A Mexican Perspective on the Extension of the Arbitral Agreement to Non-Signatories

A thesis submitted to the Bucerius/WHU Master of Law and Business Program in partial fulfillment of the requirements for the award of the Master of Law and Business ("MLB") Degree

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF CONTENTS</td>
<td>1</td>
</tr>
<tr>
<td><strong>I.</strong> INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td><strong>II.</strong> DOCTRINAL AND LEGAL APPROACH TO THE NATURE OF THE ARBITRATION AGREEMENT</td>
<td>3</td>
</tr>
<tr>
<td>A. The Doctrinal Notion of the Arbitral Agreement</td>
<td>3</td>
</tr>
<tr>
<td>B. Applicable legal framework to the arbitration agreement under Mexican Practice</td>
<td>5</td>
</tr>
<tr>
<td>1. Constitution of the Mexican United States</td>
<td>5</td>
</tr>
<tr>
<td>2. International Agreements signed by Mexico and Soft Law</td>
<td>6</td>
</tr>
<tr>
<td>3. Mexican Commerce Code</td>
<td>8</td>
</tr>
<tr>
<td>4. Jurisprudence</td>
<td>9</td>
</tr>
<tr>
<td>C. Contractual Nature and Requirements of the Arbitration Agreement</td>
<td>10</td>
</tr>
<tr>
<td>1. Principles of contractual law</td>
<td>12</td>
</tr>
<tr>
<td>2. Principles exclusively applicable to Arbitration</td>
<td>18</td>
</tr>
<tr>
<td><strong>III.</strong> THE ISSUE OF BINDING NON-SIGNATORIES TO INTERNATIONAL ARBITRATION AGREEMENTS</td>
<td>19</td>
</tr>
<tr>
<td>A. Generalities and previous definitions</td>
<td>19</td>
</tr>
<tr>
<td>B. Difference between a non-signatory and a third party in arbitration</td>
<td>21</td>
</tr>
<tr>
<td>C. Conflict of law issues related to the non-signatory situation</td>
<td>22</td>
</tr>
<tr>
<td>D. Theories</td>
<td>23</td>
</tr>
<tr>
<td>1. Agency</td>
<td>25</td>
</tr>
<tr>
<td>2. Assignment and Other Transfers of Contractual Rights</td>
<td>27</td>
</tr>
<tr>
<td>3. Incorporation by Reference</td>
<td>30</td>
</tr>
<tr>
<td>4. Group of Companies Doctrine</td>
<td>33</td>
</tr>
<tr>
<td>5. Additional Note on Mexican Law</td>
<td>36</td>
</tr>
<tr>
<td><strong>IV.</strong> CONCLUSIONS AND SUGGESTED APPROACH</td>
<td>36</td>
</tr>
<tr>
<td>A. Preliminary considerations</td>
<td>37</td>
</tr>
</tbody>
</table>
B. The model assuming Mexican law applies to the non-signatory issue on theory-by-theory basis.

1. Agency
2. Assignment
3. Incorporation by reference
4. Group of companies

C. Mitigating the problem

D. Conclusion

V. BIBLIOGRAPHY
I. Introduction

Due to the increasing number and complexity of international contractual relationships, arbitration has become one of the most frequently employed means of dispute resolution. There are several recognized advantages of arbitration, including its procedural flexibility, the confidentiality and privacy of awards, the possibility of having the dispute settled by an expert on the field the dispute arose, and the neutrality of the dispute resolution forum\(^1\), among others. However, all these advantages do not come without some challenges. As in many other fields of the legal and business relationships, constant changes in reality have surpassed the arbitration law, both in the international and the national arena.

Technological developments, as well as economic progress have resulted in more efficient but at the same time more complex international commercial relations. The need to have a dispute resolution mechanism that could fulfill the needs of this changing scenario was paramount. The contractual nature of the arbitration, which is going to be subject of further analysis in the present study, allows its adaptation to the specific needs of the relationship; however, it also imposes contractual requirements that are not compulsory or different from litigation. Formality is one of these requirements.

The current work is divided in three main content chapters. The first chapter analyses the contractual nature of the arbitral agreement by providing a doctrinal and legal approach to the topic. Different theories of the legal contracting nature of these agreements are presented that will serve as an overview for the next chapter. In the second chapter the nature of third parties in arbitration in thoroughly discussed. The main part of this chapter would be dedicated to some of the cases in which non-signatories have been allowed to

initiate or take part of the arbitral proceeding. Different theories such as agency and representation, incorporation by reference, and group of companies, among others will be discussed. In addition, the consequences of the use of these theories and the acceptance of non-signatories to be part of arbitration proceeding in light of the foundational principles applicable to the arbitration agreement will be discussed. Using as example some of the grounds invoked at an international level to allow the participation of non-signatories in the arbitral proceedings, this paper tries to formulate a comparative analysis between the principles and rules applicable internationally and in Mexico.

More ambitiously in the last theoretical chapter, this paper would suggest how this very thorny topic could be addressed when it has to be decided under the Mexican legal framework, which is a part of arbitration that has not receive enough coverage nor enough cases have been published or publicized.

The content of this paper is limited to private international arbitration. The applicability of the Mexican approach would only play a role under the assumption that after applying the governing choice of law rules, the Mexican law was deemed applicable. Another assumption that has been made, especially in the section exposing the different theories commonly used to allow non-signatories to be bound by the arbitral agreement, is that these agreements have been considered to be substantively valid. The grounds to declare an arbitral agreement substantively invalid are many but these escape the scope of the present research. One last limitation of this study is the fact that not all the theories that have been developed to extend the effects of the arbitral agreement to non-signatories have been portrayed. Only four were chosen, each one representing a different reasoning that has then been contrasted with the applicable rules and principles governing in México.

It has to be noted that despite Mexico City being the city that hosts more international arbitrations in Latin America\(^2\), jurisprudence specifically

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addressing the subject of non-signatories of arbitral agreements is limited if not
inexistent. Nevertheless, jurisprudence related to international commercial
arbitration is now to be found on a more common basis.

Taking into account the limitations and scope of the present research, the
following section will deal with the notion of arbitral agreement, its contractual
nature and the law and principles applicable to it.

II. Doctrinal and Legal Approach to the nature of the Arbitration
Agreement

A. The Doctrinal Notion of the Arbitral Agreement

The international arbitration practice, at international as well as at the national
level, nourishes from several sources. One of those source from which takes
the most are the general contract law doctrines.

The first aspect that every arbitration agreement has to deal with is related to
the contractual nature of such agreement. Many authors use basic principles of
contracting law when referring to this topic. Onyema has stated that “generally
an agreement comes into existence when a valid and unequivocal offer is
accepted. The arbitration agreement is a bilateral contract in which both parties
make legally binding promises to each other. To amount to a valid offer, the
communication, has to be an expression of willingness to contract on the
specified terms, made with the intention that it is to become binding as soon as
it is accepted by the person to whom it is addressed. Acceptance on the other
hand is defined as a final and unqualified expression of assent to the terms of
the offer.” Assuming that out of the offer and acceptance an arbitration
agreement result, it can be fairly concluded, as did the English Court in Ust-
Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower

Plant LLP\textsuperscript{4}, that two obligations arise: (i) the positive obligation to submit the differences between the parties to the arbitral tribunal, and (ii) the negative obligation to refrain from taking the same dispute to courts. The issue of consent, in relation with the arbitration agreement is going to be discussed later on this research.

The arbitral agreement can be either a clause included in the parties’ commercial contract by which the signatories undertake the commitment to submit any dispute that may arise from the underlying contract to an arbitration procedure, or a separately executed document. When referring to an arbitral agreement in the present research it is intended to comprise both cases. Additionally, if there is no arbitration agreement between the parties and a dispute arises, the parties can still enter into an agreement to arbitrate. The resulting agreement is usually called submission agreement. This type of contracts are less common due to the fact that after the dispute has arisen the parties are less likely willing to agree on anything related to the dispute or the contract. The considerations made in this study apply equally to the submission agreements even if not expressly mentioned\textsuperscript{5}.

On the Mexican context, Fernando Flores, following the trend of other Mexican doctrinaires, has defined the arbitral agreement as the voluntary covenant between the warring parties, in which the obligations and rights of arbitrators in relation to the parties, the selected law governing the proceedings and the fees to cover, are listed among other relevant matters\textsuperscript{6}.

Out of the above stated notions of arbitration agreement, it can be concluded that both, international as well as Mexican doctrinal and legal approaches


\textsuperscript{5} MOSES, Margaret L. The Principles and Practice of International Commercial Arbitration. Cambridge University Press, 2008.

\textsuperscript{6} GARCÍA, Fernando Flores. Enciclopedia jurídica mexicana (voz “Arbitraje”). Porrúa-UNAM, Instituto de Investigaciones Jurídicas, 2002, p. 315
consider the arbitration to be a creature of contract\(^7\), whose origin, occurrence and regulation depend on the existence and validity of the arbitral agreement as a manifestation of the continued subsistence of the parties’ consent. In fact, the binding force of the arbitral award, contemplated as the result of the arbitration proceedings, originates precisely from the decision of the parties to arbitrate the potential disputes.

B. Applicable legal framework to the arbitration agreement under Mexican Practice

The contractual legal system in Mexico is based on the Greek, Roman and French legal systems. Therefore, under the classical grouping of legal structures, the Mexican law practice falls into the civil law system in opposition to the well-known common law system. In consequence, codification has a primary role under this jurisdiction. Below, a brief description of the relevant laws for purposes of arbitration in Mexico:

1. Constitution of the Mexican United States

The constitutionality of the arbitration agreement and, therefore, of the arbitration as a valid legal method to solve disputes is based on the interpretation made by the Supreme Court of Justice of article 13 of the Political Constitution of the United Mexican States, which establishes that no one might be judged by a special court.

In such regard, the First Chamber of the Supreme Court of Justice ruled that the constitutional principle was limited to prohibiting the establishment of special judicial courts and that arbitral tribunals could not be considered judicial

courts since they do not form part of the Mexican judicial branch\(^8\), therefore upholding the existence of arbitral tribunals.

2. **International Agreements signed by Mexico and Soft Law**

**New York Convention**

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was approved on June 10, 1958. Mexico signed it on April 14\(^9\). The Mexican legal framework contemplates that once an international convention has been ratified by the country, its application becomes binding countrywide disregarding the federal form of state.

This is important because one of the basic elements of an arbitration agreement is related to the consent of the parties to enter into such contract. The 1958 New York Convention in its article II.2 states the following:

> 2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

As expected, the consent of the parties is an essential element to consider that an arbitration agreement has come into force.

**Inter-American Convention on International Commercial Arbitration**

This Convention was approved in Panama City on January 13, 1975. Mexico signed it on October 27, 1977\(^10\):

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\(^{8}\) Amparo in Review No. 237/2004, Emilio Francisco Casares Loret de Mola (April 28, 2004), which ruling is contained in the decision: I.a. CLXXXVI/2004, of the First Chamber of the Supreme Court of Justice of the Nation, Ninth Period.


Article 1: An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

The reference in the Inter-American Convention refer to the form that such agreements should take in order to be presumptively valid.

**UNCITRAL Model Law on International Commercial Arbitration**

On July 23, 1993 Mexico completely modified the Title IV, fifth book to introduce a new legal framework more adequate to the then imminent globalization and internationalization of the Mexican economy. The UNCITRAL Model Law on International Commercial Arbitration was adopted with few minor changes not relevant to this study. The newly signed commercial agreements opened the door to the celebration of complex international transactions and therefore, the setting of this new legal framework was vital to solve the potential disputes arising from the just acquired commitments\(^{11}\). Some excerpts from the law state:

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic

“communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Once again, the Model Law establishes as primary the role given to the consent of parties when determining the existence of an arbitral agreement.

3. Mexican Commerce Code

The Mexican Commerce Code is the internal legislation that governs the arbitration. Its title IV contains all the applicable dispositions applicable to international as well as to domestic commercial arbitrations. As part of the commercial law of the country, the interpretation principles and the supplementary rules applicable to the commercial matters also apply to international commercial arbitration.

Article 78 of the Mexican Code of Commerce provides that in commercial matters, each party will be obliged in the terms and conditions that seem to be sought and that the validity of the commercial act (acto mercantil) will not depend on the observance of formal requirements.
The Mexican Commerce Code in its article 1423 contains the following disposition:

Art. 1423 – The arbitration agreement shall be in writing and contained in a document signed by the parties, or in an exchange of letters, telex, telegrams, fax or other telecommunication means, that keep record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.¹²

Basically, the Mexican Commerce Code is a copy of the UNCITRAL Model Law and as such it prescribes exactly the same in regards to what should be considered a written agreement. It is important to note that none of the above referred legislations consider the signature to be an element of existence or validity of the arbitration agreement. It is the written form what these laws considered to be relevant, the signature is just a requirement to prove that consent has been given to arbitrate, otherwise the non-signatory situations would not even be subject of discussion. If the opposite were accepted, under Mexican law would be impossible to bring non-signatories to the arbitration. Everything would be reduced to the people whose actual signatures appear on the document, as they would be the only ones deemed to have consented to contract. Signature is considered to be one of the accepted means of manifesting consent, but not the only one. Based on this fact, the possibility of binding non-signatories to arbitral agreements remains open.

4. Jurisprudence

¹² Translation by the author
Furthermore, the First Chamber of the Mexican Supreme Court stated that the most important principles regarding the arbitration matters are the prevalence of the parties’ will and the exceptional judicial intervention\textsuperscript{13}. For instance, one decision from the Mexican Supreme Court stated that the arbitral agreement has its origins in the legal relationship, either contractual or not: “this legal reference confirms that arbitration has its origins in the agreement between the parties that, on one hand, determines which questions should be resolved through this means, and on the other, the proceeding as the necessary mean to resolve the dispute”\textsuperscript{14}.

The parties’ will is so relevant that all elements of the arbitration derive from it. As stated by the Mexican Supreme Court “the arbitrators powers and the scope of his decision derive from the parties' will as long as expressed in consonance with the law”\textsuperscript{15}.

Following the international practices and rules, in Mexico, arbitration is completely a creature of consent and out of this we can derive that the contractual principles regarding consent also apply to these matter.

\textbf{C. Contractual Nature and Requirements of the Arbitration Agreement}

The foundation of international arbitration is the arbitral agreement that might lead to an arbitration proceeding. Absent this agreement to arbitrate there would not be legal grounds for requiring a party to arbitrate a dispute or enforce an arbitral award against that party. Hence arbitration is a matter of contract

\textsuperscript{13} Register No. 166510

\textsuperscript{14} T.C.C.; S.J.F. Gaceta; Tomo XXXIII, May 2011; P. 1008

\textsuperscript{15} T.C.C.; S.J.F. Gaceta; Tomo XXXIII, May 2011; P. 1017
and a party has no obligation to submit its dispute to arbitration unless it has specifically agreed in an arbitration agreement\textsuperscript{16}.

Article II(1) of the New York Convention defines arbitration agreement as “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”\textsuperscript{17}.

From the given definitions of agreement, contract and arbitration agreement, it can be seen that an arbitration agreement is in essence a contract because it is an agreement that creates rights and duties, the right to submit to arbitration the differences arisen from a legal relationship and the duty for the other party to comply to the arbitration. Hence an arbitration agreement involves a contractual relationship between the parties, which to a great extent follows the same main principles of all the other contracts.

Under Mexican Law, the contractual nature of arbitration can be tracked down to the basic civil law definition of contract. Article 1793 of the Mexican Federal Civil Law says that the agreements which create or transfer rights and duties will be known as contracts\textsuperscript{18}. Article 1792 defines agreement as the pact between two or more parties to create, transfer, modify or terminate duties\textsuperscript{19}. A contract can be generally defined as: “an agreement which is either enforced by law or recognized by law as affecting the legal rights or duties of the parties”\textsuperscript{20}.


\textsuperscript{17} New York Convention \textit{supra}

\textsuperscript{18} Translation made from the original text of the Codigo Civil Federal de Mexico: “Articulo 1793: Los convenios que producen o transfieren las obligaciones y derechos toman el nombre de contrato”

\textsuperscript{19} Translation made from the original text of the Codigo Civil Federal de Mexico: Convenio es el acuerdo de dos o más personas para crear, transferir, modificar o extinguir obligaciones.

\textsuperscript{20} GH Treitel, An Outline of the law of contracts. Page 1
In addition, when it referring to arbitration agreements specifically, the Mexican Supreme Court has determined that its contractual nature is beyond discussion, and as stated by the court: “*arbitration is a contractual institution with the purpose of resolving a conflict*”\(^{21}\).

Several are the elements that allow identifying the contractual nature of an arbitration agreement and its close relation with a private commercial contract. Below, some of the main principles that are equally applied to arbitration agreements will be described.

1. **Principles of contractual law**

Contract law is ruled by several principles and values such as party autonomy and freedom of contract; contract relativity or contract privity principle and good faith. These principles apply to arbitration agreement due to its contractual nature.

1.1. **Party autonomy / freedom of contract principle**

The expression freedom of contract or party autonomy refers to the principle that the law does not restrict the terms and conditions on which the parties have agreed on in a contract. Most of the principles of contract law are based on the philosophy of *laissez faire*. Under this philosophy it is wrong for the governments to interfere with private agreements. The principle of freedom of contract also means that a person is not obliged by law to enter into a contract unless it is a manifestation of its will\(^{22}\), and, of course, with certain applicable limitations.

Freedom of contract theory implies that the parties have the complete choice on deciding whether they want or not to be bind by a contract, and when and what will be binding to them. This gives free autonomy to the parties to

\(^{21}\) T.C.C.; S.J.F. Gaceta; Tomo XXXIII, May 2011; P. 1048  
\(^{22}\) GH Treitel, supra
decide on the terms and outcomes they want to oblige themselves in and once the rules of the contract have been decided by the parties. The courts, in principle, have to respect any outcome that comes from them as an expression of the parties’ exercise of freedom\textsuperscript{23}. Courts are required to follow the rules decided by the parties in a contract because, as stated in the general definition of contract given before, a contract is enforced or recognized by the law as affecting the legal rights or duties of the parties.

The principal of party autonomy or freedom of contract is also a fundamental principle for the arbitration system. “The arbitral tribunal exists only when and to the extent that parties cause them to exist; for an arbitration to occur and a tribunal to have authority the parties must have freely chosen arbitration”\textsuperscript{24}. Additionally, some of the characteristics of the arbitral proceedings that have been considered by many authors to constitute some of the advantages of this alternative dispute resolution method such as its procedural and substantive flexibility as well as its confidentiality derive, mainly, from the party autonomy principle reigning in international commercial arbitration.

The application of this principle allows the parties to decide not only on the fact that they are going to arbitrate if they need to settle a dispute, but also on the applicable substantive law as well as the rules governing the proceedings. All these choices are supposed to be made when drafting the arbitral agreement. In those cases where parties fail to choose on any of the above-referred matters, international conventions, national laws, as well as national and international practice, have created mechanisms and criteria to determine the applicable set of rules.

Nonetheless, there are some limits to this principle, a general framework has been provided to ensure fairness in the arbitration process but in general, it can be considered that “party autonomy is the guiding principle in determining the

\textsuperscript{23} Mindy Chen, Contract Law. P. 14

procedure to be followed in an International Commercial Arbitration. It is a principle that has been endorsed not only in national laws, but also by international arbitral institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition\textsuperscript{25} by many countries including Mexico.

Due to Mexico’s civil law system many of the principles acquire binding force by being codified, this is the case of the party autonomy principle contained in the article XX of the Federal Civil Code. The extension of the party autonomy principle is highly influenced if not determined by the doctrine of \textit{pacta sunt servanda}. This doctrine is the seminal rule of Mexican law on obligations and contracts. Article 78 of the Mexican Code of Commerce provides that in commercial matters, each party will be obliged in the terms and conditions that seem to be sought and that the validity of the commercial act (\textit{acto mercantil}) will not depend on the observance of formal requirements. Likewise, the Mexican Supreme Court has recognized party autonomy as the source of powers and obligations of the arbitrator\textsuperscript{26}.

With regard to the main topic of this paper, which is the participation of non-signatories in arbitral proceedings, Depending on each particular case, the fact that a non-signatory initiates or is compelled to participate in an arbitration proceeding could be considered as a violation of this very basic contractual principle that seems to be the angular stone of arbitration. If not exercising its autonomy as a party, the required consent is hard to be drawn out of a non-signatory situation. What if from the beginning, the intention of the non-signatory was not to be bound by the arbitration agreement for considering it inconvenient to his interests? What if the arbitral tribunal or court allows it anyways and therefore violates the principle of party autonomy? Can an arbitrator make him arbitrate anyways without him having chosen arbitration? All these are questions that the doctrine and the legal practitioners are still

\begin{footnotesize}
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\item \textsuperscript{26} T.C.C.; S.J.F. y su Gaceta; Tomo XXXIII, Mayo de 2011; Pág. 1019
\end{itemize}
\end{footnotesize}
trying to answer and in most cases it will depend on the specifics of each case. To actually achieve justice, some limits, of course reasoned and founded have been set to this principle by allowing, in some very specific cases, non-signatories to be part of the arbitration.

1.2. Contract relativity principle or privity principle

Other principle that usually governs contracts is the proposition that if there is an agreement between “A” and “B”, this agreement cannot be sued upon by “C” regardless if “C” will benefit of it or not. This means that the rights created on a contract belongs only to the person who has stipulated for them and that contracts do not create any rights of action on the contract to a person that is not a party of it27.

Under the privity principle, the effects of a contract are limited to those who explicitly or implicitly have manifested their will to be part of the contract in question. This principle derives directly from the rule that contracts are a manifestation of the party autonomy and therefore, its legal effects can only reach those who have manifested their will to be bound by the contractual relationship28.

Contract privity is the logical consequence from the definition of contract and the reasons for enforcing. As seen in the definition of contract, contracts are recognized and enforced by the law. There are several explanatory theories of why the law recognizes as binding the agreements made in a contract. First of all, contracts create self-imposed obligations to the parties that agreed on them. The infringement of a contract calls for corrective justice to restore the balance between the party that had a right and the party that had an obligation29. Undertaking an obligation is only legally relevant if there are


29 Mindy Chen, supra
mechanisms to enforce that obligation. Law enforcement of contract is the mechanism in which parties can rely that the rights acquired by a party in a contract are going to be fulfilled by the party that undertook the obligations.

Contracts in general follow the privity principle because if contractual liabilities derive from a voluntary undertaking, then only the person that has obliged has the burden of doing so, and only the person that has been given a right can enforce it\textsuperscript{30}. As a result of its contractual nature and the consequential applicability of this principle, the arbitral agreement follows the privity principle and is only binding on the parties to such agreement\textsuperscript{31}.

However, as the signature of the arbitration agreement only constitutes an element of proof that the parties consented to arbitrate and is not an element of validity of the arbitration agreement; the blind application and abstraction of this principle in the context of international arbitration could result in an unfair, unpractical and inefficient award, however, this fact can be counteracted by the extension of the effects of the arbitration agreement to non-signatories\textsuperscript{32}.

On this regard, the issue would then be to determine if these non-signatories can be considered to somehow have manifested their will to arbitrate even if their signatures are not on paper as a proof of their consent.

\subsection*{1.3. Good faith principle}

As in any other contract, good faith is cardinal to arbitration agreements. Otherwise, unnecessary costs and delays might be caused. If we claim that arbitration is less costly and more effective than the procedure before courts, it

\begin{footnotesize}
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  \item \textsuperscript{30}Mindy Chen, \textit{supra}
  \item \textsuperscript{31}Born, \textit{supra} 2009
  \item \textsuperscript{32}Ferrari, Franco, and Stefan Kröll, eds. \textit{Conflict of laws in international arbitration}. Sellier, 2011. p. 154
\end{itemize}
\end{footnotesize}
is of capital importance that the parties who decided to enter into arbitration prove their good faith with their actions in the proceedings\textsuperscript{33}.

But not only in this instance should good faith be considered important for arbitration, “(…) courts should apply the principle of good faith to determine whether arbitration including a non-signatory is appropriate. Essentially, courts should utilize the equitable principle of good faith to analyze both the contractual language as well as the conduct of the parties during negotiation and performance of the contract to determine whether the non-signatory may compel or be compelled to arbitrate”\textsuperscript{34}. This reasoning makes sense due to the fact of the lack of actual commitment or will of the non-signatory to be part to the arbitration proceeding, and it could be seen as unfair unless good faith plays an important role in the determination of the actual part played by the non-signatory in the relationship between the parties.

1.4. Formal validity – Need for writing

A formality can be understood as the required way in which the will of the parties has to be materialized in order to produce the desired legal effects. The general rule of contracts is that they can be made in an informal way. By this rule most contracts does not have any formal requirements to be valid and exist. Hence, in spite of common belief, for a contract to produce its legal effects it does not have to be written. Contracts for sale of goods in spite of the amount, it can be millions of dollars, can be made orally and without any kind of formality. However in practice these contracts are often made in writing even there is no such requirement. The main reason for the general rule of not requiring forms is that they are seen as inconvenient for the commerce\textsuperscript{35}.

Notwithstanding that contracts usually do not have to follow any forms. Under some circumstances, some contracts are required to fulfill some forms. Asking


\textsuperscript{34} Id.

\textsuperscript{35} GH Treitel, \textit{supra} at 61 - 62
for certain form in a contract means that its conclusion has to be made in a certain way. Most of the cases when formal requirements are asked they call for at least some kind of written form.\(^{36}\)

Formalities can be considered as protection norms: depending on the nature and the importance of the legal act, the formalities required might be more complex. And the reason is simple: to ensure that the effects of the legal act that is about to be celebrated are correctly evaluated, to avoid situations in which a person or corporation become part of a legal situation they never really wanted to be part of in the first place.\(^{37}\)

The consent to arbitrate, in other words the arbitral agreement, according to the applicable sets of rules, both at the international as well as at the Mexican level has to be in written form. This is going to be discussed in the next section.

The *ratio legis* behind the formal requirements is clear and valid. No one should be compelled to arbitrate and therefore to waive its right to go to court without their previous consent. However, in recent days, there are several commercial practices that lead to the absence of the formalities, even in cases in which the intention of the parties was to choose arbitration as a dispute resolution method. In other words, the situations in which non-signatories try to commence arbitration proceedings or where signatories try to compel non-signatories to arbitrate are common in international commercial arbitration.\(^{38}\)

## 2. Principles exclusively applicable to Arbitration

### 2.1. Separability principle

It is important to mention that the Mexican doctrine and practice follows the autonomy principle when referring to the compromiser clause. As established by this international principle, the arbitration clause in private arbitration is

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\(^{36}\) Id. at 62
\(^{37}\) de Cossio, supra
\(^{38}\) Id.
considered as an independent agreement of the other terms contained within the agreement in which the clause is inserted\(^\text{39}\).

### III. The Issue of Binding Non-Signatories to International Arbitration Agreements

#### A. Generalities and previous definitions

The situations related to the participation of non-signatories in the arbitral proceedings, either as claimant or defendant, have always been of great importance and complexity.

As arbitration became such a popular mean of dispute resolution, the weaknesses of its contractual nature began to show. Unlike in litigation, where courts have the possibility of immediately attract additional parties with rights and obligations linked to the core dispute, arbitrators have authority only over the parties that gave them this authority, therefore their ability to bring non-signatories into the arbitral proceedings or to commence arbitration on their request is limited. This fact is resulting among others out of the contractual privity principle. Arbitrators lack the attraction of jurisdiction the judiciary has and sometimes, the two-party design of the arbitration agreement is less than adequate when it comes to transactions that involve more parties than the original signatories\(^\text{40}\).

Doctrinaires and legal practitioners have been trying to provide a comprehensive solution to this issue. In the end the dilemma for the arbitrators and judges can be summarized in having to balance the contractual nature of the arbitral agreement and their will to uphold the fairness and effectiveness of the arbitral mechanism.

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40 PAVIC, Vladimir, “Non-signatories and the Long Arm of Arbitral Jurisdiction”. University of Belgrade-Faculty of Law
Of course, improvements have been made after all these studies and past experiences, to adapt international arbitration to the constant changes in the world, and the opinions and cases are every time richer and with deeper insights. However, the core questions still have to be answered on a case specific basis every time one of these issues arise.

The difficulties of the situation become larger if we take into consideration that neither the New York Convention nor the UNCITRAL Model Law addresses the topic.

When referring to the Mexican legal frame, the situation is not different. The Mexican Commerce Code in its Chapter IV, which rules on the matter of international arbitration also completely neglects this topic.

So far, it has not been decided if the non-signatory issue should be solved applying rules of the respective domestic law to which the arbitration agreement in question is subject or rather take into consideration the nature of the international arbitral system as a transnational, practical and flexible dispute resolution method. The first option would provide certainty, very much required in large international transactions, by determining a defined set of applicable rules. However, it could at the same time partially disregard the consensual and national nature of the international arbitration. On the other hand, the second option if taken too far could compromise the certainty. And again the only answer to this question comes down to a balancing act between contract privity principle and parties’ consent. This topic is going to be discussed with greater insight in one of the following sections.

Slowly, as the popularity of the arbitration as a mean to solve international commercial disputes grows, the arbitral tribunals and national courts are relaxing the abstract application of the contractual privity principle and adopting


an approach more open to the joining of non-signatories to the arbitral proceedings. Proof of this are the various theories that have been developed, through the years to extend the effects of the arbitration clause to non-signatories, both by the doctrinaires and out of case law.

Some of these theories are going to be subject of further comment later on this study.

**B. Difference between a non-signatory and a third party in arbitration**

Third party is a wide term referring to any party that is not designated in an arbitration clause, the expression includes the third party *stricto sensu*, meaning all parties that are not part of the arbitration and did not manifest their consent to arbitrate in any form and the so called non-signatories considered as those who failed to sign the arbitration agreement but are otherwise bound by it.43

“The term “non-signatory” remains useful for what might be called “less-than-obvious” parties to an arbitration clause: individuals and entities that never put pen to paper, but still should be part of the arbitration under the circumstances of the relevant business relationship. The label does little harm if invoked merely for ease of expression, to designate someone whose right or obligation to arbitrate may be real but not self-evident”44.

After quickly reviewing the contractual nature of arbitration and the applicable principles, the issue becomes more obvious. Everyday with increasing frequency, arbitrators face the problem of non-signatories of the arbitration agreement wanting to compel arbitration and signatories wanting to bring non-


signatories into the proceedings seeking to fulfill the ends of justice, but how to
make justice without destroying consent?\textsuperscript{45}

To answer this point at issue, international practice and doctrine have
developed a variety of theories, which on different grounds, allow the non-
signatories to take part in the arbitration.

In practice the problem becomes more complex if we take into consideration
that most of the times the non-signatory situations often arise in different
contexts and a single set of facts sometimes involves the application of several
overlapping theories and principles all at once\textsuperscript{46}.

\textbf{C. Conflict of law issues related to the non-signatory situation}

As mentioned before it has not yet been clearly defined what law should apply
when having to decide if an arbitral tribunal should or not allow a non-signatory
of the arbitral agreement to be part of the proceedings either as plaintiff or
defendant.

The applicability of international principles to determine who are the parties in
the arbitration clause have been backed up with several distinct arguments, “a
few awards have characterized these international principles as lex mercatoria.
Others have apparently relied on the parties’ incorporation of institutional
arbitration rules, as reflecting a choice of international or transnational law”\textsuperscript{47}.

In contrast, other courts and arbitral tribunals, when deciding on this regard
have concluded that, in order to protect the consensual nature of the
agreement and in absence of any indication that the parties want it to be

\textsuperscript{45} Hosking, James M. “Third Party Non-Signatory’s Ability to Compel International Commercial

\textsuperscript{46} BREKOULAKIS, supra

\textsuperscript{47} BORN, supra 2009
otherwise, there is no sufficient reason for them to apply a different law to this issue than the one selected by the parties to govern the arbitral agreement.

As we will discuss in the following section, international arbitration practice has developed a lot of different theories to subject non-signatories. Gary Born affirms that “the better approach to the choice of law, applicable to non-signatory issues requires considering the particular legal theory that is relied upon to subject a party to the arbitration agreement”\(^{48}\).

## D. Theories

In the realm of international arbitration, many are the challenges arbitrators, parties and courts have to face. Bringing a party into arbitration is never a pleasant task, and with the development of international contracting in which several parties can take part in the performance of a contract, if any dispute arise, it is more and more common that more than one party is involved. The times in which it was clear who agreed on what are far gone, and nowadays products and services are delivered, in most of cases, from several distributors and suppliers.

Due to the increase of internationalization and with the intention of mitigating the negative effects that the blind application of the contract privity principle might have on the consensual nature of the arbitration, arbitral tribunals and national courts have faced the need to develop different theories and positions allowing the inclusion of those parties who did not, explicitly, signed the contract or the arbitral clause, and in that way extend the effects of the arbitral agreement to non-signatories.

There are as many arguments as legal systems trying to incorporate non-signatories into an arbitral dispute. Many have been the attempts to compile the different theories internationally applied to the matter. Nonetheless, since

\(^{48}\) Id. at 1217
the accepted cases vary from one jurisdiction to another, the legal frameworks are different and the differences between the theories are not always clear. This last factor has resulted in overlapping theories concerning very similar sets of facts that most of the times make a court or arbitral tribunal reach different conclusions. This lack of systematization has turned the already complex topics that surround non-signatories into one of “the most delicate and critical aspects in international arbitration.”

Although, as mentioned, compiling the theories and legal arguments developed around the non-signatories issue has been a complex task intended by several reputable authors and scholars, in the following paragraphs, an attempt will be made in order to provide a theoretical framework that provides the reader with some basic information on the current affairs of this topic. Four of said theories are going to be explained, and it is important to clarify that the following list is, of course, not exhaustive but the theories here explained only want to constitute examples of the grounds commonly given to allow non-signatories to take part in an arbitral proceeding. The theories hereby provided in compilation evidence and support the conclusion reached in the chapter before, that the New York Convention has left the door open to the inclusion of non-signatories into arbitral proceedings by considering the signature only as one of the accepted means for proving consent, and not a determinant of the validity or existence of the arbitral agreement.

As it will be further explained below, each set of facts might lead to a different rationale behind the decision. Nonetheless, certain patterns can be recognized and among the most frequently cited premises theories of representation, contract law, corporate principles and implied consent lead the discussion.

It is very important to note that it is not the intent of this thesis to discuss on the several reasons that might lead to the substantive invalidity of the arbitral agreement. This is clarify with the purpose of providing a reason why these

theories are presented under the assumption, as very well scholars have pointed out, that there is, in fact, a substantively valid arbitration agreement on which: (i) a non-signatory is trying to rely to start or join the arbitration proceedings, or (ii) on which a signatory party is trying to bring a non-signatory into the arbitration proceeding.

1. Agency

One of the most basic contractual relationships that exist between two parties is an agency. Although the definition of agency may differ from legal system to legal system, as pointed out by Brekoulakis, “the basic proposition behind these theories is that a party (agent) executes a contract on behalf of another (principal)”\(^50\). In principle, in many legal systems, including the Mexican, an agent can legally bind a principal. However, the scope and role of the agent is determined by the contract entered into between such agent and the principal.

Under private contract principles, the agent can engage into activities, contract obligations, and sale and purchases goods or services, among others, in which case all of those activities are understood, as long as part of the agency’s scope, as done by and on behalf of the principal\(^51\). On the principal’s behalf, he may among other things, sign arbitration agreements. This is how “traditional principles of agency law may bind a non-signatory to an arbitration agreement”\(^52\), because the principal is definitely not a signatory of the agreement, but it has been considered to be legally bound by it. For instance, in United States which is one of the jurisdictions where the agency theory is mostly used\(^53\), courts accept the introduction of non-signatories claiming to be part of the arbitration, or excluded thereof, under agency principles. As

\(^{50}\) BREKOULAKIS, supra

\(^{51}\) Id.

\(^{52}\) Thomson-CSF S.A. v. Am. Arb. Ass'n, 64 F.3d 777 (2d Cir. 1995) (citing Interbras Cayman Co. v. Orient Victory Shipping Co.,S.A., 663 F.2d 4, 6-7 (2d Cir. 1981)).

\(^{53}\) HANOTIAN supra
example, in *Arnold vs. Arnold* the court decided that the effect of an arbitration agreement were extensive to non-signatories under the “well-settled principles affording agents the benefits of arbitration clauses made by their principals”54.

When discussing about arbitration agreements, however, the cut is not always that crystal clear and additional issues may arise, such as those in which the agent’s signature would then be binding for such agent and not necessarily for the principal55 or would be binding for both.

The main issue derives from the theory of severability of the underlying contract from the arbitration clause, and whether under such case, the agent who has a mandate to conclude a contract can legally understood that he/she has an extensive mandate to enter into an arbitration agreement56. In specific, the question has been whether the agent needs a specific mandate to enter into the arbitration agreement or not, and which should be the law governing such answer. Because in the case of arbitration agreements several can be the relevant law, an answer needs to be provided taking into account those different possibilities. In principle, under private international law, the law mentioned in the agency contract governs the agency, and if such law is not mentioned, by the law that follows the agent in its place of business57. But because international arbitration can be governed by a different law, “it is suggested that apart from the above laws, the law governing the arbitration agreement should be considered in the alternative on the basis that the law governing the principal-agent relationship will likely no be known or readily accessible to a counter party”58. It is important to remember that this is one of the ways the international community has tried to answer the problem of agency, but it is within the power and scope of an arbitral tribunal or a national

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54 920 F.2nd 1269 (6th Cir. 1990), referred to by Hanotiau
56 Brekoulakis *supra*
57 Art. 6 of the 1978 Hague Convention on the Law Applicable to Agency
58 BREKOULAKIS *supra*
court to decide whether to consider or not the arbitration agreement law relevant for the case at bar.

It seems that is rather common as an important requirement that the agent signs the contract within the scope of the agency relationship and that this relationship is relevant to the signature of arbitral agreements. The level of relevancy of the relationship and specificity of the mandate vary from agency to agency. For instance, if we refer to a general agency, in which the agent has a general extended mandate, it has been assumed that such authority is enough and allows him or her to enter into the arbitration agreement binding the principal. Of course, in any case of agency, the burden of proving that the signatory signed the agreement as agent and not as principal or on his or her own behalf lies on the party seeking to bind the non-signatory. Agency therefore is not presumed but it must be proved. Such burden of proof is usually standard in different jurisdictions but the requirements and legal means by which to prove the agency relationship vary from jurisdiction to jurisdiction. As a consequence, the resulting applicable law and means of proof will be subject to the relevant choice-of-law rules.

Although the foregoing description seems to bring some legal issues and problems to surface, binding non-signatories through agency theories and developments is one of the arguments that triggers less controversy among the international community members. This is mainly due to the fact that it relies on the representation principle, which is accepted in almost all jurisdictions. It does not mean however, that variations of the theory do not occur from legal system to legal system.

2. Assignment and Other Transfers of Contractual Rights

59 BORN, supra 2009
61 HANOTIAU supra
The international mobility and fast development of commerce have led to the more common practice of contracts’ and rights’ assignment. It is easier nowadays to assign legal obligations, rights of payments and the like rather than enter into new contracts that will require additional negotiation, time and larger legal fees. Usually, international transactions cannot wait, and assigning rights and obligations seems a fast way to deal with foreign markets. Assigning can be seen as a continuation of a practice that has been so far successful to the assignor, and takes away the burden from the assignee to look for something already there on the hands of someone else.

Together with contracts, rights and obligations, nowadays it is generally accepted that parties to an arbitration agreement can transfer or assign such arbitration agreement just as with any other contract\textsuperscript{62}. When it comes to the assignment and transfer of contractual rights contained in a contract with an arbitration agreement, the analysis is centered in determining if the assignee or any other transferee is bound by the arbitration clause contained in the transferred contract. Special attention must be placed on whether the transferee’s consent is required so that it can become a part to the arbitration agreement.

Several jurisdictions such as the United States in cases like Star-Kist Foods vs. Diakian Hope\textsuperscript{63}, France\textsuperscript{64}, as well as most of the other civil law countries have held that when transferring the underlying contract the arbitral agreement is also conveyed. It has been understood that some sort of “automatic” transfer that does not require the assignee to specifically consent to arbitrate unless otherwise agreed by the original parties occurs\textsuperscript{65}. It can be the case that the original parties to the contract limit their rights under such contract, and more

\textsuperscript{62} BORN \textit{supra} 2012

\textsuperscript{63} (Star-Kist Foods v Diakian Hope 423 F Supp 1220 (CD Ca 1976)

\textsuperscript{64} (Soc Taurus Films v Les Films du Jeudi. Cour de Cassation, 8 February 2000 Rev Arb 280)

\textsuperscript{65} BORN \textit{supra} 2012
often that expected; such limitation might include the possibility to assign the arbitration clause.

In cases where the assignment of the arbitration clause has been excluded, the exclusion can be either express or implied. As its names shows, an express exclusion would be such expressly contained in the contract or in the arbitration agreement, and directed towards the arbitration clause. Implied exclusion would operate for example in those cases in which it is clear from the arbitration agreement that the parties had a particular interest in arbitrating exclusively with each other, for example due to strict confidentiality terms, in which cases the arbitration would be closely related to the personal characteristic of the contractual party, that cannot be easily assumed part of the transferred rights. If this exclusion of the assignment of the arbitration clause is not express or cannot be read from the particular circumstances of the case, the “automatic” transfer of the arbitration clause along with the underlying contract would be assumed and the non-signatory transforee would be deemed bound by it.\(^66\).

On the other hand, there are other jurisdictions such as England and Russia\(^67\) where it is suggested that, due to its autonomous nature, the arbitral clause cannot be automatically transferred\(^68\). This is an argument that can be contended. One reason would be that in case of transfer, the main effect is that the transferee enters the contract in the exact same legal position as the transferor, who is undoubtedly part of the arbitration agreement enclosed in the transferred contract. Therefore, it has been sustained that “the transferee cannot choose to assume the transferor’s substantive right only, namely without the attached arbitration clause. Otherwise, the transferee would be able to unilaterally negate the arbitration clause, and therefore alter the legal position of a third party, namely the debtor; such a position would be

\(^{66}\) BREKOULAKIS supra

\(^{67}\) Moscow District Court, 21 April 1997, IMP Group (Cyprus) Ltd v Aeroimp (Russian Fed) in (1998) 23 YBCA745)

\(^{68}\) BORN supra 2009
unwarranted and therefore unacceptable”\textsuperscript{69}. Accepting a different position would mean that the transferee could cherry-pick what it better suits him or her, and leave the rest of the obligations aside.

The foregoing is not to conclude that there might also be cases in which the assignment is prohibited by the law or by contractual limitations. These elements need to be taken into consideration when using assignment or transfer as theory to determine if a non-signatory can be part of an arbitral proceeding.

Under the last scenario, it would be logical to conclude, as Born does, that if the assignment has taken place in violation of the referred prohibitions, would amount to an assignment that did not occur and, consequently, the non-signatory transferee would not be considered to be bound by the arbitration agreement\textsuperscript{70}. An example of such case was presented to the Swiss Federal Tribunal in the Judgment of 16 of October 2001, 2002 Rev. arb. 753. It is worth to mention that, as in the prior agency theory and all the other theories that will follow elaborating on the non-signatory issue, the approach and actual application varies from legal system to legal system.

3. Incorporation by Reference

It is often the case that contracts are to be fulfilled by the acts of several parties. For instances, in cases of construction contracts in which more than one contractual party exist such as the main contractor, the subcontractor, temporary contractors and the like, it is rather a common practice to incorporate the terms of a framework agreement into each and all of the following and dependable contracts.

\textsuperscript{69} BREKOULAKIS \textit{supra} at 33
\textsuperscript{70} BORN \textit{supra} at 98
This situation has made that when disputes arise in one of the subsequent contracts a theory to bring those parties to arbitration has been developed. This additional theory has been developed by the doctrine and tribunals and it has been called incorporation by reference. It is largely based on the basic premise that "a non-signatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the non-signatory which incorporates the existing arbitration clause"\textsuperscript{71}.

The key element of this theory is the existence of different layers of contracts that usually refer to each other, or incorporate the terms of one into another. It is important to note that one of the referred contracts has to contain a valid arbitration clause that applies to the contractual relationship established in that same contract. Now, the issue arises when two parties refer to that separate contract containing such arbitration clause as being part of their contractual relationship. Another key element of the theory is the lack of express agreement to the first separate contract by either one or both parties. This means that the non-signatory situation emerges when only one or none of the two parties were actually part of the referred contract\textsuperscript{72}.

In these situations, two approaches could be taken. On one hand, it could be argued that an express reference not to the contract but to the arbitration clause itself is necessary in order to incorporate it to the new contractual relationship. On the other, it could be argued that the reference to the contracts containing the arbitration clause would suffice to incorporate the arbitration clause itself.

It is important to know that the prevailing approach to these cases, among almost all countries, especially the ones that adopted the UNCITRAL Model Law, is that the reference to the arbitration clause should be express and specific in the second contract\textsuperscript{73}, this is also known as the restrictive approach.

\textsuperscript{71} Thomson-CSF S.A. v. Am. Arb. Ass'n, 64 F.3d 777 (2d Cir. 1995) (citing Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.,351 F.2d 503, 505-06 (2d Cir. 1965)

\textsuperscript{72} Brekoulakis \textit{supra}

\textsuperscript{73} Id
An example is provided in the case of Nanisivik Mines Ltd vs. FCRS Shipping Ltd\textsuperscript{74} case in which the Canadian court found that a shipper was not bound by the arbitration clause contained in the charterparty that was incorporated by general reference to the bill of lading, to which both shipper and charterparty were parties. Also, the Spanish court in a similar case involving a charterparty and a bill of lading held that the party to the latter was not to be bound by the incorporate by general reference of the charterparty that included an arbitration clause\textsuperscript{75}. But even countries that have not incorporated the UNCITRAL Model Law such as England follow this restrictive approach. In particular, English courts have been reluctant to change their view: “English courts have maintained a firm position regarding the firm restrictive approach, according to which express and specific reference to the arbitration clause is required for its incorporation in a contract between different parties, even if one of them is a party to the contract in suit”\textsuperscript{76}.

The other approach, as mentioned above, is that taken by few jurisdictions such as Switzerland and the United States. Those countries and their courts have taken a more liberal approach and uphold that arbitration clauses can be incorporated by generic reference. Their main argument is that if contractual principles allow incorporation by generic reference, the same should apply for the arbitral clause. Swiss courts, in particular, have supported their view in a liberal interpretation of the New York Convention. In their opinion, the Convention is silent regarding the appropriate way of incorporation by reference and because the aim of the New York Convention was to liberalize commerce and facilitate resolution of disputes, incorporation by general reference is enough to bind a non-signatory to arbitration\textsuperscript{77}. An example of this

\textsuperscript{74} Ottawa Court of Appeal, 10 February 1994
\textsuperscript{75} Barcelona, Court of Appeal, 9 April 1987.
\textsuperscript{76} Brekoulakis \textit{supra}
\textsuperscript{77} Id
approach is provided in the decision entered in *Tradax Export vs. Amoco Iran Oil Amoco Company*\(^7^8\).

Although the reasoning seems sound, the rest of the international community considered that the fact that the third party might not even know that the referred contract involves an arbitration clause would constitute a threat to commercial certainty and the contractual nature of the arbitration as the third party to the arbitral clause would not have consented to if he does not even know it exists\(^7^9\). However, we are of the opinion that this argument could be followed by a counter-argument, which is the legal obligation of the third party’s counselor to conduct due diligence and request, at least, a copy of the referred contract and make himself or herself aware of the contracting terms he or she is agreeing to comply.

In summary, although there is a prevailing position, this matter is far from reaching a global consensus. It is an open question whether the need for specificity in the reference to the arbitration agreement is necessary to effectively incorporate the arbitration clause to a second contract in which the parties may or may not be the same as in the original agreement. An additional element should be taken into account, which is that the formalities that each jurisdiction requires to be complied are different, and therefore, increase the complexity and extension of the discussion.

Nonetheless, for purposes of this paper, the main point to be made is that courts, arbitration tribunal as well as doctrine and scholarly increasingly consider non-signatories to be, in some way, part of or at least relevant to the arbitration agreement.

4. **Group of Companies Doctrine**

\(^7^8\) 7 February 1984

\(^7^9\) Brekoulakis *supra*
One of the theories that present the most challenging approaches and discussable results is derived from, what nowadays would be considered a rather standard practice, the existence of conglomerates or group of companies. As a result of the complexity of modern days commercial transactions, it is every time more common that big corporations operate on a model including holdings, subsidiaries, affiliates and branches. As a consequence, identifying the particular or specific party with whom an agreement has been entered into and the one that is trying to enforce it or against whom enforcement is sought is not easy. There is not always an identity between those companies.\textsuperscript{80}

The relevance of this theory and the complexity of its analysis has made it the quintessential of the non-signatory issues. As said by Abdel Wahab: “it represents the foundation stone of the concept of extension, and the formal ‘big bang’ theory that triggered the debate over the existence and scope of third party intervention”\textsuperscript{81}. The theory of group of companies, therefore, represent an array of complex issues ranging from representation to actual beneficiaries passing through incorporation by reference and assignment theories. It is, indeed, a pool where all theories overlap, making the decision making process more difficult that before.

This theory purposes to bring into arbitration disputes those companies that, although part of the complex business net, did not enter expressly into an agreement with the party seeking relief or against whom relief is sought. The landmark decision in the group of companies theory is that entered in Dow Chemical vs. Isover Saint Gobain\textsuperscript{82} case in which the arbitration panel decide that a group of companies with Dow Chemical as parent exercised ownership and control over the other subsidiaries, and since Isover received performance and delivery from any of the subsidiaries without placing any emphasis on the

\textsuperscript{80} Hanotiau \textit{supra}

\textsuperscript{81} Abdel \textit{supra}

\textsuperscript{82} ICC Case No. 4131 of 1982
actual contract, the group of companies was entitled to be part to the arbitration.

Several issues might trigger the application of the group of companies’ theory. One of those issues, and the most commonly used, is related to the economic obligations that are acquired by one or more companies within the group to secure another company but trying to maintain a separate legal entity. It could be considered an extension of the contractual theory of piercing the corporate veil, and a way to deal with the abuse sometimes committed by big corporate groups transferring debt to small subsidiaries with not enough capital to cover claims.

In these cases, the proposal of this theory can be exemplified by the holding in the ICC Case No. 5103 in which the arbitral tribunal determined that “the security of international commercial relations requires that account should be taken of its economic reality and that all the companies of the group should be held liable one for all and all for one for the debts of which they either directly or indirectly have profited at this occasion”\(^{83}\). An important element of this prong of the theory is the existence of an economic reality that bring the companies together, because, as said by Abdel Wahab\(^{84}\) and Hanotiau\(^{85}\), simply belonging to a group of companies is not reason enough for the application of the theory. In this sense, a sort of consent is required, either express or implied, in which a court or arbitral tribunal can rely as the source of agreement.

In light of the above, the requirement for a court or arbitral tribunal to use the theory of group of companies can be summarized in three: (i) consent should be analyzed under a special light due to the existence of a group of companies being in some way part to a transaction and members to the group; (ii) consent does not necessarily mean express agreement to arbitrate but certain conducts that may amount to implied consent, such as the case in which another company different from the one signing the contract actively participates in the

\(^{84}\) Abdel supra
\(^{85}\) Hanotiau supra
negotiation phase, or requires certain elements to be included because e.g. it will be the guarantor to the contract; and (iii) being member of a group of companies does not automatically translates into being in jeopardy to be considered as a non-signatory and be called to arbitration.\footnote{Adopted from Hanotiau supra}

It is important to note that the group of companies’ theory does not exclusively refer to a conglomerate of commercial entities, but it can be extended to cases arising from investment arbitration in which a State is one of the parties.

5. Additional Note on Mexican Law

The first three theories discussed by the arbitral tribunals, courts and academia are based mostly on principles of contract law. The arguments presented by each of the abovementioned to allow arbitral agreements reaching non-signatories in cases of assignment and agency heavily rely on common and civil law principles of contracts. Likewise, the same applies in cases where the arbitration clauses are included by means of incorporation by reference.

Generally speaking, these principles also apply in the Mexican legal system. Therefore as it will be discussed in the following chapters, when trying to enforce an arbitral agreement against or by a non-signatory, Mexican courts and tribunals should not take a much different approach as that proposed by other leading countries in International Arbitration. Under Mexican law, it will be shown that in certain cases not much resistance should be found when invoking these grounds.

IV. Conclusions and Suggested Approach
A. Preliminary considerations

As stated in the introduction of this research, the aim of the study was first to evidence and analyze the contractual nature of the arbitration agreement and the consequential application of the contractual principles, at the international and Mexican level. Second, to describe how and under which grounds non-signatories have been allowed to join the arbitral proceedings in the arbitral practice. Third, to analyze if and when, given the nature of the arbitration agreement, non-signatories are considered to be bound by it also under Mexican law and fourth, after having considered what it is being done in the international practice, to provide a suggestion on how the issue of the non-signatories should be approached under the Mexican legal frame. This section would be dedicated mainly to provide the recommendations.

A few preliminary considerations, summarizing the information described in the previous sections of this paper seem to be pertinent.

As a result of the contractual nature of the arbitral agreement, parties can not only determine if they are going to settle their potential disputes via arbitration but in case they have done so, they can also convene on the substantive law they want to have applied to the merits of parties’ dispute, the substantive law governing the arbitration agreement, the procedural law they want to have applied to their proceedings and the conflict of law rules.\(^{87}\)

In addition to this, the contractual nature of the arbitral agreement, recognized at the International as well as at the Mexican level, calls also for the application of the general contractual principles of relativity and good faith.

It has not yet been determined if this particular topic should be addressed by applying the domestic law applicable to the agreement or if a more liberal approach should be taken for the sake of preserving the national nature of

\(^{87}\) BORN, supra 2012
international commercial arbitration. For the purpose of this analysis we will consider both scenarios.

The liberal approach, understood as the vision that proposes the application of general principles of international law to determine who are the parties to arbitration even when Mexican national law is deemed to be the governing law of the agreement. Adopting this approach has proven to be a trend among the international community.

Cases like the celebrated *Dow Chemical*\(^8^8\) in which the doctrine of group of companies was upheld even when it was not contemplated in the French legal system for considering it a usage of international commerce is an example of how this approach could contribute to achieve fair and effective results on arbitration.

If in all cases and jurisdictions this were the approach the relevance of having the national laws in this regard would be limited if not inexistent. Nonetheless, it is important to keep in mind that if taken too far could be used as “a shortcut permitting avoidance of rigorous legal reasoning, to quickly agree without substantial factual or legal analysis, to the extension of the relevant arbitration clause to non-signatory”\(^8^9\)

Nevertheless, cases such as *Peterson Farms Inc v C&M Farming*\(^9^0\), evidence the fact that when having to decide on who are the parties to an arbitration agreement courts sometimes still rely on their national laws. Hence the importance of bringing the matter to a national, in this case Mexican level\(^9^1\).

This situation constitutes a huge problem because it leads to the application of divergent criteria depending on the jurisdiction, and even within the same jurisdiction it can also lead to divergent court rulings because not all the

\(^8^8\) Interim award of September 23, 1982 in No. 4131 available at http://www.translex.org/204131

\(^8^9\) HANOTIAU, supra

\(^9^0\) Peterson Farms Inc v C & M Farming Ltd [2004] APP.L.R. 02/04 available

\(^9^1\) BREKOULAKIS supra
theories applied so far to the question at bar are incorporated in all legal systems, leaving space to court interpretation. This fact seriously compromises the legal certainty expected by the parties.

Although Born\textsuperscript{92} approach of deciding on a case-by-case basis, depending on the reason invoked to allow the non-signatories to be part of the arbitral proceedings is logical and useful when trying to determine who are the parties to an arbitration agreement. The core question remains the same. The mentioned theories are constructions made under different legal reasoning, whose ultimate goal is to objectively ascertain if the non-signatory can be bound by the arbitration agreement, even without having signed it, according to general contractual and non-contractual legal principles.

Bearing all this in mind, the next section will analyze the previously explained theories on the light of the Mexican system. We will assume that the Mexican courts or the arbitral tribunals are applying only Mexican law to the issue of determining the parties, as Sandrock suggests and then the study will ambitiously try to suggest a mean to mitigate the negative effects of the problem of the non-signatories and the thereto-attached conflict of law issues.

\textbf{B. The model assuming Mexican law applies to the non-signatory issue on theory-by-theory basis.}

At the beginning of this research it was mentioned that one of its limitations was that it only comprises a limited number of the theories that have so far been applied to join non-signatories of the arbitration agreement to the arbitration proceedings. The chosen and exposed theories in the precedent sections were: agency, assignment, incorporation by reference and group of companies. In the following section we will explore these theories applying Mexican law.

\textsuperscript{92} Born supra 2009
1. Agency

As in most jurisdictions Mexican law contemplates the principle of representation, which constitutes the basis of the agency theory.

In its article 1800 the Mexican Federal Civil code states that “the one who has the capacity to contract can do it either by himself or through another person legally authorized”\(^{93}\). This is what Mexican Law understands as representation.

Additionally, the above-mentioned code in its article 2546 provides the definition of agency saying that it is “a contract by virtue of which the agent obliges himself to execute on behalf of his principal all the legal acts conferred to him”\(^{94}\).

As previously explained in this paper, some authors as Brekoulakis\(^{95}\) affirm that the law governing the arbitral clause might also be the law governing the principal-agent relationship, on the basis that any other law would be completely unknown by the counterpart. In my opinion, this would preserve the legal certainty in favor of the counterpart but could also generate the opposite effect for the agent, who would then not know when he is signing in his own name if he does not know the applicable rules for the agency in the jurisdiction whose law governs the arbitral agreement. Anyways, in case the courts or arbitral tribunals, decided to apply Mexican law to this matter when deciding who is part to an arbitration agreement, according to the article 2587 III of the Mexican Federal Civil Code\(^{96}\) the power of attorney conferred to the agent must include the express clause that it can enter arbitral agreements on behalf of the principal.

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\(^{93}\) Free translation of the article 1800 Mexican Federal Civil Code.

\(^{94}\) Free translation of the article 2546 Mexican Federal Civil Code.

\(^{95}\) Brekoulakis supra at 46

\(^{96}\) Article 2587 III of the Mexican Federal Civil Code Free translation
The drawing of the conclusion is straightforward. When Mexican Law results applicable to the issue of non-signatories of the arbitral agreement, the theory of agency would be accepted as a reasonable and sufficient ground to join them to arbitral proceeding. There is no jurisprudence regarding this matter so far but in case courts were required to provide opinion on this regard the expected result would then be as stated.

2. Assignment

Under Mexican law as in many other jurisdictions, the transfer of contractual rights is incorporated in the legal system.\textsuperscript{97} Mexico as a civil law jurisdiction recognizes that it can be transferred along with the underlying contract as long as the parties themselves did not exclude this possibility. If that is not the case, the courts will analyze the assignment and if it is not biased in any form, they will most likely allow the non-signatory to arbitrate.

3. Incorporation by reference

In Mexico as in most of the countries were the UNCITRAL Model Law has been adopted, the incorporation by reference of an arbitral agreement is accepted as a mean to bind non-signatories. Article 1423 of the Mexican Code of Commerce states that the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract\textsuperscript{98}.

In this regard it is very important to point out that a mere generic reference will not be sufficient to invoke this theory when trying to initiate an arbitral proceeding against or under the request of a non-signatory. The requirement

\textsuperscript{97} Third Title Chapter 1 De la Cesión de Derechos Mexican Federal Civil Code
\textsuperscript{98} Article 1423 of the Mexican Federal Civil Code Free translation
that the reference to the arbitration clause should be express and specific follows the reasoning of the interest of preserving consent as the cornerstone of arbitration.

4. Group of companies

Under Mexican commercial legal framework “each legal entity has its own legal status and assets, different from those of any other legal entity including its own shareholders”\textsuperscript{99}.

As the figure of group of companies do not exist under Mexican Law, invoking this theory to extend the scope of an arbitration agreement to non-signatory parent companies or subsidiaries the possibility of failure in doing so is almost certain.

As a conclusion from this section, out of the theories analyzed, for the cases of agency, assignment and incorporation by reference it would be possible to join non-signatories to the arbitral procedure or initiate it on their claim by applying the Mexican law, as long as the requirements for the chosen legal figure are met. The reasons invoked are completely a matter ruled at the national level that would not justify the application of the so-called international law. Of course the reasoning of a court ruling for example could include references to international law and practice to support the court’s argument. In the commercial matters, interpretation can be nourished from usages and custom. However, as these figures are all incorporated to the Mexican legal framework, when invoking these as reasons to join non-signatories no major objections should be expected from the courts. On the other hand, if the courts were only to apply Mexican law, legal constructions to let non-signatories be bound by the arbitration agreement such as the group of companies would not be applicable, as this figure is not incorporated into the Mexican legal framework.

In that case, the application of the international standards and laws would be more suitable. Even considering that the doctrine of group of companies has to be applied with caution, having the option of applying it when deemed necessary is a positive factor. The doctrine of group of companies was created in the context of arbitration and it is in only that context that it should be applied. “Properly understood, the group of companies doctrine rests on the presumption that commercial parties within corporate groups engaged in a business transaction will ordinarily desire, when entering into a contract, that their arbitration agreements provide efficient, centralized dispute resolution mechanisms for all disputes relating to a particular transaction”\(^{100}\). Truth is that the Mexican commercial law provides that each legal entity has its own legal status independent of the one of others, but this legal provision was designed without considering any of the particular issues the *sui generis* nature of the arbitration mechanism would arise as a mean of doing justice, primarily based on consent. Therefore it causes the Mexican legal system to ignore the presumption on which this theory is founded.

As a consequence of current trend to prefer arbitration as a dispute resolution mechanism among the participants in the international trade, the fact of not recognizing this legal construction can be seen as a negative point.

In order to foster the growth of an economy, investments have to be made and one of the main reasons behind it not becoming richer has an institutional character. “The establishment of an environment in which legal rights, especially property and contractual rights, are enforced and protected”\(^{101}\) is key for enhancing economic growth. Commercial arbitration is closely related to the protection of contractual rights\(^{102}\), as it constitutes the preferred mean to solve disputes arising out of international commercial transactions. Thus, providing

\(^{100}\) Born supra 2009


\(^{102}\) 13 Eur. J.L. Reform 388 (2011) Arbitration and Promotion of Economic Growth and Investment; Fry, Jason
with a legal framework that secures legal certainty when dealing with arbitration has a paramount importance.

C. Mitigating the problem

The options for minimizing the effects of what has been exposed before, especially regarding the group of companies' theory, that this paper wants to suggest are two.

One way to mitigate the effects of not admitting the theory of group of companies would be to adopt the liberal approach with regards to the non-signatory issue. By liberal approach I mean by having courts applying the international law when it comes to non-signatory issues that rely on figures that are not integrated in the domestic legal framework.

According to some practitioners\textsuperscript{103} slowly but steadily, Mexican courts are adapting their criteria to the arbitration mechanism as an internationally preferred method to solve commercial disputes. So far, no court ruling has been issued regarding the matter, who knows if by the time it is, the mindset of the courts has already changed. This could mean that courts are becoming more arbitration-friendly, taking into consideration the particularities of the arbitration.

As in any other field, sharing views, theories and interpretations enriches the knowledge and nourishes the practice. Continuous scholar discourse and academic research on arbitration could be a way to learn about the advantages and potential dangers of applying. The arbitration institutions in México are gaining recognition among the national practitioners but also on an international level. This could be taken as an advantage to foster discussion and research.

\textsuperscript{103} Von Wobeser, Claus. Mexico. Arbitration World Jurisdictional comparisons. 2010
Another measure that could be taken is to include the legal figure of group of companies in the Mexican legal framework. The perils of doing so are not few. The risk of not accurately codifying all the potential cases is extremely high and the fact that was once pictured as a solution ends up complicating the facts a bit more.

Peruvian arbitration law has already taken this step of codifying the doctrine of group of companies but the benefits of having done so are still to be seen as the disposition is still very recent and no case has been yet solved on relying on this figure\textsuperscript{104}.

\textbf{D. Conclusion}

Even if the first premises of this research, regarding the contractual nature of the arbitral agreement seem pretty simple and straightforward, the issues involving consent, third parties and non-signatories are as complicated as they could be. The choice of law issues together with complicated structures used to let non-signatories join the arbitral procedures make of this topic one of the thorniest when it comes to the arbitration agreement. In Mexico, as the arbitration is still an emerging discipline the road to creating a comprehensive legal framework for all the issues mentioned in this paper is long and winding. Through scholar discourse and academic research, this paper has ventured a little bit further into this path and ambitiously suggested a different approach to the matter.

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