

Arbitration Agreements and Groups of Companies**

I. The Problem

Whether an arbitration agreement signed by a company member of a group of companies is also binding upon and entitles other nonsignatory members of that group of companies, remains an open question. Some arbitral awards¹ and judgments of state courts² rendered with respect to this problem have answered the

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1. A long line of arbitral awards rendered by arbitral tribunals acting under the auspices of the International Chamber of Commerce (ICC) in Paris hold a company member of a group of companies liable under an arbitration agreement signed by another member company belonging to the same group. See *ICC matter no. 1434, award of 1975*, 103 J. DU DROIT INT'L 978-80 (1976) with annotation by Y. Derains [hereinafter *ICC matter no. 1434*]. See also the comments upon this case by Jan Paulsson, *Third World Participation in International Investment Arbitration*, 2 ICSID REV. FOREIGN INV. L.J. 19, 25-26 (1987); *ICC matter no. 2375, award of 1975*, 103 J. DU DROIT INT'L 973-74 (1976) with annotation by Y. Derains [hereinafter *ICC matter no. 2375*]; *ICC matter no. 4131, award of 1982*, 110 J. DU DROIT INT'L 899 (1983) with annotation by Y. Derains [hereinafter *ICC matter no. 4131*], reprinted in 1984 *REVUE DE L'ARBITRAGE* 137; with respect to a slightly different factual situation, see also *ICC matter no. 3493, award of March 11th, 1983*, 22 I.L.M. 752, 761-67 (1983); *ICC matter no. 5103, award of 1988*, 115 J. DU DROIT INT'L 1206 (1988) with annotation by G.A. Alvarez [hereinafter *ICC matter no. 5103*]; *ICC matter no. 5730, award of 1988*, 117 J. DU DROIT INT'L 1029 (1990) with annotation by Y. Derains [hereinafter *ICC matter no. 5730*]; *ICC matter no. 6519, award of 1991*, 118 J. DU DROIT INT'L 1065 (1991) with annotation by Y. Derains [hereinafter *ICC matter no. 6519*]. See also *award no. 1510 of Society of Maritime Arbitrators, Inc., New York, of November 28th, 1980*, in 7 Y.B. COM. ARB. 151 (1982) [hereinafter *award no. 1510*].

2. In the following ICC awards it was denied that, under the circumstances there prevailing, the arbitration agreement signed by a company member of a group of companies could be binding upon other members of that group. See *ICC matter no. 4402, award of March 17th, 1983*, reprinted in SIGVARD JARVIN & YVES DERAINS, *COLLECTION OF ICC ARBITRAL AWARDS 1974-1985*, *RECUEIL DES SENTENCES ARBITRALES DE LA CCI 1974-1985*, at 153-57 (1990) [hereinafter *ICC matter no. 4402*]; *ICC matter no. 4504, awards of 1985/86*, 113 J. DU DROIT INT'L 1118 (1986) with annotation by S. Jarvin [hereinafter *ICC matter no 4504*]; *ICC matter no. 4972, award of 1989*, 116 J. DU DROIT

question positively. Other arbitral awards³ and judgments of state courts⁴ have denied any binding effect of, and any entitlement flowing from, an arbitration agreement signed by only one member of a group of companies on other members of such group. In doctrine⁵ the answer to this problem is as controversial as it is in the dicta of arbitral tribunals and state courts.

Commentators have at an early stage of the discussion abundantly expounded on this subject.⁶ The intent of this article is to show that there is a whole series of different situations in which this problem can arise and that those different situations require the use of rather diverse doctrinal tools that lead to a variety of solutions.

In terms of facts, one has to differentiate between three basic situations:

(1) A parent company or an individual person⁷ holding the shares of and direct-

INT'L 1100 (1989) with annotation by G.A. Alvarez [hereinafter *ICC matter no. 4972*]; *ICC matter no. 5721, award of 1990*, 117 J. DU DROIT INT'L 1019 (1990) with annotation by Y. Derains [hereinafter *ICC matter no. 5721*].

3. See Roussel-Uclaf v. Searle & Co., [1978] 1 Lloyd's Rep. 231, 232, reprinted in 4 Y.B. COM. ARB. 317 (320); Judgment of Oct. 21, 1983, Cour d'Appel de Paris, 1986 REVUE DE L'ARBITRAGE 98 (Fr.) with annotation by A. Chapelle; Judgment of Nov. 26, 1986, Cour d'Appel de Pau, 1988 REVUE DE L'ARBITRAGE 153 (Fr.); Dighello v. Busconi, 673 F. Supp. 85, 88-90 (D. Conn. 1987).

4. As to Swiss (and Dutch) courts, see Judgment of May 6, 1976, Tribunal fédéral suisse, ATF 102 Ia 582 (Switz.); unpublished Judgment of Oct. 10, 1979, Tribunal fédéral suisse (Switz.), cited by BERNARD DUTOIT ET AL., RÉPERTOIRE DE DROIT INTERNATIONAL PRIVÉ SUISSE 259 (1982), and also by P. JOLIDON, COMMENTAIRE DU CONCORDAT SUISSE SUR L'ARBITRAGE 121, art. 4 n.34 (1984) (see also *infra* note 21). With respect to a slightly different factual situation, see Judgment of July 12, 1984, Cour d'Appel de Paris, 1986 REVUE DE L'ARBITRAGE 75 (Fr.); Judgment of Jan. 6, 1987, Cour de cassation, REVUE DE L'ARBITRAGE 469 (Fr.), reprinted in 13 Y.B. COM. ARB. 152; Judgment of July 12, 1984, Arrondissementsrechtbank [District Court of Amsterdam], 10 Y.B. COM. ARB. 487 (1985). See also Judgment of Mar. 20, 1984, Tribunal fédéral suisse, ATF 110 II 54 (Switz.). As to the courts of the United States, see Oriental Commercial & Shipping Co. v. Rosseeel N.V., 609 F. Supp. 75, 78-79 (S.D.N.Y. 1985), reprinted in 12 Y.B. COM. ARB. 532, 535 (1987); Coastal States Trading, Inc. v. Zenith Navigation S.A., 446 F. Supp. 330, 338 (S.D.N.Y. 1977).

5. Some authors support the tendencies of arbitral tribunals and state courts to extend the binding effects of arbitration agreements upon other companies of the same group. See, e.g., Y. Derains & S. Schaf, *Clauses d'Arbitrages et Groupes de Sociétés*, 1985 REVUE DU DROIT DES AFFAIRES INTERNATIONALES 231; A. Chapelle, *Rapport Général sur l'arbitrage et les Tiers: II.—Le Droit des Personnes Morales (Groupes de Sociétés; Interventions d'Etat)*, 1988 REVUE DE L'ARBITRAGE 475; T. Laugier, *L'Arbitrage Multipartite à l'Epreuve des Droits Nationaux*, 1989 REVUE DU DROIT DES AFFAIRES INTERNATIONALES 985. Other authors are rather cautious and reluctant. See, e.g., I. Fadlallah, *Clauses d'Arbitrage et Groupes de Sociétés*, TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ, ANNÉES 1984-1985, at 105 (1987) [hereinafter TRAVAUX 1984-1985]; P. Leboulanger, *Etat, Politique et Arbitrage—l'Affaire du Plateau des Pyramides*, 1986 REVUE DE L'ARBITRAGE 3; ADAM SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWISS, U.S. AND WEST GERMAN LAW 102-06 (1989); see also LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 95-100 (2d ed. 1990).

6. See, e.g., P. Lalive, *Arbitrage international et ordre public suisse—Une surprenante décision du Tribunal Fédéral, L'arrêt SGTM v. Bangladesh*, 97 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 529 (1978); see also *The First "World Bank" Arbitration (Holiday Inn v. Marocco)—Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 123, 137-55 (1980).

7. If the notion of "parent company" is mentioned in this article, it will also comprise the individual owner of a parent company, that is a Mr. X or Mrs. X.

ing one or more subsidiaries, possibly with one or more subsidiaries of further degrees, signs an arbitration agreement. Here the question may arise whether the subsidiaries or sub-subsidiaries, though nonsignatories to the arbitration agreement, may be sued. If they may be sued, the question arises under what circumstances, together with their parent company or companies⁸ or even alone, based on the above-mentioned arbitration agreement. Alternatively, the question may be whether such a subsidiary or sub-subsidiary may avail itself of the agreement in suing the partner of that agreement before the arbitral tribunal therein appointed, either in conjunction with its parent company or by itself. In this factual context, the powers of a holding company have to be defined to obligate and to entitle not only itself but also the subsidiaries or sub-subsidiaries of its group by a signature attached only by itself to an arbitration agreement.⁹

(2) The same question has to be answered in the reverse situation. A subsidiary or a sub-subsidiary member of a group of companies is the sole signatory of an arbitration agreement that is later invoked either by the partner to such arbitration agreement when suing the parent company or companies of the subsidiary or by the parent company itself when suing the partner of the arbitration agreement before the arbitral tribunal therein appointed. In this factual context the rights and duties of a parent company [that derive from an arbitration agreement signed not by itself, but by a subsidiary or sub-subsidiary of its group] have to be determined.¹⁰

(3) Finally, a third factual context has to be taken into consideration. A sister company signs an arbitration agreement. Again, the question may be raised whether and under what circumstances such an arbitration agreement obligates and entitles other affiliated companies belonging to the same group either to be sued before the arbitral tribunal by the partner to the arbitration agreement or to introduce themselves as claimants in a request for arbitration against the partner of the arbitration agreement as the defendant. In practice, however, this situation seems to occur less frequently.¹¹

II. Recent Developments

The discussion of the general problem under consideration here has recently evolved in different directions. First, arbitrators acting under the auspices of the

8. *Id.*

9. This was the factual context upon which the following arbitral awards and the following judgments of state courts had to be decided: in *ICC matter no. 1434*, *supra* note 1; *ICC matter no. 2375*, *supra* note 1; *ICC matter no. 4402*, *supra* note 2; *ICC matter no. 6519*, *supra* note 1; *ICC matter no. 4504*, *supra* note 2; *ICC no. 4972*, *supra* note 2; *Roussel-Uclaf v. Searle & Co.*, [1978] 1 *Lloyd's Rep.* 231, 232 (Eng. Ch.).

10. This was the factual context upon which the following arbitral awards and judgments that state courts had to decide: *ICC matter no. 4131*, *supra* note 1; *ICC matter no. 5730*, *supra* note 1; *ICC matter no 5721*, *supra* note 2; Judgment of Oct. 21, 1983, Cour d'Appel de Paris, *supra* note 3; Judgment of Nov. 26, 1986, Cour d'Appel de Pau, *supra* note 3.

11. This was the factual context upon which the following arbitral awards and the following judgments of state courts had to decide: *ICC matter no. 4131*, *supra* note 1; *award no. 1510*, *supra* note 1; Judgment of Oct. 21, 1983, Cour d'Appel de Paris, *supra* note 3.

ICC show a strong tendency to recognize that an arbitration agreement signed by a company belonging to a group of companies obligates and entitles the other member companies of such group if that agreement fulfills certain minimum requirements.¹² This tendency is strongest among the advocates of the *lex mercatoria*.¹³ These advocates have developed "group of companies" doctrine,¹⁴ which is clearly and unequivocally reflected in some dicta in arbitral awards. In a famous award, three highly respected international arbitrators stated:

Considering that a group of companies, in spite of the separate juristic personality of each company belonging to the group, possesses a unique economic reality of which the Arbitral Tribunal has to take account when it decides upon its jurisdiction in applying article 13 (version of 1955) or article 8 (version of 1975) of the Rules of Arbitration of the I.C.C.;

Considering, in particular, that the arbitration clause which has been expressly accepted by certain companies of the group, has to bind the other companies which, through the roles played by them during the conclusion, execution or termination of the contracts with such clauses, appear, pursuant to the common intention of the parties to the procedure, to have been real parties to these contracts or to have been affected, in the first line, by them and by the litigations possibly arising out of them;

Considering that in this sense arbitral tribunals under the auspices of the I.C.C. have already pronounced themselves . . . ; that the decisions of these tribunals are progressively constituting a body of legal precedents of which it is necessary to take account because these precedents derive the consequences from economic reality and because they are consonant with the needs of the international commerce which have to be met by specific rules of international arbitration progressively elaborated.¹⁵

In another award rendered about six years later the new "group of companies" theory was summarized as follows:

When concluding, performing, nonperforming and renegotiating their contractual relations with [defendants], the three claimant companies appear, pursuant to the common intention of all parties engaged in the procedure, to have been real parties to all the contracts. In its formulation and in its spirit, this analysis is based on a remarkable and approved tendency of arbitral rulings favoring acknowledgement, under those circumstances, of the unity of the group. . . . The security of international commercial relations requires that account should be taken of its economic reality and that all the companies of the group should be held liable one for all and all for one for the debts of which they either directly or indirectly have profited at this occasion.¹⁶

The limits inherent to the "group of companies" doctrine have, however, been clearly pointed out in a recent award where the arbitral tribunal stated:

12. See the arbitral awards, cited *supra* note 1 and note 3.

13. It has been, among others, particularly B. Goldman and Y. Derains who have supported this doctrine. See, e.g., the contributions by B. Goldman to a scholarly discussion reported in TRAVAUX 1984-1985, *supra* note 5, at 125-27, and the annotations to arbitral awards by Y. Derains, *supra* note 1 and 2; see also Derains & Schaf, *supra* note 5.

14. In French, this doctrine has been baptized "*théorie de la réalité économique du groupe*" or "*théorie de l'unité du groupe*." See, e.g., S. Jarvin in an annotation to the award rendered in ICC matter no. 4504, *supra* note 2, at 1130.

15. ICC matter no. 4131, *supra* note 1, at 904 [translation by the author]. The three arbitrators were: Prof. Pieter Sanders (Pres.), Prof. Berthold Goldman, Prof. Michel Vasseur.

16. ICC matter no. 5103, *supra* note 1, at 1212 [translation by the author].

In summary, the belonging of two companies to the same group or the domination by one shareholder never in itself constitutes a sufficient reason justifying, in full, the piercing of the corporate veil. When, however, a company or an individual person appears to have been the pivot of the contractual relations in a particular transaction, it is appropriate to examine with care whether the independence of the parties must not, *exceptionally*, be disregarded giving way to a general judgment. One will accept such an *exception* when it appears that a confusion has been maintained by the group or by the majority shareholder.¹⁷

Second, the "group of companies" theory, developed notably by arbitral tribunals under the auspices of the ICC, has had its repercussions on the dicta of French courts, which seem inclined to follow the new theory as evidenced by a judgment of the Cour d'Appel de Pau rendered in 1986, a headnote of which states:

It is admitted in law that an arbitration clause which has been accepted by certain companies of a group, has to bind the other companies which, through the role played by them during the conclusion, performance or termination of the contracts containing said clauses, appear, pursuant to the common intention of all the parties in the procedure, to have been real parties to these contracts or as having been affected, in the first line, by them and by the litigations possibly arising out of them."¹⁸

Third, other jurisdictions seem to be more reluctant to follow the new doctrinal approach under which affiliated companies belonging to the same group of companies may be treated as a unit, provided certain preconditions have been met. For example, in Switzerland¹⁹ some Swiss legal writers²⁰ seem to prefer a more cautious approach to the extension of the effects of an arbitration agreement upon affiliated companies or upon the owner of a company. To illustrate this phenomenon, two examples follow: one stemming from the field of arbitral jurisdiction, the other from state jurisdiction.

(1) An arbitral tribunal presided over by an eminent Swiss international lawyer²¹

17. ICC matter no. 5721, *supra* note 2 at 1024 (emphasis added) [translation by the author].

18. Judgment of Nov. 26, 1986, Cour d'Appel de Pau [translation by the author]; *see also* Judgment of Oct. 21, 1983, Cour d'Appel de Paris, *supra* note 3.

19. *See* Judgment of May 6, 1976, Tribunal fédéral suisse, *supra* note 4; unpublished Judgment of Oct. 10, 1979, Tribunal fédéral suisse, *supra* note 4; Judgment of Mar. 20, 1984, Tribunal fédéral suisse, *supra* note 4.

20. *See, e.g.*, JOLIDON, *supra* note 4. Jolidon refers to the decision of a state court in the Canton Vaud and to a judgment rendered, on October 10th, 1979, by the Swiss Federal Supreme Court. He also comments upon these decisions as follows:

The cantonal court of Vaud had admitted, with the arbitrators, that the person who was the animator of a group of companies upon which he had his grip, could "by his only signature . . . assume all the liabilities stipulated in the respective contract and affecting the whole of the group," that "in view of the permeability and interlocking of companies dominated by a single person, one can admit that (the latter) has rendered liable all the companies of his group" and that, consequently, all the companies of the group "could be drawn into the arbitral procedure" It is justified that the Federal Court has set aside that award . . . in pointing out that the respective group did not have a juristic personality and that the question to be solved in this matter is to know whether the person who animated this group "effectively had the power to render liable all the companies and to sign, in this name, an arbitration clause. . . ." Correspondingly, the question which has been raised is to know whether, in view of the arbitration agreement concluded with the parent company, the effects of that agreement extend also to the subsidiaries. . . . A categorically negative answer has to be given in the framework of the Inter-cantonal Arbitration Convention, no matter how the wording of the arbitration agreement would be, provided that the subsidiaries are distinct legal personalities and that their representatives have not, in such quality, signed or ratified the agreement mentioned. [Translation by the author.]

21. Prof. Frank Vischer from Basle University. His co-arbitrators were W. Owen and G.W. Haight.

had to decide whether a French company *S.D.*, which was the parent company of another French company, *F.D.*, had become bound by an arbitration agreement that had been signed not by the parent company itself but only by its subsidiary *F.D.* In its award,²² the arbitral tribunal referred neither to the *lex mercatoria*, nor to international trade usages, nor to the necessities of international trade, nor to the above-mentioned arbitral jurisprudence of ICC arbitral tribunals, which had already developed their "group of companies" doctrine at the time when the award was rendered. In lieu of this approach, the arbitral tribunal simply recurred to the principles of Swiss domestic law, by which the arbitral tribunal thought the arbitration agreement was governed.²³

In a rather sober, down-to-earth manner, the arbitral tribunal differentiated the specific doctrinal problem here at stake, that is the doubtful question whether the subsidiary *F.D.* had a specific power of authority when signing the arbitration agreement to represent its parent company *S.D.* The panel explained:

The seat of this Arbitral Tribunal is Geneva (Switzerland); the Canton of Geneva has ratified the Swiss Intercantonal Arbitration Convention; article 6 of this Convention is mandatory and provides for a written document containing either a compromise or an arbitration clause. This written document has to fulfill the requirements of articles 13 ff. of the Swiss Code of Obligations. If those are not complied with, none may be forced to submit a dispute to an Arbitral Tribunal. . . . Nobody, even a non-Swiss citizen, can without his consent be deprived of his own natural judge (Art. 58 of the Constitution).

Neither party contends that *S.D.* signed the Operating Agreement with the actual arbitration clause. It is not contested either that Mr. X who signed the Operating Agreement on behalf of *F.D.*, acted only for the subsidiary and not for the mother company. It becomes clear from the introduction of the Operating Agreement that only *F.D.* is a party to it. Claimants do not contend that Mr. X was acting on *S.D.*'s behalf with special power of attorney as a member of *S.D.*'s board of directors. Mr. X therefore had only the power to bind *F.D.*, as he was acting in the Operating Agreement expressly as chairman of *F.D.*; any other company could not be committed by his signature.²⁴

The decisive legal issue involved here, the power of authority, could not have been determined and solved in a more simple and convincing manner than it has been done in the above-mentioned award.

(2) Such a conservative approach to our problem has manifested itself also in the well-known decision rendered by the Swiss Federal Supreme Court in the *SGTM v. Bangladesh* case,²⁵ a decision which has, with good reason, been widely criticized.²⁶

The judgment by the Swiss Federal Supreme Court was preceded by the award of an arbitral tribunal²⁷ that had to make a decision based upon the following facts: A state-owned corporation was sued before an arbitral tribunal by its contractual

22. ICC matter no. 4402, *supra* note 2.

23. *Id.* at 154-55.

24. *Id.* at 155-56.

25. Judgment of May 6, 1976, Tribunal fédéral suisse, *supra* note 4.

26. Lalive, *supra* note 6; see also SAMUEL, *supra* note 5, at 105.

27. ICC matter no. 1803, Award of 1972, in 5 Y.B. COM. ARB. 177, 182-85 (1980).

partner for the payment of certain contractual services it had received. After the arbitral proceedings had commenced, the state that owned the corporation simply dissolved it. Thereupon the contractual partner also introduced a request for arbitration against the respective state. The arbitral tribunal admitted such joinder, arguing that to do otherwise would be contrary to international public policy. The Swiss Federal Supreme Court annulled this award, holding that an entity like the foreign state in question here, which had not signed an arbitration agreement, could not be the defendant in arbitration proceedings instituted on the basis of such an agreement. In its judgment, the Swiss Supreme Court expounded:

[O]ne has to know only whether one can oblige the Popular Republic of Bangladesh . . . to submit to an arbitration clause contained in this contract to which that Republic has from the start and constantly declined to submit itself. In the absence of a convention . . . and in the absence of a universal succession or of special legal provisions . . . such a refusal cannot be considered as being incompatible with the public policy of Switzerland. No mandatory rule and no well-established rule of the Swiss public policy obliges anybody to submit himself, against his will, to an arbitral procedure. . . . The applicant invokes also, in addition to the Swiss public policy, the "international public policy," which is said also to impede the application, in this instance, of the ordinances of Bangladesh. . . . One cannot see how this "international public policy" would inhibit the application of foreign law more, or in a different manner, than this would be achieved through the reservation of the swiss public policy. . . .²⁸

III. The Fundamental Principles Governing the Problem Here Under Examination

On a national level, the fundamental principles under consideration have been very clearly spelled out in the opinion of a United States federal court which states: "Ordinary contract and agency principles determine which parties are bound by an arbitration agreement, and parties can become contractually bound absent their signatures."²⁹

On an international level, the situation is more complicated. Here the fundamental principles from which a solution of our problem must derive are partly disputed in the international legal community. These principles are only partly compatible with each other, and in other respects they are dialectically in opposition to each other. These principles may be enumerated as follows:

- (1) All arbitration agreements are governed by a specific national law and not by the *lex mercatoria*. (For example, see article 8 of the ICC Arbitration Rules).
- (2) The arbitration agreement does not necessarily have to be governed by the same substantive law as the main contract, to which it is attached. The

28. *Id.* at 582 [translation by the author].

29. *Oriental Commercial & Shipping Co. Ltd. v. Rosseel, N.V.*, 609 F. Supp. 75, 78 (S.D.N.Y. 1985).

- parties have the autonomy to choose a law different from the proper law of the contract to govern their arbitration agreement.
- (3) Arbitration agreements have to be construed restrictively.
 - (4) A written form is often prescribed for arbitration agreements.
 - (5) Arbitration agreements are also governed by the principle of privity of contract, which in the present context means that third parties extraneous to the arbitration agreement cannot become parties to it unless all parties to the agreement approve of such expansion.
 - (6) An exception to such privity of contract exists wherever the parties to an arbitration agreement have stipulated that a third-party extraneous to the agreement shall as a beneficiary of their agreement be entitled to introduce a request for arbitration against one (or both) of them.
 - (7) The rules of representation have to be properly applied, which means in the present context, that the company or the individual owner of a company, when signing an arbitration agreement, must under certain circumstances be deemed to have acted on behalf of and in the name of a subsidiary or any other affiliated company belonging to the same group.
 - (8) Under the doctrine of estoppel (i) the individual owner of a company, the director of a company, or any company member of a group who have *not* signed an arbitration agreement must still be held to be precluded from alleging that they are not bound by such an arbitration agreement and that they, therefore, cannot be sued upon said agreement; and (ii) the other party to the arbitration agreement, which has duly signed such agreement, must be deemed to be precluded from alleging that a party who has not signed the agreement cannot participate as a claimant in arbitration proceedings instituted against it upon said agreement.

The first five principles heretofore enunciated are dealt with in part IV. The construct of the third-party beneficiary (principle 6) is examined in part V, and the problems of representation (principle 7) and the effect of the doctrine of estoppel (principle 8) are the subject of our research in parts VI and VII.

IV. Proper Law, Autonomy, Interpretation, Form, and Privity of an Arbitration Agreement

An arbitration agreement is a contract. Whether a company that has not signed the agreement, yet is a party to the contract or must at least be deemed to be a party to it, is a question to be determined, though not exclusively, by the proper law of the contract. The search for the proper law of the arbitration agreement, therefore, must be the starting point of any analysis of our problem.

Some arbitral awards³⁰ and some doctrinal writers³¹ have argued that the proper

30. See, e.g., *ICC matter no. 4131*, *supra* note 1, at 900; see also Judgment of Oct. 21, 1983, Cour d'Appel de Paris, *supra* note 3, at 100, 101, with annotation by A. Chapelle at 104-06.

31. See, e.g., Y. Derains in the annotation to *ICC matter no. 4131*, *supra* note 1, at 905-06.

law of arbitration agreements providing for arbitral proceedings under the ICC Rules of Conciliation and Arbitration is article 8 of those Rules. This article constitutes an autonomous regulation of the agreement. Other awards³² and doctrinal writers³³ have, in a similar fashion, advanced the thesis that the so-called *lex mercatoria* governs arbitration agreements. For those arbitrators and authors, however, who have doubts about the existence of the *lex mercatoria*, an arbitration agreement must be subject to one or the other national law like a contract of any other kind.³⁴ The dispute between the advocates and the opponents of the *lex mercatoria* is not discussed in the present context. This author does not believe in the existence of the *lex mercatoria* as a system of law susceptible to governing contracts on an a-national level. For those who join this author in not following the *lex mercatoria* doctrine, the question of which national law is called upon to govern an arbitration agreement must be addressed.

Pursuant to the principle of the autonomy of an arbitration agreement, such an agreement does not necessarily have to be governed by the same substantive law as the main contract to which it is attached. This principle of conflict of laws seems to be almost universally recognized.³⁵ Therefore, for an arbitral tribunal to search for the proper law of the main contract is immaterial.

Furthermore, an arbitral tribunal is generally not bound by any rule of a specific national system of conflict of laws. Arbitral tribunals, notably those that act under the auspices of an arbitral institution, are commonly held to have a discretion in the choice of the specific conflict of laws rule they will apply.³⁶

Consequently our search for the proper law of the arbitration agreement has to proceed from the assumption that the arbitral tribunal, when determining the proper law of the arbitration agreement, may apply the conflict of laws rule it deems most appropriate.

Another principle of law that is firmly established in most national jurisdictions requires that arbitration agreements be strictly interpreted. By an arbitration

32. See, e.g., *ICC matter no. 5721*, *supra* note 2, at 1023. See also Judgment of Nov. 26, 1986, Cour d'Appel de Pau, *supra* note 3, at 156, with annotation by A. Chapelle at 159.

33. See, e.g., Y. Derains in an annotation to *ICC matter no. 5721*, *supra* note 2, at 1028; Derains & Schaf, *supra* note 5, at 236-38; T. Laugier, *supra* note 5, at 986-88.

34. See, e.g., *ICC matter no. 5730*, *supra* note 1, at 1032-34; *ICC matter no. 4504*, *supra* note 2, at 1119; see also P. Mayer in a contribution to a scholarly discussion, 1988 *REVUE DE L'ARBITRAGE* 499.

35. See 2 JEAN ROBERT & THOMAS E. CARBONNEAU, *THE FRENCH LAW OF ARBITRATION* § 2-041 (1983); ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 132-34 (1986); P. SCHLOSSER, *DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT* 291 (2d ed. 1989).

36. See Redfern & Hunter, *supra* note 35, at 95-97; CRAIG, *supra* note 5, at 283-87. See also the compilation of awards, rulings of courts, and doctrinal writers in O. Sandrock, *Die Fortbildung des materiellen Rechts durch die Internationale Schiedsgerichtsbarkeit*, in *RECHTSFORTBILDUNG DURCH INTERNATIONALE SCHIEDSGERICHTSBARKEIT* 60 (K.-H. Bökstiegel ed. 1989); O. Sandrock, *Welches Kollisionsrecht hat ein Internationales Schiedsgericht Anzuwenden*, 1992 *RECHT DER INTERNATIONALEN WIRTSCHAFT* 785.

agreement, a contractual partner is, in the language of an impressive arbitral award heretofore cited,³⁷ “deprived of his own natural judge.”³⁸ Although the institution and practice of international arbitration has, in the course of the last decades, been increasingly recognized as a legitimate and adequate means of solving international business disputes, and although this recognition seems to be established in almost all countries belonging to the industrialized world, the theory that those who have not agreed to arbitration may be sued under arbitration agreements to which they have not been signatories or that those who have not by agreement been accepted as partners to arbitration agreements would be entitled to participate as claimants in such proceedings must be discredited as a matter of principle. The principle of strict interpretation of arbitration proceedings must, therefore, be scrupulously respected.³⁹

The same is true of the form requirement established by some national jurisdictions and by some international conventions. This requirement serves the same ends as the principles of strict interpretation, namely to prevent persons extraneous to an arbitration from participating in it either as defendants or as claimants. Its purpose is also to ensure unequivocal evidence on who is a party to an arbitration agreement and who is not.⁴⁰

Lastly, both the principles of strict interpretation and the form requirement are destined to guarantee that privity of contract prevails. Privity of contract can be modified, however, by three countervailing sets of rules: the rules on third-party beneficiaries, the rules on representation, and the rules on estoppel.

A natural person or a company that did *not* sign an arbitration agreement might yet derive from the agreement a power to introduce a request for arbitration against one (or both) of the contractual partners if it appears as a third-party beneficiary to the agreement.⁴¹ Such person or company may be bound or entitled by an arbitration agreement if somebody invested with a power of authority has signed the agreement on its behalf and in its name.⁴² Finally, a natural person or a company that did *not* sign an arbitration agreement may be precluded under the applicable national rules of estoppel from alleging that it is not party to the agreement. Hence, it may be bound and entitled to appear either as a defendant or as a claimant in the ensuing arbitration proceedings.⁴³

37. See text accompanying notes 22-24 *supra*.

38. See *ICC arbitration matter no. 4402* (Prof. Frank Vischer), *supra* note 2.

39. This principle has been discussed, in the present context, by various doctrinal writers. See, e.g., Y. Derains in his annotations to the award in *ICC matters no. 1434*, *supra* note 1, at 982-83; Chapelle, *supra* note 5, at 480-81. See also *ICC matter no. 2138*, 102 J. DU DROIT INT'L 934 (1975) which applies this principle to arbitration agreements in general.

40. The problem of form has been discussed, in the present context, in a few arbitral awards and by some doctrinal writers. See *ICC matter no. 5730*, *supra* note 1, at 1035; *ICC matter no. 4504*, *supra* note 2, at 1120; A. Chapelle, *supra* note 3, at 108; A. Chapelle, *supra* note 5, at 478-80; J. Fadlallah, *supra* note 5, at 112-14 (Fadlallah engages in an in-depth analysis of the problem).

41. See *infra* part V.

42. See *infra* part VI.

43. See *infra* part VII.

Thus, the different national rules on third-party beneficiaries, on representation, and on estoppel will in the last resort resolve the problem under scrutiny in this article. The different national sets of rules concerning these issues, therefore, deserve our most thorough attention.

V. The Different National Rules on Third-Party Beneficiaries

The parties to an arbitration agreement may expressly stipulate that not only shall they themselves be bound and entitled by their agreement, but that third parties shall also acquire rights and duties thereunder. Thus, a company member of a group of companies can agree with a contractual partner, that also affiliated companies shall also be entitled and bound by the arbitration agreement. Consequently, an express agreement overrides the principle of privity of contract. The third party that has not signed the arbitration agreement becomes a member to it. As soon as the third party claims rights under the agreement, it will also be bound by the duties resulting therefrom.

Furthermore, in a few cases it may be feasible to derive from the circumstances surrounding an arbitration agreement a tacit intention of the parties to make one or several third parties a beneficiary of the agreement. In the terms of section 302 paragraph (1) of the American *Restatement (Second) on the Law of Contracts*:

Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.⁴⁴

In the present context the doctrinal construct of the triangular third-party beneficiary would enable an affiliated company to introduce, at least as a claimant, a request for arbitration against the other party to the agreement. Yet, since only rights can be conferred, but no duties can be imposed on third parties extraneous to the agreement without their consent, the construct of the third-party beneficiary doctrine could never be used to make the third-party affiliated company a mere obligee under the agreements. In other words, an affiliated nonsignatory company to the arbitration agreement could, under the doctrine of the third-party beneficiary, never be made a defendant in arbitration proceedings, but could only appear therein as a claimant.⁴⁵ The construct of the third-party beneficiary doctrine, therefore, is only of limited use in the present context.

The fact that third parties, that is affiliated companies, may acquire as beneficiaries under an arbitration agreement the right to introduce a request for arbitration before an arbitral tribunal against one or both of the parties to such agreement has been fully recognized by the rulings of state courts in a few national jurisdictions.

44. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS 439-40 (1981).

45. See also J.L. Goutal in an annotation to the decision rendered by the French Cour de Cassation cited *infra* in note 50, at 145-47.

A U.S. federal court of appeals has stated in a decision rendered in 1972⁴⁶ that a third-party beneficiary under an insurance contract may, by virtue of an arbitration clause contained in the insurance contract, be forced to pursue his claim against the insurer through arbitration. In 1924, the former German *Reichsgericht* (Supreme Court)⁴⁷ and in 1976, the *Bundesgerichtshof* (the actual German Federal Supreme Court)⁴⁸ handed down similar decisions.⁴⁹ Alternatively, in 1985,⁵⁰ the French *Cour de Cassation* declined to endorse the application of the third-party beneficiary construct to an arbitration agreement. However, this decision has been severely criticized by a French doctrinal writer.⁵¹ Furthermore, an opposite trend in French doctrine supports the thesis that a third party may derive from an arbitration agreement a title to file a request for arbitration against one (or both) of the parties to an agreement.⁵²

In summary, the construct of the third-party beneficiary will not solve most of the cases under consideration here. Instead, different national rules on representation and on estoppel achieve this task.

VI. The Different National Rules on Representation

Whether a parent company, the owner of a company, or a subsidiary is bound and entitled by the signature that has been attached to an arbitration agreement by an affiliated company must in the first place be decided by the rules of representation.⁵³ Where the signatory company has acted not only on behalf of itself, but also on behalf of and in the name of other companies affiliated with it, the arbitration agreement displays effects not only between the immediate signatory

46. *Jeans v. Arrow Ins. Co.*, 494 P.2d 1334, 1337 (Ariz. Ct. App. 1972).

47. See 108 RGZ 374: The right of a third-party to introduce a request for arbitration as a beneficiary under an arbitration clause was so much regarded as a matter of course by the *Reichsgericht* that it was not expressly mentioned in the reasoning of the court. Furthermore, there is a report on an unpublished decision of the *Reichsgericht* that unconditionally supports the broad statement in the text above. See 19 LEIPZIGER ZEITSCHRIFT 263 (1925); see also 54 JURISTISCHE WOCHENSCHRIFT 2608 (1925).

48. See 48 BGHZ 35, 43.

49. It was decided by the first-cited judgment of the *Reichsgericht* and by the *Bundesgerichtshof* that the articles of incorporation or by-laws of an association may provide that any disputes arising between the association and its members may be adjudicated by an arbitral tribunal. The members of the association, thus, appear as third-party beneficiaries of the articles of association or of the bylaws. See 108 RGZ 374, 48 BGHZ 35. Whereas these rulings seem to limit the application of the third-party beneficiary construct to the association-member-relationship, German doctrinal writers—in line with the two other decisions of the *Reichsgericht* cited *supra* in note 47—are of the opinion that the construct of the third-party beneficiary is applicable to any arbitration agreement and to any arbitrable legal relationship whatsoever. See, e.g., P. Schlosser, *supra* note 35, at 323; see also A. SCHÜTZE ET AL., *HANDBUCH DES SCHIEDSVERFAHRENS* 31 (2d ed., Berlin 1990); K.H. SCHWAB & G. WALTER, *SCHIEDSGERICHTSBARKEIT, SYSTEMATISCHER KOMMENTAR* 62 (4th ed. 1990).

50. 1987 REVUE DE L'ARBITRAGE 139.

51. See, e.g., J.L. Goutal, *supra* note 45.

52. *Id.* See also A. Chapelle, *supra* note 5, at 484-85.

53. See J.L. Goutal, *supra* note 45, at 141; see also A. Chapelle, *supra* note 3, at 161.

companies, but also as to other companies whose directors have not signed the agreement.

The rules of representation are not identical as between the different national systems of law. Instead, they vary from legislation to legislation. Each arbitral tribunal facing the problem whether a company nonsignatory to an arbitration agreement is yet bound and entitled by it will have to determine on the basis of a conflict of laws operation which national rule of representation it will apply. This problem of conflict of laws cannot be dealt with in the present context. Suffice it to say that, as a matter of rule, arbitral tribunals are not bound by specific rules of conflict of laws, but have discretion to apply the conflict of laws rules they deem most appropriate under the specific circumstances of the case.⁵⁴

The first task of the arbitral tribunal will always be to determine which national rules of representation are applicable in the context of the specific facts of a case. However, the different national rules of representation commonly distinguish between three kinds of representation.⁵⁵

A company may, for example, by a power of authority under seal or in writing, have been expressly authorized to bind and entitle with its signature to an arbitration agreement not only itself, but also its parent company, its individual owner, its subsidiary or sub-subsidiary, or any other affiliated company. When attaching its signature to the arbitration agreement, it may expressly refer to such power of authority, and thus, undoubtedly act also on behalf of and in the name of the principal. In cases of this kind the solution to our problem is very simple: not only is the company signatory to the arbitration agreement bound and entitled by the agreement, but also the principal on whose behalf and in whose name the company attached its signature.

It seems to be universally recognized, however, that powers of authority cannot only be granted and that the agent may not only act on behalf of and in the name of its principal in one of the express manners just cited; but also that the principal and agent may disclose their intention to confer power of authority to act on behalf of and in the name of the principal, in a tacit manner, that is by a conclusive action.

The arbitral tribunal must be in a situation to infer from the surrounding facts the power of the agent and the dealings of the agent on behalf of and in the name of the principal. Although the power of authority and the agent's action on behalf of and in the name of the principal did not materialize in any written document or in any express oral declaration, it must be possible to conclusively derive such power and such action from the facts surrounding the actions. The principal, agent, and third party must know that the arbitration agreement, although signed

54. See *supra* part IV.B.

55. See W. Müller-Freienfels, *Law of Agency*, 6 AM. J. COMP. L. 165, 173-76 (1957); see also W. Müller-Freienfels, *Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty*, 13 AM. J. COMP. L. 193, 203-06 (1964).

only by the agent, extended its effects as between all three of them. In this set of facts the extension of the effects of the arbitration agreement to the principal is supported by the common intentions of all three parties.

Some of the above-cited cases in which the respective arbitral tribunals made use of the group of companies theory⁵⁶ could easily be solved with the help of the doctrine of tacit representation. If some of the arbitral awards rendered under the auspices of the ICC have stressed that the affiliated companies nonsignatories to the arbitration agreement had participated in the conclusion, execution, termination, or renegotiation of the main contract and that they, therefore, must be held to be bound by it, under certain circumstances it was superfluous for such tribunals to develop a new group of companies theory. The normal rules of tacit representation would at least in some of the cases have been sufficient to solve the problem, that is to bind the affiliated companies.⁵⁷

A third category of rules of representation presumably may also be found in all national systems of law. This category of rules may be summarized under the title of apparent or constructive representation. Its distinctive feature is the absence of a real intention of the principal company to confer power of authority upon an agent company and a similar absence of a real intention of the agent company to act on behalf of and in the name of an affiliated company. Under the specific circumstances of the case, however, a party may be estopped from alleging the lack of such power of authority and the lack of such action on behalf and in the name of an affiliated company.

This third category of cases requires a more detailed analysis, which follows.

VII. The Different National Rules of Estoppel

The rules of estoppel may be applicable in two different factual situations: (1) a company may, without possessing any power of authority, have acted on behalf of and in the name of an affiliated company or of its individual owner (part A); or (2) an affiliated company, as well as the individual owner of a company, may, when the company negotiated, performed, or terminated a contract signed exclusively by the company, have posed as an additional party to the contract. In such cases the affiliated company or the individual company of the owner may be estopped from alleging that they are neither bound by the contract nor by the arbitration clause contained therein.

56. See *supra* note 1.

57. See K.-H. Böckstiegel, *Abschluss von Schiedsverträgen durch konkludentes Handeln oder Stillschweigen*, in *FESTSCHRIFT FÜR ARTHUR BÜLOW ZUM 80. GEBURTSTAG 1* (K.-H. Böckstiegel & O. Glossner eds., 1981) (referring to the formation, under German domestic law, of arbitration agreements by way of tacit understandings).

A. THE LACK OF A POWER OF AUTHORITY

As mentioned above, the institution of the apparent or constructive representation seems to be known to almost all national systems of law. In the present context it cannot be proved that such rules may indeed be found in almost all national legislations. But an attempt will be made to show how such rules operate in a few national systems of law and to the results their application leads in the cases here under consideration.

1. French Law

French law recognizes not only that a power of authority may be conferred in a tacit manner by conclusive dealings between the parties, but that such power may also be presumed to have existed although it has in fact never been issued, neither expressly nor tacitly. Thus the famous doctrine of "*mandat apparent*" is on point.

Under this doctrine a principal may be bound by the action of a person upon whom it never conferred any power of authority if the apparent principal and the apparent agent caused bona fide third parties to believe in the existence of the power. The circumstances must reveal that the third parties with whom the apparent agent dealt had good reasons to believe the agent was invested with an authorization to deal on behalf of and in the name of the apparent principal. The reliance interest of such third parties must outweigh the interest of the principal to invoke the lack of any actual power of authority. Under such circumstances the apparent principal is estopped from alleging the nonexistence of any power of authority. Instead it is liable vis-à-vis the third persons for the compensation of any damages sustained by them through their reliance on a power of authority that, in fact, did not exist. The remedy that accrues to the third parties is a claim for *restitutio in integrum*, which leads in the present context to the fictional assumption that a power of authority had indeed been conferred. The law implies a power of authority, and the arbitration agreement binds the apparent principal although it never attached its signature.⁵⁸

Commentators have applied this doctrine of *mandat apparent* to solve the

58. See D. Alexandre, *Mandat, Obligations du mandataire et du mandant, Effets à l'égard des tiers*, in JURIS-CLASSEUR CIVIL arts. 1991-2002, fasc. 2, mandat: fasc. G (8, 1989), Nos. 69-98, at 14-20; H. & L. MAZEAUD ET AL., LEÇONS DE DROIT CIVIL 854-56 (5th ed. 1980); P. Lescot, *Le mandat apparent*, 1964 LA SEMAINE JURIDIQUE, Doctrine 1826; 9 M. PLANIOL & G. RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS: CONTRATS CIVILS 949-51 (2d ed. 1954); J. Jéauté, *Le mandat apparent dans ses rapports avec la théorie générale de l'apparence*, 44 REVUE TRIMESTRIELLE DE DROIT CIVIL 288-307 (1947); 3 DALLOZ, NOUVEAU RÉPERTOIRE DE DROIT 20-21 (1949); P.J. GOTTHARDT, DER VERTRAUENSCHUTZ BEI DER ANSCHEINSVOLLMACHT IM DEUTSCHEN UND IM FRANZÖSISCHEN RECHT (1970).

problem here under consideration.⁵⁹ Indeed in at least one arbitral award⁶⁰ this doctrine was applied by an arbitral tribunal proceeding under the Rules of Arbitration of the ICC.

2. *English Law*

The doctrine of "apparent" or "ostensible" representation is also known to English law. It is based on the fact that the purported principal never issued to its apparent agent a power of authority with respect to the transaction in question. But,

the law treats their relationship as one of principal and agent, giving effect to their conduct as if it amounted to the expression of consent that they should be principal and agent. . . . [T]his form of agency may be regarded as a type of agency arising by operation of law.⁶¹

It is also called "agency by estoppel."⁶²

In an analysis of the rulings of English courts, G.H. Treitel⁶³ has found the following catalogue of conditions that must be satisfied before such apparent authority may be assumed to exist:⁶⁴ (1) There must be a representation of authority by the principal to the third party, (2) which has to be a representation of fact (3) that the agent is authorized to act as agent, and (4) the third party must have relied on that representation. Similar catalogues of conditions have been set up by other writers in an analysis of English common law.⁶⁵ This article later notes that these catalogues are in a surprising manner in harmony with the requirements established insofar by German law.

3. *U.S. Laws*

In the different jurisdictions of the United States, the pertinent laws seem to be much more complicated. In the United States distinction is made between "apparent authority" and "authority by estoppel." "Apparent authority" is

59. See P. Lagarde in a contribution to a discussion, in TRAVAUX 1984-1985, *supra* note 5, at 129; see also A. Chapelle, *supra* note 5, at 483; 1986 REVUE DE L'ARBITRAGE, *supra* note 3, at 110 (annotation to the Judgment of Oct. 21, 1983, rendered by the Cour d'Appel de Paris); P. Fouchard, in a contribution to a scholarly discussion, 1988 REVUE DE L'ARBITRAGE 500.

60. See ICC matter no. 5730, *supra* note 1, at 1036; see also A. Chapelle, *supra* note 5, at 483 (assuming also that the award of 1975 in the ICC matter no. 1434 is based on that doctrine, an assumption which seems doubtful).

61. See G.H.L. FRIDMAN, THE LAW OF AGENCY 97 (5th ed. 1983).

62. See *id.* ch. 6.

63. G.H. TREITEL, THE LAW OF CONTRACT 615-19 (8th ed. 1991).

64. The author of the present article has rearranged Treitel's criteria, however, without altering them.

65. See, e.g., FRIDMAN, *supra* note 61, at 99-103; see also F.M.B. REYNOLDS & B.J. DAVENPORT, BOWSTEAD ON AGENCY 16-18 (14th ed. 1976); John N. Adams, *Agency*, in I(2) HALSBURY'S LAWS OF ENGLAND 25, 26 (4th ed. 1990); John N. Adams, *Estoppel*, in 16 HALSBURY'S LAWS OF ENGLAND 1068-79 (4th ed. 1976) (under the title of: "Estoppel by Representation in General"); Richard T.H. Stone, *Usual and Ostensible Authority—One Concept or Two?*, 1993 J. BUS. L. 325.

defined by article 8 of the *Restatement (Second) of the Law of Agency*⁶⁶ as resulting from a manifestation by a person that another is his agent, the manifestation being made to a third person and not as when authority is created to the agent.⁶⁷ "Authority by estoppel," on the other hand, is defined by article 8B of the *Restatement*⁶⁸ as follows:

(1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if (a) he intentionally or carelessly caused such belief, (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts.⁶⁹

The astounding surprise to anybody who analyzes the state of the laws in the different jurisdictions of the United States is that the doctrinal tools of "apparent authority" and "authority by estoppel" have never been used by U.S. courts when they have had to decide on the problems here under consideration. The approach of U.S. courts to these problems has been quite different: while "apparent authority" and "authority by estoppel" did not play any role whatsoever, the alter ego doctrine (piercing the corporate veil) was implemented by U.S. courts when solving these problems.⁷⁰ Such neglect of the doctrinal tools of "apparent authority" and "authority by estoppel" is probably due to the fact that both doctrines are too narrow to produce satisfactory results under these circumstances. The conditions for their application are so strict that they would hardly ever permit an affiliated company or the individual owner of a company to be held bound by an arbitration agreement which they have not signed.⁷¹

4. German Law

In German law, on the contrary, courts would have to make use of the concept of "authority" or "representation by estoppel." In the context of representation German courts have developed two different kinds of doctrine of estoppel: the doctrine of the *Duldungsvollmacht* and the doctrine of the *Anscheinsvollmacht*.⁷²

66. RESTATEMENT (SECOND) OF AGENCY art. 8 (1958).

67. In terms of English and German law, under such circumstances there would not be "apparent," but there would be "real" authority if these conditions would be satisfied. This "real" authority would not stem from a communication between principal and agent, but from a communication between principal and third party.

68. See RESTATEMENT (SECOND) OF AGENCY, *supra* note 66, art. 8(B).

69. The requirements to be met before the concept of "authority by estoppel" can be utilized are aggravated by paragraph 3 of article 8(B) which reads: "(3) Change of position, as the phrase is used in the restatement of this subject, indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability." *Id.*

70. See *infra* part VII.B.

71. See *supra* note 69.

72. On this topic, there is abundant literature. It will suffice here to cite a few general writings which give further references. H. HÜBNER, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHS 498-502 (1985); J.V. GIERKE & O. SANDROCK, HANDELS- UND WIRTSCHAFTSRECHT 364-70 (9th ed. 1975).

Application of the doctrine of the *Duldungsvollmacht* requires the presence of four different facts.⁷³ First, somebody acts in the name of a purported principal without having been authorized so to act. Second, the alleged principal notices the action of the supposed agent, but does not intervene to stop it and lets the purported agent have its way. Third, a bona fide third party, with whom the supposed agent has dealt, relies on the existence of a power of authority. Finally, the purported principal did in fact have the opportunity to prevent the supposed agent's actions.

Under such circumstances the supposed agent indeed lacks authority to act on behalf of and in the name of the purported principal. But the principal is estopped from alleging the lack of such power of authority.⁷⁴

Instead the principal is bound by any commitment that the supposed agent has assumed in the principal's name. When parties debate whether a signature attached by one company member of a group of companies to an arbitration agreement also binds and entitles the other members of such group, the doctrine of *Duldungsvollmacht* implies: if the member signatory to the arbitration agreement has posed also as an agent for other members of such group, they will be bound and eventually also entitled by such action.

German courts have developed another doctrine of estoppel in the field of representation, that of the *Anscheinsvollmacht*.

Application of this doctrine requires the presence of the following five sets of facts.⁷⁵ First, somebody must have acted on behalf and in the name of a purported principal without having been authorized so to act. Second, it is necessary, furthermore, that such action was not only temporary, but stretched over a certain period of time (so that third parties could be induced into believing that there was a real power of authority). Third, in contrast to what has been mentioned with the *Duldungsvollmacht*, the alleged principal does not notice the action of the supposed agent. Such unawareness is due, however, to negligence on the part of the supposed principal. Fourth, a bona fide third party, with whom the supposed agent has dealt, relies on the existence of a power of authority. It is, however, not necessary that the false impression of the existence of a power of authority has been created specifically with respect to the third person involved. It suffices that such false impression has been made vis-à-vis the group to which the third person belongs. Finally, similar to what has been explained in the context of the *Duldungsvollmacht*, the purported principal did have the opportunity to prevent the supposed agent's actions.

If these five sets of facts occur in a special case, German courts will assume

73. See GIERKE & SANDROCK, *supra* note 72, at 365.

74. This is the doctrine underlying the rulings of the German Supreme Court in Civil Matters and advocated by some legal writers. In the opinion of the author of this article, the *Duldungsvollmacht* is, however, an ill-conceived notion whose problems could be solved more easily and much better by the application of the rules on a tacitly conferred power of authority.

75. See GIERKE & SANDROCK, *supra* note 72, at 366.

the existence of an apparent power of authority. The purported principal is bound, and possibly also entitled, by the action of the supposed agent. In the context of the current problem, if a company member of a group of companies has attached its signature to an arbitration agreement posing, at the same time, as an agent of one or several affiliated companies or of the individual owner of the group, these third persons will be bound and possibly also entitled by the agreement.

In summary, therefore, German courts may not expressly use a doctrine of estoppel or the doctrine of piercing the corporate veil when dealing with the problem here under consideration. But an obvious parallel exists between the French doctrine of *mandat apparent* and the German doctrine of *Duldungsvollmacht* and *Anscheinsvollmacht*. And the doctrinal principles underlying the institutions of *Duldungsvollmacht* and *Anscheinsvollmacht* are nothing more than what has been developed under the label of the doctrine of estoppel.

5. Swiss Law

Swiss law resembles German law. Although the Swiss Federal Supreme Court has never made use of the notion of *Duldungsvollmacht* or *Anscheinsvollmacht*, it has ruled in cases where the facts corresponded to those of the *Duldungsvollmacht* and *Anscheinsvollmacht* that the purported principal was bound by the action of the person who posed as agent.⁷⁶ Doctrinal writers expressly refer to the two German doctrines, maintaining that what Swiss courts apply are more or less the rules underlying the above-mentioned German doctrines.⁷⁷

B. THE NONSIGNATORY COMPANY HAS POSED AS A CONTRACTUAL PARTNER

As mentioned above,⁷⁸ the doctrine of estoppel is applicable not only to cases where a company, without possessing any power of authority, has acted on behalf and in the name of an affiliated company or of its individual owner. It may also be used in a different factual situation where an affiliated company or the individual owner of a company while not formally signing the arbitration agreement has posed as a contractual partner. The pertinent national rules of estoppel applicable under the conflict of laws rules⁷⁹ will then have to be determined for solving the conflict between the interests of the nonsignatory company or individual owner not to be bound by the agreement and the reliance interest of the third party induced into believing that the company or owner was a party to the agreement.

Furthermore, this author has already pointed out⁸⁰ that U.S. courts, when

76. See, e.g., the decision of the Swiss Federal Supreme Court of December 8th, 1970 (Verreyken v. Parsel S.A.), Schweizerisches Bundesgericht [Supreme Court], 96 BGE II 439, 442-43 (Switz.).

77. See T. GUHL, DAS SCHWEIZERISCHE OBLIGATIONENRECHT 139-40 (7th ed. 1980); E. BUCHER, SCHWEIZERISCHES OBLIGATIONENRECHT, ALLGEMEINER TEIL 558-60 (1979); A.V. TUHR & H. PETER, ALLGEMEINER TEIL DES SCHWEIZERISCHEN OBLIGATIONENRECHTS 357-58 (3d ed. 1979).

78. See *supra* part VII.

79. See *supra* part IV.B.

80. *Supra* part VIII.A.3.

confronted with the problems here under consideration, have only used the alter ego doctrine or the doctrine of piercing the corporate veil,⁸¹ which are specimens of the broader doctrine of estoppel (by matter *in pais*). In a decision regarded as the leading case rendered in 1960⁸² the United States Court of Appeals for the Second Circuit stated that a person who did not sign an arbitration agreement may still become bound by the operation of general principles of contract law,⁸³ that one set of those principles is contained in the alter ego doctrine, which provides that "the corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and at least in the area of contracts, the acts of one are the acts of all"; that the alter ego theory binds the parent which as "puppeteer" has "directed his marionette" to sign;⁸⁴ and that, therefore, if the parent is bound to the contract then like its subsidiary it is bound to submit to arbitration.⁸⁵

In later decisions U.S. courts⁸⁶ have further specified the relevant criteria to be satisfied before the alter ego doctrine may be applied.⁸⁷

VIII. Conclusion

The preceding analysis has shown that detailed legal rules have developed on a national level to deal with the problem here under consideration. These national

81. This surprising fact is explained by P.I. Blumberg, *Corporate Groups and Enterprise Liability*, in PRIVATE INVESTORS ABROAD 10-1, 10-15, 10-16 as follows: "inasmuch as common-law agency requires a consensual understanding between the parties and requires the subsidiary to be acting on behalf of the parent, not on its own behalf, common-law agency rarely exists in intragroup liability cases." See also *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929) (opinion of Learned Hand, J.)

82. *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir. 1960).

83. *Id.*

84. *Id.* at 234.

85. *Id.* at 235.

86. See, e.g., *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 523-24 (2d Cir. 1980); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1393-94 (9th Cir. 1984); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 938-39 (3d Cir. 1985); *Coastal States Trading, Inc. v. Zenith Navigation S.A.*, 446 F. Supp. 330, 336-38 (S.D.N.Y. 1977); *Hidrocarburos y Derivados, C.A. v. Lemos*, 453 F. Supp. 160, 172-74 (S.D.N.Y. 1978); *Oriental Commercial & Shipping Co. v. Rosseel*, N.V., 609 F. Supp. 75, 78 (S.D.N.Y. 1985); *Dighello v. Busconi*, 673 F. Supp. 85, 88-90 (D. Conn. 1987).

87. These criteria have been enumerated in *Flynt Distributing Co., Inc. v. Harvey* as being the following: "To apply the alter ego doctrine, the court must determine (1) that there is such unity of interest and ownership that the separate personalities of the corporation and the individuals no longer exist and (2) that failure to disregard the corporation would result in fraud or injustice." 734 F.2d at 1393. One will also note that these criteria are very narrow. In an earlier decision the Federal District Court for the Southern District of New York, in the matter of *Coastal States Trading, Inc. v. Zenith Navigation, S.A.*, had already elaborated a more specific criterion for the group of companies situation by stating the following:

[A] party seeking . . . to bind a corporation to an arbitration agreement to which it is not a signatory must . . . establish that the subsidiary corporation was controlled to such a degree by the parent that it had "no separate mind, will or existence of its own" . . . Such control must go beyond mere stock ownership, or even identity of officers and directors, to the point that the controlling corporation dominates the finances, policy, and business practices

legal rules not only create legal certainty absent insofar with any rules of the *lex mercatoria*, whose definite contours are vague and open to discussion. They also satisfy the reliance interests of the parties that expect their business deals to be judged by definite norms in no way subject to any discretion of the arbitrators, a discretion that, if it existed, would seem to border on arbitrariness. Instead of reverting to the *lex mercatoria*, arbitral tribunals should, therefore, determine the applicable domestic proper laws on third-party beneficiaries, on representation, and on estoppel, and therein search for the solution.

When advocating such a "conservative" solution, this author has in mind the promotion of values, which, in the present context, have candidly been expressed by M. Focsaneanu in the following contribution to a scholarly discussion:

I believe that we are playing a little bit with the fire. If one wishes that the institution of arbitration is to live, it is necessary to respect the two legal pillars of that institution, one of them being the acknowledgement of the distinct juristic personality of companies. . . . If a counsel to multinational corporations would listen to our discussion, he would be very worried because groups of companies have not been set up for mixing the group's entities. . . . This is why I would prefer that we come back to ideas which are perhaps a little bit old-fashioned, but which seem to me indispensable for a legal certainty if one wants arbitration to remain viable.⁸⁸

Another French lawyer was more explicit when he warned:

For ourselves, if one wants that arbitration continues to grow . . . it is necessary above all . . . to desist from expanding its empire, by whatever means, to where the litigants have not expressly made provision for. Thus, from all the reports, notably from the contributions to the discussion made until now, it clearly results that, as it had already been shown by Mr. Fadlallah during the works of the French Committee for arbitration in 1985, "that it is necessary to avoid the creation of a presumption in favor of the expansion of arbitration on a group, lest a feeling of rejection should be created susceptible of growing into a wholesale refusal of arbitration." . . . The tribunals should understand this advice!⁸⁹

The goal of the foremost promotion of international commercial arbitration is, indeed, best served when the application of uncertain theories, such as the *lex mercatoria*, is avoided at least in this field where definite, time-tested national rules are at hand. The traditional national rules on third-party beneficiaries, on representation, and on estoppel are best apt to create legal certainty without which the users of international arbitration might become afraid of turning to the best procedural means of solving international business disputes—which indeed is international commercial arbitration.⁹⁰

of the controlled corporation . . . The "puppeteer" . . . must so thoroughly interpose itself into the conduct of the controlled corporation that it can be said that the latter is merely a "screen" for the activities of the former.

446 F. Supp. at 337.

88. See Fadlallah, *supra* note 5, at 127 [translation by the author].

89. J. Rubellin-Devichi, *L'Arbitrage et les Tiers, III. Le Droit de l'Arbitrage, les Solutions Juridictionnelles*, 1988 REVUE DE L'ARBITRAGE 515 [translation by the author].

90. See A. Chapelle, *supra* note 5, at 496-98 (scholarly discussion following the presentation).

