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“Non-signatories”  
Extending arbitration clauses to third  
parties  
and its influence on the determination of  
the law applicable

by

Dániel Bán

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## I. Variable approaches to the formal requirements

The study of arbitral clauses has long been governed by the requirement stipulating that arbitration agreements be prepared in writing, and compliance with such requirement.<sup>1</sup> As opposed to medieval German law that preserved the Roman law rules of *informal compromissum*, in respect of arbitration agreements the French Code of Civil Procedure of 1806 stipulated in general the mandatory written form (Article 1005), while the Prussian ALR of 1794 stipulated the written form, if the value of the case exceeded 50 silver thalers (Article I. 5. 131).<sup>2</sup> The requirement regarding written form dates back to the remote past in Hungarian law as well: Section 5 of Article 30 of the Decree of 1729, Article 94 of Joseph II’s Code of Civil Procedure (1782), Article 377 of the temporary, forced Code of Civil Procedure of September 16, 1852 and Article 496 of Act LIV of 1868 on the Code of Civil Procedure also stipulated the mandatory written form of arbitration agreements.<sup>3</sup> The requirement of the written form was held by the 20<sup>th</sup> century Hungarian legislation, which however mirrored the changing approaches related to the arbitration. The *mandatory written form* of arbitration agreements was required in Article 767 of Act I of 1911 on the Civil Procedure, Section 1 Article 17 of Act 22 of 1952 (which took the Hungarian Code of Civil Procedure of 1952 into effect). In 1972 the arbitration agreement was returned to the Code of Civil Procedure<sup>4</sup>. From the return till 1994 Section 1 Article 360 of the Code of Civil Procedure stipulated the mandatory written form related to the arbitration agreement. Since the coming into force of the Hungarian Arbitration Act (Act LXXI of 1994) the written form is required by its Section 3 Article 5.

According to the generally accepted opinion, the primary reason behind the stipulation of the written form of arbitration agreements is facilitating the furnishing of evidence in the future.<sup>5</sup>

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<sup>1</sup> This paper is mainly based on a former research-project directed by Professor László Kecskés. The results of the former research are partly published. See: Bán, Dániel – Kecskés, László: Az alá nem írt választottbíróági szerződések megítélésének változásáról. In: Európai Jog, 2011/1, Bán, Dániel – Kecskés, László: Changing Aspects of Unsigned Arbitration Agreements. In: Belohlavek, Alexander – Rozehnalová, Nadezda (editors): Party Autonomy versus Autonomy of Arbitrators. Czech (& Central European) Yearbook of Arbitration (CYArb), JurisNet LLC, Huntington (USA), 2012.

<sup>2</sup> Fabinyi, Tihamér: A választott bírászkodás. [Arbitration] Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 114.

<sup>3</sup> Fabinyi, Tihamér: A választott bírászkodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 117.

<sup>4</sup> By the Act 26 of 1972, the so-called III. “Novel” (supplementary article) of the Code of Civil Procedure.

<sup>5</sup> Fabinyi, Tihamér: A választott bírászkodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 114.

It would be highly undesirable, if arbitration, which promises a much faster proceeding than that of the ordinary courts, would be delayed due to the lengthy procedure to provide evidence for the existence of the arbitration clause.<sup>6</sup> Moreover, the written form is also to ensure that the future decision of the arbitration court truly rests on *clear and indisputable* jurisdictional grounds.<sup>7</sup>

With view to the foregoing, it is not surprising that the idea of the extension of the arbitration clause began to develop in parallel with the relaxing of the formal requirements of validity strongly embedded into the legal environment of arbitration agreements. Two concomitant phenomena of this process were already observable from the last third of the 19th century: the gradual relaxing of the requirement of written form and the changing attitudes to the arbitration clauses included by unilateral legal transactions.

The provisions of medieval German law dismissing formal requirements – through the instrumentality of pandectistics – fundamentally determined 19th century German legal thinking. This could be the reason why in those days German law (as opposed to the earlier Prussian ALR) did not prescribe any written form relating to the arbitration agreements: in this respect, as arbitral clauses were most commonly related to commercial transactions, the German Code of Civil Procedure (ZPO) referred to the Commercial Code (HGB), which did not prescribe formal requirements with regard to commercial transactions.<sup>8</sup> The above approach was hereinafter firmly established: according to German commercial law, arbitration agreements concluded by persons qualifying under the HGB as traders, and with respect to transactions qualifying as commercial deals were not required to be prepared in writing.<sup>9</sup>

Cantonal law of Zurich produced a peculiar breakthrough in respect of the requirement of written form as well. From the perspective of formal validity, the legislator – similarly to the French regulation effective prior to 1980 – made a distinction between arbitration agreements concluded in respect of already *existing* and *future disputes*: the validity of the former was made subject to written form, while in the case of the latter, provided that the principal agreement included the arbitration clause, compliance with the formal requirements of the principal agreement was deemed to be sufficient.<sup>10</sup>

In addition to the relaxing of formal requirements for validity, the concept of the possibility of stipulating arbitral jurisdiction in unilateral transactions also contributed to the relaxing of the structure of arbitration agreements. Arbitration stipulated in respect of unilateral legal

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<sup>6</sup> Ujlaki, Géza: A választottbíráskodás kézikönyve. [Compendium of Arbitration] Published by Manó Dick, Budapest, 1927, 51.

<sup>7</sup> David, René: Arbitration in International Trade. Kluwer Law and Taxation Publishers, Deventer / Netherlands, 1985, 196. This assumption is probably the underlying reason why certain legal systems consider even the simple written form as insufficient and require a “qualified” written form. For example, Peruvian and Mexican law stipulate that arbitration agreements be prepared in the form of a deed prepared by a notary, Columbian and Texas law require the form of a deed prepared by a notary and countersigned by an attorney-at-law, and Venezuelan law prescribes court approval as a condition of validity for submission to arbitration. See: David, René: Arbitration in International Trade. Kluwer Law and Taxation Publishers, Deventer / Netherlands, 1985, 197.

<sup>8</sup> Fabinyi, Tihamér: A választott bíráskodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 114.

<sup>9</sup> The similar regulatory framework developed in Denmark and Sweden is presumably due to the previous, significantly harmonized law of towns involved in the Hanza trade. See: David, René: Arbitration in International Trade. Kluwer Law and Taxation Publishers, Deventer / Netherlands, 1985, 196-197.

<sup>10</sup> David, René: Arbitration in International Trade. Kluwer Law and Taxation Publishers, Deventer / Netherlands, 1985, 199.

transactions necessarily raises the question whether the scope of the arbitration clause can be extended to persons who did not sign (did not approve) such clause.

At the beginning of the 20th century the issue emerged in Hungarian legal thinking in a procedural law disguise.<sup>11</sup> The point of departure was the provision under Section 788 of Act I of 1911 (the former Hungarian Code of Civil Procedure), according to which the general rules of the code of civil procedure regarding the arbitration proceeding “unless it is stipulated otherwise, shall be applied to arbitration courts prescribed in testamentary disposition, or in any other manner permitted by law”. According to the opinion established in contemporary literature, within the scope of the referenced provision of the Code of Civil Procedure, the wording “arbitration courts prescribed (...) in any other manner permitted by law” is to be interpreted as referring only to *disposition in a civil law sense*.<sup>12</sup> According to the prevailing approach, such civil law disposition could be included – in addition to testamentary disposition – in the articles of association of legal persons and the deed of foundation establishing a foundation.<sup>13</sup> However, the above described threefold division applied by legal writers cannot be considered clearly established from dogmatic respects, and primarily served didactic purposes.

In relation to the arbitration clause included in testaments, both Fabinyi and Ujlaki noted that in Hungarian law such provision may be substantiated at best in the form of *modus*, since – as opposed to German law<sup>14</sup> – it may not be incorporated into the system of Hungarian law of succession, as an independent category of testamentary disposition.<sup>15</sup> As far as the validity of such arbitral clauses concerned: even if the arbitral clause can be substantiated as a *modus*, the validity of the clause may not be separated from the validity of the testament.<sup>16</sup>

There was also uncertainty in the attitude to the arbitral clause included in the articles of association of legal persons. However, in this case the problem was raised rather by the taxonomic categorization, and not the sustainability of the arbitral clause. Although the relevant literature discussed this phenomenon within the sphere of arbitration prescribed by unilateral legal transactions, in fact in such cases concern contracts: by signing the declaration

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<sup>11</sup> Fabinyi, Tihamér: A választott bíraskodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 256.

<sup>12</sup> Ujlaki, Géza: A választottbíráskodás kézikönyve. Published by Manó Dick, Budapest, 1927, 3. In support of the referenced position, Ujlaki refers to the reasoning of the Hungarian Code of Civil Procedure and Section 1048 of the German ZPO serving as model for the Hungarian Code.

<sup>13</sup> The threefold division typically used in the Hungarian legal literature of the first third of the 20th century was adopted by Tihamér Fabinyi and Géza Ujlaki, the authors of the first two Hungarian language monographs on arbitration, as well as by the renowned procedural law expert, Gyula Térfi. See: Fabinyi, Tihamér: A választott bíraskodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 256-261, Ujlaki, Géza: A választottbíráskodás kézikönyve. Published by Manó Dick, Budapest, 1927, 3, Térfi, Gyula: A polgári perrendtartás. [The Code of Civil Procedure] Stampfel-féle Könyvkiadóhivatal, Budapest, 1914, 286.

<sup>14</sup> As it was pointed out by Fabinyi, the arbitral clause included in testaments – although its exact source cannot be identified – probably originates from German law. The validity of such testamentary disposition was recognized by the German particular laws preceding the BGB. See: Fabinyi, Tihamér: A választott bíraskodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 257. In contemporary German legal literature the topic was examined in detail by Schlossmann. See: Schlossmann, Siegmund: Über die letztwillige Schiedsgerichtsklausel. Jherings Jahrbücher, 1897, 301.

<sup>15</sup> Fabinyi, Tihamér: A választott bíraskodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 257., and Ujlaki, Géza: A választottbíráskodás kézikönyve. Published by Manó Dick, Budapest, 1927, 3-4.

<sup>16</sup> Ujlaki, Géza: A választottbíráskodás kézikönyve. Published by Manó Dick, Budapest, 1927, 4.

of membership or the amended statutes (articles of association), the joining member accepts the arbitral clause included therein as binding to himself.<sup>17</sup>

It can be observed that the approach to the arbitral clauses included in unilateral legal transactions was inexplicit from dogmatic respects – consequently it still was not suitable for providing a basis for the further deliberation of the issue of the extension of arbitration agreements. The foregoing insufficiency is indicated also by the fact that legal literature considered it self-evident that unilateral legal transactions including arbitral clauses were to be committed to writing. The reasoning for such requirement was that the unilateral legal transaction substituted “only” that contractual *causa*, but it did not provide an exemption from compliance with the requirements regarding the content and formalities of the (arbitration) agreement.<sup>18</sup> Thus, this train of thought still did not recognize the connection between the relaxing of formal requirements of validity and the extension of the arbitral clause to third parties: in fact legal literature failed to examine the issue of the enforcement of the arbitral clause, included in the unilateral legal transaction subject to the requirement of written form, against a person who did not sign the document of the legal transaction.<sup>19</sup> Nevertheless, if we accept that the jurisdiction of the arbitration court can be validly stipulated in a unilateral legal transaction, this leads to the straightforward acceptance of the fact that the arbitration clause may be valid towards a third person who is not the subject of such legal transaction. The above reasoning that was discontinued at that time was gradually unfolded during the 20th century legal developments: new techniques of extending arbitration agreements to third parties appeared in practice, and naturally, legal theory also became more susceptible to dogmatic issues caused by the extension.

## II. Techniques frequently used for extending arbitration clauses to third parties

### 1. Implied acceptance by the non-signatory

It has become one of the generally accepted cornerstones of contract law that in addition to the terms expressed by the parties, contracts may also include certain implied conditions and terms. These implied terms are inferred and implied into the contract by the arbitrator (judge) primarily on the basis of the intention of the parties, the nature and purpose of the contract, and the requirement of good faith, fair dealing and the commercial reasonableness. Therefore, the purpose of this interpretation activity is to reveal the *true intention* of the parties at the time of the conclusion of the contract.

Using the technique of implied consent relating to the arbitration agreements may often result in extending the arbitration clause to a third party.<sup>20</sup> The essence of this solution is that it is

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<sup>17</sup> The Hungarian judicial practice also strengthened the contractual nature of the arbitral clause stipulated by the statutes of legal persons and organizations without legal personality in respect of the relationship between the company and its member, and the relationship between members: as specified by order No. 23381 delivered by the Court of Cassation in 1879, the statutes of the Israelite synagogue society stipulating arbitration in respect of the settlement of disputes arising from the purchase of the synagogue seat replace the written agreement. The decision is quoted and commented by: Fabinyi, Tihamér: A választott bírászkodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 260.

<sup>18</sup> Ujlaki, Géza: A választottbírászkodás kézikönyve. Published by Manó Dick, Budapest, 1927, 5.

<sup>19</sup> If the unilateral legal transaction was signed (and thereby accepted) by the other party, the transaction would be considered as a contract.

<sup>20</sup> This phenomenon occurred in Hungarian judicial practice already at the beginning of the 20th century – however, at that time still in a negative context. It was the ordinary court and not the arbitration court that referred to the “implied recognition” of the arbitral clause: order No. P.II.8772/1915 of the Budapest court of appeal considered as valid the arbitration agreement signed by only one of the parties, since from the conduct of the other party it could be established that such party intended to submit itself to arbitration. According to the

implied into the statements, or in a wider sense, into the conduct of the third person that such person also accepted the arbitration agreement as binding to himself.<sup>21</sup> In certain cases on a reasonably thinking outsider the conduct of a person who did not formally concluded an arbitration agreement may rightly make the impression that such person committed himself to participate in the arbitration proceeding. However, it seems controversial to deduct the true intention of a third person from the impressions made by the conduct of such third person on another person. The revealing of the true intention of the parties in such manner involves considerable risks. As a result of over-exaggerated belief in the “true” intention of the parties this method may become the means of achieving contradictory results: by applying this doctrine, obligations that were actually never undertaken could be deemed to be a part of the contractual obligations, while the effect of obligations that were actually taken could be diminished under the mask of the fictitious figure of the “reasonably thinking person”.<sup>22</sup>

The opinion expressed by Tibor Várady explicitly with view to arbitration is in harmony with the above mentioned. According to Várady, as a result of the strengthening and institutionalization of arbitration a previously unknown issue also needs to be faced, namely, that there might be a conflict between the loyalty of the arbitration court towards the parties and its loyalty towards the institution of international commercial arbitration.<sup>23</sup> In recognition of the above issue, Várady emphasizes that the strengthening of the position of arbitration and the extension of its scope must not transform into the forcing of arbitration on the parties. Therefore, it is essential that the examination of the *true intention of the parties* serves solely the purpose of preventing the party implicitly submitting himself to the jurisdiction of the arbitration court from evading the proceeding, and not the implication by the *arbitration court of its true intention* into the statements of the parties.<sup>24</sup>

Despite the risks involved therein, the technique of implied consent often assists the arbitration tribunal with establishing its jurisdiction in disputes between parties one of which did not conclude (more precisely, did not sign) an arbitration agreement.

For example, it may frequently occur that the person participating in the negotiations preceding the conclusion of the contract containing an arbitration clause, as well as in the development of the content of such contract, ultimately does not formally become the formal

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facts of the case, the defendant sent by mail to the plaintiff an agreement already signed by the defendant, the last section of which contained an arbitral clause. The plaintiff did not sign the agreement included in the letter forwarded thereto, and filed a statement of claim with the ordinary court. However, as a result of the evidence procedure conducted thereby, the court concluded that on the basis of the plaintiff's conduct and the circumstances of the case, it could be established that the plaintiff accepted the letter (agreement) along with the arbitral clause, therefore the compromissum contained therein was validly established. Contemporary literature strongly criticized the order. See: Fabinyi, Tihamér: A választott bíraskodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 121, and Ujlaki, Géza: A választottbíraskodás kézikönyve. Published by Manó Dick, Budapest, 1927, 54.

<sup>21</sup> Fabinyi called the attention to the risks involved in the technique of implication in relation to the above quoted order of the court of appeal that he analyzed (and criticized): “This approach is led by the reasonable intention that the recognition or refusal of the validity of the compromissum is to correspond to the presumable intention of the parties acting in good faith, however, the conclusion drawn from the circumstances in relation to the plaintiff's intention to submit to arbitration is frequently uncertain, moreover, it is an arbitrary and far too unstable basis to make the validity of a risky transaction, such as the compromissum subject thereto.” See: Fabinyi, Tihamér: A választott bíraskodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 121.

<sup>22</sup> Sturge, L. J.: The Doctrine of Implied Condition. Law Quarterly Review, 41 (1925), 171.

<sup>23</sup> Várady, Tibor: Választottbíraskodás a felek ellenére? [Arbitration in Contravention of the Intention of the Parties?] Magyar Jog, 1995/1, 52.

<sup>24</sup> Várady, Tibor: Választottbíraskodás a felek ellenére? Magyar Jog, 1995/1, 52.

party of the contract.<sup>25</sup> This was the case in a dispute before an ICC arbitral tribunal: instead of the person actually proceeding upon the conclusion of the contract, finally it was a third party that signed such contract in order to remove the transaction from the scope of the VAT obligation. The arbitration court established that the person who did not sign the contract – although he played a major role in the development of the content thereof – was also one of the actual parties of the contract and the arbitration agreement contained therein.<sup>26</sup>

In the so-called Trelleborg case a similar train of thought was followed by the Sao Paulo State Court. The court established that Trelleborg Industri AB, the owner company of the defendant was subject to the scope of the arbitration agreement, despite the fact that the arbitration agreement was signed only by the subsidiary. In its reasoning the court emphasized that the active participation of the mother company in the transaction at issue could be established on the basis of the documents in the case.<sup>27</sup> In this case the court obviously relied on the theory referenced in the relevant literature as the *group of companies doctrine*. The essence of this theory is the following: if within a group company a company signed an arbitration agreement, but another company did not sign such agreement, however the latter also participated in the drawing up of the contract that included the arbitration agreement, the scope of the arbitration clause may also extend to the non-signatory company.<sup>28</sup> Therefore, it is essential that membership within a group company is not sufficient in itself for substantiating the extension of the scope of the arbitration agreement to the non-signatory member. Such extension also requires that the relevant member of the group company actively participate in the transaction including the arbitration agreement, namely active participation admits the conclusion that the company truly intended to submit itself to the jurisdiction of the arbitration court.<sup>29</sup>

Nevertheless, the issue may arise what is to be considered as *active participation* in respect of the contract containing the arbitration agreement, or the arbitration agreement itself. This issue is to be resolved by the proceeding arbitrator (judge) upon consideration of all circumstances of the case, the conduct displayed by the parties already at the phase of the conclusion of the contract, or in the course of the enforcement of claims. Naturally, the conduct displayed in the course of the enforcement of claims best clarifies the situation: if in the arbitration proceeding the person which is not a signatory to the arbitration agreement brings an action, or submits a jurisdictional objection to the ordinary court, stating that claims against it are to be enforced by way of arbitration, such conduct will be deemed by law as the acceptance of the arbitration agreement.<sup>30</sup> Although less obviously than in the above

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<sup>25</sup> Park, William, W.: Non-signatories and International Contracts. An Arbitrator's Dilemma. Reprinted from Multiple Actions in International Arbitration, Oxford University Press, 2009, 8.

<sup>26</sup> See the decision delivered in ICC Case No. 11160. Quoted by: Park, William, W.: Non-signatories and International Contracts. An Arbitrator's Dilemma. Reprinted from Multiple Actions in International Arbitration, Oxford University Press, 2009, 27.

<sup>27</sup> Pereira Lima, Flavio – Calhman de Miranda, Daniel: Extension of the Arbitration Agreement to Non-Signatories Pursuant to Brazilian Law. In: Mattos Filho – Veiga Filho – Marrey Jr. – Quiroga: Arbitration in Brazil. Volume 1. Impressao régra, 2010, 19.

<sup>28</sup> Pereira Lima, Flavio – Calhman de Miranda, Daniel: Extension of the Arbitration Agreement to Non-Signatories Pursuant to Brazilian Law. In: Mattos Filho – Veiga Filho – Marrey Jr. – Quiroga: Arbitration in Brazil. Volume 1. Impressao régra, 2010, 20.

<sup>29</sup> Pereira Lima, Flavio – Calhman de Miranda, Daniel: Extension of the Arbitration Agreement to Non-Signatories Pursuant to Brazilian Law. In: Mattos Filho – Veiga Filho – Marrey Jr. – Quiroga: Arbitration in Brazil. Volume 1. Impressao régra, 2010, 21.

<sup>30</sup> Park, William, W.: Non-signatories and International Contracts. An Arbitrator's Dilemma. Reprinted from Multiple Actions in International Arbitration, Oxford University Press, 2009, 9. It should also be considered within the scope of the conduct displayed in the course of the enforcement of claims, if as a result of breaching formal requirements, the parties concluded an invalid arbitration agreement, however, "they expressly submitted



described case, it may also substantiate the acceptance of the binding force of the arbitration agreement, if a person participates in the formulation of the content of the future contract already in the course of the negotiations preceding the conclusion of such contract. In this respect, Park emphasizes that from the perspective of the determination of the content of the contractual obligation the relevance of the contracting significantly exceeds that of the performance phase, therefore, active participation in the course of the former may much more substantiate the extension of the scope of the arbitration agreement.<sup>31</sup>

Active participation in the relevant transaction (which includes an arbitration agreement) may be realized, even if apparently several different transactions are entered into by and between various persons, and not all of these transactions include an arbitration agreement.<sup>32</sup> In such cases, if it can be established that the documents seeming to be different agreements in fact establish a uniform contractual obligation in respect of several parties, the scope of the arbitration agreement can be extended to all parties of the contractual obligation.<sup>33</sup> By way of the above technique it may be prevented that complex transnational commercial transactions otherwise serving a single economic purpose be broken up from procedural law respects.<sup>34</sup>

We may consider the *extension of legal succession* in substantive law to the arbitration agreement as another form of implied consent to the arbitration agreement. This approach can be observed also in the practice of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (MKIK): on several occasions the proceeding arbitration panel – in lack of any agreement between the parties to the contrary – considered the legal succession based on substantive law in respect of the commercial relationship, as the simultaneous entry of the legal successor into the arbitration agreement.<sup>35</sup> Éva Horváth deduces this solution from the requirement of commercial reasonableness imposed on the successor. According to her position, it may be rightfully expected from the legal successor in substantive law that examine the legal relationship “inherited” thereby, and if such relationship also includes an arbitration agreement, the legal successor should expressly state its intention to ignore this arbitration agreement. In lack of such statement, it is obvious that the legal successor entered

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to the judgment and implemented their transactions accordingly.” See: Ujlaki, Géza: A választottbíráskodás kézikönyve. Published by Manó Dick, Budapest, 1927, 55. Fabinyi explains the above by the reasoning that the possibility of the subsequent approval or confirmation of an agreement deemed invalid due to formal reasons may not be excluded, and such approval may take place implicitly also in the course of the arbitration proceeding. For example, it is to be deemed as such concludent fact, if a person enters a lawsuit, despite the fact that such person was or should have been aware of the invalidity of the arbitral clause. See: Fabinyi, Tihámér: A választott bíráskodás. Printed by the Vác Királyi Országos Fegyintézet Printing-house and published by the author, 1926, 122.

<sup>31</sup> Park, William, W.: Non-signatories and International Contracts. An Arbitrator’s Dilemma. Reprinted from Multiple Actions in International Arbitration, Oxford University Press, 2009, 21.

<sup>32</sup> Brekoulakis, Stavros: The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It? Journal of International Arbitration. 24 (4), 2007, 350.

<sup>33</sup> Park, William, W.: Non-signatories and International Contracts. An Arbitrator’s Dilemma. Reprinted from Multiple Actions in International Arbitration, Oxford University Press, 2009, 8.

<sup>34</sup> The same concept is hidden also behind the following reasoning of the Paris Cour d’appel: “arbitration clauses contained in international transactions have sui generis validity and effect, which requires the extension of the arbitration clause to also those persons who participated in the performance of the contract and the dispute arising from such contract, provided that it can be established that the conduct displayed by such persons supports the presumption that they were aware of the existence and extent of the arbitration clause...” See the judgments delivered by the Cour d’appel in the Korsnas Marma v. Durand-Auzias case on November 30, 1988 and in the Ofer Bros. v. Tokyo Marine and Fire Insurance case on February 14, 1989. Quoted by: Brekoulakis, Stavros: The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It? Journal of International Arbitration. 24 (4), 2007, 351.

<sup>35</sup> Horváth, Éva: A választottbíráskodás néhány gyakorlati kérdése. [Some Practical Issues of Arbitration] Gazdaság és Jog, 2001/3, 5.

into the legal relationship taking into consideration (also) the possible future arbitration proceeding.<sup>36</sup>

The relation between arbitration clauses and legal succession in substantive law raises special issues with regard to assignment as well. The problem lies in the fact that assignment does not result in general legal succession, but only in a change in the subject of the position of creditor, therefore, the assumption of the obligations under the arbitration agreement (waiver of the right to submit a dispute to an ordinary court, and the obligation to enforce claims before an arbitration court) does not automatically follow from the assignment. Although the Hungarian Supreme Court has not been receptive to the above argument so far<sup>37</sup>, it nevertheless occurred in the non-litigious proceeding heard by the Metropolitan Court under number 9.Gpk.40.168/2007. In its decision delivered in the above referenced case the Metropolitan Court pointed out that a change in the subject of the arbitration agreement would require the same civil law agreement as if the change occurred in the subject of any other contractual relationship. Since the arbitration agreement is (also) the unity of rights and obligations, the change in the subject thereof may not take place by a mere assignment: instead, it requires the conclusion of an agreement combining assignment and the assumption of obligations.<sup>38</sup>

It seems that in Hungarian legal thinking the connection of assignment and the extension of the scope of the arbitration agreement is making little progress for the time being, due primarily to dogmatic reasons. The example set by foreign legal practice may facilitate progress from the standstill: for instance, according to Park's definite position, in order to facilitate the efficiency of arbitration, French legal practice frequently deems it expedient that the *rights and obligations* (jointly) following from the arbitration agreement "be contracted for following" substantive law rights and obligations. Although the above practice, which may sometimes be over-generous in overstepping dogmatics, is intended to prevent the differentiation of the person of the obligor under substantive law and the defendant actionable before the arbitration court solely as a result of legal succession in substantive law.<sup>39</sup>

## 2. Lack of independent legal personality of the signatory

In practice some techniques at the law of companies have also been developed for extending arbitration clauses to third parties. It is a common feature that in place of a signatory another person (typically the owner of the signatory) is included within the scope of the arbitration agreement. This approach may be applied primarily in two cases: if the signatory had no

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<sup>36</sup> Horváth, Éva: A választottbíráskodás néhány gyakorlati kérdése. *Gazdaság és Jog*, 2001/3, 5.

<sup>37</sup> According to the approach prevalent in the practice of the Hungarian Supreme Court, the assignee shall be bound by the arbitral clause contained in the contract concluded between the assignor and the assigned party, since the validity and effect of the arbitral clause is not affected by legal succession on the side of either of the parties. A summary of relevant judicial practice can be found in: Murányi, Katalin: Összefoglaló az állami bíróságoknak a választottbírási eljáráshoz kapcsolódó gyakorlatáról és javaslatok a Választottbíráskodásról szóló törvény és a Magyar Kereskedelmi és Iparkamara mellett szervezett Választottbírási Eljárási Szabályzata módosítása és kiegészítése tárgyában. [Summary of the Practice of State Courts Related to Arbitration Proceedings and Proposals for the Amendment and Supplementation of the Act on Arbitration and the Rules of Procedure of the Arbitration Court Attached to the Hungarian Chamber of Commerce and Industry] Manuscript, Budapest, 2010, 14.

<sup>38</sup> The position of the Metropolitan Court is quoted and analyzed in: Murányi, Katalin: Összefoglaló az állami bíróságoknak a választottbírási eljáráshoz kapcsolódó gyakorlatáról és javaslatok a Választottbíráskodásról szóló törvény és a Magyar Kereskedelmi és Iparkamara mellett szervezett Választottbírási Eljárási Szabályzata módosítása és kiegészítése tárgyában. Manuscript, Budapest, 2010, 15.

<sup>39</sup> Park, William, W.: *Non-signatories and International Contracts. An Arbitrator's Dilemma*. Reprinted from *Multiple Actions in International Arbitration*, Oxford University Press, 2009, 15.

independent legal personality already at the time of the conclusion of the agreement, or if it had a legal personality at that time, however, due to some reason, such legal personality was disregarded.

In the first case the party signing the arbitration agreement cannot be considered an independent legal entity. In the so called Westland Helicopters case the ICC arbitration court extended its jurisdiction to Arab states that had not signed the arbitration clause by reference to the aforementioned argument. According to the position of the arbitration court, the organization jointly established by the United Arab Emirates, Saudi-Arabia, Qatar and Egypt and signing the arbitration agreement could not in fact be deemed to be an independent legal entity, therefore, the arbitration court established its jurisdiction over the above mentioned four states.<sup>40</sup> Although in this case the Geneva court finally annulled the arbitral award<sup>41</sup>, reference to the lack of independent legal entity frequently proves to be successful. Especially in the case that the signatory is not an independent company, but only an organizational unit of a company, since the majority of legal systems does not acknowledge the independent legal personality of the latter. Similarly, a distinction is typically drawn between the legal entity of the state and the organ representing the state. For example in its order No. Gfv. XI. 30.452/2008/4 the Hungarian Supreme Court annulled an arbitral award, since the Hungarian Embassy of the Republic of Albania was involved in the arbitration proceeding as defendant. According to the reasoning of the order, as the Embassy has no independent legal capacity, it may not be the subject of the arbitration agreement.<sup>42</sup>

It is a more frequent occurrence than the lack of independent legal personality that the otherwise lawfully acknowledged independent legal personality of a signatory is disregarded for the very reason of the abuse of such legal personality. In such cases – as opposed to the application of implied consent – there is no question of the true intention of the parties serving as basis for the extension of the arbitration agreement to a non-signatory third party, since such extension takes place clearly against the will of the non-signatory (third) party. In fact, the purpose of the non-signatory person is to evade the arbitration proceeding by putting in the forefront the signatory, and thereby avoid substantive law liability. Therefore, the sanction for the abuse of the independent legal personality of the signatory is that the abusing person may not refer to the independent legal personality of such company.<sup>43</sup> This phenomenon is commonly referred to as the piercing of the corporate veil. In such cases, the veil of independent legal personality is pulled off in order that the member behind the company can be held directly responsible. Therefore, it is not surprising that in everyday practice the piercing of the corporate veil has become a significant means of creditor protection.

In international trade it is a common practice that multinational companies concluded contracts through their national subsidiaries in such manner that only the latter company becomes subject to the contractual obligation. The situation (and the future enforcement of claims) is further complicated, if the national company concluding the contract and the financially interested multinational company have different domiciliation. Unfortunately, it is also a frequent occurrence that during the performance phase of the contract the subsidiary

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<sup>40</sup> ICC Case No. 3879; Quoted by: Várady, Tibor: Választottbíráskodás a felek ellenére? Magyar Jog, 1995/1, 60.

<sup>41</sup> Várady, Tibor: Választottbíráskodás a felek ellenére? Magyar Jog, 1995/1, 60.

<sup>42</sup> Murányi, Katalin: Összefoglaló az állami bíróságoknak a választottbíróági eljáráshoz kapcsolódó gyakorlatáról és javaslatok a Választottbíráskodásról szóló törvény és a Magyar Kereskedelmi és Iparkamara mellett szervezett Választottbíróóság Eljárási Szabályzata módosítása és kiegészítése tárgyában. Manuscript, Budapest, 2010, 54.

<sup>43</sup> Park, William, W.: Non-signatories and International Contracts. An Arbitrator's Dilemma. Reprinted from Multiple Actions in International Arbitration, Oxford University Press, 2009, 9.

simply becomes a “phantom company”, or is rendered insolvent. In such cases arbitration courts generally consider it reconcilable with the principle of equity to pierce the corporate veil and establish their jurisdiction over the owner. For example, the arbitration court acted in the above-described manner in the so-called Orri case, in which the scope of the arbitration agreement was extended to a Greek shipping magnate following the establishment of the fact that by fraudulently hiding behind various companies the shipping magnate himself participated in the disputed transactions.<sup>44</sup> According to Park, in such case it seems fair to establish that the company turning into a phantom or rendered insolvent “leaves” its rights and obligations following from the arbitration agreement to its owner abusing the corporate form.<sup>45</sup>

As it can be observed, the piercing of the corporate veil promises a double result: on the one hand, by way of this method the jurisdiction of the arbitration court may be extended to the owners of the company, while on the other hand, the liability of such owners for the debts of the company can also be established. Therefore, it is obvious that this technique serves both procedural law and substantive law purposes. However, it also needs to be emphasized that liability for debts does not necessarily follow from the extension of jurisdiction. If the arbitration court extends its jurisdiction to the owner of the signatory company, it does not automatically follow from such extension that the owner will be in fact condemned in respect of the debts of the company.

### III. Influence of the extension on the determination of the law applicable

The extension of the arbitration agreement to a third party raises the peculiar issue of the determination of applicable law. The parties who conclude an arbitration agreement frequently choose the law applicable to the arbitration clause as well. However, the parties may stipulate the governing law selected thereby in respect of the legal relationship established between them. Therefore it is doubtful that which law shall be applied by the forum relating to the question whether the arbitration agreement and the governing law specified therein is applicable also to a third party, if the subject-matter of the dispute is in fact the possibility of the extension of the agreement to such third party.

In this case it would be prejudicial, if the extension of the agreement to a third party was judged on the basis of the law stipulated in the agreement, since such law could be applicable only if the arbitration agreement was validly established between the parties. So, which law should be applied to the question whether an arbitration agreement could be extended to a third party or not?

#### 1. Lex loci arbitri

One of the laws typically applied is the law of the place where the arbitration court is located (lex loci arbitri). This – partly hypothetic – solution is supported by the Section 1(a) of Article V of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: New York Convention). According to the above referenced provision, recognition and enforcement of the award may be refused at the request of the

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<sup>44</sup> ICC Case No. 5731; Quoted by: Park, William, W.: Non-signatories and International Contracts. An Arbitrator’s Dilemma. Reprinted from Multiple Actions in International Arbitration, Oxford University Press, 2009, 28.

<sup>45</sup> Park, William, W.: Non-signatories and International Contracts. An Arbitrator’s Dilemma. Reprinted from Multiple Actions in International Arbitration, Oxford University Press, 2009, 4.

party against whom it is invoked – among others – in the case that the relevant party furnishes to the competent authority where the recognition and enforcement is sought, proof that the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Therefore, according to the New York Convention, the validity of the arbitration agreement is to be decided primarily on the basis of the law chosen by the parties. However, it may be a contestable solution, if such law is in fact specified in the disputed arbitration agreement. With view to the foregoing, the application of the principle of *lex loci arbitri* often seems to be an appropriate expedient, which – for lack of a better solution – became the principal rule applicable to the determination of the law applicable in the cases when the parties failed to indicate their choice of law.<sup>46</sup> Nevertheless, this solution may raise further theoretical problems: it is possible that the arbitration agreement would be deemed valid under the *lex loci arbitri* (and therefore its extension to the non-signatory is allowed), meanwhile it would be deemed invalid under the law chosen by the signatories in the main contract.

## 2. Lex mercatoria

Sometimes it is easier to avoid the obstacles raised by the legal theory than to step across them, and the requirements of trade often move the application of law towards this direction. Reference to general legal practice could be the most justifiable method for avoiding dogmatic struggles. *Lex mercatoria*, as the body of general principles concluded from the contractual practice of trade, is applied not as if it were binding, but because it is expected to provide an appropriate solution for the dispute, and the participants of international commerce frequently have more confidence in these principles than in the provisions of national laws, which often seem to be provincial and narrow minded from the perspective of the requirements of international trade.<sup>47</sup> The application of *lex mercatoria* is frequently convenient also for the proceeding arbitration courts. Admittedly, in complex cases it is usually easier to reason the decision by reference to the general principles of law, than by reference to the provisions of some national law. Furthermore, the application of the general principles deducted from contractual practice renders it possible that the *true intention* of the parties be examined not only within the dogmatic framework of offer and acceptance, which seems sometimes too rigid.

The recognition of practice as a power capable of “substantiating jurisdiction” can be observed in the judgment delivered by the German Supreme Court (BGH) in 1993. According to the facts of the case, the plaintiff, as purchaser terminated the sale and purchase agreement concluded with the defendant in respect of sheepskin, and filed a claim with the ordinary court for the reimbursement of the paid purchase price. Instead of a presenting a defense on the merits, the defendant submitted a jurisdictional objection, arguing that in international pelt and leather trade arbitration was a standard method for the settlement of disputes, and the plaintiff must have been aware of this fact. The BGH ultimately deemed the jurisdictional objection to be well founded and remitted the case to the arbitration court. In the reasoning of its judgment, the German Supreme Court called the attention to the fact that in the relevant case international commercial practice may substantiate the jurisdiction of the arbitration court, however, with view to the doctrine of competence – competence, the actual existence of

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<sup>46</sup> Horváth, Éva: Mi lesz veled New York-i Konvenció? [What Will Become of the New York Convention?] *Magyar Jog*, 2010/7, 397.

<sup>47</sup> Murray, Carole – Holloway, David – Timson-Hunt, Daren: *Schmitthoff's Export Trade. The Law and Practice of International Trade*. Eleventh edition, Sweet & Maxwell, London, 2007, 549-551.

such practice was to be decided by the arbitration court.<sup>48</sup> The above argument is not foreign to Hungarian arbitration courts either: for example, the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry established its jurisdiction in a dispute resulting from a sale and purchase agreement concluded between a German purchaser and a Hungarian seller over telephone, on the basis that – although the agreement subject to the dispute contained no arbitral clause – in the course of the long-standing cooperation between the parties there had been a precedent for the settlement of a dispute before the arbitration court with view to the seller’s General Terms and Conditions.<sup>49</sup>

At first sight, the application of the flexible rules of *lex mercatoria* may seem to equally serve the interests of the parties and the arbitration court. However, this is true only to a certain extent. It is a typical tendency that arbitration courts strive to establish their own jurisdiction with the aid of the general principles of contract law.<sup>50</sup> Therefore, the application of *lex mercatoria* points towards the extension of arbitration agreements to third parties.<sup>51</sup> While such extension suits the interests of one of the parties, it may be unfavorable to the other party. Parties claiming that the arbitration agreement cannot be applied thereto will obviously be opposed to the extension of the scope of arbitration by way of the above-described means. Therefore, the assessment of the application of *lex mercatoria* in the above manner is problematical. It undoubtedly increases the efficiency of arbitration<sup>52</sup>, however, it may also weaken the intensity of the relation between arbitration and the agreement concluded between the parties.<sup>53</sup>

### 3. Law of the place of registration

It can be observed that arbitration courts resort to *lex mercatoria* primarily in the cases when they wish to support the extension of the arbitration agreement to a third party by the true intention of the parties, or the contractual practice established between or otherwise known to the parties, namely, if the means of the extension is the technique of implied consent. In respect of the determination of applicable law the problem is less complicated, if the law of companies is called to the aid of the extension of the arbitration agreement (and the jurisdiction) to a third party. The existence or lack of the independent legal personality of a company is to be decided generally on the basis of the personal law of the company. It has become generally accepted also in the continental laws that upon determining the personal law of a company the connecting principle of the place of incorporation is to be considered as

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<sup>48</sup> See order No. III. ZR, 30/91. of the BHG Urteil V, December 3, 1993.

<sup>49</sup> Horváth, Éva: Mi lesz veled New York-i Konvenció? *Magyar Jog*, 2010/7, 397.

<sup>50</sup> Park calls the attention to French practice of the contrasting application of *lex mercatoria* by ordinary courts: in one of its judgments the Cour de Cassation emphasized the significance of the intention of the parties as opposed to national laws, since one of the parties attempted to „repair” to the arbitration court from the ordinary court by taking advantage of the legal shortcut provided by national law. See: Park, William, W.: *Non-signatories and International Contracts. An Arbitrator’s Dilemma*. Reprinted from *Multiple Actions in International Arbitration*, Oxford University Press, 2009, 12.

<sup>51</sup> Brekoulakis, Stavros: The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It? *Journal of International Arbitration*. 24 (4), 2007, 352.

<sup>52</sup> Várady, Tibor: Választottbíráskodás a felek ellenére? *Magyar Jog*, 1995/1, 61.

<sup>53</sup> In certain cases this may give rise also to constitutional concerns: on the one hand, in relation to the legitimacy of the arbitration court, on the other hand, in relation to the waiver of the right to seek settlement by an ordinary court. Compare: Brekoulakis, Stavros: The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It? *Journal of International Arbitration*. 24 (4), 2007, 351.

the primary rule.<sup>54</sup> It follows from the foregoing that if the signatory has no independent legal personality under the law of its place of incorporation, it may not be the party of the agreement either, thus it may not participate in the proceeding as a party. In such cases it stands to reason that we consider as a party of the arbitration agreement the non-signatory in whose interest the signatory to such agreement proceeded.<sup>55</sup>

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<sup>54</sup> In respect of the “rivalry” between the principle of place of domicile and the principle of place of incorporation see: Nemessányi, Zoltán: A székhelyelv alkonya? [A Decline of the Principle of Place of Domicile?] *Daily Mail – Centros – Überseering*. *Európai Jog*, 2003/6, 16-24., and Nemessányi, Zoltán: A jogi személyek honosságára vonatkozó elvek az Európai Bíróság gyakorlatában. [The application in the practice of the European Court of Justice of principles regarding the domiciliation of legal persons] In: Nemessányi, Zoltán (editor): *Tanulmányok az európai magánjog köréből*. [Studies on European Private Law] *Krónika*, Pécs, 2004, 155-180.

<sup>55</sup> It is to be noted that occasionally exceptions are made to the application of the principle of place of incorporation even in relation to independent corporate existence. This may take place particularly in the following two cases: 1) in the case of supranational companies established by international conventions, or 2) if the law of the place of incorporation cannot protect a bona fide third party from the consequences of abuse of independent legal personality. In such cases the *lex mercatoria* presents a conciliatory solution. See in detail: Park, William, W.: *Non-signatories and International Contracts. An Arbitrator’s Dilemma*. Reprinted from *Multiple Actions in International Arbitration*, Oxford University Press, 2009, 19.