

CREEPING CONSENSUS ON THE EXTENSION OF ARBITRATION CLAUSES IN INTERNATIONAL COMMERCIAL ARBITRATION?

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Abstract in original language

Though the arbitration is an alternative to national courts and as such the will of the parties must be manifested to transfer the jurisdiction over both the parties and the matter, it is possible to conduct the proceedings even with non-signatories to the arbitration clause or more precisely with “unmentioned” ones. Recently, arbitrators and national courts have utilized several approaches, e.g. tacit assent to the clause, piercing the veil, alter ego, group of company or implicit agency relationship. Does this mean that the general principle of parties will is partially overridden? This contribution tries to assess mentioned trends and determine whether a new principle of international commercial arbitration is arising?

Key words in original language

Unmentioned parties, international commercial arbitration, third parties' rights, extension of the arbitration clause

Abstract

Though the arbitration is an alternative to national courts and as such the will of the parties must be manifested to transfer the jurisdiction over both the parties and the matter, it is possible to conduct the proceedings even with non-signatories to the arbitration clause or more precisely with “unmentioned” ones. Recently, arbitrators and national courts have utilized several approaches, e.g. tacit assent to the clause, piercing the veil, alter ego, group of company or implicit agency relationship. Does this mean that the general principle of parties will is partially overridden? This contribution tries to assess mentioned trends and determine whether a new principle of international commercial arbitration is arising?

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Creeping consensus on the extension of arbitration clauses in international commercial arbitration?

International commercial arbitration is a well-established method of dispute resolution within merchants' community. It provides for a more flexible solution of often complex disputes that arise from and affect multiple jurisdictions. From historical perspective, arbitration developed as a tool for merchants to resolve disputes on their own. Commercial arbitration therefore immanently tries to perceive the dispute set in its commercial background and resolve it in a way that would be the most efficient.

Extension versus "consent" as cornerstone of arbitration

Nevertheless, it may so happen that the most efficient solution brings the arbitrators towards places "where no man has gone before", to the limits of arbitration procedures. One of such limits is certainly the consent of parties to arbitrate. As it was put properly in one of the fundamental books on international commercial arbitration:

*"The foundation stone of modern international arbitration is (and remains) an agreement by the parties to submit to arbitration any disputes or differences between them. Before there can be a valid arbitration, there must first be a valid agreement to arbitrate."*¹

The consent is crucial, as arbitration is an alternative to the basic recourse to national court system. Though the sovereign states allow (and welcome) such a private resolution of disputes, it must be clearly demonstrated by the parties that they waive protected right for a standard court hearing.² If there is no will of the party to arbitrate, then logically, there could be no arbitration.

However, in previous decades the position of will (consent) has somehow changed with the emergence of several doctrines which allow to bind even the non-signatory party to the arbitration agreement. Speaking factually, there are many patterns that may enable (or require?) such extension.³ It

¹ REDFERN, A. HUNTER, M. ET AL. *Redfern and Hunter on International Arbitration* [online]. 5th ed. Oxford : Oxford University press, 2009. Marg. No.: 1.38.

² Such "right to be heard in front of the tribunal established in law" may be arising either out of national constitutions, or out of international agreements; see e.g. Article 6 of the European Convention on Human Rights.

³ See e.g. HANOTIAU, B. *Complex arbitrations: multiparty, multicontract, multi-issue and class actions*. 1st ed. Hague : Kluwer Law International, 2005. Marg. No.: 114.

may be an extension from a subsidiary to a parent company, or its CEO, or to a sovereign state that established a company and is essentially benefitting from its actions. Another example, disputes often arise where there are multiple but interdependent contracts, or where multiple parties are involved in a commercial transaction but only some of them are party to the agreement containing the arbitration clause. Many times claimants try to employ extending techniques in order to get to “deep pockets” of an affiliated subject.

However, before moving on, we should solve two linguistic issues, which do have greater impact that may not be seemingly evident.

Linguistic issues with possibly dire consequences

Although general label for described situation is “extension” or “joinder”,⁴ such denomination does not seem completely appropriate. As Park noted,⁵ both of these terms suggest that the respective subjects are forced into the arbitration. However, we should consider two additional arguments.

Firstly, it is not uncommon when the subjects themselves try to invoke the extension, so that they could join the arbitration proceedings. Therefore, logically, they manifest their consent with the arbitration. More importantly, if we concur that the consent to arbitrate remains the cornerstone of arbitration, there could not be any extension that would go beyond such principle. Arbitration tribunal is simply exercising its kompetenz-kompetenz powers and tries to ascertain who the real parties to the arbitration agreement are. Even if such examination may seem to extend the scope of subjects (formal point of view), in fact, there are no new subjects to the proceedings. On the other hand, Stucki conceded that such expression might be useful if subject is really drawn into the proceedings without manifesting its consent.⁶ He also reminds us that “extension” used in the context of non-signatories does not include a transfer of agreements.⁷

⁴ Whereas the former is used more in European literature, the latter mainly in US.

⁵ PARK, W. Non-signatories and international contracts: An Arbitrators dilemma. In PERMANENT COURT OF ARBITRATION. *Multiple Party actions in international arbitration*. 1st ed. New York : Oxford University Press, 2009. Marg. No.: 1.03.

⁶ With that regard, we may be talking about scenarios of fraud, deception or duress, which may justify the extension even when there is no consent, or no implication of its existence.

⁷ STUCKI, B. *Extension of Arbitration Agreements to Non-Signatories*. Marg. No.: 5,6. Available at <http://www.docstoc.com/docs/47479901/Main-Contract-Arbitration-Agreement> [accessed in December 2010].

Second linguistic point aims to the denomination “non-signatories”. Once again, such determination may imply the involuntary addition of the party to the proceedings. However, as was already explained, consent to the arbitration is a vital element. Therefore, it was suggested that we should speak about “less-than-obvious” or “unmentioned”⁸ parties to the arbitration agreement. These are the parties that manifested their consent to arbitrate, but they might have done that in other than a written form. Although it may look as unimportant linguistic issue, it has broader legal consequences. Because as Pavic correctly points out, “*first line of defense of non-signatories would be formal: they have not signed the agreement, hence there is no written form evidencing their consent.*”⁹

Is the form an obstacle for extension?

Traditionally, tribunals and courts required arbitration agreement to be in writing in order to be valid. Such position is rational concerning previously mentioned waiver of fundamental right. “Agreement in writing” was accepted as a general standard in 1958 when the Convention on the recognition and enforcement of foreign arbitral awards¹⁰ was adopted, and later on validated in 1985 when UNCITRAL Model law on international commercial arbitration¹¹ was issued. Even though these instruments did not provide the lack of written agreement amounts to ground for setting aside or refusing to recognize the award, the wording of respective articles led to such conclusion.¹²

However, traditional view was partially abandoned in 2006 when new version of UNCITRAL Model law was released. It provided two options concerning the form requirement. First, more traditional still stated the

⁸ PARK, *supra* note 5, marg. No.: 1.07.

⁹ PAVIC, V. “*Non signatories*” and the Long Arm of Arbitral Jurisdiction. In HAY, P. VEKAS, L., ELKANA, N. et al. *Resolving international conflicts - Liber amicorum Tibor Varady*. 1st ed. Budapest : CEU Press. 2009. p. 216. Available at SSRN: <http://ssrn.com/abstract=1421201> [accessed in December 2010].

¹⁰ Hereinafter “New York Convention”.

¹¹ Hereinafter “UNCITRAL Model Law”.

¹² Under Art. 34 (2) (a) (i) and Art. 36 (1) (a) (i) of UNCITRAL Model law award may be set aside or refused to be recognized and enforced if “*agreement is not valid under the law have subjected it, failing any indication thereon, under the law of the country where the award was made*”. Therefore, it was upon the *lex arbitri* whether it required written form for arbitration agreement, and how such law treated the failure to meet such requirement; same may be said with regards to Art. V (1) (a) of New York Convention. Moreover, both instruments would prohibit parties to have the award recognized by the way of simple requirement contained in Art. 35 (2) / Art. IV (1) (b) which requested party firstly to provide original agreement in writing.

necessity of a written agreement. It followed the New York Convention in requiring the written form of the arbitration agreement but:

“[R]ecognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties.”¹³

Therefore, state that adopts even this traditional version of the form requirement still opens the door for consenting by other means than by a written agreement. What is more, UNCITRAL Model law provides for a second solution. Article 7 - Option II states simply that arbitration agreement is agreement by the parties to submit their disputes to arbitration. No requirement as to the form of such agreement. Therefore, *lex arbitri* based on this option of Article 7 does not require either written agreement or written evidence thereof.

With these developments in mind, we should turn our attention back to the linguistic issue of “non-signatory parties”. As we could see, such description may be used in the context of the classical needs of the written form. In such scenarios, third party technically never signed the agreement, and may be rightfully labeled as a non-signatory. Question remains, however, if this is a barrier against “extension”? It seems that the answer is negative. Even in jurisdictions that have strict formal requirements, e.g. Switzerland, case law provides that it is sufficient when the initial agreement satisfies formal requirements.¹⁴ Therefore, subsequent “extension” is not so much reviewed from the formal, but material perspective. In states which adopted Option II,¹⁵ the arbitrators may of course move straight forward and deal with the real issues of “extension”.

¹³ UNCITRAL Secretariat. *Commentary on UNCITRAL Model law on international commercial arbitration*.

Available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [Accessed on 30.4.2011]. p. 28.

¹⁴ MRAZ, M. Extension of an arbitration agreement to non-signatories: Some reflections on Swiss judicial practice. In *Anali Pravnog fakulteta u Beogradu*, vol. 57, no. 3. p. 56; MÜLLER, T. Extension of arbitration agreements to third parties under Swiss law. Available at http://www.homburger.ch/fileadmin/publications/PLCAR_2009-10_03.pdf [Accessed 30.3.2011]

¹⁵ New French code on arbitration does not contain a form requirement, if international arbitration is considered.

Methods of extension with a special focus on the “group of companies” doctrine

Born in 2009¹⁶ identified 16 methods how an arbitration agreement may be extended over third party “non-signatory”. Described methods came from all jurisdictions, both from the common law as well as civil law world, arising out of consensual and even non-consensual basis.

Bamforth¹⁷ provides for five distinct doctrines used in the US, namely equitable estoppel, incorporation by reference, assumption, agency and veil piercing doctrine. Among others used, we may mention doctrine of third party beneficiaries, guarantors, extension over corporate officers and shareholder, and extension in a joint venture setting.

Most distinctive in France is a doctrine referred to as “group of companies”. This doctrine enables to extend the arbitration agreement over the members within the company group, which have distinct relationship to the main contract, under special circumstances. On the other hand, other jurisdictions, which stand on strict party autonomy, expressly rejected the applicability of this doctrine, though they use similar approaches for extension.

Next lines will try to provide a brief overview of “group of companies” doctrine.

As the name of this doctrine suggest, it provides for the extension of the arbitration agreements over members of company group. Especially in last few decades with booming groups, which spread their activities throughout the globe, this doctrine was commonly invoked. As Born points out, it is similar to the veil-piercing, alter ego or third beneficiary doctrines, however, its distinctive mark is that it was created specifically in the arbitration context, and it is not ordinarily invoked outside arbitration.¹⁸ The doctrine originates from so-called “Dow Chemical award” issued in Paris in 1982 as an interim award in the ICC case No. 4131.¹⁹ In that case, dispute arose between Dow Chemical group and Isover Saint Gobain.

¹⁶ BORN, G. *International commercial arbitration*. Austin : Wolters Kluwer, 2009. p. 1142.

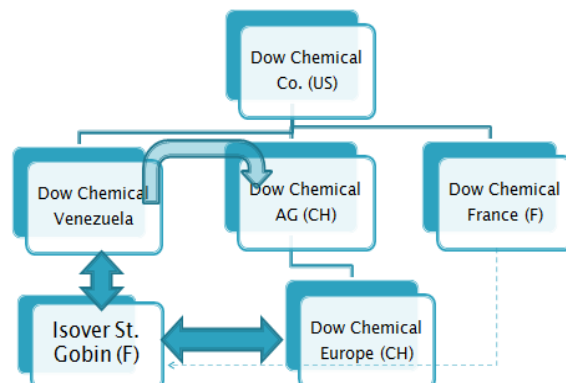
¹⁷ BAMFORTH, R., TYMCZYSZYN, I. *Joining non-signatories to an arbitration: recent developments*. Available at http://www.olswang.com/pdfs/arbitration_jun07.pdf [accessed on 30.3.2011]

¹⁸ BORN, *supra* note 16, p. 1166.

¹⁹ However, as Derains notes, there were previous ICC awards in 1970s paving the way for the Dow Chemical award; in particular, awards 2375 and 1434, both issued in 1975. Both these awards suggested that “*multinational corporation may be treated as one economic reality, which of internal reasons or of opportunity may provide the performance of the duties by its different subsidiaries, sometimes created on a purely ad hoc basis.*”

Dow Chemical Venezuela and Dow Chemical Europe, both directly or indirectly owned and controlled by parent company Dow Chemical Co., entered into distribution agreements with a number of companies the rights of which were subsequently assumed by Isover-Saint-Gobain. At the same time, distribution contract with Dow Chemical Venezuela was assigned to another Dow subsidiary, Dow Chemical AG. Moreover, during the course of cooperation, Dow Chemical France was providing performance based on mentioned distribution agreements and other action necessary to make use of business trademarks utilized.

Dow Chemical Family



Each agreement contained an arbitration clause. When a dispute arose, arbitration proceedings were commenced against Isover-Saint-Gobain by not only the two Dow Chemical companies, which had signed the agreements, but also by their parent company, and Dow Chemical France, neither of which had signed the agreements.

Swift jurisdictional objection of the Isover seemed logical – neither subsidiary, nor the parent company may be claimants in this arbitration, as they never signed the arbitration clause contained in the distribution contracts.

However, arbitration panel²⁰ rejected such objection in its interim award, and held that even if single members may have a distinct juridical identity, tribunal must take into account the fact they fall within a single economic reality. In its reasoning²¹ tribunal created a threefold test, which established group of companies' doctrine.

DERAINS, Y. Is there a Group of Companies Doctrine? In ICC: *Dossier of the ICC Institute of World Business Law: Multiparty Arbitration*. Paris : ICC, 2010. p. 131.

²⁰ Arbitration panel consisted of Professors Pieter Sanders, Berthold Goldman and Michel Vasseur. See DERAINS, *supra* note 19, p. 132.

²¹ “Considering that the tribunal shall, accordingly, determine the scope and effects of the arbitration clauses in question, and thereby reach its decision regarding jurisdiction, by reference to the common intent of the parties to these proceedings, such as it appears from the circumstances that surround the conclusion and characterize the performance and later the termination of the contracts in which they appear. In doing so, the tribunal, following, in particular, French case law relating to international arbitration should also take into account usages conforming to the needs of international trade, in particular, in

Firstly, respective third parties need to be part of the group, i.e. create a single economic reality or power. Secondly, such extension is required based on the needs of international trade, especially taking into the account usages of international trade.²² The third and most significant one is that the common intent of the parties is to be found in the surrounding circumstances that characterize the conclusion, performance or termination of the contract.

As we can see by establishing mentioned elements, arbitrators did not abandoned consent as the cornerstone of arbitration. Indeed, this test should provide for guidance how an arbitrator may imply the consent of the party to comply with arbitration proceedings. However, the third element was subject to critique where it was argued that a mere intention is not enough to bind the party, only the consent can and it itself must exist and be proved.

However, later decision of Paris Court of Appeal,²³ in annulment proceedings, confirmed the award, but did not analyze specifically the “group of companies” doctrine. Still court noted, “*following an autonomous interpretation of the agreement and the documents exchanged at the time of their negotiation and termination, the arbitrators have, for pertinent and non-contradicted reasons, decided, in accordance with the intention common to all companies involved.*”²⁴ Therefore, the interpretation of the last element should be done concerning not only the joining party, but also concerning all parties to the dispute.

The doctrine therefore stands on both objective and subjective criteria. Firstly, arbitrators must consider whether single economic reality exists. The extension should be possible only within such reality. The origin of the element arises from the international trade usages,²⁵ although such

the presence of a group of companies [...]. Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.”
See DERAINS, *supra* note 19, p. 132.

²² In Dow case, arbitrators pointed out the negotiating record showed that „*neither the “Sellers” nor the “Distributors” attached the slightest importance to the choice of the company within the Dow Group that would sign the contracts.*“ See REDFERN, A., HUNTER, M., *supra* note 1, foot note 69.

²³ Cour d'Appel, Paris, 22 October, 1983, Société Isover-Saint-Gobain v Société Dow Chemical France.

²⁴ DERAINS, *supra* note 19, p. 132.

²⁵ See quotation under 31 - where arbitrators noted that in the globalized business world, it is a common practice of companies to act through its subsidiaries belonging to the group, factually disregarding their at least formal autonomy.

implication is often subject to critique.²⁶ Second element is the consent of the party, though implied through its essential behavior or position in connection to the transaction in dispute. Only when both criteria are present, tribunal may explore the possibility of extension.

However, several consequent decisions by French courts further developed the doctrine beyond its origins, and suppressed the significance of the group identity, and boosting the “consent implications” even further.²⁷

Courts held the extension beyond the scope of a group is possible, even required “*to all parties directly involved in the performance of the contract in the dispute ... once it has been established that their situation and their activities enable to presume that they were aware of the existence and the scope of the arbitration clause.*”²⁸ Here of course the original formula is completely disregarded. There is no place for the existence of the single economic reality with its corporate meaning. Court rather used it in a way of economic reality of the transaction.

However, what seems to be even more improper is the mere awareness of the arbitration agreement should imply the consent with such agreement. As Besson and Poudret noted, such formula works with not one, but two subordinate presumption. First is the presumption of the awareness, which leads to (automatic?) presumption of acceptance.

This presumption was taken to its absurd end in Cotunav case.²⁹ An independent carrier was forced into the arbitration concerning dispute over the contract of two public agencies, which the carrier had no part in, purely by the reason the carrier “*intervened in the performance of the contract, [it] necessarily assumed the obligations defined in the contract with regards to the carrier and accepted the modalities, including the arbitration.*”³⁰ Fortunately, that decision was overruled by a superior court.

²⁶ BESSON, S., POUDRET, J.-F. *Comparative law of international arbitration*. 2nd ed. London : Sweet & Maxwell, 2007. p. 218.

²⁷ *Ibid.*, p. 219, citing cases *Konsas Marma v Durand Auzias*, and *Ofer Brothers v Tokyo Marine*.

²⁸ *Ibid.*, p. 219, foot note 485.

²⁹ GRAVEL, S., PETERSON, P. French law and arbitration clauses – distinguishing scope from validity: Comment on ICC Case No. 6519 Final Award. *McGill Law Journal*. 1991/1992. vol. 37, p. 526.

³⁰ *Ibid.*

Is there any consensus at all?

Even though, group of companies was quite successful in France, it was expressly rejected in United Kingdom, Switzerland and Germany.³¹ Although US courts considered the application of the doctrine, it seemed they still prefer other methods leading to same results.

Even in France, it seems the popularity of the doctrine declined and nowadays the existence of the group is only one of the factors, which should contribute to consideration to assess the intent of the parties (returning to the basis of the doctrine).

Even though Derains concludes, this factor/doctrine may be cutting both ways, it may still:

“[P]lay a more significant role when the intent of the parties is a decisive factor in a decision concerning a joinder or the consolidation of procedures, as the economic reality must prevail and members of the same group should not be allowed to abuse their discreet legal personalities in such cases.”³²

With more than 10 other doctrines existing - with elements, which are almost the same, there is no way escaping the fact, that the extension is possible, however, there is no consensus on how it should be done.

Maybe, we should not look for the best solution, as each doctrine may be suitable for a different factual setting. What is in front of us is a basic question – what circumstances justify that the need of having effective award prevails over the cornerstone of international commercial arbitration – which is based, without doubt, on mutual consent of the parties.

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³¹ DERAIS, *supra* note 19, 142.

³² *Ibid.*

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