Arbitration Agreements and Groups of Companies

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I. The Problem

1) Whether an arbitration agreement signed by a company member of a group of companies, is also binding upon and entitles other members of that group non-signatories of the agreement, remains an open question. Some arbitral awards and some judgments of state courts rendered with respect to this problem, have answered the question positively. Other arbitral awards and other judgments of state courts have denied any binding effect of, and any entitlement flowing from, an arbitration agreement signed by one member only of a group of companies, as to the other members of such group. In doctrine, the answer to this problem is as controversial as in the dicta of arbitral tribunals and state Courts.

Professor PIERRE LALIVE, to whom this article is dedicated with academic respect and in personal friendship, has at an early stage of the discussion abundantly expounded this subject as a doctrinal writer. It is the intent of the author of this article to show that there is a whole series of different situations in which this problem can arise and that those different situations also require the use of rather diverse doctrinal tools which, in their turn, lead to a variety of solutions.

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

(a) A parent company or an individual person who is holding the shares of and directing one or more subsidiaries, possibly with one or several sub-subsidiaries of further degrees, signs an arbitration agreement. Here the question may arise whether the subsidiaries or sub-subsidiaries, though being non-signatories to the arbitration agreement, may be
sued and if so, under what circumstances, together with their parent company/ies or even alone, based upon the before-mentioned arbitration agreement. *Vice versa*, the question may come up whether or not such a subsidiary or sub-subsidiary may avail itself of the agreement in suing the partner of that agreement before the arbitral tribunal therein appointed, either in conjunction with its parent company or without it, *i.e.* all by itself.

(b) The same question has to be answered in the reverse situation: A subsidiary or a sub-subsidiary member of a group of companies, signs an arbitration agreement all by itself which is later invoked either by the partner to such arbitration agreement when suing the parent company/ies of the subsidiary or by the parent company itself when suing the partner of the arbitration agreement before the arbitral tribunal therein appointed.

In this factual context, the rights and duties of the parent company which derive from an arbitration agreement signed not by itself, but by a subsidiary or a sub-subsidiary only of its group have to be determined.

(c) Finally, a third factual context has to be taken into consideration: A sister company signs an arbitration agreement. Again, the question may be raised whether at all and, if so, under what circumstances, such arbitration agreement obliges and entitles other affiliated companies belonging to the same group either to be sued before the arbitral tribunal by the partner to the arbitration agreement or to introduce themselves as claimants a request for arbitration against the partner of the arbitration agreement as the defendant. In practice, however, this seems to be a less frequent instance.

**II. Recent Developments**

The discussion of the general Problem under consideration here has recently evolved in different directions.

1) There is a strong tendency among arbitrators acting under the auspices of the ICC, to recognize that an arbitration agreement signed by a company belonging to a group of companies, obliges and entitles the other member companies of such group if certain minimum requirements are fulfilled. This tendency is strongest among the advocates of the *lex mercatoria*. Notably, according to them a "group of companies"-doctrine has been developed which is clearly and unequivocally reflected in dicta in arbitral awards which deserve to be cited here *verbatim*. In a famous award, three highly renowned international arbitrators have stated:

"Considérant qu'un groupe de sociétés possède, en dépit de la personnalité juridique distincte appartenant à chacune de celle-ci, une réalité économique unique dont le Tribunal arbitral doit tenir compte lorsqu'il statue sur sa propre compétence, en application de l'article 13 (version de 1955) ou de l'article 8 (version de 1975) du Règlement de la CCI; Considérant, en particulier, que la clause compromissoire expressément acceptée par certaines des sociétés du groupe, doit lier les autres sociétés qui, par le rôle qu'elles ont joué dans la conclusion, l'exécution ou la résiliation des contrats contenant lesdites clauses, apparaissent selon la commune volonté de toutes les parties à la procédure, comme ayant été de véritables parties à ces contrats, ou comme étant concernées, au premier chef, par ceux-ci et par les litiges qui en peuvent découler;

Considérant que c'est en ce sens que se sont déjà prononcés des tribunaux arbitraux institués dans le cadre de la CCI (...); que les décisions de ces tribunaux forment progressivement une jurisprudence dont il échot de tenir compte, car elle déduit les conséquences de la réalité économique et est conforme aux besoins du commerce international, auxquels doivent répondre les règles spécifiques, elles-mêmes progressivement élaborées, de l'arbitrage international."

In another award rendered about six years later, the new "group of companies"-theory has been summarized as follows:
économique et que toutes les sociétés du groupe soient tenues ensemble et solidairement responsables des dettes dont elles ont directement ou indirectement profité à cette occasion.”

The Limits inherent to the "group of companies"-doctrine have, however, been clearly pointed out in a recent award where the arbitral tribunal stated\(^7\):

"En résumé, l'appartenance de deux sociétés à un même groupe ou la domination d'un actionnaire ne sont jamais, à elles seules, des raisons suffisantes justifiant de plein droit la levée du voile social. Cependant, lorsque une société ou une personne individuelle apparaît comme étant le pivot des rapports contractuels intervenus dans une affaire particulière, il convient d'examiner avec soin si l'indépendance des parties ne doit pas, exceptionnellement\(^8\), être écartée au profit d'un jugement global. On acceptera une telle exception\(^9\) lorsque apparaît une confusion entretenue par le groupe ou l'actionnaire majoritaire."

2) The "group of companies"-theory developed notably by arbitral tribunals under the auspices of the ICC, has had its repercussions an the dicta of French Courts which seem inclined to follow the new theory as examplarily evidenced by a judgement of the Cour d'Appel de Pau rendered in 1986 the head-note of which states\(^10\):

"Il est admis en droit que la clause compromissoire expressément acceptée par certaines des sociétés du groupe, doit lier les autres sociétés qui, par le rôle qu'elles ont joué dans la conclusion, l'exécution ou la résiliation des contrats contenant lesdites clauses, apparaissent selon la commune volonté de toutes les parties à la procédure comme ayant été de véritables parties à ces contrats, ou comme étant concernées au premier chef par ceux-ci et par des litiges qui en peuvent découler."

3) Other jurisdictions seem to be more reluctant to follow the new doctrinal approach under which affiliated companies belonging to the same group of companies may be treated as a unity provided certain preconditions have been met. For example, the courts\(^22\) in the home-country of Professor P. LALIVE to whom this article is dedicated, as well as some Swiss legal writers\(^23\) seem to prefer a more cautious approach to the extension of the effects of an arbitration agreement upon affiliated companies or upon the owner of a company. To illustrate this, two examples will follow, one stemming from the field of arbitral jurisdiction, the other from state jurisdiction.

a) An arbitral tribunal presided over by an eminent Swiss international lawyer\(^24\) had to decide, whether a French company "S.D." which was the parent company of another French company "F.D.", was bound by an arbitration agreement which had been signed not by the parent company itself, but only by its subsidiary "F.D.". In its award\(^25\), the arbitral tribunal referred neither to the lex mercatoria nor to international trade usages nor to the necessities of international trade nor to the before-mentioned arbitral jurisprudence of ICC arbitral tribunals which, at the time when such award was rendered (1983), had already developed their "group of companies"-doctrine. In lieu of this, the arbitral tribunal simply referred to the principles of Swiss domestic law by which, in its opinion, the arbitration agreement was governed\(^26\).

In a rather sober, down-to-earth manner, the arbitral tribunal differentiated the specific doctrinal problem here at stake, i.e. the doubtful question of whether the subsidiary "F.D." had had a specific power of authority when signing the arbitration agreement to represent its parent company "S.D.", and explained:\(^27\)

of the Swiss Code of Obligations. If those are not complied with, none may be forced to submit a dispute to an Arbitral Tribunal (\...). Nobody, even non-Swiss citizens, can without his consent be deprived of his own natural judge (Art. 58 of the Constitution).

8a. Neither party contends that S.D. signed the Operating Agreement with the actual arbitration clause. It is not contested either that Mr. X who signed the Operating Agreement on behalf of F.D., acted only for the subsidiary and not for the mother company. It becomes clear from the introduction of the Operating agreement that only F.D. is a party to it. Claimants do not contend that Mr. X was acting on S.D.'s behalf with special power of attorney as a member of S.D.'s board of directors. Mr. X therefore had only the power to bind F.D., as he was
acting in the Operating Agreement expressly as Chairman of F.D.; any other company could not be committed by his signature."

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

b) Such a conservative approach to our problem has manifested itself also in the well known decision rendered by the Swiss Federal Supreme Court in the SGTM v. Bangladesh-case, a decision which has - in other respects with good reasons - been widely criticized also by Professor P. LALIVE. The judgment by the Swiss Federal Supreme Court was preceded by the award of an arbitral tribunal which had to decide upon the following facts: A state-owned Corporation was sued before an arbitral tribunal by its contractual partner for the payment of certain contractual services which it had received. After the arbitral proceedings had commenced, the state which owned the Corporation, simply dissolved it. Thereupon the contractual partner introduced a request for arbitration also against the respective state. The arbitral tribunal admitted such joinder arguing that to do otherwise would be contrary to international public policy. The Swiss Federal Supreme Court annulled this award holding that somebody like the foreign state here in question, who had not signed an arbitration agreement, could not be the defendant in arbitration-proceedings instituted on the basis of such agreement. In its judgment, the Swiss Supreme Court expounded:

III. The Fundamental Principles Governing the Problem under Examination

On a national level, the fundamental principles under consideration here have, in a nutshell, been spelled out very clearly in the opinion of an U.S. American court:

"Ordinary contract and agency principles determine which parties are bound by an arbitration agreement, and parties can become contractually bound absent their signatures."

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

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

The first five principles heretofore enunciated will be dealt with infra sub IV. The construct of the third party beneficiary (supra principle 6) will be examined infra sub V and the problems of representation (supra principle 7) and the effect of the doctrine of estoppel (supra principle 8) will be the subject of our research infra sub VI and VII.

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

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

Some arbitral awards and some doctrinal writers have argued that the proper law of arbitration agreements providing for arbitral proceedings under the ICC Rules of Conciliation and Arbitration, is Art. 8 of those Rules and constitutes an autonomous regulation of the agreement. Other awards and doctrinal writers have, in a similar fashion, advanced the thesis that arbitration agreements are governed by the so-called lex mercatoria. For those arbitrators and authors, however, who have doubts about the existence of the lex mercatoria, an arbitration agreement must be subject to one or the other national law like a contract of any other kind. The dispute between the advocates and the opponents of the lex mercatoria shall not be discussed in the present context. The author of the present article does not believe in the existence of the lex mercatoria as a system of law susceptible to govern contracts on an a-national level. For those who join him in this regard and who do not follow the lex mercatoria doctrine, it must therefore, in the second place, be determined which national law is called upon to govern an arbitration agreement.

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

Furthermore, an arbitral tribunal is, in general, not bound by any rule of a specific national system of conflict of laws. Arbitral tribunals, notably those which act under the auspices of an arbitral institution, are commonly held to have a discretion in the choice of the specific conflict of laws rule that they will apply. Consequently, our search for the proper law of the arbitration agreement has to proceed from the assumption that the arbitral tribunal, when determining the proper law of the arbitration agreement, may apply the conflict-of-laws rule which it deems most appropriate (cp. Art. 13 par. 3 of the ICC Arbitration Rules).

3) There is another principle of law firmly established in most national jurisdictions pursuant to which arbitration agreements have to be strictly interpreted. By an arbitration agreement, a contractual partner is, in the language of an important arbitral award heretofore cited, “deprived of his own natural judge”. Though the institution and practice of international arbitration has, in the course of the last decades, been more and more recognized as a legitimate and adequate means of solving international business disputes and though this recognition seems to be established in almost all countries belonging to the industrialized world, it must, as a matter of principle, be prevented that someone who has not agreed to arbitration, may be sued under an arbitration agreement to which he has not been a signatory or that somebody who has not by agreement been accepted as a partner to arbitration agreements, would be entitled to participate as a claimant in such proceedings. The principle of strict interpretation of arbitration agreements must therefore, in general, be scrupulously respected.
4) The same is true of the form requirement established by some national jurisdictions and by some international conventions. This requirement not only serves the same ends as the principles of strict interpretation, namely to prevent that persons extraneous to an arbitration still participate in it either as defendants or as claimants. But its purpose is also to take care that there is unequivocal evidence on who is a party to an arbitration agreement and who is not.

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

A natural person or a company which did not sign an arbitration agreement, might still derive from it a power to introduce a request for arbitration against one (or both) of the contractual partners, if he appears as a third party beneficiary to the agreement (infra sub V). And such person or company may be bound or entitled by an arbitration agreement if somebody invested with a power of authority has signed it on behalf and in the name of him (infra sub VI). Finally, a natural person or a company who did not sign an arbitration agreement, may, under the applicable national rules of estoppel, be precluded from alleging that they are not parties to such agreement; they may hence be bound and entitled to appear either as defendants or as claimants in the ensuing arbitration proceedings (infra sub VII).

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

V. The Different National Rules on Third Party Beneficiaries

1) The parties to an arbitration agreement may stipulate in express terms that it shall not be them alone who shall be bound and entitled by their agreement, but that third parties shall also acquire rights (and duties) thereunder. It is thus possible by a company member of a group of companies to agree with its contractual partner, e.g. in writing, that also its affiliated companies shall be entitled (and bound) by their arbitration agreement. Then the principle of privity of contract is broken by an express agreement. The third party which has not signed the arbitration agreement, thus becomes a member to it. At least as soon as the third party claims rights under the agreement, it will also be bound by the duties resulting therefrom.

In a few cases it may furthermore be feasible to derive from the circumstances surrounding an arbitration agreement a tacit intention of the parties to make one or several third parties a beneficiary of it. In the terms of Sect. 302 par. (1) of the American Restatement Second on the Law of Contracts: “Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and (...) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”

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

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

An U.S. American Court of Appeals has stated in a decision rendered in 1972 that a third party beneficiary under an insurance contract may, by virtue of an arbitration clause contained in the insurance contract, be forced to pursue his claim against the insurer through arbitration. In 1924, the former German “Reichsgericht” (Supreme Court) and in 1976, the
Bundesgerichtshof (i.e. the actual German Federal Supreme Court\textsuperscript{48}) have handed down similar\textsuperscript{49} decisions. It is true that, in a decision of June 4th, 1985\textsuperscript{50} the French Cour de Cassation declined to endorse the application of the third parties beneficiary construct to an arbitration agreement. But this decision has been severely criticized by a French doctrinal writer\textsuperscript{51}. Furthermore, there is an opposite trend in French doctrine supporting the thesis that, also under French law, a third party may derive from an arbitration agreement a title to file a request for arbitration against one (or both) of the parties to the agreement\textsuperscript{52}.

In summary, though, it is not the construct of the third party beneficiary which will solve most of the cases here under consideration. Instead this task is essentially achieved by the different national rules on representation and on estoppel.

VI. The Different National Rules on Representation

Whether a parent company, the owner of a company or a subsidiary are bound and entitled by the signature which has been attached to an arbitration agreement by an affiliated company, must in the first place be decided by the rules of representation\textsuperscript{53}: where the signatory company has acted not only on behalf of itself, but also on behalf and in the name of other company/ies affiliated with it, the arbitration agreement displays effects not only between the immediate signatory companies, but also as to other companies whose director/s have not signed the agreement.

1) The rules of representation are not identical as in the different national systems of law. Instead, they more or less vary from legislation to legislation. Each arbitral tribunal which is facing the problem whether a company non-signatory to an arbitration agreement is bound and entitled by it, therefore will have to determine, an the basis of a conflict-of-laws operation, which national rule of representation it will have to apply. This problem of conflict-of-laws cannot be dealt with in the present context. Suffice it to recall that, as a matter of law, arbitral tribunals are not bound by specific rules of conflict-of-laws, but that they have a discretion to apply the conflict-of-laws rule which they deem, under the specific circumstances of the case, as the most appropriate\textsuperscript{54}.

Anyway, it will always be the first task of the arbitral tribunal to determine which national rules of representation are applicable in the context of the specific facts of a case.

2) It is a common feature, however, of the different national rules of representation that they distinguish between three different kinds of representation\textsuperscript{55}.

a) A company may, e.g. by a power of authority under seal or in writing, have been expressly authorized to bind and entitle, with its signature to an arbitration agreement, not only itself, but also its parent company, its individual owner, its subsidiary or sub-subsidiary or any other affiliated company. When attaching its signature to the arbitration agreement, it may expressly refer to such power of authority and thus undoubtedly act on behalf and in the name of the said principal. In cases of this kind, the solution of our problem is very simple. There can be no doubt that not only the company signatory to the arbitration agreement is bound and entitled by it, but also the principal on whose behalf and in whose name such company also attached its signature.

b) It seems to be universally recognized, however, that powers of authority can not only be granted and that the agent may not only act on behalf and in the name of his principal in one of the express manners just cited, but that principal and agent may disclose their intention to confer power of authority and to act on behalf of and in the name of the principal, also in a tacit manner, \textit{i.e.} by a conclusive action.

Then the arbitral tribunal must be in a situation to imply from the surrounding facts the power of the agent and the dealings of the agent on behalf of and in the name of the principal. Though the power of authority and the agent's action on behalf and in the name of the principal did not materialize in any written document or in any express oral declaration, it must be possible to conclusively derive such power and such action from the facts surrounding the said actions. Principal, agent and third party must have been aware that the arbitration agreement, though signed only by the agent, extended its effects as between all the three of them. In this set of facts, the extension of the effects of the arbitration agreement to the principal is supported by the common intention of all three parties.

Some of the above-cited cases in which the respective arbitral tribunals made use of the "group of companies-theory\textsuperscript{56}"
could easily be solved with the help of such doctrine of tacit representation. If some of the arbitral awards rendered under
the auspices of the ICC have stressed that the affiliated companies non-signatories to the arbitration agreement, had
participated in the conclusion, execution, termination and/or renegotiation of the (main) contract and that they therefore
must be held to be bound by it, it was under certain circumstances

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superfluous for such tribunals to develop a new "group of companies-theory". The normal rules of tacit representation
would at least in some of the cases have been sufficient to solve the problem, i.e. to bind the affiliated company/ies.67

There is a third category of rules of representation which presumably may also be found in all national systems of law.
This category of rules may be summarized under the title of apparent or constructive representation. Its distinctive feature
is that there has neither been a real intention of the principal company to confer power of authority upon an agent
company nor a real intention of the agent company to act on behalf and in the name of an affiliated company. But under
the specific circumstances of the case, a party may be estopped from alleging the lack of such power of authority and the
lack of such action on behalf and in the name of an affiliated company.

It is only this third category of cases which needs a more detailed analysis which will be the subject of our following
chapter VII sub 1.

VII. The Different National Rules of Estoppel

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

1) The Lack of a power of Authority

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

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a) French Law

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

Under this doctrine a principal may be bound by the action of a person upon he never conferred any power of authority, if
the "apparent" principal and the "apparent" agent caused bona fide third parties to believe into the existence of said
power: the circumstances must reveal that third parties with whom the "apparent" agent dealt, had good reasons to
believe the agent to be invested with an authorization to deal on behalf and in the name of the "apparent" principal. The
reliance interest of such third parties must outweigh the interest of the principal to invoke the lack of any actual power of
authority. Under such circumstances, the "apparent" principal is estopped from alleging the non-existence of any power of
authority. Instead he is liable vis-à-vis said third persons for the compensation of any damage sustained by them through
their reliance on a power of authority which, in fact, did not exist. The remedy which then accrues to said third parties, is a
claim for "restitutio in integrum" leading, in the present context, to the fictional assumption that a power of authority had
indeed been conferred. In other words: a power of authority is implied in law, and the "apparent" principal is bound by the
arbitration agreement to which he never attached his signature.68

The application of this doctrine of mandat apparent has already been recommended to the problem here under
consideration.69 There is indeed at least one arbitral award60 in which this doctrine has been actually applied by an
arbitral tribunal proceeding under the Rules of Arbitration of the ICC.

b) English Law

The doctrine of "apparent" or "ostensible" representation is also known to English law. It is based on the fact that the purported principal never issued, to his apparent agent, a power of authority with respect to the transaction in question. But "the law treats their relationship as one of principal and agent, giving effect to their conduct as if it amounted to the expression of consent that they should be principal and agent (...) this form of agency may be regarded as a type of agency arising by operation of law"\(^{61}\). It is also called "agency by estoppel"\(^{62}\).

In an analysis of the rulings of English Courts, G.H. TREITEL\(^{63}\) has found the following catalogue of conditions which must be satisfied before such apparent authority may be assumed to exist\(^{64}\): (i) There must be a representation of authority by the principal to the third party, (ii) which has to be a representation of fact, (iii) that the "agent" is authorized to act as agent, and (iv) the third party must have relied on that representation. Similar catalogue of conditions have been set up by other writers on analysis of English common law\(^{65}\). It will be noted later that these conditions are in a surprising manner in harmony with the requirements established by German law.

c) The Laws of the United States

In the different jurisdictions of the United States, the state of the pertinent laws seems to be much more complicated.

A distinction is made not only between "apparent authority" and "authority by estoppel"; "apparent authority", being defined by Art. 8 of the Restatement of the Law of Agency 2nd\(^{66}\) as resulting from a manifestation by a person that another is his agent, the manifestation being made to a third person and not as when authority is created, to the agent\(^{67}\); "authority by estoppel", on the other hand, being defined by Art. 8 B of the before-mentioned Restatement\(^{68}\) as follows:

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

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

d) German Law

In German law, on the contrary, courts would have to make use of the concept of "authority" or "representation by estoppel". For in the context of representation, German courts have developed two different kinds of doctrine of estoppel: the doctrine of the Duldungsvollmacht and the doctrine of the Anscheinsvollmacht\(^{72}\).

(a) Application of the doctrine of the Duldungsvollmacht requires the presence of four different sets of facts\(^{73}\): (i) Somebody acts in the name of a purported principal without having been authorized so to act. (ii) The alleged principal notices the action of his supposed agent, but does not intervene to stop it and lets his purported agent have his way. (iii) A bona fide third party with whom the supposed agent has dealt, relies on the existence of a power of authority. (iv) The purported principal did in fact have the opportunity to prevent his supposed agent's actions.
Under such circumstances, there is indeed a lack of authority on the part of the supposed agent to act on behalf and in the name of the purported principal. But the said principal is estopped from alleging the lack of such power of authority.

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

(b) There is another doctrine of estoppel in German law which has been developed by German courts in the field of representation: the doctrine of the *Anscheinsvollmacht*.

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

If one is able to find these five different sets of facts in a special case, German courts will assume the existence of an "apparent" power of authority. The purported principal is bound and possibly also entitled - by the action of his supposed agent. In the context of the problem under consideration here, this means: If a company member of a group of companies, has attached its signature to an arbitration agreement posing, at the same time, as an agent of one or several affiliated companies or of the individual owner of the group, these third persons will be bound and possibly also entitled by the agreement.

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

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e) Swiss Law

Swiss law resembles German law. Though the Swiss Federal Supreme Court never made use of the notion of *Duldungsvollmacht* or *Anscheinsvollmacht*, it has ruled in cases where the facts corresponded to those of the *Duldungsvollmacht* and *Anscheinsvollmacht*, that the purported principal was bound by the action of the person who had posed as agent.

Doctrinal writers expressly refer to the two German doctrines maintaining that, what Swiss courts apply, are more or less the rules underlying the before-mentioned German doctrines.

2) The Non-Signatory Company has Posed as a Contractual Partner

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

Furthermore, it has already been pointed out *supra* that U.S. American courts when confronted with the problems here under consideration, only have used the *alter ego*-doctrine

or the doctrine of piercing the corporate veil which are examples of the broader doctrine of estoppel (by matter in pais). In a decision rendered in 1960, apparently regarded as the leading case, the United Staes Court of Appeals for the Second District stated: that a person who did not sign an arbitration agreement, may still become bound by the operation of general principles of contract law; that one set of those principles is contained in the so-called *alter ego*-doctrine which provides that “the corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and at least in the area of contracts, the acts of one are the acts of all”; that the *alter ego*-theory binds the patent which as "puppeteer" has "directed his marionette" to sign; and that therefore if the patent is bound to the contract then like its marionette it is bound to submit to arbitration.

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

**VII. Conclusion**

In the preceding analysis it has been shown that detailed legal rules have been developed on a national level to deal with the problem here under consideration. These national legal rules not only create legal certainty, a certainty which is absent insofar as regards any rules of the *lex mercatoria* whose definite contours are vague and open to discussion. They also satisfy the reliance interests of the parties who expect their business deals to be judged by definite norms in no way subject to any discretion of the arbitrators, a discretion which, if it existed, would in their eyes seem to border arbitrariness. Instead of reverting to the *lex mercatoria*, arbitral tribunals should therefore determine the applicable domestic proper laws on third party beneficiaries, on representation and on estoppel and therein search for the solution. When advocating such "conservative" solution, the author of this article has in mind the promotion of values which, in the present context, have candidly been expressed by M. Focsaneanu in the following contribution to a scholarly discussion:

> "Je crois que nous jouons un peu avec le feu. Si l'institution de l'arbitrage est destinée à vivre, elle doit respecter deux piliers juridiques de cette Institution, l'un est la reconnaissance de la personnalité juridique distincte des sociétés (...). Si un juriste des multinationales assistait à nos débats, il serait très inquiet parce que la construction des groupes de sociétés n'a pas été faite pour mélanger les personnalités d'un groupe (...). Voilà pourquoi j'aimerais que nous revenions un peu à des idées peut-être un peu vieillottes mais qui me semblent indispensables pour la sécurité juridique si on veut que l'arbitrage vive".

Another French lawyer has not been less explicit when he warned:

> "Pour nous, si l'on veut que l'arbitrage persiste dans la ligne ascendante (...), il faut avant tout (...) ne pas chercher, par quelque moyen que ce soit, à étendre son empire là où les litigants ne l'ont pas expressément prévu. Or, de l'ensemble des rapports, et surtout des interventions entendues jusqu'ici, il ressort nettement que, comme l'avait déjà démontré M. Fadallah lors des travaux du Comité français de l'arbitrage, en 1985, 'il faut éviter de créer une présomption d'extension d'arbitrage au groupe, à peine de provoquer un réflexe de défense qui pourrait aller jusqu'au refus de tout arbitrage' (...). Que la jurisprudence entende ce conseil!"

The goal of the foremost promotion of international commercial arbitration is, indeed, best served when the application of uncertain theories - like the *lex mercatoria* - is avoided at least in this field where definite, time-tested national rules are at hand. The traditional
which the users of international arbitration might become afraid of recurring to the best procedural means of solving international business disputes - which indeed is international commercial arbitration.\(^0\)

\(^1\)Professor and Director of the Institute of International Business Law at the Law School of the University of Münster, Germany.


\(^3\)See High Court of Justice, Chancery Division, October 4th-6th, 1988, (1988) 1 Lloyds Rep., pp. 231, 232 = IV YCA, p. 90


\(^5\)If, in the following, the notion of “parent company” is mentioned, it will also comprise the individual owner of a parent company, i.e. a Mr. X or Mrs. X.

\(^6\)See previous FN.

\(^7\)This was the factual context upon which the following arbitral awards and the following judgments of state courts had to decide: in ICC matter no. 1434, award of 1975 (supra FN 1); ICC matter no. 2375, award of 1975 (supra FN 1); ICC matter no. 4402, award of March 17th, 1983 (supra FN 2); ICC matter no. 6519, award of 1991 (supra FN 1); ICC matter no. 4504, award of 1985-1986 (supra FN 2); ICC no. 4972, award of 1989 (supra FN 2); High Court of Justice, Chancery...
Division, judgment of October 4th-6th, 1977 (supra FN 3).

10 This was the factual context upon which the following arbitral awards and judgments of state courts had to decide: in ICC matter no. 4131, award of 1982 (supra FN 1); ICC matter no. 5730, award of 1988 (supra FN 1); ICC matter no 5721, award of 1990 (supra FN 2); Cour d'Appel de Paris, judgment of October 21st, 1983 (supra FN 3); Cour d'Appel de Pau, judgment of November 26th, 1986 (supra FN 3).

11 This was the factual context upon which the following arbitral awards and the following judgments of state courts had to decide: in ICC matter no. 4131, award of 1982 (supra FN 1); ICC matter no. 5730, award of 1988 (supra FN 1); ICC matter no 5721, award of 1990 (supra FN 2); Cour d'Appel de Paris, judgment of October 21st, 1983 (supra FN 3).

12 See the arbitral awards cited supra in FN 1 and FN 3.

13 It has been, among others, particularly B. GOLDMAN and Y. DERAINS who have supported this doctrine. See, e.g., the contributions by B. GOLDMAN to a scholarly discussion reported in Trav.Com.fr.d.i.p., années 1984-85 (supra FN 5), pp. 125-127, and the annotations to arbitral awards by Y. DERAINS cited supra FN 1 and 2; see also Y. DERAINS/S. SCHAF (supra FN 5).

14 In French, this doctrine has been baptised "théorie de la réalité économique du groupe" or "théorie de l'unité du groupe"; see, e.g. S. JARVIN in an annotation to the award rendered in the ICC arbitration no. 4504 in 1985-1986 (supra FN 2), ibid., p. 1130.

15 ICC matter no. 4131, award of September 23rd, 1982 (supra FN 1), ibid., p. 148. The three arbitrators were: Prof. Pieter SANDERS (Pres.), Prof. Berthold GOLDMAN, Prof. Michel VASSEUR.

16 ICC matter no. 5103, award of 1988 (supra FN 1), ibid., p. 1212.

17 ICC matter no. 5721, award of 1990 (supra FN 2) ibid., p. 1024.

18 Emphasis added.

19 Emphasis added.

20 See supra FN 3.

21 See also Cour d'Appel de Paris, judgment of October 21st, 1983 (supra FN 3).

22 See the three judgments of the Swiss Federal Supreme Court cited supra FN 4.

23 See e.g., P. JOLIDON, (supra FN 4) where he refers to the decision of a state court in the Canton de Vaud and to a judgment rendered, on October 10th, 1979, by the Swiss Federal Supreme Court (see supra FN 4) and where he comments upon these decisions as follows: "Le tribunal cantonal vaudois avait admis, avec les arbitrés, qui était l'animateur d'un groupe de sociétés, sur lequel il avait la mainmise, avait pu 'par sa seule signature (...) prendre tous les engagements qui figurent dans le contrat en cause et qui concernent l'ensemble du groupe', que 'devant l'interpénétrabilité et l'imbrication de sociétés dominées par un seul homme, on peut admettre que [ce dernier] a engagé toutes les sociétés de son groupe' et que par conséquent toutes les sociétés du groupe 'pouvaient être mises en cause dans la procédure arbitrale' (...). A juste titre, le Tribunal fédéral a annulé cet arrêt (...) en relevant que le groupe en question n'a pas la personnalité juridique et que la question à résoudre en l'espèce est de savoir si la personne qui animait ce groupe avait effectivement le pouvoir d'engager toutes ces sociétés et de signer en leur nom une clause compromissoire (...). Corrélativement, la question a été posée de savoir si, en présence d'une convention d'arbitrage conclue avec la société mère, les effets de cette convention s'étendent aussi aux filiales (...). C'est une réponse catégoriquement négative qu'il faut lui donner dans la perspective du CIA, quel que soit le libellé de la convention, si les filiales sont des personnes morales juridiquement indépendantes et si leurs organes n'ont pas, égale signé ou ratifié ladite convention."

24 Prof. Frank VISCHER from Basel University; his co-arbitrators were W. OWEN and G.W. HAITZ.

25 ICC matter no. 4402, award of March 17th, 1983 (supra note 2).

26 Ibid., pp. 154,155.

27 Ibid., pp. 155,156.


29 Arbitrage international et ordre public suisse (supra FN 7). See also A. SAMUEL (supra FN 5), p. 105.


31 Judgment cit. supra FN 30, p. 582.


34 See, e.g. Y. DERAINS in the annotation to the arbitral award of 1982 in ICC matter no. 4131 (supra FN 1), JDI, pp. 905-906.

35 See, e.g., arbitral award of 1990 in the ICC matter no. 5721 (supra FN 2), p. 1023. See also Cour d'Appel de Pau, November 26th, 1986 (supra FN 3), p. 156 with annotation by A. CHAPELLE, ibid., p.159.

36 Cp., e.g., Y. DERAINS in an annotation to the award of 1990 in the ICC matter no. 5721 (supra FN 2), p.1028 Y. DERAINS/S. SCHAF (supra FN 5), pp. 236-238; TH. LAUGIER (supra FN 5), pp. 986-988.


See supra sub II, 3, a and FN 25.

See award of March 17th, 1983 in ICC arbitration matter no. 4402 (Prof. Frank VISCHER) (supra FN 25).

This principle has been discussed, in the present context, by various doctrinal writers, see, e.g., Y. DERAINS in his annotations to the awards in the following ICC matters no. 1434 (supra FN 1), pp. 982, 983; A. CHAPELLE, (supra FN 5), pp. 480, 481. See also the award of 1974 in the ICC matter no. 2138, JDI, 1975, p. 934 which applies this principle to arbitration agreements in general.

The problem of form has been discussed, in the present context, in a few arbitral awards and by some doctrinal writers. See the award of 1988 in the ICC matter no. 5730 (supra FN 1), p. 1035; the awards of 1985 and 1986 in the ICC matter no. 4504 (supra FN 2), p. 1120; A. CHAPELLE (supra FN 3), p. 108; id. (supra FN 5), pp. 478-480; J. FADLALLAH, (supra FN 5), pp. 112-114 (who engages in an in-depth analysis of the problem).


See also J.-L. GOUTAL in an annotation to the decision rendered by the French Cour de Cassation cited infra in FN 50, pp. 145-147.


Cp. RGZ 108, 374 [108 Decisions of the Federal Supreme Court in Civil Matters 374]; The right of a third party to it was decided by the first-cited judgment of the Reichsgericht and by the Bundesgerichtshof that the articles of association or of the by-laws. Whereas these rulings seem to limit the application of the third party beneficiary construct to the association-member-relationship, German doctrinal writers - in line with the two other decisions of the Reichsgericht cited supra in FN 47 - are of the opinion that the construct of the third party beneficiary is applicable to any arbitration agreement and to any arbitrable legal relationship whatsoever (cp., e.g., P. SCHLOSSER, supra FN 38, p. 323; A. SCHÜTZE/D. TSCHERNING/W. WAIS, Handbuch des Schiedsverfahrens, 2nd ed., Berlin, 1990, p. 31; K.H. SCHWAB/G. WALTER, Schiedsgerichtsbarkeit, Systematischer Kommentar, 4th ed., Munich, 1990, p. 62).


Cp., e.g., J.-L. GOUTAL (supra FN 45).

See J.-L. GOUTAL (previous FN) and A. CHAPELLE (supra FN 5), pp. 484, 485.


See supra sub IV, 2.


See supra FN 1.


See the award of 1988 in the ICC matter no. 5730 (supra FN 1), JDI, p. 1036. A. CHAPELLE (supra FN 5, p. 483) assumes that also the award of 1975 in the ICC matter no. 1434 (supra FN 1) is based on that doctrine, an assumption which seems doubtful.


See the title of chapter 6, in G.H.L. FRIDMAN'S treatise (previous FN).


61 The author of the present article has re-arranged TREITEL's criteria without, however, altering them.


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

68 See supra FN 66, p. 8 B.

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

70 See infra sub VII, 2.

71 See supra FN 69.


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


78 See supra sub VII in initio.

79 See supra sub IV, 2.

Sub VII, 1, c.

This surprising fact is explained by P.I. BLUMBERG ("Corporate Groups and Enterprise Liability", in Private Investors Abroad, Loose-leaf-ed., pp. 10-1, 10-15, 10-16) as follows: "Inasmuch as common-law agency requires a consensual understanding between the parties and requires the subsidiary to be acting on behalf of the patent, not on its own behalf, common-law agency rarely exists in intragroup liability cases." See also J. LEARNED HAND in Kingston Dry Dock Co. v. Lake Champlain Transportation Co., 31 F.2nd 265, 267 (2nd Cir. 1929).

80 Ibid., p. 233.

81 Ibid.

82 Ibid., p. 234.

83 Ibid., p. 235.

84 Ibid., p. 236.

85 Ibid., p. 237.

These criteria have been enumerated in Flynt Distributing Co., Inc. v. Harvey (previous FN), p. 1393 as being the following: “To apply the alter ego doctrine, the court must determine (1) that there is such unity of interest and ownership that the separate personalities of the corporation and the individuals no longer exist and (2) that failure to disregard the corporation would result in fraud or injustice”. One will note also, that these criteria are very narrow. In an earlier decision, the Federal Court for the Southern District of New York had, in the matter of Coastal States Trading, Inc. v. Zenith Navigation, S.A. (previous FN) already elaborated a more specific criterion for the group of companies situation in stating (ibid, p. 337): “A party seeking (...) to bind a corporation to an arbitration agreement to which it is not a signatory must (...) establish that the subsidiary corporation was controlled to such a degree by the patent that it had ‘no separate wind, will or existence of its own’(...) Such control must go beyond mere stock ownership, or even identity of officers and directors, to the point that the controlling corporation dominates the finances, policy, and business practices of the controlled corporation (...) The ‘puppeteer’ (...) must so thoroughly interpose itself into the conduct of the controlled corporation that it can be said that the latter is merely a ‘screen’ for the activities of the former.”


See also the warnings expressed by other French eminent lawyers who took part in the scholarly discussion following the presentation of the paper by A. CHAPELLE referred to supra in FN 5; e.g. by M. VASSEUR, ibid., pp. 496-498.

Referring Principles:

II.4 - Agency by estoppel / apparent authority