

BINDING NON-SIGNATORIES TO INTERNATIONAL ARBITRAL AWARDS

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1 Scope of paper

Non-signatories are bound by the award (i) if they accepted jurisdiction of the arbitral tribunal after arbitral proceedings began or (ii) if they were contractually bound by an arbitration clause before arbitral proceedings began, although they did not formally appear as parties to the contract and to the arbitration clause. This paper addresses the latter case.

2 Deciding body

The issue (of who is bound by the arbitration clause) may arise in arbitral proceedings or in state court proceedings.

If it arises in institutional arbitral proceedings, the institution may have to perform a *prima facie* examination, before the arbitral tribunal (e.g. ICC 6.2).

State courts may be confronted with the issue either in proceedings on the merits (respondent challenging the jurisdiction of the state courts on the basis of an arbitration clause) or after an award has been rendered (challenge of the award or enforcement proceedings).

3 Applicable law

The law applicable to the arbitration clause governs the issue (of who is bound by the arbitration clause).

In arbitral awards, the applicable law does not appear to make much difference in practice. In state courts decisions, it makes an important difference, e.g. whether the applicable law be French law or English law.

4 Form requirements

Most laws require that the arbitration clause be evidenced in writing, without effective signature requirement, i.e. there can be an oral agreement that the non-signatory be bound by a clause evidenced in writing. In practice, form requirements do not appear as an obstacle to binding non-signatories.

5 Consent

Consent is the most important element relevant to the decision of whether or not a non-signatory is to be considered bound by the arbitration clause.

For determining consent, not only the wording of the arbitration clause is considered, but also the intent of the parties, at the time the contract was entered into.

6 Conduct

The conduct of the parties, at the time the contract was entered into and subsequently, e.g. the fact that the non-signatory was heavily involved in the execution of the contract, perhaps solely in charge of its performance, can be evidence of consent (to the extent allowed under applicable law).

7 Legal theories applied to extend the arbitration clause

Apart from consent, several theories may be applied to bind non-signatories:

- ◆ fraud, abuse
- ◆ piercing the corporate veil, alter ego, Durchgriff
- ◆ good faith, estoppel
- ◆ group of companies doctrine

8 Group of companies doctrine

Notwithstanding certain views, the fact that the non-signatory is part of the group of companies of the signatory party is not sufficient to bind the non-signatory to the arbitration clause.

The group of companies doctrine is based on the concern that the group should be viewed as a whole, in accordance with economic reality. There is a balance to be made between the concept of legal independence and the concept of undivided economic reality. The balance between those two concepts is made by arbitral tribunals having regard to the circumstances of each specific case, and in particular the assumed intent of the parties based on such circumstances. Further, those elements are viewed through the filter of the personal views of the arbitrators. There is therefore no clear consistent presentation in the various arbitral awards.

9 Fact finding process in arbitral proceedings

The issue of consent (or of other theories) turns more upon the facts of the case than upon legal theories.

To allow a sound decision by the arbitral tribunal, it is very important for the parties to bring all relevant facts to the knowledge of the arbitral tribunal and for the arbitral tribunal to carefully assess such facts.

To the extent the decision of the arbitral tribunal is based on facts, the room for review by state courts will be more limited than it is in connection with legal analysis.

10 Individual, private corporation, State body

Arbitral tribunals seem more reluctant to extend the arbitration clause to individuals (shareholders or officers) than to private corporations.

If the non-signatory is a private corporation member of the same group of companies as the signatory, arbitral tribunals seem more willing to extend the arbitration clause.

If the non-signatory is a State or a public organization, arbitral tribunals seem rather reluctant to extend the arbitration clause and state courts take a restrictive approach.

11 Non-signatory enforcing or resisting the arbitration clause

Does it make any difference whether the non-signatory is a claimant trying to enforce the arbitration clause or whether the non-signatory is a respondent refusing to arbitrate? The question is disputed from a legal point of view. In practice, it appears easier for the non-signatory to compel arbitration against the signatory than for the signatory to compel arbitration against the non-signatory.

12 Drafting the arbitration clause

Uncertainties could perhaps be avoided by addressing specifically in the arbitration clause the issue of which parties are bound.

13 Practical advice

- ◆ Addressing the issue in the arbitration clause
- ◆ Concentrating on consent
- ◆ Going into the detailed facts

I MATERIALS

a) **Authoritative book**

Complex Arbitrations, Multiparty, Multicontract, Multi-Issue and Class Actions, by Bernard Hanotiau, Kluwer 2005.

b) **Examples of State court decisions**

Swiss Supreme Court, October 16, 2003 (ATF 129 III 727), confirmation of award finding sole shareholder liable for damages due by the company.

Peterson Farms Inc. vs C&M Farming Ltd, [2004] EWHC 121, setting aside of award allowing claimant to recoup damages sustained by subsidiaries.

c) **Arbitral award**

Interim award of August 31, 2004, NPF and X. vs Y. and Z, unpublished

