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## The Extension Of The Arbitral Agreement To Non-Signatories In Europe: A Uniform Approach?

Eduardo Silva Romero

*University of Paris Dauphine*, [eduardo.silvaromero@dechert.com](mailto:eduardo.silvaromero@dechert.com)

Luis Miguel Velarde Saffer

[LuisMiguel.VelardeSaffer@dechert.com](mailto:LuisMiguel.VelardeSaffer@dechert.com)

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# THE EXTENSION OF THE ARBITRAL AGREEMENT TO NON-SIGNATORIES IN EUROPE: A UNIFORM APPROACH?

EDUARDO SILVA ROMERO\* & LUIS MIGUEL VELARDE SAFFER\*\*

Introduction .....	372
II. The Law Applicable to the Arbitral Agreement.....	373
A. England.....	373
B. Sweden.....	373
C. Switzerland .....	374
D. Spain .....	374
E. France.....	374
III. The Contrasting Approaches toward Implied Consent .....	375
A. England: very stringent approach towards implied consent.....	375
1. Overview .....	375
2. Particularities .....	376
B. Sweden: Stringent Approach toward Implied Consent .....	377
1. Overview .....	377
2. Particularities .....	378
C. Switzerland: Intermediate Approach toward Implied Consent .	378
1. Overview .....	378
2. Particularities .....	379
D. Spain: Flexible Approach toward Implied Consent .....	380
1. Overview .....	380
2. Particularities .....	381
E. France: very flexible approach towards implied consent .....	382
1. Overview .....	382
2. Particularities .....	384
Conclusion.....	385

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\* Partner at Dechert (Paris) LLP. Professor of International Law at the University of Rosario in Bogota, of Investment Arbitration and International Contract Law at Sciences Po and of International Arbitration at the University of Paris–Dauphine.

\*\* Associate at Dechert (Paris) LLP. LL.M. by Harvard Law School. Former Professor of Contract Law at the Catholic University of Peru and at the University of the Pacific.

## INTRODUCTION

Nowadays, there is no doubt that – under certain circumstances – an arbitral agreement can be extended to non-signatories. Many theories have been developed to this effect, such as *implicit* consent, pierce of the corporate veil, and incorporation by reference, among others.<sup>1</sup>

In the last two or three decades, especially among international arbitration practitioners, consensus has emerged on the requirements to apply these theories. Most notably, there is *general* agreement on the fact that – all things being equal – active participation by a non-signatory in the negotiation, execution, performance and/or termination of the contract containing an arbitral agreement can be taken as evidence of *implied* consent to arbitrate.

However, when the theory is put into practice, as commonly occurs, dissimilar approaches resurge. This appears especially true when looking at national courts' decisions. Indeed, whereas some judges interpret the circumstances that may reveal *implied* consent in a *strict* way, others show a more *relaxed* approach and are willing to find consent more easily. We believe this is due, at least *partially*, to the different stance taken by jurisdictions (and thus judges) towards factors that may exercise great influence on the final decision to extend or not an arbitral agreement, such as good faith, the group of companies doctrine and the avoidance of a denial of justice.

In the pages that follow, after identifying the law applicable by default to arbitral agreements in a number of European jurisdictions (the "Jurisdictions") (which, as can be intuited, is also of relevance to the final decision on the extension of arbitral agreements), we will then describe the contrasting approaches taken in these same Jurisdictions towards the analysis of *implied* consent, emphasizing – as mentioned above – the different factors given relevance to in each Jurisdiction. Finally, we will finish our analysis with some conclusions.

The Jurisdictions covered in this paper are England, Sweden, Switzerland, Spain and France, which, according to ICC statistics, are some of the countries chosen most often as seat of international arbitration in Europe.<sup>2</sup>

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1. See generally Eduardo Silva Romero, El artículo 14 de la nueva *Ley Peruana de Arbitraje: Reflexiones sobre el contrato de arbitraje ... realidad*, 4 *Revista del Círculo Peruano de Arbitraje* 53 (2011) (detailing analysis of these theories).

2. 2015 ICC Dispute Resolution Statistics, *ICC Dispute Resolution Bulletin* 2016 No. 1 (2016).

## II. THE LAW APPLICABLE TO THE ARBITRAL AGREEMENT

The analysis of the extension of the arbitral agreement to non-signatories should begin by identifying the law applicable to said agreement. When parties are silent on that point, the Jurisdictions adopt different approaches to determine this law:

England and Sweden establish a strict and clear-cut procedure to determine the applicable law;

Switzerland and Spain provide the arbitral tribunal with discretion to determine the applicable law; and

France does not require the arbitral tribunal to refer to any national law when analyzing the validity and/or scope of an arbitral agreement.

How strict or flexible the approach to determining the law applicable by *default* to the arbitral agreement is, and how much discretion is given to the arbitral tribunal for this purpose, may impact the final decision on the extension of the arbitral agreement. For instance, a system which does not require referring to a national law to determine the scope of an arbitral agreement avoids potential idiosyncratic requirements that may otherwise prevent its extension to non-signatories.

In the following paragraphs, we quote the relevant provisions for each of the Jurisdictions.

### *A. England*

In the *Sulamérica* case, the United Kingdom Court of Appeals developed a clear-cut, three prong test to determine the law applicable to the arbitral agreement. It held that:

[T]he proper law [applicable to the arbitral agreement] is to be determined by *undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection*. As a matter of principle, those three stages ought to be embarked on separately and in that order, since any choice made by the parties ought to be respected.<sup>3</sup>

### *B. Sweden*

Pursuant to Art. 48(1) of the Swedish Arbitration Act, in the event of a lack of agreement between the parties, the law of the country in which the proceedings take place will apply to the arbitral agreement:

Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties.

*Where the parties have not reached such an agreement, the arbitration*

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3. See *Sulamérica Cia. Nacional de Seguros S.A. v. Engenharia S.A.* [2012] EWCA (Civ) 638 [25] (Eng.) (emphasis added).

*agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.*<sup>4</sup>

### C. Switzerland

Art. 178(2) of the Swiss Private International Act adopts the principle of *in favorem validitatis*, which provides that an arbitral agreement will be deemed valid as long as it complies with one of three different laws. The Swiss Act provides, in relevant part, “an arbitration agreement is valid if it conforms *either* to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.”<sup>5</sup>

In the words of the Swiss Supreme Court in the case of *X. Ltd v. Y. and Z. S.p.A.*:

It behoves [the Arbitral Tribunal] to determine which parties are bound by that agreement and if necessary to find out if one or more third parties not designated there nonetheless fall within its purview. Such an issue of jurisdiction *ratione personae*, which relates to the merits, must be resolved on the basis of Art. 178 (2) PILA . . . . That provision recognizes three alternative means in *favorem validitatis*, without any hierarchy between them, namely the law chosen by the parties, the law governing the object of the dispute (*lex causae*) and Swiss law.<sup>6</sup>

### D. Spain

Art. 9(6) of the Spanish Arbitration Act also adopts the principle of *in favorem validitatis*:

6. In respect of international arbitration, the arbitration agreement shall be valid and the dispute shall be capable of arbitration if *it complies with the requirements established by the juridical rules chosen by the parties to govern the arbitration agreement, or the juridical rules applicable to the merits of the dispute, or Spanish law.*<sup>7</sup>

### E. France

As indicated above, French courts have taken a different approach. They do not deem it necessary to refer to any national law to assess the validity and/or scope of an arbitral agreement. The arbitral agreement remains

4. Article 48(1) of the Swedish Arbitration Act (1999).

5. Article 178(2) of the Swiss Federal Act on Private International Law (1987).

6. See *X. Ltd v. Y. and Z. S.p.A.*, Bundesgericht [BGer] [Federal Supreme Court] Aug. 19, 2008, No. 4A 128/2008 134 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 565 (Switz.) (emphasis added).

7. Article 9(6) of the Spanish Act 60/2003 of 23 December 2003

independent (or delocalized) from the various national laws, which might, in other jurisdictions, apply to it.

In *Comité Populaire de la Municipalité de Khoms El Mergeb v. Dalico Contractors*, the Cour de Cassation said that:

[B]y virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and *the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.*<sup>8</sup>

Similarly, French arbitrator Yves Derains has said that “[t]his prominent role given to the common intent of the parties is part of a substantive rule of French law that French courts apply *without any regard to any national law that might be applicable to the arbitration clause pursuant to a conflict of laws rule.*”<sup>9</sup>

### III. THE CONTRASTING APPROACHES TOWARD IMPLIED CONSENT

We now turn to comment on the approach taken by courts in the Jurisdictions when assessing whether implied consent exists. As will become apparent from our analysis, we attribute the courts’ contrasting approaches – at least partially – to the different stances taken by the Jurisdictions towards factors such as good faith, the group of companies doctrine, and the avoidance of a denial of justice.

This idea is strengthened by the fact that, with the exception of England, all of the Jurisdictions adopt a similar theoretical approach towards implied consent. In some cases, we will also make reference to other regulations that reinforce the approach – whether strict or flexible – endorsed by each Jurisdiction on binding non-signatories.<sup>10</sup>

#### *A. England: very stringent approach towards implied consent*

##### *1. Overview*

Based on the evolution of international arbitration with regard to implied consent, England can be considered a rare case. Indeed, we have not found decisions where an English court accepted to extend an arbitral agreement

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8. *Comité Populaire de la Municipalité de Khoms El Mergeb v. Dalico Contractors*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 20, 1993, Bull. civ. II, No. 372 (Fr.) (emphasis added).

9. Yves Derains, *Is there A Group of Companies Doctrine?*, in MULTIPARTY ARBITRATION 131, 135 (Eric Schwartz and Bernard Hanotiau eds., 2010).

10. *See infra* Section III.

to non-signatories based on implied consent due in large part to the fact that the doctrine of privity of contract has been given high importance.

For instance, in *Arsanovia Ltd. & Ors v. Cruz City 1 Mauritius Holdings*, the High Court said that “English law requires that an intention to enter into an arbitration clause *must be clearly shown and is not readily inferred.*”<sup>11</sup>

In a similar vein, in the partial award rendered in ICC case 13777, the arbitral tribunal said that “*English law contains no statutory provisions empowering a Tribunal to compel arbitration against an unwilling non-signatory.*”<sup>12</sup>

This rationale was confirmed by the United Kingdom Supreme Court when, in the famous case – *Dallah Real Estate and Tourism Holding Co. v. Pakistan* – it had to assess the extension of the arbitral agreement to Pakistan under French law. After explaining what the standard was, the Court said:

This then is the test which must be satisfied before the French court will conclude that a third person is an *unnamed* party to an international arbitration agreement. *It is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however international the arbitration or transnational the principles applied.*<sup>13</sup>

## 2. Particularities

The *very stringent* approach of English courts is reinforced by two factors. First, the rejection of the group of companies doctrine (*i.e.*, no weight is given to the fact that non-signatories and signatories belong to the same corporate group).<sup>14</sup> Second, the rejection of a general principle of good faith.

In *Interfoto Picture Library v. Stilleto*, for example, the United Kingdom Court of Appeals said:

In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith . . . **English law has, characteristically, committed itself to no such overriding principle** but has developed piecemeal solutions in response to demonstrated problems of

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11. *Arsanovia Ltd. & Ors v. Cruz City 1 Mauritius Holdings* [2012] EWHC (Comm) 3702 [ 35] (Eng.) (emphasis added).

12. ICC Case 13777, partial award on jurisdiction dated April 2006.

13. *Dallah Real Estate and Tourism Holding Co. v. Pakistan* [2010] UKSC 46 [10] (Eng.) (emphasis added).

14. *Peterson Farms Inc. v. C&M Farming Ltd.* [2004] EWHC 121 [62] (Eng.).

unfairness.<sup>15</sup>

Based on the above, we can identify as particularities of the English system:

- The adoption of a clear-cut, three prong test, to determine the law applicable by *default* to arbitral agreements;
- The courts' very stringent approach towards the analysis of implied consent to arbitrate;
- The rejection of the group of companies doctrine; and
- The rejection of an overriding principle of good faith.

### *B. Sweden: Stringent Approach toward Implied Consent*

#### *1. Overview*

Non-signatories may be bound by an arbitral agreement based on their behavior. In a recent case, *Profera AB v. Blomgren*, the Court of Appeal of Western Sweden found that negotiations and exchange of drafts created an oral arbitral agreement binding upon the parties:

The Court found that the parties had agreed orally in regard the main and determining issues of the agreement, which was the purchase price. The parties had thus entered into the agreement, despite the fact that some issues remained to be agreed upon. *The Court then considered whether the parties were bound by the arbitration clause in the drafts exchanged.* The court found that the parties were bound by the arbitration clause as almost all of the discussed drafts had contained arbitration clauses that referred to the Swedish Arbitration Act. *Further, the Defendant-Appealed had never specifically objected to or protested against, or otherwise demonstrated its disagreement with the arbitration clause.*<sup>16</sup>

In general, Swedish courts appear to have a *stringent* approach towards binding non-signatories. In another recent case, the Supreme Court construed *restrictively* the reference made in an arbitration clause to disputes "*arising out of or in connection with*" the contract that contained it, concluding that disputes that arose out of a related transaction (to said contract), and its parties, were not bound by the arbitral agreement. The Court reasoned that "[t]he arbitration clauses that are relevant in the present case *do not specify* any legal relationship except the agreement that is regulated by the respective contractual document. *Thus, the arbitration clauses govern only the rights and obligations that arise under these*

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15. *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] QB 433 [439] (Eng.) (emphasis added).

16. *Profera AB v. Blomgren* [HovR] [Court of Appeal] 2008-03-12 p.1 T 2863-07 (Swed.) (emphasis added).



agreements.”<sup>17</sup>

## 2. Particularities

The group of companies doctrine is not endorsed in Sweden.<sup>18</sup>

On the other hand, in exceptional circumstances, consent to arbitrate may be inferred from passivity. In an unpublished decision, the Svea Court of Appeal said that:

In this case, the court noted that the party not signing or wishing to be bound by an arbitration agreement has to take active steps to make his disagreement known to the other party. *Whereas passivity normally would not result in the formation of a contract the case should be distinguished when a party should or ought to realize that the other party believes or assumes that a binding agreement has been concluded.* This was the case here. In such a situation, which applies to the Profura case, *there is an obligation to inform the other party that no such agreement has been formed.*<sup>19</sup>

Based on the above, we can identify as particularities of the Swedish system:

- The adoption of a clear-cut rule to determine the law applicable by default to arbitral agreements;
- The courts’ *stringent* approach towards binding non-signatories;
- The rejection of the group of companies doctrine; and
- The acceptance, in exceptional circumstances, that consent can be inferred from passivity.

## C. Switzerland: Intermediate Approach toward Implied Consent

### 1. Overview

Non-signatories may be bound by an arbitral agreement based on their behavior. Consent will be deemed to exist when the non-signatory is involved in the performance of the contract that contains an arbitral agreement.

The Swiss Supreme Court has said that “a third party involving itself in the *performance of the contract* containing the arbitration agreement is deemed to have adhered to the clause by conclusive acts *if it is possible to infer from its involvement its willingness to be bound by the arbitration*

17. *Concorp Scandinavia v. Karelkamen Confectionary* [HD] [Supreme Court] 2012-04-05 p.5 Ö 5553-09 (Swed.).

18. Anders Relden & Olga Nilsson, *INTERNATIONAL ARBITRATION IN SWEDEN: A PRACTITIONER’S GUIDE* 67 (Ulf Franke, et al. eds., 2013).

19. *Ukraine v. Norsk Hydra* [HovR] [Court of Appeal] 2007-12-17 T 3108-06 (Swed.).

clause.”<sup>20</sup>

The Supreme Court has added, however, that in case of doubt regarding the existence of consent, a *restrictive* interpretation shall be observed:

To interpret an arbitration agreement, its legal nature must be taken into account; in particular *it must be taken into account that renouncing access to the state court drastically limits legal recourses*. According to the case law of the Federal Tribunal, *such an intent to renounce cannot be accepted easily, therefore restrictive interpretation is required in case of doubt*.<sup>21</sup>

In a similar vein, commentators have said that:

As a consequence, it is clear that under Swiss substantive law participation in the performance of a contract may result in an extension of the arbitration agreement to a third party. However, in order to [honor] the principle of relativity of contractual obligations, the requirements for such an extension are rather strict.<sup>22</sup>

## 2. Particularities

The group of companies doctrine is not endorsed in Switzerland.<sup>23</sup> In this regard, the Supreme Court has said that:

The Group of Companies doctrine does not per se justify extending an arbitration clause to another company within the group. Unless there is an independent and formally valid manifestation of consent of the other company of the group to the agreement to arbitrate, such an extension will be granted only in very particular circumstances that justify a bona fide reliance of a party on an appearance caused by the non-signatory.<sup>24</sup>

However, Swiss courts do consider good faith when assessing the extension of the arbitral agreement. In a decision rendered in 2014, the Supreme Court held that “*the principle of good faith (Art. 2 CC26) would nonetheless require the recognition of X.\_\_\_\_\_’s right to act against Y.\_\_\_\_\_ Group directly on the basis of the arbitration clauses contained in the Contracts in consideration of the circumstances of the case at*

20. X. v. Y Engineering S.p.A., Tribunal Fédéral [TF] Apr. 7, 2014, ATF 4A\_450/2014 7 (Switz). (emphasis added).

21. FC X. v Y., Tribunal Fédéral [TF] Jan. 17, 2013, 4A\_244/2012 11 (Switz.) (emphasis added).

22. Thomas Muller, *Extension of Arbitration Agreements to Third Parties Under Swiss Law*, in CROSS BORDER ARBITRATION HANDBOOK 11 (2010) (emphasis added).

23. Matthias Scherer, *Introduction to the Case Law Section*, 27 ASA Bulletin 488, 494 (2009) (“Under Swiss law, mere affiliation to the same group of companies is not sufficient to extend an arbitration clause signed by a group company to a parent or sister company.”).

24. X. Ltd v. Y. and Z. S.p.A, Bundesgericht [BGer] [Federal Supreme Court] Aug. 19, 2008, No. 4A 128/2008 134 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 565 (Switz.)

hand.”<sup>25</sup>

And in another similar decision, the Supreme Court said that “[i]t has already been admitted that in specific circumstances, a certain behavior may substitute compliance with a formal requirement *on the basis of the rules of good faith*.”<sup>26</sup>

- Based on the above, we can identify as particularities of the Swiss system:
- The adoption of the principle of *in favorem validitatis*, which provides for the application of up to three different laws to the arbitral agreement
- The *restrictive* interpretation given to consent in cases of doubt;
- The rejection of the group of companies doctrine; and
- The relevance given to the good faith principle.

#### *D. Spain: Flexible Approach toward Implied Consent*

##### *1. Overview*

Non-signatories may be bound by an arbitral agreement based on their behavior. Consent will be deemed to exist when the non-signatory is *directly implicated* in the performance of the contract that contains an arbitral agreement.

The Supreme Court stated that “[a]t all times, we shall ascertain that in the instant case the arbitration agreement contained in the contract dated 31 July 1992 *entails its application to the parties directly implicated in the performance of the contract*.”<sup>27</sup>

Any finding that consent exists shall be strongly supported. In this regard, the Spanish Superior Court has said that:

[M]ore controversial is the problem of the extension of the arbitration agreement to legal and natural persons that have not signed it, not only as a result of the requirement of consent for the existence of the arbitral agreement (art. 9.1 LA) – *which does not exclude implicit consent, inferred from conduct – but also because, in any case, inferring such will, when it is not expressed, shall be strongly supported* given its radical legal consequences, i.e., the waiver of the right to access jurisdiction, hard core – in the words of the Constitutional Court – of the

25. X. v Y Engineering S.p.A., Tribunal Federal [TF] Apr. 7, 2014, No. ATF 4A\_450/2014 19 (Switz.) (emphasis added).

26. X. S.A v. Z Sarl, Tribunal Federal [TF] Oct. 16, 2013, ATF 4P\_115/2003 16 (Switz.) (emphasis added).

27. Interactive Television, S.A. c. Banco Bilbao Vizcaya, S.A. y SATCOM NEDERLAND BV, IGNACIO SIERRA GIL DE LA CUESTA, Case No. 404/2005, decision from the Supreme Court (1<sup>st</sup> Chamber) dated 26 May 2005, at *Fundamentos de Derecho*, First Item (emphasis added).

right to an effective access to justice.<sup>28</sup>

## 2. Particularities

Two factors relax the apparently stringent approach of Spanish courts.

First, according to commentators, the group of companies doctrine has certain weight in Spain. In the IBA Spanish Guide for 2012, for instance, it is said that “[a]rbitration agreements *may bind non-signatories if they have a very close and strong relationship with a signing party*, or they have played a strong role in the performance of the contract.”<sup>29</sup>

And Yves Derains adds that:

On the basis of the above, one may be tempted to conclude that the group of companies doctrine represented a brief momentum in the evolution of the French case law relating to the application of arbitration clauses to non-signatories. As a matter of fact, *this doctrine has been firmly excluded in other jurisdictions with the apparent exception of Spain.*<sup>30</sup>

Second, good faith plays a very important role in the courts’ assessment of whether implied consent exists. For instance, in case 68/2014, the Superior Court said: “[i]n sum, as already stated, the Chamber understands that the extension to DIMA and GELESA of the arbitration agreement contained in the Shareholders Agreement is a natural consequence of the contract, and is *consistent with a good faith interpretation.*”<sup>31</sup>

Finally, since it points into the same direction, it is worth briefly referring to the rules – provided in the Spanish Arbitration Act – for arbitrating in the corporate context. These rules effectively *force* minority shareholders and administrators to arbitrate their disputes.

Art. 11 (bis) of the Spanish Arbitration Act provides, in relevant part, that:

28. Dima Distribución Integral, S.A., y Gelesa Gestión Logística, S.L. v. Logintegral 2000, S.A.U., Jesús María Santos Vijande, Case No. 68/2014, decision from de Superior Court, Civil and Criminal Chamber, dated 16 December 2014, at *Fundamentos de Derecho*, Fourth Item (emphasis added).

29. IBA Arbitration Committee, *Arbitration Guide: Spain* 7 (March 2012), [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUK Ewj\\_u4Ti—bMAhWGFj4KHYyXD\\_YQFggfMAA&url=http%3A%2F%2Fwww.iba.net.org%2FDocument%2Fdefault.aspx%3FDocumentUid%3DE5431E65-E56C-4866-8E48-FF9996CF1AC5&usq=AFQjCNEqgbsqXwroSDATg2h0\\_q9oMkW-Zw](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUK Ewj_u4Ti—bMAhWGFj4KHYyXD_YQFggfMAA&url=http%3A%2F%2Fwww.iba.net.org%2FDocument%2Fdefault.aspx%3FDocumentUid%3DE5431E65-E56C-4866-8E48-FF9996CF1AC5&usq=AFQjCNEqgbsqXwroSDATg2h0_q9oMkW-Zw) (emphasis added).

30. Derains, *supra* note 9, at 135 (emphasis added).

31. Dima Distribución Integral, S.A., y Gelesa Gestión Logística, S.L. v. Logintegral 2000, S.A.U., Jesús María Santos Vijande, Case No. 68/2014, decision from de Superior Court, Civil and Criminal Chamber, dated 16 December 2014, at *Fundamentos de Derecho*, Fourth Item (emphasis added).

2. The inclusion in the bylaws of an arbitration clause will require approval of, at least, two thirds of the capital shareholders.
3. The bylaws may establish that the challenge of corporate agreements by the shareholders or administrators is subject to the decision of one or more arbitrators . . . .<sup>32</sup>

Furthermore, in a recent decision, the Superior Court of Catalonia extended an arbitral agreement (contained in the original bylaws of the company) to shareholders that acquired their shares after the company's incorporation. The Court held:

By-laws, as a constitutive agreement that has its origin in the will of the company's founders, can contain an arbitral agreement for the resolution of corporate conflicts. *An arbitral agreement is an accessory rule to the by-laws and as such is independent from the founders' will and represents a further corporate rule that binds – due to its inscription in the Commercial Registry – not only its signatories but also the present and future shareholders.*<sup>33</sup>

Based on the above, we can identify as particularities of the Spanish system:

- The adoption of the principle of *in favorem validitatis*, which provides for the application of up to three different laws to the arbitral agreement;
- The strong support needed to justify any finding of *implied* consent;
- The importance given to the group of companies doctrine and the good faith principle; and
- The innovative provision of the Spanish Arbitration Act for arbitrating in the corporate context.

### *E. France: very flexible approach towards implied consent*

#### *1. Overview*

Non-signatories may be bound by an arbitral agreement based on their behavior. Whether or not this is possible – based on the particular circumstances of each case – will depend on the common intention of the parties. This common intention was initially analyzed by French courts through a subjectivist lens, but nowadays an objectivist approach is mainly used.

As explained by Pierre Mayer:

[i]nitially there was a certain insistence on the fact that when the non-

32. Article 11(bis) of the Spanish Act 60/2003 of 23 December 2003.

33. Case No. 9/2014, decision from the Superior Court of Catalonia dated 6 February 2014 (RJ 2014, 1987). This decision follows another one rendered by the Supreme Court on 9 July 2007 (RJ 2007, 4960) (emphasis added).

signatory had participated in — generally — the performance of the contract, *and had been aware of the existence of the clause*, it was to be presumed that it had accepted to be bound by the clause. I would call this the subjectivist trend. But more recently a more objectivist trend has surfaced.<sup>34</sup>

Below we briefly describe the subjectivist and objectivist approaches.

Under the subjectivist approach, implied consent exists when (i) the non-signatory has an active role in the performance of the contract, and (ii) it is aware of the existence of the arbitral agreement (which is, in principle, presumed).

In *Société Ofer Brothers v. The Tokyo Marine and Fire Insurance Co.*, the Paris Court of Appeal said:

Considering that the arbitration clause present in an international contract has its own validity and efficacy, such as to require its extension to the parties directly involved in the performance of said contract *provided their situation and activities indicate that they were aware of the existence and the scope of such clause*, which was agreed upon according to the usages of international commerce.<sup>35</sup>

Emphasizing the requirement of awareness, the Paris Court of Appeal has said that an arbitral tribunal lacks jurisdiction over third parties who did not, and could not, know about the existence of an arbitral agreement. In one such case, it affirmatively stated that “[the arbitral agreement was] manifestly inapplicable to SOLEIL DE CUBA, third party to the contract, *who could not know about the existence of said clause given its confidential nature.*”<sup>36</sup>

Under the objectivist approach, implied consent is only assessed based on behavior. Awareness as to the existence and/or scope of an arbitral agreement is irrelevant.

In the *Alcatel* case, the Cour de Cassation said that “[t]he effects of the international arbitration clause extend to parties directly involved in the performance of the contract and the disputes that may result from it.”<sup>37</sup>

Similarly, in the *Kosa France* case, the Paris Court of Appeal said that

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34. Pierre Mayer, *The Extension of the Arbitration Clause to Non-Signatories – The Irreconcilable Positions of French and English Courts*, 27 AM. U. INT’L L. REV. 831, 831–32 (2012) (emphasis added).

35. *Société Ofer Brothers v. The Tokyo Marine and Fire Insurance Co.*, Cour d’appel [CA] [regional court of appeal] Paris, civ., Feb. 14, 1989 (Fr.) (emphasis added).

36. *S.A. Cubana de Aviación v. Société Becheret Thierry Senechal Gorrias*, Cour d’appel [CA] [regional court of appeal] Paris, civ., Oct. 23, 2012, 12/04027 (Fr.) (emphasis added).

37. *Société Alcatel Bus. Sys. v. Amkor Tech.*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 27, 2010, Bill civ. II, No. 129 (Fr.) (emphasis added).

the arbitral agreement should be extended “to the parties *directly involved in the performance of [the] contract and in the disputes that may result from it.*”<sup>38</sup>

## 2. Particularities

In general, French courts have taken a flexible approach when assessing whether implied consent to arbitrate exists. This is clearly evidenced by the decision rendered in the famous *Dallah* case by the Paris Court of Appeal (referenced below).

This flexible approach is supported by two factors. First, the endorsement of the group of companies doctrine. As explained by Yves Derains, “the existence of a group of companies is a circumstance that plays an important role in revealing the intent of parties.”<sup>39</sup>

Second, the weight given to justice considerations. Commenting on the decision of the Paris Court of Appeal in the aforementioned famous *Dallah* case, where a contract and its concomitant liability were extended to Pakistan, non-signatory party, Pierre Mayer said that:

Is the French position shocking? At first sight it is, since the consent of the parties to arbitrate is the cornerstone of arbitration, and *the Government of Pakistan had made clear its intention not to be a party to the contract* containing the arbitration clause. However, *the refusal to recognize the award would have meant a denial of justice*, since the Trust had disappeared and there was no other defendant against which *Dallah* could have acted than the Government.<sup>40</sup>

Based on the above, we can identify as particularities of the French approach:

- There is no need to refer to a national law to analyze the validity and/or scope of an arbitral agreement;
- The use of a preeminently objectivist approach when assessing whether implied consent exists; and
- The relevance given to the group of companies doctrine and justice considerations.

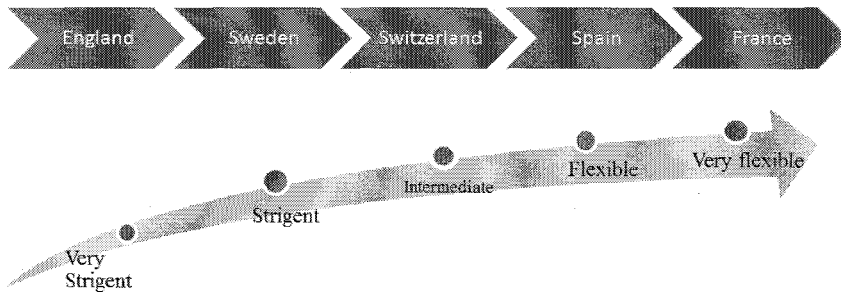
Based on what has been said, the figure below shows the placement of each Jurisdiction in terms of “stringent approach v. flexible approach” towards *implied* consent:

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38. *Kosa France v. Rhodia Operations*, Cour d’appel [CA] [regional court of appeal] Paris, civ., May 5, 2011, No. 10–04688 (Fr.) (emphasis added); *see also* *Amplitude v. Promodos*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 7, 2012, Bill civ. II, No. 11–2589 (Fr.) (supporting the same approach as the *Kosa France* case).

39. Derains, *supra* note 9, at 137 (emphasis added).

40. Mayer, *supra* note 34, at 836 (emphasis added).



### CONCLUSION

The explanation given in section III above shows that, with the exception of England:

- All of the Jurisdictions accept that consent to arbitrate can be given implicitly;
- Active participation is the common way to show implied consent; and
- A finding of implied consent needs to be strongly supported.

However, on similar facts, courts in the Jurisdictions may reach opposite conclusions because they weigh different factors in their analysis. If appertaining to the same corporate group may be indicative of intent, then it is easier to bring a non-signatory parent company to an arbitration agreed upon by its subsidiary. The same applies to justice considerations, which – it may be argued – allow binding non-signatories in total absence of a contractual basis.

Developments that make it easier to bind non-signatories have also taken place in the legislative arena, as evidenced by the innovative provisions of the Spanish Arbitration Act to bind minority shareholders and administrators.<sup>41</sup> If one goes beyond Europe, Article 14 of the Peruvian Arbitration Act can be considered as a move in the same direction.<sup>42</sup>

Finally, as pointed out earlier,<sup>43</sup> the placement of Jurisdictions in the figure shown above is generally consistent with the higher or lower discretion they give to arbitral tribunals to determine the law applicable by *default* to arbitral agreements.

41. Article 11(bis) of the Spanish Act 60/2003 of 23 December 2003.

42. Peruvian Arbitration Act, art. 14 (stating that “[t]he arbitral agreement extends to those whose consent to arbitrate, according to the good faith, can be inferred from their active and determinant participation in the negotiation, execution, performance or termination of the contract that includes the arbitral agreement or to which the agreement relates . . .”).

43. See *supra* notes 28–35 and accompanying text.