EXTENSION OF THE ARBITRAL AGREEMENT TO THIRD PARTIES – THE EVER-PRESENT ROLE OF THE APPLICABLE LAW TO THE ARBITRATION AGREEMENT BY THE EXAMPLE OF RECENT JUDGMENTS ON DIFFERENT LEGAL CONCEPTS OF EXTENDING THE AGREEMENT TO ARBITRATE

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Abstract

The parties' consent to arbitrate is the cornerstone of arbitration. Yet, there are scenarios where it might be appropriate to include a non-signatory in the arbitration, based on an extension of the personal scope of the arbitration agreement. Some of the most discussed legal concepts to justify such an extension beyond the signatories of the arbitral agreement are notions of implied consent, the group of companies doctrine, and the theory of piercing the corporate veil. While all these legal theories are applied to extend arbitration agreements in different jurisdictions, their acceptance and the specifics vary considerably across jurisdictions. Recent supreme court decisions from Switzerland, Germany, France, and India addressed these concepts and thereby, reflected the general approach of each jurisdiction while, at the same time, clarifying the requirements and limitations of extending arbitration agreements in each jurisdiction. This article depicts six recent decisions in that context, relates them to the respective legal concepts addressed, as well as to the general approach in each jurisdiction, and shows the fundamental differences which parties and arbitral tribunals need to bear in mind when dealing with cross-border arbitrations, in light of the recent case law related to extending arbitration agreements.

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I. Introduction

Few topics in the field of international arbitration are discussed as controversially, and dealt with as differently, as the extension of the arbitration agreement to non-signatories. The difficulty of applying a uniform approach in this respect is not without reason as the extension of arbitration agreements touches the very foundations of arbitration – the parties' consent to refer their disputes to arbitration. Or, as a much-cited dogma puts it: *"Arbitration is a creature of contract*."[1]

Thus, more than 40 years after the precedent-setting arbitral award in *Chemical Company and others* v. *ISOVER Saint Gobain* ["**Dow Chemical**"] was rendered,[2] the development of uniform standards and limitations as to extending arbitral agreements continues. This is driven by general developments in international business and the cosmos of international arbitration. Despite all odds, global trade volumes continue to grow,[3] leading to ever more complex cross-border interweaving of corporations and, in parallel, the centre of gravity in international arbitration keeps shifting away from its traditional hubs.[4] These developments, amongst other reasons, lead to scenarios which eventually result in a continuing growth of case law on the topic by high courts from different jurisdictions. Those decisions give rise to general discussions in the field of international arbitration. Recent attention-raising cases show that the question of extending the arbitration agreement and the law applicable to the arbitration agreement are intrinsically interconnected.[5] Depending on which law is

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1 *See, e.g.*, Steelworkers v. American Mfg. Co., 363 U.S. 570 (1960) (J. Brennan, concurring).

2 Case No. 4131, 9 ICCA Y.B. COM. ARB. 131 (1984), at ¶¶ 131 et seqq.

3 World Trade Organisation, *Global Trade Outlook and Statistics 2023*, at 3, *available at* https://www.wto.org/english/res_e/booksp_e/gtos_updt_oct23_e.pdf.

4 White & Case and Queen Mary University of London, *2021 International Arbitration Survey: Adapting arbitration to a changing world*, *available at* https://www.whitecase.com/sites/default/files/2023-05/qmul-international-arbitration-survey-2021-web-single-final-v3.pdf.

5 Kabab-Ji SAL (Lebanon) v. Kout Food Grp. (Kuwait), [2021] UKSC 48, 1-2 (Eng.); Kabab-Ji SAL v. Kout Food Grp. [2020] EWCA Civ. 6; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sep. 28, 2022, No. 21-11.846 (Fr.); Cour d`appeal [CA]

applied, and which forum is chosen to determine the respective questions, the approaches to address an extension of the arbitration agreement can differ considerably.

In light of the above, this article will show reasons for the intent to extend arbitration agreements to non-signatories in Part II, and outline some of the most discussed legal concepts in this respect under Part III, in order to assess recent decisions from Switzerland, Germany, France, and India dealing with these legal concepts, as discussed in Part IV.

These jurisdictions recently further refined and clarified their positions on implied consent, the group of companies doctrine, and piercing the corporate veil. Yet, it will become apparent that there is no internationally uniform approach in this regard. Rather, the jurisdictions continue on their own respective paths and deepen the differences between their approaches.

II. Need to Extend Arbitration Agreements to Third Parties

In today's reality of globalised and distinguished trade and investment relationships, there are manifold scenarios in which an extension of the arbitration agreement to a third party appears beneficial, at least for one of the parties to such an agreement.

One prominent advantage of such an extension is the enhanced efficiency of having one concentrated arbitration instead of initiating several proceedings in different fora against different counterparties. Apart from serious efficiency deficiencies, the latter approach runs the risk of conflicting decisions, given the limited means to establish a binding effect of arbitral awards on parallel arbitral or state court proceedings. Particularly where recourse claims are concerned or in cases of an "*alternative*" liability

[regional court of appeal] Paris, June 23 2020, Numéro d'inscription au répertoire général [RG] No. 17/22943; Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 9, 2023, Beck-Rechtssachen [BeckRS] 2023, 7724 (Ger.); *see* Maxi Scherer & J. Ole Jensen, *Towards a Harmonized Theory of the Law Governing the Arbitration Agreement*, 10(1) IND. J. ARB. L. 1, 3 (2021), for further recent decisions dealing with the law applicable to the arbitration agreement.

of either one or the other respondent, the materialisation of such a risk can result in highly unsatisfying outcomes.[6]

The commercial realities of multinational corporate groups – having sophisticated structures of various legal entities, out of which several might be involved in the negotiation or performance of a contract – contribute to the significance of questions related to the extension of arbitration agreements. To elaborate, if different entities of a corporate group are involved in the pre-negotiation stage or the negotiation stage (as financiers or guarantors, amongst others), or in the actual performance of the contract, but only one entity is a signatory to the contract, then the necessity for an extension of the agreement beyond the signatory becomes apparent. Particularly, in the cross-border context, such an extension to closely related group companies may be the only viable route for the counterparty to reach an internationally enforceable title within reasonable time.

III. Approaches to Extending Arbitration Agreements

Yet, arbitration is traditionally bilateral in its set-up. The agreement to submit a dispute to arbitration requires, in principle, the unequivocal consent of the parties involved. Approaches to extend the personal scope of an arbitration agreement beyond its signatories, therefore, raise fundamental questions of contract law, and with respect to the basic principles underlying arbitration.

The outstanding importance of party autonomy, being the foundation of arbitration, stems, not least, from the fact that an agreement to arbitrate not only offers the contracting parties the opportunity to have a forum tailored to their contractual relationship and to enjoy the often-mentioned benefits

[6] "As we have often pointed out, there is a danger in having two separate arbitrations in a case like this. You might get inconsistent findings if there were two separate arbitrators. This has been said in many cases … it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question, such as causation. It is very desirable that everything should be done to avoid such a circumstance." *Cf.* Abu Dhabi Gas Liquefaction Co. v. E. Bechtel Corp., Lord Denning MR, [1982] EWCA (Civ) 2 Lloyd's Rep. 425 (Eng.).

of arbitration,[7] but also constitutes a waiver of the basic right to the lawful judge, i.e., from an often times constitutionally guaranteed right.[8] Where an arbitration agreement is in place, the parties can be ordered to refrain from taking recourse to state courts – even from courts of a state different from the one where relief is sought,[9] and even through an application by non-signatories.[10] In light of this, as a general rule, arbitral tribunals and state courts only allow for the extension of the arbitration agreement under rather exceptional circumstances.

Few national arbitration laws lay down the extension of an arbitration agreement to non-signatories,[11] or allow for a direct inference from its wording.[12] In legal literature and the case law of arbitral tribunals and courts,

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7 *Cf.* ALAN REDFERN, NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION recitals 1.122-1.128 (7d. ed. 2022).

8 *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, ¶ 1, Nov. 4, 1950, 213 U.N.T.S.221, Europ. T.S. No. 5; GRUNDGESETZ [GG] [BASIC LAW], *translation at* https://www.gesetze-im-internet.de/englisch_gg/, art. 101, ¶ 1, sent. 2 (Ger.); INDIA CONST. art. 14, 39A (1950); U.S. CONST. amend. XIV, § 2.

9 Recent example of an anti-suit injunction by the English courts restraining a party from circumventing an arbitration agreement by seeking interim relief from local Brazilian courts: Aquavita International SA v. Indagro SA, [2022] EWHC 892 (Eng.).

10 Confirmation by the US Supreme Court that a non-signatory to an arbitration agreement may rely on US state-law principles of equitable estoppel to compel arbitration instead of Alabama state courts: GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, 140 S. Ct. 1637 (2020), at ¶ 5.

11 In Article 14 of the Peruvian Arbitration Act, 2008, the arbitration agreement is explicitly extended to "those whose consent to arbitration, in good faith, is determined by their active and determining participation in the negotiation, conclusion, execution or termination of the contract which comprises the arbitration agreement or to which the agreement is related. It also extends to those who intend to derive rights or benefits from the contract, according to its terms." Peruvian Arbitration Act, Decreto Legislativo No. 1071, El Peruano, June 28, 2008, art. 14.

12 Until its recent decision in Cox and Kings v. SAP India of Dec., 06, 2023 (*see, infra* note 71), the Indian Supreme Court read the possibility of extending the arbitration agreement to third parties into the following wording: "a judicial authority, […] shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration." *See*, The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 45; For domestic arbitration, *see,* The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 8; Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42, at ¶ 25 (India).

however, various legal concepts are subsumed under the term of *extending* arbitration agreements. Some of the legal concepts in this context, like agency or succession, are to a large extent a matter of general principles of contract law. They depend strongly on the particularities of domestic agency laws,[13] or company laws.[14]

By contrast, other legal doctrines are rather specific to international arbitration and lead to a great variety of arbitration-related case law across jurisdictions. Three approaches to extend agreements to arbitrate beyond their signatories will be outlined in the following: An extension based on the "implied consent" of the non-signatory (A.), and the "group of companies doctrine" (B.) as well as an extension through the "piercing of the corporate veil" (C.).

It is to be noted that these approaches are not always clear-cut and overlap to some extent, given that they are based on case law and that they all result in the same finding – the creation of the non-signatories' consent to arbitrate where there is no such consent or acceptance by way of a written (or oral) arbitration agreement. Even where two arbitral tribunals or state courts seemingly apply the same concept of extending the arbitration agreement, the underlying issue is always one of contract interpretation and, as such, depends heavily on the parties' intentions and the facts that can be established.[15]

Other forms of third party participation in arbitral proceedings, excepting through the extension of the arbitration agreement, will not be part of this

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13 For examples for national particularities regarding concepts of agency: *see*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 5.03 [F] (3d. ed. 2020).

14 *See, e.g.*, Joseph Schwartz, Julian Bickmann & Lukas Buchholz, *The Application of Sec. 25(1) HGB to Arbitration Agreements*, Zeitschrift für Schiedsverfahren [SchiedsVZ] 154 (2023) on the German laws of succession in case a commercial entity continues a business under its prior name; BGH Nov. 12, 1990 Neue Juristische Wochenzeitschrift Rechtsprechungs-Report [NJW-RR] 423 (424) (1991) (Ger.) on the extension to shareholder of a general partnership (*offene Handelsgesellschaft [oHG]*) under German law.

15 *See, supra* note 13, at 10.01 [E].

analysis. In particular, and importantly for arbitration users,[16] it is possible to extend the arbitral proceedings to third parties by way of a joinder, or by consolidating arbitration proceedings. These concepts also require an effective arbitration agreement as a basis. Their application depends primarily on the respective arbitration rules chosen by the parties.[17] Similarly, the legal concept of a third-party intervention – i.e., by parties who are not *directly* involved in the claim (*Nebenintervention, intervention accessoire, intervento adesivo*) – as well as third party notices, can be of utmost importance in practice, but are typically not concepts where the extension of the arbitration agreement is at the centre of interest. Solutions for these issues are mostly derived from institutional rules,[18] and supplemental rules which are to be agreed between the parties and the third parties,[19] or achieved through an appropriate design of a multi-party arbitration clause.[20] Thus, these questions are only marginally and rather incidentally concerned with the matter of extending the arbitration agreement to non-signatories.

A. Implied consent

The approach of relying on the *implied consent* of a non-signatory entity is probably the closest to an explicit consent to arbitrate, and, therefore, widely used to justify the extension of an arbitration agreement.[21]

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16 "Lack of power in relation to third parties" is considered the third worst feature of international arbitration for users of international arbitration. *See*, White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, at 8, *available at* https://arbitration.qmul.ac.uk/research/2018/.

17 *See, e.g.*, International Chamber of Commerce (ICC) Rules of Arbitration, 2021, art. 7, 10; Deutsche Institution für Schiedsgerichtsbarkeit (DIS) Arbitration Rules, 2018, art. 8, 19; Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, art. 27, 28.

18 *Cf.* Swiss Rules of International Arbitration, 2021, art. 6(4).

19 *Cf.* Draft supplementary rules for third party notices of the DIS, as of May 02, 2023, *available at* https://www.disarb.org/en/networks-young-talent/2018-dis-arbitration-rules-clinic/practice-group-third-party-notice.

20 *See* Reinmar Wolff, *Gestaltung einer vertragsübergreifenden Schiedsklausel*, SchiedsVZ 59, 62 (2008).

21 *See, e.g.*, Bundesgericht [BGer] [Federal Supreme Court] Apr. 17, 2019, 145 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 199, 202

The notion of an implied consent to arbitrate requires the intent of the non-signatory and the contracting partners that the non-signatory is understood to be bound by the arbitration agreement. A determination of such an implied consent usually requires the assessment of the non-signatories' (and the signatories') conduct with respect to the overall contract and the arbitration agreement in place.[22] Given the severability of the arbitration clause from the rest of the contract, an involvement with a contract under substantive law cannot automatically be equated with consent to arbitrate – even if the consent to the underlying contract would usually contain a consent to arbitrate as well.[23]

In jurisdictions where notions of implied consent are commonly used to justify the extension of arbitration agreements, a predominant involvement in the conclusion and/or the performance of the contract is required:

- Under Swiss law, such involvement must either constitute a clear demonstration of the consent to being bound by the agreement to arbitrate, or establish reasonable reliance of the contracting party that the non-signatory intended to be bound by it.[24] In this respect, arbitral tribunals and Swiss courts particularly assess the non-signatory's conduct in order to derive a declaration of intent thereof. If the non-signatory's conduct alone is of a certain weight, it might suffice to prove

(Switz.); Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd. & Anr., (2021) 281 DLT 246 (India); ICC Award No. 6519, 2 (2) Clunet 1991, ICC Court Bulletin 34, 35 (1991); *ICC Case No. 1434, 1975*, *in* COLLECTION OF ICC ARBITRAL AWARDS 1974 - 1985 264 (Sigvard Jarvin & Yves Derains eds., 1994); *See* BORN, *supra* note 13, at 10.02 [C].

22 Carlos Alberto Matheus López, *Global Analysis of the Extension of the Arbitration Agreement to Non-signatories, and Proposed Model Norm and Guideline for Standard Use*, *in* INTERNATIONAL ARBITRATION: QUO VADIS? § 5.04[A][1] (Ben Beaumont, Alexis Foucard & Fahira Brodlija eds., 2022).

23 *See* Stavros Brekoulakis, *Parties in International Arbitration: Cpnsent v. Commercial Reality*, THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION ch. 8, recital 8.14 (Stavros Brekoulakis, Julian David Matthew Lew & Loukas A. Mistelis eds., 2016).

24 Nathalie Voser, *Multi-party Disputes and Joinder of Third Parties*, *in* ICCA CONGRESS SERIES NO. 14 (DUBLIN 2009): 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL CONFERENCE 372-375 (2009).

the intention of being bound by the arbitration agreement.[25] The requirement that the arbitration agreement is to be "*signed by the parties*,"[26] does not impede the extension to non-signatories as it is considered to refer to the initial parties only.[27] Where the parties' conduct alone does not suffice to reason a consent, the interplay between the conduct and additional evidence – like documents proving the wilful interference with the performance of the contract – can establish the non-signatory's intent to be bound by the arbitration agreement.[28] If, however, the involvement in the negotiations and the performance of the contract is rather incidental, arbitral tribunals and state courts will usually deny motions to extend the arbitration agreement.[29]

- Similarly, French courts assess whether the non-signatories' direct involvement in the performance of a contract may justify an extension of the arbitration agreement to a third party.[30]

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25 Bundesgericht [BGer] [Federal Supreme Court] Oct. 16, 2003, 4P.115/2003/ech (Switz.); Philippe Bärtsch & Angelina M. Petti, *The Arbitration Agreement, in* INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 25 (2d. ed., Elliott Geisinger, Nathalie Voser & Angelina M. Petti eds., 2013).

26 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S 38, art. II(2).

27 Simon Gabriel, *Congruence of the NYC and Swiss Lex Arbitri Regarding Extension of Arbitral Jurisdiction to Non-Signatories.* BGE., 145 BGE III 199 (BGer Nr. 4A_646/2018), 37(4) ASA BULL. 883, 885 (2019).

28 *See* Tobias Zuberbühler, *Non-Signatories and the Consensus to Arbitrate*, 26(1) ASA BULL. 18, 23 (2008).

29 For further references to cases decided under Swiss law, *see* BORN, *supra* note 13, at 10.02 [C] recital 123, 127.

30 Cour de cassation [Cass.] [supreme court for judicial matters] 1 civ. Mar. 27, 2007, Bull. civ. 129 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, May 7, 2009, RG No. 08-02025 (Fr.).

- Under Indian law, an extension of the arbitration agreement can be accepted on the basis of "*discernible intentions of the parties, and, to a large extent on good faith principle*."[31]

However, even if an extension of the arbitration agreement on the basis of the principle of implied consent constitutes, to a large extent (and in most jurisdictions), a mere application of general principles of the interpretation of declarations of intent, some jurisdictions categorically refuse such an approach. Differing from the decision of the arbitral tribunal – and, eventually, from the decision of the French courts[32] – the United Kingdom ["**UK**"] Supreme Court, by applying French law, found in its decision in the matter of *Dallah Real Estate and Tourism Holding Company* v. *The Ministry of Religious Affairs, Government of Pakistan* ["**Dallah**"] that even the interplay of several indications for the implied consent of a non-signatory party (being the government of Pakistan) was not sufficient to justify an extension of the arbitral agreement:

> "*[T]here was no material sufficient to justify the tribunal's conclusion that the Government's behaviour showed and proved that the Government had always been, and considered itself to be, a true party to the Agreement and therefore to the arbitration agreement*." [33]

The decision was quintessential for the reluctant approach of English courts as to the extension of arbitration agreements to non-signatories.[34] This stance was, not least, reaffirmed by the decision of the English courts in the *Kabab-Ji SAL (Lebanon)* v. *Kout Food Grp. (Kuwait)* ["**Kabab-Ji**"] case.[35] The UK Supreme Court found, this time by applying English law, that the

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31 Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, ¶ 103.1 (India).

32 Cour d'appel [CA] [regional court of appeal] Paris, Feb. 17, 2011, RG No. 09-28533 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 28, 2022, No. 21-11.846 (Fr.).

33 Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 (Eng.).

34 *See, also*, The City of London v. Sancheti, [2008] EWCA Civ. 1283 (Eng.).

35 Kabab-Ji SAL (Lebanon) v. Kout Food Grp. (Kuwait), [2021] UKSC 48, 1-2 (Eng.).

respondent party's corporate parent could not become a party to the arbitration agreement, given that the relevant contract contained a clause prohibiting merely oral modifications of the contract clause which could not be superseded by any other form of consent with the arbitration agreement.

German courts are likewise reluctant towards applying notions of implied consent to assume a consent to arbitrate.[36] Although the possibility of extending an arbitration agreement based on implied consent is mentioned in some decisions,[37] the German courts – in the exceptional cases in which an extension of the arbitration agreement is accepted – base their judgments on other approaches.[38]

This shows that, although notions of implied consent are, in principle, widely accepted in different contract law systems, in the context of arbitration agreements the assessment of such consent requires additional scrutiny – and through consideration of the applicable law.

B. The Group of Companies Doctrine

The group of companies doctrine is, in essence, a subset of the broad concept of implied consent to the arbitration agreement rather than a legal theory as such.[39] Although its rationale is being applied in other areas of law

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36 *Cf.* Oberlandesgericht Saarbrücken [OLG Saarbrücken] [Saarbrücken Appeal Court] Nov. 23, 2017, No. 4 U 44/16 (Ger.).

37 "However, this does not exclude the possibility that the conduct of the third party in the individual case may justify the assumption that it has consented to the extension of the arbitration agreement to itself or has accepted this due to acting in bad faith." *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 09, 2023, BeckRS 7724, 2023 (Ger.).

38 *Cf.* Hanseatisches Oberlandesgericht Bremen [OLG Bremen] [Bremen Appeal Court] Nov. 10, 2005, No. 2 Sch 2/2005 (Ger.); Oberlandesgericht München [OLG München] [Munich Appeal Court] Jan. 13 1997, No. 13 U 104–96 (Ger.); Werner Müller & Annette Keilmann, *Beteiligung am Schiedsverfahren wider Willen?*, SchiedsVZ 113, 115 et seqq. (2007) (Ger.).

39 *See* Yves Derains, *Is there a group of companies doctrine?, in* MULTIPARTY ARBITRATION 131, 138 (Bernard Hanotiau & Eric A. Schwartz eds., 2015).

such as tax law and company law as well,[40] the group of companies doctrine emerged in the context of international arbitration.[41] It describes the notion that an entity within a group of companies may become a party to an arbitration agreement concluded by another entity within this group of companies. Yet, it always is a necessary precondition that the non-signatory fulfils further requirements indicating its intent to be bound by the arbitration agreement[42] – or that an extension is deemed reasonable on the basis of good faith considerations.[43]

Albeit not being the first award to consider an extension of the arbitration agreement to non-signatories,[44] the group of companies doctrine gained particular prominence through the interim award in the *Dow Chemical* case that the International Chamber of Commerce, International Court of Arbitration ["**ICC**"] rendered in 1982.[45] Several entities of the *Dow Chemical* group of companies, of which two were not parties to the contract with the counterparty – *Isover Saint Gobain* – initiated arbitration proceedings against *Isover Saint Gobain*. The arbitral tribunal, thus, had to decide on its jurisdiction over the claim. As regards the personal scope of the arbitration agreement contained in the main contract, the arbitral tribunal held that:

> "*irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality*."[46]

In the case of one group company of the *Dow Chemical* group, the tribunal said that the economic reality was justified through its "*absolute control over its subsidiaries having either signed the relevant contracts*."[47] In case of the other group company, jurisdiction was confirmed since it "*effectively and individually*

40 *See* BREKOULAKIS, *supra* note 23, at ¶ 133.
41 BORN, *supra* note 13, at § 10.02[E].
42 *See* ZUBERBÜHLER, *supra* note 28, at 25.
43 *Cf.* arbitral awards cited in BORN, *supra* note 13, at § 10.02[E], fn. 270, 272.
44 Bernard Hanotiau & Leonardo Ohlrogge, *40th Year Anniversary of the Dow Chemical Award*, 40(2) ASA BULL. 300, 303 (2022).
45 ICC Award No. 4131, 1984 Y.B. COM. ARB. 131 (Clunet) (Fr.), at ¶¶ 131 et seq.
46 ICC Award No. 4131, 1984 Y.B. COM. ARB. 131 (Clunet) (Fr.) at ¶ 136.
47 *Id.* at ¶ 135.

participated in their conclusion, their performance, and their termination [of the contracts]."[48] On this basis, the tribunal assumed jurisdiction over all group companies involved in the arbitration:

> "*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 contracts or to have been principally concerned by them and the disputes to which they may give rise.*"[49] (emphasis added)

It is to be noted that this decision was not based on the application of national arbitration laws or contract law, but was made "*following an autonomous interpretation of the agreement and the documents exchanged at the time of their negotiation and termination.*"[50] The tribunal in the *Dow Chemical* case relied on the foundation of consent and added the close relationships within a group of companies as an additional element to be considered when assessing the parties' intent regarding the scope of the arbitration agreement. In the following annulment proceedings regarding the interim award, the Paris Court of Appeal upheld the decision and confirmed the arbitral tribunal's finding that all *Dow Chemical* entities involved were understood as parties to the arbitration agreement, based on its analysis of the parties' common intent.[51]

Following the *Dow Chemical* award, a more flexible approach to the interpretation of the personal scope of arbitration agreements developed in international arbitration.[52] Subsequently, arbitral tribunals, scholars, and state courts used the term *group of companies doctrine* in their analysis of the personal scope of arbitration agreements and non-signatories' consent to

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48 *Id.* at ¶ 136.

49 *Id.*

50 *Id.* at ¶ 132.

51 Cour d'appel [CA] [regional court of appeal] Paris, civ., Oct. 21, 1983, 1984(1) REVUE DE L'ARBITRAGE 98, 98-114 (1984).

52 *See* HANOTIAU, *supra* note 44, at ¶¶ 305, 307.

arbitrate. The distinction from other legal concepts and the definition of what is meant by the group of companies doctrine is not always clear – and not always consistent. However, its basic idea, to use the close relationships within a group of companies as a ground for extending the arbitration agreement to other group companies, is at the heart of decisions and developments in several jurisdictions – be it in applying or denying an application of the *group of companies doctrine*:

- The English High Court held in its *Peterson Farms* v. *C&M Farming Ltd.* ["**Peterson Farms**"] decision that the group of companies doctrine "*forms no part of English law*,"[53] a principle that also became visible in earlier decisions regarding related issues.[54]

- The Singapore High Court in its *Manuchar Steel Hong Kong Ltd* v. *Star Pacific Line Pte Ltd.*[55] judgment, referred to the *Peterson Farms* decision and stated that it was convinced that "*the singly economic entity concept was recognised at law in Singapore nor was there a good legal basis to support its recognition*."[56]

- German courts and legal authors are also hesitant to extend the arbitration agreement by taking recourse to the group of companies doctrine.[57] However, the German Federal Court of Justice stated in 2014 that the application of the group of companies doctrine under foreign arbitration laws does not constitute a breach of the German *ordre public*. Therefore, an

53 Peterson Farms Inc. v. C&M Farming Ltd., [2004] EWHC 121, ¶ 62 (Eng.).

54 Bank of Tokyo Ltd. v. Karoon, [1987] EWCA (AC) 45 (Eng.); Adams v. Cape Indus Plc, [1990] EWCA Ch 433, 538 (Eng.).

55 Manuchar Steel Hong Kong Ltd v. Star Pacific Line Pte Ltd, [2014] SGHC 181, 4 SING. L. REV. [SLR] 832 (Sing.).

56 *Id.* at ¶ 136.

57 *Cf.* Müller/Keilmann, SchiedsVZ, 113, 118 (2007); Hanseatisches Oberlandesgericht Hamburg [OLG Hamburg] [Hanseatic Appeal Court], Nov. 8, 2001, 6 Sch 4/01-juris (Ger.).

arbitral award in which the arbitral tribunal assumed its jurisdiction on the basis of the group of companies doctrine under the rules of another jurisdiction would not be set aside by the German courts.[58]

- Decisions of Swiss courts and arbitral tribunals show reluctance to strongly emphasise any group of companies relationship when analysing the consent to be bound by an arbitration agreement.[59] Yet, this does not mean that an extension of the arbitration agreement to related group companies is not possible under Swiss law.[60] Rather, the refusal to accept a concept like the group of companies doctrine seems to be driven by an intent to oppose an over-simplification of the analysis of consent and to impede the existing flexible approach.

- Based on the *Dow Chemical* decision, French courts use the group of companies doctrine regularly (as one of the reasons) to justify the consent to an extension of the arbitration agreement to non-signatory group companies.[61] Not only do French courts hold up awards which are based on the group of

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58 Bundesgerichtshof [BGH] [Federal Court of Justice], May 8, 2014, SchiedsVZ 151 (2014) (Ger.).

59 "*Finally, the objection that YY is bound by the arbitration clause agreed upon by Y in accordance with the "groupe de sociétés doctrine" must be countered with corresponding considerations. Apart from the fact that such a binding obligation can only be assumed with reservation, in particular vis-à-vis an arbitration defendant, it requires – also in the opinion of the complainants – special circumstances which justify a protection of the third party's trust based on a legal prima facie case.*" *X., XX. v. Y., YY., Schweizerisches Bundesgericht, I. Zivilabteilung, Not Indicated, 29 January 1996*, 14(3) ASA BULL. 496;
"*the principle according to which a company may be considered a party to a contractual undertaking entered into by another company by virtue of the fact that the two companies belong to the same group constituting a single economic reality does not exist in Switzerland de lege lata.*" A. v. B. et C, CCIG Case No. 137, 24 March 2000, 21(4) ASA BULL. 781, 799 (2003).

60 Bundesgericht [BGer] [Federal Supreme Court] Oct. 16, 2003, 4P_115 /2003, 13 (Switz.).

61 Emmanuel Gaillard & John Savage, Part 2: *Chapter II – Formation of the Arbitration Agreement*, in Fouchard Gaillard Goldman on International Commercial Arbitration 241, 286 et seqq. (1999); also: *cf.* list of cases in DERAINS, *supra* note 39, at ¶¶ 138-140.

companies doctrine, but they also annul decisions where the group of companies doctrine was disregarded when it was found that an implied consent within a group of companies could be established.[62]

- Similarly, Egyptian courts refer to the group of companies doctrine to extend the personal scope of arbitration agreements as one of the ways to extend arbitration agreements to third parties.[63] Egyptian case law analyses the active contribution of a group company in the performance of the contract to assess whether the "*economic unity*" of the entities can justify an extension of the arbitration agreement.[64]

- In India, the group of companies doctrine was at the centre of a noteworthy development relating to the extension of arbitration agreements in recent years. While the starting point was that non-signatories cannot be included in arbitration proceedings,[65] the last decade demonstrated a distinct openness of Indian courts to extend arbitration agreements beyond their signatories. In the 2013 *Chloro Controls India Pvt. Ltd.* v. *Severn Trent Water Purification Inc* ["**Chloro Controls**"] decision,[66] for the first time in the context of international arbitration proceedings, the Indian Supreme Court affirmed the extension

62 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 06, 2010, Rev. Arb. 2010 813. (Fr.).; Cour d'appel [CA] [regional court of appeal] Paris 1e CH., Dec. 18, 2018, RG No. 16/24924 (Fr.).

63 Mahkamat al-Naqd [Court of Cassation], session of 13 Mar. 2018, year 86, challenge nos. 2609, 3100 and 3299 (Egypt); Ibrahim Shehata, *The extension of arbitration agreements to third parties through the lens of Egyptian courts*, 36(4) ARB. INT'L 571 (Dec. 2020); Mohamed Abdel Raouf, *Chapter 4.2: Egypt*, ARBITRATION IN AFRICA: A PRACTITIONER'S GUIDE 433 (2d. ed. Lise Bosman eds., 2021).

64 Mahkamat al-Naqd [Court of Cassation], session of 22 June 2004, year 72, challenge nos. 4729 (Egypt).

65 Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531 (India).

66 Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641, ¶ 103.1 (India).

of the arbitration agreement to legal entities closely related to the respective signatories of the arbitration agreement by relying on foreign cases. Since then, the application of the group of companies doctrine has been extended to domestic arbitrations and has become a well-established principle of Indian arbitration law[67] – up to a point where the jurisprudence was criticised for creating an "*overexpansion*" of the group of companies doctrine.[68] In its recent *Oil and Natural Gas Corporation Ltd.* v. *M/s Discovery Enterprises Pvt. Ltd.* ["**ONGC**"][69] decision, the Indian Supreme Court further specified the factors to be considered when applying the group of companies doctrine under Indian law and, following the referral to a five-judge constitution bench in the *Cox and Kings Ltd.* v. *Sap India Pvt. Ltd.* ["**Cox and Kings**"] case,[70] authoritatively confirmed the application of these principles.[71]

- Although the principles of privity of contract and of separate legal personality exist in all of the jurisdictions outlined above, the reception of the *Dow Chemical* decision alters fundamentally. The perceived constraint to the general validity of those legal principles as well as the, partly, blurred lines of the group of companies doctrine are the main reason for the prominent and

67 Exemplary for the Indian approach: "Courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause." *See,* Enercon (India) Ltd. & Ors. v. Enercon GMBH and Anr., (2014) 5 SCC 1 (India), ¶ 88.

68 *See* Charlie Caher, Dharshini Prasad & Shanelle Irani*, The Group of Companies Doctrine – Assessing The Indian Approach*, 10(1) IJAL 33, 40 (2021); *see, also,* Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 431 (India); Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678 (India); Mahanagar Telephone Nigam Ltd v. Canara Bank, AIR 2019 SC 4449 (India).

69 Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42, at ¶¶ 40-41 (India).

70 Cox & Kings Ltd. v. Sap India Pvt. Ltd., (2022) 8 SCC 1, ¶ 104 (India).

71 Cox & Kings Ltd. v. Sap India Pvt. Ltd., Dec. 06, 2023, A.P. (Civ.) No. 38 of 2020 (India); *see infra*, iii.

vocal criticism of the concept.[72] The above also shows that, like no other legal concept in the context of extending the arbitration agreement, the group of companies doctrine demonstrates the stark contrasts between the approaches of different jurisdictions. It furthermore shows that the boundaries do not run along the classical civil law versus common law divide, but that many jurisdictions developed their very own understanding of the group of companies doctrine.

C. Piercing of the Corporate Veil

In general, a widely accepted exception to the principle of privity of contracts is established in case of a commonly so called "piercing (or lifting) of the corporate veil." With regards to the extension of arbitration agreements, the concept is heavily based on considerations of equity and fairness and describes the approach to prevent an abuse of corporate structures.[73] An arbitral tribunal in an ICC arbitration explained the foundations of the concept as follows:

> *"Equity, in common with the principles of international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment*."[74]

Where the principles of separate legal entities are deployed to an extent that reaches the level of fraud or abuse of rights, the existence of separate legal entities may be disregarded in order to legally hold the ultimate owner of a corporation which formally acted instead of the owner accountable. The specific prerequisites differ in different legal systems. Yet, typical characteristics of cases where arbitral tribunals and courts accept an

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72 *See, e.g.*, BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTI-PARTY, MULTI-CONTRACT, MULTI-ISSUE – A COMPARATIVE STUDY 95, ¶ 244 (2d. ed. 2020).

73 BORN, *supra* note 13, at §10.02[D].

74 Westland Helicopters Ltd v. Arab Org. for Indus., *Interim Award*, ICC Case No. 3879, Mar. 5, 1984.

extension on the basis of piercing the corporate veil are that the corporate parents have excessive corporate and financial control over the formally acting entity and make fraudulent use of corporate structures in order to avoid liability, and to disregard interests of the contractual counterparty.[75] With regard to the legal effects of applying the piercing of the corporate veil theory, it is more than ever important to differentiate between the substantive liability and the procedural effect, given that a consent to arbitrate is not even fabricated, but entirely substituted.

- Under English law, piercing the corporate veil is, under exceptional circumstances, deemed to be admissible.[76] However, particularly by referring to the reasoning in *Adams* v. *Cape Industries*,[77] a decision where the deliberate allocation of risks within a group of companies was found to be "*inherent in our [the English] corporate law*," it seems that courts and arbitral tribunals are very reluctant to actually apply the principle in practice.[78]

- Under Swiss law, piercing the corporate veil (*Durchgriff*) is accepted – albeit within narrow limits.[79] However, an application would typically result in a replacement of the signatory company by the corporate parent, rather than in an

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75 BREKOULAKIS, *supra* note 23, at ch. 8, 119, 143; Three variants of the theory of piercing the corporate veil can be differentiated: The alter ego principle, the instrumentality doctrine and the identity doctrine. *See* Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?*, 6(5) J. INT'L. ARB. 647, 655 (2009).

76 Prest v. Petrodel Resources Limited, [2013] UKSC 34; DHN Food Distributors Ltd v. Tower Hamlets London Borough Council, [1976] EWCA 1 WLR 852 (Eng.).

77 Adams v. Cape Indus. Plc., [1990] EWCA Ch 433, 544 (Eng.).

78 Technical know-how buyer P v. Engineer/seller A, Final Award, ICC Case No. 7626, 1995, 22 ICCA Y.B. 132, 141 (1997); Audley William Sheppard, *Chapter 10: Third Party Non-Signatories in English Arbitration Law, in* THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 193 (Stavros L. Brekoulakis, Julian David Mathew Lew & Loukas A. Mistlelis eds., 2016).

79 Bundesgericht [BGer] [Federal Supreme Court] Nov. 24, 2006, 4C_327/2005, at recital 3.2.4 (Switz.).

extension of the contract.[80] In a much-cited ad-hoc arbitration award of 1991, an arbitral tribunal seated in Switzerland actually assumed its jurisdiction over a non-signatory corporate parent by piercing the corporate veil.[81] The tribunal held that this was justified since the actual signatory did not have any assets other than claims against the corporate mother, and any independence in making decisions. Additionally, the tribunal also found an abuse of rights based on the corporate parent's conduct when dissolving the signatory company.

- While German courts, in exceptional cases, use the theory of piercing the corporate veil to justify the substantive liability of a corporate parent,[82] they are reluctant towards an application on extending arbitration agreements.[83]

- By contrast, United States of America ["**US**"] case law shows a greater openness to applying the principles of piercing the corporate veil to extend the personal scope of the arbitration agreement as well as to justify substantial liability – especially where cases of fraud or inequitable conduct are present.[84] The factors and prerequisites of piercing the corporate veil, however, depend strongly on the factual circumstances of each case.[85]

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80 VOSER, *supra* note 24, at 378.

81 Tobias Zuberbühler, *Non-signatories and the Consensus to Arbitrate*, 26(1) ASA BULL. 18, 18-34 (2008).

82 Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 10, 2007, Deutsche Notar-Zeitschrift [DNotZ] 542, 2008 (Ger.).

83 "*Breaking the principle of separation on the substantive level in the case of a liability through piercing the corporate veil does not pass through to the procedural level and thus to the question of the arbitral tribunal's jurisdiction.*" *See below* (D.II.), Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 09, 2023, BeckRS 7724, 2023 (Ger.); *see, also*, Müller/Keilmann, SchiedsVZ, 113, 117 (2007).

84 BORN, *supra* note 13, at § 10.02 [E], fn. 172.

85 An exemplary list is given in Carte Blanche (Singapore) Pte., Ltd v. Diners Club International, Inc., 2 F.3d 24 (2d Cir. 1993); a classification is provided in: FERRARIO, *supra* note 75, at 647, 655 et seqq.

This shows that, with regards to national concepts of piercing the corporate veil, the distinction between substantive liability and a procedural obligation to arbitrate can be of particular relevance.

IV. Reflection in Recent Case Law in Different Jurisdictions

In the this part, six recent supreme court decisions from different jurisdictions have been analysed, which reflect and reiterate the respective approaches taken by these jurisdictions and are exemplary for recent developments. The decisions from Switzerland (A.), Germany (B.), France (C.), and India (D.) deal with the different concepts outlined above, and illustrate the importance of the law applicable to the arbitration agreement, as well as of the forum, for a post-award scrutiny of an arbitration agreement; be it in the context of setting aside proceedings or at the recognition and enforcement stage.

A. Switzerland: High threshold for an extension of arbitration agreement on the basis of interference with the contract

With its decision dated November 13, 2020, the Swiss Federal Supreme Court set aside a partial award through which an arbitral tribunal confirmed jurisdiction over a non-signatory to an arbitration agreement.[86] The decision dealt with the requirements of assuming an implied consent to arbitrate under Swiss law, and ultimately rejected the extension to a non-signatory.

The underlying arbitration clause was contained in a multi-party contract between a supplier and several purchasers about the construction and operation of a privately-owned power plant in Bangladesh. Under an additional contract with the supplier of the power plant, a subcontractor agreed to deliver and install diesel engines for the power plant. Following technical problems with the engines, both the supplier and the subcontractor jointly contacted the purchasers and stated that they both

[86] Bundesgericht [BGer] [Federal Supreme Court] Nov. 13, 2020, 147 ENTSCHEIDUNGEN DES SCCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 107 (Switz.).

"*will guarantee the quality of the engine*."[87] Subsequently, the subcontractor also communicated directly with the purchasers, and was involved in attempts to resolve the technical issues at the power plant. When the purchasers eventually refused to make payments under the main contract, the supplier initiated arbitration proceedings under the ICC Rules. As a response, the purchasers requested to include the subcontractor in the arbitration.

Based on an overall assessment of the subcontractor's interference in the conclusion and the performance of the main contract, the arbitral tribunal decided in a partial award that the subcontractor was bound by the arbitration agreement and, thus, confirmed jurisdiction. The tribunal held that the main parties of the contract could have been of the view that the subcontractor had the intention to accept an extension of the arbitration agreement. Since the subcontractor already took part in the negotiations of the main contract prior to its conclusion and produced one of the technical annexes to that contract, and since the subcontractor was involved significantly in the performance of certain parts of that contract, the tribunal saw sufficient reasons for the main parties to trust in an acceptance of the main contract's arbitration clause. Thus, the arbitral tribunal extended the personal scope of the arbitration agreement on the basis of principles of good faith (*Vertrauensprinzip*). It derived this outcome from the subcontractor's conduct and the reasonable trust which the conduct could create on the main contracting parties' end.

In the following annulment proceedings before the Swiss Federal Supreme Court, the subcontractor challenged the arbitral tribunal's jurisdiction. The Court dismissed the tribunal's interpretation, declined the tribunal's jurisdiction over the subcontractor, and set aside the partial award. By emphasising the principle of privity of contract, the Court stated that an extension of the arbitration agreement to non-signatories, albeit indisputably being possible under Swiss law, should be limited to exceptional cases:

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87 *Id.* at ¶ A.c.

> "*When interpreting an arbitration agreement, its legal nature must be taken into account; in particular, it must be noted that the waiver of a state court severely restricts the means of appeal. According to the case law of the Federal Supreme Court, such an intention to renounce cannot be assumed lightly, which is why a restrictive interpretation is required in case of doubt.*"[88]

In the present scenario, the Swiss Federal Supreme Court did not find compelling reasons for an extension on the basis of the principles of good faith and fair dealing. The subcontractor's interference with the contract and its involvement in the performance was found to be rather typical for a subcontractor. In light of that, the purchasers could not assume that the subcontractor had become a party to the arbitration agreement. Thus, according to the Court's decision, there was no an implied declaration of intent to be bound by the arbitration agreement. Nor was there sufficient reasons for reasonable trust by the contracting parties of the main agreement that the subcontractor could be deemed bound by their arbitration agreement.

With this decision, the Swiss Supreme Court further specified the prerequisites for an extension of the arbitration agreement. It made clear that – and insofar the case differed from the scenario in an earlier decision by the Court[89] – where the contractual role of a third party is clear, like it is in the case with a subcontractor, even a strong interference with the contract does not necessarily result in an extension of the arbitration agreement. Thus, the decision added another important piece to the overall picture of distinguished Swiss case law regarding the extension of arbitration agreements by setting certain limits as regards the interference of third parties with contracts.

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88 *Id.* at ¶ 3.1.2.

89 Bundesgericht [BGer] [Federal Supreme Court] Oct. 16, 2003, 129 147 ENTSCHEIDUNGEN DES SCCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 727, 730 (Switz.).

B. Germany: No application of the group of companies doctrine and no procedural veil-piercing in case of substantive liability

In a recent decision of the German Federal Court of Justice,[90] the Court had to decide, inter alia, on the extension of the arbitration agreement to third parties according to notions of piercing the corporate veil.

In the underlying arbitration, the arbitral tribunal – which was seated in Russia – extended the arbitration agreement to several non-signatories on the side of the respondents. These non-signatories were, *first*, group companies of the holding company which had entered into an arbitration agreement with the claimant and, *second*, former managers of the group of companies. After the tribunal ordered all respondents to, jointly and severally, pay damages in the amount of about €50 million to the claimant, the respondents' application to set aside the award in Russia was unsuccessful.

In the subsequent recognition and enforcement proceedings before German courts, the Koblenz Appeal Court[91] and the German Federal Court of Justice, it was held that German courts are not bound by the decision of the Russian courts in the annulment proceeding. Thus, the Courts denied the recognition of the arbitral award in Germany. Due to the parties' implied choice, the German Federal Court of Justice found that the arbitration agreement was governed by German law. Under German law, however, the tribunal had exceeded the personal scope of the arbitration agreement. Therefore, there was no valid arbitration agreement within the meaning of Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**]". Consequently, the arbitral award could not be recognised and enforced in Germany.

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90 Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 9, 2023, BeckRS 7724 (2023) (Ger.).

91 Oberlandesgericht Koblenz [OLG Koblenz] [Koblenz Appeal Court] Mar. 31, 2022, No. 2 Sch 3/20 (Ger.).

In its decision, the German Federal Court of Justice stressed the paramount significance of the consent to arbitrate as the fundamental basis of arbitration. The Court emphasised that deviations from the general rule that arbitration agreements exclusively bind signatories can only be accepted under exceptional circumstances. Furthermore, the Court – for the first time – held explicitly that the group of companies doctrine is not recognised under German law. And, even where substantive liability of the corporate parent due to piercing the corporate veil might be assumed based on the claimant's submissions, there is no automatic extension of the arbitration agreement on the procedural level. Courts and arbitral tribunals must separate questions of the personal scope of the arbitration agreement from the substantive liability of third parties, which might well differ. The non-signatories' constitutional right to the lawful judge outweighs a claimant's interest in concentrating the enforcement of his claims in one single forum or proceeding. The Court stated that an extension of the arbitration agreement to other group companies might only be possible if there were clear indications for consent to be bound by the arbitration agreement. In the present case, the Court found no such indications for consent of the non-signatories. Therefore, according to the German Federal Court of Justice's decision, the tribunal erred in assuming jurisdiction over all respondents.

With this case, the German Federal Court of Justice got the chance to further clarify its stance concerning the extension of the arbitration agreement under German law. In the decision, the Court referred to the established exemption of the principle of privity of contracts in cases of personally liable partners in general partnerships. However, the Court made it clear that it does not see room to further develop its judicature with respect to piercing the corporate veil on the basis of substantive liability within a group of companies; and, thereby, settled any doubts regarding whether elements of the group of companies doctrine could find application under German law.

C. France: Extension of the arbitration agreement by virtue of an involvement in the performance of a contract

With its decision of September 28, 2022, the French Cour de Cassation confirmed the Paris Court of Appeal's decision in the *Kabab-Ji* case, in which the Paris Court of Appeal had approved the arbitral tribunal's approach to confirm jurisdiction over a non-signatory of the arbitration agreement.[92] The decision gained much attention as it was the final word in the struggle between the English courts and the French courts about the appropriate manner to determine the law applicable to the arbitration agreement, followed by the differing outcomes as regards the personal scope of the arbitration agreement under the (different) rules applied by the courts of each country.[93]

The underlying dispute arose out of a franchise development agreement entered between a Kuwaiti and a Lebanese company in 2001. The contract was governed by English substantive law and contained an arbitration clause providing for arbitration seated in Paris. In 2004, the Kuwaiti franchisee party restructured its group of companies and created a new holding company. The Lebanese contracting partner was informed accordingly and agreed with the restructuring. Subsequently, the new Kuwaiti holding company was strongly involved in the performance of the contract, but never became a signatory to the contract – and to the arbitration agreement contained therein.

When a dispute arose, the Lebanese contracting party-initiated arbitration proceedings (solely) against the new Kuwaiti holding company to obtain damages. The tribunal – by majority decision – ruled in favour of the claimant and found that the new holding company had become a party to the arbitration agreement and became obliged to fulfil the substantive

92 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Sept. 28, 2022, No. 21-11.846 (Fr.).

93 *Cf. infra* Kabab-Ji decisions in note 5.

obligations under the contract. As a result, the tribunal awarded damages to the claimant.

Following this arbitral award, the Kuwaiti holding company applied for the annulment of the arbitral award before the French courts. In parallel, the Lebanese claimant filed recognition and enforcement proceedings before the English courts. While the most prominent and most disputed question in those parallel proceedings was the matter of which law to apply to the arbitration agreement, the underlying – and ultimately decisive – question was whether the arbitral tribunal was right in extending the arbitration agreement to the Kuwaiti holding company.

In England, the recognition and enforcement of the award was denied. The London High Court,[94] the Court of Appeal,[95] and, subsequently, the UK Supreme Court,[96] found that English law, being the law governing the substantive contract, was the applicable law to the arbitration agreement. On that basis, the extension of the arbitration agreement was decided by applying English law. The English courts held that the arbitral tribunal did not have jurisdiction to hear the dispute since the contract contained a clause requiring that all amendments to the contract must be in writing. Consequently, the holding company's conduct in performing the contract could not suffice for the holding company to become a party to the contract and to the arbitration agreement.

By contrast, the annulment proceedings in France were unsuccessful. The French courts, following the *Dalico* doctrine,[97] held that the arbitral award had "*no nationality*." In accordance with longstanding French case law, the personal scope of an arbitration agreement depends on whether the parties

94 J (Lebanon) v. K (Kuwait), [2019] EWHC 899 (Eng.).
95 Kabab-Ji SAL v. Kout Food Grp., [2020] EWCA Civ. 6 (Eng.).
96 Kabab-Ji SAL v. Kout Food Grp. (Kuwait), [2021] UKSC 48, 1-2 (Eng.).
97 According to the Dalico doctrine, the validity of an arbitration agreement depends primarily on the parties' common intent, without reference to the law governing the contract or other national law. *See*, Cass, 1e civ., Dec. 20, 1993, Bull. civ. I, No. 1675, 1994 Rev. Arb. 116, 117 (Fr.):

have actually consented to submit their disputes to arbitration (*règle matérielle*). Based on that principle, the French courts confirmed the arbitral tribunal's finding that the Kuwaiti holding company had accepted the arbitration agreement. Thus, the courts confirmed the tribunal's jurisdiction and upheld the award. In their assessment of such consent, the French courts took into account that –

(i) the non-signatory presented itself as the contracting partner towards the Lebanese business partner,

(ii) the non-signatory made payments under the franchise contract, and

(iii) the non-signatory conducted the negotiations regarding the expansion of the contract and its renewal after its expiration.

Thereby, the French courts reiterated that the transfer of substantive rights and obligations is to be assessed independently from the scope of the arbitration agreement, "*as this would otherwise amount to a revision on factual grounds*," which would be "*beyond the purview of the judges in annulment proceedings when reviewing an award.*"[98]

The French *Kabab-Ji* decision, once more, confirmed the French unique approach to determining consent to an arbitration agreement. It showed that especially in cases of group of companies scenarios, the prerequisites for allowing an extension of the arbitration agreement – knowledge of the arbitration agreement and an implicit intention to accept it, often established through a participation in negotiating and performing the contract – might be assumed.

[98] Cour d'appel [CA] [regional court of appeal] Paris, June 23 2020, RG No. 17/22943, ¶ 50 (Fr.).

D. India: Plain enforcement of foreign arbitral awards against non-signatories and fundamental developments in the context of the group of companies doctrine

As outlined above, India has become one of the strongest advocates of the group of companies doctrine in recent years. With the Indian Supreme Court case of *Gemini Bay Transcription Pvt Ltd.* v. *Integrated Sales Service Ltd.* ["**Gemini Bay**"],[99] and the *ONGC*[100] decision, this status was further confirmed. Shortly after the *ONGC* decision, the *Cox and Kings*[101] case called the application of the group of companies doctrine in Indian judicature into question. With its recent authoritative judgement in that case, the five-judge constitutional bench of the Indian Supreme Court confirmed the independent existence of the group of companies doctrine under Indian law and clarified its legal foundations as well as the standards for its application.[102]

i. Gemini Bay: Enforcement of foreign arbitral awards against non-signatories without assessment of the personal scope of the arbitration agreement

With its decision on the recognition and enforcement of a foreign arbitral award dated August 10, 2021, the Indian Supreme Court held that an arbitral award cannot be challenged on the ground that parties to the arbitration were non-signatories to the arbitration agreement.[103] According to the decision, the Indian Arbitration and Conciliation Act, 1996 ["**the Act**"] does not provide for an assessment of the personal scope of the

99 Gemini Bay Transcription Pvt Ltd. v. Integrated Sales Service Ltd., (2022) 1 SCC 753 (India).

100 Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42, at ¶¶ 40-41 (India).

101 Cox & Kings Ltd. v. Sap India Pvt. Ltd., (2022) 8 SCC 1, ¶ 104 (India).

102 Cox & Kings Ltd. v. Sap India Pvt. Ltd., Dec. 6 2023, Arbitration Petition (Civil) No. 38 of 2020 (India).

103 Gemini Bay Transcription Pvt Ltd. v. Integrated Sales Service Ltd., (2022) 1 SCC 753 (India).

arbitration clause in the context of recognition and enforcement proceedings.

In the underlying arbitration seated in Missouri, US, the sole arbitrator extended the personal scope of the arbitration agreement under the laws of the State of Delaware, US, to several non-signatories to the arbitration agreement. These were group companies of the respondent party, which had signed the underlying contract. The extension was based on the principles of piercing the corporate veil due to "*collusion*" and the "*use of the corporate forms of [the non-signatory respondents]*" as "*a façade used to shield or cover-up the unjust result of eliminating [the Claimant]*."[104] Against this background, the arbitral award ordered all respondent parties jointly and severally to make a payment to the claimant.

The non-signatory respondents' objections regarding the jurisdiction of the sole arbitrator during the recognition and enforcement proceedings before the Indian courts remained unsuccessful. The Indian Supreme Court reasoned its judgment, inter alia, with the wording of Section 46 of the Act. The provision regulates the circumstances under which a foreign arbitral award is deemed binding. It states that an award "*shall be treated as binding for all purposes on the persons as between whom it was made*."[105]

The Indian Supreme Court found that this wording can also include non-signatories to an agreement to arbitrate. Given the narrow scope of scrutiny of a foreign award pursuant to Section 48 of the Act, there is no assessment of the personal scope of an arbitration agreement under the laws applicable to the arbitration agreement. On that basis, the Court refrained from interfering with the recognition and enforcement of the award. Even if the law applicable to the arbitration agreement would not allow the extension of the arbitration agreement to non-signatories, this could not be a ground to refuse its recognition and enforcement in India.

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104 *Id.*, at ¶ 13.

105 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 46 (India).

With the *Gemini Bay* decision, the Indian Supreme Court took a stance on the scope of review of Indian courts with regard to foreign arbitral awards. Since the Court stated that the personal scope of the arbitration agreement is not to be reviewed in the recognition and enforcement stage, non-signatory parties cannot argue against the validity of the arbitration agreement on grounds of an illegitimate extension of such an agreement. Notably, this – now established – approach under Indian law differs from how other jurisdictions understand Article V(1)(a) of the New York Convention. The decision of the German Federal Court of Justice outlined above,[106] as well as the UK Supreme Court's *Dallah*[107] decision, are exemplary for the approach to review of the personal scope of the arbitration agreement in the recognition and enforcement stage. In instances where this question is controversial, but the award was not set aside at the seat of the arbitration, the *Gemini Bay* decision could open attractive enforcement options in India for award holders.

ii. ONGC: Arbitral tribunals must consider the group of companies

With its *ONGC* decision of April 27, 2022, the Indian Supreme Court – once again – reiterated the significance of the group of companies doctrine for the interpretation of arbitration agreements under Indian arbitration laws.[108] The Court decided to set aside an interim award on the ground that the arbitral tribunal did not appropriately consider the group of companies doctrine when determining the personal scope of the arbitration agreement.[109]

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106 Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 03, 2023, BeckRS 2023, 7724.

107 Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 (Eng.).

108 Oil and Natural Gas Corporation Ltd. v. M/s Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42, at ¶¶ 40-41 (India).

109 "The legal foundation of the group of companies doctrine has not been evaluated, on facts or law. […] For all the above reasons we have come to the conclusion that there was a fundamental failure of the first Arbitral Tribunal to address the plea raised by ONGC for attracting the group of companies doctrine." *Id.* at ¶¶ 49-50.

In the underlying arbitration proceedings, the arbitral tribunal had rendered an interim award, stating that it lacked jurisdiction with regards to a non-signatory which was a group company of the respondent in the arbitration and which the claimant considered to form "*a single economic entity*" with the respondent. This interim arbitral award was challenged before the Indian state courts and, ultimately, the Indian Supreme Court rendered a decision on the question of the personal scope of the arbitration clause.

In its decision, the Indian Supreme Court referred to earlier case law which established the group of companies doctrine in Indian arbitration law,[110] and once more, reiterated that the group of companies doctrine is to be considered when determining whether a non-signatory is bound by an arbitration agreement. The Court specified which factors are to be taken into account when deciding about the extension of agreement to arbitrate by reference to the group of companies doctrine. On the basis that a group of companies exists, and that the entities involved indicated an intention that the non-signatory might be bound, the following factors must be considered:

- The mutual intent of the parties,
- The relationship of a non-signatory to a party which is a signatory to the agreement;
- The commonality of the subject matter;
- The composite nature of the transaction; and
- The performance of the contract.

Since the interim arbitral award regarding the arbitral tribunal's jurisdiction over the non-signatory had failed to appropriately consider these factors – and to allow evidence related to the existence of an "*economic unity*" – the

[110] Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641, ¶ 103.1 (India).

Indian Supreme Court set aside the interim award and left the decision to be determined by a newly constituted arbitral tribunal.

The decision demonstrated, once more, the extraordinary standing which the group of companies enjoys in India and adds up to the great wealth of Indian case law by further concretising the requirements to assume jurisdiction over non-signatories within a group of companies. It also emphasised that arbitral tribunals are obliged to take factual evidence in order to determine an extension of the arbitration agreement.

iii. Cox and Kings: Revisiting the application of the group of companies doctrine in Indian jurisprudence

With the *Cox and Kings* decision of December 6, 2023, following a referral to the five-judge constitutional bench, the Indian Supreme Court added another prominent chapter to the development and specification of the Indian approach of the group of companies doctrine.[111]

In the underlying arbitration, the claimant, Cox & Kings Ltd. ["**Cox & Kings**"], initiated arbitration proceedings against its contracting partner, SAP India Pvt. Ltd. ["**SAP India**"], as well as against the mother company, SAP SE ["**SAP**"], which was not a signatory to the contract. Following difficulties with the performance of the envisaged project by SAP India, SAP had taken over the performance of the contract and, based on that, Cox & Kings considered SAP to be bound by the arbitration clause.

In the arbitration, SAP did not nominate an arbitrator. Thus, Cox & Kings applied to the Indian courts to appoint an arbitrator. Cox & Kings argued that SAP had to be included under the arbitration agreement in accordance with the Indian jurisprudence on the group of companies doctrine. In this respect, Cox & Kings especially referred to the fact that SAP was heavily

[111] Cox & Kings Ltd. v. SAP India Pvt. Ltd., Dec. 6 2023, Arbitration Petition (Civil) No. 38 of 2020 (India).

involved in the implementation and performance of the contract and that SAP India is a wholly owned subsidiary of SAP.

As a response to that request, first, a three-judge bench of the Indian Supreme Court examined the group of companies doctrine as applied in Indian case law.[112] The Court noted in a first decision of May 6, 2022 that "*ever since this doctrine was expounded in the Chloro Control case, it has been utilised in a varied manner.*"[113] The Court furthermore analysed that the Chloro Control case *"has created certain broad-based understanding of this doctrine which may not be suitable and would clearly go against distinct legal identities of companies and party autonomy itself.*"[114] The decision especially criticized earlier case law with respect to its strong emphasis on the establishment of an "*economic entity*"[115] and considerations of "*equity*."[116] It therefore questioned the prevailing Indian approach in light of the legal doctrine of party autonomy: "*The aforesaid exposition in the above case clearly indicates an understanding of the doctrine which cannot be sustainable in a jurisdiction which respects party autonomy*."[117]

Given that "*the questions raised herein are fundamental to the arbitration practice in India and have large scale repercussions,*"[118] the three-judge bench referred these

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112 Cox & Kings Ltd. v. Sap India Pvt. Ltd., (2022) 8 SCC 1 (India).

113 *Id.* at ¶ 14.

114 *Id.* at ¶ 42.

115 "The law laid down in Chloro Control (supra) and the cases following it, appear to have been based, more on economics and convenience rather than law. This may not be a correct approach. The Bench doubts the correctness of the law laid down in Chloro Control (supra) and cases following it." *See*, Cox & Kings Ltd. V. Sap India Pvt. Ltd., Ramana C.J., (2022) 8 SCC 1, ¶ 51); also referring to the English Court of Appeal judgment where, Goff L.J., famously stated: "Counsel suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged." *See*, Bank of Tokyo Ltd v. Karoon [1987] AC 45 (Eng.).

116 "This may also address the legitimate critique of Chloro Controls and Cheran Properties, that despite placing an emphasis on legal standards of intent, the Court eventually resorted to principles of equity and commercial/economic expediency to apply the Group of Companies Doctrine in those cases." *Id.*, Kant J., at ¶ 103.

117 *Id.*, Ramana C.J., at ¶ 42.

118 *Id.*, Ramana C.J., at ¶ 52.

fundamental questions regarding the application of the group of companies doctrine to a decision by a larger bench of the Indian Supreme Court.

In particular, it asked whether the group of companies doctrine as expounded by the *Chloro Control* case and subsequent judgments is valid under Indian law and should be construed as a means of interpreting implied consent to arbitrate to a decision by a larger bench. This referral of 6 May, 2022 could be understood as a response to the critics of the recent amplification of the scope of application of the doctrine in Indian case law.

On December 6, 2023, a five-judge constitutional bench of the Indian Supreme Court rendered it's the Court's final decision ion the *Cox and Kings* case. The Court confirmed the firm establishment of the (independent) group of companies doctrine in Indian case law and thereby, eventually, rejected the critics of the Indian approach to the group of companies doctrine.

The final decision stressed the outstanding significance of the arbitration agreement being the foundation of the arbitral tribunal's jurisdiction and the "*cornerstone of arbitration*".[119] Yet, it also confirmed the group of companies doctrine as "*a means of identifying the common intention of the parties to bind a non-signatory to [an] arbitration agreement by emphasizing and analysing the corporate affiliation of the distinct legal entities.*"[120] In order to determine whether such common intention exists, the Court referred to the *ONGC* decision and confirmed the applicability of the standards set therein.[121] The Court further set forth, that such an assessment must be "*fact-specific"* in order to take into account the "*complexity of commercial projects*".[122]

Finally, the Court found that the extension of arbitration agreements through the group of companies doctrine is not to be based on the phrase

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[119] Cox & Kings Ltd. v. SAP India Pvt. Ltd., Dec. 6 2023, Arbitration Petition (Civil) No. 38 of 2020 (India), at ¶ 60.

[120] *Id.* at ¶ 98.

[121] *Id.* at ¶ 128.

[122] *Id.*

"*any person claiming through or under [the arbitration agreement]*" from the Act,[123] as set with the *Chloro Controls* decision.[124] Rather, the respective group company is to be understood as a "*party*" within the definition of Sec. 2(1)(h) in conjunction with Sec. 7 of the Act.[125]

The Court thereby answered the very fundamental questions regarding an application of the group of companies doctrine under Indian law, which were raised by the referral of May 6, 2022, and which, in an extreme case, could have resulted in the end of the application of the doctrine in India. Now, the tendency that Indian courts rely like few other jurisdictions on the group of companies doctrine and contribute decisively to its ongoing development on an international level will likely continue.

V. Conclusion

A comparison between these decisions illustrates that any hopes for an internationally more aligned and uniform dealing with extending arbitration agreements to non-signatories,[126] are not merited.

- The Swiss Federal Supreme Court holds on to its well-known preferred approach to analyse a third party's overall conduct in order to derive an implied consent with the arbitral agreement, and now, added another layer to this test. Even if the prerequisites for an extension were not fulfilled in the decision outlined above, since the subcontractor did what a subcontractor does, parties clearly have the opportunity to apply for an extension of the arbitration agreement if they see

123 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, §§ 8, 45 (India).

124 *Cf. supra,* note 66.

125 Cox & Kings Ltd. v. SAP India Pvt. Ltd., Dec. 6 2023, Arbitration Petition (Civil) No. 38 of 2020 (India), at ¶ 153.

126 M.P. Bharucha, Sneha Jaisingh & Shreya Singh, *The Extension of Arbitration Agreements to Non-Signatories – A Global Perspective*, 5(1) IND. J. ARB. L. 35, 62 (2017).

a chance to establish indications for an implied consent which through the non-signatory's conduct.

- The German courts, by contrast, reiterated their distinctly greater reluctance to extending the arbitration agreement to third parties – even if these form part of a group of companies and were deeply involved in the performance of the obligations to the counterparty. And even where a substantial liability of a group company might be established on the basis of piercing the corporate veil. In this respect, the German Federal Court of Justice remains reluctant to extensions of the arbitration agreement and holds up a strict application of the principles of privity of contract.

- In France, (arbitration) traditions are equally valued – albeit in a very different manner than in Germany. "*Without any reference to any national law*,"[127] the will of the parties is deemed to be at the centre when assessing the scope of the arbitration agreement. Thus, without an explicit reference to *Dow Chemical*, the French courts in *Kabab-Ji* made clear that an extension of an arbitral agreement to a group company is always possible if the circumstances call for it – and that a formality like a no-oral-modification clause should not hinder an arbitral tribunal to be ambitious when deciding on the issue under French law.

- Indian arbitration law takes the same line – and even takes the group of companies doctrine further by developing its own understanding and concept of it. Coupled with the position not to review foreign awards with respect to the personal scope of the arbitration agreement, India can be seen as a vanguard of a

[127] Cour d'appel [CA] [regional court of appeal] Paris, June 23 2020, RG No. 17/22943 (Fr.) at ¶ 50 (Quote from *Kabab-Ji* arbitral award).

liberal dealing with extending the personal scope of arbitration agreements.

If these decisions have one thing in common, it is the finding that the issue of extending arbitration agreements to non-signatories is far from finally settled – not within each jurisdiction and less across different jurisdictions. Paired with the different approaches to determine the applicable law to the arbitration agreement and the different levels of judicial review courts undertake in the post-award stage, the interplay between different jurisdictions and different legal concepts can be highly complex. An overall picture of these questions should, therefore, not only be considered at the beginning of an arbitration, but also when drafting arbitration agreements and in the enforcement stage. Regarding the overall development of the established concepts, it is particularly to be seen whether the now further clarified approach of the Indian Courts will find followers in other jurisdictions.