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Extending an Arbitration Agreement to a Non-Signatory Party: An Appraisal of the Law and Practice in Tanzania in Comparison with Selected Countries

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Abstract

Under Tanzanian contract and arbitration laws, only a party to an arbitration agreement can be bound by such an arbitration agreement because of privity of contract and express consent to be bound by or benefit from a contract or arbitration agreement. While certain jurisdictions bind non-signatories to arbitration agreements, others retain the rigid approach requiring only signatories to be bound by arbitration agreements. As this article contends, in Tanzania, where the law is not clear on whether or not a non-signatory should be generally bound by an arbitration agreement, courts and arbitral tribunals, when confronted with the issue of whether a non-signatory can be bound by an arbitration agreement, they should look to the position in jurisdictions applying the SLE doctrine, when dealing with public corporations, or to the GOC doctrine, when dealing with private corporations.

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1. INTRODUCTION

Universally, arbitration is a consent-based dispute resolution process.[1] It is undertaken at the parties' instance as they expressly indicate such consent to arbitration in an arbitration agreement or clause.[2] For that matter, consent to arbitration has always been a prerequisite to arbitration under international treaties and state legislation.[3] As the U.S. Supreme Court held in *Volt v. Leland*,[4] *"arbitration under the [Federal Arbitration Act] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."* It is universally accepted that arbitration is consensual because parties to a contract are free to agree and choose it as a method of settlement of disputes arising out of or in connection with a contract to which they are parties.[5] Parties are also free to choose the law governing the contract and mode of dispute settlement, including arbitration.[6]

It should be noted from the outset that for commercial arbitration to take place, parties must agree in an arbitration agreement to submit disputes arising out of or in connection with the contract in question to arbitration.7 Therefore, it is important that where parties agree to insert an arbitration agreement or clause in a commercial contract, such clause must be drafted in such a way that it will expressly contain the parties' consensual agreement to arbitrate. This presupposes that parties must incorporate into the arbitration clause all the essential ingredients, the failure to do so makes the clause defective or pathological.[8]

This article, therefore, strives to examine whether a non-signatory party can be bound by an arbitration agreement under Tanzanian law, as is the case in other jurisdictions such as France, India, and the US, as opposed to the UK and Singapore, where such a notion has been outrightly rejected by courts. To be able

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[1] S*ee* particularly Steingruber, A.M., "The Mutable and Evolving Concept of 'Consent' in International Arbitration – Comparing Rules, Laws, Treaties and Types of Arbitration for a Better Understanding of the Concept of 'Consent'," *Oxford University Comparative Law Forum*, Vol. 2 (2012), available at ouclf.law.ox.ac.uk (accessed 26 February 2025); Diallo, O., *Le consentement des parties à l'arbitrage international* (PUF, 2010); Youssef, K., *Consent in Context: Fulfilling the Promise of International Arbitration, Multiparty, Multi-Contract, and Non-Contract Arbitration* (Thomson Reuters, 2011); and Steingruber, A.M., *Consent in International Arbitration* (OUP, 2012).

[2] *C.N. Onuselogu Enterprises Ltd v. Afribank (Nig) Plc* (2005) 1 NWLR Part 940 page 577 ('*Onuselogu v. Afribank*').

[3] Okoye, A., "When Can a Non-signatory Third-party be Bound by an Arbitration Award?"; an electronic article available at: https://ssrn.com/abstract=4059343 (accessed 2 March 2025).

[4] *Volt Information Sciences v. Leland Stanford, Jr. University* [1989] 489 U.S. 468 ('*Volt v. Leland*').

[5] *See*, for example, *Luganuza Investment Company Ltd. v. The Trustee of Orthodox Church of Tanzania Holy Archdiocese of Mwanza,* High Court of Tanzania (Commercial Division), Misc. Commercial Cause No. 49/2020 (Unreported) ('*Luganuza v. Orthodox Church*'); and *Sunshine Furniture Co. Ltd. v. Maersk (China) Shipping Co. Ltd. & Nyota Tanzania Ltd.,* Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 98 of 2016 (Unreported) ('*Sunshine Furniture v. Maersk*').

[6] *See* particularly Louis Dreyfuls Commodities Tanzania Ltd. v. Roko Investment Tanzania Ltd. [2017] TLS LR 588 (CAT) ('Louis Dreyfuls v. Roko Investment').

[7] Ibid. See also *M/S Marine Services Co. Ltd. v. M/S Gas Entec Company Ltd*., High Court of Tanzania (Commercial Division) Consolidated Misc. Commercial Causes Nos. 25 & 1l/2021 (Unreported) ('*Marine Services v. Gas Entec*').

[8] The term "pathological clauses" (in French: or "*clauses pathologiques*") was coined, for the first time, by the Frenchman, Frédéric Eisemann, in 1974. *See* Eisemann, F., "La clause d'arbitrage pathologique," in *Commercial Arbitration- Essays in Memoriam Eugenio Minoli* (Torino: Unione Tipografico-editrice Torinese, 1974), p. 129. *See* also Davis, B., "Pathological Clauses: Frederic Eisemann's Still Vital Criteria," *Arbitration International*, Vol. 7, Issue 4, 1 December 1991, p. 365; and Molfa, M., "Pathological Arbitration Clauses and the Conflict of Laws," *Hong Kong Law Journal*, Vol. 37, 2007, pp. 161-184.

to achieve this goal, the article begins by canvassing the concept, nature and scope of an arbitration agreement as the foundation of commercial arbitration.[9] It then examines whether, under Tanzanian law, a non-signatory party can be bound by an arbitration agreement and whether an arbitration agreement can be implied or extended to a contract that has no arbitration clause.

To be able to get a better understanding of these practical interrogations in both international and domestic arbitration, the article examines the legal positions in selected jurisdictions, including France, India, Singapore, Switzerland, Tanzania UK and US. The selection of these jurisdictions is based on the points of convergence and divergence obtaining from the court in the two divides. While jurisdictions such as France and India uphold the group of companies (GOC) doctrine, Singapore, Switzerland, Tanzania, UK and reject it and, instead, they uphold the separate legal entity (SLE) theory. Finally, the article concludes that where Tanzanian courts and arbitral tribunals are confronted with the issue as to whether a non-signatory can be bound by an arbitration agreement, they should look to the position in SLE jurisdictions[10] when dealing with public corporations, and to the GOC doctrine[11] when dealing with private corporations.

2. THE CONCEPT OF AN ARBITRATION AGREEMENT

Often referred to as the 'foundation' of commercial arbitration,[12] an arbitration agreement or clause is, universally speaking, a clause containing the parties' agreement to use arbitration as a method of dispute resolution based on mutual consent of the parties to a contract or investment agreement to arbitrate future or current disputes.[13] Legally defined, an arbitration clause is 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.'[14] Case law and the practice of drafting of arbitration clauses indicate that the envisaged disputes to be referred to arbitration may be those 'arising under' or 'arising out of' or 'in connection with' the contract in which such an arbitration clause is contained.[15]

In the main, an arbitration agreement encompasses an agreement by two or more

[9] *Tanganyika Wattle Company Ltd. v. Dolphin Bay Chemicals (PTY) Ltd.* (Misc. Commercial Application No. 104 of 2023) [2023] TZHCComD 393 (13 December 2023) ('*Tanganyika Wattle v. Dolphin Bay Chemicals*').

[10] *La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC [*2012] UKPC 27 ('*Gécamines v. Hemisphere*').

[11] *Cox & Kings v. SAP India Pvt. Ltd. & Another,* 2023 INSC 1051 ("*Cox & Kings v. SAP*")

[12] *Tanganyika Wattle v. Dolphin Bay Chemicals*, op. cit.

[13] LexisNexis, "Practice Notes: Arbitration Agreements—Definition, Purpose and Interpretation," available at https://www.lexisnexis.co.uk/legal/experts/practice-areas/arbitration (accessed 10 February 2023).

[14] *See* particularly Section 3 of the Kenya Arbitration Act (Cap. 49 Revised Edition 2012); Section 2(1)(c) of the Uganda Arbitration and Conciliation Act (Cap. 4 of 2000); Section 3 of the Tanzania Arbitration Ac (Cap. 15 R.E. 2020); and Section 7 of the India Arbitration and Conciliation Act (1996). *See* also Kumar, D., "Essential Ingredients of an Arbitration Agreement," April 11, 2016; available at https://vakilsearch.com/advice/essential-ingredients-of-an-arbitration-agreement/ (accessed 11 February 2025).

[15] *Tanganyika Wattle v. Dolphin Bay Chemicals*, op. cit. *See* also *Heyman v. Darwins Ltd.* [1942] AC 356, 399; *Union of India v. E.B. Aaby's Rederi A/S* [1975] AC 797; *Overseas Union Insurance Ltd. v. AA Mutual International Insurance Co. Ltd.* [1988] 2 Lloyd's Rep 63, 67; *Premium Nafta Products Ltd. & Others v. Fili Shipping Ltd. & Others* [2007] EWCA Civ 20; and *Fillite (Runcorn) Ltd. v. Aqua-Lift* (1989) 26 Con LR 66, 76.

parties to submit to arbitration[16] either: (*i*) 'future' disputes that may arise where the agreement is set out in the substantive arbitration agreement between the parties (*i.e.*, in an arbitration clause), or (*ii*) 'current' disputes where the agreement to arbitrate is set out in a stand-alone agreement entered into between the parties after the dispute has arisen.[17]

A leading authority that has broadly described an arbitration agreement in recent times is *Fiona v. Privalov,*[18] where the English House of Lords (now the UK Supreme Court) held that: 'Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement.'[19] As such, the construction of an arbitration clause 'should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.' [20] As it was held in *Euromec v. Shandong Taikai*,[21] the principal purpose of an arbitration clause is to provide 'a specialized tribunal to hear the dispute falling within the ambit of the matters governed by the agreement.'[22] As such, it is trite in law that 'the jurisdiction of the arbitrator emanates from the arbitration agreement also known as an agreement to arbitrate. In the absence of an arbitration agreement, an arbitrator being a private person, cannot assume powers to make binding decisions upon other persons.'[23]

In terms of scope, the arbitration agreement is governed by several underlying principles: foremost, is the doctrine of party freedom and autonomy, which posits that parties to a contract are *free* to agree and decide *on a forum*[24] and *choice of law* for the determination of contractual disputes.[25] In addition, parties are *free* to *agree* on how their disputes should be resolved. In this regard, subject only to such safeguards as are necessary in the *public interest* or as provided by law;[26] the court is excluded from resolving a dispute where the parties have consensually agreed to arbitrate.[27]

According to Judge Gonzi, for there to exist a valid arbitration agreement, the following minimum requirements should be met: (*i*) the arbitration agreement 'must arise out of mutual consent' – *i.e.*, the parties' consent is 'the basic requirement for the arbitration

[16] Idornigie, P.O., "The Implication of Poorly Drafted Arbitration Clause in a Contract," a paper presented at the capacity building session for the Directorate of Legal Services of the National Assembly on Bill Drafting and Dispute Resolution, held in Abuja, Nigeria, on 29-31 March 2021; available at https://paulidornigie.org/wp-content/uploads/2021/03/The-Implication-of-Poorly-Drafted-Arbitration-Clause-in-a-Contract-Final.1.pdf (accessed 21 February 2025).

[17] According to Section 6(1) of the English Arbitration Act (Cap. 23, 1996), an "arbitration agreement" means 'an agreement to submit to arbitration present or future disputes (whether they are contractual or not).'

[18] *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40 ('*Fiona v. Privalov*').

[19] Ibid, para. 5.

[20] Ibid, para. 13.

[21] *Euromec International Ltd. v. Shandong Taikai Power Engineering Co. Ltd.* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) ('*Euromec v. Shandong Taikai*').

[22] Ibid.

[23] *Tanganyika Wattle v. Dolphin Bay Chemicals,* op. cit, p. 21. *See* also *Cereals and Other Produce Board of Tanzania v. Monaban Trading & Farming Co. Ltd*., High Court of Tanzania (Commercial Division) at Dar es Salaam, Misc. Commercial Cause No. 9 of 2022 (Unreported) ('*COPBT v. Monaban*').

[24] *Sunshine Furniture v. Maersk*, op. cit.

[25] *Luganuza v. Orthodox Church,* op. cit.

[26] *See* particularly Section 10 of the Kenya Arbitration Act and *Euromec v. Shandong Taikai,* op. cit.

[27] *See*, for instance, Section 10 of the Kenya Arbitration Act; Construction Engineers and Builders Ltd. v. Sugar Development Corporation [1983] TLR 13 (CAT) ('CE&B v. SDC'); and Luganuza *v. Orthodox Church,* op. cit.

agreement';[28] (*ii*) the parties' intention to submit to arbitration 'must unequivocally arise from the arbitration agreement';[29] (*iii*) there must be 'an obligation on the parties to submit their dispute to arbitration';[30] (*iv*) the agreement 'must specifically provide for "arbitration", rather than another process of dispute resolution';[31] and (*v*) the agreement 'must have originated from the parties' free will.'[32]

3. CAN AN ARBITRATION AGREEMENT BIND NON-SIGNATORIES?

As considered above, courts and arbitral tribunals in many jurisdictions around the world quite often do find themselves faced with two practical questions: can an arbitration agreement be implied or extended to another contract that does not contain an arbitration clause? Can a non-signatory party be bound by or benefit from an arbitration agreement to which he/she is not a party? As a general rule, Tanzanian law, through the privity of contract doctrine, does not allow a stranger to a contract to be bound by or benefit from it. This doctrine also applies to an arbitration agreement, which means that; as a general rule, a stranger or non-signatory cannot be bound by or benefit from an arbitration agreement in Tanzania.

However, there are a few exceptional situations where an arbitration agreement may be implied or extended to a contract that has no arbitration clause, and where a non-signatory party can be bound by an arbitration agreement. Universally, such exceptions (which are derived from the general rules of contract law as well as case law) include assignment,[33] agency relationship,[34] incorporation by reference,[35] equitable estoppel,[36] piercing the incorporation veil/*alter ego*,[37] and ratification/assumption.[38]

The sections below examine the law and practice on the non-bindingness of an arbitration agreement (or otherwise) on a stranger or non-signatory in Tanzania in comparison with legal positions in selected GOC and SLE jurisdictions around the world.

3.1. The Legal Position in Tanzania

The general rule is that an arbitration agreement falls within the ambit of a contract and it is premised within the common law doctrine of privity of contract, which stipulates that a contract cannot confer rights or impose obligations upon anyone who is not a party to it. In *Coface v. Kamal*,[39] the High Court of Tanzania held that: 'no one is entitled to or may be bound by the terms of a contract to which he is not an original party.'[40] This also entails that a stranger to a contract 'is precluded from suing on the basis of the contract to which he is not a party.'[41] As such, the right to sue or to commence arbitral proceedings under a contract 'is a reserved

[28] *Tanganyika Wattle v. Dolphin Bay Chemicals*, op. cit, p. 23.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid, p. 24.
[33] *I&M Bank v. Bayview Properties,* op. cit.
[34] *See* particularly *Altobelli v. Hartmann*, op. cit; and *Interocean Shipping v. National Shipping,* op. cit.
[35] *See* especially *J.S. v. Richmond,* op. cit; and *EMIC v. Haskell,* op. cit.
[36] *See* generally *E.A.S.T. v. Alaia*, p. cit; *G.E. Energy Power v. Outokumpu Stainless,* op. cit; and *Belzberg v. Verus,* op. cit.
[37] *See*, for example, *Cyprus v. Adam Backstrom*, op. cit; *JJ. Ryan v. Rhone Poulenc,* op. cit; and *Swift v. Compania Colombiana*, op. cit.
[38] See particularly *B.S. v. Citgo Petroleum,* op. cit: *Wetzel v. Sullivan,* op. cit; *Caribbean SS. v. Sonmez*, op. cit; and *Gvozdenovic v. UAL*, op. cit.
[39] *Coface South Africa Insurance Co. Ltd. v. Kamal Steel Ltd.* [2021] TZHC ComD 3363 ('*Coface v. Kamal*').
[40] Ibid.
[41] Ibid.

right, available only to a person who is a party to the contract.'[42]

This position was recently cemented by the Court of Appeal in *Monaban v. COPBT*,[43] where one of the issues for determination was whether a stranger to a contract can move the court or an arbitral tribunal to have the same contract, which he/she is not privy to, invalidated. The court held that a stranger to a contract, like the respondent in this case, cannot move the court to have the same contract invalidated. In this case, the petition, on the basis of which the arbitral award was set aside and the contract invalidated, was at the instance of the respondent who was not privy to the contract. In fact, the contract was entered into between the appellant and the defunct National Milling Corporation (NMC). However, NMC (or her successor in title) was not a party to the arbitral proceedings, neither in the petition resulting into this appeal.

Therefore, the Court of Appeal held that, *"a decision determining the validity of the contract could not be made in the absence of one of the signatories or her successor in title.*" According to the court, such a decision 'cannot be made at the instance of a stranger to the contract.' As such, the Court of Appeal faulted the Commercial Court for misdirecting itself in determining the validity and legality of the contract at the instance of a stranger and without affording one of the parties to the contract the right to be heard.

In the context of arbitration, a stranger to a contract that contains an arbitration clause is not bound by such a contract nor to the arbitration agreement contained in it. This position is derived from the privity of contract doctrine as well as the definition of a 'party' to an arbitration agreement in the Tanzania Arbitration Act. This was also the reasoning of the court in *Honda Motors v. Quality Motors*.[44] Section 3 of the Arbitration Act provides a narrow definition of the term 'party'.[45] According to this provision, a 'party' means 'a party to an arbitration agreement.' This means that only parties to an arbitration agreement are bound by, and can thus benefit from, it. Therefore, under the Tanzanian arbitration law, only parties to an arbitration agreement have the *locus standi* to initiate arbitration under such arbitration clause.[46]

In *Honda Motors v. Quality Motors*, the court was moved to determine an application for stay of proceedings pending reference to arbitration of the dispute before it. One of the issues that the court considered was whether a stranger to a contract is bound by an arbitration clause contained in such contract. The dispute in this case arose out of a dealership agreement, which contained an arbitration clause, and which was entered into between the 2nd petitioner and the respondent. The 1st petitioner was not a party to the dealership agreement. On this issue, the court held categorically that, since the 1st petitioner

[42] Ibid.

[43] *Monaban Trading and Farming Co. Ltd. v. Cereals and Other Produce Board of Tanzania*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 539 Of 2022 (Unreported) ('*Monaban v. COPBT*').

[44] *Honda Motors Japan & Others v. Quality Motors Ltd*., High Court of Tanzania (Commercial Division) at Dar es Salaam, Misc. Comm. Cause No. 25/20197 (Unreported) ('*Honda Motors v. Quality Motors*').

[45] Section 2(1)(h) of the Indian Arbitration and Conciliation Act (1996) also has a narrow definition of the term "party", which means 'a party to an arbitration agreement.' *Cf*: Section 82(2) of the English Arbitration Act (1996), Section 3 of the Kenya Arbitration Act (Cap. 49), and under Section 2(1)(i) of the Uganda Arbitration and Conciliation Act. *See* particularly *Naibu Global* [2020] EWHC 2719.

[46] *See* particularly DB Shapriya Co Ltd. v. Yara Tanzania Ltd., High Court of Tanzania (Commercial Division) at Dar es Salaam, Misc. Commercial Case No. 55/2016 (Unreported) ('DB Shapriya v. Yara Tanzania'), and Tanzania Motor Services Ltd. & Another v. Mehar *Singh,* Court of Appeal of Tanzania at Dodoma, Civil Appeal No. 115 of 2005 (Unreported) ('*Tanzania Motor v. Mehar Singh*').

was a stranger to this petition, it is clear that the 1st petitioner is a stranger to the underlying contract, and the 'duties and liabilities of the controverted contract bind upon the 2nd petitioner and the respondent only and have nothing to do with the 1st petitioner.'[47]

Given the fact that the arbitration agreement is deemed a contract under Tanzanian law and since the law of contract in Tanzania permits only parties to a contract to initiate civil suits or arbitral proceedings, a stranger to an agreement (whether an arbitration agreement or a contract) cannot be conjoined in a civil case or arbitral proceedings. This means also that, as a general rule, an arbitration clause in one contract cannot be extended to or be implied into a separate contract (with different parties) that does not contain an arbitration agreement. As such, under Tanzanian law, a stranger cannot have the *locus standi* to commence arbitral proceedings basing on an arbitration agreement to which he/she is not a party. Similarly, a stranger to an arbitration agreement cannot be sued or conjoined in arbitral proceedings emanating from such agreement.

However, only in limited situations a stranger or non-signatory may be bound by or benefit from an arbitration agreement to which he/she is not a party. Extending this exception to arbitration agreements, the court in *I&M Bank v. Bayview Properties*[48] held that although an arbitration agreement is a contract and can only bind and be invoked by parties to it, 'there are instances or situations, though limited in nature, where third parties, not parties to the original agreement, may be bound by or even benefit from it.'[49] According to the court, these situations only include instances of an assignment or transfer of contractual rights or cause of action to a third party.[50] Nevertheless, the court held that the basic premise 'is understood to be that, arbitrators may not draw into the proceedings unwilling third parties' in situations where a stranger or non-signatory is to be bound by or benefit from an arbitration agreement to which he or she is not a party.'[51]

3.2. The Global Perspectives

While under Tanzanian arbitration law a non-signatory cannot be bound by or benefit from an arbitration agreement to which he/she is not a party (with limited exceptions where a non-signatory may be bound by, or benefit from, an arbitration agreement),[52] the application of the GOC doctrine allows a non-signatory to be bound by an arbitration clause.[53] On the other extreme, courts in SLE jurisdictions have rejected this doctrine, instead clinging onto a more rigid view that upholds the privity of contract and separate rights, duties and liabilities of separate entities to arbitration agreements. These divergent views are considered at length in the sections below.

3.2.1. France

The GOC doctrine is said to have originated in Frace from an interim award delivered by the International Chamber of Commerce (ICC) in the *Dow Chemical* case.[54] In that case, Dow Chemical (Venezuela) entered into a contract with a French company, which later assigned the rights under that contract to Isover Saint Gobain, for distribution of thermal isolation products in France. Dow Chemical (Venezuela) subsequently assigned the

[47] *Honda Motors v. Quality Motors,* op. cit, p. 11.
[48] *I&M Bank v. Bayview Properties,* op. cit.
[49] Ibid, p. 15.
[50] Ibid. *See* also *Coface v. Kamal*, op. cit; and *The Jay Bola* [1997] EWCA Civ 1420.
[51] *I&M Bank v. Bayview Properties*, ibid, pp. 15-16.
[52] Ibid.
[53] *Cox & Kings v. SAP,* op. cit, para. 39.
[54] *Dow Chemical v. Isover Saint Gobain*, ICC Case No. 4131 (Interim Award, dated 23 September 1982) ('*Dow Chemical* case'). *See* also Hanotiau, B. and L. Ohlrogge, "40th Year Anniversary of the Dow Chemical Award," *ASA Bulletin*, Vol. 40 No. 2, 2022, pp. 300-308.

contract to Dow Chemical AG, which was a subsidiary of Dow Chemical Company – the holding company. Thereafter, Dow Chemical Europe, a subsidiary of Dow Chemical AG, entered into a similar contract with three companies, which subsequently assigned the contract to Isover Saint Gobain. Both contracts provided that the deliveries of products to the distributors will be made by Dow Chemical France, or any other subsidiary of Dow Chemical Company. Subsequently, disputes arose giving rise to several suits that were instituted against the companies under the Dow Chemical group before French courts. In response, four companies under the Dow Chemical group (the two formal parties to the contract – Dow Chemical AG and Dow Chemical Europe, and the two non-signatories – Dow Chemical Company and Dow Chemical France) instituted arbitral proceedings against Isover Saint Gobain before an ICC-constituted arbitral tribunal.

The initial task before the arbitral tribunal was to determine its own jurisdiction over the non-signatory parties. The tribunal sought to determine whether there existed a common intention of the parties to be bound by the arbitration agreement. The tribunal established the common intention of the parties by analysing the factual circumstances underpinning the *negotiation, performance,* and *termination* of the contracts. The tribunal held that Dow Chemical France 'was a party' to the two contracts, and consequently to the arbitration agreements contained in them, because it played a preponderant role in the negotiation, performance, and termination of the contract in question. As for Dow Chemical Company, the tribunal held that the holding company had ownership of the trademarks under which the products were marketed in France and had absolute control over its subsidiaries that were involved in the negotiation, performance, and termination of the two contracts. The tribunal also relied on the fact that Isover Saint Gobain applied for the joinder of the holding company to the court proceedings in France before the Court of Appeal of Paris.[55]

After concluding that the non-signatories were also parties to the arbitration agreement, the tribunal proceeded to analyse the factual circumstances of the signatories and non-signatories belonging to the same group of companies. At first, the tribunal observed that a group of companies constitutes 'one and the same economic reality.' However, the tribunal emphasized that a non-signatory may be bound by the arbitration agreement entered into by another entity of the same group 'if the non-signatory appears to be a veritable party to the contracts on the basis of its involvement in the negotiation, performance, and termination of the contracts.'[56] In particular, it was reasoned that:

> Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in their conclusion, performance, or termination of the contracts containing said clause, 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.

In fact, the tribunal did not base its decision on extending the arbitration agreement to non-signatories solely on the fact that both the signatories and non-signatories were members of the same group. Instead, the tribunal emphasized the importance of determining the true parties to the arbitration agreement on the

[55] *Cox & Kings v. SAP,* op. cit, para. 41.
[56] Ibid, para. 42.

basis of their participation in the negotiation, performance, and termination of the agreement. Ever since, the *Dow Chemical* case has been regarded as being instrumental in the transition from a restrictive interpretation of consent focusing only on its 'express manifestation' to a more 'flexible approach' attaching necessary relevance to 'implied consent' to be bound by the arbitration agreement.[57]

After reaching the conclusion that the non-signatories were also parties to the agreements, the arbitral tribunal in *Dow Chemical* case proceeded to the analysis of the impact that the existence of a corporate group might have upon the arbitration agreement. In this regard, it is imperative to note that the arbitral tribunal found that an arbitration agreement signed by certain companies should be binding on other entities of the group 'only where the latter seem to be true parties to the arbitration agreement by virtue of their participation in the negotiation, performance and termination of the contract and if this corresponds to the parties' intent.'[58]

Subsequently, the Paris Court of Appeal acknowledged the extension of an arbitration agreement to non-signatories 'provided there was common intention of all the parties.'[59] According to the court, the common intention may be ascertained from the active role played by the non-signatories in the performance of the contract containing the arbitration agreement, which gives rise to the presumption that the non-signatory had knowledge of the arbitration agreement.[60] As such, French law on the group of companies doctrine has been succinctly summarized in an unpublished ICC award in Case No. 11405 of 2001 as follows: 'What is relevant is whether all parties intended non-signatory parties to be bound by the arbitration clause. Not only the signatory parties, but also the non-signatory parties should have intended (or led the other parties to reasonably believe that they intended) to be bound by the arbitration clause.'[61]

Therefore, the position in French law today is that an arbitration agreement can be extended to non-signatories if all the parties to the arbitration agreement had a common intention to be bound by the agreement. Under French law, the subjective intention of the parties is to be inferred 'on the basis of their objective conduct during the negotiation, performance, and termination of the underlying contract containing the arbitration agreement.'[62]

3.2.2. Switzerland

Unlike the French courts, Swiss courts have extended an arbitration agreement to non-signatories only in limited cases of assignment of a claim and assumption of debt or delegation of a contract[63] in a similar way as Tanzanian courts have done.[64] Although Section 178(1) of the Swiss Private International Law Act (1987) states that an 'arbitration agreement must be made in writing or any other means of communication allowing it to be evidenced by text,' the Swiss Federal Supreme Court[65] has held that; once there is a valid arbitration clause according to this provision, the issue whether it also extends

[57] Hanotiau and Ohlrogge, op. cit, p. 300.
[58] Ibid, p. 303.
[59] *Cox & Kings v. SAP,* op. cit, para. 44.
[60] *See*, for instance, *V 2000 (formerly Jaguar* France*) v. Project XS*, Paris Court of Appeal, 7 December 1994, *Revue de l'Arbitrage*, 1996, p. 67.
[61] *See* also Derains, Y., 'Is there a Group of Companies Doctrine?' in Hanotiau, B. and E. Schwartz (eds.), *Multiparty Arbitration - Dossier VII of the ICC Institute of World Business Law,* Vol. 7, 2010, pp. 131-145.
[62] *Cox & Kings v. SAP,* op. cit, para. 45.
[63] *See*, for example, *A, B, C v. D & State of Libya*, 4A_636/2018 ('*Butec v. Saipem*').
[64] *See*, for instance, *I&M Bank v. Bayview Properties,* op. cit.
[65] *KK Ltd v. FF*, Judgement of the Swiss Supreme Court rendered in 2003 in Case 4P.137/2002.

to non-signatories may be decided by the courts or the arbitral tribunals.

In *Butec v. Saipem*,[66] the Swiss Federal Supreme Court held that the fact that a non-signatory belonged to the same group of companies as the signatory party to the arbitration agreement was not a sufficient justification for binding the non-signatory to the arbitration agreement. Nevertheless, Swiss courts are not averse to extending an arbitration agreement to non-signatories 'if there is an independent and formally valid manifestation of consent of the non-signatory party to the arbitration agreement.'[67] This is because, under Swiss law, the consent of the parties to be bound by an arbitration agreement may be *expressly* laid down in the contract in question or *implied* by conduct.

In a 2008 decision,[68] for instance, the Swiss Federal Court held that certain behaviour or conduct of non-signatories may substitute compliance with a formal requirement of an arbitration agreement. To determine the implied consent, it was held that courts or tribunals may take into consideration the fact whether the non-signatory party was involved in the negotiation and performance of the contract, and thereby impliedly registered its willingness to be bound by the arbitration agreement.[69] Therefore, under Swiss law, the subjective element of willingness to be bound by an arbitration agreement ought to be expressed through an objective element in the form of negotiation or performance of the contract by a non-signatory.[70]

3.2.3. The USA

Although the Federal Arbitration Act in the US is silent on the aspect of the joinder of non-signatories to arbitration agreements, US courts have often used the general principles of contract law (such as incorporation by reference, assumption, agency, veil piercing or *alter ego*, and estoppel) to bind non-signatories to arbitration agreements.[71] Even though the US follows a pro-arbitration policy, an important issue that often comes up for deliberation is whether the domestic doctrines could be applied to bind non-signatories to arbitration agreements in cases of international arbitration.[72] For example, in *G.E. Energy v. Outokumpu*,[73] the issue before the US Supreme Court was whether the New York Convention precludes a non-signatory to an international arbitration agreement from compelling arbitration by invoking domestic doctrines such as equitable estoppel.

In that case, the Eleventh Circuit Court refused to apply the domestic doctrine of equitable estoppel on the ground that it conflicts with the signature requirements under the New York Convention. It observed that Article II of the New York Convention contains a strict requirement that the parties "actually sign" the arbitration agreement in order to compel them to arbitration. The court held that Article II does not restrict the contracting States from applying domestic law to refer parties to arbitration agreements. Moreover, it observed that 'the provisions of Article II contemplate

[66] *Saudi Butec Ltd. et Al Fouzan Trading v. Saudi Arabian Saipem Ltd.*, unpublished ICC Interim Award of 25 October 1994, confirmed by DFT on 29 January 1996 ('*Saudi Butec v. Saudi Arabian Saipem*'), *ASA Bulletin* (1996) Vol 3 p 496.
[67] *Cox & Kings v. SAP,* op. cit, para. 47.
[68] Decision 4A_376/2008 of 5 December 2008.
[69] *X v. Y Engineering S.p.A. & Y S.p.A.,* 4A_450/2013, ASA Bull., 160 (2015) ('*X v. Y Engineering*').
[70] *Cox & Kings v. SAP,* op. cit, para. 48.
[71] *See* generally Misovic, A., 'Binding Non-signatories to Arbitrate: The United States Approach,' *Arbitration International*, Vol. 37 No. 3, 2021, pp. 749-768.
[72] *Cox & Kings v. SAP,* op. cit, para. 55.
[73] *G.E. Energy Power Conversion France SAS v. Outokumpu Stainless,* 140 S. Ct. 1637 (2020) ('*G.E. Energy v. Outokumpu*').

the use of domestic doctrines to fill gaps in the Convention.' Thus, it was held that the

Convention does not set out a comprehensive regime to preclude the use of domestic law to enforce arbitration agreements.[74] As such, US courts have applied 'non-consensual doctrines to extend arbitration agreements to non-signatory parties.'[75] For instance, in *American Fuel v. Utah Energy,*[76] the court pierced the corporate veil and held the *alter ego* liable in exceptional circumstances where the parent company exercised complete control over the subsidiary with respect to the transactions at issue. Similarly, the doctrine of arbitral estoppel 'has been developed by the US courts to bind non-signatory parties to an arbitration agreement.'[77] The doctrine of arbitral estoppel suggests that a party is estopped from denying its obligation to arbitrate when it received a 'direct benefit' from a contract containing an arbitration agreement.[78] The second type of arbitral estoppel developed by US courts places emphasis on the substantial interdependent relationship between the signatory and non-signatory.[79] In a situation where claims of concerted misconduct are raised against both the signatory and non-signatory parties to the contract, US courts resort to the doctrine of equitable estoppel to further the pro-arbitration policy.[80]

[74] *Cox & Kings v. SAP,* op. cit, para. 56.
[75] Ibid, para. 57.
[76] *American Fuel Corp v. Utah Energy Development Co. Inc.*, 122 F.3d 130, 134 (2d Cir 1997) ('*American Fuel v. Utah Energy*').
[77] *Cox & Kings v. SAP,* op. cit, para. 57.
[78] *American Bureau, Shipping v. Tencara Shipyard*, 170 F.3d 349, 353 (2d Cir 1999) ('*ABS v. Tencara Shipyard*').
[79] *Sunkist Soft Drinks, Inc. v. Sunkist Growers*, Inc, 10 F.3d 753, 757 (11th Cir 1993) ('*Sunkist v. Sunkist*').
[80] *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524 (2000) ('*Grigson v. Creative Artists*').

3.2.4. India

In what is seen as a radical move, Indian courts have imported the GOC doctrine that was first developed by French courts and later found acceptance in international commercial arbitration. The first case to apply the GOC doctrine in the Indian context was *Chloro Controls v. Severn Trent.*[81] In this case, the Supreme Court of India (SCI) was called upon to determine and interpret the expression 'person claiming through or under, as provided under Section 45 of the Indian Arbitration and Conciliation Act, 1996 ('ACA'). In this case, there was a joint venture between an American company (Capital Controls, Delaware Co. Inc.) and an Indian company (Chloro Controls India Pvt. Ltd.), as well as the director of the Indian company (Mr. M.B. Kocha). The principal agreement also provided for several ancillary agreements required to be entered into between the Indian company, the group of companies to which the American company belonged (the Severn Trent Group), and the director of the Indian company, amongst others. While the principal agreement contained an arbitration clause, a few of the ancillary agreements did not.

The SCI held that the language of Section 45 of, read together with Schedule I to, the ACA is worded in favour of making a reference to arbitration when a party or 'any person claiming through or under him' approaches the court and the court is satisfied that the agreement is valid, enforceable and operative.[82] The court also held that the language of Section 45 is at a substantial variance to the language of Section 8. In Section 45, the expression 'any person' clearly refers to the legislative intent of enlarging the scope of the words beyond the parties who are signatory to the arbitration agreement.

[81] *Chloro Controls (I) Pv. Ltd. v. Severn Trent Water Purification Inc. & Others* (2013) I SCC ("*Chloro Controls v. Severn Trent*").
[82] Ibid, para. 55.

According to the SCI, a non-signatory applicant could claim through or under the signatory party to the arbitration agreement. Once this link was established, then the court should refer them to arbitration. According to the SCI, the expression 'shall' in the language of Section 45 was intended to require the court to necessarily make a reference to arbitration, if the conditions of this provision were satisfied.[83]

Therefore, it was held that arbitration could be possible between a signatory to an arbitration agreement and a third party, in which case the onus lied on that party to show that, in fact and in law, it was claiming through or under the signatory party as contemplated under Section 45 of the ACA.[84] As such, a non-signatory could be subjected to arbitration provided the transactions in question were undertaken by a group of companies and there was a clear intention of the parties to bind both the signatory as well as the non-signatories. According to the court, intention of the parties was a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.[85] The SCI also held that a non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases.[86]

In fact, the SCI held that, in cases involving the execution of such multiple agreements, two essential features existed: firstly, all ancillary agreements were relatable to the principal agreement; and, secondly, performance of one agreement was so intrinsically inter-linked with the other agreements that they were incapable of being performed without the performance of the others or of being severed from the rest. According to the SCI, the intention of the parties to refer all the disputes between all the parties to the arbitral tribunal was one of the determinative factors.[87]

Furthermore, the SCI held that, in the case of composite transactions and multiple agreements, it could again be possible to invoke such principle in accepting the pleas of non-signatories for reference to arbitration. Where the agreements were consequential and in the nature of a follow-up to the principal agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or inter-dependent that it was their composite performance which should discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of the intent of the parties to refer signatories as well as non-signatories to arbitration.[88]

The decision in *Chloro Controls v. Severn Trent* was modified in 2023 by the SCI's decision in *Cox & Kings v. SAP*,[89] principally because it generated controversies in subsequent decisions regarding its application of the group of companies doctrine in the Indian context.[90] In Cox & Kings v. SAP, a

[83] Ibid, para. 64.
[84] Ibid, para. 65.
[85] Ibid, para. 67.
[86] Ibid, para. 68.
[87] Ibid, para. 69.
[88] Ibid, para. 71.
[89] *Cox & Kings v. SAP India Pvt. Ltd. & Another,* 2023 INSC 1051 ('Cox & Kings v. SAP').
[90] See particularly *Duro Felguera, S.A. v. Gangavaram Port Ltd* (2017) 9 SCC 729 ('*Duro Felguera v. GPL*'); *M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.* (2009) 7 SCC 696 *('M.R. Engineers v. Som Datt Builders'):* Elite Engineering v. Techtrans Construction Civil Appeal No. 2439 of 2018 ('Elite v. Techtrans'), arising out of SLP (Civil) No. 29519 of 2015) Elite Engineering and Construction (Hyd.) Private Limited v. Techtrans Construction India Private Limited (23.02.2018 – SC); *Libra Automotives Pvt. Ltd. v. BMW India Pvt. Ltd. & Another,* 2019 (5) Arb LR 465 (Delhi) ('Libra v. BMW'); Tamil Nadu Road Sector Project II, Highways Department Represented by Project Director v. Ircon International Ltd. & Others, 2021 SCC OnLine Mad 181 ('TNRSP v. Ircon'); and *Inox Wind Ltd. v.*

five-judge bench of the SCI was constituted to try and fix the controversy that was brought about by the courts' application of the doctrine of companies since its recognition in India in 2012 in Chloro v. Severn Trent. It should be noted that; although in Chloro v. Severn Trent the SCI recognized the GOC doctrine as part of Indian law,[91] which was subsequently followed by the Indian courts in a number of cases;[92] the SCI's reasoning in *Chloro v. Severn Trent* was criticized for a number of reasons, including for leading to an overexpansion of the doctrine in subsequent case law.[93]

In fact, *Cox & Kings v. SAP* arose out of a reference made by a three-judge bench of the Supreme Court in *Cox and Kings Ltd. v. SAP India Pvt. Ltd.* (2022) where the bench doubted the correctness of the group of companies doctrine as expounded by another three-judge bench in *Chloro Controls v. Severn Trent*. The fundamental issues before the Constitution bench were: *(i)* whether the ACA allows the joinder of a non-signatory as a party to an arbitration agreement; *(ii)* whether Section 7 of the ACA allows the determination of an intention to arbitrate on the basis of the conduct of the parties; and *(iii)* whether the group of companies doctrine is valid and applicable in Indian arbitration law and, if so, under what circumstances and conditions?

In this case, the dispute related to a software license agreement between Cox and Kings ('C&K') and SAP India Private Limited ('SAP-I'), which contained an arbitration agreement. C&K commenced arbitration against SAP-I and its parent company SAP SE GmbH, which was not a signatory to the contract containing the arbitration agreement. After the SAP entities failed to appoint an arbitrator, C&K applied to the court under Section 11 of the ACA to appoint an arbitrator on their behalf. In its Section 11 application, C&K relied on Chloro v. Severn Trent to argue that the non-signatory parent company – SAP SE GmbH – was bound by the arbitration agreement pursuant to the GOC doctrine.

The SCI's full bench expounded that the ACA does not prohibit the joinder of a non-signatory as a party to an arbitration agreement, provided that there is a defined legal relationship between the non-signatory and the parties to the arbitration agreement, and that the non-signatory has consented to be bound by the arbitration agreement, either expressly or impliedly. The court further clarified that Section 7 of the ACA does not preclude the determination of an intention to arbitrate on the basis of the conduct of the parties as long as such conduct is evidenced in writing or by reference to a document containing an arbitration clause. The conduct of the parties must demonstrate a clear and unequivocal intention to submit to arbitration.

Cox & Kings v. SAP has ultimately restricted the approach laid down in *Chloro Controls v. Severn Trent*. In *Cox & Kings v. SAP,* the SCI clarified that; while a non-signatory party can, in principle, be bound by an arbitration agreement through the GOC doctrine, this is only possible if certain conditions are satisfied. According to the SCI, the correct test for determining whether the GOC doctrine applies is as follows: (*i*) the mutual intent of the parties; (*ii*) the relationship of the non-signatory party to the relevant party signatory to the agreement; (*iii*) the commonality of the

Thermocables Ltd., 2018 (2) SCC 519 ('*Inox v. Thermocables'*).

[91] Chloro v. Severn Trent, *at para. 148.*

[92] *See, for example,* Oil and Natural Gas Corporation Ltd*. v. M/S Discovery Enterprises, (2022) 8 SCC 42 ('ONGC v. Discovery'); MTNL v. Canara Bank*, (2020) 12 SCC 767; *Cheran Properties v. Kasturi and Sons*, (2018) 16 SCC 413; and *Ameet Lalchand Shah v. Rishabh Enterprises*, (2018) 15 SCC 678.

[93] Caher, C., *et al.*, "The Group of Companies Doctrine – Assessing the Indian Approach," *Indian Journal of Arbitration Law*, Vol. 33 No. 9, 2021.

subject matter; (*iv*) the composite nature of the transaction; and (*v*) most importantly, the performance of the contract. Remarkably, these factors were set out by the SCI in an earlier decision in *NGC v. Discovery*.[94] Therefore, in *Cox & Kings v. SAP,* the SCI explained that whether there was such an intention should be determined based on a "holistic" application of the foregoing factors it had previously identified in *ONGC v. Discovery*.

However, the Court held that the approach in *Chloro Controls* to the extent that it 'traced the group of companies doctrine to the phrase "claiming through or under" is erroneous.'[95] The SCI explained that the phrase "through or under" in various provisions of the ACA only applies to entities acting in a derivative capacity (*i.e.,* it applies where a party is asserting a right or being subjected to an obligation that it has derived from a party to the arbitration agreement) and not to parties acting in their own right. Therefore, the SCI concluded that the phrase 'could not be a basis for applying the doctrine because its purpose is to determine whether an affiliate of a signatory can be made a party to the arbitration agreement in its own right.'[96]

Moreover, the SCI held that: (*i*) the application of the group of companies doctrine is 'based on identifying the mutual intention of the parties'[97] to bind the non-signatory to the arbitration agreement;[98] and (*ii*) the doctrine promotes efficiency and expedition by prohibiting non-signatory affiliates from circumventing or frustrating the arbitration agreement through satellite litigation.[99] Extending the application of the Indian Contract Act (which provides that 'a contract can either be express or implied') to the arbitration agreement, the SCI held that an implied contract 'is inferred on the basis of action or conduct of the parties.'[100] Therefore, it is not necessary for entities to be signatories to a contract to enter into a legal relationship.[101] For non-signatories, the important determination for courts is whether the persons or entities intended or consented to be bound by the arbitration agreement […] through their acts or conduct.[102]

In addition, the SCI held that the group of companies doctrine is a 'consent-based doctrine'[103] whereby its application depends upon the consideration of a variety of factual elements to establish the mutual intention of all the parties involved.[104] The Court, therefore, held that; for the group of companies doctrine to apply, not only do the signatory and non-signatory have to be part of the same corporate group, but there also must be a mutual intention of all the parties to bind the non-signatory to the arbitration agreement.[105] In *Cox & Kings v. SAP*, the group of companies doctrine is retained as a valid and applicable concept in Indian arbitration law that is used to bind a non-signatory company within a group to an arbitration agreement which has been signed by [an]other member of the group.[106]

3.2.5. *England*

Unlike the French and Indian courts, English courts have generally taken a conservative

[94] *Oil and Natural Gas Corporation v. Discovery Enterprises Pvt Ltd.* [2022] 8 SCC 42 ('*NGC v. Discovery*').
[95] Ibid, at para. 165(j).
[96] Ibid, para. 146.
[97] Cox & Kings v. SAP, at paras. 26, 56(II) (Narasimha J., concurring), and at paras. 101, 123.
[98] Born, G., *International Commercial Arbitration* (3rd edn.) (Kluwer Law International, 2021).
[99] Cox & Kings v. SAP, at para. 100.
[100] Ibid, para. 74.
[101] Ibid.
[102] Ibid.
[103] Ibid, para. 81.
[104] Ibid, para. 111.
[105] Ibid, para. 105.
[106] Ibid, para. 98.

approach to binding non-signatory parties to arbitration agreements. Section 82(2) of the English Arbitration Act (1996) defines a *"party to arbitration agreement*" to include any person claiming under or through a party to the agreement. English law envisages that non-signatory parties cannot be bound by an arbitration agreement unless if they are claiming under or through the original party to the agreement.[107] English courts have adopted an approach which favours a strict adherence to the doctrine of privity of contract.[108] Under English law, an arbitration agreement is extended to non-signatory parties on the basis of traditional contractual principles and doctrines such as agency, novation, assignment, operation of law, as well as merger and succession.[109] However, English law has explicitly rejected other doctrines such as piercing the corporation veil, equitable estoppel, and group of companies as a basis for extending an arbitration agreement to non-signatories.[110]

A vivid example of the conservativeness of English courts in extending the arbitration agreement to non-signatories is *Peterson Farms v. C&M Farming.*[111] In this case, a claim for damages was brought against Peterson Farms by the respondent, C&M Farming, for damages suffered by several C&M group entities, some of them being non-signatories to the arbitration agreement. The arbitral tribunal applied the GOC doctrine to hold that C&M Farming contracted on behalf of the entire C&M group entities; and, therefore, was entitled to claim all the damages suffered by the C&M group entities arising out of the contractual relationship with Peterson. On appeal, the Commercial Court held that the chosen proper law of the agreement – Arkansas law – is similar to the English law, which excludes the application of the GOC doctrine.

Similarly, in *Dallah v. Pakistan*,[112] the Government of Pakistan entered into a Memorandum of Understanding (MoU) with Dallah Real Estate and Tourism Holding Company ('Dallah') for construction of housing facilities in Mecca, Saudi Arabia. Subsequently, an agreement was executed between Dallah and the Awami Hajj Trust, which was established by the Government through an ordinance. However, the trust ceased to exist as a legal entity because the Ordinance was not laid before Parliament and no further ordinance was promulgated. Dallah commenced arbitral proceedings against the Government. The UK Supreme Court (UKSC) had to determine whether there was a common intention on behalf of the Pakistani Government and Dallah to make the former a party to the agreement. The UKSC held that the common intention of the parties means their subjective intention derived from the objective evidence. It further held that there was no evidence to conclude that the Pakistani government's behaviour showed that it always considered itself to be a true party to the agreement.

Moreover, in *Gécamines v. Hemisphere*,[113] the Privy Council[114] rendered a judgment on 17

[107] Ibid, para. 49.
[108] Ibid.
[109] *See*, for example, Sheppard, A.W., "Third Party Non-Signatories in English Arbitration Law," in Brekoulakis, S., *et al*. (eds.), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016), pp. 183-198.
[110] *Cox & Kings v. SAP,* op. cit, para. 49.
[111] *Peterson Farms Inc. v. C&M Farming Ltd.* [2004] EWHC 121 (Comm) ('*Peterson Farms v. C&M Farming*').
[112] *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 ('*Dallah v. Pakistan-I*').
[113] *La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 27 (17 July 2012) ('*Gécamines v. Hemisphere*').
[114] The Privy Counsil is the highest court of appeal for UK overseas territories and crown dependencies (as well as a number of Commonwealth countries).

July 2012 in a case brought by FG Hemisphere, a Delaware corporation, against La Générale des Carrières et des Mines ('Gécamines'), a mining company owned by the Democratic Republic of Congo ('DRC'). In this case, FG Hemisphere purchased the assignment of two very substantial arbitral awards rendered against the DRC, and brought proceedings in a number of jurisdictions around the world in pursuit of DRC assets against which the awards could be enforced.[115] FG Hemisphere brought proceedings against Gécamines in Jersey, the UK, seeking to enforce against Gécamines' shareholding in a Jersey joint venture company and certain income streams due from that company to Gécamines under the contract. On 27 October 2010, the Royal Court of Jersey upheld FG Hemisphere's claim (including a claim for injunctive relief) on the basis that Gécamines was, at all material times, an organ of (and so was to be equated with) the DRC. On 14 July 2011, the Jersey Court of Appeal upheld this judgment (by a majority). Gécamines appealed to the Privy Council.

Subsequently, the Judicial Committee of the Privy Council (also known as the 'Board') handed down its judgment setting down clear principles regarding the position of state-owned corporations and the circumstances, if any, in which they and their assets may be assimilated to the State and its assets. Notably, the lower Jersey courts had decided the case on the basis that whether Gécamines was an organ of the DRC was to be determined by a common law test derived from the English Court of Appeal's decision in *Trendtex v. CBN* rendered in 1977.[116] The Board, however, considered that significant developments since that judgment also needed to be taken into account. In particular, the UK State Immunity Act, 1978 (the 'SIA'), which had been applied to Jersey, provided for an express distinction between, on the one hand, the State, and, on the other, a 'separate entity' – identified by the SIA as 'any entity … distinct from the executive organs of the government of the State and capable of suing and being sued.'

Nevertheless, in *Gécamines v. Hemisphere*, it was held that this distinction was central not only to the issue of whether the entity enjoyed immunity (which under the SIA was principally a question of whether or not it was performing acts of a sovereign nature), but also to the questions of liability and enforcement raised in this case. According to the Board, the starting point was, therefore, whether the entity (*i*) was distinct from the organs of State, and (*ii*) possessed legal personality. It was held that an entity's constitution, control, functions and independent budget were overarching factors in determining whether a public entity is not an organ of the State and thus separate from the State.[117]

It was ruled, as a general principle, that 'where a separate juridical entity is formed by the State for what are on the face of it *commercial* or *industrial purposes*, with its own management and budget, the strong presumption is that 'its separate corporate status should be respected' **,** and that the entity and the State forming it should not have to bear each other's liabilities[118] It was held further that the separate status of a public entity and the State forming it is not however conclusive, in that an 'entity's constitution, control and functions remain relevant.[119] Accordingly, 'constitutional and factual

[115] For a reasoning on absolute state immunity in Hong Kong, *see* particularly *Democratic Republic of the Congo v. FG Hemisphere* (FACV Nos. 5, 6 & 7 of 2010) ('*DRC v. FG Hemisphere*'). *See* also the UK State Immunity Act (1978).

[116] *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] 1 QB 529 ('*Trendtex v. CBN*').

[117] *Gécamines v. Hemisphere*, op. cit, para. 29.

[118] Ibid.

[119] Ibid.

control and the exercise of sovereign functions do not without more convert a separate entity into an organ of the state.[120]

Moreover, it was held that it would take quite extreme circumstances to rebut this presumption.[121] The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence.[122] For the two to be assimilated, 'an examination of the relevant constitutional arrangements, as applied in practice, as well as of the state's control exercised over the entity and of the entity's activities and functions would have to justify the conclusion that the entity and the State are so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa.[123]

The Board considered at some length the various connections and dealings between the DRC government and Gécamines. On the evidence, the Board found that Gécamines was not a 'mere cypher' for the DRC government; rather it was a real and functioning corporate entity, having substantial assets and a substantial business, with its own budget and accounting systems and structures, borrowings, debts as well as tax and other liabilities. It was, therefore, clearly distinct from the executive organs of government. The Board also considered the issue of piercing the corporate veil in these circumstances. It held that there may be particular circumstances in which the State has so interfered with or behaved towards a state-owned entity that it would be appropriate to look through or past the entity to the State, so lifting the veil of incorporation.[124] This was not the case here, however, and nor was it the case that the company should be regarded as a sham or as having no meaningful existence.

Therefore, the reasoning in *Peterson Farms v. C & M Farming, Dallah v. Pakistan*, and *Gécamines v. Hemisphere* exhibits that the English law and courts do not favour the application of the group of companies doctrine for extending an arbitration agreement to, and thus binding, non-signatory parties.[125] Since *Gécamines v. Hemisphere* was determined, its principles have been essentially adopted and reinforced by the UKSC in a number of cases, including *Taurus v. SOMC*[126] where it confirmed the high threshold required to "pierce the veil" of a state-owned enterprise, citing the *Gécamines* approach as the correct legal test.

3.2.6. Singapore

Like the English courts, Singapore courts have also rejected the GOC doctrine since the country does not recognize it as a basis for binding non-signatories to an arbitration agreement. In *Manuchar Steel v. Star Pacific Line,*[127] the Singapore High Court expressly rejected the GOC doctrine to bind non-signatories to an arbitration agreement. In this case, the plaintiff sought an order for pre-action disclosure to determine if Star Pacific Line was part of a 'single economic entity' with SPL Shipping. The purpose was to commence enforcement proceedings against Star Pacific Line for two arbitral awards Manuchar had obtained in London against SPL Shipping in respect of a charterparty for the vessel *Fusion 1* between Manuchar and SPL Shipping. The application was based on the concept of single economic entity, hitherto

[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid, para. 30.

[125] *Cox & Kings v. SAP,* op. cit, para. 51.
[126] *Taurus Petroleum Ltd v. State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64 ('*Taurus v. SOMC*').
[127] *Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd.* [2014] SGHC 181 ('*Manuchar Steel v. Star Pacific Line*').

adopted in such jurisdictions as France and India, whereby distinct companies with separate legal personality operate as one.

However, the court dismissed the application, holding that the 'single economic entity' concept was not recognised in law in Singapore and that there was no good legal basis to support its recognition in the country. In particular, the court reasoned that the GOC doctrine was: firstly, an anathema to the logic of consensual basis of an agreement to arbitrate; and, secondly, the ordering of companies within a broader group did not mean one could dispense with separate legal entity. Remarkably, the court relied on the position of law taken in an English precedent in *Peterson Farms v. C&M Farming*[128] to observe that enforceable obligations cannot be imposed on "strangers" to an arbitration agreement.

It should be noted that, although arbitration agreements generally do not bind third parties in Singapore (which is in accordance with the fundamental principle that submission of a dispute to arbitration is founded upon parties' consent), under Section 9 of the Contracts (Rights of Third Parties) Act (2001), a third party may be bound by an arbitration clause in limited situations. Under this provision, third parties may be bound by an arbitration agreement where they have a right to enforce a term in a contract that is subject to an arbitration clause requiring the parties to submit their dispute to arbitration.

[128] *Peterson Farms v. C & M Farming,* op. cit.

4. APPROACHES AND CONVERGENCE OR DIVERGENCE OF THE SELECTED JURISDICTIONS IN APPLYING OR NON-APPLYING THE GROUP OF COMPANIES DOCTRINE

This part makes an analysis of the approaches supporting and rejecting the GOC doctrine. It does so by first examining the implications of accepting and rejecting the GOC doctrine. It then proceeds to examine the points where courts in jurisdictions upholding and rejecting the GOC doctrine converge and diverge.

4.1. The Implications of Accepting the Group of Companies Doctrine

As considered above, France and India embrace the applicability of the group of companies doctrine, which is 'a creature of international arbitration designed to avoid multiple parallel proceedings and the fragmentation of disputes that should really be brought in the same legal fora.'[129] Importantly, it only applies in relation to the arbitration agreement itself – *i.e.,* if applicable, the non-signatory would only be a party to the arbitration agreement, not to the underlying contract. Countries that have embraced this doctrine treat it as a tool to align arbitration with modern commercial realities where companies operate in composite arrangements with parent, holding and subsidiary companies as well as affiliates. As such, accepting this doctrine implies that a non-signatory can be bound by an arbitration agreement signed by another member of its corporate group, provided certain criteria are met as outlined in *Cox & Kings v. SAP*.

[129] *Hotels and Lodges Ltd. & Another v. The Government of The United Republic of Tanzania & 2 Others*, LCIA Arbitration No: UN236008 (Partial Award, dated 1 July 2025) ('*HLL v. Tanzania*'), para. 155.

When the GOC doctrine originated in France in the *Dow Chemical* case, it implied three ramifications: Firstly, it placed its emphasis on the "economic reality" in which modern commerce entities operate. As such, French courts view a group of companies as a single economic unit (*réalité économique unique*), which implies that legal formalities (separate personality) should not allow a party that was effectively "part of the deal" to escape arbitration. Secondly, it was deemed as performance-based binding in that a non-signatory is bound if it played a *key role* in the negotiation, performance, or termination of the contract. Thirdly, the doctrine holds the pro-arbitration stance by reinforcing France's reputation as an arbitration-friendly jurisdiction by ensuring that disputes are not fragmented between courts and tribunals.[130]

When the GOC doctrine landed in India, it underwent a massive evolution, culminating in the *Cox & Kings v. SAP* decision in 2023 with the following major key implications: firstly, it introduced a shift to 'implied consent' from the France's older 'economic unit' theory. As such, India now treats the GOC doctrine as a consent-based doctrine, implying that the court or arbitral tribunal is not forcing arbitration on a non-signatory; it is interpreting the non-signatory's *conduct* as "implied consent" to be a party. Secondly, Indian courts have rejected 'single economic entity' as the sole basis and now, in India, simply being in the same group is not enough to be bound by an arbitration agreement to which a non-signatory is not party. To be bound by an arbitration agreement, a non-signatory must have 'positive, direct, and substantial involvement' in the contract containing the arbitration clause. This provides more protection for parent companies than the French approach.[131]

Thirdly, the GOC doctrine in India brought about tribunal autonomy in that Indian courts now usually leave the decision of whether a non-signatory is bound to the arbitral tribunal itself (under the principle of *Kompetenz-Kompetenz*), rather than deciding it at the referral stage. During the referral stage, Indian court are required to leave it to the arbitral tribunal to determine whether a non-signatory is bound by the arbitration agreement.[132] Thirdly, the GOC doctrine in India strives to avoid multiplicity of actions amongst members of the same group of companies. By joining all relevant group members, this doctrine aims at preventing 'split' proceedings where some parties are in court and others are in arbitration for the same dispute.

All in all, the Indian Supreme Court's decision in *Cox & Kings v. SAP* is also 'a comparative legal exercise that considers, and draws on, not only Indian law, but international jurisprudence concerning the application of the Doctrine, including English law.'[133]

4.2. The Implications of Rejecting the Group of Companies Doctrine

The definitive rejection of GOC doctrine in Singapore, Switzerland, Tanzania, the UK and the US implies three underlying legal ramifications. Firstly, *anathema to consent*, which entails that, binding a non-signatory simply because it belongs to the same corporate group is 'anathema to the internal logic of the consensual basis' of arbitration.[134]

[130] Jeffrey, C-Y.L, "Issues Relating to Non-Signatories in International Arbitration: A Comparative Analysis of Three Recent Landmark Cases," *The American Review of International Arbitration;* available at https://aria.law.columbia.edu/issues-relating-to-non-signatories-in-international-arbitration-a-comparative-analysis-of-three-recent-landmark-cases/ (accessed 4 January 2025).

[131] Shetty, T., "A Critical Analysis of *Cox and Kings Ltd. v. SAP India*," VIA Mediation & Arbitration Centre.

[132] *Cox & Kings v. SAP,* op. cit.

[133] *HLL v. Tanzania*, op. cit, para. 157.

[134] *See*, for example, *Manuchar Steel v. Star Pacific Line,* op. cit.

Secondly, courts in these jurisdictions have described the GOC doctrine as 'seriously flawed in law' and 'open to substantial criticisms'.[135] Thirdly, these countries strictly adhere to the principle of 'separate legal personality' which stipulate that each company in a group is a separate legal entity and that membership in a *"single economic entity"* is not enough to bypass the requirement of a written arbitration agreement.

The question that follows is: how non-signatories are bound instead by an arbitration agreement in these countries? While Singapore, Tanzania, the UK and the US reject the GOC doctrine and cling to the single personality entity doctrine, they allow non-signatories to be bound through traditional legal theories of contract and agency. Where a party wants to bind a non-signatory in these jurisdictions, it must rely on one of the following exceptions: agency, *alter ego*/piercing the veil of incorporation, estoppel, assignment/succession, or incorporation by reference. Beyond these exceptions, which are narrow in nature, caselaw in these jurisdictions indicate that situations where third parties/non-signatories may be bound by an arbitration agreement are extremely limited.

Through the agency exception, a party seeking to bind a non-signatory to an arbitration agreement should provide evidence that the signatory acted as an agent for the non-signatory (the principal).[136] On its part, the *alter ego*/piercing the veil of incorporation exception is invoked only in very narrow cases involving fraud, sham, or the evasion of legal obligations. Whereas the estoppel exception is invoked where a non-signatory conducts itself in a way that leads the other party to believe it has consented to be bound by the arbitration agreement; assignment/succession, as an exception, is invoked where rights and obligations are transferred via corporate restructuring or contract assignment. On its part, incorporation by reference is raised where a contract signed by the non-signatory refers to another document containing the arbitration clause.

In addition, courts in Switzerland have accepted assumption of debt or delegation of a contract[137] as an exception to binding a non-signatory to an arbitration agreement. Courts have also accepted consent as an exception if there is an independent and formally valid manifestation of consent of the non-signatory party to the arbitration agreement.[138] A party seeking to bind a non-signatory to an arbitration agreement should prove that the non-signatory party was involved in the negotiation and performance of the contract, and thereby impliedly registered its willingness to be bound by the arbitration agreement.[139]

4.3. Points of Convergence and Divergence Between the Group of Companies Doctrine and the Separate Legal Entity Theory

As considered above, the GOC doctrine and the separate legal entity (SE)L theory are often framed as polar opposites. However, they have increasingly converged in modern arbitration law, as considered below.

4.3.1. Points of Divergence

As considered above, the GOC doctrine and the SLE theory both aim at defining who is bound by an arbitration agreement in a contract. They essentially represent two

[135] Ibid. *See* also *Peterson Farms v. C&M Farming,* op. cit.
[136] *Egiazaryan & another v. OJSC OEK Finance & the City of Moscow* [2015] EWHC 3532 (Comm) ('*Egiazaryan v. OJSC OEK*").
[137] *See*, for example, *Butec v. Saipem,* op. cit.
[138] *Cox & Kings v. SAP,* op. cit, para. 47.
[139] *X v. Y Engineering S.p.A. & Y S.p.A.,* 4A_450/2013, ASA Bull., 160 (2015) ('*X v. Y Engineering*').

fundamentally different philosophies of law. Their divergence lies in whether the law should prioritize legal formality or commercial reality (the actual business conduct and behaviour). The major notable points of divergence between the two theories are: (*i*) the source of obligation: consent vis-à-vis legal form; (*ii*) piercing the corporate veil vis-à-vis the commercial bar; (*iii*) judicial philosophy: certainty vis-à-vis efficacy; (*iv*) comparison of evidence; and (*v*) impact on enforcement (the 'clash').

(a) The Source of Obligation: Consent vis-à-vis Legal Form

One of the most fundamental points of divergence between the two theories is the source of obligation. Under the SLE theory, an arbitration agreement is a creature of contract, requiring a 'signature' or clear express consent. Under this theory, arbitration is, first and foremost, a creature of contract and, as such, it derives its power and form from an underlying arbitration agreement and the consent of its signatories. Strictly following the doctrine of privity of contract, this theory requires that if a party (*e.g.*, a parent company) did not sign an arbitration agreement, it is not a party thereto. Therefore, to bind non-signatory requires the existence of a rigorous legal relationship, like agency or assignment.

Under the SLE theory, it is considered that a third party will typically not have put its mind to the terms of an arbitration agreement and cannot, therefore, be said to have consented to its terms. As such, extending arbitration agreements to third parties runs the risk of unfairly prejudicing non-signatories by forcing them to comply with contractual obligations which they have not agreed to, including potentially giving up their right to seek redress in national courts. In *Renaissance Securities v. ILLC Chlodwig,*[140] it was held that: 'requiring a third party who is a stranger to the contract to arbitrate against its will at significant cost and in a foreign seated arbitration is something that should be approached with great caution, particularly given the asymmetry of such an arrangement.'

Therefore, courts in countries applying the SLE theory are reluctant to extend arbitration agreements to third parties. In such countries, awards rendered against third parties even run the risk of being annulled. For example, in *Vale v. Steinmetz*,[141] it was held that: 'It is elementary that an arbitrator cannot make an award which is binding on third parties who have not agreed to be bound by his decision.' However, arbitration agreements can be extended to non-signatories if they are carefully supported by one or more of the limited legal grounds of assignment, agency, novation, being joined to the arbitration by the tribunal,[142] or by consolidating several ongoing arbitrations into one single procedure.[143]

While the SLE theory is rigid on consent to arbitrate, the GOC theory flexibly applies 'implied consent' by assuming that if a parent company was the 'brain' behind the deal that brought forth an arbitration agreement, it intended to be bound by the arbitration clause even if its hand did not hold the pen. These contrasting approaches between the two theories is evident in *Dallah v. Pakistan*,[144]

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[140] *Renaissance Securities (Cyprus) Ltd. v. ILLC Chlodwig Enterprises* [2024] EWHC 2843 ('*Renaissance Securities v. ILLC Chlodwig*').

[141] *Vale S.A. v. Benjamin Steinmetz* [2021] EWCA Civ 1087 ('*Vale v. Steinmetz'*), [31].

[142] For instance, Article 22.1(x) of the London Court of International Arbitration's Rules of Arbitration 2020 gives arbitral tribunals the power to join third parties to arbitral proceedings.

[143] *See*, for example, Section 42 of the Tanzania Arbitration Act (2020) and Section 35 of the English Arbitration Act (1996).

[144] *Dallah v. Pakistan-I,* op. cit.

where the underlying contract was between Dallah and a third party alone.[145] Although the Pakistani government objected jurisdiction, the arbitral tribunal upheld its jurisdiction and subsequently issued a final award in Dallah's favour.

When leave was granted to Dallah to enforce the award in the UK, the Pakistani government made an application for an order to set aside this leave on the basis that it was allegedly inconsistent with French law, the governing law of the dispute, which the Government argued did not allow the arbitration agreement to be extended in this way.[146] The English Commercial Court allowed the Pakistani government's application, setting aside Dallah's leave to enforce the arbitration award.[147] This decision was subsequently affirmed by the English Court of Appeal[148] and the Supreme Court.[149] However, later on, the French *cour d'appel* came to an entirely different conclusion, while applying the same principles of French law to the same set of facts, and allowed Dallah to enforce its award against the Pakistani government.[150]

A comparison of the decisions of the English courts and the French *cour d'appel* in this issue reveals that the French court (applying the GOC doctrine) opted for a more holistic approach, taking into consideration the relationship between the trust and the Pakistani government, as well as the role played by the said government in negotiating, executing, and terminating the contract.[151] English courts (applying the SLE theory), however, took a stricter, more traditional approach to the requirement of consent to arbitrate.[152] According to English courts, since the Pakistani government did not sign the arbitration agreement, it could simply not be bound to its terms.

(b) Piercing the Corporate Veil vis-à-vis the Commercial Bar

As considered above, both theories allow extending the arbitration agreement to a non-signatory as an exception,[153] but the 'bar' is set at different heights. Under the SLE theory, a party can extend the arbitration agreement to a non-signatory by 'piercing the corporate veil'. Disregard of the corporate form is allowed only in cases where defendant is 'hiding behind the black letter of the law may result in some kind of injustice.'[154] This usually

[145] Following the signing of an MoU between Dallah and the government of Pakistan through which Dallah would build accommodation in Mecca for pilgrims undertaking the Hajj and Umrah pilgrimages, Dallah entered into a contract with a trust created by the Government for the purposes of this MoU.

[146] *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [10], [11], [14] ('*Dallah v. Pakistan-II*').

[147] *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm), [154-157] ('*Dallah v. Pakistan-III*').

[148] *Dallah Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755, [62] ('*Dallah v. Pakistan-IV*').

[149] *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [70] ('*Dallah v. Pakistan-V*').

[150] *Gouvernement du Pakistan, Ministère des Affaires Religieuses c. Société Dallah Real Estate and Tourism Holding Company*, CA Paris, 1-1, 16 Février 2011, RG n° 09/28533 ('*Pakistan v. Dallah*'), p. 9.

[151] Ibid, pp. 5-9.

[152] Mayer, P., "The Extension of the Arbitration Clause to Non-Signatories - The Irreconcilable Positions of French and English Courts," *American University International Law Review*, Vol. 27 No. 4, 2012, pp. 831-836, p. 836.

[153] *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 447 F. 3d 411, 416 (5th Cir. 2006) ('*Bridas v. Turkmenistan*').

[154] Kombikova, A., "Extension of the Arbitration Agreement to Third Parties Based on the 'Group of Companies' and 'Piercing the Corporate Veil'

requires proof of fraud, sham, or dishonesty (*e.g.*, using a subsidiary as a shell to hide from creditors).

On its part, the GOC doctrine looks at the 'commercial bar' requiring no proof of fraud for a non-signatory to be bound by an arbitration agreement. A party is only required to prove active participation in the composite commercial enterprises of the group of companies. As such, if a parent company negotiated the technical aspects or managed the project daily, it is brought into the group of companies because it makes 'commercial sense' than because it was being 'evil'.

Although, in the GOC doctrine, it may be argued that the corporate veil of the group is being lifted to join all members of the group to arbitration, the practice of courts in countries discussed here clearly indicates that these two theories are treated differently. In France, several judgments of French courts have examined the extent to which the corporate veil can be pierced, particularly through fraud. For example, in *Orri v. SLEA*,[155] the French Court of Cassation, confirming a decision of the Paris Court of Appeal, permitted a piercing of the corporate veil and extension of the arbitration clause since the appellant, a party to the arbitration agreement had fraudulently used the corporate veil of several marionette companies to avoid paying his creditors. The Court's decision was based on the fact that the appellant was the sole decision-maker in the particular association of companies.

Although English courts have pierced the corporate veil on several occasions – such as when a subsidiary company is used for an illegitimate purpose, where it is used as a mere façade, or in any other instance of fraud, or even when a contracting party acts as agent for another company[156] – English court practice indicates great reluctance in disregarding the separate legal entities of corporate personalities and courts have lifted the corporate veil only in exceptional circumstances. After the English High Court decided, in *Roussel-Uclaf v. G.D. Searle,*[157] that held that a subsidiary claiming the benefit of an arbitration agreement to which it was not a party was entitled to a stay of court proceedings in favour of arbitration; this decision was criticized as improperly importing the group of companies doctrine into English law contrary to earlier decisions such as *Peterson Farms v. C&M Farming* and *Caparo v. Fagor,*[158] which had rejected that doctrine for England.

Consequently, in November 2008 in *City of London v. Sancheti*,[159] the English Court of Appeal overturned the decision in *Roussel-Uclaf v. G.D. Searle.* In *City of London v. Sancheti*, the English Court of Appeal held that *Roussel-Uclaf v. G.D. Searle* was '*wrongly decided on this point and should not be followed*.' Specifically, the English Court of Appeal determined that Sancheti – who brought various claims arising in relation to a lease agreement against the City of London under the arbitration agreement in the India/United Kingdom BIT – was not entitled to a stay of English court proceedings initiated by the City of London for rent arrears because the City of London was not a party to the arbitration agreement contained in the BIT.

Doctrines" LL.M. Dissertation, Central European University, 2012, p. 25.

[155] *Orri v. Société des Lubrifiants Elf Aquitaine,* Cour d'appel de Paris 1990-01-11, du 11 janvier 1990 ('*Orri v. SLEA*').

[156] *See*, for example, *Prest v. Petrodel Resources Ltd. & others*, [2013] UKSC 34, 12 June 2013 ('*Prest v. Petrodel*').

[157] *Roussel-Uclaf v. GD Searle & Co Ltd.* [1978] 1 Lloyd's Rep 225, 231-232 ('*Roussel-Uclaf v. G.D. Searle*').

[158] *Caparo Group Ltd. v. Fagor Arrasate Sociedad Cooperativa* [1998] EWHC J0807-1 ('*Caparo v. Fagor*').

[159] *City of London v. Sancheti,* 2008 EWCA Civ 1283.

However, in this decision the English Court of Appeal left unclear what, beyond 'a mere legal or commercial connection', might qualify as claiming "through or under" a party.[160] This is despite the position held in England that, in circumstances where a parent company abuses its control over the subsidiary for illegitimate purposes or otherwise uses the corporate structure to conceal a legal impropriety[161] or where there is evidence of fraud,[162] a non-signatory to the arbitration agreement may nonetheless be able to invoke (or may be bound by) that agreement upon piercing the corporate veil.

(c) Judicial Philosophy: Certainty vis-à-vis Efficacy

While jurisdictions upholding the SLE theory cling to it in order to maintain certainty and consistence in arbitration, those applying the GOC doctrine seeks to attain efficacy of arbitral proceedings. Whereas both theories aim at being fair, they disagree on whether the *legal form* (the paper contract) or the *commercial substance* (the business reality) should take precedence. In fact, this divergence creates a captivating trade-off between predictability and practicality as well as it explains why different countries have chosen different paths.

Countries upholding the SLE theory prioritize separate legal certainty. Since investors should know exactly which entity is at risk, a parent company should be able to ring-fence its liability by creating a subsidiary. These jurisdictions hold the view that for international commerce to function, a company must be able to predict exactly where its liabilities begin and end. As such, there is a need for creating a corporate 'ring-fencing' through which investors often set up subsidiaries specifically to isolate risk.[163] These jurisdictions believe that if a court ignores these boundaries without proof of fraud, it destroys the very purpose of incorporating.[164]

SLE countries also seek to avoid the cost of efficacy of arbitral proceedings. For them, efficacy is seen as a secondary goal to certainty. In most situations, they would rather have two separate proceedings (one in court and one in arbitration) than force a non-signatory into a process they didn't explicitly sign up for. To address the inefficiency of split proceedings, these jurisdictions rely on agency or estoppel. This maintains certainty because these are well-established, narrow legal rules, not a broad GOC doctrine.

On the contrary, GOC jurisdictions prioritize commercial efficacy over certainty of arbitral proceedings. For them, this strives to prevent fragmented disputes where the subsidiary is in arbitration, but the parent (the real decision-maker) is in court. Through this approach, non-signatories who are part of a group of companies are treated as a 'single economic unit'. As such, avoiding multiple fragmented proceedings and ensuring the law governing arbitration 'retains a sense of dynamism to deal with contemporary commercial challenges.'[165]

In addition, GOC jurisdictions argue that arbitration should reflect how modern business

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[160] Davies, K., "A Ghost Laid to Rest?", *Kluwer Arbitration Blog*, 12 March 2009; available at https://legalblogs.wolterskluwer.com//arbitration-blog/a-ghost-laid-to-rest/ (accessed 4 January 2025).

[161] *Adams v. Cape Industries Plc* [1990] Ch. 433 (27 July 1989).

[162] *Jones v. Lipman* (1962) 1 WLR 823*;* and *Gencor ACP Ltd. v. Dalby* [2000] EWHC 1560 (Ch).

[163] Sentient International, "Ringfencing: Protecting Your Assets Through Smart Structuring", Sentient International Ltd., 28 February 2025; available at https://www.mondaq.com/isleofman/wealth-asset-management/1590952/ringfencing-protecting-your-assets-through-smart-structuring (accessed 4 January 2025).

[164] *Renaissance Securities v. ILLC Chlodwig,* op. cit.

[165] *HLL v. Tanzania*, op. cit, para. 162.

is conducted.[166] For them, in complex projects, a shell subsidiary might sign the contract, but the parent company's engineers, lawyers, and CEOs do all the work. In that situation, these jurisdictions believe it is 'inefficient' and 'artificial' to exclude the real decision-maker from the dispute.[167] For these jurisdictions, the primary efficacy benefit is preventing split and parallel proceedings by preventing a party from 'double-dipping' by suing the subsidiary in arbitration and the parent in a local court simultaneously. Moreover, these jurisdictions (particularly India) have shifted from 'single economic unit' to 'implied consent'[168] as an attempt to bridge the gap with jurisdictions upholding the separate legal entity by arguing that; by *acting* like a party, the non-signatory has *effectively* consented.[169]

(d) Courts' Comparison of Evidence

Another point of divergence between GOC and SLE jurisdictions is that courts in both systems look at the same evidence but reach different conclusions. While courts in SLE jurisdictions u require a strict proof that the parent entity negotiated the contract containing an arbitration clause or acted as an agent, GOC in jurisdictions require an indication of implied intent on the part of a non-signatory to be bound by an arbitration agreement.[170] While courts in SLE jurisdictions require adherence to standard corporate governance regarding common directors of separate entities, those in GOC jurisdictions require evidence of a single economic reality.[171]

(e) Impact on Enforcement

Another point of divergence concerns different approaches taken by courts in between GOC and SLE jurisdictions when enforcing arbitral award concerning non-signatories. While courts in the GOC jurisdictions are open to enforcing an arbitral award rendered against a non-signatory,[172] courts in SLE jurisdictions are not open to enforcing such award on the ground that the non-signatory was not a legal party under that theory.[173]

4.3.2. Points of Convergence

Although the GOC doctrine and the SLE theory have points of divergence as considered above, they also have several points of convergence in modern arbitration law. As such, in jurisdictions like India (post-2023) and France, the GOC doctrine is no longer a 'group-wide' shortcut; it has been refined to align closely with the traditional contractual principles used in jurisdictions applying the separate legal entity theory such as Singapore, Tanzania and the UK.[174] Although there are several points of convergence between the two doctrines, the following four are the primary areas where these two theories converge: (*i*) the 'consent' anchor, (*ii*) the evidence of conduct (performance), (*iii*) preventing 'multiplicity of proceedings', and (*iv*) exceptions to the corporate veil.

(a) The 'Consent' Anchor

Consent is the most significant area of convergence between the GOC doctrine and the SLE theory. Today, there is a shift toward consent as the sole basis for jurisdiction in both parts of the divide. While traditional SLE jurisdictions have continuously insisted the need for consent for parties to be bound by an arbitration agreement, France's old GOC doctrine used to bind non-signatories based on the 'single economic reality' basis alone (*i.e.*,

[166] Ibid, paras. 162-163. *See* also *Cox & Kings v. SAP,* op. cit.
[167] Ibid.
[168] *HLL v. Tanzania*, ibid, para. 162.
[169] Ibid.
[170] Ibid.
[171] *Dow Chemical* case, op. cit.
[172] *See* particularly *Pakistan v. Dallah,* op. cit.
[173] *See*, for example, *Dallah v. Pakistan-I,* op. cit; *Dallah v. Pakistan-II,* op. cit; *Dallah v. Pakistan-III,* op. cit; *Dallah v. Pakistan-IV,* op. cit; and *Dallah v. Pakistan-V*'
[174] *HLL v. Tanzania*, op. cit.

so long as you are part of a group of companies, then you are one party).[175]

However, there is now modern convergence where countries like India after *Cox & Kings v. SAP* insist that the GOC doctrine is a *consent-based* rule which strives to discover the 'implied consent' of a non-signatory.[176] Today, while both theories agree that a party cannot be forced into arbitration without their consent, they only differ on *how* that consent is proven. Where SLE jurisdiction require consent to expressly indicated, GOC countries require consent to be exhibited through conduct of the parties.

(b) The Evidence of Conduct (Performance)

As considered above, both theories look at the exact same set of facts to determine if a non-signatory should be involved in an arbitration. Whether a court applies 'agency' (an approach taken in the SLE theory) or 'group of companies' approach, it will examine the following issues: did the non-signatory negotiate the contract? Did it perform the technical milestones? Did it handle the termination or 'fix' the project when it failed?[177] Whereas in SLE jurisdictions, the conduct of a non-signatory proves an agency relationship; in GOC jurisdictions, the same conduct proves implied intent. Although the legal label changes in both theories, the evidentiary threshold—active and substantial involvement—is increasingly similar.[178]

(c) Preventing 'Multiplicity of Proceedings'

Preventing multiplicity of proceedings is another significant area of convergence between the GOC doctrine and the SLE theory. Today, both theories share the common goal of commercial efficacy in that they try to avoid 'fragmented litigation' or multiplicity of proceedings[179] where a subsidiary is in arbitration while the parent (the real decision-maker) is being sued in court. Today, the two theories use concretely designed tools to preventing multiplicity of proceedings. While countries that apply the separate legal entity theory use 'incorporation by reference' or 'interrelated contracts' to pull parties together; jurisdictions applying the GOC doctrine use the 'composite transaction' test to preventing multiplicity of proceedings. Both are designed to ensure that a single commercial project is not broken into a dozen different legal battles in its life span.

(d) Exceptions to the Corporate Veil

Neither theory treats the corporate veil as an absolute, impenetrable wall. While SLE jurisdictions use veil piercing or *alter ego* (usually requiring proof of fraud or sham),[180] GOC jurisdictions use implied consent (requiring proof of participation in the contract). As such, both theories recognize that, in complex, multi-layered corporate structures, the 'signatory' is often just a shell. While SLE jurisdictions require a higher bar (fraud), GOC jurisdictions are now moving toward a more structured, multi-factor test that

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[175] *Dow Chemicals* case, op. cit.
[176] *HLL v. Tanzania*, op. cit.
[177] Ibid.
[178] Kabra, A. and N. Kadur, "Indian Supreme Court Endorses the Application of the 'Group of Companies' Doctrine to Join Non-Signatories," *Kluwer Arbitration Blog*, 15 March 2024; available at ttps://legalblogs.wolterskluwer.com/arbitration-blog/indian-supreme-court-endorses-the-application-of-the-group-of-companies-doctrine-to-join-non-signatories/#:~:text=Noting%20that%20the%20Group%20of,party%20to%20the%20underlying%20contract (accessed 3 January 2026).
[179] *See* particularly *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280 ('*New Era v. Balance Bar*'); and *Canadian Natural Resources Ltd. v. Flatiron Constructors Canada Ltd.,* 2018 ABQB 613 ('*CNRL v. FCFL*').
[180] Kryvoi, Y., "Piercing the Corporate Veil in International Arbitration," *Global Business Law Review*, 2010.

prevents it from being applied 'automatically' just because of shareholding.

5. CONCLUSION

The foregoing discussion indicates that; although Tanzanian arbitration law is silent on whether a non-signatory may be bound by (or benefit from) an arbitration agreement to which he/she is not a party, many jurisdictions around the world have, in some form or the other, moved beyond the formalistic requirement of consent to bind a non-signatory to an arbitration agreement. The primary conclusion is that the issue of binding a non-signatory to an arbitration agreement is more of a fact-specific aspect.[181] Whereas most common law jurisdictions such as UK and Singapore have rejected the idea of binding non-signatories to an arbitration agreement; in other jurisdictions such as France and India, there is a broad consensus that consent or a subjective intention of a non-signatory to an arbitration agreement may be proved by conduct through the GOC doctrine. Such subjective intention can be derived from the objective evidence in the form of participation of the non-signatory in the negotiation, performance, or termination of the underlying contract containing the arbitration agreement.

However, as noted above, the GOC doctrine has not been universally accepted by courts in all jurisdictions. In jurisdictions such as France and India where the doctrine has gained acceptance, the GOC doctrine is one of the several factors that a court or tribunal invokes to determine the mutual intention of all parties to join the non-signatory to the arbitration agreement. In countries such Tanzania where the law is silent on whether or not a non-signatory may be generally bound by an arbitration agreement, tribunals and courts may only look to these jurisdictions for persuasive authorities on whether to apply the rigid approach taken by English courts as per *Gécamines v. Hemisphere* or apply the more radical, flexible approach framed in the GOC doctrine in the Indian context as augmented by the SCI in *Cox & Kings v. SAP*.

In conclusion, where Tanzanian courts and arbitral tribunals are confronted with the issue as to whether or not a non-signatory can be bound by an arbitration agreement, they should look to the persuasive position in England or France and India.[182] However, these positions are persuasive and should, therefore, be invoked subject to the conditions laid down in Section 2(3) the Judicature and Application of Laws Act (Cap. 358) – 'only so far as the circumstances of Tanzania and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary.'[183] It is proposed that Tanzanian courts and arbitral tribunals may choose to invoke any of the persuasive positions: the one taken by English courts and arbitral tribunals as per well-illustrated in the celebrated case of *Gécamines v. Hemisphere*, where they deal with public corporations; or the Indian 'group of companies doctrine – illustrated by the SCI in *Cox & Kings v. SAP* – when dealing with private corporations.

Where courts and tribunals in Tanzania desire to follow the rigid position held in *Gécamines v. Hemisphere*, they will have to factor in the following considerations to determine whether a non-signatory party (particularly a public

[181] *Cox & Kings v. SAP,* op. cit, para. 58; and Hanotiau, B., 'May an Arbitration Clause be Extended to Non-signatories: Individuals, States or Other Companies of the Group?' in Hanotiau, B. (ed.), *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* (2nd edn) (Kluwer Law International, 2020), pp. 95, 194.

[182] In *Tanganyika Garage Ltd. v. Marceli G. Mafuruki* (1975) LRT 23 ('*Tanganyika Garage v. Mafuruki*').

[183] *Calico Industries Ltd. v. Zenon Investments Ltd.*, *Registrar of Titles & NBC Holding Corporation* (999) TLR 100 ('*Calico Industries v. Zenon Investments*').

entity) is assimilated to the State forming it: (*i*) whether it is distinct from organs of the State; (*ii*) whether it has the statutory capacity to sue or being sued; (*iii*) whether it is formed for commercial or industrial purpose; (*iv*) whether it has its own statutory constitution, governance and management structures independent of the State; and (*v*) whether it has separate budget from the State as well as statutory obligations (such tax, labour, and environmental obligations) and liabilities.

On the other hand, where courts and tribunals in Tanzania desire to follow the radical position held in *Cox & Kings v. SAP* through the group of companies doctrine to bind non-signatories to an arbitration agreement, they will have consider the following factors: (*i*) whether the signatory and non-signatory parties have mutual intention to be bound by the arbitration agreement; (*ii*) whether the relationship between the signatory and non-signatory parties was such that they consented, by conduct, to be bound by the arbitration agreement; (*iii*) the commonality of the subject matter; (*iv*) the composite nature of the transactions in question; and (*v*) the participation of signatory and non-signatory parties in the performance of the contract(s) in question.