Consent to Arbitration, Party Autonomy, and Non-Signatories: A Review of Procedural, Analytical, and Substantive Approaches Under Canadian Laws

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I. Introduction

Mutual consent is the foundation of an enforceable arbitration agreement. The Supreme Court of Canada has emphasized the consensual nature of arbitration and the link between consent and party autonomy. In *TELUS Communications Inc v Wellman*[1] ("*Telus*"), the Court said:

> [52] … The policy that parties to a valid arbitration agreement should abide by their agreement gives effect to the concept of party autonomy — which, in the arbitration context, stands for the principle that parties should generally be allowed to craft their own dispute resolution mechanism through consensual agreement [citations omitted]. Consensual arbitration and party autonomy are inseparable — an arbitration agreement is "a product of party autonomy . . . [and] crystallizes the parties' consent" to private dispute resolution (M. Pavlović and A. Daimsis, "Arbitration", in J. C. Kleefeld et al., eds., Dispute Resolution: Readings and Case Studies (4th ed. 2016), at p. 485).[2]

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[1] *TELUS Communications Inc v Wellman*, 2019 SCC 19 [*Telus*].

[2] *Ibid* at para 52.

A signature on a written arbitration agreement is evidence of consent. Various theories have, however, been invoked in relation to both international and non-international arbitration agreements to allow enforcement by and against non-signatories. Some theories are consistent with the requirement for mutual consent, but others are not. Some theories are founded on principles recognizable under Canadian laws—theories of contract law, such as assignment and assumption or incorporation by reference, or theories of agency law. Some, such as *alter ego*, estoppel, and third-party beneficiary theories, sound familiar to a Canadian ear, but their applicability in an arbitral context requires careful consideration. Other theories, however, seem untethered to the law. They appear designed to avoid a multiplicity of proceedings or to promote notions of "fairness." This latter category includes theories based on "intertwined" parties or contracts, several exotic species of "equitable estoppel" routinely applied by American courts and, perhaps, the "group of companies" theory articulated by French courts. Proposals to apply these more exotic theories in Canadian court proceedings could trigger questions about arbitrability, public policy, and the validity of the alleged arbitration "agreement."

A review of Canadian cases concerning the enforcement of arbitration agreements by and against non-signatories shows that, unlike the Supreme Court of the United States, the Supreme Court of Canada has not yet been asked to identify the theories that are available under Canadian laws to address non-signatory issues in the arbitral context. The review shows that the lower courts have struggled with these issues and have not yet developed a satisfactory analytical framework.

The first purpose of this article is to assess how, procedurally, non-signatory issues have arisen and how Canada's lower courts have responded to non-signatory issues to date, with reference to key topics that must be addressed when analyzing such matters. The article then examines the most commonly proposed theories to determine whether under Canadian laws those theories have been, or should be, available.

Since respect for party autonomy is of such central importance, the author proposes that only theories which are compatible with the requirement for consent to arbitration, or which conform to recognized exceptions to the privity rule, should form part of Canadian law.

II. AN ANALYSIS OF CANADIAN NON-SIGNATORY JURISPRUDENCE

1. Situations in Which Non-Signatory Issues Typically Arise

Certain variables impact the outcome of decisions about non-signatories in the arbitral context. The variables include (i) the procedural context in which the issue arises and (ii) the signatory status of the parties seeking to enforce the arbitration agreement and against whom the arbitration agreement is sought to be enforced. Non-signatory issues have arisen most commonly in the context of applications for a stay of legal proceedings commenced by or against a non-signatory. They also have arisen on applications to set aside or enforce awards for or against a non-signatory.

As to the signatory status of the parties seeking or resisting enforcement, there are three potential scenarios:

a) Scenario #1: a claimant who is a signatory to an arbitration agreement wishes to enforce the arbitration agreement against an unwilling non-signatory respondent;

b) Scenario #2: a defendant who is a non-signatory wishes to enforce an arbitration agreement against an unwilling signatory plaintiff; or

c) Scenario #3: a claimant who is a non-signatory to an arbitration agreement wishes to enforce the arbitration agreement against an unwilling signatory respondent.

2. *Who Decides Whether an Arbitration Agreement Can Be Enforced By or Against a Non-Signatory?*

a. *Stay Applications and* competence-competence*.*

Non-signatory issues arise in Canada most frequently on applications to stay court actions. There has been general adherence, in both domestic and international arbitration contexts, to the approach first taken by the British Columbia Court of Appeal in *Gulf Canada Resources Ltd v Arochem International Ltd*[3] ("*Gulf Canada*"), wherein the court stated that "… where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then … the stay should be granted and those matters left to be determined by the arbitral tribunal." This approach foreshadowed that now mandated by the Supreme Court of Canada in *Dell Computer Corp v Union des consommateurs*,[4] ("*Dell*") and in *Seidel v TELUS Communications Inc*[5] ("*Seidel*"). In *Dell* and in *Seidel* the Court stated that in accordance with the *competence-competence* doctrine, any challenge to an arbitrator's jurisdiction should first be determined by the arbitrator, unless (i) the challenge involves a pure question of law, or (ii) one of mixed fact and law that requires "only superficial consideration of the documentary evidence in the record" for its disposition (the "*Dell*/*Seidel* exceptions").[6]

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[3] *Gulf Canada Resources Ltd v Arochem International Ltd*, [1992] 11 BCAC 145, 66 BCLR (2d) 113 (BCCA) [*Gulf Canada*].

[4] *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at para 84 [*Dell*].

[5] *Seidel v Telus Communications Inc*, 2011 SCC 15 at para 29 [*Seidel*].

[6] *Dell*, *supra* note 4 at para 85; *Seidel*, *supra* note 5 at para 29. To these two exceptions the Supreme Court recently added a third, holding that a court may depart from the general rule of arbitral referral if an issue of accessibility arises. In *Uber Technologies Inc v Heller*, 2020 SCC 16, the Court stated that the assumption made in *Dell* is that if the court does not decide an issue, then the arbitrator will. Accordingly, a court should not refer a challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing

There is, of course, an obligation on the party seeking a stay in respect of a claim by or against a non-signatory to (i) show that under the applicable law it is at least arguable that the alleged arbitration agreement might be enforced by or against the non-signatory and (ii) adduce evidence sufficient to establish that the theory arguably applies.[7]

Since *Dell* and *Seidel* most courts have applied the approach they mandate to analyze non-signatory issues. There have, however, been instances where these principles have not been applied.

In *Landex Investments Company v John Volken Foundation*[8] ("*Landex*"), the sole defendant in an Alberta court action was not a signatory of an asset purchase agreement containing an arbitration agreement. The non-signatory defendant applied for a stay and referral to arbitration. The chambers judge granted the stay. Rather than referring the determination of jurisdiction to the arbitrators, the Chambers judge made a conclusive finding that the non-signatory defendant could invoke the arbitration agreement based on the "principled exception to the privity rule" identified by the Supreme Court of Canada in *London Drugs v Kuehne & Nagel International Ltd*[9] ("*London Drugs*"). On appeal, the Alberta Court of Appeal conducted its own review of the evidence and the law and found that as the asset purchase agreement expressly stated that no benefits were intended to be conferred on strangers to the contract, the

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so would result in the challenge never being resolved. If there is such a real prospect a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record.

[7] See e.g. *AtriCure, Inc v Meng*, 2020 BCSC 341, in which the British Columbia Supreme Court found that the applicant had adduced no evidence to show that available non-signatory theories might apply, and thus refused a stay.

[8] *Landex Investments Co v John Voken Foundation,* 2008 ABCA 333 [*Landex*].

[9] *London Drugs Ltd v Keuhne & Nagel International Ltd*, [1992] 3 SCR 299, [1992] SCJ No 84 [*London Drugs*]. This theory is discussed further below.

principled exception to the privity rule did not apply. On that basis, the stay of proceedings was set aside.

The Court of Appeal's reasons make no reference to Alberta's arbitration legislation. It is not clear whether the stay application invoked one of those statutes or some other basis for granting a stay. There is no mention of *competence-competence* or any arbitration case law, including *Dell*, which had been decided the previous year.

There is a line of Ontario non-signatory cases that appear to be at odds with the *competence-competence* principle. They were all decided under s. 7(1) of the *Arbitration Act* (Ontario).[10] In each case the court held that, because of the specific language used in that section, an applicant for a stay must prove to the court, on balance, that it is a "party to the arbitration agreement." They found that a non-signatory cannot satisfy this burden. Section 7(1) states:

> If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

In *Rampton v Eyre*[11] ("*Rampton*"), the Ontario Court of Appeal considered whether the motions judge on a stay application had wrongly refused the stay by finding that both the commercial agreement and, hence, the arbitration agreement, had terminated. The Court of Appeal properly applied the doctrine of separability to find that, even if the commercial agreement had been terminated (something they said the motions judge should not have decided on a stay application) the arbitration agreement would continue.

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[10] *Arbitration Act, 1991*, SO 1991, c 17, s 7(1) [*Arbitration Act* (Ontario)].

[11] *Rampton v Eyre*, 2007 ONCA 33 [*Rampton*].

Regrettably, however, the Court of Appeal added that the refusal of a stay was correct in any event, saying:

> [20] … The parties to the agreement that contained the arbitration clause were Eyre and SloGold. However, the appellant brought the application in his own name. As he is not a party to the arbitration agreement, he cannot invoke it. Other remedies may be available to him. It is not for us to decide.[12]

There is no indication that there was any considered analysis of whether an arbitration agreement might be enforced by a non-signatory.

In *2296432 Ontario Limited v FOF Franchise Corp*[13] ("*FOF*"), B.P. O'Marra J dismissed the non-signatory defendants' application under s. 7(1) to stay a court action brought by a signatory plaintiff. The Court found that an application for a stay must be made by a party to the action who is also a party to the arbitration agreement. The Court did not accept the applicant's contention that the question of whether the non-signatory was or was not a party to the arbitration agreement should be referred to the arbitral tribunal, stating "that is not a matter for the arbitrator to decide."[14] As the non-signatories had not proven to the court's satisfaction that they were parties to the arbitration agreement, the application for a stay was dismissed.

In support of its conclusion, in *FOF* the court cited *Shaw Satellite G.P. v Pieckenhagen*[15] ("*Shaw*"). That case, however, actually decided a much narrower point. Perrell J described the issue in *Shaw* as "whether a defendant who is not prepared to

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[12] *Ibid* at para 20.

[13] *2296423 Ontario Limited v FOF Franchise Corp*, 2014 ONSC 4038 [*FOF*].

[14] *Ibid* at para 19.

[15] *Shaw Satellite GP v Pieckenhagen*, 2011 ONSC 4630.

admit or deny that he or she is a party to an arbitration agreement is entitled to require that an action be stayed for a submission to arbitration."[16] The non-signatory applicant was attempting to invoke the arbitration agreement while reserving the right to argue as a matter of substantive defence that it was not a party to the commercial agreement containing the arbitration clause. The statement of facts in *FOF* indicates that the applicant defendants in that case admitted that they were parties to the franchise agreement containing the arbitration agreement, arguing that by its terms it extended to "affiliates, employees and other related parties".[17] This suggests that there was an important distinction between the circumstances in *FOF* and those in *Shaw* which was not taken into account.

In *Graves v Correactology Health Care Group Inc*[18] ("*Graves*"), Nishikawa J took the same approach as taken in *FOF* and *Shaw*, citing the Court of Appeal's decision in *Rampton* as additional authority. The Court said:

> [26] Pursuant to s. 7(1) of the *Arbitration Act* … only those who are party to the agreement containing an arbitration clause may invoke it: *Rampton v Eyre*, 2007 ONCA 331 at para. 20. A third party who is not a party to an agreement cannot invoke an arbitration clause as a shield against litigation: *Shaw Satellite G.P. v. Pieckenhagen,* 2011 ONSC 4360 at para. 34.[19]

These cases turn on an interpretation of s. 7(1) that is at odds with the approach mandated in *Dell* and *Seidel*. Read literally, but without regard to the over-arching principle of *competence-competence*, section 7(1) requires that a stay applicant prove in court, on a balance of probabilities, that (i) there is an

[16] *Ibid* at para 2.

[17] *FOF, supra* note 13 at para 10.

[18] *Graves v Correactology Health Care Group Inc*, 2018 ONSC 4263.

[19] *Ibid* at para 26.

arbitration agreement (ii) the court action is in respect of a matter falling within the scope of the arbitration agreement, and (iii) the applicant is a party to the arbitration agreement. It is illogical to conclude that the *competence-competence* principle requires that the first two requirements be referred to the arbitrators for determination if they are arguable, but that the third requirement (that the applicant is a party to an arbitration agreement) must always be conclusively proven in court, before the applicant can seek a stay.[20]

Although they are not described as such, these decisions might be reconciled with *Dell* and *Seidel* if they were regarded as instances of the application of the *Dell*/*Seidel* exceptions. What appears to have seduced the courts into embracing a strict interpretation of section 7(1) is the assumption that a non-signatory simply cannot enforce an arbitration agreement against a signatory. If one holds that view, the situation fits within the *Dell*/*Seidel* exceptions, as a final determination of the existence and validity of the arbitration agreement as between the non-signatory and others can be made on a stay application based on "only superficial consideration of the documentary evidence in the record."[21] On this view, if there is no signature, there is no arbitration agreement. None of these decisions reflects a detailed analysis of the circumstances and theories under which a non-signatory might enforce an arbitration agreement by seeking a stay.

It should be noted that under the *Arbitration Act* (Ontario), which was the applicable statute in all these cases, there is no requirement for a signed written arbitration agreement. Section 5(3) states that "[a]n arbitration agreement need not be in

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[20] In *Hosting Metro Inc v Poornam Info Vision Pvt, Ltd*, 2016 BCSC 2371 at paras 28–30 [*Hosting Metro*], the BCSC rejected the argument that under section 8(1) of the *Commercial Arbitration Act* (BC), RSBC 1996, c 55—the wording of which is slightly different than section 7(1) of the Ontario statute—all three elements must be proved to the court on a balance of probabilities.

[21] *Dell*, *supra* note 4 at para 85; *Seidel*, *supra* note 5 at para 29.

writing." Although they turned on the lack of a signature, none of the judgments falling within the *Rampton* line of cases discusses the potential implications of section 5(3). If one accepts—as other Canadian courts have done—that non-signatories *might* arguably be regarded as "parties" to written arbitration agreements—in the sense that they have rights or obligations under them—then in order for a motions judge to make a conclusive determination about whether the applicant is "a party" there would often have to be a full hearing of evidence and argument. That is the antithesis of what the Supreme Court of Canada has mandated in *Dell* and *Seidel.*

In *Ontario Medical Association v Willis Canada Inc et al*,[22] the Ontario Court of Appeal found that despite differences in the language of section 7(1) and article 16(1) of the *Model Law*[23] (relating to stays of international arbitrations), the *competence-competence* principle should be applied in the same manner under both provisions.[24]

In the light of *Dell* and *Seidel*, and the acceptance of *competence-competence* as a principle of Canadian law, a non-signatory applicant under section 7(1) of the *Arbitration Act* (Ontario) should only be required to show that it is *arguable* that it is a person who is "another party to the arbitration agreement." The *Rampton* line of cases should not be followed on this issue.

b. *Court Review of Tribunal Awards in Favour of or Against Non-Signatories: The "Standard of Review"*

In instances where a tribunal already has found that a non-signatory is bound by an arbitration agreement, varying

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[22] *Ontario Medical Assn v Willis Canada Inc*, 2013 ONSC 2253 [*Ontario Medical*].

[23] United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration* (21 June 1985), UN Doc A/40/17, Annex 1 [*Model Law*].

[24] *Ontario Medical*, *supra* note 22 at paras 30, 37.

approaches have been taken by Canadian courts to the "standard of review." Before discussing those approaches, it is important to note that there is a cogent argument that the concept of "standard of review" is not relevant to the function of a court that is asked to set aside or refuse enforcement of an award on jurisdictional grounds. The concept of "standard of review" is relevant when a court hears a statutorily authorized appeal from an arbitration award. When a court is asked to refuse to enforce or set aside an award for lack of jurisdiction, however, it is not sitting on appeal from the award or conducting a judicial review of the award. In respect of international arbitration awards, the *New York Convention* and the *Model Law* make clear that the Court's task on such applications is not to determine whether the arbitrator erred, but rather to make its own determination of whether the arbitration agreement is valid[25] and whether the award deals with a dispute not contemplated by the arbitration agreement.[26] If the Court finds that it was not contemplated that disputes by or against a non-signatory would be subject to arbitration under the arbitration agreement, the Court may then set aside the award or refuse enforcement.

In the few cases involving non-signatories in which the standard of review has been addressed, it has been assumed that a standard of review analysis is appropriate. The following analysis therefore assumes that deciding jurisdictional objections on enforcement and set-aside applications under a relevant statute may properly be characterized as an appeal from or review of an arbitral award.

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[25] See *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958 (entered into force 7 June 1959, 24 signatories, 166 parties), 330 UNTS 3, art V(1)(a) [*New York Convention*]; *Model Law*, *supra* note 23, arts 34(2)(a)(i), 36(1)(a) [*Model Law*].

[26] See *New York Convention*, *supra* note 25, art V(1)(c); *Model Law*, *supra* note 23, arts 34(2)(a)(iii), 36(1)(iii).

In *CE International Resources Holdings LLC v Yeap Soon Sit*[27] ("*CEIR*"), an award had been made in New York in an arbitration against the personal respondent, Yeap, and two companies. The arbitrator had ruled that he had jurisdiction over Yeap on the basis that a corporate signatory to the arbitration agreements had acted as Yeap's *alter ego* and that Yeap was estopped from denying that he was party to the agreements. The claimant applied under the *International Commercial Arbitration Act* ("*ICAA* (BC)")[28] (i.e., the *Model Law*) and *Foreign Arbitral Awards Act* ("*FAAA* (BC)")[29] (i.e., the *New York Convention*) for recognition and enforcement of the award. Yeap resisted enforcement on the basis that he was not a party to the arbitration agreements, and argued that the arbitrator's decision to the contrary was incorrect.

The claimant submitted that the correctness of the arbitrator's ruling was not a matter the court should address on an application for recognition and enforcement. Fisher J agreed, finding that deference should be given to the arbitrator's finding of jurisdiction, saying that the court must accept the arbitrator's jurisdictional decision on its face.[30]

In *DNM Systems Ltd v Lock-Block Canada Ltd*[31] ("*Lock-Block*"), Skolrood J of the British Columbia Supreme Court reached a different conclusion. The matter concerned an unusual provision in the former *Arbitration Act* (BC)[32] which

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[27] *CE International Resources Holdings LLC v Yeap Soon Sit*, 2013 BCSC 1804 [*CEIR*].

[28] *International Commercial Arbitration Act*, RSBC 1996, c 233 [*ICAA* (BC)].

[29] *Foreign Arbitral Awards Act*, RSBC 1996, c 154 [*FAAA* (BC)].

[30] *CEIR*, *supra* note 27 at para 32.

[31] *DNM Systems Ltd v Lock-Block Canada Ltd*, 2015 BCSC 2014 [*Lock-Block*].

[32] *Arbitration Act*, RSBC 1996, c 55 [*Arbitration Act* (BC)]. As of September 1 2020 a new *Arbitration Act*, SBC 2020, c 2, came into force. See Tina Cicchetti & Jonathan Eades, "The New BC *Arbitration Act*" at page 144 of this very issue of the *Canadian Journal of Commercial Arbitration*. In this article, unless

allowed recourse to the court from a domestic arbitration award based on "arbitral error." The definition of "arbitral error" included "exceeding the arbitrator's powers."[33] The arbitrator had allowed four non-signatories to be joined as respondents in the arbitration on the basis that they "can be considered *alter egos*" of the originally named respondent.[34] He made an award against the non-signatories. The non-signatories applied to set aside the award for arbitral error.

The court found that an arbitrator has jurisdiction to determine *in the first instance* who are the proper or necessary parties to the arbitration. Skolrood J found, however, that if an arbitrator incorrectly decides that a person is bound by an arbitration agreement the arbitrator will have exceeded his or her jurisdiction and committed "arbitral error."[35] He found that because the issue "goes to the heart" of the arbitrator's jurisdiction, it should be reviewed applying a standard of correctness.[36] On this basis he ruled that the arbitrator had committed an arbitral error and set the award aside.

In *Xerox Canada Ltd and Xerox Corporation v MPI Technologies, Inc et al*[37] ("*Xerox*"), Campbell J of the Ontario Superior Court of Justice considered an application under the *Model Law*,[38] as implemented by the *International Commercial*

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stated otherwise, references to the *Arbitration Act* (BC) refer to the old statute.

[33] *Ibid*, s 1. These provisions do not appear in British Columbia's new *Arbitration Act, supra* note 32.

[34] *Lock-Block*, *supra* note 31 at para 32.

[35] *Ibid* at para 84.

[36] *Ibid* at para 86.

[37] *Xerox Canada Ltd v MPI Technologies Inc*, [2006] OJ No 4985, 2006 CarswellOnt 7850 (ONSC) [*Xerox*].

[38] The specific provision of the *Model Law* that was invoked is not identified in the judgment, but presumably the applicant relied on art 34.

Arbitration Act[39] ("*ICAA* (Ontario)"), to set aside an award made in an international arbitration seated in Ontario. One ground for seeking to set aside the award was that a non-signatory parent company of a signatory party had been added as a party to the arbitration proceedings and had recovered a substantial award. The applicants alleged that the arbitral tribunal had exceeded its jurisdiction by adding the non-signatory as a party and making an award in its favour. Campbell J reviewed the tribunal's basis for adding the non-signatory, and cited cases from France and the United Kingdom which had been considered by the tribunal. He was not persuaded that the tribunal had erred in its jurisdictional finding. It appears, however, that a standard of correctness was not applied. Campbell J concluded his analysis of the jurisdictional issue by saying:

> [52] … in *United Mexican States v Karpa* …. [w]riting for a unanimous court, Armstrong JA stated that "Notions of international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly." Quite apart from that principle, he noted that domestic Canadian law dictates a high degree of deference for decisions of specialized tribunals generally and for awards of consensual arbitration tribunals in particular. He concluded that the appropriate standard of review was at the high end of the spectrum of judicial deference.[40]

In *Mexico v Cargill, Incorporated* (*"Cargill"*), the Ontario Court of Appeal held that, on an application to set aside an international arbitration award under the *Model Law*, a NAFTA

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[39] *International Commercial Arbitration Act,* RSO 1990, c I9. This statute was repealed and replaced by the *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sch 5. Unless stated otherwise references in this art to the *ICAA* (Ontario) refer to the old statute.

[40] *Xerox*, *supra* note 37 at para 52 [internal citations omitted].

tribunal's finding of jurisdiction should be reviewed applying a standard of correctness. *Cargill* was not a non-signatory case. In arriving at its conclusion, however, the court referred to the decision of the English Supreme Court in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*[41] ("*Dallah*"). *Dallah* was a non-signatory case. The English Supreme Court held that "[t]he tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to [a non-signatory] at all."[42] In *Dallah*, the Court agreed with the non-signatory's submission that under article VI(a) of the *Convention*, "when the issue is initial consent to arbitration" the court "is neither bound nor restricted by" the ruling or reasons of the tribunal, and must perform its own analysis.[43]

In *Sattva Capital Corporation v Creston Moly Corp*[44] ("*Sattva*"), the Supreme Court of Canada held that, "[i]n the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise …".[45] In arriving at this conclusion, while noting that "appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations" the Court observed that "judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects."

[41] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs Government of Pakistan*, [2010] UKSC 46, [2011] 1 AC 763.

[42] *Ibid* at para 30.

[43] *Ibid* at para 31.

[44] *Sattva Capital Corporation v Creston Moly Corp*, 2014 SCC 53.

[45] *Ibid* at para 109.

Sattva, however, involved a specific statutory right to appeal on a question of law arising out of a domestic arbitration award. The appeal raised no issue concerning arbitral jurisdiction. *Sattva* does not establish that a reasonableness standard should be applied when a court considers an arbitral decision relating to jurisdiction in respect of a non-signatory on a set-aside or enforcement application.

In *Teal Cedar Products Ltd v British Columbia* ("*Teal*"),[46] the Court confirmed *Sattva* and clarified the process for characterizing a question arising on an appeal as one of three principal types—legal, factual, or mixed, with legal questions being questions about what the correct legal test is, factual questions being questions about what actually took place between the parties, and mixed questions being questions about whether the facts satisfy the legal test. It also identified a fourth category of question, that might emerge when examining a mixed question, if, in the course of that application, the underlying legal test may have been altered. The fourth category is called an "extricable question of law."[47] The court also stated that the standard of review on legal questions arising from an arbitrator's analysis of statutory interpretation issues is reasonableness, which "is almost always applied in commercial arbitration."[48] The Court, again, limited itself to the standard of review on a statutory appeal from an arbitrator's award. The error in *Teal* did not relate to an alleged excess of jurisdiction, or, more specifically, to the question of the arbitral tribunal's jurisdiction in respect of a non-signatory. It did not address enforcement or set-aside applications.

In *Canada (Minister of Citizenship and Immigration) v Vavilov* ("*Vavilov*"),[49] the Supreme Court of Canada established a new

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[46] *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32.

[47] *Ibid* at paras 44–45.

[48] *Ibid* at para 79.

[49] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65.

regime for identifying the standard of review from decisions of domestic administrative tribunals, replacing a regime that had been developed in *Dunsmuir v New Brunswick.*[50] It did not expressly refer to arbitration tribunals. The new regime established in *Vavilov* starts with a presumption that the standard of review is reasonableness, but there are exceptions. One exception concerned decisions about the administrative body's jurisdiction, when there is a competing administrative body that may have jurisdiction. *Vavilov* did not address directly the standard of review for arbitral awards, let alone arbitral awards concerning jurisdiction over a non-signatory.

In the light of the Court's observations in *Sattva*, however, *Vavilov* likely will be invoked on appeals from arbitral awards. Indeed, *Vavilov* already has been invoked before the courts of several provinces, resulting in somewhat inconsistent findings about the relevance of *Vavilov*.[51] There is nothing in *Vavilov*, however, or in the jurisprudence considering *Vavilov*, that is inconsistent with applying a "standard of correctness" when an appeal concerns the jurisdiction of an arbitral tribunal in respect of a non-signatory. *Vavilov* also did not consider the nature of decisions made on set-aside or enforcement applications.[52]

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[50] *Dunsmuir v New Brunswick*, 2008 SCC 9.

[51] *Cove Contracting Ltd v Condominium Corporation No 012 5598 (Ravine Park*), 2020 ABQB 106; *Buffalo Point First Nation et al v Cottage Owners Association*, 2020 MBQB 20; *Ontario First Nations (2008) Limited Partnership v Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516; *Allstate Insurance Company v Her Majesty the Queen*, 2020 ONSC 830.

[52] In *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* 2021 SCC 7, the concurring minority expressed the view that in accordance with *Vavilov* the standard of review on statutorily mandated "appeals" from domestic commercial arbitration awards should be correctness. The majority declined to resolve the question of *Vavilov*'s application to commercial arbitrations, leaving it for another day. The majority, however, stated the fact that it did not pursue discussion of this particular point raised in the opinion of the concurring minority "should not be understood as my agreeing with their view."

There is a distinction between jurisdictional questions concerning the scope of an arbitration agreement and those concerning the persons who are "parties" to the arbitration agreement, in the sense that as matter of law they have rights or obligations thereunder. There is some force to the proposition that when parties have agreed to arbitration and appointed a tribunal, they vest that tribunal with authority to decide whether certain matters fall within or without the scope of the agreement, so that, if an error is alleged, the "standard of review" on an appeal should be reasonableness. But where a person contends that they never agreed to arbitration and never recognized the authority of the tribunal, a decision by the tribunal to assume jurisdiction over that person should not be enforced by a court unless that court is satisfied that the assumption of jurisdiction was correct. As consent is the foundation for arbitral jurisdiction, a tribunal cannot vest itself with authority over a non-consenting stranger to the arbitration agreement by misidentifying or misapplying the applicable law. Such an error would, if the concept of standard of review is relevant at all, concern an error of law or an "extricable question of law" to which a standard of correctness should apply.

3. *Identifying the Applicable Law When Analyzing Non-Signatory Issues*

a. *Alternative Theories Concerning the Applicable Law*

Even in non-international cases, there is potential for more than one law to be applicable to different aspects of a dispute. When considering non-signatory issues, in addition to identifying the substantive law applicable to the resolution of the merits of the underlying dispute and the procedural law of the arbitration—the *lex arbitri*—one also must consider the laws that govern the validity and interpretation of the arbitration agreement. One consequence of the doctrine of separability is that an arbitration clause that forms part of a contract must be treated as an agreement independent of the commercial agreement in which it is contained for the purposes

of determining jurisdiction.[53] This means that the laws applicable to validity or interpretation of the arbitration agreement are not necessarily the same as the substantive law.[54] It is also possible that different laws apply to determine validity as opposed to interpretation.

The parties seldom expressly state the law applicable to the validity or interpretation of the arbitration agreement. Article V(1)(a) of the *Convention* indicates that on applications for recognition and enforcement the validity of the arbitration agreement is to be assessed according to "the laws to which the parties have subjected it or, failing any such indication thereon, under the law of the country where the award was made." Articles 34(2)(a)(i) and 36(1)(a)(i) of the *Model Law* are to the same effect. These articles concern setting aside and enforcement. Even so, if a non-signatory issue arises in the context of an application for a stay, under article II(3) of the *Convention* or article 8 of the *Model Law*, a cogent argument can be made that the default law governing the validity of an international arbitration agreement should be the law of the seat of arbitration.[55] In Quebec, article 3121 of the *Civil Code of Quebec*[56] provides that in the absence of a designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the seat.

The conundrum of identifying the law applicable to a non-signatory analysis has been the subject of much learned

[53] *Model Law*, *supra* note 23, art 16(1).

[54] For a useful discussion of this subject see Frédéric Bachand and Fabien Gélinas, "The Implementation and Application of The New York Arbitration Convention in Canada" (2013) 92 Can Bar Rev 457.

[55] *Ibid* at 467.

[56] Art 3121 CCQ.

writing.[57] The courts often respond reflexively by applying the laws from which they derive their own jurisdiction. That approach does not, however, provide much solace to arbitrators who have no jurisdiction absent the agreement of the parties. An alternative response is that, in international cases, courts and arbitrators should have regard to what are described as "transnational norms."[58] "Transnational norms" are, however, uncertain waters in which not all decision-makers are willing to swim.

A third possible response is that the applicable law may in some cases depend on the particular theory which is advanced to allow the arbitration agreement to be enforced by or against a non-signatory. Where, for example, enforcement depends on showing that a company is the *alter ego* of its sole shareholder, there is logic to applying the law of the place of incorporation, chosen, or at least accepted, by the shareholder.

In international arbitrations if enforceability of an award by or against a non-signatory has been *prima facie* established by applying laws other than Canadian laws, separate analyses may be required to determine (i) whether the subject-matter of the dispute is not capable of settlement by arbitration or (ii) whether enforcement would be contrary to Canadian public

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[57] See e.g. William W Park, "Non-Signatories and International Contracts: An Arbitrator's Dilemma" in Belinda Macmahon, ed, *Multiple Party Actions in International Arbitration* (Oxford: OUP, 2009) 1.

[58] *Ibid* at paras 1.87–1.91. "In determining whether a non-signatory should be joined to international proceedings, arbitrators usually look to theories related to implied consent and lack of corporate personality. Transnational norms, gleaned from published decisions in significant cases, increasingly take on the character of a type of arbitral precedent. When joinder is urged on the basis of implied consent, these norms reduce the circularity inherent in reliance on the law of the contract or the arbitral situs, neither of which may be relevant with respect to a stranger to the transaction. By contrast, when joinder rests principally on lack of corporate personality, arbitrators often begin with the place of incorporation, reducing the role played by transnational norms."

policy. These requirements arise from article V(2)(a) of the *Convention* and articles 34(2)(b) and 36(1)(b) of the *Model Law*. The public policy exception is narrow in scope, applying only where enforcement of an award would offend local principles of justice and fairness in a fundamental way.[59]

b. Analysis of Non-Signatory Cases Considering the Applicable Laws, Arbitrability and Public Policy

Questions concerning the applicable laws were seldom discussed in the surveyed cases.

In *Javor v Francoeur*[60] ("*Javor*"), a California arbitrator applied an *alter ego* theory to bind a non-signatory. The award-creditor applied to enforce the award in British Columbia. The decisions of the Supreme Court and Court of Appeal make no mention of what law was applied by the arbitrator or what law should be applied by the court to determine (a) whether an *alter ego* theory can be relied on to bind a non-signatory and (b) the essential elements of the *alter ego* theory. Holmes J held that under the *ICAA* (BC) (i.e. the *Model Law*) and the *FAAA* (BC) (i.e. the *Convention*), an arbitration agreement must be signed. As described below, that finding is almost certainly incorrect.

Holmes J also observed that enforcement of the award could be declined by virtue of article V(2)(a) of the *Convention*[61]

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[59] *Corporacion Transnacional de Inversiones, SA de CV v STET International, SpA*, (2000) 49 OR 2000 CarswellOnt 3315. In *Barer v Knight Brothers LLC,* 2019 SCC 13, a case decided under Quebec law, the SCC ruled that in an action to enforce a foreign court judgment a defendant should not be able to resist recognition and enforcement on the ground that the foreign authority should not have lifted the corporate veil.

[60] *Javor v Francoeur*, 2003 BCSC 350 [*Javor*]; aff'd 2004 BCCA 134.

[61] *New York Convention*, *supra* note 25 at art V(2) states: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or

because the dispute was not capable of settlement under the law of British Columbia. In support of that finding, he stated that under British Columbia's *Commercial Arbitration Act*,[62] and the domestic arbitration rules of the British Columbia International Arbitration Centre, arbitrators only had jurisdiction over parties to the arbitration agreement.[63] As he had found that the non-signatory could not be a party to the arbitration agreement, he concluded that the claim against the non-signatory was not arbitrable under British Columbia law. On appeal,[64] the British Columbia Court of Appeal found no error in Holmes J's reasons. In her brief concurring reasons, Saunders JA said that "there is a general principle that courts should respect and enforce arbitral awards … and this result does not derogate from this principle." She found, however, that this was a rare case of "refusing to enforce an award where the subject matter in the dispute is not capable of settlement by arbitration under the law of British Columbia."[65]

The courts' conclusion in *Javor* that a claim against a non-signatory is not capable of settlement by arbitration under British Columbia law is highly suspect. Holmes J looked to the *Arbitration Act* (BC), then known as the *Commercial Arbitration Act*, as an indicator of arbitrability, but the award in question was made in an international arbitration to which that statute did not apply. Moreover, the *Commercial Arbitration Act* did not require that arbitration agreements be in writing or that they be signed. It defined "arbitration agreement" to mean "a written or *oral term* of an agreement between 2 or more persons to submit

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enforcement of the award would be contrary to the public policy of that country."

[62] *International Commercial Arbitration Act*, RSBC 1996, c 22.

[63] *Javor, supra* note 58 at para 31.

[64] *Javor v Francoeur*, 2004 BCCA 134.

[65] *Ibid* at para 7.

present or future disputes between them to arbitration…."[66] If anything, the domestic statute negated the suggestion that under British Columbia law claims against non-signatories are not arbitrable. As discussed below, this is not the only flaw in the reasoning of *Javor*.

In *CEIR,*[67] a case in which both the *lex arbitri* and the substantive law was New York law, the arbitrator found that, under New York law, in order to establish that the corporate signatory was the *alter ego* of the non-signatory, it was necessary to apply the law of the place of incorporation of the corporate signatory—the British Virgin Islands. The arbitrator made a finding of *alter ego* applying BVI law. He also found that under New York law, "a non-signatory to an arbitration agreement may be estopped from avoiding arbitration where he knowingly accepts the benefits of an agreement with an arbitration clause."[68] Fisher J accepted the arbitrator's choice of applicable laws. She did not, however, make any finding that the applicable laws had been correctly applied by the arbitrator. She only went so far as to say "[t]hese findings and conclusions are consistent with international arbitration law in this jurisdiction and elsewhere."[69]

Fisher J found that "[t]here is nothing in the arbitrator's determination on the issue of Mr. Yeap's status as a party that can be said to offend our local principles of justice and fairness."[70] Since she found that deference must be given to the arbitrator's jurisdictional ruling,[71] Fisher J did not make a finding concerning what theories would have been available to

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[66] *Supra* note 32, s 1 [emphasis added].

[67] *Supra* note 27.

[68] *Ibid* at para 34.

[69] *Ibid* at para 35.

[70] *Ibid* at para 42.

[71] *Ibid* at paras 19–20.

bind the non-signatory if the applicable laws were the laws of British Columbia, rather than those of New York. Fisher J ordered that the award was to be recognized and enforced against the non-signatory.

In *Xerox*,[72] for reasons that are not evident from the case report, although the arbitration was seated in Ontario the tribunal had interpreted the arbitration agreement relying, at least in part, on French law, in particular the decision of the French court in *Dow Chemical France v Isover Saint Gobain (France)*[73] which established the "group of companies" doctrine. Campbell J did not state why French law was considered, although the non-signatory was a French company. He did not address whether the now controversial group of companies doctrine is part of Ontario law. There was no discussion, akin to that in *Javor* or *CEIR,* of whether there were potential issues of arbitrability or Ontario public policy arising from the application of the group of companies theory.

4. Signature and the Requirement for an "Agreement in Writing"

In those provinces where the domestic arbitration legislation provides that an arbitration agreement may be wholly or partly oral, so that there is no requirement for an "agreement in writing," there cannot be a general requirement for signature. The only common law provinces whose domestic arbitration legislation requires a written arbitration agreement are Prince Edward Island and Newfoundland and Labrador. Even in those two provinces, the legislation does not mention a signature requirement. The *Civil Code of Quebec*, article 2640, similarly requires that both domestic and international arbitration agreements be "evidenced in writing" but does not

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[72] *Supra* note 37.

[73] [1984] RevArb. 98 (C.A. Paris, October 22, 1983).

impose a signature requirement.[74] As a result, in the context of domestic arbitrations, non-signatory issues should arise only where there is a signed written agreement, but the arbitration agreement is sought to be enforced by or against a person who did not sign.

The *Convention* and the *Model Law*, however, contain requirements for an "agreement in writing" and both make reference to a signature. This has resulted in a divergence in the cases concerning whether signature is always required for international arbitration agreements.

a. Cases Finding that Signature is Essential to an "Agreement in Writing"

In *Javor*, Holmes J of the British Columbia Supreme Court held that it is not possible for a non-signatory to be a "party" to an arbitration agreement under British Columbia law, with the result that an arbitration agreement cannot be enforced by or against a non-signatory. That decision was affirmed on appeal. The decision turned primarily on the courts' interpretation of the requirements in the *FAAA* (BC) (the *Convention*) and *ICAA* (BC) (the *Model Law*) regarding the formal requirements for an arbitration agreement. Holmes J found that under both statutes an arbitration award could only be enforced against a "party" to the arbitration agreement.[75] He found that under both statutes only a signatory was a "party" to an arbitration agreement.[76]

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[74] Art 2640 CCQ. See also *Zodiak International v Polish People's Republic*, [1983] 1 SCR 529 at 543, Chouinard J ("[t]he [Quebec] Code of Civil Procedure contains no provision regarding the form of an undertaking to arbitrate. It will be sufficient if it contains the essential ingredients, namely that the parties have undertaken to execute a submission and that the arbitration award is final and binding on the parties").

[75] *Javor*, *supra* note 58 at para 15.

[76] *Ibid* at paras 24–28, citing *FAAA* (BC), *supra* note 29, art V(1)(d) and *ICAA* (BC), *supra* note 28, s 36(1)(a)(v).

The *ICAA* (BC), consistent with the *Model Law*, required that "[a]n arbitration agreement must be in writing."[77] The *Convention* also requires a written arbitration agreement. Under article II(1), courts are bound to recognize and enforce "an agreement in writing" to submit differences to arbitration. Article II(2) states that "[t]he term 'agreement in writing' shall *include* an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".[78] In concluding that only a signatory could be a party to an arbitration agreement, Holmes J rejected the claimant's submission that while the *Convention* requires an agreement in writing, an agreement in writing could exist without a signature. Holmes J characterized that interpretation as "strained."[79]

Just one year after its decision in *Javor*, the Court of Appeal again considered an issue concerning a non-signatory to an international arbitration agreement on an application to stay British Columbia litigation. In *Pan Liberty Navigation Co Ltd v World Link (HK) Resources Ltd*[80] ("*Pan Liberty*"), the court stayed British Columbia litigation in favour of arbitration proceedings in England, despite the fact that the British Columbia defendant was not a signatory to the charter party agreement containing the relevant arbitration agreement. The claim in the action was that the non-signatory was the directing mind and *alter ego* of an award debtor who had failed to satisfy a monetary award and that the non-signatory had used the award debtor as a "mere façade."[81] The non-signatory denied that it was a party to the charter party agreement containing the arbitration agreement, but nonetheless invoked the arbitration agreement as a basis for

[77] *ICAA* (BC), *supra* note 28, s 7(3).

[78] *New York Convention*, *supra* note 23, art II(1)–(2) [emphasis added].

[79] *Javor*, *supra* note 58 at para 19.

[80] 2005 BCCA 206.

[81] *Ibid* at para 16.

seeking a stay. The Court of Appeal found that as the issue was whether the non-signatory was the party indebted to the owners under the charter party, "the appellant properly seeks to be treated as a party so that the issue can be resolved in the appropriate arena."[82] The court cited *Gulf Canada* as authority for the proposition that it was not for the court on a stay application to reach a final determination whether a particular party to the legal proceeding is a party to the arbitration agreement, and that such matters should be decided in the first instance by an arbitral tribunal.[83]

The reasons of the Court of Appeal in *Pan Liberty* to do not refer to *Javor*. The two cases are different in several respects. *Javor* involved an application to enforce an award, while *Pan Liberty* was a stay application. In *Javor*, it was the defendant award-debtor who sought to avoid the arbitration agreement, while in *Pan Liberty* it was the non-signatory defendant that sought to enforce the arbitration agreement. Despite these differences the two decisions cannot be reconciled. *Javor* held that a non-signatory could not be a party to an arbitration agreement and therefore could not be bound by an arbitration agreement, even on an *alter ego* basis. *Pan Liberty* found that it is arguable that a non-signatory defendant could enforce an arbitration agreement even when the claim against it was based on an *alter ego* theory.[84] Several subsequent stay decisions have remarked on the fact that *Javor* and *Pan Liberty* are in conflict on the question of whether a non-signatory can seek to enforce an arbitration agreement.[85]

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[82] *Ibid* at para 22.

[83] *Ibid* at paras 20–21.

[84] It is of interest to note that Saunders JA, who sought to narrow the impact of *Javor* in her concurring reasons in that case, was a member of the court that decided *Pan Liberty*.

[85] *Hi-Seas Marine Ltd v Boelman*, 2006 BCSC 488; *Aradia Fitness Canada Inc v Dawn M Hinze Consulting Ltd*, 2008 BCSC 839.

In *CEIR*, Fisher J distinguished *Javor,* holding that it applied only where the arbitrator had not expressly found that the non-signatory was a party to the arbitration agreement, whereas in the case before her the arbitrator had conclusively found that Yeap was a party, despite being a non-signatory.[86] It is not clear why that distinction justified departure from the principle finding in *Javor.* The distinction was, nonetheless, seized upon by Fisher J, who then performed her own analysis of the matters that had been so poorly handled in *Javor*. Fisher J stated that under s. 2(1) of the *ICAA* (BC), the word "party" is broadly defined. She noted that the concept of a "party" has in other jurisdictions and by some commentators been extended in its application to persons or entities who are not signatories.[87]

In *Kaverit Steel and Crane Ltd v Kone Corporation*[88] ("*Kaverit*"), a party seeking a stay of an Alberta court action against three non-signatories had conceded that they were not parties to the international arbitration agreement and that arbitration could be compelled only by consent of all parties. The Alberta Court of Appeal found that unlike the United Kingdom's arbitration statute, the Alberta arbitration statute did not allow stay applications by parties claiming "through or under" a party. The court also suggested that article II (2) of the *Convention* "clarified" that the "parties" who are authorized to seek a stay are only "parties signatory."[89] These statements are *obiter dictum* in the light of the applicant's concessions, but they cannot be ignored, especially insofar as they were later echoed (without citation) by the reasoning in *Javor.* Kerans JA observed

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[86] 2013 BCSC 186, *supra* note 27 at para 40. In *Hosting Metro*, *supra* note 20 at para 56, DeWitt-Van Oosten J relied on the same alleged distinction and held that "[t]he fact that a corporate entity's signature does not appear on the face of an arbitration agreement does not preclude a finding in favour of party status", saying at para 38 that "[t]he analysis can be more nuanced than that".

[87] *CEIR*, *supra* note 27 at para 35.

[88] 1992 ABCA 7 [*Kaverit*].

[89] *Ibid* at para 16.

that if the Alberta statute had tracked the language of the English statute then "Alberta, like the United Kingdom, could have sent to arbitration claims by or against those who claim through or under an agreement containing a submission." He suggested that "perhaps this is to be regretted."[90] It should be noted that s. 2(1) of the *ICAA* (BC), which the British Columbia courts considered in *Javor*, did track the English statute, defining "party" as meaning "a party to an arbitration agreement and includes a person claiming through or under a party."[91]

b. Cases Finding that Signature is Not Essential to an "Agreement in Writing"

In *Proctor v Schellenberg*[92] ("*Proctor*"), the Manitoba Court of Appeal held that a successful claimant could enforce an award under the *Convention* against a non-signatory respondent. The Court of Appeal found that signature of the arbitration agreement was not required under article II (2) of the *Convention*, saying:

> … one must first determine what "agreement in writing" means. In doing so, one must give meaning to the words "shall include." These words make it clear that the definition is not exhaustive. It is also clear that written documentation is required. My reading of the definition is that written documentation can take various forms, including an arbitral clause within a contract signed by both parties; an arbitration agreement signed by both parties; an arbitral clause within a contract contained in a series of letters or telegrams; or an arbitration agreement contained in a series of letters or telegrams. Because the definition is inclusive rather than

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[90] *Ibid* at para 17.

[91] *ICAA* (BC), *supra* note 28, s 2(1).

[92] *Proctor v Schellenberg,* 2002 MBCA 170 [*Proctor*].

> exhaustive, the Legislature did not limit the definition to these articulated methods of documentation. What is important is that there be a record to evidence the agreement of the parties to resolve the dispute by an arbitral process. This flexibility is important in this day and age of changing methods of communication. In my view, communication by facsimile falls within the definition. This is in keeping with a functional and pragmatic interpretation of the definition to serve the Legislature's intent to give effect to arbitral awards granted in other jurisdictions in this era of interjurisdictional and global business.[93]

The Supreme Court of the United States recently arrived at the same conclusion. In *GE Energy Power Conversion France SAS, Corp v Outokumpu Stainless USA, LLC*[94] (*"GE v Outokump*u**"**), the Supreme Court held that article II of the *Convention* does not preclude the application of state law doctrines that permit enforcement of arbitration agreements by non-signatories, because the language used in the *Convention* is inclusive, not exclusive. The United States Supreme Court said:

> The text of the *New York Convention* does not address whether non-signatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel. The Convention is simply silent on the issue of non-signatory enforcement, and in general, "a matter not covered is to be treated as not covered"—a principle "so obvious that it seems absurd to

[93] *Ibid* at para 18.

[94] *GE Energy Power Conversion France SAS, Corp, FKA Coverteam SAS v Outokumpu Stainless USA, LLC, et al* (2020) ("*Slip Opinion*").

> recite it," A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012).[95]

The Court also noted that "[t]he courts of numerous contracting states permit enforcement of arbitration agreements by entities who did not sign an agreement".[96]

The Manitoba Court of Appeal's inclusive interpretation of article II (2) in *Proctor,* whereunder signature of an arbitration agreement is not essential to its validity, is to be preferred to the exclusive interpretation posited by Kerans JA in *Kaverit* and used by the British Columbia courts in *Javor*. It reflects the plain meaning of the text of article II that while "writing" may be required the writing need not always be signed to create a valid arbitration agreement.

Even if the *Convention* does require signature as a pre-requisite to the enforcement of an international arbitration agreement, in Canada's common law provinces, stays may be sought and awards may be enforced in international arbitration proceedings not only under the *Convention*, but also, or alternatively, under legislation implementing the *Model Law*.[97] The *Model Law* contains its own definition of "arbitration agreement." Before any amendment to reflect UNCITRAL's proposed 2006 amendments, article 7(2) of the *Model Law* as enacted in the common law provinces required that an arbitration agreement be in writing and stated:

> An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the

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[95] *Ibid* at 6.

[96] *Ibid* at 9, citing G Born, *International Commercial Arbitration* §10.02 at 1418–1484 (2nd ed, 2014).

[97] In Quebec the same requirement for an "agreement evidenced in writing" applies to both international and non-international agreements.

> agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.[98]

In *Schiff Food Products Inc v Naber Seed & Grain Co Ltd*,[99] Wedge J of the Saskatchewan Court of Queen's Bench considered whether an award made in New York could be enforced under Saskatchewan's *International Commercial Arbitration Act*,[100] which implements the *Model Law*. The commercial contract, which contained an arbitration agreement, had been created by an exchange of correspondence, none of which was signed by the award-debtor. The award-debtor had not participated in the New York arbitration, and there is no indication in the case report that the arbitrator addressed the question of jurisdiction over the non-signatory. While there was no real question that a commercial agreement had been reached, the award-debtor argued that no enforceable arbitration agreement existed because it had not signed the contract.

Rather than referring to Saskatchewan's domestic arbitration legislation for policy guidance, akin to what was done in *Javor*, Wedge J referred to the Yearbook of the United Nations Commission on International Trade Law, 1979, and said:

> Although the precise wording is almost 40 years old and appears in comparable legislation in many countries, there is a paucity of consistent judicial interpretation of the words "agreement in writing." Courts in some countries have interpreted the phrase narrowly, holding that the mere knowledge of the existence of a written document was not enough; the agreement to be bound by arbitration should be signed by both

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[98] E.g. *International Commercial Arbitration Act*, RSO 1990, c I.9, Sched, art 7(2).

[99] [1997] 1 WWR 124, 149 Sask R 54, 28 BLR (2d) 221 [*Schiff*].

[100] SS 1988-89, c I-10.2.

> parties. Other courts giving the words “exchange of letters, telex etc.,” in the article their ordinary meaning, have given effect to arbitration clauses where one party has invoked the process and the other party is aware of the arbitration clause.
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> ....
>
> Holding that the agreement in this case constituted an agreement in writing, fosters the underlying policy objectives behind the *Act* as enunciated by the Saskatchewan Court of Appeal in *BWV Investments Limited v. Saskferco et al*, 1994 CanLII 4557 (SK CA), [1995] 2 W.W.R. 1.[101]

Quebec courts also have applied ordinary principles of contract law, including the concept of acceptance by conduct, as an alternative to acceptance through signature, to bind non-signatories to arbitration agreements.[102]

The definition of “arbitration agreement” in the *Model Law* was amended in 2006. As amended, the *Model Law* offers two optional definitions of “arbitration agreement.”[103] Option I requires the arbitration agreement to be in writing, but provides that the writing requirement is met if the agreement—which may be concluded orally, by conduct, or by other means—is “recorded in any form.” There is no requirement for a signed record. Option II leaves open the question of the form of an arbitration agreement. If Option II is adopted, the question of whether there is a valid arbitration agreement will fall to be determined by whatever law is applicable in the context in which the issue arises.

UNCITRAL has recommended adoption of the expanded definition of “arbitration agreement” to counter the risk that the *Convention* might be narrowly construed. Referring to “the

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[101] *Schiff*, *supra* note 98 at paras 13, 19.

[102] *Achilles (USA) c Plastics Dura Plastics (1977) ltée/Ltd,* 2006 QCCA 1523.

[103] *Model Law*, *supra* note 23 at art 7.

widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the *New York Convention* in respect of the form requirement governing arbitration agreements", the 7 July 2006 recommendation "encourages States to adopt the revised article 7 of the [UNCITRAL] *Model Law*."[104] The recommendation states:

> Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the *New York Convention*. By virtue of the "more favourable law provision" contained in article VII (1) of the *New York Convention*, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".[105]

Following the recommendations of the Uniform Law Conference of Canada, to date the provinces of British Columbia and Ontario have enacted the 2006 amendments to the *Model Law* as part of updated international arbitration statutes,[106] and have adopted Option I. In those provinces the argument that there is no signature requirement has even greater force than under the pre-2006 version of the *Model Law*.

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[104] UNCITRAL, "Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006" at para 20.

[105] *Ibid*. See United Nations Commission on International Trade Law, *Report on the Thirty-Ninth Session,* 2006, Supp No 17, UN Doc A/61/17, Annex II.

[106] *International Commercial Arbitration Act,* SO 2017, c 2, Sch 5; *ICCA* (BC), *supra* note 28.

c. Conclusion Regarding the Signature Requirement

There is no signature requirement for domestic arbitration agreements in any of Canada's provinces. The *Model Law*, which has been implemented through legislation in all provinces, does not contain a signature requirement. Although *Javor* and *obiter* in *Kaverit* suggest that the *Convention*, also implemented throughout Canada, contains a writing requirement, that view is not shared by the Manitoba Court of Appeal, courts in Saskatchewan and Quebec and the Supreme Court of the United States. The better view is that there is no signature requirement and that *Javor* was wrongly decided.

5. Stays Not Based on Arbitration Laws: Forum Selection Clauses and Stays on "Just and Equitable" Grounds

Questions concerning the enforcement of arbitration agreements by or against non-signatories sometimes have been resolved by applying principles applicable to forum selection clauses or statutory provisions that empower courts to control their own processes. While, in some instances, arbitration statutes and principles also have been invoked, in others they have been ignored.

a. Non-Signatory Cases Considering Stays Not Based on Arbitration Laws

In *Kaverit,*[107] the Alberta Court of Appeal considered an application for a stay of an Alberta action in favour of an international arbitration seated in Stockholm. There were claims against non-signatories which the court held could not be stayed or referred to arbitration. The Court of Appeal allowed the stay under the *International Commercial Arbitration Act*[108]—which implemented both the *Model Law* and the *Convention*—only as to claims between the signatory parties.

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[107] *Supra* note 87.

[108] SA 1986, c I-6.6 as repealed by *International Commercial Arbitration Act*, RSA 2000, c I-5.

Kerans JA observed, however, that the trial court or a chambers judge might nevertheless stay claims by or against non-signatories pending arbitration if it appeared just and equitable to do so. The Court of Appeal left that matter for "another day" when a party might apply to the trial court "for another kind of stay."[109]

In *Jardine Lloyd Thompson Canada Inc v Western Oil Sands Inc*,[110] Associate Chief Justice Wittmann considered an application by a non-signatory for a stay of an Alberta action pending the outcome of arbitration proceedings to which it was not a party. The non-signatory had been invited to participate in the arbitration but had declined to do so. The stay application was not based on arbitration legislation, but on the inherent jurisdiction of the Court to stay an action where there are two overlapping proceedings and the continuance of the action would work an injustice because it would be vexatious or would be an abuse of the powers of the court in some way. Wittmann ACJ cited, among other authorities, the comments of Kerans JA in *Kaverit* concerning the ability of a non-signatory to seek "another kind of stay."[111] Wittmann ACJ granted a stay. This is not, however, a case concerning the enforcement of an arbitration agreement by or against a non-signatory. To the contrary, it is a case in which the non-signatory did not seek to enforce the arbitration agreement, but instead wished the court to hold its own adjudication in abeyance while relevant questions between signatory parties were decided by arbitration.

In *Yaworski v Gowling Lafleur Henderson LLP*[112] ("*Yaworski*"), a signatory defendant sought to stay a court action

[109] *Supra* note 87 at para 21.

[110] 2006 ABQB 933 [*Jardine*].

[111] *Kaverit*, *supra* note 87 at para 21. See *Jardine*, *supra* note 109 at paras 14–16.

[112] 2013 ABCA 21 [*Yaworski*].

brought by a non-signatory plaintiff. The Chambers Judge granted a stay under s. 7(1) of the *Arbitration Act*[113] ("*Arbitration Act* (Alberta)") and under s. 18 of the *Judicature Act*,[114] citing both *Kaverit* and *Jardine*. The Chambers judge stated that the court had no jurisdiction to refer the non-signatory plaintiff to arbitration, but the action nonetheless could be stayed as it was "just and equitable" to do so.[115]

The Court of Appeal upheld the stay, and found:

> In our view the combination of section 7 of the Arbitration Act, section 18 of the Judicature Act, and the court's inherent jurisdiction to control its own process to avoid unnecessary and duplicitous proceedings provided the chambers judge with jurisdiction to stay Yaworski's suit pending the arbitration.[116]

While both levels of court referred to s. 7(1) of the *Arbitration Act* (Alberta), the stay appears to have been based primarily on the *Judicature Act*, which empowers a court to stay litigation on just and equitable grounds. There was no finding that the arbitration agreement could be enforced against the non-signatory plaintiff, despite comments by the Chambers Judge concerning estoppel and its effects.

In *Serendipity Ventures Inc v Winters*[117] ("*Serendipity*"), Strekaf J of the Alberta Court of Queen's Bench stayed two Alberta court actions under s. 7 of the *Arbitration Act* at the request of non-signatory defendants. The Court referred to *Dell* and *Seidel,* and found that the question of whether certain non-signatories fell within the classes of persons who might invoke

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[113] RSA 1980, c A-43, as repealed by *Arbitration Act*, RSA 2000, c A-43 [*Arbitration Act* (Alberta)].

[114] RSA 1980, c J-1 as repealed by *Judicature Act* 2000, c J-1.

[115] *Yaworski*, *supra* note 111 at para 11.

[116] *Ibid* at para 23.

[117] 2016 ABQB 398.

the arbitration agreement was a complex question of mixed fact and law, not falling within the *Dell/Seidel* exceptions. As a result, Strekaf J stayed the claims against those defendants and referred them to arbitration. In respect of other defendants, it was common ground that they could not rely on the arbitration agreement. Strekaf J, however, then exercised her discretion under the *Judicature Act* to stay the action as against these remaining defendants as it was just and equitable to do so, relying on the authority of *Jardine* and *Yaworski.* She found that the issues in the ongoing arbitration and the issues relevant to the claims against the remaining non-signatory defendants were closely related, that there was no prejudice to the plaintiff in granting a stay and that doing so would avoid possibly conflicting results. She found that "the balance of convenience favours staying the remainder of the action pending completion of the arbitration, or at least doing so until the arbitrators have determined the scope of their jurisdiction."[118]

In *Ts'kw'aylaxw First Nation v Graymont Western Canada Inc*,[119] the plaintiff sued both a signatory and a non-signatory to an arbitration agreement. Weatherill J followed the same approach as in *Kaverit* and *Serendipty,* staying the claim against the signatory under the *Arbitration Act* (BC) and referring the signatory parties to arbitration, and then staying the claim against the non-signatory on "just and equitable" grounds.

In *Donaldson International Livestock Ltd v Znamensky Selekcionno-Gibridny Center LLC*[120] ("*Donaldson*"), the Court of Appeal for Ontario upheld orders refusing to enjoin international arbitration proceedings and staying a court action in Ontario. The arbitration agreement was contained in a purchase contract between Donaldson and Znamensky. It called for ICC arbitration in Moscow. Nikolay Denim was the CEO of Znamensky. He was not a signatory to the purchase contract or

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[118] *Ibid* at para 42.

[119] 2018 BCSC 2101.

[120] 2008 ONCA 872.

arbitration agreement in his personal capacity. Donaldson claimed against Denim in the action for damages for the tort of intimidation, based on alleged death threats that had deterred Donaldson from participating in the Moscow arbitration proceedings which had resulted in the issuance of an award against Donaldson. The stay had been granted by the motion judge based on article 8 of the *Model Law* as enacted by the *ICAA* (Ontario).

Armstrong JA, writing for the Court of Appeal, found that in the face of a broadly worded arbitration agreement, the fact that one claim in the action was against "a non-party to the agreement" was not sufficient to "oust" the arbitral tribunal's jurisdiction. He affirmed the stay of the action as against both the signatory and non-signatory parties. The Court of Appeal seems to have approached the question of whether a non-signatory can enforce an arbitration agreement against a signatory as a question of the scope of the arbitration agreement. There was no analysis of jurisprudence relating to the basis on which non-signatories can enforce arbitration agreements. Instead, the Court of Appeal referred to cases concerning forum selection clauses, which are, of course, conceptually different.

In *Momentous.ca Corp et al v Canadian American Association of Professional Baseball Ltd et al*,[121] the Ontario Court of Appeal affirmed a motion judge's dismissal of an Ontario action on the basis that the courts of Ontario should not take jurisdiction. The successful applicants had alleged that because of an arbitration agreement and a forum selection clause in the relevant agreement the Ontario courts did not have, or should decline, jurisdiction in favour of proceedings in North Carolina. Two of the defendants, the City of Ottawa and Wolff, were not signatories to the agreement containing the arbitration agreement and forum selection clause. The application to dismiss was made under Rule 21.01(3)(a) of the Ontario *Rules*

[121] 2010 ONCA 722 [*Momentous.ca*].

of Civil Procedure.[122] There is no reference in the Court of Appeal's reasons or in the affirming reasons of the Supreme Court of Canada[123] to the *ICAA* (Ontario).

Treating both the arbitration agreement and the forum selection clause as forum selection clauses, the Court of Appeal found that the plaintiffs had not shown "strong cause" as to why they should not be bound by those clauses,[124] as required by the Supreme Court of Canada's judgment in *Pompey (Z.I.) Industrie et al v Ecu-Line N.V. et al*.[125] Having found that the claims against the contracting party should be dismissed on that basis, the court found based on the plaintiff's pleadings that those claims and the claims against the City of Ottawa were so "intertwined" that the claims against the City also should be dismissed. The Ontario action against Wolff was allowed to proceed as it was "quite severable."[126] The narrow question before the Supreme Court of Canada on appeal was whether the defendants in the Ontario action had lost the right to apply under Rule 21.01(3)(a) by filing a statement of defence on the merits. The Court answered this question in the negative, and affirmed the decision below for that reason. The non-signatory issue was not raised before the Supreme Court.

In *289444 Nova Scotia Ltd v RW Armstrong & Associates Inc*,[127] the Supreme Court of Nova Scotia also equated an arbitration clause requiring arbitration in the United Arab Emirates to a forum selection clause, and granted a stay of Nova Scotia court proceedings on the grounds that Nova Scotia was *forum non conveniens*. When identifying the relevant legislation,

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[122] RRO 1990, Reg 194, s 21.

[123] *Momentous.ca Corp v Canadian American Association of Professional Baseball Ltd*, 2012 SCC 9.

[124] *Momentous.ca*, *supra* note 120 at paras 39–40.

[125] 2003 SCC 27.

[126] *Momentous.ca*, *supra* note 120 at paras 53–54.

[127] 2016 NSSC 330.

the court referred to Civil Procedure Rule 4.07,[128] which governed motions where jurisdiction is challenged, to section 41 of the *Judicature Act*,[129] which allows the court to enter a stay of proceedings, and to *The Court Jurisdiction and Proceedings Transfer Act,*[130] which governs issues of territorial competence. The court performed a detailed analysis of the law concerning forum selection clauses, but no mention was made of Nova Scotia's arbitration legislation implementing the *Model Law* and the *Convention*. This was not a non-signatory case.

In *Décarel inc v. Concordia Project Management Ltd*[131] ("*Décarel*"), the Quebec Court of Appeal considered an application for a stay and referral to arbitration pursuant to article 940.1 of the Quebec *Code of Civil Procedure* ("*QCCP*").[132] The action had been commenced by a signatory to a joint-venture contract that contained an arbitration agreement against a signatory company and two individuals. After

[128] *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov 19, 2008, r 4.07.

[129] RSNS 1989, c 240.

[130] SNS 2003 (2nd Sess), c 2.

[131] [1996] RDJ 484, 1996 CanLII 5747 (QC CA).

[132] Art 940.1 CCP (1965) ("Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null. The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court." Art 940.1 has been replaced by art 622 of the *Code of Civil Procedure,* CQLR c C-25.01, which states: "Unless otherwise provided by law, the issues on which the parties have an arbitration agreement cannot be brought before a court even though it would have jurisdiction to decide the subject matter of the dispute. A court seized of a dispute on such an issue is required, on a party's application, to refer the parties back to arbitration, unless the court finds the arbitration agreement to be null. The application for referral to arbitration must be made within 45 days after the originating application or within 90 days when the dispute involves a foreign element. Arbitration proceedings may be commenced or continued and an award made for so long as the court has not made its ruling....").

commencing the action, the plaintiff asked to have its claims against all three defendants, both signatory and non-signatories, referred to arbitration. The court found that the signatory company acted only through the two individuals and that the outcome of the claim against the company ultimately depended on the conduct of the individuals through whom it acted. The majority of the court found that having the claims against the individuals and the claims against the company decided in separate proceedings in separate *fora* could lead to inconsistent decisions and was impractical.[133] For that reason the court referred the claims against both signatories and non-signatories to arbitration. In dissent, Chamberland J would have stayed the action against the signatory, but not against the two non-signatories, because they had not consented to arbitration.[134]

While the matter came before the Court of Appeal under the stay provisions of the *QCCP* that relate to arbitrations, the motivation for granting the stay was akin to a common law court's concerns when a stay is sought on just and equitable grounds. This result was immediately criticized by learned commentators.[135] Even so, *Décarel* has subsequently been followed by other Quebec courts.[136]

There is a very sound argument, however, that the Supreme Court of Canada has determined that Quebec courts must not take the approach taken in *Décarel*. In *GreCon Dimter inc v J. R. Normand inc*[137] ("*GreCon*"), the Supreme Court of Canada considered whether a forum selection clause must prevail over the court's powers under *QCCP* article 3139, which states:

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[133] *Décarel*, *supra* note 130 at para 7.

[134] *Ibid* at para 13.

[135] Alain Prujiner, "Jurisdiction and Arbitral Jurisdiction: Analysis of Recent Case Law in Quebec" (1999) 12:2 *Revue québécoise de droit international* 79.

[136] *Rodrigue v Loisel*, 2004 CarswellQue 11694, EYB 2004-82086; *9171-5607 Quebec inc (Ecocentre Val-Bio) v Graymont (Québec) inc*, 2014 QCCS 3441.

[137] 2005 SCC 46.

> 3139. Where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.

A Quebec-based purchaser of equipment sued its Quebec-based supplier under the contract of sale, and the supplier wished to claim over through an "action in warranty" against the German manufacturer, as typically was permissible due to the expanded jurisdiction of the court under article 3139. The contract between the manufacturer and the supplier contained a forum selection clause requiring litigation in Germany. The German company sought a stay under article 3148 of the *QCCP* which states:

> 3148. ....
>
> However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.

The Supreme Court of Canada found that the requirement under article 3148 to enforce arbitration agreements and forum selection clauses had priority over a court's power under article 3139 to extend its jurisdiction to incidental claims. In doing so, the Court emphasized that, by the revised *QCCP*, the Quebec legislature had signaled its intention that party autonomy must prevail, not just in relation to forum selection clauses, but also in relation to arbitration agreements. The Court found guidance in this regard in the *Convention* and commentaries which stressed the importance of party autonomy and party intentions.[138] After referring to cases decided in other countries

[138] *Ibid* at para 43. Citing Frédéric Bachand, "*L'efficacité en droit québécois d'une convention d'arbitrage ou d'élection de for invoquée à l'encontre d'un appel en garantie*" (2004) 83 Can Bar Rev 515 at 540–41; A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial*

and in common law provinces "limiting opportunities for departing from party autonomy",[139] the court found that article 3148 must apply despite article 3139. As result, the Quebec court had no jurisdiction to decide the claim in warranty against the German company, which must be decided by the German courts as provided in the forum selection clause.

Although it is a forum selection case and not an arbitration case, *GreCon* is significant to the analysis of non-signatory issues under Quebec arbitration laws for several reasons. First, it emphasizes the importance of party autonomy and the mutual intentions of the parties to the arbitration agreement.[140] Party autonomy includes the freedom to define with whom one will and *will not* resolve disputes by arbitration. Second, while legal theories of applicable law that may create substantive rights for or against non-signatories still may apply, procedural considerations must take a back seat to what the parties agreed on the question of forum. The approach taken by the Court of Appeal in *Décarel*—to extend an arbitration agreement to include non-signatories solely for the purposes of avoiding multiple proceedings and inconsistent findings—cannot be justified in the light of *GreCon.*

In *Air Liquide Canada Inc v Bombardier inc,*[141] there was an international arbitration agreement in an agreement between a French manufacturer and a Canadian supplier. The supplier and the manufacturer were sued by Bombardier, who had purchased allegedly defective goods from the supplier. In suing the manufacturer directly, Bombardier relied on article 1730 of the *Civil Code of Quebec*. The manufacturer argued that the effect

Interpretation (The Hague: TMC Asser Institute, 1981) at 135; T. E. Carbonneau, *The Law and Practice of Arbitration* (Huntington, NY: Juris, 2004) at 340.

[139] *Ibid* at para 44.

[140] *Dell, supra* note 4 at paras 142, 145, and *Desputeaux v Éditions Chouette (1987) inc*, 2003 SCC 17.

[141] *Air Liquide Canada Inc v Bombardier inc*, 2010 QCCA 1631.

of this article, and similar provisions of French law (which it alleged applied) was that Bombardier had become a party to the arbitration agreement. The Court found, however, that article 1730 did not involve Bombardier advancing the supplier's contractual rights against the manufacturer, but rather created "a legal fiction" that gave Bombardier its own direct cause of action. The Court of Appeal held that as Bombardier had not actually consented to arbitration, the request for a stay was refused.

b. Conclusions Concerning Stays Not Based on Arbitration Laws

Several important observations can be made concerning these cases.

First, it is important to distinguish between situations when court proceedings by or against a non-signatory are stayed under arbitration legislation and those in which they are stayed exercising the court's power to control its own processes, to avoid possible duplication and inconsistent results or because it is otherwise just and equitable to do so. The *competence-competence* standard under *Dell* and *Seidel* applies in the first situation, whereas a "just and equitable" standard applies in the second situation. In the first situation, the decision is premised on the possibility that the arbitration agreement is enforceable by or against the non-signatory. In the second situation, the decision is premised on the arbitration agreement *not* being enforceable by or against a non-signatory. In the first situation, the result is that the claims involving the non-signatory are referred to arbitration so that the arbitrator may rule on jurisdiction. In the second situation, the result is that court litigation of claims involving a non-signatory is stayed.

Depending on the circumstances, it is feasible for a party to apply for a stay and referral to arbitration under an arbitration statute or, alternatively, for a stay on just and equitable grounds. What should not be done, however, is to seek to enforce an arbitration agreement and referral to arbitration by invoking

staying powers other than those specifically provided for under the applicable arbitration statute. Section 6 of both the *Arbitration Act* (Alberta) and the *Arbitration Act* (Ontario) states:

> 6. No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (a) to assist the arbitration process;
>
> (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
>
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
>
> (d) to enforce awards.[142]

Similar provisions appear in the domestic arbitration legislation of all common law provinces other than Prince Edward Island and Newfoundland and Labrador. Article 622 of the *QCCP* is to the same effect. The Supreme Court of Canada summarized the import of Section 6 as follows:

> [56] Stated succinctly, s. 6 signals that courts are generally to take a "hands off" approach to matters governed by the *Arbitration Act*. This is "in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts" (*Inforica Inc. v. CGI Information Systems and Management Consultants Inc*., 2009 ONCA 642, 97 O.R. (3d) 161, at para. 14).[143]

As the granting of stays of court actions concerning matters allegedly required to be arbitrated is governed by the

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[142] *Arbitration Act* (Alberta), *supra* note 112, s 6; *Arbitration Act* (Ontario), *supra* note 10, s 6.

[143] *Telus*, *supra* note 1 at para 56.

arbitration statutes, when a stay and referral to arbitration is sought in a case by or against a non-signatory, there is no basis for the exercise of judicial discretion under other stay-authorizing enactments or rules. That is certainly consistent with the view expressed by the Saskatchewan Court of Appeal, albeit without express reference to the statutory prohibition. In *Saskatchewan Power Corp v Alberici*,[144] the court found that even though an application to stay legal proceedings had been brought under s. 37 of the *Queen's Bench Act*[145] and not brought under the *Arbitration Act* (Saskatchewan), it was nonetheless mandatory for the court to adhere to the "spirit and the particulars" of the *Arbitration Act*. The Court said:

> … the Chambers judge was entirely correct to let himself be guided largely by the terms of the *Arbitration Act* in the situation here. The matter before him was not just any application for a stay. It was an application for a stay brought against the close background of the *Arbitration Act* and brought by a party to an arbitration agreement desirous of moving forward with that proceeding. In these circumstances, it was incumbent on the Chambers judge to ensure his decision fit coherently with both the spirit and the particulars of the *Arbitration Act*. It would have been a mistake for him to have done otherwise.[146]

The second important observation based on the cases described above is that, despite some conceptual similarities between forum selection clauses and arbitration agreements, it is not appropriate to apply jurisprudence developed in connection with forum selection clauses when applications are made to stay proceedings that are alleged to be subject to an arbitration agreement. Arbitration agreements are not forum selection clauses. Forum selection clauses do not fit within the

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[144] 2016 SKCA 46 [*Alberici*].

[145] SS 1998, c Q-1.01.

[146] *Alberici*, *supra* note 143 at para 34.

scope of any statutory definition of "arbitration agreement" including the definitions in the *Convention* or *Model Law*. A party to a forum selection clause does not agree to arbitration. Arbitration statutes exhaustively state the limited circumstances in which a stay may be refused where there is, or arguably is, an arbitration agreement. The Supreme Court of Canada has provided a coherent body of arbitration jurisprudence to guide decisions concerning stays of proceedings.

It is of particular importance to recall that the *competence-competence* principle does not apply to forum selection clauses. When a court refers a non-signatory issue to arbitration in the first instance, that is not the end of the court's involvement. The tribunal's determination will be subject to judicial scrutiny when the award is sought to be enforced or set aside. In the case of a stay to enforce a forum selection clause, the court has only one opportunity to consider the matter. If the court refers the parties to the courts of a foreign jurisdiction, and that court assumes jurisdiction, that is the end of the matter. In this context, it makes sense that the bar to obtain a stay and referral to arbitration might be lower than the bar to obtain a stay and referral to a foreign court.

III. NON-SIGNATORY THEORIES UNDER CANADIAN LAWS

As described above, Canadian laws will not always be applicable to the resolution of non-signatory questions when the question is to be decided by a Canadian court or a Canadian seated arbitral tribunal. This part discusses the non-signatory theories that may apply when Canadian law is applicable.

1. The Importance of Consent

All Canadian arbitration legislation, including legislation implementing the *Convention* and the *Model Law*, requires the existence of an "arbitration agreement" to provide a basis for

arbitrator jurisdiction.[147] Under Canadian contract laws, for there to be an "agreement" there must as a general rule be mutual consent.

Where Canadian law applies, it goes without saying that—so long as any mandatory formal requirements are met—if according to ordinary contract law principles it is established that a non-signatory was a direct party to an arbitration agreement, whether domestic or international, then the non-signatory has the rights and obligations that flow from the arbitration agreement. Only Quebec, Prince Edward Island and Newfoundland and Labrador require that domestic arbitration agreements be in writing.[148] Through the implementation of the *Model Law* and the *Convention*, all Canadian provinces have a writing requirement for international arbitration agreements. The requirement for an agreement in writing does not, however, include a requirement for signature, and can be satisfied in a number of ways.

If it has not been shown by an ordinary contract law analysis that a non-signatory was a direct contracting party, there are various potential theories by which contractual rights and obligations might be acquired. These theories, which have been endorsed by some foreign courts and in arbitration literature, are discussed below, to assess whether they are, or should be part of Canadian law.

Before doing so, it is important to flag two important considerations. First, some of the theories apply in situations where clearly there was no mutual consent to arbitration. What is the justification for this? How far, if at all, should Canadian laws depart from the requirement for mutual consent? Second, is there any basis in Canadian laws to apply the consent

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[147] The domestic arbitration statutes often apply also to arbitrations mandated by other provincial statutes. These arbitrations do not give rise to non-signatory concerns.

[148] Art 2640 CCQ; *Arbitration Act*, RSPEI 1988, c A-16, Sched (6); *Arbitration Act*, RSNL 1990 c A-14, s 30.

requirement with greater rigour in the case of international arbitration agreements than in the case of domestic arbitration agreements?

The Supreme Court of the United States has recently considered both of these issues, in the context of American law. In *GE v Outokumpu*, the Court confirmed its prior recognition that in a domestic arbitration context "traditional principles of state law allow a contract to be enforced by or against non-parties to the contract."[149] There is a substantial body of jurisprudence describing and discussing the range of available state-law theories.[150] The case before the Court in *GE v Outokumpu*, however, concerned the question of whether the *Convention*'s writing requirement precluded the application to an international arbitration agreement of an estoppel theory that, under the applicable state law, might be relied upon to allow a non-signatory to enforce an arbitration agreement against a signatory. The Court found that, properly interpreted, the *Convention* did not necessarily preclude the application of state law non-signatory theories in international arbitrations.

In her concurring judgment, however, Sotomayor J found it necessary to emphasize the narrow extent of the Court's finding.

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[149] *Slip Opinion*, *supra* note 93 at 3–4.

[150] In addition to *Arthur Andersen LLP v Carlisle*, 556 US 624 (2009) and *Slip Opinion*, *supra* note 93, see also *E.I. DuPont de Nemours & Co v Rhone Poulenc Fiber & Resin Intermediaries, SAS*, 269 F (3d) 187 (3d Cir 2001); *J.J. Ryan & Sons, Inc v Rhone Poulenc Textile*, S.A., 863 F (2d) 315 (4th Cir 1988); *Thomson–CSF, SA v Am. Arbitration Ass'n*, 64 F (3d) 773 (2d Cir 1995); *Grigson v Creative Artists Agency*, 210 F (3d) 524 (5th Cir 2000); *Inter. Pa. v Schwabedissen Maschinen*, 206 F (3d) 411 (4th Cir 2000); *John Hancock Life Ins. Co v Wilson*, 254 F (3d) 48, at 59–61 (2d Cir 2001); *Am. Bureau of Shipping v Teneca Shipyard SPA*, 170 F.3d 349 (2d Cir. 1999); *In re Lloyd's Register N Am, Inc*, 780 F (3d) 283 (5th Cir 2015); *Sunkist Soft Drinks v Sunkist Growers*, 10 F (3d) 753 (11th Cir 1993); *McBro Planning Develop. v Triangle Elec*, 741 F (2d) 342 (11th Cir 1984).

She stated that "the application of … domestic doctrines must be rooted in the principle of consent to arbitrate."[151] She said:

> Because this consent principle governs the *FAA* on the whole, it constrains any domestic doctrines under Chapter 1 of the *FAA* that might "appl[y] to Convention proceedings (to the extent that they do not "conflict with" the Convention) Parties seeking to enforce arbitration agreements under article II of the Convention thus may not rely on domestic nonsignatory doctrines that fail to reflect consent to arbitrate.[152]

In Canada, except for a narrow range of subject-matters that are addressed by federal legislation, both national and international arbitrations are governed by provincial laws. Even so, it is possible that international norms could influence the application of some theories regarding non-signatories in an international arbitration context differently than in a domestic arbitration context.

2. Agency

It should be uncontroversial that a non-signatory might acquire the rights and obligations of a direct party to an arbitration agreement by virtue of Canadian agency law principles. In *Proctor*,[153] the Manitoba Court of Appeal applied agency principles to find that an attorney bound his non-signatory client to an arbitration agreement, such that the client could enforce an international arbitration award. In *Lock-Block*, Skolrood J accepted that agency is a viable non-signatory theory under Canadian law.[154]

[151] *Slip Opinion*, *supra* note 93, Concurring Judgment of Sotomayor J at 1.

[152] *Ibid* at 2 [citations omitted].

[153] *Supra* note 91.

[154] *Supra* note 31.

Sometimes, however, the boundaries between agency and veil-piercing theories are uncertain. There are instances in which Canadian courts have "pierced the corporate veil" because a subsidiary was found to have been acting as agent for the parent.[155] In so doing the courts have applied the six-part test established by Atkinson J in *Smith, Stone and Knight Ltd v Birmingham Corporation*[156] ("*Smith Stone*"): (i) were the profits treated as the profits of the parent company?; (ii) were the persons conducting the business appointed by the parent company?; (iii) was the parent company appointed the head and brain of the subsidiary?; (iv) did the parent company govern the adventure, decide what should be done and what capital should be embarked on the venture?; (v) Did the parent company make the profit by its skill and direction?; and, (vi) was the parent company in effectual and constant control? *Smith Stone* allowed a parent to sue for damage caused to one of its subsidiaries. *Smith Stone* has not been followed by the courts of several other Commonwealth countries.[157] In *Aluminum Company of Canada Ltd v City of Toronto*,[158] Rand J, writing for the Supreme Court of Canada, stated that when for tax purposes two corporations are treated as one because "the second company is in fact the puppet of the first," this involves the application of an *alter ego* theory rather than the application of agency principles.

In the United States, agency principles have been applied in a fairly conventional manner, with one exception. The exception is that some courts have applied a theory of "agency through total domination and control" that strongly resembles, but is slightly different from veil-piercing theories. Whereas the agency theory recognizes that the principle (typically a parent

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[155] Anil Hargovan and Jason Harris, "Piercing the Corporate Veil in Canada: A Comparative Analysis" (April 2007), online (pdf): http://ssrn.com/abstract=980366 at n 11 [Hargovan].

[156] [1939] 4 All ER 116 at 121.

[157] Hargovan, *supra* note 153 at n 13.

[158] [1944] SCR 267, [1944] 3 DLR 609.

company) and the agent (typically a wholly-owned subsidiary) are separate legal entities, the veil-piercing theory conflates the two entities and treats them as one. The "agency by total domination" theory has received mixed reviews from US courts.[159]

Veil-piercing theories as applicable to non-signatory cases under Canadian law are considered, separately, below.

3. Assignment and Assumption

In *ABN Amro Bank of Canada v Krupp Mak Maschihnenbau GmbH*[160] ("*ABN Amro*"), Ontario's Divisional Court considered an appeal from a motion judge's refusal to stay a court action in favour of international arbitration in Zurich. The application was brought pursuant to article 8 of the *ICAA* (Ontario) (i.e. the *Model Law*). The Court held that despite the fact that it had not signed the arbitration agreement, ABN was in law a "party" to that agreement by way of assignment, relying on "the universal commercial legal principle that an assignor is not entitled to divide that which is assigned amongst assignees so as to convey the benefits and nullify the burdens".[161] As the obligation to submit disputes to arbitration was a burden arising from the assigned agreement, the Divisional Court referred the dispute to arbitration in Zurich.

ABN Amro was distinguished by the Ontario Court of Appeal in *Simex Inc v Imax Corporation*.[162] In that case, Simex sought a declaration that any claims against it must be pursued through the courts of Ontario by virtue of a forum selection clause in a Transfer Agreement, rather than through arbitration in

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[159] *Phoenix Canada Oil Co v Texaco Inc*, 658 F Supp 1061 (D Del 1987) *aff'd* 842 F (2d) 1466 (3d Cir 1988); *Mobil Oil Corp v Linear Films, Inc*, 718 F Supp 260 at 271 (D Del 1989) at 271 and n 15.

[160] 91 OAC 229 [1996], 135 DLR (4th) 130.

[161] *Ibid* at 15.

[162] 206 OAC 3, [2005] OJ No 5389 (QL).

California pursuant to an arbitration provision in a Production Agreement, which had allegedly been assigned to Simex. The Court of Appeal found that because the Transfer Agreement was not an assignment of the Production Agreement, but rather a transfer of ownership of films produced as a result of the Production Agreement, Simex was not subject to the burden of the arbitration agreement.[163] On this basis, the court set aside the stay of legal proceedings pronounced by the lower court, which would have referred the assignee to arbitration in California.

These cases exemplify the application of ordinary principles of Canadian contract law in relation to assignment and assumption to determine whether a non-signatory is bound by an arbitration agreement.[164]

4. Incorporation by Reference

Incorporation by reference is a familiar concept under Canadian contract law. It can have the effect of binding parties who did not sign the document in which the arbitration agreement is contained.

In *MRC Total Build Ltd v F&M Installations Ltd*[165] ("*MRC*"), a sub-contractor applied for a stay under the *Arbitration Act* (BC)[166] of an action commenced against it by the prime contractor, relying on an arbitration agreement in the prime contract. The sub-contractor, however, had not signed and was not alleged to be a party to the prime contract. The sub-contractor argued that the arbitration agreement in the prime

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[163] *Ibid* at 47, 48.

[164] In *Petrowest Corporation v Peace River Hydro Partners*, 2019 BCSC 2221, 2020 BCCA 339 it was held that the court-appointed receiver of a corporate signatory to an arbitration agreement was a "party" to the arbitration agreement within the meaning of s 15 of the *Arbitration Act*, RSBC 1996, c 55.

[165] 2019 BCSC 765 [*MRC*].

[166] *Supra* note 32.

contract was incorporated by reference into the sub-contract, because the sub-contract provided that "[t]he Prime Contract, associated drawings and specifications for the scope of work are attached in Schedule I and form part of this Subcontract Agreement."[167]

Fitzpatrick J reviewed British Columbia,[168] Manitoba,[169] Ontario[170] and Nova Scotia[171] cases applying the laws concerning incorporation by reference of an arbitration agreement. She considered, in particular, the finding of the Ontario court in *Dynatec Mining Ltd v PCL Civil Constructors (Canada) Inc* ("*Dynatec*") that "[i]ncorporation of an arbitration clause can only be accomplished by distinct and specific words ...."[172] In *Dynatec*, applying the requirement for "distinct and specific words", the court had rejected the argument that an arbitration clause was incorporated by reference into a subcontract. Fitzpatrick J noted that *Dynatec* had been followed in Nova Scotia and Manitoba. Fitzpatrick J found, however, that "it is less than clear that the *Dynatec* approach is an appropriate interpretive approach in discerning the intention of the parties" in the case before her.[173] First, *Dynatec* had not been applied in British Columbia. Second, *Dynatec* and the cases that applied it were decided before *Sattva.*[174]

In addition to its important findings with regard to the standard of review on appeals from arbitral awards, in *Sattva* the Supreme Court of Canada set out a new approach to

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[167] *MRC*, *supra* note 162 at para 27.

[168] *One West Holdings Ltd v Greata Ranch Holdings Corp*, 2014 BCCA 67.

[169] *Nodricks Norsask Seeds Ltd v Dyck Forages & Grasses Ltd*, 2014 MBCA 79.

[170] *Dynatec Mining Ltd v PCL Civil Constructors (Canada) Inc*, [1996] OJ No 29, 25 C.L.R. (2d) 259 at para 11 [*Dynatec*].

[171] *Sunny Corner Enterprises Inc v Dustex Corporation*, 2011 NSSC 172.

[172] *Dynatec*, *supra* note 167 at para 10.

[173] *MRC*, *supra* note 162 at para 52.

[174] *Supra* note 44.

contractual interpretation under Canadian law. In *Sattva,* the Court said:

> [47] … the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" [citations omitted] To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[175]

Fitzpatrick J found that, arguably, the *Dynatec* requirement is a "technical rule" to interpret construction contracts that is no longer appropriate. She noted that in *One West Holdings Ltd v Greata Ranch Holdings Corp,* the British Columbia Court of Appeal had applied the *Sattva* approach to contractual interpretation in finding that a reference within an "entire agreement" clause to a separate agreement containing an arbitral clause was sufficient to bind the appellant to the arbitration agreement despite the appellant not being a party to or signing the agreement containing the arbitral clause. Fitzpatrick J ordered that the court action be stayed and referred the parties to arbitration.

The court's analysis in *MRC* is valuable for a number of reasons. First, it is an excellent example of ordinary contract law principles being applied to resolve an issue concerning the ability of a non-signatory to invoke an arbitration agreement. Second, it is a specific example of how the Canadian contract law theory of incorporation by reference could apply in such cases. Third, it confirms that the non-signatory stay applicant has the burden of articulating that there is a recognized non-signatory theory available under the applicable law. Fourth, it shows that *competence-competence* requires that arguable legal issues

[175] *Ibid* at para 47.

effecting arbitral jurisdiction be referred to the arbitral tribunal for decision in the first instance.

5. Third-Party Beneficiaries

In *London Drugs Ltd v Kuehne & Nagel International Ltd*[176] ("*London Drugs*"), the Supreme Court of Canada articulated a principled exception to the rule of law concerning privity of contract. In doing so, the Court allowed employees to claim the benefit of a limitation of liability clause in a contract between their employer and its customer. The Court repeatedly emphasized that this relaxation of the privity rule was rooted in the existence of express or implied consent.[177] In a later decision the Supreme Court summarized its finding in *London Drugs* as follows:

> [31] … regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependent upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination in general terms is made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?[178]

[176] [1992] 3 SCR 299, 97 DLR (4th) 261.

[177] *Ibid* at paras 257–259.

[178] *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108, 176 DLR (4th) 257 at para 31.

In *Landex*, the sole defendant in an Alberta court action was not a signatory of an Asset Purchase Agreement containing an arbitration agreement.[179] The non-signatory defendant applied for a stay and referral to arbitration. The chambers judge granted the stay on the basis that the defendant was entitled to benefit from the exception to the privity rule identified by the Supreme Court of Canada in *London Drugs*. On appeal, the Alberta Court of Appeal reviewed the evidence and found that, as the Asset Purchase Agreement precluded any collateral covenants that benefits are intended to be conferred on strangers to the contract, the principled exception to the privity rule did not apply. Since the intent to benefit third parties was expressly negatived, the non-signatory could not rely on the arbitration agreement. On that basis, the stay of proceedings was set aside.[180] The Alberta Court of Appeal did not, however, express any concern about the application of the third-party beneficiary doctrine to determine whether an arbitration agreement could be enforced by a nonsignatory.

In addition, the Court of Appeal, in what is clearly *obiter*, suggested that an arbitration agreement also might be enforceable *against* a non-signatory who is a third-party beneficiary:

> [11] The parties debated whether the principled exception to the privity doctrine could be used as a sword or only as a shield. That issue need not be confronted here. What can be said is that it would be unusual not to have reciprocity in the enforcement of a bilateral covenant, that is to have a situation where the stranger could take the benefits of the covenant, but not the burdens.[181]

The specific question of whether an arbitration agreement could be enforced against a third-party beneficiary based on

[179] *Supra* note 8.

[180] *Ibid* at paras 10, 11.

[181] *Ibid* at para 11.

London Drugs was addressed by the Federal Court of Appeal in *Canada Moon Shipping Co Ltd v Companhia Siderurgica Paulista-Cosipa.*[182] The Court stated:

> [96] There is little reason for the law to restrict those who, by agreement, wish to confer a benefit on a person who is a stranger to their agreement. However, the question of privity has a different cast when parties seek, by their agreement, to impose an obligation upon a stranger. The law has little interest, outside the law of tort, in imposing obligations on those who have not agreed to them.[183]

There is no principled reason why the *London Drugs* exception to the privity rule should not be applied in cases involving non-signatories to arbitration agreements, at least in cases where the non-signatory seeks to invoke the arbitration agreement against a signatory. If the proper interpretation of the arbitration agreement is that it was intended by the signatories that the benefit of the arbitration agreement was to extend to the non-signatory, and if the non-signatory consents to arbitration with a signatory, the doctrine is consistent with the requirement for bilateral consent. Absent some evidence of consent to arbitrate by the non-signatory, however, the requirement for bilateral consent should not allow an arbitration agreement to be enforced *against* a non-signatory who is a third-party beneficiary.

6. Intertwined Claims and Closely Related Parties

The usual result on stay applications when a court action is brought against some defendants who are signatories and others who are non-signatories, is that, barring the establishment of a viable theory allowing the non-signatory to enforce the arbitration agreement, the court action is stayed against the signatory but proceeds against the non-signatory.

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[182] 2012 FCA 284.

[183] *Ibid* at para 96.

There are cases from several provinces, however, in which it has been established that the claims involving the non-signatories and signatories are closely intertwined, and the courts have been moved to find an alternative solution. In some cases, the courts have found that the fact of the intertwining itself is enough to make it arguable that the claim involving the non-signatory is subject to arbitration. In others, it has been found that the intertwining justifies a stay of the entire court action, but only the signatory is referred to arbitration.

a. *Cases Finding that Intertwining Justifies a Referral of Non-Signatory Claims to Arbitration*

In *Hosting Metro v Poornam Info Vision Pvt, Ltd* ("*Hosting Metro*"), the defendant in a British Columbia court action applied for a stay pursuant to section 8(1) of the *ICAA* (BC) pending the outcome of two international arbitrations in Arizona.[184] Only one of the four corporate plaintiffs was a signatory to the arbitration agreement with the defendant. The defendant argued that the four corporate plaintiffs were "inextricably affiliated"[185] in that one of them owned the other three, they all shared senior executives and conducted business using the same email address and signatures and all four corporations received services under the relevant commercial agreement. The defendant signatory sought a stay of the court action and a referral of all four plaintiffs' claims to arbitration.

DeWitt-Van Oosten J found that based on the evidence the services provided by the defendant to the signatory plaintiff under the agreement "would run in parallel with not dissimilar services" provided by the defendant to the three non-signatory plaintiffs, as part of the defendant's "commercial relationships" with these latter entities, and that the services were not only being managed simultaneously and as part of the same transaction, but related billings and communications were intertwined, involving some of the same key players. She ruled

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[184] *Supra* note 20.

[185] *Ibid* at para 31.

that "[w]ithin this overarching context, and in light of the representative linkages between [the four plaintiffs] it is not "clear" to me that only [the signatory plaintiff] can reasonably be viewed as a party to the Agreement for the purpose of s. 8 of the ICAA."[186] She found that the defendant had an "arguable" case that the non-signatory plaintiffs fell within the scope of the commercial agreement containing the arbitration clause. The stay of the court action by all four plaintiffs was granted.

DeWitt-Van Oosten J did not, however, identify a specific legal theory under any potentially applicable law, by which the non-signatory plaintiffs might arguably be found to be bound by the arbitration agreement because of "intertwining" or "linkages."

In *Northwestpharmacy.com v Yates* ("*Northwest Pharmacy*"), Macintosh J considered an application for a stay of proceedings by non-signatory defendants in circumstances where the plaintiff was a signatory to a commercial agreement containing an international arbitration agreement.[187]

Macintosh J accepted as correct the submission of the non-signatories that "[t]he fact that this proceeding involves parties who are not *signatories* to the Arbitration Agreement is not determinative of the question of whether any of them are *parties* to the arbitration agreement," citing *Hosting Metro* as authority.[188] Macintosh J also accepted as correct the non-signatories' submissions that:

> 134. In addition to staying the proceedings against those who are parties to the Arbitration Agreement, the court may stay proceedings against parties to the litigation who are not parties to the arbitration agreement so long as the claims against those third parties involve

[186] *Ibid* at para 37.

[187] 2017 BCSC 1572.

[188] *Ibid* at para 101.

> substantially the same issues or are otherwise intertwined with the issue raised by the matter for arbitration: *Mussche*, supra at paras. 63-68; *James*, supra at paras. 59, 105; *Sandbar Construction Ltd. v Pacific Parkland Properties Inc*….[189]

Macintosh J agreed that the proceedings against the non-signatories were "inextricably intertwined" with the issues that were subject to the arbitration agreement and should be referred to arbitration.

The authorities cited by counsel, however, do not allow a stay and referral to arbitration simply because court claims against non-signatories are "intertwined" with claims that are to be arbitrated. In *Mussche v Voortman Cookies Limited*[190] ("*Mussche*"), the court had ordered a stay against certain non-signatory defendants, but not pursuant to any arbitration statute and not on the grounds that they were bound by the arbitration agreement. The court in *Mussche* did say that the claims against the non-signatories were "intertwined" with the issues that were to be arbitrated. Absent the consent of the non-signatories, however, the court did not refer the non-signatories to arbitration. Instead, it stayed the action against them on a just and equitable basis under the *Law and Equity Act*.[191] The same approach was taken in *James v Thow et al*[192] ("*James*") and *Sandbar Construction Ltd v Pacific Parkland Properties Inc*[193] ("*Sandbar*"), the other two cases cited to Macintosh J. None of *Mussche*, *James*, *Sandbar* or *Northwest Pharmacy* articulated a legal theory under any potentially applicable law by which non-signatories might be entitled to enforce an arbitration

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[189] *Ibid* at para 54.

[190] 2012 BCSC 953.

[191] RSBC 1996, c 253.

[192] 2005 BCSC 809.

[193] 66 BCLR (2d) 225, 31 ACWS (3d) 1134.

agreement simply because the claims against them were "intertwined" with those against a signatory.

Décarel[194] is an example of a similar approach being taken by the Quebec Court of Appeal. The action had been commenced by a signatory to a joint-venture contract that contained an arbitration agreement against a signatory company and two individuals. In an unusual turn of events, after starting the action the plaintiff signatory decided that it wanted to have all its claims decided by arbitration.[195] The majority of the court found that having the claims against the two individual non-signatory defendants and those against the signatory corporation decided in separate proceedings in separate *fora* could lead to inconsistent decisions and was impractical.[196] All claims were referred to arbitration. Again, no theory was identified to provide a basis for the conclusion that the non-signatory defendants were bound by the arbitration agreement.

b. Cases Finding that Claims Against Signatories Should be Referred to Arbitration and Claims Against Non-Signatories Stayed

In *Ts'kw'aylaxw First Nation v Graymont Western Canada Inc*,[197] Weatherill J of the British Columbia Supreme Court considered an application under the *Commercial Arbitration Act* to stay claims made against a signatory defendant that were closely "intertwined" with claims made against a non-signatory defendant. The plaintiff argued that because the claims were intertwined, the arbitration agreement had become "inoperative" and the stay should be refused. The court referred to several prior decisions of the Court of Appeal holding that an arbitration agreement is not void, inoperative, or incapable of

[194] *Supra* note 130.

[195] *Ibid.*

[196] *Ibid* at para 7.

[197] 2018 BCSC 2101.

being performed simply because the plaintiff advances claims against multiple defendants, one or more of whom are not parties to the agreement.[198]

Weatherill J agreed that the claims were "inextricably related." Despite this under the *Arbitration Act* he only stayed and referred to arbitration the claim against the signatory defendant. Weatherill J also concluded, however, that because of the intertwining it was appropriate to stay the entire action, pending the results of the arbitration. He said that "[t]o permit the action against the [non-signatory] to proceed in the circumstances would be to endorse multiple proceedings and create the risk of inconsistent decisions, which ought to be avoided: *Law and Equity Act*, s. 10." He stayed the entire action for that reason, but did not refer the non-signatory to arbitration.

The approach taken by Weatherill J is the approach first alluded to in *Kaverit* and subsequently applied in *Serendipity*.

c. Conclusion Concerning Stays Based on Intertwining of Claims Involving Signatories and Non-Signatories

The cases have not identified a principled basis on which claims involving non-signatories can be referred to arbitration simply because they involve matters that are inextricably intertwined with claims involving signatories. "Intertwining" is not in itself a viable theory for allowing an arbitration agreement to be enforced by or against a non-signatory. Applying such a theory would violate the principles of party autonomy and consent. A mere factual demonstration of inextricable intertwining is not sufficient to justify a stay of proceedings and referral to arbitration. In some cases, it may be appropriate for courts to refer to arbitration disputes between

[198] *Prince George (City) v McElhanney Engineering Services Ltd (1995),* 9 BCLR (3d) 368 (CA) at para 37, 1995 CanLII 2487 (BCCA), leave to appeal to SCC refused, [1995] SCCA No. 467 (QL); *Hayes Forest Services Limited v Teal Cedar Products Ltd*, 2008 BCCA 283.

signatories (or others for or against whom the arbitration might arguably be enforced based on a viable non-signatory theory) while simply staying the proceedings involving the non-signatories pending the outcome of the arbitration, on the grounds that it is just and equitable to do so.

d. The "Closely Related Doctrine"

In *Aldo Group Inc v Moneris Solutions Corporation*[199] ("*Aldo*"), the Ontario Court of Appeal considered whether the "closely related" doctrine, applied by courts in New York and elsewhere should be part of Ontario law. The doctrine operates to bind non-signatories to a forum selection clause where they are so closely related to the dispute that it is foreseeable that they would become bound by the clause. A non-party is "closely related" to a dispute if its interests are completely derivative of and directly related to, if not predicated upon, the signatory party's interests or conduct.[200] The court found that even if it were part of Ontario law, the "closely related" doctrine would not apply on the facts of the case because (i) the non-signatory's interests were not "completely derivative and directly related to the interests of any signatory" and (ii) it was not foreseeable to the non-signatory that the forum selection clause would apply to its claims.[201]

The Court of Appeal made several interesting observations. First, it observed that forum selection clauses are to be strictly enforced because participants in a global economy must be presumed to have made an informed, deliberate choice of forum, with important consequences, and that non-signatories do not participate in making that choice. The same is true of arbitration agreements. Second, the court noted that the "closely related" doctrine only operates to bind a non-signatory where it is foreseeable that the non-party would become bound, and that

[199] 2013 ONCA 725.

[200] *Ibid* at para 45.

[201] *Ibid* at para 50.

this was a mitigating feature to protect against the binding of those who had not assessed the advantages and disadvantages of litigating in the forum.

The foreseeability requirement is akin to a requirement for implied consent or acceptance. If a non-signatory enters into a closely-related contract, and in doing so foresaw that it would be bound by a forum selection clause in another agreement, its conduct might be characterized as implied acceptance of the forum selection clause. The "closely related" doctrine as described in *Aldo*, does not appear to have been applied in Canada to bind a non-signatory to an arbitration agreement. It must be said, however, that because it is principled, narrow, and structured, it is preferable to the ill-defined concept of "intertwined" or "inextricably intertwined" claims or parties.

7. Veil Piercing and Alter Ego

In *Lock-Block,*[202] concerning a domestic arbitration*,* Skolrood J considered whether as a matter of British Columbia law non-signatories can be bound to an arbitration agreement based on an *alter ego* analysis. Skolrood J said:

> In determining who the proper parties are, the arbitrator may include non-signatories to the arbitration agreement in certain circumstances. Those circumstances are summarized in *Commercial Arbitration in Canada* as follows at 2-48:
>
> (1) the contractual agreement between a party and the non-party incorporates the arbitration clause by reference;
>
> (2) there is between a party and a non-signatory an agency relationship;
>
> (3) the corporate relationship between a parent and its subsidiary may be sufficiently close

[202] 2015 BCSC 2014.

> as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other; and
>
> (4) a non-party is bound by estoppel.[203]

Skolrood J found that under British Columbia law, the *alter ego* doctrine requires that there be conduct akin to fraud in order to pierce the corporate veil.[204] As there had been no allegation of such conduct in the arbitration, there was no basis on which the arbitrator could properly pierce the corporate veil. Skolrood J found that the arbitrator had made a jurisdictional error in adding the non-signatories and set aside the award against them. Skolrood J did not expressly find that if the required elements under British Columbia law had been established, the arbitration agreement could have been enforced against a non-signatory based on the *alter ego* theory.

In *Kosmopoulos v Constitution Insurance Co*,[205] Wilson J of the Supreme Court of Canada said:

> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v Salomon & Co.*, [1897] AC 22 (HL). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not

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[203] *Ibid* at para 77, citing J Kenneth McEwan & Ludmila Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Toronto: Thomson Reuters Canada Limited, 2013). The authors of *Commercial Arbitration in Canada* must have relied on writings and cases from other jurisdictions, as there was no authoritative Canadian law on the subject.

[204] Skolrood J cited *Politeknik Metal San ve Tic A.S. v AAE Holdings Ltd*, 2015 BCCA 318 at para 36.

[205] [1987] 1 SCR 2 at 10, 34 DLR (4th) 208, 1987 CanLII 75 (SCC).

> enforced when it would yield a result "too flagrantly opposed to justice, convenience, or the interests of the Revenue": L.C.B. Gower, Modern Company Law (4th ed. 1979), at p. 112.[206]

In *B.G. Preeco I (Pacific Coast) Ltd v Bon Street Holdings Ltd*,[207] the British Columbia Court of Appeal commented on a principle found in American law, known as the "*Deep Rock* doctrine," that permits courts to pierce the corporate veil whenever it would be unfair to do otherwise.[208] The court stated that "[i]f it were possible to ignore the principles of corporate entity when a judge thought it unfair not to do so, *Salomon's Case* would have afforded a good example for the application of that approach."[209]

In *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co*[210] ("*Transamerica*"), after a thorough review of jurisprudence, Sharpe J of the Ontario Court of Justice stated there are two elements that must be established before the courts will disregard the separate legal personality of a corporate entity "where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct." He found that that the first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently.[211] The second element

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[206] *Ibid* at para 12.

[207] (1989), 60 DLR (4th) 30 at 37, 37 BCLR (2d) 258 (BCCA) [*BG Preeco*].

[208] *Pepper v Litton,* 308 US 295, 84 L Ed 281 (1939).

[209] *BG Preeco*, *supra* note 204 at para 37.

[210] *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1996), 28 OR (3d) 423 (Gen Div) at 433–434, 1996 CanLII 7979 (ONSC), aff'd (1997) 74 ACWS (3d) 207 (Ont CA).

[211] *Ibid* at para 22, citing *Aluminum Co of Canada Ltd v Toronto (City),* [1944] SCR 267 at 271, [1944] 3 DLR 609, 1944 CanLII 6 (SCC) and *Bank of Montreal v Canadian Westgrowth Ltd* (1990), 72 Alta R (2d) 319 (QB).

relates to the nature of the conduct: is there "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights"?[212]

The Ontario Court of Appeal has repeatedly confirmed the correctness of *Transamerica*[213] and rejected the proposition that a court may pierce the corporate veil when it is just and equitable to do so.[214] Courts in Alberta,[215] Prince Edward Island,[216] Nova Scotia,[217] British Columbia,[218] Saskatchewan,[219] and New Brunswick[220] have applied the *Transamerica* test for veil-piercing.

The *alter ego* doctrine operates as an exception to the principles of corporate separateness. It also can have the effect of circumventing the privity rule by notionally erasing the fictional line (drawn by the law) that separates a contracting company from those who control it, so that they become bound

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[212] *Ibid* at para 23.

[213] *A-C-H International v Royal Bank of Canada*, 2005 CanLII 17769 (ONCA), [2005] OJ No 2048 (CA).

[214] *Boyd v Wright Environmental Management Inc*, 2008 ONCA 779, 243 OAC 185 at paras 44–45; Parkland *Plumbing & Heating Ltd v Minaki Lodge Resort 2002 Inc*, 2009 ONCA 256, 250 OAC 232 at paras 50–51; *Indocondo Building Corp v Sloan*, 2015 ONCA 752, 259 ACWS (3d) 691 at para 9.

[215] *Tirecraft Group Inc v High Park Holdings ULC*, 2010 ABQB 653; *Elbow River Marketing Limited Partnership v Canada Clean Fuels Inc*, 2011 ABQB 321.

[216] *Sogelco v Island Sea Products et al,* 2006 PESCTD 3 (In this case, an arbitration award was converted into a court judgment pursuant to s 13 of the *Arbitration Act*, RSPEI 1988, Cap A-1 6, and the award creditor then brought an action to enforce the court judgment against not only the award debtor, but also two related entities on the basis of an alter ego theory).

[217] *2420188 Nova Scotia Ltd v Hiltz*, 2011 NSCA 74.

[218] *XY, LLC v Zhu*, 2013 BCCA 352.

[219] *Agmotion Trading Canada, Inc v Mcdermit*, 2018 SKQB 100.

[220] *Estate of Michael Burke and 1021256 Ontario Inc v RoyalRoyal & Sun Alliance Insurance Company of Canada*, 2011 NBCA 98.

by the contract. The binding is not based on actual or implied consent of the controller. The binding occurs despite an intent *not* to be bound. It occurs because under Canadian law, a Canadian corporation cannot be used to perpetrate a fraud or similar misdeed. Despite the lack of consent, where Canadian law applies, there does not seem to be any reason in principle why a party who makes an arbitration agreement with a Canadian corporation should not be able to enforce that agreement against a non-signatory if the circumstances meet the *Transamerica* test.

8. The "Group of Companies" Doctrine

In *Xerox*,[221] the arbitral tribunal had found that when the parties made the arbitration agreement, even though only the subsidiary company was a named party and signatory, the parties made no distinction between the parent and subsidiary companies and that "a fair and reasonable interpretation of the agreement to arbitrate was that a distinction was not made between the two MPI companies."[222] In relation to the decision to add the parent as a party to the arbitration, Campbell J quoted the tribunal as having said:

> This is not the addition of a new third party; it is the adding of the parent of a wholly owned subsidiary that conducted itself for the purposes of the contract [the1994 Agreement] as though it and its subsidiary were one and that, in most instances, Xerox treated as one.[223]

The parties relied on the same authorities before the court as had been cited to the arbitral tribunal. The "leading case" relied on was the decision of the French court in *Dow Chemical*

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[221] *Supra* note 37.

[222] *Ibid* at para 39.

[223] *Ibid* at para 40.

France v Isover Saint Gobain (France)[224] ("*Dow*"), which established the underpinnings of what is now called the "group of companies" doctrine. Under this doctrine, where the non-signatory is part of a group of related entities and played a part in the conclusion, performance, or termination of a contract containing an arbitration agreement, the arbitration agreement may be enforced by and against the non-signatory.[225] Stating that the subsidiary, MPI US, and the parent, MPI France, had dealt with Xerox "as one unit", Campbell J was not persuaded that the arbitral tribunal had committed a jurisdictional error by adding MPI France as a party.[226] He said that "there was clearly a factual basis found by the panel for its conclusion and it is entitled to deference."[227] He found that arbitral tribunals are entitled to deference "at the high end of the spectrum."[228]

Dow was, however, an instance of a non-signatory party wishing to assert an arbitration agreement against an unwilling signatory. In other words, the non-signatory had expressly consented to arbitration with the signatory. The signatory had expressly consented to arbitration of disputes relating to the same subject matter but had made no bilateral commitment to the non-signatory to do so. It has been suggested that in these circumstances the "threshold for extending the arbitration clause thus may be set at a lower level" than in cases where the resisting party never agreed to arbitration at all.[229]

Commentators have noted that the group of companies doctrine, at least in its application to certain fact situations, cannot be reconciled with the notion of consent to arbitration.

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[224] CA Paris, 22 October 1983, [1984] Rev Arb 98.

[225] *Xerox*, *supra* note 37 at para 45.

[226] *Ibid* at paras 47–48.

[227] *Ibid* at para 50.

[228] *Ibid* at paras 51.

[229] William W Park, "Non-Signatories and International Contracts: An Arbitrator's Dilemma" in Belinda Macmahon, ed, *Multiple Party Actions in International Arbitration* (Oxford: OUP, 2009) 1 at para 1.75.

Gravel and Peterson, while acknowledging that contrary views have been expressed, state:

> In many group scenarios, the extension of the scope of an arbitration clause to non-signatories on the basis of the will of the parties is a fiction. Consider, for example, the rather common situation where a parent company negotiates a contract on behalf of a subsidiary and, in order to exclude its own liability, it deliberately ensures that only the subsidiary is a signatory to the contract. It would be somewhat disingenuous to permit the parent company to commence arbitration proceedings against the subsidiary's counterparty on the ground that this reflected the will of the parties. Yet the Dow Chemical award identifies participation of a non-signatory in the negotiation of a contract as one of the factors which may support a finding that the parties intended to treat the non-signatory as a party to the contract. Surely the desire to be treated as a party after the fact, and against a backdrop of objections from the other side, does not constitute a meeting of the minds or an *accord de volontis*.[230]

The same learned authors note that the use or acceptance of the doctrine by French courts has been defended on the basis that it is the result not of applying French law, which might otherwise have required mutual consent, but of French courts and arbitral tribunals properly applying the *lex mercatoria*, which recognizes the economic reality that despite the corporate separateness of its components, a group of companies is itself an economic unit engaged in a single transaction.[231] The

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[230] Serge Gravel & Patricia Peterson, "French Law and Arbitration Clauses – Distinguishing Scope from Validity: Comment on ICC Case No. 6519 Final Award" (1992) 37:2 McGill LJ 510, 1992 CanLIIDocs 78 at 527.

[231] *Ibid* at 529, 530.

license to apply the *lex mercatoria* rather than French law, in a France-seated arbitration in which French law also was the applicable substantive law, appears to have been based on the severability of the arbitration agreement and the applicable ICC Rules, which authorize the arbitrators to define their own jurisdiction without referring to any national law.[232] The same authors observe that "[t]he extent to which one may rely upon usages or the *lex mercatoria* as a reason for extending the scope of an arbitration clause is a much debated point."[233] They conclude that the preferred approach would be to apply familiar French contract law and related principles such as agency and ratification, or other "classic concepts" of French law.[234]

In *Sarhank Group v Oracle Corp*,[235] the United States Court of Appeals for the Second Circuit rejected a group of companies theory on the basis that it was not recognized under American law. The arbitration agreement had been signed by a subsidiary. The court considered whether an award made in Egypt against a non-signatory parent, based on a group of companies theory under Egyptian law, should be enforced in the United States under the *Convention*. Starting with the premise that an arbitration agreement requires consent, the court considered whether under "general principles of domestic contract law" the

[232] *Ibid* at 517, 518.

[233] *Ibid* at 529.

[234] *Ibid* at 530. (In *Kaverit*, Kerans JA stated: "Associated and connected parties like subsidiaries, shareholders, directors, employees, agents and the like might be required to join an arbitration in one of three ways: by the governing law, by the submission itself, to the extent the parties to the contract can bind other parties, or by later agreement of the parties. Kerans JA apparently had before him only a report of the ICC tribunal's decision in *Dow*. On that basis he said, in *obiter,* that because of the tribunal's finding that it had been "the mutual intention of all parties" that the other companies be "veritable parties" the decision turned on the interpretation of the submission in the circumstances of the case. Kerans JA would undoubtedly have agreed that jurisdiction over anon-signatory had to be rooted in mutual consent).

[235] 404 F (3d) 657 (2d Cir 2005).

parent had agreed to arbitration. The court noted that while it had recognized instances in which non-signatories can be bound to the arbitration agreements of others "such cases are limited to instances of incorporation by reference, assumption, veil piercing/alter ego and estoppel and the like" and that "[t]raditional principles of agency law may bind a nonsignatory to an arbitration agreement." The Court noted that "[i]n all such situations a court has found an agreement to arbitrate under general principles of contract law, that is to say that the totality of the evidence supports an objective intention to agree to arbitrate."[236]

The arbitral tribunal had held, applying Egyptian law, that "despite their having separate juristic personalities, subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in any deal either is a party thereto, provided that this is brought about by the contract because contractual relations cannot take place without the consent of the parent company owning the trademark by and upon which transactions proceed."[237]

The court did not consider that the Egyptian law theory was a recognized principle of American law. The court vacated the award and remanded it to the district court "to find as a fact whether Oracle agreed to arbitrate, by its actions or inaction, or by reason of any action of Systems as to which Oracle clothed Systems with apparent or actual authority to consent on its behalf to arbitration, or on any other basis recognized by American contract law or the law of agency, and for further proceedings consistent with such finding."[238]

An English court also has declared that the group of companies theory is not part of English law. In *Peterson Farms*

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[236] *Ibid* at 661-662.

[237] *Ibid* at 662.

[238] *Ibid* at 663.

Inc v C & M Farming Ltd,[239] the English Commercial Court found that an arbitral tribunal in a London-seated international arbitration had erred in assuming jurisdiction over a claim against a non-signatory based on the group of companies doctrine because the doctrine was (based on expert evidence) not part of Arkansas law, which was the substantive law of the contract, and also not part of English law, which was the law of the seat.

In *Dallah*,[240] the English court applied French law in declining to enforce an international arbitration award against the Government of Pakistan, a non-signatory to the relevant agreement. The court referred to French jurisprudence, including *Orri v Société des Lubrifiants Elf Aquitaine*[241] in which the Paris Court of Appeal said:

> According to the customary practices of international trade, the arbitration clause inserted into an international contract has its own validity and effectiveness which require that its application be extended to the parties directly involved in the performance of the contract and any disputes which may result therefrom, provided that it is established that their contractual situation, their activities and the normal commercial relations existing between the parties allow <u>it to be presumed that they have accepted the arbitration clause</u> of which they knew the existence and scope, even though they were not signatories of the contract containing it.[242]

[239] [2004] EWHC 121 (Comm), [2004] 1 Lloyds L Rep 603 at para 62.

[240] *Supra* note 41.

[241] CA Paris, 11 January 1990, [1992] Jur Fr 95.

[242] *Dallah*, *supra* note 41 at para 18 [translating the case from the French; emphasis added].

The English court concluded:

> … under the test stated by the tribunal … direct involvement in the negotiation and performance of the contract is by itself said to raise the presumption of a common intention that the non-signatory should be bound. The tribunal's test represents, on its face, a low threshold, which, if correct, would raise a presumption that many third persons were party to contracts deliberately structured so that they were not party.[243]

There may be instances under which, by a more conventional route, Canadian legal principles would achieve the same result as the application of the "group of companies doctrine." In those cases, re-labelling the classic concepts as new doctrine is not necessary. If the limits of the doctrine are stretched, however, to the point where there is a *presumption* that all members of a group of companies that play a part in the conclusion, performance, or termination of a contract containing an arbitration agreement are intended to have the same arbitration rights and obligations as a signatory, the doctrine lacks a foundation in Canadian law. If the theory is regarded as an instrument of policy—to avoid multiplicity of proceedings and circumvent implications of corporate personality that are perceived to be undesirable—then the policy is inappropriate under Canadian laws because it conflicts with the fundamental precepts of corporate separateness, party autonomy and mutual consent to arbitration. Awards made under other national laws, transnational law or the *lex mercatoria* based on the group of companies approach should be closely scrutinized by Canadian courts from the perspective of public policy and arbitrability.

[243] *Ibid* at para 40.

9. *Estoppel*

In *Lock-Block*, Skolrood J mentioned estoppel as a potentially viable non-signatory theory under Canadian common law, based on a statement in a text to that effect, but he decided the case on a different basis.[244]

In Ryan v Moore[245] the Supreme Court of Canada described estoppel by representation:

> Estoppel by representation requires a positive representation made by the party whom it is sought to bind, *with the intention that it shall be acted on* by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it (*Page v Austin* (1884), 10 S.C.R. 132, at p. 164).
>
> … The jurisprudence and academic comments support *the requirement of detrimental reliance as lying at the heart of true estoppel*.
>
> … [E]stoppel by representation cannot arise from silence unless a party is under a duty to speak.[246]

There may be fact situations in which a Canadian court could properly find that the elements of an estoppel by representation are present such that a signatory is estopped from refusing to arbitrate with a non-signatory, or a non-signatory is estopped from refusing to arbitrate with a signatory, but circumstances when estoppel by representation can be relied on will likely be

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[244] *Supra* note 31.

[245] [2005] 2 SCR 53, 2005 SCC 38.

[246] *Ibid* at paras 5, 68, 76 [citations omitted; emphasis added].

rare. Merely, being unable to claim on a contract against a person with whom there is no privity is not detrimental reliance.

In *Maracle v Travellers Indemnity Co of Canada*,[247] the Supreme Court of Canada described the elements of promissory estoppel:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance *which was intended to affect their legal relationship* and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.[248]

The existence of a prior legal relationship has been held to be essential under Canadian laws to any defence based on promissory estoppel, and the notion that such an estoppel can create a legal relationship where none existed has been rejected.[249] It seems unlikely that promissory estoppel could successfully be invoked under Canadian law either by or against a non-signatory to an arbitration agreement in any case where there is no other *legal* relationship between the person seeking to enforce the arbitration agreement and the person against whom it is sought to be enforced.

In the United States, courts have relied on two sub-species of what they call "equitable estoppel" in non-signatory cases. These can conveniently be referred to as "estoppel by taking direct benefit" and "close relationship estoppel." These two forms of estoppel were described by the Third Circuit as follows:

> First, courts have held non-signatories to an arbitration clause when the non-signatory

[247] [1991] 2 SCR 50.

[248] *Ibid* at para 13 [emphasis added].

[249] *Canadian Superior Oil v Hambly*, [1970] SCR 932.

> knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement. *Thomson-CSF, S.A. v American Arbitration Assoc.,* 64 F.3d 773, 778 (2d Cir. 1995). Second, courts have bound a signatory to arbitrate with a non-signatory "at the non-signatory's insistence because of 'the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract... and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations.'" Id. at 779 ...[250]

Neither equitable estoppel theory under United States laws requires detrimental reliance or a prior legal relationship. In many cases, the doctrines have the effect of creating a legal relationship where none existed, which is a classic instance of using "estoppel" as a sword rather than a shield. Estoppel by taking direct benefit appears akin to the doctrine of election, but operates in the absence of a duty to elect. The requirement for consent to arbitration is absent, unless, perhaps, in the circumstances of a particular case, the knowing exploitation of a contractual benefit is construed as an offer to become a party to a pre-existing agreement that was accepted by the original contracting parties. Close relationship estoppel resembles the ill-considered "intertwining" concept relied on by some Canadian courts as discussed above.

In her concurring judgment in *GE v Outokumpu,* Sotomayor J said:

> While the *FAA'*s consent principle itself is crystalline, it is admittedly difficult to articulate a bright-line test for determining whether a particular domestic nonsignatory doctrine reflects consent to arbitrate. That is in no small

[250] *Griswold v Coventry First LLC*, 762 F (3d) 264 (3d Cir 2014) [internal citations omitted].

> part because some domestic nonsignatory doctrines vary from jurisdiction to jurisdiction. With equitable estoppel, for instance, one formulation of the doctrine may account for a party's consent to arbitrate while another does not.… Lower courts must therefore determine, on a case-by-case basis, whether applying a domestic nonsignatory doctrine would violate the *FAA*'s inherent consent restriction.[251]

If a court is asked to find that a non-signatory is, or arguably is, bound by an arbitration agreement on the basis of either of these equitable estoppel theories, and if Canadian law applies, the court should heed the advice of Sotomayor J and consider whether applying the particular non-signatory doctrine would violate Canadian law's consent requirement.

IV. CONCLUSIONS

In Canada, non-signatory issues typically have arisen on stay applications or on applications to enforce or set aside awards. Although there is a growing body of jurisprudence, frameworks for the analysis of non-signatory issues in these two very different procedural contexts have not yet been fully developed. The Supreme Court of Canada has not yet had occasion to assess what theories are or should be available under Canadian laws to allow arbitration agreements to be enforced by or against non-signatories.

1. The Analysis of Non-Signatory Issues on Stay Applications

In relation to stay applications, the cases show that in some instances there is tension between arbitration principles concerning party autonomy and the judicial instinct to avoid a multiplicity of dispute resolution processes to resolve disputes that appear to be related. Courts have not consistently distinguished between the power to stay actions under arbitration legislation and the power to stay on "just and

[251] *Slip Opinion*, *supra* note 93, Concurring Judgment of Sotomayor J at 2.

equitable" grounds. Entitlement to a stay and referral to arbitration should be determined by applying the applicable arbitration statute and arbitration laws, not by applying laws and principles applicable to forum selection clauses and not on just and equitable grounds. The principle of the autonomy of parties to choose with whom they will or will not agree to arbitration must be given priority.

The framework established by the Supreme Court of Canada in *Dell* and *Seidel* for giving effect to the *competence-competence* principle on stay applications applies when there are questions about whether a non-signatory is bound by or can enforce an alleged arbitration agreement. This means, using the short-hand phrase employed by the British Columbia Court of Appeal in *Gulf Canada*, that "arguable" issues about whether a person is a "party" to an arbitration agreement should be referred to the tribunal in the first instance. When considering whether such an arguable issue is present, courts should be mindful that not all Canadian statutes require that an arbitration agreement be in writing. With the possible exception of the provincial statutes implementing the *Convention*, even where there is a writing requirement, none of the Canadian arbitration statutes require a signature. The better view is that the *Convention*, also, does not require a signature for a valid and enforceable arbitration agreement. The approach taken by the British Columbia Court of Appeal in *Javor* should not be taken because neither Canadian laws nor Canadian public policy require that an arbitration agreement must be signed.

A number of cases have decided that there are arguable issues concerning the enforcement of an arbitration agreement by or against a non-signatory without the applicable theory or the applicable law being identified. In some instances, the decision to refer matters to arbitration has been rationalized on the basis that the parties, contracts or claims are "intertwined," and that this, coupled with the relatively low thresh-hold to trigger a referral under the *Dell*/*Seidel* tests, is sufficient. The stay applicant should be expected to identify the specific non-signatory theory relied on and the court should be satisfied that

the theory relied on is arguably available under a law that arguably applies.

2. The Analysis of Non-Signatory Issues on Enforcement and Set-Aside Applications

There has been only a handful of cases in which a Canadian court has been asked to enforce or set aside an arbitration award by or against a non-signatory. The cases to date have applied standards of review ranging from complete deference to the arbitrator's jurisdictional ruling to applying a standard of correctness. There is a cogent argument that the concept of standard of review is irrelevant on applications to enforce or set aside awards, when a court must decide the validity of the arbitration agreement or whether the claim by or against the non-signatory was one contemplated by the arbitration agreement. If the standard of review is relevant, there is some room for uncertainty as to the standard of review in light of *Vavilov*, but the better view is that the court should address the question of jurisdiction in respect of the non-signatory by applying a standard of correctness. Only a standard of correctness gives effect to the fundamental arbitration principles of party autonomy and consent.

3. Non-Signatory Theories Under Canadian Laws

Few specific non-signatory theories have been definitively approved or applied by Canadian courts. This is largely because on stay applications final determinations are not required due to the *competence-competence* theory. In the handful of enforcement and set-aside cases in which *alter ego*, estoppel and the group of companies theories were applied by arbitral tribunals: (i) in *CEIR* and *Xerox* the courts applied a standard of deference, and did not assess the merits of the tribunals' decisions (ii) in *Lock-Block*, the court found that the evidence was not sufficient to establish *alter ego* under British Columbia law, and did not specifically consider whether, if the facts had been proven, *alter ego* could properly be applied in the arbitral context to bind non-signatories, and (iii) in *Javor*, the courts did

not address the merits of the arbitrator's *alter ego* decision, because they found (it is submitted, incorrectly) that the lack of signature was determinative.

This dearth of authority means that the non-signatory theories available under Canadian laws must be identified by a principled analysis, taking into account the foundational requirement for consent to arbitration. The analysis set out in this article indicates that:

a. Canadian legal theories of (i) contract and agency law (including assignment, assumption and incorporation by reference) (ii) third-party beneficiaries and (iii) *alter ego* could properly be applied in non-signatory cases where Canadian law is applicable;

b. The Canadian legal theory of estoppel by representation could possibly apply, but it is difficult to envisage fact situations where it could be successfully applied;

c. The two "equitable estoppel" theories available under state laws in the United States ("estoppel by taking direct benefit" and "close relationship estoppel") are not comparable to any recognized theory of Canadian law, and their adoption likely would be inconsistent with the requirement for consent under Canadian arbitration laws;

d. There is no recognized Canadian legal theory that could render an arbitration agreement enforceable by or against a non-signatory simply because claims, facts or parties implicated in the proposed claim against the non-signatory are "intertwined" with claims, facts or parties implicated in arbitrable claims;

e. Where the arbitration agreement cannot be enforced by or against the non-signatory, "intertwining" may, however, in some cases justify a stay of court proceedings involving the non-signatory on "just and equitable" grounds, pending the outcome of arbitral proceedings amongst those who are bound by the arbitration agreement; and

f. The group of companies theory has not been recognized as part of Canadian law and is generally inconsistent with the requirement for consent to arbitration.