

Etching the Borders of Arbitration Agreement: the Group of Companies Doctrine in International Commercial Arbitration under the U.S. and Turkish Law

GIZEM HALIS KASAP †

TABLE OF CONTENTS: 1. Introduction; 2. Taxonomy of Notions Related to the ‘Group of Companies’ Doctrine: Non-Signatory Parties in Arbitration; 2.1. Rule: Agreement to Arbitrate; 2.2. Exception: Non-signatory Parties; 2.2.1. Framework of the ‘Group of Companies’ doctrine; 2.2.2. Compilation of Other Exceptions; 3. The U.S. Law Position on the Group of Companies Doctrine; 4. The Turkish Law Position on the Group of Companies Doctrine; 4.1. Statutes Related to the Group of Companies Doctrine; 4.2. Case Law on the Group of Companies Doctrine; 5. A Comparative Analysis of Two Approaches; 5.1. Stance Towards Arbitration; 5.2. Non-signatory Arbitration Extensions; 5.3. Application of the Group of Companies Doctrine; 5.4. Application of the Group of Companies Doctrine; 6. Solutions To Not To Be (or To Be) A Non-Signatory; 7. Conclusion.

ABSTRACT: In the 21st Century, the commerce is not confined to the boundaries of any single-nation state. Hence, we have been witness to the transactions and disputes involving multiple parties and legal systems. Assuming that you are an in-house counsel in an MNE. Do you ever wonder whether the parent or sister companies' counsel or the opposing counsel may make contact with you about the arbitral proceedings that your client has never agreed on in the first place? Is it possible whether the non-signatory parties are bound by or benefit from the arbitration agreement, and what could be the possible legal grounds given the doctrine of privity of contract? This article discusses one of these grounds, the group of companies doctrine, in the context of Turkish and US legal systems comparatively and explores its applicability in light of precedents.

KEYWORDS: *Arbitration Agreements; Doctrine of Privity: Non-Signatory Parties; Group of Companies Doctrine.*

UNIVERSITY OF BOLOGNA LAW REVIEW

ISSN 2531-6133

[Vol.2:1 2017]

This article is released under the terms of Creative Commons Attribution 4.0 International License

1. INTRODUCTION

Globalization is sitting in the catbird seat in our era. Recent decades, therefore, have witnessed that international commercial transactions are booming in terms of their size and sophistication. M.N.Es (multinational enterprises) usually include arbitration clauses in their transactions to navigate the risks that come with foreign jurisdiction and to protect their investment at stake. Such international business transactions often involve a myriad of contracts and parties. Hence, these transactions engender a variety of disputes. It is inevitable that when such a dispute arises, it will have a bearing on almost all of the parties' interest in the transaction. It would be ill-defined and vague to state that only parties who agree to arbitrate can be included in the proceedings since non-signatory parties can become a part of proceedings through a few special theories of law. Arbitrators, most often in the interest of fairness, feel compelled by circumstances to reach beyond the specific parties to an arbitration agreement.

This article discusses one of these theories, the group of companies doctrine, in general. It first summarizes the rule of agreement to arbitrate and its exceptions. The article continues with the application of the group of companies doctrine in international arbitration, specifically comparing the United States, where a pro-arbitration regime has been adopted, and Turkey, which is one of the less arbitration-friendly countries. The aim of this chapter is to present selected cases where the facts supported the application of the group of companies and then to discuss which theories acted as a substitute for the doctrine. The last part concludes by suggesting methods of drafting an arbitration clause to prevent taking chances with or to facilitate becoming a non-signatory party in international arbitration.

2. TAXONOMY OF NOTIONS RELATED TO THE 'GROUP OF COMPANIES' DOCTRINE: NON-SIGNATORY PARTIES IN ARBITRATION

We are conversant with a hornbook principle of contract law that an arbitration agreement does not bind a non-signatory party, and such an agreement cannot be enforced against them,¹ yet certain exceptional theories allow arbitration clauses to be imposed by or against non-signatory parties.

2.1. RULE: AGREEMENT TO ARBITRATE

International commercial arbitration is a private contractual process that yields final and binding results between the disputants.² Parties exploit the contractual nature of arbitration by tailoring the process to their needs, including with respect to procedural rules of arbitration, applicable substantive law, tribunal members, and the costs of arbitration.³ It is noteworthy that arbitration “is a matter of consent, not coercion”⁴ and this proposal is the heart of the discussion covered in this paper because the courts confirm that the non-signatories are bound by or benefit from arbitration agreements “only in rare circumstances”.⁵

2.2.EXCEPTION: NON-SIGNATORY PARTIES

Whereas civil law scholars refer to “extending” the arbitration clause to non-signatories, Anglo-American scholars prefer “joining” non-signatories to the

[†] Gizem Halis Kasap, LL.M. is a member of the Istanbul Bar Association and currently an SJD candidate at WFU Law in North Carolina. Special thanks to Dean Richard Schneider at WFU Law for his expert advice and comments on this manuscript as well as Ayca Akkayan-Yildirim, Ph.D visiting scholar at BU Law for her constant support and mentoring along the way.

¹ See, e.g., *United Steelworkers of Am. v. Am. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995).

² THOMAS E. CARBONNEAU & WILLIAM E. BUTLER, *INTERNATIONAL LITIGATION AND ARBITRATION* 571 (2nd ed. 2013); Winston Stromberg, *Development in the Law: Transnational Litigation: III. Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 *LOY. L.A. L. REV.* 1337, 1341 (2007).

³ CARBONNEAU & BUTLER, *supra* note 2, at 573. See also *United Steelworkers*, 363 U.S. at 581.

⁴ *Volt Info. Scis., Inc. v. Bd. of Trs., Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

⁵ *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002) (citing *Hill v. G.E. Power Sys., Inc.*, 282 F.3d 343, 347-49 (5th Cir. 2002)); MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 35 (2012).

arbitration agreement.⁶ Both terminologies refer to the same situations: in our case (1) when a non-signatory company of the arbitration agreement commences arbitration proceedings through an arbitration contract signed by one or more of the companies within the same group; or (2) when a non-signatory company is obliged to participate as a defendant in arbitration proceedings which is commenced by or against another company within the same group pursuant to the clause signed.

There is a burgeoning trend for tribunals and courts to make arbitration clauses binding, even on third parties who never signed an arbitration agreement.⁷ This is because of the well-entrenched principle of supporting the agreement to arbitrate, and it is in part driving the growing popularity of arbitration.

2.2.1. FRAMEWORK OF THE 'GROUP OF COMPANIES' DOCTRINE

Characteristics of the group of companies doctrine include either a non-signatory company availing itself of or being bound by an arbitration agreement in which another company in the same group is a part of the agreement.⁸

As we mentioned before, the parties are free to choose rules, which the arbitral tribunal adopts to conduct the proceedings. Considering the rules, the arbitral tribunal determines the scope and the effects of its jurisdiction. In cases where parties are silent on the situation of a non-signatory company in their arbitration agreement, an arbitral tribunal may "manipulate" its jurisdiction by joining the non-signatory company to arbitration. This practice

⁶ William W. Park, *Non-signatories and International Contracts: An Arbitrator's Dilemma*, in MULT. PARTY ACTIONS INT'L. ARB. 3, 4-5 (2009).

⁷See ICC Arbitration Posts Strong Growth in 2015, ICC, <http://www.iccwbo.org/News/Articles/2016/ICC-Arbitration-posts-strong-growth-in-2015/> (last visited Nov. 13, 2016).

⁸See, e.g., John P. Gaffney, *The Group of Companies Doctrine and the Law Applicable to the Arbitration Agreement*, in NORTON ROSE FULBRIGHT'S INT'L. ARB. REP., May 2016 at 21-22 (briefing the essential cases where the group of companies doctrine applied).

has been mostly adopted and endorsed by the I.C.C., and after over a thirty-year period of application, it still maintains its importance.⁹

Not surprisingly, the trailblazing case on the group of companies doctrine is an I.C.C. case, *Dow Chemical France v. Isover Saint Gobain* (hereinafter *Dow Chemical*).¹⁰ In this dispute, claimants were Dow Chemical France, the Dow Chemical Company- which was the parent company- Dow Chemical A.G. and Dow Chemical Europe- which both were subsidiaries- and the respondent was Isover Saint-Gobain.¹¹ There were two distribution agreements signed between Dow Chemical A.G., Dow Chemical Europe and Isover Saint-Gobain, and thereby, the arbitral tribunal was supposed to have no jurisdiction over Dow Chemical France and the Dow Chemical Company.¹² However, the parties agreed that Dow Chemical France or any other subsidiary of the Dow Chemical Company could make deliveries under the distribution agreements.¹³ The dispute arose from the products' quality, and therefore, Dow Chemical France, the Dow Chemical Company, Dow Chemical A.G. and Dow Chemical Europe initiated arbitration against Isover Saint-Gobain.¹⁴ Isover Saint-Gobain argued that only Dow Chemical A.G. and Dow Chemical Europe were the parties of the distribution agreements and arbitration clauses, and as a result, the arbitral tribunal was exceeding the scope of its authority.¹⁵

In its awards, the arbitral tribunal took into consideration the negotiation, implementation and termination of the agreements that had been signed and found that both non-signatory parties had an active role during the agreement.¹⁶ To justify this, the tribunal pointed out that Dow Chemical France played a crucial part in negotiations and also was the only supplier of the defendant.¹⁷ The Dow Chemical Company, similarly, was the parent company and exercised a power of control when the subsidiaries concluded and carried

⁹ See Otto Sandrock, *Arbitration Agreements and Groups of Companies*, 27 *THE INT'L LAW.* 941, 941-942 (1993) (listing the awards where the group of companies doctrine applied by the ICC tribunals).

¹⁰ *Dow Chemical France v. Isover Saint Gobain*, 9 *Y.B. Comm. Arb.* 1984 at 131, 131 (ICC Int'l Ct. Arb.).

¹¹ *Id.* at 132-33.

¹² *Id.* at 132.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 134.

¹⁶ *Id.* at 135.

¹⁷ *Id.*

out the agreements.¹⁸ Combining all of these, the arbitral tribunal constructed a two-prong test, which required that (1) the signatory and non-signatory parties constituted a "single economic reality", in other words, a company group and (2) the non-signatory companies actively participated in the negotiation, performance and termination of the agreements.¹⁹

In *Dow Chemical*, arbitrators made the award in the interest of fairness because the non-signatory companies were "cherry-picking" while engaging in the negotiation, implementation and termination of the contracts like a signatory party but ignoring to arbitrate because it was not beneficial for their case.

The underlying motivation under *Dow Chemical* is that the international commercial arbitration is driven by the necessities of the evolving commerce, and therefore, the arbitrators should have the power to build resilience for these necessities, such as creating a new doctrine and apply the dispute. However, the group of companies doctrine, like any other new doctrines created by *lex mercatoria*, is open to criticism because *lex mercatoria* finds its own limits at the enforcement stage, and that can lead awards to be unenforceable before the national courts.²⁰

Various subsequent I.C.C. cases have followed *Dow Chemical*.²¹ Nonetheless, the doctrine has been criticized, and it has divided scholars and courts into two groups. One group which, sticking with a traditional approach, finds that this doctrine is unneeded and this issue should be solved under the law applicable to arbitration agreements,²² and another group which, adopting

¹⁸ *Id.* at 136-37.

¹⁹ *Id.*

²⁰ See Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 696-97 (1999).

²¹ See, e.g., EMMANUEL GAILLARD & YAS BANIFATEMI, PRECEDENT IN INTERNATIONAL ARBITRATION 522 (2008); ADAM SAMUEL, REVIEW OF JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWISS, U.S. AND WEST GERMAN LAW, 102-6 (1989).

²² See, e.g., *Société Kis France et autres v. Societe Generale et autres*, 1992 Revue de l'Arbitrage 90, 93; *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98; BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 50 (2005).

a progressive approach toward arbitration, supports extending an arbitration agreement to non-signatory companies within the same group.²³

Although in *Dow Chemical*, the contracts were governed by French law, not the *lex mercatoria*, the arbitrators engaged in *lex mercatoria* and created the group of companies doctrine. The Cour d'Appel de Paris still upheld the award.²⁴ The court, however, could have dismissed the award –considering the applicability of any novel doctrine– like the German Federal Supreme Court or the Supreme Court of the United Kingdom where they heard certain different cases based on the doctrine and rejected the doctrine.²⁵ These different stands of the national courts prove why the advocates of the traditional approaches' point may be worth further consideration.

2.2.2. COMPILATION OF OTHER EXCEPTIONS

Although a discussion of each of the exceptions is beyond the scope of this paper, under U.S. law, the majority of federal cases recognizes five theories: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego and (5) estoppel.²⁶ The third-party beneficiary theory has also been accepted as a sixth exemption.²⁷ Moreover, it is possible to name other theories, arising out of the arbitral awards, case law of other countries and secondary sources, such as assignment, novation, succession by operation of the law, and subrogation.²⁸

²³ See, e.g., *Orri v. Société des Lubrifiants Elf Aquitaine* [1992] Jur Fr 95 (11 January 1990).

²⁴ *Société Isover-Saint-Gobain v. Sociétés Dow Chemical France and others*, Cour d'appel [CA] Paris, October 21, 1983 REV. ARB. 98 (1984).

²⁵ See, e.g., *BGH*, III ZR 371/12, 27 Nov. 2013 and *Peterson Farms Inc. v. C&M Farming Ltd* [2004] All E.R. (D) 50.

²⁶ See, e.g., *Reid v. Doe Run Res. Corp.*, 701 F.3d 840, 846 (8th Cir. 2012); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042,1045 (9th Cir. 2009); *World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc.*, 517 F.3d 1240, 1248 (11th Cir. 2008); *Zurich Am. Ins. Co. v. Watts Indus.*, 417 F.3d 682, 688 (7th Cir. 2005); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000); *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435, 446 (3d Cir. 1999); *Thomson-CSF*, 64 F.3d at 776; See also *Cosmotek Mumessillik Ve Ticaret Ltd. Sirkketti v. Cosmotek U.S.A.*, 942 F. Supp. 757, 760 (D. Conn. 1996) (adopting the same principles in terms of international commercial arbitration).

²⁷ See, e.g., *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004); *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.2d 347, 354 (5th Cir. 2003).

²⁸ James M. Hosking, *Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J., no. 3, 2004, at 469, 482-85.

As demonstrated, all these theories are accepted in a traditional sense, and they hinge on either contract or company law, or equity law. The rest of the paper will discuss whether there is a need to adopt the group of companies doctrine while the same result might be achieved through the abovementioned conventional doctrines.

3. THE U.S. LAW POSITION ON THE GROUP OF COMPANIES DOCTRINE

U.S. Courts are reluctant to acknowledge the group of companies doctrine, persisting with the idea that binding non-signatories is only possible under the traditional theories recognized in *Thomson-CSF*.²⁹ It should be underlined that U.S. courts have never explicitly opposed the doctrine, but instead, they have applied different theories even though the facts supported applying the group of companies doctrine.³⁰

The notable and most-relevant decision on the group of companies is *Sarhank Group v. Oracle Corp.* (hereinafter *Sarhank*) in which the Second Circuit found that the non-signatory parent was not bound by the foreign arbitral award rendered in Egypt, in spite of the fact that the arbitral tribunal had issued an award which concluded that the non-signatory parent was bound by the arbitration clause under the "group of companies" theory. Moreover, the Egyptian Supreme Court had upheld the award before the Second Circuit's ruling.³¹

In *Sarhank*, Sarhank Group, an Egyptian company, concluded an agency agreement (hereinafter the Agreement) with Oracle Systems Ltd. (hereinafter Systems), which was a wholly owned subsidiary of Oracle Group (hereinafter Oracle), a U.S. manufacturer.³² The Agreement included an arbitration clause and Oracle was neither a party to the Agreement nor to the arbitration agreement.³³ A dispute arose between the contracting parties and Sarhank

²⁹ See, e.g., *Reid*, 701 F.3d at 846; *Mundi*, 555 F.3d at 1045; *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 71 (2d Cir. 2005); *Intergen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003).

³⁰ Alexandre Meyniel, *That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine*, 3 ARB. BRIEF, no. 1, 2013, at 18, 32.

³¹ *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 658-59 (2d Cir. 2005).

³² *Id.* at 658.

³³ *Id.*

Group initiated arbitration against both Systems and Oracle, its parent.³⁴ Oracle objected to the tribunal's jurisdiction, arguing that it had not signed the Agreement.³⁵ Nonetheless, the tribunal rejected the claim and issued an award holding that Oracle and Systems were "jointly and severally liable".³⁶ The tribunal's reasoning was essentially based on the elements of the group of companies doctrine.³⁷ Sarhank Group moved to confirm and enforce the award in the United States pursuant to the "New York Convention",³⁸ codified at 9 U.S.C. § 201-08.³⁹ The district court entered the judgment for Sarhank Group, but Oracle appealed the decision to the Second Circuit.⁴⁰

The Second Circuit accepted Oracle's arguments on the grounds that Oracle did not enter into the Agreement, and the arbitrators lacked jurisdiction to determine arbitrability. Hence, the Second Circuit vacated the award.⁴¹ Further, the Second Circuit remanded for a determination as to whether Oracle was bound by the arbitration agreement "on any basis recognized by American contract law or the law of agency", and the other ground was that "enforcement of the award would be contrary to American public policy."⁴²

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 662 (stating the award 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.").

³⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, 1970 U.S.T. LEXIS 115.

³⁹ *Sarhank Group*, 404 F.3d at 659.

⁴⁰ *Sarhank Group*, 404 F.3d at 658.

⁴¹ *Sarhank Group*, 404 F.3d at 662-63.

⁴² *Sarhank Group*, 404 F.3d at 659.; See also *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 65 (2d Cir. 2004) (applying the law of the contract, Swiss law, to the issue of whether a non-signatory could benefit from an arbitration clause.) In *Motorola*, Motorola entered into a number of agreements governed by Swiss Law, containing a clause that any dispute arising under the agreement shall be submitted to arbitration. *Id.* 43. In this case, the Second Circuit found that "under Swiss law, defendants, as non signatories to the agreements, may not invoke the arbitration clauses contained in those agreements." *Id.* 51. This created a split in authority inside the Second Circuit regarding the consideration of the choice-of-law clauses and its application to the non-signatories because in *Sarhank*, the Second Circuit did not apply the Egyptian law to the issue of non-signatories. For the attempt of reconciliation see *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 355 (S.D.N.Y. 2005).

The Third Circuit has followed the Second Circuit's analysis in *Thomson-CFS*,⁴³ and it has held a narrow view in considering the extension of arbitration clauses to non-signatories.⁴⁴ In *E.I. Dupont*, DuPont China, Rhone Poulenc Fiber and Resin Intermediates (hereinafter Rhodia Fiber), and Liaoyang Petro-Chemical Fiber Company were a part of the arbitration clause included in the Joint Venture Agreement (hereinafter the J.V.A.).⁴⁵ The J.V.A. also contained a provision that the parents would "assist the Company in the balancing of foreign exchange...".⁴⁶ Furthermore, to ensure the success of the company, the J.V.A. set forth that the parties "and their *Affiliates* [emphasis added] will not take action detrimental to the interest or well-being of the Company."⁴⁷ Pursuant to these provisions of the J.V.A., both parents entered into related agreements with the joint venture company.⁴⁸ After the dispute arose, DuPont, the parent of DuPont China, brought a suit against Rhodia Fiber and its parent, Rhodia.⁴⁹

In its holding, the Third Circuit reinforced the federal policy favoring arbitration and added that "[T]he presumption in favor of arbitration carries "special force" when international commerce is involved...".⁵⁰ The Third Circuit analyzed whether DuPont, a non-signatory parent, was bound by the arbitration clause under the third party beneficiary, agency, and equitable estoppel theories.⁵¹ After applying each of the theories, the Third Circuit decided that the non-signatory parent was not bound by the arbitration clause and affirmed the District Court's judgment that denied appellants' motion to compel arbitration.⁵²

⁴³ *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 195 (3d Cir. 2001) (incorporating one more exception, the third party beneficiary, into the exceptions counted in *Thomson-CSF*, 64 F.3d at 776).

⁴⁴ See, e.g., *Invista S.à.r.l. v. Rhodia, SA*, 625 F.3d 75, 85 (3d Cir. 2010); *E.I. Dupont.*, 269 F.3d at 195; *Bel-Ray Co.*, 181 F.3d at 446.

⁴⁵ *E.I. Dupont.*, 269 F.3d at 190.

⁴⁶ *E.I. Dupont.*, 269 F.3d at 191.

⁴⁷ *E.I. Dupont.*, 269 F.3d at 192.

⁴⁸ *Id.*

⁴⁹ *E.I. Dupont.*, 269 F.3d at 192.

⁵⁰ *E.I. Dupont.*, 269 F.3d at 194.

⁵¹ *Id.*

⁵² *E.I. Dupont.*, 269 F.3d at 205.

In *Bel-Ray*, the Third Circuit adopted again the same approach in *E.I. Dupont* and maintained its view.⁵³ In this case, *Bel-Ray* and *Chemrite (Pty.) Ltd*, a South-African company, signed a number of agreements including an arbitration clause.⁵⁴ While the agreements were in force, *Chemrite* sent a fax stating that it had changed its name to "*Lubritene (Pty) Ltd*",⁵⁵ but legally, the succession took place when *Chemrite* sold its business, including its rights under the agreements, to *Lubritene*, which was a newly established entity, and *Chemrite* entered liquidation.⁵⁶

After the dispute arose between the parties, *Bel-Ray* filed an action to compel *Lubritene* and the four of its directors and officers (hereinafter the Individual Appellants) to arbitrate.⁵⁷ *Bel-Ray* alleged that *Lubritene* and the Individual Appellants "conspired to misappropriate *Bel-Ray*'s technology and other proprietary information and intentionally defrauded *Bel-Ray* by leading it to believe that *Lubritene* would abide by the Trade Agreements."⁵⁸ *Bel-Ray* also alleged "[L]ubritene marketed *Bel-Ray* products falsely under *Lubritene*'s trade name, and conversely marketed inferior *Lubritene* products under *Bel-Ray*'s trade name thereby damaging *Bel-Ray*'s business reputation".⁵⁹ After claims and counterclaims, the District Court entered a summary judgment for *Bel-Ray* and an order compelling *Lubritene* and the Individual Appellants to arbitrate.⁶⁰ Thus in appeal, the issue was whether the successor and four of its directors and officers were bound by the predecessor's arbitration agreement.⁶¹

Although the facts of the case supported the extension of the arbitration clause, the Third Circuit did not engage in a detailed analysis. The court recognized the exceptions adopted by *Thomson-CSF* and very briefly held that "having similarly compared our record with the *Thomson-CSF* court's explanation of each of the five enumerated theories, we have also concluded

⁵³ *Bel-Ray Co.*, 181 F.3d at 446.

⁵⁴ *Bel-Ray Co.*, 181 F.3d at 438.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Bel-Ray Co.*, 181 F.3d at 437.

⁵⁸ *Bel-Ray Co.*, 181 F.3d at 439.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Bel-Ray Co.*, 181 F.3d at 445.

that each is inapposite here.⁶² The court just stayed with the reasoning that traditional principles of contract and agency law do not support joining the non-signatories to the arbitration clause.⁶³

Unlike *E.I. Dupont*, the Third Circuit did not engage in application of the traditional principles of contract and agency law and rushed the conclusion by bypassing the comprehensive reasoning of its ruling. The alleged claims, however, could have supported the situation in which the claims were "intimately founded in and intertwined with the underlying contract obligations"⁶⁴ and therefore, justified the extension of the arbitration clause to the Individual Appellants under either the group of companies doctrine or traditional exceptions recognized by *Thomson-CFS*.⁶⁵

In *Invista*, the Third Circuit deferred to the tribunal's partial award when the tribunal found that it had no jurisdiction over the non-signatory party, Rhodia S.A.⁶⁶ In this case, Rhodianly, Rhodia Operations S.A.S, and Rhodia S.A. commenced arbitration against INVISTA-affiliated entities.⁶⁷ Shortly after the initiation of the arbitration, INVISTA-affiliated entities brought a suit against both Rhodia S.A. and related parties alleging that Rhodia S.A. violated the non-disclosure agreement concerning the trade secret.⁶⁸ While the parties were litigating, the tribunal issued a partial award and found that it had lacked jurisdiction over Rhodia S.A.⁶⁹ Rhodia S.A. filed a motion to have each of the three INVISTA entities to be compelled to arbitrate the claims.⁷⁰

⁶² *Bel-Ray Co.*, 181 F.3d at 446.

⁶³ *Id.*

⁶⁴ *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984) (quoting *Hughes Masonry Co. v. Greater Clark Cty. Sch. Bldg. Corp.*, 659 F.2d 836, 841 n. 9. (7th Cir. 1981)). In this case, the contractor brought a lawsuit against the construction manager. The dispute was arising from the duties to the building owner. Although there was no arbitration agreement between the disputants, each disputant had separately entered into the arbitration agreements with the building owner regarding the project. The Eleventh Circuit held that the claims were "intimately founded and intertwined with the underlying contract obligations", and thus, the non-signatory parties were subject to arbitration.

⁶⁵ Pedro J. Martinez-Fraga, *The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere?*, 46 CORNELL INT'L L.J. 291, 311 (2013).

⁶⁶ See *Invista S.à.r.l.*, 625 F.3d at 85.

⁶⁷ *Invista S.à.r.l.*, 625 F.3d at 80.

⁶⁸ *Invista S.à.r.l.*, 625 F.3d at 82.

⁶⁹ *Invista S.à.r.l.*, 625 F.3d at 81.

⁷⁰ *Invista S.à.r.l.*, 625 F.3d at 82-3.

In its holding, the Third Circuit quoted *Thomson-CSF* and restated the exceptions to bind a non-signatory party to an arbitration agreement.⁷¹ The Third Circuit, however, did not assess these exceptions. Instead, the Third Circuit held that "the Tribunal's holding that it has no jurisdiction over Rhodia, S.A. means that Rhodia S.A. is a stranger to the I.C.C. Arbitration and, therefore, has no enforceable right of arbitration" and dismissed the appeal as moot without addressing whether the non-signatory parties were bound by the arbitration agreement.⁷²

As opposed to the Second Circuit in *Sarhank*, the Third Circuit has deferred the tribunal's decision and not engaged in a merits review although it arouses curiosity whether the Third Circuit would have engaged in a merits review if the tribunal had decided contrariwise and found that it had a jurisdiction over the non-signatories.

When the issue was whether the non-signatory party could compel arbitration, the First Circuit has considered the scope and the wording of the arbitration clause. In *Sourcing*, *Sourcing Unlimited (d/b/a Jumpsource)* and *Asimco Technologies, Inc.* (hereinafter A.T.L.) entered into a partnership agreement containing an agreement to arbitrate in China.⁷³ *Asimco International, Inc.* (hereinafter *Asimco*) was a subsidiary of A.T.L., and it was not a party to the agreement.⁷⁴ The chairman of *Asimco*, however, participated in negotiations, which resulted in the agreement and became involved in the transaction by agreeing to deliver the parts produced by the partnership to the venture's customers in the United States as well as to invoice the customers and retain partnership profit in the United States.⁷⁵ When the dispute arose, *Jumpsource* brought a suit against non-signatory *Asimco* and alleged that dispute arose from a separate oral contract whereas *Asimco* asserted that it was nothing but an oral modification of the partnership contract containing a

⁷¹ *Invista S.à.r.l.*, 625 F.3d at 85.

⁷² *Invista S.à.r.l.*, 625 F.3d at 87.

⁷³ *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 41 (1st Cir. 2008).

⁷⁴ *Id.*

⁷⁵ *Id.* at 42.

provision for arbitration.⁷⁶ Asimco filed a motion to dismiss the action and compel arbitration.⁷⁷

The main issue in this case was whether a signatory party could render an arbitration clause ineffective when the claim was filed against a non-signatory party asserting that there was no arbitration agreement in writing with a non-signatory party.⁷⁸ The First Circuit reversed the district court's order and granted the non-signatory party's motion to dismiss and to compel arbitration.⁷⁹ The Court compelled the signatory party to arbitrate with the non-signatory party by employing the equitable estoppel theory and indicating the expansive nature of the arbitration clause.⁸⁰ The court held that the claim was "intertwined" with the underlying contract, including the arbitration clause.⁸¹

Similarly in *Intergen*, the Third Circuit pondered the grammatical interpretation of the arbitration clause in the purchase contract. Only the "Buyer" and "Seller", which was defined in the contract, were allowed to invoke arbitration although the clause had a broad scope in terms of claims.⁸² The Court also considered that because the parties were "sophisticated commercial actors", they could have drafted different contracts but they did make deliberate choices by defining who was eligible to invoke arbitration clause.⁸³ It is also noteworthy that the First Circuit made an emphasis on federal policy favoring arbitration, yet limiting the borders of the policy to exclude the "situations in which the identity of the parties is in dispute."⁸⁴ Thus, the Court upheld the district court's denial of the non-signatory parent's motion to compel arbitration.⁸⁵

With reference to the cases analyzed above, we can infer that the U.S. courts are reaching the result without adopting the group of companies

⁷⁶ *Id.* at 42-3.

⁷⁷ *Id.* at 42.

⁷⁸ *Id.* at 43.

⁷⁹ *Id.* at 48.

⁸⁰ *Id.*

⁸¹ *Id.* at 47.

⁸² See *Intergen N.V.*, 344 F.3d at 146.

⁸³ *Intergen N.V.*, 344 F.3d at 150.

⁸⁴ *Id.*

⁸⁵ *Id.*

doctrine, yet adopting the contractual theories, which cover more scenarios than the group of companies doctrine.⁸⁶ It should be emphasized that this analyze above does not aim to show U.S. courts' position in terms of binding non-signatories, but to compare and contrast the applicable doctrines under U.S. law and the group of companies doctrine when the issue was whether the non-signatories were bound by the arbitration agreement.

4. THE TURKISH LAW POSITION ON THE GROUP OF COMPANIES DOCTRINE

Unlike U.S. law, Turkish law is a product of the civil law system. As a result, statutes have more bearing than the case law on the judicial system. From exploring the statutes related to the group of companies doctrine, this chapter will move on to an examination of selected Turkish Supreme Court decisions related to the doctrine. Similar to the previous chapter, the information aims to create a base for the comparison of the two legal systems.

The term “group of companies” is used to refer to a management of more than one stock company under Turkish law, and the Turkish Commercial Code sets forth its principles.⁸⁷ In other words, it actually refers to a “corporate group” as understood in common law. As seen, whereas a literal translation of “corporate group” from Turkish to English results in the term of “group of companies”, the meaning of it in Turkish is not the same as that of the term in English. The term, therefore, can be misleading for foreign lawyers, and thus, it becomes of importance for foreigners to consult local lawyers. It is necessary to make it clear that this article does not use the “group of companies doctrine” term as in “corporate group” throughout the discussion.

⁸⁶ Meyniel, *supra* note 30, at 23.

⁸⁷ Turkish Commercial Code, Law No.: 6102 Official Gazette, Feb. 14, 2011 No.: 27846, §§ 195-209, enacted: Jan. 13, 2011. [hereinafter the TCC]

4.1. STATUTES RELATED TO THE GROUP OF COMPANIES DOCTRINE

International arbitration in Turkey is governed by the International Arbitration Act (hereinafter the I.A.A.), which is established based upon Chapter 12 of Switzerland's Federal Code on Private International Law and UNCITRAL.⁸⁸ Under the I.A.A., the arbitration agreement is a legally binding contract between the parties.⁸⁹ There is no provision that addresses the non-signatory parties situation, nor does the abundance of case law discuss the non-signatory parties' situation in an arbitration agreement, especially in terms of the group of companies doctrine.

This ambiguity has laid the burden on scholars and practitioners when they evaluate the issue in terms of predictability.

4.2. CASE LAW ON THE GROUP OF COMPANIES DOCTRINE

It is necessary to examine the Turkish Supreme Court database to ascertain if the group of companies doctrine itself has been addressed by the courts. A sufficient number of cases, albeit not ample, allows us draw certain conclusions on the issue:

(1) Assessment of Turkish case law as to the position of non-signatories yields a quite certain result that a non-signatory can be bound by or benefit from an arbitration agreement in the event of incorporation by reference,⁹⁰ assignment⁹¹ and subrogation.⁹²

⁸⁸ See Grand Nat'l Assembly of Turk., *Draft Act of No. 4686 and its Preamble* (Jun. 6, 2001), <http://www2.tbmm.gov.tr/d21/1/1-0874.pdf>.

⁸⁹ International Arbitration Act. Law No.: 4686 Official Gazette, 21 Jun. 2001 No.: 24453, §4, enacted Jul. 5, 2001[hereinafter the IAA]; Also see the 3rd Civ. Cir. of the Turkish Sup. Ct., Case No.: 2014/12342 Decision No.: 2015/6885 dated 27 Apr. 2015.

⁹⁰ E.g., Gen. Assemb. of Turkish Sup. Ct., Case No.: 1994/11-765, Decision No.: 1995/39 dated 1 Feb. 1995; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2015/7064 Decision No.: 2015/9348 dated 16 Sep. 2015; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2015/1687 Decision No.: 2015/6696 dated 11 May. 2015; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2012/5132 Decision No.: 2012/7052 dated 2 May 2012; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2005/13708 Decision No.: 2007/587 dated 22 Jan 2007; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2002/216 Decision No.: 2002/4357 dated 6 May 2002; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2001/10475 Decision No.: 2002/2260 dated 12 Mar. 2002.

⁹¹ 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 1993/5034 Decision No.: 1994/4082 dated 10 May 1994.

⁹² E.g., Gen. Assemb. decision *supra* note 90 dated 1 Feb. 1995; 11th Civ. decision *supra* note 90 dated 6 May 2002.

(2) There are other decisions, on the other hand, discussing certain legal theories in which binding a non-signatory party pursuant to these doctrines is not accepted. These theories can be named as, third party beneficiary, guarantee or agency with the actual express authority.

Under Turkish law, if the principal gives actual express authority to the agent for concluding an arbitration agreement, the principal is deemed a party to the arbitration agreement, not the non-signatory (third party) agent.⁹³ The actual issue under the agency theory, in fact, is whether the principal or agent can be held liable in the event of apparent authority or estoppel.⁹⁴ For now, there is no known case in which the Turkish Supreme Court discusses this issue.⁹⁵

In a recent Turkish Supreme Court case dated 6/25/2015, the issue was whether the I.C.C. award could be enforced on behalf of the third party beneficiary of the contract.⁹⁶ In this case, the non-signatory party, the plaintiff, was the state agency and it had approved the concession agreement which contained an arbitration clause between the defendant and the other plaintiff in the case.⁹⁷ Also, the non-signatory party was benefitting from the contract, put differently, it was the third-party beneficiary.⁹⁸ The majority of the Turkish Supreme Court reversed the judgment of the trial court and held that the approval of the contract by the non-signatory party did not necessarily mean that the non-signatory party also approved the arbitration clause.⁹⁹ The court stated that arbitration agreements had an exceptional character, and therefore, a non-signatory party shall give either express consent or tacit consent on the condition that it creates no doubt.¹⁰⁰ On the other hand, the dissent stated that under the Turkish Constitution, the parties

⁹³ E.g., 19th Civ. Cir. of Turkish Sup. Ct., Case No.: 2002/7495 Decision No.: 2002/6932 dated 24 Oct. 2002; 19th Civ. Cir. of Turkish. Sup. Ct. numbered 8273/265 dated 23 Jan. 1997.

⁹⁴ Banu Şit Köşgeroğlu, *Yabancı Hakem Kararlarının Üçüncü Kişilere Karşı Tenfizi* [Enforcement of Foreign Arbitral Award Against the Third Parties], 15 *GAZİ UNIVERSİTESİ HUKUK FAKULTESİ DERGİSİ* [GUHFD], no 3,2001, at. 12.

⁹⁵ See also *Id.*

⁹⁶ 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2014/9538 Decision No.: 2015/8707 dated 25 June 2015.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

can arbitrate for the disputes between state agencies and private parties, and thus, there was no ground for the majority to allege that the state agency was not a party of either the concession agreement or the arbitration clause.¹⁰¹

In one case, the Turkish Supreme Court did not accept the extension of the arbitration clause to the guarantor either. In the case dated 3/11/2004, the defendant non-signatory party was the bank that issued the letter of credit for the plaintiff where the plaintiff entered into a sale agreement, including an arbitration clause, with the other defendant, which was a corporation.¹⁰² The Turkish Supreme Court relied heavily on its earlier precedents and held that the non-signatory bank was not bound by the agreement because arbitration agreements had exceptional characteristics as opposed to litigation in the court system.¹⁰³

(3) There is no ruling discussing the group of companies doctrine, whether affirmatively or not. In one unpublished Turkish Supreme Court case dated 11/7/1989, the claimant filed a motion to enforce the arbitral award decided by the Arbitral Tribunal of the Bremen Cotton Exchange.¹⁰⁴ The claimant, Bunge GmbH, conducted negotiations with Osman Akca Corporation (hereinafter the Corporation) and believed that the Corporation was the party to the agreement whereas he actually entered into the contract of sale including an arbitration clause with Osman Akca L.L.C. (hereinafter the L.L.C.).¹⁰⁵ In this case, the Turkish Supreme Court upheld the trial court on the grounds that the arbitral award could not be enforced against the non-signatory party, the Corporation.¹⁰⁶

¹⁰¹ *Id.* The reason why the dissent referred to the Turkish Constitution is that it was prohibited for the state agencies to arbitrate until 1999. To make concession contracts arbitrable, the Turkish Constitution was amended in 1999. The dissent opinion, in fact, took a stand against the anti-arbitration mindset of the majority. See §125 of the Turkish Const., amended version by Act No.: 4446 Official Gazette 14 Aug. 1999 No.: 23786 enacted 13 Aug. 1999.

¹⁰² 19th Civ. Cir. of Turkish Sup. Ct., Case No.: 2003/2654 Decision No.: 2004/2603 dated 11 Mar. 2004.

¹⁰³ *Id.*

¹⁰⁴ 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 1990/2931 Decision No.: 1991/6828 dated 07 Nov. 1989.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

The Corporation and the L.L.C. were sister companies.¹⁰⁷ Moreover, it is understood that the sister company was involved in the negotiations in a way that indicated that the non-signatory party was in effect the original party of the sale.¹⁰⁸

In one case regarding a stock purchase agreement, the conflict arose out of the transfer of the trademark.¹⁰⁹ The stock purchase agreement concluded between the co-partners of the A.. Lastik San. A.Ş. (hereinafter the Individuals) and the C.. GmbH, the defendant.¹¹⁰ The agreement set forth the conditions of the trademark transfer and included an arbitration clause for any disputes arising out of the contract.¹¹¹ As per the Agreement, the defendant shall transfer the trademark of “A.. Lastik Sanayii” to the Individuals.¹¹² Later, the defendant, C.. GmbH, switched the title from A.. Lastik San. A.Ş. to C.. Lastik San. A.Ş. However, it did not transfer the ownership of the trademark.¹¹³

The Individuals brought a suit against the defendant and the non-signatory C.. Lastik San. A.Ş.¹¹⁴ The defendant filed a motion to compel arbitration and the trial court entered a judgment for the defendant and the plaintiffs appealed.¹¹⁵

The Turkish Supreme Court held that the C.. Lastik San. A.Ş. did not sign the agreement regardless of whether it was the assignee or successor of the C.. GmbH or the Individuals.¹¹⁶ The court also noted that because the result would directly affect the non-signatory party’s rights, it shall not be enforced to arbitrate through the arbitration clause in which it had not agreed.¹¹⁷ The

¹⁰⁷ See *Turkish Trade Registry Gazette*, THE UNION OF CHAMBER & COMMODITY EXCH. OF TURK., http://www.ticareticilgazetesi.gov.tr/sorgu_acik.php (last visited Nov. 6, 2015)

¹⁰⁸ *Id.*

¹⁰⁹ 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2005/7964 Decision No.: 2006/8410 dated 14 July 2006.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

court considered the language of the arbitration clause and held that the arbitration clause bound only the parties pursuant to the Agreement.¹¹⁸

To put it another way, the Turkish Supreme Court did not evaluate the theories, whether there is an assignment or succession, and emphasized that the arbitration agreement cannot be compelled against a non-signatory.

In the case dated 10/05/2015, the parties entered into a merger agreement which included an arbitration clause.¹¹⁹ The dispute arose when the plaintiffs did not receive the payment for the shares.¹²⁰ When the plaintiffs brought a lawsuit, the defendants filed a motion to compel arbitration before the trial court.¹²¹ The trial court entered judgment for the defendants and compelled the plaintiffs to arbitrate.¹²² The Turkish Supreme Court, however, reversed the judgment by stating that the plaintiffs S.. B.. and M.. B.. did not sign the merger agreement, and therefore, the arbitration clause could not be enforced against these non-signatory parties.¹²³ Although the available facts of the case do not allow us to comment on the non-signatory parties' position in the transaction, there might have been an opportunity for the Turkish courts to discuss the applicability of the group of companies doctrine.

Likewise, a lack of legal reasoning and the confidentiality of the parties' names create a hurdle to study other cases regarding the possible application of the group of companies doctrine. As an illustration, in the case dated 6/24/2013, there was a construction agreement including an arbitration clause between the plaintiff, Ş..Hafriyat Ins. Taah. San. Tic. Sti., and the defendant, Ş.. M.. San. ve Tic. Ltd. Sti.¹²⁴ Later, the defendant concluded a novation agreement with D.. Ltd. Sti.¹²⁵ The issue was originating from who had a right to compel

¹¹⁸ *Id.*

¹¹⁹ 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2015/9436 Decision No.: 2015/9845 dated 5 Oct. 2015.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 15th Civ. Cir. of Turkish Sup. Ct., Case No.: 2012/4971 Decision No.: 2013/4112 dated 24 June 2013.

¹²⁵ *Id.*

arbitration.¹²⁶ After mentioning briefly these facts, the Court held that because D.. A.Ş. was a non-signatory party, it cannot be compelled to arbitrate.¹²⁷

As it is seen, whereas the court mentioned the parties of the construction agreement and the party of the novation agreement, the Court mentioned D.. A.Ş. for the first time when it was holding that D.. A.Ş. was not bound by an arbitration agreement. In its ruling, the Turkish Supreme Court never engaged in explaining who the non-signatory D.. A.Ş. was and what was its position as to the privity between the parties.

(4) The last noteworthy point is that although the Turkish Supreme Court has adopted the piercing of the corporate veil theory relatively recently,¹²⁸ there has been no application of this theory in any arbitration agreements. In a similar vein, Turkish courts have employed the estoppel doctrine when the issue is that there is a valid agreement to arbitrate between the parties.¹²⁹ Nonetheless, Turkish courts have never used this doctrine to decide whether a non-signatory party can be enforced to arbitrate.

5. A COMPARATIVE ANALYSIS OF TWO APPROACHES

Compared to the United States, Turkish courts retain a touch of reluctance when there is a matter of arbitration. As a corollary of this, there is a visible difference between U.S. courts and Turkish courts as to the applicable doctrines on extension of arbitration agreements to the third parties, which can be deduced from the reiterated wording taken from the case law in each jurisdiction. The main difference is that U.S. courts have accepted more number of doctrines than the Turkish courts. U.S. courts have also more

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 19th Civ. Cir. of Turkish Sup. Ct, Case No.: 2005/8774 Decision No.: 2006/5232 dated 15 May 2006.

¹²⁹ *E.g.*, 19th Civ. Cir. of Turkish Sup. Ct., Case No.: 2015/7618 Decision No.: 2015/17519 dated 23 Dec.2015; 11th Civ. Cir. of Turkish. Sup. Ct, Case No.: 2003/6774 Decision No.: 2004/3751 dated 9 Apr.2004; 19th Civ. Cir. of Turkish Sup. Ct, Case No.: 1995/9108 Decision No.: 1995/9685 dated 15 Nov.1995; 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 1979/3855 Decision No.: 1979/351 dated 2 Oct.1979.

frequently considered and discussed the applicability of these doctrines as opposed to Turkish courts.

Where the issue is whether a non-signatory party is bound by an arbitration clause, the jurisdictions have taken the different stands as follow:

5.1. STANCE TOWARDS ARBITRATION

The Turkish Supreme Court has repeated the phrase that "[I]n principle, the courts are the ones who hear a dispute. Arbitration agreement has an exceptional character, and it only binds the parties who agree to. If not, it runs afoul of the principle that independent courts shall exercise the judicial power pursuant to the Art. 9 of the Turkish Constitution and the principle of natural judge."¹³⁰ U.S. courts, on the other hand, have laid stress on the standard of federal policy preferring arbitration over litigation.¹³¹ U.S. judiciary has demonstrated and reaffirmed the Congress's intent established by 9 U.S.C.S. § 2.¹³²

5.2. NON-SIGNATORY ARBITRATION EXTENSIONS

The great wealth of U.S. cases has applied five exceptions named by *Thomson-CFS*.¹³³ In Turkish case law, however, the courts have not named the applicable exceptions. It should come as no surprise because as a part of civil law, statutes

¹³⁰ Natural judge refers to pre-established and ordinary courts and judges as opposed to ad hoc trial. See §37 of the Turkish Const. See also 19th Civ. Cir. of Turkish Sup. Ct., Case No.: 2002/7495 Decision No.: 2002/6932 dated 24 Oct. 2002; 19th Civ. Cir. of Turkish Sup. Ct., Case No.: 2003/2654 Decision No.: 2004/2603 dated 11 Mar. 2004. See also 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 2015/14286 Decision No.: 2016/2435, dated 7 Mar. 2016; 15th Civ. Cir. of Turkish Sup. Ct, Case No.: 2015/2198 Decision No.: 2015/2758, dated 22 May. 2015; 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 2013/7572 Decision No.: 2014/14133, dated 19 Sep. 2014; 15th Civ. Cir. of Turkish Sup. Ct, Case No.: 2014/3330 Decision No.: 2014/4607, dated 1 July 2014; 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 2009/3257 Decision No.: 2011/1675, dated 15 Feb. 2011; 15th Civ. Cir. of Turkish Sup. Ct, Case No.: 2009/1438 Decision No.: 2009/2153, dated 13 Apr. 2009; 15th Civ. Cir. of Turkish Sup. Ct, Case No.: 1996/247 Decision No.: 1996/438, dated 29 Jan. 1996.

¹³¹ *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d 292, 294 (3d Cir. 2004); *E.I. Dupont De Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194 (3d Cir. 2001). See also *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 661 (2nd Cir. 2005). Cf. *Intergen N.V. v. Grina*, 344 F.3d 134, 150 (1st Cir. 2003) (limiting the federal policy favoring arbitration when the parties' identity is in question).

¹³² 9 U.S.C.S. § 2 (1925); See e.g. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

¹³³ See *supra* p.6.

prevail over case law. Considering this, when we examine the statutes and case law, the most striking exception reveals itself in the event of incorporation by reference.

Incorporation clauses are validated by the Art. 4 of the I.A.A. as a general provision and Para. 3 of Art. 1237 of the T.C.C. as a special provision in the event that a bill of lading refers to a charterparty containing an arbitration clause.¹³⁴ Moreover, the judicial application of these statutes is widespread when an arbitration clause is incorporated into an agreement by reference.

We can generalize that Turkish courts are not sympathetic to third party rights considering lack of privity. Therefore, only incorporation by reference, assignment, and subrogation theories satisfy a requirement of privity between the signatory and non-signatory party.

5.3. APPLICATION OF THE GROUP OF COMPANIES DOCTRINE

U.S. courts have accepted to extend arbitration agreements to the non-signatories, including company groups. The abovementioned five exceptions achieve similar results to application of the group of companies doctrine. However, the group of companies doctrine itself has no application pursuant to *Sarhank*, which applied U.S. domestic arbitration law when deciding the jurisdiction of the arbitral tribunal.¹³⁵ *Sarhank* found that the award was contrary to American public policy.¹³⁶ However, the Second Circuit should not have discounted a choice-of-law provision. The Second Circuit could have assessed the non-signatory parties' situation through the law chosen by the

¹³⁴ Compare the Art. 4 of the I.A.A. with the Para. 3 of Art. 1237 of the T.C.C. The I.A.A. validates that the reference in a contract to a document included an arbitration clause constitutes an arbitration agreement on the condition that the reference is such as to make that clause part of the contract. Similar, but more specifically, the T.C.C. provides that the provisions of the charter party can also be enforced against the holder of the bill of lading. In other words, if the bill of lading is referring to a charterparty with the condition that the reference contains an arbitration clause, it may be enforced against the holder of the bill of lading.

¹³⁵ See *Sarhank Group*, 404 F.3d at 662-63.

¹³⁶ See *Sarhank Group*, 404 F.3d at 659.

parties under Article V(1)(a) of the New York Convention which is a ground for refusal if there is no valid agreement to arbitrate.¹³⁷

Turkish courts have also accepted to extend arbitration agreements to the non-signatories, albeit not as often as U.S. courts. The Second Circuit refused the group of companies doctrine implicitly in *Sarhank* whereas there is no ruling discussing, or even tacitly refusing, the applicability of the group of companies doctrine under Turkish law. The case dated 11/7/1989, where the non-signatory sister company was involved in the negotiations, could have been a perfect example for the application of the doctrine but the Turkish Supreme Court did not elaborate its legal reasoning.¹³⁸

Although both judiciaries have not adopted the group of companies doctrine, the United States has made its position clear in contrast to Turkey by denying the existence of the doctrine itself when the courts refused to respond to claims involving the group of companies doctrine.¹³⁹

5.4.APPLICATION OF THE OTHER EXCEPTIONS

Turkish courts have not accepted the third-party beneficiary doctrine whereas the non-signatories have been held to benefit from or have been subject to arbitration on a third-party beneficiary theory under U.S. Case law.¹⁴⁰

Agency theory itself drastically differs between U.S. and Turkish law. Under U.S. law, it is accepted that when a principal is bound by an arbitration clause, “its agents, employees, and representatives” are also embraced under

¹³⁷ See *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 50 (2nd Cir. 2004) (applying a choice-of-law clause to determine which laws govern the validity of the arbitration clause).

¹³⁸ 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 1990/2931 Decision No.: 1991/6828 dated 07 Nov. 1989.

¹³⁹ Brief for Defendant/Appellee and Cross-Appellant at 7, *Marathon Oil Co. v. Ruhrgas A.G.*, 145 F.3d 211 (5th Cir. 1998). See also Meyniel, *supra* note 30, at 39-42.

¹⁴⁰ Compare *E.I. Dupont De Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 194 (3d Cir. 2001)-with 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2014/9538 Decision No.: 2015/8707 dated 25 June 2015.

the terms of such agreements.¹⁴¹ Under Turkish law, however, only the principal himself is bound by an arbitration clause to the extent that his agent has the actual express authority to bind the principle.¹⁴²

U.S. courts also recognized the doctrine of veil-piercing, by means of which a non-signatory party is bound by an arbitration agreement of its alter ego.¹⁴³ As for Turkish courts, they are unlikely to bind a non-signatory party by piercing the corporate veil, considering that there has been no such ruling so far, and that Turkish courts tend to litigate cases considering the notion of how important the express consent of the parties is to arbitrate.

In civil law systems, equitable estoppel is known as the “good-intent” doctrine, and it is not extraordinary for Turkish courts to employ this doctrine. In the United States, we see that a signatory party may be estopped from avoiding arbitration with a non-signatory.¹⁴⁴

In Turkey, however, the good intent doctrine (or estoppel) may become a legal reasoning when analyzing whether there is a valid agreement between the parties, which has not covered the situations so far where the non-signatories exist.¹⁴⁵

6. SOLUTIONS TO NOT TO BE (OR TO BE) A NON-SIGNATORY

¹⁴¹ *E.g.*, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3d Cir. 1993); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir.1990); *Letizia v. Prudential Bache Sec.*, 802 F.2d 1185, 1187-88 (9th Cir.1986). *Cf.* *E.I. Dupont De Nemours & Co.*, 269 F.3d at 204 (not extending the arbitration clause to the non-signatories on the grounds that the claims did not arise from the agreement including arbitration clause)

¹⁴² Turkish Code of Obligations, Act No.: 6098 Official Gazette, Feb. 4, 2011 No.: 27836, §40, enacted: Jan. 11, 2011.

¹⁴³ *E.g.*, *Bridas*, 345 F.2d at 358-59; *CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc.*, 381 F.3d 131, 138 (3d Cir. 2004).

¹⁴⁴ *E.g.*, *Sunkist Soft Drinks v. Sunkist Growers*, 10 F.3d 753 (11th Cir. 1993); *J.J. Ryan & Sons v. Rhône Poulenc Textile SA*, 863 F.2d 315 (4th Cir. 1988).

¹⁴⁵ *Compare* 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 2003/6774 Decision No.: 2004/3751, dated 9 Apr. 2004 *and* 19th Civ. Cir. of Turkish Sup. Ct, Case No.: 2002/2249 Decision No.: 2002/7219, dated 7 Nov. 2002 (finding that the party was estopped from denying arbitration agreement because silence of the denying party constituted acceptance of the arbitration agreement) *with* 19th Civ. Cir. of Turkish Sup. Ct, Case No.: 1995/9108 Decision No.: 1995/9685, dated 15 Nov. 1995 (holding that the party did not necessarily bound by arbitration agreement under the good intent doctrine where the underlying agreement was established by conduct of the parties).

Freedom of contract entitles parties to choose the law applicable to arbitration agreements as well as to the underlying contract. Most of the time, the parties do not choose the law applicable to the arbitration contract itself. This creates ambiguity of what the applicable law is. There are several approaches to determine what the law governing the arbitration agreement should be. The first thing that springs to mind would be either the substantive law chosen by the parties to govern underlying agreements or the law of the seat of the arbitration.¹⁴⁶ Although it seems remote possibility to apply, the other approach would be the application of transnational rules.¹⁴⁷ Even though choice of law clauses may be a solution, the courts can find a way to walk around the clause. Notwithstanding the existence of a choice of law clause, the Second Circuit in *Sarhank* adopted domestic law through the extensive interpretation of public policy.¹⁴⁸

The other solution may be a careful drafting of the arbitration clause itself. A carefully tailored arbitration clause, defining situation of third parties in arbitration may diminish the ambiguity. As an illustration, U.S. courts in *Sourcing* and *Intergeren* and the Turkish Supreme Court in the case dated 7/14/2006 analyzed the scope of arbitration clauses in terms of the definition of parties when they decided on the non-signatories' position in arbitration. Therefore, clear and unambiguous language defining who the parties are and the situation of related third-parties are crucial to avoid any unexpected results.

7. CONCLUSION

The group of companies doctrine is one of the solutions to extend an arbitration agreement to non-signatories, and it is not a unique for the I.C.C. to create sui generis theories. The doctrine came into existence through *lex*

¹⁴⁶ Renato Nazzini, *The Law Applicable to the Arbitration Agreement: Towards Transnational Principles*, 65 INT. COMP. LAW Q. 681, 681 (2016).

¹⁴⁷ E.g., In *Dow Chemical*, the tribunal applied transnational rules, more specifically *lex mercatoria*, to the case and took into consideration of demands of international commerce. *Id.* 695.

¹⁴⁸ *Sarhank Group v. Oracle Corp.*, 404 F.3d 662-63 (2nd Cir. 2005).

mercatoria and pragmatic-minded expert arbitrators. Nonetheless, it has created confusion by combining the equity principles where no agreement exists and the contract law principles where there is an arbitration agreement but the consent of it is tacit rather than express. Any pioneering doctrines –i.e. the group of companies doctrine– bear the risk of being rejected by the jurisdictions where the enforcement of the arbitration agreement or arbitral award is sought. Therefore, each jurisdiction has taken different stands for adaption of this doctrine.

This paper aims to see what could be the possible position of the pro-arbitration regimes and the less friendly-arbitration regimes to adopt the group of companies doctrine. To analyze this, the paper compared and contrasted two different jurisdictions – the United States and Turkey– and found that it is not necessary that the pro-arbitration regimes –e.g. the United States– are tend to adopt the group of companies doctrine although joining non-signatories to the arbitration agreement is more common and acceptable.

In the United States, agency, third-party beneficiary and estoppel theories substitute most of the time for the group of companies doctrine. Although there is a limited application of extension of arbitration clauses to non-signatories in Turkey, the abovementioned theories are also accepted in Turkey as a rule of law. If the Turkish judiciary evolves a point where arbitration is more welcomed and favored by the courts, then these theories allow the judiciary to extend the arbitration clause to non-signatories.

Even though the Turkish and U.S. courts have not accepted the group of companies doctrine, this paper argues that the courts in each jurisdiction should be more open-minded towards arbitration and should not engage in merits review when the parties seek to compel arbitral awards decided pursuant to the doctrine.