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## **Why Us? We Never Signed the Arbitration Agreement! Binding Non-Signatories to Arbitration Agreements and Awards**

*International Dispute Resolution Centre*

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Moderator: Pierre-Yves Gunter (Python Schifferli Peter, Geneva)

Rapporteur: Stephen Jagusch (Allen & Overy LLP, London)

### **Introduction**

This session, the third to be conducted on Tuesday 25 January 2005 at the International Dispute Resolution Centre, in London, was led by Christian Camboulive (Gide Loyrette Nouel, Paris), Michael Davison (Lovells, London), Alan Redfern (One Essex Court, London) and John Townsend (Hughes Hubbard & Reed LLP, Washington, DC) under the moderation of Pierre-Yves Gunter (Python Schifferli Peter, Geneva). The session addressed various theories under which non-signatories might be bound by arbitration agreements and awards, many of which have engendered sharp controversy, including divergent views on the "group of companies" doctrine among the English commercial courts and courts on the continent.

### **Moderator – Mr. Gunter**

The moderator, Mr. Gunter, in his introductory remarks, alluded to what he considered to be a more liberal approach to non-signatories which is currently being taken in France as recognised in the Dow Chemicals decision, which stands in contrast to the English position as currently reflected in the Peterson Farms case. These were positions which would be addressed respectively by Messrs Camboulive and Davison, with Mr. Townsend to describe the US position and finally Mr. Redfern to deal with broader observations on the topic principally as concerns the enforcement of arbitral awards. Mr. Gunter also referred to a decision of the Swiss Supreme Court ("Tribunal Fédéral") dated 16 October 2003 (X. S.A.L, Y. S.A.L. v. Z Sàrl ATF 129 III 727-4P.115/2003 commented in ASA Bulletin Volume 22, No 2, 2004 pp. 364-410) which, for the first time, took a more liberal approach to non-signatories. Mr. Gunter wondered if this decision might signal the beginning of a new trend towards a liberal approach, not only in Switzerland but elsewhere. Mr. Gunter did note, however, that the extension of the binding nature of arbitration to non-signatories in Switzerland was nevertheless subject to exceptions and that key to this was consideration of the role played by the non-signatory in the performance of the agreement which contains the arbitration clause.

## France – Mr. Camboulive

Christian Camboulive summarised the situation in France, which was that current case law tended to limit the enforceability of arbitration agreements to signatories but that there were certain exceptions, such as in the case of group of companies, assignment, with respect to guarantors of obligations to be performed under the relevant contract and the law relating to mandate and representation and agency, all of which may involve legal theories that may enable a French Court to bind a non-signatory to an arbitration agreement. Mr. Camboulive explained that the focus of his presentation was, however, the extension of the arbitration clause to non-signatories. He explained that the standard exception to extension of the clause to non-signatories is that the absence of a signature evidences a lack of consent to arbitration, which position is supported by the New York convention requirement of acceptance in writing.

Dow Chemicals is regarded as the founding case on the group of companies doctrine and stands as the authority for the proposition that non-signatories can be compelled to participate in an arbitration in circumstances where there is evidence that the parties accepted that the contract in question was considered to be with a group of companies. In this matter, the arbitrators had found in an interim award of 1982 that the various companies involved constituted “*one and the same economic reality*” and that the non-signatories, members of the same group of companies had been the veritable parties to the contract, “*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*”. This award was affirmed by the Paris Court of Appeals in 1983 which again relied on the “*common intent of the parties*” as demonstrated by their behaviour and conduct. Three years later, a new decision was rendered by the Court of Appeals of Pau (Sponsor v. Lestrade). This decision described the solution of Dow Chemical as a “matter of law” and held accordingly that an arbitration should bind companies of a group not privy to the arbitration agreement in view of their actual role played in the execution, performance or termination of the underlying contracts. Mr. Camboulive noted that this was treated almost as an accepted principle of law and was not the subject of separate debate. A further decision was rendered by the Court of Appeals of Paris in 1989, again supporting the extension of an arbitration clause to a parent company (Kis France v. Société Générale). Nevertheless, it is the last case in France to deal directly and expressly with a group of companies doctrine. Mr. Camboulive pointed out that there have been other cases, not based directly and expressly on a group of companies doctrine, which suggests that the test in France is to look to the intent of the parties as may be evident from their behaviour, from which one may presume or deem acceptance of the agreement to arbitrate.

## England – Mr. Davison

Michael Davison then gave a presentation on the position under English law, which focussed on the decision of the High Court in Peterson Farms. It was explained that this case concerned an ICC arbitration with a London seat and Arkansas substantive law which, for reasons which are not clear the parties were prepared to treat the same as English law. The Tribunal, based on the intention of the parties and the manner in which the sale contract had been concluded, determined that Peterson Farms, although a non-signatory, was nevertheless bound by the

arbitration agreement. Peterson Farms applied to the High Court pleading a lack of arbitral jurisdiction. Mr. Justice Langley emphatically rejected the reasoning of the Tribunal, finding it to be "seriously flawed at law". Mr. Justice Langley dismissed the agency argument on the basis that it was contrary to the terms of the contract and its performance; he overturned the Tribunal's decision. The matter is not being appealed and is therefore the last word, for the time being, in England. The case evidences the rejection by the English Courts of the group of companies doctrine. Mr. Davison suggested that other arguments might have had greater prospects of success. For example, Mr. Davison also pointed out that the Contract Third Parties Act permits third parties to take the benefit of arbitration agreements. He noted, however, in the vast majority of cases parties to contracts expressly exclude the operation of the Contract Third Parties Act.

### **USA – Mr. Townsend**

John Townsend then summarised the position in the US, which he began by stating that there were various theories under which a non-signatory might be bound by or permitted to rely on an arbitration agreement. First, the principle of agency which usually applies when the non-signatory is an agent of the signatory. A second category included situations in which ordinary contract law would permit one contract to be read into another, such as the principal of incorporation by reference, assignment and third party beneficiaries. Mr. Townsend then identified a third category of situations where one party succeeds to the rights of the other, such as under the doctrines of succession or assumption by conduct. Mr. Townsend then referred to what was perceived to be the most controversial theory, namely where it would not be considered fair to permit a non-signatory to avoid arbitration, or to prevent a non-signatory from compelling arbitration. These situations were stated to include doctrines such as piercing the corporate veil. Mr. Townsend's presentation then focussed on the doctrine of equitable estoppel which has developed as a defence under US law to attempts to evade arbitration clauses by bringing cases to Court, often on the basis that the claims being advanced were non-contractual in nature, e.g. tort claims. Mr. Townsend explained that the American Courts were reasonably quick to respond by holding that a broad agreement to arbitrate catches tort claims related to the contract. This did not, however, prevent ingenious plaintiffs nevertheless designing suits in order to avoid the obligation to arbitrate. This is where the US Courts would be prepared, on appropriate facts, to find that it would be inequitable to allow a party to rely on a contract but at the same time to avoid the obligation to arbitrate contained therein. Mr. Townsend pointed out that this is not the same as the civil law concept of group of companies, but rather an equitable principle based on substantive fairness. This doctrine was, as Mr. Townsend explained, a powerful tool to compel arbitration and whilst its limits were neither clear nor always consistently applied, it was an important piece of the American armoury of enforcement of the obligation to arbitrate.

Mr. Townsend explained that he takes issue with the outcome of Peterson Farms, explaining that Arkansas law in this respect is US Federal law which includes this concept of equitable estoppel.

### **Enforcement – Mr. Redfern**

Mr. Redfern was next to present on this subject, taking the perspective of one concerned with the enforcement of arbitral awards. In this respect, Mr. Redfern stressed that arbitration is necessarily a voluntary system of dispute resolution with the necessary consent to arbitrate to be found either in the contract between the parties or, if such agreement is made at the time a dispute arises, in a purpose-made submission to arbitration. The historical importance of an agreement to arbitrate is explained by the fact that the choice of this method of dispute resolution is a serious matter, involving the surrender of a constitutional right to have claims heard in the relevant national courts. Mr. Redfern stressed that an agreement to arbitrate in international disputes is of little value if it cannot be enforced internationally. In this respect, the 1923 Geneva Protocol, between mostly European countries, was the first international attempt at creating a framework or enforcement of arbitral awards. This protocol provided that if there existed an arbitration agreement, the Courts would be bound to respect that agreement. It was not until 1927 that the Geneva Protocol was extended to the enforcement of arbitral awards, and this occurred in the Geneva Convention. However, it was not until 1958, with the coming into effect of the New York Convention, that there was a truly global treaty for the enforcement of arbitral agreements and arbitral awards, the success of which has led it to be described as a "pillar" of international arbitration, now signed by every major trading state. The formal title to the New York Convention as a Convention on the Recognition and Enforcement of Foreign Arbitral Awards is misleading because the Convention deals also, and firstly, with the enforcement of arbitration agreements, which must be evidenced in writing. Mr. Redfern explained that in recent years the writing requirements have come under pressure as being unduly restrictive. In this respect, the English Arbitration Act provides that an agreement to arbitrate may be made orally, so long as there is reference to an arbitration clause. The question of jurisdiction is a matter of primary concern for arbitrators because if the arbitration agreement does not on its face bind any party to the proceedings, that party may be able to resist enforcement of the award.

Mr. Redfern noted that whilst it is understandable that arbitrators may wish to act sensibly to resolve disputes between parties, any attempt to bind a non-signatory, at least under the group of companies doctrine, is bound to fail in England, notwithstanding that it is likely to succeed in Paris and possibly in Switzerland if not elsewhere. Absent an agreement in writing an award may be set aside in the place, or seat, of the arbitration or it may be refused recognition and enforcement in the place where recognition or enforcement is sought.

## **Discussion**

There followed a very interesting discussion led principally by Ben Shepherd and Justice Stephen Breyer in which the US was described as the most expansive of the jurisdictions under discussion with regard to the binding of non-signatories, principally with the doctrine of equitable estoppel which essentially provides that one can not have one's cake and eat it and that the courts will look to determine who has directly benefited from contracts in its analysis of the application of its principles. Reference was made to a Second Circuit case (*Smith/Enron Cogeneration L.P., Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999)) which held that the relationship between the issues to be arbitrated and the contract was central to the application of equitable estoppel. It was also considered whether material disputes of fact determining the conduct of the parties and the intention of those individual contracts ought to be

resolved by the Court or tribunal, the consensus seeming to be that such issues will probably be resolved by an arbitral tribunal.

### **Rapporteur Summary**

Commerce tends to grow increasingly complex, both domestically and internationally, with numerous parties taking or obtaining interests in particular transactions – parent and subsidiary entities, joint venture partners, equity and debt financiers, assignees, trade creditors and, all too frequently, receivers and liquidators. These entities frequently are not signatories to the transactions in which they have an interest. Courts are generally prepared to hear from interested parties, however, arbitral tribunals are understandably less willing to do so because their jurisdiction arises from the agreement to arbitrate – itself a contract – where the signatories agree to arbitrate disputes as between themselves. Such parties cannot generally be said to have agreed to arbitrate their disputes with third-party non-signatories. As Mr. Redfern pointed out, tribunals, which ignore this fundamental principle, may render their awards vulnerable to attack.

This reluctance – and vulnerability of awards to attack – is commercially unacceptable in many situations. Certain courts have recognised this by developing legal doctrines which permit non-signatories to be bound by agreements to arbitrate contained within contracts from which they benefit. In France, for example, if there is evidence of intention to be bound, such as existed in Dow Chemicals, the courts are prepared to deploy the so-called 'group of companies' doctrine to bind non-signatories. In the US, the principle of equitable estoppel *inter alia* may operate to prevent a non-signatory who takes the benefit of a contract from denying the arbitration agreement contained therein. In England, the 'group of companies' doctrine has been rejected, however, other legal theories – such as agency, assignment and equitable principles – are other avenues which have not yet, it seems, been fully explored.