

# Arbitration and Non-Signatory Beneficiaries

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Binding Parties Who Agreed to Nothing

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<p>Sopimuksen ulkopuolisista edunsaajista välimiesmenettelyssä on keskusteltu ulkomailla aktiivisesti, erityisesti Yhdysvalloissa, mutta aihe on Suomessa ollut harvoin esillä. Tulisiko kolmansien edunsaajien olla sidottuja yleiseen välityslausekkeeseen, joka sisältyy edun myöntävään pääsopimukseen, mikäli lauseke ei nimenomaisesti ota kantaa asiaan? Korkein oikeus käsitteli kysymystä vuoden 2013 lopulla ratkaisussaan KKO 2013:84.</p> <p>Tapauksessa kyse oli siitä, tuleeko edunsaaja katsoa sidotuksi yleiseen välityslausekkeeseen siitä huolimatta, että välimiesmenettelylain kirjallisen sopimuksen vaatimus ei täytynyt eikä edunsaaja yleensäkkään ollut sopinut mistään. Voidaanko pitää esteenä välimiesmenettelylle, että lain vaatimukset eivät lähtökohtaisesti täyty ulotettaessa menettely kolmanteen edunsaajaan?</p> <p>Korkeimman oikeuden ratkaisu päätyi sitomaan edunsaajan välityslausekkeeseen, mutta päätöksessä ei juurikaan perusteltu saavutettua lopputulosta, mikä taas on tapauksen tulevan soveltamisen kannalta ongelmallista. Tästä syystä tutkielma pyrkii avaamaan tapauksessa käsittelemättä jääneet kysymykset ja näin ollen päätyään oikeudellisesti perusteltuun lopputulokseen.</p> <p>---</p> <p>Non-signatory beneficiaries in the context of arbitration is a subject actively debated abroad, especially in the United States, but rarely discussed in Finland. Should such beneficiaries be bound to the general arbitration clause of the underlying contract in which the benefit is granted in case the clause does not specifically address the matter? That is the question resolved by the Finnish Supreme Court in late 2013 in their precedent KKO 2013:84.</p> <p>The issue in the case in question was whether the general arbitration clause should bind the non-signatory beneficiary despite the lack of a written contract – or any contract for that matter – with regard to the beneficiary, which is an essential requirement in any arbitration, as provided in the Finnish Arbitration Act. Moreover, one of the most fundamental principles of arbitration regards the agreement to arbitrate as an absolute necessity. Cases involving non-signatory beneficiaries categorically fail to fulfill these requirements, resulting in ambiguity as to how these situations are to be resolved.</p> <p>The Supreme Court decision, ultimately binding the non-signatory beneficiary, is troublesome as a precedent because it does not clearly state the rationale of its conclusion, therefore leaving its future interpreters in the dark. The thesis aims to revisit the case, address all the relevant issues that the court did not and ultimately reach a legally justifiable resolution.</p>			
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# 1 INTRODUCTION

Non-signatory issues in arbitration refer to situations where, in addition to the signatory parties of an arbitration agreement, there is another party or parties who have not signed any such agreement involved as well. It may be a question of the signatory party wanting to include the non-signatory in the arbitration proceedings, or vice versa, the non-signatory insisting on joining in on the arbitration. Such situations are often a cause of heated debate among the parties concerned because of the basic premise of arbitration: there has to be an agreement to bring the dispute to arbitration between the parties.<sup>1</sup> Typically this means that only parties who have agreed to arbitration can be included in the proceedings. As a result, including non-signatories in arbitration requires special mechanisms of law.<sup>2</sup>

Especially the particular issue of binding non-signatory third party beneficiaries to arbitration has been flying under the radar in Finland – there is very little case law, and even in the legal literature the topic has been commented on scarcely. The lack of discussion and especially case law is peculiar, seeing that the issue is not new in foreign praxis and has been acknowledged and actively commented on in foreign legal literature as well.

However, this quite specialized yet fundamental issue has finally surfaced in Finland as well. A few years ago, in 2010, a case concerning this very question was brought to a district court in the form of a shareholders' agreement and a non-signatory beneficiary who was not happy about the agreement's arbitration clause. A signatory party of the agreement, however, asserted that the beneficiary is bound to arbitration. It is the very first case in Finland to deal with this specific topic. Another Finnish Supreme Court case, KKO 2007:18, has addressed a similar issue before, although with a slightly different premise.<sup>3</sup>

The theme of the thesis tightly revolves around this case, KKO 2013:84, which went through the Court of Appeal and was only very recently decided in the Finnish Supreme Court. The ultimate question which the thesis will attempt to answer is the same one that faced the Supreme Court: is a non-signatory third party beneficiary bound to the arbitration agreement included in the underlying contract from which his right is directly derived?

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<sup>1</sup> According to Article II (1) of the New York Convention, a valid arbitration requires an "agreement in writing under which the parties undertake to submit to arbitration all or any differences".

<sup>2</sup> However, these mechanisms operate according to the basic principles of contract law. What makes them special is merely that they are designed for this type of specific situations. See *infra* Chapter 4.4.

<sup>3</sup> The cases will be discussed in detail below. See *infra* Chapter 3.

Since the Supreme Court gave a positive answer, the thesis will discuss and assess whether the decision was “right” and well-reasoned.

## **1.1 Background**

Arbitration is defined by its consensual nature – its essence is the arbitrating parties’ free will to arbitrate.<sup>4</sup> In case parties to a contract do not wish to resolve their disputes, current or future, by means of traditional litigation, they may opt out and decide to bring the issue in front of an arbitral tribunal instead.

The traditional and most basic form of arbitration typically includes two parties who have agreed in advance to arbitrate all their disputes concerning a certain business deal or relationship. However, these days business deals often include complex transactions with ties to several parties, especially so in the international environment. These types of situations also often create complex disputes with more than just two adversary parties. As the societal environment in which business is done has changed, so must the legal environment that attempts to control it. This is particularly true concerning dispute resolution because it has to be able to acknowledge these situations, adapt and function accordingly.

The aforementioned complexities may arise e.g. in multiparty arbitrations or situations including non-signatories who have not formally signed an arbitration agreement but wish to participate in the arbitration nonetheless, perhaps contrary to the will of the signatory parties. In another scenario, the parties of an arbitration agreement (or either one of them) may want to include a third, non-signatory party in the process. At first sight, such arrangements seem to contradict arbitration’s underlying principle of voluntariness. How can it be consensual if one or more parties resist? However, in many cases it can be shown that the parties’ original will was to bind the non-signatory party to the arbitration agreement, and the non-signatory’s intention was to be bound. These situations call for and are determined by case-specific evaluation, as in KKO 2013:84.

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<sup>4</sup> See Möller 1997, p. 2.

## 1.2 Theme and structure of the thesis

“Few topics have received as much attention as the extension of arbitration agreements to non-signatories. This results less from the undeniable practical significance or complexity of this issue than, as will be seen, from the fact that it touches upon some of the canons of arbitration, such as, e.g. its *consensual basis* or that the arbitration *agreement be in writing*.”<sup>5</sup> (emphasis added)

These two highlighted factors form the two supporting pillars of this thesis, the theme of which is the relationship between the signatory parties of an arbitration agreement and a non-signatory third party beneficiary. The object is to discuss and find an answer to the relatively simple question presented above: does the arbitration clause bind a non-signatory third party beneficiary whose right derives from the agreement which includes the arbitration clause, and if so, on what grounds? The question may be simple, but the answer is anything but. This is demonstrated by the fact that the District Court decided the case one way, the Court of Appeal the other way and the Supreme Court eventually maintained the decision of the Court of Appeal. However, all of the courts (even the Court of Appeal and the Supreme Court, despite the conclusion being the same) reached their decisions on different grounds. In other words, the question is multifaceted and indeed topical.

Why is the question of binding non-signatories relevant? In many situations, such as cases of corporate veil-piercing and alter ego which will be discussed below, the question directly relates to making all accountable parties liable even if they are not formally parties to any agreement. As for a third party beneficiary, the focus of this study, it is a question of some very fundamental principles. Do the formal requirements set out in the law for arbitration agreements and the consensual nature of arbitration override the basic principle of freedom of contract?<sup>6</sup> Do these requirements and principles even conflict with each other? Are the formal requirements an absolute necessity?

The thesis will approach the issue by first introducing the essential legal framework used and needed in further discussion. Despite the national nature of the Supreme Court case at hand, the topic in general touches international spheres, which is why the required fundamentals are presented in Chapter 2. Chapter 3 displays and examines in detail the

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<sup>5</sup> See Stucki 2006, p. 1.

<sup>6</sup> As in the freedom of parties to grant rights conditionally.



Supreme Court case KKO 2013:84 along with the preceding District Court and Court of Appeal cases. In addition, brief analysis of the cases and background for the final deliberations is presented. Fundamental elements of arbitration agreements which are needed in the research are discussed in Chapter 4. Topics such as formation of an arbitration agreement, its consensual nature, principles related to arbitration as well as parties to the arbitration agreement will be discussed. A particularly essential topic is the relationship between the formal requirements of an arbitration agreement and the means of becoming bound by or adopting the agreement without such formalities. The question of binding a non-signatory to an arbitration agreement borders and may include multiparty arbitration issues. These issues, however, even though fascinating and equally complex, will have to be left outside the scope of the study or only mentioned briefly.

Chapter 5 will begin the actual assessment of the case at hand and the application of alternative argumentation. The thesis, displeased with the reasoning of the courts, will attempt to study the subject in depth and reach a final conclusion with a more thorough rationale and a solid legal foundation. The chapter discusses the requirement of written arbitration agreement and the conditional granting of a benefit. Chapter 6 directly continues the train of thought of the previous one, placing emphasis on the consent and intent of the parties involved. After first discussing the basis for evaluation and interpretation, the thesis will apply these rules to the case at hand. Eventually, the final conclusions as well as analysis and comparison with the Supreme Court decision will be presented in Chapter 7, which will also address potential adjustments with regard to the current situation concerning the research topic.

### **1.3 Research questions and methodology**

The thesis in its entirety boils down to the following four research questions, which will be discussed and answered chronologically.

- 1) Does the Finnish Arbitration Act's requirement of written arbitration agreement create an absolute obstacle to binding non-signatories to arbitration?<sup>7</sup>

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<sup>7</sup> The Supreme Court decided in KKO 2013:84 that the formal requirement is not an absolute obstacle. However, the Supreme Court did not present any reasoning for its view which is why the question will be discussed in the thesis.

- 2) Can the arbitration agreement (i.e. the obligation to arbitrate) be regarded to constitute an accessory of the right granted to the non-signatory beneficiary? In other words, can the right be made conditional?
- 3) What significance does the signatory parties' intention in making the agreement carry? In addition, does the non-signatory beneficiary's intention matter?
- 4) Should the non-signatory in KKO 2013:84 be bound to arbitration, and if so, what are the relevant grounds?

As stated above, the premise and phrasing of the research questions is relatively simple and straightforward. The ultimate question the thesis attempts to answer is a typical “yes or no, and why?” However, the answer may not be as one-dimensional. The legal sources used in the thesis – legislation, case law, legal principles and literature – are often in conflict with each other. Juridical opinions of scholars fluctuate with regard to the question in its entirety as well as the smaller fragments used in the evaluation, such as the concept of consent and its role in the process.

The nature of the thesis is practical in essence due to its frequency and major effect in practice (excluding Finland, at least for the moment). However, despite its practical impact and the expediency considerations used in the deliberations, the topic is ultimately theoretical and, also due to the lack of empirical data, the research is essentially legal dogmatic. The thesis balances between these concepts employing the typical means of dogmatic research, with the fundamentals of the research subject being a formation of norms as well as practices which the thesis weighs and systematizes and ultimately interprets,<sup>8</sup> yet acknowledging the inadequacy of the theoretical basis and the gaps in the integral research substance. The Finnish Arbitration Act is mostly silent on the topic and essentially unfit to resolve the question, which brings a strong *de lege ferenda* notion to the thesis in its attempt to observe and comment on the issue, how it was decided in the courts of law and finally present and improved deduction.<sup>9</sup>

In addition, another focal methodological premise of the thesis is comparative law. Justified below in the next chapter, the research surveys how the issue is managed in the

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<sup>8</sup> See Aarnio 1978, pp. 52-53; Siltala 2003, pp. 137-138.

<sup>9</sup> See Aarnio 1978, pp. 55-56.

legal praxis of countries in which it has surfaced more often. This comparison is done on a micro level as it only focuses on a specific and limited subject.<sup>10</sup> As a conscious choice, the thesis has chosen to focus especially on common law countries due to the system's emphasis on case law, its capability to remould itself according to timely needs and hence its ability to address the issue on a more flexible basis.

Finally, the thesis employs both horizontal comparison between national legislations as well as vertical comparison with respect to both international law and EU (soft) law.<sup>11</sup> Due to the attention to legal literature and influences thereof, the concept of transnational law, which ignores national borders and legal systems, surfaces in the course of the study.<sup>12</sup> While the thesis does not intrinsically embrace the attitude typical among the supporters of transnational law, it recognizes its (partial) suitability with regard to international (as well as national) arbitration arising from arbitration's autonomous nature. Justifications for these choices are found below.

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<sup>10</sup> See Husa 2013, pp. 126-127.

<sup>11</sup> See *ibid.* pp. 137-138.

<sup>12</sup> See *ibid.* pp. 138-139.

## 2 LEGAL FRAMEWORK

### 2.1 Introduction

“The practice of resolving disputes by international commercial arbitration only works because it is held in place by a complex system of national laws and international treaties.”<sup>13</sup>

As described by the quote above, the legal framework of international commercial arbitration is diverse. It is governed and affected by multiple sets of rules: international conventions, national laws and institutional rules. Enforcement and recognition of international arbitration agreements and awards is solely based on the system built on these conventions and laws.<sup>14</sup> Without such uniform codes accepted internationally, there would be a myriad of national arbitration awards and foreign courts hesitant to enforce them, which has sometimes been the situation before the current regime in international arbitration.<sup>15</sup> However, these widely accepted rules create the frame within which the parties of arbitration may operate and decide on the process on a more detailed level.

This chapter will introduce the legal framework which contemporary international commercial arbitration is built on, beginning with the New York Convention. The chapter will then introduce the UNCITRAL Model Law and national laws, followed by a brief introduction on institutional arbitration rules. All of these sources of law affect international arbitration agreements accordingly with the choices of law made by the parties. However, due to the broadness of the subject of choice of law and its clarity in the Supreme Court case at hand, the scope of this introduction on sources and choice of law in international arbitration will have to be limited. The purpose is to present where the rules and principles used in this thesis originate from – in other words, to provide the basic tools needed for the following analysis of the research question.<sup>16</sup>

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<sup>13</sup> See Redfern - Hunter 2009, p. 1.

<sup>14</sup> See Born 2009, p. 90.

<sup>15</sup> See Born 2009, p. 64.

<sup>16</sup> Choice of law and its effects in international commercial arbitration agreements is the subject of myriad of legal literature. For further analysis on the subject, see e.g. Hobér 2011, pp. 39-78; Born 2009, pp. 409-561; Redfern-Hunter 2009, pp. 163-239; Lew 2003, pp. 99-127.

## 2.2 Use of legal sources

The study will contemplate the topic from the perspectives of both contract law and arbitration legislation. However, since the issue, as will be explained below, boils down to only two sections of the Finnish Arbitration Act and their interpretation, the solutions will have to be found somewhere other than the arbitration law. General (applicable) legal principles directed and endorsed by societal practices may be used in support of administration of justice<sup>17</sup>, which is why they are weighed and valued with regard to expediency considerations and employed in the deliberations below. In addition to Finnish legislation, e.g. contract law, the study will look into arbitration laws of other countries as well as some of the most well-known arbitration institutions' rules and international conventions. Furthermore, since there is not much legal literature or research on the subject in Finland, the study will look for guidelines and tendencies in foreign legal principles and literature, where the theme has been discussed extensively.

Since the subject of this thesis concerns a national arbitration case in Finland under Finnish law, one could ask why international legal framework is introduced. The reason is that even though the aforementioned court decisions are based on Finnish sources of law, in the absence of applicable Finnish regulation or case law or to supplement it, it is facilitative and often necessary to look for help from foreign sources.<sup>18</sup> These sources, such as foreign laws and court decisions, may often be heavily influenced by rules and customs of international arbitration, which is why the fundamentals of such rules are presented briefly. Furthermore, such introduction is useful for the purposes of legal comparison. Hence, international arbitration agreements are used as tools of comparison and guidance.

The thesis will also rely in its argumentation on transnational harmonization undertakings, such as the UNIDROIT Principles of International Commercial Contracts (2010)<sup>19</sup> and the Principles of European Contract Law (2002)<sup>20</sup>. The principles, which were developed to support and supplement the general rules of contract law in international commercial environment as well as domestic law in some instances<sup>21</sup>, are used especially in the later

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<sup>17</sup> See Siltala 2003, pp. 138-139

<sup>18</sup> See Hemmo 2007a, pp. 43-48.

<sup>19</sup> See the UNIDROIT Principles of International Commercial Contracts (2010), available online at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

<sup>20</sup> See The Principles of European Contract Law (Parts I and II revised 1998, Part III 2002), available online at <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/>.

<sup>21</sup> See Norros 2007, pp. 25-26.

parts of the thesis which examine the application of certain principles of contract interpretation in KKO 2013:84. The European and (especially) UNIDROIT principles have achieved a relatively significant position in international commercial arbitration<sup>22</sup>, which is why leaning on them is justifiable in the absence of applicable domestic rules as well using them as a supporting source.<sup>23</sup> Moreover, despite their soft law nature, the principles may be applied “by virtue of their persuasive value”<sup>24</sup> as well as a direct or supplementing source or as a guide with regard to *lex mercatoria*.<sup>25</sup>

Moreover, the active use of foreign sources of law, e.g. legal literature, is based on the development of arbitration in an international environment. Therefore, using foreign sources of law is advisable in seeking directions to support the decision in KKO 2013:84. Although some commentators regard arbitration as an area of law or judicial process that may be detached from national legal regimes entirely,<sup>26</sup> or that national law should only be taken into account when national interests are implicated, the thesis will not go as far as to suggest relying completely on international or transnational norms. Although supportive to the underlying notion which emphasizes arbitration’s international connections, the complete transformation to a transnational system would in the author’s view present significant issues in practice, e.g. in questions of finding a general consensus as well as enforcement of foreign awards. Other typical downsides of such delocalization include denying the parties’ expectations, disregard for public or private interests and loss of trustworthiness of arbitration as a process.<sup>27</sup>

### 2.3 New York Convention

Preceded by the 1923 Geneva Protocol on Arbitration Clauses in Commercial Matters (the “Geneva Protocol”) and the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards, the 1958 United Nations Convention on the Recognition and Enforcement of

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<sup>22</sup> See Hemmo 2007a, p. 46.

<sup>23</sup> See *ibid.* p. 583.

<sup>24</sup> See Bonell 2004, p. 6.

<sup>25</sup> See Norros 2007, p. 38.

<sup>26</sup> See e.g. Frick 2001, p. 276; Park 2012, pp. 553-554; Hook 2011, pp. 175-176, citing e.g. Sté PT Putrabali Adyamulia v. Est Epices (French Cour de Cassation, June 29, 2007); Whytock 2008, pp. 455-458. See also Mayer 2012, p.833 quoting the arbitral tribunal in *Dallah Real Estate & Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, (2008) EWHC 1901: the issue shall be determined “by reference to those transnational general principles and usages which reflect the fundamental requirement of justice in international trade and the concept of good faith in business”.

<sup>27</sup> See Park 2012, pp. 554-555.

Foreign Arbitral Awards (the New York Convention) is the most significant convention regulating international arbitration. It originated from the need to create a uniform system under which the enforcement and recognition of international arbitration agreements and awards would work systematically.<sup>28</sup> It has been ratified by 149 countries<sup>29</sup> which makes it the most important foundation for the recognition and enforcement of arbitration awards and the cornerstone of international arbitration in general.<sup>30</sup> This is because any international arbitration agreement or award is only as effective and valuable as the possibility to have it enforced. The New York Convention has created the means for global recognition and enforcement.

In addition to its contribution to agreement and award enforcement, the Convention also sets the standards for the written form of arbitration agreements:

“Each Contracting State shall recognize an *agreement in writing* under which the parties undertake to submit to arbitration all or any differences [...]”<sup>31</sup>  
(emphasis added)

Moreover, the duty of national courts to refer the disputing parties to arbitration in case of a valid arbitration agreement is derived from the Convention.<sup>32</sup> These requirements, as the entity of the Convention in general, are given effect in practice through national legislation.<sup>33</sup> However, although these basic rules and principles are defined in the Convention, implementation of its provisions is at the discretion of the contracting states. This demonstrates the constitutional nature of the Convention.<sup>34</sup> Apart from relatively few provisions, such as Article II (1), it does not provide exact rules which the contracting states should adopt. Instead, it presents the broad framework of rules within which states and national courts are free to operate. This is reflected e.g. in the provisions of the Convention which subjugate the validity of arbitration agreements to national legislation.<sup>35</sup>

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<sup>28</sup> See Born 2009, p. 96.

<sup>29</sup> For a complete list of the countries that have ratified the New York Convention, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited 31.10.2013).

<sup>30</sup> See Born 2009, p. 95.

<sup>31</sup> Article II (1) of the New York Convention. The cause and effect of the written requirement will be discussed more thoroughly in chapter 4.3.

<sup>32</sup> See Article II (3) of the New York Convention.

<sup>33</sup> See Born 2009, pp. 99-100.

<sup>34</sup> *Ibid.* p. 101.

<sup>35</sup> See Article V (1) (a) of the New York Convention.

## 2.4 The UNCITRAL Model Law and national legislation

The UNCITRAL Model Law on International Commercial Arbitration (Model Law) is considered to be the most important legal tool<sup>36</sup> in international commercial arbitration.<sup>37</sup> It was designed by The United Nations Commission on International Trade Law (UNCITRAL) to “assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration”.<sup>38</sup> The need to create the Model Law arose from defects and incompatibilities of national arbitration laws (or the complete lack thereof) with regard to international arbitration. National laws were considered outdated and suitable only for domestic arbitrations, as well as inconsistent with each other.<sup>39</sup>

The Model Law has been adopted in national legislation in some 60 countries<sup>40</sup> and used as a model in several others. Even though Finland has not adopted the Model Law as such, it has been used as a model when enacting the Finnish Arbitration Act.<sup>41</sup>

The Model Law includes 36 articles which address the arbitration process as a whole, regulating the arbitration agreement, the arbitral tribunal, arbitration proceedings as well as recognition of awards among other things. With regard to this study, the most important part of the Model Law is Article 7 (Option I) which provides the definition of arbitration agreement and the rules for its formation, including the requirement of the written agreement.<sup>42</sup> However, the Model Law, revised in 2006, recognizes the changing environment in international business and also provides another option for the definition of an arbitration agreement (Option II); an option which disregards the requirement of written form.<sup>43</sup>

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<sup>36</sup> As opposed to the New York Convention as the most important convention regarding international arbitration.

<sup>37</sup> See Born 2009, p. 115.

<sup>38</sup> UNCITRAL Model Law home page, preface, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) (last visited 5.11.2013).

<sup>39</sup> See Explanatory note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, UNCITRAL Model Law, pp. 24-25.

<sup>40</sup> For a complete list of the countries that have adopted the Model Law in their national legislation, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited 5.11.2013).

<sup>41</sup> See HE 202/1991; Möller 1997, p. 10.

<sup>42</sup> Article 7 (2) (Option I) of the UNCITRAL Model Law. Discussed further below, see *infra* Chapter 4.3.

<sup>43</sup> Article 7 (Option II) of the UNCITRAL Model Law.



## 2.5 Institutional rules

Arbitration may be divided into two categories: institutional arbitration and *ad hoc* arbitration. In the latter instance, the parties agree in their arbitration clause that the rules that govern the arbitration process are those decided by the parties or the arbitral tribunal.<sup>44</sup> The parties may choose to incorporate their own set of procedural rules or pick from a category of pre-existing ones.<sup>45</sup> However, in addition to the rules chosen by the parties, the process is influenced by the mandatory rules in the *lex arbitri*, the procedural law of the seat of arbitration.<sup>46</sup> Moreover, in *ad hoc* arbitration, the arbitral tribunal is not under the supervision of an institution and the process is generally free of form.

In the case of institutional arbitration, the parties elect in the arbitration agreement the institution under the rules of which the arbitration process will be conducted.<sup>47</sup> The arbitral institution will also supervise the process. It has become more and more frequent that instead of using their own discretion to organize the arbitration process and the rules thereof, parties choose the package tour of arbitration – an institution with certain rules that govern the entire process from the choosing of the arbitrators to the award making process.<sup>48</sup> On the one hand, such institutionalization may lead to a more efficient process where everything is taken care of, but on the other hand it is said to lead to “judicialization” of arbitration, meaning that the autonomy of the parties diminishes and makes way to a process that resembles litigation.<sup>49</sup> However, this development has made the arbitration institutions of different countries compete with each other, which naturally encourages improvement of the process as well.

The most significant arbitration institutions are the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), and the Singapore International Arbitration Center (SIAC).<sup>50</sup> In Finland, institutional arbitration is organized by the Finland Chamber of Commerce (FCC).

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<sup>44</sup> See Redfern-Hunter 2009, p. 52; Born 2009, p. 149; Lew 2003, pp. 33-34.

<sup>45</sup> See Born 2009, pp. 149-150.

<sup>46</sup> See Redfern-Hunter 2009, p. 52. Which law eventually is the *lex arbitri* is dependent on several factors and has been discussed thoroughly in legal literature. However, due to extent of the subject it will be limited outside the scope of this work.

<sup>47</sup> See e.g. Lew 2003, pp. 35-36.

<sup>48</sup> See Gaillard-Savage 1999, p. 33.

<sup>49</sup> See *ibid.*

<sup>50</sup> See Born 2009, p. 148.

### **3 KKO 2013:84 IN CONTEXT**

As mentioned above, before ending up in the Finnish Supreme Court, the case this thesis is based on was heard in a District court<sup>51</sup> and a Court of Appeal<sup>52</sup>. The courts took the opposite approaches to the issue, the District Court choosing the formalistic point of view, emphasizing the letter of the law. The Court of Appeal decided the case to the contrary and chose to give more value to the intention of the signatory parties.

Next, the thesis will introduce the background of the case, followed by discussion of the decisions of the District Court and the Court of Appeal. The decisions will be examined in order to determine what grounds and arguments they are based on. Lastly, the Supreme Court decision will be examined and discussed.<sup>53</sup>

#### **3.1 Background**

The starting point of the case is a shareholders' agreement concerning a company called MAK-Tekniikka Oy (A). Another company, Jakaja Oy (B) entered into the shareholders' agreement with A. In addition to the typical provisions concerning the contracting parties' rights and duties, the agreement contained a clause according to which a third party, Mr. Onnela (C), had the right to acquire the shares owned by B in company A for a fixed price within a month's time, starting on 1 January 2008. In other words, C was a non-signatory third party beneficiary with a redemption right in relation to B. Furthermore, the agreement included an arbitration clause under which all disagreements arising out of the agreement shall be solved in arbitration. The arbitration clause was drafted in a general manner and did not specify any parties.

Despite C's redemption right, B sold the shares in question to another outside party even though C had made a claim for redemption of the shares. Therefore, C filed a claim in the District Court of Satakunta, alleging a breach of the shareholders' agreement and his rights under the agreement.

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<sup>51</sup> District Court of Satakunta, L 10/5022.

<sup>52</sup> The Court of Appeal of Vaasa, S 10/1479.

<sup>53</sup> The decisions of all instances are summarized in the Supreme Court decision, available online at <http://www.kko.fi/63703.htm>. However, the thesis uses the decisions in their entirety as a source.

B replied to the claim, asserting as a procedural objection that C could not bring the case to a court but must commence arbitration proceedings instead. B argued that C, whose right of redemption directly derived from the shareholders' agreement, was bound to the incorporated arbitration agreement as well. According to B, C as a third party could not be granted a better right than what was granted to A and B. In this case, the better right meant the right to choose the forum, court or arbitration, where to file his claim. Therefore, the District Court lacked jurisdiction. In addition, B referred to section 4 of the Finnish Arbitration Act, under which "arbitration clauses in wills, deeds of gift, bills of lading or similar documents, in the bylaws of an association, of a foundation, of a limited liability company or of another company or corporate entity and by which the parties or the person against whom a claim is made are bound, shall have the same effect as arbitration agreements."<sup>54</sup> B claimed that granting the redemption right to C in the shareholders' agreement was a unilateral stipulation similar to the stipulations mentioned in section 4 of the Finnish Arbitration Act, and therefore the formal requirements of an arbitration agreement were fulfilled.

C on the other hand argued that he was not bound by the arbitration clause included in the underlying agreement. C referred to section 3 of the Finnish Arbitration Act, under which an arbitration agreement must be made in writing. According to C, the fact that he had not signed the shareholders' agreement but was merely a third party beneficiary meant that he was not bound by the arbitration agreement. Furthermore, C stated that in case A and B had wanted to include C in the arbitration clause, they would have had the option to include such provision in the agreement. C also claimed that had it been A and B's intention, they would have included such provision. It is also noteworthy to point out C's argument that even if A and B had intended to include C, their mere intention was not enough to create such binding obligation.

### **3.2 District Court of Satakunta**

The District Court of Satakunta as the court of first instance emphasized the fact that C was not a party to the shareholders' agreement and had not signed the agreement. The District Court interpreted section 3 of the Finnish Arbitration Act narrowly and underlined the

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<sup>54</sup> Section 4 of the Finnish Arbitration Act (translation, see Paulsson 1984, Annex I of the Finland Chapter, p. 1).

letter of the law, requiring that an express written consent be made by C in order for him to be bound by the arbitration clause. In addition, the District Court supported this sentiment by noting that the contracting parties would have had the possibility to bind C by including a provision expressly stating so. In conclusion, the District Court found that C was not bound by the arbitration clause.

### **3.3 The Court of Appeal of Vaasa**

The Court of Appeal began by referring to both section 4 of the Finnish Arbitration Act and the District Court ruling, stating that an arbitration agreement may bind a non-signatory third party. However, it concluded that in this case, section 4 of the Finnish Arbitration Act did not apply because the shareholders' agreement in question was not comparable to the documents of section 4.

The Court of Appeal also referred to the Supreme Court precedent KKO 2007:18, in which the Supreme Court decided on a dispute concerning a non-signatory beneficiary's right of first refusal. However, the case was decisively different because the arbitration agreement in question expressly stated that all disputes arising in connection with the right of first refusal shall be settled in arbitration, whereas in the case at hand the arbitration clause is a general one with no such specific stipulations.

The District Court in its decision settled for examining whether the formal requirements of the arbitration agreement were fulfilled, whereas the Court of Appeal took a different approach to the issue. It reasoned that the case was not about A and B creating obligations to a non-signatory party, which, plainly put, is not possible according to the fundamentals of contract law.<sup>55</sup> It stated that even though the shareholders' agreement was not binding on C, the signatory parties had the right to freely determine the conditions under which they were bound in relation to C – in other words, the terms which C had to accept in order to be able to invoke his redemption right. The Court of Appeal found that despite the fact that A and B failed to mention their purpose of binding C in the arbitration clause, the wording and content of the agreement as a whole indicated that binding him as well was in fact their purpose. This way the Court of Appeal dismissed the District Court's position that an express written statement binding C had to be made.

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<sup>55</sup> See Hemmo 2007c, pp. 58-59.

The Court of Appeal also noted that, since the shareholders' agreement from which C's redemption right was derived stated that all the disputes arising from it must be settled in arbitration and C based his claim directly and exclusively on a breach of this agreement, C must also be bound by the arbitration clause.

### **3.4 The Supreme Court**

The two court decisions above set the background for the analysis of the Supreme Court. The first question to be considered, probably the most pivotal concerning the end result, was whether the District Court was wrong in concluding that section 3 of the Finnish Arbitration Act creates a peremptory obstacle to extending the arbitration clause to non-signatories. The Court of Appeal seemed to think so, but in its reasoning it failed to mention on what grounds exactly the requirement of written agreement was bypassed.

In its decision KKO 2013:84, released on 13 November 2013, the Supreme Court first went through the factual background of the case, then moving to state the applicable provisions of law, sections 2, 3, 4 and 5 of the Finnish Arbitration Act. The court also took notice on the aforementioned precedent KKO 2007:18 as well as KKO 1990:116, which related to ambiguity of the arbitration clause and the fact that the claim was not based on a breach of the underlying agreement. As for KKO 2007:18, the court underlined that the dispute and claim in question were based on the underlying agreement, which contained the arbitration clause, and its interpretation.

In KKO 2013:84, the Supreme Court refers to a number of facts which support the view that the non-signatory beneficiary C would not be bound to arbitration. First of all, C was not a party of the underlying agreement containing the arbitration clause. Secondly, the court plainly stated that C had not made a written arbitration agreement as required by section 3 of the Finnish Arbitration Act. Additionally, the court mentioned that, accordingly with the decisions of the District Court and the Court of Appeal, section 4 of the Finnish Arbitration Act was not applicable in this case. Neither had C become a party to the arbitration agreement as the assignee or directly under the law.

All of these factors, as the Supreme Court directly stated, would seem to point to the conclusion that C was not bound by the arbitration agreement. However, the court decided to rely on other factors instead.

The fact that C's claim directly derived from the shareholders' agreement between A and B was given great significance. The Supreme Court stated that because C's claim for damages was based on a breach of the underlying shareholders' agreement, resolving the case "calls for application and interpretation of the underlying agreement and the right to purchase shares contained therein". Due to this and the fact that the dispute arose from the shareholders' agreement, which was within the scope of the arbitration agreement, the court concluded that the dispute must be settled in arbitration.

### **3.5 Brief analysis**

Regardless of being the "right" decision in the author's opinion, the decision of the Supreme Court is peculiar and problematic. First of all, the dismissal without further explanation of the factors supporting the opposite conclusion (C not being bound) is interesting, to say the least. The court clearly had the view that the absolute formal requirement of section 3 of the Finnish Arbitration Act is no longer absolute nor as essential as it has been before. However, the fact that no further grounds or explanation for this view was presented suggests that the Supreme Court took a shortcut in its construction of the decision. After all, it was the very reason why the District Court dismissed the case in the first place.

Secondly, the Court of Appeal's rationale for binding C to arbitration was based on the signatory parties' power to grant the non-signatory beneficiary's right conditionally. This view was based on the freedom of contract. However, the fact that the Supreme Court gave no thought (or at least no mention) to the reasoning of the Court of Appeal is peculiar and leaves open the question whether such conditional granting of rights was valid with regard to the arbitration clause (or vice versa).

Moreover, in addition to the requirement of written form, the Supreme Court's decision in general failed to mention any grounds for dismissing the facts presented by the Supreme Court itself which supported not extending the arbitration clause to bind C. Neither did the court present the logic behind binding a non-signatory (in particular) to the arbitration, at least when it comes to the fundamental requirement of agreement and consent. No mention was given to the intentions of the parties either. Instead, the Supreme Court's decision seems to present a new rule of interpretation: in case resolving a dispute necessitates interpretation of an agreement which contains a valid (in relation to the signatory parties –

obviously the validity with regard to non-signatories carries no significance) arbitration clause, the dispute must be settled in arbitration regardless of whether the claimant is a party to that agreement or not.

There are certain substantial difficulties to this new point of view and the rule of interpretation it offers (or, more likely, imposes). The lack of reasoning to support it as well as the difficulty in its application due to that exact reason makes it remarkably dubious for any administrator of justice to use, be it a court or an arbitral tribunal. Directly applied to practice, the rule would bypass the subjective dimension of arbitration agreements and their relation to outside parties which has traditionally played a major role in such considerations. However, this subject will be discussed more thoroughly in Chapter 7 along with conclusions. It is necessary to first go through the alternative way of viewing the case and only afterwards juxtapose the construction of the case and the method of interpretation with the Supreme Court decision.

The thesis will next turn to alternative ways of resolving the issue decided by the Supreme Court. It will first discuss general rules and principles concerning arbitration agreements in order to set the background for interpretation of the arbitration agreement in question. After the basic elements of arbitration agreements have been established, it will move on to apply these rules and principles to the case at hand, after which the conclusion will be compared with the Supreme Court decision. However, the precedent will be kept on the background the whole time as a tool of comparison.

## 4 ARBITRATION AGREEMENT

In order to discuss whether a particular arbitration agreement is valid and binding in relation to a non-signatory beneficiary, it must first be established what is typically required from an arbitration agreement. This chapter discusses the requirements of getting bound to arbitration: arbitration agreements in general, their formation, validity and scope. Special attention will be paid to the requirement of written form which is in the heart of the thesis. It is a necessity enacted in international conventions and most national laws, but is it absolute or can it be bypassed by navigating with interpretation of these laws and contracts? Is the requirement meant to govern matters with regard to non-signatories in the first place?

Moreover, the chapter will address the subject of parties to arbitration. There are typically only two parties involved, but as explained above, complex (or not) business deals nowadays may often include several parties, e.g. in the form of multiple subcontractors. Furthermore, even though the signature of the parties of a contract subjecting disputes to arbitration is often considered an absolute prerequisite and premise of arbitration proceedings, binding the signatory parties only<sup>56</sup>, it is also generally accepted that non-signatories may be bound to arbitration as well without any such signature.<sup>57</sup> The aforementioned “special mechanisms of law”, used to determine whether such third parties are bound or not, are in fact not that special but result from general principles of contract law. However, due to the nature of arbitration as a surrogate of litigation, special considerations are needed when making such determinations.

### 4.1 Overview of arbitration agreements

The Finnish Arbitration Act indirectly provides the definition of arbitration agreement in its section 2:

“Any dispute in a civil or commercial matter which can be settled by agreement between the parties may be referred for final decision by one or more arbitrators. It may also be agreed that such disputes, which in the future arise from a particular legal relationship specified in the agreement, shall be

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<sup>56</sup> See Born 2009, p. 1133.

<sup>57</sup> See e.g. *Ibid.*, p. 1133, 1137; Lew 2003, pp. 146-147, Gaillard-Savage 1999, pp. 280-281.



finally decided by one or more arbitrators, unless otherwise provided in statutory law.”<sup>58</sup>

The provision makes the distinction between two types of arbitration agreements: arbitration clauses and submission agreements. The former is defined as an agreement to subject all *future* disputes related to the underlying contract to arbitration, whereas submission agreements are made when a dispute between the parties has already arisen. Submission agreements and their formation may be significantly different from that of arbitration clauses because it is likely there are hostilities between the parties (as the dispute already exists), the nature and scope of the dispute is already known to them and they might have conflicting interests in choosing the appropriate forum (arbitration in relation to litigation) or the timeliness required (one party may want to delay the process for as long as possible).<sup>59</sup> However, in KKO 2013:84 the agreement was in the form of an arbitration clause, concerning future disputes. Therefore, submission agreements will be delimited and the thesis will concentrate on discussing arbitration clauses only (although naturally both types of agreements are sometimes congruent).

As stated above, Finland has not adopted the UNCITRAL Model Law in its national legislation<sup>60</sup>, but it was used as a model when enacting the revision of the Finnish Arbitration Act in 1991.<sup>61</sup> In addition to the Model Law, the provisions of the New York Convention were used as well, especially concerning the definition and the requirement of agreement in writing when enacting the law.<sup>62</sup>

As stated in the New York Convention:

“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”<sup>63</sup>

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<sup>58</sup> See Section 2 of the Finnish Arbitration Act (translation, see Paulsson 1984, Annex I of the Finland Chapter, p. 1).

<sup>59</sup> See Redfern-Hunter 2009, p. 121.

<sup>60</sup> See *supra* note 40.

<sup>61</sup> See HE 202/1991.

<sup>62</sup> See *Ibid.*

<sup>63</sup> See Article II (1) of the New York Convention.

The UNCITRAL Model Law provides a definition of arbitration agreement almost identical to the one above.<sup>64</sup>

As may be distinguished from the definition, there are certain substantial characteristics to arbitration agreements in addition to the written form and the separation of arbitration clauses and submission agreements. First of all, a defined legal relationship between the parties is necessary. However, it does not have to be contractual, as, for instance, tortious liability.<sup>65</sup> Moreover, it may be real or implied<sup>66</sup> – a fact which is important in the case KKO 2013:84 due to the lack of any such original contractual relationship between the signatories and the non-signatory party.

Moreover, the subject matter of the dispute must be “capable of settlement by arbitration”. This requirement refers to the substantive validity of the agreement. It is similar and may be confused with the non-arbitrability doctrine. On the basis of the former, an arbitration agreement may be challenged e.g. by invoking fraud or duress or other grounds of contract law.<sup>67</sup> Non-arbitrability refers to situations where the subject matter of the dispute belongs to a category of issues which are considered to be non-arbitrable, i.e. specific reasons dictate such disputes to be brought to normal litigation.<sup>68</sup> However, non-arbitrability relates to the nullity of arbitration awards, and therefore does not concern the thesis and will be left out of the scope of this work.<sup>69</sup>

Finally, arbitration agreements are almost universally (including in Finland) considered to be “separable” from the underlying agreement.<sup>70</sup>

“The arbitral clause is autonomous and juridically independent from the main contract in which it is contained”<sup>71</sup>

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<sup>64</sup> See Article 7 of the UNCITRAL Model Law.

<sup>65</sup> See Redfern-Hunter 2009, p. 93.

<sup>66</sup> See *Ibid.*

<sup>67</sup> See Born 2009, p. 705.

<sup>68</sup> See Lew 2003, p. 129-130; Redfern-Hunter 2009, p. 94-95.

<sup>69</sup> For further reading on the subject of arbitrability, see e.g. Mistelis-Brekoulakis 2009.

<sup>70</sup> See Gaillard-Savage 1999, p. 197; Möller 1997, p. 28; see also Born 2009, p. 312; Kurkela-Uoti 1995, p. 28.

<sup>71</sup> See Born 2009, p. 312, referring to Final Award in ICC Case No. 8938, XXIVa Y.B. Comm. Arb. 174, 176 (1999).

The separability doctrine, also referred to as autonomy of the agreement, defines the independent nature of the arbitration agreement with regard to the underlying agreement in which the arbitration clause is included.<sup>72</sup> The doctrine has been adopted universally, including in Finland.<sup>73</sup> According to the doctrine, even if the underlying “main” contract is invalid, it does not result in the invalidity of the arbitration agreement. The purpose of the separability doctrine is to ensure that the purpose of the parties to bring all disputes to arbitration is secured, and mistakes such as those leading to formal invalidity of the underlying agreement do not create an obstacle to arbitration.<sup>74</sup> Separability also provides for the basis of the arbitrators’ competence to rule on their own jurisdiction.<sup>75</sup> Moreover, the question of separability may arise when contemplating party consent. It is possible that a court or an arbitral tribunal concludes that a party has given assent to the underlying agreement but has not assented to the arbitration agreement.<sup>76</sup>

## 4.2 Scope of the agreement

“Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes--but only those disputes--that the parties have agreed to submit to arbitration.”<sup>77</sup>

Seeing how arbitration is first and foremost a tool of consensual nature established and governed by the arbitration agreement, parties are able to agree on a myriad of things. Due to this variety of options and the “tabula rasa” before the parties, it is equally important that, in addition to the agreement itself, the parties agree on the limits of the agreement. These limits constitute the scope of the agreement, and to be able to bring the dispute to arbitration, it has to fall within this scope.<sup>78</sup> The issue of scope also often raises questions

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<sup>72</sup> See Redfern-Hunter 2009, p. 117.

<sup>73</sup> See Möller 1997, pp. 28-29; see also KKO 1988:55, KKO 1996:61

<sup>74</sup> See Redfern-Hunter 2009, p. 117.

<sup>75</sup> See Koulu 2008, p.72; see also *infra* note 79.

<sup>76</sup> See Born 2009, p. 662; Samuel-Currat 1989, p. 174.

<sup>77</sup> See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

<sup>78</sup> See Born 2019, pp. 39-40; Redfern-Hunter 2009, pp. 106-107.

concerning competence-competence<sup>79</sup> and choice of law, and is often invoked alongside with questions related to the existence, validity and legality of the arbitration agreement.<sup>80</sup>

The provisions of the Finnish Arbitration Act concerning scope of the agreement are found in the suspension of litigation in disputes subjected to arbitration<sup>81</sup> as well as in the grounds for setting aside an award based on arbitrators exceeding their jurisdiction.<sup>82</sup> Such situation would arise in case arbitrators addressed and decided a dispute which did not fit within the scope of the arbitration agreement. Grounds for non-recognition of an award with the same rationale are found in the New York Convention, under which recognition and enforcement of “a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration” may be refused.<sup>83</sup> Similar provisions are found in the UNCITRAL Model Law in the form of suspension of litigation<sup>84</sup> as well as non-recognition<sup>85</sup> and annulment<sup>86</sup> of an award.

The question of scope determines which issues are meant to be heard in the arbitration proceedings. For example, the question may be whether the arbitration clause only covers contractual claims or non-contractual claims, such as torts, as well.<sup>87</sup> The scope is typically assessed using the language and wording of the agreement.<sup>88</sup> However, especially in general arbitration clauses, the language may be ambiguous and constructed with the intention of including all possible disputes. In these situations, the scope is determined by means of contract interpretation, often using general principles of national contract law.<sup>89</sup>

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<sup>79</sup> The question of competence-competence (kompetenz kompetenz, competence de competence) refers to the arbitral tribunal’s competence to decide whether the dispute at hand is in fact within their jurisdiction. Questions such as validity, legality and existence of the arbitration agreement fall within these considerations, which are internationally regarded to be up for arbitral tribunals to determine. However, such jurisdictional questions are not relevant for the purposes of this work and will be left outside further discussion. For further analysis on competence-competence, see e.g. Kröll-Mistelis 2011, pp. 157-178; Born 2009, pp. 851-1001; Gaillard-Savage 1999, pp. 395-401; Koulou 2008, p. 72; Kurkela-Uoti 1995, p. 70; Karrer – Kälin-Nauer 1996, pp. 31-37.

<sup>80</sup> See Bermann 2012, p. 37.

<sup>81</sup> See Section 5 (1) of the Finnish Arbitration Act.

<sup>82</sup> See Section 41 (1) of the Finnish Arbitration Act.

<sup>83</sup> See Article V (1) of the New York Convention.

<sup>84</sup> See Article 8 (1) of the UNCITRAL Model Law.

<sup>85</sup> See Article 34 of the UNCITRAL Model Law.

<sup>86</sup> See Article 36 of the UNCITRAL Model Law.

<sup>87</sup> See Born 2009, pp. 1059-1060; Redfern-Hunter 2009, p. 107.

<sup>88</sup> See Redfern-Hunter 2009, p. 107; Born 2009, p. 1060.

<sup>89</sup> See Born 2009, p. 1063.

The relevance of the scope of the agreement is significant. In case the agreement only subjects certain specific categories of disputes to arbitration, the parties take the risk of having to deal with separate processes in both arbitration and litigation. The importance of the scope is demonstrated in the aforementioned Finnish Supreme Court precedent KKO 2007:18 which is closely related to the recent case KKO 2013:84. In KKO 2007:18, the court found that the arbitration clause was binding on the non-signatory party because of the wording of the clause. No extensive interpretation of intentions was needed because the clause expressly subjected to arbitration all disputes relating to or arising out of the particular issue of redemption right concerning real estate. In KKO 2013:84, however, the arbitration clause was worded more widely and in a general manner (subjecting all disputes related to or arising out of the agreement to arbitration), in which case the importance of contract interpretation, especially concerning the intentions of the parties, is emphasized. Some general rules concerning such interpretation are presented below, and their application in KKO 2013:84 is discussed in chapter 6.

### **4.3 Formal requirements**

In Finland, the form of contract typically rests upon the parties' determination. Any requirements in form are therefore exceptions, usually with the purpose of facilitating issues of proof.<sup>90</sup> However, as mentioned above<sup>91</sup>, the New York Convention lays out certain requirements for arbitration agreements which contracting states must give effect to.<sup>92</sup> These requirements are found in Article II, under which the arbitration agreement must, first and foremost, be in writing. The other requirements, as stated above, include the agreement dealing with existing or future disputes arising out of a defined legal relationship, the subject matter of which is capable of settlement by arbitration.<sup>93</sup> Furthermore, as imposed by Article V, the parties to the agreement must be capable of concluding such agreement and the agreement must be "valid under the law to which the parties have subjected it".<sup>94</sup> The UNCITRAL Model Law contains all of these requirements as well, adding a few clarifying provisions on what constitutes a written

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<sup>90</sup> See Hemmo 2007a, pp. 180-181.

<sup>91</sup> See Chapter 2.

<sup>92</sup> For examples of requirements laid by other conventions, see Rubino-Sammartano 2001, pp. 202-203

<sup>93</sup> See Article II (1) of the New York Convention.

<sup>94</sup> See Article V (1) (a) of the New York Convention.

agreement.<sup>95</sup> All of these requirements are naturally important, but in KKO 2013:84, all of these requirements except for one are undisputed and clear. Therefore, for the purposes of this thesis, this part of the chapter will be headlined by the requirement of written form.

The Finnish Arbitration Act was revised in 1992. It was stated in its *travaux préparatoires* that the most important revision as to the arbitration agreement concerned the written form requirement.<sup>96</sup> The provisions and requirements of the New York Convention and the UNCITRAL Model Law were used and taken into account when revising the act in order to enable it to better answer the needs of “contract usage and technical means of the moment”.<sup>97</sup>

Currently, the Finnish Arbitration Act defines the formal requirements of the arbitration agreement as follows:

#### “Section 3

The arbitration agreement shall be in writing.

An arbitration agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters between the parties. An arbitration agreement is also in writing when the parties, by exchanging telegrams or telexes or other such documents, have agreed that a dispute shall be decided by one or more arbitrators.

An arbitration agreement is also in writing if an agreement which has been made in the manner mentioned in paragraph 2 refers to a document containing an arbitration clause.

#### Section 4

Arbitration clauses in wills, deeds of gift, bills of lading or similar documents, in the bylaws of an association, of a foundation, of a limited liability company or of another company or corporate entity and by which the

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<sup>95</sup> See Article 7, Option 1, of the UNCITRAL Model Law.

<sup>96</sup> See HE 202/1991.

<sup>97</sup> See *ibid.*

parties or the person against whom a claim is made are bound, shall have the same effect as arbitration agreements.”<sup>98</sup>

The written form requirement is a so called absolute formal requirement<sup>99</sup> without which the agreement is null and void.<sup>100</sup> Interpretation of this formal requirement has typically been strict, necessitating e.g. in situations of exchange of letters that both parties exchange such letters in writing.<sup>101</sup> Therefore, mere consent between the parties, however mutual and clear, is insufficient if not executed in the right form.<sup>102</sup> This view adopted in Finland is rather typical, although many countries have given up the formal requirement.<sup>103</sup> For example, in Sweden, practices between parties have been enough to establish an arbitration agreement.<sup>104</sup> However, even though in the typical situation the parties mutually sign the agreement, no signature is required due to the provisions of section 3 subsection/paragraph 2 of the Finnish Arbitration Act which clarifies the means available for the formation of a valid agreement. At the same time, the existence of a signature does not necessarily mean that there is consent to arbitration, e.g. in the case of fraud or duress.

Rationales for the requirement of written form are easy to understand. Due to arbitration’s substitutive nature in relation to normal means of due process, i.e. litigation, anyone who attempts to prevent another’s access to court must be able to show that there is in fact an agreement to support it.<sup>105</sup> The most effective and reliable way of doing this is evidence in writing – in other words, the agreement serves as proof.<sup>106</sup> Moreover, in addition to the written form requirement’s significance as proof of the agreement, another justification arises from the need to ensure that the parties adequately understand the gravity of their waiver of due process.<sup>107</sup> Another related reason might be ensuring that the parties take into account all relevant issues in their agreement, such as selection of arbitrators and the

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<sup>98</sup> Translation of the Finnish Arbitration Act, see Paulsson 1984, Annex I of the Finland Chapter, p. 1.

<sup>99</sup> This is the author’s translation of the Finnish term “varsinainen muotomääräys”, which is defined by being an absolute necessity for the contract to be valid.

<sup>100</sup> See Möller 1997, p. 18.

<sup>101</sup> See *ibid.*

<sup>102</sup> See Koulu 2008, p. 88.

<sup>103</sup> Scandinavian countries in particular have excelled in giving up the requirement of written form: see the Swedish Arbitration Act, the Norwegian Arbitration Act, the Danish Arbitration Act. See also the New Zealand Arbitration Act and the Belgian Arbitration Act.

<sup>104</sup> See Franke-Magnusson-Ragnwaldh-Wallin 2013, p. 11.

<sup>105</sup> See Redfern-Hunter 2009, pp. 89-90; Lew 2003, p. 131.

<sup>106</sup> See Gaillard-Savage 1999, p. 360.

<sup>107</sup> See Karrer – Kälin-Nauer 1996, p. 31; Born 2009, p. 584.

place of arbitral seat.<sup>108</sup> Having these matters “recorded” in writing would allegedly help the parties in remembering to address them. However, as stated above, opinions on the necessity of written form of the agreement are not as adamant as they used to be and have started to change towards a more permissive stance.<sup>109</sup>

In general, two differing opinions may be highlighted when it comes to the question of determining the validity of the arbitration agreement based on formal requirements. On the one hand there is formalism which supports the view that arbitration agreements must be concluded in writing.<sup>110</sup> The traditional Finnish view on the matter is strongly formalist. However, on the other hand, there is consensualism which emphasizes the parties’ mutual intent of being bound by the agreement.<sup>111</sup> According to this view, the form of the arbitration agreement is insignificant and the only thing required for the validity of the agreement is the actual intent. Therefore, oral agreements would be as valid as written ones. Naturally this view raises other problems, e.g. concerning proof of the agreement. The one carrying the burden of proof would probably be the party trying to pursue arbitration, but how high would the level of proof be set? However, even though consensualism definitely entails issues revolving around matters of proof, in addition to representing the actual intent of the parties to arbitrate (which is the essence of arbitration, in comparison to formal requirements which greatly promote matters of evidence) its flexibility would be well suited for the needs of the current international business environment.

There are good grounds for not regarding the written form requirement as an absolute necessity. Firstly, the aforementioned waiver of one’s right of due process is not as relevant as it used to be because the arbitration regime internationally and nationally has developed to the point that it is nowadays the primary forum of commercial dispute resolution.<sup>112</sup> Therefore, to subject the dispute to arbitration does no longer “endanger” one’s substantial right of having their case heard.<sup>113</sup> Secondly, to demand the written form on the basis of providing sufficient proof is partially based around the notion mentioned above that arbitration may endanger one’s rights. However, since that idea no longer seems

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<sup>108</sup> See Born 2009, p. 585.

<sup>109</sup> See *ibid.*, p. 581, 585.

<sup>110</sup> See Gaillard-Savage 1999, p. 361.

<sup>111</sup> See *ibid.*

<sup>112</sup> See Born 2009, p. 585; see also Redfern-Hunter 2009, pp. 91-93.

<sup>113</sup> See Lew 2003, p. 132.



to be valid, and for the lack of better justifications, arbitration agreements may be considered as any other contracts.<sup>114</sup> Since all judicial systems typically recognize oral agreements to be as valid as written ones, there is no clear reason why an oral arbitration agreement should be invalid.<sup>115</sup>

One obvious foundation for accepting oral arbitration agreements may be construed using a theoretical situation. If a ship on international waters was in distress at sea, e.g. because of engine failure, it could contact another ship to get it back to port. In case the other ship used the radio to make an oral agreement concerning the towage with the ship in distress and mentioned that all disputes would be resolved in arbitration, and the ship in distress orally accepted this agreement, would it be justifiable that the agreement would automatically be invalid nonetheless? Would there be any other way of validly making a binding arbitration agreement in case no means other than radio were available, or would the towage ship be forced to accept the fact that this particular means of dispute resolution is not available to it? As the Supreme Court decision KKO 2013:84 does not concern oral agreements, this theoretical dilemma may be left unresolved. However, it does provide an interesting baseline for further assessment between different views of formal requirements.

As the Supreme Court's decision in KKO 2013:84 demonstrates, the aforementioned absolute formal requirement is apparently not considered absolute any longer.<sup>116</sup> The Supreme Court expressly stated that, despite the obvious lack of written agreement in relation to the third party beneficiary, the beneficiary was still bound by the agreement. Question remains, however, whether the dismissal of the absolute formal requirement only applies to such third party situations. Would the Supreme Court have decided otherwise in case the dispute only concerned the existence of the arbitration agreement between A and B and the agreement was not in writing? This is another problem arising out of the almost complete lack of reasoning behind the Supreme Court's recent decision which will be contemplated below when discussing alternative rationales for the decision.

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<sup>114</sup> See Born 2009, p. 585.

<sup>115</sup> See *ibid.*

<sup>116</sup> See Chapter 3.4.

#### 4.4 Parties to arbitration

One fundamental cornerstone of arbitration is surely the notion that arbitration is only binding on the parties of the arbitration agreement. This view is provided in section 2 of the Finnish Arbitration Act, stating that “any dispute [...] which can be settled by agreement *between the parties* may be referred for final decision by one or more arbitrators” (emphasis added). This universally accepted position is also backed up by the New York Convention<sup>117</sup> and the UNCITRAL Model Law<sup>118</sup>, both of which provide for the recognition of arbitration agreements “by the parties”. Also the leading international arbitration institutions provide in their rules for arbitration between the parties.<sup>119</sup>

The Finnish Arbitration Act does not address the capacity of parties to enter into an arbitration agreement. However, the general rule is that all natural and legal persons and entities that are able to enter into a valid agreement can also enter into an arbitration agreement.<sup>120</sup>

The question “who are the parties of the arbitration agreement?” refers to the scope *ratione personae* of arbitration, the subjective scope.<sup>121</sup> The question is easy to answer in the typical arbitration process which involves two adversary parties. As presented by an *ad hoc* arbitral tribunal,

“in arbitration *only those who are parties* to the arbitration agreement expressed in writing could appear in the arbitral proceedings either as claimants or as defendants. This basic rule, inherent to the essentially voluntary nature of arbitration, is recognised internationally by virtue of Article II of the New York Convention”.<sup>122</sup> (emphasis added)

Despite this presumption, there are many situations in which the usual premise does not work. Such situation might arise when a signatory company’s parent company has been actively involved in setting up the business deal which includes an arbitration agreement.

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<sup>117</sup> Article II (1) of the New York Convention.

<sup>118</sup> Article 7 (1) of the UNCITRAL Model Law.

<sup>119</sup> See Article 6 (1) of the ICC Rules; Article 1 (1) of the UNCITRAL Rules; preamble of the LCIA Rules.

<sup>120</sup> See Lew 2003, p. 140. Because in KKO 2013:84, capacity of the parties is not disputed, further discussion on the subject will be limited outside the scope of the thesis.

<sup>121</sup> See Born 2009, pp. 1133-1134.

<sup>122</sup> See *Banque Arabe et Internationale d'Investissement v. Inter-Arab Investment Guarantee Corp.*, award of 17 November 1994.

In the event that a dispute arises, the opposing signatory company may want to include the rich parent company in the arbitration proceedings as well, e.g. to increase the likelihood of receiving damages. For this purpose, there are sometimes circumstances which enable the opposing party to invoke the group of companies doctrine against the non-signatory parent company, making it bound to the arbitration as well.

Especially in international commercial arbitration, it has become a generally recognized rule that there are multiple ways in which third parties may be bound to arbitration, even if not as signatories of the arbitration agreement.<sup>123</sup> Moreover, such involvement of outside parties occurs more and more frequently.<sup>124</sup> For this purpose, there are several doctrines deriving from different legal systems, such as agency, veil-piercing, group of companies, alter ego, implied consent, succession, estoppel and third party beneficiary, apparent mandate and ostensible authority.<sup>125</sup> However, calling them “special mechanisms of law” above is a fairly superficial concept as several of them are merely constructs used in other areas of law, e.g. general private law (agency) and company law (veil piercing). Moreover, the use of any such doctrines has been criticized as superfluous and unnecessary surrogates of private law: “irrelevant [...] is the need for any doctrinal apparatus whatever other than the law of private agreement”.<sup>126</sup> Nevertheless, whatever the instrument, limiting arbitration to the signatory parties only is not altogether so clear after all.

As Hanotiau mentions, it may be contemplated whether equity and justice have in some decisions and awards been the ultimate reason for the conclusions and these aforementioned doctrines only used as *ex post facto* tools.<sup>127</sup> However, the whole subject of binding non-signatories to arbitration in general revolves around the notion of finding the “right” decision in a situation where the non-signatory would be able to avert the effect of an otherwise valid arbitration clause. Moreover, the issue of binding non-signatories is in general considered to be governed by ordinary principles of contract (and agency) law.<sup>128</sup> In other words, the doctrines merely provide useful tools for contract interpretation.

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<sup>123</sup> See Hanotiau 2006, p. 8; Born 2009, p. 1137; Redfern-Hunter 2009, p. 99. For case law, see also e.g. *Thomson-CSF, SA v. Am. Arbitration Ass'n*, 64 F.3d (2d Cir. 1995); *Alamria v. Telcor Int'l, Inc.*, 920 F.Supp. (D. Md. 1996).

<sup>124</sup> See Van den Berg 2003, pp. 633-634.

<sup>125</sup> See *supra* note 123.

<sup>126</sup> See Rau 2008, p. 238.

<sup>127</sup> See Hanotiau 2006, pp. 8-9. In this context, *ex post facto* tool indicates to the doctrines being used as legal justification for an already decided conclusion. However, this conception easily regresses to a “which came first, the chicken or the egg” discussion and will not be argued here.

<sup>128</sup> See Born 2009, p. 1138.

They are applied in accordance with the facts and circumstances of each case and contract to analyze the parties' intentions and consequences thereof.<sup>129</sup>

These doctrines have been readily used in foreign case law<sup>130</sup>. However, in the few cases concerning the subject in Finland, none of these doctrines have been used as such. Even though the Supreme Court decisions KKO 2007:18 and the recent KKO 2013:84 do address the same question, the reasoning of the court relies on general contract interpretation instead. However, due to the lack of legal sources in Finland or the lack of reasoning in the previous Supreme Court precedents, there is no reason not to seek guidance from foreign case law and legal literature as tools of interpretation. Furthermore, due to the transnational nature of arbitration, international practices are relevant. Therefore, the thesis will introduce the essential doctrines of the ones mentioned above. Special attention will naturally be paid to the third party beneficiary doctrine which may be applied in the case at hand.

Before delving into the doctrines themselves, it is useful to first acknowledge the difference between the constructs thereof. Some of the doctrines apply relevant facts to determine whether party consent exists regardless of the missing signature or written agreement, therefore binding the non-signatory, whereas others need not invoke party consent whatsoever. Instead, the latter ones use the concept of equity and employ the force of law in interpreting actual factual circumstances to support binding the non-signatory.<sup>131</sup> These equity based doctrines can be regarded as non-consensual and the former ones as consensual theories of subjecting third parties.<sup>132</sup> In essence, the consensual doctrines may be regarded to be of more legal value due to the fact that their function is identifying the underlying party consent which automatically results in the non-signatory being bound. As for the non-consensual theories, the conception is to "force" the non-signatory to arbitration despite the (possibly) obvious lack of intent and/or consent.

This division between the consensual and non-consensual means also carries significance in the considerations as to whether the non-signatory becomes an actual party of the arbitration agreement or if it is "only" bound by it. This subject will be discussed further in

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<sup>129</sup> See *ibid.*, p. 1139.

<sup>130</sup> See e.g. *Thomson-CSF, SA v. Am. Arbitration Ass'n*, 64 F.3d (2d Cir. 1995); *Merrill Lynch Inv. Managers v. Optibase, Ltd*, 337 F.3d (2d Cir. 2003); *Dow Chemical France, The Dow Chemical Company and others v ISOVER Saint Gobain*, Interim Award, ICC Case No. 4131, 23 September 1982.

<sup>131</sup> See Born 2009, p. 1140

<sup>132</sup> See *ibid.*, p. 1142

Chapter 6.1.1. However, for the sake of clarity, the thesis will next introduce the consensual doctrines first and the non-consensual ones after.

#### 4.4.1 Agency

Agency is the easiest and most simple form of the situations in which a non-signatory is subjected to arbitration.<sup>133</sup> It is a universally accepted principle, also established in the Finnish Contracts Act, that whoever has authorized another person to act on his or her behalf (the principle) shall be bound by the judicial acts conducted by said person (the agent) in the principle's name in relation to a third party.<sup>134</sup> One of the most common forms of such principle-agent relationship is seen in the actions of company representatives, typically the executive officers. If a company's representative (agent) commits to an arbitration agreement on behalf of the company (principle), it is the company that shall be bound instead of the representative.<sup>135</sup>

Although rare, it is still possible, however, that the agent will be bound by or may invoke the arbitration agreement in addition to the principle.<sup>136</sup> Such situation may arise (and has arisen) e.g. when a company has sued its representative in the course of his or her employment. In some cases such employee has been able to invoke the arbitration agreement engaged by the employee on behalf of the company in relation to a third party.<sup>137</sup>

It is noteworthy that the agent's mandate to act on behalf of the principle may be express or implied.<sup>138</sup> Whether it is the former or the latter will affect the circumstances under which the third party and/or the principle are bound by the agreement. However, this subject will not be discussed further in this context.

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<sup>133</sup> See *ibid.*, pp. 1142-1143

<sup>134</sup> See Section 10 of the Finnish Contracts Act; see also Article 2.2.1 of the UNIDROIT Principles of International Commercial Contracts 2010; Hanotiau 2006, p. 11; Born 2009, pp. 1142-1143.

<sup>135</sup> See e.g. Article 2.2.3 of the UNIDROIT Principles of International Commercial Contracts 2010.

<sup>136</sup> See Hanotiau 2006, p.10.

<sup>137</sup> See e.g. *Arnold v. Arnold Corp.*, 920 F.2d (6th Cir. 1990); *Thomas v. A.R. Baron & Co.*, 967 F.Supp. (S.D.N.Y. 1997).

<sup>138</sup> See Hanotiau 2006, p.10.

#### 4.4.2 Transfer of contract

Another very typical situation where a non-signatory becomes bound by the arbitration agreement is when a transfer of contractual rights occurs. This may happen e.g. by assignment, assumption, merger or subrogation.<sup>139</sup> When a contract is transferred, both the rights and duties are transferred along with it. It has been the subject of many disputes, however, whether the assignee is bound by the potential arbitration clause.<sup>140</sup> The predominant opinion used to support not binding the assignee due to the personal nature of the obligation to arbitrate (once again, the reference to the notion of arbitration being a waiver of the right of due process may be seen here).<sup>141</sup> However, this view has universally changed to allowing the parties to decide on the transfer of the arbitration clause as well.<sup>142</sup> As a consequence, the parties may also expressly assume or renounce the arbitration agreement.<sup>143</sup> The emphasis in the interpretation of whether a transfer has been valid is on the parties' intent.

As a result of the separability presumption<sup>144</sup>, there have been arguments concerning the possibility of a valid assignment of the arbitration agreement regardless of the invalidity of the assignment of the underlying contract.<sup>145</sup> Such situation might occur for instance when there is a contractual restriction of assignment in the underlying contract. However, this discussion will be limited outside the scope of this work.

#### 4.4.3 Implied consent

Implied consent as a theory of binding non-signatories to arbitration is deduced from the basic principle of contract law which allows the formation of contracts in ways other than by express stipulation or formal execution.<sup>146</sup> Such implicit agreement may be reached e.g.

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<sup>139</sup> See *ibid.*, p. 18; see also Born 2009, p. 1187.

<sup>140</sup> See Born 2009, p. 1187.

<sup>141</sup> See *ibid.*, p. 1188. As for the "obligation" to arbitrate, in *GMAC Comm. Credit LLC v. Springs Indus., Inc.*, *F.Supp.2d 209 (S.D.N.Y. 2001)*, the court regarded arbitration as a remedy instead of an obligation.

<sup>142</sup> See Born 2009, p. 1188; see also *Trippe Mfg Co. v. Niles Audio Corp.*, *401 F.3d (3d Cir. 2005)*; *Cone Constr., Inc. v. Drummond Cmty. Bank*, *So.2d (Fla. Dist. Ct. App. 2000)*. For further discussion on the requirements and details of assignment and automatic transfer, see Vincze 2003.

<sup>143</sup> See e.g. *Gruntal & Co., Inc. v. Steinberg*, *F.Supp. 324, 335-36 (D.N.J. 1994)*.

<sup>144</sup> See *supra* Chapter 4.1.

<sup>145</sup> See Born 2009, p. 1191.

<sup>146</sup> See Hemmo 2007a, pp. 133-134.

on the basis of a party's conduct. In a traditional example of such agreement, when stepping into a bus, the passenger does not sign a contract which provides for a transport for him or her in return of a certain amount of money. Neither does the passenger sign a contract approving the general terms or conditions of the transport. These matters are regarded as given, and with his or her conduct (stepping into the bus) the passenger impliedly consents.

Another means of reaching an implied agreement is by interpreting party intent in retrospect. Such interpretation is typically conducted by courts or arbitral tribunals. In case the text of the contract is ambiguous, but from the contract and the factual circumstances it may be discerned that the parties in fact intended for a certain consequence, the parties may be regarded to have agreed on the said consequence in a legally binding manner. In other words, through implied agreement.

Crucial in determining the existence of implied consent is party intent.<sup>147</sup> It is necessary that both sides, the signatories and the non-signatory, have intended to be bound by the arbitration clause. This consideration is derived from the requirements of the New York Convention and the UNCITRAL Model Law (and the requirements of national laws) which only provide for recognition and enforcement of arbitral awards and agreements "between parties".<sup>148</sup> As the purpose of the doctrine of implied consent is to identify the actual consent of parties, it is necessary that the consent is mutual as required from any arbitration agreement (as explained above).

Similarly with the examples above, a non-signatory third party may impliedly consent to be bound by the arbitration clause of another parties' agreement.<sup>149</sup> Naturally, these signatory parties must have had this purpose as well. This type of consent may occur by the non-signatory's subsequent conduct by which it "regards itself bound by the arbitration clause"<sup>150</sup> For example, the non-signatory may show its acceptance of the arbitration clause by invoking it in the event of a dispute. However, it is important to keep in mind the separability doctrine of arbitration agreements in this instance as well. When defining the

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<sup>147</sup> See Born 2009, pp. 1150-1151.

<sup>148</sup> See *supra* notes 91-93.

<sup>149</sup> See Lamm-Aqua 2003, pp. 725-726; see also *ICC case no. 9771 of 2001*, cited in Hanotiau 2006, pp. 33-34.

<sup>150</sup> See *ibid.*, quoting *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d (5<sup>th</sup> Cir. 1998); see also Hanotiau 2006, p. 36.

existence of implied consent, the non-signatory must be regarded to have consented to the arbitration clause in particular instead of the underlying agreement and its obligations.<sup>151</sup> On the other hand, the typical conclusion is that by consenting to the underlying agreement, the non-signatory also agrees to be bound by the arbitration clause therein.<sup>152</sup>

#### 4.4.4 Third party beneficiary

As expressly stated e.g. in UNIDROIT Principles of International Commercial Contracts,

“the parties (the ‘promisor’ and the ‘promisee’) may confer by express or implied agreement a right on a third party (the ‘beneficiary’).”<sup>153</sup>

This possibility to grant rights is universally regarded as given in general contract law. As a result, non-signatory third parties may claim such rights in a legally binding way. As for this concept in the context of arbitration, third party beneficiaries may invoke or become bound by arbitration agreements they have no part in except for a right granted to them therein.<sup>154</sup>

The general premise in a number of court cases has been that a non-signatory party who invokes a contract provision in order to claim rights is also bound by the arbitration clause of such contract.<sup>155</sup> However, the signatory parties may have just as well intended not to extend the arbitration clause to any outside party. Critical, once again, is the underlying intent which is defined by usual contract interpretation. As a court has stated, “under third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed.”<sup>156</sup> Therefore, in comparison to other doctrines which assess the question of binding non-signatories based on the conduct after the execution of the contract, the third party beneficiary doctrine solely relies on the original intent of the parties in making the contract.<sup>157</sup> It is noteworthy that for this exact reason the decisive

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<sup>151</sup> See Born 2009, p. 1152.

<sup>152</sup> See *ibid.*

<sup>153</sup> See Article 5.2.1 (1) of the UNIDROIT Principles of International Commercial Contracts (2010).

<sup>154</sup> See Hanotiau 2006, p. 14; Born 2009, p. 1178; see also *Spear, Leeds & Kellogg v. Central Life Assur. Co. F.3d (2nd Cir. 1996)*; for other similar U.S. case law, see Van den Berg 2003, p. 636.

<sup>155</sup> See Born 2009, p. 1179; Hobér 2011, pp. 135-136.

<sup>156</sup> See *E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F.3d 187.*

<sup>157</sup> See Born 2009, pp. 1179-1180.



factor is the intent of the signatory parties. This conclusion may be drawn from the sentiment that the intent of the parties is inferred on the basis of the contract and its language, the drafting of which is conducted solely by the signatories.<sup>158</sup>

Third party beneficiary issues and their resolution may sometimes be very close to and/or decided on similar grounds with the equitable estoppel doctrine.<sup>159</sup> Despite these two theories being distinguishable in the sense that one is a consensual doctrine and the other non-consensual, both may justifiably be used for resolving parallel or the same non-signatory beneficiary issues, as discussed below.<sup>160</sup>

#### **4.4.5 Equitable estoppel**

Equitable estoppel is a theory which relies on the notion of equity and good faith.<sup>161</sup> It is used to bar the resisting signatory or non-signatory from denying the applicability of the arbitration clause.<sup>162</sup> Equitable estoppel is a theory most commonly used in common law jurisdictions. It is not unheard of in civil law countries either, although a different concept may be used instead, such as good faith or abuse of right.<sup>163</sup>

As stated above, equitable estoppel may sometimes be used as a parallel reasoning with the third party beneficiary doctrine. However, equitable estoppel is based on equity (as may be inferred from its name), and instead of finding consent it may “force” the non-signatory to arbitration or let the non-signatory invoke the arbitration clause regardless of the signatory’s objection.

Equitable estoppel rests upon the concept that a party should not be able to act inconsistently with its previous actions or statements and this way avoid liability. Therefore, under the “direct benefits” estoppel theory, a party claiming or exercising rights directly derived from the provisions of a contract is also bound by the arbitration clause

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<sup>158</sup> See Hanotiau 2006, p. 15.

<sup>159</sup> See *ibid.* p. 1180.

<sup>160</sup> In addition to these two doctrines, it is advisable to bear in mind that several of these doctrines, especially ones that employ consent as their foundation, may be invoked or taken into account in assessing individual cases. For example, constructions based on implied consent and third party beneficiary doctrines may sometimes overlap.

<sup>161</sup> See Lew 2003, p. 139.

<sup>162</sup> See Newman-Hill 2008, p. 567.

<sup>163</sup> See Born 2009, p. 1194; see also Hanotiau 2006, p. 20.

therein.<sup>164</sup> Simply put, a person should not be able to pick the cherry (the benefit granted in the underlying agreement) from the top of the cake and leave the rest (the arbitration clause) untouched. As stated in *Int'l Paper Co.*,

“a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him”.<sup>165</sup>

There has been discussion on the use of equitable estoppel as a “sword” or “shield”.<sup>166</sup> This discussion relates to whether the doctrine should only be available for use as a defense (shield) for non-signatories who want to invoke an arbitration clause. The opposite use as a sword would let signatory parties to invoke equitable estoppel to compel non-signatories to arbitration. The discussion has arisen from the idea that such tool is “appropriate” only to be used against signatories because they have in fact agreed to arbitration, in comparison to the opposite situation where no such consent exists.<sup>167</sup> However, the author, as well as Born<sup>168</sup>, considers such approach erroneous. The essence of equity and good faith should work both ways as established in the direct benefit theory. As opposed to decisions which rely on the notion that arbitration is “strictly a matter of contract”<sup>169</sup> and therefore deny binding non-signatories, arbitration is in fact no longer as strictly tied to such formalities as it used to be. Accordingly, allowing non-signatories to use such defense based on an outdated concept to avoid the “equitable” responsibility would seem to work against the very purpose of the doctrine of equitable estoppel and fairness.

Despite the doctrine of equitable estoppel being most commonly used in common law jurisdictions, especially in the United States, it may be deemed relevant in civil law countries as well. As elaborated above, the topic of arbitration is international if anything, which is why international and transnational norms may be taken into account even when contemplating on national cases, such as KKO 2013:84. The notion of good faith and equity in law still stands in Finland, even if in a different form than a specific doctrine. For

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<sup>164</sup> See Hanotiau 2006, p. 24; see also Born 2009, p. 1195.

<sup>165</sup> *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d (4th Cir. 2000), cited in Born 2009, p. 1194; see also *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. (S.D.N.Y. 1966).

<sup>166</sup> See Born 2009, p. 1196.

<sup>167</sup> See *ibid.*

<sup>168</sup> See Born 2009, p. 1197.

<sup>169</sup> See *Thomson-CSF, S.A. v. Am. Arbitration Ass'n* 64 F.3d 773 (2nd Cir. 1995).

instance, the essence of equitable estoppel may be found in the offer-reply mechanism, according to which the reply will have to accept the offer *as such* or else it will constitute a new counter-offer.<sup>170</sup> Accordingly, equitable estoppel prevents the party receiving the benefit from only accepting the benefit and “discarding” the possible obligations subsumed into it. Moreover, the principle of good faith and prohibition of contradictory behavior is deemed to be “enshrined” in the New York Convention; not as equitable estoppel but as a duty to act consistently and in good faith towards the other party.<sup>171</sup> Therefore, considerations based on equitable estoppel may and should be acknowledged as well as used in the case at hand. The application of the doctrine in KKO 2013:84 will be discussed more thoroughly in Chapter 6.4.

#### **4.4.6 Piercing the corporate veil**

Piercing (or lifting) the corporate veil, also called “alter ego”, is a doctrine based on equity which aims to identify corporate entities that are not officially parties of the agreement but whose actions or position may still subject them to the provisions of the agreement, such as the arbitration clause.<sup>172</sup> These actions are typically connected to misuse or abuse of rights or fraud in the sense that the company whose “veil is pierced” is deemed to have used such dominating authority on the signatory company that it is “appropriate to disregard the two companies’ separate legal forms, and to treat them as a single entity”.<sup>173</sup> Such abuse of the separation of legal entities is in these circumstances used inappropriately as a shield against legal liability.<sup>174</sup>

Determinations concerning the existence of such factual alter ego situation pay no attention to the intentions of the parties.<sup>175</sup> Instead, factual circumstances are assessed in order to find the aforementioned inappropriate behavior, upon finding of which the use of the doctrine to pierce the corporate veil is based on fairness. However, the thesis will not delve

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<sup>170</sup> See *infra* note 325.

<sup>171</sup> See Article II of the New York Convention. See also Van den Berg 1981, p. 185; Born 2009, pp. 1196-1197.

<sup>172</sup> See Born 2009, pp. 1153-1154. The term “alter ego” is also used, which describes the essence of the doctrine well.

<sup>173</sup> See *ibid.*

<sup>174</sup> See Hanotiau 2006, p. 46.

<sup>175</sup> See Born 2009, pp. 1154-1155.

deeper into the subject of alter ego due to the fact that no such inappropriate actions occurred in KKO 2013:84.

#### **4.5 Party consent**

“Consent to an arbitration agreement lies in the parties' common intention to submit disputes which have arisen or which may arise between them to one or more private adjudicators.”<sup>176</sup>

Arbitration is a process based on consent: without an agreement of the parties to arbitrate there can be no arbitration.<sup>177</sup> Arbitration is a deviation from litigation, the typical forum of dispute resolution organized by the state which every person (and company) is naturally entitled to. This fundamental right is directly provided in the constitution.<sup>178</sup> When an arbitration agreement is made, the dispute within the scope of such agreement can no longer be brought to court. Therefore, subjecting oneself to arbitration constitutes a waiver of this right of due process, which is why an agreement is necessitated.

Even though the idea of party consent as the backbone of arbitration agreements is relatively self-evident, the means of establishing party consent are not necessarily so. In case there is a signed, written agreement, there will be no problem. However, if the agreement is incoherent and ambiguous and a party repudiates its purpose of subjecting the dispute to arbitration, the situation is different. These matters are resolved by means of contract interpretation, which will be discussed further alongside the concept of consent in general in Chapter 6.

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<sup>176</sup> See Gaillard-Savage 1999, p. 253.

<sup>177</sup> An exception to this rule comes in the form of compulsory arbitration. However, due to the limitations of the thesis, it will be left outside the scope of this work.

<sup>178</sup> Section 21 of the Constitution of Finland.

## **5 REVISITING THE CASE**

### **5.1 Introduction**

Now that the essential elements of arbitration agreements have been introduced, the thesis will next begin to look into the Supreme Court case KKO 2013:84 more thoroughly. As stated above, the decision of the Supreme Court seemed hasty; the rationale behind it was certainly not lucid nor did it seem like the Supreme Court had given much time to assess the grounds on which it based the decision. Or in case it had, it did not transpire from the decision. Therefore, the thesis will move to reassess the case and the merits thereof, discussing the decisions of the District Court and the Court of Appeal in juxtaposition and using them as tools of comparison. The reason for using the decisions of the courts of lower instance is that both of them took into account two significant factors underlining the circumstances of the case and based their conclusions around them. These factors are the requirement of written arbitration agreement in the Finnish Arbitration Act and granting of a benefit to a third party conditionally.

The case study will continue in Chapter 6, in which the thesis will move on to consider alternative deliberations on how the case should be interpreted. This part will heavily rely on the concept of consent and whether there are indications as to the intent of the parties. These theories do not exclude the rationale of the Court of Appeal, but may instead be regarded to provide support for its view.

### **5.2 Requirement of written agreement**

As presented above in the form of the first research question<sup>179</sup>, the thesis will begin its analysis of the case with the assessment of whether section 3 of the Finnish Arbitration Act creates an absolute obstacle to binding non-signatory beneficiaries to arbitration. As will transpire (see below), the requirement of written form, interpreted purely according to the wording and the consensual nature of arbitration, would seem to prevent binding outside parties. Therefore, the subject will be discussed more thoroughly even though the Supreme Court bypasses it as little more than a detail.

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<sup>179</sup> See *supra* Chapter 1.3.

Although the decision of the District Court of Satakunta carries no significant legal value in itself, it is useful to keep in mind the rationale of the decision because it indeed considered the Finnish Arbitration Act as an obstacle in the matter. The District Court in its formalistic approach took the standpoint that the provision of law necessitating an “agreement in writing” does prevent binding third party beneficiaries who have not formally expressed their consent to be bound. More precisely, the District Court stated that even though there are ways in which outside parties may be subjected to arbitration, such as succession or transfer of contract, this did not apply in the case at hand where the non-signatory was a third party beneficiary.

In other words, this type of reasoning seems to implicate that in the case of a third party beneficiary, the scope *ratione personae* of the arbitration agreement is to be interpreted narrowly. This means that because it is not a question of a clearly defined situation, such as succession, a third party beneficiary could not be bound without an express written consent. According to the court, this view was supported by the fact the signatory parties had the option of binding the non-signatory with an express stipulation indicating such intent. Therefore, in the absence of such clear proof of intent, the letter of the law was the determining factor.

This view, as may have become apparent, is in the light of foreign case law and legal literature rather old fashioned as becoming bound to arbitration as a third party beneficiary is a well-recognized doctrine.<sup>180</sup> As explained above, it has been widely accepted that there are multiple ways in which such third parties may be subjected to arbitration. Even though in Finland it is also considered possible that the arbitration agreement may extend its effect outside the usual scope of signatory parties, the specific question of third party beneficiary is not among these familiar concepts.

Although the decision of the Supreme Court in KKO 2013:84 gave away the ultimate conclusion (the conclusion being that third party beneficiaries may be bound without a written agreement), it is important to determine on what basis such conclusion may be drawn. Since the Supreme Court did not deem important the rationale on the basis of which the letter of the law was bypassed, the thesis will address the question.

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<sup>180</sup> See *supra* Chapter 4.4.4.

### 5.2.1 Assessment of the requirement in form

As stated above, e.g. by Möller, the prerequisite for the formal validity of an arbitration agreement is that it shall be made in writing.<sup>181</sup> This requirement is expressly stated in section 3 of the Finnish Arbitration Act.<sup>182</sup> Moreover section 2 of the same act<sup>183</sup> specifies the well acknowledged fact that the arbitration agreement is initially only binding on the parties.<sup>184</sup> If these provisions of the act are to be interpreted accurately and faithfully to the wording, it means that in order to legally bind any parties who are being subjected to arbitration, there must be an agreement between these exact parties. Furthermore, this agreement must be made in writing. Therefore, the conclusion of this strict interpretation of the absolute formal requirement in KKO 2013:84 would be that because there is no agreement between the signatory party and the non-signatory beneficiary, let alone an agreement in writing, the non-signatory beneficiary cannot be bound by the arbitration clause. This theory is endorsed by the principle of voluntariness arbitration is based on. Furthermore, as plainly stated by Born,

“Although form requirements are archaic, [...] where they exist these requirements logically must apply for the benefit of each party: a party as to whom the “signature” or “exchange” requirements under the Convention or national law were not satisfied would, in principle, *not be bound by the agreement.*”<sup>185</sup> (emphasis added)

This notion may be supported with the underlying purpose of the absolute formal requirement that no person can be allowed to give up their constitutional right of due process without a conscious intent.<sup>186</sup> Such position towards arbitration typically highlights arbitration’s role as a renunciation of the guarantee of judicial relief.<sup>187</sup> Moreover, in case a waiver of such substantial right is made, there must be a recording of such event due to its gravity. This type of strict position to the formal requirements has earlier been common:

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<sup>181</sup> See Möller 1997, p. 18; see also Ovaska 2007, p. 49.

<sup>182</sup> See *supra* note 98.

<sup>183</sup> Section 2 of the Finnish Arbitration Act, see *supra* note 58.

<sup>184</sup> See Möller 1997, pp. 19-21.

<sup>185</sup> See Born 2009, p. 1210.

<sup>186</sup> See Ovaska 2007, p. 64.

<sup>187</sup> See *ibid.*, p. 49. This view may be and has been challenged. See *infra* note 190.

“It is not necessary that the arbitration agreement is made separately; [...] It is clear, however, that the document which is being drafted or which contains the arbitration agreement *will have to be signed by the parties.*”<sup>188</sup> (emphasis added)

The context of strict interpretation is connected to earlier attitudes towards arbitration in general during the last century.<sup>189</sup> Suspicion towards arbitration as the process dislodging normal court litigation arose from the potential downsides of arbitration among other things. Arbitration was considered not to offer similar certainty of legal protection as litigation and arbitrators were regarded easily biased as well as lacking expertise.<sup>190</sup> Moreover, arbitration agreements were viewed as vague and ambiguous<sup>191</sup>, which was regarded to result in parties to arbitration agreements accidentally subjecting to arbitration matters which they in fact did not intend to arbitrate.<sup>192</sup> The formal requirement was considered to reduce the risk of such uninformed decision-making. As a “natural result” of the requirement in form, formation of arbitration agreement through the concept of implied agreement was not possible either.<sup>193</sup>

However, despite formal requirements typically being used for separating the preparation and the actual execution of the agreement as well as promoting diligent deliberation and evidential matters, the paucity of such requirements derives from the legislator’s attitude towards them as a sort of necessary evil.<sup>194</sup> In short, their use should be supported by cogent interests. Moreover, to interpret the form requirement of section 3 of the Finnish Arbitration Act so strictly would factually impede the use of arbitration agreements in modern business. It would prevent or at least significantly complicate its use outside the typical bi-party arbitration. Therefore, despite the premise that the arbitration agreement only binds the parties thereof, it has been established in Finnish case law and legal

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<sup>188</sup> See Granfelt 1941, p. 25. See also KKO:1932-II-175. It is noteworthy that before the reform of the Finnish Arbitration Act in 1992, a formally valid arbitration agreement could also be made in front of a court of justice, see Granfelt 1941, pp. 18-19, 24-25.

<sup>189</sup> See Tirkkonen 1943, p. 10.

<sup>190</sup> See *ibid* pp. 14-16. Naturally this opinion has dramatically changed since then. Instead the situation today seems quite the contrary: arbitration is preferred precisely due to the expertise of the arbitrators and the lack of specific knowledge of complex special matters in general courts of law.

<sup>191</sup> One impact of this attitude towards arbitration was limiting the possibility to agree to arbitrate future disputes, e.g. in Germany and France. See Tirkkonen 1943, p. 15.

<sup>192</sup> See Tirkkonen 1943, pp. 15-16.

<sup>193</sup> See *ibid*. p. 89.

<sup>194</sup> See Hemmo 2007c, pp. 17-18.



literature (as well as in section 4 of the Finnish Arbitration Act concerning certain specific circumstances)<sup>195</sup> that it is possible to become bound to arbitration even without entering into an arbitration agreement through formal execution.<sup>196</sup> Universal succession, such as inheritance, and succession to specific rights and obligations, such as transfer of contract, are typically mentioned. In addition, an arbitration agreement made in the name of a general partnership is considered to bind the partners of said company (as well as provide the partners with access to arbitration).<sup>197</sup>

It may therefore be deemed well established that despite the seemingly strict requirement in form of section 3 of the Finnish Arbitration Act, it is by no means an absolute requirement anymore. Jurisprudential discussion in general has emphasized the perception that formal requirements (not only in arbitration) should not be given an absolute value even when such requirements exist.<sup>198</sup> On the contrary, the “implicit understanding” of the signatory parties may be considered cogent enough to be given more significance than formal or substantial requirements in some cases.<sup>199</sup> Naturally, this aspect hardly applies to situations where the existence of the arbitration agreement between the signatory parties is being judged. Nonetheless, this rather self-evident view taking emphasis away from the formal requirement is confirmed in the Supreme Court decision KKO 2013:84, which at the latest (in Finland) validates the non-absolute nature of the formal requirement of law and the extent of the arbitration agreement to reach third party beneficiaries.

It may also be noted that the grounds for supporting the strict interpretation of the form requirement (mentioned above) can no longer be regarded valid in the current business or legal environment. As opposed to the ideas that arbitration offers no certain legal protection, arbitration agreements are somehow vague or that the process is too unreliable or unprofessional, the modern trend seems to favor the notion that arbitration is starting to resemble traditional litigation in too many ways.

In the light of the reasoning above, another question concerning section 3 of the Finnish Arbitration Act may be posed. Does the provision actually apply to the situation of binding third parties or is it in fact solely directed at the actual agreement between the signatory

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<sup>195</sup> See *supra* note 98.

<sup>196</sup> See Möller 1997, p. 21; Ovaska 2007, p. 64; KKO 2007:18.

<sup>197</sup> See Tirkkonen 1943, p. 83; see also Möller 1997, p. 24.

<sup>198</sup> See Hemmo 2007c, p. 18.

<sup>199</sup> See Rau 2008, p. 231.

parties? The construction of this rule of interpretation is in line with the theories used to extend the effects of the arbitration agreement to others than the signatory parties. In case two parties intend to enter into an arbitration agreement, the requirements of the Finnish Arbitration Act apply. However, after the agreement has been validly and definitely concluded, it exists as a legal concept, which may be regarded as the purpose of the formal requirements of the law. As for the scope and extent of the agreement, e.g. the scope *ratione personae*, these considerations are no longer defined by the formal requirements of the law due to the fact that the valid agreement already exists, but according to different factors, such as the intent of the signatory parties or other factual circumstances, which may be deemed not to be subject to the formal requirements.

According to this model of construction of section 3 of the Finnish arbitration Act, the lack of the third party's signature in KKO 2013:84 carries no legal significance. Since the validity of the arbitration agreement itself has been established under the requirements of the act, the parties to the agreement may be determined without reference to the formal requirements therein.<sup>200</sup> Rather, "the agreement takes its binding force through some circumstance other than the formality of signature."<sup>201</sup> Such construct on the application of the law was adopted in a landmark case of the Swiss Federal Supreme Court in 2003 as well as several U.S. courts<sup>202</sup> and would serve both the needs and the current alignment of interpretation of the scope of arbitration agreements.

## **5.3 Granting rights to third parties conditionally**

### **5.3.1 Legal basis**

Now that a justifiable legal basis for dismissing (or rather, the non-application of) the formal requirement of section 3 of the Finnish Arbitration Act has been established, the thesis will move on to consider the essentials of party autonomy in the case at hand. The second research question<sup>203</sup> inquires whether the arbitration agreement (in the form of a clause) can be regarded to constitute an accessory to the right granted to the third party beneficiary. In other words, in KKO 2013:84, can the signatory parties impose on the non-

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<sup>200</sup> Similar approach to the issue has been adopted in Brinsmead 2007, p. 2.

<sup>201</sup> See Park 2009, p. 7.

<sup>202</sup> See Hanotiau 2006, pp. 52-53.

<sup>203</sup> See *supra* Chapter 1.3.

signatory beneficiary the obligation to arbitrate any related disputes as a condition to the right of redemption? The question leads to another: how far does the autonomy and discretion of the signatory parties go, and does the consensual nature of arbitration agreement impose any restrictions on it?

In its decision<sup>204</sup>, the Court of Appeal of Vaasa took the position that even though the underlying shareholders' agreement itself did not bind the non-signatory party, the signatory parties nevertheless had the right to stipulate the conditions under which they undertake to be bound in relation to the non-signatory. Therefore, the signatory parties were able to grant the right of redemption to the third party with the condition that the right was subject to the arbitration clause.

In order to assess whether the view of the Court of Appeal is justifiable, it is necessary to first determine the legal basis with which the question is analyzed. In this assessment, for the sake of clarity, the starting point may be the sources of law under which the decision is made.

Aarnio divides legal sources into *strongly binding*, such as law and established custom, *weakly binding*, such as *ratio legis* and case law, and lastly *permissible* sources, such as arguments based on comparative law, jurisprudence and real or value based arguments.<sup>205</sup> Accordingly, under the established theory on sources of law concerning contract interpretation in Finland, the first and most important source is mandatory law and its *travaux préparatoires*, followed by the terms of contract of the parties.<sup>206</sup> In case the conclusion cannot be found based on these sources, the decision may be based on case law, applicable trade practices and general principles of law.<sup>207</sup> This train of thought leads to the rather self-evident conclusion that since there are no provisions of law to assess the signatory parties' right to grant rights to third parties, the question shall be examined in the light of possible case law and the established rules and principles of general contract law.

It is generally acknowledged in legal literature that, even though there are certain specific features and requirements to arbitration agreements as a special form of agreement<sup>208</sup>, the

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<sup>204</sup> See *supra* Chapter 3.3.

<sup>205</sup> See Aarnio 1989, pp. 220-221.

<sup>206</sup> See Hemmo 2007a, pp. 563-565, 577.

<sup>207</sup> See *ibid.*

<sup>208</sup> See Möller 1997, pp. 14-18. These specific requirements include e.g. issues of arbitrability.

interpretation of arbitration agreements, as briefly mentioned above<sup>209</sup>, is similar to any other types of agreements – the rules and principles of general (national) contract law apply.<sup>210</sup> This subject is related to the traditional discussion on whether the character of arbitration agreements is that of procedural or civil law.<sup>211</sup> The former is closely connected to the legal process and is typically concluded or realized in court proceedings, whereas the latter refers to typical everyday agreements.<sup>212</sup> Out of this discussion, the conclusion has been drawn in Scandinavia that arbitration agreements are to be considered private civil law agreements (with special characteristics indicating to procedural law). As a natural corollary,

“general private law principles [...] apply to arbitration agreements as well. Therefore, common contract law is a self-evident premise.”<sup>213</sup>

In short, evaluation of the extent of the signatory parties’ right to grant benefits to third parties is done using principles of general contract law. The same goes for the interpretation of arbitration agreements as to the scope, extent and purpose, which are conducted using the usual means of contract interpretation.<sup>214</sup> This conception is congruent with the requirement that “the parties must have the right to settle the dispute which they wish to submit to arbitration”.<sup>215</sup> Since subjecting oneself to arbitration is a matter of agreement, the evaluation of the existence of such agreement should be conducted using ordinary means of contract interpretation.

Next, the thesis will discuss the position of Finnish contract law in relation to rights granted to third parties. Afterwards, it will move on to discuss the most essential principles of contract interpretation applicable to the case.

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<sup>209</sup> See *supra* notes 2, 73.

<sup>210</sup> See e.g. Tirkkonen 1943, p. 102; Möller 1997, p. 19; Born 2009, pp. 1063-1065; Lew 2003, p. 150.

<sup>211</sup> See Tirkkonen 1943, p. 37; see also Koulu 2008, p. 31.

<sup>212</sup> See Koulu 2008, pp. 31-32. The distinction between these two species of agreements is a relatively unrelated subject to the issue at hand and will therefore not be discussed further.

<sup>213</sup> See *ibid.*, p. 32.

<sup>214</sup> Considerations relating to the existence of the arbitration agreement may be inseparably connected to these means as well; see *infra* Chapter 6.2.

<sup>215</sup> See Section 2 of the Finnish Arbitration Act; see also Kurkela – Uoti 1994, p. 5.

### 5.3.2 Third party rights and obligations

Privity of contract is a universally accepted doctrine under which contracts do not affect outside parties (*alteri stipulari nemo potest*).<sup>216</sup> The doctrine may be divided into two major principles of contract law: first, a contract may not create obligations to third parties, and second, third parties do not get rights from contracts made by other people. Naturally there are exceptions to these rules, the essential one in this case being an agreement to grant rights to a third party beneficiary (*negotium in favorem tertii*).<sup>217</sup> As discussed above, it is a generally acknowledged fact that parties to a contract may grant rights to third parties.<sup>218</sup> In these situations, it is up to the third party to decide whether it will capitalize on the right or not.

Such a right granted to a third party manifests itself in the third party's protected legal status, i.e. the possibility of the party to bring an action to promote its right.<sup>219</sup> In the absence of such protected independent status, it is merely a situation where the signatory parties of the contract have agreed among themselves on a performance to a non-signatory third party – the said third party cannot independently enforce its right.<sup>220</sup> There is some legislation concerning rights granted to third parties, although typically relating to a specific area of law, such as insurance law. There is no legislation concerning the case at hand, however, in which case issues concerning the status of the third party are determined using general principles of law.<sup>221</sup>

The signatory parties of the contract are regarded to have the right to, in addition to granting the right, cancel or alter the right afterwards.<sup>222</sup> However, this right ceases when the third party beneficiary gets the aforementioned protected legal status. In the absence of specific legislation, the third party is regarded to gain such status with the signatory parties' express stipulation in relation to the third party or a notice from the signatory parties to the non-signatory of the right granted.<sup>223</sup> The protected status arising from notice

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<sup>216</sup> See Hemmo 2007b, p. 408; Talaranta 1954, pp. 184-185; Hemmo 2007c, pp. 58-59.

<sup>217</sup> See Hakulinen 1965, p. 192.

<sup>218</sup> See Hemmo 2007b, p. 409; see also See Article 5.2.1 (1) of the UNIDROIT Principles of International Commercial Contracts (2010).

<sup>219</sup> See *ibid.* pp. 409-410.

<sup>220</sup> See Hakulinen 1965, p. 195.

<sup>221</sup> See Hemmo 2007b, p. 412.

<sup>222</sup> See *ibid.*

<sup>223</sup> See *ibid.*; Hakulinen 1965, p. 202; see also KKO 1932-II-175; KKO 1962-II-113.

protects the third party's trust in the validity of the transaction. In KKO 2013:84, the non-signatory party has had notice of the redemption right and has gained a protected legal status in the aforementioned fashion. Therefore, the question remains, did the signatory parties have the right to grant the benefit conditionally?

The question leads to the principle of freedom of contract, which is the cornerstone and backbone of any contractual activity.<sup>224</sup> It has been widely accepted e.g. in American legal literature and case law as well as in the majority of other countries that the parties' freedom of contract dictates the formation and interpretation of the arbitration agreement.<sup>225</sup>

Freedom of contract may be divided into the following elements: freedom to enter into contract, freedom to choose the contracting party, freedom of the type of contract, freedom of the content of contract, freedom of the form of contract and freedom of cancellation of contract.<sup>226</sup> The fundamental idea is that parties are presumptively free to stipulate the contractual rights and obligations in relation to the elements above insofar as no specific restrictions are imposed by mandatory law.<sup>227</sup>

Typical restrictions may arise with regard to consumer protection or the form of contract (e.g. in arbitration agreements). The determining factor is the purpose for which the freedom of the parties is restricted. When freedom of contract is the premise and restrictions are exceptions, all restrictions must be equivalent to the purpose they serve, as required by the principle of equity.<sup>228</sup> For example, restrictions imposed on the basis of consumer protection are derived from the consumer's subordinate position and inferior negotiation power in relation to the entrepreneur. Hence, more vigorous protection is necessitated than e.g. in business contracts, where the contract material based on the intent of the parties is regarded to be the focal factor as opposed to law.<sup>229</sup>

When this train of thought is applied to third party benefits and the right of signatory parties to grant such benefits, it may be justifiably argued that grounds supporting any

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<sup>224</sup> See Saarnilehto 2000, p. 81; Hemmo 2007a, p. 70; Hakulinen 1965, pp. 93-94.

<sup>225</sup> See Carbonneau 2007, pp. 21, 183-184: ("The Parties to the agreement could make whatever lawful stipulations they deemed appropriate". See also e.g. *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University* 489 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52 (1995).

<sup>226</sup> See Muukkonen 1956, pp. 607-608. However, this is only one way to segment the concept of freedom of contract, see Hemmo 2007a, p. 76.

<sup>227</sup> See Saarnilehto 2000, pp. 80-81; Hemmo 2007a, pp. 75-76.

<sup>228</sup> See Ervo 1996, pp. 48-51.

<sup>229</sup> See Hemmo 2007a, pp. 567-568.

restrictions on the right of the signatory parties to grant benefits as they please are elusive. This view relies on the fact that, despite the content of the benefit, the third party may choose to take it or leave it. Nevertheless, the signatory parties cannot impose obligations on the third party per se, which is why the third party needs no protection in the form discussed above. On the contrary, to restrict the signatory parties from granting the benefit conditionally would be detrimental to their freedom of contract with no justifiable purpose. The rights of the signatory parties to choose the means of dispute resolution and the purpose to settle all possible disputes in one forum (arbitration) instead of dividing them to several fora are reasonable as well as essential elements of arbitration. The fact that the parties decide to grant a benefit to a third party is trivial with regard to the aforementioned rights and invokes no need for protection of the non-signatory party. Moreover, as stated by Telaranta with regard to the judicial status of the third party beneficiary,

“Dependent on the will of the party granting the right is not only whether the third party receives an independent right to claim through the stipulation, but also whether that right is formed comprehensively right away or only when certain prerequisites are met. This is because *nothing seems to prevent the party granting the right from subsuming terms and conditions to his stipulation [...]*.”<sup>230</sup> (emphasis added)

Further applying this argument to the case at hand, following from the aforementioned rationale and the inherent freedom of the signatory parties to stipulate on binding themselves in relation to third parties as well as from the absence of any definite restrictions imposed by law on the content of such stipulation, the conclusion may be drawn in the case of KKO 2013:84 that the premise has to be freedom of contract, i.e. freedom of the signatory parties to grant the right free of any restrictions as to the content of the right. Therefore, it may be concluded that the signatory parties were able to grant the right conditionally, and by invoking the right the non-signatory also became bound by the arbitration clause.<sup>231</sup> This view is also supported by the Supreme Court precedent KKO 2007:18 in which the Supreme Court stated that the arbitration clause was binding on the third party who was granted a right of first refusal. The difference to the case at hand is that in KKO 2013:84 there was no express stipulation.

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<sup>230</sup> See Telaranta 1954, p. 206.

<sup>231</sup> The same result was reached in *Göran H v Fritidsbolaget MCB AB (AD 1976 no 54)*.

Moreover, according to Hakulinen,

“A third party right which is created directly by a stipulation of other parties in his benefit *is not valid independently of the underlying contract*”<sup>232</sup>  
(emphasis added).

For example, the invalidity of the underlying contract affects the right granted therein as well. If the solid connection of these two factors is applied to KKO 2013:84, as self-evident as it may sound, it appears that the third party right is dependent on the terms of the underlying contract as well as their validity. Therefore, since the arbitration agreement of the underlying contract in KKO 2013:84 is indeed valid, it will affect the right granted to the third party in case such condition is deemed to be the signatory parties' intent.

Since the signatory parties in KKO 2013:84 failed to expressly state that the right of redemption was subject to the arbitration clause, the question reverts to traditional contract interpretation: was it the signatory parties' intent to grant the right of redemption conditionally? In juxtaposition with the next chapter, it may be pre-emptively revealed that in case the signatory parties were deemed to have intended to bind the non-signatory in the arbitration, the intent of the latter is insignificant and no consent on behalf of the non-signatory is needed. The thesis will present its view on whether the existence of such intent in the case at hand may be found. However, this subject is adamantly related to the interpretation of the contract as well as party consent. Therefore, the result will be discussed in the next chapter.

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<sup>232</sup> See Hakulinen 1965, p. 205.



## 6 CONSENT AND EQUITABLE ESTOPPEL

### 6.1 Introduction

As a natural continuation of the previous chapter, the thesis will now examine the significance of party consent in arbitration, specifically in the light of KKO 2013:84. The reason is obvious: as stated above multiple times, arbitration is based on consensuality with regard to all parties involved, except of course in the exceptions discussed above.<sup>233</sup>

Without consent there can be no agreement, and without agreement there can be no arbitration.<sup>234</sup> After the evaluation on consent and intent has been concluded, the thesis will assess what role the doctrine of equitable estoppel may or should have played in the equation. This assessment is conducted in Chapter 6.4.

The concepts of consent and intent are intertwined in the sense that the latter is needed to establish the former. Therefore, both concepts will be discussed in tandem.

”When a court or an arbitral tribunal has to determine who is a party to an arbitration agreement, it will first determine – with more or less formalism – *who has consented to the agreement*. The consent may be express or implicit. In the latter case, the court or arbitral tribunal will base its determination on a close analysis of the facts of the case.”<sup>235</sup> (emphasis added)

As a general rule, party consent is an absolute necessity in arbitration. The existence of consent is determined using contract interpretation, as mentioned in Chapter 4.2. These determinations are naturally in the discretion of the competent court or arbitral tribunal and will be decided on a factual basis, case by case.

When discussing consent in this Chapter, the thesis refers to *implied* consent (see Chapter 4.4.3). In KKO 2013:84, the non-signatory did not expressly enunciate its consent, in which case the existence of potential consent must be determined in the light of the facts of the case juxtaposed with applicable rules of interpretation. As described above, implied consent may be discovered on the basis of the non-signatory’s conduct or alternatively by examination of the contract execution, i.e. by assessing the circumstantial premise of the

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<sup>233</sup> E.g. equitable estoppel or veil piercing, see Chapters 4.4.5 and 4.4.6.

<sup>234</sup> See Gaillard-Savage 1999, p. 253.

<sup>235</sup> See Hanotiau 2006, p. 8.

case, the justifiable intentions and expectations of the parties and comparing these factors to potential protectable appropriate policies and alignments of the applicable area of law, in this case arbitration. However, this estimation is based on no exact rules but has to be conducted according to the specific circumstances of each case. Naturally, in KKO 2013:84, when examining the intent of the signatories, both means of interpretation may be used. In comparison, the non-signatory's consent may only be determined on the basis of subsequent conduct and target-oriented interpretation due to the fact that the non-signatory has not been present in the drafting or execution of the contract. Therefore, its reasonable expectations as to the agreement may not be assessed, but those concerning the approval of the agreement sometimes may.

In KKO 2013:84, the Supreme Court took an unusual approach. Whereas in foreign legal literature and case law the relevant factors seem to be revolving around consent (which may be seen e.g. in the multiplicity of the doctrines used to bind non-signatories with the concept of consent) and whether it exists, the Supreme Court took into consideration mostly formal factors mentioned in the Finnish Arbitration Act<sup>236</sup>, which in fact favored not binding the non-signatory. However, the pivotal factor which in the Supreme Court's eyes ultimately bound the non-signatory to the arbitration was the exigency of interpreting the underlying contract, the disputes arising out of which were to be settled in arbitration according to the arbitration clause. In other words, the Supreme Court took absolutely no notice in the prospect of consent. Therefore, according to this view, the existence of consent or alternatively the complete lack thereof seems to be tangential.

The author considers this approach problematic. Even though establishing the existence of consent may not always be absolutely necessary (this subject is discussed below), it does play an essential role in arbitration agreements. Especially when there is the possibility that consent could be established, not contemplating it is peculiar. Therefore, the thesis will now discuss the establishment of consent with regard to KKO 2013:84 and whether it will provide legal justification for binding the non-signatory with reasonable grounds other than "just because"<sup>237</sup>.

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<sup>236</sup> These factors include e.g. the lack of formal agreement as provided in section 3 and the non-applicability of the ways to bind non-signatories as provided in section 4 of the act.

<sup>237</sup> Here the author refers to the Supreme Court's (scarcely argued) rationale which bound the non-signatory to the arbitration with a rather frail connection.

### 6.1.1 “Existence” and “extension” of the agreement and the relevance of terminology

Before further discussing the formation of consent in the light of the case at hand, it is worthwhile to consider the meaning of terminology in the matter. As aptly described by Park,

“When a non-signatory denies having consented to arbitrate, the very existence of that contract remains at the heart of the parties’ dispute.”<sup>238</sup>

However, the concept is ambiguous in the sense that even when the existence of the arbitration agreement between the signatory and the non-signatory party is undermined, there in fact has to be a valid arbitration agreement (between the signatory parties). The formal requirements, as asserted above<sup>239</sup>, determine the existence of that very agreement. However, when the non-signatory disputes the existence of such agreement in relation to itself, while also denying the competence of the arbitral tribunal (with reference to competence-competence) it is in fact also repudiating the subjective scope (*ratione personae*) of the agreement which nevertheless does exist in reality, denying that its effects are extended to the non-signatory. The conceptual involution is incisively described by Born:

“[...] the courts’ “interpretation” of the arbitration clause is in fact more of a procedural, preliminary view, not directed to the merits of what the agreement actually provides, but only towards the question of who should decide this issue in the first instance. This is in fact an application of the competence-competence doctrine, *not a definitive interpretation of the parties’ agreement.*”<sup>240</sup> (emphasis added)

However, the subjective scope of the arbitration agreement determines its existence in relation to the non-signatory. Therefore, while practically being only semantics, it may be misleading to discuss disputing the existence of such agreement, but rather refer to assessment of the scope of the agreement. The effect of these concepts and the means they employ are naturally the same – the lack of consent of the non-signatory leads to non-existence of the arbitration agreement in relation to it (although not between the signatory parties). However, since the prerequisite for interpreting a contract is that such contract as

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<sup>238</sup> See Newman-Hill 2008, p. 563.

<sup>239</sup> See Chapter 5.2.1

<sup>240</sup> See Born 2009, p. 1081.

a whole exists, to base the assessment, e.g. in KKO 2013:84, on the existence of the arbitration agreement between the signatories and the non-signatory would as a matter of terminology be rather confusing. Be as it may, the question is nonetheless one concerning the jurisdiction and whether it belongs to the court of the arbitral tribunal, but it is useful to acknowledge the different factors and formulations linked with each term and the effects thereof.

Moreover, even though the aforementioned separation between the existence and subjective scope is indeed relevant and different opinions have been presented on the subject<sup>241</sup>, the practical applications remain the same. It may be argued that, even if the question was regarded to be that of the existence of the arbitration agreement (which, in a way, it indeed is), the interpretation and use of the following principles is done to determine the *intent* of the parties (which typically transpires from the agreement as well as the factual circumstances). Therefore, even during the formal non-existence of the contract between the signatory and the non-signatory and despite the fact that contract interpretation requires an existing contract, it may still be used as a tool to identify the (signatory) parties' true intent.

Another specious expression is “extension” of the arbitration agreement. As discussed by Born and Hanotiau<sup>242</sup>, the term “extension” implies that the arbitration agreement would reach beyond its legitimate sphere of influence. It is evident that the arbitration agreement may only concern those who have consented to arbitrate: it “records the *consent of the parties* to submit to arbitration”<sup>243</sup> (emphasis added) all or some disputes. Therefore, extension provides for a misleading term in a matter which in reality is merely about identifying the actual parties to the arbitration agreement.<sup>244</sup> The dividing factor is the lack of signature or other express form of contract execution – instead, the formal execution has been replaced by consent in one form or another. The issue may be regarded as “mostly a question of terminology”<sup>245</sup>, but it does carry practical significance. The same fallaciousness may be linked to the term “third parties”, which also seems to refer to

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<sup>241</sup> See e.g. Rau 2008, p. 245 (“Treating any of this as a question ‘rationae personis’ is already highly tendentious”). The author begs to differ.

<sup>242</sup> See Born 2009, pp. 1138-1139; Hanotiau 2011, p. 554.

<sup>243</sup> See Redfern-Hunter 2009, p. 85.

<sup>244</sup> See Van den Berg 2007, p. 343; Hobér 2011, pp. 96-97.

<sup>245</sup> See Hobér 2011, p. 97

someone not related to the agreement.<sup>246</sup> In this case, the construct of “non-signatory (party)” undoubtedly carries a more distinctive meaning as it refers to an actual party who has merely omitted or had no chance to sign a written agreement.<sup>247</sup>

It may be questioned whether the exact terminology is of great importance. However, as this chapter examines establishing the arbitration agreement through doctrines which rely on consent, it is necessary to be aware of how these doctrines and the actual effects thereof are construed. These effects and the issue in general become relevant in practical applications, such as the enforcement of the award. For example, the New York Convention only recognizes and enforces awards between “the parties”.<sup>248</sup> As for KKO 2013:84, this question is particularly troublesome because the wording of the Supreme Court seems to suggest that the non-signatory did not in fact become a party to the arbitration agreement but was “merely” bound by it. This subject will be discussed below in Chapter 7.1.

## 6.2 Means of finding consent

“In many cases an implicit understanding on the part of the signatories as to who the ‘true’ parties ‘really’ were, should be enough to trump any other requirement, substantive or formal.”<sup>249</sup>

As conveniently conveyed above by Rau, the existence of consent may ultimately be established through interpretation of party intent. In case it may be found that the signatory parties intended to include the non-signatory party within the extent of the arbitration clause, the non-signatory may be bound as presented in Chapter 5.3. This ensues from the concept that the non-signatory may not only pick the cherry – it must also eat the (assumably unpalatable) cake. However, the intent of the non-signatory may carry significance as well in the sense that, even if the non-signatories were deemed not to have meant to impose arbitration as a condition to the benefit<sup>250</sup>, the non-signatory may be

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<sup>246</sup> See Born 2009, p. 1139.

<sup>247</sup> The use of the term “non-signatory” has also been criticized for its “laziness” and for its omission to “do justice to the problem”; see Rau 2008, p. 229.

<sup>248</sup> See Article II (1) of the New York Convention.

<sup>249</sup> See Rau 2008, p. 231.

<sup>250</sup> Based on the research material, the conditional granting of a benefit is discussed scarcely in legal literature. However, for case law, see e.g. *See e.g., Federico v. Charterers Mut. Assur. Ass’n Ltd*, 158

regarded to have accepted being subjected to arbitration by accepting the benefit.<sup>251</sup>

Moreover, finding non-signatory consent is important also due to the following notion:

“A third party beneficiary might in certain circumstances have the power to sue under a contract; it certainly cannot be *bound* to a contract it did not sign or otherwise assent to.”<sup>252</sup>

While the author of this thesis disagrees with the view that a non-signatory may *only* be bound to arbitration it has assented to (at least if assent in this case constitutes an *express* stipulation), the existence of consent is important as there is no mechanism similar e.g. to estoppel readily usable in Finland.<sup>253</sup> Therefore, the typical rules and principles of contract interpretation and how implicit party consent may be discovered must be established.

However, as a premise, the legal basis based on which the interpretation is conducted must be restated. International conventions or national laws (including the Finnish Arbitration Act) do not dispense advice on the interpretation of arbitration agreements, other than in the form of giving effect to the scope of the parties’ agreement and providing for the non-recognition of awards which exceed this scope.<sup>254</sup> In the absence of such rules, the universally established view refers the interpreters of arbitration agreements to the general rules and principles of contract law.<sup>255</sup> Naturally, when a national court considers a case based on national law, it has to seek the answers from the national law in question.

However, several international arbitral tribunals have adopted transnational, “generally-applicable canons of contract”.<sup>256</sup> Apart from some specific requirements, e.g. concerning the form of agreement, arbitration is a creature of contract, which is why normal rules of contract interpretation apply. Nevertheless, even then there are some special characteristics

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F.Supp.2d 565 2001 (“arbitration as a condition precedent to recovery”). This further begs for finding non-signatory consent.

<sup>251</sup> Naturally, if the signatory parties are regarded to have specifically excluded the non-signatory from arbitration, it ensues that, regardless of the non-signatory’s intent, the non-signatory is neither bound nor may invoke the arbitration clause.

<sup>252</sup> See *Comer v. Micor, Inc.*, 436 F.3d 1098 (9th Cir. 2006).

<sup>253</sup> The existence of consent once again appears to be a vague concept. Excluding situations where equitable estoppel has been invoked, even if assent by the non-signatory beneficiary cannot be established by other means (especially in the case of a very reluctant non-signatory), in case the benefit has been granted conditionally, does accepting the benefit with no express resistance as to the condition in fact constitute assent?

<sup>254</sup> See e.g. Born 2009, pp. 1061-1062.

<sup>255</sup> See e.g. Gaillard-Savage 1999, p. 265; Lew 2003, p. 150; Born 2009, pp. 1063-1065. This subject and its legal justification is discussed more thoroughly above in Chapter 5.3.1.

<sup>256</sup> See Born 2009, p. 1063.

to arbitration agreements that are considered to affect their interpretation, e.g. in the case of liberal construction of the agreement or the pro-arbitration regime (discussed below).<sup>257</sup>

Due to this specific nature of arbitration, some typical rules of interpretation may not apply.<sup>258</sup> In conclusion, interpretation of arbitration agreements is a mixture of general rules of (national) contract law and special rules unique to arbitration in particular.

Moreover, using rules of *contract* interpretation to examine party intent and consent in relation to the signatory parties is naturally justifiable as the signatory is expressly bound by the contract and the contract may be used to identify the signatory's intent. However, the same rules are applied to discovering non-signatory intent as well because they reflect both how intent typically manifests itself and what are the justifiable expectations typically connected with arbitration agreements. Furthermore, it is a question of determining whether the non-signatory has approved the contract in invoking the right granted therein, to which the rules of contract interpretation apply.

Another thing that affects and complicates the interpretation of arbitration agreements is that they are typically in the form of a short, ambiguous arbitration clause which only contains some rudimentary stipulations on the arbitration process. If for example a clause stating "Arbitration under Finnish law" is enforceable, it does not provide much insight to the intent of the parties. Therefore, certain presumptions of the parties' intentions have emerged with the purpose of clarifying the typical goals often connected to arbitration.<sup>259</sup> The thesis will therefore examine the essential rules and presumptions applicable to interpretation of arbitration agreements.

First, however, it is useful to state the systematics connected to the rules of interpretation. It is universally accepted that the (common) intent of the parties is the overriding rule of interpretation.<sup>260</sup> This intent may typically be discerned from the wording of the contract and other material connected to it. Interpretation based on this material is *subjective*, party-oriented, since these are the factors which bespeak party intent. However, sometimes the intentions of the parties are not congruent. In these cases where common intent does not

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<sup>257</sup> See Born 2009, p. 1060.

<sup>258</sup> See Gaillard-Savage 1999, p. 265.

<sup>259</sup> See Born 2009, p. 1066.

<sup>260</sup> See Article 4.1 (1) of the UNIDROIT Principles of International Commercial Contracts (2010); Article 5.101 (1) of the Principles of European Contract Law (2002); Telaranta 1953, p. 152; Gaillard-Savage 1999, p. 257; Hemmo 2007a, pp. 602-603; Franke-Magnusson-Ragnwaldh-Wallin 2013, p. 60. See also *Amco Asia Corp. v. Republic of Indonesia, Award on Jurisdiction, ICSID Case No. ARB/81/1 (25 September 1983)*.

exist, the question arises whether one party's intent may be given preference. Some guidance for interpreting party intent may and has been found in section 32.1 of the Finnish Contracts Act which regulates mistakes in the utterance of contracts.<sup>261</sup> Under the provision, the party who is or should have been aware of such mistake made by the other party may not rely on the mistake. The purpose of the provision is regarded to give priority to the intent of the opposing party if the other party knew or should have known of this intent.<sup>262</sup> This notion is supported internationally.<sup>263</sup> Furthermore, if no such awareness exists, the other party's intent and conduct are given the meaning which a reasonable person would have given it under similar circumstances.<sup>264</sup>

The secondary method of interpretation is *objective*, target-oriented. It may be used in case the primary (aforementioned) party-oriented interpretation is not sufficient or as supplementing guidelines.<sup>265</sup> Target-oriented interpretation may take into consideration factors such as non-mandatory law, legal policies, promoting the feasibility of a certain type of contracts as well as target-oriented interpretation rules, e.g. pro-arbitration rules, effective interpretation, *contra proferentem* and matters of expediency.<sup>266</sup> These are means to discover the meaning and content that the parties should reasonably have understood the contract to entail.<sup>267</sup>

### **6.2.1 Pro-arbitration presumption vs strict interpretation**

One of the most essential (as well as contradictory) presumptions concerning arbitration agreements is the so called "pro-arbitration" presumption. Deriving from international conventions, e.g. New York Convention, as well as national legislation and case law, the presumption promotes a general "expansive" interpretation of arbitration agreements.<sup>268</sup>

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<sup>261</sup> See Aho 1968, pp. 154-155; Hemmo 2007a, p. 625.

<sup>262</sup> See Aho 1968, pp. 154-155.

<sup>263</sup> See Article 4.2 (1) of the UNIDROIT Principles of International Commercial Contracts (2010); Article 5.101 (2) of the Principles of European Contract Law (2002); Article 8 (1) of the United Nations Convention on Contracts for the International Sale of Goods (2010).

<sup>264</sup> See Article 4.2 (2) of the UNIDROIT Principles of International Commercial Contracts (2010); Article 5.101 (3) of the Principles of European Contract Law (2002); Article 8 (2) of the United Nations Convention on Contracts for the International Sale of Goods (2010).

<sup>265</sup> See Hemmo 2007a, p. 603.

<sup>266</sup> See Lehrberg 1995, pp. 82-83; Hemmo 2007a, pp. 632-633. On the occasional overlap of party-oriented and target-oriented interpretation, see Chapter 6.3.1.

<sup>267</sup> See Hanotiau 2011, p. 548.

<sup>268</sup> See Born 2009, p. 1067.



The pro-arbitration regime, adopted widely by developed states and the international business community, recognizes the presumptive validity and enforceability of arbitration agreements as well as limits the available grounds for their invalidity.<sup>269</sup> Also called “presumption of one-stop arbitration”<sup>270</sup> or interpretation “*in favorem validitatis*”<sup>271</sup> or “*in favorem jurisdictionis*”<sup>272</sup>, the rule of interpretation presumes that the parties intended the arbitration clause to be interpreted expansively and in ambiguous situations extend to cover related disputes as well as those clearly defined in the clause.<sup>273</sup> The idea behind the presumption is that the parties may be assumed to have intended all possible disputes arising from the contract to be settled in a single proceeding as opposed to taking on multiple processes in different fora. The presumption is rather fair as it promotes the effective resolution of disputes as well as encourages the view that the parties intended to stipulate the resolution of all related disputes rather than only certain types.

The pro-arbitration presumption has been adopted widely especially in the United States<sup>274</sup>. Supported by the Federal Arbitration Act<sup>275</sup>, the view has also been reasserted by courts, e.g. in *Steelworkers v. Warrior & Gulf Co*:

“[A]n order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute; and *doubts should be resolved in favor of coverage*”<sup>276</sup> (emphasis added)

The presumption favoring wide interpretation is also predominant e.g. in Switzerland, England, Germany, Italy and Canada.<sup>277</sup> However, some authorities, e.g. the French *Cour de cassation*, have declined to employ the expansive view, and instead decided that the

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<sup>269</sup> See Born 2009, pp. 202-205.

<sup>270</sup> See Redfern-Hunter 2009, p. 108; *Yuri Privalov and others v. Fiona Trust Holding Corporation (British Virgin Islands) and others*, House of Lords, 17 October 2007.

<sup>271</sup> See Kurkela-Uoti 1995, p. 69.

<sup>272</sup> See Gaillard-Savage 1999, p. 261.

<sup>273</sup> See e.g. Lew 2003, pp. 152-153; Kurkela-Uoti 1995, p. 69.

<sup>274</sup> See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. (1995); Alderman 2012, pp. 586-587; Born 2009, pp. 1067-1068.

<sup>275</sup> See the U.S. Federal Arbitration Act, 9 U.S.C. §2.

<sup>276</sup> See *United Steelworkers of America v. Warrior & Gulf Navigation Co.* 363 U.S. 582, 583 (1960).

<sup>277</sup> See Born 2009, pp. 1072-1076.

ambiguous provisions of the arbitration agreement shall be interpreted with a more neutral standpoint.<sup>278</sup>

The pro-arbitration presumption has not been around particularly long. It was preceded by the rule of strict interpretation, according to which arbitration agreements were to be construed narrowly.<sup>279</sup> The presumption is based on the notion that arbitration is an exception to the premise that disputes are resolved by national courts according to due process.<sup>280</sup> Accordingly, the arbitration agreement is to be interpreted in the way that only such matters as expressly stipulated by the parties are to be subjected to arbitration. Therefore, in ambiguous and equivocal situations, no presumed intentions should be given to the agreement. In the absence of express wording, such unclear matters cannot be arbitrated.<sup>281</sup>

A fine line may be (and was) found, e.g. in the aforementioned decision of *Cour de cassation*, in which the court concluded that neither the strict interpretation nor interpretation *in favorem validitatis* serves the true purpose of the question at hand.<sup>282</sup> To interpret the arbitration agreement strictly was regarded old fashioned and not suitable for the modern legal environment which no longer recoils from arbitration as the evil step brother of litigation. Furthermore, to deny all claims which are not backed up by express wording in the agreement would first of all be conflicting with the notion that the intent of the parties typically overcomes the wording of the agreement<sup>283</sup> (although discerning such intent may prove to be troublesome), and secondly, it would seriously impede arbitration due to the broad and non-specific nature of arbitration clauses. However, the expansive interpretation was not deemed appropriate either because it assumes that the parties intend everything to be arbitrated, whereas it is “perfectly legitimate” to go for litigation

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<sup>278</sup> See Gaillard-Savage 1999, pp. 261-262; see also Born 2009, pp. 1076-1078.

<sup>279</sup> See Gaillard-Savage 1999, p. Tirkkonen 1943, pp. 101-103; Möller 1997, p. 30; Kurkela-Uoti 1994, p. 7. See also e.g. *Gangel v. De Groot*, 393 N.Y.S.2d 698 (N.Y. 1977) as cited in Born 2009, p. 1078: “[t]he agreement to arbitrate must be express, direct, and unequivocal as to the issues or disputes to be submitted to arbitration”.

<sup>280</sup> See Koulu 2008, p. 188.

<sup>281</sup> See e.g. Möller 1984, p. 374.

<sup>282</sup> See Gaillard-Savage 1999, pp. 259-262.

<sup>283</sup> See Hemmo 2007a, pp. 621-623; Article 4.1 of the UNIDROIT Principles of International Commercial Contracts (2010); Article 5.101 of the Principles of European Contract Law (2002).

instead.<sup>284</sup> Moreover, to automatically assume as a matter of policy that the arbitration agreement is valid, effective and extensive does have its pitfalls.

Even so, although the expansive (pro-arbitration) interpretation cannot be regarded completely universally accepted nor entirely free of doubt, seeing that it has been internationally adopted more and more comprehensively and the formerly dominant restrictive view has been “generally rejected in international arbitration”<sup>285</sup>, it is safe to assume that the preferable option is interpreting the agreement expansively rather than restrictively. This argument relies on the fact that the modern business environment no longer considers arbitration as an exception to the premise of litigation but, on the contrary, the typical form of dispute resolution in business, whether national or (especially) international. Moreover, even if a neutral starting point may be regarded justifiable, the argument (and presumption) that if an arbitration clause has been made in the first place, it is likely meant to cover all disputes, is intelligible and reasonable.

It should be mentioned briefly that, once again, the terminology discussed above seems to carry some importance. The extensive as well as the restrictive interpretation both apply to the assessment of the scope of the arbitration agreement, not its validity, i.e. the existence of the agreement.<sup>286</sup> Even though the non-signatory in KKO 2013:84 resisted arbitration relying on the non-existence of the arbitration agreement between it and the signatory parties, the argument may be disregarded as semantics. As asserted above in Chapter 6.1.1, the existence of the arbitration agreement is not in question in KKO 2013:84 – the agreement, its validity measuring up to the formal requirements of the Finnish Arbitration Act, does exist between the signatory parties. The issue of whether it “extends” to bind the non-signatory as well (which, to be fair, determines whether the agreement exists between the signatory B and the non-signatory C) concerns the subjective scope of said agreement which will be determined on the basis of the intent of the parties. As the intent will be established using normal contract interpretation, the aforementioned presumption does apply in the case at hand. Therefore, even though it may be argued that “This rule [of extensive interpretation] can apply *only once it has been ascertained that the parties actually agreed on arbitration*”<sup>287</sup> (emphasis added), this argument is countered in KKO

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<sup>284</sup> See Gaillard-Savage 1999, p. 261.

<sup>285</sup> See Gaillard-Savage 1999, p. 260. See also Möller 1997, pp. 30-31.

<sup>286</sup> See Born 2009, p. 1071; Tirkkonen 1943, p. 102; see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. (1995), pp. 944-945.

<sup>287</sup> See Lew 2003, p. 151.

2013:84 by the fact that the interpretation refers mainly to the signatory parties' intent and only supportively to the non-signatory's. Since the object of assessment is the intended subjective scope of the agreement, the rule of interpretation may apply.

### 6.2.2 Interpretation in good faith

According to Fouchard, Gaillard and Goldman,

“The first and most widely accepted principle of interpretation applied to arbitration agreements is the principle of interpretation in good faith.”<sup>288</sup>

Parallel with the rule of interpretation favoring party intent (if one can be discerned) over the wording of contract<sup>289</sup>, the principle of good faith gives preference to the parties' true intent in case it conflicts with the worded intent and presupposes that the contracting parties enter into agreement with the intention that the stipulations of the contract are binding and that both (or all) parties have intended for the subsequent consequences.<sup>290</sup> The principle of good faith and fair dealing has also been articulated in the UNIDROIT Principles of International Commercial Contracts as “one of the fundamental ideas underlying the Principles”.<sup>291</sup>

Fouchard, Gaillard and Goldman divide the principle of good faith into three more exact rules of construction of party intent.<sup>292</sup> First of all, the examination of party intent must be conducted *in context*, which refers to taking into consideration the justifiable expectations that the parties envisaged when entering into the agreement. Assumingly the consideration in context also includes reflecting these expectations to the circumstances of the execution of contract. Secondly, the perception of the parties towards the agreement and its objectives may be deduced from their attitude (and actions reflecting the attitude) between the time of the signing and the moment the dispute arises. The use of this “practical and

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<sup>288</sup> See Gaillard-Savage 1999, p. 257.

<sup>289</sup> See *supra* note 260.

<sup>290</sup> See Gaillard-Savage 1999, p. 257.

<sup>291</sup> See UNIDROIT Principles of International Commercial Contracts (2010), Article 1.7, Comment 1.

<sup>292</sup> See Gaillard-Savage 1999, pp. 257-258.

quasi-authentic interpretation” has been common in international arbitration<sup>293</sup>, e.g. in the *Aramco* case.<sup>294</sup>

However, as will be discussed below, the significance of such subsequent conduct may be reduced when juxtaposed alongside the typical offer-reply mechanism and the time of formation of an agreement. Considering this composition, the defining factor is the intent of the parties at the time of contract execution, while the subsequent attitude and conduct is considered to be of lesser (if any) significance, especially if it does not reflect the attitude of *both* parties.<sup>295</sup> Although in KKO 2013:84, the issue concerns a non-signatory – a situation based on the premise that no agreement (with the non-signatory) exists – the offer-reply mechanism is relevant in determining the acceptance or adoption of the agreement by the non-signatory *beneficiary* in case the benefit is granted conditionally.

Lastly, under the third rule of good faith interpretation, the agreement shall be interpreted *as a whole*. Although criticized to some extent for circularity, e.g. in case of related contracts,<sup>296</sup> the concept of interpreting as a whole is commonly recognized.<sup>297</sup>

### 6.2.3 Effective interpretation

Under the principle of effective interpretation (*effete utile*), when the wording of the agreement raises the question whether the intent to arbitrate exists or not (e.g. in a pathological, *optional* arbitration clause), weight should be given to the interpretation which results in the arbitration clause being effective rather than one which “renders them useless or nonsensical”.<sup>298</sup> In other words, the principle relying on consent assumes that parties who have included an arbitration clause in their contract have intended that the clause is also effective (*ut res magis valeat quam pereat*).<sup>299</sup>

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<sup>293</sup> See *ibid.*

<sup>294</sup> See *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*, 27 *International Law Report* 117 (1963).

<sup>295</sup> See Lehrberg 1995, pp. 66-67.

<sup>296</sup> See Waincymer 2012, p. 140.

<sup>297</sup> See Hemmo 2007a, pp. 586-587; KKO 1997:134.

<sup>298</sup> See Gaillard-Savage 1999, pp. 258-259; Aho 1968, p. 257; Hemmo 2007a, pp. 652-653; Article 4.5 of the UNIDROIT Principles of International Commercial Contracts; Article 5.106 of the Principles of European Contract Law.

<sup>299</sup> See Waincymer 2012, p. 141; Born 2009, p. 1065.

It is noteworthy that Waincymer asserts that the principle of effective interpretation is well suited for evaluating the existence of the arbitration agreement, but not so much as to the subjective scope thereof because “there typically is no starting point where that person can be presumed to want a valid arbitration”.<sup>300</sup> While this is true in the sense that the non-signatory is typically not present when the arbitration agreement is drafted and therefore any determination as to the non-signatory’s intent is obviously futile, the principle may be deemed to carry significance when considering whether the signatory parties meant to include the non-signatory *beneficiary* in the scope of the arbitration agreement. Although this topic will be discussed below, it may already be stated briefly that it would be rather peculiar if the signatories deliberately wanted to exclude the non-signatory from possible arbitration proceedings and thus possibly subject themselves to multiple proceedings in several fora.

#### **6.2.4 Interpretation *contra proferentem***

The principle of interpretation *contra proferentem* (against the offeror/draftsman) refers to the universally recognized principle that the party who is responsible for drafting the ambiguous or equivocal contract provision should be responsible for the ambiguity, leading to the provision being interpreted against it.<sup>301</sup> The principle is based on the idea that the draftsman would have had the opportunity to phrase the provision so that no confusion as to its meaning arises, whereas the opposing party could not have influenced it. Naturally, this rule, typically applied in cases of standard terms and conditions, does not apply when parties have drafted the agreement together.

In KKO 2013:84, the District Court and the Court of Appeal (without specifically mentioning this principle) did both refer to the fact that the signatory parties did indeed have the opportunity to expressly bind the non-signatory by a more specific arbitration clause. Indeed it may be noted that in the case at hand, the circumstances are lucid since the crucial provision, the arbitration clause, was drafted by the signatories alone.

Therefore, the prerequisites as to applying the *contra proferentem* rule are met.

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<sup>300</sup> See *ibid.* p. 142.

<sup>301</sup> See Gaillard-Savage 1999, pp. 259-260; Hemmo 2007a, pp. 638-639; Article 4.6 of the UNIDROIT Principles of International Commercial Contracts; Article 5.103 of the Principles of European Contract Law. For case law, see also e.g. KKO 1984-II-17; KKO 1978-II-126.

Some criticism may and has been presented towards this rule of interpretation. First of all, the author is of the opinion that it may sometimes place undue pressure on the drafting party and does not really encourage one to take on the task. Another opinion points out that the rule in fact encourages the other party not to remark the draftsman on an ambiguous term.<sup>302</sup> However, this criticism does not apply to the case at hand because the non-signatory had nothing to do with the contract.

Lastly, the *contra proferentem* rule is not absolute. It must be taken into consideration how the ambiguity of the provision in question manifests itself in relation to the other party. For example, the text itself may be written in poor English or the concepts and terms used may be extremely complex. The defining factor in determining whether the rule favors the party who has not drafted the provision is how that party within reason should have understood said provision in juxtaposition e.g. with the type of contract or how such provisions or contracts are typically formed.<sup>303</sup>

### **6.2.5 Interpretation according to customary practice**

Finally, in case the provision of a contract is equivocal, it may be interpreted according to the customary practice or trade usage.<sup>304</sup> This means that the provision will be given a meaning that is typically connected with similar provisions or contracts in the established business practice. As presented in the Principles of European Contract Law, the meaning should be that which “reasonable persons of the same kind as the parties would give to it in the same circumstances”.<sup>305</sup> In case the party representing the competing view does not show why that view is better suited for interpretation in the issue in question, the view supporting the customary practice will prevail.<sup>306</sup>

The justification of this rule of interpretation may be found in the idea that it reflects the presumed intent that the parties have meant for the provision to have. Therefore, yet possibly controversial in the sense that the aforementioned presumption might be wrong

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<sup>302</sup> See Hemmo 2007a, p. 639.

<sup>303</sup> See Hemmo 2007a, pp. 642-643. See also e.g. KKO 1990:120.

<sup>304</sup> See Born 2009, p. 1065; Aho 1968, p. 255; Hemmo 2007a, pp. 650-651, 592-594. See also KKO 1995:171.

<sup>305</sup> See Article 5:101 (3) of the Principles of European Contract Law.

<sup>306</sup> See Hemmo 2007a, p. 594

and the parties' intention was in fact unusual, it does provide support for establishing party intent since unusual or abnormal practices would normally be expressly stipulated.

### **6.3 Interpretation of consent in KKO 2013:84**

Moving on to apply these methods of interpretation discussed above to KKO 2013:84, the first step is to present the only piece of written material that may be used to evaluate the parties' intent. The arbitration clause, included in the "dispute resolution" paragraph of signatory parties' underlying contract was the following<sup>307</sup>:

"Disputes arising out of this contract will primarily be settled in negotiations with the intent of reaching an equitable resolution congruent with the purpose of the contract which satisfies all parties. In case no resolution is reached, the disputes shall be settled in arbitration."

Typically, the material used for the interpretation of contract or intent includes the physical contract and possible attachments, such as drafts, plans, calculations or letters.<sup>308</sup> In addition, the evaluation may be based on subsequent conduct, previous contractual practices of the parties as well as customary practice in the area of business in question. However, in KKO 2013:84, the material available for interpreting the signatory parties' intent as well as the non-signatory's is scarce. The only material that indicates anything as to the purpose of the parties is the underlying agreement and the arbitration clause. It is therefore also the only material that may be used for party-oriented interpretation. Excluding that material, the evaluation will have to be based on presumptions, reasonable expectations and customary practices – methods of target-oriented interpretation.

As for the semantics, however, the author asserts that the distinction between party-oriented and target-oriented interpretation is somewhat artificial as the concepts may factually overlap, e.g. in this case. For example, the rule of interpretation in good faith attempts to discover the true intent of the parties. However, as explained above, its methods include taking into account the expectations justifiably envisaged by the parties, which in turn refer to and are determined on the basis of customary practices and

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<sup>307</sup> The arbitration clause as well as the entire underlying agreement was written in Finnish; the following translation is the author's own. The original text in Finnish is available online at <http://www.kko.fi/63703.htm>.

<sup>308</sup> See Hemmo 2007a, pp. 584-585.



presumptions connected to the specific area of law, e.g. the pro-arbitration presumption. That is to say, expectations do affect party intent, and the concept of “a reasonable person”<sup>309</sup> is heavily influenced by what is typically expected of such person, which in turn is determined by policies and presumptions. In other words, “reasonable” intent is determined by policies, which is why this thesis will not concentrate on distinguishing between these rationales of interpretation, but merely acknowledging them and how they are typically perceived.

The factual situation in KKO 2013:84 differs from the typical premise in the way that the non-signatory beneficiary naturally has had nothing to do with drafting the contract or the arbitration clause contained therein. Therefore, the clause may only be used to interpret the signatory parties’ intent, whereas the non-signatory’s intent will have to be based solely on its subsequent conduct (insofar as it matters) and reasonable expectations.

For the sake of clarity and the slightly divergent methods and materials of interpretation of the signatories’ intent and that of the non-signatory, the thesis will first discuss the intent of the signatory parties and draw conclusions on what the results denote. As stated in Chapter 5.3.2, the intent of the signatory parties carries most relevance in the matter, as they may have meant to impose the arbitration clause as a condition to the benefit granted in the underlying shareholders’ agreement.

### **6.3.1 Discovering signatory intent**

#### **Wording**

The wording of the arbitration clause is, as stated above, generic and rather non-specific. Such construction of dispute resolution clauses is typical as the focus is often on the other substance of the underlying agreement. Interpretation of the scope of an arbitration agreement is delicate and the lines drawn are thin; however, typically, special attention is paid to whether the clause refers to disputes arising e.g. “under”, “out of” or “in relation to” or “in connection with” the underlying agreement.<sup>310</sup> In KKO 2013:84, the exact wording is “arising out of”<sup>311</sup>, which has traditionally been regarded to merit a rather broad

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<sup>309</sup> See *supra* note 264.

<sup>310</sup> See Born 2013, pp. 39-42; Waincymer 2012, p. 143.

<sup>311</sup> The author’s translation of “tästä sopimuksesta aiheutuvat”.

interpretation – broader than “arising under” yet narrower than “arising in connection with”.<sup>312</sup> For example, the ICC standard clause of arbitration states “All disputes *arising out of or in connection with* the present contract [...]”<sup>313</sup> (emphasis added) and the UNCITRAL model arbitration clause states “Any dispute, controversy, or claim *arising out of or relating to* this contract”<sup>314</sup> (emphasis added). At this point it must be noted, however, that even though this type of interpretation is typically applied to deciding whether a *form of dispute* (e.g. torts, contractual and non-contractual claims) is within the scope of the arbitration agreement, the same interpretation nonetheless provides indication as to the parties’ intent concerning the subjective brevity of the clause. Therefore, applying the same methods in interpreting the scope *ratione personae* is justifiable.

Furthermore, in addition to the phrase “arising out of” typically being linked to broad interpretation, it may be asked whether the exact wording can conclusively be the determinative factor, especially when the clause is generically broad and ambiguous. The capability of “normal persons” to pay attention to such detail, especially if they are not accustomed to such legal jargon, is presumably limited and the (slight) differences in wording may be regarded “semantic”<sup>315</sup>. Moreover, the dominant view seems consider the fact that the parties refer disputes to arbitration in the first place as a strong indication of their willingness to settle *all* disputes in such fashion.<sup>316</sup> Well phrased by Born,

“The intent of leading model international arbitration clauses is to apply expansively to all disputes relating to a particular contract, *regardless of legal formulation*. That is consistent with the practical objective of providing a single, neutral and expert forum for efficiently resolving the parties' disputes. As already discussed, *fine distinctions in wording are artificial*, or worse, obscuring the underlying commercial purposes of agreements to arbitrate.”<sup>317</sup> (emphasis added)

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<sup>312</sup> See Born 2009, p. 1097-1098; Waincymer 2012, p. 143; Redfern-Hunter 2009, p. 109. See also *Heyman v. Darwins, Ltd.*, [1942] A.C. 356 (H.L.), per Viscount Simon.

<sup>313</sup> See Standard ICC Arbitration Clauses, available online at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/>.

<sup>314</sup> See UNCITRAL Model Clause, available online at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1190](http://www.pca-cpa.org/showpage.asp?pag_id=1190).

<sup>315</sup> See *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA*, 863 F.2d 321(4th Cir. 1988).

<sup>316</sup> See Redfern-Hunter 2009, p. 110; Waincymer 2012, p. 144; Lew 2003, pp. 152-153.

<sup>317</sup> See Born 2009, p. 1090.

This view obviously relies on the notion of pro-arbitration and the assumption that the parties have actually intended to arbitrate all possible disputes. Naturally, this assumption may be countered by suggesting that this presumption is biased or ignorant to the possibility and autonomy of the parties to decide whatever they choose, which is obviously true. The parties may well have intended to spread the resolution of possible disputes all to their own fora, all with different procedures and in all corners of the Earth. However, such presumption must rely on extremely cogent argumentation and factual evidence. It would also seem fair to expect that the parties would expressly stipulate such unusual desires. Therefore, in the presence of a broad arbitration clause<sup>318</sup>, as long as the wording does not expressly stipulate or give strong indications as to the exclusion of certain types of disputes, it may be justifiably expected (as it is the normal practice) that the parties have intended to arbitrate every possible dispute. This presumption may naturally be disputed, but the disputing party defending the anomalous view must carry the burden of proof.

Applying this interpretation to the case at hand, it may be assumed that, by stipulating on “disputes arising out of” the underlying agreement, the parties have intended to subject to arbitration everything in connection with the agreement *regardless of the subjective dimension*. This argument is supported by the rationale of the Supreme Court in KKO 2013:84, under which the dispute was to be settled in arbitration because it necessitated interpretation and application of a provision in the agreement, i.e. *arose out of* the agreement. Neither does the precise wording of the clause indicate that the signatory parties intended to leave the third party outside of the arbitration. Moreover, it would be unreasonable and unrealistic to assume that the parties had taken into account the possibility that perhaps the arbitration clause was not clear or wide enough to include non-signatory parties as well. Therefore, the argument of the District Court that the parties had the option to expressly bind the non-signatory beneficiary seems to expect quite a lot of legal knowledge and insight to arbitral dispute resolution from the parties. However, since the wording of the arbitration clause is indeed generic and vague, the conclusion will have to be based on other rationales as well. Still, it is now established which is the preferable way to construe the arbitration clause in KKO 2013:84, what kind of assessment it may be subjected to and which is the preferable conclusion as to the intent of the signatory parties based on the wording of the clause.

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<sup>318</sup> Whether the arbitration clause in KKO 2013:84 is regarded broad or narrow, the premise in the author’s opinion is the same: since there is no express exclusion, “disputes” should constitute all disputes.

## **Good faith, pro-arbitration, expediency and other considerations**

As discussed above in relation to interpretation in good faith, intent of the parties must be interpreted in context and construed in the light of the expectations they have reasonable envisaged. In KKO 2013:84, there are no indications as to any unusual or abnormal expectations or purpose of the parties, which is demonstrated e.g. by the generic arbitration clause. Therefore, the interpretation may not rely on any other factual evidence, but must instead employ the standard of “reasonable” expectations which in turn are affected by presumptions connected to arbitration.

First of all, reference to the rationale presented by Lord Hoffmann in *Premium Nafta Products* may be made:

“In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, *are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal*. The clause should be construed in accordance with this presumption *unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.*”<sup>319</sup> (emphasis added)

The opinion presents valid argumentation in support of the pro-arbitration presumption, which the thesis, succumbing to the universally dominant view, as stated above, regards as the preferable premise. It is likely that parties who have agreed to arbitration have intended the coverage of such agreement to be extensive since, absent evidence to the contrary, it would indeed be irrational to assume that the parties wanted to engage several proceedings in multiple jurisdictions, possibly at the same time.

Opinions differ on the subject of applying the pro-arbitration presumption. However, even if the presumption is not perfect in its prejudice, it is supported by other considerations used to determine what may be expected from arbitration in general. First of all, matters of expediency as well as customary practice strongly favor the pro-arbitration presumption. The parties who have in general agreed to arbitration may be regarded not to wish to divide the resolution of possible disputes to several fora. Since one of the most important reasons

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<sup>319</sup> *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] UKHL 40, cited in Waincymer 2012, pp. 144-145.

to agree to arbitration in general is the efficiency of the process – it is considered speedy and cost-effective<sup>320</sup> in comparison with traditional litigation with all its appellate proceedings – and the exclusion of litigation as means of *any* dispute resolution, it would be a stretch to suggest that the signatory parties only wanted these benefits in relation to each other and not in relation to the third party beneficiary. Moreover, the intent of the parties is typically to have a centralized means of dispute resolution, which is also adamantly connected to cost-efficiency and timeliness of the proceedings. In other words, to presume the opposite would be quite unconventional, and as an exception to the rule it would have to be supported by strong argumentation as well as evidence. Therefore, the burden of proof would lie on the party suggesting such approach.

In addition, the principle of effective interpretation supports the view under which the intent of the signatory parties was to bind the non-signatory as well. Applying effective interpretation in KKO 2013:84, it is likely that the signatories have intended the arbitration clause to be effective *to its full extent*, i.e. in relation to all parties, including the non-signatory. It is reasonable to assume that the signatories have acknowledged that by granting a benefit to a third party they obligate themselves in relation to said non-signatory. This in turn may entitle the non-signatory to a rightful claim, enabling it to commence proceedings against them. Therefore, it may also be assumed that the signatories intended the arbitration clause to be effective in relation to all such persons or entities that may be a part of such proceedings arising out of the shareholders' agreement. Accordingly, it would impede the efficiency of the clause to limit it to only affect the signatory parties, especially when the signatories have been aware of the third party connected to the underlying agreement.

However, it is necessary to also take into account the rule of interpretation *contra proferentem*, under which an ambiguous contract provision is to be interpreted against the draftsman. In the case at hand, this principle would support the view of the District Court, according to which the signatories had the option of expressly binding the non-signatory, and in not doing so they forfeited the right to arbitrate with it. Indeed, applying this principle would lead to the detriment of the signatories as they alone are responsible for drafting the clause. Moreover, in case of a third party beneficiary, it would be reasonable to expect that the signatories expressly stipulated in detail of every aspect of their relations to

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<sup>320</sup> This view may and has been argued, but that discussion is left outside the scope of this work.

the third party, exactly because the third party (assumably) had no chance of influencing the contract itself. This view encourages and is supported by the predictability of contracts. Even then, however, it would be rather harsh to leave without significance the rationales supporting the other conclusion and decide the case against the signatories only because they did not realize they should pay more attention to the wording of the contract. As stated above, such conclusion would be expecting a lot from the signatories in terms of legal and contractual knowledge as well as being disproportionately harsh in juxtapose with the purpose of the principle (of *contra proferentem*) and all other aforementioned considerations.

All in all, taking into account the arguments above as well as the preference given to arbitration by the pro-arbitration presumption (or, in other words, the presumption of a “normal” or “reasonable person”); it may be assumed that the signatory parties in KKO 2013:84 have indeed intended to bind the non-signatory to arbitration as well. The fact that they have not been judicially enlightened enough to add an express stipulation of such intent cannot be regarded to constitute grounds for rejecting such view, especially when it is supported by almost all of the other considerations that may be taken into account. Therefore, the intent of the signatory parties is established.

### **6.3.2 Discovering non-signatory intent**

Now that the reasonable assumption of the signatory parties’ intent has been established in the case at hand, the thesis moves on to assess whether the non-signatory beneficiary may be deemed to have consented to arbitration. Since the non-signatory has not been present in drafting the arbitration clause or the underlying agreement, its intent shall be assessed in the light of its subsequent conduct and, absent any proof of such, reasonable expectations and presumptions concerning a normal person in a similar situation. These considerations determine whether the non-signatory may be regarded to have consented impliedly.

The circumstances in KKO 2013:84 offer little help for this assessment in terms of non-signatory conduct. Other than disagreeing on the jurisdiction of the arbitral tribunal after the dispute had arisen, which naturally cannot be taken into account, the non-signatory’s conduct only includes the apparent acceptance of the right of redemption granted to it in the underlying agreement and invoking the right after it had been breached by the signatory party. This apparent acceptance may be deduced from the very fact that the non-signatory

invoked the right in a court of law. Moreover, the acceptance may be pinpointed to the moment when the non-signatory became aware of the benefit granted to it, assumingly when the signatories informed the non-signatory of the right. The timing becomes relevant in discussing the offer-reply mechanism below.

As the acceptance of the right of redemption by the non-signatory is undisputed, the next step is to determine the conditions under which the benefit has been accepted. Since there are no other indications in the non-signatory's conduct as to its intent, the grounds for the assessment must be looked for elsewhere. In this case, the attention again turns to objective interpretation, the "reasonable person" and the justified presumptions accordingly with the customary practice and trade usages.

The grounds for objective interpretation are the same as above: with no indication as to any other intent of the non-signatory, employing the notion of a "reasonable person" the analysis will determine what the non-signatory should reasonably have expected of the benefit granted. Therefore, considering the purpose of arbitration, which is to provide for an effective, fast, private and *centralized* dispute resolution, the presumption of a comprehensive arbitration clause may be applied. The premise of a single form of dispute resolution may be expected, and a clear indication of this presumption is provided in law as well: arbitration excludes litigation.<sup>321</sup> Therefore, if the agreement states that the chosen form of dispute resolution is arbitration, the presumption is that it is also the *only* form of dispute resolution. This concept of effectiveness is supported by the pro-arbitration presumption, and vice versa. Even if the pro-arbitration presumption was not employed, the same result would be supported by other considerations, e.g. the aforementioned customary practice as well as good faith. In case the signatory parties' intent has been to establish a single, exhaustive form of dispute resolution, it would be unreasonable and in conflict with process economy to permit the non-signatory to abuse the ambiguousness of contract wording against their true intent. Therefore, according to a general rule of interpretation, presented by Koulu,

"This rule has been called comprehensive or converging interpretation above. Its core idea is that the whole complex of disputes must be directed to the same channel of dispute resolution."<sup>322</sup>

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<sup>321</sup> See Section 5 of the Finnish Arbitration Act.

<sup>322</sup> See Koulu 2008, p. 186.

In conclusion, the objective interpretation clearly seems to support the notion that the non-signatory in KKO 2013:84 is presumably intended to be bound to arbitration by the signatories as “parties cannot lightly be deemed to have knowingly split the complex of disputes”<sup>323</sup>. In becoming aware of the benefit granted to it, the non-signatory may be presumed to have also become aware of the other provisions of the agreement, including the arbitration clause. Naturally, it may well be that the non-signatory has not in fact realized this intent of the signatories. However, the presumption is so obvious and well-reasoned that a reasonable person should have understood the intent as it is consistent with the customary practice. Moreover, as stated in Chapter 6.2, in case the intentions of the parties have not been congruent, preference may be given to the intent of the opposing party if the other party knew or should have known of this intent. Therefore, in the presence of such clear presumption of comprehensive arbitration, the non-signatory should have been aware that it is presumably bound by the arbitration clause. Then again, naturally the non-signatory is never obligated to accept the benefit on whatever conditions – it may reject or attempt to alter the deal. Therefore, the issue may be observed in the light of the offer-reply mechanism.

In case the signatories have intended to bind the non-signatory and objective interpretation (in the absence of more suitable indications) strongly supports this presumption of comprehensive arbitration, the ultimate question is whether the non-signatory accepted the benefit as such. The question will be determined on the basis of the offer-reply mechanism, derived from Section 1 of the Finnish Contracts Act, according to which a binding agreement is formed by an approving reply given to an offer.<sup>324</sup> In case the reply suggests any alterations to the offer, it is regarded as a rejecting reply and a new counter offer.<sup>325</sup>

Applying the offer-reply mechanism to the case in question, the benefit granted by the signatories to the non-signatory constitutes an offer the moment the non-signatory became aware of it, supposedly when the signatories informed the non-signatory of the legal act. The question of under what conditions the non-signatory accepted the benefit crystallizes in that moment. As discussed above, the non-signatory knew or should have known that

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<sup>323</sup> See *ibid.* p. 198.

<sup>324</sup> See also Hemmo 2007c, p. 14. Even though the act does not apply to agreements subject to formal requirements, the issue at hand is related to but does not intrinsically concern such agreement, which is why the underlying idea may be applied to considering whether the non-signatory has accepted the benefit as such (see e.g. the Swedish Supreme Court decision NJA 2000, cited in Hemmo 2007a, p. 100).

<sup>325</sup> See Section 6 of the Finnish Contracts Act.



the arbitration clause was meant to bind it – arbitration was a condition to the benefit. The determinative factor is therefore whether the non-signatory expressed refusal or willingness to alter the deal. As the presumption favors arbitration, the burden of proof of showing such refusal lies upon the non-signatory.<sup>326</sup> However, in KKO 2013:84, there is no mention whatsoever of any such stipulation or objection by the non-signatory on the arbitration clause before the actualization of the dispute. Therefore, from the perspective of the offer-reply mechanism, the signatories made an offer in the form of the right of redemption, subject to the arbitration clause, in notifying the non-signatory of the benefit, and the non-signatory accepted the benefit as such without making any objections as to the terms or conditions, thus accepting it conditionally. In conclusion, the non-signatory impliedly consented to the benefit as such. Furthermore, if and when the non-signatory wanted to repudiate the arbitration clause, the burden of proof lies upon it. However, since no such evidence of refusal or similar has been presented in KKO 2013:84, the non-signatory is to be deemed bound by the arbitration clause.

#### **6.4 Employing equitable estoppel**

Regardless of the fact that a relatively clear conclusion may be drawn based on the factors discussed above, additional support is presented in the form of the doctrine of equitable estoppel, in one form or another. The essence of this doctrine may be found in the principle of *venire contra factum proprium*<sup>327</sup> – no one may set himself in contradiction to his own previous conduct. As discussed above in Chapter 4.4.5, the underlying fundamental conception is that a party may not act inconsistently with his own conduct, which in practice means that a third party beneficiary may not choose to accept one provision of an agreement and choose not to touch the rest. Therefore, in case the right granted to it is subject to certain conditions, these conditions are not elective.

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<sup>326</sup> There are differing views to the question of burden of proof. For example, the Dutch Supreme Court stated in its decision in 2006 that subjecting the non-signatory to arbitration requires that “the will of the non-signatory to adhere to the arbitration agreement was *clear and expressed without doubt*”, see *Hoge Raad (Civil Chamber) 20 January 2006, NJ 2006/77, JOL 2006, 40, RVDW 2006*, p. 109, cited in Van den Berg 2007, p. 352. However, while agreeing that binding a non-signatory cannot happen lightly, the author disagrees with such construction of burden of proof which disregards valid and justifiable presumptions concerning arbitration agreements and therefore unnecessarily and to the detriment of the signatory hampers the true purpose of the parties by setting needlessly steep requirements of evidence, such as “without doubt”.

<sup>327</sup> See Born 2009, p. 1194

Diligently employed especially in the United States, the doctrine of equitable estoppel has found its place in binding non-signatories to arbitration. For instance, in *Hughes Masonry Co v. Greater Clark County School Building Corp.*, the court stated that

“it would have been *"manifestly inequitable"* to allow the contractor both to claim that the manager was liable for a failure to perform under the terms of the contract, and at the same time to deny that the manager was a party to the contract in order to avoid arbitration.”<sup>328</sup> (emphasis added)

Incidentally, the non-signatory in KKO 2013:84 asserted that the signatory was liable for a failure to perform under the terms of the contract, and at the same time denied that the non-signatory itself was a party to the contract in order to avoid arbitration. Various other cases in the United States have affirmed the notion that a non-signatory who invokes a right deriving from a contract is also bound by the dispute resolution clause of said contract.<sup>329</sup> Similarly, there are several civil law cases which rely on the same underlying principle, although in the form of good faith, *venire contra factum proprium* or abuse of right.<sup>330</sup> Despite the different names on which courts and arbitral tribunals have relied, the fundamental principle is still the same. Furthermore, the same principle crystallizes in the offer-reply mechanism as well, enabling the receiver of the offer only to accept the whole, unaltered offer or otherwise reject it or make a counter-offer. In other words, only picking the cherry is not an option.

Although readily used in case law, the doctrine of equitable estoppel does bring forward issues which have roused criticism towards the doctrine, its justification and usefulness. For instance, as alleged by Rau,

“it should not matter in the slightest whether the rhetoric is of ‘assumption’ or ‘ratification’, or ‘standing in another's shoes’, or ‘condition precedent’ or ‘*estoppel*’ – those are nothing but word balloons.”<sup>331</sup> (emphasis added)

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<sup>328</sup> See *Hughes Masonry Co v. Greater Clark County School Building Corp.*, 659 F.2d 836 (7th Cir. 1981) as cited in Hanotiau 2006, p. 21.

<sup>329</sup> See e.g. *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349; *Bridas S.A.P.I.C. et al. v. Government of Turkmenistan*, 345 F.3d.

<sup>330</sup> See Born 2009, pp. 1197-1198. See also Hemmo 2007a, pp. 372-373, discussing the meaning of good faith as a morale code in the light of the Finnish Contracts Act.

<sup>331</sup> See Rau 2008, p. 238.

With this assertion, Rau claims the futility of estoppel and its surrogate role for the real tool of binding non-signatories: consent. Parallel to the discussion on finding non-signatory consent above, Rau states that the true justification for enforcing arbitration against a non-signatory (using it as a “sword”) always derives from consent, even in cases where equitable estoppel has been employed.<sup>332</sup> For example, in case the author decided to order a fine, well-aged whisky in an ostentatious bar lounge without inquiring the price, he would naturally be bound to pay whatever the astronomical check would be. Not because it is fair and equitable, but because the author has in fact consented to it. Even better example would be if such glass of whisky was brought in front of the author without him ordering anything, and he decided to drink it anyway. Similarly, in case the non-signatory in KKO 2013:84 acknowledged (which it did) that the contract includes an arbitration clause, the true justification to bind the non-signatory choosing to invoke its right under the contract would not be derived from the notion that it is “equitable” but from the fact that the non-signatory has knowingly consented to be bound. Naturally, the questions relating to the reasonable expectations and the “normal person” rationale would have to be taken into account.

However, even though the author does agree with Rau for the part that consent does play a major, if not crucial, role in binding the non-signatory to arbitration, the assertion that estoppel is factually “unnecessary window-dressing” or “mere ornamentation” is taking it a bit too far.<sup>333</sup> While consent is indeed necessitated, the doctrine of equitable estoppel does have its legal justifications in the notions of good faith and abuse of right, as discussed above. Utilizing equitable estoppel works both as a supportive argument to the existence of consent and as an independent rule of interpretation. As presented earlier, finding consent is eventually a consideration for the courts, based on factual evaluation of the circumstances at hand. However, not only is it possible to state that the non-signatory has in fact consented to arbitration, but also to acknowledge that the non-signatory beneficiary may not dictate which provisions of the contract it will choose to capitalize on and which it does not.

These two different ways of viewing the case do pose an interesting question: does the fact that the non-signatory invoking the benefit may not reject the arbitration clause constitute consent, or will the consent have to be found independently as well? The question

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<sup>332</sup> See *ibid.* pp. 239-240.

<sup>333</sup> See *ibid.*

ultimately regresses to the typical chicken or egg dilemma. Fact of the matter is, it matters not which comes first in case both support the conclusion that the non-signatory is bound. Naturally, it starts to matter in case the view of the Dutch Supreme Court is applied<sup>334</sup> and clear, definite proof is required in order to find non-signatory consent. In such event, consent could not be established by stating that the non-signatory was or should have been aware of the arbitration clause and invoked its right knowingly and despite the assumption that the arbitration clause was meant to bind it. Once again, however, the author disagrees on whether it is appropriate or even justifiable to set such thresholds of proof as the justifiable expectations provide strong arguments against it.

In addition, it may be argued that the meaning of equitable estoppel is emphasized specifically in non-signatory *beneficiary* issues, where the non-signatory actually receives a benefit as a complete outsider to the agreement. Consent has a bigger role to play in other non-signatory issues where the non-signatory is alleged to be bound based on its factual or legal status, position or role in negotiations. In comparison, the status of non-signatory beneficiaries is different in the sense that they receive a right (often) with no counter-performance and subject only to the intent of the signatories, in which case the justification and considerations of equitable estoppel are highlighted – equitableness does not favour a non-signatory who has received the benefit gratuitously. The fact that the fundamentals of equitable estoppel are completely different to consent is significant. Binding the non-signatory is based on the fact that the benefit is solely derived from the underlying agreement and by invoking it the non-signatory also takes on the “burden” of arbitration. As discussed above, this may be deemed to constitute consent, but it should also be enough without such deduction. It may well be enough as an independent conclusion.

After discussing the elements of equitable estoppel, and seeing that the principles of good faith, equity and fair dealing as well as duty of loyalty are concerned, the doctrine of equitable estoppel may be applied to KKO 2013:84. The doctrine was not invoked in the deliberations as an argument per se, not by the Supreme Court nor the parties involved. However, the same rationales which are highlighted by the doctrine can be seen in the argumentation.

As opposed to the argument of the non-signatory (C) that the clause granting the right and the arbitration clause are completely separate and that it should have been separately stated

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<sup>334</sup> See *supra* note 326.

that the right granted was also subject to arbitration, the main argument of the signatory party (B) in its petition for leave of appeal was that right granted to C derives from the entire agreement and not just one single clause.<sup>335</sup> Furthermore, B claimed that the arbitration clause covers the entire underlying agreement, and that the agreement shall be regarded as an entity. Reading these arguments between the lines, it may be discovered that what B is really saying means that the non-signatory may not choose to pick individual clauses which it invokes and disregard the rest – the essence of equitable estoppel. It may be presented in many different words, but the concept is to always apply the agreement to the non-signatory beneficiary as an entirety as intended by the signatories.

As for the deliberations of the Supreme Court, it is noteworthy how it lists grounds for not binding the non-signatory, and yet with an ambiguous rationale ends up deciding that C is bound after all. It is possible, perhaps even probable, that there have been additional considerations in effect which have not reached the published precedent. One such factor may have been the earlier invocation of the arbitration clause by C, which ultimately did not lead to arbitration proceedings. However, even though the fact that C had previously invoked the arbitration agreement did not constitute an arbitration agreement between B and C (as stated by the court), and despite the fact that said invocation did not lead to actual arbitration proceedings, the Supreme Court may have deemed the earlier invocation of the arbitration clause by the non-signatory to bar it from later denying its applicability.

Another answer for the question of why the Supreme Court would refuse to present thorough arguments as a support for its decision may be found in the national nature of the case at hand. The Finnish Supreme Court has to decide cases based on Finnish law and principles. Therefore, even though plenty of case law as well as legal literature exist on this very subject, the lack thereof in Finland leaves the Supreme Court in a peculiar position. It may not be willing to base its decisions on foreign praxis, yet it would be questionable to conclude that it has paid no attention to it whatsoever. Since tools to solve the problem are readily available across the border, it may be assumed that the Supreme Court has indeed used these arguments presented above in its decision-making process. Not to state them aloud would not really be a surprise, especially when the Supreme Court seems to dislike referring to anything but the law and its own previous decisions. This notion is also supported by the fact that the court refused to voice any opinion as to the intent, actions

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<sup>335</sup> "The right of [the non-signatory] derives not from a single clause of the agreement, but the entire agreement." (a non-official translation of the author)

and possible consent by conduct of the non-signatory. Consent is in the author's opinion one of the most determinative factors in KKO 2013:84, the dismissal of which could point to other such tools used behind the curtain, such as equitable estoppel. Infallible conclusions are naturally hard to draw from a decision which gives very little insight to the train of thought behind it, but some clarity may be reached with such benefit of hindsight.

## 7 CONCLUSIONS

After a thorough evaluation, the author expectedly reaches the same result as the Supreme Court: the non-signatory beneficiary is bound by the arbitration clause. However, the rationale behind the conclusion is very different. For the sake of clarity, a short juxtaposition with the Supreme Court decision is in order. To conclude the analysis, the thesis will first discuss the focal issues with the Supreme Court decision after which, compiling the conclusions and essential rationales of the previous chapters, an alternative way of structuring the case is presented. Lastly, the thesis will present a brief analysis of the significance and effect of the Supreme Court decision and propositions for the future accordingly.

### 7.1 Shortcomings of KKO 2013:84

As discussed above, the rationale behind the Supreme Court decision in KKO 2013:84 is basically the following: the non-signatory's claim necessitates interpretation of the underlying agreement (in which the benefit was granted), making it an issue arising out of the agreement, which is to be resolved in arbitration.

As an independent rule of interpretation, this one raises a few questions: first of all, with regard to arbitration agreements' formal requirements and extent in relation to third parties, and secondly with regard to situations in which multiple parties are involved in a series of contracts. In the first case, the rule provides no insight as to why the arbitration is extended to cover the non-signatory or why the formal requirements are dismissed. Even though it is now obvious that the written requirement is irrelevant with regard to the non-signatory beneficiary, does it mean that the Supreme Court decision construes the requirement the same way as the author<sup>336</sup> or does it also mean that the nature of the requirement has changed even between the signatory parties? Although the author assumes the former, it might provide an interesting premise for further analysis.

Be as it may, this lack of reasoning basically leads to literal application of the rule of interpretation. Therefore, in the case of multiple parties and series of contracts, if parties X and Y had a dispute which was materially linked to another agreement between Y and Z

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<sup>336</sup> I.e. the requirement only applies in the formation of the arbitration agreement between the signatory parties. See *supra* Chapter 5.2.1.

containing an arbitration clause, would the dispute have to be brought to arbitration? If the rationale of the Supreme Court was applied, the answer would be positive, especially in case resolving the dispute would require interpretation of the agreement between Y and Z. This view, however, is troublesome due to the fact that it disregards the subjective scope of arbitration which has typically only bound the parties of the arbitration agreement. In other words, this rationale would place emphasis on the object and the subject matter of the dispute. Such interpretation would shift the focus away from party consent and intent which have traditionally been the focal elements, at least in the international environment.

Further concern arises with regard to this problematic interpretation. Would the “easy access” to arbitration provided by this view drastically increase objections based on jurisdiction? Since it would be so much easier to factually link any case to arbitration with this interpretation, it might open a Pandora’s Box of a sort, producing a lot of *mala fides* procedural defences that would not be possible otherwise. This begs the question, has the Supreme Court thought its interpretation through? Instead of using an internationally accepted rule of interpretation, the court creates a new rule with no clear rationale. Perhaps the issue will have to be resolved in the form of another precedent, presenting more definite justifications.

More questions arise with regard to the lower tier court decisions. Even though the decisions of the District Court and the Court of Appeal have no real legal significance after the Supreme Court has given its ruling, those courts managed to address issues which the Supreme Court did not. These issues were highlighted in the thesis as it attempted to provide legally valid and rational as well as well-reasoned grounds for resolving the matter.

First of all, the question of the requirement of written agreement was admittedly somewhat resolved by the Supreme Court, in the sense that obviously it is not an absolute requirement. The complete lack of rationale to support this view, however, is puzzling. Either the Supreme Court in its progressiveness regarded this notion as truism and therefore did not even bother to comment on the subject, except for stating that the non-existence of a written agreement supports *not* binding the non-signatory. Alternatively, the Supreme Court recognized the need to address the issue, but saw the task of its further examination as better suited for commentators of the precedent, such as lowly thesis writers. Secondly, the question of whether the signatories can in a legally binding way set a



condition to the benefit they are granting is resolved by the Supreme Court decision KKO 2007:18, the requirement being an express stipulation of such intent. However, with regard to the universally acknowledged doctrine of binding a third party beneficiary to arbitration without an express stipulation<sup>337</sup>, KKO 2013:84 provides no help. In the light of this decision, the question still remains.

Another deficiency in KKO 2013:84 concerns the status of the non-signatory with respect to the arbitration agreement. Introduced above in Chapter 6.1.1, the issue whether the non-signatory is regarded as an actual party or “merely” bound by it carries some significance. First and foremost, the question of enforcement comes to mind. In case a non-signatory had insisted and succeeded in joining in on the arbitration, it would have trouble enforcing the award abroad as the coverage of the New York Convention only reaches to *actual parties* of the arbitration agreement.<sup>338</sup> The emphasis of KKO 2013:84 on the subject matter of the dispute as the determinative factor seems to imply that the non-signatory beneficiary would *not* be a party. After all, the Supreme Court’s decision practically states that no factors favorable to regarding the non-signatory as a party exist, quite on the contrary. While the case at hand is undeniably national, the rules and policies governing arbitration should not be laid out to impede international arbitration either. Whether this issue would actualize often is a different thing, but still leaves one more question open.

## 7.2 The alternative

In conclusion and to answer the fourth and last research question, the thesis will briefly present the alternative way of resolving the issue in KKO 2013:84 in the light of the previous analysis.

Chronologically following the research questions, the deduction begins by addressing the issue of requirement of written arbitration agreement, which, as a premise, would preclude arbitration with regard to the non-signatory if the letter of the law was interpreted accurately. However, as the argumentation above in Chapter 5.2.1 asserts, the previous strict interpretation of the written requirement is ill-suited to the modern business environment in which situations including non-signatory parties arise more and more

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<sup>337</sup> See *supra* Chapter 4.4.4.

<sup>338</sup> See Article II (1) of the New York Convention.

frequently. It lacks justification and has widely been replaced by freedom of the parties to decide on the form more freely. Furthermore, the more appropriate perception of the requirement would apply the strict requirement only to the initial creation of the arbitration agreement, not the subsequent determination of its *ratione personae*.

Accordingly, after concluding that the letter of section 3 of the Finnish Arbitration Act does not create an obstacle, the deduction moves on to consider whether the signatories may validly set arbitration as a condition to the benefit they grant to the non-signatory. As stated in Chapter 5.3.2, the signatories do indeed have the right to place such conditions because, absent any restrictions by the law, it is essentially a question of freedom of contract concerning a unilateral stipulation by the signatories. The question of whether the non-signatory is bound is therefore determined by interpreting whether it was the signatories' *intention* to bind him.

The next step is to interpret the intent of both the signatories and the non-signatory. Discussed in Chapter 6.3.1, the interpretation, in addition to exploring the actual arbitration clause, relies heavily on presumptions and objective interpretation. The presumptions along with other considerations clearly support the intent of the signatories to bind the non-signatory. Therefore, in the absence of any proof whatsoever to the contrary, the signatories' intent (as well as the aforementioned right to impose arbitration as an accessory) leads to the conclusion that the non-signatory is bound to arbitration. Furthermore, addressed by the same (third) research question, the intent of the non-signatory may be used as a supporting factor as discussed in Chapter 6.3.2. The same presumptions and the rationale of a reasonable person obliges to the non-signatory in the sense that it should have known it was going to be bound by the arbitration clause in case it invoked the right of redemption. Employing the notion of implied consent, the non-signatory is deemed in fact to have consented to arbitration, therefore becoming an *actual* party to the arbitration. However, it must be highlighted that this obligation to arbitrate only actualizes in case the non-signatory wants to enforce the right granted to it in the underlying agreement, which also brings us to the doctrine of equitable estoppel. Applicable as an independent rule, the doctrine relying on good faith dictates that when the

non-signatory chooses to invoke its right, it in reality invokes the entire agreement with all the terms and conditions applicable to it, such as the arbitration clause.<sup>339</sup>

### 7.3 Propositions for the future

The Supreme Court may be commended on its decision in the sense that it was indeed the “right” decision concerning the future of arbitration in Finland. When situations including non-signatory parties become more frequent, it is important that the arbitration regime, the laws and rules of interpretation, are up to date and capable of addressing the needs and demands of the environment. However, as discussed above, in addition to presenting no real rationales which might be used in future cases, KKO 2013:84 creates a rule of interpretation which is troublesome and rather unwieldy as an independent rule. Since the crucial factor in arbitration is essentially consensuality, there is rarely need to revert to legal tools other than those which employ party consent. One such exception is equitable estoppel, the doctrine which in itself is unfamiliar in our legal environment, but the fundamentals and rationales of which can still be found deeply rooted in Finland. As for consent, it is true that this approach of dealing with non-signatory issues would emphasize the role of courts or arbitral tribunals because discovering consent is typically a matter of interpretation of factual circumstances, e.g. in determining implied consent. Then again, the author sees no difficulties with this approach – what better way to adapt to a variety of situations than a pliant rule of interpretation. Moreover, as for equitable estoppel, the essence of the doctrine does not require such fact oriented interpretation; it is applicable in a more straightforward manner.

The requirement of written agreement, as imposed in Section 3 of the Finnish Arbitration Act, was an essential question in the thesis. Even though the non-existence of a written agreement was ultimately not an issue with regard to the non-signatory, the fact remains that, if interpreted accurately and “by the book”, the provision would effectively prevent binding any non-signatories.<sup>340</sup> Therefore, following the universal trend of gradual liberalization – countries giving up the requirement in form – the written requirement of Section 3 could be revisited. In addition, an alternative for entirely giving up the formal

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<sup>339</sup> See Hosking 2004a, p. 292: “the third party beneficiary is only bound to arbitrate where it is the claimant in a claim relying on the main agreement”.

<sup>340</sup> See *supra* Chapter 5.2.

requirement, yet less progressive, would be redefining the application of the written form by elaborating how it is to be viewed and used. The case of non-signatory beneficiaries, for instance, craves for clear instructions on the usage of the section. For instance, revising the section to include a specific subsection which clarifies non-signatory issues is a possibility. Elaborating how the section is to be interpreted in the *travaux préparatoires* is another. Then again, this option would still leave the door closed for oral agreements.

All in all, in the author's opinion there is no reason to impose excessively rigid conditions to the formation of arbitration agreements where none exist for other types of agreements. The view regarding arbitration as an anomaly or danger to due process has become obsolete and can no longer be considered as a justification for the requirement in form of the law. Instead, the purpose of the formal requirement could be replaced with a "high contractual threshold" as is done in Sweden.<sup>341</sup> Setting definite standards of clarity and unambiguity would help reaching the same result, but in a manner that is more pliant and user friendly. In this option, emphasis would be placed on evidentiary matters. This, however, is rather irrelevant since such emphasis already exists on any other types of agreements. Therefore, giving up the requirement of written form completely, as an idea, might be contemplated on as well. For instance, the author, in the light of the rationales above, sees no justification in preserving the requirement. The actualization of this suggestion in practice is another thing.

With regard to the internationally recognized tools<sup>342</sup> of binding third parties to arbitration, some of them are naturally available for use in Finland, such as implied consent or matters of agency or transfer of contract. However, even though binding third party beneficiaries may be supported with other considerations as well, acknowledging it as an independent rule of interpretation would help in avoiding insufficiently justified decisions such as KKO 2013:84. The doctrine clearly has a solid ground, good justifications as well as flexibility needed for the variety of different situations which are bound to arise. Furthermore, the recognition thereof requires no factual action on behalf of the legislator, even a well justified precedent would suffice.

As for the doctrine of equitable estoppel, its theoretical significance and obvious suitability to KKO 2013:84 as well as its possible influence between the lines of the Supreme Court's

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<sup>341</sup> See Hobér 2011, pp. 90-91.

<sup>342</sup> As presented above in Chapter 4.4.

deliberations (as discovered above) brings forward the question of whether it could be embraced more openly in the Finnish legal system. Even when the references to it in KKO 2013:84 are relatively open to interpretation, it does diminish the significance of the existing foundations thereof. Naturally, this thought may be criticized by invoking the fact that it is of Anglo-American origin, it is mostly used in common law countries or that it has not been actively employed (as such) in other civil law countries either. However, these arguments disregard the fact that the doctrine is already essentially embedded in the civil law system, if only in other forms, such as good faith, the offer-reply mechanism or the duty of loyalty towards the other party. Then again, it may be further questioned whether a completely new doctrine is needed since similar tools already exist. In the author's opinion, adopting the doctrine as a complete legal transplant would not be necessary. However, the lack of court decisions employing deliberations which gave relevance to the underlying notion of equitable estoppel, good faith, is apparent. Simply put, despite the existence of such tools, they are not readily used in contemporary Finnish case law. The aforementioned embracing of the doctrine could and should therefore occur in the form of acknowledging the integral foundations thereof. Moreover, the fact that these foundations may be distinguished in the background of KKO 2013:84 – even if it does not transpire from the actual published decision – is an indication of the possibility to recognize their existence more openly.

Finally, the role of consent may be evaluated. In 2011, Hanotiau posed the question of whether there is a marginalization of consent in international arbitration.<sup>343</sup> In the light of KKO 2013:84, the same question may be presented again. Consent, any determinations (or lack thereof) or the very little significance given to it in the decision seems to suggest that the Supreme Court does not share the author's fondness of the simplicity and usefulness of the concept of consent and its use in non-signatory issues. However, in foreign case law, consent seems to be the backbone of binding non-signatories to which courts, arbitrators and scholars alike often tend to lean on. Moreover, as stated above, the peculiar lack of reasoning by the Supreme Court could suggest that there have in fact been other factors behind the rationale of the decision which, in its current form, seems to have come out of thin air. As asserted above, one such factor might be equitable estoppel, but one could also be the actualization of non-signatory consent.

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<sup>343</sup> See Hanotiau 2011, pp. 553-554.

However, it must be noted that deliberately leaving out any references to consent in case the Supreme Court actually regarded consent to exist would be rather strange. After all, it would have been a rationale completely based on national legislation and legal principles. This seems to point back to the idea that the rationale behind the decision has been something else, or perhaps the Supreme Court has simply attempted to create a new rule of interpreting arbitration agreements. Either way, the author still considers consent as the most pragmatic and easily applicable legal tool with regard to binding non-signatories to arbitration. Therefore, for the sake of development of arbitration in Finland, where no practical (or theoretical) need for creating new, perplexing rules of interpretation exists, the recommendable option would be to refrain from such ventures and instead employ the justifiable, universally acknowledged and, before all, working rules and methods. Moreover, regardless of whether the legislator and the Supreme Court wish to employ tools commonly used in foreign case law and legal literature or the tools which already exist in Finland, the essential objective is ultimately to have clear, unambiguous rules which all operators on the field of arbitration may rely on.