THE GROUP OF COMPANIES DOCTRINE AS A NON-SIGNATORY ISSUE IN ARBITRATION AGREEMENTS

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ABBREVIATIONS

ECJ : European Court of Justice

EU : European Union

ICC : International Chamber of Commerce

ICSID : International Centre for Settlement Investment Disputes

U.K. : United Kingdom

UNCIRTAL : United Nations Commission on International Trade Law

UNIDROIT : International Institute for the Unification of Private Law

U.S. : United States

ABSTRACT

The issue of non-signatories is a significant point of international arbitration. As one of the non-signatories, the Group of Companies Doctrine can be defined as companies which are the parts of an integrated economic group being bound by one another's arbitration agreements in some circumstances. Despite the clear definition regarding the doctrine, it is probably the most misunderstood theory to bind parties that are not signatories of arbitration agreements.

To help understand the Group of Companies Doctrine better, different applications in different jurisdictions and criticisms about the doctrine must be evaluated. In light of all these evaluations, it is without doubt that the Group of Companies Doctrine is a necessary and important theory for the benefit of international arbitration. This can be proved through 'single economic entity' and 'control' factors in group of companies. Additionally, to clarify the significance of the doctrine, preventing the abuse of corporate structure issue and the application of the doctrine as *lex mercatoria* must be noted as important arguments.

ÖZET

Tahkim anlaşmasına imza koymayan tarafların sorumluluğu halleri uluslararası tahkimin önemli bir meselesidir. Bu hallerden biri olan Grup Şirketler Doktrini, ekonomik açıdan bütünleşmiş bir grubu oluşturan şirketlerden herhangi birinin imzaladığı tahkim anlaşmasının diğer şirketler için de bağlayıcı olduğu durumlar olarak tanımlanabilir. Bu açık tanıma rağmen, Grup Şirketler Doktrini, imza koymayan tarafları tahkim anlaşmalarıyla bağlı kılan teorilerin en yanlış anlaşılanıdır.

Grup Şirketler Doktrinini daha anlaşılır kılmak için, farklı yargılama sistemlerindeki farklı uygulamaları ve doktrin hakkındaki görüşleri değerlendirmek gerekir. Tüm bu değerlendirmeler ışığında görülecektir ki Grup Şirketler Doktrini, uluslararası tahkim açısından önemli ve gerekli bir teoridir. Bu iddia, grup şirketlerdeki 'tek ekonomik bütünlük' ve 'kontrol' kavramları ile kanıtlanabilir. Bunlarla birlikte, doktrinin önemini daha da netleştirmek amacıyla, tüzel kişiliğin kötüye kullanımı hususu ve doktrinin *lex mercatoria* olarak uygulanması da önemli argümanlar olarak dikkate alınmalıdır.

Anahtar Kelimeler: Tahkim sözleşmesi, tahkim sözleşmesinin üçüncü şahıslara teşmili, Grup Şirketler Doktrini, Tek Ekonomik Bütünlük Doktrini.

Key Words: Arbitration agreements, effect of arbitration agreements to non-signatory, Group of Companies Doctrine, Single Economic Entity Doctrine.

I. Introduction

Internationalization is a vital element for any type of work in today's world. National boundaries and territorial limits do not suffice to obstruct the effects of internationalization. This is, without a doubt, a positive development; as the world becomes much smaller for everyone. This result can be seen particularly from trade between countries, firms, and people.

At that point, as an important factor, trade can link these three subjects. Where internationalization and trade meet, a new concept called and known as international trade emerges. International trade consists of several advantages, yet it involves numerous difficulties. Legal problems are surely one of the fundamental difficulties. Therefore, international arbitration, one of the Alternative Dispute Resolution mechanisms, has become the constituted method of settling international trade disputes, and all over the world, states have modernised their laws of arbitration to take account of this fact.[1]

International arbitration is a way to provide an efficient and effective resolution for international disputes that include international commercial, investment and state-to-state disputes.[2] With some variations, all the definitions of arbitration are similar. In its general sense, arbitration can be defined as a process by which parties consensually submit a dispute to a non-governmental decision maker who is selected by or for the parties, to make a binding decision for resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case.[3]

Thanks to certain features of international arbitration such as neutrality, centralized dispute resolution, enforceability of agreements and awards, commercial competence and expertise, finality of decisions, party autonomy and procedural flexibility, cost efficiency and speed, confidentiality of dispute resolution and arbitration involving states and state-entities; international arbitration is regarded as suffering ills less than litigation of international disputes in national courts. Furthermore, it affords a more practical, efficient and neutral dispute resolution than other forms.[4]

As it is understood from the definition and features of international arbitration, it has great significance on international trade in terms of giving the parties the opportunity to resolve disputes.

[1]A. Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, Sweet & Maxwell Press (2004) 1.
[2]G Born, International Arbitration: Law and Practice, Kluwer Law International (2012) 3.
[3]Born (n 2) 4.
[4]Born (n 2) 9.

The agreement to arbitrate is the keystone of international commercial arbitration and it involves the consent of the parties to have arbitration as a resolution mechanism.[5] To show the consent and prove the intention of the parties to have a consensual procedure, the arbitration agreement has to include certain requirements and the 'written agreement' condition is a principal point. As it is known, the New York Convention[6] and UNCITRAL Model Law[7] are the fundamental regulations in the international arbitration field, and both of them involve provisions regarding the writing requirement.

Although the New York Convention appears to be clear regarding the signature requirement, arbitration practitioners have grappled with the problem of 'non-signatories' to the arbitration agreement which is nevertheless related and integral to the resolution of the dispute.[8]

The issue of non-signatories can be summarized as the circumstances that non-signatories may be held to be parties and thus both bound and benefited by an arbitration agreement.[9] The bound and benefited non-signatory circumstances are organised under certain ground types such as: Group of Companies Doctrine, Agency, Alter Ego/Veil-Piercing, Succession, Assignment or Transfer, Estoppel, Corporate Officers and Directors, Incorporation by Reference, Third Party Beneficiary and other circumstances.[10]

These types of non-signatories will be evaluated in this article. However, the main theme of the article is the Group of Companies Doctrine. The *Dow Chemical*[11] award is interpreted as the founder of the doctrine and the doctrine basically holds that companies which are integrated and are in the same economic group may be in some circumstances, bound by one another's arbitration agreements.[12] The doctrine is significant but controversial in many aspects.[13] Therefore, in this article, the role of the Group of Companies Doctrine as a non-signatory issue for arbitration agreements will be examined. The article will be a critical study in terms of analysing all comments in different jurisdictions with regard to the doctrine and proving its significance and necessity for international arbitration.

[5]Redfern and Hunter (n 1) 131.
[6]Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[7]UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.
[8]James H. Hosking, 'Non-Signatories and International Arbitration in the United States: the Quest for Consent' (2004) 289 The Official Journal of the London Court of International Arbitration (LCIA) Volume 20.
[9] Born (n 2) 95.
[10]Born (n 2) 95.
[11]Dow Chemical v. Isover Saint Gobain, ICC Case No. 4131, Interim Award, Sept. 23, 1982,JDI (1983).
[12]G Born, International Arbitration Cases and Materials, Kluwer Law International (2011) 522.
[13]Born (n 2) 95.

In order to express the aim of this study, at first, arbitration agreements will be analysed particularly in two subtitles: consent and writing. In the second part of the study, non-signatories will be defined. After giving sufficient information on all types of non-signatories, the main question of the article will be evaluated under a distinct title. The definition of the doctrine and the applications of different jurisdictions will be provided. Additionally, in that part of the study, the question on why the doctrine is significant and necessary will be answered with two fundamental points: 'single economic entity' and 'control'. As an additional argument, in light of the 'single economic entity' and the 'control' factors, the relationship between having a distinct legal identity and abuse of corporate structure will be examined. Lastly, the application of the doctrine as *lex mercatoria* will also be shown to prove the necessity of the doctrine. Afterwards, in the conclusion part, the summary of the study will be provided with certain ideas of creating a better application for the doctrine.

II. International Arbitration Agreement

To allow for a better understanding of the theme of the study, as a first step, international arbitration agreements must be examined. This is because the arbitration agreement is the cornerstone of arbitration.[14] In the absence of an arbitration agreement, it means that parties have not consented to arbitrate their disputes.[15] With the conclusion of the arbitration agreement, resorting to arbitration becomes an obligation for the parties.[16] Arbitration agreements have both a jurisdictional and a contractual character that enable a number of functions. For instance, they prove the consent of the parties to arbitrate and they are the sources of the authority and jurisdiction of arbitrators. They must be in writing even though this rule has become more and more flexible during the last decades.[17]

Furthermore, one of the definitions of the arbitration agreement is also laid down in the UNCITRAL Model Law. UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law.[18] Therefore, its definitions have significance in the interpretation of international arbitration agreements. Pursuant to Article 7/1 of the UNCITRAL Model Law, the arbitration agreement is defined as an agreement which is concluded by the parties to submit all or certain disputes that have arisen or may arise according to contractual

[14]T. Varady, J Barcelo and A Mehren, International Commercial Arbitration A Transnational Perspective, Thomson West (2003) 85.
[15]Andrea Steingruber, 'Notion, Nature and Extent of Consent In International Arbitration', (2009) 87 Queen Mary University of London School of International Arbitration, Thesis For The Degree of Doctor of Philosophy London
[16]Steingruber (n 15) 87.
[17]Steingruber (n 15) 87.
[18]<http://www.uncitral.org/uncitral/en/index.html> Accessed on: 02 June 2015.

or non-contractual relationships. In the same provision, it is also noted that arbitration agreements can be in the form of an arbitration clause in a contract or a separate agreement.[19] The meaning of an arbitration clause and separate agreement should be also clarified. There is no doubt that both forms constitute an arbitration agreement. In its general sense, if the arbitration agreement is concluded within a contract, it is called an 'arbitration clause'. However, if the parties conclude another contract to identify arbitration as a dispute resolution method, this will be called "a separate arbitration agreement". As a matter of practicality, arbitration agreements are generally concluded in the form of arbitration clauses.[20]

Moreover, where the meaning of the arbitration agreement is taken into account, the separability doctrine should be also defined. Separability is a legal doctrine which allows an arbitration agreement to be considered separately from the underlying contract in which it is contained. This point is significant in terms of enforceability of the underlying agreement.[21]

The rule of the separability doctrine stems from the case of *Harbour Assurance*[22] and it is also enshrined in Section 7 of the Arbitration Act 1996.[23] In practice, the effect of the rule is that unenforceability of the underlying agreement does not automatically render an arbitration agreement contained within it unenforceable. If the rule is not applied, an arbitral tribunal would be precluded from hearing any dispute that raised a question with regards to the validity or existence of the contract containing the arbitration agreement.[24]

Additionally, in order to render an agreement to arbitrate unenforceable, the arbitration agreement must be independent in terms of being invalid, or should be rendered void specifically.[25]

According to the definitions, the meaning of arbitration agreement is explicit. However, to analyse non-signatories, in the further part of the study, two fundamental elements of the arbitration agreement that have a precise relation with the non-signatory circumstances are clarified: consent and writing requirements.

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[19]<http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> Accessed on: 07 May 2015.
[20]Erdem & Erdem Law, 'Turkey: The Separability of An Arbitration Clause from the Underlying Contract' <http://www.mondaq.com/turkey/x/258196/Arbitration+Dispute+Resolution/The+Separability+Of+An+Arbitration+Clause+From+The+Underlying+Contract> Accessed on: 24 June 2015.
[21]J Carter and H Kennedy, 'English High Court Addresses Separability of Arbitration Clauses' International Arbitration Newsletter, (2013).
<https://www.dlapiper.com/en/europe/insights/publications/2013/06/english-high-court-addresses-separability-of-arb__/> Accessed on: 24 June 2015.
[22]Harbour Assurance v. Kansa General International Insurance (1993) 1 Lloyd's Rep 455.
[23]Arbitration Act 1996.
[24]Carter and Kennedy (n 21).
[25]Fiona Shipping v. Privalov (2007) EWCA Civ. 20.

A. Consent

Consent is a significant element for creating a binding arbitration agreement since arbitration agreements bind only the parties that have signed it.[26]

In order to have a binding arbitration agreement, parties must have validly consented to that agreement.[27] In practice, consent is proved by written instruments that have a signature.[28] However, because of the technological developments, some less formal written documents and written exchanges are also applied.[29]

In the interpretation of consent, difficulties may arise in determining the exact scope of an arbitration agreement whenever a contract has been entirely or partially negotiated or performed by a party that is not a signatory.[30] In several cases, arbitrators handled the cases similar to how French Courts handle cases and they have developed the approach that such involvement can raise the presumption that the true intention of contracting parties is that a non-signatory party can be bound by the arbitration agreement.[31]

The Paris Court of Appeals has also dealt with the issue of non-signatories in the ***V 2000*** [32] case. The plaintiff was a purchaser of vintage cars, who sued the French distributor before French courts due to a dispute arising from the sales agreement. The agreement however was signed between the plaintiff and a third English company, and it contained an arbitration clause. Although the French distributor acted only as an intermediary in the sales transaction, the French Court declined jurisdiction by stating that "*in international arbitration law, the effects of the arbitration clause extend to parties directly involved in the performance of the contract, provided that their respective situations and activities raise the presumption that they were aware of the existence and scope of the arbitration clause, so that arbitrator can consider all economic and legal aspects of the dispute* "[33], and accepted that the French distributor may also rely on the arbitration clause between the plaintiff purchaser and the English company as the purchaser was aware of the French distributor's involvement in the agreement. This typical circumstance can also be interpreted as a reason why the consent is important.

[26]E Gaillard and J Savage, Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International (1999) 280.
[27]Born (n 2) 69.
[28]Born (n 2) 69.
[29]Born (n 2) 70.
[30]Gaillard and Savage (n 26) 281.
[31]Gaillard and Savage (n 26) 281.
[32]Paris Court of Appeals, Société V 2000 v. Société Project XJ 220 ITD, Cases No: 94/12322 and 94/12323 (1994).
[33]Gaillard and Savage (n 26) 282.

As a further example about the consent in arbitration agreements, *Cable TV v. St. Kitts and Nevis*[34] case can be shared. In the case, the Respondent was not a signatory to the arbitration agreement, yet the Claimant claimed that consent by the Respondent could be construed from the institution of proceedings by the Attorney-General of St. Kitts and Nevis against the Claimants in a domestic court of the Respondent.[35] The main aim of the domestic court proceedings was to take an injunction to restrain the Claimant from raising its rates prior to the resolution of the dispute through ICSID arbitration. In the case, the Tribunal pointed in its concluding part that the references which showed the ICSID clause in the agreement were merely statements of fact and they did not actually refer to consent by any person to ICSID jurisdiction.[36]

To summarize, the link between consent and non-signatory issues has been explained in this part. However, for analysing the Group of Companies Doctrine, the question of consent must be examined in further detail. Therefore, this question will be tackled with as 'implied consent' under the title of the doctrine.

As a second part of the requirements of international arbitration agreements, the writing requirement must be evaluated as well.

B. Writing

As provided in Article 2/2 of the New York Convention, the definition of the 'written agreement' is clear. Pursuant to Article 2/2 of the New York Convention: *"The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."*[37] The article also clarifies that apart from exchange of letters or telegrams, the signature is a proof of existence of the 'written' international arbitration agreement and it certainly constitutes evidence of consent of the parties.[38]

The writing requirement is also noted in the UNCITRAL Model Law, albeit differently than the New York Convention; as there has been a revolution in communications since the New York Convention. To cite an example, telegrams were largely replaced by telex, and later by fax and e-mail.[39] These improvements were implied in Article 7/2 of the UNCITRAL Model Law. According

[34]Cable TV v. St. Kitts and Nevis, Award, 13 January 1997, 13 ICSID Review–Foreign Investment Law Journal 328, 354-361.
[35]United Nations Conference on Trade and Development, Dispute Settlement: International Commercial Arbitration 5.2, United Nations (2005) 7.
[36]United Nations Conference on Trade and Development, Dispute Settlement: International Commercial Arbitration 5.2, United Nations (2005) 7.
[37]<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf > Accessed on: 18 May 2015.
[38]Redfern and Hunter (n 1) 131.
[39]Redfern and Hunter (n 1) 131.

to the provision, the arbitration agreement shall be in writing and an agreement can be accepted as written if it is contained in a document that is signed by the parties.[40] Additionally, exchange of letters, telex, telegrams or other means of telecommunication devices that help record the agreement, or exchanges of statements of claim and defence in that the existence of the agreement is asserted by one party and not denied by another, shall constitute written arbitration agreements.[41]

Due to this provision, the importance of signature implied in the New York Convention has decreased. This is a welcomed development as the signature requirement has raised certain problems in some states. The general idea is that the signature is not necessary, provided that the arbitration agreement is in writing.[42] For the purpose of the UNCITRAL Model Law, the writing requirement can be satisfied by any means of telecommunication which enables to record the agreement.[43] Thus, where a party takes part in arbitration without denying the existence of an arbitration agreement, this is deemed as an 'implied consent' to arbitration and will satisfy the written requirement.[44]

At that point, the application of the requirement of 'agreement in writing' must be handled. In national legislations and court decisions, there are different applications. To exemplify, some legal systems have no particular form for an arbitration agreement. Actually, as an example and as an explanation, an exchange of telexes between two broker firms in Paris containing the simple statement that *"Arbitration based on English law, if any, according to ICC Rules in London"* can constitute a valid arbitration agreement which provides arbitration in London under the International Chamber of Commerce (ICC) Rules with English law as the substantive law of the contract.[45] Because there is almost inevitably a requirement of 'agreement in writing' or record such as disk or an electronic tape which can be made written transcription though there may be no requirement of form.[46]

In both of Article 2/2 of the New York Convention and Article 7/2 of the UNCITRAL Model Law, signed written contract or an exchange of written communications which demonstrate the record of the arbitration agreement is a necessity. Both of them exclude oral agreements and tacit acceptances. However, with the 2006 revision to the Model Law, two options were added that

[40]<http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> Accessed on: 09 May 2015.
[41]<http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> Accessed on: 09 May 2015.
[42]Redfern and Hunter (n 1) 135.
[43]United Nations Conference on Trade and Development (n 35) 18.
[44]United Nations Conference on Trade and Development (n 35) 18.
[45]Redfern and Hunter (n 1) 135.
[46]Redfern and Hunter (n 1) 135.

eliminate any written requirement. In light of Option II of Article 7, "*"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."*[47] This option can eliminate any written form of requirement except only substantive issues of consent, and under this option, tacit and oral consent would be adequate for creating a valid and binding arbitration agreement.[48]

In this study, there will be no discussion with regard to the validity of arbitration agreement. However, due to the requirement of signatures in arbitration agreements, the written requirement is a significant point. Both consent and written requirement are important matters to examine the circumstances which are called as non-signatory issues.

III. **Non-Signatory Issues**

As a general rule, all international and national legal regimes that are related to arbitration are based on consensual procedures and provide that only the parties to the arbitration agreement are obliged to comply with that agreement.[49] However, in some circumstances, entities that are not signatories of a contract can be bound by arbitration clause or separate arbitration agreements.[50] These circumstances, which are organized under some theories presenting non-signatories, are used to overcome a lack of expressed consent.[51] These theories show difference in the names of the subtitles.[52] There are two types of classification regarding the subtitles. In the doctrine, one of these classifications divides non-signatories into four subtitles: Implied consent, Estoppel, Piercing the corporative veil, and Group of Companies Doctrine.[53] On the other hand, another classification divides non-signatories into ten distinct subtitles: Incorporation by reference, Assumption of obligation, Agency, Veil piercing / Alter ego / Group of Companies Doctrine / Consortium / Joint venture, Estoppel, Assignment, Novation, Succession by operation of the law Subrogation, and Third party beneficiary.[54] The reason of different classifications is that some theories obviously overlap with each other. In this part of the study, the subtitles which must be known in general to understand the theme of the non-signatory issue will be scrutinized.

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[47]<http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/A1E.pdf > Accessed on: 19 May 2015
[48]Born (n 2) 75.
[49]Born (n 12) 495.
[50]Born (n 12) 495.
[51]W Park, Multiple Parties in International Arbitration: Non-Signatories And International Contracts: An Arbitrator's Dilemma, Oxford (2009) 13
[52]Park (n 51) 13.
[53]Park (n 51) 13.
[54]James H. Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justine without Destroying Consent', (2004) Pepperdine Dispute Resolution Law Journal: Vol.4:Iss.3.

A. Agency

Agency is the case where an agreement containing an arbitration clause has been signed by a person who expressly or impliedly did so as a representative of the principal, where the non-signatory principal may be bound to the arbitration agreement.[55] An agent that executes an agreement on behalf of a disclosed principal will not be compelled to arbitrate against its wishes.[56] However, a non-signatory principal may be compelled to arbitration based on the arbitration agreement contained in the contract that the agent signed in his or her capacity as a corporate director, officer or employee where he or she would otherwise be required to defend the claim in court.[57]

Sample cases can create a better understanding about the agency theory. Therefore, at first, one of the most known cases will be shown as an example. In the case of *Interbras Carman Co. v. Orient Victory Shipping Co.*[58] Frota, a shipping company, entered into an agreement to charter a vessel from Orient. The agreement included a standard arbitration clause and Frota subsequently sub-chartered the vessel to Interbras. When a dispute arose concerning the vessel, Interbras was eager to have arbitration and claimed a right to arbitrate as the assignee of Frota, yet it later changed its theory to one of agency and claimed that Frota had entered into the charter agreement which contained the arbitration clause as an undisclosed agent of Interbras. Although the Appellate Court remanded for a trial on the issue of agency, it concluded that an undisclosed principal may enforce a contract made for its benefit by an agent even though the signatory to the arbitration clause was unaware of the existence of an undisclosed principal.[59]

As an additional piece of information about the agents, in general, it is held that the agent who executes an agreement on behalf of a disclosed principal will not be bound if clear evidence to prove the agent's intention to bind himself is lacking.[60] As it is understood, the intention of the principal is a significant issue because there is no doubt that to bind the principal with the contract, at first, there must be an agency contract between the agent and the principal to prove the agency

[55]Hosking (n 8) 293.
[56]Hosking (n 8) 293.
[57]Hosking (n 8) 293.
[58]United States Court of Appeals 2nd Circuit, Interbras Carman Co. v. Orient Victory Shipping Co, No. 115, Docket 81-7340. (1981).
[59]Charles L. Eisen, 'What arbitration agreement? : Compelling Non-signatories to arbitrate' (2001) 44 Dispute Resolution Journal Volume 56.
[60]Tea Courtney, 'Binding Non-Signatories to International Arbitration Agreements: Raising Fundamental Concerns in the United States and Abroad' (2009) 587 Richmond Journal of Global Law & Business Volume 8, No 4.

relation and secondly, there must be the intention of the principal to bind himself with the contract.[61]

There are several cases to reveal the approaches of courts in investigating the intention of the principal. For example, in the case of *Thomson-CSF*[62], it is stated that an agent who is a signatory to the contract on behalf of a disclosed principal cannot be individually bound without clear proof of the agent's intention to bind himself instead of or as well as the principal.[63] *Lerner v. Amalgamated Clothing & Textile Workers Union*[64] case is another example. In the case, it is concluded that if an agent is a signatory to the contract but it does not indicate in the contract that he is signing on behalf of an undisclosed principal, as its agent, *"The agent is deemed to be acting on his own behalf."*[65]

Also, the difference between the Agency and the Group of Companies Doctrine should also be clarified to prevent confusion about their similarities. In a few words, the theory of "group of companies" is different from the agency theory, because its aim is binding other members of the group to the arbitration agreement, and not replacing some members with others.[66]

B. Alter-Ego / Veil Piercing

To help understand the doctrine better, the title should be examined firstly. Alter ego is one of the titles of the doctrine and there are myriad of different titles to define it in different languages: *'Veil piercing'* and '*lifting the corporate veil'* are the titles that are produced by English language to introduce the doctrine.[67]

Veil piercing is a well-known term of the corporate law and it can bind a non-signatory to an agreement if the agreement is signed by the parent, subsidiary or affiliate of a corporation.[68] In particular, the courts have justified piercing the corporate veil in the circumstances of fraud or other wrongdoing or where a parent controls a subsidiary.[69] From the perspective of the courts, this

[61]Courtney (n 60) 587.
[62]Thomson-Csf, S.A. v. American Arbitration Association, Evans & Sutherland Computer Corporation, 64 F.3d 773 (2d Cir. 1995).
[63]Varady. Barcelo and Mehren (n 14) 185.
[64]Lerner v. Amalgamated Clothing & Textile Workers Union, 938 F.2d 2, 5 (2d Cir 1991).
[65]Varady. Barcelo and Mehren (n 14) 185.
[66]Steingruber (n 15) 156.
[67]Born (n 2) 96.
[68]Courtney (n 60) 587.
[69]Courtney (n 60) 587.

examination is especially hard due to fact that it requires an extensive analysis of facts; therefore it is generally applied for truly egregious situations.[70]

In this type of non-signatories, a parent company and its subsidiary are separate and distinct legal entities and due to this separation, an agreement which is signed by the subsidiary to arbitrate is not binding for the parent company.[71] However, if there is a discussion regarding fraud or other similar legal questions or if the subsidiary is dominated and controlled by the parent company, the corporate veil of the subsidiary can be pierced and the parent can be compelled to arbitrate notwithstanding that it is not a signatory to the arbitration agreement.[72]

As an example of the veil piercing doctrine, *Bridas S.A.PI.C v. Gov't of Turkmenistan* case can be reviewed. According to the case, an officer or shareholder of the corporate company that was a signatory to the arbitration agreement was held to be bound by the arbitration agreement where there was a unity of ownership and interest between the corporate signatory and the individual, such that their distinct legal identities no longer existed and to adhere to that sham distinction would promote a fraud or perpetuate an injustice.[73]

In the application of the veil piercing, a few awards imply the moral aspect to prevent avoidance of the responsibilities of a company, by exploiting the fact that the group to which it belongs consists of distinct companies.[74] In an example case of the ICC, the arbitral tribunal held that the corporate veil being pierced very much depended on the circumstances of the particular case.[75] Significant control of the subsidiary's activities by the parent or shareholder is not adequate. Additionally, if the actual control and management of the subsidiary by the parent company has contributed to making illusory recourse against the subsidiary, the case for the corporate veil becomes more compelling.[76]

As it is repeated several times, the main aim of this study is the Group of Companies Doctrine as a non-signatory issue. In the scope of this subtitle, the relation between the alter ego and the Group of Companies Doctrine must be evaluated. This is due to the fact that the existence of parent and subsidiary companies and control factors make these two distinct types of non-

[70]Alexandra Ann Hui, 'Equitable Estoppel and the Compulsion of Arbitration' (2007) 724 60 VAND. Law Review 711.
[71]Carte Blanche PTE., Ltd. v. Diners Club Int'l, Inc., 2 F.3d 24, 26 2nd Cir. (1993).
[72]Eisen (n 59) 44.
[73]Richard Bamforth and Irina Tymczyszyn, 'Joining Non-Signatories to an Arbitration: Recent Developments', Dispute Resolution 2007/08 Volume 2: Arbitration, 10.
[74]Gaillard and Savage (n 26) 285.
[75]ICC Award No: 8385 (1995), U.S. Company v. Belgian Company, 124 J.D.1. 1061 (1997).
[76]ICC Award No: 8385 (1995), U.S. Company v. Belgian Company, 124 J.D.1. 1061 (1997).

signatories similar. However, the alter ego is a non-consensual mechanism that arises from corporate law.[77] It has never been intended to demonstrate arbitral consent since it aims at punishing fraudulent conduct.[78]

On the other hand, the Group of Companies Doctrine has not been universally accepted and as an example of some jurisdictions, Switzerland has refused to recognize the doctrine.[79] Moreover, the U.S. and English Courts have shown that they are ready to refuse to recognise the Group of Companies Doctrine though they have on occasion permitted the piercing of the corporate veil so as to recognise third party group affiliates as non-signatory parties to arbitration agreements.[80] This acceptance is also a clue to prove the importance and applicability of the alter ego as a non-signatory issue.

C. Succession

Succession can be defined as a company's merger or combination with the original party to an agreement.[81] Moreover, it is an issue of companies rather than natural persons.[82] To make the definition more clear, an example can be beneficial. To illustrate, if Company A and Company B conclude a contract that involves an arbitration clause and then if the Company B merges into Company C, Company C becomes a party to the contract and the arbitration agreement.[83]

In the case of succession, the courts may compel the non-signatory assignee to arbitrate and the arbitration agreement may be deemed transferred or found binding on the successor even in the absence of an express agreement to the arbitration agreement.[84] To compel the successor non-signatory to arbitrate, the courts require some conduct evidencing the intent by the non-signatory in general.[85]

Furthermore, it is worth mentioning that assignment or succession is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.[86] Also, succession is

[77]Alexandre Meyniel, 'That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine' (2013) 50 Arbitration Brief, Volume 3, Issue 1, Article 3
[78]Meyniel (n 77) 50
[79]Redfern and Hunter (n 1) 150.
[80]Redfern and Hunter (n 1) 150.
[81]Born (n 12) 521.
[82]Redfern and Hunter (n 1) 148.
[83]Born (n 2) 97.
[84]M Palay and T Landon, 'Participation of third parties in International arbitration: Thinking outside of the Box', (2011) 14 Global Legal Group, Chapter 3.
[85]Giedre Pociūtė, 'Arbitration Agreement Extension To Non-Signatories: Rights And Duties Of The Parties That Have Not Submitted Any Dispute To Arbitration' (2012) 16 Vytautas Magnus University, Thesis For The Degree of Master.
[86]Pociūtė (n 85) 16.

accepted as a matter of domestic law in terms of finding a solution.[87] This is because neither the New York Convention nor the UNICITRAL model law deals with the issues of succession.[88]

D. Assignment or Transfer

Assignment is a way to transfer contracts from one party to another and at that point, there is a discussion about the capability of arbitration agreements to be transferred.[89] In earlier cases, there are lots of decisions which revealed that arbitration agreements can be binding only upon the original parties.[90] However, with the passing of time, this view was abandoned and it is currently accepted that parties have a right to assign or transfer their arbitration agreements.[91]

Transfer of the arbitration clause is a part of the assignment of the underlying contract and this situation creates a presumption which is called as 'automatic assignment' to clarify the assignment of the arbitration clause with the underlying contract.[92]Automatic assignment can be interpreted as a vision of France.[93] Nonetheless the U.S. must be analysed to show the other view.[94] The U.S. courts imply that closely analysing the arbitration provision and the assignment agreement to ensure this result is consistent with the parties' intention, thusly regarding intention as an important issue, contrary to the French approach.[95] On the other hand, the Swedish Supreme Court appears to have adopted a middle position.[96] In other words, according to the Swedish jurisprudence, an arbitration clause must be presumed as being assignable if the parties have not expressly agreed otherwise, yet once assigned it will operate vis-a-vis the assignee only if that party has a knowledge which is actual or constructive of the arbitration clause.[97]

With these pieces of information about the Assignment, it is really clear that despite different approaches, assignment in non-signatories is generally accepted.

E. Estoppel

Estoppel is also one of the fundamental doctrines of binding non-signatories by the arbitration agreement and it is a well-known legal doctrine that is accepted particularly by common

[87]Pociūtė (n 85) 15.
[88]Pociūtė (n 85)16.
[89]Born (n 2) 98.
[90]Cottage Club Estates Ltd. v. Woodside Estates Co. (1928) 2 K.B 463 (K.B.).
[91]Born (n 2) 98.
[92]Born (n 2) 98.
[93]Gaillard and Savage (n 26) 716.
[94]Gaillard and Savage (n 26) 716
[95]Gaillard and Savage (n 26) 716.
[96]Redfern and Hunter (n 1) 151.
[97]Redfern and Hunter (n 1) 151.

law jurisdictions.[98]According to these jurisdictions, Estoppel can be defined in different ways, but in general, it means that a party is precluded by considerations of good faith from acting inconsistently with its own statements or conduct.[99]

As it is referred to in the case of *Thomson-CSF, SA v. American Arbitration Association*,[100] permitting a non-signatory to invoke an arbitration agreement against its signatories, many authorities have applied Estoppel and if a signatory claims rights against a non-signatory pursuant to the contract that includes an arbitration clause, it can be estopped from claiming that the non-signatory party is not a party to the arbitration agreement.

According to the doctrine, if a non-signatory acts as a party or raises a claim or exercises under the contract which includes an arbitration clause, it is estopped from denying the arbitration clause contained in that contract.[101]

The U.S. Federal Courts have a road map to draw on the boundaries of the doctrine of equitable estoppel to bind non-signatories to arbitration agreements.[102] According to the road map, if the signatory's claims presume the existence of a written agreement containing an arbitration clause or if the signatory alleges concerted misconduct between a non-signatory and a signatory, the doctrine can be applicable to bind non-signatories. [103]

In the application of the U.S. courts, the Fourth, Fifth, and Eighth Circuits have expressly adopted this approach.[104] However, the Second Circuit has used a different formula which is nevertheless similar to the other courts' approach. In the recent case of *Meyer v WMCO-GP L.L.C.*[105], the Texas Supreme Court explained the doctrine of estoppel and stated that any person including non-signatories claiming a benefit from a contract which contains an arbitration agreement is equitably estopped from refusing to arbitrate.[106]

Pursuant to the formula, direct benefit is a key point and this circumstance is also stated in the case of *Tepper Realty Co. v. Mosaic Tile Co.*[107], where the Court held that benefitting from a

[98]Born (n 12) 523.
[99]Born (n 12) 523.
[100]Thomson-Csf, S.A. v. American Arbitration Association, Evans & Sutherland Computer Corporation, 64 F.3d 773 (2d Cir. 1995).
[101]Born (n 2) 98.
[102]Bamforth and Tymczyszyn (n 73) 9.
[103]Bamforth and Tymczyszyn (n 73) 9.
[104]Bamforth and Tymczyszyn (n 73) 9.
[105]Meyer v. WMCO-GP L.L.C., 211 S.W.3d 302, 305 (Tex. 2006).
[106]Bamforth and Tymczyszyn (n 73) 9.
[107]Tepper Realty Co. v. Mosaic Tile Co., 259 F.Supp. 688,692 (S.D.N.Y. 1966).

contract to have advantages, yet denying its disadvantages creates unreliability.[108] Thus, it can be asserted again that the doctrine is vital because of the need of reliability in contracts.

F. Corporate Officers and Directors

As it is seen, in any type of the non-signatories, the U.S courts have a significant impact and the Corporate Officers and Directors doctrine is also established by the U.S. Courts although there is no unified approach.[109]

In the case of *Hirschfeld Prod. Inc. v. Mirvish*[110], the Court stated that officers and directors of a corporate party may invoke the arbitration clause even if individual officers and directors are not parties to the underlying contract. To illustrate, if Company A and Company B have an arbitration agreement and if the Chief Executive Officer of Company B is sued personally by Company A, he or she is permitted to invoke the agreement.[111]

It must also be noted that outside the United States, few other jurisdictions follow this approach which permits corporate employees or agents to invoke arbitration agreements to which they are not signatories.[112]

G. Incorporation by Reference

Incorporation by reference is also one of the doctrines relating to non-signatories and it can be applicable when a party signs an agreement that incorporates, or references, a second agreement which includes an arbitration clause.[113] In that theory, although the party is not a signatory to the contract that includes the arbitration agreement, it will be compelled to arbitrate because it signed the contract referencing the one requiring arbitration.[114] In the case of *Upstate Shredding, LLC v. Carloss Well Supply Co.*[115], the Court turned this exception into a two-part test by requiring for the agreement to contain the words of incorporation and that the arbitration agreement is broad enough to include the non-signatory.[116]

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[108]Hosking (n 8) 293.
[109]Born (n 2) 99.
[110]Hirschfeld Prod. Inc. v. Mirvish, 88 N.Y.2 d.1054 (N.Y. 1996).
[111]Born (n 2) 99.
[112]Born (n 2) 99.
[113]Robert M. Nelson, 'Guide - How to Bind Non-Signatories to an Arbitration Clause; Guide - How to Prevent Non-Signatories from Being Bound by an Arbitration Clause' 1.
<http/www.nelsonadr.ca/media.php?mid=14&xwm.> Accessed on: 08 June 2015.
[114]Courtney (n 60) 586.
[115]Shredding, L.L.C. v. Carloss Well Supply Co., 84 F. Supp. 2d 357, 366 (N.D.N.Y. 2000).
[116]Dwayne E. Williams, 'Binding Non-signatories to Arbitration Agreements', (2006) 175, 176 25 FRANCHISE Law Journal

In another case, *JS & H Const. Co. vs. Richmond County Hospital Authority*[117], the Court found a provision in a subcontract which incorporated by reference the "general conditions" of a prime contract. It was clearly provided that the subcontractor would assume toward the prime contractor those responsibilities and obligations that the prime contractor assumed toward the hospital authority in the prime contract. That provision would also subject the subcontractor to the provision in the prime contract that stated the parties would submit contract disputes to arbitration.[118]

As another sample case of the incorporation by reference theory, *Import Export Steel Corp. v. Mississippi Valley Barge Line Co.*[119] can be shown. In the case, it was held that in the separate agreement with the non-signatory, it was expressly stated that assuming all the obligations and privileges of the signatory party under the sub-charter could establish grounds for enforcement of the arbitration clause by the non-signatory.[120] As a further example to clarify the application of the theory, the case of *Contiental U.K. Ltd. v. Anagel Confidence Compania Naviera, SA*[121] should be taken into account. In the case, it was concluded that if a party's arbitration clause is expressly incorporated into a bill of lading, the parties who were not signatories but who were linked to that bill through general principles of contract law or agency law may be bound by the arbitration agreement contained therein. [122]

On the other hand, if the non-signatory agreement is not explicitly incorporated by reference, courts will be reluctant to compel the non-signatory to arbitrate.[123]

H. Third Party Beneficiary

The theory of the third party beneficiary requires that the court look into the intentions of the parties at the time the contract was executed.[124] In this analysis, the court examines what the parties intended. The fact that a person is affected directly by the conduct of the parties or that he may have substantial interest in a contract's enforcement, does not make him a third party beneficiary.[125]

[117]JS& H Const. Co. v. Richmond County Hospital Authority, 473 F.2d 212 (5th Cir., 1973)
[118]Clint A. Corrie, Challenges in International Arbitration for Non-Signatories, Comparative Law Yearbook of International Business.
<https://www.international-arbitration-attorney.com/wp-content/uploads/11890047141.pdf> Accessed on: 27 June 2015.
[119]Import Export Steel Corp. v. Mississippi Valley Barge Line Co., 351 F 2d 503, 505-506.
[120]Varady, Barcelo and Mehren (n 14) 188.
[121]Contiental U.K. Ltd. v. Anagel Confidence Compania Naviera, SA 658 F.Supp. 809, 813 (S.D.N.Y. 1987).
[122]Varady, Barcelo and Mehren (n 14) 188.
[123]Corrie (n 118).
[124]Pociūtė (n 85) 17.
[125]DuPont de Nemours & Co. vs. Rhone Poulenc Fiber & Resin Intermediates, SAS, 269 F.3d at 196–97 (3rd Cir.2001).

To clarify the application of the Third Party Beneficiary Doctrine, there is considerable case law.[126] According to the cases, an arbitration clause may be applied against a third party beneficiary of a contract.[127] In one of the cases, the court specified a test to detect the third party beneficiary status as follows: To characterise a party as a third party beneficiary of a contract, firstly, contracting parties must have intended for the third party beneficiary to benefit from the contract. Secondly, the benefit must have been intended as a gift or satisfaction of a pre-existing obligation of that person. Thirdly, the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract.[128]

In the application of the Third Party Beneficiary Doctrine, the third part beneficiary must be defined or expressed clearly under the contract which has an arbitration clause that affects the third party directly. Additionally, other parties to the contract must have an intention to make the third party a beneficiary of the contract.[129]

In the scope of the Third Party Beneficiary Doctrine, the validity and effectiveness of the arbitration clause in an agreement have a link with the parties which are directly implicated in the performance of the contract and in the disputes.[130] This demonstrates that the parties were aware of the arbitration agreement although they were not signatories to the contract.[131]

To illustrate, the receipt of payments regarding the agreement can be interpreted as direct consent to the terms of the agreement and substantial involvement in the performance of a contract.[132] Therefore, third party beneficiaries who are aware of the basis of the payments must be regarded as knowledgeable about the agreement and the arbitration clause. This type of conduct shows that third party beneficiaries have consent to be bound by the arbitration agreement.[133]

Another example can be shown by the *Pyramids Plateau Case*[134]. According to the case, the Egyptian Ministry of Tourism participated in the negotiations of the contract and concluded it. The

[126]Robert M. Hall, 'Third Party Beneficiary: Binding Non-signatories to Arbitration Clauses In Reinsurance Contracts' Accessed: < http://www.robertmhall.com/articles/3rdParBenArt.pdf > Accessed on: 27 June 2015.
[127]Hall (n 126)
[128]DuPont De Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediaries et al., 269 F.3d 187, 196 (3rd Cir. 2001).
[129]Pociūtė (n 85) 18.
[130]Bernard Hanotiau, 'Groups of Companies in International Arbitration' In Pervasive Problems in International Arbitration (2006) 279 Kluwer Law International, Vol 15.
[131]Hanotiau (n 130) 279.
[132]Rimantas Daujotas, 'Non-Signatories and Abuse of Corporate Structure In International Commercial Arbitration' 12. <http://ssrn.com/abstract=2148900> Accessed on: 19 June 2015.
[133]Daujotas (n 132) 12.
[134]ICC case no: 3493 of 1983, SPP (Middle East) Ltd. v. Arab Republic of Egypt, IX Yearbook Comm. Arb. (1983), 111.

Tribunal stated that signing of the actual contract by the government is evidence of the intention of the Egyptian government to be bound by the arbitration agreement.[135]

In addition to these requirements, while applying the Third Party Beneficiary Doctrine, the U.S. courts state that for a person to be an intended third party beneficiary, the contract must be concluded directly for the benefit of that person.[136]

It should be also noted regarding the Third Party Beneficiary Doctrine; the meaning of the doctrine is not only the extension of the arbitration clause to third parties. Other concepts such as single economic entity should also be examined as the Group of Companies Doctrine is also associated with these concepts in this context.[137]

To summarize, in this part of the study, fundamental non-signatories have been introduced in light of different perspectives and precedents. However, as indicated in the introduction part, the main theme of the article, the Group of Companies Doctrine, will be covered more extensively in the following part.

IV. Group of Companies Doctrine

Different judges and arbitrators around the world have viewed the extension of the arbitration agreement to non-signatories in a variety of ways and for this reason, the position of non-signatories is not clear.[138] At this juncture, setting factual diversity aside, one of the main debateable issues is the Group of Companies Doctrine.[139] This is because, it often overlaps with similar theories such as arbitral estoppel, good faith, tacit consent and piercing the corporate veil[140] However, the Group of Companies Doctrine is accepted as an identification for the view of non-signatories in general terms and it is not actually a legal rule based exclusively upon the structure of related corporations.[141] Rather, the doctrine has developed on the basis of an analysis of the facts in each given case.[142]

Certain cases of the ICC can be evaluated briefly as examples of the application of the doctrine. For example, in ICC case No. 4972, the arbitral tribunal held that the arbitration clause

[135]ICC case no: 3493 of 1983, SPP (Middle East) Ltd. v. Arab Republic of Egypt, IX Yearbook Comm. Arb. (1983), 111.
[136]Ramminger v. Archdiocese of Cincinnati, 1st Dist. No. C-060706, 2007-Ohio-3306; Caruso v. Natl. City Mtge. Co., 187 Ohio App.3d 329, 2010-Ohio-1878.
[137]Daujotas (n 132) 15.
[138]E Gaillard and D Pietro, Enforcement of Arbitration Agreements and International Arbitral Awards The New York Convention in Practice, Cameron May (2009) 456.
[139]Gaillard and Pietro (n 138) 456.
[140]S Brekoulakis, Third Parties in International Commercial Arbitration, Oxford University, (2010) paras 6.05-6.06.
[141]Daujotas (n 132) 16.
[142]Daujotas (n 132) 16.

signed by the parent company was extendable to its subsidiaries. In ICC cases No. 5721 and 5730, the arbitral tribunal stated that the arbitration clause which was signed by the subsidiary company could also be applicable for the parent company.[143] In another case of the ICC, No. 5103, the arbitral tribunal concluded that a group of companies must be considered as an economic unity since all of the companies that belong to it have the same participation in a complex international business relationship, and that the interest of the group is valid for each company of the group.[144]

In these cases, the parent companies were accepted as parts of the arbitration proceedings, because the arbitral tribunals stated that the parent companies implicitly accepted the arbitration clauses.[145]

The Group of Companies Doctrine is based on two elements which are divided as objective and subjective. The objective element refers to the actual existence of a group of companies under common ownership that is operated and managed closely by the parent company. The subjective one is represented by the implied acquiescence of the parent company to the contracts entered by the subsidiary and the participation of the parent company in the formation, performance and / or termination of the contract.[146]

It should be taken into consideration that according to the report of UNCITRAL Working Group on Arbitration, the doctrine requires proof of the following issues: a) that the legally distinct company being brought under the arbitration agreement is part of a group of companies that constitute one economic reality; b) that the company played an active role in the conclusion and performance of the contract; and c) that including the company under the arbitration agreement reflects the mutual intention of all parties to the proceedings.[147]

To make sure that all of these cases are well understood, it is also necessary to dwell upon the case of Dow Chemical which is the founder of the doctrine.

[143]I, When are Non-Signatories Bound by the Arbitration Agreement in International Commercial Arbitration? University of Chile and University of Heidelberg, (2012) 44.
[144]Rodler (n 143) 44.
[145]Rodler (n 143) 45.
[146]Rodler (n 143) 42.
[147]Yaraslau Kryvoi, 'Piercing the Corporate Veil in International Arbitration' (2011)177 Global Business Law Review 1.

- **Dow Chemical Case**

The Dow Chemical case is an example of the French Law which provides for extending the arbitration clause to group of companies if that extension is possible in light of the express or implied intention of the parties.[148]

The dispute arose in the early 1980's between the companies of the Dow Chemical Group and the French Company Isover-Saint-Gobain. In that case, both of the subsidiaries of the Dow Chemical Company had entered into contracts for the distribution of thermal insulation products.[149] Each of the contracts contained arbitration clauses and problems arose regarding the quality of the goods. Arbitration proceedings were initiated by the two companies of the Dow group which signed the contracts together with their parent company and another subsidiary, neither of which had signed the contracts.[150]

The respondent, Isover-Saint-Gobain, argued that the arbitral tribunal had no right to hear the claims which were raised by the non-signatories because they were not parties to the contracts that involved the arbitration clauses.[151]

The arbitral tribunal, by its interim award, rejected the arguments of the respondent by applying substantive rules of international commerce and by analysing the signature, performance and termination of the disputed contracts.[152] It is significant to note that participation in all three stages is a requirement, because this construction is in line with the idea that the extension of the arbitration agreements to non-signatories is allowed in rare and exceptional situations. [153] The Dow Chemical is a case in which all three stages were participated.

In the case, the arbitral tribunal held that it had jurisdiction over all of the claimants and the decision discussed undivided economic reality of the group of companies and unimportance of the distinct judicial identity.[154]

In the Dow Chemical decision, the arbitrators stated that the Dow Chemical Company had a precise effect and absolute control over its subsidiaries which was involved in the performance of the contract at issue.[155] To detect this relationship, the arbitral tribunal used a method which can be

[148]Gaillard and Savage (n 26) 286.
[149]Park (n 51) 20.
[150]Park (n 51) 20.
[151]Courtney (n 60) 588.
[152]Gaillard and Savage (n 26) 287.
[153]Meyniel (n 77) 46.
[154]Gaillard and Savage (n 26) 287.
[155]Dow Chemical v. Isover Saint Gobain (n 11) 136-137.

clarified as determining the company's role in the performance of the contract, the intention of the parties and the company's attitude towards the disputes that arise.[156] In accordance with this method, the arbitral tribunal found that Dow Chemical was bound by the arbitration clause although it was not a signatory to the contract. The arbitrators also concluded that even if there were distinct legal identities, they all shared the same economic reality.[157] On the other hand, the application of the doctrine has a clear link with the mutual intent of the parties and thus the consent requirement is also satisfied.[158] The decision was later on upheld by the Paris Court of Appeals.[159]

In 1983, the Paris Court of Appeals rejected an action to set aside that award and it referred to common intention of all parties to conclude that Dow Chemical France and Dow Chemical Company were the parties of the contracts and the arbitration clause could be applicable to them although they were not signatories to the contracts.[160]

The Dow Chemical case has some points which create a formula to apply the Group of Companies Doctrine in commercial arbitration. However, it should also be noted that the doctrine has an influence on state owned companies that are subjects of the investment arbitration.

A. Application of the Doctrine on State Owned Companies

The Group of Companies Doctrine also applies for state owned companies. State owned companies are issues of investor-state arbitrations.[161] The application of the doctrine in this field is a significant matter, since foreign direct investment is a major component of the world economy.[162] Therefore, being a tool to resolve disputes which arise in this scope reveals the importance of the Group of Companies Doctrine.

State owned companies, in other words, state entities must be defined at first to understand the application area of the Group of Companies Doctrine. State entities are based on the *'instrumentality concept'*.[163] According to ICC case law, *'instrumentality'* can be defined as an

[156]W. Reismann, W Craig, W Park and J Paulsson, International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes, University Casebook Series (2003) 486.
[157]Dow Chemical v. Isover Saint Gobain (n 11) 136.
[158]Courtney (n 60) 589.
[159]Reismann, Craig, Park and Paulsson (n 156) 486.
[160]Gaillard and Savage (n 26) 287.
[161]Born (n 2) 411.
[162]Born (n 2) 411.
[163]Eduardo Silva Romero, 'Are States Liable for the Conduct of Their Instrumentalities?', (2008) 36 IAI Series On International Arbitration No: 4

entity of the State that has its own legal personality which is created by the State with a specific purpose and which is controlled by the State.[164]

A clear definition of a State *'instrumentality'* is shared in the ICC Award No: 6465. According to the case, it is stated that the state entity serves for the purpose of satisfying the requirements of the X government as a vehicle and it is controlled by and dependent under the decisive influence of the X government. The government exercises its powers to such a degree which the state entity must be seen as an instrumentality of the X Government.[165]

Vivendi[166], an ICSID case, may be analysed as an example. The case is one of the known examples that are cited by authors to clarify the meaning of the state entities concept. This case arose from a complex and often bitter dispute associated with a 1995 Concession Contract that a French company, (Compagnie Generale des Eaux), and its Argentine affiliate, (Compania de Aguas del Aconquija, S.A.) made with Tucuman, a province of Argentina, and with the investment in Tucuman resulting from that agreement.[167] The Republic of Argentina was not a party to the Concession Contract or to the negotiations that led to its conclusion.[168] However, the Tribunal, while considering the question of its jurisdiction, held that the actions of states' political subdivisions are attributable to the central government.[169] Therefore, at that point, it can be argued that which party signed the contract is not important; since the actions of non-signatories are accepted as the acts of its controlling party.[170]

An ICC case can be mentioned as a further example of the doctrine's application on state owned companies. The Tribunal in that case applied the Group of Companies Doctrine to hold liable a State entity which was one of the respondents in the case, for the activities of a second respondent which represented the Ministry of Agriculture[171].

The above explanations and examples regarding the application of the Group of Companies Doctrine help define the concept. However, to make this definition more clear, consent should also be examined closely.

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[164]Romero (n 163) 36.
[165]ICC Case No. 6465, Aug. 15, 1991 Interim Award
[166]Compañía de Aguas del Aconquija S.A. and Compagnie Generale des Eaux v. Argentine Republic, Award of the Tribunal, ICSID ARB/97/3 (2000)
[167]<http://www.italaw.com/sites/default/files/case-documents/ita0210.pdf> Accessed on: 20 June 2015
[168]<http://www.italaw.com/sites/default/files/case-documents/ita0210.pdf> Accessed on: 20 June 2015
[169]<http://www.italaw.com/sites/default/files/case-documents/ita0210.pdf> Accessed on: 20 June 2015
[170]<http://www.italaw.com/sites/default/files/case-documents/ita0210.pdf> Accessed on: 20 June 2015
[171]ICC 9762 (2001) para.35.

B. Implied Consent in the Doctrine

The requirement of consent to be bound by the arbitration agreement has been evaluated under the section on the arbitration agreement. However, in this part of the study, implied consent must also be examined with example cases to reveal that the intentions of the parties are much more important than they are considered to be.

Implied consent is one of the fundamental cornerstones of contract law and it is established in the International UNIDROIT principles.[172] Pursuant to Article 2/1/1 of the UNIDROIT principles, it is stated that a contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show an agreement.[173] Additionally, Article 4/1 provides that a contract shall be interpreted according to the common intention of the parties.[174] These provisions demonstrate that each and every detail of the contract cannot be put in writing and in some circumstances; the parties enter into contracts based on their implied intention.[175]

In the application of the Group of Companies Doctrine, France is the first country and it has a leading position all around the world.[176] This doctrine is applied where a party to an international transaction is a member of a group of companies.[177] At that point, the consent of a member of the group which is a non-signatory may lead for that member to be bound by the agreement if another member of the group signed the agreement and the conduct of the group of companies implies consent to the contractual obligations.[178] The requirement of consent or conduct amounting to consent is a necessity to mention an arbitration agreement which is binding upon non-signatories even if it is determined that a non-signatory belongs to the group of companies.[179]

The Dow Chemical case is an excellent example to discover the meaning of the implied consent of the parties to be bound by an arbitration agreement. There are many other cases demonstrating the application of implied consent. To exemplify, a myriad of ICC cases also show that the rationale underlying the extension of the arbitration agreement to non-signatories is more closely related to consent rather than having a single economic entity as a group.[180]

[172]Pociūtė (n 85) 15.
[173]Pociūtė (n 85) 15.
[174]Pociūtė (n 85) 15.
[175]Pociūtė (n 85) 16.
[176]Bernard Hanotiau, Complex Arbitrations: Multipart, Multicontract, Multi-Issue and Class Actions, Kluwer Law International (2005) 73.
[177]Hanotiau (n 176) 73.
[178]Hanotiau (n 176) 74.
[179]Courtney (n 60) 588.
[180] Meyniel (n 77) 28.

Moreover, in the case of *Sponsor A.B. v. Lestrade*[181] the Pau Court of Appeals accepted the doctrine.[182] In that case, it was also held that there could be no general rule for an arbitration agreement which was signed by one or more members of the group of companies to be extended to other companies within the group.[183] Furthermore, as it is concluded in the same case, detecting intentions of the parties is not a single indicator, but also all the circumstances of the case must be analysed to come to a conclusion in this regard.[184]

In the *Kis France v. Societe Generale* [185] case, the Paris Court of Appeal provided for another example of the circumstances that lead to the extension of an arbitration agreement within a group. The case concerned a dispute over a framework contract.[186] In the case, a parent company and its co-contractor had signed this contract and the parent company declared that it was taking an action on behalf of its subsidiaries.[187] Therefore, the arbitral tribunal held that the co-contractor and its subsidiaries could initiate arbitration proceedings related to the framework contract against both the parent company and its subsidiaries.[188]

While rendering its decision, the arbitral tribunal took into consideration that there was a common intention of the parties to hold Kis France and Kis Photo liable for any and all amounts that are owed by them or the subsidiary, Kis Corporation.[189]

As it is seen from these precedents, implied consent can be accepted as one of the fundamental points of the Group of Companies Doctrine.

C. Application of the Doctrine in Civil Law and Common Law Jurisdictions

As stated above, there is no consensus regarding the doctrine and its application is a critical issue.[190] Due to the lack of a clear rule at national or international level to enable a better understanding of the application of the doctrine, it is evaluated and decided on a case by case basis. For this reason, different jurisdictions can create different jurisprudences.[191] In general terms, the

[181]Court of Appeals (Regional Court of Appeal) CA Pau, (Sponsor A.B. v. Lestrade) (1986).
[182]Bernard Hanotiau, 'Consent to Arbitration: Do We Share a Common Vision?' (2011) 539 The Official Journal of the London Court of International Arbitration (LCIA) Arbitration International, Volume 31.
[183]Hanotiau (n 182) 539.
[184]Hanotiau (n 182) 539.
[185]Kis France v. Societe Generale (France) Court of Appeals, (1989).
[186]Gaillard and Savage (n 26) 289.
[187]Gaillard and Savage (n 26) 289.

[189]G Burn, The London Shipping Law Centre Forum for Shipping, Insurance, Trade and Maritime Safety Arbitration And Third Parties The Group Of Companies Doctrine, University College London, (2009) 3.
[190]Born (n 2) 97.
[191]Gaillard and Pietro (n 138) 456.

main difference depends on the application of civil and common law jurisdictions. Therefore, in this part of the study, the differences will be scrutinized with sample cases.

1. Civil Law Jurisdictions

In the determination of the consent, civil law jurisdictions are similar to each other in practice.[192] However, in the point of arbitral consent, there are great differences.[193]As an arbitration-friendly country, France has a system that requires little to no form for purposes for contractual validity.[194] However, Swiss law is more form-driven than France although it has relaxed its formalistic requirements gradually in support of the binding non-signatories.[195] This alteration must be noted particularly, as Switzerland took a conservative attitude regarding the Group of Companies Doctrine which was demonstrated in several cases[196]. However, after numerous decisions of the French courts supporting the extension of the arbitration clause, the alteration in the Swiss Courts started with a landmark case. In that case, the Swiss Federal Supreme Court concluded clearly that if there is an arbitration clause, extending the arbitration to a non-signatory may be possible.[197] Nevertheless, the parties' intention remains significant even if it can be litigated on the merits now.[198]

On the other hand, Germany, another significant jurisdiction of civil law, still continues its insistence on the writing requirement and the principle of privity.[199] Furthermore, extension is not based on the Group of Companies Doctrine in Germany. As a matter of fact, scholars agree that the companies of the same group cannot be bound by the arbitration agreements signed by other members of the same group. This determination is valid even if those members have participated in the negotiation, performance and termination of the agreement.[200]

Brazil and Turkey can also be evaluated regarding the Group of Companies Doctrine. In its general sense, Brazil does not specifically support the 'Group of Companies' doctrine. However, in its very recent cases, it suggests that it would not be opposed to the enforcement of such a doctrine within its legal system.[201]

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[192]Hanotiau (n 182) 539.
[193]Hanotiau (n 182) 539.
[194]Hanotiau (n 182) 539.
[195]Meyniel (n 77) 29.
[196]Burn (n 189) 5.
[197]Meyniel (n 77) 29.
[198]Meyniel (n 77) 29.
[199]Otto S. Sandrock, 'Extending the Scope of the Arbitration Agreement to Non-Signatories',(1994) 165 The Arbitration Agreement ASA Special Series no 8.
[200]Sandrock (n 199) 165.
[201]Meyniel (n 77) 30.

In Turkish application, the doctrine is debatable. In a decision of the Turkish Supreme Court rendered in 1989, which indirectly tackled the Group of Companies Doctrine, the Court dismissed the claim for the enforcement of an award which was directed at the parent company based on an arbitration agreement to which the subsidiary was a party.[202]

On the other hand, the Turkish Commercial Code[203]states in Article 203/1, *"…The bodies of the dependent company are obliged to comply with the instruction."*[204] Considering this provision, despite the award of the Supreme Court, Turkey should be accepted as a supporter of the Group of Companies Doctrine.

The different applications in the civil law jurisdictions show that there is no unified implementation in the doctrine. However, the application of the common law jurisdictions certainly shows a more conservative position in terms of the doctrine.

2. Common Law Jurisdictions

Both of the leading countries of common law jurisdictions; England and the U.S. are reluctant to apply the doctrine concerning the extension of arbitration agreements to non-signatories.[205] However, the U.S courts are more willing to recognize the extension of an arbitration agreement to non-signatories.[206] As provided also in the case of United States Court of Appeals, *J.J. Ryan & Sons v. Rhone Poulenc Textile*[207], the U.S. courts do not apply the Group of Companies Doctrine, yet they may well use common law doctrines like Veil-Piercing and Estoppel in order to extend the arbitration agreement to cover related entities.[208]

The U.S. courts generally refuse to apply the Group of Companies Doctrine to bind non-signatories.[209] The connection between the Alter Ego and Group of Companies Doctrine reappears as a discussion in the U.S. courts and they are distinguished as two theories by the courts, primarily on the basis of fraud.[210] Not being listed as a recognized method, the doctrine has received mixed feedback in the U.S courts.[211]

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[202]11. HD, 7.11.1989, 1990/2931 E., 1991/6828 K.
[203]Turkish Commercial Code.
[204]<http://www.pwc.com.tr/en_TR/TR/publications/ttk-assets/pages/ttk-a_blueprint_for_the_future.pdf> Accessed on: 24 June 2015.
[205]Meyniel (n 77) 31.
[206]Edward Tang, 'Methods to Extend to Scope of an Arbitration Agreement to Third Party Non-Signatories', Research Paper, 10.
[207]J.J. Ryan & Sons v. Rhone Poulenc Textile, 863 F.2d 315, 320–21 (4th Cir. 1988).
[208]< http://openjurist.org/863/f2d/315/jj-ryan-sons-inc-v-rhone-poulenc-textile-sa > Accessed on: 15 June 2015.
[209]Meyniel (n 77) 32.
[210]Meyniel (n 77) 32.
[211]Meyniel (n77) 32.

In the case of *Sahrank*[212], the Second Circuit overturned the award of a tribunal in Cairo which applied the doctrine.[213] The Tribunal had held that pursuant to the Egyptian law, although the parent company and subsidiary company had separate legal identities, the subsidiary companies of the group of companies were deemed to be subject to the arbitration clause.[214] This is because the consent of the parent company to participate in a contractual relationship is a necessity. However, in the stage of enforcement, the U.S. court concluded that under the American law, an arbitration agreement can be extended only on the basis of theories such as: veil piercing, estoppel and incorporation by reference.[215] Additionally, the Court separated these theories from the Group of Companies Doctrine and stated that these theories require an agreement to arbitrate, under the general principles of contract law, that is to say that the totality of evidence supports an objective intention to agree to arbitrate.[216] In the conclusion part of the decision, the Court commented that an American non-signatory cannot be compelled to arbitrate if there is no full demonstration 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 practice of dealing through a subsidiary is entirely appropriate and essential for the American conduct of foreign trade.[217]

Despite the decision of the Second Circuit, New York Society of Maritime Arbitrations concluded the case of *Map Tankers*[218] that provided a view to the contrary.[219] In the case, the arbitrators stated that it is not reasonable or practical to prevent a non-signatory party from being included in the arbitration regarding the claims of its group of subsidiaries or partners.[220]

The contradicting views from different courts and tribunals cause inconsistency regarding this issue.[221] While the application of the doctrine was not allowed by the Second Circuit, other institutions kept their door open.[222]

On the other hand, the English Courts maintain their position to protect their conservatism.[223] English law refuses the existence of the doctrine, yet it also provides that if the law

[212]Sarhank Group v. Oracle Corporations 404. F.3d 657 (2d. Cir 2005)
[213]<http://openjurist.org/404/f3d/657/sarhank-group-v-oracle-corporation> Accessed on: 15 June 2015
[214]<http://openjurist.org/404/f3d/657/sarhank-group-v-oracle-corporation> Accessed on: 15 June 2015
[215]<http://openjurist.org/404/f3d/657/sarhank-group-v-oracle-corporation> Accessed on: 15 June 2015
[216]<http://openjurist.org/404/f3d/657/sarhank-group-v-oracle-corporation> Accessed on: 15 June 2015
[217]<http://openjurist.org/404/f3d/657/sarhank-group-v-oracle-corporation> Accessed on: 15 June 2015
[218]Map Tankers v. Mobil Tankers, YCA (1982).
[219]J Poudret and S Besson, Comparative Law of International Arbitration, Sweet & Maxwell Press (2007) 263.
[220]Poudret and Besson (n 219) 263.
[221]Poudret and Besson (n 219) 263.
[222]Tang (n 206) 16.
[223]Tang (n 206) 16.

applicable to the arbitration agreement recognizes the doctrine, the English Courts would have no issue with enforcing such an award.[224]

At that point, the precedents of the English Courts can be beneficial to understand the position of the English law with regard to the doctrine. In *Caparo Group Ltd v Fagor Arrastate Sociedad Cooparative*[225] case, the English commercial court refused the application of the doctrine.[226] In the case, Spanish company Fagor and Indian Company CML had entered into a contract and a dispute arose over payment.[227] Spanish company Fagor sought to hold Caparo that was the 60% shareholder of CML for the alleged default. The Court refused to extend liability with the reasoning that the contract and arbitration agreement were governed by English law and according to English law, there is no basis upon which it could be held that parties to either the contract or the arbitration agreement were other than Fagor on the one hand and CML on the other.[228] In that case, it was also held that there is no room for a conclusion that Caparo was a party to either the contract or the arbitration agreement.[229]

The same approach is reaffirmed in the case of *Peterson Farms Inc. v. C&M Farming Limited*.[230] It is the leading case of the Group of Companies Doctrine in England and concerns the sale of chickens under Arkansas law.[231] The claimant in the arbitration, C&M, bought "grandparent" chickens from Peterson Farms and then it mated these chickens to produce "parents" that it would sell to other firms in its corporate group.[232] However, the "grandparent" chickens which were sold by Peterson had avian flu virus and thus C&M sued for breach of the contract and also claimed compensation for losses it suffered and losses of "parent" chickens suffered by other members of the C&M Group. Therefore, C&M claimed that other C&M firms are integrated and inseparable part of the Group.[233] On the other hand, Peterson Farms argued that C&M could not apply the Group of Companies Doctrine, because according to Arkansas law there is no application

[224]Sarita Patil Woolhouse,'Group of Companies Doctrine and English Arbitration Law', (2004) 435, Arbitration International, Volume 20, Number 4.
[225]Commercial Court, Queen's Bench Division, 07 August 1998, LEXIS.
[226]Tang (n 206) 10.
[227]Peter Aeberli, 'Jurisdictional Disputes Under The Arbitration Act 1996: A Procedural Route Map Jurisdictional Disputes Under The Arbitration Act 1996: A Procedural Route Map' (2005) 288 Arbitration International, Volume 21, Number 3.
[228]Aeberli (n 227) 288.
[229]Aeberli (n 227) 288.
[230]Peterson Farms Inc. v. C & M Farming Ltd (2004) APP.L.R. 02/04.
[231]<http://www.nadr.co.uk/articles/published/ArbitLawReports/Peterson%20v%20Farming%202004.pdf> Accessed on: 15 June 2015.
[232]<http://www.nadr.co.uk/articles/published/ArbitLawReports/Peterson%20v%20Farming%202004.pdf> Accessed on: 15 June 2015.
[233]<http://www.nadr.co.uk/articles/published/ArbitLawReports/Peterson%20v%20Farming%202004.pdf> Accessed on: 15 June 2015.

area for the doctrine.[234] However, the ICC Tribunal rejected the argument of Peterson Farms. The Tribunal concluded that according to the separability doctrine, an arbitration agreement is separable and autonomous from the underlying contract.[235] Therefore, the Tribunal had a right to apply a different law from the chosen law by the parties as the law of the contract.[236]

Moreover, the Tribunal stated that in accordance with the negotiations and conclusion of the sales contract, Peterson Farms knew it was dealing with not just C&M but also all other entities of the C&M.[237] Therefore, it determined that C&M contracted on behalf of and as an agent of the entire C&M Group and that this was understood by Peterson.[238]

The decision was appealed before the English High Court and the High Court found that the autonomy of the contract is not an issue, because the issue of jurisdiction is an issue of how to interpret the contract that is governed by Arkansas law.[239] Therefore, the approach of the Tribunal is open to several substantial criticisms.[240] As the Court put it: *"There was . . . no basis for the tribunal to apply any other law whether supposedly derived from the 'common intent of the parties' or not."*[241] Pursuant to the agreement, the common intent is expressed as Arkansas law and the counsel for the parties thought that Arkansas law would be considered the same as English law for the purpose of the hearing.[242] Therefore, the Court had to conclude whether the doctrine is part of English law or not and the Court concluded that *"English law treats the issue [of jurisdiction] as one subject to the chosen proper law of the Agreement and that excludes a doctrine which forms no part of English law."*[243] This case is an excellent example to prove the attitude of English law towards the Group of Companies Doctrine.

As it is understood, both civil and common law jurisdictions and even states which belong to the same systems have different tendencies regarding the application of the Group of Companies Doctrine. The lack of a clear rule regarding the doctrine and inconsistent jurisprudences can be noted as the main factors of criticism of the doctrine.

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[234]Burn (n 189) 4.
[235]Burn (n 189) 4.
[236]Gaillard and Pietro (n 138) 460.
[237]Gaillard and Pietro (n 138) 468.
[238]Audley Sheppard, 'Group of Companies Doctrine Not Part of English Law' Arbitration & ADR - United Kingdom<http://www.internationallawoffice.com/newsletters/detail.aspx?g=5b0d9e74-82ad-4a36-8d43-a26ffbffb339> Accessed on: 15 June 2015
[239]Court of Appeals, Paris, 31 October 1989, in A.J. van den Berg, Yearbook Commercial Arbitration 145-9, (Vol. XVI 1991)
[240]Court of Appeals, Paris, 31 October 1989, in A.J. van den Berg, Yearbook Commercial Arbitration 145-9, (Vol. XVI 1991)
[241]Court of Appeals, Paris, 31 October 1989, in A.J. van den Berg, Yearbook Commercial Arbitration 145-9, (Vol. XVI 1991)
[242]Burn (n 189) 5.
[243]Burn (n 189) 5.

Criticizing scholars believe that the doctrine must be rejected due to various reasons; in domestic and international law, there are several principles which state that the arbitration agreement must have effect only on signatories and any other non-signatories must be excluded from the scope of an arbitration clause.[244]

To illustrate, the form requirement principle is one of the most known and widespread principles in international law. The New York Convention and the European Convention on International Commercial Arbitration, in their relevant articles, provide for the signature requirement to be able to participate in arbitration proceedings. [245]

Pursuant to these articles, it is argued by the criticizing scholars that the most significant element to detect the parties' intention to arbitrate is the signature of such parties. At that point, being a member of a group of companies is not an important issue even if other members have signed the arbitration agreement.[246]

ICC ruled a case related to this point. In this case, a buyer and a main contractor had entered into a business contract, and this contract had been signed by a subcontractor. However, the latter was not named in the contract as a party of the business transaction. Thus, the tribunal refused to extend the arbitration agreement to the subcontractor and kept the scope of the arbitration clause limited to the parties whose names were mentioned in the contract as parties. It is believed that a mere signature is not adequate to extend the arbitration agreement. This is because, according to the tribunal, the parties to an arbitration clause should be clearly mentioned in the contract that includes such a clause.[247] Under these conditions, the application of the Group of Companies Doctrine by the tribunal seems to be impossible.

However, despite all the criticisms and the clear danger in its over-expansion, the doctrine still continues to serve for its aim in arbitrations and is recognized by UNCITRAL as a method of

[244]Law Teacher November 2013, 'Group of Companies Doctrine Law Essays' <http://www.lawteacher.net/free-law-essays/commercial-law/group-of-companies-doctrine-law-essays.php?cref=1> Accessed on: 26 June 2015
[245]Law Teacher November 2013, 'Group of Companies Doctrine Law Essays' <http://www.lawteacher.net/free-law-essays/commercial-law/group-of-companies-doctrine-law-essays.php?cref=1> Accessed on: 26 June 2015
[246]Law Teacher November 2013, 'Group of Companies Doctrine Law Essays' <http://www.lawteacher.net/free-law-essays/commercial-law/group-of-companies-doctrine-law-essays.php?cref=1> Accessed on: 26 June 2015
[247]Law Teacher November 2013, 'Group of Companies Doctrine Law Essays' <http://www.lawteacher.net/free-law-essays/commercial-law/group-of-companies-doctrine-law-essays.php?cref=1> Accessed on: 26 June 2015

extending the scope of an arbitration clause.[248] Therefore, it is predicted that the doctrine will continue to play an important role in the ever changing and expanding world of arbitration.[249]

As well as this prediction, to show the main argument of the study, the necessity and importance of the Group of Companies Doctrine can be proved through the 'single economic entity' and 'control' factors. To clarify the significance of the doctrine, preventing abuse of corporate structure issue and the application of the doctrine as *lex mercatoria* will be evaluated as well.

D. Single Economic Entity and Control

As it is known, to mention the Group of Companies Doctrine, the requirement of the existence of the corporate group has vital significance. This is due to the fact that in theoretical terms, it is the first thing that tribunals look at when they are eager to decide a question as to whether a non-signatory is bound by the arbitration agreement under the doctrine. However, it is worth noting that this circumstance always means more than the mere existence of the corporate group. In other words, being members of the same group is not sufficient. The existence of a 'single economic entity' is an important issue as well.[250]

In addition to 'single economic entity', 'control' is also a factor to detect the existence of groups of companies and their responsibilities. The doctrine requires the existence of an economic unity that is derived from the absolute control of the parent company on its subsidiaries.[251] Therefore, economic control is an essential matter as an evidence to prove the necessity of the Group of Companies Doctrine.[252]

To exemplify, as it is demonstrated in the case of Dow Chemical as well, absolute control over subsidiaries is a key issue[253], because although they have distinct legal identities, they are parts of the same economic reality.[254] Furthermore, having distinct legal identities is not adequate to show independence. To determine the actual situation, it must be examined case by case.[255]

Although the framework of this study is arbitration, the Single Economic Entity Doctrine and 'control' factors are also discussed in competition law. Therefore, the decisions of the European Court of Justice (ECJ) and European Commission (Commission) can be accepted as sources. On an

[248]Tang (n 206) 19.
[249]Tang (n 206) 19.
[250]Hanotiau (n 176) 48.
[251]Meyniel (n 77) 46.
[252]Meyniel (n 77) 46.
[253]Reismann, Craig, Park and Paulsson (n 156) 486.
[254]Dow Chemical v. Isover Saint Gobain (n 11) 136.
[255]A Tokatlı, The Concept of Single Economic Entity Doctrine in Competition Law (1st edn, Turkish Competition Authority 2009) 45.

international level, the decisions and justifications of the ECJ and the Commission overlap with arbitration cases. Therefore, some example cases of competition law can also be beneficial in giving more detailed information about the Single Economic Entity Doctrine and 'control'.

In the scope of competition law, 'undertaking' is a subject of all cases.[256] Hence, the definition of undertaking is a significant point and is defined in the case of *Höfner and Elser v. Macrotron GmbH*[257]. Accordingly, an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of that entity and the way in which it is financed.[258] While this information is evaluated, it is clear that any type of entity can be defined as an undertaking if it has a link with an economic activity. At that point, legal status and financial sources are insignificant. This view is also adopted by the EU courts in its general sense and the Courts have held that they can treat a parent company and its subsidiaries as a single economic unit.[259]

The importance of the definition of undertaking can be seen in the examination of precedents[260] as the cases are decided in accordance with the definition. The Single Economic Entity Doctrine was developed to create a more detailed explanation for undertakings, and pursuant to that doctrine, distinct legal personalities are not obstacles for belonging to the same group and having the status of parent and subsidiary companies.[261] The scope of the Single Economic Entity Doctrine was expanded in *Europemballage and Continental Can v. Commission*[262] case, and according to the case, if a subsidiary does not reveal its market behaviours autonomously and if it follows the directives of the parent company, having a distinct legal entity is not sufficient to prevent the liability of the parent company.[263]

Moreover, the Commission has renewed many times that with the acceptance of the Single Economic Entity Doctrine, the violations of parent and subsidiary companies should be held as an infringement of the parent company.[264] In all of the related cases, parent companies which were established outside the European Community designated the price policies of subsidiaries, and as

[256]R Whish and D Bailey, Competition Law (7th edn, Oxford 2012) 84.
[257]Case C-41/90 Höfner and Elsner v Macrotron ECR (1991) ECR I-1979.
[258]Whish and Bailey (n 257) 84.
[259]Daujotas (n 132) 6.
[260]A Jones and B Sufrin, EU Competition Law (4th edn, Oxford 2010) 134.
[261]Jones and Sufrin (n 260) 134
[262]Case C-6/72 Europemballage and Continental Can v. Commission (1973).
[263]Tokatlı (n 255) 45.
[264]O Güzel, The Concept of Undertaking and Association of Undertakings in Competition Law (1st edn, Turkish Competition Authority 2003) 40.

producers they had the opportunity to implement their agreements on marking up within the Community via subsidiaries. In all cases, sanctions were applied for parent companies.[265]

In addition to the evaluations of the Court of Justice, the Commission, in its *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements* held that if a company exercises decisive influence over another company, they form a single economic entity and they can be labelled as part of the same undertaking.[266]

As it is explained above, in competition law, determining the existence of 'control' is also an issue tackled by the Court of Justice and the Commission.[267] The relationship between the concepts of 'control' and 'single economic entity' is most certainly significant. Because, how parent companies control their subsidiaries also draws the boundaries of the Single Economic Entity Doctrine. The control means the administrating power and styles of using that power.

To determine the 'control' issue regarding the doctrine, the Commission ruled a case which qualifies as precedent, the *ZOJA/CSC–ICI* [268]case. In that case, CSC had been controlling the ICI by using its majority capital ratio in the plenary assembly and its voting power.[269] Thanks to these tools, CSC had the right to audit the balance sheet of ICI, appoint the manager of ICI and thus, it determined the road map for the activities of ICI with 51 percent of capital power. The Commission also took into account that CSC, in its annual consolidated financial statements, provided ICI as a subsidiary in the European market. Based on all of these grounds, in its decision, the Commission regarded both of the companies as a single economic entity although they have distinct legal identities.[270]

This decision of the Commission also proves that the parent company owning all shares of the subsidiary is not a necessity in order to claim the existence of the parent company's control on the subsidiary.[271] Besides, the situations in which parent companies have less than 50 percent of all shares do not mean that there is no control of parent companies on subsidiaries.[272] One of the interesting cases about that point is *Trefileurope / Commission*[273] and according to that case, the

[265]Güzel (n 264) 40.
[266]Whish and Bailey (n 256) 94.
[267]H Eryuva and M Coskun, 'The ZOJA/CSC-ICI v Commission Case (1998) Ankara Bar Review 2.
[268]Case C-299751 ZOJA/CSC-ICI v. Commission Case (1972).
[269]Eryuva and Coskun (n 267).
[270]Eryuva and Coskun (n 267).
[271]Güzel (n 264) 39.
[272]Güzel (n 264) 39.
[273]Tréfileurope Sales SARL v. Commission of the European Communities, Case T-141/89.

Court of Justice held that having 25 percent of all shares is not adequate to control the whole company when the other partners' shares are considered.[274] However, that evaluation is not precise; because the most important point to settle the case is the independent behaviour ability of the subsidiary.[275] This is a key question of the cases.

In all of these competition cases, the Single Economic Entity Doctrine and 'control' factors were examined in detail. It can be concluded from the related competition cases that regardless of having distinct legal identities, determination of the economic reality can be easier in the arbitration area. This determination is a significant issue; since, as it is stated in the case of *ICC Case no: 5013*[276], determination of the economic reality is a requirement for the reliability of international commercial relations.[277]

The reliability of international commercial relations should be accepted as a cornerstone. This is due to the fact that the main purpose of arbitration is to resolve international commercial disputes and it is the first step of establishing a reliable international commercial area.[278] The relationship between economic reality and distinct legal identities demonstrates that the lack of application of the Group of Companies Doctrine can cause the abuse of corporate structure.

E. Abuse of Corporate Structure

Abuse of corporate structure is observed in the practice as the party, who is a controlling company, has a tendency to maintain the appearance of a separate legal entity to avoid obligations arising from contracts concluded by its subsidiaries.[279]

Having a separate legal personality is an important matter of groups of companies[280], because the question of group of companies can only arise where each entity has a separate legal personality.[281] To illustrate, if an entity is a branch of another entity, any arbitration agreement the former signs will be extended to the latter simply because both entities constitute together a single judicial person.[282]

[274]Güzel (n 264) 39.
[275]Güzel (n 264) 39.
[276]ICC Case No: 5103, 1988 J.D.I. 1206.
[277]Born (n 12) 522.
[278]Born (n 2) 3.
[279]Daujotas (n 132) 5.
[280]Gaillard and Savage (n 26) 282.
[281]Gaillard and Savage (n 26) 282.
[282]Gaillard and Savage (n 26) 283.

If the Group of Companies Doctrine is not applied, companies may be created for the sole purpose of avoiding subsidiaries' obligations.[283] To cite an example, in case that the deal fails, a company can create a few separate legal entities through restructuring and it can use its new entities to enter into contracts.[284] There is no doubt that this kind of structuring often helps companies to avoid claims arising from contracts concluded before the actual reorganization of the business.[285]

The abuse of corporate structure is prevented by international law as a general rule and an authoritative commentary explains that *"international law has a reserve power to guard against giving effect to ephemeral abusive and simulated creations"*[286]. To show the tendency of international law, there are several example cases. One of them is the *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [287]case and in that case, it was held that the subsidiaries are tied to the parent company and they must do whatever the parent company commands. They are virtually in the same economic group and for this reason; they should not be treated separately.[288]

To summarize, the abuse of corporate structure is a difficult doctrine to apply. This is because the examination of groups of companies from the viewpoint of the Single Economic Entity and 'control' factors under the Group of Companies Doctrine ensures that if there is an economic control of the parent company over its subsidiaries, having a separate legal personality is not an issue. Thus, the abuse of corporate structure is prevented by virtue of the Group of Companies Doctrine. This benefit should be noted as one of the arguments why the application of the doctrine is necessary.

F. Application of the Doctrine as *Lex Mercatoria*

Generally, the application of international principles shows many advantages in terms of creating a uniform fashion that is independent from national laws.[289] Additionally, these international principles take into consideration the needs of international law by allowing efficient exchanges between systems which have conceptual distinctions and thus, pragmatic solutions to particular situations can be possible.[290] Therefore, it can be accepted as an ideal opportunity to apply what is increasingly referred to as the *lex mercatoria* that is defined as the general principles

[283]Daujotas (n 132) 5.
[284]Daujotas (n 132) 5.
[285]Daujotas (n 132) 5.
[286]I Brownlie, Principles of Public International Law, Oxford University Press, (2009) 489.
[287]DHN Food Distributors Ltd v Tower Hamlets London Borough Council (1976) 1 WLR 852.
[288]<http://www.lawteacher.net/cases/company-law/> Accessed on: 17 June 2015.
[289]Daujotas (n 132) 7.
[290]Daujotas (n 132) 7.

of commerce and trade customs.[291] In this sense, the Group of Companies Doctrine is certainly one of the theories included in *lex mercatoria*.[292]

Regarding the application of the Group of Companies Doctrine, international tribunals have characterized the doctrine as *lex mercatoria*. In the case of *ICC Case No: 5721*[293], it is concluded that the arbitral tribunal cannot examine a delicate question only on the basis of the law applicable to the merits of dispute which is Egyptian law.[294] Therefore, the tribunal applied *lex mercatoria* in the scope of good faith in business transactions and international commercial usages.[295] Furthermore, in a myriad of awards, the application of national law to non-signatory issues is expressly rejected, instead insisting on the application of international law.[296]

All of these assessments imply that arbitral tribunals have a legitimate right to apply the Group of Companies Doctrine even though the parties did not agree on the doctrine in their arbitration agreement.[297] This is due to international tribunals accepting the doctrine as part of the international principles of the trade practice; namely, as *lex mercatoria*.[298]

As *lex mercatoria* is in line with the example cases, the Group of Companies Doctrine has an important place in the arbitration practice. The provision contained in the rules of one of the leading arbitration institutions is also proof of the necessity and importance of the doctrine. Pursuant to Article 21/2 of the ICC Arbitration Rules[299], it is stated that '*the arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.*'[300] According to example cases, as per one of the trade usages, the doctrine can be regarded as necessary and important *lex mercatoria* for the non-signatory issues despite all the criticisms.

To summarize, in this part of the study, the Group of Companies Doctrine has been studied with all its perspectives. The application differences in different jurisdictions, criticisms regarding the doctrine and arguments to prove the necessity and importance of the doctrine have been provided.

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[291]ICC Case No: 8385.
[292]Daujotas (n 132) 7.
[293]Bernd Ehle, 'Law Applicable to the Extension of Arbitration Agreements', YAAP Anniversary Program Featuring ASA Below 40, Lalive (2011) 15. <http://www.lalive.ch/data/document/Law_Applicable_to_the_Extension_of_Arbitration_Agreements_(01-12-2011).pdf> Accessed on: 09 June 2015.
[294]Ehle (n 293) 15.
[295]ICC Case No. 5721, 177 J.D.L (Clunet) 1019 (1990).
[296]G Born, International Commercial Arbitration, Kluwer Law International, (2009) 1213.
[297]Daujotas (n 132) 7.
[298]Daujotas (n 132) 7.
[299] ICC Rules of Arbitration.
[300]<http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of arbitration/#article_17 > Accessed on: 21 June 2015.

To emphasize the economic reality of groups of companies, the 'single economic entity' and 'control' factors have been argued. Additionally, prevention of abuse of corporate structure was explained as an argument supporting the necessity and importance of the Group of Companies Doctrine. Lastly, the application of the doctrine as an international principle, in other words as *lex mercatoria* by arbitral tribunals was provided as another argument.

V. Conclusion

This is a critical study of the role of the Group of Companies Doctrine and in this scope, the significance and necessity of the doctrine as one of the circumstances which allows non-signatories to be bound by the arbitration agreement has been analyzed. In addition to this analysis, other important matters of arbitration agreements have been demonstrated.

To build clearer comprehension regarding the doctrine, at first, the study examined international arbitration agreements in light of the related provisions of the UNCITRAL Model Law and the New York Convention. As a further explanation on international arbitration agreements, the study also showed example cases. In consideration of the relationship between international arbitration agreements and non-signatory issues, 'consent' and 'writing' requirements have great significance. Therefore, the study separately argued both the 'consent' and 'writing' requirements. In these parts, the provisions of relevant regulations of international law and precedents have also been provided.

In the following part, the study explained the meaning of non-signatory issues in international arbitration agreements, and all of the related and important types of the non-signatories have been defined in separate sections. Within this scope; Agency, Veil-Piercing, Succession, Assignment or Transfer, Estoppel, Corporate Officers and Directors, Incorporation by Reference and Third Party Beneficiary theories have been scrutinized. Although there are other types of non-signatories, the study focuses on these theories; since, some types of non-signatories which are defined under different titles overlap with others. Therefore, in this study, more significant theories of non-signatories which are similar to the Group of Companies Doctrine have been selected. In particular, Agency and Veil Piercing have been analysed more deeply because of their similarities with the doctrine. To introduce all of these theories, a myriad of cases from different jurisdictions have been indicated to commentate the concept of non-signatory issues in international arbitration agreements.

As the main theme of the study, the doctrine has been evaluated in a distinct section even though it is also one of the types of non-signatories that are shown in the previous part. As

mentioned, the doctrine has an application on those companies which constitute parts of an integrated economic group. According to the doctrine, one of the companies in the same group can be bound by another's arbitration agreements in certain circumstances.

In the scope of the study, it is also noted that for both commercial arbitration and investment arbitration, the doctrine is applicable to bind parties that are not signatories. In other words, stated owned companies are also subjects of the Group of Companies Doctrine. There is no doubt that this facility of the doctrine is an important point, because while the capacity of state owned companies in the world trade is taken into account, resolving related disputes has an outstanding significance.

In this study, to understand the details of the doctrine, the founder case Dow Chemical has been also analysed. In the case, the core points of the boundaries of the doctrine have been determined. Due to this case, signing, performance and termination of the disputed contracts are analysed as the conditions required for the application of the Group of Companies Doctrine. As further significant issues, economic reality of the group of companies and insignificance of the separate legal personality were identified to clarify the implementation of the Group of Companies Doctrine. In light of these, 'control' factor has also been mentioned. Mutual intention of the parties and thus, the requirement of consent are also addressed by virtue of this case; however, not only in the Dow Chemical case but also in other example cases of the doctrine, the requirement of consent shows itself as an 'implied consent'.

In the following part of the study, different jurisdictions of the doctrine have been thoroughly examined. As a case-based theory, the implementation of the Group of Companies Doctrine shows significant differences in different jurisdictions. The application differences between civil law systems and common law systems are clear. However, the application of the doctrine is not identical within countries belonging to the same system. Countries of both civil and common law jurisdictions have also varied applications with regard to the doctrine. In civil law jurisdictions, the application of the Group of Companies Doctrine is much more widespread. However, this does not mean that there is a consensus on how the doctrine shall be applied. It is possible to encounter different applications of the doctrine in different countries of the civil law jurisdiction. At that point, as mentioned, the French jurisprudence must be noted as the tutelary of the doctrine and as an arbitration friendly country, and must be accepted as the founder of the Group of Companies Doctrine. Therefore, the study relies substantially on the precedents of the French Courts. As stated previously in the introduction part, in accordance with the French

jurisdiction, the main purpose of the study is to analyze different applications and debates over the doctrine and to provide arguments to prove the importance and necessity of the doctrine.

The study, in general, has declared that despite all the criticism, the necessity and importance of the Group of Companies Doctrine is explicit. As it has been stated before, there are some facts to clarify the significance of the doctrine. The single economic entity and control factors are two of these concepts which are quite fundamental. Thanks to the application of the Group of Companies Doctrine, the Single Economic Entity Doctrine and 'control' factors can be examined separately or together. Thus, the reality of the economic control can be detected.

As it has been shared in the related part of the study, the existence of a corporate group is a significant point of the doctrine. However, the existence of the single economic entity is significant as well. The single economic entity issue has been examined by a doctrine titled the Single Economic Entity Doctrine. This doctrine and the 'control' factor are the main steps of detecting the economic reality of group of companies. In the related part of the study, competition law cases have also been shared to provide examples. Additionally, it has been stated that the determination of the economic reality through applying the Single Economic Entity Doctrine and 'control' factors enables the reliability of international commercial relations, which is certainly the main aim of international arbitration.

In that part of the study, it has been concluded that the relationship between the economic reality of the group of companies and their separate legal personalities should be considered; since the lack of application of the Group of Companies Doctrine would cause the problem of the abuse of corporate structure. As another argument of the study to prove the importance and necessity of the doctrine, preventing abuse of corporate structure has been evaluated. Having a separate legal personality can be used to avoid obligations which arise from contracts signed by subsidiary companies. As mentioned, having a separate legal identity is a basic point of the group of companies, because the case of the group of companies can be mentioned only if there are separate legal personalities in the same group. International law aims to prevent the abuse of corporate structure, and in this direction, several precedents exist, one of which has been shown in that part of the study.

In the application of the Group of Companies Doctrine, there is no chance for the companies which are in the same economic unit and which are controlled by the parent company to abuse their corporate structure on the basis of having a separate legal personality; since, by courtesy

of the doctrine, determination of the ‘single economic entity’ and ‘control’ factors are quite possible.

In the subsequent part of the study, another argument on why the Group of Companies Doctrine is necessary and important has been commentated. This argument is based on the application of international principles. As it is known, there are common trade usages in the international trade area titled *lex mercatoria*. The Group of Companies Doctrine is also accepted as a *lex mercotoria* by arbitral tribunals and sample cases have also demonstrated that the tribunals have a right to apply the doctrine although there is no agreement regarding its application.

In conclusion, this study aims to analyse the Group of Companies Doctrine in a detailed manner. Arguing for the necessity and importance of the doctrine, determining the reality of the ‘single economic entity’ and ‘control’ factors, preventing the abuse of corporate structures and applying the doctrine as a *lex mercatoria* have been indicated within the scope of the study.

The doctrine should be improved to enable efficient application. To provide this improvement, there must certainly be some innovations. Adding clear rules regarding the doctrine at national and international levels can be the first step. There must also be more clear provisions about the doctrine in the rules of international arbitration institutions. As a result of these innovations, the consistency of the doctrine in awards can be ensured. Although these suggestions may be expanded to constitute the subject of another study, they are also pieces of evidence to demonstrate the possibility of efficient application of the doctrine which is necessary and important for international arbitration.

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