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Jurisdiction of the Arbitral Tribunal in the Case of Multiple Contracts

James Otis Rodner*
Angélica Marcano**

The foundation of the arbitration jurisdiction is the arbitration agreement entered into by the parties to a contract. Usually, only the signatory parties to a contract and the disputes arising from a contract that includes an arbitration clause or to which the arbitration clause relates are the ones that can be submitted to arbitration. This article discusses some of the arguments for extending the arbitration clause in complex arbitrations, that is, in those cases where there are more than two parties, more than two contracts or more than two parties and contracts. Particularly, this paper addresses multiple contract arbitration when the contracts are related. One of the arguments used by the arbitral tribunal for the extension of jurisdiction is the existence of a link between the contracts. Additional arguments include implied consent, participation in the negotiation and performance of a contract and good faith. The article also discusses some of the typical cases of linked contracts in many civil law countries, such as subcontracts, third party beneficiaries and standard terms of contracts, from which arbitral jurisdictions problems may arise. Finally, special attention is given to Article 14 of the 2008 Peruvian Arbitration Law as the first provision in an arbitration law in Latin America that extends the arbitration agreement to non-signatory parties using for this a mixed approach.

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* Attorney, admitted to practice in Venezuela, the Commonwealth of Massachusetts and the District of Columbia. Member of the ICC International Court of Arbitration. Partner of the law firm Rodner, Martínez & Asociados. His practice focuses in international commercial arbitration and commercial law. He often gives conferences on both in Venezuela as well as in other countries on topics related to arbitration, the law of contracts and obligations, both in Venezuela and in comparative law and the rules in the Unidroit Principles.

** Attorney, admitted to practice in Venezuela. Junior Associate of the law firm Rodner, Martínez & Asociados. Her practice focuses in corporate law and commercial arbitration.

Key Words : Multiple contract arbitration, Linked contracts, Implied consent, Subcontracts, Standard terms of contract, Good faith, Peruvian arbitration Law, Mixed approach.

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Ⅰ. GENERAL[1)]

1.01 This article covers the extension of the arbitration clause for disputes arising from multiple contracts when these contracts are linked. One example is the case of a contract and a subcontract when the contract has an arbitration clause and the subcontract has none. If the subcontractor wants to bring a direct action against the employer for collection of amounts owed on the subcontract, can he avail himself of the arbitration clause in the main contract if the subcontract does not have an arbitration clause (see *post*, section 4.03 on subcontracts)? Does the fact the contracts are linked provide a justification for extending the arbitration clause to the subcontract?

1.02 Complex arbitration arises in three cases: (i) when there is multiplicity of contracts, that is, the dispute arises from two or more contracts; (ii) when there is multiplicity of parties, that is, when the parties in the arbitration are

1) Abbreviations: Uncitral, United Nations Commission on International Trade Law; Uncitral Model Law, 2006 Uncitral Model Law on International Commercial Arbitration; NYC, Convention on the Recognition and Enforcement of Foreign Arbitral Award or 1958 New York Convention, adopted by Venezuela on February 8, 1995, by Panama on October 10, 1984 and by Peru on July 7, 1988; ICC, International Chamber of Commerce; ICC Rules, Rules of Arbitration of the International Chamber of Commerce, in force from January 1, 2012; Unidroit, International Institute for the Unification of Private Law; Unidroit Principles (PIC), Principles of International Commercial Contracts 2010 Edition; PAL, 2008 Peruvian Arbitration Law; LAV, 1998 Venezuelan Arbitration Law; PAA, 2014 Panamanian Arbitration Act.

more than two, but the dispute relates to only one agreement; and, (iii) when there is multiplicity of parties and of contracts. One of the most common arguments to extend arbitral jurisdiction when there is a multiplicity of parties, is the concept of corporate group or group companies[2] where one of the parties to the arbitration tries to bring into the dispute a parent company that was not a party to the contract. However, we do not in this article cover the problem of corporate groups[3]. Rather, the arguments for the extension of the arbitration clause that we present here are related to the fact that the contracts that are pulled into the arbitral proceedings are in some way related (linked contracts) and do not require necessarily that the multiple parties form a group of companies.

1.03 Our main purpose is to deal with the problem of multiple contract arbitration, that is, when the dispute arises from two or more contracts, where one of the contracts has an arbitration clause and the other contract does not. Most of the cases of disputes related to two or more contracts also involve a multiplicity of parties, some of which were not original signatories of the arbitration clause. However, there are also cases where the same parties have entered into several contracts, one of which does not have an arbitration clause. The fact that a dispute arises between parties to a contract with an arbitration clause does not mean that all disputes between the same parties arising out of other contracts are covered by this arbitration clause. Arbitral jurisdiction does not extend to all contracts between the same parties. To extend the arbitration clause in these cases, the agreements must be linked in some way.[4]

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2) The existence of a corporate group was used as one of the arguments to extend the arbitral jurisdiction in the case Dow Chemical France vs. Isover Saint Gobain (*see post*, section 3.05)

3) The concept of corporate groups is initially developed in Anglo-American corporate law and, in general terms, is a reference to "the legal rights and responsibilities of one legal unit forming part of a collective enterprise are attributed to another legal unit with which it conducts a common integrated economic undertaking under common control", Philip I. Blumberg and Kurt A. Strasser, *The law of corporate groups, enterprise liability in commercial relationships,* Aspen, MD (1998), § 1.01, p. 5. This definition of corporate groups has been adopted in many civil law countries; see José Augusto Quelhas Lima Engrácia Antunes. *Os Grupos de Sociedades.* 2nd Ed. Almedina, Coimbra (2002). P. 52

4) See Bernard Hanotiau, *Complex Arbitrations, Multiparty, Multicontract, Multi-Issue and Class*

1.04 The article is written in the context of a civil law country, specifically Latin American civil law in Venezuela, Panama and Peru. These countries, in turn, are strongly influenced by European law (France, Spain, Portugal and Italy).[5] It does not deal with arguments typical of common law. However, *estoppel*[6], though originally a concept taken from common law and supplemented by equity, has now made its way into international commercial law and is used in international arbitration.[7] In fact, implied consent in arbitration derives from *estoppel* and has become a cornerstone of multiple contract arbitration.[8] We do not cover in this article the issues of conflicts of laws[9].

Actions. Kluwer Law International (2005), p. 141. This author quotes ICC case No. 7893 of 1994 where the tribunal rejected jurisdiction even though there where two connected contracts with arbitration clauses between the same parties. The arbitral tribunal considered that its jurisdiction was based on the arbitration agreement contained in the first contract which limited its scope to disputes arising from such contract. This decision is also reported in the *Collection of ICC Arbitral Awards,* Volume V, Kluwer Law International, p. 67.

5) The 1942 Venezuelan Civil Code amended in 1982 is directly influenced by the 1865 Italian Civil Code and the 1804 French Civil Code, with some provisions taken from the 1927 French-Italian Project of Code of Obligations. The Panamanian Civil Code is influenced by the 1879 Spanish Civil Code. The Peruvian Civil Code of 1983 is an updated version of the 1942 Italian Civil Code. Civil law countries of Latin influence constitute a broad and important geography which includes in addition to France, Belgium, Luxemburg, Italy, Portugal and Spain, all of Latin America, an important segment of Africa, the Middle East and certain countries in South East Asia.

6) *Estoppel* is generally defined as a ban that prevents a party from asserting a right for a defense of some kind (Black's Law Dictionary). "By the nineteenth century, both at law and in equity, the rule was that there would be an *estoppel* where by words or conduct there had been a representation of existing facts (not of law) which was intended to be acted upon…", John McGhee, *Snell's Equity,* 13th Ed., London (2000), p. 631, § 39-01. *Estoppel* can be used to prevent a party from asserting a defense of lack of jurisdiction when, by its conduct, it leads the parties to act on the assumption of acceptance of the terms of another contract.

7) Originally, *estoppel* was a concept totally strange in civil law, though now it is reflected in the principle of "interdiction de se contredire" (limitation to the right to contradict a previous conduct), Philippe Fouchard, Emmanuel Gaillard and Bethold Goldman, *Traité de l'arbitrage commercial international,* Paris (1996).

8) The theory of implied consent is developed from substantive law, especially contract law.

9) Conflicts of laws related to the scope of the power of the tribunal to extend the jurisdiction nor to the law applicable to the determination of when the contracts are linked.

1.05 Arbitral jurisdiction is based on the agreement of the parties to submit any controversy that may arise in a particular contract to arbitration; this agreement appears in the arbitration clause. The agreement to submit a controversy to arbitration is what is called the conventional foundation of arbitration, according to which, parties in a contract are only obligated to submit to arbitration if they have so agreed to it. The need to have an agreement to submit to arbitration is universally accepted in most municipal laws[10]; the agreement to submit to arbitration is the cornerstone of arbitration. Arbitral jurisdiction is protected through two separate principles: (i) the concept of the independence of the arbitral clause, according to which the agreement to arbitrate is considered an agreement separate from and independent of all the other provisions in the contract (Uncitral Model Law, Article 16(1)); and, (ii) the principle of *kompetenz-kompetenz*, that gives the arbitration tribunal the capacity to decide its own jurisdiction even in decisions related to the existence or validity of the arbitration agreement (Uncitral Model Law, Article 16(1)).

1.06 The principle of *kompetenz-kompetenz* allows an arbitral tribunal to extend its jurisdiction in the case of complex arbitrations, that is, in those cases where it is faced with more than two parties, more than two contracts or more than two parties and contracts. When deciding its jurisdiction, however, the arbitral tribunal must always keep in mind that an improper extension of its jurisdiction may be a causal to request to set aside the award (Uncitral Model Law, Article 34(2)(a)(i) and (2)(a)(iii))[11], or recognition can be rejected (Uncitral

10) Fouchard, Gaillard and Goldman, idem, § 44. Arbitration always assumes the existence of an agreement under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration, NYC, Article 2, N° 1; in Venezuela, LAV, Article 5, defines the arbitration agreement as the agreement in which the parties decide to submit to arbitration all or some of the controversies which have arisen or may arise between them with respect to a legal relationship, contractual or non contractual. This definition is taken from the Uncitral Model Law. In the PAL, the arbitration agreement is defined in Article 13 and in the PAA in Article 15.

11) According to the 2012 Uncitral Digest of Case Law on the Model Law, referring to case law of Article 34, courts have considered claims based on the ground that a person was not a party to the arbitration agreement under either paragraph (2)(a)(i) or paragraph (2)(a)(iii). Available at: http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf(last visit on July 26, 2014).

Model Law, Article 36(1)(a)(i)[12] and (1)(a)(iii)) (NYC, Article V (1)(a) and (1)(c)). This forces the tribunal to develop arguments in favor of an extension that will later hold up in action to set aside the award; the extension of the arbitration clause is not discretional for the arbitrators, therefore, the decision to include in the same procedure contracts where not all the agreements have an arbitration clause must be properly founded.

1.07 Despite the risk of having the award set aside or not being recognized when brought in for enforcement, some arbitral tribunals ignore this as an argument to refuse jurisdiction and determine their jurisdiction according to the criteria adopted by the tribunal and not according to the risk of having the award not recognized. In ICC Case 8910 (1998)[13], the tribunal held that it was perfectly aware of the fact that its decision may not be recognized in the United Arab Emirates. However, though it is true that a tribunal should decide taking into account that its decision can be legally enforceable (citing ICC Rules effective at the time, Article 26)[14], it will not be tied by the rules of a particular country where the award may be enforced.[15] According to the 2012 ICC Rules, the International Court of Arbitration as well as the tribunal "shall make every effort to make sure that the award is enforceable at law".[16] ICC Rules, Article 41 refers to enforceable at law but it does not say enforceable according to the laws of the country where the award will be enforced. The fact is that an arbitral award cannot be universally enforceable.

12) According to the 2012 Uncitral Digest of Case Law on the Model Law, idem, referring to case law of Article 36(1)(a)(i), awards rendered against non-signatories, which cannot be considered parties to an arbitration agreement, have in general not been declared enforceable.

13) ICC, ICC *Collection of Arbitral Awards,* Vol. IV (1996-2000), Paris (2003), p. 574.

14) Currently this is ICC Arbitration Rules (2012), Article 41.

15) ICC 8910 (1998), idem.

16) ICC Arbitration Rules, Article 41.

1.08 One approach to this risk that has been followed in the case of multiple contract or multiple party arbitrations is to make a decision through a separate award, that is, through the use of an interim award on jurisdiction. The interim award on jurisdiction of course should be used in those cases where the tribunal believes that it does not have jurisdiction on the additional contract or additional party, and it is convenient in those cases where it is going to extend its jurisdiction to include an additional contract that does not have an arbitration clause. This allows the party that is not in agreement with the award to request the setting aside of the award at the beginning of the arbitral procedure and not wait until there is a final award.[17)]

Ⅱ. EXTENSION OF THE ARBITRATION CLAUSE IN LINKED CONTRACTS

2.01 In most cases involving multiple contracts, the contracts are linked. Linked contracts in most civil law[18)] countries are a reference to two or more independent agreements that are in some form connected to the extent that the performance of one of the contracts depends on the other contract. Linked

17) The use of the interim award as a way of solving the problem of jurisdiction is recognized as a valid procedure in international arbitrations, see Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on international arbitration,* 5th Ed., Oxford (2009), § 5.114 through 5.116. According to Redfern and Hunter, the use of an interim award normally is adopted when one of the parties has requested it. From our experience in domestic arbitrations in Venezuela, at times tribunals have actually rendered an interim award on jurisdiction, independently of the request of the parties. Of course, a defense of lack of jurisdiction must have been raised by one of the parties.

18) The study of linked contracts in civil law appears as early as 1962; see Francesco Messineo, *Contratto collegatto,* in "Encyclopedia del Diritto", Milan (1962), Vol. X, p. 48. In France, linked contracts have been the subject of extensive work since the publication of *Les groupes de contrats* by Bernard Teyssie, LJDG N° 139, Paris (1975), and has continued, see Mireille Bacache Gibeili, *La relativité des conventions et les groupes de contrats,* LGDJ Vol. 268, Paris (1996). In Venezuela, see James Otis Rodner, Los *Contratos Enlazados, El Subcontrato,* Academia de Ciencias Políticas y Sociales, 2nd Ed. Caracas (2013). Link or group contracts are also recognized in Dutch and in German law; see Sanne van Dongen, *Groups of Contracts: an exploration of the types and the archetype from a Dutch Legal Perspective* in Ilse Samoy and Marco Loos, *Linked contracts,* Cambridge (2012). Linked contracts are also referred to as "group of contracts."

contracts are independent agreements, but where each contract has a reference in its purpose[19] or in the performance, to another agreement. The link in the contracts derives from the fact that parties share the same purpose when entering into the agreements or in the performance of one or various obligations under the contracts. There are many examples of linked contracts in contemporary international commerce. For example, franchise agreements have linked supply agreements that are tied to and derive exclusively from the main contract; ordinary guaranties have traditionally been linked to the principal obligation; subcontracts, particularly for works, are connected in their performance to the main contract.

2.02 In the case of linked contracts, the existence of the link itself is a strong argument in favor of the extension of the arbitration clause. Moreover, in most cases where the arbitration clause has been extended to linked contracts arbitrators add other justifications for this extension, such as, the fact that some of the linked contracts are entered into by one of the parties to the main agreement and a company related to the other party (group company theory); the performance of one of the contracts depends on the performance of the other contract; arbitral tribunals also use as justification for the extension implied consent and good faith. The willingness of an arbitral tribunal to extend its jurisdiction based on the existence of a link between two or more contracts depends in part on the strength of the link.[20] If both contracts are strongly dependent on each other, some tribunals accept the extension of the arbitration clause because both of the contracts behave as one agreement (see *post*, section 2.04), this is especially true when the contracts are between the same parties or related parties. In case of contracts with weaker links, the tribunal will normally add additional justifications for the extension. The extension is more acceptable in cases where one contract has an arbitration clause and the other does not.

19) The reference to purpose is to "causa" in civil law. Causa is a reference to purpose of the parties for entering into a contract, Jacques Ghestin, *Cause de l'engagement et validité du contrat,* Paris (2006), § 135.

20) For the extension based on the strength of the link, see François-Xavier Train, *Les contrats liés devant l'arbitre du commerce international: étude de jurisprudence arbitrale,* LGDJ 395, Paris (2003), § 40 et seq.

Additional difficulties arise when both contracts have incompatible arbitration clauses. In these cases, the arbitral tribunal will have to evaluate the incompatibility of the clauses. [21] The incompatibility can be found in three different forms: (i) one contract has an institutional arbitration clause and the other has ad hoc arbitration; (ii) both contracts have an institutional arbitration clause but with procedural differences (different places of arbitration, applicable law or procedural rules); (iii) both contracts have an institutional arbitration clause but with reference to different arbitration institutions (i.e. one has the Korean Commercial Arbitration Board and the other has an ICC clause).[22]

2.03 In the case of related (linked) contracts, there are a few decisions that have extended the arbitration clause without the requirement of the development of other justifications (such as implied consent). In ICC Case 8708 (1997)[23], the tribunal extended the arbitration clause in a framework contract to an accessory or implementation contract of the principal contract without requiring the showing of implied consent or good faith. The tribunal held that an arbitration clause in the framework contract could be extended to a sales contract among the same parties. The sale contract was an implementation agreement of the framework contract.[24] The extension of the arbitration clause was taken from the framework contract down to the implementation contract, that is, a form of vertical extension of the arbitration clause. The arbitration clause in ICC Case 8708 was contained in the framework contract. The extension in these cases was vertical, from the principal, framework or main contract down to the accessory. A horizontal extension is not always acceptable. Horizontal would be an extension from one implementation contract into another. So, for example, if the party entered into a general terms of contract and subsequently into a sales contract for certain goods and later into a lease agreement, the arbitration clause contained in the sales contract does not necessarily extend itself horizontally to

21) See François-Xavier Train, idem, § 522 et seq. Also see Hanotiau, idem, § 337 et seq.
22) See François-Xavier Train, idem, § 522.
23) This decision is taken from François-Xavier Train, *Les contrats liés devant l'arbitre du commerce international: étude de jurisprudence arbitrale,* idem, § 230. This award does not appear reported in the collection of ICC arbitral awards.
24) François-Xavier Train, idem, § 230.

the other accessory agreements. However, the arbitration clause contained in a general terms of contract can be extended down to any one of the implementation contracts; in the example, the lease and sales contract.

2.04 In ICC Case 8910 (1998)[25], the tribunal considered that the "*ensemble*" complex contract structure constituted one single agreement. The arbitral tribunal called this a unique or a single operation and therefore extended the arbitration agreement to contracts that did not have one. The structure included the following agreements: first, the Claimant entered into a distributorship agreement with the Respondent N° 1. The distributorship agreement provided for ICC arbitration in Paris. Second, the Claimant signed with Respondent N° 1 and Respondent N° 2 a tripartite agreement in which the Respondent N° 2 substituted Respondent N° 1 in the performance of the distributorship agreement. Finally, Respondent N° 3 guaranteed all payments overdue by Respondent N° 2 under the distributorship agreement. When the Claimant started the arbitration, Respondent N° 2 and Respondent N° 3 objected the jurisdiction of the arbitral tribunal because their agreements did not include an arbitration clause. The tribunal decided that it had jurisdiction over the first two agreements (distributorship and tripartite agreements) based on the close interconnection among the agreements entered into by the Claimant and Respondent N° 1 and Respondent N° 2.[26]

Ⅲ. FURTHER JUSTIFICATIONS OF THE EXTENSION OF JURISDICTION

3.01 In most cases, the arbitral tribunal has to develop additional arguments to reinforce its decision parallel to the explanation of the existence of related contract. The principal arguments used in linked contracts include implied consent, participation in negotiation or performance of the contract and good faith.

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25) ICC Case 8910 reported in *Collection of ICC Arbitral Awards,* Vol. IV, p. 569 *et seq.*

26) Bernard Hanotiau also reports this case in *Multiparty, Multicontract, Multi-issue and Class Actions.* Idem, § 261-262.

1. Implied consent

3.02 The most developed argument in favor of the extension of the arbitration clause is that of implied consent. Implied consent in many civil law countries is a reference to an act or a conduct by a party that implies the intention to be bound by the terms of an agreement to which it is not a party.[27] The consent is indirect (implied from something else) but in contract law it must be certain.[28] Consent must come from a conduct or an act or some form of exteriorizing the will of a party to be bound; a simple tacit acceptance by silence is normally not enough to imply consent to be bound by another agreement or an arbitration clause[29]. Implied consent refers to an arbitration clause not to the contract itself, though frequently they appear together. It is possible that a party agrees to be bound by certain terms of another contract but expressly rejects the arbitration clause. A case in point would be a Venezuelan government entity. Under the Venezuelan Arbitration Law a government entity can only agree to arbitration if they have an approval from the Ministry (LAV, Art. 4). The government entity can agree to be bound by certain terms of a separate contract, but cannot agree to settle disputes by arbitration unless it has been authorized.

3.03 The implied consent to arbitration is implied consent to be bound by an existing arbitration clause. Implied consent is always consent to be subject to an arbitration clause contained in some form of writing.[30] Therefore, implied consent does not mean that the party is consenting orally to arbitration but rather that it is implicitly, through its conduct, consenting to be bound by an existing arbitration clause. By definition, it assumes that there is a valid and binding arbitration clause that is included in a separate agreement. If, under the

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27) Jean-Luc Aubert, *Notions et rôles de l'offre et l'acceptation dans la formation des contrats,* LGDJ, T. 119, Paris (1970). This classical concept in French doctrine is also developed in the Unidroit Principles (see Article 2.1.1).

28) Jean-Luc Aubert, idem. Certain in the sense that there is no doubt that the conduct is directed at consenting to be submitted or bound by another agreement.

29) Arbitrators must take into account the applicable law to the arbitration agreement to analyze if there are particular requirements to derive implied consent.

30) If the applicable arbitration law establishes that the arbitration agreement must be in writing.

applicable law, the arbitration clause must be in writing, it cannot be substituted by the conduct of the party. The conduct of the party does not create the arbitration jurisdiction, but rather, the conduct of the party creates the implied consent to be bound by a valid arbitration clause.

3.04 Consent has been extended to cases where one of the parties, even though it was not a party to the contract that provided for arbitration, has executed or performed obligations under the contract. Implied consent can also extend to the beneficiary of a third party stipulation under the civil law principle of stipulation in favor of a third party at the time that the beneficiary accepts the stipulation made in its favor (see *post*, section 5.03).

2. Participation in the negotiation and performance of a contract

3.05 The second argument in favor of the extension of the arbitration clause is the active participation in the negotiation of a contract that contains an arbitration clause. The participation in the negotiation and performance of a contract as an argument of the extension of the arbitration clause appeared initially in the known award in the case of Dow Chemical France against Isover Saint Gobain.[31] Dow Chemical Venezuela entered into a contract initially with the company Boussois-Isolation. Later, Boussois-Isolation assigned the contract to a company called Isover Saint Gobain (ISG). The contract was for the distribution in France of certain equipment for thermal isolation. Dow Chemical Venezuela subsequently assigned its condition as party to the contract to Dow Chemical AG (Switzerland), Claimant N° 3, which in turn was a wholly owned subsidiary of Dow Chemical Company (USA), Claimant N° 1. Later in 1968, there was a second agreement of distribution between Dow Chemical Europe, in turn a subsidiary of Dow Chemical AG (Claimant N° 3); with three companies of the group Boussois-Isolation which contracts originally had been assigned to ISG,

31) Interim award on jurisdiction ICC Case 4131 of September 23, 1982 reported in *ICC Arbitral Awards,* Vol. I (1974-1985), p. 146. Against this award an action for setting aside was filed and was rejected by the Court of Appeals of Paris in a decision of October 21, 1983.

the defendant in this procedure.

The arbitration was commenced by four claimants, of which two were parties to the contract with ISG that is, Dow Chemical AG and Dow Chemical Europe. Both of these agreements contained arbitration clauses with arbitration submitted to ICC. In turn, both agreements provided that deliveries could be made by Dow Chemical France, which was not a party to the contract, as well as by any subsidiary of the company Dow Chemical. In practice, Dow Chemical France proceeded to make the deliveries under the contract. The four Dow Chemical companies (Dow Chemical AG, Dow Chemical Europe, Dow Chemical France and Dow Chemical Company) started arbitration against Isover Saint Gobain for damages resulting from defective products.

The Defendant alleged that the arbitral tribunal did not have jurisdiction to issue an award in the proceeding between Dow Chemical France and Dow Chemical Company against Isover Saint Gobain on the grounds that it had not signed any agreement with these parties that included an arbitration clause.

In an interim award, the arbitral tribunal held that it had jurisdiction to decide the dispute, including the claim from Dow Chemical Company and Dow Chemical France, although they were not parties to the contracts. Some of the arguments of the arbitral tribunal were as follows. First, Dow Chemical Company had absolute control over its subsidiaries, and confirmed the contracts. In the case of Dow Chemical France, the company had participated effectively and individually in the conclusion, performance and termination of the contracts. Second, the counterparty did not object at any time to which company of the group was performing the obligations. Third, Dow Chemical France actively participated in the performance of the obligations. Fourth, Dow Chemical France and Dow Chemical Company had an important role in the termination of the contracts. Finally, the arbitration clause expressly accepted by some of the companies of the group must also bind the other companies of the group because of the role they had in the negotiation, performance and termination of the contracts and because their participation testified to their intention to be a party to the proceedings and accept the arbitration clause.

Based on the above arguments, the arbitral tribunal rejected the objection to

jurisdiction over the claim brought by Dow Chemical Company and Dow Chemical France.

The Dow Chemical award was one of the first cases where the concept of group companies and the active participation in the performance of the contract of non-signatories were used to extend the scope of the arbitration agreement. In this case, the active participation in the performance of the obligations of the contract was used as an argument to derive implied consent to the arbitration agreement included in the contracts.

3. Good faith; protection of third parties

3.06 Good faith is a very broad term, at times related to a behavior in accordance with general moral principles, a reference to honesty, legal spirit.[32] In the context of contract relations it relates to some form of reliance on an erroneous assumption of the truth.[33] When applied to the extension of the arbitration jurisdiction, good faith implies respecting what others have relied on. Good faith, more than a single argument in favor of broadening the arbitral jurisdiction beyond the strict limits of an arbitration clause, is a condition that is added to try to satisfy a sense of justice or the legitimate expectations of a third party in a related contract. A criterion of good faith appears in a recent decision of the Appeals Court in Cairo (2011), which held that the arbitrator should take into consideration the protection of third parties from fraud or collusion or undue delay for insignificant reasons; since the Egyptian Arbitration Law did not regulate joining non-signatories to arbitration proceedings, the arbitrator was free to seek the solution best suited to the nature of the arbitration process and its requirement. Further, in an international dispute the interpretation of the applicable arbitration rules is different, since it relates to different cultures frameworks and legal consequences.[34] In lieu of an express provision of the

32) Denis Alland and Stéphane Rials, *Dictionnaire de la Culture Juridique,* Paris (2003), p. 143.
33) Alland and Rials, idem.
34) Cairo Court of Appeals Judgment No. 70 of 123, Seventh Commercial Circuit. March 9, 2011. Quoted in Fatma Salah, *Extension of Petroleum Arbitration Agreements.* Journal of International Arbitration. Vol.30. February 2013.

Egyptian Arbitration Law, this decision refers to the general protection of third parties as an argument to extend the arbitration agreement to non-signatories.

Ⅳ. THE CASE OF SUBCONTRACTS

4.01 In many civil law countries, an example of the extension of the arbitration clause to multiple contracts is the case of subcontracts. A subcontract is used as a form of transferring the price and obligations contained in the main contract and reproducing them vis-à-vis the subcontractor without eliminating the original (main) contract. The subcontractor, in the case of works contracts[35], assumes part of the performance of the obligations that were included in the main contract. The subcontractor has a right to collect a price, which in turn comes from the main contract.

4.02 The subcontractor, at least in most civil law countries, has a direct action against the employer for the collection of amounts owed under the subcontract but up to the limit of the amounts in turn owed by the employer to the contractor. A direct action in most civil law countries is a reference to direct standing to sue the employer in the case of a subcontract for works. [36] The right

35) Works contract is a reference to contracts where a party undertakes the performance of transformation and construction of something, normally related to some form of construction of building, plant, or equipment. According to the Venezuelan Civil Code, Article 1630, a work contract or construction contract is that where a party agrees to perform a specific work by himself or under his direction for a price, which the other party agrees to pay. A similar provision is found in Article 1771 of the Peruvian Civil Code.

36) A direct action is a standing to bring an action in your own name, between parties that are not related or are not tied under a contract, without having the plaintiff the obligation to previously sue his direct debtor and when the plaintiff is acting in his own right *(in iure propio)* and not by substitution of his debtor, Miguel Pasquau Liaño, *La acción directa en el derecho español,* Madrid (1989), p. 20. In a similar sense, in Venezuela, Enrique La Roche, *La acción directa,* the direct action does not operate as a procedural substitution, but comes from the legitimate right of the plaintiff (proper standing) acting in defense of his own rights, Ricardo Enrique La Roche, *Código de Procedimiento Civil - Anotaciones,* Vol. I, Caracas (1995), p. 417. Pursuant to Article 1643 of the Venezuelan Civil Code, the workers of the construction of a building have a direct action against the employer up to the amount owed to the contractor. A similar provision is in the Panamanian Civil Code, Article 1349. The direct action, in the case of a subcontract, is justified on the existence of a strong link between the main contract and the subcontract. Pedro Romano Martinez, *O Subcontrato,* Coimbra (2006), §58, p. 172.

of the subcontractor to sue the employer directly is further recognized by a decision of the Spanish Supreme Court in 1999, which extended the direct action that workers have against the employer pursuant to Article 1597 of the Spanish Civil Code to subcontractors.[37] In addition, the Spanish Supreme Court in 199 6[38] recognized the right of the employer to bring a direct action against the subcontractor for the destruction of the construction, if the subcontractor has contributed to the destruction. In Venezuela, the standing of the employer to sue the subcontractor comes from Article 1637 of the Civil Code, which establishes a ten years period of liability of the architect and the contractor for the destruction of the construction. Any other defect in the construction is also covered by this responsibility.[39]

4.03 The right to bring a direct action gives the subcontractor the possibility of enforcement of its rights that in fact arise from the main contract. Rights run together with their accessories including the right to enforcement, which materializes in the right to bring an action. One of the accessories tied to the right to bring an action is the right to claim the existence of an arbitration clause contained in the contract from which the action arises. If the main contract has an arbitration clause and the subcontract has none, because the subcontractor has a direct action against the employer and, the employer has a direct action against the subcontractor for improper performance, in our opinion the arbitration clause extends to the action brought by the subcontractor against the employer[40] or by the employer against the subcontractor. This right of a direct action can also be justified with an argument of implied consent in those cases

37) See Decision RJ 1999, N° 4115. Reported by Francisco Fernández Urzainqui, *Código Civil,* 10th Ed. Madrid (2011).

38) See Decision of January 30, 1996 (RJ 1996, N° 740) and decision of November 23, 1985 (RJ 1985 N°5634). Reported by Francisco Fernández Urzainqui, idem.

39) See Luis Corsi, *La responsabilidad decenal,* 2nd Ed. Caracas (1998).

40) There are opinions on the contrary. For example, Hanotiau quoting Bacache-Gibeili, M, states "… it is generally admitted that the fact that the owner has a direct action against the subcontractor does not justify the extension to the latter of the arbitration clause contained in the owner main contractor agreement". See Hanotiau, idem, § 471. However, Hanotiau does not take into consideration the fact that subcontracts have a strong link to the main contract. He is willing to accept the extension of the arbitration clause to other linked agreements but does not explain why the subcontract should not enjoy the same effect.

where the subcontractor was aware of the existence of the arbitration clause in the main contract.

4.04 We note that we are looking at two different types of actions. When the subcontractor files a request for arbitration against the employer because of its right to bring a direct action against the employer, the subcontractor is recognizing its willingness to submit to arbitral jurisdiction. At this point, the employer had already agreed to submit to arbitral jurisdiction any actions arising out of the contract and these include the direct actions of any subcontractor. If the subcontractor has commenced the arbitration, it cannot bring as a defense the lack of jurisdiction of the arbitral tribunal. In turn, if it is the employer that commences an arbitration against the subcontractor, the problem of extension of the arbitration jurisdiction could come up as a defense, since the subcontractor would only be submitted to arbitral jurisdiction under an interpretation of the action (arbitration agreement) arising out of the main contract and not out of the subcontract, but the link of the subcontract to the main contract originates in the subcontract.

V. THIRD PARTY BENEFICIARIES[41]

5.01 Many civil law countries recognize the possibility of conferring a right to a third party.[42] In addition, the Unidroit Principles include a section that refers to third party rights (PIC, Articles 5.2.1 to 5.2.6).[43] A stipulation in favor of a third party (*estipulación a favor de terceros*) or, as it is known in common law, a third party beneficiary contract[44] is a contract whereby the promisor agrees with the stipulator (the other party or promisee) to perform an obligation

41) Some parts of this section are taken from James Otis Rodner, *Contratos Enlazados,* idem.

42) See Venezuelan Civil Code, Article 1164; French Civil Code, Article 1121; Italian Civil Code, Article 1411; Peruvian Civil Code, Articles 1457 to 1469; Panamanian Civil Code, Article 1108; Argentinean Civil Code, Article 1712.

43) See the integral version of the 2010 UNIDROIT Principles, available at: http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf (last visit on June 20, 2014).

44) A contract that directly benefits a third party and that gives the third party a right to sue any of the original contracting parties for breach. This definition was taken from Black's Law Dictionary. 7th Ed. (1999). p. 325.

in favor of a beneficiary. The beneficiary is the third party claiming rights under the main contract.[45] In Venezuela and in other civil law countries, a stipulation in favor of a third party is a typical case of linked contracts if two agreements coexist: (i) the agreement between the promisee and the promisor (main agreement); and (ii) the agreement between the promisee and the beneficiary.

5.02 In Venezuela, a stipulation in favor of a third party must meet the following conditions. First, there must be a valid agreement between the promisee and the promisor. Second, the parties must have expressed their intention to make the third party (the beneficiary), the creditor of the obligation. That is, there must be a clear intention to confer a benefit to the third party. Third, the promisee must have an interest in the performance of the obligation by the promisor.[46]

In many civil law countries, a stipulation in favor of a third party cannot be revoked after the beneficiary declares that he wants to take advantage of it.[47] Similarly, Article 5.2.5 of the Unidroit Principles states that the parties may revoke or modify the rights conferred until the beneficiary accepts them or has acted reasonably in reliance of them. Reliance seems to be a form of implied consent based on some argument of good faith.[48] The commentary of Article 5.2.5 of the Unidroit Principles includes an example of the acceptance of the beneficiary through reliance in the right received. It refers to a contractor that takes out an insurance policy to cover the damages of the work in progress. The policy covers damages incurred by subcontractors. Subcontractors are informed of the contracted policy. If a subcontractor does not take up his own

45) A third party beneficiary is a person who, though not a party to a contract, stands to benefit from the contract's performance. This definition was taken from Black's Law Dictionary, idem. p. 149

46) See José Melich-Orsini, *Doctrina General del Contrato,* Academia de Ciencias Políticas y Sociales, 5th Ed., Caracas (2014), § 379. Also, pursuant to the Peruvian Civil Code, Article 1457, the promisee must have a personal interest in to enter into the contract in favor of the third party.

47) See Venezuelan Civil Code, Article 1164. Peruvian Civil Code, Articles 1458 and 1464.

48) The concept of reliance when referring to third party beneficiaries seems to be taken by the Unidroit Principles (PIC) from the *American Restatement of Contracts Second,* American Law Institute, Restatement 2nd, § 302. See also E. Allan Farnsworth, *Farnsworth on Contracts,* 4th Ed, New York (2004), § 10.3.

policy, it is acting in reliance of the contractor's policy. Therefore, the subcontractor is accepting the stipulation and making it irrevocable.[49)]

5.03 A crucial element of a stipulation in favor of a third party is that the beneficiary has a direct action against the promisor for the enforcement of the promise.[50)] This right is derived from the contract between the promisee and the promisor. Thus, if the main agreement (between promisee and promisor) includes an arbitration clause then, in our opinion, the claim of the beneficiary against the promisor must be submitted to arbitration.[51)] Furthermore, one could interpret that when the beneficiary accepts the stipulation, it is also implicitly consenting to submit any dispute that may arise related to the contract to the resolution mechanism chosen by the parties in the promise. If the parties to the main contract (promisor and promisee) have chosen arbitration, then the beneficiary must submit his claim to arbitration. A dispute in the context of a stipulation in favor of a third party is a case of complex arbitration because there is a multiplicity of parties, i.e., promisee, promisor and beneficiary, and, potentially, multiple contracts (linked contracts).

5.04 In common law, the arguments for the extension of the arbitration agreement to third party beneficiaries appear to be different. In the United States, various decisions rely in the parties' intention to determine whether the third party beneficiary is bound by the arbitration agreement.[52)] A United States court

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49) See comment to Article 5.2.5 in the integral version of the Unidroit Principles, idem.

50) Venezuelan Civil Code, Article 1164; Peruvian Civil Code, Article 1461.

51) The arbitrator must always take into account the wording of the arbitration clause to be able to decide to extend the arbitral jurisdiction. For arbitration in case of third party beneficiaries, see Roque Caivano and Verônica Sandler, *Arbitraje y estipulación a favor de terceros bajo el derecho peruano.* Available at: http://www.forseti.pe/sites/default/files/9_0.pdf (last visit on June 22, 2014), p.9. When the beneficiary accepts the substantive right created by promisor and promisee in his favor, he accepts it as it is, with the mechanism to exercise the corresponding action established in the contract. If the contract has an arbitration clause, the action must be exercised through arbitration.

52) See Gary Born, International Commercial Arbitration, idem, p. 1457 quoting a decision that concluded that under the third party beneficiary theory a court must look to the intention of the parties at the time the contract was executed. See also Hanotiau, B., *Complex Arbitrations. Multiparty, Multicontract, Multi-issue and Class Actions,* idem, p. 15.

decision (Georgia) in the case Hugh Collins v. International Dairy Queen, Inc. (1998) decided that third party beneficiaries are not beneficiaries of the arbitration clause contained in the contract. This decision was based on the limited scope of the wording of the arbitration clause that was not intended to cover the third party beneficiary.[53] Further, a recent award has accepted that third party beneficiaries are bound by the arbitration agreement included in the contract from which they benefit. The award stated that "it is generally accepted that if the third party is bound by the same obligations stipulated by a party to a contract and this contract contains an arbitration clause or, in relation to it, an arbitration agreement exists, such a third party is also bound by the arbitration clause or arbitration agreement, even if it did not sign it."[54] In England, the solution is established in the Contracts (Rights of Third Party) Act 1999 that states that if the arbitration agreement is in writing for the purposes of the Act, a third party shall be treated as a party to the arbitration agreement regarding the disputes between himself and the promisor relating to the enforcement of a substantive term of the contract (Contracts (Rights of Third Party) Act 1999, section 8).

Ⅵ. STANDARD TERMS OF CONTRACTS[55]

6.01 Standard or general terms of contracts are a set of terms and clauses that can be applied to particular agreements. Similar to standard terms of contracts are framework contracts (*contratos base*)[56] and standard form contracts.[57] Framework contracts include general terms and conditions presented

53) See Hanotiau, idem, p. 16 case reported in 2F.Supp.2nd p. 1465, MD. Ga. 1998. The wording of the arbitration clause of the main contract limited the scope of it to the parties of the main contract (disputes between "Territory Operator" and "Licensee").

54) See Born, idem. p. 1456, quoting the ICC Final award in case No. 9762 (2001). This decision is also reported in *Collection of ICC Arbitral Awards,* Vol. V, p. 180.

55) Parts of this section are taken from Rodner, James, *Los Contratos Enlazados,* idem, § 3.20 and § 4.120.

56) In French doctrine known as *contrat cadre*.

57) These are defined as preprinted contracts containing set clauses, used repeatedly by a business or with a particular industry with only slight additions or modifications to meet the specific situation. Definition of standard-form contract taken from Black's Law Dictionary, idem, p. 325. Arbitration clauses contained in standard-form contracts may raise special issues of validity, depending on the applicable national law. See Born, idem, p. 893-894.

as a structure for future contracts (implementation contracts). Usually, these contracts contain conditions that are imposed by a party on the other party through what is known as adhesion contracts.[58] There are different examples of standard terms of contracts and framework contracts in international commercial practice. One of them is the International Federation of Consulting Engineers (Fédération International des Ingénieurs Conseils-FIDIC) Conditions of Contract. The FIDIC Conditions of Contract include terms for Construction Contracts, Plant and Design-Build and Engineering, Procurement and Constructions (EPC) Turn Key Contracts.[59] Another example is the International Swaps and Derivatives Association (ISDA) master agreement.[60] This master agreement has two formats. The first format is a base contract, which is ready to be adopted by the parties. It includes all the terms of the obligations of the parties. The second format includes a set of definitions that can be adopted and applied to a specific contract.[61]

6.02 If the standard terms of contract or the framework contract contain an arbitration clause that expressly states that it is applicable to the particular agreements and the parties of the main contract and the specific contracts are the same, then they can submit their controversies to arbitration. Problems arise when the main agreement or standard conditions of contract do not state that the arbitration clause must be applied to the particular agreements or when the parties to the contracts are different. In ICC case number 8708 of 1997 (see *ante,* section 2.03) there was a framework, principal or main contract called Protocol signed by three companies. The arbitral tribunal held that it had jurisdiction and extended the arbitration clause included in the framework agreement to the disputes that could arise from any of the contracts included in the transaction (the framework contract and the six implementation agreements including the

58) An adhesion contract is a standard-form contract prepared by one party, to be signed by the party in weaker position, usually a consumer, who has little choice about the terms, Black's Law Dictionary, idem, p. 319

59) For more information please visit: http://fidic.org

60) For more information please visit: http://www2.isda.org

61) The usual base contract is the ISDA 2002 Master Agreement and the particular contracts are named confirmations.

one without arbitration clause).[62]

6.03 An arbitration clause included in the standard terms of contracts can be incorporated by reference to those terms in a particular agreement.[63] For example, the FIDIC Conditions of Contract include an arbitration clause.[64] If a particular contract makes reference to the application of the FIDIC Conditions of Contract, then the arbitration agreement included in such conditions may also be incorporated by reference in the particular contract. Therefore, a party to a contract that on the face of it does not include an arbitration clause can submit a controversy to arbitration taking advantage of the arbitration agreement of the standard terms of contract.

In an interim award of the Netherlands Arbitration Institute ("NAI") dated February 10, 2005, a sole arbitrator held that it had jurisdiction to decide a dispute between a seller and buyer that entered into several sale contracts without arbitration clauses. The dispute arose because the buyer refused to pay under the last three contracts claiming defects on the goods. The decision of the arbitrator was based on the arbitration agreement included in the seller's general

62) Hanotiau, idem. p. 120-121. The *UNCITRAL 2012 Digest of Case Law on the Model Arbitration Law* in the case law of Article 34(2)(a)(i), specifically in awards against non-signatory, explains that arbitration agreements contained in framework agreements were extended to disputes arising out of related contracts. As an example, the Digest quotes a case of the Hungarian Supreme Court. The Hungarian Supreme Court refused to set aside an award dealing with a dispute arising from a contract where the underlying asset management contract contained a broadly worded arbitration clause.

63) Uncitral Model Law, Article 7(6) (Option I). "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract". "Incorporation by reference is related to whether an arbitration clause contained in standard conditions or in a document or contract other than the main contract concluded between the parties binds the latter or third parties or permits bringing all the parties of these agreements to the same arbitral proceeding", Hanotiau, idem, p. 29. The author also explains that incorporation by reference seems to be generally accepted by statute or case law in Western European countries. The requirement of the arbitration clause to be in writing have been interpreted by most courts in a more relaxed fashion. According to the PAL, Article 15, arbitration clauses referred to agreements in general terms of contracts or adhesion contracts, would only be enforceable if the other party knows or could have known about the existence of the arbitration clause.

64) Clause 20.6 of the FIDIC Conditions of Contract for Construction Plant and Design-Build and Engineering, Procurement and Constructions Turn Key Contracts. *See FIDIC Contracts Guide,* 1st Ed., Lausanne (2000).

terms of contract. The general course of business was that the buyer placed an order. The seller sent a confirmation of order followed by an invoice after the delivery of the goods. The buyer returned the confirmation of order signed. The confirmation of order and the invoices included a clear reference to the seller's general conditions of contract. Also, in the confirmation of order the seller's general conditions were printed on the reverse. The general conditions provided for arbitration pursuant the rules of the NAI. The sole arbitrator concluded that when the buyer did not inform the seller that it did not accept the general conditions, it created an expectation that it did agree with the application of the general conditions. This conduct of the buyer in light of the good faith principle entails that the seller may have relied on the signature of the buyer on the confirmations and on its conduct to imply acceptance to the general conditions and thus to the arbitration clause.[65] This decision mixes implied consent and good faith to incorporate the arbitration agreement in the general conditions to several contracts without arbitration clause.

Ⅶ. MIXES APPROACH; THE PERUVIAN ARBITRATION LAW

7.01 Article 14 of the 2008 Peruvian Arbitration Law[66] includes a provision that is an innovation in arbitration laws in Latin America. In fact, Article 14 extends the arbitration agreement to parties that did not sign it but have expressed their consent to be bound by it through other means. Although many laws around the world have eliminated the requirement of signature in the arbitration agreement[67], this provision goes a bit further and establishes new ways of expressing consent to submit to arbitration. We refer to new means of

65) *Yearbook Commercial Arbitration,* Volume XXXII, Kluwer Law International BV, The Netherlands (2007). p. 93-106.

66) Decree Law N° 1071 published on June 28, 2008. The complete text of the Peruvian Arbitration Law is available online at: http://www.peruarbitraje.org/pdf/revista/REVISTA_PERUANA_DE_ARBITRAJE_RPA_7_2008.pdf (last visit on June 12, 2014).

67) Jean Marguerat, *Extensión de la cláusula arbitral a terceros no firmantes* in "Arbitraje Comercial Internacional en Europa", Lima (2013), p. 100. Available online in: http://www.castillofreyre.com/archivos/pdfs/vol22.pdf (last visit on June 11, 2014). The author states that most countries in Europe, with the exception of Germany, have eliminated the requirement of signature of the arbitration clause.

expressing consent because in contract law consent of a party comes from the acceptance of an offer. Such acceptance is expressed by the execution of a contract. The same principle applies to commercial arbitration. Therefore, consent to arbitration is usually expressed through the execution of the arbitration clause or the contract where such clause is included.

The concept of extension of the arbitration clause to parties and contracts is not foreign to international commercial arbitration. Since the case Dow Chemical v. Isover Saint Gobain (see *ante*, section 3.05), several arbitral awards have used different foundations to extend the arbitration agreement to parties that did not sign it and to related contracts that do not have one. Also, numerous articles have been written on the subject. Nevertheless, today no other arbitration law in Latin America regulates this possibility as the Peruvian Arbitration Law does, not even the recently enacted Panamanian Arbitration Act of 2014.[68] Further, the Uncitral Model Law does not contain a similar provision.[69]

7.02 Article 14 of the Peruvian Arbitration Law is related to Article 13. This article was modified from the previous PAL. It refers to the form and content of the arbitration agreement. It states that the arbitration agreement must be in writing but expands the definition of written arbitration agreement. Further, according to PAL the arbitration agreement is in writing when its contents are recorded in any form, be it the arbitration agreement or contract concluded by executing certain actions or by any other means (PAL, Article 13). Pursuant to this provision, the requirement of written form is only for the purposes of proving the existence of the agreement. This article is taken from the Uncitral Model Law, Article 7, Option I.[70] This option of the Uncitral Model Law no longer requires the signature of the parties in the arbitration agreement.[71]

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68) Law N° 131 of December 31, 2013 published in Official Gazette No. 27449-C of January 8, 2014. Also, the 2012 Colombian Law on Arbitration (Law Nº 1563 of July 12, 2012) does not include a similar provision.

69) The Uncitral Model Law amended in 2006 eliminated the requirement of signature of the arbitration agreement. See *Uncitral Model Law of International Commercial Arbitration,* available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visit on June 13, 2014).

70) Carlos Soto Coaguila, Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje,* Vol. I, Instituto Peruano de Arbitraje, Lima (2011). p. 169.

When Article 13 states that the arbitration agreement or contract can be concluded "by executing certain actions or by any other means", it is recognizing the possibility of entering into the arbitration agreement orally or by conduct, paving the way for Article 14 which uses conduct to derive the consent of non-signatories to submit to an existing arbitration clause.

PAL is applicable when the place of arbitration is Peru. Furthermore, Articles 13 and 14 of the PAL are also applicable when the place of arbitration is not Peru, but a judicial procedure related to the matter submitted to arbitration has been initiated before a Peruvian Court (PAL, Article 1)[72].

7.03 Article 14 of the Peruvian Arbitration Law expressly provides: "The arbitration agreement extends to those whose consent to submit to arbitration, according to good faith, is determined from their active and decisive participation in the negotiation, performance or termination of the contract that includes the arbitration agreement or to which the arbitration agreement relates. It also extends to those who pretend to derive rights or benefits from the contract, according to its conditions."[73]

Peruvian authors stress that this provision of the Peruvian Arbitration Law (PAL, Article 14) refers to an extension of the agreement to arbitrate to non-signatory parties. The Peruvian Arbitration Law does not permit the inclusion of third parties to the arbitration. On the contrary, the arbitration clause extends to those that are parties (referring to those that have expressed their consent to be bound by the arbitration clause) to the arbitration agreement but have not signed it.[74] The traditional consent (express consent through the execution of the arbitration agreement or the contract where it is included) does

71) Explanatory Note of the Uncitral Model Law of International Commercial Arbitration, available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visit on June 21, 2014).

72) Carlos Soto Coaguila, Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje,* ídem, p. 6.

73) Translation for informational purposes. Peruvian Arbitration Law, Article 14. Text taken from Carlos Soto Coaguila, Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje,* ídem p. 200-201.

74) See Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje,* ídem, Article 14, p. 202.

not occur but a form of implied consent is always necessary.[75] Thus, consent to submit to arbitration continues to be the cornerstone of this institution.

7.04 According to Article 14 of PAL, non-signatory parties can express their consent to arbitrate through:

(1) The active and decisive participation of the non-signatory party in any of the stages of the contract that contains the arbitration clause or in the contract to which the arbitration clause relates. The participation must be interpreted according to the good faith principle. This form of expressing consent relies on the behavior of the non-signatory party to the arbitration clause. He must have some kind of participation in the contract that would make it possible to be bound by the arbitration clause. Under the provision, not any type of participation is enough to be able to imply consent to submit to arbitration. The participation in the contract must be relevant. That is why the law refers to an active and decisive participation. How do arbitrators decide what decisive participation is? In international awards the most common argument for the extension of the arbitration agreement using conduct as a form of consent seems to be when a non-signatory party participates in the performance or negotiation of the contract.

On the other hand, according to Article 14, the decisive participation of the non-signatory party must be interpreted using the good faith principle. It is difficult to define what good faith is. Good faith in the performance of a contract refers to a general duty of loyalty and cooperation that parties must have when performing their obligations. In this context, good faith is related to the expectations of the parties. The participation of a non-signatory in the negotiation, performance or termination of a contract creates an expectation in the other party of being bound by the provisions of such contract. It would be against the good faith principle to fail to fulfill the other party's expectations.

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75) See Pablo Mori Bregante and Giuseppe Galluccio Tonder, *Aplicación del Artículo 14 de la Ley Peruana de Arbitraje al Caso de los Grupo de Sociedades.* Anuario Latinoamericano de Arbitraje, *Aplicación del Convenio Arbitral a Partes No Signatarias. Intervención de Terceros en el Arbitraje.* Lima (2012), p. 234-235.

(2) Deriving rights of benefits from the contract: The typical example of a contract from which a third party derives benefits is a stipulation in favor of a third party which is explained above (see *ante*, sections 5.01 to 5.04). According to Article 14, he who expects to receive benefits from a contract to which he is not a party is bound by the arbitration agreement contained in such contract. This provision makes the "third party" to whom the benefit is conferred a "non-signatory party" of the arbitration agreement. Here, consent is not only extending the arbitration agreement to the non-signatory party but also to the linked contract between the beneficiary and the promisee or stipulator (if any). It is important to point out that the provision refers to "expects" to derive benefits of a contract. It does not matter if the existence of the right conferred to the third party is in dispute. Pursuant to Article 14, simply by expecting to derive benefits from a contract, the beneficiary has the right to submit any claim to arbitration based on the arbitration clause included in the contract between promisee and promisor.[76)]

7.05 The good faith principle is used in PAL to interpret the scope of participation in the contract of the non-signatory party from which consent is intended to be derived.[77)] From the text of the article there seem to be two standards to extend the arbitration clause to non-signatory parties: a subjective standard that mixes participation in the contract and good faith and an objective standard based on the possibility of deriving benefits of a contract. On the other hand, some authors imply that good faith should not only be used to interpret the participation of the non-signatory party but also for the case of deriving benefits of a contract. For example, one author states that if a third party beneficiary takes advantage of the benefits of a contract, taking into account the good faith principle, he must also be bound by the obligations of the agreement.[78)] Another author explains that good faith must be the cornerstone of

76) See Roque Caivano and Verónica Sandler, *Arbitraje y estipulación a favor de terceros bajo el derecho peruano.* Available at: http://www.forseti.pe/sites/default/files/9_0.pdf (last visit on June 22, 2014).

77) According to Alfredo Bullard González in *Comentarios a la Ley Peruana de Arbitraje,* idem, p. 213. "The interpretation regarding to the existence of consent must be done pursuant to the rules of good faith".

78) Idem, p. 214.

extension of the arbitration clause in both cases (participation in contract and deriving benefits) in order to avoid the arbitrary extension of the arbitration clause to third parties.[79] For the latter, the reference to good faith in Article 14 is related to the concept of *doctrina de los actos propios* or what is known in common law as *estoppel* (see *ante*, section 1.04). This concept requires consistency in the parties' behavior to the point of repudiating acts that contradict prior acts of a party that created the expectation of compliance with the contract.[80] Therefore, taking into account the good faith principle, if a non-signatory party participates decisively in any of the stages of a contract, it cannot later deny its consent to the arbitration clause contained in such contract. Further, if a beneficiary expects to derive a right from a contract, it is bound by the dispute mechanism clause contain in said contract. Finally, the inclusion of good faith in Article 14 of the PAL leaves the door open for arbitrators to use other expressions of consent to extend the arbitration clause to non-signatory parties or to related contracts.[81]

7.06 We refer to this provision (PAL, Article 14) as a mixed approach since the Peruvian Arbitration Law requires two elements to arrive at implied consent. These are: (i) there must be a decisive participation in the contract or the intent of deriving benefits from it, and (ii) the interpretation of the conduct of the non-signatory party must be made in light of the good faith principle. There is some ambiguity in the law as to the extent of the scope of good faith. However, it seems to be a way of ensuring that the non-signatory party that participated in the contract does not later go back and deny the consequences of its conduct. Taking into account good faith, one could conclude from the

79) See Jorge Satistevan, *Extensión del Convenio Arbitral a Partes No-Signatarias: Expresión de la inevitabilidad del arbitraje,* Revista Peruana de Arbitraje, Vol. 8 (2008). Available online at: http://www.peruarbitraje.org/pdf/revista/REVISTA_PERUANA_DE_ARBITRAJE_RPA_8_2009.pdf (last visit on June 23, 2014). p. 44.

80) See Jorge Satistevan, *Extensión del Convenio Arbitral a Partes No-Signatarias: Expresión de la inevitabilidad del arbitraje,* idem, p. 45.

81) See Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje,* idem, p. 213. The author explains that "good faith" was included in the text of the project of law at the last moment to make the article suitable to adapt to new situations that in the future could be relevant to derive consent.

Peruvian Arbitration Law that when there is an active participation in the contract but the non-signatory party expressly states that it does not want to be bound by the arbitration clause, then the arbitral tribunal cannot extend its jurisdiction to that particular party.

7.07 PAL, by defining the criteria that must be used to determine jurisdiction in the case of complex arbitration (PAL, Article 14), grants the tribunal a defined power to decide if it will broaden its jurisdiction to cover additional contracts and/or additional parties into the procedure. In Peru, following the principle of *kompetenz-kompetenz* (see ante, section 1.06), the tribunal is the only one competent to decide on its jurisdiction (PAL, Article 41(1)). Article 14 of the PAL defines the scope of this power when used to broaden jurisdiction in complex arbitrations[82]. Modern commerce is no longer the result of single contracts and simple relations, but rather it is reflected in complex structures with multiple agreements and parties participating. Peru recognizes this and shows a possible route to take.

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