Multiple Parties in Internatioal Arbitration
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NON-SIGNATORIES AND INTERNATIONAL CONTRACTS: AN ARBITRATOR'S DILEMMA

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I. Introduction

Like consummated romance, arbitration rests on consent.[1] An agreement of some sort waives each side's right to invoke the jurisdiction of otherwise competent courts.[2] **1.01**

Nevertheless, arbitrators do hear cases involving entities and individuals that never signed an arbitration clause. Continental scholars sometimes refer to **1.02**

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1 One American judge referred to the "abecedarian" (*i.e.* "rudimentary") tenet that no-one can be forced to arbitrate absent an agreement to do so. *See* InterGen v. Grina, 344 F. 3d 134 (1st Cir. 2003), addressing claims for deceit and unfair trade practices. InterGen (affiliated with engineering giant Bechtel) sought to litigate in Massachusetts, while Grina (affiliated with power generation leader Alstom) invoked an arbitration clause contained in purchase orders for gas turbines executed by entities within the two groups. In an opinion studded with erudition, Judge Selya rejected a motion to compel arbitration.

2 *See, e.g.* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 575 U.N.T.S. p. 159 [hereinafter New York Convention], art. II; U.S. Federal Arbitration Act § 2; English Arbitration Act of 1996 § 5; Swiss *Loi fédérale sur le droit international privé* (Swiss Private International Law Act) [hereinafter PILA], art. 178; French *Nouveau code de procédure civile* (New French Code of Civil Procedure) [hereinafter NCPC], arts. 1484 & 1502; United Nations Commission on International Trade Law ("UNCITRAL") Model Arbitration Law, art. 7. Treaty-based investment arbitration might be seen as an exception, in that claims related to expropriation or anti-foreign discrimination may be brought under investment treaties or free trade agreements without a contract between the investor and host state. *See* Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 Br. Y.B. Int'l L. p. 151 (2003); Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. p. 232 (1995); Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration*, 28 Yale J. Int'l L. p. 365 (2003).

"extending" the arbitration clause.[3] Lawyers in Anglo-American traditions tend to speak of "joining non-signatories."[4]

1.03 Neither expression accurately captures what happens when arbitrators hear claims by or against someone who never signed the relevant contract. "Extension" of an arbitration clause can suggest imposing a duty beyond the circle of those who have agreed to arbitrate. Yet consent (even implied from circumstances) remains the cornerstone of arbitration, at least by arbitrators who value intellectual rigor and analytic integrity.

1.04 Likewise, "joining non-signatories" may mislead by implying that signatures are needed to create commitments to arbitrate, when many developed legal systems recognize unsigned commitments to arbitrate.

1.05 In making the critical determination of who agreed to arbitrate, judges normally look for guidance to standards set by their own jurisdiction, whether in conflict of laws principles or substantive standards for determining contract validity. Either way, a court starts with the established legal system from which it draws its authority.

1.06 In cross-border arbitration, however, the genesis of decision-making power derives from no single legal system. Arbitration arises from the parties' decision that the dispute should not be sent to national courts. Although various countries lend support to the arbitral process (recognizing agreements and awards), the litigants themselves call the arbitrators into existence, and usually fix the substantive standards to be applied.

1.07 How should arbitrators approach the task of bringing in what might be called "less-than-obvious" parties? What standards should apply when one member of a corporate group seeks to join (or to avoid) an arbitration based on a contract signed by its corporate affiliate? What role (if any) should be played by transnational norms elaborated during the course of other arbitrations and cases addressing similar questions? The modest aim of this paper lies in suggesting analytic starting points in the exploration of these and related questions.

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[3] *See, e.g.* Pierre Mayer, *Extension of the Arbitration Clause to Non-signatories under French Law*, in this volume at p. 189.

[4] *See generally*, Alan Scott Rau, *"Consent" to Arbitral Jurisdiction: Disputes with Non-signatories*, in this volume at p. 69; John M. Townsend, *Non-Signatories in International Arbitration: An American Perspective*, 13 ICCA Congress Series p. 359 (Kluwer Law International 2007); Bernard Hanotiau, Complex Arbitrations (2005); William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, 13 ICCA Congress Series p. 55 (2007).

II. Less-than-obvious Parties

A. The Basics

1. A Spectrum of Approaches

Traditionally, joinder of an additional party into arbitral proceedings justifies itself on grounds such as apparent agency, veil-piercing, alter ego, and estoppel,[5] and can be sought by either signatories or non-signatories. Reaching for the financial resources of a large shareholder, claimants sometimes file arbitrations against a parent company. Conversely, respondents in American court actions often seek arbitration as a way to escape the perceived unpredictability of jury verdicts. **1.08**

For arbitrators, motions to join non-signatories create a tension between two principles: maintaining arbitration's consensual nature, and maximizing an award's practical effectiveness by binding related persons. Pushed to the limit of their logic, each goal points in an opposite direction. Resolving the tension usually implicates the two doctrines discussed below: implied consent and disregard of corporate personality. **1.09**

Verbal formulae vary from one legal system to another. However, most explanations of joinder relate to either (1) implied consent or (2) disregard of corporate personality.[6] In each case, an agreement to arbitrate must exist. However, the effect of that agreement extends beyond the named signatories, by virtue of behavior that either suggests acceptance of the agreement by someone else or justifies going beyond the corporate form of the signatory entity. **1.10**

2. Implied Consent

Agreements of all sorts can be inferred from behavior. A couple dining in a fancy restaurant, consuming their lamb cutlets with gusto while sipping a 1982 Cheval Blanc Saint-Emilion, will be bound to pay the chef's exorbitant prices even without a formal offer and acceptance. Likewise, two business entities might act in a way that reasonable observers construe as a commitment to arbitrate disputes. **1.11**

[5] One well-known American case presented a litany of five theories for binding non-signatories: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. Under the facts of the case, the court rejected each theory as insufficient to bind the parent under an arbitration agreement signed by its subsidiary. *See* Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir 1995). For an institutional perspective, *see* Anne-Marie Whitesell, *Non-Signatories in ICC Arbitration*, 13 ICCA Congress Series p. 366 (2007).

[6] On occasion, arguments may also rest on "deemed" consent, a somewhat slippery notion which for present purposes can best be grouped with implied consent.

1.12 Arbitral jurisdiction based on implied consent involves a non-signatory that should reasonably expect to be bound by (or benefit from) an arbitration agreement signed by someone else, perhaps a related party. In such circumstances, no unfairness results when arbitration rights and duties are inferred from behavior.

1.13 Implied consent focuses on the parties' true intentions. Building on assumptions that permeate most contract law, joinder extends the basic paradigm of mutual assent to situations in which the agreement shows itself in behavior rather than words.

3. Disregard of Corporate Personality

1.14 In contrast to implied consent, disregard of corporate personality builds on factors such as fraud or undercapitalization. Regardless of the parties' intent, the legal entity that signed the arbitration clause disappears, and a shareholder answers for its corporate obligations. In ceasing its separate legal existence (for purposes of the arbitration), the signatory company leaves its owner or affiliate to inherit arbitration rights and duties.

1.15 To illustrate, a businessman might actively negotiate a purchase agreement containing an arbitration clause, but at the last minute arrange for it to be signed by a company owned and controlled by him. An application to extend the arbitration clause to the businessman could find support in the notion that buyer and seller intended the businessman to be a party to the agreement.

1.16 Assume, however, that the businessman played no role in the contract negotiation and performance, but did misappropriate corporate assets for personal use. If the fraudulent transactions made the company an empty shell, an arbitrator might feel justified in looking beyond the corporation to its owner, irrespective of what the parties had originally intended. For jurisdictional purposes, the corporation would simply cease to exist, leaving the businessman to inherit the arbitration clause.

4. Conceptual Overlaps

1.17 In practice, of course, arguments on joinder overlap. A single fact pattern might lend itself both to disregard of the corporate form and to finding implied consent. A parent company's fraudulent manipulation of an undercapitalized subsidiary could justify disregard of the corporate form, as well as a finding that the subsidiary acted merely as agent for the parent company, which was the true contracting party.[7]

[7] *See* ICC Case No. 5730 ("*Orri*"), where a Greek shipping magnate engaged in willful misrepresentation by organizing personal activities in several corporate entities. In addition, the non-signatory was actually mentioned in the relevant contract.

Such overlap can lead to focus on "the right result" rather than analytic rigor. Good arbitrators, however, will resist the temptation to sloppy reasoning, which can bring discredit on the arbitral process. **1.18**

The inter-relatedness of theories affecting non-signatories might be illustrated by the following scenario, in which a parent's involvement in contract *negotiation* might lead to different conclusions from those flowing from contract *performance*. Two engineering firms agree to work together on a construction project, one as prime contractor and the other as sub-contractor. Their contract contains an arbitration clause. After the deal goes sour, the sub-contractor seeks payment for work allegedly performed at the prime contractor's direction. Arbitration is filed not only against the prime contractor (tottering on bankruptcy, it turns out) but also against its more financially stable parent shareholder. **1.19**

If the prime contractor's controlling shareholder had participated actively in negotiating the original agreement, it might be argued that the parties' true intent (albeit implied) had always been that the parent should be responsible for paying for any extra work. This argument would be buttressed if the sub-contractor could show that it justifiably relied on the availability of the parent company's financial resources when concluding the agreement. **1.20**

Let us change the timing slightly, with the parent of the prime contractor coming on the scene only *after* the contract has been signed, having purchased the signatory subsidiary pursuant to an arm's length corporate acquisition. Assertions of the parties' true intent can no longer be founded on participation in contract negotiation or justifiable reliance. **1.21**

Now let us develop the facts a bit further. During contract performance, the parent entity assists the subsidiary in completion of management and technical services that fell to it in the role of prime contractor. Depending on the facts, this might indicate that the two sides had reached an understanding that the parent would become a party to the earlier contract and its arbitration clause. **1.22**

Implied consent would not be the only conclusion, however. The parent might well be performing the services on a fee basis, as any unrelated party could do. In such event, arguments would be weak that involvement in the project indicated implied consent. **1.23**

As discussed later in this essay, no magic formula tells arbitrators what legal principles apply in determining when to join non-signatories. Allegations of implied consent implicate a different legal framework from arguments asserting lack of corporate personality. National law can come into play, particularly the place of incorporation of a signatory company. In addition, arbitrators often look to transnational norms established in other arbitral awards, as well as the law at the arbitral situs and the enforcement forum. **1.24**

1.25 In some instances, questions arise with respect to the interaction of state and federal law, particularly when an arbitrator's decision is challenged in court.[8] For example, the United States Supreme Court requires application of "ordinary state-law principles" that govern contract formation.[9] This should not be surprising, since for almost seventy years no general federal contract law has existed in the United States.[10] Nevertheless, federal principles do come into play, however, with respect to matters governed by the Federal Arbitration Act.[11]

B. A Word on Taxonomy: Unsigned Agreements

1.26 The term "non-signatory" remains useful for what might be called "less-than-obvious" parties to an arbitration clause: individuals and entities that never put pen to paper, but still should be part of the arbitration under the circumstances of the relevant business relationship. The label does little harm if invoked merely for ease of expression, to designate someone whose right or obligation to arbitrate may be real but not self-evident.

1.27 Nevertheless, the expression remains potentially misleading, suggesting that a lack of signature in itself reduces the validity of an arbitration agreement. In fact, however, many legal systems impose no requirement that agreements to arbitrate must take the form of signed documents.[12] Some countries enforce arbitration

[8] *See, e.g.* InterGen v. Grina, 344 F. 3d 134. Faced with a choice between state and federal law, the court concluded that uniform federal standards were appropriate.

[9] First Options of Chicago v. Kaplan, 514 U.S. 938 (1995), finding that an arbitrator wrongfully took jurisdiction over shareholders on the basis of an arbitration clause signed by their wholly owned corporation. *See also* General Elec. Co. v. Deutz AG, 270 F.3d 144 (3d Cir. 2001), finding an exception to the general rule that federal law governs international arbitration agreements. An American manufacturer sued a German corporation that guaranteed its subsidiary's obligations in a joint venture to manufacture locomotive engines. The contract's choice of law clause (calling for application of Swiss law) was deemed inapplicable to the initial determination of whether there had been an agreement. Applying the law of Pennsylvania (which governed most of the contract's performance and pre-contract negotiations), the court concluded that the joint venture clause was ambiguous. Thus the matter was submitted to a jury, which returned a verdict that the two companies had *not* agreed to arbitrate.

[10] *See* Erie Railroad v. Tomkins, 304 U.S. 64 (1938). Readers from outside the United States should note that the adjective "general" qualifies the noun "common law." Federal courts construing statutes and treaties create a form of common law specific to the instrument to be interpreted, as happened in First National City Bank v. Banco Para el Comercio Exterior de Cuba ("*Bancec*"), 462 U.S. 611, 613 (1983), discussed in Part IV.B. *infra*.

[11] States may not make enforcement of arbitration agreements more difficult than other types of contracts. Thus a state might require that all contracts be written in capital letters, but could not impose such an obligation only on arbitration agreements. *See* Doctor's Assoc. v. Casarotto, 517 U.S. 681 (1996). *See also* veil-piercing analysis in *Bancec*, discussed in Part IV.B. *infra*.

[12] Conversely, a signature does not always bind the signatory to arbitrate, most notably when fraud or duress can be demonstrated, or when consumer protection regimes apply. In addition, signatures may be irrelevant when courts deem a dispute's subject matter to be "non-arbitrable" or consider the contract itself "unconscionable" by reason of special circumstances surrounding its conclusion.

agreements made orally.[13] National arbitration statutes often recognize consent memorialized in unsigned written provisions,[14] as does the United Nations Commission on International Trade Law ("UNCITRAL") Model Law.[15] The New York Convention covers agreements to arbitrate concluded through unsigned exchanges of letters and telegrams,[16] and some courts have read the Convention to permit arbitral jurisdiction derived from unsigned contracts, such as purchase orders.[17]

Most significantly, the fact that a "non-signatory" might be bound to arbitrate does not dispense with the need for an arbitration agreement. Rather, it means only that the agreement takes its binding force through some circumstance other than the formality of signature. The legal framework for normal commercial arbitration (whether statute, treaty, or institutional rules) continues to require some **1.28**

[13] *See, e.g.* New Zealand Arbitration Act, 1996, No. 99, First Schedule, para. 7, which applies to arbitrations conducted within New Zealand. Section 6(a) of the Act itself applies the First Schedule to arbitrations conducted in New Zealand, as contrasted with awards made abroad. Consumer arbitration agreements are enforceable only if concluded in separate written agreements (not the main contract) after a dispute has arisen: Arbitration Act, section 11, as amended Oct. 9, 2007. A separate set of rules applies in the Second Schedule (addressing inter alia appeal on questions of law) applicable to international arbitrations only if the parties so agree (opt in) and to non-international arbitrations where parties have not exercised a right to opt out.

[14] In the United States, section 2 of the Federal Arbitration Act requires recognition of an arbitration agreement contained in a "written provision" even if not signed. Section 5(4) of the English Arbitration Act defines an "agreement in writing" to include contracts made otherwise than in writing but recorded either by one of the parties or a third party. Article 178 of the Swiss LDIP/IRRG speaks of communications that establish agreement by a text ("*établir la prevue par un texte*"/"*Nachweis der Vereinbarung durch Text ermöglicht*"). Article 1443 of the French NCPC (applicable to domestic arbitration) permits an arbitration clause to be contained in a document to which the main agreement refers ("*un document auquel* [*la convention principale*] *se réfère*").

[15] Amendments to art. 7, adopted in 2006, provide two options. The first provides for an arbitration agreement to be in the form of a clause in a contract or a separate agreement, both of which must be in writing. A writing exists if its "content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means." For the avoidance of doubt, the first option includes as writings electronic communication, exchanges in statements of claim and defense, and incorporation into a contract by reference to a document containing an arbitration clause. The second option is silent on the matter of writing, and includes only a sentence (also included as an introduction to the first option) to the effect that an arbitration agreement is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship." The earlier version of art. 7 (which required a signature in some instances) had been criticized as too restrictive, given that parties often benefit from form contracts that one side had failed to sign.

[16] New York Convention, *supra* note 2, art. II(2), defines "agreement in writing" to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

[17] *See* Sphere Drake Ins. PLC v. Marine Towing, Inc. 16 F.3d 666, 669 (5th Cir. 1994), which held that an arbitral clause in a contract need not be signed, based on a restrictive effect given to the comma found after "an arbitration agreement" in art. II(2) of the New York Convention. *Compare* Kahn Lucas Lancaster v. Lark Int'l Ltd., 186 F.3d 210 (2d Cir. 1999), construing "signed by the parties" as applicable to arbitral clauses encapsulated in broader contracts, as well as separate arbitration agreements.

assent to arbitrate, whether express, implied or incorporated by reference to other documents or transactions.[18]

C. The Devil in the Detail: Relevant Criteria

1.29 The proverbial devil in the detail lurks in the complex fact patterns underlying most situations that might justify extension of arbitration clauses. The criteria most relevant to joinder do not yield to facile identification or application, in part because arbitrators often consider and apply overlapping theories. Often, the decision to join a non-signatory rests on more than one factor, bringing to mind the Continental expression *un faisceau d'indices*—"a bundle of criteria."

1.30 Nevertheless, several factors do emerge from distillation of significant elements in a sample of relevant arbitral awards. The following fact patterns appear not infrequently in cases where arbitrators join non-signatories, and seem to comport with the reasonable expectations of most business managers. The enumeration carries no pretension of being either exhaustive or clever, but may nevertheless commend itself as a set of mental pegs on which to hang practical analysis of requests for joinder in cross-border commercial arbitration.

1.31 At least five common scenarios are often present in cases where an arbitrator's analysis leads to joinder of a non-signatory. These might be listed as follows:

(1) non-signatory participation in contract formation,[19] sometimes linked to confusion created by mention of the non-signatory in contract documents;[20]
(2) a single contract scheme constituted by multiple documents;[21]

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[18] On occasion one sees misplaced references to "non-voluntary" arbitration, particularly in the United States. The label has been applied with a contentious tone to describe binding arbitration commitments that parties may not later disregard, and/or arbitration clauses in consumer or employment contracts where informed consent may be absent. The term has also come into vogue for protective schemes enacted by American legislatures as a type of court-annexed mediation mechanism. For example, "lemon law" regulations covering complaints against automobile manufacturers require arbitration of claims over allegedly defective vehicles, but permit appeal to the Superior Court. *See, e.g.* Mass. Gen. Laws ch. 90 § 7N1/2. The system bears limited analogies to the British Financial Ombudsman Service, whose decisions bind institutions but not consumers. *See* Adam Samuel, *Consumer Financial Services in Britain*, 3 Eur. Bus. Org. L. Rev. p. 649 (2002).

[19] ICC Case No. 7155, denying extension because of the absence of involvement at the time the contract was concluded; *see also* ICC Case No. 11160, joining a non-signatory that played a significant role at the time of contract formation.

[20] ICC Case No. 5730, where a corporation serving as group leader intentionally created and maintained confusion.

[21] ICC Case No. 1434, extending the arbitration clause based on consent, manifested by inconsistent designation of the party contracting on behalf of the non-signatory in a series of contracts; *see also* ICC Case No. 8910, where multiple contracts were found to constitute a single contractual relationship.

(3) implied or express acceptance of the arbitration agreement by the non-signatory, whether in the particular arbitration itself[22] or in another forum;[23]
(4) absence of the signatory corporate personality;[24] and
(5) fraud or fraud-like abuse of the corporate form.[25]

The first three elements relate principally to implied consent, while the last two address the corporate veil. To illustrate the way specific fact patterns bear on any decision about joinder, some of cases have been set forth in the Appendix to this essay. **1.32**

III. Transnational Norms

A. Governing Law

When doubt has been raised about who agreed to arbitrate, arbitrators can face a "chicken and egg" conundrum. The side arguing that an agreement exists might urge application of the governing law designated by the contract itself, even though that law was clearly not intended to govern relationships with strangers. **1.33**

Choice of law questions can present themselves to arbitrators and courts in very different procedural contexts. Arbitrators need to decide whether the factual and legal context of the dispute permits joinder of an entity that never signed the contract. Courts, however, may need to decide the preliminary matter of whether they even have jurisdiction to entertain an application with respect to **1.34**

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22 ICC Case No. 4131 (*Dow Chemical*), granting corporate affiliates the benefit of an arbitration clause contained in agreements concluded by another member of the corporate family. *Compare* ICC Case No. 6519, refusing the request of companies of the same group to join the arbitration based on the fact that the group leader and the signatory never intended to commit them to the agreement in their capacity "as a separate legal entity."

23 ICC Cases No. 7604 & 7610, where a non-signatory respondent admitted its acceptance of the arbitration agreement.

24 ICC Case No. 5721, where the signatory did not exist as a separate legal entity, but was merely a branch of the non-signatory at the time of agreement. *Compare* ICC Case No. 3879 (*Westland Helicopters*), where arbitrators reached through a legally transparent organization to take jurisdiction over the Arab countries that had created the group's umbrella organization, which was deemed to lack legal personality. The award was later annulled by the Swiss *Tribunal fédéral* for excess of jurisdiction, albeit prior to the entry into force of the current Swiss statutory framework for arbitration, the PILA. *See* Westland Helicopters v. Egypt, AOI & Arab British Helicopter Co., XVI Y.B. Com. Arb. p. 174 (1991).

25 ICC Case No. 8385, where the arbitrator found "illegitimate conduct" carried on toward the party seeking the lift of the corporate veil; 1991 Swiss *ad hoc* case where the tribunal found abuse to be a basic condition for piercing the veil. *Compare* ICC Case No. 10758, where the tribunal found no evidence of fraud that could justify piercing the corporate veil.

foreign proceedings, where one side asks that an award be vacated or proceedings enjoined.[26]

1.35 Moreover, even when addressing similar questions about non-signatories, judges have a much easier job than arbitrators in finding applicable standards. Courts can look to the conflict of laws principles or substantive contract law of the legal system from which they draw their judicial authority. By contrast, international arbitrators derive their decision-making power from no single national jurisdiction. Arbitration implicates a renunciation of dispute resolution in national courts, with the litigants' agreement serving as the foundation for the arbitrators' authority and mission.

1.36 If "X" never accepted the contract, it would not have consented to its applicable law or the standards at the arbitral seat. The relevance of each depends on assent. Although each legal system might affect award enforcement, either would be problematic in guiding the arbitrator on whether "X" consented to arbitrate.[27]

1.37 When a non-signatory denies having consented to arbitrate, the very existence of that contract remains at the heart of the parties' dispute. An arbitrator whose decision rests on a single version of contested facts (the assertion that "X" agreed to arbitrate) would be open to the charge of having engaged in a circular exercise, presuming the very fact that remains open for determination and starting from the contested conclusion whose truth must be evaluated.

1.38 One way out of the arbitrators' dilemma lies in seeking notions of "agreement" divorced from any particular national legal system. Such norms often find voice in arbitral awards and scholarly commentary, to which we now turn.

B. Arbitral Precedent

1.39 Standards articulated in published arbitral awards, supplemented by scholarly comment, often provide intellectual coherence and practical merit for arbitrators seeking guidance on questions related to non-signatories. Such "transnational norms" reach for common sense notions of contract distinct from a governing law whose relevance depends on the story told by one side to the dispute. Their intelligent application can enhance the procedural predictability of international arbitration.

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[26] Such motions can implicate treaty considerations with respect to "primary" and "secondary" judicial review. *See, e.g.* URS Corp. v. Lebanese Co. for Development and Reconstruction of Beirut (Solidere), 512 F. Supp. 2d 199 (D. Del., 2007) (court in Delaware without jurisdiction to enjoin arbitration in Paris); Gulf Petro Trading Company Inc. et al v. Nigerian National Petroleum Corp. et al, 2008 WL 62546 (5th Cir. 2008) (court in Texas without jurisdiction to vacate award made in Geneva).

[27] On a provisional basis, some arbitrators might consider the law of the arbitral seat as constituting a *lex loci arbitri*, but testing any conclusions against the winnowing principles of transnational norms that emphasize true intent as the touchstone to determining consent. One notes, of course, that most arbitration statutes do not address implied consent in any significant way.

These standards constitute part of a larger corpus of emerging principles sometimes described as *lex mercatoria*, commanding wider application than trade practices derived from specific professions,[28] and remaining distinct from general principles of law.[29] While not binding in the strict sense of "precedent" as applied by a single national judiciary,[30] transnational norms often serve an analogous function in that they represent decisional authority from one case likely to justify the award in another.[31] Increasingly, one even sees a tendency for arbitrators to scrutinize general pronouncements in earlier awards with the aim of distinguishing what some legal traditions consider *obiter dictum* statements not essential to determination of the case.[32] **1.40**

Such norms can justify themselves as the best calculus for determining reasonable expectations of litigants from diverse legal cultures. In appropriate circumstances, they apply not because any authority says they must, but *faute de mieux*, for want of any better way to promote fair dispute resolution in a global community where not all commercial actors accept the parochial standards of a single national law.[33] **1.41**

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28 In Germany, the *Bundesgerichtshof* held that an arbitration clause may be implied through practice in the sheepskin trade. A buyer of skins cancelled the contract and sued for return of payments made. The seller requested arbitration based on a standard "International Hide & Skin Contract" mentioned in party correspondence. The court found that commercial practices can give rise to a duty to arbitrate, and remanded the case for determination of whether the alleged practice did exist. BGHZ, Urt. V, December 3 1993, III ZR 30/91, comment by Klaus-Peter Berger, *Deutsche Zeitschrift für Wirtschaftsrecht* p. 465 (1993).

29 Emmanuel Gaillard, *La Distinction des Principes Généraux du Droit et des Usages du Commerce International*, *in Etudes Offertes à Pierre Bellet* (1991). *See generally*, W. Laurence Craig, William W. Park & Jan Paulsson, International Chamber of Commerce Arbitration ch. 35, at pp. 633–639 (3d ed. 2000); Yves Derains & Eric Schwartz, Guide to New ICC Rules of Arbitration pp. 242–244 (2d. ed. 2005); Michael Mustill, *The New Lex Mercatoria*, 4 Arb. Int'l p. 86 (1988); Klaus Peter Berger, The Creeping Codification of the Lex Mercatoria pp. 102–112 (1999); Filip De Ly, International Business Law and Lex Mercatoria pp. 134–151 (1992).

30 Within a single jurisdiction, a measure of uniformity can be imposed from the top down so that one case can furnish authority for decisions in similar fact patterns with respect to a similar question of law. As a matter of theory, civil law systems take a different view of precedent. *See* French *Code civil*, art. 5, which forbids judges from purporting to make general rules: "*Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises*." In practice, however, the difference between the traditions may not be so great. *See generally*, Denis Tallon, *Précedent*, *in* Dictionnaire de la culture juridique pp. 1185–1187 (2003).

31 *See* Barton Legum, Definition of Precedent, Symposium on Precedent in International Arbitration, International Arbitration Institute, Paris, Dec. 14, 2008. *See generally*, Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse*, 23 Arb. Int'l p. 357 (2007); Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 Fordham Int'l L. J. p. 1014 (2007).

32 The common law emphasis on finding the "holding" of a case may not be shared in all traditions. French jurists, for example, often read decisions of the *Cour de cassation* as if they were a legislative text, without distinguishing statements that might be considered *dictum* across the Channel.

33 Under the rules of some arbitral institutions, additional considerations support the application of non-national legal norms. For example, art. 17(1) of the Rules of Arbitration of the International

1.42 Intensely fact-based, transnational norms applied in joinder cases draw their content and value from consensus in the decisions of a wide range of national courts and arbitral proceedings. These decisions tend to work themselves into an emerging framework to guide principled decision-making in international arbitration.[34]

1.43 In some instances, courts as well as arbitrators look to something akin to transnational norms to test the validity of an arbitration clause, at least when one side seeks an escape hatch in parochial provisions of a national law. Such a transnational approach has been taken in France by the *Cour de cassation*, which strongly supports an international standard for determining the validity of an arbitration clause,[35] and can occasionally be found in national decisions in other jurisdictions.[36]

C. Deemed Consent

1.44 References to "surrogates" or "substitutes" for consent sometimes serve as catchphrases to explain joinder in situations in which arbitrators or courts deem an arbitration agreement to exist.[37] However, sound doctrine should never countenance a suggestion that consent has somehow become irrelevant.

Chamber of Commerce ("ICC") permits arbitrators to apply "rules of law" (not limited to national legal systems) that they determine as "appropriate." This approach commends itself in the absence of a clear agreement by the parties, which is precisely the situation in the present proceedings.

34 In some instances, arbitrators test their conclusions against the law proposed as most favorable to the losing party. For example, an arbitrator minded to pierce the corporate veil, over objections from a non-signatory respondent shareholder, might check the result under the normative framework put forward by the shareholder itself as supporting arguments against joinder. In the opposite direction, a tribunal inclined to refuse the application for extension of the arbitration clause could examine its tentative conclusions by reference to the law suggested in briefs filed by the claimant urging joinder.

35 *See* Muncipalité de El Mergeb v. Dalico, Cass. 1e civ., Dec. 20, 1993, Rev. Arb. p. 116 (1994), holding that the arbitration clause was "legally independent of the principal contract in which it is contained . . . and its existence is to be determined by the common will of the parties without the necessity of a reference to any national law" ("*C'est d'après une règle matérielle du droit international de l'arbitrage que la clause compromissoire est indépendante juridiquement du contrat principal qui la contient . . . et que son existence et son efficacité s'apprécient d'après la commune volonté des parties, sans qu'il soit necessaire de se référer à une loi étatique*"). *Id.* at p. 117. *See also* Dominique T. Hascher, *Complex Arbitration: Issues in Enforcement and Annulment Actions of Arbitration Awards under French Law*, in this volume at p. 375 Part I.

36 *See* Rhône Méditerranée v. Achille Lauro, 712 F.2d 50 (3d Cir. 1983), validating an arbitration clause that contravened Italian law, which disregarded clauses that called for an even number of arbitrators, even if they made provision for an umpire tie breaker. The court held that a commitment to arbitrate would be deemed "null and void" under the New York Convention only if defective by reason of "an internationally recognized defense such as duress, mistake, fraud, or waiver" or when contrary to some fundamental policy of the forum state.

37 *See* Rau, *supra* note 4.

Properly understood, "deemed consent" operates simply as a way to objectify assent for fact patterns where an agreement exists, notwithstanding that traditional formalities may be absent or unclear. The circumstances of the parties' relationship will be seen as "tantamount" to an agreement (perhaps a "backdoor" contract) even if the conduct does not fit squarely within the contours of classic contract doctrine.[38] Such an approach can sometimes be helpful, but should never replace clear-minded analysis of who agreed to what. **1.45**

Analogies to deemed consent appear in other areas of the law, where courts draw distinctions between subjective and objective consent. Several years back the Swiss *Tribunal fédéral* was called upon to decide when parties "agreed to disagree" such that the deadline for filing a claim was triggered. In so doing, the court distinguished between consent as a matter of fact (*tatsächlich*) and consent as a matter of law (*objektiv*).[39] **1.46**

As discussed below, the operation of "deemed consent" might be illustrated by two different legal constructs: the American doctrine of "estoppel" and the French principles related to "chains" of transactions. The former permits courts to direct arbitration with respect to facts intimately intertwined with a cause of action subject to arbitration. In the latter, the procedural framework of a claim will follow the transfer of substantive rights along a chain of buyers and sellers. In each case, the parties' reasonable expectations require that arbitration be imposed by virtue of facts which in fairness must be assimilated to consent. **1.47**

1. Estoppel

When the essence of a claim relates to a contract requiring arbitration, a signatory may be barred (estopped) from asserting inapplicability of an arbitration clause. **1.48**

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[38] Other areas of the law provide analogous situations in which one pattern of behavior will be deemed tantamount to another. For example, investment treaties often extend protection to host state conduct that is tantamount to expropriation, although outright confiscation has not occurred. Such "creeping" expropriation might be implemented through discriminatory tax measures, regulatory harassment or a bankruptcy proceeding engineered with the aim of forcing foreign owners to abandon assets. *See, e.g.* Michael Reisman & Robert Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 2003 Br. Y.B. Int'l L. p. 115 (2004); Rachell Edsall, *Indirect Expropriation under NAFTA and DR-CAFTA*, 86 B.U. L. Rev. p. 931 (2006); Burns H. Weston, *"Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation,"* 16 Va. J. Int'l L. p. 103 (1975).

[39] Vekoma v. Maran Coal, *Tribunal fédéral*, Civil Division I, Aug. 17, 1995, 14 ASA Bull. p. 673 (1996); commentary by Philippe Schweizer. A sales contract provided for ICC arbitration on condition that claims be filed within 30 days after negotiations failed. An award rendered on the basis of a claim filed in May 1992 was challenged as untimely. The respondent asserted that negotiations broke down in January, rather than April as the claimant contended. Focusing on the parties' will and understanding, the court vacated the award, reasoning that breakdown (agreement to disagree) occurred in January as a matter of legal norm (*Konsens objektiv*) regardless of subjective intent (*Konsens tatsächlich*). *Id.* at p. 678, Section C-3-c of the decision.

This type of equitable estoppel is illustrated by a case arising from supply and services agreements between two groups of companies that worked together to construct a power plant in Saudi Arabia.[40] Some members of each group had concluded contracts containing arbitration clauses, while others had not. Alleging that the contracts had been induced through misrepresentations about the work to be performed, the claimants sought damages in court against non-signatory affiliates of the companies that had signed the relevant agreements.

1.49 The court ordered arbitration, reasoning that the claimants could not "rely on the contract when it works to their advantage . . . but then repudiate the contract and its arbitration clause when they believe it works against them."[41] Thus a signatory to an arbitration clause will be precluded from refusing to arbitrate with a non-signatory when the essence of the dispute is intertwined with, or derived from, the contract containing the arbitration clause.[42]

1.50 Another recent illustration can be found in a case addressing beverage distribution in Illinois. An arbitration clause had been included in a principal distributorship contract (top level), but not in the subsequent (second level) grant of rights to a sub-distributor.[43] Alleging wrongful termination by virtue of sales to third parties (an alleged breach of obligations in the original distribution agreement), the sub-distributor brought a judicial action against the manufacturer. Notwithstanding the lack of an arbitration clause in the sub-distribution contract, the court stayed the lawsuit and compelled arbitration.[44]

1.51 Caution must be exercised in connection with estoppel, given the term's promiscuous and sometimes confusing application. Arbitral estoppel remains distinct from promissory estoppel (promises induce action so as to cause injustice if not binding), equitable estoppel (preclusion from asserting rights against one who justifiably relied on conduct), and collateral estoppel (issue preclusion whereby a matter decided in one action cannot be litigated again in another suit involving

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[40] Fluor Daniel Intercontinental, Inc. v. General Electric Co., Inc No. 98-Civ. 7181 (WHP), 1999 WL 637236 (S.D.N.Y. 1999).

[41] 1999 WL 637236 at *6, setting forth an "alternative" estoppel theory.

[42] *See* Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753 (11th Cir. 1993); J.J. Ryan & Sons v. Rhône Poulenc Textile SA, 863 F.2d 315 (4th Cir. 1988).

[43] Southern Illinois Beverage v. Hansen Beverage Co., 2007 WL 3046273 (S.D. Ill. 2007).

[44] Successors in interest present another illustration of the principle. An arbitration clause signed by a decedent can bind heirs. *See* In re Ford Motor Co. & Gillespie Motors, 220 S.W.3d 21 (Tex. App. 2006), where a widow was bound to arbitrate a motor vehicle sales contract when she brought a lawsuit as representative of their minor children (as well as the estate), alleging breach of warranty in a fatal rollover accident. *Compare* Peltz v. Sears, Roebuck & Co., 367 F. Supp. 2d 711 (E.D. Pa. 2005), where a couple died of heat exposure in Philadelphia when Sears Roebuck failed to repair their air-conditioner. On an estoppel theory, the administrator of the estate was obligated to arbitrate pursuant to a clause in the maintenance agreement, not only the action brought on behalf of the estate, but also the wrongful death action on behalf of the heirs. In continental traditions, analogies can be found in the French concept of third party "*opposabilité*."

the same parties).[45] Inherent in all usage of the term is the notion that justice requires that a particular path be barred, whether that forbidden road be derogation from a promise, assertion of rights, re-litigation of legal questions, or (in the case of arbitral estoppel) denial of benefits and burdens of an arbitration clause.[46]

2. Chains of Transactions

In France, a long line of cases supports the principle that arbitration rights and duties follow the cause of action itself as derivative from agreements in earlier "chains" of property transfers. As one authority noted, the principle serves to connect a substantive obligation with its procedural framework.[47] **1.52**

The doctrine was confirmed in an interesting *Cour de cassation* case decided in early 2007, involving a series of transfers arising from a contract providing arbitration in Philadelphia.[48] A Belgian company had contracted for electronic chip components sold by an American corporation, which in turn contracted with a Korean entity. The Belgian company's French affiliate was to use the chips to produce telephone terminals. The Korean supplier apparently needed approval from the Belgian company, which was arranged by French subsidiaries of the American seller, introduced into the scenario for the Belgian company's convenience. **1.53**

When the chips proved defective, the buyer sued for damages before a French *tribunal de commerce*. The action was brought against the American seller, its subsidiaries, and the Korean supplier. The respondents asserted that the arbitration clause precluded court proceedings. The *Cour d'appel* and the *Cour de cassation* agreed. The consent to arbitrate expressed in the original agreement followed the cause of action arising from the chain of transactions. **1.54**

Moreover, the Belgian company, by accepting the two subsidiaries into the project (apparently to facilitate approval of the Korean chip maker) conferred on them the benefit of the arbitration clause signed with their parent. The mutual consent **1.55**

45 Derived from the ancient French "*estouper*," the verb became "to stop" in English. In modern French the term still survives as "*étouper*," used in the sense of "to plug" or "to caulk" as for holes in a vessel or a barrel. *See* III *Le Grand Robert de la Langue Française* p. 302 (Alain Rey ed. 2001).

46 On civil law analogues to equitable estoppel, *see* Emmanuel Gaillard, *L'Interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international*, Rev. Arb. p. 241 (1985); Philippe Pinsolle, *L'estoppel reconnu en France de manière autonome*, note on Cass. 1e civ., July 6, 2005 (Golshani v. Gouvernement de la République Islamique d'Iran), Rev. Arb. p. 993 (2005).

47 François-Xavier Train, *L'arbitrage est action directe: à propos de l'arrêt*, ABS du 27 mars 2007, Gaz. Pal. (Nov. 21 & 22, 2007). Placing the decision in context, Professor Train notes, "*Elle* [the chain of transactions doctrine] *fixe le régime procédural de l'obligation . . . qui, à ce titre, ne saurait en principe en être dissociée*."

48 Société Alcatel Business Systems (ABS), Société Alcatel Micro Electronics (AME) et Société AGF v. Amkor Technology et al, Cass 1e civ., Mar. 27, 2007, JCP [2007] I 168, No. 11, *comment* Christophe Seraglini; JCP [2007] II 10118, *comment* Catherine Golhen.

to arbitrate derived from their acceptance into the transaction at the time the Korean supplier received the approval.

IV. The *Lex Societatis*

A. Veil-piercing

1.56 In a free enterprise model of economic activity, the separate legal existence of corporations and their shareholders has long constituted a fundamental underpinning of business transactions, whether by cross-border cooperation or within a single jurisdiction. Consequently, arbitral awards usually bind only the companies that agree to arbitrate. Other members of the corporate family (parent, subsidiary or sibling) would not lose their proverbial "day in court" simply because an arbitration clause has been signed by one entity within a corporate group.

1.57 This general principle comports with commercial expectations of most business managers, and presents no unfair surprises. Third parties contracting with corporations will be on notice that the boundaries of corporate liability flow from principles established by the place of corporation, sometimes called the corporate seat or *siège*.[49]

1.58 This rule is not absolute, however. Most sophisticated legal systems disregard corporate personality in the face of abusive shareholder conduct such as fraud or undercapitalization. Some countries speak of "extending liability" (*extension du passif*) to describe exceptional situations where owners will answer for company debts.

1.59 From country to country doctrines often apply analogous concepts, albeit with varying labels and formulations. Anglo-American lawyers speak of "piercing" or "lifting" the veil between shareholder and corporation.[50] French speakers tend to refer to *abus de droit*, permitting claims against controlling shareholders for abuse of their ownership rights.[51] German authorities invoke notions of *Durchgriff*, or

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[49] In some instances, supra-national groups take legal personality from international treaties, as discussed, *infra*, in connection with the *Westland Helicopters* case.

[50] For better or for worse, the expression "veil-piercing" has taken different meanings in different contexts. For example, discussions of investment arbitration sometimes apply the term in connection with a shareholder's standing to sue for loss suffered by a host-state company that has suffered direct expropriation, as in cases such as Barcelona Traction, Light & Power Ltd. (Belg. v. Spain, Second Phase), 1970 I.C.J. p. 3 (Feb. 5, 1970), 1970 WL 1 (I.C.J.), and Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. p. 15, 1989 WL 139016 (I.C.J.).

[51] To non-French ears, the notion contains a delicate ambiguity. Although "*le droit*" would refer to "law," "*un droit*" or "*les droits*" indicates "a right" or "rights." In this context, shareholder abuse of the corporate form implicates misuse of "*un droit*"—the right of limited liability.

"seizing through" the corporation.[52] Using an optical metaphor, loss of separate legal personality renders the company transparent rather than opaque.

Veil-piercing may be invoked to justify either jurisdiction over a corporate affiliate[53] or one company's liability for the substantive debts of another.[54] This does not mean, however, that arbitrators who join a non-signatory parent must (or should) find the shareholder liable for the subsidiary's obligations. On occasion, joinder might be justified on the basis of consent, as when a parent agrees to be bound in an arbitration based on contracts signed by its subsidiary.[55] Even though both entities have agreed to subject themselves to the same arbitral proceeding, the arbitrator might determine that neither company is liable for the other's obligations. **1.60**

Conversely, one company might be liable for another's obligations, without necessarily subjecting itself to the same dispute resolution mechanism as contained in the primary obligation. A guarantor answers for the principal's debts, but might negotiate a *court* selection clause in the guarantee instrument (X guarantees Y) notwithstanding that the loan which is guaranteed (Y borrows from Z) contains an arbitration clause. The existence of such split forum selection arrangements says nothing about their wisdom. **1.61**

B. The Place of Incorporation

Shareholders can be barred from relying on the separate existence of a company whose corporate form has been abused through fraud or deliberate undercapitalization. The shareholder may have looted subsidiary assets.[56] Under such circumstances, sound policy ceases to require recognition of the corporate form, which presumes that shareholders receive profits only through legitimate dividends and/or share appreciation. **1.62**

This does not mean that arbitrators may call into question a company's legal existence simply because its assets prove inadequate to its obligations. Money may **1.63**

[52] The concept arises from *durch* ("through") and *greifen* ("to seize"). *See* Swiss *Tribunal fédéral* decision 4C.327/2005, Nov. 24, 2006, I. *Zivilabteilung*.

[53] Even with respect to subsidiaries of foreign entities, American principles can apply to jurisdictional determinations. In Taca International Airlines v. Rolls Royce of England, 15 N.Y. 2d 97, 102 (1965), a New York court took jurisdiction over a British company on the basis that its Delaware subsidiary was "a mere department" of its ultimate parent.

[54] *See* Phillip Blumberg, Kurt Strasser, Nicholas Georgakopoulos, & Eric Gouvin, Blumberg on Corporate Groups ch. 6 (2d ed. 2005); Phillip I. Blumberg, The Multinational Challenge to Corporation Law pp. 78–96 (1993).

[55] *See Fluor Daniel v. General Electric*, discussed at text accompanying notes 40–42 *supra*, where estoppel permitted a non-signatory respondent to benefit from an arbitration clause signed by a subsidiary.

[56] In addition, extension of arbitral jurisdiction over a parent corporation might be based on some defect in corporate formalities, resulting in *ab initio* lack of legal personality for the alleged entity that signed the arbitration clause.

have been lost through bad management or bad luck. A corporation's creditors always run the risk that the company may end up insolvent through the vicissitudes of commerce or the ineptitude of key executives.

1.64 When arguments for joinder build on doctrines elaborated in connection with corporate personality (rather than implied consent), the starting point for analysis lies in the law of the place of incorporation.[57] The law that brought the company into existence would logically serve as the legal system to which contracting parties look for guidance on matters related to corporate personality. Thus the subsidiary's place of incorporation has traditionally served as a starting point in determining the extent of a corporate personality.

1.65 This *lex societatis* generally governs questions related to the extent of its legal existence. Looking to the place of incorporation for guidance on corporate personality finds support in the domestic law of many arbitral centers.[58]

1.66 In addition to serving as a starting point for analysis of corporate personality, the law of the alleged place of incorporation may also serve as an end point. For example, a claimant might assert that a subsidiary corporation was never properly constituted under the laws of its alleged corporate seat. If that allegation can be proven, there would be no need to look to transnational principles. The game would be over, owing to the lack of corporate personality under the law that putatively gave life to the company.

1.67 When arbitrators look to national law, the interaction between state and federal law can occasionally present tensions. For example, in the United States the status of companies would normally be governed by the state of incorporation. Nevertheless, foreign governmental-controlled entities have been subject to a federal standard for veil-piercing. In addressing an attempt by Cuba to collect money from a bank whose assets it had just confiscated, the U.S. Supreme Court, in the well-known *Bancec* case, applied equitable principles "common to international

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57 In some federal systems questions arise about when the source of relevant law is to be found in federal principles or the rules of political sub-divisions. *See Bancec*, 462 U.S. 611, 613 (1983), discussed at note 59 *infra*. In either event, applicable standards are those of national law (in the sense of government-derived) rather than transnational practice.

58 In the United States, the Restatement of the Law (2d) of Conflicts of Law § 307 (1971), provides that the "local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts." In France, corporate life is governed by the law of the company seat. *See Répertoire Dalloz De Droit International*, Tome III, *Société*, ch. 1, Sect 2, art. 2, §§ 99–114 (Hervé Synvet): "[*Les*] *droits et obligations des associés . . . obéit nécessairement à une loi unique . . . celle du siège social*." In Switzerland, Article 154 of the PILA provides that corporations are governed by the law according to which they are organized ("*le droit de l'Etat en vertu duquel elles sont organisées*").

law and federal common law" to permit the value of expropriated assets to be credited against sums due under a letter of credit.[59]

In some circumstances, arbitrators also take notice of transnational norms that determine corporate personality according to a common sense approach that avoids territorial-bound rules, looking to a comparison of national law or a consensus among international arbitral awards. Such norms play a special role with respect to supra-national entities created by international treaty,[60] or when the place of incorporation has inadequate rules to protect innocent third party victims of corporate abuse. **1.68**

Such instances will likely remain the exception rather than the rule, however. Arguments for veil-piercing grow tenuous in the context of regular commercial relationships (as contrasted to actions based on tort),[61] which include requests to expand arbitral power by piercing the corporate veil of a contracting party. Moreover, in most cases the application of national and transnational veil-piercing principles share broad common contours, differing in the emphasis rather than in basic principle.[62] **1.69**

[59] First National City Bank v. Banco Para el Comercio Exterior de Cuba ("*Bancec*"), 462 U.S. 611, 613 (1983). In permitting a set-off, the court acknowledged the obvious injustice that would result if Cuba could claim sovereign immunity to thwart compensation for expropriation but still collect a letter of credit issued to its instrumentality. The court articulated two contexts that justified the departure from normal rules limiting shareholder liability: (1) when control of one entity by another creates a relationship of principal and agent; and (2) when respect for the corporate form would tend to "work fraud or injustice." *Id.* at 629–630.

[60] For example, in the case of *Westland Helicopters*, XVI Y.B. Com. Arb. pp. 174–181 (1991), the arbitral tribunal looked to partnership analogies in major legal systems to determine corporate personality.

[61] In finding that the alter ego doctrine was inapplicable in contract claims, one American court noted this difference between contract and tort claims as follows: "In a contract case, the creditor has willingly transacted business with the subsidiary. If the creditor wants to be able to hold the parent liable for the subsidiary's debts, it can contract for this." *See* Subway Equip. Leasing Corp. v. Sims (*In re Sims*), 994 F.2d 210, 218 (5th Cir. 1993) (citing United States v. Jon-T Chems, Inc. 768 F.2d 686, 694 (5th Cir. 1985)). *See generally*, Andreas Lowenfeld, International Litigation and the Quest for Reasonableness: Essays in Private International Law p. 105 (1996).

[62] In this connection, one might note that some authors suggest that arbitrators normally dispense with a decision on applicable law. *See* Bernard Hanotiau, *L'arbitrage et les groupes de sociétés*, Gaz. Pal. p. 6 (Dec. 18 & 19, 2002). Such generalities must be read in context. Most joinder of non-signatories justifies itself on the basis of the contours of consent, not total disregard of corporate personality. In the same article, Professor Hanotiau explains that arbitrators most often base their jurisdictional decisions on what they perceive as "the common will of the parties" viewed in the context of dispute's factual matrix and applicable trade usages: "*la volonté commune des parties, en prenant également en considération les usages du commerce international.*" *See also* Philippe Fouchard, Emmanuel Gaillard, & Berthold Goldman, *Traité de L'Arbitrage Commercial International*, § 502, suggesting joinder "by the will of the parties" ("*des cas où cette extension pouvait se justifier par la volonté, au moins implicite, des parties*").

V. The "Group of Companies" Doctrine

A. The *Dow Chemical* Award

1.70 Most scholarly discussions address joinder of non-signatories with some reference to the so-called "group of companies" doctrine, elaborated almost a quarter century ago in France.[63] In the prototype case, *Dow Chemical v. Isover St. Gobain*,[64] an American parent (Dow USA) and its French subsidiary (Dow France) sought to benefit from an arbitration clause contained in agreements that affiliates (Dow AG and Dow Europe) had signed with companies whose rights were transferred to Isover St. Gobain. Given that the party resisting joinder (Isover St. Gobain) had already agreed to arbitrate pursuant to the relevant arbitration clauses binding Dow AG and Dow Europe, the critical issue was whether it would be compelled to honor that commitment with respect to companies that wished to participate in the arbitral proceedings.

1.71 In rejecting the motion by Isover St. Gobain to deny a place at the arbitration table for Dow USA and Dow Europe, the arbitral tribunal cited various indicia of the parties' common intent, stressing that the arbitration clause was autonomous from the main agreement. Thus the parties must be shown to have accepted either the entire contract (including the arbitration clause) or the agreement to arbitrate itself.[65]

1.72 *Dow Chemical* assumes that the party sought to be joined will have been involved in the initial and final stages of the transaction: the negotiation and conclusion of the contract, as well as in performance and termination. Participation in "performance" of the contract does not seem to receive significance when isolated from at least one other element, such as negotiation.[66] Scholarly authorities stress

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63 For general discussion, *see* Stephen Wilske, Laurence Shore & Jan-Michael Ahrens, *The Group of Companies Doctrine: Where is it Headed?*, 17 Am. Rev. Int'l Arb. p. 73 (2006); Otto Sandrock, *Arbitration Agreements and Groups of Companies*, 27 Int'l Law. p. 941 (1993).

64 Dow Chemical v. Isover Saint Gobain, ICC Case No. 4131, Interim Award, Sept. 23, 1982, JDI p. 899 (1983), *comment* Yves Derains. An English version of the case can be found *in* Sigvard Jarvin & Yves Derains, I *Recueil des sentences arbitrales de la CCI*: 1974–1985, at p. 146, with relevant quotation on p. 149, first full paragraph. The award was confirmed by the *Cour d'Appel de Paris*, Oct. 21, 1983, Rev. Arb. p. 98 (1984). *See generally*, Jean-François Poudret & Sébastien Besson, *Droit Comparé de l'Arbitrage International* p. 227 (2002); Bernard Hanotiau, Complex Arbitrations (2005); Charles Jarrosson, *Conventions d'Arbitrage et Groupes de Sociétés*, *in* The Arbitration Agreement: Its Multifold Critical Aspects, ASA Bull., Special Series No. 8 p. 209 (Dec. 1994).

65 *See Dow Chemical* award (JDI p. 899, at p. 904 (1983)), noting that in a similar case it had not been established that Company X would have accepted the arbitration clause if it had signed the contract directly.

66 The French original makes reference to "*la commune volonté des parties . . . telle qu'elle résulte des circonstances qui ont entouré la conclusion et caractérisé l'exécution puis la ésiliation des contrats*

that a non-signatory must play a role in the contract's creation (negotiation and conclusion) as well as its execution (performance).[67]

Common sense explains the emphasis on participation at the initial stage of the parties' relationship. Normally, at the time contracts are negotiated and concluded the parties come to understand who was expected to be bound. A dominant entity should not be permitted to renege on its agreement, particularly when the negotiation induced reliance by the counterparty. **1.73**

B. Consenting Non-signatories

In *Dow Chemical*, the non-signatory did not resist arbitration, but wished to join a proceeding already initiated by its affiliates. The non-signatory was able to show that "the application of the arbitration clause . . . conforms to the mutual intent of the parties."[68] The party resisting arbitration had in fact agreed to arbitrate the subject matter of the dispute. The only issue was whether it would be compelled to honor that arbitration commitment with respect to affiliates of the otherwise legitimate claimant companies. **1.74**

When a non-signatory asks to arbitrate against a signatory, the threshold for extending the arbitration clause thus may be set at a lower level from its resting place when one side never abandoned the right to present claims or defenses in courts that would normally have jurisdiction over the parties and/or their dispute.[69] The signatory resisting joinder of the third party might argue that it never agreed to arbitrate with the particular affiliate seeking to enter the proceedings. **1.75**

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où elles figurent . . . ." JDI p. 899 (1983), *comment* Yves Derains. The quote appears at p. 901, first full paragraph. Later the same award mentions "*la conclusion, l'exécution ou la résiliation*" using the disjunctive "*ou*" (or) rather than the conjunctive "*et*" (and). *See* p. 904, third paragraph in part D, concerning "*Le groupe des sociétés*." The disjunctive "*ou*" (or) appears to have been a typographical slip. The earlier text makes clear that the tribunal considered all three moments to be relevant: negotiation, performance and termination. The subsequent paragraphs make clear that acceptance of the arbitration clause itself is what counts.

67 In connection with parent/subsidiary relationships, one author argues, "*[S]eules sont liées par le contrat et la clause d'arbitrage les sociétés qui ont participé à la conclusion et à l'exécution de la convention*." ("The only entities bound by the contract and the arbitration clause are the companies that have participated in the conclusion and the execution of the agreement"). Hanotiau, *supra* note 62, at p. 16, para. 54(5).

68 *See Dow Chemical* award (JDI p. 899, at p. 904 (1983)); in French original: "*cette application* [of the "*clause compromissoire*" mentioned earlier in the same paragraph] *est conforme à la volonté des parties*." English version *in* Jarvin & Derains, *supra* note 64, at p. 152.

69 Non-signatories consented to arbitrate not only in *Dow Chemical*, but also in the *Jaguar* decision, known in some literature for exempting international consumer transactions from French consumer protection schemes. Société V 2000 v. Société Project XJ 220 ITD et autre, Rev. Arb. p. 245 (1996), *comment* Charles Jarrosson. It is important to note that the non-signatory (Jaguar France) sought arbitration, and had been involved in the transaction (sale of a custom-made automobile) from its beginning.

The argument has some force, albeit limited in nature. The resisting party *did* agree that disputes related to the subject in question would be settled by arbitration.[70]

1.76 By contrast, if an application is made to bind a non-signatory, the very basis of arbitral jurisdiction would normally be lacking. The party sought to be bound would argue that it never agreed to arbitrate with anyone at all, thus requiring arbitrators to look fully for clear manifestation of assent.

1.77 Consequently, arbitrators and judges often draw distinctions between what might be called "*consenting non-signatories*" (which seek to arbitrate) and "*non-consenting non-signatories*" (which resist arbitration). It is understandably easier to justify allowing a willing party to join an arbitral proceeding than the converse. One side to a dispute would not normally be permitted to seek relief under a contract containing an arbitration clause without according to the other side (if it wishes) the benefits of the agreement's arbitration provision.

1.78 This does not mean that a "consenting non-signatory" will always succeed in joining the proceedings, but simply that extension of an arbitration clause to accommodate a consenting non-signatory remains quite different from joinder of an unwilling party. The scrutiny and the evidence must be greater when an attempt is made to *force* (rather than to *permit*) joinder by a non-signatory. In joining a non-signatory, the evidence of consent would normally require special circumstances.[71]

1.79 Policy reasons as well as practical considerations make it difficult to compare a situation where the non-signatory *does* want to arbitrate with one where the non-signatory does *not* want to arbitrate. In the latter instance, the drawbacks of parallel proceedings must be weighed against the serious countervailing considerations of imposing arbitration on clearly unwilling entities. When the non-signatory has never consented to arbitration, more analytic rigor and hesitation are in order before extension should be ordered. The very basis of arbitral jurisdiction is prima facie absent.

1.80 In this connection, courts and arbitrators routinely distinguish between (1) the existence of consent to arbitrate and (2) the scope of that consent. This latter distinction is made both *ratione materiae* and *ratione personae*. When the existence of a broadly drafted arbitration clause has been admitted, it is commonplace for

70 A somewhat analogous reasoning underpins Rule 22.1(h) of the London Court of International Arbitration ("LCIA") Arbitration Rules, which permits an arbitral tribunal to join third persons who have consented thereto in writing. The LCIA mechanism is direct, of course, derived from the explicit character of the provision. *See* Adrian Winstanley, *Multiple Parties, Multiple Problems: A View from the London Court of International Arbitration*, in this volume at p. 213, Part IV.B.1.

71 Marc Blessing, *Extension of the Arbitration Clause to Non-signatories*, *in* The Arbitration Agreement: Its Multifold Critical Aspects, ASA Bull., Special Series No. 8 p. 160 (Dec. 1994).

courts and arbitrators to permit willing non-signatories to enter the arbitration as a way to avoid duplicative parallel proceedings.[72] When claims lie within the ambit of the relevant contract, the willing third party is often given the right to "piggyback" onto the arbitration clause itself.[73] In some instances, this results in "defensive veil piercing" where a respondent in a court action (usually faced with an unwanted American jury[74]) seeks the benefit of the arbitration clause.

C. What really happens

No discussion of the group of companies doctrine would be complete without asking how often its principles lead to joinder in practice, both before arbitral tribunals and when considered by national courts. Although generalities remain problematic owing to the paucity of reported decisions available cases and awards indicate that the doctrine's fortunes have not generally fared well. **1.81**

Two leading Swiss scholars examined a random sample of arbitrations in which the "group of companies" criteria were considered. In only a quarter (twenty-five per cent) of the surveyed cases did the tribunal extend the arbitration clause to non-signatories.[75] Although the data remain insufficient to permit any firm conclusions (at least without more information on the facts of the cited cases), the study does indicate a relatively low success rate for bringing parties into arbitration through "group of companies" criteria. Invoking the doctrine presents no shibboleth to open doors for joinder. Rather, non-signatories normally would be joined under common principles such as fraud, implied consent and lack of corporate personality. **1.82**

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72 *See, e.g.* Halcot Navigation Ltd. Partnership v. Stolt-Nielsen Transportation Group, 491 F. Supp. 2d 413, 417 (S.D.N.Y. 2007), where a vessel owner had concluded a time charter, and the time charterer had entered into a voyage charter with another company. Both the time charterer and the voyage charterer were given standing to arbitrate against the vessel owner. *See also* Redmon v. Society & Corp. of Lloyds, 434 F. Supp. 2d 1211 (M.D. Ala. 2006) (coverage action in which both underwriters and Society of Lloyd's was permitted to benefit from arbitration clause in policy); Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753 (11th Cir. 1993) (trademark license dispute in which both licensee and its parent permitted to compel arbitration).

73 A variant on this theme can be found in the landmark decision in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), where the U.S. Supreme Court permitted joinder of multiple claimants against a single respondent, notwithstanding that the respondent never agreed to arbitrate with all of them together in a consolidated proceeding. In that case, each claimant (the borrowers) had agreed to arbitrate with one respondent (the lender), and the claimants had no apparent adverse interests inter se causing special hardship by the joinder.

74 *See also* Fluor Daniel Intercontinental, 1999 WL 637236 (S.D.N.Y. Aug. 20, 1999) (arbitration of construction dispute in which non-signatory parent corporation permitted to invoke arbitration clause).

75 Jean-François Poudret & Sébastien Besson, *Droit comparé de l'arbitrage international* paras. 253–254 (2002; 2d ed. 2007), published in English as Comparative Law of International Arbitration. *See also* commentary by Yves Derains in connection with ICC Award No. 7155 (1993), JDI p. 1037 (1996).

1.83 Outside of France, few legal systems welcome the group of companies doctrine. The English decision in the *Peterson Farms* case[76] was clear in its disapproval, stating that an arbitral tribunal's approach in applying the doctrine was "seriously flawed" and concluding that "where an arbitration agreement (or the contract in which it is contained) is subject to English law . . . an ICC arbitral tribunal has no jurisdiction to apply the 'Group of Companies' doctrine."[77]

1.84 Similarly, Swiss courts and arbitrators sitting in Switzerland have generally rejected joinder based on the group of companies doctrine,[78] as have courts in the United States.[79]

1.85 Judicial attitudes toward the group of companies doctrine comes into play most directly when an award is presented for confirmation, recognition, or annulment, events as to which most arbitrators will not be indifferent. Absent an explicit choice of foreign law, most courts that are asked to enforce a foreign award would instinctively apply their own general contract notions to test allegations that the losing party had indeed agreed to be bound.

1.86 This should not be surprising. Except when corporate personality is completely disregarded (as in the case of fraud), no civilized legal system will enforce an award without first ascertaining that the losing party did agree to arbitrate.[80]

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[76] Peterson Farms Inc. v. C & M Farming Ltd. [2004] EWHC 121, [2004] 1 Lloyd's L. Rep. 603, 2004 WL 229138, 7(4) Int'l Arb. L. Rev. p. 111 (2004), Q.B. Div., 2004. A different line of analysis might have justified the court's decision on grounds related to indirect damages, prohibiting awards for losses incurred by corporate affiliates. Instead, the court took the opportunity to express general disapproval of the doctrine. A purchase of poultry from an Arkansas corporation resulted in losses when the chickens turned out to be infected by an avian flu. Birds purchased by one entity in the buyer's group were used for breeding chickens by affiliated companies within the group. The arbitrators awarded damages for all of the birds, including those owned by a corporate affiliate of the buyer. The seller challenged the award on the basis that the tribunal had no jurisdiction to entertain claims by entities not named as parties to the relevant agreement.

[77] [2004] 1 Lloyd's Rep. 603, at 604.

[78] *See* Saudi Butec Ltd. v. Al Vouzan Trading et al, 14 ASA Bull. p. 496 (1996); ICC Case No. 4401, *in* Jarvin & Derains, *supra* note 64, at p. 153; ICC Case No. 4504 (1985), JDI p. 1118 (1986). The doctrine was again dispproved in X Ltd. v. Y & Z SpA, Tribunal fédéral, August 19 2008 (Case 4A_128/2008/ech), involving a guarantee given by the parent of one party. It has been suggested that the Swiss *Tribunal fédéral* in 2003 expressed some sympathy for the doctrine by upholding an award against the controlling shareholder of two Lebanese companies that had engaged a construction company to perform work in Lebanon. The shareholder had repeatedly intervened in the negotiation, performance and termination of the contract. However, the court stopped short of endorsing the doctrine or expressing disapproval of the 1996 decision.

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

[80] In this regard, a recent Court of Appeals decision remains instructive. *See Sarhank*, 404 F. 3d 657. The court rightly refused to enforce an award against a non-signatory subsidiary of an American company that was improperly joined to an arbitration in Cairo, and noted that, for award enforcement, American courts look to "general principles of domestic contract law." *Id.* at 661. Although not relevant to the present point, the case has been criticized by some commentators for its misplaced reasoning by referring to art. V(2) rather than V(1) of the New York Convention.

VI. Conclusion

In determining whether a non-signatory should be joined to international proceedings, arbitrators usually look to theories related to implied consent and lack of corporate personality. Transnational norms, gleaned from published decisions in significant cases, increasingly take on the character of a type of arbitral precedent. **1.87**

When joinder is urged on the basis of implied consent, these norms reduce the circularity inherent in reliance on the law of the contract or the arbitral situs, neither of which may be relevant with respect to a stranger to the transaction. By contrast, when joinder rests principally on lack of corporate personality, arbitrators often begin with the place of incorporation, reducing the role played by transnational norms. **1.88**

Such arbitral case-law implicates a number of common scenarios: **1.89**

(1) non-signatory participation in contract formation;
(2) a single contract scheme constituted by multiple documents;
(3) acceptance of the contract or arbitration agreement by the non-signatory, whether in the particular arbitration itself or in another forum;
(4) ab initio absence of corporate personality; and
(5) fraud or fraud-like abuse of the corporate form.

The first three relate principally to arguments based on implied consent, while the last two address disregard of corporate veil. **1.90**

In large measure, the health of international arbitration will depend on how arbitrators apply these elements in light of the reasonable expectations of the international business community. In so doing, arbitrators, like the scholar, practitioners and judges, will benefit from a measure of humility. Although one perspective may have more intellectual rigor than another, or be less effective in furthering desirable economic or social goals, little analytic benefit obtains from labels such as "wrong" and "right" with reference to doctrinal variants from competing national systems. Just as different paths can lead to the same end, so divergent terminologies may point to functionally-equivalent ways of deciding cases. **1.91**

APPENDIX: ILLUSTRATIVE ARBITRAL AWARDS

A. Awards on consent

1. ICC Case No. 1434[81]

Related contracts were made with little or no formality, such that the various agreements could be considered part and parcel of the same obligation. Ultimately the award was annulled by the Swiss *Tribunal fédéral*.

2. ICC Case No. 4131 (*Dow Chemical*)[82]

Joinder of a non-signatory that consented to the arbitration.

3. ICC Case No. 4504[83]

The tribunal refused to extend the arbitration clause to non-signatory respondents, and expressed skepticism with respect to the group of companies doctrine generally. There was a finding that the non-signatory's mention of "our company" and "our agreement" were irrelevant, given that the reference was clearly on behalf of the signatory entity.

4. ICC Case No. 6519[84]

A special purpose holding vehicle was created only for an Anglo-French joint venture in the leisure industry. The tribunal refused a request for joinder by two claimant companies from the English signatory's group. However, the tribunal allowed joinder for the joint venture holding vehicle itself, on the basis that it had participated in the negotiations leading to the agreement and was at the heart of these negotiations ("*au coeur de toutes ces négociations*").

5. ICC Case No. 6610[85]

The tribunal found no evidence of an intent to add other parties to the contract under a "group of companies" theory invoked in an ICC arbitration seated in Hong Kong arising from a construction of a hotel in Indonesia.

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[81] Decided in 1975, JDI p. 978 (1976).
[82] Decided in 1982, JDI p. 899 (1983).
[83] Decided in 1985, JDI p. 1118 (1986).
[84] Decided in 1991, JDI p. 1065 (1991).
[85] Decided in 1991, 19 Y.B. Com. Arb. (1994), *also in* Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher, III *Recueil des sentences arbitrales de la CCI*: 1991–1995 p. 277 (1997).

6. ICC Case No. 7155[86]

This case involved no extension of the arbitration clause because neither of the two non-signatories was part of the relevant corporate group at the time the contract was concluded.

7. ICC Cases No. 7604 and 7610[87]

A non-signatory defendant accepted, in a national court action, that it was bound by the arbitration agreement.

8. ICC Case No. 8910[88]

Multiple contracts (agreement and distributorship) were found to constitute a single contractual ensemble.

9. ICC Case No. 10758[89]

The tribunal found no evidence of consent to arbitrate merely because the non-signatory participated in the contract negotiation, noting "[i]f the Claimant had intended [the non-signatory] to be a party to either the Contract or its arbitration clause it could have so insisted at that time."

10. ICC Case No. 11160[90]

Non-signatories played a critical role at the time the contract was concluded. The related signatory was formed only for the specific purpose of qualifying for an exemption from the value added tax.

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86 Decided in 1993, JDI p. 1037 (1996).
87 Decided in 1995, JDI p. 1027 (1998).
88 Decided in 1998, JDI p. 1085 (2000).
89 Decided in 2000, XVI No. 2 ICC Bull. pp. 94–98; JDI p. 1171 (2001).
90 Decided in 2002, XVI No. 2 ICC Bull. pp. 99–101.

B. Awards on corporate personality

1. ICC Case No. 3879 (*Westland Helicopters*)[91]

The arbitrators reached through a legally transparent organization to take jurisdiction over the Arab countries that had created the group's umbrella organization, found to lack legal personality.

2. ICC Case No. 5730 (*Orri*)[92]

A Greek shipping magnate was found to have engaged in willful misrepresentation in organizing his *personal* activities under the guise of several entities with closely linked names, many of them the names of ships. Misrepresentation was established in national Greek court decisions, and the non-signatory was actually mentioned in the main contract.

3. ICC Case No. 5721[93]

A finding of no corporate personality in a construction dispute that set "Company X" against the claimant sub-contractor, the latter having succeeded to the rights and duties of the project owner. An American entity, sometimes referred to as "X USA," argued that its so-called affiliate "X Egypt" (represented as "in formation") had contracted for civil engineering works in a Cairo suburb. In reality, however, X Egypt did not even exist as a separate legal entity, but was merely a branch of Company X.

4. ICC Case No. 7626[94]

Based on Indian law, the decision understandably incorporated a line of English cases such as *Salamon v. Salamon*[95] and *Adams v. Cape*[96] to affirm separate legal personalities of a subsidiary of the Austrian company and its parent corporation participating in an inchoate joint venture to establish a chemical plant in India.

5. ICC Case No. 8385[97]

Decision to pierce the veil of an insolvent subsidiary in the face of "illegitimate conduct" (fraud) by the subsidiary at the instigation of the parent company.

6. 1991 Swiss *Ad Hoc* Case[98]

The arbitrators found insufficient capitalization of the company and an unlawful liquidation. The arbitrators state the basic condition for veil-piercing as an "abuse of right" (*abus de droit*).

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91 Decided in 1984, 11 Y.B. Com. Arb. pp. 138–141 (1984).
92 Decided in 1988, JDI p. 1029 (1990).
93 Decided in 1990, JDI p. 1020 (1990).
94 Decided in 1995, 22 Y.B. Com. Arb. pp. 132–148 (1997); *also in* Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher, IV *Recueil des sentences arbitrales de la CCI*: 1996–2000 p. 119 (2003).
95 Salamon v. Salamon & Co. Ltd, [1897] A.C. 22 (H.L.)
96 Adams v Cape Industries PLC, [1990] 1 Ch. 433
97 Decided in 1995, JDI p. 1061 (1997).
98 ASA Bull. p. 202 (1992).

C. Awards with hybrid reasoning

1. ICC Case No. 6673[99]

The tribunal denied extension of the arbitration clause, holding that ownership of a know-how license was not enough to justify joinder.

2. ICC Case No. 8163[100]

Applying German law, the tribunal refused to extend the arbitration clause against the owner of companies engaged in consulting services that had withdrawn from a contract shortly after having been purchased by the respondent. The tribunal refused to extend the arbitration clause to the purchasers, indicating that joinder would be permitted only in the case of "abuse of rights" following insolvency or use of a company as a sham. Moreover, the tribunal refused to consider the two agreements (purchase contract and consulting contract) as a single "economic unity."

3. ICC Case No. 9762[101]

The tribunal refused to extend the arbitration clause to join a state fund for agricultural development by reason of a contract concluded by the ministry of agriculture.[102]

4. ICC Case No. 9839[103]

The American affiliate of an international merger and acquisition firm (all bearing the group name) was entitled to share in a "success fee" associated with an acquisition. The Spanish affiliate was not permitted to enter as a party to the arbitration under the clause contained in the agreement with the American affiliate. The cooperation on the acquisition project did not establish intent to permit joinder of the non-signatory.

5. ICC Case No. 10818[104]

Extension of the arbitration clause was denied under both Swiss and Portuguese law in a case arising from a contract according to which the claimant was to be the exclusive distributor for two companies of the same group. Only the first was a signatory to the contract, but the claimant alleged that the second was bound for having assumed performance. Distinguishing *Dow Chemical*, the tribunal found that the two companies had not behaved in an interchangeable way. The second company's involvement in performance was deemed insufficient to permit joinder.

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99 Decided in 1992, IV No. 1 ICC Bull. p. 51; *also* JDI p. 992 (1992) *and* Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher, III *Recueil des sentences arbitrales de la CCI: 1991–1995* p. 429 (1997).

100 Decided in 1996, XVI No. 2 ICC Bull. pp. 77–80.

101 Decided in 2001, 29 Y.B. Com. Arb. pp. 26–45 (2004).

102 The arbitrators did extend the arbitration clause to the "Ministry of Agriculture and Water Management" as successor to the "Ministry of Agriculture and Food"—hardly a surprising conclusion under any theory, since both ministries were responsible for entering into the same types of development contracts.

103 Decided in 1999, 29 Y.B. Com. Arb. pp. 66–88 (2004).

104 Decided in 2001, XVI No. 2 ICC Bull. pp. 94–98.

6. ICC Case No. 11209[105]

The claimant had entered into a supply agreement with one company after it had acquired another and changed names to that of the acquired entity. An arbitration was initiated against the two companies and their sole shareholder. The tribunal accepted the argument that the first company ceased to exist independently of the second, but refused to extend arbitral jurisdiction as against the parent. No evidence was found of fraud, deceit or collusion.

7. ICC Case No. 11405[106]

In the context of a share purchase agreement, an extension was permitted for a claimant that wished to be joined, but was denied for two respondents who had been involved in negotiations in their personal capacity and not as corporate representatives.

105 Decided in 2002, XVI No. 2 ICC Bull. pp. 102–103.

106 Decided in 2001 (unpublished interim award), *discussed in* Bernard Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions (Kluwer Law International 2005), paras. 158–161.

D. Award comparison chart

1. Extension Refused

Award	Reasoning
ICC Case No. 4504	No inter-company confusion
ICC Case No. 6610	No evidence of consent
ICC Case No. 6673	Ownership of license insufficient
ICC Case No. 7155	Not part of group when contract signed
ICC Case No. 7626	Draft agreement insufficient
ICC Case No. 8163	No abuse
ICC Case No. 9762	State agriculture fund not alter ego of ministry
ICC Case No. 9839	Cooperation on project insufficient
ICC Case No. 10758	No fraud or abuse
ICC Case No. 10818	Involvement in performance insufficient
ICC Case No. 11209	No evidence of fraud

2. Extension Granted

Award	Reasoning
ICC Case No. 1434	Inter-related contracts
ICC Case No. 3879 (*Westland*)	Lack of corporate personality[107]
ICC Case No. 4131 (*Dow*)	Express consent
ICC Case No. 5721	No corporate personality for "X Egypt"[108]
ICC Case No. 5730	Fraud/confusion
ICC Case No. 6519	Express consent[109]
ICC Cases No. 7604 & 7610	Bound by admission in judicial action
ICC Case No. 8385	Fraud/abuse
ICC Case No. 8910	Inter-related contracts
ICC Case No. 11160	Participation in negotiation through special vehicle
ICC Case No. 11405	Express consent[110]

107 ICC Case No. 3879: Extension subsequently set aside by Swiss court.

108 ICC Case No. 5721: Extension refused as to "Mr Z."

109 ICC Case No. 6519: Extension refused to other non-signatory claimants not active in contract negotiations.

110 ICC Case No. 11405: Extension refused as to the non-signatory respondent.