

**NON-SIGNATORY PARTIES IN ARBITRATION: WHAT CAN THE
ARBITRATION INSTITUTION OF THE KYRGYZ REPUBLIC LEARN FROM
INTERNATIONAL PRACTICE?**

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Abstract

The consent of parties to arbitrate is essential to commence any arbitral proceedings. This consent should be expressed in the arbitration agreement between the parties, in which they willingly agree to arbitrate their dispute. However, there are situations, when it is not easy to find the real parties to arbitration agreement, as sometimes they are not expressly mentioned in it. The thesis analyzes such situations, referred to as “binding non-signatories” or “extending the arbitration agreement” and shows the factual patterns, in which such practice is justified and encouraged. The research provides an analysis of the law of the Kyrgyz Republic, the author’s home jurisdiction, and endeavors to contribute to the development of Kyrgyzstani arbitral institution through learning from the experience of developed jurisdictions.

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Introduction

The inherent principle of commercial arbitration is that it is based on the consent of parties to submit the dispute arising out of their legal relationships to arbitration and to waive their right to use judicial proceedings.¹ Such consent is usually contained in arbitration agreement between the parties, concluded as a part of underlying contract, or as a separate agreement. However, there are cases in which the arbitral tribunals establish their jurisdiction to include the non-signatory parties to arbitration agreement in the arbitral proceedings. This is usually referred to as “extending” the arbitration agreement, “binding non-signatories” or “joining non-signatories.”² Such extension may happen in a number of situations, which highly contrast in nature. There is no commonly accepted practice regarding this question. Legal practice has developed several doctrines, which may be exploited to bind non-signatories to arbitration. They include, but are not limited to, the doctrine of piercing the corporate veil, “group of companies” theory, agency theory, and others.

The thesis analyzes the problem that under the law of the Kyrgyz Republic, including the Law on Arbitral Tribunals³ and the Rules of Kyrgyzstani International Court of Arbitration⁴ it is not clear whether there is a possibility to bind non-signatories to arbitration. Article 41 of the Rules states that participation of third parties is permitted only with consent of both parties and non-signatory itself.⁵ In practice, such consent of all parties is unlikely to

¹ William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 1 (Oxford University Press 2009).

² *Id.*, 2.

³ Zakon Kyrgyzskoi Respubliki o Treteiskih Sudah v Kyrgyzskoi Respublike [Law of the Kyrgyz Republic on Arbitral Tribunals in the Kyrgyz Republic], 2002, No. 135.

⁴ Reglament Mezhdunarodnogo Treteiskogo Suda Pri Torgovo-Promyshlennoi Palate Kyrgyzskoi Respubliki [The Rules of International Court of Arbitration in Affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic], 2007.

⁵ *Id.*, art. 41.

happen. However, it is not clear if this article can be applied to non-signatories as well, or it refers to other issues, such as intervention of a third party.

Many arbitral institutions in Eastern Europe and Central Asia have quite a low number of cases administered each year. Kyrgyzstani arbitration institution is one of them, and at this point, having only thirteen years of experience, there is no publicly available arbitral or court decisions on this issue. Because the Kyrgyzstani Law on Arbitral Tribunals almost entirely follows the Arbitration act of the Russian Federation, and the rules of Russian arbitration institution (the International Commercial Arbitration Court) are quite similar, it is possible to refer to Russian experience as a practical example of decision-making on the issue of non-signatories. In 2013, the Arbitrazh Court of Moscow set aside the case between a German company and a Russian governmental authority, in which the arbitral tribunal decided that the government-owned entity is a party of the arbitration agreement.⁶ This decision was later upheld by the Federal Arbitrazh Court of the Moscow Circuit and the Supreme Arbitrazh Court.⁷ Due to similarities between the legal systems of Kyrgyzstan and Russia, the case in most probability would have the same conclusion in Kyrgyz Republic. The research has chosen Kyrgyzstan as a focus jurisdiction because it is important for the author to put his efforts into development of the arbitration institution of his home country.

The methodology of research includes case studies of leading arbitration institutions and domestic courts of Switzerland, the UK, the US, Germany, and France. The issue of non-signatories is not a uniformly settled problem, and it cannot offer an extensive number of cases, thus it is possible to extend the research area outside a particular jurisdiction in order to observe

⁶ Sergei Usoskin, *Russian Dallah in the Making*, CIS ARBITRATION FORUM (Jul. 14, 2013), <http://www.cisarbitration.com/2013/07/14/russian-dallah-in-the-making/>.

⁷ BAKER & MCKENZIE, BAKER & MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK: 2013-2014, at 268–69 (Liz Williams ed., Juris Publishing 2014).

the question generally. The research also analyzes scholarly opinions on this issue and synthesizes the opinions to promote a development of the Kyrgyzstani arbitration institution.

Chapter I: General Overview of the Concept of Binding Non-Signatories

1. Consensual nature of arbitration

The traditional court litigation is a dispute settlement mechanism, where parties are determined by interest or claim that they have to another party.⁸ In order to initiate a court proceeding it is necessary to prove the existence of a substantiated legal or financial interest, and based on domestic procedural law, the court will decide whether to accept such claim or not. To commence a court litigation, it is not required to prove that parties agree to be tried in the court, since such right is presumed under national procedural law. Jurisdiction of court may also arise if it courts have exclusive jurisdiction in certain disputes or if the rules of private international law provide for jurisdiction based on domicile, place of implementation of contract, and other grounds.

International commercial arbitration, in contrast to litigation, is a purely consensual dispute settlement mechanism, which is based on the agreement between the parties. This means that arbitration procedure applies only to the disputes, which parties decided to arbitrate under arbitration agreement concluded between them. It is an application of the doctrine of privity of contract, which is established in both civil and common law countries.⁹ This became a fundamental principle of arbitration, and applied in international law instruments, national legislation and arbitral awards.¹⁰

The New York Convention in Article II (1) states that parties to the Convention “shall recognize 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

⁸ STAVROS L. BREKOULAKIS, *THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION* 3 (Oxford University Press 2010).

⁹ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION (SECOND EDITION)* 1405 (Kluwer Law International, 2d ed. 2014).

¹⁰ *Id.*

defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”¹¹ (emphasis added) Article II (3) underscores an obligation of courts of the contracting states to refer the parties to arbitration by request of one of the parties in the cases “when seized of an action in a matter in respect of which *the parties* have made an agreement within the meaning of this article.”¹² (emphasis added)

European Convention in International Commercial Arbitration as a leading regional arbitration instruments recognizes the principle in its definition of arbitration agreement as “either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by *the parties*.”¹³

Inter-American Convention on International Commercial Arbitration states that “[a]n agreement in which *the parties* undertake to submit to arbitral decision any differences that may arise or have arisen *between them* with respect to a commercial transaction is valid.”¹⁴

The principle is also recognized in international investment arbitration. Article 25 (1) of the ICSID Convention states that “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which *the parties* to the dispute *consent* in writing to submit to the Centre.”¹⁵

¹¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II (1), Jun. 10, 1958, 330 UNTS 38.

¹² *Id.*, art. II (3).

¹³ European Convention on International Commercial Arbitration art. 1 (2) (a), Apr. 21, 1961, 484 UNTS 364.

¹⁴ Inter-American Convention on International Commercial Arbitration art. 1, Jan. 30, 1975, 1438 UNTS 245, OASTS No. 42.

¹⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25 (1), Mar. 18, 1965, TIAS 6090, 575 UNTS 159.

Moreover, domestic laws of leading jurisdictions uniformly recognize the principle that only parties to arbitration agreement are bound by its effect. UNCITRAL Model Law on International Commercial Arbitration in its Article 7 (1) provides a definition of arbitration agreement as “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.”¹⁶ Kyrgyz Law on Arbitral Tribunals, in Article 7 (1) provides that “*The parties* may conclude an arbitration agreement to submit all or certain disputes which have arisen or may arise *between them* to an arbitral tribunal.”¹⁷

Institutional rules also acknowledge the principle that only parties to arbitration are bound by arbitration agreement. In Article 1 (1), the UNCITRAL Arbitration Rules define the scope of application by asserting that they are applicable “[w]here *parties have agreed* that disputes *between them* in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules...”¹⁸ (emphasis added) Article 3 (1) of the Rules of International Court of Arbitration of Kyrgyzstan defines the arbitration agreement as the “agreement of *the parties* to submit to arbitration all or certain disputes which have arisen or may arise *between them*...”¹⁹ (emphasis added)

The judges in developed jurisdictions are consistent with the approach that arbitration agreement is binding only for the parties.²⁰ In the highly discussed case of *Dallah Real Estate v. Ministry of Religious Affairs, Gov’t of Pakistan*, the English court stated that “[t]he ‘validity’

¹⁶ UNCITRAL Model Law on International Commercial Arbitration, article 7 (1), 24 ILM 1302 (1985)

¹⁷ Zakon Kyrgyzskoi Respubliki o Treteiskih Sudah v Kyrgyzskoi Respublike [Law of the Kyrgyz Republic on Arbitral Tribunals in the Kyrgyz Republic], 2002, No. 135, art.7 (1).

¹⁸ 2013 UNCITRAL Arbitration Rules, art. 1(1).

¹⁹ Reglament Mezhdunarodnogo Treteiskogo Suda Pri Torgovo-Promyshlennoi Palate Kyrgyzskoi Respubliki [The Rules of International Court of Arbitration in Affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic], 2007, art. 3(1).

²⁰ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1407 (Kluwer Law International, 2d ed. 2014).

of the arbitration agreement depends in the present case upon whether there existed between Dallah and the Government any relevant arbitration agreement at all.”²¹ In the United States, it was held that “arbitration is strictly a matter of consent – and thus...courts must typically decide any questions concerning the formation or scope of an arbitration agreement before ordering parties to comply with it.”²²

Civil law jurisdictions follow the same approach. The French Cour d’appel in 1986 decision declared that “[t]he law of arbitration, based on the consensual nature of the arbitration clause, does not allow to extend to third parties, foreign to the contract, the effects of the disputed contract, and bars any forced intervention or guarantee procedures.”²³ Russian courts follow the same logic, by stating that “[a]rbitration agreement due to a principle of the autonomy of the parties’ will bind only the parties of that agreement and has no legal effect with regard to third parties which are not parties thereto.”²⁴

2. Theories behind binding non-signatories to arbitration

The contractual nature of arbitration allows a certain level of flexibility for parties to determine how they are willing to conduct their dispute settlement without external regulation by domestic law. This factor is considered one of the advantages of arbitration over traditional litigation.²⁵ However, in modern economic reality, complex business relations may not fit into the consensual formula of arbitration. Business entities, especially those of large-scale, are usually operated by sophisticated structures with involvement of holding companies with subsidiaries, and the conventional structure of arbitration agreement may not effectively satisfy

²¹ *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov’t of Pakistan* [2010] UKSC 46, 11 (U.K. S.Ct.).

²² *Granite Rock Co. v. Int’l Bhd of Teamsters*, 130 S.Ct. 2847, 2857 n.6 (U.S. S.Ct. 2010)

²³ Judgment of 19 December 1986, *OIAETI v. SOFIDIF*, 1987 Rev. arb. 359, 363 (Paris Cour d’appel).

²⁴ Decision of 23 December 2011, Case No. A40-56769/07-23-401, 6 (Russian S. Arbitrazh Ct.).

²⁵ STAVROS L. BREKOULAKIS, *THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION* 3 (Oxford University Press 2010).

the needs of the parties.²⁶ National courts and arbitral institutions developed numerous theories to bind non-signatory parties to arbitration. The theories are based on principles of contract and commercial law, including agency, alter ego, “group of companies,” estoppel, assumption, incorporation by reference, and several others. Non-signatories may be bound by application of any of these theories.

Generally, the party of arbitration is a party who signed an arbitration agreement or a “signatory” party. By putting their signatures, the parties agree to submit the dispute arising out of their relations to an arbitral tribunal. However, in a limited number of cases, a person or entity, who never signed an arbitration agreement, may become a party of arbitration proceedings. As stated by the court in *Thomson-CSF, SA v. Am. Arbitration Association*: “Arbitration is consensual by nature....It does not follow, however, that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. This court has made clear that a non-signatory party may be bound to an arbitration agreement if so dictated by the ‘ordinary principles of contract and agency.’”²⁷ This decision became a landmark case on extending the arbitration agreement to non-signatories in the United States. The Court presented a list of legal theories that allow extension of arbitration agreement to non-signatories.

a. Incorporation by Reference

Incorporation by Reference is the first theory mentioned by the court, which provides that it is possible for the non-signatory party to be bound by arbitration, when the party to

²⁶ STAVROS L. BREKOULAKIS, *THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION* 3-4 (Oxford University Press 2010).

²⁷ *Thomson-CSF, SA v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995).

arbitration agreement is in “a separate contractual relationship with the non-signatory which incorporates the existing arbitration clause.”²⁸

b. Theory of assumption

The theory of *assumption* provides the possibility of non-signatory party to be bound by arbitration agreement “if its subsequent conduct indicates that it is assuming the obligation to arbitrate.”²⁹

c. Theory of agency

According to *agency theory*, the non-signatory person or entity may be bound by arbitration agreement by virtue of the “traditional principles of agency law.”³⁰ This is the situation when agent performs a contract for a principal. It is one of the least controversial theories allowing to bind non-signatory to arbitration.³¹ In most legal systems it is established that an agent acting on an agency contract can bind principal, who in this case is a non-signatory person or entity.³² If for example an agent enters into an arbitration agreement on behalf of a principal, the latter will be bound by its effect, even if he himself is not a signatory to it. Therefore, the principle of agency may be applied to bind non-signatory person or entities to an arbitration agreement, if proved that agency relations existed. An agent shall be duly authorized to enter into such agreements by a principal and such authorization shall be made in a required form.³³ In the analysis of whether non-signatory shall be bound by arbitration

²⁸ Thomson-CSF, SA v. Am. Arbitration Ass’n, 64 F.3d 777 (2d Cir. 1995).

²⁹ *Id.*

³⁰ *Id.*

³¹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (SECOND EDITION) 1418 (Kluwer Law International, 2d ed. 2014).

³² GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 95 (Kluwer Law International 2012).

³³ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 2.56 (Oxford University Press 2015).

agreement, the tribunal shall consider law governing the arbitration agreement (the seat of arbitration), the law governing the agent's capacity to enter into such agreements, and the law governing the form of agreement between agent and principal.³⁴

Such analysis may lead to different conclusion, based on the governing laws, which may vary as to the requirement of written authorization of principal or the specific requirement of authorization with regards to entering into arbitration agreements on behalf of a principal.³⁵ For example, Swiss law requires principal's express authorization of agent to enter into arbitration agreements on his/her behalf.³⁶ Austrian law requires a written authorization to enter into arbitration agreements.³⁷ Italian,³⁸ German³⁹ and French⁴⁰ law have no such specific requirement.

d. Theory of veil-piercing/alter ego

Theory of *veil piercing/alter ego* is another theory is established by most jurisdictions,⁴¹ although the context of application may vary significantly.⁴² The Court in *Thompson* states that the court may pierce the corporate veil in order to prevent frauds, and when the parent company dominates over daily activities of its subsidiary.⁴³ The theory is used when the legal entity is created as an instrument to avoid liability.⁴⁴ The famous *Barcelona Traction* case in the International Court of Justice considers the veil-piercing practice as justified "to prevent misuse

³⁴ *Id.*, 2.56

³⁵ *Id.*, 2.57.

³⁶ Swiss Federal Code of Obligations [Switzerland], art. 396(3).

³⁷ Civil Code of Austria [Austria], s. 1008.

³⁸ *See* Rocco Giuseppe e Fli v Federal Commerce and Navigation Ltd, Judgment No. 6915, Corte di Cassazione, 15 December 1982, (1985) 10 YBCA 464.

³⁹ *See* Landesgericht Hamburg, Judgment of 19 December 1967, [1968] Arbitrale Rechtspraak 138, at 140

⁴⁰ *See* Code Civil, art. 1985; Code de Commerce, art. L1103.

⁴¹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1431 (Kluwer Law International, 2d ed. 2014).

⁴² GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 95 (Kluwer Law International 2012).

⁴³ Thomson-CSF, SA v. Am. Arbitration Ass'n, 64 F.3d 777 (2d Cir. 1995).

⁴⁴ *Prest v Petrodel* [2013] UKSC 34, at 22.

of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.”⁴⁵ Although the practice of lifting the veil varies depending on a jurisdiction, the common requirement for its application is the evidence that one company tightly controls the affairs of another company, and that such control leads to abuse of right, and avoidance of legal obligations.⁴⁶ The main difference of veil-lifting theory from agency theory is that the parties’ intentions in the case of veil-lifting do not have much importance, since the main focus is concentrated on the need of justice and equity, to prevent the wrong-doing and to impose liability on the wrong-doer.⁴⁷

The courts are generally reluctant to apply veil-lifting theory, and only specific circumstances may justify the disregard of separate legal identity.⁴⁸ In Swiss law, for example, the corporate veil is lifted in the situation where the acceptance of separate legal personality by court or arbitral tribunal would lead to an abuse of right.⁴⁹ Bad faith of the company may also be a ground for piercing the veil, if the company is created as a vehicle for fraud or confusion, or to circumvent liability.⁵⁰ In Germany, the courts apply this theory in exceptional circumstances of fraud or other breaches of law.⁵¹ Some German courts argue that veil-lifting, which is applied in substantive liability, may not be applicable in binding non-signatories to arbitration.⁵² G. Born considers that courts in France, Canada, Ireland, Netherlands, Korea, Hong Kong and China may also pierce the veil in some circumstances.⁵³ The courts in the US

⁴⁵ Case Concerning the Barcelona Traction, Light & Power Co., [1970] I.C.J. Rep. 3, 38-39 (I.C.J.).

⁴⁶ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1431 (Kluwer Law International, 2d ed. 2014).

⁴⁷ In re Cambridge Biotech Corp., 186 F.3d 1356, 1376 (Fed. Cir. 1999).

⁴⁸ GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 95 (Kluwer Law International 2012).

⁴⁹ INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 34 (Elliott Geisinger and Nathalie Voser eds., Kluwer Law International, 2d ed. 2013).

⁵⁰ *Id.*

⁵¹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1434 (Kluwer Law International, 2d ed. 2014).

⁵² *Id.*

⁵³ *Id.*

are willing to apply alter-ego doctrine if proved that, as it was decided by one court in New York, “there is such unity of interest and ownership that separate personalities of the corporations no longer exist, and that failure to disregard the corporate form would result in fraud or injustice.”⁵⁴

Identifying the necessity to pierce the corporate veil is usually a fact-heavy legal exercise, which demands an analysis of wide spectrum of circumstances. As noted in the decision of the famous *Bridas* case, the span of analysis may touch as many as fifteen factors, which are:

- (1) the parent and subsidiary have common stock ownership;
- (2) the parent and subsidiary have common directors or officers;
- (3) the parent and subsidiary have common business departments;
- (4) the parent and subsidiary file consolidated financial statements;
- (5) the parent finances the subsidiary;
- (6) the parent caused the incorporation of the subsidiary;
- (7) the subsidiary operated with grossly inadequate capital;
- (8) the parent pays salaries and other expenses of the subsidiary;
- (9) the subsidiary receives no business except that given by the parent;
- (10) the parent uses the subsidiary’s property as its own;
- (11) the daily operations of the two corporations are not kept separate;
- (12) the subsidiary does not observe corporate formalities...
- (13) whether the directors of the ‘subsidiary’ act in the primary and independent interest of the ‘parent’;
- (14) whether others pay or guarantee debts of the dominated corporation; and
- (15) whether the alleged dominator deals with the dominated corporations at arm’s length.

Analyzing these factors, the court decided that foreign state-owned entity was financially dependent from government of Turkmenistan.⁵⁵ As a result, the state’s intentional “bleeding [of] a subsidiary to thwart creditors” became a ground for piercing the corporate veil.⁵⁶

⁵⁴ *Oriental Commercial & Shipping Co. (U.K.), Ltd v. Rosseel, NV*, 609 F.Supp. 75, 78 (S.D.N.Y. 1985).

⁵⁵ *See Bridas SAPIC*, 447 F.3d at 419-20.

⁵⁶ *Id.*

The courts in Russia, however, have quite an opposite view as to the issue of piercing the corporate veil, particularly in the case of state-owned entities. The recent decision of Arbitrazh Court of Moscow stated that “the doctrine of piercing the corporate veil is not applicable to the relationships between the Government of Moscow and the Department of Construction [government-owned entity under control of the Government of Moscow] because these relationships are not of private nature.”⁵⁷ The court disagreed with the application of doctrine by the arbitral tribunal, which found that exceptional circumstances of the case lead to conclusion that the Government of Moscow is a party to arbitration agreement. The arbitral tribunal decided so because the existing corporate veil was “concealing the reality of contract,”⁵⁸ as the signatory entity was under control of Government of Moscow, and if the tribunal decided otherwise, it would limit the procedural legal instruments of protection.⁵⁹ This limitation was caused by the fact that the claim was initiated with regards to recognition of right on property of Moscow, and under Russian law only the Government of Moscow could be a defendant in this case.⁶⁰

e. Theory of estoppel

The last theory mentioned by Court in *Thompson* is the *estoppel theory*, according to which the courts may bind non-signatories in a situation where a party “by knowingly exploiting the agreement ... was estopped from avoiding arbitration despite having never signed the agreement.”⁶¹

⁵⁷ Decision of the Arbitrazh Court of Moscow, S+T HANDELSGESELLSCHAFT mbH & Co. KG v. Moscow, № A40-41781/13-69-197, 2, May 30, 2013.

⁵⁸ *Id.*, 5.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Thomson-CSF, SA v. Am. Arbitration Ass’n*, 64 F.3d 778 (2d Cir. 1995).

f. The “group of companies” doctrine

“*Group of companies*” doctrine. Another controversial doctrine is the “group of companies” doctrine, developed in France and having characteristics comparable to alter ego/corporate veil theory.⁶² It may be invoked when the non-signatory company is a part of a corporate group and is controlled by a signatory. Non-signatory may participate in negotiations or performance of the contract.⁶³ The group of companies doctrine was developed particularly in the sphere of arbitration and not general court practice as other theories did (agency, veil-piercing, etc.)⁶⁴

One of the leading authorities on group of companies doctrine is the case of *Dow Chemical Company* where the ICC tribunal supported the right of Dow Chemical and its subsidiaries to bring claims against Isover under arbitration clause.⁶⁵ The tribunal held that “it is indisputable...that Dow Chemical Company has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like Dow Chemical France, effectively and individually participated in their conclusion, their performance, and their termination.”⁶⁶ The tribunal, relying not on the French law but mostly on the trade usages,⁶⁷ as some commentators stated,⁶⁸ concluded that even though Dow Chemical and its subsidiaries have separate legal identity, the arbitration clause can still be extended on them since they constitute “the same economic reality.”⁶⁹

⁶² GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION) 1405 (Kluwer Law International, 2d ed. 2014).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Interim Award in ICC Case No. 4131, IX Y.B. Comm. Arb. 131, 135 (1984).

⁶⁶ Interim Award in ICC Case No. 4131, IX Y.B. Comm. Arb. 131, 135 (1984).

⁶⁷ ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 3-31 (Sweet&Maxwell, 4th ed. 2004).

⁶⁸ *Id.*

⁶⁹ Interim Award in ICC Case No. 4131, IX Y.B. Comm. Arb. 131, 135 (1984).

The decision was later upheld by the French Cour d'appel, which stated:

[F]ollowing an autonomous interpretation of the agreement and the documents exchanged at the time of their negotiation and termination, the arbitrators have, for pertinent and non-contradictory reasons, decided, in accordance with the intention common to all companies involved, that Dow Chemical France and The Dow Chemical Company (USA) have been parties to these agreements although they did not actually sign them, and that therefore the arbitration clause was also applicable to them.⁷⁰

The decision of Dow Chemical is recited by numerous arbitration authorities as establishing the “group of companies” doctrine.⁷¹ When determining whether the party is bound by arbitration agreement, the court or tribunal shall consider parties’ mutual intention and shall thoroughly research such circumstances as participation or negotiation of non-signatory in the underlying contract containing arbitration agreement,⁷² the interest of non-signatory in the dispute,⁷³ and whether the non-signatory is intertwined with the disputed contract.⁷⁴

The “group of companies” doctrine is not widely recognized, and in England, for example, the courts are not willing to accept it as a ground for binding non-signatories. One of the authorities is the case of *Peterson Farms*, in which the court ruled that “the Group of Companies doctrine ... forms no part of English law.”⁷⁵ Swiss courts, as well as English ones, refuse to bind non-signatories to arbitration only because they are from same economic group.⁷⁶

⁷⁰ CA Paris, Oct. 22, 1983, *Societe Isover-Saint-Gobain v. Societe Dow Chemical France et al* [1984] Rev. Arb. 98 at 100-101.

⁷¹ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 1446 (Kluwer Law International, 2d ed. 2014).

⁷² ICC Case No. 5103/1988 [1988] J du Droit Intl 1206; *Société Orthopaedic Hellas v Société Amplitude*, No. 11-25.891, Cass. Civ. 1ere, 7 November 2012.

⁷³ *Trelleborg do Brasil Ltda v Anel Empreendimentos Participações e Agropecuária Ltda*, Apelação Cível No. 267.450.4/6-00, 7th Private Chamber of São Paulo Court of Appeals, 24 May 2004.

⁷⁴ *Khatib Petroleum Services International Co. v Care Construction Co. and Care Service Co.*, Case No. 4729 of the Judicial Year 72, Egypt's Court of Cassation, June 2004; *Chaval v Liebherr*, Recurso Especial No. 653.733, Brazilian Superior Court of Justice, 3 August 2006.

⁷⁵ *Peterson Farms Inc. v. C&M Farming Ltd* [2004] 2 Lloyd's Rep. 603 (Q.B.).

⁷⁶ See ICC Case No. 4504/1985–86 (1986) 113 J du Droit Intl 1118;

However, some scholars argue that the decision in *Dow Chemical* is widely misinterpreted as it does not create a separate doctrine, but relies on analysis of intention of parties to arbitrate.⁷⁷ Indeed, the tribunal states that the documents and evidences confirm that application of arbitration clause to non-signatories is in line with mutual intention of the parties.⁷⁸ The decision points that the arbitration agreement should be binding on all the corporate group as “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, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.”⁷⁹ The key point is not the existence of the group of companies or the “same economic reality,” but the common intention of the parties.⁸⁰

This means that the mere fact that a non-signatory company is part of a group of companies is not enough to bind a non-signatory to arbitration. The court or tribunal should consider, as it was stated in the decision, the intention of the parties, and if it reaches the conclusion that there is sufficient factual circumstances to prove the mutual intention of parties to bind non-signatory in arbitration, only then the court or tribunal can bind the non-signatory company.⁸¹

⁷⁷ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 2.46 (Oxford University Press 2015). See Hanotiau, ‘Consent to arbitration: Do we share a common vision?’, 2010 Annual Freshfields Lecture, London, 21 October 2010. See also Ferrario, ‘The group of companies doctrine in international commercial arbitration: Is there any reason for this doctrine to exist?’ (2009) 26 J Intl Arb 647.

⁷⁸ Interim Award in ICC Case No. 4131, IX Y.B. Comm. Arb. 131, 135 (1984).

⁷⁹ Interim Award in ICC Case No. 4131, IX Y.B. Comm. Arb. 131 (1984).

⁸⁰ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 2.48 (Oxford University Press 2015).

⁸¹ Bernard Hanotiau, *Back to Basics. Or Why the so-Called ‘Group of Companies Doctrine’ Should Be Disregarded Once and for All*, in BARBARA DEN TANDT, THE PRACTICE OF ARBITRATION: ESSAYS IN HONOUR OF HANS VAN HOUTTE 128 (Patrick Wautelet et al. eds., Hart Publishing 2012).

g. Theory of assignment

The theory of *assignment* can be used when “[t]he claimant or the defendant party is the assignee of ... the contract, including arbitration agreement.”⁸² The effect of assignment depends on the law regulating the assignment and the law governing the arbitration agreement.⁸³ The approach of different jurisdictions vary as to this issue. German, English, and French laws make presumption that an arbitration agreement shall be assigned with the underlying contract, which means that an arbitration agreement is automatically transferred and follows the main contract.⁸⁴ New York law, although with some limitations, tends to follow the same approach.⁸⁵ The Swedish court have a different position.⁸⁶ The arbitration agreement will be assigned if otherwise is not agreed by the parties.⁸⁷ The assignee will be bound by arbitration agreement if it is aware of the existing arbitration agreement between the former parties.⁸⁸

h. Other theories

Moreover, there is a theory of *succession by operation of the law*, which happens as a result of bankruptcy of party to arbitration agreement.⁸⁹ Non-signatory party moves to participate in arbitration proceedings as a claimant or defendant, replacing the bankrupt party.⁹⁰ Another situation is *subrogation*, which may happen in insurance cases, where the subrogee

⁸² Sigvard Jarvin, The Group of Companies Doctrine, in AAMCA, 183.

⁸³ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 2.54 (Oxford University Press 2015).

⁸⁴ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 2.55 (Oxford University Press 2015).

⁸⁵ *Id.*, 2.55

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Sigvard Jarvin, The Group of Companies Doctrine, in AAMCA, 183.

⁹⁰ *Id.*

replaces original party to arbitration agreement.⁹¹ There is also a theory of *third party beneficiary*, according to which a non-signatory party obtains right to be a party to arbitration as a result of the parties contract to grant the benefits to the third party.⁹²

The theories, which allow binding non-signatories to arbitration agreement does not provide clear answer but create a legal framework, according to which an arbitrator or competent judge can make a decision. The question whether each particular party shall be bound by arbitration agreement is to be decided on case-by-case basis depending on facts of each particular case. As noted by one arbitral tribunal, this requires:

a close analysis of the circumstances in which the agreement was made, the corporate and practical relationship existing on one side and known to those on the other side of the bargain, the actual or presumed intention of the parties as regards rights of non-signatories to participate in the arbitration agreement, and the extent to which and the circumstances under which non-signatories subsequently became involved in the performance of the agreement and in the dispute arising from it.⁹³

Concluding this chapter, it is important to mention that the analysis of whether the non-signatory person or entity can be bound by an arbitration agreement shall be based on applicability of an arbitration agreement itself, not of the underlying contract. This is a direct application of principle of separability of arbitration agreement (presumption of separability), meaning that the existence of the arbitration agreement is independent from the life of the underlying agreement.⁹⁴ The situations of non-existence, termination or any other defect of underlying agreement, which may lead to invalidity of underlying contract, does not affect the

⁹¹ *Smith v. Pearl Ins. Co. Ltd.*, [1939] 1 All E.R. 95.

⁹² Sigvard Jarvin, *The Group of Companies Doctrine*, in AAMCA, 185-186.

⁹³ Interim Award in ICC Case No. 9517, in B. Hanotiau, *Complex Arbitrations* ¶203 (2005).

⁹⁴ PHILIPPE FOUCHARD AND EMMANUEL; SAVAGE GAILLARD, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard and John Savage eds., Kluwer Law International 1999). *See also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 353 (Kluwer Law International, 2d ed. 2014).

arbitration agreement, for the reason that it has a separate identity.⁹⁵ Thus, when scrutinizing on binding non-signatory to arbitration, the real question is whether the non-signatory is indeed a party to the arbitration agreement, not of the underlying contract.

⁹⁵ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 400 (Kluwer Law International, 2d ed. 2014).

Chapter II: Binding Non-Signatories under the Law of the Kyrgyz Republic

Neither international conventions such as the New York Convention, to which Kyrgyzstan is a party, nor national Law on Arbitral Tribunals and Rules of Kyrgyzstani arbitration institution are able to provide guidance for identifying parties of arbitration agreement, which would allow binding non-signatories to arbitration. Kyrgyzstani law is not unique in this regard. The question of non-signatories is rarely regulated in national arbitration laws, international treaties, or institutional rules.⁹⁶ As a result of this legislative vacuum, national courts and arbitrators have to rely on general principles of contract, corporate and agency law.

1. Binding non-signatories in Kyrgyzstani contract law

The requirements on content and form of the arbitration clause under Kyrgyzstani law are provided by Article 7 of the Kyrgyz Law on Arbitral Tribunals:

1. The parties may conclude an arbitration agreement to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of civil relations, regardless of whether they were contractual or not. The arbitration agreement may be in the form of an arbitration clause in the contract, which is an integral part of the contract, or may be in the form of a separate agreement.
2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or concluded by exchange of letters, telex, telegraph, facsimile or other means of communication, including electronic, which provide a record of the agreement.⁹⁷

The law creates a requirement that the arbitration agreement shall be in writing.⁹⁸ It allows the agreement to be concluded by exchange of letters or other means of communication, serving as a written evidence of the existing agreement between the parties.⁹⁹ The arbitration

⁹⁶ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (SECOND EDITION) 1411 (Kluwer Law International, 2d ed. 2014).

⁹⁷ Zakon Kyrgyzskoi Respubliki o Treteiskih Sudah v Kyrgyzskoi Respublike [Law of the Kyrgyz Republic on Arbitral Tribunals in the Kyrgyz Republic], 2002, No. 135, art. 7.

⁹⁸ *Id.*, art. 7.2.

⁹⁹ *Id.*

clause should contain a provision, stating that disputes between the parties shall be decided by arbitral tribunal, and a particular tribunal shall be specified.¹⁰⁰ The Law states that the failure to comply with stated requirement leads to invalidity of arbitration agreement.¹⁰¹ It may also contain, as per will of the parties, miscellaneous terms on language, applicable law and rules, and specify time limits of consideration.¹⁰²

The law is almost entirely consistent with the original 1985 UNCITRAL Model Law in its requirements to arbitration agreement. The requirements are not as relaxed as option I of Article 7 of the revised version of Model Law, which not only allows the arbitration agreement to be concluded orally, by conduct, or by any other means, provided that the content of the agreement is recorded,¹⁰³ but also by “exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.”¹⁰⁴ The Kyrgyzstani law does not give such opportunities.

In order to identify the parties of the arbitration agreement, as any other agreement, it is necessary to analyze the provision of Civil Code, regulating the identity of parties and formation of contract. Article 393.1 of the Civil Code provides that the contract is concluded, when the parties reached an agreement on all essential terms of the contract.¹⁰⁵ Essential are the terms that are named essential or necessary for this type of contract by law, and also the terms requested by one of the parties to be agreed upon.¹⁰⁶ The contract is formed by generally

¹⁰⁰ Zakon Kyrgyzskoi Respubliki o Treteiskih Sudah v Kyrgyzskoi Respublike [Law of the Kyrgyz Republic on Arbitral Tribunals in the Kyrgyz Republic], 2002, No. 135, art. 7.3.

¹⁰¹ *Id.*, art. 7.4.

¹⁰² *Id.*, art. 7.3.

¹⁰³ UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006, art. 7.3, option 1.

¹⁰⁴ *Id.*, art. 7.5.

¹⁰⁵ Grazhdanskii Kodeks Kyrgyzskoi Respubliki chast I [GK KR] [Civil Code of the Kyrgyz Republic part I], 1996, № 15, art. 393.1.

¹⁰⁶ *Id.*

accepted offer-acceptance mechanism at the moment of receipt of the acceptance by the offering party.¹⁰⁷ The requirement of written form of the contract may be satisfied by conclusion of a single document, or by exchange of letters and other means of communication.¹⁰⁸ Article 178 provides that in the cases specified by law or by the agreement of parties, failure to comply with the simple written form of the deal shall entail its invalidity.¹⁰⁹

The Civil Code and the Law on Arbitral Tribunals, when read together, lead to conclusion, that the arbitration agreement is valid when parties' consent to submit their disputes to a specified arbitral tribunal is documented either by signed document, or by exchange of letters and other means of communication. The essential terms of this type of contract are the consent to submit the dispute to arbitral tribunal, which may be considered as a subject matter of a contract, and specification of arbitral tribunal.

UNCITRAL Model law, as well as Kyrgyzstani Law on Arbitral Tribunals require written form of arbitration agreement. One can argue that this leads to the conclusion that in the absence of a written arbitration agreement between a signatory party and non-signatory one, this requirement bars the arbitrators and judges from binding non-signatory to arbitration, as there is no formal agreement between them, should it be a signed document, exchange of document or in any other form. However, the answer is not that simple as it seems.

As it was found by the Swiss Federal Supreme Court in 2003:

this formal requirement (contained in article 178 al. 1 of the Swiss Law on Private International Law) only applies to the arbitration agreement itself, that is to the agreement ... by which the initial parties have reciprocally expressed their common will to submit the dispute to arbitration. As to the question of the subjective scope of an arbitration agreement formally valid under article 178 al.

¹⁰⁷ Grazhdanskii Kodeks Kyrgyzskoi Respubliki chast I [GK KR] [Civil Code of the Kyrgyz Republic part I], 1996, № 15, art. 393.

¹⁰⁸ *Id.*, art. 395.

¹⁰⁹ *Id.*, art. 178.

1 – the issue is to determine which are the parties which are bound by the agreement and eventually determine if one or several third parties which are not mentioned therein nevertheless enter into its scope *ratione personae* –, it belongs to the merits and should consequently be decided in the light of article 178 al. 2 LDIP.¹¹⁰

This means that what is important is the existence of a written arbitration agreement between the original parties, and this agreement may not explicitly state the non-signatory party. If the agreement exists, and it complies with formal requirements, the tribunal or the competent court should consider, if requested, the issue of binding non-signatory party.

The U.S. courts also held that if there is a written agreement between parties, the courts can consider whether the agreement should bind non-signatory, and the lack of signed agreement is not a bar to it.¹¹¹ French courts, as it was found by B. Hanotiau, also support this point by finding that “the French law of international arbitration does not subordinate the validity of the arbitration provision to compliance with formal requirements.”¹¹²

However, the courts in Russia tend to have an opposite view. In a recent decision of Moscow Arbitrazh Court on the issue of binding non-signatory entity (the Government of Moscow) the Court agrees with proposition that the requirement of written form of arbitration agreement precludes the arbitral tribunal from extending the effect of arbitration agreement to the non-signatory entity.¹¹³ The Court stresses that only the parties of original arbitration agreement (Department of Construction of the City of Moscow and “S&T” private firm) had reached the agreement to arbitrate their dispute. The Court decided that the tribunal erred in

¹¹⁰ *X. S.A.L., Y. S.A.L. and A v. Z, SARL and ICC Arbitral Tribunal*, DFT 129 III 727.

¹¹¹ *See Fisser v. Int'l Bank*, 82 F.2d 231 at 233 (2nd Cir. 1960) and *Interocean Shipping Co. v. Nat'l Shipping and Trading Corp.*, 523 F.2d 527 at 539 (2nd Cir. 1975).

¹¹² BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* 54 (Kluwer Law International 2006).

¹¹³ Decision of the Arbitrazh Court of Moscow, *S+T HANDELSGESELLSCHAFT mbH & Co. KG v. Moscow*, № A40-41781/13-69-197, 5, May 30, 2013.

extending the arbitration agreement to the Government of Moscow, which had no written agreement with “S&T.” This was one of the strongest arguments, among several others, which led the Court to set aside the case. Consequently, the decision was upheld by cassation court and the Supreme Arbitrazh Court.

Bearing this decision in mind, and also the practice of western counterparts, there is still a room for interpretation in Kyrgyzstani law. The Law on Arbitral Tribunals, being based on UNCITRAL Model Law, may lead an arbitrator or a judge into to opposite direction. The author considers that Kyrgyzstani arbitrators should pay attention to the practices of more developed jurisdiction, when choosing a right direction, and consider existence of arbitral agreement between parties sufficient to start analyzing factual background, that would allow to bind non-signatories. The absence of written arbitration agreement should not bar the arbitrator from considering the issue of binding non-signatories.

2. Binding non-signatories in Kyrgyzstani corporate law

Kyrgyzstani law in its Civil Code acknowledges the principle of separate personality of legal entity. The Article 91 the Civil Code provides the general concept of separate liability of legal entity:

1. Legal entities other than the owner-funded institutions are responsible for their obligations with all property belonging to them.
2. Institutions funded by the owner are responsible for their obligations in the manner and subject to the conditions specified in Article 164 of this Code.
3. The founder (participant) of the legal entity or the owner of its property is not liable for the obligations of the legal entity and the legal entity is not liable for the obligations of the founder (participant) or owner, except as provided in this Code, the law or the constituent documents of a legal entity.¹¹⁴

¹¹⁴ Grazhdanskii Kodeks Kyrgyzskoi Respubliki chast I [GK KR] [Civil Code of the Kyrgyz Republic part I], 1996, № 15, art. 91.

The liability of subsidiary companies under Kyrgyz law is regulated by Article 150 of the Civil Code, which states that:

The subsidiary company is not liable for the debts of its principal company (or partnership).

The principal company (partnership), which under an agreement with a subsidiary has the right to give binding instructions to its subsidiary, shall bear joint responsibility with the subsidiary for transactions concluded by the latter pursuant to such instructions.

In the event of bankruptcy (insolvency) of the subsidiary company through the fault of the principal company (or partnership), the latter shall bear subsidiary liability for its debts.¹¹⁵

Kyrgyzstani law provides for joint liability of a parent company in the cases, where the parent directly controls and instructs the subsidiary. Even though the last sentence shall be disregarded due to the fact that bankruptcy claims are not arbitrable under Article 45 (2) of the Law on Arbitral Tribunals, the provision on joint responsibility of the principal company, which controls the subsidiary, attracts certain attention. However, this may not serve as a ground for binding non-signatory, as the issue with non-signatories in arbitration is not the question of levying liability arising out of the underlying contract but the question of identifying the true party of the arbitration agreement. This means that Kyrgyzstani law grants possibility for reaching the parent company, but such possibility are irrelevant to the issue at hand, and may be applied in general court litigation.

3. Binding non-signatories in agency law

The principles of agency, which would allow binding non-signatories based on agency theory, are regulated by the Civil Code in the section dedicated to contracts of agency. The Contract of agency is regulated by the Article 843 of the Civil Code, which provides that:

1. According to the agency contract, one party (the agent) undertakes to perform on behalf of the other party (the principal) legal and other actions on their own

¹¹⁵ *Id.*, art. 150.

behalf, but at the expense of the principal, or on behalf and at the expense of the principal.

In a transaction made by the agent with a third party on its behalf and at the expense of the principal, it shall acquire the rights and becomes obligated to an agent, even if the principal was named in the transaction or entered into direct relationship with a third party to execute the transaction.

In a transaction made by the agent with a third party on behalf of and at the expense of the principal, the rights and duties arise directly from the principal.

2. In cases where the agency contract concluded in writing, it is provided that the agent possesses a general authority to conduct transactions on behalf of the principal, the latter in his/her relations with third parties is not entitled to rely on the absence of the agent's proper authority, unless it is proved that the third party knew or should have known the limitations on the powers of the agent.¹¹⁶

This article regulates framework of legal relationships between principal and agent. The law allows for the party of arbitration to bind non-signatory principal to arbitration, if it provides evidence that the agent acted on behalf and at the expense of the principle, and vice versa, to bind non-signatory agent, if the transaction was made by agent on its behalf and at the expense of the principal. The law provides possibility to apply agency principles to bind non-signatory party to arbitration by analyzing whether the agent or the principal were the true party of the agreement.

4. Binding non-signatories by succession of rights and obligations

According to Kyrgyzstani Law, the rights (claims) of one party may be transferred to another party as a result of transaction, or assignment (cession), or on the basis of law.¹¹⁷ The rights of the creditor may be transferred to another person or entity as a result of universal

¹¹⁶ Grazhdanskii Kodeks Kyrgyzskoi Respubliki chast II [GK KR] [Civil Code of the Kyrgyz Republic part II], 1998, № 1, art. 843.

¹¹⁷ Grazhdanskii Kodeks Kyrgyzskoi Respubliki chast I [GK KR] [Civil Code of the Kyrgyz Republic part I], 1996, № 15, art. 314.1.

succession of rights,¹¹⁸ by a court decision,¹¹⁹ as a result of performance of obligation by guarantor or pledger,¹²⁰ subrogation in insurance contracts,¹²¹ other cases provided by law.¹²²

Succession of rights and obligations of a legal entity, which may include the right of being a party to arbitration agreement under Kyrgyz Civil Code is regulated by Article 93 of the Civil Code, which provides a general overview of consequences of various types of legal entity's reorganization:

Article 93. Succession in case of reorganization of legal entities

1. In the case of merger of legal entities, rights and obligations of each of them are transferred to the newly established legal entity in accordance with the transfer deed.
2. In the case of accession the legal entity to another legal entity, the rights and obligations of the entity are transferred to the latter in accordance with the transfer deed.
3. In the case of division of a legal entity, its rights and obligations shall be transferred to the newly established legal entities in accordance with the separation balance sheet.
4. In the case of separation of one or more legal entities from a legal entity, the rights and obligations of the reorganized legal entity are transferred to each of them in accordance with the separation balance.
5. In the case of conversion of the legal entity of one type into a legal entity of another type (a change of legal form) the rights and obligations of the reorganized legal entity are transferred to the newly established legal entity in accordance with the transfer act.¹²³

In all these cases, the new entity becomes a party to arbitration agreement. As being a party to arbitration agreement provides the same rights and obligation as being a party to any other contract, the Kyrgyzstani law allows the change of party of arbitration in the cases of succession. In this cases, the party, which seeks to bind non-signatory party shall prove that

¹¹⁸ *Id.*, art. 314.2.1.

¹¹⁹ Grazhdanskii Kodeks Kyrgyzskoi Respubliki chast I [GK KR] [Civil Code of the Kyrgyz Republic part I], 1996, № 15, art. 314.2.2.

¹²⁰ *Id.*, art. 314.2.3.

¹²¹ *Id.*, art. 314.2.4.

¹²² *Id.*, art. 315.2.5.

¹²³ *Id.*, art. 93.

rights and obligations of the former party where transferred to the new one. This may be proved by transfer deeds, separation balances, and reorganization documents.

Conclusion

It is widely accepted that international commercial arbitration is a creation of contract. The parties agree to submit the disputes arising out of their defined legal relationships not to competent courts but to an arbitral tribunal, which they are free to choose. The parties may also choose the procedure, applicable law, language, and other features, which are usually rigidly fixed in a court litigation.

The arbitration agreement between the parties affects only the parties to the agreement. However, the thesis observed that there are situations, when the party of the agreement may not be expressly identified in the agreement itself. In such cases, the tribunals and courts need to seek the true parties of the arbitration agreement. Such practice is usually named as “binding non-signatories” or “extending the arbitration” agreement.

The factual circumstances, when this practice of binding non-signatories may be exercised, significantly vary in nature. National courts and arbitral institutions have developed numerous theories to bind non-signatories to arbitration. The theories are based on principles of contract, corporate, and agency law. The theories themselves cannot provide clear-cut answers but usually serve as a legal framework for arbitrators and judges to decide whether a particular party is to be bound by the arbitration agreement.¹²⁴ The question of binding non-signatory to an arbitration agreement is to be decided on case-by-case bases depending on the facts of each particular case. Each of the theories for binding non-signatories provide legal standard, and arbitrator or judge shall refer to such standard when analyzing the language of contract and factual circumstances.¹²⁵

¹²⁴ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (SECOND EDITION) 1413 (Kluwer Law International, 2d ed. 2014).

¹²⁵ *Id.*

The thesis found that even though the theories are different in nature, the main cornerstone of decision-making is the mutual intention or consent of the parties. In contrast with litigation, where the court may exercise jurisdiction in order to levy liability or to punish certain entity, in arbitration, the common idea of binding non-signatory is to identify whether or not the person, entity, or state is an actual party to the agreement, and whether the signatory parties intended to bind the non-signatory by the arbitration agreement.

The theories may be concluded to have a widely accepted character in the sense that they are based on general principles of contract, agency, and corporate law. The law of each state has its own particularities, but in application of theories, even seemingly contrasting jurisdictions, as for example civil law jurisdictions and common law jurisdictions, may have common threads.

By choosing the law of the Kyrgyz Republic as the jurisdiction of focus, the thesis has analyzed how and in which situations, the Kyrgyzstani law allows binding non-signatories by using a particular theory as a benchmark. The author analyzed four different factual circumstances. Even though some of these situations provide clear possibility to bind non-signatories, there is still a room for interpretation, and it is suggested that the Kyrgyzstani arbitration institution pays attention to the experience of developed jurisdictions, collected and analyzed in this thesis, for making correct decision in future disputes with regards to the issue of binding non-signatories to arbitration.

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