Title: Extending Arbitration Agreements to Non-Signatories: A Defence of the Group of Companies Doctrine

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Extending Arbitration Agreements to Non-Signatories: A Defence of the Group of Companies Doctrine

Adyasha Samal

Consent is the cornerstone of international arbitration. Since arbitration entails a waiver of the right to seek recourse from courts, the concept rests fundamentally on consent and operates on the principle of party autonomy. The intention of the parties to arbitrate manifests in the form of an arbitration agreement. However, on occasion, the scope of an arbitration agreement is extended to non-signatories when it is difficult or ineffective to resolve the dispute without the particular party being part of the proceedings. In this context, a mechanism often relied upon is the Group of Companies Doctrine ("the Doctrine"), which prescribes a threefold test to determine whether the non-signatory is bound by the arbitration agreement. Tribunals check for the existence of a tight group structure, involvement of the third party in the conclusion of the contract, and common intention of all parties to bind the third party to the arbitration agreement. The article constructs a defence of the doctrine by addressing claims against its validity. It attempts to prove that consent can be manifested through written agreement as well as through the behaviour of parties. It is this behaviour that the doctrine inquires into, thus upholding arbitration's core tenet of consent.

Introduction

Arbitration is a private, consensual form of dispute resolution where disputes are submitted on the basis of an agreement between the parties, wherein they covenant to waive their right to invoke the jurisdiction of otherwise competent courts. The jurisdiction of the arbitral tribunal adjudicating the dispute arises from what is commonly known as the arbitration agreement. This agreement contains the expression of the parties' intention to arbitrate, usually sealed with a signature. However, arbitrators at times find themselves in complicated circumstances where parties who have not signed the arbitration agreement either seek to be bound by the same or are impleaded by the signatories. Such circumstances place the

arbitrator in an uncomfortable situation where including a non-signatory party in the arbitration might jeopardise the process of enforcement of the award. This may be due to challenge in the country where enforcement is sought, as was seen in the case of *Dallah Real Estate v Government of Pakistan*.[1] Alternatively, not including the non-signatory might render the award practically ineffective.

To resolve this dilemma, tribunals rely upon non-consensual theories as well as consensual theories. Consensual theories attempt to infer consent from the behaviour of parties where it is not self-evident from an agreement. They include theories of estoppel, agency, and implied consent, as well as the Group of Companies Doctrine ("the Doctrine"). Estoppel is applied to bar or 'estop' a party from avoiding arbitration on the grounds of not having agreed to arbitrate when the dispute essentially arises out of a contract requiring arbitration, to which it is party. Agency, which is an extension of the contract law principle, binds a principal when the arbitration agreement is signed by the former's agent acting on its behalf. Implied consent is inferred on the part of a non-signatory that they should reasonably expect to be bound by or benefit from an arbitration agreement signed by another party. Here, the parties need not form part of a corporate group. In contrast, the doctrine is applied on those entities which seemingly operate within a corporate group. It specifically assesses the nature of the relationship between parties, looks into the intention of the parties at the time of conclusion of the contract, and examines the non-signatory's role and participation in its execution to conclude whether the parties constitute a single economic reality.

Non-consensual theories involve a non-signatory party in the arbitration despite there being a clear lack of intention to arbitrate. Third-party beneficiary doctrine and veil-piercing doctrine are examples of such theories.[2] In the third party beneficiary doctrine, the party which has received direct benefits from the contract subject to arbitration is bound to arbitrate the dispute. The corporate veil is a metaphor for the independent legal personality of a corporation. It is considered to be 'pierced' when wrongful activities undertaken by the shareholders of a company in the name of the company prompt the court or tribunal to extend liability to those shareholders, making them financially accountable.[3] This doctrine has continuously evolved over the years. In the recent case of *Prest v Petrodel*,[4] it was held that the corporate veil can only

[1] *Dallah Real Estate & Tourism Hldg Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

[2] William H. Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in Doak Bishop (ed), *Multiple Party Actions in International Arbitration* (OUP 2009) 4.

[3] *Adams v Cape Industries* [1990] Ch 433.

[4] [2013] UKSC 34.

be pierced when a person evades or frustrates an existing legal restriction, obligation, or liability by deliberately interposing a company under their control.

This article focuses on the Group of Companies Doctrine, which has been criticised by multiple commentators who claim that its application undermines the intent of the parties and, thus, impedes arbitral autonomy.[5] It undertakes a detailed analysis of the Doctrine in order to argue that the same is compatible with the fundamental principles of arbitration. Section 1 of the article discusses specific case law in which the Doctrine was formulated, assesses the threefold test that it prescribes, and analyses the manner of its application on parties which are state entities. Section 2 evaluates the reception of the Doctrine by countries around the world, focusing on the approaches adopted by various common law and civil law jurisdictions. Section 3 explores the challenges related to enforcement of arbitral awards delivered after applying the Doctrine to join a non-signatory to arbitration, with specific reference to *Dallah v Pakistan*.[6] Section 4 presents a defense of the Doctrine, arguing that through its multifaceted inquiry into the circumstances under which the arbitration agreement was signed, the Doctrine embraces arbitral consent and autonomy.

1. An Assessment of the Group of Companies Doctrine

1A: Origin

The origin of the Doctrine can be traced to the French interim award of *Dow Chemical v Isover Saint Gobain* (*Dow Chemical*),[7] where the Claimant's parent company and another subsidiary were allowed to join the arbitration after assessing the agreement on the basis of a three-factor test. At that time, the Doctrine was unheard of and, therefore, a novelty in contract law.[8] Presently, *Dow Chemical*[9] forms the primary authority on the application of the Doctrine.

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[5] Otto Sandrock, 'The Extension of Arbitration Agreements to Non-Signatories: An Enigma Still Unresolved' in Theodor Baums, Klaus J. Hopt, Norbert Horn (eds), *Corporations, Capital Markets and Business in the Law, Liber amicorum Richard M. Buxbaum* (Kluwer Law International 2000); Bernard Hanotiau, 'Consent to Arbitration: Do We Share A Common Vision?' (2011) 27 Arb Int'l 539, 545.; Pietro Ferrario, 'The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?' (2009) 26 J. Int'l Arb. 647.

[6] *Dallah* (n 1).

[7] *Dow Chemical France & Ors v Isover Saint Gobain*, ICC Case No. 4131, Interim Award of 23 September 1982.

[8] Alexandre Meyniel, 'That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine' (2013) 3(1) The Arbitration Brief 18, 27.

[9] *Dow Chemical* (n 7).

In this case, two subsidiaries of the Dow Chemical Group, an American corporation, had entered into multiple contracts with Isover for the distribution of thermal insulation products. These contracts contained an arbitration clause. When disputes arose, the parent (Dow US) and another subsidiary (Dow France) sought to join the signatories Dow AG and Dow Europe in commencing arbitration against Isover. Isover resisted the joinder on the grounds that Dow US and Dow France were not signatories to the agreement. The International Chamber of Commerce's ("ICC") tribunal rejected Isover's contention and allowed the joinder as it found the Dow subsidiaries and the parent, despite possessing distinct legal entities, together constituted 'one and the same economic reality.'[10] The case has been criticised for permitting joinder simply on the basis of the existing parent-subsidiary relationship between the parties.[11] The decision is seen as problematic because it risks making parent companies susceptible to joinder in arbitration proceedings arising from commercial contracts concluded by their subsidiaries.

The following section evaluates the threefold test laid down by *Dow Chemical* which tribunals now utilise as the set of requirements to be fulfilled for permitting a joinder of the third party to an arbitration agreement. The section will argue that in reaching its conclusion, the tribunal in *Dow Chemical* decided, on the 'common intention of all parties at the time of conclusion of the contract' to bind the third parties to the arbitration agreement.[12]

1B: Requirements of the Doctrine

To successfully apply the Doctrine both objective and subjective elements must be considered.[13] The objective part inquires into the nature of the relationship between the parties, while the subjective criterion looks for implied acquiescence of the non-signatory to the contracts entered by the signatory.[14] This acquiescence is evidenced by the non-signatory's participation in the contract.

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[10] ibid.

[11] Ferrario (n 5).

[12] Bernard Hanotiau, 'Groups of Companies in International Arbitration' in Mistelis-Lew (ed), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006).

[13] Irmgard Anna Rodler, 'When are Non-Signatories Bound by the Arbitration Agreement in International Commercial Arbitration?' (LLM thesis, University of Chile and University of Heidelberg 2012) 42.

[14] ibid.

Dow Chemical[15] has laid down three conditions for a successful application. Firstly, the existence of a group of companies that, despite being distinct legal entities, must display a tight group structure.[16] Secondly, an active role must be played by the non-signatory in the conclusion, performance, and termination of the contract containing the arbitration clause.[17] Thirdly, a mutual intention of the parties must be there for the group to be considered a 'unity bound by the arbitration agreement.'[18] The following sub-sections discuss these conditions in turn.

Tight Group Structure

Carrying out business through subsidiaries created for executing specific projects is a widespread commercial practice and is therefore not tantamount to arbitral consent.[19] However, at times, parent and subsidiary companies act as part of one larger business entity that operates through coordinated actions and exercise of complete control by the parent.[20] The first condition of *Dow Chemical*[21] addresses the latter situation. The mere existence of a group of companies is not enough; the group structure has to be sufficiently tight wherein one group member has to exercise significant control over the other group member(s).[22] The law does recognise that companies prefer to structure themselves in such a way as to avoid risk. What the arbitrators particularly look for under this Doctrine are strong financial and organisational links between the companies,[23] and a unity of financial orientation derived from a common power.[24]

Corporate groups with a delineated hierarchical structure, wherein the entities at higher echelons of power dictate to those operating below, are more susceptible to extension of the arbitration agreement to non-signatories. This exercise of control is determined through fact patterns, such as commonly owned intellectual property, financing of one company by the other, common managerial personnel, sharing of assets, offices and even premises, among others.[25] In *ICC Case No 2375* concerning joinder of two companies, the first company had reserved the right to appoint a number of directors and vice presidents to manage the second

[15] *Dow Chemical* (n 7).

[16] Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, OUP 2010) [5.15].

[17] *Sponsor AB v Lestrade* Pau, 26 November 1986 [1988] Rev arb 153.

[18] *Dow Chemical* (n 7) [136].

[19] Brekoulakis (n 16) [12.42].

[20] Philip Blumberg, 'Limited Liability and Corporate Groups' (1925) 11 J. Corp. L. 573, 623.

[21] ibid.

[22] ICC Case No 5894, 27; ICC Case No 8385, 484-485.

[23] ICC Case No. 5894, 27.

[24] Mauro Rubino-Sammartano, *International Arbitration: Law and Practice* (3rd edn, Juris Net 2014) 371.

[25] Brekoulakis (n 16) [5.19].

company.[26] The tribunal found this to be an example of the control exercised in a tight group structure, as persons holding the top managerial positions of a company effectively control all of its significant business and legal decisions.

One significant issue that has arisen is whether the tight group structure can be found only among companies or whether other kinds of legal persons can be considered in this context as well. It has been found that this Doctrine has also been pleaded by natural persons. The tribunal in *ICC Case No 9571* did not permit the application of an individual who owned shares in multiple companies that were claimants and sought to join them in arbitration.[27] In contrast, the German Federal Supreme Court in a 2014 decision allowed a non-signatory patent holder to join its licensee company in arbitration proceedings against the respondents.[28] Some scholars agree with such an application on individuals.[29] While this does not *prima facie* appear to interfere with the element of consent, it broadens the scope of the Doctrine and thereby undermines its essence, which is grounded in close corporate links. It is necessary to limit application to entities sharing a corporate relationship.

In *ICC Case No 10818*, the tribunal allowed proceedings against a non-signatory company that had participated in the disputed contract.[30] This company was only bound to the respondent company by a contractual agreement, and the two had no corporate links. The absence of a 'tight group structure' was disregarded. This is a case of overreach by the tribunal, as companies linked by a contract alone cannot share the tight corporate links that entities sharing control and ownership can. A more fitting application of the Doctrine was in *ICC Case No 13774,* where the tribunal refused joinder pleaded on the sole grounds of contractual relationship.[31] Alexander Meyniel and Stavros Brekoulaski hold that actual corporate links between companies must exist.[32]

It is necessary to note that the very essence of this Doctrine is to join non-signatories who form part of a 'group of companies.' The economic relationship between a set of companies in a corporate group showing deep links between their decision-making authorities is not at par with an individual holding a certain interest in a company, or even two companies bound in

[26] ICC Case No. 2375 of 1975.

[27] ICC Case No 9571 of 2000.

[28] *Bundesgerichtshof* [BGH] [Federal Court of Justice] Case No. III ZR 371/12 (May 8, 2014) (Ger.).

[29] Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (Kluwer Law International 2006) 49.

[30] ICC Case No 10818 of 2001.

[31] ICC Case No 13774 of 2006.

[32] Brekoulakis (n 16) [6.04]; Meyniel (n 8) 31.

contract. The decision-making authority and control giving rise to a 'tight group structure' present in case of a corporate group is absent in a contractual relationship and a shareholder relationship. Moreover, joining an individual shareholder in arbitration with a company threatens to interfere with the principle of limited liability. It is for these reasons that the application of the Doctrine should be restricted to corporate groups.

Participation in the Contract

The second test laid down by *Dow Chemical*[33] sets the threshold higher than the mere objective existence of a tight group structure. It requires the cumulative participation of the non-signatory in all three stages of the contract: conclusion, performance, and termination.[34] The logical premise of this condition is that it is both unreasonable and highly unlikely for a party to play an active role in all of these stages when it has no intention to be bound by or benefit from the contract.

Participation of the non-signatory in the contract is determined from the manner of the non-signatory's conduct.[35] This conduct includes various kinds of actions, such as intentional causing of confusion by using common letterheads,[36] or leaving an impression of interchangeability of parties for the purpose of fulfilment of obligations, as was the case in *Dow Chemical.*[37] Importantly, participation is deduced from a set of facts which together give rise to the assumption of coordinated action.

One form of conduct indicating involvement of the non-signatory is the active use of intellectual property of the non-signatory by the signatory. This is pursued in the course of execution of the contract from which the dispute has arisen. This is different from joint ownership of intellectual property and refers specifically to usage. The best example of such usage is *Dow Chemical*[38] itself, where the trademark 'Dow Chemical' was owned by the American parent but used by the signatory subsidiaries without any proof on a licensing agreement between the former and the latter. Trademarks are used by proprietors in the course of trade to indicate the source of a product or service and are not shared without proper licensing agreements in place.[39] A

[33] *Dow Chemical* (n 7).

[34] Meyniel (n 8) 27.

[35] ICC Case No 10758.

[36] Brekoulakis (n 16) [5.53].

[37] ibid.

[38] *Dow Chemical* (n 7).

[39] *Eva's Bridal Ltd v Halanick Enterprises Inc* 639 F3d 788 (7th Circ 2011) 789.

company's intellectual property portfolio is crucial to its business as it seeks to create a permanent connection between its market offerings and its intellectual property in the mind of the public. It is therefore reasonable to conclude that when a company allows its intellectual property to be used by another company, their actions are coordinated.

The existence of a contract that is 'intrinsically intertwined' with the contract under which the dispute has arisen, or evidence of the non-signatory's clear interest in the outcome of the dispute, furthers tilts the scales in favour of a joinder.[40] In *Sponsor AB v Lestrade*, the parent company Sponsor AB started negotiations with Lestrade and signed a protocol for acquisition of several companies.[41] Consequently, a subsidiary Sponsor SA was set up for the purpose and signed an agreement containing an arbitration clause with Lestrade. Later, when Lestrade sought arbitration against both Sponsor companies for non-performance of the second contract, Sponsor AB resisted. The Pau Court of Appeals allowed a joinder, observing that Sponsor AB had been the soul, inspiration, and mastermind behind the contract, having played a role in both conclusion and non-performance.[42] While this approach is reasonable, Hanotiau insists that there is inconsistency in extending arbitration to subsidiaries created for a specific purpose.[43] He points out that in *ICC Case No 4402*, faced with a similar set of facts, the tribunal applied Swiss law and refused to allow the non-signatory to join arbitration.[44]

The application of the Doctrine must be based on a thorough analysis of the set of facts presented by each individual case. Creation of a subsidiary for the sole purpose of carrying out a project is only amenable to joinder when combined with a clear indication of intent by the parent to be the real partner in the contract. Tribunals and courts must assess whether the non-signatory's participation in the contract is complete to a degree where it leaves no shadow of doubt as to its liability.

Mutual Intent

The last test requires that there must be clear intention of all parties - the signatories as well as the non-signatory - indicating that the latter is bound by the arbitration agreement, at the time of conclusion of the contract. The Paris Court of Appeal in *Dow Chemical*[45] had made it clear that

[40] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 87.

[41] *Sponsor* (n 17).

[42] ibid.

[43] Hanotiau (n 29) 56.

[44] ICC case No 4402 of 1983, discussed in Hanotiau (n 29) 56.

[45] *Dow Chemical* (n 7).

the basis for their decision was the common intention of all parties involved and future decisions of French courts have endorsed this view in their application of the Doctrine. The award of *ICC Case No 11405* held that it is not so much the existence of a group that results in various companies within it being bound by an agreement signed by one of them, but rather the fact that it was the true intention of the parties.[46]

It must be noted that a distinction is often drawn by arbitrators between those who might be called 'consenting non-signatories' (which seek to arbitrate) and 'resisting non-signatories' (which resist arbitration).[47] When a non-signatory voluntarily seeks to arbitrate against a signatory, the threshold for extending the arbitration clause may be set lower than when arbitration is imposed on a party that does not intend to participate in arbitration. This is material, as resorting to arbitration entails a surrender of the right to judicial remedy on that of the dispute, except in the case of alleged violation of the arbitration agreement.[48] Can a party be compelled to waive the right to approach the courts without its written expression of will to do so? This enjoins upon the tribunal a duty to conduct a more thorough inquiry into the non-signatory's intent at the conclusion of the contract. This does not imply that a consenting non-signatory shall always succeed in securing a joinder, since the resisting signatory might still argue that it refused to arbitrate 'with the non-signatory.' It only means that the standard of scrutiny and evidence required in such a case is somewhat relaxed. This is because the resisting signatory did in fact agree to 'resolve disputes arising from the contract through arbitration,' which a resisting non-signatory would not have. William Park notes that consenting non-signatories have been allowed to join proceedings arising out of broadly drafted arbitration clauses in order to avoid duplication of proceedings.[49]

While arbitral consent is usually proven through written instruments complete with a signature, in practice, other forms of written exchanges, such as letters, emails, invoices and other less formal documents have also been accepted as demonstrative of consent.[50] According to Meyniel, it is insufficient to determine consent solely on the basis of what the written agreement contains, as writing only constitutes a formal presumption of consent.[51] Similarly, refusal to join arbitral proceedings is not evidential of consent at the time of conclusion of the

[46] ICC award case No. 11405 of 2001, (Interim award, 29 November 2001) discussed in Hanotiau (n 29) 158-161.

[47] Park (n 2) 21.

[48] ibid.

[49] ibid, 23.

[50] Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 69.

[51] Meyniel (n 8) 22.

arbitration agreement. An inquiry into the actual intent of the parties involved therefore presupposes that consent to arbitration need not necessarily be written. Meyniel notes that the court or tribunal's task is to find the true intent of the parties, implied or express, and determine whether the parties did consent, in any form, to arbitration.[52] The three-pronged test developed strengthens and reinforces the mutual intent of all parties as to who formed the real parties to the agreement at the time of entering into it. These real parties are disallowed to renege on their promise merely because this intention was not expressed in a written agreement.

A pertinent question which arises in the context of international arbitration is whether the Doctrine can be applied to a State entity and its parent State, acting together as a single economic reality. The following sub-section discusses instances when the Doctrine has been applied.

1C: Application of the Doctrine on State Entities

Due to the increasing role of foreign direct investment in the global economy, rising investor-state arbitrations have led to wider application of the Doctrine to seek extension of arbitration agreements to State entities as well.[53] One of the reasons parties choose to arbitrate international disputes is to ensure that States and State entities can be required to participate in, and be bound by the results of such processes.[54] As States are important actors in international commercial transactions, their participation in the dispute resolution process, when necessary, facilitates smoother resolution of the disputes. An investor is more likely to conduct business with a State entity if they know that should disputes arise, the State can be held liable for corporations acting as its agents.

In order to understand joinder of state-owned companies, we must first ascertain what entities come within the bracket of 'state entities.' ICC awards have recognised what is known as the 'instrumentality concept', which refers to an entity (1) possessing a distinct legal personality; (2) created by a state for a specific purpose and; (3) controlled by the State itself.[55] The government exercises the powers over the entity to such a degree that it must be seen as an instrumentality of the State.[56] In *Defense Ministry of State X v European Company,* the tribunal stated that:

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[52] ibid.

[53] Born (n 50) 411.

[54] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 1482.

[55] Eduardo Romero, 'Are States Liable for the Conduct of Their Instrumentalities?' (2008) 4 IAI Series Int'l Arb 36.

[56] *Defense Ministry of State X v European Company*, ICC Case No. 9762 (Interim Award, 15 August 1991).

> [The State entity] by its purpose and through its operations almost totally served as a vehicle to meet the needs and requirements of X Government, in particular its military forces… [The State entity] was almost completely controlled by and dependent on the X Government's decisions, and the Government exercised its powers to such a degree that [the State entity] must be seen as an instrumentality of, or agent for, the X Government.[57]

The Doctrine has been applied by arbitral tribunals in a number of cases to hold the State liable for actions of its instrumentalities.[58] In *Compañía and Compagnie Generale v Argentine Republic* a Concession contract was entered into by a French company and its Argentinian Province affiliate.[59] The tribunal impleaded the Republic of Argentina too, holding that the actions of States' political subdivisions are attributable to the central government. This shows that similar to a parent company which controls and directs its subsidiary, a State that drives the actions of its entity can be joined as a party to arbitration.

Perhaps the most controversial case involving a State as an additional party to arbitration is that of *Dallah Real Estate v Govt. of Pakistan*.[60] In this case, after a tribunal extended the arbitration agreement to join the Government of Pakistan to the arbitration proceedings, independent appeals against the enforcement of the award were filed in England and France. The award was examined in light of the relevant principles of the applicable French law by the courts of England as well as France. Despite the symmetry, the French court ordered enforcement of the award, whereas the English court refused it. This can be attributed to the different stances that the countries maintain on joinder of non-signatories. The case has been discussed in detail in Section 4. However, to better appreciate the reasoning behind such stark difference in judgment one must consider the positions adopted by these two jurisdictions, as well as that of other civil law and common law countries on the Doctrine.

2. Growing International Acceptance of the Doctrine

Ever since its proposition in *Dow Chemical,* France has led the way on the application of the

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[57] ibid [29].

[58] ICC Case No 9762 of 2001.

[59] *Compañía de Aguas del Aconquija SA and Compagnie Generale des Eaux v Argentine Republic* ICSID ARB/97/3 (2000).

[60] *Dallah* (n 1).

Doctrine.[61] The Court of Appeals of Pau in *Sponsor A B v Lestrade* went as far as declaring the Doctrine a legal rule.[62] In *Kis France v Societe Generale,* the Paris Court of Appeal allowed the extension of arbitration clause to the subsidiaries of the party.[63] The court observed that Kis France had signed the contract declaring initially that it was doing so on behalf of its subsidiaries, Kis Photo and Kis Corporation. Thus, there existed a common intention among all parties that all three Kis companies are party to the contract.[64] French tribunals and courts have thus shown a proactive approach in recognising and applying the Doctrine in the most intricate factual matrices. This can be attributed to France's liberal approach to contractual consent, which allows for inference of consent from the behaviour of non-signatories. This is not the case with other jurisdictions, which impose stricter requirements.

2A: Civil Law Jurisdictions

Despite concurring on the determination of consent, civil law countries remain divided on the form of arbitral consent that they accept as valid.[65] France, which requires almost no predetermined 'form' for the purpose of contractual validity, places arbitration agreements on an equal pedestal.[66] This has allowed French law to embrace the Doctrine with relative ease.

Swiss law, does not insist upon formalistic requirements of consent, suggesting the possibility of acceptance of non-signatories into arbitration.[67] The Swiss Supreme Court has expressed that the Doctrine can be accepted only in very particular cases where there is an independent and formally valid manifestation of consent to the arbitration agreement by the other company of the group.[68] In a subsequent case, the Swiss Supreme Court held that a third party involving itself in the performance of the contract containing the arbitration agreement is deemed to have adhered to the clause by conclusive acts if it is possible to infer from its involvement its willingness to be bound by the arbitration.[69] This decision, which carries in it the essence of the

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[61] *Dallah* (n 1) [73].

[62] *Sponsor* (n 17).

[63] *Kis France v Societe Generale (France)* 31 October 1989, 1992 Rev Arb 90 (Cour d'appel Paris).

[64] Gaillard E and Savage J, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 289.

[65] Meyniel (n 8) 29.

[66] Ibid.

[67] Meyniel (n 8) 30.

[68] *X Ltd v Y and Z SpA* Bundesgericht [BGerl [Federal Supreme Court] Aug 19, 2008, No 4A 128/2008 134 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 565 (Switz).

[69] *X v Y Engineering SpA* Tribunal Frdrral [TF] Apr 7, 2014, ATF 4A_450/2014 7 (Switz).

Doctrine, shows that Swiss courts are not fundamentally opposed to the idea of the Doctrine so long as it embodies a true common intention of the parties.

Brazil permits extensions of an arbitration agreement on the basis of the Doctrine. In *GP Capital and Ors v Fernando Correa Soares*, the Sao Paolo Court of Justice found that the non-signatory group company had an active role in the negotiation, which resulted in the execution of the share purchase agreement and the subsequent commercial operations.[70] Accordingly, the company's intention to be bound by the agreement was undeniable. This case succeeds other cases wherein arbitration has been extended to non-signatories following similar reasoning.[71] This reflects a positive trend in Brazilian law towards a less form-driven approach to consent.

Owing to Germany's strict writing requirement,[72] it is generally agreed that companies belonging to a group cannot be bound by an arbitration agreement concluded by other members of the same group, even if they have participated in the negotiation, performance, and/or termination of the agreement.[73] However, the German Federal Supreme Court in *Bundesgerichtshof BGH* examined the conflict of laws principles and adjudged that joinder of the third party applying the Doctrine is not opposed to German public policy.[74] This decision is a leap forward, as it calls for a thorough conflict of laws analysis on a case-by-case basis whether the outcome is contrary to fundamental principles of German law. In doing so, the court has adopted a flexible approach which paves the way for application of the Doctrine in cases involving German law.

Of the civil law jurisdictions examined, France has relied on its liberal notions of forms of consent to allow the widest application of the Doctrine. Although commendable, this extremely liberal acceptance has led to inconsistencies between certain decisions as Hanotiau points out.[75] In comparison, Brazil and Switzerland have cautiously warmed up to the Doctrine. Germany, while still behind the rest, has relaxed its previous rigidity and adopted a careful approach with regards to the Doctrine's validity in German public policy.

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[70] *GP Capital Partners and other v Fernando Correa Soares and others* (2014) 43 Revista Brasileira de Arbitragem, 116 (Brazil).

[71] *Trelleborg do Brasil Ltda v Anel Empreendimentos Participações e Agropecuária Ltda,* Apelação Cível No 267.450.4/6-00, 7th Private Chamber of São Paulo Court of Appeals, 24 May 2004.

[72] German Civ. Code 1887, § 1031.

[73] Otto S Sandrock, 'Extending the Scope of the Arbitration Agreement to Non-Signatories' (1994) 8 Arb Agreement ASA Spl Series 165.

[74] *Bundesgerichtshof* (n 28).

[75] Hanotiau (n 29) 56.

2B: Common Law Jurisdictions

While both the United States (US) and the United Kingdom (UK) have refrained from recognising the Doctrine, US courts generally have a more liberal approach towards the extension of an arbitration agreement to a non-signatory.[76] This is due to US public policy regarding arbitration agreements primarily as contracts,[77] and the courts' favour of recourse to traditional contractual doctrines for the determination of a joinder.[78]

In *Thompson-CSF, SA v American Arbitration Association*, a US court recognised five theories under which non-signatories may be bound to arbitration.[79] These included that of incorporation, assumption, agency, veil piercing/alter-ego, and estoppel. However, none of these theories were applicable nor sufficient to render Thompson amenable to the arbitration agreement of its subsidiary.[80] This view was confirmed in *Sarhank Group v Oracle Corporation*, where the court found that Oracle was not bound by the arbitration agreement because Sarhank had failed to show that the former had intended to arbitrate such claims under American contract or agency law.[81]

Meyniel observes that the reason behind the profound denial of US courts to apply the Doctrine and instead base its joinders on contract and common law doctrines alone is a result of its misconceived presumption that the Doctrine is not founded upon consent.[82] In *Bridas SAPIC v Government of Turkmenistan*, Turkmenistan was found to exercise total dominion and control over the signatory company Turkmenneft, and was responsible of fraudulent undercapitalisation.[83] Thus, the necessary elements of Doctrine were present. The court, however, acknowledged the extension of the arbitration agreement under the alter ego theory, which is a non-consensual doctrine arising from common law.[84] In comparison, the Doctrine is

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[76] See *Bridas SAPIC v Government of Turkmenistan, 447 F 3d 411 (*5th Cir. 2006*)* (Arbitration extended to non-signatory State).

[77] *Certain Underwriters at Lloyd's London v Westchester Fire Ins. Co* 489 F.3d 580, 584 (3d Cir 2007).

[78] *Fisser v Int'l Bank* 282 F.2d 231 (2d Cir 1960); *Bridas* (n 78).

[79] *Thompson-CSF, S.A. v Am. Arbitration Ass'n* 64 F.3d 773 (2d Cir. 1995).

[80] ibid.

[81] *Sarhank Group v Oracle Corp* 404 F.3d 657, 662 (2d Cir. 2005).

[82] Meyniel (n 8) 54.

[83] *Bridas* (n 79).

[84] Alter Ego Doctrine refers to a situation where stakeholders in a corporate body attempt to pass their own acts as that of the corporate body and shift liabilities. The Doctrine of separate legal entity allows courts to separate the acts of the individuals and hold them liable for the same.

rooted entirely in arbitral consent. Thus, the American approach against the inclusion of the Doctrine requires reconsideration.

English Courts have adopted a conservative approach and have completely denied the existence of the Doctrine. In *Caparo Group Ltd v Fagor Arrastate Sociedad Cooparative*,[85] the English commercial court refused the application of the Doctrine. The grounds for refusal were that the contract and arbitration agreement were governed by English law, wherein there is no basis upon which it could be held that Caparo was a party to either of those.[86] Subsequently, it was pleaded again in *Peterson Farms Inc v C&M Farming Limited,* a dispute relating to sale of chickens found infected with Avian flu virus.[87] The tribunal had permitted the joinder on the basis that Peterson Farms knew that they were dealing with all members of the group, thus securing mutual intention. The court on challenge refused the enforcement of the award, concluding that the Doctrine 'forms no part of English law'.[88] Some scholars argue that if the law applicable to the arbitration agreement recognises it, there should have been no problem in enforcing the award.[89]

English Law's rejection of the Doctrine appears to be an extension of its broader policy that places paramount importance on the doctrine of privity in contract law which disallows extension of arbitration to non-signatories.[90] English law requires an intention to enter into an arbitration clause to be clearly shown and not readily inferred.[91] It rarely takes into account the pre-contractual discussions or agreements when interpreting contracts, as those are not considered to be legally binding promises.[92] However, it does consider doctrines of agency, trust, and alter ego.[93] This rare example of rigid denial of implied forms of consent is disadvantageous to parties wishing to arbitrate in accordance with English law. It withholds

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[85] *Caparo Group Ltd v Fagor Arrastate Sociedad Cooparative* Commercial Court, QB Div. (1998).

[86] Peter Aeberli, 'Jurisdictional Disputes Under the Arbitration Act 1996: A Procedural Route' (2005) 21(3) Arb Int'l 288.

[87] *Peterson Farms Inc v C & M Farming Ltd* (2004) APP.L.R. 02/04.

[88] ibid 7.

[89] Sarita Patil Woolhouse, 'Group of Companies Doctrine and English Arbitration Law' (2004) 20(4) Arb. Int'l 435.

[90] Eduardo Silva Romero & Luis Miguel Velarde Saffer 'The Extension of the Arbitral Agreement To Non-Signatories in Europe: A Uniform Approach?' (2017) 5(3) American Univ Business L Rev 373, 376.

[91] *Arsanovia Ltd & Ors v Cruz City 1 Mauritius Holdings* [2012] EWHC (Comm) 3702 (UK) [35].

[92] Michael H Whincup, *Contract Law and Practice: the English System and Continental Comparisons* (4th edn, Kluwer Law International 2001) 17.

[93] Hanotiau (n 29) 97.

recognition to the various kinds of contractual behaviours that manifest consent in ways other than writing.

Contrary to their counterparts in the US and UK, Indian courts have been more willing to embrace this Doctrine. Indian contract law recognises both written and oral agreements as valid, and by extension, does not stress on signed arbitration agreements. In the case of *Chloro Controls India v Severn Trent Water Purification Inc & Or*, the Supreme Court of India allowed joinder under the Doctrine. It recognised that even though multiple agreements had been entered into, they all formed part of one composite transaction and the performance of one was intrinsically linked to the others.[94] The court held for the Doctrine to apply, the commercial arrangements under scrutiny must show an intent to bind a party that is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.[95] Indian courts, however, warn that the Doctrine is to be applied on a fair evaluation of the factual matrix of each case and no straightjacket formula can be developed.[96] In *Reckitt Benckiser (India) v Reynders Label Printing*, the Supreme Court of India denied application of the Doctrine. The only evidence in this case was an email sent by an employee of the third-party to the applicant company. This third-party happened to be an associate company of the respondent.[97] Relying on the principles of *Chloro Controls*,[98] the court found that these facts were not sufficient to establish the existence of a mutual intent to bind the third party.[99] Notably, though *Chloro Controls*[100] has laid down the precedent for joinder of non-signatory parties to arbitration, the Indian courts are yet to adjudicate upon disputes relating to enforcement of awards delivered in such cases.

These differences in treatment of the Doctrine across jurisdictions further lead to problems during enforcement of arbitral awards rendered by tribunals. Since international arbitral awards are enforced in countries separate from the one whose law was applied to the arbitration, they face further judicial obstacles. The following section discusses this issue of enforcement. This focuses on situations where the courts of the country that the award is sought

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[94] *Chloro Controls India Pvt Ltd v Severn Trent Water Purification Inc & Or* (2013) 1 SCC 641 (India).

[95] *Ameet Lalchand Shah and Others v Rishabh Enterprises and Anr* Civil Appeal No. 4690 of 2018 (India).

[96] MP Bharucha, Sneha Jaisingh, & Shreya Gupta, 'The Extension of Arbitration Agreements to Non-Signatories – A Global Perspective' (2016) 5(1) Ind. J. Arb. Law 35, 46.

[97] *Reckitt Benckiser (India) Private Limited v Reynders Label Printing India Private Limited and Anr Petition for Arbitration* (Civil) No. 65 of 2016 (India).

[98] *Chloro* (n 97).

[99] ibid [12].

[100] *Chloro* (n 97).

to be enforced in, do not recognise the Doctrine, and thus, deny enforcement on the basis of impermissible joinder of non-signatory.

3. The Challenge of Enforcement

International arbitration involves the application of a combination of distinct national laws to various aspects of the arbitration. Separate systems of laws may be chosen by the parties to apply to the procedure, the substance, the enforcement and the arbitration agreement respectively.[101] In such a mélange of national laws, a secondary problem in binding non-signatories to arbitration agreements arises at the time of enforcement. While the tribunal might allow the joinder of a non-signatory in the proceedings, the award consequently rendered is quite often required to be enforced in another country. The laws of the country of enforcement might be inconsistent with, and not recognise, the substantive law applied to the arbitration to allow such a joinder. This has led to much inconsistency in enforcement patterns.

Enforcement is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). It is the foundational instrument for international arbitration and requires courts of contracting states to recognise and enforce arbitration awards made in other contracting states. Article V of the New York Convention provides that recognition and enforcement of an arbitral award may be refused if the applicant faces some incapacity, or the agreement is not valid under the law of the country of enforcement, or it is contrary to the public policy of the country. Article V has been invoked to refuse enforcement earlier, and the leading case in that regard is *Dallah v Pakistan*.[102]

3A: The curious case of *Dallah v Pakistan*

Dallah is a Saudi Arabian company providing pilgrimage services. They were contracted with a Trust established by the Government of Pakistan for constructing accommodation for Pakistani pilgrims in Mecca. When the dispute arose, Dallah sought the joinder of the third-party State, Pakistan, in the arbitration which was allowed by the ICC tribunal. When Dallah approached the UK courts for enforcement of the award, French law was applied to determine whether Pakistan could be regarded as a party to the arbitration agreement. The following sub-section analyses the English and the French juridical approaches to the enforcement of the award.

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[101] Blackaby and others (n 40) 157.

[102] *Dallah* (n 1).

The UK Supreme Court acknowledged the French precedent in *Dalico*,[103] which upheld unsigned arbitration agreements if the parties intended to be bound in contract. It then assessed the facts in *Dallah*:[104] Pakistan was involved in the negotiation of the Contract; two employees of Pakistan, neither of whom had any role within the Trust, wrote to Dallah to discuss savings plans and a publicity campaign; and after the Trust had ceased to exist, a senior government employee who was previously part of the Trust wrote to Dallah on government letterhead to state that Dallah had breached the Contract and therefore accepted its termination.[105] It concluded that the correspondences between the parties and the letter by the government employee taken together were not conclusive of the fact that Pakistan intended to be a party to the Contract, as the government's position and involvement in these respects is clear but understandable and the employee may not have been writing on behalf of the government.[106]

When the matter was brought before the Paris Court of Appeal, it recounted the exact same facts and relied on the same precedent. However, it held that Dallah had dealt and negotiated exclusively with Pakistan. According to the court, the approval of the project depended only on Pakistan as it was the government that actively sought assistance from banks in its own name for the project. Further, everything in the government employee's letter indicated that he was accepting termination of the contract in the name of Pakistan.[107] Since no justification could be found for this intervention, the establishment of the Trust was purely formal and Pakistan behaved as 'the true party to the economic transaction'.[108]

Consequently, while the award was denied enforcement in the UK invoking Article V (1)(a) of the New York Convention on the grounds that there was no valid arbitration agreement, the Paris Court of Appeal held it enforceable. The UK Supreme Court failed to take into account several factual circumstances, such as the Pakistani Government's direct involvement in pre-contractual negotiations with Dallah. In doing so, it adopted a typically English approach to contract law, which operates on a formalistic standard of proof of intention in the form of clear written agreement. This would have been correct had the case before it been one of English law.

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[103] *Municipalité de Khoms El Mergeb v Société Dalico, Cour de Cassation* 1994 Rev Arb 116.

[104] *Dallah* (n 1).

[105] Sarah Garvey, 'Directly opposing decisions from UK Supreme Court and Paris Court of Appeal on arbitration', (*Allen & Overy Publications*, 6 April 2011), <www.allenovery.com/publications/en-gb/Pages/Directly-opposing-decisions-from-UK-Supreme-Court-and-Paris-Court-of-Appeal-on-arbitration.aspx> accessed 19 March 2019.

[106] *Dallah* (n 1).

[107] ibid 132.

[108] *Ministere des Affaires Religieuses v Société Dallah Real Estate & Tourism Holding Company* Paris Court of Appeal, No 09-28533, 2011.

However, the *Dallah v Pakistan*[109] arbitration was seated in France, thereby requiring any court adjudicating upon the case to apply principles of French law. The Paris Court of Appeal applied French law and read into the circumstances of the case and behaviour of parties, thus allowing the joining of Government of Pakistan.[110] One scholar argues that the framing of the arguments by the parties was in some part to blame for the unfortunate result in *Dallah v Pakistan*. Others have criticised the case as an example of the English court's failure to uphold the substance and spirit of the New York Convention, a core objective of which is achieving uniformity in enforcement of awards.[111]

3B: Other instances

Another case of denial of enforcement by English courts is that of *Peterson Farms.*[112] The tribunal was found to have no jurisdiction over other members of the C&M Group through the application of the Doctrine, since the Doctrine formed no part of English law.[113] Similarly, the court in *Sarhank v Oracle* applied the Doctrine to extend arbitration to non-signatory Oracle with regards to an award based on the laws of Republic of Egypt. This award was set aside in the US by the Second Circuit Court of Appeals, which held that Sarhank had failed to show that Oracle had intended to be bound by the arbitration clause under American agency or contract law.[114] It is to be noted that courts from jurisdictions that do not recognise the Doctrine in their domestic laws, tend to render decisions against the Doctrine even in enforcement suits. This creates roadblocks in successful arbitrations and brings about ambiguity as to which court may or may not accept an award owing to its domestic legal principles. In determining such cases, courts must focus on whether the laws applicable to the arbitration envision extension under the Doctrine so as to achieve greater flexibility in enforcement of international arbitral awards.

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[109] *Dallah* (n 1).

[110] Jan Kleinheisterkamp, 'Lord Mustill and the Courts of Tennis — Dallah v Pakistan in England, France and Utopia' [2012] 75(4) Modern L Rev 639

[111] Gary Born and Michal Jorek, 'Dallah and the New York Convention' (*Kluwer Arbitration Blog*, 7 April 2011) <www.kluwerarbitrationblog.com/blog/2011/04/07/dallah-and-the-new-york-convention> accessed 4 October 2020; George Bermann, 'The UK Supreme Court Speaks to International Arbitration: Learning from the Dallah Case' (2011) 22 Am Rev Int'l Arb 1

[112] ibid 90.

[113] *Peterson Farms* (n 90).

[114] *Sarhank* (n 84).

It can thus be concluded that there is no uniformity and a great amount of unpredictability when considering the enforcement of an award permitting a joinder. Thus, the extension of arbitration agreements to non-signatories on the basis of the Doctrine faces the twin challenge of acceptance by the tribunal, and subsequently, enforcement of the award when brought before national courts.

4. Addressing Misconceptions Surrounding the Doctrine

Courts across jurisdictions are reluctant to embrace the Doctrine due to scepticism regarding its nature and application. This section attempts to clarify the position of the Doctrine with regard to consent, separateness of legal personality, and whether it penalises the act of conducting business through subsidiaries. It argues that the Doctrine does not interfere with the aforementioned principles of law and commerce.

4A: Question of Consent

The primary argument that scholars hold against the Doctrine is that it derogates from arbitral autonomy by imposing arbitration upon a party that has not consented to waive its right to judicial recourse in the first place.[115] In fact, the Doctrine is grounded in arbitral consent. The elaborate tests laid down for its application (explained in Section B) show us that it requires the consent of each party involved in order to permit a joinder. It infers consent from the actions and behaviour of the parties when it is not self-evident in their written agreement.[116] This misconception arises from the disagreement on the forms of consent. The fundamental question is thus whether the 'intent to arbitrate' is only valid when expressed through a written agreement or unwritten expressions of consent are also valid. The answer to this question has to be found in the accepted definitions of what constitutes an arbitration agreement.

Turning to international instruments, we find that the most widely accepted definitions of 'arbitration agreement' are contained in the New York Convention, which governs the recognition and enforcement of arbitral awards, and the United Nations Commission on International Trade Law (UNCITRAL)'s Model Law (Model Law), adopted by several national legislatures.[117] The New York Convention, in Article II, mandates that arbitration agreements are to be 'in writing' and defines the term to include 'an arbitral clause in a contract or an

[115] Ferrario (n 5) 648; Hanotiau (n 5) 545.

[116] Meyniel (n 8) 45.

[117] UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17, 24 ILM 1302 (1985), amended on 7 July 2006 (Model Law).

arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'[118] On the contrary, the Model Law, while asking for an agreement to be in writing, clarifies in Article VII(3) that an arbitration agreement shall be in writing if its contents are in 'any form, whether orally, by conduct or by other means.'[119] Thus, while the requirement for an arbitration agreement is clearly indispensable, a signature is not the only condition that renders it valid. By inferring consent through in-depth scrutiny of the parties' control structure and participation in the contract, the Doctrine reinforces the idea that arbitration agreements can be concluded in any form. This includes orally and through behaviour. This is in consonance with the stance adopted by many modern legal systems that recognise unsigned commitments to arbitrate, as discussed in Section 3.

Another concern may be that the granting of joinder in the face of resistance to arbitrate would render the arbitration non-consensual. This rule should apply irrespective of whether the resistance comes from a non-signatory or a signatory. It must be noted that the Doctrine's investigation into the parties' intent is in fact an investigation into their true intent at the time of conclusion of the contract, and not the parties' wishes after the disputes have arisen. To give precedence to the latter over the former is to dishonour contract law, which operates on the basis of promises made at the time of conclusion of the agreement. Once disputes arise, parties are likely to seek the option that best favours their situation, even if that amounts to violating their contractual promises. Thus, an attempt is made to ascertain whether the parties did actually consent, in any form, to arbitration.[120] The Doctrine ensures that parties cannot renege from their original promise to arbitrate by relying on the technicality of the absence of a signature when all evidence points towards the mutual intent to bind the non-signatory into arbitration.

4B: Penalising Corporate Groups

Another misconception regarding the Doctrine is that it allows a joinder simply on grounds of the non-signatory being a part of the same corporate group as a signatory. This amounts to punishing the common practice of doing business through subsidiaries, which would mean disregarding the independent personalities of separate companies. The independence of a corporation's legal personality allows corporations to function in a variety of areas without the problems in one corporation affecting the others' operations. Carrying out business by establishing multiple related companies is accepted in commerce and permitted in law.

[118] Art II(2), Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1985.

[119] Article VII(3), Model Law (n 116).

[120] Meyniel (n 8) 22.

Hanotiau goes so far as to suggest eradicating the Doctrine altogether, as he believes that traditional mechanisms of joinder adequately address issues that may arise under the process.[121] Meyniel counters the allegation:

> [The Doctrine] only operates to effectuate a presumption that group of companies tend to act as a composite economic entity, and where such a situation occurs, it should affect the scope of an arbitration agreement. Yet, that presumption does not operate to negate the requirement for consent, and absent such a finding, the 'Group of Companies' doctrine will have no effect to binding non-signatories.[122]

As explained in Section 2, the Doctrine operates in a very comprehensive manner and takes into account several factors. What it seeks is far more than a parent-subsidiary relationship, it looks for a 'tight group structure,' as exhibited through ties of control exercised by one party on another. This degree of control is so high, that the signatory could not have consented to the contract without the non-signatory directing it, thereby proving that it is the latter that pulled the strings of consent. The Doctrine looks beyond static corporate links and delves into interactions between the entities in the form of negotiation for the purpose of and execution of the specific contract, in order to arrive at a conclusion. This is clear from the final award in *ICC Case No 11160*,[123] where the tribunal acknowledged that the creation of subsidiaries for carrying out some specific project or business is a widespread commercial practice rather than evidence of arbitral consent.[124]

4C: Separate Legal Personality

In Common law jurisdictions in particular, the Doctrine also faces criticism for allegedly ignoring the basic corporate law principles of separate legal personality and limited liability. These jurisdictions traditionally honour these principles as a foundational principle in company law. They ensure that a company enjoys the status of an independent legal person with defined financial accountability that is not coterminous with that of its members. In one case, an arbitral tribunal sitting in Mongolia allowed a joinder applying the Doctrine by relying on the factual matrix of shared offices, email address, phone number and one director in common between the

[121] Hanotiau (n 12) 546.

[122] Meyniel (n 8) 22.

[123] ICC Case No 11160 of 2002.

[124] Brekoulakis (n 16) [12.42].

signatory and non-signatory.[125] The Supreme Court of Victoria upheld the enforceability of this award in Australia, acknowledging that the non-signatory IMCS has not been able to prove that it was not bound by the arbitration agreement. This judgment was reversed by the Court of Appeal citing separateness of legal entity as the ground for rejecting the Doctrine.[126] The first decision had rightly refrained from interfering with the arbitral tribunal's reliance on the Doctrine to join the non-signatory. The Court of Appeal's judgment failed to take into account the nuanced approach of the Doctrine which requires arbitrators to examine parties for a degree of control so high that, even though they are separate legal entities, they constitute one and the same economic reality. This was established by *Dow Chemical*[127] itself where it was held that having distinct legal entities is not conclusive proof of financial and operational independence.

Conclusion

The Doctrine, which is a novel concept in arbitration developed by ICC tribunals, faces several challenges. These challenges predominantly center around the legitimacy of unsigned commitments to arbitrate. French courts and tribunals have recognised this and wholeheartedly embraced the Doctrine. Other civil law nations, such as Germany and Brazil, are also gradually relaxing their positions on the Doctrine. Common law jurisdictions on the other hand, remain in a profound state of denial. The US courts' refusal to acknowledge the Doctrine comes as a result of its preference for traditional contract law-based theories which alone are regarded as consensual. This ill-founded hypothesis is shared by UK courts which regard only written agreements as evidential of consent. In fact, the manners in which consent can be evidenced lies at the very heart of group of companies. Comprehensive in its endeavour, the Doctrine lays down a threefold test inquiring into the objective existence of a tight group structure and subjective effort on the non-signatory's part to substantially involve itself in the execution of the contract, both of which are then run through the litmus test of mutuality of intent among all parties for the non-signatory to be bound by the arbitration agreement.

The Doctrine therefore marks a departure from conventional mechanisms of contract law. It paves a way for greater enforcement of the arbitral rights in cases where defaulting parties seek to avoid their liabilities by placing reliance on the technicality of signature. It is thus a shield against those corporations which attempt to escape liability for their unscrupulous contractual actions committed through subsidiaries. However, no singular formula can be developed, and each case ought to be evaluated individually. Tribunals and courts must strike a balance

[125] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 (Aus.).

[126] ibid 298.

[127] *Dow Chemical* (n 7).

between a flexible interpretation of arbitration agreements and misconstruing consent when there is in fact none. Consent, after all, is paramount - whether evidenced through document or conduct.