Joining non-signatories to an arbitration: recent developments

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One of the perceived advantages of arbitration as a form of dispute resolution is that it is chosen consensually by contracting parties. It would therefore seem logical that only a party to an arbitration agreement can be compelled to arbitrate with the other party(ies) to that agreement, and that any arbitration necessarily involves only the parties to the agreement.

However, in some circumstances certain national laws permit a party which is not a signatory to an arbitration agreement to participate in an arbitration, either as claimant or respondent. Joinder may be desirable in a number of situations. For 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. This can arise particularly where a contracting party is a member of a group of companies and where its parent or the other subsidiaries have been involved in the commercial transaction underlying the relevant contract, even though they may not be signatories to that contract. While in national court proceedings joinder is common in most jurisdictions, in international arbitration joinder is generally not possible without some form of contractual relationship between the parties.

Against this background, this chapter considers the extent to which various national laws permit joinder in arbitration even though there may be no strict contractual relationship between the parties, and how this concept has developed. In particular, it examines:

- Joinder of a non-signatory in the US, through at least five distinct legal principles.
- Joinder of a non-signatory in Europe (specifically, France, England, Switzerland, Russia and Germany).
- Joinder when states and state-owned entities are involved in the dispute.

THE US

The US approach to whether a non-signatory to an arbitration agreement can be bound by it is principally governed, at both federal and state court levels, by common-law principles of contract and agency. This was summarised in the judgment of the Second Circuit court in Thomson-CSF, S.A. v American Arbitration Assoc. and Evans & Sutherland Computer Corp., 63 F.3d 773, 766: “Arbitration is contractual by nature...It does not follow, however, that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. This court has made clear that a non-signatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency”. Significantly, the court identified five principles under which a non-signatory can be bound by an arbitration agreement:

- Estoppel.
- Incorporation by reference.
- Assumption.
- Agency.
- Veil piercing/alter ego.

Equitable estoppel

US federal courts draw on the doctrine of equitable estoppel to bind non-signatories to arbitration agreements in the following circumstances:

- When the signatory’s claims presume the existence of a written agreement containing an arbitration clause.
- If the signatory alleges concerted misconduct between a non-signatory and a signatory.

The Fourth, Fifth, and Eighth Circuits have expressly adopted this approach but other circuits, such as the Second Circuit, have used a slightly different formula, although the effect is broadly the same.

In the recent case of Meyer v WMCO-GP L.L.C., 211 S.W.3d 302, 305 (Tex. 2006), the Texas Supreme Court concisely explained the doctrine of estoppel and held that any person (including a non-signatory) claiming a benefit from a contract containing an arbitration agreement is equitably estopped from refusing to arbitrate.

The case involved non-signatories to an arbitration agreement seeking to rely on it. The dispute arose out of WMCO’s proposal to buy Bullock’s Ford dealership. Bullock’s dealership agreement with Ford Motor Company, the manufacturer, gave Ford a contractual right of first refusal to buy the dealership. Since Ford had the option to exercise its right or allow Bullock to sell the dealership to another buyer, Bullock decided to enter a purchase and sale agreement (PSA) with WMCO. The PSA acknowledged Ford’s right of first refusal and stipulated that if Ford exercised its option, Bullock was permitted to terminate the PSA and sell to Ford. The PSA also contained an arbitration clause requiring WMCO to arbitrate any disputes with Bullock. Ultimately, Ford exercised its right of first refusal and Bullock terminated its PSA with WMCO. Ford assigned its right to acquire the dealership to Meyer and Bullock sold to Meyer.
Based on the PSA, WMCO sued Ford and Meyer in Court for tortious interference and Bullock for breach of contract. Even though Ford and Meyer were not parties to the arbitration agreement with WMCO, they demanded arbitration under the PSA. The trial court refused to compel arbitration and this was upheld by the Court of Appeals. The Texas Supreme Court, however, reversed those decisions based on the doctrine of equitable estoppel. The court held that equitable estoppel applies in two circumstances:

- If the signatory’s claims presume the existence of a written agreement containing an arbitration clause, arbitration is warranted. The claimant “cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a non-signatory”.

- If the signatory alleges substantially interdependent and concerted misconduct between a non-signatory and a signatory, arbitration is appropriate. (This is sometimes referred to as the “inextricably intertwined” or “inherently inseparable” test.)

The Supreme Court held that both circumstances applied to bind WMCO to arbitration. All of WMCO’s claims and damages depended on the existence of the PSA and were intertwined with its claims against Bullock. The court also held that trial courts do not have discretion to apply equitable estoppel.

Equitable estoppel has also been applied in cases by the courts of other states such as New York, Hawaii, and Florida, but not all state courts adhere to the principle. State courts in both Missouri and Illinois have held that equitable estoppel is inconsistent with the policy that arbitration is a matter of agreement between the parties.

**Incorporation by reference**

Applying ordinary principles of incorporation by reference, state courts have incorporated an arbitration agreement from one document into another merely by reference. In a dispute between a contractor and subcontractor, a Florida court held that the subcontract incorporated by reference the terms of the head contract. The head contract referred to the provisions of the American Institute of Architects, which in turn contained an arbitration clause. The subcontractor was therefore entitled to arbitrate the dispute. The court held that equitable estoppel applies in two circumstances:

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**Assumption**

The principle of assumption is based on the notion of consent which can be inferred from a party’s conduct. For example, in the class action *Gvozdenovic v United Air Lines Inc.*, 933 F.2d 1100 (2nd Cir. 1991), the claimants appealed a judgment of the trial court dismissing a class action they had brought in which they sought to vacate an arbitral award. In the appeal, they argued that the trial court had improperly dismissed their petition for vacating the award because they were not parties to the arbitration agreement. However, the Second Circuit found that the claimants had been represented in the arbitration by counsel who had been selected and instructed by a committee specifically designated by the claimants to represent them in the arbitration. The court held that the claimants had voluntarily and actively participated in the arbitration process and were therefore bound by its outcome as if they had been signatories to the arbitration agreement.

The doctrine of assumption may overlap with other contractual or equitable principles and there may be some variance in the different courts’ analysis of how a non-signatory has been held to be bound by an arbitration agreement. In *Wetzel v Sullivan, King & Sabom, P.C.*, 745 S.W.2d 78 (Tex. App.-Hous. 1st Dist. 1998), a Texas court held that a company’s conduct in accepting the benefit of shareholders’ and compensation agreements meant that the company was deemed to have ratified them and was estopped from denying the existence of the arbitration agreements, even though it had not signed them.

**Agency**

Ordinary principles of agency have also been judicially applied to the issue of identification of the parties to an arbitration agreement. An undisclosed principal can enforce an arbitration agreement made for its benefit by an agent, despite the fact that the signatory to the arbitration agreement did not know of the existence of the undisclosed principal.

**Veil piercing/alter ego**

Where a signatory to an arbitration agreement is merely the alter ego of a non-signatory, the US courts have allowed the piercing of the corporate veil of the entity which agreed to arbitrate, so that the non-signatory is also bound by the arbitration agreement. This will be the case where it can be shown that in the circumstances, to distinguish between the signatory and non-signatory to the arbitration agreement would be perpetuating a fraud or injustice. A likely scenario is where a subsidiary has signed an arbitration agreement on its own behalf but in fact its parent company is controlling and directing the subsidiary in respect of the commercial transaction to which the arbitration agreement relates. Similarly, in the case of *Bridas S.A.P.L.C. v Gov’t of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003), an officer or shareholder of the corporate signatory to the arbitration agreement was held to be bound by the arbitration agreement where there was a unity of ownership and interest between the corporate signatory and the individual, such that their distinct personalities no longer existed, and to adhere to that sham distinction would promote a fraud or perpetuate an injustice.
EUROPEAN JURISDICTIONS

France

Under French law, it may be possible for a non-signatory to an arbitration agreement to be joined to the arbitration, either as claimant or respondent, under the "group of companies doctrine". As its name implies, where a signatory to an arbitration agreement is part of a group of companies, the doctrine allows for the extension of the application of the arbitration agreement to one or more companies in the same group as the signatory.

However, French courts and arbitral tribunals applying French law have tended only to extend arbitration agreements to other company(ies) in the same group if both:

- The non-signatory has played a part in the conclusion, performance or termination of the contract containing the arbitration agreement.
- It was the common intention (express or implied) of the parties that the non-signatory be bound by the contract and the arbitration agreement within it.

The first and best-known case on this issue was *Dow Chemical Group v Isover-Saint-Gobain* (ICC Case No. 4131) (*Dow Chemical*). Two companies within the Dow Chemical group each entered into distribution agreements with a number of companies the rights of which were subsequently assumed by Isover-Saint-Gobain. 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 their parent company and another subsidiary, neither of which had signed the agreements.

Isover-Saint-Gobain objected to the claims brought by the non-signatory claimant companies, as they were not parties to the agreements containing the arbitration clauses. The tribunal rejected the challenge, considering that:

- One of the non-signatory companies had in fact made all the deliveries to Isover-Saint-Gobain under the agreements.
- The other non-signatory company was the parent of one of the signatories, the owner of the trade marks under which the products were marketed, and had absolute control over those subsidiaries that were directly involved or could contractually have become involved in the conclusion, performance or termination of the distribution agreements.

The tribunal therefore concluded that, given the role that the non-signatories played in the conclusion, performance or termination of the contracts containing the arbitration agreements and the mutual intention of all parties to the proceedings, the non-signatories were de facto parties to the contracts and should therefore be bound by the arbitration clauses contained within them. This was upheld by the Paris Court of Appeals (CA Paris, 21 Oct 1983, *Isover-Saint-Gobain v Dow Chemical France*).

The notion, therefore, that a group of companies comprises distinct legal entities the contractual arrangements of which can remain distinct from the other entities in the group is to a certain extent eroded under French law by the group of companies doctrine.

In *Dow Chemical*, the tribunal found that it was the common intention of the parties that non-signatories should be bound by the arbitration agreements as well as the distribution agreements in which they were contained. However, it should be noted that to infer a common intention that a non-signatory be bound by an arbitration agreement, it was insufficient to establish that the non-signatory was involved in the overall commercial transaction if it was not also involved in the conclusion, performance or termination of the contract containing the arbitration agreement. In *ICC Case No. 2138 of 1974*, the tribunal refused to extend an arbitration clause signed by one company to another company of the same group because it was not established that the non-signatory party would have accepted the arbitration clause if it had signed the contract directly. The non-signatory had negotiated the overall commercial transaction and signed the main provisions but had not signed the contract containing the arbitration agreement.

By analogy with the group of companies doctrine, French law also permits in certain circumstances the application of an arbitration agreement signed by a company to the (non-signatory) individual with control of that company. The Paris Court of Appeals (CA Paris Jan 11 1990, *Orri v Societe des Lubrifiant Elf Aquitaine*) and Supreme Court have permitted the application of an arbitration agreement to a non-signatory individual who was found to be the alter ego of the signatory company, on the basis that on the facts, the signing of the contract by the company and the individual constituted a "subterfuge, amounting to fraud, aimed at concealing the identity of the actual contractor".

England

The group of companies doctrine under French law has no counterpart in English law (obiter Peterson Farms Inc. v C&M Farming Ltd [2004] EWHC 121 (Comm), Langley J. at paragraph 62). In *Peterson Farms*, the court confirmed that under English law, it is the substantive rather than the procedural law of an agreement which should be applied to identify the parties to an agreement.

In *Peterson Farms*, the substantive law of the agreement was Arkansas law. Following an ICC arbitration award, Peterson Farms (the respondent in the arbitration) sought a declaration from the English court that certain findings in the award were made without jurisdiction, on the basis that some of the claimants in the arbitration were not signatories to the arbitration agreement. The tribunal decided that it had jurisdiction over all the parties by application of, among other things, the group of companies doctrine, following the *Dow Chemical* case. However, the court held that the tribunal was wrong not to have applied the substantive law of the dispute, Arkansas law, to identify the parties. The court applied Arkansas law and held that the group of companies doctrine did not form part of that law, and stated that this was also the position under English law.

However, even if English law is the substantive law, “other considerations” can be taken into account by the tribunal in deciding the dispute, if the parties agree or if it is so determined by the Tribunal (section 46(1)(b), *Arbitration Act 1996* (1996 Act)). Therefore, under section 46(1)(b) the group of companies doctrine could conceivably be applied by a tribunal even where English law is the substantive law of the dispute (for example, if all parties, signatory and non-signatory, agree to the application of the doctrine).
It is a requirement of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) that the consent to arbitration be in writing. Therefore, the parties’ consent to the applicability of the arbitration agreement to the non-signatories must be explicit. If it were implicit, then section 5(3) of the 1996 Act (“Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing”) would arguably be satisfied. A implied or inferred intention is unlikely to trigger section 5(3) and, in the absence of a written agreement to arbitration, the arbitration would stand outside the 1996 Act. In this case, any award in favour of or against the non-signatories would not be enforceable by the English court under section 66 of the 1996 Act (which relates to the enforcement of awards). Likewise, a foreign award invoking the group of companies doctrine may not be enforceable under section 100 of the 1996 Act (relating to New York Convention awards).

Additionally, a non-signatory to an arbitration agreement can become a party to an arbitration under it by way of the contracts (Rights of Third Parties) Act 1999 (1999 Act). The 1999 Act abolished the long-standing doctrine of privity of contract (that only a party to a contract can enforce its terms). A third party can enforce a term of the contract if the contract expressly provides that it can do so (section 1(a), 1999 Act), or if the term provides a benefit to it (section 1(b), 1999 Act). Section 8 of the 1999 Act expressly envisages the applicability of section 1 to arbitration agreements. However, it is now common for commercial contracts to exclude the applicability of the 1999 Act.

Switzerland

The extension of the binding nature of arbitration to non-signatories in Switzerland depends on the role played by the non-signatory in the performance of the agreement containing the arbitration clause.

While an arbitration agreement would traditionally not be extended to non-signatories under Swiss procedural law, a decision of the Swiss Federal Tribunal (Y.S.A.L. v Z Sarl ATF 129 III 727-AP.115/2003 (X.S.A.L.) on 16 October 2003 for the first time took a more liberal approach to non-signatories. In this case, three Lebanese companies (X, Y and Z) entered into a construction contract containing an arbitration clause. When a dispute arose, Z commenced proceedings against X, Y and Mr A. (who was not a party to the agreement), on the basis that Mr A. actively participated in the negotiations and performance of the contract. The Federal Tribunal, applying the principle of good faith, allowed an extension of the arbitration agreement to Mr A., on the basis of the written evidence showing Mr A.’s active involvement in the management of X and Y, and in the actual performance of the contract with Z.

The Federal Tribunal also held that the fact that Mr A. owned companies X and Y, held the construction permit for the works under the contract between X, Y and Z and represented the construction project dealt with by the contract personally in the media were not sufficient grounds for extending the arbitration agreement to Mr A. It was his active involvement in the management and implementation of the construction project which became the basis for the extension, because by his actions, Mr A. showed his willingness to be bound by the arbitration agreement within the contract.

The decision was a step forward in the interpretation of the Swiss statute governing international arbitration, the Federal Act on Private International Law 1987 (PIL).

The arbitration agreement must be “evidenced by text” (that is, have some form of written expression) (Article 178(1) PIL). The Federal Tribunal, while accepting that there was no such written agreement with Mr A., considered that the purpose of the legal requirements were to form in a similar way to its practice of accepting arbitration clauses incorporated by reference. In the circumstances, the Federal Tribunal found that these requirements should be kept to a minimum (that is, the existence of the documents evidencing Mr A.’s involvement in the performance of the contract was sufficient).

An arbitration agreement is valid if it conforms to the law chosen by the parties, the law governing the subject matter of the dispute, or to Swiss law (Article 178(2), PIL). The Federal Tribunal supported the arbitral tribunal’s application of Lebanese law as the law governing the contract, relying on the concept of lex mercatoria (principles derived from the established customs of merchants and traders rather than the laws of a particular state) and the French arbitral practice of involvement in the conclusion, performance or termination of the contract containing the arbitration agreement.

Russia

Russian law provides that an arbitral tribunal only has jurisdiction over non-signatories to an arbitration agreement if all the parties explicitly agree on this, including the non-signatory itself (Article 19, International Commercial Arbitration Act 1993). In practice, this provision effectively restricts joinder of non-signatories, as in most cases non-signatories object to being added as parties to arbitration.

Germany

There are limited instances where non-signatories to an arbitration agreement can be compelled to arbitrate in Germany. For example, a third-party beneficiary who wishes to enforce a contractual right arising from an agreement that contains an arbitration clause must respect this dispute resolution choice made by the main parties to the contract. A principal is bound by the arbitration agreement concluded by its agent on its behalf, even in cases of apparent authority. However, it is highly unlikely that German courts would follow the group of companies doctrine.

STATE-OWNED ENTITIES AND THE STATE

When a state-owned company, which is a separate legal entity to the state itself, enters into an arbitration agreement, the question often arises as to whether the arbitration agreement can be enforced against the relevant state. Similarly, would such a state-owned entity be bound by the arbitration agreement entered into by the state?

Extension of an arbitration agreement from a state-owned entity to the state

The key case on this issue is S.P.P. (Middle East) Ltd. v Arab Republic of Egypt (Case No. 3493 (1983)) (known as the Pyramids), an arbitration under ICC Rules in Paris. SPP, a company incorpo-
rated in Hong Kong, signed Heads of Agreement with EGOTH, an Egyptian state-owned company, and the Egyptian government, for the construction of two tourist centres in Egypt. SPP and EGOTH then entered into a contract which contained an ICC arbitration clause with its seat in Paris. The contract was signed, among others, by the Minister of Tourism of Egypt, his signature appearing underneath the words “approved, agreed and ratified”.

When the construction project was cancelled, SPP commenced the arbitration against both EGOTH and the state of Egypt. The state contested the jurisdiction of the arbitral tribunal on the basis that it had not agreed to be bound by the arbitration agreement. However, the arbitral tribunal held that the signing of the Heads of Agreement and of the actual contract by a government official was clear evidence of the intention by the Egyptian Government to be bound by the arbitration agreement.

The Egyptian government appealed to the Paris Court of Appeals under Article 1502 of the French New Code of Civil Procedure, claiming lack of an arbitration agreement. The Court allowed the appeal, holding that the words “approved, agreed and ratified” did not imply the Egyptian government’s intention to be bound by the arbitration agreement, as under Egyptian law the Minister, by virtue of his office, was supposed to grant approvals to the contracts entered into by state-owned entities. SPP appealed to the French Cour de Cassation, which supported the interpretation of the Court of Appeals.

This judgment was followed by the arbitral tribunal in another ICC arbitration against a state (Case No. 8035 (1995)), reiterating the fact that a signature by a state official of a contract on behalf of a state-owned company does not automatically constitute the state’s consent to be bound by the arbitration agreement contained in the contract. In both cases the wording before the signature was interpreted as mere approval of the terms of the contract by the company’s supervisory board.

An important factor which may lead a tribunal to decide that an arbitration clause is binding on a non-signatory state is the existence of common obligations and interests between the parties and the non-signatory. Another ICC case, with its seat in Switzerland, was Westland Helicopters Ltd. v Arab Organisation for Industrialization (AOI) (Case No. 3879 (1984)) between an English company, Westland, and an entity created by four states, AOI. Westland joined the four states as respondents, even though they did not sign the agreement under which the dispute arose. In its partial award the Tribunal held that if the obligations arising out of the agreement are also obligations of the states, then the states are bound by the arbitration clause. The award was successfully challenged by one of the states at the Swiss Federal Tribunal which concluded that, no matter how obvious it was that the states intended to be bound by the agreement, they could not be forced to be bound if they had not signed. However, the final award was subsequently rendered against both AOI and the three remaining states. The Swiss Federal Tribunal supported the tribunal’s reasoning, holding that an arbitration agreement could be extended to the non-party states if the economic interdependence between the states and the company is evident, and if the actions of the states led the claimant to believe that the states intended to be bound by the contract, including the arbitration agreement contained in it.

Similarly, in a recent ICC Case Svenska Petroleum Exploration AB v Government of Republic of Lithuania (1) AB Geonafta (2) (2001), the dispute related to the joint venture agreement entered into by Svenska and Geonafta, which contained terms dealing expressly with rights and obligations of the Lithuanian government. The agreement was signed by government officials and contained a statement above their signatures specifying that the government approved the agreement and “acknowledges itself to be legally and contractually bound as if the Government were a signatory to the Agreement”. The tribunal in its interim award held that the government agreed to be bound by the agreement. The issue of the tribunal’s jurisdiction was subsequently challenged in the context of enforcement proceedings brought by Svenska before the English courts. The Court of Appeal on 13 November 2006 held that the existence of the statement provided strong evidence that the parties did intend that the government should be bound by the terms of the agreement (Svenska Petroleum Exploration AB v Government of Republic of Lithuania and another (2006) EWCA Civ 1529).

These decisions show that it is not sufficient for the state to formally own or part-own the entity which is a signatory to the arbitration agreement. The intention of the parties and the non-signatory state or states to be bound by the arbitration agreement must be established.

Extension of an arbitration agreement from a state to a state-owned entity

Similarly, for an arbitration agreement to be extended from a state to a state-owned entity, the real intentions of the parties when entering the contract must be established. In ICC Case No. 4727 (1987), a Swiss corporation entered into an agreement with an African state which was signed by a senior manager of a state-owned company on behalf of the state. When the dispute arose, the corporation attempted to include the state-owned company as a co-respondent on the basis of its signature. However, the claim was rejected by the tribunal on the basis that the signature was clearly made “on behalf of the state”, and the company therefore never intended to be bound by the arbitration agreement. The award was upheld by the Paris Court of Appeals.

The circumstances under which an arbitration agreement can bind a party which was not a party to it differ from jurisdiction to jurisdiction. The European approach is more limited in its scope than the five principles which characterise the US approach. Careful consideration should be given to this issue both by parties to an arbitration agreement (as to whether non-signatories could potentially claim the benefit of the arbitration agreement) and by non-signatories (as to whether their conduct is such that they could be deemed to be bound by an arbitration agreement).
No one wants to be involved in contentious proceedings but sometimes it is inevitable.

The business world exists without borders and with greater diversity and international scope comes a desire to resolve disputes in a way that the international business community accepts and trusts. More and more our clients are turning to arbitration as their preferred method to resolve their disputes and they look for the practical, straight-talking advice which Olswang provides.

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