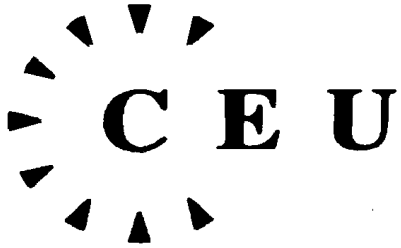

EXTENSION OF THE ARBITRATION AGREEMENT TO THE THIRD PARTIES

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ABSTRACT

There are a number of theories under which the arbitration agreement can be extended to third parties. However, recognizing them, neither scholars nor judges or arbitrators do not sufficiently examine the distinct or common features of the theories, this issue still remains open for discussion. All theories that allow extension of arbitration agreement to third parties can be divided into two groups: contractual and doctrinal ones. The present paper is focused on the analysis of the common grounds and the distinct features of the theories within each of the group, as well as the issues the courts and arbitral tribunal face when allow extension under the theories within each group. Going through the applications of both groups of theories we may conclude that the distinct features between contract-based and doctrine-based theories are the ground on which the theory is based, the expression of the consent under the theory, and the legal basis by which the theory is determined. The common ground of all theories is the element of consent to arbitrate. Despite the existing case law the attention still should be paid to the clarification and examinations of facts which will allow the extension of arbitration agreement to third parties.

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INTRODUCTION

The issue of the consent to arbitrate is one of the important issues in international commercial arbitration. The arbitration agreement is the "cornerstone of the arbitration process"[1], as submission of the dispute to arbitration necessitates an agreement between the parties, and the parties of the dispute cannot be forced to arbitrate without their consent. This approach is reflected in New York Convention and UNCITRAL Model Law on International Commercial Arbitration. If we look at the provisions of the documents we can see that under Article 7 of UNCITRAL Model Law on International Commercial Arbitration "arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[2] Following this line New York Convention defines arbitration agreement as "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship."[3] These definitions show the necessity of the agreement between the parties to submit their dispute to arbitration and presume that only parties to the arbitration agreement can arbitrate.

Nevertheless, there are "exceptions to the general rule that courts [and arbitral tribunals] do not compel non-signatories to arbitration"[4] Third parties in the present thesis mean the parties who are external to the contract that contains the arbitration agreement and did not sign it. There are a number of theories under which the arbitration agreement can be extended to the third parties. The

[1] VARADY TIBOR ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE, (Thomson/West 2006): 85
[2] UNCITRAL Model Law on International Commercial Arbitration opened for signature June 21, 1985, amended on July 2, 2006, United Nations documents A/40/17, annex I and A/61/17, annex I
[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards opened for signature June 10, 1958, U.N.T.S. vol. 330, p. 3
[4] Regent Seven Seas Cruises Inc v. Rolls Royce PLC 2007 WL 601992 (S.D.Fla) (2007)

court in *Thomson*, for example, has recognized five theories "under which non-signatories may be bound to the arbitration agreements of others": incorporation by reference; assumption; agency; veil-piercing/alter ego and estoppel.[5] The scholars also recognized the guarantees, group of companies and third party beneficiary as major ones.[6]

The problem of the extension of the arbitration agreement to the third parties is complicated for the following reasons. First, the issue of extension of arbitration agreement is not regulated under international treaties on arbitration such as UNCITRAL Model Law on International Commercial Arbitration and New York Convention, therefore leaving no common grounds to consider when justifying extension of the arbitration agreement to the non-signatories. Second, the existing arbitration practice is inconsistent in regard to the issue of extension of the arbitration agreement to the non-signatories, and the award rendered against non-signatory may be more probably set aside by the national court or be refused recognition and enforcement.

However, recognizing the number of theories, neither scholars nor judges or arbitrators do not sufficiently examine the distinct or common features of the theories. Thus, the issue how all these theories can be classified and what common features can be found in all of them that allow their application towards non-signatories remains open for discussion.

Still, some attempts have been made to find the common grounds among theories which allow the extension of the arbitration agreement to third parties. Some scholars consider that the majority of the theories undermine consent (direct or implied) of the third party to be bound by

[5] Thomson-CSF, S.A. v. American Arbitration Association 64 F.3d 773 (2nd Cir. 1995)

[6] Tobias Zuberbühler Non-Signatories and the Consensus to Arbitrate, ASA Bulletin, Vol. 26 No. 1 (2008): 18 – 34 James M. Hosking *Non-signatories and International Arbitration in the United States: the Quest for Consent* Arbitration International, Vol. 20, No. 3 (2004): 289-303

the arbitration agreement in the contract that it did not sign[7]. In the view of *Strong*, parties should either establish the so-called "contractual roots" for the extension of arbitration agreement or may compel to arbitrate based on the principle of equity.[8] Therefore, the theories may have their common grounds as consent to arbitrate and distinct features as principles that allow their extension. Nevertheless, some aspects of the theories that allow extension of the arbitration agreement to third parties were not taken into account.

Taking into consideration the analysis of the previous works of *Hosking, Strong* and others, the following should be mentioned. First, the list of the features of the theories that allow extension of the arbitration agreement to third parties is broader than suggested in scholarly writings. Second, all the theories have both common and distinct features with each other. Third, consistency is needed to define both common and distinct features a number of theories. All theories that allow extension of arbitration agreement to third parties can be divided into two groups: contractual and doctrinal ones. The present research will be focused on the analysis of the common grounds and the distinct features of the theories within each of the group, as well as the issues the courts and arbitral tribunal faced when allow extension under the theories within each group. In my view, such an analysis is necessary, as it will show the problem of extension from the two different perspectives and will contribute to the guidance of arbitrators of resolving arbitration disputes with non-signatures.

[7] Hanotiau Bernard *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis* Journal of International Arbitration, Vol. 18 No. 3 (2001): 10
James M. Hosking *The Third Party Non-Signatory's Ability To Compel International Commercial Arbitration: Doing Justice Without Destroying Consent* Pepperdine Dispute Resolution Law Journal, Vol. 4 (2004): 471-587
Hosking, *supra* note 6, at 303

[8] S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?* Vand. J. of Transnat`l L., Vol. 31 (1998): 933

The present paper will be divided into three chapters. The first chapter will explain the suggested division of the existing theories into two groups: contractual and doctrinal groups and outline the common features of each of the groups and grounds for their application. The second and third chapters will scrutinize the selected theories from each group to explain their application both in court decisions, concerning the arbitration matters, and arbitral awards. The conclusion will summarize the finding of all chapters and will show the common and distinct features within each of the group and general trend in their application.

CHAPTER 1. THE MAIN FEATURES OF CONTRACT-BASED AND DOCTRINE BASED THEORIES

I divided the theories under which the arbitration agreement can be extended over the third parties into two groups: the so-called contract-based (which have a contract as a ground) and doctrine based (which is based on the legal doctrine). Each group has its distinct features which will be discussed below.

First distinct feature is a ground on which the doctrine is based. The contract-based theory has a contract which links the third party to the signatory of arbitration agreement and served as a basis for the extension of arbitration agreement to that third party. For example, the agency relationship may be created by contract and bind a principal –third party to the arbitration agreement concluded by its agent. In the doctrine - based theories the ground on which the theory is based is doctrine, created by the court or arbitral tribunal, which by its application may justify the extension of the arbitration agreement to the third party. The application of the doctrine requires certain preconditions to be fulfilled to establish the links between the third party and the signatory to the arbitration agreement and make the third –party bound by the arbitration agreement. For example, the application of alter ego doctrine requires three elements to be fulfilled to compel non-signatory third party to arbitrate: close relationships between two companies, control exercised by one company over another and the use of control over another company to commit fraud or misconduct.

Second distinct feature is the expression of consent under each of the groups of theories. As was unsurprisingly stated by *Hosking*, the various legal theories may determine the way in which the third party can be bound to arbitrate but "the 'touchstone' for this determination is whether or not

the relevant entities *consented* to arbitrate with one another".[9] It is obvious that both groups of theories are determined by implicit consent to arbitrate, the differences are by which way this consent is determined. Under the contract-based theories the third party expresses its consent and becomes a party to the arbitration agreement through the application of contract and agency principles. Thus if an agent entered into the arbitration agreement expressly or impliedly on behalf of the principal, by the application of agency that means that principal gave its consent to be bound to the arbitration agreement. The same may be applied to the guaranty agreement where, in some cases the courts or tribunals by analyzing the guaranty agreement come to the conclusion that the rights and obligations of the guarantor are identical to the obligations of the guarantee under the agreement which contain the arbitration clause. Consequently, by entering into the guaranty agreement, the guarantor gave its consent to arbitrate.

At the same time, in the doctrine –based theory the consent can be drawn from the analysis of economic relationship between the third party and the signatory of the arbitration agreement. This analysis may lead to the conclusion that the third party participated in the contract which contain the arbitration clause, controlled that contract, derived benefits from that contract and, therefore, by its actions or intention showed its consent to be bound to arbitrate. The same analysis may also lead to the conclusion that if the relationships between two companies are sufficiently close, the acceptance of the arbitration agreement by the signatory of the arbitration agreement means the consent of the non-signatory third party to arbitrate.

Third distinct feature is an existence of legal basis for application which differentiates every group of theories. The contract-based theories are governed by the legal rules that are applicable to the contract between the third-party and the signatory of the arbitration agreement according

[9] Hosking, *supra* note 6, at 303

to the conflict of law rules. However, the doctrine-based theories have their aims to reach the fair result and are applied "in accordance with customary principles of equity and international commerce".[10]

Consequently, the distinct features between contract-based and doctrine based theories are the ground on which the theory is based, the expression of the consent under the theory, and the legal basis by which the theory is determined. The analyses of the issues the courts and arbitral tribunals facing when consider extension under the theories of each group will be given below.

[10] Strong, *supra* note 8, at 933

CHAPTER 2. EXTENSION OF THE ARBITRATION AGREEMENT UNDER CONTRACT-BASED THEORIES

As it was stated above, a non-signatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency.[11] In the present chapter I will analyze the extension of the arbitration agreement to the third parties through the application of the contract based theories of agency, guaranty and sub charter contracts.

2.1. Extension under Agency Principles.

Before examination of precondition under which the non-signatory may be bound to arbitrate in agency contracts we need to establish the definition of agency. Analyzing the definition of agency, it can be concluded that agency is a "fiduciary relationship created by express or implied contract or by law, in which one party (the agent)" that is subject to principal's control "may act on behalf of another party (the principal) and bind that other party by words or actions"[12]

If the arbitration was concluded by the representative of the principal, the principal may be bound to the arbitration agreement itself. It seems that both courts and arbitral tribunals are anonymously convinced to extend the arbitration agreement to the principal of the agency agreement. Nevertheless there are still two unresolved issues that may be raised when establishing the preconditions for application agency principles. First, in what form should be the agent's power to bind the principal to the arbitration agreement and, second, what features should be found in the relationships between the two parties to define them as principal-agent relationships.

The issue that still remains unresolved is what should be the form of agent's power to sign an

[11] Thomson -CSF, S.A v. American Arbitration Association, 64 F.3d 773, (2nd Cir. 1995)
[12] Black's Law Dictionary, 7th ed., s.v. "Agency"

arbitration agreement. It was asserted that the form requirement of the power of the agent has to be governed by national law while it is still not determined whether it should follow the requirements stated under Article II (2) of New York Convention.[13] Under Article II (2) of New York Convention the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. New York Convention does not indicate in what form should be the agent's power to sign the arbitration agreement which allows assuming that it is not required that the agent's power has to be in writing and signed by the principal. It is national law, determined by the rules of International Private Law, which states the requirements to the form of the agent's power to sign arbitration agreement. The same approach is adopted by the courts and arbitral tribunals.

In *ICC case No 5832* defendant asserted that the arbitration agreement was not signed in a legally binding way. The arbitral tribunal decided that the law of the existence of the power applies to determine the agent's power to sign an arbitration agreement. "The authorization to conclude an arbitration agreement forms a part of the arbitration agreement itself and therefore must be in writing […] Due to the fact that tacit granting an authorization is not valid under Austrian Law"[14] agent's authorization cannot be concluded from the conduct of the defendant therefore "defendant did not enter the arbitration agreement in a legally binding way". [15] Based on the abovementioned the Arbitral Tribunal dismissed the claim due to the lack of Tribunal's jurisdiction in regard to defendant.

In another case Italian Supreme Court enforced the arbitral award, which was rendered in

[13] Andreas Reiner *"The Form of Agent's Power to Sign an Arbitration Agreement and Article II (2) of the New York Convention"*, ICCA Congress series no.9 (Paris/1999): 83-84
[14] Case No 5832, Austrian Company v. Liechtenstein Company (1988) *in* COLLECTION of ICC ARBITRAL AWARDS 1986-1990 (Sigvard Jarvin et al. eds., Kluwer Law and Taxations Publishers 1994): 542
[15] *Id*. at 542

London and rejected defendant` s argument that the arbitration agreement lacked the written form and therefore was invalid as "under English Law contracts can be validly stipulated by brokers on oral authorization of the parties"[16] Consequently, the Tribunal declared the award enforceable affirming the decision of the Court of Appeal.

A different approach was upheld by the arbitral court in Czechoslovak Republic which stated that it is not relevant that according to the law of Czechoslovak Republic a written power of attorney is required for an agent to conclude an arbitration agreement. Mr. K, an agent, did not obtain the company's stamp in illegal way. By signing an agreement which contains an arbitration clause, he was acting by the principal's approval. Therefore, the arbitration agreement signed by him is bound on the firm, a principal.[17]

Another issue that may arise during application of agency principles is establishing the criteria that help to determine the agency relationships between the parties. The key characteristic of agency is the degree of control which the principal retains over the agent, "actions or omissions of agents can often be imputed to principal, rendering the principal liable even where the agent act without principal authority".[18] Therefore, the parameters of agent's activity are determined by the principal.[19] The cases below show the approach of the courts and arbitral tribunals to determine the agency relationships between the parties.

In *Interocean shipping* the court held that "agency is a legal concept which depends on the manifest conduct of the parties not on their intentions or beliefs" and decided that acts of a party

[16] Rocco Giuseppe e Figli s.n.s v. Federal Commmerce and Navigation Ltd. (1982) *in* Yearbook Commercial Arbitration, Vol. X (Peter Sanders ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 1985)
[17] Czechoslovak foreign trade Company v. Austrian Company X. (1980) *in* Yearbook Commercial Arbitration Vol. XI (A.J. van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 1986): 112-113
[18] CLASEN THOMAS, INTERNATIONAL AGENCY AND DISTRIBUTION AGREEMENTS: ANALYSIS AND FORMS (Butterworth Legal Publishers, Vol. 1, 1995): 3-1
[19] Warren Seavey *The Rationale of Agency* 29 Yale L.J. (1920): 850-895

concluded the contract bound his principal.[20] In *Interbras Cayman Co.* the court did not deny that if agent entered into agreement the principal has the right to enforce the arbitration clause if the contract was made for its benefit, but, however it pointed out that agency is an issue of fact.[21] In *Pacific Can Co. v. Hewes* the Circuit Court of Appeals, Ninth Circuit held that the fact that the packing company organized, controlled, financed, governed according to defendant orders shows that it was responsible for the act of the packing company and is bound to arbitrate under the application of principles of agency.[22] Thus, in *China National* the Swiss Federal Supreme Court held that both principal and agent are bound to arbitrate, as they are "one indistinguishable entity… mutually connected, with a uniform purpose and a mere geographical separation of tasks"[23].

In the case before the District Court of SDNY one of the parties contested the enforcement of the award rendered in accordance with ICC rules as it was merely as an agent for its subsidiary. The Court rejected the appellant's contention and held that the argument itself contradicted by the unambiguous terms of the contract where appellant is identified as a party to the contract, nowhere in the contract is it stated that it was acting on behalf of its subsidiary[24].

In SCC case No 45/2001 the sole arbitrator applying the Chinese Law concluded that the third-party end-user had not become a party to the arbitration agreement.[25] The arbitrator does not

[20] Interocean Shipping Co. v. National Shipping and Trading Corp. and Hellenic International Shipping, S.A, 523 F.2d 527, (2nd Cir 1975)
[21] Interbras Cayman Co. v. Orient Victory Shipping Co., S.A, 663 F.2d 4 (2nd Cir.1981)
[22] Pasific Can v. Hewes, 95 F.2d 42 (9th Cir. 1938)
[23] "China National Machinery & Equipment Import & Export Corporation v. Loebersdorfer Maschinenfabrik AG (Austria) *in* Tobias Zuberbuhler *Non-Signatories and the Consensus to Arbitrate* ASA Bulletin, Vol. 26, No. 1 (2008): 21
[24] Shaheen Natural Resources Company Inc. v. Société Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures (Sonatrach), 585 F.Supp. 57 (1983)
[25] Alpha International S.A. (France) v. Beta Industry Company (China), Gamma Industry (China) *in* SCC Arbitral Awards 1999-2003 (Sigvard Jarvin, Annette Magnuson eds., Jurisnet 2006): 525-537

deny that the principal in an agency relationship in certain cases will be held liable for the obligations of his agent under a contract between the agent, acting on behalf of the principal and the third party. However, he stated that the Chinese law does not allow establishing a direct relationship between the principal and the opposite party to the contract as a result of the agent's contract with the opposite party as in order for [Gamma] to be bound by the contract the alleged agency agreement must be in writing according to Chinese Law, which is not supported by the facts of the present case.

Therefore to establish the agency relationships and allow the extension of arbitration agreement under agency principles the court and arbitral tribunals will look at the relationships between two parties, the degree of control exercised by one party over another, the factual circumstances that allow to suggest that one company is acting on behalf of another, the requirements to the form of agent's power to sign an arbitration agreement.

2.2. Extension under Guaranty Agreements

The extension of the arbitration agreement can be justified based on contractual principles reflected in the guaranty agreement. *Black's Law Dictionary* defines guaranty as "a promise to an answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance"[26]. The issue is to determine whether the guarantor of the guaranty agreement which guaranties the performance of the contract containing the arbitration clause is bound to arbitrate.

There are three possible solutions that are used either by state courts or arbitral tribunals when they encounter the issue of the extension of the arbitration agreement to the guarantor.

[26] Black's Law Dictionary, 7th ed., s.v. "Guaranty"

According to the first approach, the guaranty agreement is an independent business transaction that does not contain any express agreement to arbitrate, therefore, the guarantor cannot be bound to arbitrate. In the Interim award in the *ICC case No 4367* the arbitral tribunal held that the guarantor is not the party of the agreement which contains the arbitration clause.[27] Following this line, the courts of the US favor the position that a "non-signatory guarantor to an agreement containing the arbitration provision is not bound by that provision".[28] A non-signatory guarantor may compel to arbitrate only "when the particular guaranty explicitly incorporates the underlying [arbitration] agreement by reference".[29] The same position was upheld by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, which refused to declare its jurisdiction over the German guarantor and based its award on the facts that guaranty contract is a distinct transaction which could not fall within the scope of arbitration agreement in the main contract.[30] Consequently, under the first approach there is a general rule that the guarantor cannot be forced to arbitrate, except when it expressly agreed to arbitrate or when the arbitration clause is incorporated into the guaranty agreement.

Under the second approach, the guarantor may be bound to arbitrate even absence his consent to arbitrate if the arbitration agreement can be considered to be incorporated into the guaranty agreement also. In *Bettis Group Inc. v. Transatlantic Petroleum Corp.* the US Court of Appeals, Fifth Circuit remand the ruling of the district court with instructions to enforce the arbitration award rendered against guarantor who signed the guaranty agreement which was incorporated

[27] U.S. supplier v. Indian Buyer Interim award in case No. 4367 (1984) *in* Yearbook Commercial Arbitration, Vol. XI (A.J. van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 1986): 135-136
[28] Grundstad v. Ritt, 106 F.3d 201 (7th Cir. 1997)
[29] *Id*. at 205
[30] Case No 132/2004 (Russian seller v. Turkey buyer) (2005) *in* M.G. Rozenberg, PRAKTIKA MEZHDUNARODNOGO KOMMERCHESKOGO ARBITRAZHNOGO SUDA PRI TPP RF 2005 [Arbitration decisions rendered by the International Commercial Tribunal at the Russian Federation Chamber of Commerce and Industry in 2005], published by "Statut" (2006)

into Shareholders Agreement despite the guarantor's expressed disagreement to arbitrate, "spelled out in the body of the Agreement"[31]. The court based its assertion on the fact that the arbitration agreement in the Shareholders Agreement are broad enough to conclude that the guarantors are subject to arbitration.[32]

In my view, it is not enough to prove the broad scope of the arbitration agreement to extend the arbitration agreement to the third party. The signature and approval of the main contract is additionally required to extend the arbitration over the guarantor as was in *Development Bank of Philippines v. Chemtex Fibers Inc.* case where the court of SDNY held that as the guarantor was a signatory to the main contract and participating in its approval (and the approval of arbitration agreement either) its claims are covered by the arbitration clause.[33] Therefore, under the second approach the guarantor can compel to arbitrate if it can be proved that the arbitration agreement in the main contract is incorporated into the guaranty agreement as the guaranty agreement refers to the main contract and the guarantor approves the arbitration clause in the main contract.

Under the third approach, the arbitration agreement can be extended to the guarantor as by the execution of the guaranty agreement the guarantor became a party the main contract and hence a party to the arbitration agreement itself. It was expressed in jurisdictional award in SCC case No 38/1997 where the sole arbitrator decided that "the third party (the guarantor) was bound by the

[31] Bettis Group Inc. v. Transatlantic Petroleum Corp., 55 Fed.Appx. 717 (5th Cir. 2002)
[32] *Id*. at 11
[33] Development bank of Philipines v. Chemtex Fibers Inc. 617 F.Supp.55 (1985)

arbitration clause in the main agreement when the undertakings of the debtor and the guarantor were identical or equivalent".[34]

Guided by Swedish law, the arbitrator established a number of preconditions under which the arbitration agreement can be extended to the guarantor of the transaction. First, the guaranty should be given to the contract which contains the arbitration clause and form "an integral part of the overall transaction".[35] Second, the guarantor should be aware of the arbitration clause in the main contract. Third the guarantor is bound to arbitrate as he undertakes the same responsibility as the debtor, in fact the arbitrator held "the obligations of debtor and guarantor are in principle identical[36]"The same position was upheld by the US district court in *J.A. Jones, Inc., Kvaener ASA v. The Bank of Tokyo-Mitsubishi Ltd.* case where it granted the petition to compel arbitration based on following. It was explicitly stipulated in the contract that "guarantor shall have the same rights and remedies of Contractor"[37] under the main contract which contains the arbitration clause therefore the main contract and the guarantees "should be read in conjunction with one another"[38] Therefore, under the third approach the guarantor of the performance of the main contract is bound to arbitrate as by receiving the obligation to provide performance under the contract he became bound by the main contract and the arbitration agreement contain therein.

To summarize, when deciding to extent the arbitration agreement to third party under guaranty agreement the courts and arbitral tribunals will look at the scope of arbitration agreement, the

[34] The A Company (Israel), The B Company (Israel) v. The Former Soviet Republic Jurisdictional Award in SCC cases 38/1997and 39/1997 *in* International Arbitration Court Decisions 2nd edn., (Sigvard Jarvin, Annette Magnuson eds., Jurisnet 2008):1089-1113
[35] *Id*. at 1093
[36] *Id*. at 1104
[37] J.A. Jones, Inc., Kvaerner ASA v. The Bank of Tokyo-Mitsubishi, Ltd, New York Branch *in* Yearbook Commercial Arbitration, Vol. XXV (A.J van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 2000): 641-1164
[38] *Id*. at 905

connections between the guaranty agreement and the main contract, the awareness and approval of the arbitration agreement by the guarantor and to the nature of obligations of the guarantor in regard to the main contract.

2.3. Extension under Sub charter contract

The question whether arbitration agreement can also be extended under sub charter agreement to the third parties (the owners of the vessel) who did not sign it still remains controversial. Charterparty is a "special contract between the shipowner and charterer for the carriage of goods at sea".[39] The subcharter agreement is an agreement between the charterer, a disponent owner of the vessel, and subcharterer for carriage of goods by the sea.

As stated by *Tetley,* the dominant trend in maritime arbitration is that only the original parties to the subcharter agreement that contain an arbitration clause may be bound to arbitrate.[40] Also "it seems to be inconsistent with the concept of maritime arbitration to imagine a situation where a party is obliged to arbitrate a case without having agreed to arbitration or to arbitrate a case before arbitrators without having agreed to their appointment".[41] Indeed, as can be shown by the cases below, only under certain preconditions the owner of the vessel may be bound to arbitrate the dispute under the arbitration clause in the subcharter agreement.

The issue that arose in *Goldmar* case was whether the owner of the ship and the affiliate of the subcharterer, not a party to the subcharter party could be bound to arbitrate under the subcharter. The arbitration panel refused to compel the owner to arbitrate as he has a separate arbitration clause in the charter-party, but it allowed the affiliate to arbitrate for the following reasons. The

[39] Black's Law Dictionary, 7th ed., s.v. "Charterparty"
[40] WILLIAM TETLEY, MARINE CARGO CLAIMS (3rd ed., International Shipping Publications 1988):608
[41] O'Connor John G. *Maritime Arbitration Without Consent Vouching, Consolidation and Self-Execution -Will the New York Practice Migrate to Canada?* Journal of International Arbitration, Vol. 10 No. 2 (1993): 165

arbitration panel held that non-signatory could be compelled to arbitrate due to close corporate relationships with signatory party and "where the non-signatory's claim was closely intertwined with the charterparty".[42] The tribunal made the arbitration agreement binding on the third party who has no contractual relationship arising from subcharter contract but refused to extend it to the owner of the vessel.

The opposite was held by the court in the *Import Export Steel*. The court stated that the party to the charter party may enforce the agreement to arbitrate if the subchaterer clearly assume the obligation to arbitrate and the issue in dispute falls within the terms of the arbitration clause, but refused to bind affiliate of the party to the contract as "it is not a holder of or shipper or consignee under the bills of lading, where its name appears only as notify party".[43] The court in *Rice Company* also stated that the fact that "party brings an *in rem* claim for the vessel or because a bill of lading with an arbitration clause was issued for the vessel"[44] is not enough to compel non-signatory owner of the vessel to arbitrate and rejected the party's assertions that the owner of the vessel is contractually bound by the arbitration clause. However in *Coastal States Trading* the court held that the arbitration agreement was broad enough to encompass dispute between consignee and vessel owner despite the vessel owner was not a signatory to a charter party which contained the arbitration clause executed between the subcharterer of the vessel and the consignee, the charter party was incorporated by reference into the bill of lading and the arbitration clause could be enforced against the consignee by the vessel owner"[45]

[42] Stena Bulk v. Citgo Asphalt Refining Co., Society of Maritime Arbitrators of New York, Inc. Award No 3902 (2005) http://www.onlinedmc.co.uk/the_goldmar.htm
[43] In the Matter of Arbitration between Import Export Steel Corp. and Nimpex International, Inc v. Mississippi Valley Barge Line Co., 351 F.2d 503 (2nd Cir. 1965)
[44] The Rice Company (Suisse), S.A, v. Precious Flowers Limited; Ibn Agrotrading GmbH; M/V Nalinee Naree, 523 F.3d 528 (5th Cir. 2008)
[45] Coastal States Trading, Inc. v. Zenith Navigation S. A. and Sea King Corporation, 446 F.Supp. 330 (1977)

Consequently, it can be assumed that the subcharter contract does not create obligations for third-parties, owners of the vessel, to be bound by the arbitration agreement, which contained in it. The courts and arbitral tribunals rather tend to bound third parties to the arbitration clause only if they assume the obligations under the sub charter contract or the contract between the vessel owner and the subcharterer is incorporated into the subcharter agreement.

As can be seen from the analysis above the courts and arbitral tribunals tend to extend the arbitration agreement to third parties under agency principles, may extend the arbitration agreement under guaranty agreement if they manage to establish the consent to arbitrate and the quality of obligations between the signatory of the arbitration agreement and third party. The courts and arbitral tribunals refused to recognize sub charter contract as a basis for the extension of arbitration agreement to the vessel owner but may do so if the vessel owner assumes the obligation under the subcharter contract or the contract contain the reference to the charterparty.

CHAPTER 3. EXTENSION OF THE ARBITRATION AGREEMENT UNDER DOCTRINE-BASED THEORIES

In chapter three I will analyze the extension of the arbitration agreement to third parties through the application of the doctrinal based theories of alter ego, group of companies and third party beneficiary.

3.1. Extension under Alter Ego Doctrine

The arbitration agreement can be extended under alter ego doctrine. The alter ego theory allows holding one corporation legally bound for the actions of the other despite the rules of limited liability.[46] It was recognized by the courts and arbitral tribunals that the existence of alter ego relationship is sufficient to justify the extension of the arbitration agreement to the non-signatory third party, based on the close relationships between two companies.[47] The preconditions for the application alter ego doctrine were developed by the courts and scholars and include: a close relationship between two companies (unity of ownership and interests), control by one company over another and "where recognition of them as separate entities would sanction fraud or lead to an inequitable result".[48] I will talk about each of the preconditions more precisely.

The first important precondition to apply the alter ego is the close relationship between two companies, mainly parent-subsidiary, which would "justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other".[49] Thus the UK court in determining the issue whether a subsidiary of the parent company, non-signatory of the arbitration agreement, can claim the stay of court proceeding in favour of arbitration held that as the two parties and their actions are closely connected with factual circumstances of the case "it

[46] KAREN VANDEKERCKHOVE, PIERCING THE CORPORATE VEIL (Kluwer Law International 2007): 11
[47] Thomson-CSF, S.A. v. American Arbitration Association 64 F.3d 773 (2nd Cir. 1995)
[48] VANDEKERCKHOVE, *supra* note 44, at 83
[49] Thomson-CSF, S.A. v. American Arbitration Association 64 F.3d 773 (2nd Cir. 1995)

would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is claiming 'through or under' the parent to do what is in fact doing whether ultimately held to be wrongful or not".[50]

Moreover, the courts in the US have developed a "laundry list" of factors to determine whether a subsidiary is an alter ego of a parent company. These are whether

> the parent and the subsidiary have common stock ownership, the parent and the subsidiary has common directors or officers; the parent and the subsidiary have common business departments; the parent and the subsidiary file consolidated financial statements and tax returns; the parent finances the subsidiary; the parent caused the incorporation of the subsidiary; the subsidiary operates with grossly inadequate capital; the parent pays the salaries and other expenses of the subsidiary; the subsidiary receives no business except that given to it by the parent; the parent uses the subsidiary's property as its own; the daily operations of the two corporations are not kept separate; and the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings.[51]

Nevertheless, it is not necessary for the court to establish all the factors in a list to reach the conclusion that there are alter-ego relationships between two companies. For example in *Jon –T Chemicals* the court established the ten factors to consider the parent company an alter ego of its subsidiary and pointed out that "resolution of the alter ego issue is heavily fact-specific".[52]

The second important factor is domination and control over activities of the subsidiary by the parent company. Thus in an ad hoc award rendered in Switzerland the arbitral tribunal decided to pierce the corporate veil and extend the arbitration agreement to the parent company as the parent company exercised total control over subsidiary, its administration, management and

[50] Roussel-Uclaf G. D. v. Searle & Co. Ltd., (High Court Of Justice, Chancery Division 1977) *in* Yearbook Commercial Arbitration, Vol. IV (P. Sanders ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 1979): 317 - 319
[51] United States of America v. Jon-T Chemicals, Inc., 768 F.2d 686, (5th Cir. 1985)
[52] *Id*. at 695

assets.[53] Nevertheless, sometimes the arbitral tribunals may try to avoid the application of alter ego doctrine.

The approach of the arbitral tribunal of SCC seems interesting, which stated that the arbitration agreement can not be extended to the parent company under alter ego doctrine as the factors that are necessary to pierce the corporate veil arise out of contractual relationship between the parties "that they cannot be considered to be covered by the arbitration clause in the contract".[54] Following the tribunal's logic, it can be assumed that the arbitration agreement cannot be extended under alter ego doctrine as the preconditions for application of the doctrine establish the liability of the parent company but cannot make it bound under particular arbitration clause in a particular contract. The arbitral tribunal of SCC nevertheless declared the parent company bound by the arbitration clause in the contract but it concluded that the conduct of the parent company shows the full acceptance of the contract together with the arbitration clause contained therein. The conduct of the parent company was expressed by administrative and financial control over its subsidiary which may create the impression for the third person that parent and subsidiary where jointly and severally liable for the contract. The decision was criticized on the grounds that it would be unlikely for claimant to enforce it in Russian Federation (the home country of both respondents) as the enforcement of foreign arbitral award is governed by New York Convention, which recognizes only arbitration agreement in writing, not concluded by the conduct of one of the parties.[55]

[53] The ad hoc ward rendered in Switzerland (1991) *in* Bernard Hanotiau *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis* Journal of International Arbitration, Vol. 18 No. 3 (2001):282

[54] X v. Z, Y, Final award in case 108/1997 (2000) *in* SCC Arbitral Awards 1999-2003 (Sigvard Jarvin, Annette Magnuson eds., Jurisnet 2006): 91-103

[55] Observations by Michael S. Walker *in* SCC Arbitral Awards 1999-2003 (Sigvard Jarvin, Annette Magnuson eds., Jurisnet 2006): 104-110

The third important factor is that the control was "misused to commit fraud or injustice".[56] In *Bridas* the Court of Appeals held that the government of Turkmenistan is bound to arbitrate by virtue of application of alter ego doctrine as an alter ego of State Concern Turkmenneft. The Court of Appeals asserted that the control of Government of Turkmenistan over its affiliate corporation was used to commit a fraud or another wrong on plaintiff and was expressed in "government's manipulation of oil company to prevent plaintiff from recovering any substantial damage" from the contract with government's state-owned company.[57]

Nevertheless the doctrine of alter ego is criticized by arbitral tribunals as it "has nothing to do with the issue of consent or reliance on appearance and should not either be applied in case of confusion of assets or undercapitalization of the subsidiary. Applying this doctrine will lead to denying the legal independence of the subsidiary".[58] Nevertheless despite its criticism for the lack of consent the alter ego doctrine is widely applicable in the US.

To sum up, the main elements which comprise the alter ego doctrine are the close relationships between two companies, control exercised by one company over another and using the control over another company to commit fraud or injustice.

3.2. Extension under the Group of Companies Doctrine

Another doctrine that can justify the extension of the arbitration agreement over the third parties is the group of companies doctrine. According to the definition given by *Wilske* under the group of companies doctrine, the arbitration agreement can be extended to "the parent or other affiliate

[56] Bridas S.A.P.I.C v. Government of Turkmenistan, 447 F.3d 411 (5th Cir. 2006)
[57] *Id*. at 413
[58] Decision of Swiss Federal Court of 1 September 1993 *in* Bernard Hanotiau *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis* Journal of International Arbitration, Vol. 18 No. 3 (2001):282

company"[59] of the signatory of arbitration agreement "provided that such non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute".[60]

The application of the group of companies is most precisely described in *Dow Chemical*, where the arbitral tribunal held that "the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings".[61] In the present case the Tribunal stated that the group of companies doctrine was formed according to the customs in international trade and was applicable to establish the jurisdiction of the tribunal over claimant. Following this line, the ICC arbitral tribunal in Venezuela held that the participation of second respondent in the preparation and execution of the contract in dispute may determine the intention of the parties and can be inferred as an extension of the contract and arbitration clause to the second respondent.[62]

This position was upheld by the French courts, for example in *kis France S.A.* the Court of Appeal of Paris considered that the arbitrators fairly decided that there was a common intention of all the parties within a group of companies to consider the parent company liable for the debts of its subsidiaries which therefore allow to extend the arbitration clause over them.[63] The same conclusion was reached by the Court of Appeal of Pau in *Sponsor*, where it was stated that "a

[59] Wilske, Stephan, Shore, Laurence Ahrens, Jan-Michael *The group of companies doctrine – where is it heading?* American Review of International Arbitration, Vol. 17 (2006): 74
[60] *Id.* at 74
[61] Dow Chemical France v. ISOVER Saint Gobain, Interim Award in case No. 4131 (1982) *in* Yearbook Commercial Arbitration Vol. IX (P. Sanders ed. Kluwer Law and Taxation Publishers, Deventer/Netherlands 1984): 131 - 137
[62] Case No. 11160, Final award (2002) *in* ICC International Court of Arbitration Bulletin Vol. 16 No 2 (2005): 99
[63] Kis France SA v. SA Societe Generale (Court of Appeal, Paris 1989) *in* Yearbook Commercial Arbitration Vol. XVI (A.J. van den Berg ed. Kluwer Law and Taxation Publishers, Deventer/Netherlands 1991): 145 - 149

group of companies indeed possesses, notwithstanding the separate legal personality pertaining to each of them, a unique economic reality, which the courts have to take into consideration, when extending the arbitration agreement over third parties within a group".[64]

Consequently, the preconditions for application of group of companies doctrine are the following. First, the third party should be involved in the negotiation, performance and termination of the contract in dispute, creating by its act the single economic reality with the signature of the arbitration agreement. Because of the creation of the single economic reality, the choice of the company for the transaction in dispute is of secondary importance to the parties. Second, the third party should show its intent to arbitrate by exercising control over the signatories of the arbitration agreement, mainly through the existence of parent subsidiary-relationships between them. Third, the application of trade usages to the procedural issues justifies the extension of the arbitration agreement under the group of companies doctrine over third parties.

On the opposite side, the group of companies doctrines also has its drawbacks. The weakest part of the application of this doctrine can be seen during enforcement of the award based on the group of companies doctrine. This can be seen from the cases below.

The tribunal in *Westland Helicopters* made surprising conclusion that "it does not follow from the requirement of the written form [of the arbitration agreement] that the clause must be concluded in the name of the party to the proceedings"[65], therefore, rejecting the necessity of

[64] Sponsor AB v. Ferdinand Louis Lestrade, (Court of Appeal of Pau 1986) *in* Yearbook Commercial Arbitration, Vol. XIII (A.J. van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 1988): 149 - 151
[65] Westland Helicopters Ltd. v. Arab Organozation for Industrialization, Interim award in case No. 3879 (1984) *in* Yearbook Commercial Arbitration Vol. XI (.J. van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 1986): 127-133

consent to arbitrate. Based on the principles of good faith, taking into account the control that all four States exercised over operations of Arab Organization for Industrialization, the possibility of the denial of justice in regard to Westland, the tribunal pierced the corporate veil and made all four States, shareholders of Arab Organization for Industrialization, to arbitrate.

However, the Court of Appeal of Geneva and later the Supreme Court in Switzerland affirmed that the tribunal had jurisdiction in regard to the respondents except the Republic of Egypt. The Court of Appeal of Geneva fairly noted that Arab Organization for Industrialization is an independent entity with a legal personality and totally autonomous on the administrative and financial level "It is this organization, and not the States, which signed the contract containing the arbitration clause", therefore, the four States are not bound by an arbitration clause contained in a contract concluded with Westland[66]. The court also held that there is no denial of justice in the present dispute, as Westland is free to initiate proceedings against parties in state court.[67] The Supreme court also stressed the idea that a party cannot be bound to arbitrate in the absence of its consent "unless this party is nevertheless bound [by the clause] by the signature of an entity or a third party empowered to act on behalf of the first party, on the basis of an act granting to that entity or third party the power to refer a dispute to arbitration" which is in fact a basis for the extension of arbitration agreement under agency principles, not group of companies doctrine.[68]

The same approach was taken in *Sarhank* where the arbitrators held that the companies within one group are bound to the arbitration agreement as the subsidiary companies that cannot

[66] Westland Helicopters v. The Arab Republic of Egypt, Court of Appeal of Geneva (1987) *in* Yearbook Commercial Arbitration Vol. XVI (A.J. van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 1991): 174-181

[67] *Id.* at 180

[68] Westland Helicopters v. The Arab Republic of Egypt, Swiss Supreme Court (1988) *in* Yearbook Commercial Arbitration Vol. XVI (.J. van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 1991): 174-181

conduct transactions without approval of the parent company which owns the trademark. Nevertheless, the US Court of Appeal refused to enforce the award, as the award rendered by the arbitral tribunal was not based on the clear and unmistakable consent of the parent company to arbitrate; moreover, the parent company repeatedly objected to being compelled to arbitrate.[69] In the other decision Swiss Federal Supreme Court expressly rejected the group of companies doctrine and stated that the company can only arbitrate with non-sigantory in case "it deceived to believe that it was dealing with a single legal entity".[70] Moreover, in *Peterson Farms* the court of Queen's Bench Division expressly stated that the group of companies doctrine does not exist under English Law.[71]

In the recent decision English court of Queen's Bench Division set aside the order to enforce the ICC arbitral award on the basis that there was no valid arbitration agreement between the parties. The ICC tribunal held that the Government of Pakistan is a party to the arbitration agreement under the group of companies doctrine, as it was "directly involved in the negotiation and performance of such contract, such involvement raising the presumption that the common intention of all parties was that the non-signatory party would be a true party to such contract and would be bound by the arbitration agreement".[72] Nevertheless, the court critically referred to the arbitrators findings and stated that there is no subjective intention of Government of Pakistan to arbitrate absence its signature on the arbitration agreement or contract which contains the arbitration clause.

[69] Sarhank Group v. Oracle Corporation 404 F.3d 657 (2nd Cir. 2005)
[70] Saudi Butec Ltd.v. Al Vouzan Trading, Contracting Co. Ltd v. Saudi Arabian Saipem Ltd, Saipem S.p.A., (Swiss Federal Supreme Court 1996) *in* Wilske Stephan et al., *The group of companies doctrine – where is it heading?*American Review of International Arbitration, Vol. 17 (2006): 78
[71] Peterson Farms Inc. v C&M Farming Ltd., 2004 WL 229138 (QBD 2004)
[72] Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan, [2008] 2 Lloyd's Rep. 535 (Queen's Bench Division 2008)

To sum up the weakest features of the group of companies doctrine are following. Firstly, third parties extraneous to the arbitration agreement cannot become parties to it unless all parties to such agreement approve of such extension".[73] Secondly, the party cannot be forced to arbitrate disregarding its explicit consent to submit the dispute to arbitration. Some jurisdiction may consider the written form of the arbitration agreement as an explicit consent to arbitrate, while the economic involvement in the transaction and awareness of the arbitration clause in the contract in dispute can not be the legal base for liability. Thirdly, the group of companies lacks explicit legal bases for its application, referring only to the commercial trade usages which may not be accepted in some countries. Moreover, the purpose of creating foreign subsidiaries is to protect the parent company when exploring the market of other countries, to protect themselves from the liability and money damages for the contracts of the subsidiary.

3.3. Extension under Third party Beneficiary Doctrine

"The third party beneficiary doctrine provides that in certain circumstances a non-signatory who has received benefits under the main contract is entitled to demand performance of those benefits"[74] Following the same line, the party who has received the direct benefit from the contract which contains an arbitration clause is bound to arbitrate the dispute. *Hosking* contends that the arbitration agreement can be extended under the third party beneficiary doctrine only to "claimant in a claim relying on the main agreement".[75] Nevertheless, in *Deloitte Noraudit* The Court of Appeal held that the appellee is bound by arbitration provision, as it knowingly received

[73] Otto Sandrock *Arbitration Agreements and Groups of Companies in* ETUDES PIERRE LALIVE (1993): 632
[74] Hosking, *supra* note 6, at 292
[75] *Id*. at 292

the benefit from using the trade name "Deloitte" in accordance with the agreement which contained the arbitration clause and did not object to it.[76]

A number of preconditions for the application of third party beneficiary doctrine were established by the case law. Firstly, the contract which contains the arbitration clause should indicate that its execution confers a direct benefit on the third party. Secondly, the benefit must be an intended benefit established by the will of the parties to the contract, not incidental benefit. Thirdly, it should be established whether the scope of arbitration agreement allows its extension over non-signatory.

Thus, in ICC case the arbitral tribunal held that "whether a party is an intended third-party beneficiary depends on the intent of the parties to the contract".[77] The tribunal concluded that there is no evidence of intent in the agreement which contains the arbitration clause as the third party is not referred to anywhere in the agreement and the apportionment of fees according to the terms of the agreement does not confer a benefit on the third party in the present proceedings.

A more liberal approach was taken by the Court of Appeals Second Circuit, according to which even implied intent in the contract to confer the benefit on third party can be the precondition for the application of third-party beneficiary doctrine. In that case the company that was formed to construct and operate a mill in Sweden "had no interests as a third party beneficiary"[78], as the contract between to companies for the installation of recovery system in the mill did not indicate it as a third-party beneficiary from the transaction either expressly or impliedly. Nothing in the

[76] Deloitte Noraudit A/S v. Deloitte Haskins & Sells, 9 F.3d 1060, (2nd Cir. 1993)
[77] Mergers and acquisitions firm Q, Inc. v. Mergers and acquisitions firm Q-Z Ltd., Final Award *in* Case No. 9839 of 1999 in Yearbook Commercial Arbitration, Vol. XXIX (A.J. van den Berg ed., Kluwer Law and Taxation Publishers, Deventer/Netherlands 2004): 66 - 88
[78] In the Matter of a Certain Demand for Arbitration by Hylte Bruks Aktiebolag v. Babcock & Wilcox Co., 399 F.2d 289, (2nd Cir. 1968)

terms of the contract shows the intent of both parties to confer a benefit to the third party. The court stated that "it needs no argument to show that a third party can not turn himself into a beneficiary by enlarging the terms of the contract; he must find in the contract a promise the performance of which will benefit him".[79]

The more liberal approach was upheld in International Dairy Queen, where the court held that "whether the third party was an intended beneficiary may be determined by examining both the writing itself as well as the surrounding circumstances known to the parties".[80] Based on this, the court established the application to the third-party beneficiary doctrine over second defendant and grant stay of proceedings as the numerous factors shows the intent of it to receive the benefit from the transactions of the first defendant which contained the arbitration agreements.

However, the court refused to apply the third party beneficiary doctrine to the third person in cases where the arbitration agreements in the contracts expressly stated that it is applicable to the dispute between the only two parties of the agreement. The necessity of the examination of the scope of the arbitration agreement to allow it extension over the third party was also raised in *Sherer* where the Court of Appeals granted the motion to compel arbitration. "The Court held that since this clause provided that Sherer had agreed to arbitrate any claims arising from relationships resulting from the agreement, and Green Tree, as the loan servicer, was in such a relationship, Sherer had validly agreed to arbitrate with Green Tree and the language was sufficiently broad to permit Green Tree to compel arbitration".[81]

[79] *Id*. at 293-294
[80] Hugh Collins v. International Dairy Queen, Inc., 2 F.Supp.2d 1465 (1998)
[81] Stephen L. Sherer v. Green Tree Servicing LLC, 548 F.3d 379 (5th Cir. 2008)

Consequently, it is not enough to be the third party beneficiary to compel to arbitrate. The arbitration agreement can be extended under the third party beneficiary doctrine where the benefit of third party is stipulated in the contract, the benefit is intended and the scope of arbitration clause allows the extension over third parties.

To sum up the above chapter it should be noted that the doctrine-based theories allow the extension of arbitration agreement to third party by the application of economic factors, not creating the legal links from the contract as was shown in contract based theories. Thus, in alter ego doctrine the preconditions are the close relationships between the parties, in the group of companies doctrine it is a single economic reality between the parties, in the third-party beneficiary doctrine it a direct benefit conferred on third party.

CONCLUSION

Discussion of the existing theories that extend the arbitration agreement to third parties reveals distinct and common features within each of the group and allows making the following conclusions. The distinct features between contract-based and doctrine based theories are the ground on which the theory is based the expression of the consent under the theory, and the legal basis by which the theory is determined.

All the theories within each group have different issues which the courts or arbitral tribunals need to resolve while deciding to extend the arbitration agreement to third parties. In the contract –based theories they examine the scope of the agent's power to sign the arbitration agreement and the existence of agency relationships between the parties. Under the guaranty agreement they examine the scope of the arbitration agreement, the implied consent of the guarantor to arbitrate and the nature of the obligations of the guarantor under the contract which contains the arbitration clause. In the subcharter contract they will look at the scope of the arbitration agreement and search for additional factors to extend the arbitration agreement to third party.

In the doctrine - based theories the courts and arbitral tribunals will feel that priority should be given to economic reality rather than strict legal rules"[82]. Thus, in the application of group of companies doctrine they will look at the participation of third party in the negotiation and performance of contract which contain the arbitration clause. In the application of alter ego doctrine they will look at the close relationships between two companies and the degree of control exercised by one company over another. In the application of the third-party beneficiary

[82] Vandekerckhove, *supra* note 44, at 13

doctrine they will look at the direct benefit which can be achieved by third party from the contract that contains the arbitration clause.

The two groups of theories are based on the consent to arbitrate, but the way which the courts or arbitral tribunals follow differ within every group and even within one group not always lead to the acceptance of extension over third party. As was truly noted by *Blessing*, "the difficulty lies in a proper understanding of the entire mosaic of the particular contractual relationship and its specific and characteristic dynamics.[83] Therefore more attention should be paid to the clarification and examinations of facts which will allow the extension of arbitration agreement to third parties.

[83] Marc Blessing The Law Applicable to the Arbitration Clause ICCA Congress series No. 9 Paris (1999): 188

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