Per aspera ad astra-non-signatories in arbitration: from “juristic chemistry” to concept of dispute

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I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the source(s) according to the Regulations set in the Student’s Handbook.
Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial law and Alternative Dispute Resolution at the International Hellenic University. For decades, academics and practitioners unsuccessfully try to unravel the mysterious password to the non-signatories issue in arbitration. To the date, the only solution so far proposed by current practice is a traditional concept of consent based on the application of contractual theories and general principles. However, the current commercial reality develops new sophisticated business forms that cannot be covered by such an elementary approach resulting in a chaotic decision-making (the so-called “legal creativism”) based on efficiency and fairness to the detriment of consent in the sense of its replacement.

Does this mean that a traditional concept of consent to arbitrate has been modified under the influence of the arbitration transforming process? Is it really necessary (important) to sign an arbitration agreement at all? Does this mean that accepted contractual theories are pure legal fictions based on none of consent at all? If so, could a jurisdictional consideration based on a concept of dispute be an alternative solution to the problem? This work attempts to analyze the aforesaid trends and determine whether the “out of the box” thinking could be a practical remedy to the problem in the era of cosmopolitan arbitration?

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On a more personal level, I want to express my gratitude to my family for their unconditional support and love as well as a constant inspiration during my studies in Greece.

Keywords: arbitration, third parties, non-signatories, consent, concept of dispute.

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Preface

This dissertation is written as part of the LLM in Transnational and European Commercial Law and Alternative Dispute Resolution at the International Hellenic University. It is a modest contribution to the ongoing discussion on the issue of necessity to reconsider the settled contractual approach of consent to arbitrate as regards non-signatories towards the concept of dispute.
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Introduction

Perhaps when readers hear again and again the magic collocation of “non-signatories in arbitration” undoubtedly, it grates on the ear to listen to the repetition. However, it is truly hoped that the present thesis could be a modest contribution to the global process of turning of the juristic “orthodox river of thinking” to the mainstream of the demands of contemporary business world and thus, to the promising future of arbitration as a truly cosmopolitan system of dispute resolution.

A. Back to basics

We have to admit that relying on the principle of privity of contracts, the discussion on the issue for decades was remaining exclusively concentrated on the framework of good old contract law ignoring the effect of arbitration agreement. Therefore, the “face-control regime” to the arbitration club based on evidence of (traditionally formal) consent exclusively. However, current business creates new, previously unknown forms that challenge arbitration to its (traditional) limits and cannot be explained by pure philosophy of traditional commerce of the Middle ages. In order to remedy the problem arbitration community, attempting to put “effects of arbitration agreement” into contractual regulation, started to “invent” new methods based on equity and factual circumstances rather than on consent as such that resulted in blurring of notion of consent and even its exclusion. For instance, France, being among the most liberal (if not innovative) jurisdictions, interprets the content of arbitration clause in a way that it makes possible to bind not only entities or state-owned companies\(^\text{1}\) but even sovereign states\(^\text{2}\). Moreover, the main idea that lies behind such philosophy (of course on case by case basis) is performance\(^\text{3}\) (in relation to the main contract) that


\(^2\) See for example, Cass. 1st Civil Chamber, 29 June 2011, Papillon Group v Syrian Arab Republic.


Additionally, in general third party could be also involved into proceedings through the so-called “transmission” that has to do with situations (by law or agreement) in which the main contract, that includes the arbitration agreement, is the subject of a transfer to another party. In this case, such arbitration agreement, being a separate from the whole economy of the
“replaces” the traditional formal expression of consent to arbitration. For instance, although the Swiss law is quite reluctant to the arbitration proceedings with a non-signatory element, the “legal fate” of the latter much depends on a role that a non-signatory played in the main contract, namely: direct involvement in the performance of a contract, substantial participation in the negotiation without sign the contract, as well as transfer of rights. By contrast, among common jurisdictions England adheres quite strict formal approach and “retains a touch of conservatism” as to the fact that “there must be positive acts that clearly establish the non-signatory’s intent to accede to the contract and also the original parties acceptance of that accession”, whereas in USA Courts, on the ground of general principles of contract law and agency, main contract, binds successors irrespective of whether the assignment is valid itself. See Cass. 1st Civil Chamber, 28 May 2002, CIMAT v SCA.

As case law shows there is variety of facts under which arbitration agreement, in terms of the main contract, was transferred, including situations of “receivables transfers” as well as “chains of contracts”. In this regard See Paris, 10 September 2003, no. 2002/05034) and (Cass. 1st Civil Chamber, 27 March 2007; Cass. 1st Civil Chamber, 17 November 2010, Refcomp v Axa) respectively.


5 (According to the view of French Courts such involvement may assume that the party’s intention to the main contract was to bound the non-signatory to arbitration clause” (Paris, 7 December 1994, V 2000 case, Rev. arb. 1996 p. 245, note E. Gaillard; Paris, 21 October 1983, Dow Chemical, Rev. arb. 1984 p. 9)

6 (the arbitration clause is automatically transferred as an accessory to the substantive rights transferred, regardless of the homogenous or heterogeneous character of the different contracts involved (Cass. civ. 1re, 27 March 2007, ABS case, Bulletin 2007 I.129)


9 “However, as it is suggested there is a need for “integrating the five theories (incorporation by reference, assumption, agency, alter ego, estoppel) defined in Thomson(See Thomson-
developed a kind of far-reaching methods that “gone well beyond seminal consensual predicate”\textsuperscript{10}… to the extent of “more generic and unified theory”\textsuperscript{11} based on the principle of good faith with, however, lack of predictability as regards procedure as well as a legal outcome. Furthermore, so liberal “attitude” towards arbitration became to the point of development of the so-called “presumption of arbitrability”, holding that it is “applicable when the arbitration clause is broadly drafted”\textsuperscript{12} as well as “the most minimal indication of the parties’ intent to arbitrate must be given full effect…in international disputes”\textsuperscript{13}. In a word, all this legal chaos, that results in a significant legal uncertainty worldwide, was highly criticized by commentators to the extent of abandonment of such theories as equitable estoppel as well as the theory of group of companies\textsuperscript{14}. All in all, a reasonable person would wonder whether the difference of approach really matters at the time of global trade and so, a cosmopolitan arbitration.

\textbf{B. “Creative legalism”}

Unsurprisingly, this justice, that is called among commentators as “creative legalism”\textsuperscript{15}, results in a legal chaos, that is to say, decisions of courts and arbitrators differ

\begin{footnotesize}
\textsuperscript{10} See, Meyniel, supra note 7, 23 et seq.
\textsuperscript{11} Id.
\textsuperscript{12} United Steelworkers of Am.v.Warrior&Gulf N.Co.,363 U.S. 574,582-83 (1960), available at https://www.law.cornell.edu/supremecourt/text/363/574
\textsuperscript{13} Republic of Nicaragua, 937 F.2d at 478, available at http://law.justia.com/cases/fedERAL/appellate-courts/F2/937/469/192868/
\textsuperscript{15} Youssef K.,"The Limits of Consent" The Right or Obligation to Arbitrate of Non-Signatories in Group of Companies, in B. Hanotiau and E. Schwartz (Eds.), Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law, No.7, 2010, pp. 71-109
\end{footnotesize}
from one jurisdiction to the other; moreover, even the same jurisdiction could come up with contradictory legal outcome that, in the end, jeopardise "...basic compliance with the New York Convention" in the sense of successful enforcement. And it is not obviously because of traditionally different philosophy of substantive law between jurisdictions, rather due to the constant change of the normative approaches by jurisdictions in the quest for a practical (if not unified in terms of harmonization) solution.

C. "At the crossway of the roads"

Although some scholars consider the latter metamorphosis as a mere modification of the consent (in contrast to its traditional meaning) in relation to the contemporary approach based on the puzzle of facts, quite recently the other camp of commentators has insisted on the jurisdictional consideration of the issue towards the dimension of concept of dispute regardless of consent as such. To be more precise, instead of creating of the so-called legal magic via contractual theories based on "an artificial interpretation of the will of parties", there is a proposal of more liberal approach based on the "level" of significance of the third parties' relationship to the dispute at hand. To this end, if applicable set of theories worldwide is not a satisfactory solution as well as the notion of consent to arbitrate outgrew its original scope, therefore, we might or accept the transformed form of the consent according to the mod-

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17 In a word, after Dow award, which "discovered" the group of companies doctrine, French courts drastically changed their view as to the "existence of an economic group" element in defining a consent. See for instance, the Pau Court of Appeal, 26 November 1986, Rev. Arb. (1988) p. 154.

In a nutshell, the Paris Court of Appeal shifted focus to the involvement in the main contract including arbitration agreement, regardless of the existence of a "réalité économique unique". Moreover, the notion of "involvement" within time significantly differ from case to case, for instance, in some cases it was considered "as a mere indice of consent", while others cases justified the jurisdiction of arbitrators on involvement as prima facie evidence exclusively.

18 Gravel S., Peterson P., French law and arbitration clauses-Distinguishing scope from validity: comment on ICC Case n 6519 Final award,(1992)37 McGill L.J. 510
ern business needs and continue to suffer from perpetual “legal chaos” in this matter or to re-think and acknowledge the fact that perhaps the bone of contention lies not on the consent itself but on the wrong interpretation of factual circumstances that, as a matter of fact, relate to the dispute itself rather than reflect consent as such.

**D. Purpose and Structure of this thesis**

Taking into consideration the aforesaid, this paper attempts to analyze the paradox of non-signatories issue in terms of encouraging discussion as to the consideration the problem through the jurisdictional filter that leads to the following central questions:  
*With regard to the case law, does the traditional set of theories really “confess” the idea of consent? If the answer is negative, then what alternatives are available? Among others, as presumption, is it possible to refuse the traditional approach of consent to arbitration, as a contractual derivative, in favour of dispute that, through the certain set of facts, link all true parties to the dispute?*

This thesis consists of four chapters. Chapter I analysis the whole way of the mentioned metamorphosis of consent to date through the prism of the ongoing transformation of arbitration and its influence on decision-making as regards non-signatories element. In particular, we will examine the reasons that are used by courts and arbitrators as justification of allowance of non-signatories to arbitrate.

Further Chapter II will proceed with more thorough analysis of the decision making on the example of the most illustrative cases in terms of application of theory of equitable estoppel and the doctrine of group of companies as the main “components of the process of legal creativism” as well as the most contradictory approaches in relation to non-signatories.

Eventually, besides the conclusions (Chapter IV), Chapter III in brief will address the previous attempts to remedy the problem as well as, under jurisdictional viewpoint, discusses the recent proposals in terms of concept of dispute and the IBA-type guidelines as being the first reaction of the arbitration community towards acknowledging the necessity in harmonising approach to the issue at stake.
I. Consent: still disunity of essence

“How puzzling all these changes are!
I’m never sure what I’m going to be, from one minute to another.”

(Lewis Carrol, Alice in Wonderland)

A. Academic battles: durable past v. promising future

To begin with, the mentioned statement clearly reflects the current situation on the scene of non-signatory in arbitration in the sense that under the same circumstances, decision, regarding the involvement of non-signatories in arbitration, will be antipodal depending on our understanding of the notion of arbitration. In other words, the legal fate of non-signatories depends on how exactly we (i.e. Courts, arbitrators in a certain jurisdiction) consider the scope of the arbitration agreement or to rephrase, to what “party” we are members.

To be more precise, such a phenomenon on the theoretical level according to Dr Blessing\(^1\) could be explained by distinguishing of two types\(^2\) of academic views, namely, “mercatorists” and “non-mercatorists\(^3\)”. Simply put, the standpoint based on

\(^{19}\) Blessing M., The Arbitration agreement- Its multifold Critical Aspects, A.S.A.Special Series N8,19 (December 1994) at 18

\(^{20}\) In other words, “while one school favours a stricter approach relying predominantly on national laws, the other is more lenient, allowing extension based on principles such as bona fides, lex mercatoria or other principles of private international law”- Habegger Ph.,Extention of arbitration agreements to nonsignatories and requirements of form, ASA Bulletin, Vol. 22(2) 2004, 398 at 404.

\(^{21}\) It is worth noting that the “nationalists” are also divided amongst themselves in four groups: “the first argues that the law governing the arbitration agreement rules, as extension pertains, to the proper construction of the arbitration agreement and its validity. The second claims that the law applicable to the “extension” depends on the particular doctrine invoked. The third states that the validation principle is in order to give effect to an arbitration agreement vis-a-vis a third party if such extension is secured under either the law applicable to the arbitration agreement or the law governing the parties’ underlying relationship. And finally, the fourth is in favour of the application of the lex loci executionis.” See Wahab Mohamed S.Abdel, “Ex-
tension of arbitration agreement to third parties: A never ending legal quest through the spa-
the idea of understanding of arbitration nature (in other words, it is more about contract or about dispute). Therefore, it is possible to distinguish a formalistic view (i.e. that considers arbitration agreement strictly as a derivative of contract law) and a “liberal” one (i.e. Here arbitration agreement is considered on the basis of a jurisdictional nature of arbitration).

However, the former presented by Professor Sandrock\textsuperscript{22} the so-called “traditional approach”\textsuperscript{23}, based on a pure substantive contract law that seek to use “definite, time-tested national rules”, as the only legal tool to the issue at stake, “does not consider whether this is suited to the consensual nature of arbitration and dismisses any transnational or a national dimension to the problem”\textsuperscript{24}.

\textbf{B. “Juristc magic”: in quest for consent somewhere between equity and conduct}

As regards the application of general principles of contract (national) law, the latter “results in a basis of jurisdiction embodying various degrees of consent,”\textsuperscript{25} depending on the applicable method that, as practice shows, “seems to focus as much on equitable considerations after the conclusion of the contract as on discerning the intent of the parties ex ante”\textsuperscript{26} as well as on the factual actions of non-signatories. Therefore, in reality arbitrators face with the issue of consent in terms of its elusive (i.e. equitable considerations) or functional nature (that does not correspond with the normal


\textsuperscript{24} Fouchard, Gaillard&Goldman on International Commercial Arbitration par 1443 et seq (Gaillard&Savage eds.,1999)

\textsuperscript{25} See Hosking, supra note 23.

way of whether parties concluded an arbitration agreement) as a basis for presumed, abstract consent in terms of so-called “implied” consent as well as “consent by conduct”. One may say that in a way it is a kind of “artificial legal facts” that mostly exist in “mind” rather than in fact. In other words, arbitrators are like magicians\(^{27}\) who transform the “idea” into life in a form of certain legal facts. Therefore, it seems that the latter is a consequence of inability of classical approach to resolve modern complex arbitrations.

**C. Notion of transformation: from “eco zone” to “biome”**

Although it is traditionally presumed that “consent is the touchstone of jurisdictional assessment in complex arbitrations\(^{28}\), however, according to professor Capper\(^{29}\) “in the transition that we have seen over the last decade,…it is already changing in ways…” that do not necessarily based on the consensus\(^{30}\) merely due to the fact that, to say the truth \(^{31}\) “…business people in this world are not agreeing to national concepts, baggage-laden ideas of arbitration informed by the litigation practices of history and geography which is the eco zone\(^{32}\) way of looking at systems…”; therefore we have”…to face up the fact that international commercial arbitration has out-

\(^{27}\) However, in order to “minimize” the uncertainty, arbitrators, in particular ,”should consider the following variables collectively: the factual matrix of the case at hand, overriding transnational norms and trade usages utilized in the context of international arbitration, and the prevailing norms under the law governing arbitration agreement, *lex loci arbitri* and *lex loci executionis* if possibly determinable and reconcilable.”See Wahab, supra note 21 at 180 et seq.


\(^{29}\) Capper Philip, *Arbitration: just what are the parties agreeing to?* the Worshipful company of arbitrators, the master’s lecture 2009. Available at: [http://www.arbitratorscompany.org/speechesAnnualLecture.php](http://www.arbitratorscompany.org/speechesAnnualLecture.php)

\(^{30}\) Id. , “I am denying the survival of the predominance of the agreement of the parties, the consensual basis, as the answer to almost everything in international commercial arbitration because it is not even true today…”

\(^{31}\) Id.

\(^{32}\) Id. It is used as metaphor holding that ”eco zones are the way we divide up the world by history and geography“.
stripped national, historical, regional baggage into a new biome…33 where, in particular, “the exclusive rule of consent has faded”34 to the extent of its negation (or even exclusion)35 towards “economies of the transaction in mind…as self-standing elements that feed...(directly) the decision to extend or not to extend.”36 Such a position has been explicitly declared by one of the ICC awards: “… [T]he question whether persons not named in an agreement can take advantage of an arbitration clause incorporated therein is a matter which must be decided on a case-to-case basis, requiring a close analysis of the circumstances in which the agreement was made, the corporate and practical relationship existing on one side and known to those on the other side of the bargain, the actual or presumed intention of the parties as regards rights of non-signatories to participate in the arbitration agreement, and the extent to which and the circumstances under which non-signatories subsequently became involved in the performance of the agreement and in the dispute arising from it.” In other words, the ground on which tribunals assume their jurisdiction over non-signatories is no longer a consent itself but the puzzle of facts (the so-called among scholars “factual matrix”) towards dispute before the tribunal, “taking into consideration the usages of international trade and well-established arbitral practices37.”

Jurisdictional arsenal: règle de raison

Such transformation in determination of consent has been called among commentators as a règle de raison (a rule of reason) which Hanotiau rephrased via “what –if-not” case explaining that “a good test to decide whether an ‘extension’ of the clause is appropriate is to determine whether the same solution would be justified if the situ-

33 Id. “biomes are the way we divide up the world by a community of commonality of similar characteristics; and that is what…international commercial arbitration is growing into…a largely unitary system”

34 See Youssef, supra note 15.

35 However, “All individual elements of a case will have to be weighted very carefully, respecting the basic principle of the privity of contract and the clear notion that legal entities are distinct from each other and that, therefore, such fundamental principles cannot easily be removed by an arbitral tribunal unless very specific circumstances demand such a removal.” See Blessing M., supra note 19.

36 See Youssef, supra note 15.

37 See Wahab, supra note 21.
ation were reversed. Further, it should be noted that such a “reasonable justice, under concrete facts based on the principle of equity and good faith itself,…” “likely to be far more important to the outcome than which theory of law is advanced”.

In this respect USA Courts went even farther in the sense of rendering decisions relatively “in the name of equity” under the framework of “presumption of arbitrability”, whereas French Courts developed the principle of “involvement in performance” allowing a non-signatory to participate in arbitration proceedings to the extent “… so that all legal and economic aspects of the dispute are brought before the arbitrator”. For instance, in a Westland case with an element of a non-signatory State, arbitrators, even directly mentioned the “equity choice” resumed that “the practical reasons and considerations of equity… have motivated the arbitrators in this matter, quite apart from the legal ground.” Therefore (in contrast to the consideration of arbitration on

38 See Hanotiau, supra note 28.

39 Id.

40 “…when the corporate form is used as a sham to perpetrate a fraud.” Bridas S.A.P.I.C. v. Government of Turkmenistan, 447 F.3d 411, 416 (5th Cir. 2006).

41 ICC Case No. 3879, Interim award of 5 March 1984, Yearbook XI (1986) p. 127 at p. 132. The facts are as follows: “On 29 April 1975, the United Arab Emirates, Saudi Arabia, Qatar and Egypt concluded a treaty by which they established the Arab Organization for Industrialization (AOI). On 27 February 1978, AOI and Westland signed a Shareholders Agreement for the establishment of a joint stock company, (ABH). The ABH was to be the legal base for manufacturing and selling “Lynx” helicopters developed by Westland. The Agreement contained an arbitration clause referring all disputes to ICC arbitration in Geneva… Later on the United Arab Emirates, Saudi Arabia and Qatar withdrew from the AOI agreement as of 1 July 1979 and declared that a committee would be established to liquidate the organization’s assets. Egypt opposed this decision and announced its intention to keep the AOI in existence in the form of a company governed by Egyptian law (“eaoi “). In July 1979, Westland took note of the fact that its contractual counterpart had been dissolved and, on 12 May 1980, it filed a request for ICC arbitration against AOI, the four Member States and ABH as respondents… The UAE, Saudi Arabia and Qatar did not participate in the arbitral proceedings.” - Westland Helicopters v. The Arab Republic of Egypt, The Arab Organization for Industrialization and others, Tribunal Fédéral [Supreme Court], 19 July 1988 in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 1991 - Volume XVI, Yearbook Commercial Arbitration, Volume 16 Kluwer Law International 1991, pp. 174 – 181

All in all, the final award was rendered by Swiss tribunal against AOI and 3 remaining States on the ground that “an arbitration agreement could be extended to the non-party states if the economic interdependence between the states and the company is evident and if the actions
the contractual basis) we may say about jurisdictional dimension that, as a matter of fact, is an origin of arbitration, which is not a logic based on the set of legal rules (the classic understanding of the legal system), “but...a process of reaching a decision which is essentially pragmatic, utilitarian or even at times, regrettably, arbitrary.”

With regard to the aforesaid, we may conclude that, eventually, in order to render the enforceable award, arbitrators and courts in the first place attempt to transform the equity or economic reasons (de facto) into acceptable (logically by jurisdiction of enforcement) legal tool (de jure) in terms of applicable theories such as estoppel, l'apparence, doctrine of group of companies etc. Moreover, with such a logic in mind it is possible to assume that such a “legal magic” is a kind of legal trick that, in the absence of real consent, formally covers the core tribunal's issue of jurisdiction based on consent, on the one hand. On the other hand, according to the view of Hanotiau, there is no any anomaly due to the fact that we should speak not about the breadth of the arbitration agreement, but rather about the true parties to it in the sense of new modern approach to the notion of consent, which like a chameleon, changes its form and content according to circumstances of a complex reality.

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43 In this regard Hanotiau noted: “One is occasionally tempted to wonder whether equity is not in some cases the paramount consideration and all the legal theories advanced to justify the tribunal decision, ex post facto creation.” Hanotiau Bernard, ‘Problems Raised by Complex Arbitrations Involving Multiple Contracts—Parties—Issues An Analysis’ (2001) 18 Journal of International Arbitration, Issue 3, pp. 251–360

II. Contractual theories and consent: chameleon effect

“Fragmentation is an artifact that may involve both risks and opportunities”

J. P. Trachtman, The future of international law, Cambridge 2013

As we may see from the previous discussion, arbitrators' and courts' decisions not always and obviously funded on consent in its traditional meaning; moreover, as case law shows in order to define the so-called “common intention” between parties and non-signatories to the arbitration agreement, courts and tribunals, occasionally, even forced out of facts that normally is not allowed to the extent that decision-making process went more far out of the scope of arbitration clause maintaining the sophisticated “manipulations of law and facts” in a form of “legal magic” that creates significant misconceptions as to the correct interpretation of the factual background and the whole legal outcome of the issue at hand.

Moreover, as practice shows decision making will be never limited by the formal scope of the arbitration agreement if justice required otherwise in terms of equity, fairness and efficiency. However, in any case, such “a legal freedom” in relation to consent must be justified by certain legal form, that, as a matter of fact, drastically differ among jurisdictions in terms of “forms” of consent, its interpretation and a manner of expression. Therefore, taking into consideration complexities of the issue as well as space constrains the present Chapter attempts to analyze the said phenomenon as regards the limits of the scope of the arbitration clause de jure and its interpretation in practice de facto in relation to consent to arbitrate via brief analysis of the theory of equitable estoppel and the doctrine of group of companies. Put simply, are we talking about the metamorphosis effect of consent in the context of the transformation of arbitration? If the answer is positive, then perhaps there is no any consent at all? Is there any sense to sign an arbitration agreement at all? If so, is this an impasse or there are other alternatives?

Despite the fact that arbitration faced its first “troubles” in relation to non-signatories since 70's, the “load is there until this very day”. The decisive philosophy to the issue

45 In a word, it has to do with the famous case Dallah v Government of Pakistan, [2010] UKSC 46 and previously in the Peterson Farms v C&M Farming, [2004] 1 Lloyd’s Rep. 603. Both cases will be discussed further in this paper.

46 Id.
lies on the ground of desperate range of theories and legal presumptions, namely:
(1) alter ego/piercing the corporate veil, (2) incorporation by reference, (3) assumption, 
(4) agency, (5) third-party beneficiary, and (6) equitable estoppel among which legal 
literature, in general, distinguishes two groups of theories in relation to non-
signatories. In particular, to rephrase Hanotiau “…the jurisdiction of arbitrators 
based either on the ground of equity and fairness or transmission”. Moreover, 
Brekoulakis distinguishes the first group based on the equitable (not consensual) 
principle of good faith, whereas the second group is rooted in a determination of the 
consent by conduct. The “good faith” is represented by such theories as alter ego, 
agency and equitable estoppel, while the “consent by conduct” is defined by the fol-
lowing theories: assignment or transfer of rights, the third-party beneficiary and the 
group of companies’ doctrine.

A. Good faith

To begin with, “the concept of good faith in contractual dealings is pervasive in both 
common law and civil law systems”. It has to be noted that “in civil law systems, 
good faith is the first and most accepted principle in the interpretation of consent”. The 
latter could be interpreted in a few ways: firstly, on the ground of presumption of 
reverse situation (by analyzing the content and conduct) as if such a dispute arises 
with participation of reasonable “men” in the first place; secondly, execution of justice 
in its the most general meaning in the sense of rendering simply a “just” decision. As 
regards the latter, in other words, the tribunal “… may look at each party’s action, re-
spectively, for violations of the duty of good faith and decide whether the non-
signatory must arbitrate based on what justice requires to re-balance the equities be-
tween two parties.”

47 Williams E.Dwayne, Binding Non-signatories to arbitration Agreements,25 FRANCHISE 
L.J.,(2006) at 176

48 See Hanotiau, supra note 44.

49 See Capper, supra note 29.

50 Thomas, supra note 14.

51 See Fouchard, supra note 24.

52 See Thomas, supra note 14.
The described process of “birth” of justice under the umbrella of the theory of equitable estoppel is discussed below.

**Estoppel**

To put simply, the main philosophy of the principle of estoppel lies in the equity and fairness and could be perfectly and simply described by the well-known adage “good guys should win and bad guys should lose”\(^53\). Moreover, the theory influenced the arbitrator's decision to the extent of negation of consent in the sense of “potential alternative to consent” as a ground for legitimate arbitration. Following Oliver Wendell Holmes: “the life of the law has not been logic: it has been experience”\(^54\), further we will analyze such an experience in terms of relevant case law. To be more precise, the following line of cases illustrates decisions of arbitrators dealing with the issue of good faith (or its lack\(^55\)) as a decisive argument in determining the legal fate of non-signatory to arbitrate.

\(^53\) Young Roger&Spitz Stephen, SUEM-Spitzs Ultimate Equitable Maxim: In Equity ,Good guys should win and bad guys should lose,55S.C.L.Rev.175,177(2003).

\(^54\) Holmes Oliver W., The common law 1 (Little,Brown &Co1938)

\(^55\) For instance see Motorola Credit Corporation v. Uzan, 322 F.3d 130, 134 (2d Cir. 2003), available at: [http://law.justia.com/cases/federal/district-courts/FSupp2/274/481/2493622/](http://law.justia.com/cases/federal/district-courts/FSupp2/274/481/2493622/) Here Court did not envoke the estoppel in relation to Uzan family (defendants) as a non-signatory because “from the very outset... defendants have acted fraudulently...through inconsistencies, omissions, false representations, and tactical diversions”. In a word, Court founded its decision on the basis of doctrine of “unclean hands”. This case is a brilliant example of the magical effect of the (reverse) good faith principle as regards non-signatory issue that is twofold: on the one hand, violation the duty of good faith precludes the non-signatory from arbitration benefits, whereas the behavior in good faith may be the lucky gateway to arbitration. As the Court of Appeals has noted, "[t]his case raises a host of unusual [legal] questions...Further "...all the credible evidence before the Court proves that the defendants in particular, the members of the Uzan family ,have perpetrated a huge fraud. Under the guise of obtaining financing for a Turkish telecommunications company, the Uzans have siphoned more than a billion dollars of plaintiffs' money into their own pockets and into the coffers of other entities they control. Having fraudulently induced the loans, they have sought to advance and conceal their scheme through an almost endless series of lies, threats, and chicanery, including, among much else, filing false criminal charges against high level American and Finnish executives, grossly diluting and weakening the collateral for the loans, and repeatedly disobeying the orders of this Court."
The simple search for the true intent of the parties derives directly from the rule of interpretation in good faith. In a word, the legitimacy of such equitable outcome highly depends on "how much support there is in the facts and the law..." furthermore, "the latter define the extent to which the arbitrators would need to depart from their duty to render an enforceable award in order to reach the intended outcome in a name of justice based on the fragile interconnection between "economic and moral values".

It has to be noted that the term Arbitral estoppel presumes two following theories: the direct benefit estoppel and the closely intertwined estoppel.

One more example of the application of good faith (i.e. lack of it by conduct) in Gorlach v. Sports Club Co., 148 Cal. Rptr. 3d 71 (2009) US courts have denied the enforcement of an arbitration agreement that was included in an employee handbook, but never specifically signed by the employee. In fact, the court rejected arguments that the agreement was enforceable under theories of equitable estoppel or implied-in-fact agreement. It was not enough for the arbitration agreement to be placed in the handbook. The employee must sign the arbitration agreement for the provision to be enforceable. Cited at California lawyer http://www.callawyer.com/2015/12/arbitration-update-an-overview-of-recent-california-appellate-decisions/

56 See Fouchard, supra note 24.
57 See Youssef, supra note 15.
58 Id.
In a nutshell, under the theory of the *Direct benefit* estoppel a non-signatory may be compelled to arbitrate on the ground of certain benefit from the contract at hand. Moreover, a non-signatory can benefit from the terms of the contract even without explicit participation in its "*conclusion, performance and termination*." For Instance, *in Deloitte case, two* international associations DHSI and TRI merged globally. The main agreement contained the relevant arbitration clause. In fact, affiliates of the DHSI had to accept the deal by signing the copy of the said agreement or to object to it upon receipt. However, the Noraudit (a non-signatory), a regional affiliate of DHSI, neither signed nor raised the objections to the agreement while continuing to use the international DHSI's trademark "Deloitte". The nuance of the merger laid on the fact that the further use of the mentioned trademark of the DHSI's affiliates was strictly conditional upon the acceptance of the said agreement. Consequently, the DHSI sought to compel Noraudit to arbitration on the ground of the agreement at issue. All in all, taking into account the aforesaid, and the fact that "*Noraudit knew of the arbitration agreement and "knowingly accepted the benefits of" that agreement through its continuing use of the name "Deloitte"*" , the Court stopped Noraudit from arguing it was not bound by the arbitration clause in the agreement.

In *the American Bureau of Shipping v Tencara Shipyards* non-signatories, being Owners of the yacht, were compelled to arbitration on the ground of direct benefit from the contract at issue. In brief, a group of investors (Owners/insurers) entered into a construction (to construct a yacht) contract with Tencara. In turn, Tencara, under the terms of the contract, entered into a contract with ABS to obtain a vessel classification for the yacht. Due to the defects of the yacht investors filed the lawsuit against Tencara while Tencara brought suit against ABS. In a word, the arbitration clause, in terms of contract between Tencara and ABS, was incorporated into the certificate of classification. After all, the Court of Appeals endorsed the decision of first instance as to the "compelling arbitration of claims between Tencara and ABS

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63 See Meyniel,supra note 7.

64 Id.

and extended it to the investors claim as well on the ground that investors received a “direct benefit” from the contract (Interim Certificate of Classification) without which registration would have been practically impossible in the form of lower insurance rates and the ability to sail under the French flag.

Moreover, in a recent case In re: Lloyd’s Register North America the Fifth Circuit granted a writ of mandamus to enforce a forum selection clause requiring London disposition of a dispute between (LRNA) a classification society and a ship purchaser (Pearl Seas). In a nutshell, “Pearl Seas contracted with Irving Shipbuilding, Inc. (Irving) for the construction of a ship. LRNA was responsible for certifying the ship. Pearl Seas was dissatisfied with the ship and engaged in several years of arbitration and litigation with Irving. Upon the conclusion of those proceedings, Pearl Seas brought suit against LRNA. LRNA moved to dismiss the suit for forum non conveniens, alleging that a forum-selection clause… required Pearl Seas to bring its claims in England. All in all, the Fifth Circuit held the forum selection clause in the contract between Irving and LRNA applied to non-signatory Pearl Seas through the doctrine of direct-benefits estoppel, because firstly, Pearl Seas knew about the content of the contract between LRNA and Irving well before the instant litigation, secondly, Pearl Seas acted to exploit that contract through actively attempting to enforce

66 See, Hosking, supra note 23.


those terms that benefitted it and finally, Pearl Seas gained a direct benefit\(^69\) from LRNA’s performance of the contract’s terms.\(^70\)

Regarding the theory of closely intertwined estoppel, a non-signatory will be involved (or even compelled) to arbitration “if the non-signatories claims are closely intertwined with the underlying contract and the entities involved share a close relationship”\(^71\). For example, in *International Paper Company v. Schwabedissen Maschinen & Anlagen GmbH*\(^72\) “buyer of industrial saw was precluded from asserting that, as a non-signatory party, it was not bound by the arbitration clause included in the contract for the sale of the saw between distributor and manufacturer, when the buyer's claims against manufacturer were based on and arose out of that contract”\(^73\). Taking into account the fact that a buyer, being a non-signatory to the main contract between distributor and manufacturer “clearly does seek a "direct benefit" from the contract and makes a "claim... integrally related to" that contract ...,that provides part of

\(^{69}\) By contrast, in *Belzberg v Verus Invs Holdings Inc*, 21 NY 3d 626 (2013), a securities broker (Jefferies) brought an arbitration against its customer (Verus) to recover expenses regarding the withholding taxes. Verus sought to imply in arbitration certain third-party claims against several individuals for their shares of the taxes as well. Among those was the so-called Belzberg who did not sign the SAA (securities account agreement), including an arbitration clause. After all, the New York Court of Appeals held: “where the benefits are merely indirect, a non-signatory cannot be compelled to arbitrate...therefore, Belzberg derived benefits from the financial advisory services he provided to another party but not directly from the Jefferies-Verus SAA”.

\(^{70}\) See Lloyd’s Register North America, supra note 68.

\(^{71}\) See Meyniel, supra note 7.

\(^{72}\) “The question presented to us is whether an arbitration clause in the distributor-manufacturer contract requires the buyer, a non-signatory to that contract, to arbitrate its claims against the manufacturer. The district court held that it did. Concluding that the buyer cannot sue to enforce the guarantees and warranties of the distributor-manufacturer contract without complying with its arbitration provision, we affirm. The arbitration clause is a broad one, requiring arbitration of " [a]ny dispute arising out of the Contract." *International Paper Company v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411 (4th Cir. 2000), available at: [http://law.justia.com/cases/federal/appellate-courts/F3/206/411/597981/](http://law.justia.com/cases/federal/appellate-courts/F3/206/411/597981/)

the factual foundation for every claim of non-signatory"; therefore, Court held that "the buyer cannot sue to enforce the guarantees and warranties of the distributor-manufacturer contract without complying with its arbitration provision."

However, as this world is imperfect the same applies to the application of the theory of estoppel that also creates certain difficulties (if not a legal chaos) by applying a rule of the lex mercatoria or the factual conduct.

For instance, in famous *Bridas S. A. P. I. C. v. Government of Turkmenistan* Bridas entered into a joint venture agreement (JVA) to exploit oil and gas resources with an entity (Turkmenneft) designated by the Government of Turkmenistan. All in all, the Government ordered to halt operations in Keimir and cease making imports into and exports from Turkmenistan. Consequently, Bridas commenced an arbitration proceeding, as provided in the JVA, against the Government and Turkmenneft. Importantly, the Government decreed that all proceeds from oil and gas exports in the country were to be directed to a special State Oil and Gas Development Fund; the fund's assets were declared immune from seizure. As a result, the tribunal held that the Government was a proper party to the arbitration and that the tribunal had the authority to adjudicate Bridas's dispute with the Government. The tribunal held both Turkmenneft and the Government liable for repudiating the JVA. In its findings US Court explicitly held that actions of the government are fundamentally unfair and

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74 See International Paper, supra note 72.

75 Id.

76 See Fouchard, supra note 24.


78 an Argentine corporation

79 The “Turkmenian Party” to the agreement has been an entity wholly owned by the Government, whose identity was designated and re-designated at will by the President of Turkmenistan and has changed a number of times during the life of the joint venture. Turkmenneft is the last entity to step into the role of “Turkmenian Party.”

80 See, BRIDAS, supra note 77.

81a "...there is ample evidence that ...Turkmenistan misused Turkmenneft to harm Bridas by destroying the value of the joint venture Agreement. When the Government dissolved the Turkmenian party and replaced it with Turkmenneft, Turkmenneft was capitalized with the
especially in relation to its manipulation over the subsidiary. Moreover, the Court determined “fundamental unfairness” in a situation “when a parent corporation diverted income from the undercapitalized subsidiary to itself, and therefore, piercing the corporate veil was appropriate”82. Otherwise Bridas with almost no chances would try its fate before the local courts of Turkmenistan where the success of the former is out of the question. However, this decision faced quite a strong criticism. In particular, professor Smith noted that “it was on the basis of a doctrine foreign to Turkmenistan’s legal tradition that… Court not only held the government bound by contractual obligations it had not assumed, but also exercised its jurisdiction over a (non-signatory) on the basis of arbitration clause it did not agree to”83.

Furthermore, the application of the so-called “two-prong” or hybrid test84, that results in decision-making tendency, based exclusively on the integral relationship between signatories and a non-signatory, with explicit elimination of the significance of consent to the extent, as Hosking noted, of “… undermin (ing) consent” as the keystone of arbitration85.

All in all, such a liberal approach is an organic element of extensive interpretation of arbitration agreement for the sake of fairness and efficiency as “after all, how is it that

equivalent of only $17,000 US and was funded by a State oil and Gas Development Fund expressly rendered immune from swizuare under newly enacted Turkmenian law. Yet Turkmenneft became the party bound to arbitrate under the JVA and liable for any adverse award. At the same time, the Government a number of decrees distancing itself from the joint venture and attempting to limit its potential exposure to liability. The Government’s manipulation of Turkmenneft to prevent Bridas from recovering any substantial damage award satisfies the “fraud or injustice” prong”. Id.

82 Id.


85 See Hosking, supra note 23 at 530.
the claimant could ever receive a fair outcome when he has to arbitrate part of his claim and then go to court against another part of the same dispute"86.

Therefore, some general conclusions can be drawn:

- Firstly, the theory of equitable estoppel based on principles of equity that has nothing to do with contract law in terms of traditional understanding of the notion of consent. On the contrary, case law based on a "totality of circumstances" test87 that consists of "relationship test" with no universal effect88. Therefore, the issue of legal certainty, procedural efficiency and predictability of legal outcome is at stake.

- Secondly, if we insist that the fundament of arbitration is consent with its source of contract law, then it seems quite illogically to apply non-consensual methods to remedy the "consensual" deal (arbitration agreement). However, the latter facilitates the decision-making process by providing the adequate interpretation89 of the arbitration agreement in a non-default situations90 “by analyzing what a reasonable person in the party situation would believe the

88 In fact it results in rendering of contradictory decisions under the same set of facts.
89 “Although general principles of interpretation of intent exist, national laws provide very different solutions to key questions, such as: What are the acceptable forms of expression of consent? What are the rules which govern the interpretation of arbitration agreements? Are these rules different from the rules which govern contractual interpretation in general? And finally, what are the conditions and scope of application of third-party principles to contracts in general, and to arbitration agreements, in particular? See Youssef, supra note 15.
90 “A signatory may be compelled to arbitrate with a non-signatory if, in good faith, the signatory intended to grant that right to more than just the other signatory.”/Sourcing Unlimited, Inc.v.Asimco, Inc., 526 F.3d 38,48(1st Cir.2008),

Equally, “a nonsignatory may be compelled to arbitrate with a signatory if the nonsignatory’s actions during negotiations of the contract signal its intent to be bound by the promise to arbitrate made by another party”/Intl Paper Co.v.Schwabedissen Maschinen &Anlagen GMBH, 206 F.3d 411, 416-18 (4th Cir.2000)
breadth of the arbitration clause should be in the sense of determination of the true parties to the arbitration agreement. Furthermore, by application of the principle of good faith through estoppel arbitrators exercise the highest and major goal of the arbitration (as being a “private” but justice anyway) equity and balancing the legal positions of the parties as “When one party violates the duty of good faith, there is never the possibility of finding any other intent besides self-interest, and most often, the bad actor will resist any venue the innocent party chooses in an attempt to avoid being held accountable”. To rephrase, tribunals, in the absence of the relevant contractual instruments (due to the rudimentary structure of legal theories) and in order to execute the mission of formal justice, “dress facts in the content of equity but in the shape of (abstract) consent according to the traditionally accepted canons.

- Finally, there is clear huge inconsistency as to the application of the principle Lex Mercatoria in the sense of the mentioned issue of differentiation between “mercatorists” and “non-mercatorists”. In other words, if for France application of the said principle on the position of transnational law (i.e. arbitration) is a “piece of cake”, case law of England, Germany or Switzerland pursues the traditional approach in terms of prevailing of national law that in the end seems to be a destructive factor.

B. Decoding the code of conduct

The second set of theories that is used in relation to non-signatories is so-called “consent by conduct” and generally speaking, is represented by the following theories such as: the third party beneficiary, assignment or transfer of rights and the group of companies’ doctrine.

Remarkably, the consent under those theories is defined by the actions which, and that is most important, are related to the main contract exclusively (not to the arbitra-


92 Transrol Navegacao S.A.782 F.Supp.848 (S.D.N.Y.1991): “A bad actor should not be able to injure an innocent party through their contractual relations and then shout “lack of consent!” in order to avoid the venue of recovery that the innocent party may choose: arbitration or litigation”. Cited in Thomas,A., supra note 14.
tion agreement at stake as it should be presumed). Further, here it is possible to admit a kind of anomaly in the sense that the level of requirements of the consent to be defined by application of such theories is relatively lower in contrast to the consent between parties to the main contract in the first place. Furthermore, for instance, taking into account the findings of the Polish Supreme Court (in case regarding assignment)\textsuperscript{93}, it is important to note that the consent was recognized on the basis of the analysis of the content of arbitration agreement regardless of the parties to it. Put simply, “the scope ratione personae of the arbitration agreement is determined by reference to its scope ratione materiae”\textsuperscript{94}. In a word, such findings correspond to the recent solution proposed by professor Brekoulakis, that will be discussed further.

The more detailed analysis of the aforementioned will be presented by one of the most contradictory (in practice) theory, the theory of group of companies.

\textsuperscript{93} In 1992 RPPD SA entered into an agreement with P. sp. z o.o. in W. The agreement included an arbitration clause as well as a clause providing that P. sp. z o.o. in W could transfer all of its rights and obligations under the agreement to another company upon notice to RPPD SA but without the consent of RPPD SA. By letter signed by one person who was the CEO of both P. sp. z o.o. in the city of W. and P. sp. z o.o. in the city of R., RPPD SA was notified that the rights and obligations under the 1992 agreement had been transferred from P. sp. z o.o. in W. to P. sp. z o.o. in R. The letterhead referred to P. sp. z o.o. in W., but the stamp under the CEO’s signature referred to P. sp. z o.o. in R. P. sp. z o.o. in R. filed an arbitration claim against RPPD SA. RPPD SA sought to dismiss the claim on the grounds that there was no arbitration clause because the rights and obligations under the agreement had not been effectively transferred from P. sp. z o.o. in W. to P. sp. z o.o. in R. The arbitration court overruled the objection to its jurisdiction and RPPD SA thereafter refused to participate in the proceeding before the arbitration court. See Polish Supreme Court, 3 September 1998, I CKN 822/97. Summary available at: http://arbitration-poland.com/caselaw/475,polish_supreme_court_judgment_dated_3_september_1997.html

The Court founded its decision on Art. 698(2) of the Polish Code of Civil Procedure which requires that arbitration agreement shall specify the subject of the dispute or at least a legal relation resulting in a dispute, or a potential dispute.

\textsuperscript{94} See Youssef, supra note 15.
French "nightmare"- Group of companies' doctrine

“Even in the context of arbitration agreement it is not always the case that the concepts of separate legal personality of corporate entities and privity of contract are sacrosanct”.

James and Ridgeon, Norton Rose Fulbright95, 2014

Despite the fact that there are two diametrically opposed points of view and there is a huge literature as regards the phenomenon of this doctrine, it is worth noting that the group of companies’ doctrine is one of the most extravagant (if not extreme) approaches among arbitration community that has come a long way96 from


96 For instance, in Jj Ryan Sons Inc v. Rhone Poulenc Textile Sa - 863 F. 2d 315 (1988), available at: http://openjurist.org/863/f2d/315/jj-ryans-sons-inc-v-rhone-poulenc-textile-sa , “Ryan brought tort and contract claims against Rhone and fourt of its foreign affiliates arising out of the importation of products manufactured by Rhone’s affiliates. Ryan had no contractual relations with Rhone; however, it had entered into several contracts with Rhone affiliates. While the distribution contract between Ryan and Rhone affiliates contained arbitration clauses, the other agreements did not. All in all, the trial court ordered arbitration of the principal claims against affiliates under all the contracts notwithstanding the absence of arbitration clause in those contracts.”- Cited in AAA, Handbook on commercial arbitration, Juris Net; 2 edition, ed. by Carbonneau T., Jaeggi J.A., (September 30, 2010), 500, at 43. The fourt circuit affirmed the decision holding that “although the contracts did not contain arbitration provisions, they implemented the distribution agreement that did contain an arbitration provision...as without the ancillary agreements pertaining to the details of actual importation of the affiliates’ products, the exclusive distribution agreements would be largely illusory. Further, Court of Appeals affirmed the decision holding that “When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.” In a word, the decision based on the findings of the Fifth Circuit back to 1976 in case Sam Reisfeld & Son Import Company v. S.A. Etco, 530 F.2d 679, 681 (5th Cir.1976) where Court held: “If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted”, whereas in Sahrank v Oracle Corporation, Docket No. 02-9383, 2005, Available at: http://caselaw.findlaw.com/us-2nd-circuit/1476967.html, Court of Appeal declined to enforce an arbitral award against a corpo-
acknowledgement as a great legal discovery to the extent of disillusion in terms of total negation as a practical tool. Likewise, perhaps this is the only theory that, due to rate parent where there was “no clear and unmistakable intent by (it) to arbitrate” cited in Zuberbuhler T., Non-signatories and consensus to arbitrate, 26 ASA BULLETIN 1/2008 (Mars).

For instance, in Peterson Farms Inc. vs. C&M Farming Ltd. (judgment of 4 February 2004, [2004] EWHC 121 as regards application of the theory of group of companies where the English Commercial Court set aside an arbitral award rendered in London in which the “group of companies” doctrine had been applied to grant damages to entities of the C&M Farming Ltd group which were not named as parties to the sales agreement which contained an ICC arbitration clause. The law applicable to the sales agreement were the laws of Arkansas, USA and the place of arbitration was London. In brief, C&M, the purchaser and Peterson, the seller, concluded a sale contract. The contract provided for ICC arbitration and for the application of the law of Arkansas. Under the agreement, the C&M was sold male “grandparent” birds. It mated the birds to produce “parent” males which it would sell on as hatching eggs or day-old chicks to other “group entities” and to other purchasers. The other group entities used the parent males to breed with parent females to produce broiler chicks. It transpired that the poultry was infected with an avian virus. Consequently, C&M initiated arbitration. One of the issues for the Tribunal was whether it had jurisdiction to consider and determine the damage claims of other entities within the C&M’s group which were not named as parties to the agreement. Following the Dow, tribunal recognize the group of companies on the ground of “the record of correspondence between the parties and internal documents of Peterson, the preliminary documents exchanged between the parties, and the general nature of the poultry business demonstrate that Peterson intended to enter into and perform under a contract with all the entities forming the C&M Group of companies. Peterson knew that it was contracting with a group as a whole and that its product would be used in an integrated operation that involved all members of the C&M Group. The tribunal considers that C&M is fully entitled to claim all damages suffered by the C&M Group and arising out of the contractual relationship with Peterson. However, Court set aside that part of the award which awarded payment of losses suffered by C&M Group members which were not party to the arbitration due to the fact that as Langley J held: “English law treats the issue as one subject to the chosen proper law of the agreement and that excludes the doctrine which forms no part of English law”. Cited in Alvarez H., Chapter 6: Autonomy of International Arbitration Process in Julian D. M. Lew and Loukas A. Mistelis (eds), Pervasive Problems in International Arbitration, International Arbitration Law Library, Volume 15, Kluwer Law International 2006, pp. 119 - 139

Additionally, according to Hanotiau, the issue (raised by tribunal) of “pass-through claims” is not specific to groups of companies and does not necessarily have to be decided on the basis
to its philosophy, instead of straight legal reasoning, gives possibility to arbitrators to create the so-called “juristic magic” in the sense that “in many group scenarios, the extension..., on the basis of the will of the parties, is a fiction”\(^{98}\). Moreover, the latter takes place in decision-making as a result of mislead interpretation of the context of the doctrine original meaning. Further, we will discuss the aforesaid in correlation with the central issue of the thesis, as regards the existence of consent, in more detail.

Although there is nothing new under the sun regarding the history of the doctrine, however, from the practical and methodological point of view, it is quite important to emphasize the following facts on the basis of which the doctrine became known in its current “appearance”:

- The birth of the theory relates to the decision of French Court\(^{99}\) in a well-known case Dow Chemical in 1982 that was a starting point of the vicious of this doctrine. For example, it is not unusual for a main contractor to claim from the owner not only its own damages but also the damages suffered by its sub-contractors, which the main contractor has already indemnified. Whether this pass-through claim should be granted as such is function of the applicable law, which will most probably be the law applicable to the main agreement. Cited in Hanotiau B., Chapter 14: Groups of Companies in International Arbitration in Julian D. M. Lew and Loukas A. Mistelis (eds), Pervasive Problems in International Arbitration, International Arbitration Law Library, Volume 15 Kluwer Law International 2006, pp. 279 – 290.

All in all, as to the phenomenon of Peterson farms, Kaplan noted that “Parisian courts attempt to liberate international arbitration from national law”. Schwartz added: “If you want to have a better chance of including a non-signatory in your arbitration, go to Paris. If you want to limit that possibility then select London.” Cited at Commercial dispute resolution (2015) http://www.cdr-news.com/4980-a-tale-of-two-cities

\(^{98}\) See Gravel, supra note 18.

\(^{99}\) Briefly speaking, the “group of companies doctrine” is often associated with French law because of the ICC Interim Award No. 4131 of 23 September 1982 ,Dow Chemicals v Isover Saint Gobain, available at: http://www.trans-lex.org/204131#head_2 Here Isover Saint Gobain concluded a few contracts with the subsidiaries of the Dow Group. At the moment of the dispute Dow Group aimed to commence arbitration due to the fact that Isover and one of the Dow subsidiaries signed the relevant arbitration clause in terms of a distribution agreement that specifically included the reference to subsidiaries of Dow in the sense that the latter are able to make delivery to Isover. The issue at stake concerned the jurisdiction over all subsidiaries at transaction. In this case tribunal established its jurisdiction on the following grounds:
circle of cases\textsuperscript{100} "...where courts or tribunals can bind a non-signatory on the basis of that company's strings to, or parent/sibling relationship with another company...the result is that the court or tribune infers common intention of the parties on the basis of corporate structure and the active involvement of the non-signatory. This involvement is for example negotiation, performance, or termination of the contract containing the arbitration agreement."

- However, it is not fully correct to say (that is, unfortunately, overlooked in practice) that the Dow Chemical is a ground for creation of the doctrine of group of companies. Rather, it is a pure misinterpretation by arbitration community the real meaning of the original intention of the Court in its ruling that, in fact..."it is not so much the existence of a group that results in the various companies of the group being bound by the agreement signed by only one of them, but rather the fact that such was the true intention of the parties".\textsuperscript{101}

- Moreover, as practice shows courts and tribunals determine “common intention to arbitrate” through the categories of “the group structure or the economic unit” of companies or on the ground of “active role of non-signatory in performance or termination of the main contract”. Further, such application of conduct “for substitute consent to arbitration is considered as a shortcut

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there was an acknowledgement of the “single economic entity”, further, a parent company exercised absolute control over subsidiaries that signed the contract, next, one of the subsidiaries at issue performed the obligation, and finally, the common intention of all parties was therefore interpreted as the subsidiaries in transaction were bound by the main contract in the sense of being true parties to the latter.
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However, to the date concept in its original meaning is not recognised. The misbelief takes place merely due to the fact that France is considered as the most friendliest (if not innovative) jurisdiction (that considers arbitration through its transnational notion) regarding the “extending” arbitration clauses to non-signatories. In fact, even in France the pure existence of a group of companies is not in itself a sufficient reason to extend arbitration agreement. Instead involvement or performance (according to the current (especially French) case law tendencies) consider as a ground to allow participation of non-signatories in arbitration proceedings.

\textsuperscript{100} See, Brekoulakis, supra note 73.

\textsuperscript{101} See Fouchard, supra note 24.
permitting avoidance of rigorous legal reasoning that, as a result, “...has contributed to a distorted approach by courts and arbitrators in a number of complex arbitrations” to the extent when “a notion of involvement in performance per se replaces a search for consent.” Such a set of facts leads to the conclusion of Hanotiau that “involvement and knowledge have a standing on their own, as a substitute for consent.”

- The current business transactions became sophisticated to the extent of maintaining by courts their own reasoning over the notion of consent.

Next, regarding the consideration of consent as contractual derivative, (assuming that the active role of a non-signatory in main contract could be evidence to be bound by this main contract), this, however, “would not necessarily reveal... intention to be bound by the arbitration agreement too ('arbitral intention'). In this respect, Dallah is a brilliant example of a long-stay contention as to the way of decoding conduct in terms of mentioned “camps” of the nature of arbitration. In a nutshell, Dallah entered into a memorandum of understanding with the Pakistani Government.


103 See Hanotiau, supra note 43.

104 Id at 273.

105 In this respect, case Khatib Petroleum Services International Co. v. Care Construction Co. and Care Services Co., is an exact example. Here the Egyptian Court maintained its own reasoning as to the extension in group of companies that according to the view of Youssef “pretend to be even more liberal approach than French ruling in a famous Dow case due to the fact that “Khatib does not refer to the parties’ intentions, unlike Dow, which refers explicitly to the “common intentions of the parties” as the main basis for extension”.

106 See Brekoulakis, supra note 73.

107 For instance, the tribunal in ICC case no. 2138 of 1974 held "it is not at all certain that if the non-signatory had signed itself the contract [...] it would have accepted the arbitration clause", in ICC awards 1974-1985 (Y. Derains and S. Jarvin), at p. 934. Cited in Brekoulakis, supra note 73.

108 Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan

109 The Saudi Arbian Dallah Real Estate and Tourism Holding Company
ment to provide accommodation for Pakistani pilgrims to the Mecca. Pakistan later established Trust to collect and invest the donations received from pilgrims for the project. Afterwards the Trust and Dallah entered into an agreement containing the terms which had been previously negotiated by Pakistan. The agreement also contained an ICC arbitration clause. Due to the fact that Trust ceased to exist, a government official wrote to Dallah purporting to terminate the agreement. Dallah commenced ICC arbitration in Paris against Pakistan. The tribunal declared that according to French international arbitration law Pakistan was bound by the arbitration clause as an alter ego of the Trust. However, the Dallah unsuccessfully tried to enforce the French award in England due to the fact that English courts did not recognize that Pakistan consented to arbitration. All in all, it has to be noted that in this case English and French Courts “searched” for consent through decoding the conduct of Pakistan on the ground of two irreconcilable views: on the one hand, English position lies on the attempt to evidence the intent of Pakistan to be bound by the main contract in the sense that creation of the Trust was considered to the contrary as “indicative of an intent not to be bound by the contract” (i.e. through the strict


112 The High Court, the Court of Appeal and the Supreme Court in November 2010 confirmed this view.

113 “the UK Supreme Court devoted only passing attention to the fact that the Pakistani Government was actively involved in directing performance of the Agreement and formally terminating the Agreement (again, in correspondence from Government officials on Government letterhead), while the Trust had not been involved at all in either performance or termination of the Agreement. In contrast, the Paris Court of Appeal placed substantial weight on all these circumstances, holding that the Government’s actions both before and after conclusion of the Agreement could only be explained by its status as a real party to the Agreement.” Cited in “Dallah and the New York Convention”, G.Born, April 7, 2011, Kluwer Arbitration Blog. Available at: http://kluwerarbitrationblog.com/2011/04/07/dallah-and-the-new-york-convention/
principle of privity of contracts).”114 115 On the other hand, French court concentrated on “the true party to the economic transaction,” and “in this light, the active-yet-indirect role the government maintained throughout the contract (even despite the creation of the Trust), was sufficient to persuade the court of an intent to be bound by the arbitral provision (i.e. in relation to the effects of arbitration agreement).”116 Moreover, from practical experience it is fair to say that in fact a non-signatory (regardless of the role) “might not even be aware of the arbitration agreement in the main contract”117 or in a worst case scenario, a non-signatory could not be aware about the fact that contract has been signed at all (very often it happens in situation when subsidiary enters into a contract on its own as a separate legal entity but at the same time the latter maintains certain obligations for its parent company acknowledging the correctness on the basis of pure formal corporate structure)118 119.

In this regard position of French Court as to to the fact “..that a non-signatory party has taken part in the negotiation or the performance of the contract raises the presumption that the non-signatory party is aware of the existence and the scope of


116 Id.

117 Id.

118 Born G., International commercial arbitration 1154-1177, 2009. Cases that present misbelief by contracting party as to who are the true parties to the agreement. In a word, in this regard the so-called concept of “piercing the corporate veil”, that is rapidly applicable by USA Courts, very often replaces the issue of “extending”. However, it is fair to say that such application is justifiable only in case when the shareholders hold 100 per cent of shares (de jure) and at the same time exercises the full control of the transaction (de facto) in question in order to commit a fraud

119 See Hanotiau, supra note 102.
the arbitration agreement included in this contract seems incorrect if not absurd. To this end, such a presumption is not “a lifebuoy” in the sense that “an arbitration agreement must be founded upon a meeting of minds of both the signatories and the non-signatories, which must be ascertained by reference to specific facts revealing

120 the concrete actions of non-signatories raised such a belief regardless of the fact that the main contract has not been signed at all. See for example Paris Cour d’appel, Nov. 30.1988, Korsnas Marna v Durand-Auzias (1989) REV. ARB. p. 691, with note Tschanz 208 and Paris Cour d’ Appel, 7 Dec. 1994. Here a French Subsidiary of a Swedish company (Durand-Auzias) started arbitration proceedings in Paris on the basis of a distribution contract that was originally concluded by the parent company of Durand-Auzias (Barkman) with Korsnas Marna (another Swedish company) including reference to the French subsidiary as its Paris office. Afterwards Durand-Auzias sued Korsnas Marna for an reimbursement. In its turn the latter argued as to the fact that French courts are lack of jurisdiction due to the existence of an arbitration clause. All in all, Courts concluded as to the contrary with the subsequent overruling of the decision by Cour d’appel on the ground of the presumption of the fact that Durand was aware of the arbitration clause and its meaning. Remarkably, with regard to the Dow, court in its ruling did not refer to the groupe de societes theory as well as the “direct reference to the volonte or intention of the parties and the emphasis on circumstances that would permit one to presume that the party which has not signed the contract was aware of the existence and meaning of arbitration clause”. See Gravel, supra note 18, at 524 et seq.

The relatively similar formulation is presented also by Orri v. Societe des Lubrifiants Elf-Aquitaine, Paris 11 Jan 1990, 118 JDI 141. Here Mt Orri, a Saudi businessman, owned the SEL, a group of companies. Elf supplied certain products to the SEL regardless of the remaining debts. As to the latter Mt Orri and Elf signed 2 documents: rescheduling of payments and a separate supply contract. The only first document was signed by Mr Orri. However the second document included an arbitration clause. At the moment of arbitration that has been commenced by Elf against SEL and Mr Orri, the latter argued that tribunal is lack of jurisdiction due to the absence of Mr Orri’s signature on the supply contract. All in all, the argument was rejected and upheld by the Cour d’appeal as well on the ground that: “two contracts formed part of an indivisible ensemble as well as the fact that Mr Orri was the real counter-party to the contract containing the arbitration clause; and finally, the groupe de societes theory give rise to the treatment of Mr Orri as a party to the contract (in a word, the court went so far as to find that the substitution of the third party who signed the contract on behalf of SEL was a fraudulent act designed to shield Mr Orri from liability under the contract)”. Cited in Gravel, supra note 18, at 524 et seq.

121 See Fouchard, supra note 24.
the mutual intention of the parties to resort to arbitration.” In this respect, we can find the relevant conclusion in ICC case 11405 of 2001. Here two individuals (Mr T and Mr G, CEO and General Manager of I) objected the jurisdiction of tribunal over themselves and company E (a non-signatory claimant). I and C concluded a Share sale agreement (SSA) as to the incorporation of E by I with the subsequent transfer of E’s shares to C. Importantly, I was acting in its own name as well as in the name and on behalf of its shareholders, however, neither Mr T nor Mr G was not mentioned in agreement in terms of personal liability. Moreover, I and E concluded the other service agreement. Due to the fact that I stopped its operations, C and E commenced an arbitration by claiming damages against I, Mr T and Mr G as “implied” parties to the SSA on the ground that I was a major source of income for E. The arbitrator held: “What is relevant is whether all parties intended to be bound by the arbitration clause. Not only the signatory parties, but also the non-signatory parties should have intended (or led the other parties to reasonably believe that they intended) to be bound by the arbitration clause.” Moreover, the philosophy of the doctrine is so vague that it excludes any kind of manual, and therefore, may lead even to the incorrect legal outcomes. For instance, in ICC case n 6519 Mr X, the controlling shareholder of the French group of companies X, concluded a contract containing an arbitration clause with company Y, being a part of the English group of companies. Upon the agreement, Mr X and company Y had to transfer certain assets to the French group of companies to company XB, that was under the control of

122 See Brekoulakis, supra note 73.

123 See Hanotiau, supra note 102.

124 See Fouchard, supra note 24, at para 480: “It is equally inappropriate to resort to a general principle of interpretation in favorem validitatis or in favorem jurisdictionis, whereby arbitration agreements are to be interpreted extensively. Although it is true that arbitration is now a normal means of resolving disputes in international trade, and that arbitration agreements should therefore not be interpreted “restrictively” or “strictly,” it remains perfectly legitimate to choose to have one’s international disputes settled by the courts. In this regard see also the so-called principle of “effective interpretation of arbitration agreement” as well as the highly criticized approach of the American courts towards “presumption in a favour of arbitration”.

125 As was pointed out by the sole arbitrator in ICC case no. 11405 of 2001. Cited in Hanotiau, supra note 102.

126 See Gravel, supra note 18.
Mr X. Further Company XB and XC which were controlled by Mr X, were among those which shares were to be transferred to company XB as well. In a while, before the contract came into force, company Y withdrew from the joint venture. As a result, Mr X and companies XB, XC and XD started arbitration proceedings against Y as a consequence of such a withdrawal in terms of losses. The very question was as to the status of companies XC and XD in terms of “groupe de societes”. All in all, tribunal rejected such a claim concluding the fact of mere disposition of shares by shareholder. Moreover, the fact that Company XB, being a vehicle, in the sense that it received certain assets under the joint venture agreement, merely support the idea of its status as a third party beneficiary, but not a party to the main contract with the relevant arbitration clause. In this case, neither “tribunals substitution...to “be directly concerned”, nor the Dow “test of involvement in performance” is not a solution as “each test is designed to lead to the conclusion that the company...was a party to the arbitration clause”. Further, in order to remedy the problem there are cases\textsuperscript{127} where the general principles of contract law are applicable as well in order to\textsuperscript{128}“support the extension doctrines’...because the application of the traditional principles themselves” is safe harbour “under the factual circumstances of the case\textsuperscript{129}”. However, it seems to be contradictory to apply the doctrine on the ground of (abstract) consent and at the same time “cover” the lack of facts by the application of general principles by concluding “common intention”.

After all, Gaillard’s phrase that “Visions are never wrong; they can be inoperative or internally inconsistent” perfectly describes the status of the doctrine. However, despite all pros and cons, the main finding is that, being merely “an orientation de la jurisprudence”,\textsuperscript{130} it reveals the failure of the contractual approach on the one hand, and on the other hand, it simply reflects “increased” needs of the users of the system in terms of efficiency and regardless of consent in the sense that it does not “affect” it but overrides it.


\textsuperscript{128} See Brekoulakis, supra note 73.

\textsuperscript{129} For example, the arbitral award in C&M Farming Ltd v Peterson Farms Inc made specific reference to the agency theory in addition to the application of a ‘group of companies’ doctrine.

\textsuperscript{130} See Gravel, supra note 18.
III. In the quest for a solution: from contractual “due process paranoia” to the concept of dispute

“All system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness. Ultimately, there must be a right answer.”

Goldhaber M.D.132

Taking into consideration the fact that lack of efficiency and certainty is one of the major concerns among scholars and users of international commercial arbitrations, this chapter attempts to analyze the possibility to find practically “more consistent, more inclusive and intellectually more honest approach to non-signatories.”

As can be seen from the analysis above current practice of the application of legal theories is more than imperfect. Instead of applying the certain legal reasoning arbitrators and courts are forced “to…unnecessary and incoherent formulations that apparently serve only as obstacles.”134 Taking into account the view of Dr. Blessing who considers the possible solutions regarding non-signatories phenomenon as “the most delicate and critical aspects in international arbitration”135 further, we will briefly discuss solutions (past and recent) that attempt to change the situation drastically if not to evolve at all. It is truly hoped that as every disease has its specific treatment

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135 See Blessing, supra note 19.
depending on symptoms, at least one of the solutions below, eventually, could be a proper and an effective remedy.

**A. General solutions**\(^{136}\) - At first glance

In the absence of harmonization and taking into consideration a high complexity and nonpredictability of the international business operations, one may suggest the obvious solution is quite simple, namely it is an obligation of parties, from the very beginning, to conclude a contract to the mere detail or to face the responsibility otherwise. Furthermore, if the parties are not brave enough the “the safe-harbor” is too simple, to insert a clause explicitly negating any possible extension to third parties\(^{137}\). However, and as any reasonable man could admit, such a kind of an exaggerated pragmatism is not an adequate strategy from a practical point of view.

Next, there is perfect option to execute the maxim *Jura novit curia* in the sense that arbitrators on the ground of consent of the parties and according to the certain arbitration rules will be able to exercise their jurisdiction regarding a non-signatory involved in arbitration proceedings. However, such a mechanism reminds a kind of litigation procedure, thus, it might be questioned the legitimacy of the arbitrators jurisdiction on the ground of the said maxim as well as the mechanic (without reasoning) “drugging” a non-signatory into arbitration.

Further, with regard to the fact that law as such is rooted in justice based on equity, and “the fundamental principle of good faith entails searching for the common intention of the parties”\(^{138}\), and taking into consideration the fact that applicable by arbitrators theories in most is the test of “good faith”, as an explicit manifestation of justice, it is quite reasonable, as a solution, to use the said principle in its large extent in terms of *lex mercatoria or as a general transnational rule (as France does, for instance)* that is universally independent form any national or international regime. Nonetheless, quite uncertain nature of Lex Mercatoria as well as the broad (if not a


\(^{137}\) See Blessing, supra note 19.

morph due to jurisdictional factor) range of possible situations involving non-signatories, makes the realization of the idea in a framework of arbitration, relatively impossible. However, the realistic point of the proposal, in principle, could be raised in a distant future (upon acknowledgement of status of cosmopolitan arbitration) or, at least, on the ground of general contract harmonization, in a foreseen future.

All in all, as we may see the aforesaid is not more than a theoretical idea of a little practical value in terms of an adequate solution to the problem. One may say because of too trivial viewpoint that does not correspond with the notion of arbitration as such. And perhaps this is so as arbitration, unlike any other legal tool, is capable of being really a magical wand just depends on what hands it is (referring to the “mercatorists and non-mercatorists”).

**B. A hybrid approach**

With regard to the fact that, in general, the main outcome of the application of theories is an implied consent and taking back to the mentioned subject of “juristic magic”, one may suggest, as a remedy, to use the advantage of arbitration that, according to Lord Wilberforce is not “a kind of appendix or poor relation to court proceedings”, but “a freestanding system, free to settle its own procedure and free to develop its own substantive law” in terms of creating the necessary instruments on its own through the jurisdiction of arbitrators. Furthermore, taking into consideration the fact that very often “lack of consent” in terms of application a certain theory in relation to non-signatories can be, under certain circumstances, tremendously detrimental, as well as the further complex issue regarding recognition of theories that has a strict jurisdictional constrains, it is possible to define the so-called hybrid approach\(^{139}\). Put simply, instead of suffering from lack of consent applying a separate theory or fabricate an implied (to the extent of illusion) consent or to be strong criticized to the extent of negation for the application too vague arbitration estoppel, or extreme theory of group of companies, arbitrators on a case by case basis could chose and peak a few doctrines which suit to the factual bases of the dispute at hand. Remarkably, this progressive approach, as a matter of fact, is a “product” of already established case law, therefore it is not just a pure theoretical fantasy. In fact, *in mentioned*

\(^{139}\) Tang E., Methods to extend the scope of an arbitration agreement to third party non-signatories, W4635 research paper (2009).
case J.J Ryan & Sons v Rhone Poulenc Textile SA, the main argument of the plaintiff based not on the certain theory, but on the “procedural efficiency” consisting of a set of legal facts.

Furthermore, in Copropriété Maritime Jules Verne et autres v. Société ABS American Bureau of Shipping et autre defendant applied four different theories in order to compel the plaintiffs to arbitrate: agency, third-party beneficiary, involvement of the owners in the performance of the classification agreement, and the doctrine of accessory. In a word, as regards the mentioned case Bridas v Government of Turkmenistan the claimant, in order to evidence that the government was bound by arbitration clause signed by Turkmenneft, invoke almost the whole non-signatory “arsenal” including such theories as agency, instrumentality, apparent authority, alter ego, third-party beneficiary and theory of equitable estoppel.

Moreover, Zuberbuhler back to 2008 proposed a general three-step method based on factual circumstances that consist of the following steps: firstly, determination of the (implied) consent of parties, secondly, in case of uncertainty of consent the issue of accountability is considered through the compelling a non-signatory on the ground of its fake impression to be bound, thirdly, facts are considered through the prism of fraud or abuse of rights of respective party. To rephrase the proposed method, broadly speaking, we may say about the following set of doctrines (in turn) doctrine of group of companies, alter ego and estoppel. Further, despite the fact that “attempt to identify... general rules very much remains a work in progress as the fact specific nature of the problem is its most prominent common element”, hopefully, we are at the outset of quite revolutionary solution that will be discussed below.


142 Zuberbuhler Tobias, Non-signatories and consensus to arbitrate, 26 ASA BULLETIN 1/2008 (Mars).

143 Id.
C. Concept of dispute

“I'm afraid I can't explain myself, sir.
Because I am not myself, you see?”
Carrol, Alice in Wonderland

At first sight, as we may conclude from the above discussion the light in a tunnel is not foreseeable due to the obstacle in terms of consent. However, consent is not a dogma which should be abandoned. Rather, “the qualification of arbitration as a ‘consensual’ dispute resolution mechanism needs to be differentiated and reconciled with the jurisdictional side of arbitration.” In other words, “as it is not fully settled whether arbitration is of a contractual, jurisdictional, or mixed nature, one should not unduly favor the contractual over the jurisdictional element.” Despite a certain difficulty in relation to attempt to reverse the conventional thinking that was “managed by those who manage it” for decades, professor Brekoulakis recently made a kind of revolution in orthodoxy settled arbitration community by representation a concept of dispute (in contrast to the issue of consent), that, in fact, might be, quite promising solution of a great practical value.

The cited phrase of Alice clearly describes the intention of proposal in the sense that for decades we were talking about “ghost” of consent through application of contract theories but which, in fact, is absent. Rather, these theories, in the absence of an adequate reasoning, were as a virtual reality of wishful thinking. “Indeed the main purpose of non-signatory theories is: to presume or at least facilitate the deduction of consent. For example, in the context of the group of companies doctrine, it can be enough for a party to prove that several companies constitute an “economic unit” and that the non-signatory company has taken an “active role in the negotiation or the


147 See Rau, supra note 134.
performance of the contract containing the arbitration agreement” for the tribunal to presume the “common will of the parties to arbitrate”. In some cases, non-signatory theories have gone as far as to suggest that mere awareness of the existence of an arbitration clause will be sufficient for a party to be bound by it.\footnote{148}

To be more precise, Brekoulakis considers the first set of theories\footnote{149} as “clear equity”, whereas the second set\footnote{150} of theories on the ground of “… no evidence for arbitration consent is needed”, and with regard to the fact that arbitration is “an autonomous legal field with a distinct jurisdictional nature and purpose”: these legal theories “in reality amount to “legal fictions” and (as a rule), with absence of consent for arbitration; and therefore, in his view such a new “approach would require to focus not on putative consent of non-signatories, but on the boundaries of the pute”\footnote{151}...And the scope of the original arbitration clause” without necessity to main-


\footnote{149}{Theories of apparent authority, alter ego and equitable estoppels. “The non-signatory party is compelled to arbitrate not because it has actually consented to arbitration but because it would be unfair not to arbitrate. It would be unfair, for example, for a state to escape arbitration where [it] has misled a party to believe that an instrumentality is acting with authority to enter into a contract and an arbitration clause on behalf of the state. Equally, it would be unfair for a parent company to escape arbitration when it has fraudulently used a subsidiary to frustrate the interests of a claimant in arbitration”-See Brekoulakis, parties in international arbitration, supra note 133.}

\footnote{150}{Here consent to the assignment of the substantive right is at stake.}

As for the group of companies doctrine, Brekoulakis noted that the doctrine “relies on certain fact-patterns to ascertain consent for arbitration”, for example the fact that a non-signatory member of a group was involved in the negotiation or performance of the main contract, which includes an arbitration clause. It is the participation of the non-signatory parent in the substantive part of the contract that allows tribunals to order arbitration – “no evidence for arbitration consent is needed”. Thus, the level of consent is “quite different” from that normally required.”
tain any new theory or legal method in this regard\textsuperscript{152} that, as a matter of fact, allows tribunals to assume jurisdiction over non-signatories based on the fact that the non-signatory claim is a part of the dispute before tribunal and such a claim, that is most important, falls within the scope of the arbitration clause. To this point, “a widely drafted arbitration agreement may allow “any or all disputes” “in connection with the contract” to be determined by an arbitral tribunal. It follows that whether a tribunal has jurisdiction to determine a dispute involving a non-signatory will depend on whether the tribunal, with the power of competence-competence, finds that such a dispute is “connected with the contract”.\textsuperscript{153} By contrast, as it seems, in the case of narrow (more precisely) formulation of the ratione personae of the arbitration agreement, the “link test” is just a matter of technique of interpretation. For instance, in case Lindemann v. Hume, 204 Cal. App. 4th 556 (2012)\textsuperscript{154}, “Because the agreement only covered disputes between Cage and the plaintiff, not Cage and his agents, the court of appeal denied Cage’s motions to compel arbitration against the plaintiff and cross-defendants.”\textsuperscript{155}

As we may see, it sounds quite simple, clear and practical, without any influence of the contractual quest for amorphous consent in its myriad forms that in a way corresponds with the mentioned proposal of professor Capper who proposed “...to reclassify arbitration as a biome...that defies history and geography, in the hope that we will (eventually) identify what is the true unity of essence...”\textsuperscript{156} and “which is not

\textsuperscript{152} See Brekoulakis, Parties in international arbitration, supra note 133.

\textsuperscript{153} Id.

\textsuperscript{154} In a nutshell, “a case involving a signatory’s agents, a developer built and sold a home to actor Nicholas Cage, who subsequently sold the home to the plaintiff by way of an agreement that contained an arbitration clause. The plaintiff sued the developer for construction defects and also sued Cage, Cage’s business manager, and the contractor for failure to disclose the defects. Cage’s business manager and the contractor cross-complained for indemnity.” Available at: California lawyer (2015), http://www.callawyer.com/2015/12/arbitration-update-an-overview-of-recent-california-appellate-decisions/

\textsuperscript{155} Id.

\textsuperscript{156} See Capper, supra note 29.
rooted for all purposes in consensual agreement"157 and that, for instance, is crystal clear for French in the sense that latter consider arbitrator “comme juge”, holding that “the moment you have the transmission of the mandate, you have already given up a great deal of the parties autonomy to the tribunal which have its power to arbitrate”158. Moreover, the technical execution of the concept of dispute, in this respect, seems to be relatively unproblematic on the ground of powerful arbitration rules, which, according to the belief of “Swiss, Belgian and French arbitrators give them powers beyond party autonomy”.

Despite the aggressive criticism159 and possible disadvantages, we must admit that the proposed approach is probably the most vital one in the sense that it proposes relatively adequate solution to the whole puzzle of the issue by reflecting an indispensable extent on arbitration evolution regarding the issue of consent, that in the end paraphrasing Montesquieu160 proves that the real value of law is in its ability to find an effective solution rather than “complex quests for elusive consent, through fact patterns and presumptions […] which compromise the basic principles of contract

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157 Id.
158 Id.
159 Conference 30th anniversary of the School of International Arbitration at Queen Mary, University of London, 19-21 April 2015, available at: http://globalarbitrationreview.com/news/article/33775/queen-mary-professor-challenges-thinking-consent/: Schellenberg Wittmer partner Nathalie Vozer:“..A methodical approach to establishing consent is… essential… simplicity and legal certainty..If the level of user-control is reduced, arbitration begins to resemble litigation.” Audley Sheppard, co-head of international arbitration at Clifford Chance: taking into account the fact that “…arbitration is a “creature of contract”, “… privity of contract is central to its ethos. Also one has to weigh the predictability and consistency of the arbitration process against …possible advantages ( i.e.efficiency). Moreover, “We don’t need a holistic theory of everything.” Hughes Hubbard & Reed’s John Fellas: “there is still merit in relying on time-tested theories that apply to contracts more generally and have evolved in response to different factual scenarios, “even though they offer a patchwork quilt of different approaches, rather than a single unitary approach.”

law and have questionable practicable value”\textsuperscript{161}. However, taking into account the substantial difference among jurisdictions as regards justification for extension, the only willingness of the arbitration community to go “out of box” thinking will determine the dynamics of deliberation in relation to the proposal. To the point, recently \textsuperscript{162} prominent commentators discussed\textsuperscript{163} as an alternative to maintain the IBA-type guidelines on non-signatories. However, due to the fact that the official findings are in progress, any comments on this matter are not available at the moment.

After all, one may wonder is it really important to sign an arbitration agreement? What exactly this signature will evidence? Consent? More likely it might show the “level of connection” of non-signatories to the substantive contract as a filter in dimension to the dispute at stake.

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\textsuperscript{161} See Brekoulakis, Parties in international arbitration, supra note 133.
\textsuperscript{162} Fernando Mantilla-Serrano, Latham & Watkins, Isabelle Michou, Herbert Smith Freehills, Stavros Brekoulakis, Professor of International Arbitration and Commercial Law, Queen Mary University of London, Andrew de Lotbinière McDougall, White & Case.
\textsuperscript{163} 3rd Annual GAR Live Paris Conference, Nov 20, 2015. Among others, the agenda included the problem of binding of non-signatories. As remedy to the problem, it was proposed to maintain IBA-type guidelines on non-signatories. In a word, such a proposal was made by Tobias Zuberbuhler earlier (going back to 2008).
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IV. Conclusions

Undoubtedly, arbitration is a consensual “private justice” that aims to render a just and an enforceable decision. While the historical role of arbitration was resolving disputes in linear bilateral commercial transactions on the ground of contract law, recently we have entered into an era of complex jurisdictional issues with non-signatories element, where the sense of the consent to arbitrate has been transformed. “[T] he law of arbitration cannot ignore these situations [complex arbitrations] which have become the norm in present day international commerce.” Arbitration’s ancient code has been broken and results in so-called social engineering decision-making that “had to depart... from the black-letter law, strict legal rigor and conventional methods... to less focused on the automatic and per se application of consent and traditional legal rules to the extent of “creative legalism”.

164 See article III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) : “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”


167 See Youssef, supra note 15.


Courts and arbitrators proceed with a highly intellectual modified test in order to unravel the whole puzzle on the ground of set of subjective and objective facts that are considered as self-contained evidences through filter of which, in contrast to concept of consent, the legal fate of non-signatories will be solved. As a result, “tribunals (and courts) reason less in terms of norms (the consent, writing and privity requirements), and more in term of effects of extension (or its absence) in the particular case. “Concerns of equity often underlie the reasoning of courts and, even more, of arbitral tribunals.”

Such a revolution or more precise, evolution has received mixed reviews: total ignoring, marginalization of consent\textsuperscript{171}, modern approach to consent\textsuperscript{172} as well as abandoning the dogma of consent toward the dimension of concept of dispute\textsuperscript{173}. Taking into consideration the fact that arbitration itself, in its origin, based on consensus, therefore it is not logical to insist on application of contractual tools as regards non-signatory involvement. On the one hand, “There is reason to believe that rationales of practicality and equity… are often implicit in the minds of tribunals and courts and play a mind-setting role, but are simply part of the unsaid\textsuperscript{175}, on the other hand, firstly, perhaps the current legal tools in terms of contractual theories simply are not able to serve adequately any the current demands of the global business world, secondly, alternatively, could one assume that such a creative solution, as the apogee of justice, is mere fair and just due to the absence of consent as such. In other words, one reasonable person would wonder whether it would be more intelligent and reasonable, from the perspective of global arbitration, to name “whatever” in terms of consent only because of “elementary” static doctrine that is not able to “accept” the fact of development. Rather, it looks like an act of surrendering. However, we cannot run or hide from reality. Everything that is important to arbitration is influenced by its main “engine”- clients (i.e.public and private actors). The only way to

\textsuperscript{170} See Hanotiau, supra note 102.

\textsuperscript{171} Regarding consent in international arbitration in general See:

Youssef, supra note 165.

\textsuperscript{172} Hanotiau, supra note 44.

\textsuperscript{173} Diallo O.,, Le consentement des parties à l’arbitrage international, (PUF 2010)

\textsuperscript{174} See Brekoulakis, supra note 133.

\textsuperscript{175} See Youssef, supra note 15.
protect the interest of clients (as non-signatories are among them as well) and value of arbitration, as contemporary forum for dispute resolution, is to be active and engaged in dialogue.

Therefore, bear in mind the complexity of current business transactions and its reflection in the decision-making process via “creative” (regarding consent) reasoning, that is prima facie evidence of the evolution of arbitration in general, the idea of a modern approach of Hanotiau and its more intellectual and objective expression by Brekoulakis, in terms of concept of dispute, is a reasonable explanation in terms of a solution to non-signatory dilemma in particular.

Moreover, as rightly pointed out by Gaillard that “In international arbitration… concepts become reality when they shape the way in which the players… comprehend a situation,” mentioned approaches are not an invention, rather an objective analysis of the current trends in relationships arbitrators-clients and their influence on each other, therefore, this is a reality. The reality of dispute between those true parties which have the objectively significant connection to the dispute. To rephrase, parties would not be true if they could not be in touch with a contract that predetermine from the beginning the will of the parties to arbitrate in terms of scope and a subject matter. Therefore, main question relates not to the “enough consent”, but rather to whether and how “significant” non-signatories are connected to the dispute at hand. To put differently, referring to the proponents’ critique of the orthodox school, one may wonder whether it would be legally efficient if not destructive (in terms of constant development of arbitration as a universal forum for disputes) to continue a permanent dispute as to the adequate remedies to the problem of non-signatories. In other words, upon a legal will in the sense of reluctance to face the new reality merely anything could be named as consent, when it is absent. In a word, it reminds me of a tale "The Emperor's New Clothes" by H.Ch. Andersen in terms of “blind” appreciation of illusive consent and thereby the negation of the real realm of facts as a "tribute" to the Emperor (i.e. traditional view).

Regarding the approach of dispute, it is fair to speak not about negation of consent, but, on the contrary, it is a crucial factor that delimits the borders of the dispute including subject matter and involving actors. In other words, the composition of the arbitration agreement, from the beginning, defines the breadth of the possible dispute, which, respectively, predetermines sufficiency of the connection between parties and non-signatories to arbitrate. Put simply, the will of the parties of the main contract predetermines the legal fate of a (possible) non-signatory to arbitrate. That is why the application of theories suffers to find an implied (in fact illusive) consent that
normally is absent as the only a level of connection factor between parties and non-signatories is a predominant condition to open the gate. In this regard the correct interpretation of the context and scope of the arbitration agreement is of high importance. Importantly, consent as the rule of the arbitration remains in its position, however, the proposal lies in the intent to maintain a practical and an adequate algorithm to consider the issue of non-signatories through the filter of dispute (in terms of arbitration agreement) as a consequence of the consent between parties to the main contract.

However, at this particular point commentators reproach that the balance between legal certainty and legal flexibility is jeopardized in the sense that on the one hand, arbitration as a specific legal system is able “to serve” clients need, but on the other hand, the procedural imperfection of such a “service” in terms of unpredictability simply repel clients and arbitrators alike. Nonetheless, we must admit that the above arguments are unfounded in the sense that such limited standpoint simply disregard the current legal chaos due to “existent normative jungle of applicable contractual theories in terms of constant change and modification. To this end, the current situation seems more risky as to the perspective of arbitration to be trusted by users rather than attempt to upgrade it. In other words, “arbitration has to be responsive to the free market..., (otherwise) it will disappear”. However, one may object that in any case, “the efficiency or any other reason cannot be used... without limits, putting in danger... justice” in the sense that “the further one gets from... consent, the slimmer the change are that award will fare well after being rendered” (in terms of application of New York Convention). Nonetheless, the issue is how to deal with the current “context”, rather than elaborate on the unreasonable, in this regard, amendments to the New York Convention. Moreover, such reluctant attitude, that can be

176 To paraphrase professor Schwebel “the only solution to the problem of uncertainty in international arbitration is to create a world court of arbitration.” Cited in Goldhaber M.D., Wanted: a world investment court, The American Lawyer: focus Europe, summer 2004.

177 See Youssef, supra note 165.

178 See Capper, supra note 29.

described by adage “if it ain’t broke, don’t fix it” has a destructive influence and simply
does not contribute to the inevitable evolution of the arbitration. In other words, such
resistance continues the perpetual quest.
Although the proposed solutions “cannot be… (justified) by popular opinion or be
judged from a few cases” automatically, however, the imperfect, but practically
adequate legal method is more preferable rather than magic (illusory consent) in
terms of “juristic chemistry”. Therefore, in order to avoid the destructive legal crea-
tivity that results in an unpredictable metamorphosis of decision making, perhaps, the
IBA-type guidelines on non-signatories as a combination of “the best of two worlds”
could be, at least in a test-regime, a first practical step towards formal
recognition of concept of dispute in a foreseen future.
All in all, despite the strong criticism and skepticism, it is truly hoped that the present
discussion will contribute to a better understanding of the need to re-think the con-
tventional approach to the jurisdictional aspects of arbitration on its way of transfor-
mation to “the best forum” for dispute resolution. In this respect, Sophocles, a great
Greek poet said: “One must wait until the evening to see how splendid the day has
been”, therefore, it is just a matter of time.

181 Theory of judicial Decision, 36 HARV. L. REV. 641, 657 (1923), discussing the classic creative
eras of law that included when law was guided by a philosophical theory of natural law with

183 In terms of the incentive of Tobias Zuberbuhler back to 2008 as to the combination of the
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