On the "Group of Companies Doctrine" and Interpreting the Subjective Scope of Arbitration Agreements- which law applies? [1]

I. Introduction

It is not uncommon in arbitration proceedings to find a party on the respondent side which is not expressly party to the arbitration agreement underlying the claim. Conversely, in court proceedings, one may encounter respondents holding claimants to an arbitration agreement which the claimants did not enter into. These cases often involve companies which are part of a group of companies where one of the affiliated companies is a direct party to the arbitration agreement in question or cases involving bodies or representatives of that company. The question therefore arises how the subjective scope of arbitration clauses should be determined.

In international cases, *i.e.* cases involving some foreign aspect, deciding on which law is applicable precedes the actual application of the law. Determining the applicable law is of particular importance, as the subjective scope of an arbitration clause may be judged differently under the various legal systems. This is exemplified by a judgment of the German Federal Supreme Court in a case where the court had to decide whether the claimant was bound by an arbitration agreement and where the respondent invoked the arbitration agreement as a defense against the claim brought before state courts.[2] In order to achieve this, the respondent relied on the principles of the *group of companies doctrine* under Indian law. In its appeal decision, the Higher Regional Court Braunschweig categorically ruled out the possibility that the arbitration agreement could be extended to the Danish claimant company based on the *group of companies doctrine*.[3]

The decisions of the German Federal Supreme Court and the Higher Regional Court Braunschweig provide an opportunity to consider more closely the question of which laws should be applied to determine the subjective scope of an arbitration agreement from a German perspective. This article will set out the facts of the case decided by the German Federal Supreme Court and the Higher Regional Court Braunschweig (**II**.). It will further analyze which law applies to determining the subjective scope of arbitration agreements (**III**). The article concludes with a résumé on the questions raised (**IV**).

For the purpose of this article, it is assumed that the subjective scope of international arbitration agreements must be determined by the provisions of a specific legal system. By contrast, it will not cover the approach, favored mostly in France, which applies general international legal principles to this issue.[4]

---

[1] This article had originally been written in the German language and been published in the liber amicorum in honor of Siegfried H. Elsing, 2015, p. 475. The authors wish to thank Falco Kreis, Associate of CMS Hasche Sigle, and Maria Hayden, Trainee Solicitor of CMS Cameron McKenna, for their assistance in translating the article into English.

[2] German Federal Supreme Court ("BGH"), SchiedsVZ 2014, 151; Higher Regional Court Braunschweig ("OLG Braunschweig"), BeckRS 2014, 11052.

[3] OLG Braunschweig, BeckRS 2014, 11052 at II.1.b)cc).

[4] See *Sandrock*, liber amicorum Lalive, 1993, p. 633 et seq.; *Busse*, SchiedsVZ 2005, 118, 120 et seq.

II. Facts and Procedural History

1. Facts

Claimant was a Danish company, whose sole shareholder and director was L. Respondent was an Indian company.

On 12 February 1999, a Mauritius-based company, I.P.H. Ltd. ("IPH"), entered into a license agreement as licensor with an Indian company, B.I.P. Ltd ("BIP"), as licensee, for the rights to use a three-dimensional frame design. At the time that the license agreement was concluded, the design was subject to a European patent and, derived from this, was also subject to a German patent (the "patent"). L, the owner of the patent, concluded the license agreement with BIP on behalf of IPH. The license agreement contained an arbitration clause, which provided that any disputes between the contracting parties out of or in connection with the agreement were to be settled by an arbitral tribunal seated in New Delhi in accordance with the Rules of the International Chamber of Commerce. The license agreement was terminated by mutual consent on 15 December 2008.

In April 2010, Respondent, being the legal successor of BIP, attended a trade fair in Hanover and set up an exhibition stand. According to Claimant, by offering certain casings at the fair, Respondent violated the patent. Respondent asserted that according to the provisions of the license agreement, it was entitled to use the patent even after termination of the agreement for distribution purposes.

Claimant, which, according to Respondent's submission, belonged to the same group of companies as IPH, eventually initiated proceedings in the Regional Court Braunschweig, and requested an order for Respondent to cease and desist, surrender the allegedly patent-infringing frame designs, provide relevant information and for declaratory relief pertaining to liability for damages. At first, Claimant based its claim on two equally-weighted arguments: on the one hand, it relied on a written declaration dated 15 November 2015 from L, as patent holder, transferring the rights pertaining to the patent and the right to pursue the claim on its own motion ("Act of Assignment") and on the other hand, Claimant relied on an alleged exclusive license granted orally to Claimant by L in October 1999 which was allegedly valid in the territory of the Federal Republic of Germany ("Oral License"). After the German Federal Supreme Court indicated that Claimant's request for relief, as submitted in the claim, did not meet the minimum degree of certainty (*Bestimmtheitsgrundsatz*) required under s. 253(2) German Code of Civil Procedure, Claimant, in the course of the third instance proceedings, amended its claims to being primarily based on the Act of Assignment and supplemented only by the Oral License argument.

In each of the alleged claims, Respondent invoked the arbitration clause contained in the license agreement requesting the court to dismiss the claims. With regard to the subjective scope of the arbitration agreement, Respondent relied on the *group of companies doctrine* under Indian law. According to Indian law, Respondent submitted, the arbitration clause would be extended within a group of affiliated companies if (i) the representatives of the non-signatory company had participated in some way in the conclusion or performance of the contract, (ii) such company was to be regarded as the actual party to the main contract or to the arbitration agreement, and (iii) such company in some way benefitted, or is expected to benefit from, its aforementioned involvement. Additionally, under Indian law, an arbitration clause may be extended within a group of companies where a

non-signatory party exerts excessive control over one of the parties to the arbitration agreement.[5]

2. Procedural history

a) First Instance

In its interim judgment of 15 June 2011, the Regional Court Braunschweig held that the arbitration clause found in the license agreement did not impair the admissibility of the claim and found that the claim was admissible. As the claim concerned actions which took place in 2010, the license agreement which was terminated on 15 December 2008 had no bearing on the legal arguments of this claim. When the license agreement was terminated, so too were all related rights and obligations stemming from it, including the arbitration clause.

b) Second Instance

The Higher Regional Court Braunschweig rejected Respondent's appeal against the interim judgment, on the basis that the arbitration clause, regardless of doubts surrounding its objective scope, could in no way be extended to include Claimant. In the view of the court, Respondent could not rely on the *group of companies doctrine* as:

- the question of whether or not Claimant falls within the scope of the arbitration agreement is not a matter of Indian law, but Danish law, which does not recognize the *group of companies doctrine*;[6]

- recognizing the impact of the *group of companies doctrine* would seriously violate German public policy as a party could not be subject to the jurisdiction of an arbitral tribunal instead of the domestic courts unless the party voluntarily submitted to the authority of the arbitral tribunal;[7]

- furthermore, extending the scope of the arbitration agreement to Claimant would be contrary to the writing requirement contained in Art. II(1) of the New York Convention.[8]

c) Third Instance

The German Federal Supreme Court permitted the appeal due to the fundamental significance of the matter under s. 543(2) German Code of Civil Procedure. It reversed the Higher Regional Court Braunschweig's appeal decision and remitted the case for a new trial and decision.

The German Federal Supreme Court held that significant legal grounds had been left unconsidered at the second instance stage, from which it could have been argued that Claimant was bound by the arbitration agreement. This was particularly pertinent to the arguments relating to the Act of Assignment:

---

[5] OLG Braunschweig, BeckRS 2014, 11052 at II.1.b)cc)(1).
[6] OLG Braunschweig, BeckRS 2014, 11052 at II.1.b)cc)(2).
[7] OLG Braunschweig, BeckRS 2014, 11052 at II.1.b)cc)(3).
[8] OLG Braunschweig, BeckRS 2014, 11052 at II.1.b)cc)(4).

- in respect of the claims relating to the assigned right, the most relevant issue was not Claimant's affiliation to the group in question, rather it was the question of whether L, being the patent holder and assignor of the patent rights, was subject to the arbitration agreement, which was a question the Higher Regional Court Braunschweig had neglected to deal with. This issue of the subjective scope of the arbitration agreement was a matter of Indian law.[9]

- with respect to the violation of German public policy, the Higher Regional Court Braunschweig ought to have applied a two-stage test. As a first step, the Higher Regional Court ought to have applied the applicable law arriving at a concrete conclusion based on the facts of the present case. In a second step, the court would have had to assess whether this result, rather than the underlying provisions of the applicable law as such, was consistent with the fundamental principles of the domestic legal system.[10]

- in relation to the finding by the Higher Regional Court Braunschweig that an extension of the arbitration agreement would be inconsistent with the writing requirement of Art. II(1) of the New York Convention, the German Federal Supreme Court pointed out that due to the most favorable law principle (*Günstigkeitsprinzip*) contained in in Art. VII(1) of the New York Convention, the arbitration agreement may be formally valid under Indian law being the law applicable to the arbitration agreement.[11]

3. The differing approaches of the Higher Regional Court Braunschweig and the German Federal Supreme Court

The German Federal Supreme Court and the Higher Regional Court Braunschweig looked at the question whether Claimant was subject to the arbitration agreement from different perspectives. The Higher Regional Court Braunschweig followed Respondent's position and thus considered the question whether Claimant was bound by the arbitration agreement based on the *group of companies doctrine* due to Claimant's connection with IPH, being a direct party to the arbitration agreement. Since the Higher Regional Court Braunschweig rejected the argument that the arbitration agreement could extend from IPH to also include Claimant – regardless of the applicable law – due to public policy concerns and a presumed non-conformity with the writing requirement of Art. II(1) of the New York Convention, assessing the law applicable to the determination of the subjective scope of the arbitration agreement, was not relevant for the court's decision.

The German Federal Supreme Court, on the other hand, focused on the questions firstly whether L was subject to the arbitration agreement concluded on behalf of IPH and secondly whether the effect of the Act of Assignment was such as to also bind Claimant to the arbitration agreement. Only if Claimant was not found to be subject to the arbitration agreement based on these considerations would the question whether Claimant's affiliation to the group of companies led to it being bound by the arbitration agreement become pertinent.

---

[9] BGH, SchiedsVZ 2014, 151, 152, at II.1.a).
[10] BGH, SchiedsVZ 2014, 151, 153, at II.1.b).
[11] BGH, SchiedsVZ 2014, 151, 154, at II.1.c).

As the German Federal Supreme Court rejected the conclusions by the Higher Regional Court Braunschweig on public policy concerns and the writing requirement of Art. II(1) of the New York Convention (at least with regard to the Higher Regional Court's particular reasoning), it appears that ascertaining the subjective scope of the arbitration agreement is relevant for all of the approaches discussed above. Therefore, this article will examine which law should be applied to determine the subjective scope of an arbitration agreement, taking into account the judgments of both the German Federal Supreme Court and the Higher Regional Court Braunschweig.

III. Determination of the law applicable to the subjective scope of the arbitration agreement

Determining which law is relevant in deciding on the subjective scope of the arbitration agreement necessitates a closer look at the matter for which the applicable law is to be determined. The binding effect of an arbitration agreement can be rooted in various legal grounds. Usually, a person is bound by an arbitration agreement based on its position as a direct party to the arbitration agreement. However, a person may also be bound to an arbitration agreement by virtue of non-contractual provisions, for example, provisions of company law or inheritance law. In such circumstances, the relevant laws pertaining to these concepts must be determined in addition to the law applicable to the arbitration agreement.

In the present case, Respondent advanced the argument that the arbitration agreement contained in the License Agreement extended to Claimant by virtue of the *group of companies doctrine* (under Indian law). This begs the question of which law governs the legal concept of the *group of companies doctrine* and whether, under this law, the doctrine is applicable to the present case.

1. Classification (*Qualifikation*)

Classification, known in German international private law as *Qualifikation*, describes the process of linking the relevant provisions or concepts of the substantive law, which may be applied, to the relevant conflict of laws rules according to such provisions' or concepts' exact function within a legal system.[12] As these functions of juridical concepts are generally to be determined based on the substantive law of the place of the court,[13] classification, according to prevailing opinion, is dictated by the *lex fori*.[14] Classification is about discovering those conflict of laws provisions in the domestic legal system, which govern legal concepts fulfilling the same function in this domestic legal system as the foreign legal concept, whose application is being considered, fulfills in the foreign legal system.[15] This can cause some difficulties if, as in the case of the *group of companies*

---

[12] *Kegel*/*Schurig*, Internationales Privatrecht, 8th ed. 2000, § 7 I, p. 279.

[13] The legal terms used to describe legal concepts leading to the application of specific conflict of laws rules ("*Systembegriffe*" in German international private law terminology) do not equate exactly to the respective the substantive law terminology, as the former may be broader, MünchKomm/*Sonnenberger*, Vol. 10, 5th ed. 2010, Intro. International Private Law para. 495; Palandt/*Thorn*, 74th ed. 2015, Intro. to Art. 3 German Introductory Act to the Civil Code ("EGBGB") para. 27.

[14] See BeckOK/*Lorenz*, Internationales Privatrecht, 1 Nov. 2014, Intro. International Private Law para. 57; MünchKomm/*Sonnenberger*, op. cit., para. 495. For an autonomous interpretation of public international law and EU law in respect of conflict of laws, BeckOK/*Lorenz*, op. cit., Intro. International Private Law para. 62.

[15] BeckOK/*Lorenz*, op. cit., Intro. International Private Law para. 57; MünchKomm/*Sonnenberger*, op. cit., Intro. International Private Law para. 499 et seq.; *Palandt*/*Thorn*, Intro. to Art. 3 EGBGB para. 27.

doctrine, a legal principle which has no direct counterpart in the respective domestic substantive law has to be classified.

In these instances, the function of the foreign legal concept in the respective legal system becomes particularly significant, where, as the case may be, various functions have to be distinguished.[16] Thereafter, it must be ascertained whether the legal concept which is to be classified falls within the scope of application of a conflicts of laws provision of the domestic legal system in terms of the function the concept performs in the circumstances of the specific case. If this is not the case, a separate conflicts of laws rule must be created for the foreign legal principle.[17]

a) Extending the subjective scope of arbitration agreements

In many cases, whenever the question whether a person is party to an arbitration agreement arises, this issue is generically referred to as an extension of the effect of the arbitration agreement to include a person or inclusion of a person in the arbitration agreement.

With regards to applicable law, some authors suggest that, if it is a question of including a third party in an arbitration agreement, the relevant law is the law applicable to the legal relationship which ties the person, which is presumptively being bound by the arbitration agreement, to the original party to the arbitration agreement.[18] This was the view taken by the Higher Regional Court Braunschweig in its second instance decision in which it considered the relationship between Claimant and IPH to be governed by the law applicable to corporate groups.

Before determining which law is applicable to including a third party in an arbitration agreement, it must be established whether it is indeed a case of including an actual "third party" in the scope of the arbitration agreement, or whether this outsider is already a party to the arbitration agreement. Where this is unclear, the arbitration agreement would require further interpretation. As a first step, the statements of those who took part in the conclusion of the arbitration agreement would have to be examined to ascertain who, in the opinion of those who concluded the respective contract, should be party to the arbitration agreement. The relevant provisions for interpreting these statements would be found in the law applicable to the arbitration agreement.[19]

Drawing a clear distinction between the interpretation of the subjective scope of an arbitration agreement and its extension to include a third party may hardly be possible in certain cases. In the latter case, the arbitration agreement itself may serve as the legal relationship between the third party which is presumptively bound to the arbitration agreement and the "original" parties to the arbitration agreement. If, in addition to the arbitration agreement, other legal relationships exist between the third party and one of the parties to the arbitration agreement, these legal relationships are also subject to individual classification. The rule on conflict of laws given above does not temper the

---

[16] *Kegel*/*Schurig*, op. cit., § 7 II, 283.
[17] *Kegel*/*Schurig*, op. cit., § 7 II, 283.
[18] Stein/Jonas/*Schlosser*, Vol. 9, 22nd ed. 2002, Annex to s. 1062 ZPO para. 47 with further references.; Reithmann/Martiny/*Hausmann*, Internationales Vertragsrecht, 7th ed. 2010, para. 6783.
[19] MünchKomm/*Münch*, Vol. 3, 4th ed. 2013, s. 1029 ZPO para. 39; Zöller/*Geimer*, 30th ed. 2014, s. 1029 ZPO para. 108; *Pfeiffer*, SchiedsVZ 2014, 161, 162; Wolff/*Wilske*/*Fox*, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary, 2012, Art. II NYC para. 231.

requirement to classify each of the legal relationships from which some connection to the arbitration agreement may possibly arise.

The foundation of an arbitral tribunal's jurisdiction is party autonomy.[20] Generally, a person will be bound to an arbitral proceeding by an act of its own volition.[21] This does not, however, exclude the possibility that a person can, under the applicable law, be bound by an arbitration agreement without its explicit consent.[22] Under German law, universal successors, such as heirs, are bound by an arbitration agreement concluded by their predecessor. The impact of succession on an arbitration agreement is to be derived from the applicable inheritance laws.[23] As far as personally liable partners in a general partnership are concerned, they can be bound by an arbitration agreement entered into on behalf of the entity,[24] German courts predominantly apply s. 128 German Commercial Code governing the liability of partners.[25] Conversely, some object to this approach, concluding that s. 128 German Commercial Code does not provide for such an extension of the scope of an arbitration agreement. Rather, the liability of individual partners originates directly from the arbitration agreement, whose subjective scope must be interpreted on a case by case basis having regard to the interests of all the parties.[26] On the other hand, there is a general consensus that binding bodies of legal persons to arbitration agreements of the entity can only originate from the arbitration agreement itself, not from company law.[27] As regards the subjective scope of an arbitration agreement within a group of companies, there is no principle in German law based on which individual companies within a group are bound by (arbitration) agreements which have been entered into by their parent companies or other affiliated companies.[28]

b) Group of Companies Doctrine

In respect of the *group of companies doctrine*, the following discusses whether and, if necessary, under which conditions, this legal concept provides for extending an arbitration agreement within a group of companies or whether the doctrine is actually merely a rule on interpretation.

---

[20] Other rules apply when arbitration is legally prescribed, cf. Musielak/*Voit*, 11th ed. 2014, s. 1066 para. 1.
[21] MünchKomm/*Münch*, op. cit., s. 1029 ZPO para. 44.
[22] See Musielak/*Voit*, op. cit., s. 1029 ZPO para. 8; BayObLGZ 1999, 255, 266 et seq.; *Schütze*, Schiedsgericht und Schiedsverfahren, 5th ed. 2012, para. 183; Stein/Jonas/*Schlosser*, op. cit, Annex to s. 1062 para. 47. Generally on universal succession: BGH, NJW 1977, 1397, 1398.
[23] Stein/Jonas/*Schlosser*, op. cit., Annex to s. 1061 para. 47.
[24] German case law concerns the German OHG (*Offene Handelsgesellschaft*) which constitutes a legal entity distinct from its partners.
[25] BGH, NJW-RR 1991, 423, 424; BayObLG, SchiedsVZ 2004, 45, 46 (as to limited partners). See also MünchKomm/*Münch*, op. cit., s. 1029 para. 51; *W. Wiegand*, SchiedsVZ 2003, 52, 57.
[26] *Haas*/*Oberhammer*, Liber Amicorum Karsten Schmidt, 2009, 493, 509 et seq.; *Müller*/*Keilmann*, SchiedsVZ 2007, 113, 115; *Schmidt*, DB 1989, 2315, 2318 et seq.
[27] Expressely covered in *Müller*/*Keilmann*, SchiedsVZ 2007, 113, 116 with further references; *Lachmann*, Handbuch für die Schiedsgerichtspraxis, 3rd ed. 2008, para. 506; *Schwab*/*Walter*, Schiedsgerichtsbarkeit, 7th ed. 2005, Chap. 7 para. 35. Of a different view, OLG Munich, NJW-RR, 198, 199. According to unanimous opinion limited partners are not bound by arbitration agreements entered into by the partnership, cf. *Lachmann*, para. 504 with further references.
[28] *Kreindler*/*Schäfer*/*Wolff*, Schiedsgerichtsbarkeit Kompendium für die Praxis, 2006, para. 182; *Lachmann*, op. cit., para. 510; *Schwab*/*Walter*, op. cit., Chap. 7 para. 35. In this way also OLG Braunschweig, BeckRS 2014, 11052 at II.1.b)cc)(3).

aa) Regulatory Content and Function

The *group of companies doctrine* drew international interest and prominence due to the interim ruling in the 1982 ICC-case, *Dow Chemical v. Isover Saint Gobain*.[29] The arbitral tribunal had to decide whether the parent company and a subsidiary of the claimant were subject to the effects of the arbitration agreement underlying the arbitral proceedings, although those companies had not signed the relevant arbitration agreements, only the respondents and the two other claimants had.

The arbitral tribunal affirmed this with reference to general international commercial reequirements ("*French case law relating to international arbitration tak*[ing] *into account, usages conforming to the needs of international commerce, in particular, in the presence of a group of companies*")[30] It was the mutual intention of the claimants as well as of the respondents to bind the subsidiaries as well as the parent company and the other affiliated company.

The decision reads as follows:

> "[I]*rrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (une realité economique unique)* […]. [T]*he arbitration clause accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing* [the arbitration] *clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.*"[31]

Thus, in the arbitral tribunal's decision, not only the corporate ties of the individual companies within the Dow Chemical group were relevant, another significant factor was the role of the parent company as well as that of the other affiliated subsidiaries in the course of negotiating, concluding, drafting the contracts or terminating one of the disputed contracts.[32] Against the background of the existing corporate structure and having regard to the roles played by these companies, the arbitral tribunal arrived at conclusions on what the presumed intentions of all those who entered into the contract were in respect of the subjective scope of the arbitration agreement. However, the intentions of those who concluded the contracts, rather than the corporate structure, remained of primary importance in establishing the binding effect of the arbitration agreement.

This corresponds with the predominant understanding of the *group of companies doctrine,* according to which the corporate structure merely offers "*grounds to a more precise examination of the parties' intentions*".[33] Thus understood, the *group of companies doctrine* is an empirical tool, which is to be taken into account as a means of interpretation.[34]

---

[29] *Dow Chemical France, The Dow Chemical Company and others v. Isover Saint Gobain*, Zwischenschiedsspruch v. 23.09.1982, ICC Case No. 4131, Y. Comm. Arb. 1984, 131 et seq.
[30] *Dow Chemical v. Isover*, Y. Comm. Arb. 1984, 131, 133.
[31] *Dow Chemical v. Isover*,Y. Comm. Arb. 1984, 131, 136.
[32] As to the prerequisites,see also *Sandrock*, SchiedsVZ 2005,1, 7.
[33] *Ahrens*, Die subjektive Reichweite internationaler Schiedsvereinbarungen und ihre Erstreckung in der Unternehmensgruppe, 2001, p. 157 .
[34] Cf. *Hanotiau*, Arb. Int'l 2011, 539, 545; *Lew*/*Mistelis*/*Kröll*, Comperative International Commercial Arbitration, 2003, p. 145, para. 7-51.

In some cases, further reaching effect is attributed to the *group of companies doctrine* leading to an extension of the subjective scope of an arbitration agreement to a company solely due to its affiliation with a group of companies.[35] This understanding of the legal concept is commonly met with disapproval.[36] However, in the current context, for the classification of the *group of companies doctrine* it is decisive how it is actually interpreted and applied under the potentially applicable Indian law.

The appeal decision of the Higher Regional Court of Braunschweig does not shed any light on this question. By referring to *Professor Schütze*, the court came to the conclusion that, according to the *group of companies doctrine*, arbitration agreements are extended within a group of companies "*if the representatives of a non-signatory company within the group in some way have taken part in the negotiations or the performance of the contract, this company has acted as the real party to the main contract and the arbitration agreement, and, because of this, the non-signatory has benefited therefrom or expects to do so*."[37] Furthermore, the Higher Regional Court Braunschweig referred to the legal position in the USA. There, "*a third party with an excessive level of control over the party to the arbitration agreement, perhaps through internal dependence within the group of companies but also a clear level of undercapitalization can justify extending the effect of the arbitration agreement to bind another party*."[38] The German Federal Supreme Court did not comment on the regulatory content of the *group of companies doctrine* in its decision.

Evidently, the *group of companies doctrine* is recognized in Indian law. In *Chloro Controls (I) P. Ltd.* v. *Severn Trent Water Purification Inc. and Ors.* the Indian Supreme Court explained the *group of companies doctrine* as follows:

> "*This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement.*"[39]

Including a third party in an arbitration agreement without its prior consent was deemed permissible by the Indian Supreme Court only in exceptional circumstances:

> "*A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a*

---

[35] For a critical view, see *Fouchard*/*Gaillard*/*Goldman*, International Arbitration, 1999, p. 287 et seq., para. 504.
[36] *Adams v. Cape Industries plc* [1990] Ch 433 (CA) (incorporation of a separate company as to limit future liability is no reason for extension); BGE 134 III 565 = 26 ASA Bulletin 2008, 777, 786 et seq. (a mere review is not sufficient); *Born*, International Commercial Arbitration, 2nd ed. 2014, Vol. 1, p. 1448, fn. 227 and 228 with further references; Hanotiau/Schwartz/*Derains*, Multiparty Arbitration, ICC Institute Dossiers, 131, 136; *Fouchard*/*Gaillard*/*Goldman*, op. cit., p. 288, para. 504; *Hanotiau*, Complex Arbitrations, 2006, p. 49, para. 105.
[37] OLG Braunschweig, BeckRS 2014, 11052 referring to *Schütze*, op. cit, para. 189.
[38] OLG Braunschweig, BeckRS 2014, 11052 at II.1b)cc)(2) referring to *Kreindler*/*Schäfer*/*Wolff*, op. cit, para. 180 with further references.
[39] *Chloro Controls (I) P. Ltd.* v. *Severn Trent Water Purification Inc. and Ors*, (2013) 1 SCC 641, para. 66 (S. Ct. of India).

composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed."[40]

Therefore, according to Indian law, it is a fundamental condition that all parties agree to be bound by the arbitration agreement. Subject to certain conditions, a third party can, even if it did not consent, on an exceptional basis, be subjected to an arbitration agreement due to its affiliation with a group of companies. In this respect, India set itself apart from the common law legal sphere of England which, according to the High Court in *Peterson Farm Inc v C&M Farmin Ltd,* does not recognize the *group of companies doctrine* as a part of English law.[41]

aa) Classification of the *group of companies doctrine*

In respect of the *group of companies doctrine,* the following question must thus be answered: Does the doctrine, under the applicable law, provide for a rule to determine the intention of the parties when concluding the contract based on specific circumstances or does it lead to an extension of an arbitration agreement due to the affiliation of a company to a group, irrespective of the intentions of the parties?

The formation and efficacy of the arbitration agreement are governed by the law applicable to the arbitration agreement.[42] The same applies to the *group of companies doctrine*, insofar as it is a rule of interpretation used to determine the (presumed) intentions of those parties who concluded the contract.

Provided that the scope of the arbitration agreement under the *group of companies doctrine* is extended based solely on the affiliation of companies to a certain group however,[43] the law applicable to the arbitration agreement cannot be applied. In this case, extending the arbitration agreement's scope stems from the law, not from the parties' autonomous choice. The rationale behind this interpretation of the doctrine is that companies are part of a single group entity. They should not be able to benefit from the advantages of contracts which are not available to other affiliated companies without being bound by the arbitration agreements contained therein.[44] This certainly applies if the subsidiary is under the control of the company to which the effect of the arbitration agreement is supposed to be extended.[45] If, in a legal system, the requirements under the *group of companies doctrine* in respect of extending the effect of an arbitration agreement

---

[40] *Chloro Controls (I) P. Ltd.* v. *Severn Trent Water Purification Inc. and Ors*, (2013) 1 SCC 641, para. 67 (S. Ct. of India).
[41] *Peterson Farm Inc v C&M Farmin Ltd*, [2004] EWHC 121 (Comm), para. 62.
[42] OLG Hamm, SchiedsVZ 2014, 38, 41; MünchKomm/*Münch*, s. 1029 ZPO, para. 39.
[43] So ICC Fall Nr. 2375, J.D.I. 1976 (103), 973 (without further explanation); *Barbara Vitzethum, et al. v. Dominick & Dominick, Inc. and others v. Hubert Anders, et al.*, Y. Comm. Arb. 1997, 927 ff. (S.D.N.Y.).
[44] Vgl. *Barbara Vitzethum, et al. v. Dominick & Dominick, Inc. and others v. Hubert Anders, et al.*, Y. Comm. Arb. 1997, 927, 931, para. 9 (S.D.N.Y.).
[45] *Barbara Vitzethum, et al. v. Dominick & Dominick, Inc. and others v. Hubert Anders, et al.*, Y. Comm. Arb. 1997, 927, 931 (S.D.N.Y.); Zöller/*Geimer*, op. cit., s. 1029 ZPO para. 72.

are tied to the corporate structure that closely, company or corporate law has to be applied to the legal concept.[46]

2. Connecting factors

Those laws which have been identified as relevant through the classification process are ascertained by way of their connections.

a) Laws on arbitration agreements

German law does not contain any conflict of laws provisions which fully regulate the law applicable to arbitration agreements. In this respect, two approaches have primarily been taken. Under one approach, focusing on the substantive law aspects, the law applicable to the arbitration agreement is to be decided by way of general contractual conflict of laws rules.[47] Under another approach, focusing mainly on procedural law aspects, the applicable law is to be determined based on the conflict of laws rules contained in s. 1059(2) German Code of Civil Procedure or Art. V(1) lit. a of the New York Convention which are directly applicable only to annulment or recognition proceedings.[48]

Until recently, the supporters of a connection based on substantive law could rely on Art. 27 German Introductory Act to the Civil Code (repealed) arguing that German lawmakers had not incorporated the exclusion concerning arbitration agreements into Art. 1(2) Rome Convention[49] into national law.[50] However, ever since Art. 27 German Introductory Act to the Civil Code (repealed) has been replaced by the directly applicable Rome I Regulation, this argument is obsolete, as Art. 1(2) Rome I Regulation expressly excepted arbitration agreements from the regulation's scope of application. The German Federal Supreme Court has still not taken a position on the new legal situation. It remains to be seen whether the Court will apply the Rome I Regulation analogously to determine the law applicable to an arbitration agreement.[51]

Both approaches recognize an express or implied choice of law in respect of the arbitration agreement. They will also lead to the same results if, due to the absence of an express or implied choice of law, the law of the seat of arbitration is to be applied – either by virtue of s. 1059(2) German Code of Civil Procedure or Art. V(1) of the New York Convention,[52] or by virtue of the closest connection approach under Art. 28(1) German Introductory Act to the Civil Code (repealed) or Art. 4(4) Rome I Regulation applied

---

[46] Cf. *Park*, Multiple Party Actions in International Arbitration, 2009, para. 1.64.

[47] See BGH, SchiedsVZ 2011, 46, 48; BGH, NJW 2005, 3499, 3500; BGH, NJW 1964, 591, 592; OLG Hamm, SchiedsVZ 2014, 38, 42; MünchKomm/*Martiny*, op. cit., Preliminary Remarks to Art. 1 Rome I Reg, para. 91 (indirect applicability of the Rome I Reg. through application of the law applicable to the main contract).

[48] See Wolff/*Wilske*/*Fox*, op. cit., Art. II para. 228; Zöller/*Geimer*, op. cit, s. 1029, para. 17a.

[49] Convention on the Law Applicable to Contractual Obligations 1980.

[50] This way BGH, NJW 2005, 3499, 3500; *Lachmann*, op. cit., para. 268.

[51] On the possibility of analogous application: MünchKomm/*Martiny*, op. cit, Preliminary Remarks to Art. 1 Rome I Reg. para. 91 and *Martiny*. Art. 1 Rome I Reg. para. 57. For an example of an analogous application: Palandt/*Thorn*, op. cit., Art. 1 Rome I Reg. para. 11. Objecting to an analogous application of the Rome I Reg.: *Stürmer*/*Wendelstein*, IPrax 2014, 473, 475 with further references.

[52] Similarly, OLG Braunschweig, BeckRS 2014, 11052 at II.1.b)aa). See further *Kreindler*/*Schäfer*/*Wolff*, op. cit., para. 117; Reithmann/Martiny/*Hausmann*, op. cit., para. 6620; Stein/Jonas/*Schlosser*, Annex to s. 1061 para. 78; Wolff/*Wolff*, op. cit., Art. II para. 42; Zöller/*Geimer*, op. cit., s. 1029 para. 17a; Staudinger/*Magnus*, Internationales Vertragsrecht 1, revised ed. 2011, Art. 1 Rome I Reg. para. 78.

analogously.[53] However, in this respect it has to be pointed out that the German Federal Supreme Court will, if a choice of law does not exist, accessorily revert to the law of the main contract as the closest point of connection according to Art. 28(1) German Introductory Act to the Civil Code or Art. 4(4) Rome I Regulation. [54]

With regard to the fact that the parties had based the license agreement on Indian law and specified New Delhi as the seat of arbitration, the Higher Regional Court Braunschweig and the German Federal Supreme Court assumed that the parties had impliedly agreed on Indian law to be applicable to the arbitration agreement.[55] In the described circumstances, a determination of the applicable laws based on connecting factors rather than by virtue of the parties' choice of law, leads to the applicability of Indian law under all approaches previously discussed.

b) Other connecting factors pursuant to the rationale of Art. 10(2) Rome I Regulation

In respect of the inclusion of Claimant in the scope of the arbitration agreement contained in the license agreement between BIP and IPH, the Higher Regional Court Braunschweig applied the law applicable to the legal relationship that tied the claimant and IPH, the original party to the arbitration agreement.[56] In this regard, the German Federal Supreme Court had remarked that the applicable law may be determined based on alternative connecting factors, in exceptional circumstances if this appeared necessary in order to protect third parties. An advantage of this is that the parties to the arbitration agreement could otherwise dictate which legal system would apply to the question of the inclusion of a third party to the agreement to that third party's detriment.[57] In the opinion of the German Federal Supreme Court, in the case at hand there were no grounds calling for such protection of a third party which could justify determining the applicable law based on an additional connecting factor.[58]

Such an additional connecting factor is provided for in Art. 10(2) Rome I Regulation in respect of the law applicable to a contract's conclusion. If it appears from the circumstances of the individual case that it would not be reasonable to determine the effect of a party's conduct in accordance with the law determined under Art. 10(1) Rome I Regulation, such party may rely upon the law of the country of its habitual residence in order to establish that it did not consent to a contract or term. If corporate entities are involved in the conclusion of a contract, the law of the place where the respective company's head office is located is to be applied.[59]

The provision serves to protect from outside influence. The same rationale can be applied to the situation in which a party, under the law applicable to the arbitration agreement, would be subject to such agreement; in particular, if determining the law of the arbitration agreement is led by conflict of laws provisions applicable to contracts. In contrast to the approach considered by the German Federal Supreme Court leading to the application of the law governing the legal connection between the third party and one of the parties to the arbitral proceedings, applying the rationale of Art. 10(2) Rome I Regulation leads

[53] Palandt/*Thorn*, op. cit., Art. 1 Rome I Reg. para. 11.
[54] Cf. BGH, SchiedsVZ 2011, 46, 48 (law of the main contract generally marks the closest connection under art. 28 EGBGB (repealed)).
[55] BGH, SchiedsVZ 2014, 151, 152, para. 19; OLG Braunschweig, BeckRS 2014, 11052 at II.1.b)aa).
[56] OLG Braunschweig, BeckRS 2014, 11052 at II.1.b)cc)(2).
[57] BGH, SchiedsVZ 2014, 151, 153, para. 21.
[58] BGH, SchiedsVZ 2014, 151, 153, para. 21.
[59] BeckOK/*Spickhoff*, 1.02.2013, Art. 10 Rom I Reg. para. 10.

directly to the law of the state of habitual residence or the place of a company's head office, respectively.

Whilst the decisions of the Higher Regional Court Braunschweig and the German Federal Supreme Court do not contain any information on the habitual residence of L, the administrative headquarters of the claimant are located in Denmark.

c) Law applicable to corporate relationships

According to the prevailing opinion in international company law, to the extent that the interests of an affiliated company, outside shareholders, and its creditors are concerned, the law to be applied to the relationship between affiliated companies is generally governed by law applicable to such affiliated company.[60] Where there is a group with a flat structure under joint representative leadership where no company controls the other (*Gleichordnungskonzern*), the law chosen in the agreement establishing the joint representatives forming the leadership is to be applied; absent such choice of law, the applicable law has to be determined based on general conflict of laws rules applicable to such companies.[61] In this context, the Higher Regional Court Braunschweig referred to the law applicable to the Danish claimant and found Danish law to be applicable in the current case.

According to German conflict of laws rules, the law applicable to corporate entities incorporated in the EU territory, in associated European countries in which freedom of establishment is applicable, and the EEA, is the law at the place of incorporation ("incorporation theory").[62] With respect to all other corporate entities – subject to deviating international treaty regulations – the applicable law is the law of the seat of such company's head office ("real seat theory").[63] Therefore, the law applicable to the claimant company is the law at the place of its incorporation, rather than at the place its (current) administrative headquarters.[64] Provided that Claimant was incorporated in Denmark, application of this rule leads to the applicability of Danish law, since Denmark also follows the incorporation theory and thus accepts the comprehensive reference (*cf.* Art. 4(1) sentence 1 German Introductory Act to the Civil Code).[65]

d) Summary

In respect of the applicable law it can be concluded that, based on the underlying set of facts, all relevant aspects of the subjective scope of the arbitration agreement are to be assessed based on Indian law as the law governing the arbitration agreement. This is also true insofar as the binding effect of the arbitration agreement is derived from the assignor-assignee relationship between L and Claimant. The German Federal Supreme Court reverted to the underlying rationale of Art. 14(2) Rome I Regulation and Art. 33(2)

---

[60] Expressly covered in MünchKomm/*Kindler*, Bd. 11, Internationales Handels- und Gesellschaftsrecht, 5th ed. 2010, paras. 756-762.
[61] Expressly covered in MünchKomm/*Kindler*, op. cit., paras. 791-799.
[62] BeckOK/*Mäsch*, 1.05.2013, Art. 12 EGBGB para. 57.
[63] BGH, NJW-RR 2010, 1554, 1556 (Turkey); BGH, NJW 2009, 289, 290 (Switzerland); for a general view, see MünchKomm/*Kindler*, op. cit, para. 358; Palandt/*Thorn*, op. cit., Annex to Art. 12 EGBGB para. 10.
[64] Unclear OLG Braunschweig, BeckRS 2014, 11052 at II.1.b)cc)(2).
[65] Cf. EuGH – Centros, EuZW 1999, 216, 218 et seq.

German Introductory Act to the Civil Code (repealed), according to which the assignment of a contractual obligation does not affect its content.[66]

In exceptional cases, based on the underlying rationale of Art. 10(2) Rome I Regulation, the law of the place of residence of the party presumably bound by the arbitration agreement may be applied, if binding that party on the basis of the law of the arbitration agreement appears to be unreasonable.

Considering that the present case concerns an arguable extension of the arbitration agreement to Claimant irrespective of its consent but merely by virtue of its affiliation to a group of companies – particularly because of the German Federal Supreme Court's focus on the relationship between IPH and L –, Danish law, being the law applicable to the Claimant, would (likely) be the appropriate law to be applied.

3. Formal validity of the arbitration agreement

The Higher Regional Court Braunschweig found the question of the subjective scope of the arbitration agreement to be irrelevant as the arbitration agreement did not comply with Art. II(2) of the New York Convention's formal requirements, under which an arbitration agreement shall be signed by the parties or contained in a letter or telegram exchanged between them.

In this respect, the German Federal Supreme Court referred to its prior decisions on the most favorable law principle contained in Art. VII(1) of the New York Convention, on which parties may rely not only in the course of proceedings for recognition and enforcement of their award, but also when determining the validity of an arbitration agreement.[67] According to the this case law, insofar as the formal validity of an arbitration agreement is concerned, the most favorable law principle does not only refer to the provisions of the 10th Book of the German Code of Civil Procedure, which contains the German arbitration law, but to the respective national conflict of laws rules.[68]

Pursuant to Art. 11(1) Introductory Act to the Civil Code, a legal transaction is formally valid when it satisfies the formal requirements of the law which is applicable to the legal relationship forming the subject matter of the transaction, or the law of the country in which the transaction is performed. Accordingly, in the current case, the formal validity of the arbitration agreement may also arise from Indian law. If, under Indian law, Claimant is subject to the arbitration agreement based on the principles of the *group of companies doctrine*, Indian law is unlikely to, at the same time, lead to formal invalidity of the arbitration agreement.

4. Adjustment of the results under the public policy doctrine

Under Art. 6 Introductory Act to the Civil Code the results of the application of (foreign) law may be adjusted on the basis of public policy concerns.

However, the German Federal Supreme Court, in its decisions on this issue, emphasizes that applying Art. 6 Introductory Act to the Civil Code will only be considered after a

---

[66] BGH, SchiedsVZ 2014, 151, 153, paras. 22 et seq.; see also above III.2.b).
[67] BGH, SchiedsVZ 2014, 151, 154, para. 31 with reference to BGH, NJW 2005, 3499, 3500.
[68] BGH, SchiedsVZ 2014, 151, 154, para. 31. See also BGH, SchiedsVZ 2011, 46; BGH, SchiedsVZ 2011, 157; Higher Regional Court Berlin ("Kammergericht"), BeckRS 2011, 23597

comprehensive review of the conclusions reached by application of foreign law, including full consideration of all options for correction and adjustment of such conclusion which exist within that legal system.[69] Accordingly, it must firstly be determined whether Claimant and L are ultimately bound by the arbitration agreement under applicable law.[70] Only if this is indeed the case and if this result contradicts the fundamental principles of the German legal system and the concepts of justice contained therein so gravely that applying foreign law appears intolerable could an adjustment of the conclusions reached under Indian law be considered.[71]

IV. Conclusion

The question of which law should be applied in order to determine the subjective scope of an arbitration agreement cannot be resolved in general terms. A party can be bound by an arbitration agreement based on different legal concepts. Buzzwords like "the group of companies doctrine" carry the risk of preventing a comprehensive determination of the law applicable to the subjective scope of arbitration agreements.[72] Classification and applying the correct connecting factors are dependent on the precise analysis of the function of the doctrine or concept from which the binding effect of the arbitration agreement supposedly arises.

As far as a party is to be bound to an arbitration agreement on the basis of its conduct and consent, the law of the arbitration agreement will in principle decide on the legal consequences thereof. Other laws can prove important on an exceptional basis, if the scope of the arbitration agreement is extended irrespective of a party's consent due to the law prescribing such an extension.

In both cases the relevant law must first be applied. The concrete conclusion resulting from such application can potentially be adjusted. In relation to binding a party based on the law governing the arbitration agreement, an adjustment may be based on the rationale of Art. 10(2) Rome I Regulation. In all cases, the result of the application of law is subject to the public policy test under Art. 6 Introductory Act to the Civil Code.

---

[69] BGH, SchiedsVZ 2014, 151, 153, para. 28; BGH, NJW 1993, 848, 849; BeckOK/*Lorenz*, op. cit., Art. 6 EGBGB para. 10; MünchKomm/*Sonnenberger*, op. cit., Art. 6 EGBGB para. 44;
[70] BGH, SchiedsVZ 2014, 151, 153, para. 28.
[71] Cf. BGH, NJW 1991, 1418, 1420; BGH, NJW 1978, 1114, 1115; BGH, NJW 1969, 369.
[72] Also *Hanotiau*, Arb. Int'l 2011, 539, 454; *Wilske*/*Shore*/*Ahrens*, 17 Am. Rev. Int'l Arb. 2006, 73, 87.