# Methods to Extend the Scope of an Arbitration Agreement to Third Party Non-Signatories

**LW4635 Research Paper**

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## 1. Introduction

Arbitration should be adopted as the form of dispute resolution only when there is a consensus amongst the parties to settle the dispute through arbitration. No one should be compelled to arbitrate against its will, as this will violate the very roots of arbitration. Arbitration exists only as an alternative dispute resolution method to litigation, but not a substitution. Litigation is a fundamental, inherent right granted to all legal entities, and in essence, arbitration is a deprivation of this fundamental right.[1] Therefore, where a dispute is submitted to arbitration, it must be entirely clear that the parties are aware of their rights, and have willfully agreed.

The fundamental underlying principle of arbitration is that it is "a matter of consent, not coercion."[2] Paying due regard and heavy emphasis on the notion of consent, a party will not ordinarily be "compelled to arbitrate unless that party has entered an agreement to do so."[3] This notion of consent is imbedded in the UNCITRAL Model Law on International Commercial Arbitration (hereinafter the Model Law), as well as in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention). The Model Law defines an 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"[4]. The New York Convention contains a similar definition of an arbitration agreement[5].

However, despite the heavy emphasis on consent, there are situations in which third party non-signatories to an arbitration agreement are nonetheless compelled or may participate in the arbitral proceedings under extenuating circumstances where the facts fit within the preset parameters augmented in case law. Such doctrines to the effect of binding non-signatories to an arbitration agreement include[6], *inter alia*, the *alter ego* doctrine, the group of companies doctrine, *estoppel*, piercing the corporate veil, assignment, agency, assumption, incorporation by reference[7], succession and novation[8]. While most of the

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[1] *Alan Redfern and Martin Hunter*: "Law and Practice of International Commercial Arbitration", London Sweet & Maxwell [2004] 1-08

[2] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

[3] Employers Ins. of Wausau v. Bright Metal Specialties, 251 F.3d 1316, 1322 (11th Cir. 2001).

[4] UNCITRAL Model Law on International Commercial Arbitration (2006 amendments) Option 1 Article 7(1)

[5] The United Nations on the Recognition and Enforcement of Foreign Arbitral Awards Article II(1)

[6] *Redfern and Hunter* at 3-30

[7] *World Rentals And Sales, Llc, A Florida Limited-Liability Company, Cruz R. Rodriguez, Et Al, v. Volvo Construction Equipment Rents, Inc., A Delaware Corporation, And Volvo Commercial Finance Llc, A Delaware Limited-Liability Company.*

[8] *Redfern and Hunter* at 3-36

methods are readily established, this essay will focus primarily on the least established and problematic method; the group of companies doctrine. The *alter ego* doctrine and *estoppel* will be discussed in less detail, and an overview of the other methods will be given.

## 2. The Group of Companies Doctrine

The group of companies doctrine, primarily a civil law invention, has been used to "find arbitration obligations in situations where there have been a number of affiliated companies involved with various contracts, not all of whom are signatories of the particular contracts that contain an arbitration clause."[9] The doctrine provides that several companies that form part of a larger corporate group may be regarded as a single legal entity[10] or "une réalité économique unique"[11], and may benefit from or be bound by an arbitration agreement entered into by another group entity[12].

### a. *Dow Chemical v Isover Saint Gobain*

The landmark case introducing the group of companies doctrine is the *Dow Chemical v Isover Saint Gobain*[13] case brought before an International Chamber of Commerce (hereinafter ICC) tribunal in Paris. In *Dow Chemical*, a claim was brought not only by the companies that had signed the arbitration agreement, but also by their parent company and a French subsidiary in the same group[14]. The parties to the arbitration include Dow Chemical Venezuela, Dow Chemical AG, Dow Chemical Europe, and Dow Chemical France, all of which were owned 100%, either directly or indirectly, by the Dow Chemical Company incorporated in the United States. The dispute followed from two separate contracts entered into by two Dow entities with separate French companies, which were later assigned by the French companies to Isover Saint Gobain, the eventual party to the arbitration. The terms of the contract included, *inter alia*, an ICC arbitration clause, and a clause that permitted any subsidiary of the Dow group to make deliveries contemplated by the agreements. Various difficulties arose with the

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[9] *Margeret L. Moses*: "The Principles and Practice of International Commercial Arbitration", Cambridge University Press [2008] pg. 34
[10] *Simon Brinsmead*: "Extending the application of an arbitration clause to third-party non-signatories: which law should apply?" available on http://ssrn.com/abstract=980483
[11] ICC No. 4131/1982
[12] *Mohit Saraf and Luthra &Luthra*: "Who is a party to an arbitration agreement – Case of the non-signatory", Institutional Arbitration in Asia [2007]
[13] ICC No. 4131/1982
[14] *Redfern and Hunter* pg. 149 para 3-31

products, and Isover Saint Gobain brought subsequent legal action against various related Dow subsidiaries in French courts. The Dow group filed a request for arbitration with the ICC against Isover Saint Gobain. The claimants were Dow Chemical Co, the US incorporated parent, Dow Chemical AG and Dow Chemical Europe, the contracting parties, and Dow Chemical France, the subsidiary effecting delivery under the contract. Isover Saint Gobain challenged the arbitral tribunal's jurisdiction to hear the case on the ground that Dow Chemical Co and Dow Chemical France were non-signatories to the agreement.[15]

The tribunal rejected the jurisdictional challenge and made an interim award that Dow Chemical Co and Dow Chemical France should become a party to the arbitration agreement. The tribunal stated;

"Considering that it is indisputable – and in fact not disputed – that DOW CHEMICAL COMPANY (USA) 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.[16]"

The tribunal considered that the companies, despite being separate legal entities, were in fact "one and the same economic reality"[17]. The tribunal, by looking at the negotiating records, noted that "neither the sellers nor the distributors attached the slightest importance to the choice of the company within the DOW group that would sign the contracts."[18] It was further noted 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, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes which they may give rise".[19]

As a result of the tribunals' findings, the Paris Court of Appeal subsequently declined a challenge of an interim award on the basis of jurisdiction and stated;

"Following 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

[15] Case summary from *Mohit Saraf and Luthra &Luthra*: "Who is a party to an arbitration agreement – Case of the non-signatory", Institutional Arbitration in Asia [2007]
[16] ICC No. 4131/1982
[17] *Ibid*
[18] *Redfern and Hunter* at 3-32
[19] ICC No. 4131/1982 904

Dow Chemical Company (USA) have been parties to these arbitration agreements although they did not actually sign them, and that therefore the arbitration clause was also applicable to them."[20]

As a result of the *Dow Chemical* judgment, scholars have commented that "the issue of consent may take a special dimension when one company to a complex transaction is member of a group of companies, given the nature of the relationships which exist between companies of such group."[21] Hanotiau further added that "consent to arbitrate may sometimes be implied from the conduct of a company of the group – although it did not sign the relevant arbitration agreement – by reason of its implication in the negotiation and/or the performance and/or the termination of the agreement containing the arbitration clause and to which one or more members of its group are a party."[22]

The *Dow Chemical* case lead to a series of subsequent cases in which the group of companies doctrine was affirmed[23], further elaborated[24], expanded[25], and ultimately rejected[26]. These cases will be addressed below.

**b. *<u>Ensuing ICC Awards</u>***

Following the *Dow Chemical* award, various ensuing ICC cases have applied the group of companies doctrine as a scope-widening mechanism. In ICC award No. 5103[27], the tribunal held that the security of international commercial relations requires that account must be taken of these economic realities and that all the companies of the corporate group must be held jointly and severally liable for the debts of which they have directly or indirectly benefited in this case[28].

In ICC award No. 6519[29], corporation A (the signatory), the majority shareholder of corporations B, C, and D (the non-signatories) entered into a contract containing an ICC arbitration clause. Corporation B was directly concerned by the contract and effectively took part in the negotiations that led to the conclusion of the contract. Corporations C and D were unrelated to the

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[20] CA Paris, October 22, 1983, *Societe Isover-Saint-Gobain v. Societe Dow Chemical France et al* [1984] Rev. Arb. 98 at 100-101
[21] *Hanotiau* pg. 51 para 107
[22] *Ibid*
[23] *Sarhank v Oracle Corporation 404 F.3d 657 (2d Cir. 2005).*
[24] *Smith Enron v. Smith Cogeneration International, 198 F.3d 88 at 97-98 (2d Cir. 1999)*
[25] *X, Y, et A v. Z Tribunal Federal, decision dated October 16, 2003*
[26] *Peterson Farms Inc. v. C&M Farming Ltd [2004] All E.R. (D) 50*
[27] ICC Award No. 5103, Clunet 1988, at 1206 et seq.
[28] Translation from TransLex.org, http://www.tldb.net/output.php?docid=205103&markid=912000#1a
[29] ICC 6519/1991, 118 Journal du Droit International 1065.

contract, but merely affiliated in terms of shareholding. The tribunal held that;
"As things stand, the arbitration clause can only be applied to the companies of group A which did effectively take part in the negotiations which led to the signature of the Protocol or which are directly concerned by it, to the exclusion of those which were nothing but instruments of a financial transaction between the hands of a majority shareholder."

In coming to its ruling, the tribunal considered that it would be excessive to hold that the moment a company signs an agreement containing an arbitration clause, all entities it may control are also bound by that clause. However, the extension of arbitral jurisdiction to controlled companies may be justified by effective participation of such companies in the performance of the contract[30]. The tribunal commented that;
"Only those companies of the group that played a part in the negotiation, conclusion, or termination of the contract may thus find themselves bound by the arbitration clause, which, at the time of the signature of the contract, virtually bound the economic entity constituted by the group. Beyond the general principle, the arbitrations should thus appreciate on a case by case basis not only the existence of an intention of the members of the group to bind it as a whole, but also and especially, if such intent is established, its practical effects *vis-à-vis* each of the companies of the group considered separately."

The decision reaffirms the applicability the doctrine, and redefines its scope and effectively instills an increased stringency in the doctrines' application. Increased emphasis is placed on the participation in the contract, and mere affiliation or control is insufficient to bind a non-signatory group entity. The doctrine continues to serve as a scope-widening mechanism in ICC arbitrations.

### c. *The Group of Companies Doctrine in National Courts*

#### i. *France*

Considered as the founding father of the Group of Companies doctrine, French national courts have inevitably adopted its application. The French Court of Appeal first recognized the validity of the doctrine by upholding the interim award made by the ICC tribunal in the *Dow Chemical* case, and reaffirmed its position in *KIS France SA v SA Société Générale*[31]. KIS France and Société Générale

[30] *Yves Derains*: "Notes of ICC Case No 4131", (1983) 110 Journal du Droit International 905, from *Poudret and Besson* on pg. 217
[31] *KIS France SA v SA Société Générale (France)* Cour d'Appel, Paris, 31 October 1989

(the signatories) entered in an agreement for the sale of miniature photographic laboratories in certain countries. The agreement was signed and entered into by the signatories on behalf of their respective subsidiaries (the non-signatories). The agreement contained an ICC arbitration clause. KIS France subsequently defaulted on payment, and Société Générale along with two of its subsidiaries brought an arbitration against KIS France and two of the subsidiaries within the KIS group. Société Générale pleaded the group of companies doctrine to bind the non-signatories in the arbitration agreement. The arbitrators made an interim award ruling that the claims against the KIS subsidiaries were admissible[32]. On a challenge by KIS France, the Court of Appeal held that the group of companies doctrine is recognized under French law and, therefore, the arbitrators did not violate the parties' choice of French law by taking into account to undermine the integrity of the parties' bargain.

Having given positive recognition to the doctrine, the French courts further expanded its application and justified extension on the basis of a "more general and audacious formula"[33]. In *Korsnas Marma v Durand Auzias*, the Paris Court of Appeal held that "an arbitration clause contained in an international contract has its own validity and effectiveness which require its extension to all parties directly involved in the performance of the contract and in the disputes which may arise therefrom, once it has been established that their situation and their activities enable to presume that they were aware of the existence and the scope of the arbitration clause, even if they were not signatories of the contract containing it." Poudret comments that this ruling introduces " two unfortunate innovations"[34]. Firstly, membership of a group of companies seems no longer to be a prerequisite, but instead, emphasis is placed on the presumption of awareness of the arbitration clause based on participation and performance. Secondly, awareness of the arbitration clause is in itself sufficient, and there no longer requires proof of the mutual will of the parties to arbitrate. The result is that the doctrine is now based on two presumptions, the presumption of awareness of the clause, which leads to the presumed acceptance of the clause. Following this interpretation, Tschanz prophesized that there may be a phenomenon of over-expanding the doctrine's applicability, in which he stated that "to take the formula too literally could lead to an extension of the effects of the arbitration agreement to persons who have not even consented to it

[32] Case Summary from *John Leadly and Liz Williams*: "Peterson Farms: There is no 'Group of Companies' Doctrine in English Law', available on www.bakernet.com/NR/rdonlyres/5780A31F-14DE-4FD2-B1A5- F6DCA447CD6B/34239/petersonfarms.pdf

[33] *Poudret and Besson:* "Comparative Law on International Arbitration", Sweet & Maxwell [2007] pg. 219

[34] *Poudret and Besson* pg. 219

implicitly."[35] This evolvement of the doctrine led to heavy criticism from scholars[36], including amongst others Fouchard, Gaillard and Goldman, Poudret and Besson, and its unwelcoming repercussions were quick to follow. In *Ofer Brothers v Tokyo Marine*[37], the doctrine was applied to a carrier who issued bill of ladings referring to an arbitration clause contained in the charterparty; this case effectively departed from application to a "group" entity, but instead relied on the binding nature of a clause by reference. The final break came in the case *Cotunav*[38], when the court found a carrier bound by an arbitration clause contained in an agreement between two public agencies, solely on the fact of undertaking the role as a carrier. Despite having no part in the agreement itself, or any affiliation with the contracting parties, the court held that "by accepting to intervene in the performance of the contract as carrier appointed by one of the parties in the framework of the contract, *Cotunav* necessarily assumed the obligations defined by the contract with regard to the carrier and accepted its modalities, including the arbitration agreement."[39] It seems Tschanz was correct in his prophecy, and the French courts may have taken the doctrine a step too far. Fortunately, the Court of Cassation (the highest court in France) did not adopt the reasoning by the trial court when confirming the judgment of *Cotunav*, and instead held that *Cotunav*, by performing the contract in awareness of the situation, had in reality ratified it, including the arbitration clause.[40] Despite correcting the situation and bringing the doctrine closer to its orthodox self, it nevertheless deviates from previous case law, since it "recognized such tacit acceptance outside of a group of companies"[41]. As Poudret and Besson pointed out, "a subjective criterion, i.e. membership of a group, was abandoned in favour of an objective criterion, i.e. a connection with the object of the contract, of which arbitration is merely a component of its performance."[42] The consequence from the departure of the "group entity" requirement is that presumption of awareness from accepting performance of a contract has become the cornerstone of extending the scope of an arbitration clause to a non-signatory.

ii. *The United Kingdom*

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35 Rev. Arb. 1989, pg. 707

36 *Fouchard, Gaillard and Goldman*: "International Commercial Arbitration", Kluwer Law International [1999] para 440 and 505

37 1989 Rev. Arb. 691

38 Rev. Arb. 1990, pg. 691

39 *Ibid*

40 Rev. Arb. 1991, pg. 453

41 *Poudret and Besson* pg. 220

42 *Ibid*

Unlike the French courts, the English Courts have rejected the application of the group of companies doctrine on repeated occasions, and assertively held that the doctrine forms no part of English law[43]. In *Caparo Group Ltd v Fagor Arrastate Sociedad Cooperative*[44], the English commercial court refused to apply the group of companies doctrine. The Spanish company Fagor and an Indian company known as CML had entered into a contract for the sale and purchase of printing presses. In a dispute over non-payment, Fagor sought to hold Caparo, which was a 60% shareholder in CML, liable for the alleged default[45]. Clarke J, in refusing to extend liability, held that;

"On the facts of the instant case, the position is quite clear. The contract, as I have said, was governed by English law; so was the arbitration agreement. Under English law, I can see no basis upon which it could be held that the parties to either the contract or the arbitration agreement were other than Fagor on the one hand and CML on the other. In my judgment, there is no room for a conclusion that Caparo was a party to either the contract or the arbitration agreement."[46]

The position in *Caparo* was reaffirmed six years later in *Peterson Farms Inc v C&M Farming Limited*[47]. The dispute arose from a damages claim by C&M against Peterson Farms over a contract for the sale of live poultry. Peterson Farms sold male "grandparent" chickens to C&M, which mated them to obtain "parents" which could be sold on to third parties, including other entities in the C&M group. These third parties then mated the parent birds to produce chicks or hatching eggs to produce broilers for the consumer market. The grandparent chickens were infected with avian virus and, although not harmful to human health, affected the birds' ability to produce healthy chicks. C&M consequently claimed $16 million in damages from Peterson Farms for losses suffered by C&M, and other entities in the C&M group. The sales contract, subject to Arkansas law, contained an arbitration clause in ICC London, where the case was ultimately heard. Applying the doctrine of separability, the tribunal held that, unlike the contract itself, the arbitration clause was not subject to Arkansas law, and was entitled to apply ICC precedent, including the group of companies doctrine. In applying the group of companies doctrine, the tribunal ruled that Peterson Farms was liable to pay $6.7 million in damages to C&M and its group entities.

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[43] *Peterson Farms Inc. v. C&M Farming Ltd [2004] All E.R. (D) 50*

[44] Commercial Court, Queen's Bench Division, 7 August 1998, LEXIS

[45] Case Summary from *John Leadly and Liz Williams*: "Peterson Farms: There is no 'Group of Companies' Doctrine in English Law', available on www.bakernet.com/NR/rdonlyres/5780A31F-14DE-4FD2-B1A5- F6DCA447CD6B/34239/petersonfarms.pdf

[46] Commercial Court, Queen's Bench Division, 7 August 1998, LEXIS

[47] *Peterson Farms Inc. v. C&M Farming Ltd [2004] All E.R. (D) 50*

The tribunal held that Peterson had intended throughout to deal with the C&M group as a whole and had contracted with one member of the group purely as a matter of convenience, the group not being a legal entity.

Ensuing the decision of the ICC tribunal in London, Peterson Farms challenged the award in the Commercial Court pursuant s.67 of the English Arbitration Act 1996[48]. Peterson argued that the tribunal had no jurisdiction to award damages to the C&M group entities, which were not parties to the arbitration agreement. Langley J reversed the tribunal's decision in applying ICC precedent in determining jurisdiction, and held that the arbitration clause was subject to the same choice of law clause as the contract. Langley J stated;

"The autonomy of the arbitration agreement is not in point. The question is whether Arkansas law governs it. In my judgment it plainly is. There was, therefore, no basis for the tribunal to apply any other law whether supposedly derived from the common intent of the parties or not. The common intent was indeed expressly in the agreement: that is both English and Arkansas law. The law that the tribunal derived from its approach was not the proper law of the agreement nor even the law of the seat but, in effect, the group of companies doctrine itself. In the context of the group of companies doctrine, the agreement was that Arkansas law was the same as English law. English law treats the issue as one subject to the chosen proper law of the agreement and that excludes the doctrine that forms no part of English law."[49]

Emphatically rejecting the application of the group of companies doctrine, Langley J overturned the tribunal's decision and held that the award in favour of the other group entities could not stand. The United Kingdom have thus made their position clear in regards to the doctrine; parties should resort to more conventional and orthodox liability-extending mechanisms, such as, piercing the corporate veil.

### iii. *Switzerland and Germany*

Taking a similar stance as the United Kingdom, Switzerland has rejected the application of the doctrine, and comments that the doctrine does not exist in Switzerland[50]. The doctrine has been tested numerous times in Swiss courts,

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[48] S.67 of the Arbitration Acts states "A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging any award of the arbitral tribunal as to its substantive jurisdiction or for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction".

[49] *Peterson Farms Inc. v. C&M Farming Ltd [2004] All E.R. (D) 50 (Feb)*

[50] ASA Bull 3/2003, at 799, N 154.

failing on each occasion.

In *ALPHA S.A. v. BETA & Co., State Company of Ruritanian Law*[51], a Swiss arbitral tribunal refused to extend an arbitration clause to a non-signatory parent whose subsidiary was a party to the contract containing the arbitration clause. Alpha S.A, the plaintiff, initiated arbtration against BETA, parent of a foreign subsidiary, ZETA, which signed the contract and arbitration clause. Alpha S.A alleged that BETA and ZETA formed a single economic unit, and sought to extend the scope of the arbitration clause by virtue of the group of companies doctrine. The tribunal refused to extend the clause, and noted that Swiss substantive law did not recognize the doctrine.

The doctrine was once again tested in the Swiss Federal Supreme Court in *Butec*[52]. In Butec, the plantiff successfully tendered for a construction subcontract from Saudi Saipem, a subsidiary of the Italian company Saipem SpA. A dispute arose, and Butec initiated arbitration against Saudi Saipem and attempted to extend the scope of the arbitration clause to include Saipem SpA, relying on the group of companies doctrine. In its ruling, the court cautioned that one should only reluctantly bind non-signatories to an arbitration clause on the basis of the group of companies doctrine. Instead, the court referred to the more stringent Swiss principle *Konzernvertrauenshaftung* (translated as Group Confidence Liability); this principle was distinguished from the doctrine, as it is only applicable where the non-signatory group company participated in the conclusion, performance or termination of the contract, creating an appearance to be a party to the contract in which the party requesting an extension relied to its detriment[53]. The Swiss court ultimately refused to extend jurisdiction over Saipem SpA, commeting that the plaintiff had been aware of their exclusive contractual relationship with Saudi Saipem.

In *A v B and C*, the Geneva Chamber of Commerce and Industry reiterated the stance adopted by previous decisions, and affirmed that the group of companies doctrine is unrecognized law within the jurisdiction. In this case, P, an employee of D, acted as a consultant for B, of which D held a 50% stake, in B's bid for the construction of an electrolyte plant in Tunisia. P contacted A to support B in the bidding process. While P participated in the negotiations for a consultancy agreement between A and B, and the draft agreement was prepared by the legal department of D, the final agreement was signed by a representative

[51] Ad hoc award of 1991, ASA Bull 2/1992, p. 202
[52] *Saudi Butec Ltd et Al Fouzan Trading v. Saudi Arabian Saipem Ltd*, unpublished ICC interim awards of 25 October 1994, confirmed by DFT of 29 January 1996, ASA Bull 3/1996, pp 496-507
[53] *Zuberbuhler*: "Non-signatories and the Consensus to Arbitrate", (2008) 26 *ASA Bulletin*

of B. When A subsequently initiated arbitration against both B and D (which became C, following a merger), the arbitrator declined to bind D on a group of companies concept[54]. The tribunal commented that dispute Swiss law recognizing certain liability-extending mechanisms, eg. *Konzernvertrauenshaftung, Durchgriff (Swiss equivalent of piercing the corporate veil)*, "the principle according to which a company may be considered a party to a contractual undertaking made by another company because both companies belong to a group does not exist in Switzerland."[55]

In the *Westland Helicopters*[56] case, the Swiss Federal Tribunal disagreed with an ICC tribunal decision that held that countries that were shareholders in an entity were bound by the arbitration clause signed by that entity. In *Westland Helicopters*, four nations, Egypt, United Arab Emirates, Saudi Arabia, and Qatar, jointly created the Arab Organization for Industrialization (AOI), which was controlled and directed by representing ministers from the four states. AOI entered into an agreement containing and ICC arbitration clause with Westland Helicopters. Westland Helicopters initiated arbitration against AOI and the four nations, and the ICC tribunal found the four non-signatory states party to the arbitration agreement entered into by AOI. The Swiss Federal Tribunal held that the countries were not bound as they had not signed the arbitration agreement, the entity was separate from the countries, and there was no indication in the entity's statutes that the countries were bound by the clause.[57] The Federal Tribunal commented that "the close control of a legal entity by a state and the close connection existing between them is not sufficient to reverse the presumption, resulting from the fact that, if the state is not a signatory to the arbitration agreement, only the entity which signed the clause shall be a party to the arbitration."

The *Westland Helicopter* case shows a great contrast between the liberal approach adopted by the French, and the restrictive and reluctant approach by the Swiss. Under its stringent and restrictive approach, it is not surprising that arbitrators and courts in Switzerland have mostly refused to extend the scope of arbitration agreements to bind non-signatories. The group of companies doctrine is deemed for failure under the Swiss law, and even more established principles such as the piercing of the corporate veil (*Durchgriff*) has only been

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[54] Case summary from *Zuberbuhler*: "Non-signatories and the Consensus to Arbitrate", (2008) 26 *ASA Bulletin*
[55] ASA bull 3/2003, at 799, N 154.
[56] Swiss Supreme Court, July 19, 1988, *Westland Helicopters v AOI et al,* (1991) YBCA Vol. XVI, p. 174; (1989) ASA Bull Vol. 7 p. 63
[57] *Michael Bühler, Thomas H. Webster:* "Handbook of ICC Arbitration", Sweet & Maxwell [2005] pg. 96

applied once[58]. The Swiss laws' respect for corporate separateness means that it would rarely allow economic reality to prevail over legal independence.

Unlike Switzerland where there is an abundance of case law rejecting the doctrine, there is a lack of reported cases in German law. However, authors like Sandrock and Schlosser, generally opine that the German law differs only slightly from Swiss law. The group of companies doctrine has been rejected by German authors, and only enable an extension of the arbitration agreement under veil-piercing (very restrictively) or apparent authority. Some authors consider German courts to be very backward compared with arbitration practice in this area.[59]

iv. *Asia Pacific Region*

The group of companies doctrine has seen very limited application by jurisdictions in the Asia Pacific region. In a survey conducted by the Global Arbitration Review in 2007[60], 33 countries were directly asked about the application of the group of companies doctrine in their local jurisdiction. Delegates from Australia revealed that the doctrine is unsettled law in Australia. The doctrine remains untested in India, Japan, Hong Kong, and South Korea. The doctrine has limited application in New Zealand, confined only to taxation or insolvency matters. Of the participating nations from the Asia Pacific region, only Singapore indicated that the group of companies may be recognized in some matters, but the law remains unsettled and there has yet to be a successful plea of the group of companies doctrine.

v. *Singapore*

In *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd*[61], the Singaporean High Court was invited to consider, *inter alia*, a group of companies plea. The plaintiffs' vessel was chartered by the first defendants, Masterpart (Singapore) Pte Ltd ('Masterpart'), to carry a cargo from Kandla to Colombo. The vessel arrived in Kandla on 18 October 1996 and tendered notice of readiness to the charterers. No cargo was loaded. On 28 November 1996, the plaintiffs were informed that Masterpart was no longer interested in the vessel. The plaintiffs

[58] *Poudret and Besson* pg. 224, citing ASA Bull. 1992, p. 202
[59] Raeschke-Kessler and Berger, pp. 72-75
[60] *Gerhard Wegen and Stephan Wilske*: "Getting the Deal Through – Arbitration in 33 Jurisdictions Worldwide", Global Arbitration Review, Law Business Research Inc, London [2007]
[61] *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98

accepted this as repudiation of the charter contract and looked for alternative employment, which they were able to secure within two weeks. The plaintiffs alleged that they had suffered loss arising from the breach of the charterparty. The plaintiffs commenced an action not only against Masterpart but also against the second defendants, Donald & Mcarthy Pte Ltd ('D&M'), whom the plaintiffs alleged should be responsible for Masterpart's default. The plaintiffs alleged that: (1) Masterpart entered the charterparty as an agent of D&M and therefore D&M was the undisclosed principal in the transaction; (2) although the charterparty was entered into by Masterpart, Masterpart was only the nominal charterer and was a sham and/or a mere facade and/or the *alter ego* of D&M; and (3) Masterpart and D&M were at all material times run as a single corporate entity and therefore must be jointly liable for the breach.[62]

The Singaporean High Court dealt with the agency plea in detail and ultimately rejected it on grounds of lack of consent in creating an agency relationship. The veil-piercing argument was similarly rejected for an absence of fraud. Judge Judith Prakash then considered the group of companies argument.

D&M took the stand that it was not a party to the charter contract and that it had been wrongly sued. D&M was supported in this position by Masterpart, which said that it alone should be held responsible for any damages arising from the breach.

D&M and Masterpart had different directors and shareholders. The sole directors and shareholders of Masterpart were LSY and SA, both of whom were employees of D&M. Masterpart had a paid-up capital of $ 10,000. Masterpart had a separate registered address from D&M but did not have a separate office. Masterpart had no staff apart from its directors and had no independent facsimile or telephone number. Masterpart used D&M's address and facsimile numbers for its correspondence. Masterpart maintained its own bank accounts although there was never very much money or activity in these bank accounts.

The plaintiffs relied on an agreement which the defendants had entered into, under which: (1) D&M would 'provide banking infrastructure' to Masterpart as regards the establishing of letters of credit and guarantees for purchases made by Masterpart against sales; (2) all transactions in which sales were made by Masterpart would be at Masterpart's risk; and (3) D&M would pay Masterpart 0.1% of the annual turnover as consideration for the business done.[63]

The court, having considered relevant case law[64] and scholarly writing[65],

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[62] Case summary directly from *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98

[63] *Ibid*.

[64] *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462

recognized that the doctrine may have the effect of extending liability onto a third party belonging to the same group; Judge Prakash does comment, however, that the law on this issue has not been completely resolved.[66] Recognizing the possibility of applying the doctrine, the court rejected the plea nonetheless, commenting that "what the plaintiffs wish me to do here is to extend the principle into a completely different area and treat two companies which have no common shareholders or directors as being a single economic unit and thus a single legal unit. I cannot do this." Considering the factual basis of the plaintiff's plea, the court opined that the evidence does not establish that D&M and Masterpart were a single economic unit. The court considered that there was no evidence of corporate financial control, which is crucial in a group of companies plea, exercised by D&M over Masterpart. The court concluded that instead of there being a single economic unit, Masterpart and D&M had a mutually beneficial but economically separate business relationship. D&M was held not liable for the breach committed by Masterpart.

The *Win Line* case establishes that Singapore is prepared to accept the group of companies doctrine as valid law within the jurisdiction. However, there is yet to be a successful plea, and until then, the Singaporean courts' threshold is still being tested and indefinite. What is certain from the *Win Line* case is that the Singaporean courts view the issue as one of fact; in order to succeed, one must establish, on the basis of fact, that the third party has indeed exercised a significant, if not complete, control over the contracting party.

### vi. *The United States*

The US Second Circuit in *Thomson*[67] notably recognized five theories arising out of common law principles of contract and agency law that could provide a basis for binding non-signatories to arbitration agreements; incorporation by reference, assumption, agency, veil piercing/*alter ego*, and *estoppel*. Although the *alter ego* doctrine strikes resemblance with the group of companies doctrine on certain aspects, courts in the US have distinguished the two theories, primarily on the requirement of fraud. Not being listed as a recognized method, the group of companies doctrine has received mixed feedback in US courts.

In *Sarhank*[68], the Second Circuit overturned the decision of a tribunal in

[65] *Francis Gore-Browne, A. J. Boyle, Richard Sykes, Richard Jordan:* "Gore-Brown on Companies" Jordan [1986] (44th Ed)
[66] *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98
[67] *Thomson-CSF, S.A v American Arbitration Association*, 65 F.3d 773, 776 (2d Cir. 1995)
[68] *Sarhank Group v. Oracle Corporation* 404 F.3d 657 (2d Cir. 2005)

Cairo in which the group of companies doctrine was applied. The tribunal in Cairo decided, on the basis of Egyptian law, that "despite their having separate juristic personalities, subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in [the contract] because contractual relations cannot take place without the consent of the parent company owning the trademark by, and upon which transactions proceed."[69] When enforcement was sought pursuant the New York Convention in the US, the Second Circuit overturned the decision, and held that under American law, an arbitration agreement may only be extended to a non-signatory third party of the basis of the theories such as veil-piercing, *estoppel* and incorporation by reference; the court distinguished these theories from the group of companies doctrine, stating that "[these theories] has found an agreement to arbitrate, under general principles of contract law, that is to say that the totality of evidence supports an objective intention to agree to arbitrate."[70] In its concluding remarks, the court struck out for certain the applicability of the doctrine, and commented that;

"An American non-signatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulate theory based on American contract law or American agency law. To hold otherwise would defeat the ordinary and customary expectations of experienced business persons. The principal reason corporations form wholly owned foreign subsidiaries is to insulate themselves from liability for the torts and contracts of the subsidiary and from the jurisdiction of foreign courts. The practice of dealing through a subsidiary is entirely appropriate and essential to our nation's conduct of foreign trade."[71]

Despite the Second Circuit being rather definite in declining the doctrine's application, the New York Society of Maritime Arbitrations in *Map Tankers*[72] gave a contradicting view. In a dispute concerning the delegation of transportation contracts, the arbitrators held that "it was not reasonable and practical to prevent a signatory party from including in the arbitration the claims of its group of subsidiaries or partners." Similarly, the Federal Court of the Southern District of New York also accepted a group of companies plea, in which it held that "since it had itself invoked the arbitration provided for in a chaterparty of which it was not a signatory, but which it negotiated, the parent company could not deny being bound by the arbitration clause contained in this document."[73]

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[69] *Ibid*
[70] *Ibid*
[71] *Ibid*
[72] *Map Tankers v Mobil Tankers,* YCA 1982, pg. 151
[73] YCA 1993, pg. 499, US 129

The contradicting views from different courts and tribunals in the US have led to inconsistency in dealing with the issue. While it seems certain that the Second Circuit will not allow extension by virtue of the doctrine, other institutions have left the door open. The doctrine is yet to be fully ruled out, and until a firm decision is made universally in the US, the only thing for certain is that the orthodox methods arising out of contract and agency law remain the surest ways of binding a non-signatory group entity in the US.

**d.** ***Analysis of the Group of Companies Doctrine***

Since its introduction in the *Dow Chemical* case, the group of companies doctrine has "prospered in arbitration case law"[74]. Unlike the more established and orthodox methods recognized under general principles of contract and agency law, the doctrine is a rather novel creation, which inevitably cause problems in application. The original doctrine introduced in the *Dow Chemical* case placed emphasis on a non-signatory's control over the signatory company, and also on a non-signatory's participation in the negotiation and performance of the contract. It strictly applied to companies within the same group, and predicated consent by virtue of affiliation, control, and participation. Despite departing from requirements of form, the doctrine still respected the fundamental notion of consent in arbitration. Instead of being an exception to consent, the doctrine was merely a mechanism of predicating implied consent. As Hanotiau comments, consent to arbitrate may sometimes be implied from the conduct of a company of the group. Authors unanimously agree that the mere membership in a group is not sufficient to disregard corporate independence[75], and the non-signatory must have behaved in a manner from which it can be inferred that it has accepted to submit to the arbitration agreement.[76] Generally, the burden of proof is on the party seeking the extension of the clause to prove the existence of an implied consent.

Unfortunately, as the doctrine expanded and case law accumulated, the focus on consent was blurred. Instead of putting the duty on the party seeking extension to prove the non-signatories' consent, French courts created a legal presumption of consent, arising from a party's participation in a contract with knowledge of the existence of an arbitration clause. Further developments saw the

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[74] *Poudret and Besson* pg. 229
[75] Authors including Poudret, Besson, Hanotiau, Berger, Boisseson, Fadlallah, Hascher, Jarven, Jarrosson (if you cite them like this then their book or articles should be referred by the author's name)
[76] *Poudret and Besson* pg. 229

doctrine depart from the requirement of a "group entity", applying the doctrine to practically any person who participated in the negotiation or performance of the contract containing an arbitration clause. The result is that it is "no longer a group of companies doctrine, but instead a much more general theory."[77] It is not surprising that even the generally liberal US courts have rejected the doctrine. Poudret opines that such a development is not only contrary to the privity of contracts and to the consensual character of arbitration, but also does not correspond to the usual intention of actors of international commerce. The presumption of consent by virtue of participation is criticized as being opposite to the reality of the commercial world; a reverse presumption is more appropriate, meaning that companies which have not signed an arbitration agreement should be presumed not to have submitted to arbitration, unless the contrary can be proven, even if they have participated in the performance or negotiation of the contract. Participation and awareness of the existence of an arbitration agreement are merely, and nothing more, than supporting factors to show an implied consent. Fadlallah comments that "the creation of a presumption of extension of arbitration to the group should be avoided for the fear of provoking a reaction which might lead to rejection of arbitration in general."[78] Similarly, Rubin-Devichi[79] states that arbitration must not seek, by whatever means, to extend its ambit to litigants who did not expressly provide for it." Georges Delaume[80] reiterates these warnings, and foresees that this extensive approach by the courts might provoke negative reaction among businessmen and disaffection for France as a place of arbitration. The group of companies doctrine also undermines the long-held notion of corporate independence and threatens the effectiveness of international trade; the doctrine jeopardizes the system by permitting jurisdiction over a company based merely on its relationship to other independent companies, directly undermining the purpose of creating and establishing separate subsidiary companies.

Despite all the criticism and the clear danger in its over-expansion, the doctrine continues to serve its purpose in arbitrations, and was recognized by UNCITRAL as a method of extending the scope of an arbitration clause. With the UNCITRAL Model Law of International Commercial Arbitration departing from the requirement of form and explicitly accepting implied consent, it is foreseeable that the doctrine will continue to play a role in the ever-changing and expanding

[77] *Poudret and Besson* pg. 229
[78] *Fadlallah:* "La notion d'investissement: vers une restriction a la competence du CIRDI?", pp. 259-268, pg. 114 from *Poudret and Besson*
[79] *Rubin-Devichi*, "Les solutions juridictionnelles", pg. 217 from Poudret and Besson
[80] Reflections on the Effectiveness of International Arbitral Awards, Jnl. Int. Arb. 1995/1, p. 9

world of arbitration. However, the common opinion of courts, arbitrators, practitioners, and scholars is that the more developed and widely accepted methods of liability-extension remain the surest ways of binding a non-signatory to an arbitration clause. The remainder of the essay will provide an overview of the other recognized methods.

## 3. *Estoppel*

While the group of companies doctrine remains primarily a civil law concept, common law jurisdictions, with the US in particular, have derived their very own method of binding non-signatories into an arbitration agreement. The doctrine of *estoppel*, familiar to common law jurists, has been expanded in use to cover situations where third party beneficiaries of a contract containing an arbitration clause evade liability on the mere basis of being a non-signatory. In the leading case of *International Paper*[81], it stated that;
"In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him."[82]

The doctrine of *estoppel* provides three grounds for compelling non-signatories of an arbitration agreement to arbitrate nonetheless. The first ground stipulates that a non-signatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause[83]. The second ground states that the application of equitable *estoppel* is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract[84]. The third ground of *estoppel* applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory.[85]

The first ground of *estoppel* precludes a party from enjoying rights and benefits under the contract while at the same time avoiding its burdens and obligations[86]. In *International Paper,* the court explained that "to allow a party to

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[81] *International Paper Company v. Schwabedissen Maschinen & Anlagen GMBH 206 F.3d*
[82] *Ibid* at 415-6
[83] *Hanotiau* pg. 105
[84] *Grigson v. Creative Artists Agency L.L.C. 210 F.3d 524 (5th Cir. 2000)*
[85] *Ibid*
[86] *Intergen N. V. v. Grina, 344 F.3d I34 {1st Cir. 2003)*

claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."[87] Similar ideologies were upheld in *Thomson* where the court estopped a non-signatory from denying the obligation to arbitrate after knowingly exploiting the agreement to obtain a direct benefit.[88] In a more recent case, *Meyer v WMCO-GP*[89], the Texas Supreme Court held that any person claiming a benefit from a contract containing an arbitration agreement is equitably estopped from refusing to arbitrate.[90] In *Meyer*, WMCO entered into a sales agreement with Bullock to buy Bullock's Ford Dealership. The sales agreement contained an arbitration agreement, and also a clause which stipulated that Ford had a contractual right of first refusal to buy the dealership. Ford subsequently exercised this right to first refusal, leading Bullock to terminate the sales agreement with WMCO. Ford later assigned its right to acquire the dealership to Meyer, and Meyer duly purchased the dealership from Bullock. WMCO brought legal proceedings against Meyer and Ford for tortious interference, and against Bullock for breach of contract. Meyer and Ford, though both non-signatories to the arbitration clause contained in the sales agreement, sought to compel arbitration against WMCO. The trial court refused, and the appellate court affirmed the decision. Meyer appealed to the Texas Supreme Court, where the decision was reversed and compelled arbitration by virtue of the doctrine of *estoppel*. The Texas Supreme Court held that, "the claimant cannot, on the one hand, seek to hold the non-signatory liable pursuant duties imposed by the agreement, which contains and arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory." The notion of a direct benefit stipulated in *International Paper* is pivotal in invoking the first ground of *estoppel* and includes, but is not limited to, direct financial gains. Case law has suggested other means of establishing direct benefit; *inter alia*, reliance on a contract as a grounds for litigation[91], significantly lower insurance rates and the ability to sail under the French flag[92].

The second and third ground for invoking *estoppel*, collectively referred to as the two-pronged *estoppel* test[93], was first introduced in *MS Dealer Service Corp.*

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[87] *Redfern and Hunter* at pg. 418
[88] *Thomson-CSF v. American Arb. Ass'n, 64 F.3d 773, 776 (2d Cir. 1995)*
[89] *Meyer v WMCO-GP L.L.C., 211 S.W.3d 302, 305 (Texas Supreme Court 2006)*
[90] *Richard Bamforth and Irina Tymczyszyn*: "Joining non-signatories to an arbitration: recent developments", available on http://www.practicallaw.com/6-275-4952
[91] *Redfern and Hunter at pg. 418*
[92] *American Bureau of Shipping v Tencara Shipyard S.P.A., 170 F.3d 349 (1999).*
[93] *Frank Z. LaForge,* "Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under *Grigson v. Creative Artists"* Texas Law Review Vol. 84 pg. 225

*v. Franklin*[94], and further elaborated in the leading case of *Grigson*[95]. In *MS Dealer*, the court held that non-signatories can compel plaintiffs to arbitrate their claims under the doctrine of equitable *estoppel*: (1) when the plaintiff's claims rely on or presume the existence of a contract containing an arbitration provision[96], and (2) when the plaintiff's claims allege concerted misconduct.[97] The plaintiff in *MS Dealer* purchased a vehicle from the defendant automobile dealership in which the purchase agreement contained a broad arbitration clause. The purchase agreement contained an additional servicing clause which stipulated that the plaintiff would be charged $990 for a service contract under which MS Dealer would provide services for the plaintiff's car. MS Dealer, although named in the contract, was not a signatory to it. The plaintiff sued both the dealership and MS Dealer, alleging that they colluded to defraud her. The court held that by satisfying both prongs of the test, MS Dealer could compel the plaintiff to arbitrate her claims under the doctrine of equitable *estoppel*[98].

*Grigson* affirmed the decision in *MS Dealer* and adopted the two prong *estoppel* test to compel arbitration against a non-signatory. In *Grigson*, the plaintiff Charles O. Grigson, trustee for the movie owners for the film "The Texas Chainsaw Massacre", filed a law suit against Creative Artists Agency, agent for actor Matthew David McConaughey, alleging that Creative interfered with the distribution agreement of the film. The distribution agreement contained an arbitration clause in Los Angeles County, California, and was concluded between Grigson and Columbia Tristar. The alleged interference occurred when Creative Artists agency pressured Columbia Tristar to limit the release of the film. Grigson subsequently brought an action against Creative in the district court. Although non-signatories to the distribution agreement, Creative sought to compel arbitration against Grigson, and for the case to be withdrew from the court. The district court held that Grigson was equitably estopped from relying on the fact that Creative was a non-signatory, and referred the case to arbitration. The district court based its ruling upon the fact that the claim was so intertwined with, and dependent upon, the distribution agreement, therefore its arbitration clause should be given effect. Grigson appealed to the Fifth Circuit, arguing that the district court had abused its discretion to compel arbitration. The Fifth Circuit affirmed the district court's

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[94] *MS Dealer Service Corp. v. Franklin 177 F.3d 942 (11th Cir. 1999).*

[95] *Grigson v. Creative Artists Agency L.L.C. 210 F.3d 524 (5th Cir. 2000)*

[96] Supra 29 at 947, (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993)).

[97] *MS Dealer Service Corp. v. Franklin 177 F.3d 942 (11th Cir. 1999).* at 947, (citing *Boyd v. Homes of Legend, Inc., 981 F. Supp. 1423, 1433 (M.D. Ala. 1997); Sam Reisfeld & Son Imp. Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976).*

[98] *MS Dealer Service Corp. v. Franklin 177 F.3d 942 (11th Cir. 1999).* at 235

decision, concluding that the district court had not abused its discretion. Citing *MS Dealer*, the Fifth Circuit held that, "existing case law demonstrates that equitable *estoppel* allows a non-signatory to compel arbitration under two grounds…we agree with the two prong *estoppel* test formulated by the Eleventh Circuit [in MS Dealer]". The court also established that either prong is sufficient to find equitable *estoppel*[99], but it is "much more readily applicable when the case presents both independent bases."[100]

The decisions in *MS Dealer* and *Grigson* received widespread criticism from common law jurists and academics alike, suggesting that it "violates arbitration's general premise of consent."[101] It had been argued that the *estoppel* established in *MS Dealer* and *Grigson* is a dramatic departure from the traditional *estoppel* doctrine[102]. The traditional *estoppel* requires the satisfaction of two requirements; misrepresentation and detrimental reliance.[103] However, the *Grigson estoppel* deviates from the traditional view, therefore attracting the criticism that it has no basis in equity. Dennis J in his dissenting judgment in *Grigson*, labeled the doctrine of *estoppel* established in *Grigson* as the "spurious *estoppel* theory", and commented that it unfairly denies the plaintiff its right to recourse in civil court[104]. Despite its many criticisms, fundamentally on the basis that it extends the applicability of arbitration too far[105], the two prong *estoppel* test remains good law[106].

The two prong *estoppel* test was affirmed in two subsequent cases; *Hill v. GE Power System Inc.*[107] and *Westmoreland v. Sadoux.*[108] In *Hill*, an energy company, Hill, entered into an agreement with GE Power System Inc to build two power plants in the UK. Following the termination of the agreement, Hill initiated legal proceedings against GE Power System and GE Capital Corporation, a non-signatory. GE Power System and GE Capital Corporation requested a stay of proceedings, and to compel arbitration. The district court ruled in favour of GE

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[99] *Grigson v. Creative Artists Agency L.L.C. 210 F.3d 524 (5th Cir. 2000)* at 236
[100] *Frank Z. LaForge, "*Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under *Grigson v. Creative Artists"* Texas Law Review Vol. 84 pg. 225
[101] *Grigson v. Creative Artists Agency L.L.C. 210 F.3d 524 (5th Cir. 2000), 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) pg. 337
[102] *Grigson v. Creative Artists Agency L.L.C. 210 F.3d 524 (5th Cir. 2000)* at 246
[103] *Lyng v. Payne 476 U.S. 926, 935 (1986).*
[104] *Grigson v. Creative Artists Agency L.L.C. 210 F.3d 524 (5th Cir. 2000)*
[105] *Frank Z. LaForge, "*Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under *Grigson v. Creative Artists"* Texas Law Review Vol. 84 pg. 225
[106] Affirmed in *inter alia, Hill v. GE Power System Inc. 282 F.3d 343 (5th Cir. 2002), Westmoreland v. Sadoux 299 F.3d 462 (5th Cir. 2002), Washington Mutual Financial Group, L.L.C. v. Bailey364 F.3d 260, 268 (5th Cir. 2004)., DSMC Inc. v. Convera Corp., 349 F.3d 679, 683 (D.C. Cir. 2003),*
[107] *Hill v. GE Power System Inc. 282 F.3d 343 (5th Cir. 2002)*
[108] *Westmoreland v. Sadoux 299 F.3d 462 (5th Cir. 2002)*

Power System and Capital Corporation, and held, on the basis of equitable *estoppel*, that the dispute be settled via arbitration. However, the court in *Hill* commented that the first prong, the non-signatory's reliance on the contract containing the arbitration agreement in its claims, is more important than the second prong. In *Westmoreland*, although the Fifth Circuit refused to compel arbitration, it nonetheless reaffirmed the validity of the two prong *estoppel* test. The Fifth Circuit in *Westmoreland* asserted, however, that the second prong alone is insufficient to compel arbitration against the non-signatory[109].

## 4. ***Alter Ego* Doctrine**

Generally speaking, a parent-subsidiary relationship alone is insufficient in binding a non-signatory to an arbitration agreement, however, the corporate veil may be pierced when a parent company and a subsidiary is no longer treated as separate legal entities, but instead one is the *alter ego* of the other[110]. In other words, according to the *alter ego* doctrine, a corporation may be bound by an agreement entered into by its shareholders regardless of the agreement's structure or the shareholders' attempts to bind itself alone to its terms, where their conduct demonstrates a virtual abandonment of separateness[111].

While affirming that courts should be reluctant in disregarding corporate form, the Second Circuit in *Gartner v Snyder*[112] established that liability may be predicated and application of the doctrine is justified when the corporate form has been used to achieve fraud, or when the corporation has been so dominated by an individual or another corporation, and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's *alter ego*[113]. The decision in *Gartner*[114] was affirmed and clarified in *Kirno Hill Corp v Holt*[115] where it was held that "the prerequisites for piercing a corporate veil are clear: the defendant must have used the corporation to perpetrate a fraud or have so dominated and disregarded the corporation's corporate form that the corporation primarily transacted the defendant's personal business rather than its own corporate business.[116] The two

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[109] *Westmoreland v. Sadoux 299 F.3d 462 (5th Cir. 2002)* at 238
[110] *Margeret L. Moses*: "The Principles and Practice of International Commercial Arbitration", Cambridge University Press [2008] at pg. 36
[111] *Hanotiau* pg. 107
[112] *Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir.1979)*
[113] *Ibid, Wm.Passalacqua Builders v. Resnick Developers 933 F. 2nd 131 (2d Cir. 1991), Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd., 909 F.2d 698, 703 (2d Cir.1990)*
[114] *Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir.1979)*
[115] *Kirno Hill Corp. v. Holt, 618 F.2d 982, 985 (2d Cir.1980)*
[116] *Ibid*

fundamental requirements contingent in invoking the *alter ego* doctrine can therefore be summarized as, (i) the parent exercised complete control over the subsidiary corporation with respect to the transaction at issue[117], (ii) such control was used to commit a fraud or wrong that injured the party seeking to pierce the corporate veil[118].

It is not always an easy to task to determine whether one company was the *alter ego* of another, and the decision often resorts to the assessment of the facts; the court in *Wm. Passalacqua Builders v Resnick*[119] recognized that due to the infinite variety of situations that might warrant disregarding the corporate form, it is not an easy task because disregarding corporate separateness is a remedy that[120] "differs with the circumstances of each case."[121] In such cases, the court must decide whether, considering the totality of the evidence, "the policy behind the presumption of corporate independence and limited shareholder liability--encouragement of business development--is outweighed by the policy justifying disregarding the corporate form--the need to protect those who deal with the corporation".[122] The Fifth Circuit, faced with the same dilemma, issued a list of factors which may assist in the determination of an *alter ego* relationship[123];

(i) the parent and subsidiary have common stock ownership, (ii) the parent and subsidiary have common directors or officers, (iii) the parent and subsidiary have common business departments, (iv) the parent and subsidiary file consolidated financial statements, (v) the parent finances the subsidiary, (vi) the parent caused the incorporation of the subsidiary, (vii) the subsidiary operated with grossly inadequate capital, (viii) the parent pays salaries and other expenses of the subsidiary, (ix) the subsidiary receives no business except that given by the parent, (x) the parent uses the subsidiary's property as its own, (xi) the daily operations of the two corporations are not kept separately, (xii) the subsidiary does not observe corporate formalities, (xiii) whether the directors of the subsidiary act in the primary and independent interest of the parent, (xiv) whether others pay or guarantee debts of the dominated corporation, and (xv) whether the alleged dominator deals with the dominated corporation at arms length.[124]

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117 *Bridas SAPIC v. Turkmenistan, 345 F.3d 347, 358 (5th Cir. 2003)*
118 *Ibid*
119 *Wm.Passalacqua Builders v. Resnick Developers 933 F. 2nd 131 (2d Cir. 1991)*
120 *Ibid*
121 *American Protein, 844 F.2d at 60*
122 *William Wrigley, Jr. Co. v. Waters, 890 F.2d 594, 601 (2d Cir.1989)*
123 *Bridas SAPIC v. Turkmenistan, 345 F.3d 347, 358 (5th Cir. 2003)*
124 See also *17 Willamette L.Rev. 371, 398 (1981); Director's Guild of America v. Garrison Prod., 733 F.Supp. 755, 760-61 (S.D.N.Y.1990); United States Barite Corp. v. M.V. Haris, 534 F.Supp. 328, 330 (S.D.N.Y.1982).*

The factors above are in no way exhaustive, but merely examples of situations where an *alter ego* relationship may exist. The decision as to whether the corporate veil should be pierced remains fundamentally at the courts' discretion following the thorough assessment of the facts.

Despite courts recognizing the possibility of extending liability under the *alter ego* doctrine, it remains a remedy of the last resort and exercised reluctantly. The party seeking to extend liability has the burden of proving the existence of an *alter ego* relationship, and must overcome the presumption of corporate separateness. The US District Court in *Kalin v Xanboo Inc*[125] opines that courts apply a presumption of separateness to corporations and are hesitant to disregard corporate form. And in *Bridas v Turkmenistan*[126], the Fifth Circuit stated that parties are presumed to be contracting for themselves only, and when an arbitral tribunal is deciding to assert jurisdiction over a non-signatory government, there is a presumption of independent status. The Second Circuit in *Crown Central Petroleum Corp v Cosmopolitan Shipping Co*[127] found that although the "identity of ownership in two corporations may have a bearing on their relationships with third parties, a corporation, absent findings of fraud or bad faith, is entitled to a presumption of separateness from a sister corporation even though both are owned and controlled by the same person."[128] Poudret[129] comments that the use of the doctrine is only justified in cases of manifest abuse (i.e. a fraud). The general principles should be a respect for legal identity, recognizing the legality of the use of subsidiaries in business.

In light of these decisions, courts have only exercised the discretion to extend liability in extenuating circumstances.

## 5. Agency and Incorporation by Reference

### a. *Agency*

General principles of agency law apply in arbitration, therefore, principals are generally bound by arbitration agreements entered into by their agents. The most straightforward situation is where an agent enters into an arbitration clause

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[125] *Kalin v Xanboo Inc 526 F.Supp.2d 392 (United Sates District Court for the Southern District of New York 2007)*
[126] *Bridas SAPIC v. Turkmenistan, 345 F.3d 347, 358 (5$^{th}$ Cir. 2003)*
[127] *Crown Central Petroleum Corp v Cosmopolitan Shipping Co 602 F.2d 474 (2$^{nd}$ Cir. 1979)*
[128] *Ibid*
[129] *Poudret and Besson* at pg. 228

on behalf of a disclosed principal; in such a case, no complications arise and the principal is bound to arbitrate. However, undisclosed principals have also been held party to an arbitration agreement, even where the signatory did not know of the existence of the undisclosed principal. National courts and tribunals have thus not only recognized actual agency relationships, but also ostensible and apparent agency relationships. In France, Germany, and Italy, the law does not require the principal to grant authority to an agent in any particular form. In contrast, Swiss and Austrian Law require the principal to expressly authorize an agent to act on behalf of the principal to enter into an arbitration agreement; Austrian Law further requires the authorization to be in writing. Article 15 of the Convention on Agency in the International Sales of Goods stipulates that, where the conduct of the principal causes a third party to reasonably and in good faith believe that the agency has authority to act on behalf of the principal, even where the agent in fact acts without authority, the principal may not invoke against the third party the lack of authority of the agent. The effect of this article is that, even where the agent has in fact acted without authority, the principal will nonetheless be liable for the acts of its agent, including the liability to arbitrate, if the principal has acted in a manner which leads a third party to believe that the agent acted with authority.

**b. *Incorporation by Reference***

Arbitration agreements have been held to be capable of being incorporated merely by reference from one document to another. In *Frank J. Rooney Inc v Charles W Ackerman of Fla Inc*[130], a Florida court, by applying general principles of incorporation by reference, held that an arbitration agreement may be incorporated into a subcontract by referencing to a document containing an arbitration agreement. The case involved a dispute between and contractor and a subcontractor. The subcontract incorporated by reference the terms of the head contract, and the head contract referred to provisions from the American Institute of Architects, which contained an arbitration clause. The subcontractor wished to pursue its claim via arbitration, which the Florida Court duly allowed.

The US Federal Court adopted a slightly different approach, and allowed incorporation by reference only where there is a specific reference to the arbitration clause; mere reference to a document containing an arbitration clause does not suffice. This was the case in *Grundstad v Ritt*[131], where the Seventh

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[130] *Frank J. Rooney Inc v Charles W Ackerman of Fla Inc, 219 So.2d 110*
[131] *Grundstad v Ritt 106 F.3d 201 (7th Cir. 1997)*

Circuit held that there was no incorporation by reference of an arbitration clause when there lacks an expressed intention of the parties to specifically incorporate an arbitration clause into a contract.

## 6. A Hybrid Approach

While national courts are bound by national laws and precedent, international tribunals are not bound *per se*. Free from the constraints of national laws, tribunals may adjudicate on the basis of equity, *amiable compositeur*, or a mixture of national laws. Therefore, tribunals may, if it sees fit, adopt mechanisms from different jurisdictions when dealing with the issue of non-signatories in arbitration. Unlike French courts where the group of companies doctrine prospers, or American courts where the *alter ego* doctrine and *estoppel* is used, international tribunals can 'choose and pick', or even derive a method of its own. Tribunals may therefore decide predominantly on the basis of fact, free from the rigidity of the law.

As discussed above, each doctrine requires certain elements to be satisfied; group of companies doctrine requires affiliation and control, *alter ego* doctrine requires an abandonment of separateness, *estoppel* requires either benefit or concerted misconduct. The constant failure in binding a non-signatory is often credited to the failure in meeting all the requirements in a certain doctrine. Lack of recognition for certain doctrines is a similar hindrance. Under such circumstances, it may be advisable to adopt a 'hybrid' approach, or a 'shotgun' approach, when seeking to extend the scope of an arbitration clause to bind, or include, a third party non-signatory. Instead of focusing, or pleading, solely on one doctrine, parties may choose from the vast number of doctrines and match the facts with the law. Pinpointing the factual basis of the argument, and fitting it within the parameters of different doctrines may provide higher success rates in binding a non-signatory. This hybrid method was tested by law students competing in the Willem C. Vis International Commercial Arbitration Moot, organized and sponsored by, amongst others, the American Arbitration Association, ACICA, the Chartered Institute of Arbitrators, CIETAC, the ICC, JAMS, the LCIA, the SCC, the ASA, and UNCITRAL. The case dealt with an automotive company, which distributed its vehicles through an authorized distributor. The automotive company, Universal, held 10% shareholding in the authorized distributor, UAM; in fact, it was Universal which caused the incorporation of UAM. Universal, as shareholder of UAM, inevitably receives benefit from UAM; especially since UAM only sold vehicles manufactured by Universal. A dispute arose when 25 vehicles delivered were found to be defective. The sales contract contained an arbitration clause, signed between the plaintiff and UAM. UAM subsequently become insolvent, and the plaintiff initiated arbitration against UAM and Universal collectively. Universal, non-signatory to the arbitration agreement, challenged the jurisdiction of the arbitral tribunal set up pursuant the Stockholm Chamber of Commerce rules. The case required participants to argue, on behalf of the plaintiffs in the case, to bind Universal to arbitrate. The facts were distinguishable from any existing case law where a non-signatory was bound, and did not fit within the parameters of existing doctrines. It seemed reasonable for the Universal to be bound, however, the argument simply could not stand merely on the basis of individual doctrines. Considering the fact-orientated characteristic of arbitration, many teams adopted the 'hybrid' approach, combining the supporting facts and departing from the traditional doctrine-fact approach. Extracting requirements from different doctrines seemed the most plausible approach; benefit from *estoppel*, affiliation from group of companies doctrine, control from *alter ego*. This method focuses on the strength of the facts, and skips the shortcomings. The essence of each doctrine remains, thereby justifying the legal basis of the argument, and at the same time, achieves flexibility. Where tribunals have the jurisdiction to rule *ex aequo et bono*, or on the basis of *amiable compositeur*, this 'hybrid method' may be the solution for providing an internationally recognizable approach (which is of utmost importance at the stage of enforcement).

This method is not unheard of in reality. In fact, it was put into practice in several cases and received considerable success. In *J.J Ryan & Sons v Rhone Poulenc Textile SA*[132], instead of arguing on the basis of recognized doctrines, the plaintiff proceeded on the basis of 'procedural efficiency', which was in effect a collective argument, focusing on facts over law. Swiss scholar Zuberbuhler[133] identified the possibility of a fact-based method and formulated a three step approach. The first step is to identify the parties' intent, whether actual or implied; this requires an analysis of the facts in an attempt to predicate consent. Where the parties' intent is not ascertainable, an assessment of accountability should be the next step; under this branch, a non-signatory may be compelled to arbitrate where it has created an impression to be bound. Finally, a non-signatory will be bound to arbitrate if the act of the non-signatory amounts to an abuse of rights, or fraud. The first step adopts a similar rationale as the group of companies doctrine, while the second step resembles aspects of the *alter ego*

[132] *J.J Ryan & Sons v Rhone Poulenc Textile SA 863 F.2d 315 (4th Cir. 1988)*

[133] *Zuberbuhler*: "Non-signatories and the Consensus to Arbitrate", (2008) 26 *ASA Bulletin*

doctrine, and the third step appears to be an *estoppel* theory. Zuberbuhler explains that this attempt to "identify specific non-signatory fact patterns and general rules very much remains a "work in progress" as the fact specific nature of the problem is its most prominent common element".[134]

## 7. Conclusion

Traditionally speaking, consent is the most essential characteristic of arbitration, and was widely respected and upheld by courts and tribunals alike. The emphasis on consent can be seen from the rigid and stringent requirements of form in the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention. The New York Convention, drafted in 1958, ratified by 140 plus countries, rigidly requires that an arbitration agreement must be in writing, and either signed by the parties, or contained in an exchange of letters or telegrams.[135] Similarly, the UNCITRAL Model Law, prepared in 1985 and incorporated by numerous nations, require arbitration agreements to be in writing.[136] The heavy emphasis on writing reveals the importance of consent; courts and tribunals will grant arbitration only where the consent of the parties are clearly and unequivocally demonstrated. Jurists have viewed evidence of consent in writing as the most reliable source, thus courts have generally implemented this rule strictly, and where consent is questionable, an arbitration agreement is invalid and unenforceable. Courts have gone as far as to strike out an arbitration agreement solely on the ground of the lack of a written agreement, even where the result is contrary to principles of good faith.[137]

However, with the popularization of arbitration in international commerce, the public called for a change in the stringent rules and pleaded for increased flexibility to facilitate and encourage international trade. The growing use of electronic communication further pushed the need for change and growth in the rules. The growing trend in arbitration valued economic reality over legal procedure and form, leading courts and tribunals to loosen up the rules, adopting an approach which valued substance over form. The UNCITRAL Working Group, aware of the public outcry for change, amended the Model Law in 2006, formally departing from the requirement of form.[138]

The result is self-evident; the once rigid requirements of consent were

[134] *Ibid* at pg. 33
[135] New York Convention Article II
[136] UNCITRAL Model Law on International Commercial Arbitration Article 7
[137] *Robobar Limited v Finncold SAS 28 Oct. 1993 Yearbook Commercial Arbitration XX at 739*
[138] UNCITRAL Model Law on International Commercial Arbitration with 2006 amendments Article 7 Option 2

departed with, and courts began predicating implied consent through different mechanisms and doctrines. As discussed above, courts and tribunals extended contractual principles into arbitration, and some even invented new methods to imply consent, or to extend the scope of arbitration agreements. Despite its good intentions, such evolvement in the law inevitably leads to uncertainty, and uniform application of the law is sacrificed in order to achieve the intended results.

The fundamental question is whether a balance has been achieved between legal certainty and legal flexibility. On one hand, legal flexibility allows non-signatories to arbitrate in the absence of a formally concluded arbitration agreement. On the other hand, when a dispute arises, parties are unable to ascertain the correct channel for dispute resolution. Undoubtedly, it is difficult to strike a balance between the conflicting notions of flexibility and certainty, however, it is of utmost importance that courts and tribunals are capable of realizing the need to protect the system. The only solution in the short term is for tribunals and courts, while exercising the discretion to extend the scope of an arbitration clause, adhere to the general principle of consent and the concept of privity. Courts and tribunals must not be overly flexible and liberal; a certain level of rigidity must be retained in order to achieve legal certainty. On the same token, an overly restrictive approach is just as unwelcoming, as it may hinder the effectiveness of arbitration.

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