COMBAR'S INDIAN ROUND TABLE CONFERENCE 2018

Getting Parties In – Can non signatories be required to arbitrate?

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An arbitration agreement binds formal signatories to a contract. We all know that parties' consent is the foundation of any international arbitration. Article II of the New York Convention states that international arbitration agreements are binding on the parties involved. It provides no guidance as to how those parties are to be determined. National laws are also almost universally silent on this matter. The non-signatory position is therefore developed through case law across jurisdictions.

There are circumstances where non-signatories to the original agreement may be bound by it. The obvious instances of getting parties in are:

(i) Assignment (ii) succession and (iii) agency.

Another method to bring non-signatories to an arbitration is consolidation.

In England, consolidated or concurrent proceedings can be achieved only if the parties agree.[1] Unless the parties agree, the tribunal has no power of consolidation.

Positives: Consolidation preserves the confidentiality of evidence and minimises the risk that the time and cost of arbitrations be extended.

Other methods of getting parties in include extending the arbitration clause to include non-signatories.

Two well-known doctrines which allow extension of the arbitration agreements to non-signatories are 'piercing the corporate veil' and 'the group of companies doctrine'.

Piercing the veil focuses on fraud or abuse of right where the real party is shielded from liability by the corporate structure.

The 'group of companies' doctrine addresses the intention of the parties to arbitrate. It is recognised in India but not recognised in England and I will speak about this interesting distinction between our countries.

[1] *Oxford Shipping Co Ltd v. Nippon Yusen Kaisha, The Eastern Saga* [1984] 3 All ER 835

THE ENGLISH POSITION

Dallah v Government of Pakistan [2010] UKSC 46

Dallah and Pakistan entered into a Memorandum of Understanding (**MOU**) by which Dallah agreed to build accommodation for Pakistani pilgrims in Mecca. Pakistan established a trust for the purpose of entering into a contract with Dallah.

Following a change in government, the Trust was terminated.

Dallah initiated ICC proceedings against Pakistan and the Tribunal awarded Dallah approximately US$20 million.

Dallah sought enforcement in England against Pakistani assets.

The Supreme Court in England concluded that it was clear that the government did not want to be directly involved in the Contract. There was a difference between an agreement with a state entity and the state itself.

THE INTERNATIONAL POSITION

France. The Dow Chemical Company and others v ISOVER Saint Gobain

France is really the pioneer of group of companies doctrine in 1983 in Dow Chemical v Isover Saint Gobain.

Two Dow Chemical companies entered into contracts with a distributor which provided that deliveries could be made by any Dow company. Two different Dow companies – which had not signed the distribution agreements - later faced product liability litigation and in turn the non-signatory Dow companies started an arbitration against the distributor with whom they had no agreement. The distributor objected to the Tribunal's jurisdiction.

The Tribunal held that the arbitration clause was autonomous from the rest of the contract and therefore the Tribunal had power to determine its own jurisdiction. The Tribunal also held that the group of companies constituted one and the same economic reality.

Under French law, an arbitration clause could be extended to non signatories if the circumstances allow it to be presumed that parties have accepted the arbitration clause of which they knew the existence and scope, even if they were not signatories[2].

[2] quoting Orri v Société des Lubrifians Elf Acquitaine, Paris Court of Appeal, 1992 Rev Arb 95

Switzerland. Case No. 4A_450/2013

The case involved a construction dispute between an aluminium company (A) and a group of companies (B). Contracts containing arbitration clauses were signed only between A and B1. It was later agreed that a division of B1's parent company (B2) would carry out the construction instead of B1.

Considering B's complicated organizational structure, the Supreme Court acknowledged that A should not be faulted for its inability to identify its actual partner in the project. B2 had continuously taken decisive steps in the project. As a result, B2 should be considered bound by the contracts and the arbitration agreements.

Under Swiss law a non-signatory party can be bound by the arbitration agreement if:

- A third party involves itself in the performance of the contract
- There is confusion with regard to the respective spheres of activity of a subsidiary and its parent (one of which is a signatory).

CONCLUSION

According to this reasoning, if one behaves as a party to an economic operation, one is also presumed to have been a party to the agreement.

If a corporate group wishes to avoid having non-signatory affiliates pulled into arbitration, it should clearly communicate which entity is or is not considered bound by the contract.

THE INDIAN POSITION

It may not be unusual for companies within the same group to be involved in carrying out various parts of a project, even without contracts formally setting out their roles. If there is no wish to allow extension of an arbitration agreement to nonsignatories involved in a project, this has to be very clearly indicated in the agreement. Companies may otherwise find themselves drawn into arbitration proceedings with related companies and find that the circumstances justify that.

Chloro Controls (I) Pvt Ltd v Severn Trent Water Purification (2013) 1 SCC 641 (Chlo ro Controls), finding that non-
signatories can be bound by an arbitration agreement in the following circumstances:

"... an arbitration agreement entered into by a company, being one within a group of companies, can bind its non signatory
affiliates or sister or parent concerns, if the circumstances demonstrate that the mutu al intention of all the parties was to bind both the signatories and the non-signatory affiliates..." (paragraph 18 of the judgment).

Cheran Properties – Background

Kasturi and Sons ("**KSL**") entered into a contract for the sale of shares of its subsidiary, Sporting Pastime India Limited ("**SPIL**"), to KC Palaniswamy ("**KCP**") (the "**Agreement**"). Under the Agreement, KCP had the right to nominate a person to receive the shares in SPIL. Upon KCP's direction, KSL transferred 95% of the shares to Cheran Properties Limited ("**Cheran**"). However, the transaction was not completed and a dispute arose between the parties.

KSL initiated an arbitration under the following clause –

> *"In the unlikely case of dispute arising out of this agreement relating to claims and counter claims, the parties hereto agree that the same shall be referred to Arbitration under the Indian Arbitration Law. The arbitration shall be by three arbitrators. KCP shall be entitled to appoint one arbitrator. KSL shall be entitled to appoint one arbitrator. The two arbitrators so appointed shall elect the third arbitrator."*

According to the award issued by the arbitral tribunal in 2009, KCP was required to return the documents of title and share certificates of SPIL to KSL. This award was challenged, first before the Madras High Court and then the Supreme Court of India. Each of these challenges was dismissed, and the award attained finality in February 2017. Subsequently, KSL initiated proceedings under the Companies Act against Cheran for rectification of the register of SPIL. This petition was allowed by the NCLT and affirmed by the National Company Law Appellate Tribunal ("**NCLAT**") on the ground that Cheran was a nominee of KCP and held the shares on his behalf.

The NCLAT's decision was then appealed to the Supreme Court on the ground that (i) Cheran was not party to the arbitration agreement or the arbitration proceedings, and an arbitration agreement could not bind a third party, and (ii) the award had to

be enforced as a decree of a civil court and could not be enforced by proceedings before the NCLT.

KSL argued that the Agreement specifically provided that the nominees of KCP would be bound by its terms and that any transfer to KCP's nominees was subject to their acceptance of the terms and conditions of the Agreement. KSL also contended that under the Companies Act, (post the amendments to the Companies Act in 2013) a matter regarding the transfer of shares could only be decided by the NCLT.

Judgment

> *Binding a non-signatory to the arbitration agreement*: In examining whether Cheran could be held liable, the Supreme Court turned to its earlier judgment in *Chloro Controls*. After reviewing the facts of the case, particularly the provisions of the Agreement that KCP's nominated transferee was to accept the terms and conditions of the Agreement, the court concluded that "*to allow [Cheran's] defence to prevail would be to cast the mutual intent of the parties to the winds and to put a premium on dishonesty*."[10] Therefore, the Supreme Court held that the award was binding on Cheran despite it being a non-signatory to the Agreement that contained the arbitration clause.

Ameet Lalchand Shah – Background

Rishabh Enterprises ("**Rishabh**") entered into four different agreements for the commissioning of a photovoltaic solar power plant in India. All except one of these four agreements contained an arbitration clause.

At SC, Rishabh argued that the principles in Chloro Controls only applied to "foreign" arbitration agreements (governed by Section 45 of the Indian Arbitration Act) and not domestic situations (governed by Section 8). However, the Supreme Court held that the Amendments had brought Section 8 in line with Section 45 of the Arbitration Act.

The Supreme Court found that one of the four agreements, the Equipment Lease Agreement, was the main agreement and also contained an arbitration clause. The remaining three agreements (including the one agreement which did not contain an arbitration clause) were found to form an integral part of the main Equipment Lease Agreement. The Court applied the findings in *Chloro Controls* (although, not expressly), and held that even though the dispute involved different parties with different agreements, all of the agreements were inter-connected, making all of the parties amenable to arbitration.

The Court observed that it was "*evident from the facts […] [that the] intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments*…" and that "*[t]he dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration*."