ADOPTING A UNIFIED SET OF RULES REGARDING NON-SIGNATORY ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION: EXTENSION BASED UPON CONTRACT LAW THEORIES

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I dedicate this dissertation to the soul of my dad who left our world last year leaving a lot of love and memories but also a loss that could not be compensated. I wish that the great and fair judge, who provided me with the love of studying law, could have witnessed the moment I finished my dissertation. I will never forget all that you have done that led me to where I am today. I will always remember you and dedicate every and each success in my entire life to you. Love you, Dad. I miss you beyond words and I always will.

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ABSTRACT

Extension of arbitration agreements is one of the most debatable issues in international commercial arbitration. Effectuating the extension to bind non-signatories to arbitration produces a lot of problems in practice, especially extension based on contract law theories. Applying national laws to determine the validity of extension is unsuitable to the nature of international disputes because of the peculiarities and technicalities of national contract laws, which are designed primarily to be applied to domestic disputes — not international ones. This study aims to develop and adopt a unified set of rules to be applied to extension issues without any recourse to national laws. The study focuses on agency, incorporation by reference, and third-party beneficiary theories. Applying this unified proposed approach enhances certainty, predictability, and flexibility in international arbitration, which aligns with the nature of arbitration as a neutral and effective dispute resolution mechanism.

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INTRODUCTION

Extension of an arbitration agreement to non-signatories binds a third party to an arbitration despite the fact that the third party has not signed the agreement or the contract that contains the arbitration clause. One of the main difficulties surrounding extension to non-signatories is that the international instruments addressing international commercial arbitration — such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration — do not regulate the law governing the extension or the legal principles applied to effectuate binding non-signatories.[1] So, disputes over the parties to the arbitration agreement or its scope are often left to national courts, arbitral tribunals, and jurisprudence.[2] Moreover, different jurisdictions have adopted varied positions on effectuating an extension and the requirements to extend the arbitration agreement to non-signatories.[3]

Non-signatory issues are determined, in most cases, based on the law applicable to the arbitration agreement, since these issues are considered within the subjective scope of this agreement. Application of this law of the agreement is prejudicial to non-signatories,[4] since non-signatories claim to have not consented to any arbitration agreement, enhancing their allegation by the concrete fact that they have not signed the agreement. It is nonsense to apply the law governing the arbitration agreement to determine whether the non-signatory is bound by it or not.

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[1] Mohamed S. Abdel Wahab, *Extension of Arbitration Agreements to Third Parties: A Never Ending Legal Quest through the Spatial-Temporal Continuum*, *in* CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 137, 138 (Franco Ferrari et al. eds., 2011).
[2] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1412 (2nd ed. 2014).
[3] Abdel Wahab, *supra* note 1, at 138.
[4] Dániel Bán, *Non-signatories: Extending Arbitration Clauses to Third Parties and its Influence on the Determination of the Law Applicable*, 1, 10 (Cornivus Univ. of Budapest, Working Paper 1/2015, 2015), http://unipub.lib.uni-corvinus.hu/1804/.

In other words, applying the law of the arbitration agreement to determine the status of someone with no apparent relation to such agreement appears unsettling. Moreover, the parties, in most cases, do not choose the law applicable to arbitration agreement and instead opt for standard arbitration clauses provided by arbitral institutions, which do not include such designation.[5] The traditional choice of law approach is applied to determine the law applicable to the arbitration agreement and then to the extension issues. Different theories are embodied in this traditional choice of law approach, as there is no consistent theory that has been continuously applied by arbitrators in this respect;[6] however, the common theme of all these theories is that they are all national laws.

The core of the problem with the traditional approach is first, the irrelevance and inadequacy of national laws that are more suitable to domestic disputes, not international ones. Examination of extension, which is based upon contract law theories, demonstrates the inadequacy of national laws and is a key theme in this dissertation. In fact, national legislatures are only concerned with domestic issues when drafting laws and do not give enough attention to international disputes as they neither understand nor respond to the needs of such disputes.[7]

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[5] Bernardini Piero, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 197, 197 (A.J. van den Berg, Permanent Court of Arbitration & International Council for Commercial Arbitration eds., 1999).

[6] Julian D.M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 114, 140 (A.J. van den Berg, Permanent Court of Arbitration & International Council for Commercial Arbitration eds., 1999) (discussing theories including the law of the seat of arbitration, the law of the main contract, the conflict of laws approach, the law of the closest connection, the validation principle, and the cumulative approach).

[7] Frédéric Bachand, *Do Transnational Rules Matter?*, *in* INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE? 389, 390 (A.J. van den Berg, Permanent Court of Arbitration & International Council for Commercial Arbitration eds., 2013); *see also* Markus A. Petsche, *International Commercial Arbitration and the Transformation of the Conflict of Laws Theory*, 18 MICH. ST. INT'L L. REV. 454, 470, 474 (2009) (noting that national laws are unable to "keep pace with the development and fast evolution as well as the high degree of specialization of international commerce," especially as amending such laws requires undergoing a lot of formalities).

Second, the unpredictability, which is the result of different conflict of laws approaches, increases the uncertainty,[8] especially when these rules point to the application of a law that one of the parties is unfamiliar with or that is outdated and inconvenient for the dispute.

An arbitration agreement constitutes the heart of the arbitration process and the gate to provide the arbitral tribunal with its jurisdiction so, it "cannot be governed by a choice of law rules which is flawed in principle."[9] Determining who is bound by the arbitration agreement is a sensitive question, since it entails binding parties to an arbitration agreement despite not signing the agreement or, more precisely, not being parties to the agreement. Generally speaking, international parties are unsatisfied with arbitration when it excludes non-signatories due to technical requirements despite implications of certain non-signatories in the contract or agreement.[10]

This problematic situation of applying national laws to issues of extension was the motive toward developing a unified set of rules — the intent of this study — to be applied by arbitral tribunals when extending the arbitration agreement to non-signatories. A unified approach is needed now more than ever because "[t]he unprecedented scale of sophistication of modern international trade presents crucial challenges for international arbitration today and tests its traditional role and bilateral nature to its limits,"[11] leading to increased issues with non-signatories.

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[8] BORN, *supra* note 2, at 7.
[9] Maria Hook, *Arbitration Agreements and Anational Law: A Question of Intent?*, 28 J. INT'L ARB. 175, 175 (2011).
[10] Stavros L. Brekoulakis, *Introduction: The Evolution and Future of International Arbitration, in* THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 1, 16 (Stavros L. Brekoulakis, Julian D.M. Lew & Loukas A. Mistelis eds., 2016).
[11] Stavros L. Brekoulakis, *Parties in International Arbitration: Consent v. Commercial Reality*, *in* THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 119, 120 (Stavros L. Brekoulakis, Julian D.M. Lew & Loukas A. Mistelis eds., 2016).

The proposed unified rules presented in this dissertation are derived from common principles of contract law and national arbitration acts in different jurisdictions, prevailing institutional rules, and case law. The triangle of the proposed approach is represented in the following: the factual circumstances, trade usage, and good faith principles; these factors are reflected in the formulation of the proposed set of rules. Each angle is analyzed and assessed, focusing on the presence in previous cases and how arbitrators rely on it to extend arbitration agreements to non-signatories.

The development and adoption of the proposed rules is conceivable since detaching the determination of who is bound by the arbitration agreement from national laws has been applied before.[12] The famous *Dow Chemical* case,[13] is considered a turning point as the arbitral tribunal extended the arbitration agreement based on a transnational concept — the group of companies doctrine.[14] This doctrine is discussed in Chapter Two as it shares a lot of similarities with the proposed approach. Primarily, both are based on the application of anational rules instead of national laws to extend an arbitration agreement to non-signatories. In addition, both extensively rely on factual circumstances and good faith principles to decide who is bound by the arbitration agreement.

Moreover, the formulation of unified rules to extend an agreement is not impossible as the core of any extension is consent, whether express or implied, to be bound by the arbitration agreement; arbitral tribunals never extend an arbitration agreement absent such consent from the parties. Therefore, differences among jurisdictions on the conditions and requirements to apply

[12] Marc Blessing, *The Law Applicable to the Arbitration Clause*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 168, 178 (A.J. van den Berg, Permanent Court of Arbitration & International Council for Commercial Arbitration eds., 1999).
[13] Case No. 4131 of 1982, 9 Y.B. COM. ARB. 131 (ICC Int'l Ct. Arb.).
[14] *Id.*

the extension theories are not an obstacle to obtaining unified rules. In other words, the proposed approach will shift the focus from rigid national requirements to the real intention of the parties. Such position has two advantages; first, it honors the application of the party autonomy principle and, second, it respects the legitimate expectations of the international parties and enhances the application of the good faith principles.

While many supporting factors reinforce the anational rules proposed in this dissertation, eight key factors offer the most support for reducing national interference and promoting a unified approach. First, the authority of arbitrators to decide their own jurisdiction without reference to national law supports the proposed approach since extension of the arbitration agreement is within the arbitrators' jurisdiction.[15] Second, the emergence of competitors to international arbitration — such as the international arbitration courts — threatens the current status of arbitration and requires reformation of the system to override its deficiencies, including the complication of joining non-signatories.[16] Third, the substantive validity approach adopted by French courts for arbitration agreements, providing that arbitration agreements are autonomous from national legal systems and only subject to general principles of international law — especially on issues of existence and formation — enhances the proposed approach.[17] Fourth, the tendency to expand issues that are arbitrable in international disputes and limit restrictions imposed by national legislation to domestic arbitration is another victory for the proposed approach since the intent is to set international commercial arbitration free from the restrictions of national law.[18] Fifth, wide recognition and extensive application of *Lex Mercatoria* — especially regarding existence and validity of international arbitration agreements

[15] *See* discussion *infra* Chapter 3 § 2.
[16] *See* discussion *infra* Chapter 3 § 3 on the international arbitration courts.
[17] *See* discussion *infra* Chapter 3 § 4 on the substantive validity approach.
[18] *See* discussion *infra* Chapter 3 § 5 on arbitrability.

— adds credibility to the proposed approach by indicating the status of the application of transnational rules in the realm of international arbitration.[19] Sixth, support derived from Article II of the New York Convention is another tool to disregard the application of national laws and set minimum standards for the validity of arbitration agreements aligned with the proposed approach.[20] Seventh, harmonizing the extension of arbitration agreements to non-signatories aligns with the general tendency to harmonize the law and practice of international commercial arbitration.[21] Finally, the general trend toward the delocalization theory converges with the motivation behind the proposed approach.[22]

The approach proposed in this dissertation favors more flexibility in extending the arbitration agreement to non-signatories through conditions of extension and broad interpretation of contract law theories to allow joining parties who have impliedly consented, without being restricted by some formalities in national laws. Such flexibility is warranted by the fact that the extension is based mainly on implied consent or conduct of a non-signatory; as previously mentioned, a more flexible approach will not prejudice the inherent right to recourse to courts. In addition, such flexibility is supported by the fact that arbitration is now common to settle international disputes as people involved in international business pursue protection against litigation due to the possibility of discrimination against foreigners in some national judiciary systems. Moreover, restrictive application of an extension or refusal to join a non-signatory will lead to two separate disputes — one in front of an arbitral tribunal and the other in front of a national court — concerning the same facts, which increases the risk of contradictory decisions. The flexible approach helps avoid such a situation.

[19] *See* discussion *infra* Chapter 3 § 6 on *Lex Mercatoria*.
[20] *See* discussion *infra* Chapter 3 § 7
[21] *See* discussion *infra* Chapter 3 § 8
[22] *See* discussion *infra* Chapter 3 § 9 on the delocalization theory.

This study proposes unified rules for extension of an arbitral agreement based on contract law theories only; it does not discuss extension based on corporate law theories. Agency, incorporation by reference, and the third-party beneficiary are addressed under contract law theories; however, extension based on assignment has been previously discussed in another academic work, with recommendations for applicable rules,[23] and is not addressed here. According to this academic work, the arbitration agreement is automatically transferred with the main contract, so the assignee and obligor are bound to arbitrate any dispute arising from the assigned contract unless the parties have agreed to the contrary.[24] In addition, the assignor has a pre-contractual duty to inform the assignee about the existence of the arbitration agreement otherwise, the assignor is personally liable for any damages.[25] Finally, the obligor is released from the duty to arbitrate with the assignee if sufficient evidence demonstrates that substitution by the assignee regarding the arbitration agreement curtails the assignee's rights.[26]

This unified set of rules is proposed as a guideline for arbitrators to consult when determining an extension, such as the International Bar Association (IBA) guidelines on international commercial arbitration. Hopefully, these guidelines will be adopted in different national laws and will have the same impact as the UNCITRAL Model Law in refining and harmonizing national laws. Application of the proposed approach will be practical to arbitrators since it will remove the unnecessary responsibility of digging into different national laws and analyzing complicated conflict of laws rules. The proposed approach will also override one of the most common problems often attributed to the application of anational rules: vagueness.[27]

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[23] *See* Daniel Girsberger & Christian Hausmaninger, *Assignment of Rights and Agreement to Arbitrate*, 8 ARB. INT'L 121 (2014).
[24] *Id.* at 164.
[25] *Id.*
[26] *Id.*
[27] Hook, *supra* note 9, at 178.

The content of most anational rules is often unclear since it is not provided in written form like national legislations and other legal instruments. The proposed approach is a written set of rules to overcome this challenge, adding simplicity and removing complicated choice of law rules to make application more efficient for both arbitrators and parties.

This dissertation begins by identifying some important issues and explaining the notion of extension as well as the role of implied consent in extending an arbitration agreement to non-signatories. In addition, the first chapter discusses the written form required to enforce arbitration agreements before analyzing how a written requirement should be interpreted under the extension of an arbitration agreement to non-signatories. Finally, Chapter One addresses who decides on the issue of the extension — national courts or arbitral tribunals.

Chapter Two discusses the traditional choice of law approach to determine the law applicable to extension of an arbitration agreement. This includes applying the law of the seat of arbitration, the law of the substantive contract, the conflict of laws rules, the law of the closest connection, the validation principle, and the cumulative approach. The problems associated with the traditional approach are highlighted to advocate the development and adoption of the proposed approach. The notion of the proposed approach is explained in this chapter as well; exploring its targets, justifications, and similarities with the group of companies doctrine. Chapter Three addresses the eight supporting factors to the proposed approach in detail.

The fourth chapter assesses the current situation of extension, which is based on the agency theory, and the restrictions required by some legal systems to bind the principal. These restrictions include special authorization of an agent to conclude an arbitration agreement, proof that the agency relationship specifically pertained to the contract in dispute, and the requirement that the principal is disclosed. Afterward, the position of the agents and employees regarding the

arbitration agreement concluded on behalf of the principal is addressed. In addition, this chapter discusses wide reliance on "apparent authority" in the context of international commercial arbitration. Moreover, Chapter Four explores the law applicable to determine the validity of the agency relationship in the context of arbitration agreements and the problems associated with this approach, paving the way for a move toward a transnational approach. Finally, the proposed rules for the agency theory and their justifications are presented.

Chapter Five addresses the current situation for extension — based on incorporation by reference — by identifying the two approaches commonly employed: the liberal approach and the restrictive approach. Afterward, the approaches are applied to determine the law applicable to the validity of the incorporation of an arbitration agreement and the problems associated with these applicable approaches are addressed. Finally, the proposed rules for the incorporation by reference theory and their justifications are presented. This justification is based on first, the assessment of the restrictive and the liberal approach in light of the New York Convention and second, defeating the arguments supported the application of the restrictive approach.

The last chapter addresses the theory of the third-party beneficiary and the main issues that determine the ability to invoke the arbitration agreement including status as an intended or incidental beneficiary, the importance of a special intention from the main contractors to confer arbitration rights on the third-party beneficiary, and the breadth of language in the arbitration clause. Enforcement of an arbitration agreement against the third-party beneficiary and whether consent is required is addressed as well. Then, the law applicable to determine the status of the third-party beneficiary regarding the arbitration clause and the problems associated with it are discussed before, finally, the proposed rules for the third-party beneficiary theory and their justifications are presented.

The current approach of applying national laws to determine the scope of arbitration agreement leads to a lot of problems and uncertainty in the context of international disputes. The extension of the arbitration agreement to non-signatories should be governed by transnational rules away from the technicalities and peculiarities of national laws, especially when the extension is based on one of contract law theories. The intent of this study is to develop a set of unified rules to be applied to these issues of extension without recourse to national laws.

CHAPTER 1

THE EXTENSION OF THE ARBITRATION AGREEMENT AND ITS MOST RELATED QUESTIONS

Identifying the ability to extend the arbitration agreement to bind non-signatories and the debate surrounding the terms "extension" and "non-signatories" must be discussed before proceeding to the current issues regarding non-signatories and the proposed rules to resolve these problems. After addressing these topics, this chapter moves to discuss the foundation of extension — implied consent — as consent is also the base for the proposed rules in subsequent chapters. Moreover, this chapter discusses the effect of the writing requirement on the extension of the arbitration agreement, demonstrating that the requirement is not a bar for effectuating extension. Finally, this chapter addresses the allocation of jurisdiction between national courts and arbitral tribunals to decide on the issues of the extension according to the well-recognized competence-competence doctrine, which is one of the main supporting elements for the proposed approach

1. What is the Extension of the Arbitration Agreement to Non-Signatories?

Extension of an arbitration agreement to non-signatories binds third parties to an arbitration agreement despite the fact that a non-signatory has not signed the arbitration agreement or the contract that contains the arbitration clause. It is a situation in which "a person or entity may be bound by an arbitration agreement, even though he is not expressly named in the agreement."[28] Extension of an arbitration agreement is considered an exception to the privity of contract rule — where the contract binds its parties only — and to the nature of arbitration as

[28] Nathalie Voser, *Multi-Party Disputes and Joinder of Third Parties*, *in* 50 YEARS OF THE NEW YORK CONVENTION 343, 347 (A.J. van den Berg, Permanent Court of Arbitration & International Council for Commercial Arbitration eds., 2009).

a consensual dispute resolution method; no one can be obliged to arbitrate a dispute without agreeing to the arbitration.

The notion of extension revolves around binding non-signatories to arbitration agreements because they have implicitly consented to be bound by the agreement.[29] While national courts have authority to extend procedures to third parties because "[n]ational and international civil procedure codes usually provide for the possibility of extending the jurisdiction to a third party over whom the court would normally not have jurisdiction in particular circumstances,"[30] the only source of jurisdiction for arbitral tribunals is arbitration agreements.[31] Parties who may be affected by the decision of the court have the right to participate in the court proceedings; however, participation in arbitration requires being party to the valid arbitration agreement.[32]

Debate always arises concerning the terms "extension" and "non-signatories." First, "extension" has been criticized since binding non-signatories is mainly based upon consent and common intent to arbitrate; "extension" of the arbitration agreement, then, is not an accurate characterization for binding third parties to the arbitration agreement.[33] The misleading character of the term stems from the fact that "[n]othing is actually extended. Instead, a determination is made as to whether a non-signatory nevertheless falls within an arbitration agreement on some theoretically and factually valid basis and hence can be said to be included in the agreement."[34]

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[29] Brekoulakis, *supra* note 11, at 120.
[30] DANIEL GIRSBERGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES 72 (3rd ed. 2016).
[31] *Id.*
[32] Stavros Brekoulakis, *Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories*, 8 J. INT'L DISPUTE SETTL. 610, 611 (2017).
[33] Bernard Hanotiau, *Non-Signatories in International Arbitration: Lessons from Thirty Years of Case Law*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 341, 343 (A.J. van den Berg, Permanent Court of Arbitration & International Council for Commercial Arbitration eds., 2007).
[34] JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 514 (2012).

Some have suggested using the term "inclusion" instead of the term "extension."[35] Despite the criticism of "extension," however, widespread recognition strongly indicates that use of the term has not produced any practical problems. The word "extension" here simply refers to the notion of broadening the ambits of an arbitration agreement beyond its original signatories by applying different theories to bind non-signatories so, it makes sense to use "extension" in this context.

Second, regarding the term "non-signatories," it is well-settled that the signature itself is not a requirement for a valid arbitration agreement as there could be a valid arbitration agreement, which could bind its parties despite being unsigned.[36] Accordingly, some have objected to linking the status of not being bound by an arbitration agreement with the status of unsigned arbitration agreement as an original party to the arbitration agreement could not sign the agreement and still bound. An alternative suggestion was to use the term "unmentioned" instead of "non-signatories"[37] as the term "non-signatory" encompasses the two possibilities — the original party to an unsigned but binding arbitration agreement and the non-signing third party bound to an arbitration agreement. However, use of the terms "non-signatory" and "extension" in the same sentence undoubtedly refers to the second option — where a third party is nonetheless bound by the arbitration agreement. Consequently, use of the term "non-signatory" does not create any confusion in practice especially with the widespread usage of this term in the context of third parties to an arbitration agreement. Therefore, the expression "extension to non-signatories" is used throughout this dissertation.

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[35] *Id.*

[36] WILLIAM W. PARK, NON-SIGNATORIES AND INTERNATIONAL CONTRACTS: AN ARBITRATOR'S DILEMMA 6 (2009); *accord* Max D. Passey, *The Shortcoming of Arbitration in the Modern World: The Third Parties Limitation*, 2 GLOBAL POL. REV. 74, 78 (2016) ("[M]any courts and tribunals will accept an agreement to arbitrate that has not been signed.").

[37] Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of "Consent,"* 24 ARB. INT'L 199, 230 (2014).

Extension theories include contract law theories, such as agency, incorporation by reference, third-party beneficiary, and transfers. In addition, extension can also be based on corporate law theories, such as alter ego and piercing the corporate veil. Moreover, extension through the group of companies doctrine developed in the context of international commercial arbitration without any roots in contract or commercial law.[38] Finally, there is extension based on the group of interrelated (whether successive or multiple) contracts.

There are two scenarios for extension of an arbitration agreement: the extension sought by a non-signatory and the extension sought against a non-signatory. The first type is a consenting non-signatory (who seeks to arbitrate) while the second type is a non-consenting non-signatory (who resists arbitration).[39] In both scenarios, the party seeking extension should provide explicit or implicit proof of the non-signatory's intent to arbitrate. When extension is sought against a non-consenting non-signatory, the non-signatory typically argues that there was no agreement to arbitrate anything.[40] However, when extension is sought by a non-signatory, the signatory party tends to argue that there was no agreement to arbitrate with the non-signatory.[41]

The evidence needed to join a non-signatory to arbitration is less than the evidence required to force non-signatory to arbitrate as "[w]hen the non-signatory has never consented to arbitration, more analytic rigor and hesitations are in order before extension should be ordered."[42] In other words, the issue in the first situation is the scope of the arbitration agreement, while the second scenario considers the existence of agreement to arbitrate.[43] Extension is much harder to obtain when the examination analyzes the presumption of intent to

[38] ANDREA MARCO STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION 152 (2012).
[39] BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 24 (2005).
[40] William W. Park, *Non-Signatories and the New York Convention*, 2 DISP. RESOL. INT'L 84, 106 (2008).
[41] *Id.*
[42] *Id.*
[43] HANOTIAU, *supra* note 39, at 24.

arbitrate rather than mere extension of arbitral scope.[44] However, this distinction is not convincing as no reason justifies the application of different standards when the extension is sought by or against non-signatory.[45] Consent to arbitrate is not general consent to arbitrate with any one, it is consent to arbitrate specific disputes with particular parties.[46] Therefore, there is no place for this distinction. The important role of consent is discussed in the following section as the foundation of any extension is based on consent to be bound by an arbitration agreement regardless of how such consent is concluded.

2. What is the Role of Implied Consent in Extending the Arbitration Agreement to Non-Signatories?

Consent has a vital role in arbitration as it is often described as "the fundamental premise on which arbitration is based."[47] While disputes are typically decided through national courts whose awards are binding on the parties, arbitration can replace national courts for dispute resolution if the parties agree. Such consent is derived from the common intention of the parties to submit their current or future disputes to arbitration.[48] No party could unilaterally decide to arbitrate a dispute and drag the other party to arbitration proceedings as "arbitration is a matter of consent not coercion."[49]

The contractual nature of an arbitration agreement requires that "courts look at who consented to the agreement,"[50] to identify the parties, recognizing that "[a]ny legal or financial interests that a party may have in the outcome of an arbitration is in principle irrelevant, unless

[44] *Id.*
[45] BORN, *supra* note 2, at 1412.
[46] *Id.*
[47] Passey, *supra* note 36, at 77.
[48] PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 253 (1999).
[49] Passey, *supra* note 36, at 77.
[50] Tae Courtney, *Binding Non-Signatories to International Arbitration Agreements: Raising Fundamental Concerns in the United States and Abroad*, 8 RICH. J. GLOBAL L. & BUS. 581, 590 (2009).

that party has previously entered into an arbitration agreement."[51] Consent in international commercial arbitration is mainly expressed through signing a contract which contains an arbitration clause or signing an arbitration agreement itself. However, consent is also satisfied even when the document that contains the arbitration agreement is unsigned as long as there is a proof in writing that the parties consented to arbitrate. Most national laws give effect to the written arbitration agreement in unsigned documents.[52] This position is also adopted by the New York Convention, as Article II(2) refers to the exchange of unsigned letters and telegrams as a way to conclude a valid arbitration agreement.[53]

Consent can also be implied, which is inferred from the conduct and/or from the circumstances surrounding the case. The focal point of the implied consent is the parties' true intentions and it builds "on assumptions that permeate most contract law, joinder extends the basic paradigm of mutual assent to situations in which the agreement shows itself in behavior rather than words."[54] Therefore, the extension to a non-signatory is based on the intent to arbitrate, whether it is explicit or implicit.[55]

All the different theories for extension of an arbitration agreement are based on the implied consent to arbitrate. This suggests that "an element of deemed consent, even if artificially construed, intrinsically lingers in the psychological mindset of courts and tribunals" when deciding who is bound by the arbitration agreement.[56] The role of implied consent has the

[51] Brekoulakis, *supra* note 11, at 119.
[52] PARK, *supra* note 36, at 7.
[53] *Id.*
[54] *Id.* at 4.
[55] Felipe Vollbrecht Sperandio, *The Reach of the Arbitration Agreement to Parties Involved in the Same Legal Relationship*, 11 REV. E-MERCAT. 164, 179 (2012), https://revistas.uexternado.edu.co/index.php/emerca/article/view/3203.
[56] Abdel Wahab, *supra* note 1, at 171.

same important status in the proposed approach. All the proposed requirements to effectuate extension reflect the existence of implied consent to arbitrate.

Professor Brekoulakis proposed another anational approach for dealing with non-signatory consent and extension: shifting the focus from consent to "the scope of the dispute submitted for arbitration and the scope of the original arbitration clause."[57] Accordingly, "[i]f a dispute strongly implicates a non-signatory and is covered by a broad arbitration clause, a tribunal should have jurisdiction to decide this dispute, even if that means that it has to assume jurisdiction over a party that has not signed the arbitration clause."[58] Brekoulakis stated that this approach to determine jurisdiction over non-signatories is closer and more connected to commercial reality than consent-based theories.[59]

In fact, the application of Brekoulakis's approach contradicts the notion of arbitration as a private dispute resolution based on the parties' consent to submit their disputes to arbitration. The consensual nature of arbitration applies to both the original parties and the non-signatories who seek to arbitrate or against whom the arbitration agreement is enforced. There is no room to replace the consent requirement with other elements such as implication in the dispute and the broadness of the arbitration agreement. If the consent requirement is replaced, no difference will exist between the arbitral tribunals and national courts that "have objective statutory criteria to determine jurisdiction."[60] In other words, "[i]f we dispose of the principle of consent (also if only partly), we are blurring this distinction" between litigation and arbitration.[61] Therefore,

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[57] Brekoulakis, *supra* note 11, at 153.
[58] *Id.*
[59] *Id.* at 160.
[60] Nathalie Voser, *The Swiss Perspective on Parties in Arbitration: "Traditional Approach with a Twist Regarding Abuse of Rights" or "Consent Theory Plus," in* THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 161, 178 (Stavros L. Brekoulakis, Julian D.M. Lew & Loukas A. Mistelis eds., 2016).
[61] *Id.*

implication in the dispute and the broadness of an arbitration clause is insufficient and irrelevant to determine the jurisdiction of the arbitral tribunal over non-signatories absent construed consent.[62] Practically, "such a purely objective approach would create a lot of uncertainty for the parties in the arbitration as well as for the third parties" as it will lead to unpredictability and vagueness, which harms the status of the arbitration.[63]

The inevitable connection between extension and implied consent honors the principle of party autonomy by not extending the arbitration agreement without sufficient evidence of implied consent to arbitrate. The balance between party autonomy and implied consent is embedded in the joinder rules of different arbitral institutions; most of these rules confer discretionary powers to the arbitral tribunal for considering the issue of joinder in light of the surrounding circumstances.[64] For example, under Article 4.2 of the Swiss Rules of International Arbitration, "[w]here one or more third persons request to participate in arbitral proceedings . . . the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances."[65] These circumstances indirectly refer to the existence of the non-signatory's implied consent to be bound by the arbitration agreement.

The circumstances surrounding a case is an important element in determining the applicable extension theory, as there is a strong link with implied consent.[66] Such circumstances may include awareness of the arbitration agreement, involvement in the negotiation, performance or termination of the contract, subsequent approval of the agreement, and the degree of

[62] *Id.* at 180.
[63] *Id.*
[64] *See generally* Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions under Leading Arbitral Rules*, 35 J. INT'L ARB. 173 (2018).
[65] Swiss Rules of International Arbitration, Swiss Chambers' Arbitration Institution, art. 4.2 (2012), https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf.
[66] Abdel Wahab, *supra* note 1, at 171.

professionalism and experience of the third party, which indicate knowledge about the existence of the arbitration agreement.[67] In fact, these circumstances are often used to conclude whether implied consent exists or not taking into account the usage of international trade, good faith principles, and the widely recognized arbitral practice.[68] However, "[a]t all times the question should not simply be what involvement the party had but whether that involvement goes far enough to indicate implied consent on its behalf."[69] As the tribunal in ICC Case No. 9517[70] noted,

> the question [of] whether persons not named in an agreement can take advantage of an arbitration clause incorporated therein is a matter which must be decided on a case-by-case basis, requiring a close analysis of the circumstances in which the agreement was made, the corporate and practical relationship existing on one side and known to those on the other side of the bargain, the actual or presumed intention of the parties regarding rights of non-signatories to participate in the arbitration agreement, and the extent to which and the circumstances under which non-signatories subsequently became involved in the performance of the agreement and in the dispute arising from it.[71]

Analysis of these circumstances should also be done according to good faith principles as all extension theories "rely to some degree on notions of reasonableness and good faith considered in the context of original consent."[72] Both the surrounding circumstances and good faith principles are important elements when determining who is bound by the arbitration agreement or, more precisely, who consented to the arbitration agreement. Therefore, these two elements are an essential part of the approach proposed in this dissertation, as discussed later.[73] In short, the whole process of the extension is "a question of balance, on the one hand, there is a necessity for flexibility to ensure the maximization of the practical effectiveness of the award,

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[67] WAINCYMER, *supra* note 34, at 538.
[68] Abdel Wahab, *supra* note 1, at 171.
[69] WAINCYMER, *supra* note 34, at 538.
[70] Case No. 9517 of 2000, 16 ICC Disp. Resol. Bull. No. 2, 80 (ICC Int'l Ct. Arb.).
[71] *Id.*; *see also* Abdel Wahab, *supra* note 1, at 171.
[72] WAINCYMER, *supra* note 34, at 515.
[73] *See* discussion *infra* Chapter 2.

while on the other legal certainty and the consent of the parties must remain of paramount importance."[74] In order to achieve this balance, the writing requirement for the validity of the arbitration agreement should be liberally interpreted in the context of extension to non-signatories.

3. What is the Relation Between the Writing Requirement and Extending the Arbitration Agreement to Non-Signatories?

An arbitration agreement should be in writing in order to be enforceable. The writing requirement is because of the consequences of an arbitration agreement, which excludes the jurisdiction of national courts, so it serves as "a cautionary function, in that it distinguishes the conclusion of an arbitration agreement from other types of transaction, thereby alerting the parties to the special significance of the agreement."[75] Legislators in different legal systems adopt this position when dealing with important contracts that have significant consequences for the parties as they require these contracts be in writing.[76] Since arbitration is an exceptional way of settling disputes, a writing is evidence of the parties' intention to restrict the jurisdiction of national courts and settle their dispute through arbitration.[77]

In addition, the writing of an arbitration agreement has an important role in avoiding obstacles for proceeding to arbitration.[78] In fact, the written form of the arbitration agreement is clear evidence of the parties' intention to arbitrate their disputes, which consequently minimizes the possibility of initial recourse to national courts to determine whether the parties consented to

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[74] Passey, *supra* note 36, at 87.
[75] Toby Landau, *The Requirement of a Written Form for an Arbitration Agreement When "Written" Means "Oral," in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 19, 22 (A.J. van den Berg, Permanent Court of Arbitration & International Council for Commercial Arbitration eds., 2003).
[76] *Id.*
[77] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 75 (6th ed. 2015).
[78] Landau, *supra* note 75, at 23.

arbitration or not.[79] Such evidentiary function is beneficial since the main reason to choose arbitration is to avoid national courts and instead resolve disputes efficiently and effectively through arbitration.[80] Moreover, the writing facilitates recognition and enforcement of the arbitral award as "[t]he greater the degree of certainty of the form and nature of arbitration (i.e., the precise terms of the arbitration agreement), the less the scope there may be for challenges to the process at the stage of recognition and enforcement."[81] This position is reflected in Article IV(1) of the New York Convention, which requires that the party who seeks to enforce an arbitral award should present the original arbitration agreement or a duly authorized copy of it to the court.[82]

The New York Convention expressly provides for the writing requirement in Article II(1):

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.[83]

In the same context, Article 7(2) of the UNCITRAL Model Law requires that "[t]he arbitration agreement shall be in writing."[84] National legislations have adopted the same position,

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[79] *Id.* at 24.
[80] *Id.*
[81] *Id.*
[82] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. IV, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention] ("(1). To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof."); *see also* C. Ryan Reetz, *Recent Developments Concerning the "Writing" Requirement in International Commercial Arbitration: A Perspective from the United States*, SPAIN ARBIT. REV. CLUB ESP. ARBITR. 29, 30 (2009), https://dialnet.unirioja.es/servlet/articulo?codigo=4378918.
[83] New York Convention, *supra* note 82, art. II(1).
[84] U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 7(2), U.N. Sales No. E.08.V.4 (2006) [hereinafter UNCITRAL Model Law].

expressly requiring that the arbitration agreement be in writing to be enforceable.[85] For example, under Article 12 of the Egyptian Arbitration Act, "[t]he arbitration agreement must be in writing, on penalty of nullity. An agreement is in writing if it is contained in a document signed by both parties or contained in an exchange of letters, telegrams or other means of written communication."[86] In the same context, Article 5(1) of the English Arbitration Act requires that "[t]he provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing."[87]

In France, the writing requirement for domestic arbitration is addressed in Article 1442 of the Civil Procedure Code which provides that "an arbitration clause is void unless it is set forth in writing in the main agreement or in a document to which that agreement refers."[88] Regarding international arbitration, Article 1499 of the French Civil Procedure Code addresses recognition and enforcement of arbitral awards by submitting the award with the arbitration agreement, suggesting that there should be a written arbitration agreement.[89] Indirectly, Article 1499 refers

[85] *See, e.g.*, WETBOEK VAN BURGERLIJKE RECHTSVORDERING [RV] [CIVIL PROCEDURE CODE] art. 1020 (Neth.) ("The arbitration agreement must be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party."); *see also* LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [PRIVATE INTERNATIONAL LAW STATUTE] Jan. 1, 1989, RO 1988, RS 291, art. 178(1) (Switz.) [hereinafter Swiss Arbitration Act] ("As regards its form, an arbitration agreement is valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text."); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] art. 1031(1) (Ger.) [hereinafter German Civil Procedure Code] ("The arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.").
[86] Law No. 27 of 1994 (Promulgating the Law Concerning Arbitration in Civil and Commercial Matters), *al-Jarīdah al-Rasmīyah*, vol. 16 bis, 21 Apr. 1994, art. 12 (Egypt) [hereinafter Egyptian Arbitration Act].
[87] Arbitration Act 1996, c. 23, § 5(1) (Eng.) [hereinafter English Arbitration Act].
[88] CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1442 (Fr.) [hereinafter French Civil Procedure Code]; Landau, *supra* note 75, at 56.
[89] French Civil Procedure Code, *supra* note 88, art. 1499; Landau, *supra* note 75, at 56.

to the written form required for the validity of the arbitration agreement in an international context.[90]

Despite the importance of a writing to enforce arbitration agreements, there is great flexibility in the form required for the writing. It is well-settled that the actual signature of the parties is not required as the signature requirement is satisfied once there is proof in writing that the parties consented to arbitrate. Article II(2) of the New York Convention and Article 7 the UNCITRAL Model Law have adopted the same position.[91] In addition, almost all national arbitration laws have adopted this position by giving effect to the written arbitration agreement in unsigned documents.[92] For example, under Article 5(2) of the English Arbitration Act 1996, "[t]here is an agreement in writing (a) if the agreement is made in writing (whether or not it is signed by the parties)."[93]

Moreover, the flexibility in writing is reflected by not determining a particular form for the arbitration agreement. Article II(2) of the New York Convention notes that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[94] Different rules have been adopted based on interpretation of the word "exchange" in the New York Convention.[95] Some national courts construes it strictly — requiring a written offer and a written acceptance of the arbitration agreement — others construe it more liberally by considering "a reference to the

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[90] Landau, *supra* note 75, at 56.
[91] *See* PARK, *supra* note 36, at 7.
[92] *Id.*; *accord* Philippe Bärtsch & Angelina M. Petti, *The Arbitration Agreement*, *in* INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 25, 27 (Elliott Geisinger, Nathalie Voser & Angelina M. Petti eds., 2nd ed. 2013).
[93] English Arbitration Act, *supra* note 87, § 5(2).
[94] New York Convention, *supra* note 82, art. II(2).
[95] S.I. Strong, *What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflict Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT'L L. 47, 73 (2012).

arbitration clause or agreement in subsequent correspondence emanating from the party to which the arbitration clause or agreement was sent . . . sufficient."[96] Courts have depended on different factual circumstances when applying the more liberal approach, such as requiring that the parties have an ongoing business relationship.[97] Under the second view, however, it is not strictly required that the document with the arbitration agreement be exchanged as long as there is "a definite and seasonable expression of acceptance."[98]

Such flexibility in the form of the writing was sufficient when the New York Convention was drafted in 1958, however, this position is not enough to keep pace with the current international commercial practice since "[w]ith recent progress in technology and commercial activities, more and more businessmen choose to carry on their transactions through less traditional measures that are inconsistent with the strict meaning of Article II(2), such as telex, facsimile, and e-mail."[99] In practice, case law demonstrates increased tolerance toward arbitration agreements concluded through new technology, embracing communication advancement that did not exist when the drafters of the New York Convention provided for the traditional methods only.[100] For example, in the United States, "most federal courts tak[e] a relatively permissive attitude towards technological innovations."[101] "Agreement in writing," as mentioned in the New York Convention, "has . . . been interpreted broadly to validate agreements that by the strict wording of the provision, would not have been considered within its

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[96] *Id.*
[97] *Id.*
[98] *Id.* at 64.
[99] Jing Wang, *International Judicial Practice and the Written Form Requirement for International Arbitration Agreements*, 10 PAC. RIM L. & POL'Y J. 375, 380 (2001).
[100] Giuditta Cordero Moss, The Form Requirement for Arbitration Agreements in International Commercial Arbitration, 18-19 (Apr. 21, 2005) (unpublished thesis, University of Oslo), https://www.duo.uio.no/bitstream/handle/10852/20268/26160.pdf?sequence=1; *see also* Strong, *supra* note 95, at 73 ("[M]ost states reflect relatively liberal attitudes towards new forms of electronic technology and consider them to fall within the ambit of 'letters or telegrams.'").
[101] Strong, *supra* note 95, at 63.

ambit."[102] Such flexible practice does not contradict the New York Convention since the methods noted in the Convention were examples and not exhaustive. Moreover, such position adheres to the policy of the Convention, favors recognizing and enforcing arbitration agreements and foreign arbitral awards in order to make arbitration more effective on the international scale.[103] This interpretation is consistent with the recommendation issued by UNCITRAL on interpretation of Article II of the New York Convention, noting that the circumstances in Article II are not exhaustive and encouraging the article to be read as "including, but not limited to the following methods."[104] Ultimately, satisfaction of the form requirement depends to a great extent on whether the national court and the applicable national law are arbitration-friendly or not, which "implies that there is currently no uniform interpretation of Article II(2) and the users therefore are in an uncertain position where the predictability is limited regarding the validity and enforceability of the agreement and the subsequent award."[105]

In this respect, the question that arises is whether Article II of the New York Convention establishes a minimum or a maximum standard for what constitutes an agreement in writing. The essence of this debate is Article VII(1) of the New York Convention which provides that

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[102] Moss, *supra* note 100, at 18.
[103] *Id.* at 20.
[104] U.N. Comm'n on Int'l Trade Law, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Annex II, U.N. Doc. A/61/17 (July 7, 2006); *Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html ("[T]he Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention 'recognizing that the circumstances described therein are not exhaustive.'") (last visited Feb. 13, 2019); *see also* Jack Graves, *ICA and the Writing Requirement: Following Modern Trends Towards Liberalization or Are We Stuck in 1958?*, 3 BELGRADE L. REV. 36, 38 (2009); *accord* Strong, *supra* note 95, at 78.
[105] Moss, *supra* note 100, at 18.

> [t]he provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.[106]

Applying this provision to the writing requirement of Article II of the New York Convention means that it is acceptable to enforce arbitration agreements based on more liberal provisions in national laws.[107] According to this view, Article II of the New York Convention establishes a maximum standard for what constitutes an agreement in writing. However, other jurisdictions have concluded that this provision does not apply to the writing requirement.[108] The concern is that validating more favorable provisions will lead to uncertainty, especially when arbitration is conducted in jurisdiction with more favorable provisions while enforcement of the award occurs in a jurisdiction adhering to the writing requirement in the New York Convention.[109] Accordingly, Article II "constitutes a 'minimum' form requirement which would not allow parties to take advantage of more generous provisions of national law."[110]

In fact, the first view adheres to the philosophy and objectives of the New York Convention by facilitating the recognition and enforcement of arbitration agreements and foreign arbitral awards. Moreover, there is no convincing justification for excluding Article II from the ambit of Article VII(1) as "the minimalist approach falters because it fails to take into account the express language of article VII (1), which allows parties to take advantage of more liberal provisions of national law."[111] Accordingly, the writing form provision in the New York Convention is considered the maximum standard and an upper limit for state signatories to the

[106] New York Convention, *supra* note 82, art. VII(1).
[107] Strong, *supra* note 95, at 76.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*

New York Convention on the writing required to enforce arbitration agreements; however, states are free to adopt more liberal provisions. Such interpretation has been supported in a number of court decisions that "have upheld the validity of an arbitration agreement under domestic law, which would not have been considered as valid under the New York Convention."[112] This prevailing liberal view extends to the writing requirement — when compelling arbitration or enforcing the award — even though the literal interpretation of Article VII(1) only refers to the enforcement proceedings.[113] Finally, this liberal interpretation adheres to the recommendation issued by UNCITRAL regarding the relationship between Article II and Article VII(1).[114]

The UNCTRAL Model Law is more detailed in dealing with the form of the writing, providing in Article 7 that

> (3) 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. (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.[115]

This provision indicates that the Model Law is broad and flexible in accepting any form of writing, so long as it refers to the intention of the parties to settle their disputes by arbitration.

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[112] *Id.*
[113] *Id.* at 77.
[114] *See Recommendation Regarding Interpretation of New York Convention*, *supra* note 104 ("In addition, the Recommendation encourages States to adopt the revised article 7 of the UNCITRAL Model Law on International Commercial Arbitration. Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the 'more favourable law provision' contained in article VII (1) of the New York Convention, the Recommendation clarifies that 'any interested party' should be allowed 'to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.'"); *see also* Strong, *supra* note 95, at 78; *accord* Graves, *supra* note 104, at 38.
[115] UNCITRAL Model Law, *supra* note 84, art. 7.

The detailed language of the UNCITRAL Model Law avoids the uncertainty problem attributed to the interpretation of the writing form requirement in the New York Convention.[116] Moreover, such flexible language does not contradict the New York Convention; the agreements and awards that comply with the UNCITRAL Model Law are also recognized and enforceable under the New York Convention as intended by the drafters of the UNCITRAL Model Law.[117]

The flexible approach of the UNCITRAL Model Law is also reflected in the second option provided by Article 7, which does not require the writing to effectuate an arbitration agreement as an "[a]rbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[118] In fact, this second option, which entirely eliminated the writing requirement, does not necessarily facilitate the enforcement of foreign arbitral awards when adopted in national legislations.[119] The hurdle of this option is that it could be a reason for conflict with the New York Convention when the award is rendered in a jurisdiction that has adopted this option and enforcement is in a jurisdiction that applies the writing requirement according to Article II of the New York Convention.[120] Despite the fact that the two options of the UNCITRAL Model Law share the same philosophy regarding the writing requirement, the first option is more realistic in terms of enforceability since there is no conflict with Article II of the New York Convention.

While Article 7 sets the maximum standards required to enforce an arbitration agreement, it is unacceptable for a state that adopted the Model Law to require, in its national laws, a more

[116] Moss, *supra* note 100, at 23.
[117] *Id.*
[118] UNCITRAL Model Law, *supra* note 84, art. 7.
[119] Graves, *supra* note 104, at 38.
[120] *Id.*

restrictive approach to the writing requirement for enforceable arbitration agreements.[121] Otherwise, "they might not be recognized as a Model Law country because of their arbitration hostile environment."[122] However, the opposite position is applicable and acceptable; countries that adopted the Model Law have the freedom to offer a more liberal approach than the one provided in the Model Law.[123] For example, Article 7(1) of the New Zealand Arbitration Act No. 99 provides that "[a]n arbitration agreement may be made orally or in writing" and New Zealand is still recognized as a Model Law country because the form requirement in the Model Law is a maximum standard, not a minimum.[124]

Despite wide recognition of the writing requirement, some propose the need to totally abandon the requirement and validate oral arbitration agreements. One of the justifications for this position is the current status of arbitration as the preferred method for settling international disputes, recognizing that "[t]he situation was different in 1958, when international arbitration was seen as a less secure way to solve disputes than litigation in court and arbitration was thus subjected to strict conditions to provide protection for parties opting for arbitration."[125] The status of arbitration now — as the frequent if not dominant way to settle international disputes — makes "the cautionary and evidentiary functions inherent in Article II appear largely out of place today."[126] Moreover, proponents of this view argue that the motivation behind the writing requirement in the New York Convention was to encourage more states to sign the Convention by avoiding an overly liberal approach to recognizing and enforcing arbitration agreements,

[121] Moss, *supra* note 100, at 24.
[122] *Id.*
[123] *Id.*
[124] Arbitration Act 1996, sch 1, cl 7(1) (N.Z.); *see also* Moss, *supra* note 100, at 24.
[125] Moss, *supra* note 100, at 19-20.
[126] Graves, *supra* note 104, at 37.

otherwise, the states might have hesitated in signing the convention.[127] In addition, oral agreements are generally enforceable in most developed legal systems, hence, there is no justification for considering arbitration agreements as distinct from other agreements.[128] In conclusion, this liberal view recognizes that "[t]he new arbitration-friendly environment that has developed over the last decades and the spiraling use of arbitration imply that one of the main reasons behind the strict form requirements no longer has the same value, at least in the international commercial arena."[129]

Eliminating the writing requirement would lead to a lot of practical problems in the enforcement stage, particularly when an award is rendered in a jurisdiction without a written requirement but enforcement is in a jurisdiction that applies the writing requirement according to Article II of the New York Convention; the award will be unenforceable in the latter jurisdiction. "Even though the interpretation of Article II has become more liberal over the years, it is unfeasible to interpret it to also cover purely oral agreements . . . . ,"[130] therefore, jurisdictions that have adopted a liberal approach and dispensed of the writing requirement should pay attention to the potential difficulties recognizing and enforcing arbitral awards in other jurisdictions when the arbitration agreement has not satisfied the writing requirement according to the New York Convention.[131]

Moreover, eliminating the writing requirement would indirectly contradict basic and widely recognized arbitral doctrines, such as competence-competence and the separability doctrines.[132] First, the negative aspect of the competence-competence doctrine, on the one hand,

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[127] Moss, *supra* note 100, at 20.
[128] *Id.* at 54.
[129] *Id.* at 10.
[130] *Id.* at 53-54.
[131] *Id.*
[132] Graves, *supra* note 104, at 40.

limits the role of the court in the initial review to prima facie existence of the arbitration agreement "leaving any more thorough decisions to any potential action to set aside the arbitrators' decision," negatively affected by such approach.[133] Such prima facie determination requires a record of consent in order to be done in an effective and a timely manner; absent a written agreement, the court will proceed through "a full and complete examination of the issue" contradicting the concept of the negative competence.[134] On the other hand, the positive part of the competence-competence doctrine confers on the arbitrators the authority to decide on their own jurisdiction, which will also be negatively affected by eliminating the writing requirement.[135] The doctrine "requires one to engage in an act of 'bootstrapping' or to take a 'leap of faith' in order to effectively granting the arbitrators the authority to 'presume' that the parties agreed to arbitration, while actually deciding whether the parties 'in fact' agreed to anything at all."[136] A clear and written record of consent is the main factor that supports such "bootstrapping" and a "leap of faith" by granting arbitrators the authority to decide on such a critical issue in their own jurisdiction.[137]

Secondly, the separability principle — which treats the arbitration agreement as separate from the main contract, so that invalidity or termination of the main contract does not entail the invalidity or termination of the arbitration agreement — is also affected, indirectly, by the elimination of the writing requirement.[138] Since the doctrine is mainly based on a legal fiction (having two distinct contracts), the written form supports such fiction as having a written

[133] *Id.* at 41.
[134] *Id.*
[135] *Id.* at 40.
[136] *Id.* at 40-41.
[137] *Id.* at 41.
[138] *Id.*

agreement enhances its treatment as a distinct instrument from the main contract.[139] In other words, the conceivability of the separability doctrine is dramatically undermined absent written record of the arbitration agreement. Therefore, "the justifications, foundations, and practical applications of all of these fundamental principles are seriously undermined by the elimination of any form requirement with respect to consent to arbitrate."[140]

Ultimately, adopting an extremely strict or an extremely liberal writing requirement will not positively affect the efficiency of the arbitration. The efficient and practical position should not advocate disregarding the writing requirement in the New York Convention, however, it should encourage a flexible interpretation of the requirement that aligns with the current status of arbitration and the technological developments aiding how international contracts are concluded today.[141] In this respect, a flexible interpretation should take the form of a protocol to amend Article II of the New York Convention to achieve clarity and uniformity, as well as avoid any obstacles when enforcing the award.[142]

After analyzing the writing requirement and its importance for enforcing the arbitration agreement and enforcing the arbitral award, emphasis should be on proper interpretation of a writing requirement in the context of binding non-signatories to arbitration agreements. A proper interpretation would find that the written form requirement regarding non-signatories is satisfied when there is a written arbitration agreement between the main parties. Accordingly, there is no writing requirement to extend arbitration agreements; "[m]ore broadly, some authorities have held that form requirements apply only to the arbitration agreement itself and not to extra-contractual mechanisms by which an entity may succeed to or assume a party's obligations and

[139] *Id.*
[140] *Id.*
[141] Moss, *supra* note 100, at 27.
[142] *Id.*

rights under that agreement . . . ."[143] In the same context, "no overly strict requirements should apply to the formal validity of an extension of the arbitration clause to a third party."[144]

Excluding the extension from the writing requirement imposed by Article II of the New York Convention is supported by the fact that no signature is required for the formal validity of the arbitration agreement; what is crucial for the validity of the arbitration agreement is the writing itself, not the signature, and this is applied equally to both the original parties and the third parties. "[W]here a 'non-signatory' may be bound to arbitrate, the requirement of an arbitration agreement is not dispensed with but only that the agreement gains force by means other than signature,"[145] which is the implied consent to be bound by the agreement. Otherwise, requiring a signature to be bound by the arbitration agreement would mean that there is no place for extension of the arbitration agreement to third parties since they have not signed the agreement. This would be an unconscionable result and is unacceptable in both theory and practice.

The Swiss Federal Supreme Court addressed this issue in its decision on October 16, 2003,[146] emphasizing that "from the moment there is an arbitration clause, the issue of extension to a non-signatory may be considered. The fact that the clause or the contract containing the clause was not signed by the non-signatory is not a formal bar to the extension."[147] It is well-settled in the Swiss jurisdiction that the writing requirement in Article 187(1) of the Private

[143] BORN, *supra* note 2, at 1490.
[144] *Id.* at 1491.
[145] M.P. Bharucha, Sneha Jaisingh & Shreya Gupta, *The Extension of Arbitration Agreement to Non-signatories – A Global Perspective*, 5 INDIAN J. ARB. L. 35, 37 (2016).
[146] Tribunal fédéral [TF] [Federal Supreme Court] Oct. 16, 2003, 22 Association Suisse de l'Arbitrage Bulletin [ASA Bull.] 390 (Switz.).
[147] Bernard Hanotiau, *Groups of Companies in International Arbitration*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 279, 284 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) (discussing the outcome of Tribunal fédéral [TF] Oct. 16, 2003, 22 ASA Bull. 390 (Switz.)).

International Law Act[148] applies only to the original arbitration agreement and only between the initial parties; it does not apply to third parties that might also be bound by the agreement.[149] The English law has adopted the same position, as section 8 of the Contracts (Rights of the Third Parties) Act 1999[150] provides that

> (1)Where . . . (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, the third party shall be treated for the purposes of that act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.[151]

This section is clear in extending the arbitration agreement to the third-party beneficiary without requiring any formal requirements and "[i]n this way, the section ensures that the arrangement is treated as satisfying the written form requirement."[152] Not requiring that the third-party beneficiary be involved physically in a written arbitration agreement is logically extended to other categories of non-signatories. In addition, the same position has been applied in the United States as

> from the moment there is a written agreement, U.S. Courts have held that a non-signatory may be considered in an appropriate case to have agreed to it or may be bound to submit

[148] Swiss Arbitration Act, *supra* note 85, art. 187(1).
[149] Bärtsch & Petti, *supra* note 92, at 28; *accord* GIRSBERGER & VOSER, *supra* note 30, at 83 ("With regard to the formal validity of the arbitration agreement vis-à-vis third parties, i.e. an 'extension' of the arbitration agreement to non-signatory parties, the Swiss Supreme Court held that the formal requirements of Art. 178(1) SPILA only apply to the arbitration agreement in which the initial parties to the arbitration expressed their common consent to arbitrate. Accordingly, the fulfillment of those formal requirements for a third party is not necessary.").
[150] Contracts (Rights of the Third Parties) Act 1999, c. 31, § 8 (Eng.) [hereinafter English Contracts Act]; *see also* Landau, *supra* note 75, at 51.
[151] English Contracts Act, *supra* note 150, § 8.
[152] James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469, 510-11 (2004) ("The English law has recently recognized the position of the third-party beneficiary in the rights of third parties act 1999, as before the enactment of this law, the English law has strictly enforced the privity principles with very limited exceptions.").

to arbitration and that the ensuing award can be entitled to the protection of the New York Convention.[153]

This also applies in France as "the French law of international arbitration does not subordinate the validity of the arbitration provision to compliance with formal requirements" when objection of extension to a non-signatory is raised due to an unfulfilled writing requirement.[154]

Therefore, the decisive inquiry is whether a written arbitration agreement exists or not when deciding on the formal validity of an arbitration agreement between the main parties; however, when deciding whether a third party is bound by an arbitration agreement, the focus is shifted to whether the party consented to be bound by the agreement.[155] Accordingly, the rule is that "the form requirement of the New York Convention and national arbitration legislation apply only to the initial agreement to arbitrate and not to legal bases for subjecting parties, that are by definition 'non-signatories,' to that agreement."[156] In the practical context, the writing requirement does not affect extension principles since there are an unlimited number of arbitral awards and court decisions that recognize extension of an arbitration agreement to non-signatories by considering the writing requirement satisfied since there is a written arbitration agreement between the initial parties.[157] Courts and tribunals should focus on the grounds and conditions required to effectuate the extension instead of the formal requirement of writing. The writing requirement does not constitute any bar to extend the arbitration agreement to non-

[153] HANOTIAU, *supra* note 39, at 53; *accord* Reetz, *supra* note 82, at 37 ("The U.S. courts have also taken a liberal approach to the FAA's writing requirement in another set of circumstances: those involving parties that are not themselves signatories to the written arbitration agreement.").
[154] Hanotiau, *supra* note 33, at 349-50.
[155] BORN, *supra* note 2, at 1491.
[156] *Id.*
[157] Irmgard Anna Rodler, When are Non-Signatories Bound by the Arbitration Agreement in International Commercial Arbitration? 1, 16 (Mar. 2012) (unpublished LL.M. thesis, University of Chile & Heidelberg University) (on file with the Academic Repository at the University of Chile), http://repositorio.uchile.cl/handle/2250/112891.

signatories. In this context, the question arises as to whether the arbitral tribunal or the national court has jurisdiction to decide on the ground and conditions required to extend the arbitration agreement.

4. Who Decides on the Issue of the Extension: National Courts or Arbitral Tribunals?

Arbitral tribunals have the authority to decide on their own jurisdiction based upon the well-known competence-competence principle adopted under different institutional rules[158] and national arbitration acts. For example, Article 22(1) of the Egyptian Arbitration Act provides that "[t]he arbitral tribunal is competent to rule on the objections related to its lack of jurisdiction, including objections claiming the non-existence of an arbitration agreement its extinction, nullity of said agreement, or that it does not cover the subject matter in dispute."[159] In the same context, under Article 1465 of the French Code of Civil Procedure, "[t]he arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction,"[160] and, under Article 186(1) of the Swiss Private International Law, "the arbitral tribunal shall decide on its own jurisdiction."[161] Moreover, Article 16(1) of the UNCITRAL Model Law provides that "[t]he arbitral tribunal may rule on its own jurisdiction with respect to the existence or validity of the arbitration

[158] *See, e.g.*, ICC Rules of Arbitration, art. 6(3) (2017) [hereinafter ICC Rules] https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ ("If any party against which a claim has been made does not submit an Answer, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4)"); *see also* LCIA Arbitration Rules, art. 23(1), (2014), https://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx [hereinafter LCIA Rules] ("The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.").
[159] Egyptian Arbitration Act, *supra* note 86, art. 22(1).
[160] French Civil Procedure Code, *supra* note 88, art. 1465.
[161] Swiss Arbitration Act, *supra* note 85, art. 186(1).

agreement."[162] Consensus on the doctrine is based on the universally accepted conclusion that "the arbitral process is facilitated, greater efficiencies are realized and justice is better served if an arbitral tribunal is permitted to consider and decide objections to its own jurisdiction . . . ."[163]

Basically, competence-competence is "a legal fiction granting arbitration tribunals the power to rule on their own jurisdiction."[164] The doctrine has two effects.[165] The positive effect is that arbitral tribunals have the authority to decide on their own jurisdiction while the negative effect is that national courts should refrain from adjudicating the question of the arbitral tribunal's jurisdiction until there is a decision by the tribunal.[166] Accordingly, the role of national courts is only to review the decision of the arbitral tribunal so, "the principle of competence-competence is a rule of chronological priority."[167] The arbitral tribunal has the initial jurisdiction to decide the extension and the national court has subsequent jurisdiction after the issuance of the tribunal's decision.

In practice, the competence-competence doctrine has been concluded and applied by all arbitral tribunals.[168] There is no precedent where an arbitral tribunal denied its authority to decide on a question related to its jurisdiction;[169] such "universality of tribunals' conclusions regarding competence-competence lends support to the doctrine's status as a general principle of

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[162] UNCITRAL Model Law, *supra* note 84, art. 16(1); *see also* European Convention on International Commercial Arbitration art. V(3), Apr. 21, 1961, 484 U.N.T.S. 349 [hereinafter European Convention] ("Subject to any subsequent judicial control provided for under the *lex fori* the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.").

[162] BORN, *supra* note 2, at 1075.

[163] *Id.*

[164] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 333 (2003).

[165] GIRSBERGER & VOSER, *supra* note 30, at 134.

[166] *Id.*

[167] *Id.*

[168] BORN, *supra* note 2, at 1069.

[169] *Id.*

international law and an inherent power (absent contrary agreement) of an arbitral tribunal."[170] The applicable law, whatever it is, has not constituted any obstacle to this authority, which is undisputedly conferred on the arbitral tribunal.[171]

The justification for the competence-competence doctrine is to preserve the effectiveness of arbitration as a private dispute resolution mechanism.[172] The fact that a party who seeks to escape the obligation to arbitrate "could easily frustrate the parties' agreement to have their dispute decided by arbitration or at least create considerable delay by merely contesting the existence or validity of the arbitration agreement" is a scary scenario for the parties.[173] The role of the competence-competence doctrine is to allow the arbitral tribunal to decide on the issue, ensuring that party's contention is not an obstacle for the arbitral proceedings.[174] Moreover, in order to fully benefit from this doctrine, it is settled that the challenge of the arbitral award on jurisdiction by one of the parties in national courts does not affect the arbitral tribunal's jurisdiction to decide on the substantive components of the dispute.[175] In other words, the arbitral tribunal does not need to wait for the court's review of its decision on jurisdiction before proceeding to adjudicate the substance of the dispute;[176] otherwise, the competence-competence would be useless in avoiding delay tactics by the parties. In fact, this rule is even more important in international cases "where the presumptive expectation and desire of commercial parties is to avoid litigation in one another's home courts, and instead to have their disputes — including their jurisdictional disputes — resolved in a neutral forum."[177]

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[170] *Id.*
[171] *Id.*
[172] LEW, MISTELIS & KRÖLL, *supra* note 164, at 232-33.
[173] *Id.*
[174] GIRSBERGER & VOSER, *supra* note 30, at 135.
[175] *Id.* at 136.
[176] *Id.*
[177] BORN, *supra* note 2, at 1069.

Despite recognition of the competence-competence doctrine in almost all jurisdictions, its application varies. More precisely, allocation of the authority between national courts and arbitral tribunals are different for determining the scope of the arbitration agreement. For example, the French law conclusively notes the incompetence of national courts to decide on the jurisdiction of arbitral tribunals as "[i]f the arbitral tribunal has been constituted, the state courts must decline jurisdiction without even examining the validity of the arbitration agreement."[178] The only exception to this rule exists in Article 1448(1) of the French Civil Procedure Code,[179] where the arbitration agreement is manifestly null and void if the arbitral tribunal has not been seized the dispute.[180] However, conferring on arbitrators the power to decide on jurisdiction does not negate the essential authority of the French courts to review arbitral decisions on jurisdiction. In other word, this article only confers on arbitrators the initial power to decide their jurisdiction before the courts have an opportunity to review the arbitrators' decision on jurisdiction. The Swiss Law has adopted the same position.[181]

However, in the United States "[i]n the absence of statutory guidance, U.S. courts have developed a substantial body of case law that addresses various aspects of the competence-competence doctrine."[182] The main theme on allocation of authority between national courts and arbitral tribunals is that courts retain authority unless there is clear and unmistakable evidence that the parties agreed to confer powers to decide issues of arbitrability on the arbitrators.[183] These issues of arbitrability, which are known as gateway issues, include questions of who is bound by the arbitration agreement as it was held that "determining the scope of an arbitration

[178] GIRSBERGER & VOSER, *supra* note 30, at 135.
[179] French Civil Procedure Code, *supra* note 88, art. 1448(1).
[180] GIRSBERGER & VOSER, *supra* note 30, at 135.
[181] *Id.*
[182] BORN, *supra* note 2, at 1125.
[183] *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

provision falls within the category of gateway matters which the Supreme Court has instructed us that courts and not arbitrators should decide."[184]

The decision of the arbitral tribunal may take the form of a preliminary decision on jurisdiction or a final award.[185] The tribunal has the authority to choose which path to follow absent special determination by the parties or by the applicable national law; if the decision of the tribunal denies jurisdiction then the decision takes the form of a final award.[186] For example, Article 22(3) of the Egyptian Arbitration Act provides that

> [t]he arbitral tribunal may rule on the pleas referred to in paragraph 1 of this Article either as a preliminary question before ruling on the merits or adjoin them to the merits in order to be ruled upon together. If the arbitral tribunal rules to dismiss a plea, such motion may not be raised except through the institution of recourse for the annulment of the arbitral award disposing of the whole dispute pursuant to Article 53 of this Law.[187]

In all cases, the parties have the right to challenge the tribunal's decision on jurisdiction before national courts.[188] However, it is impermissible to attack the jurisdiction of the arbitral tribunal if a challenge is not issued within the timeframe imposed by the applicable law.[189]

A challenge in the national court of a partial award (on jurisdiction) is a concurrent control since the national court will review the jurisdictional decision of the arbitral tribunal before the tribunal issues a final award.[190] The advantage of this situation is that it saves time and money from proceeding with the substantive dispute if the court denies the jurisdiction of the tribunal.[191] However, it could also be an interference, which may negatively affect the arbitral

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[184] BORN, *supra* note 2, at 1182.
[185] LEW, MISTELIS & KRÖLL, *supra* note 164, at 335.
[186] *Id.* at 335-36.
[187] Egyptian Arbitration Act, *supra* note 86, art. 22(3).
[188] LEW, MISTELIS & KRÖLL, *supra* note 164, at 336.
[189] *Id.* at 337.
[190] *Id.*
[191] BLACKABY ET AL., *supra* note 77, at 343.

proceedings.[192] Under most national laws, the court reviews jurisdiction decisions as a full review, as opposed to a review of decisions related to the merits of the dispute, which are limited to narrow grounds of annulment, such as being contrary to public policy.[193] In fact, complete review of jurisdictional decisions is consistent with public policy; by this complete review, the court asserts whether the non-signatory has consented to be bound by arbitration agreement or not as no one should be obliged to arbitrate absent consent.[194]

Finally, it should be noted that the competence-competence doctrine is closely related to the separability principle.[195] The separability principle means that the arbitration agreement is a distinct agreement from the main contract containing this agreement. The essence of this principle is that the termination or invalidity of the main contract does not affect the existence of the arbitration agreement. More precisely, "[t]he arbitration agreement by that has its own formal validity, substantive validity, choice of law, and allocations of jurisdictional competence."[196] This principle is adopted in different legal systems. For example, under Article 23 of the Egyptian Arbitration Act, "[t]he arbitration clause shall be treated as an independent agreement separate from the other terms of the contract. The nullity, rescission or termination of the contract shall not affect the arbitration clause, provided that such clause is valid per se."[197] In the same context, Article 178(3) of the Swiss Private International Law provides that "[t]he validity of an arbitration agreement may not be contested on the grounds that the principal contract is

[192] *Id.*
[193] LEW, MISTELIS & KRÖLL, *supra* note 164, at 337-38; *see also* BORN, *supra* note 2, at 1195 (noting that, in the United States, courts are entitled to *de novo* review of the jurisdictional decisions when the parties have not agreed to submit the question of arbitrability to the arbitral tribunal).
[194] LEW, MISTELIS & KRÖLL, *supra* note 164, at 337-38.
[195] *Id.* at 334.
[196] Johanna Maxon, Binding Non-signatories to Arbitration Agreements: The Issue of Consent in International Commercial Arbitration 7 (Feb. 23, 2014) (unpublished Master's thesis, Göteborgs University) (on file with the UNCITRAL Law Library), https://unov.tind.io/record/42230.
[197] Egyptian Arbitration Act, *supra* note 86, art. 23.

invalid or that the arbitration agreement concerns a dispute which has not yet arisen."[198] The application of the separability principle supports the effectiveness of the competence-competence doctrine as "[w]ithout the doctrine of the separability, a tribunal making use of its competence-competence would potentially be obliged to deny jurisdiction on the merits since the existence of the arbitration clause might be affected by the invalidity of the underlying contract."[199] The separability principle supplements and ensures the proper application of the competence-competence doctrine.

The discussion of these issues indicates that the extension of arbitration agreements to non-signatories aims to bind third parties by the agreement. The base for this extension is the consent to arbitrate, whether explicit or implicit. In addition, the writing requirement is not a condition to effectuate the extension because the form requirement is satisfied once there is a written agreement to arbitrate between the initial parties. Finally, arbitral tribunals have the jurisdiction to decide the issues of extension based upon the competence-competence doctrine. The next chapter expands on this discussion by assessing the different laws applicable in this respect.

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[198] Swiss Arbitration Act, *supra* note 85, art. 178(1).
[199] LEW, MISTELIS & KRÖLL, *supra* note 164, at 334.

CHAPTER 2

THE LAW APPLICABLE TO NON-SIGNATORIES' ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION AND IDENTIFYING THE PROPOSED APPROACH OF THE TRANSFORMATION FROM THE TRADITIONAL NATIONAL APPROACH TO A TRANSNATIONAL ONE

Non-signatory issues are the subjective scope of the arbitration agreement and are determined, in most cases, based on the law applicable to the arbitration agreement. Accordingly, determining the law governing the arbitration agreement is essential to determine who is bound by the agreement. In most cases, parties do not choose the law applicable to the arbitration agreement because they opt for standard arbitration clauses provided by arbitral institutions that do not indicate the governing law.[200] In addition, to avoid any ambiguity that may impede the clause's effectiveness, parties may prefer not to add detailed determinations that may complicate the proceedings, such as the law applicable to the clause[201] — particularly since the arbitration agreement could be subject to different national laws for different issues.[202] For example, formal validity of the arbitration agreement, subjective validity, arbitrability, interpretation, scope, capacity of the parties, etc. could be determined by different laws;[203] that is why it was stated that the accurate expression is the 'laws' applicable to the arbitration agreement instead of the 'law' applicable to the arbitration agreement.[204]

This leads to the traditional choice of law approach for determining the law applicable to the arbitration agreement — and to the extension issues. Different theories are embodied in the

[200] Piero, *supra* note 5, at 197. *But see* BORN, *supra* note 2, at 491 (noting sometimes, in large and complex projects, parties prefer to have a separate, more detailed arbitration agreement that includes law applicable to the arbitration agreement and, even if the arbitration agreement is in the main contract, they provide for a stipulation for law applicable to the arbitration clause; however, those situations are rare in practice).
[201] Piero, *supra* note 5, at 197.
[202] BORN, *supra* note 2, at 473.
[203] *Id.*
[204] Klaus Peter Berger, *Reexamining the Arbitration Agreement: Applicable Law – Consensus or Confusion?*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 301, 304 (A.J. van den Berg & Permanent Court of Arbitration eds., 2007).

traditional choice of law approach, as no consistent theory has been continuously applied by arbitrators.[205] The most common theories include the law of the seat of arbitration, the law of the main contract, the conflict of laws approach, the law of the closest connection, the validation principle, and the cumulative approach.[206] These most frequently applied theories are all national laws, which offer complications and peculiarities that make them unsuitable for international disputes. As a result of these problems, a growing trend applies transnational rules to arbitration agreements instead of pursuing the traditional approach. Application of the traditional choice of law method to determine applicable national law is considered unsuitable to determine the existence and the validity of the arbitration agreement from which arbitral tribunals derive their jurisdiction, as such issues should be determined by transnational rules.[207]

Disregarding the application of national laws is particularly necessary for non-signatory issues. First, determining who is bound by the arbitration agreement is a sensitive question, since it binds third parties to an arbitration agreement so, such determination should be done without being subject to the technicalities and disparities of national laws. Second, applying the law of the arbitration agreement to extension issues, which is the common tendency, is prejudicial to non-signatories,[208] since non-signatories claim that they have not consented to an arbitration agreement as they have not signed the agreement. Applying the law governing the arbitration agreement to determine whether a non-signatory is bound by the arbitration agreement is counterintuitive. How can applying the law of the arbitration agreement to determine the status of someone with no apparent relation to the agreement be a fair analysis?

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[205] Lew, *supra* note 6, at 140.
[206] *Id.*
[207] Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules*, *in* PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 570, 579 (A.J. van den Berg, T.M.C. Asser Instituut & International Council for Commercial Arbitration eds., 1996).
[208] Bán, *supra* note 4, at 10.

The proposal in this dissertation resolves this dilemma by formulating and adopting a unified set of rules for extension issues. This set of rules is derived from different sources and based on trade usage, factual circumstances, and good faith principles, as explained later in this chapter. These proposed rules are flexible and effective for determining who is bound by the arbitration agreement; checking for the conditions and requirements embedded in national laws are only suitable for domestic disputes, not international ones. International parties are rarely familiar with domestic technicalities, especially when extension of the agreement is based on contract law theories. The transnational approach for non-signatory issues, however, has been applied before through the group of companies doctrine; the similarities and differences between this doctrine and the proposed set of rules are addressed in the last part of this chapter.

1. The Traditional Choice of Law Approach to Determine the Law Applicable to the Extension of the Arbitration Agreement

Non-signatory issues are governed by the law applicable to the arbitration agreement. The New York Convention and most institutional rules contain no specific provisions on the law applicable to various issues of the arbitration agreement.[209] However, there are provisions dealing with the validity of the arbitration agreement at the post-award stage, noting that invalidity of the arbitration agreement is sufficient for the annulment of an arbitral award, and specifying the laws that should be applied to determine validity at the earlier stage.[210] Similarly, most national arbitration acts do not indicate the law applicable to the arbitration agreement.[211] The Swiss Private International Law Act is considered an exception as Article 178 notes that the arbitration agreement is valid if it conforms to either the law chosen by the parties, the law of the

[209] LEW, MISTELIS & KRÖLL, *supra* note 164, at 118.
[210] *Id.*
[211] *Id.*

main contract, or Swiss law.[212] Absent a determination of the law applicable to arbitration agreement, arbitrators have adopted different approaches.

The most frequently applied approaches for determining the law applicable to the arbitration agreement, as assessed below, include the law of the seat of arbitration, the law of the main contract, the conflict of laws approach, the law of the closest connection, the validation principle, and the cumulative approach.

1.1. The Law of the Seat of Arbitration Approach

1.1.1. Support for the Law of the Seat of Arbitration Approach

The law of the seat of arbitration approach is the most popular and most frequently applied law to the arbitration agreement.[213] According to this theory, the substantive rules of the law where the arbitration proceedings are conducted will be applied to determine the existence and validity of the arbitration agreement. This approach is rooted in the assimilation of the arbitrator and the national judge exercising adjudicatory functions in one national legal system (the seat), as "[t]here is a pronounced similarity between the national judge and the arbitrator in that both of them are subject to the local sovereign."[214] In other words, arbitral tribunals are part of the legal system of the place where arbitration is held and considered a special kind of court.[215]

Different factors contribute to this approach, which mainly include the presumption of the parties' intention to apply the law of the seat of arbitration to their arbitration agreement.[216] Under this approach, the parties' express choice of a place to conduct the arbitration proceedings

[212] Swiss Arbitration Act, *supra* note 85, art. 178.
[213] BORN, *supra* note 2, at 509.
[214] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 15 (2010).
[215] *Id.*
[216] FOUCHARD ET AL., *supra* note 48, at 226.

also includes an implied choice to apply the law of the seat of the arbitration to the arbitration agreement.[217] This presumption is supported by the fact that the law of the seat governs the procedures of the arbitration, absent another choice by the parties, leading to an assumption that the parties had the intent, when executing the contract, to achieve consistency between the law governing the procedures and the law governing the substance of the arbitration agreement.[218] In other words, "by choosing a specific State as the seat of arbitration, the parties . . . have intended to submit the arbitration to the exclusive control of that State's legal order" suggesting it is not a spontaneous choice, "but made for good and well-understood reasons and purposes."[219]

Another justification for applying the law of the seat is that, absent an express choice by the parties, the law with the closest connection to the arbitration agreement should be applied, which is the law of its characteristic performance.[220] Under this approach, since performance of the arbitration agreement is the obligation to arbitrate — and its procedures are governed by the law of the seat — the law of the seat should be applicable to the arbitration agreement because it has the closest connection.[221] In addition, proponents of applying the law of the seat based on the closest connection approach justify their position because "the legal order of the seat is the one having the most complete and effective control over the arbitration."[222]

In addition, the power of the place of arbitration in the annulment of arbitral awards has played a vital role in giving the law of the seat priority to govern the substance of arbitration agreements, "stemming from the notion that arbitration is exclusively anchored in the legal order

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[217] *Id.*
[218] Dongdoo Choi, *Choice of Law Rules Applicable for International Arbitration Agreements*, 11 ASIAN INT'L ARB. J. 105, 108 n.10 (2015).
[219] GAILLARD, *supra* note 214, at 19.
[220] Harisankar K. Sathyapalan, *International Commercial Arbitration in Asia and the Choice of Law Determination*, 30 J. INT'L ARB. 621, 630 (2013).
[221] *Id.*
[222] GAILLARD, *supra* note 214, at 22.

of the seat . . . ."[223] Applying the law of the seat to the arbitration agreement reduces the annulment risk of the arbitral award by the courts of the seat of arbitration because, in most cases, the courts determine the validity of the arbitration agreement and the award according to its domestic law.[224] Since arbitrators are required to take every effort to ensure the award is enforceable, they may be more comfortable applying the law of the seat to the arbitration agreement to avoid annulment of the award in the courts of the seat.[225] In addition, applying another law to the validity of the arbitration agreement may result in losing the supportive powers of the courts of the seat through the arbitral proceedings.[226] For example, if interim relief is required during the proceedings, the local court may refrain from intervening because the arbitration agreement is invalid under its domestic law of the seat of arbitration, even if the agreement is valid under other applicable law.[227]

The New York Convention supports the importance of the law of the seat as the law governing the arbitration agreement.[228] According to Article V(1)(a) of the New York Convention,[229] recognition and enforcement of an arbitral award could be refused if the party against whom the award was rendered provided proof that the arbitration agreement was invalid under the law chosen by the parties or the law of the place where the award was made.[230] Under the New York Convention, first priority in determining the validity of an arbitration agreement is

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[223] *Id.* at 23.
[224] LEW, MISTELIS & KRÖLL, *supra* note 164, at 125.
[225] *Id.* at 127.
[226] *Id.* at 126.
[227] *Id.*
[228] *Id.* at 118.
[229] New York Convention, *supra* note 82, art. (V)(1) ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said 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.").
[230] LEW, MISTELIS & KRÖLL, *supra* note 164, at 118.

given to the law chosen by the parties and, absent a choice by the parties, second priority is given to the law of the seat. While this article addresses the post-award stage and does not extend automatically to the pre-award stage, national courts and arbitral tribunals have applied Article V(1)(a) to the pre-award stage since the Convention does not preclude such application.[231] Some consider this a general international private law rule because of the Convention's powerful international influence.[232] In addition, some suggest that the parties in international commercial arbitration are sophisticated enough to be aware of this provision and its potential effect at the post-award stage; therefore, absence of a choice of law by the parties favors a presumption that the parties' intent was to govern their arbitration agreement by the law of the seat.[233] Moreover, Article V(1)(e) of the New York Convention recognizes that annulment in the seat could be grounds for refusal of recognition and enforcement of the arbitral award elsewhere.[234]

Similarly, the European Convention on International Commercial Arbitration expressly notes that the validity of the arbitration agreement is governed by the law of the seat absent other determination by the parties.[235] According to Article VI(2),

> [i]n taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions.
> (a) under the law to which the parties have subjected their arbitration agreement;
> (b) failing any indication thereon, under the law of the country in which the award is to be made . . . .[236]

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[231] *Id.* at 107.
[232] *Id.* at 121.
[233] Choi, *supra* note 218, at 108.
[234] New York Convention, *supra* note 82, art. (V)(1) ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that . . . (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.").
[235] FOUCHARD ET AL., *supra* note 48, at 226-27.
[236] European Convention, *supra* note 162, art. VI(2).

Contrastingly, the European Convention indicates the role of the law of the seat at the pre-award stage, not at the post-award stage, like the New York Convention. This provision enhances and supports the status of the law of the seat regarding the validity and existence of arbitration agreements by giving it priority application absent another choice of law by the parties.

Plenty of arbitral awards have determined the validity of the arbitration agreement based upon the law of the seat.[237] For example, in International Chamber of Commerce (ICC) Case No. 14046,[238] the parties entered into a framework agreement with Italian law applied to the substantive contract and ICC arbitration in Geneva.[239] A dispute arose between the parties because of a non-competition clause in the contract and the claimant commenced ICC arbitration proceedings.[240] The tribunal held that the validity of the arbitration agreement, absent another determination by the parties, was governed by the substantive law of the seat — not Italian law — under Article V(1)(a) of the New York Convention.[241] The tribunal provided that,

> [g]iven the generally recognized principle of the autonomy of the arbitration clause on the one hand, and the fact that the law applicable to the arbitration clause is rarely the subject of a specific stipulation, on the other, most national courts' decisions under the New York Convention have applied the law of the country where the award was rendered.[242]

As previously mentioned, most national legislations have not dealt directly with the law applicable to the arbitration agreement; however, the Swedish Arbitration Act is an exception in this respect.[243] According to Section 48 of the Swedish Arbitration Act, the arbitration agreement is governed by the law of the seat of the arbitration absent any other determination by the

[237] *See, e.g.*, BORN, *supra* note 2, at 509 nn.189-201.
[238] Case No. 14046 of 2007, 35 Y.B. COM. ARB. 241 (ICC Int'l Ct. Arb.).
[239] *Id.* at 242.
[240] *Id.*
[241] *Id.* at 246.
[242] *Id.*
[243] LEW, MISTELIS & KRÖLL, *supra* note 164, at 119.

parties.[244] The London Court of International Arbitration (LCIA) Arbitration Rules are also considered an exception as Article 16(4) recognizes that the law of the seat is the law applicable to the arbitration agreement unless another choice of law was agreed in writing by the parties and the choice is not prohibited by the laws of the seat.[245]

Finally, this position has also been adopted by some national courts. For example, in *Government of the Republic of Philippines v. Philippines International Air Thermal Co. Inc.*,[246] the Singapore High Court held that, absent a choice of law governing the arbitration agreement by the parties, the agreement was subject to the law of the seat — the law of Singapore.[247] The tribunal justified its decision based on the implied intention of the parties to govern their arbitration agreement by the neutral law of the place where they chose to conclude the arbitration.[248]

Accordingly, reliance on the law of the seat of arbitration to determine the existence and validity of the arbitration agreement is mainly based upon the presumed intention of the parties to govern the substance of the arbitration agreement by the law applicable to the proceedings, the powers of the national courts of the seat in the annulment of the award, and the support derived from Article (V)(1)(a) and Article (V)(1)(e) of the New York Convention. However, these supporting factors are insufficient to justify the application of the law of the seat to the arbitration agreement.

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[244] *Id.*
[245] LCIA Rules, *supra* note 158, art. 16(4); BLACKABY ET AL., *supra* note 77, at 159.
[246] Sathyapalan, *supra* note 220, at 631 (examining outcome of Government of Philippines v. Philippines Int'l Air Thermal Co., 1 S.L.R. 278 (2007)).
[247] *Id.*
[248] *Id.*

1.1.2. Criticism of the Law of the Seat Approach

The theory of applying the law of the seat of arbitration to the arbitration agreement, despite its popularity, is still subject to criticism. Parties choose the seat of arbitration for geographical factors or other convenient factors without necessarily linking this choice to the law applicable to the arbitration agreement.[249] Asserting that the law of the seat represents the implied intention of the parties as the law governs their arbitration agreement does not have any meaningful support and could open the door for forum shopping and bad intentions by the parties.[250] Moreover, in some cases the choice of seat is done by arbitral institutions or arbitral tribunals; in such cases, there is no implied intention by the parties to govern their arbitration agreement by the law of the seat.[251] In the same context, the allegation of an implied intention by the parties to govern the arbitration agreement by the same law governing the procedures — typically the law of the seat — ignores the contractual nature of the arbitration agreement and incorrectly mixes the law applicable to the arbitration agreement and the law applicable to the arbitration proceedings.[252]

Moreover, reliance on Article V(1)(e) of the New York Convention to support application of the law of the seat is misplaced because an accurate interpretation of this article minimizes the importance attached to the law of the seat.[253] Although Article V(1)(e) notes that setting aside the award in the seat of arbitration is ground for refusal of recognition and enforcement, the decision is made by the country of enforcement, which has the right to enforce

[249] *Id.*
[250] *Id.*
[251] Piero, *supra* note 5, at 201.
[252] BORN, *supra* note 2, at 517.
[253] GAILLARD, *supra* note 214, at 29.

the award regardless of its annulment in the seat.[254] This is apparent from using the word "may" in the provision instead of "shall" or "must."[255] Precisely,

> [f]rom a methodology standpoint, the convention's significance lies in the invitation made to the courts of the country where enforcement is sought to focus on the raw product constituted by the award, and no longer on the court decisions surrounding the award that may have been rendered at the seat of the arbitration.[256]

The Convention changed the old conception that exclusively recognized the arbitral process under the law of the seat of the arbitration.[257] This position is clear as "it shifts the focus on the conditions of recognition of awards in the national legal orders where enforcement is sought"[258] by giving the courts in the place of enforcement the option to enforce an arbitration agreement that was annulled by the courts in the seat of arbitration.

Generally speaking, the importance attached to the law of the seat is overrated. For example, the law of the place of the enforcement is more important than the law of the seat.[259] This importance is justified by comparing

> [b]etween a State that simply hosts arbitral proceedings in its hotels or its conference centers and a State that authorizes the seizure and forced sale of assets on its territory, the latter manifestly has the strongest title to determine what it regards to be an arbitral award worthy of legal protection and, retrospectively, what it considers to be a valid arbitration agreement and proper arbitral proceedings.[260]

Accordingly, the role of the law of the seat is not exclusive since each state has its own determination regarding the arbitration agreement, the arbitral process, and the award.[261]

Furthermore, some national legislations have minimized the role of the law of the seat by adopting legislative provisions on the validity of agreements allow the parties to waive the right

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[254] *Id.* at 31.
[255] *Id.*
[256] *Id.* at 30.
[257] *Id.* at 31.
[258] *Id.* at 29.
[259] *Id.* at 32.
[260] *Id.*
[261] *Id.* at 28-29.

to apply to set aside the award in the courts of the seat.[262] The criteria for the application of such provisions is that the parties do not have any connection to the seat of arbitration other than being the physical place to conduct arbitration.[263] The Swiss law took the first step under Article 192(1) of the Private International Law providing that

> [i]f none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).[264]

Other jurisdictions have adopted the same position including Tunisia,[265] Belgium,[266] and Peru,[267] indicating that "[n]ational legal orders are thus gradually abandoning the idea that the source of validity of arbitral awards necessarily lies in the legal order of the seat."[268]

There is a growing tendency toward delocalization of the arbitration agreement from the law of the seat. The delocalization theory developed in the 1960s and encourages detaching international commercial arbitration from the law of the seat in two aspects; the first relates to the procedural law of the seat and the second relates to the national courts of the seat.[269] Detachment aims to minimize the role of the seat as only a physical place to conduct the arbitration, without imposing any restrictions upon the arbitration process nor having any powers regarding the arbitral award.[270]

Accordingly, application of the law of the seat of arbitration is irrelevant regarding the validity of the arbitration agreement in general and, specifically, for determining who is bound

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[262] *Id.* at 64.
[263] *Id.*
[264] Swiss Arbitration Act, *supra* note 85, art. 192(1); GAILLARD, *supra* note 214, at 64.
[265] GAILLARD, *supra* note 214, at 65 (citing Article 78(6) of the Tunisian Arbitration Code of 1993).
[266] CODE JUDICIAIRE/GERECHTELIJK WETBOEK [C.JUD./GER.W.] [JUDICIAL CODE] art. 1717(4) (Belg.).
[267] GAILLARD, *supra* note 214, at 65 (citing Article 126 of the Peruvian General Law on Arbitration from 1996).
[268] GAILLARD, *supra* note 214, at 66.
[269] Hong-lin Yu & Motassem Nasir, *Can Online Arbitration Exist within the Traditional Arbitration Framework?*, 20 J. INT'L ARB. 455, 463 (2003).
[270] *Id.*

by the arbitration agreement.[271] The importance attached to the law of the seat of arbitration as the law applicable to the existence and validity of the arbitration agreement by reliance on an implied intention by the parties or Article V(1) of the New York Convention is unwarranted and groundless, especially with first, more national laws minimizing the role of the law of the seat; second, the growing tendency toward the delocalization theory. In fact, the law of the seat of arbitration is not the only national law that has lost a lot of its status regarding the arbitration agreement; the law of the main contract, despite the existence of proponents for its application, is frequently refused by arbitral tribunal to be applied to issues of validity and the existence of an arbitration agreement — as discussed in the following section.

1.2. The Law of the Substantive Contract

1.2.1. Support for the Law of the Substantive Contract Approach

Another approach to determining the law for non-signatory issues applies the law of the substantive contract to the arbitration clause. When the parties choose the law of the main contract they usually intend to apply it to their entire contract, not only parts of the agreement. According to the substantive contract approach, if the parties had a contrary intention to exclude the arbitration clause from the reach of the law of the main contract, they would expressly note that in the contract.[272] Moreover, proponents of applying this approach conclude that the separability principle does not negate this assumption.[273] Under the separability principle, the arbitration clause is a separate contract in terms of its existence and validity so, termination or

[271] Gaillard, *supra* note 207, at 579.
[272] Ilias Bantekas, The *Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy*, 27 J. INT'L ARB. 1, 2 (2010); *accord* BLACKABY ET AL., *supra* note 77, at 158.
[273] Choi, *supra* note 218, at 108 n.8.

invalidity of the main contract does not affect the arbitration agreement.[274] However, the separability principle does not apply to the choice of law provision.[275]

A considerable number of common and civil law jurisdictions apply this approach.[276] In addition, many arbitral awards have applied the law of the main contract to the arbitration agreement.[277] For example, in ICC Case No. 11869,[278] an Australian seller and Company A entered into a sales contract for the delivery of certain goods in sixty days.[279] The seller failed to make the delivery even after an extension of the delivery date; company A requested liquidated damages as provided for in the contract.[280] Company A assigned the contract to another company, which then started arbitration proceedings against the seller according to the arbitration clause in the sale contract.[281] The seller objected to the jurisdiction of the arbitrator claiming that there was no arbitration agreement with the assignee.[282] The arbitrator decided on arbitral jurisdiction according to the competence-competence principle and concluded that the law applicable to the validity of the arbitration agreement was the law of the main contract, which was English law.[283] The arbitrator noted an assumption of the parties' intention to govern their arbitration clause by the law of the substantive contract — particularly since the choice of law clause was directly after the arbitration clause.[284]

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[274] *Id.*
[275] *Id.*
[276] *See* BORN, *supra* note 2, at 515 n.220.
[277] *Id.* at 516 n.223.
[278] Case No. 11869 of 2003, 36 Y.B. COM. ARB. 47 (ICC Int'l Ct. Arb.).
[279] *Id.* at 48.
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.* at 52-53.
[284] *Id.* at 53.

1.2.2. Criticism of the Law of the Substantive Contract Approach

First of all, application of the law of the substantive contract to the arbitration agreement is considered an obvious violation of the separability principle contrary to the analysis held by the proponents of the application of the law of the contract to the arbitration agreement. The separability principle is based on a legal fiction that the arbitration agreement is an autonomous contract independent from the main contract in all aspects, including the choice of law clause. Any justification to customize the separability principle and reduce its applicability to save the existence and validity of the arbitration clause when the contract is void or terminated is unwarrantable.

Second, the assumption of an implied intention to apply the law of the main contract to the arbitration agreement is unjustifiable. First, application of the law of the contract to the arbitration agreement impedes the neutrality sought by the parties.[285] When parties negotiate the law applicable to the merits, which in most cases is the law of one of parties or the law of the place of the performance, they do not automatically intend to extend such law to the dispute resolution mechanism, which is supposed to be neutral.[286] Application of the law of the contract would disturb the legitimate expectations of the parties.[287] The reasons for choosing the law of the main contract are likely different from the factors considered when determining the law applicable to the arbitration agreement.[288] Second, in many cases the law applicable to the contract is chosen by arbitral tribunals, not by parties.[289] In these instances, no reference is made

[285] Gaillard, *supra* note 207, at 579.
[286] *Id.*
[287] *Id.*
[288] FOUCHARD ET AL., *supra* note 48, at 223.
[289] Piero, *supra* note 5, at 201. Notably, if the parties have not agreed on the law applicable to the substantive contract, other sources can provide guidance. Article 21 of the Regulation (EC) No 593/2008 of the European Parliament and of the council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) provides that, "[i]n the absence of choice, where the applicable law cannot be

to any implied consent of the parties to apply the law of the contract to the arbitration agreement.[290]

In practice, arbitral tribunals typically refuse to apply the law of the main contract to the issues of the validity and existence of the arbitration agreement. For example, in ICC Case No. 4131,[291] the arbitral tribunal refused to apply French law — the law of the main contract — to issues related to the scope of the arbitration agreement.[292] According to the tribunal, the autonomy and separability of the arbitration agreement means that such agreement is autonomous from the law governing the main contract.[293] The tribunal applied transnational rules to determine who was bound by the arbitration agreement.[294] The same principle was adopted in ICC Case No. 14144,[295] where the tribunal refused to apply Brazilian law, which was the law of the main contract, to issues related to the validity of the arbitration agreement.[296] In this case, the court instead applied the conflict laws of the seat of the arbitration, which was Switzerland, to determine the validity of the arbitration agreement.[297]

In conclusion, the application of the law of the contract relies on the inaccurate assumption that the parties intended to apply the same law to their arbitration agreement and it clearly contradicts the separability principle. That is why arbitrators refuse, in many cases, to apply the law of the contract to determine the validity and existence of arbitration agreements.

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determined either on the basis of the fact that the contract can be categorized as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts."

[290] Piero, *supra* note 5, at 201.

[291] Case No. 4131 of 1982, at 131.

[292] *Id.* at 133.

[293] *Id.*

[294] *Id.*

[295] Case No. 14144 of 2006, 23 ICC Disp. Resol. Bull. No. 1, 77 (2012) (ICC Int'l Ct. Arb.); *see* discussion *infra* note 311.

[296] *Id.*

[297] *Id.*

However, arbitrators frequently tend to apply the conflict of law rules to the issues of the arbitration agreement.

1.3. Conflict of Laws Rules

1.3.1. Support for the Conflict of Laws Rules

Traditional conflict of laws rules play an important role in determining the law governing the arbitration agreement. Absent agreement by the parties, arbitral tribunals in a considerable number of cases turn to conflict of laws rules to determine the applicable national law.[298] Arbitrators possess significant discretionary powers in determining which conflict of laws rules apply.[299] The factors arbitrators consider when determining the applicable conflict of laws rules include, among others, the place where the arbitration is conducted, the probable place of the enforcement, the place where the arbitration agreement was executed, the law governing the main contract, or a combination of those factors.[300] Arbitrators resort to these factors absent any indicator of the implied intention of the parties.[301]

The conflict laws of the seat of arbitration have the same importance as the substantive laws of the seat of arbitration because of the powers of the courts in the seat of arbitration to annul the award and Article V(1)(a) and Article V(1)(e) of the New York Convention. In practice, arbitrators frequently apply the conflict laws of the seat to decide the law applicable to the existence and validity of the arbitration agreement.[302] For example, in ICC Case No. 6149,[303] three sales contracts were concluded between a Jordanian buyer and a Korean seller with three

[298] BORN, *supra* note 2, at 561.
[299] LEW, MISTELIS & KRÖLL, *supra* note 164, at 124.
[300] *Id.*
[301] *Id.*
[302] BORN, *supra* note 2, at 561.
[303] Case No. 6149 of 1990, 20 Y.B. COM. ARB. 41 (ICC Int'l Ct. Arb.).

identical arbitration clauses for proceedings in Paris under the ICC Arbitration Rules.[304] When the dispute arose, the defendant challenged the jurisdiction of the arbitral tribunal since the arbitration agreement was invalid under a mandatory provision in Jordanian law that considers arbitration agreements concerning bills of lading and maritime issues null and void.[305] The arbitral tribunal held that Jordanian law was not applicable to the substantive validity of the arbitration agreement and instead pointed to Article 13(3) of the ICC Rules of Conciliation and Arbitration, which confers power on the arbitrator to determine the appropriate law (absent any determination by the parties) by consulting the conflict of laws rules the arbitrator deems appropriate.[306] The tribunal concluded that the conflict laws of the seat of arbitration are the appropriate rules to be applied — the conflict rules of French law, in this case.[307] The tribunal also supported its conclusion by referring to Article V(1)(a) of the New York Convention, noting that recognition and enforcement of an arbitral award could be refused if the arbitration agreement is invalid under the law of the place where the award was made.[308]

The conflict laws of the seat also have special importance when the law of the seat includes a specific provision for the validity of arbitration agreements.[309] An example of this situation is Article 178 of the Swiss Private International Law Act, which provides that "[a]s regards its substance, an arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or the law governing the subject-matter of the dispute, in particular, the law governing the main contract, or it conforms to Swiss law."[310] In these circumstances, the arbitral tribunal will likely apply the conflict laws of the seat to determine the law applicable to

[304] *Id.* at 41-42.
[305] *Id.* at 42-43.
[306] *Id.* at 44.
[307] *Id.* at 44-45.
[308] *Id.* at 45.
[309] BORN, *supra* note 2, at 525.
[310] Swiss Arbitration Act, *supra* note 85, art. 178.

the validity of the arbitration agreement. For example, in ICC Case No. 14144,[311] a shareholder agreement existed between a company, registered in Brazil, and two other companies, one registered in Brazil and the other registered in Luxembourg.[312] The contract was governed by Brazilian law and had an arbitration clause for proceedings in Switzerland under the ICC Arbitration Rules.[313] When a dispute arose, one of the parties commenced court proceedings and the other commenced arbitration proceedings.[314] The respondent in the arbitration proceedings contended that the arbitration agreement was invalid under Brazilian law.[315] The tribunal, however, referred to Article 176 of the Swiss Private International Law Act, which provides that "[t]he provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland."[316] The tribunal decided to apply the conflict laws of the seat to determine the validity of the arbitration agreement.[317] Applying Article 178 of the Swiss Private International Law Act,[318] the tribunal held that the validity of the arbitration agreement was determined under either Brazilian law or Swiss law; since it was valid under Swiss law, the tribunal had jurisdiction to hear the case.[319]

1.3.2. Criticism of the Conflict of Laws Approach

One the main critiques of the conflict of laws approach is its unpredictability. First, arbitrators have wide discretionary powers in determining the applicable conflict of law rules;

[311] Case No. 14144 of 2006, at 77.
[312] *Id.*
[313] *Id.*
[314] *Id.*
[315] *Id.*
[316] Swiss Arbitration Act, *supra* note 85, art. 176; Case No. 14144 of 2006, at 77.
[317] Case No. 14144 of 2006, at 77.
[318] Swiss Arbitration Act, *supra* note 85, art. 178.
[319] Case No. 14144 of 2006 at 77.

second, disparities exist among conflict of laws rules in different jurisdiction. In other words, application of conflict of laws rules does not provide clarity since, when the parties enter into their contractual relationship, they have no idea which law will be applied if a dispute arises; it has been described as a "jump in the dark."[320] This unpredictability is more apparent when the national conflict of laws rules refer to an uncommon or outdated approach, such as the application of the law of the place where the contract was concluded.[321] In addition, the conflict of laws rules typically only focus on factors such as the closest connection, the law of the seat of arbitration, or other geographical elements without considering the substantive consequences or the outcome of the application of a specific conflict of laws rules.[322] This leads to accusations of unfairness or "blind[] and mechanical" laws,[323] suggesting that conflict of laws rules have "had a destructive rather than a constructive effect on the development of commercial arbitration."[324] Moreover, the complexity of the conflict of laws process is an obstacle to an effective arbitration process as it is "a very 'technical' discipline involving the application of numerous abstract concepts."[325]

These difficulties have induced different international associations to develop unified conflict of laws rules to be applied internationally.[326] In addition, applying what is known as the general principles of conflict of laws provides a solution to overcome the problems associated

[320] Petsche, *supra* note 7, at 454.
[321] *Id.* at 480.
[322] *Id.* at 466.
[323] *Id.*
[324] David Stern, *The Conflict of Laws in Commercial Arbitration*, 17 L. CONTEMP. PROBS. 567, 579 (1952).
[325] Petsche, *supra* note 7, at 459.
[326] *See id.* at 465 n.53 (stating that the Hague Conference on Private International Law had a prominent role in this respect).

with traditional conflict of laws rules.[327] This approach helps avoid unusual and unpredictable conflict of laws rules.[328]

The problems associated with the application of conflict of laws rules, which are mainly unpredictability, complexity, and inadequacy — especially when these rules point to application of a law unfamiliar to one of the parties or outdated and inconvenient for the dispute — have led to consideration of other approaches to determine the validity and existence of the arbitration agreement. The law of the closest connection is one of these laws frequently applied to the arbitration agreement.

1.4. The Law of the Closest Connection

1.4.1. Support for the Law of the Closest Connection

Applying the law of the closest connection means considering elements strongly connected to the arbitration agreement itself before giving priority to the element with the most considerable weight to determine the law applicable to the arbitration agreement.[329] Many factors could be considered in this respect, such as the law of the seat of arbitration, the law of the main contract, the law of the place where the contract was concluded, the procedural law governing the arbitration agreement, the law of the potential location for enforcement of the award, and other laws that may be connected to the arbitration agreement.[330] Determining the law of the closest connection depends to a great extent on the discretionary powers of the arbitral tribunal.

[327] A.F.M. Maniruzzaman, *Conflict of Laws Issues in International Arbitration: Practice and Trends*, 9 ARB. INT'L 371, 377 (1993).
[328] Petsche, *supra* note 7, at 481.
[329] FOUCHARD ET AL., *supra* note 48, at 224.
[330] *Id.*

1.4.2. Criticism of the Law of the Closest Connection

In practice, courts and tribunals have "encountered substantial difficulties" in deciding among different laws to determine the closest connection to the arbitration agreement, which will have priority to govern the agreement.[331] Such approach wastes time and effort in searching and comparing different laws and, in the end, there is no guarantee that the chosen law has the closest connection to the arbitration agreement. In addition, this approach increases problems of uncertainty, as the view of one tribunal on the law with the closest connection may be different from the view of another tribunal. In other words, the parties cannot predict the law a tribunal determines to be the law with the closest connection. For example, tribunal decisions may differ regarding situations where the parties adopted a standard contract with an arbitration clause drafted by a professional entity in a particular country, which is closely connected to a specific legal system.[332] Some tribunals may decide that "[b]y choosing such a contract, the parties might well be considered to have intended the arbitration clause to be subject to the laws of that jurisdiction."[333] Other tribunals may consider such factors irrelevant in concluding the existence of the parties' intention to govern the arbitration agreement by the laws of such country.[334] Therefore, one of the main problems of the closest connection approach is inconsistency resulting from the different positions adopted by arbitral tribunals and national courts in different cases, as "[t]he occasional pronouncements of the courts in this respect cannot be interpreted as an adhesion to a given doctrine and are only meant in general to explain in a convenient manner how the court has arrived at a solution in a particular case."[335]

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[331] BORN, *supra* note 2, at 521.
[332] FOUCHARD ET AL., *supra* note 48, at 225.
[333] *Id.*
[334] *Id.*
[335] *Id.* at 228.

Therefore, application of the law of the closest connection to determine who is bound by the arbitration agreement leads to inconsistency and uncertainty, which does not fit with the nature of international disputes. The next approach applied in this respect is the validation approach with its distinctive character of increasing the possibilities of upholding the validity of the arbitration agreement.

1.5. Validation Principle Approach

1.5.1. Support for the Validation Principle Approach.

The validation principle considers the substantive validity of the arbitration agreement under different laws, and the arbitration agreement is valid if it meets the requirements of any of these laws. In practice, many arbitral tribunals apply the validation principle to uphold the validity of the arbitration agreement.[336] When a number of potentially applicable national laws exist that will lead to different results regarding the validity or existence of the arbitration agreement, the tribunal applies the one that gives effect to the arbitration agreement.[337] The main purpose of the validation principle is to establish a pro-arbitration policy by giving arbitration agreements more opportunities to be deemed valid rather than making such validity subject to one national law.[338]

The Swiss Private International Law Act provides for the validation principle in Article 178(2) noting, "as regards its substance, an arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or the law governing the subject-matter of the dispute, in particular, the law governing the main contract, or it conforms to Swiss law."[339] Article 178

[336] *See* BORN, *supra* note 2, at 546 n.389.
[337] *Id.*
[338] BLACKABY ET AL., *supra* note 77, at 165.
[339] Swiss Arbitration Act, *supra* note 85, art. 178(2); Voser, *supra* note 60, at 162; *see also* FOUCHARD ET AL., *supra* note 48, at 238 (stating that the Algerian law has adopted the same approach, as Article 458 bis

gives priority to the validity of the arbitration agreement over party autonomy since the arbitration agreement is considered valid even if it is invalid according to the law chosen by the parties, provided that such agreement conforms with the law of the main contract or Swiss law.[340] In other words, the provision only gives effect to party autonomy if it leads to the validity of the arbitration agreement; if it invalidates the agreement then the principle is disregarded.[341] The validation principle is, in fact, consistent with the parties' intention since it increases the possibility of upholding the arbitration agreement the parties formed instead of disregarding this intention due to the lack of some formalities in the applied national law.[342]

1.5.2. Criticism of the Validation Principle Approach

Despite the pro-arbitration policy of the validation principle by increasing the chances of upholding the validity of the arbitration agreement, it does not avoid the problems associated with the other traditional approaches. The validation principle still applies a national law and the same problem of national laws inadequately determining who is bound by the arbitration agreement is encountered when applying the validation principle. Another approach that involves the application of various laws is the cumulative approach, discussed in the following section.

1.6. The Cumulative Approach

1.6.1. Support for the Cumulative Approach

Under the cumulative approach, arbitrators apply different potentially applicable laws to ensure that the result is the same if any of these laws are applied.[343] Using the cumulative approach, after the arbitral tribunal determines the applicable law to the validity of the arbitration

1, paragraph 3 of the Code of Civil Procedure has an identical provision); *see also* Blessing, *supra* note 12, at 170 (stating that the WIPO Arbitration Rules of 1994 was inspired by the Swiss law on this issue).
[340] Hook, *supra* note 9, at 183.
[341] *Id.*
[342] BLACKABY ET AL., *supra* note 77, at 165.
[343] BORN, *supra* note 2, at 523.

agreement, it consults other potentially applicable laws to ensure that the agreement is valid under these laws as well. The objective of the cumulative approach is verification that the award is enforceable in different relevant jurisdictions decreasing the possibility of annulment or enforcement refusal.

In addition, arbitrators may resort to the cumulative approach regarding the application of conflict of laws rules.[344] The arbitral tribunal considers all potentially applicable conflict of laws rules to determine the appropriate law for the arbitration agreement.[345] The rationale behind this approach is to avoid outdated approaches by some conflict of laws rules that were not foreseeable by the parties when concluding the contract.[346]

This approach aligns with Article 42 of the ICC Arbitration Rules,[347] which requires arbitral tribunals to make every effort to ensure the award is enforceable.[348] For example, in ICC Case No. 5485,[349] the parties entered into a joint venture agreement, but a dispute arose regarding the dividend distribution.[350] The claimant requested ICC arbitration according to the arbitration clause in the contract.[351] The defendant contested the jurisdiction of the arbitral tribunal based on the allegation that the arbitration agreement was null and void under Spanish law — the law of the contract.[352] The arbitral tribunal asserted its authority to decide on jurisdiction based upon the competence-competence principle.[353] In addition, the tribunal noted that the law governing the arbitration agreement could be different from the law governing the

[344] *See* Petsche, *supra* note 7, at 480 nn.115, 117, 118.
[345] *Id.*
[346] *Id.*
[347] ICC Rules, *supra* note 158, art. 42.
[348] LEW, MISTELIS & KRÖLL, *supra* note 164, at 125.
[349] Case No. 5485 of 1987, 14 Y.B. COM. ARB. 156 (ICC Int'l Ct. Arb.).
[350] *Id.* at 156.
[351] *Id.* at 156-57.
[352] *Id.* at 157.
[353] *Id.* at 159.

main contract according to the separability principle, which is considered a general principle of international commercial arbitration.[354] The arbitral tribunal found that the arbitration agreement was expressly governed by the ICC Arbitration Rules in the contract and, according to these rules, the arbitration agreement was valid.[355] In applying the cumulative approach for consistency with Article 26 of the ICC Arbitration Rules, which provides for the effort of the arbitral tribunal to make sure that the award is enforceable, the arbitral tribunal re-examined the validity of the arbitration agreement under the other involved laws: French law (the law of the seat) and Spanish law (the law of the main contract).[356] The tribunal held that the arbitration agreement was valid under both French law and Spanish law, indicating that the provision the defendant used to contest jurisdiction was only applicable to domestic arbitration, not international arbitration.[357]

1.6.2. Criticism of the Cumulative Approach

The cumulative approach is only helpful when the potentially applicable laws lead to the same result or all the concerned conflict of laws rules are identical and refer to the same applicable law.[358] However, no answer exists when the results are different or when the conflict rules of different legal systems point to different applicable laws. In such cases, the arbitral tribunal will go back to the same point from which it started and it has to pick one applicable law among the different options available.[359]

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[354] *Id.* at 160.
[355] *Id.* at 161-62.
[356] *Id.* at 162.
[357] *Id.*; *see also supra* note 311 discussing Case No. 14144 of 2006, at 77 (applying the cumulative approach by deciding the validity of the arbitration agreement under the Swiss law and checking such validity according to the Brazilian law as well).
[358] Petsche, *supra* note 7, at 480.
[359] BORN, *supra* note 2, at 524.

2. Overall Evaluation of the Traditional Approach

The core problem with the traditional approach is, primarily, the irrelevance and inadequacy of national laws which are more suitable to domestic disputes than international ones. This inadequacy is clear regarding determining the scope of the arbitration agreement as national laws put a lot of restrictions to effectuate the extension and that is analyzed through the extension based on contract law theories. Therefore, the application of the traditional approach to determine who is bound by the arbitration agreement leads to unpredictability, uncertainty, and inefficiency. Moreover, national laws are often unable to "keep pace with the development and fast evolution as well as the high degree of specialization of international commerce,"[360] especially as amendment of such laws must undergo a lot of formalities.[361]

Parties mainly opt for arbitration to escape the complications of national laws where the conflict of laws rules are integrated; it is unreasonable to imitate the same system with arbitration agreements by applying the traditional approach to determine the existence and validity of arbitration agreements. In other words, in international disputes, parties from different countries with different legal backgrounds opt for arbitration as an international dispute resolution mechanism conducted in a neutral country.[362] Therefore, the contemplation and implied consent of the parties, most likely, is to apply transnational law to their arbitration agreement, not a national one.[363]

The deficiencies of the traditional approaches and the need for more transnational efforts is best expressed as "from science to art,"[364] which means the need to move from application of purely academic theories to more practical approaches by honoring the parties "fair and

[360] Petsche, *supra* note 7, at 470.
[361] *Id.* at 474.
[362] Bachand, *supra* note 7, at 393.
[363] *Id.*
[364] Blessing, *supra* note 12, at 171-72.

reasonable expectations," which are the cornerstone of international arbitration.[365] Applying traditional choice of law methods to determine who is bound by an arbitration agreement without adopting some flexibility based on the circumstances surrounding the contract is like a doctor prescribing a drug without considering factors such as the patient's age, allergies, and medical problems; both approaches lead to inaccurate conclusions.[366] Therefore,

> since the strictly academic approach, which favors a traditional conflict of laws analysis, has produced unsatisfactory answers and results, international arbitrators should indeed go back to the parties and take the most determinative guidance from the intentions which the parties have expressed (either explicitly or implicitly and by their behavior), taking into account their fair and reasonable expectations and the kind of usage which may exist between them.[367]

Evidence of the unnecessity of such complicated choice of law methods for the existence, validity, and scope of arbitration agreements is found in the positions of leading authorities in the field of international arbitration — international conventions, arbitration acts, and arbitral institutions. Most of these authorities do not explicitly encourage application of such traditional choice of law approaches.[368] However, these authorities impliedly paved the way for potentially applying a more flexible and predictable approach based upon "the parties' intentions and expectations,"[369] by giving arbitrators discretion in this respect. A variety of arbitral awards have applied the general principles of international law to determine the validity and existence of the arbitration agreement instead of applying a specific national law.[370] Therefore, the development and adoption of the proposed approach is conceivable, practical, and credible.

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[365] *Id.*
[366] *Id.* at 188.
[367] Berger, *supra* note 204, at 309-10.
[368] BORN, *supra* note 2, at 492.
[369] *Id.*
[370] *Id.* at 524 n.257; *see also* discussion *infra* Chapter 3.

3. The Proposed Approach of a Unified Set of Rules to Determine Non-Signatory Issues in International Commercial Arbitration

3.1. What is the Proposed Approach?

The proposed approach provides a unified set of rules — as a guideline — to be applied by arbitral tribunals when considering extending the arbitration agreement to non-signatories based on contract law theories without any recourse to national laws. This unified approach is needed now more than ever because of the current expansion of multiparty disputes and the increasingly complex transactions in the context of international commercial arbitration. These proposed unified rules are derived from common principles adopted by contract laws and arbitration acts in different jurisdictions, prevailing institutional rules, and case law. This comparative study sheds light on which jurisdictions are better at handling issues of extension for an arbitration agreement. Of course, unanimity among different jurisdictions regarding a specific rule is not required to draft proposed rules; the formation of transnational rules considers what is generally accepted internationally, not what is unanimously accepted.[371]

The complexity of the conflict of laws rules and the inadequacy of national laws applied to international arbitration in general — and to issues of non-signatories specifically — are the main motives for the proposed unified rules. Examination of the cases of the extension based upon contract law theories demonstrates inadequacy, especially in terms of the technicalities and domestic nature of some of the requirements needed to extend the arbitration agreement to non-signatories.[372] Such technicalities and formalities disturb the expectations of international parties. Releasing the structure and effect of the arbitration agreement from the domain of national laws

[371] Gaillard, *supra* note 207, at 588.
[372] *See* discussion *infra* Chapters 4, 5, and 6.

is the minimum requirement necessary to achieve effectiveness in international arbitration.[373] In practice, "courts, arbitrators and parties today recognize that the arbitration clause is governed by the common intent of the parties, general principles, and usages of international business."[374] The transnational approach "has the merit of emphasizing the independence of international arbitration from the shackles of national laws, too few of which are equipped to address anything but domestic issues."[375]

In practice, third-party issues have been determined before based on transnational rules by both arbitral tribunals and national courts,[376] which enhance the applicability of the proposed approach. The famous *Dow Chemical* case is considered a turning point as the arbitral tribunal extended the arbitration agreement based on a transnational concept — the group of companies doctrine.[377] Moreover, in the realm of national law, the *Dalico* case expressly concluded that the validity of the arbitration agreement was determined based on the common intention of the parties without any reference to national laws.[378] In *Dalico*, the arbitral tribunal applied substantive transnational rules to decide on the validity issue of the arbitration agreement instead of considering the law of the seat, the law of the main contract, or any other national law.[379] The French courts affirmed the award of the arbitral tribunal.[380]

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[373] Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration?*, *in* ARBITRATION INSIGHTS: TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION 455, 456 (Julian D. M. Lew et al. eds., 2007).
[374] Lew, *supra* note 6, at 123.
[375] FOUCHARD ET AL., *supra* note 48, at 236.
[376] Blessing, *supra* note 12, at 178.
[377] *Id.*
[378] *Id.*
[379] Gaillard, *supra* note 207, at 580.
[380] *Id.*

Providing the proposed approach as a set of rules will override the most common problem often attributed to the application of anational rules which is vagueness.[381] In addition, the proposed approach adopts more flexible rules to effectuate the extension to allow joining parties who have impliedly consented to arbitration, without being constrained by the restricted conditions and requirements of national laws. Emphasis in the proposed set of rules is on the usage of international trade, the parties' common intention represented in the circumstances surrounding the case, and the principles of good faith.

3.2. Different Angles of the Proposed Approach's Triangle and How They Have Been Applied Previously by Arbitral Tribunals

The triangular nature of the proposed approach incorporates the following: the trade usage, the factual circumstances, and the good faith principle. These factors are reflected in the formulation of the proposed set of rules. Each angle is analyzed and assessed focusing on its presence in previous cases and how arbitrators rely on it to extend arbitration agreements to non-signatories.

3.2.1. Trade Usage

The first angle of the proposed approach relies on trade usage, which has a considerable role in assessing the position of non-signatories. Under this angle, arbitrators will have significant discretionary powers to extend the arbitration agreement to a non-signatory if trade usage justifies such extension. Trade usage includes principles that are well-known to people in a particular commercial sector; they develop over time by practice to the extent that they are applied automatically without the need to be written or referenced in a contract.[382] According to Article 1.8 of the International Institute for the Unification of Private Law (UNIDROIT)

[381] Hook, *supra* note 9, at 178.
[382] Vanessa L.D. Wilkinson, *The New Lex Mercatoria*, 12 J. INT'L ARB. 103, 110 (1995).

Principles of International Commercial Contracts,

> (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
> (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such usage would be unreasonable.[383]

The importance attached to trade usage concerning non-signatory issues stems from its reliability in assessing the status of the parties without the technical requirements of national laws. According to the proposed rules, an extension to a non-signatory could occur based on trade usage, however, the potentially applicable law could prevent extension because a certain requirement is missing. In other words, trade usage truly reflects the reality of the situation and what the parties legitimately expect. These legitimate expectations need to be protected in international disputes as parties are from different jurisdictions and are not necessarily aware of the contract law provisions in other national laws. Arbitral tribunals should try to respect such expectations as much as they possibly can.[384]

Reliance on the trade usage is permissible by different institutional rules and arbitration acts.[385] For example, under Article 33(3) of the UNCITRAL Rules, "[i]n all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."[386] In the same context, Article 21(2) of the Egyptian Arbitration Act provides that "[t]he arbitral tribunal, when adjudicating the merits of

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[383] INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, art. 1.8 (2010), https://cisgw3.law.pace.edu/cisg/principles.html.
[384] Petsche, *supra* note 7, at 484; *see, e.g.*, Case No. 5103 of 1988, 1 ICC Disp. Resol. Bull. No. 2, 25 (1990) (ICC Int'l Ct. Arb.) (applying common principles between French law and Tunisian law along with trade usage to protect the legitimate expectations of the European claimants and Tunisian respondents as the parties conferred on the tribunal the power to act as *amiable compositeur*).
[385] Aksen Gerald, *The Law Applicable in International Arbitration – Relevance of Reference to Trade Usages*, *in* PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 471, 473 (A.J. van den Berg, T.M.C. Asser Instituut & International Council for Commercial Arbitration eds., 1996).
[386] U.N. Commm'n on Int'l Trade Law, UNCITRAL Arbitration Rules, G.A. Res. 31/98 (Dec. 15, 1976), https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf [hereinafter UNCITRAL Arbitration Rules].

the dispute, shall decide in accordance with the terms of the contract in dispute and the usages of the trade applicable to the transaction."[387] These provisions demonstrate that trade usage has been on the same footing with the provisions of the contract by providing for its application in all instances.[388] Many arbitral awards have generally relied on the trade usage through the application of *Lex Mercatoria* in the context of international commercial arbitration.[389] In fact, the application of trade usage is closely connected to the factual circumstances of the case since such circumstances are the factors that complete the image of the dispute and indicate whether trade usage is applicable in this case or not. Therefore, the factual circumstances of each case are analyzed as follows.

3.2.2. Factual Circumstances of the Case

The factual circumstances of each case play an important role in determining who is bound by the arbitration agreement; in the proposed approach, discretionary powers are conferred on arbitrators to bind a non-signatory based on the circumstances surrounding the contract. The relevance of factual circumstances clearly appears where involvement of a non-signatory in the contract does not suffice to make the non-signatory a party under the national law applied, despite recognition that the circumstances should make the non-signatory a party to the contract and to the arbitration agreement. As "[t]he existence of an intention to be bound to an arbitration agreement is demonstrated without reference to a particular law; it is a matter of

[387] Egyptian Arbitration Act, *supra* note 86, art. 21(2).
[388] *See* ICC Rules, *supra* note 158, art. 21(2); American Arbitration Association Rules, art. 29(2), https://www.adr.org (last visited Mar. 9, 2019); UNCITRAL Model Law, *supra* note 84, art. 28(4); European Convention, *supra* note 162, art. VII.
[389] *See* discussion *infra* Chapter 3.

facts and evidence, not of law,"[390] the proposed approach provides factual circumstances considerable weight when deciding who is bound by the arbitration agreement.

The factual circumstances that should be analyzed to determine who is bound by the arbitration agreement pertain to the all stages of the contract: negotiation, performance, and termination. In addition, the nature of the contract and the status of the contracting parties should be considered. The UNIDROIT Principles of International Commercial Contracts have referred to the circumstances surrounding the case in Article 4.3, noting that

> [i]n applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including (a) preliminary negotiations between the parties; (b) practices which the parties have established between themselves; (c) the conduct of the parties subsequent to the conclusion of the contract; (d) the nature and purpose of the contract; (e) the meaning commonly given to terms and expressions in the trade concerned; (f) usages.[391]

Factual circumstances play an important role in many arbitral awards when the question of who is bound by the arbitration agreement arises. Such an important role is clear through analyzing the group of companies doctrine where determination of the circumstances surrounding the contract is an essential step in deciding whether to extend the arbitration agreement to non-signatories or not.[392] Of course, all factual circumstances should be interpreted according to the good faith principles, which constitute the third angle of the proposed approach.

3.2.3. Good Faith Principles

Good faith principles are important in the execution and interpretation of contracts. Article 1.7 of the UNIDROIT Principles of International Commercial Contracts provides that "(1) Each party must act in accordance with good faith and fair dealing in international trade. (2)

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[390] Rimantas Daujotas, *Non-Signatories and Abuse of Corporate Structure in International Commercial Arbitration*, 1, 9-10 (Queen Mary Univ. London, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2148900.
[391] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 383, art. 4.3.
[392] *See* discussion *infra* note 426.

The parties may not exclude or limit this duty."[393] Good faith plays a significant role in assessing the situation of non-signatories and determining whether to extend the arbitration agreement to non-signatories or not.

In practice, tribunals rely on good faith principle to extend the arbitration agreement, therefore, incorporating the good faith principles along with a set of flexible rules reinforces the proposed approach. An example of applying good faith principles to determine the validity of the arbitration agreement is found in ICC Case No. 17146.[394] In this case, the arbitral tribunal held that the existence, validity, and scope of the arbitration agreement were governed by transnational rules and trade usage where the good faith principles were an integrated part.[395] The tribunal provided that, according to the good faith principles, interpretation of the contract should not be restricted to the literal words of the agreement but should be based on the interpretation of the real intention of the parties.[396] Precisely,

> [f]irst, the intention of the parties must be examined in the context, that is to say, by taking into account the consequences which the parties reasonably and legitimately envisaged. Second, the attitude of the parties after the signature of the contract and up until the time when the dispute arose should be taken into account, as that attitude will indicate how the parties themselves actually perceived the agreement in dispute.[397]

Another example of applying the good faith principles is found in ICC Case No. 5730, in which the tribunal extended the arbitration agreement to the non-signatory parent company because of its manipulation, considering the subsidiary company a mere agent of the parent company.[398] In other words, the tribunal extended the arbitration agreement because of the fraudulent behavior of a non-signatory, which contradicts the good faith obligation.

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[393] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 383, art. 1.7.
[394] Case No. 17146 of 2013, ICC Disp. Resol. Bull. No. 1, 114 (2015) (ICC Int'l Ct. Arb.).
[395] *Id.*
[396] *Id.*
[397] *Id.*
[398] Daujotas, *supra* note 390, at 19.

4. Common Characteristics Between the Group of Companies Doctrine and the Proposed Approach

The proposed approach shares some similarities with the group of companies doctrine, a product of the modern increase in international commerce. International business is becoming more complex and advanced, leading many companies to form a parent company with several subsidiaries and affiliates, which constitutes a group of companies.[399] In a typical multinational group of companies, each company has its own legal personality, despite close connections and relations among the group.[400] This form of business is advantageous for its efficiency in both management and taxation,[401] and also enhances the growth and sustainability of the companies.[402] However, such a complicated network of companies can also be used as a tool to allocate risks and escape contractual obligations — especially the arbitration clause[403] — as most national laws offer limited liability for members of the group and separate corporate personality for each company.[404] However, under the group of companies doctrine, the non-signatory company in the group could be brought as a party to the arbitration because of its actual involvement in the negotiation, conclusion, and termination of the contract. There are many reasons to seek extension of the arbitration agreement to the non-signatory company, such as the insolvency of the contracting company.[405] Notably, the group of companies could also be used when a non-signatory company seeks to join the arbitration as a claimant — as was the situation

[399] STAVROS L. BREKOULAKIS, THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION 151 (2010).
[400] *Id.*
[401] *Id.*
[402] Daujotas, *supra* note 390, at 1.
[403] *Id.* at 2.
[404] BREKOULAKIS, *supra* note 399, at 151.
[405] HANOTIAU, *supra* note 39, at 52.

in the *Dow Chemical* case. The group of companies doctrine is, essentially, "a legal theory . . . to enjoin a non-signatory party to arbitration."[406]

4.1. Development of the Group of Companies Doctrine

ICC arbitration, specifically the Dow Chemical case, served as the starting point for the group of companies doctrine,[407] despite the fact that the ICC Arbitration Rules did not have any provisions addressing this issue.[408] In *Dow Chemical*,[409] two distribution agreements were signed in France, both with an arbitration clause under ICC Arbitration Rules; the first agreement was signed by Dow Chemical Venezuela (later assigned to Dow Chemical A.G.) and Boussois-Isolation (later assigned to Isover Saint Gobain).[410] The second one was signed by Dow Chemical Europe and Boussois-Isolation (later assigned to Isover Saint Gobain).[411] Dow Chemical A.G was a subsidiary of Dow Chemical USA and Dow Chemical Europe was a subsidiary of Dow Chemical A.G.[412] When the dispute arose, Dow Chemical Europe and Dow Chemical A.G. started arbitration proceedings, alongside Dow Chemical USA and Dow Chemical France, against Isover Saint Gobain.[413] The defendant, Isover Saint Gobain, objected to the jurisdiction of the tribunal regarding the latter two companies since they were not parties to the contracts with the arbitration agreements.[414]

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[406] Alexandre Meyniel, *That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts with Respect to the Group of Companies Doctrine*, 3 ARB. BRIEF 18, 20 (2013), http://digitalcommons.wcl.american.edu/ab/vol3/iss1/3.
[407] STEINGRUBER, *supra* note 38, at 153.
[408] David Foxton, Arbitration and Third Parties: Some Recent Developments at Seoul IDRC 4 (July 29, 2014), http://www.sidrc.org/lib/download.php?file_name=Arbitration and third parties Korea talk.pdf&save_file=a_201409111157271.pdf&meta=free.
[409] Case No. 4131 of 1982, at 131.
[410] *Id.* at 132.
[411] *Id.*
[412] *Id.*
[413] *Id.* at 133.
[414] *Id.*

The arbitral tribunal extended the arbitration agreement to the non-signatory companies for two reasons.[415] First, the same economic reality existed among the companies in the group, which was apparent from the absolute control that the parent company had over its subsidiaries.[416] Second, the active involvement of the non-signatory companies in the contract at all three stages — negotiation, performance, and termination — supported the extension.[417] Finally, the common intention among the signatories and non-signatories as parties to the contract was apparent as no importance was attached to the company within the Dow Chemical group that signed the contract.[418] In other words, the tribunal considered the non-signatory companies *de facto* parties to the contract subject to the arbitration agreement.[419]

In reaching its decision to extend the contract to non-signatories, the arbitral tribunal did not apply French law, despite the fact that French law was chosen by the parties to govern the main contract.[420] The tribunal justified its choice by noting that the parties were bound by the ICC Arbitration Rules, which gave the arbitrators the right to rule on their own jurisdiction without the reference to any national law.[421] As the scope of the arbitration agreement is considered one aspect of the arbitrators' jurisdiction, they were not obliged to apply French law

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[415] *Id.* at 136.
[416] *Id.*
[417] *Id.* at 134; *see also id.* at 135 (finding such involvement in the contract apparent as first, Dow Chemical France had done all the distributions and second, there was no special license agreement between Isover Saint Gobain and Dow Chemical USA, which obtained the trademark essential for exercising the distribution activities).
[418] *Id.* at 134-135.
[419] Richard Bamforth et al., *Joining Non-signatories to an Arbitration: Recent Developments*, 3 IN-HOUSE PERSP. 17, 20 (2007); *see also* Philippe Pinsolle, *A French View on the Application of the Arbitration Agreement to Non-signatories*, *in* THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 209, 215 (Stavros L. Brekoulakis, Julian D. M. Lew & Loukas A. Mistelis eds., 2016) (providing examples of the application of the group of companies doctrine).
[420] Case No. 4131 of 1982, at 134; *accord* Serge Gravel & Patricia Peterson, *French Law and Arbitration Clauses – Distinguishing Scope from Validity: Comment on ICC Case No. 6519 Final Award*, 37 MCGILL L.J. 510, 518 (1991) (stating that in spite of not applying the French law, the tribunal only asserted that its decision was not in conflict with the international public policy; the requirement which is imposed by French law).
[421] Case No. 4131 of 1982, at 134.

to determine who was bound by the arbitration agreement.[422] The tribunal also justified its actions on the principle of separability and the subsequent autonomy of the arbitration agreement from the main contract.[423] The autonomy of the arbitration agreement includes its scope, so the law governing the main contract does not necessarily govern the scope of the arbitration agreement.[424] The tribunal looked at the common intention of the parties derived from the circumstances surrounding the contract, its conclusion, performance, and termination considering the usage of international trade.[425]

4.2. Conditions and Requirements Essential for the Application of the Doctrine

The key factor in the group of companies doctrine is the existence of the group; however, such factor is not *per se* sufficient to extend the arbitration agreements to non-signatory members.[426] Principal requirements for the extension to take place according to the group of companies doctrine include the existence of a tight group structure, the active role of the non-signatory in the conclusion, performance, and/or termination of the contract, and the common intention of the parties to arbitrate.

4.2.1. Existence of a Tight Group Structure

The mere fact that the company is a member of the group of companies does not directly bind it to an arbitration clause signed by another member in the group; however, a tight group structure may justify such extension.[427] Many circumstances exist for the tribunal to infer the existence of a tight group structure such as a high level of control the parent company exerts over

[422] *Id.* at 133; *accord* Gravel & Peterson, *supra* note 420, at 517.
[423] Case No. 4131 of 1982, at 133.
[424] *Id.*; *accord* Gravel & Peterson, *supra* note 420, at 517.
[425] Gravel & Peterson, *supra* note 420, at 517.
[426] Meyniel, *supra* note 406, at 45.
[427] BREKOULAKIS, *supra* note 399, at 154.

its subsidiaries.[428] In addition, the so-called "single economic reality" is strong evidence to satisfy the tight group structure condition.[429] This economic reality could be inferred, for example, from the flow of money between different companies in the group to support each other.[430] Concisely, "the signatory and non-signatory have to be members of the same corporate group and also have strong administrative, executive, and/or financial links for the doctrine to apply."[431]

4.2.2. Active Role of the Non-Signatory Company in the Negotiation, Performance, or Termination of the Contract Containing the Arbitration Clause

The second condition for the group of companies doctrine is that the non-signatory company should actively participate in the negotiation, performance, and/or termination of the contract containing the arbitration clause.[432] Arbitral tribunals have great discretionary powers in assessing such involvement at any stage of the contract.[433] Some tribunals give great weight to involvement at the early stages of the contract's negotiations where parties set expectations and draw the full image of the agreement.[434] Involvement in the performance stage, when isolated

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[428] *Id.* at 155.
[429] *Id.*
[430] *Id.* (stating that sharing the same intellectual property rights, the common financial assets, and the same human resources are other strong indicators for the existence of a tight group structure).
[431] *Id.*
[432] *Id.* at 156 (stating that the actual involvement in the contract without signing it happens a lot in practice, especially in the multinational companies, as it is common to designate a specific company in the group to sign a contract, and other company or companies in the group to negotiate and perform the contract); *see also* HANOTIAU, *supra* note 39, at 98 (noting that it may happen also that only one company in the group signed the contract and all the concerned companies in the group have participated and executed the contract's rights and obligations which is called a total confusion and it also justifies the application of the group of companies doctrine).
[433] *See also* Bernard Hanotiau, *Multiple Parties and Multiple Contracts in International Arbitration*, *in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 49 (R. Doak Bishop et al. eds., 2009) (stating that the actual involvement should be proved by the party seeking the extension whether he is the signatory or the non-signatory party).
[434] *See* Park, *supra* note 40, at 104 (stating that it shouldn't be acceptable from the dominant party to renege on its agreement, especially when reliance was induced by such negotiations as such involvement

from involvement in the negotiation or conclusion stages, may receive less weight in extending the arbitration agreement to non-signatories.[435] This appears most clearly in complex contracts, such as construction agreements, because these kinds of contracts involve significant cooperation between different parties and participation of the parent company at some point in the concerned project does not automatically demonstrate that the parent should be bound by the contract.[436] Involvement in the termination of the contract also may lead to the extension of the arbitration agreement.[437] However, a distinction exists between active involvement in the termination of the contract and mere procedural involvement.[438] For example, when the parent company helps one of its subsidiaries resolve its dispute over a specific contract, this does not directly entail the extension of the arbitration agreement to the parent.[439]

4.2.3. Common Intention of the Parties to Arbitrate

Determining common intention to arbitrate is a prerequisite to extend the arbitration agreement to non-signatories in the group since the core of arbitration is consent.[440] Generally speaking, the existence of common intent is analyzed according to good faith principles.[441] For example, such intention could be inferred from the behavior of the non-signatory company when it legitimately led the other contracting party to believe that the non-signatory would be bound

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in the negotiation stage is influential and decisive in the intention to be bound by the arbitration agreement).

[435] Hanotiau, *supra* note 433, at 22.

[436] BREKOULAKIS, *supra* note 399, at 160.

[437] *Id.*

[438] *Id.*

[439] *Id.*

[440] *Id.* at 162; *see also* Park, *supra* note 40, at 86 (noting that such common intention could be inferred from the implied consent and/or from the conduct); *see also* STEINGRUBER, *supra* note 38, at 151 (stating that the status of the non-signatory depends on the tacit acceptance instead of the written document of the agreement).

[441] BREKOULAKIS, *supra* note 399, at 152.

by the contract despite not signing.[442] In other words, the contracting parties did not attach great importance to which member signed the contract because the intent was to deal with all units of the group regardless of the contract.[443] In such cases, the tribunal will likely extend the arbitration agreement to this non-signatory member of the group provided that the other conditions are satisfied.[444]

4.3. The Extent of Applying the Group of Companies Doctrine in Different Jurisdictions

Despite the popularity of the group of companies doctrine and the French courts' reliance on it as an efficient doctrine with its own distinctive character, many jurisdictions refuse to apply the doctrine.[445] These jurisdictions argue that the different contractual theories suffice to determine and justify the extension without any need for the group of companies doctrine.[446] This view considers the group of companies doctrine a shortcut to avoid the legal reasoning.[447] According to this view, close reading of the ICC awards indicates that the extension is more attached to consent than the economic reality of the group of companies,[448] suggesting that the group of companies doctrine is irrelevant and has no role to play on its own.[449] This was the position of English courts[450] Swiss courts,[451] and others.[452] U.S. courts also refuse to apply the

[442] Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?*, 26 J. INT'L ARB. 647, 648 (2009).
[443] *Id.*
[444] *Id.*
[445] *Id.*
[446] *Id.*
[447] Bernard Hanotiau, *Consent to Arbitration: Do We Share a Common Vision?*, 27 ARB. INT'L 539, 539 (2011).
[448] Meyniel, *supra* note 406, at 28.
[449] *Id.* at 32.
[450] STEINGRUBER, *supra* note 38, at 156 (stating that the English courts consider the group of companies doctrine inconsistent with the privity of contracts and corporate veil doctrines); *see also* Bamforth et al, *supra* note 419, at 21 (suggesting that any award rendered by the application of the group of companies doctrine would not be enforceable in English courts, whether it was in favor or against non-signatory company or if the award was domestic or foreign, as the refusal in the domestic case will rely upon

group of companies doctrine despite being generally flexible in extending the arbitration agreement to non-signatories to avoid duplication of the proceedings and to achieve equity.[453]

The Egyptian Court of Cassation applies the group of companies doctrine as long as actual involvement in the performance of the contract by the non-signatory company is evident.[454] For example, in *Khatib Petroleum Service International Co. v. Care Construction Co. and Care Service Co.*,[455] the court recognized the possibility of applying the doctrine despite its ultimate refusal to extend the arbitration agreement to the non-signatory parent company in this particular case.[456] The court stated that,

> [a]rbitration agreements are of relative effect, and may not be invoked except against the parties who have consented thereto. Therefore, the mere fact that one of the parties to the arbitration proceedings is a company member of a corporate group, in which a parent company holds in the capital of its member entities, is not by itself sufficient basis to hold the parent company bound by the contracts concluded by other companies of the group, and which may contain arbitration clauses; unless evidence is submitted that the parent company was involved in the performance of these contracts, or has caused by its

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section 66 of the English Arbitration Act, and in the foreign one will rely upon section 100 of the same act).

[451] *See* Tobias Zuberbuhler, *Non-Signatories and the Consensus to Arbitrate*, 26 ASA BULL. 18, 41 (2008) (providing an example of the conservative view of the doctrine where a court refused to extend the arbitration agreement to the parent company because the contracting party knew that the deal was only with the signatory company and the role of the parent company was only about the normal involvement in the performance as the main contractor. In addition, there are many cases in which tribunals provided expressly that the group of companies doctrine is non-existent in Swiss law). *But see* Stephan Wilske et al., *The Group of Companies' Doctrine – Where is it Heading?*, 17 AM. REV. INT'L ARB. 73, 79 (2006) (noting that the Swiss Federal Supreme Court showed some sympathy in 2003 toward the group of companies doctrine by upholding an award by an arbitral tribunal to extend the arbitration agreement to a non-signatory controlling shareholder as the arbitral tribunal provided that the shareholder participated, actively, in the negotiation, performance, and termination of the contract).

[452] *See* Hanotiau, *supra* note 447, at 549 (stating that the German courts refuse to apply the doctrine).

[453] *See id.* at 553; *see also* Meyniel, *supra* note 406, at 21 (stating that the U.S. courts have continuously refused to apply the group of companies doctrine; they assert that the principles of contract, corporate and agency law are sufficient to achieve the sought extension).

[454] Karim Abou Youssef, *The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration*, *in* ARBITRATION: THE NEXT FIFTY YEARS 103, 117 (A.J. van den Berg ed., 2012).

[455] *Id.* (examining the outcome of Mahkamat al-Naqd [Court of Cassation], Challenge No. 4729, session of June 22, 2004).

[456] *Id.*

> conduct, confusion as to the identity of the member of the corporate group contracting with the third party, in such a way that it has become difficult to distinguish the wills of the companies involved.[457]

The Egyptian court adopted a more flexible approach than the French court considering actual involvement sufficient to bind the non-signatory company by the arbitration agreement without any reference to common intention to arbitrate as was emphasized in Dow Chemical.[458] Therefore, the Egyptian Court of Cassation considered the existence of only two conditions, not three, sufficient to extend the arbitration agreement to another non-signatory company in the group. Based on that, the Egyptian Court of Cassation demonstrated more flexibility than the French courts in applying the group of companies doctrine.

4.4. Distinction Between the Group of Companies Doctrine and the Proposed Approach

The main similarity between the group of companies doctrine and the proposed approach is that both prioritize the same principle: issues of the scope and effect of the arbitration agreement are governed by transnational rules and not subject to any national law. As the court noted in *Dow Chemical*,[459]

> [c]onsidering that the tribunal shall, accordingly, determine the scope and effects of the arbitration clauses in question, and thereby reach its decision regarding jurisdiction, by reference to the common intent of the parties to these proceedings, such as it appears from the circumstances that surround the conclusion and characterize the performance and later the termination of the contracts in which they appear. In doing so, the tribunal, following, in particular, French caselaw relating to international arbitration should also take into account, usages conforming to the needs of international commerce, in particular, in the presence of a group of companies.[460]

This is the same concept as the proposed approach, however, the proposed approach applies to contract law theories. The key reason for the application of the two approaches is the

[457] *Id.*
[458] *Id.*
[459] Case No. 4131 of 1982, at 134.
[460] *Id.*

inadequacy of national laws to be determine who is bound by the arbitration agreement in international disputes. First, most national laws protect the separate legal personality of individual companies in the group and also support the limited liability principle.[461] This makes it difficult to reach the non-signatory company and bind it to the arbitration agreement,[462] which negatively affects the discretionary powers of the arbitral tribunal in ascertaining the common intention of the parties to bind the non-signatory company.[463] Second, as previously noted, the peculiarities and technicalities of national laws do not fit to control who is bound by the arbitration agreement in international disputes.

In addition, significant reliance on factual circumstances in the group of companies is similar to their role in the proposed approach. The factual circumstances are represented in the three conditions required to apply the group of companies doctrine. The first condition — the tight group structure — is inferred from surrounding circumstances such as the high level of control the parent exerts over its subsidiaries that may affect the status of the subsidiary (for example, leading to its insolvency),[464] or when the parent company is acting on its own behalf as well as on behalf of its subsidiaries and affiliates.[465] The second condition — the active role of the non-signatory company in the negotiation, performance, and/or termination of the contract containing the arbitration clause — depends upon analysis of the circumstances surrounding the contract. The last condition is the common intentions of the parties to arbitrate, inferred from either implied consent or conduct, both of which are assessed based on the factual circumstances surrounding the contract. The proposed approach dedicates the same weight to factual circumstances, which constitute one of its three main angles. Reliance on factual circumstances

[461] BREKOULAKIS, *supra* note 399, at 151.
[462] *Id.*
[463] Foxton, *supra* note 408.
[464] BREKOULAKIS, *supra* note 399, at 155.
[465] Ferrario, *supra* note 442, at 652.

increases flexibility to extend the arbitration agreement instead of the considerable weight the traditional approach gives to the conditions required by national laws to extend the arbitration agreement, which upstage the factual situation.

Finally, good faith plays an important role in both the proposed approach and the group of companies doctrine. The good faith principle's role in the group of companies doctrine is apparent when determining whether the common intention of the parties considered the non-signatory a party to the arbitration agreement. For example, good faith is applied when the conduct of the non-signatory induced the signatory to legitimately believe that the non-signatory was a party to the contract and the arbitration agreement. The proposed approach also gives considerable weight to the good faith principles when analyzing the circumstances surrounding the contract to determine the real intention of the parties regarding who is bound by the arbitration agreement.

One of the main differences with the proposed approach is the distinctive character of the group of companies doctrine as it was developed in the context of arbitration without any roots in contract law or corporate law.[466] Despite the consensual character of the doctrine, it has no roots in traditional contract theories of common law or civil law,[467] instead arising out of the ICC arbitration in Dow Chemical,[468] where the "vision of a group of companies as one and the same economic reality was both novel and alien to contract law."[469] Meanwhile, the proposed approach relies on traditional contract law theories in different jurisdictions as a base to develop the unified set of rules based on the common and/or most flexible principles.

[466] STEINGRUBER, *supra* note 38, at 152.
[467] Meyniel, *supra* note 406, at 26.
[468] STEINGRUBER, *supra* note 38, at 153.
[469] Meyniel, *supra* note 406, at 27.

Another difference between the two approaches is that the group of companies doctrine does not have any written guidelines; however, the proposed approach is a written set of rules to be easily used and applied by arbitrators. When the tribunal applied the group of companies doctrine in *Dow Chemical*, there was no reference to any rules or guidelines. Since then, *Dow Chemical* has been used as precedent for other tribunals applying the doctrine, but the written form of the proposed approach will provide more clear, concrete, and determinable guidelines.

This chapter indicated the inadequacy of the traditional approach in determining non-signatories issues and the need to move to the proposed transnational approach. After explaining the proposed approach, its objective, its angles; and the similarities between it and the group of companies doctrine; the next chapter discusses the different supporting factors to the proposed approach to enhance its application.

CHAPTER 3

DIFFERENT SUPPORTING FACTORS FOR THE PROPOSED APPROACH

1. Introduction

There are many supporting factors for the proposed approach; the most important ones are discussed in this chapter. These factors vary in their sources, objectives, and application. However, they all converge in proving the practicality, applicability, and importance of the proposed approach as follows.

2. The Authority of Arbitrators to Decide on Their Own Jurisdiction Without Reference to National Laws Supports Application of the Proposed Rules Regarding Non-Signatory Issues

Arbitrators have the authority to decide on their own jurisdiction based upon the well-known competence-competence principle which is adopted in different national arbitration acts.[470] For example, Article 22(1) of the Egyptian Arbitration Act provides that "[t]he arbitral tribunal is competent to rule on the objections related to its lack of jurisdiction, including objections claiming the non-existence of an arbitration agreement its extinction, nullity of said agreement, or that it does not cover the subject matter in dispute."[471] Almost, all institutional rules also recognize the competence-competence doctrine.[472] For example, according to Article 23(1) of the LCIA Arbitration Rules, "[t]he Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement."[473]

Arbitrators are not obliged to consult national laws to decide on jurisdiction because arbitrators do not belong to any national legal system and are not required to prioritize any

[470] *See* French Civil Procedure Code, *supra* note 88, art. 1465; Swiss Arbitration Act, *supra* note 85, art. 186(1); UNCITRAL Model Law, *supra* note 84, art. 16(1).
[471] Egyptian Arbitration Act, *supra* note 86, art. 22(1).
[472] *See, e.g.*, ICC Rules, *supra* note 158, art. 6(3).
[473] LCIA Rules, *supra* note 158, art. 23(1) (2014).

national choice of law rules absent a determination by the parties.[474] This freedom from the restrictions of national laws applies also to the question of who is bound by the arbitration agreement because the scope of the arbitration agreement is an essential part of the foundation for the arbitrators' jurisdiction.[475] Accordingly, "the most appropriate law to decide on the existence of an arbitration clause in case of an international contract is not a national law but rather general principles of law and international trade usage, especially good faith."[476]

In practice, "[t]here is consequently a strong tendency in arbitral case law to examine the existence and validity of the arbitration agreement exclusively by reference to transnational substantive rules, in keeping with the transnational nature of the source of the arbitrators' powers."[477] Several arbitral awards have applied transnational rules to determine the existence and validity of the arbitration agreement. An example of this tendency is found in the *Dow Chemical* case,[478] when the tribunal extended the arbitration agreement to the non-signatory companies based upon the group of companies doctrine, which is an anational principle.[479] The tribunal provided that, according to the ICC Arbitration rules, it had the power to decide on its own jurisdiction without reference to any national law.[480]

Applying transnational rules to jurisdictional issues supports the proposed approach. It proves that the application of a transnational unified rules regarding non-signatory issues is not a theoretical proposal as it has been applied before by arbitrators to rule on their jurisdiction. Therefore, disregarding national laws when determining the scope of arbitration agreements is practical and applicable.

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[474] FOUCHARD ET AL., *supra* note 48, at 234.
[475] *Id.*
[476] Piero, *supra* note 5, at 201.
[477] FOUCHARD ET AL., *supra* note 48, at 235-36.
[478] *See* discussion *supra* Chapter 2 note 409.
[479] *Id.*
[480] *Id.*

3. The Growing Need to Cope with the Demands of the International Market Due to the Emergence of Competitors to Arbitration

Every legal theory or legal process needs revised occasionally to respond to changes in the market and to preserve its standing. The same applies to international arbitration — particularly with the growing complexity in international business. International commercial arbitration "is a commercially-oriented product that flourishes on the basis of market forces" and its popularity depends mainly on the satisfaction of the parties.[481] The rise of arbitration may be largely attributed to the fact that there were no qualified competitors; other alternative dispute resolution mechanisms have not gained popularity and are often described as "lacking teeth."[482]

However, the emergence of the recently established Dubai International Financial Center (DIFC) and the Singapore International Commercial Court (SICC) are potentially strong competitors to arbitration.[483] International commercial courts are a reflection of some of the deficiencies in international commercial arbitration that have started to disturb the equilibrium of arbitration and negatively affect the satisfaction of international parties.[484] In other words, "such courts did not appear out of the blue,"[485] demonstrating the previously asserted need for redacting and retouching international arbitration to preserve the standing and the position it has obtained in the international field.

The lack of speed, complications with conflict of laws rules, and difficulties of joining third parties are listed as some of the worst problems with arbitration.[486] The newly created

[481] Hong-lin Yu, *Five Years On: A Review of the English Arbitration Act 1996*, 19 J. INT'L ARB. 209, 224 (2002).
[482] Brekoulakis, *supra* note 10, at 14.
[483] *See* Dalma R. Demeter & Kayleigh M. Smith, *The Implications of International Commercial Courts on Arbitration*, 33 J. INT'L ARB. 441, 469 (2016) (detailing these courts, their structure, composition, and how they work).
[484] *Id.* at 443.
[485] *Id.*
[486] *Id.* at 444.

international courts stress such deficiencies to market to their services by providing more flexible rules for joining third parties and avoiding conflict of laws rules as much as possible.[487] Therefore, a reformation of the international arbitration system is necessary to preserve its standing and prevent competitor mechanisms from taking over its popularity. The proposed approach, applying unified transnational rules to non-signatory issues, will help avoid complexities and technicalities of national laws regarding conflict of laws rules and joining non-signatories. The proposed approach will make the arbitration process easier, faster, and more predictable to parties from different jurisdictions with different legal backgrounds.

The proposed approach and similar endeavors that seek to harmonize the law and practice of international arbitration by providing unified flexible rules, are needed now more than ever to overcome the declining status of arbitration and the emergence of new competitors, such as the international commercial courts. In other words, arbitration is unsustainable as the only credible dispute resolution mechanism in the international commercial community[488] without continuous efforts to overcome its deficiencies and difficulties in the international context. Therefore, the strategy to harmonize the laws of international arbitration should be enhanced, which is what is sought by the proposed approach for non-signatory issues.

4. The Substantive Validity Approach Adopted by French Courts Enhances the Application of the Proposed Approach

Adoption of a set of unified rules regarding the extension of the arbitration agreement to non-signatories finds strong support in the substantive validity approach adopted by French

[487] *Id.* at 445; *see also* Brekoulakis, *supra* note 10, at 14 (noting that these courts are composed of a panel of international judges, exclude national laws in evidence, and have a limited right of appeal accompanied with procedural flexibility).
[488] *Id.*

courts in the 1970s.[489] Under the substantive validity approach, arbitration agreements are autonomous from national legal systems and are only subject to the general principles of international law — especially regarding the issues of existence and formation.[490] Therefore, the existence and validity of the arbitration agreement is determined according to the common intention of the parties without being subject to any national law — avoiding the peculiarities of national laws and the hurdles of conflict of laws rules.[491]

One justification for such an approach is that it is well-settled that arbitration agreements are, by nature, independent and separate from any national law; a challenge to its validity or formation should be determined without the consultation of any national law.[492] In other words, "the arbitration agreement has a validity and effectiveness of its own."[493] The French *Cour de Cassation* adopted this approach in many cases, including the landmark *Municipalite de Khoms El Mergeb v. Societe Dalico*.[494] In this case, the decision of the court perfectly illustrated the approach and its dimensions, stating that,

> [b]y virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French Law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.[495]

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[489] BORN, *supra* note 2, at 549.
[490] *Id.*
[491] *See* BLACKABY ET AL., *supra* note 77, at 164 (stating that if the parties expressly provide for the application of a certain national law or a set of conflict rules to govern their arbitration agreement, their choice will be applied instead of the French substantive validity approach because of the supremacy of the party autonomy principle).
[492] Hook, *supra* note 9, at 181.
[493] FOUCHARD ET AL., *supra* note 48, at 229.
[494] Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Dec. 20, 1993, Bull. civ. I, 116-17 (Fr.).
[495] BLACKABY ET AL., *supra* note 77, at 164 (discussing the outcome of Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Dec. 20, 1993, Bull. civ. I, 116-17 (Fr.)).

The only limitations on the substantive validity approach are the French mandatory rules and international public policy.[496] These two limitations, in fact, do not affect the flexibility and transnational nature of this approach, particularly regarding the mandatory provisions of French law as it is known to be pro-arbitration, which is why France is considered one of the most important venues for arbitration.

The substantive validity approach was adopted to determine the scope of the arbitration agreement and who is bound by the agreement.[497] In *Société d'études et représentations navales et industrielles (SOERNI) et autres v. Société Air Sea Broker limited (ASB)*,[498] the French Supreme Court decided that there was no need to consult any national law to determine who was validly bound by the arbitration agreement as the surrounding facts clearly indicated the parties' intention.[499] The French Court avoided the complications and hurdles of choice of law rules by opting for a more practical and efficient solution.[500] This case is a mere example of the multiple cases in which the French courts adopted a creative approach for detaching the arbitration agreement from national laws.[501]

The core of the proposed approach — the detachment of extension issues from national laws — has been applied by French courts regarding all issues of the existence and validity of an

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[496] *See* FOUCHARD ET AL., *supra* note 48, at 232-33 (stating that the mandatory rules of French law and international public policy should be understood by courts and tribunals as what is considered fundamental under the French concept to achieve justice in the context of international trade and these principles always represent what is widely recognized by civilized legal systems).

[497] 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 ARB. BLOG (Jan. 27, 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/.

[498] Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., July 8, 2009, Bull. civ. I (Fr.).

[499] Von Krause, *supra* note 497 (discussing the outcome of Cour de cassation (Cass.) (supreme court for judicial matters) 1e civ., July 8, 2009, Bull. civ. I (Fr.)).

[500] *Id.*

[501] BORN, *supra* note 2, at 550 nn.405-08.

arbitration agreement. This gives reliability and feasibility to the proposed rules, proving that it is not a mere theoretical approach as the French approach was established around fifty years ago and has proved successful and practical. The difference between the proposed approach and the substantive validity approach is that the proposed approach goes a step further by providing a unified set of rules to apply for extension issues instead of recourse to the general principles of international law. In this respect, the proposed approach is more accessible to arbitrators and more predictable for parties.

5. The Motivation Behind the Flexible Application of Arbitrability in International Disputes is the Same Regarding the Proposed Approach

The issue of arbitrability is a complicated part of the arbitration agreement and the full discussion extends beyond the limits of this study, however, a quick reference to arbitrability is required to some extent to support the proposed approach.[502] Arbitrability is a condition for the validity of the arbitration agreement and has two dimensions: the objective arbitrability and the subjective arbitrability.[503] The objective arbitrability means that the subject matter of the dispute is capable of being settled by arbitration while the subjective arbitrability means that the parties have the capacity to participate in the arbitration proceedings.[504]

Regarding the objective arbitrability, there is a general trend in national courts to expand the subject matter of the disputes that could be solved through arbitration when the case concerns

[502] *See generally* LOUKAS A. MISTELIS, ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).
[503] Bernard Hanotiau, *The Law Applicable to Arbitrability*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 146, 146 (A.J. van den Berg, Permanent Court of Arbitration & International Council for Commercial Arbitration eds., 1999).
[504] *Id.*

an international dispute.[505] This trend is widely applied as many court decisions apply exceptions to restrictive national provisions concerning arbitrability when the arbitral award is related to an international dispute.[506] For example, in the United States, securities law and antitrust issues are arbitrable if an international transaction is involved despite not being subject to arbitration in domestic disputes.[507]

Regarding the subjective validity, it is widely recognized to be governed by substantive international rules; however, this validity was previously subject to conflict of laws rules or the personal law of the parties.[508] Actually, the determination of the subjective validity often arises in the context of state entities that try to avoid the arbitration clause by availing themselves of a provision in their national law prohibiting arbitration or requiring certain authorization to conclude an arbitration agreement by a state agency.[509] However, these provisions are applicable only in the context of domestic arbitration, not international disputes.[510]

Therefore, there is an influential trend applied by national courts[511] and arbitral tribunals[512] regarding arbitrability issues to reduce the requirements embedded by national legislations when the case concerns an international dispute.[513] The target of this trend addresses international disputes in a manner adequate to their nature by not imposing restrictions primarily applied to domestic disputes for the sake of international trade. Similarly, the proposed rules aim to avoid any special requirements or conditions to extend the arbitration agreement in

[505] Filip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L L. & BUS. 48, 66 (1991).
[506] *Id.*
[507] *Id.* at 66 n.73.
[508] Hanotiau, *supra* note 503, at 148-49.
[509] *Id.*
[510] *Id.*
[511] *See id.* at 149-50.
[512] *See id.* at 151-52.
[513] *Id.* at 149-52.

international disputes by disregarding national laws and instead apply a set of transnational rules. Therefore, the general practice of detaching the arbitrability issues from national laws, which is part of the validity of the arbitration agreement, constitutes additional support for the proposed approach.

6. The Wide Recognition and the Extensive Application of *Lex Mercatoria* in International Commercial Arbitration

The primary characteristic of the proposed approach, which applies non-national rules, has been used heavily in the realm of international commercial arbitration through the application of *Lex Mercatoria*. *Lex Mercatoria* shares many similarities with the proposed approach as it applies anational rules derived from different sources, primarily focused on trade usage, giving considerable weight to the parties' expectations and good faith principles while promoting equity and fairness. The extensive application of *Lex Mercatoria* in the realm of international commercial arbitration gives considerable support to the proposed approach as both exclude national laws and substitute transnational norms, which are more suitable for the nature of international disputes. *Lex Mercatoria*, its role in international commercial arbitration, and the similarities between it and the proposed approach illustrate how the current status of *Lex Mercatoria* genuinely supports application of the proposed rules.

6.1. The Definition of *Lex Mercatoria*

Lex Mercatoria is a set of general principles and customary rules[514] that developed in the context of international trade[515] and are applied similar to national laws.[516] *Lex Mercatoria*

[514] Michael Lord Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, XIV REV. BRASIL. DE ARBIT. 205, 207 (2017).
[515] Wilkinson, *supra* note 382, at 104.
[516] Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 617 (1988); *see also* Sulun Gucer, *Lex Mercatoria in International Arbitration*, 2 ANKARA B. REV. 30, 34 (2009) ("*Lex Mercatoria*

principles are common to almost all parties engaged in international trade.[517] The application of *Lex Mercatoria* does not require a reference to any national law, which was the motivation behind its creation; *Lex Mercatoria* is not codified in national laws or even international agreements.[518] The roots and evolution of *Lex Mercatoria* are attributed to medieval Europe.[519] Merchants were aiming to establish trade rules that were flexible, fast, and effective without involving the complications of conflict of laws rules, long procedures, inadequacies, and technicalities of national laws.[520]

The similarity between trade principles, concepts, and technicalities around the world contributed to the establishment and flourishing of *Lex Mercatoria*.[521] The essence of *Lex Mercatoria* is "the endorsement of the majoritarian principle."[522] There is no requirement that its rules are unanimously recognized all over the world, but the rule should reflects the prevailing position adopted by national laws.[523] Therefore, "[w]hen a significant number of national laws have adopted a given solution, the corresponding rule can be considered to be a general principle even before other legal systems have joined the dominant trend."[524] In other words, "the whole idea is to segregate rules that are widely recognized from those which are idiosyncratic or

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is a law of an economic organization which lacks any center and it represents the social function of a law.").

[517] Wilkinson, *supra* note 382, at 104.

[518] *Id.*

[519] *See generally* Gucer, *supra* note 516, at 30-33; Wilkinson, *supra* note 382, at 105; Christoph W.O. Stoecker, *The* Lex Mercatoria*: To What Extent Does it Exist?*, 7 J. INT'L ARB. 101, 102-03 (1990) (providing historical overview); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 453-60 (2007) (explaining the Medieval *Lex Mercatoria*, the new *Lex Mercatoria*, and the new new *Lex Mercatoria*).

[520] Gucer, *supra* note 516, at 34.

[521] Wilkinson, *supra* note 382, at 106.

[522] GAILLARD, *supra* note 214, at 48.

[523] *Id.*

[524] *Id.* at 50-51.

outdated."[525] Imposing a requirement of unanimous recognition would deprive the whole notion of *Lex Mercatoria* from its meaning.[526]

6.2. The Sources of *Lex Mercatoria*

Sources for *Lex Mercatoria* include national and international sources.[527] This variety of sources is the reason for labeling *Lex Mercatoria* a transnational law.[528] These different sources cannot be listed exclusively due to their sheer number; reference is made to the sources that are most widely accepted.[529]

The primary source of *Lex Mercatoria* is the general principles of law — principles that are common to almost all national legal systems, therefore, international parties are expected to be familiar with them.[530] These include good faith principles, the voiding of unfair and unconscionable contracts, substantial breach, damages and the obligation to mitigate loss, the situation in the force majeure, and many other undisputed commercial principles.[531] General principles of law do not constitute an exclusive list, however, it is a combination of principles that should be updated from time to time to align with the changes and needs of international commerce.[532] These principles were initially determined through a comparative study among different national legal systems — a complicated task.[533] However, the existence of different studies aimed at reaching a common basis among different legal systems, such as the

[525] *Id.* at 48.
[526] *Id.*
[527] Mustill, *supra* note 514, at 207.
[528] *Id.*
[529] Gucer, *supra* note 516, at 35.
[530] Wilkinson, *supra* note 382, at 108.
[531] Michael Pryles, *Application of the Lex Mercatoria in International Commercial Arbitration*, 31 UNIV. NEW SOUTH WALES L.J. 319, 322 (2008) (listing general principles of law).
[532] *Id.*
[533] Gucer, *supra* note 516, at 35 (2009).

UNIDROIT principles of international commercial contracts,[534] facilitated such determination.[535] In addition, the growing literature on the comparative laws makes it easier for arbitrators to identify these principles.[536] Arbitrators regularly use the international encyclopedia of comparative law[537] to ascertain the common legal rules of the major legal systems.[538]

Customs and usage are also important sources for *Lex Mercatoria*.[539] International agencies, such as the ICC, have played a significant role in solidifying trade customs and usage through codification.[540] Such codification makes these sources easily reached and ascertained. The international rules for the interpretation of trade terms (Incoterms)[541] and the Uniform Customs and Practice for Documentary Credits,[542] formulated by the ICC, are examples of codified customs and usage.[543] In general, uniform laws of international trade are a significant source of *Lex Mercatoria* as they aim to formulate common rules regulating different aspects of trade for international adoption by different states.[544] In addition, different standard contracts have gained popularity internationally and are used as sources of *Lex Mercatoria*, such as the

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[534] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 383.
[535] *Id.*
[536] Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L COMP. L. Q. 747, 750 (1985).
[537] *See* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ONLINE, https://referenceworks.brillonline.com/browse/international-encyclopedia-of-comparative-law-online (last visited Mar. 9, 2019).
[538] Lando, *supra* note 536, at 750.
[539] Wilkinson, *supra* note 382, at 110.
[540] *Id.*
[541] *Incoterms Rules 2010*, INT'L CHAMBER OF COM., https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/ (last visited Apr. 14, 2019); *see also Know Your Incoterms: An Overview*, EXPORT.GOV, https://www.export.gov/article?id=Incoterms-Overview (last visited Apr. 14, 2019) (defining Incoterms as "a set of rules which define the responsibility of sellers and buyers for the delivery of goods under sales contracts. They are published by the International Chamber of Commerce (ICC) and are widely used in commercial transaction.").
[542] INT'L CHAMBER OF COM., UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, ICC PUB. NO. 600 (2007).
[543] *Id.*
[544] *Id.* at 109.

General Conditions for the Supply of Plant and Machinery for Export Issued by the Economic Commission for Europe.[545]

Public international law has also been cited as a source of *Lex Mercatoria*.[546] In addition, the rules of international organizations concerning contract issues — represented in the form of resolutions, recommendations, or codes of conduct — are also sources for *Lex Mercatoria* as these rules are based on good faith and fair dealings.[547] Multinational conventions widely accepted by a considerable number of states are also sources for *Lex Mercatoria*, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG).[548]

Arbitral awards are also an important source for *Lex Mercatoria* since these awards are considered rules for the international trade community.[549] The distinctive example is the *Dow Chemical* award, which introduced the group of companies doctrine without any roots in national laws.[550] The wide recognition and application of the group of companies doctrine illustrates the important input arbitral awards provide to *Lex Mercatoria.* This role of arbitral awards is reinforced by increasing the publication of these awards to produce a coherent source for the rules and principles applied by international arbitrators.[551] The ICC is taking the initiative and playing an important role in this respect.[552]

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[545] U.N. ECON. COMM'N EUROPE, UNECE – GENERAL CONDITIONS FOR THE SUPPLY OF PLANT AND MACHINERY FOR EXPORT (Mar. 1953), https://www.trans-lex.org/700200/_/unece-general-conditions-for-the-supply-of-plant-and-machinery-for-export/; Lando, *supra* note 536, at 750.
[546] GILLES CUNIBERTI, THREE THEORIES OF LEX MERCATORIA 381 (2014).
[547] *Id.*
[548] *Id.*
[549] Wilkinson, *supra* note 382, at 111.
[550] *See* discussion *supra* Chapter 2.
[551] *Id.*
[552] *Id.*

6.3. Criticism of *Lex Mercatoria* and the Response to Criticism

The importance of *Lex Mercatoria* is debatable and subject to a lot of criticism. One of the main critiques of *Lex Mercatoria* is that it does not amount to the status of a law[553] or a legal order fit to settle legal disputes,[554] so it is not binding.[555] Accordingly, reliance on *Lex Mercatoria* leads to "the parties [being] left with a minimal number of vague principles to solve their dispute."[556] For example, one of the principles of *Lex Mercatoria* is that "contracting parties must act in accordance with good faith and fair dealings."[557] However, this principle is not a defined legal rule — it is more or less a general principle that could not be used to settle a legal dispute.[558] That position is different from other rules, such as the CISG, which provide "a set of reasonably precise rules that are, from that perspective, comparable to the commercial laws of many states."[559]

This critique goes further by considering the application of *Lex Mecatoria* as giving permission to arbitrators to act as *amiable compositeur* and to render the award based on the principles of equity and fairness instead of law.[560] This potentially leads arbitration in the direction of an uncontrollable process with a high possibility of arbitrary awards.[561] Critics conclude that *Lex Mercatoria* is not a comprehensive set of rules but rather a vague and general set of principles that do not put any limits or pressure on arbitrators' decisions. Consequently, by applying *Lex Mercatoria*, arbitrators have great discretion in adjudicating the dispute.[562] *Lex*

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[553] Gucer, *supra* note 516, at 34.
[554] Lando, *supra* note 536, at 752.
[555] Gucer, *supra* note 516, at 34.
[556] Wilkinson, *supra* note 382, at 115.
[557] CUNIBERTI, *supra* note 546, at 391.
[558] *Id.*
[559] *Id.*
[560] Veijo Heiskanen, *Theory and Meaning of the Law Applicable in International Commercial Arbitration*, 4 FINNISH Y.B. INT'L L. 98, 110 (1993).
[561] *Id.*
[562] CUNIBERTI, *supra* note 546, at 421.

Mercatoria increases uncertainty and unpredictability since the parties will not have the full chance to know precisely what rules they are bound by and which govern their dispute. Therefore, criticism of *Lex Mercatoria* boils down to its non-binding legal rules with vague and uncertain principles.

In practice, *Lex Mercatoria* is accepted by societies involved in international trade and plays an important role in regulating the practice and the transactions in this field.[563] Such position proves that it has the character of law and is binding. *Lex Mercatoria* is an "autonomous norm system,"[564] well recognized, frequently applied, and useful in maintaining efficiency in international trade.[565] The fact that *Lex Mercatoria* is closely connected to the general principles of law does not undermine its status as "[g]eneral principles of law are 'general' only to the extent that they are widely accepted, not because they lack specificity."[566]

Moreover, *Lex Mercatoria* has many advantages over the application of national laws. First, the nature of the *Lex Mercatoria* and its components make it easier to adapt to any change or variation in international trade. This characteristic is a huge advantage over the rigidity of national laws, particularly taking into account the long and complicated process to amend an existing national law.[567] The "dynamic nature of the transnational rules method"[568] helps offer pragmatic solutions depending on the facts and circumstances of each dispute which genuinely reflect the parties' needs and expectations.

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[563] Gucer, *supra* note 516, at 34.
[564] Lando, *supra* note 536, at 752.
[565] *Contra* Michaels, *supra* note 519, at 465 ("Both in history and in present, we find law merchant in the sense of a commercial law that transcends boundaries and in that sense transnational. However, the law that we find is not truly autonomous from the state in any meaningful sense.").
[566] GAILLARD, *supra* note 214, at 55.
[567] Yu & Nasir, *supra* note 269, at 468.
[568] GAILLARD, *supra* note 214, at 50.

Second, application of *Lex Mercatoria* is more suitable than national laws to international commercial transactions. *Lex Mercatoria* diverts international parties from the hardship of dealing with choice of law rules that have become so complicated as it is hard to predict which law governs the dispute.[569] In addition, *Lex Mercatoria* avoids technicalities, formalities, and difficulties associated with the rules of national systems, especially if these rules are outdated and unfairly applied in the international context.[570] In fact,

> [a]ll legal systems contain idiosyncratic rules. Thus, such as the archaic non-recognition in French law of the duty to mitigate damages, English law's invalidation of agreements to agree or Algerian law's indiscriminate prohibition of intermediaries until 1991 would be disregarded whenever the parties have not specified that these laws would apply to their dispute.[571]

Transnational rules are extremely different from national laws, in this respect, as "[t]he entire philosophy of transnational rules consists in avoiding the situations where solutions that are not sufficiently grounded in comparative law prevail over views that are more generally accepted by the international community."[572] Therefore, the widespread statement that application of transnational rules leads to uncertainty is a false allegation based upon incorrect understanding and theoretical determination.[573] The recourse to *Lex Mercatoria* achieves the certainty and predictability to the parties in international commercial disputes. In other words, "[p]arties that have not taken the trouble to choose which law will apply to their contract will, by definition, be more surprised by the application of a rule that is not generally accepted in comparative law than by a rule which corresponds to a widely followed legislative movement."[574]

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[569] CUNIBERTI, *supra* note 546, at 392.
[570] Lando, *supra* note 536, at 748.
[571] GAILLARD, *supra* note 214, at 56-57.
[572] *Id.* at 50.
[573] *Id.* at 58.
[574] *Id.*

Finally, the efficiency of the application of *Lex Mercatoria* is obvious when a governmental entity is a party to the dispute.[575] Practically speaking, *Lex Mercatoria* is the best option either for the governmental entity or for the private party.[576] First, if the laws of the state of the governmental entity are applicable to a dispute, the private party will likely have justified doubts regarding equal treatment.[577] Second, the governmental party, in most cases, will resist application of a foreign state law.[578] *Lex Mercatoria* smoothly reaches the required balance between the two parties. In other words, it is the closest option to the real intention of the parties rather than the application of conflict of laws rules.[579] For example, if the arbitrators apply the conflict of laws to the dispute between the sovereign state and the private party, which pointed out to the law with the closest connection.[580] The law of the closest connection might be in many cases the law of the sovereign state.[581] In such case, it would be clear that it was not the intention of the private party to apply the law of the state and it would be more suitable for it to apply *Lex Mercatoria*.[582]

After rebutting the arguments against *Lex Mercatoria*, it becomes clear that the views refusing adjudication based upon *Lex Mercatoria* are ridiculous, unreasonably strict, and only based on theoretical analysis. These views attach such importance to the role of national laws because of deep fears that expansion in the application of *Lex Mercatoria* will diminish reliance upon national laws in international arbitration gradually until the whole arbitration process is

[575] Wilkinson, *supra* note 382, at 107.
[576] *Id.*
[577] *Id.*
[578] *Id.*
[579] Mustill, *supra* note 514, at 237.
[580] *Id.*
[581] *Id.*
[582] *Id.*

conducted according to anational rules.[583] The views against *Lex Mercatoria* have been trying to preserve the trait of international commercial arbitration as a private method of settling disputes governed in essence by national laws. These views do not assess the advantages of *Lex Mercatoria* and anational rules generally in promoting the efficiency and the predictability of the arbitration agreement. In conclusion, the advantages of the application of the transnational rules will be reflected in the improvement, development, and increasing trustworthiness of international commercial arbitration.

The application of *Lex Mercatoria* in the context of international arbitration is discussed through illustrating the different scenarios to apply it by arbitrators as follows.

6.4. The Different Scenarios for the Arbitrator's Authority to Apply *Lex Mercatoria* in the Context of Arbitration

In the arbitration realm, *Lex Mercatoria* is frequently applied as there is a direct relationship between *Lex Mercatoria* and international commercial arbitration.[584] Generally, three scenarios apply *Lex Mercatoria* in the context of arbitration. The first one is where the parties agreed on *Lex Mercatoria*, whether expressly or impliedly, as the governing rules; this is the easiest application because of the party autonomy principle.[585] Granting the arbitrators the powers to act as *amiable compositeur*[586] is considered an implied intent by the parties to apply *Lex Mercatoria*[587] because, in this case, the arbitrator is not restricted by the application of any

[583] *See* Michaels, *supra* note 519, at 448-49 ("Scholars of conflict of laws . . . abhorred the idea of a non-state law demanding recognition, not least because they feared for central tenets of their field.").
[584] Gucer, *supra* note 516, at 36.
[585] *Id.*
[586] Many institutional rules provide for acting as *amiable compositeur*; *see, e.g.*, ICC Rules, *supra* note 158, art. 21(3); LCIA Rules, *supra* note 158, art. 22(4); UNCITRAL Arbitration Rules, art. 35(2); *see also* Daujotas, *supra* note 390, at 1, 8 (stating that parties should agree expressly on granting arbitrators such power).
[587] Gucer, *supra* note 516, at 37.

law and the decision is mainly based on principles of equity.[588] For example, Article 39(4) of the Egyptian Arbitration Act provides that

> [t]he arbitral tribunal may, if it has been expressly authorized to act as an "amiable compositeur" by agreement between the two parties to the arbitration, adjudicate the merits of the dispute in conformity with the rules of equity and fairness (ex aequo et bono), without being restricted by the legal provisions.[589]

The second scenario applying *Lex Mercatoria* is when the parties have not agreed on any applicable law.[590] In such situation, the tribunal has the right, by virtue of most national laws[591] and institutional rules[592] to consider *Lex Mercatoria* an option.[593] For example, Article 21(1) of the ICC Arbitration Rules provides that "[t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."[594] In practice, some tribunals have construed the absence of an agreement about the

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[588] *See* BLACKABY ET AL., *supra* note 77, at 217 (noting that the decision of the *amiable compositeur* should be based on some acceptable legal principles not only equity principles).
[589] Egyptian Arbitration Act, *supra* note 86, art. 39(4).
[590] Marc Blessing, *Regulations in Arbitration Rules on Choice of Law*, *in* PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 391, 424 (A.J. van den Berg, T.M.C. Asser Instituut & International Council for Commercial Arbitration eds., 1996).
[591] *See* French Civil Procedure Code, *supra* note 88, art. 1496; Dutch Civil Procedure Code, *supra* note 85, art. 1054(2); Swiss Arbitration Act, *supra* note 85, art. 187(1); *see also* Blessing, *supra* note 590, at 429 (providing more examples of the situation in other national laws).
[592] *See* Blessing, *supra* note 590, at 424 (providing more examples of the situation in other arbitral institutions); *see also* LCIA Rules, *supra* note 158, art. 13(1)(a); American Arbitration Association Rules, *supra* note 388, art. 29(1).
[593] Gucer, *supra* note 516, at 37.
[594] ICC Rules, *supra* note 158, art. 21(1); *see* Gaillard, *supra* note 207, at 581 (stating that some provisions do not explicitly empower arbitrators with such authority absent a determination by the parties, such as the UNCITRAL Model Law, which provides in Article 28(1) that "the arbitral tribunal shall apply the law determined by the appropriate conflict of laws rules absent a determination by the parties and that the parties are free to agree on the rules of law." Therefore, it seems obvious that the UNCITRAL Model Law differentiates between the authority of the parties and the authority of the arbitrators to apply the rules of law); *accord* Egyptian Arbitration Act, *supra* note 86, art. 39(2) ("If the two parties have not agreed on the legal rules applicable to the substance of the dispute, the arbitral tribunal shall apply the substantive rules of the law it considers most closely connected to the dispute.").

applicable law by the parties as an intent to apply transnational laws and not subject the dispute to national laws.[595]

The last scenario is when the parties agreed on the applicable national law and the tribunal nevertheless reverts to the principles of *Lex Mercatoria* regarding certain issues or to fill gaps in the law.[596] Most international contracts, international documents regulating international trade, arbitration institutional rules, and national acts refer to trade usage and international commercial principles as important rules for arbitrators to consider in international commercial disputes, even if there is an explicit choice of law by the parties.[597] An example of that is Article 21(2) of the ICC Arbitration Rules, which provides that "[i]n all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usage."[598] Moreover, Article 39(4) of the Egyptian Arbitration Act provides that "[t]he arbitral tribunal, when adjudicating the merits of the dispute, shall decide in accordance with the terms of the contract in dispute and the usages of the trade applicable to the transaction."[599]

6.5. Growing Expansion in the Application of *Lex Mercatoria* Regarding Issues on the Existence and Validity of the Arbitration Agreement

Generally, the tendency to apply transnational laws has flourished since the 1970's, as arbitral tribunals often conclude that the application of such rules is the most appropriate solution in international disputes.[600] The transnational rules are consistent with party autonomy

[595] Petsche, *supra* note 7, at 489.
[596] *Id.* at 491 (noting that despite being a subject to some criticism since the chosen national law should have rules for gap filling process to be applied by the arbitrators, such position strongly indicates the reliance on transnational rules in the context of international disputes).
[597] Gucer, *supra* note 516, at 37.
[598] ICC Rules, *supra* note 158, art. 21(2); Gucer, *supra* note 516, at 37; *see also* Daujotas, *supra* note 390, at 8 (stating that the UNIDROIT Principles were more liberal in this respect as Article 22.2.3 provides that "the court may rely upon legal theory that has not been advanced by a party," so it is broad enough to include any legal theory not only trade usage); Lew, *supra* note 6, at 137.
[599] Egyptian Arbitration Act, *supra* note 86, art. 39(4).
[600] Petsche, *supra* note 7, at 489.

as "it is more capable than centralized state law of measuring and fulfilling party preferences and thereby enhancing overall welfare."[601] This tendency is apparent primarily concerning the existence and validity of arbitration agreements, whether in disputes between private parties or disputes related to state contracts,[602] as arbitral tribunals have considered the traditional approach inappropriate to determine who is bound by the arbitration agreement. Transnational principles are the most convenient principles to apply because of its compatibility with the international character of the dispute and the sensitivity of joining non-signatories to arbitration proceedings. In addition, as previously noted, the scope of the arbitration agreement is part of the tribunal's jurisdiction and it is entitled to decide on the scope without reference to national laws.[603]

Multiple arbitral awards are based on *Lex Mercatoria* whether regarding the substance of the dispute or the arbitration agreement.[604] One of the leading arbitral awards in this respect is the *Dalico* case,[605] where a contract was concluded between a Danish party and a Libyan party for work to be performed in Libya.[606] The contract was governed by Libyan law and an arbitration clause provided for proceedings in Paris under the ICC Arbitration Rules.[607] When a dispute arose and the validity of the arbitration clause was challenged, the arbitral tribunal applied substantive transnational rules to decide on the validity issue instead of the law of the seat, the law of the main contract, or any other national law.[608] The French courts affirmed the

[601] Michaels, *supra* note 519, at 463.
[602] FOUCHARD ET AL., *supra* note 48, at 235.
[603] *See* discussion *supra* § 2.
[604] BORN, *supra* note 2, at 551 nn.409-10.
[605] Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Dec. 20, 1993, Bull. civ. I, 116-17 (Fr.).
[606] Gaillard, *supra* note 207, at 580 (discussing the outcome of Cour de cassation [Cass.] [Supreme Court for Judicial Matters], 1e civ., Dec. 20, 1993, Bull. civ. I, 116=17 (Fr.)).
[607] *Id.*
[608] *Id.*

award of the arbitral tribunal.[609] Another example is ICC Award No. 5721,[610] the tribunal stated that

> [t]he principle of autonomy of arbitration clauses, now widely recognized, justifies this reference to a non-national rule construed from international commercial usage alone. In particular, it is justified to separate the merits from the validity scope of the arbitration clause. The arbitral tribunal will thus rule on the basis of general notions of good faith in the business transaction and international commercial usage.[611]

Actually, freedom from the restrictions of national laws has not stopped with arbitrators as national courts have embraced this concept when enforcing arbitral awards based on *Lex Mercatoria*. Jurisdictions that were originally reluctant to enforce awards based on *Lex Mercatoria*, such as the English courts, eventually enforced these principles to keep pace with the development of international commercial arbitration.[612] For example, in *Deutsche-und Tiefbohrgesellschaft v. Ras Alkhaimah National Oil Co. and Shell International Petroleum Co. Ltd.*,[613] the English court enforced an arbitral award based on "internationally accepted principles of law governing contractual relations" without any reference to national laws as there was no choice of law clause in the contract.[614]

In an official step, recognition of the application of transnational rules in international commercial arbitration was adopted by the International Law Association in Cairo on April 28, 1992.[615] Under the resolution, the fact that an arbitral award is based on transnational rules should not affect its validity or enforceability whether such rules were expressly chosen by the

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[609] *Id.*
[610] Case No. 5721 of 1990, 3 ICC Disp. Resol. Bull. No. 1, 17 (1992) (ICC Int'l Ct. Arb.).
[611] Daujotas, *supra* note 390, at 10 (discussing Case No. 5721 of 1990, at 17).
[612] Yu, *supra* note 481, at 219.
[613] Deutsche-und Tiefbohrgesellschaft v. Ras Alkhaimah National Oil Co. & Shell International Petroleum Co. Ltd [1988] 3 W.L.R. 230 (Eng.).
[614] Yu, *supra* note 481, at 219 (discussing the outcome of *Deutsche-und*, [1988] 3 W.L.R. 230).
[615] Gaillard, *supra* note 207, at 581.

parties or the arbitrators applied these rules absent a choice by the parties.[616] The resolution indicated that the term transnational rules include, for example, general principles of law, principles common to several jurisdictions, international law, and usages of trade.[617] Therefore, the position adopted, either by national courts or international resolutions, in removing obstacles for enforcing awards based on *Lex Mercatoria* strongly indicates that the application of the proposed rules by arbitrators would not be problematic. Generally speaking, "[t]he recognition of the right of arbitrators to apply transnational law forms part of the general legislative tendency to increase arbitral 'autonomy.'"[618]

6.6. Similarities Between *Lex Mercatoria* and the Proposed Rules

The first similarity between *Lex Mercatoria* and the proposed rules is that both are anational rules and do not attach to a particular national legal system, which makes them more suitable for international disputes. Both rules are more flexible than national laws and confer on arbitrators great discretionary powers based upon the circumstances of the case and the legitimate expectations of the parties. In addition, they share a lot of sources such as trade usage, multinational conventions, and arbitral awards. The fact that they are derived from different national and international sources also gives them more weight and reliability in international disputes.

Moreover, one of the main similarities between *Lex Mercatoria* and the proposed rules is that both are closer to the principles of equity than national laws.[619] National laws have restrictions and special provisions, which are more suitable to domestic cases and their application in the international context may lead to unreasonable, unpredictable, and unjust

[616] *Id.*
[617] *Id.*
[618] Petsche, *supra* note 7, at 488.
[619] Lando, *supra* note 536, at 753.

results.[620] For example, consulting the *Lex Mercatoria* on the notice required by a buyer in the case of late delivery leads to the application of Article 49(2) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980,[621] which requires notice to be given in a reasonable time after the delivery of goods.[622] However, some national laws require such notice to be given immediately upon the delivery of goods.[623] That may be suitable in domestic cases but not international ones, especially since many international parties may not be aware of such provision, which puts the arbitrator in a situation of compromising equity for law.[624] Application of *Lex Mercatoria*, however, will achieve the desired equity; this same concept applies to the application of the proposed rules regarding non-signatory issues. For example, in some jurisdictions, extension of the arbitration agreement which is based on the agency theory requires special authorization from the principal to the agent in order to bind the principal to the agreement.[625] Strict adherence to this provision leads to unjust results when the international party is unaware of such provision in the applicable national law. Moreover, in practice this provision could be used by the principal to escape the obligation to arbitrate the dispute.

The proposed approach actually goes a step further than *Lex Mercatoria*, formulated as a written set of rules that are easier for arbitrators to identify and apply while also adding more predictability and certainty. The parties could set their expectations regarding who would be bound by the arbitration agreement and on what basis.

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[620] *Id.*
[621] United Nations Convention on Contracts for the International Sale of Goods art. 49(2), Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].
[622] *Id.*
[623] *Id.*
[624] *Id.*
[625] *See* discussion *infra* Chapter 4.

7. Support Derived from Article II of the New York Convention and its Role in the Application of International Minimum Standards for the Validity of the Arbitration Agreement

Another point supporting the proposed approach is Article II(3) of the New York Convention. Article II(3) indicates that the role of national laws in governing arbitration agreements has been diminishing gradually as this article imposes international limitations on national laws governing the validity and formation of arbitration agreements. According to this article,

> [t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[626]

The null, void, inoperative, or incapable of being performed expressions are well settled and interpreted as the "generally-applicable, internationally-neutral contract law defenses," which are the only grounds for refusal to enforce arbitration agreements in the contracting states.[627] Under this article, the arbitration agreement is void if there is no consent or such consent was obtained through duress or corruption, but not because it does not satisfy some requirements in the applicable national law.[628] In other words, it is unacceptable to determine an arbitration agreement is invalid because of some discriminatory national law provisions against arbitration "that adopt idiosyncratic rules of invalidity that are not applied neutrally on an international scale."[629]

Article II(3) is consistent with the spirit and goals of the New York Convention in unifying the standard for recognition and enforcement of arbitration agreements and adopting a

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[626] New York Convention, *supra* note 82, art. II(3).
[627] BORN, *supra* note 2, at 557.
[628] Gaillard, *supra* note 207, at 580.
[629] *See* BORN, *supra* note 2, at 551-52 (noting many cases in the United States that have applied this construction, such as Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982) and Rhone Mediterranee v. Lauro, 712 F.2d 50 (3rd Cir. 1983)).

pro-arbitration policy in the contracting states.[630] The target of Article II(3) gives transnational rules superiority over national laws in international disputes, which could be an initiative for new ideas outside the box that would set arbitration free from the peculiarities and technicalities of national laws. The proposed approach moves toward this target by applying anational rules to determine who is bound by the arbitration agreement without recourse to national laws. The base of the proposed approach is supported by the motivation of Article II(3) of the New York Convention. The proposed approach takes it a step further by drafting a complete set of transnational rules regarding non-signatory issues, which helps remove any ambiguity and enhance certainty as the Convention does not provide an international standard defining null and void agreements.[631]

8. The Significant Effect of Harmonization Achieved Through the Proposed Approach

The proposed approach significantly avoids the uncertainty that arises from the different conditions required by national laws to extend the arbitration agreement to non-signatories. The proposed approach achieves harmonization regarding non-signatories' issues in international commercial arbitration. Such harmonization is needed due to the serious consequences of extending an arbitration agreement to a non-signatory.

In general, harmonization of the law and practice in international commercial arbitration has been a significant target with multiple initiatives taken over the last fifty years to achieve this objective.[632] Harmonization gives the arbitration a truly international impress since the procedural and substantive framework of conducting the arbitration will be the same

[630] *Id.* at 553.
[631] *Id.* at 558.
[632] Renata Brazil-David, *Harmonization and Delocalization of International Commercial Arbitration*, 28 J. INT'L ARB. 445, 446 (2011).

everywhere.[633] Harmonization will encourage the parties to conclude their arbitration in different countries without over thinking the approach of different jurisdictions to international arbitration.[634] While full harmonization of arbitral principles has not been achieved yet, harmonization has been reached regarding specific aspects. Harmonization in the recognition and enforcement of foreign arbitral awards through the New York Convention is a clear example of achieving harmonization in specific areas.

Generally speaking, two main methods are employed to obtain harmonization; the first is a formal method through multinational treaties and the second is through what is known as "soft law," such as model laws and drafted codes.[635] The latter does not have a binding character, however, states or participants in international commercial arbitration can adopt it on a voluntary basis.[636] Instruments of soft law adopted by different states are tools to harmonize the binding domestic laws of these states.[637] Reference to some of the most significant international harmonization tools — such as the Geneva Treaties, the New York Convention, and the UNCITRAL Model Law — can provide a complete image of the current position of harmonization and what still needs to be achieved.

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[633] Fernando Dias Simões, *Harmonisation of Arbitration Laws in the Asia-Pacific: Trendy or Necessary?*, *in* TRADE DEVELOPMENT THROUGH HARMONIZATION OF COMMERCIAL LAW 217, 229 (Muruga Perumal Ramaswamy & João Ribeiro eds., 2015).
[634] *Id.*
[635] Sieg Eiselen, *The Adoption of UNCITRAL Instruments to Fast Track Regional Integration of Commercial Law*, 12 REV. BRAS. ARB. 82, 85 (2015).
[636] *Id.*
[637] *Id.* at 86, 88 (stating that model laws, as methods for the harmonization, are double-edged swords as they have the flexibility advantage as states are free to modify or even disregard parts of them, however, such position provides no guarantee for achieving harmonization with the discretionary powers of states).

8.1. Geneva Treaties

The Geneva Protocol of 1923[638] and the Geneva Convention of 1927[639] were the first international conventions aimed at enhancing the existence of international commercial arbitration as a method for settling disputes.[640] The role of these treaties was, first, through ensuring the effective recognition and enforcement of arbitration agreements and arbitral awards in the contracting states and, second, through facilitating the required steps for conducting arbitral proceedings in these signatory countries.[641] Despite the pioneering role played by these conventions, they failed to meet expectations regarding their scope (in terms of the contracting states) and their application (in terms of some difficulties that negatively impacted their effect).[642] However, the importance of the Geneva treaties is that they represent the first multinational effort to attain a considerable level of harmonization in international commercial arbitration.

8.2. The New York Convention

The New York Convention is considered the most important international commercial arbitration convention due to its substantial role in harmonizing the law and practice for recognition and enforcement of foreign arbitral awards.[643] One of the main achievements of the Convention is the establishment of minimum standards for recognition and enforcement of arbitration agreements and arbitral awards by placing limited exceptions for the refusal to

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[638] Protocol on Arbitration Clauses, Sept. 24, 1932, 27 L.N.T.S. 157 [hereinafter Geneva Protocol].
[639] Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 [hereinafter Geneva Convention].
[640] Brazil-David, *supra* note 632, at 447.
[641] *Id.*
[642] *Id.* (indicating that contracting states have the right to limit the effects of the Convention to what is considered commercial under their national laws and that the party seeking to enforce the arbitral award must obtain a declaration that the award is final from its country of origin).
[643] Eiselen, *supra* note 635, at 91.

recognize or enforce a foreign arbitral award.[644] The fact that the Convention has been ratified by a considerable number of states illustrates its leading impact on international arbitration.[645] Despite some problems associated with the application of the Convention, it is often considered the cornerstone for the harmonization process of international commercial arbitration, particularly regarding the recognition and enforcement of foreign arbitral awards.[646]

8.3. The UNCITRAL Model Law on International Commercial Arbitration

The UNCITRAL Model Law on International Commercial Arbitration plays an irreplaceable role in harmonizing the law and practice of international commercial arbitration.[647] The UNCITRAL Model Law provides a full guideline related to all stages of the arbitration process.[648] It aims to, first, reduce disparities among national laws and, second, provide rules that are more suitable to the nature of arbitration since most national laws are inconvenient for regulating international commercial arbitration.[649] The UNCITRAL Model Law is based on internationally accepted principles — or at least the most widely recognized ones.[650] A considerable number of states have been adopted the UNCITRAL Model Law; the rules have even affected domestic law for the states that have not adopted the Model Law, in one way or another.[651]

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[644] Brazil-David, *supra* note 632, at 448.
[645] *Id.*
[646] *Id.*
[647] *Id.* at 450 (discussing the Model Law formulation by the UNCITRAL in 1985, its influence from the UNCITRAL Arbitration Rules of 1976 and the New York Convention of 1958, and its amendment in 2006 to align with developments in international trade); *see also* Eiselen, *supra* note 635, at 88 (offering information about the UNCITRAL organization).
[648] Brazil-David, *supra* note 632, at 448.
[649] *Id.* at 450.
[650] Lew, *supra* note 373, at 469.
[651] Brazil-David, *supra* note 632, at 450; *see also id.* at 450 n.41 (listing the states that have adopted the UNCITRAL Model Law).

Other attempts to harmonize the law and practice of international commercial arbitration include regional conventions.[652] However, with the current overall level of harmonization "there is still a considerable amount of uncertainty and parties to international arbitration might be unpleasantly surprised by the idiosyncrasies of different national laws."[653] That is why more effort should be dedicated to achieving the desired level of harmonization through both formal and informal tools. The proposed approach takes an important step toward such harmonization regarding non-signatory issues, which is a particularly sensitive and vital aspect in international commercial arbitration.

9. Analogy with the Objective of the Delocalization Theory as Additional Support for the Proposed Approach

The delocalization theory was developed in the 1960s and detaches international commercial arbitration from the laws of the seat of arbitration in two aspects; the first aspect relates to the procedural law of the seat and the second one relates to the national courts of the seat.[654] In other words, the detachment aims to minimize the role of the seat so that it is only a physical place where the arbitration is conducted, neither imposing any restrictions on the arbitration process nor having any powers regarding the arbitral award.[655] Applying the first aspect, arbitrators have the right to disregard the procedural law of the seat, its mandatory rules, and public policy provisions.[656] Delocalization from the mandatory laws of the seat increases the effectiveness of arbitration since parties are not threatened by the potential unenforceability of

[652] *See id.* at 451-53.
[653] *Id.* at 454.
[654] Yu & Nasir, *supra* note 269, at 463.
[655] *Id.*
[656] *Id.* at 464; *see also* Petsche, *supra* note 7, at 477 (stating that the delocalization theory also excludes the application of the substantive laws of the seat of arbitration and the conflict laws of the seat from determining the applicable substantive law of the contract or the law governing the validity and formation of the arbitration agreement).

the award due to non-compliance with some unexpected or uncommon laws of the seat.[657] Under the second aspect, the delocalization theory supports giving the lead to the national court of the place where enforcement is sought instead of the place of the arbitration.[658]

Assessment of the delocalization theory is beyond the limits of this thesis,[659] however, referencing this theory shows strong views and real efforts to minimize the role of national laws and their restrictions on international arbitration. While the proposed approach addresses the application of anational rules regarding issues of extension, which differs from the delocalization theory, both approaches intend to set arbitration free from the complications and the technicalities of national laws. Both theories converge on the same conclusion that arbitration should not be subject to national laws that vary between jurisdictions and do not

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[657] Brazil-David, *supra* note 632, at 459.

[658] *Id.*; *see also* Christian Tautschnig, *The Arbitration Agreement and Arbitrability, Legal Challenges and Opportunities for the Next Generation of Online Arbitration*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 87, 96 (Christian Klausegger et al. eds., 2015) (stating that the application of the delocalization theory entails that the awards annulled in the seat will be enforced elsewhere); De Ly, *supra* note 505, at 72-73 (indicating that some national legislations have partially adopted the delocalization theory by ousting the jurisdiction of their national courts to setting aside arbitral awards rendered on their territory if there is no real connection with the country other than being the seat of the arbitration such as no nationals or residents involved, no registration for incorporations or place of business and so on. The Swiss law adopted this position provided that parties agreed on that and the Belgium law also, however, it has been amended shortly after its enactment because it was subject to a lot of criticism); *id.* at 75 (observing that French courts have adopted similar cosmopolitan approaches in a number of awards as the Paris Court of Appeal declined jurisdiction for setting aside awards rendered in Paris under ICC rules that have no connection with the French procedural law because the parties were not French citizens and the dispute was clearly international); *see also* Lew, *supra* note 373, at 478-79 (noting that many national courts have enforced arbitral awards annulled in the courts of the seat of arbitration, such as *Chromalloy Aeroservices v. Arab Republic of Egypt*, when the U.S. District Court of Columbia enforced an arbitral award annulled in Egypt); *accord* Antonio Carlos Nachif Correia Filho, *The Theories of International Arbitration and Related Practical Issues: The Brazilian Approach (Particularly the Recent Leading Case on Recognition of Annulled Awards) vis-a-vis the "Delocalization Trend,"* 13 REV. BRAS. ARB. 26, 32 (2016) (citing French courts' enforcement of annulled arbitral awards).

[659] *See generally* Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981); Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983) (supporting the delocalization theory). *But see* Alexander J. Belohlavek, *Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth*, 31 ASA BULL. 262 (2013) (criticizing the theory).

accommodate the various and fast changes in the practice of international commercial arbitration.[660] In addition, application of both theories could remove unnecessary obligations on arbitrators to either dig into the procedural law of the seat of arbitration or different national laws in situations of extension.[661] These unnecessary tasks take a lot of effort and consume a lot of time, which are reflected in expenses and delays for the parties of the arbitration.

At this stage, application of the proposed approach is more conceivable than the delocalization theory since the proposed approach does not face the same obstacles as the delocalization theory. For example, one of the most challenging hurdles facing the delocalization theory is the New York Convention.[662] It first, provides the courts of the seat with the supervisory powers and second, places nullity of the arbitral award by the courts of the seat as a ground for refusal of the enforcement of the award in other contracting states.[663] Some views consider amendment of the New York Convention a prerequisite to application of the delocalization theory.[664] Adoption of the proposed approach does not face such obstacles.

In conclusion, discussing these factors proves the applicability and practicality of the proposed approach. All these factors indicate the need to move to a more transnational approach regarding issues of the existence and validity of the arbitration agreement — especially with the emergence of competitors to international arbitration, such as the international arbitration courts. Arbitrators have already begun applying this transnational approach when they decide on their jurisdiction, as indicated in the first factor. The transnational approach has also reached national courts, as discussed in the subjective validity approach applied by French courts and the

[660] Yu & Nasir, *supra* note 269, at 463.
[661] *Id.* at 464.
[662] *Id.* at 465.
[663] *Id. But see* Tautschnig, *supra* note 658, at 97 (stating that the proponents of the delocalization do not see this article as an obstacle since it contains the word 'may'); *see also* Filho, *supra* note 658, at 31 (explaining the debate surrounding Article V(1)(e) of the New York Convention).
[664] Yu & Nasir, *supra* note 269, at 464.

tendency toward excluding the restrictions imposed in arbitrability issues exists in many jurisdictions, especially the U.S. courts. The wide reliance on *Lex Mercatoria* in the context of international arbitration illustrates the expansion in the transformation toward a transnational approach. The New York Convention also supports such transformation by disregarding the application of national laws and setting minimum standards for the validity of arbitration agreements. Finally, the tendency to achieve harmonization in international arbitration and the trend toward the delocalization theory support the transnational approach in general and the proposed approach in specific. Now, the focus is on analyzing the application of the proposed approach regarding agency, incorporation by reference, and third-party beneficiary theories.

CHAPTER 4

THE CURRENT SITUATION OF EXTENSION BASED ON THE AGENCY THEORY AND THE PROPOSAL FOR A UNIFIED SET OF RULES SHIFTING FROM A NATIONAL TO A TRANSNATIONAL APPROACH

Agency is a contract law theory applied to extend arbitration agreement to non-signatories. This chapter introduces the proposed rules to effectuate extension to non-signatories, based on the agency theory, without reference to national laws. The chapter begins by defining agency and its construction in the context of arbitration. Conditions required by some jurisdictions to bind the principal to the arbitration agreement concluded by its agent are discussed. In addition, the different positions adopted by different jurisdictions regarding the ability of agents and/or employees to rely on arbitration agreements concluded on behalf of their principles are analyzed. Moreover, this chapter assesses reliance on the apparent authority principles in different jurisdictions. Afterward, the approaches adopted by different jurisdictions to determine the applicable law to the issues of agency are discussed. In fact, analysis of these different issues highlights the problems associated with the application of national laws to issues of agency in the context of the extension of arbitration agreements. Such problems justify the need to move to a transnational unified approach. Finally, the proposed rules are provided accompanied by the justification for each rule.

1. The Definition of Agency and its Construction in the Context of Arbitration

1.1. The Definition of Agency

Agency is defined as

> [a] relation, created either by express or implied contract or by law, whereby one party (called the principal or constituent) delegates the transaction of some lawful business or the authority to do certain acts for him or in relation to his rights or property, with more

> or less discretionary power, to another person (called the agent, attorney, proxy, or delegate) who undertakes to manage the affair and render him an account thereof.[665]

Therefore, "the agent has the power to bring about or alter business and legal relationships between the principal and third persons and between the principal and agent" provided that the agent is working within the scope of authorization.[666] The person or entity on whose behalf the contract is concluded is subject to the rights and obligations — not the agent who only serves as the gateway to bind the principal.[667] This relationship is well established in all developed legal systems.[668]

The actual agency relationship could be express — executed in a contract — or implied —inferred from conduct, circumstances of the case, or/and trade usage.[669] Implied agency frequently arises in the context of transactions concluded by subsidiaries concerning whether the subsidiary is executing the contract on its own behalf or as an agent for its parent company.[670] In addition, it arises in the relation between the state's entities and the government.[671] A claimant attempts to establish arbitral jurisdiction over the parent company or the state instead of the subsidiary or agent mainly to increase its chances of recovering money; in many cases, the subsidiary or the state agent's financial resources are limited compared to the parent company or the state.[672]

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[665] *Agency*, BLACK'S LAW DICTIONARY (10th ed. 2014), https://thelawdictionary.org/agency/.
[666] Alexandra Anne Hui, *Equitable Estoppel and the Compulsion of Arbitration*, 60 VAND. L. REV. 711, 723 (2007).
[667] STEINGRUBER, *supra* note 38, at 145; *see also* BREKOULAKIS, *supra* note 399, at 49 n.115.
[668] *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY §§ 2.01, 2.02 (AM. LAW INST. 2006).
[669] Audley Sheppard, *Third Party Non-Signatories in English Arbitration Law*, *in* THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 183, 186 (Stavros L. Brekoulakis, Julian D. M. Lew & Loukas A. Mistelis eds., 2016).
[670] *Id.*
[671] *Id.*
[672] BREKOULAKIS, *supra* note 399, at 55.

Agency is not presumed and must be proven for it to be effective.[673] If the signatory is unable to present evidence of contracting on behalf of another person, the signatory is personally bound by the agreement, not the purported principal.[674] In other words, the signatory is presumed independent and, if otherwise alleged, has the burden of proving status as an agent.[675] Express agency is definitely easier to prove than implied agency, which entails analysis of surrounding facts to conclude the existence of an agency relationship.[676] For example, to determine the existence of an implied agency relationship between the parent company and its subsidiary, one question that arises is whether the subsidiary is conducting business mainly on behalf of the parent company or if it is the subsidiary's own business.[677] This is a question of fact and different factors are taken into consideration, such as the extent of the control exercised by the parent over the subsidiary and whether the parent is involved in the day-to-day transactions, long-term policy plans, or financial decisions of the subsidiary.[678] In addition, the profits — whether they are directly attributed to the parent or the subsidiary — and the extent of ownership shares for the parent in the subsidiary are examined.[679] Generally, it is about the nature and extent of the ongoing business between the parent and subsidiary.[680]

[673] HANOTIAU, *supra* note 39, at 11.
[674] *Id.*
[675] *Id.*
[676] ROBERT M. NELSON, GUIDE – HOW TO BIND NON-SIGNATORIES TO AN ARBITRATION CLAUSE; GUIDE – HOW TO PREVENT NON-SIGNATORIES FROM BEING BOUND BY AN ARBITRATION CLAUSE 19, https://www.nelsonadr.ca/media.php%3Fmid=14 (last visited Apr. 9, 2019).
[677] *Id.*
[678] *Id.*
[679] *Id.* at 19-20.
[680] *Id.*; *see, e.g.*, Pacific Can Co. v. Hewes, 95 F.2d 42 (9th Cir. 1983).

1.2. The Construction of Agency in the Context of Arbitration

Extension based on agency is frequently applied by arbitral tribunals and national courts.[681] Generally speaking, the principal is bound by contracts concluded by the agent; if such contracts contain an arbitration clause, the principal is obliged to arbitrate disputes arising from these contracts despite not personally signing the agreement. In exceptional cases, the agent is bound by the arbitration agreement concluded on behalf of the principal, such as when wrongful acts are attributed to the agent or when the agent failed to reveal that the agreement was concluded on behalf of an undisclosed principal.[682]

According to the separability principle, when applied to the arbitration agreement and the main contract, an agency relationship could exist concerning the main contract but not the arbitration agreement.[683] There are different reasons for such position, including the existence of an agreement between the principal and the agent to exclude the conclusion of arbitration agreements from the mandate of the latter, as well as non-compliance with some formal restrictions imposed by national laws, such as a special written authorization for the agent to be able to conclude an arbitration agreement on behalf of the principal.[684]

The basic rule that agency is not presumed and must be proven to bind the principal also applies for arbitration agreements. Therefore, if an arbitration agreement is invoked against a non-signatory based on a purported agency relationship, the existence of such agency

[681] *See, e.g.*, Keytrade USA, Inc. v. Ain Temouchent M/V, 404 F.3d 891 (5th Cir. 2005); Harvey v. Joyce, 199 F.3d 790 (5th Cir. 2000); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3rd Cir. 1993); Arriba Ltd v. Petroleos Mexicanos, 962 F.2d 528 (5th Cir. 1992).
[682] Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party – Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 GEO. WASH. INT'L L. REV. 711, 724-25 (2003).
[683] BORN, *supra* note 2, at 1423.
[684] *Id.*; *see* discussion *infra* § 2.

relationship should be decided by the court or the tribunal before compelling arbitration.[685] Failing to prove the existence of the agency relationship, the arbitration agreement is only binding upon its signatories. For example, in *E.I. DuPont de Nemours v. Rhone Poulenc Fiber*,[686] a joint venture agreement was concluded among Dupont China (DPC), Rhone Poulenc Fiber and Resin Intermediates (Rhodia Fiber), and Liaoyang Petro-Chemical Fiber Company (LYPFC) a Chinese company.[687] The parent companies of DPC and Rhodia Fiber — E.I. Dupont de Nemours and Rhodia SA — were not parties to the joint venture agreement; however, they agreed orally to support the joint venture between their subsidiaries and the Chinese company.[688] The joint venture failed and Dupont sued Rhodia Fiber and Rhodia SA for damages based on the alleged failure to provide the orally agreed financial support for the joint venture.[689] The defendants filed a motion to compel arbitration despite the fact that E.I. Dupont de Nemours was not a signatory to the joint venture agreement, which had the arbitration clause.[690]

As DPC was an agent for its parent company, E.I. Dupont de Nemours, the defendants argued that E.I. Dupont de Nemours, as principal, was bound by the arbitration agreement signed by its agent.[691] The district court refused to compel arbitration and the appeals court confirmed the decision stating that "[o]ne corporation whose shares are owned by a second corporation does not, by that fact alone, become the agent of the second company."[692] Therefore, the decision of the court was mainly based on the fact that the defendants were unable to present an evidence that the subsidiary entered into the agreement as an agent for its parent. Since the agency

[685] HANOTIAU, *supra* note 39, at 11.
[686] E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, 269 F.3d 187 (3rd Cir. 2001).
[687] *Id. at* 191.
[688] *Id.* at 192.
[689] *Id.* at 193.
[690] *Id.* at 194.
[691] *Id.*
[692] *Id.* at 199.

relationship is not presumed, the plaintiff was not considered party to the arbitration agreement and was not obliged to arbitrate the dispute.

Determining whether the principal is automatically bound by the arbitration clause in the contract concluded by its agent or whether some requirements must be satisfied to extend the arbitration agreement often arises in the context of arbitration and agency. In fact, the position of the non-signatory principal changes in different jurisdictions, especially regarding requirements for special authorization from the principal to the agent to conclude an arbitration agreement on its behalf. Moreover, some jurisdictions require that authorization is in written form. Another requirement is that the agency relationship should pertain to the specific contract and arbitration clause in dispute — not to other agency relationships between the parties.[693] Additionally, the requirement that the principal should be disclosed at the time of concluding the contract, otherwise, the principal is not considered a party to the arbitration agreement.[694]

2. Requirements in Some Legal Systems to Bind the Principal to the Arbitration Agreement Concluded by its Agent

Different jurisdictions have adopted different approaches in binding the principal to the arbitration agreement concluded by its agent regarding either the content or the form of the authorization to conclude such agreement. Some require special authorization from the principal to conclude an arbitration agreement on its behalf, that the authorization for concluding such arbitration agreements is in writing, that the agency agreement pertains to the contract in dispute, and that the principal is disclosed when concluding the contract. This section analyzes these different conditions.

[693] BORN, *supra* note 2, at 1421.
[694] *See* discussion *infra* § 2.4.

2.1. Special Authorization from the Principal to the Agent to Conclude an Arbitration Agreement on its Behalf

Some jurisdictions require special authorization from the principal to the agent to be able to conclude an arbitration agreement on its behalf. In these jurisdictions, the principal-agent relationship is insufficient to bind the principal by the arbitration agreement concluded by its agent unless the agent was specifically authorized. However, an exception applied in almost all jurisdictions is the existence of a general agency agreement.[695] A general agency agreement is not restricted to a special contract or transaction, as the agent is authorized to deal with all the rights of the principal, including the right to conclude arbitration agreements.[696]

French law adopted the restrictive approach, in Article 1989 of its Civil Code, and requires special authorization from the principal to the agent to conclude an arbitration agreement on its behalf.[697] Article 1989 provides that "[t]he mandatary cannot do anything beyond what is expressed in his mandate: the authority to settle does not include that to enter into an arbitration agreement."[698] Despite its liberal approach to arbitration, French law applies this restriction that unjustifiably distinguishes between arbitration and litigation.

Article 702 of the Egyptian Civil Code also requires special authorization from the principal to the agent to be able to conclude an arbitration agreement.[699] In the same context, under Article 76 of the Egyptian Code of Civil Procedure, it is impermissible to accept arbitration instead of litigation without special authorization from the principal when there is a

[695] BREKOULAKIS, *supra* note 399, at 52.
[696] *Id.*
[697] FOUCHARD ET AL., *supra* note 48, at 251.
[698] CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1989 (Fr.) [hereinafter French Civil Code].
[699] Law No. 131 of 1948 (Civil Code), *al-Waqā'i' al-Misrīyah*, vol. 108 bis (a), 29 July 1948, art. 702 (Egypt) [hereinafter Egyptian Civil Code].

right claimed by an agent on behalf of a principal.[700] Such authorization could be a general mandate to conclude arbitration agreements on behalf of the principal without a link to a special contract or dispute.[701] This special authorization to conclude an arbitration agreement empowers the agent to proceed with all of the arbitration procedures, such as appointing the arbitrators, signing the terms of reference, etc.[702]

Despite the explicit requirement of these two Egyptian provisions for special authorization to conclude arbitration agreements, however, the jurisprudence in Egypt only applies such provisions to domestic arbitration and not apply to international arbitration because of the special nature of international disputes and the flexibility required.[703] According to the jurisprudence, dispensing special authorization in international disputes is supported by the trade usage, which authorizes the agent in international issues to conclude arbitration agreements on behalf of the principal, particularly when the contract signed by the agent is an international standard contract containing an arbitration clause.[704] In all cases, the absence of such special authorization does not invalidate the arbitration agreement unless the principal contests being bound by the agreement.[705] In other words, the counterparty cannot rely on the absence of such

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[700] Law No. 13 of 1968 (Code of Civil and Commercial Procedures), *al-Jarīdah al-Rasmīyah*, vol. 19, 7 May 1948, art. 76 (Egypt) [hereinafter Egyptian Civil Procedure Code].

[701] NARIMAN ABDELKADER, ETFAK ALTAHKIM WEFKAN LE KANOUN AL TAHKIM FE AL MWAD AL MADNYA W AL TEGARIA RAKM 27 LESANAT 1994 [ARBITRATION AGREEMENT IN THE CONTEXT OF THE EGYPTIAN ARBITRATION LAW NO. 27/1994 CONCERNING CIVIL AND COMMERCIAL MATTERS] 225 (1996).

[702] EL-ANSARY HASSAN EL-NIDANY, AL ATHAR AL NESBY LE ETFAK AL TAHKIM, DERASA FE AL KANOUN RAKM 27 LE SANAT 1994 F SHAAN AL TAHKIM FE EL MWAD AL MADNYA W AL TEGARYA, [THE RELATIVE EFFECT OF THE ARBITRATION AGREEMENT, A STUDY OF THE LAW NO. 27/1994 CONCERNING ARBITRATION IN CIVIL AND COMMERCIAL MATTERS] 30 (2001).

[703] AHMED A. SALAMA, AL TAKIM F AL MOAAMLAT AL MALYA AL DAKHLYA W AL DAWLYA (DERASA MOKARNA) [ARBITRATION IN THE DOMESTIC AND INTERNATIONAL FINANCIAL TRANSACTIONS] (COMPARATIVE STUDY) 206 (1992).

[704] *Id.* at 206-07.

[705] MOSTAFA M. EL-GAMAL & OKASHA M. ABDELAL, AL TAHKIM FE ALELAKAT ALKHASA AL DAWLYA W AL DAKHELYA [ARBITRATION IN PRIVATE INTERNATIONAL AND DOMESTIC RELATIONS] 433 (1998).

authorization to exclude the principal from arbitration proceedings as long as the principal has not argued involvement.[706]

Jurisprudence in Egypt generally agrees that such special authorization is not required to bind corporations to arbitration agreements concluded by their managers.[707] Since the manager has wide discretionary powers to make all kinds of decisions that deeply affect the corporation, there is no reason to require special authorization to conclude arbitration agreements, particularly since arbitration has become the most common way to settle disputes for corporations.[708] The only exception to this position is when the regulations or internal law of the corporation requires such authorization; in such case, the manager should have the authorization before concluding arbitration agreements on behalf of the company, otherwise, the company would not be bound.[709] A similar position has been adopted in European laws but without the exception; in all cases, the manager has the power to bind the company to an arbitration agreement concluded on its own behalf even if its internal rules provide otherwise.[710] According to Article 9(2) of Council Directive 68/151/EEC, "[t]he limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed."[711]

Greek and Turkish laws have adopted the restrictive approach by requiring special authorization from the principal for the agent to conclude an arbitration agreement on the

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[706] *Id.*
[707] ABDELKADER, *supra* note 701, at 228.
[708] *Id.*
[709] *Id.*
[710] FOUCHARD ET AL., *supra* note 48, at 251.
[711] Council Directive 68/151/EEC of 9 March 1968 on Co-ordination of Safeguards which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 58 of the Treaty, with a View to Making Such Safeguards Equivalent Throughout the Community, 1968 O.J. (L 65).

principal's behalf.[712] On the contrary, U.S. courts have not required such authorization to bind the principal to an arbitration agreement concluded by its agent.[713] In addition, amended Italian law and Swiss law, which previously adopted the restrictive approach, no longer require such authorization.[714]

Arbitral tribunals, in some cases, have refused to bind the principal to the arbitration agreement absent special authorization if the applicable national law requires such authorization. For example, in ICC Case No. 5832,[715] a contract concluded between an Austrian company and a Liechtenstein firm referred to the general conditions of the Austrian company, which contained an ICC arbitration clause.[716] The contract was signed by two employees of the Austrian company and a representative from the Liechtenstein firm.[717] When the dispute arose, the Liechtenstein firm initiated arbitration proceedings against the Austrian company, which objected to the jurisdiction of the arbitral tribunal based on the allegation that it was not bound by the arbitration agreement.[718] The Austrian company argued that the contract was not signed by its legal representative and the two employees who signed were not duly authorized to conclude an arbitration agreement on behalf of the company.[719]

The arbitral tribunal applied different national law approaches, applicable to different aspects of the power of representation.[720] It applied the law of the place of the registered office of the principal to determine whether the power of the representation existed or not and applied the law of the place where the arbitration agreement was concluded to determine the scope and

[712] BLACKABY ET AL., *supra* note 77, at 90.
[713] *Id.*
[714] *Id.*
[715] *See* BREKOULAKIS, *supra* note 399, at 47 (discussing the outcome of the ICC Case No. 5832 (1988)).
[716] *Id.*
[717] *Id.*
[718] *Id.*
[719] *Id.*
[720] *Id.*

extent of this power.[721] The two approaches pointed to the application of Austrian law, which requires special authorization from the principal to the agent to conclude an arbitration agreement on its own behalf.[722] Therefore, the arbitral tribunal decided that the arbitration agreement was not binding upon the Austrian company absent such authorization.[723]

Clearly, some jurisdictions are flexible in binding the principal by the arbitration agreement concluded by its agents. However, other jurisdictions are more restrictive, requiring special authorization from the principal to the agent. Such disparities negatively affect the certainty and predictability regarding whether the principal is bound by the arbitration agreement or not. The proposed approach is helpful in removing this uncertainty by providing a suitable rule in this respect, as discussed later in this chapter.[724]

2.2. Written Authorization to Conclude an Arbitration Agreement

Another condition imposed by some jurisdictions to validly conclude an arbitration agreement on behalf of the principal is that the authorization be in writing.[725] For example, Austrian law and the law of the Czechoslovak Republic require a written form of authorization.[726] However, French, Swiss, Italian, and German law do not require such written authorization.[727]

As the new Egyptian Arbitration Law does not refer to the form required to conclude an arbitration agreement by an agent, the rules of the Civil Code are applied.[728] According to Article 700 of the Egyptian Civil Code, the agency relationship should take the required form for

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[721] *Id.*
[722] *Id.*
[723] *Id.*
[724] *See* discussion *infra* § 6.
[725] BLACKABY ET AL., *supra* note 77, at 90.
[726] *Id.*
[727] *Id.*
[728] ABDELKADER, *supra* note 701, at 226.

legal work subject to this agency unless another provision provides otherwise.[729] Strict application of this provision entails that the agency relationship for concluding an arbitration agreement should be in writing since the arbitration agreement should be in writing to be enforceable under Article 12 of the new Arbitration Act.[730] However, the prevailing view in the jurisprudence differs.[731] Article 700 of the Egyptian Civil Code applies only to the domestic civil disputes — not international commercial ones.[732] Therefore, the agency in the context of international commercial arbitration is out of the reach of this article and no written form is required to bind the principal to the arbitration agreement concluded by its agent.[733]

The Egyptian Civil Code has a conflict of laws rule in Article 20, noting that contracts could be governed by either the law of the country where they were concluded, the law applied to the substantive rights and obligations, the law of the contractor's domicile, or a common national law.[734] Based on Article 20, if the agency agreement to conclude an arbitration agreement is not in written form, it is still valid and enforceable under Egyptian law provided it is valid according to one of the aforementioned laws.[735] In addition, widely accepted trade usage recognizes that the agency relationship in commercial and maritime issues impliedly includes an

[729] Egyptian Civil Code, *supra* note 699, art. 700; ABDELKADER, *supra* note 701, at 226.
[730] Egyptian Arbitration Act, *supra* note 86, art. 12 ("The arbitration agreement must be in writing, on penalty of nullity. An agreement is in writing if it is contained in a document signed by both parties or contained in an exchange of letters, telegrams or other means of written communications."); ABDELKADER, *supra* note 701, at 226.
[731] MOHAMED N. SHEHATA, MAFHOUM AL GHER FE AL TAHKIM "DERASA TAHLEELYA W TATBEEKIA MOKARNA LE MABDAA NESBYET ATHAR AL TAHKIM BELNESBA LEL GHER" [THE THIRD-PARTY CONCEPT IN ARBITRATION "AN ANALYTICAL COMPARATIVE STUDY FOR THE PRINCIPLE OF THE RELATIVE EFFECT OF THE ARBITRATION AGREEMENT CONCERNING THIRD PARTIES"] 47 (1996).
[732] *Id*.
[733] *Id*.
[734] Egyptian Civil Code, *supra* note 699, art. 20; ABDELKADER, *supra* note 701, at 226.
[735] ABDELKADER, *supra* note 701, at 226.

authorization to conclude arbitration agreements since arbitration is the common and default method for settling such disputes.[736]

In practice, arbitral tribunals have had some flexibility in applying this requirement when international parties are involved.[737] For example, in *Czechoslovakia Foreign Trade Company v. Austrian Company X*,[738] the Austrian company participated in a fair conducted by the Czechoslovakian company and signed the application form, which had an arbitration clause incorporated by reference to the general conditions of the trade company.[739] A dispute arose because the Austrian company refused to pay for certain services and the Czechoslovakian company initiated arbitration proceedings.[740] The Austrian company raised a preliminary objection based on the allegation that it was not bound by the arbitration agreement because the person who signed the form was not the managing director and was not validly authorized by the company to conclude an arbitration agreement.[741] The Austrian company enhanced its position by providing that the applicable law, which was the law of Czechoslovakia, required the agency relationship to be in writing to bind the principal by the arbitration agreement concluded by its agent.[742]

The tribunal refused to strictly apply the written form requirement for concluding an arbitration agreement by the agent.[743] Alternatively, the tribunal analyzed the factual circumstances surrounding the conclusion of the contract to determine whether the Austrian

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[736] SHEHATA, *supra* note 731, at 47.
[737] Karyna Loban, Extension of the Arbitration Agreement to the Third Parties 10 (Mar. 24, 2009) (unpublished LL.M. thesis, Central European University), http://www.etd.ceu.hu/2009/loban_karyna.pdf.
[738] Czechoslovakia Foreign Trade Company v. Austrian Company X, Case No. Rsp. 153/79 of 1980, 11 Y.B. COM. ARB. 112 (1986) (CAC).
[739] *Id.*
[740] *Id.*
[741] *Id.*
[742] *Id.*
[743] *Id.*

company was bound by the arbitration agreement signed by the employee or not. The arbitration court concluded that the Austrian company validly approved the arbitration agreement entered into by the signatory employee.[744] This conclusion is based mainly on the fact that the application form bore the stamp of the Austrian company, which was obtained legally by the chief managing director of the company.[745] Therefore, use of the stamp was considered approval of the application form signed by the employee and to the arbitration clause included, especially as arbitration clauses are common in this kind of application form.[746] The importance of this decision was that the court did not strictly apply Czechoslovakian law, which required the agency relationship to be in writing to bind the principal by the arbitration agreement concluded by its agent. Rather, the arbitral court based its decision on the factual circumstances surrounding the case and asserted that the signatory acted according to the approval of the company. This decision clearly honors the principles of good faith, which support such flexible application of the requirement for a written authorization.

The analysis of this condition indicates that it is unsuitable to be applied regarding binding the principal in international disputes. Moreover, the fact that it is not required in all jurisdictions and not all arbitrators strictly adhere to this condition, justifies the move to a unified proposed rule in this respect.

2.3. Proof that the Agency Relationship Specifically Pertains to the Contract in Dispute

To bind the principal by the arbitration agreement concluded by an agent, the agency relationship must pertain to the specific contract and the arbitration clause in dispute and not to

[744] *Id.*
[745] *Id.*
[746] *Id.*

other agency relationships between the parties.[747] In other words, proving the existence of an agency relationship is insufficient to bind the principal to the arbitration agreement unless the proof demonstrates the existence of an agency relationship concerning, in specific, the contract in dispute. For example, in *InterGen N.V. v. Grina*,[748] InterGen, an energy company, had its affiliate (Bechtel) enter into a purchase agreement with a subsidiary of a manufacturer, Alstom.[749] The purchase agreement and the supporting agreements provided for arbitration regarding any and all controversies, disputes, and claims between the buyer and the seller.[750] Due to technical problems with the purchased generators, the energy company sued the manufacturer, its affiliate, and its agent.[751] The manufacturer sought to enforce arbitration alleging that InterGen was bound by the arbitration agreement signed by its subsidiary based on, inter alia, agency principles.[752] The district court refused to compel arbitration and the appeals court affirmed this decision.[753] According to the appellate court, although an agency relationship existed between the parent and its subsidiary regarding other purposes, such limited agency relationship did not bind the parent company absent an explicit agency relationship regarding the transaction in dispute.[754] The court conclusively held that,

> although InterGen may have had an agency relationship with a Bechtel entity for certain (limited) purposes, the record is bereft of any evidence suggesting that a Bechtel entity acted as InterGen's agent in committing to carry out the purchase orders. Without evidence of such a commitment, InterGen cannot, under applicable principles of agency law, be bound by the arbitration clauses contained in the purchase orders.[755]

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[747] BORN, *supra* note 2, at 1421.
[748] InterGen N.V. v. Grina, 344 F.3d 134 (1st Cir. 2003).
[749] *Id.* at 139-40.
[750] *Id.*
[751] *Id.*
[752] *Id.* at 148-49.
[753] *Id.*
[754] *Id.*
[755] *Id.* at 148.

This position is different from a general agency relationship between the agent and the principal.[756] Such kind of agency authorizes the agent to conclude any contract on behalf of the principal and is not limited to a specific contract or transaction.[757] U.S. courts have distinguished between the general and special agency based on the scope of powers conferred upon the agent for dealing with the principal's affairs.[758] General agency is recognized in most legal systems so, if the party who seeks to compel arbitration proves a general agency relationship, the principal is bound by the arbitration agreement without proving the existence of a special agency regarding the contract in dispute. However, the determination of a general agency relationship should be approached with caution in the context of commercial corporations as the corporate structure is mainly based on the notion of separate legal entities and the existence of general agency among the group defeats the notion of separation.[759]

In fact, the general application of this condition in almost all jurisdictions makes it easier to adopt it in the proposed rules, keeping the existence of the general agency agreement between the principal and the agent.[760]

2.4. Positions on Binding the Undisclosed Principal to the Arbitration Agreement Concluded by its Agent

The question that arises in this respect is whether an arbitration agreement concluded by an agent is extended to an undisclosed principle or not. Some U.S. courts have concluded that when the principal is undisclosed, the agent is personally bound by the arbitration agreement.[761]

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[756] BORN, *supra* note 2, at 1421.
[757] *Id.*
[758] *Id.* at 1421 n.77.
[759] *Id.* at 1421-22.
[760] *See* discussion *infra* § 6.
[761] Michael P. Daly, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 100 (2007).

For example, in *Sandy Beck v. Suro Textiles, Ltd.*,[762] three purchase agreements concluded between Sandy Beck and Suro Textiles Ltd. had an arbitration clause.[763] When the dispute arose, Suro started arbitration proceedings against Beck who objected to the jurisdiction of the tribunal and applied for a petition to stay the arbitration proceedings.[764] Beck alleged that he signed the contract as an agent for his corporate entity so, he was not personally bound to arbitrate.[765] Suro affirmed that Beck was the proper party of the arbitration agreement since Beck did not indicate in the purchase agreements that he was contracting on behalf of any corporate entity.[766] The court decided that Beck was personally bound by the arbitration agreement because "[w]here a contract is signed by an agent who does not indicate therein that he is signing as an agent on behalf of a disclosed principal, the agent is deemed to be contracting of his own behalf."[767]

Courts have reached the same conclusion when the question of the undisclosed agent arises in the context of enforcing an arbitral award. In *La Societe Nationale v. Shaheen Natural Resources*,[768] the plaintiff sought an order confirming an arbitral award, rendered on its behalf by a three-member ICC tribunal in Geneva, against Shaheen Natural Resources based on breach of contract due to late payment of the amount of the second cargo.[769] The defendant contested the recognition and enforcement of the award, alleging that the contract was signed by the defendant as an agent for its subsidiary, Newfoundland Refining Company, Ltd, and the defendant was not

[762] Beck v. Suro Textiles, Ltd., 612 F. Supp. 1193 (S.D.N.Y. 1985).
[763] *Id.* at 1194.
[764] *Id.*
[765] *Id.*
[766] *Id.* at 1195.
[767] *Id.*; *see also* Cosmotek Mumessillik Ve Ticaret Ltd. Sirkketi v. Cosomotek USA, Inc. et al., 942 F. Supp. 757 (D. Conn. 1996).
[768] La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et la Commercialisation Des Hydrocarbures v. Shaheen Natural Resources Co., Inc., 585 F. Supp. 57 (S.D.N.Y. 1983).
[769] *Id.* at 62.

personally bound either by the contract or by its arbitration clause.[770] The court refused that allegation based primarily on the fact that the defendant had not raised such objection before the arbitral tribunal and, therefore, waived such contention.[771] In addition, the court held that even if the defendant had raised the contention in arbitration, it would have been refused because of the clear language of the contract, which identified the plaintiff as the seller and the defendant as the buyer in the first paragraph.[772] The court stated that "[t]he party claiming that it is an agent has the burden of proving it and generally, the self-serving statements of the purported agent are insufficient."[773] Based on that, the district court confirmed the arbitral award.[774] The decision was confirmed in appeal.[775] Therefore, language in the contract should clarify that the agent is contracting on behalf of a principal, otherwise, it is difficult to bind the principal and prove the agency relationship.[776]

Under English law, if the principal is undisclosed and the counterparty either thought that the agent was contracting as the principal or did not know the specific identity of the principal, the agent is personally bound by the arbitration agreement.[777] However, an undisclosed principal has the right to reveal its identity and intervene in the proceedings.[778] The limitation for such disclosure and intervention is that it must occur before the commencement of arbitration

[770] *Id.* at 63.
[771] *Id.*
[772] *Id.*
[773] *Id.*
[774] *Id.*
[775] La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et la Commercialisation, Des Hydrocarbures v. Shaheen Natural Resources Co., Inc., 733 F.2d 260 (2nd Cir. 1984).
[776] Dwayne E. Williams, *What You Need to Know about Binding Nonsignatories to Arbitration Agreements*, CORP. COUNCIL BUS. J. (Sept. 1, 2006), http://ccbjournal.com/articles/what-you-need-know-about-binding-nonsignatories-arbitration-agreements.
[777] Sheppard, *supra* note 669, at 187.
[778] *Id.*

proceedings, otherwise, "if disclosed subsequent to proceedings have been commenced, a claimant is not required to sue the principal or forbear from suing the agent."[779]

In Egypt, the agent is the only one bound by the arbitration agreement when the principal is undisclosed.[780] The Egyptian Civil Code provides, in Article 106, that when a party concludes a contract in its name without revealing that he is an agent concluding the contract on behalf of a principal, the contract is binding upon the agent; this also applies to issues of agency in the context of arbitration.[781] This principle was applied in arbitration proceedings decided under the rules of the Cairo Regional Center for International Commercial Arbitration.[782] In Case No. 2/1994,[783] the claimant initiated arbitration proceedings against the respondent because the latter was obliged to transport and deliver a shipment of grains in a port of an African state and the shipment was damaged in the transit.[784] The respondent claimed that he was not bound by the arbitration agreement because he was acting as an agent for the owner.[785] The tribunal refused to consider the respondent not bound by the arbitration agreement because, despite signing in the capacity of an agent, there was no mention of the principal's name.[786] The tribunal noted that an established legal principle requires the agent to state the name of the principal on whose behalf the agent is signing to "realize that all the effects of the contract shall inure to the principal."[787] Otherwise, "[i]f a party pretended that he was an agent without disclosing the name of the

[779] *Id.*
[780] SHEHATA, *supra* note 731, at 41.
[781] Egyptian Civil Code, *supra* note 699, art. 106; SHEHATA, *supra* note 731, at 41.
[782] MOHIE-ELDIN ALAM-ELDIN, ARBITRAL AWARDS OF THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION 141 (2000).
[783] *Id.* at 141 (discussing the outcome of Case No. 2/1994, 25 July 1995, Cairo Regional Center for International Commercial Arbitration).
[784] *Id.*
[785] *Id.* at 142
[786] *Id.* at 143.
[787] *Id.*

principal, such a party became the principal and the effect and obligations of the contract would pass on him."[788]

Two exceptions exist under this article to consider the undisclosed principal a party to the contract concluded by the agent.[789] First, if it is absolutely clear that the contracting party is aware without any doubt that he is dealing with an agent to the principal.[790] Second, when it does not make a difference to him to conclude the contract with either the agent or the principal.[791]

Therefore, despite the existence of limited exceptions in some jurisdictions, the general tendency is not to extend an arbitration agreement concluded by the agent to an undisclosed principal. The proposed rule follows the same trend without providing any exceptions in this respect, as discussed in the proposed approach section.[792]

In order to fully develop the proposed approach regarding agency issues, the debatable position of agents and/or employees in relation to the arbitration agreement concluded on behalf of the principal — and whether those agents and employees are able to rely on such arbitration agreement or not — should be analyzed to reach the suitable proposed rule in this respect.

3. The Position of Agents and Employees Regarding an Arbitration Agreement Concluded on Behalf of a Principal

The general rule is that the agent is not bound by a contract executed on behalf of the principal absent a clear manifestation that the agent would be bound instead of, or alongside, the principal.[793] However, there is a tendency, especially in the United States, to give agents, employees, and representatives the right to rely on the arbitration agreement concluded on behalf

[788] *Id.*
[789] Egyptian Civil Code, *supra* note 699, art. 106.
[790] *Id.*
[791] *Id.*
[792] *See* discussion *infra* § 6.
[793] Lamm & Aqua, *supra* note 682, at 724.

of the principal.[794] The common scenario is that the claimant, who is party to an arbitration agreement concluded with an entity, files a court claim against this entity and also against its employees, officers, or agents as co-defendants.[795] The indirect objective of such action is to escape arbitration as the claim cannot be separated; since the co-defendants are not parties to the arbitration clause, the whole claim must be heard before a national court.[796] Allowing the agent to rely on the arbitration agreement, however, is applied to avoid such manipulation. In other words, "to hold otherwise would seriously weaken the arbitration agreement since a corporation or partnership acts through its employees and agents and, in such cases, it is their very acts or omissions which allegedly give rise to the liabilities at issue."[797] Extension of the arbitration agreement to the agents and employees of the principal is considered an exception to the ordinary agency principles because of the special nature of the arbitration agreements.[798] This approach is based on "the separable character of the agreement to arbitrate and to be primarily attributable to the parties' presumed intention to provide protections for agents and/or employees against joinder in oppressive litigation and to prevent the circumvention of agreements to arbitrate through satellite litigation."[799]

U.S. courts have frequently applied this approach. For example, in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*,[800] a claim was filed against a brokerage firm, its employee, and

[794] *Id.*
[795] BREKOULAKIS, *supra* note 399, at 51.
[796] *Id.*
[797] Matthew Farley, *Arbitration with People Who are Not Parties to the Agreement*, 39 REV. SEC. & COMMODITIES REG., no. 22, Dec. 20, 2006, at 245, 246, https://files.drinkerbiddle.com/Templates/media/files/publications/2006/arbitrating-with-people-who-are-not-parties-to-the-agreement.pdf.
[798] BORN, *supra* note 2, at 1422.
[799] *Id.*
[800] Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3rd Cir. 1993).

its sister corporation for an alleged breach of fiduciary duties.[801] The defendants filed a motion to compel arbitration that was refused by the district court; however, the appellate court reversed and remanded the case, asserting that the brokerage firm, its employee, and the sister corporation had the right to rely on the arbitration agreement.[802] In referring to the arbitration clause, the court noted that "[w]here the parties to such a clause unmistakably intend to arbitrate all controversies which might arise between them, their agreement should be applied to claims against agents or entities related to the signatories."[803]

U.S. courts have adopted this right for agents even if the principal waives the right to arbitrate. For example, in *Lemon Drop Properties, LLC v. Pass Marianne, LLC*,[804] a contract existed between the parties to construct new condominiums; the pre-construction sales contract had an arbitration clause.[805] This contract expressly provided that Alfonso was the agent of the seller, Pass Marianne.[806] Lemon Drop sued Pass Marianne for rescission of the contract because of alleged defects in design and construction of the condominiums. Pass Marianne filed an answer without invoking the arbitration clause, which waives the right to arbitrate these disputes.[807] Afterward, Lemon Drop amended its claim by filing a motion to add Alfonso as a defendant.[808] Alfonso filed a motion to compel arbitration as the agent of the seller although he was not a signatory to the contract.[809] The court held that

> agents of a signatory can compel the other signatory to arbitrate so long as (1) the wrongful acts of the agents for which they are sued relate to their behavior as agents or in

[801] *Id.* at 1113-14.
[802] *Id.*
[803] *Id.* at 1122.
[804] Lemon Drop Properties, LLC v. Pass Marianne, LLC, 73 So. 3d 1131 (Miss. 2011).
[805] *Id.* at 1134.
[806] *Id.*
[807] *Id.* at 1134-35.
[808] *Id.*
[809] *Id.* at 1135.

> their capacities as agents . . . and (2) the claims against the agents arise out of or relate to the contract containing the arbitration clause . . . .[810]

In addition, the court provided that the waiver of the right to arbitrate by Pass Marianne did not affect the right of the agent to invoke the arbitration clause.[811] According to the court, "[t]he decision to exercise the right to arbitrate, *vel non*, is often made for strategic reasons consistent with the client's best interests . . . Such strategy considerations undeniably are personal and may differ as between the principal and agent."[812] Therefore, the waiver of the principal was not imputed to Alfonso.[813] While the agent's right to rely on the arbitration agreement originates from the right of the principal to arbitrate, the court has flexibly effectuated this right toward the agent independent of whether the principal uses this right or not.

Such flexibility of some U.S. courts in applying this doctrine clearly appears in dealing with the arguments raised by plaintiffs to avoid arbitration with agents or employees, alleging that the omissions were for the agent's own benefit unrelated to the interest and the objectives of the entity or that the misconduct was related to acts prior to and leading up to the conclusion of the contract that has the arbitration agreement.[814] These arguments to exclude agents or employees from the reach of the arbitration agreement typically fail and have not been given any weight by the courts.[815] However, that does not negate the possibility of excluding agents and employees from the reach of the arbitration agreement if the wrongful acts are totally unrelated to their position and could not be attributed to the entity.[816] An example of this situation would be if an employee at a shopping center had an accident in the parking lot with a manufacturer and

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[810] *Id*. at 1136.
[811] *Id*.
[812] *Id*. at 1137.
[813] *Id*.
[814] Farley, *supra* note 797, at 247.
[815] *Id*.
[816] *Id*.

the manufacturer had an arbitration agreement with the management of the shopping center where the employee works.[817] In this scenario, extension of the arbitration agreement to the employee could not occur by any means.[818]

However, some U.S. courts have been reluctant to recognize such extension to agents and employees.[819] The main logic behind the refusal for such an extension is that "if a corporation wants to include its agents in the arbitration clause, then it would write the contract in such a way to convey this message."[820] An example of refusal to extend the arbitration agreement to an agent occurred in *Westmoreland v. Sadoux*,[821] where a minority shareholder sued the majority shareholders, in their individual capacities, for fraud as they convinced him to sell his shares by providing misleading statements about the status of the company.[822] The owner of the majority shareholder filed a motion to compel arbitration, which the district court ordered.[823] The plaintiff appealed the decision of the district court asserting no agreement to arbitrate its dispute with the appellee.[824] However, the appellee asserted the right to invoke the arbitration clause in the shareholder agreement as the company's agent.[825] The appellate court held that the defendant could not compel arbitration because "an agent or employee of a signatory cannot invoke an

[817] *Id.*
[818] *Id.*
[819] Keisha I. Patrick, *The Tie that Doesn't Bind: Fifth Circuit Rules that Non-Signatories Agents Can't Compel Arbitration as Individuals – Westmoreland v. Sadoux*, 2003 J. DISP. RESOL. 583, 585 (2003); *see also* Jaime Dodge Byrnes & Elizabeth Pollman, *Arbitration, Consent and Contractual Theory: The Implications of the EEOC v. Waffle House*, 8 HARV. NEGOT. L. REV. 289, 301 n.8 (2003) (referring to the different positions adopted by various circuits as the Third Circuit has adopted this extension while the First, Fifth, and Ninth Circuits have refused to extend the arbitration agreement to the agents and employees).
[820] Patrick, *supra* note 819, at 588.
[821] Westmoreland v. Sadoux, 299 F.3d 462 (5th Cir. 2002).
[822] *Id.* at 465.
[823] *Id.* at 465-66.
[824] *Id.*
[825] *Id.*

arbitration clause unless the parties intended to bring them into the arbitral tent."[826] The court provided that

> a nonsignatory cannot compel arbitration merely because he is an agent of one of the signatories. An agent is not ordinarily liable under the contract he executes on behalf of his principal, so long as his agency is disclosed, but he is personally liable if his acts breach an independent duty. If he seeks to compel arbitration, he is subject to the same equitable estoppel framework left to other nonsignatories.[827]

The court clearly decided that the agent was not subject to the arbitration agreement based on agency principles, however, recognized that the agent could claim this right through equitable estoppel principles.[828]

Notably, the extension of the arbitration agreement to the agents and/or the employees of the principal does not have support in all jurisdictions — it is almost only recognized in France, Germany, and Canada, as well as the United States.[829] The varied positions adopted by different jurisdictions lead to difficulties and uncertainties, which justify the need to adopt a unified rule.

In order to analyze all the dimensions of the agency in the context of the extension of arbitration agreements, an important aspect of this agency — apparent authority — is discussed as follows.

4. Wide Reliance on Apparent Authority in the Context of International Commercial Arbitration

Apparent authority is a general principle applied to international commercial contracts.[830] Under this principle, a party could be held bound by acts concluded on the party's own behalf by another person — despite the fact that the other person is not authorized to do so — if the purported principal's words or conduct created the appearance of authorization which the

[826] *Id.* at 467.
[827] *Id.* at 467-68.
[828] *Id.* at 468.
[829] BORN, *supra* note 2, at 1479.
[830] Abdel Wahab, *supra* note 1, at 148.

counterparty relied upon, believing that the authorization existed.[831] Under Article 2.2.5(2) of the UNIDROIT principles,

> [h]owever, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.[832]

Apparent authority is applied when there is no agency agreement at all, when the agent exceeds its agreed scope of representation, or when the agency is expired.[833] In other words, it is the second step in arbitral tribunal analysis to bind a non-signatory principal when an actual representation is lacking and there is no subsequent ratification of the acts concluded by the agent.[834] The justification behind application of this doctrine is to prevent inequitable results,[835] especially when the other signatory has a legitimate interest in binding the non-signatory (supposed principal) by the arbitration agreement. In other words, apparent authority is based on estoppel and the good faith principle.[836]

Contrary to the actual authority, where focus is on the relationship between the principal and the agent, the focus for apparent authority is on the relationship between the apparent principal and the counter party.[837] Two conditions exist for the apparent mandate to bind the principal to the arbitration agreement: inducement and false representation by the principal that the agent has the authority to conclude the agreement as well as reasonable reliance in good faith by the counter party.[838]

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[831] BORN, *supra* note 2, at 1425.
[832] UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACT, *supra* note 383, art. 2.2.5(2).
[833] Abdel Wahab, *supra* note 1, at 148.
[834] Zuberbuhler, *supra* note 451, at 22.
[835] Brekoulakis, *supra* note 11, at 128.
[836] Abdel Wahab, *supra* note 1, at 148.
[837] BREKOULAKIS, *supra* note 399, at 53.
[838] Brekoulakis, *supra* note 11, at 128.

Misrepresentation can occur by words or by conduct.[839] An example of misrepresentation is when the principal refers to previous transactions where the apparent agent was a representative to give the impression that the agency relationship is still in effect.[840] The misrepresentation may also occur by highlighting the existence of close business and corporate relationships between the apparent principal and the apparent agent to give the counterparty the image that they are "operating as one indistinguishable entity, with authority to represent each other."[841] These false inducements strongly connect the apparent authority with estoppel, abuse of rights, and fraud.[842]

Meanwhile, good faith reliance is satisfied if the contracting party took sufficient effort to investigate and ensure that the purported agent was, in fact, a representative, "otherwise, courts and tribunals are likely to reject good faith reliance and the application of apparent authority."[843] However, practically speaking, an inverse relationship should exist between the degree of inducement through misrepresentation and the required investigation to satisfy the good faith reliance condition. Therefore, when the misrepresentation is based on conceivable factual circumstances that do not raise doubts to the prudent person, investigation is not required and the condition of the good faith reliance is satisfied. The Egyptian Court of Cassation adopted this same position, providing that

> the third party should, in principle, verify the capacity of the agent dealing on behalf of the principal and enforceability of such dealings vis-à-vis the principal. Nonetheless, the third party is exempted from such duty if the principal behaves in a way that demonstrates, prima facie, that he/she has delegated an agent to deal in the Principal's name.[844]

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[839] BREKOULAKIS, *supra* note 399, at 53.
[840] *Id.*
[841] *Id.*
[842] *Id.*
[843] *Id.*
[844] Abdel Wahab, *supra* note 1, at 150.

The principle of apparent authority, and its two conditions, is recognized in most legal systems — whether in common law or civil law countries. For example, the *Restatement (Third) of Agency* provides that "[a]pparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."[845] It is also adopted in French law as it is one of the oldest substantive rules of private international law — "a party cannot rely on its lack of capacity or on the absence of power of its apparent representative, where the other party could legitimately have been unaware of that incapacity or absence of power."[846]

In Egypt, the apparent authority theory is not explicitly regulated, however, it is a well-known legal doctrine and frequently applied by the courts.[847] In this respect, the Egyptian Court of Cassation provided for the application of the apparent authority after indicating that the contract binds its parties, stating that

> by scrutinizing the provisions of the Civil Code it becomes evident that there exist some important applications where apparent situations are acknowledged for considerations of justice and protection of dealings within the society. Such applications share a common ground as well as consistent rules, which entail that they may not be stigmatized as an exception.[848] Accordingly, and provided all relevant conditions of application are met, the governing principle entail that if a person [the principal] has contributed — actively or passively — to the appearance of the party disposing of certain rights [the agent] as an authorized person in a manner that would instigate a bona fide third party to enter into a contract therewith in light of the surrounding circumstances . . . then such act or contract concluded for a consideration between the apparent agent and the bona fide third party shall be enforceable vis a vis the principal.[849]

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[845] RESTATEMENT (THIRD) OF AGENCY, *supra* note 668, §2.03. The U.S. courts have frequently applied this principle; *see, e.g.*, Telenor Mobile Comm. AS v. Storm LLC, 584 F.3d 396 (2nd Cir. 2009); Alamria v. Telcor Int'l, Inc., 920 F. Supp. 658 (D. Md. 1996).
[846] FOUCHARD ET AL., *supra* note 48, at 252.
[847] Abdel Wahab, *supra* note 1, at 149.
[848] *Id.*
[849] *Id.* (discussing the outcome of Mahkamat al-Naqd [Court of Cassation], Challenge No. 826, session of 16 Feb., 1986, year 54).

Such awards indicate stable application of apparent authority in the Egyptian legal system.

Tribunals frequently rely on the apparent mandate to bind a principal to an arbitration agreement concluded by a purported agent in cases where actual authority was lacking.[850] The application of apparent authority in the context of arbitration agreements "would prevent a party from successfully contesting the validity of an arbitration agreement on the basis of a law which is clearly out of step with what might reasonably be expected in international commerce"[851] regarding the conditions of representation. The issue of the apparent mandate always arises in the context of an attempt to bind a parent company to a contract concluded by its subsidiary and regarding agreements concluded by a state entity to bind the government.[852] In practice, it is hard to prove the existence of an actual authority in these two cases, "because States or parent companies often rely on obscure or idiosyncratic formalities of their national laws to claim that actual authority is invalid or lacking."[853]

Reliance on apparent authority in relation to corporations has been applied by most arbitrators when validity of the arbitration agreement is contested because of non-compliance with some formalities; these are either required by national laws — notable, since most national laws impose strict requirements — or corporations' regulations.[854] For example, if the person who signed the agreement does not have the power of representation according to the laws of the corporation (such as not being in the commercial registrar as an authorized representative of the

[850] Brekoulakis, *supra* note 11, at 128; *see also* HANOTIAU, *supra* note 39, at 13-14.
[851] FOUCHARD ET AL., *supra* note 48, at 253.
[852] Brekoulakis, *supra* note 11, at 127-28.
[853] *Id*.
[854] BREKOULAKIS, *supra* note 399, at 55.

corporation), the arbitration agreement is invalid for the company.[855] In such cases, arbitrators focus on evidencing consent instead of being stuck with the formal requirements.[856] This position of reliance on evidencing consent is supported by trade usage.[857] In other words,

> international tribunals may, under certain circumstances, rely on transnational principles of apparent authority to hold a corporation to an arbitration clause, signed by an apparent representative (i.e., officer, shareholder, or subsidiary) of that corporation notwithstanding any provisions in the by-laws of the corporation or in the national law governing those by-laws, restricting the actual authority of the representative.[858]

Illustrating reliance on consent, some tribunals consider that the exchange of correspondences and faxes between the parties is sufficient to bind the company to the arbitration agreement, even if signed by an unauthorized person.[859] Such correspondences are considered as ratification from the company to the agreement concluded by the alleged unauthorized employee since the communications contain the signature of authorized persons in the company.[860] Another example of such reliance is considering the stamp of the company on the contract to demonstrate consent to the arbitration agreement concluded by an employee even if the employee was not originally authorized to conclude such agreement.[861] This principle was applied by the arbitral tribunal in *Czechoslovak Foreign Trade Company v. Austrian Company X*.[862]

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[855] Konstantin Leonidovich Razumov, *The Law Governing the Capacity to Arbitrate*, *in* PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 260, 263 (A.J. van den Berg, T.M.C. Asser Instituut & International Council for Commercial Arbitration eds., 1996).
[856] *Id*. at 262.
[857] *Id*.
[858] BREKOULAKIS, *supra* note 399, at 55.
[859] Razumov, *supra* note 855, at 263.
[860] *Id*.
[861] *Id*.
[862] *See* discussion *supra* § 2.

French courts apply the apparent authority doctrine concerning binding corporations by arbitration agreements. For example, in *Intercast v. Est Peschand et Cie International*,[863] the court held the company bound to the arbitration agreement concluded by its director without requiring formal authorization.[864] The court based its decision on the fact that the contracting party was reasonable in believing that the director had the power to enter into arbitration agreement because arbitration has become a common way of settling disputes in international commercial transactions.[865] Concluding arbitration agreements was considered one of the day-to-day management issues normally within the director's scope of authority.[866]

This tendency, relying on apparent authority regarding binding corporations, has been supported by different national and international legislations.[867] For example, the English Companies Act 2006, § 40(1), provides that "in favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution."[868] In the same context, Article 9 of the European Commission's Directive on Comparative Law 68/151/EEC provides that "[t]he limits on the powers of the organs of the company, arising under the statute or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed."[869] Egyptian jurisprudence has reached similar results, concluding that

[863] FOUCHARD ET AL., *supra* note 48, at 253 (discussing Cour d'appel [CA] [Court of Appeal] Paris, Jan. 4, 1980, Rev. arb. 1981, 160 (Fr.)).
[864] *Id*.
[865] *Id*.
[866] *Id.*
[867] BREKOULAKIS, *supra* note 399, at 55.
[868] English Companies Act 2006, c. 46 (Eng.); BREKOULAKIS, *supra* note 399, at 55.
[869] *Id*.

corporations are not allowed to rely on its laws and regulations to negate the effect of the arbitration clause concluded on its own behalf by an apparent agent.[870]

In the United Arab Emirates, Dubai courts recently decided to apply apparent authority to arbitration agreements.[871] Before 2015, however, the prevailing position in the U.A.E. was that there should be a special authorization to conclude arbitration agreements.[872] The existence of apparent authority was insufficient to bind the apparent principal by the arbitration agreement concluded by the apparent agent because of the absence of special authorization.[873] Pro-arbitration policy in the U.A.E. and the flexibility of Dubai courts, however, have promoted this shift.[874] This position is also supported by the good faith principles and the need for stability and predictability in international transactions.[875] One of the decisions that illustrates application of the doctrine is *Palm Jebel Ali LLC v. Alan Stenet*.[876] In this case, nullification of an arbitral award rendered on behalf of PJA was sought on the basis that the person who signed the arbitration agreement was not the authorized manager, suggesting that PJA was not bound by such agreement.[877] The Dubai Court of Cassation refused this argument and held that there was a presumption that the person who signed on behalf of the company was authorized provided the

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[870] SHEHATA, *supra* note 731, at 47-48.
[871] Gordon Blanke, *Dubai Onshore and Offshore Courts Confirm Application of Apparent Authority to Arbitration Under UAE Law*, ARB. BLOG (May 24, 2017), http://arbitrationblog.practicallaw.com/dubai-onshore-and-offshore-courts-confirm-application-of-apparent-authority-to-arbitration-under-uae-law/ (referring to other cases applying the apparent authority such as, Middle East for Development LLC v. Safir Real Estate Investments LLC Appeal No. 293/2015; Al-Firjan LLC v. JNR Development Limited Case No. 310/2015; Case No. 547/2014, Ginette PJSC v. Geary Middle East FZE & Geary Ltd.).
[872] *Id.*
[873] *Id.*
[874] *Id.*
[875] Zafer Oghli & Marwa El Mahdy, *Apparent Authority When Signing Arbitration Agreements*, AL-TAMIMI & CO. (July 2017), https://www.tamimi.com/law-update-articles/apparent-authority-when-signing-arbitration-agreements/.
[876] Blanke, *supra* note 871 (discussing the outcome of Palm Jebel Ali LLC v. Alan Stenet Appeal, No. 547/2014).
[877] *Id.*

company's stamp was placed on the agreement, which was "in itself, sufficient to confer authenticity and hence a binding effect on the underlying arbitration agreement."[878]

The Dubai Court of Cassation drew a distinction to balance between protecting the legitimate expectations of the parties and the circumstances in which the contract was executed. The court distinguished between two situations; in the first situation, the names of the persons who have the authority and capacity to represent the company were stated at the beginning of the contract following the name of the company.[879] In this situation, the company may argue against the validity of the arbitration agreement based on the inadequate authorization of the party who signed the contract if the signatory's name was not included among the authorized names at the beginning of the contract.[880] The second situation is when there are no names listed as the companies' representatives at the beginning of the contract.[881] In this situation, there is a presumption that the person who signed the contract as a representative is the one duly authorized to bind the company.[882] This position aligns with good faith principles and does not disturb the legitimate expectations of the counterparty as the prudent person would have doubts and consequently make sufficient effort to guarantee that the person who signed on behalf of the company was authorized.

Apparent authority may also be applied by arbitral tribunals in cases involving state entities and whether such entities have the capacity and authority to bind the state.[883] The importance of apparent authority in this situation is based on the fact that it is hard, in practice, for a private party to prove that the state is bound by the arbitration agreement on the basis of

[878] *Id*.
[879] Oghli & El Mahdy, *supra* note 875.
[880] *Id*.
[881] *Id*.
[882] *Id*.
[883] Blessing, *supra* note 12, at 182.

actual authority because "national legislations, in this case the law of the state itself, may provide for overly technical rules for the state to be bound by an agreement entered by the state entity."[884] An exceptional national law in this respect is the Swiss Federal Private International Law Act as Article 177(2) provides that "[i]f a party to the arbitration agreement is a state or an enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration, or the arbitrability covers by the arbitration agreement."[885] Although this article mentions capacity only without the authority to represent the state, there is no obstacle precluding interpretation that includes the representation as well.[886]

Disregarding national limitations to invalidate arbitration agreements for the states and applying apparent authority has been applied in different arbitral awards.[887] Application of apparent authority by an arbitral tribunal for a state entity occurred in the interim award of ICC Case No. 6474.[888] In this case, a European supplier concluded different contracts with a state to supply agriculture products.[889] The contracts provided that the law applicable to any disputes was Swiss law; the contract contained an arbitration clause.[890] When the dispute arose, the supplier initiated ICC arbitration in Zurich based on the arbitration clause.[891] The state contested the jurisdiction of the arbitral tribunal alleging that it was not bound by the arbitration agreement signed by its officials as they neither had the capacity to bind the state nor the authority to

[884] BREKOULAKIS, *supra* note 399, at 56.
[885] Swiss Arbitration Act, *supra* note 85, art. 177(2).
[886] BREKOULAKIS, *supra* note 399, at 56.
[887] *Id*.
[888] Case No. 6474 of 1992, 25 Y.B. COM. ARB. 279 (ICC Int'l Ct. Arb.).
[889] *Id*.
[890] *Id*.
[891] *Id*.

represent it in such kinds of contracts.[892] The state provided that its national law should be the law applicable to determine the capacity and authority of those officials in binding the state.[893]

The arbitral tribunal applied the law of the seat, which was Swiss law, and referred to Article 177(2) of the Private International Law Act to conclude that "assuming the existence in the law of the territory of a provision depriving the Ministers concerned of the capacity to agree to arbitration, such a provision could *not* be invoked or relied upon in an international arbitration in Switzerland."[894] The tribunal provided that "general principles of arbitration law and of international practice would in any case lead to the same result . . . ."[895] and noted that the two conditions required to apply the apparent authority approach were satisfied.[896] The first condition — inducement — was satisfied because "if some territory regulations, formalities or procedures were not followed, at the time of execution of the contracts, the defendant government was in a much better position than the claimant to remedy the situation, and had a much greater duty to prevent such irregularities."[897] Therefore, since the state had the opportunity but failed to clarify its position, it was considered intended inducement. The second condition — good faith reliance

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[892] *Id.* at 280.
[893] *Id.* at 297.
[894] *Id.* at 298-99.
[895] *Id.* at 299 (referring to three arbitral awards, quoted by the court, that were based on the same principle of rejecting the objection to the tribunal jurisdiction because lack of authority and/or capacity of the state or its public figures. First, ICC Case No. 1939 of 1971, the arbitrator provided that "[i]nternational public policy would strongly reject the idea that a State organ, having contracted with foreign persons, could openly and intentionally agree to an arbitration clause which attracts the confidence of the contracting party and could later, whether during the arbitral proceedings or at the stage of enforcement, invoke the nullity of its own word." Second, ICC Case No. 3896, of 1982, the tribunal provided that the Iranian agency "could not be allowed, as a legal person party to proceedings relating to jurisdiction, to invoke and take advantage of irregularities, violations of the regulations and of Iranian law *which had been committed*, by omission or action, by *its own organs or representatives.*" Third, the ICC Case No. 4381 of 1986, the tribunal provided that "[w]hereas the claimant has agreed in good faith to the arbitration clause and the defendant's lack of authority must therefore be considered as inoperative, by reason of its violation of international public policy, the applicability of which cannot be excluded by that of Iranian law . . . ."
[896] *Id.* at 296.
[897] *Id.* at 302.

— was satisfied as the claimant relied on different correspondence and the cabinet's resolutions to indicate a reasonable belief that those officials had actual authority with no reason or a way to know that the officials lacked the authority to act on behalf of the state.[898] Based on that, the tribunal did not accept the objection of the state due to the alleged lack of capacity and/or authority of the territory's officials.[899]

The discussion of apparent authority indicates that it is a widely-recognized principle in different jurisdictions to bind the putative principal to an arbitration agreement concluded by the agent, absent actual authorization. Wide reliance on the apparent authority approach and the adoption of the same two conditions to bind the putative principal to the arbitration agreement in different jurisdictions are reflected in the unified proposed rule.[900]

In the following section, the approaches adopted by different jurisdictions to determine the applicable law to the issues of agency are discussed and the problems associated with these approaches are highlighted to justify the need to move to a transnational unified approach.

5. The Law Applicable to Determining the Existence of a Valid Principal-Agent Relationship to Bind the Principal to the Arbitration Agreement and the Problems Associated with the Applicable Approaches

5.1. The Traditional Approaches

Generally speaking, there is a strong tendency to apply national laws and conflict of laws rules for issues of representation and capacity rather than other issues, such as transfers and assignments, because agency and capacity are more related to the personal status of the parties and the domestic law of the country of the parties.[901] This tendency is justified in the case of capacity because it is directly related to the public policy issues — such as the ability of minors

[898] *Id*. at 296.
[899] *Id*.
[900] *See* discussion *infra* § 6.
[901] BREKOULAKIS, *supra* note 399, at 47.

to enter into contracts — or to public international law — such as the ability of ministers to bind states.[902] In addition, the New York Convention conclusively connected capacity with personal law by providing, in Article V(1)(a), for incapacity according to the law applicable to the party as grounds for refusal to recognize and enforce the arbitral award.[903] However, the situation in representation is different as it is mostly connected to the general principles of contract law and commercial law.[904] Therefore, the insistence on giving considerable weight to the personal law in determining the existence of agency is less justified.[905]

Traditionally, the existence and extent of an agent's authority to represent the principal is governed by the law chosen by the parties; absent such determination, the views are divided among different involved national laws.[906] Some views apply the personal law of the agent or the law of the agent's headquarter.[907] Other authorities apply the effect doctrine, which means that "the law governing a particular power, or power of attorney, is the law of the place where the agent or mandatary has to carry out his mission, or where the power of attorney should deploy its effect."[908]

Different laws are also applied in the context of representation of juridical persons as there is no unified determination across all jurisdictions.[909] Some jurisdictions apply the law of the place of incorporation and others apply the law of the headquarters.[910] For example, in

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[902] *Id.*
[903] New York Convention, *supra* note 82, art. V(1)(a); BREKOULAKIS, *supra* note 399, at 48.
[904] *Id.*
[905] *Id*.
[906] *Id*. at 46.
[907] *Id*.; *see accord* Razumov, *supra* note 855, at 260-61.
[908] Blessing, *supra* note 12, at 181; *see also* FOUCHARD ET AL., *supra* note 48, at 246 (stating that the Hague Convention also allows application of the effect doctrine provided that the principal's headquarters or habitual residence is located in either; the place where the agent or mandatary has to carry out his mission, or where the power of attorney should deploy its effect).
[909] FOUCHARD ET AL., *supra* note 48, at 246-47.
[910] *Id.*

England, the law of the place of incorporation is the law applied to issues of representation.[911] On the contrary, French law has adopted the approach of the law of the headquarters.[912] Article 1837(1) of the French Civil Code provides that "any company whose headquarters are located on French territory is subject to the provisions of the French law."[913] However, French law has an exception to this rule, which is the right of a third party to rely on the law of the place of incorporation if it would be more beneficial to the claim; however, the company has no right to invoke application of this law vis-a-vis the third party.[914]

In the context of arbitration, the power of representation to conclude an arbitration agreement is subject to the law of the arbitration agreement itself,[915] since the answer to such question affects the other party or parties to the arbitration agreement.[916] In this respect, applying the validation principle is suggested to determine whether the principal is bound by the arbitration agreement.[917] Arbitral tribunals apply either the law of the agency agreement or the law of the arbitration agreement, depending upon which one will lead to the validity of the arbitration agreement by binding the principal.[918] Application of the validation principle "is consistent with the likely intentions of the parties and serves more general interests in efficiency and fairness, by centralizing disputes in a single forum."[919]

The law applicable to the apparent authority may be the law applicable to the arbitration agreement, the law of the state where appearance of the existence of authority occurred, or the

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[911] *Id*. at 246.
[912] *Id*.
[913] French Civil Code, *supra* note 698, art. 1837(1); FOUCHARD ET AL., *supra* note 48, at 246.
[914] *Id*.
[915] Razumov, *supra* note 855, at 262 (noting that the law of the main contract has no role in the issue of determining the validity of the representation as it makes more sense to apply the law governing the relationship between the putative principal and the agent or the law of the arbitration agreement).
[916] BREKOULAKIS, *supra* note 399, at 46.
[917] BORN, *supra* note 2, at 1424.
[918] *Id*.
[919] *Id*.

law of the state where the other contracting party apprehended the actions or the statements of the putative principal.[920] The law of the seat may also be applied to decide on the existence of apparent authority.[921] For example, in the previously discussed ICC Case No. 6474,[922] the arbitral tribunal applied the law of the seat to decide whether the state is bound by the arbitration agreement.[923] The arbitral tribunal provided that "it applied the law of the seat, as it had wide discretion on the law applicable to matters of jurisdiction and notwithstanding the wide-spread practice, which regards questions of capacity as relating to status and the personal law."[924]

5.2. Problems Associated with the Traditional Approach and the Need to Move to a Transnational One

Application of choice of law rules to bind the principal to an arbitration agreement concluded by its agent introduces many problems in international transactions as "it is liable to produce different outcomes depending on the forum."[925] Such different outcomes open the door for forum shopping, which should be eliminated in international commercial arbitration. In addition, jurisdictions have adopted different requirements to bind the putative principal to the arbitration agreement concluded by the agent, such as requiring special authorization or a written instrument, as previously discussed. Therefore, applying national laws to determine the question of agency in the context of international arbitration leads to unexpected results for international parties who are unaware of such technical requirements in national laws primarily designed for domestic cases.

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[920] Abdel Wahab, *supra* note 1, at 151.
[921] BREKOULAKIS, *supra* note 399, at 57.
[922] Case No. 6474 of 1992, at 279; *see* discussion *supra* note 888.
[923] *Id.*
[924] *Id.*
[925] FOUCHARD ET AL., *supra* note 48, at 247.

For example, in ICC Case No. 5832,[926] the arbitral tribunal applied different approaches to reach national laws applicable to the power of representation.[927] First, it applied the law of the place of the registered office of the principal to determine whether the power of the representation existed.[928] Next, it applied the law of the place where the arbitration agreement was concluded to determine the scope and extent of this power.[929] The two approaches pointed to the application of Austrian Law, which requires written authorization to bind the principal when the contract is not concluded by its legal representative.[930] Accordingly, the tribunal decided that the arbitration agreement was not binding on the Austrian company.[931] This case obviously illustrates first, the complications of the choice of law rules in determining the applicable laws for the power of representation and, second, the inadequacy of applying national laws in this respect. Such inadequacy is clear from the unjustified and restricted approach holding an arbitration agreement invalid because of non-compliance with national formality requirements.

Due to the uncertainty problems associated with the application of the national laws regarding whether the principal is bound by the arbitration agreement, national courts and arbitral tribunals have begun to depart from strict compliance with these rules to reach more equitable and expected results in international disputes.[932] Therefore, courts and tribunals have been disregarding the applicable national law if the law leads to the invalidity of the arbitration agreement because of absent formalities concerning the power of representation.[933] National courts and arbitral tribunal should "take a careful and distant look at the solution given by one

[926] *See* discussion *supra* note 715.
[927] BREKOULAKIS, *supra* note 399, at 47 (discussing ICC Case No. 5832 (1988)).
[928] *Id.*
[929] *Id.*
[930] *Id.*
[931] *Id.* at 48.
[932] Blessing, *supra* note 12, at 182.
[933] *Id.*

party's national law and [ ] reject such solution where it contradicts good faith or, for instance, the confidence inspired in the other party which would seem to deserve an overriding protection."[934]

Czechoslovak Foreign Trade Company v. Austrian Company X,[935] illustrates the flexible and practical approach applied by arbitral tribunals. The tribunal, as discussed in the written form section, disregarded the application of the applicable national law which imposed a written form authorization to conclude an arbitration agreement.[936] Instead, the tribunal analyzed the factual circumstances surrounding the case to bind the company by the arbitration agreement.[937] *Total Soc. It. PA v. Achille Lauro, Corte Di Cassazione (Sez. Un.)*,[938] demonstrates this approach in the context of national courts. In *Total Soc.*, two Italian corporations concluded a charter party agreement in Paris with an arbitration clause to arbitrate any dispute in London.[939] The contract was concluded through a broker on behalf of the ship owner and the authority of the broker was orally stated.[940] When the dispute arose, one of the companies initiated proceedings before the Italian courts and the other company brought an action before the Italian Supreme court, attacking the jurisdiction of the Italian courts based on the arbitration clause in the charter party agreement.[941] The Supreme Court decided on the validity of the arbitration clause based on French Law — the law of the place where the act was concluded — instead of Italian law.[942] The tribunal then applied French law to hold the validity of the representation and consequently the

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[934] *Id.*
[935] Czechoslovakia Foreign Trade Company v. Austrian Company X, Case No. Rsp. 153/79 of 1980, 11 Y.B. COM. ARB. 112 (1986) (CAC); *see supra* note 738.
[936] *Id.*
[937] *Id.*
[938] Cass., sez. un., 25 Jan. 1977, 4 Y.B. COM. ARB. 1979, 283 (Ital.).
[939] *Id.*
[940] *Id.*
[941] *Id.*
[942] *Id.*

validity of the arbitration agreement; Italian Law requires the power of the attorney or the broker to be in writing while French law does not.[943] According to Article 1985 of the French Civil Code, the power of the attorney or the broker could be stated orally and proven by testimony.[944]

The proposed uniform rules disregard recourse to any national law and apply transnational unified principles instead. Such an approach will be more practical regarding the expectations of international parties since it will be flexible on the required conditions to uphold the validity of the arbitration agreement. The proposed substantive approach is efficient for arbitrators as

> the divergence of choice of law rules in this area is so great that it would be artificial, where different systems are involved, to give precedence to one system over another. The interests of justice and predictability would probably be better served if the arbitrators were able to adopt substantive solutions which they judge appropriate given the international character of the disputes, without compromising the enforceability of their award.[945]

The clear importance of this approach appears when all concerned laws have the same restrictions; for example, in the previous case, if French Law required a written form as well. The proposed approach disregards these national laws and applies a flexible unified set of rules. "These observations would support the application of transnational substantive standards, if only to correct unwarranted situations resulting from overly technical national rules favoring form over substance,"[946] and do not respect the legitimate expectations of international parties. The focal point should be the real consent of the parties instead of compliance with formal requirements of representation in national laws, specifically since "[t]he results produced by the

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[943] *Id*.
[944] French Civil Code, *supra* note 698, art. 1985; Cass., sez. un., 25 Jan. 1977, 4 Y.B. COM. ARB. 1979, 283 (Ital.).
[945] FOUCHARD ET AL., *supra* note 48, at 247-48.
[946] *Id.*

choice of law method are thus not sufficiently convincing or predictable to deflate the appeal of substantive transnational rules."[947]

Now, the discussion turns to the proposed unified approach along with the justification for each rule.

6. The Proposed Set of Rules for the Authority of the Agent to Conclude an Arbitration Agreement on Behalf of the Principal

The proposed unified rules regarding extension based on agency principles are motivated by the inconsistency among jurisdictions to effectuate this extension. Therefore, the objective of the proposed rules is adopting suitable rules for the nature of international disputes to be applied regarding each aspect of the agency principle avoiding the complications and differences that currently exist among different jurisdictions.

6.1. The Proposed Rules

a- The valid agency relationship for international contracts includes the right to conclude arbitration agreements on behalf of the principal unless it has been expressly provided that the agency agreement does not confer such right on the agent.

b- The agency relationship should pertain to the contract in dispute in order to bind the principal to the arbitration agreement concluded by the agent, unless it is a general agency relationship.

c- The principal should be disclosed when the arbitration agreement is concluded in order to be a party to the agreement, otherwise, the agent will be personally bound by the arbitration agreement.

[947] *Id*. at 247.

d- The agents and employees of the principal may rely on the arbitration agreement provided that the claims against them and the claims against the principal are inseparable.

e- Absent actual authorization,

(1) A person should be considered a principal bound by an arbitration agreement concluded by another person who acted as agent, if the former acted in a way that reasonably made the counterparty believe in good faith that the latter was an authorized agent.

(2) Corporations or the states cannot rely on their internal rules or national laws to claim a lack of agent authorization to be bound by arbitration agreements concluded by the apparent representative.

6.2. The Justifications

a- The valid agency relationship for international contracts includes the right to conclude arbitration agreements on behalf of the principal unless it has been expressly provided that the agency agreement does not confer such right on the agent.

This substantive rule provides that no special authorization is required, whether in writing or not, for the agent to conclude an arbitration agreement on behalf of the principal. Elimination of special authorization and the written form requirement is based on a few different factors. First, the powers of the agent to enter into contracts on behalf of the principal and the agent's ability to change the principal's legal relations with others without any limitations on the agent's powers is incredibly important. In other words, there is no logic behind the over-protection of the principal against the powers of the agent to conclude an arbitration agreement at the same time the agent has the authority to bind the principal by other similarly important contracts and transactions.

Second, arbitration has become the standard method of settling international disputes as international parties prefer it over the complications and bureaucracy of national courts. International parties need to be protected against national litigation, not from international arbitration. Therefore, it is unclear to whom these extras protective provisions are directed in the realm of international disputes or what benefit is gained from them. This kind of provisions could be justified in domestic disputes but have no meaningful support in international ones.

Third, most of the parties in international contracts are experienced traders aware of their rights and obligations; it would not be a burden for them to exclude the authority to conclude arbitration agreements from the agency agreement. In other words, experienced traders can be more specific when they conclude an agency agreement by expressly determining the scope of the powers conferred on the agent. Absent such determination, they should not be taking advantage of the other party by escaping the obligation to arbitrate, if they would like to do so, by claiming that they are not bound by the arbitration agreement because the agent has not received special authorization to conclude an arbitration agreement.

Fourth, requiring special authorization or a written form to conclude an arbitration agreement contradicts the New York Convention. The Convention has not referred to the power of representation, supporting the assumption that no special authorization is required for the agent to conclude an arbitration agreement on behalf of the principal.[948] In addition, Article II(2) of the New York Convention provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[949] This article suggests that the convention does not require special written authorization. First, Article II(2) refers to the exchange of unsigned documents as

[948] Loban, *supra* note 737, at 9.
[949] New York Convention, *supra* note 82, art. II(2).

evidence of the parties' consent to arbitrate without specifying the capacity or authority of the person who has sent these documents, which means that the convention does not require special authorization to conclude an arbitration agreement.[950] Second, the admissibility of the telegrams strongly indicates that no special powers are required for the agent to conclude an arbitration agreement.[951] Telegrams are sent by an operator who has no representation powers and normally do not have the name of the person who drafted the text or gave the instruction to the operator; they only contains the company's name.[952] Despite the fact that telegrams are rarely used now in international business, their presence in the convention means that the convention does not require special powers for an agent' to conclude an arbitration agreement.[953] Moreover, Article II(3) provides that the arbitration agreement should only be held invalid if it is null and void, inoperative, or incapable of being performed;[954] it is well settled that these expressions are interpreted as the "generally-applicable, internationally-neutral contract law defenses" and these are the only grounds for the refusal to enforce arbitration agreements in contracting states.[955] Therefore, the arbitration agreement is void if there is no consent or such consent has been obtained through duress or corruption, but not if it does not satisfy some formal requirements in the applicable national law regarding the power of representation.[956] In other words, it is unacceptable to hold an arbitration agreement invalid because of some discriminatory national

[950] Andreas Reiner, *The Form of the Agent's Power to Sign an Arbitration Agreement and Article II(2) of the New York Convention*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 82, 86 (A.J. van den Berg, Permanent Court of Arbitration & International Council for Commercial Arbitration eds., 1999).
[951] *Id.*
[952] *Id.*
[953] *Id.*
[954] New York Convention, *supra* note 82, art. II(3).
[955] BORN, *supra* note 2, at 557.
[956] Gaillard, *supra* note 207, at 580.

law provisions against arbitration "that adopt idiosyncratic rules of invalidity that are not applied neutrally on an international scale,"[957] such as requiring the special authorization.

Finally, the drawbacks of such provisions exceed their benefits as they open the door to forum shopping and enable manipulation to escape the obligation to arbitrate — or at least promote procrastination through objections to the jurisdiction of the tribunals. Under this, arbitration loses one of its biggest advantages, which is the flexibility that saves time and effort for the parties; "[t]his restrictive philosophy is not well-suited to international commerce. One can therefore only hope that a substantive rule will be adopted whereby a general authorization to contract will suffice for the purpose of entering into a valid international arbitration agreement."[958]

b- The agency relationship should pertain to the contract in dispute in order to bind the principal to the arbitration agreement concluded by the agent, unless it is a general agency relationship.

The existence of an agency relationship is insufficient to bind the principal to the arbitration agreement concluded by the agent, as the contract should be within the scope of the agency. In other words, the agent should work within the scope of the agency agreement and should be restricted by the limits of the agency agreement. Therefore, if the agency agreement is related to a specific contract (or contracts), the agent cannot represent the principal in other contracts and any arbitration agreement concluded outside the limits of the agency agreement are not binding upon the principal. The only exception is the general agency agreement, which is not restricted to a specific contract but gives the agent broad and complete powers regarding all aspects of the contracts and transactions related to the principal.

[957] *See* BORN, *supra* note 2, at 551-52.
[958] FOUCHARD ET AL., *supra* note 48, at 251.

c- The principal should be disclosed when the arbitration agreement is concluded in order to be a party to the agreement, otherwise, the agent will be personally bound by the arbitration agreement.

The undisclosed principal cannot rely on the arbitration agreement against the counterparty and, also, cannot be obliged to arbitrate. First, it is unfair for the counterparty who concluded an arbitration agreement with the agent, and thought that the agent was the principal, to ultimately be obliged to arbitrate with another person or company. In other words, if the counterparty knew the real situation before concluding the agreement, the final arrangement might have been different. Second, this position may give the principal an advantage over the counterparty; the principal has the opportunity to reveal the true identity if the principal seeks to arbitrate, however, if the counterparty seeks arbitration, the principal may avoid arbitration and not reveal the true identity. Therefore, the proposed rule achieves equity by not giving the principal the option to arbitrate or not and excluding the counterparty from such power.

d- The agents and employees of the principal may rely on the arbitration agreement provided that the claims against them and the claims against the principal are inseparable.

The agents and employees' reliance on the arbitration agreement of the principal should not be an automatic right. First, there is no proof that the counterparty consented to arbitrate with the principal and the agents and officers. Second, it is unfair that the agent or officer could rely on the arbitration agreement if desired but, at the same time, if the counterparty seeks arbitration against the agent or officer, the counterparty cannot oblige the agent or officer to arbitrate. Therefore, the general rule should be that agents and officers cannot rely on the arbitration agreement; the only exception to this rule is if the counterparty has claims against the principal and the agent or officers and these claims are inseparable and cannot be adjudicated in two

different forums. The only solution, in this case, is adjudicating the claims together, either before a national court or an arbitral tribunal. Since it is unfair to compel the principal to litigate the dispute instead of arbitration just because the agents or officers are involved, the practical and effective solution is to give the agents and the officers the right to rely on the arbitration agreement. Otherwise, the plaintiff who signed the arbitration agreement would have the opportunity to escape the obligation to arbitrate by adding non-signatories agents or/and officers to the claim.[959]

e- Absent actual authorization,

1- A person should be considered a principal bound by an arbitration agreement concluded by another person who acted as agent, if the former acted in a way that reasonably made the counterparty believe in good faith that the latter was an authorized agent.

2- Corporations or the states cannot rely on their internal rules or national laws to claim a lack of agent authorization to be bound by arbitration agreements concluded by the apparent representative.

This rule does not need much justification as it is adopted in almost all jurisdictions. Apparent authority, as discussed, has been frequently used by national courts and arbitral tribunals to bind the apparent principal to the arbitration agreement provided that the two conditions have been satisfied, which are inducement by the putative principal and good faith reliance of the counterparty. The apparent authority principal closes the gap when actual authority is lacking or cannot be proven, however, the good faith principles binds the apparent

[959] Daly, *supra* note 761, at 100.

principal to the arbitration agreement. Such an approach keeps balance between parties and promotes the effectiveness of arbitration.

To achieve the optimum benefit from the apparent authority approach when corporations or states are involved, there should be no reliance on national laws or internal regulations to claim the lack of a representative's powers. Otherwise, the door would be open for manipulation and escaping the obligation to arbitrate. Therefore, once the conditions for application of apparent authority are met, the state or the corporation is bound by the arbitration agreement regardless of any restrictions imposed by national law or internal regulations. Over focusing on academic or theoretical solutions based on restrictions imposed by national laws and ignoring the parties' situation and factual circumstances of each case "would not only fail, it would also lead to an unacceptable answer."[960]

In conclusion, this chapter indicated the different positions adopted by jurisdictions to bind the principal by the arbitration agreement concluded by its agent and how that negatively affect the predictability and certainty needed in international disputes. The proposed rules solve this problem by providing unified principles to be applied which are more suitable to the nature of international disputes. The next chapter addresses the role of the proposed approach in unifying the requirements to incorporate arbitration agreements by reference.

[960] Blessing, *supra* note 12, at 182.

CHAPTER 5

THE CURRENT SITUATION OF EXTENSION BASED ON THE INCORPORATION BY REFERENCE THEORY AND THE PROPOSAL FOR A UNIFIED SET OF RULES AS A SHIFT FROM THE NATIONAL TO THE TRANSNATIONAL APPROACH

Incorporation by reference, as a theory to extend the arbitration agreement to non-signatories, raises problems and uncertainty in the context of international commercial arbitration because jurisdictions have adopted different positions to effectuate this incorporation and bind the parties to the arbitration agreement. This chapter begins by defining incorporation by reference and its construction in the context of arbitration. The restrictive and liberal approaches regarding incorporation of the arbitration agreement are analyzed. Next, the mechanism adopted by arbitral tribunals to determine the applicable national law regarding issues of incorporation is illustrated. Finally, the proposal for unified rules, which is in favor of applying a liberal approach for incorporation, is presented. The justification for theses proposed rules is mainly based first, on the interpretation of the incorporation by reference in the light of the writing requirement in the New York Convention and second, on defeating the arguments of the proponents to the restrictive approach.

1. The Definition of Incorporation by Reference and its Construction in the Context of Arbitration

1.1. The Definition of Incorporation by Reference

Incorporation by reference occurs when a document or a contract is mentioned in another contract, which asserts that the mentioned document or contract is part of the agreement and, therefore, the parties are bound by the provisions of the incorporated document or contract as well. The validity of incorporation by reference to bind the parties is well recognized in all legal systems. No specific language or words are required to effectuate incorporation, however, the language employed should clearly manifest the intention of the parties to incorporate another

document into their contract.[961] An example of a clear incorporation statement is that "[t]his contract is subject to (description of incorporated material) which by reference is incorporated as a part of this agreement."[962] Absent such clear language of incorporation, the court may validate the incorporation by interpreting the implied intention of the parties.[963] In this case, the court will determine whether mentioning another document in the contract was for descriptive purposes only or whether it was the intention of the parties to adopt and import the provisions of the other document into their agreement.[964]

Incorporation by reference is common in international trade "due to the standardization of business transactions and the rules by which those transactions are governed."[965] Parties often prefer to refer to a pre-existing document, such as a previous contract between the parties or a standard agreement prepared by specialized professional bodies, instead of setting out all the terms in detail in their original contract.[966] The incorporation of such stereotyped clauses achieves uniformity,[967] and saves the parties a lot of time and effort since all they need is to incorporate the other document without separately including all its provisions in the new contract. In other words, efficiency is achieved through "consenting to a term in a contract without actually repeating in the contract what has been incorporated."[968] Incorporation by reference is frequently used in construction contracts where subcontracts refer to the main construction contract or to standard forms.[969] In addition, it is used in maritime transactions

[961] Robert Whitman, *Incorporation by Reference in Commercial Contracts*, 21 MD. L. REV. 1, 1 (1961).
[962] *Id.* at 3.
[963] *Id*. at 2-3.
[964] *Id*. at 4.
[965] Rodler, *supra* note 157, at 33.
[966] FOUCHARD ET AL., *supra* note 48, at 272.
[967] Whitman, *supra* note 961, at 1.
[968] Hosking, *supra* note 152, at 541.
[969] BREKOULAKIS, *supra* note 399, at 66.

where the bill of lading[970] refers to the charterparty, as well as in insurance and guarantee contracts.[971]

1.2. Construction of Incorporation by Reference in the Context of Arbitration

Incorporation by reference arises in the context of arbitration when the original or main contract does not have an arbitration clause, however, the parties have incorporated another document or contract that involves an arbitration clause. While the document incorporated by reference may not have the arbitration clause itself, it may have a reference to another document, which contains the arbitration agreement.[972] Therefore, a chain of references could exist that eventually leads to the incorporated arbitration clause.[973]

The question arises is whether there are any requirements or conditions to bind the parties to an arbitration clause in the incorporated document or whether it is automatically binding. Different jurisdictions have varied answers to this question as some jurisdictions are more restrictive while other jurisdictions are more liberal.

2. Conditions Required to Effectuate Incorporation by Reference Regarding the Arbitration Agreement

Some jurisdictions are incredibly restrictive in this respect, imposing a condition that the reference should be to the arbitration clause itself. However, other jurisdictions are more liberal

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[970] *See* Sandra Lim, *Bill of Lading*, INVESTOPEDIA (Mar. 4, 2016), https://www.investopedia.com/terms/b/billoflading.asp ("[A] legal document issued by a carrier to a shipper that details the type, quantity, and destination of the goods being carried. A bill of lading also serves as a shipment receipt when the carrier delivers the goods at a predetermined destination. This document must accompany the shipped products, no matter the form of transportation, and must be signed by an authorized representative from the carrier, shipper, and receiver.").

[971] BREKOULAKIS, *supra* note 399, at 66.

[972] William D. Gilbride & Erin R. Cobane, *Extending Arbitration Agreements to Bind Non-Signatories*, MICH. DISP. RESOL. J., Spring 2018, https://www.abbottnicholson.com/wp-content/uploads/2018/04/WDG-and-ERC-Article-Extending-Arbitration-Agreements-to-Bind-Non-Signatories.pdf.

[973] *Id.*

in giving effect to incorporation without requiring notice of the arbitration clause itself, taking into consideration the existence of other requirements or criteria. Both perspectives are discussed in this section.

2.1. The Restrictive Approach to Bind Non-Signatories Through Incorporation by Reference Theory

Under the restrictive approach, incorporation of an arbitration clause is only effective when there is an express and specific reference to the clause itself — not only a general reference to the contract or the document that contains the arbitration clause. If the parties are not signatories to the incorporated contract and they enter into a new agreement with a different subject and conditions; "they only take a shortcut and agree on their terms by reference to a pre-existing contract. But this should not mean that the necessary consent to arbitrate can be dispensed with."[974] According to this approach, a specific reference to the arbitration agreement is required to bind the parties.

Different jurisdictions have adopted the restrictive approach. The English courts adopted this approach both before and after the enactment of the English Arbitration Act.[975] Section 6(2) of the English Arbitration Act provides that "[t]he reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."[976] Despite being non-conclusive in requiring an express and specific reference to the arbitration clause, the prevailing views have interpreted it in a restrictive way.[977] The general incorporation of the document that has an arbitration clause does not suffice to bind the parties to arbitrate their

[974] BREKOULAKIS, *supra* note 399, at 76.
[975] *Id.*; *see, e.g.*, Thomas v. Portsea [1912] AC 1 (HL) (Eng.); Federal Bulk Carriers Inc v. C Itoh & Co. Ltd. [1989] 1 L1oyd's Rep. 103 (Eng.).
[976] English Arbitration Act, *supra* note 87, § 6(2).
[977] BREKOULAKIS, *supra* note 399, at 67.

disputes.[978] This restrictive position has been steadily maintained by English courts with the justification that it is "in the direct interest of commercial certainty and security."[979]

An example of this restrictive approach is in *Trygg Hansa Insurance Co. Ltd. v. Equitas*.[980] Trygg was the reinsurer of Lloyd's syndicates and attempted to avoid the reinsurance on grounds of alleged non-disclosure and misrepresentation.[981] The syndicates started court proceedings and Trygg applied to have the action stayed due to the existence of an arbitration agreement.[982] Trygg provided that the reinsurance contract incorporated the excess of loss policy and this policy incorporated the primary policy, which had an arbitration clause.[983] The primary policy provided in clause 10 that "[a]ny dispute or difference whatsoever arising between the Assured and the Insurers shall be referred to Arbitration in London."[984] The excess of loss policy provided that "[e]xcept as otherwise provided herein this policy is to follow the same terms, exclusions, conditions, definitions and settlements as the Policy of the Primary Insurers."[985] The court held that "[i]n the absence of special circumstances, general words of incorporation were

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[978] *Id.*; *see e.g.*, Sea Trade Maritime Corp v. Hellenic Mutual War Risks Association (Bermuda) Ltd [2006] 2 CLC 710, 727 (Eng.) ("Generally speaking, the English law of contract has taken a benevolent view of the use of general words to incorporate by reference standard terms to be found elsewhere. But in the present field a different, and stricter, rule has developed, especially where the incorporation of arbitration clauses is concerned. The reason no doubt is that a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charterparty. The cases show that a strict test of incorporation having, for better or worse, been laid down, the Courts have in general defended this rule with some tenacity in the interests of commercial certainty . . . .").

[979] Carlos Esplugues, Validity and Effects of the Incorporation by Reference of Arbitration Agreements in International Maritime Arbitration: Current Situation and Future Trends 13 (2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063117. *But see id.* at 17 (indicating that there are few examples when the English courts have adopted a more flexible approach, such as Astro Valiente Compania Naviera S.A. v. The Government of Pakistan Ministry of Food and Agriculture [1982] 1 L1oyd's Rep. 286 (Eng.)).

[980] Trygg Hansa Insurance Co Ltd v. Equitas Ltd [1998] CLC 979 (Eng.).

[981] *Id*.

[982] *Id*.

[983] *Id*. at 983.

[984] *Id*. at 982.

[985] *Id*. at 983.

not to be treated as effective for the purposes of s. 6(2) of the 1996 Act."[986] Based on that, the wording in the excess of loss insurances did not incorporate the arbitration clause of the primary policy because there was no specific mention of this arbitration clause.[987] The court justified its position by providing that "an arbitration clause was of a special nature different from the majority of clauses in a contract relating to its performance and that the parties were not to be taken to have intended to incorporate it along with those clauses in the absence of an express indication."[988] However, this position is overly restrictive as the provision in the excess policy was definitely clear in illustrating the intent of the parties to incorporate all the provisions of the primary policy by providing expressly for terms, exclusions, conditions, definitions, and settlements. Nothing could be more conclusive than mentioning all these terms, which definitely encompassed the arbitration clause without the need to mention it specifically.

This case indicates how English courts have been restrictive in effectuating the incorporation of arbitration agreements as the broad language of incorporation does not have any effect on applying a more flexible approach as long as there is no specific and express reference to the arbitration agreement. For example, it was held that an incorporation clause that stated "[t]his shipment is carried under and pursuant to the terms of the charterparty . . . and all the terms whatsoever of the said charter . . . apply to and govern the rights of the parties" was insufficient to incorporate the arbitration agreement absent specific reference.[989] This provision indicates that the restrictive approach is firmly applied even when the language clearly illustrates

[986] *Id*. 990.
[987] *Id*. at 979-980.
[988] *Id*. at 979.
[989] Chrysoula Olymoia Papageorgiou, The Incorporation of a Charterparty Arbitration Clause into a Bill of Lading 15 (Feb. 2017) (unpublished LL.M. thesis, International Hellenic University), https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/15280/The%20incorporation%20of%20a%20charterparty%20arbitration%20clause%20into%20a%20bill%20of%20lading.pdf?sequence=1.

the intent of the parties to incorporate all the provisions of the incorporated document, including the arbitration clause.

The restrictive approach is frequently applied in the context of bills of ladings that incorporate the terms of charter parties, which usually have arbitration clauses. The main argument for adopting the restrictive approach in this situation is that the bill of lading is a negotiable instrument that may come into the hands of someone who never knew or had the opportunity to know about the provisions of the charter party.[990] It is unfair to bind a party to an arbitration clause in the incorporated charter party when the party is unaware of its existence. In other words, the restrictive approach protects non-original parties, such as the holders, by requiring specific incorporation of the arbitration clause to provide fair notice about the existence of the dispute resolution provision.[991] The validity of incorporation by reference of arbitration agreements into bills of ladings is complicated because

> it exceeds the mere formal dimension of the arbitration agreement, connecting with the issue of the assessment of the nexus existing between an individual — the actual bearer of the bill of lading — and a set of terms — those existing in a certain charterparty — which are incorporated into the bill of lading through an incorporation clause.[992]

There has been a tendency in English courts to adopt a flexible approach when reference is made to general conditions or standard forms.[993] In other words, the restrictive approach applies only when reference is made to another contract where at least one of the parties (or both of them) was not a signatory.[994] This tendency has been specifically applied when either the general conditions are printed on the back of the contract, the general conditions are in a separate

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[990] Esplugues, *supra* note 979, at 14.
[991] Ling Li, *Binding Effect of Arbitration Clauses on Holder of Bills of Lading as Nonoriginal Parties and a Potential Uniform Approach Through Comparative Analysis*, 37 TUL. MAR. L.J. 107, 109 (2012).
[992] Esplugues, *supra* note 979, at 11.
[993] Nikki O'Sullivan, *Effective Incorporation of Arbitration Clauses: Are You Making it Clear?*, ARB. BLOG (Nov. 2, 2016), http://arbitrationblog.practicallaw.com/effective-incorporation-of-arbitration-clauses-are-you-making-it-clear/.
[994] *Id.*

document but the document was communicated to the other party, or the general conditions are common in previous dealings between the parties.[995] This distinction is described as a single contract or two contracts situation.[996]

In *Barrier Ltd. v. Redhall Marine Ltd.*,[997] the court was confronted with both incorporation of general conditions and incorporation of another contract in one claim. Redhall entered into a contract with a company for the construction of submarines for the Ministry of Defense; the contract had an arbitration clause.[998] Redhall concluded a subcontract with Barrier for the internal and external painting of the submarines.[999] The dispute arose between Redhall and Barrier because of sums allegedly unjustifiably deducted from Barrier's payment and Barrier started court proceedings to recover these sums.[1000] Redhall applied to stay the proceedings and to compel arbitration as the subcontract incorporated by reference the main contract and the general conditions of Redhall, both of which had an arbitration clause.[1001] Barrier objected to being bound by these arbitration clauses since they were not expressly and specifically incorporated in the subcontract as the general reference to a document containing an arbitration clause is insufficient to be bound by such a clause.[1002] Incorporation by reference in the subcontract took place through two provisions: clause 9 provided that "[t]he terms of the [Main]

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[995] Albert Jan Van Den Berg, *Consolidated Commentary Cases Reported in Volume XXII(1997) - XXXVII (2002)*, 28 Y.B. COM. ARB. 562, 590 (2003); *see, e.g.*, Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL [2010] EWHC 29 (Comm) (Eng.); *see also* Melis Ozdel, Incorporation of Arbitration Clauses into Bills of Ladings 4 (unpublished manuscript), http://www.lmaa.london/uploads/documents/Incorporation%20of%20Arbitration%20Clauses%20into%20Bills%20of%20Lading%20Melis%20Ozdel.pdf (stating that this flexible approach is applied also when the reference is made to a previous contract between the same parties as in such case the general reference is sufficient to incorporate the arbitration agreement as well).
[996] O'Sullivan, *supra* note 993.
[997] Barrier Ltd v. Redhall Marine Ltd [2016] EWHC 381 (QB) (Eng.).
[998] *Id.*
[999] *Id.*
[1000] *Id.*
[1001] *Id.*
[1002] *Id.*

Contract shall be incorporated into this Agreement . . . .” and clause 10 provided that “CIL's standard terms and conditions, a copy of which was on the reverse of the CIL Purchase Order . . . shall be incorporated into this Agreement . . . .”[1003]

The court distinguished between the two situations

> where there are only two parties involved where no special rules apply and the case where the attempt is to incorporate an arbitration clause between two other parties or one of the parties and a third party. In that situation there is a particular need to be clear that the parties intended to incorporate the arbitration clause.[1004]

Based on that, the court decided that general incorporation was sufficient to include the arbitration clause from the general conditions, however, it was insufficient to include the arbitration clause from the main contract, as a clear and express reference to the arbitration clause was required to bind the parties in the latter case.[1005] In fact, no convincing justification exists for such distinction between the two situations — incorporating through the general conditions or incorporating through the main contract. Practically speaking, the position of the parties in the case of two contracts does not require extra protection than in the case of the one contract, as it is discussed in the assessment part.

When applying the restrictive approach, questions arise regarding the degree of specificity required in the reference clause to validly incorporate the arbitration agreement from the charterparty.[1006] Some views conclude that reference to “litigation” or “dispute resolution mechanism” is sufficient to bind the parties of the bill of ladings to the arbitration clause in the charterparty,[1007] as “a reference to ‘litigation’ in a bill of lading incorporation clause should be

[1003] *Id.*
[1004] *Id.*
[1005] *Id.*
[1006] Ozdel, *supra* note 995, at 5.
[1007] *Id.*

treated as a proper reference to arbitration."[1008] In general, it is mainly an issue of contract construction; "courts and tribunals should consider what a reasonable person would have understood the parties to have meant from the words of incorporation in the bill of lading, with due consideration of business common sense and the commercial purpose of the incorporation clause."[1009]

In the same context, if the contrary situation occurs — the bill of lading validly incorporates the dispute resolution method of the charter party — however, the bill of lading refers to arbitration while the charterparty provides for litigation. This is what happened in the *Channel Ranger* case.[1010] The incorporation clause in the bill of lading provided that "[a]ll terms, and conditions, liberties and exceptions of the charter party, dated as overleaf, including the Law and Arbitration clause are herewith incorporated," however, the charter party provided that "[t]his Charter Party shall be governed by English Law, and any dispute arising out of or in connection with this charter shall be submitted to the exclusive jurisdiction of the High Court of Justice of England and Wales."[1011] When the dispute arose and the jurisdiction of the court was challenged based on the existence of an arbitration clause, the court found that the real intention of the parties when concluding the contract was to incorporate the charter party with its court jurisdiction clause and the reference to arbitration in the bill of lading was an error that did not invalidate the incorporation.[1012] The court of appeals confirmed this decision and noted that refusal to remedy a clear and apparent mistake in the bill of lading "is a very old-fashioned and outdated approach to interpretation."[1013]

[1008] *Id.* at 7.
[1009] *Id.*
[1010] Caresse Navigation Ltd v. Zurich Assurances Maroc [2014] 2 CLC 851 (Eng.).
[1011] *Id.*
[1012] *Id.*
[1013] *Id.*

There is an exclusive alternative to the specific and express reference if the arbitration clause in the charterparty applies regarding disputes arising from the bill of lading and the bill of lading incorporated by general reference the terms and provisions of the charterparty.[1014] In this case, there is no need to refer to the arbitration agreement specifically in the bill of lading provided that the reference clause in the bill of lading is broad enough to encompass the arbitration clause of the charterparty.[1015] This was applied in the *Merak* case,[1016] where arbitration clause 32 of the charterparty applied to disputes arising under both the charterparty and the bill of lading.[1017] The incorporation clause in the bill of lading provided that "the bills of lading shall be prepared in the form indorsed upon this charter and shall be signed by the master, quality, condition and measure unknown, freight and all terms, conditions, clauses (including clause 30) and exceptions as per this charter."[1018] However, the reference to clause 30 was an error and the real intention of the parties was the incorporation of the arbitration clause in clause 32.[1019] The court did not attach importance to the error of incorporating clause 30 instead of clause 32, finding it sufficient that the arbitration clause in the charterparty provided for its own application to disputes arising from the bill of lading in order to effectuate the incorporation of the arbitration clause.[1020] The court noted that focus should be on both the precise words of the bill of lading and the charterparty as "where the arbitration clause by its terms applies both to disputes under the charterparty and to disputes under the bill of lading, general words of

[1014] BREKOULAKIS, *supra* note 399, at 69; *see also* Sandra Lielbarde, The Incorporation of a Charterparty Arbitration Clause in the Bill of Lading: Binding Effect of Contract without Consent 33 (Spring 2010) (unpublished Master's thesis, Lund University), http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1698465&fileOId=1698466.
[1015] *Id.*
[1016] TB & S Batchelor & Co Ltd v. Owners of the SS Merak [1964] 1 All ER 223 (Eng.).
[1017] *Id.* at 225.
[1018] *Id.*
[1019] *Id.* at 226.
[1020] *Id.*

incorporation will bring the clause in the bill of lading so as to make it applicable to disputes under that document."[1021]

In fact, dispensing with specific reference by providing in the charterparty for application of arbitration to disputes arising in connection with the bill of lading does not solve the assumed problem that the parties of the bill of lading do not have knowledge about the provisions of the incorporated charterparty. This example indicates that the rationale behind the restrictive approach is not based on solid ground and the justification for its application is unpersuasive regarding the existence of consent to arbitrate and protect the parties from being subject to an arbitration clause they never agreed to. This issue is discussed in the assessment section of this chapter.

When specific reference to the arbitration clause is satisfied, English courts give effect to it even in cases where the arbitration clause in the incorporated contract narrowly refers to its immediate parties.[1022] In other words, "English courts apply a rule that does not deal with the scope of the arbitration clause" to decide on issues of the incorporation.[1023] For example, in *Daval Aciers d'Usinor et de sacilor v. Armara Srl*,[1024] the bill of lading incorporated the charterparty by providing that "all terms and conditions, liberties and exceptions and arbitration clause of the charterparty, dated as overleaf are herewith incorporated."[1025] The arbitration clause in the charterparty provided that "should any dispute arise between the Owners and Charters the

[1021] *Id.*; *see, e.g.*, Nanisivik Mines Ltd v. FCRS Shipping Ltd, 113 D.L.R. 4th 536 (Can.); *see also* Esplugues, *supra* note 979, at 30 (noting that the Ottawa Court of Appeal in Canada has adopted the same approach of giving effect to the general incorporation of arbitration agreement when the charterparty provides for arbitration regarding disputes arising of bills of lading).
[1022] Li, *supra* note 991, at 116.
[1023] *Id.*
[1024] Daval Aciers D'Usinor et de Sacilor v. Armare Srl [1996] 1 Lloyd's Rep. 1 (Eng.).
[1025] Miriam Goldby, *Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments*, 19 DENNING L.J. 171, 174 (2007) (examining the outcome of the Daval Aciers D'Usinor et de Sacilor v. Armare Srl [1996] 1 Lloyd's Rep. 1.).

matter in dispute shall be determined in London, England according to the Arbitration Act."[1026] The court did not attach any importance to the narrow language of the arbitration clause in the charterparty as the specific and express reference to the arbitration clause in the bill of lading indicated that the parties had the intent to arbitrate their dispute. The court held that the arbitration clause in the charterparty should be construed in a way that honors such agreement.[1027] In other words, the focus is on the wording of the incorporation clause not the wording of the arbitration clause and "this is reasonable as it is the contents of the incorporation clause that transferees of the bill of lading can reasonably be expected to be aware of."[1028] Therefore, "where the charterparty arbitration clause is referred to in the incorporation clause, then verbal manipulation is possible"[1029] to bind the parties of the bill of lading to arbitration despite the fact that the scope of the clause is narrow by only referring to the parties of the charterparty.[1030]

The Italian courts have also adopted the restrictive approach for incorporation by reference, especially regarding bills of ladings.[1031] The Italian courts apply this restrictive approach even in cases where the language of the incorporation is broad enough to reasonably include the arbitration agreement, such as referring to all the terms, liberties, conditions, and exceptions of the charterparty.[1032] Moreover, in Spain, the Court of Appeal in Barcelona stressed

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[1026] *Id.*
[1027] *Id.*
[1028] *Id.*
[1029] Papageorgiou, *supra* note 989, at 19.
[1030] *Id.* This position is different from the one adopted by the U.S. courts, discussed in the subsequent section.
[1031] Van Den Berg, *supra* note 995, at 592.
[1032] *Id.*; *see e.g.*, Cass., sez. un., 22 Dec. 2000, n. SU 1328, 27 Y.B. COM. ARB. 2002, 506 (Ital.). *But see* Dominico Di Pietro, *Incorporation of Arbitration Clauses by Reference*, 21 J. INT'L ARB. 439, 451 (2004) (stating that this restrictive approach does not apply if the reference is made for example to general provisions of a trade association and the parties are experienced traders in this field as this is a straightforward application to the Article 833(2) of the Italian Civil Code which provides that "[t]he arbitration clause contained in general conditions incorporated into a written agreement between the

that general reference is insufficient to invoke the arbitration clause against the party who has signed the bill of lading.[1033] It justified this position by stating that "the charter party and the bill of lading are two distinct documents which bind different parties: Owners and Charterer on the one hand, and Carrier and Shipper on the other, and have a different legal nature."[1034] In the same context, the Court of Appeal of Athens has required an explicit and clear reference to the arbitration agreement "according to objective standards and the prevailing usage of the specific international trade, not according to the intention of the original parties to the bill of lading" in order to be validly incorporated.[1035] Finally, the German law explicitly adopted the restrictive approach as section 1031(4) of the German Code of Civil Procedure provides that "an arbitration agreement is also concluded by the issuance of bill of lading, if the latter contains an express reference to an arbitration clause in a charter party."[1036] In fact, this extra protection for the holder of the bill of lading as a subject to the arbitration clause does not have a meaningful support; this is discussed further in the assessment section.

Article 7(6) of the UNCITRAL Model Law provides that "[t]he reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."[1037] This provision recognizes the incorporation of arbitration agreements by reference but without any clarification of the requirements to effectuate such incorporation and whether a specific reference to the arbitration clause is required or not.[1038] The drafting history of the Model Law supports the

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parties is valid, provided that the parties had knowledge of the clause or should have had such knowledge by using ordinary diligence.").

[1033] Van Den Berg, *supra* note 995, at 593.

[1034] *Id.*

[1035] *Id.* at 592-93.

[1036] German Civil Procedure Code, *supra* note 85, art. 1031(4); BREKOULAKIS, *supra* note 399, at 70.

[1037] UNCITRAL Model Law, *supra* note 84, art. 7(6).

[1038] BORN, *supra* note 2, at 821.

notion that no specific reference to the arbitration clause should be made to be validly incorporated in the document as "the text clearly states [that] the reference need only be to the document; thus, no explicit reference to the arbitration clause contained therein is required."[1039] However, the prevailing view in the Model Law countries is that this article, by making the arbitration clause part of the contract, requires a specific and express reference to the arbitration clause in the contract.[1040] In fact, the interpretation that the UNCITRAL Model Law adopted the restrictive approach is not persuasive. It is not clear from Article 7(6) that this restrictive approach was the intention of the drafters as the article "merely permits incorporation by reference, while leaving open what degree of clarity or precision is required in particular cases to make the arbitration provision part of the contract."[1041]

Some Model Law countries provide articles similar to the UNCITRAL Model Law. For example, Article 10(3) of the Egyptian Arbitration Act similarly provides that the arbitration agreement could be incorporated into a contract by a reference to another document that has such arbitration agreement provided that the reference is clear in making this agreement part of the contract.[1042] This article, however, does not provide a conclusive rule as it does not illustrate what constitutes a clear reference to make the arbitration agreement part of the contract.[1043] The jurisprudence has restrictively construed this article by determining that the only way for incorporation of the arbitration agreement to be clear is specific reference to such clause.[1044]

[1039] *Id.* at 822 (quoting from *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, U.N. Doc. A/CN.9/264, art. 7, ¶ 8).
[1040] BREKOULAKIS, *supra* note 399, at 69.
[1041] BORN, *supra* note 2, at 822.
[1042] Egyptian Arbitration Act, *supra* note 86, art. 10(3); EL-NIDANY, *supra* note 702, at 27.
[1043] EL-NIDANY, *supra* note 702, at 27.
[1044] *Id.* at 26- 27; *see also* EL-GAMAL & ABDELAL, *supra* note 705, at 506; SALAMA, *supra* note 703, at 252.

The Egyptian jurisprudence has also supported such interpretation by linking the specific reference to consent and considering such specific reference to the arbitration agreement as proof that the parties consented to be bound by the arbitration agreement; without such consent, parties could not be bound by an arbitration agreement that they have not signed.[1045] In addition, they have stressed the exceptional nature of arbitration and noted that, even with wide reliance on arbitration regarding international disputes, arbitration remains an exceptional way of settling disputes.[1046] Therefore, there should be a clear and specific reference to arbitration in the contract to bind the parties and exclude the jurisdiction of national courts.[1047]

Moreover, jurisprudence in Egypt relied on the separability principle to require a specific reference to the arbitration agreement in order to be binding.[1048] The arbitration agreement is considered a separate contract in relation to the main contract so, the general reference is sufficient to include the substantive clauses of the contract but not the arbitration clause.[1049] Therefore, specific reference is the only way to give effect to the arbitration agreement incorporated from another document, particularly since arbitration requires special conditions to be concluded such as the capacity and the authority.[1050]

In practice, there has been no unified application of what constitutes a valid incorporation of arbitration agreements by Egyptian courts.[1051] The Egyptian Court of Cassation, in most of its judgments, adopted the liberal approach as it considered general reference to the document with the arbitration agreement sufficient to consider this agreement part of the new contract.[1052] The

[1045] EL-NIDANY, *supra* note 702, at 26-27.
[1046] SHEHATA, *supra* note 731, at 61-62.
[1047] *Id.*
[1048] *Id*. at 60.
[1049] *Id*.
[1050] *Id*.
[1051] EL-NIDANY, *supra* note 702, at 26-27.
[1052] *Id*.

Court only required certain proof that the parties were aware of the existence of the arbitration agreement or at least had an opportunity to know of its existence.[1053] However, there was a shift in a recent judgment when the Court of Cassation explicitly required specific reference to the arbitration agreement to bind the parties of the bill of lading.[1054] In this case, the court provided that the parties to the bill of lading were not parties to the charter party so, they could not be held bound by the arbitration agreement without clear and specific reference.[1055]

In the U.A.E., the courts have also adopted the restrictive approach by requiring specific reference to the arbitration agreement for valid incorporation.[1056] This approach was applied in a case where a sale contract was signed by the purchaser and the seller; the contract incorporated the general terms of the seller, which had an arbitration clause, and these general terms were attached as an appendix to the contract and initialed by the manager of the purchaser.[1057] When the dispute arose, the purchaser requested the court of first instance to invalidate the contract while the seller applied to dismiss the case and compel arbitration based on the contract and its valid arbitration clause, which was incorporated by reference to the general terms of the seller.[1058] The court of appeals dismissed the motion to compel arbitration and the court of cassation affirmed the decision based on the absence of a specific reference to the arbitration agreement.[1059] The adoption of this restrictive position in the U.A.E., much like in other jurisdictions, is because courts view arbitration as an exceptional way to settle disputes. General

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[1053] *Id.*
[1054] SHEHATA, *supra* note 731, at 58-59 (discussing the outcome of Mahkamat al-Naqd [Court of Cassation], Appeal No. 7622, session of 13 July, 1992, year 54).
[1055] *Id.*
[1056] Mohammad Al Muhtaseb & Marwa El Mahdy, *When Can an Arbitration Clause be Incorporated by Reference in the UAE?*, AL-TAMIMI & CO. (Aug. 2014), https://www.tamimi.com/law-update-articles/when-can-an-arbitration-clause-be-incorporated-by-reference-in-the-uae/.
[1057] *Id.*
[1058] *Id.*
[1059] *Id.*

reference is insufficient then to indicate that it was the choice of the parties to exclude the jurisdiction of courts as there is a possibility that the party signed the contract unaware of the existence of the arbitration agreement.[1060]

Discussion of the restrictive approach shows that there are many jurisdictions that adopt this approach. However, the liberal approach has considerable support in many other jurisdictions.

2.2. The Liberal Approach to Bind Non-Signatories Through Incorporation by Reference Theory

The U.S. courts have adopted a liberal approach toward arbitration agreements incorporated by reference, as they have not required specific and express reference to the arbitration agreement for valid incorporation; general reference is considered sufficient in binding the parties to arbitrate their disputes, according to the U.S. courts.[1061] The Federal Arbitration Act, as well, does not require any special conditions to incorporate arbitration agreements by reference.[1062] This liberal approach is an application of the well-established Federal pro-arbitration policy as the courts have put arbitration clauses on the same footing as other substantive provisions of the contract.[1063] In other words, the courts concluded that, since a general reference is sufficient to incorporate the substantive provisions of the contract, it is sufficient also to incorporate the arbitration agreement.[1064]

However, these courts established two criteria in order to give effect to the arbitration agreement incorporated by general reference; the first is the effectiveness of the language of the

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[1060] *Id.*
[1061] BREKOULAKIS, *supra* note 399, at 71; *see, e.g.*, Continental Insurance Co. v. Polish Steamship Co., 346 F.3d 281 (2nd Cir. 2003); Progressive Casualty Insurance Co. v. CA Reaseguradora National De Venezuela, 991 F.2d 42 (2nd Cir. 1993).
[1062] BORN, *supra* note 2, at 824.
[1063] BREKOULAKIS, *supra* note 399, at 71.
[1064] *Id.*

incorporation and the second is the broadness of the arbitration clause itself.[1065] These two conditions set by U.S. courts indicate that the issue of incorporation by reference of the arbitration clause is a fact-driven issue based on the wording of both the incorporation clause in the new contract and the wording of the arbitration clause in the incorporated contract. In other words, what is required is an intention to incorporate a contract with a broad arbitration clause by using broad words of incorporation; the parties of the new contract will be bound to arbitrate their disputes without any need for a specific reference to the arbitration clause.[1066]

In satisfying the first condition, courts have required the language of the incorporation to be broad enough to incorporate the arbitration agreement as such broadness unmistakably refers to the intention of the parties to be bound by the arbitration clause in the incorporated document.[1067] Otherwise, with a narrow language of incorporation, there will be doubt that the parties did not have the intention to be bound by the arbitration agreement.[1068] Examples of the effective and broad language of incorporation accepted by the courts are "all Charter terms are incorporated but for the rate and payment of freight provisions," and "all terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, are herewith incorporated."[1069]

The second condition is related to the arbitration agreement itself as it should be broad enough to include the disputes arising out of the contract in which the clause was incorporated by general reference.[1070] The breadth of the arbitration clause requires that the language is not limited only to the immediate parties of the first contract but should be flexible enough to include

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[1065] *Id.*
[1066] Papageorgiou, *supra* note 989, at 18.
[1067] *Id.*
[1068] *Id.*
[1069] *Id.*
[1070] Li, *supra* note 991, at 109.

other parties of the contracts that have incorporated the original contract.[1071] In *Production Steel Co. v. S.S. Francois L.D.*,[1072] an action was brought by the consignee against the owner and the charters of the ships for damages of a shipment in transit; the owner filed a motion to compel arbitration.[1073] The charterparty agreement had an arbitration clause, providing that "[s]hould any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to three persons in New York . . . ."[1074] The bill of lading incorporated the charterparty as it provided that it was "[s]ubject to all terms, conditions and exceptions of charter party dated 2nd, November 1964 at New York."[1075] The court refused to compel arbitration because the consignee was not a party to the charter party agreement and the incorporation of its terms into the bill of lading was insufficient to bind the consignee to the arbitration agreement.[1076] The court provided that an "attempt to expand the arbitration clause beyond its plain meaning not only violates fundamental contract principles but ignores the plain and limited language used by the parties."[1077] Therefore, the limited language of the arbitration clause — by naming the parties, in this case — precluded its incorporation from the charterparty to the bill of lading. However, when the language is broad and not specifically limited to the immediate parties, its incorporation by general reference will bind the parties of the new contract.

Accordingly, no manipulation is permitted under U.S. law to give effect to the narrow arbitration clause and cover the parties of the new contract, unlike the position adopted by English courts.[1078] This anti-manipulation position is applied even with the specific reference to

[1071] BREKOULAKIS, *supra* note 399, at 72.
[1072] Production Steel Co. v. S.S. Francois L.D., 294 F. Supp. 200 (S.D.N.Y. 1968).
[1073] *Id.*
[1074] *Id.* at 201.
[1075] *Id.*
[1076] *Id.* at 201–02.
[1077] *Id.*
[1078] Papageorgiou, *supra* note 989, at 19.

the arbitration clause.[1079] For example, if the arbitration clause in the charterparty specifically identifies disputes between the owner and the charter then it is a narrow arbitration clause that will not bind the parties of the bill of lading, which incorporated the charter party and made a specific and express reference to the arbitration agreement.[1080]

Another dimension of the requirement for the broadness of the arbitration clause is that the clause should be broad enough to include the disputes arising out of the new contract.[1081] An example of the broad language of an arbitration clause is "any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration."[1082] Therefore, the broadness of the arbitration clause should be in terms of the parties bound by arbitration and disputes covered by arbitration.

The flexibility of the U.S. courts in enforcing arbitration agreements incorporated by general reference appears clearly in guarantee contracts.[1083] The courts tend to bind the guarantor by the arbitration agreement in the main contract when there is a general or broad reference to the provisions of the main contract in the guarantee contract.[1084] For example, in *Kvaerner v. Bank of Tokyo Mitsubishi*,[1085] the bank entered into a guarantee contract with Kvaerner regarding the financing of a joint venture project.[1086] When a dispute arose, Kvaerner applied to compel the bank to arbitrate the dispute based on the arbitration agreement in the construction contract; however, the bank contested being bound to the arbitration agreement since the bank was not a

[1079] *Id.*
[1080] *Id.*
[1081] Li, *supra* note 991, at 112.
[1082] *Id.*
[1083] HANOTIAU, *supra* note 39, at 31-32.
[1084] *Id.*
[1085] Kvaerner ASA v. Bank of Tokyo-Mitsubishi, Ltd., New York Branch, 210 F.3d 262 (4th Cir. 2000).
[1086] *Id.* at 264–65.

party to the construction contract.[1087] The district court ordered to compel arbitration and the United States Court of Appeals for the Fourth Circuit affirmed its decision.[1088] The court held that the arbitration agreement of the construction contract was incorporated by reference in the guarantee contract through a provision, which stated that "[u]pon receipt of notice of default, [Kvaerner and Jones] shall have the same rights and remedies of [the joint venture] under the [Construction] Agreement . . . ."[1089] The court considered the arbitration agreement included in the expression "rights and remedies," which was then binding upon the bank.[1090] The court relied upon certain factors, noting that the arbitration clause in the construction contract was broad as it referred to any disputes arising from or relating to the construction contract so, it could be validly applied to the guarantee contract, which was basically included for the benefit of the joint venture.[1091] Therefore, guarantors should pay more attention to such provisions if they are unwilling to get involved in the arbitration agreement in the main contract and prefer to settle their disputes through litigation.[1092]

Some U.S. courts have applied other tests to decide on the validity of the arbitration agreement incorporated by general reference.[1093] The most common two tests are the trade usage test and the status of the parties as experienced in the field test.[1094] Both tests lead to the same result, which gives considerable weight to the real intentions of the parties by observing their status or the trade usage.

[1087] *Id.*
[1088] *Id.* at 263–64.
[1089] *Id.* at 265.
[1090] *Id.* at 265–66.
[1091] *Id.*
[1092] HANOTIAU, *supra* note 39, at 32.
[1093] Di Pietro, *supra* note 1032, at 444.
[1094] *Id.*

The trade usage test looks at whether arbitration is common as a dispute resolution mechanism in this field or industry; its common application is important evidence that the parties were aware of the arbitration agreement incorporated by general reference and explains why it was not expressly and specifically referenced. For example, in *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*,[1095] the parties started exchanging letters for the sale of steel; the confirmation orders provided that they were subject to the general terms of the seller.[1096] These general conditions had an arbitration clause.[1097] When the dispute arose, the buyer started court proceedings and the seller applied for a motion to compel arbitration.[1098] The buyer contended that he was not bound by the arbitration clause because, among other reasons, there was no specific reference to it in the confirmation orders and general terms were not enclosed with the confirmation orders.[1099] The district court denied the motion to compel arbitration.[1100] On appeal, the court held that the arbitration agreement was validly incorporated by reference because the general reference to incorporate the general terms of the seller was sufficient to bind the parties to the arbitration clause since arbitration is the standard dispute resolution mechanism in this kind of industry.[1101] The court made its decision even recognizing that the general terms were not enclosed with the order confirmation as the court considered the mere reference sufficient to bind the parties to the arbitration clause.[1102] This decision indicates great reliance on trade usage concerning the incorporation of arbitration agreements and how the court genuinely depended on it in ascertaining the intentions of the parties and their awareness about the existence of the

[1095] Aceros Prefabricados, S.A. v. TradeArbed, Inc., 282 F.3d 92 (2nd Cir. 2002).
[1096] *Id.* at 95-96.
[1097] *Id.* at 96.
[1098] *Id.*
[1099] *Id.*
[1100] *Id.*
[1101] *Id.* at 101-02.
[1102] *Id.*

arbitration clause. That is particularly clear from considering the non-enclosed of these terms is immaterial and did not lead to disregarding the arbitration agreement.

The second test, which relates to the status and experience of the parties in the concerned field, is considered another affirmation of the significant role of intention and knowledge of the parties regarding the existence of an arbitration agreement. In *Metallgesellschaft v. Montrose*,[1103] Threlkeld and Metallgesellschaft (MG) entered into different agreements subject to the rules and regulations of the London Metal Exchange.[1104] These rules provide for arbitration regarding any disputes arising from or relating to the contracts of the parties.[1105] When the dispute arose because of the contract valuations, Threlkeld commenced proceedings in the district court and MG applied a motion to compel arbitration, which was denied by the district court.[1106] On appeal, Threlkeld's argued that it was not bound by arbitration because "there has not been a specific acknowledgment of arbitration signed by both parties" and the general reference to the London Metal Exchange rules and regulations was insufficient.[1107] The court refused this argument and noted that "Threlkeld is a sophisticated commodities trader with extensive experience in this field. The LME arbitration provisions are typical of those employed in commercial contracts. Threlkeld cannot now claim that it did not understand its rights and obligations under the contracts."[1108] Binding the parties to an arbitration agreement in this instance is imposed by compliance with good faith principles as it is unacceptable for a party with such extensive experience in the field to claim unawareness of the existence of the arbitration agreement. The court provided that this holding adhered to the federal pro-arbitration

[1103] Metallgesellschaft Ltd. v. Montrose et al., 923 F.2d 245 (2nd Cir. 1991), *reprinted in* 17 Y.B. COM. ARB. 672 (1992).
[1104] *Id*.
[1105] *Id*.
[1106] *Id*. at 673.
[1107] *Id*. at 675.
[1108] *Id*.

policy, specifically applied in the context of international transactions.[1109] Therefore, the court of appeals reversed and held that the suit was subject to arbitration, remanding the case to the district court.[1110]

The French courts, as well, have adopted the liberal approach[1111] as Article 1443(1) of the French Code of Civil Procedure provides that "[t]o be valid, an arbitration clause shall be in writing and included in the contract or in a document to which it refers."[1112] The main factor to effectuate the incorporation of the arbitration agreement is that the parties were aware of the existence of the arbitration clause in the incorporated document and intended to be bound by it.[1113] Accordingly,

> French Courts have usually vinculate [sic] the issue of the validity and effectiveness of the arbitration agreement incorporated by reference into a contract to the proof of the clear will of the parties to be bound by that arbitration clause, leaving aside either the question of the assertion of the fulfillment of certain formal requirements by the incorporation clause or its general or narrow wording.[1114]

In other words, the approach adopted by French courts is more liberal than the U.S. courts since French courts have not required any conditions in terms of effective language for the incorporation provision or the broadness of the arbitration clause.

In *Bomar Oil v. ETAP*,[1115] the contract was concluded by the exchange of telexes and incorporated by reference the standard general conditions of ETAP, which had an ICC arbitration clause.[1116] When a dispute arose over re-negotiation of terms relating to the significant change in

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[1109] *Id*. at 673.
[1110] *Id*.
[1111] Hosking, *supra* note 152, at 542.
[1112] French Civil Procedure Code, *supra* note 88, art. 1443(1).
[1113] Alessandro Villani, *Arbitration Clauses Incorporated by Reference: An Overview of the Pragmatic Approach Developed by European Courts*, KLUWER ARB. BLOG (Mar. 3, 2015), http://arbitrationblog.kluwerarbitration.com/2015/03/03/arbitration-clauses-incorporated-by-reference-an-overview-of-the-pragmatic-approach-developed-by-european-courts/.
[1114] Esplugues, *supra* note 979, at 25.
[1115] Cour d'appel [CA] [Court of Appeal] Paris, Jan. 20, 1987, 13 Y.B. COM. ARB. 466 (Fr.).
[1116] *Id*. at 466-67.

the market price, ETAP started arbitration proceedings but Bomar Oil refused to participate, alleging that it was not a party to any arbitration agreement.[1117] The arbitral tribunal refused the challenge to its jurisdiction and issued its award in favor of ETAP; Bomar Oil then brought an action before the Paris Court of Appeal to set aside the award.[1118] The court upheld the award as it provided that Bomar

> being conversant with the operations of the trade of hydrocarburates, cannot assert to have not been aware of the usual clauses in contracts concluded in this sector of activity. Moreover, before giving its definite consent to the proposals of ETAP, it was its duty to consult the standard contract to which the telex of the seller referred expressly. Consequently, the arbitral tribunal has rightly held that the proof of the parties' consent to the arbitration clause was sufficiently established and has correctly relied upon the requirements of the applicable law designated by them and of the international convention to which both of them have adhered.[1119]

However, in a highly-criticized award, the Court of Cassation reversed the ruling of the Paris Court of Appeals because

> it is necessary — as it would be in French law — that the existence of the clause be mentioned in the main contract, unless there exists between the parties a longstanding business relationship which ensures that they are properly aware of the written conditions normally governing their commercial relationships. Since [the Court of Appeal] decided without determining that the clause at issue had been mentioned in the exchange of telexes, or that there existed a longstanding business relationship between the parties, the Court of Appeal violated the above-mentioned norms.[1120]

The Court of Cassation sent the case back to the Versailles Court of Appeals, which upheld the award and confirmed that there was no provision in the New York Convention precluding incorporation by general reference.[1121] The court recognized a condition to effectuate the incorporation, noting that "the principle of consensualism requires the party invoking the arbitration agreement to prove that the other party knew about the arbitral clause at the time it

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[1117] *Id*.
[1118] *Id*.
[1119] *Id*. at 470.
[1120] Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] Oct. 11, 1989, 15 Y.B. COM. ARB. 48-49 (Fr.).
[1121] Cour d'appel [CA] [Court of Appeal] Versailles, Jan. 23, 1991, 17 Y.B. COM. ARB. 488 (Fr.).

entered into the main agreement."[1122] After examining the correspondence between the parties, since the parties are merchants and any kind of evidence is admissible, the court held that this condition is satisfied and Bomar was bound by the arbitration agreement.[1123] When the case was returned back to the Court of Cassation, the court adopted the liberal consensual approach and provided for application of a substantive rule, requiring that,

> in the field of international arbitration, an arbitration clause, if not mentioned in the main contract, may be validly stipulated by written reference to a document which contains it, for instance general conditions or a standard contract, when the party against which the clause invoked was aware of the contents of his document at the moment of concluding the contract and when it has, albeit tacitly, accepted the incorporation of the document in the contract.[1124]

Based on this rule, French courts analyze the factual circumstances to determine whether the party challenging arbitration had knowledge of the arbitration clause's existence when concluding the contract and whether the party accepted to be bound by the clause.[1125] Such awareness is a fact determinant issue.[1126] The factors that should be taken into account in this respect include the professionalism and experience of the parties in this field or industry, the trade usage regarding settling the disputes of this kind of trade through arbitration, the common use of standards forms with arbitration clauses in the field, and the relation between the parties — whether it is a one-time transaction or there is ongoing business between them.[1127]

[1122] *Id*. at 490.
[1123] *Id*.
[1124] Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] Nov. 9, 1993, 20 Y.B. COM. ARB. 660, 662 (Fr.); *see* FOUCHARD ET AL., *supra* note 48, at 278 (stating that it was surprising that this case was decided based upon the New York Convention not the French Law provisions as other decisions which have been rendered on the basis of the French law have shown more flexibility in the validity of the arbitration agreement incorporated by general reference); *accord* Esplugues, *supra* note 979, at 26-27.
[1125] *See* Esplugues, *supra* note 979, at 25 ("French courts are willing to make sure that parties affected by the incorporation clause are aware of the incorporation itself and of the legal consequences arising out of this fact, thus ensuring a certain level of legal security and certainty as regards the whole process of incorporation by reference of the charterparty's arbitration clause into the bill of lading.").
[1126] HANOTIAU, *supra* note 39, at 29-30.
[1127] *Id.*

This position of the French courts is consistent with their decisions on the issue of extension generally, which focuses mainly on the consent of the parties.[1128] Accordingly,

> [a]rbitration agreements incorporated by reference must therefore be analyzed in terms of the existence and extent of the parties' consent to have their disputes resolved by arbitration. The existence and extent of that consent should be interpreted using the general principles of interpretation of arbitration agreements, that is, neither extensively nor restrictively.[1129]

Swiss courts have taken the same position as French courts by first, adopting the liberal approach, and second, considering the real intention of the parties as the core of the validity of incorporation and noting that intention could be inferred from analyzing the surrounding circumstances.[1130] For example, in *Tradax v. Amoco Iran Oil Amoco Company*,[1131] the bills of lading incorporated the terms and conditions of the charterparty agreement, which had an arbitration clause.[1132] When the dispute arose, one of the parties commenced court proceedings and the other party objected to the competence of the Swiss courts, relying instead on the arbitration clause incorporated by reference to the charterparty.[1133] The court of first instance rejected the challenge and declared that it was competent; this was affirmed by the court of appeal.[1134] However, the Swiss Supreme Court reversed the decision of the court of appeal and declared that Swiss courts lacked competence to adjudicate this dispute.[1135] The Supreme Court concluded that

> the validity of an arbitration clause has to be evaluated in the light of the circumstances of the particular case. This being so, regard should be had to such considerations as whether

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[1128] *See* FOUCHARD ET AL., *supra* note 48, at 279 (indicating that the only case in which a French court refused to hold an arbitration agreement incorporated by general reference was where there was a genuine doubt about the existence of consent because one of the parties made unilateral changes to the contract).
[1129] Hosking, *supra* note 152, at 542.
[1130] BREKOULAKIS, *supra* note 399, at 70.
[1131] Tribunal fédéral [TF] [Federal Supreme Court] Feb. 7, 1984, 11 Y.B. COM. ARB. 532 (Switz.).
[1132] *Id.*
[1133] *Id.*
[1134] *Id.* at 533.
[1135] *Id.*

> it was entered into by seasoned businessmen, or by people with little experience; in the same way, a different degree of awareness is required of the signatories depending on whether the contract refers back to the provisions of another contract which is deemed to be known to them, or to general conditions which may or may not be known to them.[1136]

By applying these principles, the court held that both parties were experienced in this field of trade and, therefore, should have been aware of the standard terms of charter parties.[1137] Based on that, "the bill of lading refers back to the totality of the clauses and conditions of the charter party, among which one must include the arbitration clause even if this is not expressly mentioned."[1138]

The rule adopted by the Swiss Supreme Court, which differentiated between the experienced and inexperienced party in the field when deciding on the incorporation of arbitration agreement by general reference, is connected to the "rule of unusualness," developed by the same court.[1139] The "rule of unusualness" provides that "a party cannot be expected to have agreed to a clause contained in a text to which the main contract or another document refers if the content of such clause is unusual, i.e., if its content deviates from what a reasonable party could expect."[1140] Therefore, if it appears unreasonable — from the circumstance of the case — to expect that the inexperienced party knows or is aware of the existence of an arbitration clause in the document incorporated by reference then the party cannot be bound by it.[1141] This rule of unusualness is negated when the parties have previous dealings and their previous contracts contained an arbitration clause.[1142] This relation between the parties "can replace compliance

[1136] *Id.* at 535.
[1137] *Id.*
[1138] *Id.*
[1139] Bärtsch & Petti, *supra* note 92, at 32.
[1140] *Id.*
[1141] *Id.*
[1142] *Id.*

with the formal requirement according to the rules of good faith."[1143] In all cases, if the party invoking the validity of the general incorporation of arbitration clause was aware that the other party was unaware of the existence of the arbitration clause when concluding the contract, then general reference is insufficient to bind the party.[1144]

In 1990, the liberal approach was confirmed again in the Swiss jurisdiction.[1145] In this case, a supply contract was concluded by the parties and contained an arbitration clause.[1146] When the goods were not delivered, the purchaser started arbitration proceedings.[1147] Afterward, the parties concluded an addendum to the contract to supply other goods, however, nothing was delivered.[1148] The arbitral tribunal rendered an award of damages on behalf of the purchaser.[1149] When the purchaser sought to enforce the award, the supplier contested to the enforcement based on the allegation that the addendum the award was based upon did not have an arbitration clause.[1150] The court of first instance enforced the award and its decision was confirmed by the appellate court;[1151] the Supreme court reaffirmed this decision.[1152] The court held that the supplier was bound by the arbitration agreement based on the general incorporation by reference to the main contract.[1153] The addendum provided explicitly that "[a]ll other terms and conditions per original contract to remain in force."[1154] The court provided that the interpretation of this provision, according to good faith principles, led to the incorporation of all the provisions of the

[1143] Di Pietro, *supra* note 1032, at 443.
[1144] Bärtsch & Petti, *supra* note 92, at 32.
[1145] Tribunal fédéral [TF] [Federal Supreme Court] Jan. 12, 1989, 15 Y.B. COM. ARB. 509 (Switz.).
[1146] *Id. at* 510.
[1147] *Id.*
[1148] *Id.*
[1149] *Id.*
[1150] *Id.* at 510–511.
[1151] *Id.* at 511.
[1152] *Id.*
[1153] *Id.*
[1154] *Id.*

main contract, including the arbitration clause.[1155] The court confirmed the main principle, which is that "the agreement resulting from an exchange of written documents need not explicitly mention the arbitration clause; reference to the contract in its totality suffices."[1156]

After analyzing the restrictive and flexible approaches to incorporating arbitration agreements by general reference, this chapter moves forward to discuss the different positions adopted to determine the law applicable to the issues of incorporation. The problems associated with the current adopted choice of law rules are highlighted as well.

3. Approaches Applied to Determine the Law Applicable to the Validity of the Incorporation of the Arbitration Agreement and the Problems Associated with These Approaches

3.1. The Traditional Approach

There is a tendency to apply the law of the main contract to determine the validity of the incorporation of arbitration agreements.[1157] The justification for such tendency is that incorporation by reference is a matter of the contract construction so, it is governed by the law of that contract.[1158] In other words, "[w]hether or not a reference in one contract to text in another document constitutes an effective incorporation is a question of consent and the formation of contracts, and therefore a question for the substantive governing law."[1159] The clause that mentions the incorporation is considered a part of the main contract and should be governed by the law of the substantive contract. The law of the seat of arbitration could be also applicable to determine the validity of the incorporation of arbitration agreements since the law of the seat is frequently applied to issues of validity with arbitration agreements. Moreover, there are cases

[1155] *Id.*
[1156] *Id.*
[1157] Landau, *supra* note 75, at 29.
[1158] *Id.*
[1159] *Id.*

when national courts and arbitral tribunals resort to the New York Convention to determine whether the arbitration agreement was validly incorporated or not, as discussed in *Bomar Oil*.[1160]

3.2. The Problems Associated with the Traditional Approach and the Need to Move to a Transnational Approach

The main problem of the traditional approach to determine validity of the incorporation of an arbitration agreement is the disparities between jurisdictions on the conditions and requirements for incorporation. Discussion of the restrictive and liberal approaches illustrates how this issue is decided differently across jurisdictions. The negative effect of this situation is apparent as "such varied results cause conflicts of interest and uncertainty at the international level."[1161] In addition, these differences open the door for forum shopping.[1162] For example, if a bill of lading incorporates the charterparty by general reference, providing that all the terms and conditions of the charter party are herein incorporated, then absent a choice of law clause, the party who wishes to avoid arbitration will argue for the applicability of English law while the party who seeks to arbitrate will argue for the applicability of U.S. law since the incorporation provision is sufficient to incorporate the arbitration agreement under U.S. law but not under English law.[1163]

Another apparent problem is when the law of the contract is applied to determine the validity of the arbitration agreement — especially in the context of bills of ladings, which are commonly silent regarding the governing law — and refer to the law of the charterparty, which could be an express or implied choice by the charter's parties.[1164] However, application of the law of the charterparty to determine validity of the incorporation of the arbitration clause is

[1160] *See* discussion of *Bomar Oil* case, *supra* note 1115.
[1161] Li, *supra* note 991, at 109.
[1162] *Id.*
[1163] *Id.*
[1164] Ozdel, *supra* note 995, at 2.

problematic. Before applying the law of the charterparty to the incorporation clause in the bill of lading, there should first be an assertion that the bill of lading validly incorporated the terms and provisions of the charter party, which "brings with it a typical chicken and egg conundrum: which should come first, the decision on incorporation or the decision on the applicable law?"[1165] One view provides that the solution to this problem is to assume that the charterparty is validly incorporated in order to apply its law to the incorporation clause in the bill of lading.[1166] "In other words, solving the problem of incorporation with reference to the law that would govern the bill of lading if the charterparty were incorporated"[1167] to overcome the problem of not providing for an applicable law in the bill of lading. Another view justifies application of the law of the charter party because the parties are considered to impliedly intend to apply the law of the charterparty to the bill of lading, which refers to such charterparty, because they are closely interrelated contracts.[1168]

All these problems increase the possibility of having "parties in complicated proceedings before different courts in different countries," which lead to more costs and extra delays.[1169] In fact,

> [t]he lack of international responses to this issue combined with the presence of very many different national solutions, in too many cases plenty of contradictions and inconsistencies, generates a very problematic situation, highly capable of creating great problems to the parties involved. Some actions should rapidly be taken to solve this unsatisfactory situation.[1170]

[1165] *Id*. at 3.
[1166] *Id*. at 4.
[1167] *Id*. at 3.
[1168] *Id*. at 5.
[1169] Lielbarde, *supra* note 1014, at 50.
[1170] Esplugues, *supra* note 979, at 32.

The proposed rules would be helpful in this respect, especially with the "pressing need to have a binding and balance universal regime that will regulate what constitutes a valid incorporation."[1171]

4. The Proposed Rules to be Applied to Determine the Validity of the Incorporation of the Arbitration Agreement and its Justification

The proposed rules aim to remove the inconsistency that exists because of the application of the restrictive approach in some jurisdictions and the liberal approach in others. These proposed rules advocate the application of a liberal approach to enforce the arbitration agreement incorporated by general reference.

4.1. The Proposed Rules

a- The general reference to a contract that contains an arbitration agreement is considered a valid incorporation of the arbitration agreement.

b- This rule is subject to the general rules of defects in contract law as the only basis to invalidate incorporation by general reference.

4.2. The Justification

4.2.1. The Basis of the Proposed Rules

The proposed approach puts the arbitration clause on the same footing as other incorporated substantive provisions of the contract. The logic is

> [t]here is no real difference between a contract incorporating reference material which includes an arbitration provision, or a provision for a short statute of limitations, or a requirement of written notice to be given within a stated time as a condition precedent for suit. In each case a party may be unaware of material restrictions contained within the incorporated provisions, yet he may be held to them because he has signed a contract.

[1171] Papageorgiou, *supra* note 989, at 33.

> Any reasoning employed to avoid this result in cases where its application would be unjust should have widespread use.[1172]

Therefore, when the document is validly incorporated, the arbitration agreement is automatically incorporated as well.

These proposed rules are supported by the fact that "enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation."[1173] Therefore, no restrictive requirements should be required to enforce arbitration agreements incorporated through general reference. The general rule that arbitration agreements should be in writing must be correctly interpreted regarding incorporation by reference since "the writing requirement aims to enhance protection of the parties, but this should not harm the practice of international trade and international transactions."[1174] In fact, such protection "may have some weight at a domestic level, where the acquaintance with arbitration may not be as widespread in certain industries" but not in international transactions where "arbitration is traditionally regarded as the norm."[1175] Therefore, in the international context, it is unacceptable to claim that general reference to a document containing an arbitration agreement contradicts the widely-accepted writing requirement.

Now, to enhance and justify the adoption of the proposed rules, incorporation by reference is first examined in the context of the New York Convention. Next, the arguments

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[1172] Whitman, *supra* note 961, at 19.
[1173] Di Pietro, *supra* note 1032, at 443.
[1174] Antonios D. Tsavdaridis, *Form and Proof of Arbitration Agreements Incorporated by Reference Under New York Convention*, ROKAS L. FIRM (Oct. 19, 2017), http://www.rokas.com/uploads/Form_and_proof_of_arbitration_agreements_incorporated_by_reference_under_New_York_Convention.pdf.
[1175] Di Pietro, *supra* note 1032, at 448.

employed to support the restrictive approach are discussed and rejected, reinforcing adoption of the proposed rules, which are consistent with the liberal approach.

4.2.2. Incorporation of Reference in the Context of the New York Convention

The New York Convention has not dealt directly with arbitration agreements incorporated by reference.[1176] While some commentators argue that the New York Convention requires specific reference to the arbitration agreement in order to be validly incorporated,[1177] in fact, nothing in the text of the convention or its legislative history imposes a requirement of specific reference to the arbitration clause for the arbitration agreement to be validly incorporated.[1178]

The more convincing interpretation is that general reference to a document or a contract that contains an arbitration agreement is sufficient under the New York Convention since the convention's provisions do not preclude such interpretation. First, Article II(1), which requires the arbitration agreement to be in writing to be enforceable, is satisfied by the general incorporation of the arbitration agreement.[1179] The effective interpretation of this article, which adheres to the policy of the New York Convention, is that the writing requirement does not mean that the arbitration agreement itself must be in writing but that there should be a writing that records such agreement. General incorporation satisfies this requirement by the reference to the written document that contains the arbitration agreement.

Second, Article II(2) of the New York Convention, which explains what constitutes an agreement in writing, also encompasses the incorporation of arbitration agreement by general

[1176] Tsavdaridis, *supra* note 1174; *see also* Di Pietro, *supra* note 1032, at 441.
[1177] Di Pietro, *supra* note 1032, at 441.
[1178] *Id.*
[1179] New York Convention, *supra* note 82, art. II(1); Di Pietro, *supra* note 1032, at 441.

reference.[1180] It is well-settled that the New York Convention's mentioned forms of signed arbitration agreements or agreements contained in the exchange of letters or telegrams are not exclusive, especially since the word "shall include" is not followed by "only."[1181] Therefore, according to the prevailing view, any form that records and evidences the arbitration agreement is acceptable under the New York Convention.[1182]

Third, Article II(3) of the New York Convention, which provides the bases for refusing the enforcement of arbitration agreements, does not include the general incorporation of a document with the arbitration clause.[1183] The null, void, inoperative or incapable of being performed expressions mentioned in this article, are to be interpreted as the "generally-applicable, internationally-neutral contract law defenses"; these are the only grounds for refusal of enforcing arbitration agreements in the contracting states.[1184] In fact,

> the status of international arbitration as a neutral, efficient and expert means of dispute resolution precludes argument that special clarity should be required in an arbitration agreement in international commercial settings; indeed, such requirements are contrary to the New York Convention's requirement that Contracting States apply generally-applicable, non-discriminatory contract law rules to arbitration agreements.[1185]

Therefore, the requirement of a specific reference to the arbitration agreement in order to be validly incorporated in the contract clearly contradicts this provision.[1186] In other words,

> [u]nder these standards, the better view is that a blanket rule of national law, invalidating any arbitration agreement incorporated by a general reference to another instrument, would be invalid; that rule discriminates against arbitration agreements by subjecting them to a notice requirement not applicable to other contractual provisions (and not reflecting commercial realities in many instances). Contracting States would be free, based on case-by-case review of particular instances of 'general' references, to conclude

[1180] New York Convention, *supra* note 82, art. II(2).
[1181] Di Pietro, *supra* note 1032, at 440.
[1182] *Id.*
[1183] New York Convention, *supra* note 82, art. II(3).
[1184] BORN, *supra* note 2, at 557.
[1185] *Id.* at 829.
[1186] *Id.* at 821.

> that putative arbitration clauses are invalid, but would not be free to impose a blanket prohibition on all incorporations by general reference.[1187]

Based on that, the liberal approach to incorporating the arbitration agreement aligns with the spirit of the New York Convention and its goals in facilitating the recognition and enforcement of arbitral agreements and awards. However, absence of an express provision dealing with the incorporation opens the door for different explanations and interpretations in different jurisdictions.[1188] In other words, inconsistency in case law is a direct result of the silence of the Convention, which does not expressly address the issue of incorporation.[1189]

4.2.3. Assessment of the Restrictive Approach for Incorporation of Arbitration Agreements

As previously discussed, the difference between the restrictive and the liberal approach is whether specific and express reference to the arbitration agreement is required to bind the parties. Different justifications for the adoption of the restrictive approach include the separability principle and the recognition that arbitration agreements are ancillary provisions not directly relevant to the subject matter of the main contract.[1190] It was stated that

> the status of a so-called 'arbitration clause' included in a contract of any nature is different from other types of clauses because it constitutes a 'self-contained contract collateral or ancillary to' the substantive contract.[1191] In other words, arbitration clause is a self-contained contract, even though it is, by common usage, described as an 'arbitration clause.'[1192]

Accordingly, arbitration agreements cannot be incorporated into a contract through general incorporation — there must be specific reference. For example, general reference to the charterparty is only sufficient to incorporate the charterparty's provisions that are germane and

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[1187] *Id.*
[1188] Di Pietro, *supra* note 1032, at 445.
[1189] *Id.* at 452.
[1190] BREKOULAKIS, *supra* note 399, at 68- 69.
[1191] Esplugues, *supra* note 979, at 14.
[1192] *Id.*

closely related to the shipment — as long as reference to the terms and provisions of the charterparty is clear and compatible with the provisions of the bill of lading.[1193] However, incorporation of the arbitration clause needs specific reference under the restrictive approach, according to its nature as a separate dispute resolution provision.[1194]

In fact, such argument interprets the separability principle outside its domain, as it is mainly related to the existence and validity of the arbitration agreement; so, the termination or invalidity of the main contract does not entail the invalidity of the arbitration clause. In addition, the separability principle also relates to the choice of law provision as the law applied to the substantive contract may not be the law applicable to the arbitration clause. However, there is no convincing explanation for why the separability principle should be involved when there is an incorporation by reference to the provisions of another contract that includes an arbitration clause.

Interestingly, the English courts, which adopted the restrictive approach and referred frequently to the separability principle, indirectly undermined reliance on the separability principle by adopting the distinction between single contract and two contract situations — holding that when reference is done to a general conditions or standard form, the general reference (without specifying the arbitration clause) is sufficient. This distinction contradicts the interpretation of the separability principle; if the separability principle is a valid justification then even in the single contract scenario there should also be a specific reference to the arbitration clause.[1195] Therefore, it is clear that the separability principle does not provide meaningful support to the restrictive approach. The logical result is that the party to the contract with incorporation, "should be subject not only to those provisions germane to his substantive rights

[1193] *Id.* at 15-16.
[1194] Ozdel, *supra* note 995, at 5.
[1195] O'Sullivan, *supra* note 993.

and liabilities but also to provisions regarding dispute resolution, including an arbitration clause."[1196]

Another justification is that arbitration is considered an exception to the right of litigation. Therefore, it needs special wording in order to have the effect of ousting the jurisdiction of courts.[1197] This specific reference ensures that the parties have consciously and knowingly agreed to arbitrate.[1198]

This argument does not reflect the reality because "arbitration has become the habitual dispute resolution method in international transactions and the parties should show enhanced vigilance in their business activities."[1199] Therefore, it is unacceptable that an international experienced trader claims unawareness of the existence of an arbitration clause or that it is unexpected to be included in the document through incorporation by general reference.[1200] In fact, such justification to support the restrictive approach clearly contradicts good faith principles.

Finally, it is alleged that the express and specific reference to the arbitration agreements is clearer in affirming the intention of the parties to be bound by the arbitration agreement. In other words, with general reference the parties may not have been able to know about the existence of the arbitration clause in the incorporated contract or document.[1201] Allegedly,

> it is not obvious why the shipper, the subcontractor, the reinsurer, and the guarantor ought to or just should know that the separate contract they refer to contains an

[1196] Li, *supra* note 991, at 122.
[1197] BREKOULAKIS, *supra* note 399, at 69; *see also* BORN, *supra* note 2, at 829.
[1198] Jagath Chandrawansa Korale, The Impact of the Inclusion of Arbitration Clause by Reference in Main Contract and Sub Contract Documents in the Construction Industry and its Negative Connotations (June 28-30, 2012), *in* WORLD CONSTRUCTION CONF. 2012, June 2012, at 202, 204 http://www.irbnet.de/daten/iconda/CIB_DC25127.pdf.
[1199] Tsavdaridis, *supra* note 1174.
[1200] *Id.*
[1201] BREKOULAKIS, *supra* note 399, at 69.

> arbitration clause, when this separate contract has been concluded by two different parties and it will not normally be readily available to the third party.[1202]

In fact, this justification goes beyond what should be assumed as, when a party signed a contract, there is a presumption that the party is aware of the content of this contract. Therefore, when there is a reference to another contract or document, the presumption of the party's knowledge extends to the incorporated document as well. In other words, since it is unacceptable to deny contractual obligations based on the contention that the party was unaware of the contract's provision, the same logic should apply to the incorporated provisions. The only way to negate the effect of the incorporated arbitration clause is by applying traditional contract defenses such as duress, undue influence, unconscionability, misrepresentation, fraud, etc. In fact,

> [i]t is surprising that where courts find that a party should be relieved from an unseen and unexpected incorporated provision, they do not unanimously turn to the exceptions to the general contract rule that a person is bound by what he signs regardless of whether he has read it, and extend and strengthen their application in the incorporation situation.[1203]

Essentially, if there is a general incorporation of a document, it is expected that the parties will look at this document; if they did not look at the document before signing the agreement, it is there fault. Even if the document was unavailable or nonexistent when the contract was concluded, the prudent person would wait to review the incorporated document that becomes a part of the contract the party will sign and be bound by.

This unjustified distinction between the provisions of the contract and the arbitration clause is very clear in the case of bills of lading, as there is no meaningful justification for the extra protection granted to the holder of the bill of lading to not be bound by the arbitration clause. The rule should be that

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[1202] *Id*. at 75.
[1203] Whitman, *supra* note 961, at 20.

> [a]n arbitration clause, as a clause in the bill of lading, creates specific rights and obligations that are transferable. When the bill of lading is endorsed from a charterer or a shipper to an original buyer (an original holder) and later negotiated from an original buyer to a subsequent buyer (a subsequent holder), the arbitration clause binds both the original buyer and subsequent buyer because it is a contractual provision in the bill of lading.[1204]

In fact, the holder of the bill of lading is a sophisticated merchant who "has a constructive notice of an arbitration clause because a holder frequently deals with international sales transactions by buying and selling goods."[1205] Therefore, subjecting the holder of the bill of lading to an arbitration clause incorporated by general reference to the charterparty "will not cause undue hardship" because it is widespread practice to have an arbitration clause in the charterparty.[1206] Therefore, "it is commonly understood that sophisticated merchants are at least constructively aware of the potential existence of an arbitration clause."[1207] Moreover, the position adopted by English courts of accepting general reference in the bill of lading, if the charter party provides for arbitration for disputes under both the charter party and bills of lading, assures the invalidity of the logic behind the restrictive approach in protecting the parties of the bill of lading since such provision in the charterparty does not solve the assumed problem that the parties of the bill of lading were unaware of the provisions of the incorporated charterparty.

Based on all of that, it is clear that the arguments applied to support the restrictive approach are weak and do not provide a convincing justification for its application in the international context. These arguments clearly indicate that the restrictive approach is applied only because of formalistic issues and considerations. However, what should really matter is the

[1204] Li, *supra* note 991, at 123.
[1205] *Id.* at 125.
[1206] *Id.*
[1207] *Id.*

parties' true intentions with "no reason to take a hostile position towards arbitration clauses incorporated by reference."[1208]

Finally, the proposed rules do not impose any requirement to communicate the document with the arbitration agreement to the other party by attaching it to the new contract or by being available through any means. Requiring such communication of these documents is considered a heavy burden on the party preparing the contract, which would make incorporation by reference useless as its notion and advantage will be nullified.[1209] Even attaching a summary of the incorporated document would not be an effective solution as it is still a burden and "would be likely to lead to stereotyped vague recitals which would involve the parties in litigation over the adequacy of the clause's coverage."[1210]

In conclusion, the existence of the restrictive and the liberal approaches in effectuating the incorporation of arbitration agreements leads to uncertainty in context of international disputes. Therefore, the proposed rules are developed to unify the incorporation of arbitration agreements by general reference to the document containing the arbitration clause, without the need to mention the arbitration agreement in specific. The next chapter discusses the role of the proposed approach in unifying the requirements to subject the third-party beneficiary to the arbitration agreement.

[1208] FOUCHARD ET AL., *supra* note 48, at 277.
[1209] Whitman, *supra* note 961, at 20.
[1210] *Id.*

CHAPTER 6

THE CURRENT SITUATION OF EXTENSION BASED ON THE THIRD-PARTY BENEFICIARY THEORY AND THE PROPOSAL FOR A UNIFIED SET OF RULES AS A SHIFT FROM THE NATIONAL TO THE TRANSNATIONAL APPROACH

The third-party beneficiary theory in contract law is employed to extend the arbitration agreement to a non-signatory who benefits from the agreement. Jurisdictions apply the theory differently in terms of the conditions required to effectuate extension and whether to enforce the arbitration clause by or against the third-party beneficiary. Therefore, unified rules on third-party beneficiary theory need to be applied to achieve certainty and predictability in international disputes. This chapter develops these unified rules after first, discussing the positions adopted in different jurisdictions and second, analyzing the approaches to determine the applicable law to this extension. The chapter begins by defining the third-party beneficiary theory and its construction in the context of arbitration, then analyzing the requirements to enforce the arbitration agreement by the third-party beneficiary. Next, the ability of signatories to bind the third-party beneficiary to the arbitration clause is assessed. Finally, the laws applicable to determine the status of the third-party beneficiary are discussed before presenting the proposed unified rules along with their justification.

1. The Definition of the Third-Party Beneficiary Theory and its Construction in the Context of Arbitration

1.1. The Explanation of the Beneficiary's Triangle Relationship

Normally, the contract intends to bind just the signatory parties, however, it is possible that the parties intend to confer the benefits of the contract on a third party — that person is a third-party beneficiary. In other words, the third-party beneficiary gains a benefit from the contract because of the intention of its parties, despite the fact that the third-party beneficiary is not a party to the contract. However, parties do not have the power to impose obligations on third

parties as all contracts that impose obligations on non-signatories are invalid in all legal systems.[1211] For example, Article 145 of the Egyptian Civil Code clearly provides for the validity of contracts that confer rights on third parties and invalidates contracts that impose obligations.[1212]

There are three involved parties in this respect: the promisor or the obligor who will render the performance to the third party, the obligee or the promisee (who is the other contracting party), and the third-party beneficiary.[1213] Therefore, three distinct legal relationships stem from the contract.[1214] The first is the so-called "cover relationship" between the promisor and the promisee, which relates to the consideration the promisor received in order to render performance to the third party.[1215] The second is the value relationship between the promisee and the third party, which incorporates the reasons for conferring rights on the third party.[1216] Finally, a performance relationship exists between the promisor and the third-party beneficiary.[1217]

Third-party beneficiary relationships can be found in all kinds of contracts as they are not limited to certain contracts or transactions and "[v]irtually any contract creating obligations can be worded so as to establish a third-party beneficiary."[1218] For example, a third-party beneficiary could be found in corporate transactions, settlement agreements, complex contracts such as joint ventures, etc.[1219] It also frequently arises in the context of insurance, construction, and

[1211] Andrea Meier & Anna Lea Setz, *Arbitration Clauses in Third Party Beneficiary Contracts — Who May and Who Must Arbitrate?*, 34 ASA BULL. 62, 62 (2016).
[1212] Egyptian Civil Code, *supra* note 699, art. 145.
[1213] Meier & Setz, *supra* note 1211, at 63.
[1214] *Id.*
[1215] *Id.*
[1216] *Id.*
[1217] *Id.*
[1218] *Id.* at 65.
[1219] *Id.*

employment contracts.[1220] The only two conditions for the validity of this kind of contract are that the parties conclude the contract in their own names — not in the name of the beneficiary — and that the beneficiary has a directly enforceable benefit from the contract.[1221] If the contract was concluded in the name of the beneficiary, it would be an agency contract, not a third-party beneficiary contract.[1222] Moreover, if the third-party beneficiary could not enforce the substantive rights against the promisor except through the promisee, it would also not be a third-party beneficiary contract.[1223] Notably, acceptance of the third-party beneficiary is not a condition to conclude the contract between the promisor and the promisee, however, it is a condition to be enforceable against the third-party beneficiary.[1224] Such acceptance by the third-party beneficiary has a significant effect as the promisee cannot revoke the benefits conferred on the third party after acceptance.[1225]

The notion of a third-party beneficiary stands against the principle of privity of contracts, however, it is well recognized in common law and civil law systems, as they have compromised strict compliance with the privity principle to achieve efficiency.[1226] For example, Article 1121 of the French Civil Code recognizes third-party beneficiaries,[1227] as does the United States in

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[1220] FATHY WALY, KANOUN AL TAHKIM FE AL NAZAREYA W AL TATBEEK [ARBITRATION LAW IN THEORY AND APPLICATION] 438 (2007).
[1221] *Id*. at 484.
[1222] *Id*.
[1223] *Id*. at 484-85.
[1224] *Id*. at 485.
[1225] *Id*.; *see, e.g.*, English Contracts Act, *supra* note 150, § 2(1) ("Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if – (a) the third party has communicated his assent to the term to the promisor.").
[1226] WAINCYMER, *supra* note 34, at 519.
[1227] French Civil Code, *supra* note 698, art. 1121 ("One may likewise stipulate for the benefit of a third-party, where it is the condition of a stipulation which one makes for oneself or of a gift which one makes to another. He who made that stipulation may no longer revoke it, where the third party declares that he wishes to take advantage of it.").

Section 302 of the Restatement (Second) of Contracts.[1228] In the same context, the Swiss law provides for the validity of third-party beneficiary contracts in Article 112 of the Code of Obligations as it gives the party in whose benefit the contract was concluded, the right to compel enforcement of the contract.[1229] English law has recently recognized the status of the third-party beneficiary in the Contracts (Rights of Third Parties) Act 1999, although, before the enactment of this law, English law strictly enforced the privity principles with limited exceptions.[1230]

1.2. Construction of the Status of the Third-Party Beneficiary in the Context of Arbitration

One question that arises in the context of arbitration is whether the third-party beneficiary is considered a party to the arbitration clause in the main contract, as an automatic consequence of being a third-party beneficiary to the main contract. In other words, is the third-party beneficiary able to invoke the arbitration clause against the parties? Are the parties able to enforce the arbitration clause against the third-party beneficiary? This arises in two scenarios; the first is when a signatory defendant argues that a non-signatory (third-party beneficiary) plaintiff is obliged to arbitrate any claims based on an arbitration clause in the contract where the non-signatory rights were granted.[1231] The second scenario arises when a non-signatory (third-party beneficiary) defendant argues that the signatory plaintiff is bound to arbitrate any disputes arising from the agreement.[1232] The fact that the third-party beneficiary has not signed the

[1228] RESTATEMENT (SECOND) OF CONTRACTS §302 (AM. LAW. INST. 2013); David M. Summers, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880, 881 (1982) (providing the historical overview for the development of the concept third-party beneficiary in the U.S. law).
[1229] OBLIGATIONENRECHT, CODE DES OBLIGATIONS, CODICE DELLE OBLIGAZIONI [OR, CO, CO] [Code of Obligations] Mar. 30, 1911, SR 220, art. 112 (Switz.) [hereinafter Swiss Code of Obligations]; Meier & Setz, *supra* note 1211, at 63.
[1230] *See* Hosking, *supra* note 152, at 510-11 (discussing the history of the English Law regarding the adoption of the third-party beneficiary theory).
[1231] Seungnam Shin, *Non-Signatories in Arbitration Proceedings with Focus on a Third Party Beneficiary and Equitable Estoppel Doctrines in the United States*, 27 J. ARB. STUD. 77, 79 (2017).
[1232] *Id.*

contract raises the issue of extension of the arbitration agreement to non-signatories and whether its core, which is consent, is satisfied or not. Such consent is assessed according to different factors, which generally include the parties' intention, the scope of the language of the arbitration agreement, and the surrounding circumstances.[1233] Each factor has a distinct role in determining the status of the third-party beneficiary regarding the arbitration agreement, as illustrated in the following sections.

2. The Third-Party Beneficiary's Ability to Invoke the Arbitration Clause

Different steps must be taken to determine whether the third-party beneficiary — whether claimant or defendant — has the right to invoke the arbitration clause or not. The threshold requirement is determining that the third party is an intended beneficiary of the main contract, not an incidental one. Different national legislations and case law have drawn a distinction between the intended and incidental beneficiary.[1234] This entails an inquiry into who has the burden of proving this status.[1235] After confirming the status of an intended third-party beneficiary, the second step is determining whether the parties intended to confer on the third-party beneficiary the right to rely on the arbitration clause in the main contract or if this is an automatic consequence of the third-party beneficiary status.[1236] In other words, is the right to arbitrate on the same footing as the substantive rights of the contract so the third-party beneficiary can enforce the arbitration clause without requiring a special stipulation or authorization of the parties? Some argue that such intention is not required while others advocate for an intention requirement. One of the main elements to determine whether such intention

[1233] WAINCYMER, *supra* note 34, at 519.
[1234] *See* discussion *infra* § 2.1.
[1235] *See* discussion *infra* § 2.2.
[1236] *See* discussion *infra* § 2.3.

exists is the scope of the language of the arbitration clause.[1237] Is it broad enough to encompass the third-party beneficiary or is it a narrow and strict clause expressing the intention of the parties to exclude the third-party beneficiary from the reach of the arbitration clause. Interpretation of the broadness of the arbitration clause has been construed differently by courts, tribunals, and jurisprudence in different jurisdictions.

2.1. The Distinction Between the Intended and the Incidental Third-Party Beneficiary

The intended beneficiary has a direct benefit from the contract as conferred by the parties; the incidental beneficiary could benefit from the contract, however, that was not the main intention of the parties when concluding the agreement. In other words, the parties concluded the contract for their own benefit and the promisor has a performance obligation toward the promisee; while a third party may indirectly benefit from that performance, the third party is not an intended third-party beneficiary. As the intention of conferring a direct benefit is the criterion, "[t]he circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement" without a clear intention of the parties to specifically confer a direct benefit.[1238] The Restatement (Second) of Contracts provides distinguish between the intended and incidental beneficiary in Section 302.

> 1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.[1239]

[1237] *See* discussion *infra* § 2.4.
[1238] Neverkovec v. Fredericks, 74 Cal. App. 4th 337, 348 (Cal. Ct. App. 1999).
[1239] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1228, § 302.

In the context of arbitration, the threshold issue to determine whether the third-party beneficiary has the right to invoke the arbitration clause or not is whether the third-party beneficiary is an intended or incidental beneficiary. If the third-party beneficiary is an incidental beneficiary, then the third party will not have the right to invoke the arbitration clause. In other words, arbitral tribunals, in deciding jurisdiction for a non-signatory claiming third-party beneficiary status, should determine whether the third-party beneficiary is an intended or incidental beneficiary. The distinction between the intended and incidental beneficiary frequently arises in the context of contracts signed by state entities and whether the state, which benefits from the contract, is considered a third-party beneficiary. In addition, the distinction also arises in the context of binding the parent company to an arbitration agreement concluded by its subsidiary, since the parent is benefitting from contracts concluded by its subsidiaries.

An example of an arbitration award distinguishing between the intended and incidental beneficiary in the context of a parent company and a subsidiary company was ICC Case No. 9839.[1240] In this case, Q was an international mergers and acquisition company with two affiliates Q-Spain and Q-Z.[1241] In the agreement between Q and Q-Z, there was a provision for fee sharing as Q-Z was obliged to pay Q a percentage of the success fee for any transaction that involved Q; this agreement had an arbitration clause.[1242] A dispute arose between Q and Q-Z regarding the success fee of a specific transaction.[1243] Q considered it a material breach and terminated the contract.[1244] Q and Q-Spain commenced ICC arbitration against Q-Z, which contested to arbitration with Q-Spain as Q-Spain was not a party to the agreement and could not

[1240] Case No. 9839 of 1999, 29 Y.B. COM. ARB. 66 (ICC Int'l Ct. Arb.).
[1241] *Id.*
[1242] *Id.* at 67.
[1243] *Id.*
[1244] *Id.*

rely on the arbitration clause.[1245] Q-Spain argued that it was a third-party beneficiary of the agreement since Q was obligated to pay Q-Spain a portion of the fee received from Q-Z.[1246]

The tribunal refused this argument, concluding that the mere status of Q-Spain as an affiliate, which was entitled to a portion of the fees paid to Q, did not make it an intended third-party beneficiary of the agreement between Q and Q-Z.[1247] The tribunal enhanced this conclusion by the fact that Q-Spain was not mentioned anywhere in the agreement between Q and Q-Z and, specifically, was not mentioned in the provision discussing the obligation of Q-Z to pay Q an apportionment of the fees.[1248] Therefore, the tribunal found that there was no intention of the contracting parties to confer any benefit on Q-Spain and it could not invoke the arbitration agreement in a contract that it neither signed nor had a status of an intended third-party beneficiary.[1249] This case clearly indicates the difference between the intended beneficiary and the incidental beneficiary and how this issue is determined according to the language employed in the contract and the surrounding circumstances. It confirms that the incidental beneficiary can benefit from a contract between the parties, as Q-Spain benefitted from the success fee paid by Q-Z to Q, but this is insufficient to give it the right to rely on the arbitration clause or even to rely on the provisions of the contract to demand the enforcement of its obligations.

National courts have adopted the same distinction between the intended and the incidental beneficiary for invoking the arbitration clause. For example, in *Kyung Sup Ahn v. Rooney, Pace, Inc.*,[1250] a customer established two securities account with a broker and also signed a standard agreement with a clearing broker, as it is common for small brokers to have a

[1245] *Id*. at 67-68.
[1246] *Id*.
[1247] *Id*. at 70.
[1248] *Id*. at 71.
[1249] *Id*.
[1250] Kyung Sup Ahn v. Rooney, Pace Inc., 624 F. Supp. 368 (S.D.N.Y. 1985).

separate clearing broker handle tasks related to the clearance and settlement of different transactions in the customer's account.[1251] This standard agreement had an arbitration clause for settling any disputes arising out of or related to the customer's cash and margin accounts.[1252] The dispute arose between the customer and the introducing broker and the customer filed a suit for securities fraud.[1253] The broker applied to stay the proceedings pending arbitration, claiming status as a third-party beneficiary in the contract between the customer and the clearing broker.[1254] The court denied the motion because there was nothing in the agreement that referred to the introducing broker as a third-party beneficiary.[1255] According to the court, it was clear that the introducing broker was a mere incidental beneficiary and had no right to invoke the arbitration clause in the contract.[1256] This case also confirmed that the determinative element in distinguishing an intended beneficiary from an incidental one is the language of the contract and its interpretation in light of the surrounding circumstances, not the element of receiving a benefit from the contract.

Swiss Law has a similar distinction for the intended and the incidental beneficiary recognized as a quasi and a genuine third-party beneficiary.[1257] The status of the genuine third-party beneficiary is similar to the intended beneficiary, as the genuine has the right to demand performance from the promisor.[1258] The quasi-beneficiary has no direct right from the promisor

[1251] *Id*. at 369.
[1252] *Id*.
[1253] *Id*. at 370-71.
[1254] *Id*.
[1255] *Id*.
[1256] *Id*. at 372.
[1257] Marja Boman, Privity of Contract and Multi-Party Arbitration 18 (Sept. 22, 2016) (unpublished manuscript), https://www.researchgate.net/publication/311947283_Privity_of_Contract_and_Multi-Party_Arbitration_published_in_Edilex/download.
[1258] *Id*.

and performance can only be demanded by the promisee.[1259] In the same context, the genuine third-party beneficiary is the one who has the right to invoke the application of the arbitration clause, however, the quasi-third-party beneficiary does not have this right.[1260] This distinction was raised in Case No. 4A_627.[1261] A contract was entered into by the International Ice Hockey Federation and the Swiss Ice Hockey Association — as well as the Swiss Ice Hockey National League — concerning participation of the Swiss clubs in the Champions League; this contract had an arbitration clause.[1262] However, the Ice Hockey Champions League was canceled from 2009 to 2011.[1263] The Swiss Ice Hockey club, SCB Eishockey AG, filed a request for arbitration against the International Ice Hockey Federation alleging the right to be compensated for the loss stemmed from the cancellation based on the club's status as a third-party beneficiary of the agreement concluded between the International Ice Hockey Federation, the Swiss Ice Hockey Association, and the Swiss Ice Hockey National League.[1264] The court held that the claimant was not a genuine third-party beneficiary to the contract because the contract did not confer on the clubs a direct benefit; the club could not rely on the arbitration clause contained on such contract.[1265] This decision was clearly based on the fact that the parties, when concluding the contract, had no intention of benefitting the clubs. The provisions of the contract proved this as no direct benefits for the clubs were stipulated in the agreement.

[1259] *Id.*
[1260] *Id.*
[1261] Meier & Setz, *supra* note 1211, at 69 (discussing the outcome of Case No. 4A_627/2011, rendered on March 8, 2012).
[1262] *Id.*
[1263] *Id.*
[1264] *Id.*
[1265] *Id.*

Finally, in most jurisdictions, the intended third-party beneficiary does not need to be determined when concluding the contract.[1266] In other words, the third-party beneficiary — as a person or as a category of entities — could claim the status even if not specifically in the contemplation of the parties when concluding the agreement.[1267] An example of this is Article 308 of the Restatement (Second) of Contracts, which provides that "[i]t is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made."[1268] The principle was applied in the context of arbitration agreements in *Spear, Leads & Kellogg v. Central Life Assurance Co.*[1269] In this case, Goodman opened an investment account with a broker company which was a member of the New York Stock Exchange (NYSE).[1270] Goodman then contracted with insurance companies for insurance policies so that, in case of his death, his clients would be paid for the balances deserved in their accounts.[1271] Goodman provided the insurance companies with fraudulent statements about his status and his investment position.[1272] Goodman died and the insurance companies paid his clients and then started arbitration proceedings before the NYSE against the broker company to recover the amounts paid, asserting that the broker company was involved with Goodman in the fraudulent actions.[1273] The broker company started court proceedings to enjoin the insurance companies from arbitral proceedings.[1274] The district court granted an injunction to stay

[1266] Hosking, *supra* note 152, at 529.
[1267] *Id*.
[1268] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1228, § 308.
[1269] Spear, Leeds & Kellogg v. Central Life Assur. Co., 85 F.3d 21 (2nd Cir. 1996).
[1270] *Id*. at 23.
[1271] *Id*.
[1272] *Id*. at 23- 24.
[1273] *Id*. at 24.
[1274] *Id*.

arbitration because there was neither an agreement to arbitrate nor any 'transactional nexus' between the broker company and the insurance companies.[1275]

On appeal, the court held that the broker company was bound by the arbitration provision in the NYSE Rules, which provided that "[a]ny dispute, claim or controversy between a . . . non-member and a member . . . arising in connection with the business of such member . . . shall be Arbitrated under the Constitution and the Rules of the [NYSE] . . . ."[1276] This provision gave the insurance companies the right to compel arbitration against the broker company without needing an agreement to arbitrate because of their status as third-party beneficiaries to the agreement between the broker company and the NYSE.[1277] The court held that

> [n]either a transactional nexus between plaintiff and defendants, nor identification of these specific defendants as third party beneficiaries, is required to compel the broker company to arbitrate a dispute in accordance with NYSE procedures. Thus, the NYSE Arbitration Rules provide a sufficient basis for finding the necessary agreement to arbitrate defendants' claims . . . . [1278]

This position is supported by the U.S. federal pro-arbitration policy to enforce arbitration agreements.[1279] This case is a clear indication that there is no requirement that a third-party beneficiary be identified before enforcing the rights arising from the contract.

Egyptian law has adopted the same liberal position as the U.S. law. According to Article 156 of the Egyptian Civil Code, the beneficiary could be a future person or entity and there is no identification requirement when concluding the contract as long as the beneficiary could be designated during the enforcement of the contract.[1280] On the contrary, the English Contracts (Rights of Third Parties) Act 1999 adopted a restrictive position for identifying the third-party

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[1275] *Id*.
[1276] *Id*. at 26.
[1277] *Id*.
[1278] *Id*. at 28.
[1279] *Id*. at 26.
[1280] Egyptian Civil Code, *supra* note 699, art. 156.

beneficiary in the contract.[1281] According to Section (1)3, "[t]he third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into."[1282] Regardless of the constrained language of this provision, a flexible interpretation and application has been suggested by the Law Commission's Report, suggesting that "the third party must be capable of being ascertained with certainty at the time when the promisor's duty to perform in the third party's favor arises, or when a liability against which the provisions seeks to protect the third party is incurred."[1283]

After concluding that the third-party beneficiary must be an intended beneficiary as a threshold to determine its ability to rely on the arbitration agreement, the next question is who has the burden of proving this status: the third-party beneficiary or the signatory who resists the extension of the arbitration clause?

2.2. Proof of the Status of the Third-Party Beneficiary Regarding the Arbitration Agreement

Generally, determining the proof of the status of the third-party beneficiary is not easy "since the contracting parties seldom specifically state their intent directly to benefit a third party, proof of such intent is extremely difficult."[1284] In other words, there is no requirement that the three parties conclude an express agreement stipulating the benefit of the third party.[1285] The third-party beneficiary is an exception to the presumption that the contracting parties conclude the contract for their own benefit,[1286] and "[t]his presumption may be overcome only if the intent

[1281] Hosking, *supra* note 152, at 529.
[1282] English Contracts Act, *supra* note 150, § 1(3).
[1283] Hosking, *supra* note 152, at 529 (quoting English Law Commission, Report No. 242, Privity of Contracts: Contracts for the Benefit of Third Parties, §§ 8.17-8.18 (1996)).
[1284] James J. Sentner Jr., *Who is Bound by Arbitration Agreements – Enforcement by and Against Non-Signatories*, 6 BUS. L. INT'L 55, 68 (2005).
[1285] Lui Xing'er, *Analysis of the Third Party Involvement as a New Development in Chinese International Arbitration Rules*, 4 PEKING U. TRANSNAT'L L. REV. 245, 260 (2016).
[1286] BORN, *supra* note 2, at 1458.

to make someone a third-party beneficiary is clearly written or evidenced in the contract."[1287] Therefore, most conclude that the third-party beneficiary should submit sufficient proof of status and a clear intention of the parties to confer benefits on the third party.[1288]

Some courts have concluded that determining the position of the beneficiary as either intended or incidental is only done according to the specific language of the contract.[1289] However, other views concluded the question should be answered based upon both the writing itself and the surrounding circumstances.[1290] In fact, the second view is more convincing. First, since the core of the distinction between the intended and incidental beneficiary is in the parties' intention, then such intention could be determined according to all the circumstances that surrounded the conclusion of the contract.[1291] Second, the parties' intention to benefit a third party from the contract is not necessarily clearly stipulated in the contract as, in practice, parties often do not pay enough attention to some provisions because they rely on their previous dealings and the usage of trade.[1292] The surrounding circumstances should be carefully analyzed when answering this question.[1293] In fact, this position is consistent with the general rule of interpretation, which gives effect to both the provisions of the contract and the surrounding circumstances.

The Restatement (Second) of Contracts does not specifically refer to the factors that should be employed to determine the intention of the parties to confer a benefit on a third-party beneficiary.[1294] However, the Reporter's Note states that "[a] court in determining the parties'

[1287] BREKOULAKIS, *supra* note 399, at 65.
[1288] BORN, *supra* note 2, at 1458.
[1289] Summers, *supra* note 1228, at 898.
[1290] *Id*.
[1291] *Id*.
[1292] *Id*.
[1293] *Id*.
[1294] RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 1228, § 302; Summers, *supra* note 1228, at 898.

intention should consider the circumstances surrounding the transaction as well as the actual language of the contract."[1295] In the same context, Swiss law does not presume that the third party is a genuine beneficiary so, when the jurisdiction of the arbitral tribunal is challenged concerning a third-party beneficiary, the threshold of proof is that the third party has the status of a genuine third-party beneficiary.[1296] Such determination is made through interpretation of the parties' intentions and surrounding circumstances.[1297] Undoubtedly, this position confers on judges and on arbitrators great discretionary powers in assessing the surrounding circumstance in order to decide on the status of the third-party beneficiary.

The question of proof that arises in the context of arbitration is whether the parties or the beneficiary should have the burden to prove an intention to benefit the third-party beneficiary from the arbitration agreement. Some views require the beneficiary to prove such special intention as the case when proving the general status as an intended third-party beneficiary.[1298] However, other views conclude that the signatory party who denies the arbitration should prove that the contracting parties had no intent to confer the right to arbitrate on the third-party beneficiary.[1299] For example, in the Unites States "the FAA's pro-arbitration policy has at times been invoked as a kind of 'reverse onus,' i.e., the party seeking to deny arbitration was forced to prove that no intent to create a third party beneficiary of the arbitration clause existed."[1300] In other words, the pro-arbitration policy imposes that the "third party beneficiary status should require no special or elevated standard of proof in the context of international arbitration

[1295] Summers, *supra* note 1228, at 899.
[1296] Meier & Setz, *supra* note 1211, at 69.
[1297] *Id*. at 65.
[1298] BORN, *supra* note 2, at 1458.
[1299] Hosking, *supra* note 152, at 519-20.
[1300] *Id*.

agreements."[1301] This position is important in effectuating the principles of efficiency and settling all related disputes in one forum to avoid wasting time and the possibility of contradictory decisions.[1302]

Notably, determining the burden of proving the status of the third-party beneficiary regarding the arbitration agreement, arises only in jurisdictions that require a special intention to consider the third-party beneficiary as a party to the arbitration agreement.

2.3. The Requirement of a Special Intention of the Main Parties to Confer the Arbitration Right on the Third-Party Beneficiary

The main question that arises in the context of a third-party beneficiary invoking the arbitration clause, is whether a special intention of the contracting parties to confer such right on the third party is required or if the arbitration right is automatically transferred with the substantive rights. Some authorities require the existence of this special intention to arbitrate.[1303] Therefore, a third-party beneficiary could not arbitrate any claims against the signatories unless a clear indication exists that they had the intent to confer the arbitration right on the third party and not just the substantive rights of the contract.[1304]

Requiring a special intention is based on the well-established separability principle by concluding that since the arbitration agreement is a separate contract there should be a special intention from the parties to confer on the beneficiary the right to arbitrate.[1305] In other words, granting substantive benefits does not necessarily entail the right to benefit from the arbitration agreement since they are two separate contracts.[1306] According to this view, the focus only shifts

[1301] BORN, *supra* note 2, at 1458.
[1302] *Id*.
[1303] *Id*. at 1157-58.
[1304] Meier & Setz, *supra* note 1211, at 70.
[1305] BORN, *supra* note 2, at 1458.
[1306] *Id*.

from the parties' specific intentions to confer the arbitration right to the parties' general intention to confer a substantive right when the alleged third-party beneficiary claims a right stemming from the contract.[1307] In such a case, there is no need to search for specific intention because the third-party beneficiary is obliged to arbitrate the dispute, even absent such intention.[1308]

Other views do not require the existence of such special intention to confer on the third-party beneficiary the right to arbitrate.[1309] This position is based on the presumption that the parties had intention because, if they made their dispute subject to arbitration, it is assumed that they had the same intention regarding the disputes arising with the third-party beneficiary.[1310] Otherwise, parties would have two methods to settle disputes arising from the same contract, which is less likely to happen in practice.[1311] Therefore, according to this view, the entitlement of the third-party beneficiary to rely on the arbitration clause in the contract is only based on assuring status as an intended third-party beneficiary.[1312]

English law clearly adopts the latter liberal position in Section 8 of the Contracts (Rights of Third Parties) Act as it does not require any special intention to arbitrate and the position of a third-party beneficiary is sufficient to have the right to invoke the arbitration clause.[1313] According to Section 8(1) of the Contracts (Rights of Third Parties Act), where

> (a) a right under section 1 to enforce a term ("the substantive term") is subject to a term providing for the submission of disputes to arbitration ("the arbitration agreement"), and
> (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996,

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[1307] *Id.*
[1308] *See* discussion *infra* § 3.
[1309] BREKOULAKIS, *supra* note 399, at 59.
[1310] Meier & Setz, *supra* note 1211, at 70.
[1311] *Id.*
[1312] Bärtsch & Petti, *supra* note 92, at 34.
[1313] Hosking, *supra* note 152, at 516.

> the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.[1314]

Therefore, "the arbitration obligation is presumably automatically transferred with the substantive benefit based only on the intention test for the substantive right."[1315] This flexible approach of the English Contracts (Rights of Third Parties) Act is considered a revolutionary approach compared to the restrictive position on third-party beneficiaries, applied before the enactment of the new law.[1316] Previously, third-party beneficiaries were unable to enforce arbitration agreements unless a legal relationship was established with the promisee, such as being the agent of the third party.[1317]

An example of the liberal approach applied by English courts is in *Nisshin Shipping Co. Ltd v. Cleaves Co. Ltd,*[1318] a broker brought an arbitration action against the ship owners because of a dispute concerning his commission arising from charterparties that he negotiated, which contained an arbitration clause.[1319] The broker was not a party to the charterparty but he claimed the status of a third-party beneficiary.[1320] The arbitrators held that they had jurisdiction according to Sections 1 and 8 of the English Contracts (Rights of Third Parties) Act.[1321] The ship owners applied to English courts to challenge the arbitrator's decision on jurisdiction because the broker was not a party to the charterparty agreement with the arbitration clause, so he could not arbitrate the dispute.[1322] The court first examined the status of the broker as a third-party beneficiary

[1314] English Contracts Act, *supra* note 150, § 8.
[1315] Hosking, *supra* note 152, at 516-17 (indicating that the law commission has had concerns about this position as it has considered it contradicts and undermines consent which is the base of arbitration).
[1316] *Id.* at 511.
[1317] *Id.*
[1318] Nisshin Shipping Co Ltd v. Cleaves & Co. Ltd. [2003] 2 CLC 1097 (Eng.).
[1319] *Id.*
[1320] *Id.*
[1321] *Id.*
[1322] *Id.*

according to Section 1 of the English Contracts (Rights of Third Parties) Act and held that the broker was the third-party beneficiary because the parties conferred on him the substantive benefit of a 1% commission.[1323] After confirming the status, the court noted that the broker had the right to invoke the arbitration clause in the charterparty according to Section 8 of the Act without any further requirements of special intention from the ship owners.[1324]

The ship owners argued that the application of Section 8 should be done in light of the well-established party autonomy principle, which requires a clear manifestation that the parties intended to arbitrate their disputes with third-party beneficiaries.[1325] The court refused this argument holding that the third-party beneficiary has the right to invoke the arbitration clause in the contract without any requirement of special intention by the parties as "a third party who wishes to take action to enforce his substantive right is not only able to enforce effectively his right to arbitrate, but it also 'bound' to enforce his right by arbitration . . . ."[1326] The court added that the reliance of a third-party beneficiary on an arbitration clause is "analogous to that applied to assignees who may be prevented from unconscionably taking a substantive benefit free of its procedural burden,"[1327] such as arbitration clauses. Other English cases have affirmed the same principle and do not require a special intention of the parties to give the third-party beneficiary the right to rely on the arbitration agreement.[1328] The Austrian Supreme Court has adopted the same approach as well.[1329]

The Swiss Federal Supreme Court has adopted a position similar to the English courts and do not require special intention of the parties to confer on the third-party beneficiary the

[1323] *Id*. at 1101-02.
[1324] *Id*.
[1325] *Id*. at 1107.
[1326] *Id*.
[1327] *Id*. at 1108.
[1328] BREKOULAKIS, *supra* note 399, at 60.
[1329] *See id*. at 61.

right to invoke the arbitration clause in the main contract.[1330] The Federal Supreme Court considers the arbitration clause an annex or an accessory right transferred directly along with the substantive rights of the contract to the third-party beneficiary.[1331] The first decision rendered by the Federal Supreme Court in this respect examined a contract between four individuals with an obligation on one of them to inject funds into another third-party company.[1332] This third-party company invoked the arbitration clause in the main contact in order to claim its substantive rights that arose from the contract.[1333] The court examined the status of the company and affirmed that it was a genuine third-party beneficiary.[1334] The court held that "this right to demand performance also included all preference and accessory rights connected thereto, including the arbitration clause."[1335] Despite the flexibility of this approach, it has been subject to a lot of critiques because it is based on considering the arbitration agreement a mere annex or accessory to the substantive contract, not as a separate contract.[1336]

In France, there is no special intention requirement, which is consistent with the general tendency of French courts to enforce arbitration agreements.[1337] In Egypt, the prevailing view is that there is no requirement for establishing a special intention of the parties in order to give the third-party beneficiary the right to invoke the arbitration clause, as it is an automatic right conferred on the third party along with the substantive rights of the contract.[1338] An example of this position is found in the final award for Cairo Regional Center for International Commercial

[1330] Meier & Setz, *supra* note 1211, at 68.
[1331] Boman, *supra* note 1257, at 18.
[1332] Meier & Setz, *supra* note 1211, at 68 (discussing the outcome of the Swiss case rendered on April 19, 2011).
[1333] *Id*.
[1334] *Id*.
[1335] *Id*.
[1336] *Id*. at 70.
[1337] BREKOULAKIS, *supra* note 399, at 60.
[1338] EL-NIDANY, *supra* note 702, at 47-48; *see also* WALY, *supra* note 1220, at 171.

Arbitration (CRCICA) Case No. 96/1997,[1339] where there was a contract between two companies for the supply of electric equipment.[1340] The supplier required an insurance policy from the buyer to secure the payment, which was in the form of deferred cheques through a period of twelve months.[1341] After the payment of four cheques, other cheques were returned for the lack of provisions; the supplier then asked the insurance company to pay based on the terms of the insurance policy, however, it refused to make any payment.[1342] The claimant started arbitration proceedings with the CRCICA based on the arbitration clause in the insurance policy, which provided that "[i]t is expressly agreed that in case of differences between parties upon the value of losses and/or prejudice resulting from the event and secured by this policy, it must be evaluated by arbitrators . . . ."[1343] The insurance company contested the arbitration based on the allegation that there was no arbitration agreement between it and the claimant since the claimant was not a party to the insurance policy with the arbitration clause.[1344] The tribunal decided that

> [t]he plea of non-competence, because the Claimant was not a party to the arbitration clause, was dismissed because the Claimant was the beneficiary of the insurance policy and had a direct right against the insurer emanating from the *stipulation pour autrui* which meant that although the beneficiary was not a party, nevertheless the effects of this stipulation devolved to it protected by the right to sue.[1345]

According to this decision, there is no special intention required to confer on the third-party beneficiary the right to benefit from the arbitration clause.

The U.S. courts have varied in their application of this requirement as some of them have been more flexible than others by not requiring special intention to confer on the third-party

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[1339] MOHIE-ELDIN ALAM-ELDIN, ARBITRAL AWARDS OF THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION 203 (2003) (discussing CRCICA Case No. 96/1997, Final Award (Nov. 29, 1997).
[1340] *Id.*
[1341] *Id.*
[1342] *Id.* at 204.
[1343] *Id.*
[1344] *Id.* at 204-205.
[1345] *Id.* at 206.

beneficiary the right to rely on the arbitration agreement.[1346] However, other courts have been more restrictive in this respect by stating that the status of the third-party beneficiary is insufficient in itself to create the right of relying on the arbitration clause as "one must establish that the contracting parties intended for the defendants to have the benefit of the arbitration clause."[1347] Such position clearly contradicts the well-established pro-arbitration policy and the efficiency principles.[1348] The Federal Arbitration Act policy's tendency "provides an exception to the general rule, providing that where an arbitration agreement is ambiguous or unclear as to what disputes are arbitrable or to whom the agreement covers, there is a presumption that the disputes and/or parties in question are included under the arbitration agreement."[1349] Therefore, by applying this to the position of the third-party beneficiary, no special intention should be required to confer on the third party the right to benefit from the arbitration clause.

Imposing a requirement of special intention to arbitrate with the third-party beneficiary does not have meaningful support; therefore, the proposed rules advocate for dispensing of this requirement.[1350]

One of the factors courts and tribunals consider when determining the extension of the arbitration agreement to a third-party beneficiary is whether the arbitration clause is broad or narrow.

2.4. The Breadth of the Language of the Arbitration Clause

Some jurisdictions require that the language of the arbitration agreement be broad enough to be extended to the third-party beneficiary.[1351] For example, broad clause provides that the

[1346] BREKOULAKIS, *supra* note 399, at 60.
[1347] Hosking, *supra* note 152, at 518.
[1348] BORN, *supra* note 2, at 1458.
[1349] Jeff DeArman, *Resolving Arbitration's Non-Signatory Issue: A Critical Analysis of the Application of Equitable Estoppel in Alabama Courts*, 29 CUMB. L. REV. 645, 656 (1999).
[1350] *See* discussion *infra* § 5.

arbitral tribunal has jurisdiction over all disputes arising under or in connection with the contract without identifying the parties subject to the clause.[1352] In practice, most of the model clauses of arbitral institutions are broad.[1353]

The restricted language may lead to the exclusion of the third-party beneficiary from the reach of the arbitration agreement. An example of the restrictive language used by the parties can be illustrated in *InterGen N.V. v. Grina*,[1354] which was discussed in Chapter Four under the agency principles. InterGen was an energy company had its affiliate entered into a purchase agreement with a subsidiary of a manufacturer Alstom.[1355] The purchase agreement and the supporting agreements provided for arbitration regarding any and all controversies, disputes, and claims between the buyer and the seller.[1356] There were technical problems with the purchased generators so, the energy company sued the manufacturer, its affiliate, and its agent.[1357] The manufacturer sought to enforce arbitration alleging that InterGen was a third-party beneficiary to the agreement and was bound by the arbitration agreement.[1358] The court refused this allegation and concluded that InterGen was not a third-party beneficiary to the contract as "[t]he critical fact is that the purchase orders neither mention nor manifest an intent to confer specific legal rights upon InterGen."[1359] The court set a distinction between the status of the third-party beneficiary and the non-signatory who may benefit from the contract by providing that "a benefitting third party is not necessarily a third-party beneficiary."[1360] The arbitration clause in

[1351] BORN, *supra* note 2, at 1457.
[1352] Meier & Setz, *supra* note 1211, at 70.
[1353] *Id.*
[1354] InterGen N.V. v. Grina, 344 F.3d 134 (1st Cir. 2003).
[1355] *Id.* at 139-40.
[1356] *Id.*
[1357] *Id.*
[1358] *Id.*
[1359] *Id.*
[1360] *Id.*

the purchases order was considered a restrictive clause providing for disputes arising between the buyer and the seller, therefore, there were "no third-party rights afforded to InterGen."[1361]

InterGen N.V. v. Grina demonstrates how restrictive and narrow arbitration clauses are construed by courts. In fact, the main reason the court refused arbitration in this case was the missing threshold to bind a non-signatory to the arbitration agreement, which includes — among other theories — being a third-party beneficiary to the dispute.[1362] Interestingly, assuming that the court considered InterGen a third-party beneficiary to the agreement because the parties had the intent to confer substantive rights, would InterGen be bound by the arbitration clause under its current wording? The answer would be still no; the status of InterGen would be a third-party beneficiary who is, nevertheless, not bound by the arbitration agreement in the contract. In other words, if it is clear from the language of the arbitration clause that the arbitration applies to the main contractors only, the status of the third-party beneficiary will not change this stipulation and the third party cannot rely on this arbitration clause. Therefore, parties should be cautious when drafting arbitration clauses if they intend to confer the rights of the contract on third-parties. In such a case, the arbitration clause should be broad enough to include any third-parties and not specify the parties and their titles.[1363]

Some courts have been extremely restrictive in this respect as they consider the mention of the word "parties" in the arbitration clause sufficient to exclude the third-party beneficiary from its reach. For example, in *Republic of Iraq v. BNP Paribas*,[1364] the Republic of Iraq filed a lawsuit against BNP Paribas and, after two years, it filed a motion to compel arbitration based on

[1361] *Id.* at 146.
[1362] *Id.*
[1363] Shin, *supra* note 1231, at 82.
[1364] Caline Mouawad & Kana Ellis Caplan, *Note – Republic of Iraq v. BNP Parisbas USA, BNP Parisbas Hong Kong, BNP Parisbas Paris, BNP Parisbas London Branch, United States Court of Appeals, Second Circuit, Decision No. 11-1356-cv, 28 March 2012*, 4 INT'L J. ARAB ARB., no. 3, 2012, at 112, 113.

its status as a third-party beneficiary in the agreement concluded between BNP Paribas and the United Nations, which had an arbitration clause.[1365] The motion to compel arbitration was refused by the district court without determining the status of Iraq as a third-party beneficiary.[1366] The court noted that it would not make a difference as, even if Iraq was an intended third-party beneficiary, Iraq would not be able to invoke the arbitration clause because the language of the arbitration clause provided for disputes between the parties, which meant that the parties had no intent to include third-parties beneficiaries in the arbitration clause.[1367] The Appeal court affirmed the decision of the district court by referring to the word "parties" on the arbitration clause.[1368] The Appeal court provided that "even if the contract between the United Nations and BNP Paribas can give rise to third-party claims, there is no evidentiary basis for concluding that the parties bound themselves to resolve such claims through arbitration."[1369]

The language of the arbitration clause is an important factor in determining whether the third-party beneficiary is able to rely on the clause against the signatories or not. However, interpretation of the broadness of the arbitration clause should be done in a flexible way, as discussed *infra* Section 5.

Now, after analyzing the ability of the third-party beneficiary to rely on the arbitration clause, the ability of the signatories to bind the third-party beneficiary by the arbitration clause is discussed to complete the image of the extension which is based on the third-party beneficiary theory.

[1365] *Id.* at 113-14.
[1366] *Id.* at 116.
[1367] *Id.*
[1368] The Republic of Iraq v. BNP Paribas USA, 472 Fed. Appx. 11, 14 (2nd Cir. 2012).
[1369] *Id.*

3. Enforcement of the Arbitration Clause Against the Third-Party Beneficiary

The third-party beneficiary is not bound by the arbitration clause based on mere status because "a stipulation in favor of a third party does not entail representation, and the beneficiary of that provision will therefore only be bound if it subsequently agrees to the specified method of dispute resolution."[1370] Therefore, being a third party beneficiary does not automatically bind the third party to the arbitration clause.[1371] However, it is widely recognized that the third-party beneficiary is bound by the arbitration agreement if the third party enforces contractual substantive benefits stemming from the contract.[1372] The justification for this is that

> [a]n arbitration clause and a contractual right are not divisible in the sense that the third party reject the one but accept the other. Rather, the arbitration clause determines how the right afforded can be claimed — so that the third party only has the option to exercise the rights under the contract with that property or to reject them altogether.[1373]

The third-party beneficiary is bound by all provisions in the contract that the third party relies upon and that includes the arbitration agreement as "[i]f a party asserts rights stemming from a third-party contract, it is confined to its limits."[1374] In other words, "a third-party beneficiary steps into the shoes of a contracting party and is subject to all provisions of contract."[1375]

In short, the third-party beneficiary has the choice either to reject the rights conferred by the original parties or otherwise accept the package as it is — the substantive rights and its

[1370] Hosking, *supra* note 152, at 524.
[1371] *Id*.
[1372] *Id*. at 527.
[1373] FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA 345 (2009).
[1374] Ingeborg Schwenzer & Florian Mohs, *Arbitration Clauses in Chains of Contracts*, 27 ASA BULL. 213, 225 (2009).
[1375] Doug Uloth & Hamilton Rial, *Enforcing Arbitration Against Non-Signatories*, 65 TEX. B.J. 802, 806 (2002).

dispute resolution clause.[1376] This position is not only applied to cases of third-party beneficiary, but to all cases

> [w]here a party assumes the legal rights and obligations of another, by whatever substantive legal mechanism, it must accept those rights and obligations as it finds them. It would be inequitable in the extreme for a party to pick and choose certain advantages of the legal position that it enters, but to reject the obligations and disadvantages that attend that legal position.[1377]

Binding the third-party beneficiary to the arbitration clause shares some similarities with the equitable estoppel doctrine, however, the basis for both of them is different.[1378] On the one hand, the equitable estoppel doctrine is based on the actions of the third party following the conclusion of the contract, which are construed in light of the equity principles.[1379] On the other hand, the third-party beneficiary theory is a contract law theory that relies on the intention of the parties to confer on the third party a benefit when concluding the contract.[1380]

The claim of status as a third-party beneficiary is sufficient grounds to exercise arbitral jurisdiction over this third-party beneficiary.[1381] The real status of the claimant, determining whether the claimant is a third-party beneficiary having substantive rights and subject to arbitration clause, is decided through the arbitral proceedings.[1382] However, if the obligor commences arbitration proceedings to declare that the third party has no substantive rights from the contract, then the third-party beneficiary may succeed in challenging the jurisdiction of the tribunal as the third party is not bound by the arbitration clause.[1383]

[1376] SCHWARZ & KONRAD, *supra* note 1373, at 345.
[1377] *Id*. at 344.
[1378] LAURENCE SHORE, INTERNATIONAL ARBITRATION IN THE UNITED STATES 208 (2018).
[1379] *Id*.
[1380] *Id*.
[1381] Rau, *supra* note 37, at 237 n.139.
[1382] *Id*.
[1383] BREKOULAKIS, *supra* note 399, at 63. *But see* Meier & Setz, *supra* note 1211, at 75-76 (providing for the possible claims of the obligor against the third-party beneficiary, which are subject to the arbitration clause. These claims can happen when the obligor has made a payment to a third-party beneficiary and then the obligor asserts that the payment was unjustified and should be returned, or when the promisor

The U.S. courts have adopted this position of binding the third-party beneficiary to arbitrate dispute with the parties. For example, in *Black & Veatch International Company v. Wartsila NSD North America, Inc.*,[1384] there was a main contract between Wartsila and Coastal for the construction of a power plant.[1385] Wartsila then subcontracted a substantial part of its responsibilities to Black & Veatch.[1386] Wartsila also contracted with Vaasa to provide design information for the project; this contract had an arbitration clause.[1387] Vaasa failed to meet the deadlines for its responsibilities and Black & Veatch initiated suit in the district court as a third-party beneficiary.[1388] Vaasa sought to dismiss the claim and compel arbitration based upon the fact that the plaintiff sought to enforce an obligation stemming from Wartsila and Vaasa's contract as a third-party beneficiary, binding Black & Veatch to the provisions of that contract, including the arbitration agreement.[1389] The court raised four questions in the context of the New York Convention to determine whether the arbitration agreement was enforceable or not.[1390] First, whether there was an agreement in writing; second, whether the agreement provided for arbitration in one of the contracting states; third, whether the agreement pertained to a legal relationship; and finally, whether the agreement was about an international commercial relationship.[1391] The court answered all questions in the affirmative and ordered arbitration.[1392] The court refused all arguments of the plaintiff to escape arbitration since "the court accepts the

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claims damages against the third-party beneficiary for issues connected to the performance rendered. These examples are subject to the arbitration clause in the third-party beneficiary contract since they are connected with the performance rendered to the third-party beneficiary).

[1384] Black & Veatch Intern. Co. v. Wartsila NSD North America, Inc., 1998 WL 953966 (D. Kan. Dec. 17, 1998).

[1385] *Id*. at *1.

[1386] *Id*.

[1387] *Id.*

[1388] *Id.*

[1389] *Id.*

[1390] *Id.* at *3.

[1391] *Id.*

[1392] *Id.*

veracity of plaintiff's well-pleaded facts, plaintiff, for purposes of this motion, a third-party beneficiary to the Wartsila-Vaasa contract and is bound by the arbitration clause contained therein."[1393]

This is the position adopted by U.S. courts in several cases.[1394] The courts agree that arbitration is the condition for the third-party beneficiary to enforce substantive rights.[1395] In the same context, U.S. courts consider this position based upon the principles of equitable estoppel because the third-party beneficiary relying upon the substantive provisions of the contract for a benefit is estopped from denying being bound by its arbitration clause.[1396]

The English Contracts (Rights of Third Parties) Act also refers to the binding effect of the arbitration agreement upon the third-party beneficiary when seeking to enforce substantive rights.[1397] Article 8(1) of the Act provides that "the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party."[1398] Based on that, the English act clearly considers the third-party beneficiary a party to the arbitration agreement with the right to invoke it and the obligation to arbitrate disputes arising from enforcing the substantive rights. The Explanatory Notes to Contracts (Rights of Third Parties) Act describe this position as a "conditional benefit approach," which "supposedly mitigates against the original concern to impose a 'burden' on the third party."[1399]

The Swiss Federal Supreme Court has not yet dealt with this situation; however, the Federal Supreme Court would likely bind the genuine third-party beneficiary to the arbitration

[1393] *Id.* at *4.
[1394] Hosking, *supra* note 152, at 522.
[1395] *Id.*
[1396] BREKOULAKIS, *supra* note 399, at 64.
[1397] Hosking, *supra* note 152, at 516.
[1398] English Contracts Act, *supra* note 150, § 8.
[1399] Hosking, *supra* note 152, at 516 (quoting § 34 of the explanatory notes to the Act).

agreement when the third party seeks to enforce rights.[1400] The justification for this conclusion is the annex or the accessory approach previously adopted by the court.[1401] As it considered the arbitration agreement an annex to the main contract — and the third-party beneficiary has the right to invoke it — then, by the same logic, the third party is bound by it and the promisor has the right to compel the third party to arbitrate.[1402] The Austrian Supreme Court has adopted the same position — binding the third-party beneficiary to the arbitration agreement.[1403]

In Egypt, the jurisprudence has adopted the same position of binding the third-party beneficiary by the arbitration agreement if the third party seeks to enforce substantive rights because the third party is then bound by all the provisions of the contract whether conferring rights or imposing obligations.[1404] According to Article 156(2) of the Egyptian Civil Code, if a stipulation of benefits for a third party exists, then the contractor has the right to raise all the defenses arising out of the contract against the third party if the third party accepts the rights conferred by the contract.[1405] This provision clearly applies to arbitration clauses just as it applies to any other substantive defense.[1406] Therefore, if the third-party beneficiary started court proceedings to claim the substantive rights, then the contractor has the right to raise the arbitration agreement ordering the stay of proceedings and compelling arbitration.[1407]

However, under the jurisprudence in Egypt, to bind the third-party beneficiary to the arbitration agreement requires that the arbitration agreement be mentioned in the contract,

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[1400] Meier & Setz, *supra* note 1211, at 71.
[1401] *Id.*
[1402] *Id.*
[1403] Markus Schifferl, *The Award and the Courts – Decisions of the Austrian Supreme Court on Arbitration in 2008 and 2009*, AUSTRIAN Y.B. INT'L ARB. 219, 233 (2010); *see, e.g.*, SCHWARZ & KONRAD, *supra* note 1373, at 343 (discussing Case 4 Ob 533/95 from June 13, 1995).
[1404] EL-GAMAL & ABDELAL, *supra* note 705, at 486-87.
[1405] Egyptian Civil Code, *supra* note 699, art. 156(2).
[1406] WALY, *supra* note 1220, at 171.
[1407] *Id.*

otherwise the third party is not bound by arbitration contained in a separate agreement.[1408] The only exception is if the third-party beneficiary already knew or had the opportunity to know about the existence of such agreement before the acceptance of the substantive rights.[1409] In all cases, if the arbitration agreement was agreed upon by the parties after the acceptance of substantive rights by the third-party beneficiary, then the third party is not bound by the arbitration agreement.[1410]

On the contrary, a minority opinion in Egypt refuses to bind the third-party beneficiary to the arbitration agreement unless the third party expressly consents to be bound.[1411] According to this opinion, when the third-party beneficiary avails himself to the rights conferred by the contract, it does not amount to consent to be bound by the arbitration clause.[1412] In addition, enforcing the third-party beneficiary to arbitrate is considered imposing an obligation by virtue of the contract to which the third party was not a signatory, which is invalid under most legal systems as imposing a duty on a third party is unenforceable.[1413] Moreover, the position of third-party beneficiaries and conferring rights on a non-party is an exception to the general rule of the relativity effect of the contract so, such exception — conferring substantive rights on third-party beneficiary — should be kept inside its ambit and does not extend to arbitration agreements or need to be analogous to include arbitration agreements.[1414] Finally, the third-party beneficiary is not a party to the contract in its technical meaning even after accepting the substantive rights as the third party does not have rights to alter or invalidate the contract as these rights are

[1408] EL-NIDANY, *supra* note 702, at 48.
[1409] *Id.*
[1410] EL-GAMAL & ABDELAL, *supra* note 705, at 487.
[1411] SHEHATA, *supra* note 731, at 73.
[1412] Meier & Setz, *supra* note 1211, at 71-72.
[1413] *Id.*
[1414] SHEHATA, *supra* note 731, at 73.

exclusively for the signatories.[1415] Based on that, it is unfair to bind the third party by any obligation in the contract and that includes the obligation to arbitrate any disputes.[1416] In other words, since the third party does not fully enjoy the status of being a party to the contract, it is unconscionable to bind the third party to its arbitration clause just because the third party accepted status as a beneficiary of the benefit stipulated by the parties.

The same view has been also advocated in France in the context of domestic arbitration, asserting the importance of removing the link between enforcing the substantive rights and being bound by the arbitration clause as they are two distinct issues.[1417] According to this view, a third-party beneficiary should accept being bound by the arbitration clause separately from acceptance of the substantive rights.[1418] This acceptance could be inferred from the surrounding circumstances as "respective situations and activities raise the presumption that they were aware of the existence and the scope of the arbitration clause."[1419]

Finally, there should be a reference to the position of the incidental beneficiary as the third party is not entitled to invoke the arbitration agreement, and could not also be obliged to arbitrate a dispute arising from a contract where the third party is not an intended beneficiary. For example, in *Recold, S.A. de C.V. v. Monfort of Colorado, Inc.*,[1420] there was a contract between Recold (a Mexican manufacturing corporation) and Central Ice Machine Company (a Nebraska corporation) for the purchase of refrigeration equipment; the contract had an arbitration clause.[1421] Monfort, a Delaware corporation purchased the equipment from Central Ice, which

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[1415] *Id.*
[1416] *Id.*
[1417] BREKOULAKIS, *supra* note 399, at 63.
[1418] Hosking, *supra* note 152, at 525.
[1419] *Id.*
[1420] Recold, S.A. de C.V. v. Monfort of Colorado, Inc., 893 F.2d 195 (8th Cir. 1990).
[1421] *Id.*

had technical problems after installation.[1422] Monfort then filed a suit against Central Ice Machine and Recold requesting damages.[1423] Recold requested the court compel arbitration because Monfort was a third-party beneficiary in the contract between Recold and Central Ice Machine asserting that Monfort was bound by this clause.[1424] The court held that Monfort was not an intended third-party beneficiary to the contract between Recold and Central Ice Machine — as it was concluded three years before any purchase by Monfort — so, Monfort was not bound by the arbitration clause.[1425]

In conclusion, enforcing the arbitration clause against a third-party beneficiary who seeks to enforce the substantive rights under the contract is equitable and justified; therefore, it is adopted in the proposed rules, as discussed *infra* Section 5. First, however, reference is made to the different approaches adopted to determine the law applicable to the issues of extension based on the third-party beneficiary theory.

4. The Law Applicable to Determine the Status of the Third-Party Beneficiary Regarding the Arbitration Clause

4.1. The Applicable Approaches

There are different approaches regarding the law applicable to determine the status of the third-party beneficiary concerning the arbitration agreement; the first approach applies the law governing the arbitration agreement.[1426] The justification for this approach is that whether the arbitration agreement is binding upon the third-party beneficiary is an issue of the interpretation and formation of the agreement; therefore, it is governed by the same law applicable to this

[1422] *Id*.
[1423] *Id*. at 196.
[1424] *Id*.
[1425] *Id*.
[1426] Schifferl, *supra* note 1403, at 232.

agreement.[1427] This approach returns to the problems associated with the traditional choice of law rules to determine the law applicable to the arbitration agreement, discussed in Chapter Two. An approach such as this has a lot of problems to be applied in determining whether a third-party beneficiary is subject to the arbitration agreement or not.

The second approach is that this issue is governed by the law of the main contract because this law determines the substantive rights of the supposed third-party beneficiary and, therefore, should determine the right to arbitrate as well.[1428] In other words, this approach relies on the argument that the reason for subjecting the third-party beneficiary to the arbitration clause is the third party's substantive right entitlements under the main contract; both rights are connected and that justifies being governed by the same law, which is the law of the main contract.[1429] For example, in ICC Case No. 9839,[1430] the tribunal applied New York law, which was the law of the main contract, to determine the scope of the arbitration agreement based on the third-party beneficiary theory.[1431] The third approach applies the validation principle, so the potential national law that will give effect to the arbitration agreement in relation to the third-party beneficiary is the one that applies.[1432]

4.2. Problems Associated with the Applicable Approaches

Any of these approaches that points to the application of a national law will lead to uncertainty and makes the arbitration agreement unpredictable regarding the position of the third-party beneficiary. Despite the similarities between different jurisdictions regarding some aspects for determining the status of a third-party beneficiary regarding the arbitration

[1427] BORN, *supra* note 2, at 1459.
[1428] *Id.*
[1429] *Id.*
[1430] Case No. 9839 of 1999, at 66; *see* discussion *supra* note 1240.
[1431] *Id.*
[1432] BORN, *supra* note 2, at 1459 n.286.

agreement, differences still exist that should be avoided in international arbitration. The proposed unified set of rules is more adequately addressed to the nature of international arbitration, more accessible to parties from different jurisdictions, and more practical for arbitrators avoiding complexities in choice of law rules. This approach of shifting from the traditional choice of law approach to a transnational substantive one is justified and convincing because

> [t]here is no reason why tribunals should not seek to apply transnational substantive rules to determine the matter. This is more especially the case here than for example in the case of agency and representation, as issues of third-party beneficiary do not touch on public policy or international public law. They are issues that sit comfortably with commercial law.[1433]

Therefore, the proposed transnational rules to be applied to third-party beneficiary are discussed in the following section.

5. The Proposed Set of Rules and its Justification

The proposed rules to effectuate enforcement of the arbitration agreement by or against the third-party beneficiary aims to remove the obstacles of such enforcement by adopting flexible rules, which is consistent with the real intention of the parties and the nature of international disputes.

5.1. The Proposed Rules

a- The third party must be an intended beneficiary in order to have the right to invoke the arbitration agreement. There is no requirement that the intended third-party beneficiary is identified when concluding the contract as long as such identification is satisfied at the time of contract enforcement.

[1433] BREKOULAKIS, *supra* note 399, at 66.

b- The intention to confer on a third party the rights from a contract includes conferring the right to arbitrate unless there is clear evidence in the language of the contract that provides otherwise.

c- In all cases, if the presumption of the intention of the parties to arbitrate with the third-party beneficiary is contested, then the burden of the proof is on the contracting party raising such objection.

d- The narrow language of the arbitration clause could be, in limited circumstances, employed as evidence that the parties intended to exclude the third-party beneficiary from the reach of the arbitration agreement. Providing for the word "parties" in the arbitration clause is insufficient to exclude the third-party beneficiary from its scope.

e- The third-party beneficiary is obliged to arbitrate disputes with the parties when the contract provides for an arbitration agreement, provided that the third party was aware of the existence of such an arbitration clause before accepting the substantive rights.

5.2. The Justifications

a- The third party must be an intended beneficiary in order to have the right to invoke the arbitration agreement. There is no requirement that the intended third-party beneficiary is identified when concluding the contract as long as such identification is satisfied at the time of contract enforcement.

The first part of this rule does not need justification since it is well-settled in all jurisdictions that the beneficiary should be an intended beneficiary in order to invoke the rights stemming from the contract. The incidental beneficiary does not have the right to rely on either the substantive clauses of the contract or the arbitration agreement.

The second part is justified by the fact that, in practice, the third-party beneficiary is not usually designated by the parties when concluding the contract. Most contracts that confer a right on a third-party beneficiary are general contracts that do not specify a non-signatory party to benefit from the contract. An example of these contracts are the contracts concluded between members in a special field and a professional association in this field, such as *Spear, Leads & Kellogg v. Central Life Assurance Co*.[1434] These contracts may provide for arbitration between the member and non-members regarding disputes arising from professional activities. In these cases, there is no way to determine who is the third-party beneficiary of such contracts at the time of its conclusion. Therefore, such contracts should be enforced without imposing this designation condition when concluding the contract. In other words, if the status of the intended third-party beneficiary is proven then the third party could enforce the substantive rights and the arbitration clause in the contract even if not designated when the parties concluded the contract. Otherwise, adopting the restrictive view of determining the beneficiary at the time of concluding the contract contradicts the intention of the parties and defeats the notion of third-party beneficiary contracts.

b- The intention to confer on a third party the rights from a contract includes conferring the right to arbitrate unless there is clear evidence in the language of the contract that provides otherwise.

The threshold for the entitlement of the third-party beneficiary to rely on the arbitration agreement should be proving status as entitled to a substantive right stemmed from the contract with the arbitration clause. Once reaching this point, the third party will automatically have the

[1434] Spear, Leeds & Kellogg v. Central Life Assur. Co., 85 F.3d 21 (2nd Cir. 1996); *see* the discussion of the case *supra* note 1269.

right to rely on the arbitration clause to enforce the substantive rights.[1435] According to this proposed rule, there is no requirement regarding the parties' intention to confer on the third-party beneficiary the right to rely on the arbitration clause. This rule leads to predictable results, as its application is a simple equation — when there is an intended third-party beneficiary then the third party has the right to rely on the arbitration agreement of the contract. This position is more suitable for international disputes since it avoids an unjustified waste of time and effort searching for the intention of the parties to arbitrate the dispute with a beneficiary. In fact, this restricted position, of requiring such specific intention, imposes extra unjustified restrictions for compelling arbitration in a situation that does not warrant such protection since the third-party beneficiary has become involved in a contract where its parties have chosen the arbitration to be the method of settling disputes arising from that contract.

The argument of the separability principle, which has been employed to justify the requirement of specific intention, would not help in this context as it is widely settled that this principle mainly relates to the existence and validity of the arbitration agreement. Therefore, involving the separability principle here is irrelevant as that improperly interprets the notion of separability and puts such principle outside its ambit. In short, the "factual and conceptual nexus between the arbitration clause and the principal contract is . . . sometimes difficult to overlook."[1436] It should be noted that the advocates of the special intention based on the separability principle do not raise this argument when signatories seek to bind the third-party beneficiary by the arbitration agreement.[1437] Therefore, such unjustified distinction between who wants to enforce the arbitration agreement is sufficient to render the separability argument invalid.

[1435] BREKOULAKIS, *supra* note 399, at 61.
[1436] Hosking, *supra* note 152, at 528.
[1437] BORN, *supra* note 2, at 1458.

The only exception to this rule is when the parties have explicitly provided in the contract that the third-party beneficiary would not be subject to the arbitration clause. In this case, the third-party beneficiary could not rely on the arbitration clause in the contract. This rule achieves a balance between the rights of the parties to provide for whatever they want in the contract and also the third party's advance awareness that reliance on the arbitration clause in the contract is impermissible. In fact, in international commercial disputes, parties tend to be sophisticated and experienced enough to be specific regarding the provisions of their contracts, especially regarding arbitration clauses, and who could enforce them. Therefore, parties could not take advantage and exclude the third-party beneficiary from the reach of the arbitration clause without providing for that expressly in the contract.

c- In all cases, if the presumption of the intention of the parties to arbitrate with the third-party beneficiary is contested, then the burden of the proof is on the contracting party raising such objection.

If the third-party beneficiary's right to enforce the arbitration clause is contested by the parties, then the party who denies the right of the third-party beneficiary to rely on the arbitration clause should provide sufficient proof for excluding the third-party beneficiary from the reach of the arbitration agreement. Otherwise, the presumption of intent to arbitrate will prevail and the party will be obliged to arbitrate the dispute with the third-party beneficiary.

Imposing a burden of proof on the contracting party adheres with the general principle that the party who raises a claim should prove it. This rule is also supported by principles of equity since, as the third-party beneficiary has the initial burden of proving status as an intended third-party beneficiary, the party who seeks to exclude the right to arbitrate should bear the burden of proof. This position is also supported by the fact that arbitration has become the most

common way to settle international disputes; if there is an arbitration clause in the contract then the party who seeks to limit its application shall provide the proof.

d- The narrow language of the arbitration clause could be, in limited circumstances, employed as evidence that the parties intended to exclude the third-party beneficiary from the reach of the arbitration agreement. Providing for the word "parties" in the arbitration clause is insufficient to exclude the third-party beneficiary from its scope.

If the parties provided for a narrow arbitration clause then that may exclude the third-party beneficiary from the reach of the arbitration clause. Giving effect to the scope of the language of the arbitration clause is to honor and respect the intention of the parties and the freedom of contract. However, interpretation of the language of the arbitration agreement in terms of assessing its broadness should be done in a flexible way by excluding the third-party beneficiary only if it is clear that this is the intention of the parties, such as by naming the parties of the arbitration or their titles.

In this context, the phrase "disputes between parties" is not considered restrictive language so, the third party could still rely on the arbitration clause. First, it is common for arbitration clauses to be drafted to include disputes arising between the parties and that does not constitute any special intention regarding excluding benefiting the third-party beneficiary from the clause, especially since most of the model clauses provide for the word "parties." In other words, use of the word "parties" is different from the above-mentioned cases in which the parties named themselves as being bound by the arbitration clause, such as indicating "the seller and the distributor" or "the franchisor and the operator." In the latter cases, describing the parties indicates their intention to enforce the arbitration agreement between themselves only so, they

have provided for their status or titles in the contract to remove any ambiguity regarding who will be subjected to the clause. This does not apply to the word "parties."

Second, the third-party beneficiary is also considered a party to the contract. The beneficiary is connected to the contract based on contractual rights stemming from the contract. In other words, even if the third party is not a signatory to the contract, the third party is otherwise a party because the core of the contract confers a substantial benefit on the third party. Therefore, the word "parties" should not be an obstacle for reliance of the third-party beneficiary on the arbitration clause.

Finally, since the parties could enforce the arbitration agreement against the plaintiff third-party beneficiary — even with the existence of the word "parties" in the agreement — if the third party claimed a substantive right of the contract, it is unfair to prevent the third party from relying on the same clause if the third party seeks to arbitrate a dispute. As noted in *Black & Veatch International Company v. Wartsila NSD North America, Inc.*,[1438] the district court dismissed the case and enforced the arbitration clause against the plaintiff third-party beneficiary based on an arbitration clause, which provided that "[a]ll disputes arising between the Parties from or in connection with this Contract shall be settled through friendly consultations between the Parties. In case no agreement can be reached through consultation, the dispute shall be submitted to arbitration for final and exclusive settlement."[1439] The court did not attach any importance to the word "parties" and compelled arbitration. Therefore, this concept should be the applied whether the third-party beneficiary seeks to enforce the arbitration clause or avoid it because there is no meaningful reason to distinguish between the two scenarios.

[1438] Black & Veatch Intern. Co. v. Wartsila NSD North America, Inc., 1998 WL 953966 (D. Kan. Dec. 17, 1998); *see* discussion *supra* note 1384.
[1439] *Id.*

e- The third-party beneficiary is obliged to arbitrate disputes with the parties when the contract provides for an arbitration agreement, provided that the third party was aware of the existence of such an arbitration clause before accepting the substantive rights.

The third-party beneficiary is bound by the arbitration clause in the contract if the third party seeks to enforce the substantive rights granted. This automatic transfer of the arbitration agreement with the substantive rights is based on equitable principles as it is unfair to give the third party the advantage of claiming the substantive rights of the contract without binding the third party to its arbitration clause. In other words, "third parties cannot cherry-pick when it comes to their position in the proceedings and invoking certain clauses for the agreement."[1440]

The view that requires special acceptance by the third party in order to be bound by the arbitration clause exaggerates in assessing the real position of the third-party beneficiary. First, while consent to arbitrate is the core of any arbitration, it is also well-established that this consent could be express or implied as inferred from the conduct and the surrounding circumstances. In the case of the third-party beneficiary, it is assumed that the third party has impliedly consented to be bound by the arbitration agreement when claiming substantive rights arising from the contract with the arbitration clause.[1441] Therefore,

> [a]lthough the third party beneficiary never expressly (let alone in written form) consents to arbitration, that consent is implied — it is deemed to have consented because it voluntarily decided to exercise rights under the contract in question. That voluntary choice is sufficient to bind the third party to the effects of the arbitration clause.[1442]

Based on that, there is no basis for claiming a lack of consent to arbitrate when the third party enforces the substantive rights under the contract.

[1440] Boman, *supra* note 1257, at 17.
[1441] GIRSBERGER & VOSER, *supra* note 30, at 100.
[1442] SCHWARZ & KONRAD, *supra* note 1373, at 345.

Second, it is invalid to impose obligations on third-parties; however, the arbitration agreement in the case of a third-party beneficiary is considered a condition stipulated by the parties and linked to the substantive rights that they have conferred on the third party.[1443] There is no provision that precludes the parties or invalidates their agreement when they impose a condition on a third-party beneficiary in order to be able to enforce the rights stemming from the contract that they concluded on the third party's behalf.[1444]

The only limitation in this respect is that the third party should be aware of the existence of the arbitration clause. If the third party was unaware of the existence of the clause then third party could enforce the substantive rights through litigation. It is a general rule that one cannot be bound by the arbitration clause if one has no idea of its existence. Therefore, if the arbitration agreement was in a separate document that the third-party beneficiary does not know about then the third party is not bound to arbitrate. In addition, if the parties concluded the arbitration agreement after the third-party beneficiary accepted the substantive rights, then the third party should not be bound by the arbitration clause and can enforce the rights through national courts.[1445] In such a case, the beneficiary is bound only by the provisions that existed when accepting the conferred benefits, so the third party is not subject to any addition or alteration in these provisions and that includes the arbitration clause. Finally, if the parties intentionally misinformed the third-party beneficiary about the existence of the arbitration clause or they have misled the third party to believe that the contract has no such clause,[1446] then good faith principles impose not binding the third-party beneficiary to arbitration and allowing the third-party beneficiary to enforce the substantive rights through litigation.

[1443] Meier & Setz, *supra* note 1211, at 72.
[1444] *Id.*
[1445] *Id.*
[1446] *Id.*

This chapter indicated the problems associated with applying national laws to extension of the arbitration agreement based on the third-party beneficiary theory. The disparities among different jurisdictions in effectuating such jurisdiction were a main theme in this chapter. The proposed unified rules provide certainty and practicality to extend the arbitration agreement to the third-party beneficiary, which supports the intent of this study in disregarding national laws regarding issues of extension and applying, instead, transnational unified rules.

CONCLUSION

The extension of arbitration agreements is a sensitive and vital issue that needs to be handled in a manner suitable to its nature. The application of national laws to effectuate this extension leads to many difficulties in international disputes. First, differences between jurisdictions on extending arbitration agreements to non-signatories lead to unpredictability and uncertainty regarding who is bound by arbitration agreements. Second, the nature of different conditions required by jurisdictions is typically relevant for domestic disputes, but there is no justification for obligating international parties to adhere to these conditions. This inadequacy is apparent in requests for extension that are based on contract law theories, such as agency, incorporation by reference, and third-party beneficiary.

This study examined key issues related to non-signatory extension of arbitral agreements to develop and adopt a unified set of rules to be applied when deciding to extend arbitration agreements in international disputes without recourse to national laws. This approach has many supporting factors, which affirm its applicability and practicality. The main supporting factors are the authority of arbitrators to decide their jurisdiction without reference to national laws, the application of transnational rules regarding the existence and validity of arbitration agreement in France (the substantive validity approach), the wide reliance on *Lex Mercatoria* in arbitration, the expansion in arbitrability issues in international disputes, and the growing tendency toward harmonization and delocalization in international commercial arbitration.

The results of this study engendered three sets of proposed rules to be applied for extension of arbitration agreements regarding the agency, incorporation by reference, and third-party beneficiary theories. First, under the agency theory, the agent is entitled to conclude a valid arbitration agreement on behalf of the principal without the need for special authorization, whether in writing or not. To enforce the arbitration agreement concluded on behalf of the

principal, the agency should pertain to the contract in dispute and the principal should be disclosed when the arbitration agreement is concluded, otherwise the agent is personally bound, not the principal. Moreover, the agents and/or employees of the principal are entitled to rely on the arbitration agreement concluded on behalf of their principal as long as the claims against them and the claims against the principal are inseparable. The proposed rules also apply apparent authority to bind the principal to an arbitration agreement concluded by its purported agent when two conditions — inducement and good faith reliance — are satisfied.

Second, the approach used by the proposed rules to address incorporation by reference does not require any special or specific reference to the arbitration agreement for it to be enforceable, considering general reference to the document that includes the arbitration agreement sufficient to bind the parties. Applying a restrictive approach in incorporating arbitration agreements does not have any meaningful support. Specifically, the separability principle, the exceptional nature of arbitration compared to state courts, or the unavailability of the document containing the arbitration agreement are ridiculous justifications to support imposing a condition of special and specific reference for arbitration agreements to be validly incorporated. In contrast, the proposed liberal approach aligns with the policy and objectives of the New York Convention, specifically the writing requirement in Article II. Of course, this rule is subject to the general rules of defects in contract law, which is the only basis to invalidate incorporation by general reference.

Third, the proposed rules require that the third-party be an intended beneficiary in order to have the right to invoke the arbitration agreement. However, there is no requirement that the intended third-party beneficiary is identified when concluding the contract as long as such identification is satisfied at the time of the contract enforcement. In addition, there is no

requirement that the parties have special intention to confer on the third-party beneficiary the right to rely on the arbitration agreement; it is an automatic right transferred with the right to benefit from the substantive rights of the contract unless clear evidence in the language of the contract provides otherwise. In all cases, if the presumption of the intention of the parties to arbitrate with the third-party beneficiary is contested, then the burden of the proof is on the contracting party raising such objection. The third-party beneficiary is obliged to arbitrate disputes with the parties when seeking to enforce the substantive rights if the contract provides for an arbitration agreement. The only limitation in this respect is that the third-party beneficiary should be aware of the existence of the arbitration clause before accepting the substantive rights.

Finally, while this study focused on drafting transnational rules to release non-signatory issues from the restrictions of national laws, the example set should be followed for other components of international commercial arbitration by adopting more unified approaches to free different aspects of the arbitration process from the unnecessary restrictions of national laws. The inadequacy of national laws when addressing international transactions, in general, has led many scholars to promote the establishment of a uniform legal system to govern these international disputes.[1447] Arbitration is increasingly used as an autonomous dispute resolution governed by non-national rules and the widely recognized international commercial practice.[1448] In other words, the movement toward unified transnational rules is inevitable to protect the strength of arbitration and the freedom of international contracts.

[1447] Petsche, *supra* note 7, at 470.
[1448] *Id.* at 457.

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