VYTAUTO DIDŽIOJO UNIVERSITETAS

TEISĖS FAKULTETAS

Giedrė Pociūtė

ARBITRATION AGREEMENT EXTENSION TO NON-SIGNATORIES: RIGHTS AND DUTIES OF THE PARTIES THAT HAVE NOT SUBMITTED ANY DISPUTE TO ARBITRATION

Magistro baigiamasis darbas

Teisės vientisųjų studijų programa, valstybinis kodas 60101S103

Vadovas **dr. Paulius Čerka** _____ _____
(Moksl. laipsnis, vardas, pavardė) (Parašas) (Data)

Apginta _____ _____ _____
(Fakulteto dekanas) (Parašas) (Data)

Kaunas, 2012

CONTENTS

SUMMARY

Comparative research and scientific analysis, confirmed an idea that arbitration process is influenced by globalization, economic, transnational relationships and harmonization of Contract law principles. Contract law principles play a fundamental role in arbitration agreement.

The main problem is whether arbitration agreement is extended under general doctrines of contract law or under specific legal doctrines and does arbitration award may be enforced under New York convention.

The aim of this thesis is to determine when and if ever non-signatory is bound to participate in arbitration procedure without expressing their consent by signing an arbitration agreement.

The analysis revealed that concept of arbitration agreement has been winded, what is more by analyzing arbitration agreement, as itself under International arbitration principles and New York convention showed that written form of arbitration agreement is not required. Furthermore, application of general contract doctrines and specific legal doctrines helps to overcome a lack of expressed consent. Analysis also showed that under general contract doctrines, such as implied consent, assignment or succession; third party beneficiary, estoppel and agency doctrines arbitration agreement extends. The same should be said about specific legal doctrines. Application of these two groups of doctrines, i.e. general contract law doctrines and specific legal doctrine clarified two roles of non-signatories while arbitration agreement is extended.

SANTRAUKA

Arbitražas – tai vienas iš populiariausių ir dažniausiai taikomų tarptautinių komercinių ginčų sprendimo būdų. Tai privatus, laiką tausojantis bei ekonomiškai naudingas ginčų sprendimo būdas. Be to, arbitražo sprendimai dėka Niujorko konvencijos yra pripažįstami ir vykdomi beveik visame išsivysčiusiame pasaulyje. Taip pat svarbu pažymėti, tai jog arbitražo išlyga laikytina sutarčių teisės dalimi, todėl, jei subjektas nėra ta šalis, kuri dėl arbitražo susitarė, t.y. neišreiškėte valios ir nesudarė arbitražinio susitarimo, tuomet jo atžvilgiu negalima kreiptis į arbitražą dėl kilusio ginčo sprendimo. Arbitražo procesas kyla iš šalių laisvanoriško sprendimo, išreikto pasirašius arbitražinę išlygą, kilusius ginčus spręsti arbitraže pagal pasirinktą jurisdikciją ir teisę. Šiame darbe keliamas klausimas ar toks sutikimas dėl arbitražinio proceso galimas tik išreiškiant tai aiškiai raštu ar kita vertus, tokiam sutikimui gali būti taikomos komercinių sutarčių sudarymui taikomos sutarčių teisės teorijos?

Ištyrus teisminę praktiką pastebėta, kad arbitražinis susitarimas pripažįstamas privalomu šalims, net ir tada, kai jos nepasirašė arbitražinio susitarimo, tačiau savo valia išreiškė kitu būdu ar forma. Siekiant išsiaiškinti ar šalis išreiškė valią dėl ginčų sprendimo arbitraže, teismai vadovaujasi vietinės teisės doktrinomis *(lex loci arbitri, o neapsiboja griežtos ir formalios rašytinės formos reikalavimu).*

Gerai žinoma, jog sutarties galiojimą nusako šalies sutikimas, kuris gali būti išreiškiamas ne vien parašo forma. Taigi, atsižvelgiant į tai, kyla klausimas, ar arbitražinį susitarimą valios išraiška sudariusios šalys, t.y. sutikimas išreiškimas jo nepasirašant, laikomas galiojančiu, nepaisant to, kad pagal Niujorko konvenciją arbitražinis susitarimas laikomas sudarytu tik išreiškus valią raštu, nedetalizuojant ar šis reikalavimas taikomas išlygos sąlygoms ar pačiam šalies sutikimo formai. Taip pat tyrimo metu nustatyta, jog Tarptautinių arbitražinių teismų taisyklėse yra naudojama išplėsta arbitražinės išlygos sudarymo būdų apimtis. Antai UNICITRAL arbitražo taisyklėse 1 straipsnio 1 punkte numatyta, jog privaloma raštinė formai parašo būdu nėra būtina, kad būtų susitarimas laikomas galiojančiu.

Taigi, arbitražinės išlygos galiojimas formos klausimais neretai sukelia klausimų dėl jos taikymo apimties. Ar arbitražinis susitarimas gali apimti ir tuos asmenis, kurie tiesiogiai nepasirašė arbitražinio susitarimo, t.y valią sudaryti arbitražinę išlyga išreiškė kitais sutarčių teisėje taikomais sutarčių sudarymo ir galiojimo būdais.

Baigiamojo darbo tikslas- nustatyti, kada ir jei iš vis galima, arbitražinio susitarimo nepasirašiusioms šalis laikyti sudarius galiojančią arbitražinę išlygą, t.y. ar arbitražinio susitarimo galiojimo išplėtimas jo nepasirašiusiems subjektams?

Atsižvelgiant į James M. Hosking and William W. Park pasiūlytas ir taikytinas doktrinas, kalbant apie arbitražinio susitarimo apimties taikymo klausimą, buvo suskirstytos į sutarčių teisei būdingas ir spacialiąsias doktrinas, kurios išimtai taikomos tik arbitražinio susitarimo galiojimo apimčiai nustatyti.

Baigiamojo darbo tikslams pasiekti buvo įsiskelti šie uždaviniai:

(1) pristatyti arbitražinio susitarimo koncepciją;
(2) pristatyti tarptautinėse arbitražo taisyklėse ir Niujorko konvencijoje keliamus reikalavimus arbitražinio susitarimo formai;
(3) aptarti arbitražinio susitarimo galiojimo aspektus;
(4) išanalizuoti teisės doktrinas, kurias taikant plečiama arbitražinio susitarimo apimtis;
(5) pristatyti ir išanalizuoti sutarčių teisėje taikomas doktrinas, kurių pritaikymas arbitražiniam susitarimui turi įtakos arbitražinio susitarimo apimties išplėtimui;
(6) Pristatyti ir išanalizuoti teisinės doktrinas, kurios išimtinai taikomas tik arbitražinių susitarimų apimties išplėtimui;
(7) Aptarti teises ir pareigas šalių, kurios nesudarė arbitražinio susitarimo jį pasirašant.

INTRODUCTION

Arbitration is the most common vehicle for dispute resolution in international commercial transactions. It may be institutionalized through the use of standard rules provided by organizations[1], or it can be done ad hoc basis. It is private, time and cost efficient and more straight-forward than state courts proceedings. Furthermore, arbitral awards are enforceable world-wide[2]. Needless to say, that arbitration is the matter of contract law and if you are not a party which has signed or agreed upon arbitration clause you cannot be required to submit any dispute[3] to arbitration. Arbitration arises from the parties' decision, that the dispute should be solved on the basis of agreed jurisdiction and law.[4]

However, due to increasing number of disputes, a trend has been noticed to make arbitration agreement binding even on parties who had never signed an arbitration agreement or in other words who had never "put a pen to a paper". In making the critical determination of who agreed to arbitrate, judges normally look for guidance to standard set by their own jurisdiction (*lex loc arbitri)*, whether in conflict of law principles or substantive standards for determining contract validity.

It is well known that in the contract law the validity of contract is defined by consent and one of consent's form is signing. In regard to this, a question whether arbitration agreement expressed by parties consent without physically signing it is valid; regardless the fact that under New York convention the form of arbitration agreement is clearly defined.[5] Due to this another **problem** arises that if arbitration agreement is extended under general doctrine of contract law or under specific legal doctrines, will arbitration award be enforced under New York convention[6] and what duties and rights are shared by parties who have never consented to an arbitration by signing.

The ***aim of the master's thesis is*** to determine when and if ever non-signatory is bound to participate in arbitration procedure without expressing their consent by signing an arbitration agreement?

---

[1] LCIA (London Court of International Arbitration); SCC (Stockholm Chamber of Commerce), ICC (the International Chamber of Commerce; AAA (the American arbitration Assosiation) etc..

[2] The Convention on Recognition and Enforcement of Foreign Arbitral awards, 1959.

[3] Id Article II (2).

[4] Decision is usually expressed in arbitration agreement (clause) that is an autonomous part of entire contract.

[5] „The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by parties or contained in an exchange of letters or telegrams"; Article II (2), New York convention, 1959.

[6] The Convention on Recognition and Enforcement of Foreign Arbitral awards was adipted in New York, on 10 June 1958, and entered into force ob 7 June 1959. The first countries to sign New York Convention were belgium, Costa Rica, El salvador, etc.. Since the adoption, the membership has grown steadily to 146 countries in 2011 (Lithuanian entered convention in 14 March 1995), information available at http://www.uncitral.org.

To answer the main question of the master's thesis, the following ***objectives*** have been formulated:

- *to present the concept of arbitration agreement;*

- *to present arbitration agreement form under International Arbitration Rules and New York Convention on Recognition and Enforcement of Foreign Arbitral awards;*

- *to discuss and analyze what criteria defines arbitration agreement validity;*

- *to analyze the doctrines under which arbitration agreement is extended to the parties that have not signed an arbitration agreement;*

- *to analyze international contract law doctrines that are applied for defining whether arbitration agreement binds non-signatories;*

- *to analyze which specific legal doctrines are applied for defying whether arbitration agreement binds non-signatories;*

- *to set what are the rights and duties of non-signatories that have not submitted any dispute to an arbitration.*

To achieve the aim of the study, the thesis employed the following **methods**: *comparative research approach* is applied to examine relations between signatories and non-signatories in the scope of arbitration agreement. Also *analysis* of general contract law doctrines and special legal doctrines that defines arbitration agreement validity to parties is presented.

Arbitration starting is consensual. Due to this, the determination of who is the party to an arbitration agreement is equivalent to the determination of which party has consented to it. Thus, whether exit matrix for determining the parties who consented to implement to arbitration agreement without signing it or whether the determination is an exception of already existing rules. This question will be held as an indicator for „purification" rights and duties of the non-signatories, i.e. parties who have not submitted any dispute to arbitration.

The thesis raises the hypothesis that non-signatories to an arbitration agreement acquire rights and duties by extension of arbitration agreement under general contract law doctrines and special legal doctrines.

I. CONCEPT OF ARBITRATION AGREEMENT

Law theoreticians have distinguished two main concepts of arbitration: common law concept of arbitration and civil law concept of arbitration.[7] Over the years these two concepts have come closer to each other, but some distinguishing features still exist. English arbitration legislation[8] has established the pattern for the common law concept and dispersed throughout the world. The same can be said about civil law concept of arbitration. French arbitration legislation[9] influenced the arbitration legislation in African countries, Spain, Netherlands and other civil law countries.

It is worth to notice that nowadays these conceptual approaches are closely tied, due to globalization process. Business no longer has any borders, corporations consists of multinational entities and national contract laws are far from being the only rules to be applied in the field of contract law, etc. The sign of such conceptual approaches closeness is International Arbitration Law harmonization. The first attempt to harmonize national Law is dated in 1985, when UNICITRAL published a Model Law on the arbitration of international commercial disputes.[10]

In regard to this, the section will shortly present the historical background of arbitration agreement: how during the centuries the arbitration agreement, form as itself, has changed; what is the form of arbitration agreement and what factors indicates arbitration agreement validity.

1.1 Historical development of Arbitration agreement

M. J. Mustill in the article "Arbitration: History and Background" presents the idea that "commercial arbitration must have existed since the dawn of commerce".[11] All commerce relations potentially involves dispute and all dispute must have successful and effective dispute solving methods. The method of using force was not supported by merchant. It was recognized that most practical way of solving disputes, was to ask "opinion of the colleague".[12]

[7] Pieter Sanders, *Quo Vadis Arbitration?-Sixty years of arbitration practice, a comperative study* (Netherlands: Kluwer Law International, 1999), p. 28-37.
[8] The basic for arbitration patters of common concept were three English arbitration acts: 1950; 1979 and 1996. id. pg. 28-33.
[9] The fundamental law sources of civil concept of arbitration: Uniform law of Strasbourg 1966; The New York convention, 1959.
[10] Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.
[11] Michael John Mustill, *Arbitration: History and Background*, 1989 May.
[12] John Collier and Vaughan Lowe, *The settlement of disputes in international Law*e (UK: Oxford University Press, 1999), p. 82.

In the 5th century B.C Greeks had implemented very significant innovations in international relations. The first one, in the international agreements Greeks had started to determine declaration of war order and humanitarian rules of war imposition. The second, dispute solving was concentrated in arbitration. During five centuries arbitration was used for 110 times[13]. During this time of innovation period there was also established and an international commercial arbitration court.[14] Classical Greek period had left a vestige for all coming centuries. It may be said, that his source of knowledge, that was given to us by Greeks was and is – fundamental.

Though arbitration is a dispute solving vehicle, it did not survive during the Greek times. J. Collier and V.Lowe in the book "*The settlement of disputes in the International law*"[15], had distinguished three reasons why international commercial arbitration courts did not survive till nowadays. Firstly, proceedings of arbitration were the matter of parties; they had to decide upon all procedures. During the time to reach communal consensus was getting more and more complicated. Secondly, arbitration awards were unenforceable, and finally to reach successful arbitration process it was necessary to arrange agreements with other countries, to make arbitration procedures international.

The 20th century was the period of international commercial arbitration institutionalization[16]. What is more, establishing all institutions was one step forward but to make this institution work it was necessary to create and implement rules. Depending on the institution, the international commercial arbitration rules[17] differ as well. Due to these processes arbitration agreement in international commerce obtained clearly defined form. Also, a significant role was played by United Nations when 1959 New York convention on Recognition and Enforcement of the Foreign Arbitral Awards was enforced.

In regard to arbitration development, it is obvious that arbitration grew up from local importance to global usage. Under International arbitration rules the form of arbitration agreement was clearly defined – consent expressed by signature, though this general rule is slightly changing.

---

[13] Vilenas Vadapalas, *Tarptautine teise*, (Vilniaus: Eugrimas, 2006") pg. 76.
[14] Id., pg 77.
[15] Id., pg. 82.
[16] *London Court of International Arbitration* - LCIA (the Chamber was formally inaugurated on 23 November 1892. In April 1903, the tribunal was re-named the "London Court of Arbitration" and, two years later, the Court moved from the Guildhall to the nearby premises of the London Chamber of Commerce. In 1986, the LCIA became a private not-for-profit company, limited by guarantee, and fully independent of the three founding bodies. Information avalibe at http://www.lcia.org/); *Stockholm Chamber of Commerce* – SCC (the Stockholm Chamber of Commerce and was established in 1917. information available at http://www.sccinstitute.se/skiljeforfarande-2.aspx.), International *Chamber of commerce*- ICC (The International Chamber of Commerce was founded in 1919 with an overriding aim that remains unchanged: to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital. information available at http://www.iccwbo.org/).
[17] The mater on rules decides the arbitration agreement signed parties. This right to the parties is delegated by most arbitration rules.

1.2 Forms of arbitration agreement

During the years of arbitration procedures institutionalization, it was agreed upon that arbitration agreement shall be in writing. Arbitration agreement and its very form were highly discussed while creating International Arbitration system. Under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in Article II, member states will recognize "agreements in writings".[18]

It is worth to notice that slightly different practice is being formed under International arbitration rules. For example, under UNICITRAL rules[19] Article 1(1) states "*where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration …*>. In other words, that under UNICITRAL rules subjects to an arbitration agreement are not strictly bound by the form of arbitration clause, i.e. it may be in written or not, though to arbitration subjected parties must be tied by legal relationship.

Swiss Arbitration Rules[20] is also friendlier to the extension of arbitration, while not defining arbitration agreement in writing[21]. Another International ICC arbitration rules[22] (revised version become effective in January 2012) also keeps position that *parties are encourage to include an appropriate dispute resolution clause in their agreement*, though at the same time this rule prompts the idea, that arbitration clause on some extend is not an obligatory. Article 4 (1) opening

[18] It included in the definition of "writing" arbitral clauses or arbitration agreements "contained in an exchange of letter and telegrams. In this way, even if there was no unique document signed by the lawful representatives of both parties, the agreement would be valid.

[19] The newly-revised (2010) UNCITRAL Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

[20] Arbitration in Switzerland is offered by many institutions in Switzerland and abroad. In particular, the Chambers of Commerce in Basel, Berne, Geneva, Lausanne, Lugano and Zurich offers international arbitration under the Swiss Rules. Other international arbitration institutions also conduct arbitrations in Switzerland. For the proceedings under the Arbitration Rules of the International Chamber of Commerce (ICC) locations in Switzerland are among the most frequently selected places. Further international arbitration proceedings are held under the UNCITRAL Rules or under the Rules of the United Nations Economic Commission for Europe.

[21] Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these Rules. (Swiss rules, model of arbitration clause, available at http://www.arbitration-ch.org).

[22] Arbitration under the ICC Rules of Arbitration is a formal procedure leading to a binding decision from a neutral arbitral tribunal, susceptible to enforcement pursuant to both domestic arbitration laws and international treaties such as the New York Convention.These Rules respond to today's business needs. The 2012 Rules of Arbitration remain faithful to the ethos, and retain the essential features, of ICC arbitration, while adding new provisions to address such matters as disputes involving multiple contracts and parties; updated case management procedures; the appointment of an emergency arbitrator to order urgent measures; and changes to facilitate the handling of disputes arising under investment treaties and free trade agreements.

phrase "*a party wishing to have recourse*" – leave an open question, whether any party is a subject to these International arbitration rules or not.

Under UNIDROIT principles article 1(2) declares that no form is required, i.e. article states the principle that the conclusion of a contract is not subject to any requirement as to form. The same principle also applies to the subsequent modification or termination of a contract by agreement of the parties.[23]

In regard to already discussed form of arbitration agreement under the New York Convention, NYC, it is clearly defined, i.e. written form, though in widely used International Arbitration rules a gap was left for defining whether parties are subjects to an arbitration agreement or not. What is more, arbitration agreement is a matter of contract law, though general principles of contract law is applied while answering the question, whether parties are subjected to an arbitration or not. It is worth to notice that under UNIDROIT principles form of agreements vanishes, i.e. no requirement is held under this International commerce contract law.

Section II will present the analysis based on general doctrines of contract law and some specific legal doctrine that have been formed during the processes of International globalization and specifically have been used only for defining arbitration agreement existence.

1.3 Arbitration agreement validity

Initially, arbitration arises from parties' agreement, which is usually a part of commercial contract. Under international principles of the commercial contract law[24] - *parties are free to enter a contract and to determine its content*. This fundamental principal of freedom of contracting is established in every modern law country. Due to this, the same principle is applied for arbitration agreement because arbitration agreement is a matter of contract law.

By entering into contract parties express their will to participate in relation of contracting parties, due to this they are parties who are bound by the agreement they concluded. In regard to this, validly of arbitration agreement is expressed by parties to consent to be bound under arbitration agreement.

[23] This principle which is to be found in many, although not in all, legal systems, seems particularly appropriate in the contex of international trade relationships where, thanks to modern means of communication, many transactions are concluded at great speed and by a mixture of conversations, telefaxes, apper contracts, e-mail and web communication. (http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf).

[24] Article 1.1 (Freedom of the contract); The right of business people to decine freely to whom they will offer goods or servines and by whom they wish to be supplies, as well as the possibility for them freely to agree on the terms of individual transactions are the cornesstones of an open, market-oriented and competitive international economic order. UNIDROIT principles of international comercial contracts, Id.

Under UNICITRAL rules, arbitration agreement is valid, when parties expressed their conduct to arbitration. Also, it is recommended to implement arbitration clauses in contracts, which particularly includes the following information: the appointing authority (name of institution or person); number of arbitrators (one to three); the place of arbitration (tow, country) and the language to be used in arbitral proceedings. Under New York convention such arbitration clause is obligatory and it should be expressed in writing.

Obviously, to define parties of the contract is not so complicated, as it is not complicated to define parties of arbitration agreement. It is said, that parties cannot require submitting to arbitration any dispute he has not agreed to submit[25]. Despite this basic rule, in the practice courts have relied upon to extend the obligation to arbitrate to parties regardless of whether they have physically signed an arbitration agreement. The question under which circumstances courts extends obligation will be discussed in the following section II.

In regard to already mentioned, it may be said that arbitration agreement during the arbitration transformation period to some extent has been transformed to some kind of "legal relation". If the party is not the arbitration agreement signing party it does not mean by itself that party may not be subjected to an arbitration agreement.

All in all during the time of arbitration agreement transformation from 5th century B.C till nowadays it have brought some new concepts of arbitration as itself. Regardless of its rising popularity, now more and more scholars are talking about arbitration ability to expand. These ideas bring us to new dimensions of understanding how we as practitioners should form an arbitration clause and when arbitration agreement is valid without signing it. During the analysis presented in Section II, we will try to reveal whether arbitration agreement is valid without signing it as it is required under New York Convention.

II. ARBITRATION AGREEMENT EXTENTION TO NON-SIGNATORIES BY APPLYING GENERAL CONTRACT LAW DOCTRINE

It was already mentioned, that arbitration agreement is a matter of contract law, i.e. parties' decision to submit dispute to arbitration may be expressed or implied by the consent of the party.

[25] In Lithuanian comercial arbitration law the form of arbitration agreement is strictly defined, it is worth to mentioned that such formulation of the clause has been directed implemented from NY conventon , LR Comercial arbitration law, 1995, Article Nr. 9;

At international level in the mid 1990s, the Institute for the Unification of Private law presented its principles of International Commercial Contracts, known as UNIDROIT Principles. The UNIDROIT principles may be incorporated into contract containing arbitration agreement, so these principles may be entirely or exclusively applied to an arbitration agreement.

Theories that are presented in this section are typically used to overcome a lack of expressed consent, for example where a third party is not a signatory to an arbitration agreement or where there is opposition to such party‘s involvement in an arbitration proceedings. In this section the arbitration agreement extension on contract law and on specific legal doctrines will be presented.

William W. Park, distinguishes 4 doctrines[26] arising out of common principles of contract and special legal doctrines that may bind non-signatories to arbitration agreements:

1. Implied consent;[27]
2. Estoppel;[28]
3. Piercing the corporative veil;[29]
4. Group of companies doctrine;[30]

James M. Hosking another American scholar distinguishes 10 doctrines[31] that may bind non-signatories to arbitration as the following:

(1) Incorporation by reference;[32]
(2) Assumption of obligation;[33]
(3) Agency;[34]
(4) Veil piercing/alter ego/group of companies/consortium/joint venture[35];

[26] William W. Park, *Non-signatories and International contracts: an arbitrator’s dilemma* (available at http://www.arbitration-icca.org/media/0/12571271340940/park_joining_non-signatories.pdf)
[27] Id. Prg. 1.11
[28] Id. Prg.1.48.
[29] Id. Prg 1.56
[30] Id. Prg 1.70-1.80.
[31] Hosking, James M. (2004) „The Third Party Non-Signatory‘s Ability to Compel International Commercial Arbitration:Doing Justine without Destroying Consent“, Perperdine Dispute Resolution Law Journal:Vol.4:Iss.3, Article 6. Availabale at: http://digitalcommons.peperdine.edu
[32] a non-signatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the non-signatory which incorporates the existing arbitration clause. id., pg, 482.
[33] in the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligationto arbitrate.", id., pg, 482.
[34] id., pg, 482.
[35] In some circumstances, the corporate relationship between the parent and its subsidiary are sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other. As a general matter, however, a corporate relationship alone is not sufficient to bind a non-signatory to an arbitration agreement." Similarly, the so-called "group of companies doctrine" provides a precedent for treating a group of companies as a single economic unit for the purposes of being bound by an arbitration agreement to which

(5) Estoppel[36];

(6) Assignment[37]

(7) Novation[38]:

(8) Succession by operation of the law[39]:

(9) Subrogation[40];

(10) Third party beneficiary[41]

When reviewing these lists presented by different scholars it is obvious that some theories overlap with each other. These theories maybe categorized into two groups: arbitration agreement extension to non-signatories by applying general contract law doctrines and arbitration agreement extension to non-signatories under specific legal doctrines. These theories have been grouped and are presented in the Table, No. 1.

Arbitration agreement extension to non-signatories by applying general contract law doctrines	Arbitration agreement extension to non-signatories under specific legal doctrines.
1. Implied consent 2. Assignment or succesion 3. Third party beneficiary	1. Piercing the corporative veil/ Alter ego 2. Group of companies' doctrine

not all individual companies within the group are signatories. The arbitral tribunal will "[clonsider closely the structure and organization within a Group of Companies. The fact that such a group ... may form a so-called unit Meconomique would be a significant element and as such may justify a conclusion that not only a particular subsidiary "C" must be considered bound by the arbitration clause, but also its sister "B" or its parent "A" etc. A similar argument is made in cases of "consortium," partnerships and joint ventures. id., pg, 482.

[36] "This Court has also bound non-signatories to arbitration agreements under an estoppel theory ...by knowingly exploiting the agreement, the [plaintiff] was estopped from avoiding arbitration despite having never signed the agreement." The Court also referred to "an alternative estoppel theory" where "[a] signatory wasbound to arbitrate with a non-signatory and the nonsignatory's insistence because of the 'close relationship' between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract . . . and [the fact that] the claims were 'intimately founded in and intertwined with the underlying contract obligations. id., pg, 483

[37] "This situation frequently arises in practice. The claimant or the defendant party is the assignee of the rights and benefits of a contract, including its arbitration provision." id., pg, 483

[38] "In this situation the claimant or defendant in the arbitration is a person who has replaced the original party to the arbitration agreement; the original person has ceased to have any rights or liabilities under the contract." id., pg, 484

[39] "This situation occurs in bankruptcy. The receiver adopts the contract and seeks as claimant in an arbitration to enforce it in the place of a bankrupt party, named in the contract. Or the receiver is attacked as defendant.., and has to answer in the arbitration since he has succeeded in the place of the bankrupt party." This may also arise in certain testamentary and similar disputes. id., pg, 485

[40] Closely related to the above, this arises mainly in the insurance and reinsurance in which the subrogee "stands in the shoes" of the original party to the agreement containing the arbitration clause. id., pg, 485

[41] The parties to a contract may expressly stipulate that, in addition to themselves, a third party shall acquire rights thereunder. Even if no express stipulation has been made by the parties to a contract whereby a party acquires rights, including the right to arbitrate, circumstances may indicate that the parties have such intention. The third party beneficiary will then de-rive his right to be a party to the arbitration from a tacit agreement.

4. Estoppell. 5. Agency	

Table, No. 1.

According to doctrines categorization, the analysis of every doctrine will be presented in Section II of this paper. The following every doctrine and court practice under each one will be presented.

2.1. Implied consent

Arbitral jurisdiction based on implied consent involves a non-signatory that should reasonably expect to be bound by (or benefit from) an arbitration agreement signed by someone else. In such circumstances, no unfairness results when arbitration rights and duties are inferred from behavior.

Implied consent focuses on the parties' true intentions. In other words agreements of all sorts can be inferred from party's behavior. This theory of implied consent may be illustrated as single lady dinning in the most expensive restaurant and sipping Shipwrecked 1907 Heidsieck. By choosing a restaurant where you are served with the glass of one of the most expensive champagne you have agreed by choosing this restaurant i.e. showed "implied consent" without any formal offer. In circumstances of implied consent no unfairness may affect rights and duties of the parties, who constantly agreed upon arbitration by behavior or by true intentions. This includes „extending the arbitration clause" to parties which may have ratified, signed or otherwise manifested an intend to be bound by an arbitration agreement, for example through the negotiation or performance of the contract, or related agreements; or non signatories may have benefit from the contract, or may acted in such way that it would be inequitable for a party to avoid arbitration of the dispute.[42]

This *implied consent* doctrine is one of the fundamental cornerstones of all contract law. This doctrine is established in the International UNIDROIT principles, for example: Article 2.1.1 states that a contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.[43] Article 4.1 declares that contract shall be interpreted

[42] Jean-Francois Poudret/Sebastien Besson, *Comparative Law of international arbitration*, (London 2007), prg. 251.
[43] In commercial practice contracts, particulary when related to complex transactions, are often concluded after prolonged negotions without an identifiable sequence of offer and acceptance. In order to determine whether there is sufficient evidence of the parties' intention to be bound by a contract, their conduct has to be interpreted in accordance with criteria set forth in article 4.1. (available at http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf)

according to the common intention of the parties.[44] In other words not every detail can be written down when parties enter into contracts, some elements rely on intent.

In regard to already mentioned arbitration agreement is a matter of contract law, due to this any right and duties of arbitration agreement may be inferred by behavior or in other words by *implied consent.*

To illustrate this doctrine I would like to present classical case ICC, No.4131 (Dow Chemical).

2.2. Assignment or succession

When a non-signatory either assumes a contract containing an arbitration clause, or receives the assignment of such a contract, the courts may compel the non-signatory assignee to arbitrate. In case of assignment and statutory or contractual succession, an arbitration agreement may be deemed transferred or found binding on the successor even absent express agreement to the arbitration agreement[45].

To compel arbitration, however, the courts will generally require some conduct evidencing the intent by the non-signatory to be bound by the assumed or assigned arbitral agreement.[46] In

[44] Paragraph (1) of this Article lays down the principle that in determining the meaning to be attached to the terms of a contract, preference is to be given to the intention common to the parties. In consequence, a contract term may be given a meaning which differs both from the literal sense of the language used and from the meaning which a reasonable person would attach to it, provided that such a different understanding was common to the parties at the time of the conclusion of the contract. The practical importance of the principle should not be over-estimated, firstly because parties to commercial transactions are unlikely to use language in a sense entirely different from that usually attached to it, and secondly because even if this were to be the case it would be extremely difficult, once a dispute arises, to prove that a particular meaning which one of the parties claims to have been their common intention was in fact shared by the other party at the time of the conclusion of the contract. For those cases where the common intention of the parties cannot be established, paragraph (2) provides that the contract shall be interpreted in accordance with the meaning which reasonable persons of the same kind as the parties would give to it in the same circumstances. The test is not a general and abstract criterion of reasonableness, but rather the understanding which could reasonably be expected of persons with, for example, the same linguistic knowledge, technical skill, or business experience as the parties. In order to establish whether the parties had a common intention and, if so, what that common intention was, regard is to be had to all the relevant circumstances of the case, the most important of which are listed in Article 4.3. The same applies to the determination of the understanding of reasonable persons when no common intention of the parties can be established. Both the "subjective" test laid down in paragraph (1) and the "reasonableness" test in paragraph (2) may not always be appropriate in the context of standard terms. Indeed, given their special nature and purpose, standard terms should be interpreted primarily in accordance with the reasonable expectations of their average users irrespective of the actual understanding which either of the parties to the contract concerned, or reasonable persons of the same kind as the parties, might have had. For the definition of "standard terms", see Article 2.1.19(2), ibd.

[45] Marc S. Palay, Tanya Landon, Partcicipation of third parties in International arbitration:Thinking outside of the Box, (available at http://www.sidley.com/files/Publication/3dd82534-8d6c-4314-9210-25bb37960cfe/Presentation/PublicationAttachment/73ae2adf-ff5e-4108-97ee-287ced57f2a2/IA11_Chapter-3_SidleyAustin.pdf)

[46] *Fyrnetics* (*Hong Kong*) *Ltd*. vs. *Quantum Group, Inc.*, 293 F.3d 1023 (7th Cir., 2002), in which a non-signatory who was an affiliate of the licensee, was not bound by the arbitration provision of the license agreement under the doctrine

Caribbean SS. Co., SA vs. *Sonmez Denizcilik Ve Ticaret AS,*[47] the Court held that by assigning the cargo owner's claim to a charterer after it had been determined that the cargo owner's claim was non-arbitrable, the charterer could not force the ship owner to arbitrate the cargo owner's claim against the ship owner since there was no intent by the charterer to be bound by the arbitration clause.

In *Thomson-CSF, SA* vs. *American Arbitration Ass'n,*[48] the Second Circuit Court of Appeals held that a corporate parent that had only recently purchased a subsidiary did not assume the obligation, in an agreement between its subsidiary and its subsidiary's supplier, to arbitrate disputes with that supplier, even though the parent was aware that the agreement purported to bind the parent as an affiliate of the subsidiary. The Court held that the parent did not manifest an intention to be bound by the agreement and explicitly disavowed any obligations arising out of that agreement.

It is worth to mention, 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.

Nonetheless, neither the New York Convention nor the UNICITRAL (2010) model law deals with issues of assignment or succession. The one reason may be named, that issues of assignment and succession is left for domestic law – *lex loci arbitri.*

2.3. Third party beneficiaries

Under a third-party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. Under third-party beneficiary analysis, a court will examine, what the parties intended at the time of contracting: "[T]he fact that a person is directly affected by the parties' conduct, or that he may have a substantial interest in a contract's enforcement, does not make him a third-party beneficiary."[49] This presumption may be overcome only if the intent to make someone a third-party beneficiary is "clearly written or evidenced in the contract".[50]

---

of assumption apsent evidence that the non-signatory directly paid royalties to the licensor pursuant to anagreement, or other evidence of assumption.

[47] Caribbean SS. Co., SA vs. Sonmez Denizcilik Ve Ticaret AS, 598 F.2d 1264(2d Cir.,1979).

[48] Thomson-CSF, SA vs. American Arbitration Ass'n, 64 F.3d 773 (2d Cir., 1995).

[49] *E.I. DuPont de Nemours & Co.* vs. *Rhone Poulenc Fiber & Resin Intermediates, SAS*, 269 F.3d at 196–97 (3rd Cir., 2001), noting the fact that a parent derived benefits from a contract executed by its subsidiary is insufficient to make it a third-party beneficiary.

[50] *Fleetwood Enterprises, Inc.* vs. *Gaskamp*, 280 F.3d 1069, 1075–76 (5th Cir., 2002); *McCarthy* vs. *Azure*, 22 F.3d 351, 362 (1st Cir., 1994), *Lester* vs. *Basner*, 676 F.Supp. 481, 484 85 (S.D.N.Y., 1987), Washington Square Sec. Inc. V Aune, 385 F3d 432 (4th circuit); John Hancock Life Ins v Wilson, 254 F.3d 48 (2d Cir. 2001).

In regard to above mentioned, there should be clearly defined or expressed under *third party beneficiary* doctrine that under contract where is an arbitral clause third party is directly affected, other two contracting parties has an intention to make third party beneficiary.

2.4. Estoppel

Estoppel/Abuse of right (*venire contra factum proprium*) – a third party may be bound to an arbitration agreement under principles of estoppel or abuse of right. This may occur, for example, where a part asserts that the lack of its signature on a contract precludes enforcement of the arbitration clause contained therein, but has at the same time maintained that other provisions of the contract should be enforced for its benefit, or where a non-signatory has received a direct benefit from the contract containing the arbitration clause[51].

2.5 Agency

Agency 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".An agency relationship may be demonstrated by: ". . . written or spoken words or conduct, by the principal, communicated either to the agent (actual authority) or to the third party (apparent authority)".[52] If a party signs an agreement in the capacity of a non-signatory's agent, the non-signatory may be bound by the agreement's arbitration requirement.[53]

In regard to these presented contract law doctrines, it is obvious that courts requires either express – in writing or implied consent to an arbitration, because this is fundamental criteria for determining whether arbitration agreement is valid or not. When the case lack an express agreement, court or tribunals will look at the conduct of the party whether party demonstrated implied consent. Regardless to this, aspect of arbitration award implementation is not answered. There is no question whether arbitration award will be enforced in national country, but if it is required to enforce arbitration agreement in other country we come ahead to arbitration award enforcement under New York convention.

[51] See footnote 26
[52] *Hester Intern. Corp.* vs. *Federal Republic of Nigeria*, 879 F.2d 170, 181 (5th Cir., 1989); *Arriba Limited* vs. *Petroleos Mexicanos*, 962 F.2d 528, 536 (5th Cir., 1992).
[53] *Srivastava* vs. *Commissioner*, 220 F.3d 353, 369 (5th Cir., 2000). *Bridas, S.A.P.I.C., et al* vs. *Government of Turkmenistan*, 345 F.3d 347 (5th Cir., 2003).

III. ABITRATION AGREEMENRT EXTENTION TO NON-SIGANTORIES BY APPLYING SPECIFIC LEGAL DOCTRINES

In this section two theories under which arbitration agreement may be extended under specific legal doctrine are presented. These theories, under which arbitration agreement may be extended under specific legal doctrine is a result of globalization of international commerce, i.e. corporations are constituted by multinational entities, national contract laws are far from being the only rules to be applied in the field of contract law, international business is transferred to electronic space and etc. Furthermore, these two doctrines help to defy whether parties expressed their consent to submit any dispute to arbitration.

3.1 Piercing the corporative veil / Alter ego doctrine

A subsidiary or affiliate‘s separate identity may be disregarded and a parent or affiliate bound by an arbitration agreement where that company has used its subsidiary or affiliate to commit a fraud or has otherwise abused the corporate form[54]. Although a corporate relationship or affiliation alone rarely has been held sufficient to bind a non-signatory to an arbitration agreement, there are circumstances where, under applicable state law principles, the relationship between a corporation and a subsidiary may be sufficient to justify piercing the corporate veil[55] to thereby hold a non-signatory corporation subject to the arbitration agreement of another corporate entity.[56] Because of the difficulty in establishing factual basis to pierce the corporate veil, most cases

[54] Sebastien Besson, Piercieng the Corporate Veil: Back on the right track in ICC Dosier: Multiparty Arbitration, Paris 2010.

[55] Anglo-Americans use piercing or lifting of the veil between shareholder and corporation. Veil-piercing justifies jurisdiction over corporate affiliate or one company’s liability for the substantive debts of other.

[56] In comparison of Lithuanian Law, that is a part of continental law, statutes on corporation and subsidiary relationship is strictly regulated. There is no potential of arbitration to be held. In Lithuanian Law, the right of shareholders are determined in the statute of Corporation Law. What is more it is declared that all disputed arisen from this statute are under jurisdiction of Lithuania courts.

considering this theory have not found the non-signatory to be subject to the arbitration agreement.[57]

Under requirements to include third parties are the following:

1. A close relationship between both corporations;
2. Control one corporation over the other;
3. A recognition of both companies as separate entities would lead to fraudulent or inequitable results.

In the context of international arbitration, piercing the corporate veil involves bringing in the parties that have not signed an arbitration agreement. These could be parent companies, subsidiaries, private individuals, governmental and quasigovernmental entities, and states. In their determination of the merits of a particular dispute, arbitration tribunals are usually bound by domestic law. As already mentioned, there is no consistency across national legal systems on the issue of piercing the corporate veil. As a practical matter, it is advisable to make arbitration agreements as inclusive as possible to avoid dealing with piercing the corporate veil altogether.

3.2 Group of companies' doctrine

This doctrine allows a non-signatory company to benefit from or be bound by an arbitration agreement signed by another company within the same group. The analysis focuses on the relations and dealings between separate corporate entities within the group and their respective roles in the conclusion, performance and termination of the relevant contract.[58]

In the practice it has been noticed that these theories overlap. By establishing big corporations, consortiums or international entities parties are engaged in various relation with other parties, though it is inevitable that theories mention above overlaps.

Most scholarly discussions address joinder of non-signatories with some reference to the so-called "group of companies" doctrine, elaborated almost a quarter century ago in France.[59] In the prototype case, *Dow Chemical v. Isover St. Gobain*,[60] an American parent (Dow USA) and its

[57] InterGen, NV v. Grina, 344 F. 3d 134 (1 st Cir. 2003); Bridas S.A.P.I.C v. Government of Turkmenistan, 345 F3d 347, 359 (5th Cir. 2003); Long v. Silver, 248 F.3d 309 (4th Cir. 2001).
[58] This principle originates from France and it is not widely excepted in the world.
[59] Otto Sandrock, *Arbitration Agreements and Groups of Companies*, 27 Int'l Law. p. 941 (1993) (available at http://www.trans-lex.org/116200)
[60] Dow Chemical v. Isover Saint Gobain, ICC Case No. 4131, Interim Award, Sept. 23, 1982, JDI p. 899 (1983), *comment* Yves Derains. An English version of the case can be found *in* Sigvard Jarvin & Yves Derains, I *Recueil des*

French subsidiary (Dow France) sought to benefit from an arbitration clause contained in agreements that affiliates (Dow AG and Dow Europe) had signed with companies whose rights were transferred to Isover St. Gobain. Given that the party resisting joinder (Isover St. Gobain) had already agreed to arbitrate pursuant to the relevant arbitration clauses binding Dow AG and Dow Europe, the critical issue was whether it would be compelled to honor that commitment with respect to companies that wished to participate in the arbitral proceedings.

In rejecting the motion by Isover St. Gobain to deny a place at the arbitration table for Dow USA and Dow Europe, the arbitral tribunal cited various indicia of the parties' common intent, stressing that the arbitration clause was autonomous from the main agreement. Thus the parties must be shown to have accepted either the entire contract (including the arbitration clause) or the agreement to arbitrate itself. [61] *Dow Chemical* assumes that the party sought to be joined will have been involved in the initial and final stages of the transaction: the negotiation and conclusion of the contract, as well as in performance and termination. Participation in "performance" of the contract does not seem to receive significance when isolated from at least one other element, such as negotiation.

Common sense explains the emphasis on participation at the initial stage of the parties' relationship. Normally, at the time contracts are negotiated and concluded the parties come to understand who was expected to be bound. A dominant entity should not be permitted to renege on its agreement, particularly when the negotiation induced reliance by the counterparty. The argument has some force, albeit limited in nature. The resisting party *did* agree that disputes related to the subject in question would be settled by arbitration. By contrast, if an application is made to bind a non-signatory, the very basis of arbitral jurisdiction would normally be lacking. The party sought to be bound would argue that it never agreed to arbitrate with anyone at all, thus requiring arbitrators to look fully for clear manifestation of assent. Consequently, arbitrators and judges often draw distinctions between what might be called "*consenting non-signatories*" (which seek to arbitrate) and "*non-consenting non-signatories*" (which resist arbitration). It is understandably easier to justify allowing a willing party to join an arbitral proceeding than the converse. One side to a dispute would not normally be permitted to seek relief under a contract containing an arbitration

---

sentences arbitrales de la CCI: 1974–1985, at p. 146, with relevant quotation on p. 149, fi rst full paragraph. The award was confi rmed by the *Cour d'Appel de Paris*, Oct. 21, 1983, Rev. Arb. p. 98 (1984). *See generally*, Jean-François Poudret & Sébastien Besson, *Droit Comparé de l'Arbitrage International* p. 227 (2002); Bernard Hanotiau, Complex Arbitrations (2005); Charles Jarrosson, *Conventions d'Arbitrage et Groupes de Sociétés*, *in* The Arbitration Agreement: Its Multifold Critical Aspects, ASA Bull., Special Series No. 8 p. 209 (Dec. 1994).

[61] *See Dow Chemical* award (JDI p. 899, at p. 904 (1983)), noting that in a similar case it had not been established that Company X would have accepted the arbitration clause if it had signed the contract directly.

clause without according to the other side (if it wishes) the benefits of the agreement's arbitration provision.

This does not mean that a "consenting non-signatory" will always succeed in joining the proceedings, but simply that extension of an arbitration clause to accommodate a consenting non-signatory remains quite different from joinder of an unwilling party. The scrutiny and the evidence must be greater when an attempt is made to *force* (rather than to *permit*) joinder by a non-signatory.

In joining a non-signatory, the evidence of consent would normally require special circumstances. Policy reasons as well as practical considerations make it difficult to compare a situation where the non-signatory *does* want to arbitrate with one where the non-signatory does *not* want to arbitrate. In the latter instance, the drawbacks of parallel proceedings must be weighed against the serious countervailing considerations of imposing arbitration on clearly unwilling entities. When the non-signatory has never consented to arbitration, more analytic rigor and hesitation are in order before extension should be ordered. The very basis of arbitral jurisdiction is prima facie absent.

IV. DUTIES AND RIGHTS OF NON-SIGNATORIES TO AN ARBITRATION AGREEMENT

Ordinary only parties to the contract have duties and rights. In regard to this, if you have not signed a contract you are not subjected with any right or duty under the contract. Under general contract principles and specific legal doctrine, parties are being subjected to arbitration without signing it. Due to this under International arbitration rules parties from not-signatories "are being transformed" to respondents and to third parties. This section will present analysis of International arbitration rule models in scope of non-signatories' rights and duties.

4.1 Duties and rights of non-signatories as respondent and claimant

Firstly, right and duties of non-signatory transformation to respondent will be presented. Under Section II and III contract law doctrines and specific legal doctrines were presented under which non signatory is subjected to apply for arbitration under most International Arbitration rules. Of course firstly non-signatory has to file a submission to Jurisdiction to arbitration. Arbitral

Tribunal has Competence to decide whether non-signatory is bound by arbitration is subjected to an arbitral tribunal (or arbitror). Arbitral tribunal after hearing the parties' statements decides, whether parties *implied consent* for arbitration exists or not.

The newly-revised UNCITRAL Rules[62] allow one or more third parties to be joined to the arbitration provided they are a party to the arbitration agreement, unless such joinder would result in prejudice to any of the parties. Though, non-signatories may be allowed to join arbitration, unless they have not been invited by arbitration agreement signed parties. According to this UNICITRAL rules, Article 1(1) defines parties who is subjected to an arbitration agreement as a party. In Article 1(1) it is stated "*where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration ...*>. It is worth to notice, that under UNICITRAL rules subjects to an arbitration agreement are not strictly bound by the form of arbitration clause, i.e. it may be in written or volition expressed by true intentions, or manifested an intend to be bound by arbitration agreement[63].

Under Swiss Arbitration rules article 4 (2)[64] states that question of non-signatory participation are subjected to an arbitral tribunal. In its landmark October 2003 decision[65], the Swiss Federal Tribunal considered the extension of an arbitration agreement to a non-signatory to be admissible given the third party's significant involvement in the performance of the contract, and demonstration that it was fully aware of its contents

It is worth to notice that decision whether the third party will be enforced to arbitrate is subjected to arbitral tribunal. This tendency is notified in most of modern arbitration rules, where competence to decide is redirected to arbitral tribunal.

---

[62] 2010 revision of UNICITRAL RULES came in to force;

[63] Case material; http://www.uncitral.org/uncitral/en/case_law/abstracts.html

[64] 1. Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Chambers may decide, after consulting with the parties to all proceedings and the Special Committee, that the new case shall be referred to the arbitral tribunal already constituted for the existing proceedings. The Chambers may proceed likewise where a Notice of Arbitration is submitted between parties that are not identical to the parties in the existing arbitral proceedings. When rendering their decision, the Chambers shall take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings. Where the Chambers decide to refer the new case to the existing arbitral tribunal, the parties to the new case shall be deemed to have waived their right to designate an arbitrator.
2. Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.

[65] DFD 129 III 727.

Under International Commerce court rules (ICC) parties wishing to join additional party (respondent or third party) may submit a request[66] to arbitration. The newly revised ICC rules become effective in January 2012. The revisions have for the first time dealt at length with arbitrations involving multiple parties, multiple contracts and consolidation of arbitrations. In particular, a new proposed Article 7[67] will allow a party to submit a "Request for Joinder" to the Secretariat to join an additional party to the arbitration. The revised rules also allow for claims arising out of more than one contract to be asserted in a single arbitration, regardless of whether such claims are made pursuant to one or more arbitration agreements. *Despite these innovations, the existence of an arbitration agreement binding all parties, and thus the consent of all parties to arbitrate, remains a fundamental requirement "a party wishing to recourse..>".*

In regard to already mentioned non-signatory after recognizing by arbitral tribunal as respondent acquires all duties and right that are given by the law to the arbitration agreement signing parties: to submit claims, take parts in hearings get issued aword. Problem arising when it is required to enforce arbitration award in to the country. Then we knock against the wall, because Law on enforcement an arbitration agreement recognizes only written form of arbitration agreement.

4.2 Duties and rights of non-signatories as third parties

Under analysis that has been presented in Sections II and III, non-signatories are subjected to an arbitration agreement by *implied consent*. Due to the mentioned analysis third party is a subject which did not express consent or by general contract doctrines or by specific legal relation and are not bound by arbitration - "participate" in arbitration process as third party.

In Section 4.1 presented International arbitration law models provide ability to participate in arbitration- the same standards has to be applied. General rule under most International arbitration rules that question of participation is subjected to an arbitral tribunal. When third party is recognized as a participant of arbitration - party acquires duties and right that are given by the law that has been chosen by parties.

[66] Article 7(1) Joinder of Additional PartiesA party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder

[67] Ibd. Article 7 (1)

CONCLUSIONS

1. Presented concept of arbitration agreement showed, that arbitration agreement as itself, bearing in main form and validity during the last couple years have slightly changed. International arbitration rules, UNICITRAL, (revised in 2010), Swiss arbitration Rules (revised in 2012), ICC arbitration rules (revised in January 2012) expanded arbitration agreement by widening the concept of arbitration agreement (form, validity and applicability).

2. By analyzing arbitration agreement, as itself, under International arbitration Law and New York convention it showed that under New York convention arbitration agreement expressed in writing is obligatory, though under International Arbitration rules the arbitration agreement is not required to meet obligatory arbitration clause requirements that are required under New York convention.

3. By analyzing International arbitration law and arbitral tribunal practice, it was noticed that arbitration agreements validity "arises" from the moment when the parties expressed their cosent to participate in arbitration.

4. Arbitration agreement by its nature is consensual, due to this for determining consent of the party it is applied general contract law doctrines and specific legal doctrines. Application of these doctrines helps to overcome a lack of expressed consent of the party while determining whether party expressed their conduct to be subjected to arbitration.

5. Contract law principle play significan role to arbitration law. Doctrines that are used in international contract law are applicable to an arbitration agreement as well for arbitration agreement extension to parties that have not submitted any dispute to arbitration. Analysis showed that under general law principles, such as implied consent; assignment or succession; third party beneficiary; estoppel or abuse of rights and agency doctrines extension of arbitration agreement are applied. Though at the point of the practical view, recognizing such theories as sufficient substance to an extension of arbitration agreement to non-signatories is not uniformed.

6. Special legal doctrines such as Viel priercing and Group of companies' are applicable to an arbitration agreement and parties under these doctrines are subjected to an arbitration regardless lack of expressed consent. What is more, practical view of recognizing such theories as sufficient at the level of international arbitration stage is not uniformed.

7. In the process of arbitration claimants, respondants and third parties take place. In regard to above mentioned doctrines duties and right are difiend by answering the question who expressed consent to be subjected to an arbitration. Parties who enterend into arbitration under above mention doctrines participate in arbitration with all right and duties that are granted by

choisen law. Parties, who did not express a consent participate as thir parties with all granted duties and right of fird party under choisen law.

All in all, comparative research and scientific analysis, leads to an idea that arbitration process is influenced by global economic, transnational relationships and harmonization of International Contract law. Nonetheless, it is worth to mention that arbitration tribunal decisions upon extension of arbitration agreement are not uniformed because of legislation inconsistence. On the other hand, extension of arbitration agreement to non-signatories, especial on the specific legal doctrine will not be the right way for guaranteeing parties their right to arbitrate. Under this doctrine more competence will be subjected to an arbitral tribunal and the question of parties' liability will be raised.

INDEX OF AUTHORITIES

Conventions and Treaties

1. United Nations, Convention on the recognition and enforcement of foreign arbitral awards, 1958, New York, (available at http://www.uncitral.org/uncitral/uncitral_texts);
2. European treaty on European Convention providing a uniform Law of arbitration, No. 56, 1966 Strasbourg, (available at http://conventions.coe.int/Treaty);

International legislation on Arbitartion

3. International Institute for Unification of private Law, UNIDROIT principles on International commercial contracts, 2010, (available at http://www.unidroit.org/english/principles)
4. United Nation Commission on International trade law, UNICITRAL rules 2010, (available at http://www.uncitral.org/uncitral/en/about_us.html)
5. The world trade organization, International Chamber of Commerce, ICC Arbitration an ADR rules 2012, (available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration)
6. Swiss Chamber;s Arbitration Institute, Swiss arbitration rules 2012 (available at https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf)
7. International Arbitral center of the Austrian Federal economic chamber, Rules of Arbitration and Consiliation, 2006 (available at http://www.viac.eu/images/stories/documents/en/VIAC_Arbitration_Rules_2006_)
8. London Court of International Arbitratio, LCIA Arbitration rules, 1998 (available at http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx)

Articles and Books

9. Graziano T. K., Comparative Contract Law, (Palgrave Macmillan, 2009)
10. DiMateo L.A., Law of International contracting (Kluwer Law International, 2009)
11. Sanders P., Quo Vadis Arbitration?-Sixty years of arbitration practice, a comperative study (Netherlands: Kluwer Law International, 1999)
12. Collier J. and Lowe V., The settlement of disputes in international Lawe (UK: Oxford University Press, 1999)
13. Vadapalas V., *Tarptautine teise*, (Vilniaus: Eugrimas, 2006)

14. Hosking, James M. (2004) „The Third Party Non-Signatory‘s Ability to Compel International Commercial Arbitration:Doing Justine without Destroying Consent“, Perperdine Dispute Resolution Law Journal:Vol.4:Iss.3, Article 6. Availabale at: http://digitalcommons.peperdine.edu
15. Park W. W., *Non-signatories and International contracts: an arbitrator's dilemma* (available at http://www.arbitration-icca.org/media/0/12571271340940/park_joining_non-signatories.pdf)
16. Jean-Francois Poudret/Sebastien Besson, *Comparative Law of international arbitration*, (London 2007).
17. Kraakman R., *Piercing the corporate veil in international arbitration*, Global Business Law Review, Vol. 1, p. 169, 2011 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1572634)
18. Sandrock O., Arbitration Agreements and Groups of Companies, 1993 (available at http://www.trans-lex.org/116200)

Conferences

19. "National courts and Comercial Arbitration relation in solving commercial arbitration disputes", Lithuanian Commercial Arbitration court, 15 November 2011, Vilnius.
20. "Evidence and Conflict of Laws: Emerging Challenges", Young Austrian Arbitration Practittioners, International Arbitral center of the Austrian Federal economic chamber 1 December 2011, Vienna.

Practice of courts and tribunals

21. ICC Case No. 4131;
22. ICC Case No. 143481
23. ICC Case No. 4131 (*Dow Chemical*)
24. ICC Case No. 450483
25. ICC Case No. 651984
26. ICC Case No. 661085
27. ICC Case No. 715586
28. ICC Cases No. 7604 and 761087
29. ICC Case No. 891088
30. ICC Case No. 1075889

31. ICC Case No. 1116090
32. ICC Case No. 3879 (*Westland Helicopters*)91
33. ICC Case No. 5730 (*Orri*)92
34. ICC Case No. 572193
35. ICC Case No. 762694
36. ICC Case No. 838597
37. ICC Case No. 667399
38. ICC Case No. 8163100
39. ICC Case No. 9762101
40. ICC Case No. 9839103
41. ICC Case No. 10818104
42. ICC Case No. 11209105
43. ICC Case No. 11405106
44. ICC Case No. 4504 No inter-company confusion
45. ICC Case No. 6610 No evidence of consent
46. ICC Case No. 6673 Ownership of license insuffi cient
47. ICC Case No. 7155 Not part of group when contract signed
48. ICC Case No. 7626 Draft agreement insuffi cipent
49. ICC Case No. 8163 No abuse
50. ICC Case No. 9762 State agriculture fund not alter ego of ministry
51. ICC Case No. 9839 Cooperation on project insuffi cipent
52. ICC Case No. 10758 No fraud or abuse
53. ICC Case No. 10818 Involvement in performance insuffi cipent
54. ICC Case No. 11209 No evidence of fraud
55. ICC Case No. 3879 (*Westland*) Lack of corporate personality107
56. ICC Case No. 4131 (*Dow*) Express consent
57. ICC Case No. 5721 No corporate personality for "X Egypt"108
58. ICC Case No. 5730 Fraud/confusion
59. ICC Case No. 6519 Express consent109
60. ICC Cases No. 7604 & 7610 Bound by admission in judicial action
61. ICC Case No. 8385 Fraud/abuse
62. ICC Case No. 8910 Inter-related contracts
63. ICC Case No. 11160 Participation in negotiation through special vehicle
64. ICC Case No. 11405 Express consent110
65. *Fyrnetics* (*Hong Kong*) *Ltd*. vs. *Quantum Group, Inc*., 293 F.3d 1023 (7th Cir., 2002)

66. Bronx entertainment, LLC v ST. Paul‘s Merkury INS. CO., 265 F.Supp 2d 359 (2003)
67. Thomson-CSF, SA vs. American Arbitration Ass’n, 64 F.3d 773 (2d Cir., 1995).
68. *E.I. DuPont de Nemours & Co*. vs. *Rhone Poulenc Fiber & Resin Intermediates, SAS,* 269 F.3d at 196–97 (3rd Cir., 2001)
69. *Fleetwood Enterprises, Inc*. vs. *Gaskamp,* 280 F.3d 1069, 1075–76 (5th Cir., 2002);
70. *McCarthy* vs. *Azure*, 22 F.3d 351, 362 (1st Cir., 1994),
71. *Lester* vs. *Basner,* 676 F.Supp. 481, 484 85 (S.D.N.Y., 1987),
72. Washington Square Sec. Inc. V Aune, 385 F3d 432 (4th circuit);
73. John Hancock Life Ins v Wilson, 254 F.3d 48 (2d Cir. 2001).
74. *Hester Intern. Corp*. vs. *Federal Republic of Nigeria*, 879 F.2d 170, 181 (5th Cir., 1989); *Arriba Limited* vs. *Petroleos Mexicanos*, 962 F.2d 528, 536 (5th Cir., 1992).
75. *Srivastava* vs. *Commissioner,* 220 F.3d 353, 369 (5th Cir., 2000).
76. *Bridas, S.A.P.I.C., et al* vs. *Government of Turkmenistan*, 345 F.3d 347 (5th Cir., 2003).
77. InterGen, NV v. Grina, 344 F. 3d 134 (1 st Cir. 2003);
78. Long v. Silver, 248 F.3d 309 (4th Cir. 2001).