 423 (424) (1991) (Ger.) on the extension to shareholder of a general partnership (*offene Handelsgesellschaft [oHG]*) under German law.

15 *See, supra* note 13, at 10.01 [E].

analysis. In particular, and importantly for arbitration users,[16] it is possible to extend the arbitral proceedings to third parties by way of a joinder, or by consolidating arbitration proceedings. These concepts also require an effective arbitration agreement as a basis. Their application depends primarily on the respective arbitration rules chosen by the parties.[17] Similarly, the legal concept of a third-party intervention – i.e., by parties who are not *directly* involved in the claim (*Nebenintervention, intervention accessoire, intervento adesivo*) – as well as third party notices, can be of utmost importance in practice, but are typically not concepts where the extension of the arbitration agreement is at the centre of interest. Solutions for these issues are mostly derived from institutional rules,[18] and supplemental rules which are to be agreed between the parties and the third parties,[19] or achieved through an appropriate design of a multi-party arbitration clause.[20] Thus, these questions are only marginally and rather incidentally concerned with the matter of extending the arbitration agreement to non-signatories.

A. Implied consent

The approach of relying on the *implied consent* of a non-signatory entity is probably the closest to an explicit consent to arbitrate, and, therefore, widely used to justify the extension of an arbitration agreement.[21]

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16 "Lack of power in relation to third parties" is considered the third worst feature of international arbitration for users of international arbitration. *See*, White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, at 8, *available at* https://arbitration.qmul.ac.uk/research/2018/.

17 *See, e.g.*, International Chamber of Commerce (ICC) Rules of Arbitration, 2021, art. 7, 10; Deutsche Institution für Schiedsgerichtsbarkeit (DIS) Arbitration Rules, 2018, art. 8, 19; Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, art. 27, 28.

18 *Cf.* Swiss Rules of International Arbitration, 2021, art. 6(4).

19 *Cf.* Draft supplementary rules for third party notices of the DIS, as of May 02, 2023, *available at* https://www.disarb.org/en/networks-young-talent/2018-dis-arbitration-rules-clinic/practice-group-third-party-notice.

20 *See* Reinmar Wolff, *Gestaltung einer vertragsübergreifenden Schiedsklausel*, SchiedsVZ 59, 62 (2008).

21 *See, e.g.*, Bundesgericht [BGer] [Federal Supreme Court] Apr. 17, 2019, 145 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 199, 202

The notion of an implied consent to arbitrate requires the intent of the non-signatory and the contracting partners that the non-signatory is understood to be bound by the arbitration agreement. A determination of such an implied consent usually requires the assessment of the non-signatories' (and the signatories') conduct with respect to the overall contract and the arbitration agreement in place.[22] Given the severability of the arbitration clause from the rest of the contract, an involvement with a contract under substantive law cannot automatically be equated with consent to arbitrate – even if the consent to the underlying contract would usually contain a consent to arbitrate as well.[23]

In jurisdictions where notions of implied consent are commonly used to justify the extension of arbitration agreements, a predominant involvement in the conclusion and/or the performance of the contract is required:

- Under Swiss law, such involvement must either constitute a clear demonstration of the consent to being bound by the agreement to arbitrate, or establish reasonable reliance of the contracting party that the non-signatory intended to be bound by it.[24] In this respect, arbitral tribunals and Swiss courts particularly assess the non-signatory's conduct in order to derive a declaration of intent thereof. If the non-signatory's conduct alone is of a certain weight, it might suffice to prove

(Switz.); Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd. & Anr., (2021) 281 DLT 246 (India); ICC Award No. 6519, 2 (2) Clunet 1991, ICC Court Bulletin 34, 35 (1991); *ICC Case No. 1434, 1975*, *in* COLLECTION OF ICC ARBITRAL AWARDS 1974 - 1985 264 (Sigvard Jarvin & Yves Derains eds., 1994); *See* BORN, *supra* note 13, at 10.02 [C].

22 Carlos Alberto Matheus López, *Global Analysis of the Extension of the Arbitration Agreement to Non-signatories, and Proposed Model Norm and Guideline for Standard Use*, *in* INTERNATIONAL ARBITRATION: QUO VADIS? § 5.04[A][1] (Ben Beaumont, Alexis Foucard & Fahira Brodlija eds., 2022).

23 *See* Stavros Brekoulakis, *Parties in International Arbitration: Cpnsent v. Commercial Reality*, THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION ch. 8, recital 8.14 (Stavros Brekoulakis, Julian David Matthew Lew & Loukas A. Mistelis eds., 2016).

24 Nathalie Voser, *Multi-party Disputes and Joinder of Third Parties*, *in* ICCA CONGRESS SERIES NO. 14 (DUBLIN 2009): 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL CONFERENCE 372-375 (2009).

the intention of being bound by the arbitration agreement.[25] The requirement that the arbitration agreement is to be "*signed by the parties*,"[26] does not impede the extension to non-signatories as it is considered to refer to the initial parties only.[27] Where the parties' conduct alone does not suffice to reason a consent, the interplay between the conduct and additional evidence – like documents proving the wilful interference with the performance of the contract – can establish the non-signatory's intent to be bound by the arbitration agreement.[28] If, however, the involvement in the negotiations and the performance of the contract is rather incidental, arbitral tribunals and state courts will usually deny motions to extend the arbitration agreement.[29]

- Similarly, French courts assess whether the non-signatories' direct involvement in the performance of a contract may justify an extension of the arbitration agreement to a third party.[30]

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25 Bundesgericht [BGer] [Federal Supreme Court] Oct. 16, 2003, 4P.115/2003/ech (Switz.); Philippe Bärtsch & Angelina M. Petti, *The Arbitration Agreement, in* INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 25 (2d. ed., Elliott Geisinger, Nathalie Voser & Angelina M. Petti eds., 2013).

26 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S 38, art. II(2).

27 Simon Gabriel, *Congruence of the NYC and Swiss Lex Arbitri Regarding Extension of Arbitral Jurisdiction to Non-Signatories.* BGE., 145 BGE III 199 (BGer Nr. 4A_646/2018), 37(4) ASA BULL. 883, 885 (2019).

28 *See* Tobias Zuberbühler, *Non-Signatories and the Consensus to Arbitrate*, 26(1) ASA BULL. 18, 23 (2008).

29 For further references to cases decided under Swiss law, *see* BORN, *supra* note 13, at 10.02 [C] recital 123, 127.

30 Cour de cassation [Cass.] [supreme court for judicial matters] 1 civ. Mar. 27, 2007, Bull. civ. 129 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, May 7, 2009, RG No. 08-02025 (Fr.).

- Under Indian law, an extension of the arbitration agreement can be accepted on the basis of "*discernible intentions of the parties, and, to a large extent on good faith principle*."[31]

However, even if an extension of the arbitration agreement on the basis of the principle of implied consent constitutes, to a large extent (and in most jurisdictions), a mere application of general principles of the interpretation of declarations of intent, some jurisdictions categorically refuse such an approach. Differing from the decision of the arbitral tribunal – and, eventually, from the decision of the French courts[32] – the United Kingdom ["**UK**"] Supreme Court, by applying French law, found in its decision in the matter of *Dallah Real Estate and Tourism Holding Company* v. *The Ministry of Religious Affairs, Government of Pakistan* ["**Dallah**"] that even the interplay of several indications for the implied consent of a non-signatory party (being the government of Pakistan) was not sufficient to justify an extension of the arbitral agreement:

> "*[T]here was no material sufficient to justify the tribunal's conclusion that the Government's behaviour showed and proved that the Government had always been, and considered itself to be, a true party to the Agreement and therefore to the arbitration agreement*." [33]

The decision was quintessential for the reluctant approach of English courts as to the extension of arbitration agreements to non-signatories.[34] This stance was, not least, reaffirmed by the decision of the English courts in the *Kabab-Ji SAL (Lebanon)* v. *Kout Food Grp. (Kuwait)* ["**Kabab-Ji**"] case.[35] The UK Supreme Court found, this time by applying English law, that the

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31 Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, ¶ 103.1 (India).

32 Cour d'appel [CA] [regional court of appeal] Paris, Feb. 17, 2011, RG No. 09-28533 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 28, 2022, No. 21-11.846 (Fr.).

33 Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 (Eng.).

34 *See, also*, The City of London v. Sancheti, [2008] EWCA Civ. 1283 (Eng.).

35 Kabab-Ji SAL (Lebanon) v. Kout Food Grp. (Kuwait), [2021] UKSC 48, 1-2 (Eng.).

respondent party's corporate parent could not become a party to the arbitration agreement, given that the relevant contract contained a clause prohibiting merely oral modifications of the contract clause which could not be superseded by any other form of consent with the arbitration agreement.

German courts are likewise reluctant towards applying notions of implied consent to assume a consent to arbitrate.[36] Although the possibility of extending an arbitration agreement based on implied consent is mentioned in some decisions,[37] the German courts – in the exceptional cases in which an extension of the arbitration agreement is accepted – base their judgments on other approaches.[38]

This shows that, although notions of implied consent are, in principle, widely accepted in different contract law systems, in the context of arbitration agreements the assessment of such consent requires additional scrutiny – and through consideration of the applicable law.

B. The Group of Companies Doctrine

The group of companies doctrine is, in essence, a subset of the broad concept of implied consent to the arbitration agreement rather than a legal theory as such.[39] Although its rationale is being applied in other areas of law

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36 *Cf.* Oberlandesgericht Saarbrücken [OLG Saarbrücken] [Saarbrücken Appeal Court] Nov. 23, 2017, No. 4 U 44/16 (Ger.).

37 "However, this does not exclude the possibility that the conduct of the third party in the individual case may justify the assumption that it has consented to the extension of the arbitration agreement to itself or has accepted this due to acting in bad faith." *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 09, 2023, BeckRS 7724, 2023 (Ger.).

38 *Cf.* Hanseatisches Oberlandesgericht Bremen [OLG Bremen] [Bremen Appeal Court] Nov. 10, 2005, No. 2 Sch 2/2005 (Ger.); Oberlandesgericht München [OLG München] [Munich Appeal Court] Jan. 13 1997, No. 13 U 104–96 (Ger.); Werner Müller & Annette Keilmann, *Beteiligung am Schiedsverfahren wider Willen?*, SchiedsVZ 113, 115 et seqq. (2007) (Ger.).

39 *See* Yves Derains, *Is there a group of companies doctrine?, in* MULTIPARTY ARBITRATION 131, 138 (Bernard Hanotiau & Eric A. Schwartz eds., 2015).

such as tax law and company law as well,[40] the group of companies doctrine emerged in the context of international arbitration.[41] It describes the notion that an entity within a group of companies may become a party to an arbitration agreement concluded by another entity within this group of companies. Yet, it always is a necessary precondition that the non-signatory fulfils further requirements indicating its intent to be bound by the arbitration agreement[42] – or that an extension is deemed reasonable on the basis of good faith considerations.[43]

Albeit not being the first award to consider an extension of the arbitration agreement to non-signatories,[44] the group of companies doctrine gained particular prominence through the interim award in the *Dow Chemical* case that the International Chamber of Commerce, International Court of Arbitration ["**ICC**"] rendered in 1982.[45] Several entities of the *Dow Chemical* group of companies, of which two were not parties to the contract with the counterparty – *Isover Saint Gobain* – initiated arbitration proceedings against *Isover Saint Gobain*. The arbitral tribunal, thus, had to decide on its jurisdiction over the claim. As regards the personal scope of the arbitration agreement contained in the main contract, the arbitral tribunal held that:

> "*irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality*."[46]

In the case of one group company of the *Dow Chemical* group, the tribunal said that the economic reality was justified through its "*absolute control over its subsidiaries having either signed the relevant contracts*."[47] In case of the other group company, jurisdiction was confirmed since it "*effectively and individually*

40 *See* BREKOULAKIS, *supra* note 23, at ¶ 133.
41 BORN, *supra* note 13, at § 10.02[E].
42 *See* ZUBERBÜHLER, *supra* note 28, at 25.
43 *Cf.* arbitral awards cited in BORN, *supra* note 13, at § 10.02[E], fn. 270, 272.
44 Bernard Hanotiau & Leonardo Ohlrogge, *40th Year Anniversary of the Dow Chemical Award*, 40(2) ASA BULL. 300, 303 (2022).
45 ICC Award No. 4131, 1984 Y.B. COM. ARB. 131 (Clunet) (Fr.), at ¶¶ 131 et seq.
46 ICC Award No. 4131, 1984 Y.B. COM. ARB. 131 (Clunet) (Fr.) at ¶ 136.
47 *Id.* at ¶ 135.

participated in their conclusion, their performance, and their termination [of the contracts]."[48] On this basis, the tribunal assumed jurisdiction over all group companies involved in the arbitration:

> "*The arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.*"[49] (emphasis added)

It is to be noted that this decision was not based on the application of national arbitration laws or contract law, but was made "*following an autonomous interpretation of the agreement and the documents exchanged at the time of their negotiation and termination.*"[50] The tribunal in the *Dow Chemical* case relied on the foundation of consent and added the close relationships within a group of companies as an additional element to be considered when assessing the parties' intent regarding the scope of the arbitration agreement. In the following annulment proceedings regarding the interim award, the Paris Court of Appeal upheld the decision and confirmed the arbitral tribunal's finding that all *Dow Chemical* entities involved were understood as parties to the arbitration agreement, based on its analysis of the parties' common intent.[51]

Following the *Dow Chemical* award, a more flexible approach to the interpretation of the personal scope of arbitration agreements developed in international arbitration.[52] Subsequently, arbitral tribunals, scholars, and state courts used the term *group of companies doctrine* in their analysis of the personal scope of arbitration agreements and non-signatories' consent to

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48 *Id.* at ¶ 136.

49 *Id.*

50 *Id.* at ¶ 132.

51 Cour d'appel [CA] [regional court of appeal] Paris, civ., Oct. 21, 1983, 1984(1) REVUE DE L'ARBITRAGE 98, 98-114 (1984).

52 *See* HANOTIAU, *supra* note 44, at ¶¶ 305, 307.

arbitrate. The distinction from other legal concepts and the definition of what is meant by the group of companies doctrine is not always clear – and not always consistent. However, its basic idea, to use the close relationships within a group of companies as a ground for extending the arbitration agreement to other group companies, is at the heart of decisions and developments in several jurisdictions – be it in applying or denying an application of the *group of companies doctrine*:

- The English High Court held in its *Peterson Farms* v. *C&M Farming Ltd.* ["**Peterson Farms**"] decision that the group of companies doctrine "*forms no part of English law*,"[53] a principle that also became visible in earlier decisions regarding related issues.[54]

- The Singapore High Court in its *Manuchar Steel Hong Kong Ltd* v. *Star Pacific Line Pte Ltd.*[55] judgment, referred to the *Peterson Farms* decision and stated that it was convinced that "*the singly economic entity concept was recognised at law in Singapore nor was there a good legal basis to support its recognition*."[56]

- German courts and legal authors are also hesitant to extend the arbitration agreement by taking recourse to the group of companies doctrine.[57] However, the German Federal Court of Justice stated in 2014 that the application of the group of companies doctrine under foreign arbitration laws does not constitute a breach of the German *ordre public*. Therefore, an

53 Peterson Farms Inc. v. C&M Farming Ltd., [2004] EWHC 121, ¶ 62 (Eng.).

54 Bank of Tokyo Ltd. v. Karoon, [1987] EWCA (AC) 45 (Eng.); Adams v. Cape Indus Plc, [1990] EWCA Ch 433, 538 (Eng.).

55 Manuchar Steel Hong Kong Ltd v. Star Pacific Line Pte Ltd, [2014] SGHC 181, 4 SING. L. REV. [SLR] 832 (Sing.).

56 *Id.* at ¶ 136.

57 *Cf.* Müller/Keilmann, SchiedsVZ, 113, 118 (2007); Hanseatisches Oberlandesgericht Hamburg [OLG Hamburg] [Hanseatic Appeal Court], Nov. 8, 2001, 6 Sch 4/01-juris (Ger.).

arbitral award in which the arbitral tribunal assumed its jurisdiction on the basis of the group of companies doctrine under the rules of another jurisdiction would not be set aside by the German courts.[58]

- Decisions of Swiss courts and arbitral tribunals show reluctance to strongly emphasise any group of companies relationship when analysing the consent to be bound by an arbitration agreement.[59] Yet, this does not mean that an extension of the arbitration agreement to related group companies is not possible under Swiss law.[60] Rather, the refusal to accept a concept like the group of companies doctrine seems to be driven by an intent to oppose an over-simplification of the analysis of consent and to impede the existing flexible approach.

- Based on the *Dow Chemical* decision, French courts use the group of companies doctrine regularly (as one of the reasons) to justify the consent to an extension of the arbitration agreement to non-signatory group companies.[61] Not only do French courts hold up awards which are based on the group of

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58 Bundesgerichtshof [BGH] [Federal Court of Justice], May 8, 2014, SchiedsVZ 151 (2014) (Ger.).

59 "*Finally, the objection that YY is bound by the arbitration clause agreed upon by Y in accordance with the "groupe de sociétés doctrine" must be countered with corresponding considerations. Apart from the fact that such a binding obligation can only be assumed with reservation, in particular vis-à-vis an arbitration defendant, it requires – also in the opinion of the complainants – special circumstances which justify a protection of the third party's trust based on a legal prima facie case.*" *X., XX. v. Y., YY., Schweizerisches Bundesgericht, I. Zivilabteilung, Not Indicated, 29 January 1996*, 14(3) ASA BULL. 496;
"*the principle according to which a company may be considered a party to a contractual undertaking entered into by another company by virtue of the fact that the two companies belong to the same group constituting a single economic reality does not exist in Switzerland de lege lata.*" A. v. B. et C, CCIG Case No. 137, 24 March 2000, 21(4) ASA BULL. 781, 799 (2003).

60 Bundesgericht [BGer] [Federal Supreme Court] Oct. 16, 2003, 4P_115 /2003, 13 (Switz.).

61 Emmanuel Gaillard & John Savage, Part 2: *Chapter II – Formation of the Arbitration Agreement*, in Fouchard Gaillard Goldman on International Commercial Arbitration 241, 286 et seqq. (1999); also: *cf.* list of cases in DERAINS, *supra* note 39, at ¶¶ 138-140.

companies doctrine, but they also annul decisions where the group of companies doctrine was disregarded when it was found that an implied consent within a group of companies could be established.[62]

- Similarly, Egyptian courts refer to the group of companies doctrine to extend the personal scope of arbitration agreements as one of the ways to extend arbitration agreements to third parties.[63] Egyptian case law analyses the active contribution of a group company in the performance of the contract to assess whether the "*economic unity*" of the entities can justify an extension of the arbitration agreement.[64]

- In India, the group of companies doctrine was at the centre of a noteworthy development relating to the extension of arbitration agreements in recent years. While the starting point was that non-signatories cannot be included in arbitration proceedings,[65] the last decade demonstrated a distinct openness of Indian courts to extend arbitration agreements beyond their signatories. In the 2013 *Chloro Controls India Pvt. Ltd.* v. *Severn Trent Water Purification Inc* ["**Chloro Controls**"] decision,[66] for the first time in the context of international arbitration proceedings, the Indian Supreme Court affirmed the extension

62 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 06, 2010, Rev. Arb. 2010 813. (Fr.).; Cour d'appel [CA] [regional court of appeal] Paris 1e CH., Dec. 18, 2018, RG No. 16/24924 (Fr.).

63 Mahkamat al-Naqd [Court of Cassation], session of 13 Mar. 2018, year 86, challenge nos. 2609, 3100 and 3299 (Egypt); Ibrahim Shehata, *The extension of arbitration agreements to third parties through the lens of Egyptian courts*, 36(4) ARB. INT'L 571 (Dec. 2020); Mohamed Abdel Raouf, *Chapter 4.2: Egypt*, ARBITRATION IN AFRICA: A PRACTITIONER'S GUIDE 433 (2d. ed. Lise Bosman eds., 2021).

64 Mahkamat al-Naqd [Court of Cassation], session of 22 June 2004, year 72, challenge nos. 4729 (Egypt).

65 Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531 (India).

66 Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641, ¶ 103.1 (India).

of the arbitration agreement to legal entities closely related to the respective signatories of the arbitration agreement by relying on foreign cases. Since then, the application of the group of companies doctrine has been extended to domestic arbitrations and has become a well-established principle of Indian arbitration law[67] – up to a point where the jurisprudence was criticised for creating an "*overexpansion*" of the group of companies doctrine.[68] In its recent *Oil and Natural Gas Corporation Ltd.* v. *M/s Discovery Enterprises Pvt. Ltd.* ["**ONGC**"][69] decision, the Indian Supreme Court further specified the factors to be considered when applying the group of companies doctrine under Indian law and, following the referral to a five-judge constitution bench in the *Cox and Kings Ltd.* v. *Sap India Pvt. Ltd.* ["**Cox and Kings**"] case,[70] authoritatively confirmed the application of these principles.[71]

- Although the principles of privity of contract and of separate legal personality exist in all of the jurisdictions outlined above, the reception of the *Dow Chemical* decision alters fundamentally. The perceived constraint to the general validity of those legal principles as well as the, partly, blurred lines of the group of companies doctrine are the main reason for the prominent and

67 Exemplary for the Indian approach: "Courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause." *See,* Enercon (India) Ltd. & Ors. v. Enercon GMBH and Anr., (2014) 5 SCC 1 (India), ¶ 88.

68 *See* Charlie Caher, Dharshini Prasad & Shanelle Irani*, The Group of Companies Doctrine – Assessing The Indian Approach*, 10(1) IJAL 33, 40 (2021); *see, also,* Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 431 (India); Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678 (India); Mahanagar Telephone Nigam Ltd v. Canara Bank, AIR 2019 SC 4449 (India).

69 Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42, at ¶¶ 40-41 (India).

70 Cox & Kings Ltd. v. Sap India Pvt. Ltd., (2022) 8 SCC 1, ¶ 104 (India).

71 Cox & Kings Ltd. v. Sap India Pvt. Ltd., Dec. 06, 2023, A.P. (Civ.) No. 38 of 2020 (India); *see infra*, iii.

vocal criticism of the concept.[72] The above also shows that, like no other legal concept in the context of extending the arbitration agreement, the group of companies doctrine demonstrates the stark contrasts between the approaches of different jurisdictions. It furthermore shows that the boundaries do not run along the classical civil law versus common law divide, but that many jurisdictions developed their very own understanding of the group of companies doctrine.

C. Piercing of the Corporate Veil

In general, a widely accepted exception to the principle of privity of contracts is established in case of a commonly so called "piercing (or lifting) of the corporate veil." With regards to the extension of arbitration agreements, the concept is heavily based on considerations of equity and fairness and describes the approach to prevent an abuse of corporate structures.[73] An arbitral tribunal in an ICC arbitration explained the foundations of the concept as follows:

> *"Equity, in common with the principles of international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment*."[74]

Where the principles of separate legal entities are deployed to an extent that reaches the level of fraud or abuse of rights, the existence of separate legal entities may be disregarded in order to legally hold the ultimate owner of a corporation which formally acted instead of the owner accountable. The specific prerequisites differ in different legal systems. Yet, typical characteristics of cases where arbitral tribunals and courts accept an

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72 *See, e.g.*, BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTI-PARTY, MULTI-CONTRACT, MULTI-ISSUE – A COMPARATIVE STUDY 95, ¶ 244 (2d. ed. 2020).

73 BORN, *supra* note 13, at §10.02[D].

74 Westland Helicopters Ltd v. Arab Org. for Indus., *Interim Award*, ICC Case No. 3879, Mar. 5, 1984.

extension on the basis of piercing the corporate veil are that the corporate parents have excessive corporate and financial control over the formally acting entity and make fraudulent use of corporate structures in order to avoid liability, and to disregard interests of the contractual counterparty.[75] With regard to the legal effects of applying the piercing of the corporate veil theory, it is more than ever important to differentiate between the substantive liability and the procedural effect, given that a consent to arbitrate is not even fabricated, but entirely substituted.

- Under English law, piercing the corporate veil is, under exceptional circumstances, deemed to be admissible.[76] However, particularly by referring to the reasoning in *Adams* v. *Cape Industries*,[77] a decision where the deliberate allocation of risks within a group of companies was found to be "*inherent in our [the English] corporate law*," it seems that courts and arbitral tribunals are very reluctant to actually apply the principle in practice.[78]

- Under Swiss law, piercing the corporate veil (*Durchgriff*) is accepted – albeit within narrow limits.[79] However, an application would typically result in a replacement of the signatory company by the corporate parent, rather than in an

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75 BREKOULAKIS, *supra* note 23, at ch. 8, 119, 143; Three variants of the theory of piercing the corporate veil can be differentiated: The alter ego principle, the instrumentality doctrine and the identity doctrine. *See* Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?*, 6(5) J. INT'L. ARB. 647, 655 (2009).

76 Prest v. Petrodel Resources Limited, [2013] UKSC 34; DHN Food Distributors Ltd v. Tower Hamlets London Borough Council, [1976] EWCA 1 WLR 852 (Eng.).

77 Adams v. Cape Indus. Plc., [1990] EWCA Ch 433, 544 (Eng.).

78 Technical know-how buyer P v. Engineer/seller A, Final Award, ICC Case No. 7626, 1995, 22 ICCA Y.B. 132, 141 (1997); Audley William Sheppard, *Chapter 10: Third Party Non-Signatories in English Arbitration Law, in* THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 193 (Stavros L. Brekoulakis, Julian David Mathew Lew & Loukas A. Mistlelis eds., 2016).

79 Bundesgericht [BGer] [Federal Supreme Court] Nov. 24, 2006, 4C_327/2005, at recital 3.2.4 (Switz.).

extension of the contract.[80] In a much-cited ad-hoc arbitration award of 1991, an arbitral tribunal seated in Switzerland actually assumed its jurisdiction over a non-signatory corporate parent by piercing the corporate veil.[81] The tribunal held that this was justified since the actual signatory did not have any assets other than claims against the corporate mother, and any independence in making decisions. Additionally, the tribunal also found an abuse of rights based on the corporate parent's conduct when dissolving the signatory company.

- While German courts, in exceptional cases, use the theory of piercing the corporate veil to justify the substantive liability of a corporate parent,[82] they are reluctant towards an application on extending arbitration agreements.[83]

- By contrast, United States of America ["**US**"] case law shows a greater openness to applying the principles of piercing the corporate veil to extend the personal scope of the arbitration agreement as well as to justify substantial liability – especially where cases of fraud or inequitable conduct are present.[84] The factors and prerequisites of piercing the corporate veil, however, depend strongly on the factual circumstances of each case.[85]

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80 VOSER, *supra* note 24, at 378.

81 Tobias Zuberbühler, *Non-signatories and the Consensus to Arbitrate*, 26(1) ASA BULL. 18, 18-34 (2008).

82 Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 10, 2007, Deutsche Notar-Zeitschrift [DNotZ] 542, 2008 (Ger.).

83 "*Breaking the principle of separation on the substantive level in the case of a liability through piercing the corporate veil does not pass through to the procedural level and thus to the question of the arbitral tribunal's jurisdiction.*" *See below* (D.II.), Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 09, 2023, BeckRS 7724, 2023 (Ger.); *see, also*, Müller/Keilmann, SchiedsVZ, 113, 117 (2007).

84 BORN, *supra* note 13, at § 10.02 [E], fn. 172.

85 An exemplary list is given in Carte Blanche (Singapore) Pte., Ltd v. Diners Club International, Inc., 2 F.3d 24 (2d Cir. 1993); a classification is provided in: FERRARIO, *supra* note 75, at 647, 655 et seqq.

This shows that, with regards to national concepts of piercing the corporate veil, the distinction between substantive liability and a procedural obligation to arbitrate can be of particular relevance.

IV. Reflection in Recent Case Law in Different Jurisdictions

In the this part, six recent supreme court decisions from different jurisdictions have been analysed, which reflect and reiterate the respective approaches taken by these jurisdictions and are exemplary for recent developments. The decisions from Switzerland (A.), Germany (B.), France (C.), and India (D.) deal with the different concepts outlined above, and illustrate the importance of the law applicable to the arbitration agreement, as well as of the forum, for a post-award scrutiny of an arbitration agreement; be it in the context of setting aside proceedings or at the recognition and enforcement stage.

D. Switzerland: High threshold for an extension of arbitration agreement on the basis of interference with the contract

With its decision dated November 13, 2020, the Swiss Federal Supreme Court set aside a partial award through which an arbitral tribunal confirmed jurisdiction over a non-signatory to an arbitration agreement.[86] The decision dealt with the requirements of assuming an implied consent to arbitrate under Swiss law, and ultimately rejected the extension to a non-signatory.

The underlying arbitration clause was contained in a multi-party contract between a supplier and several purchasers about the construction and operation of a privately-owned power plant in Bangladesh. Under an additional contract with the supplier of the power plant, a subcontractor agreed to deliver and install diesel engines for the power plant. Following technical problems with the engines, both the supplier and the subcontractor jointly contacted the purchasers and stated that they both

[86] Bundesgericht [BGer] [Federal Supreme Court] Nov. 13, 2020, 147 ENTSCHEIDUNGEN DES SCCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 107 (Switz.).

"*will guarantee the quality of the engine*."[87] Subsequently, the subcontractor also communicated directly with the purchasers, and was involved in attempts to resolve the technical issues at the power plant. When the purchasers eventually refused to make payments under the main contract, the supplier initiated arbitration proceedings under the ICC Rules. As a response, the purchasers requested to include the subcontractor in the arbitration.

Based on an overall assessment of the subcontractor's interference in the conclusion and the performance of the main contract, the arbitral tribunal decided in a partial award that the subcontractor was bound by the arbitration agreement and, thus, confirmed jurisdiction. The tribunal held that the main parties of the contract could have been of the view that the subcontractor had the intention to accept an extension of the arbitration agreement. Since the subcontractor already took part in the negotiations of the main contract prior to its conclusion and produced one of the technical annexes to that contract, and since the subcontractor was involved significantly in the performance of certain parts of that contract, the tribunal saw sufficient reasons for the main parties to trust in an acceptance of the main contract's arbitration clause. Thus, the arbitral tribunal extended the personal scope of the arbitration agreement on the basis of principles of good faith (*Vertrauensprinzip*). It derived this outcome from the subcontractor's conduct and the reasonable trust which the conduct could create on the main contracting parties' end.

In the following annulment proceedings before the Swiss Federal Supreme Court, the subcontractor challenged the arbitral tribunal's jurisdiction. The Court dismissed the tribunal's interpretation, declined the tribunal's jurisdiction over the subcontractor, and set aside the partial award. By emphasising the principle of privity of contract, the Court stated that an extension of the arbitration agreement to non-signatories, albeit indisputably being possible under Swiss law, should be limited to exceptional cases:

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87 *Id.* at ¶ A.c.

> "*When interpreting an arbitration agreement, its legal nature must be taken into account; in particular, it must be noted that the waiver of a state court severely restricts the means of appeal. According to the case law of the Federal Supreme Court, such an intention to renounce cannot be assumed lightly, which is why a restrictive interpretation is required in case of doubt.*"[88]

In the present scenario, the Swiss Federal Supreme Court did not find compelling reasons for an extension on the basis of the principles of good faith and fair dealing. The subcontractor's interference with the contract and its involvement in the performance was found to be rather typical for a subcontractor. In light of that, the purchasers could not assume that the subcontractor had become a party to the arbitration agreement. Thus, according to the Court's decision, there was no an implied declaration of intent to be bound by the arbitration agreement. Nor was there sufficient reasons for reasonable trust by the contracting parties of the main agreement that the subcontractor could be deemed bound by their arbitration agreement.

With this decision, the Swiss Supreme Court further specified the prerequisites for an extension of the arbitration agreement. It made clear that – and insofar the case differed from the scenario in an earlier decision by the Court[89] – where the contractual role of a third party is clear, like it is in the case with a subcontractor, even a strong interference with the contract does not necessarily result in an extension of the arbitration agreement. Thus, the decision added another important piece to the overall picture of distinguished Swiss case law regarding the extension of arbitration agreements by setting certain limits as regards the interference of third parties with contracts.

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88 *Id.* at ¶ 3.1.2.

89 Bundesgericht [BGer] [Federal Supreme Court] Oct. 16, 2003, 129 147 ENTSCHEIDUNGEN DES SCCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 727, 730 (Switz.).

E. Germany: No application of the group of companies doctrine and no procedural veil-piercing in case of substantive liability

In a recent decision of the German Federal Court of Justice,[90] the Court had to decide, inter alia, on the extension of the arbitration agreement to third parties according to notions of piercing the corporate veil.

In the underlying arbitration, the arbitral tribunal – which was seated in Russia – extended the arbitration agreement to several non-signatories on the side of the respondents. These non-signatories were, *first*, group companies of the holding company which had entered into an arbitration agreement with the claimant and, *second*, former managers of the group of companies. After the tribunal ordered all respondents to, jointly and severally, pay damages in the amount of about €50 million to the claimant, the respondents' application to set aside the award in Russia was unsuccessful.

In the subsequent recognition and enforcement proceedings before German courts, the Koblenz Appeal Court[91] and the German Federal Court of Justice, it was held that German courts are not bound by the decision of the Russian courts in the annulment proceeding. Thus, the Courts denied the recognition of the arbitral award in Germany. Due to the parties' implied choice, the German Federal Court of Justice found that the arbitration agreement was governed by German law. Under German law, however, the tribunal had exceeded the personal scope of the arbitration agreement. Therefore, there was no valid arbitration agreement within the meaning of Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**]". Consequently, the arbitral award could not be recognised and enforced in Germany.

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90 Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 9, 2023, BeckRS 7724 (2023) (Ger.).

91 Oberlandesgericht Koblenz [OLG Koblenz] [Koblenz Appeal Court] Mar. 31, 2022, No. 2 Sch 3/20 (Ger.).

In its decision, the German Federal Court of Justice stressed the paramount significance of the consent to arbitrate as the fundamental basis of arbitration. The Court emphasised that deviations from the general rule that arbitration agreements exclusively bind signatories can only be accepted under exceptional circumstances. Furthermore, the Court – for the first time – held explicitly that the group of companies doctrine is not recognised under German law. And, even where substantive liability of the corporate parent due to piercing the corporate veil might be assumed based on the claimant's submissions, there is no automatic extension of the arbitration agreement on the procedural level. Courts and arbitral tribunals must separate questions of the personal scope of the arbitration agreement from the substantive liability of third parties, which might well differ. The non-signatories' constitutional right to the lawful judge outweighs a claimant's interest in concentrating the enforcement of his claims in one single forum or proceeding. The Court stated that an extension of the arbitration agreement to other group companies might only be possible if there were clear indications for consent to be bound by the arbitration agreement. In the present case, the Court found no such indications for consent of the non-signatories. Therefore, according to the German Federal Court of Justice's decision, the tribunal erred in assuming jurisdiction over all respondents.

With this case, the German Federal Court of Justice got the chance to further clarify its stance concerning the extension of the arbitration agreement under German law. In the decision, the Court referred to the established exemption of the principle of privity of contracts in cases of personally liable partners in general partnerships. However, the Court made it clear that it does not see room to further develop its judicature with respect to piercing the corporate veil on the basis of substantive liability within a group of companies; and, thereby, settled any doubts regarding whether elements of the group of companies doctrine could find application under German law.

F. France: Extension of the arbitration agreement by virtue of an involvement in the performance of a contract

With its decision of September 28, 2022, the French Cour de Cassation confirmed the Paris Court of Appeal's decision in the *Kabab-Ji* case, in which the Paris Court of Appeal had approved the arbitral tribunal's approach to confirm jurisdiction over a non-signatory of the arbitration agreement.[92] The decision gained much attention as it was the final word in the struggle between the English courts and the French courts about the appropriate manner to determine the law applicable to the arbitration agreement, followed by the differing outcomes as regards the personal scope of the arbitration agreement under the (different) rules applied by the courts of each country.[93]

The underlying dispute arose out of a franchise development agreement entered between a Kuwaiti and a Lebanese company in 2001. The contract was governed by English substantive law and contained an arbitration clause providing for arbitration seated in Paris. In 2004, the Kuwaiti franchisee party restructured its group of companies and created a new holding company. The Lebanese contracting partner was informed accordingly and agreed with the restructuring. Subsequently, the new Kuwaiti holding company was strongly involved in the performance of the contract, but never became a signatory to the contract – and to the arbitration agreement contained therein.

When a dispute arose, the Lebanese contracting party-initiated arbitration proceedings (solely) against the new Kuwaiti holding company to obtain damages. The tribunal – by majority decision – ruled in favour of the claimant and found that the new holding company had become a party to the arbitration agreement and became obliged to fulfil the substantive

92 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 28, 2022, No. 21-11.846 (Fr.).

93 *Cf. infra* Kabab-Ji decisions in note 5.

obligations under the contract. As a result, the tribunal awarded damages to the claimant.

Following this arbitral award, the Kuwaiti holding company applied for the annulment of the arbitral award before the French courts. In parallel, the Lebanese claimant filed recognition and enforcement proceedings before the English courts. While the most prominent and most disputed question in those parallel proceedings was the matter of which law to apply to the arbitration agreement, the underlying – and ultimately decisive – question was whether the arbitral tribunal was right in extending the arbitration agreement to the Kuwaiti holding company.

In England, the recognition and enforcement of the award was denied. The London High Court,[94] the Court of Appeal,[95] and, subsequently, the UK Supreme Court,[96] found that English law, being the law governing the substantive contract, was the applicable law to the arbitration agreement. On that basis, the extension of the arbitration agreement was decided by applying English law. The English courts held that the arbitral tribunal did not have jurisdiction to hear the dispute since the contract contained a clause requiring that all amendments to the contract must be in writing. Consequently, the holding company's conduct in performing the contract could not suffice for the holding company to become a party to the contract and to the arbitration agreement.

By contrast, the annulment proceedings in France were unsuccessful. The French courts, following the *Dalico* doctrine,[97] held that the arbitral award had "*no nationality*." In accordance with longstanding French case law, the personal scope of an arbitration agreement depends on whether the parties

94 J (Lebanon) v. K (Kuwait), [2019] EWHC 899 (Eng.).
95 Kabab-Ji SAL v. Kout Food Grp., [2020] EWCA Civ. 6 (Eng.).
96 Kabab-Ji SAL v. Kout Food Grp. (Kuwait), [2021] UKSC 48, 1-2 (Eng.).
97 According to the Dalico doctrine, the validity of an arbitration agreement depends primarily on the parties' common intent, without reference to the law governing the contract or other national law. *See*, Cass, 1e civ., Dec. 20, 1993, Bull. civ. I, No. 1675, 1994 Rev. Arb. 116, 117 (Fr.):

have actually consented to submit their disputes to arbitration (*règle matérielle*). Based on that principle, the French courts confirmed the arbitral tribunal's finding that the Kuwaiti holding company had accepted the arbitration agreement. Thus, the courts confirmed the tribunal's jurisdiction and upheld the award. In their assessment of such consent, the French courts took into account that –

(i) the non-signatory presented itself as the contracting partner towards the Lebanese business partner,

(ii) the non-signatory made payments under the franchise contract, and

(iii) the non-signatory conducted the negotiations regarding the expansion of the contract and its renewal after its expiration.

Thereby, the French courts reiterated that the transfer of substantive rights and obligations is to be assessed independently from the scope of the arbitration agreement, "*as this would otherwise amount to a revision on factual grounds*," which would be "*beyond the purview of the judges in annulment proceedings when reviewing an award.*"[98]

The French *Kabab-Ji* decision, once more, confirmed the French unique approach to determining consent to an arbitration agreement. It showed that especially in cases of group of companies scenarios, the prerequisites for allowing an extension of the arbitration agreement – knowledge of the arbitration agreement and an implicit intention to accept it, often established through a participation in negotiating and performing the contract – might be assumed.

[98] Cour d'appel [CA] [regional court of appeal] Paris, June 23 2020, RG No. 17/22943, ¶ 50 (Fr.).

G. India: Plain enforcement of foreign arbitral awards against non-signatories and fundamental developments in the context of the group of companies doctrine

As outlined above, India has become one of the strongest advocates of the group of companies doctrine in recent years. With the Indian Supreme Court case of *Gemini Bay Transcription Pvt Ltd.* v. *Integrated Sales Service Ltd.* ["**Gemini Bay**"],[99] and the *ONGC*[100] decision, this status was further confirmed. Shortly after the *ONGC* decision, the *Cox and Kings*[101] case called the application of the group of companies doctrine in Indian judicature into question. With its recent authoritative judgement in that case, the five-judge constitutional bench of the Indian Supreme Court confirmed the independent existence of the group of companies doctrine under Indian law and clarified its legal foundations as well as the standards for its application.[102]

i. Gemini Bay: Enforcement of foreign arbitral awards against non-signatories without assessment of the personal scope of the arbitration agreement

With its decision on the recognition and enforcement of a foreign arbitral award dated August 10, 2021, the Indian Supreme Court held that an arbitral award cannot be challenged on the ground that parties to the arbitration were non-signatories to the arbitration agreement.[103] According to the decision, the Indian Arbitration and Conciliation Act, 1996 ["**the Act**"] does not provide for an assessment of the personal scope of the

99 Gemini Bay Transcription Pvt Ltd. v. Integrated Sales Service Ltd., (2022) 1 SCC 753 (India).

100 Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42, at ¶¶ 40-41 (India).

101 Cox & Kings Ltd. v. Sap India Pvt. Ltd., (2022) 8 SCC 1, ¶ 104 (India).

102 Cox & Kings Ltd. v. Sap India Pvt. Ltd., Dec. 6 2023, Arbitration Petition (Civil) No. 38 of 2020 (India).

103 Gemini Bay Transcription Pvt Ltd. v. Integrated Sales Service Ltd., (2022) 1 SCC 753 (India).

arbitration clause in the context of recognition and enforcement proceedings.

In the underlying arbitration seated in Missouri, US, the sole arbitrator extended the personal scope of the arbitration agreement under the laws of the State of Delaware, US, to several non-signatories to the arbitration agreement. These were group companies of the respondent party, which had signed the underlying contract. The extension was based on the principles of piercing the corporate veil due to "*collusion*" and the "*use of the corporate forms of [the non-signatory respondents]*" as "*a façade used to shield or cover-up the unjust result of eliminating [the Claimant]*."[104] Against this background, the arbitral award ordered all respondent parties jointly and severally to make a payment to the claimant.

The non-signatory respondents' objections regarding the jurisdiction of the sole arbitrator during the recognition and enforcement proceedings before the Indian courts remained unsuccessful. The Indian Supreme Court reasoned its judgment, inter alia, with the wording of Section 46 of the Act. The provision regulates the circumstances under which a foreign arbitral award is deemed binding. It states that an award "*shall be treated as binding for all purposes on the persons as between whom it was made*."[105]

The Indian Supreme Court found that this wording can also include non-signatories to an agreement to arbitrate. Given the narrow scope of scrutiny of a foreign award pursuant to Section 48 of the Act, there is no assessment of the personal scope of an arbitration agreement under the laws applicable to the arbitration agreement. On that basis, the Court refrained from interfering with the recognition and enforcement of the award. Even if the law applicable to the arbitration agreement would not allow the extension of the arbitration agreement to non-signatories, this could not be a ground to refuse its recognition and enforcement in India.

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104 *Id.*, at ¶ 13.

105 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 46 (India).

With the *Gemini Bay* decision, the Indian Supreme Court took a stance on the scope of review of Indian courts with regard to foreign arbitral awards. Since the Court stated that the personal scope of the arbitration agreement is not to be reviewed in the recognition and enforcement stage, non-signatory parties cannot argue against the validity of the arbitration agreement on grounds of an illegitimate extension of such an agreement. Notably, this – now established – approach under Indian law differs from how other jurisdictions understand Article V(1)(a) of the New York Convention. The decision of the German Federal Court of Justice outlined above,[106] as well as the UK Supreme Court's *Dallah*[107] decision, are exemplary for the approach to review of the personal scope of the arbitration agreement in the recognition and enforcement stage. In instances where this question is controversial, but the award was not set aside at the seat of the arbitration, the *Gemini Bay* decision could open attractive enforcement options in India for award holders.

ii. ONGC: Arbitral tribunals must consider the group of companies

With its *ONGC* decision of April 27, 2022, the Indian Supreme Court – once again – reiterated the significance of the group of companies doctrine for the interpretation of arbitration agreements under Indian arbitration laws.[108] The Court decided to set aside an interim award on the ground that the arbitral tribunal did not appropriately consider the group of companies doctrine when determining the personal scope of the arbitration agreement.[109]

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106 Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 03, 2023, BeckRS 2023, 7724.

107 Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 (Eng.).

108 Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42, at ¶¶ 40-41 (India).

109 "The legal foundation of the group of companies doctrine has not been evaluated, on facts or law. […] For all the above reasons we have come to the conclusion that there was a fundamental failure of the first Arbitral Tribunal to address the plea raised by ONGC for attracting the group of companies doctrine." *Id.* at ¶¶ 49-50.

In the underlying arbitration proceedings, the arbitral tribunal had rendered an interim award, stating that it lacked jurisdiction with regards to a non-signatory which was a group company of the respondent in the arbitration and which the claimant considered to form "*a single economic entity*" with the respondent. This interim arbitral award was challenged before the Indian state courts and, ultimately, the Indian Supreme Court rendered a decision on the question of the personal scope of the arbitration clause.

In its decision, the Indian Supreme Court referred to earlier case law which established the group of companies doctrine in Indian arbitration law,[110] and once more, reiterated that the group of companies doctrine is to be considered when determining whether a non-signatory is bound by an arbitration agreement. The Court specified which factors are to be taken into account when deciding about the extension of agreement to arbitrate by reference to the group of companies doctrine. On the basis that a group of companies exists, and that the entities involved indicated an intention that the non-signatory might be bound, the following factors must be considered:

- The mutual intent of the parties,
- The relationship of a non-signatory to a party which is a signatory to the agreement;
- The commonality of the subject matter;
- The composite nature of the transaction; and
- The performance of the contract.

Since the interim arbitral award regarding the arbitral tribunal's jurisdiction over the non-signatory had failed to appropriately consider these factors – and to allow evidence related to the existence of an "*economic unity*" – the

[110] Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641, ¶ 103.1 (India).

Indian Supreme Court set aside the interim award and left the decision to be determined by a newly constituted arbitral tribunal.

The decision demonstrated, once more, the extraordinary standing which the group of companies enjoys in India and adds up to the great wealth of Indian case law by further concretising the requirements to assume jurisdiction over non-signatories within a group of companies. It also emphasised that arbitral tribunals are obliged to take factual evidence in order to determine an extension of the arbitration agreement.

iii. Cox and Kings: Revisiting the application of the group of companies doctrine in Indian jurisprudence

With the *Cox and Kings* decision of December 6, 2023, following a referral to the five-judge constitutional bench, the Indian Supreme Court added another prominent chapter to the development and specification of the Indian approach of the group of companies doctrine.[111]

In the underlying arbitration, the claimant, Cox & Kings Ltd. ["**Cox & Kings**"], initiated arbitration proceedings against its contracting partner, SAP India Pvt. Ltd. ["**SAP India**"], as well as against the mother company, SAP SE ["**SAP**"], which was not a signatory to the contract. Following difficulties with the performance of the envisaged project by SAP India, SAP had taken over the performance of the contract and, based on that, Cox & Kings considered SAP to be bound by the arbitration clause.

In the arbitration, SAP did not nominate an arbitrator. Thus, Cox & Kings applied to the Indian courts to appoint an arbitrator. Cox & Kings argued that SAP had to be included under the arbitration agreement in accordance with the Indian jurisprudence on the group of companies doctrine. In this respect, Cox & Kings especially referred to the fact that SAP was heavily

[111] Cox & Kings Ltd. v. SAP India Pvt. Ltd., Dec. 6 2023, Arbitration Petition (Civil) No. 38 of 2020 (India).

involved in the implementation and performance of the contract and that SAP India is a wholly owned subsidiary of SAP.

As a response to that request, first, a three-judge bench of the Indian Supreme Court examined the group of companies doctrine as applied in Indian case law.[112] The Court noted in a first decision of May 6, 2022 that "*ever since this doctrine was expounded in the Chloro Control case, it has been utilised in a varied manner.*"[113] The Court furthermore analysed that the Chloro Control case *"has created certain broad-based understanding of this doctrine which may not be suitable and would clearly go against distinct legal identities of companies and party autonomy itself.*"[114] The decision especially criticized earlier case law with respect to its strong emphasis on the establishment of an "*economic entity*"[115] and considerations of "*equity*."[116] It therefore questioned the prevailing Indian approach in light of the legal doctrine of party autonomy: "*The aforesaid exposition in the above case clearly indicates an understanding of the doctrine which cannot be sustainable in a jurisdiction which respects party autonomy*."[117]

Given that "*the questions raised herein are fundamental to the arbitration practice in India and have large scale repercussions,*"[118] the three-judge bench referred these

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112 Cox & Kings Ltd. v. Sap India Pvt. Ltd., (2022) 8 SCC 1 (India).

113 *Id.* at ¶ 14.

114 *Id.* at ¶ 42.

115 "The law laid down in Chloro Control (supra) and the cases following it, appear to have been based, more on economics and convenience rather than law. This may not be a correct approach. The Bench doubts the correctness of the law laid down in Chloro Control (supra) and cases following it." *See*, Cox & Kings Ltd. V. Sap India Pvt. Ltd., Ramana C.J., (2022) 8 SCC 1, ¶ 51); also referring to the English Court of Appeal judgment where, Goff L.J., famously stated: "Counsel suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged." *See*, Bank of Tokyo Ltd v. Karoon [1987] AC 45 (Eng.).

116 "This may also address the legitimate critique of Chloro Controls and Cheran Properties, that despite placing an emphasis on legal standards of intent, the Court eventually resorted to principles of equity and commercial/economic expediency to apply the Group of Companies Doctrine in those cases." *Id.*, Kant J., at ¶ 103.

117 *Id.*, Ramana C.J., at ¶ 42.

118 *Id.*, Ramana C.J., at ¶ 52.

fundamental questions regarding the application of the group of companies doctrine to a decision by a larger bench of the Indian Supreme Court.

In particular, it asked whether the group of companies doctrine as expounded by the *Chloro Control* case and subsequent judgments is valid under Indian law and should be construed as a means of interpreting implied consent to arbitrate to a decision by a larger bench. This referral of 6 May, 2022 could be understood as a response to the critics of the recent amplification of the scope of application of the doctrine in Indian case law.

On December 6, 2023, a five-judge constitutional bench of the Indian Supreme Court rendered it's the Court's final decision ion the *Cox and Kings* case. The Court confirmed the firm establishment of the (independent) group of companies doctrine in Indian case law and thereby, eventually, rejected the critics of the Indian approach to the group of companies doctrine.

The final decision stressed the outstanding significance of the arbitration agreement being the foundation of the arbitral tribunal's jurisdiction and the "*cornerstone of arbitration*".[119] Yet, it also confirmed the group of companies doctrine as "*a means of identifying the common intention of the parties to bind a non-signatory to [an] arbitration agreement by emphasizing and analysing the corporate affiliation of the distinct legal entities.*"[120] In order to determine whether such common intention exists, the Court referred to the *ONGC* decision and confirmed the applicability of the standards set therein.[121] The Court further set forth, that such an assessment must be "*fact-specific"* in order to take into account the "*complexity of commercial projects*".[122]

Finally, the Court found that the extension of arbitration agreements through the group of companies doctrine is not to be based on the phrase

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[119] Cox & Kings Ltd. v. SAP India Pvt. Ltd., Dec. 6 2023, Arbitration Petition (Civil) No. 38 of 2020 (India), at ¶ 60.

[120] *Id.* at ¶ 98.

[121] *Id.* at ¶ 128.

[122] *Id.*

"*any person claiming through or under [the arbitration agreement]*" from the Act,[123] as set with the *Chloro Controls* decision.[124] Rather, the respective group company is to be understood as a "*party*" within the definition of Sec. 2(1)(h) in conjunction with Sec. 7 of the Act.[125]

The Court thereby answered the very fundamental questions regarding an application of the group of companies doctrine under Indian law, which were raised by the referral of May 6, 2022, and which, in an extreme case, could have resulted in the end of the application of the doctrine in India. Now, the tendency that Indian courts rely like few other jurisdictions on the group of companies doctrine and contribute decisively to its ongoing development on an international level will likely continue.

V. Conclusion

A comparison between these decisions illustrates that any hopes for an internationally more aligned and uniform dealing with extending arbitration agreements to non-signatories,[126] are not merited.

- The Swiss Federal Supreme Court holds on to its well-known preferred approach to analyse a third party's overall conduct in order to derive an implied consent with the arbitral agreement, and now, added another layer to this test. Even if the prerequisites for an extension were not fulfilled in the decision outlined above, since the subcontractor did what a subcontractor does, parties clearly have the opportunity to apply for an extension of the arbitration agreement if they see

123 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, §§ 8, 45 (India).

124 *Cf. supra,* note 66.

125 Cox & Kings Ltd. v. SAP India Pvt. Ltd., Dec. 6 2023, Arbitration Petition (Civil) No. 38 of 2020 (India), at ¶ 153.

126 M.P. Bharucha, Sneha Jaisingh & Shreya Singh, *The Extension of Arbitration Agreements to Non-Signatories – A Global Perspective*, 5(1) IND. J. ARB. L. 35, 62 (2017).

a chance to establish indications for an implied consent which through the non-signatory's conduct.

- The German courts, by contrast, reiterated their distinctly greater reluctance to extending the arbitration agreement to third parties – even if these form part of a group of companies and were deeply involved in the performance of the obligations to the counterparty. And even where a substantial liability of a group company might be established on the basis of piercing the corporate veil. In this respect, the German Federal Court of Justice remains reluctant to extensions of the arbitration agreement and holds up a strict application of the principles of privity of contract.

- In France, (arbitration) traditions are equally valued – albeit in a very different manner than in Germany. "*Without any reference to any national law*,"[127] the will of the parties is deemed to be at the centre when assessing the scope of the arbitration agreement. Thus, without an explicit reference to *Dow Chemical*, the French courts in *Kabab-Ji* made clear that an extension of an arbitral agreement to a group company is always possible if the circumstances call for it – and that a formality like a no-oral-modification clause should not hinder an arbitral tribunal to be ambitious when deciding on the issue under French law.

- Indian arbitration law takes the same line – and even takes the group of companies doctrine further by developing its own understanding and concept of it. Coupled with the position not to review foreign awards with respect to the personal scope of the arbitration agreement, India can be seen as a vanguard of a

[127] Cour d'appel [CA] [regional court of appeal] Paris, June 23 2020, RG No. 17/22943 (Fr.) at ¶ 50 (Quote from *Kabab-Ji* arbitral award).

liberal dealing with extending the personal scope of arbitration agreements.

If these decisions have one thing in common, it is the finding that the issue of extending arbitration agreements to non-signatories is far from finally settled – not within each jurisdiction and less across different jurisdictions. Paired with the different approaches to determine the applicable law to the arbitration agreement and the different levels of judicial review courts undertake in the post-award stage, the interplay between different jurisdictions and different legal concepts can be highly complex. An overall picture of these questions should, therefore, not only be considered at the beginning of an arbitration, but also when drafting arbitration agreements and in the enforcement stage. Regarding the overall development of the established concepts, it is particularly to be seen whether the now further clarified approach of the Indian Courts will find followers in other jurisdictions.

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