The Judicial Solution to the Arbitrator's Dilemma: Does the 'Extension' of the Arbitration Agreement to Non-Signatories Threaten the Enforcement of the Award?

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This article contributes to the debate on non-signatories by relying on the Kluwer Research project. In particular, through the raw data underlying the Kluwer Research, we have identified cases at the enforcement stage, in which courts had to decide whether, despite the apparent lack of consent, non-signatories were correctly brought into arbitration proceedings. In our view, the analysis of those courts' decisions is perhaps a reminder that when considering non-signatory issues, the relevant facts of the case are always what matters the most. Non-signatories' involvement in the relationship underlying the dispute is essential, absent a clear expression of it in the contract. We believe that the results show the judicial solution to the arbitrator's dilemma, that is, the due consideration of the circumstances of any case, disregarding the rigid application of any theories.

Keywords: international arbitration, non-signatories, consent, equitable theories, international law, enforcement, New York Convention, evidence, arbitration agreement, transnational principles

1 INTRODUCTION

In 2008, Professor Rusty Park, in a famous article, presented the international arbitration jurists with a dilemma, which he coined 'an arbitrator's dilemma'.[1] While there is the fundamental principle that international arbitration rests on consent, in certain circumstances parties to arbitration proceedings may never have signed an arbitration agreement. Hence, the main question he raised was how one could reconcile the idea of consent in international arbitration with the reality of cases in which, despite the apparent lack of it, non-signatories are parties to the proceedings. In turn, this dilemma implies the question of when and how one can

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1 William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, in *Multiple Party Actions in International Arbitration* 1–25 (Doak R. Bishop & Belinda Macmahon eds, Oxford University Press 2009).

Mistelis, Loukas & Rao, Giammarco. 'The Judicial Solution to the Arbitrator's Dilemma: Does the 'Extension' of the Arbitration Agreement to Non-Signatories Threaten the Enforcement of the Award?'. *Journal of International Arbitration* 39, no. 3 (2022): 351–364.

imply consent; or which circumstances would allow disregarding the principle of consent in international arbitration.

Doctrine and jurisprudence have delved into the analysis of this dilemma extensively.[2] Indeed, its solution – as is the case with most debates in the context of international arbitration – is not merely of academic interest. Its solution has significant practical consequences, as it determines the jurisdiction of an arbitral tribunal. It is not surprising then, that one can identify different theories in doctrine and jurisprudence to establish when a party could be subject to arbitration proceedings. Indeed, non-signatories' issues represent one of the many cases in which theory and practice meet and complement each other in international arbitration.

This article contributes to the debate on non-signatories by relying on the Kluwer Research project. In particular, through the raw data underlying the Kluwer Research, we have identified cases *at the enforcement stage*, in which courts had to decide whether, despite the apparent lack of consent, non-signatories were correctly brought into arbitration proceedings. In our view, the analysis of those courts' decisions is perhaps a reminder that when considering non-signatory issues, the relevant facts of the case are always what matters the most. Non-signatories' involvement in the relationship underlying the dispute is essential, absent a clear expression of it in the contract. We believe that the results show the judicial solution to the arbitrator's dilemma, that is, the due consideration of the circumstances of any case, disregarding the rigid application of any theories.

The article does not intend to cover all issues relating to non-signatories and is structured as follows: section 2 briefly presents the relevant theories and our selective reflections on them; then section 3 points out the potential problems related to non-signatories at the enforcement stage of an award and considers the approach of national courts when dealing with non-signatories. Section 4 presents our conclusions and attempts to resolve the arbitrator's dilemma.

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[2] On non-signatories generally, *see* Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (Oxford University Press 2010); Stavros Brekoulakis, *Parties in International Arbitration: Consent v. Commercial Reality* in *The Evolution and Future of International Arbitration* 119–160 (Stavros Brekoulakis, Julian D.M. Lew & Loukas Mistelis eds, Kluwer Law International 2016); Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2012); Sébastien Besson, *Piercing the Corporate Veil: Back on the Right Track*, in *Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law* 147–160 (Bernard Hanotiau & Eric A. Schwartz eds, Kluwer Law International 2010); 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* 161–182 (Stavros Brekoulakis, Julian D.M. Lew & Loukas Mistelis eds, Kluwer Law International 2016); 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*, ICCA Congress Series, vol 16 103–132 (Albert Jan van den Berg ed., Kluwer Law International 2012); Gary Born, *International Commercial Arbitration* 1515–1642 (Third Edition, Kluwer 2021); Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Second Edition, Kluwer Law International Law 2020).

2 THE ARBITRATOR'S DILEMMA: REFLECTIONS ON NON-SIGNATORIES THEORIES AND POTENTIAL ENFORCEMENT ISSUES

While doctrine and jurisprudence recognize the sanctity of the principle of consent in international arbitration,[3] different theories have been put forward to deal with situations in which parties have not expressed their agreement by signing the contract which contains the arbitration agreement. A comprehensive review of those theories would go beyond the scope of this article; however, briefly discussing them is helpful as it shows the complexity around the arbitrator's dilemma.

In discussing such theories, we use here a simple classification.[4] We distinguish between approaches which rely on the idea that consent, in

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[3] In the words of Lew, Mistelis, and Kröll: 'The arbitration agreement is the foundation of almost every arbitration. There can be no arbitration between parties which have not agreed to arbitrate their disputes. The contractual nature of arbitration requires the consent of each party for an arbitration to happen. State courts derive their jurisdiction either from statutory provisions or a jurisdiction agreement. In contrast, the arbitration tribunal's jurisdiction is based solely on an agreement between two or more parties to submit their existing or future disputes to arbitration … An arbitration agreement fulfils a number of different functions. First, it evidences the consent of the parties to submit their disputes to arbitration. Second, it establishes the jurisdiction and authority of the tribunal over that of the courts. Third, it is the basic source of the power of the arbitrators. The parties can in their arbitration agreement extend or limit the powers ordinarily conferred upon arbitration tribunals according to the applicable national law. In addition, the arbitration agreement establishes an obligation for the parties to arbitrate. Arbitration agreements therefore have both a contractual and a jurisdictional character. It is contractual by virtue of the required agreement of the parties. It is jurisdictional by virtue of conferring jurisdiction upon the arbitration tribunal'. Julian D. M. Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), paras 6-1 – 6-2. On the principle of consent in international commercial arbitration, *see also Fouchard Gaillard Goldman on International Commercial Arbitration* 191–196 (Emmanuel Gaillard & John Savage eds, Kluwer Law International 1999); *Redfern and Hunter on International Arbitration* (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds, 6th ed., Oxford University Press 2015), paras 1.40–1-48. In the jurisprudence, *see* e.g., *Banque Arabe et Internationale d'Investissement v. Inter-Arab Investment Guarantee Corp.*, Award of 17 Nov. 1994, 21 Y.B. Comm. Arb., 13, 18 (1996), in which the tribunal stated: 'Contrary to litigation in front of state courts where any interested party can join or be adjoined to protect its interests, in arbitration only those who are parties to the arbitration agreement expressed in writing could appear in the arbitral proceedings either as claimants or as defendants. This basic rule, inherent to the essentially voluntary nature of arbitration, is recognized internationally by virtue of Art. II of the New York Convention'.

[4] The doctrine would appear to agree on such a classification. *See* e.g., Brekoulakis, *supra* n. 2, *Parties in International Arbitration: Consent v. Commercial Reality*, para. 8.10, according to which: 'when a non-signatory theory is employed to extend the arbitration agreement, we either rely on equitable (i.e., non-consensual) considerations or we treat consent as a functional legal construct which is markedly different from the concept of consent that we normally use to test whether two signatories have agreed to arbitrate. By doing so, we effectively employ the non-signatory theories as nothing more than legal fictions "so that our square spade can dig a nice round hole" big enough to accommodate commercial reality and complex disputes involving both signatory and third parties'. *See also* Born, *supra* n. 2, at 1531, according to whom: 'The principal legal bases for holding that a non-signatory is bound (and benefited) by an arbitration agreement … include both purely consensual theories (e.g., agency, assumption, assignment) and nonconsensual theories (e.g., estoppel, alter ego). Each of these various theories gives rise to both substantive and choice-of-law issues. The authorities discussed below, which address these issues, are relevant both in actions to enforce agreements to arbitrate and in actions to annul or recognize arbitral awards'.

While not expressly mentioning it, Hanotiau's work would appear in line with this classification. *See* Hanotiau, *supra* n. 2, Ch. 1.

reality, is present, and theories that do not depend on it. We call the former 'consensual theories', as they rely on the presumption that non-signatories' conduct would indicate their intention to be parties to the contract containing the arbitration agreement. We use 'equitable theories' for the latter since they do not emphasize non-signatories' conduct as expressing their intentions; they also vest arbitral tribunals with discretionary power whether to extend jurisdiction over a non-signatory to the arbitration agreement or not.

According to consensual theories, non-signatories would be parties to the arbitration agreement *ab initio*, in line with their intentions, presumptively inferred by their conduct. In light of this consideration, some authors point out that the use of the term 'extension' of the arbitration agreement would be inaccurate.[5] Examples of these theories include agency,[6] assignment,[7] implied consent and/or group of companies' doctrine,[8] third party beneficiary.[9]

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[5] *See* e.g., Born, *supra* n. 2, at 1526. In particular, Born points out that: 'These expressions are inaccurate, in that they imply that an entity which is not a party to an arbitration agreement is nonetheless subject to that agreement's effects, by virtue of something other than the parties' consent. Contrary to the references to "extension" or "third parties", most of the theories discussed below provide a basis for concluding that an entity is in reality a party to the arbitration agreement – which therefore does not need to be "extended" to a "third party" – because that party's actions constitute consent to the agreement, or otherwise bind it to the agreement, notwithstanding the lack of its formal execution of the agreement. The arbitration agreement is therefore not ordinarily "extended", but rather the true parties that have consented to the arbitration agreement are identified'. Similarly, *see* Hanotiau, *supra* n. 2, para. 7. In his words: '[T]he widely used concept of "extension" of the arbitration clause to non-signatories is misleading, and, moreover, is probably wrong to a large extent since, in most cases, courts and arbitral tribunals still base their determination of the issue on the existence of a common intent of the parties and, therefore, on consent. The basic issue, therefore, remains: who is a party to the clause, or has adhered to it, or eventually is estopped from contending that it has not adhered to. This is, in other words, a classic problem of contract law. The real issue, therefore, becomes whether in international arbitration, given its specific character and taking into consideration the usages of international trade, one should follow the same rules as are applicable to ordinary civil and commercial cases or adopt a more liberal approach, and in the latter case what approach should be adopted'.

[6] Generally accepted in the majority of jurisdictions, the agency theory concerns the signing of a contract by an agent on behalf of the principal. *See* e.g., Hanotiau, *supra* n. 2, para. 20. *See* e.g., ICC Case No. 6268, 16 Y.B. Comm. Arb., 119–126 (1991).

[7] Assignment would include transfer of rights and obligations. *See* e.g., Brekoulakis, *Parties in International Arbitration: Consent v. Commercial Reality, supra* n. 2, para. 8.21 .

[8] On implied consent and the group of companies' doctrine, we can identify two positions. According to the first position, the group of companies' doctrine would be an expression of the doctrine of implied consent in the context of complex corporate structures. On this point, *see* Bernard Hanotiau, *Do We Share a Common Vision?,* 27(4) Arb. Int'l 539, 546 (2011). In his view the group of companies' doctrine is an 'awkward, inappropriate, expression for the fact that conduct can be an expression of consent and that among all the factual elements and surrounding circumstances to be taken into consideration to determine whether conduct amounts to consent in a particular case, the existence of a group of companies may be relevant, particularly because it generates certain dynamics in terms of organization, control, common participation in projects, the interchangeability of the members within the group, etc'. Born supports a different view, as he adds that the group of companies' doctrine could apply in 'a manner similar to principles of alter ego, apparent authority, estoppel and abuse of right, on concepts of good faith, equity and objective intent to supplement subjective intentions of the parties to an arbitration agreement'. *See* Born, *supra* n. 2, at 1568.

[9] Third party beneficiary concerns cases in which the parties to a contract agree that certain benefits of the agreement would be granted to a non-signatory. *See* Brekoulakis, *Parties in International Arbitration: Consent v. Commercial Reality, supra* n. 2, para. 8.33.

Under equitable theories, the emphasis is on considerations of good faith, equity, and justice rather than the parties' intentions – as inferred from their conduct. In line with such consideration, non-signatories should be subject to the arbitration proceedings, but ultimately the tribunal enjoys discretion whether to extend or not. For instance, these theories would include apparent authority,[10] estoppel,[11] alter ego.[12]

On the applicable law to non-signatories, from a practical perspective, one can identify two approaches, namely: (i) a transnational approach, with the application of transnational rules or international law rules[13]; (ii) a conflict of law analysis, with the application of national laws or jurisprudence.[14] However, despite some relevant exceptions, most national laws allow a transnational approach or share principles, the application of which would lead to similar conclusions. Perhaps even more importantly, as correctly noted by Hanotiau:

> in an increasing number of cases, arbitral tribunals and courts determine who is a party to the arbitration clause without much recourse to conflict rules, on the sole basis of an analysis of the facts and circumstances of the case, sometimes also taking into consideration the usages of international trade.[15]

Theoretical classifications are helpful to make sense of the theoretical and practical complexities involving non-signatory issues. However, from an evidentiary perspective, such theories are not very far from each other. One should note that, in reality, both types of theories rely on certain presumptions. Tribunals and courts,

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[10] In presence of the appearance of authorization, a principal can be bound to contract in light of an entity's acts. Such theory is related, of course, to the theory of agency. As noted by Brekoulakis, it might apply when states' entities are involved. *Ibid*., para. 8.44.

[11] Commonly found in common law jurisdictions, the estoppel doctrine prevents a party from acting inconsistently with its own conduct. According to Hanotiau 'estoppel is regarded today as a general principle of international law'. It should be noted that while less frequently applied in civil law jurisdictions, this doctrine is akin to the principle of *non-venire factum proprium*, which we can identify in civil law jurisdictions. *See* Hanotiau, *supra n. 2,* paras 134, 152.

[12] Also referred as the 'piercing the corporate veil doctrine', it allows lifting the corporate veil of a company in certain circumstances to find that a tribunal has jurisdiction over non signatories – e.g., the parent company or the majority shareholder. To this end, the analysis should generally focus on different factors including, e.g.,: gross undercapitalization; non-payment or overpayment of dividends; withdrawal of funds by the dominant shareholders, sometimes for personal purposes; absence of corporate formalities, in terms of behaviour and documentation; guarantee of corporate liabilities by majority shareholders in their individual capacity; non-functioning of corporate officers and directors; concealment or misrepresentation of members; absence or inaccuracy of corporate records. Brekoulakis, *Parties in International Arbitration: Consent v. Commercial Reality, supra* n. 2, para. 8.93.

[13] On the application of a transnational approach *see* e.g., ICC Case No. 14208/14236 of 2008, 24 (2) ICC Ct. Bull. 62 (2013), para. 391. In this case, the tribunal concluded that there is a '[g]eneral principle that transnational norms should be applied to determine the issue of extension of the arbitration clause to a non-signatory, even when piercing the corporate veil is at issue'.

[14] A conflict of laws' analysis would aim to identify the national law(s) potentially applicable to non-signatory issues. In general, on conflict of laws analysis, *see* Lew, *supra* n. 2, paras 6.53–6.62.

[15] Hanotiau, *supra* n. 2, para. 17.

under those theories, are convinced of the truth of certain facts by reference to the existence of relevant circumstances.

In particular, there might be two kinds of presumptions, namely, legal presumptions and judicial or human presumptions.[16] According to the former, 'a legal norm supposes (automatically) that certain facts are established in a given situation'.[17] The rule of the applicable law gives the adjudicator the power to infer circumstances without having to ascertain direct evidence. In the context of non-signatories, such is the case every time the relevant applicable law establishes non-signatories should be subject to arbitration proceedings. For example, it is so when an arbitral tribunal considers certain norms as international law principles. In the words of the tribunal in International Chamber of Commerce (ICC) Case no. 8385:

> The final question is to what extent the juridical fiction which is the basis of legal entities must give way to the reality of human behavior and cease to protect those who hide behind the corporate veil in order to promote their own interests at the cost of those who dealt with the company.[18]

Under judicial presumptions, the adjudicator draws certain inferences by referencing a general practice rather than a specific rule of the applicable law.[19] Perhaps we might find an example of such an approach in the analysis of the tribunal in ICC Case no. 4131, which relied on the general practice of groups of companies. It concluded that 'irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (une réalité économique unique)'.[20]

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[16] The reference here is to presumptions in the context of international disputes. As international courts or tribunals generally refer to such presumptions, they do offer a useful framework to consider how arbitral tribunals consider non-signatories' issues. On these presumptions, *see* e.g., Frédéric G. Sourgens, Kabir Duggal & Ian A. Laird, *Evidence in International Investment Arbitration* (Oxford University Press 2018) paras 6.03–6.05.

[17] Robert Kolb, *The Elgar Companion to the International Court of Justice* 241 (Edward Elgar Publishing 2014).

[18] ICC Case No. 8385 of 1995, in *Collection of ICC Arbitral Awards 1996–2000* 479 (Jean Jaques Arnaldez, Yves Derains & Dominique Hascher eds 2003).

[19] As expressed by Judge Kreća: 'Judicial presumption, along with legal presumption, is one of the main sorts of presumption in international law. It means that a certain fact or state of affairs, even though it has not been proved, is taken by an international tribunal as truthful. As such it does not necessarily coincide with, or is not equivalent to, the fact or the state of affairs. As far as the reasoning of the existence of judicial presumption is concerned, considerations of a practical nature are prevalent. Judicial presumption is a weapon to avoid waiting to get to know precisely the facts and situation on which is dependent the existence, content or cessation of the right that would have adverse consequences for interested subjects or that would render difficult due course of legal proceedings'. *See Legality of Use of Force (Serbia and Montenegro v. United Kingdom)* (Separate Opinion of Judge ad hoc Kreća) [2004] ICJ Rep. 1307, 1394, 1400–1401.

[20] *Dow Chemical France, Dow Chemical Company & others v. ISOVER Saint Gobain*, ICC Case No. 4131, 9 Y.B. Comm. Arb. 132, 136 (1982).

Accordingly, if seen through the evidentiary lens, the analysis of non-signatories' issues rests on the facts of the case at stake. As obvious as it might sound, this consideration would perhaps help in stressing the importance of a thorough assessment of the factual matrix. Of course, applying theories that rely on consent inferred from the parties' conduct perhaps offers an apparently better solution, as it formally satisfies the requirement of the parties' consent to establish jurisdiction. However, we should bear in mind there is no direct evidence of such consent even under pure consensual theories.

In line with these considerations, it is not surprising then that an analysis firmly anchored to the specific factual matrix would always represent the best approach. Far from being a theoretical statement, such an approach is accepted in jurisprudence and doctrine.

3 NATIONAL COURTS' RESPONSE TO THE ARBITRATOR'S DILEMMA: KLUWER EMPIRICAL RESEARCH PROJECT

As shown above, we can identify different theories on non-signatories in the doctrine and jurisprudence. However, the relevant instrument through which parties enforce awards is silent on non-signatories' issues. That is the 1958 United Nations Convention on the Recognition of Foreign Arbitral Awards ('New York Convention').[21] It applies to awards which are the outcome of commercial disputes, contract-based investor-to-State disputes,[22] and investment treaty disputes which are not covered by the International Centre for Settlement of Investment Disputes (ICSID) Convention.[23] Amongst other issues, the New York Convention is silent on non-signatories. The Convention also does not address whether the extension of an arbitration agreement is an issue linked to the scope and ambit of the arbitration agreement, or a stand-alone jurisdictional question. Accordingly, such silence raises the question of whether awards involving non-signatories might pose any issues at the enforcement stage. Some of the cases reviewed referred to setting aside or vacatur applications relying on national arbitration law and provisions often very similar (if not identical) to the New York Convention.

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[21] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958, entered into force on 7 Jun. 1959) ('New York Convention').

[22] On the New York Convention and its application *see* in general, Loukas Mistelis & Domenico Di Pietro, *New York Convention, 1958,* in *Concise International Arbitration* (Loukas Mistelis ed., Kluwer Law International 2015) commentaries to Arts II and V.

[23] Professor Schreuer has argued in favour of the application of the New York Convention to non-pecuniary obligations in the ICSID context. He also proposed the application of the New York Convention to ICSID awards in states that are not party to the ICSID Convention. *See* Christoph H. Schreuer et al., *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* 1118 (Cambridge University Press 2010).

3.1 Overview of the Kluwer Empirical Research Project results on non-signatories

Upon reviewing the raw data of the Kluwer Research,[24] we have identified certain cases involving non-signatories. Their analysis confirms what we have already mentioned in section 2. That is, an approach strictly anchored to the factual matrix of the case at stake would safeguard the enforcement of an award, even when non-signatories are subject to arbitration proceedings. In this section, we will briefly review some cases we identified in the data set in support of our claim.[25]

3.2 *Hernandez v. Smart & Final, Inc.*[26]

In *Hernandez v. Smart & Final, Inc.*, the US District Court of California had to decide whether to vacate an ICC award involving two non-signatories. In particular, the dispute before the arbitral tribunal arose from the joint business operation of two companies, Trevino Hernandez, Sociedad De Responsabilidad Limitada de Capital Variable ('Tre–Her') and Smart & Final Inc. ('SFI'). In 1992, Tre–Her and SFI entered a written Joint Venture Agreement (the 'Agreement'). They would establish a Mexican corporation to operate a chain of stores, Smart & Final De Noroeste, Sociedad Anonima de Capital Variable ('SFDN'). Under the Agreement, SFI could do this either directly or through a wholly owned subsidiary, namely, Smart & Final de Mexico, Sociedad Anonima de Capital Variable ('Smart–Mex').[27]

In 2007, SFI commenced arbitration proceedings related to the Agreement against Tre–Her for breach of contract, fraud, and deceit. The tribunal concluded

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[24] Kluwer Research. We have particularly identified the following cases which address directly or indirectly, expressly or impliedly issues of non-signatories: *Trevino Hernandez, S de RL de CV (Mexico) v. Smart & Final, Inc.* (US) United States District Court, Southern District of California, 09-cv-2266 BEN (NLS); 09-cv-2322, 17 Jun. 2010; *Jiangsu Overseas Group Co., Ltd v. Concord Energy Pte Ltd & another matter* (Singapore High Court); *Ajwa for Food Industries Co. (MIGOP) v. Pacific Interlink Sdn Bhd* (Federal Court of Malaysia); *CTI Group Inc. v. International Bulk Carriers SPA* (Federal Court of Malaysia); *Banco Santander S/A & Banco BTG Pactual S/A v. Paranapanema S/A*, Brazilian Administrative Council for Economic Defense, Appeal No. 002163–90.2013.8.26.0100, Case Date 3 Jul. 2014; *Amplitude SA v. Oebe TH Thotou & Iakovoglou Promodos*, Court of Cassation of France, First Civil Law Chamber; *Government of the Russian Federation c/o Federal Customs Office of the Russian Federation v. I.M. Badprim SRL*, District Court of Stockholm, T 2454–14, 23 Jan. 2015; *Worldwide Medical Assurance, Ltd Corp. v. SISA Vida SA*, Seguro de Personas, Supreme Court of Costa Rica, RES. 000280-F-S1-2015 (EXP. 14–000159-0004-AR), 5 Mar. 2015; *VRG Linhas Aereas SA v. (1) Matlin Patterson Global Opportunities Partners (Cayman) II LP (2) Matlin Patterson Global Opportunities Partners II LP & (3) Matlin Patterson Partners II LLC*, Grand Court of the Cayman Islands, Financial Services Division, Cause No. FSD 137 of 2016 (IMJ), 19 Feb. 2019. All these cases are available in the ITA Report and at www.kluwerarbitration.com.

[25] We focused on cases in which non-signatories were brought into arbitration proceedings, despite their apparent lack of consent.

[26] *Hernandez v. Smart & Final, Inc.*, United States District Court, S.D. California, WL 2505683 (2010).

[27] *Ibid.*, at 1.

that Tre–Her violated the Agreement in having taken a dividend from the accounts of SFDN, removed the Operations Director of SFDN, and refused SFI access to SFDN's offices. As SFDN and Smart-Mex were not parties to the arbitration, Tre–Her challenged the enforcement of the award by arguing that the tribunal exceeded its powers.[28] The Court rejected this challenge and endorsed the tribunal's approach[29] on non-signatories' issues. In particular, it noted that the Agreement identified the non-signatories and recognized certain rights and duties of both SFI and Smart–Mex. Accordingly, as Tre–Her was aware of the Agreement's content, it should be estopped from denying SFI the benefit of the arbitration clause.[30] In this way the Court classified the non-signatory issue as a matter of jurisdiction, rejected the vacatur application and confirmed the award.[31]

3.3 *Amplitude SA v. Oebe TH Thotou and Iakovoglou Promodos*, Court of Cassation of France, First Civil Law Chamber

In 2012, the Cour de Cassation (French Supreme Court) had to consider whether an arbitral tribunal has jurisdiction on a non-signatory involved in the performance of a contract.[32] In 2004, Amplitude, a French company, and Oebe TH Thoutou and Company ('Oebe'), a Greek company, entered into an agreement (the 'Agreement') for the distribution of orthopaedic prostheses in Greece. It appears that the Agreement was effectively performed by Iakovoglou Promodos. In 2007, Oebe Thotou and Iakovoglou Promodos brought a claim against Oebe, which had previously terminated the Agreement for reasons related to its performance.[33] The tribunal rendered an award in 2009, in which it found jurisdiction over Iakovoglou Promodos, despite the latter not being formally a signatory to the Agreement containing the arbitration agreement.[34]

Subsequently, Amplitude requested the annulment of the award, arguing that the tribunal did not have jurisdiction over the non-signatory, as the latter was not a

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28 *Ibid.*, at 5.

29 *Ibid.* In particular, the tribunal rejected such objection as follows: '[T]he JVA Agreements set forth the terms and conditions directly governing the relationship of the Parties and their reciprocal rights and obligations relating to their joint venture and must be read and construed as one single unit. Any infringement by a JVA Party of provisions found either in the JVA, its Exhibit "A" or the SFDN Charter necessarily becomes a violation of the JVA Agreements considered as a whole and entitles the other JVA Party to directly seek relief for breach of contract against the one in breach'.

30 *Ibid.*

31 The Court only referred to the New York Convention indirectly via the Federal Arbitration Act, 9 U. S.C. ss 9 and 10(a)(4) and the Inter-American Arbitration Convention, Arts 203–204 and 302.

32 *Amplitude SA v. Oebe TH Thotou and Iakovoglou Promodos*, Court of Cassation of France, A Contribution by the ITA Board Reporters, 2012, 1. *See also* the unedited French report of the case, www.legifrance.gouv.fr/juri/id/JURITEXT000026609009.

33 *Ibid.*

34 *Ibid.*

party to the arbitration agreement.[35] The Paris Court of Appeal annulled the award, noting that the non-signatory's performance of the contract was beyond the scope of the arbitration agreement.[36] The French Supreme Court reached the opposite conclusion, in so doing, confirming a line of argument which French literature and case law generally follow. In particular, it held that when a non-signatory executes a contract, the arbitration agreement contained in such contract will extend to the non-signatory.

The Cour de Cassation relied on articles 1502(1) and 1504 of the French Arbitration Law as they were in force before the 2011 Reform.

3.4 *Government of the Russian Federation c/o Federal Customs Office of the Russian Federation v. I.M. Badprim SRL*, District Court of Stockholm, T 2454-14, 23 January 2015

In *Government of the Russian Federation c/o Federal Customs Office of the Russian Federation v. I.M. Badprim SRL*,[37] the District Court of Stockholm had to decide – amongst other issues[38] – whether an arbitral tribunal correctly found jurisdiction over a non-signatory, which was mentioned in the relevant agreement containing an arbitration clause. In 2007, Badprim entered an agreement (the 'Agreement') with the Customs Office of the Russian Federation for the construction of a customs border station.[39] Badprim commenced arbitration proceedings against both the Russian Federation and its Customs Office, asserting claims for the payment of executed work. The Russian Federation argued that the tribunal did not have jurisdiction, as it did not sign an arbitration agreement to that effect. In 2013, the tribunal rendered an award confirming its jurisdiction over the Russian Federation, rejecting claims against its Customs Office, and ordering the Russian Federation to pay EUR 1.8 million, plus expenses and interest.[40]

Subsequently, the Russian Federation challenged the award before the District Court of Stockholm. Amongst other arguments, it argued in favour of a distinction between the State and its Customs Office.[41] The latter was a separate entity, authorized under Russian law to act separately from the State. Further, it noted

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35 *Ibid.*
36 *Ibid.*
37 John Kadelburger, *The Government of the Russian Federation c/o Federal Customs Office of the Russian Federation v. I.M. Badprim S.R.L., District Court of Stockholm, T 2454–14, 23 Jan. 2015,* A contribution by the ITA Board.
38 This case is relevant also for the enforceability of pathological clauses. The relevant arbitration agreement referred to arbitration under the ICC Rules administered by the Stockholm Chamber of Commerce Arbitration.
39 Kadelburger, *supra* n. 37, at 1.
40 *Ibid.*
41 *Ibid.*, at 2.

that while it was a party to certain agreements, it was not a party to the Agreement containing the arbitration clause. On the contrary, Badprim argued that the Customs Office acted for and on behalf of the Russian Federation. Further, it argued that the Customs Office entered the Agreement on behalf of the Russian Federation; hence it would apply to the latter.[42]

In analysing the arguments submitted by the parties, the District Court of Stockholm paid particular attention to the facts of the case. As a result, it confirmed that the tribunal had jurisdiction over the non-signatory.[43] It noted that the Russian Federation had the opportunity to read the arbitration agreement before the Customs Office signed the Agreement. Further, it pointed out that according to an expert opinion on the record, the Customs Office would be a federal executive body, hence acting on behalf of the State.[44]

3.5 *VRG linhas Aereas SA v. (1) Matlin Patterson Global Opportunities Partners (Cayman) II LP (2) Matlin Patterson Global Opportunities Partners II LP & (3) Matlin Patterson Partners II LLC*

In 2019, the Grand Court of the Cayman Islands, in *VRG Linhas Aereas SA v. Matlin Patterson and others*,[45] rendered a decision annulling an award which, amongst other things, concerned a case of fraud attributable in part to non-signatories during the negotiation and performance of a contract.

The arbitration proceedings arose from an agreement for the sale and purchase of equity control in the airline VRG Linhas Aéreas SA (the 'Agreement'). In particular, VRG Linhas Aéreas SA ('VRG') commenced arbitration proceedings on the overstatement of the airline working capital, with the consequent demand for the adjustment of the price under the Agreement. The respondents were members of Funds who promoted the sale of the airline and the sellers – namely, special purpose companies MP Funds used to perform the sale of the airline.[46] These were MatlinPatterson Global Opportunities Partners (Cayman) II Limited Partnership ('MP Cayman'), MatlinPatterson Global Opportunities Partners II Limited Partnership (MP USA), and MatlinPatterson Global Partners II Limited

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42 *Ibid.*

43 *Ibid.*, at 3.

44 *Ibid.*

45 *VRG Linhas Aereas SA v. (1) Matlin Patterson Global Opportunities Partners (Cayman) II LP (2) Matlin Patterson Global Opportunities Partners II LP & (3) Matlin Patterson Partners II LLC*, Grand Court of the Cayman Islands, Financial Services Division, Cause No. FSD 137 of 2016 (IMJ), 16 (4) Revista Brasileira de Arbitragem 141 (2019). The Cayman Islands Court of Appeal decision was delivered on 11 Aug. 2020.

46 *Gol Linhas Aéreas SA (formerly VRG Linhas Aéreas SA) v. MatlinPatterson Global Opportunities Partners (Cayman) II LP & others*, CICA No. 12 of 2019 (2020), paras 6–10.

Liability Company ('GP') (referred together as the 'MP Funds'). MP USA and MP Cayman were not signatories to the Agreement; however, MP USA had signed an addendum to the Agreement (the 'Non-Compete Letter'), which joined the former to a non-compete provision in the Agreement.[47] VRG claim's premise was fraud on the part of MP Funds in the use of the sellers. As a result, VRG argued that MP Funds were alter egos of the sellers, hence the need to pierce the corporate veil.[48]

The non-signatories objected to the tribunal's jurisdiction as not being party (and signatories) to the arbitration agreement during the proceedings. The tribunal, in a partial award, rejected that challenge; on the arbitration agreement, the tribunal interpreted the Non-Compete Letter as amending the Agreement and making the non-signatories parties to the arbitration clause. In the final award, the tribunal found that there was indeed fraud on the part of the non-signatories.[49] The non-signatories then challenged the award before the Brazilian courts; however, the Court of Appeal of São Paolo confirmed the findings of the tribunal.[50]

In further proceedings, the non-signatories challenged the award before the US courts,[51] which decided to annul it, and they also challenged the award before the courts of the Cayman Islands. The Grand Court of the Cayman Islands set aside the award. Amongst other reasons, the Court noted that the non-signatories were not parties to the Agreement, as this was clear as a matter of objective construction of the Non-Compete Letter.[52] However, a recent (August 2020) decision of the

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47 *Ibid.,* para. 11.

48 *Ibid*., para. 13.

49 *Ibid*., para. 28.

50 In the words of the Court of Appeal of São Paolo: 'Now, with all due respect, the appellants, constituting an international fund, after having signed a document that clearly and unquestionably stipulates their adherence to the contract unequivocally described in the aforementioned amendment, cannot now claim, even through skilfully made allegations, that they were not aware of or did not know that their participation in the deal in question would not be affected by the arbitration expressly agreed upon in the agreement to which they adhered. One also finds that, as stated, by signing the document on at 468 of the record, with an express provision regarding being bound to the agreement on at 232–263 of the record, which stipulated arbitration as a form of conflict resolution, the appellants cannot try to allege absence of intention to participate in and submit to the arbitration court, under penalty of undeniable violation of the principle of "venire contra factum proprium", that is, the prohibition of contradictory behaviour, since, as stated, having signed the amendment to the contract that called for arbitration, it is not reasonable later on for them to try to distance themselves from the extent of the effects resulting from the arbitral award'. *Ibid.,* para. 50. Also, it should be noted that it is not clear whether certain proceedings before Brazilian courts are still pending.

51 *See VRG Linhas Aéreas SA v. MatlinPatterson Global Opportunities Partners II LP*, 2014 WL 4928929 (SDNY); *VRG Linhas Aereas SA v. MatlinPatterson Global Opportunities Partners II LP*, No. 14–3906-CV, 2015 WL 3971177.

52 In the words of the Court: 'The Tribunal's theory was also that the Non-Compete Letter had amended the PSA itself, so as to make the parties to it, party to the whole PSA. At paras 49–50 of the Partial Award on Jurisdiction, the Tribunal found that the MP Funds were "integrated" into the PSA, with the Tribunal concluding that "all the terms and conditions contained in the Principal Contract" were "reproduced" in the letter. In my view, the Tribunal's conclusions are not correct, for

Court of Appeal of the Cayman Islands overturned that decision. In particular, the Court stated that the decision of the Court of Appeal of São Paulo was 'final and conclusive' under English law; as a result, it would give rise to estoppel.[53] The decision touched upon different issues; however, as regards non-signatories, it overturned the previous decision by simply accepting that the decision of the Court of Appeal of São Paulo had already decided on such issue with finality. The Court of Appeal confirmed the award subject to a stay pending the conclusion of the Brazilian proceedings.

4 CONCLUDING REMARKS: JUDICIAL SOLUTION TO THE ARBITRATOR'S DILEMMA RESOLVED

While the data analysed is somewhat limited – we identified some ten cases in the data set[54] and only discussed thoroughly a selection of them specifically dealing with non-signatories' issues – certain trends are quite clear and consistent with the doctrinal debate. Indeed, any extension of the arbitration agreement to non-signatory parties, rendering them full parties to the arbitration agreement and before an arbitration tribunal, is not a very frequent occurrence. On the other hand, it is also not uncommon. However, one cannot ascertain with any degree of certainty how often non-signatories' issues arise in international arbitration proceedings and related court proceedings.

We have looked at the arbitrator's dilemma as national courts consider non-signatories' issues while setting aside or enforcement proceedings. At that stage, one can observe a clear pro-enforcement policy in the vast majority of New York Convention states. Consequently, when national courts review awards for purposes of enforcement or setting aside, they are very reluctant to interfere with arbitral tribunals' decisions on the merits. Hence, they only address jurisdiction issues in a review that aims to establish whether a tribunal manifestly exceeded its powers or otherwise violated a fundamental rule of procedure. As a corollary, the burden of proof on the party resisting enforcement or challenging an award is quite high.

The whole matter is further accentuated by the scarcity of specific national or international rules of law addressing with clarity issues of the extension of the

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a number of reasons. It seems plain to me that the Non-Compete Letter supplements the PSA by providing an undertaking by nonparties to the PSA. The Non-Compete Letter is described as "aditando", and this in my view should be understood as meaning "adding" or "supplementing", not "amending" or "changing"'. *VRG Linhas Aereas SA v. Patterson, supra* n. 45, paras 155–156.

53 *Gol Linhas Aéreas SA (formerly VRG Linhas Aéreas SA) v. MatlinPatterson Global Opportunities Partners (Cayman) II LP & Others, supra* n. 46, paras 118, 137, 138.

54 It is noteworthy that most of the cases reviewed, even when dealing with non-signatories' issues, do not expressly refer to 'non-signatories'. *See also supra* n. 24.

arbitration agreement to non-signatories. Consequently, it is not surprising that tribunals carry out a case-by-case assessment. Inevitably, they tend to focus on two fundamental elements: while consent is the main foundation for a decision to be fair and effective – unless there is evidence of fraud (or abuse of corporate form) or the risk of serious injustice – tribunals also look at the second element, the factual matrix of each case. The assessment of facts is critical to establish whether to extend an arbitration agreement or not.

National courts and the cases reviewed appear to confirm that both elements are relevant in making such an assessment, and there is a fascinating complementarity. Of course, no tribunal would be prepared to ignore express consent. In all instances where consent is not expressed or manifested by signature, tribunals try to ascertain whether it can (i) be implied by conduct or at law (e.g., in cases of assignment of contract or takeover of a corporation to name but two examples); or (ii) be imported from another contract in a chain of agreements or other communications between the parties. Also, some theories (which do not rely on the presence of consent) are employed when there is evidence of fraud (or abuse of corporate form) or the risk of serious injustice. At the same time, establishing the facts and persuading arbitral tribunals is not always an exact science and may prove very onerous.

Finally, national courts will assume jurisdiction to examine whether an arbitral tribunal has erroneously accepted jurisdiction, but they tend to be deferential and allow tribunals to perform their duties. In other words, there is a healthy dialogue and indeed complementarity in the judicial and arbitral functions when it comes to issues of non-signatories. The priority in such determinations rests with arbitral tribunals. However, we should note that, given the scarcity of rules and the increasing complexity of modern business involving multiple contracts and multiple parties, we expect to see more cases on non-signatories in years to come. The dilemma is inevitably conferring upon arbitral tribunals discretion as to how the assess and decide on the facts. It will not always be easy to address such questions but, amongst all major actors in the arbitration process, there appears to be trust in the way arbitrators handle them.