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Binding Non-Signatories to Arbitration Agreements

The Issue of Consent in International Commercial Arbitration

Johanna Maxson

Supervisor: Trisha Rajput
Examiner: Sara Stendahl



GÖTEBORGS UNIVERSITET
HANDELSHÖGSKOLAN

Abstract

Arbitration is a method frequently used throughout the world to settle disputes in the international arena. As it is a private procedure beyond the public eye with experts as judges and results in an award that generally is easier to enforce than court judgments, it may be the most efficient way of settling international disputes. To be entitled to commence arbitral proceedings instead of litigation, the only requirement is an agreement between two or more parties to do so.

If a dispute then later arises where a third party, not signatory to the agreement, is so intertwined with the dispute that it seems impossible or maybe even unnecessary to resolve it without this third party being part of the proceedings, he cannot technically take part in the arbitration. If such an issue is at hand, or if a third party itself wants to invoke arbitration against one of the signatories, courts and arbitral tribunals have developed methods through which third parties can be bound to an arbitration agreement without its expressed consent. Using these methods can at first glimpse be seen as a measure of fairness and efficiency, however problems arise as the very foundation of arbitration, the consent of the parties, are bargained with. This thesis therefore explores the justifications behind two of the methods used today, the arbitral estoppel theory and group of companies doctrine, and discusses the implications they have on consent.

This thesis concludes that as a result of the development of the arbitral estoppel method and the group of companies doctrine, the previously so important notion of consent in regard to arbitration has to a large extent been replaced by the consideration of efficiency and fairness when comes to joining third parties.

Abbreviations

ICC	International Chamber of Commerce
The Model Law	The UNCITRAL Model Law on International Commercial Arbitration of 1985
The New York Convention	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
U.K.	The United Kingdom
U.S.	The United States of America

Table of Content

- 1 INTRODUCTION 1**
 - 1.1 GENERAL 1
 - 1.2 TOPIC AND RESEARCH QUESTIONS 2
 - 1.3 METHOD AND DISPOSITION..... 2
- 2 INTERNATIONAL COMMERCIAL ARBITRATION AND THE ARBITRATION AGREEMENT..... 3**
 - 2.1 INTRODUCTION TO ARBITRATION AND THE THIRD PARTY PROBLEM 3
 - 2.2 APPLICABLE LAW WITH REGARD TO BINDING NON-SIGNATORIES 4
 - 2.3 THE REQUIREMENTS FOR A VALID ARBITRATION AGREEMENT 5
 - 2.3.1 *The ‘in writing’ Requirement set forth in the New York Convention*..... 6
 - 2.4 THE SEPARABILITY PRINCIPLE 7
 - 2.5 COMMON- AND CIVIL LAW..... 7
- 3 ARBITRAL ESTOPPEL 9**
 - 3.1 ARBITRAL ESTOPPEL IN THEORY 9
 - 3.2 ARBITRAL ESTOPPEL IN PRACTICE 12
 - 3.2.1 *Intertwined and Equitable Estoppel Explained* 12
 - 3.2.2 *The Continued Development of the Equity Approach*..... 15
 - 3.2.3 *The Continued Development of the Intertwined Approach* 17
 - 3.3 FINDINGS WITH REGARD TO ARBITRAL ESTOPPEL 22
- 4 THE GROUP OF COMPANIES DOCTRINE 23**
 - 4.1 THE GROUP OF COMPANIES DOCTRINE IN THEORY..... 23
 - 4.2 THE GROUP OF COMPANIES DOCTRINE IN PRACTICE..... 24
 - 4.2.1 *The Requirements of the Group of Companies Doctrine Explained*..... 24
 - 4.2.2 *The Continued Development of the Group of Companies Doctrine* 28
 - 4.3 DIFFERENT APPROACHES ON THE GROUP OF COMPANIES DOCTRINE..... 31
 - 4.4 FINDINGS WITH REGARD TO THE GROUP OF COMPANIES DOCTRINE 33
- 5 ENFORCEMENT ISSUES 34**
- 6 CONSENT 37**
 - 6.1 CONTRACT INTERPRETATION 38
 - 6.2 IMPLIED CONSENT WITH REGARD TO ARBITRAL ESTOPPEL AND GROUP OF COMPANIES DOCTRINE 41
 - 6.2.1 *Arbitral Estoppel and Implied Consent*..... 41
 - 6.2.2 *Group of Companies Doctrine and Implied Consent*..... 43
 - 6.2.3 *Findings with regard to Consent in Arbitral Estoppel and Group of Companies Doctrine* 45
 - 6.3 THE ‘IN WRITING’ REQUIREMENT AND IMPLIED CONSENT 46
 - 6.4 THE DOCTRINE OF SEPARABILITY AND IMPLIED CONSENT 48
 - 6.5 FINDINGS WITH REGARD TO CONSENT 49
- 7 CONCLUSION 53**
- BIBLIOGRAPHY..... 56**

1 Introduction

1.1 General

Over 2 500 years ago in the prosperous commercial center of Rome, contracts were entered into daily. At that time, the contracts were formed orally through the correspondence of questions and answers from the two parties. The questions and answers had to be a precise reflection of one another; otherwise the contract would be null and void.¹ The importance of the precise congruence was upheld through the meeting of the parties.² If the parties did not meet, no contract could be formed, as it was not clear that the parties had the exact same intentions. The meeting of the minds was by that the essence of contract making in the Roman Empire. Today however, parties to a contract do not need to meet for a contract to be formed, however the concept of consent would seem to be equally important.

Arbitration is today the only forum outside of courts where a dispute can be settled with the result in an enforceable award. The only way to waive your fundamental right to a fair trial is by writing a contract to arbitrate. A contract in which you can state the terms of this alternative dispute settlement procedure, choose where the dispute should be settled, by whom and with reference to which national laws and/or international principles. The most fundamental principle of arbitration is therefore consent.

Problems can thus arise when non-signatories to the arbitration agreement, who in absence of consent either wants to join the arbitration proceedings or has arbitration invoked against them. Today, several methods have been invented through case law through which non-signatories either can be allowed or forced to take part in arbitral proceedings without their explicit consent. When applying these methods, courts and arbitral tribunals presume that consent from the non-signatories impliedly is at hand. However, this application may by that contravene the most basis principle of arbitration, consent.

¹ Franklin Miller, Alan Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2009) 40

² Ibid 41

1.2 Topic and Research Questions

The topic of this thesis is “Binding Non-Signatories to Arbitration Agreements: The Issue of Consent in International Commercial Arbitration”. The thesis therefore aims to answer the following two questions:

- Are the principles and requirements for a valid arbitration agreement, especially the requirement of consent, being upheld when the methods of arbitral estoppel and group of companies doctrine are applied?
 - How has the evolvement of the methods affected this fact?

1.3 Method and Disposition

To answer this, this thesis uses a legal dogmatic method when analyzing foremost the landmark case law on the area. The analysis will mainly focus on cases from England, France and United States as those countries most frequently apply the methods that will be discussed. Some reference to international conventions and agreements will also be made. The main text will mostly analyze the landmark- or most prominent cases of the area but will also include different scholar’s views on the topic, gathered both from articles and literature.

The second chapter will first explain the main features in international commercial arbitration with focus on the arbitration agreement, as it is the basis of determining who are the real parties to the agreement. Second, the third and fourth chapters aim to explain, exemplify and analyze the development of two of the most interesting and controversial methods used to bind non-signatories to arbitration agreements, the arbitral estoppel theory and group of companies doctrine. Third, the fifth chapter will aim to bring forth the issues of enforcement that can arise when no unanimous view with regard to the methods of arbitral estoppel and group of companies doctrine can be found. Fourth, in the sixth chapter, a discussion and analysis regarding the issue of consent will be made. The analysis will relate to the arbitral estoppel theory and group of companies doctrine to exemplify the importance of, and the current position taken, when courts and tribunals apply the methods. In the seventh and last chapter, the conclusions drawn from the previous chapters will be stated, as well as recommendations for the future.

2 International Commercial Arbitration and the Arbitration Agreement

2.1 Introduction to Arbitration and the Third Party Problem

Arbitration is today the principal way of solving disputes in international trade, commerce and investment.³ The process is efficient, private and relatively cheap. Almost everything that concerns the process can be agreed upon by the parties. The arbitrators can for example be handpicked experts, the procedure can be completely confidential and the process can take place in a neutral country, everything of the parties' choice.⁴ Furthermore, the award can through the New York Convention⁵ be enforced in most countries all over the world and the possibilities for appeal of the final award are few, upholding the efficiency of arbitral proceedings.⁶

When it comes to arbitration, the fundament is the agreement by the parties to arbitrate. The cornerstone is by that consent. In contrast to court proceedings where jurisdiction over the parties is based on the dispute at hand, arbitration proceedings draws its jurisdiction from the agreement of the parties.⁷ It is therefore more problematic when third parties, not signatories to that agreement, want to join the arbitral proceedings. Through case law around the world, different methods have developed that binds non-signatories or even third parties to arbitration agreements. Examples of these methods are agency, subrogation, estoppel, third party beneficiary, group of companies doctrine and incorporation by reference.⁸ Different views in regard to binding non-signatories are however taken by both nations and scholars worldwide. Some argue that joining third parties to an arbitration agreement is extending that agreement to cover an actual non-party⁹ while some argue that the methods does not extend the agreement, they merely help to find the true parties to it.¹⁰

³ Nigel Blackaby and others, *Redfern and Hunter on International Commercial Arbitration* (5th edn, Oxford University Press 2009) para 1.01

⁴ *Ibid* para 1.05

⁵ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

⁶ *Ibid* para 1.92

⁷ Bernard Hanotiau B, 'Consent to Arbitration: Do We Share a Common Vision?' (2011) 27 *Arbitration International* 539

⁸ *Merrill Lynch Inv Managers v Optibase Ltd* 337 F 3d 125, 131 (2nd Cir 2003)

⁹ See for example Pierre Mayer, 'The Extension of the Arbitration Clause to Non-Signatories: The Irreconcilable Position of French and English Courts' (2012) 27 *American University International Law Review* 831 and Blaise Stucki, Wittmer Schellenberg, 'Extension of Arbitration Agreements to Non-Signatories' (ASA Below 40 Conference, Geneva, September 2006)

¹⁰ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 1139

Binding non-signatories is a matter of big controversy as different levels of consent is accepted worldwide. Some countries hold to the importance of consent where clear evidence has to show that the parties actually intended to arbitrate while others focus more on the effectiveness and necessity of flexibility in the context of international commerce. These differences can lead to several problems. First, the predictability in international trade diminishes when it is possible to have arbitration invoked against you without your agreement to be included in such proceedings. Second, the final award that should be enforceable all over the world might be refused due to the fact that non-signatories have been joined to the proceedings. Binding non-signatories is however important as arbitration by that is kept a commercially efficiency and competitive system of solving international disputes. It also makes arbitration effective, flexible and develops and expands international trade.

A further introduction relating to some key aspects of international commercial arbitration will now follow as these are essential for the understanding of the thesis in general but the discussion relating to consent in particular.

2.2 Applicable Law with regard to Binding Non-Signatories

When interpreting who is a party to the dispute at hand and by that the party obliged to arbitrate, the law applicable to the arbitration agreement is the one to apply.¹¹ The parties may always choose the law that should apply to their arbitration agreement. The parties' choice of law will in such cases always prevail.¹² If the parties have made no such choice, the court or arbitral tribunal applies the law relating to the substantive terms of the main agreement.¹³ This would in most cases mean that they use the domestic law of the country where the arbitration proceedings takes place.¹⁴ It is therefore important, in all disputes relating to international commercial arbitration, that the parties either have agreed on the applicable law or are aware of which rules that might be used in the proceedings. This is especially important with regard to joining non-signatories as different jurisdictions accepts or uses different methods of binding non-signatories to the contract.¹⁵

¹¹ Ibid 1153

¹² ICC Case No 1512 of 1971 YBCA 171 (1980)

¹³ James P Gaffney, 'The Group of Companies Doctrine and the Law Applicable to the Arbitration Agreement' (2004) 19(6) Mealey's International Arbitration Report, 6

¹⁴ James M Hosking, 'Non-Signatories and International Arbitration in the United States: the Quest for Consent' (2004) 20 Arbitration International 289, 296

¹⁵ Andrew Tweeddale, Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (1st edn, Oxford University Press 2005) 180

As this thesis in chapter 5 will discuss enforcement issues relating to joining non-signatories, it is also important to note that the applicable law for the enforcement of the award is the law of the country of enforcement. Hence, where the losing party has its assets and not the law of the country in which the arbitral award was made.¹⁶

2.3 The Requirements for a valid Arbitration Agreement

For there to be a valid arbitration, there has to be a valid arbitration agreement. This means that there has to exist an offer and acceptance, consideration, capacity of the parties and the intention from the same to enter into a legal relationship.¹⁷ If these requirements are at hand, an agreement can be formed. There are then two different ways as of today to draft an arbitration agreement. The first, and most common, is to incorporate an arbitration clause within the main contract, which is done in conjunction with the negotiation of the rest of the contract. The other possible way is to draft an agreement after the dispute has arisen, an agreement that then would be called a submission agreement.¹⁸

The most important international standard on the subject is the New York Convention. In Article II(1), four requirements are specified that all needs to be fulfilled for there to be a valid arbitration agreement. The agreement needs to be *in writing* and deal with existing or future *disputes*. These disputes in turn has to arise in *respect of a defined legal relationship*, whether contractual or not, and concern a *subject matter capable of settlement* by arbitration. There are two additional requirements in Article V(1a), which states that the parties cannot be in incapacity when entering into the arbitration agreement or that the agreement itself is deemed invalid under the applicable law. The only requirement discussed further will be the *in writing* requirement.

It is further important to note that the uniform and internationally accepted rule regarding the arbitration agreement is that only the parties to the agreement are bound by it.¹⁹ The goal should be that to find the true parties to the agreement, and not to bind non-consenting parties to the same.

¹⁶ Ibid

¹⁷ Nigel Blackaby and others, *Redfern and Hunter on International Commercial Arbitration* (5th edn, Oxford University Press 2009) para 1.93

¹⁸ Ibid para 1.40

¹⁹ *United Steelworkers of America v Warrior and Gulf Navigation Co* 363 U.S. 574 (US Supreme Court 1960)

2.3.1 The 'in writing' Requirement set forth in the New York Convention

The New York Convention with 149 countries as signatories²⁰ takes to the question of the formal requirements regarding the arbitration agreement and the view taken in this convention is strict. In Article II(1) it is made clear that for a country to recognize a foreign award, the arbitration agreement needs to be in writing. Article 11(2) explains the 'in writing' as either a contract signed by the parties or a contract gathered from the exchange of letters or telegrams. The meaning of this is clear. For there to be a valid arbitration agreement, one of these two requirements needs to be at hand. This would, if applicable, mean that the possibilities to bind a non-signatory are small due to the fact that the New York Convention does not include oral or tacit acceptance to an arbitration agreement. However, different ways of interpreting the requirement has developed over the last years. Some courts, both in civil- and common law jurisdictions, argue that since the purpose of writing Article II was to exclude tacit acceptance, the arbitration agreement should actually be in writing.²¹ Others however take a wider approach arguing that the requirement that an agreement only is valid if written would no longer be in line with today's commercial practice or contract law, where implied consent in most countries is part. They also argue that as long as consent can be established, either expressly or impliedly, the requirement is fulfilled.²²

The UNCITRAL Model Law on International Commercial Arbitration of 1985 (the Model Law) aimed to loosen the requirements of the New York Convention. In Article 7(2) it is stated that the agreement shall be in writing. However, Article 7(3) states that the agreement can be made orally, by conduct or by other means as long as the agreement is recorded in some way. This would mean that if an arbitration agreement is put forth in some form and the other party does not object to it, an agreement is at place.²³ Oral and tacit acceptance is by that accepted.²⁴ A further discussion and analysis regarding this requirement will be made in chapter 6.

²⁰ <<http://www.newyorkconvention.org/new-york-convention-countries/contracting-states>> accessed 2013-11-19

²¹ *Report of the Committee on the Enforcement of International Arbitral Awards*, UN Doc E/2704, note 30, Art. II(a) (1955) available at <www.uncitral.org>

²² Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 596

²³ *Ng Kin Kenneth v HK Football Association Ltd* (1994) 1 HKC 734

²⁴ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 606

2.4 The Separability Principle

Another important factor to note, which also shall be discussed in more detail in chapter 6 of this thesis, is the workings of one of the cornerstones of arbitration, the separability principle. This principle holds that all arbitration agreements are separate or autonomous in regard to the main- or underlying contract of which it forms a part.²⁵ An arbitration agreement is by that a separate contract and juridically independent from the main contract.²⁶ What this means is for example in the circumstance that the main contract is deemed invalid, the arbitration agreement can still stand. Thus, if a conflict arises relating to the main contract, which is for example terminated, the arbitration clause is still binding and can be used to initiate arbitration.²⁷ The separability principle also has the effect that different national law can be applicable to the arbitration agreement as opposed the main contract.²⁸ The arbitration agreement by that has its own formal validity, substantive validity, choice of law, and allocations of jurisdictional competence.²⁹

2.5 Common- and Civil Law

As the discussion below will entail both common- and civil law references, it is important to explain the basics of common law, as it is widely different from civil law.

Of uttermost importance is this first statement about common law; its basis is case law, not legislation.³⁰ The primary sources in common law countries are thereby both judgments and legislation.³¹ Even though legislation, where it exists, ranks higher than case law,³² almost all rules, and especially in regard to contract law, are based on case law and not legislation.³³ The rulings from the courts have to be followed according to the principle of precedents or *stare decisis*.³⁴ The older the case law, the more cautious the courts are in changing it.³⁵ As consent

²⁵ Ibid 311

²⁶ ICC Case no 8938, XXIVa YBCA 174, 176 (1999)

²⁷ Nigel Blackaby and others, *Redfern and Hunter on International Commercial Arbitration* (5th edn, Oxford University Press 2009) para 1.53

²⁸ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 313

²⁹ Ibid 348

³⁰ Andrew Borrows, *English Private Law* (3rd edn, Oxford University Press, 2013) para 1.21

³¹ John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (1st edn, Hart Publishing 2007) 12

³² Andrew Borrows, *English Private Law* (3rd edn, Oxford University Press, 2013) para 1.25

³³ Ibid para 1.62

³⁴ Michael H Whincup, *Contract Law and Practice: the English System and Continental Comparisons* (4th edn, Kluwer Law International 2001) 4

³⁵ John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (1st edn, Hart Publishing 2007) 21

is one of the foundations of contract law, which in turn is deeply rooted in case law, especially English courts are reluctant to change this basis fact.

Even though the U.S. as well as England, is a common law country, the law has developed in another direction. It still has its basis in the English common-, and thereby case law, but with additional influence from other jurisdictions.³⁶ The U.S. has for example adopted the good faith doctrine, which is seen in European civil law countries. They have also created the doctrine of estoppel. These examples can be compared to English law, which is less open in regard to such ideas.³⁷

Civil law on the other hand is derived from the statutes, in turn adopted by the legislative powers through parliamentary process in the country. Cases are secondary to the statutes. This means that, opposite to the common law system, the decisions of courts do not per se have binding force on subsequent cases, even though it has significance. The decisions from courts should only be seen as applying the legislative provisions.³⁸

³⁶ E. Allan Farnsworth, *United States Contract Law* (rev edn, Juris Publishing 1999) 51

³⁷ John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (1st edn, Hart Publishing 2007) 10

³⁸ *Ibid* 20

3 Arbitral Estoppel

As stated above, consent is the cornerstone of arbitration.³⁹ As consent, and especially implied consent, is hard to prove, theories and methods have developed to presume or easier prove that implied consent is at hand. Two of the most prominent, but controversial, methods of doing so are the arbitral estoppel theory and the group of companies doctrine. The first, developed in the U.S. and the latter in France to deal with this practical problem of proving implied consent.

The following two chapters will aim to analyze how these two methods are applied to presume implied consent in international commercial arbitration and the scope of consent is stretched to its limits. The analysis will explain the methods, pinpoint the justifications for them, and show the still ongoing development of the two.

In this chapter, a thorough description and analysis of the arbitral estoppel theory will be made. It will start with an explanation of the basic rules and requirements for the application of the theory and then, through landmark cases, an analysis of the development and current state of the method of estoppel will be conducted.

3.1 Arbitral Estoppel in Theory

When talking of or referring to the method of estoppel, not many people or even lawyers in civil law countries know what this principle entails. The method, developed and used mostly in the U.S., states that one cannot withdraw from a taken legal position or act.⁴⁰ To describe the estoppel theory with an easy example, imagine a company that acts in accordance with a contract of sales, for example by delivering goods and by receiving benefits, i.e. payments from that very contract. The company has by that taken an active part in the contract as it has derived benefits from it. It cannot later avoid the burdens of that same contract. What this means is if a dispute would arise, for example regarding faults in the goods, the company cannot escape from solving this problem by stating that it was never a party to the contract and that the terms therefore does not apply to it. As the company has received benefits from the contract, it cannot escape the burdens of the same contract; it is estopped (stopped) from escaping.

³⁹ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 1133

⁴⁰ Kunal Mimani, Ishan Jhingran, 'Extension of Arbitration Agreements to Non-Signatories: An International Perspective' (2007) 4(3) *India Law Journal* <http://www.indialawjournal.com/volume4/issue_3/article_6.html>

What this means in regard to arbitral estoppel and joining the non-signatories to arbitration proceedings is if a non-signatory has acted in accordance with a contract containing an arbitration clause or agreement, it is estopped from withdrawing from that contract and by that also from the arbitration agreement. In short, if a dispute arises in regard to the contract the company has acted in accordance with, it cannot litigate. It has to arbitrate the dispute as he is estopped from not accepting the burdens of the contract, i.e. arbitration.

A quote from the case of *Washington Mutual Financial Group LLC v Bailey*⁴¹ defines the workings of estoppel as: "[it] precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes"⁴². And as the court pointed out in the case of *Fluor Daniel Intercontinental, Inc. v General Electric Co*⁴³, a non-signatory cannot "rely on the contract when it works to their advantage [...] but then repudiate the contract and its arbitration clause when they believe it works against them"⁴⁴.

Arbitral estoppel is by that the method where one can bind a third party or non-signatory with the basis solely in that party's actions. It is a way of presuming that implied consent by conduct exists and the goal is to find the true intentions of the parties.⁴⁵ The method has in the U.S. become an accepted and natural part of their contract law, making it a justified mean of presuming implied consent in all kinds of different contractual circumstances. In regard to arbitration, the method is likewise an accepted part of the U.S. system of contract interpretation.

One of the justifications for using the estoppel method is to end up with a result that is fair. Also, it protects the party of a contract from being harmed by another's voluntary conduct. As an example, it would not be fair if a non-signatory is taking advantage of a contract and then escape the arbitration agreement stated within. The non-signatory is estopped from

⁴¹ *Washington Mutual Financial Group LLC v Bailey* 364 F 3d 260 (5th Cir 2004)

⁴² *Ibid* 267

⁴³ *Fluor Daniel Intercontinental Inc. v General Electric Co* 1999 WL 637236 (SDNY 1999)

⁴⁴ William W. Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in Lawrence W. Neuman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, Juris Net, 2008) para 1.49

⁴⁵ *Ibid* para 1.13

withdrawing from arbitration invoked against him by a signatory. He can't take advantage of the contract and then be free from disputing about it.⁴⁶

When comes to the method of arbitral estoppel, there are two different methods. These are applicable in different situations and have different requirements but both end up with the same outcome, that the concerned party is estopped from withdrawing from the contract.

First, we have the method of equitable estoppel that could be summed up as estoppel through fairness reasons. Here, the requirement is one. By accepting a *substantial and direct benefit* arising from the contract containing an arbitration clause, the party also accepts the burdens of that contract.⁴⁷ A benefit could for example entail the ability to preform in accordance with the contract. The party cannot later escape the burdens of that contract and the method of equitable estoppel would by that be in line with the example of estoppel given above.

Second, we have the method of intertwined estoppel where two criterions have to be at hand. First, the dispute that has arisen needs to be *intertwined* with the contract containing the arbitration clause. This means that the dispute needs to relate to, or be connected with, the contract of which the party invoking arbitration derives the arbitration agreement from. Second, there has to exist a *contractual or close corporate link* between the non-signatory and one of the signatories to the contract.⁴⁸ This would for example mean that the companies exist in the same corporate family or have other similar corporate ties. The requirement could also be fulfilled if the non-signatory and signatory have contractual links that connect them to one another, for example if they previously have worked closely together.⁴⁹

As this only states the requirements for the two subparts of estoppel, they will in the following segments be further explained and exemplified.

⁴⁶ 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 469, 483

⁴⁷ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 129

⁴⁸ Ibid

⁴⁹ Ibid 139

3.2 Arbitral Estoppel in Practice

3.2.1 Intertwined and Equitable Estoppel Explained

To get an understanding of how the two methods of the arbitral estoppel theory work in practice, landmark cases of the area will be described, analyzed and commented. A case where the basis of the theory is explained is the case of *Mundi v Union Security Life Insurance Co*⁵⁰. Here, a loan agreement with an arbitration clause was drafted between Mundi and Wells Fargo. Relating to this loan agreement, the Union Security Life Insurance Company issued credit insurance on behalf of Mundi. As a dispute arose in regard to this insurance, Union Security wanted to invoke arbitration against Mundi by the method of intertwined estoppel. This due to the close ties between both the companies but especially the two contracts at hand. Union Security held that even if they were not a party to the loan agreement, which entailed the arbitration agreement, they could still invoke arbitration on the grounds that the contracts were so intertwined with one another that they should be seen as one. Mundi on the other hand, held that as no arbitration agreement was signed between Mundi and Union Security, arbitration could not be possible.

The case ended up in the United States Court of Appeals, which first stated that they would use general principles of contract interpretation when deciding on the matter. This, as we later will see, is an important factor to note as the basis of interpreting a contract, even in those cases where estoppel is at hand, always has to be within the boundaries or scope of contract law and practice. By emphasizing this fact, the court points out that the focus when question is of binding a non-signatory or third party is on finding actual consent and discovering the true intentions of the parties.

The court then examined the requirements for estoppel in arbitration, developed the reasoning for them and identified two types of the method. First, in regard to equitable estoppel, the court stated that a non-signatory is to be held to an arbitration agreement where the non-signatory “knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement”⁵¹. Second, in regard to the method of intertwined estoppel, the court summarized the requirements and a non-signatory may be required to arbitrate “because of the close relationship between the entities involved, as well as the relationship of the

⁵⁰ *Mundi v Union Security Life Insurance Co* 555 F 3d 1042 (9th Cir 2009)

⁵¹ *I.E. DuPont de Nemours & Co v Rhone Poulenc Fiber & Resin Intermediates* 269 F 3d 187, 199 (3d Cir 2001)

alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations"⁵².

The court also made reference to the case of *Sokol Holdings Inc. v BMB Munai Inc.*⁵³ where it was stated that it was "essential in all of these cases that the subject matter of the dispute was intertwined with the contract providing for arbitration"⁵⁴ and that "a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement"⁵⁵. In regard to this last fact, Mundi held that as no reference was made to other parties in the loan agreement, no other parties could be seen as relating to the main contract. Union Security on the other hand held that the reason for issuing the credit insurance was the loan agreement, and the contracts should be seen as two contracts intertwined with one another.

With these factors explained, in the case of *Mundi*⁵⁶ the decision from the court was that since the credit insurance was not "intertwined with the contract providing for arbitration"⁵⁷, i.e. not in any way referred to in the loan agreement, arbitration could not be invoked by the non-signatory. In addition did the claim not "arise[] out of or relate[] directly to"⁵⁸ the main contract, and by that it failed to meet the first requirement, i.e. that the contracts need to be *intertwined* with one another.

This conclusion by the court, even taking a pro-arbitration perspective, has to be deemed the correct one. The signatories to the arbitration agreement had explicitly written in their contract that it only concerned them and that the contract was not to be extended to a third party. It seems unlikely that the court therefore would be able to interpret implied consent into the arbitration agreement when it both clearly stated the parties concerned and explicitly excluded outsiders.

⁵² Ibid 201

⁵³ *Sokol Holdings Inc. v BMB Munai Inc.* 542 F 3d 354 (2nd Cir 2008)

⁵⁴ Ibid 361

⁵⁵ Ibid 359

⁵⁶ *Mundi v Union Security Life Insurance Co* 555 F 3d 1042 (9th Cir 2009)

⁵⁷ *Sokol Holdings Inc. v BMB Munai Inc.* 542 F 3d 354, 361 (2nd Cir 2008)

⁵⁸ *Brantley v Republic Mortgage Insurance Co* 424 F 3d 392, 396 (4th Cir 2005)

Furthermore, holding this last statement in mind, the court identified one of the important factors when discussing estoppel. It quoted the previous case of *United Steelworkers of America v Warrior and Gulf Navigation Co*⁵⁹ in which it is stated, “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit”⁶⁰. The court also made reference to the case of *Victoria v Superior Court*⁶¹ and cited that “however broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract”⁶². This further emphasizes the basis of arbitration, consent, and the importance to actually find implied consent within the arbitration agreement. As these cases are from 1959 and 1985, the strict view here taken might, as we later will see, have been loosened in the last couple of years.

To exemplify the early use of the equitable estoppel theory the buyer in the *Avila Group Inc. v Norma J of California*⁶³ of 1977 wanted damages in regard to a contract containing an arbitration clause as the seller had breached the contract. The contract was signed when the buyer had accepted the purchase orders but as the buyer had not read the small print, in which the arbitration clause was clearly stated, he held that he had not expressly agreed to the arbitration clause and therefore did not want to arbitrate. The court however held that arbitration should be invoked against him, as he wanted the damages arising out of the very same contract as from which the arbitration agreement he wanted to avoid did.⁶⁴

The court argued that the buyer could not be allowed to hold the contract for valid in regard to those parts to which he wanted damages from the seller but at the same time contradictorily hold the contract invalid in order to avoid the arbitration agreement. The court stated, “to allow the buyer to claim the benefits of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.”⁶⁵. This last quote, seen out of its context, could be interpreted as allowing merely equity reasons for binding non-signatories, which by an analysis of the rest of the case seems not to have been the courts intention. The court did not mainly invoke arbitration on the basis that the non-signatory received a benefit from the contract but merely due to the fact

⁵⁹ *United Steelworkers of America v Warrior and Gulf Navigation Co* 363 U.S. 574 (US Supreme Court 1960)

⁶⁰ Ibid 624

⁶¹ *Victoria v Superior Court* 40 Cal 3d (1985)

⁶² Ibid 734

⁶³ *Avila Group Inc v Norma J of California* 426 F Supp 537 (SDNY 1977)

⁶⁴ Ibid 542

⁶⁵ Ibid

that the buyer actually had signed the contract (even though he had not read the conditions closely enough). Expressed consent was by that a factor in the case and it seems that binding the party to the arbitration agreement was done so foremost on the basis of that signature and not for equity reasons. This quote would later however be one of the sources to which reference would be made when interpreting equity and fairness through conduct in the arbitration context. This will be shown below.

3.2.2 The Continued Development of the Equity Approach

We now skip several years forward to the case of *International Paper v Schwabedissen Maschinen & Anlagen GmbH*⁶⁶ to understand the evolvement of the equity approach, partly due to the *Avila* case. The case of *International Paper* concerned a contract between a manufacturer (Schwabedissen Maschinen) and a distributor (Wood) containing an arbitration clause. The buyer (International Paper), who in turn had contracted with the distributor, brought up a claim relating to a warranty set in the contract between the manufacturer and the distributor. International Paper tried to sue in court but Schwabedissen Maschinen replied that as the dispute only concerned the manufacturer-distributor contract, in which there was an arbitration agreement, arbitration proceedings should instead be initiated. The question for the court would therefore be if arbitration could be invoked against the non-signatory only on the grounds of two other separate parties' contract. The court concluded that arbitration was possible and the buyer was by that estopped from going ahead with the court proceedings and instead had to arbitrate its claims.⁶⁷

The court reasoned that as the manufacturer-distributor contract was the entire factual foundation for the claims International Paper had against Schwabedissen Maschinen, they should proceed with arbitration. If International Paper were to be able to use that contract to claim its rights, and as their entire case was dependent on the rights arising out from that contract, it would be unfair for International Paper to be able to enforce those rights but at the same time avoid the burdens from the same, i.e. avoid the arbitration agreement.⁶⁸

⁶⁶ *International Paper v Schwabedissen Maschinen & Anlagen GmbH* 206 F 3d 411 (4th Cir 2000)

⁶⁷ *Ibid* 418

⁶⁸ *Ibid*

The previously emphasized reason of equity in the *Avila*-ruling was cited and interpreted in the case when stating that:

In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. "To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."⁶⁹

This could indicate a development towards a higher level of focus on these equity reasons when basing the decision on the non-signatories use of the contract, from which it derives the benefits. This in contrast to the *Avila* case where the main reason still was the signature from the party. The reference to equity in the *Avila* case only seemed secondary to the actual consent derived from the signature and more as a background justification for the judgment.

Even if this case suggests a development of the equitable theory of estoppel, it becomes even more evolved in the case of *American Bureau of Shipping v Tencara Shipyard*⁷⁰. Here, the company Tencara entered into a contract to build a yacht. For that, the American Bureau of Shipping (ABS) had to classify the yacht. For this, a contract with an arbitration agreement was drafted between Tencara and ABS. Later on, the yacht was damaged and it was clear that the reasons for this damage were poor design and construction, matters that ABS were responsible for ensuring. Therefore Tencara sued ABS in Italy and the yacht owners in turn sued ABS in France. ABS brought both cases to New York to arbitrate to make all parties join the same dispute. The yacht owners on the other hand held that they had never signed the arbitration agreement and therefore did not want to arbitrate.

The court however held that the yacht owners should be deemed to arbitrate on the basis of equitable estoppel. The reason was that the owners received benefits from the agreement between Tencara and ABS as the classification ABS had made lowered the insurance rates for the owners. The owners were by that estopped from not arbitrating when they already had

⁶⁹ Ibid

⁷⁰ *American Bureau of Shipping v Tencara Shipyard* 170 F 3d 349 (2nd Cir 1999)

gotten benefits from the contract containing the arbitration clause.⁷¹ The rationale for this final decision was made in short as the court stated:

It is patent that on the actual facts the owners received direct benefits from the ICC [the document drafted by ABS for ensuring the construction]. Without the ICC, registration would have been practically impossible. The owners are hence required to arbitrate their claims against ABS.⁷²

This decision, as previously stated, further developed the equity approach. The court did not require the claim arising out of, or having its factual foundations in, the contract as in the *International Paper* case. It was content with the fact that any benefit that could be seen at the non-signatory's end relating to the contract with the arbitration clause was enough to have arbitration invoked against him.

When relying on these equity-reasons developed and evolved in the stated cases above, the courts seem to have accepted the binding not only of non-signatories to the agreement but outside-coming third parties as well.

3.2.3 The Continued Development of the Intertwined Approach

For this thesis especially interesting is the intertwined version of estoppel. This, as the method to a greater extent than the equitable version affects the basis of arbitration, i.e. consent.

In the case of *McBro Planning Development v Triangle Electrical Construction*⁷³ both parties had separate contracts with a hospital that contained arbitration agreements. The hospital was to be renovated but a dispute arose between the construction manager (McBro) and the electrical engineer (Triangle), between which no contracts or arbitration agreements existed. Triangle claimed that McBro harassed and hampered its work and wanted to litigate the matter. McBro on the other hand, with reference to both parties separate arbitration agreements with the hospital, wanted arbitration proceedings to commence. Although the separate contracts clearly stated that they only applied to the two signatory companies to the

⁷¹ Kunal Mimani, Ishan Jhingran, 'Extension of Arbitration Agreements to Non-Signatories: An International Perspective' (2007) 4(3) India Law Journal <http://www.indialawjournal.com/volume4/issue_3/article_6.html>

⁷² *American Bureau of Shipping v Tencara Shipyard* 170 F 3d 349, 353 (2nd Cir 1999)

⁷³ *McBro Planning Development v Triangle Electrical Construction* 741 F 2d 342 (11th Cir 1984)

contract⁷⁴ and no contractual agreements were found between McBro and Triangle, the court found that the claims of Triangle were *intimately founded in and intertwined with* McBro's underlying contract with the hospital.⁷⁵ The Eleventh Circuit therefore held that arbitration should be the form of dispute settlement, not litigation, this even though Triangle was a non-signatory to the contract containing the arbitration clause between McBro and the hospital.

The court in regard to the fact that no written agreement existed between McBro and Triangle, made reference to the case of *Hughes Masonry Co v Greater Clark County School Building Corporation*⁷⁶. Here, almost identical circumstances were at hand and the court held that a non-existing arbitration agreement between two companies were not an obstacle for arbitration. Even without a contract it was enough that the basis of the contractor's claim against the construction manager was the managers breach of the contractor-owner contract. This reasoning was also found in the case of *McBro*. The contracts between the hospital and the disputing parties expressly excluded any other party from those contracts. Even so, the court held that the fact that the contracts however made continued reference to the other non-signatory, were enough to invoke arbitration against the non-signatory.⁷⁷

When discussing the interrelatedness between the parties, the court pointed to the contractual links between the hospital as the owner, McBro as the construction manager and Triangle as the electrical engineer. As the court deemed there to exist a "close relationship of the three entities here involved"⁷⁸ and also taking into account the "close relationship of the alleged wrongs to McBro's contractual duties to perform as construction manager."⁷⁹, the requirement of intertwinement was met. When the court had established this fact, the arbitration agreement between the hospital and McBro could be used to invoke arbitration against the non-signatory, Triangle.

To comment on the discussion of interrelatedness of the parties in the case, one notes that no parent- or sibling connection between the companies or any previous relationship between McBro and Triangle existed. The two companies had only worked together on this very

⁷⁴ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 137

⁷⁵ Kunal Mimani, Ishan Jhingran, 'Extension of Arbitration Agreements to Non-Signatories: An International Perspective' (2007) 4(3) India Law Journal <http://www.indialawjournal.com/volume4/issue_3/article_6.html>

⁷⁶ *Hughes Masonry Co v Greater Clark County School Building Corporation* 659 F 2d 836 (7th Cir 1993)

⁷⁷ *McBro Planning Development v Triangle Electrical Construction* 741 F 2d 342, 344 (11th Cir 1984)

⁷⁸ *Ibid* 343

⁷⁹ *Ibid*

construction. It would not seem to be the ordinary situation where two separate companies contracts effects a third company. It thus has to be a regular situation when several companies work together on a construction. One could argue that if regard is not taken to the actual signatories of the contracts but merely to the links between the companies, as in the case of *McBro*, it could by extension lead to a softer approach on the importance of the actual consent of the parties. The implications if regard is not taken of the actual signatories, could be that it now is easier for courts to bind non-signatories to arbitration agreements. If two or more companies were to work together, the case of *McBro* could point to a willingness by the courts to invoke arbitration between all companies only by reference to two other, separate, companies contract and the arbitration agreement existing between them. This could mean that on a construction site, if two companies had a contract containing an arbitration clause, a dispute that in any way related to this contract (between other parties), could be resolved by arbitration instead of litigation. This is however only a theoretical possibility brought forward in this thesis and is not the direct implications of *McBro*.

It could also be held that the result occurring when several contracts exist and applies within a construction site without regard for the actual signatures thereof, would widely overstep the limits of intertwined estoppel. The basis of the method, as explained above, is the close corporate or contractual ties of the companies involved and one could question if this requirement really is being upheld when the mere existence of companies working together on a construction binds non-signatory companies to arbitration agreements. It seems that the scope or limits of intertwined estoppel are being stretched to its limits, or even extended beyond them, and one could question of this application of intertwined estoppel ensures the predictability of contract law.

To see the continued development of the method of intertwined estoppel an analysis of a case finalized ten years later, *Sunkist Soft Drinks v Sunkist Growers*⁸⁰, will be made. Here, the licensor (Sunkist Growers) of a trademark claimed that Sunkist Soft Drinks together with its parent company (Del Monte) had breached the license agreement between Sunkist Growers and Sunkist Soft Drinks. The non-signatory Del Monte wanted to compel arbitration with basis in an arbitration agreement existing as a clause in the license agreement. The question

⁸⁰ *Sunkist Soft Drinks v Sunkist Growers* 10 F 3d 753 (11th Cir 1993)

for the court was by that if this non-signatory parent company could compel arbitration even though it had not signed the arbitration agreement.

Sunkist Growers held that as Del Monte never was a party to the license agreement, Sunkist Growers never consented to or intended to arbitrate with Del Monte. By stating this, Sunkist Growers pointed to the difference in this case opposed to that of *McBro*. Here, no reference in the license agreement is made to Del Monte and no interrelatedness or relationship is seen between Del Monte and Sunkist Growers. Despite this fact, the court holds that the fact that the non-signatory in the case of *McBro* were mentioned in the signatories contract, were not the primary reason or crucial factor for the judgment. The dominant reason, the court holds, was instead that the non-signatory's claim was derived from the main contract containing the arbitration agreement. The court therefore determined that as the claims of Sunkist Growers against Del Monte were derived from the license agreement, the arbitration clause in that agreement could be used by Del Monte to invoke arbitration.⁸¹

One could however argue that the court somewhat contradicted itself when stating, "although Sunkist does not rely exclusively on the license agreement to support its claims, each claim presumes the existence of such an agreement. We find that each counterclaim maintained by Sunkist arises out of and relates directly to the license agreement"⁸². What this seems to indicate is that even if the disputes are not directly derived from the agreement containing the arbitration clause, the claims are arbitrable if they relate to the license agreement. As the court stated that the claims in the case were *intimately founded in and intertwined with* the license agreement, and that there existed an *integral relationship* between the licensee and the licensee's parent company, intertwined estoppel could be used to invoke arbitration.⁸³

The court here seems to state that it is actually not important if the non-signatory is a signatory to the contract or not. Merely the fact that the dispute arises from the main contract can bind a third party. The discussion did not concern if the third party actually had agreed to arbitrate, but if the dispute was connected to the other companies' contract. This could point towards the direction that the court here partly abandons the consent requirement and are moving towards a jurisdictional based approach to arbitration. This would mean that the basis

⁸¹ Ibid 757

⁸² Ibid 758

⁸³ Ibid

for arbitration, the cornerstone of consent, now is starting to evolve into an approach where the jurisdiction is derived not from consent but from analyzing the dispute at hand and defying the parties related to this dispute. The basis would not, as originally intended, be to analyze if consent to arbitrate is at hand but instead to define the parties only by viewing the dispute and the parties connected to it, even if not all are signatories to the arbitration agreement.

In the cases of *McBro* and *Sunkist* the question in both cases was if the non-signatory could invoke arbitration against a signatory. A different conclusion was reached when a signatory to an arbitration clause wanted to invoke arbitration against a non-signatory. In the case of *Thomson-CFS v American Arbitration Association*⁸⁴ the court first emphasized the importance of remaining within the boundaries of contract- and agency law when joining non-signatories. The question in the case was if the company of Thomson could have arbitration invoked against it, due to the working agreement between the company earlier acquired by Thomson (Rediffusion) and E&S, or not. E&S first, with reference to equitable estoppel, held that as Thomson derived an indirect benefit from the working agreement, it should be deemed to arbitrate. The court rejected that claim on the basis that only direct benefits could invoke equitable estoppel.

When then discussing intertwined estoppel, the court held that as the non-signatory is the one towards which the arbitration proceedings is invoked, caution needs to be taken. The court held that the nature of arbitration makes this distinction important i.e. it is important if it is a non-signatory or a signatory that is to become bound to the agreement. It would seem as if the court was of the opinion that it should be more difficult to invoke arbitration against a non-signatory than a signatory. The court stated that when speaking of Thomson, a non-signatory in this case, it cannot be estopped from denying the existence of an arbitration agreement as such an agreement does not exist. In reference to this statement, the court held in regard to binding Thomson as a non-signatory that it "dilutes the safeguards afforded to a non-signatory by the ordinary principles of contract and agency"⁸⁵. This would point towards a desire of a more restricted view on binding non-signatories with emphasis on the importance of having the basis in contract- and agency law, at least when it comes to joining a non-signatory.

⁸⁴ Thomson-CFS v American Arbitration Association 64 F 3d 773 (2nd Cir 1995)

⁸⁵ Ibid 780

A difference in attitude can thereby be seen, at least in the case of *Thomson*, regarding the invocation of arbitration agreements against a non-signatory in contrast to a signatory. One could argue that such a difference may be unnecessary and that the safeguards existing when interpreting in accordance with contract- and agency law should cover all companies on the market, signatories or not. The reason for taking special notice and care of the non-signatory is evident but one could argue that the basis of arbitration, consent, always should be present, signatory or not.

3.3 Findings with regard to Arbitral Estoppel

As can be seen in regard to these landmark cases, a big evolvement especially concerning the intertwined method of estoppel has taken place. The methods, that started as exceptions to the rule of consent, has now become a rule of presumption. A presumption that now holds that implied consent is at hand when certain requirements between the parties or non-parties exist. One can wonder if this were the intentions of the courts in the earlier cases as single sentences, sometimes drawn from its context, has been used to justify the continued development of the methods. As the courts no longer seem to specifically discuss if consent is at hand, but instead merely refers to the method of intertwined estoppel to invoke arbitration, the method has become an accepted fact. This, even if the application of the method could be held to contravene the requirement of consent.

The method of equitable estoppel has since years back been an accepted and widely used part of American contract law. The intertwined method has however developed within the boundaries of international commercial arbitration and it seems as if this method has started to get questioned by the very same courts that invented it.

As no formal rules in international commercial arbitration regulate the area of estoppel, the frequent usage of the method may have extended the boundaries of arbitration, especially when it comes to the intertwined method of estoppel, which might no longer be in line with the rules of arbitration. The final word about this method has however yet not been said, but one can ponder over the effects it will have on the enforcement of the subsequent awards throughout the world as most countries does not accept the method of estoppel in their jurisdictions. Chapter 5 will provide an analysis regarding this matter.

4 The Group of Companies Doctrine

As previously stated, this thesis will also include an analysis regarding one additional method of binding non-signatories to arbitration agreements, the group of companies doctrine. This will also be done through landmark cases on the area.

4.1 The Group of Companies Doctrine in Theory

The group of companies doctrine is the method where courts or tribunals can bind a non-signatory on the basis of that company's strings to, or parent/sibling relationship with, another company. In short, the result is that the court or tribune infers common intention of the parties on the basis of the corporate structure and the active involvement of the non-signatory. This involvement is for example negotiation, performance, or termination of the contract containing the arbitration agreement.⁸⁶

The initial intention when the doctrine was developed in France was, as we will see, that when dominant parent companies take active part in for example the negotiation of a subsidiary's contract, over which subsidiary it has absolute control, it should become bound to the arbitration agreement existing within that contract. If the parent has such absolute control over the subsidiary and works for the contracts creation, it should be seen as a party to the agreement. This method by that targets dominant companies in corporate groups. The signatory and non-signatory have to be members of the same corporate group and also have strong administrative, executive, and/or financial links for the doctrine to apply.⁸⁷ It is not only that the companies belong to the same economic reality that play a role in determining the scope of the companies' closeness, other factors such as if they share financial or human resources, trademarks, assets, ownership titles, shares the same office or premises etc. points in the direction of the existence of close corporate ties.⁸⁸

To sum up, the requirements for the application of this method is that the non-signatory company *belongs to the same group of companies* as one of the signatories to the arbitration agreement. Furthermore, the non-signatory company has to *take active part* in the negotiation,

⁸⁶ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 11

⁸⁷ Andrew Tweeddale Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (1st edn, Oxford University Press 2005) 161

⁸⁸ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 155

performance, or termination of the contract containing the arbitration clause. By fulfilling these requirements the idea is that it shows the *common intentions of the parties* to be bound by the arbitration agreement.⁸⁹ This common intention is a question of if the other signatory (not part of the group of companies) believed that the non-signatory was in fact a party to the contract, even though it hadn't signed it.⁹⁰

This method of binding non-signatories is, as of today, the method that is the basis for far most controversy throughout the world. Some scholars have even held the method to be non-existing.⁹¹ The reason for this controversy is, according to scholars, that it is clear that this doctrine is used by the courts or arbitral tribunals to be able to extend the arbitration agreement outside of the actual signatories to the contract.⁹² The method is also controversial in regard to one dominant principle of contract law, which states that an agreement signed by one company within a group of companies, only is binding upon that company. If a company within a group of companies is not acting within the scope of traditional contract law principles (i.e. through an agreement about agency or representation) to bind other companies in the same corporate group, the parent or siblings to that company will never be bound by that contract. The same contract principle should apply to arbitration agreements.⁹³ As the method of group of companies doctrine is intended to bind non-signatories without these agency or representation being present, it has led to big controversy.

4.2 The Group of Companies Doctrine in Practice

4.2.1 The Requirements of the Group of Companies Doctrine Explained

The three requirements seen above will now be explained, but first an introduction of how the doctrine came into existence.

When discussing the method's application in practice, a statement from 1987 and the Paris Court of Appeals states the main point regarding the non-signatory issue: "The law of arbitration, based on the consensual nature of the arbitration clause, does not allow to extend

⁸⁹ ICC case no 4131 of 1982, *Dow Chemical France et al v Isover Saint Gobain* (1984) 9 YBCA 131

⁹⁰ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 162

⁹¹ Andrew Tweeddale, Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (1st edn, Oxford University Press 2005) 162

⁹² Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 149

⁹³ ICC Case no 11405 of 2001 (unpublished)

to third parties, foreign to the contract [...]”⁹⁴ What then followed is with regard to that statement quite peculiar.

It all began with the case of *Dow Chemical v Isover Saint Gobain*⁹⁵ where the company Isover Saint Gobain (Isover) had entered into different contracts with various siblings of the Dow Group. A dispute arose and Isover brought up several claims relating to faults in the products Isover were to distribute. The Dow Chemical Group wanted to invoke arbitration to settle the dispute, this with reference to an arbitration clause in a distribution agreement signed by Isover and one of the siblings in the Dow Group. It is for the following discussion important to note that the contract that contained the arbitration clause made specific reference to other companies of the Dow Group in that way that it stated that any of those companies could deliver goods to Isover. The question for the tribunal in the case was if they had jurisdiction over all of the companies concerned or not.

For the tribunal to tackle this question they first stated that despite the fact that the subsidiary companies had not signed the relevant contract or arbitration agreement, nor worked for the contracts fulfillment, the entire group should be seen as a whole as it was a part of the same economic reality⁹⁶. They also established that the Dow Chemical Company, the parent of the group, had absolute control over the subsidiary companies and the tribunal therefore held that it had jurisdiction to hear all four Dow-companies claims based on the arbitration clause only signed by one of the siblings.⁹⁷

The reasons for binding the non-signatory siblings were several. The court stated:

Considering that it is indisputable – and in fact not disputed – that Dow Chemical Company has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like Dow Chemical France [one of the subsidiary companies], effectively and individually participated in their conclusion, their performance, and their termination” [...] and] “irrespective of

⁹⁴ *O.I.A.E.T.I. v SOFIDIF et O.E.A.I. S.E.R.U., EURODIF et C.E.A* 1987 rev arb 359 (Paris Cour d’appel, judgement of 19 December 1986)

⁹⁵ ICC case no 4131 of 1982, *Dow Chemical France et al v Isover Saint Gobain* (1984) 9 YBCA 131

⁹⁶ 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* 469, 483

⁹⁷ Andrew Tweeddale, Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (1st edn, Oxford University Press 2005) 161

the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality of which the arbitral tribunal should take account when it rules on its own jurisdiction [...]”⁹⁸

The tribunal by that determined that it had jurisdiction over all of the companies in the Dow Group and it based its decision on the fact that the parent exercised absolute control over the subsidiaries and had been involved in all the contracts concerned. Even though the companies were separate from each other on paper, the tribunal held that in practice so was not the case and resumed jurisdiction over all companies.

Relating this decision to the requirement of finding the *common intention of the parties*, binding all the companies of the Dow Group would be acceptable if Isover was not clear in regard to which of the companies it had dealt with at different points in time. If the same people within the Dow Group would have acted in accordance with the contracts and it was uncertain what company those people represented, it would somewhat justify that implied consent was at hand. This for the reason that if Isover were to accept the delivery of goods from all of the subsidiaries at different times, it would show that all companies were aware of the distribution agreement containing the arbitration clause. As all subsidiaries performed in accordance with the distribution contract, implied consent through this conduct could be present and show the common intentions of the parties to become bound by the distribution agreement. In this award however, there was no explicit reference to these continued deliveries as basis for implied consent or justification for the same. A fact that one could argue is a deficiency in regard to the requirement of consent.

The tribunal additionally expanded their reasoning further and may have went way beyond the scope of arbitration when they stated, “it is neither sensible nor practical to exclude [from the arbitral jurisdiction] the claims of companies who have an interest in the venture and who are members of the same corporate family”⁹⁹. This is of course true but is not in line with the basis of arbitration. It would instead point towards a jurisdictional approach on jurisdiction when the dispute is the center of attention, not the consent from the parties to be bound by the arbitration agreement. A jurisdictional approach might be the more practical and efficient

⁹⁸ ICC case no 4131 of 1982, *Dow Chemical France et al v Isover Saint Gobain* (1984) 9 YBCA 131, 136

⁹⁹ Partial final award no 1510, YCA 1982, *Society of Maritime Arbitrators Inc.* (1980) 151

mean to deal with these types of questions, however no justification to do so is found in the regulations of international commercial arbitration.

The also required *close relationship* between the companies was discussed in the case of *Astra Oil Co Inc. v Rover Navigation Ltd*¹⁰⁰. Here, the question was if Astra Oil Co Inc. (Astra), the non-signatory to a charter party containing an arbitration clause, could invoke arbitration against one of the signatories, Rover Navigation Ltd (Rover). The charter party was originally signed by Astra's subsidiary, Astra Oil Trading NV (AOT) and Rover but as Astra and AOT both had acted throughout the entire performance of the contract as being parties to the contract and with regard to the close ties between Astra and AOT, Astra could invoke arbitration. Even though AOT formally had signed it, Astra was both the owner of AOT and the holder of the bill of lading.¹⁰¹ Rover had also treated Astra as if it were a signatory to the charter party by accepting instructions from Astra during the trip. This, the court stated, was enough to find the common intention by all of the parties to become bound by the arbitration agreement within the charter party.

With regard to the other requirement, that the non-signatory need to take *active part* in the contract, the ICC award no 6519¹⁰² is a good example. Here, Mr. X and Company Y entered into a contract containing an arbitration clause with the purpose that Mr. X and Company Y were to transfer their shares in different companies to Company XB. Mr. X then transferred his shares of the companies XC and XD but when doing so, Company Y withdrew from the contract. Mr. X, together with company XB, XC and XD then tried to invoke arbitration against Company Y and claimed damages for breach of contract. The question for the tribune was by that if all four entities (Group X) could proceed with arbitration stemming from the contract between Mr. X and Company Y and it was stated:

As things stand, the arbitration clause can only be applied to the companies of group [X] which did effectively take part in the negotiations which led to the signature of the Protocol or which are directly concerned by it, to the exclusion of those which were nothing but instruments of a financial transaction between the hands of a majority shareholder.

¹⁰⁰ *Astra Oil Co Inc. v Rover Navigation Ltd* 344 F 3d 276 (2nd Cir 2003)

¹⁰¹ *Ibid*

¹⁰² Award in ICC Case No 6519, 1991 in *Journal du Droit International* 1065

It was decided that only Mr. X and Company XB within the group were so related to the contract that they could invoke arbitration. The case by that clarified that only those companies taking active part in the negotiation, conclusion or termination of the contract containing the arbitration agreement or that are directly concerned by it, can by reference to conduct become parties to the agreement and invoke arbitration. Those companies of the group that did not take this active part in the contract, i.e. Companies XC & XD, which were only being transferred to Company XB, could not proceed with arbitration.

This section has in short explained the three initial requirements for applying the method of group of companies in international arbitration and so far, the requirement of the companies taking active part in the contract concerned is being upheld. The application of this requirement will however change.

4.2.2 The Continued Development of the Group of Companies Doctrine

For a different take on the subject of the group of companies doctrine, the *ICC Case No 5103*¹⁰³ is an interesting example. The tribunal here stated, “the security of international commercial relations requires that account should be taken of its economic reality and that all the companies of the group should be held liable one for all and all for one for the debts of which they either directly or indirectly have profited at this occasion”¹⁰⁴. This reasoning clearly departs from the previously stated rule of finding the common intention of the parties, a rule that is considered as being “the flagship and fundamental prerequisite of the group of companies doctrine”.¹⁰⁵

This reasoning would also defeat the purpose of having separate companies in a corporate group. As stated in the American case of *Sarhank Group v Oracle Corporation*¹⁰⁶ it holds to the importance of having separate companies in corporate groups:

To hold otherwise would defeat the ordinary and customary principles of experienced businesspersons. The principal reason corporations form wholly

¹⁰³ Award in ICC Case No 5103 (1988) in ICC Collection of Arbitral Awards 1986-1990 (Kluwer 1997)

¹⁰⁴ Ibid 1206

¹⁰⁵ Franco Ferrari, Stefan Kröll, *Conflict of Laws in International Commercial Arbitration* (Sellier European Law Publishers GmbH, 2011) 156

¹⁰⁶ *Sarhank Group v Oracle Corporation* 404 F 3d 657 (2d Cir 2005)

owned foreign subsidiaries are to insulate themselves from liability for the torts and contracts of the subsidiary and from the jurisdiction of foreign courts. The practice for dealing through a subsidiary is entirely appropriate and essential to our nation's conduct of foreign trade.¹⁰⁷

As indicated, it is the normal conduct in today's business world to separate legal entities within the same group from each other. They should not easily be held to each other's contracts or obligations. Not even the parent to its subsidiaries'. The method of group of companies is therefore in many jurisdictions, due to this fact, foreign to the views on company law.

Furthermore, in *Korsnas Marma v Durand Auzias*¹⁰⁸, the court expanded the view once more. It first concluded, in congruence with the ICC award no 6519¹⁰⁹, that an arbitration clause contained in an international contract has its own validity and effectiveness, which require its extension to all parties directly involved in the performance of the contract. It additionally held that once it has been established that the parties' situations and activities allow the court to presume that the companies were aware of the existence and the scope of the arbitration clause, they could use the arbitration agreement to invoke arbitration even if they were not signatories of the contract containing it.¹¹⁰

If all parties concerned by a dispute could become parties to the same arbitration proceeding, it would be an efficient mean to solve international disputes. Even so, it is not based in the current requirements of arbitration, i.e. consent. If awareness of an arbitration clause were enough to bind a non-signatory performing in accordance with the main contract to the arbitration agreement, it would seem to be presumed that the party also accepts the clause. The signature of, and consent to, the actual arbitration agreement would by that loose its importance. This might be a positive result. However, it would not be in line with the current rules of arbitration.

¹⁰⁷ Ibid

¹⁰⁸ *Société Korsnas Marma v Société Durand Auzias* rev arb 1981 (Paris Court of Appeal, judgment of 30 November 1988)

¹⁰⁹ Award in ICC Case No 6519, 1991 in *Journal du Droit International* 1065

¹¹⁰ *Société Korsnas Marma v Société Durand Auzias* rev arb 1981 (Paris Court of Appeal, judgment of 30 November 1988) 691

The discussion in *Korsnas* was later adopted and used in the case of *ABS v Amkor*¹¹¹. The dispute concerned a contract containing an arbitration agreement between Alcatel Micro Electronics (AME) and Amkor Technology, the first a Belgian company and the latter an American. AME sold goods purchased from Amkor to the French company of Alcatel Business Systems (ABS). When problems with the goods arose, AME and ABS sued Amkor and its subsidiaries but Amkor wanted the court to refer the case to arbitration. AME and ABS once belonged to the same corporate group but had since long before the arising of the dispute at hand, been two entirely separate companies. Even so, the court held that both AME and ABS were parties to the contract as they both had acted in accordance with it. The court held that “the effect of an international arbitration clause extends to parties that are directly involved in the performance of the contract and the disputes that may arise out of it”¹¹².

The cases of *Korsnas* and *ABS*, one could argue, might have led to an entire new approach to the group of companies doctrine. In the case of *ABS* it was no longer companies within a corporate group that were bound to the agreement, but instead two separate companies working together as business partners of which only one had signed the arbitration agreement. The group of companies in the group of companies doctrine would by that no longer be a requirement for the application of the doctrine.

This new view on arbitration clauses was also seen in the case of *Compagnie Tunisienne de Navigation Cotunav v Comptoir Commercial André*¹¹³, where two organizations from the Tunisian and French governments signed an agreement containing an arbitration clause. A third company, Cotunav, was to deliver food as the carrier for the French government. The court however held the Cotunav bound to the entire agreement, solely on the fact that they took active part in the performance of the contract. Cotunav had taken no part in rest of the main contract, besides from the performance, and was neither affiliated with the French government. Even considering that, Cotunav were bound by the arbitration clause. The reasoning were that “by accepting to intervene in the performance of the contract as carrier appointed by one of the parties in the framework of the contract, Cotunav necessarily

¹¹¹ *Alcatel Business Systems, Alcatel Micro Electronics and AGF v Amkor Technology* 2007 11 JCP I (Cour de Cassation, judgment of 27 March 2007)

¹¹² Ibid

¹¹³ *Compagnie Tunisienne de Navigation Cotunav v Comptoir Commercial André* rev arb 1990 (Paris Court of Appeal, judgment of 28 November 1989)

assumed the obligations defined by the contract [...] and accepted its modalities, including the arbitration agreement”¹¹⁴.

In the doctrine, it has been held that the *Cotunav* case has “led to an enlargement of the previous case law, since it recognized such tacit acceptance outside of a group of companies. Tacit acceptance that results solely from the performance of a contract concluded by other parties.”¹¹⁵. This would, as previously indicated, mean that the group of companies has expanded to a method that deems it enough that a third party performs in accordance with a contract to become bound by the same. The mere knowledge of an arbitration agreement could as a result be enough to interpret implied consent from the third party.¹¹⁶ One could question this result and the implications it brings. Even if this way of solving the non-signatory problem could be seen as the most efficient one, the basis of arbitration makes such an application impossible.

To further note is that the last case of *Cotunav* could suggest that even if the awareness of the arbitration clause is not at hand, third parties could anyways be bound to arbitration agreements. The company in the case was bound to the agreement by merely taking part in the performance of the contract. Nothing was stated as to the fact if the company has been aware of the arbitration clause. This could not be held for sure but if that would be the case, it would extend the scope of the arbitration agreement way beyond what was initially intended. Future cases on the area will by that be interesting.

4.3 Different Approaches on the Group of Companies Doctrine

As several countries of today have criticized the doctrine, it is for this thesis interesting why they have done so.

Switzerland for example has in large refused to invoke arbitration based on the group of companies doctrine. This, with the reasoning that the “extension of an arbitration agreement to a party which does not appear therein can be envisaged only if it can be established (by any means) that such a party was validly represented by one of the other parties – which does not result solely from membership in a group of companies – or if there was subsequent

¹¹⁴ Ibid 453

¹¹⁵ Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) para 9.43

¹¹⁶ Ibid para 9.43

ratification or, finally, in the attempt to evade arbitration constitutes an abuse of rights allowing a piercing of the corporate veil”¹¹⁷. It would by that seem as if the group of companies doctrine would apply outside of the boundaries of Switzerland’s contract law, due to the reference made in the quote to the importance of either representation, or that the company afterwards explicitly accepted the arbitration clause. It seems to be outside of the boundaries to establish that representation is at hand only with based on the fact that the company is part of a group of companies.

Furthermore, in England, the group of companies is said to be inconsistent with the principle of privity of contract, which states that only the two actual contracting parties to a contract are parties to that contract. As explained above, the contract law of England has deep roots in case law and it seems as if the courts would be reluctant in changing one of the fundamental principles of contract law, i.e. the principle of privity of contract. To take the case of *Peterson Farms v C&M. Farming*¹¹⁸ for example, the view of the group of companies doctrine was made clear as the court stated that it does not form a part of English law. It stated that, “where an arbitration agreement (or the contract of which it is contained) is subject to English law [...] an ICC arbitral tribunal has no jurisdiction to apply the group of companies doctrine”¹¹⁹.

In the U.S. the application of the doctrine has both been accepted and refused. When enforcement was sought in the case of *Sarhank v Oracle*¹²⁰, where the basis for bringing in a non-signatory was the group of companies doctrine, the enforcement was denied. The court held that under American law, the only ways of binding a non-signatory was through veil piercing, estoppel and incorporation by reference. The court also held that in regard to arbitration, the evidence should show an objective intention to arbitrate, which was not seen in the case at hand. It also made direct reference to contract- and agency law as the only sources in which the basis of binding non-signatories can be found,¹²¹ and the group of companies doctrine was not a part of that law.

¹¹⁷ Ibid para 9.46

¹¹⁸ *Peterson Farms v C&M Farming Ltd*, [2003] EWHC 2298

¹¹⁹ William W. Park, ‘Non-Signatories and International Contracts: An Arbitrator’s Dilemma’ in Lawrence W. Neuman and Richard D. Hill (eds), *The Leading Arbitrators’ Guide to International Arbitration* (2nd edn, Juris Net, 2008)

¹²⁰ *Sarhank Group v Oracle Corporation* 404 F 3d 657 (2d Cir 2005)

¹²¹ Ibid

Opposite opinion was however reached in the case of *Map Tankers v Mobil Tankers*¹²². Here, the court reached a conclusion based on an efficiency approach, and in accordance with that stated, “it was not reasonable and practical to prevent a signatory party from including in the arbitration the claims of its group of subsidiaries or partners”¹²³. This decision however does not seem to reflect the current view. The judgment of *Sarhank* is more recent and one could hold that it therefore overrides the decision of *Map Tankers*. However, it is possible that the efficiency reasons stated in *Map Tankers* is more in line with the conduct of international trade of today. It would still seem as uncertainty regarding this matter exists.

4.4 Findings with regard to the Group of Companies Doctrine

As indicated, the evolvement of the group of companies doctrine has moved fast. The doctrine has no longer its base in the three requirements first stated. There is today no need for a parent company to have absolute control over its subsidiaries and, as a consequence, be seen as the actual signatory to the contract. Instead, we have seen a shift towards a usage of the doctrine extending beyond the contract law of several jurisdictions of today when it now is enough that a third party performs in accordance with a contract to become bound by not only that, but also by the arbitration agreement. As arbitration is based on consent, this fact is an obvious issue. To bind a third party only on the basis of its role as a carrier, as in the case of *Cotunav*, is not in line with the fundamental principles of arbitration nor most contract laws throughout the world. The intention to arbitrate is not present, which is a major problem.

This raises questions not only in regard to the fact that consent, the cornerstone of arbitration, might no longer present but also towards the separability principle, which states that the arbitration agreement is an entire separate contract which can be upheld even if the main agreement is deemed void. Furthermore, questions as to the possibilities of the enforcement of an award based on this doctrine arise. These questions will be further developed and discussed below.

¹²² *Map Tankers v Mobil Tankers* YCA 1982

¹²³ *Ibid* 151

5 Enforcement Issues

As indicated in chapters 3 and 4, inconsistencies between different countries use, and level of acceptance, of arbitral estoppel and group of companies doctrine can be seen. When such inconsistencies appear, it affects the parties to the dispute. On one hand, if a party wants to invoke arbitration against a non-signatory through either arbitral estoppel or group of companies doctrine, it can of course only be done when applying those laws that accept the methods. For example, to be relatively sure that a parent company, not signatory to the arbitration agreement, still can take part in the arbitration proceedings, French law in this case needs to be the applicable one. The applicable law is, as explained in para 2.2 of this thesis, determined either by the parties expressed choice of law, or otherwise by the law applicable to the substantive terms of the main agreement.¹²⁴ It is therefore important as a party to a dispute to know which law that will apply to the non-signatory problem. This problem will not be discussed further, however it should be noted that when having these vast differences in the applicability of the methods, problems with the predictability of arbitration arises.

On the other hand, and more interesting to this thesis, problems can arise when the law used to finalize an award is not coherent with the law of the jurisdiction of enforcement. If for example the intertwined version of estoppel has been used to bind a non-signatory to an arbitration agreement and an award in the case has been finalized, problems when one of the parties wants to enforce this award in another jurisdiction can arise. If this country of enforcement does not accept the method of intertwined estoppel, it is possible that the enforcement of the award is refused. This of course causes serious problems for the party wanting to enforce the award as the losing party might have all its assets in the country of enforcement. It is by that almost impossible to actually obtain a result from the award, making the arbitration proceeding meaningless and expensive.

Article V(2) of the New York Convention deals with the issue of enforcement. It states:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

¹²⁴ James P Gaffney, 'The Group of Companies Doctrine and the Law Applicable to the Arbitration Agreement' (2004) 19(6) Mealey's International Arbitration Report, 6

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country.

It is with reference to this article that enforcement can be refused if the country of enforcement does not find the applied method as being part of their national law.

One of the leading cases on this area is the case of *Dallah v Pakistan*¹²⁵, where the English court refused to enforce a French award. The background of the case was Dallah's arrangement with the Pakistan government that stated that Dallah was to purchase land in Mecca to build houses for pilgrims from Pakistan. The government in turn established a trust, which entered into an agreement with Dallah. The agreement contained an arbitration clause and when a dispute arose concerning this contract, Dallah initiated arbitration proceedings against the Pakistan government. The government however held that it was not party to the arbitration agreement, as it at no time had signed it. Even so, the arbitral tribunal held that international general principles and usages reflect a fundamental requirement in international trade for justice and fairness and with regard to that fact arbitration could be invoked. The fact that the Pakistan government were involved in the negotiation of the contract led to the presumption that common intention of the parties existed, and the government was deemed a party to the agreement.¹²⁶

When the award was to be enforced in England however, the English court refused. The basis for refusing was that the doctrine applied in France formed no part of English law. The government of Pakistan was, according to the English court, not a party to the arbitration agreement in the first place and the award could not be enforced. The English court put emphasis on the fact that the government could not be seen as a signatory to the arbitration agreement on the mere fact that it had created the trust, which in turn entered into the agreement. The creation of the trust was instead seen as a way of distancing itself from the agreement and it was therefore not the common intention of the parties that all three entities (including the government) were parties to the agreement.

¹²⁵ *Dallah v Pakistan* [2008] EWHC 1901 (Comm); [2009] 1 All ER (Comm) 505

¹²⁶ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 193

Another example is the American case of *Sarhank*¹²⁷, where a problem again arose regarding the enforcement of an award. The court here with reference to Article V(2) held that it was not required to enforce an agreement if its subject matter was not capable of arbitration in the U.S. It, as previously stated, held that the basis of joining the non-signatory i.e. the group of companies doctrine, was not part of American law. It held that an agreement to arbitrate had to be made voluntarily, something that was not proved in the case. As the arbitration agreement was signed by Oracle Systems and Sarhank, and not by Oracle (or even with reference to Oracle), the agreement could not prove a clear and unmistakable intent by Oracle to arbitrate and the enforcement of the same was refused. The court held that with reference to Article V(2) it was not bound by the Egyptian court's decision in regard to the arbitrability of the dispute. As the decision did not form a part of American contract law and implied- or common consent could not be established in regard to the non-signatory, Oracle, the American court were entitled to question that decision and by that refuse enforcement of the award.

From these decisions it is clear that there exists uncertainty and unpredictability in international commercial arbitration today. When France on one hand has an open-minded view on joining non-signatories, several other jurisdictions on the other, do not.¹²⁸ Problems relating to these differences arise when the dispute is international and needs to be enforced in another country than from which it was resolved. It therefore seems unwise to rely on the methods above for presuming consent, especially with regard to the group of companies doctrine. As the effects of the following enforcement is hard to predict, caution needs to be taken when basing an argument on any of these methods to bind a non-signatory.

¹²⁷ *Sarhank Group v Oracle Corporation* 404 F 3d 657 (2d Cir 2005)

¹²⁸ Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) para 9.30

6 Consent

As the methods of arbitral estoppel and group of companies doctrine now has been explained, analyzed, and exemplified, the main question regarding these methods is the one concerning consent. As the methods are formed in such a way to presume implied- or common consent of the parties, this thesis will now discuss the matter of consent in relation to the two methods. It will also analyze consent in regard to the separability principle and the ‘in writing’ requirement, previously explained in para 2.3.1 and 2.4 of this thesis. The discussion will concern both common and civil law as the previous cases are derived from both these areas.

Consent has been the basis of contract law since forever.¹²⁹ The ability to enter into contracts only effective to the parties that has consented to it, makes for security and predictability. As one can rely on a contract he has consented to, it strengthens the autonomy of the individual and the freedom of contract. One is free to agree or to not agree, making for a safe contract environment. If consent was not a factor in contract law, this freedom and individual autonomy would not mean much at all.¹³⁰

In its most basic form, consent should be made explicitly. It should be clear from the wordings of the contract what the parties intentions, when entering into the contract, were. However, this is not likely to be the case, not everything can be put into words. As consent is not always found in its basic form, the more interesting discussion will be about implied consent. It can be found in most legal systems around the world and is accepted in various degrees by conduct, non-explicit declarations, or the formal execution of an agreement. This basic way of interpreting a contract is also applicable to arbitration agreements. The question in regard to implied consent and binding non-signatories should be: Did the parties intend to also bind the non-signatory to the contract?¹³¹

Allowing third parties to arbitrate is however good for commercial, procedural, and equity reasons. It is efficient as the tribunal can decide over several parties in the same dispute and it is both cost and time efficient. Holding too strongly to the requirement of consent has been

¹²⁹ Franklin Miller, Alan Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2009) 40

¹³⁰ Chunlin Leonhard, ‘The Unbearable Lightness of Consent in Contract Law’ (2012) 63 Case Western Reserve Law Review 57

¹³¹ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 1150 ff

held to lead to multiple theoretical and practical problems and inconsistencies.¹³² It is possible that entities important to a dispute, if an ease of the consent requirement is not made, would be left outside the dispute due to inconsistent evidence of consent.¹³³ It has further been held that the requirement of consent may perhaps no longer be in line with the commercial reality of today. It might have outgrown the current contractual doctrine, where efficiency is key.¹³⁴

An analysis of implied consent will follow in regard to arbitral estoppel and the group of companies doctrine. The purpose is to analyze where the state of consent is at today and how well the two methods are in line with that state.

6.1 Contract Interpretation

The only way a court can bind a non-signatory to an arbitration agreement is by interpreting who is party to the agreement within the scope of contract law.¹³⁵ Important to note is that there is no specific rule that allow courts or arbitral tribunals to extend arbitration agreements outside of what has been agreed. The ordinary principles for contract interpretation, as used for any other contract, should be applied. A lesser degree of consent than is required for regular contracts is therefore not acceptable.¹³⁶ This interpretation should always have the result that third parties *in stricto sensu* should be excluded from the arbitration proceedings.¹³⁷

With regard to interpretation, the basis in all countries is finding the parties true intentions when entering into the relevant contract.¹³⁸ Differences in the way this is applied is however seen worldwide. In England for example, the view is an *objective* one as they only take into account the appearance of the contract.¹³⁹ What this means is that the actual intentions or thoughts of the parties, i.e. *subjectivism*, are not taken into consideration. It is only the parties' intentions, as expressed in the contract as a whole and in the contracts objective context, that

¹³² Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 178

¹³³ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* <<http://blogs.law.nyu.edu/transnational/2011/07/third-parties-in-international-commercial-arbitration/>> accessed 25 November 2013

¹³⁴ *Ibid*

¹³⁵ Alexandra A Hui, 'Equitable Estoppel and the Compulsion of Arbitration' (2007) 60 *Vanderbilt Law Review* 711, 713

¹³⁶ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 187

¹³⁷ *Ibid* 179

¹³⁸ Michael H Whincup, *Contract Law and Practice: the English System and Continental Comparisons* (4th edn, Kluwer Law International 2001) 16

¹³⁹ *Ibid* 16

are considered. That is, what the clause reasonably would mean to a person with all the background information the day the contract was signed and what can be found in regard to the feelings coming out from the contract.¹⁴⁰

With that said, England takes a classical position also when interpreting arbitration agreements. The parties need to have undertaken positive acts that clearly establish the non-signatories' intent to be bound by the agreement. The original parties also have to accept, or it has to be clear by the circumstances that they accept, the third party being joined to the arbitration agreement.¹⁴¹

The English courts rarely take into account the pre-contractual discussions or agreements, for example the negotiation documents or letters of intent, when interpreting contracts.¹⁴² It is important in English law to distinguish the contract from the negotiations, which is not a legal promise and should therefore not be taken into consideration.¹⁴³ Interpretation with regard to these pre-documents only applies in exceptional cases.¹⁴⁴

In the U.S. however, it is not only the *objective* intentions that can be taken into account when interpreting a contract, even *subjective* ones are important. Such *subjective* intentions are, even though not expressed in the contract, for example the actual or mental intentions of the parties at the time of contract. This with one restriction though, which is the non-acceptance of parole evidence. A rule also seen in England that restricts extrinsic evidence that contradicts the written contract from being taken into account. What this means is if the pre-documents would contradict a term in the contract, the pre-document cannot be used as evidence. The rationale for this is that if this document was such an important part in regard to interpreting and understanding the contract, it should have been included in the contract in the first place. As the parties have agreed to leave it out, it cannot be used.¹⁴⁵

¹⁴⁰ Steven J Burton, *Elements of Contract Interpretation* (1st edn, Oxford University Press 2008) 2

¹⁴¹ Pierre Mayer, 'The Extension of the Arbitration Clause to Non-Signatories: The Irreconcilable Position of French and English Courts' (2012) 27 *American University International Law Review* 831, 832

¹⁴² John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (1st edn, Hart Publishing 2007) 66

¹⁴³ Michael H Whincup, *Contract Law and Practice: the English System and Continental Comparisons* (4th edn, Kluwer Law International 2001) 17

¹⁴⁴ John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (1st edn, Hart Publishing 2007) 25-27

¹⁴⁵ *Ibid* 58

In common law countries, and in England especially, certain goals sometimes weigh more heavily than contractual freedom. One example is the importance of fostering the security of transactions, which means to hold parties to their manifested intentions when it is fair to do so. It is also important that the parties can rely on a contract, clear as to the rights, duties, and powers resulting from the terms in it.¹⁴⁶

In civil law countries the dominant principle is, as in the U.S., the *subjective* one. Relating this to the drafting of legislation, the reasoning behind, and pre-documents drafted before, the legislation are sources that can be used as interpretation.¹⁴⁷ This view is also taken in regard to contract interpretation, as the goal is to find the parties true intentions when entering into the contract. When doing so, all documentation both before and after the conclusion of the contract can be used to achieve this goal. Not only the parties' words are examined, but also the circumstances at hand, for example the conduct of the parties.¹⁴⁸

In reference to arbitration, France for example overlooks the in para 2.4 explained principle of separability as they not only interpret the arbitration agreement to find implied consent, but also looks at the entire contract it is a part of. This, showing a difference in regard to the U.S., where the arbitration agreement in itself is the place to look for implied consent. However, an overlook to the entire contract can, in exceptional cases, be made.¹⁴⁹

This would point to the conclusion that the U.S. has placed itself somewhere between the English approach to contract interpretation and the one of the civil law countries. The U.S. still has one leg standing firmly in the English system, as the non-acceptance of parole evidence indicates the importance of contract, but also has one leg in the civil law system as it focuses more on the *subjective* intentions of the parties.

¹⁴⁶ Steven J Burton, *Elements of Contract Interpretation* (1st edn, Oxford University Press 2008) 7

¹⁴⁷ John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (1st edn, Hart Publishing 2007) 25

¹⁴⁸ Andrea M Steingruber, 'Notion, Nature and Extent of Consent in International Arbitration' (DPhil thesis, Queen Mary University of London 2009) 47 ff

¹⁴⁹ James M Hosking, 'Non-Signatories and International Arbitration in the United States: the Quest for Consent' (2004) 20 *Arbitration International* 289, 302

6.2 Implied Consent with regard to Arbitral Estoppel and Group of Companies Doctrine

6.2.1 Arbitral Estoppel and Implied Consent

When first comes to the equitable estoppel, the basis for binding a non-signatory to a contract is, as previously stated, that the non-signatory gets such benefits from the contract that it would be highly unfair if the burdens of the contract could not effect him. If it is clear from the circumstances that the non-signatory from the beginning acted in accordance with the contract and benefitted from the same¹⁵⁰, and then sued a party to the contract with basis in that contract, it seems obvious that the signatory instead could invoke arbitration against him. As the non-signatory has acted in accordance with, and sued with basis in, that contract it would suggest that the non-signatory has impliedly consented to the same, even though he formally had not signed it. The crucial point in finding the non-signatory bound is the fact that he is using the contract as the basis for suing the other party. As the contract has an arbitration agreement contained in it, the signatory should instead be able to use this to invoke arbitration. If the non-signatory has relied on the rest of the contract, that clause cannot be avoided. Objective intention with regard to the contract would by that be at hand.¹⁵¹ As the method of equitable estoppel also forms part of U.S. law, the requirement that the signatories is bound to the arbitration agreements with basis in contract law would seem to be upheld.

It has been held in regard to the intertwined method of estoppel that the importance of consent has “been practically diminished, and even on some occasions overlooked”¹⁵². The focus should always be on finding consent to arbitrate from the parties, something that not always seem to be the focus of attention when the method is being applied. It has also been held that a more rigorous legal analysis by using traditional principles of contract- and agency law needs to be undertaken in these cases.¹⁵³ There has to be focus on finding consent within the scope of contract law. Often both of the requirements for applying intertwined estoppel, i.e. the *intertwinement* of the dispute with the contract and the *contractual or corporate link* between the non-signatory and the signatory, has not been fulfilled. It today seems to be enough that the signatory and non-signatory are closely related to find implied consent from

¹⁵⁰ *International Paper v Schwabedissen Maschinen & Anlagen GmbH* 206 F 3d 411, 418 (4th Cir 2000)

¹⁵¹ Alexandra A Hui, 'Equitable Estoppel and the Compulsion of Arbitration' (2007) 60 *Vanderbilt Law Review* 711, 727

¹⁵² Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) para 9.60

¹⁵³ *Ibid* para 9.57

the parties.¹⁵⁴ As seen in chapter 3, it is sometimes even enough that the companies merely work on the same construction site.

To exemplify these opinions, in the case of *Choctaw*¹⁵⁵, the intertwined method of estoppel was used. The background of the dispute was a construction contract between Choctaw and the company Bechtel. In regard to this contract, a surety bond was issued by the American Home Assurance Company (AHA, the non-signatory) to secure the performance of the construction contract. An arbitration agreement was incorporated in the construction contract but non were to be found in the surety bond. A dispute arose between Choctaw and Bechtel and arbitration proceedings commenced. Due to this fact, AHA wanted to join the arbitration proceedings. The court held that such participation by the non-signatory was possible by reference to the method of intertwined estoppel. The reason was that “the Bond could hardly be more closely bound to the dispute now in arbitration between Choctaw and Bechtel under the construction contract”¹⁵⁶. The deciding factor was the interrelatedness between the parties and their contracts.¹⁵⁷ It seems as if no focus was on the question of consent, it was quietly presumed.

With this example in mind, it seems as the discussion of binding a non-signatory is no longer a discussion about consent. It seems that as long as the courts can find the requirements for the estoppel method present, that alone is enough to bind non-signatories to arbitration agreements. It seems that the method is now so widely recognized that the need for discussing consent with basis in contract law is not necessary. The method of intertwined estoppel, if applicable, presumes that consent is at hand without further analysis. That kind of presumption of consent might lead to an unacceptable compromise of the requirement of consent.¹⁵⁸

It has additionally been held that these types of judgments seen in the *Choctaw* case rely more on the consideration of equity and efficiency, than on actually analyzing the contract with

¹⁵⁴ Ibid para 9.56

¹⁵⁵ *Choctaw Generation Limited Partnership v American Home Assurance Company* 271 F 3d 403 (2nd Cir 2001)

¹⁵⁶ Ibid para 15

¹⁵⁷ See for example *Choctaw Generation Limited Partnership v American Home Assurance Company* 271 F 3d 403 (2nd Cir 2001) para 33

¹⁵⁸ ICC Case no 7453 of 1994 in YBCA 107 (1997)

regard to contract law. The arguments of equity and efficiency however do not support the extension of arbitration agreements, as they do not have their basis in consent.¹⁵⁹

If this would be the case, that the mere applicability of the intertwined method of estoppel is enough to bind non-signatories, it would mean that the non-signatory by that is estopped from denying the existence of an arbitration clause. An interesting view brought up relating to that fact is that the non-signatory cannot be estopped from denying the existence of an arbitration clause, because he never signed a contract where such a clause existed.¹⁶⁰

6.2.2 Group of Companies Doctrine and Implied Consent

As regarding the group of companies doctrine, the important requirement for the application of the method was from the beginning that the non-signatories of the group of companies had absolute control over its subsidiaries and took active part in the negotiation, performance, or termination of the contract containing the arbitration clause. The courts would then discuss this issue by referring to the common intention of all the companies.¹⁶¹ If all companies were to have worked together in accordance with a contract, and at the same time it was not clear which company a certain party had dealt with at different times, implied consent through conduct could be confirmed. It was also important that the parent company had such influence over its subsidiary that the parent in fact should be viewed as the right party to the contract. This, as it had been the party most dedicated to the contracts creation and the subsidiary only was the signatory on paper. This was, as previously stated, the initial view and justification for the group of companies doctrine.

The acceptance is by that a tacit one and results either from the conduct when the contract was being negotiated, or from the acts following, for example the supervision of operations or by the parent company taking an active role in the performance in accordance with the contract.¹⁶² It has now been held that, at least in France, reference to this type of tacit acceptance is no longer made. Instead it is presumed that the non-signatory wants to be bound by the entire agreement when he, by conduct, is acting in accordance with the contract.¹⁶³

¹⁵⁹ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 1206

¹⁶⁰ Alexandra A Hui, 'Equitable Estoppel and the Compulsion of Arbitration' (2007) 60 *Vanderbilt Law Review* 711, 727

¹⁶¹ Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) para 9.37

¹⁶² *Ibid* para 9.50

¹⁶³ *Ibid* para 9.51

It can be difficult when it comes to implied consent to draw the line between consent based on conduct, and the mere awareness of a specific fact. The latter, which has been held, should not bind a non-signatory to an arbitration clause.¹⁶⁴ Another opinion raised concerns the fact that even if a smaller involvement in a contract usually does not bind a non-signatory to the arbitration therein, it has happened. However, involvement to a larger extent usually implies consent.¹⁶⁵ Of course, when it is the third party that has invoked arbitration or has failed to object to an arbitration invocation, this conduct is seen as evidence of implied consent.¹⁶⁶ If the third party however is the one against whom the invocation is done, more involvement from this third party would seem to be needed to prove that consent is at hand. The mere awareness of the arbitration clause should not be deemed enough.

In the French case of *Korsnas Marma v Durand-Auzias*¹⁶⁷ for example, the court held that when a non-signatory was involved with the performance of a contract, the mere awareness of the existence of the arbitration clause could make the non-signatory a party to the same. It was presumed that the party also accepted the clause only by its awareness of it. Furthermore, in the case of *ABS & Amkor*¹⁶⁸, the non-signatory was deemed to arbitrate even though no corporate links were found between the companies. The only justification for joining the non-signatory to the dispute was not through consent, which could be indicated by the fact that the parent company actually was the real signatory to the contract, but through the conduct of separate entities acting in accordance with the contract.

This conclusion of the mere awareness of an arbitration clause within another contract, signed by completely different entities, cannot in any way be in line with the requirement of consent. The view taken in *ABS* somewhat changed the view that consent was the basis of arbitration. This as the French court stated that the arbitration agreements had autonomous validity and effectiveness. They stated that if a non-signatory was aware of an arbitration clause, even if it was not part of a group of companies, the mere fact that he acted in accordance with a

¹⁶⁴ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 129

¹⁶⁵ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 1152

¹⁶⁶ ICC Case no 7453 of 1994 YBCA 107 (1997)

¹⁶⁷ *Korsnas Marma v Durand-Auzias* Cour d'Appel Paris 20 November 1988

¹⁶⁸ *Alcatel Business Systems, Alcatel Micro Electronics and AGF v Amkor Technology* 2007 11 JCP I (Cour de Cassation, judgment of 27 March 2007)

contract, it accepted the workings not only of the contract but of the arbitration agreement as well.¹⁶⁹

In regard to the group of companies doctrine one view is that the initial way to find implied consent through companies participation in the negotiation, performance, or termination of the contract only was an indication of the consent to arbitrate, something that has changed. The method has now evolved into a state where the mere knowledge of the arbitration clause constitutes acceptance thereof.¹⁷⁰ The method is of course part of French law, but could not be held to form part of international commercial arbitration as consent is neither discussed in the group of companies cases or in most seems not to exist at all.

It could be held that if the mere awareness is enough to bind a non-signatory, that non-signatory's awareness and acceptance of the agreement should actually be put into the agreement. In some cases, the non-signatory deliberately might not have signed such an agreement even though being aware of its existence. By not signing the contract, it could instead be seen as evidence in the opposite direction, and that the non-signatory might just not have wanted to be a part of the arbitration agreement.

6.2.3 Findings with regard to Consent in Arbitral Estoppel and Group of Companies Doctrine

As indicated above, the initial view that consent only can be established through a group of companies common intention to be bound by the contract has changed. Here, the view taken was that if a group of companies all took part in the negotiations, performance, or termination of the contract, and they all had the intentions to be bound by that contract (or if that couldn't be established, at least that they formed a part of a economic reality and all participated in the contract), all companies in that group was seen as one and implied consent was then presumed. The basis for this was those companies' acts in accordance with that specific contract, and one could argue that to be a legitimate way to stop involved companies, that belong to the same economic system, from avoiding the burdens of a contract to which they have taken substantial part. This way of invoking arbitration against a group of companies so related to the dispute, that it is clear that more than the signatory of that contract intended to be bound by it, is perhaps a necessary way to uphold justice in the system of arbitration.

¹⁶⁹ Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) para 9.40 ff

¹⁷⁰ *Ibid* para 9.51

Current case law instead points to the direction that merely tacit or presumed acceptance should be enough to bind a third party. This would extend the arbitration clause in a much broader sense than seems to have been initially intended. One can never escape the fact that arbitration has its basis in consent. It therefore has to be the goal to find that consent in the party's conduct or acts. The purpose should not be to try to extend the arbitration agreement to other than the signatories with basis in the current dispute at hand, even if effective. The view should be to define the consenting parties to the dispute, not to drag companies with relation to the dispute into it. The current international law behind arbitration does not allow such a view as it can be considered ignorant to the importance of consent, and thereby the predictability of arbitration. It therefore seems that the group of companies doctrine is not consistent with the requirement of consent.

6.3 The 'in writing' Requirement and Implied Consent

It is also important to note how the *in writing* requirement is set in relation to the question of consent. As explained earlier, the *in writing* requirement was from the beginning a requirement of signature. Today however, the requirement is still present but has changed into a view that the agreement preferably should be able to in some way be evidenced in writing.¹⁷¹ In the ICC case no 10758 of 2000¹⁷² for example, the court held that when wanting to show a non-signatory's willingness or consent to arbitrate, it must be proved in writing. This is however only true when the seat of arbitration requires the agreement to be in writing.

If, on the other hand, the applicable law does not require arbitration agreements to be in writing, they can be entered into orally. Today the view on the *in writing* requirement has shifted, and almost all jurisdictions now accept arbitration agreements without basis in writing. The center for discussion in courts and arbitral tribunals regarding this fact is therefore not if the agreement is signed or evidenced in writing, but if the party has actually consented to it or not.¹⁷³

One view on the subject is that a strict holding on the *in writing* requirement is hard to justify in the expanding context of international trade. It is just not effective. It can however be used as evidence. Even if such evidence is not at hand, implied consent can be proven but it has to

¹⁷¹ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 189

¹⁷² ICC case no 10758 of 2000 in ICC Collection of Arbitral Awards 2001-2007 (Kluwer 2009) 537

¹⁷³ Ibid 537

be clear from the circumstances and evidenced in full.¹⁷⁴ It is, for implied consent to be at hand, important that the agreement is interpreted, as previously stated, with regard to well-established principles and techniques for interpretation. It has been held that consent by conduct must be possible, but only if it can be certainly established.¹⁷⁵

Another opinion raised concerning consent by conduct in regard to the *in writing* requirement is that “[...] existing form requirements in the New York Convention and the 1985 UNCITRAL Model Law are unnecessary and instead serve to frustrate commercial parties’ legitimate expectations and rights”.¹⁷⁶ The provisions, at least relating to this quote, seem obsolete.

Also, in regard to the *in writing* requirement, both the New York Convention and the Model Law clearly states that the arbitration agreement is an agreement between *the parties*¹⁷⁷. There is no room in that definition to bind other than the parties. This statement as such is in most cases not addressed. Some courts and tribunals, that thus has considered the problem, has argued that since there is no obligation to actually sign the agreement, third parties can be included. This has however been held not to be an acceptable conclusion.¹⁷⁸ Even if the *in writing* requirement in its wording is obsolete, the principle steaming from the articles is not. It is the parties that should agree to arbitrate. One could therefore argue that the principle steaming of this article does not leave room for joining non-signatories.

It seems that this principle is not taken into consideration by the courts and tribunals even though some have argued that the form requirements only should apply to the arbitration agreement itself, and not to extra-contractual mechanisms through which a third party can become bound to the agreement.¹⁷⁹ Even if this might be in line with the commercial practice of today, it is held not to be in line with the requirements of arbitration. If the articles in the New York Convention or Model Law do not deal with extra contractual mechanisms per se,

¹⁷⁴ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 189

¹⁷⁵ Emmanuel Gaillard, Berthold Goldman, John Savage, *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer 1999) para 477

¹⁷⁶ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 619

¹⁷⁷ Article II of the New York Convention and Article II of the Model Law

¹⁷⁸ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 1210

¹⁷⁹ See for example *I.E. DuPont de Nemours & Co v Rhone Poulenc Fiber & Resin Intermediates* 269 F 3d 187 (3d Cir 2001) and *Judgment of 16 October 2003* ASA Bulletin 364 (Swiss Federal Tribunal 2004)

one could argue that the principles found in the two conventions only concerns parties and signatories, not leaving room for entities that are not true parties to the agreement. It could therefore be said not to be in line with the basis of arbitration to easily bind non-signatories to arbitration agreements.

6.4 The Doctrine of Separability and Implied Consent

As previously briefly mentioned, the separability principle is of uttermost importance regarding consent. Even if a third party acts in accordance with a contract, that ordinarily only means that the party is acting in accordance with the substantive terms of that contract.¹⁸⁰ As the arbitration agreement is to be seen as a different contract, according to the separability principle, the fact that the party is acting in accordance with the main contract should mean just that, that he should be bound to the main contract. As the arbitration clause is separate, he should not be bound to it only on the merits of acting in accordance with an entirely different contract. It should be proven that the party has actually consented to the arbitration agreement in itself. This is however, as has been previously indicated, not the view taken by the courts.

With the basis in the performance of the main contract, the courts have bound third parties to arbitration agreements. It has been held that the actual intention to arbitrate also has to be proven by clear evidence that shows that the party first became aware of the clause and then tacitly agreed to it.¹⁸¹ This view was affirmed by the American case of *Celanese Corporation and Celanese (Nanjing) Chemical Co v The BOC Group Plc*¹⁸². Two parent companies (Celanese AG and BOC Plc) together with their fully owned subsidiaries (Celanese Nanjing and BOC Nanjing) entered into a contract that regarded the construction of a power plant. The arbitration agreement however was only signed by the subsidiary companies. When the Celanese parent and subsidiary sued the BOC Group, BOC instead sought arbitration proceedings. The court however refused due to the fact that it was not certain that consent from the parent companies existed in regard to the arbitration agreement. The reason for this was that even if the parents did know about the arbitration agreement, they for some reason did not sign it. The mere knowledge was by that not enough for binding the non-signatories to

¹⁸⁰ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 182

¹⁸¹ *Hercules Inc v United States* 516 US 417, 424 (1996)

¹⁸² *Celanese Corporation and Celanese (Nanjing) Chemical Co v The BOC Group Plc* USD Court Texas (2006 WL 3513633)

the agreement.¹⁸³ This case demonstrates the point made in this part of the thesis, that consent not only needs to be found in regard to the main contract, but also specifically in regard to the arbitration agreement in itself. For a new party to accept the main contract, or to perform in accordance with it, it is according to this case, and as one could argue also according to the separability principle, not enough to ensure that he has actually consented to the arbitration agreement.

It has further been noted that “it is a party’s implied consent to arbitrate – not to deliver or purchase goods- that is decisive.”¹⁸⁴. As we have two separate contracts, something more than performance in regard to the main contract is by that needed. The implied consent should be found in regard to the arbitration agreement and not in regard to the main one. This way of applying the separability principle is however not consistent, even if desired, around the world.

6.5 Findings with regard to Consent

To start with the equitable estoppel, when used in the sense of binding a non-signatory that has acted in accordance with the contract, and who is trying to sue one of the signatories with that contract as a basis, the use of the method has to be deemed proper. When it comes to this, it has been argued that implied consent usually is a factor when the courts tries to bind a non-signatory “especially when the non-signatory party relies on a direct benefit arising out of the substantive terms of the contract, which contains an arbitration clause as well. Reliance of the non-signatory on the substantive terms of the contract may implicitly suggest consent to the arbitration clause contained therein”¹⁸⁵. It is however a problematic application with regard to the separability doctrine.

When it comes to the intertwined method of estoppel, as can be seen through the presented case law in this thesis, it is now questionable if the requirement of consent is really fulfilled. As the method has developed from an implied version of consent towards one where consent it wordlessly presumed, it is questionable if it is in line with the basis of arbitration. With reference to the previously stated case of *Sunkist*, it has for example been argued that this way of binding the non-signatory only with reference to the nexus between the parties has led

¹⁸³ Ibid 7

¹⁸⁴ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 1152

¹⁸⁵ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 143

commentators to view the decisions as relying on considerations of equity and efficiency as opposed to consent.¹⁸⁶ This is an obvious problem. Even if it is more efficient to join entities on this basis, it is not in line with the basis of arbitration.

It has also been pointed out that in the last couple of years it has become easier in the U.S. to invoke arbitration through the method of estoppel. The courts have “continued to be willing to expand that agreement to extend to others [...] Our decisions may not call the governing principle consent, but that would be as good a name for it as any”¹⁸⁷. It has been held that the courts have expanded the use of estoppel outside the boundaries set forth in contract law and this to the extent that it is invalid under contract law.¹⁸⁸ An explanation of why the requirements of consent should be lower than in regard to other contract is additionally not found in the theory of arbitration.¹⁸⁹

If the courts no longer can find implied consent through the method, it has to be seen as extending beyond contract- and agency law. And that would be the very law which the courts several times has stated as being the foundation and starting point of interpreting contracts and arbitration agreements.

It has been held that “in the intertwined estoppel the importance of consent has been practically diminished, and even on some occasions overlooked. Strictly speaking, the term ‘non-signatory’ is a euphemism here, as the crux of the matter is not the lack of signature but the lack of consent. In some cases, the ‘non-signatory’ parties are actually third parties *stricto sensu*.”¹⁹⁰

In regard to the group of companies doctrine, it is argued that “the crux here is whether the non-signatory has validly agreed with the other signatories to be bound by the arbitration agreement, not whether the scope of an arbitration agreement extends to cover a non-signatory. An arbitration agreement, as is the case with any other contract, cannot bind a third

¹⁸⁶ Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2009) 1206

¹⁸⁷ John M Townsend ‘Non-Signatories in International Arbitration: An American Perspective’ in *International Arbitration 2006: Back to Basics?* ICCA International Arbitration Congress (Kluwer Law International, 2006) 359, 365

¹⁸⁸ Alexandra A Hui, ‘Equitable Estoppel and the Compulsion of Arbitration’ (2007) 60 *Vanderbilt Law Review* 711, 714

¹⁸⁹ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 186

¹⁹⁰ *Ibid* 143

party merely because it exists between two others”¹⁹¹. Furthermore, the validity for the non-signatory to be joined to the arbitration agreement should not be made in reference to the existing signatories. Even if these were found not to be bound by the agreement, the third party should anyways be able to be bound by the contract. This would ensure that consent really was at hand for the non-signatory.

It can further be stated that as the court or tribunal assumes jurisdiction over non-signatory companies, as part of a corporate group within the group of companies theory, they by that interfere with the theories of limited liability and legal independence of companies. One can ponder over why such interference is deemed acceptable in regard to arbitration, but not in regard to ordinary contract law.

The separability principle is here an important factor, even though it unfortunately is not discussed in most cases. As argued, the consent needs to be found in regard to the actual arbitration agreement. It cannot be deemed enough that awareness exists in regard to the main agreement or even to the arbitration agreement, consent in some form needs to be seen and evidenced in regard to the arbitration agreement.

To briefly mention the *in writing* requirement, which today may be referred to more as a principle than a strict formal requirement, it is no longer part of the international commerce that all agreements must be written, however the articles mentioned can in light of the rest of the principles of arbitration, be seen as upholding the principle of party autonomy of the signatories.

It is also held, with regard to all these methods, that presumption of consent may eventually lead to the unjustifiable compromise of the requirement of consent. It is held that:

The principle of *in favorem validitatis* is not applicable to this issue, and therefor there can be no presumption in favor of the existence of the intention to arbitrate as non-signatory theories tend to argue.¹⁹² Eventually, non-signatory theories may unwarrantedly lower the threshold of required consent and

¹⁹¹ Ibid 186

¹⁹² Emmanuel Gaillard, Berthold Goldman, John Savage, *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer 1999) para 480

compromise the very same they originally intended to observe, namely the requirement of consent to arbitrate.¹⁹³

This pinpoints the problem seen in regard to the methods; they are not in line with the basis of arbitration and questions should be raised if they should be allowed to be used. As the fundamental principle of arbitration is consent, and as these methods exceed the scope of consent, it means that it no longer is in line with the basis of arbitration. As the scope of extending the arbitration agreement is not in line with the requirement of contract interpretation within contract- and agency law, the methods might not be acceptable.

¹⁹³ Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, Oxford University Press 2010) 186

7 Conclusion

As indicated in the previous analysis, this thesis concludes several problems concerning the binding of non-signatories in international commercial arbitration. First, the methods of arbitral estoppel and group of companies have expanded and developed considerably in a short period of time, indicating a need of binding non-signatories to arbitration agreements. As the current regulation of international commercial arbitration does not concern itself with the non-signatory issue, it is needed for the courts and tribunals to deal with this outside of the current legislation. If the courts are to do so, it is important that the decision of binding a non-signatory have its basis in contract- or agency law. Otherwise, there is no real justification for using any of the methods. One can question if the intertwined version of estoppel really have its basis in the contract law of the U.S., especially as it has developed only in the area of arbitration, and is not part of U.S. regular contract law.

Furthermore, even if a need exists of binding non-signatories to arbitration agreements the intertwined method of estoppel and the group of companies doctrine seems to have evolved outside of the boundaries first set in regard to the methods. The requirements for the application of the methods have changed considerably and some are no longer being applied. Regard is no longer taken of the first so important limitations of the methods, instead a shift towards the efficiency of the arbitration procedure is seen. It seems more important that the non-signatory can be part of the procedure than that the requirements for the applicable method are discussed and clearly established. One example is that the requirement for the contractual closeness in regard to the intertwined version of estoppel is fulfilled already when two companies work on the same construction site. This is highly questionable.

It can also be noted that the methods from the beginning were invented to easier find consent in cases where uncertainty regarding that fact existed. Today, it seems to be used as a way of presuming consent in all cases where the court or tribune holds the requirements of the methods for fulfilled. This of course leads to one of the main points of this thesis, the importance of consent. The methods might be an efficient, practical and convenient way of bringing together several disputes and parties to one procedure but caution needs to be taken as the basis of arbitration always has been, and is, consent. This thesis concludes that even if the issue of consent was discussed when the methods developed, it is no longer the main question when the courts or tribunes discusses the non-signatory issue. Often when the methods are used, the issue of consent is not even mentioned. It seems that as long as the

requirements for the methods are fulfilled, the question if the non-signatory actually has consented, is not important.

Furthermore, if the non-signatory expresses a reluctance to join the arbitration proceedings, that fact has to be taken into account and be given evidential value. As arbitration restricts the parties' fundamental freedoms to a fair trial, caution when binding non-signatories to the procedure needs to be taken. The only way to waive the right to a fair trial is to agree to arbitrate. It is therefore of uttermost importance that the agreement to arbitrate is clear from the circumstances at hand. The goal should not be to try to extend the arbitration agreements to parties related to the dispute. The goal should instead be to define the parties that actually have consented to arbitrate.

The principles or requirements existing today in regard to arbitration are for example the separability principle and the parties' consent to arbitration. The use of arbitral estoppel and group of companies doctrine makes it possible to take one company's performance in accordance with a main contract as acceptance of the arbitration agreement contained therein. It is questionable if this is in line with the separability principle as it states that the aim is to find consent in regard to the arbitration agreement, not to the main contract. Also the fact that the parties' consent is not expressly discussed when binding a non-signatory is problematic, as it does not ensure that the requirement is in fact fulfilled. As regard is not taken to these issues, this thesis concludes that the principles and requirements for a valid arbitration are not being fulfilled when applying the methods.

The problems arising when countries have different views on what is needed to restrict entities rights to litigate are several. First, the predictability of arbitration when different applications of the methods are seen worldwide cause uncertainty on the global arena, which might lead to a restrictiveness when comes to signing arbitration agreements. If entities does not know with whom they might have to arbitrate, with basis in what laws, or what these laws will conclude, they might be reluctant to sign an arbitration agreement or to perform in accordance with a contract containing one. In the long term this could lead to a decrease of the use of arbitration, something that would be very unfortunate as it is, as initially stated in this thesis, the principal way of settling complicated international disputes.

Second, even if the use of one method is accepted in a country, difficulties arise when the following award is to be enforced abroad. As the disputes are international, one of the main reasons for choosing arbitration instead of court proceedings is that the enforcement of the awards are made simple through the New York Convention. However, if an award based on these controversial methods are to be enforced somewhere else, it is not as simple as intended. As the countries of enforcement can refuse to enforce an award if it is obvious that the basis of the decision is not coherent with the law of the enforcement country, it leads to difficulties. The need for international enforcement still exists as companies often have assets in other countries than that of the dispute. If enforcement is refused, there really was no point in arbitrating to begin with.

As of today, the regulation of international commercial arbitration does not deal with the issue of joining third parties. For an efficient arbitral proceeding there is today clearly a need for the courts and tribunals to be able to bind non-signatories in international disputes. This need has been expressed through case law since the methods of binding non-signatories have developed. As no regulation on the area exists, this thesis concludes a need for international regulation on binding non-signatories. This, for a more efficient and coherent approach, which would serve the needs in international trade. Furthermore the trust in international arbitration has to be maintained and there has to exist predictability. If international regulations on binding non-signatories cannot be agreed, the requirement of consent needs to be loosened in favor of a more jurisdictional approach. The center of the discussion would then not be if the parties have consented or not but which entities that are to be seen as involved in the dispute. It of course does not solve the problem with regard to the predictability of arbitration as it is for the different jurisdictions to decide how to bind third parties. It can however be a way forward as the regulation existing at this point are not in line with the needs of international arbitration of today.

As arbitration is such a recognized and established mean of solving international disputes, the issue of the non-signatories has to be addressed for arbitration to maintain its standing.

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