

NON-SIGNATORIES IN INTERNATIONAL COMMERCIAL ARBITRATION: CONTESTING THE MYTH OF CONSENT

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Summary: Consent, the final frontier. International commercial arbitration is a dispute resolution mechanism embedded in consent of the parties involved. Presentation of such a mutual understanding is done through an arbitration agreement. However, the aim of this paper is to analyse whether its contractual, indeed consensual, nature is the only element which the courts use to identify the subjects who may compel or must be compelled to arbitrate disputes, or whether they employ other considerations as well. The paper will focus on extension doctrines which might be less known even to a professional audience: piercing of the corporate veil, estoppel & group of companies. A review of selected case law leads to a conclusion that consent-finding analysis is definitely a starting point of any analysis. However, at the same time courts and arbitrators do indeed use tools of contract interpretation and the ones based on equity or good faith considerations to establish, and exceptionally force, the implication of consent far beyond what is obvious.

Keywords: Arbitration Agreement; Consent; Estoppel; Extension; Group of Companies; Piercing of the Corporate Veil.

1. Introduction

In the latest White & Case survey, undertaken amongst private practitioners, in-house counsels, experts and other stakeholders, an overwhelming majority of 97 percent of respondents stated that arbitration is preferred method of international commercial disputes settlement.¹ Compared to state litigation, the most important advantage remains the same, broad enforceability of an arbitral award. Avoiding specific legal systems ended up on the second place.² In other words,

1 White&Case; Queen Mary University of London. *2018 International Arbitration Survey*. [online]. Available at: <https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration>. Accessed 28.10.2018

2 White&Case; Queen Mary University of London. *2018 International Arbitration Survey*. [online]. Available at: <https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration>. Accessed 28.10.2018

the parties to international commercial arbitration seek a neutral forum, with a few easily understandable principles.

Without doubt, one of those principles is universally respected truth that arbitration is based on consent.³ Such agreement is vital to alter natural jurisdiction of state courts. It leads parties from their respective national courts to a private body which is vested with similar authority to decide dispute. Essential ground for such a transfer – valid arbitration agreement – should be of course well established as the arbitration does not necessarily provide all the safeguards and common features which national procedural rules do. As the consequence, the primary task of any judge or arbitrator should be to determine whether the arbitration agreement was concluded and who the parties to such agreement are.

This starting point seems to be a straightforward one. Whether a person can take part in arbitration proceeding depends on whether it has previously entered into a valid arbitration agreement. The US Supreme Court summarised the notion quite clearly, when stated, “*To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, if the parties have agreed to arbitrate the particular dispute.*”⁴ Subsequently, Brekoulakis illustrates one of the crucial differences between arbitration and litigation, “*Even if a party is strongly implicated in a dispute before a tribunal and has a great interest in its outcome, he simply cannot participate.*” Irrespective of willingness or unwillingness to participate, arbitration seems to be reserved only for those who consented to it.

Such understanding might be correct in case of a classical commercial transaction, a bilateral trade with clearly designated parties. Though it may be still true for a some part of international trade, contemporary projects are far often more complex and sophisticated. In addition, current “players” are often multinational and multigroup enterprises, with a broad net of true subsidiaries or mere SPV companies.

From the point of substantial law, many legal system do indeed provide for a possibility how to distribute substantial liabilities arising out of underlying commercial contracts (e.g. piercing of corporate veil doctrine) or to bound entities which prima facie did not become parties if good faith and/or administra-

3 Born, G. *International commercial arbitration* (2014). Alphen aan den Rijn: Kluwer Law International, 2014, p. 1; Fouchard, P.; Gaillard, E.; Goldman, B., et al. *Fouchard, Gaillard, Goldman on international commercial arbitration*. The Hague: Kluwer Law International, 1999, p. 193; Lew, J. D. M; Mistelis, L.; Kröll, S. *Comparative international commercial arbitration*. The Hague: Kluwer Law International, 2003, p. 99; Blackaby, n.; Partasides, C.; Redfern, A., et al. *Redfern and Hunter on international arbitration*. Oxford, New York: Oxford University Press, 2009, p. 85; Rubino-Sammartano, M. *International arbitration law*. The Hague: Kluwer Law International, 2001, p. 195.

4 U.S. Supreme Court. Decided on 20.6.1960. *Supreme Court Reporter*, vol. 363, 1960, 564 et seq. [online]. Available at: www.westlaw.com. Accessed 1.7.2014

tion of justice requires so (e.g. various estoppel doctrines in common law, or a notion of *venire contra factum proprium* in many civil law jurisdictions). But, do these contemplations echo into the realm of international commercial arbitration? Indeed. In the last incarnation of his book, Born identified 16 bases for binding non-signatories to international arbitration agreements.⁵ Extension of an arbitration agreement over a non-signatory is definitely an ongoing issue in arbitral practice.⁶ But does this work with the basic notion of arbitration being “creature of consent”?

To answer such question, the article will describe 3 less known methods of extension: estoppel, piercing of the corporate veil and group of companies doctrine.⁷ These methods will be presented through an analysis of sample case law coming from major arbitral jurisdictions: US, UK, France, Germany and Switzerland.⁸

2. Examples of extension of arbitration over non-signatory

2.1 Estoppel

The first large group of scenarios stem from the contract law; however, it is integrally interconnected with the principle of protection of justice, good faith and the effective resolution of disputes. As the result, these principles will sometimes overshadow the analysis of the parties’ intent and will.

Common law estoppel doctrine is a classic example. This equity-based institute deals with unjust results of unfair, or inconsistent behaviour. As for the specific arbitral estoppel, one can provide a following scenario: a third party com-

5 Born, G. *International commercial arbitration* (2014). Alphen aan den Rijn: Kluwer Law International, 2014, pp. 1418–1484.

6 Followed by respective court practice as well; typically, deciding on the question of the annulment of an arbitral award.

7 For a more traditional situation – assignment of a substantive agreement or right under Czech law, refer to Halla, S.; Drličková, K. Zmeny v subjektech hlavnej zmluvy a ich dopad na súvisiacu rozhodcovskú zmluvu. *Obchodněprávní revue*, 2014, no. 3, pp. 76–82; Internationally, see: Landrove, J. C. *Assignment and Arbitration*. Basel: Schulthess, 2009.

8 The question of the subjective scope / validity of the arbitration agreement is without doubt one of the main aspects any court will analyse in eventual setting aside / enforcement proceedings, either based on the objection of party (see Art. 34 (2) (a) (i) of the UNCITRAL Model Law on International Arbitration or Art. V (1) (a) of the New York Convention), or even *ex officio* via public policy reasons (see Art. 34 (2) (b) (i) of the UNCITRAL Model Law on International Arbitration Art. V (2) (a) of the New York Convention). Therefore, it is of vital importance to establish what the approach of national courts in the country of seat is considered. Already mentioned White & Case survey declares these seats to be among most favoured in international arbitration: London, Paris, Geneva and New York. This study will therefore focus primarily on UK, French, Swiss and US case law, with brief addition of German position to reflect possible concerns in a setting aside or enforcement procedure.

mences a court proceeding against any of the parties to contract it draws benefits from.

The argument may be made, that once the benefit is drawn such third party accepts provisions of the contract which including an arbitration clause as well. However, the above-mentioned autonomy of the arbitration clause and pure contract analysis may lead to a conclusion that the opposite is true. Third party beneficiary might have accepted the performance or benefit, without willing to accede to the arbitration clause, which creates a separate contract, especially if such beneficiary started court proceedings – a clear negation of the arbitration agreement.

In such situation, depending on all circumstances of the case, courts may use the arbitral estoppel, because as decided in e.g. **Tepper Realty vs. Mosaic Tile**, “*In short, [plaintiff] cannot have it both ways. It cannot rely on the contract when it works to its advantage and ignore it when it works to its disadvantage*”.⁹ Therefore, even though the court would reach the result the third party beneficiary did not consent to the contract, the justice or good faith still require it would be bound by it, as it drew benefits.

In the civil law realm, legal orders do recognise the principle of good faith protection in general, and subsequently, a requirement of performance of right in line with the requirement of good faith, which might be considered also in jurisdictional analysis in arbitration.¹⁰ However, extension based on these principle in civil law jurisdictions would be a rare occurrence,^{11,12} as the courts here opt for a more traditional ways of analysis, e.g. agency or apparent mandates.

Therefore, the following analysis will focus on US decisions, which employed two versions of the estoppel doctrine – equitable and intertwined.

9 United States District Court S. D. New York. Decided on 20.9.1966. Case number no.66 Civ. 2072. *Federal Supplement*, vol. 259, 688 et seq. [online]. Available at: <https://law.justia.com/cases/federal/district-courts/FSupp/259/688/2293417/>

10 Bowden, P. L'interdiction des se contredire au détriment d'autrui (estoppel) as a Substantive Transnational Rule in International Commercial Arbitration. In Bernardini, p.; Gaillard, E. *Transnational rules in international commercial arbitration*. Paris, France: ICC Publications, 1993, pp.125–135; Gaillard, E. L'Interdiction de se Contredire au Détriment d'Autrui comme Principe Général du Droit du Commerce International. *Revue de l'arbitrage*, 1985, pp.241–258; Bundesgerichtshof. Decided on 17.4.2008. Case number III ZB 97/06. [online]. Available at: www.jurion.de. Accessed 1.8.2014

11 Born, G. *International commercial arbitration* (2014). Alphen aan den Rijn: Kluwer Law International, 2014, p.1472; Hanotiau, B. *Complex arbitrations*. The Hague: Kluwer Law International, 2005, pp.55–56.

12 See decision of French Cour de Cassation in case Golshani, one of a few examples of what can be understood as estoppel based consideration in civil law jurisdiction. Cour de Cassation. Decided on 6.7.2005. Case number 01-15912. [online]. Available at: <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007050505>. Accessed 1.8.2014

2.1.1 Equitable estoppel

Equitable estoppel serves primarily as a defensive mechanism, ie. serves to protect equity-based expectations of a party which relied on the existence of an arbitration clause. Consequently, such reliance would prevent a non-signatory to claim formalistic objection of not being formal party to arbitration clause, even though it drew benefits from the underlying substantive contract. In other words, as summarised by Rau, “one should not be allowed to open one’s mouth to contradict oneself to another’s detriment”.¹³ This was also the basic message in **Noraudit**, one of the leading decisions applying equitable estoppel in arbitration.¹⁴

In **Noraudit**, the appellate court analysed a dispute in which a Norwegian subsidiary of a global audit group refused to participate in a settlement agreement between the group and one of its members, which was the holder of “Deloitte” trademark. At the same time, the Norwegian subsidiary continued to use trademark “Deloitte” in its commercial activities. The court pointed to the fact that the subsidiary never actively objected to the content of the settlement agreement. What is more important, the subsidiary used the commercial label “Deloitte”, a right which could have been derived for the benefit of the subsidiary only once the settlement and restructuring of the organisation ended. Thus, even if the subsidiary refused to be formally part of the settlement, by using the commercial label, the subsidiary accepted the benefit arising out of the settlement agreement and equitable consideration would prevent it to object to the lack of the formal participation.

Building on **Noraudit** decision, the following case law focused primarily on the distinction between “direct” and “indirect” benefit derived from the substantive contract. The distinction between direct and indirect benefit was introduced in the subsequent decision in **Thomson-CSF** case.¹⁵ In the ruling, the court used **Noraudit** decision to analyse the situation at hand; however, limited its applicability to situations in which a non-signatory draws only a direct benefit from the substantive contract. Subsequent case law focused on better distinguishing

13 Rau, A.S. Arbitral jurisdiction and the dimension of “consent”. *Arbitration International*, 2008, vol. 24, no. 2, p. 239.

14 United States Court of Appeals, Second Circuit. Decided on 22.11.1993. Case number 93-7271. *Federal Reporter, 3rd series*, vol. 9, 1060 et seq. [online]. Available at: www.west-law.com. Accessed 1.8.2014

15 United States Court of Appeals, Second Circuit. Decided on 24.8.1995. Case number 94-9118. *Federal Reporter, 3rd series*, vol. 64, 773 et seq. [online]. Available at: www.west-law.com. Accessed 1.1.2014.

The decision also built a general guide regarding the extension of arbitration agreements over non-signatories, when pointed to five doctrines which are accepted therein: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing and (5) estoppel.

between direct and indirect benefit, and understanding of examples of direct benefit.¹⁶

Summary of individual case law stream was provided in the current decision in **Life Technologies**.¹⁷ The court limited the use of equitable estoppel consideration to two scenarios. Firstly, as stated above, when a direct benefit is drawn in any form from the substantive contract. However, such benefit must be drawn intentionally, not occur only as incidental consequences of the contract, or incidental development of relations. The party drawing such benefit must thus draw it intentionally, ie. willingly, knowing of the existence and content of the underlying substantive agreement. Secondly, equitable estoppel might be also used in situations, where the original contracting parties explicitly negotiated the contract for the benefit of third party or at least anticipated for such an eventuality. However, if the facts of the case prove the original parties had never intended for a third party to draw any benefits from their agreement, the mere fact that the third party then indeed obtained some benefit, would classify the situation as indirect benefit only, which does not represent a ground for estoppel based extension.

2.1.2 Intertwined estoppel

Another category of estoppel does not analyse the benefit coming out of the substantive agreement but focuses primarily on the interplay of claims arising out of various, but still interconnected (“intertwined”) relations. In other words, if claims are so interconnected that their separate analysis or enforcement would lack sense or would practically prevent the decision on one of them, then arbitration should be extended even over such a claim which is not covered by arbitration agreement. The case law established that the connection must be based either on a contractual or corporate basis.¹⁸

16 In *Tencara*, court ruled that direct benefit is also obtained by a ship owner in case where a shipbuilder provides for a ship classification certificate issued by a third-party assessment centre. Even though the ship owner is a non-signatory to the ship assessment contract between the builder and the centrum, the owner draws direct material benefit from the classification of vessel, in particular, lower insurance fees and possibility to register the ship under certain flags. In the specific case, this was more so, when the shipbuilding contract called for the classification which should have been secured by the builder. See *The United States Court of Appeals, Second Circuit*. Decided on 17.3.1999. Case number 98-7823(L), 98-7893(XAP). *Federal Reporter, 3rd series*, vol. 170, 349 et seq. [online]. Available at: www.westlaw.com. Accessed 20.8.2014.

17 *United States District Court, S.D. New York*. Decided on 11.8.2011. Case number 11 Civ. 00325 (RJH). *Federal Supplement, 2nd Series*, vol. 803, 270 et seq. [online]. Available at: www.westlaw.com. Accessed 20.8.2014

18 This result was explicitly confirmed in *Sunkist* decision. See *United States Court of Appeals, Eleventh Circuit*. Decided on 30.12.1993. Case number 91-9153. *Federal Reporter, 3rd series*, vol. 10, 753 et seq. [online]. Available at: www.westlaw.com. Accessed 20.8.2014

The contractual connection is represented by cases like **Hughes Masonry**¹⁹ where courts dealt with complex building contracts. In Hughes, client negotiated a contract with both suppliers of works and with a building supervisor. The contract with suppliers contained a provision that established powers of the supervisor; however, supervisor was not formally part of such agreement. But, it was the supervisor that required arbitration of all disputes that arose between client and supplier. Even though supplier objected that supervisor was not a direct party to the construction contract and thus cannot enforce arbitration agreement therein, the court dismissed such objection. The court pointed out that it is the supplier that relies in many counts on the breach of agreement between client and supplier through the actions of client-authorised supervisor. Thus, as the court observed, “[supplier] cannot rely on the contract, when it works to [supplier’s] advantage, and repudiate it when it works to their disadvantage. To permit [supplier] to do so would not only flout equity, it would do violence [...] to the purpose of the Federal Arbitration Act.”

Similarly, the recent case law in **Choctaw** reconfirmed the need to arbitrate interconnected claims, even though formal objections might be raised.²⁰ In Choctaw, a building contract contained arbitration clause. This was not the case for the secondary contract between the supplier and the bank for the issuance of a bank guarantee. After the client disputed quality of works, it tried to draw compensation from the bank guarantee, which was refused by the bank claiming an undergoing dispute between client and supplier. The client filed a claim before a state court to compel drawing. However, the court dismissed the claim, pointing out to the fact that secondary contract refers to the primary building contract, and it is directly dependent on the interpretation of the primary contract. As the result, the claims are intertwined and must be decided in arbitration.

In another building case **McBro**,²¹ the supplier claimed tortious interference of the supervisor into the works carried out by the supplier, and failure of supervisor to act professionally. But, supplier filed the claims before the state court, as it alleged there is no direct contractual relation between the supplier and the supervisor. The court again dismissed the claims based on the lack of jurisdiction. In *obiter dictum*, the court reasoned that the purpose of the arbitration would be threatened if arbitration could be avoided by a mere requalification of claims from contractual to tort based.

19 United States Court of Appeals, Seventh Circuit. Decided on 28.9.1981. Case number 80-2817. *Federal Reporter, 2nd series*, vol. 659, 836 et seq. [online]. Available at: www.west-law.com. Accessed 20.8.2014

20 United States Court of Appeals, Second Circuit. Decided on 21.10.2008. Case number 01-7899. *Federal Reporter, 3rd series*, vol. 217, 403 et seq. [online]. Available at: www.west-law.com. Accessed 20.8.2014

21 United States Court of Appeals, Eleventh Circuit. Decided on 6.9.1984. Case number 83-7034. *Federal Reporter, 2nd series*, vol. 741, 342 et seq. [online]. Available at: www.west-law.com. Accessed 20.8.2014

Second line of interconnection may come from corporate ties and can be demonstrated on **J.J Ryan** decision.²² The dispute originated in merger negotiations between American distributor and a group of final sale companies, with a French corporate mother. Originally, the distributor entered into a separate distribution agreement with each of the subsidiaries. Subsequently, French mother company tried to negotiate a merger with American distributor. However, the negotiations ended in a dead end, commercial relation between the parties deteriorated. Subsequently, distributor filed a tort-based lawsuit against both the subsidiaries, and their corporate mother, claiming mother company instructed subsidiaries to terminate distribution agreements. Subsidiaries and mother-company objected the existence of arbitration agreement; in return, distributor objected that mother-company was never party to distribution contract and thus cannot rely on arbitration agreement contained therein. Court dismissed distributor's objections stating, "*When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.*" Court concluded that arbitration would be rendered meaningless if part of the intertwined claims was decided by a state court.

2.1.3 Estoppel doctrine compliant to consent-based arbitration (?)

As could be seen from the analysed case law, equitable estoppel does not always dispute the "myth of consent". Here, an argument could be made that if third party non-signatory draws benefits from a substantive contract, it does so with accepting contract's legal framework which includes arbitration clause as well. The intent of signatories is clear if the contract itself foresees drawing of the benefit by third party. Similar conclusion might be reached also in situation when drawing is not explicitly stipulated, but the signatory parties foresaw such possibility to manifest later. Of course, the intent of non-signatory does not exist *ab initio*, from the moment the contract is concluded, but could be constructed from the moment the benefit is accepted. Thus, equitable estoppel does not necessarily contradict the consensual nature of arbitration, however, as any estoppel, it focuses more on a protection of expectations than on a proper analysis of consent. Even if the ends do really justify the means here, the consent is not destroyed along the way.

However, such conclusion is not valid for intertwined version of estoppel. Resulting extension is based on encompassing legal framework of a more complex transaction. Many times, the fact pattern shows that at the moment of contract conclusion, it was never the intention of non-signatory entity to enter

22 See United States Court of Appeals, Fourth Circuit. Decided on 13.12.1988. Case number 87-1759 a 88-1501. *Federal Reporter, 2nd series*, vol. 863, 315 et seq. [online]. Available at: www.westlaw.com. Accessed 20.8.2014

into arbitration agreement, or intention of signatories to bound non-signatory to arbitration. However, the extension is carried out despite evidenced negative intention and lack of consent.

2.2 Piercing of the corporate veil

Piercing of the corporate veil represent an example which comes from non-contractual sphere. It is used in extreme situations in order to negate one of the main principles of modern company law – formal independence of company on its shareholders.

In theory, a corporation acts independently upon direct interests of its owners, primarily focusing on its own goals and actions. Legal deeds executed by any company are ascribed to such a company, not to its shareholders. Legal identity of company is legally separate from the identity of shareholders. Thus, in turn, it is the company, not its shareholders, which is primarily responsible and liable from obligations it asserted.²³ Investors are thus insulated from liabilities which the company would face, if its business does not go as planned. Limited liability is one of the principles which the modern international trade is based on²⁴ and which is recognised by both common and civil law jurisdictions.²⁵

However, such theoretical independence might not go hand in hand with situations were e.g. a single shareholder fully controls the company, even in its day-to-day operations. Such scenario invites the question if the will demonstrated by such company is indeed a will of formally independent corporate entity, or actually a well-hidden will of the controlling individual or corporate entity. However, it must be understood, that in most cases, corporate veil piercing does not negate independence even in such a scenario. It is triggered mostly in situations in which the controlling owner uses its subsidiary as a mere “puppet”, and not unfrequently, to cover up actions which may be later described as malicious.²⁶ Therefore, the intent of the doctrine is to protect a good faith behaviour of third parties which entered into contracts with corporate subsidiary – though it later turned out to be a mere puppet of its corporate mother. Both common law and civil law jurisdictions recognise,²⁷ as well as by transnational soft law, recog-

23 Badia, A. *Piercing the veil of state enterprises in international arbitration*. The Hague: Wolters Kluwer, 2014.

24 As pointed out by US Court of Appeals in Anderson, “*Limited liability is the rule [...] on that assumption, large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.*” U.S. Supreme Court. Decided on 6.3.1944. *Supreme Court Reporter*, vol. 321, 1944, 349 et seq. [online]. Available at: www.westlaw.com. Accessed 29.6.2014

25 Blumberg, P.; Strasser, K.; Gouvin, E., et al. *Blumberg on Corporate Groups*. New York: Aspen Publishers, 2004, Section 3.1.

26 Blumberg, P. *The Multinational Challenge to Corporate Law*. Oxford: Oxford University Press, 1993, p. 66.

27 Vanderkerckhove, K. *Piercing the corporate veil*. Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2007.

nise this protective approach.²⁸ The result is simple, either the controlling entity becomes liable alongside its corporate subsidiary, or it is placed “in the shoes” of the subsidiary and bears liabilities on its own.

2.2.1 Case law of common law jurisdictions applied to arbitration setting

One of the first decisions which applied standard veil piercing test in the arbitration setting was the case **Fisser**.²⁹ The US court analysed the situation in which a claimant alleged that respondent is just an alter ego of its mother company. Therefore, if there is a valid arbitration agreement between claimant and respondent, but respondent is a mere puppet of the mother company, such corporate mother must be bound by arbitration as well. The court generally admitted this hypothesis to be applicable also to arbitration setting³⁰ and provided for a three prong test which justifies lifting of the corporate veil and arbitral extension: (1) full formal or functional control of mother company which was used to (2) commit fraud, avoid legal obligation or to induce other illegal state of affairs, which was (3) the basis of the alleged claim for damages. However, in the fact pater of the case, the court did not find enough evidence to fulfil the abovementioned requirements and dismissed the extension over non-signatory mother.

The same negative result was achieved in already quoted case **Thomson-CSF**.³¹ Even here, court did not find sufficient fact pattern to allow the extension, but it listed important indicators to the first prong of the test: sharing of office spaces, employees and directors, a stand-still in day-to-day operations, or non-existence of an independent bank account. The court noted that being part of a larger corporate group does not justify piercing of the corporate veil, as long as respective company preserves its own identity.

Even though, it is safe to state that US case law provides for many instances where piercing of the corporate veil was analysed so that the court could extend the scope of the arbitration agreement,³² there are basically none in which the

28 See e.g. Principle X.2 of the *Translex Principles* issued by Center for Transnational Law (Central). University of Cologne. [online]. Available at: www.trans-lex.org/962000/_/piercing-the-corporate-veil/. Accessed on 20.11.2018

29 United States Court of Appeals, Second Circuit. Decided on 1. 8. 1960. Case number 25914. *Federal Reporter, 2nd series*, vol. 282, 231 et seq. [online]. Available at: www.west-law.com. Accessed 1.5.2014

30 The court observed, “We have [...] held that the obligation [...] arises from a contract to which the alter ego theory binds that parent which as “puppeteer” has “directed his marionette” to sign. We hold now that if the parent is bound to the contract then like its marionette it is bound to submit to arbitration.”

31 United States Court of Appeals, Second Circuit. Decided on 24.8.1995. Case number 94-9118. *Federal Reporter, 3rd series*, vol. 64, 773 et seq. [online]. Available at: www.west-law.com. Accessed 1.1.2014

32 WestLaw legal database shows more than 90 decisions that referred back to the original Fisser decision and analysed the conditions based on the piercing of the corporate veil doctrine.

test was successful, as courts require quite high level of proof,³³ most of the time, extension was granted based on the application of a different doctrine.

If US case law provides a vast majority of examples, even though with negative results, English case law is much more conservative, and the doctrine of corporate veil piercing is seldom analysed.³⁴

One of a few decisions which indicated practical use of the doctrine was decision in **Roussel-Uclaf**.³⁵ The court analysed a claim of a non-signatory daughter to enforce arbitration against a company, which negotiated distributorship contract with its mother company. The court analysed provision of Section 1 of UK Arbitration Act (1975), allowing initiation of arbitration “*through or under*” a party to an arbitration agreement. Court noted that in a corporate setting, there is no reasonable ground to interpret the statutory provision restrictively, if arbitration is called for by a daughter company which is fully owned and controlled by the parent signatory to arbitration.

However, it must be also noted that general applicability of corporate veil piercing is currently under discussion among UK courts.³⁶

2.2.2 Case law of civil law jurisdictions applied to arbitration setting

In Switzerland, one of the first attempts to use piercing doctrine to extend the scope of arbitration was in an ad hoc arbitral award in case **Alpha vs Beta**,³⁷ where the tribunal seated in Switzerland analysed three doctrines which may be used to bind non-signatories under Swiss law: (1) group of companies, (2) fictional company, or (3) *Durchgriff* – piercing of the corporate veil. With regards of the piercing test, Swiss tribunal pointed to similar elements as US courts, namely,

33 Born, G. *International commercial arbitration* (2014). Alphen aan den Rijn: Kluwer Law International, 2014, pp. 1436–1442.

34 Blackaby, N.; Partasides, C.; Redfern, A., et al. *Redfern and Hunter on international arbitration*. Oxford, New York: Oxford University Press, 2009, p. 102; Poudret, J.-F.; Besson, S.; Berti, S., et al. *Comparative law of international arbitration*. London: Sweet & Maxwell, 2007, p. 227.

35 The High Court of Justice (Chancery Division). Decided on 4.10.1977. *Yearbook Commercial Arbitration*, vol. IV., 1979, pp. 317–319. [online]. Available at: www.kluwerarbitration.com. Accessed 7.6.2014

36 In an appellate decision in VTB Capital, the appellate court stated that it recognises the doctrine of corporate veil piercing as applicable under English law. However, the Supreme Court pointed that English law could provide a more traditional ways to analyse such disputes and refused to comment on doctrine’s applicability as being too hypothetical. See Court of Appeal of England and Wales (Civil Division). Decided on 20.6.2012. Case number A3/2011/3093, 3270 and 3306. [online]. Available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2012/808.html>. Accessed 1.7.2014; The Supreme Court of the United Kingdom. Decided on 6.2.2013. Case number [2013] UKSC 5. [online]. Available at: <http://www.bailii.org/uk/cases/UKSC/2013/5.html>. Accessed 1.7.2014

37 Ad hoc award. Decided in 1991. *ASA Bulletin*, vol. 10, 1992, pp. 202–258. [online]. Available at: www.kluwerarbitration.com. Accessed 31.5.2014

(1) full functional control which led to (2) disadvantage to a third party with (3) a malicious intent. As the arbitrators found the fact pattern “shocking”, proving extreme abuse of the daughter company,³⁸ they lifted the veil and extended arbitration over the mother company. However, literature points out, that this was one of the rare cases under applicable Swiss law.³⁹

In another Swiss case, well known **Westland Helicopters**,⁴⁰ courts dealt briefly with the applicability of the doctrine. In setting aside procedure, Swiss courts analysed a series of arbitral awards which extended arbitration from a corporate entity to its owners, or more precisely founding entities – 4 states in the Middle East region. Swiss Supreme Court pointed out that a secondary liability of mother company for daughter’s debts is in no contradiction to established Swiss legal principle or transnational public policy. It would be therefore allowed to pierce formal independence of companies if exceptional circumstances occur. However, in the case itself, the court found insufficient fact pattern to allow piercing and piercing based extension.

Detailed analysis of *Durchgriff* doctrine was provided in **Butec** decision.⁴¹ Here, Swiss Supreme Court analysed interim ICC award in which arbitrators declined extension to a mother company of respondent. Court reconfirmed general applicability of doctrine and pointed that the situations when daughter company is used to abuse law, the law requires that an economic reality trumps over formal independence of companies within the group.⁴² In addition, the court distinguished *Durchgriff* from other scenarios in which there is no real switch in bound entities, but rather an extension. In real piercing scenario (*echter Durchgriff*), mother company stands in the shoes of its daughter, and is the sole entity bound by actions of the puppet daughter. In other scenarios, mother company accedes to relationship and stands aside its daughter, ie. both entities are bound by daughter’s actions.⁴³

38 E.g. registered capital of daughter company consisted of 500 pcs of shares without nominal value, corporate mother negotiated all contracts which daughter company executed; daughter company had no real employees, and the sole statutory body consisted of an attorney who provided regular legal services to mother company.

39 Poudret, J.-F.; Besson, S.; Berti, S., et al. *Comparative law of international arbitration*. London: Sweet & Maxwell, 2007, p. 224.

40 Bundesgericht. Decided on 19.4.1994. *Sammlung der Bundesgerichtsentscheide*, vol. 120, 1994, pp. 155–172. [online]. Available at: www.bger.ch. Accessed 29.7.2014

41 Bundesgericht. Decided on 29.1.1996. *ASA Bulletin*, vol. 14, 1996, pp. 496–507. [online]. Available at: www.kluwerarbitration.com. Accessed 2.6.2014

42 Court stated directly, “*Durchgriff means [...] it is not formal independence of legal entity which is important, but rather economic reality which creates legal consequences*” (translated from German original by author).

43 Court provided examples of the protection of good faith expectations of the counterparty, or implicit consent of mother company through its deeds.

Subsequent case law of Swiss Supreme Court confirmed possibility to extend arbitration agreement over non-signatory mother company in *echter Durchgriff* cases.^{44,45}

Even though German case law recognises piercing doctrine with regards to material liability of mother company,⁴⁶ there is no case law which would confirm the applicability of the doctrine to arbitration agreement as well. Legal literature remains split on the issue.⁴⁷

French case law relies on its own group of companies doctrine⁴⁸ which is analysed in detail in section 2.4.

2.2.3 Piercing of the veil doctrine in compliance with consent-based arbitration (?)

The analysed case law proved again that consent is not necessarily the only basis for arbitration. The abovementioned cases showed situations in which non-signatory expressed its will not to be a part of the substantive agreement even though it was involved with the transaction to some extent. The negative will was demonstrably manifested either by creating a separate company which later become signatory or even directly at negotiating table. However, the fact pattern of piercing case law allowed tribunals and courts to disregard such manifestation and extend arbitration over such non-signatory, binding both corporate daughter and mother.

However, it could be argued that not in all piercing scenarios, consent-based analysis is fully destroyed. Courts have stated many times, that in piercing sce-

44 Bundesgericht. Decided on 25.8.2009. Case number 4A_160/2009. [online]. Available at: www.bger.ch. Accessed 1.8.2014

45 It seems that recent case law of the Swiss Supreme Court explicitly confirmed three scenarios under which extension might be possible: (1) apparent authority to act, (2) intervention in the performance of the agreement and (3) piercing of the corporate veil. See Bundesgericht. Decided on 7.4.2014. Case number 4A_450/2013. [online]. Available at: www.bger.ch. Accessed 1.8.2014; Bundesgericht. Decided on 16.2.2017. Case number 4A_473/2016. [online]. Available at: http://www.servat.unibe.ch/dfr/bger/170216_4A_473-2016.html. Accessed 20.11.2018

46 Born, G. *International commercial arbitration* (2014). Alphen aan den Rijn: Kluwer Law International, 2014, p. 1453.

47 Pro: Busse, D. Die Bindung Dritter an Schiedsvereinbarungen. *SchiedsVZ – Zeitschrift für Schiedsverfahren*, 2005, no. 3, pp. 118–123; Gross, D. Zur Inanspruchnahme Dritter vor Schiedsgerichten in Fällen der Durchgriffshaftung. *SchiedsVZ – Zeitschrift für Schiedsverfahren*, 2006, no. 4, pp. 194–196; Contra: Zöller, R.; Geimer, R. *Zivilprozessordnung*. Köln: O. Schmidt, 2007, 2274 et seq.; Trittman, R.; Hanefeld, I. Part II – Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure). In Böckstiegel, K.; Kröll, S.; Nacimiento, p. *Arbitration in Germany*. Alphen aan den Rijn: Kluwer Law International, 2007, pp. 126–138.

48 Poudret, J.-F.; Besson, S.; Berti, S., et al. *Comparative law of international arbitration*. London: Sweet & Maxwell, 2007, p. 220.

narios, they disregard formally different corporate identity of a daughter company and see her actions as will of its corporate mother.

Therefore, those examples of piercing doctrine which work with a hypothesis that consent to arbitration was displayed, the question left to tribunal or court is who displayed such consent, whether formally independent subsidiary or in fact its corporate mother who pulled the strings in its puppet daughter, could be compliant with “myth of consent”. Such result could be respected only in scenarios where piercing of the corporate veil leads to a switch of entities – mother for daughter, and in that sense, there is no extension of arbitration to non-signatory, because formalistic approach to corporate identity is disregarded in order to safeguard higher principles – prohibition of the abuse of law.

2.3 Group of companies

Last, but not least, we will briefly explore the famous doctrine of group of companies, which arose on a particular line of case law decided by ICC tribunals and subsequent review of those by French courts. Most interestingly, from its formal origin in early 1980’s, it departed significantly from a consent seeking doctrine to a consent presuming doctrine.

Factually, the scenarios may differ in complexity and number of entities involved, but as the name suggests, a group of companies, or a holding structure, is present. Even if one part of this group will play a primary role in a respective business transaction, other parts will be involved to a certain degree as well. The formal contractual relation will always stay with one entity of the group and its business counterparty. However, in arbitration there will be either an attempt to force other non-signatory members of the group into the arbitration⁴⁹, or attempt of a non-signatory group member to force arbitration on a signatory counterparty.

This scenario might partially resemble both *piercing of the corporate veil* and *estoppel* scenarios discussed above. However, as will be further shown by the case law, contrary to these doctrines, it is not directly the (bad) intent of the parties or drawing of a direct benefit, which is required. Group of companies doctrine is based around the concept of the so-called “single economic reality”, first discussed in “Dow Chemical” case, an ICC award no.4131 of 1982;⁵⁰ how-

49 In this scenario, reason is an economic one. Signatory part of the group might not be in a good economic situation to fulfil its obligations arising out of the potential future award, because e.g. it is a mere project / SPV company with limited liquidity. Therefore, it might be prudent for signatory counterparty to try to extend the arbitration even over non-signatory mother company.

50 ICC International Court of Arbitration. Decided on 23.9.1982. Case number ICC No. 4131. *Yearbook Commercial Arbitration*, vol. IX, 1984, pp. 131–137. [online]. Available at: www.kluwerarbitration.com. Accessed 17.5.2014

ever, the basic principles of the doctrine may be found in earlier decisions from mid-1970's.⁵¹

2.3.1 Dow Chemicals case

Dow Chemical Venezuela and Dow Chemical Europe, both directly or indirectly owned and controlled by parent company Dow Chemical Co., entered into distribution agreements with several companies the rights of which were subsequently assumed by company Isover-Saint-Gobain. Subsequently, distribution contract with Dow Chemical Venezuela was assigned to another Dow subsidiary, Dow Chemical AG. Moreover, during the course of cooperation, Dow Chemical France performed distribution agreements instead of the formal signatories and took other action necessary to make use of business trademarks utilized under the agreements as well.

Each agreement contained an ICC arbitration clause. When a dispute arose, arbitration proceeding were commenced against Isover-Saint-Gobain by not only the two signatory Dow Chemical companies, but also by their parent company Dow Chemical Co. and Dow Chemical France, neither of which had signed the agreements, nor arbitration clauses contained therein.

Swift jurisdictional objection of the Isover seemed logical – from the formal point of view, neither the subsidiary, nor the parent company could act as claimants in the arbitration, as they had never signed the arbitration clause contained in the distribution contracts.

However, arbitration panel rejected such objection in its interim award, and held that even if individual members may have a distinct juridical identity, tribunal must consider all the surrounding elements and factors, including usages of international trade, and respective case law. After analysing these conditions, the tribunal decided that even distinct entities may be bound by an arbitration agreement, which they never signed, as long as these non-signatories form a part of single economic reality with signatory parties.⁵² In its reasoning, tribunal created a threefold test which established what is now known as the group of companies' doctrine.

Firstly, respective third parties need to be part of a corporate group, i.e. altogether, they must create a single economic reality or power. Secondly, extension

51 See e.g. ICC award no.2375 of 1975 and no.1431 of 1975. For further discussion see Derains, Y. Is there a Group of Companies Doctrine? In Hanotiau, B.; Schwartz, E. A. *Multiparty arbitration*. Paris: International Chamber of Commerce, 2010, p.132.

52 The tribunal stated, "*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.*"

is required based on the needs of international trade, especially taking into the account usages of international trade. The third and most significant one is that the common intent of all the parties must be found in the surrounding circumstances that characterize the conclusion, performance or termination of the contract. In this regard, the tribunal observed for example, that neither of the contracting parties attached the slightest importance to the choice of the company within the Dow Group that would formally sign the contracts. Thus, it seemed of no greater than formal importance that only certain parts of the “single economic reality” are formally bound by the agreement. Arbitrators concluded, “*In reality all the entities of the DOW Group involved in distribution in France understood themselves to be contracting with the distributor in France, and likewise, it was with the aggregate of these entities that the [contracting predecessors of Isover] understood themselves to be contracting.*”

Many commentators pointed out that even though first two elements must be established, the existence of the group could not in itself justify the extension.⁵³ Thus, in establishing mentioned elements, arbitrators did not intend to fully abandon consent-based analysis as the cornerstone of arbitration. Indeed, this test should provide for a guidance how an arbitrator may imply the consent of the party to comply with arbitration proceedings⁵⁴ and which may perhaps partially compensate formal shortage of the missing signature by another part of what is established to be “single economic reality”.

On the other hand, the third element was also subject to critique. It was argued that a mere intention or understanding is not enough to bind a party into arbitration, only party's consent has such a power, therefore it should be sought for and proven.⁵⁵ Later on, some decisions changed the term of “common intent” to “common will”⁵⁶ which might have perhaps indicated a more consent oriented analysis; however, as will be shown, the majority of subsequent awards seemed to depart from a consent-based analysis altogether.

53 Hanotiau, B. Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law. In van den Berg, A. J. *International Arbitration 2006*. Alphen aan den Rijn: Kluwer Law International, 2007, pp.344–345; Mayer, P. Extension of the arbitration clause to non-signatories under French law. In Permanent Court of Arbitration. *Multiple party actions in international arbitration*. Oxford, New York: Oxford University Press, 2009, p.190; Born, G. *International commercial arbitration (2014)*. Alphen aan den Rijn: Kluwer Law International, 2014, p.1448.

54 Mantilla-Serrano, F. Multiple Parties and Multiple Contracts: Divergent or Comparable Issues? In Hanotiau, B.; Schwartz, E. A. *Multiparty arbitration*. Paris: International Chamber of Commerce, 2010, p.13.

55 Poudret, J.-F.; Besson, S.; Berti, S., et al. *Comparative law of international arbitration*. London: Sweet & Maxwell, 2007, p.218.

56 ICC International Court of Arbitration. *ICC International Court of Arbitration Bulletin*, vol. 2, 1991. [online]. Available at: www.iccdri.com. Accessed 30.5.2014.

2.3.2 Further development of Dow Chemical doctrine

In subsequent decisions, French case law modified original concept introduced in Dow Chemical decision and moved the doctrine closer to piercing of the corporate veil understanding. Cases of Lestrade and Orri could be named as examples.

In **Lestrade**,⁵⁷ a project company Sponsor AB was created for a single purpose to acquire certain companies of Lestrade group. The project company was fully owned and controlled by its mother undertaking Sponsor SA. However, when Lestrade group called for the closing of the deal in line with agreed acquisition contract, neither of Sponsor companies replied. Lestrade filed a claim against both the daughter and the mother company. Formal objection of Sponsor AB came as no surprise. However, the court saw the fact pattern clearly, and applied Dow Chemical test word by word. Such analysis would reconfirm the understanding of the doctrine, but the court went beyond these considerations and contemplated also about a true relationship between Sponsor AB and Sponsor SA. It stated that the mother company was “*only appearance of the third party and in fact appears to be the soul, inspirer and, in a word, the brains of the contracting party.*” The court thus allowed for the extension not only on Dow Chemical test but jointly with alter ego (piercing of veil) considerations. On the other hand, court did not state anything regarding common intent of the parties, as analysed under the original Dow Chemical decision.

In **Orri**, arbitral tribunal with the seat in France dealt with a payment claim from company Elf which provided services to various companies of what was labelled as Saudi Europe Lines, group of companies created by Mr Orri. As the group was not formally registered, and respective agreements were signed by Mr Orri, with a postscript “Chairman of the group Orri”, the tribunal used a traditional agency principle and the principle of protection against abuse of law⁵⁸, to conclude that it would not be rational for Elf to have an intention to negotiate with formally non-existent group, but more probably with its real owner Mr Orri. Of course, Mr Orri did not agree with such a conclusion and filed for a setting aside. Even though French court dismissed the challenge and allowed the extension, it based its decision on other reasoning.

On one hand, the court mirrored the conclusion of the tribunal regarding deceptive intent of Mr Orri to create shields and barriers which would protect him personally from any liability. On the other hand, the court paralleled Dow Chemicals reasoning with some important changes. Firstly, it disregarded “single economic reality” element and introduced “direct implication of third party in

57 Cour d'Appel de Pau. Decided on 26.11.1986. Case number N/A. *Yearbook Commercial Arbitration*, vol. XIII, 1988, pp. 149–151. [online]. Available at: www.kluwerarbitration.com. Accessed 31.12.2013

58 Poudret, J.-F.; Besson, S.; Berti, S., et al. *Comparative law of international arbitration*. London: Sweet & Maxwell, 2007, p. 219.

execution of the contract”. Secondly, “common intent” element was changed to a presumption of knowledge and consent to arbitration clause, based on acts or usage between the parties. It follows from this decision, that common economic reality is not based on a corporate setting of the group, but on an economic life of respective transaction. This would have vast implication regarding third party non-signatories.

Indeed, subsequent decisions in cases like **Korsnas Marma**,⁵⁹ **Ofer Brothers**⁶⁰ or **Amkor**⁶¹ were based not primarily on a single economic reality of corporate groups and common intent of all parties involved, formally or informally, but turned more around the scope of respective substantive transactions and need to create single jurisdiction to deal with all aspects of interconnected claims, and thus entangling even the non-signatories. Contrary to Dow Chemical, common intent represents no longer a crucial element to look for and to establish; mere involvement into the life of certain economic cycle might be sufficient to base arbitral jurisdiction over a nonsignatory.

2.3.3 Position of US, UK, German and Swiss courts

Within the abovementioned group, the case law from Switzerland supplies the largest number of decisions which analysed the applicability of the doctrine.

One of the first was **ICC award no.4402**, where a familiar fact pattern occurred – mother company not formally part to the substantive contract, wishing to make use of arbitration clause contained therein. Even though the tribunal did not explicitly refer to group of companies doctrine, it analysed the issue in similar way, including questions of common will of all entities involved. But contrary to Dow Chemicals decision, the tribunal followed a more restricted, formalistic approach, when observed that, “*If claimants had wanted to include [mother company] in the [agreement], and, therefore, in the arbitration clauses, they could have so requested before the signing the [agreement].*” Tribunal thus stated that if there is a possibility to include what is later a non-signatory into the contract, but the negotiating parties decide otherwise, such decision should be honoured. This conservative and formalistic position on corporate independence was later reconfirmed in already quoted decision **Alpha vs. Beta**⁶² where arbitral tribunal concluded that group of companies is not part of Swiss law.

59 Cour d’Appel de Paris. Decided on 30.11.1988. *Revue de l’arbitrage*, 1989, p.691. [online]. Available at: www.kluwerarbitration.com. Accessed 17.3.2014

60 Cour d’Appel de Paris. Decided on 14.2.1989. *La Revue de l’arbitrage*, 1989, p.691. [online]. Available at: www.kluwerarbitration.com. Accessed 17.3.2014

61 Cour de Cassation. Decided on 27.3.2007. *Revue de l’arbitrage*, 2007, pp.758–787. [online]. Available at: www.kluwerarbitration.com. Accessed 30.5.2014

62 Ad hoc. Decided on 1991. *ASA Bulletin*, vol. 10, 1992, pp.202–258. [online]. Available at: www.kluwerarbitration.com. Accessed 31.5.2014

One of the first court decisions was again already analysed decision in **Butec**.⁶³ Here, the court analysed several approaches, including group of companies. Even though it did not rule out its applicability under Swiss law, it noted that the threshold for its applicability is high, and the court would use it only in extreme cases. Additionally, regarding the fact pattern of Butec case, the court observed that claimant had sufficient negotiating power to insist on formalising its contractual position even against a non-signatory mother company of respondent. Reaching similar point as in decisions ICC no. 4402 and Alpha vs. Beta, the court stated that in such a situation, signatory cannot successfully claim extension if it failed to act respectively during negotiations.

A more recent case law seems to divert from a strict formalistic view and allows, at least partially, to see a broader economic picture. This could be demonstrated by decision **X., Y. & A. vs. Z.**⁶⁴ in which both arbitration tribunal and subsequently Swiss Supreme Court reconfirmed the position under Swiss law, and stated that if a non-signatory takes an active role in the performance of a contract which contains arbitration clause, such clause may then be applicable even to such non-signatory. This basically mirrors the decisions in the later stage of group of companies doctrine.⁶⁵

In another decision **A.C., A.D., A.E vs K.**,⁶⁶ Swiss Supreme Court analysed a more traditional group of companies setting, where the contract contained the names of all companies within the group but was signed only by one of them. Even though the court did also apply Dow Chemical test, the analysis relied heavily on objective interpretation and applying the principle of protection of good faith expectations ("*Vertrauensprinzip*").

Therefore, Swiss case law does not recognise group of companies as a stable part; on the other hand, it is not indifferent to a more flexible approaches leading to extension.

To some extent similarly, German case law does not provide any specific answer to applicability of group of companies under domestic law.⁶⁷ As the Ger-

63 Bundesgericht. Decided on 29.1.1996. *ASA Bulletin*, vol. 14, 1996, pp. 496–507. [online]. Available at: www.kluwerarbitration.com. Accessed 2.6.2014

64 Bundesgericht. Decided on 16. 10. 2003. Case number 4P 115/2003. *Sammlung der Bundesgerichtsentscheide*, vol. 129, 2003, pp. 727–738. [online]. Available at: <http://www.bger.ch>. Accessed 2.1.2014

65 Arbitral tribunal even pointed to several, at that time recent, decisions of French courts in the group of companies setting and stated that these represent a modern arbitration practice.

66 Bundesgericht. Decided on 22.1.2008. Case number 4A_244/2007. [online]. Available at: www.bger.ch. Accessed 8.5.2014

67 Trittman, R.; Hanefeld, I. Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure). In Böckstiegel, K.; Kröll, S.; Nacimient, P. *Arbitration in Germany*. Alphen aan den Rijn: Kluwer Law International, 2007, pp. 109–110. Poudret, J.-F.; Besson, S.; Berti, S., et al. *Comparative law of international arbitration*. London: Sweet & Maxwell, 2007, p. 225.

man case law is generally reluctant to extend the scope of the agreement beyond formal parties, negative position to group of companies, as part of German law, could be expected as well. However, from the perspective of incoming arbitral awards, it seems that extension of arbitration based on the group of companies doctrine would not represent a sufficient reason to refuse enforcement of such award based on public policy reasons.⁶⁸

Common law case law reached similar negative position regarding the applicability of the doctrine under respective domestic laws.

English courts stated this position quite clearly in **Peters Farms** decision.⁶⁹ In the original arbitral proceeding, the tribunal extended the scope of arbitration to a non-signatory and reasoned the group of companies doctrine was part of international arbitral practice. However, English court vacated the award, and stated that group of companies “*forms no part of English law*”.⁷⁰

As developed by Thomson-CSF decision, US courts use five distinctive methods to extend the scope of arbitration over non-signatories; group of companies is not one of them. This position has been repeatedly reconfirmed.⁷¹

2.3.4 Group of companies doctrine in compliance with consent-based arbitration (?)

As could be deduced from the original Dow Chemicals decision, the holding structure per se does not justify the extension over non-signatories, it was just one of the elements in overall fact pattern that subsequently enabled to consider a broader picture of each transaction. The original decision acknowledges the leading position of consent and proposes a methodology how to establish such consent in corporate group setting. In group of companies, we could see considerations which could be similar both to estoppel and piercing doctrines, but group of companies is far from being a simple cumulation of both.

Contrary to piercing doctrine, corporate structure in group of companies is not established to abuse the law. It is the result of commercial reality of how

68 Bundesgerichtshof. Decided on 8.5.2014. Case number III ZR 371/12. [online]. Available at: <https://beck-online.beck.de/Dokument?vpath=bibdata%5Czeits%5Cschiedsvz%5C2014%5Ccont%5Cschiedsvz.2014.151.1.htm>. Accessed 20.11.2018

69 The High Court of Justice (Queen's Bench). Decided on 4.2.2004. Case number [2004] EWHC 121 (Comm). [online]. Available at: <http://www.bailii.org/ew/cases/EWHC/Comm/2004/121.html>. Accessed 2.1.2014

70 Even though some later cases might have indicated the change in the position (e.g. already discussed Roussel-Uclaf), recent decision reconfirmed negative standing of English Law. See Court of Appeal of England and Wales (Civil Division). Decided on 21.11.2008. Case number B2/2008/0489. [online]. Available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2008/1283.html>. Accessed 7.6.2014

71 From the recent judgments on the issue see: United States Court of Appeals, Second Circuit. Decided on 14.4.2005. Case number 02-9383. *Federal Reporter, 3rd series*, vol. 404, 657 et seq. [online]. Available at: www.westlaw.com. Accessed 7.6.2014

multinational groups organise their business, where individual companies are indeed independent and autonomous, but to some degree connected with each other and their corporate parent, sharing a common goal.

Therefore, a second element must be also established, parts of the group intervene in crucial moments of the substantive transaction, ie. its negotiation, performance or termination. At the same time, the counterparty is aware of this group setting, and to some degree acknowledges it. On the other hand, a mere involvement into transaction would be insufficient to justify extension, as could be the case in estoppel scenarios. The link to holding structure in the original Dow Chemical decision seems to be firm, it is this requirement of single economic reality of the group which allows tribunal or court to further investigate specific actions and through them analyse (non)-existence of consent.

Group of companies, in its original wording, thus represents an interesting tool to reflect modern principles of corporate structures and needs of international trade, which call for an effective and unitary dispute resolution mechanism, but at the same time respects the basic principles that arbitration is based on consent.

However, through the later development of case law, the original analysis shifted into a consent-less area. Even though new cases quote directly Dow Chemical decision, or its leading principles, they shift from seeing single economic reality of corporate group to a single economic reality of transaction as starting point for further analysis. Thus, in the end, a third party non-signatory which might incidentally perform part of the obligation would be presumed to have accepted arbitration. Formally, consent is demonstrated and safeguarded; but, only through a presumption, based on a premise that in international trade, arbitration is a standard model of dispute resolution and party which performs part of the obligation should have reasonably foreseen that framework of the obligation would be surely covered by such a dispute resolution mechanism. However, a mere knowledge does not necessarily amount to acceptance, and such implications should not be achieved quickly, especially in situation when there is a change of venue from state court to arbitration, which might be favoured by international businessmen, but such preference is surely based on the simple fact that they are precisely these businessmen who control what kind of dispute resolution they consciously choose.

3. Arbitration: Creature of consent – a myth or reality

This article provided a brief description of methods which might be less common when considering the extension of an arbitration agreement over non-signatory parties. It tried to answer the question if the very basic understanding of arbitration as a consent-based dispute resolution mechanism could be quoted

without any limitations or conditions. Partial conclusions show that unfortunately this simple truth is not simple at all and needs further explanation.

Arbitration is indeed a creature of consent. Without valid arbitration agreement, there can be no arbitration. That truth is valid without doubt. But once we agree that there is a valid arbitration agreement, then the discussion turns more complex and more problematic consent-wise.

As was proven by quoted case law coming from major arbitral jurisdictions, there are methods which allow to extend the personal scope of such valid arbitration clause of parties which manifestly did not sign such an agreement. However, such an extension brings result which impacts the very beginning of jurisdictional analysis – whether there is valid arbitration agreement. To the author of this article, it seems to be an endless circle, if strict consensual doctrine is adopted. But, as was shown by the case law, consent-based tests seem to be missing too many times, and other considerations take precedence.

In his latest article, Brekoulakis summarises the contradiction between rhetorical and practical approach to arbitration as a creature of contract and points out that applicable theories contravene fundamental principles of consent. One of the reasons for such conclusion is the fact that these doctrines, except for group of companies scenario, were not formulated for the needs of arbitration itself, but were merely “loaned” from contract and corporate laws.⁷²

However, it is the point in discussion if these principles, which might break the privity of the substantive contract or the independence of company, may be used in arbitral setting as well. Surely, arbitration contract is by its very definition a contract, but as discussed, its implications might be more serious. Arbitration agreement triggers a different method of dispute resolution which to some degree lowers procedural and even constitutional protections available under national laws. This does not go against accepting arbitration as a favoured solution to international commercial disputes, but points to the fact that these consequences should not be alleviated or even overlooked lightly. Therefore, either a well-reasoned solution must be found not to compromise consensual basis of arbitration, or such “myth of consent” must be abandoned, perhaps shifting to jurisdiction-based approach.⁷³ Whether accepting a new general theory of arbitration is a way forward is definitely a question to be answered in the years to come.

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✓ 72 Brekoulakis, S. Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories. *Journal of International Dispute Settlement*, 2017, no. 8, p. 618.

73 Brekoulakis, S. Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories. *Journal of International Dispute Settlement*, 2017, no. 8, p. 630.

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