



(Mis)Joinder of Woes

A CRITICAL EVALUATION OF
JOINDER OF NON-SIGNATORIES
TO ARBITRATION IN INDIA



The Future of Arbitration in India

- Arbitration and Conciliation Act, 1996
- Most recent amendment is the Arbitration and Conciliation (Amendment) Act, 2019
 - Attempt to encourage and promote more institutional arbitration and to improve the quality and standard of arbitration in India.
 - Sets up an Arbitration Council of India to promote and encourage ADR mechanisms by framing policies and guidelines that set up uniform professional standards for arbitration. The Council will also grade arbitral institutions and arbitrators.
 - Statement of claim and defense completed within 6 months of the appointment of arbitrators. Arbitral award to be given within 12 months of the completion of pleadings.



The Future of Arbitration in India

- Arbitration and Conciliation Act, 1996
- Most recent amendment is the Arbitration and Conciliation (Amendment) Act, 2019
 - Minimum qualifications for arbitrators set up.
 - Reference to arbitration for international commercial arbitrations unless the Courts *prima facie* find the arbitration agreement to be void.




The Future of Arbitration in India

- Pro-arbitration stance of the Gol, Parliament and Courts is resulting in another interesting development – Courts are more aggressively joining non-signatories to arbitration agreements.
- **GROUP OF COMPANIES DOCTRINE**



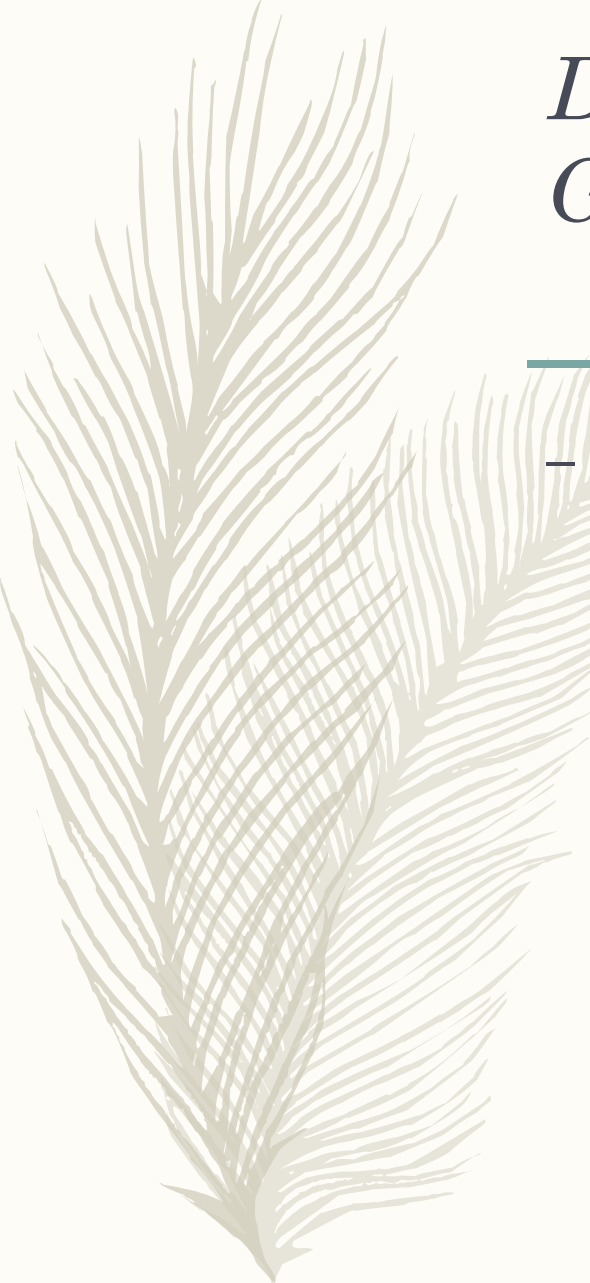
The Future of Arbitration in India

- *Dow Chemical France v. ISOVER Saint Gobain*
 - [1982] - ICC Arbitration Interim Award
- *Chloro Controls v. Severn Trent Water Purification*
 - [2012] – 3 judge bench
- *Duro Felguera v. Gangavaram Port*
 - [2017] – 2 judge bench
- *Cheran Properties v. Kasturi & Sons*
 - [2018] – 3 judge bench
- *Ameet Lalchand Shah v. Rishabh Enterprises*
 - [2018] – 2 judge bench
- *MTNL v. Canara Bank*
 - [2019] – 2 judge bench




Dow Chemical France et al. v. ISOVER Saint Gobain. ICC Case No. 4131.

- Distribution agreements between Dow Chemical A.G./Dow Chemical Europe and ISOVER Saint Gobain. Disputes break out.
- Dow Chemical (the parent company) and Dow Chemical France (sister company) seek to join arbitration.



Dow Chemical France et al. v. ISOVER Saint Gobain. ICC Case No. 4131.

- Arbitral tribunal says they can because:
 - Both had been central to negotiations.
 - Parent company's approval needed to consummate the deal and the performances.
 - Parent company was the owner of all relevant trademarks.
 - Sister company was consistently in charge of performing the obligations in the agreements.
 - Sister company largely responsible for the termination of the agreements.



Dow Chemical France et al. v. ISOVER Saint Gobain. ICC Case No. 4131.

- Arbitral tribunal concludes that:
 - The parent company exercised “absolute control” over the subsidiaries and the companies formed “**one and the same economic reality.**”
 - “Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, **by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings,** appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.” (emphasis added)

Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

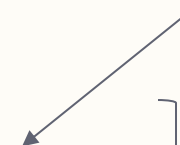
CHLORO CONTROL

MB KOCHA

CAPITAL CONTROLS (DELAWARE)

JOINT VENTURE:
CAPITAL CONTROLS (INDIA)

Shareholders' Agreement

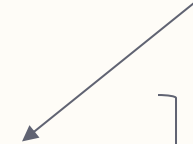


Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

CHLORO CONTROL

MB KOCHA

CAPITAL CONTROLS (DELAWARE)



JOINT VENTURE:
CAPITAL CONTROLS (INDIA)



CAPITAL CONTROLS (COLMAR)

Shareholders' Agreement

**International
Distributorship Agreement
Financial & Technical Know-
How License Agreement
Trademark Registered User
License Agreement**

**Export Sales Agreement
Supplementary
Collaboration Agreement**



Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

CHLORO CONTROL

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CAPITAL CONTROLS (DELAWARE)

Managing
Director's
Agreement

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- ICC Arbitration in London

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- ICC Arbitration in London
- Litigation in Eastern District of Pennsylvania

Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

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- Litigation in Eastern District of Pennsylvania
- AAA Arbitration in Pennsylvania
- No mention

Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

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JOINT VENTURE:
CAPITAL CONTROLS (INDIA)

CAPITAL CONTROLS (COLMAR)

Parent Company:
SEVERN TRENT SERVICES
(DELAWARE)

Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

CHLORO CONTROL

MB KOCHA

CAPITAL CONTROLS (DELAWARE)

JOINT VENTURE:
CAPITAL CONTROLS (INDIA)

CAPITAL CONTROLS (COLMAR)

Changed into:
SEVERN TRENT WATER
PURIFICATION INC.





Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

- Chloro Controls initiated suit in Bombay
- Severn Trent Water Purification and others object and invoke the SHA arbitration clause.
- Bombay High Court compels arbitration.
- Chloro Controls appeals.



*Chloro Controls India Pvt. Ltd. v. Severn
Trent Water Purification Inc. & Ors.*

- The Supreme Court of India notes that non-signatories may be bound – principle/agent, alter ego, succession, assignment, and Group of Companies.



Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

“68 A non-signatory or third party could be subjected to arbitration *without their prior consent*, but this would only be in exceptional cases. ***The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement [sic] may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute.*** Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties *would fall within the exception afore-discussed.*” (emphasis added).



Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

- Direct Relationship
 - *Severn Trent Group of Companies*
- Direct Commonality of Subject Matter
 - *The disputes were interrelated*
- Composite Transaction: “... performance of mother agreement [*sic*] may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute.”

- ICC Arbitration in London
- Litigation in Eastern District of Pennsylvania
- AAA Arbitration in Pennsylvania
- No mention

Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

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Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.

- SHA = mother agreement
- ***“If one segregates the Principal Agreement from the rest, the subsequent agreements would be rendered ineffective***...In other words, it was one composite transaction for attaining the purpose of business of the joint venture company. All these agreements are so intrinsically connected to each other that it is neither possible nor probably to imagine the execution and implementation of one without the collective performance of all the other agreements. The intention of the parties was clear that all these agreements were being executed as integral parts of a composite transaction.”



*Chloro Controls India Pvt. Ltd. v. Severn
Trent Water Purification Inc. & Ors.*

- But has the Supreme Court of India adopted the Group of Companies doctrine or a new *cause celebre*, a Composite Transaction doctrine?



Duro Felguera S.A. v. Gangavaram Port Ltd.

- Duro Felguera (Spanish, parent company) and its subsidiary, Felguera Gruas India (“FGI”) enter to a contract with Gangavaram Port Ltd. (“GPL”) to expand their bulk material handling systems.
- Duro Felguera then asks GPL to split the contract into five separate contracts.



Duro Felguera S.A. v. Gangavaram Port Ltd.

- Contract 1: Duro Felguera and GPL (refers to Original Contract 1)
- Contracts 2-5: FGI and GPL (refers to Original Contract 1)
- Contract 6: MOU between all parties laying out the order of performances in the five contracts (refers to Original Contract 1)
- Contract 7: Performance Guarantee provided by Duro Felguera to GPL for FGI's work
- ALL CONTRACTS PROVIDE FOR ARBITRATION IN HYDERABAD.



Duro Felguera S.A. v. Gangavaram Port Ltd.

- GPL argued that Original Contract 1 was the “mother agreement” to this “composite transaction,” and therefore, all disputes should be settled in one arbitration.
- Duro Felguera and FGI objected and argued all contracts were separate.



Duro Felguera S.A. v. Gangavaram Port Ltd.

- Direct Relationship
 - *Parent and fully-owned subsidiary*
- Direct Commonality of Subject Matter
 - *The disputes were interrelated*
- Composite Transaction
 - *NO.*



Duro Felguera S.A. v. Gangavaram Port Ltd.

– Composite Transaction

- *Original Contract 1: No longer exists*
- *Contracts 1-5: Separated intentionally by the parties, upon Duro Felguera's request. References did not rise to the level of incorporation.*
- *MoU: References do not rise to the level of incorporation.*
- *Performance Guarantee: separate agreement altogether in nature and character.*



Duro Felguera S.A. v. Gangavaram Port Ltd.

– Composite Transaction

- Contracts 1-5 arbitration clause only refers “any dispute in respect of which amicable settlement has not been reached” to arbitration.
- *Chloro Controls* SHA referred “Any dispute or difference arising under or in connection with this Agreement” to arbitration.



Cheran Properties Ltd. v. Kasturi and Sons Ltd.

- Multi-party agreement to transfer shares in a company to Mr. KC Palanisamy (“KCP”), with an arbitration agreement.
- Agreement recognized the right of “KCP and/or his nominees” to receive the shares under the agreement. KCP nominates Cheran Properties Ltd., one of his own companies.
- Dispute arises. National Company Law Tribunal registers the shares in the name of Cheran Properties Ltd., after an arbitral award found that KCP should be compelled to specifically perform his obligations under the agreement.
- Cheran objects stating it cannot be bound to an arbitral award when it was not a signatory to the arbitration agreement.



Cheran Properties Ltd. v. Kasturi and Sons Ltd.

-
- There is no composite transaction. One contract.
 - But the Supreme Court revisited *Chloro Controls* and stated that it should not be read so narrowly as to require all three elements – (1) direct relationship (2) direct commonality of subject matter (3) composite transaction.
 - This was termed a “constricted interpretation of the *Chloro Controls* dictum.”



Cheran Properties Ltd. v. Kasturi and Sons Ltd.

“The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, *an intent* to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.” (emphasis added)



Cheran Properties Ltd. v. Kasturi and Sons Ltd.

- Conclusion: the true intent of the parties was to encompass joining non-signatory nominees to the arbitration clause.
- Group of Companies doctrine vs. “*Chloro Controls dictum*”

Ameet Lalchand Shah v. Rishabh Enterprises

1 Feb. 2012:
Contract 1 with Juwi
(equipment and
material supply for
solar power facility)

1 Feb. 2012:
Contract 2 with Juwi
(installation and
commission of solar
power facility)

5 Mar. 2012:
Contract with Aston
Renewables
(purchase
equipment for solar
power facility)

14 Mar. 2012:
Contract with Dante
(lease out solar
power facility)



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Both companies owned by
Ameet Lalchand Shah

- Arbitrate in Bombay
- Nothing mentioned

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Recitals refer to the purpose of leasing out solar power facility to Dante. And Dante given right to inspect goods and approve purchase (Contract 1)

Recitals refer to the purpose of leasing out solar power facility to Dante. And Dante given right to inspect goods and approve purchase.

MOTHER AGREEMENT



Ameet Lalchand Shah v. Rishabh Enterprises

- “All the four agreements are interconnected. ***This is a case where several parties are involved in a single commercial project (Solar Plant at Dongri), executed through several agreements/contracts.*** In such a case, all the parties can be covered by the arbitration Clause in the main agreement, i.e. Equipment Lease Agreement (14.03.2012).” [sic]
- “Composite transaction” redefined!



Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors. 8 August 2019

- MTNL placed bonds with Can Bank Financial Services Ltd. (“CANFINA”). CANFINA allegedly did not pay MTNL the agreed amounts.
- After market shock, share prices plummeted, and CANFINA sold the bonds to its parent company, Canara Bank.
- MTNL refused to register the bonds in Canara’s name.
- All three parties went to court.



Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors. 8 August 2019

- In the Delhi High Court, MTNL and Canara Bank represented to the bench that they had agreed to enter into an arbitration agreement to arbitrate the dispute.
- On a subsequent date they informed the court of the name of the sole arbitrator whom they had appointed.
- CANFINA was not present on these dates, and alleged it was not a signatory to the arbitration agreement. The arbitrator agreed and dismissed it.



Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors. 8 August 2019

- Supreme Court notes that CANFINA was a wholly-owned subsidiary of Canara Bank; BoD comprised of Canara Bank executives; CEO was a Canara Bank senior official.
- Original dispute arose out of the transaction between MTNL and CANFINA.
- Previous written drafts of the arbitration agreement included CANFINA.



*Mahanagar Telephone Nigam Ltd. v.
Canara Bank & Ors. 8 August 2019*

- No composite transaction. Follows the same logic as *Cheran Properties*, without referring to the case!
- Explicitly discusses *Dow Chemical France v. ISOVER Saint Gobain*.




Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors. 8 August 2019

- ***“The circumstances in which the “Group of Companies” Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third-party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties.*** A ‘composite transaction’ refers to a transaction which is inter-linked in nature; or, where the performance of the agreement may not be feasible without the aid, execution and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.”



*Mahanagar Telephone Nigam Ltd. v.
Canara Bank & Ors. 8 August 2019*

- ***“The Group of Companies Doctrine has also been invoked in cases where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality.*** In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or re-structure other members of the group.”



The Group of Companies Doctrine in India

- Group of companies = lens of mutual intent
- Composite transaction is just one type of factual matrix where courts can find intent of parties to bind non-signatories who belong to a group of companies, to which one of the signatory's also belongs.



The Group of Companies Doctrine in India – drafting contracts

- Use narrow language: Dispute arising out of the agreement NOT “arising out of related to” or “in connection with.” [*Duro Felguera*]
- Separate contracts where possible to reflect discrete elements of a larger transaction. [*Duro Felguera*]
- Steer clear of including a broader “storyline” in the recitals of contracts.
- Where necessary, establish intention by expressly stating that the matrix of contracts does not constitute a composite transaction.

4th Annual Conference: The Future of the Commercial Contract in Scholarship
and Law Reform– IALS, London, 11 October 2019



Blockchain Arbitration: An Adequate Forum for the Resolution of Disputes Ensuing on Blockchain-based Supply Chains?

[Dr Sara Hourani](#)
Senior Lecturer in Law

School of Law
Middlesex University London

Introduction

- Technology bound to impact arbitration as main contribution is reduction of costs-better access to
- Blockchain technology was first introduced at the the 2000s when Satoshi Nakamoto released his whitepaper on the Bitcoin cryptocurrency.
- Receiving business interest for uses going beyond payment methods.



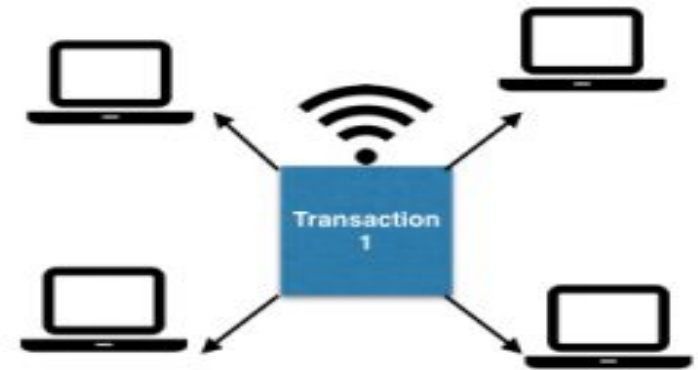
The Blockchain Process



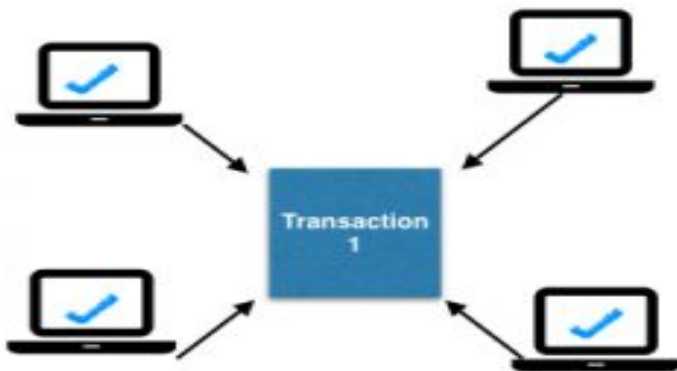
George wants to buy something from Sue.



A block is created which represents the transaction.



The transaction block is "broadcast" to everybody in the network.



Everybody in the network verifies the transaction.



The verified block is date stamped and linked to the other blocks in the chain.



The purchase goes through. George gets the product from Sue, and Sue receives payment for the product.

What is Blockchain Technology?

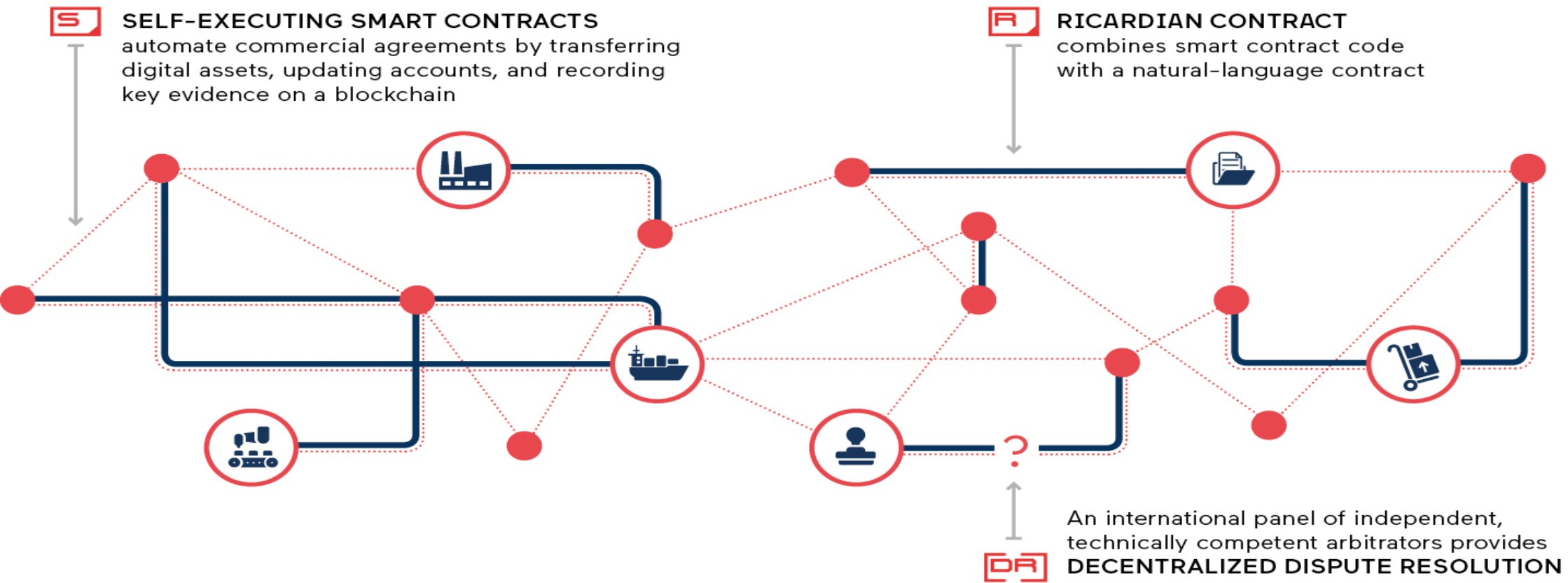
- Digital data structure
- The specificity of this technology is that it functions on a decentralised basis-no use of trusted intermediary
- This data structure consists of transactions that are found in blocks that constitute a ledger
- This ledger is copied amongst the members of a network so that these can reach a consensus on how to organise the data and validate it

So What are Smart Contracts?

- It is a software programme that is stored on the blockchain
- Smart contracts were first referred to by Nick Szabo in the 1990s as “a set of promises, specified in digital form, including protocols within which the parties perform on these promises.”
- Software codes that embed the terms and conditions of a contract and that run on a network leading to a partial or full automated self-execution and self-enforcement of the contract.

Why Blockchain Arbitration?

- Use of smart contracts in supply chain management:



What is Smart Contract Arbitration?

- There is currently no uniform standard arbitration procedure for smart contract arbitration.
- The concept is based on dispute resolution taking place electronically on the blockchain.
- These characteristics mainly relate to the coding of the arbitration agreement and the automation of parts of the procedure.

Smart Contract Arbitration as a Better Forum for Access to Justice in B2B Disputes? A Practical Perspective:

- **Advantages:**

- Efficient: time and cost.
- Confidential and secure (immutable).

- **Limitations:**

- Lack of flexibility (rigid procedure).
- Data privacy issues.
- Security issues (hacks).

Application of the NYC to CodeLegit Arbitration?

- Submission of the Award for recognition (and enforcement?) to national courts:

- **Characteristics:**

- Automated enforcement of the award via the relevant protocol (code)

- **Analysis:**

- Is this in conflict with the NYC? Arts III and IV
- Is this in conflict with domestic laws re recognition? *E.g.* It is necessary to apply to the court for recognition as a preliminary step in order to enforce the award (France under the Code of Civil Procedure 1981)

Conclusion

- Blockchain-based arbitration as a procedure does bring benefits for access to justice
- Limitations are technical
- Relevant for low value disputes in smart contracts and emergency proceedings
- NYC favourable position towards blockchain-based awards
- But main limitation in domestic legal systems requirements
- Adoption of smart contracts (in supply chain management for e.g.) eventually depends on its adoption by businesses

Making sustainable trade possible through blockchain technology

Dr. Johan VANNEROM

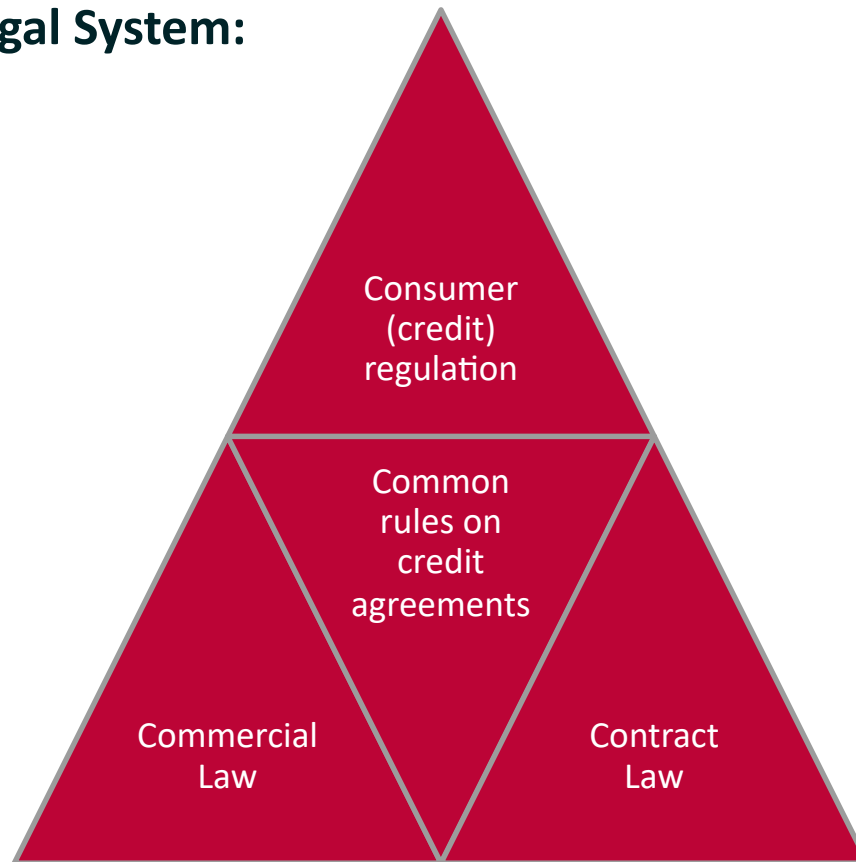
Assistant Professor, Erasmus University Rotterdam

Attorney at law – Vannerom + Partners

11 October 2019

Law governing B2B (& B2C) credit agreements

Multilayered Legal System:



For whom do we regulate?

Regulating 'persons':

- Start-up's, SME's & Consumers = market participants



Definitions (criterion (I): natural person; criterion (II): objective – goal)

- *Sensu lato*: to safeguard each market participant's freedom & give each market participant the possibility to freely conclude contracts
- *Sensu stricto*: rules applicable to B2C-transactions

Why is there a need for regulation?

Regulating 'markets':

- **Open market economy with free competition and (formal) freedom of contract**
- **Also need for rules to safeguard the functioning of the market (cf. creditor's position)**
- **Also need for compensatory rules (cf. borrower's weaker position)**
 - 1. Duties to inform (substantive freedom of contract)**
 - 2. Right of withdrawal (substantive freedom of contract)**
 - 3. Substantive contractual justice**

How do we regulate?

- **Formal contractual freedom**
 - contractual freedom & competition law
- **Substantive contractual freedom**
 - (pre-)contr. information duties, both for creditor as borrower
 - Cooling-off periods
- **Formal contractual justice: '*Quid pro Quo*'**
 - Basic principle in commercial / contract law
- **Substantive contractual justice – regulating 'products & services'**
 - Abuse of rights
 - Unfair terms (judicial review)
 - Usury prohibition, IRR

What changed in the circular economy?

- **Regulating 'services'**
 - **Goods → services**
 - **No immediate net-revenues: sustainability/re-using goods = key**
- **Possible solutions (present)**
 - ✓ **Inclusive finance**
 - **P2P-lending**
 - **Equity finance**

Which problems do I want to tackle today?

- Credit < "credere" ('trust')
- Creditor's information asymmetry:
 - ==> Know Your Customer?
 - ==> Assessment of the borrower's creditworthiness
 - ==> Monitoring the circular project
- Direct exchange of information
- Indirect exchange of information

Know Your Customer

- Aim is to prevent money laundering and financing of terror attacks
 - Client-profile (incl. beneficial owners) is to be assessed by each financial institution
- ==> Risk?** Start-ups/platforms could be placed under scrutiny
- ✓ Report 26.6.2017 by European Commission:
 - Money remittances + crowd funding platforms + virtual currencies
 - Low Value Loans (recurrent practice in terrorist cases)
 - NPOs

Know Your Customer (II)

- ✓ **Report 26.6.2017 by European Commission:**
 - **Forged documents**
 - **Insufficient information-sharing**
 - **Digital economy: platforms = non-face-to-face transactions**

- **Risk of being **excluded from certain basic banking services****
 - ❖ **E.g. current account, credit...**

Assessment of the creditworthiness

□ Aim is to evaluate the borrower's **solvability**

- Different from the 'client's profile score'

- ✓ Different approaches between creditors remain possible

- ❖ Kind of business: self-employed, age/start-up, ...

- ❖ Client's history

- ❖ Kind of activities

Assessment of the creditworthiness (II)

- ✓ **Comparison debt to income**

- **How to weigh revenues in a service economy?**

- ✓ **Assessment of the company's financial debts**

- **Problem with cross-border credit agreements/trade**
 - **credit rating agencies: limited access**

- **Risk?** Access to financial data of a company

KYC & creditworthiness – use of blockchain technology

□ Aim is to promote collaboration

• Private blockchain:

✓ Based upon the idea of reciprocity

❖ Do we wish to include non-AML entities (e.g. P2P lending platforms)?

✓ Financial institutions can exchange data / assessments

❖ Fee to be paid?

❖ Quid GDPR? Right to erase certain personal data

➔ Thus creating a passporting-regime for companies

□ Improving statistical data collection

✓ Better understanding of the risks

Monitoring during the currency of the contract

□ *Why?*

➔ **Setting intermediary goals for the sustainable project**

➤ **Target reached = new drawdown of the loan facility**

• **Use of smart contracts**

○ **'If, then...'**

✓ **Not used as a contract**

➔ **cf. problems relating to the validity of a smart contract**

Many thanks for your attention!

Do you have questions, remarks, suggestions...?

Feel free to contact me:

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The consequences of Brexit on the regulatory competition and the approximation of commercial contract law in Europe

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Introduction

- **Direct impact of Brexit on the law governing transnational commercial laws**
 - Uncertainties until an agreement is reached as to future trade relationship
 - Legal uncertainties *vis-à-vis* performance and enforcement of existing and future commercial agreements for parties to cross border transactions
- **Wider legal implications of Brexit** On the modernisation environment for the laws governing cross border commercial transactions for both the UK and the EU
 - may reduce legal reforms opportunities and endeavours by adversely reducing legal competitiveness and weakening approximation of law in Europe
 - may challenge the transnationalisation of commercial laws phenomenon which may spark a significant turning point for its future trajectory.

Definitions and assumptions

- **The modernisation environment of commercial laws in Europe:**
- currently driven by the Single Market with its ambition to remove legal barriers to trade, primarily through **regulatory competition** and the **approximation of law**.
- **Modernisation of commercial laws** support the Single market. Legal reforms aim to implement economically efficient laws, which ensure security and predictability for commercial actors and which also protect the interests of consumers and of the environment. Legal reforms enables the adaptation to the fast-ever-growing technological changes.
- **Assumption that both approximation of law and regulatory competition positively contribute to the modernisation of commercial laws.**

Approximation of law vs Regulatory competition

- Both dynamics complement each other in promoting legal reforms/modernisation of commercial laws in Europe.

Approximation of law: 'refers to the European Union's ability to adopt binding legislative measures setting out common regulatory standards across Member States. When the EU carries out approximation, national laws remain in place, but must conform to the regulatory standards prescribed by the EU, so that the Union's policy objectives are achieved within the framework of the domestic legal systems.'

Regulatory competition: 'a process whereby legal rules are selected and de-selected through competition between decentralised, rule-making entities, which could be nation states, or other political units, such as regions or localities.'

Research question

- To what extent will the departure of the UK from the EU affect the key dynamics underpinning the modernisation of commercial laws and the achievement of the Single market in Europe (explicitly the approximation of law and regulatory competition)?

Impact on the approximation of law:

Lack of UK expertise ?
Legal divergences and legal barriers to trade between UK and EU?
Reduced opportunities for the UK to reform its law?

The approximation of law :The epitome of the EU Single market

-The case for the harmonisation of law to support the Single market has long been established but... Harmonisation of law in commercial law areas remains fragmentary.

(Regulatory competition thus also contributes to support the Single market and to promote the modernisation of laws.

Role of comparative law in the approximation of law

- 'The economic and political integration of Europe must be supported and accompanied by a gradual approximation and finally unification of the domestic legal systems in Europe. This goal may not be accomplished without the comparative lawyer and profound connoisseur of foreign law if the result shall constitute ... 'a sound and sensible combination of the hitherto existing domestic differences instead of a soulless and authoritative uniform solution' Dölle

Europe without the UK: Loss of UK expertise?

- Substantial influence and contribution of the UK within EU private law making.

Examples include:

Liberal influence and the Single Market, Restructuring and Insolvency and Company law

- Reduction in the range of legal expertise / scope of comparative law research may weaken the modernisation environment
- Significant loss of Common law influence may affect the future shape of the approximation of commercial laws in Europe
 - Impact on Ireland and its Common law roots
 - likelihood of more preeminent continental approach within approximation of law endeavours.

UK without the EU: Will the UK continue to align its law to EU standards?

- Arguably, yes: Geopolitically and economically, the UK will continue to export and import to and from Continental EU. Departing from EU standards will lead to legal divergences and legal barriers to trade between UK and EU.
- BUT
- Removing itself from the constraints of EU directives could give the UK greater freedom to improve its commercial laws including the tax system's competitiveness..
- Debates about whether the UK could become a tax haven?

Impact on regulatory competition: Reduced legal competitiveness?

- “No deal Brexit” may reduce the legal competitiveness of UK legal products (e.g. English contract law) and legal services (e.g. English courts).

Brussels I Recast governs the enforceability of jurisdiction clauses and judgments between EU member states

Rome I & II govern choice of law clauses

Alternative? Lugano Convention and the Hague Convention.

If not.....

- Reduced market for legal products and legal services in Europe may reduce incentives to reform and modernise commercial laws in both the UK and the EU.

Reduced opportunities for legal reforms?

- **For the UK: Brexit may restrict availability of UK legal products and legal services on the European market**

Uncertainties for commercial parties may adversely impact popularity of UK legal products and of UK courts to solve litigations

Reduced market may disincentive legal reforms/modernisation of the law in the UK

- **For the EU: Brexit will reduce the market of available legal products and services following the loss of a key competitor**

In the absence of the UK, significant competitor in the market, the impetus for legal reforms in other EU jurisdictions may slow down

BUT... There are opportunities for both UK and the EU

e.g. Some jurisdictions have seized the opportunity of Brexit to modernize their commercial laws (France has developed a commercial court to apply the common law and use English language).

Trans nationalisation of commercial laws phenomenon and globalisation slow-down: the grand challenge of law

- Brexit challenged the transnationalisation of commercial laws phenomenon.

Q- Can idea of the Nation State in its 19th Century self-regulation operation can work in our modern world and modern economic models?