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That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine

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THAT WHICH MUST NOT BE NAMED: RATIONALIZING THE DENIAL OF U.S. COURTS WITH RESPECT TO THE GROUP OF COMPANIES DOCTRINE

By Alexandre Meyniel¹

Introduction.....	19
I. Taxonomy of Key Concepts Relating to the ‘Group of Companies’ doctrine: Welcome to ‘Non-Signatories 101.’.....	23
A. Non-Signatories versus Signatories & Non-Signatories versus Third Parties.	24
B. ‘Who Compels Whom’ To Arbitrate?.....	25
II. An International Assessment of The ‘Group of Companies’ Doctrine.	26
A. The Genesis: In the Beginning There Was <i>Dow Chemical v. Isover Saint Gobain</i>	26
B. Civil Law Jurisdictions.....	29
C. Common Law Jurisdictions.....	31
D. Putting an End to Voodoo Fears: The Group of Companies doctrine accomplishes nothing more than trigger a rebuttable inference that companies belonging to the same economic group are more likely to have consented.	31
III. U.S. Courts’ Traditional Refusal to Voice, Discuss, or Adopt the ‘Group of Companies’ Doctrine.	32
A. The U.S. Courts’ Refusal to Apply the Group of Companies doctrine.....	33
1. Contract law, Company law, and Agency law prevail.	34
2. The <i>Sarhank v. Oracle</i> Group Case.....	34
a. Facts and Holding.....	35
b. The Critique of <i>Sarhank v. Oracle</i>	36
B. The Sound of Silence: When U.S. Courts Refuse to Even Acknowledge the Invocation of the ‘Group of Companies’ doctrine.....	39
IV. The Growing Irrelevance of the ‘Group of Companies’ Doctrine.	42

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A.	The Natural Evolution of the ‘Group of Companies’ Doctrine under French Law: The Substantial Involvement Criterion Alone Remains.	42
B.	The Novelty of the ‘Group of Companies’ Doctrine Has Withered in Comparison With The U.S. Court’s Dynamic Contract Law Approach.	44
C.	The U.S. Contractual Approach Allows For A Broader Scope: Not Only Companies.	50
V.	Facing Denial: Not Recognizing ‘The Group of Companies’ Doctrine Does Not Render Arbitral Estoppel Any Less Intrusive.	50
A.	The Contractual Approach Violates the Consensual Construct on which Arbitration Relies.	51
B.	The Contractual Approach Violates the Modern Contract Bargain Theory of Consideration.	52
C.	Equitable Estoppel Can Trigger Violation of the Seventh Amendment of the U.S. Constitution.	53
	Conclusion	54

INTRODUCTION

The arbitral realm is one of consent. As one author puts it, “like consummated romance, arbitration rests on consent.”²

It is this alleged consensual romance that this Article will attempt to anatomize the ‘Group of Companies’ doctrine. More specifically, the present Article endeavors to rationalize the continued fears that surround the application of such a theory to enjoin non-signatories in the U.S.

Generally speaking, arbitration is a procedural device whereby two or more parties agree to entrust one or more private persons – the arbitrator or arbitrators – to resolve their dispute outside State judicial systems.³ The arbitrators derive their power not from the State, but from

² WILLIAM H. PARK, *Non-Signatories And International Arbitration*, in *THE LEADING ARBITRATOR’S GUIDE TO INTERNATIONAL ARBITRATION* 553, 553 (Lawrence W. Newman & Richard D. Hill eds.) (2d; 2008); see *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960) (“For 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.”).

³ FOUCHARD, GAILLARD, *GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* 8 (Emmanuel Gaillard & John Savage, eds., 1999).

the parties' private agreement.⁴ The entire procedure is thus predicated on the consensual decision of the parties to arbitrate their dispute.⁵ Respecting the principle of autonomy that innervates arbitration, U.S. courts treat an arbitration agreement as a "creature of contract,"⁶ thus entitling them to employ the full arsenal of contract law in determining the scope and validity⁷ of an arbitration agreement.⁸

It is in this apparently harmonious Eden of consensual justice that the issue of non-signatory⁹ arbitration arises.¹⁰ Indeed, if arbitration is a system that bathes itself in consent, and if a showing of consent generally requires some form of authenticated written provision,¹¹ how can entities be amenable¹² to arbitration proceedings when they have not signed an arbitration clause? And if they can, on what grounds?

These questions constitute the primary analytical matrix to assess the existence, legacy, and sufficiency of the 'Group of Companies' doctrine under U.S. law.

Simply put, the 'Group of Companies' doctrine is a legal theory that enables to enjoin non-signatory parties to arbitration. It arose out of

⁴ *Id. But see* ANDREA MARCO STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION 55 (Oxford University Press, Loucas Mistelis ed.) (2012) (explaining that followers of the jurisdictional theory of arbitration view "the source's of the arbitrator's powers as being the State rather than the parties' arbitration agreement").

⁵ *United Steelworkers*, 363 U.S. at 581.

⁶ *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 584 (3d Cir. 2007) (citing to *Metromedia Energy Inc. v. Enserch Energy Servs., Inc.*, 409 F.3d 574, 578 (3d Cir. 2005)).

⁷ This article will not use the term "arbitrability" to refer to the determination of the scope and validity of an arbitration agreement.

⁸ *See* *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 939 (1995) (articulating that courts should apply contract law principles to determine the issue of arbitrability [the validity and scope]).

⁹ The term non-signatory encompasses parties to an arbitration agreement who have not signed the arbitration agreement. They are not treated as third parties because the question is to decide whether they are to remain third parties to the agreement, and thus the arbitration, or become parties to the arbitration. *See* STAVROS L. BRELOUKAKIS, THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION 1-16 (Oxford University Press, 2011).

¹⁰ *See* Park, *supra* note 1.

¹¹ Federal Arbitration Act, 9 U.S.C. §2 (2010) (suggesting that the enforceability an agreement to arbitrate be contained in a written provision.

¹² This article uses the terms extension, enjoinder, or amenable to describe the same situation, that is, where a court or a tribunal must determine whether a non-signatory is party to an arbitration agreement even though he did not sign it.

the *Dow Chemical* ICC award¹³ where the tribunal held that,¹⁴ notwithstanding the distinct legal entities of its members, a group of companies constitutes one and the same economic reality.¹⁵ Moreover, through their involvement in the conclusion, performance, or termination of the contract, all the parties had consented to the non-signatories' participation in the arbitration agreement included in the underlying contract.¹⁶

This approach was both novel and somewhat revolutionary at the time. Applying principles of international commercial law – *lex mercatoria* – the arbitrators extended the scope *ratione personae* of an arbitration clause to the parent and sister subsidiary companies on the basis of three factors:¹⁷ first, the economic reality of the group;¹⁸ second, the consent of the parties;¹⁹ and third, their participation in the negotiation, performance, or termination of the contract.²⁰

However, U.S. courts have continuously refused to apply the 'Group of Companies' doctrine,²¹ articulating that the interpretation of an arbitration agreement's scope is a matter of contract law,²² and thereby circumscribing their analysis of binding non-signatories to traditional theories of contract, corporate, and agency law.²³ These theories are the

¹³ ICC Award No. 4131, (*Dow Chemical*), Interim Award of September 23 of 1982, 1983 J. DR. INT'L 899, note Yves Derains; SIGVARD JARVIN & YVES DERAINS, I RECUEIL DES SENTENCES ARBITRALES DE LA CCI: 1974-1985 146 (for the English version of the Award).

¹⁴ Professors Sanders, Goldmann & Vasseur.

¹⁵ ICC Award No. 4131, 1983 J. DR. INT'L at 904.

¹⁶ *Id.* at 901.

¹⁷ BRELOUKAKIS, *supra* note 8 at 149; see Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?* 2009 J. INT'L ARB. 647 (proposing that in addition to the economic reality that the group constitutes, there must be consent that the units of the company be taken as a whole, and an active participation in the conclusion, performance, or termination of the contract).

¹⁸ ICC Award No. 4131, 1983 J. DR. INT'L at 904.

¹⁹ *Id.* at 901.

²⁰ *Id.*

²¹ See *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005) (refusing to enforce an Egyptian award that applied the "Group of Companies" doctrine because a the extension of the arbitration agreement's scope to a non-signatory is only possible after a full showing of facts supporting an articulable theory based on American contract law).

²² *Fisser v. Int'l Bank*, 282 F.2d 231 (2d Cir 1960); *Thompson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995);

²³ *Fisser*, 282 F.2d at 231; *Thompson-CSF*, 64 F.3d at 776.

following: incorporation by reference,²⁴ assumption,²⁵ agency,²⁶ third-party beneficiary,²⁷ veil-piercing/alter-ego,²⁸ and estoppel.²⁹

Enjoining a non-signatory to arbitration therefore commands a careful inquiry of all the parties' intent. It is insufficient to stop at the mere written agreement because such a writing constitutes only a formal presumption of consent.³⁰ It is equally insufficient to stop at a party's refusal to arbitrate, be it the signatory's refusal to arbitrate with the non-signatory or the non-signatory's refusal to be drawn into an arbitration procedure by a signatory. The court or the tribunal's task is thus to find the true intent of the parties, however implied it might be, and determine whether the parties did consent, in any form, to arbitration. Both the 'Group of Companies' doctrine and the U.S. approach serve the purpose of identifying the parties' implied consent.

But do both achieve that purpose with the same effectiveness? What differences do these approaches take? And are these approaches exempt of critique? This Article will address all of these questions.

Part II provides a taxonomy of essential concepts that one should have in mind before entering the complexities of non-signatory issues. Part III then discusses the origins of the 'Group of Companies' doctrine, its current applications, and sheds light on the varied positions of foreign jurisdictions on the question.³¹ Part IV then explores the U.S. courts' continued refusal to adopt the 'Group of Companies' doctrine, favoring instead a stricter contractual approach.³² This section will also

²⁴ *Thompson-CSF*, 64 F.3d at 777.

²⁵ *Invista S.A.R.L. v. Rhodia, S.A.*, 625 F.3d 75, 84 (3d Cir. 2010).

²⁶ *Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F.2d 4 (1981).

²⁷ *E.I. Dupont de Nemours v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 195 (3d Cir. 2001).

²⁸ *Bridas S.A.P.I.C. v. Gv't of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006).

²⁹ *E.I. Dupont de Nemours*, 269 F.3d at 195; *Choctaw Generation Ltd. P'ship. V. Am. Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2008); *Thompson-CSF*, 64 F.3d at 778-79.

³⁰ For a general explanation of the formalistic component of arbitral consent, see ANDREA MARCO STEINGRUBER, *supra* note 3 at 105-08 (describing the different views on the importance and place written should bear in the determination of consent); see also JEAN-FRANÇOIS PLOUDRET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* para 274 (Sweet & Maxwell) (2007) (observing that the limitations of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards regarding form did not apply to the issue of non-signatories).

³¹ See discussion *infra* Part III.

³² See discussion *infra* Part IV.A.

pay attention to specific case law examples where the U.S. courts demonstrated such rejection.³³ Although the U.S. stance may appear more traditional, conservative, and enabling less flexibility, this Article demonstrates that the contractual theories developed by the U.S. courts have proved themselves perfectly sufficient to enjoin non-signatory companies that belong to the same group, or economic reality.³⁴ In fact, such theories have gone well beyond the seminal consensual predicate that justified compelling arbitration upon a non-signatory in the first place. Moreover, revealing the sufficiency of the U.S. contractual approach in the economic universe of companies, Part V questions the ‘Group of Companies’ doctrine’s growing obsolescence, further showing that the U.S. methodology has enabled a more generic and unified theory of non-signatory arbitration enjoyment.³⁵ There, this Article intends to demonstrate that the contractual approach taken by the U.S. Courts is in fact broader than the ‘Group of Companies’ doctrine, thus covering far more situations than the original perimeter envisioned under the Group of Companies doctrine.³⁶ Part VI finally examine the challenges the equitable estoppel mechanism poses in comparison to the ‘Group of Companies’ doctrine regarding fundamental principles of arbitration and U.S. law.³⁷

I. Taxonomy of Key Concepts Relating to the ‘Group of Companies’ doctrine: Welcome to ‘Non-Signatories 101.’³⁸

Before parachuting into the complexities of the ‘Group of Companies’ doctrine and the justifications invoked by U.S. courts for its non-application, it is first necessary to take a step back and explain the elementary concepts that underlie the non-signatory matrix. Providing a

³³ See discussion *infra* Part IV.B.

³⁴ See discussion *infra* Part V.

³⁵ See discussion *infra* Part V.

³⁶ See discussion *infra* Part V.

³⁷ See discussion *infra* Part VI.

³⁸ Used as an adjective, the term ‘101’ refers to the introductory material in a particular course (i.e. biology 101; economics 101; or algebra 101). <http://dictionary.reference.com/browse/101>.

concise definition to the term ‘non-signatory’ is no easy task.³⁹ In fact, it is perhaps best described when taking the comparative route and opposing non-signatories to signatories and then to third parties (A). In addition, this section will discuss the distinction that may occur depending on whom compels whom (B).

A. Non-Signatories versus Signatories & Non-Signatories versus Third Parties.

A signatory is an entity that has formally authenticated an arbitration agreement. Traditionally, signatories are presumed to be parties to the arbitration agreement. Indeed, by formally ratifying the arbitral instrument, the signatory is presumed to have fully consented to resolving its dispute through arbitration. Conversely, by not formally authenticating the arbitration agreement, the non-signatory is initially presumed to be a third party⁴⁰ to the arbitration.⁴¹ Yet, as William H. Park observes: “the expression [non-signatory] remains potentially misleading, suggesting that a lack of signature in itself reduces the validity of an arbitration agreement.”⁴²

Accordingly, the process whereby the tribunal inquires as to its scope *ratione personae* is that particular stage where it determines who the parties are. Are these parties limited to the signatories, or do they also encompass non-signatory entities? In doing so, the tribunal will have to ascertain whether the non-signatory has truly consented and is thus bound by the arbitration clause or whether such consent was not given and should not, as a third party, be amenable to the arbitral procedure. In other words, the extension of an arbitration agreement amounts

³⁹ One possible definition suggested by an author was “[E]xtension’ of an arbitration clause can suggest imposing a duty beyond the circle of those who have agreed to arbitrate.” WILLIAM H. PARK, *Non-Signatories and International Contracts: An Arbitrator’s Dilemma*, in *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 4 (Oxford University Press) (2009).

⁴⁰ See BRELOUKAKIS, *supra* note 8 at 3 (distinguishing between third parties *stricto sensu* and non-signatories on the basis that non-signatories are parties that have failed to sign an arbitration clause but remain bound by it, as opposed to third parties that have never expressed their consent nor their authentication).

⁴¹ See CA Paris, **22 mai 2008, note F.-X Train, Rev. arb.** 2008.735 (observing that the non-signatory is presumed a third party to the arbitration because he has not executed the arbitration agreement).

⁴² WILLIAM H. PARK, *Non-Signatories and International Contracts: An Arbitrator’s Dilemma*, in *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 8 (Oxford University Press) (2009).

to nothing more than reversing the presumption that a non-signatory is a third party to the arbitration agreement.⁴³

For purposes of this Article, a non-signatory party will be considered a party to the arbitration agreement as opposed to a third party.

B. ‘Who Compels Whom’ To Arbitrate?⁴⁴

Extension issues can be classified in a variety of ways, but one that is particularly pertinent and rarely discussed is the “Who Compels Whom” question.⁴⁵

Should a difference be drawn when (i) a signatory demands to arbitrate its claims with a non-signatory, or (ii) a non-signatory attempts compel arbitration against a signatory. In both instances, a non-signatory becomes bound to an arbitration agreement and an arbitral procedure. However, while in the first situation the non-signatory objects to the extension and refuses to be bound by the arbitration agreement, in the second situation, the non-signatory advances its own consent to arbitration as a basis for requesting arbitration of its claims against the signatory.

The first scenario could be accordingly viewed as a ‘passive non-signatory enjoinderment’ because the non-signatory does not take the initiative to enter the arbitral process but in fact resists it. He is active in his resistance, but passive in light of the arbitral process’ furtherance. The second scenario emphasizes the active role performed by the non-signatory to attempts to enter the arbitral process, and could thus be viewed as an ‘active non-signatory enjoinderment.’

It is generally believed that favoring active non-signatory enjoinderment is “easier to justify”⁴⁶ since it allows “a willing party to join an arbitral proceeding than the converse.”⁴⁷ Traditionally, this view stems

⁴³ See CA Paris, **22 mai 2008, note F.-X Train**, *Rev. arb.* 2008.735.

⁴⁴ See Bernard Hanotiau, *L’Arbitrage et Les Groupes de Sociétés*, 353 *GAZ. PAL.* 6, ¶32 (2002) (using the passive/active language not to refer to consenting non-signatories or non-consenting non-signatories, but to describe the enjoinderment of claimants as opposed to the enjoinderment of defendants). See WILLIAM H. PARK, *supra* note 1 at 578 (articulating that “arbitrators and judges often draw distinctions between what might be called ‘*consenting non-signatories*’ (which seek to arbitrate) and ‘*non-consenting non-signatories*’ (which resist arbitration)).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

from framing the issue through the non-signatory's point of view.⁴⁸ Yet, this analytical framework is vitiated by a profound pathology in that it forgets that with arbitration, 'it takes two to tango'. Accordingly, the same weight should be given to the signatory's consent as that of the non-signatory. It matters very little that a signatory may have authenticated an arbitration agreement if it never consented to entering into that specific arbitration with the non-signatory. Indeed, even though the signatory party may have agreed with another party to settle their dispute through arbitration, he did not give such consent to arbitrate at large against all claims non-signatories may have against him—however related these claims may be to the underlying contract in which the arbitration agreement is stipulated.

II. An International Assessment of The 'Group of Companies' Doctrine.

To better question the legacy of the 'Group of Companies' doctrine and the continuing mystifications that surround its implications, this section will first reiterate the *Dow Chemical* award's main facts (A), and then provide a rapid overview of both civil (B) and common law (C) practices of the 'Group of Companies' doctrine's application. Finally, the analysis will focus on rationalizing the voodoo-like fears that have haunted the 'Group of Companies' existence and legitimacy (D).

A. The Genesis: In the Beginning There Was *Dow Chemical v. Isover Saint Gobain*.

The 'Group of Companies' doctrine does not arise out of traditional common law or civil law contract principles.⁴⁹ In fact, though the 'Group of Companies' doctrine emphasizes the consensual aspect

⁴⁸ See *id. supra* note 42. But see Nima H. Mohebbi, *Back Door Arbitration: Why Allowing Nonsignatories to Unfairly Utilize Arbitration Clauses May Violate the Seventh Amendment*, 12 U. PA. J. BUS. L. REV. 555, 555 2009-2010 (arguing that by forcing signatories to arbitrate claims with non-signatories under the equitable estoppel theory could trigger a severe violation of the Seventh Amendment).

⁴⁹ Cf F.-X. Train, *Arbitrage et Action Directe: A Propos de l'Arrêt ABS du 27 Mars 2007*, 326 Gaz. Pal. 6, ¶ 4 (Nov. 22, 2007) ("En matière de transmission et d'extension *ratione personae* de la convention d'arbitrage, les règles matérielles du droit français sont directement inspirées des mécanismes du droit civil.") [in matters of the transmission or the extension *ratione personae* of an arbitration agreement, the substantives rules of French law are stem directly from civil law mechanisms].

of extending the arbitration agreement to non-signatories, the *Dow Chemical Tribunal's* vision of a group of companies as "one and the same economic reality" was both novel and alien to contract law.

The 'Group of Companies' doctrine originates from the Interim Award No. 4131 of the International Court of the International Chamber of Commerce (ICC). Dow Chemical Company was the parent company of three subsidiaries, two of which concluded contracts with the ISOVER Saint-Gobain containing ICC arbitration clauses. Both of these contracts provided that Dow Chemical France or any other subsidiary of the Dow Chemical Company would be able to make the deliveries, though only Dow Chemical France solely performed these deliveries. After several claims were brought against the Dow Chemical Group relating to the difficulties in regards to one of the products, Dow Chemical Company, Dow Chemical A.G., Dow Chemical Europe, and Dow Chemical France requested the commencement of arbitral proceedings pursuant to the clause contained in the agreements signed by Dow Chemical Europe and Dow Chemical A.G. The defendant objected, arguing that the Tribunal did not have jurisdiction over Dow Chemical Company and Dow Chemical France's claims because neither were signatories of the underlying contracts containing the ICC arbitration clauses.

The Tribunal made several novel findings.⁵⁰ First, in the absence of a choice of law by the parties, the severability principle commanded that the Tribunal determine the scope and effects of the arbitration clause by reference to the intent of the parties, as it appeared from the circumstances that surrounded the conclusion, performance, and termination of the contracts. But, most importantly, the Tribunal noted that usages

⁵⁰ Interim Award in ICC Case No. 4131 of 1982, *Dow Chemical France and others v. Isover Saint Gobain* (1984) IX YBCA 131 ("Considering, however, that in referring to the ICC Rules, the parties incorporated its provisions concerning the arbitral tribunal's authority to decide as to its own jurisdiction, which provisions do not refer to the application of any national law. The reference to French law could therefore concern only the merits of the dispute ... Considering 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 case relation to international arbitration should also take into account, usages conforming to the needs to international commerce, in particular, in the presence of a group of companies.").

conforming to the needs of international commerce should be taken into account, especially regarding group of companies. Accordingly, subjecting the defendant's objection to the conforming usages to the needs of international commerce, the Tribunal found that the non-signatory claimants could compel arbitration because their involvement in the conclusion, performance, or termination was sufficient to infer that all parties had intended them to be parties to the arbitration agreement. The Tribunal further developed this theory and stated "that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these proceedings...."

Consequently, the defendant brought an action to set aside the award under the former Article 1502 of the French Civil of Civil Procedure. The Paris Court of Appeals rejected the action and enforced the award.

The French Courts have undoubtedly been the most favorable to the 'Group of Companies' doctrine. One decision from the Court of Appeals of Pau even went as far as declaring the doctrine a legal rule.⁵¹ Other ICC tribunals have also favored the "Group of Companies" doctrine.⁵² However, a closer reading of ICC awards shows that the rationale underlying the extension of the arbitration agreement to non-signatories is more closely affiliated to the requirement of consent, rather than the economic reality of the group. This distinguishes such a rationale from the sense of automatic extension through the notion of implied consent,

⁵¹ Cour d'appel [regional court of appeal] [CA] Pau, (*Sponsor A.B. v. Lestrade*), Nov. 26, 1986 (Fr.).

⁵² ICC award case No. 11405 of 2001, interim award of 29 nov. 2001; ICC case No. 8385 of 1995.

which is triggered by the mere existence of a group that participated in the conclusion, performance, or termination of the contract.⁵³

B. Civil Law Jurisdictions⁵⁴

While civil law jurisdictions tend to have a similar approach to the determination of consent, they greatly differ on the importance that form should have with respect to showing *arbitral* consent.⁵⁵ France, as a system entirely predicated upon the principle of *solo consensu*, requires little to no form for purposes of contractual validity. Because the arbitration agreement is a contract, the same rule applies. Swiss law is more form-driven than France, but has progressively relaxed its formalistic requirement with respect to non-signatory issues.⁵⁶ Germany, on the other hand, continues to adhere strictly to the writing requirement⁵⁷ and the principle of privity.⁵⁸ Finally, Brazil, which takes from both Napoleonic and Germanic contractual visions, grants a large autonomy to the simple exchange of consents and remains less formalistic.

The manner in which consent can be evidenced lies at the heart of the ‘Group of Companies’ doctrine since here, the consent is tacit

⁵³ See ICC Case No. 6519 of 1991, JDI p. 1065 (1991) (allowing joinder of a joint venture vehicle on the basis that it had participated in the negotiations leading to the agreement and was at heart of these negotiations); ICC Case 7604 and 7610 of 1995 (joining the non-signatory because of an express declaration that all disputes arising out of that contract should be resolved through arbitration, which made in the records of a lawsuit being conducted in parallel to the arbitration); see ICC Award Case 10510 of 2000 (asserting jurisdiction over the non-signatory because of its active role in the execution, performance, and termination of the contract, as well as the direct interest it had in the agreement and its litigation); see also ICC Award No.11405 of 2001 (allowing extension to a claimant requested to be joined, even though it was denied for two respondents who had been involved in negotiations in personal capacity and not as corporate representatives).

⁵⁴ For purposes of this article, we will only look at France, Switzerland, Germany, and Brazil.

⁵⁵ See Bernard Hanotiau, *Consent to Arbitration: Do We Share A Common Vision?* 27 *Arbitration International* 539, 546 (2011).

⁵⁶ See DFT 129 III 727 (4P.115/2003), ASA Bull 2/2004, 364 389, with case notes by J.F. Poudret and P. Habegger (articulating that article 178(1) of the Swiss Private International Law no longer applied to extension issues since such a question was one of scope *ratione personae* and not one of initial validity and existence).

⁵⁷ Section 1031 of the German Civil Code of Procedure (ZPO).

⁵⁸ See Hanotiau, *supra* note 53 at 546.

and implied.⁵⁹ Accordingly, only jurisdictions that recognize implied consent by conduct would be susceptible to incorporate the ‘Group of Companies’ doctrine within their legal corpus.

As discussed above, France remains the sole forum where the doctrine has been actively enforced. In Switzerland, although the ‘Group of Companies’ was never entrenched *per se*,⁶⁰ the Federal Tribunal has held that it was not fundamentally opposed to the idea so long as it embodied a true common intention of the parties. Moreover, its holding in *X S.A.L., Y S.A.L. and A v. Z S.A.R.L.* is of particular relevance since the Swiss Court referred to the principles of *lex mercatoria* to extend the arbitration clause to the non-signatory.⁶¹ Invoking the Group of Companies doctrine is only a small step further considering that Switzerland may no longer object to employ *lex mercatoria* principles to substantiate its analysis.

Although extension has never been argued on the basis of the ‘Group of Companies doctrine’ in Germany, “it is generally agreed by scholars that companies belonging to a group cannot be bound by arbitration agreement concluded by other members of the same group, even if they have participated in the negotiation, performance, and/or termination of the agreement.”⁶²

Finally, while Brazil has not specifically upheld the ‘Group of Companies’ doctrine, a very recent case suggests that it would not be opposed to the enforcement of such a doctrine within its legal system.⁶³

⁵⁹ Brekoulakis, *supra* note 8 at 152.

⁶⁰ Judgment of January 29, 1996, ASA Bul. 1996.496.c.5-7; *cf* Poudret & Besson, *supra* note 2 (observing that this judgment “rejected an application of the group of companies doctrine, which should be viewed with reluctance and applied only if the other party had been deceived by the appearances created.”). *But see*

⁶¹ *See* DFT 129 III 727 (4P.115/2003), ASA Bull 2/2004, 364 389 (where tribunal applied Swiss law and the principles of *Lex Mercatoria* in determining that a non-signatory private investor was a party to an arbitration clause contained in two contracts due to his substantial involvement in the management of respondent signatories as well as in the overall oversight of the real estate project).

⁶² Hanotiau, *supra* note 53 at 548 (citing Otto S. Sandrock, *Extending the Scope of the Arbitration Agreement to Non-Signatories*, in ASA Special Series no 8, THE ARBITRATION AGREEMENT at 165 (1994)).

⁶³ *See* LEONARDO DE CAMPOS MELO, EXTENSAO DA CLAUSULA COMPROMISSORIA ET GRUPOS DE SOCIEDADES (Forense 2013) (suggesting that the *Trelleborg* case only pushes further the inference that Brazilian law would not be opposed to the ‘Group of Companies’ doctrine).

C. Common Law Jurisdictions.⁶⁴

While both the English and the U.S. courts are in accordance in their refusal to extend an arbitration agreement on the basis of the ‘Group of Companies’ doctrine,⁶⁵ their positions diverge with respect to extension more generally. As later explored in this article,⁶⁶ U.S. courts are generally more inclined to recognize the extension of an arbitration agreement to non-signatories. On the other hand, English law retains a touch of conservatism. First of all—and similar in this respect to the U.S.—English law refuses to acknowledge the existence of the ‘Group of Companies’ doctrine. However, provided that the law applicable to the arbitration agreement recognizes the ‘Group of Companies’ doctrine, English courts would have no issue with enforcing such an award.⁶⁷

D. Putting an End to Voodoo Fears: The Group of Companies doctrine accomplishes nothing more than trigger a rebuttable inference that companies belonging to the same economic group are more likely to have consented.

An author recently proposed to do away with the ‘Group of Companies’ doctrine,⁶⁸ suggesting a strict adherence to traditional legal

⁶⁴ For purposes of this article, we will only refer to English law and U.S. law.

⁶⁵ In England, the leading case that refused the Group of Companies doctrine is *Peterson Farms Inc. V. C&M Farming Ltd* EWHC at 121 (2004). In the U.S. see *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005) (refusing to enforce an Egyptian award that applied the ‘Group of Companies’ doctrine because the extension of the arbitration agreement’s scope to a non-signatory is only possible after a full showing of facts supporting an articulable theory based on American contract law).

⁶⁶ See *supra* Section IV (establishing that extension of an arbitration agreement to non-signatories is very much possible in the U.S., so long as the extension is conducted under traditional principles of contract law).

⁶⁷ See Sarita Patil Woolhouse, *Group of Companies Doctrine and English Arbitration Law*, 20 *ARBITRATION INTERNATIONAL* 435, (2004) (narrating that had Arkansas law—the main contract’s governing law, which the Court found also applicable to the arbitration agreement—recognized the existence of “The Group of Companies” doctrine, the outcome would have probably been different).

⁶⁸ Hanotiau, *supra* note 53 at 545 (expressing that “the so-called doctrine is merely an awkward, inappropriate expression for the act 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 dynamics in terms of organization, control, common participation in projects, the interchangeability of the members within the group, etc.”)

concepts and mechanisms since they are perfectly able to address modern international commercial activities.⁶⁹

The ‘Group of Companies’ doctrine revolves almost entirely upon the notion of consent. Although it may be derived from *lex mercatoria* and substantive rules of international arbitration, it is deeply anchored in the consensual construct. It only operates to effectuate a presumption that group of companies tend to act as a composite economic entity, and where such a situation occurs, it should affect the scope of an arbitration agreement. Yet, that presumption does not operate to negate the requirement for consent, and absent such a finding, the ‘Group of Companies’ doctrine will have no effect to bind non-signatories.

III. U.S. Courts’ Traditional Refusal to Voice, Discuss, or Adopt the “Group of Companies’ Doctrine.

U.S. Courts have continuously refused to apply the ‘Group of Companies’ doctrine to bind a non-signatory,⁷⁰ preferring instead to have recourse to traditional concepts of contract law.⁷¹ This rationale stems from its national policy, which favors the enforcement of arbitration agreements as contracts.⁷² Yet, as we will see, the U.S. has never discussed the ‘Group of Companies’ doctrine, nor uttered its name, even in instances where the parties had raised claims under the ‘Group of Companies’ doctrine. This state of denial is all the more intriguing as U.S. courts continue to embrace the equitable estoppel theory pursuant

⁶⁹ *Id.*

⁷⁰ *Fisser v. Int’l Bank*, 282 F.2d 231 (2d Cir 1960); *Thompson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773 (2d Cir. 1995); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005), *Bridas S.A.P.I.C. v. Gv’t of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006); *Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F.2d 4 (1981).

⁷¹ *Fisser v. Int’l Bank*, 282 F.2d 231 (2d Cir 1960); *Thompson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773 (2d Cir. 1995); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005), *Bridas S.A.P.I.C. v. Gv’t of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006).

⁷² *Certain Underwriters at Lloyd’s London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 584 (3d Cir. 2007).

to which a non-signatory can compel a signatory to arbitrate its claim in arbitration on a non-consensual basis.⁷³

This section will begin by discussing that refusal and the instances that may illustrate it (A). The analysis will then provide a comparison between equitable estoppel and the ‘Group of Companies’ doctrine, which will show that the former is a far more intrusive method upon the parties’ consent to arbitrate (B). It will also demonstrate that the ‘Group of Companies’ doctrine is not as flexible as some argue it to be. In light of this analogy, the reader will begin to understand that the novelty that embodied the ‘Group of Companies’ doctrine have partially withered, and as such, there appears no reason for the U.S. to refuse its enforcement.

A. The U.S. Courts’ Refusal to Apply the Group of Companies doctrine.

This section will set itself to explain (1) what rules govern non-signatory enjoinder in the U.S. and how this precludes the application of the ‘Group of Companies’ doctrine, as well as (2) discuss two specific instances where the court rejected the enforcement of such doctrine. Overall, we will see that U.S. courts respect a ‘sound of silence’ rule when it comes to the ‘Group of Companies’ doctrine and will negate in any manner so as to not even utter the term, sometimes even refusing to respond to the parties claims.

Accordingly, the courts have never openly discussed the scope and potential applicability of the doctrine within the ambit of U.S. law, thus leaving litigants in a fog of disguised justifications as to why its invocation should be precluded.

⁷³ *Joliat v. Majella Found.*, 3:12-CV-00551 AWT, 2013 WL 495284 (D. Conn. Feb. 6, 2013). (citing *Ross v. Am. Express Co.*, 478 F.3d 96 (2d Cir. 2007) and acknowledging that “this Court had recognized a number of common law principles of contract law that may allow nonsignatories to enforce an arbitration agreement, including equitable estoppel ... Under principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where a careful review of the ‘relationship among the parties, the contracts they signed..., and the issues that had arisen’ among them discloses that the ‘issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed”). Such standard omits any reference to the consent, intent, or volition.

1. Contract law, Company law, and Agency law prevail.

U.S. courts have persistently rejected the ‘Group of Companies’ doctrine, preferring a constant and rigorous application of common law contract, corporate, and agency principles.⁷⁴ Following its national policy that favors the enforcement of arbitration agreements as a common law contracts,⁷⁵ U.S. Courts have kept to the same instruments contract law offers. These principles are the traditional defenses that parties may raise to create a contract where the requirements for formation have not been met or bind a party to a contract she was not initially a party to. These principles are those of incorporation, assumption, agency, third-party beneficiary, corporate veil piercing/alter-ego, and estoppel.⁷⁶ Applying these principles, the courts have found non-signatories amenable to arbitration proceedings.

In *Thompson-CSF*, the court recognized five theories under which non-signatories “may be bound,” though none were, in that case, applicable or sufficient to render Thompson amenable to the arbitration agreement of its subsidiary.⁷⁷ The court further discussed in detail why Thompson was not subject to the arbitration proceedings under the theory of incorporation,⁷⁸ assumption,⁷⁹ agency,⁸⁰ veil piercing/alter-ego,⁸¹ or estoppel.⁸²

Thompson-CSF therefore serves as the analytical platform from which enjoinder issues should be assessed under the US law.

2. The Sarhank v. Oracle⁸³ Group Case.

A thorough discussion of the *Sarhank* decision must encompass (i) a descriptive assessment of its facts and holding, but also (ii) an objective critique of the grave and inconsistent legal reasoning it employed.

⁷⁴ See *supra* note 36.

⁷⁵ *Supra* note 5.

⁷⁶ *Supra* notes 23-29.

⁷⁷ *Thompson-CSF*, 64 F.3d at 776.

⁷⁸ *Id.* at 777.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 777-78.

⁸² See *id.* at 778-79 (observing that Thompson, as non-signatory, could not bound to its subsidiary’s arbitration agreement under direct benefit estoppel, nor under closely intertwined estoppel).

⁸³ *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005).

a. Facts and Holding

In *Sarhank*, the Second Circuit had to rule on a lower court's decision that granted enforcement to an Egyptian award.⁸⁴ In this case, two parties, Oracle Group and Sarhank, entered into a contract that contained a clause providing for arbitration in accordance with the laws of the Republic of Egypt.⁸⁵ Although Oracle Group was not a signatory to the arbitration agreement, Sarhank sought to compel arbitration against it.⁸⁶ The Tribunal found that Oracle Group was bound by the arbitration agreement because "despite...their having separate juristic personalities, subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in any deal either is a party."⁸⁷ The Tribunal further held that Oracle Group and Oracle Systems were jointly and severally liable for the amount of \$1,902,573.⁸⁸ Sarhank then sought enforcement of the award before the U.S. District Court of the Southern District of New York, which it granted.⁸⁹

Oracle Group appealed the decision to the Second Circuit Court of Appeals, which found that Oracle was not bound by the arbitration agreement because Sarhank had failed to show that the former had intended to arbitrate such claims under American contract or agency law.⁹⁰ First of all, the court began its analysis by confirming that it had subject-matter jurisdiction to hear the claim pursuant to 9 U.S.C. § 202, 203. The court then went on to determine what was the proper standard of review when assessing whether a foreign award was in violation of article V of the 1958 New York Convention.⁹¹ The court listed two grounds under which it would review the award: (i) whether the dispute was arbitrable;⁹² and

⁸⁴ *Id.* overturning *Sarhank Group v. Oracle Corp.*, No. 01-civ-1295, 2002 WL 31268635 (S.D.N.Y. October 8, 2002), slip op.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 662.

⁸⁸ *Id.* at 658.

⁸⁹ *Sarhank Group v. Oracle Corp.*, No. 01-civ-1295, 2002 WL 31268635 (S.D.N.Y. October 8, 2002), slip op at 7 ("the Arbitration Award in its entirety is AFFIRMED and Respondent's Motion to Vacate the Arbitration Award is DENIED.").

⁹⁰ *Id.* at 662.

⁹¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 U.N.T.S. 3; 21 U.S.T. 2517; T.I.A.S. No. 6997, *entered into force* 7 June 1959.

⁹² *Sarhank*, 404 F.3d at 661 (citing *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Ind.*, 508 F.2d 969, 974 (2d Cir.1974)).

(ii) whether the award is contrary to American public policy.⁹³ On this matter, U.S. jurisprudence has consistently upheld the applicability of U.S. federal law to determine these two issues. Since U.S. law allocates the determination of arbitrability to the courts,⁹⁴ the court then reasoned that it was competent to determine whether the dispute was arbitrable (i.e. whether Oracle had consented to arbitrate and should have been enjoined as a party).⁹⁵ From there, the court observed that, under U.S. law, the extension of an arbitration clause to a non-signatory party could only be effectuated through the mechanisms of contract and agency law.⁹⁶ The court concluded that “[since] [i]t is American federal arbitration law that controls [a]n American non-signatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law.”⁹⁷

In vacating an award that successfully applied the ‘Group of Companies’ doctrine on the grounds that federal arbitration law mandated an inquiry of arbitrability under domestic principles of contract law or agency law, the Second Circuit only intensified the U.S. courts’ rejection of the ‘Group of Companies’ doctrine.

b. The Critique of *Sarhank v. Oracle*.

What is perhaps most surprising in the *Sarhank* holding is the complete disregard the Court of Appeals for the Second Circuit had for the parties’ express choice-of-law. Indeed, the parties had specifically opted for Egyptian law and yet the court completely ousted that factor from its analysis. This Houdini-like stunt should not go unnoticed as it quite evidently violates the principle of autonomy that supports arbitration practice. The only possible explanation to justify such an outcome would be to construe the entire decision as a public policy exception under Article V of the New York Convention—seemingly expressed when the court stated that “Federal arbitration law controls in deciding this issue [the

⁹³ *Sarhank*, 404 F.3d at 661 (citing *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l. Inc.*, 198 F.3d 88, 96 (2d Cir.1999)).

⁹⁴ *First Options, Inc. v. Kaplan*, 514 U.S. 938, 943 (holding that arbitrability may be determined by the tribunal if the parties clearly and unmistakably stipulate that the question of arbitrability in itself should be determined by the arbitrators).

⁹⁵ *Sarhank*, 404 F.3d at 661.

⁹⁶ *Id.*

⁹⁷ *Id.*

issue of whether enforcement of the arbitral award would be contrary to American public policy].”⁹⁸

However, if the court really intended to review the award under the public policy exception, it should have provided a more detailed and thorough analysis, especially since the public policy exception should be reviewed strictly. Its first responsibility should have been to conduct a full analysis under the applicable law, here Egyptian law, and only then examine whether that result was contrary to American public policy. The short cut taken by the court created confusion as it failed to articulate and solidly justify its foundations.

In fact, the court’s only legal basis in applying its own domestic law here was to state the question of arbitrability as one of public policy, which meant it should be resolved according to American law. Such a ruling is not only harsh but profoundly absurd—especially in light of the strong national policy that the U.S. Supreme Court delineated in *Sherk v. Alberto-Culver Co.* towards international arbitration.⁹⁹

Moreover, there is a profound incoherence to the incorporation of arbitrability within American public policy. Determining arbitrability amounts to nothing more than answering the question of whether the parties consented to arbitration.¹⁰⁰ Arbitrability thus echoes the civil law principle of validity, and an arbitration agreement is not valid if the parties have not consented to arbitrate. Article V (a) protects the validity of the arbitration agreement in allowing the parties to challenge the enforcement if the arbitration agreement is invalid (i.e. non-arbitrable). Specifically, it states:

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 no valid under the law to which the parties have subjected it or, failing**

⁹⁸ *Sarhank*, 404 F.3d at 661.

⁹⁹ *Sherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (explaining that “[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.”).

¹⁰⁰ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 79 (noting that “the question whether parties have submitted a particular dispute to arbitration, [is] i.e. the ‘question of arbitrability’”).

**any indication thereon, under the law of the country
where the award was made** (emphasis added).¹⁰¹

Therefore, Article V(a) indisputably mandates that any review of the validity and scope of the arbitration agreement to be conducted under the law chosen by the parties, or, in the event that the parties have not expressly stipulated any choice of law, the law of the seat.¹⁰² Here, the Court of Appeals for the Second Circuit quite clearly by-passed such an obligation, and instead chose to incorporate the issue of validity (i.e. arbitrability) within the public policy exception protected under Article (2)(b).¹⁰³

Accordingly, why incorporate the issue of arbitrability within the public policy exception when the Convention already provides for such a ground of non-enforcement—if not only to impose its own domestic law, dispose of the parties’ choice of law, and prevent the ordinary effect of the ‘Group of Companies’ doctrine? In sum, the *Sarhank* decision created a redundancy in the U.S. New York Convention regime¹⁰⁴ by making the question of validity a ground of non-enforcement under the public policy question, and therefore allowing itself to review the validity and scope of the arbitration agreement under its own laws, and not under the chosen law by the parties—which Article V(a) requires.

Thus, a combined reading of both *Thompson-CSF* and *Sarhank* show that U.S. courts have strictly kept to domestic principles of contract to determine whether a non-signatory should be bound under an arbitration agreement.

¹⁰¹ Article V(a), Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

¹⁰² *Id.*

¹⁰³ Article V(2)(b), Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

¹⁰⁴ Austin I. Pullé, *Enforcing Foreign Arbitral Awards Against Non-Signatories: A Plea for Strict Scrutiny*, 16 ASIA PAC. L. REV. 177, 188 (2008) (commenting that “Prakash J disapproved of this decision. She faulted the court expanding the ambit of public policy exception in the New York Convention and observed that the court ‘effectively held that it was entitled to ignore the parties’ choice of law and apply American law to the determination of whether a party was bound by the arbitration agreement.”).

B. The Sound of Silence: When U.S. Courts Refuse to Even Acknowledge the Invocation of the ‘Group of Companies’ doctrine.

What should also strike any careful reader assessing the place for the ‘Group of Companies’ doctrine in U.S. arbitral jurisprudence is the absolute inexistence of any sort of discussion by the courts. Although it has often been invoked, raised, and argued quite extensively by the parties involved in their submissions, U.S. courts not only refuse its application, but go further by refusing to respond to such claims, and thereby negate its existence entirely. The *Sarhank* holding discussed above is one such case where the court refused to even acknowledge the tribunal’s application of the ‘Group of Companies’ doctrine. It referred to Egyptian law but could not bring itself to utter the words “Group,” “of,” “Companies,” and “doctrine.”¹⁰⁵

The *Sarhank* holding does not stand alone in negating the existence of the ‘Group of Companies’ doctrine. Indeed, the *Marathon Oil Company et al., v. Ruhrgas, A.G.* dispute also illustrates the courts’ ‘sound of silence’ phenomenon. In *Marathon Oil*, the dispute arose out of a series of both written and oral agreements between Marathon Oil Company, Marathon International Oil Company, Marathon Petroleum Norge A/S (together “Marathon”), and Ruhrgas’, a German gas supplier, concerning the development and operation of gas fields in Norway.¹⁰⁶ The claims arose out of alleged tortious interference with Marathon Petroleum Company Norway (“MPCN”)’s stake in the Heimdal natural gas field in the North Atlantic. The claims alleged that MPCN had been duped in entering into the projects when Ruhrgas allegedly never intended to pay such premium prices.

¹⁰⁵ *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005). (refusing to qualify the findings of the arbitral tribunal as an operation of the Group of Companies’ doctrine when citing the arbitral tribunal’s findings on jurisdiction, which provided that “despite ... their having separate juristic personalities, subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in any either is a party thereto provided that this is brought about by the contract because contractual relations cannot take place without the consent of the parent company owning the trademark by and upon which transactions proceed.”).

¹⁰⁶ *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315 (5th Cir. 1997), *rehearing en Banc granted by Marathon Oil Co. v. Ruhrgas A.G.*, 129 F.3d 746 (5th Cir. 1997) and *vacated en Banc by Marathon Oil Co. v. Ruhrgas A.G.*, 145 F.3d 211 (5th Cir. 1998).

Rurghas objected to the Texas state court's jurisdiction and timely removed the case invoking federal jurisdiction under diversity of citizenship, federal question, and 9 U.S.C. § 205.¹⁰⁷ Once removed, Rurghas filed a motion to stay the proceedings pending the ongoing arbitration in Europe. Indeed, Rurghas argued that all claims brought by Marathon concerned an agreement that was covered by an arbitration clause stipulated in the MCPN and Rurghas's sale agreement. Since Marathon was not a signatory to that agreement, it was not entitled to circumvent the arbitration clause and raise claims covered by the clause.¹⁰⁸ At the same time, Rurghas also filed a motion for lack of personal jurisdiction. The district court found in favor of Rurghas on the count of lack of personal jurisdiction but dismissed all over motions, including its demand for a stay pending arbitration. Following that decision, Rurghas filed a motion for reconsideration requiring the court to abate all proceedings pending the completion of the arbitration in Europe, which the court denied.

The parties then formed an appeal to the Fifth Circuit. On June 10, 1997, the Fifth Circuit rendered its decision finding that it did not have subject matter jurisdiction on either of the grounds raised by Rurghas: (i) diversity of citizenship; (ii) federal question; or (iii) New York Convention arbitration agreement under 9 U.S.C. § 205. The court refused to uphold federal subject matter jurisdiction since the requirement of a valid and existing arbitration agreement pursuant to 9 U.S.C. § 205 was not met in the present instance because Marathon was not a signatory to the arbitration clause.¹⁰⁹ Indeed, absent an agreement to arbitrate, the court was not entitled to exercise jurisdiction on the basis of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹¹⁰ The Fifth Circuit court concluded that the district court had lacked subject matter jurisdiction, vacated its judgment, and remanded the case back to the 152nd Judicial District Court of Harris County, Texas.

¹⁰⁷ See *Marathon Oil Co.*, 115 F.3d at 317 (requesting removal to a federal district court pursuant to diversity of citizenship, federal question, and 9 U.S.C. § 205).

¹⁰⁸ *Id.* at 320.

¹⁰⁹ *Id.* at 320 (“the issue is whether any *relevant* arbitration agreement exists between the parties to this litigation, a necessary predicate for federal jurisdiction under 9 U.S.C. § 205”).

¹¹⁰ *Id.*

Certainly due to the cases' high profile, a majority of judges from the Fifth Circuit filed a motion to rehear the appeal *en banc*.¹¹¹ The *en banc* decision was rendered by the Fifth Circuit on June 22, 1998.¹¹²

In its brief for defendant/appellee and cross appellant,¹¹³ Marathon admitted to transparently attempting to circumvent the effect of the arbitration clause stipulated in the sale agreement between MCPN and Ruhrgas.¹¹⁴ In other words, Marathon had brought suit to the Texas courts to bypass the arbitration agreement, or in the alternative, have the court dismiss the claims and compel Ruhrgas to arbitrate Marathon's claims.¹¹⁵ Marathon argued that U.S. law favored such a construction because Ruhrgas intentionally and consciously exploited the sale agreement, including its arbitration provision, to seek benefits under the sale agreement.¹¹⁶ Alternatively, Marathon made a specific argument under the 'Group of Companies' doctrine.¹¹⁷ Invoking *Sherk v. Alberto-Culver Co.*¹¹⁸ to support its contention that the 'Group of Companies' doctrine was entirely applicable and relevant in the present case.¹¹⁹ Marathon even found additional support in the Republic of Germany's *Amicus Curiae* Brief where it "specifically acknowledged the validity of the doctrine and its applicability to this case."¹²⁰

¹¹¹ *Marathon Oil Co. v. Ruhrgas A.G.*, 129 F.3d 746 (5th Cir. 1997) ("[A] majority of judges in active service having determined, on the Court's own motion, to rehear this case *en banc*.").

¹¹² *Marathon Oil Co. v. Ruhrgas A.G.*, 143 F.3d 211 (5th Cir. 1998).

¹¹³ Brief for Defendant/Appellee and Cross-Appellant at 7, *Marathon Oil Co. v. Ruhrgas A.G.*, 143 F.3d 211 (5th Cir. 1998) (No. 96-20361).

¹¹⁴ *Id.* ("[t]he assertions of claims here by [marathon]—and not MPCN—is a transparent attempt to circumvent the HGSA's arbitration clause").

¹¹⁵ *Id.* ("[e]ven if the district court had personal jurisdiction over Ruhrgas, those orders were erroneous because Plaintiffs [i.e. Marathon] are bound to arbitrate their claims under both United States and international legal principles.").

¹¹⁶ *Id.* at 8 (arguing that it should not forum-shop the contract and was forced to submit to arbitral jurisdiction since the claims it made were covered by an arbitration agreement.").

¹¹⁷ *Id.* ("even if [Marathon] were not bound to arbitrate under U.S. legal principles, **they are bound under the "group of companies" doctrine** that has been applied international transactions.") (emphasis added).

¹¹⁸ *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-19 (1974).

¹¹⁹ Brief for Defendant/Appellee and Cross-Appellant at 39, *Marathon Oil Co. v. Ruhrgas A.G.*, 143 F.3d 211 (5th Cir. 1998) (No. 96-20361).

¹²⁰ *Id.*

Ruling *en banc*, the Fifth Circuit did not pay attention to the arguments raised by Marathon regarding the interpretation that should be made of 9 U.S.C. § 205 and how the ‘Group of Companies’ doctrine was perfectly compliant and effective in doing so. The dissent recognized this majority’s disregard and briefly touched on it. It held that: “[f]urthermore, considering the mountain of amicus filings before our court criticizing the panel’s interpretation of § 205, the plaintiffs’ opposition to federal subject matter jurisdiction was a difficult one to address, implicating novel questions of law in this circuit.”¹²¹

Ultimately, the Court never addressed the issue or the claims raised by Marathon. This shows yet again the profound denial that affects U.S. courts when it comes to the ‘Group of Companies’ doctrine.

IV. The Growing Irrelevance of the ‘Group of Companies’ Doctrine.

The ‘Group of Companies’ doctrine’s core advantages are becoming obsolete. This progressive obsolescence touches the doctrine’s semantics, scope, and conditions and shows that the contractual approach taken by the U.S. courts enables a broader scope without truly imposing more narrow consensual requirements. We will begin by reviewing that even in France, homeland to the ‘Group of Companies’ doctrine, the theory has become a little outdated in light of modern formulas established by the *Cour de Cassation* (A). We will then compare the ‘Group of Companies’ doctrine to the U.S. approach, especially with arbitral estoppel, and see that the U.S. approach has the ability to cover more varied situations, some where consent is particularly tenuous (B).

A. The Natural Evolution of the ‘Group of Companies’ Doctrine under French Law: The Substantial Involvement Criterion Alone Remains.

France adopts a very peculiar methodology when it comes to non-signatories. Certainly inspired at first by the ‘Group of Companies’ doctrine, the *Cour de Cassation* progressively established a rule that went beyond the contextual limitations imposed by the necessity of an economic group.

¹²¹ *Id.*

Indeed, in the cases *Korsnas Marma*,¹²² *Orri*,¹²³ and *Cotunav*,¹²⁴ the Paris Court of Appeals had crafted the following rule:

the arbitration clause stipulated within an international agreement has a validity and efficacy of its own, which accordingly commands extending its application to parties directly involved in the performance of the contract and all related disputes if it is shown that their contractual relation and their activities can trigger the presumption that all parties accepted the arbitration clause, the existence and scope of which were known to the parties, even though they were not signatories.

In *Société Alcatel Business Systems S.A. et al. v. Société Amkor technology et al.*,¹²⁵ the *Cour de Cassation* established a new rule concerning extension of an arbitration agreement to non-signatories. It held that “**the effect of an international arbitration agreement extends to parties directly implied in the performance of the contract and all related disputes**” (emphasis added). This new definition contrasts severely with the longer enunciation above in more than one aspect. Firstly, it removes any reference to the arbitration agreement’s own validity and efficacy. Secondly, the new language does away with the presumed consent as a condition to the extension. The debate as to whether this change truly affects the consensual nature of arbitration remains unknown, since scholars on both sides of the spectrum are arguing for and against it.¹²⁶ The personal view taken by this Article is that the *Cour de Cassation* did not, in *ABS v. Amkor*, attack the consensual precondition to extension by removing “if it is shown that their contractual relation and their activi-

¹²² CA Paris, 1st ch., Nov 30, 1988, *Korsnas Marma* Rev. arb. 1989, p. 691, note P.-Y. Tschanz.

¹²³ CA Paris, 1st ch., January 11, 1990, *Orri*, Rev. arb. 1992, p. 99, note D. Cohen.

¹²⁴ CA Paris, 1st ch., November 28, 1989, *Cotunav*, Rev. arb. 1990, p. 675, note P. Mayer.

¹²⁵ *Alcatel Business Systems v. Amkor* (March 27, 2007), JDI 2007. 968, note C. Legros; Rev. arb. 2007, p. 788 note J. El Ahdab; Rev. crit. DIP 2007. 798, note F. Jault-Seseke; JCP G 2007. I. 168, obs. Ch. Seraglini et II. 10118, note C. Golhen; D. 2007. 2077, note S. Bollée et p. 1086, obs. X. Delpech, Contrats; conc. consom. 2007. 166, note L. Leveneur; LPA 2007, n°160, p. 23, note A. Malan; F.-X. Train, «Arbitrage et action directe: à propos de l’arrêt ABS du 27 mars 2007», Gaz. Pal. des 21-22 novembre 2007, p. 6; CA Paris, 15^e ch. B, 19 octobre 2007, Merrill Lynch, RG n° 06/20561, inédit.

¹²⁶ C. SERAGLINI, J. ORTSHEIDT, LE DROIT DE L’ARBITRAGE INTERNE ET INTERNATIONAL 641 (Montchrestien 2013).

ties can trigger the presumption that all parties accepted the arbitration clause, the existence and scope of which were known to the parties, even though they were not signatories.”¹²⁷

Accordingly, this descriptive narration of non-signatory extension requirements shows that France has progressively developed tests that no longer require any conceptual anchorage to the economic group of company. Consent can be directly presumed from the substantial involvement of the non-signatory in the contractual performance, without having to show (i) the existence of an economic group; or (ii) involvement in all stages of the contractual relationship.

Therefore, French practice shows that the ‘Group of Companies’ doctrine could be said to have become somewhat irrelevant in light of more modern and favorable approaches to the idea of extension.

B. The Novelty of the ‘Group of Companies’ Doctrine Has Withered in Comparison With The U.S. Court’s Dynamic Contract Law Approach.

This Article argues that the ‘Group of Companies’ doctrine has become somewhat irrelevant in view of the effectiveness of the U.S. court’s approach’.¹²⁸ Surprisingly, the novelty of the ‘Group of Companies’ doctrine has withered under the influence of more effective stances such as the U.S. Courts’ contract, corporate, and agency principles, even though all three should in theory be predicated upon the

¹²⁷ *Amplitude v. Iakovoglou Promodos and Oebe TH Thotou*, Cass civ 1, [Supreme Court for civil matters] 7 November 2012, No. 11-25.891 (applying the standard developed by *Sté ABS*); Cour d’appel [regional court of appeal] [CA] Paris, *Sté Carraig Insurance Ltd v. SAS Bayer*, RG:12/19982, 12 March 2013. *But see* Cour d’appel [regional court of appeal] [CA] Paris, *Dubai United Arab Emirates et al v. Mr. Khaled Ali A*, RG: 11/17961, 26 February 2013 (reformulating the prior test pursuant to which “the arbitration clause stipulated within an international agreement has a validity and efficacy of its own, which accordingly commands extending its application to parties directly involved in the performance of the contract and all related disputes if it is shown that their contractual relation and their activities can trigger the presumption that all parties accepted the arbitration clause, the existence and scope of which were known to the parties ... “)

¹²⁸ *See* Park, *supra* note 1, at 580 n.68 (citing to JEAN-FRANÇOIS POUURET & SEBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* ¶ 253-54 (2d ed. 2007) for the statistic that only 25% of claims under the “Group of Companies” doctrine succeed).

same consensual rationale.¹²⁹ Though this may come as surprise since the contractual approach appears, at first, as a more traditional and less liberal construction of non-signatory arbitration agreement extension, case law shows otherwise. In fact, a closer examination demonstrates the exact contrary, highlighting the U.S. courts' intention to use contract law defenses offered at common law extensively to render non-signatories amenable to arbitration proceedings.¹³⁰

Both approaches theoretically encompass the two situations where a non-signatory may be enjoined to an arbitration proceeding.¹³¹ Both the 'Group of Companies' doctrine and the U.S. courts approach may bind consenting non-signatories as well as non-consenting signatories. Even though the *Dow Chemical* award dealt with consenting non-signatory claimants, the requirements it established for the "Group of Companies" doctrine's application are neutral and could apply to both situations.¹³²

Nevertheless, the U.S. contractual approach offers more options, and less stringent conditions to bind non-signatories. Indeed, U.S. courts have authorized the extension of the arbitration agreement to bind non-signatories under six different theories of contract, corporate, and agency law.¹³³ These six different theories include very different mechanisms to extend the scope of an arbitration agreement to non-signatories. This is different to the "Group of Companies" doctrine where application of the doctrine requires the existence of both an economic unity derived from the absolute control the parent company holds over its subsidiaries, and a showing that all the parties *intended* the non-signatories to be part of the arbitration agreement, which is inferred from their participation in the conclusion, performance, or termination of the contract. The "Group

¹²⁹ Dominique Vidal, *The Extension of Arbitration Agreements within Groups of Companies: The Alter Ego Doctrine in Arbitral and Court Decisions*, ICC INT'L CT. OF ARB. BULL. VOL. 16/No.2 –FALL 2005, 63, ¶ 5. This does not apply to the alter ego that stems from corporate law. There the intent is not to assess the existence of consent but determine whether the parties have

¹³⁰ *Supra* note 77.

¹³¹ *See* discussion *supra* at 3 (distinguishing the situations where the non-signatory consents to arbitrate its claims and initiates the arbitration against the signatory; and, where the non-signatory does not consent to arbitrate against the signatory that attempts to force arbitration).

¹³² *See* Park, *supra* note 1, at 579 (discussing that the "Group of Companies" doctrine may apply to non-consenting signatories).

¹³³ Thompson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 777-79 (2d Cir. 1995).

of Companies” doctrine thus requires evidence of economic control and implied consent.¹³⁴ Moreover, the implied consent is only evidenced if the non-signatories have participated in the conclusion, performance, “and” termination of the contract. Whereas the English translation of the *Dow Chemical* award read “or,” the original French version read “et” (“and”).¹³⁵ Thus, there is no showing of implied consent unless the non-signatories participated in the conclusion, performance, and termination of the underlying contract.

Due to the great variety of theories under which non-signatories may be enjoined, the U.S. courts’ contractual approach does not always require a strict combination of both economic control and implied consent. For instance, under the alter-ego doctrine, a court will not look to the implied consent of the non-signatory parent company to pierce the corporate veil and hold that non-signatory parent company amenable to arbitration.¹³⁶ Additionally, under arbitral estoppel, a court forgoes all heightened scrutiny of the nature of the relationship between the parent company and its subsidiary.¹³⁷ Rather, arbitral estoppel operates solely on implied consent. These differences are understandable since estoppel did not develop solely to bind a group of companies to the same contract. Estoppel is a contract law defense that applies irrespectively of the legal nature of the person.

But even if one were to consider only the requirement of implied consent, we can see that arbitral estoppel is a far more effective instrument to bind non-signatories than the “Group of Companies” doctrine. Arbitral estoppel covers in reality two distinct branches: first, the direct

¹³⁴ Cf BERLOUKAKIS, *supra* note 8, at 149-52 (suggesting that there are three distinct requirements to apply the “Group of Companies” doctrine). This note argues that there are only two requirements, and the implied consent is derived from the participation in the conclusion, performance, or termination.

¹³⁵ See Park, *supra* note 1, at 577.

¹³⁶ See Ferrario, *supra* note 15, at 670 (observing that the “Group of Companies” doctrine served a different purpose to the alter-ego theory where consent was not required and only a showing of economic control was pertinent); see also *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006).

¹³⁷ Cf closely intertwined where the court does look that the link between the non-sign and one of the sign, but not essential.

benefit estoppel theory;¹³⁸ and second, the closely intertwined estoppel theory.¹³⁹

Direct Benefit Estoppel. Under the first branch, a signatory may compel a non-signatory to arbitrate because the non-signatory directly benefited from the provisions of the underlying contract. Accordingly, a party cannot embrace portions of a contract and then turn its back on other portions of the contract such as the arbitration agreement. Here, demonstration of implied consent is not evidenced through the participation of the non-signatory in the conclusion, performance, *and* termination of the contract – which is what the “Group of Companies” doctrine requires. Rather, a court only requires that the non-signatory benefited in one way or another from the contract. The non-signatory may have even tried to enforce some of the underlying contract’s provisions against the signatory and refused to arbitrate these claims, but it is not always necessary. A showing of implied consent under direct-benefit estoppel is *probably* more flexible than under the ‘Group of Companies’ doctrine because the signatory seeking to enjoin the non-signatory must only show that the non-signatory benefited in some way under the contract. He does not need to show that the party took part in the conclusion, performance, *and* termination of the contract. Indeed, a party may benefit without having to participate in the conclusion, performance, *and* termination of the contract. It may have been exterior to that setting, but still benefited from the provisions of the contract. The true distinction pertains to the absence of a requirement of an affirmative action in the lifetime of the underlying contract. Indeed, the non-signatory does not have to actively participate in the contractual process – which is a requirement to prove the element of implied consent under the ‘Group of Companies’ doctrine. For instance, a non-signatory parent company that does not participate in the conclusion, performance, *and* termination of its subsidiary but still benefits from that contract could not be enjoined under the “Group of Companies” doctrine. However, under direct-benefit estoppel, the signatory could compel the non-signatory parent company on the sole grounds that it benefited from that contract. This shows direct-benefit estoppel is a more effective to bind non-consenting non-signatories parent companies that have not taken part in the

¹³⁸ *Thompson-CSF*, 64 F.3d at 779; *International Paper Co. v. Schwabedisen Mashinen & Anlagen GmbH*, 206 F.3d 411, 418 (4th Cir. 2000).

¹³⁹ *Sunkist Soft Drinks Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1993), *cert denied* 115 S. Ct. 190 (1994).

contractual process of its subsidiary's contract, but still benefited from its provisions.

Equitable Estoppel (or "closely intertwined estoppel")). Under the second branch, sometimes referred as closely intertwined estoppel, a non-consenting signatory is estopped from refusing to arbitrate the non-signatories' claims because the claims are closely intertwined with the underlying contract and the non-signatory shares a relationship with a signatory.¹⁴⁰ The issue with the application of this alternative theory of estoppel is that the non-consenting party is no longer the non-signatory like in the case of direct-benefit estoppel. Here, it is the signatory that refuses to arbitrate the non-signatory's claims and does not consent to arbitration. Although the signatory has agreed to arbitrate the subject matter, he has not consented to arbitrate that subject matter with the non-signatory. Nevertheless, U.S. courts have held that a signatory is estopped from avoiding arbitration if the non-signatories' claims are closely intertwined with the underlying contract and "the entities involved"¹⁴¹ share a "close relationship."¹⁴² This theory is more similar to the 'Group of Companies' doctrine in that it requires an inquiry of the relationship between the consenting non-signatory and the signatories. But whereas the implied consent element in the 'Group of Companies' doctrine is inferred from the non-signatories' involvement in the conclusion, performance, *and/or* termination of the underlying contract,¹⁴³ closely intertwined estoppel's implied consent is less apparent and more tenuous. In fact, one could actually question exactly where the Court draws the signatory's implied consent to arbitrate its claims with the non-signatory. Under the closely intertwined estoppel theory, the non-consenting signatory is forced to arbitrate with a non-signatory simply because the latter's claims are related to the underlying contract. The signatory may have very well never expected this claim; and even if he did, he may have never expected it to go to arbitration. This is very different from the 'Group of Companies' doctrine, where the signatories are aware from the start of the non-signatories' constant involvement in all stages of the contract. Indeed, the consent element under the 'Group

¹⁴⁰ *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000); *Choctaw Generation Ltd. P'ship. v. Am. Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001); *Sunkist*, 10 F.3d at 757.

¹⁴¹ *Sunkist*, 10 F.3d at 757.

¹⁴² *Id.*

¹⁴³ See Brekoulakis, *supra* note 8 at 152.

of Companies' remains significant since it was *procedurally foreseeable* for the signatories to know that the non-signatories, through their non-involvement, would be entitled to a *procedural interest* in the resolution of dispute arising out of the contract. There is no such *procedural foreseeability* under the closely intertwined estoppel theory since the non-signatory did not take part in the different stages of the contract—like in the 'Group of Companies' doctrine. He simply brings claims that are related to the underlying contract to which he is not a party and expects to benefit from the written-in arbitration clause to which he is as equally a non-party to.

The reality is that closely intertwined estoppel theory is not predicated upon consent, nor implied consent, or even *impliedly* implied consent.¹⁴⁴ The signatory never consented, but actively resists arbitration.

Unlike direct-benefit estoppel where the court infers the consent from the non-consenting party's attempt to provision-shop, seeking the benefit of some of the provisions but refusing the effect of others, under closely intertwined estoppel, the non-consenting signatory never sought to derive contractual benefits from the non-signatory – even remotely.

Thus, because the closely intertwined estoppel theory enables a consenting non-signatory to enjoin itself to arbitration proceedings against a non-consenting signatory without any inference of the signatory party's consent, the U.S. courts' approach shows very strong instruments to bind non-signatories to arbitration agreements—and perhaps dangerous ones. This U.S. courts' approach is more effective than the 'Group of Companies' doctrine since the latter requires a strong showing of intent—which is not the case with closely intertwined estoppel where intent is not a condition.¹⁴⁵

Therefore, the flexibility of the 'Group of Companies' doctrine withers in comparison to far more flexible mechanisms of the U.S. approach—especially when such theories no longer require consent

¹⁴⁴ See Frank Z. LaForge, *Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under Grigson v. Creative Artists*, 84 Tex. L. Rev. 225, 242-47 (2005) (demonstrating that the closely intertwined estoppel test set up in *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000) differs from the traditional principle of estoppel in that it lacks the elements of misrepresentation and detrimental reliance).

¹⁴⁵ Cf. *Sokol BMB v. Munai*, 542 F.3d 354, 359-62 (2d Cir. 2008) (reiterating the Circuit's jurisprudence to show that estoppel was consistent with a demonstration of consent even though the actual test did not include the term "consent").

a condition precedent to the enjoinder of non-signatory parties to arbitration.

Accordingly, either way, a party will probably be more successful in enjoining itself, or compelling another, to an arbitration agreement by raising the six contractual principles U.S. Courts allow to bind a non-signatory to an arbitration agreement rather than invoking the ‘Group of Companies’ doctrine.

C. The U.S. Contractual Approach Allows For A Broader Scope: Not Only Companies.

The U.S. court’s approach governs arbitration enjoinder of a wider range of non-signatory entities. Indeed, whereas the “Group of Companies” doctrine was exclusively limited to the existence of corporate entities, the application of common law contract defenses like estoppel, agency, or alter-ego enable the extension of the arbitration agreement’s scope to any legal person – be it real or legal. In fact, only considering the legal persons, application of the alter-ego doctrine the Fifth Circuit held that a State was amenable to arbitration against the signatory because it exercised total dominion and control over the other signatory, and was responsible for fraudulent undercapitalization. It is not so sure that the ‘Group of Companies’ doctrine applied to legal entities such as a State. In *Bridas*, the Fifth Circuit acknowledged that under the alter ego theory, Turkmenistan was compelled to participate in arbitration because it exercised total dominion and control over the signatory company Turkmenneft and was responsible of fraudulent undercapitalization.¹⁴⁶ But alter ego is a nonconsensual mechanism that arises from corporate law. It was never intended to demonstrate arbitral consent since it aims at punishing fraudulent conduct.

V. Facing Denial: Not Recognizing ‘The Group of Companies’ Doctrine Does Not Render Arbitral Estoppel Any Less Intrusive.

Regardless of the effectiveness and flexibility of the U.S. Court’s contractual approach, this extreme liberalization of an arbitration agreement’s possible extension to non-signatories is dangerous and should be corrected because it strikes at the founding principles of contract

¹⁴⁶ *Bridas S.A.P.I.C. v. Gv’t of Turkmenistan*, 447 F. 3d 411 (5th Cir. 2006).

and constitutional law.¹⁴⁷ Moreover, such concerns would never had occurred with the recognition of the ‘Group of Companies’ doctrine since it strictly complies with the notion of consent. This section will briefly highlight how equitable estoppel no longer adheres to the founding principles of U.S. law in its violation of (A) arbitration’s consensual construct; (B) the procedural bargain that lies at the heart of arbitration; and (C) the seventh amendment of the U.S. Constitution.

A. The Contractual Approach Violates the Consensual Construct on which Arbitration Relies.¹⁴⁸

Certain aspects of the contractual approach taken by the U.S. Courts are in violation of the principle of autonomy on which arbitration rests. Arbitration arises out of the consent of the parties. Arbitration is born of an arbitration agreement where two parties agree to settle a dispute they have, or may potentially have, privately, outside of the State’s courts system. This necessarily implicates and commands that both parties agree to settle their dispute privately in front of private parties. Without such consent, there should be no binding arbitration.

The ‘Group of Companies’ doctrine never breached this fundamental principle of arbitration law. In *Dow Chemical*, the Tribunal very highly valued the consensual element and held that through their participation in the conclusion, performance, and termination of the contract, “and in accordance with the mutual intention of the parties to the proceedings, [the non-signatories] appear to have been the veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.”

That consent is no longer required under the closely intertwined estoppel theory, or the alter-ego doctrine. A non-consenting signatory will be forced to arbitrate non-signatories’ claims under arbitration.

¹⁴⁷ Nima H. Mohebbi, *Back Door Arbitration: Why Allowing Nonsignatories to Unfairly Utilize Arbitration Clauses May Violate the Seventh Amendment*, 12 U. PA. J. BUS. L. REV. 555, 555 2009-2010.

¹⁴⁸ See *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960) (“For 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.”).

B. The Contractual Approach Violates the Modern Contract Bargain Theory of Consideration.

This Article argues that the U.S. Courts' approach under the closely intertwined estoppel theory violates the contract law requirement of consideration. At common law, consideration is an essential requirement for the enforceability of a contract. Federal policy favors the enforcement of arbitration agreements as contracts. Accordingly, the same common law contract principles should apply to determine an arbitration agreement's enforceability.¹⁴⁹ Following this reasoning, both parties should provide adequate consideration to render an agreement to arbitrate enforceable.¹⁵⁰ Additionally, pursuant to the principle of separability of the arbitration clause,¹⁵¹ a party seeking to avoid arbitration "must show that the arbitration clause itself, which is to say the parties' agreement to arbitrate any disputes over the contract that might arise, is vitiated by...lack of consideration."¹⁵² Under an arbitration agreement, both parties provide consideration when each waives its respective right to judicial process and gains the right to invoke arbitration.¹⁵³

Yet, contract consideration is the result of a bargain between the two parties.

However, that bargain and the resulting equilibrium greatly suffer when one of the signatories to an arbitration agreement is suddenly forced to arbitrate against consenting non-signatories' claims. Indeed, under the closely intertwined estoppel theory a consenting non-signatory seeks to force a signatory to arbitrate the former's claims. There, the signatory that stands alone is procedurally ambushed by the non-signatory party. It faces a procedure for which it had not bargained. Thus, the agreement lacks consideration since the reciprocal benefits it derived from arbitration are suddenly altered with the enjoinder of another party: the non-signatory. For instance, the signatory never anticipated the non-signatory and the potentially exponential increase

¹⁴⁹ See Federal Arbitration Act, 9 U.S.C. § 2 (2010) (stating that a written arbitration provision "[S]hall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

¹⁵⁰ *E.g.*, *Campbell v. General Dynamics Gvt. Sys. Corp.*, 321 F. Supp. 2d 142, 148 n.3 (D. Mass. 2004).

¹⁵¹ *Prima Paint Corp. v. Flood & Conklin Manuf.*, 388 U.S. 395 (1967).

¹⁵² *Colfax Envelope Corp. v. Local No. 458-3M, Chi. Graphic Commc'n Int'l Union*, 20 F.3d 750, 754 (7th Cir. 1994).

¹⁵³ See *Miller v. Cotter*, 448 Mass. 671, 684 (2007).

in cost.¹⁵⁴ Moreover, it enables the opposing signatory party to benefit from the enjoinder of the non-signatory to bring new pieces of admissible evidence that it would not have been able to do alone.¹⁵⁵

Thus, the procedural bargain and risk calculus that is at the heart of an arbitration agreement is violated when a signatory's commitment to arbitrate no longer equates with the other's consideration because of the ambush that accompanies the extension to consenting non-signatories.¹⁵⁶

C. Equitable Estoppel Can Trigger Violation of the Seventh Amendment of the U.S. Constitution.

Compelling arbitration against a non-consenting signatory under the closely intertwined estoppel theory constitutes a violation of the right to a jury trial pursuant to the seventh amendment.¹⁵⁷ Indeed, the signatory did not consent to arbitrate, and granting a non-signatory's motion for arbitration results in the plaintiffs' loss of their right to a jury trial.¹⁵⁸ An author argued that permitting a non-signatory to benefit from an arbitration agreement, even though that party did not detrimentally rely on the signatory's misrepresentation,¹⁵⁹ unfairly usurped the [signatory's] day in court without so much considering inequity or constitutional implications.¹⁶⁰ Additionally, courts have upheld the primacy of federal policy favoring arbitration over jury trial doctrines.¹⁶¹ Courts no longer subject arbitration agreements to the "knowing and voluntary" standard applied to traditional jury trial waiver clauses.¹⁶² This violates the Seventh Amendment because the traditional test articulated by the courts to act as a check to unconsented jury trial waiver clauses is not

¹⁵⁴ The important costs of discovery endured as a result of a non-signatory's enjoinder.

¹⁵⁵ See Vidal, *supra* note 61, at 64.

¹⁵⁶ This is the author's own point of view.

¹⁵⁷ Mohebbi, *supra* note 77, at 555.

¹⁵⁸ *Id.* at 557.

¹⁵⁹ See LaForge, *supra* note 75 (regarding the missing elements of detrimental reliance and misrepresentation in the closely intertwined estoppel theory).

¹⁶⁰ Mohebbi, *supra* note 77, at 576.

¹⁶¹ *Id.* at 577 (citing to Jean Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 699, 711-13 (2001))

¹⁶² Sternlight, *supra* note 91, at 716 (arguing that the "knowing and voluntary" should apply to arbitration agreements because the Constitution is the Supreme law of the Land).

applied. Rather, the courts allow federal legislation, the FAA, to dwarf a constitutional provision, the seventh amendment.¹⁶³

CONCLUSION

The U.S. courts are in a profound state of jurisprudential denial. For the last 30 years, they have managed to continuously reject the application of the ‘Group of Companies’ doctrine while at the same time refusing to discuss it or even utter its existence. The underlying rationale appears to be the courts’ deep attachment to the idea that enjoinderment of non-signatories should only be accomplished under traditional principles of contract law, and that the ‘Group of Companies’ doctrine is not one of such principles, but rather a *sui generis* theory derived from international *lex mercatoria*. Yet this belief is only a half-truth since the *lex mercatoria* is in fact itself a derived concept from common contractual and commercial practices.

Moreover, since U.S. courts refuse to the ‘Group of Companies’ doctrine with traditional contractual mechanisms, they appear to the make the assumption that such a doctrine could not be predicated upon consent. This is all the more wrong and hypocritical since not only is the Group of Companies doctrine deeply rooted in consent-based arbitration, but the U.S courts have themselves derived from consent in their development of the equitable estoppel doctrine.

Moreover, equitable estoppel is not a principle derived from contract law but from principles of equity, which are two distinct sources of law. It thus seems a little contradictory to argue for consent-based arbitration on the basis of contract mechanisms when one employs non-consensual methods to compel arbitration based on non-contractual mechanisms, but equitable ones. The court should never forget the procedural nature of the obligation conveyed in an arbitration agreement. The specificity of an arbitral obligation warrants a stricter approach than the very liberal approach taken up till now.

Courts should not confuse a national policy favoring enforcement of arbitration agreements with a policy that creates new arbitration agreements by altering the scope of the arbitration to such an extent than what the parties had initially bargained may have disappeared. Favoring the enforcement of arbitration agreement is a sound policy to secure arbitral justice.

¹⁶³ Mohebbi, *supra* note 77, at 578.

The ‘Group of Companies’ doctrine respects these fundamentals because it only allows enjoinder in instances where the non-signatory was involved to such an extent that it was impossible for the other party to not contemplate it being a party.

This approach would certainly be less flexible than equitable estoppel for example, but it would have the merit of ensuring the continuity of consent-based arbitration. Indeed procedural security and judicial certainty should never have to be sacrificed on the altar of convenience and flexibility.