

NON-SIGNATORIES TO ARBITRATION AGREEMENTS

- Hazel Brasington and Andrey Panov

Where a non-signatory is involved in performing a contract it may be bound by the arbitration agreement. 'Good faith' will play a role, as case law concerning the 'group of companies' doctrine reveals. The solution is to be absolutely clear in your arbitration agreement as to whether you wish it to extend to non-signatories involved in a project.

Introduction

Parties' consent is the foundation of any international arbitration. Usually, this consent is expressed in an arbitration agreement, binding the formal signatories to the contract.

There are circumstances where non-signatories to the original agreement may be bound by it and benefit from it. The New York Convention states that international arbitration agreements are binding on the parties involved (article II). It provides no guidance as to how those parties are to be determined. National laws are also almost universally silent on this matter. The non-signatory position is therefore developed through case law across jurisdictions: this can cause difficulties when drafting arbitration clauses.

The arbitration clause is binding on the basis of assignment, succession or agency: no surprises there. In certain circumstances, however, the court or tribunal may extend the arbitration clause to include a party other than a signatory to the arbitration clause, in particular if that party has corporate ties with the original signatory.

'Group of companies' and 'piercing the corporate veil'

Two well-known doctrines which allow extension of the arbitration agreements to non-signatories are 'group of companies' and 'piercing the corporate veil'. These two theories are often mixed up.

Essentially, both are justified by considerations of fairness and good faith, both of these general principles of contract law (although these general principles are not applicable under English law, they are relevant in Australia and many civil law jurisdictions). Veil piercing focuses on fraud or abuse of right where the real party is shielded from liability by the corporate structure. The 'group of companies' doctrine addresses the (presumed) intention of the parties to arbitrate.

Drafting the arbitration agreement

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It may not be unusual for companies within the same group to be involved in carrying out various parts of a project, even without contracts formally setting out their roles. If there is no wish to allow extension of an arbitration agreement to nonsignatories involved in a project, this has to be very clearly indicated in the agreement. Companies may otherwise find themselves drawn into arbitration proceedings with related companies and find that the circumstances justify that. In order to ensure the effectiveness of corporate structures created with the intention of allocating profit, cost and risk between different entities, companies will need to review all transactions and associated arbitration agreements to check where and how best to put the necessary express provisions in place.

Case law on 'group of companies'

The Dow Chemical Company and others v ISOVER Saint Gobain

A prominent case covering 'group of companies' is the Dow Chemical v ISOVER ICC arbitration. The dispute arose out of several contracts executed by various Dow Chemical Company subsidiaries (but not Dow Chemical Company itself) and Isover. Dow Chemical Company together with its subsidiaries commenced arbitration. Isover objected to jurisdiction over the claims asserted by Dow Chemical Company on the ground that the latter was not a party to the contract. The tribunal upheld its jurisdiction.

The award is often misinterpreted as suggesting that the corporate ties within the group were sufficient to establish the tribunal's jurisdiction, and has thus been subject to criticism. In fact the reasoning was more

nanced, taking into account the role of the non-signatory 'in the conclusion, performance, or termination of the contracts'.

Government of Pakistan, Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company

The ICC analysis based on the non-signatories' involvement with the contract was supported by the French courts in the 2010 case of Pakistan v Dallah. The Paris Court of Appeals dismissed the challenge of an ICC award which upheld the jurisdiction against Pakistan arising out of the contract signed by Dallah and a trust established by Pakistani presidential in negotiations, performance and termination of the agreement showed that it (and not the trust) was the 'true party' to the agreement and, hence, to arbitration.

The UK Supreme Court had earlier refused to enforce the award in England on the basis that the Government of Pakistan was not a proper party to the arbitration.

Case No. 4A_450/2013

In 2013, the Swiss Supreme Court applied a similar test. The facts of this case are a little

complicated. It involved three contracts between Iranian company A and Italian company B1 (part of B Group of companies). The project was suspended and parties sought to resolve the dispute by negotiation. During the negotiations the parties agreed that the project would be carried out by a specific division of B1's parent company – B2 – instead of B1, and that a member of this division would become responsible for the project. It was also agreed that B2 was to provide a guarantee for performance of the contract.

The division responsible for the project was later acquired by B3 (also a company within B Group). Subsequently, B1 started arbitration against A, and A brought a counterclaim against B1 and B3. The tribunal upheld B3's objection against jurisdiction, but the Swiss Supreme Court set aside this part of the award and remitted the case to the tribunal.

In its decision, the Swiss Supreme Court relied not only on the involvement of B1, B2 and B3 in carrying out the project, but also on the principle of good faith: the court considered that the confusion that existed among the B Group of companies was a valid reason for A's inability to identify the actual contracting party.

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