

Master Thesis  
International Commercial Arbitration Law



A General Theory for Non-signatories?  
An analysis of Brekoulakis' new unifying theory

By Astrid Andersson  
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Supervisor: Patricia Shaughnessy

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# Contents

Acknowledgements.....	1
Abstract.....	2
A. Introduction .....	3
B. Aim and Research Inquiries.....	5
C. Thesis, Methodology and Materials .....	6
D. Relevance and Contribution .....	8
E. Brekoulakis' General Theory for Non-signatories .....	11
E.1. Existing Framework.....	11
E.2. Brekoulakis' Critique of the Existing Framework.....	14
E.3. Brekoulakis' General Theory.....	16
E.4. Section Conclusion .....	17
F. Analysis of Brekoulakis' Critiques of the Existing Framework.....	18
F.1. Arbitration Law is a Form of Contract Law.....	18
F.2. The Existing Theories do not Contravene Consent.....	21
F.2.1. The Role of Equity and Good Faith in Contract Law.....	22
F.2.2. Non-signatory Theories Focused on Implied or Constructive Consent .....	26
F.2.3. The Role of Legal Fiction.....	29
F.3. Arbitration Law is Able to Respond .....	32
F.4. Section Conclusion .....	37
G. Why Brekoulakis' General Theory Should Not be Adopted.....	38
G.1. Brekoulakis' Theory Not as General as Suggested .....	38
G.2. Consent not Absent from Brekoulakis' General Theory .....	40
G.3. Consent is the Foundation of Arbitration .....	42
G.4. A Complex Problem that Requires a Nuanced Response.....	43
G.5. Section Conclusion.....	44
H. Conclusion.....	45
I. Bibliography .....	48

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To my parents, who always encouraged my will to learn and who drilled me in the importance of studying hard.

To my sister, my best friend, who listens to all my troubles and always offers sound advice.

To Caio, who taught me that passion and patience do not have to be mutually exclusive.

I love you all

# Abstract

Although arbitration is the preferred method of resolution for international commercial disputes, arbitration law is not always well equipped to handle multi-party disputes. A particular problem is when one or more of the parties to the dispute have not signed the relevant arbitration agreement.

In a recent article, Stavros Brekoulakis challenged the current law on non-signatories in international arbitration. He suggested that the existing framework consisting of a number of separate theories for non-signatories should be replaced by his general theory, which focuses the inquiry on the dispute itself, rather than on traditional considerations of consent.

This thesis first critically analyses Brekoulakis' critiques of the existing arbitration law framework for non-signatories and suggests that these do not justify his general theory. Thereafter, the thesis analyses Brekoulakis' proposed general theory and concludes that it is not desirable to adopt it. His theory is not as general nor as far removed from principles of consent as he suggests. Despite that, moving away from a consent based analysis risks reducing the legitimacy of arbitration. Further, the problems associated with multi-party disputes are varied and complex which means that a nuanced response with multiple options is more suitable.

## A. Introduction

Despite the fact that arbitration is the preferred method of resolution for international commercial disputes,<sup>1</sup> arbitration law is not always well equipped to handle multi-party disputes, in particular when one or more of the parties to the dispute has not signed the relevant arbitration agreement.

Arbitration law's difficulty to deal effectively with non-signatories is problematic for a number of reasons. For example, when a dispute arises, it may be unclear who may or must arbitrate with whom. In circumstances where not all parties to a dispute can be brought into a single arbitration, parties may be required to participate in multiple proceedings, which carries the risk of inconsistent or conflicting awards.<sup>2</sup> Further, including non-signatories or third parties in an arbitration may also lead to greater unpredictability at the enforcement stage. There are several examples of courts refusing to enforce awards on the grounds that a non-signatory had not consented to arbitrate.<sup>3</sup>

The problems associated with non-signatories have received a lot of attention over the past decades and a number of theories have been developed regarding when a non-signatory can be permitted or compelled to arbitrate. Some of these theories bind non-signatories on the basis that they have impliedly consented to arbitrate, such as assignment or other forms of transfer, agency, third-party beneficiary, incorporation by reference, and consent to arbitrate

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<sup>1</sup> Dimitar Kondev, *Multi-Party and Multi-Contract Arbitration in the Construction Industry* (John Wiley & Sons, 2017) 1; Bernard Hanotiau, 'Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis' (1998) 18(3) *Journal of International Arbitration* 253, 255–256.

<sup>2</sup> Pablo Constenla, "'Multi'- Arbitration Incidents in International Disputes: "Better Marriages and Partners" Disputes?" (2015) 2015(24) *Spain Arbitration Review* 105, 105.

<sup>3</sup> *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755; *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm) ('*Peterson Farms*'); *PT First Media TBK v Astro Nusantara International and Others* [2013] SGCA 57; Hanotiau, above n 1, 50.

based on conduct. Other theories bind non-signatories through equitable doctrines or considerations of fairness, such as estoppel, piercing the corporate veil or *alter ego*.<sup>4</sup>

However, these theories are not all universally accepted, either by national courts or commentators. In a recent article entitled "Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories"<sup>5</sup>, the prominent arbitration scholar Professor Stavros Brekoulakis has voiced strong criticisms of the existing non-signatory theories. He argues that they are not necessarily appropriate for arbitration because the majority of these theories are borrowed from contract and commercial law, and have thus not been developed specifically for arbitration; they contravene fundamental principles of consent; and they are unable to accommodate complex commercial reality of many users of international commercial arbitration.<sup>6</sup> On this basis, Brekoulakis puts forward a new unifying, general theory which he suggests could replace the current patchwork of theories. Brekoulakis' general theory shifts the focus of the inquiry away from questions of consent and instead requires an analysis of the dispute being arbitrated, as well as the relationship between the non-signatory and signatory parties.<sup>7</sup>

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<sup>4</sup> Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (Oxford University Press, 2010) 11; Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories' (2017) 8(4) *Journal of International Dispute Settlement* 610, 4–6; Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International, 2005) 7–48; John Gilbert, 'Chapter 22: Multi-Party and MultiContract Arbitration' in Julian DM Lew, Harris Bor and et al. (eds), *Arbitration in England, with chapters on Scotland and Ireland* (Kluwer Law International, 2013) 455, 462–463; Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) 713; Steven Smith, Marcus Quintanilla and Paul Hines, 'Chapter 9: Enforcing Agreements to Arbitrate' in Laurence Shore and Tai-Heng Cheng (eds), *International Arbitration in the United States* (Kluwer Law International, 2017) 14, 204–208.

<sup>5</sup> Brekoulakis, above n 4.

<sup>6</sup> *Ibid* 4.

<sup>7</sup> *Ibid* 3.

## B. Aim and Research Inquiries

The aim of this thesis is to critically analyse Brekoulakis' general theory and his justifications for it. To achieve this aim, this thesis will first consider Brekoulakis' critiques of the current framework, which he argues justify his general theory, through analysing three preliminary questions:

1. **Is arbitration law an autonomous legal field, with a nature and purpose distinct from contract law?** This question is analysed because Brekoulakis argues that there is an unwarranted identification between contract law and arbitration law. He suggests that arbitration law should to some extent retreat from contract law and develop non-signatory theories specifically for international arbitration.<sup>8</sup>
2. **Do the existing theories for non-signatories contravene fundamental principles of consent?** This question is posed because Brekoulakis argues that while the existing theories purport to be premised on the idea of implied consent, in reality consent for arbitration is often absent from these theories.<sup>9</sup>
3. **Are the existing non-signatory theories in arbitration law able to respond to the complex commercial reality of users of arbitration?** This question seeks to analyse Brekoulakis' contention that the existing framework is often unable to offer solutions in complex commercial multi-party disputes involving non-signatories.<sup>10</sup>

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<sup>8</sup> Ibid 17–19.

<sup>9</sup> Ibid 9–14.

<sup>10</sup> Ibid 14–17.

Thereafter, the thesis will consider Brekoulakis' general theory itself to answer the fourth and primary research question:

4. **Should Brekoulakis' general theory for non-signatories be adopted?** This question is considered after the three preliminary questions because the analysis of Brekoulakis' justifications for his general theory is the first step in answering the question of whether the theory should be adopted. The question is answered by analysing the general theory itself, but also draws on the conclusions of the prior inquiries.

## C. Thesis, Methodology and Materials

This thesis argues that it is not desirable to adopt Brekoulakis' general theory for non-signatories. To test this argument, a two-part analysis is carried out.

First is a doctrinal, comparative analysis of the three preliminary questions regarding Brekoulakis' justification for his general theory.<sup>11</sup> This analysis is used to test the logical consistency and soundness Brekoulakis' propositions regarding the purpose and nature of arbitration law, the role of consent in non-signatory theories, and arbitration law's ability to address problems related to non-signatories.<sup>12</sup> Because this thesis endeavours to take an international perspective, the analysis is necessarily also comparative.<sup>13</sup>

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<sup>11</sup> Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' [2016] *Erasmus Law Review* 84.

<sup>12</sup> Paul Chynoweth, 'Legal Research' in Andrew Knight and Leslie Ruddock (eds), *Advanced research methods in the built environment* (Wiley-Blackwell, 2008) 30; J Sanjeyvignesh, 'Types of Legal Research Needed for Law Reform' <[http://www.academia.edu/7146989/TYPES\\_OF\\_LEGAL\\_RESEARCH\\_NEEDED\\_FOR\\_LAW\\_REFORM](http://www.academia.edu/7146989/TYPES_OF_LEGAL_RESEARCH_NEEDED_FOR_LAW_REFORM)>, 11.

<sup>13</sup> J Sanjeyvignesh, 'Types of Legal Research Needed for Law Reform' 17 <[http://www.academia.edu/7146989/TYPES\\_OF\\_LEGAL\\_RESEARCH\\_NEEDED\\_FOR\\_LAW\\_REFORM](http://www.academia.edu/7146989/TYPES_OF_LEGAL_RESEARCH_NEEDED_FOR_LAW_REFORM)>.

The second part is a critical analysis of Brekoulakis' general theory, which also employs a doctrinal, comparative methodology. Brekoulakis' general theory is considered at a doctrinal level and is compared to similar existing doctrine. This part of the analysis draws on aspects of the prior analysis where the relevant doctrine overlaps (for example, regarding the role of consent when considering non-signatories). It also has a normative aspect, as it considers what the law should, or should not, be.<sup>14</sup> That is, it considers whether the law should be changed in the manner Brekoulakis suggests.

There are also elements of historical and practical (or contextual) analysis where this is required to develop the doctrinal understanding. For example, a review of the historical development of a legal concept or doctrine can assist in demonstrating how that concept or doctrine fits into the larger framework. The contextual analysis considers the social, scientific and ethical aspects of the inquiry because it considers how users of arbitration view the existing framework, as well as how they may respond to changes in the law.<sup>15</sup> This aspect of the analysis is important since any law reform must be cognisant of its impact on the confidence in and legitimacy of the legal system (in this case the institution of arbitration) and its ability to provide certainty and predictability in the law.

A range of materials are used to carry out the analysis described above. Unlike in domestic legal research, where national legislation and case law are the primary sources, research in international arbitration law requires the use of a blend of national and international sources.<sup>16</sup> International sources drawn upon include the *United Nations Convention on the Recognition and Enforcement*

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<sup>14</sup> Ibid 22; Tom R Tyler, 'Methodology in Legal Research' (2017) 13(130) *Utrecht Law Review* 14, 130.

<sup>15</sup> Chynoweth, above n 12, 31.

<sup>16</sup> Kondev, above n 1, 6.

*of Foreign Arbitral Awards* (“New York Convention”), which provides the framework for international commercial arbitration. Other international sources include soft law, such as arbitral institutional rules and commentary of these, as well as of the New York Convention. The thesis also uses national legislation and case law, which cannot be considered formal sources of law outside of their own jurisdiction, but that can be useful examples of how arbitration law is interpreted and applied by lawmakers and judges. Similarly, arbitral awards do not provide legally binding decisions, but are used in this thesis as illustrations of legal interpretation.<sup>17</sup> The thesis also uses a range of secondary sources, including books and articles that relate to one or several of the questions this thesis considers. These secondary sources are of particular relevance in international commercial arbitration law research since many arbitral awards are not publicly available.

## D. Relevance and Contribution

Brekoulakis’ thesis raises some fundamental questions regarding non-signatories in international arbitration, as well as about the nature of arbitration law and the source of arbitral tribunals’ jurisdiction. His general theory recasts the source of the jurisdiction from the concept of consent to instead focus on the dispute itself.

There is a plethora of literature analysing the problems associated with non-signatories in international arbitration, some of which offer solutions. Some authors have offered practical solutions, such as suggesting that the answer lies in more careful drafting at the contracting stage. In essence, this argument is that since the contract sets out the will of the parties, parties should take care to make clear their intention regarding multi-party dispute resolution in

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<sup>17</sup> Ibid 8–9.

the arbitration agreement itself.<sup>18</sup> Other authors suggest that parties to complex projects or transactions involving multiple contracts should consider whether to execute an umbrella agreement which provides for arbitration of disputes between the various parties,<sup>19</sup> or propose legislative or regulatory reform.<sup>20</sup>

Brekoulakis' approach is more theoretical as it considers the actual theories used to permit or compel non-signatories to arbitrate. Since Brekoulakis' thesis offers such a stark departure from traditional arbitration discourse, other scholars have offered their critique of earlier articulations of his general theory.<sup>21</sup> Previous critiques have been offered from the perspective of a specific legal system: English,<sup>22</sup> US,<sup>23</sup> Swiss,<sup>24</sup> and French.<sup>25</sup> Because the problem Brekoulakis is addressing often arises in an international context, this thesis attempts to contribute to the existing body of literature by offering possibly a more holistic, but at least more international, response than previous critics. It also offers a critique of the latest version of Brekoulakis'

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<sup>18</sup> Edwin Tong Chun Fai and Nakul Dewan, 'Drafting Arbitration Agreements with "Consolidation" in Mind?' (2009) 5(1) *Asian International Arbitration Journal* 70, 93–94; Kondev, above n 1.

<sup>19</sup> Paul Buckingham, 'Arbitration' in Robert Gaitskell (ed), *Construction Dispute Resolution Handbook* (ICE Publishing, 2nd ed, 2011) 65.

<sup>20</sup> Clive Hardy, 'Multi-Party Arbitration: Exceptional Problems Need Exceptional Solutions' (2000) 66(1) *Arbitration* 15.

<sup>21</sup> Stavros Brekoulakis, 'Chapter 8: Parties in International Arbitration: Consent v. Commercial Reality' in Stavros Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 119.

<sup>22</sup> Audley Sheppard, 'Chapter 10: Third Party Non-Signatories in English Arbitration Law' in Stavros Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 183.

<sup>23</sup> John Fellas, 'Chapter 11: Comments on Parties in International Arbitration: Consent v. Commercial Reality by Professor Stavros Brekoulakis' in Stavros Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 199.

<sup>24</sup> Nathalie Voser, 'Chapter 9: The Swiss Perspective on Parties in Arbitration: "Traditional Approach With a Twist Regarding Abuse of Rights" or "Consent Theory Plus"' in Stavros Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 17.

<sup>25</sup> Philippe Pinsolle, 'Chapter 12: A French View On The Application of The Arbitration Agreement to Non-Signatories' in Stavros Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 8.

fully articulated general theory, rather than earlier versions of the theory that were less developed.

## E. Brekoulakis' General Theory for Non-signatories

In his recent article “Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories”, Brekoulakis proposes a new general theory for non-signatories. He suggests that the theoretical basis for finding that an arbitration agreement applies to a non-signatory should be shifted from the current focus on who has consented to arbitrate, to instead focus on who the parties to the dispute are. He suggests that his general theory is needed because arbitration law’s current approach to non-signatories is inefficient and incoherent.<sup>26</sup> This section will set out the existing framework, Brekoulakis’ critiques of this framework, and thereafter summarise Brekoulakis’ general theory.

### E.1. Existing Framework

Under the existing framework, non-signatories may be bound by an arbitration agreement in certain circumstances according to a number of “non-signatory theories”. The majority of these theories originate in contract and company law and centre on the idea that the non-signatory has impliedly consented to the arbitration agreement. Those theories include assignment (or other forms of transfer), agency, incorporation by reference and third-party beneficiaries. Other theories bind non-signatories by reason of equity or considerations of fairness or good faith, such as the doctrines of piercing the corporate veil, *alter ego* and estoppel.<sup>27</sup>

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<sup>26</sup> Brekoulakis, above n 4, 1.

<sup>27</sup> Brekoulakis, above n 4, 11; Brekoulakis, above n 4, 3, 4–6; Hanotiau, above n 4, 7–48; Born, above n 4, 713; Gilbert, above n 4, 462–463; Smith, Quintanilla and Hines, above n 4, 204–208.

Before delving into Brekoulakis' critique of these theories, it is necessary to clarify the distinction made in this thesis between "non-signatories" and "third parties". Most legal systems, as well as the New York Convention, require arbitration agreements to be in writing.<sup>28</sup> Arbitration agreements are typically included in contracts which are signed by the parties, i.e. the signatories. A "non-signatory" is a person (a definition which includes companies) that has not signed the arbitration agreement but is nevertheless party to it. For example, when an agent enters into an agreement on behalf of its principal, the principal is a party to that agreement, despite being a non-signatory to the agreement.<sup>29</sup> By contrast, this thesis defines a third party is a non-signatory that is not party to the arbitration agreement.

The distinction is important, because the inquiry into whether a non-signatory is bound by an arbitration agreement is aimed at determining who the proper parties to that agreement are. It is not a question of "extending" the arbitration agreement beyond the proper parties or scope of the agreement, which would suggest that the non-signatories are not "actual" parties to the agreement. The signatures may evidence who the parties to the arbitration agreement are, but the inquiry does not necessarily end there.

The first question is if the signatories are the proper parties to the arbitration agreement, as the signatories may not, or no longer, be the actual parties. Following on with the agency example, the agent is the signatory but is not usually party to the agreement.<sup>30</sup> In a different scenario a signatory is no longer party to the agreement because it has transferred its substantive rights and obligations of the contract, which contains the arbitration clause, to another

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<sup>28</sup> 'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' Article II; Pinsolle, above n 25.

<sup>29</sup> Hanotiau, above n 4, 11; Constenla, above n 2, 106; Smith, Quintanilla and Hines, above n 4, 206.

<sup>30</sup> Hanotiau, above n 4, 11; Constenla, above n 2, 106.

person through for example: assignment; succession, acquisition or merger; novation; or subrogation. Most legal systems recognise that where a contract containing an arbitration clause is assigned, or otherwise transferred, the arbitration agreement will automatically be transferred to the non-signatory.<sup>31</sup>

This ties into the second question, which is if any non-signatories are proper parties to the agreement, either instead of, or in addition to, the signatories. In the agency example, the proper party is the non-signatory principal, and in case of an assignment, it is the non-signatory assignee.<sup>32</sup> There may also be other reasons why a non-signatory is party to the arbitration agreement, such as if it has signed another contract which incorporates the agreement by reference<sup>33</sup> or is deemed to be a party by reason of equity or good faith.<sup>34</sup> Further, most national laws provide that where a contract confers a benefit on a third party, that third-party beneficiary may be subject to any arbitration agreement in that contract.<sup>35</sup> By accepting the benefit, the third party ratifies the contract and becomes a non-signatory party to the contract, at least in relation to the substantive term than confers the benefit.<sup>36</sup> Whilst a third-party beneficiary may in fact be a non-signatory party rather than a true third party, the term “third-party beneficiary” will be used in reference to this theory for consistency.

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<sup>31</sup> Brekoulakis, above n 4, 28–29, 42–45; Sheppard, above n 22, 187–189; Constenla, above n 2, 106; Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (Kluwer Law International; Schulthess Juristische Medien AG, 3rd ed, 2016) 73–74; see also *Montedipe SpA v JTP-RO Jugotanker* [1990] 2 *Lloyd's Rep* 11 (*'The Jordan Nicolov'*).

<sup>32</sup> Hanotiau, above n 4, 11; Constenla, above n 2, 106.

<sup>33</sup> Hanotiau, above n 4, 29–30; Brekoulakis, above n 4, 67–70; Smith, Quintanilla and Hines, above n 4, 205–206.

<sup>34</sup> Brekoulakis, above n 4, 11; Brekoulakis, above n 4, 4–6; Hanotiau, above n 4, 20–29, 47–48; Smith, Quintanilla and Hines, above n 4, 206–208.

<sup>35</sup> *Contracts (Rights of Third Parties) Act 1999* ss 1 and 8.; See also Brekoulakis, above n 4, 5; Hanotiau, above n 4, 8; Girsberger and Voser, above n 31, 53–56.

<sup>36</sup> Hanotiau, above n 4, 15; Brekoulakis, above n 4, 63.

In this sense, it is more accurate to describe the inquiry as a determination of who the arbitration agreement *applies* to. The result is that signatories and non-signatories are on the same footing once the identity of the proper parties has been established:<sup>37</sup> a non-signatory party to the arbitration agreement may or must, as the case may be, arbitrate under that agreement, just like a signatory, whereas a third party cannot be brought into an arbitration without the consent of all parties (including the third party).<sup>38</sup>

## **E.2. Brekoulakis' Critique of the Existing Framework**

Brekoulakis argues that international arbitration law has struggled to develop rules for non-signatories which actually respond to the needs of users of international commercial arbitration,<sup>39</sup> and suggests that there are three primary problems with the existing non-signatory theories.

First, Brekoulakis claims that tribunals and courts' approaches to non-signatory theories are incoherent and in practice contravene "*fundamental principles of consent*."<sup>40</sup> He notes that the existing non-signatory theories are founded on the idea that the non-signatory has impliedly consented to be bound by the arbitration agreement, and that courts and tribunals insist that consent is at the heart of the inquiry. However, he argues, in reality the non-signatory's consent to arbitrate is often absent from the existing theories.

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<sup>37</sup> Ibid, 201-211. Nathalie Voser, 'Chapter 9: The Swiss Perspective on Parties in Arbitration: "Traditional Approach With a Twist Regarding Abuse of Rights" or "Consent Theory Plus"' in Stavros Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 17, 161.

<sup>38</sup> See e.g. International Chamber of Commerce Arbitration Rules ('ICC Arbitration Rules'), Arts 7-10; The London Court of International Arbitration Rules ('LCIA Arbitration Rules'), Art 22.

<sup>39</sup> Brekoulakis, above n 4, 9.

<sup>40</sup> Ibid 12.

He supports his argument by categorising non-signatory theories into two groups and considering the characteristics of each group. The first group contains those theories which are based on equitable considerations: apparent or ostensible authority, the doctrine of lifting the corporate veil or *alter ego*, and estoppel. These doctrines are founded in equity or refer to ideas of good faith, and do therefore not focus on consent.

The second group are those theories which rely on constructive consent to the underlying contract: assignment, third-party beneficiaries, and the group of companies doctrine.<sup>41</sup> The problem with the theories in the second group, according to Brekoulakis, is that “[w]hile a form of consent exists in these cases, it is not consent for arbitration”.<sup>42</sup> He then adds to his argument by claiming that because consent is absent from non-signatory theories, tribunals and courts have been forced to use legal fiction to stretch the concept of consent further than the parties ever intended. The result is, he argues, that there is a divide between tribunals and courts’ rhetoric, which is centred on consent, and their actual practice, which is to apply theories which do not in actuality consider the non-signatory’s consent to arbitrate.<sup>43</sup>

Secondly, Brekoulakis argues that the existing non-signatory theories are unable to cater for the complex commercial reality of many of the users of international arbitration, in particular multiparty transactions involving multinational groups or state entities.<sup>44</sup> Under the current theories, a non-signatory State or parent company can often avoid arbitration. Brekoulakis suggests that even though international business transactions have become increasingly multifaceted, involving multiple parties and multiple contracts, the existing non-signatory theories have a narrow scope of application, which

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<sup>41</sup> Ibid 9–10.

<sup>42</sup> Ibid 11.

<sup>43</sup> Ibid 12–13.

<sup>44</sup> Ibid 14–17.

means that arbitration law is often unable to accommodate complex international commercial disputes.<sup>45</sup>

Brekoulakis' third critique of the existing non-signatory theories is that there is an unwarranted connection between contract law and arbitration law.<sup>46</sup> Arbitration law's difficulties in dealing with non-signatories, he argues, is founded in the fact that these theories have not been developed specifically for international arbitration law, but instead are borrowed from contract law or corporate law.<sup>47</sup> Brekoulakis suggests that this identification between contract law and arbitration law is unwarranted because arbitration law is an autonomous legal field, distinct in nature and purpose from contract or corporate law. He contends that the main questions in contract law relate to the parties' liability, whereas in arbitration law they relate to whether a tribunal has jurisdiction over a specific dispute. Theories developed to address questions of liability, he argues, do not necessarily assist in answering questions regarding jurisdiction.

### **E.3. Brekoulakis' General Theory**

According to Brekoulakis, a general theory for non-signatories, developed specifically for international arbitration, is needed to address the deficiencies in the current framework. This general theory should focus on the extent to which a non-signatory is implicated in the dispute, rather than on the traditional ideas of consent.<sup>48</sup> Brekoulakis proposes a test with three elements for when a tribunal may apply an arbitration agreement to a non-signatory. The first element is if a non-signatory is "*inextricably implicated*" in the relevant dispute.<sup>49</sup> The second element is "*the existence of a close*

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<sup>45</sup> Ibid 16.

<sup>46</sup> Ibid 17–19.

<sup>47</sup> Ibid 17–18.

<sup>48</sup> Ibid 20.

<sup>49</sup> Ibid 21.

*relationship*” between the non-signatory and one of the signatory parties.<sup>50</sup> The third element is if the signatories and non-signatories have claims and contracts that are intertwined.<sup>51</sup> He qualifies this test however, by noting that the arbitration agreement must be drafted with language which is broad enough to cover the non-signatory claim.<sup>52</sup> Brekoulakis also emphasises that the inquiry under his general theory should always focus on the scope of the dispute and the “*commercial implications*” on the parties involved, including the non-signatories.<sup>53</sup>

## **E.4. Section Conclusion**

Brekoulakis’ proposes a new general theory for non-signatories which shifts the theoretical basis for finding that an arbitration agreement applies to a non-signatory to the concept of the dispute, rather than the concept of consent. He argues that this general theory is needed because international arbitration law’s current approach to non-signatories is incoherent and inefficient. First, he suggests that the existing non-signatory theories in practice contravene “*fundamental principles of consent.*”<sup>54</sup> Secondly, the existing framework is unable to respond to the complex commercial reality of many of the users of international arbitration.<sup>55</sup> Thirdly, these theories have not been developed specifically for international arbitration law, but are instead borrowed from contract and corporate law. The existing identification between contract law and arbitration law is unwarranted because arbitration law is an autonomous legal field, distinct in nature and purpose from contract or corporate law. Therefore, it cannot be assumed that contract law theories will assist in arbitration law.<sup>56</sup>

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<sup>50</sup> Ibid 22.

<sup>51</sup> Ibid 23.

<sup>52</sup> Ibid 24.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid 9.

<sup>55</sup> Ibid 14–17.

<sup>56</sup> Ibid 17–19.

## F. Analysis of Brekoulakis' Critiques of the Existing Framework

Brekoulakis' critiques and general theory goes to the heart of an important question for international arbitration law: how should non-signatories be dealt with? Under the current framework non-signatories or third parties involved in a dispute cannot always be included in the arbitration of that dispute. As Brekoulakis correctly points out, arbitration law is at its foundation bilateral in nature, which means that it struggles to accommodate multi-party and multi-contract disputes, including when non-signatories are involved.<sup>57</sup> Against this backdrop, it is desirable to review the existing theoretical and practical responses to determine if and how these can be improved.

However, like any new legal developments, Brekoulakis' general theory, and his reasons for proposing it, warrant careful consideration. This section of the thesis critically analyses and challenges Brekoulakis' critiques of the existing framework, suggesting that it may not be as inappropriate and unable to respond to the needs to the users of arbitration as Brekoulakis suggests.

### F.1. Arbitration Law is a Form of Contract Law

Brekoulakis argues that arbitration law is an autonomous legal field, distinct in nature and purpose from contract law, because the main questions in contract law relate to liability, whereas in arbitration law they relate to jurisdiction. Arbitration law should therefore “retreat” from contract law and develop its own theory which “*reflects the distinct jurisdictional nature and purpose of arbitration.*”<sup>58</sup>

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<sup>57</sup> Ibid 2, 14–15.

<sup>58</sup> Ibid 18–19.

Brekoulakis' argument is unconvincing because, on closer examination, both the nature and purpose of arbitration law align with contract law. Of course, Brekoulakis' suggestion that arbitration law has a jurisdictional nature is not incorrect. It is true that one of the most relevant questions in arbitration law is whether the tribunal has jurisdiction to hear a specific dispute. However, arbitration agreements, which are the focus of arbitration law in the context of non-signatories, do not solely raise jurisdictional questions; they also raise questions of liability. Arbitration agreements may be characterised as having a dual nature: substantive and jurisdictional. That is, they impose substantive obligations on the parties, which have jurisdictional effects.<sup>59</sup> Parties to an arbitration agreement are obliged to arbitrate disputes which fall within the scope of that agreement. This is a substantive contractual obligation, evidenced by the fact that a party who commences a lawsuit in breach of an arbitration agreement may be liable for breach of contract.<sup>60</sup> Brekoulakis only takes into account the jurisdictional effect of the arbitration agreement but ignores the fact that the parties' substantial liabilities under that agreement is what creates that effect in the first place.

It is this primacy of the parties' agreement that gives arbitration law its connection to contract law. Contract law can be characterised as "*an emanation of the parties' wills in terms of agreement plus intention to be bound*".<sup>61</sup> Perhaps it is trite, or "banal" as Brekoulakis suggests, to refer to arbitration as a creature of contract, but it is nevertheless true. Arbitration is only an available dispute resolution mechanism when parties have *agreed and intended* to arbitrate their disputes.<sup>62</sup>

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<sup>59</sup> Voser, above n 24, 162.

<sup>60</sup> Fellas, above n 23, 202–203.

<sup>61</sup> Martin A Hogg, 'Competing Theories of Contract' in Larry A DiMatteo et al (eds), *Commercial Contract Law* (Cambridge University Press, 2013) 14, 15.

<sup>62</sup> See for example Gilbert, above n 4, 460 The relevance of consent will be discussed in detail below in Section H.2.

The term “contract law” does not refer to is not a single unitary set of principles. Rather, contract law can be described as a collective term for principles of transactions that do not have their own completely separate sets of governing rules. Other examples of special types of contracts are employment agreements, insurance contracts and leases.<sup>63</sup> Whilst it is true that arbitration law contains certain rules and principles that are unique to arbitration and that distinguishes it from other forms of contract law, the idiosyncrasies of arbitration law do not deprive it of its contractual nature. Rather, it illustrates the flexibility of the basic principles of contract law which enables it to apply in different contexts.<sup>64</sup>

Further, the main questions for contract law and arbitration law are not as different as Brekoulakis suggests. The central question in contract law is: “which promises are legally enforceable?”. One of the primary questions for arbitration law is similar, albeit more specific: “is the promise to arbitrate enforceable in this case?”. This question may lead to further questions, such as “who can enforce the promise to arbitrate?” and “against whom can this promise be enforced?”. Whilst the answer to these questions will affect the tribunal’s jurisdiction, the questions themselves are directed at substantive obligations. When considering these questions in arbitrations which involve non-signatories, it therefore makes common sense to draw on theories of contract law which consider the same questions.

The proposition that arbitration law is a form of contract law finds further support in that arbitration agreements are treated as ordinary contracts in an increasing number of legal systems.<sup>65</sup> For example, the Australian Federal

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<sup>63</sup> Brian Bix, *Contract Law: Rules, Theory, and Context* (Cambridge University Press, 2012) 119–123.

<sup>64</sup> *Ibid* 126.

<sup>65</sup> Karim Abou Youssef, ‘The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration’ in Albert Jan van der Berg (ed),

Court has noted that “[a]rbitration clauses are contractual provisions ... and are governed by ordinary rules of contractual interpretation”.<sup>66</sup> Similarly, US courts’ standard practice is to treat arbitration agreements as they would treat other contracts.<sup>67</sup>

Arbitration law should therefore not “retreat” from contractual law, but rather should draw on it, and adapt contract law theories to the arbitration context. This approach ensures both doctrinal consistency and acknowledges the idiosyncrasies of arbitration law. The fact that certain non-signatory theories used in arbitration law developed in a different context may actually be a benefit, as these theories have been tested over time and in difference situations.<sup>68</sup>

## **F.2. The Existing Theories do not Contravene Consent**

Brekoulakis argues that in practice, the existing non-signatory theories contravene “*fundamental principles of consent*.”<sup>69</sup> However, if the argument that arbitration law is a form of contract law is accepted, Brekoulakis’ argument becomes less persuasive because of the role of equity and good faith in contract law. Further, a deeper analysis of the non-signatory theories which focus on implied or constructive consent, reveal that consent in these instances is not as unrelated to the relevant arbitration agreement as Brekoulakis suggests.<sup>70</sup>

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*Arbitration: The Next Fifty Years* (Kluwer Law International, 2012) vol 16, 20, 124; Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2nd ed, 2016) 92.

<sup>66</sup> *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd*, [2005] FCA 1102 (Unreported, Federal Court of Appeal (Australia), 2005) [41] (‘*Walter Rau*’).

<sup>67</sup> *Arthur Andersen LLC v Carlisle*, 556 U S 624 (S Ct 2009); Fellas, above n 23, 200–201; Youssef, above n 65, 124.

<sup>68</sup> Fellas, above n 23, 203.

<sup>69</sup> Brekoulakis, above n 4, 9.

<sup>70</sup> *Ibid* 9–14.

## F.2.1. The Role of Equity and Good Faith in Contract Law

Freedom of contract is not absolute. Both the positive and negative aspects of the freedom are limited to some extent by considerations of good faith and equity. For example, a party which enters into a contract under duress will in most legal systems not be bound by the obligations in that contract. In other circumstances, negative freedom of contract may be limited to prevent parties from “*abusing the contractual rules of the game*” to avoid contractual obligations.<sup>71</sup> How this limitation is manifested varies between legal systems. For example, in continental European law uses the principle of good faith, whereas in common law jurisdictions equitable doctrines, such as estoppel, provide this limitation.<sup>72</sup> The purpose of imposing these limitations on contract law is to attempt to balance freedom with fairness.<sup>73</sup>

This is illustrated by considering the doctrine of estoppel. The basic theory of estoppel is that a party is precluded from enforcing a right against another party, where the former acted inconsistently with that right, the latter justifiably relied on those actions and it suffered detriment as a result.<sup>74</sup> Put differently, “*it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage.*”<sup>75</sup>

Estoppel is sometimes used in common law jurisdictions, predominantly the US, to find that an arbitration agreement applies to a non-signatory.<sup>76</sup> US courts have developed two distinct versions of arbitral estoppel. The first is

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<sup>71</sup> Nili Cohen, ‘Precontractual Duties - Two Freedoms and the Contract to Negotiate’ in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1997) 28; Simon Whittaker and Reinhard Zimmermann, ‘Good Faith in European Contract Law: Surveying the Legal Landscape’ in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000) 13, 37-39,44-46; Smith, Quintanilla and Hines, above n 4, 193–198.

<sup>72</sup> Cohen, above n 71, 30–31.

<sup>73</sup> Ibid 32.

<sup>74</sup> Brekoulakis, above n 4, 132.

<sup>75</sup> *Wachovia Bank, Nat Ass’n v Schmidt*, 445 F 3d 762, 769 (4th Cir 2006).

<sup>76</sup> Hanotiau, above n 4, 20–21.

the equitable version, which is also available in other common law jurisdictions, the second is the “intertwined” version of estoppel.<sup>77</sup>

The equitable version of estoppel is similar to the third-party beneficiary theory and is based on the proposition that where a party has gained a substantial benefit from a contract that contains an arbitration clause, and seeks to enforce that benefit, that party will typically also be bound by the arbitration agreement. US courts have relied on the equitable version of arbitral estoppel to enforce arbitration agreements against signatories seeking to enforce a right against a non-signatory and vice versa.<sup>78</sup>

In the intertwined version of estoppel, US courts have estopped parties from avoiding arbitration where the parties, contracts and claims are all closely related, or “intertwined”. The two key elements the courts tend to focus on are: if the dispute between the signatory and the non-signatory is intertwined with a contract containing an arbitration agreement, and if the non-signatory has either a close corporate or contractual relationship with one of the signatories to the contract.<sup>79</sup>

US courts developed this version of estoppel specifically in the arbitration context and it departs somewhat from the doctrine’s equitable origins. The courts appear to have dropped the reliance and detriment elements that are

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<sup>77</sup> Brekoulakis, above n 4, 131; Smith, Quintanilla and Hines, above n 4, 207–208; Fellas, above n 23, 204–206.

<sup>78</sup> *International Paper Co v Schwabedissen Maschinen & Anlagen GmbH*, 206 F3d 411 (4th Cir 2000); *Deloitte Noraudit A/S v Deloitte Haskins & Sells*, 9 F3d 1060, 1064 (2nd Cir 1993); Brekoulakis, above n 4, 131–134; Hanotiau, above n 4, 24; Smith, Quintanilla and Hines, above n 4, 106–108.

<sup>79</sup> *Choctaw Generation Ltd Partnership v American Home Assurance Co*, 271 F3d 403 (2d Cir 2001); *Grigson v Creative Artists Agency* 210 F3d 524 (5th Cir 2000); *Hill v GE Power Sys, Inc*, 282 F3d 343, 348 (5th Cir 2002) 527; See also Brekoulakis, above n 4, 135–136; Smith, Quintanilla and Hines, above n 4, 207–208.

required in equitable estoppel. Instead, the focus is on considerations of fairness and efficiency.<sup>80</sup>

The theory underpinning equitable estoppel is largely mirrored in the general principle of international law that one cannot contract oneself to the detriment of others.<sup>81</sup> As noted above, estoppel is a common law doctrine, and is therefore not used in the context of continental European law. However, courts and tribunals have reached similar results through the application of the theories of good faith, or apparent mandate or ostensible authority. Like with the doctrine of estoppel, some of the primary considerations in those circumstances are the relationship between the signatory and non-signatory parties, the conduct of the non-signatory in relation to the relevant contract or transaction and considerations of fairness and equity.<sup>82</sup> For example, in ICC Case No 2375 of 1975, the Tribunal's reasons for finding non-signatories bound by the arbitration agreement were reminiscent of common law judges' reasoning in estoppel cases. It held that a non-signatory was not entitled to "*shelter behind the wording of specific provisions, strictly construed and isolated from the context of the whole agreements*".<sup>83</sup>

Similarly, the doctrine piercing the corporate veil is intended to prevent abuse of corporate law principles and is available both in common law and continental European legal systems.<sup>84</sup> It is typically applied to prevent abuse of the corporate structure or in cases where it would be inequitable for the

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<sup>80</sup> Fellas, above n 23, 206.

<sup>81</sup> Whittaker and Zimmermann, above n 71, 45.

<sup>82</sup> Hanotiau, above n 4, 20, 27; Born, above n 4, 691.

<sup>83</sup> *Award in ICC Case No 2375 of 1975* 257.

<sup>84</sup> Sébastien Besson, 'Chapter 8. Piercing the Corporate Veil: Back on the Right Track' in Bernard Hanotiau and Eric A Schwartz (eds), *Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law* (Kluwer Law International, 2010) vol 7, 7, 147; Smith, Quintanilla and Hines, above n 4, 207–208.

parent not to be held liable for the actions of the subsidiary.<sup>85</sup> For example, when the subsidiary is only a “sham company” set up to provide the parent with a shield from liability, or parent company uses the corporate structure in bad faith to deliberately confuse the other party. In certain exceptional circumstances, tribunals and courts have pierced the corporate veil to find that an arbitration agreement applies to a non-signatory parent of a signatory.<sup>86</sup> In a 2009 decision, the Swiss Supreme Court explained that when the corporate veil is pierced, all rights and obligations of the relevant agreement become binding on the parent, including the arbitration clause.<sup>87</sup>

In the US, a parent company may also be bound by an agreement signed by its subsidiary under the *alter ego* doctrine. According to this doctrine, a parent may be found to be the *alter ego* of its subsidiary when “*their conduct demonstrates a virtual abandonment of separateness*”. The *alter ego* parent may be liable for its subsidiary’s obligations if it exercised complete control over the subsidiary with respect to the relevant transaction and that “*control was used to commit a fraud or wrong that injured the party seeking to pierce the veil.*”<sup>88</sup>

With this in mind, the absence of consent in Brekoulakis’ category of equitable non-signatory theories appears less problematic. These theories introduce considerations of fairness into the inquiry of who the proper parties to an arbitration agreement are. Consent is not irrelevant in this inquiry, but the analysis of what the parties have expressly agreed must be balanced against parties’ legitimate expectations and principles of fairness. The use of equitable doctrines in arbitration law does not demonstrate the deficiencies of

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<sup>85</sup> *Partial Award in Case 14208/14236 of 2013; Final Award in ICC Case 10758 of 2005; ICC Case 5721 of 1990*; see also Hanotiau, above n 4, 46.

<sup>86</sup> Besson, above n 84, 151; Brekoulakis, above n 4, 5–6; Hanotiau, above n 4, 44.

<sup>87</sup> DFT4A\_160/2009 of 25 August 2009, cited in Voser, above n 24, 172–173.

<sup>88</sup> Hanotiau, above n 4, 47; Smith, Quintanilla and Hines, above n 4, 205–206.

the existing framework, rather it illustrates the strength and flexibility of contract law to be able to respond in different contexts.

## F.2.2. Non-signatory Theories Focused on Implied or Constructive Consent

The question of consent to arbitrate does not refer only to consent as evidenced by a signature in a contract, but rather relates to the question of who the proper parties to the arbitration agreement are.<sup>89</sup> That is, consent in this context does not need to be express. Like in other forms of contract, consent to arbitrate may be implied or imputed. The use of theories of implied consent is well established in arbitration law, and the idea that a party can consent to an arbitration agreement without signing it is not in itself necessarily controversial, as demonstrated by for example an agent's ability to bind its principal.

Brekoulakis' primary concern in relation to theories which are based on implied or constructive consent, is that, he argues, the consent in these cases relate to the underlying contract, not the arbitration agreement itself.<sup>90</sup> This argument appears to be based on the doctrine of separability, pursuant to which the arbitration agreement is autonomous of the underlying contract.<sup>91</sup> Arguably, Brekoulakis is overemphasising the relevance of the doctrine of separability in this context. As noted above, in most legal systems an arbitration agreement is automatically transferred if a contract containing an arbitration clause is assigned or otherwise transferred.<sup>92</sup> Brekoulakis himself has, in previous work, contended that transfer of an arbitration agreement in these circumstances does not violate the doctrine of separability. This is

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<sup>89</sup> See Constenla, above n 2, 106; Smith, Quintanilla and Hines, above n 4, 206.

<sup>90</sup> Brekoulakis, above n 4, 11.

<sup>91</sup> Born, above n 4, 349–350.

<sup>92</sup> Sheppard, above n 22, 187–189; Brekoulakis, above n 4, 28–29, 42–45.

because the assignee assumes the assignor's legal position in its totality on "exactly the same terms".<sup>93</sup> If the arbitration agreement did not apply to the assignee, the assignee would be able to unilaterally alter the bargain struck between the assignor and the other party to the contract. Further, the doctrine of separability does not pose a theoretical hinder to the automatic transfer of arbitration agreements, because the arbitration agreement is in effect attached to a substantive right in the relevant contract.<sup>94</sup> A similar logic can be applied to other non-signatory theories that use implied consent, in particular if the non-signatory is the proper party in substitution of a signatory.

If the non-signatory is a party in addition to the signatory parties, the question of consent to the arbitration agreement itself becomes more relevant. For example, where a contract that contains an arbitration agreement provides a third-party beneficiary with a substantive right, the question of whether that third-party beneficiary can enforce the right through arbitration often requires further analysis. In the UK, third party beneficiaries have a statutory right to be treated as a party to the arbitration agreement.<sup>95</sup> Other legal systems have applied other theoretical bases to determine if and when a third-party beneficiary is party to the arbitration agreement, such as express consent, operation of law (similar to that of transfer of rights) or estoppel.<sup>96</sup> This demonstrates that the analysis goes beyond establishing consent only in relation to the underlying contract.

In relation to the group of companies doctrine, Brekoulakis' criticism is perhaps more well founded, at least in relation to its treatment under French

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<sup>93</sup> Brekoulakis, above n 4, 32.

<sup>94</sup> Ibid 32–33.

<sup>95</sup> *Contracts (Rights of Third Parties) Act 1999*, above n 35, s 8.

<sup>96</sup> In France, a third-party beneficiary is bound either because they specifically consented or due to the operation of the law (akin to a transfer of rights), and in the US the source is equitable estoppel, which estops a third-party beneficiary from denying it is bound by an arbitration agreement where it has relied on the substantive contract containing that agreement. Born, above n 4, 1180; Brekoulakis, above n 4, 63–64.

law. The group of companies doctrine was developed in the context of international arbitration and provides that the subsidiaries, affiliates and holding companies of a multi-national corporate group should be treated as a whole, rather than separate legal entities, where the corporate group is in fact a “*same economic reality*”.<sup>97</sup> Whilst the doctrine is not entirely settled, there are three elements that are typically required for a tribunal to apply the doctrine. First, the existence of a tight corporate group structure; second, the active participation of the non-signatory company in the negotiation, performance or termination of the substantive contract; and third a common intention among the parties, including the non-signatory, to arbitrate.<sup>98</sup> None of these elements alone are sufficient, and a tribunal will normally consider the totality of the parties’ conduct, including any express or implied representations or bad faith.<sup>99</sup>

Although the group of companies doctrine developed specifically in the context of international arbitration to cater for the needs of international commerce, it is not universally accepted under national laws. One of the legal systems that has accepted the doctrine as such is French Law, and Brekoulakis takes particular issue with the French courts’ approach to the application of the doctrine.<sup>100</sup> In earlier decisions, the Paris Court of Appeal applied a cumulative test, requiring first that the non-signatory was involved in the performance of the contract, and second that it had knowledge of the existence and scope of the arbitration agreement therein. Gradually, the knowledge requirement became less relevant, and in more recent decisions, French courts have decided the question without any reference to the non-signatory’s

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<sup>97</sup> *Interim Award of 23 September 1982, ICC Case no 4131, YCA Vol IX (1984) 137* (‘*Dow Case*’).

<sup>98</sup> Brekoulakis, above n 4, 149–164; see also *Final Award in ICC Case 10758 of 2005*.

<sup>99</sup> *Final Award in ICC Case 10758 of 2005*; Hanotiau, above n 4, 49–52.

<sup>100</sup> Brekoulakis, above n 4, 12.

knowledge of the arbitration agreement. Instead, their analysis has focused on the non-signatory's involvement in the performance of the contract.

Brekoulakis questions if it is possible to reconcile this approach can be “*fundamental principles of consent*”.<sup>101</sup> Brekoulakis question however has not gone unchallenged by other scholars. For example, Philippe Pinosolle agrees that the French approach is “*difficult to reconcile with fundamental principles of consent*”, but argues that it reflects the French courts’ pragmatism and strive to ensure the effectiveness of arbitration.<sup>102</sup> Bernard Hanotiau argues that the French courts are actually applying the theory of consent by conduct, whereby the parties conduct is an expression of its implied consent to arbitrate.<sup>103</sup> Viewed in that way, the analysis regarding whether the non-signatory is party to an arbitration agreement by reason of its conduct is still centred on the principle of consent.

The question of consent is also still relevant when tribunals apply the group of companies doctrine under principles of international arbitration law. Whilst the elements of the doctrine are not entirely settled, most tribunals will consider whether there is a common intention to arbitrate among the parties, including the non-signatory.<sup>104</sup> This intention to be bound may be inferred from the parties’ conduct.

### F.2.3. The Role of Legal Fiction

Whilst there are admittedly some theoretical difficulties with some of the implied consent theories, Brekoulakis overemphasises the inability to reconcile these theories with the requirement of consent. Rather than abandon

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<sup>101</sup> Ibid.

<sup>102</sup> Pinosolle, above n 25, 216–218.

<sup>103</sup> Hanotiau, above n 4, 37.

<sup>104</sup> Brekoulakis, above n 4, 149–164; see also *Final Award in ICC Case 10758 of 2005*.

the concept of consent, a better approach would be to acknowledge that consent is not only a finding of fact, but is also a legal construct, which provides a framework that both supports and limits the development of arbitration law.

One way in which law develops is through using legal fictions to extend existing legal doctrines to apply in new situations where a strict interpretation of the doctrines would not permit their application.<sup>105</sup> Brekoulakis however, is critical of the use of legal fiction, a criticism which appears founded on the idea it “*runs afoul*” with some pure form of consent, which he defines as “*a conscious and informed decision of an individual to abide by an unequivocal promise*”.<sup>106</sup>

To properly assess this criticism, it is necessary to first examine the role of legal fiction in law. Legal fiction is a tool that can be used to overcome the rigidity of the law and allow legal doctrine to adapt and accommodate change “*without abandoning its fundamental structure*”.<sup>107</sup> Rule of law requires law to be predictable and understandable. Legal doctrines, such the privity of contract, provide a predictable and understandable framework. However, strict application of doctrine may actually prevent the law from responding to social and commercial needs and inhibits the development of the law to apply in new circumstances. Law makers constantly remake legal categories to fit new conditions and legal fiction enables them to adapt existing concepts while retaining the existing understanding and framework of the law.<sup>108</sup> In his treatise on the topic, Lon Fuller explained that legal fictions exist to allow specific legal results to be reconciled with a certain premise or purpose. Put

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<sup>105</sup> Aviam Soifer, ‘Reviewing Legal Fictions’ (1985) 20 *Georgia Law Review* 871, 7.

<sup>106</sup> Brekoulakis, above n 4, 13.

<sup>107</sup> Soifer, above n 105, 7.

<sup>108</sup> Lon Luvois Fuller, ‘Legal Fictions’ (1930) 25(5) *Illinois Law Review* 7.

differently, a legal fiction is generally “*intended to escape the consequences of an existing, specific rule of law.*”<sup>109</sup>

Theories of implied or constructive consent use legal fiction as a tool to apply arbitration agreements to non-signatories who should properly be regarded as parties to the agreement where express consent is absent. The use of these theories avoids the general rule of law that arbitration agreements only apply to signatories (which in common law is referred to as privity). The consequence of a strict application of this general rule would be that arbitration agreements cannot apply to non-signatories. However, the commercial reality of many users of arbitration is that non-signatories are sometimes proper parties to an arbitration agreement, or that they should be compelled or permitted to arbitrate under that agreement due to considerations of fairness or equity.

Legal fiction may create “*obstacles to [the] symmetrical classification*”<sup>110</sup> of when a person is permitted or obliged to arbitrate, but it does not “*run afoul with the very idea of consent*”.<sup>111</sup> Rather it allows the parties to escape the consequence of the strict application of privity while retaining the existing framework of consent, which provides certainty and predictability.

Legal fiction is not foreign to international arbitration law. As an illustration, most of the parties to international commercial arbitrations are corporations or other non-natural (i.e. non-human) entities. In many aspects, law (including arbitration law), treats corporations as persons. They can enter into contracts, sue and be sued, and have the same right to access to justice through the court

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<sup>109</sup> Ibid 5.

<sup>110</sup> Soifer, above n 105, 7.

<sup>111</sup> Brekoulakis, above n 4, 13.

system as natural persons.<sup>112</sup> However, the very idea that a corporation has a legal personality, is itself a legal fiction. The doctrine of corporate legal citizenship developed separately on both sides of the Atlantic during the 19<sup>th</sup> century.<sup>113</sup> At that time, law makers created this legal fiction to escape the general rule that only natural persons could engage in legal acts, such as to sue or be sued. The doctrine of corporate legal citizenship resolved this practical obstacle to efficient administration of justice by extending the concept of person to a corporate entity.<sup>114</sup> While the doctrine is now well established, it was controversial at the time the courts began developing it. For example, in the 1896 case *St Louis & S.F.R. Co v James*, the US Supreme Court commented that the doctrine of corporate citizenship “*went to the very verge of judicial power.*”<sup>115</sup> This demonstrates how effective legal fictions can be, despite their departure from traditional understanding and application of legal doctrine.

### **F.3. Arbitration Law is Able to Respond**

Brekoulakis argues that arbitration law is often unable to accommodate complex commercial disputes involving non-signatories because the arbitration law on non-signatories has not been developed specifically for international arbitration, but is instead made up of “*a body of fragmented doctrines that have been largely borrowed from national contract law*”.<sup>116</sup>

As Brekoulakis points out, a cause of the problem is arbitration’s bilateral and contractual nature.<sup>117</sup> However, the crux of the problem is that the institution

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<sup>112</sup> Sanford A Schane, ‘Corporation Is a Person: The Language of a Legal Fiction’ (1986) 61 *Tulane Law Review* 563, 1.

<sup>113</sup> RM Benjamin, ‘Corporate Citizenship a Legal Fiction’ (1907) 65 *Central Law Journal* 157; Schane, above n 112.

<sup>114</sup> Schane, above n 112, 10–11.

<sup>115</sup> 161 US 545, 563 cited in Benjamin, above n 113, 159.

<sup>116</sup> Brekoulakis, above n 4, 4.

<sup>117</sup> *Ibid* 2.

of arbitration was created to cater for two-party disputes where both parties are signatories to the arbitration agreement. The fault does not lie in the use of legal theories originating in contract law. As argued above, the nature and purpose of arbitration law aligns with contract law, meaning that drawing on established contract law theories may actually benefit arbitration law, because it does not need to reinvent the wheel when dealing with similar questions.<sup>118</sup> Moreover, the theories originating in contract law are not rigid, but rather are sufficiently flexible to be able to develop in the context of arbitration law. For example, the principle of automatic transfer of an arbitration clause in an assigned contract would violate the doctrine of separability on a strict application of the doctrine. However, courts and tribunals usually do not require the assignee to separately and expressly consent to the arbitration agreement itself, as the assignee assumes the assignor's legal position of the terms the assignor agreed with the other contracting party. This doctrinal adjustment permitting automatic transfer is now well established in most national arbitration laws.<sup>119</sup>

Further, specific theories for non-signatories have in fact been developed specifically in the arbitration context, namely the group of companies doctrine (which Brekoulakis recognises)<sup>120</sup>, and the intertwined version of estoppel (which he does not discuss in his article). Brekoulakis discusses the group of companies doctrine in detail, but dismisses it as lacking appeal in the practice of international arbitration.<sup>121</sup>

Many of Brekoulakis' criticisms of the group of companies doctrine are pertinent and should not be readily dismissed. For example, despite its purported ability to respond to the needs of users of international arbitration,

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<sup>118</sup> Fellas, above n 23, 203.

<sup>119</sup> Brekoulakis, above n 4, 32–33.

<sup>120</sup> Brekoulakis, above n 4, 6–8.

<sup>121</sup> *Ibid* 6, 8.

the doctrine has not gained broad acceptance among national laws, meaning the group of companies doctrine has failed to deliver its promise of an effective solution to the problem of non-signatories, at least when considered with reference to national laws.<sup>122</sup> However, this does not itself mean that arbitration law is unable to respond.

Other illustrations of how arbitration law is able to develop specific responses intended to address the problems posed by non-signatories are found national laws. One of the most obvious examples is the intertwined version of estoppel in the US. The development of this theory demonstrates that national arbitration laws have the ability to be sufficiently flexible and adaptable to be able to better take into account the commercial reality of complex business disputes. It also demonstrates that even common law jurisdictions have the capacity to move beyond a strict adherence to the doctrine of separate legal personality, which Brekoulakis argues has prevented the group of companies doctrine from gaining acceptance in those jurisdictions.<sup>123</sup> Another prominent example is the enactment of the *Contracts (Rights of Third Parties) Act 1999* in the UK, which provides that where a term of a contract which confers a benefit on a third party is subject to an arbitration agreement, the third party must be treated as a party to that agreement.<sup>124</sup>

Leading arbitral institutions are also cognisant of the increased need for rules which deal with issues that arise in multi-party disputes and many have revised their rules to include provisions relating to, for example, joinder of third parties and consolidation.<sup>125</sup> These provisions typically require the parties' consent but are nonetheless a step in the direction of addressing arbitration's shortcomings in relation to multi-party disputes.

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<sup>122</sup> Ibid 6–8.

<sup>123</sup> Ibid 8.

<sup>124</sup> *Contracts (Rights of Third Parties) Act 1999*, ss1 and 8.

<sup>125</sup> E.g. ICC Arbitration Rules, Arts 7-10; LCIA Rules, Art 22.

Another reason why the development of arbitration law on non-signatories (as well as other issues relating to multi-party disputes) is slow is that users of arbitration themselves resist certain developments which would make it easier to bring non-signatories into arbitration. For example, the users of arbitration involved in revising the ICC Arbitration Rules, made it clear they wanted consent (or implied consent) to remain as the basis for bringing non-signatories into arbitration.<sup>126</sup> Similarly, some (albeit not all) users opposed statutory reform in the UK,<sup>127</sup> which would provide for court ordered consolidation of arbitrations. Of those who opposed the reform, the majority of the opposition came from the construction industry,<sup>128</sup> one of the industries that Brekoulakis identifies as most likely to give rise to complex, multi-party disputes.<sup>129</sup> They opposed the reform as unnecessary, because, among other things: the existing regime was sufficient and provided certainty; those who want to can make provision for multi-party arbitration in their contracts; no reform will effectively deal with all likely situations; and parties did not want to find themselves unintentionally bound to an arbitration.<sup>130</sup> This demonstrates that users of arbitration, who are aware of the challenges of the existing framework, nevertheless desire the certainty provide by the current framework. Developments should therefore be made within this framework, by reference to existing principles and doctrines.

At the same time, Brekoulakis observation that an international response to non-signatory issues is required is compelling, as it would provide a more uniform approach, which would in turn increase certainty.<sup>131</sup> Karim Abou

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<sup>126</sup> Voser, above n 24, 180.

<sup>127</sup> The enactment of *Contracts (Rights of Third Parties) Act 1999* as well as proposed reform to the United Kingdom *Arbitration Act 1996*.

<sup>128</sup> Hardy, above n 20, 9 footnote 14.

<sup>129</sup> Brekoulakis, above n 4, 2.

<sup>130</sup> Hardy, above n 20, 9 footnote 14.

<sup>131</sup> Brekoulakis, above n 4, 3, 19.

Youssef suggests that such an international response is already emerging through a new generation of case law in which tribunals and courts apply principles of jurisdictional *lex mercatoria*. Tribunals and courts refer to these principles by a variety of other terms, including usages of international commerce, general principles of international arbitration law, or even equitable doctrines such as estoppel. They primarily use these principles to “*alleviate the rigor of arbitration law and adapt it to jurisdictional necessities*”.<sup>132</sup> The basic principles of this emerging jurisdictional *lex mercatoria* are:

- consent as a general and sufficient basis of jurisdiction;
- automatic transfer of the arbitration agreement with the transfer of substantive rights; and
- a broad interpretation of arbitration agreements.<sup>133</sup>

A review of published ICC awards further supports the idea that tribunals are increasingly willing to apply general principles of international arbitration law to questions of jurisdiction over non-signatories. A prominent example is the Tribunal in the Dow Case that applied substantive rules of international commerce, which it held included the group of companies doctrine.<sup>134</sup> A later example is the partial award in the ICC Case 14208/14236 of 2013, where the tribunal considered this issue. The tribunal applied what it referred to as transnational legal principles to determine if the arbitration agreement applied to the non-signatory parent company of one of the signatories, and noted that the experts in the case agreed that:<sup>135</sup>

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<sup>132</sup> Youssef, above n 65, 126.

<sup>133</sup> Ibid 126–128.

<sup>134</sup> *Dow Case*.

<sup>135</sup> Partial award on jurisdiction in ICC Case 14208/14236 of 2013, 2-6; see also Award ICC Case 5721 of 1990, Award ICC Case 8385 of 1997, and Award ICC Case 6769 of 1991.

*international arbitrators often decide this issue in cases with a cross border element through the application of transnational legal principles and that it is legitimate for them to do so.*

## **F.4. Section Conclusion**

A closer analysis of Brekoulakis' critiques of the existing framework for non-signatories reveals that it is not as disconnected from contract law, as devoid of consent and as unable to respond to the needs of users of arbitration as he suggests. First, this thesis submits that arbitration law should be considered a form of contract law. This is clear when arbitration law's dual purpose of establishing both liability and jurisdiction is taken into account, rather than only the jurisdictional element. Further, contract law is sufficiently flexible to enable its doctrines to be adapted to new circumstances, like arbitration. Secondly, the existing non-signatory theories are not as contrary to principles of consent as Brekoulakis suggests. Finally, that arbitration law struggles to deal with complex multi-party arbitrations, including those involving non-signatories, is undisputable. However, arbitration law is not so ill equipped as Brekoulakis suggests to develop better mechanisms to deal with non-signatories in multi-party disputes. This is evident from developments that have already taken place. National contract law theories are not the only way in which arbitration law can, or does, respond. Other responses such as statutory reform and revision of arbitration institution rules also contribute to alleviating the problem. Perhaps the most promising development is the use of principles of international law to determine questions of jurisdiction over non-signatories.

## G. Why Brekoulakis' General Theory Should Not be Adopted

International commercial disputes involving non-signatories raise challenges to arbitration law, which it is not always able to resolve in a satisfactory way. Strict adherence to the principles of party autonomy and freedom of contract means that it is not always possible to bring non-signatories who are involved in disputes into arbitration. For this reason, Brekoulakis' general theory for non-signatories is at first glance attractive, in particular as it promises to resolve this thorny problem for arbitration law and would thus make arbitration better able to accommodate complex multi-party disputes. However, a closer analysis of Brekoulakis' general theory reveals that it is not as general nor as far removed from the concept of consent as he suggests.

### G.1. Brekoulakis' Theory Not as General as Suggested

Brekoulakis refers to his theory as a “unifying theory”<sup>136</sup> or a “general theory”<sup>137</sup> for non-signatories. However, his theory does not in fact purport to cover all cases involving non-signatories. It would only apply in those specific cases which would fit his detailed test, pursuant to which a non-signatory could be brought into an arbitration if:<sup>138</sup>

1. its claim is inextricably connected with a dispute submitted for arbitration;
2. it has a close relationship with one of the signatories; and
3. the signatories and non-signatories have claims and contracts that are intertwined.

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<sup>136</sup> Brekoulakis, above n 4, 1.

<sup>137</sup> Ibid 20.

<sup>138</sup> Ibid 20–23.

Based on this test, Brekoulakis' theory only would only apply in multi-party disputes, where there is a dispute between two signatories that has been submitted to arbitration, which also includes non-signatories.<sup>139</sup> Presumably then, his theory would not cover disputes involving only one of the signatories and a non-signatory. For example, the dispute may be between a signatory and the non-signatory parent company of the other contracting party. In that circumstance, the signatory party would need to commence arbitration against the other signatory to then be able to bring the parent company into the arbitration. The general theory would also not apply where the non-signatory does not have a close contractual or corporate relationship, despite being inextricably connected to the dispute. Both of these limitations on the scope of Brekoulakis' theory reduce its general applicability.

Further, for Brekoulakis' general theory to apply, the language of the relevant arbitration agreement must be broad enough to permit multi-party arbitration. Brekoulakis admits that narrowly drafted arbitration agreements could exclude non-signatories from participating in an arbitration of a dispute they are involved in.<sup>140</sup> This means that drafting parties have the ability to exclude non-signatories from any future arbitration. Considering the hesitance of the users of arbitration to move away from the consent-based system, it is likely that non-signatories who fall within Brekoulakis' test would nevertheless not be able to be brought into an arbitration in at least some complex commercial disputes of the very kind that Brekoulakis' theory is aimed at assisting.

Finally, it is not entirely clear if Brekoulakis' theory is intended to replace all existing theories or to supplement them. His rhetoric, by referencing his theory as a "general" or "unifying" theory, suggests that his proposal is to completely replace the current framework. However, since his theory only appears to be

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<sup>139</sup> Ibid 21.

<sup>140</sup> Ibid 24.

applicable in multi-party disputes between related parties, in practice some mechanism to deal with non-signatories in bilateral disputes, or that are unrelated to the signatory parties, would also be required alongside this theory. The alternative would be that non-signatories could not be brought into an arbitration, even in circumstances where they could be under the current framework. Again, this suggests that Brekoulakis' theory is not entirely general.

## **G.2. Consent not Absent from Brekoulakis' General Theory**

A closer analysis of Brekoulakis' general theory suggests that it does not shift away from consent as much as he contends. His theory is in many ways similar to the US doctrine of intertwined estoppel.<sup>141</sup> Under this doctrine, both signatories and non-signatories may be estopped from avoiding arbitration where the parties, contracts and claims are all closely related, or "intertwined". The key elements of intertwined estoppel are:

1. if the dispute between the signatory and the non-signatory is intertwined with a contract containing an arbitration agreement; and
2. if the non-signatory has a close relationship with one of the signatories to the contract.<sup>142</sup>

These elements bear a striking similarity with the elements of Brekoulakis' general theory. Despite estoppel being an equitable doctrine, John Fellas suggests that consent remains at the core of the analysis of intertwined estoppel (as well as equitable estoppel). Relevantly, where the intertwined version of estoppel is applied to estop a signatory of an arbitration agreement

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<sup>141</sup> See also Fellas, above n 23, 204–206.

<sup>142</sup> *Choctaw Generation Ltd Partnership v American Home Assurance Co*, 271 F3d 403 (2d Cir 2001); *McBro Planning Development v Triangle Electrical Construction* 741 F2d 342 (11th Cir 1984); *Hughes Masonry v Greater Clark County School Bldg* 659 F2d 836 (7th Cir 1981); *JLM Industries v Stolt-Nielson* 387 F3d 163 (2nd Cir 2004); Brekoulakis, above n 4, 135–136; Fellas, above n 23, 204–206; Smith, Quintanilla and Hines, above n 4, 207–208.

from avoiding arbitration with a willing non-signatory, the court's task is to determine the scope of that agreement. Consent is not at issue, as the signatory has signed the arbitration agreement and the non-signatory has submitted to the arbitration. The same would be true in a similar scenario under Brekoulakis' theory.

Where the non-signatory is an unwilling party Brekoulakis' theory may admittedly provide a somewhat simpler analysis. Despite the prominence of estoppel in the US, US courts appear reluctant to compel an unwilling non-signatory to arbitrate, unless it has sought to enforce a direct benefit from the contract containing the arbitration agreement. In those circumstances courts are likely apply the equitable version of estoppel, to determine if the non-signatory is deemed to have impliedly consented by accepting that benefit, before considering the proximity of the relationship between the signatories and the non-signatories.<sup>143</sup> Pursuant to Brekoulakis' theory, this additional inquiry of establishing the non-signatory's consent (constructive or otherwise) would not be required.

However, the second element of Brekoulakis' test, that the signatories and the non-signatories have a close contractual or corporate relationship is mirrored in intertwined estoppel. More importantly, it is in this relationship that US courts have analysed when considering whether the non-signatory has consented to arbitration. For example, in cases where the link was contractual, the non-signatory had nevertheless signed a related contract containing an arbitration agreement, meaning it had consented to arbitration in some form.<sup>144</sup> When the link is a close corporate relationship between a signatory and a non-

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<sup>143</sup> *Thomson-CSF, SA v American Arbitration Association* 64 F3d 773 (2d Cir 1995); *In re Arbitration Between Keystone Shipping Co & Texport Oil Co* 782 F Supp 28 (SDNY 1992); See also Smith, Quintanilla and Hines, above n 4, 207–208; Fellas, above n 23, 206–207. *Ibid* 206–207.

<sup>144</sup> *McBro Planning Development v Triangle Electrical Construction* 741 F2d 342 (11th Cir 1984).

signatory, courts appear to justify the application of the arbitration agreement to the non-signatory where the two share similar or identical commercial interests.<sup>145</sup> Again, this suggests that the requirement of consent is relevant to the inquiry. Because Brekoulakis' theory would only apply where this type of close relationship exists, and not where the non-signatory is unrelated, the non-signatory's consent is not entirely irrelevant.

### **G.3. Consent is the Foundation of Arbitration**

Whilst Brekoulakis admits that this theory is not a “*radical departure from consent*”, he nevertheless suggests that his general theory offers an “*intellectually more honest approach*” to the issue relating to non-signatories.<sup>146</sup> However, if the suggestion that the focus of arbitration law in relation to non-signatories should be shifted away from consent is accepted, this may of itself have consequences which reach farther than simply bringing non-signatories or third parties into arbitration. It may affect the legitimacy of arbitration as an institution.

Consent is a founding pillar of arbitration and an arbitral tribunal has jurisdiction to hear and determine a dispute because the parties have agreed, or consented, to submit their dispute to it. Some commentators argue that, because courts are the “natural” adjudicators of disputes, parties' consent is required to oust the jurisdiction of the courts.<sup>147</sup> This argument carries particular weight in jurisdictions where access to court is a constitutional right. On a more fundamental level, the requirement for consent is rooted in the contractual nature of arbitration law. Contract law is predicated on the freedom of contract, which means that parties are free to create an agreement

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<sup>145</sup> *JLM Industries v Stolt-Nielson* 387 F3d 163 (2nd Cir 2004); *Astra Oil v Rover Navigation* 344 F3d 276 (2nd Cir 2003).

<sup>146</sup> Brekoulakis, above n 4, 30.

<sup>147</sup> Hanotiau, above n 1, 256; Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 71.

that reflects their free will. There is also a negative aspect of the freedom to contract, which means that parties are free from obligations if they are not party to a binding agreement.<sup>148</sup>

An important consequence of arbitration's consensual nature is that it provides arbitration as an institution with legitimacy. Courts, who are the default, or "natural", adjudicators of disputes, derive a key part of their legitimacy from their public nature, which means they are open to public scrutiny. By contrast, arbitration is private and must therefore find an alternative source of legitimacy. Just as the public nature and openness of the court is integral to public confidence in the judicial system, the consensual nature of arbitration is integral to the participants confidence in arbitration as an institution.<sup>149</sup> Whilst Brekoulakis' idea that non-signatories who are inextricably involved in the dispute should be brought into the arbitration on the basis that it may increase the efficiency of arbitration in multi-party disputes,<sup>150</sup> the countervailing risk is that a departure from the consensual framework risks decreasing the legitimacy of arbitration.

## **G.4. A Complex Problem that Requires a Nuanced Response**

The problems associated with non-signatories are complex and multi-faceted. Often there is not one right answer in a particular situation. A number of possible solutions may be available and what works in one situation may be of no assistance in another. Even Brekoulakis implicitly admits through his very specific test that no one solution is likely to be able to cover all possible cases involving non-signatories.

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<sup>148</sup> Cohen, above n 71, 25.

<sup>149</sup> George Berrman, 'The "Gateway" Problem in International Commercial Arbitration' (2012) Winter *Yale Journal of International Law* 4.

<sup>150</sup> Brekoulakis, above n 4, 17.

Because non-signatory issues arise in so many different contexts, perhaps what is needed is not a general, unifying theory, but a range of nuanced options for parties involved in disputes with or including non-signatories.<sup>151</sup> While the existing framework offers a range of options, it is undeniable that the current approach is piecemeal, in particular in common law jurisdictions. Non-signatory theories vary across jurisdictions and are not always applied consistently. Clearly it would be desirable to develop a more clearly defined and consistently applied set of rules. A pragmatic solution could be to apply principles of international arbitration law to determine jurisdictional questions in relation to non-signatories. As noted above, Youssef suggests such an international response is already emerging.<sup>152</sup> Under this approach myriad of alternative theories would remain available, allowing parties and decisionmakers to consider which theoretical basis (if any) is the most appropriate for applying an arbitration agreement to a non-signatory in any particular case. More importantly, a properly articulated set of international principles could contribute to a more uniform approach to the question of jurisdiction over non-signatories.

## **G.5. Section Conclusion**

Whilst a general theory for non-signatories may appear desirable because of its promise to offer a simpler solution to a difficult problem, Brekoulakis' theory should not be adopted as such a general theory. Firstly, it is not in fact general enough to alone address all issues related to non-signatories without being supplemented by additional mechanisms. Further, his theory purportedly abandons the basic principle of consent in arbitration law, which has the potential of undermining the legitimacy of arbitration as an institution. Finally, the problems associated with non-signatories require a nuanced approach. Brekoulakis' theory does not provide this type of nuanced approach.

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<sup>151</sup> Youssef, above n 65, 115.

<sup>152</sup> *Ibid* 126–128.

## H. Conclusion

This thesis has critically analysed Brekoulakis' critiques of the existing arbitration law regarding non-signatories as well as his new general theory for non-signatories. It concluded that it is not desirable to adopt Brekoulakis' general theory, firstly because this thesis disagrees with his critiques of the existing framework (which he argues justifies his general theory), and secondly because his general theory does not in fact offer the promised solution.

Turning to Brekoulakis' critiques of the existing framework. First, arbitration law is not an autonomous legal field, but rather is a form of contract law. The nature and purpose of arbitration law aligns with contract law, as both seek to answer the question of when and against whom promises are legally enforceable. The jurisdictional nature of arbitration law is an effect of a legally enforceable promise and does not remove the contractual nature of arbitration agreements. Contrary to Brekoulakis' assertion that arbitration law should not draw on theories developed in contract law, this thesis submits that it is both appropriate and desirable for arbitration law to draw on theories that have been tried and tested in different contexts. Contract law is sufficiently flexibly to enable its doctrines to be adapted to new circumstances, including arbitration.

Secondly, Brekoulakis' argument that the existing theories for non-signatories do not accord with fundamental principles of consent does not stand up to scrutiny, in particular if it is accepted that arbitration law is a form of contract law. Consent is a fundamental pillar of arbitration law and even a rhetorical shift away from consent as the basis for arbitration risks undermining the legitimacy of arbitration. It is true that the existing non-signatory theories either rely on implied or constructive consent or on considerations of good faith or equity. But both categories of theories fit comfortably within the

existing consent-based framework. Whilst implied consent is a legal fiction, legal fictions are in effect a useful legal tool to provide a theoretical basis to extend legal principles to new situations, in order to achieve a result that a strict application of doctrine would prevent.<sup>153</sup> In the context of non-signatories, implied consent theories permit the stretching of legal principles whilst retaining the framework of consent. Theories that are based in equity or on principles of good faith admittedly do not focus on consent. Neither are they incompatible with fundamental principles of consent. It is widely accepted that freedom of contract is not absolute. Parties' reasonable expectations in terms of fair dealing and good faith on the part of their contractual counterpart are not irrelevant in law. Principles of equity and good faith operate to limit freedom of contract and can be used to impose legal obligations on parties despite the absence of consent. These principles thus do not contravene principles of consent, rather they provide a balance within the framework.

Thirdly, the existing non-signatory theories in arbitration law are more able to respond to the challenges raised by multi-party arbitration, including non-signatories, than Brekoulakis gives them credit for. The existing theories that have been drawn from contract law show that they are sufficiently flexible to adapt to the arbitration context. Further, several non-signatory theories have in fact been developed specifically for arbitration (group of companies doctrine and intertwined estoppel), and both national legislatures and arbitration institutions have taken steps to alleviate the problems associated with multi-party arbitration. Whilst complex multi-party disputes involving non-signatories remain difficult for arbitration law to accommodate, progress is being made, albeit slowly. Another relevant consideration on this point, is that users of arbitration resist changes which contravene principles of party

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<sup>153</sup> Fuller, above n 108, 5–7.

autonomy and consent. The existing system, while imperfect, is viewed as providing certainty.

Turning finally to Brekoulakis' general theory itself. This thesis submits that Brekoulakis' general theory for non-signatories should not be adopted. As discussed above, this thesis disagrees with Brekoulakis' argument that his critiques of the existing framework justify his general theory. Therefore, Brekoulakis' general theory should not replace the existing non-signatory theories. There are also several additional reasons why Brekoulakis' general theory should not be adopted. First, it is not in fact an entirely general theory, but would only apply in multi-party disputes, involving both the signatories and the non-signatory, and where the non-signatory is closely related to one of the signatories. Secondly, Brekoulakis' general theory risks undermining the legitimacy of arbitration by removing the requirement of consent. Finally, Brekoulakis' theory does not provide the type of nuanced approach required to resolve the complex problems associated with non-signatories in arbitration.

# I. Bibliography

## **Legislation, International Conventions, Institutional Rules**

*Arbitration Act 1996* (United Kingdom)

*Contracts (Rights of Third Parties) Act 1999* (United Kingdom)

International Chamber of Commerce Arbitration Rules

The London Court of International Arbitration Rules

United Nations Convention on the Recognition and Enforcement of Foreign  
Arbitral Awards (“New York Convention”)

## **Cases and Awards**

*Arthur Andersen LLC v Carlisle*, 556 U S 624 (S Ct 2009)

*Astra Oil v Rover Navigation* 344 F3d 276 (2nd Cir 2003)

*Award in ICC Case No 2375 of 1975*

*Award in ICC Case 5721 of 1990*

*Award ICC Case 6769 of 1991*

*Award ICC Case 8385 of 1997*

*Award in ICC Case 10758 of 2005*

*Choctaw Generation Ltd Partnership v American Home Assurance Co*, 271  
F3d 403 (2d Cir 2001)

*Dallah Real Estate and Tourism Holding Co v The Ministry of Religious  
Affairs, Government of Pakistan* [2009] EWCA Civ 755

*Deloitte Noraudit A/S v Deloitte Haskins & Sells*, 9 F3d 1060, 1064 (2nd Cir  
1993)

*Grigson v Creative Artists Agency* 210 F3d 524 (5th Cir 2000)

*Hill v GE Power Sys, Inc*, 282 F3d 343, 348 (5th Cir 2002)

*Hughes Masonry v Greater Clark County School Bldg* 659 F2d 836 (7th Cir  
1981)

*In re Arbitration Between Keystone Shipping Co & Texport Oil Co* 782 F Supp  
28 (SDNY 1992)

*Interim Award of 23 September 1982, ICC Case no 4131, YCA Vol IX (1984)*  
*International Paper Co v Schwabedissen Maschinen & Anlagen GmbH*, 206  
F3d 411 (4th Cir 2000)  
*JLM Industries v Stolt-Nielson* 387 F3d 163 (2nd Cir 2004)  
*McBro Planning Development v Triangle Electrical Construction* 741 F2d  
342 (11th Cir 1984)  
*Montedipe SpA v JTP-RO Jugotanker* [1990] 2 Lloyd's Rep 11  
*Partial Award in Case 14208/14236 of 2013*  
*Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm)  
*PT First Media TBK v Astro Nusantara International and Others* [2013]  
SGCA 57  
*Thomson-CSF, SA v American Arbitration Association* 64 F3d 773 (2d Cir  
1995)  
*Wachovia Bank, Nat Ass'n v Schmidt*, 445 F 3d 762, 769 (4th Cir 2006)  
*Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd*, [2005]  
FCA 1102 (Unreported, Federal Court of Appeal (Australia), 2005)

### **Books and Articles**

Benjamin, RM, 'Corporate Citizenship a Legal Fiction' (1907) 65 Central  
Law Journal 157  
Berrman, George, 'The "Gateway" Problem in International Commercial  
Arbitration' (2012) Winter Yale Journal of International Law  
Besson, Sébastien, 'Chapter 8. Piercing the Corporate Veil: Back on the Right  
Track' in Bernard Hanotiau and Eric A Schwartz (eds), *Multiparty  
Arbitration, Dossiers of the ICC Institute of World Business Law* (Kluwer  
Law International, 2010) vol 7, 7  
Bix, Brian, *Contract Law: Rules, Theory, and Context* (Cambridge University  
Press, 2012)  
Blackaby, Nigel and Constantine Partasides, *Redfern and Hunter on  
International Arbitration* (Oxford University Press, 6th ed, 2015)

Born, Gary, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014)

Born, Gary, *International Arbitration: Law and Practice* (Kluwer Law International, 2nd ed, 2016)

Brekoulakis, Stavros, *Third Parties in International Commercial Arbitration* (Oxford University Press, 2010)

Brekoulakis, Stavros, 'Chapter 8: Parties in International Arbitration: Consent v. Commercial Reality' in Stavros Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 119

Brekoulakis, Stavros, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories' (2017) 8(4) *Journal of International Dispute Settlement* 610

Buckingham, Paul, 'Arbitration' in Robert Gaitskell (ed), *Construction Dispute Resolution Handbook* (ICE Publishing, 2nd ed, 2011)

Chynoweth, Paul, 'Legal Research' in Andrew Knight and Leslie Ruddock (eds), *Advanced research methods in the built environment* (Wiley-Blackwell, 2008)

Cohen, Nili, 'Precontractual Duties - Two Freedoms and the Contract to Negotiate' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1997)

Constenla, Pablo, "'Multi"- Arbitration Incidents in International Disputes: "Better Marriages and Partners" Disputes?" (2015) 2015(24) *Spain Arbitration Review* 105

Fai, Edwin Tong Chun and Nakul Dewan, 'Drafting Arbitration Agreements with "Consolidation" in Mind?' (2009) 5(1) *Asian International Arbitration Journal* 70

Fellas, John, 'Chapter 11: Comments on Parties in International Arbitration: Consent v. Commercial Reality by Professor Stavros Brekoulakis' in Stavros

Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 199

Fuller, Lon Luvois, 'Legal Fictions' (1930) 25(5) *Illinois Law Review*

Gilbert, John, 'Chapter 22: Multi-Party and MultiContract Arbitration' in Julian DM Lew, Harris Bor and et al. (eds), *Arbitration in England, with chapters on Scotland and Ireland* (Kluwer Law International, 2013) 455

Girsberger, Daniel and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (Kluwer Law International; Schulthess Juristische Medien AG, 3rd ed, 2016)

Hanotiau, Bernard, 'Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis' (1998) 18(3) *Journal of International Arbitration* 253

Hanotiau, Bernard, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International, 2005)

Hardy, Clive, 'Multi-Party Arbitration: Exceptional Problems Need Exceptional Solutions' (2000) 66(1) *Arbitration* 15

Hogg, Martin A, 'Competing Theories of Contract' in Larry A DiMatteo et al (eds), *Commercial Contract Law* (Cambridge University Press, 2013) 14

Hutchinson, Terry, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' [2016] *Erasmus Law Review*

Kondev, Dimitar, *Multi-Party and Multi-Contract Arbitration in the Construction Industry* (John Wiley & Sons, 2017)

Pinsolle, Philippe, 'Chapter 12: A French View On The Application of The Arbitration Agreement to Non-Signatories' in Stavros Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 8

Sanjeyvignesh, J, 'Types of Legal Research Needed for Law Reform' <[http://www.academia.edu/7146989/TYPES\\_OF\\_LEGAL\\_RESEARCH\\_NEEDED\\_FOR\\_LAW\\_REFORM](http://www.academia.edu/7146989/TYPES_OF_LEGAL_RESEARCH_NEEDED_FOR_LAW_REFORM)>

Schane, Sanford A, 'Corporation Is a Person: The Language of a Legal Fiction' (1986) 61 *Tulane Law Review* 563

Sheppard, Audley, 'Chapter 10: Third Party Non-Signatories in English Arbitration Law' in Stavros Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 183

Smith, Steven, Marcus Quintanilla and Paul Hines, 'Chapter 9: Enforcing Agreements to Arbitrate' in Laurence Shore and Tai-Heng Cheng (eds), *International Arbitration in the United States* (Kluwer Law International, 2017) 14

Soifer, Aviam, 'Reviewing Legal Fictions' (1985) 20 *Georgia Law Review* 871

Tyler, Tom R, 'Methodology in Legal Research' (2017) 13(130) *Utrecht Law Review* 14

Voser, Nathalie, 'Chapter 9: The Swiss Perspective on Parties in Arbitration: "Traditional Approach With a Twist Regarding Abuse of Rights" or "Consent Theory Plus"' in Stavros Brekoulakis, Julian DM Lew and et al. (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International, 2016) vol 37, 17

Whittaker, Simon and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000)

Youssef, Karim Abou, 'The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration' in Albert Jan van der Berg (ed), *Arbitration: The Next Fifty Years* (Kluwer Law International, 2012) vol 16, 20