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The Extension of Arbitration Agreements to Non-Signatories in International Commercial Arbitration

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Abstract

Due to the growth and the sophistication of international business relations, it became clear that there are circumstances in which third parties that have not signed or similarly assented to an arbitration agreement may be both bound and benefitted from its terms. In this respect, the arbitration doctrine and practice use a wide range of theories to compel non-signatories to arbitrate.

The main aim of this study is to analyse conditions that allow an arbitration agreement to be extended to non-signatories; to reconcile the requirement of the consent to arbitrate with the necessities of modern developments in international trade; and to emphasize the importance of functional consent and equitable considerations with regard to non-signatory issues. In order to achieve these purposes, the present paper will focus on the most controversial four legal theories – the group of companies doctrine, piercing the corporate veil, third party beneficiary rule and guaranty agreements - under which arbitration agreement can be extended to non-signatories and will provide a commentary regarding the recent trends observed in this matter.

Keywords

Arbitration agreement • Non-signatories • Third parties • Extension • Third Party Beneficiary • Guaranty Agreements • Group of Companies • Piercing the Corporate Veil

Öz

Uluslararası ticari ilişkilerin yaygınlaşması ve karmaşık hale gelmesine bağlı olarak, tahkim anlaşmasını imzalamayan ve imzalanmasına rıza göstermeyen kişilerin bazı durumlarda tahkim anlaşması ile bağlı olabileceği veya tahkim anlaşmasından yararlanabileceği ortaya çıkmıştır. Bu kapsamda, tahkim doktrini ve uygulaması, tahkim anlaşmasını imzalamayan üçüncü kişilerin tahkime tabi olmasına ilişkin birçok hukuki teoriden yararlanmaktadır.

Bu çalışmanın temel amacı, tahkim anlaşmasının imzalamayan üçüncü kişilere teşmil edilmesine yol açan şartları analiz etmek, tahkim anlaşmasına rıza gösterilmesi şartı ile uluslararası ticari ilişkilerdeki modern gelişmelerin getirdiği gereklilikleri uzlaştırmak, tahkim anlaşmasının imzalamayan üçüncü kişilere teşmil edilmesine ilişkin işlevsel rıza ve hakkaniyet kavramlarının önemini vurgulamaktır. Bu amaçlara ulaşabilmek bakımından, işbu çalışma, tahkim anlaşmasının imzalamayan üçüncü kişilere teşmil edilmesine yönelik en çok tartışılan dört teori – grup şirketleri doktrini, tüzelkişilik perdesinin kaldırılması teorisi, üçüncü kişi yararına sözleşme, garanti sözleşmeleri – üzerinde yoğunlaşmakta ve bu konulardaki güncel gelişmelere ilişkin kapsamlı bir analiz sunmaktadır.

Anahtar Kelimeler

Tahkim Anlaşması • İmzalamayanlar • Üçüncü Kişiler • Teşmil • Üçüncü Kişi Yararı • Garanti Sözleşmeleri • Grup Şirketleri • Tüzelkişilik Perdesinin Kaldırılması

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Introduction

Arbitration is a private dispute resolution mechanism and the parties involved have to agree on it owing to its contractual nature. The arbitration agreement is the keystone of international commercial arbitration and it involves the consent of the parties to have arbitration as a resolution mechanism.² This is actually an advantage compared to disputes resolved by national courts, since the parties to court proceedings are determined on the basis of interests³ while in the context of arbitration, there is a will to reach a binding and definite decision through arbitration. As a consequence, entering into an arbitration agreement is indispensable for a person to participate in the arbitration proceedings and be bound by the arbitral award. This approach is also reflected in the definition of “arbitration agreements” in the Article 2/1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴ (hereinafter referred to as “**New York Convention**”), European Convention on International Commercial Arbitration (hereinafter referred to as “**European Convention**”) Art I (2)(a)⁵ and in the Article 7 of UNCITRAL Model Law on International Commercial Arbitration⁶ (hereinafter referred to as “**UNCITRAL Model Law**”) Each of these legal instruments provides that it is the parties to an arbitration agreement and not other persons that are bound by the agreement.⁷

In line with the traditional role and bilateral nature of arbitration, the extension of the arbitration agreement to a party that had not consented was not considered as a possibility by arbitral tribunals for a long period of time. Accordingly, any legal or financial interest that a non-signatory could have in the dispute between the parties bound by an arbitration agreement was irrelevant.⁸ However, due to the growth and the sophistication of international business relations, it became clear that there are circumstances in which third parties that have not signed or similarly assented to an arbitration agreement may be both bound and benefitted from its terms.⁹ The arbitration doctrine and practice use a wide range of theories and legal constructs to compel non-signatories to arbitrate on the basis of agency and apparent authority, transfer and assignment, estoppel, alter ego and piercing the corporate veil, third party beneficiary rule, incorporation by reference, guarantees and the group of companies doctrine.

2 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration*, (6th edn, OUP 2015) 71.

3 Stavros Brekoulakis, *Third Parties in International Commercial Arbitration*, (1st edn, OUP 2010) 3.

4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Art. 2/1 <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf> accessed 26 July 2016.

5 European Convention on International Commercial Arbitration 1961, Art. I(2)(a) <<http://www.jus.uio.no/im/europe.international.commercial.arbitration.convention.geneva.1961/doc.html>> accessed 26 July 2016.

6 UNCITRAL Model Law on International Commercial Arbitration 1985, Art. 7 with amendments as adopted in 2006 <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 26 July 2016.

7 Gary Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014) 1408.

8 Brekoulakis (n 2) 3.

9 Born (n 6) 1411.

Before examining the main aim of this paper, it should be noted that the subject of the extension of the arbitration agreement to non-signatories is problematic for several reasons. First, consent is a fundamental element for creating a binding arbitration agreement since arbitration agreements bind only the parties that have signed it.¹⁰ The surrounding idea behind all these legal theories mentioned above is that a non-signatory may be bound by an arbitration agreement on the assumption that it has implicitly consented to it by conduct. However, in reality, consent for arbitration is often absent in each one of these legal theories. Each of the existing non-signatory theories relies on equitable considerations or treat consent as a functional legal construct.¹¹ Second, non-signatory issues are not regulated under international treaties, institutional rules and the UNCITRAL Model Law and therefore there are no common statutory grounds to justify the extension of arbitration agreements to non-signatories. Furthermore, the law applicable to the substantive validity of the arbitration agreement governs the issue of non-signatories and the current arbitration practice is inconsistent between different national laws in regard to this issue.¹² Finally, this issue may be reviewed from the perspective of two different jurisdictions – a jurisdiction that is relied upon in proceedings for recognition and enforcement, and a jurisdiction that is connected to the proceedings for setting award aside.

Thus, the main aim of this study is to analyse conditions that allow an arbitration agreement to be extended to non-signatories; to reconcile the requirement of the consent to arbitrate with the necessities of modern developments in international trade; and to emphasize the importance of functional consent and equitable considerations with regard to non-signatory issues. In order to achieve these purposes, the present paper will focus on the most controversial four legal theories – the group of companies doctrine, piercing the corporate veil, third party beneficiary rule and guaranty agreements - under which arbitration agreement can be extended to non-signatories and will provide a commentary regarding the recent trends observed in this matter. These theories have drawn considerable attention in the academic area and in practice and the debate on these four legal theories remains largely unsettled today. In addition, the sophistication of modern business transactions and economic reality outgrow the idea of bilateral contractual arbitration which tends to exclude any non-signatory party from the arbitration process.

Therefore, this thesis adopts a liberal approach on this controversial issue and emphasizes that arbitration is becoming the ordinary way to solve commercial

10 Emmanuel Gaillard and John Savage (ed), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (1st edn, Kluwer Law International 1999) 280.

11 Stavros Brekoulakis, 'Parties in International Arbitration: Consent v. Commercial Reality' Speech in the 30th Anniversary School of International Arbitration (Global Arbitration Review, 19-25 April 2015) <http://globalarbitrationreview.com/cdn/files/gar/articles/Stavros_Brekoulakis_speech_30_Anniversary_SIA.pdf> accessed 26 July 2016.

12 Christian Borris, 'The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process' in Stefan N. Frommel and Barry A.K. Rider (eds), *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends*, (1st edn, Kluwer Law International 1999) 61.

disputes and fairness or the good administration of justice, especially the necessity to avoid the multiplication and potential inconsistency of parallel proceedings justifies that extension be admitted freely by national courts and arbitral tribunals under certain conditions that will be explained in the main part for each of these four legal theories since applying a liberal standard of proof of consent and attaching importance to the functional concept of consent and equitable considerations will be more consistent with commercial reality and the pro-arbitration policies of the New York Convention.

In examining these four legal theories, the selected jurisdictions are mainly England, France, US and Swiss courts since they are leading authorities in establishing the conditions of these legal theories and they contributed to the development of the most important current trends regarding the subject. Taking a comparative look at these countries, it is seen that there are discernible differences with regard to the extension of arbitration agreements to non-signatories and this fact makes them suitable for comparison purposes.

Such differences may have a profound effect on the outcome of an arbitration and lawyers preparing an international arbitration agreement should carefully consider the advantages and disadvantages of the available choice of seats. In particular, the extension of the arbitration clause to other companies of the group started in France and still today, its courts and tribunals seated in France are among the most innovative in the development of this jurisprudence. Swiss courts appeared in the first place extremely reluctant to accept the extension of an arbitration clause to non-signatories but the Swiss Federal Court has considerably relaxed its jurisprudence.

The English approach still appears to be more restrictive where the group of companies doctrine is said to be inconsistent with the principle of privity of contract and the principle of corporate veil. In England, the issue of who is party to the arbitration clause is mainly viewed as an issue of consent, nevertheless extension may be achieved by recourse to some theories such as agency or piercing the corporate veil. The same theories are also applied in the United States and American case law is much more liberal than most European countries at least in some circuits due to the paramount concern of the courts being the federal policy favouring arbitration.

The thesis proceeds as follows. The first section considers the classification of four legal theories that will be examined as contractual and doctrine-based theories. In this classification, the common and distinct features of these two categories are highlighted. The second section addresses the issue of binding non-signatories under contractual theories. More specifically, conditions for the extension under third party beneficiary rule and guaranty agreements as well as different approaches taken by courts and tribunals are analysed, critically assessing the ideal conditions for these legal theories under which arbitration agreement should be extended to non-signatories. In the third section, the conditions for the application of piercing the

corporate veil and group of companies doctrines as well as different approaches taken by courts and tribunals are examined by proposing the ideal conditions for these legal theories under which arbitration agreement should be extended non-signatories. The final section summarises the conclusions reached as part of the analysis of each of these four legal theories and restates our solutions with respect to the conditions for the application of these legal theories.

CHAPTER 1: CLASSIFICATION OF THE LEGAL THEORIES AS CONTRACTUAL AND DOCTRINE-BASED THEORIES

As mentioned above, the arbitration doctrine and practice use a wide range of legal theories to compel non-signatories to arbitrate. However, the issues as to which common features can be found in all of them that allow their application towards non-signatory parties and how all these legal theories can be classified remain open for discussion in the academic area. Some attempts have been made in order to find common grounds among all legal theories which allow the extension of arbitration agreements to third parties and to classify all of them.

In this respect, with regard to the common features among all legal theories, some scholars assert that the majority of these theories undermine consent of the non-signatory to be bound by the arbitration agreement in the contract that it did not sign.¹³ From the perspective of another scholar, non-signatory parties may be compelled to arbitrate on the basis of “contractual roots” or the principle of equity.¹⁴ Therefore, considering the findings of the scholars, all the legal theories may have common features with regard to the consent of non-signatories and distinct features in respect of principles that allow their extension.

As regards the classification of all legal theories, Hosking tries to group them into four different categorizations: the first category is based on the question of whether rights are grounded on or explained by other rationales; the second is based on the status of non-signatory vis-à-vis a signatory, the third is based on the spectrum/importance of consent and the fourth is based on the probability of non-signatory party to be known to a signatory. Criticising all of these categorizations, he correctly argued that none of these classifications is entirely satisfactory and an overall classification of theories is impossible.¹⁵

Another classification has been made by Brekoulakis who divides legal theories into two groups: In the first group, non-signatories are compelled or allowed to arbitrate

13 Bernard Hanotiau, ‘Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis’ (2001) 18 *Journal of International Arbitration* 251.

14 S.I. Strong, ‘Third Party Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?’ (1998) 31 *Vand. J. Transnat’l L.* 915.

15 James M. Hosking, ‘The Third Party Non-Signatory’s Ability To Compel International Commercial Arbitration: Doing Justice Without Destroying Consent’ (2004) 4 *Pepperdine Dispute Resolution Law Journal* 471.

on the basis of equitable considerations while in the second group, they are allowed or compelled to arbitrate on the basis of a functional concept of consent that refers to the substantive contract which contains the arbitration agreement.¹⁶ In this respect, according to the classification proposed by him, the piercing the corporate veil doctrine would be classified under the first group as it is based on clear equitable considerations while the other theories which will be examined in the next chapters- third party beneficiary, extension under guaranty agreements and group of companies doctrine would be classified under the second group which is based on a functional concept of consent that concerns the underlying main contract, not the arbitration agreement.

Taking into account the previous works of the scholars mentioned above, it should be noted that all legal theories that allow extension of arbitration agreements to non-signatories have both common and distinct features with each other and it is very difficult to classify them into categories since common and distinct features of legal theories are broader than that suggested in the scholarly writings. At this point, in order to facilitate the planning of this paper and to provide consistency in examining the common and distinct features of the four legal theories that will be analysed in the Chapter 2 and Chapter 3, the four legal theories are classified under two categories: contractual and doctrine-based ones.

According to this classification, some distinct features between two categories should be highlighted. First, the contractual theories are based on a contract which links the non-signatory to a signatory of the arbitration agreement while the ground of doctrine-based theories is a doctrine which is created by national courts or arbitral tribunals and requires certain preconditions to be fulfilled to make the non-signatory be bound by the arbitration agreement. Second, there are differences between contractual and doctrine-based theories about the primary consideration for the extension of arbitration agreements. Under the contractual theories, the extension of the arbitration agreement to a non-signatory depends primarily on determination of implied consent of the non-signatory through the application of contract principles. By contrast, as for doctrine-based theories, economic reality considerations which focus on the economic relationship between the non-signatory and one of the signatories of the arbitration agreement take primacy for the extension of arbitration agreements.

In this direction, extension under third party beneficiary rule and guaranty agreements are examined as contractual theories in Chapter 2 and piercing the corporate veil and group of companies doctrines are examined as doctrine-based theories in Chapter 3. The other features of each of these legal theories that are faced by national courts and arbitral tribunals will be considered below in detail.

¹⁶ Brekoulakis (n 10).

CHAPTER 2: BINDING NON-SIGNATORIES UNDER CONTRACTUAL THEORIES

In the present chapter, the extension of the arbitration agreement to non-signatories through the application of contractual theories of third party beneficiary rule and guaranty agreements will be scrutinised.

2.1. Extension Under Third Party Beneficiary Rule

According to the general principles of contract law, the original parties may agree to grant the benefits of their agreement to a party not otherwise bound by the agreement. In such circumstances, two important questions arise as to whether the third party beneficiary is entitled to bring an arbitration claim against one of the original parties and whether one of the original parties has a right to bring an arbitration claim against the third party beneficiary.¹⁷ Under certain conditions that will be explained below, the third party beneficiary is entitled to demand performance of the benefits under the main contract through arbitration and at the same time, the party who has received the direct benefit from the contract which contains an arbitration clause is bound to arbitrate the dispute.

2.1.1. Law Governing Extension Under Third Party Beneficiary Rule

As for the applicable law to the extension under third party beneficiary rule, different approaches have been taken by the authorities. Some scholars have contended that issues of the extension under third party beneficiary rule should be governed by the law applicable to the arbitration agreement due to the fact that the status of the third party beneficiary is related to the formation and interpretation of the arbitration agreement.¹⁸ Others have argued that this issue may also be governed by the law applicable to the main contract including the arbitration clause as the third party beneficiary will be bound by the arbitration agreement as a supplement right of the main substantive rights.¹⁹ Moreover, there are reasonable arguments to apply transnational substantive rules to the third party beneficiary position since these issues are not related to public policy or international public law.²⁰

Taking into consideration all these approaches in the academic area, if the law governing the main contract applies to the extension under third party beneficiary rule, it seems that this will not really offer certainty owing to the fact that it does not provide a uniform rule and also it is determined on a case-by-case assessment. It is also crucial to note that the internationalist approach in favour of application of

¹⁷ Brekoulakis (n 2) 59.

¹⁸ Born (n 6) 1459.

¹⁹ Mohamed S. Abdel Wahab, 'Extension of Arbitration Agreements to Third Parties: A Never Ending Legal Quest through the Spatial-Temporal Continuum', in F Ferrari and S Kröll (eds), *Conflict of Laws in International Commercial Arbitration*, (Sellier International Publishers 2010) 162.

²⁰ Brekoulakis (n 2) 66.

transnational substantive rules to the third party beneficiary position would lead to unpredictable decisions as the scope and conditions of application of the transnational substantive rules to the third party beneficiary position may be interpreted differently in diverse jurisdictions. Therefore, transnational substantive rules to the third party beneficiary position should only be applied as a component of the applicable national law or prevailing international usages.

Accordingly, the law applicable to the arbitration agreement should govern the extension under third party beneficiary rule since it touches upon the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement. Nonetheless, the law governing the arbitration agreement may be more than one law, in particular since the arbitration agreement contains the issues of formal validity, substantive validity, objective and subjective arbitrability. If one considers the issue of extension as part of subjective arbitrability, it could be argued that 'extension' should be governed by the law governing capacity. However, applying the law governing capacity is problematic since it would lead to uncertainty and unpredictable results in different jurisdictions. In this respect, it seems plausible to suggest that extension under third party beneficiary rule should be governed by the law applicable to the existence and validity of the arbitration agreement on the occasion that the parties have agreed on a certain law or the law of the seat of arbitration in the absence of parties' agreement.

2.1.2. Application of the Third Party Beneficiary Rule in Diverse Jurisdictions

In some jurisdictions, issues related to the third party beneficiary status are governed by statutory provisions which generally contain provisions that apply to arbitration agreements.²¹ These provisions allow for the direct enforcement of a contract by a third-party beneficiary in these jurisdictions.²² For instance, in England, the Contracts (Rights of Third Parties) Act section 8 allows a third party beneficiary to receive the "pure benefit" of an arbitration agreement. In other words, if the beneficiary exercises the right under the contract, he may insist that arbitration shall be the main dispute resolution mechanism for any dispute between him and the promisor concerning their legal relations.²³

In other jurisdictions, a number of national courts and arbitral tribunals confirmed that a non-signatory who claims third party beneficiary rights under a contract, is entitled to invoke the arbitration clause contained in the contract and also is bound by that clause.²⁴ Even in Swiss jurisdiction where neither statutory provisions nor court

21 Contracts (Rights of Third Parties) Act (England) 1999, s 8(1) and s 8(2); Singaporean Contracts (Rights of Third Parties) Act 2001, s 9(1) and s 9(2).

22 Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions*, (1st edn, Kluwer Law International 2005) 16.

23 Neil Andrews, 'Strangers to Justice No Longer: The Reversal of The Privity Rule Under The Contracts (Rights of Third Parties) Act 1999' (2001) 60 Cambridge Law Journal 353.

24 *Riek v Xplore-Tech Services Private Ltd et al*, 34 ICCA Yearbook 2009, 1056 (MDNC 2009).

decisions address the issue of whether the third party beneficiary is bound by the arbitration agreement, the prevailing view among scholars is that the beneficiary is not only entitled to invoke the arbitration clause but also under an obligation to do so.²⁵

As already mentioned above, the first important question is whether the third party beneficiary may invoke an arbitration clause against one of the original parties. In most jurisdictions, this issue is determined based on the original parties' objectives and good faith intentions, especially depending on whether the parties aim to confer on the third party a real benefit under the main contract.²⁶ To illustrate, the English court first examined this issue in the *Nisshin Shipping* case²⁷, where it was held that the original parties had clearly purported to provide a real benefit of 1 per cent commission on the broker and therefore, he is entitled to invoke the arbitration clause against one of the original parties.²⁸ This approach has been followed consistently by several cases in England.²⁹ Similarly, French and US courts emphasized the crucial importance of granting real benefit to the third party beneficiary in order for the third party beneficiary to enforce the arbitration clause contained therein.³⁰

Accordingly, once the condition of real benefit is proved, the third party beneficiary may directly invoke the arbitration agreement against the original parties. In this respect, the third party beneficiary must prove that the benefit conferred to it is closer to the degree of "substantial" rather than incidental.³¹ Some authorities that adopt a high standard of proof have held that the third party beneficiary must prove the real benefit conferred on it with special clarity.³² Evidence of this may be drawn from the writing itself and the surrounding circumstances.³³ However, it should be noted that this is a difficult burden for a third party beneficiary to satisfy due to the fact that the original parties rarely state their intention to confer a substantial benefit on a third party.³⁴ Given this difficulty, it seems logical to suggest that a reduced standard of proof should be maintained since it is more consistent with the pro-arbitration perspective in interpreting arbitration agreements and also, the requirements of efficiency and single forum for resolving closely related disputes argue for a reduced standard of proof.³⁵

25 Andrea Meier and Anna Lea Setz, 'Arbitration Clauses in Third Party Beneficiary Contracts- Who May and Who Must Arbitrate' (2016) 34 ASA Bulletin 62.

26 Brekoulakis (n 2) 61

27 *Nisshin Shipping Co Ltd v Cleaves Co Ltd* [2003] EWHC 2602 (Comm), [2003] 2 CLC 1097.

28 *Nisshin Shipping Co Ltd v Cleaves Co Ltd* [2003] EWHC 2602 (Comm), [2003] 2 CLC 1097.

29 *Christina Mulchrone v Swiss Life* [2005] EWHC 1808 (Comm), [2005] ArbLR 43.

30 C Cass Civ (1) 11 Jul 2006, 2006 Rev Arb 969; *Continental Cas Co v American National Insurance Co*, 417 F 3d 727, 735 (7th Cir 2005).

31 *Kyung Sup Ahn v Rooney Pace* 624 F Supp 368, 371 (SDNY 1985).

32 *McCarthy v Azure* 22 F.3d 351, 362 (1st Cir 1994).

33 James M. Hosking, 'Non-Signatories and International Arbitration in the United States: The Quest for Consent' (2004) 20 Arbitration International 289.

34 Brekoulakis (n 2) 61; James J Sentner- 'Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories' (2005) 6 Business Law International 55, 68.

35 Born (n 6) 1458.

Taking a comparative look at the Swiss jurisdiction, it is seen that there is a considerably different approach with regard to the right of the third party beneficiary to invoke the arbitration clause contained in the main contract. Under Swiss law, there are two types of third party beneficiary contracts: In the case of a quasi-third party beneficiary contract, the promisee remains the sole party with the right to demand performance and the beneficiary has no right to demand performance from the promisor on its own.³⁶ By contrast, in the case of a genuine third party beneficiary contract, the third party has a right to demand performance on its own.³⁷ This differentiation is crucial for the issue of whether the third party beneficiary is entitled to invoke the arbitration clause contained in the main contract. Likewise, according to its two recent decisions, the Swiss Federal Supreme Court held that the arbitration clause is an accessory right to the claim for performance and examined in both decisions whether the contract entered into by the original parties was a genuine third party beneficiary contract.³⁸ If so, the third party would have a right to resort to an arbitral tribunal.³⁹ Therefore, comparing to other jurisdictions, under Swiss law, the right to demand performance is central to determine the issue of whether the third party beneficiary is entitled to invoke the arbitration clause rather than the condition of real benefit.

As already stated above, the second important question is whether one of the original parties may bring an arbitration claim against the third party beneficiary or whether the third party is bound by the arbitration clause contained in the main contract. The predominant view is that the status of third party beneficiary does not bring solely a duty to arbitrate.⁴⁰ In other words, only if the third party beneficiary exercises the real benefit conferred on it, will it be bound by the arbitration clause contained in the main contract.⁴¹

Likewise, this proposition is generally recognised in different jurisdictions, though on different grounds. In England, the Explanatory Notes to the Contracts (Rights of Third Parties) Act 1999 declare that section 8(1) is based on a “conditional benefit approach”.⁴² This effectively means that the subsection requires a third party beneficiary to have chosen to exercise the substantive right before it is bound by the arbitration clause. The Explanatory Notes further state that “to avoid imposing a “pure” burden on the third party, it does not cover, for example, a separate dispute

36 Swiss Code of Obligations 1912, Art 112 para 1.

37 Swiss Code (n 35) Art 112 para 2 .

38 Swiss Supreme Court decision 4A_44/2011 of 19 April 2011 [2.4.2] (2012) 30 ASA Bulletin 659,668-9; Swiss Supreme Court decision 4A_627/2011 of 8 March 2012 [3.5] (2012) 30 ASA Bulletin 647, 655-8.

39 *ibid* [2.4.1] (4A_44/2011); *ibid* [3.2] (4A_627/2011).

40 Hosking (n 32) 292.

41 Brekoulakis (n 2) 63.

42 Explanatory Notes to Contracts (Rights of Third Parties) Act 1999 (Explanatory Notes), s. 8 [34] < <http://www.legislation.gov.uk/ukpga/1999/31/notes/division/4/8> > accessed 27 July 2016.

in relation to a tort claim by the promisor against the third party for damages.⁴³ In light of these explanations, it can reasonably be assumed that the English conditional benefit approach characterizes the arbitration agreement as a “burden”⁴⁴ and this is probably due to the traditional English reluctance to oust the jurisdiction of the courts in favour of arbitration agreements.⁴⁵

In the United States, the same proposition is accepted on the basis of the principle of equitable estoppel. According to this principle, US authorities have held that where a third party that claims or exercises rights as a party under a contract, will be estopped from denying that it is bound by the arbitration clause contained in the contract.⁴⁶ Furthermore, in the *DuPont* case, US Court pointed out the difference between the third party beneficiary theory and the equitable estoppel and it was held that under the third party beneficiary theory, the intentions of the parties at the time the contract was executed are of crucial importance whereas under the equitable estoppel theory, a court must look at the parties’ conduct after the contract was executed.⁴⁷ However, it should be emphasized that this is not exactly the case since in other jurisdictions where the third party beneficiary theory is applied, only if the third party chooses to exercise the substantive benefit conferred on it after the conclusion of the contract, will it be bound by the arbitration clause contained in the main contract. Thus, it seems that the conduct of the third party beneficiary after the conclusion of the contract is central in both theories to determine whether it is bound by the arbitration clause.

As regards the approach of the French courts, some commentators contend that the third party beneficiary is only bound by the arbitration clause contained in the main contract if he subsequently agrees to the specific dispute resolution mechanism.⁴⁸ Accordingly, one may assume that French case law is more concerned with giving effect to the intentions of the parties and it requires the specific consent of the third party beneficiary. Nonetheless, by virtue of the close reading of *V 2000* case of the Paris Court of Appeals, it seems plausible to suggest that French courts have a liberal and pragmatic approach with regard to the extension of the arbitration agreement under third party beneficiary rule.⁴⁹ Likewise, in the *V 2000* case, the ruling is that the arbitration clause extends to parties directly involved in the performance of the contract if their respective situations and activities raise the presumption that they

43 *ibid.*

44 *ibid.*

45 *Kulukundis Shipping Co v Amtorg Trading Corp*, 126 F2d 978, 982-985 (2d Cir 1942).

46 *Sourcing Unlimited Inc v Asimco Int'l Inc*, 526 F3d 38 (1st Cir 2008) in Jennifer Kirby, ‘Sourcing Unlimited, Inc. v Asimco Int'l, Inc.: Appellate Jurisdiction and Equitable Estoppel’ (2009) 26 *Journal of International Arbitration* 149; *JLM Indus, Inc v Stolt-Nielsen SA*, 387 F3d 163 (2d Cir 2004).

47 *E.I. DuPont de Nemours & Co v Rhone Poulenc Fiber and Resin Intermediates, SAS*, 269 F3d 187 (3d Cir 2001).

48 Gaillard and Savage (n 9) 280.

49 CA Paris 7 Dec 1994, *V2000 (formerly Jaguar France) v. Renault* in (1996) *Revue de L'Arbitrage* 245.

were aware of the existence and scope of the arbitration clause.⁵⁰ Though some scholars suggest that this situation usually arises in circumstances involving group of companies and state owned entities⁵¹, there is no reason as to why this ruling does not apply to the status of the third party beneficiary. Considering the pragmatic approach of the French case law, the third party beneficiary will be bound by the arbitration clause contained in the main contract provided that his activities raise the presumption that he knows the existence and scope of the arbitration clause and he is involved in the performance of the contract.

Under Swiss law, the position is less certain than other jurisdictions as the Swiss Supreme Court did not have a ruling on the question of whether a third party beneficiary may be bound by the arbitration clause contained in the main contract when it is the respondent in the arbitration.⁵² The prevailing view among scholars is that the third party beneficiary is bound by the arbitration clause since they are directly connected with performance being rendered to the third party⁵³ and the consent does not need to be express.⁵⁴ Likewise, some commentators confirmed that the consent exists if the third party beneficiary accepts the substantive rights conferred on it and if it has sought performance of such rights.⁵⁵ Thus, even if the Swiss Supreme Court left the issue of whether the third party is bound by the arbitration clause contained in the main contract open, the predominant view among scholars is consistent with the proposition mentioned above.

2.1.3. Critique on the Third Party Beneficiary Rule

In light of the explanations stated above, it seems reasonable to suggest that extension under third party beneficiary rule should be governed by the law applicable to the existence and validity of the arbitration agreement as it touches upon the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement. In addition, transnational substantive rules with regard to the third party beneficiary position may be applied as a component of the applicable national law or prevailing international usages.

Taking a comparative look at the selected jurisdictions, it is seen that in England, France and US, the issue of whether the third party beneficiary may invoke an arbitration clause against one of the original parties depends on whether the original parties aim to confer to the third party beneficiary a real benefit under the main contract

50 *ibid* 248-249.

51 Gaillard and Savage (n 9) 282.

52 Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (3rd edn, OUP 2015) 140.

53 Meier and Setz (n 24) 72.

54 Kohler and Rigozzi (n 51) 141.

55 Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet&Maxwell 2007) 289.

and the said benefit should be substantial rather than incidental. Given the fact that proving the condition of real benefit is a difficult burden for a third party beneficiary to satisfy, I argue that a reduced standard of proof should be maintained as it is more consistent with the pro-arbitration perspective in interpreting arbitration agreements. According to the recent decisions of the Swiss Supreme Court, an approach which is significantly different from other jurisdictions can be seen due to the fact that the right to demand performance is crucial for being entitled to invoke the arbitration clause rather than the condition of real benefit.

Despite the fact that the Swiss Supreme Court's approach leads to predictable results, it seems plausible to suggest that deeming an arbitration clause to be annexed to the claim for performance is not the right approach. This approach is not persuasive since an arbitration agreement is separable from the main contract and thus, cannot be merely an accessory right. Indeed, the aim of an arbitration clause set out in a contract is to give effect to the substantive rights and duties regulated under the contract. In this respect, the scope of the arbitration clause should not be more restricted than the scope of substantive rights. Therefore, determining the right to invoke the arbitration clause on the basis of the condition of real benefit is conceivable since only if the original parties aim to confer a substantial benefit to the third party beneficiary, will it be entitled to invoke the arbitration clause.

There is a general recognition among selected jurisdictions that only if the third party exercises the substantive rights conferred on it, will it be bound by the arbitration clause contained in the main contract. This proposition is generally accepted in England, US and France, though on different grounds. Even in Switzerland where the Swiss Supreme Court did not have a ruling on this issue, the prevailing view in the academic area is consistent with the approach of other jurisdictions. In my opinion, of course, the main contract between the original parties cannot create mere burdens for a third party. However, once the third party beneficiary chooses to exercise its substantive rights under the main contract, its consent to arbitrate does not need to be express. Likewise, the consent of the third party beneficiary is deemed to exist on the occasion of the fact that it accepts the substantive rights conferred on it and it has sought performance of such rights. Consequently, it seems logical to suggest that the third party beneficiary can only make use of its substantive benefits arising from the main contract if it also accepts the arbitration clause.

Finally, it is important to note that the parties should provide sufficient information in their contract to address the position of the third party beneficiary and its relationship to the dispute resolution clause.⁵⁶ This would provide a greater clarity with regard to the status of the third party beneficiary and facilitate to respond to the problematic issue of whether to extend the arbitration clause to the third party beneficiary.

⁵⁶ Hosking (n 14) 529.

2.2. Extension Under Guaranty Agreements

“Guaranty” means a contract whereby the guarantor undertakes an obligation to be liable for the performance of the original debtor in case the original debtor does not perform its obligations.⁵⁷ After this definition, it should be emphasized that it is very common in international commercial transactions for a third party to agree in a separate guaranty agreement to provide a security for the obligations of the main debtor under a contract to which the guarantor is not party. In the event that the main contract between the creditor and the main debtor contains an arbitration clause but there is not any arbitration clause in the guaranty agreement, an important questions arises as to whether the guarantor is entitled to invoke the arbitration clause contained in the main contract and similarly whether the guarantor is bound by that arbitration clause.

There are serious arguments for and against the extension of the arbitration agreement contained in the main contract to the guarantor. On the one hand, the obligation of the guarantor has a secondary nature and closely dependent upon the main obligation.⁵⁸ Moreover, there is a general recognition in both common and civil law jurisdictions that the guarantor may invoke against the creditor all the defences of the main debtor arising out of the main contract, except for defences that are personal to the debtor.⁵⁹ Relying on these argument, it could be argued that the guarantor is bound by the arbitration clause contained in the main contract. On the other hand, the legal status of the guarantor and the main debtor are different as the guarantor is not a party to the main contract containing an arbitration clause and the liability of the guarantor will occur only when the original debtor fails to perform its obligations.⁶⁰ Thus, it may well be argued that the guarantor is not bound by the arbitration clause contained in a contract to which it is not a party. This section will provide an analysis of divergent approaches to the issue of extension under guaranty agreements in different jurisdictions.

2.2.1. Law Governing Extension under Guaranty Agreements

Regarding the applicable law to the extension under guaranty agreements, some authorities have argued that issues of the extension under guaranty agreements should be governed by the law applicable to the underlying guarantee relationship due to considerations of being the most relevant law to determine this issue.⁶¹ Other authorities applied the choice of law clause in the main contract in order to give effect to the parties’ intentions in the main contract.⁶² Another line of thought has contended

⁵⁷ Geraldine Andrews and Richard Millett, *Law of Guarantees* (7th edn, Sweet&Maxwell 2015) 2.

⁵⁸ *ibid* 4.

⁵⁹ Brekoulakis (n 2) 93.

⁶⁰ Andrews and Millett (n 56) 309.

⁶¹ *Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985 (Comm).

⁶² *The A Company (Israel), The B Company (Israel) v. The Former Soviet Republic*, Jurisdictional Award in SCC cases 38/1997 and 39/1997 (SCC Award), affirmed Judgment of the Stockholm District Court in case T 1510-99 (2001) and Judgment of the Svea Court of Appeal in case T 4496-01 (2002) <http://sccinstitute.com/media/56056/government_guarantee_case.pdf> accessed 27 July 2016.

that the law applicable to the arbitration agreement should apply to the issues of extension under guaranty agreements since it touches upon the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement.⁶³ In addition, some scholars have suggested to apply a “validation principle”, meaning that a guarantor is bound by an arbitration clause provided that either the law governing the arbitration agreement or the law applicable to the underlying guaranty agreement provides for this conclusion.⁶⁴

The approach in favour of applying the law governing the main contract can be seen in a *SCC award case no. 38/1997* where it was held that the effect on the guarantor of an arbitration clause in the main contract shall be decided on the basis of the choice of law –Swedish law– made by the parties in the main contract.⁶⁵ From my point of view, a choice of law clause in the main contract cannot provide the basis for the law governing the extension under guaranty agreements due to the fact that the guarantor is a third party to the main contract and the guaranty agreement did not contain a choice of law clause. In this respect, it seems logical to suggest that the sole arbitrator should have determined the applicable law without recourse to the choice of law clause agreed by the original parties of the main contract.

Accordingly, the better view is that the law applicable to the arbitration agreement should govern the extension under guaranty agreements since it is the most closely connected law with the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement. In this direction, in a recent Finnish award, the sole arbitrator held that it is appropriate to deal with the issue of extension pursuant to the Finland law as being the law of the seat of arbitration.⁶⁶ I am of the opinion that this finding leads to fairer and more predictable results than applying the choice of law clause agreed by the parties of the main contract owing to the fact that the guarantor is a third party to the main contract and the choice of law clause does not reflect its intention. At the same time, applying the law governing the arbitration agreement is more consistent with the principle of the separability of arbitration agreements than applying the law governing the underlying guarantee relationship. As a consequence, it seems plausible to suggest that the issue of extension under guaranty agreements should be governed by the law applicable to the existence and validity of the arbitration agreement on the occasion that the parties have agreed on a certain law or the law of the seat of arbitration in the absence of the parties’ agreement.

63 A recent FAI Award reported by Mika Savola, chair of the FAI Board < <http://arbitration.fi/2016/05/30/sole-arbitrators-jurisdictional-decision-finding-arbitration-clause-contained-loan-agreement-valid-binding-lendee-guarantor/> > accessed 27 July 2016 (FAI Award).

64 Born (n 6) 1463.

65 SCC Award (n 61).

66 FAI Award (n 62).

2.2.2. Divergent Approaches to the Issue of Extension under Guaranty Agreements

Different approaches have been taken by arbitral tribunals and national courts with regard to the issue of whether the guarantor is bound by the arbitration agreement of the main contract between the debtor and the creditor.

According to the first and prevailing approach in international arbitration, a guarantor is a third party to the main contract and to the arbitration clause therein. For this reason, a guarantor will not be bound by the arbitration agreement contained in the main contract.⁶⁷ Following this line, many arbitral tribunals and national courts have taken this approach. For instance, in the Interim Award of the *ICC Case No. 4367*, the arbitral tribunal pointed out that the guarantor Indian Bank is not a party to the main contract and the arbitration clause therein and thus, the suits before Indian courts in respect of a guaranty agreement are independent remedies separate from those before the tribunal.⁶⁸ The same position was upheld by the US Court in the *ITT Hartford* case where it was held that guarantors were not signatories to the main contract, the main contract does not illustrate an intent to benefit the guarantors and therefore, the guarantors were not bound by the arbitration clause contained in the main contract.⁶⁹

Following this line of thought, French courts also did not accept the extension of arbitration agreements to the guarantors unless the parties' real intentions in drawing up the guaranty agreement were that the guarantor would be a party to the arbitration agreement.⁷⁰ This approach has been recognised for both first demand guarantees where the obligation of the guarantor is independent of the liability of the guarantor and general guarantees.⁷¹ Likewise, some scholars have not supported the extension of arbitration agreements to the guarantors since the obligations of the guarantor are significantly different from the obligations of the main debtor and contended that the exceptions inherent in the debt that the guarantor may oppose to the creditor, do not cover the procedural objection based on the right to invoke the arbitration clause.⁷² Other scholars have argued that whereas the guarantor may rely on the arbitration clause in the main contract against the creditor, the arbitration clause cannot be opposed against the guarantor.⁷³ The main argument behind the idea of impossibility of the invocation of arbitration clause against the guarantor is that it would be unjust to deprive the guarantor of its right of access to a state court due to considerations of fairness and good faith.⁷⁴

67 Brekoulakis (n 2) 94.

68 *U.S. supplier v. Indian Buyer* Interim award in case No. 4367 (1984) in *Yearbook Commercial Arbitration*, Vol. 11 (A.J. van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 1986) 135-136.

69 *ITT Hartford Life & Annuity Ins Co v Amerishare Inv, Inc*, 133 F 3d 664, 670 (8th Cir 1998).

70 CA Paris 7 July 1994, *Uzinexportimport Romanian Co v Attock Cement Co* in (1995) *Revue de L'Arbitrage* 107.

71 C Cass Com 22 November 1977, *Buy Van Tuyen v Merrill Lynch Pierce Fenner* in (1978) *Revue de L'Arbitrage* 461; CA Paris 14 December 1987, *Cie de signaux et d'entreprises électriques v BNP et CPA* in (1989) *Revue de L'Arbitrage* 240.

72 Eric Loquin, 'Arbitrage et Cautionnement' (1994) *Rev Arb* 236, 240.

73 Rana Chaaban, 'Clause d'Arbitrage et Cautionnement' (2007) *Revue de l'arbitrage* 721, 728-743.

74 *ibid* 742-743.

As explained above, the prevailing view in most jurisdictions is that as the guarantor is not party to the main contract, it is also not party to the arbitration agreement contained in the main contract. In this sense, there is a general recognition that a separate legal theory must apply to the facts of the case in order to extend the arbitration clause to the guarantor. The most commonly used legal theory to this effect is incorporation by reference.⁷⁵ As regards the interpretation of issues related to the incorporation by reference, there are two divergent approaches taken by different jurisdictions to the extension of arbitration agreements. As such, three recent cases with comparable scenarios will be explained below in order to illustrate the difference between these approaches.

On the one hand, some national courts resorted to restrictive interpretation and have required a clearer language of reference for the extension of arbitration agreements to guarantors. Taking a close look at the facts of the *Decision no. 4A/128* of the Swiss Supreme Court, it is seen that the guaranty agreement explicitly referred to the main contract and the parties agreed that the guarantor which is the parent company of the guaranteed party, shall indemnify the creditor “as if the guarantor was the original debtor”.⁷⁶ The Swiss Supreme Court held that the references in the guaranty contract to the various provisions of the main contract, while not specific to the arbitration clause, were intended to identify the secured obligations and were not sufficient to evidence a common intention of the parties to the guaranty agreement to incorporate the arbitration clause.⁷⁷ Thus, the Swiss Court emphasized that strict requirements of reference must be met for the extension of arbitration agreement to a guarantor.⁷⁸ Similarly, according to the facts of a recent Croatian Supreme Court’s judgment, a Slovenian third party signed an annex to the main contract committing itself as a guarantor for the entire debt.⁷⁹ The annex did not restate the arbitration clause but contained a reference which states “All the other conditions remain unchanged”.⁸⁰ The Croatian Supreme Court held that this clause only concerns the main contract and not the guaranty agreement despite the fact that it follows immediately after the guaranty agreement. Furthermore, it was held that even if the guarantor consented to the said clause, it would have meant that it did not oppose having the disputes between the parties of the main contract resolved by arbitration and thus, the guarantor is not bound by the arbitration clause contained in the main contract.⁸¹ Therefore, it

75 Brekoulakis (n 2) 96.

76 Swiss Supreme Court decision 4A-128/2008 of 19 August 2008 Decision in (2008) 26 ASA Bulletin 721 (Swiss decision).

77 *ibid.*

78 Georg Naegeli and Chris Schmitz, ‘Switzerland: Strict Test for the Extension of Arbitration Agreements to Non-Signatories’ (2009) <<http://www.homburger.ch/fileadmin/publications/EXTENSION.pdf>> accessed 27 July 2016.

79 Croatian Supreme Court Judgment issued on 2 September 2014 (VSRH Revt-321/2013-2) (Croatian decision), in Tamara Manasijevic, ‘Extension of Arbitration Agreements in Light of the Croatian Supreme Court Ruling- Caution with Pro-Arbitration Approach’ published in Kluwer Arbitration Blog (2016) <<http://kluwerarbitrationblog.com/2016/02/17/extension-of-arbitration-agreements-in-light-of-the-croatian-supreme-court-ruling-caution-with-pro-arbitration-approach/>> accessed 27 July 2016.

80 *ibid.*

81 *ibid.*

seems that the Croatian Supreme Court also took the stance in favour of restrictive interpretation of references contained in guaranty agreements.

On the other hand, other national courts have a tendency toward a broad interpretation of references by putting the commercial sensibility in the first place. In the *Stellar Shipping* case, the English High Court considered whether the guarantor's endorsement of the main contract in relation to its guarantee obligations included acceptance of the arbitration clause contained in the main contract.⁸² Considering the close connection between the main contract and the guaranty agreement as well as the parties involved, it was held that it would be sensible to expect the parties to agree to a common method of dispute resolution and the guarantor is bound by the arbitration clause.⁸³

According to the second and minority view, the guarantor may be bound by the arbitration clause under certain conditions. In a jurisdictional award of SCC *Case no. 38/1997*, the sole arbitrator established some preconditions for the extension of arbitration agreement contained in the main contract to the guarantor due to considerations of fairness. Firstly, the obligations undertaken by the debtor and the guarantor should be equivalent. According to the facts of the case, there was an explicit undertaking of the guarantor to repay a loan and as a consequence, the obligations of the debtor and the guarantor were identical.⁸⁴ Secondly, the guarantor should be aware of the arbitration clause. In this case, since organs of the guarantor state were involved in the negotiations of the main contract and there is a specific reference to that contract in the guaranty text, the guarantor was aware of the arbitration clause.⁸⁵ A similar position was upheld by a recent FAI award where the sole arbitrator decided that the guarantor is bound by the arbitration clause contained in the main contract as it was aware of the main contract and the arbitration clause therein.⁸⁶ As can be understood from these two arbitral awards, under the second and minority view, the nature of obligations and the awareness of the guarantor play an important role for adjudicators to decide whether to extend the arbitration clause to the guarantor.

2.2.3. Critique on the Extension under Guaranty Agreements

As explained above, the law applicable to the existence and validity of arbitration agreements should govern the extension under guaranty agreements as it is the most closely connected law with the jurisdiction of arbitral tribunal and the subjective scope of the arbitration agreement. Additionally, this proposition would lead to fairer and more predictable results for both the guarantor and the parties of the main

⁸² *Stellar Shipping* (n 60).

⁸³ *ibid.*

⁸⁴ SCC Award (n 61).

⁸⁵ SCC Award (n 61).

⁸⁶ FAI Award (n 62).

contract and would be more consistent with the principle of separability of arbitration agreements than applying any other law.

In regard to the issue of whether the guarantor is bound by the arbitration agreement contained in the main contract, there are mainly two different stances taken by national courts and arbitral tribunals. According to the first and prevailing approach taken by many arbitral tribunals and national courts in selected jurisdictions, since the guarantor is not party to the main contract, it is also not bound by the arbitration clause contained therein. As such, it is generally accepted in these jurisdictions that a separate legal theory must exist in order to extend the arbitration clause to the guarantor. In particular, as the most frequently used theory to this effect is incorporation by reference, two divergent approaches to the interpretation of references were explained above on the basis of three recent decisions given by different jurisdictions.⁸⁷

Considering these two divergent approaches to the interpretation of references, the Swiss Supreme Court and the Croatian Supreme Court tend to require that any incorporation by reference into a guarantee be explicit and the guarantor's intent to be personally bound by the arbitration clause must be express. From a critical perspective, it is questionable whether this restrictive interpretation of references is consistent with the necessity to avoid the multiplication of parallel proceedings, fairness and good administration of justice. In this respect, I argue that the restrictive interpretation of the said courts gave priority to the necessity of clear consent to the arbitration clause over commercial sensibility and procedural economy. Likewise, as pointed out by Brekoulakis, clear consent for arbitration is often absent in each one of legal theories for the extension of arbitration agreements to non-signatories.⁸⁸ In addition, commercial parties do not often consider the arbitration clause as a separate part of the main contract in the course of concluding the contract and they do not often carry about requesting clear consent for arbitration from a guarantor when incorporating the terms of the main contract into the guaranty agreement. Thus, this restrictive approach encourages parallel proceedings arising out of the obligations of the guarantor and ignores the fact that commercial parties are not specialists in the arbitration field. In this respect, the English High Court's broad interpretation of references by putting emphasis on the close connection between the main contract and the guaranty agreement is more consistent with the expectations of modern commercial transactions. Likewise, the English approach reconciles with the idea that arbitration is not a burden for commercial parties, but rather it is a normal way to resolve disputes between commercial parties.

Under the second and minority stance taken by awards of SCC and FAI mentioned above, the guarantor may be bound by the arbitration clause provided that its

⁸⁷ Swiss decision (n 75), Croatian decision (n 78), Stellar Shipping (n 60).

⁸⁸ Brekoulakis (n 10).

obligations are equivalent to that of the debtor and it is aware of the arbitration clause. These awards brought a new pro-arbitration perspective to the academic debate in relation to the extension of arbitration agreements to guarantors. Nonetheless, these awards can be criticised as the preconditions stated by arbitral tribunals for holding a guarantor subject to arbitration are not enough to determine the implied consent of the guarantor. Even if this thesis adopts a liberal approach to the non-signatory issues, this situation is quite different from holding that an arbitration clause extends with incorporation by reference. If the creditor or the guarantor intend to have the benefits of an arbitration clause, they can insist at least to refer to the provisions of the main contract. By holding a guarantor subject to arbitration when the guaranty agreement does not contain any references, the arbitrator grants the creditor a benefit for which it could have bargained with the guarantor and this may lead to unfair results.

Therefore, it seems plausible to suggest that in case there are references to the main contract in the guaranty agreement, the broad interpretation of these references is more persuasive and consistent with the expectations of modern commercial transactions. In case there are not any specific references in the guaranty agreement, the identical nature of obligations with the debtor and the awareness of the arbitration clause are not sufficient for a guarantor to be bound by the arbitration clause since these factors do not evidence even the functional and implied consent of the guarantor.

CHAPTER 3: BINDING NON-SIGNATORIES UNDER DOCTRINE-BASED THEORIES

In this chapter, the extension of the arbitration agreement to non-signatories through the application of doctrine-based theories will be evaluated.

3.1. Extension under Group of Companies Doctrine

In principle, an arbitration agreement concluded by one of the companies in the same group cannot be binding on other members of the same group due to considerations of limited liability and separate legal personality. As an exception to this general rule, arbitral tribunals may extend an arbitration clause to a non-signatory member of the same group under certain conditions that will be scrutinised below. Accepting the fact that this doctrine might even have experienced more criticism than sympathy in the arbitration community, this section will analyse different approaches taken by national courts and arbitral tribunals in relation to the law governing extension under group of companies doctrine and the applicability of the doctrine.

3.1.1. Law Governing Extension under Group of Companies Doctrine

In the context of the group of companies doctrine, there is a noticeable trend among tribunals not to base their decision on the issue of extension on a prior

determination of the applicable law.⁸⁹ Given the separability of the arbitration clause, they generally decide on this issue according to the common intention of the parties and the usages of international trade by applying international rules of substantive law.⁹⁰ The main reason is that the majority of national laws supports the principles of separate legal personality and limited liability that does not allow for the application of the group of companies doctrine.⁹¹ In this respect, in the Dow Chemical case, Paris Court of Appeal decided whether to extend the arbitration clause under the group of companies doctrine having regard to the common intention of the parties and the usages of international trade.⁹² By contrast, the majority of other jurisdictions did not allow international rules to determine the issue of extension.⁹³ Likewise, it should be noted that some scholars have argued that issues related to the group of companies doctrine ought to be governed by the law applicable to the arbitration agreement.⁹⁴

In my opinion, in case the implied consent of the non-signatory can be deduced from the facts of the case, national courts and arbitral tribunals should take equity and efficiency considerations into account when determining their competence. As such, the law applicable to the arbitration agreement should govern this issue as it is the most closely connected law with the jurisdiction of arbitral tribunal and the subjective scope of the arbitration agreement. In addition, since the main purpose of the group of companies doctrine is to demonstrate the implied consent according to the facts of the case, this doctrine should be considered as a rule of international law and be applied as part of the law applicable to the arbitration agreement. Likewise, arbitral tribunals seated in France have treated this doctrine as “a usage conforming to the needs of international commerce”.⁹⁵ Otherwise, due to the principle of separate legal personality which is generally recognised in most jurisdictions, this doctrine will rarely be applicable if the tribunal relies only on the national law.⁹⁶ Furthermore, given the fact that equitable considerations are taken into account by courts and tribunals when deciding on substantive issues, considerations of equity and good administration of justice should also play an important role in jurisdictional issues.

89 Hanotiau (n 21) 97.

90 Brekoulakis (n 2) 165-166.

91 Brekoulakis (n 2) 165.

92 CA Paris 21 October 1983, *Société St. Gobain v Société Dow Chemical* (1984) Revue de L'Arbitrage 98 with observations by A. Chapelle (CA Dow Chemical case).

93 *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] WL 229138 [62] (Peterson Farms).

94 Born (n 6) 1498.

95 *Dow Chemical France, The Dow Chemical Company and others v ISOVER Saint Gobain*, Interim award of ICC Case No. 4131, 23 September 1982, in Pieter Sanders (ed), (1984) 9 Yearbook Commercial Arbitration 131 (*Dow Chemical Award*).

96 Brekoulakis (n 2) 168.

3.1.2. Divergent Approaches to the Extension under Group of Companies Doctrine

French arbitration practice is the leading authority adopting the group of companies doctrine.⁹⁷ Although it is not the first award in relation to group of companies, the conditions for the application of the group of companies doctrine was first introduced by the famous *Dow Chemical award*⁹⁸, issued in Paris in 1982. These conditions were: (i) the existence of a ‘single economic unit’⁹⁹, (ii) the active role of the non-signatory company in the negotiations, performance or termination of the contract¹⁰⁰; and (iii) the requirement of common intention of the parties to arbitrate.¹⁰¹ The combination of these conditions were main criteria for determining the implied consent of the non-signatory and led to the concept of group of companies doctrine. Likewise, Paris Court of Appeal upheld this award but its reasoning was focused on the intention of the parties as revealed by their conduct rather than the concept of group of companies doctrine.¹⁰²

In the *Orri* decision, Paris Court of Appeal went too far from the requirement of combination of the aforementioned three conditions.¹⁰³ In this case, the Paris Court of Appeal refused to set aside the award in which the arbitration agreement is extended to a non-signatory on the basis of the active role of the non-signatory in the performance of the contract and its awareness of the existence of the arbitration clause.¹⁰⁴ Therefore, the Court did not require the combination of three elements mentioned above in order to determine implied consent of the non-signatory. However, more recent decisions made by the ICC tribunals adopted a more moderate approach and it seems that arbitrators now recognize the significant problems arising from this doctrine.¹⁰⁵ For instance, in *ICC Case no. 9517*, the tribunal pointed out that even if the condition of close corporate ties is established, this will not be enough to justify an extension of the arbitration clause.¹⁰⁶

The approach of the Swiss jurisdiction has been inconsistent. On the one hand, the Swiss Federal Supreme Court in 1996 did not allow for the extension of an arbitration clause signed by a project company to its foreign parent.¹⁰⁷ Similarly, some Swiss

97 Born (n 6) 1445.

98 *Dow Chemical Award* (n 94), Collection of ICC Awards 1974-1985, 146-153 and 464-473 with observations by Yves Derains.

99 *Dow Chemical Award* (n 94) (1984) *Revue de L'Arbitrage* 137 (1984) 9 *YBCA* 131.

100 *ibid.*

101 *ibid.*

102 *CA Dow Chemical case* (n 91); Yves Derains, ‘Is There a Group of Companies Doctrine?’ in Bernard Hanotiau and Eric A. Schwartz (ed), *Multiparty Arbitration* (1st edn, ICC 2010) 131.

103 *CA Paris* 11 January 1990, *Orri v Lubrifants Elf Aquitaine* (1992) *Revue de L'Arbitrage* 95 (*CA Orri* decision).

104 *ibid.* 106.

105 Stephan Wilske, Laurence Shore and Jan-Michael Ahrens, ‘The “Group of Companies Doctrine” – Where is it Heading?’ (2006) 17 *American Review of International Arbitration* 73, 88.

106 *ICC Case No. 9517* (2000), 16(2) *ICC BULL* 80 (2005).

107 Swiss Supreme Court decision of 29 January 1996, *Saudi Butech Ltd v Al Vouzan Trading, Contracting Co Ltd v Saudi Arabian Saipem Ltd, Saipem SpA* (1996) 14 *ASA Bulletin* 496.

scholars have contended that the group of companies doctrine is not recognised under Swiss law.¹⁰⁸ On the other hand, in a recent case, the Swiss Federal Supreme Court upheld an award in which the tribunal applied Lebanese law and international trade usages to extend the arbitration agreement to the controlling shareholder.¹⁰⁹ Although the Court did not expressly recognise the group of companies doctrine, this decision surprised many practitioners and was criticised by arbitration practitioners.¹¹⁰ Consequently, although the Swiss jurisdiction did not endorse the group of companies doctrine as a part of Swiss law, it appears to be flexible and close to the present position of French courts.¹¹¹ Nonetheless, it may well be argued that the Supreme Court would not allow the extension of arbitration agreement to the controlling shareholder if the tribunal applied Swiss law.

Though the US Jurisdiction has a generous case law applying the other non-signatory theories, US Court of Appeals, in the *Sarhank* case, clearly stated that US courts will not follow the group of companies doctrine.¹¹² Nonetheless, in the *Ryan* case, US Court of Appeals held that a non-signatory parent company may be bound by an arbitration clause due to procedural efficiency considerations.¹¹³ Even if the Court did not refer explicitly to the group of companies doctrine, the discrepancy between US courts was criticised by some scholars as it affects adversely the business certainty required in modern transactions relating to several companies.¹¹⁴

The most conservative approach between selected jurisdictions can be seen in England. The English Commercial Court, in *Peterson Farms* case, established that the group of companies doctrine “forms no part of English law” and annulled the relevant part of the award.¹¹⁵ English scholars have also been generally suspicious in relation to the doctrine.¹¹⁶ In this direction, in the *Dallah* case, the English Court refused enforcement of an ICC award issued in Paris, reasoning that French law had wrongly been applied by the arbitral tribunal with regard to the issue of extension.¹¹⁷ In this case, there was no group of companies situation but the issue was related to the

108 Jean-François Poudret, ‘L’Extension de la Clause d’Arbitrage: Approches Française et Suisse’ (1995) 122 *Journal de Droit International* (Clunet) 893, 913.

109 Swiss Supreme Court decision of 16 October 2003, *X. S.AL., Y.S.AL., et A contre Z Sarl* ATF/BGE (Collection of Supreme Court cases) 129 III 727, 730.

110 Philipp Habegger, ‘Extension of Arbitration Agreements to Non-Signatories and Requirements of Form’ (2004) 22 *ASA Bulletin* 398. 111 Derains (n 101) 137.

112 *Sarhank Group v Oracle Corporation*, 404 F 3d 657 (2nd Cir. 2005) (SDNY).

113 *J.J. Ryan & Sons v Rhone Poulenc Textile SA et al*, 863 F 2d 315, 320–21 (4th Cir. 1988), 15 *Yearbook Commercial Arbitration* 543 (1990).

114 Hosking (n 32) 295.

115 *Peterson Farms* (n 92), (2004) 1 *Lloyd’s Law Rep.* 612 (QB).

116 John Leadley and Liz Williams, ‘Peterson Farms: *There Is No Group of Companies Doctrine in English Law*’ 2004 *International Arbitration Law Review* 111; Wilske, Shore and Ahrens (n 104) 81-82.

117 *Dallah Real Estate and Tourism Holding Co.v. The Ministry of Religious Affairs, Government of Pakistan* [2009] *EWCA Civ 755*, [2010] 1 *All ER* 592.

determination of implied consent of a state.¹¹⁸ Since the decision was based on a strict interpretation of the implied consent that was incompatible with French approach, it is also a good example for showing the reluctance of English courts to recognise the group of companies doctrine.

3.1.3. Critique on the Extension under Group of Companies Doctrine

In light of the explanations stated above, the law applicable to the arbitration agreement should govern the extension under the group of companies doctrine as it touches upon the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement. Additionally, the group of companies doctrine should be considered as a rule of international law and be applied as part of the national law governing the arbitration agreement. Otherwise, if the tribunal relies only on the legal rules of a national law, the doctrine will not have a chance to be applicable.

Taking a comparative look at the selected jurisdictions, it is seen that French arbitration practice generally supports the doctrine whereas England adopted the most conservative approach between selected jurisdictions. The stance taken by United States and Switzerland seems to be more flexible than England but it should be noted that there are several discrepancies between court decisions in the US and Switzerland. As emphasized by Hosking, this discrepancy affects negatively the business certainty required in modern transactions.¹¹⁹ Therefore, it seems plausible to suggest that the clear and consistent case law with regard to the doctrine would be more desirable for commercial parties due to considerations of predictability and prudence. Furthermore, given the divergent approaches between major selected jurisdictions, the initial choice of seat has a great importance for determining the willingness of the tribunal to extend the arbitration agreement.¹²⁰

From a general perspective, the group of companies doctrine emphasizes the importance of economic reality on the basis of determining the implied consent of the non-signatory. Even implicit consent needs to be clearly evidenced with a degree closer to certainty, rather than possibility.¹²¹ Of course, the strict approach of English courts can be criticised as parties with an important role in the commercial transaction might be left outside the arbitration proceedings. However, this should not mean that implied consent may be construed with a degree of probability. In this respect, the Paris Court of Appeal's *Orrri* decision can be criticised since the extension of the arbitration agreement to the non-signatory was only based on its active role in

118 *ibid.*

119 Hosking (n 32) 295.

120 Vladamir Pavic, "Non-Signatories" and the Long Arm of Arbitral Jurisdiction' in Peter Hay and others(ed), *Resolving International Conflicts – Liber Amicorum Tibor Varady* (1st edn, Central European University Press 2009) 213, 229.

121 Gaillard and Savage (n 9) 254 .

the performance of the contract and its awareness of the arbitration clause.¹²² It seems reasonable to suggest that these grounds are ambiguous factors and insufficient to determine the implicit consent with a degree closer to certainty in the context of the group of companies doctrine.

Accordingly, I argue that the combination of three conditions introduced by *Dow Chemical*¹²³ award should exist in every situation for the extension of the arbitration clause under the group of companies doctrine and the tribunal should focus on the common intention of the parties. In addition, the implied consent of the non-signatory should be determined according to the facts of the case with a degree of certainty rather than probability.

3.2. Extension under Piercing the Corporate Veil Doctrine

According to the piercing the corporate veil doctrine, a party who has not consented to a contract containing an arbitration clause may nevertheless be bound by the clause if that party strongly dominates the affairs of an entity that did execute the agreement and has abused such control.¹²⁴ The doctrine constitutes an exception to the principle of limited liability and separate legal identity of companies and is justified by elements of fairness.¹²⁵

Some scholars have drawn attention to three variants of the theory which are instrumentality, alter ego and identity doctrines.¹²⁶ Given this difference, although the words “alter ego” and “piercing the corporate veil” are often used interchangeably, it is preferred to use the word “piercing the corporate veil” in a general sense including all variants of the doctrine in the context of extension of arbitration agreements to non-signatories. This section will analyse different approaches taken by national courts and arbitral tribunals in relation to the law governing extension under piercing the corporate veil doctrine. In addition, accepting the fact that the doctrine is generally recognised in all selected jurisdictions, this section will draw attention to some differences with regard to the application of the doctrine in diverse jurisdictions.

3.2.1. Law Governing Extension under Piercing the Corporate Veil Doctrine

Regarding the applicable law to the extension of arbitration agreements under the piercing the corporate veil doctrine, distinct authorities have applied the law of the

¹²²CA *Orri* decision (n 102).

¹²³Dow Chemical Award (n 94).

¹²⁴Born (n 6) 1433.

¹²⁵Sebastien Besson, ‘Piercing the Corporate Veil: Back on the Right Track’ in Bernard Hanotiau and Eric A. Schwartz (ed), *Multiparty Arbitration* (1st edn, ICC 2010) 147.

¹²⁶Pietro Ferrario, ‘The Group of Companies Doctrine in International Commercial Arbitration: Is There Any Reason for This Doctrine to Exist?’ (2009) 26 *Journal of International Arbitration* 647, 649.

state of incorporation¹²⁷, or the law governing the main contract¹²⁸ or the law governing the arbitration agreement¹²⁹. Furthermore, some scholars have argued that uniform international principles should govern the extension since the doctrine arises from the application of internationally recognized equitable principles to avoid unfairness.¹³⁰ Other scholars have suggested that the law of place of residence of the contracting party who asserts the misuse of the control could govern this issue as the theory is an exception that aims to correct the effect of the law on the basis of good faith considerations.¹³¹

Taking into consideration all these approaches with regard to the applicable law, even if some courts have contended that the state of incorporation of an entity has a greater interest in determining when to isolate shareholders from legal liability¹³², this law may be uncertain in case the signatory and the non-signatory corporations are incorporated in different countries. Similarly, applying the law governing the main contract to the issue of extension is not appropriate since non-signatory party is not a party to the main contract and the choice of law clause does not reflect its intention. It is also important to note that the law of the place of residence of the contracting party which invokes the abuse may be unfamiliar and unpredictable to other contracting party in the context of multinational transactions. Likewise, the application of uniform international rules may lead to unpredictable decisions as the scope and conditions of internationally recognized equitable principles may be interpreted differently in diverse jurisdictions.

In this respect, it seems plausible to suggest that the law applicable to the arbitration agreement should govern the extension under the piercing the corporate veil doctrine as it is the most closely connected law with the jurisdiction of arbitral tribunal and the subjective scope of the arbitration agreement. Likewise, as noted by Brekoulakis¹³³, tribunals often rely on national laws and especially on the law of the seat of arbitration when they refer to this theory.¹³⁴ I argue that this finding leads to fairer and more predictable results in respect of non-signatories than any other law mentioned above. Additionally, this approach is more consistent with the principle of autonomy of arbitration agreements than applying any other laws. Consequently, this issue should be governed by the law applicable to the existence and validity of the arbitration agreement on the occasion that the parties have agreed on a certain law or the law of the seat of arbitration in the absence of the parties' agreement.

127 *Fletcher v Atex Inc*, 68 F 3d 1451, 1456 (2d Cir 1995).

128 *FR8 Singapore Pte Ltd v Albacore Maritime Inc.*, 754 F Supp 2d 628 (SDNY 2010).

129 ICC Case No. 8385 of 1995 (1997) 124 *Journal du Droit International* 1061, 1072-1073 with observations by Yves Derains.

130 Born (n 6) 1444.

131 Besson (n 124) 155.

132 *Soviet Pan Am Travel Effort v Travel Committee Inc*, 756 F Supp 126 (SDNY 1991).

133 Brekoulakis (n 2) 172.

134 ICC Case no. 7626 of 1995, in Jean-Jacques Arnaldez and Yves Derains and Dominique Hascher (eds), *Collection of ICC Arbitral Awards 1996-2000* (1st edn, Kluwer Law International 2003) 119; ICC Case no. 10758 of 2000, (2000) *Journal du Droit International* 1171.

3.2.2. Application of Piercing the Corporate Veil Doctrine in Diverse Jurisdictions

The piercing the corporate veil doctrine is recognised in all selected jurisdictions but there are some differences between jurisdictions with regard to the application of the doctrine.

Under English law, the principle of separate legal personality has a crucial importance and the corporate veil can only be pierced in very limited circumstances. Especially, in both recent *VTB Capital*¹³⁵ and *Prest*¹³⁶ cases, the UK Supreme Court established that piercing the corporate veil is possible only where a corporate structure has been implemented or used to avoid or frustrate an existing legal obligation. As such, the English jurisdiction has a significantly high standard that generally requires fraud or other misconduct to avoid liability through the use of corporate structure.¹³⁷ Therefore, since any published case law specific to the extension of arbitration agreements could not be reached at the time of writing this paper, it can be assumed that this elevated standard for piercing the corporate veil would also be valid in the context of arbitration.

Swiss case law has also been reluctant to disregard the legal personality of a corporation. As pointed out by Poudret, under Swiss law, the legal personality of a corporation will only be disregarded in exceptional circumstances consisting of fraud or an abuse of right.¹³⁸ In a recent decision, the Swiss Supreme Court held that the doctrine of piercing the corporate veil can be used to extend the arbitration agreement.¹³⁹ In addition, the Court emphasized its well-established practice according to which the corporate veil may be pierced in exceptional circumstances where a corporation and another entity or its majority shareholder are operating as a single economic entity and it would be unfair to uphold the legal distinction between them.¹⁴⁰ Thus, Swiss case law also brought an elevated standard for piercing the corporate veil.

Many US Courts have similarly been prudent in applying piercing the corporate veil doctrine and they adopted a three-pronged test for disregarding the separate legal personality of a corporation.¹⁴¹ For instance, in the *Fisser* case, the US Court held that the requirements for the application of the doctrine are: (i) control or complete domination of an entity, (ii) fraud or wrong committed by the use of this control or domination and (iii) injury or loss suffered by the counterparty caused by the

¹³⁵ *VTB Capital plc v Nutritek International Corp and Others* [2013] UKSC 5, [2013] 2 AC 337.

¹³⁶ *Prest v Petrodiesel Resources Limited and Others* [2013] UKSC 34, [2013] 3 WLR 1.

¹³⁷ *Born* (n 6) 1434.

¹³⁸ Poudret (n 107) 913.

¹³⁹ Swiss Supreme Court Decision 4A_160/2009 of 25 August 2009, in Georg Van Segesser and Petra Rihar, 'Piercing the Corporate Veil – Effect on the Arbitration Clause and Jurisdiction' published in *Kluwer Arbitration Blog* (2009) < <http://kluwerarbitrationblog.com/2009/11/24/piercing-the-corporate-veil-effect-on-the-arbitration-clause-and-jurisdiction-2/?print=print> > accessed 27 July 2016.

¹⁴⁰ *ibid.*

¹⁴¹ Philip I. Blumberg and others, *Blumberg on Corporate Groups* (2nd edn, Harcourt Professional Publishing 2006) s 70.22.

aforementioned act.¹⁴² This three-pronged test has been referred to in the *Freeman* case and in that case, the US Court applied the piercing the corporate veil doctrine in relation to the extension of an arbitration agreement.¹⁴³ However, according to the minority view, in case of complete control of a company's regular activities by another company, this may merely be sufficient to disregard the separate legal personality. To illustrate, in the *Servaas Inc* case, the US Court held that a corporate veil may be pierced "where one entity exercises complete domination and control over the day-to-day operations of another entity".¹⁴⁴ In this respect, US Courts that adopt this minority view would be more willing to pierce the corporate veil and extend the arbitration agreement to a non-signatory.

Furthermore, it seems that French case law does not clearly distinguish the group of companies and piercing the corporate veil doctrines.¹⁴⁵ This can be explained by the practice that the group of companies doctrine was recognized in France and was generally satisfactory to address the issue of extension.¹⁴⁶ Nonetheless, it should be noted that French courts appear to be prone to pierce the corporate veil in case of fraud. Likewise, in the *Orri* case, as mentioned in the previous section, Paris Court of Appeal had applied the group of companies doctrine for the extension.¹⁴⁷ However, in that case, French Supreme Court relied only on the ground of fraud for the extension of arbitration agreements.¹⁴⁸ As already explained, the grounds relied on by the Paris Court of Appeal were ambiguous factors and insufficient to determine the implicit consent with a degree closer to certainty in the context of the group of companies doctrine. By contrast, in that case, it seems reasonable to suggest that the notion of fraud constituted an appropriate justification for the extension in the context of piercing the corporate veil doctrine. In addition, since the French Supreme Court allowed the extension of arbitration agreement on the sole ground of fraud in the *Orri*¹⁴⁹ case, the French approach is familiar with piercing the corporate veil doctrine.

3.2.3. Critique on the Piercing the Corporate Veil Doctrine

As regards the applicable law, it seems logical to suggest that extension under piercing the corporate veil doctrine should be governed by the law applicable to the existence and validity of the arbitration agreement as it touches upon the jurisdiction of the arbitral tribunal and the subjective scope of the arbitration agreement. Furthermore, this proposition would lead to fairer and more predictable results for all

¹⁴² *Fisser v International Bank*, 282 F 2d 231, 237 (2d Cir1960).

¹⁴³ *Freeman v Complex Computing Company Inc*, 979 F Supp 257 (SDNY 1997).

¹⁴⁴ *Servaas Inc v Republic of Iraq*, 686 F Supp 2d 346, 354-355 (SDNY 2010).

¹⁴⁵ Poudret and Besson (n 54) 255-56.

¹⁴⁶ Besson (n 124) 152.

¹⁴⁷ CA *Orri* decision (n 102).

¹⁴⁸ C Cass Civ (1) 11 June 1991, *Orri v Société des Lubrifiants Elf Aquitaine* (1992) Revue de L'Arbitrage 73.

¹⁴⁹ *ibid*.

parties and would be more consistent with the principle of autonomy of arbitration agreements than applying any other suggested law.

Taking a comparative look at the selected jurisdictions, it is seen that authorities generally recognise the piercing the corporate veil doctrine. On the one hand, under English and Swiss law, the corporate veil may be pierced in exceptional circumstances where a non-signatory significantly controls a contracting party and there is a fraud or abuse of right. Similarly, many US Courts adopted a three-pronged test and they also have an elevated standard for piercing the corporate veil. On the other hand, some US Courts held that complete control of a company's day-to-day activities can solely be sufficient to disregard the separate legal personality. As such, US Courts that adopt this minority view has a lower standard to pierce the corporate veil. Moreover, although French case law does not distinguish the group of companies and piercing the corporate veil doctrines, given the recognition of group of companies doctrine in France and acceptance of the notion of fraud in the *Orrri*¹⁵⁰ decision, French courts seem to be prone to piercing the corporate veil in case of fraud. Since there is not any published decision apart from the French Supreme Court's *Orrri*¹⁵¹ decision, the standard of French jurisdiction is not clear. Nevertheless, it seems reasonable to suggest that French case law would not have such a high standard for piercing the corporate veil as English, Swiss and many US Courts have due to the fact that the group of companies doctrine is generally satisfactory to address these situations.

In the context of piercing the corporate veil doctrine, an important question arises as to whether the control or domination of an entity over another justifies treating it as a party to the arbitration agreement. I argue that this element is not merely sufficient and a second element, at least an abuse of right must exist for piercing the corporate veil. The reason behind this argument is that piercing the corporate veil doctrine implies an extension without consent of the parties and the analysis is much more fact-oriented than other non-signatory theories.¹⁵² In this respect, only the control criterion should not be sufficient to disregard limited liability and separate legal personality of companies which are core principles of company law. Likewise, the core of the doctrine is based on the abuse of right of the corporate form.¹⁵³ Nonetheless, it should be noted that such abuses may be divergent.¹⁵⁴ From a liberal perspective, it seems reasonable to suggest that courts and tribunals should not limit such abuses to the case of fraud and they should also pay attention to other scenarios of abuses.

Lastly, an important question arises in relation to the arbitration procedure as to whether the non-signatory company will be bound by the arbitration agreement instead

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² Pavic (n 119) 223-224.

¹⁵³ ICC Case No 11209 (2005) 16(2) ICC Bulletin 102, 106-107.

¹⁵⁴ Besson (n 124) 154.

of or in addition to the signatory company. The answer to this question is not consistent in practice. Some scholars suggest that the claim should be invoked against the non-signatory controlling company which is the real party in interest.¹⁵⁵ It is also contended that the arbitration agreement would not be extended to the non-signatory and in fact, non-signatory would replace the signatory.¹⁵⁶ These propositions in the academic area appear to be well-grounded and justifiable but as there is no uniform practice with regard to this procedural issue, it is questionable whether it would be possible to invoke the claim against the non-signatory company until the tribunal determines the issue of extension. In this respect, it seems logical to invoke claims against both signatory and non-signatory companies in order to be on the safe side in the arbitration proceedings.

CONCLUSION

The classification of the most controversial four legal theories –third party beneficiary rule, guaranty agreements, group of companies doctrine and piercing the corporate veil doctrine- as contractual and doctrine-based theories brings to light the distinct features of these two categories. The main differences between them are the legal basis which links the non-signatory to the arbitration agreement and primary considerations for the extension of arbitration agreements. This thesis focuses on the applicable law issues and comparison of divergent approaches in selected jurisdictions under each of these legal theories. As such, this thesis emphasizes the importance of functional concept of consent and equitable considerations with regard to these controversial non-signatory theories and allows for making the following conclusions.

As regards the applicable law, the law applicable to the existence and validity of the arbitration agreement should govern the extension under the theories examined in this paper. This proposition would lead to fairer and more predictable results for all parties and would be more consistent with the principle of autonomy of arbitration agreements than applying any other suggested law. In particular, the group of companies doctrine should be considered as a rule of international law and be applied as part of the national law governing the arbitration agreement.

Regarding the application of the selected theories, the primary concern of contractual theories is to determine the implied consent of the non-signatory. Under the third party beneficiary rule, in most selected jurisdictions, the right of the third party to invoke the arbitration clause depends on whether the original parties aim to confer the third party a real benefit under the main contract. In this respect, the benefit conferred on third party beneficiary must be substantial rather than incidental. This prevailing approach taken by England, France and United States is persuasive.

¹⁵⁵ Brekoulakis (n 2) 173.

¹⁵⁶ Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties' in Albert Jan van den Berg (ed), ICCA: 50 Years of the New York Convention (Kluwer Law International, 2009) 343, 378.

Nevertheless, given the difficulty of proving the condition of real benefit, a reduced standard of proof should be maintained as it is more consistent with the pro-arbitration perspective in interpreting arbitration agreements. Likewise, it seems logical to suggest that only if the third party exercise its substantive rights under the main contract, will it be bound by the arbitration clause contained therein. In regard to the extension under guaranty agreements, a separate legal theory must exist in order to determine the implied consent of the guarantor and the most frequently used theory to this effect is incorporation by reference. In case there are references to the main contract in the guaranty agreement, the broad interpretation of these references is advisable as it is more consistent with the expectations of modern commercial transactions. Likewise, the approach in favour of broad interpretation of references reconciles with the idea that arbitration is not a burden for commercial parties, but rather it is a normal way to resolve disputes between commercial parties.

As for doctrine-based theories, economic reality considerations take primacy as they mainly focus on the economic relationship between the non-signatory and one of the signatories of the arbitration agreement. In this respect, the group of companies doctrine is beneficial as it facilitates including a third party who has an active role in the transactions in the arbitration proceedings. Nonetheless, the combination of three conditions introduced by the leading *Dow Chemical*¹⁵⁷ award should exist in every situation for the extension of the arbitration clause under the group of companies doctrine and the tribunal should focus on the common intention of the parties. In addition, adjudicators should determine the implied consent of the non-signatory according to the facts of the case with a degree of certainty rather than probability in order to achieve a fair and equitable solution. In the context of piercing the corporate veil doctrine, since this theory is much more fact-oriented rather than implied consent in comparison with other theories, the control criterion is not merely sufficient to treat a non-signatory as a party to the arbitration agreement and a second element, at least an abuse of right must exist for the application of the doctrine. Furthermore, it seems plausible to suggest that adjudicators should not limit such abuses to the case of fraud and they should also take into consideration other scenarios of abuses.

The debate on the extension of arbitration agreements remains largely unsettled today. This thesis, adopting a liberal approach, highlights the fact that becoming a party to the arbitration agreement is not a sanction for the non-signatory. Instead, arbitration is currently the ordinary way to solve commercial disputes and the good administration of justice necessitates the extension of arbitration agreements to non-signatories under certain conditions that are examined for each of these four legal theories. As such, arbitral tribunals and national courts should grant more importance to the functional concept of implied consent and equitable considerations in deciding whether to extend

¹⁵⁷*Dow Chemical Award* (n 94).

an arbitration agreement to a non-signatory. In addition, there are strong arguments to conclude that commercial parties would desire that all related disputes be resolved efficiently in a single forum instead of multiple and potentially inconsistent proceedings in different forums and applying a liberal standard of proof of consent is compatible with commercial reality and the pro-arbitration policies of the New York Convention.

Finally, given the divergent approaches of leading authorities with regard to the application of non-signatory theories, lawyers drafting an arbitration agreement should carefully choose the seat of arbitration and they should be aware of the recent trends with regard to the extension of arbitration agreements in the available choice of seats.

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