LEGAL EFFECT OF ARBITRATION AGREEMENT ON NON-SIGNATORIES

BY

SUPORN DETPIRATTANAMONGKOL

AN INDEPENDENT STUDY SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)
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INDEPENDENT STUDY

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Chairman _____

(Dr. Panumas Sittivaekin)

Member and Advisor _____

(Professor Dr. Pinai Nanakorn)

Dean _____

(Associate Professor Dr. Pokpong Srisanit)

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Author	Suporn Detpirattanamongkol
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Independent Study Advisor	Professor Dr. Pinai Nanakorn
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ABSTRACT

In the modern world, litigation might not be the most suitable course of action in cross-border disputes due to the duration, the inability to address the complexities of cross-border issues, and the gap between the judicial and national court systems. The parties attempt to find different methods of resolving the dispute outside of national courts, referred to as alternative dispute resolution, or ADR. Even though there are numerous kinds of ADR, including but not limited to mediation, conciliation, negotiation, and arbitration. Arbitration is the preferred resolution method for most parties due to the preservation of confidentiality, the impartial selection of arbitrators, and the enforcement of arbitral awards within the contracting states.

The arbitration process in Thailand relies on the agreement and mutual consent of the parties, which can be established by either including an arbitration clause in their contract or entering into a separate written arbitration agreement. The absence of the parties' agreement to arbitrate leads to the arbitral tribunal's lack of jurisdiction in settling the dispute. Moreover, the absence of an arbitration agreement or its invalidity will result in an award being set aside or refused by the court in accordance with Article V of the New York Convention, the UNCITRAL Model Law, and the Thai Arbitration Act B.E. 2545.

The requirement that the arbitration agreement must be in writing and signed by the parties is stated in Article II (2) of the New York Convention, Article 7 of

the UNCITRAL Model Law, and Section 11 paragraph 2 of the Thai Arbitration Act. It implies that an arbitration agreement will bind only the parties who agree to submit their dispute to arbitration proceedings by creating a written and signed arbitration agreement; however, those provisions are silent on the parties who are not signing an arbitration agreement but are involved in the underlying transaction. The legal effect of arbitration agreements on non-signatories is still controversial among scholars, arbitral tribunals, and national courts.

In today's globalized economy, the growing complexity of international trade frequently results in multinational business transactions that involve multiple companies. These transactions go beyond the traditional parent-subsidiary structure and instead adopt more complex corporate arrangements. Corporate groups can manifest as contractual or equity-based organizations, joint ventures between independent enterprises, informal alliances, publicly owned multinational corporations, and supranational entities engaged in worldwide business. The question of how we should deal with disputes arising out of transactions with multinational groups of companies may arise.

This independent study pursues to seek proper legal provisions and appropriate approaches and solutions for arbitral tribunals and courts to deal with the matter of non-signatories in Thailand, especially to have jurisdiction over the non-signatories by comparing international rules, i.e., the New York Convention, the UNCITRAL Model Law, and foreign legislations as well as landmark case law in France, the United States and the Republic of China.

This independent study will focus on the "group of companies doctrine," under which an arbitration agreement will bind non-signatory subsidiaries or parent companies within the same group as the signatory party. The "piercing of corporate veil doctrine," in which the non-signatory parent corporation's veil will be pierced to bind arbitration agreements since it has excessive control over its subsidiaries and its conduct is for its benefit. The "principal-agent doctrine" is one in which the non-signatory undisclosed principal could be bound by the arbitration agreement, even though it was executed by the agent.

Keywords: Arbitration Agreement, Non-Signatories, Group of Companies, Piercing of Corporate Veil, Principal-Agent

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Suporn Detpirattanamongkol

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Symbols/Abbreviations	Terms
ADR	Alternative Dispute Resolution
Chinese Contract Law	Contract Law of the People's Republic of China
Chinese Civil Law	General Principles of Civil Law of The People's Republic of China
FAA	Federal Arbitration Act
FCC	French Civil Code
FCCP	French Code of Civil Procedure
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
New York Convention 1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PRC	Arbitration Law of the People's Republic of China
SPC	Supreme People's Court Interpretation of Some Issues on the Application of the Arbitration Law of the People's Republic of China
Thai Arbitration Act	Thai Arbitration Act
Thai CCC	Thai Civil and Commercial Code
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
U.S.	United States
U.K.	United Kingdom

CHAPTER 1
INTRODUCTION

1.1 Background and Problems

In the modern world, it cannot be denied that when disputes arise, the majority of parties may consider filing a lawsuit. However, in cross-border matters, litigation may not be the most appropriate option. Due to the expense, duration, inability to address the complexities of cross-border issues, and the gap between the judicial systems and national court systems.[1] The parties attempt to find different methods of resolving the dispute outside of national courts; this is referred to as alternative dispute resolution ("ADR"). ADR consists of many forms, including but not limited to (i) mediation and conciliation; (ii) expert determination; (iii) mini-trials and neutral evaluation; (iv) "baseball" or "final-offer" arbitration; and (v) arbitration.[2] Even though there are numerous kinds of ADR, arbitration is the preferred method of resolution for most parties. The use of this method provides numerous advantages, including the preservation of confidentiality, the impartial selection of arbitrators, and the enforcement of arbitral awards within the contracting states.[3]

The arbitration process relies on the agreement and mutual consent of the parties, which can be established by either including an arbitration clause in their contract or by entering into a separate written arbitration agreement (and signing it).[4] The arbitration agreement serves as the fundamental basis for most arbitration cases,

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[1] Thomas Gaultier, 'Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement' (2013) 26 NYSBA International Law practicum 38, 38-39.

[2] Gary B. Born, 'Chapter 5: International Arbitration Agreements: Non-Signatory Issues' in Gary B. Born (ed) *International Commercial Arbitration: Law and Practice* (3rd edn, Kluwer Law International, 2021) 297-303.

[3] 'What is arbitration?' (Thailand Arbitration Center, 12 January 2021) <https://thac.or.th/what-is-arbitration/?> accessed 31 March 2024.

[4] Thailand Arbitration Act B.E. 2545, Section 11.

as it is widely recognized in many countries. Prior to creating an arbitration agreement, all parties involved must take into account the multitude of functions that an arbitration agreement fulfills. Initially, the parties need to comprehend that an arbitration agreement is established when the parties voluntarily agree to resolve their disputes through arbitration proceedings, the absence of the parties' agreement to arbitrate undermines the jurisdiction of the arbitral tribunal to settle the dispute. It is also related to the second aspect that the arbitral tribunal lacks the jurisdiction to resolve the issue, it indicates that the parties did not initially agree to submit their cases to arbitration. Alternatively stated, the parties' agreement to arbitrate provides the tribunal with jurisdiction over the courts. The final function of an arbitration agreement is to serve as the foundational source of authority for arbitrators. Nonetheless, such authority may be restricted or expanded by national laws.[5]

As stated in the previous paragraph and determined by the court, arbitration is consensual and only applies to individuals who have personally signed the written arbitration clause. Nevertheless, certain legal principles have been invoked to enforce arbitration agreements on entities that have not signed an arbitration agreement. There are multiple justifications for considering the expansion of the arbitration clause or agreement to individuals or entities who did not originally sign it. First, the party that signed an arbitration agreement is not the actual party; rather, its affiliates, parent companies, or subsidiaries are the actual parties. Second, the entity that signed the arbitration agreement is insolvent, whereas the group's other subsidiaries or the parent company are solvent. Third, the party who suffered a loss as a result of the arbitration agreement is not a signatory; rather, its subsidiaries within the same group are signatories.[6] However, the key factor in determining a non-signatory as a party to the arbitration agreement is primarily based on the consent that he or

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[5] Julian D.M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 6-1 and 6-2.

[6] Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract & Multi-issue and Class Actions* (2nd edn, Kluwer Law International, 2005) 49 and 249.

she has given, and it is crucial to take into account the formation of a contract, as the arbitration agreement is regarded as an integral component of the contract.

When considering the formation of contracts, it is crucial to analyze the parties' intention; namely, if it is considered as the parties' voluntary lawful acts to establish a legal relationship between persons in order to create, modify, transfer, reserve, or extinguish a right, it is considered a juristic act under Section 149 of the Thai Civil and Commercial Code ("Thai CCC"). In addition, the doctrines of private autonomy, which include the principle of autonomy will and the doctrine of freedom of contract stated in Section 151 of the Thai CCC, will need further consideration. It can be inferred from the two general principles that the parties shall have the freedom to execute agreements consensually, including but not limited to the freedom to choose the counterparty, the freedom to stipulate the content of the contract, and the freedom to stipulate the consequences of the contract,[7] as such long as it is not prohibited by law, is impossible or is not contrary to public order or good morals.[8] In certain instances, however, a third party that is not a party to the contract may be engaged and bound by the parties' agreement. It is worthwhile to analyze whether a third person who did not sign an agreement can be bound by the agreement and on what grounds or legal principles such a party can be bound.

Regarding non-signatories issues, the Thai Arbitration Act B.E. 2545 ("Thai Arbitration Act") provides a provision stating that the parties may agree to submit their disputes to arbitration, regardless of whether the arbitration agreement is in the form of an arbitration clause in a contract or a separate agreement.[9] The requirement that the arbitration agreement must be in writing and signed by the parties is also stated in Section 11 paragraph 2 of the Thai Arbitration Act. Even though this Section defines arbitration agreement, it is silent regarding the non-signatories to the agreement. In addition, the New York Convention on the Recognition and Enforcement of Foreign

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[7] Thai Civil and Commercial Code B.E. 2535, Section 151.

[8] Thai Civil and Commercial Code B.E. 2535, Section 150.

[9] Thai Arbitration Act B.E. 2545, Section 11 paragraph 1.

Arbitral Awards 1958 ("New York Convention")[10] and the UNCITRAL Model Law on International Commercial Arbitration 1985 ("UNCITRAL Model Law") embrace a similar concept. They define the arbitration agreement as an agreement between the parties to resolve disputes arising from a contractual or non-contractual legal relationship through arbitration. Moreover, such an agreement must be in written form and signed by all parties that consent to bringing the dispute to arbitration.[11] Consequently, only the parties who gave their consent will be bound by the arbitration agreement.

Even though there are no explicit principles that establish the binding effect of non-signatories to an arbitration agreement, arbitral tribunals and courts in numerous countries have issued a considerable number of decisions addressing this matter. For instance, France is the first country to apply the concept of the group of companies doctrine,[12] in which non-signatories may be subsidiaries and not the parent company that signed an arbitration agreement. The tribunal may opt to extend the arbitration clause to these subsidiaries. Additionally, the United States court ruled in another case to pierce the parent corporation's veil since it has excessive control over its subsidiaries and its conduct is for its benefit, per the corporate veil doctrine.[13] Another interesting case relating to the principal-agent doctrine is when a Chinese court applied this principle to an arbitration agreement for the first time. The Beijing No. 4 Intermediate People's Court ruled that the undisclosed principal could be bound by the arbitration agreement, even though it was executed by the agent of the undisclosed principal.[14] Numerous doctrines convey the concept of extending the

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[10] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Article III.

[11] UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, Article 7 option 1.

[12] Gary B. Born, 'Chapter 5: International Arbitration Agreements: Non-Signatory Issues' (n 2) 297-303.

[13] *Smoothline Ltd., Greatsino Electronic Ltd. v. North American Foreign Trading Corp.,* U.S. District Court for the Southern District of New York, 00 Civ. 2798 (DLC), 30 December 2002.

[14] *Ivatherm v. Xia Shi,* Beijing No. 4 Intermediate People's Court, June 2020.

arbitration clause to non-signatories, including but not limited to the doctrines of the group of companies, piercing the corporate veil, principal-agent, third-party beneficiary, implied consent, and equitable estoppel.

The primary focus of this paper will be three doctrines, including the "group of companies doctrine," "piercing of the corporate veil doctrine," and "principal-agent doctrine." These doctrines involve elements from various areas of law, such as corporate law, contract law, agency law, and arbitration law, making them an intriguing subject for further exploration. The principles of a group of companies and piercing of the corporate veil are a combination of corporate law and arbitration law. The principal-agent doctrine originated from contract and agency laws. Particularly, this paper will cover significant legal precedents, such as rulings from the Supreme Court of France, the United States, and the Republic of China, as well as legal principles pertaining to corporate, contract, agency, and arbitration law, in addition to relevant case law.

1.2 Research Questions

Based on the above-mentioned background and problems regarding the non-signatories to the arbitration agreement, it can develop to the research questions for this paper as follows:

1.2.1 Whether the non-signatories should be bound by the arbitration clause or agreement.

1.2.2 Whether Thailand should adopt the concept of extending the arbitration clause or agreement to non-signatories.

1.3 Hypothesis

Under the Thai Arbitration Act B.E. 2545, the existing provisions are insufficient for binding the non-signatories to the arbitration agreement and allowing the courts or arbitral tribunals to have jurisdiction over them. Section 11 of the Thai

Arbitration Act only addresses the definition of an arbitration agreement, the legal requirements, and its validity. Furthermore, the absence of explicit recognition, either by Thai courts or arbitral tribunals, that an arbitration agreement may affect individuals or entities who did not directly sign it in specific circumstances could potentially create difficulties in determining the jurisdiction of arbitral tribunals and enforcing awards in arbitration cases. Therefore, it is necessary to revise Thai legislation to candidly recognize the legal effect of arbitration agreements on non-signatories in situations that are justifiably determined by the law.

1.4 Objective of Study

These are the following objectives of this paper:

1.4.1. To study the concept of non-signatories to the arbitration agreement of the group of companies, piercing of corporate veil, and principal-agent doctrines.

1.4.2 To find the appropriate approach in applying the non-signatories to the arbitration agreement.

1.4.3 To suggest how arbitral tribunals and courts should deal with the matter of non-signatories in Thailand.

1.5 Scope of Study

This paper will focus primarily on arbitration agreement formation, the interpretation of arbitration agreements and arbitration clauses that extend to non-signatories based on the case law decided by the arbitral tribunals and courts in a group of companies, piercing of the corporate veil, and principal-agent doctrines in Thailand (if any), France, the United States, and the Republic of China.

1.6 Research Methodology

This paper will be conducted as a comparative study of France, the United States, and the Republic of China regarding court decisions on applying non-signatories to arbitration agreements in foreign theories. The documents' references will be from the laws, case laws, research, books, theses, and scholarly opinions. Since the group of companies doctrine was first employed by a French court, it is beneficial to select France to examine the case law pertaining to this theory. The United States also decides numerous cases based on the piercing of the corporate veil; consequently, it may be extremely useful to review the case law pertaining to this concept. In addition, this is the first time in which the Republic of China has resolved a dispute by applying the principal-agent doctrine, which holds that an arbitration agreement is binding on the undisclosed principal who did not directly sign the agreement but had it signed by their agent. Consequently, it is valuable to explore the rationale behind this decision.

1.7 Expected Outcomes

1.7.1 To understand the concept of non-signatories to the arbitration agreement of the group of companies, piercing of corporate veil, and principal-agent doctrines.

1.7.2 To offer solutions and suggestions regarding the appropriate approach in applying the non-signatories to the arbitration agreement in Thailand.

1.7.3 To find solutions for how arbitral tribunals and courts should deal with the matter of non-signatories in Thailand.

CHAPTER 2
THE CONCEPT OF NON-SIGNATORIES TO THE ARBITRATION AGREEMENT IN INTERNATIONAL COMMERCIAL ARBITRATION

2.1 Introduction

This chapter will begin with a review of the background and characteristics of arbitration. It will subsequently proceed to address the arbitration clause and agreement, covering a study of national and international law, model laws, and conventions that govern the validity of arbitration agreements, the incorporation of crucial provisions such as the place or seat of arbitration in the arbitration agreement, and the extension of arbitration clauses to include one or more additional defendants or claimants. In order to find the answer to the research question aforementioned in the first chapter, it is necessary to comprehend the background and characteristics of arbitration, the enforceability of arbitration clauses, and the legal basis on which arbitration clauses can be extended to third parties.

2.2 Background and Characteristics of Arbitration

To comprehend the concept of non-signatories to arbitration agreements in international commercial arbitration ("ICA"), it is necessary to consider the following. It is beneficial to understand the concept of ICA since ICA is an alternative to litigation in national courts for resolving disputes between private parties arising from cross-border business transactions, or sometimes it may refer to foreign arbitration. The presence of mutual consent among the parties is crucial in establishing an arbitration agreement and compelling the tribunal to adjudicate the case through arbitration. Consequently, only those parties who have given their consent to be bound by arbitration will be bound.[15]

[15] Gary B. Born, 'Chapter 5: International Arbitration Agreements: Non-Signatory Issues' (n 2) 1517.

As previously discussed in the initial chapter, both the New York Convention and the UNCITRAL Model Law adhere to a common understanding of an "arbitration agreement" as an agreement between the parties to refer all or specific disputes arising from a contractual or non-contractual legal relationship to arbitration. Furthermore, the prerequisite of a written agreement signed by all parties is a fundamental requirement that holds significant importance and cannot be disregarded.[16]

Arbitration is one type of alternative dispute resolution that has been employed for centuries. Globally, the concept of arbitration is firmly rooted. As formal courts of law began to emerge, a potentially uneasy tension arose between courts, legislators, and arbitration, as evidenced by some early decisions reported from England and France. English law has long acknowledged arbitration as a mechanism for resolving disputes, allowing the issuance of penal requests to ensure compliance with arbitration agreements and adherence to arbitrators' decisions. Nonetheless, some legal scholars consider arbitration agreements to be revocable by either party.[17] In contrast to France, the French Civil Code 2016 recognized and enforced arbitration provisions in international trade disputes so long as certain legislative safeguards were followed. A commentator has also noted that French jurisprudence played a crucial role in establishing international arbitral uniformity.[18] From the past to the present, it can be concluded that most people prefer to use arbitration as the method for resolving disputes since arbitration is the most appropriate mechanism due to its neutrality, privacy, flexibility in procedure, speed, and cost, the expertise of the arbitrators, and enforcement of awards.[19]

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[16] New York Convention 1958, Article 3 and UNCITRAL Model Law 1985, Article 7 option 1.

[17] ibid.

[18] Arthur Taylor von Mehren, 'International Commercial Arbitration: The Contribution of the French Jurisprudence' (1986) 46 Louisiana Law Review 1045, 1045.

[19] Jan Paulsson and others, *The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts* (2d edn, Kluwer Law International, 1999).

In addition to the evolution of arbitration to the present day, it is crucial to contemplate the characteristics of arbitration. Three essential aspects of arbitration must be considered. First, consent.[20] It is clearly illustrated that, without the consent of the parties, arbitrators have no authority to decide a case through arbitration. Moreover, the parties' agreement governs the establishment of the arbitrator's jurisdiction and the procedural framework. In the absence of the parties' consent, an arbitration agreement would be deemed invalid, and the arbitrator would lack jurisdiction. Second, arbitrators are not government representatives since they are chosen by the parties individually. Thus, their primary duty is to safeguard the parties' best interests, unlike judges who serve the public interest.[21] Third, the award made by the tribunal is final and binding on the parties.[22] This is the most significant and attractive aspect of arbitration, which encourages numerous parties to use it to settle their conflicts. Especially, the prevailing party has the opportunity to file a petition with a court in a jurisdiction where the losing party holds assets, seeking to enforce the arbitration award. Generally, it is not permissible for the parties to request a higher court for the annulment of the award; however, in specific circumstances where the arbitration process exhibits particular deficiencies, the court may opt to annul the award.

In order to enhance the comprehensibility of the arbitration procedure, the author has provided a reference to the procedural steps commonly employed in most international arbitrations, as described below.

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[20] New York Convention 1958, Article 3 and Thai Arbitration Act B.E. 2545, Section 11.

[21] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press, 2012).

[22] Francesca Richmond, 'When is an arbitral award final?' (10 September 2009, Kluwer Arbitration Blog) <https://arbitrationblog.kluwerarbitration.com/2009/09/10/when-is-an-arbitral-award-final/> accessed 31 March 2024.

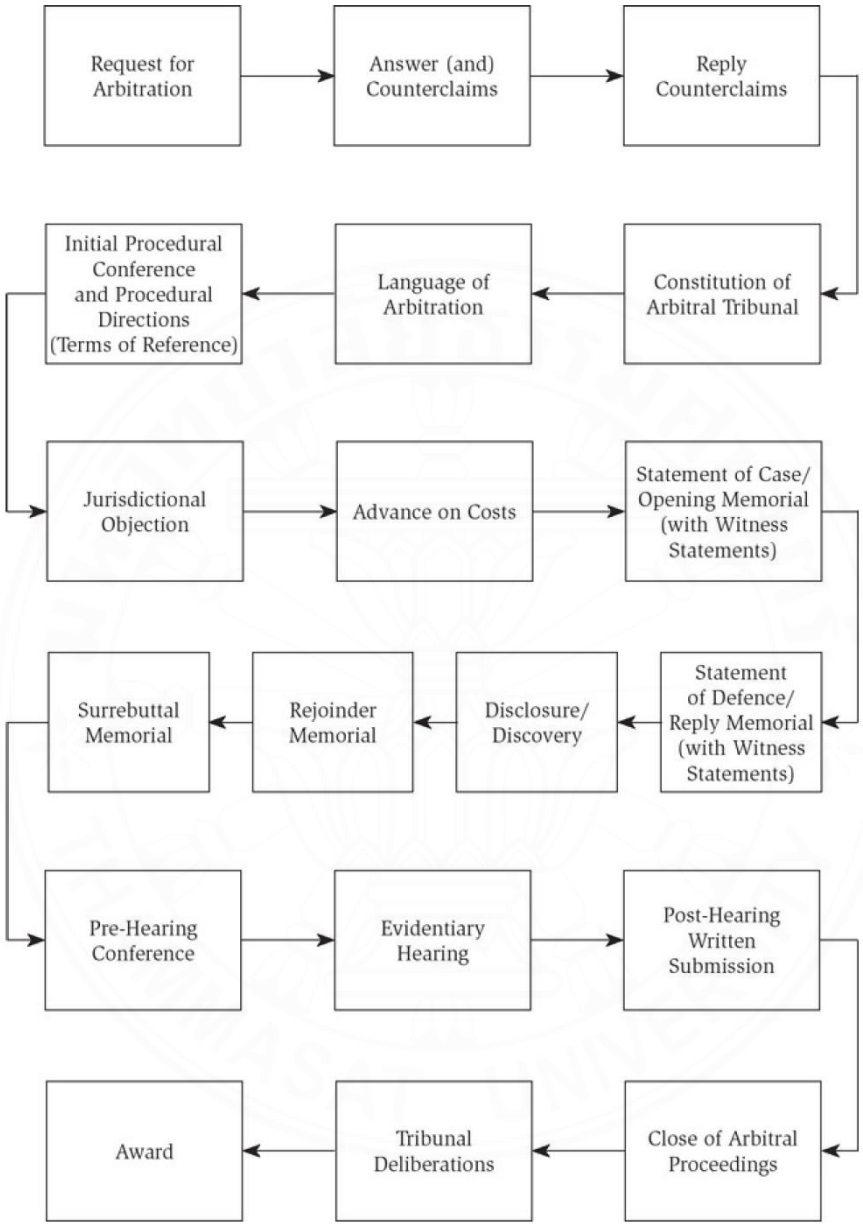

Figure 1.1 The Major Procedural Steps in International Arbitral Practice

2.3 The Arbitration Clause and Arbitration Agreement

It is undeniable that parties have the freedom to design arbitration clauses and agreements, but in some instances, it is subject to the legal and regulatory framework. Therefore, to avoid an invalid contract, the parties must comply with the

regulatory framework that regulates the legitimacy and enforceability of arbitration in both the national and international juridical systems.

2.3.1 Regulatory Framework

There are three important regulatory frameworks to consider, beginning with national law. When the parties opt for substantive law as the means to settle the dispute, the agreement will be interpreted, the dispute's merits will be evaluated, and any other substantive matters, including arbitrability, will be assessed based on the chosen substantive law.[23] The majority of countries, including Thailand, have adopted the UNCITRAL Model Law since it covers all aspects of the arbitration process, from the execution of the arbitration agreement to the enforcement of the award. The Thai Arbitration Act appears to have been formulated in accordance with the UNCITRAL Model Law and the New York Convention.[24] Occasionally, Thai courts will also consider the Thai Civil and Procedure Code B.E. 2477, as well as scholarly comments and decisions from other jurisdictions, when a case contains similar issues. Second, international arbitration practice. The parties and tribunals may choose to rely on a guideline, soft law, or any code of ethics as their mandatory framework. Lastly, international treaties. The New York Convention is the most significant mechanism as it establishes a global framework enabling states to facilitate the recognition and enforcement of foreign arbitral awards. Its significant characteristic is that the contracting state can enforce the award against another contracting state.[25] In order to draft an effective and enforceable arbitration clause and agreement, it is crucial to understand what should be included in the clause and agreement.

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[23] Margaret L. Moses (n 21).

[24] ibid.

[25] New York Convention 1958, Article III.

2.3.2 Essential Clauses in the Arbitration Agreement

As stated in this paper, an arbitration clause or agreement is the parties' intention to bring their claim to arbitration; accordingly, several crucial aspects should be stipulated in such a clause or agreement.

Firstly, the selection of arbitrators. It depends on whether the parties select ad hoc or institutional arbitration. Institutional arbitration is conducted in accordance with procedural rules promulgated by a specific arbitration institution, and the institution's arbitration rules are applied to the case. For instance, In Thailand, the two most renowned institutions for institutional arbitration are the Thailand Arbitration Center (THAC) and the Thai Arbitration Institute (TAI), whereas in Singapore, there is the Singapore International Arbitration Centre (SIAC). When the parties select institution arbitration, the institution will handle the entire arbitral proceeding, including the appointment and removal of arbitrators.[26] In contrast to the ad doc arbitration, all arbitral proceedings, including the selection of arbitrators and all administrative tasks, will be managed by the disputing parties. However, the fee for ad doc arbitration is lower than that of institutional arbitration, and the parties have more opportunities to adapt the process to the nature of the dispute.[27]

Secondly, the seat of arbitration. This is the most crucial element, as it is the law that will govern the arbitration.[28] The seat of arbitration serves as more than just the physical location where the arbitration proceedings take place; it also determines the national law that will be applied to the proceedings in case court intervention becomes necessary during or after the arbitration. Consequently, the parties must exercise careful consideration when choosing a suitable seat for

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[26] Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (2nd edn, Kluwer Law International) 200.

[27] Margaret L. Moses (n 21).

[28] Phillip Capper, 'When is the 'Venue' of an Arbitration its 'Seat'?' (Kluwer Arbitration Blog, 25 November 2009) <https://arbitrationblog.kluwerarbitration.com/2009/11/25/when-is-the-venue-of-an-arbitration-its-seat/> accessed 11 May 2024.

arbitration. For enhanced enforceability of the arbitral award, it is crucial to choose a country that is a party to the New York Convention.

Thirdly, substantive law and arbitration language. According to Section 34 of the Thai Arbitration Act, the parties to an arbitration agreement may choose any substantive law, including foreign substantive laws. However, it must be expressly stated in an arbitration clause or agreement to avoid needless disputes. The language of arbitration is also a crucial element to include in the arbitration agreement, particularly when the parties are of different nationalities and communicate in different languages. When drafting an arbitration agreement, it is advisable for the parties to explicitly designate the language of arbitration to mitigate any potential uncertainties in contract interpretation and facilitate effective communication between the involved parties. The following part would be the most important aspect of an arbitration agreement, as failure to comply with the law's arbitration requirement would render the agreement invalid.

2.3.3 Validity of the Arbitration Agreement

The consent of the parties to arbitrate is undoubtedly the most important factor to consider when analyzing the validity of an arbitration agreement. However, it is not specified whether consent must be expressed or implied. Consideration should be given to whether written consent is required from the parties. In some jurisdictions, such as French law, an oral arbitration agreement is allowed.[29] In contrast to U.S. law, the crucial element of arbitration is that it must be in written form and signed by all parties.[30]

When considering the writing requirements, it is worth seeing Article II (1) of the New York Convention which states that contracting states must recognize

[29] *Sarl Centro Stoccaggio Grani v. SA Granit,* Cour d'appel Paris, 8 June 1995, Rev Arb 89 (1997).

[30] S.I. Strong, 'What Constitutes an 'Agreement in Writing' in International Commercial Arbitration? Conflicts between the New York Convention and the Federal Arbitration Act' (2012) 48 Stanford Journal of International Law 47, 48.

arbitration agreements in writing.[31] This Article contains two requirements: the arbitration agreement must be in "writing" and either (i) signed by the parties or (ii) contained in an exchange of letters or telegrams.[32] Thailand also adopted the New York Convention to Section 11 of the Thai Arbitration Act, which stipulates that arbitration agreements shall be in writing and signed by all parties as well. In addition, some non-contractual disputes, such as those found on tortious acts or unfair business practices, can be brought to arbitration if a party agrees, in addition to contractual disputes.

Additionally, the dispute shall be capable of being settled by arbitration is also one of the requirements to make an arbitration agreement valid, as stated in Article II of the New York Convention. The "arbitrability" issue must be considered. The national law and public policy must be applied to assess and evaluate arbitrability. Depending on the government policy and economy of each jurisdiction, the specifics of its arbitrability law have been formulated differently.[33] Criminal and bankruptcy cases, for instance, cannot be submitted to arbitration since they violate public policy.[34]

The final remark is that an arbitration agreement must not be null, void, inoperative, or unenforceable. In such instances, if an arbitration agreement fails to meet this criterion, the court of a contracting state will not refer the case to arbitration upon the request of either party.[35] An example of a null and void contract

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[31] Appears in the New York Convention 1958, Article II (1) which states that "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration".

[32] Loukas A. Mistelis, *Concise International Arbitration* (2nd edn, Kluwer Law International, 2010).

[33] Saowanee Asawaroj, *Explanation of the law regarding business dispute resolution procedures* (3rd edn, Thammasat University Press, 2011).

[34] Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (n 26) 200.

[35] New York Convention 1958, Article II (3).

is Section 156 of the Thai CCC, in case it is misunderstood that an arbitration agreement and a compromise agreement are the same agreement. Another example is that if the arbitration agreement becomes unenforceable, it may be attributed to various factors, such as the unavailability of the designated place of arbitration due to political instability, the unavailability of the appointed arbitrators, or ambiguity in the arbitration clause.[36]

This part explains that the arbitration agreement must be in writing and signed by the parties; however, it does not address the inclusion of non-signatories or third parties who have not signed an arbitration agreement. Hence, the next part will provide a more comprehensive analysis of the foreign court's determination and interpretation regarding the extension of an arbitration clause or agreement to non-signatories. These non-signatories may consist of one or more additional defendants or claimants.

2.4 The Extension of the Arbitration Clause to the Third Parties

As previously mentioned in the first paper, foreign courts may have extended the arbitration agreement or clause to non-signatories for the following reasons: the party signing the clause or agreement is not the real party; instead, its parent or subsidiary is the real party. In some instances, the party suffering loss or harm may not be a signatory but rather its affiliates or parent firm. Another scenario could be when a signatory to the arbitration agreement is insolvent while the other subsidiaries of the group or the parent company remain financially stable. This part will demonstrate eight factual patterns in which tribunals and courts have been presented with the decision to extend the arbitration clause to third parties, which are non-signatories. These extensions may be elaborated on in the following two primary scenarios and subsections:

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[36] Margaret L. Moses (n 21).

2.4.1 The Extension of the Arbitration Clause to One or Several Other Defendants

This part contains case law and four circumstances in which courts and tribunals decide to extend an arbitration clause or agreement to one or more defendants, including but not limited to parent companies, subsidiaries, sister companies, employees, and company managers.[37]

2.4.1.1 Extension to the Parent Company

Prior to providing the case law scenario in which the arbitration clause extends to the parent company, it is worthwhile to understand the term "parent company". Although the specific meaning of the term "parent company" may vary across jurisdictions, the fundamental principle remains the same: a parent company is an entity that possesses or exercises control over the majority of the outstanding voting stock or other equity in another company, or has the authority to do so either directly or indirectly and a company that is owned or controlled by a parent corporation is referred to as a "subsidiary".[38]

As illustrated in this case law between the Swedish parent corporation, its subsidiaries, and a French company, there are two agreements that relate to this case. The first agreement was signed by the Swedish parent corporation, hereinafter referred to as "Sponsor A.B.", and the shareholders of two French companies. The purpose of signing such an agreement is to create a French subsidiary and to purchase shares in such two French companies. The second option agreement was signed by a French subsidiary to commit to the purchase of the remaining twenty percent of shares in the two French companies. Upon the vendors exercising the option, the French subsidiary refrained from purchasing the shares. In accordance with the ad hoc arbitration clause in the option agreement, which stipulated the use of

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[37] Bernard Hanotiau (n 6) 253.

[38] 'Parent Company' (Thomson Reuters PRACTICAL LAW) <https://content.next.westlaw.com/practical-law/document/I1559f7b4eef211e28578f7ccc38dcbee/Parent-Company?viewType=FullText&transitionType=Default&contextData=(sc.Default)?> accessed 31 March 2024.

three arbitrators, two French corporations have commenced arbitration proceedings against Sponsor A.B. and its French subsidiary.[39]

It is clearly demonstrated in this case that a French subsidiary breached an option agreement that it and French companies had previously executed. Therefore, the French companies have the right to initiate arbitration proceedings against the French subsidiary. Nevertheless, despite Sponsor A.B. did not sign its signature to the option agreement that included the ad hoc arbitration clause, it is critical to determine whether Sponsor A.B. should be compelled to it as the defendant in this particular instance under an arbitration clause. The Cour d'appel of Pau rendered this decision based on the fact that Sponsor A.B. had significantly contributed to the conclusion and non-performance of the option contract, despite the fact that it had not signed it. Sponsor A.B. influenced its French subsidiary's non-performance of the option agreement by means of control.[40] This decision followed the Dow Chemical case, which is the landmark case of the group of companies doctrine, which will be described in the third chapter.

In conclusion, if there is performance, negotiation, or termination of subsidiaries controlled by a parent corporation, an extension of an arbitration clause or agreement to the parent company or to the parent company and another company of the group that is non-signatories is possible, since the actions of the subsidiaries may be construed as those of the parent company in certain aspects based on the group of companies doctrine.

2.4.1.2 Extension to One or More Subsidiaries

A subsidiary is typically a subordinate corporation that operates under the control of a body corporate of a larger business organization. Various tiers of wholly or partially owned subsidiaries may exist within a single business entity. For instance, in the case where Company B, which is a wholly-owned subsidiary of Company A, possesses over fifty-one voting shares in Company C, this indicates that Company A functions as the parent company, as it exercises direct control over

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[39] *Sponsor AB v. Lestrade*, Court of Appeal of Pau, 26 November 1986, (1988) Rev Arb 153.

[40] ibid 156.

Company B and indirect control over Company C. Company C is a first-tier subsidiary of company B and a second-tier (or grandchild) subsidiary of the parent company, whereas company B is a first-tier subsidiary of the parent company.[41]

As the preceding case demonstrates, a parent company may be compelled to be bound by the arbitration agreement despite the absence of its signature, so long as it appears to have participated in the contract through actions such as performing, negotiating, or terminating the agreement. This concept is also applied in situations where a parent company is a signatory but subsidiaries are non-signatories; they may be compelled to be bound by an arbitration agreement under certain circumstances.

This case law may be more complex since the United States Court of Appeals for the Second Circuit ruled that the arbitration clause may extend to the parties' affiliates even if one of the parties is no longer a party to the agreement. A dispute arose between Enron and Smith companies; both entities reached an agreement to establish a joint venture (JV) with the purpose of constructing and operating a power plant. Smith and Enron both assigned their rights under this agreement to their respective affiliates. Subsequently, Smith's affiliates filed a claim against five Enron affiliates; nevertheless, since such five Enron affiliates have transferred their rights to other affiliates, they are no longer parties to the agreement. Enron, as a defendant, invoked the arbitration agreement, but Smith argued that the agreement was unenforceable since none of the Enron petitioners had the authority to enforce a contract to arbitrate from which they were no longer a party. Although Enron is not a party to the agreement since it transferred its rights to its affiliates, Enron nevertheless has control over its affiliates. The Court determined Enron entities as one entity in the dispute resolution, which prevented Smith from arguing that the current

[41] 'Subsidiary' (Thomson Reuters PRACTICAL LAW) <https://ca.practicallaw.thomsonreuters.com/Glossary/CAPracticalLaw/I188aacd0f92311e498db8b09b4f043e0?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 31 March 2024.

signatories in the disputed agreement were different from the defendants in the case.[42]

In summary, this decision estopped Smith from denying the binding effect of an arbitration agreement under the equitable estoppel theory. The concept of this doctrine is to allow non-signatories to an agreement containing an arbitration clause to compel arbitration if a signatory to the agreement must rely on the terms of that agreement in asserting its claims against the non-signatories. The equitable estoppel doctrine will be further elaborated on in the third chapter.

2.4.1.3 Extension to a Sister Corporation and an Employee

Some individuals might misunderstand the terms "subsidiaries" and "sister company" due to their similarities. The similarity lies in the ownership structure of the parent company and sister companies. Sister companies can be considered subsidiaries merely by virtue of sharing a parent company's ownership, whereas subsidiaries are either wholly owned or under the parent company's control.

As explained in this case law, the Court of Appeals for the Third Circuit extended the arbitration clause to include a sister company and an employee, reasoning that "as Merrill Lynch can only act through its employees, an arbitration agreement that did not extend to them would be of little value."[43] This case involved a conflict between a pension plan trustee, a brokerage firm, an employee of the firm, and a sister corporation of the firm. The brokerage company and the trustee signed an agreement that included an arbitration clause. Both the sister firm and the employees can be considered non-signatories. When the conflict arose, the trustee opposed the court's order to compel an arbitration agreement against the sister firm and the employee. However, the court denied the trustee's request on the grounds that the employee was bound by the contract to which the brokerage firm was a party. A principal is obligated to adhere to the requirements of a

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[42] *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.,* 198 F.3d 88 (2d Cir. 1999).

[43] ibid.

legal arbitration clause, which extends to its agents, employees, and representatives likewise. Additionally, the arbitration agreements shall apply to a sister company, given that it was required to provide specific services in relation to the accounts established by the trustees.[44]

To sum up, the court decided this case law was based on the principal-agent doctrine. Even if a sister company and employees are non-signatories to an arbitration agreement, the arbitration agreement should be enforced against them likewise on the grounds that they are construed as the principals, as illustrated by the brokerage firm act. The court rendered its decision by considering the intention of all parties involved, which was to resolve the dispute through arbitration, notwithstanding the fact that some of the non-signatories. The theory of the principal agent will be discussed further in the third chapter.

2.4.1.4 Extension to a Director or General Manager or CEO or the Owner of the Group

It is undeniable that when considering the extension of the arbitration agreement to non-signatories, such as the company's general manager or directors, the corporate law principle of liability separation between shareholders and limited liability companies must be duly considered. As previously pointed out, shareholders and managers have liabilities separate from those of the limited company. Therefore, if the court decides to extend the arbitration clause to these individuals, sufficient reasons must exist, such as the basis of the piercing of the corporate veil theory.

This dispute is one of the few cases in which a Japanese court ruled it reasonable to bind the arbitration clause to the company's managers. The Nagoya District Court resolved the case in October 1995. The background of this case is that Company A and Company B had signed a distribution agreement; however, Company B, in its role as the distributor, failed to make a payment to Company A for the product. Company A therefore chose to submit the claim to arbitration, as the

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[44] *Pritzker v. Lynch, Pierce, Fenner Smith*, 7 F.3d 1110 (3d Cir. 1993).

distribution agreement contains a clause for arbitration. In addition, the court extends an arbitration clause to X and Y, who are managers of Company B, on the grounds of fraud. This is because X and Y induced company A to sign the distribution agreement with company B, despite both parties being aware that company Y initially had no intention of paying for the product.

In the final analysis, the District Court determined that despite the fact that defendants X and Y were not parties to the distribution agreement which contained the arbitration clause, an element of fraud occurred, resulting in loss and injury to company A.[45] Therefore, it can be inferred that the court rendered its decision by applying the corporate veil-piercing theory and extending the arbitration clause to non-signatories X and Y. The aforementioned doctrine will be explored in the third chapter; however, its objective remains the same: to prevent non-signatories from hiding behind the shield in the event of fraudulent activities and other associated occurrences.

This part represents the circumstances and legal precedents in which the court extended the arbitration agreement or clause to one or more defendants, including the parent company, subsidiaries, sister company, employees, and company managers. The next part will discuss the circumstances and legal precedents in which the court extended the arbitration agreement or clause to one or more claimants.

2.4.2 The Extension of the Arbitration Clause to One or Several Other Claimants

In most cases, courts consider whether to extend the arbitration clause to non-signatories to be a matter that primarily concerns respondents rather than claimants; however, in some circumstances, the court decides to extend an arbitration clause to other claimants as well. This part contains case law and four circumstances in which courts and tribunals decide to extend an arbitration clause or

[45] Hiroyuki Tezuka, 'Who Is a Party: Case of the Non-Signatory' (2005) 1 Institutional Arbitration in Asia 68, 68.

agreement to one or more claimants, including but not limited to the parent company, state, majority shareholder of the group, and subsidiaries.[46]

2.4.2.1 Extension to the Parent Company

As mentioned in this paper, a "parent company" refers to the organization or entity that exercises control over its subsidiaries, either through the holding of a majority of shares, financial control, or managerial power; likewise, a company that is owned or controlled by a parent corporation is referred to as a "subsidiary".

"In the present case, the court ruled that the parent company is obligated to adhere to the arbitration agreement despite the fact that the main contract was signed by its subsidiary and not the parent firm. The license agreement was signed by Xerox Canada Ltd., Xerox Corporation ("Xerox"), and MPI Technologies, Inc. ("MPI US"), and this agreement contains an arbitration clause. Subsequently, MPI US filed a lawsuit against Xerox, alleging that the latter infringed on the copyright it owned when it developed and sold its software, which MPI claimed was merely an enhanced version of the software it had developed and sold. Afterward, MPI US petitioned the panel to modify its pleadings in order to include its parent company, MPI Tech SA ("MPI France"), as a party claimant and to assert a claim for copyright infringement on its behalf. Xerox expressed its opposition to the inclusion of MPI France as a party claimant, noting the absence of a written agreement between the parties to arbitrate any dispute. Finally, the Panel ultimately ruled in favour of MPI US and awarded nearly $90 million in damages.

Xerox challenged such an award; however, the Ontario Superior Court of Justice decided to dismiss an award challenged by Xerox and expressed that the issue was not about adding a new third party but rather about including the parent company of a wholly owned subsidiary that behaved as if it and its subsidiary were a single entity for the contract's purposes, and in many cases, Xerox treated them as such. The arbitration clause shall bind MPI France, due to the fact

[46] Bernard Hanotiau (n 6) 253.

that it is the parent company of MPI US and holds subsidiary control over MPI US. Therefore, the court has the jurisdiction to decide this matter over MPI France.[47]

This case highlights that in the event that a parent company controls a subsidiary despite not having signed an arbitration agreement, it is not permissible for the parent to hide behind a shield; rather, the arbitration agreement shall also bind the parent. Since the subsidiary cannot operate or fulfil the contract without the parent's approval.

2.4.2.2 Extension to a State

The extent to which a court or tribunal will extend an arbitration clause to a state is relatively limited in comparison to private entities due to the state's sovereign immunity. Consequently, the rationale for extending the arbitration clause must be obvious, such as the state exercising control over the entity or appointing an agent to execute contracts on its behalf.

In this particular instance, the dispute was adjudicated before the Swiss Federal Court since Zurich serves as the seat of the arbitration. A share purchase agreement was entered into between Company Y and the National Property Fund (NPF) of State X. The agreement stipulates that Company Y would acquire the NPF's shares in Bank B. Both parties agree to resolve the dispute under the UNCITRAL arbitration rules. Firm Y later transferred its ownership in Bank B to Firm Z, and Bank B was placed under forced administration. State X and NPF filed a claim against companies Y and Z, alleging that they breached the agreement. As a result, the court ordered both companies to compensate State X and NPF for the damages incurred as a consequence of the breaches.

Company Y and Z objected to the jurisdiction of the arbitral tribunal over state X and company Z by challenging an award on the grounds that state X and company Z did not sign a share purchase agreement that contained an arbitration clause. The court determined that State NPF was State X's instrument. It stipulated that the Ministry for Administration of National Property would direct the

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[47] *Xerox Canada Ltd v. MPI Technologies Inc*, [1981] Lloyd's Rep. 514 and 522.

NPF's activities. Since the NPF is controlled by state X, it lacks independence, or, in other words, it cannot act independently without direction from state X. It can be inferred that during the period when the NPF operated as an operational entity of state X, company Y's dealings with the NPF were conducted with the awareness that they were engaging with an organ of state X or its government.[48]

It can be concluded that an arbitration clause may extend to a state that did not sign the agreement if there is clear evidence that the state controls the party involved and the party cannot act without the state's direction.

2.4.2.3 Extension to an Individual (Possibly a Majority Shareholder of the Group)

As stated earlier, the liability of a limited company and its shareholders is separate; nevertheless, there are circumstances in which the shareholders may bear joint liability with the company. For instance, in situations where a shareholder's action contains an element of fraud and the shareholder personally benefits from that action, resulting in a counterparty incurring losses or damages. By applying the theory of piercing the corporate veil, the court may hold the shareholders liable; this also applies to the case of non-signatories to the arbitration agreement.

Ghana Investment Centre (GIC) and Marine Drive Complex (MDCL), a foreign investor, entered into an investment agreement with the intention of obtaining concessions from the Ghanaian government. Subsequently, MDCL was expropriated, and co-claimant Mr. B (who serves as MDCL's chairman and majority shareholder) filed a lawsuit against GIC and the Ghanaian government. The investment agreement between MDCL and GIC includes an arbitration clause. It is crucial to determine if this clause ought to be extended to Mr. B, who did not sign the agreement. The tribunal affirmed its jurisdiction over all parties, including non-signatory Mr. B, who is obligated to be bound by the arbitration clause. Even though Mr. B was not a party to the agreement between MDCL and GIC, the award must have been based on the

[48] ATF 131 III 173 and 23 ASA Bull. 496 (2005) and note by François Perret.

fact that he served as chairman and principal shareholder of MDCL and had significantly contributed to the financing and direction of the project, a fact that GIC was well aware of. He shall, therefore, also be compelled by this arbitration clause in his capacity as a co-claimant.[49]

From this case, it can be concluded that a majority shareholder may be compelled to an arbitration clause even if his or her signature is absent from the main agreement; however, this should be determined on a case-by-case basis, dependent on factors such as whether the majority shareholder has authority over the company's finances or management.

2.4.2.4 Extension to One or More Subsidiaries

As described in this chapter, subsidiaries are those that the parent company controls, whether via holding a majority of shares, power over management, or financial matters. As outlined in this disputed issue, the Court of Appeals and the Supreme Court have rendered divergent decisions regarding whether or not to extend the arbitration clause to an entity formed by identical individuals and engaged in identical commercial operations.

A dispute occurred concerning the distribution of orthopedic prosthetics. The Greek firm Oebe TH Thotou and Co. ("Oebe TH Thotou") and the French firm Amplitude ("Amplitude") executed the sale and purchase contract, which contained an arbitration clause. In fact, a portion of the distribution had been carried out by Iakovoglou Promodos ("Iakovoglou"), a Greek company that was not a signatory to the agreement but shared the same ownership, representatives, and corporate headquarters as the signatory company, Oebe TH Thotou. Following that, Amplitude terminated the agreement, which led Oebe TH Thotou to file a claim against Amplitude, which was subsequently settled through an arbitration process. The tribunal determined that it has jurisdiction over both Oebe TH Thotou and Iakovoglou (a non-signatory) as claimants.

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[49] *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* 1989-1990 Ad hoc tribunal (UNCITRAL rules).

However, the Grenoble Court of Appeal determined that the arbitrator had exceeded his jurisdiction, and the award was set aside as a result. The court decided that Iakovoglou's performance of deliveries in accordance with the contract did not sufficiently expand the scope of the arbitration clause to cover its claims. Both claimants filed an appeal with the French Supreme Court, where they provided clarification that they are sister companies, noting that they were both founded by the same individuals and engaged in identical commercial operations. Furthermore, Iakovoglou is the one who executed the contract with the client and sent the invoice. Evidently, Iakovoglou intends to be bound by the sale and purchase agreement, which could result in the tribunal allowing the non-signatory an extension of the arbitration clause. The award rendered by the Grenoble Court of Appeal was overturned by the French Supreme Court on the grounds that Iakovoglou's performance of the contract and the claimant's intention were obviously sufficient to extend the arbitration clause.[50]

To analyze this case, the court may evaluate this case by considering the proximity of the non-signatory to one of the contracting parties (as they were sister companies founded by the same individuals and engaged in the same commercial activity) and its fulfillment of the "crucial" contractual obligations of the signatory party.

2.5 Conclusion

To summarize, this chapter elaborated on the elements of arbitration, the regular framework, and the enforceability of the arbitration clause. It is crucial that the parties draft an arbitration clause in accordance with the law; otherwise, it will be deemed null and void, and the court will not refer the dispute to arbitration proceedings due to its validity, and the parties' intention to resolve the dispute through arbitration will not be fulfilled. Additionally, this chapter elaborated on how

[50] Oebe TH Thotou et. Co. et IakovoglouPromodos et co.c. Amplitude S.A., Cour de Cassation, Chambre Civile, Section 1, no. 11/25891.

arbitration agreements or clauses can extend to third parties, including additional claimants and defendants, by providing examples of case laws. The expansion is justified by factual evidence rather than legal grounds, and certain considerations must be taken into account. For instance, the consent of all parties, including those who did not sign the contract, to be obligated by an arbitration clause, the participation of non-signatories in performing or negotiating the contract, and the commission of fraud, abuse of rights, or violation of mandatory regulations that the court ruled to pierce the corporate veil to shareholders or the company's manager.

This chapter provides a brief overview of the court's decision and award that obligated non-signatories to be bound by an arbitration agreement or arbitration clause such as the principal-agent doctrine, the group of companies doctrine, and the piercing of the corporate veil doctrine. The following chapter will elaborate on the aforementioned doctrines as well as other relevant doctrines and case law.

CHAPTER 3
FOREIGN LAW APPROACHES

3.1 Introduction

This chapter aims to provide a detailed explanation of various legal theories, including the group of companies, the piercing of the corporate veil, and the principal-agent theories, as well as the landmark case law that has been applied by different legal systems to enforce arbitration agreements on entities that have not signed an arbitration agreement at both international and national levels. At the international level, it will address the definition of an arbitration agreement, the legal requirements, and its validity under the New York Convention and the UNCITRAL Model Law. At the national level, it intends to study the concept of the aforementioned three doctrines as well as pertinent case law through an analysis of contract, corporate, agency, and arbitration law principles in France, the United States, and the Republic of China.

3.2 International Level

Both the New York Convention and the UNCITRAL Model Law aim to standardize arbitration agreements formally, establish a unified and consistent framework, and reduce variations in country-specific applications. While the New York Convention focuses on global recognition and enforcement of final awards, it does establish an overall concept of arbitration agreements to support the UNCITRAL Model Law, which establishes recommendations for the legal framework governing international commercial arbitration. This enables states to harmonize their domestic legal systems with the Model law.

3.2.1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention 1958")

The New York Convention was adopted in 1958 by the United Nations with the aim of promoting and simplifying arbitration, particularly for the recognition and enforcement of foreign awards. The fundamental objectives of this framework are to establish standardized enforcement of final awards on a global level and to create a unified framework for foreign awards. The New York Convention is only applicable to non-domestic or foreign arbitrations.[51] The key elements of the New York Conventions are (i) based on international public law, (ii) directly applicable, (iii) a hard law regime, and (iv) binding between member states.

Article II (1) of the New York Convention deals with the arbitration agreement; it states that the agreement must be duly identified in writing, a future or ongoing dispute must involve a clearly defined legal relationship, and the subject matter must be capable of resolution through arbitration.[52] Article II (2) also specified that the arbitration agreement must be in writing and either (i) signed by the parties or (ii) contained in an exchange of letters or telegrams. It shall be a form of arbitration agreement or an arbitration clause in a contract.[53] Additionally, Article II (3) states that the court of a contracting state shall, at the parties' request, refer the parties involved to arbitration unless they determine that the agreement is null and void, inoperative, or incapable of being performed.[54] This prevents the involvement of domestic courts in matters pertaining to conflicts that are governed by an arbitration agreement serving the fundamental purpose of the New York Convention, which is to establish universally recognized standards and general regulations, as well as to assist with the "circulation" of international awards and the enforcement of arbitration agreements.[55]

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[51] Andrea Miglionico, 'The Arbitral Agreement' (Lecture Slides, University of Reading 2014).

[52] New York Convention 1958, Article II (1).

[53] New York Convention 1958, Article II (2).

[54] New York Convention 1958, Article II (3).

[55] Andrea Miglionico, 'The Arbitral Agreement' (n 51).

As mentioned, the New York Convention's main focus is on the recognition and enforcement of foreign awards and provides a very broad concept regarding the validation of arbitration agreements. Even though it is a hard-law regime and Thailand has been a member of the New York Convention since 1959,[56] it does not provide a clear explanation of the circumstances under which an arbitration agreement may affect non-signatories. Additionally, it does not clarify whether arbitral tribunals have jurisdiction over non-signatories or if awards from the arbitral proceedings can be enforced against them. It only describes the arbitration agreement's legal requirements, its validity, and its enforcement. Therefore, it is worth examining the UNCITRAL Model Law to determine whether the concept of non-signatories to arbitration agreements exists or not.

3.2.2 UNCITRAL Model Law on International Commercial Arbitration 1985

UNCITRAL was established by the United Nations General Assembly in 1966 with the aim of establishing a unified international trade law. As a legal entity of the United Nations, UNCITRAL eventually developed the Model Law. The UNCITRAL Model Law was created to support countries in the development of their laws on international commercial arbitration or ICA and to ensure harmonization with their domestic laws.[57] The crucial elements of the UNCITRAL Model Law are (i) a set of rules based on a soft law regime; (ii) a set of recommendations; (iii) a lack of mandatory enforcement; and (iv) operating on the principle of voluntary compliance. It is evident that the regime is a soft law system that exclusively applies to countries that incorporate model law into their national legal framework. The primary objective is to establish a legal framework for conducting international commercial arbitration cases.[58]

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[56] 'Contracting States' (New York Convention) <https://www.newyorkconvention.org/contracting-states> accessed 27 April 2024.

[57] Andrea Miglionico, 'UNCITRAL Rules and Institutional Arbitrations' (Lecture Slides, University of Reading 2014).

[58] Karen Tweeddale and Andrew Tweeddale, *A Practical Approach to Arbitration Law* (Oxford University Press, 1999) 321.

An arbitration agreement is defined under Article 7 of the UNCITRAL Model Law. This article states that an arbitration agreement is a procedure in which parties agree to resolve their disputes, whether contractual or non-contractual, before submitting them to arbitration.[59] Article 7 also specified that a form of arbitration agreement may be drafted as a separate agreement or an arbitration clause in a contract, and it must be in writing.[60] Article 8 of the UNCITRAL Model Law stipulates the obligations of the courts to refer the parties involved to arbitration unless they determine that the agreement is null and void, inoperative, or incapable of being performed.[61]

As previously stated, one of the primary goals of the UNCITRAL Model Law is to standardize the procedure for international commercial arbitration ensuring that member states may incorporate it into their domestic laws. Although not mandatory, exemplifying status allows nations to incorporate this model legislation into their own national laws. For instance, commencing the development of an international commercial arbitration code from the beginning could bring challenges due to the requirement of incorporating universally recognized principles while also ensuring compatibility with the domestic legislation of individual nations. An additional convincing rationale for embracing the UNCITRAL Model Law is that, by virtue of its formation grounded in international principles aimed at harmonizing national applications, it unquestionably reduces the disparities that exist among national applications. The utilization of common usage facilitates the arbitral process when disputes emerge across various jurisdictions. Thailand is among the countries that adopted the UNCITRAL Model Law in 2002.[62]

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[59] UNCITRAL Model Law 1985, Article 7 option II.

[60] UNCITRAL Model Law 1985, Article 7 option I.

[61] UNCITRAL Model Law 1985, Article 8 (1).

[62] 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' (United Nations Commission On International Trade Law) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 27 April 2024.

Although Thailand has adopted the UNCITRAL Model Law, it does not have specific provisions addressing the circumstances where an arbitration agreement may affect non-signatories. Additionally, it does not clarify whether arbitral tribunals have jurisdiction over non-signatories or if awards from the arbitral proceedings can be enforced against them. It describes only the definition of an arbitration agreement, the legal requirements, and its validity. In view thereof, any matters relevant to non-signatories, including arbitral tribunal jurisdiction, must be determined based on their own local laws, guidelines, and court decisions.

3.3 National Level

To understand the issues of non-signatories to arbitration agreements explicitly, it is worthwhile to study the contract, corporate, agency, and arbitration laws, including the arbitral awards and court decisions ruled in France, the United States, and the Republic of China. These three countries are chosen for studying since France is the first country to adopt the group of companies doctrine; the United States has also decided numerous cases based on the piercing of the corporate veil. The Chinese court has, for the first time, applied the principal-agent doctrine to bind an undisclosed principal who did not sign the arbitration agreement explicitly. Furthermore, all of them are members of the New York Convention, which enables the recognition and enforcement of foreign arbitral awards.

The research will analyze case law from France, the United States, and the Republic of China pertaining to the aforementioned doctrines in order to provide specific grounds for extending arbitration agreements to non-signatories.

3.3.1 The Group of Companies Doctrine Adopted in France

This theory was first utilized in France and is currently recognized by courts around the globe.[63] Indeed, this principle does not originate from French domestic arbitration law; rather, it is the discretion of French courts and arbitral tribunals to extend arbitration agreements on the basis of non-signatories participation in contract performance. Additionally, these non-signatories must be parent companies or subsidiaries within the same group, as illustrated in the Dow Chemical case law, which will be discussed in the following section.

3.3.1.1 General Concept of the Group of Companies Doctrine

As pointed out previously, France was the first country to adopt the group of companies doctrine; in comparison to other nations, a small number of jurisdictions have adopted this principle. The reason may be that it conflicts with the privity of arbitration agreements and is incompatible with the fundamental principle of arbitrations, which is parties' consent.[64] The group of companies principle is examined when one of the parties engages in a transaction that is affiliated with the same group of companies. This situation arises when, among a group of companies, only one or a few of the companies have signed the arbitration clause. Under such circumstances, arbitration tribunals and courts are tasked with determining the extension of the arbitration clause to those companies that have not signed an arbitration clause but are in the same corporate group as the signatory. This issue not only raises questions regarding the extent of jurisdiction held by the arbitral tribunal but also explores the implications it carries for those companies involved.[65]

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[63] Bernard Hanotiau (n 6) 96; Stephan Wilske, Laurence Shore and Jan-Michael Ahrens, 'The "Group of Companies Doctrine" - Where Is It Heading?' (2006) 17 American Review of International Arbitration 73, 74-75.

[64] Eric Chin-Ru Chang, 'Due Process as a Limit to Binding Non-Signatories to Arbitration Agreements in International Commercial Arbitration: With Special Focus on Binding Non-Signatories Within Corporate Groups' (2021) 14 Contemporary Asia Arbitration Journal 211, 213.

[65] Pietro Ferrario, 'Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist' (2009) 26 Journal of International Arbitration 647, 650.

Before knowing what the company's group is, it is beneficial to understand its history. In the United States, when companies in New Jersey are permitted to purchase shares in other companies, it opens up the possibility of forming corporate groups, which in turn challenges the fundamental principle of private companies having distinct entities and liabilities separate from their shareholders.[66] Even though the definition of a group of companies varies by jurisdiction, the majority of jurisdictions agree on two elements: (i) common ownership and (ii) common control.[67]

In general, a group of companies will have common ownership if they are owned by the same company, also referred to as having the same parent company, or if one of them owns the other, also referred to as being a subsidiary of the other.[68] According to the Taiwan Company Act, "control" is defined as a company holding the majority of voting shares or capital stock of another company. The controlled company is then referred to as the subsidiary. In addition to holding the majority of shares, a controlling company may exercise control over its subordinate company by directly or indirectly influencing the personnel management, board of directors' seat, financial concerns, or company affairs of its subsidiaries.[69] Although the group of companies doctrine has its roots in corporate law, there is an additional factor to consider. For instance, if the subsidiaries have signed an arbitration agreement but the parent company has not, the parent company may, in some cases, be bound by such agreement.

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[66] Virginia Harper Ho, 'Theories of Corporate Groups: Corporate Identity Reconceived' (2012) 42(3) Seton Hall Law Review 879, 899.

[67] Taiwan Company Act 1931, with amendments as adopted in 2021 (Taiwan Company Act 1931), Article 369-2.

[68] 'Group company' (Thomson Reuters PRACTICAL LAW) <https://uk.practicallaw.thomsonreuters.com/1-520-8867?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 31 March 2024.

[69] Taiwan Company Act 1931, Article 76.

Although a company belongs to the same group as another signatory company, this does not automatically imply that the arbitration clause will legally bind a non-signatory company within the same group since the crucial element, which is "consent", may need to be considered.[70] In order for a court or arbitral tribunal to compel a non-signatory to be bound by an arbitration agreement, the non-signatory must express his or her consent or intention to be bound. The way of expressing consent can either be expressed or implied.[71] It can be said that without the consent of the parties, the court cannot resolve the case using the arbitration procedure.

Other than the consent of the parties, the court will consider the performance of the non-signatories in performing the contract, whether through drafting, negotiating, dealing, managing, or delivering products to the counterparty.[72] In this context, the court will consider the following three factors: (i) the genuine intent of the parties; (ii) in the event that the subsidiary has signed an arbitration agreement but the parent corporation has not, the excessive control of the parent corporation over its subsidiaries and the benefit for itself must be considered; and (iii) the jurisdiction that the arbitral tribunal will have over the non-signatories by ignoring the signature of the non-signatories but paying attention to the fact that the company is in the same group and may perform or negotiate the contract despite not having signed the arbitration agreement.[73]

3.3.1.2 Legal Basis of the Group of Companies Doctrine

After exploring the general concept of the theory of a group of companies, examining the French law concerning arbitration clauses and agreements regarding the group of companies principle is beneficial. In contrast to other nations, French arbitration law is more stringent due to its departure from the

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[70] Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 501.

[71] i.e., conduct amounting to consent.

[72] *Dow Chemical v. Isover Saint Gobain* (Fr. U.S. Switz. v. Fr.), Int'l Comm, 136.

[73] ICC Case No. 6519 (1991).

UNCITRAL Model Law. Instead, it applies its domestic law to both domestic and international arbitration cases[74] where the parties consent to have the arbitration seat in France.

When considering the concept of a "group of companies", it is essential to consider two distinct French domestic statutes. Firstly, the French Civil Code 2016 ("FCC") addresses the effects of contracts with respect to third parties. Secondly, the French Code of Civil Procedure 1804 ("FCCP") addresses the legal requirements and enforceability of arbitration agreements.

Articles 1199[75] and 2061[76] of the FCC explain the concept of privity of contract by stating that a contract, including an arbitration agreement, only binds the parties to that contract. Third parties are not entitled to enforce the contract or be compelled to fulfill its terms. When considering the legal requirements and validity of arbitration agreements, are set forth in Book IV of the FCCP. In accordance with the FCCP, the arbitration agreement must be in writing.[77] If the arbitration clause or agreement is created prior to the occurrence of the dispute, it must be included in the main contract or a separate written document.[78] A French court has ruled that the arbitration agreement is deemed autonomous of the contract to which it pertains by a French court. It is not impacted by the contract's nullification. It signifies that French courts, without reference to French or other national law, verify the parties' consent to arbitrate their dispute and the validity of their agreement. In other words, the validity

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[74] The French Code of Civil Procedure 1804, with amendments as adopted in 1981 (The French Code of Civil Procedure 1804), Article 1447.

[75] Appears in the French Civil Code 2016, Article 1199 which states that "A contract creates obligations only as between the parties. Third parties may neither claim performance of the contract nor be constrained to perform it, subject to the provisions of this section and those in Chapter III of Title IV".

[76] Appears in the French Civil Code 2016, with amendments as adopted in 2016, Article 2061 which states that "arbitration clause must be accepted by the party against whom it is opposed, unless the latter was subrogated in the rights and obligations of the party who initially accepted it".

[77] The French Code of Civil Procedure 1804, Article 1443.

[78] ibid.

of the parties' arbitration agreement may be upheld even if the underlying agreement in which it appears is void.[79] Although the privity of contract generally applies to the arbitration agreement, French judges may nonetheless have the discretion to establish certain exclusions for practical purposes. In complex agreements, there are situations where the arbitration agreement may apply to a party that did not sign the contract. Furthermore, the arbitral tribunals may have jurisdiction over non-signatories if their consent can be demonstrated. In order to comprehend this concept, the following case law needs to be considered.

3.3.1.3 French Case Law: *Dow Chemical v. Isover Saint Gobainin*

The Dow Chemical case is a landmark case that was decided by a French arbitral tribunal and brought before the International Chamber of Commerce (ICC) tribunal in Paris. In this case, the claim was filed not only by the companies that signed an arbitration agreement but also by their parent company and a French subsidiary within the same corporate group.[80] At the beginning of the case, there were many parties, such as Dow Chemical Venezuela, Dow Chemical AG, Dow Chemical Europe, and Dow Chemical France. All of these companies were owned by the Dow Chemical Company, which was established in the United States, either directly or indirectly. There are two separate agreements involved in this case.

The initial contract was signed in 1965 between Dow Chemical Venezuela and the French corporation Boussois-Isolation. Subsequently, Boussois-Isolation transferred the rights and obligations of the first contract to Isover Saint Gobain ("Isover"), while Dow Chemical Venezuela transferred its rights and obligations to Dow Chemical A.G. It is important to note that Dow Chemical A.G. is a subsidiary of Dow Chemical Firm (USA), which serves as the parent corporation.

In 1968, a second agreement was entered into by Dow Chemical Europe, a subsidiary of Dow Chemical A.G., along with three other companies, one of which was Boussois-Isolation. Later on, Boussois-Isolation transferred its rights

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[79] Paris Court of Appeal, Pôle 5 – Chamber 16, September 7, 2021, n°19/17531.

[80] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London Sweet & Maxwell, 2004) 149 paragraph 3.

and obligations under the agreement to Isover. It is illustrated by the fact that Dow Chemical France was responsible for the delivery under the contract. The Dow Group, in this case, consists of Dow Chemical A.G., Dow Chemical Firm (USA), Dow Chemical Europe, and Dow Chemical France.[81]

The dispute arose when the Dow Group initiated arbitration proceedings against Isover. This was based on an ICC arbitration clause included in the distribution contract, which mandated that Isover be held accountable for damages resulting from the use of Roofinate in France and required Isover to make the corresponding payments.[82] Isover argued, however, that Dow Chemical France and Dow Chemical Firm (USA) cannot be bound by the arbitration clause since their signatures do not appear in any agreement between them and that the court does not have jurisdiction over both corporations.[83] Finally, the tribunal dismissed the jurisdictional challenge and issued an interim award, stating that Dow Chemical USA and Dow Chemical France should be included as parties to the arbitration agreement. The court may rule based on the reasons as follows:

First, although Dow Chemical France was not a signatory to the agreement, it held responsibility for the product's delivery to the distributor. It became apparent that Dow Chemical France was actively engaged in the transaction by fulfilling its contractual obligations. Consequently, the tribunal reached the determination that the arbitration clause should be extended to Dow Chemical France as well, thereby establishing its jurisdiction over the company.[84]

Second, in this instance, Dow Chemical Company (USA) is the parent corporation of the other Dow Group companies. Even if such a company did not sign an arbitration agreement, it has a great deal of control and authority over its subsidiaries, and in general, the majority of subsidiaries may require assistance and

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[81] *Dow Chemical v. Isover Saint Gobain*, ICC Case No. 4131 (1982), 9YB. COM.ARB. 131 (1984).

[82] ibid 132.

[83] ibid 133.

[84] Suporn Detpirattanamongkol, 'Non-Signatories to the Arbitration Agreement' (Final Paper for Arbitration Class LB622, Thammasat University 2022) 9.

approval from the parent corporation, particularly when dealing with financial, company secretary, formation, negotiation, and termination of contract matters. Consequently, it can be inferred that the actions of the subsidiaries may be considered the actions of the parent company in certain aspects.[85]

In summary, the arbitral tribunal reached the decision that it has the jurisdiction to hear the claim not only from the signatory parties but extending beyond to encompass non-signatory entities as well, specifically in this instance, the Dow Chemical Company (USA) and Dow Chemical France.[86] As this case illustrates, the tribunal does not automatically extend the arbitration clause to a non-signatory solely based on the same company's group. Instead, the crucial factors for consideration are the non-signatory's involvement in contract performance and the genuine intent of such a party.

3.3.2 The Piercing of Corporate Veil Doctrine Adopted in the United States

The U.S. Court of Appeals for the Second Circuit announced that it recognizes five theories for binding non-signatories to arbitration agreements, including the piercing of the corporate veil principle, which arises out of common law principles of contract law. It can be construed that many foreign doctrines regarding non-signatories, outlined in this paper, have been largely endorsed and ruled by U.S. courts. Mainly, the U.S. Supreme Court has repeatedly acknowledged the veil-piercing or alter ego principle, provided that it identifies specific elements such as one party exercising complete control over another party's company, fraudulent activities, and wrongdoing that caused harm to the plaintiff that triggered the lifting of the corporate veil.[87]

In comparison to the Salomon case, which was decided by the House of Lords in the United Kingdom, this case affirmed the concept of a separate legal entity. It established that shareholders and the company are distinct entities, with

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[85] ibid.

[86] *Dow Chemical v. Isover Saint Gobain,* ICC Case No. 4131 (1982) (n 81) 137.

[87] Andrijana Misovic, 'Binding non-signatories to arbitrate—the United States approach' (2021) 37 Arbitration International 749, 749-768.

separate debts and liabilities. Shareholders are personally responsible for debts that exceed the unpaid amount on their shares. In short, he will no longer have a limit on the amount of obligation he is responsible for above his unpaid share.[88] The U.K. court rarely recognizes the exception of a separate legal entity and decides to pierce the corporate veil even in cases involving fraud or equity.

3.3.2.1 General Concept of the Piercing of Corporate Veil Doctrine

This principle originated within the realm of corporate law, where the concept of separating liability between shareholders and limited liability companies is explicitly enshrined. The case law exemplifies that the actions and liabilities of a company are distinct from those of its shareholders, irrespective of the proportion of shares they hold.[89] In the Salomon case, for instance, it is evident that Mr. Salomon manages his company and holds the majority of the shares. When the company entered liquidation, the court ruled that the company's debt would be paid from the company's assets, not Mr. Salomon's personal assets. As a shareholder, Mr. Salomon's obligation is limited to his unpaid capital.[90] It appears unjust to the unsecured creditors who received no payment for their debt. Therefore, it is worth studying the relevant court's decision to understand the grounds on which the court considers piercing the corporate veil in situations where no one could hide behind the company's entity to perpetrate fraud and avoid liability.

The concept of piercing the corporate veil might differ from jurisdiction to jurisdiction, but its fundamental notion remains consistent. It entails a scenario where one party exercises extensive control over another party's business and has exploited that control to such an extent that it becomes justifiable to ignore the fundamental concept of corporate law, which holds that the corporation and its stockholders are separate entities, and view them as a single entity.[91]

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[88] *Salomon v. Salomon & Co Ltd* (1897) AC 22.

[89] ibid.

[90] ibid.

[91] Gary B. Born, 'Chapter 5: International Arbitration Agreements: Non-Signatory Issues' (n 2) 1546.

The principle of lifting the corporate veil serves as an exception to the standard regulations of corporate law, which typically shield shareholders from personal liability for the debts of the company. The mechanism of lifting the corporate veil outlines the criteria by which shareholders and directors can be held accountable for the company's debts, specifically in cases involving their misconduct. In such a case, the arbitral tribunal might ignore the shareholders' lack of signature on the arbitration agreement and bring them through the arbitration process. To pierce the corporate veil, the court will consider many factors, including but not limited to fraud element, excessive control, and parent company control.[92]

In the majority of cases where the court chose to lift the company's veil, there must be some element that the defendants or shareholders acted in bad faith and defrauded a third party for their own benefit. Another important factor that the court will take into account is the "alter ego" principle. Alter ego is a Latin term that translates as "other self" or "two sides of the same coin". There are numerous circumstances that support this principle. For instance, the company may lack funds, the funds may have been used for the advantage of shareholders, and there may be ownership overlap among staff members, officials, and directors.[93] When such instances occur, the court may also consider piercing the corporate veil. In addition, the court may also consider how much control the parent company has over its subsidiaries and whether that control is utilized to commit illegal or dishonest acts or not. Further, if the fraudulent or dishonest actions cause harm or unjustifiable loss, the court may decide to pierce the corporate veil to find the guilty parties.[94] Nevertheless, this is subject to the court's and tribunal's discretion, and the reason for lifting the corporate veil will vary from case to case, and there may be additional arguments to support.

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

[93] *McKay v. Longman*, 332 Conn. 394, 399, 211 A.3d 20, 28, 2019 Conn. LEXIS 204, 441-442, 2019 WL 3242577.

[94] *MCI Telecommunications v. O'Brien Marketing, Inc*., 913 F. Supp. 1536 (S.D. Fla. 1995).

Even the piercing of the corporate veil doctrine is grounded in corporate law; however, there are some instances in which international commercial arbitration chooses to apply this principle.[95] For example, when a parent corporation has control over its subsidiaries and benefits from such control, the court may disregard the separation of liability between the parent corporation and its subsidiaries and decide to bind the non-signatory (the parent company) to the arbitration process and rule that the court has jurisdiction over the parent company that was hidden behind the corporate veil.[96]

In international commercial arbitration, the crucial aspect that cannot be ignored is the seat of arbitration as the law of the seat will regulate the procedure of the arbitration. However, the enforcement and recognition of foreign awards may depend on the jurisdiction of the enforcement of such awards, and whether the country of the award's enforcement is a contracting party to the New York Convention or not is also an important aspect to consider, as Article V of the New York Convention permits the court to set aside the award, or its enforcement may be refused if there is a defect in the arbitration agreement.[97] This paper analyzes the case law in which a court broke the non-signatory (parent company) shield and extended the arbitration clause to the parent company.

3.3.2.2 Legal Basis of the Piercing of Corporate Veil Doctrine

After exploring the general concept of piercing the corporate veil, it is advantageous to examine the U.S. federal legislation pertaining to arbitration clauses and agreements related to piercing the corporate veil.

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[95] Yarik Kryvoi, 'Piercing the Corporate Veil in International Arbitration' (2011) 1 Global Business Law Review 169, 178-186; Chieh Lee, 'Resolving Nationality Planning Issue Through the Application of the Doctrine of Piercing the Corporate Veil in International Investment Arbitration' (2016) 9 Contemporary Asia Arbitration Journal 87, 87.

[96] William W. Park, 'Non-Signatories and the New York Convention' (2008) 2 Dispute Resolution International 84, 100.

[97] Yarik Kryvoi (n 95) 178-186.

The United States Federal Arbitration Act of 1925 and its amendment ("FAA") provide the fundamental legal principles that govern arbitration. The main principles of this legislation are to determine the enforceability of arbitration agreements in U.S. courts, to establish the conditions for converting awards into judgments, to outline the circumstances in which a court can refuse to confirm an award and to implement the New York Convention and the Inter-American Convention of International Commercial Arbitration of 1975 (Panama Convention).

Even if the FAA lacks explicit articles or sections that directly discuss the extent of arbitration agreements, the FAA as a whole establishes the legal framework for the enforcement of arbitration agreements in contracts involving interstate commerce. The basic principle of the FAA is Section 2, which stipulates that arbitration clauses in contracts involving interstate commerce are enforceable, valid, and irrevocable unless there are equitable or legal grounds for contract revocation.[98] Section 2 of the FAA contains four elements as follows:

First, the arbitration agreement must be in writing. Typically, this implies that the clause must be included in a contract or in a separate written document that is signed by all parties involved. In specific situations, electronic communications such as emails or digital signatures may also be acceptable.

Second, arbitration agreements are stipulated in contracts involving interstate commerce. These include contracts between businesses operating in different states, contracts involving the transportation of goods across state lines, and contracts with a significant impact on interstate commerce, among a wide array of commercial transactions.

Third, in accordance with Section 2 of the FAA, arbitration agreements must satisfy the following requirements: they must be "valid, irrevocable, and enforceable." In practice, this means that courts are typically compelled to uphold the terms of arbitration agreements, barring legal or equitable grounds for revocation.

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[98] The United States Federal Arbitration Act 1925, with its amendment as adopted in 1947 (The United States Federal Arbitration Act 1925), Section 2.

Last, although Section 2 expresses a strong inclination towards arbitration, it does recognize that arbitration agreements can be revoked for specific legal or equitable reasons. Examples of common defenses that could void a contract include fraud, unconscionability, duress, and mutual mistake.

In addition, Section 3 of the FAA outlines a mechanism for the courts to halt litigation pertaining to disputes designated for arbitration under a written arbitration agreement.[99] This provision helps to prevent avoidable litigation and ensures that parties to an arbitration agreement can enforce their right to arbitration. Under Section 4 of the FAA, parties have the right to request a federal court to enforce arbitration where one party fails or refuses to participate in arbitration for a dispute covered by an arbitration agreement.[100] When an arbitration agreement specifies that arbitration should follow the FAA, federal courts, under Section 5 of the FAA, have the power to select arbitrators or take any other required actions to facilitate arbitration proceedings.[101]

Other than the scope of the arbitration agreement stated in the FAA, the arbitral tribunal's jurisdiction and whether federal or state laws will apply in situations involving non-signatories are still debatable. Due to the fact that each of the 50 states of the U.S. has enacted separate supplementary legislation governing arbitration in their respective jurisdictions, in cases of conflict between FAA provisions and state law, FAA typically takes precedence.

As demonstrated in this subsection, neither the FAA nor state law expressly specify in which circumstances the non-signatory party may be bound by the arbitration agreement. Therefore, it would be essential to study the case law concerning the lifting of the corporate veil of non-signatories to an arbitration agreement in order to comprehend the grounds upon which U.S. courts or tribunals decide to do so.

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[99] The United States Federal Arbitration Act 1925, Section 3.

[100] The United States Federal Arbitration Act 1925, Section 4.

[101] The United States Federal Arbitration Act 1925, Section 5.

3.3.2.3 U.S. Case Law

(1) Smoothline Ltd., Greatsino Electronic Ltd. v. North American Foreign Trading Corp., U.S.

The case began with North American Foreign Trading Corporation ("NAFT"), the defendant in this case, entering into an agreement with Smoothline, Ltd. ("Smoothline") and Greatsino Electronic Ltd. ("Greatsino"), both of which are plaintiffs in this case, and the subsidiaries of Universal Appliances Ltd. ("UAL"), although UAL is a non-signatory. The plaintiff's obligations include selling cell phones and providing after-sale service. Whereas the defendant is the plaintiff's customer. Both the defendant and the plaintiff also signed a letter of credit agreement and other agreements containing an arbitration clause.[102]

The dispute arose from NAFT's breach of the letter of credit agreement, which included an arbitration clause. The plaintiff filed a lawsuit against NAFT for breaching such letters of credit, while the defendant sought to enforce arbitration against both the plaintiffs and UAL. In this case, the U.S. District Court for the Southern District of New York ruled that the corporate veil must be pierced against UAL under New York law since UAL and the plaintiff were considered as a single entity and the court applied the alter ego doctrine by considering two factors.

First, UAL has exercised its complete dominance over Smoothline and Greatsino with regard to the disputed transaction. Second, this dominance was used to commit fraud or wrongdoing that harmed the plaintiff. The case clearly demonstrates that UAL has drained money from Smoothline and Greatsino by paying high prices to subcontractors and component suppliers of Smoothline and Greatsino. It is obvious that UAL's conduct was for its own benefit; consequently, this should be sufficient for the court to determine fraud or wrongdoing and decide to lift UAL's veil.[103]

As stated in this case, for a court to decide to pierce or lift the corporate veil of a non-signatory as the parent corporation in this case, there must

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[102] *Smoothline Ltd., Greatsino Electronic Ltd. v. North American Foreign Trading Corp.* (n 13).

[103] ibid.

be an element of excessive control over its subsidiaries, such control must be used to commit fraud, and there must be an injured party who suffered from the defendant's wrongdoing. The non-signatory should not be able to hide behind the shield when these elements manifest; rather, it should be compelled to participate in the arbitral proceeding.

(2) Carlos Giron, et al. v. John Dodds

This case is particularly interesting since the highest court in the District of Columbia has determined that lifting the corporate veil falls outside the jurisdiction of the arbitration clause. The case started when the property owners, John and Teresa Dodds (referred to as "Dodds"), entered into a construction contract with a company called C&C General Builders, Inc. (referred to as "C&C"). The contract included an arbitration clause stating that any disputes shall be resolved through arbitration conducted by the American Arbitration Association, following its Construction Industry Arbitration Rules and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Additionally, Carlos and Alex Giron are the shareholders of C&C, and the purpose of this contract is to do demolition and renovation work.[104]

The dispute arose when Dodds made a payment of 70 percent of the contract price, but the work's progress was only 40 percent complete, and C&C would not be able to complete it as stated in the contract's schedule. Dodds subsequently submitted complaints, alleging breach of contract and breach of fiduciary duties, against Carlos and Alex Giron as individuals. In accordance with Girons' motion to compel arbitration, the Superior Court ordered the parties to proceed with arbitration and suspended the case pending the outcome of the arbitration.[105] In addition, Dodds submitted a statement of claim to the American Arbitration Association, which contained almost identical allegations to their initial complaint. Before the arbitrator's decision on that request, Dodds amended their statement of

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[104] *Carlos GIRON, et al. v. John DODDS, et al.*, District of Columbia Court of Appeals, 35 A.3d, 5 Jan 2012, 433 (D.C. 2012).

[105] ibid.

claim to include C&C as a defendant, on the grounds that C&C was an undisclosed principal. Finally, the arbitrator determined that C&C was liable for the claims by issuing a final award in favor of Dodds and awarded Dodds in full and complete settlement of a claim.

Nevertheless, upon discovering that C&C is financially constrained and unable to pay the award, Dodds filed a motion to pierce C&C's corporate veil and hold Alex Giron and Carlos personally liable for the award. This is because Dodds discovered that Girons treated the company's assets as personal property, neglected to follow proper corporate procedures, and intermingled company funds with their personal finances. The Girons contended that such a motion should be resolved by arbitration. The court rejected the Girons' motion to arbitrate on the grounds that the disputes were not newly created; rather, they derived from the arbitration award itself, due to the breach of contract by C&C, and that the award is already final and binding on all parties. In the end, the District of Columbia Court of Appeals determined that it had jurisdiction over the Girons (who were not signatories), pierced the corporate veil of C&C, and held the Girons liable and paid damages in compliance with the award.[106]

Ultimately, the author agrees with the court's decision to lift the company C&C shield and hold Girons liable due to Girons' conduct in treating the company's assets as their own and combining company funds with their personal finances and the company C&C suffered harm from Girons' acts. The court has the power to disregard the legal protection of the corporation C&C and find Girons, as a shareholder, liable even if Girons did not directly sign the arbitration agreement. To pierce the corporate veil of a non-signatory, the court must demonstrate the elements of fraud committed by the non-signatory, identify an injured party who suffered due to the non-signatory's wrongdoing, and evaluate the case on a case-by-case basis, considering all relevant facts before making a decision. This is because such a course

[106] *Schattner v. Girard, Inc.,* United States Court of Appeals, District of Columbia Circuit, 668 F.2d 1366 (D.C. Cir. 1981) 6 Nov 1981.

of action would contradict the corporate law principle that separates the liability of the company and its shareholders.

3.3.3 The Principal-Agent Doctrine Adopted in the Republic of China

Although many countries have embraced this theory, this is the first time a Chinese court has explicitly ruled that an arbitration agreement binds the undisclosed principal, which is a non-signatory party, by employing the doctrine of the principal and agent in contract law. This theory may not be fresh in the realm of contract law, as provisions in both Chinese and Thai law adhere to the same concept: If the agent entered into a contract in its own name with a third party who was aware of the agency relationship between the principal and agent while acting within the scope of authority granted by the principal, the contract shall be directly enforceable against the principal and said third party.[107] Nevertheless, there needs to be more clarity regarding whether this provision can also be applied to bind the non-signatory party in arbitration. The case law determined by the Beijing No. 4 Intermediate People's Court will be exposed to further examination and analysis.

3.3.3.1 General Concept of the Principal-Agent Doctrine

This principle originated within the realm of agency law, in which a person or entity, known as a "principal", appoints an "agent" to transact business on their behalf.[108] Under certain circumstances, an arbitration agreement may bind a non-signatory principal by applying this theory.[109] It is illustrated in many arbitration disputes that the principal-agent theory is mainly used to bind the non-signatory principal to the arbitration agreement; however, the court, in many cases, always carefully examines whether a genuine agency connection exists before approving applications to compel arbitration based on accusations from the agency. In some cases, courts have granted permission for non-signatories acting as true agents

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[107] The Contract Law of the People's Republic of China, adopted at the Second Session of the Ninth National People's Congress on March 15, 1999 (The Contract Law of the People's Republic of China), Article 402.

[108] *Paragon Industrial Applications, Inc. v. Stan Excavating*, LLC, 432 S.W.3d 542 (Tex. App. 2014).

[109] *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 738 (Tex. 2005).

of the signatory principal to enforce arbitration against the opposing party, provided that the opposing party's claims against the non-signatories fall within the same scope as the asserted claims. Motions seeking to compel non-signatories who falsely represent themselves as agents are denied by the courts.[110]

There are various kinds of principals and agents. Principals are divided into three types: disclosed principal, undisclosed principal, and unidentified principal. First, a disclosed principal refers to a situation in which an agent acts on behalf of a principal, and the third party is aware of both the principal's existence and identity. The principal bears direct responsibility towards the third party, but the agent is generally exempt from any liability towards that third party unless otherwise specified. Second, an undisclosed principal refers to a situation in which the agent carries out actions on behalf of the principal, but the third party is unaware that the agent acts on behalf of that principal. The agent will bear legal liability for the third party. The principal becomes liable to the third party, and the third party may bring claims against the principal or the agent if the principal's identity is disclosed. Third, an unidentified principal refers to a scenario in which a third party is aware of the existence of a principal but does not know the specific identity of that principal. In agency law, there exists a rather ambiguous situation where the agent may be held liable to a third party. This is because the third party is unaware of the identity of the principal and, hence, cannot take legal action against them. The principal assumes liability towards the third party if the identity of the principal is disclosed.[111]

There are three types of agents. First, an unlimited agent, also known as a general agent, has extensive authority to represent the principal in many conducts. If an unlimited agent performed within their authority and for the benefit of

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[110] Gilda R. Turitz, 'When Non-Signatories Compel Arbitration, Relationships Matter' (2012) 16 American Bar Association, Section of Litigation, Alternative Dispute Resolution 1, 2.

[111] Doneld G. Shelkey and Oliver Bell, 'Agency Relationships in the United Kingdom and United States' (Morgan Lewis, 1 September 2023) <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2023/09/agency-relationships-in-the-united-kingdom-and-united-states> accessed 1 May 2024.

the principal, the principal may be held responsible for their activities. Second, a limited agent, also known as a specific agent. A limited agent's authority is restricted to carrying out particular duties or transactions on behalf of the principal. The principal is often responsible for the agent's activities within the limits of their explicit instructions. Last, a sub-agent, acting on behalf of the principal, designates a sub-agent. While liability for the actions of a sub-agent is typically complex, the principal is seldom held explicitly liable to that sub-agent. In general, the agent who appointed the sub-agent is liable for all actions performed by the sub-agents in the course of their authority.[112]

To understand how the principal or undisclosed principal, who is a non-signatory party, binds an arbitration agreement, it is worth studying the legal principles and the related case law.

3.3.3.2 Legal Basis of the Principal-Agent Doctrine

Upon examining the extent to which the principal-agent doctrine applies to parties who have not signed an arbitration agreement, it is useful to dig deeper into the legal principles and grounds upon which the Chinese court will rule to bind non-signatories. The Chinese agency law stated in the Contract Law of the People's Republic of China 1999 ("Chinese Contract Law"), the General Principles of Civil Law of The People's Republic of China 1986 ("Chinese Civil Law"), the Arbitration Law of the People's Republic of China 1994 ("PRC"), and the Supreme People's Court Interpretation of Some Issues on the Application of the Arbitration Law of the People's Republic of China 2006 ("SPC") will be considered in this part.

Article 68 of the Chinese Civil Law provides that a contract entered into through agency or representation may bind the principal so long as the agent or representative has authority. This means that when the agent lacks authority, the circumstances become more complex, and Chinese courts have frequently ruled that the principal was not bound.[113]

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[112] ibid.

[113] The General Principles of Civil Law of The People's Republic of China 1986, Article 63.

Article 402 of the Chinese Contract law establishes the legally enforceable obligations between the principal, agent, and third party. The provision states that if an agent, acting within the authority granted by the principal, enters into a contract with a third party in their own name and if the third party is aware of the agent's relationship with the principal at the time of entering into the contract, then the contract shall be binding on the principal and the third party. However, this presumption can be rebutted if there is compelling evidence to demonstrate that the contract only binds the agent and the third party.[114] This means that any action taken by an agent in accordance with Article 402 is also considered the action of the principal. The next issue to consider is determining whether a non-signatory principal is obligated to abide by an arbitration clause or agreement stated in the underlying contract between an agent and a third party.

When examining the concept of a "principal-agent, to bind the non-signatories", it is crucial to consider the PRC and SPC. The PRC was established in 1994, while the SPC was issued in 2006. Even if the PRC lacks specific provisions that specifically define the extent of arbitration agreements in a manner similar to the FAA, Article 4 of the PRC stipulates that all parties involved have the option to resolve disputes through arbitration based on both parties' free will.[115] Article 16 specifies that the following elements shall be included in an arbitration agreement: (i) the explicit intention of arbitration; (ii) matters that may be submitted to arbitration; and (iii) the appointed Arbitration Commission." This definition applies regardless of whether the agreement is an arbitral clause in a contract or any other written form of arbitration agreement.[116] Article 17 of the PRC states a key provision regarding the invalidity of an arbitration. It specifies that an arbitration agreement will be considered null and void under the following circumstances: (i) if the matters agreed upon for arbitration go beyond the legally specified range of arbitrable matters, (ii) if a party entering into the arbitration agreement lacks the legal capacity or has limited legal capacity, or (iii) if one

[114] ibid.

[115] The Arbitration Law of the People's Republic of China 1994, Article 4.

[116] The Arbitration Law of the People's Republic of China 1994, Article 16.

party compel another party into entering into the arbitration agreement.[117] The SPC additionally offers more clarification regarding the application of the arbitration law. Although it does not explicitly explain the extent of arbitration agreements, it does provide direction on particular aspects of arbitration procedures, such as the legitimacy and interpretation of arbitration agreements, as provided in the following four sections.

As per Article 1 of the SPC, an arbitration agreement can be in the form of written contracts, letters, or data messages, which include telegraph, telefax, fax, electronic data exchange, and electronic mail.[118] Additionally, according to Article 16 of the SPC, each party may select the law that will govern the arbitration agreement.[119] Articles 8 and 9 of the SPC establish the conditions under which non-signatories might be legally required to adhere to an arbitration agreement. These articles specify that a non-signatory party may be bound by the arbitration agreement in specific circumstances, including succession, inheritance, and debt assignment.[120] In alternative scenarios, the court's determination of the extent of the arbitration agreement will dictate the resolution of the matter.

In China, the principal-agent doctrine is primarily regulated by the Chinese Civil and Contract Law. When it comes to the recognition and enforcement of arbitration agreements, the PRC and SPC frameworks are essential to consider. These frameworks are guided by principles such as party autonomy, fairness, and courts interpreting agreements in line with the parties' intentions. To gain a comprehensive understanding of this doctrine, it is worthwhile to examine the following Chinese landmark case law.

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[117] The Arbitration Law of the People's Republic of China 1994, Article 17.

[118] The Supreme People's Court Interpretation of Some Issues on the Application of the Arbitration Law of the People's Republic of China 2006, Article 1.

[119] The Supreme People's Court Interpretation of Some Issues on the Application of the Arbitration Law of the People's Republic of China 2006, Article 16.

[120] The Supreme People's Court Interpretation of Some Issues on the Application of the Arbitration Law of the People's Republic of China 2006, Article 8 and 9.

3.3.3.3 Chinese Case Law: *Ivatherm v. Xia Shi*

This case represents a landmark ruling made by the Beijing No. 4 Intermediate People's Court. It demonstrates that the principle of privity of contract can be "overridden" in certain exceptional situations, such as when an undisclosed principal is involved.

In 2015, the applicant ("Ivatherm") and a third party ("High Hope") entered into a distribution contract for the sale and purchase of specific goods ("Distribution Contract"). This contract included an arbitration clause that any dispute arising out of or in connection with the Distribution Contract shall be resolved by arbitration administrated by the CIETAC Shanghai Branch. Subsequently, High Hope incorporated the respondent corporation name ("Xia Shi"), which serves as its agent by executing an agency contract and carrying out all distribution contract obligations on its behalf. It appears in the fact that Ivatherm was informed in advance that Xia Shi would be incorporated shortly and that after Xia Shi was incorporated, Ivatherm continued to fulfill its obligations under the Distribution Contract with Xia Shi without any objections.[121]

The dispute arose due to the lack of quality products from Ivatherm. Xia Shi initiated the arbitration proceedings against Ivatherm by submitting a request to the CIETAC Shanghai Branch in conformity with the arbitration clause stipulated in the Distribution Contract. The Chinese court issued an award in Xia Shi's favor and required Ivatherm to pay compensatory damages. Nevertheless, Ivatherm filed a request with the court to set aside the arbitral ruling based on the argument that there was no agreement to arbitrate between Ivatherm and Xia Shi. The Chinese court ultimately decided not to overturn the award, citing the fact that Xia Shi was the true party involved in the Distribution Contract. Consequently, Xia Shi, despite not being a signatory party, should nonetheless be bound by the arbitration clause.[122]

From the author's view, the decision made by the Beijing No. 4 Intermediate People's Court can be analyzed as below:

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[121] *Ivatherm v. Xia Shi* (n 14).

[122] ibid.

First, the court followed the principle of agency, as stated in Article 402 of the Contract Law of the People's Republic of China,[123] by ruling that there was an agency relationship between Xia Shi and High Hope. In this instance, it is demonstrated that High Hope informed Ivatherm in advance that Xia Shi would be incorporated shortly, and that Ivatherm continued to fulfill its obligations under the Distribution Contract with Xia Shi without objections after Xia Shi was incorporated. This indicates that Ivatherm was initially aware of the fact that Xia Shi was an undisclosed principal and High Hope was Xia Shi's agent. Additionally, Xia Shi fulfilled all its obligations under the Distribution Contract under the scope of the agency agreement between it and Ivatherm. The Distribution Contract shall, therefore, also bind Xia Shi, an undisclosed principal in this instance, and High Hope's actions before the incorporation of Xia Shi were binding on Xia Shi as well.

Second, despite Xia Shi not being a signatory to the arbitration clause stated in the Distribution Contract, the court has determined that Xia Shi is nonetheless bound by the arbitration clause. Based on Xia Shi's conduct during the negotiation and execution of the Distribution Contract, it may be inferred that Ivatherm, as the contracting party, was aware from the beginning that Xia Shi was the actual party to the Distribution Contract, while High Hope was acting as an agent. Therefore, according to Article 402 of the Contract Law of the People's Republic of China, the court may have the legal basis to apply the arbitration clause to Xia Shi in this Distribution Contract.

Lastly, for the court to enforce an arbitration clause on non-signatories employing the principal-agent principle, it must be evident that a principal-

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[123] Appears in the Contract Law of the People's Republic of China, adopted at the Second Session of the Ninth National People's Congress on March 15, 1999, Article 402 which states that "If the agent, within the scope of the power delegated by the principal, concludes a contract with a third party in its own name, and the third party is aware of the agency relationship between the agent and the principal at the time of concluding the contract, the contract shall be directly binding on the principal and the third party, unless there is conclusive evidence proving that the said contract is only binding on the agent and the third party".

agent genuine relationship exists and that the contracting party is aware of it. An agent shall additionally perform within the authority granted by the principal. If it is an undisclosed principal, as is the case here, the principal may declare himself and accept any contract executed on his behalf, as stipulated in Article 806 of the Thai CCC regarding the principal-agent relationship.[124] The critical factor that the court will take into account to bind the non-signatories to an arbitration clause or agreement is also the involvement of the undisclosed principle in the underlying contract.

3.4 Conclusion

Based on the author's study, reveals that both the New York Convention and the UNCITRAL Model Law, which are international instruments, as well as France, the United States, and the Republic of China's corporate law, contract law, agency law, and arbitration law, which are national instruments, do not include explicit provisions that apply to non-signatories to arbitration agreements. The legal effect of an arbitration agreement on those who did not sign it is determined by the decisions of arbitral tribunals and courts. These decisions may involve the application of concepts such as the group of companies, piercing the corporate veil, and principal-agent doctrines in certain circumstances.

[124] Appears in the Thai CCC, Article 806 which states that "An undisclosed principal may declare himself and assume any contract entered into on his behalf. ….".

CHAPTER 4
ANALYSIS AND THE EFFECT OF ADOPTING THE NON-SIGNATORIES TO THE ARBITRATION AGREEMENT IN THAILAND

4.1 Introduction

In Thailand nowadays, the growing complexity of current international trade is especially apparent in the area of business contracts. Multinational corporate groupings, in particular, are heavily involved in international economic operations. There will not be only one group involved in commercial contracts; rather, the transaction will involve more than two parties. As a result, the effective management of a wide range of international corporations in the case that disputes concerning the arbitration agreement emerge is an urgent matter.

The previous chapter reflects that other countries, namely France, the United States, and the Republic of China, are aware of the matters concerning non-signatories to arbitration agreements, and its main focus was on applying numerous foreign law doctrines. In this chapter, the author will provide an overview of the current situation of Thai national courts as they pertain to the enforcement of non-signatories in arbitration agreements. It will include an analysis of the preferred approaches under Thai jurisdiction and reference the Thai Supreme Court's decision concerning this matter.

4.2 The Current Position of Thai National Courts in Applying the Non-Signatories in Arbitration Agreement

When considering the Thai national law regarding arbitration agreements, only Section 11 of the Thai Arbitration Act addresses the idea, form, and validity of arbitration clauses or agreements. Unfortunately, it fails to clarify anything about those

who did not sign the arbitration agreement.[125] It is the International Council for Commercial Arbitration (ICCA) has interpreted the written requirement of the arbitration agreement in the New York Convention in a manner that reconciles the question of whether non-signatories are bound by the agreement with the separate requirement of its written form, recognizing that the form of the arbitration agreement and the parties bound by it are distinct elements. It can be elaborated that the analysis of the arbitration agreement must prioritize the examination of its form, with subsequent consideration given to the analysis of the involvement of non-signatory parties.[126] Therefore, when taking into account that Thailand has adopted the New York Convention and the UNCITRAL Model Law, the requirement of a written arbitration agreement and the non-signatories to an arbitration agreement must be considered separately.[127] To comprehend the Thai court's perspective on the non-signatory issue, it is essential to examine the Thai Supreme Court decision.

Unfortunately, no concrete cases indicate an arbitration agreement under the Thai Supreme Court decision binds the non-signatories. However, the Thai Supreme Court has ruled on three cases that relate to the non-signatories to arbitration agreements. These cases involve Section 11 of the Thai Arbitration Act, the principal-agent doctrine, and the piercing of the corporate veil doctrine. The author will go into more detail about these below.

4.2.1 Thai Courts' Decision Applied the Thai Arbitration Act

The first case recently ruled by the Thai Supreme Court in 2022 was related to the extension of arbitration agreements to non-signatories in accordance with Section 11 of the Thai Arbitration Act. The plaintiff was a limited corporation that owned the Hyatt Place Phuket Patong hotel, which is situated in the province of Phuket. The plaintiff engaged the six defendants to jointly manage the aforementioned

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[125] Thai Arbitration Act B.E. 2545, Section 11 paragraph 2.

[126] 'Manual for Judges: The Recommendation of ICCA in Interpretation of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (ICCA).

[127] Saowanee Asawaroj (n 33) 59.

hotel, for which the plaintiff obtained authorization to utilize the trademark “HYATT PLACE” from the third defendant. The plaintiff signed six agreements with the six defendants: (i) the Hotel Operations Service Agreement with the first defendant; (ii) the Strategic Oversight Agreement with the second defendant; (iii) the Trademarks License Agreement with the third defendant; (iv) the Technical Services Agreement with the fourth defendant; (v) the Memorandum of Understanding (MOU) of Global Fund, which provides worldwide services, with the fifth and sixth defendants. A clause of the Hotel Operations Service Agreement stipulated that five contracts would be deemed equivalent to a single contract, thereby holding six defendants jointly liable with the plaintiff.[128]

The plaintiff alleged that the defendants’ termination was invalid because the limitation of liability was considered an unfair contract, which rendered the termination not in good faith. As a result, the plaintiff requested that six defendants provide compensation for the plaintiff’s serious damages. The Central Intellectual Property and International Trade Court ruled in favor of the defendants in this case, determining that the dispute should be disposed of by the court and be resolved through arbitration proceedings. This decision was made since it was found that the arbitration agreement was valid and not nullified.[129] The plaintiff filed an appeal and the Court of Appeal for Specialized Cases determined that the matter falls within the jurisdiction of the Supreme Court. The Supreme Court rendered its decision in this case by identifying two issues.

First, the judgment issued by the Central Intellectual Property and International Trade Court to dispose of the case and determine whether the dispute should be handled through arbitration proceedings is right or not. Upon careful examination of the agreements between the plaintiff and the first to fourth defendants, it is evident that there are no defects in the arbitration agreement that would render it unlawful. Consequently, the decision rendered by the Central Intellectual Property

[128] Thai Supreme Court Decision No. 1455/2566.

[129] Thai Arbitration Act B.E. 2545, Section 14.

and International Trade Court is legally valid and ruled that this case shall be settled by arbitration in accordance with the parties' intentions.[130]

The second question concerned whether the arbitration agreement should also bind the fifth and sixth defendants. The MOU between the plaintiff and both of those defendants does not contain any evidence of the existence of an arbitration clause. Furthermore, both defendants have argued that they are not parties to any agreements with the plaintiff. In the end, the Supreme Court determined that the fifth and sixth defendants' cases would not be dismissed from court.[131]

In conclusion, this case has illustrated that in the absence of explicit evidence that the parties agree to the arbitration proceedings, the Thai court will not grant an extension of the non-signatory to the arbitration agreement. From the author's view, this case extends beyond the scope of Section 11 of the Thai Arbitration Act. It also refers to Section 14 of the Thai Arbitration Act, in which the court may rule not to dispose of the case to an arbitration proceeding if it finds that there is no arbitration agreement between the parties.

4.2.2 Thai Courts' Decision Applied the Piercing of Corporate Veil Doctrine

This was the consumer case that the Thai Supreme Court ruled on in 2010. The plaintiff, the consumer protection committee, initiated the legal proceedings by requesting compensation from the first and second defendants, the condominium developers, due to the damages suffered by the consumers as a result of the unfinished construction of the condominium. The sale and purchase condominium agreements were signed between the consumers and the first defendant; the second defendant, in this case, is merely the shareholder of the first defendant. Generally, in accordance with Sections 1015 and 1096 of the Thai CCC, a company, upon registration, is a juristic person distinct from the shareholders, and the

[130] Thai Supreme Court Decision No. 1455/2566

[131] ibid; Thai Arbitration Act B.E. 2545, Section 11.

liability of the shareholders is limited to the amount, if any, unpaid on the shares, respectively, held by them.[132]

In this case, the Supreme Court made the decision to hold the second defendant, who is not a signatory, jointly liable with the first defendant. This decision ignored the idea of separating liability between shareholders and limited liability corporations, which is a fundamental element of corporate law. The court rendered its decision on the grounds that the second defendant, despite not being a signatory, serves as the parent company of the first defendant. It has complete control over the first defendant and advertised condominiums in this project, inviting the public to purchase. The second defendant's conduct clearly played a role in the indirect transaction of selling the condominium. It can be analyzed that the court applied the concept of piercing the corporate veil in this instance, holding the parent firm, which is a shareholder, liable jointly with the subsidiary, which was a signatory party.[133]

Although this case does not involve arbitration, it is a consumer case that applies all the requirements for piercing the corporate veil as established by the U.S. Supreme Court. These criteria include: (i) the parent company has absolute control over its subsidiary; (ii) the use of this control to engage in fraudulent or wrongful activities; and (iii) the resulting harm suffered by the plaintiff. This case also aligned with the concept stated in Section 44 of the Thai Consumer Case Procedure Act B.E. 2551.

4.2.3 Thai Courts' Decision Applied the Principal-Agent Doctrine

This matter is related to the Supreme Court's decision no. 611/2535. This case arose from a transaction involving the sale and purchase of raw cotton. The agreement pertaining to this transaction was executed by a non-authorized agent of the defendant. The plaintiff claimed that the defendant was bound by the terms of such sale and purchase; however, the question arises as to whether the plaintiff can enforce an award against the defendant due to the fact that the agreement for this

[132] Thai Supreme Court Decision No. 2637-2638/2553.

[133] ibid.

transaction was signed by an individual who is not the defendant's authorized agent. The court ruled in this particular case that the plaintiff is unable to enforce the award against the defendant due to the fact that the signatories of the agreement containing the arbitration clause are not the authorized representatives of the defendant and there are no circumstances that demonstrate the defendant appointing an agent to act on its behalf. The sale and purchase agreement and the arbitration clause are, therefore, not enforceable against the defendant.[134]

In analyzing a court's decision, the author concurs with the decision of the Supreme Court, as there is no evidence or principal-agent agreement stating that this person acted on behalf of the defendant. Therefore, the defendant should not be bound by the award enforcement. Nevertheless, if the representative of the defendant signs a purchase and sale agreement that includes an arbitration clause, it is crucial to consider whether this arbitration agreement will also bind the defendant and enable the plaintiff to enforce an award against that defendant. From the author's perspective, if the defendant appoints a representative through an agency appointment agreement or if that representative is the defendant's puppet, the arbitration clause will also bind the defendant, even if the defendant did not sign the sale and purchase agreement containing the arbitration clause. When compared to the foreign approaches regarding the non-signatories to arbitration agreements in the third chapter, it is the principal-agent theory that has been explained in this paper, and it has been accepted by many countries, such as the Chinese court.[135]

4.3 Analysis of the Preferred Approaches under Thai Jurisdiction

Regarding the foreign theories mentioned in this paper, including the group of companies, the piercing of the corporate veil, and the principal-agent doctrines, it is challenging to determine which approach is most applicable to Thai law. This is exceedingly difficult due to the absence of any direct Supreme Court decision in

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[134] Thai Supreme Court Decision No. 611/2535.

[135] *Ivatherm v. Xia Shi* (n 14).

Thailand that has applied the concept of non-signatories to arbitration agreements and the absence of a specific provision of it in the Thai Arbitration Act.

In the author's opinion, in order to implement each doctrine, the first consideration is the consent of the non-signatories, which is also the core of the arbitration process. In order for the group of companies doctrine to apply, the non-signatories must take some action, such as performing, negotiating, or delivering the products. It can be interpreted as an implicit consent to be bound by the terms of the arbitration agreement. Furthermore, the element of the corporation as a member of the same group may not be sufficient for courts and arbitral tribunals to have jurisdiction over non-signatory subsidiaries; other factors, such as the control of the parent corporation over its subsidiaries, may also need to be considered.

For the piercing of the corporate veil, there may be an element of shareholders that have an excessive amount of control over the corporation. This control must have been used to commit fraud, and someone must have suffered from the defendant's misconduct. If such a situation arises, the court may have the authority to lift or pierce the corporate veil, and the shield cannot protect the shareholders from liability. For the non-signatory party principal to be bound by the arbitration agreement signed by the agent, it must be evident that a genuine principal-agent relationship exists and that the contracting party is aware of it. Moreover, an agent shall perform within the authority granted by the principal, and in the case of an undisclosed principal, the principal may declare himself and accept any contract executed on his behalf as stated in the case law in the third chapter.

In summary, there is no definitive answer to the question of which doctrines are most suitable under Thai law, as this differs from case to case. However, for the arbitrators to decide to bind the non-signatories to an arbitration agreement, which would give them jurisdiction over such non-signatories, the non-signatories express or implied consent to be bound by an arbitration agreement must be given. In addition, all foreign doctrines shall only be applied in exceptional circumstances due to the fact that the group of companies' doctrine conflicts with the concept of privity of contract, which states that contractual rights and obligations are generally

binding only between the parties to the contract. A third party that is not a party to the contract cannot enforce its provisions or claim its benefits. The piercing of the corporate veil is also in conflict with the corporate law principle that the company and its shareholders are distinct entities and that a corporation may be sued in its own name and assets separately from its shareholders. Even though the Thai CCC does contain explicit provisions stating that an agent's actions will bind the principal if the principal authorizes the agent to act on his behalf with a third party, clear consent is still required to extend the arbitration agreement to a principal who did not sign the agreement. In conclusion, the Thai court should have room to decide the case regarding individuals or entities who did not sign an arbitration agreement based on foreign doctrines and other doctrines that are related to them as well. However, in order to bind non-signatories to an arbitration agreement, there must be a solid legal argument and either the express or implied consent of that party.

CHAPTER 5
CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

Thailand is unfamiliar with the concept of non-signatories to an arbitration agreement. This may be due to the fact that Thailand has never faced a case involving non-signatories to an arbitration agreement. Even though the foreign court has previously dealt with this issue, it is not a simple task to manage and resolve, and it remains controversial among scholars and practitioners. Due to the many factors involved, the majority of cases are decided on a case-by-case basis. However, this paper has demonstrated the three doctrines, which are the group of companies, the piercing of the corporate veil, and the principal-agent. Each of them has an independent idea.

The first principle deals with companies in the same group, and the tribunal will determine whether non-signatories in the same group have implied consent to participate in the arbitration or not. In addition to a party's true intent and consent, the performance of the contract, including drafting, performing, negotiating, and terminating, may be considered. As shown by the Dow Chemical case, even if a party did not sign the arbitration agreement, they would still be bound by its terms if some of the elements mentioned were met.

In contrast to the first principle, the second principle focuses on the dominant control of one company, particularly a parent corporation, over its subsidiaries. This dominant control must have been used to commit fraud, and there must be someone who was harmed by the defendant's misconduct. If these situations happen, the court will typically decide to lift the corporate veil and hold the parent corporation liable by disregarding the parties' signatures on the arbitration agreement, as illustrated in the case law in the third chapter.

The third principle concerns whether a non-signatory principal is bound by an arbitration clause stated in the underlying agreement between an agent and a third

party or not. Prior to allowing applications to compel arbitration against third parties who are non-signatories, the court will assess the existence of a genuine agency connection and the extent of authority conferred by the principal.

As mentioned in this paper, there is no direct provision; only the Thai Arbitration Act Section 11 expresses the definition and validity of arbitration agreements. The concept of non-signatories to arbitration agreements is relatively new in Thailand. However, even the Thai court had never encountered or was unfamiliar with the non-signatories concept. The suggestion is that the court should be prepared to handle this type of dispute, as international trade is growing rapidly and it is unavoidable that there will be multiple contracts involving multiple parties, as well as the possibility of a third party who was not a signatory to the arbitration agreement but suffered losses due to the actions of a subsidiary or the parent company of the group. The author is of the opinion that prevention is always better than cure.

In conclusion, the extension of the arbitration clause or agreement to a non-signatory may differ by jurisdiction. Therefore, the arbitral tribunal must be cautious when deciding cases involving non-signatories to an arbitration agreement, as it is quite risky that the award may be set aside or refused if the conditions in Article V of the New York Convention are fulfilled. In short, arbitration tribunals must use principles of fairness when making decisions rather than relying purely on legal statutes. To uphold the decision, there must also be appropriate legal foundations, such as corporate, contract, agency, arbitration law, or other relevant law.

5.2 Recommendations

It cannot be denied that the principles of groups of companies, piercing of the corporate veil, and principal-agent to non-signatories to arbitration agreements are still interpreted in different ways nowadays. Therefore, for the Thai courts and arbitral tribunals to have the flexibility and standard to apply such theories, the best solution is to amend the law by adding an exception for the courts and arbitral tribunals to

apply in a specific circumstance. The recommendations provided by the author will be to amend the Thai Arbitration Act, as described below.

5.2.1 Suggestion for Amending the Thai Arbitration Act

Section 11 of the Thai Arbitration Act only addresses the definition of an arbitration agreement, the legal requirements, and its validity. It does not address an arbitration agreement, which may affect individuals or entities who did not directly sign it in specific circumstances. This could potentially create difficulties in determining the jurisdiction of arbitral tribunals and enforcing awards in arbitration cases. Therefore, it is necessary to revise the Thai Arbitration Act to candidly recognize the legal effect of arbitration agreements on non-signatories in situations that are justifiably determined by the law. The author sees it essential to add this exception to the Thai Arbitration Act, as shown below.

"Unless otherwise agreed by the parties, the arbitral tribunal may, if necessary, extend the arbitration agreement to non-signatories if it finds (i) the non-signatories were companies of the same group with signatory, (ii) the non-signatory companies had assumed an active role in the conclusion, performance, or termination of the contract, which contained an arbitration clause, or (iii) the factual circumstances of the case demonstrated common intention for arbitration between the claimants, including the non-signatories and the respondents."

The proposal to add the aforementioned exception may be applicable exclusively in arbitration proceedings. However, it does not apply directly in situations where a non-signatory shareholder has committed an illegal act by performing for its own benefit rather than the benefit of the company. A provision in corporate law that permits the court to hold shareholders liable for the debts of the company is still absent; the only provision pertaining to the piercing of the corporate veil is found in Section 44 of the Thai Consumer Case Procedure Act B.E. 2551, and it is applicable exclusively in consumer cases and not generally.

Therefore, if the provision in the Thai CCC could be amended to add this exception, the company's profit would be protected, and shareholders would be

unable to exploit this principle as a means to hide themselves behind the corporate veil.

Thailand's legal system is fundamentally a civil law system, in which legislation is the sole source of law. Consequently, the most effective way for arbitral tribunals and courts in Thailand to address the issue of non-signatories is by amending current legislation. However, since the concept of non-signatories to arbitration agreements is an exception in corporate and contract law, it should only be applied in exceptional circumstances, and when making decisions, the court or tribunal should not rely solely on legal statutes but also consider all relevant facts, the parties consent, and principles of fairness.

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BIOGRAPHY

Name	Suporn Detpirattanamongkol
Date of Birth	20 November 1991
Educational Attainment	2015: Bachelor of Laws, Thammasat University