Non-Signatories and Abuse of Corporate Structure in International Commercial Arbitration

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Summary

I. Introduction

Modern practice of international business requires companies to structure their corporate form into one which would be advantageous and safe for the management, growth and sustainability of business. However, when corporate structuring is used to avoid obligations of the company, the latter may become and abusive tool in international commerce. One could not deny that corporate structuring, such as mergers and acquisitions, reorganization

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or liquidation of business may serve as a tool to avoid one's liability arising from a breach or violation of contract. Such a practice is even more often when it comes to international contracts containing arbitration clauses. Large international companies often use complex networks of subsidiaries to allocate the risk of different international contracts and this often becomes a tool to escape arbitration procedure while claiming that the parent company is not liable for the contracts concluded by its subsidiaries, so the parent company could not be bound by arbitration clause. Similar situations may arise where company is reorganized and the contract containing arbitration clause is allocated to certain newly created company. This article aims to analyze such an abusive practice and to enquire what legal measures and theories could be used against such form of abuse of corporate structuring, as well as means to extend the arbitration clause against such defaulting parties (non-signatories).

II. Abuse of corporate structure

It could be observed from the practice of abusive corporate structuring that parties, usually the holding or controlling company, tend to maintain the appearance of a separate legal entity and to avoid obligations arising from contracts concluded by its subsidiaries. Even more, companies may be created for the sole purpose of avoidance one's obligations arising from subsidiaries' activities. For example, in case the deal goes sour, a company may restructure its corporate form into few separate legal entities and transfer certain legal obligations to such newly created companies. This kind of structuring often helps companies to avoid claims arising from contracts concluded earlier that reorganization of the business actually occurs.

However, international tribunals have cast a particularly wary eye on transfers of obligations to corporate entities that appear to be solely purposed of avoiding its obligations of the parent company. An authoritative commentary explains that "international law has a reserve power to guard against giving effect to ephemeral abusive and simulated creations"[1].

In such circumstances, customary international law recognizes a limitation to the general principle that a corporation has a legal identity separate from that of its shareholders. As the

[1] Principles of Public International Law, Ian Brownlie, Q.C., Oxford University Press, USA, Feb 15, 2009 at 489;

International Court of Justice acknowledged in *Barcelona Traction* case:

> *"the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or obligations. . . . [T]he process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law."*[2]

Consistent with this authority, the *U.S.-Mexican Claims Commission* in the claim of *Monte Blanco Real Estate Corp. (U.S. v. Mexico)* denied the claim of Monte Blanco because it found that Mexican nationals had formed the claimant corporation for the sole purpose of seeking diplomatic protection from the United States against Mexico[3].

Similar result was reached in a case involving the sinking of the "*I'm Alone*" (a British Ship of Canadian registry) by the United States[4]. At the time of sinking, the "*I'm Alone*" was formally registered in Nova Scotia and owned by a Canadian company, all of whose shareholders were nominally British. However, despite the ostensible Canadian and British ownership of the "*I'm Alone*," the United States argued that the ultimate American owners of the shipping company "abused the privilege of both Canadian registry and Canadian incorporation". The Commission agreed, finding that the ship was "de facto owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert"[5].

[2] Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 39 (Judgment Feb. 5); see also Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, (Decision on Jurisdiction Sept. 27, 2001) at 116, 122 (the tribunal found it had "to review the concrete circumstances of the case without being limited by formalities" and to ascertain whether "corporation of convenience exert[ed] a purely fictional control for jurisdictional purposes").

[3] Monte Blanco Real Estate Corp., Decision No. 37-B (Am.-Mex. Cl. Comm'n of 1942), reprinted in Report to the Secretary of State 191, 195 (1948).;

[4] (S.S. "I'm Alone" (Can. v. U.S.), (Special Agreement, Convention of Jan. 23, 1924) 3 R.I.A.A. 1610, 1617-18 (1935));

[5] Ibid, at 1617-18;

Both of these cases of international tribunals were referred to also by the *Loewen v United States* tribunal, which stated that "like the purportedly Mexican corporation in Monte Blanco and the Canadian-registered "*I'm Alone*", Nafcanco was "concocted" for the sole purpose of masking shareholders interests behind "colorable" foreign ownership.[6]

As for national courts' jurisprudence, the practice of the courts of United Kingdom would also serve as an example of the "substance over form" approach. There were cases where courts of United Kingdom described abusive corporate structuring as a 'sham' (usually in conjunction with other terms such as 'cloak' or 'mask'). For example, in *Jones v Lipman* [1962], the court stated – *"*defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity*"*. Or as it was the case in *Re a Company* [1985], where a complicated structure of foreign companies and trusts was used to place the individual's assets beyond the reach of his creditors, Cumming-Bruce LJ described the structure as a *façade* (p.336), but expressed the principle to be that the Court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration.

Thus, it can be stated that a subsidiary may be ignored as a separate legal entity to allow a court to exercise jurisdiction over the corporate parent or to compel the production of documents from a subsidiary[7].

Similarly, court's ability to prevent persons evading their obligations by transferring their property to other entities is also illustrated by *Trustor AB v Smallbone* (No. 2) [2001] 1 WLR. In the latter case, Mr Smallbone had been the managing director of Trustor AB, and in breach of fiduciary duty transferred money to a company that he owned and controlled. The court was of the view that it was entitled to pierce the corporate veil and recognize the receipt of a company as that of the individual or individuals in control of it if the company was used as a *device* or *facade* to conceal the true facts thereby avoiding or concealing any liability. Or as it was the case in *Re G* (Restraint Order) [2001] EWHC 606, [2002], the judge referred, at [11], to a company which 'has no genuine separate existence from the defendant, and is used by it as a device for fraud'.

[6] *The Loewen Group*, *Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3).;
[7] See Lonrho Ltd. v. Shell Petroleum Co., [1980] 1 W.L.R. 627 (H.L.) at 634–35 (appeal taken from Eng.); Multinational Gas & Petrochemical Co. v. Multinational Gas & Petrochemical Servs., [1983] Ch. 258 (A.C.) at 268 (Eng.); Tate Access Floors Inc. v. Boswell, [1991] Ch. 512 at 515 (Eng.).;

In *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852. Lord Diplock held:

> *"These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point."*

Furthermore, it was stated by Goff LJ in the latter case:

". . this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever"

Another similar conclusion was brought by the Canadian Ontario Court of Appeal in *Manley Inc. v Fallis* (1977) 38 CPR (2d) 74:

> *"This is a case where the court is not precluded from lifting the corporate veil, and, in effect, regarding the closely related respondent companies as essentially one trading enterprise, in the interests of the affiliated companies, in a circumstance where the refusal to do so would allow the appellant to escape the consequences of his breach of a fiduciary trust."*

It can also be argued that the same view is adopted by the EU law. For example, EU courts had held that they can treat a parent company and its subsidiaries as an economic unit. EU rules on competition are 'rules applying to undertakings' and the Court of First Instance has held that the use of the word 'undertakings' means that the rules are 'aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis' (*Shell International Chemical Co Ltd v Commission* (Case T-11/89) [1992] ECR II-757 at para 311). Where a group of companies forms an 'undertaking', the whole undertaking can be found to have broken the competition rules. Even so, because a group of companies does not have legal personality, the Commission must select a specific company in the group to be the addressee of its

decision and to be responsible for payment of any penalty (see *Provimi Ltd v Roche Products Ltd* [2003] EWHC 961 (Comm), [2003] 2 All ER (Comm) 683, at [6]).[8]

The doctrine also suggests that separate corporate personality may be set aside so that proceeds from fraud that have been deposited into a company can be recovered[9]. Some commentators have called these "identification" cases[10], while others have used the more colorful metaphor of "peeping behind the veil."[11].

However, as it can be observed from the cases cited, courts and international tribunals state that they "are not precluded" or "enabled" to look further than the form of the transaction and to assess the substance of the latter. This often raises jurisdictional questions. One could state that courts or international tribunals do not have the power or jurisdictional basis to pierce the corporate veil or to transfer claims to other entities which are formally not parties to the dispute. Thus, another issue which must be assessed is the basis of the courts' of tribunals' jurisdiction to lift the corporate form on their own discretion, even if the parties had not required the tribunal to do so.

III. Jurisdictional objections and *lex mercatoria*

When it comes to commercial arbitration, it is clear that the authority of the tribunal is derived from the arbitration agreement of the parties and the terms of reference agreed.

Therefore, if the parties do not base their claims on specific legal arguments or theories, such as 'piercing the corporate veil' or 'the doctrine of group of companies', the award based on

[8] See also Van Cleynenbreugel, Pieter, Single Entity Tests in US Antitrust and EU Competition Law (June 21, 2011); Zhang, Angela Huyue, The Single Entity Theory: An Antitrust Time-Bomb for Chinese State-Owned Enterprises? (December 5, 2011). Journal of Competition Law and Economics;

[9] See Wallersteiner v. Moir, [1974] 1 W.L.R. 991 (A.C.) at 1016–17 (Eng.); Gencor ACP Ltd. v. Dalby, [2000] 2 B.C.L.C. 734 (Ch.) at 734 (Eng.).;

[10] See Vandekerckhove, supra note 17, at 13. The reason for calling these cases identification cases is that the shareholders are identified with the corporation. Id.

[11] Piercing The Veil Across The Atlantic: A Comparative Study Of The English And The U.S. Corporate Veil Doctrines by Thomas Cheng, University of Hong Kong; The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines Thomas K. Cheng, Boston College International and Comparative Law Review Volume 34, Issue 2; See also Smadar Ottolenghi, from Peeping Behind the Corporate Veil, to Ignoring It Completely, 53 Mod. L. Rev. 338, 340 (1990);

such theories which were not argued by the parties themselves could be endangered as concerns enforceability of the latter.

Obviously, in such a situation, the New York Convention 1958 and its provisions should be analyzed first.

Article V(1)(c) of the New York Convention sets out one of the five exhaustive grounds that may justify national court's refusal to recognize and enforce an arbitral award. Pursuant to this provision, recognition and enforcement of an award may be refused if 'the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or [if] it contains decisions on matters beyond the scope of the submission to arbitration'

Article V(1)(c) also covers situations in which the arbitrator has decided matters which go beyond the claims and counterclaims made by the parties in the submission or during the arbitration proceedings instituted under an arbitration clause'[12].

Thus, if a party has expressly spelt out, in its prayers for relief, the legal basis supporting its claim, the arbitrators may not award the relief sought on another legal basis; if they do, the award rendered may be considered *ultra petita*[13].

However, on the other hard it can be argued that the arbitrators are considered entitled to determine *ex officio* the content of the applicable law, in accordance with the principle '*iura novit curia'*.

Hence, although the parties remain in charge of alleging and proving the contents of the applicable law, the arbitrators are entitled to conduct their own research and substitute their legal characterization of the facts of the case for that of the parties. If the parties fail to allege and establish the contents of the applicable law, the arbitrators may do so *ex officio*[14].

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[12] M. Rubino-Sammartano, International Arbitration Law and Practice, The Hague, Kluwer Law International, 2001; Lew, Mistelis, Kröll, supra note 13, at 714, 26-93; Van den Berg, *The New York Arbitration Convention of 1958*, supra note 2, at 314; Poudret and Besson, supra note 2, at 889;

[13] Swiss Fed. Trib., 30 April 1992, *O. & consorts v. V.*, unpublished; CA Paris, 14 October 1993, unpublished. *Contra*, François Perret, 'Les conclusions et les chefs de demande dans l'arbitrage international', 1996(1) *ASA Bull.* 7, and François Perret, 'Les conclusions et leur cause juridique au regard de la règle *ne eat judex ultra petita partium*', in *Etudes de droit international en l'honneur de Pierre Lalive* 595, Helbing & Lichtenhahn (1993

[14] Gabrielle Kaufmann-Kohler, '"Iura novit arbiter" – Est-ce bien raisonnable ? – Réflexions sur le statut du droit de fond devant l'arbitre international', in A. Héritier-Lachat and L. Hirsch (eds.), *De lege ferenda – Réflexions sur le droit désirable en l'honneur du Professeur Alain Hirsch* 71, 77, Slatkine (2004);

For example, Art. 17(2) of the ICC Arbitration Rules, states that 'in all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages'.

Even more liberal approach is envisaged in the UNIDROIT principles, where it is stated in Article 22.2.3 that 'the court may rely upon legal theory that has not been advanced by a party'.

Furthermore, the qualification and subsumption of fact belong to the evaluation of the legal consequences of that fact is a part of the legal reasoning that the tribunal has the power and duty to carry out independently[15].

For, example the tribunal in *Eureko v Republic of Poland*[16] was vastly criticized for not having conducted its own analysis of the essential basis of the claim and having simply relied on the claimant's qualification of the claim -

> "*The tribunal did not investigate whether the fundamental basis of Nykomb's claims was the Contract but instead adopted the characterisation of the claims asserted by Nykomb. There was, therefore, no objective analysis of the legal foundation of Nykomb's claim*"[17]

Therefore, the issue of tribunal's own analysis of the situation and provision of its own legal arguments and theories is rather conflicting. However, it should be noted that first and most important duty of the tribunal is to issue an award that is enforceable. In addition, almost all internationally accepted arbitration rules provide for a provision similar to Art. 17(3) of the ICC Rules which states that 'the Arbitral Tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers'.

Thus, if there are no indications in the arbitration agreement that parties have agreed to give the tribunal such power, the tribunal should state its arguments and deliver theories mentioned with caution.

As regards the topic of this article – abuse of corporate structuring, it is noteworthy that a number of arbitral tribunals have applied principles of international law to ascertain parties

[15] The Oxford Handbook of International Investment Law, Peter Muchlinski, Federico Ortino, Christoph Schreuer, Oxford University Press, 2008;
[16] *Eureko B.V. v. Republic of Poland*, Ad Hoc (Netherlands/Poland BIT).
[17] Z. Dauglas in The International Law of Investment Claims 2009, p. 373

to international arbitration agreement[18]. For example, such doctrines as 'Group of companies' or 'Alter ego' had been addressed in a number of cases and the case law in this area is well developed[19].

As for illustration, it was stated in one of ICC awards:

> *"In international relations, the tribunal considers that it is preferable to apply rules adapted to the conditions of the international market and which provide a reasonable balance between the company's confidence in its distinct legal status and the protection of entities which may fall victim to the manipulations of a company controlling its subsidiary to deprive a creditor of the benefits to which is it entitled."*[20]

A number of the awards cited in support of the foregoing proposition expressly reject the application of national law to non-signatory issues, instead insisting on the application of international law.[21] For example, the doctrine provides that "the traditional approach to the problem that the arbitrators take, is done without reference to any particular law… The existence of an intention to be bound to an arbitration agreement is demonstrated without

[18] Final award in Chamber of National and International arbitration of Milan in Case No. 1795 (1 December 1996), XXIV . Y.B. Comm. Arb. 196 (1999) (applying UNIDROIT Principles); Interim Award in ICC Case No. 4131, IX Y.B. Comm. Arb. 135 (1984); Award in ICC case No. 5721, 117 J.D.I (Clunet) 1019. (1990); Final award in ICC case No. 9797, 18 ASA Bull. 514 (2000) (applying UNIDROIT Principles); Interim award in ICC case No. 9873, 16(2) ICC Ct. Bull. 85 (2005) (not applying any national law to determine status of non-signatory; no explanation or analysis); Award in Case No. 11429, XVI Y.B. Comm. Arb. 377 (1991); Sea-Land Service, Inc. v. Islamic Republic of Iran, Award No. 135-33-1 (22 June 1984), X.Y.B. Comm. Arb. 245 (1985). See also Hosking, Non-signatories and International arbitration in the United States: The Quest for Consent, 20 Arb. Int'l 289, 296 (2004).

[19] Knight *et al*, "Arbitration By and Against Non-Signatories", *California Practice Guide*: *Alternative Dispute Resolution* (1998), at Sections 5:261–288; Stewart, *The Equitable Estoppel Argument for and Against Commercial Arbitration*: *from Hughes Masonry Co*., *Inc.* vs. *Clark County School Building Corp*. *to Northern*, *Ltd.* vs. *RE*. *James*, 103 *Com*. *LJ* 336 (1998); Sawrie, Special Project, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law*: *The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51*Vand*. *L*. *Rev*. 721 (1998); McKinnis, Note, "Enforcing Arbitration with a Non-Signatory: Equitable Estoppel and Defensive Piercing of the Corporate Veil", (1995) *J*. *Disp*. *Resol*. 197; Welch, Comment, "Arbitration Agreements: Standard of Review, Interpretation and Who is Bound", (1997) *J*. *Disp*. *Resol*. 271.;

[20] Award in ICC case No. 8385, in J-J. Arnaldez, Y. Derains & D. Hascher 9eds.), Collection of ICC Arbitral Awards 1996-2000 474 (2003).

[21] International Commercial Arbitration, Gary Born, Kluwer Law International, 2009, p. 1213;

reference to a particular law; it is a matter of facts and evidence, not of law… the choice of national law as source seems to be in the defensive."[22]

Similarly, same view was confirmed by an ICC tribunal which submitted that 'the tribunal considers that the case of neutral forum such as this one, the automatic application of the rules of conflict of the seat of the arbitration must be rejected and the tribunal must apply the law, and if necessary private international law, which is the most appropriate in the circumstances. This is the law which best corresponds to the needs of international business community, which is not in conflict with the legitimate expectations of the parties, which produces uniform results and offers a reasonable solution to the dispute'[23].

Furthermore, as regards explicitly the doctrine of 'Group of companies', international tribunals have characterized the latter as *lex mercatoria.* For example, an ICC tribunal in case No. 5721 had stated that 'the Arbitral Tribunal will not examine this delicate question [of the status of a non-signatory under veil-piercing analysis] only on the basis of the law applicable to the merits of the dispute, Egyptian law… The Tribunal is justified in referring to the *lex mercatoria*. The principle of autonomy of arbitration clauses, now widely recognized, justifies this reference to a non-national rule construed from international commercial usage alone. In particular, it is justified to separate the merits from the validity scope of the arbitration clause. The Arbitral tribunal will thus rule on the basis of general notions of good faith in business transaction and international commercial usage'[24].

In addition, the importance of the application of *lex mercatoria* by international tribunals was characterized in ICC case No. 8385:

"The application of international principles offers many advantages. They apply in a uniform fashion and are independent from peculiarities of each national law. They take into consideration the needs of international relations and allow for a fruitful exchange between systems which are sometimes excessively attached to conceptual distinctions, and systems

[22] . Jarvin, The Group of Companies Doctrine, in the Arbitration agreement – Its Multifold Critical Aspects 181, 196-197 (ASA Special Series No. 8 1994);
[23] Award in ICC case No. 8385;
[24] Award in ICC Case No. 5721, 177 J.D.I. (Clunet) 1019 (1990) in International Commercial Arbitration, Gary Born, 2009;

which seek a just and pragmatic solution to particular situations. This is therefore ad ideal opportunity to apply what is increasingly referred to as the *lex mercatoria*"[25]

Therefore, taking into account the above, it can be stated that international tribunals have a legitimate right to apply such doctrines and theories as 'Group of companies' or 'pierce the corporate veil', notwithstanding the fact that parties themselves had not agreed on the applicability of such methods in their arbitration agreement or their submission to arbitrate or in the respective law or rules applicable. The latter is argument is based on the rationale accepted by international tribunals which consider such doctrines as 'Group of companies' being a part of internationally accepted principles of trade practice – *lex mercatoria*. Thus, it can be argued that such doctrines are applicable to non-signatories in cases of abusive corporate structuring.

Having determined the above, the doctrines itself in the context of abusive corporate structuring must be assessed next.

VI. Doctrines applicable

i. Third party beneficiaries

Firstly, it must be noted that arbitration is contractual by nature. However, it does not follow that the obligation to arbitrate attaches only to a party which has personally signed the written arbitration agreement[26].

Secondly, when it comes to third party beneficiaries, parties' extent of participation in conclusion of the contract or its execution must be assessed thoroughly. One needs to weigh relevant party's influence on the termination of the contract and its knowledge of the content of the contract. Furthermore, it must be assessed whether a party knew about the

[25] Ibid, Award in ICC Case No. 8385, in J-J. Arnaldez, Y. Derains & D.Hascher (eds.), Collection of ICC Arbitral awards 1996-2000 474 (2003);

[26] *Thomson-CSF, S.A. v American Arbitration Association and Evans & Sutherland Computer Corporation, 64 F.3d 773 (2d Cir. 1995)766;* Redfern, Alan and Hunter, Martin**,** Law and Practice of International Commercial Arbitration (2nd ed, Sweet and Maxwell, London, 1991). 3-30; Galliard, Emmanuel and Savage, John (eds.), Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International, London 1999). 280-281

arbitration agreement and the content of such agreement. The latter would prove that a non-signatory party is aware of the arbitration clause and obligations contained therein[27].

The self-standing validity and effectiveness of the arbitration clause in the agreement requires that the obligation to arbitrate includes parties which are directly implicated in the performance of the contract and in the disputes, provided they are aware of the arbitration agreement, even though they were not signatories of the contract itself[28].

Thus, receipt of payments due in connection with the agreement can be regarded as direct consent to the terms of the agreement and substantial involvement in the performance of a contract. Therefore, when it comes to third party beneficiaries, who know under what basis they are receiving payments, they should be regarded as having full knowledge of the agreement and, respectively, the arbitration clause. Such a conduct would demonstrate that third party beneficiaries consented to being bound by the arbitration agreement. The latter would also imply a tacit consent[29].

In addition, it can be stated that, receipt of payments by beneficiaries can be viewed as an engagement in a commercial relationship with the original party, framed by the agreement (including the arbitration clause).

As it is provided in the commentary, courts and arbitral tribunals will take into consideration the conduct of the party in the negotiation and performance, and will infer consent to be bound where there was a significant involvement by the party[30]. In making its assessment the tribunal should consider not just the arbitration agreement, but all economic and legal aspects of the dispute[31].

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[27] „In contracting for arbitration, 'the parties' subjective intent is most likely to be satisfied by a default rule that interprets manifested consent to reflect the commonsense or conventional expectations that are likely part of the tacit assumptions of particular parties". Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 821 (1992). *supra* note 36, at 827;

[28] *Cour d'appel de Paris (1st Ch. D.) 22 March 1995 (1997) Revue de l'Arbitrage 550* cited in Hanotiau, Bernard, Groups of Companies in International Arbitration in Loukas A. Mistelis and Julian D.M. Lew (eds), Pervasive Problems in International Arbitration (Kluwer Law International, 2006) 279, 282

[29] '*by performing the contract in awareness of the situation, had in reality ratified it, including the arbitration clause*' - Cour d'appel de Paris, (1st Ch. Suppl.) 28 November 1989; Cour d'appel de Paris (1st Ch. Suppl.) 8 March 1990 (1990) 3 Revue de l'Arbitrage 647 and Note: Mayer, Pierre.

[30] Hanotiau, Bernard, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues – An Analysis* (2001) 18 Journal of International Arbitration 253. *271;* Zuberbühler, Tobias, *Non-signatories and the Consensus to Arbitrate* (2008) 26(1) ASA Bulletin 18, 21. *p. 21*;

[31] Galliard, Emmanuel and Savage, John (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, London 1999).p. *281*;

For example, the Paris Court of Appeals in *Société V 2000 v Société Project*[32] held that that the effects of the arbitration clause extend to parties directly involved in the performance of the contract, provided that the actions and surrounding circumstances raise the presumption that they were aware of the existence and scope of the arbitration clause.

Another example may be brought by the practice of U.S. courts which state that "for a person to be an intended third-party beneficiary, the contract must have been entered into directly or for the benefit of that person"[33].

Therefore, taking into account basic principles of contract law, it can be stated that creditor beneficiary can enforce the contract against the party who owes the benefit or against the party who has contracted to provide it[34]. Similarly, a right to enforce the contract should raise the presumption that a third party was aware of the existence and scope of the contract, including the arbitration clause. In addition, it can be stated that if the terms of the contract specifically state that a third party will be a creditor beneficiary, the contract cannot be satisfied without the involvement of the third party. Therefore, the latter could be regarded as significant involvement, which would satisfy the requirements of making the presumption, according to which the third party was aware of the existence and scope of the contract and the arbitration clause contained therein.

Taking into account the above and the principle that each party knows her rights and duties, it can be legitimately presumed that the third party beneficiary was aware of its rights and duties under the contract, including the arbitration clause.

Were it otherwise, the ability of the tribunal to render an effective award would be undermined. The autonomous validity and effectiveness of the arbitration agreement would support the conclusion that third party beneficiaries consent to the agreement by their conduct.

It should also be noted that even if one would not consider the argument of significant involvement as basis to presume the awareness of the arbitration clause, another argument could be brought merely on the existence of third-party beneficiary in the contract.

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[32] Cour d'appel de Paris (1st Ch. D) 7 December 1994 – Société V 2000 v Société Project XJ 220 ITD et autre (1996) 2 Revue de l'Arbitrage 250 and Note: Jarrosson, Charles, confirmed by Cour de Cassation (1st Ch. civ.) 21 May 1997, Revue de l'Arbitrage 538;

[33] *Ramminger v. Archdiocese of Cincinnati*, 1st Dist. No. C-060706, 2007-Ohio-3306; *Caruso v. Natl. City Mtge.* Co., 187 Ohio App.3d 329, 2010-Ohio-1878;

[34] Introduction to Law. Beth Walston-Dunham - 2011 - Business & Economics, p. 452;

As provided in the commentary, the third party may either be able to invoke or may be bound by an arbitration clause contained in the contract[35]. Therefore it follows that if third party beneficiary is able to enforce the contract against the original party, then the original party is also enabled to enforce the contract against third party beneficiary.

This conclusion is also confirmed by a number of cases[36]. As an example, the practice of arbitration under ICC Rules should be noted:

"It is generally accepted that if a party is bound by the same obligations stipulated by a party to a contract and this contract contains an arbitration clause or, in relation to it, an arbitration agreement exists, such third party is also bound by the arbitration clause, or arbitration agreement, even if it did not sign it"[37]

This conclusion is also provided in UNIDROIT principles of International Commercial Contracts, Art. 5.2.1 (2004) – "*A promise in a contract creates a duty to the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty*", or as it is provided in Rights of third parties Act 1999 of England, "*where a substantive term of a contract is subject to an arbitration agreement, then that term cannot be conferred on a third-party beneficiary without subjecting that party to the arbitration agreement*".

Further, the situation is more complex when the entities involved are all of different nature, for example in case of concession contracts or public procurement agreements. In addition, the situation is even more complex where there is no information regarding the relationship or subordination of these entities. However, usually it may be presumed that the holding company subordinates its subsidiaries, and it can be stated that it should be bound by the arbitration clause, because the subsidiaries were acting on behalf of the controlling company.

For example, in *Dallah*[38] case, the Tribunal found that, notwithstanding the fact that the government did not sign the arbitration agreement, it was still bound to arbitrate, because an entity which signed the respective contract was the *alter ego* of the government. The tribunal based its decision on the fact that the government was exclusively involved in the

[35] *International Commercial Arbitration. Gary B Born.* Kluwer Law International 2009, p. 1178;
[36] Nauru Phosphate Royalities, Inc. v. Drago Daic Interests, Inc, 138 F.3d 160, 166 (5th Cir. 1998, confirming award against non-signatory third-party beneficiaries); Spear,Leeds & Kellogg v. Cent.Life Assur. Co., 85 F.3d. 21, 27 (2d Cir. 1997); Black & Veatch Int'l Co. v. Wartsila NSD N.Am. Inc. 1998 U.S. Dist. LEXIS 20732 (D.Kan. 1998) – *third party beneficiary of contract bound by arbitration clause contained in contract*);
[37] Final Award in ICC case No. 9762, XXIX Y.B. Comm. Arb. 26(2004);
[38] Dallah Real Estate v Pakistan Ministry of Religious Affairs, in 2010 upholded by the UK Supreme Court which followed in this respect the U.S. Supreme Court's decision in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), and the U.S. Third Circuit Court of Appeals' decision in China Minmetals Materials Import & Export Co. v. Chi Mei Corp., 334 F.3d 274 (3d Cir. 2003).

negotiations upon signing the contract. The Tribunal also stressed that it applied "the transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in international business."

Another example can be brought by the *Pyramids Plateau Case*[39] where the Egyptian Ministry of Tourism participated in the negotiations of the contract, and the Minister of Tourism executed and concluded the contract. The tribunal held that by signing the actual contract by a government official was a clear evidence of the intention by the Egyptian government to be bound by arbitration agreement.

However, third party beneficiary is not the only means of the extension of arbitration clause to third parties. Other concepts such as *one economic entity* should also be analysed as the 'Doctrine of Group of companies' is also relevant is this context.

ii. Group of companies

As it was stated above, the benefit acquired by the third party may serve as a basis to claim that the third party beneficiary is bound by the arbitration clause. Similar argumentation could be brought in case of concession contracts, because the nature of concession contracts provides that these contracts are basically concluded in favour of the state as a whole and not in favour of certain public entities. For example, in ICSID case *Vivendi*[40], a dispute arose from concession contract concluded by French company, its Argentine affiliate and province of Argentina, concerning operation of water and sewage system. Argentine maintained that the dispute related exclusively to the concession contract to which it was not a party. The Tribunal, while dealing with the question of its jurisdiction, found that under international law it was well established that the actions of states political subvisions were attributable to the central government.

Therefore, it can be argued that there is no difference which party from the group of companies signed the contract, because their actions and activities are considered as acts of its controlling entity – the state in the example of concession contracts or the holding company in case of private agreements.

[39] ICC case no, 3493 of 1983, SPP (Middle East) Ltd. v. Arab Republic of Egypt, IX Yearbook Comm. Arb. (1983), 111;
[40] Compañía de Aguas del Aconquija S.A. and Compagnie Generale des Eaux v. Argentine Republic, Award of the Tribunal, ICSID ARB/97/3 (Nov. 21, 2000);

Another example was brought in one of the ICC cases where the arbitral tribunal relied in part on the 'Group of Companies doctrine' to find that a State entity, which was one of the respondents in the case, could be held liable for the acts of a second respondent in the case, who represented a sub-division (i.e. the Ministry of Agriculture) of that State entity[41].

It can be argued that in this case the state and its entities formed *"one and the same economic reality"*[42]. The latter term was brought in the *Isover-Saint-Gobain v. Dow Chemical*[43] case.

It was stated in the latter case that a parent company will be deemed to be bound by an arbitration agreement entered into by one of its subsidiaries if the parent company appears to be chiefly concerned by the contract and any disputes that may arise in its connection. The court held, in substance, that the self-standing validity of an arbitration agreement in an international contract requires that its scope be extended to parties which are directly implicated in the performance of the contract and in the disputes that may arise therefrom, as long as it is established that their situation and activities gives rise to the presumption that they were aware of the existence and the scope of the arbitration agreement, even though they were not named in the contract containing it. Whereas this case law was originally limited to the extension of arbitration agreements to companies of a group under the justification that a group should be viewed as a whole, according to the economic reality, courts and arbitral tribunals have been prompt to free themselves of this obstacle and apply it in other cases as well.[44]

Similarly, in ICC Case No. 10510 of year of 2000, the arbitral tribunal extended the arbitration agreement to B Japan, acting as wholly owned subsidiary of B France, signatory of a distribution agreement with S, a Japanese company – whose purpose was the distribution in Japan of B France products – the arbitration clause contained in the said agreement. Or as it was the case in ICC Case no. 2375 of 1975, where the tribunal stated:

> *"a whole where each of the dominated and dominant companies of the two groups are indissolubly bound and committed<…> it would be inconceivable that the arbitral*

[41] *ICC 9762 (2001) (Para. 35)*

[42] *"related companies which share a common interest with regard to a specific contract are presumed to have a common will" by virtue of which the contract is extended to the non-signatory company"* ICCA International Handbook of Commercial Arbitration, Supplement 26, February, 1998

[43] Interim award of 23 Septemeber 1982 in ICC case no 4131, Isover-Saint-Gobain v. Dow Chemical France

[44] Blaise Stucki, Schellenberg Wittmer, Extension of Arbitration Agreements to Non-Signatories, ASA Below 40 – Conference of September 29, 2006;

> *tribunal should isolate the (arbitration) clause of Article 9 from these complex links and decide that it does not apply to the present proceedings".*[45]

Similarly, since if it would be established that a parent company is exercising total control on its subsidiaries, the 'alter ego doctrine' must also be applied[46]. There were a substantial number of cases where subsidiary companies were regarded as the alter ego of their parent companies[47] and the latter was usually found to be bound by the contracts signed by its subsidiaries[48].

In *Hamilton v. Water Whole International Corp*[49]., the U.S. Court of Appeals for the Tenth Circuit identified nine relevant factors for determining when a corporation becomes an alter ego.

These factors were:

> (1) whether the dominant corporation owns or subscribes to all the subservient corporation's stock, (2) whether the dominant and subservient corporations have common directors and officers, (3) whether the dominant corporation provides financing to the subservient corporation, (4) whether the subservient corporation is grossly undercapitalized, (5) whether the dominant corporation pays the salaries, expenses or losses of the subservient corporation,(6) whether most of the subservient corporation's business is with the dominant corporation or the subservient corporation's assets were conveyed from the dominant corporation, (7) whether the dominant corporation refers to the subservient corporation as a division or department, (8) whether the subservient corporation's officers or directors follow

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[45] Cited in Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions, Bernard Hanotiau, Kluwer Law International, 2005, p. 92;

[46] Although a corporate relationship or affiliation alone not always has been held sufficient to bind a non-signatory to an arbitration agreement, there are circumstances where, under applicable law principles, the relationship between a corporation and a subsidiary may be sufficient to justify piercing the corporate veil to thereby hold a non-signatory corporation subject to the arbitration agreement of another corporate entity. *E.g., MAG Portfolio Consultant GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58 (2d Cir. 2001).

[47] ICC case no. 6519 of 1991 - Only to group entities which effectively took part in the negotiations which led to the contract or those directly concerned by it, to the exclusion of those which were only instruments of a financial transaction in the hands of a majority shareholder;

[48] Once it has been determined that the corporate form was used to effect fraud or another wrong on a third party, alter ego determinations then revolve around issues of control and use. *Estate of Lisle* vs. *Commissioner*, 341 F.3d 368, 2003WL21752801 8 (5th Cir., 2003);

[49] 302 F. App'x 789, 793 (10th Cir. 2008);

> the dominant corporation's directions, and (9) whether the corporations observe the legal formalities for keeping the entities separate.

For example, in *JJ. Ryan & Sons* vs. *Rhone Poulenc Textile*[50], the Court noted that when allegations against "a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement".

Thus, although formally parties may be regarded as separate companies, legal independence of these individual entities is not relevant in certain cases, because a group of companies constitutes one and the same economic reality where the circumstances of a contract's conclusion, performance, and termination, and the degree of influence amongst members of the group warrants such an inference[51]. When the claims against the companies are based on the same facts and are inherently inseparable, a party which has not signed the arbitration agreement should be considered bound by the agreement, or else the arbitration proceedings would be rendered meaningless[52].

So when one is considering the applicability of arbitration clause to a company coming after corporate structuring or reorganization, determination of whether an arbitration clause should be considered to bind other companies of the group or its shareholders is a matter which must be decided on a case-to-case basis, requiring close analysis of:

> (a) the circumstances in which the agreement was made;
> (b) the corporate and practical relationship existing on one side and known to those on the other side of the bargain;
> (c) the actual or presumed intention of the parties as regards the rights of non-signatories to participate in the arbitration agreement; and

[50] *JJ. Ryan*&*Sons* vs. *Rhone Poulenc Textile*, *SA*, 863 F.2d 315, 320–21 (4th Cir., 1988).; similarly, in *Sunkist Soft Drinks*, *Inc.* vs. *Sunkist Growers*, *Inc.*, 10 F.3d 753, 757 (11th Cir., 1993), holding that because claims against a non-signatory parent were "intimately founded in and intertwined with" a contract containing an arbitration clause, the signatory was estopped from refusing to arbitrate those claims; *Hughes Masonry Co.* vs. *Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 840-41 (7th Cir., 1981), finding the signatory equitably estopped from repudiating the arbitration clause in an agreement on which the suit against the non-signatory was based.;

[51] *Dow Chemical Group v Isover-Saint-Gobain* (*ICC Case No. 4131*), upheld by the Paris Court of Appeals (*CA Paris, 21 Oct 1983, Isover-Saint-Gobain v Dow Chemical France*).;

[52] J.J. Ryan & Sons, Inc v Rhone Poulenc Texile, S.A., et al., 863 F.2d 315 (4th Cir. 1988).

> (d) the circumstances under which non-signatories subsequently became involved in the performance of the agreement and in the dispute arising from it[53].

Another example can be brought by the practice of The Swiss Federal Tribunal which on 16 October 2003 dealt with non-signatories. In this case, three Lebanese companies (X, Y and Z) entered into a construction contract containing an arbitration clause. When a dispute arose, Z commenced proceedings against X, Y and Mr A. (who was not a party to the agreement), on the basis that Mr A. actively participated in the negotiations and performance of the contract. The Federal Tribunal, applying the principle of good faith, allowed an extension of the arbitration agreement to Mr A[54].

Similarly, as it was stated by the Tribunal in 1977 award in ICC Case No. 2626:

> *"The dominant trend in case law holds that an arbitration agreement is not only valid between the parties, but can also be relied upon against their heirs, their legatees, their assignees and all those acquiring obligations."*

In the latter award, the arbitrators concluded that the conversion of a limited liability company (*societe a responsabilite limitee*), which had signed an arbitration agreement, into joint stock corporation (*societe par actions*) did not prevent the arbitration agreement from being relied upon against the company as it existed after the conversion.

Furthermore, an example of abusive corporate structuring can be observed in the ICC Case No. 5730 ("*Orri*") where the Tribunal found that a single fact pattern might lend itself both to disregard of the corporate form and to finding implied consent. A parent company's fraudulent manipulation[55] of an undercapitalized subsidiary could justify disregard of the corporate form, as well as a finding that the subsidiary acted merely as agent for the parent company, which was the true contracting party.

Although the inquiry is fact-specific in each case, courts will look to whether corporate formalities, such as regular maintenance of board minutes, books, and records have been disregarded, whether the same office space was used by the corporate entity and the

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[53] ICC Arbitral Award No 9517 (1998) 30 November, unpublished, cited in Hanotiau, Bernard, *Groups of Companies in International Arbitration* in Loukas A. Mistelis and Julian D.M. Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International, 2006) 279, 285.;

[54] *Y.S.A.L. v Z Sarl ATF 129 III 727-4P.115/2003*) (*X.S.A.L*);

[55] See also ICC Case No. 5730, where a corporation serving as group leader intentionally created and maintained confusion.

individual shareholders, whether there has been a commingling of funds and other assets of the corporation with those of the individual officers or shareholders, and whether corporate funds or assets have been diverted to non-corporate uses such as the personal uses of the corporation's officers or shareholders.

iii. Agency

Alternatively, traditional principles of agency law may bind a non-signatory to an arbitration agreement[56]. Where it is established that one party signed the agreement to arbitrate as agent for a third party, the latter will be also considered bound by the arbitration agreement[57] .

A principal may authorize an agent to bind it on the basis of actual authority, apparent authority, or subsequent ratification. Therefore, if one would consider a state or a holding company as a presiding body in respect of all its subsidiaries or affiliates, then it could be stated that the subordinated party signed the contract (and the arbitration clause) on behalf of controlling entity[58].

In the alternative, if there was no actual authority for subordinated entity to act as agent, the controlling entity may be bound as a result of apparent authority[59]. A principle, whose conduct leads a third party reasonably to believe that the agent has authority to act on its behalf, is prevented from invoking against the third party the lack of authority and is therefore bound by the latter's act *[Agency Convention Art. 14]*. Whether the third party's belief was reasonable will depend on the circumstances of the case[60]. Apparent authority is an

[56] Thomson-CSF, S.A. v American Arbitration Association and Evans & Sutherland Computer Corporation, 64 F.3d 773 (2d Cir. 1995) 777;
[57] Hanotiau, Bernard, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues – An Analysis* (2001) 18 Journal of International Arbitration 253, 258;
[58] „*The question of the subjective scope of a formally valid arbitration agreement, including determination of the parties bound by it, is a matter of interpretation rather than form*" - X S.A.L., Y S.A.L. et A v Z, SARL et Tribunal Arbitral CCI, BGE 129 III 727.
[59] China National Machinery & Equipment Import & Export Corporation v Loebersdorfer Maschinenfabrik AG (Austria), Zurich Chamber of Commerce Case No. 188/1991, unpublished interim award of 11 February 1993, in Zuberbühler, Tobias, *Non-signatories and the Consensus to Arbitrate* (2008) 26(1) ASA Bulletin 18, 21.; Alamaria v Telcor International Inc., et al., 920 F.Supp.
658 (D. Md. 1996);
[60] Bonell, Michael Joachim (ed), *The UNIDROIT Principles in Practice: caselaw and bibliography on the UNIDROIT principles of international commercial contracts* (Transnational Publishers 2nd ed, 2006), p. 170;

application of the general principle of good faith and the prohibition of inconsistent behavior[61] *(UNIDROIT Arts. 1.7, 1.8).*

As it was argued, a principal will generally be bound by an arbitration clause in a contract signed by its agent[62]. As a result, arguments about whether a non-signatory should be compelled to arbitrate will only arise where there is no explicit contract between the principal and its agent[63] and the principal does not wish to be part of the arbitration. In *China National*, for example, the Federal Supreme Court of Switzerland upheld the decision by the arbitral tribunal against a signatory agent based on the fact that agent and principal held themselves out as one indistinguishable entity[64].

As it is provided in the case law[65] - "Ordinary contract and agency principles determine which parties are bound by an arbitration agreement, and parties can become contractually bound absent their signatures."[66]

Although, application of the institute of agency may be problematic in various jurisdictions as its principles are not universally applied, it just indicates that there are various tools to consider when trying precluding state entities or holding companies to escape its obligations arising under arbitration agreement.

[61] Ibid, p. 171;

[62] *Srivastava* vs. *Commissioner*, 220 F.3d 353, 369 (5th Cir., 2000).

[63] For example, see Thomson-CSF, S.A. v American Arbitration Association and Evans & Sutherland Computer Corporation, 64 F.3d 773 (2d Cir. 1995) 777, see also Hanotiau, Bernard, *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues – An Analysis* (2001) 18 Journal of International Arbitration 253, 258

[64] See further - Kunal Mimani and Ishan Jhingran, Extension of Arbitration Agreements to Non-Signatories: An International Perspective, India law journal, volume4, issue 3, article 6;

[65] *Fisser* vs. *Int'l Bank*, 282 F.2d 231, 233 (2d Cir., 1960), quoted in *Int'l Paper Co.* vs. *Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir., 2000), and *Thomson-CSF*, *SA* vs. *Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir., 1995); *Washington Mutual Finance Group*, *LLC* vs. *Bailey*, 364 F.3d 260, 267 (5th Cir., 2004), quoting *Thomson-CSF*, *SA* vs. *Am. Arbitration Ass'n*, 64 F.3d 776; *In re FirstMerit Bank*, 52 SW.3d 755 (Tex., 2001), citing *Nationwide of Bryan*, *Inc.* vs. *Dyer*, 969 SW.2d 518, 520 (Tex. App., Austin 1998, no pet.); *SW. Tex. Pathology Assocs.* vs. *Roosth*, 27 SW.3d 204, 208 (Tex. App., San Antonio 2000, pet. dism'd w.o.j.).;

[66] Oriental Commercial and Shipping Co. Ltd. v. Rosseel, N.V. 609 F. Supp., pp. 75, 78 (S.D.N.Y. 1985).

iv. Estoppel

As it was observed above, there are number of tools in international practice which would preclude parties evading their obligations while hiding under corporate structure.

In this context, the doctrine of *estoppel* should be considered as well, because the latter doctrine serves to preclude a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations[67]. *Estoppel* will recognize a party which has not signed the contract as bound by an arbitration agreement where the party is inextricably intertwined with the contract, or alternatively where the party has received a direct benefit under the agreement[68].

As it was stated in *Deloitte*[69] case, "*A party is estopped from denying its obligation to arbitrate when it receives a direct benefit from a contract containing an arbitration clause".*

Another example can be brought by *McBro Planning*[70] case which concerned a hospital construction dispute. The hospital had two separate agreements with its electrical contractor, Triangle, and its construction manager, McBro. Both contracts contained identical arbitration provisions, however the Triangle agreement expressly denied any contractual relationship between Triangle and McBro. Despite the denial of any contractual agreement, the court compelled Triangle to arbitrate its claims with McBro. The court found that the dispute was inextricably linked with McBro's contract with the hospital and the parties were sufficiently connected, such that Triangle was estopped from denying arbitration.

Or as it was even more complex issue in *ABS*[71] case, where Tencara had contracted with a syndicate to build a yacht. The contract required the American Bureau of Shipping (ABS) to classify the yacht. Tencara entered into a contract containing an arbitration clause for the ABS to classify the yacht. The yacht sustained serious hull damage due to poor design and construction. Tencara sued the ABS in Italy and the yacht's owners sued the ABS in France. The ABS brought suit in New York to compel all parties to arbitrate their claims together.

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[67] Intergen N.V. v Grina, 344 F.3d 134 (1st Cir. 2003)*;* Hanotiau, Bernard, Groups of Companies in International Arbitration in Loukas A. Mistelis and Julian D.M. Lew (eds), Pervasive Problems in International Arbitration (Kluwer Law International, 2006) 279, 263

[68] Moses, Margaret L., The Principles and Practice of International Commercial Arbitration (Cambridge University Press, Cambridge, 2008). 35

[69] Deloitte Noraudit A/S v Deloitte Haskins & Sells, 9 F.3d 1060 (2nd Cir. 1993)

[70] McBro Planning and Development Co. v Triange 19 Electronic Construction Co., Inc, 741 F.2d 342 (11th Cir. 1984);

[71] American Bureau of Shipping v Tencara Shipyard SPA 170 F.3d 349, 1999 AMC 1858 (2nd Cir. 1999);

The owners claimed they were not a party to the contract between Tencara and the ABS and, therefore, were not a party to the arbitration agreement. The court held that the owners were obliged to arbitrate. Since the owners had received the benefit of the ABS's classification in the form of lower insurance rates and being able to sail in French waters, they were precluded from claiming the arbitration agreement did not apply to them.

Therefore, where a party received significant direct benefits arising from the agreement, it should be estopped from denying the extension of arbitration clause and should be bound by the arbitration agreement which forms part of the agreement from which it directly benefits[72].

As it was stated by one U.S. federal court judge "a non- signatory [should be prevented] from embracing a contract, and then turning its back on the portions of the contract, such as [the] arbitration clause, that it finds distasteful" [*E.I. DuPont (U.S.)*].

V. Conclusion

In conclusion, it should be noted that all the theories and legal arguments provided are not universal or applied in all jurisdictions. However, it can also be stated that international practice on abusive corporate structuring is also well developed and one must take into account the principles already established in various jurisdictions which would seriously assess the corporate structuring and would take a 'substance over form' approach in cases where businesses are aiming to escape their obligations, including the arbitration clauses, by way of hiding under complex corporate structures.

In addition, it was observed such tools as the doctrine of 'Group of companies' or 'agency' or 'estoppel' or 'piercing the corporate veil' are vastly recognized in international arena and in some cases are even considered as *lex mercatoria*. However, it should be borne in mind that it is still not clear what the approach would be taken by the courts of international tribunals in case where neither of the parties rely on such theories, thus the question still rests whether the tribunal might apply such theories if absent of such claims of by parties.

[72] the principle of estoppel "represents a special application of the general principle of good faith", Internationales schiedsgericht der bundeskammer der gewerblichen wirtschaft *SCH-4318 June 15, 1994 Available at: www.unilex.info (Para. 38) (Austria)*