
McGill Journal of Dispute Resolution



Revue de règlement des différends de McGill

Volume 5 (2018-2019), Number 2

Article

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The Law Applicable to Veil Piercing in International Arbitration

Juan Marcos Otazu*

This paper addresses a significant contemporary issue in international commercial arbitration: choice of law in the context of veil piercing. While most jurisdictions today recognize that the separate legal personality of a corporation can be disregarded to submit the parent company or the controlling shareholder to a choice-of-forum agreement and/or to hold them contractually liable, the rules and applicable test for veil piercing vary across state lines. This discrepancy proves to be particularly complex in international arbitration, which often incorporates bodies of law from various jurisdictions. For example, it is not uncommon for parties to be incorporated and/or have their principal place of business in different states, states which might also be distinct from the place chosen as the seat of the arbitration. The parties might again choose the law of a totally different state to govern their contract. This paper focuses on the jurisdictional issue (i.e. whether the non-signatory can be included in the arbitration proceedings via veil piercing) and analyzes various choice-of-law proposals while also proposing possible solutions that achieve predictable and uniform results.

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Cet article s'adresse à une problématique contemporaine au sein de l'arbitrage commerciale internationale : le choix de loi dans le contexte de la lever de voile corporatif. Tandis que la plupart des juridictions d'aujourd'hui reconnaissent que la personnalité juridique unique de la corporation peut être mis de côté pour soumettre la société mère ou actionnaire contrôlant à une entant de clause attributive de compétence et/ou les tenir responsable pour des fautes contractuelles, les règles et les tests applicables varient considérablement. Cette divergence est particulièrement complexe en arbitrage commerciale internationale, qui importe souvent plusieurs corps de lois de différentes juridictions. Par exemple, ce n'est pas rare que les parties sont incorporés et/ou ont leur siège social dans différents états, des états qui pouvant aussi être distincts du milieu choisi pour être le siège juridique de l'arbitrage. Les parties peuvent aussi choisir un loi d'un état différent pour gouverner leur contrat. Cet article porte sur la problème juridictionnelle (c'est-à-dire, si un non signataire peut être inclus à une procédure d'arbitrage par l'utilisation du soulèvement de la voile corporatif) et analyse différents propositions de choix de loi en même temps qu'elle propose des solutions possibles qui atteignant des résultats prévisibles et uniformes.

I. Introduction

While the practice of veil piercing has been accepted in numerous jurisdictions, its application in international arbitration creates unique difficulties. Arbitration is not a default dispute resolution mechanism and can only be adopted via party consent.¹ This raises questions regarding how and when a non-signatory can be included in an arbitral proceeding, as is the case when a corporate veil is pierced to include a third party. And because international arbitration often implicates parties across jurisdictions, choice-of-law issues often arise in the veil-piercing context, *i.e.*, to determine which law provides the applicable test. It is therefore unsurprising that the matter has attracted significant attention. Indeed, one of the most reputed voices in the field considers this to be among “the most delicate and complex issues in international commercial arbitration.”² Thus, this paper undertakes an analysis of veil piercing in international commercial arbitration, with a focus on the choice-of-law issues it raises and the possible solutions.

II. Who Are the Parties to an Arbitration Agreement?

Arbitration agreements are subject to general principles of contract law. Among these is the doctrine of privity of contract, which dictates that contractual rights and duties only affect the parties to the agreement.³ Civil law jurisdictions recognize this doctrine via the application of the Roman law principle *res inter alios acta*. This doctrine mandates that arbitration agreements extend only to “the agreement’s parties, and not to others.”⁴ Article II(1) of the New York Convention also implicitly recognizes privity in providing that contracting states recognize written agreements under which “*the parties* undertake to submit to arbitration all or any differences.”⁵ Privity is also indirectly recognized by states that adopt the UNCITRAL Model

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1 *E v Z, ICA Z & Société M*, Decision on Award (31 March 1989) in (1990) 8:3 ASA Bull 248 at 277 [*E v Z*].

2 Gary B Born, *International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2014) at 1406.

3 *Black’s Law Dictionary*, 9th ed, *sub verbo* “privity.”

4 Born, *supra* note 2 at 3658.

5 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 1473 UNTS 330 art 2(1) (entered into force 7 June 1959) [emphasis added].

Law,⁶ as well as in the rules of many arbitral institutions.⁷ Crucially, because arbitration requires consent,⁸ only parties to an arbitration agreement are bound to submit disputes to arbitration.

III. How are Parties to an Arbitration Agreement Identified?

To determine who is bound by an arbitration agreement, it is common to look to the contract for “the entities [or natural persons] that formally executed and expressly assumed the status of parties.”⁹ In other words, the signatories of the contract and, more specifically, the signatories to the arbitration agreement will, as a general rule, constitute the parties to the arbitration agreement. This is because non-signatories are not ordinarily parties to an arbitration agreement.¹⁰ Consequently, signatory status is usually the primary basis for determining that an entity is a party to a contract.¹¹ However, as one domestic court noted, even though arbitration is consensual by nature, this does not mean that “an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision”, rather, “a non-signatory party may be bound to an arbitration agreement if so dictated by the ‘ordinary principles of contract and agency.’”¹²

Thus, the issue of party identification is governed by rules of contract and corporate law. These will ultimately determine if a non-signatory is bound by—or can invoke an arbitration agreement.¹³ Specialized rules applicable exclusively to international arbitration agreements,

6 *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* (effective 7 July 2006), United Nations Commission on International Trade Law (defines an arbitration agreement as “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them” at art 7(1)).

7 See e.g. *ICC Arbitration Rules* (effective 1 March 2017) art. 6(1), International Chamber of Commerce; *LCIA Arbitration Rules* (effective 1 October 2014) Preamble, London Court of International Arbitration; *SCC Arbitration Rules* (effective 1 January 2017) Preamble, Arbitration Institute of the Stockholm Chamber of Commerce; *ICDR Arbitration Rules* (effective 1 June 2014) art 1, International Centre for Dispute Resolution; *UNCITRAL Arbitration Rules (as revised in 2010)* (effective 6 December 2010) art 1(1), United Nations Commission on International Trade Law.

8 Born, *supra* note 2 at 1410; William W Park, “Non-Signatories and International Contracts: An Arbitrator’s Dilemma” in Belinda McMahon, ed, *Multiple Party Actions in International Arbitration: Consent, Procedure and Enforcement* (Oxford: Oxford University Press, 2009) 1 at para 1.01, available online at: <www.arbitration-icca.org/media/4/80099054862_031/media012571271340940park_joining_non-signatories.pdf>.

9 Born, *supra* note 2 at 1410.

10 Park, *supra* note 8 at para 1.56.

11 Born, *supra* note 2 at 1411.

12 *Thomson-CSF, SA v Am. Arbitration Ass’n*, 64 F (3d) 773 at 776 (2d Cir 1995).

13 *Ibid*; see also Born, *supra* note 2 at 1409.

such as the group of companies doctrine, have also been developed to address this issue.¹⁴ Within these areas of law, theories of agency (actual and apparent), alter ego, implied consent, group of companies, estoppel, third party beneficiary, guarantor, subrogation, legal succession, ratification, and assumption¹⁵ have developed and can be invoked by non-signatories or against them. These theories permit the identification of parties to an arbitration agreement, regardless of whether the entity or person formally signed the agreement. References in case law and commentary made to ‘extending the arbitration agreement’ or ‘third parties’ are therefore deemed inaccurate. The arbitration agreement is not ordinarily extended; rather, the “true parties that have consented to the arbitration agreement are identified.”¹⁶

IV. Approaches to Assessing Whether a Non-signatory is a Party to the Arbitration

Determining whether a non-signatory can invoke or be bound by an arbitration agreement is done on a case-by-case basis.¹⁷ As Born notes, relevant factors include

the circumstances in which the agreement was made, the corporate and practical relationship existing on one side and known to those on the other side of the bargain, the actual or presumed intention of the parties as regards rights of non-signatories to participate in the arbitration agreement, and the extent to which and the circumstances under which non-signatories subsequently became involved in the performance of the agreement and in the dispute arising from it.¹⁸

Methods for joining a non-signatory to an arbitration can be categorized into two groups: consensual and non-consensual theories.¹⁹ The former includes theories of actual authority, implied consent, group of companies, third-party beneficiary, guarantor, ratification, and assumption. On the other hand, veil piercing (alter ego), estoppel, apparent authority, and succession are non-consensual theories.²⁰ By way of the applicable law or

14 Born, *supra* note 2 at 1412.

15 Born, *supra* note 2 at 1413; Park, *supra* note 8 at para 1.08.

16 Born, *supra* note 2 at 1414; see also Park, *supra* note 8 at para 1.24 (explaining that “no magic formula tells arbitrators what legal principles apply in determining when to join non-signatories”).

17 Born, *supra* note 2 at 1414.

18 *Ibid* at 1414–15.

19 Born, *supra* note 2 at 1416; Park, *supra* note 8 at para 1.10.

20 Born, *supra* note 2 at 1415.

equity, these latter theories force the non-signatory to be bound to the arbitration agreement without their consent.

It should be noted that binding non-signatories to an arbitration agreement is an exceptional manoeuvre.²¹ The burden is on the non-signatory invoking the arbitration clause or the party attempting to subject a non-signatory to the arbitration agreement to demonstrate that a consensual or non-consensual theory applies. While both of these situations give rise to substantive and choice-of-law issues, this article's focus will be on the non-consensual theory of veil piercing and the choice-of-law issues it creates.

V. Veil Piercing or Alter Ego Generally

Nearly every jurisdiction allows companies to structure themselves as they see fit in order to limit their potential liability.²² For juridical purposes, companies are generally considered distinct legal entities from their constituents, and their rights and obligations are separate from those of their shareholders and subsidiaries.²³ Limited liability, one of the effects of this distinction, has always been the norm.²⁴ As Justice Breyer of the United States Supreme Court ('USSC') states, it is "a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation... is not liable for the acts of its subsidiaries."²⁵

Companies often limit their potential liability by contracting through foreign and domestic subsidiaries. This is considered an entirely legitimate practice essential to facilitating international transactions.²⁶ Indeed, the underlying rationale of limited liability is to promote commerce and investment.²⁷ However, the freedom to

²¹ *Ibid* at 1414.

²² *Sarhank Grp v Oracle Corp*, 404 F (3d) 657 at 662 (2d Cir 2005) [*Sarhank*].

²³ *ICC Case No 10758*, Decision on Award (2000) in Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher, eds, *Collection of ICC Arbitral Awards / Recueil des Sentences Arbitrales de la CCI, 2001-2007* (Alphen aan den Rijn: Kluwer Law International, 2009) 537 at 538; *Bridas S.A.P.I.C v Turkmenistan*, 477 F (3d) 411 at 416 (5th Cir 2006) [*Bridas 2006*]; Park, *supra* note 8 at para 1.56.

²⁴ *First Nat City Bank v Banco Para El Comercio Exterior de Cuba*, 462 US 611 at 626 (1983) [*First Nat City Bank*]; *Bridas 2006*, *supra* note 23 at 416; King Fung Tsang, "Applicable Law in Piercing the Corporate Veil in the United States: A Choice with no Choice" (2014) 10:2 *J Priv Int L* 227 at 237.

²⁵ *United States v Bestfoods*, 524 US 51 (1998).

²⁶ *Sarhank*, *supra* note 22 at 662; *First Nat City Bank*, *supra* note 24 at 626.

²⁷ Tsang, *supra* note 24 at 237.

structure companies and limit liability is not without limits. Most jurisdictions recognize that, where there has been abusive conduct or fraud, a company's separate personality can be disregarded and its shareholders held liable in contract or tort.²⁸ This is known as piercing the corporate veil or the alter ego doctrine.

In most jurisdictions, the essence of the alter ego doctrine is that "one party so strongly dominates the affairs of another party, and has sufficiently misused such control, that it is appropriate to disregard the two companies' separate legal forms, and to treat them as a single entity."²⁹ In *Barcelona Traction*, the International Court of Justice describes its purpose as follows:

the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable under certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.³⁰

The alter ego doctrine is therefore non-consensual in nature, as the parties' intentions are not decisive; rather, its use rests on "overriding considerations of equity and fairness, which mandate disregarding an entity's separate legal identity in specified circumstances."³¹

It is important to reiterate that veil piercing is an exceptional maneuver.³² Courts and tribunals have adopted a restrictive approach to its use, and do not take doing so lightly.³³ Reasons for this, particularly in the context of arbitration agreements, are threefold: first, as a general rule, only signatories are bound to arbitration agreements;³⁴ second, consent to arbitrate is not presumed;³⁵ and, most importantly, because limited liability must remain the norm.

28 *First Nat City Bank*, *supra* note 24 at 628–29; *Park*, *supra* note 8 at para 1.58.

29 *Born*, *supra* note 2 at 1432.

30 *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain), [1970] ICJ Rep 3, available online at: <www.icj-cij.org/docket/files/50/5387.pdf>.

31 *Born*, *supra* note 2 at 1433.

32 *Bridas* 2006, *supra* note 23 at 146.

33 *Bridas S.A.P.I.C. v Turkmenistan*, 345 F (3d) 347 at 359 (5th Cir 2003) [*Bridas* 2003].

34 See Section III, below, for further discussion.

35 *E v Z*, *supra* note 1 at 277.

VI. Distinguishing Veil Piercing from the ‘Group of Companies’ Theory

Tribunals, courts, and respected scholars alike often use the terms veil piercing, alter ego, and ‘group of companies’ interchangeably.³⁶ The first two do indeed mean the same thing, but the group of companies theory is a wholly different doctrine with a different rationale, and should therefore, for the sake of accuracy, be distinguished.³⁷

Dow Chemical is the seminal case in this respect.³⁸ It involved a dispute which arose over distribution contracts concluded between two subsidiaries of Dow Chemical USA (the ‘Parent Company’) and ISOVER Saint Gobain (‘ISOVER’). The two Dow Chemical subsidiaries (which had signed contracts), and the Parent Company and a French subsidiary (‘Dow Chemical France’) (both of whom were not formal signatories) initiated ICC arbitration against ISOVER. In deciding whether it had jurisdiction over the non-signatories, the tribunal considered the role Dow Chemical France played in the negotiation, performance, and termination of the contracts. It also considered the absolute control that the Parent Company exercised over its subsidiaries. Applying international law and trade usages, it considered the group of companies to be “one and the same economic reality (*une réalité économique unique*)” because of their role in the conclusion, performance, or termination of the contracts containing the clauses in question, and because of the mutual intention of all parties to the proceedings.³⁹ The tribunal thus ruled that it had jurisdiction over all of the named parties.

The group of companies theory therefore applies when the non-signatory can be considered a member of a ‘group of companies’, and when *all parties*, by virtue of their conduct, *intended* for the non-signatory to be bound by the arbitration agreement. This is determined by the non-signatory’s active participation in the negotiations or performance of the contract. It is not only essential that all parties

36 Sébastien Besson, “Piercing the Corporate Veil: Back on the Right Track” in Bernard Hanotiau & Eric A Schwartz, eds, *Multiparty Arbitration* (Paris: ICC Institute of World Business Law, 2010) at 149–50; see e.g. Alan Redfern et al, *Redfern and Hunter on International Arbitration*, 4th ed (Oxford: Oxford University Press, 2009) at 99–103.

37 Besson, *supra* note 36 at 149–50; Born, *supra* note 2 at 1449–50.

38 *Dow Chemical Co v ISOVER Saint Gobain*, Decision on Interim Award (23 September 1982), International Chamber of Commerce (ICC) in (1984) vol IX YB Comm Arb 131 at 131–37.

39 *Ibid* at 136.

intended the non-signatory to be bound by the arbitration clause, but also that the non-signatory parties had “intended (or led the other parties to reasonably believe that they intended) to be bound by the arbitration clause.”⁴⁰ The alter ego theory, on the other hand, is invoked to “disregard or nullify the otherwise applicable effects of incorporation or separate legal personality.”⁴¹ The group of companies doctrine is thus based on the parties’ intentions; it includes non-signatories to the arbitration, but does not ignore their separate legal personality.⁴² Therefore, the group of companies theory is based on implied consent of the parties. Conversely, veil piercing is non-consensual.

This distinction becomes more complicated in practice. A single factual matrix can lead to arguments in favor of both disregarding the corporate personality and of implied consent.⁴³ Arbitrators often combine both elements in their decisions, and it is sometimes difficult to recognize what doctrine is actually being applied.⁴⁴ This lack of analytic rigor leads to sloppy reasoning that can discredit the arbitrator’s findings.⁴⁵ In the case of *Dallah*, for instance, the UK Supreme Court criticized an arbitrators’ finding that Pakistan was the alter ego of the signatory to the contract and that the parties intended for Pakistan to be a party to the same contract. As Lord Mance explains:

[t]here is a considerable difference between a finding (and between the evidence relevant to a finding) that one of two contracting parties is the alter ego of a third person and a finding that it was the common intention of the other party to the contract that the third person should be a party to the contract made with the first party.⁴⁶

Another relevant difference between the doctrines is that veil piercing was developed in corporate law and applies to international arbitration, while the group of companies doctrine is a contract law theory that was developed in—and specifically for—international arbitration.⁴⁷ The group of companies doctrine has also played a more limited role in binding non-signatories to arbitration agreements, and has not been well received in sev-

40 Born, *supra* note 2 at 1449.

41 *Ibid* at 1450.

42 Besson, *supra* note 36 at 149; Born, *supra* note 2 at 1450.

43 Park, *supra* note 8 at para 1.17.

44 Besson, *supra* note 35 at 151.

45 Park, *supra* note 8 at para 1.18.

46 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 at para 39 [*Dallah* UKSC].

47 Born, *supra* note 2 at 1445; Besson, *supra* note 36 at 150 (this characterization as noted by Besson also has an influence on the applicable law, as it would—at least prima facie—promote a reference to the law of the place of incorporation of the signatory).

eral jurisdictions,⁴⁸ whereas the veil-piercing doctrine is recognized—at least to some extent—in almost every jurisdiction. Finally, the veil-piercing doctrine is often applied by way of recourse to state law, giving rise to a conflict-of-laws issue, while the group of companies doctrine—as discussed in *Dow Chemical*—is based exclusively on international law and trade usages.⁴⁹

VII. The Jurisdictional Piercing Issue

The veil-piercing doctrine can be invoked either to hold the shareholder or parent company liable for the debts of the affiliated corporation (i.e. liability piercing), or to justify jurisdiction over the former.⁵⁰ US courts have called the latter approach “jurisdictional veil-piercing.”⁵¹ In arbitration, the purpose of jurisdictional veil-piercing is to subject the non-signatory to the jurisdiction of the arbitral tribunal, and not necessarily to bind the non-signatory to the underlying contract. The principle of severability of arbitration agreements implicates that, even if a non-signatory is considered bound by the arbitration agreement, it is not necessarily bound by the underlying contract and may not be liable for the signatory’s obligations.⁵² Similarly, a non-signatory may be found substantively liable for the signatory’s obligations but not bound by the arbitration agreement.⁵³

In the context of veil piercing, whether binding occurs will depend on whether the non-signatory intervened via domination, fraud, or other abusive conduct with regard to a *specific part of a transaction*, which justi-

⁴⁸ Besson, *supra* note 36 at 150; see also Yves Derains, “Is There a Group of Companies Doctrine?” in Bernard Hanotiau & Eric A Schwartz, eds, *Multiparty Arbitration* (Paris: ICC Institute of World Business Law, 2010) at 136–38 (explaining that the group of companies doctrine has been expressly rejected by Switzerland, has not been acknowledged in the United States and that its impact on arbitration is very limited today); Philippe Leboulanger, “L’extension de la clause d’arbitrage” in Julio César Rivera & Diego P Fernández Arroyo, eds, *Contratos y Arbitraje en la Era Global / Contrats et Arbitrage à l’Ère Global* (Centros de Estudios de Derecho, Economía y Política & La Asociación Americana de Derecho Internacional Privado, 2010) at 33 (explaining that the group of companies doctrine is not accepted in England); Park, *supra* note 8 at paras 1.83–1.84 (indicating that the group of companies doctrine was rejected in England, Switzerland and by some courts in the United States).

⁴⁹ Besson, *supra* note 36 at 151.

⁵⁰ *Ibid* at 154; see also Georgios Petrochilos, “Extension of the Arbitration Clause to Non-Signatory States of State Entities: Does it Raise a Difference?” in Bernard Hanotiau & Eric A Schwartz, eds, *Multiparty Arbitration* (Paris: ICC Institute of World Business Law, 2010) at 121; Tsang, *supra* note 24 at 248.

⁵¹ *Akeblom v Ezra Holdings Ltd*, 848 F Supp (2d) 673 at 689 (SD Tex 2012); see also Tsang, *supra* note 24 at 248–49 (according to the author jurisdictional piercing can also be called “procedural piercing”).

⁵² Besson, *supra* note 36 at 154; Born, *supra* note 2 at 1418, 1442; Park, *supra* note 8 at para 1.60; Petrochilos, *supra* note 51, at 121.

⁵³ Born, *supra* note 2 at 1418, 1442; Park, *supra* note 8 at para 1.61.

fies it being bound by the arbitration agreement.⁵⁴ In practice, however, an alter ego relationship is normally found with regard to the underlying contract and extended to the “associated arbitration agreement.”⁵⁵

This being said, even if the alter ego relationship generally extends to the underlying transaction and the arbitration agreement (justifying both liability piercing and jurisdictional piercing), the autonomy of the arbitration agreement implies that different laws can govern each type of piercing.⁵⁶ It is therefore necessary to clarify that this paper focuses on the jurisdictional issue; *i.e.* what law applies to determine if the tribunal has jurisdiction over the non-signatory when the veil-piercing doctrine is invoked. It does not deal with the law applicable to assessing the substantive liability of the non-signatory or the substantive law applicable to the non-signatory if it were found to be a party to the arbitration. The principle of the autonomy of the arbitration agreement means that the applicable law in these three cases may vary.

VIII. Choice-of-Law Problems in Veil Piercing

Although most jurisdictions recognize the veil-piercing doctrine, substantive requirements differ from country to country. In the US, they may even differ from state to state. Thus, in an international setting with various extraterritorial elements (e.g. contracting parties from different states, a substantive law from a third state, or an arbitral seat in a state separate from that of the contracting parties and the substantive law chosen) a choice-of-law problem arises. This is the case when at least two alternatively applicable laws differ in terms of their requirements for veil piercing.⁵⁷ A quick look at the laws of different jurisdictions demonstrates the possible difficulties.

In the US, the *Van Dorn* test⁵⁸ dictates that

[a] corporate entity will be disregarded and the veil of limited liability pierced when two requirements are met: First, there must be such unity of interest and ownership that the separate personalities of the

⁵⁴ Born, *supra* note 2 at 1442.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 1418.

⁵⁷ A choice-of-law problem arises when the standards for veil piercing differ among the possible applicable laws. If all the standards are the same or if they differ but the factual situation allows for veil piercing under all the possible standards, choosing a specific applicable law becomes irrelevant, at least from a practical point of view.

⁵⁸ *Van Dorn Co v Future Chemical & Oil Corp*, 753 F (2d) 565 (7th Cir 1985).

corporation and the individual [or other corporation] no longer exist; and, second, circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.⁵⁹

Other US courts have adopted a three-prong test, adding a third element by requiring that the fraud or injustice “be proximately caused by the excessive control.”⁶⁰ Most US courts follow the *Van Dorn* test or the three-prong test, and the difference between them is ultimately slim because “[i]f both excessive control and fraud are found, they are usually proximately related...it is extremely rare for a court to reject piercing simply based on the lack of proximity.”⁶¹ However, there are also US courts that follow different tests requiring only control, only fraud, either control or fraud, a laundry list including a fraud factor, a laundry list without a fraud factor, and some jurisdictions do not permit veil piercing at all.⁶² Further, the level of control required, or the definition of fraud or injustice, can also vary from jurisdiction to jurisdiction. As Tsang notes:

some courts demand a very high level of control, so high that it takes a ‘complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own’, while some only require a ‘degree of control... greater than that normally associated with ownership and directorship.’⁶³

Similar difficulties arise with determining the adequate interpretation of fraud,⁶⁴ especially because many jurisdictions have lowered the standard requiring only injustice akin to fraud.⁶⁵

As is the case within the US, different jurisdictions around the world have different requirements for veil piercing. In England, courts maintain that lifting the veil “is done only in extreme cases of misconduct”⁶⁶ and most

⁵⁹ *Sea-Land Services Inc v Pepper Source*, 941 F (2d) 519 at 520 (7th Cir 1991) [*Sea-Land*].

⁶⁰ *Fisser v International Bank*, 282 F (2d) 231 at 238 (2d Cir 1960); Tsang, *supra* note 24 at 242.

⁶¹ Tsang, *supra* note 24 at 243.

⁶² *Ibid* at 243–44 (the so called “laundry list” is a series of non-exclusive factors listed by courts and taken into consideration to determine if there is domination or alter ego status such as: common ownership, intermingling of funds, non-observance of corporate formalities, undercapitalization, etc.).

⁶³ *Ibid* at 246, citing *Joe Hand Promotions, Inc v Jacobson*, 847 F Supp (2d) 1010 at 1014 (D Or 2012) and *In re Chinese Manufactured Drywall Products Liability Litigation*, 819 F Supp (2d) at 868 (ED La 4 Sept 2012).

⁶⁴ For example, some jurisdictions consider that undercapitalization alone constitutes fraud (see Tsang, *supra* note 24 at 246).

⁶⁵ Tsang, *supra* note 24 at 246; see also *Sea-Land*, *supra* note 59 at 522–25.

⁶⁶ Stephen B Presser, *Piercing the Corporate Veil* (Thomson & West, 1991) (loose-leaf revision 2004), ch 5 at 5-4 to 5-6.

judges refuse to lift the corporate veil without clear evidence of fraud.⁶⁷ In France, the corporate veil is lifted only in cases of mismanagement leading to bankruptcy or fraud,⁶⁸ and via two court-developed doctrines: the fictitious company doctrine ('société fictive') and the commingling of assets doctrine ('confusion des patrimoines').⁶⁹ The approach adopted by French courts is primarily used in liability piercing in domestic litigation. It is seemingly not applied to include non-signatories to arbitration agreements, as the group of companies doctrine is the leading standard in these scenarios and it is often not properly distinguished from veil piercing.⁷⁰ Swiss law adopts an exceptionally restrictive approach that disregards the separate personality of corporations only in 'abuse of right' or fraud cases.⁷¹ German courts require a series of cumulative factors to pierce the corporate veil, such as the commingling of assets, failure to follow formalities, undercapitalization, or total domination of a company by another.⁷² Fraud is a relevant factor but not a critical one, as several other joint factors are sufficient to constitute misconduct allowing veil piercing.⁷³ Whether a corporation's legal personality will ultimately be disregarded is very fact-based, but it is recognized that undercapitalization or domination alone are insufficient grounds to justify veil piercing.⁷⁴

These varying requirements for veil piercing give rise to a choice-of-law problem when the different potentially applicable laws establish different standards that are outcome determinative. In *FR8 Singapore Pte. Ltd. v Albacore Maritime Inc.*, for instance, a plaintiff sought to compel several non-signatory companies incorporated in the Marshall Islands to arbitrate under the Federal Arbitration Act ('FAA'). In analyzing the veil-piercing claim, the district court recognized that there was a choice-of-law question to be addressed.⁷⁵ It noted several alternatively applicable laws, including English law governing the underlying contract, Delaware law (which the court found was the corporate law of Marshall Islands and the governing law of signatories and non-signatories' place of incorporation), as well as federal common law.⁷⁶ It found that the chances of a veil

67 *Ibid.*

68 Presser, *supra* note 66 at 5-6 to 5-8.

69 *Ibid.*

70 Besson, *supra* note 36 at 152; Born, *supra* note 2 at 1435.

71 Besson, *supra* note 36 at 153; Born, *supra* note 2 at 1434.

72 Presser, *supra* note 66 at 5-8 to 5-12.

73 See Born, *supra* note 2 at 1435 (indicating that German courts require fraud or "other misconduct").

74 Presser, *supra* note 66 at 5-8 to 5-12.

75 *FR 8 Singapore Pte. Ltd v Albacore Mar. Inc.*, 754 F Supp (2d) 628 at 633 (SD NY 2010) [*FR 8 Singapore*].

76 *Ibid.*

piercing claim succeeding under English law was “virtually impossible”; Delaware law was similarly strict requiring proof of fraud; and federal common law prescribed the most lenient standard.⁷⁷

This analysis was somewhat unique, as courts often ignore these choice-of-law problems and, without any explanation, resort to forum law.⁷⁸ The problem is also often ignored by arbitral tribunals, which, not infrequently, omit any explanation of how they came up with the applicable standards to rule on veil piercing.⁷⁹ In fact, very few rulings or publications discuss this choice-of-law issue.⁸⁰ Those that do generally propose some combination of the following as alternatively applicable laws: the law of incorporation of the company, the law applicable to the arbitration agreement, the law governing the underlying contract, the law with the closest connection to the issue of veil piercing, and ‘international principles’ or ‘general principles of law’. These proposals are analyzed in turn below.

IX. The Law Governing the Underlying Contract

A first alternative is to apply the law governing the underlying contract.⁸¹ Possible justifications for this approach include that the claim to pierce the corporate veil is ancillary to the underlying contract,⁸² or that the party requesting the piercing by invoking the arbitration clause (be it the signatory or the non-signatory) should also accept the law chosen to govern the underlying contract.⁸³ These arguments ignore the well-established principle that the arbitration agreement is severable from the underlying contract,⁸⁴ which entails that the law governing the contract does not generally govern issues related to the arbitration agreement.⁸⁵ It also ignores the fact that it is the issue of jurisdiction that is being analyzed (i.e. whether

⁷⁷ *Ibid.*

⁷⁸ See e.g. *Bridas 2003*, *supra* note 33 at 359; *Bridas 2006*, *supra* note 23 at 416; *First Inv. Corp. of Marshall Islands v Fujian Shipbuilding Ltd*, 703 F (3d) 742 at 752–53 (5th Cir 2012).

⁷⁹ See e.g. *ICC Case No 9517*, Decision on Award (May 2000) in (2005) 16:2 ICC Bull 1 at 80–3; *ICC Case No 9873*, Decision on Interim Award (August 1999) in (2005) 83:2 ICC Bull 1 at 85–7; *ICC Case No 11209*, Decision on Award (February 2002) in (2005) 83:2 ICC Bull 1 at 102–3.

⁸⁰ See Besson, *supra* note 36 at 155 (stating that “[t]he question regarding the applicable law [in veil piercing] is difficult and has apparently not been dealt with extensively”).

⁸¹ Proposed by *Motorola Credit Corp v Uzan*, 388 F (3d) 39 (2nd Cir 2004) [*Motorola*]; *FR 8 Singapore*, *supra* note 75; see also *ICC Case No 8163*, Decision on Award (July 1996) in (2005) 83:2 ICC Bull 1 at 77–80 (taking into consideration the standards of the law applicable to the contract).

⁸² Tsang, *supra* note 24 at 252.

⁸³ *Motorola*, *supra* note 81 at 51; *FR 8 Singapore*, *supra* note 75 at 636.

⁸⁴ Philippe Leboulanger, “The Arbitration Agreement: Still Autonomous?” in Albert Jan van den Berg, ed, *International Arbitration 2006: Back to Basics?* (Alphen aan den Rijn: Kluwer Law International, 2007) 3 at 19.

⁸⁵ Leboulanger, *supra* note 84 at 20; *Dallah Real Estate v Ministry of Religious Affairs*, ICC Award No 9987, Decision on Partial Award (26 June 2001) in (2010) 2:4 Intl Journal of Arab Arb 337 at 353 [*Dallah ICC*].

the non-signatory can be subjected to the arbitration agreement) and not an issue of substantive liability governed by the law chosen in the contract. Indeed, the principle of *depeçage* allows different laws to be applied to different issues.⁸⁶

Despite its shortcomings, one could nevertheless argue that this approach has merit because it promotes certainty. Parties normally choose a specific law to govern an international commercial contract, and a layman or a merchant might reasonably expect all matters to be resolved by the law chosen in that contract. But, unfortunately, the law chosen to govern the contract is generally not intended to govern the inclusion of non-signatories.⁸⁷ Typically, it is selected due to its favorability to the underlying transaction, and might not promote the parties' interests in relation to veil piercing. Signatories are not usually concerned with the veil-piercing standards of the chosen law at formation, which could in fact be either too lenient or too strict for their liking. This approach could also be unfair to the non-signatory. One US district court decision mentions that non-signatory parties opposing arbitration are in essence contending that they are not subject to the contract at all; thus, "applying the choice-of-law clause from that contract to determine the issue [of veil piercing] would beg the question in a manner potentially unfair to the nonsignatory."⁸⁸

One might still argue that the non-signatory, were it in fact the alter ego of one of the signatories, consented to the choice-of-law clause and could have expected that law to govern its inclusion to the arbitration. However, this is an issue that can only be determined after applying the veil-piercing standards of the applicable law. In practice, the non-signatory opposing its inclusion to the arbitration is usually arguing that it is a stranger to both the arbitration agreement and the underlying contract, and is thus contesting its inclusion in a contract that ordinarily contains the choice-of-law provision.⁸⁹

Finally, it should be added that the suggestion by the court in *FR 8 Singapore*—that the non-signatory opposing its submission to arbitration has the choice to invoke the law governing the contract when it is favorable to its position—is not desirable either because it would promote further uncertainty—purportedly what the court wanted to prevent.⁹⁰

86 Tsang, *supra* note 24 at 252.

87 Park, *supra* note 8 at para 1.33.

88 *Republic of Ecuador v ChevronTexaco Corp*, 376 F Supp (2d) 334 at 355–56 (SD NY 2005) [*Ecuador*].

89 Park, *supra* note 8 at para 1.37.

90 *FR 8 Singapore*, *supra* note 75 at 636.

X. The Law Governing the Arbitration Agreement

Another option is resorting to the law applicable to the arbitration agreement. Here, however, there is a dispute over what the applicable law to the arbitration agreement is. Proposals include the law of the arbitral situs, the law governing the parties' main contract, or the law of the forum where judicial enforcement is sought.⁹¹ Others have suggested the law applicable to the parties' capacity to conclude the arbitration agreement, the law applicable to the arbitral procedure (*lex loci arbitri*), the law applicable to the arbitrator's contract (*receptum arbitri*), and the law applicable to the substance of the dispute.⁹²

In light of Art. V(1)(a) of the New York Convention, however, the general consensus today seems to be that the law that governs the arbitration agreement is the law chosen by the parties or, in absence thereof, the law of the arbitration's seat.⁹³ Klaus Peter Berger takes this further in submitting that the law governing the arbitration agreement should also govern the substantive validity of the arbitration agreement and questions that relate to its scope, including the extension of the arbitration agreement to third parties.⁹⁴ In stating this, Berger relies on a Swiss source.⁹⁵ The argument is thus heavily influenced by the approach followed by Swiss courts and tribunals. These have characterized the issue of inclusion of non-signatories as one of substantive validity of the clause, relying on Article 178(2) of the Swiss Private International Law ('SPILA').⁹⁶ This provision states that either the law chosen by the parties to govern the arbitration agreement, the law applicable to the contract, or Swiss law shall govern the substantive validity of arbitration clauses in an international arbitration setting.⁹⁷ Its purpose is to facilitate a pro-ar-

91 Leboulanger, *supra* note 84 at 20–21.

92 Klaus Peter Berger, "Report: Re-examining the Arbitration Agreement: Applicable Law—Consensus or Confusion?" in Albert Jan van den Berg, ed, *International Arbitration 2006: Back to Basics?* (Alphen aan den Rijn: Kluwer Law International, 2007) at 302.

93 *Ibid* at 315–16.

94 *Ibid*.

95 Pierre Lalive, Jean-François Poudret & Claude Reymond, *Le Droit de L'Arbitrage International* (Zurich: Schulthess Verlag, 2002).

96 *Alpha S.A. v Beta & Co.*, Decision on Award (1991) in (1992) 10:2 ASA Bull 124 at 209–10; *ICC Case No 9719*, Decision on Interim Award (June 1999) in (2005) 83:2 ICC Bull 1 at 83–85; *ICC Case No 10758*, *supra* note 23 at 537–42; *ICC Case No 10818*, Decision on Partial Award (April 2001) in (2005) 83:2 ICC Bull 1 at 94–98.

97 Article 178 in its French version provides: "III. Convention d'arbitrage (2) Quant au fond, elle est valable si elle répond aux conditions que pose soit le droit choisi par les parties, soit le droit régissant l'objet du litige et notamment le droit applicable au contrat principal, soit

bitration policy favoring the validity of arbitration agreements. It is also the provision used by the Swiss Federal Tribunal to allow the inclusion of non-signatories to arbitrations despite the requirement of Article 178(1) of SPILA, which mandates that arbitration agreements be concluded in writing.⁹⁸ Ultimately, this approach is evidently motivated by the legal characterization they have adopted. Numerous jurisdictions also require that arbitration agreements be concluded in writing, and still include non-signatories to the arbitral proceedings by characterizing the issue as one of scope and not of validity.

The Swiss approach does not seem to adequately solve an eventual conflict-of-laws issue. Rather, it permits recourse to two⁹⁹ and sometimes three alternative laws. This was noted in a Partial Award in the ICC Case No. 10818 of 2001, where the arbitral tribunal seated in Switzerland remarked that the ‘extension’ of the arbitration agreement was governed either by Swiss law or Portuguese law—the latter being the law applicable to the contract.¹⁰⁰ One could imagine situations where one allows veil piercing and the other does not, creating quite a dilemma as to which law should apply.¹⁰¹

A different problem occurs in US courts. As mentioned, where the non-signatory is invoking the arbitration agreement and attempting to compel arbitration¹⁰² (and also, arguably, when the non-signatory is opposing the request to compel arbitration), one line of cases favors the application of the law governing the contract.¹⁰³ However, where the non-signatory is opposing a request to compel arbitration, courts have also ruled that it would be unfair to adopt the law applicable to the contract and that federal common law under the FAA should govern the dis-

encore le droit suisse.”

98 *ICC Case No 10758*, *supra* note 23 at 543; Leboulanger, *supra* note 84 at 20.

99 Since parties do not generally choose a law to govern the arbitration agreement, normally the two alternative laws to govern the substantive validity of the arbitration agreement—under Swiss law—would be the law chosen to govern the contract and Swiss law. Additionally, if we were to consider that, absent a choice-of-law, the parties have implicitly chosen the law of the seat to govern the arbitration agreement, there would be another alternatively applicable law.

100 *ICC Case No 10818*, *supra* note 96 at 96.

101 If the outcome of the alternatively applicable laws under 178(2) SPILA differs, it is unclear which law would be found applicable under the Swiss approach. Would it be the law that allows the “extension” of the arbitration agreement? Or, would tribunals and courts simply resort to the law of the seat of the arbitration?

102 *Motorola*, *supra* note 81 at 51. See *contra Smith/Enron Cogeneration Ltd P’ship, Inc v Smith Cogeneration Int’l, Inc*, 198 F (3d) 88 at 96 (2nd Cir 1999) [*Smith/Enron*] (holding that federal common law under the FAA would always be the governing law—even when compelling arbitration—for ruling over extension of the arbitration clause to non-signatories in international arbitrations regardless of who is requesting to compel arbitration).

103 *FR 8 Singapore*, *supra* note 75 at 636.

pute.¹⁰⁴ There also seems to be some consensus among federal courts that federal common law governs all requests to confirm an arbitration award.¹⁰⁵ It can therefore be legitimately questioned if, by resorting to federal common law, the courts are applying the law of the seat of the arbitration (i.e. the law that generally governs the arbitration agreement). One decision made it quite clear that the court did not consider federal common law to be equivalent to the law of the seat, but rather a different choice-of-law alternative.¹⁰⁶

Regardless, these inconsistencies underscore an exceptionally diverse approach that seems to be adopted solely in the US. Elsewhere, using the law applicable to the arbitration agreement has the advantage of promoting certainty because contracting parties normally choose the seat expressly in the agreement. However, it also often the case that parties choose the seat due to its neutrality or arbitration policies and, unlike domestic litigants, parties often lack a significant connection with the seat itself.¹⁰⁷ In choosing the seat, the parties seldom consider its corporate laws, and thus do not anticipate that they will govern a jurisdictional-piercing claim.

On the other hand, if this issue is characterized solely as one of agreement validity, adopting the law applicable to the arbitration agreement as the governing law for jurisdictional piercing and non-signatory inclusion generally seems to be the appropriate solution. As will be explained later,¹⁰⁸ it could be especially helpful in avoiding inconsistent decisions.

XI. International Principles or General Principles of Law

Several decisions and leading scholars have argued that veil piercing should be assessed using general principles of law applicable to veil piercing.¹⁰⁹ Others argue that international commercial usages or *lex*

104 *Ecuador*, *supra* note 88 at 355–56.

105 *Sarhank*, *supra* note 22 at 662; *FR 8 Singapore*, *supra* note 75 at 636.

106 See e.g. *Smith/Enron*, *supra* note 102 at 96.

107 *ICC Case No 8385*, Decision on Award (1995) in Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher, eds, *Collection of ICC Arbitral Awards / Recueil des Sentences Arbitrales de la CCI, 1991-1995* (Alphen aan den Rijn: Kluwer Law International, 1997) at 478.

108 See Section XVI, below, for further discussion.

109 *ICC Case 8385*, *supra* note 107 at 479; *Westland Helicopters Ltd v Arab Organization for Industrialization*, Decision on Interim Award (5 March 1984) in Albert Jan van den Berg, ed, *Yearbook of Commercial Arbitration 1986* (Deventer: Kluwer Law International, 1986) 127 at 132 [*Westland*]; *Dallah ICC*, *supra* note 85 at 353; *First Nat City Bank*, *supra* note 24 at 623; *Born*, *supra* note 2 at 1444; Dominique Vidal, “The Extension of Arbitration Agreements within Groups of Companies: The Alter Ego Doctrine in Arbitral

mercatoria should apply.¹¹⁰ While these are distinguishable,¹¹¹ they will nevertheless be analyzed jointly here because—in addition to often being used interchangeably—¹¹² they have identical justifications; namely, promoting uniformity and rejecting governance by any one legal system. Both also intend to provide transnational and uniform standards.

Born is among the leading authors that agree with their use. He argues that

[I]t is artificial to select the law of any particular national jurisdiction to define those circumstances in which basic principles of fairness and good faith in international business dealings require disregarding a corporate identity conferred by national law and subjecting a party to an international arbitration agreement. Rather, uniform international principles better achieve the purposes of the veil piercing doctrine, without materially interfering with the parties' expectations.¹¹³

In support of this position, he points to the USSC's *First National City Bank* decision.¹¹⁴ There, a state-owned Cuban bank called Banco Para el Comercio Exterior de Cuba ('Bancec') had submitted a claim regarding an unpaid letter of credit issued by First National City Bank. The court granted the defendant's request to pierce Bancec's veil and dismissed the claim. It determined that Bancec was merely an instrument of the Government of Cuba, and that the amount claimed could be offset by the outstanding amount owed to the defendant after the seizure of its properties by the Government. In determining what standard applied in the veil-piercing claim, the court held that the internal affairs doctrine (dictating that the law of the state of incorporation must be applied) was inapplicable because it is not intended to govern "the rights of third

and Court Decisions" (2005) 16:2 ICC Bull 63 at para 41; see also *ICC Case No 11160*, Final Award (March 2002) in (2005) 83:2 ICC Bull 1 at 99–101 (refers to case law and standards from different jurisdictions).

110 *ICC Case No 8385*, *supra* note 107 at 479, 485; *ICC Case No 5721*, Decision on Award (1990) in Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher, eds, *Collection of ICC Arbitral Awards / Recueil des Sentences Arbitrales de la CCI, 1986-1990* (Alphen aan den Rijn: Kluwer Law International, 1994) at 404, 409; *Dallah ICC*, *supra* note 85 at 353; Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher, *Collection of ICC Arbitral Awards / Recueil des Sentences Arbitrales de la CCI, 1986-1990* (Kluwer Law International, 1994) at 409; Vidal, *supra* note 109 at para 41.

111 See Emmanuel Gaillard, «La Distinction des Principes Généraux du Droit et des Usages du Commerce International» in Pierre Bellet, ed, *Études Offertes à Pierre Bellet* (Paris: Litec, 1991); Park, *supra* note 8 at para 1.40.

112 *ICC Case 8385*, *supra* note 107 at 537–42; *Dallah ICC*, *supra* note 85 at 353.

113 Born, *supra* note 2 at 1444.

114 *First Nat City Bank*, *supra* note 24 at 611.

parties external to the corporation.¹¹⁵ It ruled that veil-piercing claims must be assessed using international principles of law¹¹⁶ and internationally recognized equitable principles.¹¹⁷

Beyond its political undertones, the ruling has one evident shortcoming: it fails to indicate what international principles permit veil piercing. The court recognized this, stating that their decision prescribed “no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded.”¹¹⁸ A 1995 ICC award dealing with a choice-of-law issue arising in a veil-piercing claim, however, does. It analyzed three potentially applicable laws and similarly ruled that international principles of law (which it considered equivalent to the so called *lex mercatoria*) should apply.¹¹⁹ According to the tribunal, this approach presents numerous advantages: permitting uniform decisions, allowing for the needs of international commerce to be considered, and permitting the arbitrator or judge to favor a just and pragmatic solution¹²⁰ (another argument which was not raised there is that, in an international commercial setting, this approach is usually better adapted to the parties’ expectations).¹²¹ Unlike *First National City Bank*, the award provides an explanation of what the arbitrators considered to be international legal standards for veil piercing: significant domination of the subsidiary by the parent company, some sort of illegitimate conduct by the subsidiary promoted by the parent company, and subsidiary insolvency.

Unfortunately, these factors fall short of establishing international standards that would promote uniform solutions. The concept of illegitimate conduct is extremely ambiguous and encompasses both fraud and what some laws call abusive conduct or situations of injustice. As indicated in Section VIII, factors used to determine whether veil piercing should be allowed also vary from one jurisdiction to another: some states require mere domination, others only permit veil piercing in cases of accredited fraud, while others require misconduct, injustice, or abusive conduct, which are all strictly defined under each law. The level of control or domination, and whether insolvency is required also varies. Consequently, even if a court or tribunal submits that it is apply-

115 *Ibid* at 621.

116 *Ibid* at 623.

117 *Ibid*.

118 *Ibid* at 633.

119 *ICC Case 8385*, *supra* note 107 at 479.

120 *Ibid*.

121 *Park*, *supra* note 8 at para 1.41.

ing international principles of law governing veil piercing, it is likely implicitly applying the standards of a specific body of law, or picking and choosing among different legal systems to arrive at a solution that the tribunal or court considers just and pragmatic. This does not promote uniformity, and might not conform to the expectations of the parties.

Therefore, without diminishing the role international legal principles or commercial usages play in other contexts, it is clear that they do not provide an adequate method for determining the standards that should govern veil piercing in international arbitration. The requirements for veil piercing are so varied among legal systems that it is doubtful that one could delineate international legal principles to govern veil-piercing claims. They may therefore only play a significant role in situations where there is a “*faute de mieux*, for want of any better solution”¹²² to resolve the dispute.¹²³

XII. The Law of the Place of Incorporation

Another line of thinking suggests looking to the laws of the place of incorporation for guidance.¹²⁴ This makes a good deal of sense, firstly because veil piercing entails disregarding the corporate personality of the signatory, and secondly because corporate law of the place of incorporation governs the legal existence of its companies and the extent of their liability.¹²⁵ Therefore, if we characterize the issue as one governed by corporate law, it should be the law of the place of incorporation that governs.¹²⁶

One might then ask which company’s laws govern: that of the signatory or the non-signatory?¹²⁷ The answer is undoubtedly that of the signatory’s.¹²⁸ This is because transactional decisions are

122 Park, *supra* note 8 at para 1.41.

123 See Sections XIV and XV, below, for further discussion.

124 Besson, *supra* note 36 at 155; Julian DM Lew et al, *Comparative International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2003) at 147; Park, *supra* note 8 at para 1.64-5; see also *E v Z*, *supra* note 1 at 275.

125 Park, *supra* note 8 at para 1.65.

126 Besson, *supra* note 36 at 155.

127 *Ibid.*

128 See Park, *supra* note 8 at para 1.64 (agreeing with this assertion by stating “the subsidiary’s position of incorporation has traditionally served as the starting point in determining the extent of a corporate personality”).

partly based on the corporate law of the company chosen to execute the contract.¹²⁹ Parties look to the corporate laws of its contracting partner to ensure that it has sufficient capacity to execute and perform the contract. Before reaching an agreement, parties have had the opportunity to seek assurances from their contracting partner's parent company or the controlling shareholder.¹³⁰ One could therefore expect the parties to consider the laws limiting the capacity and liability of its contracting partner and, among them, the laws limiting veil piercing.¹³¹ Further, the application of the law of the signatory's place of incorporation is the only proposal that would conform with the parties' legitimate expectations. They would otherwise need to analyze the entire line of ownership and scrutinize the corporate laws of any company that could exercise some sort of control over the signatory. Finally, the alternative—applying the law of the non-signatory—would also certainly be unfair to both parties. It would permit a scenario where the party intending to hold a non-signatory liable could simply look up the chain of ownership and do a sort of 'company shopping'. A signatory could also protect itself through a parent company whose applicable laws do not allow veil piercing or severely restrict it. Finally, although it is less likely, a non-signatory controlling a signatory can be a natural person. When this is the case, the law of the place of incorporation should still have general application, and this is only possible if one resorts to the corporate laws of the signatory.

Therefore, references to the law of the place of incorporation should exclusively designate the corporate laws that govern the signatory whose corporate personality is sought to be disregarded. This is the approach followed by most US jurisdictions,¹³² and also the one proposed in Section 307 of the Restatement Second on Conflict of Laws.¹³³ There are also numerous policy arguments in its

129 Park, *supra* note 8 at para 1.64.

130 *Bridas 2006*, *supra* note 23 at 417.

131 Park, *supra* note 8 at para 1.64.

132 *Dassault Falcon Jet Corp v Oberflex, Inc*, 909 F Supp 345 at 349 (MD NC 1995) [*Dassault*]; *Kalb, Voorhis & Co v Am. Fin. Corp.*, 8 F (3d) 130 at 132–33 (2nd Cir 1993) [*Kalb*]; *Soviet Pan Am Travel Effort v Travel Comm., Inc*, 756 F Supp 126 at 131 (SD NY 1991) [*Soviet Pan Am*]; *Fletcher v Atex, Inc*, 68 F (3d) 1451 at 1456 (2nd Cir 1995).

133 *Dassault*, *supra* note 132 at 349; Tsang, *supra* note 24 at 250; Section 307 of the Restatement (Second) on Conflict of Laws, which states that: "The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its

favor: accordance with the state of incorporation's interest in determining when and if legal protection is stripped away,¹³⁴ promoting consistency and predictability for the corporation and its shareholders,¹³⁵ favoring the law that most likely has the strongest connection to the jurisdictional-piercing issue,¹³⁶ and, as mentioned, consistency with the party's expectations and the restrictive nature of veil piercing.

There are nevertheless dissenting voices. For instance, an ICC tribunal has held that although it might be reasonable and fair to submit a corporation and its shareholders, directors, and administrators to the law of incorporation of the company, it is not reasonable to expect third parties to have accepted the application of their contracting partners' corporate laws simply because they decided to contract with said corporation.¹³⁷ According to the tribunal, this is especially unfair and unreasonable for foreign third parties unfamiliar with the corporate laws of its contracting partner.¹³⁸ Similarly, in *First National City Bank*, the USSC held that while the law of the state of incorporation determines issues relating to the *internal* affairs of a corporation, different principles apply where rights of third parties *external* to the corporation are at issue.¹³⁹ This US standard, however, only applies to foreign governmental-controlled entities,¹⁴⁰ and it is doubtful that US courts or tribunals would extend it to jurisdictional piercing in international arbitration settings. Nonetheless, one could imagine a scenario where, via this approach, a corporation could seek to incorporate in a state that does not allow veil piercing or has very restrictive standards to shield itself in the event of fraud or misconduct. However, the aforementioned counter-arguments still stand: parties are free to structure themselves as they wish and contract through their subsidiaries, are expected to consider the corporate laws of their contracting partners, and can ask for assurances from the parent company or controlling shareholder to mitigate risk.

XIII. The Law with the Most Significant Relationship to the Dispute

The law with which the dispute has the most significant relationship or is more closely connected is the default conflict-of-laws rule under

creditors for corporate debts.”

134 *Dassault*, *supra* note 132 at 349; *Kalb*, *supra* note 132 at 132; *Soviet Pan Am*, *supra* note 132 at 131.

135 *Dassault*, *supra* note 132 at 349.

136 *E v Z*, *supra* note 1 at 275.

137 *ICC Case 8385*, *supra* note 107 at 479.

138 *Ibid.*

139 *First Nat City Bank*, *supra* note 24 at 621

140 *Park*, *supra* note 8 at para 1.67.

Section 188 of the Second Restatement of Conflict of Laws.¹⁴¹ It is also the ‘escape-valve’ rule¹⁴² and the subsidiary rule¹⁴³ of the Rome I Regulation.

Due to its ambiguity, it is said to be the most difficult one to use.¹⁴⁴ This is because courts or the arbitrators only determine the applicable law *ex post*, and parties to a contract can only attempt to guess the outcome before the dispute arises. In other words, parties will not know *ex ante* what law governs veil piercing, and whether the standards are onerous or permissive. They must simply trust the capacity of the arbitrators to arrive at a just solution. There are no definitive guidelines regarding what law is most closely connected to the issue of veil piercing, and the discretion to arbitrators is therefore wide.

When properly applied, however, this approach can be an adequate when all or most factors point to the law of a specific jurisdiction. This was the case in an unpublished award rendered in Zurich where the claimants wished to pierce the veil of an Italian company and hold the sole shareholder liable. Even though Article 178(2) of SPILA would have allowed the application of Swiss law, the tribunal determined that the issue was significantly connected to Italian law: the signatory was a company incorporated in Italy where it had its principal place of business, and the non-signatory was an Italian national domiciled in Italy. The tribunal therefore held that Italian law applied to the issue of veil piercing, citing the significant connections with Italian law and Article 155 SPILA.¹⁴⁵

The significant relationship approach also has the added benefit of flexibility. It allows the parties to argue for any of the choice-of-law alternatives that have been analyzed and propose additional relevant connections. One must keep in mind, however, that the law proposed must have a significant connection with the jurisdictional veil-piercing claim and not the underlying contract or the substantive dispute.

141 The Restatement (Second) of Conflict of Laws § 188 (1971) provides: “Law Governing in Absence of Effective Choice by the Parties: (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.”

142 Rome I Regulation, Article 4, provides: “Applicable law in the absence of choice. (3) Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.”

143 Rome I Regulation, Article 4 provides: “Applicable law in the absence of choice. (4) Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.”

144 Tsang, *supra* note 24 at 252.

145 *E v Z*, *supra* note 1 at 273–75.

XIV. State-Owned Entities

As is the case with corporations, the personality of state-owned entities can be disregarded so as to hold the controlling sovereign liable or subject them to arbitration. This occurred in both *First National City Bank* and *Dallah*,¹⁴⁶ where the personality of a state-controlled entity was disregarded in order to hold a sovereign state liable and, in the latter, by sending the state to arbitration.

As a general rule, states and state-controlled entities are subject to the same laws as other non-signatories.¹⁴⁷ Once the applicable law for veil piercing is determined, the non-signatory state can be designated a party to the arbitration and held liable in the final award. However, when veil piercing claims target state-owned entities, there are additional considerations. A preliminary one is that states generally enjoy sovereign immunity from both jurisdiction and execution. It is therefore relevant to determine how jurisdictional immunity is waived.¹⁴⁸ Most states do so voluntarily in submitting their dispute to arbitration,¹⁴⁹ but this is not always the case. Therefore, one must consider the law pertaining to jurisdictional immunity that is applicable to the state involved. The municipal law of the state, for instance, may also be relevant in determining if the conduct exercised over the signatory is in fact domination and not an execution of domestic administrative law. Indeed, this was stressed by the Paris Cour d'Appel in a ruling setting aside an award in the *Pyramids* case. In its review, the court noted that the ratification of a contract by the Tourism Ministry did not imply consent to arbitration because it was mandated by local administrative law.¹⁵⁰

Thus, it is clear that the law of the state-controlled entity's place of incorporation, which coincides with that of the non-signatory state, plays an important role in a choice-of-law analysis. One might therefore conclude that this is the choice-of-law approach to be adopted. However, as noted in *First National City Bank*, giving conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected risks permitting the state "to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts."¹⁵¹ Thus, when the state completely shields itself from liability, the choice-of-law approach requires a type of 'escape device'. This could mean resorting to the law of closest connection, or

¹⁴⁶ *Dallah ICC*, *supra* note 85.

¹⁴⁷ *Petrochilos*, *supra* note 50 at 121.

¹⁴⁸ *Westland*, *supra* note 109 at 133.

¹⁴⁹ *Ibid.*

¹⁵⁰ CA Paris, 12 July 1984, *The Arab Republic of Egypt v Southern Pacific Properties Ltd., Southern Pacific Properties (Middle East) Ltd.* in (1985) X YB Com Arb at 118–19.

¹⁵¹ *First Nat City Bank*, *supra* note 24 at 621–22.

perhaps following the approach of *First National City Bank* and applying the so called general principles of law.

XV. Supranational Entities

Determining the law applicable to piercing the veil of supranational entities is a uniquely complicated task because these entities are not bound by the laws of any particular state and their stakeholders are ordinarily states or state-owned entities.

The issue was addressed in an extremely complex claim before a tribunal in *Westland Helicopters*.¹⁵² In this case, the United Arab Emirates, Saudi Arabia, Qatar, and Egypt had established a supranational entity called the Arab Organization for Industrialization ('AOI') to contract with Westland. They concluded a shareholder's agreement creating a joint stock company to manufacture and sell helicopters developed by Westland. The agreement contained an arbitration clause referring all disputes to ICC arbitration in Geneva under Swiss law. After a political dispute arose between the members of the AOI, the United Arab Emirates, Saudi Arabia, and Qatar announced that they were ending the AOI's legal existence. Westland filed an arbitration request against the AOI and all its member states. In discussing the applicable law for determining if the states could be party to the arbitration, the tribunal stated the following:

Having regard to the supranational character of the AOI it is, from the outset, impossible to attribute to it, *a posteriori*, an 'applicable law' according to the rules of private international law, that is to say to submit this entity to the law of either the place of its incorporation (which, *in casu*, does not exist), or the place where the centre of its business activities lies, or the place of its management, or any other place. This private law manner of approach is excluded if the legal entity in question is created by States which have wished to give it a supranational character, that is to say to exempt it from being subject to any national law. Fixing the administrative seat in Cairo has no effect on the legal status of this entity.¹⁵³ In the present case, the Basic Statute, despite the fixing of capital, does not classify the AOI as a '*société de capitaux*' such as a limited liability company. The AOI is rather more akin to a general partnership (*société en nom collectif*) under French, Swiss or German law or a 'partnership' under English or United States law.¹⁵⁴

The tribunal ultimately found that "[e]quity, in common with the principles of international law, allows the corporate veil to be lifted, in order to protect

¹⁵² *Westland*, *supra* note 109 at 127–33.

¹⁵³ *Ibid* at 130–31.

¹⁵⁴ *Ibid* at 131.

third parties against an abuse which would be to their detriment.”¹⁵⁵

William Park has held a similar position. He submits that transnational norms play a “special role with respect to supra-national entities created by international treaty ... to protect innocent third party victims of corporate abuse.”¹⁵⁶ Thus, where supranational entities are concerned, it is clear that there is a significant school of thought that believes that so-called ‘international principles of law’ should be applied.

XVI. Who Should Have the Last Word?

An important aspect of the choice-of-law question has been purposely left for last. Its relevance is such that one’s answer to it defines their choice-of-law approach, and might even impact the recognition and enforceability of an award. The issue is whether the inclusion of non-signatories is one of scope or validity of the arbitration agreement. In other words, is the analysis whether the arbitration agreement ‘extends’ to the non-signatory (i.e. the scope of the agreement), or whether the arbitration agreement exists between a non-signatory and a signatory (i.e. the validity of the agreement). This issue is not just relevant for academic purposes; it indeed has very important practical consequences.

It is well-known that Article V(1)(a) of the New York Convention states that the recognition and enforcement of an award may be refused if the arbitration agreement is not “*valid* under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”¹⁵⁷ Courts seized with recognition and enforcement proceedings must therefore look to the choice-of-law rule provided by the New York Convention if there is an opposition to the *validity* of the arbitration agreement. Consequently, if determining whether to include non-signatories to the arbitration agreement is categorized as an issue of agreement validity, courts seized with recognition and enforcement proceedings would be obliged to review the issue of veil-piercing under the law chosen to govern the arbitration agreement or, in absence thereof, the law of the seat of the arbitration. Conversely, if it were an issue of scope, Article V(1)(a) would not apply to non-signatories. In the latter case, the arbitrator would have the last word in ruling as to whether the non-signatory is bound by the agreement to arbitrate.

Differing opinions in this matter held by tribunals and courts can lead to conflicting decisions. This is precisely what occurred in *Dallah*, where the ICC tribunal ruled that Pakistan was the alter ego of a state-controlled

¹⁵⁵ *Ibid* at 132.

¹⁵⁶ Park, *supra* note 8 at para 1.68.

¹⁵⁷ Emphasis added.

trust by applying transnational general principles and usages.¹⁵⁸ When recognition and enforcement was sought in England, the UK Supreme Court implicitly characterized the issue of binding the non-signatory to the arbitration as one of validity, and looked to the law of France—the place where the award was made—¹⁵⁹ to conclude that Pakistan was not bound by the arbitration agreement.

In light of this analysis, it might be best for all tribunals to follow the Swiss approach and categorize the issue as one of validity. This way, both the tribunal and the enforcing courts would look to the law governing the arbitration agreement, which could reduce the likelihood of seeing more situations analogous to *Dallah*. However, Born rightly points out that a better approach would be to categorize the question as an issue of scope because “non-signatories have a substantial and close relationship with one of the parties to the arbitration agreement... [and] determining whether that relationship is sufficient to subject the non-signatory to the arbitration agreement is principally a question of interpreting the parties’ underlying commercial relationship.”¹⁶⁰ This approach does limit the enforcing court’s power to review the arbitrator’s decision regarding the non-signatory. However, the drafters of the New York Convention intended the grounds for opposing recognition and enforcement awards to be interpreted and applied narrowly.¹⁶¹ One could thus conclude that the drafters did not intend for courts to review the arbitrator’s decision regarding the scope of the arbitration agreement. Indeed, in commenting on *Dallah*’s procedural history, Antonias Dimolitsa suggests that, in claims seeking to include non-signatories to the arbitration, arbitrators are probably in a better position to analyze the facts and weigh the evidence presented.¹⁶²

XVII. Conclusion

Although veil piercing is recognized in most jurisdictions, it is clear that requirements and standards for its use differ significantly from one state to another. Therefore, when adopting a choice-of-law proposal, predictability and justice must be the chief selection criteria.

There are arguments for and against each of the choice-of-law proposals examined. Upon review, the leading options appear to be the law of the place of incorporation of the signatory and international principles of law. However, despite ample support for the application of transnation-

¹⁵⁸ *Dallah ICC*, *supra* note 85 at 353.

¹⁵⁹ *Dallah UKSC*, *supra* note 46 at paras 11–14.

¹⁶⁰ Born, *supra* note 2 at 1418.

¹⁶¹ ICCA, *ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, (International Council for Commercial Arbitration, 2011) at 81.

¹⁶² Antonias Dimolitsa, “L’extension de la clause compromissoire à des non-signataires : rien de neuf” in (2012) 30:3 *ASA Bull* 516 at 536.

al standards, the requirements and criteria for veil piercing are so diverse among legal systems that, under this approach, courts and tribunals are likely implicitly applying the standards of a specific jurisdiction, or picking and choosing among different legal systems to arrive at what they consider to be a just and pragmatic solution. Consequently, this proposal does not promote uniformity and might not conform to the parties' expectations.

The best approach therefore seems to be applying the law of the place of incorporation of the signatory. It promotes predictability among corporations and their shareholders. A party can make its transactional decisions cognizant of the limits to its capacity and liability as well as those of its contracting partners. Additionally, it provides corporations the freedom to structure themselves as they please, and keeps veil piercing in the realm of exceptional remedies.

There would nevertheless be the need, however, for an 'escape-valve' provision in rare circumstances where the signatory incorporated in a state that does not permit veil piercing in order to avoid impunity in cases of extreme misconduct or manifest fraud. Here, the law with the closest connection to the issue of veil piercing should apply. Although it is unpredictable *ab initio* for the parties, it allows arbitrators to maneuver—with adequate reasoning—towards a result that is likely more just in the circumstances. In cases where state-controlled entities are involved, the primary rule should be the law of the charter state.

An 'escape valve' would once again be needed where the state has insulated itself from liability and there is a significant risk of gravely violating to the rights of third parties. However, the law with the closest connection may lead back to the law of the non-signatory state and thus prove to be ineffective. Therefore, 'international principles of law' would then have to be called into application. Supranational entities also present a very particular problem because they are not tied to a given state. Here, the general consensus, which is indeed persuasive, proposes applying transnational standards. Even though it is unlikely that truly international legal principles governing the standards for veil piercing can be established, it should be recognized that, as a general rule, veil piercing is justified in cases of absolute domination and evident fraud, or perhaps excessive abuse of rights. The limited role granted to the application of transnational standards should be restricted to these grave and exceptional cases.