CHAPTER II

ARTICLES

A. CHANGING ARBITRATION: SOLVING THE PROBLEM OF CONSENSUAL JURISDICTION AND THIRD PARTIES IN A COMPLEX COMMERCIAL WORLD

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Unsplash

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Arbitration changes to meet its users' needs, but it also has certain constraints. One significant constraint is that it is consensual in nature. This means that arbitration requires the agreement of all the parties, and, unlike the coercive jurisdiction of courts, arbitral tribunals rely on consensual jurisdiction. This creates a particular issue, and potential inefficiency, when third parties are relevant to a dispute that is subject to arbitration.

This limitation is of particular relevance in circumstances where there are complex commercial arrangements, such as where there are multi-party agreements or multiple contracts relating to one overall commercial relationship. This is common in infrastructure or construction projects, and may also be true with supply contracts and distribution agreements, as well as many other contexts. Courts generally have more power than arbitrators to hear related disputes together, but, where some, but not all of, the parties to a composite transaction or multiple agreements have not signed the same or compatible arbitration agreements, neither a court nor an arbitral tribunal may be able to resolve related disputes in the same proceedings. Indeed, one of the potential benefits of arbitration is efficiency. However, where third parties connected to a composite transaction are not signatories to the same or at least compatible arbitration agreement, it may create even greater inefficiencies because it may ensure that there are multiple proceedings, as well as the risk of contradictory decisions.

Arbitral institutions have tried to take steps to address this gap. Thus, arbitral institutions have repeatedly revised their consolidation and joinder rules in order to, among other things, make it easier to consolidate arbitrations involving the same subject matter but different parties, or to include parties that were not initially parties to the arbitration. Consent continues to limit the scope and efficacy of these efforts, however. Even where they have liberalized their rules, institutions continue to limit the authority to join parties or consolidate arbitrations to situations either where the parties have consented or where they are parties to the same or "compatible" arbitration agreements,[1] which means in practice where the arbitration agreements are subject to the same rules.[2] In addition, other express limitations on the authority to join parties or consolidate disputes involving other parties include timing and the impact on the arbitral procedure, including the appointment of arbitrators.[3]

In addition to the (limited) authority under institutional rules to join parties who have consented to arbitrate, or consolidate arbitrations with the same or compatible arbitration agreements, there are a number of doctrines that can be used to go further and to bind a non-signatory to an arbitration agreement. Arbitral tribunals and courts have relied on these doctrines to allow non-signatories both to invoke arbitration agreements and to be bound to them over their objections.

Although these doctrines vary depending on the applicable law, they include a number of contract law doctrines that are recognized in many jurisdictions in some form, including agency, ostensible or apparent authority, assumption, assignment, subrogation, alter ego and veil piercing. In addition, non-signatories may be bound to arbitration agreements through doctrines such as implied consent and estoppel, which focus more on conduct. Another doctrine that is used to bind non-signatories, and arguably relies on conduct to ascertain whether there has been consent, is the so-called "group of companies" doctrine, which is discussed in more detail below.

The U.S. Supreme Court recently confirmed that using doctrines like "equitable estoppel" to allow a non-signatory to compel a signatory to arbitrate is not contrary to the New York Convention. In *GE Energy Power Conversion France SAS, Corp v. Outokumpu Stainless USA, LLC*, the U.S. Supreme Court reversed an appellate court decision that held that, although equitable estoppel could be used by a non-signatory to compel a *domestic* arbitration, it could not be used to compel *international* arbitration because it was incompatible with Article II(3) of the New York Convention, which refers to enforcing written arbitration agreements.[4] In its decision, the U.S. Supreme Court reasoned that the New York Convention is silent on this issue, and that "[t]

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[1] For joinder, *see, e.g.*, ICC Rules, Art. 7(5); SIAC Rules, Rule 7.1; LCIA Rules, Art. 22(x). For consolidation, *see, e.g.*, ICC Rules, Art. 10; SIAC Rules, Rule 8; LCIA Rules, Art. 22A.

[2] In 2017, noting that there was a lack of any existing mechanism for "cross-institution" consolidation of arbitrations subject to different institutional arbitration rules, and that this "substantially limits the types of disputes that can be consolidated," SIAC issued a Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol." However, that initiative has not moved forward, and the SIAC press release and the memorandum explaining the proposal appear to no longer be available on the SIAC website.

[3] For example, under Article 7.5 of the ICC Rules, a third party can be joined to an arbitration after the tribunal has been appointed, if that party accepts the constitution of the tribunal and agrees to the terms of reference, and after the tribunal considers various factors such as the prima facie jurisdiction over the additional party, the timing of the request, possible conflicts of interest, and the impact of joinder on the arbitral procedure. Similarly, consolidation is permitted under Article 10 of the ICC Rules where (i) all parties agree to the consolidation, (ii) all claims in the arbitrations are made under the "same arbitration agreement" (even if there is no party common to the different sets of proceedings), or (iii) claims are made across not the same, but compatible, arbitration agreements and by the same parties in respect of the same legal relationship.

[4] *Outokumpu Stainless USA, LLC v Coverteam SAS*, 902 F3d 1316 (11th Cir. 2018).

his silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines.'"[5] It thus concluded that it was appropriate to rely on domestic law doctrines to fill the gap in the New York Convention, and to determine the applicability of an arbitration agreement to non-signatories. This arguably brings the U.S. in line with other arbitration-friendly jurisdictions, and underscores that the New York Convention can operate as a floor, not a ceiling, on arbitration agreements.

It is important to note that, while *GE Energy* involved a non-signatory seeking to compel a signatory to arbitrate, it appears that the same doctrine – equitable estoppel – is increasingly being invoked by signatories to compel non-signatories to arbitrate, which is potentially more controversial. Other doctrines used to compel arbitration against non-signatories can also be perceived as controversial, although their parameters, and hence their exact meaning, can be vague. In particular, the labels used – such as "group of companies" – can potentially obscure the analysis and the evidence relied on by a court or tribunal to find that a non-signatory has consented to arbitrate or otherwise should be bound by an arbitration agreement.

The "group of companies" doctrine is often identified as originating from an ICC arbitration, *Dow Chemical v. Isover Saint Gobain*.[6] The tribunal in that case found that it had jurisdiction over two non-signatory entities of the Dow Chemicals group because (i) they were part of the same group as the signatory entities; (ii) had taken an active role in the conclusion, performance and termination of the distribution agreements (that contained the arbitration clause); and (iii) the tribunal found there to be a common intention as between the signatory parties as well as the non-signatories, for the latter to be bound by the arbitration agreement.

Following the award in *Dow Chemicals*, a number of courts and arbitral tribunals have applied what has come to be called the "group of companies" doctrine. Some commentators have argued that it is misunderstood. Others have argued that it is mislabeled.

In a well-known lecture, Bernard Hanotiau argued that the *Dow Chemicals* tribunal did nothing more than apply a consent-based approach, and found that the parties (both signatories and non-signatories) had intended to be bound. He suggested that the "group of companies" label has caused unnecessary confusion, and that it is "merely an awkward, inappropriate expression for the fact that conduct can be an expression of consent and that among all the factual elements and surrounding circumstances to be taken into consideration to determine whether conduct amounts to consent in a particular case."[7] Thus, he argued that, while merely being a member of a group of companies cannot be sufficient, the existence of a group of companies may be relevant to an analysis of consent, because it may, in a particular case, "generate certain dynamics in terms of organization, control, common participation in projects, the interchangeability of members within the group" that is relevant to the analysis of consent.[8]

Nonetheless, courts in many common law jurisdictions (and some civil law jurisdictions[9]) appear to be hostile to the doctrine, at least in its broadest characterization. Famously, in *Peterson Farms*, the English High Court held that the "group of companies" doctrine has "no place" in English law.[10] The doctrine has been criticized in that case and in others for being contrary to privity of contract, disregarding the separate legal personalities of corporate entities, and undermining the importance of consent.

This is seen in cases like *Manuchar Steel H.K. Ltd v. Star Pac. Line Pte Ltd*, in which the Singapore Court of Appeal refused to enforce an award against a non-signatory that formed part of the same group of companies as the signatory, on the basis that the two companies formed a single economic entity. In rejecting this argument, the court held that the right to use a corporate structure in any manner legally permissible was inherent in Singapore's corporate law, and Singapore did not recognize the theory of single economic entity.[11]

Similarly, in *Sarhank Group v. Oracle Corp.*, the U.S. Court of Appeals for the Second Circuit dismissed attempts to enforce an arbitral award against a non-signatory parent.[12] In the underlying arbitration, the tribunal had found that the non-signatory was bound by the arbitration agreement and liable for obligations under the contract. The tribunal held that:

"despite ... their having separate juristic personalities, subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in any deal either is a party thereto provided that this is brought about by the contract because contractual relations cannot take place without the consent of the parent company owning the trademark by and upon which transactions proceed."[13]

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[5] 140 SCt 1637, 1645 (2020).
[6] *Dow Chemical France, the Dow Chemical Company & Ors. v. Isover Saint Gobain*, ICC Case No. 4131, IX Y.B. COMM. ARB. 131 (1984).
[7] Hanotiau, *Consent to Arbitration; Do We Share a Common Vision?* in W. Park (ed.) Arbitration International, p. 546
[8] *Ibid.*
[9] *See, e.g.*, Girsberger & Voser, *International Arbitration: Comparative and Swiss Perspectives 101* (3d ed. 2016); Duve & Wimalasena, *Part IV: Selected Areas and Issues of Arbitration in Germany, Arbitration of Corporate Law Disputes in Germany, in Arbitration in Germany: The Model Law in Practice* 927, 951 (Patricia Nacimiento eds., 2d ed. 2015).
[10] *Peterson Farms Inc. v. C&M Farming Ltd* [2004] EWHC (Comm) 121, at para. 62.
[11] *Manuchar Steel H.K. Ltd v. Star Pac. Line Pte Ltd.* [2014] SGHC 181 at para. 89.
[12] *Sarhank Group v. Oracle Corp*, 404 F.3d 657 (2d Cir. 2005).
[13] *Id.* at 662.

While accepting in principle that non-signatories could be bound by an arbitration agreement, the court refused to enforce the award, stating that U.S. courts have only been willing to bind non-signatories to an arbitration agreement where there is "incorporation by reference, assumption, veil piercing/alter ego and estoppel and the like."[14] The court stressed the importance of privity of contract, and concluded that it would be impermissible to look beyond the corporate form of a subsidiary to bind a parent company because:

"[t]o hold otherwise would defeat the ordinary and customary expectations of experienced business persons. The principal reason corporations form wholly owned foreign subsidiaries is to insulate themselves from liability for the torts and contracts of the subsidiary and from the jurisdiction of foreign courts. The practice of dealing through a subsidiary is entirely appropriate and essential to our nation's conduct of foreign trade."[15]

In contrast, Indian courts have recently appeared to embrace the "group of company" doctrine, out of an apparent concern for the potential for inefficiency and unfairness that might otherwise arise in composite and multi-party transactions. While cautioning that the "'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties," in *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors*, the Indian Supreme Court accepted the application of the "group of companies" doctrine as a basis for binding non-signatories to an arbitration agreement.[16] In subsequent cases, Indian courts have continued to apply the "group of companies" doctrine to bind non-signatories to arbitration agreements with multiple parties or multiple contract disputes.[17]

Interestingly, the Indian jurisprudence relies primarily on a legislative basis for the application of the "group of companies" doctrine. Indian courts, including the Indian Supreme Court in *Chloro Controls*, focus on the use of the phrase "party and any person claiming through or under him" in multiple provisions of the Indian Arbitration and Conciliation Act of 1996: Sections 8 and 45 refer to the courts' authority to refer parties to arbitration where there is an arbitration agreement, and a party to the arbitration agreement "or any person claiming through or under him" applies to compel arbitration; and Section 35 states that an arbitral award shall be final and binding on the parties "and persons claiming under them."

However, other arbitration laws use similar "through or under" phrasing, including the Australia, Singapore, and English Arbitration Acts, and courts in those jurisdictions have refused to rely on that language as a basis to compel arbitration in cases involving non-signatories.

Thus, for example, the Australian courts have interpreted similar language to refer to circumstances where a non-signatory brings a derivative action in place of a signatory, such as where a liquidator brings a claim.[18] The Australian courts have since reaffirmed that, to bring an arbitration using the "through or under" language, the third party's claim must rely upon or resist a right of the party that was a signatory to the arbitration agreement.[19]

Like the Indian Arbitration Act, Section 82(2) of the English Arbitration Act, 1996 defines a "party" as including "any person claiming under or through a party to the agreement." However, the English Court of Appeal has rejected the argument that a non-signatory could be considered to be a party claiming "through or under" its parent company (which was the signatory to an arbitration agreement) simply because they were "closely related."[20] More recently, in *Naibu Global*, the English High Court rejected an argument that the phrase "under or through" in Section 82(2) of the English Arbitration Act could be read to allow a non-signatory parent company of the signatory company to invoke an arbitration agreement. The court held that the parent company was asserting independent rights, in its own name, based on separate duties allegedly owed to it, without attempting to assert any rights *through* its subsidiary entity. [21]

So where does this leave us? We have a problem – the limitations on jurisdiction imposed by the consensual nature of arbitration, and the potential inefficiencies that causes, particularly with regard to complex commercial arrangements. We also have the reality that in many commercial deals different companies in the same group may be involved in various aspects of the relationship, including negotiating the terms, performing the obligations, and terminating the contract. The company that signs the contract with the arbitration agreement may not be the company (or the only company) in the same group that plays a vital role. Moreover, other companies may pay for or benefit from the arrangements without being a signatory. Similarly, there may be a chain or ladder of contracts that are essential to a supply or distribution arrangement, or to an infrastructure project. Limiting arbitration only to signatories might seem artificial, costly,

[14] *Ibid*.
[15] *Ibid*.
[16] (2013) 1 SCC 641 at 67.
[17] For an excellent discussion of the Indian jurisprudence and these issues more generally, *see* Caher, Prasad, Irani, *The Group of Companies Doctrine – Assessing the Indian Approach*, Indian Journal Of Arbitration Law, Vol. 9, Issue 2 (January 2021).
[18] *Tanning Research Labs. Inc. v. O'Brien*, (1990) 169 CLR 332, at para. 11.
[19] *Rinehart V Hancock Prospecting Pty Limited; Rinehart V Rinehart* [2019] HCA 13 (8 MAY 2019) at 86, 87.
[20] *The Mayor & Commonalty & Citizens of the City of London v. Sancheti* [2008] EWCA (Civ) 1283 (Eng.)
[21] *Naibu Global and Anr v. Daniel Stewart & Co and Anr* [2020] EWHC 2719.

inefficient, and, ultimately, unfair, and this is compounded by the lack of coercive jurisdiction in arbitration.

At the same time, allowing parties to limit liability through privity of contract is fundamental to contract law, and compelling a party to arbitrate (and forego its right to have its right determined in a competent court) only where a party consents to do so is fundamental to arbitration law. Although they will likely continue to tweak their joinder and consolidation provisions, it is not clear that arbitral institutions can go much further to revise their rules with regard to non-signatories, or to address multiple contract arrangements where there are different arbitration agreements, particularly of they are subject to different arbitration rules. The need for consent is a potentially insurmountable hurdle to further substantial reform by arbitral institutions.

Nor is it clear that there is a legislative solution. As discussed above, Indian courts have relied on language in the Indian Arbitration Act to find authority for the Indian approach to the "group of companies" doctrine, but even if based on legislation, binding a party to an arbitration agreement must still require some indicia that the parties intended the non-signatory to be bound or that the non-signatory has become bound through its conduct. Otherwise, privity of contract and consent become meaningless. The overly broad application of doctrines like equitable estoppel and "group of companies" create the same risks of undermining privity and consent. Indeed, as discussed above, the *Dow Chemical* approach looks for evidence of consent, not mere membership in a group of companies.

If answers are not easy to find in arbitration rules or law, there is another, more prosaic way to avoid potential inefficiencies and uncertainties in multi-contract and multi-party arrangements: careful and thoughtful drafting of contracts and arbitration agreements to ensure that related disputes can decided efficiently with all relevant parties in one proceeding where that is intended. Equally, where the intent is to protect corporate distinctions, or to keep disputes relating to different aspects of a composite transaction separate, careful drafting can help ensure that as well. Consideration of potentially applicable laws – including the substantive law, the law of the seat, and the law of potential enforcement jurisdictions – can also be important. Ultimately, the best way to create efficiencies – and avoid creating inefficiencies and injustices -- is through forethought and hard work to make sure that there is deliberate consideration of the options and the risks when drafting complex contractual arrangements. This may sound obvious, but is regrettably still a significant challenge, and one that cannot be changed by arbitral institutions, courts, or legislatures. The ability to change to better address efficiency in a complex commercial world is in the hands of parties and their representatives. Arbitration provides the tools to address the problem – parties must take advantage of those tools to customize dispute resolution solutions that are more efficient than litigation and customized to meet the needs of their commercial arrangements.

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