



**EXTENSION OF THE ARBITRATION AGREEMENT TO THIRD PARTIES BASED ON
THE ‘GROUP OF COMPANIES’ AND ‘PIERCING THE CORPORATE VEIL’ DOCTRINES**

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TO MY PARENTS

ABSTRACT

This thesis analyzes and compares the two doctrines applied in international commercial arbitration with the purpose to extend arbitration agreements to third parties, namely the ‘group of companies’ and ‘piercing of the corporate veil’ doctrines. Given the lack of a unified approach to the definition of the scope and conditions of application of these doctrines, which allegedly leads to their confusion and frequent misuse, this thesis, first and foremost, aims at clarifying the scope of the doctrines and conditions under which they can be applied. The thesis further compares the ‘group of companies’ and ‘piercing of the corporate veil’ doctrines with the purpose to prove that there are significant differences between the two, which has to be taken into account by the lawyers wishing to apply the doctrines in practice. Taken in whole, the present study is expected to improve the usage of both doctrines in the context of extension of arbitration agreements to third parties.

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“The concept is not an “open sesame,” which will open all gates. When to use it, when to ignore it, is the present day dilemma.”

I. Maurice Wormser¹

INTRODUCTION

Among all legal and equitable doctrines currently used in international commercial arbitration with the purpose to extend arbitration agreements to third parties (also called non-signatories²) the ‘group of companies’ and ‘piercing of the corporate veil’ doctrines are considered to be the most controversial.³ This is so not only for the reasons of absence of a party’s formal written consent to arbitrate, which is inherent to all means of extension of arbitration agreements to non-signatories, but rather because these doctrines interfere with a fundamental principle of corporate law – limited liability of corporate entities.⁴ The latter principle gives the corporate form its primary business advantage – insulation of shareholders from liability for the debts of the corporation⁵ and is, therefore, taken very seriously throughout the world.⁶

¹ I. MAURICE WORMSER, *THE DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS* 43 (1927).

² For a discussion of the appropriateness of the use of the term ‘non-signatory’, see William W. Park, *Non-Signatories and International Contracts: an Arbitrator’s Dilemma*, in *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* ¶ 1.26-1.28 (2009).

³ Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52(1) U. CHI. L. REV. 89, 89 (1985) (“‘Piercing’ seems to happen freakishly.... is rare, severe, and unprincipled....[and] is among the most confusing in corporate law.”); *Id.* at 109 (discussing further “doubt on the utility of the [piercing of the corporate veil] doctrine.”); STAVROS L. BREKOULAKIS, *THIRD PARTIES IN INTERNATIONAL COMMERCIAL ARBITRATION* ¶5.01-5.02 (2010) (describing the ‘group of companies’ doctrine as “certainly one of the most controversial” and “one of the most intriguing” in arbitration).

⁴ Easterbrook & Fischel, *supra* note 3 at 89.

⁵ Adolf A. Berle, Jr., *The theory of Enterprise Entity*, 47(3) COLUM. L. REV. 343, 343 (1947). Most commentators speak about English *Salomon v. Salomon & Co.* as the first case to set the principle of limited liability of the corporate entity. *Salomon v. Salomon & Co.* [1897] A.C. 22. At least one commentator, however, refers to earlier US statutes and case law recognizing the limited liability principle. Carsten Alting, *Piercing the Corporate Veil in American And German Law - Liability of Individuals and Entities: a Comparative View*, 2

At the same time, the globalization of economy and the constantly increasing complexity of corporations' patterns⁷ and their businesses as well as frequent cases of corporate misconduct have led major jurisdictions to reconsidering their approach to the limited liability principle.⁸ The 'group of companies' and 'piercing of the corporate veil' were among the doctrines developed to 'restore justice' when the circumstances so required.⁹

Extension of arbitration agreements to third parties based on the 'group of companies' and 'piercing of the corporate veil' doctrines is not a recent phenomenon in international commercial arbitration,¹⁰ however, the overview of major scholarly works and case law shows that there is still no single approach taken as regards the scope and conditions of their application. In fact, until recently commentators would not even try to draw a dividing line

TULSA J. COMP. & INT'L L. 187, 192 (1995) ("For example, Massachusetts enacted five different statutes regulating shareholder liability between 1809 and 1830, and by that time, the principle of limited liability was widely recognized in the United States. In the early case of *Wood v. Dummer* [30 F. Cas. 435 (C.C.D. Me. 1824)], the court approved the principle of limited liability.").

⁶ The possibility to extend arbitration agreement to third parties depends on the law applicable to the arbitration agreement. For instance, England is still reluctant to disregard corporate entity on the basis of the discussed doctrines and allows it only in exceptional circumstances. *E.g.*, *Peterson Farms Inc v. C&M Farming Ltd* [2004] EWHC 121, ¶ 62 (Comm) (the court stating that "[the group of companies] doctrine...forms no part of English law"). Commentators from many other jurisdictions, including the Russian Federation and Ukraine, ascertain the absence of the said doctrines in these jurisdictions, though, acknowledging availability of various statutory exceptions to the limited liability of a corporate entity. For a further discussion about Russian and Ukrainian legislation, *see* respectively *Vicarious Liability and Piercing the Corporate Veil in Russia*, *The Moscow Times*, May 24, 2011, http://www.themoscowtimes.com/business/business_for_business/article/vicarious-liability-and-piercing-the-corporate-veil-in-ussia/437337.html; Lischina I., *Проникаючи під корпоративну вуаль* [Piercing the Corporate Veil], 33-34 (159-160) *Legal Weekly*, Aug. 25, 2009, <http://www.legalweekly.com.ua/article/?uid=1312> (Ukr.).

⁷ Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195, 207 (2009) (noting "massive corporate webs that may involve layers of subsidiaries, loosely affiliated corporations, subcontractors, and other structurally complex corporate arrangements....[and] corporate groups [that] frequently cross national borders.").

⁸ For a discussion, *see* Berle, *supra* note 5, at 343-344; Dearborn, *supra* note 7, at 202-246.

⁹ *See, e.g.*, Jonathan A. Marcantel, *Because Judges Are Not Angels Either: Limiting Judicial Discretion by Introducing Objectivity into Piercing Doctrine*, 59 KAN. L. REV. 191, 195 (2010); *United States v. Milwaukee Refrigeration Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905) (Judge Sanborn stating that "[w]hen the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.").

¹⁰ For instance, the 'group of companies' doctrine was introduced in 1982 by the International Court of Arbitration of the International Chamber of Commerce (ICC) (*see* *Dow Chemical v. Isover Saint Gobain*, Case no. 4131, Interim Award of 23 September 1982, 9 YBCA 131 (1984) discussed *infra* in subchapter 1.1.) while the 'piercing of the corporate veil' doctrine was applied in cases before arbitration tribunals even earlier (*see infra* subchapter 2.1.).

between the two doctrines,¹¹ while in their latest works Born, Brekoulakis and other scholars argue that there is a substantial difference between them.¹²

In the author's view, understanding of the two doctrines and their requirements will help eliminate their confusion and frequent misuse, and foster the doctrines' successful application in international commercial arbitration. Therefore, the purpose of the present research is to clarify the scope and conditions of application of the 'group of companies' and 'piercing of the corporate veil' doctrines as used in the context of international commercial arbitration's means of extension of the arbitration agreement to third parties. To achieve the said purpose this thesis will, first, analyze the historical development of each of the doctrines as well as the scope and conditions of their application suggested in arbitral awards, decisions of national courts and scholarly works. As a result of further comparison of the two doctrines, it will be shown that, despite some similarities, they differ significantly, which has to be taken into account by the lawyers wishing to apply the doctrines in practice.

In view of the above logic, this thesis is organized into three main chapters. Chapter one is devoted to the 'group of companies' doctrine. It starts from a short overview of the historical preconditions of the doctrine's emergence and then proceeds with analysis of the famous arbitration 'precedent'¹³ in the ICC *Dow Chemical* case.¹⁴ It further examines the specific conditions of the doctrine's application, such as the existence of the group of

¹¹ E.g., MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION §10:02 (Gabriel M. Wilner, ed., rev. ed. 1991); FOUCHARD, GAILLARD & GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 500-506 (Emmanuel Gaillard & John Savage eds., 1999).

¹² E.g., 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1153-1178 (2009); BREKOULAKIS, *supra* note 3, at ¶ 5.71-5.89; Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?*, 26(5) J. INT'L ARB. 647, 668-672 (2009).

¹³ Here, the term 'precedent' is used with some reservations as arbitral precedents are generally considered to have no binding nature. See MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE 78 (2nd rev. ed. 2001).

¹⁴ *Dow Chemical v. Isover Saint Gobain*, Case no. 4131, Interim Award of 23 September 1982, 9 YBCA 131, 131 (1984).

companies constituting one and the same economic reality (*une réalité économique unique*), the role that a non-signatory company played in the conclusion, performance, and/or termination of the contracts containing arbitration clauses, the mutual intention of all parties to bind the non-signatory, and other conditions, which analysis will be used to compare the ‘group of companies’ doctrine to the doctrine of ‘piercing of the corporate veil’.

Similarly, the second chapter deals with the ‘piercing of the corporate veil’ doctrine. It explains the context in which the doctrine was developed, gives an overview of its variations, namely the alter ego doctrine, the instrumentality doctrine, and some others, and analyzes conditions of their application, such as unity of interest and ownership, excessive control, fraud and injustice.

The third chapter then compares the two doctrines and expresses the author’s support for the recent theoretical and practical developments viewing the ‘group of companies’ and ‘piercing of the corporate veil’ as independent doctrines different in their scope and conditions of application. The findings of this research are expected to help practicing lawyers, arbitrators and judges distinguish between the two doctrines and, thus, improve usage of both doctrines in the context of extension of arbitration agreements to third parties in international commercial arbitration.

The author is also aware of the extensive case law and literature that relates to the present research; however, it was decided to include in this thesis analysis of the most instructive and/or widely discussed cases and scholarly works, in particular, some of the latest ones.

1. THE ‘GROUP OF COMPANIES’ DOCTRINE

The ‘group of companies’ doctrine was introduced in the early 1970s in France.¹⁵ It was the time when French arbitral tribunals and state courts in their attempts to overcome the old French Civil Procedure Code’s rigidities developed an approach according to which international arbitration clauses were declared to be independent not only from the main contract but also from national legal systems and were said to be governed solely by international trade usages and the parties’ agreements, subject to French vision of the international public policy.¹⁶ In 1982 guided by what it considered to be international trade usages relating to groups of companies the ICC arbitral tribunal in its famous *Dow Chemical* case¹⁷ suggested a concept which was further labeled the ‘group of companies’ doctrine. Despite that it still lacks a unified definition, it is generally agreed¹⁸ today that the doctrine provides that several companies forming part of a larger corporate group may, under certain conditions, be regarded as a single legal entity (*une réalité économique unique*) bound or entitled by an arbitration agreement signed by only one or some companies of the group.¹⁹

Soon after its emergence, a number of important issues arose in connection with the doctrine application²⁰ and until now it remains unclear what conditions must be present in a

¹⁵ Stephan Wilske, Laurence Shore & Jan-Michael Ahrens, *The “Group of Companies Doctrine” – Where Is It Heading?*, 17 AM. REV. INT’L ARB. 73, 75 (2006).

¹⁶ *Id.* at 75.

¹⁷ *Dow Chemical v. Isover Saint Gobain*, Case no. 4131, Interim Award of 23 September 1982, 9 YBCA 131, 131 (1984).

¹⁸ *E.g.*, Ferrario, *supra* note 12, at 647; BORN, *supra* note 12, at 1167.

¹⁹ *See also* ICC Final Award of 10 March 2003, unpublished, ¶93, *quoted in* Peterson Farms, [2004] EWHC 121, ¶43 (“*The group of companies doctrine provides that an arbitration agreement signed by one company in a group of companies entitles (or obligates) affiliate non-signatory companies, if the circumstances surrounding negotiation, execution, and termination of the agreement show that the mutual intention of all the parties was to bind the non-signatories.*”).

²⁰ *E.g.*, Ferrario, *supra* note 12, at 652; BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS ¶ 108 (2006).

given case in order to justify the doctrine's application. This chapter attempts to shed more light on this issue after examining some of the most prominent cases to date.

1.1. 1982 Dow Chemical Precedent

Most commentators²¹ agree that the group of companies doctrine was developed specifically in arbitration context and was for the first time used to extend arbitration agreement to non-signatories in the ICC *Dow Chemical* case.²²

In *Dow Chemical* a dispute arose between several companies of the Dow Chemical Group and Isover Saint Gobain in respect of fulfillment of two distribution contracts. The first contract was entered into between Dow Chemical (Venezuela) and French Company Boussois-Isolation. Subsequently, both parties assigned their rights and obligations under the contract respectively to Dow Chemical A.G. (Zürich), a subsidiary of Dow Chemical Company (USA), and Isover Saint Gobain. The second contract was entered into by Dow Chemical Europe, a subsidiary of Dow Chemical A.G., with three other companies whose rights and obligations were later also assigned to Isover Saint Gobain. Both contracts provided that deliveries could be made by Dow Chemical France *or any other subsidiary* of the Dow Chemical Company and contained ICC arbitration clauses. Dow Chemical France did in fact effectuate the deliveries foreseen by both contracts.

²¹ E.g., BREKOULAKIS, *supra* note 3, at ¶ 3.59; BORN, *supra* note 12, at 1167; Ferrario, *supra* note 12, at 647; Wilske, Shore & Ahrens, *supra* note 15, at 75.

²² Some commentators, however, mention earlier arbitration case *Map Tankers, Inc. v. MOBIL Ltd, Society of Maritime Arbitrators* case no. 1510, Partial Final Award of 28 November 1980, 7 YBCA 151 (1982), where the arbitral tribunal adopted position essentially identical to the one in *Dow Chemical* stating that “[i]t is neither sensible nor practical to exclude the claims of companies who have an interest in the venture and who are members of the same corporate family” and that other interpretation would “narrowly restrict the parties’ apparent intention to arbitrate their differences”. See also BORN, *supra* note 12, at 1167; Wilske, Shore & Ahrens, *supra* note 15, at 75.

When the dispute arose, Dow Chemical Company, Dow Chemical France, Dow Chemical A.G., and Dow Chemical Europe instituted arbitral proceedings against Isover Saint Gobain on the basis of the arbitration clauses contained in the distribution contracts. Dow Chemical Company and Dow Chemical France, however, were not signatories to the distribution contracts containing arbitration clauses which led to defendant's raising a preliminary jurisdictional objection as to whether the arbitral tribunal had competence to render an award between Dow Chemical France and Dow Chemical Company on the one hand and Isover Saint Gobain on the other.²³

The arbitral tribunal rendered an interim award by which it rejected objections of Isover Saint Gobain and assumed its jurisdiction to decide the claims of all four Claimants. As it can be concluded from the analysis of the interim award, in order to be able to apply what later became known as the group of companies doctrine the arbitral tribunal, first of all, held that considering the principle of the autonomy of the arbitration agreement the latter should not necessarily be governed by the same law that governs the main contract and the merits of the dispute. As a consequence, the tribunal did not apply French law, which was chosen by the contracting parties to govern the main contract, and decided to reach the decision on the scope and the effects of the arbitration clauses by reference to the common intention of the parties.²⁴

Having decided so, the tribunal then looked into the role that non-signatories played in the conclusion, performance and termination of the two contracts containing arbitration

²³ The second preliminary objection pleaded by the defendant and not discussed here touched upon questions of admissibility of claims brought by the non-signatory companies. *See Dow Chemical v. Isover Saint Gobain*, Case no. 4131, Interim Award of 23 September 1982, 9 YBCA 131, 133 (1984).

²⁴ *Id.* at 134.

clauses. The tribunal considered the following findings to be of importance for the outcome of their analysis:

- Dow Chemical France “appeared to be at the center of the organization of the contractual relationship” of both contracts at the time of their negotiation;
- both contracts “designated first of all Dow Chemical France for delivery of the products to distributor”;
- “neither the ‘Sellers’ nor the ‘Distributors’ attached the slightest importance to the choice of the company within the Dow Chemical Group that would sign the contracts”;
- “in reality all the entities of the Dow Chemical Group involved in distribution in France understood themselves to be contracting with the distributor or distributors in France and likewise, it was with the aggregate of these entities that the present defendant's predecessors understood themselves to be contracting”;
- the relationship contemplated by both contracts “could not have been formed without the approval of the American parent company, which owned the trademarks under which the relevant products were to be marketed in France”;
- no special license agreement was ever concluded between Dow Chemical Company as owner of the trademarks needed to make use of in the distribution process and Isover Saint Gobain;
- Dow Chemical France in fact effectuated the deliveries foreseen by both contracts;

- “Dow Chemical France played an essential role in the termination of the 1968 contract, which had been substituted by the 1965 contract”.²⁵

The above-mentioned fact pattern permitted the arbitral tribunal to conclude that Dow Chemical France *was a party* to each of the contracts at dispute and, consequently, to the arbitration clauses they contained.²⁶ The tribunal reached the same conclusion in respect of Dow Chemical Company “by reason of its ownership of the trademarks under which the products were marketed, and its absolute control over those of its subsidiaries that were directly involved, or could under the contracts have become involved in the conclusion, performance, or termination of the litigious distribution agreements”.²⁷

In addition to analysis of the contractual stages, the arbitral tribunal also looked into the Dow Chemical Group structure. It underlined that Dow Chemical Company had and exercised absolute control over its subsidiaries “having either signed the relevant contracts or, like Dow Chemical France, effectively and individually participated in their conclusion, their performance, and their termination”.²⁸ This finding led the tribunal to another important conclusion that “irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une réalité économique unique*)”.²⁹

Considering all of the above mentioned findings and conclusions, the ICC tribunal held that both Dow Chemical Company and Dow Chemical France “appeared to have been *veritable parties to these contracts* or to have been *principally concerned by them and the*

²⁵ *Id.* at 134-135.

²⁶ *Id.* at 135.

²⁷ *Id.* at 135.

²⁸ *Id.* at 136.

²⁹ *Id.* at 136.

disputes to which they may give rise” (emphasis added).³⁰ As a result, the arbitral tribunal took the position that the arbitration clauses expressly accepted by certain of the companies of the group should also bind the non-signatories – Dow Chemical Company and Dow Chemical France.

To sum up the *Dow Chemical* case it becomes clear that the ICC tribunal considered the following facts to be important for allowing extension of the arbitration agreement to non-signatory companies of the group:

- the existence of the group of companies that constituted one and the same economic reality (*une réalité économique unique*);
- the active role that non-signatory companies of the group played in the conclusion, performance, and termination of the contracts containing arbitration clauses; and
- mutual intention of the parties to consider the group as a unity bound by the arbitration agreement.

At the same time, the ICC tribunal has neither established any priority of these facts for the outcome of the case nor explained the consequences of absence of one or some of them. It will be shown in subchapter 1.2. that such uncertainty led to many questions connected with application of the group of companies doctrine most of which remain unresolved until today.

Another important *Dow Chemical* peculiarity is that in order to be able to apply the just developed group of companies doctrine in that case the ICC tribunal had to opt out from the application of the national (in that case French) law to arbitration agreements contained in

³⁰ *Id.* at 136.

both contracts. The arbitral tribunal did so by simply referring to the presumption of separability of the arbitration agreement from the main contract and proceeding with interpretation of arbitration agreements according to the parties' common intention.³¹ As it will be shown further in chapter 3, in many cases such approach proved to generate significant problems when the issue comes to the stage of recognition and enforcement of the arbitral awards by national authorities. However, the *Dow Chemical* interim award, which was further the subject of an action for setting aside instituted by Isover Saint Gobain, was upheld by the Court of Appeal in Paris, which reiterated conclusion made by the arbitral tribunal that "in accordance with the intention common to all companies involved (...) Dow Chemical France and Dow Chemical Company have been parties to these [1965 and 1968] agreements although they did not actually sign them and that therefore the arbitration clause was applicable to them as well."³²

1.2. Conditions of Application

The previous subchapter summarized that in *Dow Chemical* the ICC tribunal extended arbitration agreements to non-signatory companies of the group taking into account the following facts of the case:

- the existence of the group of companies that constituted one and the same economic reality;

³¹ *Id.* at 134.

³² *Société Isover-Saint-Gobain v. Société Dow Chemical France*, Cour d'Appel de Paris, Judgment of 21 October 1983, REV. ARB. 98, 100-101 (1984).

- the active role that non-signatory companies of the group played in the conclusion, performance, and termination of the contracts containing arbitration clauses; and
- mutual intention of the parties to consider the group as a unity bound by the arbitration agreement.³³

Brekoulakis suggests that these facts are indicators of the non-signatory companies' consent to arbitration.³⁴ Indeed, the analysis of *Dow Chemical* – the first case to use the group of companies doctrine – shows that the ICC tribunal extended arbitration agreement to non-signatories exactly because it was persuaded by the above mentioned facts of the case that there was a consent of the parties to be bound by the arbitration agreement.

It is undisputed that the parties' consent to arbitrate has a key role in the group of companies doctrine.³⁵ The literature emphasizes that under the doctrine the courts and arbitral tribunals will not extend the arbitration agreement to the non-signatory company belonging to the group unless there is enough evidence showing the mutual intention of the parties to consider such non-signatory company to be the true party to the contract containing the arbitration agreement.³⁶ In conditions, where there is obviously no possibility to speak about reference to formal written consent, approach summarized by Hanotiau, suggesting that “consent to arbitrate may sometimes be implied from the conduct of a company of the group – although it did not sign the relevant arbitration agreement – by reason of its “implication” in the negotiation and/or the performance and/or the termination of the agreement containing the

³³ See *supra* p. 10.

³⁴ BREKOULAKIS, *supra* note 3, ¶ 5.14.

³⁵ E.g., FOUCHARD, GAILLARD & GOLDMAN, *supra* note 11, ¶ 500, 501; BORN, *supra* note 12, at 1169-1170; HANOTIAU, *supra* note 20, ¶ 107; BREKOULAKIS, *supra* note 3, ¶ 5.10; Ferrario, *supra* note 12, at 651.

³⁶ BREKOULAKIS, *supra* note 3, ¶ 5.10.

arbitration clause and to which one or more members of its group are a party”,³⁷ appears to be very helpful.

However, coming back to the *Dow Chemical* case, it should be noted that the arbitral tribunal in that case has neither established any priority of the conditions of the doctrine’s application nor explained the scope and consequences of absence of one or some of such conditions, which generated broad legal discussions around the doctrine.

In particular, the *Dow Chemical* tribunal left without answer the question of whether the mere existence of a group of companies satisfying the economic unity condition is enough to apply the doctrine. No clarification was suggested as regards the question of what decision should be taken if only some companies of the group participated in the conclusion, performance, and/or termination of the contracts containing arbitration clauses and others did not. Will such non-participating companies be bound by the arbitration agreement together with participating companies of the same group?

Similarly, a number of important questions refer to the role of the non-signatory company of the group in the conclusion, performance, and termination of the contracts containing arbitration clauses. Is it important that the non-signatory played an active (or any) role at every stage – the conclusion, performance, and termination of the contracts containing arbitration clauses – or participation in only some stages would suffice? If active involvement is required only in some stages, then in which stages or in which combinations of stages the non-signatory company of the group should be involved?

Are there any additional conditions that may substitute absence of one or more conditions suggested by the *Dow Chemical* tribunal?

³⁷ HANOTIAU, *supra* note 20, ¶ 107. See also Park, *supra* note 2, ¶ 1.11-1.13.

Many arbitrators, judges and scholars have been attempting to answer these and other questions relating to the conditions of application of the group of companies doctrine. Below I suggest the analysis of the most recent approaches and views on this issue.

1) Existence of a group of companies that constitute one and the same economic reality (unity).

At least one commentator insists that “the tribunals will require the signatory and the non-signatory to have established a *tight* group structure and strong organizational and financial links.”³⁸ Indeed, in *Dow Chemical* the ICC tribunal attached a significant importance to the fact that Dow Chemical Company had and exercised absolute control over its subsidiaries “having either signed the relevant contracts or, like Dow Chemical France, effectively and individually participated in their conclusion, their performance, and their termination.”³⁹ The same approach was taken by the arbitral tribunal in ICC Case no. 8385 of 1995.⁴⁰

In another well-known case the ICC tribunal decided a dispute involving a bunch of agreements entered into between KIS France and KIS Photo and companies affiliated with them on the one hand, and Société Générale and a number of its affiliates on the other.⁴¹ In granting the claim filed by Société Générale and its subsidiaries against KIS France and KIS Photo the arbitral tribunal held that the parties' mutual obligations were “inexorably linked” and that “the parent companies played a dominant role vis-à-vis their subsidiaries, which were

³⁸ BREKOULAKIS, *supra* note 3, ¶ 5.15.

³⁹ *See supra* p. 9.

⁴⁰ US company v. Belgian company, ICC Case no. 8385 of 1995, ICC COLLECTION OF ARBITRAL AWARDS 1996-2000, 474 (J. Arnaldez, Y. Derains & D. Hascher eds., 2003) (“Some elements are nearly always considered as necessary. They comprise a significant direct control measure of the activities of the subsidiary by the parent company or the shareholder....”).

⁴¹ ICC Partial Award of 27 January 1989, unpublished, *quoted in* KIS France SA v. SA Société Générale, Cour d’Appel de Paris, Judgment of 31 October 1989, 16 YBCA 145, 145-146 (Albert Jan van den Berg ed., 1991).

bound to abide by the former's commercial and financial decisions.”⁴² In particular, the tribunal took into account that in the Basic Agreement of 1983 KIS France agreed that it would “take all necessary measures to ensure that its foreign subsidiaries fulfill their obligations with respect to the local leasing subsidiaries of Société Générale under the present agreement and the Local Agreements to follow.”⁴³ In another contract of 1985 it was stipulated that “the KIS group shall take all necessary measures to ensure that KIS Photo and KIS US fulfill their obligations to the banks under the present agreement.”⁴⁴

The tight group structure, however, seems to be not associated with the percentage of ownership taken alone: commentators reveal cases where a subsidiary was bound by the arbitration clause signed by its parent company owning only 51 per cent of the non-signatory subsidiary and, vice versa, where arbitral tribunals refused to bind non-signatories owning 99.99 per cent of the subsidiary.⁴⁵

Evidence of a tight group structure can also be represented by several companies’ sharing intellectual property rights, assets, and financial and human resources.⁴⁶ For instance, in *Dow Chemical* the parent Dow Chemical Company was accepted as a true party to each of the contracts containing arbitration agreements in particular “by reason of its ownership of the trademarks under which the products were marketed” and absence of any license agreement allowing their use.⁴⁷ Ownership by a non-signatory parent company of a “trademark by and

⁴² *Id.* at 147.

⁴³ *Id.* at 147.

⁴⁴ *Id.* at 147.

⁴⁵ *E.g.*, BREKOULAKIS, *supra* note 3, ¶ 5.17 (*referring to* the ICC Case no. 8910 of 1998, ICC COLLECTION OF ARBITRAL AWARDS 1996-2000, 569 (J. Arnaldez, Y. Derains & D. Hascher eds., 2003) and the ICC Case no. 7155 of 1993, ICC COLLECTION OF ARBITRAL AWARDS 1996-2000, 454 (J. Arnaldez, Y. Derains & D. Hascher eds., 2003)).

⁴⁶ *Id.* ¶ 5.19.

⁴⁷ *See supra* p. 9.

upon which transactions proceed” was also considered to evidence consent to arbitrate in another case before the Cairo Regional Centre for International Commercial Arbitration.⁴⁸

An important condition has to be met by the group in order to make application of the group of companies doctrine possible is that the group must represent a ‘single economic unit’ or a ‘single economic reality’ (*une réalité économique unique*).⁴⁹ Commentators suggest that such single economic unit (reality) will be present, for instance, where funds of one company are used to financially support or restructure other members of the group.⁵⁰ Another factor can be the complex integrated nature of the business of the group. In particular, in a widely discussed *Peterson Farms* case the ICC tribunal applied the group of companies doctrine taking into account, *inter alia*, the fact that C&M Farming Ltd operated within integrated poultry business and that an agreement between the signatories would impact the operations of all of the C&M Group.⁵¹ It held that “(...) the general nature of the poultry business demonstrate that Peterson intended to enter into and perform under a contract with all the entities forming the C&M Group of companies. Peterson knew that it was contracting with the group as a whole and that its product would be used in an integrated operation that involved all members of the C&M Group.”⁵²

There is also a suggestion that the group must exist at the time when the contract is concluded.⁵³ In my view, however, the issue is not that clear-cut. What if, for example, a non-signatory company of a group complied with formalities of its incorporation the day (week,

⁴⁸ *Sarhank Group v. Oracle Corp.*, 404 F. 3d 657, 662 (2d Cir. 2005).

⁴⁹ BREKOULAKIS, *supra* note 3, ¶ 5.21.

⁵⁰ *Id.* ¶ 5.21.

⁵¹ ICC Final Award of 10 March 2003, unpublished, ¶¶96, 99, *quoted in* Peterson Farms, [2004] EWHC 121, ¶43.

⁵² *Id.* ¶100.

⁵³ Case no. 7155 of 1993, ICC COLLECTION OF ARBITRAL AWARDS 1996-2000, 454 (J. Arnaldez, Y. Derains & D. Hascher eds., 2003) (where subsidiary company was created at a later stage and did not take part in the negotiation or conclusion of the contract), *cited in* BREKOULAKIS, *supra* note 3, ¶ 5.44.

month) following the day of signing the contract? To complicate things even more, what if all contracting parties knew of and expected its upcoming incorporation? What if after its incorporation such non-signatory company of the group actively participated in the contract performance? Born, for instance, suggests that the non-signatory that participated only at later stages following the negotiation and conclusion of the contract may still be bound by the arbitration agreement contained in it.⁵⁴ If this approach is followed, then I suggest that it is not necessarily that the group must exist at the time when the contract containing the arbitration clause is concluded.

Thus, the above analysis shows that the existence of the group of companies condition of the doctrine involves many additional requirements such as tight group structure, the group being a single economic reality, and others. Yet another important question that arises in connection with the doctrine's application is what decision should be taken if only some companies of the group participated in the conclusion, performance, and/or termination of the contracts containing arbitration clauses and others did not? Analysis of the case law suggests that only those non-signatories that were involved in the conclusion, performance, and/or termination of the contracts can be bound by arbitration agreements they contain.

In ICC Case no. 6519 of 1991⁵⁵ a signatory company, the majority shareholder of the three non-signatory companies, entered into a contract containing an ICC arbitration clause. One of the non-signatory companies was directly concerned by the contract and effectively took part in the negotiations that led to its conclusion. Two other non-signatories were, however, unrelated to the contract, but merely affiliated in terms of shareholding. The issue

⁵⁴ BORN, *supra* note 12, at 1174 (referring to *Judgment of 18 December 2001, LUKoil-Permnefteorgsintez, LLC v. MIR*, 20 ASA Bull. 482 (Swiss Federal Tribunal) (2002)).

⁵⁵ ICC Case no. 6519 of 1991, ICC COLLECTION OF ARBITRAL AWARDS 1991-1995, 420 (J. Arnaldez, Y. Derains & D. Hascher eds., 1997).

arose as regards whether all three non-signatories are bound by the arbitration agreement. The arbitral tribunal held:

the arbitration clause can only be applied to the companies of group A which did effectively take part in the negotiations which led to the signature of the Protocol or which are directly concerned by it, to the exclusion of those which were nothing but instruments of a financial transaction between the hands of a majority shareholder.⁵⁶

2) *The non-signatory's role in the conclusion, performance, and/or termination of the contracts containing arbitration clauses.*

It is generally agreed that the existence of a group of companies is not by itself sufficient to make the application of the group of companies doctrine and the extension of the arbitration agreement to the non-signatories possible.⁵⁷ Analysis of the case law and literature shows that there is an additional condition that has to be met, namely the non-signatory company of the group has to be involved in the conclusion, performance, and/or termination of the contracts containing arbitration clauses,⁵⁸ and involvement of the non-signatory company of the group must be active (significant).⁵⁹

Indeed, in its decision in *Sponsor A.B. v. Lestrade* the Court of Appeal of Pau particularly stressed the importance of the role played by non-signatory Sponsor A.B. in the conclusion of the purchase undertaking and extended the arbitration clause to this company holding:

[i]t also appears that where Sponsor AB has played an important role in the conclusion of the purchase undertaking, it has equally played an important role in the non-execution of the purchase undertaking. Therefore, the third

⁵⁶ *Id.* at 422.

⁵⁷ FOUCHARD, GAILLARD & GOLDMAN, *supra* note 11, ¶ 500, 501; BORN, *supra* note 12, at 1172; BREKOULAKIS, *supra* note 3, ¶ 5.15, 5.25; Park, *supra* note 2, ¶ 1.74; Ferrario, *supra* note 12, at 648.

⁵⁸ Ferrario, *supra* note 12, at 663.

⁵⁹ BREKOULAKIS, *supra* note 3, ¶ 5.32; Ferrario, *supra* note 12, at 648.

party in question is only an appearance of a third party and in fact appears to be the soul, inspirer and, in a word, the brains of the contracting party.⁶⁰

In ICC Case no. 11160 the arbitral tribunal extended the arbitration agreement to non-signatory parent company taking into account that: (i) at initial stages of tender and the signature of the disputed contract all working and legal relationships of the claimant in connection with project were with the non-signatory company; (ii) the negotiations for the contract were also made with the same company; (iii) at least at the beginning of the contract performance payments under the contract were made by the non-signatory; (iv) the executives of signatory subsidiary and non-signatory parent responsible for the project were the same; and (v) the meetings in connection with the project were held in the UK where headquarters of the non-signatory parent are located, not in Caracas where signatory companies were incorporated.⁶¹

At the same time, it is still highly disputed whether the active involvement must be shown in one or just some or all stages of the contract.⁶² Park makes an interesting observation that French version of the *Dow Chemical* award used conjunction “or” when referring to negotiation, performance *or* termination stages.⁶³ He further supports the approach emphasizing the importance of a non-signatory company’s involvement at the time of the contract’s creation (negotiation and conclusion) as well as its execution (performance) leaving aside the termination stage.⁶⁴ His explanation appeals to the common sense:

[n]ormally, at the time contracts are negotiated and concluded the parties come to understand who was expected to be bound. A dominant entity should

⁶⁰ Sponsor A.B. v. Lestrade, Cour d’Appel de Pau, Judgment of 26 November 1986, REV. ARB. 153, 156 (1998).

⁶¹ ICC Case no. 11160 of 2002, 16(2) ICC Bull 99, 101 (2005).

⁶² BREKOULAKIS, *supra* note 3, ¶ 5.39.

⁶³ Park, *supra* note 2, n.66 at p. 20.

⁶⁴ Park, *supra* note 2, ¶ 1.72.

not be permitted to renege on its agreement, particularly when the negotiation induced reliance by the counterparty.⁶⁵

Brekoulakis, however, highlights that active involvement at the negotiation stage is the most relevant factor which may lead to binding a non-signatory company of the group.⁶⁶ There is, indeed, some case law supporting this approach.

In particular, in *Trelleborg v. Anel* the São Paulo State Court of Appeals by a unanimous decision enforced an agreement to arbitrate against a non-signatory Trelleborg Industri AB (Sweden) considering its “active participation,” “clear involvement” and “interest in the outcome” of the acquisition negotiations.⁶⁷ Anel initiated court proceedings to obtain a court order compelling Trelleborg Industri AB and its Brazilian subsidiary to arbitrate. In its decision, further upheld by the São Paulo State Court of Appeals, the District Court took into account that the agreements were negotiated by the non-signatory parent company, both were drafted in two versions, Portuguese and English, and both arbitral clauses provided for bilingual arbitration proceedings, in both Portuguese and English. The Court of Appeals noted that in a purely domestic transaction, between Brazilian parties – Anel and Trelleborg Brazilian subsidiary, under Brazilian law, it might not make sense at all to have arbitration in English unless the non-signatory intended to be bound by the agreements.

However, as it was already mentioned above, on the basis of the relevant case law Born argues that the group of companies doctrine may be applied even where the non-signatory became involved only at later contract stages “as an instance of a non-signatory’s

⁶⁵ Park, *supra* note 2, ¶ 1.72.

⁶⁶ BREKOULAKIS, *supra* note 3, ¶ 5.40 (referring to ICC Case no. 6519 of 1991, ICC COLLECTION OF ARBITRAL AWARDS 1991-1995, 420 (J. Arnaldez, Y. Derains & D. Hascher eds., 1997)).

⁶⁷ *Trelleborg v. Anel*, São Paulo State Court of Appeals, Appeal no. 267.450.4/6-00, 7th Chamber of Private Law, Reporting Justice Constança Gonzaga, decided on May 24, 2006 by unanimous decision, *quoted in* Fernando Serec & Rabelo Coes, *Arbitration and Non-Signatories*, 14 VINDOBONA J. INT’L COM. L. & ARB. 67, 72 (2010).

assumption of contractual obligations”,⁶⁸ and I would support his approach and allow arbitrators to decide if participation at later stages was such as to make extension of the arbitration agreement to non-signatories adequate.

3) *Mutual intention to arbitrate the dispute.*

Born emphasizes that the group of companies doctrine “depends on the intentions of the parties.”⁶⁹ Brekoulakis further maintains that “the group structure and the active involvement of the non-signatories in the negotiation and execution of the particular contract must be such as to suggest that the non-signatory and the signatory party intended to arbitrate.”⁷⁰ The arbitrators extend the point even more:

[w]hat is relevant is whether *all parties* intended non-signatory parties to be bound by the arbitration clause. Not only the signatory parties, but also the non-signatory parties should have intended (or led the other parties to reasonably believe that they intended) to be bound by the arbitration clause.⁷¹

Indeed, analysis of the case law shows that the group of companies doctrine allows extension of the arbitration agreement to non-signatories if the parties’ mutual consent to arbitrate their dispute can be implied from the facts of the case.⁷² To find out if there was such implied consent the conduct and behavior of both signatory and non-signatory companies has to be examined.⁷³ In this connection, Brekoulakis suggests that it is necessary to question (i)

⁶⁸ See *supra* note 54 and accompanying text.

⁶⁹ BORN, *supra* note 12, at 1172; FOUCHARD, GAILLARD & GOLDMAN, *supra* note 11, ¶ 504.

⁷⁰ BREKOULAKIS, *supra* note 3, ¶ 5.46.

⁷¹ HANOTIAU, *supra* note 20, n. 142 at p. 50 (emphasis added) (quoting ICC Case No. 11405 of 2001, Interim Award of 29 November 2001, unpublished). See also Ferrario, *supra* note 12, at 648 (reiterating that “for the application of the group of companies doctrine the following conditions are necessary: a) the intention of all the parties involved to consider the whole group as the contracting party without giving importance to which company would conclude or perform the contract...”).

⁷² See, e.g., Dow Chemical v. Isover Saint Gobain, Case no. 4131, Interim Award of 23 September 1982, 9 YBCA 131, 131 (1984); ICC Partial Award of 27 January 1989, unpublished, *quoted in* KIS France SA v. SA Société Générale, Cour d’Appel de Paris, Judgment of 31 October 1989, 16 YBCA 145, 147 (Albert Jan van den Berg ed., 1991); *et al.*

⁷³ BREKOULAKIS, *supra* note 3, ¶ 5.47.

whether the group has acted in a way to lead its contractor “to *genuinely believe* that the non-signatory member of the group was actually a party to the contract, notwithstanding the fact that it had not signed it”,⁷⁴ and (ii) whether the non-signatory adopted “the behavior of a ‘genuine party’ that confused or misled the co-contractor”.⁷⁵

Despite the particular emphasis that the doctrine places on the parties’ mutual intention to bind the non-signatory, Born, however, insists that the doctrine should not be limited to such intentions only.⁷⁶ To support his view, Born refers, *inter alia*, to cases where the activities of the group were conducted in a way that led the contracting party to some confusion or misunderstanding as to who the true parties to the agreement were.⁷⁷ It seems that in such a case, even in the absence of the non-signatory’s intention to be bound by the arbitration agreement, an arbitral tribunal may hold a non-signatory to be bound by the arbitration agreement.

4) Other conditions

Commentators mention random cases where arbitral tribunals required some fraud or lack of good faith to be shown in order to bind the non-signatory under the group of companies doctrine.⁷⁸ In my view this approach is at least strongly questionable. As it comes from the above analysis, the primary goal of the group of companies doctrine is the identification of proper parties to the arbitration agreement which is done by way of reference to the parties’ mutual intention inferred from their engagement in contractual relations with each other. This approach is consistent with the case law and literature cited here. In ICC

⁷⁴ *Id.* ¶ 5.47.

⁷⁵ *Id.* ¶ 5.52.

⁷⁶ BORN, *supra* note 12, at 1177.

⁷⁷ For a discussion, *see id.* at 1177.

⁷⁸ *Id.* at 1171.

Case no. 11160 the arbitral tribunal too speaks about the group of companies doctrine in the context of “exceptions [to the rule requiring separate legal personalities] [that] have been recognized in contemporary decisions of the courts and arbitral tribunals without a need for any devious purpose”.⁷⁹

At the same time, ‘confusion’ created by the non-signatory’s intervention in affairs of the affiliated company may, indeed, lead to application of the doctrine. In ICC Case no. 5721 the arbitral tribunal stated that:

the mere fact that two companies belong to the same group, or that they are dominated by a single shareholder, will not automatically justify lifting the corporate veil. However, where a company or individual appears to be the *pivot* of the contractual relations in a particular matter, one should carefully examine whether the parties' legal independence ought not, exceptionally, be disregarded in the interests of making a global decision. This exception is acceptable in the case of *confusion* deliberately maintained by the group or by the majority shareholder (emphasis added).⁸⁰

Surprisingly, there are also few decisions that focused entirely on the mere existence of a group of companies.⁸¹ Considering the extensive analysis of the case law and literature related to the topic, I suggest that this approach is absolutely contrary to what the doctrine envisages and such practice must be abolished.

Thus, the analysis of the case law and major scholarly works shows that the application of the group of companies doctrine may be possible in cases where the following general conditions are met: (i) there exists a group of companies that constitute one and the same economic reality (unity); (ii) the non-signatory member of the group is or was actively involved in the conclusion, performance, or termination of the contract containing arbitration

⁷⁹ ICC Case no. 11160 of 2002, 16(2) ICC Bull. 99 (2005).

⁸⁰ ICC Case no. 5721 of 1990, 117 J.D.I. 1020 (1990), *quoted in* FOUCHARD, GAILLARD & GOLDMAN, *supra* note 11, ¶ 501.

⁸¹ BORN, *supra* note 12, at 1171-1172 (referring to ICC Case no. 2375, 103 J.D.I. 973 (1976)).

clause; and (iii) from the facts of the case it is possible to imply that all the parties intended to bind the non-signatory company to arbitrate. As a rule, each of these conditions, taken separately, is not enough to allow extension of the arbitration agreement to the non-signatory member of the group – all three conditions have to be met. However, the case law and commentators suggest that some deviations from the general model are possible, for instance, in cases where there seemed to be no intention of the non-signatory to be bound by the arbitration agreement but the activities of the group were conducted in a way that led the contracting party to some confusion or misunderstanding as to who the true parties to the agreement were. Nevertheless, the possibility of the doctrine's application has to be tested according to the above mentioned general conditions.

2. THE ‘PIERCING OF THE CORPORATE VEIL’ DOCTRINE

The ‘piercing the corporate veil’ doctrine was developed in common law jurisdictions long before the group of companies doctrine came into existence.⁸² As Marcantel points out, its emergence was an “equitable response to the perceived - or actual - unfairness that could result from the application of strict limited liability statutes.”⁸³ In the context of international commercial arbitration the piercing of the corporate veil doctrine, in addition to substantive liability, came to be used as a means of extension of the arbitration agreement to the non-signatory parties.

Similarly to the group of companies doctrine, the piercing of the corporate veil doctrine is reserved for exceptional cases.⁸⁴ Disregard of the corporate form is allowed only in cases where defendant’s hiding behind the black letter of the law may result in some kind of injustice.⁸⁵ Nevertheless, the doctrine is widely used in the United States⁸⁶ and is popular in many other countries of the world. Different variations of the doctrine are known today in Australia, Canada, China, England, France, Germany, Switzerland, some Latin American and other countries.⁸⁷ At the same time, despite its wide application, the doctrine remains one of the least understood.⁸⁸

⁸² For a discussion, see *infra* sub-chapter 2.1.

⁸³ Marcantel, *supra* note 9, at 199.

⁸⁴ *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 447 F. 3d 411, 416 (5th Cir. 2006) (citations omitted); Ferrario, *supra* note 12, at 649.

⁸⁵ Marcantel, *supra* note 9, at 199.

⁸⁶ For instance, Professor Thompson in his 1991 article published the results of the research that involved around 1,600 cases dealing with the piercing the veil doctrine. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1044 (1991).

⁸⁷ See generally Helen Anderson, *Piercing the Veil on Corporate Groups in Australia: the Case for Reform*, 33 MELBOURNE U. L. REV. 333 (2009); Chen Jianlin, *Clash of Corporate Personality Theories: A Comparative Study of One-member Companies in Singapore and China*, 38 HONG KONG L. J. 425 (2008); Thomas K. Cheng, *The Corporate Veil Doctrine Revisited: a Comparative Study of the English and the U.S. Corporate Veil Doctrines*, 34 B.C. INT’L & COMP. L. REV. 329 (2011), <http://lawdigitalcommons.bc.edu/iclr/vol34/iss2/2>; BORN, *supra* note 12, at 1154-1157; Park, *supra* note 2, ¶1.59; Altling, *supra* note 5, at 187; Jose Mauricio Bello, *An*

This chapter will discuss in more detail the context in which the doctrine was developed, its scope, major variations and conditions under which the doctrine can be applied.

2.1. History of Development and the Scope

Commentators suggest that the term ‘piercing the veil’ was for the first time used by Professor Wormser in 1912.⁸⁹ Despite that and the fact that there were earlier cases considering the possibility to disregard of the corporate form, in particular the frequently mentioned *United States v. Milwaukee Refrigeration Transit Co.*,⁹⁰ the doctrine is said⁹¹ to draw its origins from the three events of the 20th century: 1912-1927 works by Maurice Wormser,⁹² Judge Benjamin Cardozo's 1926 opinion in *Berkey v. Third Avenue Railway Co.*,⁹³ and Frederick Powell's 1931 famous book on parent and subsidiary corporations.⁹⁴ Of the three, Professor Powell's work is most often viewed as the one that, actually, framed the piercing of the corporate veil doctrine.⁹⁵

Overview of the Doctrine of the Piercing of the Corporate Veil as Applied by Latin American Countries: a U.S. Legal Creation Exported to Civil Law Jurisdictions, 14 ILSA J. INT'L & COMP. L. 615 (2008).

⁸⁸ E.g., Thompson, *supra* note 86, at 1036 (“Piercing the corporate veil is the most litigated issue in corporate law and yet it remains among the least understood.”); Douglas C. Michael, *To Know a Veil*, 26 J. CORP. L. 41, 41 (2000) (suggesting that the doctrine represents “jurisprudence without substance”); Stephen B. Presser, *The Bogalusa Explosion, “Single Business Enterprise,” “Alter Ego,” and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary “Abuse” Theory of Piercing the Corporate Veil*, 100 NW. U. L. REV. 405, 411 (2006) (suggesting that “the current state of veil-piercing law is chaotic”); Marcantel, *supra* note 9, at 208 (“[C]urrent veil piercing jurisprudence is extremely unprincipled and wildly unpredictable.”).

⁸⁹ Alting, *supra* note 5, at 192 (referring to I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496 (1912)).

⁹⁰ *United States v. Milwaukee Refrigeration Transit Co.*, 142 F. at 255.

⁹¹ Douglas, *supra* note 88, at 43 (referring to STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* §§ 1.03[2]-[4] (1998)).

⁹² WORMSER, *supra* note 1.

⁹³ *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84 (App. Ct. 1926).

⁹⁴ FREDERICK J. POWELL, *PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT CORPORATION FOR THE OBLIGATIONS OF ITS SUBSIDIARY* (1931).

⁹⁵ Douglas, *supra* note 88, at 45.

In his book Powell expressed the view that where (i) there was control of the corporation, (ii) used to commit “fraud or wrong,” causing (iii) unjust loss or injury to the complainant, the recognition of the separate existence of a corporation would constitute an “abuse of the privilege”.⁹⁶ This three-prong test became the touchstone for veil-piercing analysis in many cases.⁹⁷ However, deeper inquire into the case law preceding as well as following Powell’s study reveals that the test he suggested has never been the only one used by the courts. Visa versa, commentators acknowledge that there are a lot of versions of the piercing of the corporate veil doctrine and, consequently, a lot of tests to detect their applications.⁹⁸ In addition, they unanimously agree that piercing of the corporate veil tests are quite vague and may differ from jurisdiction to jurisdiction.⁹⁹ The situation becomes even more complicated where courts distinguish between tort and contract cases, horizontal¹⁰⁰ and vertical piercing cases¹⁰¹, reverse piercing cases,¹⁰² and triangular piercing cases.¹⁰³ As Marcantel notes, each of these cases requires focusing on certain types of factors within the

⁹⁶ *Id.* at 45-46 (citations omitted).

⁹⁷ *Id.* at 46 (citations omitted).

⁹⁸ *E.g.*, Dearborn, *supra* note 7, at 196-197; John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners’ Limited-Liability Protection*, 75 WASH. L. REV. 147, 173 (2000), cited in Marcantel, *supra* note 9, n. 28 at 196-197.

⁹⁹ *E.g.*, Dearborn, *supra* note 7, at 196-197; Marcantel, *supra* note 9, at 195-198; Alting, *supra* note 5, at 187; Douglas, *supra* note 88, at 51 (“Current veil-piercing doctrine relies on a list of factors to get beyond the conclusory and content-free rule. The list is indeterminate both in length and in the conclusiveness of each factor.”) (citations omitted).

¹⁰⁰ Marcantel, *supra* note 9, at 200-201 (“Horizontal piercing involves a plaintiff’s attempt to pierce the veil of one subsidiary to reach the assets of another subsidiary who shares a parent corporation.”) (citations omitted).

¹⁰¹ *Id.* at 201 (“Vertical piercing occurs when a plaintiff attempts to pierce through the corporate shield of a subsidiary to reach the assets of a parent. In contrast with horizontal piercing, the plaintiff is no longer attempting to pierce two corporations of equal power within the hierarchy of the corporate structure. Rather, the plaintiff is now attempting to pierce an inferior corporate entity - a subsidiary - in an attempt to reach the assets of a superior corporate entity - the parent.”) (citations omitted).

¹⁰² *Id.* at 202 (“[A] reverse pierce would occur where a plaintiff attempts to pierce a parent to reach the assets of a subsidiary.”) (citations omitted).

¹⁰³ *Id.* at 203 (“Triangular piercing cases exist where a plaintiff attempts to pierce a parent corporation to reach a shareholder of the parent, in an attempt to reach an otherwise unrelated corporation of which the shareholder owns an interest.”) (citations omitted).

relevant test.¹⁰⁴ For instance, he points out that in terms of application, the distinction between tort and contract cases tends to focus on the element of injustice (in particular, in contract cases, undercapitalization is largely ignored, while in tort cases, undercapitalization is generally deemed important).¹⁰⁵ At the same time when analyzing horizontal, vertical, reverse, and triangular piercing cases, courts tend to focus their inquiry on control or unity factors and deemphasize injustice elements.¹⁰⁶ The present research, however, is not intended to go deep into analysis of dependence of the piercing tests on case types but will rather focus on clarifying the general scope of the doctrine and conditions of its application in respect of contract cases.¹⁰⁷

Most commentators suggest that the piercing of the corporate veil doctrine may be applicable in cases where creditors want to reach assets of the company's shareholders¹⁰⁸ or persons holding corporate positions in a company,¹⁰⁹ and creditors of the subsidiary attempt to reach assets of the parent company¹¹⁰ or a sister subsidiary company.¹¹¹ In case of reverse veil-piercing shareholder's creditors may try to reach assets of the company or creditors of the parent company will attempt to reach assets of its subsidiary.¹¹² These are, indeed, the most common situations dealt with in piercing cases but commentators also note that piercing is possible in cases involving "other sorts of control relationships or corporate affiliations."¹¹³ For instance, Born refers to cases where the courts stated that "an 'equitable owner' of a corporation may be held its alter ego, even where he is not a shareholder, officer, director or

¹⁰⁴ *Id.* at 198.

¹⁰⁵ *Id.* at 200.

¹⁰⁶ *Id.* at 202-204 (citations omitted).

¹⁰⁷ Due to the contractual nature of arbitration, discussion of tort cases, *a priory*, falls out of the scope of the present research.

¹⁰⁸ Easterbrook & Fischel, *supra* note 3, at 109-110.

¹⁰⁹ BORN, *supra* note 12, at 1162.

¹¹⁰ Easterbrook & Fischel, *supra* note 3, at 110-111.

¹¹¹ Marcantel, *supra* note 9, at 200-201 (discussing the horizontal piercing).

¹¹² For a discussion, *see id.* at 202-203.

¹¹³ BORN, *supra* note 12, at 1162.

employee”, or “the equitable doctrine of piercing the corporate veil is not limited to the parent-subsidiary relationship.”¹¹⁴ The latter, are rather “unusual cases” for piercing the corporate veil,¹¹⁵ however, for the purposes of the doctrine’s application it is important to know all of them as the type of relationship involved in a particular case might indicate application of a particular variation of the doctrine.

2.2. Variations of the Doctrine and Conditions of Application According to US Law

The case law and scholarly works acknowledge that there is no clear dividing line between the piercing of the corporate veil doctrine’s variations.¹¹⁶ Nevertheless, in particular in the United States, they distinguish at least two major types of the doctrine and some of its minor variations. Marcantel, for instance, speaks about tests that denominate the alter ego doctrine, the instrumentality doctrine, and the injustice or equity doctrine.¹¹⁷ Ferrario distinguishes between the instrumentality, alter ego, and the identity doctrines.¹¹⁸ At the same time, Born focuses his research exclusively on the alter ego doctrine, leaving aside all others.¹¹⁹ This subchapter will discuss in more detail the US approach to the alter ego and instrumentality doctrines, being the most widely used variations of the piercing of the corporate veil doctrine.

¹¹⁴ *Id.* n. 132 at 1162 (citations omitted).

¹¹⁵ *Id.* at 1162.

¹¹⁶ Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches*, 36 AM. BUS. L. J. 73, 91 (1998), *quoted in* Marcantel, *supra* note 9, n. 26 at. 196 (“[T]he ‘instrumentality’ theory, the ‘alter ego’ theory, and the ‘identity’ theory....are not helpful in light of the numerous descriptive phrases that are used, apparently interchangeably, by the courts. Some courts have abandoned all efforts to articulate a theory and instead take a ‘laundry list’ approach to the identification of factors likely to justify veil-piercing....”); Ferrario, *supra* note 12, at 661 (“As a result of the close relationship between the [alter ego and instrumentality] doctrines....and the fact that in practice they lead to the same result, it is possible to consider them as interchangeable.”).

¹¹⁷ Marcantel, *supra* note 9, at 195-196 (citations omitted).

¹¹⁸ Ferrario, *supra* note 12, at. 647.

¹¹⁹ BORN, *supra* note 12, at 1154-1166.

2.2.1. *Alter Ego Doctrine*

In the literature on international commercial arbitration the alter ego doctrine is probably the most frequently cited of all veil-piercing variations.¹²⁰ However, the doctrine was first introduced in corporate law by common law courts¹²¹ and only afterwards became known to arbitration.¹²²

Definitions of the alter ego doctrine and tests detecting its presence vary widely in different jurisdictions and legal systems.¹²³ Since the possibility of the doctrine's application depends on national law governing the case, it is important to understand the specific requirements of that particular law as regards the scope of doctrine and conditions of its application. This point was made very clear in the recent decision in *FR 8 Singapore Pte. Ltd., v. Albacore Maritime Inc.* where the court stated that “the choice-of-law question affects the elements FR8 must plead in order to maintain a veil-piercing or alter-ego claim. (...) Delaware law (...) requires proof of fraud to pierce the corporate veil. (...) Under English law defendants assert that piercing Albacore's veil would be “virtually impossible.” (...) Federal common law, according to FR8, “merely requires that the plaintiff allege domination to compel arbitration on the basis of alter ego liability, and not fraud or injustice.”¹²⁴

As it can be seen from *FR 8 Singapore*, at least two different alter ego tests were developed by American courts. One of them (hereinafter, also referred to as ‘the first test’) requires the following two elements to be proved: (1) presence of such unity of interest and

¹²⁰ E.g., BORN, *supra* note 12, at 1153-1166; BREKOULAKIS, *supra* note 3, ¶ 5.71-5.73.

¹²¹ BREKOULAKIS, *supra* note 3, ¶ 5.71.

¹²² Thompson-CSF, S.A. v. American Arbitration Association, 64 F. 3d 773, 776 (2d Cir. 1995) (the 2d Circuit recognizing that piercing the corporate veil between a signatory and non-signatory party may bind the non-signatory party to an arbitration agreement of its alter ego).

¹²³ BORN, *supra* note 12, at 1154.

¹²⁴ *FR 8 Singapore Pte. Ltd., v. Albacore Maritime Inc.*, 754 F. Supp. 2d 628, 633 (D.N.Y. 2010) (citations omitted).

ownership that the separate personalities of the corporation and the individual or another corporation no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.¹²⁵ Another test (hereinafter, also referred to as ‘the second test’) requires proof of (1) the owner’s exercise of complete control (domination) over the corporation with respect to the transaction at issue and (2) such control being used to commit a fraud or wrong that injured the party seeking to pierce the veil.¹²⁶ Of the two, the first test is considered to set forth to a more lenient standard for veil-piercing because on the equitable element it is sufficient that it appear that recognition of the acts as those of a corporation only will produce inequitable results.¹²⁷ Ownership/control criteria will test similar element – the extent to which an alleged alter ego company is controlled or dominated by another one. In any case, both elements of the respective test must be found to exist before the corporate form will be disregarded.¹²⁸

a) Existence of the unity of interest and ownership or owner’s exercise of complete control (domination) over the corporation.

The courts constantly repeat that “the conditions under which the corporation may be regarded as the alter ego of the stockholders necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is

¹²⁵ *E.g.*, *Watson v. Commonwealth Insurance Co.*, 8 Cal. 2d 61, 68 (1936); *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 837 (1962); *RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985); *Van Dorn Co. v. Future Chemical & Oil Corp.*, 753 F.2d 565 (7th Cir. 1985); *National Elevator Industry v. Lutyk*, 332 F.3d 188 (3d Cir. 2003).

¹²⁶ *E.g.*, *American Fuel Corp. v. Utah Energy Development Co.*, 122 F. 3d 130, 134 (2d Cir. 1997); *Bridas*, 447 F. 3d at 416.

¹²⁷ *E.g.*, *Watson v. Commonwealth Insurance Co.*, 8 Cal. 2d at 68; *Associated Vendors*, 210 Cal. App. 2d at 837.

¹²⁸ *E.g.*, *Associated Vendors*, 210 Cal. App. 2d at 837 (citations omitted); *American Fuel Corp. v. Utah Energy Development Co.*, 122 F. 3d at 134 (citations omitted). *But see* Ferrario, *supra* note 12, at 661 (discussing the precedents where courts allowed veil-piercing on the basis of just one element of the test).

particularly within the province of the trial court.”¹²⁹ This is particularly true with respect to the first condition of the doctrine’s application – existence of the unity of interest and ownership or owner’s exercise of complete control (domination) over the corporation. Most courts and commentators suggest only general rules for detecting its presence.¹³⁰

In *Associated Vendors* the California Court of Appeals listed twenty factors used by the trial courts in veil-piercing cases.¹³¹ Among these factors the court named the following:

Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; the failure to obtain authority to issue stock or to subscribe to or issue the same; the holding out by an individual that he is personally liable for the debts of the corporation; the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family; the use of the same office or business location; the employment of the same employees and/or attorney; the failure to adequately capitalize a corporation; the total absence of corporate assets and undercapitalization; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal

¹²⁹ *E.g.*, *Stark v. Coker*, 20 Cal. 2d 839, 846 (1942); *Associated Vendors*, 210 Cal. App. 2d at 837; *Thompson-CSF*, 64 F. 3d at 777 (the court pointing out that veil-piercing determinations are fact specific and differ with the circumstances of each case).

¹³⁰ *E.g.*, *Associated Vendors*, 210 Cal. App. 2d at 837

¹³¹ In that case the court used the first type of the alter ego test requiring “(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.” *Id.* at 837.

liability, or the use of a corporation as a subterfuge of illegal transactions; and the formation and use of a corporation to transfer to it the existing liability of another person or entity.¹³²

Despite that the list suggested by the court is quite extensive, commentators emphasize that it is not exhaustive – the courts have used other factors as well.¹³³

In its decision in *Bridas I*¹³⁴ the 5th Circuit court identified twelve ‘private law’ factors commonly utilized by this circuit in making the alter ego determination, namely:

(1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities.¹³⁵

The court mentioned three more private law factors:

(1) whether the directors of the ‘subsidiary’ act in the primary and independent interest of the ‘parent’; (2) whether others pay or guarantee debts of the dominated corporation; and (3) whether the alleged dominator deals with the dominated corporation at arm's length.¹³⁶

As we can see, the lists suggested by different courts significantly overlap and this result is very much common across other jurisdictions. However, since not much is said about

¹³² *Id.* at 838-840 (citations omitted).

¹³³ Marcantel, *supra* note 9, n. 29 at 197-198 (citations omitted).

¹³⁴ *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 349 (5th Cir. 2003). In this case the court used the second type of the alter ego test requiring that “(1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil.” *Id.* at 359.

¹³⁵ *Id.* at 360 (citations omitted).

¹³⁶ *Id.* at 360 (citations omitted).

the importance of each of these factors or their combinations,¹³⁷ conclusions that courts reach with respect to the ownership/control criteria of the alter ego test vary greatly.

In *Andrew Martin Marine Corp. v. Stork-Werkspoor Diesel B.V.* the court granted the motion for a stay pending arbitration holding that equity required it to pierce the corporate veil of one of the plaintiffs in order to deem it a signatory to the contracts containing the arbitration clauses.¹³⁸ The court analyzed the facts of the case through the prism of twelve factors which mainly resemble those suggested in above lists and, having answered positively to every factor, held that the corporate form should be disregarded.¹³⁹

The cases like *Andrew Martin Marine* are, of course, rare. Therefore, at least, some general guidance as to the combination of factors is usually provided by courts. For instance, in the same *Andrew Martin Marine* the court noted that “the identity of corporate names, stockholders and officers, and the complete ownership of the capital stock of the subsidiary by the parent” are not enough to decide whether the corporate veil should be pierced.¹⁴⁰ In *Associated Vendors* the court stressed that if taken alone inadequate capitalization, though being an important factor, is also not enough to pierce the corporate veil.¹⁴¹ In many other cases courts held that mere identity of corporate logos or parent company involvement in subsidiary's decision-making processes alone will not be sufficient to satisfy the alter ego

¹³⁷ David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1327 (2007) (“The cases typically list a series of more or less standard factors. Little if anything is said about how they are to be weighted or which ones are necessary or sufficient by themselves to support a piercing result.”), *quoted in* Marcantel, *supra* note 9, n. 29 at 197-198.

¹³⁸ *Andrew Martin Marine Corp. v. Stork-Werkspoor Diesel B.V.*, 480 F. Supp. 1270 (D. La. 1979).

¹³⁹ *Id.* at 1276.

¹⁴⁰ *Id.* at 1275 (citations omitted).

¹⁴¹ *Associated Vendors*, 210 Cal. App. 2d at 841.

test.¹⁴² No court, however, suggested any more definite guidance which means that each alter ego case will be considered on an individual basis.

b) Inequitable result.

The inequitable result prong is the second element of the first of the two alter ego tests named at the beginning of this subchapter.¹⁴³ As Marcantel fairly notes, the definition of this element suggested by courts is too broad and, thus, even vaguer than that of control/ownership.¹⁴⁴

In *Associated Vendors* the court stated general rule:

it is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an “inequitable result.” In almost every instance where a plaintiff has attempted to invoke the [alter ego] doctrine he is an unsatisfied creditor. The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where *some conduct amounting to bad faith* makes it inequitable, under the applicable rule above cited, for the equitable owner of a corporation to hide behind its corporate veil.¹⁴⁵

Thus, in order to satisfy the inequitable result prong some conduct amounting to bad faith in one form or another has to be proven by the claimant. Of course, no court suggested even an approximate list of what is considered to be “conduct amounting to bad faith.”¹⁴⁶ Such conduct, for instance, was found and corporate form disregarded where the sole shareholder used independent corporate existence to secure an advantage over third persons,

¹⁴² See BORN, *supra* note 12, n. 118 at 1158.

¹⁴³ See *supra* p. 31.

¹⁴⁴ Marcantel, *supra* note 9, at 215 (“[C]ourts have produced an incredibly broad definition of injustice that requires nothing even remotely close to an actual standard.”).

¹⁴⁵ *Associated Vendors*, 210 Cal. App. 2d at 842 (emphasis added).

¹⁴⁶ See Presser, *supra* note 88, at 412 (“It is usually understood that to pierce the corporate veil some sort of abuse is required, but there is no consensus on what constitutes ‘abuse.’”).

through the medium of the corporation, to which she would not be entitled as an individual.¹⁴⁷ Other examples include various undercapitalization claims,¹⁴⁸ stripping the subsidiary of its assets,¹⁴⁹ etc.

c) Fraud or wrong.

The fraud or wrong must be proven in the second of the two alter ego tests.¹⁵⁰ The importance of this criteria in the whole piercing the corporate veil doctrine was underlined by Powell stating that

[the] mere manipulation of the subsidiary in violation of its legal requirements should not therefore be sufficient to establish the parent corporation's liability for the acts of its subsidiary. It must be shown that the control over the subsidiary was exercised by the parent corporation in such a manner as to defraud or wrong the complainant. If no wrong has been done to the complainant, the parent corporation should not be made to respond simply because it has exercised undue control over the subsidiary.¹⁵¹

By now fraud and misrepresentation are considered to be “fairly static concepts.”¹⁵² Commentators suggest that the most obvious case of fraud or misrepresentation takes place where a corporation misrepresents the nature of its activities, its ability to perform, or its financial condition.¹⁵³ Among less obvious situations they mention those where a firm

¹⁴⁷ *Wenban Estate, Inc. v. Hewlett*, 193 Cal. 675, 698 (1924).

¹⁴⁸ *E.g., Associated Vendors*, 210 Cal. App. 2d at 842; *Bridas*, 447 F. 3d at 420 (“Intentionally bleeding a subsidiary to thwart creditors is a classic ground for piercing the corporate veil.”); *National Elevator Industry*, 332 F.3d at 198 (finding an “element of injustice or fundamental unfairness” where incoming revenues were directed away from an undercapitalized corporation and into the hands of the controlling party).

¹⁴⁹ *Baker v. Caravan Moving Corp.*, 561 F. Supp. 337, 340 (D. Ill. 1983).

¹⁵⁰ *See supra* p. 131.

¹⁵¹ POWELL, *supra* note 94, § 3.

¹⁵² Marcantel, *supra* note 9, at 217.

¹⁵³ Easterbrook & Fischel, *supra* note 3, at 112.

misleads a creditor into believing that it would have recourse to the assets of other corporations in the event of nonperformance.¹⁵⁴

In *Bridas* the Government asserted that only fraud – and no other type of injustice – was required to satisfy the fraud or wrong prong of the alter ego test.¹⁵⁵ The court, however, took a broader view that the test may also be met through an “illegal act” or “misuse of the corporate form,”¹⁵⁶ which makes it close to the first test pattern. The court further pointed out that the alter ego doctrine may be applicable when the corporate form is used as a “sham to perpetrate a fraud”¹⁵⁷ and allowed veil-piercing having found that the Government used the lack of financial separateness of Turkmenneft “to commit a fraud or another wrong on plaintiffs.”¹⁵⁸

Because of the second test type involving fraud or wrong the alter ego doctrine resembles another variation of the piercing of the corporate veil doctrine – the instrumentality doctrine. In fact, many courts seem to make no clear distinction between the two. Marcantel, however, suggests that unlike the instrumentality doctrine, this doctrine is usually used in vertical piercing cases.¹⁵⁹

¹⁵⁴ *Id.* at 112 (suggesting that such a situation may be found “if managers make express statements that a parent corporation will stand behind the debts of a subsidiary or if the parent and the subsidiary have confusingly similar names, so that the creditor believes it is dealing with the parent”).

¹⁵⁵ *Bridas*, 447 F. 3d at 416.

¹⁵⁶ *Id.* at 416-417 (the court reiterating its position taken in earlier decisions that “‘fraud’ may be required to pierce the corporate veil in contract cases, because the party seeking to utilize the doctrine has had the opportunity, during negotiations with a subsidiary, to obtain assurances of payment from its parent.” Nevertheless, the court continued that even in contract cases the alter ego fraud or injustice test may be met through an “illegal act” or “[misuse of] the corporate form”) (citations omitted).

¹⁵⁷ *Id.* at 416 (citations omitted). See also *Baker v. Caravan Moving Corp.*, 561 F. Supp. at 340 (“When an affiliated corporate structure is used as a shield to circumvent the intended purpose of legislation, courts will disregard the corporate entity and find a corporation liable for the debts of its affiliate.”).

¹⁵⁸ *Bridas*, 447 F. 3d at 419-420.

¹⁵⁹ Marcantel, *supra* note 9, n. 23 at 195-196 (citations omitted).

2.2.2. Instrumentality Doctrine

The three-prong test that Powell suggested in his 1931 book¹⁶⁰ introduced and shaped the instrumentality doctrine.¹⁶¹ As it was already mentioned *supra* in subchapter 2.1., the test requires exercise of the control of the corporation which is used to commit “fraud or wrong” causing unjust loss or injury to the complainant.¹⁶²

One of the most prominent cases explaining the instrumentality doctrine in more detail was *Lowendahl v. Baltimore & Ohio Railroad Co.*¹⁶³ In *Lowendahl* the court noted that the ‘instrumentality rule’ could be “the most practical and effectively applicable theory for breaking down corporate immunity where equity requires that this be done to circumvent fraud or other legal wrong”.¹⁶⁴ It further formulated the ‘instrumentality rule’:

Where a parent corporation, at the time of the transaction complained of, (1) exercises control over its subsidiary not in a manner normal and usual with stockholders, but to such extent and in such manner, in disregard of the subsidiary's corporate paraphernalia, directors and officers, that the subsidiary has become a mere instrumentality or department of the parent's own business and the parent, under the unreal form of the subsidiary, is the real actor in the transaction; or where the business and officers of the two corporations have become so inextricably confused that it is impossible or impracticable to identify the corporation that participated in the transaction attacked; and (2) where such control has been used by the parent to commit fraud, or violate other legal duty, or has been used to do an act tainted by dishonesty or unjust conduct violating plaintiff's rights or under circumstances giving rise to an estoppel; and (except in estoppel cases) (3) where such fraud or wrong results in unjust loss and injury to plaintiff, – the court, in disregard of the corporate entity of the subsidiary, will hold the parent liable.¹⁶⁵

With respect to the control element the court then stressed that “not mere majority or complete stock control but complete domination, not only of finances but of policy and

¹⁶⁰ POWELL, *supra* note 94, § 3.

¹⁶¹ Ferrario, *supra* note 12, at 655; Marcantel, *supra* note 9, n. 24 at 196 (citations omitted).

¹⁶² See *supra* p. 21.

¹⁶³ *Lowendahl v. Baltimore and Ohio Railroad Co.*, 247 A.D. 144 (N.Y. 1936).

¹⁶⁴ *Id.* at 156.

¹⁶⁵ *Id.* at 157.

business practice in respect to the transaction attacked so that the corporate entity as to this transaction had *at the time* no separate mind, will or existence of its own” was required to satisfy the control element of the test.¹⁶⁶ In addition, that control had to be “used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights.”¹⁶⁷ Finally, both the control and breach of duty must cause the injury or unjust loss that the plaintiff is complaining of.¹⁶⁸

In the instrumentality doctrine the excessive control prong is tested on the basis of the factors identical to those of the alter ego control/ownership element. For instance, in another widely cited case *Steven v. Roscoe Turner Aeronautical Corp.*¹⁶⁹ the court listed the following factors as generally considered by courts for the purposes of the control test: ownership by the parent corporation of all or most of the capital stock of the subsidiary; directors or officers common for both parent and subsidiary corporations; parent’s financing of the subsidiary; parent’s subscription to all the capital stock of the subsidiary or otherwise causing its incorporation; grossly inadequate capital of the subsidiary; payment by the parent corporation of the salaries and other expenses or losses of the subsidiary; subsidiary’s having substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; description of the subsidiary as a department or division of the parent corporation in the papers of the latter or in the statements of its officers, or subsidiary’s business or financial responsibility being referred to as the parent corporation's own; parent corporation’s use the of the subsidiary’s property as its own; directors’ or executives ‘of the subsidiary not acting independently in the interest of the subsidiary; and the ignorance of the

¹⁶⁶ *Id.* at 157.

¹⁶⁷ *Id.* at 157.

¹⁶⁸ *Id.* at 157.

¹⁶⁹ *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 160 (7th Cir. 1963).

formal legal requirements of the subsidiary.¹⁷⁰ Again, the presence of these factors in the proper combination is supposed to define if there was the required degree of control.¹⁷¹ At the same time, similarly to alter ego cases, no further explanation is given to the question of what that ‘proper combination’ is.¹⁷²

Fraud or wrong is another essential element of the instrumentality doctrine. Within the instrumentality doctrine this element will be tested in the same way as in alter ego doctrine and may involve violation of a statute, stripping the subsidiary of its assets, etc.¹⁷³

The instrumentality doctrine necessarily requires proof of the third element not found in the alter ego doctrine – unjust loss or injury to the claimant resulting from the fraud or wrong committed by the defendant. Douglas expresses the generally agreed view that an owner's failure to treat the corporation properly – to follow formalities like conducting meetings of officers or directors, keeping minutes, subscribe for stock, etc. – will never be considered the cause of the claimant’s injury.¹⁷⁴ He further insists that undercapitalization is the only legitimate claim to any causal connection to the plaintiff's injury. In *Roscoe Turner*, for instance, the court also suggested that unjust loss or injury to the claimant can be evidenced by insolvency of the subsidiary.¹⁷⁵

Finally, it is worth noting that, despite the general requirement that all three elements

¹⁷⁰ *Id.* at 161. See also *William Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 139 (2d Cir. 1991).

¹⁷¹ *Roscoe Turner*, 324 F.2d at 161.

¹⁷² For instance, in *Roscoe Turner* the court only reiterated the approach stating that “[w]hile stock control and common directors and officers are generally prerequisites for application of the instrumentality rule, yet, they are not sufficient by themselves to bring the rule into operation.” *Roscoe Turner*, 324 F.2d at 161 (citations omitted). See also *Edgar v. Fred Jones Lincoln-Mercury*, 524 F.2d 162, 166 (10th Cir. 1975) (“It is clear that the plaintiff's allegations concerning stock ownership and interlocking directors were insufficient standing alone to justify the disregard of the corporate entity.”).

¹⁷³ *Roscoe Turner*, 324 F.2d at 160.

¹⁷⁴ Douglas, *supra* note 88, at 57 (citations omitted).

¹⁷⁵ *Roscoe Turner*, 324 F.2d at 160.

of the instrumentality rule be present, in random cases courts have pierced the corporate veil relying primarily on the excessive exercise of control without paying due attention to the other two elements.¹⁷⁶

2.3. Piercing the Corporate Veil in Other Jurisdictions

In subchapter 2.2. I showed that the piercing of the corporate veil doctrine can have different forms and requirements. Within the United States the courts developed a body of law that recognizes several variations of the doctrine, such as the alter ego, instrumentality, identity, and equity doctrines, and suggests different tests to check their applicability.¹⁷⁷ However, the United States is far not the only jurisdiction that recognizes the piercing of the corporate veil doctrine – some variations of the doctrine exist in many other both common and civil law jurisdictions. For instance, in Germany the doctrine is known as “*Durchgriffshaftung*,” in France – as “*levee du voile social*”, in England and Canada it is termed both as “piercing” or “lifting” the corporate veil.¹⁷⁸ As it was already mentioned earlier, the Russian Federation and Ukraine do not recognize the piercing of the corporate veil doctrine, though, there are various statutory exceptions to the limited liability principle in these jurisdictions.¹⁷⁹

French courts are generally considered to be sympathetic to veil-piercing in cases amounting to fraud while Swiss and German courts may disregard the corporate form only in

¹⁷⁶ Ferrario, *supra* note 12, at 660.

¹⁷⁷ *See supra* p. 30-40.

¹⁷⁸ BORN, *supra* note 12, at 1154; Alting, *supra* note 5, at 190; for Canada *see also* Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc., 2009 ONCA 256 and Trans-Pacific Shipping Co. v. Atlantic & Orient Trust Co., 2005 FC 311.

¹⁷⁹ *See sources cited supra* note 6.

exceptional circumstances involving, again, fraud or other misconduct.¹⁸⁰ With respect to Germany it is important to note that the legal doctrine referred to as *Durchgriffshaftung* applies only to cases where the complainant is attempting to pierce the corporate veil in relation to individual shareholders of the company.¹⁸¹ In relation to affiliated companies Germany has developed a body of law referred to as “*Konzernrecht*,” the basic rules of which differ from those of *Durchgriffshaftung* and can be found in the German Corporate Law Code and German law on stock corporations (*Aktiengesetz*).¹⁸² *Durchgriffshaftung* doctrine, however, resembles the approach taken by US courts. Despite that the piercing of the corporate veil doctrine is recognized in Germany, Born, however, notes that some German authorities still question whether the doctrine can be used as a means of extension of arbitration agreements to third parties.¹⁸³

Canadian approach to the piercing of the corporate veil doctrine was restated in *Parkland Plumbing*:

[w]hile a corporation is a legal entity distinct from its shareholders, this principle may be disregarded by ‘lifting the corporate veil’ and regarding the company as the agent or vehicle of its controlling shareholder or parent corporation where enforcing the ‘separate entities’ principle would yield a result “too flagrantly opposed to justice” (...) But this does not mean that the courts enjoy ‘*carte blanche*’ to lift the corporate veil absent fraudulent or improper conduct whenever it appears ‘just and equitable’ to do so. The courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, “complete control”, requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently. (...) The second element relates to the nature of the conduct:

¹⁸⁰ BORN, *supra* note 12, at 1156-1157.

¹⁸¹ Alting, *supra* note 5, at 191.

¹⁸² *Id.* at 191.

¹⁸³ BORN, *supra* note 12, at 1156 (taking the view that such approach is wrong).

is there “conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.”¹⁸⁴

Canadian veil-piercing test, thus, resembles one of the variations of the US alter ego tests.¹⁸⁵

Under English law veil-piercing is quite rare¹⁸⁶ but can be used where the corporate form was created as a mere façade to escape from mandatory legal obligations or the enforcement of existing and legitimate third party rights.¹⁸⁷ In *Presbyterian Church* the court noted that, “English courts find that a corporation is a façade when a subsidiary is established as a mere device for the purpose of evading existing obligations to other parties.”¹⁸⁸

Understanding of the different approaches taken by national legal systems with respect to the piercing of the corporate veil doctrine is particularly important for the purposes of international commercial arbitration where several legal systems can be involved simultaneously. As we can see, there is no consistency across different jurisdictions as regards the piercing the corporate veil doctrine; therefore, approaches taken by arbitral tribunals also vary. Born points out that international arbitral tribunals have generally been circumspect in applying veil-piercing doctrines.¹⁸⁹ His analysis suggests that most awards have require persuasive evidence of overlapping ownership, management and involvement in negotiation and performance of the contract, as well as affirmative statements that the affiliated company is involved in the transactions in question.¹⁹⁰

¹⁸⁴ *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256, §49 (citations omitted).

¹⁸⁵ *See supra* p. 31.

¹⁸⁶ *FR 8 Singapore v. Albacore Mar.*, *supra* note 124, at 459 (citations omitted).

¹⁸⁷ BORN, *supra* note 12, at 1155.

¹⁸⁸ *Presbyterian Church v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 683 (D.N.Y. 2006).

¹⁸⁹ BORN, *supra* note 12, at 1161.

¹⁹⁰ Case no. 8385 of 1995, ICC COLLECTION OF ARBITRAL AWARDS 1996-2000, 474 (J. Arnaldez, Y. Derains & D. Hascher eds., 2003) (“The piercing, or not, of the corporate veil very much depends on the circumstances of

Thus, the piercing of the corporate veil doctrine, unlike the group of companies doctrine, can have different forms and requirements depending on applicable national law. In the United States, which is considered to have the most developed law on veil-piercing, the courts and scholars distinguish between, at least, two major variations of the doctrine, being the alter ego and instrumentality doctrines, as well as some of its minor variations, such as identity and injustice or equity doctrine. No single approach was also taken with respect to criteria of the doctrine's application. For instance, there are, at least, two tests adopted by American courts for determining whether one company is the alter ego of another: one of the tests requires proof of presence of such unity of interest and ownership that the separate personalities of the corporation and the individual or another corporation no longer exist, and that, if the acts are treated as those of the corporation alone, an inequitable result will follow; another test requires proof of the owner's exercise of complete control (domination) over the corporation with respect to the transaction at issue and such control being used to commit a fraud or wrong that injured the party seeking to pierce the veil. The US instrumentality rule directs three elements to be proven: (i) that there was control of the corporation, (ii) used to commit "fraud or wrong," causing (iii) unjust loss or injury to the complainant.

The United States is not the only jurisdiction that recognizes the piercing of the corporate veil doctrine – the doctrine is known in Germany as *Durchgriffshaftung*, in France – as *levee du voile social*, in England and Canada both as piercing or lifting the corporate veil. Except for, probably, Germany, the variations of the doctrine that exist in other jurisdictions in one or another way resemble those accepted by the US courts. German *Durchgriffshaftung*

each case. Some elements are nearly always considered as necessary. They comprise a significant direct control measure of the activities of the subsidiary by the parent company or the shareholder and the insolvability of the former An illegitimate behavior of the subsidiary, instigated by the parent company, towards the person seeking to pierce the corporate veil is another element that can facilitate this piercing It is therefore the facts of the case that impose the solution.”), *quoted in BORN, supra* note 12, at 1161.

applies only to cases where the complainant is attempting to pierce the corporate veil in relation to individual shareholders of the company while cases involving affiliated companies will be governed by the provisions of German Konzernrecht.

3. COMPARISON OF THE TWO DOCTRINES AND THE RESULTS

Analysis of the literature on international commercial arbitration shows that until recently the scholars did not even try to compare the group of companies and the piercing of the corporate veil doctrines to draw a dividing line between them.¹⁹¹ However, in their latest works major scholars argue that there is a substantial difference between the two.¹⁹² Indeed, despite some obvious similarities, such as domination and control of one company over another, the doctrines differ significantly in a number of aspects.

First, and probably the most important distinction between the two doctrines, is related to the consent element of the test employed by the group of companies doctrine.¹⁹³ The group of companies doctrine is consent based;¹⁹⁴ that is, in order to allow application of the doctrine arbitral tribunals and courts require evidence of the parties' consent (usually implied) to arbitrate their dispute. In order to find such evidence they analyze how actively, if at all, the non-signatory parties were involved in the conclusion, performance and/or termination of contracts containing arbitration clauses,¹⁹⁵ which, as most commentators agree, may suggest consent by conduct.¹⁹⁶ In its turn, the piercing of the corporate veil is an equitable doctrine which was developed by common law courts to evade the limited liability principle where its application would amount to some injustice towards the complainant. As Born fairly notes, the consequence of the veil-piercing is that one entity is deemed either non-existent or merely an unincorporated part of another entity.¹⁹⁷ No further intentions of the parties are tested

¹⁹¹ See sources cited *supra* notes 11.

¹⁹² See sources cited *supra* notes 12.

¹⁹³ BORN, *supra* note 12, at 1172 (stressing that presence of consent is a “fundamental difference” between the two doctrines).

¹⁹⁴ BORN, *supra* note 12, at 1172.

¹⁹⁵ See *supra* p. 18-20.

¹⁹⁶ E.g., BREKOULAKIS, *supra* note 3, ¶5.81; HANOTIAU, *supra* note 20, ¶ 107.

¹⁹⁷ BORN, *supra* note 12, at 1172.

rather the focus is made on the relationship between the companies and elements of fraud, wrong or other injustice involved,¹⁹⁸ which is not inherent in the group of companies doctrine.

Consistent with the above point Brekoulakis suggests additional important procedural difference between the two doctrines. Since the very essence of the piercing the corporate veil doctrine is to disregard corporate form and to hold the controlling company liable for acts and omissions of the controlled company (that is, liable instead of the controlled company), Brekoulakis expresses the view that the claimant should only be able to request the tribunal to assume jurisdiction over the non-signatory controlling company instead of the controlled company rather than in addition to it.¹⁹⁹ In contrast, the group of companies doctrine is used as a means of identifying the true parties to arbitration, which does not disturb the legal personality of the entities in question.²⁰⁰ Therefore, a claimant that relies on the group of companies doctrine may well request the joinder since in this case the basis would be the non-signatory's consent to the arbitration agreement contained in the main contract in addition to the signatory's consent, which has signed the contract anyway.²⁰¹

Another, though relatively minor difference between the two doctrines, is the requirement of a corporate group existence. While the group of companies doctrine is centered around the corporate group so tightly connected that it can be considered to constitute one and the same economic reality (unity), the piercing of the corporate veil doctrine does not require presence of the corporate group. The latter doctrine can be applicable even with respect to individual shareholders or managers of the corporation.

¹⁹⁸ BORN, *supra* note 12, at 1142, 1154.

¹⁹⁹ BREKOULAKIS, *supra* note 3, ¶5.89 (further explaining that "[t]he claim before tribunal should not be for a joinder; it should be against the controlling company alone").

²⁰⁰ BORN, *supra* note 12, at 1172.

²⁰¹ BREKOULAKIS, *supra* note 3, ¶5.89-5.90.

Finally, while the piercing of the corporate veil doctrine, whether developed by courts or introduced by legislators, forms part of national laws of many major jurisdictions, the group of companies doctrine was introduced by arbitration tribunals applying a national principles and is still either negatively treated or generally ignored by national courts,²⁰² which makes its application generally much riskier than that of the piercing the corporate veil.

Thus, the above analysis shows that the group of companies and piercing of the corporate veil doctrines have different focuses and require different fact patterns to be proved. The presence of certain facts vital for one doctrine can be absolutely irrelevant for another, the best examples being the requirement of active involvement of the non-signatory in the conclusion, performance and/or termination of contracts containing arbitration clauses present in the group of companies test versus fraud or wrong requirement which forms no part of the group of companies doctrine test but is very important in most veil-piercing tests. In my view, clear understanding of the differences between the two doctrines as well as specific requirements that various jurisdictions and legal systems add to the applicability tests will allow lawyers to conduct appropriate assessment of the facts of the case and build proper arbitration strategies to make outcomes of their cases more predictable.

At the same time, it is important to remember that successful application of either doctrine at one stage of the dispute does not guarantee its success at later stages. In particular, extension of the arbitration agreement to third parties on the basis of the discussed doctrines involves significant risk of further refusal of recognition and enforcement of the arbitral award by national courts. In this respect, one instructive decision was delivered by the British Columbia Supreme Court in *Javor v. Francoeur* case.²⁰³ In *Javor* the British Columbia

²⁰² *Supra* note 6.

²⁰³ *Javor v. Francoeur*, 2003 BCSC 350.

Supreme Court refused to enforce part of the arbitral award extending the arbitration agreement and liability to the non-signatory party on the basis of the alter ego doctrine. The court's refusal was not based on the ground that the doctrine is not known in Canada, vice versa, as it was mentioned above, Canadian courts recognize and apply the piercing of the corporate veil doctrine.²⁰⁴ In *Jacob* the court held that it was not for the arbitral tribunal but rather judicial authority to decide if the arbitration agreement could be extended to the non-signatory party.²⁰⁵ On that ground the court dismissed the application for recognition and enforcement of the arbitral award with respect to Francoeur. Therefore, not only clear understanding of the differences between the two doctrines is important – at the time when a lawyer decides on application of the respective doctrine he or she must also consider approaches to that doctrine taken by national courts, first of all, in jurisdictions where the setting aside or recognition and enforcement proceedings might take place.

²⁰⁴ See *supra* p. 42-43.

²⁰⁵ *Javor v. Francoeur*, 2003 BCSC 350, §31.

CONCLUSION

The above analysis of the case law and literature proves that the group of companies and piercing of the corporate veil doctrines are independent from each other, having different focus and conditions of application.

The group of companies doctrine may be applicable in cases where the following conditions are met: (i) there exists a group of companies that constitute one and the same economic reality (unity); (ii) the non-signatory member of the group is or was actively involved in the conclusion, performance, or termination of the contract containing arbitration clause; and (iii) from the facts of the case it is possible to imply that all the parties intended to bind the non-signatory company to arbitrate. The general rule is that each of these conditions has to be met to allow extension of the arbitration agreement to third parties, though commentators report cases where some deviations from the general model were accepted.

The piercing of the corporate veil doctrine, unlike the group of companies doctrine, can have different forms and requirements depending on applicable national law. For instance, in the United States both courts and scholars distinguish between, at least, two major variations of the doctrine, being the alter ego and instrumentality doctrines, as well as some of its minor variations, such as identity and injustice or equity doctrine. No single approach was also taken with respect to criteria of the doctrine's application. For instance, there are, at least, two tests adopted by American courts for determining whether one company is the alter ego of another: one of the tests requires proof of presence of such unity of interest and ownership that the separate personalities of the corporation and the individual or another corporation no longer exist, and that, if the acts are treated as those of the corporation alone, an inequitable result will follow; another test requires proof of the owner's exercise of complete control

(domination) over the corporation with respect to the transaction at issue and such control being used to commit a fraud or wrong that injured the party seeking to pierce the veil. The US instrumentality rule directs three elements to be proven: (i) that there was control of the corporation, (ii) used to commit “fraud or wrong,” causing (iii) unjust loss or injury to the complainant.

Except for, probably, Germany, the variations of the doctrine that exist in other jurisdictions require proof of fraud and in one or another way resemble the tests accepted by the US courts. In Germany there are two different concepts for veil-piercing: *Durchgriffshaftung* that applies only to cases where the complainant is attempting to pierce the corporate veil in relation to individual shareholders of the company and *Konzernrecht* which applies to cases involving affiliated companies.

Comparison of the two doctrines reveals, at least, one fundamental difference between them: the group of companies doctrine seeks to prove the mutual consent to bind the non-signatory party by the arbitration agreement while for the piercing of the corporate veil doctrine the consent factor is absolutely irrelevant. The veil-piercing cases often require proof of fraud, wrong or other injustice which is not found in the group of companies test. Consequently, the presence of certain facts vital for one doctrine can be of no use for another.

Understanding of the differences between the group of companies and piercing of the corporate veil doctrines is particularly important for the purposes of international commercial arbitration where several legal systems can be involved simultaneously. It is supposed to help lawyers conduct appropriate assessment of the facts of the case and build proper arbitration strategies to make outcomes of their cases more predictable. At the same time, it is important to remember that successful application of either doctrine at one stage of the dispute does not

guarantee its success at later stages. In particular, extension of the arbitration agreement to third parties on the basis of the discussed doctrines involves significant risk of further refusal of recognition and enforcement of the arbitral award by national courts. Therefore, not only clear understanding of the differences between the two doctrines is important – at the time when a lawyer decides on application of the respective doctrine he or she must also consider approaches to that doctrine taken by national courts, first of all, in jurisdictions where the setting aside or recognition and enforcement proceedings might take place.

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