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Binding Non-Signatories to International Arbitration Agreements: Raising Fundamental Concerns in the United States and Abroad

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BINDING NON-SIGNATORIES TO INTERNATIONAL ARBITRATION AGREEMENTS: RAISING FUNDAMENTAL CONCERNS IN THE UNITED STATES AND ABROAD

*Tae Courtney**

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I. INTRODUCTION

Whenever an agreement is signed by parties of two or more countries, each with its own substantive laws, a contractual provision identifying how disputes will be settled is essential. Without such a provision, international business transactions lack predictability and order when disputes between parties arise.¹ Parties to an agreement must decide if they want to settle disputes in the courts of a particular jurisdiction or if they want to use a method of alternative dispute resolution, such as arbitration. In addition, parties must determine what law will be applicable in the case of a future dispute. Parties may choose the law of a particular nation or they may make the contract subject to the *lex mercatoria*, or international trade law.²

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¹ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

² MARK HULEATT-JAMES & NICHOLAS GOULD, *INTERNATIONAL COMMERCIAL ARBITRATION: A HANDBOOK* 19 (LLP Reference Publishing 1996) (1999) (defining inter-

If the parties choose arbitration as the process by which to settle disputes, these details can be included within an arbitration clause in the contract. International arbitration agreements are becoming more common and are most often the preferred form of dispute settlement between parties.³ Arbitration is a form of alternative dispute resolution that allows parties to resolve disputes outside of court. If parties choose to use the arbitration process, they agree by contract to resolve disputes using a private adjudicator, the arbitrator.⁴ The arbitrator will make a binding and final decision, known as the "award."⁵ All parties that sign a contract containing an arbitration clause also become parties to the arbitration clause.

A question attracting much attention in the international arena is whether a non-signatory to a contract can be bound to the arbitration agreement. This question raises fundamental concerns, considering that one of the principal requirements of international arbitration law is consent. This comment discusses some of the principles of international arbitration and its role in international commercial transactions today. It focuses on the unsettled issue of binding non-signatories to arbitration agreements and looks at theories used by courts to justify compelling parties to arbitrate. It also discusses the implications of compelling parties to arbitrate, the importance of upholding fundamental principles of arbitration to promote its effectiveness, and the role of the courts in the process.

II. BACKGROUND AND BASICS OF ARBITRATION

Although arbitration has become a more common method of resolving differences between international actors, it is not a modern method.⁶ Throughout history it has been used as a way to solve international disputes peacefully and judicially.⁷ Countries have ceased to allow national pride blind them from the effectiveness of arbitral proceedings. For example, the Supreme Court of the United States rejected its prior mindset that "all disputes must be solved under our

national trade law as "those principles governing the conduct of international trade that which are generally accepted by international traders").

³ *Id.*

⁴ 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* 1, available at <http://www.nelsonadr.ca/media.php?mid=14&xwm=true>.

⁵ American Arbitration Association, *Arbitration & Mediation* (2007), <http://www.adr.org/sp.asp?id=28749>.

⁶ ROBERT C. MORRIS, *INTERNATIONAL ARBITRATION AND PROCEDURE* 1–3 (Yale Univ. Press 1911) (explaining how arbitration was used in Ancient Greece as a police measure for the preservation of order).

⁷ *Id.* at 125.

laws and in our courts.”⁸ Federal policy in the United States is now to “resolve any ambiguity as to the availability of arbitration in favor of arbitration.”⁹ When there is doubt concerning arbitrability, policy favors arbitration.¹⁰

Arbitration is the preferred alternative to litigation when complex international contracts are involved.¹¹ More and more agreements include arbitration clauses as parties begin to realize that international commerce today requires solutions outside of the realm of national concepts.¹² As Robert Briner, chairman of the International Court of Arbitration of the International Chamber of Commerce said, “[i]nternational commercial arbitration is the servant of international business and trade.”¹³ The Supreme Court of the United States acknowledged the importance of such agreements to resolve disputes between parties of different states in an effective, orderly manner in *Scherk v. Alberto-Culver Company*.¹⁴ The Court held that the arbitration agreement, which was part of a sale between an American company and a German citizen, should be respected and enforced.¹⁵ The Court recognized that international commercial transactions were rising in number and a failure to recognize such international agreements would deter individuals from entering in similar agreements in the future.¹⁶

Some advantages of using arbitration with these contracts are privacy, neutrality of the procedure, predictability, flexibility in proce-

⁸ JOACHIM G. FRICK, *ARBITRATION AND COMPLEX INTERNATIONAL CONTRACTS* 12 (Kluwer Law Int'l 2001).

⁹ Anthony DiLeo, *The Enforceability of Arbitration Agreements by and Against Nonsignatories*, 2 J. AM. ARB. 31, 35 (2003).

¹⁰ *Commercial Union Ins. Co. v. Gilbane Bldg. Co.*, 992 F.2d 386 (1st Cir. 1993); *City of Meridian, Miss. v. Algernon Blair, Inc.*, 721 F.2d 525 (5th Cir. 1983).

¹¹ FRICK, *supra* note 8, at 7.

¹² *Id.* at 11; see Michael P. Daly, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 96 (2007) (explaining that “[g]iven the increasingly global nature of business, it has become normal to expect that many business disputes will involve corporations, investors. . . or any other interested parties who (1) are from different countries, and (2) have included a clause in their business agreements providing that any potential contractual disputes will be resolved through international arbitration.”).

¹³ Robert Briner, Chairman, Int'l Court of Arbitration of the Int'l Chamber of Commerce, *Philosophy and Objectives of the Convention*, Presented at the United Nations “New York Convention Day” (June 10, 1998), in *Enforcing Arbitration Awards Under the New York Convention*, at 9, available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>.

¹⁴ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 506–07 (1974).

¹⁵ *Id.* at 506.

¹⁶ *Id.* at 517.

dure, speed and cost, and the expertise of the arbitrators.¹⁷ It also allows for more flexibility and the preservation of relationships between those involved.¹⁸ Because national laws will have little importance in relation to these complex transactions that are entirely international in nature, an agreement between parties must indicate ahead of time which laws or principles will govern disputes.¹⁹

III. THE ARBITRATION CLAUSE

The United States Federal Arbitration Act establishes that arbitration agreements are valid as enforceable contracts.²⁰ It says an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²¹ The arbitration clause contained in a contract is widely accepted as a separate agreement from the rest of the contract.²² It has “autonomy” or “separability” from the other provisions in the agreement.²³ Therefore, even if a contract is terminated, the arbitration agreement may remain valid. As the court in *Peterson Farms, Inc. v. C & M Farming Limited* said, “[u]nder the doctrine of separability, an arbitration agreement is separable and autonomous from the underlying contract in which it appears.”²⁴

“The autonomy of arbitration agreements has become a universal principle in the realm of international commercial arbitration.”²⁵ A state may treat the arbitration clause as a separate contract and apply international arbitration law rather than general contract law when issues arise. One instance, however, when it may be difficult to distinguish between the contract as a whole and the arbitration clause contained within it, is when the existence of the contract is challenged. If a court held the contract itself did not exist, then the arbitration clause would likely be affected by that ruling.²⁶

¹⁷ See FRICK, *supra* note 8, at 7; see also JAN PAULSSON, NIGEL RAWDING, LUCY REED & ERIC SCHWARTZ, *THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR: CLAUSES IN INTERNATIONAL CONTRACTS* 3–5 (Kluwer Law Int'l 2d ed. 1999).

¹⁸ Frick, *supra* note 8, at 7.

¹⁹ Frick, *supra* note 8, at 9.

²⁰ Federal Arbitration Act of 1947, 9 U.S.C. § 2 (2006).

²¹ *Id.*

²² MARK HULEATT-JAMES & NICHOLAS GOULD, *INTERNATIONAL COMMERCIAL ARBITRATION: A HANDBOOK* 16 (LLP Reference Publishing 2d ed. 1999) (1996).

²³ *Id.*

²⁴ *Peterson Farms Inc. v. C&M Farming Ltd.*, (2004) L.R.Q.B 609 (Eng.) (quoting International Chamber of Commerce Arbitration Award finding).

²⁵ *Id.* at 609.

²⁶ See MAURO RUBINO-SAMMARTANO, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 225 (Kluwer Law Int'l 2d ed. 2001).

IV. BINDING NON-SIGNATORIES TO ARBITRATION CLAUSES

A non-signatory to a contract may be bound to an arbitration agreement under principles of contract law.²⁷ Increasingly, parties to a contract attempt to bind third party non-signatories to arbitration agreements either because the third party was so involved in the performance of the contract or the third party became involved in the dispute.²⁸ This attempt, understandably, is often met with resistance from those third parties who do not want to be brought into the dispute.²⁹ This issue has raised considerable concern among courts and scholars as well.³⁰

Parties can only be bound to an arbitration clause if they intended to be bound.³¹ The Supreme Court said “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”³² The party must sign the contract, or at least demonstrate a manifest intent to be a party to the contract.³³ While the facts in some cases support compelling a non-signatory to be bound to a contract to avoid injustice, courts remain hesitant to make such a ruling because it goes against core rules of arbitration and contract law.³⁴

A. *Theoretical Exceptions*

Most courts still require either express or implied consent to arbitration.³⁵ When a case lacks an express agreement, courts will look at the conduct of the party to consider whether that party demonstrated implied consent.³⁶ Under the doctrine of implied consent, several exceptions to the signature requirement have emerged. These

²⁷ See *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975); *Hartford Fin. Sys., Inc. v. Florida Software Servs., Inc.*, 550 F. Supp. 1079, 1086 (D. Me. 1982); *Cia. Platamon de Navegacion, S.A. v. Empresa Colombiana de Petroleos*, 478 F. Supp. 66, 67 (S.D.N.Y. 1979).

²⁸ Nelson, *supra* note 4, at 1.

²⁹ *Id.*

³⁰ See generally Daly, *supra* note 12, at 95.

³¹ DOMKE ON COMMERCIAL ARBITRATION, §13:1 (2008).

³² *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

³³ See DOMKE, *supra* note 31, at § 13:1.

³⁴ “The Courts have generally been cautious in compelling non-signatories to arbitrate due to the competing considerations of privity of contract and the autonomy of the parties.” PAULSSON, *supra* note 17, at 3.

³⁵ BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* 50 (Dr. Julian D.M. Lew QC ed., Kluwer Law Int'l) (2005).

³⁶ *Id.* at 36–37. Usually only substantial involvement in the negotiation or performance of the agreement will amount to consent.

exceptions are: 1) incorporation by reference, 2) assumption, 3) agency, 4) veil piercing, and 5) equitable estoppel.³⁷ While all of these exceptions warrant their own study and discussion, for the purpose of this comment, a brief overview of each is provided.

1. *Incorporation by Reference*

Incorporation by reference applies when a party signs an agreement that incorporates, or references, a second agreement which includes an arbitration clause.³⁸ Even though the party did not sign the contract including the arbitration agreement, it will be compelled to arbitrate because it signed the contract referencing the contract requiring arbitration.³⁹ The court in *Upstate Shredding, LLC v. Carloss Well Supply Co.*, turned this exception into a two-part test by requiring that the agreement contain the words of incorporation and that the arbitration agreement is broad enough to include the non-signatory.⁴⁰

2. *Assumption*

A non-signatory may be bound under the theory of assumption if he manifested intent to arbitrate through his conduct and another party relied on that conduct.⁴¹ The idea behind this theory is that the non-signatory should not be allowed to express intent to arbitrate and then later assert that an arbitral award is invalid.⁴² The non-signatory will be considered to have “impliedly agreed to arbitrate.”⁴³ If the non-signatory’s conduct indicated that he waived any objection to being bound by the arbitration agreement then he would also be bound under this theory.⁴⁴

3. *Agency*

The agency exception is rooted in traditional laws of agency. Agency is:

[T]he relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able

³⁷ Daly, *supra* note 12, at 99–102.

³⁸ *Id.* at 99.

³⁹ Nelson, *supra* note 4, at 29.

⁴⁰ See *Upstate Shredding, L.L.C. v. Carloss Well Supply Co.*, 84 F. Supp. 2d 357, 366 (N.D.N.Y. 2000); Dwayne E. Williams, *Binding Nonsignatories to Arbitration Agreements*, 25 FRANCHISE L.J. 175, 176 (2006).

⁴¹ Daly, *supra* note 12, at 99.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Williams, *supra* note 40, at 179.

to affect the principal's legal position in respect of strangers to the relationship by the making of contracts.⁴⁵

A principal may be bound to an arbitration agreement signed by the agent.⁴⁶ However, there must have been an agency relationship and when the contract was signed the agent must have been acting "within the scope of the agency relationship."⁴⁷ Problems arise when the principal does not want to arbitrate and where there is no contract between the principal and agent.⁴⁸

4. *Veil Piercing*

Veil piercing is a term well known in corporate law. It can bind a non-signatory to an agreement if the agreement was signed by the parent, subsidiary, or affiliate of a corporation.⁴⁹ Courts have justified piercing the corporate veil in situations "to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary."⁵⁰ It is a very fact intensive analysis and courts tend to only apply this theory in egregious circumstances.⁵¹

5. *Equitable Estoppel*

The equitable estoppel exception binds non-signatories who take advantage of benefits in a contract but claim to be exempt from the obligation of arbitration.⁵² It enables a non-signatory party benefiting from a contract to be estopped from avoiding the obligations of the contract.⁵³ Tacie H. Yoon, an attorney for Wiley Rein, LLP wrote, "where a signatory to an arbitration agreement is asserting claims against a non-signatory and seeks to compel arbitration, equitable es-

⁴⁵ Nelson, *supra* note 4, at 18.

⁴⁶ Daly, *supra* note 12, at 100.

⁴⁷ Williams, *supra* note 40, at 177.

⁴⁸ See Nelson, *supra* note 4, at 19 (Explaining that "[a]bsent an explicit agency agreement created by contract, a court may imply agency where the relationship between a parent and subsidiary is such that the only business carried out by the subsidiary is the parent's business.>").

⁴⁹ Daly, *supra* note 12, at 100-01.

⁵⁰ *Carte Blanche (Singapore) PTE., Ltd. v. Diners Club Int'l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993).

⁵¹ Alexandra Ann Hui, *Equitable Estoppel and the Compulsion of Arbitration*, 60 VAND. L. REV. 711, 724 (2007).

⁵² Nelson, *supra* note 4, at 32.

⁵³ William J. McSherry, Jr., *Arbitrating By and Against Parties Who Have Not Signed an Arbitration Agreement*, METROPOLITAN CORP. COUNS., at 4 (2005) available at <http://www.metrocorpccounsel.com/current.php?artType=View&artMonth=August&artYear=2005&EntryNo=3387>.

toppel rarely justifies binding the non-signatory to arbitrate those claims.”⁵⁴

B. *The Group of Companies Doctrine*

The group of companies doctrine is another means by which courts have recognized implied consent and bound non-signatories to arbitration agreements. France was the first country to use this theory and it has since been considered by courts around the world.⁵⁵ This doctrine applies in cases where a party to an international transaction is a member of a group of companies. Consent of a non-signatory member of the group may be implied if another member of the group signed the agreement and the conduct of the group of companies implied consent to the contractual obligations.⁵⁶ Even if it is determined that a non-signatory belongs to a group of companies, a court will still require the existence of consent or conduct amounting to consent.⁵⁷

Dow Chemical v. Isover Saint Gobain provides an example of the group of companies doctrine.⁵⁸ The question in *Dow Chemical* was whether the arbitration clause in a contract was binding on companies that did not sign the contract but were in the group and participated in the formation, performance and termination of the contract.⁵⁹ The case involved a parent company and its subsidiaries.⁶⁰ To determine if the non-signatory was bound to the arbitration clause in the contract, the arbitrators considered the company’s role in the performance of the contract, the intention of the parties, and the company’s concern of disputes that may arise.⁶¹ The arbitrators determined that the Dow Chemical Company had absolute control over its subsidiaries and was involved in the performance of the contract at issue. Therefore, the arbitrators found that Dow Chemical was bound to the arbitration clause, despite the fact it was not a signatory to the contract.⁶² Supporting the decision was the fact that even though each company had a

⁵⁴ Tacie H. Yoon, *Can a Non-Signatory to an Arbitration Agreement be Compelled to Arbitrate? It Depends. . .*, FRANCHISE ALERT (Jan. 18, 2008) available at http://www.wileyrein.com/docs/newsletter_issues/551.pdf.

⁵⁵ See HANOTIAU, *supra* note 35, at 96; Stephan Wilske, et. al., *The “Group of Companies Doctrine” – Where Is It Heading?*, 17 AM. REV. INT’L ARB. 73, 74–75 (2006).

⁵⁶ HANOTIAU, *supra* note 35, at 51.

⁵⁷ *Id.* at 50.

⁵⁸ *Dow Chemical v. Isover Saint Gobain (Fr. U.S. Switz. v. Fr.)*, Int’l Comm. Arb. 131, 131–38 (1982) reprinted in 110 JOURNAL DU DROIT INTERNATIONAL (Clunet) 899, 899–907 (1983).

⁵⁹ *Id.* at 131.

⁶⁰ *Id.* at 132–33.

⁶¹ *Id.* at 136.

⁶² *Id.* at 136–37.

distinct identity, they all shared the same economic reality.⁶³ The arbitrators found that application of this doctrine conformed to the “mutual intent of the parties.”⁶⁴ Thus, the arbitrators did not dismiss the consent requirement, but rather acknowledged that it was a requirement for arbitration.⁶⁵

Peterson Farms, Inc. v. C & M Farming Ltd. is an example of a court refusing application of the group of companies theory.⁶⁶ The parties in *Peterson* entered into a contract for the sale of live poultry.⁶⁷ The poultry was infected by a virus and C & M Farming initiated arbitral proceedings as indicated by the sales contract.⁶⁸ Not only did C & M Farming receive damages in the arbitral award, but other C & M group entities received damages pursuant to the group of companies doctrine.⁶⁹ The Tribunal said C & M entered into the contract as an agent for the other members of the group and, therefore, those entities were also parties to the arbitration clause.⁷⁰ On appeal, the court rejected the holding of the Tribunal and refused to recognize the group of companies doctrine.⁷¹

C. Debate Surrounding the Exceptions

These theoretical ways of binding non-signatories to arbitration agreements have caused much debate in the international arena. Unfortunately, courts issuing opinions on this topic in many countries, including the United States, are split and often issue conflicting holdings. One of the reasons for this split is the unique fact patterns presented by each case. Each case presents a different factual sequence that judges must consider and then compare against each exception to determine if the non-signatory should be bound to the agreement. Some courts, in the interest of equity, are willing to bind non-signatory parties to the contract. This is an exception to the principles of contract and international arbitration law which generally limit liability to parties who consent to enforceable promises.

⁶³ *Id.* at 136.

⁶⁴ *Id.* at 137.

⁶⁵ Wilske, *supra* note 55, at 86–87

⁶⁶ *Peterson Farms, Inc. v. C & M Farming Ltd.*, [2004] EWHC (Comm) 121 (Eng.).

⁶⁷ *Id.* at [2004] EWHC (Comm) 121 [3] (Eng.).

⁶⁸ *Id.* at [2004] EWHC (Comm) 121 [6] (Eng.).

⁶⁹ *Id.* at [2004] EWHC (Comm) 121 [6]–[9] (Eng.).

⁷⁰ *Id.* at [2004] EWHC (Comm) 121 [12] (Eng.).

⁷¹ *Id.* at [2004] EWHC (Comm) 121 [62]–[71] (Eng.).

V. THREATENING FUNDAMENTALS

A. *The Consent Requirement*

An important requirement of international arbitration law is the requirement of consent to arbitrate by all parties. To identify the parties to an arbitration agreement, courts look at who consented to the agreement.⁷² Express consent is easily shown by a party's signature on a contractual document.⁷³ Binding non-signatories to arbitration agreements goes against this foundational requirement of express consent by forcing unwilling parties to arbitrate. As discussed above courts justify binding non-signatories by using theories to show implied consent. The problem is that court holdings have been inconsistent and the importance of party consent has often been cast aside.⁷⁴

The voluntariness of arbitration is a positive aspect of the process and makes the process more effective in the international arena. Because there is no uniform international law enforcing arbitration clauses, the voluntary nature of the process encourages parties to commit to arbitration and follow through with their obligations. Arbitration is a party's choice of dispute resolution. When a party to an agreement is able to dictate the terms, it will be more likely to follow those terms and abide by its decisions. It will take personal ownership of the terms to which it agreed. A signatory to an agreement containing an arbitration clause knows what to expect when a dispute arises and will not be forced into litigation. Instead, there will be a signed contract clearly stating what law will apply and how the problem will be resolved.

Another problem with binding non-signatories is that even if that party was substantially involved in the negotiation or performance of a contract, it does not mean the party would have agreed to the arbitration clause if it had been a signatory. Again, this raises the question of lack of consent. In an International Chamber of Commerce (ICC) award, the arbitral tribunal refused to bind a party to the arbitration clause explaining, "il n'est nullement établi que si celle-ci avait signé elle-même le contrat. . . , elle aurait accepté la clause compromissoire" ("it is not at all certain that if the non-signatory had signed itself the contract. . . , it would have accepted the arbitration clause").⁷⁵ While a party may bind itself to the obligations of a contract, the arbitration clause is a separate agreement that requires express consent.

⁷² HANOTIAU, *supra* note 35, at 8.

⁷³ *Id.* at 32.

⁷⁴ See Anthony DiLeo, *The Enforceability of Arbitration Agreements by and Against Nonsignatories*, 2 J. AM. ARB. 31, 72 (2003) (explaining that courts should not put policy goals favoring arbitration over consideration of whether the parties agreed to arbitrate).

⁷⁵ ICC award no. 2138 (1974) *quoted in* HANOTIAU, *supra* note 35, at 37 n.104.

If a party did not sign an agreement containing an arbitration clause, it likely did not agree to arbitrate in the event of a dispute.

There is also criticism of binding non-signatories based on the argument that everyone should be given the right to a fair trial if they so choose. Consequently, binding parties to an agreement that they did not agree to is a fundamental problem because it denies them that right. As noted earlier, according to arbitration principles, no one should be forced to arbitrate. The New York Convention supports this notion by requiring all arbitration agreements to be in writing.⁷⁶

B. *The New York Convention*

Article II of the New York Convention, an important treaty in the realm of international arbitration, requires that the arbitration treaty be in writing and signed by the parties.⁷⁷ To date, there are 144 signatories to the Convention.⁷⁸ Kofi Annan, former Secretary General of the United Nations, referred to the Convention as “one of the most successful treaties in the area of commercial law.”⁷⁹ He said, “[i]t has helped ensure fair treatment when disputes arise over contractual rights and obligations. . . . [W]ithout it parties are often reluctant to enter into cross-border commercial transactions or make international investments.”⁸⁰ The Convention has served as a guide for international commercial arbitration agreements and has provided more predictability in the law surrounding these agreements. An arbitral tribunal in an ad hoc award noted:

⁷⁶ United Nations Conference on International Commercial Arbitration, July 6, 1988, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Art. II, ¶ 2, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf [hereinafter UNCITRAL]; see Jean-Louis Delvolve, *Third Parties and the Arbitration Agreement*, at 19 ¶¶ 3–7, U.N. Sales No. E.99.V.2. (1988), available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYC Day-e.pdf>.

⁷⁷ UNCITRAL, *supra* note 76, at Art. II (“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. . . concerning a matter capable of settlement by arbitration.”)

⁷⁸ United Nations Commission on International Trade Law, *Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2008), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

⁷⁹ The Secretary-General, *Opening Address Commemorating the Successful Conclusion of the 1958 United Nations Conference on International Commercial Arbitration*, at 2, U.N. Sales No. E.99.V.2 (1988) available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>.

⁸⁰ *Id.*

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 Article II of the New York Convention.⁸¹

Despite the fact that states are still sovereign entities and the New York Convention lacks any international enforcement power, one of the purposes of the Convention was to enforce arbitration awards between parties of different countries.⁸² Considering so many states have signed and declared their willingness to incorporate the New York Convention into their own national laws, the Convention has proved effective.

While international organizations are gaining more power and influence, national laws still prevail. The lack of universal enforcement is not a fault of the New York Convention and international arbitration, but rather a reflection of the state structure. UNCITRAL published a Model Law in 1985, demonstrating its attempt to harmonize national laws on the arbitration of international commercial disputes.⁸³ States are encouraged to incorporate all or part of this law into their own national law in an effort to make arbitration law more universal.

C. *The Judicial Role in Arbitration*

As arbitration requires consent of the parties involved, there is no need for national laws to interfere with the process. If the parties have contractually consented to resolve disputes in arbitration, they are bound by that promise and cannot turn to courts to resolve the issue. However, there are times when court assistance is useful to en-

⁸¹ HANOTIAU, *supra* note 35, at 7.

⁸² See Jan Paulsson, Vice President, London Court of International Arbitration, *Awards set Aside at the Place of Arbitration*, at 24, U.N. Sales No. E.99.V.2 (1988) available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>.

⁸³ United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration at 1–42., U.N. Sales No. E.08.V.4 (1985) available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf; see HULEATT-JAMES *supra* note 2, at 25.

sure the enforcement of the agreement and the arbitral award.⁸⁴ For example, a court may be needed when the validity of the arbitration agreement itself is disputed. Other examples of when a court may be used are to assist in the appointment of an arbitrator, to remove an arbitrator for bias or misconduct, to provide assistance to arbitrators, and to establish whether an award is valid and final.⁸⁵ When an arbitration clause is challenged, the issue may go to the courts; however, if the contract itself is in dispute, the issue is heard by an arbitrator.⁸⁶

State courts must remember that party autonomy is one of the most important principles in international arbitration. The autonomy of the arbitration clause allows it to be treated separately from the rest of the contract. Parties must not only have the freedom to choose if they want to arbitrate, but also what laws will apply to the process and how the process will work.⁸⁷ Therefore, state courts should treat these agreements as separate from any contract involving a national party and only use the courts to enforce the arbitral award.

VI. CONCLUSION

International arbitration will continue to play an important role in commercial transactions among parties of different states because it offers flexibility and predictability. Arbitration is an effective way to resolve disputes outside national courts and preserve business relationships. As the Court held in *United Steelworkers v. Warrior & Gulf Navigation*, “[a]rbitration is the means of solving the unforeseeable by molding a system of private law for all problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.”⁸⁸

While arbitration is an effective means of dispute resolution, it will only remain successful if arbitration clauses survive judicial decisions and remain respected contractual agreements among consensual parties. Especially in commercial transactions, parties expect liability only when they breach an enforceable promise in a contract to which

⁸⁴ ANDREAS BUCHER, *Court Intervention in Arbitration*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY?* 29, 29 (Richard Lillich & Charles Brower eds., 1994).

⁸⁵ HULEATT-JAMES *supra* note 2, at 17.

⁸⁶ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006).

⁸⁷ Other decisions that need to be made include where the arbitration will take place and how the arbitrator will be appointed. See HULEATT-JAMES, *supra* note 2, at 16; *Balancing the Need for Certainty and Flexibility*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY?* 5 (Richard Lillich & Charles Brower eds., 1994).

⁸⁸ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

they were a party. This is a basic principle of contract law. Parties should not expect to be held liable for obligations contained in contracts to which they are not a party. One of the attractive aspects of international commercial agreements is predictability. If they lose this aspect, parties will be more hesitant to enter into these types of agreements in the future.

Binding non-signatories to arbitration agreements has not only brought national courts more into the arbitration process, it has questioned the principles of consent and severability which are at the core of international arbitration law. Parties are compelled to join arbitral proceedings without consenting, and arbitration clauses are being used to bind those third parties. Through these decisions and cases, courts and arbitrators have created a type of "common law of non-signatories."⁸⁹

With so many states now party to it, the New York Convention was a positive addition to arbitration law, and has moved countries a step closer to reaching international binding law on these issues. Alternative dispute resolution as a whole is growing as a means of handling international disputes, and arbitration leads this push. As globalization continues and national markets are drawn closer and closer together, this area of law will continue to move away from national laws and policies.

⁸⁹ DiLeo, *supra* note 74, at 75.