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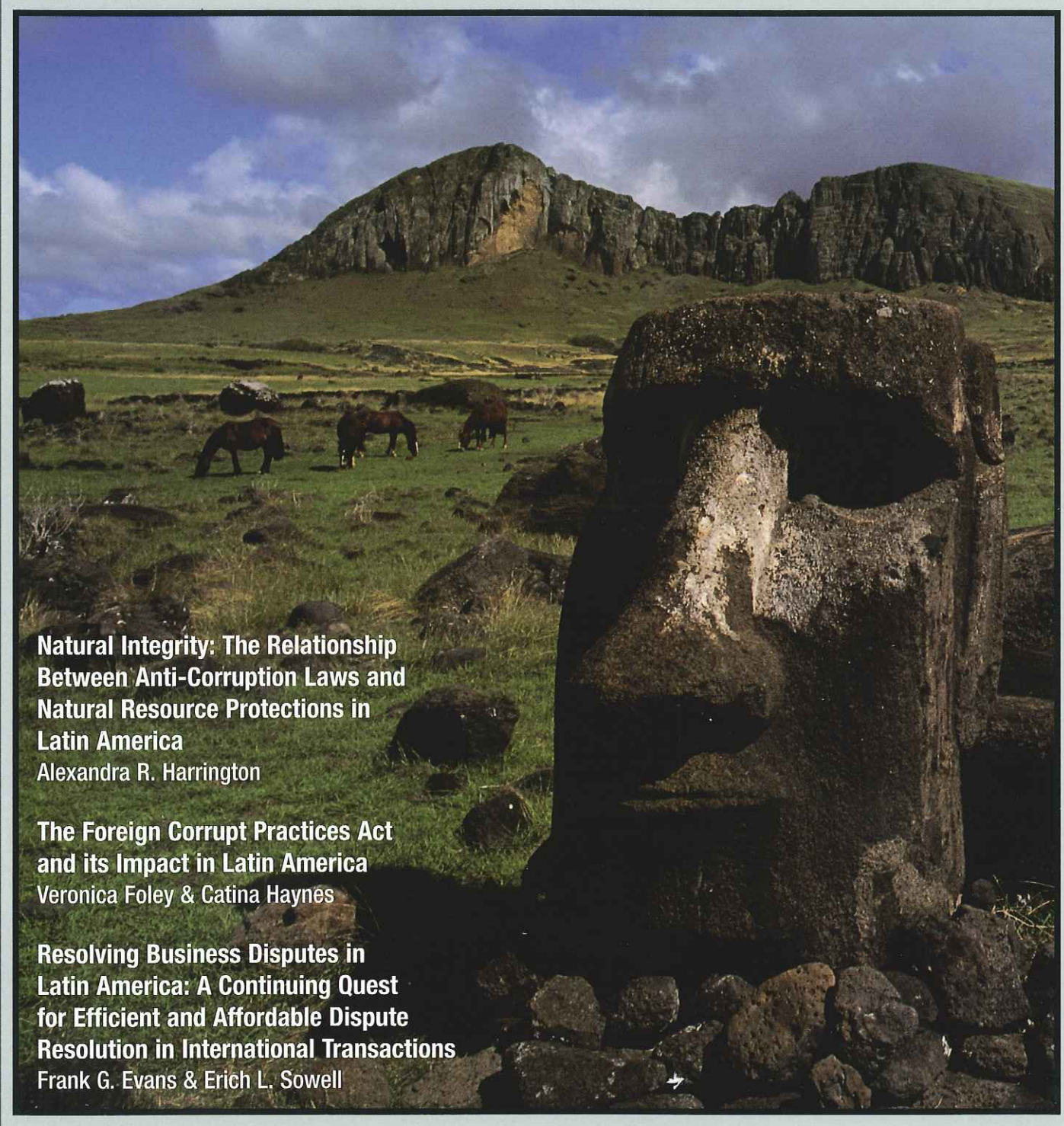

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Letter From The Editor

Dear Readers:

I hope that this issue is as special and as great an opportunity to learn about Latin America for you as it has been for us. The 2009-2010 Editorial Board is proud to have collaborated with the 2008-2009 Board in producing this issue. Through the dedication and diligence of all our members, we are pleased to present different facets of the legal developments in this region, which is home to me and several of our members. What makes Latin America so exciting is its complexity – a mosaic of different cultures, landscapes, music and faces held together not just by linguistic, historic and religious ties, but also by a burgeoning will to face the challenges in the years ahead in development, peace and stability. In Latin America, we look forward to the future with great hope, but also hold a deep respect for the lessons of the past.

In this issue, you will find articles that touch on these different challenges and more, such as navigating through anti-corruption laws, dispute resolution, and arbitration law; traversing the natural resources in terms of biopiracy and oil protection and exploring how American laws, post 9-11 immigration and the FCPA, affect Latin America. By looking through the eyes of this vast region, we gain insight not only into their world, but into our own.

I would like to thank Carolina Ortuzar-Diaz for soliciting these articles, and the 2008-2009 Board in getting us started to put this spotlight issue on Latin America together. I also want to give my deepest thanks to the 2009-2010 Editorial Board, along with our members, for all of their hard work on bringing Carolina's vision to reality. We are thrilled to embark on yet another year of CURRENTS *and have high hopes for our next volume!*

Un abrazo!

JoAnna Pelaez van der Henst
Editor-in-Chief
Rotary Foundation Ambassadorial Scholar 2010-2011

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Caveat Arbiter: The U.S.-Peru Trade Promotion Agreement, Peruvian Arbitration Law, and the Extension of the Arbitration Agreement to Non-Signatories. Has Peru Gone Too Far?

RAFAEL T. BOZA*

I. Introduction

As a Peruvian attorney living abroad, I always look back to my beloved country to see how it surprises me. This time it is the Peruvian arbitration law recently enacted in September 2008. When I learned that the Peruvian government was introducing a new arbitration law, I wondered why. Why is a system that works and is well known going to be replaced? Thinking about the popular expression "if it ain't broke, don't fix it," I questioned the decision and tried to study its product.

This article will address one particular aspect of the new Peruvian arbitration law that has sparked my interest and attention: the express provision contained in Article 14 allowing Peruvian arbitration panels and Peruvian courts to force non-signatories to the arbitration agreement to arbitrate as respondents.

First, I will explain how this new arbitration law came to be. I will generally discuss the adoption of the United States-Peru Trade Promotion Agreement ("TPA") and the Congressional authorization granted to President Garcia to enact legislation aimed at increasing Peru's competitive edge to take the fullest advantage of the TPA and other opportunities of international trade and business that Peru has developed during the last 10 years.

Then, I will address the traditional means of extending arbitration agreements to non-signatories. This, as I will discuss, is a practice that courts and arbitration tribunals have allowed in particular situations for a long time. Here, however, I will particularly focus the analysis on the methods used to bind non-signatories as respondents. Because the new Peruvian arbitration law does not address it directly, I will not discuss the possibility of a non-signatory (as claimant) compelling a signatory (as respondent) to arbitration. Generally, courts have been friendly to such possibility.[1]

In my next point, I will thoroughly discuss Article 14 of the Peruvian arbitration law and particularly focus on the theories adopted to bind a non-signatory. Finally, I will briefly discuss the enforceability problems that a Peruvian award issued against a non-signatory respondent under Article 14, may have to face in the country of enforcement based on the exceptions to recognition and enforcement provided for in Article V of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

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II. The U.S.-Peru Trade Promotion Agreement and its Implementation: How Did it Change the Peruvian Arbitration Legal Landscape?

A. THE ADOPTION OF THE TRADE PROMOTION AGREEMENT

Negotiations for the TPA started in May 2004. The original project was to enter into a Free Trade Agreement with the Andean countries (Ecuador, Colombia and Peru) who would form a single negotiating block.[2] About a year into the negotiations, in April 2005, a number of external factors started to play a negative role in the negotiations. These external factors eroded the Andean block to the point where, in September 2005, the then Peruvian President, Mr. Alejandro Toledo, declared his intent to move forward with the U.S. and sign a trade agreement without the other Andean countries.[3] The group negotiations finally broke in November 2005 when the Andean Countries suspended the negotiations arguing that there was no clear possibility of reaching an agreement with the U.S. regarding key issues as intellectual property, agriculture and textiles, among others.[4]

Peru continued the negotiations with the U.S. individually and concluded the TPA on December 7, 2005.[5] The agreement was signed by the U.S. and Peruvian representatives in Washington D.C. on April 12, 2006.[6] Further negotiations were later needed to modify certain aspects of the agreement related to the labor and environment chapters in order to reflect the May 2007 bipartisan agreement reached in Congress.[7] These negotiations resulted in an amendment signed in June 2007.[8]

Peruvian Congress approved the agreement by Legislative Resolution No. 28766.[9] Later, the U.S. House of Representatives approved the implementation of the agreement by House Resolution No. 3688.[10] The Senate also approved the implementation of the agreement on December 4, 2007.[11]

At the signing ceremony of H.R. No. 3688, on December 14, 2007, President Bush addressed the members of Congress and a Peruvian delegation led by President Garcia.[12] He stated that "[t]he agreement will create a secure, predictable legal framework that will help attract U.S. investors."[13] Perhaps the new arbitration law creates some unpredictability in a legal framework that had worked and was working without major disruptions since 1996.[14]

B. THE IMPLEMENTING LEGISLATION PACKAGE

Before the TPA came into effect on February 1, 2009, the Peruvian Congress enacted a law delegating power to the Executive to legislate on the implementation of the TPA and the improvement of the country's economic competitiveness.[15] This legislation authorized the Peruvian Executive to legislate, among other issues, on the improvement of the administration of justice in commercial and administrative matters as well as the improvement of the regulatory framework, the strengthening of institutions, administrative simplification and the State's modernization.[16]

It is unclear what the exact reasons were for a seemingly unnecessary new arbitration law.

i. The Legislative Decree Regulating Arbitration

Based on that law, the Peruvian Executive approved the "Legislative Decree Regulating Arbitration."[17] This decree superseded the previous "General Arbitration Law" that had been in effect for over ten years.[18]

The Decree is divided into seven Titles regulating general applicability issues: the formation of the arbitration agreement, the selection of arbitrators, the arbitration procedure and proceedings, the award, the arbitration costs, the annulment and execution of the award, and the enforcement of foreign awards.[19] Our point of focal interest, Article 14, is found in Title II – the Arbitration Agreement. It provides for the extension of the arbitration clause to non-signatories.

ii. Reasoning for Enactment: Did the TPA Require a New Arbitration Law?

It is unclear what the exact reasons were for a seemingly unnecessary new arbitration law. The Peruvian government issued one-hundred and two Legislative Decrees during the 180-day period that the law delegating legislative power gave to the Peruvian Executive. For that reason, there is almost no legislative history available.

It is possible, however, to grasp the Peruvian government's reasons to enact new legislation. First, the TPA contains an express resolution for both the U.S. and Peruvian governments, to "[establish] clear

and mutually advantageous rules governing their trade."[20] This goal is accompanied by Peru's own goal to "[c]reate mechanisms to defend Peruvian commercial interests in the U.S. and define clear, transparent and efficient means to resolve commercial conflicts that may arise."[21]

Thus, the intent was to modernize, streamline and make the arbitration process more efficient, especially if the dispute resolution mechanism wanted to be promoted in light of the TPA.

III. Traditional Ways of Extending Arbitration Agreements to Non-Signatory Parties

Arbitration is a creature of agreement; as such, consent of the parties involved in the proceeding has always been a requisite *sine qua non* for any arbitration.[22] This is so because the arbitration agreement is considered a personal contractual right or duty of the parties to the arbitration agreement and it is not assignable or delegable.[23] Generally, this contractual right cannot be invoked by someone who did not sign the contract in which it appeared, reflecting the basic principle that only parties who have manifested an intent to be bound to the arbitration clause should be obligated to arbitrate.[24]

However, the scope of application of the arbitration agreement has been widened by the application of a number of legal theories and now can include parties who were not originally a party to the arbitration agreement.[25]

A. THEORIES USED TO BIND NON-SIGNATORIES TO ARBITRATION

The "extension" of the arbitration agreement to, or the "joining" of, non-signatory respondents[26] happens normally in multi-party, multi-contract situations where the claimant and respondent in the arbitration do not have a clear, unambiguous, undisputed contractual obligation to arbitrate.[27] In fact, they may not even be parties to the same contract; thus, no arbitration agreement exists between them or, at least *prima facie*, a formal agreement does not exist.[28]

Because arbitration tribunals lack the procedural powers that courts possess to compel parties to litigation,[29] arbitration tribunals have normally based their decisions on the parties implied consent- on their implied intent to be bound by an arbitration clause to satisfy the required agreement to arbitrate.[30]

[T]he arbitration agreement is considered a personal contractual right or duty of the parties to the arbitration agreement and it is not assignable or delegable.

In order to find this implied consent to incorporate non-signatories as respondents in arbitration cases, a number of theories have been developed by different courts and arbitration tribunals based largely on contract law.[31] In fact, the U.S. Supreme Court, recognizing a trend, clearly accepted such possibility when it stated that arbitration agreement should be placed "upon the same footing as other contracts."[32]

By placing the arbitration agreement at the same level as any other contract, which is consistent with the doctrine of "separability" of the arbitration agreement,[33] arbitration tribunals are impliedly authorized to apply contractual theories to bind non-signatories. Theories such as agency or mandate, third party beneficiary, assumption of duties or implied contract, successor in interest, and estoppel have been used to extend the applicability of an arbitration agreement to a non-signatory respondent.[34]

In addition, arbitration tribunals have applied theories derived from the law of corporations and business associations to extend arbitration agreements to non-signatory respondents. Incorporation by reference, veil piercing or alter ego, or the "Group of Companies" doctrine are some of the theories that have been used.[35]

B. THE MODEL LAW AND OTHER NATIONAL LAWS

i. UNCITRAL Model Law on International Arbitration

The 1985 UNCITRAL's Model Law on International Arbitration[36] and the 2006 amendments do not contain an express or implied authorization to extend the arbitration clause to parties who did not sign the arbitration agreement; parties who did not agree to arbitrate and thus, are not proper parties to the arbitration process.

The model law, however, does not bar the extension of the arbitration agreement to non-signatory respondents. In fact, the commentary of the model law expressly states that "… applicable contract law remains available to determine the level of

consent necessary for a party to become bound by an arbitration agreement allegedly made 'by reference.'"[37]

This text implies, as the general principle requires, that evidence of some sort of agreement is necessary to force parties into arbitration. The parties must still show some evidence of an agreement to arbitrate, even if only tacitly, based on the law applicable to the contract or the dispute.[38]

ii. National Arbitration Laws

Furthermore, national arbitration laws from all over the world are silent on this issue.[39] Most rely on principles of contract law applicable in their own jurisdictions or on *lex mercatoria*, if applicable, to bind third parties to an arbitration agreement to which they were not a party.[40]

The U.S. Federal Arbitration Act does not contain express provisions authorizing courts to compel non-signatories to arbitration.[41] However, the U.S. Supreme Court has authorized the extension of the arbitration agreement to non-signatories in a large number of cases, under the "traditional theories for binding non-signatories to an arbitration agreement."[42]

The United Kingdom Arbitration Act of 1996 does not mention the possibility of extending the arbitration clause either.[43] However, British arbitration tribunals and courts have done so, albeit reluctantly, based on contractual principles.[44]

Although the United States has a longer experience in binding non-signatories to arbitration, other countries have also allowed the extension of the arbitration agreement despite not having express provisions for that purpose in their laws.[45]

IV. Prodigium Peruvianus, an Express Authorization to Bind

Unlike most laws in the world the new Peruvian arbitration law now provides for an express authorization to bind non-signatories to the arbitration clause using a fairly permissive standard. We will now turn our discussion to such provision and its possible effects.

The new Peruvian arbitration law expressly provides a very broad authorization for the arbitrators and courts to bind non-signatories to the arbitration clause.

A. CAVEAT ARBITER, ARTICLE 14 AND THE "EXTENSION" OF THE AGREEMENT TO ARBITRATE

The new Peruvian arbitration law expressly provides a very broad authorization for the arbitrators and courts to bind non-signatories to the arbitration clause. Article 14 reads as follows:

> **Article 14.- Extension of the Arbitration Agreement.**
> The arbitration agreement extends to those whose consent to submit to arbitration, according to good faith, is determined from their active and decisive participation in the negotiation, celebration, performance or termination of the contract that includes the arbitration clause or to which the arbitration agreement relates. It also extends to those who pretend to derive rights or benefits from the contract, as written.[46]

This article incorporates what I would call a "hybrid group of companies" and a "direct benefits estoppel." Under these theories, an unsuspecting third party respondent may find itself litigating a claim in arbitration without having first agreed to arbitrate with the claimant.

B. THEORIES ADOPTED TO BIND NON-SIGNATORIES

As mentioned, Article 14 adopts a "modified or hybrid group of companies" and a "direct benefits estoppel" as theories to bind non-signatories, both of which we will analyze separately.

i. The Hybrid Group of Companies

The group of companies doctrine was developed under French law and it is represented by the flagship case *Dow Chemical*.[47] The doctrine operates by introducing flexibility in the arbitration clause allowing the parent company of a corporate group to be included into the proceedings despite it not being "formally a party to the arbitration agreement."[48]

This doctrine relies on two elements. First, an objective element, the actual existence of a group of companies under common ownership, operating and being managed closely by the parent. Second, a subjective element, represented by the implied acquiescence of the parent to the contracts entered by the subsidiary and the participation of the parent in the formation, performance, and/or termination of the contract.[49]

The increasing acceptance of this doctrine by legislators, arbitral tribunals and courts,

particularly French, has not been without critics.[50] English courts have expressly rejected this theory stating that it "forms no part of English law."[51] The doctrine has also been rejected in Switzerland.[52]

Some consider that the mere existence of a group is not "*per se* [sufficient] to allow the 'extension' to a non-signatory company of an arbitration agreement concluded by another member of the group."[53] Given the nature of the corporate entity as a mechanism to avoid or divert liability, something else is needed to extend the arbitration clause; there must be "consent or … conduct amounting to consent."[54] The relationship between the companies in the group allows "the issue of consent to arbitration [to] take a special dimension."[55]

Although this "special dimension" is not defined, it is fair to understand it as a lesser level of consent necessary to extend the arbitration clause. This consent is implied from the involvement of the non-signatory in the "negotiation and/or performance and/or termination of the agreement containing the arbitration clause and to which one or more members of the group are a party."[56]

The new Peruvian arbitration law provides that consent can be implied from the active and determinative participation in the negotiation, celebration, performance, or termination of the contract containing the arbitral agreement.[57]

The key difference between the traditional group of companies doctrine, as explained above, and the Peruvian hybrid version is the scope. The traditional doctrine looks at parent companies or members of a group to bind those who, because of their voluntary or willful entanglement with the contractual relationship containing the arbitration clause, have impliedly consented.[58] The Peruvian version, on the other hand, incorporates anyone who by its actions, whether voluntary or involuntary, has become entangled in the "negotiation, celebration, performance or termination of the contract that includes the arbitration clause."[59]

The new Peruvian arbitration law ignores the crucial element of the group of companies (as crafted in the *Dow Chemical* case): the objective existence of a group.[60] Here, an obligation to arbitrate will arise by operation of law without regard to the nature of the relationship between the parties to the arbitration agreement.

Many questions arise from this Article of the Peruvian law but two are crucial for the application of this modified group of companies doctrine. First, how do we know when someone acted in good faith? Second, how do we determine that someone or a company had a "decisive" participation in the formation, performance or termination of the contract that includes the arbitration clause? In analyzing these questions, I will avoid especially complex issues of good faith and contract formation. However, notwithstanding such limitations, I will also attempt to analyze these questions under the scope of the United Nations Convention on Contracts for the International Sales of Goods (CISG) in an attempt to incorporate issues of international commercial law which may be relevant in international arbitration cases.[61]

In Peru, the good faith element of a contractual obligation arises mainly from the mandate of Article 1362 of the Civil Code.

A. The Good Faith Element

First, how do we know when someone acted in good faith? In Peru, the good faith element of a contractual obligation arises mainly from the mandate of Article 1362 of the Civil Code.[62] This Article, part of Peru's general contract law, expressly states that "contracts shall be negotiated, celebrated and performed according to the rules of good faith and the parties' common intent."[63]

There is not, however, a clear definition of good faith.[64] Nevertheless, there were studies that ventured in the meaning of good faith and have defined it as a dualistic or unitary concept. The dualistic concept classifies good faith in an objective good faith – loyalty and subjective good faith – belief.[65] The unitary concept binds together these to separate good faith concepts into the concept of "morals" or *bonos mores*, which has a much broader range of application than good faith does.[66]

The Peruvian Civil Code adopted the unitary model, incorporating the morals concept.[67] This unitary version of *bonos mores*, or utmost good faith, does not seem to fit comfortably in the scheme created by the new arbitration law. This is because Article 14 requires the evaluation of consent to arbitrate from a good faith – belief perspective.[68]

This perspective requires us to discern what the respondent knew of the circumstances of the agreement. From there, we must conclude that the respondent should have had "a firm persuasion of the legitimacy with which [she] acquire[d] and maintain[ed]

a determined legal situation,"[69] meaning, the respondent was firmly persuaded that she was legitimately acquiring a legal obligation or right, the duty to arbitrate.

The language of Article 14 imposes a heightened level of knowledge on the part of the non-signatory for the arbitral tribunal to conclude, validly, that arbitration against the non-signatory respondent is proper.

Thus, under Peruvian law, someone consented to arbitration in accordance with good faith when he knew with some level of certainty that he was adopting a legally valid relationship to arbitrate.

The outcome would not necessarily be the same if the source of law for the contract (*lex loci contractus*) would be the CISG[70] and the procedural law (*lex loci arbitri*) Peruvian law. Article 7 of the CISG imposes a general duty of good faith in the interpretation and application of the convention. The explanatory notes of the convention even admonish courts and arbitral tribunals applying the CISG to observe the duty of good faith in international trade.[71]

In international contracts governed by the CISG, "good faith guides the interpretation of … law texts, the interpretation of individual contracts, and the interpretation of the entire contractual relationship."[72] Internationally, good faith is an overarching tool of interpretation which relies not on national understandings of good faith, but rather on international trade standards.[73]

Good faith in the CISG has been considered to play a number of roles. It is (i) an aid in interpretation; (ii) a gap filling principle; (iii) a party's obligation; (iv) a product of trade usage, custom, or course of dealings and performance between the parties; or (v) an independent source of rights and duties that may expand or contract the application of the CISG.[74]

Of these interpretations, the two that may yield a result in interpreting Article 14 are: number (iv), trade usage, custom or course of dealings and performance between the parties; and, number (v), an independent source of rights and duties that may expand or contract the application of the CISG.

In its "trade usage" aspect, good faith may impose substantive duties to the parties and third parties.[75] Depending on the trade and the prevailing customs, one of those duties may be to clearly state the nature of your participation. For example, whether your consent to the formation of the contract binds you to the arbitration clause or whether your participation is only to assist the parties in reaching an agreement.

There is . . . a good faith duty imposed on the parties and there may be liabilities . . . based on unjustified breakups of negotiations.

In its "independent source of rights" aspect, good faith may impose duties based on estoppel. Article 16(2)(b) and 29(2) of the CISG have an implied estoppel element incorporated, which is considered to be based on good faith principles.[76] This aspect of good faith may be used to interpret Article 14 as implying consent from the manifestations of a third party non-signatory. This is consistent with the civil law doctrine of own acts or *venire contra factum proprium*.[77] This doctrine, however, is broader than the direct benefits estoppel mentioned and discussed below.

Thus, under the CISG, a non-signatory third party could have consented in good faith to arbitrate when it is customary to disclose the nature of the third party's participation in the contract formation or when it would be inequitable to allow the third party to escape arbitration based on its prior acts and manifestations.

B. The Negotiation, Celebration, Performance or Termination

Second, how do we determine that a non-signatory had a "decisive" participation in the formation, performance or termination of the contract that includes the arbitration clause? This has to be mainly a factual analysis but some guidance can be found in Peruvian contract law and in the CISG, as a source of contract law for international sales.

i. The Negotiation

Clearly, the negotiation of the contract cannot start until the parties actually start to bargain or negotiate. In Peru, preliminary discussions or negotiations effectively begin when the parties to the future contract agree to enter into talks for the specific purpose of creating a contract.[78] This stage necessarily concludes with one of the parties making an offer to the other. It is at this point that the parties "change hats" from negotiating parties to offeror and offeree.[79]

This stage, however, has some legal effects in Peruvian law. There is, as discussed, a good faith duty imposed on the parties and there may be liabilities, in very narrow circumstances, based on unjustified breakups of negotiations.[80] Generally, this stage does

not have substantial legal effects because the parties are still free to change their positions and not conclude the contract. This is a stage where the parties express their ideas and aspirations for the future contract.[81]

If this stage of the formation of the contract has no substantial binding force between the parties, and its characteristics are more those of talks and loose conversations, why would we bind a third party who participated in it to the arbitration agreement that ultimately was agreed upon by the parties?

The answer may lie in the distinction between the civil law concepts of imputation and responsibility. In extending the arbitration clause, we deal with the issues of imputation of procedural effects rather than responsibilities. The imputation of the arbitral agreement to one who did not sign it "operates within the powers of the arbitration tribunal and defines the scope of arbitral jurisdiction."[82] On the other hand, responsibility refers to the substantial duties that arise from a contractual relationship. A non-signatory may be bound to arbitrate (procedural imputation), but have no liability under the contract (substantive responsibility).

The CISG, on the other hand, does not concern itself with the negotiation stage of contract formation. Part II of the CISG, Contract Formation, starts directly with the offer defined in Article 14 of the Convention.[83] This, however, will not relieve the non-signatory who may still be bound to arbitrate under a conflict of laws analysis.

Thus, participation of a non-signatory third party in the negotiation stage of a contract, even as a facilitator of communications, could subject the third party to arbitration despite the lack of express agreement.

ii. The Celebration

Once the parties become offeror and offeree, the celebration stage begins. This is a stage of pure contract law in which the offeror must present an offer to the offeree. Mere inquiries will not be enough to trigger the celebration stage.

Under Peruvian law, an offer requires (i) completeness—it must contain all necessary elements to create a contract; (ii) intent to be bound—it must carry the offeror's intent to be bound by a contract as soon as acceptance occurs. This element is regularly presumed if the offer is complete on its face; (iii) knowledge—the offer must be known by the intended offeree; and (iv) identify the offeror.[84]

If an offer contains such elements, the contract will be concluded at the time and moment when the offeror learns of the acceptance.[85] Learning of the acceptance requires "cognition" of the existence of the acceptance.[86] This is the so-called "cognitive theory" of acceptance and it involves the offeror's actual knowledge of the acceptance.[87]

To define the executory period of a contract under Peruvian law, we must first inspect the way promises are made.

The CISG requires basically the same conditions to consider a proposal to enter into a contract as an offer.[88] Under the CISG, an offer (i) must be addressed to someone specific, a person; (ii) must be sufficiently definite, indicating the goods and determining or allowing for the determination of quantity and price; and, much like Peruvian law, (iii) must indicate the offeror's intent to be bound by a contract if the offer is accepted.[89]

The celebration stage under the CISG ends with the acceptance becoming effective, which concludes the contract.[90] The CISG adopted the "reception theory."[91] Under Article 18(2), the CISG provides that an acceptance becomes effective when it reaches the offeror.[92] Reaching occurs when the offeree orally accepts the offer directly to the offeror or when it is delivered to him, personally, or in his place of business, mailing address, or habitual residence.[93] Unlike learning, reaching refers to the moment in which the acceptance arrives at the "offeree's sphere of interest … regardless of whether he actually knows of it."[94] This concludes the celebration stage under the CISG.

Thus, if a third-party non-signatory of the contract being concluded, participates in any of the stages of the celebration of the contract, by formulating an offer by delegation, by dispatching an acceptance that is later known by the offeror, or by facilitating any of these steps, it may find itself involved in an unwanted arbitration.

iii. The Performance

The performance of the contract is perhaps the most complex of the stages. It, of course involves the moment when the parties are performing their contractual obligations but these are not yet completed. This stage extends from the moment of formation until the moment when there are no remaining obligations between the parties, or when the contract has been completely performed.

The issue of when the contract is still executory has created lengthy debates. Black's Law Dictionary defines "executory contract" as that which is "wholly unperformed or for which there remains something still to be done on both sides."[95] The Countryman test, applied in bankruptcy cases, states that a contract is executory when it is "so far unperformed [by both parties] that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[96] This test, however, seems too narrow for our purposes.

To define the executory period of a contract under Peruvian law, we must first inspect the way in which promises are made. Much like in U.S. contract law, legal obligations under the Peruvian Civil Code can be reciprocal, imperfect-reciprocal, or unilateral. These obligations mirror the contractual commitments that parties to a contract make.

Reciprocal or bilateral (sinalagmatic) promises must be related to each other. This means that the obligations must be linked one to the other, so that one promise constitutes a condition precedent of the other party's promise and *vice-versa*.[97] The mere fact that each party assumed an obligation towards the other is not enough to create reciprocal obligations in the absence of a link between such promises.[98]

Imperfect-reciprocal obligations are those that arise by the unilateral promises of one party, which may cause, almost "accidentally," the rise of unrelated obligations from the other party.[99] These imperfect obligations may mutate and turn into reciprocal obligations if a link is created between them.[100]

Finally, unilateral obligations impose all contractual obligations on one party while the other, as a creditor, has only a "passive" role.[101]

Under the CISG, on the other hand, the performance of a contract is framed by the particular obligations of the seller and the buyer, and by the obligations common to both. These are, generally, delivery of the goods and handing over of documents, payment of price, taking delivery, conformity of goods, and preservation of goods, among others.[102]

Thus, under Peruvian law and, most likely, the CISG, the performance of contractual duties[103] is executory if, as described by Black's Law Dictionary, the contract or series of contracts are "wholly unperformed or … there remains something still to be done."[104] Because of the existence of the imperfect-reciprocal obligations in Peruvian law, which could unforeseeably create duties on the other party, and unilateral obligations, which only one party must fulfill, I have removed from the definition the condition that "both sides" must still have some remaining duty.

The third party non-signatory, who participates in fulfilling any of the contractual duties of the obligee . . . could find itself in arbitration, despite not having agreed to it.

This seems to be the most sensible interpretation of the performance requirement. The third party non-signatory, who participates in fulfilling any of the contractual duties of the obligee in a bilateral, unilateral, imperfect-reciprocal contract, or under the CISG, could find itself in arbitration, despite not having agreed to it.

iv. The Termination

Termination of a contract happens either because the contract was fully performed or because there was a breach.[105] Between those two possible outcomes there may be some shades of gray. Some may cause a breach to be excused, some may ameliorate liability. There may have been divisible obligations. It may have been impractical to perform the contract, or maybe the contract's purpose was frustrated. Perhaps the parties were mutually mistaken or they agreed to a novation or a complete abrogation of their duties and obligations under the contract. Possibly a condition precedent was not satisfied.

Of course, if the contract is fully performed according to its terms, there should be no conflict giving rise to arbitration. If, however, the contract was breached in any way, conflict is very likely. The analysis of every possible contractual breach or situation that may give rise to arbitration, under Peruvian law or the CISG, is unnecessary because the focus of our analysis is how to imply a third party's consent to arbitration from such breach.

My understanding of this situation will take us back to the equitable estoppel principle or the *venire contra factum proprium* doctrine mentioned above.[106] Under those principles, the only way a non-signatory could impliedly consent to arbitrate from a contractual termination is if the non-signatory's actions and involvement in the termination of the contract would make it inequitable to not bind them to the arbitration clause.

To reach such level of involvement, the third party non-signatory's participation must be outcome determinative.[107] It must be the cause-in-fact of the breach and not merely incidental to the breach. Only in such a circumstance would I consider the extension of the arbitration agreement possible in the termination of a contract.

c. Some International Case Law

The rule implemented by Article 14 has been adopted by some arbitration panels. ICC Award No. 1434 expressly states that an arbitration clause may be extended "based on an economic conception of the notion of a group of companies."[108] Other ICC cases, such as ICC Award No. 2375/1975, state that the extension of the clause should not be found in the formal independence created by the establishment of separate legal entities, but in the single economic orientation given by a common authority.[109]

In ICC Award No. 7626/1995, an arbitral tribunal sitting in London refused to use the group of companies doctrine to compel arbitration to a non-signatory.[110] Based on English law, the tribunal held that it did not have jurisdiction over the third party non-signatory of the arbitral agreement. The English Court of Appeals concurred with the arbitral tribunal, holding that only in circumstances in which the respondent, by means of its corporate structure, attempted to evade mandatory legal provisions or the enforcement of existing legal rights, will the third party company be considered subject to the arbitration agreement.[111]

In the U.S. the same rule applies. In the *Merrill Lynch Inv. Managers* case the court reasoned that a "willing signatory (such as Optibase) seeking to arbitrate with a non-signatory that is unwilling (such as [Merrill Lynch]) must establish at least one of the five theories described in *Thomson-CSF*."[112] The court further reasoned that separate legal entities should not be able to bind other separate legal entities absent any intention or factual evidence to the contrary intent.[113]

In France, decisions such as *Cotunav* extended the arbitration clause in a similar way the new Peruvian Arbitration Law is doing. In such a case, the French court extended the arbitration clause beyond the group to an unrelated carrier who simply provided transportation for goods sold in a contract between two unrelated parties. The court reasoned that because the carrier "intervened" in the performance of the contract of sale, it was bound by the arbitration clause found in it, which the carrier must have known.[114]

Generally, because arbitration is a creature of agreement, a signatory to arbitration cannot compel a non-signatory to arbitrate under the estoppel theory.

These cases show that the extension of the arbitration clause is a controversial issue that requires more study and discussion, as well as very cautious approximation.

ii. Deriving Benefits

In its second sentence, Article 14 of the new Peruvian Arbitration Law also adopts the "direct benefits estoppel" theory to bind non-signatories to an arbitration agreement. In civil law countries, like Peru, the concept of estoppel or *venire contra factum proprium* is seldom applied.[115]

If used, direct benefits estoppel should "appl[y] when a non-signatory 'knowingly exploits the agreement containing the arbitration clause.'"[116] This doctrine is based on the premise that a party may not claim the benefit of a contract and simultaneously avoid its burden (the arbitration clause) by claiming that, as a non-signatory, it cannot be compelled to arbitrate.[117]

A restatement of this principle provides that "a non-signatory cannot be bound without receiving a 'direct benefit' from or pursuing a 'claim ... integrally related to the contract containing the arbitration clause.'"[118] The benefit obtained must be "direct" or significant, as opposed to minor or incidental.[119]

An example of a direct benefit obtained from pursuing a claim presents itself when "a buyer who is a non-signatory to a sales contract attempts to enforce a contract's guarantees without complying with an arbitration provision contained in said contract."[120]

Generally, because arbitration is a creature of agreement, a signatory to arbitration cannot compel a non-signatory to arbitrate under the estoppel theory.[121] The general dislike for this legal theory was expressed in the *Thomson-CFS* case where the court stated that unless another exception is applicable to extend the arbitration clause to a non-signatory, a party cannot be estopped from denying the existence of an arbitration clause to which it is a non-signatory, because no such clause exists.[122]

Also, in the *Kellogg* case, the court concluded that "if a non-signatory's claim [as the warranty claim mentioned above] can stand independently of the underlying contract of the signatories,

arbitration should not be compelled under the direct benefits estoppel theory."[123]

Thus, direct benefits estoppel is used and will be used as it has a more reasonable basis than the group of companies doctrine. With estoppel, we are analyzing the actual interaction between the parties and the non-signatory from the perspective of the non-signatory's own actions and statements. It is reasonable to hold the non-signatory to them.

Nonetheless, my concern with these theories rests in their daily application in practice. They unfortunately lend themselves to abuses and give the arbitrators too much discretion. Sometimes I wonder if perhaps it should be that way. In the end the arbitration process is only as good as the arbitrators who decide it; it is the parties' responsibility to select wisely.

V. Potential Difficulties Enforcing Awards Under Article 14

In Peru, just like in many other jurisdictions, when a respondent is brought to arbitration, the challenge to the validity of the arbitration clause and the arbitrator's jurisdiction is decided by the arbitrators themselves. They are the ones responsible to rule on their own jurisdiction under the principle of Kompetenze-Kompetenze.[124]

The challenge of the arbitrator's decision as to the validity of the arbitration clause or their own jurisdiction to hear the case can only be brought to the courts attention in an annulment proceeding under Article 62 and 63 of the new Peruvian arbitration law.[125] This kind of challenge has been described as an "offensive attack on the award in the place of arbitration."[126] I would classify this attack as a "direct attack" on the award.[127]

Then later, if international enforcement is attempted, a challenge to the enforceability of the award can be made under Article V of the New York Convention.[128] This attack could be classified as a "collateral attack" on the award.[129]

International enforcement of an award, if within the Americas, could also be analyzed under Article 5 of the Inter-American Convention on International Arbitration,[130] which is almost identical to that of the New York Convention; we will focus only on the latter one.

Even in countries where the strict formal writing requirement has been relaxed, some evidence of an agreement to arbitrate is still required.

The two issues that may arise on annulment or enforcement are the existence of an agreement to arbitrate and the issue of public policy in the country of enforcement. Let us briefly address each in turn.

A. THE EXISTENCE OF AN AGREEMENT TO ARBITRATE

There may be two possible routes to challenge an arbitral award issued against a party compelled to arbitrate under Article 14 of the new Peruvian Arbitration Law, both based on the existence of an agreement to arbitrate. These challenges will take place in the place of arbitration, under the *lex loci arbitri*.[131] One is the validity of the implied consent. The other would be the application of Article 14 in the absence of an arbitration agreement.

First, as discussed before, consent to arbitrate, whether in writing or not, is necessary to compel arbitration.[132] Even in countries where the strict formal writing requirement has been relaxed, some evidence of an agreement to arbitrate is still required.[133] If, in our case, the arbitral tribunal exceeded its interpretative capacities by improperly binding a non-signatory on an implied consent basis, the non-signatory can challenge the award based on Article 63(1)(a). This Article provides that an award may be annulled if "the arbitral agreement is inexistent, void, voidable, invalid or ineffective."[134]

The arbitral award will be vacated if the non-signatory respondent could prove on annulment proceedings, under Peruvian law or under the law that governs the contract, (e.g. the CISG) that (i) his consent was not implied in good faith; or (ii) it was improperly implied, under either contractual law (participation in the formation, performance, or termination of the contract) or obligations law (direct estoppel).

Second is the application of Article 14 in the absence of an arbitration agreement, as provided in Article 63(1)(c). This Article states that "[t]he composition of the arbitral tribunal or the arbitral procedure was not in accordance with the [arbitral] agreement of the parties ... or, failing such agreement [to arbitrate], was not in accordance with this Legislative Decree."[135]

In case of Article 14, there would not be an agreement. Consent is being implied, which is not the same as having agreed, thus we fall within the "failing such agreement" clause

of Article 63(1)(c).[136] The non-signatory respondent could claim that because of an arbitral tribunal's error in the interpretation or application of Article 14, the composition of the arbitral tribunal or the arbitral procedure "was not in accordance with this Legislative Decree" and thus the award shall be annulled.[137]

If any annulment is to proceed, however, the non-signatory must have raised these issues before the arbitral tribunal and obtained a negative ruling.[138] The effect of the annulment will be that the award is set aside and considered ineffective or inexistent.

B. PUBLIC POLICY IN THE COUNTRY OF ENFORCEMENT

When international enforcement is attempted, new mechanisms to challenge the award arise under Article V of the New York Convention.[139] It is worth noting that this attack will not invalidate or annul the award, it will only prevent its enforcement in the attempted jurisdiction.

Article V(2)(b) of the New York Convention provides in its relevant part that, "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… the recognition or enforcement of the award would be contrary to the public policy *of that country*."[140] (Emphasis added).

While this Article emphasizes (i) a different law relevant for enforcement, the law of the state of enforcement, and (ii) different considerations for refusal of enforcement, as is public policy, what is most relevant about it is the protection that it may provide.[141] This article may provide a tool to protect the non-signatory, compelled to arbitrate in Peru under Article 14, from enforcement in a different country.[142]

The public policy exception to enforcement, however, is not favored. This is because there is a pro-enforcement policy or "*favor arbitrandum*" implied within the New York Convention.[143] For example, English courts are "reluctant to excuse and award from enforcement on grounds of public policy."[144] Also, this exception is narrowly interpreted,[145] making it difficult to expand the exception beyond those "fundamental principles"[146] of the enforcement country's legal system which, if violated, would offend the most basic feelings of justice in such country.[147]

Notwithstanding these arguments, the amorphous nature of public policy detracts from the clarity of its interpretation and blurs its limits.[148] This may allow a non-signatory to successfully challenge an award. Although the analysis is fact specific, the basis for this challenge would be the country of enforcement's proclivity to accept the extension of the arbitral agreement on the grounds provided for in Article 14.

The public policy exception to enforcement, however, is not favored.

This proclivity may be assessed based on the laws of the place of enforcement. Most arbitration laws in the world do not expressly provide for the extension of the arbitration clause.[149] In addition, most have opted for Option I of Article 7 of the UNCITRAL Model Law on International Arbitration, requiring the agreement to arbitrate to be in writing.[150] Under those circumstances, the challenge to the extension of the arbitration clause under Article 14 could gain traction. The public policy considerations could play an important role, as the extension may offend the "fundamental principles"[151] of the enforcement country's legal system.

This would be the case of the enforcement of the award in England, where the group of companies doctrine has been expressly rejected.[152] Enforcement of an award applying the hybrid group of companies doctrine of Article 14 would most likely fail. On the other hand, in France, it would probably be accepted, as France has embraced the group of companies doctrine, unless the contractual bases for extension, discussed above, are not sufficiently clear.

In general, it would be fair to say that if the country of enforcement has not adopted, either by statute or precedent, the validity of the group of companies or estoppel doctrines, then enforcement courts will look long and hard at any attempted enforcement in their jurisdictions of an award based on the application of Article 14.

VI. Other Concerns and Suggestions Regarding Article 14

In my opinion, Article 14 reflects some of the hastiness that the Peruvian Executive had with the implementation package for the TPA. If the Peruvian Executive, through its legislative authority, considered it important to include an article authorizing the extension of the arbitration clause, I would have preferred to see a text like the following:

Article 14. Extension of the Arbitration Agreement.

The arbitration agreement extends to those whose consent to submit to arbitration, may be implied, in good faith, by the application of the law of obligations or the law of contracts, giving due regard to the contract as written, and the parties' intentions, including that of the non-signatory.

This text would force the arbitrator to refer back to two very well-developed bodies of law—obligations and contracts—and imply consent in any of the narrow circumstances in which such laws would allow it. The arbitrator would be forced to focus her analysis of the case from the perspective of the contract as written. In addition, the arbitrator would have some guidance in looking at the intent of the parties, including the non-signatory, to determine the willingness to be bound by the arbitration clause from any manifestation of intent.

My other concern is the application of the Article 14 on the face of Article 1363 of the Civil Code.[153] Article 1363 expressly limits the effects of a contract to the executing parties and their heirs.[154] Because the arbitration agreement is indeed a contract, its effects should be limited as provided by article 1363. This is called the "relativity rule" of contract law, which intends to convey that a contract is not "an unlimited source of juridical relations"[155] and should not bind third parties.[156] This rule, however, seems to be based on the State's intention to limit the protection provided to private contracts.[157] If that is the case, the State can expand at will the limits of such protection. An additional argument could be made on statutory interpretation, based on the principle that a special law prevails over a general law. Here the special arbitration law would prevail over the general provisions of the Civil Code.

In any case, despite my concerns, I am sure some scholars and practitioners will consider Article 14 useful as it clarifies whether the country or national courts will follow the group of companies doctrine and whether estoppel could be applied in a civil law country like Peru. This at least allows for proper drafting and planning.

VII. Conclusion

In sum, has Peru gone too far by allowing the extension of the arbitration agreement in the way provided for by Article 14? In my opinion, yes. Article 14 of the new Peruvian arbitration law is a unique codification of case law and scholarly opinion that is neither clear nor widespread. It adopts two very controversial theories. First, a hybrid group of companies theory, which has only been accepted in a handful of jurisdictions and rejected in many others. Then, an estoppel theory which although widely accepted, in common law jurisdictions is rarely applied and mostly obscure in civil law jurisdictions.

As I see it, Article 14 presents a number of problems that do not have clear answers, giving the arbitral tribunal too much discretion to bind a non-signatory and the courts a very limited ability to annul the award or deny enforcement. I would have liked to see more guidance for the arbitrators in determining the application of good faith. I would have also liked to see more guidance as to when a party has had an active and determinative participation in the negotiation, celebration, performance or termination of the contract. It would have also been useful to have some guidance as to what it means to derive benefits.

I believe the theories incorporated in Article 14 could be described in the same way the British courts illustrated the public policy concept, like a "very unruly horse,"[158] which in the hand of a "good [rider] … can be kept in control."[159] This means that the arbitrators have substantial responsibility while in the "saddle" of an arbitral procedure calling for the application of Article 14.

Caveat Arbiter, because you will have to exercise your best legal control of the process and be very severe and precise about your ability to actually bind a non-signatory to the arbitration. Your analysis should be directed by the premise that consent to arbitrate is a requisite *sine qua non* for any arbitration, and that arbitration is considered a personal right or duty, not assignable or delegable.[160] If you fail in this endeavor, there may be serious consequences. The award may be unenforceable in another country, wasting time and money; or, the arbitrators may be promoting, albeit unintentionally, the rise of precedent that could allow for the general rule of express consent to be swallowed by the exception of implied consent.

There may also be other consequences. Peru may be disfavored as a place for arbitration. Parties will not want such provision to govern their case either as *lex loci arbitri* nor as *lex loci contractus*.[161] Thus, Peru will not be selected as a place for arbitration and Peruvian law will not be chosen as substantive law.

The solution to some of these problems will hinge on the actual application of Article 14, which has not yet been applied. There are cases in process, but no final awards interpreting such Article.[162] It can be

expected that its application will be affected by scholarly articles, and other opinions as well as international authorities. Therefore, we will have to wait for authorities to develop and cases to be decided. Only time will tell.

End Notes

* To my wife Brandy, and my children Alexandra & Nicolas, for their love, support and patience.

1. *See* MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999) (holding that a signatory to an arbitration agreement can be compelled to arbitrate against a non-signatory defendant at the non-signatory's request); *see also* Choctaw Generation L.P. v. Am. Home Assur. Co., 271 F.3d 403 (2d Cir. 2001) (showing courts proclivity to compel arbitration at the non-signatory's request).
2. Organization of American States [OAS], Foreign Trade Info. Sys. [SICE], http://www.sice.oas.org (follow "Trade Policy Developments" hyperlink tab; then under "Agreements in Force" follow "Peru-United States" hyperlink) (last visited Aug. 31, 2009).
3. *See* Bilaterals.org, TLC: Colombia y Perú a un paso de claudicar [FTA: Colombia and Peru one step from surrender], Sept. 8, 2005, http://www.bilaterals.org/article.php3?id_article=2680; *see also* Perú21, *Toledo: Negociación técnica llego al limite* [Toledo: Technical negotiation reached its limit], Oct. 28, 2005, *available at* http://peru21.pe/impresa/noticia/toledo-negociacion-tecnica-llego-al-limite/2005-10-28/47161.
4. SICE, *supra* note 2 (follow "14-22 November 2005, Washington, D.C.: XIII round of negotiations" hyperlink).
5. *Id.*
6. Resolución Legislativa No. 28766, June 28, 2006, Resolución Legislativa que Aprueba el "Acuerdo de Promoción Comercial Perú - Estados Unidos" [Resolución No. 28766] [Congress Resolution Approving the "Peru - United States Trade Promotion Agreement"], Official Gazette "El Peruano" [O.G.], June 29, 2006 (Peru); *see also* Tratado de Libre Comercio Perú-EE.UU. [Spanish text of U.S.-Peru Free Trade Agreement] (2006), http://www.tlcperu-eeuu.gob.pe/index.php?ncategoria1=209&ncategoria2=215; U.S.T.R., Final Text of the United States-Peru Trade Promotion Agreement (2006), http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html (last visited Aug. 31, 2009).
7. Editorial, *US Officials Reach Agreement on Trade Deals to Open Way for Peru, Panama, Other Pacts*, Int'l Herald Trib., May 10, 2007, *available at* http://www.illegal-logging.info/item_single.php?it_id=2095&it=news.
8. United States-Peru Trade Promotion Agreement Implementation Act, Pub. Law 110-138, § 101(a)(1), 121 Stat. 1455, 1456-67 (2007).
9. Resolución No. 28766, *supra* note 6.
10. H.R. Res. 3688, 110th Cong. (2007) (enacted).
11. *Id.*
12. President Bush and President Garcia of Peru Sign H.R. 3688, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2007/12/20071214-8.html.
13. *Id.*
14. Ley No. 26572, Dec. 20, 1995, Ley General de Arbitraje [Ley No. 26572] [General Arbitration Law], O.G., January 5, 1996 (Peru).
15. Ley No. 29157, Dec. 18, 2007, Ley que Delega en el Poder Ejecutivo la Facultad de Legislar sobre Diversas Materias Relacionadas con la Implementación del Acuerdo de Promoción Comercial Perú - Estados Unidos, y con el Apoyo a la Competitividad Económica para su Aprovechamiento [Ley No. 29157] [Law that Delegates Legislative Authority on Diverse Issues Related to the Implementation of the U.S. – Peru Trade Promotion Agreement and the Improvement of Economic Competitiveness for its Use], O.G., December 20, 2007 (Peru).
16. *See* Ley No. 29157, *supra* note 15, art. 2.1(b)-(c).
17. Decreto Legislativo No. 1071, June 27, 2008, Decreto Legislativo que Norma el Arbitraje [D.L. No. 1071] [Legislative Decree Regulating Arbitration], O.G., June 28, 2008 (Peru).
18. *See* Ley No. 26572, *supra* note 14.
19. *See* D.L. No 1071.
20. *See* Preamble, U.S. – Peru Trade Promotion Agreement, U.S.T.R., Final Text of the United States - Peru Trade Promotion Agreement, http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_ Index.html.
21. Tratado de Libre Comercio Perú-EE.UU., "Objetivos Generales del TLC" [General Objectives of the TPA] http://www.tlcperu-eeuu.gob.pe/index.php?ncategoria1=101&ncategoria2=102 (last visited Aug. 31, 2009).
22. Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 148 (Sweet & Maxwell 4th ed. 2004).
23. *See* Silvia Gaspar Lera, El Ámbito de Aplicación del Arbitraje 79 (1998) (referring to arbitration as a personal right - "derecho personalísimo").
24. Martin Domke, Gabriel M. Wilner, & Larry E. Edmondson, Domke on Commercial Arbitration (The Law and Practice of Commercial Arbitration) § 13:2 (West 3d ed. 2003).
25. *See generally* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. Foreign Inv. L.J., 232, 233 (1995) (describing the concept of Arbitration without Privity).
26. *See* Bernard Hanotiau, *Non-Signatories in International Arbitration: Lessons from Thirty Years of Case Law*, *in* International Council For Commercial Arbitration [ICCA], International Arbitration 2006: Back to Basics? 343 (Albert Jan van den Berg ed., Kluwer Law Int'l 2007) (explaining that the term "extension" may be wrong because "courts and arbitral tribunals still base their determination … on consent." Thus, there is no real extension.); *see also* William W. Park, N*on-Signatories and International Arbitration*, *in* The Leading Arbitrators' Guide to International Arbitration 553, 553-54 (Lawrence W. Newman & Richard D. Hill eds., Juris Publishing, Inc. 2nd ed. 2008)(distinguishing between the continental expression "extension" and the common law expression "joining").
27. *See* Bernard Hanotiau, Complex Arbitrations, Multiparty, Multicontract, Multi-Issue and Class Actions 7-9 (Kluwer Law Int'l 2005).
28. *See id.* at 105.
29. *See generally* Jack H. Friedenthal, Mary K. Kane & Arthur R. Miller, Civil Procedure 350-65 and 380-85 (Thomson West 4th ed. 2005) (discussing methods such as Permissive Joinder, Compulsory Joinder and Impleader or Third-Party Practice).
30. Bernard Hanotiau, *supra* note 26.
31. Ben H. Sheppard, Jr., Presentation to the Houston Bar Ass'n Int'l L. Section: Commercial Arbitration. An Overview of the Preliminary Stages of the Arbitral Process (May 31, 2007) (on file with publication).
32. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (citing H. R. Rep. No. 68-96, at 2 (1924); S. Rep. No. 68-536 (1924)).
33. Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kroll, Comparative International Commercial Arbitration 102 (Kluwer Law Int'l 2003) (explaining that "[t]he doctrine of separability recognizes the arbitration clause in a main contract as a separate contract, independent and distinct from

the main contract. … [It] protects the integrity of the agreement to arbitrate …").

34. *See* Thomson-CSF, S.A. v Am. Arbitration Ass'n, 64 F.3d 773, 776-80 (2d Cir. 1995); *see also* Ben H. Sheppard, *supra* note 31, at 20; *see also* William W. Park, *supra* note 26, at 554-55.
35. *See* Thomson-CSF, 64 F.3d at 776-80; *see also* Ben H. Sheppard, *supra* note 31, at 20; *see also* Bernard Hanotiau, *supra* note 26, at 343-46.
36. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *International Commercial Arbitration: Draft Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Annex I (1985), *reprinted in* 16 Y.B. of the UNCITRAL 46 [hereinafter Model Law]; *see also* Resolution Approving the Model Law on International Commercial Arbitration of the United Nations Commission on International Commercial Arbitration, G.A. Res. 40/72, at 308, U.N. GAOR, 40th Sess., 112th plen. mtg., U.N. Doc. A/RES/40/72 (Dec. 11, 1985); Resolution Approving the Revised Articles of the Model Law on International Commercial Arbitration, G.A. Res. 61/33, U.N. GAOR, 61th Sess., 64th plen. mtg., U.N. Doc. A/RES/61/33 (Dec. 4, 2006).
37. *See* Model Law, Comments, at 28.
38. *See* Jean-François Poudret & Sebastian Basson, Comparative Law of International Arbitration 227 (Stephen Berti & Annette Ponti, trans., Sweet & Maxwell 2d ed. 2007); *see also* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).
39. *See* International Commercial Arbitration (Eric E. Bergsten ed., Oceana Publ'n 2001).
40. *See* Jean-François Poudret et al., *supra* note 38, at 227-28.
41. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2000).
42. Thomson-CSF, S.A. v. Am. Arbitration Ass'n; 64 F.3d at 773, 780 (2d Cir. 1995).
43. *See* Arbitration Act, 1996, c.23, §§ 5, 6 & 7 (Eng.) *available at* http://www.opsi.gov.uk/Acts/acts1996/ukpga_19960023_en_1.
44. *See* Redfern & Hunter, *supra* note 22, at 150 (citing to Peterson Farms Inc. v C&M Farming Ltd [2004] EWHC 121 (Comm) (Eng.) where the courts of England rejected the group of companies doctrine to bind non-signatories).
45. *See* John M. Townsend, *NonSignatories in International Arbitration: An American Perspective*, *in* International Council for Commercial Arbitration [ICCA], International Arbitration 2006: Back to Basics? 359 (Albert Jan van den Berg ed., Kluwer Law Int'l 2007) (noting that the U.S. has "made a disproportionate contribution" to the law in this subject).
46. *See* D.L. No. 1071, art. 14 (Artículo 14.- Extensión del convenio arbitral. El convenio arbitral se extiende a aquellos cuyo consentimiento de someterse a arbitraje, según la buena fe, se determina por su participación activa y de manera determinante en la negociación, celebración, ejecución o terminación del contrato que comprende el convenio arbitral o al que el convenio esté relacionado. Se extiende también a quienes pretendan derivar derechos o beneficios del contrato, según sus términos.) (liberal translation by the author).
47. Dow Chemical France v. Isover-Saint-Gobain, Interim Arbitral Award, ICC Case No. 4131 of 1982, IX YBCA 131, 133 (1984); 1983 J. du Droit Int'l, 899 (1983).
48. *See* Adkins v. Labor Ready, Inc., 185 F. Supp. 2d 628, 641 (S.D.W. Va. 2001); *see also* C. Ignacio Suárez Anzorena, *Algunas Notas sobre los Grupos de Sociedades y los Alcances del Acuerdo Arbitral Según la Practica Internacional*, 2 Rev. Int'l De Arb. 55, 61 (2005); William W. Park, *supra* note 26, at 576.
49. *See* C. Ignacio Suárez Anzorena, *supra* note 48, at 63.
50. *See id.* at 62.
51. *See* Redfern & Hunter, *supra* note 22, at 150.
52. Blaise Stucki & Schellenberg Wittmer, Speech at ASA Below 40 Conference: Extension of Arbitration Agreements to Non-Signatories ¶ 22, at 5 (2006), *available at* http://www.arbitration-ch.org/below-40/pdf/extension-bs.pdf.
53. *See* Bernard Hanotiau, *supra* note 26, at 343; *see also* C. Ignacio Suárez Anzorena, *supra* note 48, at 63 (citing to ICC Case No. 6519); Thomson-CSF, S.A. v Am. Arbitration Ass'n, 64 F.3d 773, 777 (2d Cir. 1995).
54. *See* Bernard Hanotiau, *supra* note 26, at 343; *see also* C. Ignacio Suárez Anzorena, *supra* note 48, at 63 (citing to ICC Case No. 6519).
55. Bernard Hanotiau, *supra* note 26, at 344.
56. *Id.*
57. Decreto Legislativo No. 1071, June 27, 2008, Decreto Legislativo que Norma el Arbitraje [D.L. No. 1071] [Legislative Decree Regulating Arbitration], art. 14, O.G., June 28, 2008 (Peru).
58. *See* Jean-François Poudret et al., *supra* note 38, at 181; *see also* William W. Park, *supra* note 26, at 555.
59. D.L. No. 1071, art 14.
60. *See* C. Ignacio Suárez Anzorena, *supra* note 48, at 63.
61. UNCITRAL, Status Report: 1980 - United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (describing Peru as a party to the CISG since March 25, 1999 having entered into force on April 1, 2000).
62. Código Civil [Cód.Civ.][Civil Code], art. 1362, O.G., July 25, 1984 (Peru).
63. *Id.*
64. Lisa Spagnolo, *Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG*, 21 Temp. Int'l & Comp. L.J. 261, 275 (2007)(stating that "good faith has so many meanings that it becomes meaningless.").
65. Manuel de la Puente y Lavalle, El Contrato en General: Comentarios a la Sección Primera del Libro VII del Código Civil: Primera Parte, (Artículos 1351 a 1413) [The Contract in General: Commentary to the First Section of Book VII of the Civil Code: First Part, (Articles 1351 to 1413)], Vol. II, at 25 (Editorial Fund of the Catholic University of Peru 3d ed. 1996).
66. *Id.* at 36.
67. *See* Cód.Civ., art. 1362; *see also* Manuel de la Puente, *supra* note 65, at 34.
68. *See* Manuel de la Puente, *supra* note 65, at 25.
69. Manuel de la Puente, *supra* note 65, at 28 (citing Delia Matilde Ferreira Rubio, La Buena Fe, [Good Faith] 91, 184 (1984))(liberal translation by the author).
70. United Nations Convention on Contracts for the International Sales of Goods – CISG, Apr. 11, 1980, 52 F. Reg. 6262, 6264-80 (Mar. 2, 1987)[hereinafter CISG] *available at* http://www.uncitral.org/pdf/english/texts/ sales/cisg/CISG.pdf.
71. UNCITRAL Secretariat on the CISG, Explanatory Note ¶ 13 (1980) http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf.
72. The Honorable Ulrich Magnus, *Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts*, 10 Pace Int'l L. Rev. 89, 91 (1998).
73. *Id.*
74. *See* Lisa Spagnolo, *supra* note 64, at 273.
75. *Id.* at 275-76.
76. *See* Ulrich Magnus, *supra* note 72, at 92.
77. *See* Ludwig Enneccerus, Theodor Kipp & Martin Wolff, Tratado de Derecho Civil [Treatise on the Civil Law], Vol. II, Part I, at 33 §6.IV.2 (Blas Pérez & José Alguer trans., Bosch, Casa Editorial 1953); *see also* Ulrich Magnus, *supra* note 72, at 92.
78. *See* Manuel de la Puente, *supra* note 65, at 51.
79. *See id.* at 52.
80. Comisión Encargada del Estudio y Revisión del Código Civil, Código Civil Peruano. Exposición de Motivos y Comentarios, Vol. IV, Part III, at 26 (Delia Revoredo de DeBakey ed., 1985); *see also* Manuel De La Puente, *supra* note 65, at 61.
81. *See generally* Manuel De La Puente, *supra* note 65, at 53 – 58 (explaining the non-binding character of the preliminary negotiations).
82. C. Ignacio Suárez Anzorena, *supra* note 48, at 71.
83. CISG, art. 14.
84. *See* Manuel de la Puente, *supra* note 65, at 213-16.
85. *See* Cód.Civ., art. 1373.
86. *See* Marcel Planiol & Georges Ripert, Treatise on the Civil Law, Vol. II, Part I, at 568-70 ¶ 984-90 (Louisiana State Law Inst. trans., 1959); *see also* Manuel De La Puente, *supra* note 65, at 253.
87. *See* Webster's II New Riverside University Dictionary 278 (1988) (defining "cognition" as actual knowledge of a fact).
88. CISG, art. 14.
89. *Id.*
90. CISG, art. 23.
91. *See* Manuel de la Puente, *supra* note 65, at 255-60.
92. CISG, art. 18(2).
93. *Id.* art. 24; *see also* CISG Database, Guide to CISG Art. 24, Secretariat Comment. on Art. 22 Of The 1978 Draft, http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-24.html.
94. Manuel de la Puente, *supra* note 65, at 255 (citing Luis Díez Picazo, Fundamentos del Derecho Civil Patrimonial, Vol. I at 242 (1976)).
95. Black's Law Dictionary 144 (3rd pocket ed. 2006).
96. Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1972-1973).
97. *See* Manuel de la Puente Y Lavalle, El Contrato en General: Comentarios a la Sección Primera del Libro VII del Código Civil: Segunda Parte, (Artículos 1441 a 1528) [The Contract in General: Commentary to the First Section of Book VII of the Civil Code: Second Part, (Articles 1441 to

1528)], Vol. IV, at 185 (Editorial Fund of the Catholic University of Peru 2d ed. 1996).
98. *Id.* at 183.
99. *Id.* at 204 (citing Robert J. Pothier, Tratado de las Obligaciones [Treatise On Obligations] 214 (1947)).
100. *Id.* at 212.
101. *Id.* at 203.
102. *See* CISG, *supra* note 70, ch. III, IV, & V.
103. The Peruvian Civil Code refers to "Prestaciones," translated as "contractual duties," which constitute the actual thing that must be given or transferred or the act that must be performed, or not performed. This as opposed to "Obligaciones," translated as "Obligations," which constitute the abstract relationship between the parties, to give, do or not do.
104. Black's Law Dictionary 144 (3rd pocket ed. 2006).
105. *See* Cód.Civ., art. 1428 (explaining that upon breach of the contract the non-breaching party may request either specific performance or damages).
106. Ulrich Magnus, *supra* note 72, at 92.
107. *See* J.J. Ryan & Sons, Inc. v. Rhône Poulenc Textile, 863 F.2d 315 (4th Cir. 1988) (showing that defendant's, Rhone Polenc Textile, actions directing or ordering its subsidiaries to terminate the agreements with JJ Ryan are outcome determinative).
108. *See* Jean-François Poudret et al., *supra* note 38, at 215 n.466 (citing ICC Award No. 1434, Collection of ICC Arbitral Awards, Recueil des Sentences Arbitrales de la CCI, 1974-1985 at 261 (Sigvard Jarvin & Yves Derains eds. 1990)).
109. ICC case 2375/1975, Collection of ICC Arbitral Awards, Recueil des Sentences Arbitrales de la CCI, 1974-1985 at 262 (Sigvard Jarvin & Yves Derains eds. 1990).
110. *See* Bernard Hanotiau, Complex Arbitrations, Multiparty, Multicontract, Multi-issue and Class Actions 69 (Kluwer Law Int'l 2005).
111. *Id.*
112. Merrill Lynch Inv. Managers v. Optibase, Ltd., 337 F.3d 125, 131 (2d Cir. 2003).
113. *Id.* at 131-32.
114. *See* Jean-François Poudret et al., *supra* note 38, ¶ 256, at 219, and ¶ 265, at 229 (both paras. citing *Cotunav*, Rev. Arb. 75 (1990)).
115. *See* Bernard Hanotiau, *supra* note 110, ¶ 41, at 20.
116. Clint A. Corrie, Challenges in International Arbitration for Non-Signatories, Comp. L. Y.B. Int'l Bus. 60, 61 (2007) *available at* http://www.iln.com/articles/pub_488.pdf.
117. *See* Redfern & Hunter, *supra* note 22, at 150 n.8 (citing Avila Group v. Norma J of California, 426 F. Supp. 537, 542 (S.D.N.V. 1977)).
118. Clint A. Corrie, *supra* note 116, at 62 (citing Thomson - CFS).
119. *See* Redfern & Hunter, *supra* note 22, at 150.
120. Bernard Hanotiau, *supra* note 110, at 24.
121. *See* Martin Domke, *supra* note 24, § 13:1 at 13-2.
122. *See* Thomson-CFS, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995).
123. *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739-40 (Tex. 2005).
124. *See* Redfern & Hunter, *supra* note 22, at 252 (explaining that the principle of "Kompetenze-Kompetenze" represents the inherent power of the tribunal "to decide upon its own jurisdiction."); *see also* D.L. No. 1071, art. 41 (incorporation of the Kompetenze-Kompetenze principle).
125. *See* D.L. No. 1071, arts. 62-63.
126. Joseph Morrissey & Jack Graves, International Sales Law and Arbitration: Problems, Cases, and Commentary 463 (Kluwer Law Int'l 2008).
127. *See* Kevin M. Clermont, Principles of Civil Procedure 312 (Thomson West 2d ed. 2005) (defining direct attack as an appeal); *see also* Dictionary.com, Legal Dictionary, http://dictionary.reference.com/browse/attack. (last visited Sept. 09, 2009)(defining "direct attack" as "an attack on a judgment made in a proceeding (as an appeal) brought for the specific purpose of having the judgment corrected or overturned.").
128. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517; 330 U.N.T.S. 38 [hereinafter New York Convention]; *see also* 9 U.S.C.S. § 201 (LexisNexis 2009) (directing the enforcement of the New York Convention in United States courts).
129. Kevin M. Clermont, *supra* note 127, at 312; *see also* Dictionary.com, Legal Dictionary, http://dictionary.reference.com/browse/attack (last visited Sept. 09, 2009)(defining "collateral attack" as "an attack on a judgment made during or by a proceeding brought for a different purpose" such as a *habeas corpus* proceeding).
130. Organization of American States, Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.5. No. 42, 14 I.L.M. 336 (1975) [hereinafter Inter-American Convention].
131. Joseph Morrissey & Jack Graves, *supra* note 126, at 463.
132. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002); Bernard Hanotiau, *supra* note 110, at 52-54.
133. *See* Jean-François Poudret et al., *supra* note 38, at 227.
134. D.L. No. 1071, art. 63(1)(a).
135. D.L. No. 1071, art. 63(1)(c).
136. *Id.*
137. D.L. No. 1071, art. 63(1).
138. *Id.*, art. 63(2).
139. New York Convention, art. V.
140. *Id.*, art. V(2)(b).
141. *See* Redfern & Hunter, *supra* note 22, at 444 – 59; *see also* Joseph Morrissey & Jack Graves, *supra* note 126, at 473.
142. *See* Joseph Morrissey & Jack Graves, *supra* note 126, at 477 (referring to the public policy exception as the most fertile ground for court disputes).
143. Bernard Hanotiau & Oliver Caprasse, *Public Policy in International Commercial Arbitration*, *in* Enforcement of Arbitration Agreements and International Arbitration Awards: The New York Convention in Practice, 787, 802-04 (Emmanuel Gaillard & Domenico DiPietro eds., Cameron May 2008).
144. *See* Redfern & Hunter, *supra* note 22, at 456.
145. Joseph Morrissey & Jack Graves, *supra* note 126, at 480 (citing to Supreme Court of Korea, Adviso N.V. v. Korea Overseas Constr. Corp., Feb. 14, 1995, 93Da53054, Enforcement of Award Case (R.O. Korea 1995) *reprinted in* XXI Y.B. Com. Arb. 612-16 (1996)).
146. *See* Redfern & Hunter, *supra* note 22, at 459 (quoting K.S.A.G. v. C.C. SA., XX Y.B. Com. Arb. 762 (1995)).
147. *See id.* at 458; *see also* Joseph Morrissey & Jack Graves, *supra* note 126, at 480-81 (citing to Supreme Court of Korea, Adviso N.V. v. Korea Overseas Constr. Corp., Feb. 14, 1995, 93Da53054, Enforcement of Award Case (R.O. Korea 1995) *reprinted in* XXI Y.B. Com. Arb. 612-16 (1996)); Hanotiau & Caprasse, *supra* note 143, at 788.
148. *See* Redfern & Hunter, *supra* note 22, at 459; *see also* Joseph Morrissey & Jack Graves, *supra* note 126, at 482.
149. International Commercial Arbitration, *supra* note 39; *see also* National Arbitration Laws (Hans Smit, Thomas E. Carbonneau, and Loukas A. Mistelis eds., Juris Net 2007).
150. *See* Model Law, *supra* note 36, art. 7, Opt. I.
151. *See* Redfern & Hunter, *supra* note 22, at 459 (quoting the German Federal Supreme Court [Bündesgerichtshof], XX Y.B. Com. Arb. 489 (1987)).
152. John Leadley & Liz Williams, Peterson Farms: There is no Group of Companies Doctrine in English Law, http://www.bakernet.com/NR/rdonlyres/5780A31F-14DE-4FD2-B1A5-F6DCA447CD6B/34239/petersonfarms.pdf.
153. *See* Cód.Civ., art. 1363.
154. *Id.*
155. *See* Manuel De La Puente, *supra* note 65, at 105.
156. *Id.* at 121.
157. *Id.* at 103.
158. Joseph Morrissey & Jack Graves, *supra* note 126, at 483.
159. *Id.*
160. *See* Redfern & Hunter, *supra* note 22, at 148; *see also* Silvia Gaspar Lera, *supra* note 23, at 79.
161. *See* Jean-François Poudret et al., *supra* note 38, ¶ 265, at 229-30 (referring to the stern warning issued by Professor Georges Delaume when France adopted the group of companies doctrine. However, as I see it, France continues to be a favored place for arbitrations and the seat of the most important arbitration institution in the world-the International Chamber of Commerce (ICC)).
162. Telephone interview with Mr. Paolo del Aguila Ruiz de Somocurcio, Secretary General, Lima Chamber of Commerce's National & International Arbitration Center, in Lima, Peru (Sept. 3, 2009).

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