Consent and expediency: binding non-signatories to international arbitration agreements

by Gordon Menzies, Six Pump Court

The issue of whether non-signatories to arbitration agreements can nevertheless be bound by such agreements is one of increasing importance as recourse to arbitration grows. The traditional limits of arbitration as defined by consent have come under increasing pressure given the enthusiasm for arbitration as the preferred means of dispute resolution in the context of international agreements.

When considering the circumstances in which non-signatories may be bound to arbitration agreements the case of *Bridas Sapic v Govt of Turkmenistan* (5th Circuit 2003) is perhaps the most useful starting point as it identified six theories where this course may be justified; (a) incorporation by reference (b) assumption (c) agency (d) veil piercing/alter ego (e) estoppel and (f) third party beneficiary. On closer analysis there are actually more than this might suggest.

The first three (reference, assumption and agency) are relatively uncontroversial applications of contractual principle to which can be added apparent or ostensible authority, guarantees, novation, subrogation and legal succession. These are all means by which a contract is transferred to an entity which was not a named party when that contract was completed. Such cases involve a simple exercise in identifying the real parties to the arbitration. Here the essential element of consent is clearly present and this, according to modern theories,[1] should be sufficient to satisfy the requirements of Article II of the New York Convention.

However when (e) estoppel and (f) third party beneficiary situations are considered, consent becomes much harder to identify and justify joinder. Both

[1] See Born International Commercial Arbitration 2nd Ed

theories as in interpreted in the context of arbitration appear to start from the principle that a party who receives the benefit of a contract should also be bound by any burdens, including the obligation to arbitrate. Such an approach to arbitral estoppel has featured heavily in the US jurisdiction in cases such as *Washington Mutual v Bailey*, *Mundi v Union Security Life Insurance* and *Avila Group v Norma J*[2] However although these are situations where arbitrators *can* assume jurisdiction the problem is that whilst estoppel is used as a vehicle for presuming consent it simply does not follow that because a party receives a benefit under a contract it has consented to assume its burdens. If entities are going to be derived of the fundamental right of recourse to a state court that should not be overridden lightly and this is what such theories may do. Separability may also be relevant; even if a non-party wishes to act in accordance with some provisions of a contract, the agreement to arbitrate is separate and distinct from other provisions. Ultimately the enthusiasm to extend arbitration beyond the limits of consent could seriously compromise its legitimacy. It may also be self-defeating as because many countries do not accept the forms of estoppel developed by the arbitration jurisprudence in their jurisdictions it may be a ground of refusal of enforcement pursuant to Article 5 of the New York Convention. The most famous example is of course *Dallah*[3] where binding a party by virtue of involvement in contractual negotiations was not recognised by the enforcing court in England.

Consent becomes even more difficult to identify in the third group relating to companies. In addition to veil piercing there is also the 'group of companies' theory. Veil piercing is, in most jurisdictions limited to situations where policy requires prevention of wrongdoing. It has nothing to do with consent. As far as the 'group of companies' theory is concerned here the approach is to imply obligations on the basis of an associated company's role, as identified by Voser[4] referring to the case of *Dow Chemical v Isover*[5], in *'the conclusion, performance or termination of the contracts containing said clauses'*. Whilst Voser seeks to suggest that such conduct merely reflects a mutual intention of the parties involved from which consent could be inferred this is not consistently reflected in the language of the courts. Maxton cites the case of ICC Case No. 5103 where the language used to justify joining a non-party was that this reflected *'economic realities'*. These justifications are further

[2] As referred to in Maxton 'Binding Non- Signatories to Arbitration Agreements' 2013
[3] *Dallah Real Estate and Tourism Holding Co v Pakistan* [2010] UKSC 46
[4] See Voser 'Multi party disputes and joinder of parties' (2009)
[5] *Dow Chemical v Isover Saint Gobain* ICC Interim Decision 23.9.82 4131

removed from consent than even the estoppel cases. Organisations are entitled to organise their affairs according to fundamental principles of separate corporate identity. This is usually because they do *not* consent to being treated as one with another company. Such basic principles should not be overridden on the basis of expediency. Thus whilst arbitrators can and do assume jurisdiction in such cases (especially in France) it is not clear that they should assume such jurisdiction. Again problems may arise at enforcement stage[6].

To proponents and enthusiasts of arbitration the benefits of increasing its ambit in such ways and thereby loosening it from the shackles of its traditional and formal limits is attractive and ultimately justified by expediency. However a note of caution is appropriate. There is the theoretical issue of comprising the legitimacy of arbitration by detaching it from limits defined by clear consent. But that is not all. There is a clear practical disadvantage too; a wholehearted desire to be inventive in this area will only led to more opportunities to challenge the process throughout its course; from an initial adjudication on jurisdiction through to enforcement at the conclusion of the process. To invite such challenges will ultimately be counterproductive as it will deprive arbitration of the very expediency and assurance of enforcement that is the essence of its advantage over forms of traditional litigation. In every case where this issue arise the lawyers must ask themselves the fundamental question; is such a course really necessary? It may be that it is only where there is no other viable choice that the risks involved are actually justified.

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[6] For example the US case of *Sarhank* quoted in Maxton *ibid*