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WHEN ARE NON-SIGNATORIES BOUND BY THE ARBITRATION AGREEMENT IN INTERNATIONAL COMMERCIAL ARBITRATION?

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ABSTRACT

This thesis concerns the issue of third non-signatory parties and analyses under what circumstances they should be bound by an arbitration agreement not signed by them. First it refers to the effects of signing an arbitration agreement between the parties, and then analyses the different theories that eventually could support an extension of the arbitration agreement to third parties.

Also, it refers to the legislation of different countries and the treatment courts dispense on this subject, as well as to some international rules to discover which approaches are contained in those rules. It concludes by referring to the most important trends existing presently regarding the subject, used by arbitral tribunals to bring third non-signatory parties into arbitration proceedings.

TABLE OF CONTENTS

	Page
Table of abbreviations	5
A Introduction	6
B Chapter I: The arbitration agreement in international commercial Arbitration.....	9
1. Effects regarding signatories and non-signatories	11
1.1. Principle of relativity of contracts.....	11
1.2. Extension of the arbitration agreement to non-signatories.....	12
2. How do arbitral tribunals solve the problem?	17
3. Theories employed by arbitral tribunals to solve the problem of Extension	24
3.1. Estoppel.....	26
3.2. Third Party Beneficiary.....	30
3.3. Incorporation by Reference.....	32
3.4. Subrogation	33
3.5. Veil Piercing	34
3.6. Group of Companies	41
3.7. Alter Ego.....	46
3.8. Assumption	48
3.9. Agency	50
3.10. The economic reality behind the decisions taken by	

Arbitral tribunals	52
4. International legal references to the problem.....	55
4.1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)	56
4.2. International Chamber of Commerce Rules of Arbitration.....	57
4.3. United Nations Commission on International Trade Law Model Law on International Commercial Arbitration	59
 C Chapter II: International Arbitration Law and judicial control through Courts	 62
1. France	65
2. Switzerland	68
3. United States of America	71
4. Peru	78
 D Conclusion.....	 83
 Bibliography.....	 89

TABLE OF ABBREVIATIONS

ICC:	International Chamber of Commerce
Model Law:	Model Law for International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL)
New York Convention:	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, New York (entered into force June 7, 1959)
SPILA:	Swiss Private International Law Act
UNCITRAL:	United Nations Commission on International Trade Law
USA or US:	United States of America

A. INTRODUCTION

Arbitration is a private dispute resolution mechanism and consequently the parties involved have to agree on it, due to its consensual nature. This is actually an advantage compared to disputes resolved by ordinary judicial proceedings, since in an arbitration dispute there is at least the will to reach an understanding. Consequently, it seems that a party that did not agree cannot be obliged to arbitrate, and the other one would have to sue in court in order to defend its rights and to oblige the other one to comply. In most countries the right to litigate before national courts is granted in their Constitution, so generally the possibility is open to the parties that decide to go that way. In fact, for a long period of time the extension of the arbitration agreement to a party that had not consented was not accepted, and further, arbitral tribunals would simply not consider it as a possibility. The general opinion was that a company that had not signed the arbitration agreement could not be sentenced to respond for damages, which actually had been caused by another party that had signed the agreement.

As international business relations grew and became more sophisticated, it became obvious that new solutions had to be found that would contribute toward making transactions as swift and cost effective as possible for all parties involved. One of the solutions used, and more and more in use today, is to establish a subsidiary company in the country the parent company wants to do business with, because of legal or tax reasons, or any other considerations. In many transactions performed today only the newly created company signs the agreement without even mentioning the parent company. But is it really fair, just and legal that it will not be possible to make the parent company responsible

for damages caused by its subsidiary, only because it did not sign the contract?

It did not take long before the problem found its way to the desks of arbitral tribunals, and today we now see an important number of awards referred to conflicts in which the problem of non-signatory parties and multi-party transactions had to be addressed. Undoubtedly, the dilemma to solve is whether pre-eminence should be given to the consensual nature of arbitration, thus excluding those parties that did not express their consent, or to the practical effectiveness of awards by eventually binding related companies also.

Among others, one of the most important arguments historically invoked for not considering a non-signatory or third party responsible for damages caused by a related company, was the principle of the relativity of contracts. The principle means, from a legal point of view, that the rights and obligations of that particular contract only affect the signatories. On the contrary, no other parties could be affected by that particular contract in any way due to the lack of signature.

However, there are some situations in which it could be interpreted that third parties eventually would be obliged by a contract, even though they did not sign it; for instance when a company was included in the contract by reference, or because it was acting as an agent or financing certain aspects of the operation. Another important matter to take into account is the economic reality of the operation, beyond the text of the agreement itself.

Another aspect to consider, from the legal point of view, is the

execution of the award in a certain State, and the considerations of the courts of justice and treatment given by those to arbitral awards that extend the agreement to non-signatories. It is very important for the party that was favoured by the tribunal's decision to be able to execute the award effectively, and finally obtain the reparation of the damages suffered from the other party or parties involved, even if they were non-signatories. If the courts of a State would deny recognition of that kind of award, every effort made toward obtaining it would have been useless.

Therefore, the purpose of this thesis is to find out what grounds and circumstances are considered by arbitral tribunals for sentencing a third non-signatory party to respond for damages. In order to achieve that goal, first we will analyse in general terms the arbitration agreements in international commercial arbitration. We will also address the principle of relativity of contracts, and particularly focus on the extension of the arbitration agreements to third non-signatory parties.

Next we will analyse the ways in which arbitral tribunals approach the problem, and also discuss the theories and doctrines employed by arbitral tribunals to solve the problem and make a decision on the issue.

Finally, we will conclude this thesis with a commentary regarding the latest trends observed in this matter, and our opinion about the subject.

B. CHAPTER I: THE ARBITRATION AGREEMENT IN INTERNATIONAL COMMERCIAL ARBITRATION

Since the nineteen sixties we have been able to witness the transformation of conditions of international arbitration. The most important changes have taken place in the political area, world economy and also in the legal field¹.

The new corporate structures and global business transactions, like bank guarantees and surety ships, charter parties, bills of lading, chains of contracts of different types and partnerships, are often connected with multi-party arbitration, resulting in new challenges for arbitral tribunals².

Business transactions in international commerce have become complex and often are not easy to carry out. In many cases, there are more than two parties involved, each performing part of the agreement, which also means that it will be necessary to draw up elaborate and intertwined contracts, trying to consider all the possible scenarios that the parties involved in the transaction could eventually have to face. On the other hand, business relationships, especially international ones, are quite unpredictable, since there are many variables in play, and it is likely that difficulties or even disputes will arise that the involved entities had not or could not have foreseen.

As a reaction to the internationalization of business transactions, and for protection of their national interests, States require in a constantly

¹ Harmathy, Attila. "New Experiences of International Arbitration." *Electronic Journal of Comparative Law* 11.3 (December 2007): p. 3.

² *Ibid.*, p. 13.

growing number of cases that a company that wants to do business in a certain country opens up a subsidiary or starts the business with an associated local company. In fact, many times it will be indispensable to prepare the main business that the parties intend to achieve by concluding preparation contracts. To do so can be convenient for many reasons, e.g., the State law requires the establishment of a local company or it is a multi-party transaction. Most likely, all of the contracts signed will contain an arbitration agreement. However, those clauses often lack coherence, which eventually will become a source of conflict.

The perfect contract probably would be the one foreseeing all possible scenarios and their solutions, regarding the beginning of the business relationship, its performance and finally its termination. Unfortunately, such a contract does not exist. It is not that the parties' do not want to have a clear arrangement regarding all the possible problems that could arise at the different stages of the relationship. The difficulty is rather that it is almost impossible to foresee every situation that could affect the business transaction and the signatory and non-signatory parties involved in it.

It is also important to consider the moment when the arbitration agreement is written and included in the contract. It generally happens at a time when the parties have the best possible relationship, just starting their business transaction, and still agreeing on the issues that eventually later on could end up weakening or bringing trouble into the relationship.

Without any doubt, arbitration agreements grow in importance at the same pace as the volume of international business transactions. A growing number of parties involved in international transactions include

an arbitration agreement in the contracts, precisely because of the advantages dispute resolution offers. Also contributing to that phenomenon is the fact that there are already international standards relating to arbitration proceedings quite broadly accepted by many countries. An important contribution to this matter is the Model Law on International Commercial Arbitration designed by the United Nations Commission on International Trade Law³, since many States with little or no modifications adopted it, which helps to achieve uniformity in this matter, a characteristic it lacked not too long ago.

1. Effects regarding signatories and non-signatories

Theoretically, a contract signed by two parties, e.g., company A and company B, will only produce effects regarding these parties, in this case A and B, because of the privity established between these parties of the contract. Nobody else should have to fulfill obligations contained in that document, neither have any rights to claim because of that contract having been signed. Nevertheless, and similar to other situations in life, there are exceptions to the rule.

1.1. Principle of relativity of contracts

One of the most important principles applicable to a contract is the relativity of it. The privity of contract only affects the signatory parties. In simple terms, it means that only the parties that signed the contract will be obliged by it and will be able to claim rights based on it. On the other hand, it also means that only the signatory parties will be able to compel the

³ UNCITRAL Model Law on International Commercial Arbitration (1985).

other party to fulfill its obligations emanating from the agreement that was signed by both.

The privity of contract has a tremendous strength. A demonstration of that strength is that in case one of the signatory parties is not willing to comply voluntarily, the other one will be able to claim its rights in court, based on the agreement that was signed. Assuming that the claimant has fulfilled all the requirements established in the contract, the court will oblige the other party to comply with its obligations, if necessary even through public force.

1.2. Extension of the arbitration agreement to non-signatories

Arbitration promises a relatively relaxed, flexible procedural surrounding, swift delivery of the final award and very limited opportunities for review⁴. It also has the advantage of being resolved by a neutral arbitral tribunal and the possibility of enforcing the award in a great number of countries. Thus, it has several characteristics that make this procedure attractive and an interesting alternative to litigating in ordinary courts.

In some cases a party to the arbitration agreement brings a claim against a non-signatory before the arbitral tribunal, or vice versa, i.e., a non-signatory pleads against a signatory party of the agreement forcing the tribunal to make a

⁴ Pavic, Vladimir. "Non-Signatories and the Long Arm of Arbitral Jurisdiction." In *Resolving International Conflicts - Liber Amicorum Tibor Varady*, edited by Peter Hay, Lajos Vékás, Yehuda Elkana and Nenad Dimitrijevic, Budapest: Central European University Press, 2009, p. 213.

decision whether to extend the arbitration agreement, and under what grounds. The extension of arbitration agreements refers to the situation when a company that has not signed an arbitration clause is nevertheless obliged to participate as defendant in arbitration proceedings initiated pursuant to that clause by another company in the group to which it belongs. It also refers to the opposite situation, namely when a non-signatory company of the arbitration agreement signed by one or more of the companies belonging to the group is allowed to initiate arbitration proceedings. Both situations could be applicable eventually also to a natural person who owns all or the greater part of a company's shares⁵.

The jurisprudence regarding the extension of the arbitration agreement to non-signatories, and the amount of decisions allowing an extension, develop constantly, as arbitral tribunals are faced with the problem more and more frequently, due to the fast growing amount of international commercial transactions.

Arbitration has a contractual nature, and represents a voluntary alternative to litigation in state courts; an arbitration agreement actually may only be binding for a party that has either explicitly or impliedly consented to it. Therefore, whenever the question arises whether or not to extend an arbitration agreement to a party that did not sign it, the logical answer should be to take into account the legal rules applicable

⁵ Vidal, Dominique. "The Extension of Arbitration Agreements within Groups of Companies: The Alter Ego Doctrine in Arbitral and Court Decisions ." *ICC International Court of Arbitration Bulletin* 16, no. 2 (2005): p. 63.

to that specific agreement as defined by the parties that signed it.

Generally there would be no obstacle for joinder or consolidation, if all the parties involved or somehow related to the matter agreed on having related disputes resolved in a single arbitration. In a carefully drafted arbitration clause the parties can determine under what circumstances they want to allow for joinder or consolidation, who would have the authority to decide on these issues, and how to deal with the appointment of a tribunal in case of a consolidated proceeding⁶. Such a clause could be included at the moment the main agreement is drafted, or negotiated afterwards as a separate agreement, or even once a dispute has arisen.

Another solution could be to include rules of one of the institutions that provide them for arbitration and that consider different solutions to the matter, e.g., the American Arbitration Association rules⁷, the International Chamber of Commerce rules of arbitration⁸, or the United Nations Commission on International Trade Law arbitration rules⁹.

In most countries, according to the law, it is possible for the defendant to bring a third party into the trial. However, that is not the case in arbitration since it rests basically on consent. The principle of procedural party autonomy provides parties

⁶ Ten, Irene. "Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements under U.S. Law." *The American Review of International Arbitration* 15 (2004): p. 142.

⁷ Available at www.adr.org

⁸ Available at www.iccarbitration.org

⁹ Available at www.uncitral.org

with the freedom to contractually determine the circle of persons entitled to participate in the arbitration proceedings. Thus, that principle and the contractual foundations of arbitration make it a flexible dispute resolution mechanism, allowing parties to design a system for resolving differences in accordance with their particular commercial needs. That is one of the reasons for the increasing popularity of arbitration in international commerce¹⁰.

Seen from a different point of view, while the consensual nature of arbitration has proved to be an impediment to obtaining consolidated arbitration that same nature provides great leeway for the parties to structure their contracts to assure consolidated arbitration¹¹.

Due to the development of international commerce during the last decade, multi-party arbitrations are no longer the exception. There are usually two possible scenarios for the entities not appearing to be parties to the arbitration agreement to enter the stage: one is as the claimant, alone or alongside the party whose participation is non-contestable; another is at the receiving end, as the sole or additional respondent. Those parties are generally referred to as “non-signatories”¹².

Thus, what was until recently an unbreakable rule, today steps more and more aside leaving space for new solutions,

¹⁰ Brekoulakis, S. "The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room." *Penn State Law Review* 113, no. 4 (2009): p. 1166.

¹¹ Sentner, James. "Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories." *Business Law International* 6, no. 1 (January 2005): p. 57.

¹² Pavic, Vladimir, op. cit., p. 215.

which are necessary for many reasons, among others, due to legal aspects of the participating countries in international commerce. Undoubtedly, arbitral practice has to consider those recent developments when it comes to making decisions. In fact, the extension of arbitration agreements to non-signatory parties has become a critical matter in arbitral practice.

Actually the question whether an arbitration agreement can or cannot be extended to third non-signatory parties is not the issue anymore. Proof of it is the considerable amount of awards that include non-signatories in the arbitral proceedings and final decisions. We will refer below to some of these awards. The discussion today rather is centered in what characteristics a non-signatory should have in order to be able to extend the arbitration agreement to it, and what considerations are taken into account by the arbitral tribunal, i.e., on what grounds it brings the non-signatory into arbitration proceedings. Some of the factors arbitral tribunals should take into account in general when it comes to take a decision are the language of the arbitration provisions and the underlying agreement, the circumstances under which the parties entered into the agreements and the legal relationship between the parties, the purpose of the arbitration agreements and considerations of efficiency, the parties' obligation to act in good faith and consequences of consolidated proceedings for the constitution of the arbitral tribunal¹³.

Nevertheless, as clearly stated by diverging arbitral

¹³ Ten, Irene, op. cit., p. 143.

decisions and awards, so far it has not been possible to reach consent in this matter.

2. How do arbitral tribunals solve the problem?

Sometimes an arbitral tribunal is asked to look beyond the question of who signed the arbitration agreement to ascertain whether a non-signatory has in fact given its consent to be bound by the arbitration agreement and whether the signatories have also consented to the non-signatory being obliged¹⁴.

There are different ways to consolidate arbitrations including non-signatories before disputes arise. One possibility is to draft an agreement separate from the main contract or subcontracts establishing consolidated arbitration, involving signatories as well as non-signatories, and make all parties sign it. Another way is to choose applicable arbitration rules that will allow the arbitral tribunal to consolidate all proceedings into one. Arbitration should operate as an open dispute resolution system that takes into account the interests of third parties that are strongly associated on a substantive level with the parties to an arbitration agreement, rather than a closed one, limited to the signatory parties only¹⁵.

One of the advantages of multi-party arbitration, bringing into the proceedings also third non-signatory parties, is that it avoids inconsequent or even conflicting decisions that could be taken by different arbitral tribunals in case of initiating several arbitral

¹⁴ Hosking, James. "The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent." *Pepperdine Dispute Resolution Law Journal* 4, no. 3 (2004): p. 477.

¹⁵ Brekoulakis, Stavros, op. cit., p. 1167.

proceedings, making them more efficient. Another advantage of multi-party arbitration is that it avoids the problems that could arise when trying to enforce those inconsistent awards. Further, those inconsistent awards could eventually prove the arbitral tribunals wrong, and that could affect the prestige of international commercial arbitration, which would be a very undesirable effect.

The parties' intentions should be the first and most important guideline for the arbitral tribunal once a case is submitted for its decision, especially considering the great amount of economic operations that involve several contractual relationships between multi-party operations.

Whenever there is a third party seeking to get involved with the arbitration proceedings, or a party trying to bring a non-signatory into the proceedings, and the arbitral tribunal has to make a decision as whether to include it or not, it should consider the substantive background of the arbitration arrangements made. Also the arbitral tribunal should consider that including third parties somehow related to the matter would eventually provide valuable information allowing the tribunal to make a better founded and therefore most likely more just decision.

However, including a non-signatory eventually could have some disadvantages too. For instance, if the non-signatory is only related to a small part of the business transaction, consolidated proceedings would probably be more expensive and time consuming than a separate arbitration for it. Additionally, the possibility exists that a party would use the threat of bringing into arbitration a non-

signatory to force the other to settle the dispute. Further, some of the parties involved could be concerned about giving away confidential information to third parties through the consolidated proceedings. Nevertheless, there is a solution to that problem, making all the parties involved in a consolidated proceeding sign a confidentiality agreement¹⁶.

Analysing the arbitral jurisprudence, it is not difficult to distinguish several situations involving entities and individuals that never signed an arbitration clause¹⁷. The first one is that the signatory or signatories could sue a non-signatory before the arbitral tribunal, together with another signatory or even alone, trying to bring it into the arbitration proceedings. In general this would occur when the claimant would estimate the non-signatories' patrimony as more attractive as the one of the other signatory concluding that the enforcement of an eventual favourable award would be easier. In that case, the non-signatory probably would defend itself highlighting such character and adding that therefore it could not be considered as bound by the arbitration agreement. It also could happen the other way around, i.e., the non-signatory suing one or all of the signatories, and those opposing to the pretensions of the non-signatory on the basis that it is not a party to the arbitration agreement.

In both situations the possibility exists that the respondent agrees on entering into arbitral proceedings accepting that the counterpart is bound by the arbitration agreement, even though it had

¹⁶ See generally Ten, Irene. "Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements under U.S. Law." *The American Review of International Arbitration* 15 (2004): p. 134-135.

¹⁷ Park, William. "Non-Signatories and International Contracts: An Arbitrator's Dilemma." In *Multiple Party Actions in International Arbitration*, edited by Belinda Macmahon, Oxford University Press, 2009, p. 1.

not signed the agreement or was not part of it in any other way. In those cases, the arbitral tribunal's task would be easier, considering that an arbitration agreement is based on consent, and whenever all the parties involved, whether signatories or non-signatories, accept that they are bound by it, the most important impediment for arbitration is overcome.

Lawyers often speak of "extending" the arbitration clause, or "joining non-signatories", but in Park's opinion, neither expression accurately captures what happens when arbitrators hear claims by or against someone who never signed the relevant contract. The author sustains that for arbitrators, motions to join non-signatories create a tension between two principles: maintaining arbitration's consensual nature, and maximizing an award's practical effectiveness by binding related persons¹⁸.

It is also important to consider that the whole arbitration process is intended to serve justice and equity, so it would be unfair to marginalize a third party, that even if it did not sign the agreement, it is in some way related to the business transactions. For example, when a contractor signs a contract with his client agreeing to build a bridge, most likely it will have to sign one or more subcontracts in order to be able to fulfill its contractual obligations. Of course the client will not sign the contracts celebrated between the contractor and the subcontractors. However, it would be difficult to deny that the client would be aware of the fact that besides the contractor there will be other parties related to the business transaction, e.g., as subcontractors or suppliers, because of the interdependence of all the

¹⁸ Park, William, *op. cit.*, p. 2.

parties involved in the project and its complexity, and therefore eventually those other parties could be part in a dispute resolution process through arbitration.

The conditions usually required to consider a non-signatory as party to a contract are that it took an active and substantial part in the negotiation or performance of the main contract, which on the other hand allows the arbitral tribunal to presume that it was aware of the arbitration agreement¹⁹. Nevertheless, if the cases including non-signatories would be limited to that scenario, a great number of them would be margined from the possibility to seek arbitration with a signatory. This eventually could lead to an unjust decision, e.g., a small subcontractor that signed a contract only with the main contractor, not with the client, and didn't get paid the salaries that he had agreed on with the contractor, would not be able to seek arbitration as a party, since he does not fulfill the criteria mentioned above.

At least five common scenarios are often present in cases where an arbitrator's analysis leads to joinder of a non-signatory, which are the following²⁰: a) Non-signatory participation in contract formation or mentioning of the non-signatory in contract documents; e.g. ICC Case No. 7155, denying extension because of the absence of involvement at the time the contract was concluded; ICC Case No. 11160, joining a non-signatory that played a significant role at the time of contract formation; and ICC Case No. 5730, where a corporation serving as group leader intentionally created and

¹⁹ Stucki, Blaise. "Extension of Arbitration Agreements to Non-Signatories ." *ASA Below 40 Conference*. Geneva, 2006, p. 3.

²⁰ Park, William, op. cit., p. 8.

maintained confusion; b) a single contract scheme constituted by multiple documents; e.g., ICC Case No. 1434, extending the arbitration clause based on consent, manifested by inconsistent designation of the party contracting on behalf of the non-signatory in a series of contracts; and ICC Case No. 8910, where multiple contracts were found to constitute a single contractual relationship; c) implied or expressed acceptance of the arbitration agreement by the non-signatory, whether in the particular arbitration itself, or in another forum; e.g., ICC Case No. 4131, granting corporate affiliates the benefit of an arbitration clause contained in agreements concluded by another member of the corporate family; ICC Case No. 6519, refusing the request of companies of the same group to join the arbitration based on the fact that the group leader and the signatory never intended to commit them to the agreement in their capacity “as a separate legal entity”; and ICC Cases No. 7604 and 7610, where a non-signatory respondent admitted its acceptance of the arbitration agreement; d) absence of the signatory corporate personality; e.g., ICC Case No. 5721 where the signatory did not exist as a separate legal entity but was merely a branch of the non-signatory at the time of agreement; and ICC Case No. 3879 (*Westland Helicopters*), where arbitrators reached through a legally transparent organization to take jurisdiction over the Arab countries that had created the group’s umbrella organization, which was deemed to lack legal personality²¹; e) fraud or fraud-like abuse of the corporate form; e.g., ICC Case No. 8385, where the arbitrator found “illegitimate conduct” carried on toward the party seeking the lift of the corporate veil; 1991 Swiss *ad hoc* case where the tribunal found abuse to be a basic condition for piercing the veil; and ICC Case No. 10758, where the tribunal found

²¹ See *Westland Helicopters v. Egypt, AOI & Arab British Helicopter Co.*, XVI Y.B. Com. Arb. p. 174 (1991).

no evidence of fraud that could justify piercing the corporate veil.

In some cases, we find deemed consent, which according to Park operates simply as a way to objectify assent for fact patterns where an agreement exists, even though traditional formalities may be absent or unclear²². In those cases, the circumstances of the parties' relationship will be seen as equivalent to an agreement, even if the conduct does not fit squarely within the contours of classic contract doctrine²³. In a business operation of a certain scope it could easily occur that in some of the contracts the signature of an entity that actually is going to be acting as a party to the agreement was omitted. In these cases should it be understood that it is not a party just because of the lack of signature, even though everything else expresses the contrary? Obviously not, rather the circumstances and the participation of that party should be considered, understanding that it is a part of the agreement even without signature.

Nowadays, a growing number of economic projects require for their execution several contracts or subcontracts, all interrelated and destined to regulate all the details of the relationships between the parties and also to avoid problems or inconveniences in the future due to its scope. The best solution regarding the arbitration agreement would be to include the same clause in all of the contracts and subcontracts, since it avoids contradictions. However, in practice it sometimes occurs that the parties use different clauses, or even omit the arbitration clause completely in one of the documents that they signed. Obviously, in that situation it will be more difficult to resolve problems that might arise, as there is no clause defining how

²² Park, William., op. cit., p. 12.

²³ Ibid., p. 13.

such problems would have to be resolved. The process of finding a solution definitely would be more expensive and time consuming, which are very undesirable circumstances in any business relation, and especially in the ones that went bad.

As Park states, no magic formula tells arbitrators what legal principles apply in the determination of joining non-signatories²⁴. Often, the decision to join a third non-signatory party rests on more than one factor, and in that situation it is important that the arbitral tribunal considers and analyses all of them. Otherwise there is a danger of taking a decision that will not do justice to the entities involved, whether signatories or non-signatories.

Standards articulated in published arbitral awards, supplemented by scholarly comment, often provide intellectual coherence and practical merit for arbitral tribunals seeking guidance on questions related to non-signatory parties, because they reach for common sense notions and the real motives parties had to celebrate the contract.

3. Theories employed by arbitral tribunals to solve the problem of extension

If an application is made to bind a non-signatory, the very basis of arbitral jurisdiction would normally be lacking, and the party sought to be bound would argue that it never agreed to arbitrate with anyone at all, thus requiring arbitrators to look for clear manifestation of

²⁴ Ibid., p. 5.

assent²⁵. Nevertheless, due to the growing amount of business transactions that involve not only the usual two parties, but also whole groups of companies, nowadays it is no longer possible for arbitral tribunals to simply deny extension based on the lack of consent. Rather the tribunal will have to analyse the arguments and circumstances very carefully before deciding on the matter.

It is worth mentioning that there might be what arbitrators call “consenting non-signatories”, which seek to arbitrate, and have to be distinguished from those who don’t, which are also called “non consenting non-signatories”. Obviously, it is easier to justify allowing a willing party to join the arbitration proceedings than the other way around; for example, in the ICC Cases No. 7604 and 7610, a non-signatory defendant accepted, in a national court action, that it was bound by the arbitration agreement²⁶.

A number of legal theories have been urged for compelling a non-signatory to participate in arbitration, widely commented by scholars and professionals dedicated to the subject²⁷, like estoppel, incorporation by reference, third party beneficiary, subrogation, veil piercing, group of companies, alter ego, assumption and agency.

²⁵ Ibid., p. 22.

²⁶ Ibid.

²⁷ See generally Bamforth, Richard; Tymczyszyn, Irina; Van Fleet, Alan and Correro, Mark. "Joining non-signatories to an arbitration: recent developments." *The In-House Perspective* 3, no. 3 (2007): 17-24; Corrie, Clint. "Challenges in International Arbitration for Non-Signatories." *Comparative Law Yearbook of International Business* 29 (2007): 45-74; Park, William. "Non-Signatories and International Contracts: An Arbitrator's Dilemma." In *Multiple Party Actions in International Arbitration*, edited by Belinda Macmahon, Oxford University Press, 2009, 1-31; see also Hosking, J. "The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent." *Pepperdine Dispute Resolution Law Journal* 4, no. 3 (2004): 469-587; MacHarg, Jeffrey and Bates, Albert. "Non-Signatories and International Arbitration: Understanding the Paradox." *Comparative Law Yearbook of International Business* 29 (2007): 3-22; Sentner, James. "Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories." *Business Law International* 6, no. 1 (January 2005): 55-75.

It should be noted that in some cases, when a party intends to include a non-signatory in arbitration through one of those figures, the primary purpose of any arbitration proceeding which is a cost efficient and fast resolution of the differences that arose, might not be achieved. However, it should also be noted that in the long run it could be more convenient to operate that way, since it probably will avoid an additional procedure, eventually even in court, against the non-signatory.

The following are the most important theories that are applied in a constantly growing number of cases in which third parties are somehow involved but are non-signatories:

3.1. Estoppel

This theory has become one of the most used by arbitral tribunals when it comes to making a decision about the joinder of third non-signatory parties to arbitration proceedings. It is based on the premise that a non-signatory may not claim the benefit of a contract and at the same time avoiding its burden, which would be the arbitration clause in this matter, claiming that being a non-signatory it cannot be compelled to arbitrate²⁸. A party cannot seek and receive benefits of a contractual relationship while simultaneously ignoring other contractual obligations that it finds inconvenient²⁹.

²⁸ Boza, Rafael. "Caveat Arbitrator: The U.S.-Peru Trade Promotion Agreement, Peruvian Arbitration Law, and the Extension of the Arbitration Agreement to Non-Signatories. Has Peru Gone Too Far?" *Currents International Trade Law Journal* 17 (2009): p. 73.

²⁹ MacHarg, Jeffrey and Bates, Albert. "Non-Signatories and International Arbitration: Understanding the Paradox." *Comparative Law Yearbook of International Business* 29 (2007): p. 19.

The arbitral estoppel means denial of benefits and burdens of an arbitration clause, and is comparable to equitable estoppel on civil law³⁰. The principle of estoppel, meaning that one is not allowed to contradict itself to the detriment of others, has been often invoked in order to bring a non-signatory into arbitration³¹.

Estoppel represents the extension of the arbitration agreement to create a right based not on being a party but by conduct that resembles undertaking contractual obligations³². The non-signatory arbitration issue arises where a party by its own conduct is prevented from denying that the other party at issue is entitled to rely on an arbitration agreement. Some authors also think that referred to arbitration, estoppel prevents a party who knowingly accepted the benefits of a contract containing an arbitration agreement from avoiding the obligation to arbitrate contained in it³³, or prevents a non-signatory from claiming that because of not having signed the arbitration agreement it cannot be obliged to join arbitration when it has consistently required that other provisions of the same contract containing the arbitration clause should be enforced to benefit it³⁴.

The courts have recognised two theories for holding a

³⁰ Park, William, op. cit., p. 15.

³¹ Pavic, Vladimir, op. cit., p. 224.

³² Hosking, James, op. cit., p. 529.

³³ See Bamforth, Richard; Tymczyszyn, Irina; Van Fleet, Alan and Corroero, Mark. "Joining non-signatories to an arbitration: recent developments." *The In-House Perspective* 3, no. 3 (2007): p. 18 ; see also Sentner, James. "Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories." *Business Law International* 6, no. 1 (January 2005): p. 58.

³⁴ Corrie, Clint. "Challenges in International Arbitration for Non-Signatories." *Comparative Law Yearbook of International Business* 29 (2007): p. 59.

party estopped; the first one is that a party had knowingly accepted direct benefits of the contract containing an arbitration agreement whether it has signed it or not, and the second one is that a signatory party of an arbitration agreement cannot avoid arbitration with a non-signatory when the issues the non-signatory is seeking to resolve are intertwined with the agreement and it shares a close relationship with a signatory party³⁵.

There are two interesting cases regarding estoppel, the *Mississippi Fleet Card, LLC v Bilstat, Inc.* case and the *Astra Oil* case³⁶. The first one presents an original approach to estoppel that could prove beneficial in the right circumstances to bring all parties in a dispute into arbitration, whether they signed the arbitration agreement or not. In fact, when certain non-signatories to the arbitration agreement were compelled to arbitrate under an estoppel theory, they sought to compel other non-signatories to be included in the arbitration. In ruling on the objection to this request, the court noted that the objecting non-signatories sought the benefit of the underlying contract as third-party beneficiaries and were therefore estopped from avoiding arbitration under the contract³⁷.

The second case arose out of a sale of oil by Astra to its customer and the related charter of a vessel from a third party by a company affiliated with Astra and owned by a common parent company to transport the oil. When the vessel broke

³⁵ Sentner, James, op. cit., p. 58.

³⁶ Ibid., p. 64.

³⁷ Ibid.

down and delivery was late, Astra sought arbitration of its damage claim against the vessel owner to recoup a penalty it suffered under the sale contract. Astra was not a party to the charter contract that contained the arbitration clause. However, the vessel had issued a bill of lading to Astra covering the transport. While the decision of the court to compel arbitration could have easily been justified by principles of maritime law applicable to bills of lading, the court appears to have gone out of its way to premise its decision on factors tending to establish the intertwined nature of the dispute sought to be arbitrated and the failure of the vessel to meet its obligations under the charter contract to make a diligent voyage in accordance with performance criteria guaranteed in the charter contract. The primary factors relied on by the court were the close connection and relationship that existed between Astra and its affiliate, the charterer, and the similar factual basis for the claims of those companies against the vessel owner³⁸.

The estoppel doctrine permits courts to direct arbitration with respect to facts intimately intertwined with a cause of action subject to arbitration. When the essence of a claim relates to a contract requiring arbitration, a signatory may be barred from asserting inapplicability of an arbitration clause³⁹. An example to illustrate this type of equitable estoppel is the *Fluor Daniel Intercontinental, Inc v General Electric Co., Inc* case, where two groups of companies had signed agreements to work together in order to build a power plant in Saudi Arabia. Some members of each group had concluded contracts

³⁸ Ibid.

³⁹ Park, William, op. cit., p. 13.

containing arbitration clauses, while others did not include such clauses. Alleging that the contracts had been induced through misrepresentations about the work to be performed, the claimants sought damages in court against non-signatory affiliates of the companies that had signed the relevant agreements. The court ordered arbitration, reasoning that the claimants could not “rely on the contract when it works to their advantage...but then repudiate the contract and its arbitration clause when they believe it works against them”. Consequently, a signatory to an arbitration clause will be unable to refuse arbitration with a non-signatory when the main dispute is related with, or derived from, the contract containing the arbitration clause⁴⁰.

In brief, the essence of equitable estoppel is that a party may not take advantage out of rights and relationships created by a contract while it avoids at the same time fulfilling the obligations of that same contract because it finds them inconvenient. Arbitral tribunals have interpreted the estoppel doctrine in that sense, applying it in practice in a growing number of cases to avoid possible situations of abuse and arrive to a just decision.

3.2. Third Party Beneficiary

As its name suggests, under this theory, intended third party beneficiaries who are also non-signatories may enforce arbitration provisions against signatory parties if the agreement

⁴⁰ Ibid., p. 14.

and its arbitration clause permit it⁴¹.

Before applying this theory, the arbitral tribunal must analyse the intentions of the parties at the time of contracting, which distinguishes it from the equitable estoppel theory where the court takes a decision whether to extend the agreement based on the signatory and non-signatory parties' conduct after the contract was executed⁴².

In this case, the agreement reached between the contracting parties establishes certain benefits for a third non-signatory party. Regarding this matter, arbitral tribunals tend towards greater recognition of third party beneficiary rights. Also the arbitral tribunals make this doctrine applicable whenever it appears from the analysis of the background that the intentions of the parties was to grant benefits to a third party that had not signed the contract or arbitration agreement⁴³.

This theory seems to be one of those less argued about, and rather easily accepted since the grounds for applying it can be demonstrated. Obviously, once the tribunal extended the arbitration agreement to the non-signatory based on this theory, it seems fair that that third party would then be bound for better or for worse to the arbitration agreement, meaning that it eventually would not only be able to get benefits out of it but would also have to fulfill the obligations determined in the main contract if a party submits that subject to the arbitral tribunal

⁴¹ MacHarg, Jeffrey and Bates, Albert, op. cit., p. 10.

⁴² Corrie, Clint, op. cit., p. 64.

⁴³ Hosking, James, op. cit., p. 510.

and obtains a favourable decision regarding the matter.

3.3. Incorporation by reference

Whenever a contract does not specifically include the arbitration clause but a term that refers to another document, which includes the arbitration clause, like another contract or standard form terms, there could be a case of “incorporation by reference”⁴⁴. Courts have recognized this theory for a long time, holding that a non-signatory may be bound to arbitrate disputes, especially when the agreement containing the arbitration provision is clearly incorporated by reference in another agreement executed by the party⁴⁵. Some cases in which this theory was applied are the *Continental Ins. Co. v Polish Steamship Co.* case and the *Import Export Steel Corp. v Mississippi Valley Barge Line Co.* case⁴⁶. In fact, in both cases the parties executed bills of lading that clearly and unequivocally incorporated by reference other agreements that contained mandatory arbitration clauses, and when disputes arose, one of the parties claimed that it was not bound by the arbitration agreement. However, the Court held in each case that by executing an agreement that expressly incorporated by reference another agreement that included an arbitration clause, the parties demonstrated intent to be bound by the arbitration provision⁴⁷.

⁴⁴ Ibid., p. 538.

⁴⁵ MacHarg, Jeffrey and Bates, Albert, op. cit., p. 11.

⁴⁶ Ibid.

⁴⁷ See *Continental Ins. Co. v Polish Steamship Co.*, 346 F.3rd 283 (2^d Cir., 2003); and *Import Export Steel Corp. v Mississippi Valley Barge Line Co.*, 351 F.2nd 505 (2nd Cir., 1965).

Another example where this theory was applied is the *JS & H Const. Co. v Richmond County Hospital* case⁴⁸. There had been included a provision in a subcontract that incorporated by reference the general conditions of a prime contract. It provided explicitly that the subcontractor had to assume towards the prime contractor those responsibilities and obligations that the prime contractor assumed toward the hospital authority in the prime contract. The Court found that the provision would subject the subcontractor to the provision in the prime contract that rules that the parties would submit contract disputes to arbitration⁴⁹.

Arbitral tribunals have to deal with this matter in an increasing amount of cases, due to the standardization of business transactions and the rules by which those transactions are governed. In general, international entities that offer arbitration proceedings also provide model clauses or general rules the arbitration process has to be based on in case the parties to the arbitration chose that specific entity. Thus, the rules that arbitrations are guided by become more and more uniform, especially in arbitration proceedings of broader scope, contributing to the application of the “incorporation by reference” theory.

3.4. Subrogation

Subrogation consists in the subsequent transfer to a

⁴⁸ See *JS & H Const. Co. v Richmond County Hospital Authority*, 473 F.2nd 212 (5th Cir., 1973).

⁴⁹ Corrie, Clint, op. cit., p. 50.

third party of the right to represent the original subrogate⁵⁰. This is a quite frequent figure in international commercial arbitration, especially in arbitration procedures that involve insurance companies. Additionally, in some countries, e.g., in France, the remaining party can still bring a claim against the original party, in addition to a claim brought against the subrogated party⁵¹.

If the relationship is truly one rising out of subrogation, then all claims within the scope of the arbitration agreement should be arbitrated⁵².

When the original party is subrogated by a third party, that third party acquires the exact same rights and obligations having belonged to the original party. Consequently, if there existed a valid arbitration agreement, the third party is bound by it just like the original party was, and the remaining party will have to arbitrate with the new and unknown party in terms it signed the primitive agreement.

3.5. Veil piercing

This theory started developing a long time ago. In fact, it was the US Supreme Court that in 1892 through the *Simmons Creek Coal Co v. Doran* case prepared the way for its development on the state level. In that case the Court held that the knowledge of the founders of a corporation about a fact

⁵⁰ Hosking, James, op. cit., p. 502.

⁵¹ Ibid., p. 507.

⁵² Ibid., p. 503.

related to a closed corporation set the bases for veil piercing⁵³.

Anglo-American lawyers speak of “piercing” or “lifting” the veil between shareholder and corporation; French authors tend to refer to *abuse de droit*, permitting claims against controlling shareholders for abuse of their ownership rights; and German authorities invoke notions of *Durchgriff*, or “seizing through” the corporation, as an author explains the different ways that issue is referred to depending on the country⁵⁴. However, they all refer to the same practice, which in simple terms, consists in finding out what entity exists behind the signatory in certain cases, to make it eventually responsible for actions or omissions of the signatory party, not allowing to hide behind the company that signed the agreement as a way to avoid its responsibility. Veil piercing is a way to justify jurisdiction over a corporate affiliate, and also one company’s liability for the substantive debts of another⁵⁵. It also sustains that piercing the corporate veil essentially means disregarding the separation between companies organized in corporate form with limited liability of shareholders⁵⁶.

The separate legal existence of corporations and their shareholders has long constituted a fundamental underpinning of business transactions, whether by cross-border cooperation or within a single jurisdiction, and therefore, arbitral awards

⁵³ Figueroa, Dante. *Levantamiento del Velo Corporativo Latinoamericano*. Santiago: Editorial El Jurista, 2012, p. 57.

⁵⁴ Park, William, op. cit., p. 16.

⁵⁵ Ibid., p. 17.

⁵⁶ Kryvoi, Yaroslau. "Piercing the Corporate Veil in International Arbitration ." *Global Business Law Review* 1 (2011): p. 173.

usually bind only the companies that have agreed to arbitrate⁵⁷. Other members of the corporation in principle would not be affected by that agreement to arbitrate.

When arguments for joinder are built on doctrines elaborated in connection with corporate personality rather than implied consent, the starting point for analysis lies in the law of the place of incorporation since the law that brought the company into existence would logically serve as the legal system to which contracting parties look for guidance on matters related to corporate personality⁵⁸. In general, the boundaries of corporate liability are given by the legislation of the place of incorporation or “corporate seat”. However, that rule has exceptions. In some circumstances, arbitrators also take notice of transnational norms that determine corporate personality according to a common sense approach that avoids territorially-bound rules, looking to a comparison of national law or a consensus among international arbitral awards, especially with respect to supra-national entities created by international treaties, or when the place of incorporation has inadequate rules to protect innocent third party victims of corporate abuse.

When shareholders conduct abusively and commit fraud or undercapitalize the company, exceptionally owners could be obliged to answer for company debts in those cases. For example, in ICC Case No. 5730 the arbitral tribunal decided to bring into arbitration a Greek shipping magnate, who engaged in willful misrepresentation by organizing personal activities in

⁵⁷ Park, William, *op. cit.*, p. 16.

⁵⁸ *Ibid.*, p. 18.

several corporate entities. In this case the non-signatory was even mentioned in the relevant contract⁵⁹.

Even though the practice of veil piercing still is rather the exception, and there are still many questions that remain without an answer, i.e., whether the common economic roof and chain of command are enough to draw other entities within the group⁶⁰, there is no doubt that its use is growing among arbitral tribunals.

According to Pavic, if the company invokes legal separation as a liability shield, corporate veil is pierced in order to prevent unjust results and open the possibility to make the real owners responsible. The author considers piercing a rather extreme remedy, arguing that the pierced entity will be liable instead rather than additionally to the respondent⁶¹. However, we have to consider that if the pierced entity was the liable one all along, it is reasonable and just to make it respond instead of the respondent. That is precisely what veil piercing is all about. The whole idea is not allowing that a truly liable entity “hides behind the veil”.

When an arbitral tribunal decides to “pierce the veil”, it could lead to binding of a non-signatory to the arbitration agreement when the autonomy of the signatory party is disregarded and is replaced by a controlling non-signatory party, or whenever it can be established that due to its

⁵⁹ Ibid., p. 28.

⁶⁰ Pavic, Vladimir, op. cit., p. 223.

⁶¹ Ibid., p. 224.

behaviour the non-signatory has created a *bona fide* expectation that it considers itself bound by the arbitral clause and consequently also by the main contract in which case it will become an additional party to the arbitration agreement⁶².

Under New York law, the party seeking to pierce the corporate veil has to show that the parent exercised complete domination over the subsidiary regarding the business transaction at issue, and also that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil⁶³. There are different ways to achieve that goal, e.g., by proving that there was inadequate capitalization, intermingling of funds, common office spaces and telephone numbers, payment or guarantee of the corporation's debts by the dominating entity, among others⁶⁴. In the *Carte Blanche (Singapore) PTE Ltd. v Diners Club Int'l, Inc.* case⁶⁵, the plaintiff Carte Blanche (Singapore) obtained an award against a subsidiary of Diners Club International in an arbitration proceeding. However, soon the company realized that it would be unable to collect on the award from the subsidiary. Therefore, Carte Blanche initiated an action to enforce the award against the parent company Diners Club since it was a franchisee of the subsidiary and according to the franchise agreement, Carte Blanche (Singapore) was to market "Carte Blanche" credit cards provided by the subsidiary in Malaysia, Singapore and Brunei, and the parent company Diners Club

⁶² Mráz, Michael. "Extension of an Arbitration Agreement to Non-Signatories: Some Reflections on Swiss Judicial Practice." *Belgrade Law Review* 3 (2009): p. 60.

⁶³ MacHarg, Jeffrey and Bates, Albert, op. cit., p. 16.

⁶⁴ *Ibid.*, p. 17.

⁶⁵ *Ibid.*

decided to discontinue marketing the credit cards worldwide. The subsidiary offered to buy out Carte Blanche (Singapore), which was refused and instead the company continued marketing the credit cards. The subsidiary eventually terminated its operation and ended up without separate offices, officers, books, bank accounts, employees or assets, and all of its revenues were paid directly by Diners Club bank accounts, and all operations related to Carte Blanche (Singapore) were performed directly by Diners Club employees. On appeal, the Second Circuit Court reversed the decision of the District Court that refused to pierce the corporate veil, finding that it had been clearly erroneous. Furthermore, the Court held that the subsidiary and its parent Diners Club were indistinguishable, and consequently piercing the corporate veil was manifestly required in the case. The Court considered especially relevant in this case that when Carte Blanche (Singapore) allegedly breached its franchise agreement, the notice of default came on a letterhead signed by the Chairman of Diners Club and not from the subsidiary, upholding enforcement of the arbitration award against Diners Club.

The following cases are examples of awards on corporate personality⁶⁶: a) ICC Case No. 3879 (*Westland Helicopters*), where the arbitrators reached through a legally transparent organization to take jurisdiction over the Arab countries that had created the group's umbrella organization, found to lack legal personality; b) ICC Case No. 5721, a finding of no corporate personality in a construction dispute that set

⁶⁶ Park, William, op. cit., p. 28.

“company X” against the claimant sub-contractor, the latter having succeeded to the rights and duties of the project owner. An American entity, sometimes referred to as “X USA”, argued that its so-called affiliate “X Egypt” (represented as “in formation”) had contracted for civil engineering works in a Cairo suburb. In reality, however, X Egypt did not even exist as a separate legal entity, but was merely a branch of company X; c) ICC Case No. 5730 (*Orr*), where a Greek shipping magnate was found to have engaged in willful misrepresentation in organizing his personal activities under the guise of several entities with closely linked names, many of them the names of ships; misrepresentation was established in national Greek court decisions, and the non-signatory was actually mentioned in the main contract; d) ICC Case No. 7626, based on Indian law, the decision understandably incorporated a line of English cases such as *Salaman v Salaman* and *Adams v Cape* to affirm separate legal personalities of a subsidiary of the Austrian company and its parent corporation participating in an inchoate joint venture to establish a chemical plant in India; e) ICC Case No. 8385, decision to pierce the veil of an insolvent subsidiary in the face of “illegitimate conduct” (fraud) by the subsidiary at the instigation of the parent company; f) 1991 Swiss Ad Hoc Case, the arbitrators found insufficient capitalization of the company and an unlawful liquidation. The arbitrators state the basic condition for veil piercing as an “abuse of right” (*abus de droit*).

In order to avoid difficulties once disputes arise, it is advisable to prepare the arbitration agreement well, making it

as inclusive as possible, to definitely avoid having to deal with piercing the corporate veil at all⁶⁷.

Analysing cases involving the “veil piercing” doctrine, it has to be concluded that arbitral tribunals go in the right direction, not allowing a company to hide behind an artificially created veil and alleging that it cannot be considered responsible since it did not sign the contract containing the arbitration agreement.

3.6. Group of companies

The “group of companies” doctrine was elaborated almost 25 years ago in France, on account of the *Dow Chemical v Isover St. Gobain* case (ICC Case N° 4131)⁶⁸. An American parent (Dow USA) and its French subsidiary (Dow France) sought to benefit from an arbitration clause contained in agreements that affiliates (Dow AG and Dow Europe) had signed with companies whose rights were transferred to Isover St. Gobain. Given that the party resisting joinder (Isover St. Gobain) had already agreed to arbitrate pursuant to the relevant arbitration clauses binding Dow AG and Dow Europe, the critical issue was whether it would be compelled to honour that commitment with respect to companies that wished to participate in the arbitral proceedings. In rejecting the motion by Isover St. Gobain to deny a place at the arbitration table for Dow USA and Dow Europe, the arbitral tribunal cited various indicia of the parties’ common intent, stressing that the

⁶⁷ Kryvoi, Yaraslau, op. cit., p. 186.

⁶⁸ Park, William, op. cit., p. 20.

arbitration clause was autonomous from the main agreement. Thus the parties must be shown to have accepted either the entire contract (including the arbitration clause) or the agreement to arbitrate itself⁶⁹. The tribunal also analysed the common economic reality of the group of parties involved, which was an important factor considered by the arbitral tribunal for allowing the extension⁷⁰.

It should be mentioned that the economic reality is an important factor that is considered by arbitral tribunals especially regarding the group of companies' doctrine, beyond the contracts that were signed, since it is very revealing of the true intentions the companies had when agreeing on the business transaction.

The group of company theory relies on two elements, an objective and a subjective one. The first one refers to the actual existence of a group of companies under common ownership, operating and being managed closely by the parent company, and the second one is represented by the implied acquiescence of the parent company to the contracts entered by the subsidiary and the participation of the parent company in the formation, performance and/or termination of the contract⁷¹. This matter is undergoing important changes, since traditionally, the veil of a legal personality was lifted only when it came to fraud, but invoking the group of companies' doctrine

⁶⁹ Ibid.

⁷⁰ Pavic, Vladimir, op. cit., p. 219.

⁷¹ Boza, Rafael. "Caveat Arbitrator: The U.S.-Peru Trade Promotion Agreement, Peruvian Arbitration Law, and the Extension of the Arbitration Agreement to Non-Signatories. Has Peru Gone Too Far?" *Currents International Trade Law Journal* 17 (2009): p. 68.

it is also lifted when there was no wrongdoing⁷².

It is important to consider that the UNCITRAL Working Group on Arbitration sustained that the group of companies fact pattern might not require a written arbitration agreement, noting that this theory had been applied repeatedly by arbitral tribunals and even had been approved by some courts. According to its report, the doctrine required proof of the following: a) that the legally distinct company being brought under the arbitration agreement is part of a group of companies that constitutes one economic reality; b) that the company played an active role in the conclusion and performance of the contract; and c) that including the company under the arbitration agreement reflects the mutual intention of all parties to the proceedings⁷³.

The arbitration agreement can be extended to the parent or other affiliate companies of the signatory of an arbitration agreement, provided that the non-signatory party was involved in the conclusion, performance or termination of the contract in dispute in some way⁷⁴.

There should also be a certain kind of control exercised by the company over the non-signatory, if there is an intention to extend the arbitration agreement to it. In any case, when the question of extension arises, it is important to take into account the specific characteristics of the relationship between the

⁷² Pavic, Vladimir, op. cit., p. 220.

⁷³ See Kryvoi, Yaroslau. "Piercing the Corporate Veil in International Arbitration ." *Global Business Law Review* 1 (2011): p. 177.

⁷⁴ Wilske, Stephan; Shore, Laurence and Ahrens, Jan-Michael. "The Group of Companies Doctrine - Where is it heading?" *The American Review of International Arbitration* 17, no. 1 (2006): p. 74.

contracting parties and non-signatories, in each particular case.

According to Pavic, only in France the courts view arbitration agreements as subject to no particular national law, determining their validity based on the will of the parties and international usages, which makes it easier than in other States to find consent or usage even though not stated in documents. As a matter of fact, this doctrine allows the extension of the arbitration clause to a non-signatory belonging to the same group as the signatory only based on these considerations⁷⁵.

The group of companies' doctrine has been applied in a great number of arbitral proceedings, out of which the following are representative cases⁷⁶: In ICC case No. 4972 the arbitral tribunal decided that the arbitration clause signed by the controlling company was extendable to its subsidiaries. In ICC cases No. 5721 and 5730 the arbitral tribunal concluded that the arbitration clause that had been signed by the subsidiary company also was applicable to the parent company. In another ICC case, No. 5103, after analysing the background, the arbitral tribunal decided that a group of companies had to be considered as an economic unity since all of the companies that belonged to it had the same participation in a complex international business relationship, and that the interest of the group prevailed over the interests of each company of the group. The certainty of international economic relations demanded to take into account the economic reality and also

⁷⁵ Pavic, Vladimir, op. cit., p. 220.

⁷⁶ Caivano, Roque. "Arbitraje y grupos de sociedades. Extensión de los efectos de un acuerdo arbitral a quien no ha sido signatario." *Lima Arbitration 1* (2006): p. 125.

that all the companies that had obtained benefits had to respond for the debts. In the ICC case No. 6519, even though the claim was admitted only against the only company that was a party to the arbitration agreement, it is important to consider that the tribunal excluded the other companies on the grounds of not having had effective participation in the business transactions. In fact, the arbitral tribunal stated in the award that the effects of the arbitration agreement could have been made extensive to non-signatories, if it had been proven that they had been represented effectively or implicitly, or that they had played an active role in the negotiations that preceded the business deal or that they had been implicated directly in the contract containing the arbitration clause. Other examples are the ICC cases No. 7604 and 7610. In these cases, the arbitral tribunal concluded that the extension of the arbitration agreement proceeded whenever the circumstances of the business made clear the common will of the parties involved in the process to consider the third non-signatory party as involved decisively in the contract that contains the arbitration agreement, or whenever can be presumed that the non-signatory accepted its submission to the contract, especially when it recognized it expressly. In these cases, the parent company was considered part of the arbitration proceedings, basically because the arbitral tribunal held that it had implicitly accepted the arbitration clause. It arrived to that conclusion because in a judicial proceeding regarding the guarantee, the parent had litigated on behalf of its subsidiary, and had claimed the incompetence of the judicial tribunal in favour of the arbitral tribunal.

In general, the “group of companies” doctrine has been used for quite some time and in a considerable amount of awards by arbitral tribunals to justify the extension of an arbitration agreement to third non-signatory parties, allowing them to take more informed and therefore more equitable decisions.

3.7. Alter ego

The *alter ego* doctrine is about binding the dominant non-signatory party to the arbitration agreement of the dominated signatory party. Basically, it requires three elements in order to join a non-signatory to arbitration proceedings, which are the following: a) close relationship between two companies; b) control exercised by one company over another; and c) the use of control over another company to commit fraud or misconduct⁷⁷.

However, the jurisprudence of arbitral tribunals has developed a large list of issues that are also considered when it comes to deciding about an *alter ego* situation. The following is a non-exclusive list of the most important factors and issues: disregard of corporate formalities; inadequate capitalisation; intermingling of funds or property, or common stock ownership; overlap of ownership as well as officers, directors or personnel; common office space, address and telephone numbers of corporate entities; common business departments; the degree of discretion shown by the allegedly dominated corporation;

⁷⁷ Loban, Karyna. *Extension of the Arbitration Agreement to the Third Parties*. Central European University . Budapest, March 24, 2009; p. 19.

treatment of the corporation as independent profit centres; common consolidated financial statements and tax returns; the parent finances the subsidiary; the parent caused the incorporation of the subsidiary; the parent pays the salaries and other expenses of the subsidiary; the subsidiary receives no business except that given to it by the parent; the parent uses the subsidiary's property as its own; the daily operations of the two corporations are not kept separate; and the companies do not observe the basic corporate formalities, such as keeping separate books and records, and holding separate shareholder and board meetings; payment of guarantee of the corporation's debts by the dominating entity; whether the directors of the subsidiary act in the primary and independent interest of the parent company, and whether the parent company pays or guarantees debts of the subsidiary or vice versa⁷⁸.

When a signatory to an arbitration agreement is merely the *alter ego* of a non-signatory, the US Courts have allowed the piercing of the corporate veil of the entity which agreed to arbitrate, so that the non-signatory party will also be bound by the arbitration agreement. The same thing should happen in those cases in which a subsidiary has signed an arbitration agreement on its own behalf but in fact its parent company is controlling and directing the subsidiary with respect to the commercial transaction to which the arbitration clause relates⁷⁹.

⁷⁸ See Corrie, Clint. "Challenges in International Arbitration for Non-Signatories." *Comparative Law Yearbook of International Business* 29 (2007): p. 58; see also generally Loban, Karyna. "Extension of the Arbitration Agreement to the Third Parties." *Central European University*. March 24, 2009. Sentner, James. "Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories." *Business Law International* 6, no. 1 (January 2005).

⁷⁹ Bamforth, Richard; Tymczyszyn, Irina; Van Fleet, Alan and Corroero, Mark. "Joining non-signatories to an arbitration: recent developments." *The In-House Perspective* 3, no. 3 (2007): p. 19.

The *alter ego* doctrine has gained in importance due to the business practice of forming a subsidiary to perform certain transactions. In a growing number, companies that do business on an international level decide to create a subsidiary. There are different reasons for doing so. It could be necessary because of requirements in the country they want to do business with, or simply because of internal trade policies. Therefore, arbitral tribunals are also presented with possible *alter ego* cases more frequently.

When it comes to taking a decision whether the *alter ego* doctrine should be applied in a particular case, the arbitral tribunal should explore and analyse very carefully all of the circumstances and characteristics of the relationship between the companies involved, since considering just some of the facts and issues would mean uncovering only part of the picture. Consequently, the tribunal would not be able to decide the matter in a correct and just way.

3.8. Assumption

The argument to compel arbitration on the basis of assumption arises in situations where the third party has undertaken directly or indirectly the legal obligations of a contracting party; in those cases, the subsequent actions of the non-signatory party in performance of the contract can lead to the conclusion that the obligation has been assumed⁸⁰.

⁸⁰ Sentner, James. "Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories." *Business Law International* 6, no. 1 (January 2005): p. 58.

Generally, courts require that a non-signatory's conduct is evidence enough of its intention to be bound by the arbitration agreement in order to arrive to the conclusion that the non-signatory assumed the obligation⁸¹.

When a non-signatory either assumes a contract containing an arbitration clause, or receives the assignment of such a contract, in case a court has to decide about that matter, it most likely will compel the non-signatory party to arbitrate taking into consideration that there has to be some conduct evidencing an intent by the non-signatory to be bound by the assumed arbitration agreement⁸².

The principle of assumption is based on the notion of consent, which can be inferred from a party's behaviour⁸³. An example of it is the *Gvozdenovic v United Air Lines Inc.* case in which the claimants appealed a judgement of the trial court dismissing a class action they had brought in through which they sought to vacate an arbitral award. In the appeal, they argued that the trial court had improperly dismissed their petition for vacating the award arguing that they were not parties to the arbitration agreement. However, the Second Circuit Court found that the claimants had been represented in the arbitration by a counsel who had been selected and instructed by a committee specifically designated by the claimants to represent them in the arbitration proceedings. The

⁸¹ MacHarg, Jeffrey and Bates, Albert. "Non-Signatories and International Arbitration: Understanding the Paradox." *Comparative Law Yearbook of International Business* 29 (2007): p. 12.

⁸² Corrie, Clint. "Challenges in International Arbitration for Non-Signatories." *Comparative Law Yearbook of International Business* 29 (2007): p. 50.

⁸³ Bamforth, Richard; Tymczyszyn, Irina; Van Fleet, Alan and Corroero, Mark. "Joining non-signatories to an arbitration: recent developments." *The In-House Perspective* 3, no. 3 (2007): p. 19.

Court held that the claimants had voluntarily participated in the arbitral proceedings and were therefore bound by its outcome as if they had been signatories to the arbitration agreement⁸⁴.

In order to be treated as a case of assumption, it has to be quite clear that the intention of the non-signatory party was to assume an obligation for another party involved in the business transaction. If the evidence existing is considered insufficient, the arbitral tribunal will hardly render an award making the non-signatory party responsible for the obligation of a signatory party.

3.9. Agency

There is a fairly traditional concept that can be used to go beyond and reach for the principal non-signatory, which is the figure of agency, even though the rules in this area differ very much among various jurisdictions and are quite complex⁸⁵. In those cases, the arbitral tribunal has the possibility of determining whether an agency exists and whether the agent had or did not have authority, based on the national rules applicable to the particular case. Sometimes arbitral tribunals distinguish among rules applicable to the arbitration agreement itself, rules applicable to the agent's capacity to bind the principal non-signatory, and those applicable to certain formal aspects of the agency relationship; therefore it is always recommendable to exercise caution when confronted with an

⁸⁴ See *Gvozdenovic v United Air Lines Inc* 933 F2d 1100 (2nd Cir 1991); Bamforth, Richard; Tymczyszyn, Irina; Van Fleet, Alan and Corroero, Mark. "Joining non-signatories to an arbitration: recent developments." *The In-House Perspective* 3, no. 3 (2007): p. 19.

⁸⁵ Pavic, Vladimir, op. cit., p. 222.

agent, in spite of being a well-established fiduciary relationship⁸⁶.

Another factor that should be taken into account when establishing whether the agent is bound to arbitrate as well as the principal, depends on whether the principal was disclosed or undisclosed at the time the contract was entered into, since an agent for a disclosed principal should not be considered as bound to the contract⁸⁷.

Generally, courts require that there has to be clear evidence of the agency relationship before forcing an unwilling non-signatory to join arbitration proceedings. In the *Interbras Cayman Co. v Orient Victory Shipping Co.* case the Court of Appeals of the Second Circuit allowed a non-signatory purported principal of a signatory party to compel arbitration against a signatory, holding that an undisclosed, non-signatory principal whose agent was a signatory to the contract containing the arbitration clause could enforce the arbitration against another signatory party⁸⁸.

The agency doctrine is a long known figure in legal relationships, and seems to have its roots in contract law. For this reason it is not surprising that this theory has found its way into arbitration proceedings and is applied by arbitral tribunals.

⁸⁶ Ibid.

⁸⁷ Sentner, James, op. cit., p. 66.

⁸⁸ MacHarg, Jeffrey and Bates, Albert, op. cit., p. 14.

3.10. The economic reality behind the decisions taken by arbitral tribunals

In the opinion of Orrego, referring to three cases in which he acted as an arbitrator and that involved third non-signatory parties, first the arbitral tribunal has to determine which are the real interests that should be connected by the arbitration agreement. That means that the arbitral tribunal has to identify the economic reality underlying the contractual reality. Simultaneously, it has to determine whether that reality has to prevail over judicial fictions originated in issues like legal personality of the companies and its nationality, among others. Whatever decision the arbitral tribunal is going to take, it always would have to be based on these considerations⁸⁹.

Nowadays it is possible to observe a clear trend of arbitral tribunals to consider the economic reality above judicial fictions whenever the application and extension of an arbitration agreement are discussed. The result of such an analysis done by the arbitral tribunal could either be the extension of the agreement to third parties that did not sign the agreement, or denying such extension. In any case, the basic and most important argument for such a decision, in one sense or another, should always be the economic reality existing in that particular case⁹⁰.

The decision made by a company to form a subsidiary,

⁸⁹ Orrego, Francisco. *La Extensión de la Cláusula de Arbitraje a Terceros: Realidades Económicas y Ficciones Jurídicas*. Vol. I, in *Tratado de Derecho Arbitral*, edited by Carlos Soto, Bogotá: Grupo Editorial Ibañez, 2011, p. 363 – 364.

⁹⁰ *Ibid.*, p. 383.

or to hire a third party for performing certain services it requires to fulfil obligations of a contract it signed, at the bottom line are always decisions made based on economic considerations. Keeping that fact in mind, the logical way for an arbitral tribunal to deal with a claim brought before it is to get to the bottom of that matter uncovering what really moved the signatory and non-signatory parties to behave like they did, to celebrate the contracts they celebrated, and to sign or not sign the agreement.

It is important to mention that not only arbitral tribunals apply the different doctrines commented above in order to bring a non-signatory into arbitration proceedings, but they are also applied by national courts for the purpose of deciding whether a company can resolve a dispute through arbitration with another one even if it is a third party that has not signed any agreement.

In the *McBro* case⁹¹ an US court compelled a company to arbitrate its claims with another one on the basis that it was equitably estopped from denying arbitration. In this case, two completely separate contracts had been signed, one between St Margaret's Hospital, (hereinafter Hospital), and its electrical contractor, (hereinafter Triangle), and the other one between the Hospital and its construction manager, (hereinafter McBro). Both contracts contained identical arbitration provisions, but the agreement between Hospital and Triangle expressly denied any contractual relationship between Triangle and McBro. Despite that denial, the Court compelled Triangle to arbitrate its claims with McBro on the basis that it was equitably

⁹¹ Hosking, James, op. cit., p. 533.

estopped from denying arbitration. The Court's decision was based on a two step analysis. It first examined the relationship between the signatory's claim and the contract containing the arbitration provision, and then the nexus between the parties involved.

Regarding the estoppel doctrine, there are two more cases⁹² which were decided by courts under the prism of estoppel doctrine. The first one is the *Tencara* case, which was decided by the US Court of Appeals for the Second Circuit. In this case the marine surveyor ABS provided a seaworthiness certificate to a boat builder, (hereinafter Tencara), who had manufactured a yacht based on a contract signed with a group of investors. The contract signed contained an arbitration clause expressly incorporating the certificate of classification. When the yacht proved to be faulty, the investors and their insurers brought suit against Tencara, and Tencara sued ABS. The Court upheld the order of the District Court compelling arbitration of claims between the signatory companies, and extended it to the investors' claim, as well. The Court argued that the investors were estopped from denying their obligation to arbitrate as they had received a direct benefit from the contract containing the arbitration agreement because the seaworthiness certificate had enabled them to obtain lower insurance rates and to sail under the French flag.

The other case is an example of a signatory compelling arbitration against a non-signatory, which is the *Schwabedissen* case. Here, a company, (hereinafter IPC), bought an industrial saw from a distributor, (hereinafter Wood), of the German manufacturer Schwabedissen. The saw proved faulty, and since Wood had filed for

⁹² Ibid., p. 534.

bankruptcy and therefore making useless a claim against it, IPC decided to bring suit against Schwabedissen alleging breach of contract and warranties in the purchase order, and on the basis that Wood was Schwabedissen's agent. It also based its claim on its third party beneficiary status with respect to the Schwabedissen – Wood purchase order relating to the saw. However, once revised the order appeared to contain an arbitration clause. In spite of the allegation of IPC not having had any knowledge of such a clause, the District Court compelled it to arbitrate its claims. Finally, when Schwabedissen sought to enforce the arbitral award, IPC decided to defend itself alleging that it had never been a party to the arbitration agreement. However, the Court of Appeals for the Fourth Circuit upheld the District Court's order enforcing the award on the basis that IPC was estopped from refusing to arbitrate its dispute with Schwabedissen since it also pretended to enforce rights out of the same contract it considered not being a part of.

4. International legal references to the problem

It is undeniable that arbitration has become an important issue in almost all States. That fact motivated the creation of rules by different entities related with the matter. The consequence of it is that today there exist a certain amount of regulatory bodies applicable in international commercial arbitration. We will refer to the most important ones regarding the subject treated in this thesis in the following paragraphs, i.e., the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter New York Convention)⁹³, International Chamber of Commerce

⁹³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, New York.

Rules of Arbitration (hereinafter ICC Rules of Arbitration)⁹⁴ and United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law)⁹⁵.

4.1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

In an international context, the New York Convention is the most important mechanism for recognition and enforcement of foreign arbitral awards. It is considered to be the most successful multilateral convention adopted by the United Nations, and its worldwide acceptance ensures the effectiveness of arbitration⁹⁶.

Regarding the subject of this thesis, it is necessary to consider that it provides in its Article II (2) that "*The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*". This article is important since it means that actually a third non-signatory party would not be able to defend itself arguing that it did not sign the arbitration agreement.

Another aspect to consider is the fact that a consolidated proceeding often modifies the procedure of appointment of the arbitral tribunal⁹⁷. That eventually could

⁹⁴ International Chamber of Commerce Rules of Arbitration, 1998.

⁹⁵ United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985.

⁹⁶ Harmathy, Attila, op. cit., p. 6.

⁹⁷ Ten, Irene, op. cit., p. 138.

result in making the award unenforceable under the New York Convention, since Article V (1) (d) allows for refusal of recognition and enforcement of arbitral awards where the composition of the arbitral authority, or the arbitral procedure was not in accordance with the agreement of the parties. Therefore, it is to be considered indispensable that the arbitral tribunal includes in the award very clearly the considerations and arguments that made it decide to include a third party in the arbitral proceedings, in order to avoid this particular problem at the moment of the enforcement of the award.

4.2. International Chamber of Commerce Rules of Arbitration

The Rules of Arbitration provided by the ICC, in force as from January 1, 1998, have recently undergone important changes, which are in force as of January 1, 2012⁹⁸.

One of the reasons that motivated the ICC to introduce modifications is precisely the fact that disputes involving multiple contracts and parties have become more common. The rules in force from January 1, 2012 on refer to Joinder of Additional Parties⁹⁹, Claims between Multiple Parties¹⁰⁰, Multiple Contracts¹⁰¹ and Consolidation of

⁹⁸ Available at www.icc.org

⁹⁹ ICC Arbitration Rules, Art. 7.

¹⁰⁰ ICC Arbitration Rules, Art. 8.

¹⁰¹ ICC Arbitration Rules, Art. 9.

Arbitrations¹⁰².

The Rules provide in Article 21 (1)¹⁰³ that the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. However, the same article also provides that in absence of any agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate, which means that the arbitrator is not limited to a specific national legal system. The possibility offered by the rules is without any doubt a very helpful tool for arbitrators whenever they have to deal with a case where a clear agreement made by the parties does not exist.

On the other hand, Article 22 (1)¹⁰⁴ provides that the arbitral tribunal as well as the parties should make every effort to conduct the arbitration in an expeditious and cost-effective manner, taking into consideration the complexity and value of the dispute. That rule provides a very valuable tool for the arbitral tribunal since it makes it possible for it to bring third non-signatory parties into the arbitration proceedings, and also makes it possible to end dilatory tactics used by signatory and non-signatory parties.

¹⁰² ICC Arbitration Rules, Art. 10.

¹⁰³ ICC Arbitration Rules, Art. 21 (1).

¹⁰⁴ ICC Arbitration Rules, Art. 22 (1).

4.3. United Nations Commission on International Trade Law Model Law on International Commercial Arbitration

The Model Law on International Commercial Arbitration, adopted by the General Assembly of the United Nations in 1985, and amended in 2006¹⁰⁵, has achieved a high level of uniformity in understanding arbitration and its practice. In fact, since it is in force, many countries adopted arbitration laws based on the Model Law, and even those that already had an arbitration law, took it into consideration¹⁰⁶. Therefore, the influence that the Model Law has on arbitration is undeniable.

The 1985 version, in its Article 7 (1)¹⁰⁷, provided that an “Arbitration agreement” was an agreement by the parties to submit to arbitration all or certain disputes which had arisen or which could arise between them with respect to a defined legal relationship, whether contractual or not.

Even though limited to “defined legal relationships”, the Model Law already then clearly recognized the possibility that parties could solve a problem through arbitration even if they were not bound by a signed contract.

Also the Model Law provided in Article 7 (2)¹⁰⁸ that the arbitration agreement should be in writing. However, it considered that requirement fulfilled not only when it was

¹⁰⁵ Available at www.uncitral.org

¹⁰⁶ Harmathy, Attila, op. cit., p. 7.

¹⁰⁷ UNCITRAL Model Law on International Commercial Arbitration (original 1985 version), Art. 7 (1).

¹⁰⁸ UNCITRAL Model Law on International Commercial Arbitration (original 1985 version), Art. 7 (2).

contained in a document signed by the parties, but also in an exchange of letters, telex, telegrams or other means of telecommunication which provided a record of the agreement, or in an exchange of statements of claim and defense in which the existence of it was alleged by one party and not denied by another. Consequently, the requirement of signature as it was known up to that point was eliminated by that rule, liberalizing the subject a great deal.

The Model Law revision of 2006 even went a step further including additional options in Article 7¹⁰⁹. In fact, it considers that a written agreement exists whenever it was recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means¹¹⁰. It also provides that the requirement of arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or

¹⁰⁹ When the UNCITRAL Working Group discussed the matter, it arrived to the conclusion that the previous provision was outdated. See in general Sorieul, Renaud. "Update on Recent Developments and Future Work by UNCITRAL in the Field of International Commercial Arbitration." *Journal of International Arbitration* 17, no. 3 (2000): 163-184.

¹¹⁰ UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006. Art. 7 (3).

telecopy¹¹¹. Consequently, “in writing” in the common or usual sense, is not required anymore in order to be able to oblige a non-signatory to arbitrate, since its agreement to it can be established through other means. Considering the provision cited, actually the expression “non-signatory” has lost its meaning and it should rather be referred to as “third party”.

On the other hand, Article 19 (2)¹¹² of the Model Law provides that the arbitral tribunal may conduct the arbitration in such manner, as it considers appropriate, whenever the parties failed to provide for rules regarding this matter. The article also provides that the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence. That provision could be interpreted in a way that would allow arbitral tribunals to decide about the admission of third non-signatory parties to the proceedings, if there is evidence that to do so is the right decision and that justice would be served more conveniently doing so. In fact, the trend in this regard is to uniform the rules that regulate arbitration proceedings, which is very convenient for all entities seeking arbitration because of knowing beforehand what to expect.

¹¹¹ UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006. Art. 7 (4).

¹¹² UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006. Art. 19 (2).

C. CHAPTER II: INTERNATIONAL ARBITRATION LAW AND JUDICIAL CONTROL THROUGH COURTS

Almost all States, and naturally all of the members to the New York Convention¹¹³, recognize the enforceability of arbitral awards rendered in another State. This is important since once the award is issued, eventually it may have to deal with the fact that it may be revised judicially. This may be the case because of an entity challenging it before the courts at the arbitration seat, or when the party tries to enforce the award.

In general, the arbitral awards are normally subject to recognition and enforcement according to the New York Convention¹¹⁴ and have to be respected in accordance with its provisions by all signatory States. However, when arbitrators are based in a country whose legal system has a liberal attitude towards bringing non-signatory parties into arbitration, resulting awards might prove to be unenforceable in other jurisdictions, and also if the arbitral tribunal approaches the matter with a rather liberal point of view, they eventually risk the award being quashed immediately in the proceeding for setting aside¹¹⁵. This is one of the reasons why it is very important to carefully choose the applicable law when drafting the arbitration clause. It is also crucial to make a correct choice of the arbitration seat, since this will determine to a great extent the later dynamics of deliberation and the willingness of the arbitral tribunal to go beyond the letter of the agreement¹¹⁶.

Once a non-signatory party joins the proceedings and participates

¹¹³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, New York.

¹¹⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, New York.

¹¹⁵ Pavic, Vladimir, *op. cit.*, p. 226.

¹¹⁶ *Ibid.*, p. 228.

alongside with other parties in the arbitration, it will not be able to claim in the future that it had not been a party to the original agreement. Whenever a non-signatory invokes invalidity or lack of jurisdiction as grounds for setting aside, the court will have to evaluate the petition generally according to the law of the country of the arbitration seat, since the parties rarely choose the law applicable to the arbitration agreement¹¹⁷.

Another argument that could be invoked when seeking for annulment is a difference not contemplated by or falling within the terms of the submission to arbitration, or that the award contains decisions on matters beyond the scope of the submission to arbitration (*ultra petita*), as provided in Article V (1) (c) of the New York Convention¹¹⁸ and Article 34 (2) (a) (iii) of the Model Law¹¹⁹. The provisions mean that the arbitral tribunal should not rule beyond the petitions formulated by the parties or rule over a subject not submitted for its decision.

Considering that the applicable law can significantly alter the ruling on enforceability of the arbitration agreement, at the moment of writing the arbitration clause there should always be a provision expressly included establishing the law applicable to enforceability and other issues regarding the business relationship.

The Article V of the New York Convention refers expressly to recognition and enforcement of arbitral awards, and its numbers 1 and 2 provide certain grounds on which courts can refuse to recognize or

¹¹⁷ Ibid., p. 226.

¹¹⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, New York. Art. V (1) (c)

¹¹⁹ UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006. Art. 34 (2) (a) (iii).

enforce arbitral awards, e.g., because the award is contrary to the public policy of the state were recognition or enforcement was sought¹²⁰.

The UNCITRAL Model Law in its Article 34 (1)¹²¹ provides that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs 2 and 3 of the same article. Therefore, a revision by court of the award in a wider sense and regarding the grounds that motivated the decision of the arbitral tribunal is not possible according to the Model Law. As a matter of fact, the United Nations Commission on International Trade Law (UNCITRAL) Working Group in charge of elaborating the text of the Model Law was very concerned about the possibility that an award could be revised by the competent court through appeal, and how to avoid the loss of time and significant cost of such a proceeding, since one of the aims was precisely to save time and money by favouring international commercial arbitration. Finally the Working Group agreed that it should not be possible to revise the fundamental grounds of an award rendered in an international arbitration proceeding through appeal¹²².

Considering the limited scope of this thesis, for the purpose of analysing particular States, there were four representative countries selected: France, due to its long tradition in arbitration; Switzerland because of being recognized as one of the most important seats of arbitration and its neutrality; the United States of America because of its importance when it comes to arbitration; and Peru as a representative of Latin America and considering that its international arbitration legislation

¹²⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, New York. Art. V.

¹²¹ UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006. Art. 34 (1).

¹²² Calvano, Roque. *Control judicial en el arbitraje*. Buenos Aires. Abeledo Perrot, 2011, p. 279.

is the most modern one on the continent.

1. France

France has a long tradition of resolving disputes by arbitration, and the proceedings in that country have some unique features. For instance, French law contains well-developed principles for dealing with problems regarding the validity of an arbitration agreement, unlike the scope issue where it takes judicial clarification to end the existing confusion in the jurisprudence between these two issues¹²³. Also, a long line of cases supports the principle that arbitration rights and duties follow the cause of action itself as derivative from agreements in earlier “chains” of property transfers. That way of resolving the subject is called the “theory of chains of transactions”¹²⁴.

The Court of Appeal of Paris plays an important role when it comes to the recognition and enforcement of arbitral awards. The Court confirmed the award regarding the well-known *Dow Chemical* case when it had to decide about the annulment proceeding brought before it. In its sentence the court held that there were not sufficient grounds for declaring the award null, since the arbitral tribunal based its decision on proper and just arguments, free of contradictions and within the limits of their jurisdiction, when it decided that the parent company had been a party to the contracts despite not having signed them, and also when taking into consideration the “group of companies” doctrine

¹²³ Gravel, Serge and Peterson, Patricia. "French Law and Arbitration Clauses Distinguishing Scope from Validity: Comment on ICC Case No. 6519 Final Award." *McGill Law Journal* 37 (1992): p. 535.

¹²⁴ Park, William, op. cit., p. 15.

which was used as one of the arguments to support the award since it was recognized as usual in international business transactions¹²⁵.

In another case, the Court of Appeal of Paris also recognized the “group of companies” theory. In fact, when it had to decide about the annulment proceeding brought before it against the award in the *KIS France c. Société Générale* case, the Court confirmed the award in which the arbitral tribunal had applied that theory admitting subsidiaries of Kis France to the arbitration proceedings that had not signed the contract. The interpretation the Court made in its sentence was that the arbitral tribunal had not violated the limits of its jurisdiction in this case. The reason for it was that it had been proven that there existed a common will to perform the economic transaction as one, basically because of the way in which it had been conceived: one contract as frame signed by the two parent companies, including the arbitration agreement, and multiple contracts to implement the basic contract, all signed by different subsidiaries and all referring to the arbitration agreement¹²⁶.

A similar reasoning was used in another case, the *Société Ofer Brothers c The Tokyo Marine and Fire Insurance Co* case where the Court also confirmed the award. It recognized the award’s validity which extended the arbitral agreement to a non-signatory party holding that it was possible to extend the effects to the parties directly involved in the performance of the contract

¹²⁵ Caivano, Roque. "Arbitraje y grupos de sociedades. Extensión de los efectos de un acuerdo arbitral a quien no ha sido signatario.", op. cit., p. 126.

¹²⁶ Ibid., p. 127.

whenever the situation and the activities developed by those non-signatory parties presumed that they had knowledge of the existence and scope of the arbitration clause, stipulated according to the uses and customs of international commerce¹²⁷.

In similar terms, in the *Elf Aquitaine v Grupo Orri* case, the Court held the validity of the award that had declared the controller of different companies, Mr. Mohamed Abdul Rahman Orri, as personally subject to the arbitration clause, once it had been proven that the businesses were performed throughout different companies, all of them controlled by him. The Court confirmed that according to the uses and practices in international commerce the arbitration clause contained in an international contract could be extended to non-signatory parties when they had been directly involved in the performance of the contract. The Court added that the clause was extended correctly since the circumstances, activities and usual commercial relationships existing between the non-signatory parties presumed that they knew about the existence and scope of the arbitral clause and had accepted it, even though they had not signed the contract that contained it¹²⁸.

In another case, the Court of Appeal of Paris went even further declaring that because of the simple fact that the conveyor had participated in the operation, it was implied that he submitted to the arbitration agreement contained in the basic contract signed by the parties involved, despite not having signed it. Therefore, the extension of the arbitration agreement to a non-signatory no longer depends on it being a part of a group of companies, but can also

¹²⁷ Ibid.

¹²⁸ Ibid.

be based on the simple participation in an international commerce operation¹²⁹.

It has to be mentioned that according to French legislation ruling this matter, it is possible for the parties to resign the right of judicial control of the award¹³⁰.

Having analysed the cases mentioned above, it is easy to conclude that French Courts do not hesitate when it comes to recognizing and enforcing arbitral awards based on the already well established theories used by arbitral tribunals to bring non-signatory parties into arbitration proceedings.

2. Switzerland

In Switzerland, whether an extension to non-signatories is possible or it is not, depends on the role played by such non-signatories regarding the performance of the original arbitration agreement.

In fact, the Swiss Private International Law Act (SPILA) dedicates its Chapter 12 to International Arbitration. Article 178¹³¹ provides the following: *“1. As to form, the arbitration agreement shall be valid if it is made in writing, by telegram, telex, telecopy, or any other means of communication that establishes the terms of the agreement by a text. 2. As to substance, the arbitration agreement shall be valid if it complies with the requirements of the*

¹²⁹ Ibid., p. 128.

¹³⁰ Calvano, Roque. *Control judicial en el arbitraje*, op. cit., p. 543 – 545.

¹³¹ Swiss Private International Law Act, Art. 178 (1).

law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law.”

However, regarding paragraph 1, in Swiss arbitration doctrine it is controversial whether or not the extension of an arbitral clause to non-signatories is subject to the same formal requirement provided in it, because of the Federal Tribunal’s decision of October 16, 2003 when it held that the formal “in writing” requirement of Article 178 (1) applied only to the arbitration clause concluded between the initial parties, but not to third parties in case of extension¹³². It actually means that once the initial parties have fulfilled the formal requirements established by that rule, the agreement can be extended to non-signatories without them having to fulfill it also, and the extension could be based on other evidence, like behavior, interaction of the entities of any kind, or even oral statements¹³³.

The Swiss Federal Tribunal applies the ordinary rules of Swiss contract law to determine whether the non-signatory party consented in any way to be bound by the arbitration agreement, either explicitly or by implication. However, the scope of review of the Tribunal is limited to the proper application of the law when it comes to international arbitration awards since it is not an ordinary appellate body in such matters. Therefore, it can only review decisions taken by arbitral tribunals regarding implied consent, but not those based on explicit agreement of the non-signatory party to

¹³² Mráz, Michael, op. cit., p. 56.

¹³³ Hosking, James, op. cit., p. 550.

be bound by the arbitration clause¹³⁴.

Ultimately, the practice of the Swiss Federal Tribunal regarding extensions to non-signatories of an arbitral agreement may be resumed saying that it would consider such a party being obliged to arbitrate whenever the statements and behavior of it must in good faith be interpreted like the party itself considered that it was bound by the arbitral clause, either together with the main contract or limited to that agreement. It also would arrive to the same conclusion in those cases in which the non-signatory had relied abusively on the autonomy of the signatory party, and therefore would have to be considered being bound by the arbitration agreement¹³⁵.

In a case reviewed by the Swiss Court¹³⁶, three companies signed an agreement containing an arbitration clause. A fourth company, that did not sign the agreement, cooperated in the performance and implementation of the original contract signed by the three parties. When arbitration proceedings started, the non-signatory company defended itself invoking that it had not signed any agreement and consequently there was no consent that would bind it to the arbitration agreement. However, the Swiss Court had a different opinion and held that the formal requirements, i.e., the signature on the document, only needed to be satisfied in the initial conclusion of the arbitration agreement. Therefore, as long as the agreement to arbitrate was formally correct initially, its extension to a non-signatory could not be objected to for merely formal reasons.

¹³⁴ Mráz, Michael, op. cit., p. 57.

¹³⁵ Ibid., p. 62.

¹³⁶ Pavic, Vladimir, op. cit., p. 217.

Regarding the reasoning of the Court, it could be sustained that the acceptance of lack of formalities as a bar to the extension of an arbitration agreement to non-signatories would in effect prevent extension altogether and that is undesirable since those exceptions do happen rather often in arbitral practice¹³⁷.

It has to be mentioned that according to Swiss legislation, the parties may agree on resigning judicial control of the award rendered in an interactional arbitration, as long as none of the parties has its usual seat of business or home in Switzerland¹³⁸.

3. United States of America

Compared with other countries, like for instance Switzerland, the trend of extending the arbitration agreement to non-signatories is more dynamic in the United States of America, (hereinafter USA or US).

Even though arbitration has a consensual nature and due to it in principle nobody can be obliged to submit to arbitration against its will, the jurisprudence of US courts consistently reflects the trend that despite of it the arbitration agreement can be extended to third non-signatory parties¹³⁹. In fact, according to Federal arbitration law, the same principles and rules of interpretation applied to any other contract also are applicable to arbitration agreements. Consequently, it is possible to consider that there exists a valid arbitration agreement, even if one of the parties did

¹³⁷ *Ibid.*, p. 218.

¹³⁸ Calvano, Roque. *Control judicial en el arbitraje*, op. cit., p. 536 – 539.

¹³⁹ Caivano, Roque. "Arbitraje y grupos de sociedades. Extensión de los efectos de un acuerdo arbitral a quien no ha sido signatario.", op. cit., p. 128.

not sign it or if there is no signed agreement at all, since contracts can have tacit character, only based on the parties conduct, without a signed document¹⁴⁰. There is no doubt that a party can agree to submit to arbitration by other means also, not necessarily only by signing the contract that contains the arbitration clause, and a non-signatory can enforce, or be bound by an arbitration agreement within a contract executed by other parties, according to well established common law principles¹⁴¹.

Some examples of recognition given by courts to the extension of arbitration agreements are the *JJ Ryan & Sons v Rhone Poulenc Textile case*, *Sunkist Soft Drinks, Inc. v Sunkist Growers Inc. case* and *Hughes Masonry Co v Greater Clark County Sch. Bldg. Corp case*¹⁴². Regarding the first one the Court noted that when allegations against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court might refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.

When referring to the second case it held that because claims against a non-signatory parent were intimately founded in and intertwined with a contract containing an arbitration agreement, the signatory was estopped from refusing to arbitrate those claims.

In the third one it found that the signatory was equitably

¹⁴⁰ Ibid., p. 129.

¹⁴¹ Corrie, Clint, op. cit., p. 46.

¹⁴² Ibid., p. 47.

estopped from repudiating the arbitration clause in an agreement on which the suit against the non-signatory was based¹⁴³.

Even though state law determines the validity of an arbitration agreement, courts have applied federal as well as state law to determine the related, but distinct issue of whether non-signatory plaintiffs should be compelled to arbitrate their claims. It is important to mention that the Federal Arbitration Act does not specify whether state or federal law governs this matter, and the United States Supreme Court has not directly addressed the issue. Therefore, it is possible to find examples for both. The following cases are examples for it¹⁴⁴: Federal law was applied in the *Washington Mutual Finance Group, LLC v Bailey* case and the *Bridas S.A.P.I.C, et al v Government of Turkmenistan* case. In the *Fleetwood Enters. Inc. v Gaskamp* case, *SW. Tex Pathology Assocs. v Roosth* case and the *Nationwide of Bryan, Inc. v Dyer* case state law was applied. Sometimes courts even apply both federal and state law, e.g. in the *Lakeland Anesthesia, Inc. v United Healthcare of La., Inc.* case.

Notwithstanding the Court in the *Thomson-CSF, S.A. v American Arbitration Association* case rejected the claim of extending the arbitral claim to the buyer of the company that had signed the arbitration agreement, this case is rather famous because for the first time the Court established in an orderly manner under which circumstances an arbitration agreement could be extended to a non-signatory. The grounds given by the Court

¹⁴³ Ibid.

¹⁴⁴ Ibid.

were the following¹⁴⁵: a) if the party signed a contract that expressly and directly refers to an arbitration clause contained in another contract (incorporation by reference); b) if the party's conduct indicates that it is willing to join the arbitration proceedings (tacit consent); e.g., if it participates in the arbitration proceedings without objecting to the arbitral tribunal's jurisdiction; c) if a party is represented by another one, or acting on behalf of another one (agency); d) If the relationship between the parent company and its subsidiary is close enough to justify piercing the veil; and e) if the party claiming that it cannot be reached by the arbitration agreement previously conducted itself in a way contrary to that allegation (estoppel).

It is clear that United States federal courts have recognized in general six theories arising out of common principles of contract and agency law that may bind non-signatories to arbitration agreements which are applied whenever the requirements of the particular theory were fulfilled in the particular case. Those theories are incorporation by reference, assumption, agency, alter ego, equitable estoppel and third-party beneficiary¹⁴⁶.

The New York Convention requires the courts of contracting States to refer the parties to arbitration when they have made an agreement to submit to arbitration in the terms of the Convention. It also provides that the contracting States have to recognize arbitral awards as binding and enforce them in accordance with the rules of procedure where the award is relied upon, under certain

¹⁴⁵ Caivano, Roque. "Arbitraje y grupos de sociedades. Extensión de los efectos de un acuerdo arbitral a quien no ha sido signatario", op. cit., p. 129.

¹⁴⁶ Corrie, Clint, op. cit., p. 48.

conditions¹⁴⁷. Therefore, and being the United States of America a member of the New York Convention, for enforcing a foreign arbitral award in that country it is only necessary for the party to present an authenticated original or certified copy of the award and of the arbitration agreement, eventually with an official translation in case those documents are written in a language other than English, within three years after the award was rendered¹⁴⁸.

However, according to Article II (3) of the New York Convention, the court is not obliged to refer the parties to arbitration if it finds the arbitration agreement to be null and void, inoperative or incapable of being performed. It has to be mentioned that under the New York Convention “null and void” means that the arbitration agreement is subject to one of the internationally recognized defences regarding the consensual nature of the agreement itself, like duress, mistake, fraud, waiver, or when the arbitration agreement contravenes the fundamental policies of the forum nation¹⁴⁹.

In the United States of America, a court should refuse to enforce a foreign arbitral award on the grounds provided by Article V of the New York Convention, which are a) party incapacity or agreement invalidity; b) lack of notice of the arbitral proceedings or appointment of arbitrators; c) the award is outside the scope of the submission to arbitrate; d) selection of the arbitration was contrary to the parties’ agreement; e) the arbitration award is not final; f) the subject-matter of the dispute is not subject to arbitration; and g) the

¹⁴⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, New York. Art. II and III.

¹⁴⁸ Corrie, Clint, *op. cit.*, p. 65.

¹⁴⁹ *Ibid.*, p. 66.

award is void for public policy reasons¹⁵⁰.

An example for a decision regarding a matter of agreement invalidity is the *Prima Paint Corp. vs. Flood & Conklin Mfg. Co.* case¹⁵¹. The Supreme Court held that it was a matter for the arbitrator to decide in the first instance whether the arbitration agreement included in the contract was valid and whether the contract had been fraudulently induced¹⁵².

The second ground provided by the New York Convention for denying enforcement of an arbitration award is that the losing party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise prevented from presenting its case, but this ground has seldom proved successful, even though it is raised frequently¹⁵³.

Another ground that could be invoked by a court in order to refuse enforcement of an arbitral award is the fact that it deals with a dispute that is not contemplated by, or does not fall within the terms of the submission to arbitrate. For instance, in the *Fiat S.p.A. vs. Ministry of Finance and Planning of Republic of Suriname* case, the court held that enforcement of an award may be refused on proof that the award deals with a difference not contemplated by the terms of the submission to arbitration, or including decisions made on matters that are beyond the scope of that submission. In this case, the New York District Court found that despite the

¹⁵⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, New York. Art. V; Corrie, Clint. "Challenges in International Arbitration for Non-Signatories." *Comparative Law Yearbook of International Business* 29 (2007): p. 67.

¹⁵¹ See *Prima Paint Corp. vs. Flood & Conklin Mfg. Co.*, 38 US 395 (1967).

¹⁵² Corrie, Clint, op. cit., p. 67.

¹⁵³ *Ibid.*, p. 68.

arbitral tribunal having exceeded its authority when deciding to bind a non-signatory who was not expressly covered by the arbitration agreement, that defect did not require declaring void the entire award against the signatory, since Article V (1) (c) of the New York Convention allows a court to enforce an award partially when the decisions or matters submitted to arbitration can be separated from those not submitted¹⁵⁴.

The New York Convention also provides that the court can refuse enforcement when the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place¹⁵⁵. Consequently, whenever the composition of the arbitral tribunal or its procedures violated the parties' agreement or the law of the seat of arbitration, the court eventually could deny recognition and enforcement of the award that was rendered.

The next provision refers to an award that is not yet final or has been set aside or suspended by the arbitral tribunal. This actually was a response to concerns about giving binding effect to an award when it is not binding under the laws of the country of origin. United States courts generally refuse to enforce an "interim" arbitral award, only exceptionally allowing its enforcement in those cases in which it disposes of separable issues¹⁵⁶.

¹⁵⁴ See *Fiat S.p.A. vs. Ministry of Finance and Planning of Republic of Suriname*, 1989 WL 122891 (S.D.N.Y., 1989); see also Corrie, Clint. "Challenges in International Arbitration for Non-Signatories." *Comparative Law Yearbook of International Business* 29 (2007): p. 69 – 70.

¹⁵⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, New York. Art. V (1) (d).

¹⁵⁶ Corrie, Clint, op. cit., p. 72.

The New York Convention also establishes that enforcement can be refused in court when the subject matter of the difference is not capable of settlement by arbitration under the law of that country¹⁵⁷. Regarding this matter, the US Supreme Court has instructed that any doubts concerning the scope of arbitral issues should be resolved in favour of arbitration¹⁵⁸.

The final ground provided by the Convention in its Article V (2) (b) for refusal of recognition and enforcement of an arbitral award is if it would be contrary to the public policy of that country. Since this ground is the most commonly invoked among all of the ones provided by the Convention, and in order to avoid any abuse, United States courts have given it a narrow construction, applying it only when enforcement would violate the most basic notions of morality and justice¹⁵⁹.

Analysing the jurisprudence of the United States of America, it is obvious that there exists a rather open mind towards arbitration and especially to new developments in that matter, in search of more adequate and just proceedings and awards. Also the influence of the country's jurisprudence in international arbitral tribunals is remarkable.

4. Peru

The Peruvian arbitration law entered into force September 1, 2008 and provides in its Article 14 that the arbitration agreement

¹⁵⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, New York. Art. V (2) (a).

¹⁵⁸ Corrie, Clint, *op. cit.*, p. 72.

¹⁵⁹ *Ibid.*, p. 73.

extends to those whose consent to submit to arbitration, according to good faith, is determined from their active and decisive participation in the negotiation, celebration, performance and termination of the contract that includes the arbitration clause or to which the arbitration agreement relates. It also is extended to those who pretend to derive rights or benefits from the contract, according to its written terms¹⁶⁰. Consequently, the scope of this article is wider than the usual group of companies' doctrine, since it incorporates anyone who by their actions, either voluntary or involuntary, has become involved in the negotiation, celebration, performance or termination of the contract that includes the arbitration agreement¹⁶¹.

Considering that Peruvian arbitration law requires good faith and an active and decisive participation in some stage of the business transaction in order to bring a non-signatory party into the arbitration proceedings, the decision whether those requirements were fulfilled in the particular case will have to be taken by the arbitral tribunal, once it has carefully analysed and balanced the background of it.

Even though Article 14 does not establish a new type of practice in international arbitration, it is relevant considering that for the first time a legislative body refers formally to the extension of the arbitration agreement to non-signatory parties¹⁶².

The only way foreseen by the Peruvian arbitration law to

¹⁶⁰ Decreto Legislativo N° 1071 que norma el arbitraje, Art. 14.

¹⁶¹ Boza, Rafael, op. cit., p. 69.

¹⁶² Talero, Santiago. "Extensión del pacto arbitral a no signatarios: Perspectivas en la nueva Ley Peruana de Arbitraje." *Lima Arbitration* 4 (2010/2011): p. 99.

challenge the award is an annulment proceeding before the courts, established in Article 62. In fact, the mentioned article provides that the purpose of the annulment proceeding is to review the validity of the award, based on the grounds exhaustively named in article 63. Additionally, it makes clear that the court only can declare the award valid or null, and forbids making any reference to the merits of the dispute or the decision, or the criteria used and interpretation made by the arbitral tribunal¹⁶³.

As stated above, Article 63 provides the grounds on which a party may claim the annulment of an award¹⁶⁴. Article 63 (1) (a) provides that an award may be annulled if the arbitral agreement is nonexistent, void, voidable, invalid or ineffective. Therefore, if the arbitral tribunal exceeded its interpretative capacities by improperly binding a non-signatory on an implied consent basis, it will be able to challenge the award based on that article, and the award will be declared null if the non-signatory can prove on annulment proceedings that his consent was not implied in good faith or that it was improperly implied, under contractual or obligations law¹⁶⁵.

Furthermore, Article 63 (1) (c) provides that the award is subject to annulment proceedings when the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration agreement of the parties, or failing such agreement, was not in accordance with this Arbitration Law. It means that Article 14 of the Decree was applied in the absence of an arbitration agreement, and that would make applicable the

¹⁶³ Decreto Legislativo N° 1071 que norma el arbitraje, Art. 62.

¹⁶⁴ Decreto Legislativo N° 1071 que norma el arbitraje, Art. 63.

¹⁶⁵ Boza, Rafael, op. cit., p. 74.

“failing such agreement” clause of the mentioned article. In fact, the non-signatory could claim the annulment not only in case of an arbitral tribunal’s error in the interpretation or application of Article 14, but also in case the composition of the arbitral tribunal or the arbitral procedure was not in accordance with this Arbitration Law¹⁶⁶. The other grounds on which a party could claim the annulment of an award are lack of notification making it impossible for the other party or parties to defend their rights properly during the arbitration proceedings (Article 63 (1) (b)); *ultra petita* (Article 63 (1) (d)); in case of national arbitration proceedings that the arbitral tribunal decided about an issue insusceptible to arbitration (Article 63 (1) (e)); in case of an international arbitration proceeding that the dispute is insusceptible to arbitration or that the award is contrary to international public order (Article 63 (1) (f)); and that the dispute has been decided extemporaneously, not fulfilling the time limit established by the applicable arbitration rules or by the arbitral tribunal (Article 63 (1) (g)).

Just like in Switzerland and France, in Peru the legislation also foresees the possibility of resigning completely any control of the arbitral award through courts, even though only in those cases in which none of the parties has its permanent seat of business or home in Peru¹⁶⁷.

Even though this Arbitration Law was criticized up to a certain extent when it entered into force, there is no doubt that its contribution to uniforming arbitral proceedings will be important. It has achieved regulating national arbitral proceedings as well as

¹⁶⁶ *Ibid.*, p. 75.

¹⁶⁷ Calvano, Roque. *Control judicial en el arbitraje*, op. cit., p. 541-543.

international ones in one legislative body. Another advantage is that an effort was made to adequate the rules to international standards.

D. CONCLUSION

Even though historically arbitral tribunals would not easily accept the joinder of non-signatories in an arbitration proceeding, the treatment of this matter has changed drastically. Indeed, the commercial community has witnessed a profound change in the approach of this issue, starting from total rejection to include a non-signatory party just a few decades ago, through gradual joinder of non-signatories. First there were only isolated cases in which arbitral tribunals would address the problem, but the number of cases kept increasing continuously, until today where there is no longer discussion whether it is possible or not.

The question today clearly is under what circumstances a non-signatory party should be included in the arbitration process and what criteria should be taken into consideration before deciding on the matter. To consider nowadays the consent of a third party or non-signatory still as an indispensable condition in order to be able to bring it into arbitration, would prepare the path for avoiding justice done through arbitration. Actually, to defend itself it would be enough to claim that as a third non-signatory party it never agreed to arbitration whatsoever and it would end there.

As a solution to the problem, tribunals and authors have elaborated different theories regarding the subject. Those theories make it possible for the arbitral tribunal to oblige a third party that did not sign the agreement to arbitrate. The most important ones are estoppel, third party beneficiary, incorporation by reference, subrogation, veil piercing, group of companies, *alter ego*, assumption and agency.

There are even cases in which the arbitral tribunal does not limit its decision on only one of the theories used to extend the arbitration agreement to non-signatory parties. An example for such a proceeding is the *Thomson CSF S.A. v American Arbitration Association* case, where the arbitral tribunal rendered the award taking into consideration issues like incorporation by reference, agency, veil piercing, alter ego and estoppel doctrine¹⁶⁸.

No doubt, up to date consent remains the foundation of relationships between parties involved in international commercial arbitration. The arbitration agreement, either included in the primitive contract signed, or agreed and signed afterwards in a separate document, reflects its contractual nature and of course also that the signatories reached an agreement. However, the non-signatories and their eventual inclusion in arbitral proceedings even though they did not sign the arbitration agreement, is a fact in the field of international dispute resolution today.

Of course, reaching for the other extreme and trying to include a third non-signatory party under any circumstances, has to be avoided. Doing so would be as wrong as still sustaining that such a party should not be obliged to arbitrate. Therefore, it is important to consider the particular circumstances of each case when the arbitral tribunal has to decide whether to bring into the arbitration proceedings a non-signatory party. The advantages and disadvantages of such a decision have to be balanced very carefully, for the signatories as well as for the non-signatories involved. Arbitral tribunals will have to analyse in detail the

¹⁶⁸ Suárez, Ignacio. "Algunas notas sobre los grupos de sociedades y los alcances del acuerdo arbitral según la práctica internacional." Edited by Eduardo Zuleta. *Revista Internacional de Arbitraje* (Universidad Sergio Arboleda) 2 (2005): p. 58.

arguments of each party, signatory or non-signatory, before deciding on the subject. Usually arbitral tribunals also consider decisions made by other tribunals before it, using it as a kind of precedent, which in practice actually contributes to the uniformity of arbitral awards. Such arbitral case law in general is characterized by common scenarios, like non-signatory participation in contract formation, a single contract scheme constituted by multiple documents, acceptance of the contract or arbitration agreement by the non-signatory, whether in the particular arbitration itself or in another forum; *ab initio* absence of corporate personality, and fraud or fraud-like abuse of corporate form. The first three relate principally to arguments based on implied consent, while the last two factors address disregard of corporate veil¹⁶⁹.

Definitely, in our opinion, the most important element to consider today due to the development of international business relationships and its unique characteristics should be the economic reality behind the transaction performed by signatory and non-signatory parties. In fact, in the emblematic *Isover Saint Gobain v. Dow Chemical France* case, the arbitral tribunal held that international arbitration has to be receptive to the uses and necessities of international commerce especially when there are groups of companies involved, since those represent an economic reality as a whole that cannot be ignored¹⁷⁰.

Companies doing international business transactions have certain expectations when it comes to arbitration proceedings, which they want to see fulfilled, like for instance a faster and cost-effective procedure, and also that adequate protection of their rights. On the other hand, and not necessarily contradictory, there are many reasons for favouring the

¹⁶⁹ Park, William, op. cit., p. 25.

¹⁷⁰ Suárez, Ignacio, op. cit., p. 62.

extension of arbitration agreements to non-signatory parties, among others because the efficiency of the procedures is increased, and also because it widens the range of justice and allows reaching for the ones really responsible, so that justice will be better served.

Maintaining today the “signatories model” and ignoring the reality behind clear manifestations of willingness to arbitrate, would mean that the tribunal would not really be arbitrating the proper controversy in its whole dimension, but instead just a fragment of it. Further, one of the dangers when forcing a non-signatory party to arbitrate separately regarding a matter in which it is involved is that there could be inconsistencies between one award and the other. Obviously there would have to be arguments that would justify bringing the third non-signatory party into arbitration.

However, the efficiency or any other reason or argument cannot be used indiscriminately and without limits, putting in danger the precise objective that is to be achieved: justice. It is also necessary to bear in mind that the further one gets from the notion of consent and firm legal reasoning, the slimmer the chances are that the award will fare well after being rendered¹⁷¹.

It has become more and more relevant for arbitral tribunals to analyse, understand and reveal the economic reality behind an international business transaction, since on many occasions, especially on the ones of bigger scope, there are multiple entities involved. Those entities decided to participate in the transaction due to certain reasons, and regarding a company in general the main reason of its existence is to

¹⁷¹ Pavic, Vladimir, op. cit., p. 229.

make a profit. Therefore, and considering that business decisions are motivated by economic considerations, the arbitral tribunal taking those into account most likely will have very solid grounds for rendering an award regarding also third non-signatory parties.

The discussion regarding the subject is far from coming to an end. Actually, today there are probably as many awards that sentence non-signatory parties to respond for damages caused by signatories, as awards considering that non-signatories cannot be made responsible.

The challenge remains since to this date the solutions to the problem are not consistent; arbitral tribunals all over the world still apply different criteria, and also different legislations according to the particular case. However, in many cases non-signatories already have seen themselves bound to arbitration proceedings, and there is clearly a trend to keep on going in this direction. Definitely, the question is no longer whether the arbitration agreement should or should not be extended, but under what circumstances it should be extended. Therefore, it would be convenient to reach for internationally accepted standards, to avoid uncertainty and inconsistent decisions.

As a recommendation, companies that do international business should choose very carefully the applicable law, bearing in mind also that there could eventually arise third party issues along the way making it convenient to foresee a solution to the problem. On the other hand, as the creation of a set of rules applicable to third non-signatories parties is just wishful thinking for now, due to the important differences in national legislations and lack of a common view regarding this matter, to find creative solutions applying the doctrines treated in this thesis whenever it

is asked to decide about bringing into arbitration a non-signatory, remains an arbitral tribunal's biggest challenge.

It is only natural that a company tends to protect its interests. Nevertheless, there is a fine line between protection of legitimate interests and abuse. Therefore, it is the arbitral tribunal's task to find that line.

Arbitral tribunals should not be afraid of rendering an award extending the arbitration agreement to a non-signatory party, especially considering the economic reality of the particular case, whenever justice is properly served by that decision despite the consequences, like for instance that maybe the seat of arbitration could become unpopular or that a member of the tribunal eventually would not be chosen anymore by entities in similar circumstances. Justice should prevail.

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