ARBITAL JURISDICTION OVER NON-SIGNATORIES:
THE ‘GROUP OF COMPANIES’ DOCTRINE

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ABSTRACT

The development of the arbitral practice resulted in a number of doctrines allowing extending the arbitration clause to non-signatory. One of these doctrines is the ‘group of companies’ doctrine, which is harshly criticized for inconsistency. This thesis is aimed at further explaining possible problem arising out of the said doctrine together with the proposing best ways for its application. The first requirement - ‘tight group structure’ - is often omitted by tribunals. However, the existing awards provide a number of examples showing flawed group structures. The scope of the second requirement - the active role of the non-signatory in the contract – was expanded by tribunals and it now overlaps with adjoining doctrines. The first and second requirements of the doctrine are obsolete, but their existence contributes to the establishment of the third and most important requirement – the mutual intention to arbitrate. This requirement was and remains central in the ‘group of companies’ doctrine.
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INTRODUCTION

Consent to arbitrate is the cornerstone of international commercial arbitration. This consent is normally expressed in the arbitration agreement. Arbitration agreement is the basis giving raise to arbitration and subsequent enforcement of the award. However, it is wrong to think that only parties which signed the arbitration agreement and thereby explicitly expressed their consent are bound by arbitration agreement. The arbitration agreements can be therefore ‘extended’ to non-signatories. There is a number of theories, which allow giving binding force to arbitration agreements vis-à-vis party that never signed the arbitration agreement. The common justification of these theories is the need of effective arbitration as sometimes it is impossible to solve the dispute without non-signatory. That is the case, for instance, when the non-signatory is a legal successor of the contractual party that does not exist anymore or when the non-signatory has the pivotal role in the contract.

The ‘group of companies’ doctrine is probably the most misunderstood theory of binding non-signatories. It often overlaps with other theories such as arbitral estoppel, good faith, tacit consent and piercing the corporate veil. The spectrum of opinion about ‘group of companies’ doctrine varies from considering the doctrine controversial to questioning the very existence of it. The author is not aware of the scholarly opinion which supports the doctrine in its existing state.

The first decision that crystallized the ‘group of companies’ doctrine is the Dow Chemical case. In its reasoning the tribunal developed three main requirements for the
doctrine to be applied. The requirements are as follows: first, the existence of the group of companies that constituted the same economic reality; second, the active role that non-signatory companies of the group played in the conclusion, performance and termination of the contract containing the arbitration clause; and third, mutual intention of the parties to consider the group as a unity bound by the arbitration agreement. A significant amount of arbitral cases dealing with the doctrine’s application followed. In spite of the number of cases where the doctrine was invoked, the joinder was successful in approximately twenty-five percent of cases. Arbitral practice shows that there is still uncertainty as to the practical application of the doctrine’s requirements and much more reliance on the traditional contractual principles permitting the extension of arbitration agreement. This thesis will describe particular circumstances which lead to the application of the ‘group of companies’ doctrine in order to evaluate the necessity of the doctrine’s existence. The author is aware of the fact that these circumstances are numerous as they vary from case to case and arbitral practice related to the ‘group of companies’ is extensive. It was decided to focus on the most crucial fact patterns within each of the requirements and does not cover their application in whole. For this reason, only landmark, contradictory, and most recent cases will be analyzed in this thesis.

The thesis proceeds as follows. The first section considers the requirement of the ‘same economic reality’. In this connection it is analyzed whether the corporate ties within the group are necessary, which entities can constitute the group, and whether the close corporate relations suffice for the satisfaction of the first criterion. The second section addresses the issue of participation of the non-signatory in the contract. More specifically, it analyzes whether the participation in the conclusion, performance and termination of the

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8 Park (n 2) 1.82.
contract is the only type of conduct relevant. Furthermore, it explains how this conduct can be used for binding non-signatories under other theories such as estoppels, good faith, piercing the corporate veil and tacit consent theory. The third section highlights the importance of the mutual parties’ intention to arbitrate, which is by itself sufficient ground for binding a party to arbitrate, and the final section concludes.
CHAPTER 1: THE EXISTENCE OF THE GROUP THAT CONSTITUTED THE SAME ECONOMIC REALITY

The requirement of the existence of the corporate group is the most obvious as it gave the name to the doctrine. Theoretically, this is the first thing that the tribunals look at when they decide a question whether a non-signatory can be a part to the arbitration proceedings under ‘group of companies’ doctrine. It is important to note that this criterion always means more than the mere existence of the corporate group. Being members of the same group does not usually suffice – the existence of the ‘same economic reality’, or, in other words, ‘tight group structure’ is necessary.

The practice of arbitration tribunals has revealed some inconsistent aspects of evaluating this criterion. Firstly, the name ‘group of companies’ implies that this doctrine is applicable only to the companies forming one group, i.e. companies connected by corporate ties. This is not necessarily true. Secondly, in evaluating ‘tight group structure’ the tribunals do not always focus strictly on the static property relations. Quite the opposite, the interaction between the parts of the group comes into play.

1.1 Importance of corporate ties for the application of the doctrine

The name ‘group of companies’ may be deceptive. Some scholars state that for the doctrine to be applied, the close corporate links within the companies must exist. However, in practice this doctrine is applied to individuals or companies which do not own shares of company in dispute. In these cases the corporate links between signatory and non-signatories do not exist.

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9 Brekoulakis (n 4) 5.15.
To exhibit the application of the ‘group of companies’ doctrine to individual one can turn to ICC case No. 9517. In this case one of the non-signatory claimants wishing to join the proceedings was the natural person, who owned several other companies, which were the claimants in the case. In this case arbitrators noted that they were not aware of cases of joinder where a non-signatory individual, rather than a company was joined to the proceedings. Recent judgment of the German Federal Supreme Court showed that these cases are not extremely rare. This case similarly dealt with questions arising from application of the ‘group of companies’ to the non-signatory individual, not the company. The dispute involved the alleged patent infringement. The owner of the patent was the individual who was also the managing director and sole shareholder of the claimant based in Denmark, and whose patent rights were assigned to the claimant. The respondent company raised a jurisdictional objection because there was the license agreement between the legal predecessor of the respondent and another company based in Mauritius and represented by the same individual. This contract related to the same patented invention and contained the arbitration clause. Respondent contended that claimant had close relations with the Mauritius company and the patent owner and therefore was also bound by the arbitration agreement. These contentions were raised on the basis of the ‘group of companies’ doctrine and the German Federal Supreme Court found no difficulties in applying this doctrine to an individual.

These decisions of arbitral tribunal and national court reflect the approach according to which the distinction between a natural person and a parent company is not crucial in the

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12 Interim Award No 9517 [2000] (ICC).
13 Ibid.
realm of non-signatories in arbitration. However, relations between individual and company
differ from relations between two companies. If the shareholder is a natural person he/she is
normally a mere investor separated from the management of the company. Unlike a natural
person, a parent company is usually involved in the decision-making processes related to
budget, strategy and day-to-day activities of the subsidiary. Quite often parent and
subsidiary companies act as parts of one bigger business. The abovementioned implies that
the principle of the limited liability should protect an individual shareholder more than a
parent company as the latter is usually not distanced from the activity of its subsidiary.

As was demonstrated, it is not necessary that there are two or more companies involved. On the one hand, restricting the cases of non-signatory involvement to the
companies is a highly formalistic approach. On the other hand, the application of the doctrine,
which was developed in corporate context and is called ‘group of companies’, to both
individuals and companies leads to blurring the scope of the doctrine. Companies and
individuals in international business transactions have different capacity and this should be
taken into consideration. Moreover, the doctrine is applied also to states. In these cases the
additional issues of jurisdictional immunity and distinction between public and private
activity of the state should be considered. Therefore the ‘group of companies’ doctrine is not
apt for the disputes involving entities other than companies.

Moreover, even when the dispute arises in relation of two or more companies
tribunals may omit the fact that those companies are not connected with corporate ties and
nevertheless apply the doctrine. In ICC case No. 10818 the claims were brought against two
respondents – one that signed and terminated the agreement and another that after some

\[16\] Ibid.
\[17\] Ibid.
\[18\] Hanotiau (n 11) 62–69; Marc Henry, ‘The Group of Companies Doctrine Applied to Arbitrations Involving a
period of time started to carry out most obligations under the agreement\textsuperscript{19}. The first and second respondents are not subsidiaries of one another. The stated purpose of the second respondent’s involvement into the contract with the claimant was the desire of the first respondent to manage relations with claimant in a more efficient way. The contract was concluded between the two respondents in order to reach this purpose\textsuperscript{20}. Therefore, the relations between them were contractual, not corporate. Analysing the ‘group of companies’ doctrine, the tribunal did not pay attention to the fact that the ‘tight group structure’ is absent. The applicability of the ‘group of companies’ doctrine was rejected, but on different grounds than the absence of the group.

In the interest of a comprehensive analysis it is to be said that tribunals do not always disregard the absence of the corporate structure. In ICC case No. 13774 the application of the doctrine was rejected because the relation between the first respondent that signed the contract and the second non-signatory respondent was of the contractual nature\textsuperscript{21}. Those two companies were not connected by corporate ties and this was an exact reason why the tribunal refused to proceed with the application of the ‘group of companies’ doctrine. The approaches of different ICC tribunals vary and some of them treat the doctrine in accordance with the three-step analysis while others disregard the first criterion.

As was shown, the ‘group of companies’ doctrine does not apply only to the group of companies. This creates confusion and undermines the first of the doctrine’s criterion. Hence, the more weighed way of application of the ‘group of company’ doctrine requires denial of the application to individuals, as the criterion of ‘tight group structure’ is not met in that case. It is equally not met in the cases where the companies are linked solely by the contractual relations. Therefore, it is preferable that non-signatory entities which do not constitute the

\textsuperscript{19}Final Award No 10758 [2000] (ICC).
\textsuperscript{20}Partial Award No 10818 [2001] (ICC).
\textsuperscript{21}Partial Award No 13774 [2006] (ICC).
corporate group are brought to arbitration on grounds other than the ‘group of companies’ doctrine. The ‘group of companies’ doctrine itself should be applied only in the cases where the indicators of the tight group structure are present.

1.2 Criteria for evaluating the ‘same economic reality’

As was noted above, existence of the ‘same economic reality’ or ‘tight group structure’ is an important prerequisite for the application of the doctrine. The existence of the corporate group was reasoned by the tribunal in the following way: “The notion of the group is defined, besides formal independence arising from the creation of separate legal entities, by the unity of the financial orientation deriving from a common power”22. The notion of ‘tight group structure’ used in the ‘group of companies’ doctrine, however, is not without ambiguity. The question arises as to where to draw the line between ‘tight’ and ‘not tight’ group structure. Conducting business through subsidiaries, their creation for the purpose of carrying out a specific project and/or shielding a parent company from liability is a wide-spread commercial practice, rather than evidence of arbitral consent23. Correspondingly, something more than ownership of shares is necessary to establish that the corporate group has tight structure.

Unfortunately, the profound analysis of a tight group structure is rarely found in arbitral award. Usually tribunals simply state that several companies constitute one group and proceed to the next requirements of the doctrine. This approach is not favorable for the doctrine and should be rejected. So far these omissions allow concluding that the doctrine punishes the deliberate and wide-spread practice of doing business through subsidiaries24. However, ICC Case No. 11160 shows that such conclusion is unsound. In this case the tribunal acknowledged that the subsidiary which signed the arbitration agreement was created

23 Brekoulakis (n 4) 12.42.
for the purpose of exemption from the Value Added Tax in Venezuela. In regard of extension of this arbitration agreement to the non-signatory parent company, the tribunal noted that creating subsidiaries for tax exemption purposes “is a perfectly lawful and valid business purpose”. Conducting business through subsidiaries, their creation for the purpose of carrying out a specific project and/or shielding a parent company from liability is a widespread commercial practice, rather than evidence of arbitral consent.

Another drawback relating to the analysis of ‘tight group structure’ criterion is the fact that this analysis is sometimes circular. It means that in order to establish tight group structure the tribunal refers to the active participation of non-signatory in the contract. It is true that general interference of a non-signatory into the business of a signatory company may be due to the abnormally close structure between the two companies. However, involvement into the particular project in dispute cannot be relayed on as the only evidence showing tight group structure because this involvement should be regarded in ensuing analysis of the next criterion – active involvement in conclusion, performance and termination of the contract.

To avoid this drawbacks the clear test of ‘tight’ economic structure needs to be developed. Even though the decisions in non-signatory cases are mostly taken on case-by-case basis, there are certain achievements in clarifying which specific fact patterns lead to establishing tight group structure. The examples of these fact patterns are common assets, intellectual property rights, corporate name, human resources, offices and premises. Hence, not only proprietary indicators but also the way how two (or more) companies are conducting business matter for establishing ‘tight group structure’.

25 Final Award No 11160 [2002] (ICC).
26 Brekoulakis (n 4) para 12.42.
27 Ibid 5.19.
To illustrate and further elaborate on the example of common human resources we will turn to ICC case No. 2375\textsuperscript{28}. The tribunal in this case found that corporate ties were close and extended the arbitration agreement to non-signatory. The basis for this extension was an internal protocol indicating that certain Directors and Vice-Presidents are appointed ‘for the account’ of the particular company\textsuperscript{29}. Given that managers have significant impact on the companies’ standing in the market it is legitimate conclusion that the composition of the management board and/or the dependence of chief officers from mother company trigger the affirmative answer as to the question of ‘tight group structure’ existence. At the same time if the two companies are connected via middle-ranking officers they are not necessarily constitute the ‘tight group structure’. In order to avoid the risk of unexpected involvement of the non-signatory into the arbitral proceedings it is desirable not to mention the interests of other companies of a group in the protocols of a formally independent company. The next important thing to consider is the degree of control exercised by the parent company\textsuperscript{30}. Thus, the groups with hierarchical structure are more vulnerable to the extension of the arbitration agreement to non-signatory.

The said criteria are applied by arbitral tribunals to establish tight group structure. The fact that they can be found in arbitral awards is already a positive development in comparison with the total absence of the analysis related to this criterion. However, two problems still maintain.

Firstly, the said criteria are not assessed uniformly. Each of these criteria does not suffice for the extension of the arbitration agreement. Each of them can be seen as common and perfectly normal practice in international business. Therefore, the assessment of the ‘tight group structure’ resembles the situation governed by the principle of preponderance of

\textsuperscript{28} Rubino-Sammartano (n 22) 371.
\textsuperscript{29} ibid.
\textsuperscript{30} Kim and Mitchenson (n 7) 417.
evidence: you need to show that many factors of tight relations within group that present factors of independence are disregarded.

Secondly, national jurisdictions, especially from common law tradition, tend to honor the principle of separate legal personality above all these criteria. Using the said reasoning, the Australian court denied the enforcement of the arbitral award in relation to non-signatory\(^{31}\). The signatory and the non-signatory shared office, e-mail address, phone number and had one person acting as director for both companies\(^{32}\). The arbitral tribunal held the non-signatory bound by arbitration agreement. The Victorian Supreme Court ruled that the award is enforceable in Australia, but this decision was overruled by the Supreme Court of Victoria Court of Appeal\(^{33}\). This case shows that the first criterion of the ‘group of companies’ often clashes with the well-established principles of national corporate law which lead to unenforceability of the ‘group of companies’ awards.

In some cases, it is the rationale behind the non-signatory involvement, not the examination of the group structure features, which comes into play. Thus, for the extension of the arbitral agreement the tribunal reasoned: "[…] it is neither reasonable nor practical to exclude (from the jurisdiction of the arbitrators) claims of companies which have an interest in dispute and which are members of the same family of companies"\(^{34}\). Another decision of the Paris Court of Appeal dated 1994 in the Jaguar case upheld the award in which the non-signatory was joined because it was necessary that all economic and legal aspects of the dispute were seized in the single arbitration\(^{35}\).

\(^{31}\)IMC Mining Inc & Anor v Altain Khuder LLC [2011] Supreme Court of Victoria Court of Appeal S APCI 2011 0017.

\(^{32}\)Ibid.

\(^{33}\)Ibid.

\(^{34}\)Rubino-Sammartano (n 22) 372.

\(^{35}\)Hanotiau (n 6) 544.
This approach seems positive in light of avoiding formalistic obstacles and guaranteeing the ‘arbitral economy’ during proceedings. However, the harsh critique comes from the fact that such reasoning is lack of legal certainty. When the extension is done on the basis of the analysis of a corporate structure, the company is able to conduct due diligence, create such structure as to avoid excessive connections and secure its own non-involvement into arbitral proceedings. Given the lack of established test for this ‘reasonable joinder’, the companies cannot know and control whether the tribunal will consider them a party to arbitration or not.

Finally, the very relevance of the existence of ‘tight group structure’ is questionable. Thus, the tribunals in dealing with the ‘group of companies’ doctrine refer directly to the active role and build the consent out of this involvement\textsuperscript{36}. This leads to the transformation of the doctrine from the three-prong test to two-prong – active involvements of a non-signatory plus a mutual intention to arbitrate.

The undisputed feature of the first criterion is that even if the tight group structure is established, this is not sufficient to justify an extension of the arbitration clause\textsuperscript{37}. In ICC case No. 10758 the tribunal reaffirmed that “the extension of an arbitration agreement to a non-signatory is not a mere question of corporate structure or control, but rather one of the non-signatory’s participation in the negotiation, execution or performance of the contract, or its conduct towards the party that seeks the non-signatory’s inclusion in the arbitration”\textsuperscript{38}.

Therefore, even though his criterion gave the name to the doctrine, this criterion is applied inconsistently and at the end of the day is of a minor importance for an extension of an arbitration agreement over non-signatories. In the ensuing chapter the participation in the

\textsuperscript{36}Interim Award No 15116 [2008] (ICC).
\textsuperscript{37}Interim Award No. 9517 [2000] (n 12).
\textsuperscript{38}Final Award No. 10758 [2000] (n 19).
negotiation, execution or performance of the contract and other conduct of the non-signatory is analyzed as the second requirement has gained more attention of the tribunals and scholars.
CHAPTER 2: THE ACTIVE ROLE OF NON-SIGNATORY IN THE CONTRACT

The active role of the non-signatory in the contract is considered to be a central matter of evaluation when the tribunal deals with the ‘group of companies’ doctrine. This is the core element of the doctrine. The forms of such participation vary from case to case. Dow Chemical award suggested the formula which became classic, namely, the participation in the all stages of the contract: negotiation, performance and termination\textsuperscript{39}. It is important to note, that the participation in all three stages cumulatively is required\textsuperscript{40}. This construction is in line with the idea that the extension of an arbitration agreement is allowed in rare and exceptional circumstances and therefore the threshold needed for such extension is high.

Tribunals relays on various set of facts in order to establish the active participation in the contract. The one sing act of participation is not conclusive. To illustrate the threshold which is needed to be met in performing the active role in the contract the author will provided the example of the case, in which the arbitration agreement was extended to the non-signatory\textsuperscript{41}. The extension of the arbitration agreement was granted on the basis of the ‘group of companies’ doctrine when the parent company was actively involved into the contract. First, prior to the conclusion of the contract all legal relations existed with non-signatory parent. Second, the present contract was primarily negotiated with non-signatory. Third, at early stages payments under the contract were made by the parent company. Forth, the personnel responsible for the contract were the same. And finally, the meetings related to the contract took place in the premises of the non-signatory parent\textsuperscript{42}. Those facts allowed the tribunal to find an implicit intention to arbitrate and stretch the arbitration clause to the non-signatory.

\textsuperscript{39} Dow Chemical (n 7).
\textsuperscript{40} Meyniel (n 10) 46; Brekoulakis (n 4) 5.39.
\textsuperscript{41} Final Award No. 11160 [2002] (n 25).
\textsuperscript{42} Ibid.
It is important to note that it is normally a set of facts. In this set there are facts which cannot be classified as relating to one of the three mentioned stages of the contract. In the case cited above it is, for instance, the first fact taken into consideration, namely, role of non-signatory even before the negotiations as to the pertinent contract started. It is also possible that the specific fact goes beyond the single stage and relates to the overall behavior during the contract. It is also true, that the active role in the contract does not always take the form of participation in the conclusion, performance and termination. These types of conduct are in the center of interest in this chapter. The second part of the chapter is devoted to the illustration how the active role during the three above-mentioned stages as well as other types of conduct described in ‘group of companies’ awards are used by the tribunals in the analysis of the adjoining doctrines such as estoppels, good faith, piercing the corporate veil and tacit consent theory.

2.1 Types of conduct relevant

Active participation is the incipient factor for estimating the conduct of the non-signatory in the light of the arbitration agreement extension. This criterion is sometimes also referred to as ‘direct’ or ‘close’ participation. Arbitral practice developed fact patterns illustrating this close participation in all stages of the contract. It also went beyond the facts established in Dow Chemical and proceeded to types of conduct evidencing the participation in the contract as a whole.

The text of the Final Award in ICC case No. 10758 suggests that different types of conduct relate to the issue of an extension of an arbitration agreement to a non-signatory under group of company doctrine, and participation in the negotiation or execution of the contract is merely one of the forms of such a conduct. Other forms of conduct named are

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43Interim Award No. 15116 [2008] (n 36).
44Final Award No. 10758 [2000] (n 19).
express or implied representation or bad faith. Another example of such a conduct could be intentional confusion, when two companies themselves cause perception that they are interchangeable, for instance when one company uses letterheads of another. Similarly, in ICC Case No. 5721 the tribunal referred to the confusion as the ground for the extension of the arbitration agreement: “[W]here a company or an individual appears to be the pivot of the contractual relations in a particular matter, one should carefully examine whether the parties’ legal independence ought not, exceptionally, be disregarded in the interests of making a global decision. This exception is acceptable in the case of confusion deliberately maintained by the group or by the majority shareholder.” These types of conduct are not easily attributed to one of the stages of the contact and show the development of the arbitral practice related to the ‘group of companies’ doctrine since the Dow Chemical award was rendered.

The particular example of conduct relevant for the ‘group of companies’ doctrine is the intellectual property rights management. Intellectual property rights are mentioned in the first chapter among the criteria for establishing ‘tight group structure’. However, the way how those rights are used may show also the level of the non-signatory involvement. Thus in the Dow Chemical case the trademark ‘Dow Chemical’ belonged to the parent non-signatory. In performing the contract, the signatory made use of this trade mark. Given the absence of any license agreement, this was deemed by the tribunal to be an evidence of the primarily involvement of the parent company in the performance of the contract. In the Sarhank case the tribunal found that “despite … their having separate juristic personalities, subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in any either is a party thereto provided that this is brought about by the contract because contractual relations cannot take place without the consent of the parent company

45 ibid.
46 Brekoulakis (n 4) para 5.53.
47 Born 2014, FT 259.
48 Dow Chemical (n 7).
owning the trademark by and upon which transactions proceed.”⁴⁹ Hence, the intellectual property rights, especially trademarks are so pivotal to the commercial transaction as a whole, that usage of them proves the close connection to the contract. As a general rule, trademark is used in business to distinguish its owner from other market players. Each company is seeking to establish such trademark which is constantly associated with this particular company and serves as a distinctive sigh. It follows from the above, that it is highly unlikely that any company would allow another unrelated company to use trademark belonging to the first company. In the absence of licence agreement it is legitimate presumption that intellectual property rights shared by two companies are indicators of coordinated business position of those companies and their operating in the market as a single entity.

The analysis in the Korsnas Marma v. Durand-Auzias case⁵⁰ may serve as an example of a further evolution of the active role requirement. In this case, the possibility of extending the arbitration agreement depended not on the active role in the performance but rather on the parties’ (including non-signatory) awareness of the existence and scope of the arbitration clause. Alike, the tribunal applied the ‘group of companies’ doctrine in ICC case No. 15116 on similar basis. During the evaluation of the non-signatory’s participation in the contract the tribunal sited authorities from French jurisdiction according to which ‘In international arbitration law, an arbitration agreement binds the parties who are directly involved in performance of the contract, provided that their positions and activities create the presumption that they were aware of the existence and scope of such agreement, in order that the arbitrator may assume jurisdiction over all economic and legal aspects of the dispute’⁵¹ [emphasis added]. This excerpt proves that the conduct of the behavior of the parties should demonstrate not only their involvement in all stages of the contract but the

⁴⁹ Meyniel (n 10) 39 FN 105.
⁵⁰ Born (n 1) 1452 FT 244.
⁵¹ Interim Award No. 15116 [2008] (n 36).
awareness of the arbitration agreement. The awareness requirement goes to next level of the overall assessment of all parties’ actions.

Given the fact that the concept of conduct relevant to the estimating the active role of non-signatory has expanded, the relation of the ‘group of companies’ doctrine and other doctrines which bind non-signatories has become more evident.

2.2 Other doctrines which relay on the same conduct.

Doctrines allowing the stretching of the arbitration clause to the non-signatory evolved to a considerable extend. Other than ‘group of companies’ doctrine, these doctrines involve agency, piercing the corporate veil, estoppel, guarantor relations, succession, assignment, assumption. The realm of non-signatories in international commercial arbitration developed to a sophisticated level. The main doctrines are split into auxiliary ‘sub-doctrines’. For instance, the doctrine of piercing the corporate veil appears in the forms of ‘alter ago’ doctrine, instrumentality doctrine and identity doctrine. Estoppel is applied as direct benefit estoppel theory and closely intertwined estoppel theory. The differences of all doctrines are discussed in scholarly works, but it is extremely difficult to draw lines between these theories in practice.

Most commonly, parties invoke several adjacent theories of binding non-signatories and sometimes tribunals do not differentiate them clearly. This leads to the constant confusion in the arbitral awards as to the application of the ‘group of companies’ doctrine. For instance, in his analysis of the ‘group of companies’ doctrine on pp. 1451-1452, Professor Gary B. Born makes references to the awards, some of which do not contain the

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52 Born (n 1) 1405.
53 Rustamjon Rasuljon o'gli Rasulov, Internal Governance Structure and Protection of Shareholders’ Rights in Corporate Governance in Public Corporations: Comparative Study between Uzbekistan, Germany and the United States (CEU, Budapest College 2014) 144.
54 Meyniel (n 10) 46–47.
word combination ‘group of companies’. His analysis of the extension of the arbitration agreements to the third parties, which is perfectly logical and persuasive, stems from principles developed by other doctrines, e.g. piercing the corporate veil or guarantee. The ‘group of companies’ doctrine is therefore particularly hard to distinguish from other theories during the analysis of the arbitral practice.

The question arises of whether we further need the ‘group of companies’ doctrine as a separate doctrine. The legitimacy of this question is proven by the number of examples in which tribunal use the active participation in the contract for the stretching of the arbitration agreement to non-signatories under doctrines other than ‘group of companies’. The requirement of active participation which is attributed by scholars to ‘group of companies’ doctrine is not monopolised by it and can be effectively used under other doctrines.

Most often confusion arises as to the distinction between the ‘group of companies’ doctrine and piercing the corporate veil doctrine. In a number of arbitral awards principles of both doctrines are applied to the same set of facts without differentiating between two separate doctrines. On the other hand, there is also at least one example of clear distinction of these two doctrines in the arbitral award.

The cause of this confusion may be the wrong perception of the ‘group of companies’ doctrine. This doctrine may be understood as depending entirely on the corporate structure of the group. The name of this doctrine favours such interpretation. Understood in this way the ‘group of companies’ doctrine is similar to the veil-piercing doctrine. But this understanding is not correct. The doctrine of piercing the corporate veil is applicable when the corporate

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55 Born (n 1) 1451–1452.
56 Final Award No. 10758 [2000] (n 19); Final Award No. 11160 [2002] (n 25); Final Award No 11209 [2002] (ICC).
57 Partial Award No. 10818 [2001] (n 20).
structure is used to commit a fraud\textsuperscript{58}. Fraud requirement does not form a part of the ‘group of companies’ doctrine, but the requirement of tight corporate structure does. However, the role of ‘tight group structure’ is strikingly different. Unlike the veil-piercing doctrine, the ‘group of companies’ doctrine is focusing on consent of the parties. The existence of corporate structure is therefore not crucial and is even neglected (see sub-chapter 1.1). Such disregard reflects the reality in which the consent is a central element of the ‘group of companies’ doctrine while the requirement of existent corporate group is obsolete. Unlike the ‘group of companies’ doctrine the veil-piercing doctrine cannot be applied to entities (companies or individuals) which are not connected with corporate ties. There is a sufficient amount of studies devoted to the distinctions between the ‘group of companies’ doctrine and piercing the corporate veil doctrine\textsuperscript{59}. This makes the distinctions between the two the most known and understandable.

Other doctrines were never compared or distinguished from the ‘group of companies’ doctrine. One example of such doctrines is the principle of estoppels, or its civil law counterpart the good faith doctrine\textsuperscript{60}. Those doctrines can be applied in most cases instead of the ‘group of companies’ doctrine. The direct involvement of the non-signatory into the contract created the image that the non-signatory company is the true party to the contract. This in turn gives rise to the reasonable expectations which are protected by the good faith/estoppel doctrine. Indeed, underdirect benefit estoppel theory a company cannot refuse to participate in the agreement when it exploits it to its benefit. Here appears an important addition to the conduct already discussed in the previous sub-chapter. Thus, the active role of the non-signatory should lead to the benefits of that non-signatory. In the In Re Kaiser Group

\textsuperscript{58} Born (n 1) 1432–1435.
\textsuperscript{60} Born (n 1) 1475–1476; Hanotiau (n 11) 28.
International Inc. case decided by the U.S. District Court for the District of Delaware in 2004, the doctrine of estoppel was successfully applied and the clear benefits of the non-signatory from the contract in question were proven. In this case the third party did not sign the contract but executed guarantee. The fact that the mother company was supposed to receive benefits from the contract was evidenced in this guarantee. The non-signatory continued to relay on the proceeds from the contract in written documents and later in the court procedure before the Bankruptcy Court. The conduct of the companies from the group in embracing the contract and the expectation of a mother company to benefit directly from that contract led to conclusion that the doctrine of estoppel should apply to require the non-signatory to arbitrate under that contract.\textsuperscript{61}

The confusion maintained by the several companies of the group may lead to the extension under the doctrine of good faith. This is exactly what happened in the case before the Swiss court. The client company signed the protocol with the contractor, represented by the individual at the time when he was an employee of the mother company of that contractor. Other companies from the same group and having common parts of the corporate names contacted with the client occasionally during the project performance. Moreover, the companies prepared the protocol which should have been signed by the mentioned parent company. The tribunal found that despite the fact that this protocol was never sighed it was admissible as evidence in the proceedings and proves that the client had reasonable expectations as to mother company’s role in the project. According to the tribunal the signature on the protocol increased the confusion between various companies of the same group. The tribunal further noted that “[...] it appears questionable to blame the Appellant for not having always been able to identify its real contractual counterpart in the fog around the members of this group of companies. Yet, the confusion as to this group is an element that

should not be neglected in applying the principle of reliance, namely from the point of view of the addressee of the manifest intent emanating from either one of these companies.  

The next doctrine which can be used interchangeably with the ‘group of companies’ doctrine is the tacit consent theory. As it was already shown above, the tight group structure was absent between the companies in ICC case No. 10818. This did not preclude the tribunal from continuing with analysis of the active participation under the ‘group of companies’. The disadvantages of this approach are discussed in Chapter 1 supra. However the case also illustrates that active role of non-signatory in the contract can be relevant outside of the ‘group of companies’ doctrine. Thus, the involvement into the performance of the agreement was discussed within the tacit consent theory along with the ‘group of companies’ doctrine.

The necessity of the ‘group of companies’ doctrine is questioned not only because the same effect can be reached by applying more traditional doctrines. The usefulness of the ‘group of companies’ doctrine itself is disputed. It is called to be a “shortcut for legal reasoning” and “awkward and inappropriate expression of the fact that conduct can be an expression of consent”.

The doctrine is considered as useless as the traditional approach of establishing the consent to arbitrate guarantees a much higher degree of certainty of law and foreseeability. There are doubts as to whether the traditional principles of the contract law are as arbitration-friendly as the ‘group of companies’ doctrine. It might seem that the traditional contract theories are more rigid, however those traditional theories allow the extension of an arbitration clause to a non-signatory to arbitration easier than under the group of companies’ doctrine.

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62 X vs Y Engineering and Y S.pA, 4A_450/2013 (First Civil Law Court of the Swiss Federal Tribunal).
63 Wautelet, Kruger and Coppens (n 6) 131–132.
64 Brekoulakis (n 4) 153, FN 22.
65 Meyniel (n 10) 45.
These scholarly opinions denying the efficiency of the doctrine are in line with the judicial approach. Back in 1996 the Swiss Federal Court in one of its decision noted that “the group of companies doctrine does not per se justify extending an arbitration clause to another company within the group”\textsuperscript{66}. The next chapter represents the attempt to find for the ‘group of companies’ doctrine the way of effective use.

\textsuperscript{66}Hanotiau (n 11) 58.
CHAPTER 3: THE MUTUAL INTENTION TO CONSIDER THE GROUP BOUND BY THE ARBITRATION AGREEMENT

All grounds for the extension of an arbitration clause to a non-signatory can be classified into two categories – non-consensual and consensual. The example of the non-consensual theory is the piercing the corporate veil doctrine\(^67\). By contrast, the ‘group of companies’ doctrine along with the theories of implied consent, assumption, assignment, or agency falls within the second category\(^68\). Consequently, the mutual intentions of the parties are the core element of this doctrine. However, this doctrine is sometimes perceived as one that runs counter to the clear intention of the parties and undermines the consensual nature of arbitration\(^69\). This existing contradiction in the perception of the doctrine is in focus of this Chapter.

The doctrine is from its inception connected to the intention of the parties. The Paris Court of Appeal emphasized that the arbitrators in the Dow Chemical case made their decision in accordance with the intentions of all parties involved\(^70\). This decision was further developed by the French courts. Nowadays their position can be summarized as follows from the ICC award of 2001 in case No.11405:

“There is no general rule in French international arbitration law that would provide that non-signatory parties members of a same group of companies would be bound by an arbitration clause, whether always or in determined circumstances. What is relevant is whether all parties intended non-signatory parties to be bound by the arbitration clause. Not only the signatory parties, but also the non-signatory parties should have intended (or led the other parties to reasonably believe that they intended) to be bound by the arbitration clause... what is relevant is whether the non-signatory parties were intended to be bound, rather than

\(^{67}\)Born (n 1) 1417.
\(^{68}\)Ibid 1449.
\(^{69}\)Brekoulakis (n 4) 153 FT 22; Wilske, Shore and Ahrens (n 24) 88.
\(^{70}\)Hanotiau (n 6) 544.
a general rule about a group of companies: ... it is not so much the existence of a group that results in the various companies of the group being bound by the agreement signed by one of them, but rather the fact that such was the true intention of the parties.\footnote{Ibid 545.}

Similarly, a number of ICC awards analyzing the ‘group of companies’ doctrine reaffirmed the need of consent in order to extend the arbitration agreement.

During more than forty years scholars and arbitrators deal with the intention to arbitrate under the ‘group of companies’ doctrine. During these years the verity of fact patterns and construction of consent were developed. In the light of this, the best way to use the doctrine is the usage of its methods of deducting consent in the context of tangled corporate relations. The doctrine may serve as a tool for construing parties’ intentions.

Interestingly, the two-prong test with which we ended the first chapter seems to merge into sole requirement – consent. This conclusion is in line with outcomes reached by, for instance, Alexandre Meyniel, Juris Doctor, American University-Washington College of Law: “consent can be directly presumed from the substantial involvement of the non-signatory in the contractual performance, without having to show (i) the existence of an economic group; or (ii) involvement in all stages of the contractual relationship.”\footnote{Meyniel (n 10).} Professor Brekoulakis upheld the same position: “the evidence of a tight group structure and an active role of the parent company largely imply a common intention that the third party would be bound”\footnote{Brekoulakis (n 4) 5.46.}. The arbitral practice follows this conclusion, as the tribunal in ICC case of 2008 held that consent is found in the close/direct involvement of the non-signatory into the performance of the contract\footnote{Interim Award No. 15116 [2008] (n 36).}. This means that tribunal did not follow the rule according to
which the active role should be found in all stages of the contract – negotiations, performance and termination.

It is true that requirement to show presence of both ‘tight group structure’ and participation in all stages of the contract seems to be obsolete. The following excerpt proves that consent is the matter of the first interest before the courts: “although the existence of a group is the first condition for joining a third party to the arbitration proceedings, it is also necessary to determine the parties’ actual intention at the time of the facts or, at the very least the intention of the non-signatory third party”75. Moreover, “it is not so much the existence of a group that results in the various companies of the group being bound by the agreement signed by only one of them, but rather the fact that such was the true intention of the parties”76.

It is widely and generally accepted that intention to arbitrate can only be deduced from all the circumstances of the case77. The legacy of the doctrine in relation to its first and second requirement should be used in the process of analyzing the circumstances of the specific cases. It is relatively easy to deduct consent from either tight group structure or active role of the non-signatory in the contract as a whole. Thus, in the ICC award dated 2008 the tribunal held that “the true intention of the parties is evidenced by the circumstance that a non-signatory was directly or closely involved in the performance of the contract containing the arbitration clause: the direct or close involvement is therefore the decisive criterion”78. Scholars also acknowledge that “existence of a group of companies may be relevant,

75 Born (n 1) 1448.
76 Ferrario (n 59) 651.
78 Interim Award No. 15116 [2008] (n 36).
particularly because it generates dynamics in terms of organization, control, common participation in projects, the interchangeability of the members within the group, etc” 79.

Therefore, it is important not to reject the ‘group of companies’ doctrine, but to modify it in order to ensure its application in line with its central principle – mutual intentions of the parties.

78 Hanotiau (n 6) 545.
CONCLUSION

The ‘group of companies’ doctrine is applicable in the exceptional circumstances when the existence of a ‘tight group structure’, active role of mom-signatory in the conclusion, performance and termination of the contract and mutual intention of the parties to arbitrate are present. However, today each of those requirements can be either disregarded or used for the application of other doctrines.

First, the ‘tight group structure’ requirement is often missing from awards dealing with the ‘group of companies’ doctrine. Instead of being applicable solely to the group of companies the doctrine was also applied in cases with a non-signatory individual involved and with several companies not connected by corporate ties. In spite of this arbitral practice exemplifies the tight group structure by the following: common assets and premises, intellectual property rights, corporate name, composition of management board and the degree of control exercised by a parent company. This set of examples illustrates that the ‘tight group structure’ is analyzed both in statics and dynamics meaning that not only the various elements of group structure are examined, but also the way of group day-to-day operation.

Second, the active role of the non-signatory in the contract is ordinarily seen as a participation in the negotiations, performance and termination stages of the contract. However, the practice has already made step forward out of this theoretical division. Some of the forms of party’s participation cannot be attributed to a certain stage or relates to the transaction in whole. More importantly, the active participation seems to be a central element not only in the ‘group of companies’ doctrine but rather the common rationale behind each and any doctrine allowing the extension of an arbitration clause to a non-signatory. Namely, the principles of piercing the corporate veil, good faith/estoppel and tacit consent to arbitration were effectively applied in certain cases along with the ‘group of companies’
doctrine. The applicability of other doctrines to the same circumstance impeaches the necessity of the ‘group of companies’ doctrine as an independent doctrine.

Finally, the mutual intention is the element which was central from the inception of the doctrine and continues to capture a sufficient part in the arbitral awards’ analysis.

The modern practical approach shows that the doctrine has been turned upside down. The order in which the tribunals proceed with the requirements was established back in Dow Chemical case. Later it became established and the requirements are usually sited in this order: the existence of the group of companies that constituted the same economic reality; second, the active role that non-signatory companies of the group played in the conclusion, performance and termination of the contract containing the arbitration clause; and third, mutual intention of the parties to consider the group as a unity bound by the arbitration agreement. The same order was kept by the author in this thesis. However, it seems that the development of the doctrine has proposed the better way of its application. The foremost thing to be estimated is the mutual consent of the parties. This consent is to be found, *inter alia*, in the active role of the non-signatory in the contract. This is the broadest criterion common for doctrines allowing non-signatories participate in arbitration. In its turn, the active role of the non-signatory in the contract is to be found among other factors in the tight group structure. The ‘tight group structure is not necessary for the extension of the arbitration agreement to third parties. The requirement of the ‘tight group structure’ is disregarded so often that nowadays it is rather a rule than an exception for the tribunal to start directly with the second requirement, namely, active role in the contract.

The assessment of the requirements of this doctrine in the manner specified above allows avoidance of unjustified critique related to the alleged distortion or departure from the consensual nature of arbitration. This also allows solving the issue of overlapping doctrines, since it would be construed in a way that tribunals look for consent by searching for the
appropriate fact patterns under different doctrines. These fact patterns surely still need to be clearly distinguished; however the overlapping would become less problematic.

This move from the most important criterion to least important is more logical and since this most important criterion is consent it better reflects the nature of arbitration. The acceptance of the proposed approach means that the significant change in the ‘group of companies’ doctrine are needed.
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