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IS *DALLAH* REVISITED? THE VARYING NATIONAL LEGAL RULES FOR EXTENDING ARBITRATION AGREEMENTS TO "NON-SIGNATORIES": A REVIEW OF RECENT CASE LAW

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I. Introduction

As global international trade and commerce increases, so too does the number of cross border commercial disputes.[1] International commercial arbitration has gained significance over the last few decades and has become the most popular method of cross border dispute resolution[2]: this is primarily due to the global adoption of the New York Convention[3] which ensures a near certain regime of enforcement of foreign arbitral awards.[4] It also provides global recognition and enforcement of the choice of arbitration by requiring national courts to stay proceedings in the event of there being a valid arbitration agreement.[5]

Since arbitration is a private system of adjudication by which parties effectively renounce their fundamental right to go to national courts[6], there needs to be firm evidence of this intent and consent, and this is an essential element of arbitration.[7] Without this clear agreement and intention, the arbitrator has no jurisdiction or authority to hear the dispute. This is the genesis of the NYC's requirement for the "written agreement of the parties"[8]; but matters and international trade have developed further in the last 60 years. In traditional international arbitration, with two parties and a clear arbitration clause in the commercial agreement, there were significantly less issues. However, this structure does not necessarily reflect to modern cross-border commercial complex and multi-party transactions, where it is common to involve several parties in the delivery and completion of projects, which involves several separate contracts, external negotiations, especially in areas such as constructions, marine transports financial transactions and corporations with complex structure and multiple subsidiaries.[9]

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[1] Richard Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?' (2009) 5(1) Journal of Private International Law 161, 1

[2] Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (White & Case, 2018) < http://www.arbitration.qmul.ac.uk/research/2018/> accessed 15 June 2020

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention)

[4] New York Convention (n 3) art III

[5] New York Convention (n 3) art II (3)

[6] William W. Park, *Arbitration of International Business Disputes* (2nd edn, OUP, 2012) 3, Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements İn International Commercial Law* (1st edn, Routledge2014) 1.

[7] Alan Redfern and Martin Hunter, *International Arbitration* (6th edn, OUP 2015)

[8] New York Convention (n 3) art II (3)

[9] Stavros L. Brekoulakis, *Third Parties in International Commercial Arbitration* (Oxford International Arbitration Series 2010) 2

It is common therefore where commercial parties may want to "join" non-parties to the main commercial agreement and the arbitration clause. This often occurs when a party enters into a contractual relationship with a subsidiary company but wants to join the parent company to the dispute and therefore the arbitration (usually because of involvement by the parent in negotiations or from other representations) to increase its chance to get paid.[10] It is also common in situations where a party becomes insolvent[11] or a party wants to extend liability of a state owned entity to the state itself (for example, when the entity is abolished)[12]. Still, the former can desire to have a decision of its dispute via the previously agreed dispute resolution way, which is arbitration. Nevertheless, allowing such desire would be contrary to the current rules; the basic concept of corporations, having limited and definite liability because of each being a separate legal entity. This can cause great uncertainty and problems for all those involved, and if arbitrators do take jurisdiction over non-parties, the award may be in jeopardy later on, via application for set aside. Even though challenges are allowed on very limited grounds, lack of a valid arbitration agreement thus lack of jurisdiction and NYC Article V(1)(a) would suffice. Moreover, different courts have different national legal approaches to both determining the applicable law of the arbitration agreement and then the legal rules which may result in a non-party, such as a parent company, being held to have the required intention. This was seen in the very famous case heard in both the French and English courts, *Dallah Real Estate*, where the outcome of French and English proceedings ended up with conflicting decisions despite the same fact pattern and indeed application of the same law (French law). Further, in very recently decided *Kabab* case, a similar outcome is reached by conflicting judgments from England and French courts.[13] Other key legal arbitration seats have varying national legal approaches to binding third parties, such as the US and Switzerland, and the fact of this lack of a uniform approach undoubtedly causes uncertainty and unpredictability, with the possible effect of damaging the reputation and therefore choice of arbitration as an international dispute resolution mechanism.

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[10] Ibid.

[11] Ad hoc award of 1991, (1992) 2 ASA Bull 202; Stavros Brekoulakis, 'Rethinking the Concept of Consent in International Commercial Arbitration: A General Theory for Non-Signatories' (2017) 8(4) Journal of International Dispute Settlement 610

[12] *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46.

[13] Pierre Mayer, 'The Extension of the Arbitration Clause to Non-Signatories - The Irreconcilable Positions of French and English Courts' [2011]27(4) American University International Law Review 831-836

The question which will therefore be attempted to be answered in this study is that in the light of the recent case law on repeated conflicted decisions; whether a uniform approach needs to be taken as to when an arbitration agreement can be extended to the non-parties and if so, what the legal basis of this should be? In order to answer this question, this study will, first of all, talk about the issues regarding this question. Then, current situation will be discussed by explaining national approaches to joining third parties and with a case law study. Then, an analysis and evaluation will be made and available solutions will be specified, including a possible criteria suggestion made by the author, followed by a conclusion.

In summary, this study will conclude that the repeat of conflicting awards in *Kabab* shows that currently used theories and doctrines for extending arbitration to non-signatories are mainly excerpted from contract law, which is not always suitable with the judiciary character of arbitration.[14] Hence, a fair balance should be drawn in regards to this issue and courts should adopt similar approaches when possible, due to the globality of arbitral awards, different approaches by the courts may cause forum-shopping in the stage of enforcement.

A Brief Word on Taxonomy

To express entities that have never formally signed an arbitration agreement but attempt to commence or get involved or forced to take part in the arbitration the term "non-signatory" is often used.[15] Yet, this term may be misleading, due to the fact that a signature is neither a requirement nor suffice to be a part of the arbitration proceedings.[16] As explained below, a formal signature is not a prerequisite as it used to be by national laws and case-law.[17] Furthermore, it should be kept in mind that when a so-called non-signatory party is included into an arbitral proceeding via its implied consent, it is not extending the arbitration clause, it is merely identifying right parties.[18] Therefore, with all situations considered, the term non-party will be used in this study to comprise inclusively for both situations where a party is identified later due to not

[14] Brekoulakis (n 11)
[15] William Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' 2 Dispute Res. Int'l 84 (2008)
[16] Philipp Habegger, 'Extension of Arbitration Agreements to Non-Signatories and Requirements of Form' (2004) 22 ASA Bulletin 398
[17] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014)
[18] Born, (n 17) 1414.

being an initial signatory and where arbitration agreement is extended to a third party with the considerations of good faith and equity.

II. Overview of International Commercial Arbitration

International commercial arbitration has become the main chosen method of dispute resolution for cross-border disputes as demonstrated in Queen Mary Survey in 2017, 97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%).[19] This aforementioned study has also demonstrated that, enforcement regime international arbitration supplies to the parties and flexibility of the procedure is the top characteristics of arbitration which makes it preferable over litigation and mediation.[20] Rather than going to State courts, parties agree instead to appoint an arbitral tribunal consisting of private individuals therefore, not public servants, to hear and decide their dispute, and whose decision they will abide by and treat as final and binding. Arbitration is thus consensual, and derives its power from the parties' unequivocal agreement to arbitrate rather than litigate.[21]

International commercial arbitration has many advantages, but the key ones derive from nearly global adoption of the New York Convention, which is ratified by 164 countries so far.[22] Hence, it is safe to deem it as a global law, since it is harder to find a country which has it in its legislation than a country which has not. New York Convention gives global force and effect to the agreement to arbitrate by requiring contracting states' courts to stay proceedings in the event of there being a valid arbitration agreement.[23] More fundamentally, it also provides for the global enforcement of foreign awards, with very few grounds on which an award can be refused enforcement, and thus, provides much greater certainty and predictability to parties than enforcement of foreign judgments.[24] In addition, not only is the award globally enforceable, it is final in the sense that, unlike court judgments, it cannot be

[19] Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (White&Case, 2018) < http://www.arbitration.qmul.ac.uk/research/2018/> accessed 15 June 2020
[20] ibid.
[21] Redfern (n 7) 2.
[22] 'Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")' (United Nations Commission on International Trade Law) <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 28 June 2020
[23] New York Convention (n 3) Art II (3).
[24] New York Convention (n 3) Article III.

appealed on points of law or fact and may only usually be "challenged" on very limited grounds relating to jurisdiction of the tribunal and serious procedural irregularities.[25] An award cannot be challenged in many jurisdictions on the basis of wrongful application of law or selecting the applicable law wrong or merely claiming that arbitrator has decided wrongfully, except for England where an award can be challenged on the basis of point of law due to the Arbitration Act 1996.[26] Therefore, parties should give due care while choosing arbitration over litigation. Arbitration is also far more flexible than litigation in national courts, and enables parties to choose neutral forums, their own arbitrators and their own rules due to the autonomy given to the parties.

On the other hand, the usual clear contractual arrangement, with clearly defined parties, has changed in the 21st-century greatly. The question now is how far should an arbitrator's jurisdiction reach in circumstances where non-parties have been involved in the contractual relationships or in negotiations. It should be noted that arbitrators do not have the power of a state judge to "join" parties to an action, although some national laws and institutional rules have been developed, as it will be considered below, to allow joinder in the event of agreement of all parties.

There have however been numerous occasions when arbitrators have extended the arbitration agreement and contractual nexus to non-parties and the question then is, how in law is this achieved.

III. Issues

A. A valid agreement to arbitrate

As discussed above, in order for a dispute to be resolved by arbitration, there must be a *valid* arbitration agreement between parties.[27] It is common that an arbitration agreement needs to include unequivocal and clear intent to arbitrate the specified dispute between parties.[28]

a. Evidencing the parties' agreement

To claim the jurisdiction of the arbitral tribunal, the party who wants to arbitrate the specific dispute needs to demonstrate the existence of a valid arbitration agreement.

[25] Redfern (n 7).
[26] Arbitration Act 1996, s 101.
[27] New York Convention (n 3) art V(1)(a).
[28] Redfern (n 7); Born (n 17).

Thus, evidencing the parties' agreement plays an important role. As explained below, it is no longer required to have a written agreement, as it was required under the New York Convention.

b. NYC – signed and in writing

As noted, however arbitration is consensual and based on clear and unequivocal intent and agreement of the parties, given the fact that once agreed to, they effectively give up their legal right to go to court for the resolution of any disputes. It is therefore fundamental that evidence of intent of these "parties" is available. In the 1950s when the New York convention was being promulgated, this intent was seen as best evidenced by written agreement signed by the parties (or contained in an exchange of letters or telegrams): it was clear then that in order to be a valid arbitration agreement, there had to be evidence that the "parties" had agreed. Therefore, it is stated in the second article of the NYC that an agreement shall be in writing in order to be recognized by the contracting states, then it states that an arbitration agreement will also be treated as signed by the parties if it is contained in an exchange of letter or telegrams.[29]

c. Developments in UML and national laws

However, things have changed since 1958 and the formal written requirement has been relaxed over the years and this has been evidenced in the UNCITRAL Model Law on International Commercial Arbitration, in particularly in the 2006 amendments, which is adopted by 116 jurisdictions[30] states in its Article 7 that:

> "*An arbitration agreement is in writing 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.*"[31]

This is a significant change in terms of the formal writing requirement, which is critical for the subject topic of this study, as if this formal writing requirement was still in order, then it would be impossible for the non-parties to join to an arbitration agreement which they did not have a signature on. Still, even though a formally written arbitration agreement is not a prerequisite anymore, evidence of intent to arbitrate is

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[29] New York Convention (n 3).
[30] 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' (United Nations Commission on International Trade Law, 2006) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 29 March 2020
[31] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006' (7 July 2006) UN Doc A/61/17 Art 7

required, which parties can demonstrate in multiple ways.[32] While extending the arbitration agreement to non-parties, the fact that a "non-signatory" might be obliged to join to the arbitration does not supress with the need for an valid arbitration agreement. Rather, it means that the agreement takes its binding force through some circumstance other than the formality of signature.[33] Thus, in the event of a dispute, it is vital to determine the applicable law for the validity of the arbitration agreement.

B. Determining Applicable Law for Validity and Varying Conflict of Law Rules

There is no global law regarding the validity of arbitration agreements. Therefore, it is unthinkable that different national laws on this subject to not conflict with each other. As it happens when different related laws clash on a specific matter, when this issue of validity of an arbitration agreement is encountered by the national courts, they refer to the international private law rules, in other words, conflict of law rules.

Furthermore, issues get even more complicated due to the lack of a harmonised conflict of law rule. Absent such rule, each national court is obliged to operate its own national conflict of law rule, which leads to different outcomes of applicable law when the issue is heard before a court. Thus, this will contribute to the uncertainty and unpredictability of the point in question, due to the fact that a party is not in a place to estimate the applicable law of the validity of the arbitration agreement to its dispute, in the likely event of international disputes being heard in front of different national courts. Therefore, as it will be explained in more detail below, at least a harmonised conflict of law rule is in need and can be achieved.

i. Approach of English courts

Although England is an important dispute resolution centre both in international and commercial matters, the law it supplies in regards to the validity of the arbitration agreement is, as the phrase goes, a chaos. The English law's rule on how to determine the applicable law of the arbitration agreement, i.e. conflict of law rules on this matter used to be the *Sulamerica* case. *Sulamerica* conveys that, the suitable law applicable to

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[32] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 < https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf> accessed 8 August 2020

[33] Park (n 15).

the arbitration agreement should be determined by undertaking a three-stage test, which gives effect to the express choice of the parties first. In the absence of any express choice, implied choice should be determined. Finally, if it is not possible to reach an implied choice, closest and most real connection should be the proper law governing the arbitration agreement.[34] Furthermore, it establishes that, unless indicated otherwise, an express choice of law governing the substantive contract is a strong indication of an implied choice of the same law in relation to the agreement to arbitrate.[35] Yet, in another well-known case *C v D*, the court stated that it would be not common that the law of the arbitration agreement differs from the law of the seat of the arbitration, which is chosen by the parties themselves.[36] The reason was remarked as "*an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate, rather than with the place of the law of the underlying contract, in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place*".[37] However, it should be noted that, in a very recently decided case, it seems that English courts have changed their approach and adopted a new conflict of law rule. In the newly decided case *Enka*[38], The Court of Appeal noted that "*the time had come to seek to impose some order and clarity*" on the significance of the main contract law and the law of the seat for the purpose of determining the arbitration agreement law, setting out a new principle.[39] Under the new principle, express choice of the parties will be given effect first, similar to Sulamerica principle.[40] To do so, it will be determined whether express choice of law in main contract amounts to express choice of law for the arbitration agreement, which can be construed to cover the arbitration agreement within it, as for example in *Kabab* case. Yet, it stated that this situation will occur in minority of the cases. In the absence of an express choice, implied choice will be given effect.[41] The significant part is, the court set a general rule that the law of the arbitration agreement is the law of the seat, as a matter of implied choice. After these, the system

[34] *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 [24-26].
[35] ibid.
[36] Jacqueline Chaplin, 'Hold on to your seats! A settled test for the proper law of arbitration clauses?' (Kluwer Arbitration Blog, 23 March) <http://arbitrationblog.kluwerarbitration.com/2012/03/23/hold-on-to-your-seats-a-settled-test-for-the-proper-law-of-arbitration-clauses/> accessed 8 August 2020
[37] *C v D* [2007] EWCA Civ 1282 [26].
[38] *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb* [2020] EWCA Civ 574.
[39] ibid.
[40] ibid.
[41] ibid.

of law which has the closest and realest connection with the arbitration agreement will be rendered as the proper law.[42] Thus, the main difference from Sulamerica principle is that, the Court has shifted the importance of the law of the seat over the law of the main contract. Since Enka is a recent decision, this case is likely to become the leading English law on the applicable standards relating to the way to determine the proper law of an arbitration agreement. Yet, it remains to be seen whether the Supreme Court will agree with the Court of Appeal in relation to the importance of the law of the seat for the purpose of determining the proper law of the arbitration agreement.[43]

Consequently, with the different and conflicting judgements coming from English courts, this enormously important issue becomes more chaotic and it becomes a mess in the eyes of the businesspersons. With the validation principle seen in the case law and conflict of law rule supplied by the NYC Article V(1)(a), which is mirrored in article 34(2)(a)(i) of the Model Law, stating that "*agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*", it is argued that the common law approach to the proper law of the arbitration agreement needs to be re-considered.[44]

To exemplify how important and essential the applicable law of the validity of the arbitration agreement, the newly decided *Kabab-Ji Sal v Kout Food Company*[45] can be shown.

After the tribunal rendered the arbitral award favouring the KJS, it sought the enforcement of the English courts. English courts decided that the issue before it is a jurisdictional question regarding whether KFG had become an additional party to the FDA, and therefore to the arbitration agreement. In order to answer that question, it was fundamental to determine which law applies to the question of whether KFG became a party to the arbitration agreement and whether KFG had become a party to the arbitration agreement under that law. Furthermore, the arbitration agreement stipulated that the seat of arbitration would be Paris, and the governing law clause stated that the

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[42] ibid.
[43] Herbert Smith Freehills, 'English Supreme Court to Decide Approach to Determining Governing Law of Arbitration Agreement' (Herbert Smith Freehills, 5 August 2020) <https://hsfnotes.com/arbitration/2020/08/05/english-supreme-court-to-decide-approach-to-determining-governing-law-of-arbitration-agreement/> accessed 9 August 2020
[44] Steven Lim, 'Time to Re-Evaluate the Common Law Approach to the Proper Law of the Arbitration Agreement' (Kluwer Arbitration Blog, 5th July) <http://arbitrationblog.kluwerarbitration.com/2020/07/05/time-to-re-evaluate-the-common-law-approach-to-the-proper-law-of-the-arbitration-agreement/> accessed 9 August 2020
[45] *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)* [2020] EWCA Civ 6.

main contract would be governed by English law, which incorporated a no oral modification clause. English Court of Appeal considered that express choice for English law provided in the main contract nullified the lack of choice for the governing law of the arbitration agreement.[46] This decision is compatible with England's long-established case-law of Sulamerica. However, it is important to note that this approach is not in line with in a more recent decision, which the English court has overturned a LCIA decision which the tribunal decided it did not have jurisdiction over a Russian company which was not a signatory to the relevant arbitration agreements. To do so, the court founded that applicable law to the arbitration agreement does not deals with whether a non-signatory is bound by the arbitration. The court stated that:

"*if the question is one as to whether a non-signatory of the agreement can be joined by virtue of a concept such as agency or, in this case, a principle that shareholders or parents are obliged to arbitrate on contracts entered into by the signatory, then it is not the proper law of the contract which gives the answer, but English conflicts rules would look to another law, in this case the law of incorporation of the signatory*."[47]

In Kabab case, following these tests, England Court of Appeal has ruled that English law is the proper law to govern the arbitration agreement itself under the circumstances of the case, as FDA provided an express choice of English law, which involved the arbitration agreement. Thus, looking for an implied choice was not necessary.

Applying English law to the arbitration agreement, England Court of Appeal has decided that KFC did not become a party to the arbitration, because of the no-oral modification clause and the effect given to them under English law, following the Supreme Court's *Rock Advertising* decision.[48]

ii. Approach of French courts: Common Intention of the Parties

French courts have the tendency to apply international principles to resolve disputes regarding non-signatories, instead of national rules. They apply more general French choice-of-law analysis, supplying that international arbitration agreements are "autonomous" from national legal systems and subject to international law, which is in

[46] ibid

[47] *Egiazaryan v OJSC OEK Finance* [2015] EWHC 3532 (Comm).

[48] *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.

line with their approach of internationality opposed to territoriality.[49] Under this approach, an arbitration agreement is separate and autonomous from the main contract. Further, arbitration is not dependent on the law of the seat.

Comparing the approach of French courts, in the *Kabab case*, nevertheless the French Court of Appeal has decided that it must first decide which law is applicable to the arbitration agreement in order to decide whether KFG is bound by the arbitration agreement to set aside or upheld the arbitral award. It decided that French law is the applicable law to determine the validity of the arbitration agreement. To reach such a decision the court employed its established case law: "*by virtue of a material rule of international arbitration law, the existence and effectiveness of an arbitration clause are determined according to the common intention of the parties without a reference to a national law.*"[50] This is because of the fact that under French law there is a substantive rule of international arbitration law that the arbitration clause is legally independent from the main contract which it is included within.[51] Although many jurisdictions have accepted separability of the arbitration agreement from the main contract, under French law this position is heavier. This is because of the position taken by French courts in the *Dalico* case[52] according to which validity of the arbitration agreement depends fundamentally on the parties' common intent, without reference to the law governing the contract or other national law.[53]

Although French Court of Appel deemed applying an analysis of conflict of law rules to determine the applicable law of the validity of the arbitration agreement suitable, this is not always the case. Just as in the *Soerni v. Asb*[54] case, the French Supreme Court selected not to operate a conflicts of law study during considering the validity of an arbitration agreement, rather it deemed looking at the relevant facts and

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[49] Born (n 17) 473.
[50] *Dalico v. Khoms et El Mergeb* Cass. Civ. No.01-1195130 [2004].
[51] Herberth Smith Freehills , 'French Court of Appeal Upholds Award That Was Denied Enforcement in England' (Herberth Smith Freehills , 31 July 2020) <https://hsfnotes.com/arbitration/2020/07/31/french-court-of-appeal-upholds-award-that-was-denied-enforcement-in-england/> accessed 3 August 2020
[52] *Municipalité de Khoms El Mergeb v. Société Dalico*, December 20, 1993, Case no. 91-16828
[53] Christophe von Krause, 'Existence and Validity of an Arbitration Agreement: The French Supreme Court Confirms that the Validity of an Arbitration Agreement Depends Primarily on the Common Intent of the Parties' (Kluwer Arbitration Blog, 27 January 2010) <http://arbitrationblog.kluwerarbitration.com/2010/01/27/existence-and-validity-of-an-arbitration-agreement-the-french-supreme-court-confirms-that-the-validity-of-an-arbitration-agreement-depends-primarily-on-the-common-intent-of-the-parties/?doing_wp_cron=1596536743.6535809040069580078125> accessed 4 August 2020
[54] *Société d'études et représentations navales et industrielles (SOERNI) et autres v Société Air Sea Broker limited (ASB),* July 8, 2009, Case no. 08-16025)

examine the common intent of the parties, in other words to apply the French substantive rules of international arbitration to the arbitration agreement more suitable.[55] The French Supreme Court stated that the question of whether a party is or is not validly bound by an arbitration agreement should be examined in light of the parties' common intent and the requirement of good faith. Also, there are more examples present where French Supreme Court has looked after common intention of parties without even determining the law applicable to the validity of the arbitration agreement.[56]

As it is seen clearly with the approaches of two major countries which are significant in international dispute resolution, different courts have different approaches regarding the determination of the law applicable to the validity of the arbitration agreement, which causes critical issues in the eyes of businesspersons.

C. "Joining" Third Parties

As known, a significant difference between litigation and arbitration is the ability of the court judges to include third parties to the proceedings without the prior consent of the parties. Thus, in international arbitration with complex and multi-party transactions, lack of power to force parties to be included in the proceedings becomes a serious issue.

a. Law and Rules

It is necessary to mention joinder rules for the benefit of this study. The leading arbitral institutions has started to take action in regards to this issue, such as the new Rules introduced by ICC on 2012, which states that joinder of third parties to the arbitration is possible at any time until the confirmation or appointment of an arbitrator in its article 7, which is still in place.[57] LCIA Arbitration Rules adopt a similar approach as well.[58]

Yet, legal issues arise and problems with non-parties occur. This is because, a third party is not always willing to join the arbitral procedure for numerous reasons. Since arbitral tribunals does not embody coercive powers to join third parties to the

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[55] ibid.

[56] *L'Entreprise Tunisienne d'Activités Pétrolières (ETAP) v Bomal Oil*, November 9, 1993, Case no. 91-15194; *Société anonyme Française Entrepose GTM pour les Travaux Pétroliers Maritimes (ETPM) v Société anonyme Empresa Constructoria Financiera (ECOFISA)* [1990] , Case no. 88-13336

[57] International Chamber of Commerce Arbitral Rules 2017, art 7.

[58] London Court of International Arbitration Rules 2014 <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx> accessed 4 August 2020

proceedings like courts have, this became a severe issue where arbitration is the preferred way of dispute resolution.[59] Moreover, almost all international commercial transactions includes more than two parties, which constitute the basis of our problem. Since there is no global law or global conflict of law rule regulating the issue of non-parties in arbitration, this creates uncertainty and unpredictability in the minds of traders. Furthermore, the inconsistent decisions from different jurisdictions exacerbate this situation, which will be further examined in the next chapter.

b. Legal Methods or Theories to bind Non-Parties

As there is no criteria or formula exists on the issue of extending arbitration clause to non-parties, arbitrators are often forced to refer the issue to various pre-existing legal theories or doctrines.[60] The list for those doctrines or theories used is long, some of them are; agency, apparent or ostensible authority, implied consent, alter ego and piercing the corporate veil, group of companies doctrine, third party beneficiaries, guarantors, succession, assignment and other transfers of contractual rights, subrogation, estoppel and other related doctrines, ratification, corporate officers and directors, shareholder derivative rights, joint venture relations etc.[61] These theories and doctrines are mostly derived from contract law and company law, considering the contractual nature of the arbitration and corporate structures.[62] Therefore, it is seen that some authors have classified the factual structures causing a non-party to be able to participate or be forced to participate to an arbitration into groups.[63] These are deriving consent to arbitrate from the actions of a non-party, in other words implied consent and ignoring corporate personality in the events of fraud or undercapitalisation.[64] Although analysis differs under each of the doctrines discussed below, the issue is whether specific facts of the case meet applicable legal standards for either establishing consent to an arbitration agreement or a non-consensual basis for binding an entity to the agreement.[65] For the benefit of this study it is important to evaluate the mostly used theories individually.

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[59] Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (White & Case, 2018) < http://www.arbitration.qmul.ac.uk/research/2018/> accessed 15 June 2020

[60] Park (n 15).

[61] Born (n 17) 1405.

[62] Park (n 15).

[63] ibid.

[64] ibid.

[65] Born (n 17).

i. Group of Companies Doctrine

As stated, the issue of extension of the arbitration agreement to non-signatories is almost always attempted to be resolved by applying pre-existing theories of contract and commercial law. The group of companies doctrine differs from others in this manner, it is developed for and applicable only to non-signatory issues in the context of international arbitration agreements.[66] In circumstances where a party other than a signatory to the arbitration clause has corporate ties with the original signatory, the court or tribunal may extend the arbitration clause to the non-signatory party via the group of companies doctrine which is derived from good faith obligation.[67] The group of companies doctrine is a doctrine accepted in some civil law jurisdictions which presents that non-signatories of the contract may be parties under an arbitration clause where the company is part of the corporate group subject to the control of a corporate affiliate that is a signatory to the contract and was involved in the negotiation or performance of the contract.[68] Such a company may take the benefit of the arbitration clause and initiate arbitration proceedings or be brought into the arbitration as a party, despite the fact that it was not an initial signatory to the contract.[69]

This doctrine is developed due to the fact that it is typical and common for companies within the same corporate group to be involved in accomplishing various parts of a single project, notwithstanding the lack of contracts formally setting out their roles.[70] In terms of group of companies, the extension of the arbitration agreement may be interpreted as the extension of arbitration agreement to the parties involved in the contract somehow; whether by performing or drafting of the agreement or in disputes arising therefrom, on the condition that they prove that they were aware of the arbitration agreement based on their position.[71] In terms of international arbitration

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[66] Born (n 17) 1413.
[67] Norton Rose Fulbright, 'Non-signatories to arbitration agreements: ‘Group of companies’ beware' (Norton Rose Fulbright, May 2016) <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/eb82eee0/non-signatories-to-arbitration-agreements> accessed 5 August 2020
[68] Michael Reynolds, 'Non-signatory issues: All for one and one for all' [2016] 37(6) Company Lawyer 189
[69] Ibid.
[70] Norton Rose Fulbright, 'Non-signatories to arbitration agreements: ‘Group of companies’ beware' (Norton Rose Fulbright, May 2016) <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/eb82eee0/non-signatories-to-arbitration-agreements> accessed 5 August 2020
[71] Emre Esen, *Uluslararası Ticari Tahkimde Tahkim Anlaşmasının Üçüncü Kişilere Teşmili* (Beta 2008) 100; Ezgi Babur, 'Extension of the Arbitration Clause to Group of Companies' (Erdem & Erdem Law Firm, September 2013) <http://www.erdem-erdem.av.tr/publications/law-post/extension-of-the-arbitration-clause-to-group-companies/> accessed 5 August 2020

practice, there is a strong tendency that the arbitration agreement signed by a company which is a part of a corporate group, would be extended to the other companies in the group if they meet certain conditions.[72] Yet, it should be acknowledged that there are many ICC awards decided on the contrary and refused the extension.[73] Thus, it is often argued that this doctrine is not accepted and applicable in many cases and jurisdiction, except for France.

A landmark decision regarding the group of companies doctrine is *Dow Chemicals*[74] case where the arbitrator decided that the group of companies forms a "*single economic entity*", and that all the companies included the corporate group intended to be bound by the arbitration agreement. Yet it should be kept in mind that the arbitrator rendered such decision by considering the circumstances of the case while coming to a decision; such as actions of the non-signatory companies' who are a part of the corporate group, the transactions of buyer which he had with the group rather than the individual company it signed the contract with and the fact that non-signatory companies took an very active involvement during the drafting and the conclusion of the arbitration agreement. It is important to note that the arbitral tribunal in this case has rendered its award on the basis of alleged general international principles instead of a careful interpretation of the parties' intentions under the applicable law.[75] After this decision, upon application of set aside of the award on the basis of lack of jurisdiction, the Paris Cour d'Appel has upheld the award, which confirmed French law's strong and long-established position on group of companies doctrine.[76]

Importantly, although the group of companies doctrine is rooted and supported by scholars in France, this is not the case for other jurisdictions.[77] Case law of national courts other than France evidently demonstrates that the courts are more careful and prejudiced against this doctrine and they tend to endure a burdensome analysis of the facts of a case. There are courts which prefer to approach this issue without mentioning

[72] Esen (n 71).
[73] Esen (n 71).
[74] ICC Case No. 4131, Y.C.A. Vol. IX (1984), 131
[75] Kirstin Schwedt, 'When Does an Arbitration Agreement Have a Binding Effect on Non-Signatories? The Group of Companies Doctrine vs Conflict of Laws Rules and Public Policy' (Kluwer Arbitration Blog, 30 July 2014) <http://arbitrationblog.kluwerarbitration.com/2014/07/30/when-does-an-arbitration-agreement-have-a-binding-effect-on-non-signatories-the-group-of-companies-doctrine-vs-conflict-of-laws-rules-and-public-policy/?doing_wp_cron=1596651897.3513329029083251953125> accessed 6 August 2020
[76] ibid.
[77] ibid.

the group of companies doctrine, without determining the applicable law and without properly considering related principles such as agency or implied consent, but taking the specific fats of the case into consideration.[78] A good example is the well-known English High Court decision *Peterson Farms*[79], which set aside an ICC award which precisely determined the law applicable. In this case arbitral tribunal found that they have jurisdiction over non-signatories of the arbitration clause by applying the 'group of companies doctrine'. Yet, the High Court found that the applicable law should be determined first and after finding the English law suitable, it stated that the group of companies doctrine is not applicable in the case because this doctrine forms no part of English law, just as the Arkansas law.[80]

Although the group of companies doctrine is adopted by French law, it is highly criticised as well.[81] The reason behind it is that it lacks certainty, and a non-party would not be aware of its potential participation in proceedings, which might lead to serious injustice and depriving a non-party from its right to have its case heard before national courts.[82] On the other hand, this doctrine is supported by some authors as well, as the "economic reality" may weigh heavily in favour its application.[83] Still, some authors argue that the group of companies doctrine is relatively inadequate and that conduct of the companies is simply taken into account in determining whether there is a consent where the existence of a group of companies may be only relevant as a matter of fact.[84] Thus, they reject the idea that *Dow Chemicals* gave rise to the application of group of companies doctrine in England which is consistent with *Peterson Farms* case.[85]

Consequently, the group of companies doctrine is widely accepted within France, yet, it cannot be argued that the extension of the arbitration agreement to the companies within the same group of companies is a widely accepted practice. In a study it is stated that only in twenty-five per cent of the surveyed cases, the tribunal extended the

[78] ibid.
[79] *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm)
[80] ibid.
[81] Reynolds (n 68).
[82] Judgment of 7 December 1994, V2000 v. Project XJ 220 ITD, 1996 Rev. arb. 245 (Paris Cour d'appel); Roger Alford, 'Binding Sovereign Non-Signatories' [2004] 19(3) INT'L ARB REP 14.
[83] Ibid.
[84] Otto Sandrock, 'Arbitration Agreements and Groups of Companies' [1993] 27(4) International Lawyer 941.
[85] Bernard Hanotiau, 'Consent to Arbitration: Do we share a Common Vision?' [2011] 27(4) Arbitration International 539

arbitration clause to non-signatories.[86] Yet, the data remain insufficient to permit any firm conclusions without more information on the facts of the cited cases. Nevertheless, the study does indicate a relatively low success rate for bringing parties into arbitration by "group of companies" criteria.[87]

ii. Estoppel Doctrine

Especially in common law jurisdictions, "estoppel" is a broadly accepted legal doctrine, which can be put into effect to prohibit parties from declining that they are party to agreements in general or to arbitration agreements. [88] In these jurisdictions, "estoppel" is defined in various ways, but generally means that a party is stopped from acting inconsistently with its own statements or conduct on the basis of good faith and equity.[89] A scholar paraphrased the doctrine as stated:

"*The doctrine of equitable estoppel exists to prevent fraud or injustice; to the extent that a party has made a statement or acted in a particular way, it is unjust and tantamount to fraud to permit that party thereafter to allege and prove facts contrary to its previous statements.*"[90]

Although estoppel doctrine is more common in common law jurisdictions, similar conceptions exist in other jurisdictions under good faith, abuse of right, or *venire contra factum proprium* or simply in connection with the group of companies doctrine.[91] Thus, either under recognized estoppel or related doctrines of good faith are used as a basis for either permitting a non-signatory to invoke an arbitration agreement or holding that a non-signatory is bound by an arbitration agreement. These authorities have held that, where a non-signatory claims or exercises rights as a party under a contract, which contains an arbitration clause, the non-signatory will typically be estopped from denying that it is a party to the arbitration clause. In other words, a non-signatory to a contract cannot pick and choose the contact terms that favours it.[92]

The usage of equitable estoppel which is adopted for application to questions of arbitral jurisdiction is not rare.[93] Yet, the events courts decided to not to apply estoppel

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[86] Jean-François Poudret and Sébastien Besson, *Droit comparé de l'arbitrage international* (2002; 2d ed. 2007), published in English as Comparative Law of International Arbitration. 253–254
[87] Park (n 15).
[88] Spencer Bower, *Estoppel by Representation* (4th edn, 2004)
[89] Elizabeth Cooke, *The Modern Law of Estoppel* (1st edn, 2000) 2
[90] Born (n 17) 1473.
[91] Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International 2005) 55,56
[92] Born (n 17) 1473.
[93] ibid.

on the basis of its criterions not being met is existent. It is seen that under direct benefits theory of estoppel, the United States district court held in its *Jasmin Solar* case that: "*A company knowingly exploiting an agreement with an arbitration clause can be estopped from avoiding arbitration despite having never signed the agreement.*" In this case, the Circuit court reversed District court's judgment which confirmed the award holding non-signatory party liable, on the basis of estoppel and benefiting from the contract. The Circuit court stated that, benefiting from a particular contract is not relevant when there is no record of direct benefit provided to the third party or invocation of the contract. As the third party could not benefit from any rights or disputes under the contract, because it is not a party, the lower court erred when it found that Jasmin was estopped from avoiding the Contract's arbitration clause. [94]

Moreover, it should be kept in mind that these equitable doctrines are designed to apply in extraordinary circumstances, not in ordinary business transactions which nowadays tend to be multifaceted and multiparty.[95]

iii. Piercing the Corporate Veil

The doctrine of lifting the corporate veil, which was originally developed for company law to prevent abuse of the legal principle of limited liability, has been used to deal with non-signatories in arbitration too.[96] The words used identify piercing the corporate veil differs in almost each jurisdiction but the elements of it is very much alike in most jurisdictions, at least in the context of international arbitration agreements. The International Court of Justice explained the veil-piercing doctrine in *Barcelona Traction* as follows:

"*The process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such*

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[94] *Trina Solar US, Inc. v. Jasmin Solar Pty Ltd.*, No. 17-572 (2d Cir. 2020).

[95] Brekoulakis (n 11).; Pedro Martines-Fraga 'The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere?' [2013] 46 Cornell Int'l L.J. 291

[96] John P. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* (Little Brown 1989) 105,106.

as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."[97]

It is seen that some national courts and arbitration tribunals have lifted the corporate veil of the signatory subsidiary to find that the non-signatory parent company is the true party to an arbitration agreement, specifically if the subsidiary is insolvent at the time a dispute arises or lacks sufficient funds to cover the damages requested by the claimant, yet in exceptional circumstances only.[98] Thus, considering the similar nature of estoppel and lifting the corporate veil doctrines, it is safe to say that they are designed to apply in exceptional circumstances only, not for the arbitration which has a contractual and bilateral nature, which is often multifaceted, multiparty and multi-contract.[99]

D. When Is This Relevant?

a. Insolvency

As a global pandemic outbreak happened in 2020, it is hard to argue that it is not only a health crisis but rather has more critical effects, on societies and economies at the core.[100] With the recession all around the world and the decrease in the economies of even the biggest countries in the world, this has affected international trade and led to an increase in the disputes.[101] As discussed, Moreover, the number of companies who applied for insolvency has increased dramatically with the rapid change in the world. This means that whenever a dispute arose between a company who declared insolvency but had entered previous arbitration agreements, the other signatory to the arbitration agreement could not find any legal entity to begin arbitration proceedings against. This party would be forced to bring its claim to state courts, which is not fair, given the fact that it agreed to arbitrate any possible dispute with its business partner. In this

[97] Case Concerning the Barcelona Traction, Light & Power Co., [1970] I.C.J. Rep. 3, 38-39 (I.C.J.).
[98] Brekoulakis (n 11).
[99] ibid.
[100] United Nations, 'UN's Framework for the Immediate Socio-Economic Response to the COVID 19 Crisis' (*United Nations Development Programme*, April 2020) <https://unsdg.un.org/sites/default/files/2020-04/UN-framework-for-the-immediate-socio-economic-response-to-COVID-19.pdf> accessed 30 July 2020
[101] Norton Rose Fullbright, 'Insolvency and International Arbitration Tension: Between Competing Public Policy Interests' (Norton Rose Fullbright Publications, June 2020) <https://www.nortonrosefulbright.com/en/knowledge/publications/c984bc11/insolvency-and-international-arbitration> accessed 30 July 2020

scenario, the signatory party would be forced to go to the state courts instead of the predetermined arbitration, just because of the privity of the arbitration agreement.

Some national courts and arbitration tribunals, albeit in exceptional only circumstances, have lifted the corporate veil of the signatory subsidiary to find that the non-signatory parent company is the true party to an arbitration agreement, especially if the subsidiary is insolvent at the time a dispute arises or lacks sufficient funds to cover the damages requested by the claimant.[102] Therefore, it is expected to encounter more cases similar to it.

Thus, it can be argued that the interplay between arbitration and insolvency is largely addressed on a case-by-case basis, whilst there appears a need for addressing it at a legislative level or by resorting to more uniform international instruments.[103]

b. State Owned Companies

In the trade world, states themselves also enter into agreements with companies or real people. Yet, states may deem establishing an entity just for the subject project suitable. In this case, signatory to the arbitration argument will be the newly founded entity. The problematic part here is the fact that, in the event of a dispute, the state-owned and newly found entity usually will not have enough assets and states can use the same arguments stated above. Furthermore, it would not be practical for a party to bring a claim to the courts of a state against the state itself. state entity, any disputes are likely to be referred either to the courts of the state concerned or to international arbitration. The private party to such a contract will almost certainly prefer to submit to arbitration as a ‘neutral’ process, rather than to the courts of the state with which it is in dispute.[104] Thus, a standard or a resolution is in need, for both parties in terms of predictability and certainty.

c. Deep Pockets of Parent

[102] Ad hoc award of 1991, (1992) 2 ASA Bull 202.
[103] Ishaan Madaan and Chauhan Prakhar, 'A Dialogue on International Arbitration and Insolvency' (Kluwer Arbitration Blog, 6th September)<http://arbitrationblog.kluwerarbitration.com/2020/09/06/a-dialogue-on-international-arbitration-and-insolvency/?fbclid=IwAR00HD8ModQxoY6jCFmlJbUNoQmu0XMKVwe4GT3qFJ90D55hEJex1tsfz2Y> accessed 9 September 2020
[104] Redfern (n 7) 53.

As business transactions got complicated, companies chose to use division of labour in a way that each have a separate legal entity. Also, companies started to merge and acquire with other companies, which created parent companies. The problematic part here regarding the issue of non-signatories in arbitration is that a parent company often has control over its subsidiaries and they get involved to their contracts. While this constitutes no harm when the project moves dispute-free, in the event of a dispute, the parent company may use the privity of the arbitration agreement and separate legal entity argument easily, to evade responsibility. This is a frequently encountered situation, therefore, a standard or a resolution is in need, for both parties in terms of predictability and certainty

IV. Current Situation

Neither international arbitration nor multi-party transactions are novel for the commercial disputes. Yet, the problem regarding non-parties in international arbitration has gained dramatic importance in the last few years. The main reason behind this is the inconsistent decisions coming along from various jurisdictions. As it will be explained below, different courts even rendered conflicting decisions on the very same case, which is affecting the predictability and certainty adversely.

A. National Approaches to Joining Third Parties

It is accepted that England has a very stringent approach towards implied consent and it is considered to be a rare case. This is mostly because, the doctrine of privity of contract has been given high importance. For instance, in *ArsanoviaLtd. & Ors v. Cruz City 1 Mauritius Holdings*, the High Court stated that "English law requires that an intention to enter into an arbitration clause must be clearly shown and is not readily inferred."[105] This rationale was upheld by the Supreme Court when, in *Dallah*, which the Court said:

"*It is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however international the arbitration or transnational the principles applied.*"[106]

On the other hand, France has very flexible approach and more aspirant to extend the arbitration agreement on the basis of the common intention of the parties. Moreover, more recently a more objectivist trend has surfaced, which means that

[105] *Arsanovia Ltd. & Ors v. Cruz City I Mauritius Holdings* [2012] EWHC (Comm) 3702 [35].
[106] Dallah Real Estate and Tourism Holding Co. v. Pakistan [2010] UKSC 46 [10]

implied consent is only assessed based on behaviour rather than awareness as to the existence and/or scope of an arbitral agreement.[107]

Consequently, England and France represent two opposite approaches to joining third parties. In between these two approaches, more moderate approaches exist, yet, the significant issue here is the lack of harmonisation which causes uncertainty and unpredictability.[108]

B. National Case Law Study

a. Dallah Real Estate & Tourism Holding Co v the Government of Pakistan

i. The approach of the arbitral tribunal

The arbitral tribunal rendered a partial award regarding its jurisdiction on 2001, finding that it has jurisdiction to hear the dispute between Dallah and the Government of Pakistan whereas the Government of Pakistan was not a party to the original arbitration agreement on the paper, then the tribunal rendered an award in favour of the Dallah Real Estate.

ii. The approach of English Courts

Dallah Real Estate has brought a case to the courts of England to enforce the award. In 2010, the Supreme Court has rejected to enforce award on the basis that the applicable law to determine validity of the arbitration agreement is French law and they found that since the Government of Pakistan was not a party to the arbitration agreement, there was no valid arbitration agreement. Moreover, it stated that although the NYC's language is permissive and says "*enforcement of the award <u>may</u> be refused*" in certain circumstances in its Article V, when there is no valid arbitration agreement between parties, the courts has no discretion to enforce it anymore and are obliged to refuse its enforcement.[109]

iii. The approach of the French Courts

[107] Eduardo Silva Romero and Luis Miguel Velarde Saffer, 'The Extension Of The Arbitral Agreement To Non- Signatories In Europe: A Uniform Approach?' [2015] 5(3) American University Business Law Review 371-385; Mayer (n 13).; Victoria Leclerc, 'A Third-Party, One Arbitration Agreement, Two Approaches: The French Courts' Views on the Law Applicable to the Arbitration Agreement in Kabab-Ji v Kout Food Group' (Kluwer Arbitration Blog , 8th September) <https://www-kluwerarbitration-com.uea.idm.oclc.org/document/kli-ka-born-2014-ch10> accessed 9 September 2020

[108] ibid.

[109] *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46.

One year later French Court of Appeal (Cour d'Appel) had rendered a completely opposite decision. Upon application of the Government of Pakistan to set aside the award, it upheld the award and found that the arbitration agreement is valid between the Dallah Real Estate and the Government of Pakistan, who was a true party to the arbitration agreement on the basis that it was the alter ego of the Trust, an entity the Government of Pakistan has established solely for the project.[110] Although the Government of Pakistan argued that the memorandum of understanding which it was a part of and the agreement were separate legal documents, that it had not signed the agreement and that the parties had never had a common intention that the Government of Pakistan would be bound by the arbitration agreement. Yet, the fact that Trust ceased to exist shortly after the signing of the contract containing an arbitration clause between the Trust and Dallah Real Estate, and the Government of Pakistan's conduct at the time of the pre-contractual negotiations and the termination of the agreement by the Secretary of the Ministry Religious Affairs, a state agency, had confirmed that creation of Trust was a formal matter and the Government of Pakistan was therefore bound by the arbitration agreement. Thus, the challenge was not successful and arbitral awards was not set aside by the arbitral seat, meaning they are still enforceable across the globe.

To conclude, it is argued that the French decision was outrageous at the first sight due to the lack of a solid ground to bind a non-signatory to an arbitration, since the consent of the parties to arbitrate is the cornerstone of arbitration, and the Government of Pakistan had made clear its intention not to be a party to the contract containing the arbitration clause. Yet, the only remedy available for the French Courts was to bind the Government of Pakistan on the grounds of its good faith duty to keep the Trust alive. Thus, it is argued that the only remedy left for the French Court was to upheld jurisdiction of the arbitral tribunal over the Government of Pakistan and held it liable for the concerns of justice and equity.[111]

b. Kabab-Ji Sal v. Kout Food Company

i. The approach of arbitrators

[110] *Pakistan v Dallah Real Estate and Tourism Holding Co* [2011] 2 WLUK 605.
[111] Mayer (n 13).

The dispute in this case has arose from the Franchise Development Agreement signed between Kabab-Ji Sal and Al Homaizi Foodstuff Company. The latter has become a subsidiary of the Kout Food Company , after the FDA has been signed, which contains an arbitration agreement, no oral modification clause and a provision stating that the rights granted under it were intended to be strictly personal in nature and could not be assigned or transferred without prior written approval of the counterparty. Nevertheless, KJ has commenced arbitration against KFC, not against AHFC. When KFC objected to the jurisdiction of the arbitral tribunal over itself, the tribunal found that English law should apply to the case and KFC was a party to the arbitration under novation ‘by addition’ could be inferred by conduct and this made KFC a further party to the arbitration. In the end, the tribunal rendered an award in favour of KJ. Save that the third arbitrator has dissented to this award and stated that KJ has simply sued the wrong party.[112]

ii. The approach of English courts

When KJ has applied to the English courts to enforce the favoured award, the courts rejected such request, on the basis that KJ was not a party to the FDA and the arbitration agreement. Nevertheless, English Courts had disagreed with the tribunal and stated that the law applicable to the validity of the arbitration agreement and whether KJ is a party to the arbitration is English law instead of French law, due to the selection of English law to govern the FDA by the parties. Still, English Courts followed the approach of *Rock Advertising*[113] and stated that where there is a no-oral modification clause, and no established case of estoppel, an oral or conduct-based modification of the contract that had the effect of binding KFG is not in order. Thus, English Courts refused to enforce the arbitral award on the basis that KJ was not a party to the arbitration agreement, due to the lack of a strong estoppel case where there is an effective no oral modification clause. Still, with this decision it can be argued that English Courts has opened its doors to estoppel arguments in regards to non-parties in arbitration, which is a theory used for extending the arbitration agreement to non-parties on the basis of good faith, which will be explained in detail later on this study.[114]

[112] Kabab (n 45).
[113] *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.
[114] Joe Rich , 'Kabab-Ji: The Effect Of No Oral Modification Clauses On Non-Signatories Of Arbitration Agreements Under English Law' (Kluwer Arbitration Blog, 21 February) <http://arbitrationblog.kluwerarbitration.com.uea.idm.oclc.org/2020/02/21/kabab-ji-the-effect-of-no-

iii. The outcome of French court proceedings

On 23 June 2020, Paris Court of Appeal has given its decision regarding the Kout's application to set aside the arbitral award. To give this decision, Paris Court of Appeal has made a *de novo* review of the arbitrator's jurisdiction. To do so, the French Courts diverged from their case-law which overlooks the applicable law of the arbitration agreement and focuses on the common intention of parties and has determined the applicable law to the validity of the arbitration agreement as French law. To do so, French court has given regard to the lack of specification on the arbitration agreement that it will be governed by English law. Thus, the law of the seat which was Paris was the proper applicable law.[115] The judges further stressed that there were no provisions in the agreements designating English law as the law governing the arbitration clause and, "on the contrary", that separate provisions in the agreements expressly empowered the arbitrators to apply "all the legal principles generally recognized in the context of international transactions".[116] The court stated that the arbitration clause must be "extended to the parties directly involved in the performance of the contract and in any dispute arising out of the contract, provided that it is established that their contractual situation and their activities give rise to a presumption that they accepted the arbitration clause, the existence and scope of which they were aware of", regardless of whether they were signatories to the contract containing the clause.[117] The court then found that due to the involvement of the Kout in the performance and termination of the contract, the arbitral tribunal rightly decided that the arbitration agreements extended to Kout.

Kout still has time to appeal the decision to the French Supreme Court (Court of Cassation), and Kabab-ji has applied for permission to appeal to the UK Supreme Court and the outcome of these proceedings are pending. Yet, it will not be surprising

oral-modification-clauses-on-non-signatories-of-arbitration-agreements-under-english-law/?doing_wp_cron=1596058313.4805209636688232421875> accessed 30 July 2020

[115] Devoise & Plimpton, 'Kabab-Ji and the Law of the Arbitration Agreement: French and English Courts Clash Once Again' (Devoise & Plimpton, 9 July 2020) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjwyK_d9vTqAhUWRxUIHUodAuYQFjAAegQIBhAB&url=https%3A%2F%2Fwww.debevoise.com%2F-%2Fmedia%2Ffiles%2Finsights%2Fpublications%2F2020%2F07%2F20200709-kabab-ji-and-the-law-of-the-arbitration.pdf&usg=AOvVaw0a51vLqrm9U_t3Jsh1UEbI> accessed 30 July 2020

[116] Elizabeth Oger-Gross, Paul Brumpton, Bryony Withers and Niels Aujouannet-Kelner, 'Dallah Revisited: The French and English Courts in Conflict Again Regarding Arbitral Jurisdiction Over Non-Signatories' (White&Case Publications, 9 July 2020) <https://www.whitecase.com/publications/alert/dallah-revisited-french-and-english-courts-conflict-again-regarding-arbitral> accessed 30 July 2020

[117] ibid.

if both high courts grant the decisions of lower courts and reach to conflicting decisions once again as in *Dallah*. The reason behind this is clear. While English courts necessitate the law of the arbitration agreement to be governed by a domestic system of law, contrastingly, French courts evaluate the "existence and validity" of an arbitration agreement by reference to the "common will of the parties without the need to refer to any national law". This approach of the French courts can be displaced only if there is a clear intention by the parties to expressly choose an applicable law to govern the arbitration agreement as a particular national system of law. Due to the different approaches of English law and French law regarding the issue of extending arbitration agreements to the non-parties, with English law being stricter than French law, it is straightforward why they came to different outcomes.

c. GE Energy Power Conversion v. Outokumpu Stainless

In this case, ThyssenKrupp Stainless USA, LLC, entered into three contracts with F. L. Industries, Inc., which provided for arbitration in Dusseldorf under German law. When a dispute arose, Outokumpu has sued GE Energy Power Conversion ("**GE**"), F.L. Industries Inc.'s sub-contractor, on the state court. Due to the arbitration agreement, GE objected to the jurisdiction of the court and asked to compel arbitration. The federal district court held that GE qualified as a party under the arbitration clauses because the contracts defined the terms "Seller" and "Parties" to include subcontractors, thus allowed arbitration.[118]

On the appeal of the F.L. Industries, Inc., the Eleventh Circuit Court of Appeals reversed this decision, on the basis of GE's inability to compel arbitration as a non-signatory. The court interpreted the New York Convention as imposing a "*requirement that the parties actually sign an agreement to arbitrate their disputes*." According to the Court of Appeals, GE could not rely on state-law's domestic equitable estoppel doctrines to enforce the arbitration agreement as a non-signatory because equitable estoppel conflicts with the Convention's signatory requirement, which found its body on New York Convention's second article. [119]

On the appeal over the decision rendered by the Eleventh Circuit , Supreme Court stated that Eleventh Circuit was wrong to read into the writing requirement of Article II of the New York Convention a categorical prohibition on compelling

[118] *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, U.S. Supreme Court Case No. 18–1048, Slip. Op. 590 U. S. (June 1, 2020).
[119] ibid.

international arbitration on the basis of estoppel principles, on two bases: the Convention is permissive regarding the enforcement of the international arbitral awards, thus it only requires contracting states to enforce arbitration agreements; it does not forbids them from doing so; and Article II(2) does not deal with who may be bound or who may invoke those agreements.

Thus, the Supreme Court unanimously held that "*The New York Convention does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by non-signatories.*"[120] and found that the New York Convention is simply silent on the issue of non-signatory enforcement. Accordingly, the Court found that the New York Convention does not deal whether non-signatories may enforce arbitration agreements under domestic internal doctrines such as equitable estoppel. The Court then found that "*silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of equitable estoppel doctrines.*"[121]

This decision of the Supreme Court can be read as having a pro-arbitration approach and allowing non-signatories to try to enforce an arbitral award, when there is a strong equitable estoppel case.[122]

d. Recent Swiss Supreme Court rulings

In the decision 4A_636/2018 of 24 September 2019, the Supreme Court dealt with the issue of whether a state was bound by an arbitration clause signed by a state-owned entity. The Supreme Court stated that, under the Swiss *lex arbitri*, legal entities found under public law and founded by the state are treated to be legally separate and independent, thus, arbitration agreements entered by such entities cannot be extended to the states, because they did not sign the arbitration agreement.[123] However, exceptions to this exists, such as, in the case of an assignment of claims, a transfer of contract and a contractual interference background. In the latter, a third party who continuously and repeatedly interferes in the performance of a contract containing an arbitration clause is treated as having joined the contract and submitted to the arbitration

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[120] ibid.
[121] ibid.
[122] Herbert Smith Freehills, 'US Supreme Court Paves the Way for Non-Signatories to Enforce Arbitration Agreements Under Domestic Equitable Estoppel Principles' (Herbert Smith Freehills, 9 June 2020) <https://hsfnotes.com/arbitration/2020/06/09/u-s-supreme-court-paves-the-way-for-non-signatories-to-enforce-arbitration-agreements-under-domestic-equitable-estoppel-principles/#_ftn7> accessed 30 July 2020
[123] 4A_636/2018 of 24 September 2019

clause if she indicates her will expressly or gives the impression under the principle of good faith to be a party to the arbitration clause.[124]

In a more recent ruling, the Swiss Supreme Court confirmed on 17 April 2019 in its ruling 4A_646/2018 the court that extended an arbitration clause to a non-signatory and referred the dispute to arbitration by virtue of NYC article II (3). The reasoning for this decision was the involvement of the third-party to the performance of the agreement and it showed that, by its conduct, that it intends to be party to the agreement and the arbitration clause, which can bind a non-signatory under NYC Article II. Formal requirements of Article II (2) of NYC is not a bar to tacit prolongation of the agreement and the arbitration clause contained within.[125]

Thus, Swiss Supreme Court also showed a pro-arbitration approach in regards to the extension of arbitration agreement to the non-signatories in the event of an involvement to the contract.[126]

Consequently, as it is seen, in the recent years a lot of conflicting decisions rendered from different jurisdictions, which is one of the reasons of the importance gained in regards to the issue of this study.

V. Analysis and Evaluation

As it seen clearly, with the French courts repeating their approach they took in *Dallah* to the *Kabab* case, and rendering two conflicting decisions in regards to the law of extending the arbitration agreement and reached to different outcomes, this topic protects its importance. The more interesting part is that, two different courts in different jurisdictions have reached conflicting outcomes on two different cases, yet, in Dallah they both applied the same law to the validity of arbitration agreement, while in Kabab, English Court has found English law as the proper law of the arbitration agreement and French Court applied French law.

Also, it is arguable that French Courts have took a too broad approach and simply reached to a wrong decision in *Kabab*. The reason behind this argument is that

[124] Petra Rihar, 'Decisions of the Swiss Federal Supreme Court in 2019 – Part I' (Kluwer Arbitration Blog, 9 February 2020) <http://arbitrationblog.kluwerarbitration.com/2020/02/09/decisions-of-the-swiss-federal-supreme-court-in-2019-part-i/?print=print&doing_wp_cron=1596140314.3242158889770507812500> accessed 30 July 2020
[125] 4A_646/2018 of 17 April 2019
[126] Petra Rihar, 'Decisions of the Swiss Federal Supreme Court in 2019 – Part I' (Kluwer Arbitration Blog, 9 February 2020) <http://arbitrationblog.kluwerarbitration.com/2020/02/09/decisions-of-the-swiss-federal-supreme-court-in-2019-part-i/?print=print&doing_wp_cron=1596140314.3242158889770507812500> accessed 30 July 2020

French Court did not set aside an arbitral award issued to the detriment of a non-party, even though there was a no oral modification clause present. This decision has the ability to render the usage of contractual tools such as memorandum of understandings, entire agreement clauses and no oral modification clauses inefficacious, which is contrary to their aims.

With these taken into consideration, a solution is in need for the sake of international trade and international arbitration. Below, already available solutions/recommendations and a suggested solution made by a scholar and a new proposal by the author of this study is given.

VI. Solutions

A. Should the Strict Concept of Prior Consent be Loosened?

As stated, there is no uniform approach in between national laws to the issue of extension of the arbitration agreement to third parties; some jurisdictions are more prone to allowing extension on the basis of implied consent or overlooking separate legal entities and some are more close-minded and stricter. In this part, it will be argued for both sides whether the strict concept of consent and privity of the contract should be preserved or eased for a possible uniform approach and reaching a compromise.

It should be noted that, there can be no such argument as lowering or increasing the threshold for consent, and rendering judgements to such new thresholds.[127] This is because, consent cannot be identified with thresholds.[128] In the events when consent is required, it becomes a prerequisite. Thus, the evaluation made here should be considered in this regard. Yet, it can be argued that, either threshold for proving whether there was a consent or not or other criterions should be decreased or increased. To exemplify, it can be argued that English Courts are too strict, or basically French Courts are too prone.

It should be noted that a dispute will arise when there is a consenting non-signatory and a signatory who does not accept the arbitral proceeding with the non-signatory or when there is a signatory who desires to involve a non-signatory to the arbitration and a non-consenting non-signatory. This is because in the event of similar approach by parties, either by acceptance or denial of the jurisdiction of the arbitral

[127] Born (n 17).
[128] ibid.

tribunal, there will be no dispute and the issue will be easily resolved by a submission agreement or not objecting to the jurisdiction of national courts.

Some scholars argue that the threshold for extending the arbitration agreement to consenting non-signatories should be set lower than the criteria applicable to the non-consenting non-signatories.[129] Yet, some authors oppose to this argument and claim that this will be amount to a fairness, due to the fact that, if the threshold for the consenting non-signatories will be set lower, this will cause for more initial signatories to an arbitration agreement to be forced to enter into arbitral proceedings with a party they did not agree in the first place.[130] In authors opinion, the second argument is more coherent and logical, because it is not reasonable to think that just because an entity has argued to submit its dispute to arbitration, it does not mean that they agreed to resolve the dispute with anybody. It is far more than possible that the signatory considered other party's prior actions and business ethics while agreeing to arbitration agreement.

Thus, in either way, a specific criterion is in need and the application of such criteria should not be discretionary or variable. This approach will serve to the predictability and certainty of the dispute resolution method, which will benefit parties and international trade eventually.

B. Possible Solution Suggestions

a. A suggestion on harmonising the substantive law on third parties

Clearly, the ultimate goal in every issue that has supranational character is to harmonise the substantive law, so as there will be no need left for conflict of law rules. Yet, this is often not possible due to the different approaches and culture of each jurisdiction. Although NYC is an exceptional example in this manner, it is really burdensome to reach such harmonisation rate via a convention, which constitutes an example of hard law. Nevertheless, a closer success rate can be reached by using soft law instruments, such as model laws, which allows adopting jurisdictions to pick and choose the clauses they deem fit their national laws due to making it more acceptable.[131]

A scholar has suggested a general theory for the issue of non-signatories in the international arbitration law which proposes that the theoretical basis for finding that non-signatories have rights or obligations in an arbitration should be shifted from the

[129] Park (n 15)
[130] Born (n 17) 1416.
[131] Roy Goode, Herbert Kronke, Ewan McKendrick, *Transnational Commercial Law: text, cases and materials* (2nd edn, Oxford University Press 2015)

concept of consent to the concept of a dispute. Under this proposal, attention should be given to whether a non-signatory is inextricably implicated in a dispute submitted for arbitration. Beside this, existence of a close relationship between a non-signatory and a signatory which provides sufficient proximity and whether existence of intertwined claims and contracts between them will be considered. Finally, the scholar suggested that whether the arbitration agreement is drafted broadly will be taken into consideration. The author has argued that although these criteria is mostly fact-specific it would not render it discretionary or unpredictable.[132]

In this study's author's opinion, although suggested theory makes sense in the manner of considering the relationship between parties and paying regard to how broad or narrowly drafted an arbitration agreement is; taking the focus out of consent does not suit to the very nature of the arbitration. Therefore, this suggestion is almost impossible to be accepted by jurisdictions because it is not likely for jurisdictions to waive their jurisdiction on their citizens or corporations or depriving them from their natural right of applying to courts without consent being a prerequisite. Thus, even though this suggestion makes sense on the paper, its likelihood to become a reality is not rational. Below, other criteria will be supplied by the author.

b. Harmonising the Conflict of Law rules on determining applicable law

As stated, reaching to a consensus on the substantive law regarding to third parties in arbitration is not very likely. Yet, this does not mean a harmonisation project cannot be successful. Harmonisation of conflict of law rules will still contribute to the certainty and predictability of the international disputes, at least parties will be aware of the applicable law to their dispute and they will not encounter unexpected obstacles and legal fees.

C. Interim Solution - Careful planning and drafting

When there are no harmonisation efforts exist at the present time, the wisest thing for parties to do is careful and precise drafting which gives no room for doubt and shows clear intent.[133] Yet, when a business relationship originates, parties rarely assume a possible conflict. Furthermore, dispute resolution clauses are often the ones

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[132] Brekoulakis (n 11).

[133] Norton Rose Fulbright, 'Non-signatories to arbitration agreements: 'Group of companies' beware' (Norton Rose Fulbright, May 2016) <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/eb82eee0/non-signatories-to-arbitration-agreements> accessed 5 August 2020

that are drafted at the end of the negotiation and called as "midnight clauses".[134] Therefore, having an expert to draft dispute resolution clause is of significant importance, which can save parties plenty of legal fees and time.

D. Using English Contractual Tools of Memorandum of Understandings, No Oral Modification Clauses and Entire Agreement Clauses

As seen on the *Kabab* case, it is reasonable to insert no oral modification clauses into the contract. In this case, a no-oral modification clause was present and the Court of Appeal agreed with KFG that, under English law, the no oral modification clauses could only be overridden to the extent that the test for an estoppel in *Rock Advertising* was satisfied. Principles of good faith and fair dealing could not override the clear wording of the contract, because of the clear expectations it supplies in the eyes of the parties.[135] Therefore, inserting such clause intentionally can help parties in proving their intent. Yet, not every jurisdiction's approach to such clauses are the same. Thus, in the absence of a uniform international arbitration law, it will be more practical to show clear intent in arbitration clause.

Memorandum of understandings are documents stating the intentions and understandings of the parties broadly. It should be noted that, unlike no oral modification clauses, these broad acknowledgements are not legally binding. Still, these devices can serve as a proof of intention and can be used as evidences.

On the other hand, entire agreement clauses which also known as whole agreement clauses, aims to protect the party relying on it from being responsible of the any statements or representations made orally or written, unless they embody in the contract.

Consequently, usage of these contractual tools can prevent a non-party from being included in an arbitration proceeding by virtue of evidencing their intentions. Yet, courts have a long way to come, as it is seen in the French proceedings, the French Court confirmed the jurisdiction of the arbitral tribunal over the non-party even though a strict no oral modification clause was present.[136]

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[134] Gary B. Born, 'Planning for International Dispute Resolution' (2000) 17(3) Journal of International Arbitration 61

[135] Herberth smith freehills, 'Court of Appeal Refuses to Enforce an Arbitration Award Against A Non-Party' (Herberth Smith Freehills , 31 January 2020) <https://hsfnotes.com/arbitration/2020/01/31/court-of-appeal-refuses-to-enforce-an-arbitration-award-against-a-non-party/> accessed 8 August 2020

[136] Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [CA Paris, 23 June 2020, n°17/22943]

E. A Possible Criteria Suggestion to Apply Non-Parties by Author of This Study

a. Substantive Law

Although it is not likely to have a harmonised substantive law on this issue, a possible and reasonable suggestion can be as followed. Due to the importance of the consent in arbitration,[137] it is not reasonable to dispose it completely, yet, this can be the case in special circumstances. Thus, to differentiate the potential situations and disputes, they should to be identified and grouped correctly.

First group should represent the potential disputes where it is necessary to identify the parties of the arbitration agreement is needed, such as when implied consent plays a role. As stated before, in such cases the arbitration clause is not extended to third parties actually, only the right parties who are not formal signatories are being identified.[138] In such cases, whether implied or express, consent is indispensable and a prerequisite for any arbitration agreement to be legally binding and valid. Since the consent to arbitrate is still the core consideration in this group of disputes, determining whether there is an implied consent is significant. To do so, factors such as the participation of the non-signatory to the negotiations and/or performance of the contract and whether the arbitration agreement is drafted broadly or narrowly should be taken into consideration and implied consent should be deemed in this respect.

Second group should represent the minority of the cases which are the potential disputes where disregard of corporate personality plays a role rather than consent. These are mostly the cases where there is fraud, bad faith or decapitalisation of a subsidiary company are present; which makes it exceptional in its nature[139] and allow exceptional doctrines such as piercing the corporate veil to come into play. Only in these situations consent for arbitration should be no longer indispensable for the considerations of equality and fairness. In such situations, as suggested by Brekoulakis[140], instead of consent; the concept of the dispute, existence of a close relationship between signatory and non-signatory and whether a non-signatory claim is inextricably implicated in a dispute should be considered.[141]

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[137] Park (n 15).
[138] ibid.
[139] ibid.
[140] Brekoulakis (n 11).
[141] ibid.

b. Conflict of Law Rules

Even though a consensus cannot be reached respecting a uniform substantive law on the issue of third parties in international arbitration, a uniform conflict of law rule is achievable and it will benefit parties by contributing to the predictability and certainty significantly. Even the substantive rules and approach of the courts in different jurisdictions differ greatly, with a uniform private international law, knowing the applicable substantive law wherever the dispute may be submitted will benefit parties and international trade.

It should be reminded that, on the issue of the law applicable to the validity of the arbitration agreement, New York Convention Article V(1)(a) supplies a conflict of law rule, stating failing any indication, the law where the award was made should prevail.

A possible suggestion for harmonising conflict of law rules in this subject matter of non-parties, is selecting the law of the seat as the applicable law to the issue of third parties in international arbitration as well. This will prevent any confusion as there can be only one selected seat by the parties, nevertheless arbitral hearings can occur in different places. Moreover, this approach is reasonable because, ultimately in the case a party tries to nullify the award, the courts of the seat is the proper court to initiate setting aside proceedings. Hence, the courts of the seat will have the chance to apply their law more accurately. Further, with the new approach of English courts demonstrated in *Enka*[142] case, giving importance to the law of the seat, it is more sensible.

An example for an effort of harmonise conflict of law rules in the area of international dispute resolution can be found in Hauge Conference Convention of Choice of Court Agreements.[143] In this convention, it provides an autonomous choice of law rule for purposes of determining whether the choice of court agreement is valid or not. To do so, in its Article 5(1) it requires that a chosen court in an exclusive choice of court agreement must take jurisdiction, "unless the agreement is null and void *under the law of that State*."[144] Secondly, its Article 6(a) requires that any court other than the

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[142] *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb* [2020] EWCA Civ 574.

[143] Convention of 30 June 2005 on Choice of Court Agreements (adopted 30 June 2005, entered into force 1 October 2015)

[144] Convention of 30 June 2005 on Choice of Court Agreements (adopted 30 June 2005, entered into force 1 October 2015) art 5

chosen court, in a Contracting State to "suspend or dismiss proceedings ... unless ... the agreement is null and void *under the law of the State of the chosen court.*"[145] And lastly, Article 9(a) implements that "a court in another Contracting State may refuse recognition and enforcement if the agreement was null and void *under the law of the State of the chosen court*, unless the chosen court has determined that the agreement is valid."[146] It is clearly seen that; these three provisions, altogether indicate a single source of applicable law for making the decision regarding substantive validity of the choice of court agreement.[147] Although it can be argued that the effects of such unification is yet to be seen due to the ratification of Choice of Court Convention is limited to 32 jurisdictions[148], which 28 of them belongs to the European Union countries where enforcement of judgements is already direct and straight forward on a regional basis thanks to Brussels Recast Regulation[149]; without a doubt incorporation of these provisions were a positive development. Hence, following such logic and rendering the law of the seat, *lex arbitri*, the applicable law to the issue would be reasonable and possible.

VII. Conclusion

Since the international arbitration law on the issue of third parties cannot accommodate the needs and complexity of transnational dealings which is almost always multifaceted multi-party and multi-contract, a uniform approach around the world is not existent and it is in need. Due to the lack of a regulation regarding this issue in international arbitration law, courts and arbitral tribunals are forced to use doctrines and theories that are mostly developed for contract and company law, which does not fit the judicial character of arbitration. Thus, this was continually causing disputes which needed to be resolved since the development of transnational trade and increase in the number of corporate groups. Nevertheless, by virtue of the recent case-

[145] Convention of 30 June 2005 on Choice of Court Agreements (adopted 30 June 2005, entered into force 1 October 2015) art 6
[146] Convention of 30 June 2005 on Choice of Court Agreements (adopted 30 June 2005, entered into force 1 October 2015) art 9(a)
[147] Ronald A. Brand, 'Arbitration or Litigation? Choice of Forum After the 2005 Hague Convention on Choice of Court Agreements' (2009) University of Pittsburg Legal Studies Research Paper Series Working Paper No. 2009-14
[148] 'Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements' (HCCH) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 5 May 2020
[149] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351

law of *Dallah* and *Kabab* which further demonstrated different approaches of certain jurisdictions and conflicting judgments of different courts, this issue became more crucial due to the unpredictability and uncertainty it caused amongst international traders. It is seen that French Courts unsurprisingly repeated their approach as they did in Dallah, which confirmed the uncertainty and unpredictability around the world. Moreover, the global pandemic outbreak in 2020 served detrimentally to this issue by giving rise to a lot of insolvency applications and cases which rendered this issue even more significant. Although this issue seems like a basic conflict of laws situation, it is much more. A tribunal or a national court facing this issue needs to resolve multiple issues in multiple stages in order to be able to reach a conclusion. First, the law applicable to the arbitration agreements itself should be determined, which is not always the same with the law applicable to the main contract. In this stage, conflict of law rules intercedes when a court is faced with such issue. Albeit almost all national conflict of law rules gives effect to the parties' choice, parties are not always clear and in absence of a choice, different courts come to different outcomes by applying various conflict of law rules. After determining the applicable law properly, a court or a tribunal will apply the proper law and reach to the conclusion of whether the arbitration agreement will be extended to a third party and whether a non-signatory was a true party to the arbitration agreement via its implied consent. Yet, the law of each jurisdiction differs greatly on this regard too. Therefore, this becomes a time and effort consuming process which is non-predictable. Thus, to resolve such confusion, the author suggested that, a harmonised substantive law rule should be reached, which groups potential disputes into two categories and treats them individually. This suggestion supports the basis of arbitration being consent to arbitrate yet does not overlook good faith, equity and fairness considerations at the same time. Notwithstanding, it is argued that at a minimum a harmonised conflict of law rule is approachable, which will decrease unpredictability greatly. In the absence of such efforts, the parties need to be aware of the situation and draft their dispute resolution clauses precisely; by being clear as to whether they wish the arbitration agreement to extend to non-signatories involved in a project. At least selecting an applicable law of the arbitration agreement and indicating it expressly in the arbitration agreement will shorten this complicated and long procedure notably, which is recommended strongly.

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