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Limits to extension of the arbitration agreement in Cyprus

As a rule, arbitration is 'a creature of contract' and the proper parties to arbitration are those who have concluded an arbitration agreement or a wider contract containing one. This rule is evident in various international and national law instruments such as Article II (2) of the New York Convention, section 5 of the English Arbitration Act, and Article 7 of the International Arbitration Law L 101/1987 applicable in Cyprus. Nevertheless, arbitral tribunals and courts sometimes enforce arbitration agreements or awards upon or allow access to arbitration by non-signatories to the arbitration agreement. The aim of this article is to analyse this issue and present a recent Cypriot judgment in which the court declined to extend the arbitration agreement to a non-signatory.

Various national approaches

National laws have adopted various principles of contract law to address the matter of non-signatories in arbitration. Examples include third-party beneficiary, agency, succession, subrogation, assignment, estoppel, piercing the corporate veil and the 'group of companies' doctrine. There is a divergence of views by both arbitral tribunals and, later, by national courts which might be requested to register and enforce an arbitral award issued against or in favour of a non-signatory.

In the *Dow-Chemical* case,[1] an ICC arbitral tribunal extended the arbitration-agreement to a non-signatory by way of the 'group of companies' doctrine. Whilst the tribunal clarified that, the mere existence of a group of companies in itself does not necessarily mean the extension of an arbitration agreement to affiliate non-signatory companies, in this particular case a number of factors were taken into consideration upon which the tribunal ultimately extended the arbitration agreement. These factors included the participation of the relevant non-signatory in the negotiation, performance and termination of the contracts that included the relevant arbitration clause, the mutual intention of all parties and the fact that the particular group of companies constituted one and the same economic reality.

In the *Peterson Farms v C&M Farming*[2] case, the English Commercial Court set aside an arbitral award in which the tribunal had awarded damages in favour of other companies within the claimant's group of companies which were not signatories to the arbitration agreement. With respect to the 'group of companies' doctrine, the court noted that the issue is subject to the applicable law of the arbitration agreement and that this doctrine is not recognised by English law. The court also dismissed the concepts of agency, estoppel and ad hoc jurisdiction for this particular case and the requirement of privity prevailed. One of the principal reasons for the rejection of the agency argument was that the commercial reality of the particular group was such that the group had been incorporated precisely in order to create separate legal entities and, therefore, the non-signatories could not have been considered as agents to the signatories on the basis of English law.

Pursuant to the French transnational approach, the extension of an arbitration agreement is decided on the basis of criteria such as the common intention of the parties, the interpretation of the circumstances of the case and an obligation to act in good faith. This pattern of reasoning has been applied in the *Dalico*[3] *Elf Aquitaine*[4] *and Dallah*[5] *cases*, which together constitute the principal rulings on this issue. Despite the innovative case law in this context, the downside of this approach is legal uncertainty as extension of an arbitration agreement has been based more on factual circumstances rather than certain legal principles.

The American courts have generally recognised legal theories seeking to extend an arbitration agreement to a non-signatory, but with caution.[6]

Notwithstanding these different perspectives, an examination of consent has remained the common fundamental point in addressing this issue.

The Cypriot judgment *Cooresby v Astroplus*

In the Cypriot case of *Cooresby v Astroplus, Application* nr 377/17 D C Nicosia, the question arose of whether an arbitration agreement could bind a non-signatory and the court applied a strict rule of consent to determine the matter.

In this case, a dispute arose between three out of the four shareholders of a Cyprus company (the 'Company') which was the owner, via a subsidiary company (the 'Subsidiary'), of an oil refinery located in Russia. The dispute related to the dilution of the shareholding held by the two minority shareholders and their exclusion from the management of the Company. The three shareholders had executed a Shareholders Agreement in 2016 (the 'SHA 2016'), which governed their relations as shareholders. The SHA 2016 contained an arbitration clause for any disputes and provided for arbitration to be conducted at the Arbitration Institute at the Stockholm Chamber of Commerce (SCC). The Company and the Subsidiary were not parties to the SHA 2016. Prior to the execution of the SHA 2016, the predecessors of the three shareholders had executed a Shareholders Agreement (the 'SHA 2010') which included an arbitration clause also providing for arbitration at the SCC, but providing for a different procedure. The Company was a party to the SHA 2010, but the current shareholders had not executed the SHA 2010 and they did not follow a procedure prescribed therein, which could have rendered them parties to the SHA 2010. Had the current shareholders followed the prescribed procedure, then they would have been in a

position to initiate an arbitration on the basis of the SHA 2010 and the Company would have been a party to the arbitration.

When the dispute arose, the two minority shareholders had initiated an arbitration procedure at the SCC on the basis of the SHA 2016 and simultaneously applied to a Cypriot court and obtained ex parte prohibitive orders, including Mareva-type injunctive orders, in aid of the international arbitration procedure on the basis of the International Commercial Arbitration Law (L101/87) applicable in Cyprus. The ex parte orders were issued against, inter alia, the Company and the Subsidiary. Our firm represented the Company and the Subsidiary and argued that the Company and the Subsidiary had not executed the SHA 2016 and, therefore, they could not be bound by the arbitration clause on the basis of which the arbitration had been initiated. Furthermore, since the minority shareholders had not executed the SHA 2010, they had no *locus standi* to prosecute any claim on the basis of this agreement against the Company.

The applicants argued that since three out of the four shareholders had executed the SHA 2016 and since it was, allegedly, their intention that the SHA 2016 (like the SHA 2010) would bind the Company as well, they as shareholders of the Company had bound the latter orally to the provisions of the SHA 2016. Our counter-argument was firstly, that three out of the four shareholders could not have orally bound the Company to the SHA 2016 and further, that the Company could not be bound by an arbitration agreement to which it had not expressly consented. Secondly, even if the Company were to be considered as a party to the SHA 2016 on the basis of the oral agreement or intention of the shareholders, an award issued against it could not in any event be registered and executed in Cyprus and, therefore, any procedure against the Company before the Cypriot court would be in vain. The reason for this is that English law (the law governing the SHA 2016) and Cyprus law (the law which would apply in an application for recognition and enforcement of any potential arbitral award), together with the New York Convention, require the arbitration agreement to be in writing and the presentation of the written arbitration agreement is a prerequisite for the registration and enforcement of an arbitral award.

The court accepted our arguments and held that since the Company and the Subsidiary were not parties to the SHA 2016 and had not consented to the arbitration procedure, the arbitration could not be prosecuted against them. The court further found that since any potential arbitral award could be neither registered nor enforced in Cyprus, there was no reason to maintain Mareva orders against the Company or the Subsidiary. All ex parte orders were dismissed and the arbitration procedure was withdrawn by the minority shareholders.

Conclusion

In conclusion, it may be seen that the extension of an arbitration agreement to non-signatories does not constitute a rule but rather an exception. This judgement, even though a first instance ruling, indicates that the extension of an arbitration agreement to non-signatories is not without boundaries, highlights the importance of consent to an arbitration agreement and confirms that such consent is the cornerstone of any arbitration proceeding in Cyprus.

Notes

1 Dow Chemical France, *The Dow Chemical Company and others v Isover Saint Gobain*, Interim Award, 23 September 1982, ICC Case nr 4131, Y Comm Arb 1984, 131 *et seq*.

2 *Peterson Farms v C and M Farming Ltd* [2004] EWHC 121 (Comm).

3 *Municipalité de Khoms El Mergeb v Société Dalico*, 20 December 1993, Case nr 91-16828.

4 CA Paris,11 January 1990, *Orri v Société des Lubrifiants ElfAcquitaine* [1992], *Revue de l'arbitrage* 95.

5 *Government of Pakistan, Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company CA Paris*, RG nr 09/28533, 17 February 2011.

6 John M Townsend, 'Non signatories in International Arbitration: An American Perspective', in Albert Jan van den Berg (ed), International Arbitration 2006: Back to Basics?, ICCA Congress Series, Volume 13; (Kluwer Law International 2007) pp 359–365.