

KLUWER LAW INTERNATIONAL

ASA Bulletin



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central
and South America by *Aspen*
Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries
by *Turpin Distribution*
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 1574-3330
© 2008, Association Suisse de l'Arbitrage
(in co-operation with Kluwer Law International, The Netherlands)

This journal should be cited as (2008) 26 *ASA Bulletin*

The *ASA Bulletin* is published four times per year.
Subscription prices for 2008 [Volume 26, Numbers 1 through 4] including postage
and handling: EUR217/USD286/GBP159 (print)

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.

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Non-Signatories and the Consensus to Arbitrate

TOBIAS ZUBERBÜHLER*

1. The Non-Signatory Issue

Where arbitration is the chosen method of dispute resolution in an agreement, the increasing complexity of contractual frameworks and corporate structures has arbitral tribunals and courts alike facing the question whether or not the obligations and rights emanating from an arbitration clause may be extended to a party not named as one. A range of legal theories have been developed to facilitate this determination either for or against including such non-signatories. While some concepts are hands-on solutions without much recourse to conflict of law rules, others emphasize more dogmatic approaches.¹ As the linchpin between all theories, the point of departure in any analysis of *who is* and *who is not* a party to an arbitration remains the parties' intent.

Under Swiss private international law, Art. 178 PILS² provides the initial framework for any non-signatory analysis. In accordance with the New York Convention, its formal prong requires an agreement in writing.³ An arbitration agreement's material validity is determined according to the law applicable to the dispute, the law chosen by the parties or Swiss law.⁴

This article discusses non-signatory fact patterns in international arbitrations in Switzerland decided on the basis of contract principles.⁵ We

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¹ E.g. DFT 129 III 727, 734-738 (cons. 5.3); cf. on this subject HABEGGER, *Groups of Companies*, N 32-33.; POUURET, *Case Note*; POUURET, *Extension*, 893; SANDROCK, *Case Note*; SANDROCK, *Extension*, 166-169; BLESSING, *Aspects*, 18-22.

² Swiss Federal Statute on Private International Law of 18 December 1987.

³ Art. 178(1) PILS. For an overview of the ongoing debate as to the extent of application of Art. 178(1) PILS, see, for example, BLESSING, *Extension*, 160-163; HABEGGER, *Case Note*, 404-410; POUURET, *Case Note*, 396; SANDROCK, *Case Note*; BUSSE, *Non-Signatories*, 123.

⁴ Art. 178(2) PILS. Other aspects of the arbitration agreement's validity do not fall within Art. 178(2) PILS; the objective arbitrability and the subjective capacity of states and state-controlled entities to arbitrate are governed by Art. 177 PILS, and issues concerning the capacity of company officers, etc. are in general dealt with under Art. 187(1) PILS.

⁵ Cases based on succession in rights issues such as subrogation, merger, bankruptcy or inheritance are not subject of this analysis.

have attempted to categorize the various cases into groups based on a core of recurring fact patterns and the legal conclusions drawn from them.⁶

2. Contractual Concepts Applied in Swiss Arbitral Practice

A. (Implied) Guarantees

The typical guarantee scenario arises in a corporate, parent-subsiary context. Where the signatory subsidiary is inadequately capitalized for purposes of the contractual obligations incurred, the contractual counterparts, in their efforts to reach the parent's assets, will seek to extend the scope of the arbitration agreement to include the non-signatory controlling entity. Subsidiaries are set up for various reasons, most notably to comply with legal requirements of local jurisdictions, for tax purposes or to insulate parent companies from liability and the jurisdiction of foreign courts. Practices of this sort are common, and, as a general rule, any party aware of such an arrangement which has nevertheless failed to include the controlling entity as a party to the arbitration agreement, should not be afforded the benefits of the arbitration agreement on the basis of an (implied corporate) guarantee alone.

In *Westland*, for example, an arbitral tribunal compelled four non-signatory states to arbitrate under an arbitration agreement entered into by an entity they jointly controlled based on implied guarantees for the liabilities they had extended to their "joint inter-state enterprise" ("*entreprise commune interétatique*").⁷ Four Arab nations (Egypt, U.A.E., Saudi Arabia and Qatar) founded the Arab Organization for Industrialization (AOI), which entered into a shareholders' agreement with Westland Helicopters, thereby creating a joint stock company, the Arab British Helicopters Company (ABH). The AOI was directed by a "Higher Committee" composed of the ministers of the four states. When Westland initiated arbitration against AOI, ABH and all four Arab states, Egypt filed an objection to the jurisdiction of the tribunal. The tribunal found it had jurisdiction over the four non-signatory nations, pointing to a de facto guarantee of the states for the AOI.⁸

The Federal Supreme Court annulled the tribunal's decision. It pointed out the separate legal entity as well as the administrative and financial

⁶ We recognize that there are many different ways to categorize non-signatory scenarios. See most notably HANOTIAU, N 4-5.

⁷ ICC Case No. 3879; Hanotiau, N 81-85; HABEGGER, *Groups of Companies*, N 42.

⁸ Interim Award of 5 March 1984, Rev. arb. 3/1989, 547-557, YB Comm. Arb. XI (1986), 127-133, at 131.

independence of the AOI. The Court found that the states had no other financial responsibilities beyond their contributions to AOI's capital. It further noted *in dicta* that even if the states had further financial responsibilities, they would have still not been bound by the arbitration clause.⁹

B. Agency

The law of representation (or agency, in the international context) is a common legal concept applied in Swiss non-signatory cases. Because agency relationships in non-signatory cases are often not explicit, the courts and tribunals are regularly dealing with undisclosed or apparent agents, i.e. situations where a principal is not willing to be represented or not aware of a representative, but a third party's legitimate reliance in such representation is protected.¹⁰

In *China National*,¹¹ for example, the Federal Supreme Court upheld the decision by the arbitral tribunal against a signatory agent based on the fact that agent and principal held themselves out as one indistinguishable entity. China National Machinery & Equipment Import & Export Corporation (C Corp), a Chinese national foreign trading company, and the Austrian Loebersdorfer Maschinenfabrik AG (L AG) signed a contract for the construction of air compressors. The signing by C Corp was based on Chinese legislation requiring a foreign trade company to participate in any contract with a foreign company. In the subsequent arbitration, C Corp objected to the arbitral tribunal's jurisdiction, arguing that A Corp, the provincial foreign trading company, was the actual contractual partner of L AG. Both the arbitral tribunal and the Federal Supreme Court on appeal rejected this argument.

⁹ Decision of 19 July 1988, ASA Bull 1989, 63, YB Comm. Arb. XVI (1991), 174-181, confirming a decision by the Cour de justice of Geneva of 3 November 1987. Because of its importance, the *Westland* matter will be the only case discussed in this article under the regime of the Intercantonal Concordat of Arbitration of 27 March 1969 ("Concordat"), the Swiss *lex arbitri* for international arbitrations prior to the entry into force of the PILS on 1 January 1989. All other cases fall under the "era" of the PILS. For a discussion of other cases under the Concordat, see HABEGGER, *Groups of Companies*, N 34-44.

¹⁰ Gauch/Schluep/Schmid/Rey, *Schweizerisches Obligationenrecht Allgemeiner Teil*, 8. ed., Zurich 2003, N 1406. The terminology is not consistent; for the sake of simplicity, we will use the term "apparent mandate". See, e.g., DFT 120 II 199; the terms used are *Anscheinsvollmacht*, *Duldungsvollmacht* and *Rechtsscheinvollmacht*, see Gauch/Schluep/Schmid/Rey, *op.cit.*, N 1409-1413.

¹¹ Zurich Chamber of Commerce Case No. 188/1991, *China National Machinery & Equipment Import & Export Corporation v. Loebersdorfer Maschinenfabrik AG (Austria)*, unpublished interim award of 11 February 1993, confirmed by DFT of 1 September 1993, ASA Bull 4/1996, 623-629; POUURET/BESSON, N 259; HABEGGER, *Groups of Companies*, N 49.

In its reasoning, the Court emphasized that A Corp and C Corp appeared mutually connected, with a uniform purpose and a mere geographical separation of tasks. In the Court's view, this was particularly apparent in the organisational dependence of the provincial company, A Corp, upon the national company, C Corp, which designated the president and vice-president of the former. The Court found further support: in the use of identical logos by both entities; A Corp's use of a C Corp form contract; and the use of the term "branch" to distinguish the entities - a term that does not indicate separate legal entities. Therefore, C Corp was to be held to the arbitration clause under apparent mandate.¹²

In *Butec*,¹³ an ICC tribunal seated in Geneva denied jurisdiction over the signatory-subcontractor's corporate parent despite the fact that the subcontractor was held out as the "representative" of its parent in brochures and contracts. Butec, the Saudi subsidiary of a Lebanese company, successfully tendered for a construction subcontract. For that purpose, it entered into a contract with Saudi Saipem, a subsidiary of the Italian company Saipem SpA. In the subsequent dispute, Butec initiated arbitration proceedings against Saipem SpA and its subsidiary. The tribunal denied jurisdiction over Saipem SpA, finding that Butec agreed to close the deal with Saudi Saipem, a subcontractor of Saipem SpA; and that Butec had been aware of this subcontractor relationship when it concluded the contract with Saudi Saipem.

In confirming the arbitral tribunal's decision, the Federal Supreme Court added that apparent mandate required actual reliance; Butec, however, failed

¹² To warrant an extension of the arbitration clause, the "appearance" upon which the counterparty detrimentally relies must reach a certain threshold. In *G S.p.A. v. Mr. Z*, for example, despite factors that blurred the line between the individual signatory and the non-signatory corporate entity, the tribunal refused to compel the non-signatory to arbitrate because other factors pointed towards the separateness of the two, and the counterparty never bothered to verify whether the individual non-signatory had the power to bind the non-signatory entity. Unpublished interim award of 4 August 1994, confirmed by DFT of 16 May 1995, ASA Bull 4/1996, 667; HABEGGER, *Groups of Companies*, N 50. Where applicable corporate law, moreover, does not allow for representation by apparent mandate, a signatory lacks the power to bind a non-signatory even when he holds himself out as such. In *A Ltd. v. B SARL*, an arbitral tribunal, later affirmed by the Federal Supreme Court, found that one of the alleged parties to the arbitration agreement had not become a party because its "representative" lacked the formal power to represent it. It held that the signatory individual had no formal power of representation under French corporate law and had no implied power of representation based on subsequent ratification, based on being a factual organ or apparent mandate. Unpublished final award of an ICC tribunal seated in Geneva of 23 April 2002, confirmed by DFT of 4 July 2003 (4P.137/2002), ASA Bull 4/2003, 842-856.

¹³ *Saudi Butec Ltd et Al Fouzan Trading v. Saudi Arabian Saipem Ltd*, unpublished ICC interim awards of 25 October 1994, confirmed by DFT of 29 January 1996, ASA Bull 3/1996, 496-507; HABEGGER, *Groups of Companies*, N 51; HANOTIAU, N 121.

to establish that it had relied in good faith on Saudi Saipem's power of representation on behalf of Saipem SpA.¹⁴

In a recent non-signatory case, *X v. Y Banka and Z*,¹⁵ the Federal Supreme Court refused to extend an arbitration agreement to a non-signatory entity whose director had entered into the agreement in a personal capacity. In this case, individuals B, E and F entered into a shareholders' agreement. E was also a director of Z, and F was deputy chairman of the board of G, later absorbed by Y. B subsequently assigned his rights under the agreement to X, which initiated arbitration against E, F, Z and Y. Finding that F had not acted as statutory organ of G when signing the shareholders agreement, F was not authorized under internal guidelines of G to execute the transaction, and signing a shareholders' agreement was not customary for someone in F's position and did not pertain to G's business, the Court held that there was no basis for jurisdiction over Y under agency principles.

To conclude, in an agency analysis, courts and tribunals will, as a first step, look to whether a non-signatory party was made a party by formal representation or subsequent ratification and, as a second step, look to whether the appearance of an agency relationship between signatory and non-signatory and a good faith reliance on this appearance to the counterparty's detriment warrants extending the arbitration clause to the non-signatory. Courts and tribunals will reject good faith reliance where the alleging party did not at least investigate the non-signatory's purported powers of representation.

C. "Intervention" in Contracts

In their analysis as to whether an arbitration agreement was intended to encompass a non-signatory party, courts and arbitral tribunals also look to the non-signatory's behavior and role in the negotiation phase of the agreement as well as during its performance and will infer intent to be bound to the

¹⁴ ASA Bull 3/1996, 502-503. The law of representation was also applied in the *Arthur Andersen* case. ICC Case No. 9797, *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative*, unpublished interim award of 29 April 1999, confirmed by DFT of 8 December 1999, ASA Bull 3/2000, 546-557. The Final Award was rendered on 28 July 2000, ASA Bull 3/2000, 514-540. The tribunal, affirmed by the Federal Supreme Court, concluded that the Swiss entity whose responsibilities entailed coordinating the firms' professional endeavors had entered into the "member firm interfirm agreement" with the arbitration clause on behalf of itself and each member firm.

¹⁵ Decision of 20 September 2005 (4P.48/2005), ASA Bull 3/2006, 504-520, confirming an interim award by an arbitral tribunal of the Ticino Chamber of Commerce and Industry of 21 December 2004.

agreement where there was significant involvement on the part of the non-signatory.

In the landmark case of *X S.A.L., Y. S.A.L. and A v. Z Sàrl*,¹⁶ the Federal Supreme Court extended an arbitration agreement to a non-signatory individual who was heavily involved in the operations of two of the signatory entities. Z entered into a real estate construction contract with two other Lebanese companies, X and Y, containing an arbitration clause. In the subsequent dispute, Z filed for arbitration against X and Y as well as against the individual A. In its analysis the tribunal observed that A personally owned the land before transferring it to Y, held the construction permit for some time after conclusion of the contract and provided the funds for X and Y. While these facts alone would not warrant an extension of the arbitration clause, the tribunal found that additional (undisclosed) documents evincing the manifest and willful interference of A in X's and Y's management of the project and contractual performance tilted the balance. Applying Swiss law and *lex mercatoria*, the tribunal held that these facts established A's intention to be personally bound by the arbitration clause.

In *A v. B and C*,¹⁷ the arbitral tribunal extended the arbitration agreement to a non-signatory state based on its involvement in the privatization and sale of a signatory entity. During the privatization of state C businesses, the English company A purchased the shareholdings of B, C's National Property Fund, in one of C's largest banks. After the sale, A transferred its shares to its subsidiary D. When the bank subsequently went into receivership and was sold by the receiver to another bank, non-signatory C and B initiated arbitration proceedings against A and non-signatory D, alleging a breach of the share purchase agreement. The arbitral tribunal found it had jurisdiction over C, but denied it vis-à-vis D. With regard to C, the tribunal concluded that the implied consent of the parties was to include state C as a party to the agreement. In support of its decision, it pointed to the fact that B was run by the government agency in charge of "national property", supervised by the state C's parliament, and assets of state C were transferred to B based on a privatization decision of the agency; A negotiated primarily with the government agency and B as the instruments of State C; and the

¹⁶ CC final award (unpublished) of 22 April 2003, confirmed by DFT 129 III 727 (4P.115/2003), ASA Bull 2/2004, 364-389, with case notes by J.-F. Poudret and P. Habegger; cf. also SANDROCK, *Case Note*; Knoepfler/Schweizer, *Jurisprudence suisse en matière d'arbitrage international*, Revue suisse de droit international et de droit européen 2005, 158.

¹⁷ Interim award of 31 August 2004 by an ad hoc tribunal seated in Zurich, reported by HANOTIAU, N 142-145 and 177-179. A challenge of the interim award was rejected by the Federal Supreme Court without addressing the issue of jurisdiction (DFT 131 III 173 of 4 February 2005 [4P.236/2004], ASA Bull 3/2005, 496).

final terms of the stock purchase agreement were adopted by the government of state C and offered to A on a take-it-or-leave-it basis. These facts established that B was merely the instrument for the government of C.¹⁸

In another case where the negotiation and performance of the agreement played a crucial role, the High Court of Lucerne, in *X SA and A v. Y AG*,¹⁹ referred two parties to arbitration based on the nature of their claims against the counterparty. Z, the predecessor of X, and Y entered into a secrecy agreement providing for arbitration. A, the inventor of an underlying patent and employee of Z, signed the agreement on behalf of Z. At some point after the transfer of all rights under the secrecy agreement from Z to X, A and X filed a court action against Y requesting the assignment of certain rights. The High Court of Lucerne instead referred both to arbitration. It held that the secrecy agreement was not limited to confidentiality aspects, but constituted a framework agreement for the research, development and distribution of the underlying product. Due to its nature as a framework agreement, the secrecy agreement's arbitration clause applied to any dispute arising from the joint project. Therefore, A's and X's claims fell within the scope of the arbitration clause.

In affirming the lower court's decision, the Federal Supreme Court added that A and X formed a "voluntary joinder of parties", because they essentially based their claims on the same facts and did not distinguish between X's claim for assignment of patent registrations and A's claim to be named as inventor.²⁰

In conclusion, the Federal Supreme Court's non-signatory case law based on "interference" in the negotiation or performance of a contract will bind a non-signatory to an arbitration clause where its conduct constitutes a declaration of intent (by conduct). While this practice is sensible in that any contract principle will require clear conduct to warrant an inference of assent, its application "to the letter" may be artificial in some instances.²¹

¹⁸ The non-signatory parties' position in the set-up and negotiation of contracts was also the basis for the extension of an arbitration agreement in *T v. H and S*. The arbitral tribunal held it had jurisdiction over two non-signatory offshore vehicles because they constituted the very object of the contracts entered into by the signatory beneficiary owners. Ad hoc interim award (unpublished) of 28 May 2004, confirmed by DFT of 20 October 2004 (4P.168/2004).

¹⁹ Decision of 20 November 2002, confirmed by DFT of 19 May 2003 (4C.40/2003), ASA Bull 2/2004, 344.

²⁰ In a subsequent decision, *X v. Y Banka and Z*, fn. 15 supra, the Federal Supreme Court reemphasized its view that the third party's "interference" in the negotiation or performance of the agreement must evince the party's intent by "clear active conduct" to be bound by the arbitration clause. Cons. 3.4.1., ASA Bull 3/2006, 515.

²¹ See, for example, the remark by Matthias Scherer on *X v. Y Banka and Z* in the *Introduction to the Case Law section* of ASA Bull 3/2006, 460.

D. Groups of Companies

While not a legal theory in a strict sense, the reference to the group of companies doctrine is often applied as an umbrella term for all the non-signatory scenarios where the fact of a corporate relationship among signatory and non-signatory parties plays an important role.²² The considerations of the arbitral tribunal in *Dow Chemical*²³ are generally viewed as forming its cornerstone. Under the doctrine, a group of companies constitutes one and the same economic reality - despite the legal independence of the individual entities from one another - where the circumstances of the contract's conclusion, its performance, its (possible) subsequent termination, and the degree of control executed among the group companies warrants such an inference. However, in all group of companies decisions, the finding of an (implied) consensus of the parties remains key in binding non-signatories to an arbitration clause.²⁴ Switzerland has produced comparably few arbitral awards and court decisions explicitly dealing with the group of companies doctrine.

In *ALPHA S.A. v. BETA & Co., State Company of Ruritanian Law*,²⁵ for example, the arbitral tribunal was not willing to extend the arbitration clause to a non-signatory parent whose subsidiary was a party to the contract containing the arbitration clause. In *ALPHA S.A.*, an undisclosed country, "Ruritania", established the company ETA to commercialize the product X at a fixed price. Looking for an intermediary to sell X at market rate after a significant price hike, ETA created a foreign subsidiary, ZETA, to sell X to ALPHA, which could offer it on the free market. Subsequent problems led ALPHA to initiate arbitration against BETA, the legal successor in rights to ETA, based on an arbitration clause signed by ALPHA and ZETA. In its analysis as to whether the arbitration agreement could be extended to the non-signatory BETA, the tribunal declined to extend it based on the group of companies doctrine. It noted that Swiss substantive law did not (yet) recognize this concept, and that ETA and ZETA did not actually form a

²² HANOTIAU, N 105, pointing to the risk that the doctrine could be used as a "shortcut permitting avoidance of rigorous legal reasoning".

²³ *Dow Chemical v. Isover Saint Gobain*, ICC Case No. 4131 (1982), ICC Awards 1974-1985, 146-153 and 464-473 with observations by Yves Derains.

²⁴ In *Dow Chemical*, the arbitral tribunal emphasized "the mutual intention of all parties to the proceedings". ICC Awards 1974-1985, 151. To our knowledge, the affiliation of an entity to a group of companies has never been sufficient *per se* for an extension of an arbitration clause to a non-signatory party.

²⁵ Ad hoc award of 1991, ASA Bull 2/1992, 202; HABEGGER, N 58; HANOTIAU, N 120.

group of companies, all the more as ZETA had been established by ETA for only one transaction of limited duration.²⁶

The Federal Supreme Court discussed the group of companies doctrine *in dicta* in *Butec*.²⁷ It cautioned that one should only reluctantly bind non-signatory respondents to an arbitration clause on the basis of the group of companies doctrine. The Court further added that, in any case, such an extension presupposed special circumstances justifying reliance in good faith on an appearance caused by the non-signatory, thus, in effect, referring to the narrower Swiss principle of *Konzernvertrauenshaftung*. Applying this principle to the facts in *Butec*, the Court denied an extension based on *Konzernvertrauenshaftung*, since the claimants had been aware of their exclusive contractual relationship with the subcontracting signatory, and the non-signatory had only intervened into the performance of the contract to the extent required by its role as the main contractor.

Similarly, in a case before the Geneva Chamber of Commerce and Industry, *A v. B and C*,²⁸ the arbitrator declined to extend the arbitration agreement on the basis of the group of companies doctrines. In this case, P, an employee of D, acted as a consultant for B, of which D held a 50% stake, in B's bid for the construction of an electrolyte plant in Tunisia. P contacted A to support B in the bidding process. While P participated in the negotiations for a consultancy agreement between A and B, and the draft agreement was prepared by the legal department of D, the final agreement was signed by a representative of B. When A subsequently initiated arbitration against both B and D (which became C, following a merger), the arbitrator declined to bind D on a group of companies concept, explaining that, despite similar applications in other areas of Swiss corporate law,²⁹ "the principle according to which a company may be considered a party to a contractual undertaking made by another company . . . [because] both companies belong to a group . . . does not exist in Switzerland. . . ."³⁰

²⁶ The arbitration clause was eventually extended on the basis of piercing the corporate veil; see chapter II.E below.

²⁷ Fn. 13 above, ASA Bull 3/1996, at 506 (cons. 7).

²⁸ CCIG case No. 137, decision of 24 March 2000, ASA Bull 4/2003, 781.

²⁹ Citing DFT 123 III 220 (*Omni*); DFT 120 II 331 (*Swissair*) and DFT 121 III 350 (*Grossen*). In other words, the arbitrator was referring to the concepts of piercing the corporate veil (*Durchgriff*) and *Konzernvertrauenshaftung*.

³⁰ ASA Bull 3/2003, at 799, N 154. Similarly, the tribunal in *A v. B and C*, fn. 17 above, distinguished *Konzernvertrauenshaftung* from piercing the corporate veil and held that the former was only applicable where the non-signatory group company participated in the conclusion, performance or termination of the contract, creating an appearance to be a party to the contract in which the party requesting an extension relied to its detriment.

It remains to be seen whether Swiss courts will ever embrace the group of companies doctrine. Swiss law's commitment to the independence of a company in relation to its owner(s) is strong.³¹ Nevertheless, it is not unknown to the Swiss legal tradition to take into account the economic reality and factual circumstances of a group of companies.³² For now, recent international cases suggest an overall tendency back to more conservative roots. *Peterson Farms*, for instance, represents a set-back to the efforts of incorporating the group of companies doctrine into transnational law or the *lex mercatoria*.³³ In that decision, the Commercial Court held that "the [group of companies] doctrine . . . forms no part of English law".³⁴ Similarly in the U.S., *Sarhank*,³⁵ where the Second Court of Appeals declined to enforce an arbitral award against a corporate parent where there was no "clear and unmistakable intent by [it] . . . to arbitrate", may indicate a shift from a rather liberal view, as expressed, for example, in *J.J. Ryan*,³⁶ back to a greater emphasis on the parties' intent to arbitrate.

E. Piercing the Corporate Veil

Early elements of the doctrine of piercing the corporate veil in Swiss international arbitration decisions can be found in the *Westland* interim award.³⁷ The tribunal compared the AOI to a limited liability partnership (*société en nom collectif*) established by the founding states, noting that the members, i.e. the founding states, were bound by an arbitration clause entered into by the AOI, and that the contracting party, Westland, may rely on the arbitration clause if it initiated arbitration against the member instead of the limited liability partnership.³⁸

³¹ POUURET, *Extension*, 913, rejecting the group of companies doctrine under Swiss law as a whole.
³² Cf. e.g. Art. 663e-g of the Swiss Code of Obligations regarding consolidated financial statements.

³³ *Peterson Farms Inc v. C&M Farming Limited*, [2004] EWHC 121 (Comm). LEADLEY/WILLIAMS, 112-113.

³⁴ [2004] EWHC 121 (Comm), N 62. It must be emphasized, however, that the Court seems to have based its decision on the fact that the non-signatories, while they attempted to hold the counterparty responsible for their losses, did not intend to be bound by the respective agreement themselves (LEADLEY/WILLIAMS, 113). So even though the English courts deny an application of the group of companies doctrine, the underlying concept (i.e. to examine whether the parties intended to extend the effects of an agreement to non-signatories) is similar to that applied in Continental European jurisdictions. For an in-depth discussion of the case, see GAFFNEY.

³⁵ *Sarhank Group v. Oracle Corporation*, 404 F.3d 657 (2nd Cir. 2005). For case notes, see WILSKE/SHORE and SALOMON/STERKEN.

³⁶ See section II.G below.

³⁷ Section II.A above. ICC Awards 1986-1990, 16 (at N 19): "*Equity, in common with the principles of international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment.*"

³⁸ *Id.*, N 14. As mentioned *supra* (chapter II.A), this view was rejected by the Federal Supreme Court.

In *E v. Z, ICA Z and M Corp*,³⁹ on the other hand, the tribunal denied extending the arbitration clause entered into by a general partnership to one of its partners. E and an Italian general partnership, ICA Z, represented by its partner Z, concluded a license agreement featuring an arbitration clause. When asked to extend it to the partner Z, the tribunal denied an economic identity, explaining that the partners were only subsidiarily liable for debts of the general partnership. It also discussed the doctrine of piercing the corporate veil, noting that this theory was only applicable to corporations, and not to general partnerships, to “remedy any shocking situation created by a shareholder abusively hiding behind a share corporation he or she controls...”⁴⁰

In *ICC Case No. 5721*,⁴¹ an arbitral tribunal refused to bind a non-signatory individual to an arbitration clause he entered into on behalf of a supposedly foreign subsidiary to be established because it could not be demonstrated that the non-signatory intended to be personally bound. Claimant C had entered into two subcontracts with X Egypt, which presented itself as a subsidiary of X USA to be established (*filiale en cours de constitution*). Z, president and shareholder of X USA, signed the contracts on behalf of X Egypt. In the subsequent dispute, C initiated arbitration against X Egypt, X USA and Z, with both X USA and Z objecting to the tribunal's jurisdiction. It emerged that X Egypt was not a separate legal entity from X USA, but merely its branch office (*succursale*); accordingly, the tribunal found it had jurisdiction over X USA. The tribunal then turned to the binding effect of the arbitration clause on Z, examining the merits of the case under Egyptian law and - by reference to Art. 13(5) of the ICC Rules⁴² - under *lex mercatoria*. It noted that an examination of the principle of piercing the corporate veil under different national laws (U.S. law as the law of incorporation of X USA, Swiss law as the *lex arbitri*, and Egyptian law as the substantive law) led to the same result. The tribunal observed that under Swiss law, the *Durchgriff* theory was based on the prohibition of an abuse of right (*Rechtsmissbrauch, abus de droit*), and it was thus necessary to examine whether the general institution of independent legal entities was deprived of its meaning.

³⁹ Award rendered on 15 September 1989 in Zurich, ASA Bull 3/1990, 270; HABEGGER, *Groups of Companies*, N 46.

⁴⁰ ASA Bull 3/1990, 276; translation of the French original.

⁴¹ Award rendered 1990 in Geneva, ICC Awards 1986-1990, 400; HABEGGER, *Groups of Companies*, N 47; POUURET, Extension, 911; HANOTIAU, N 167-172.

⁴² Today Art. 17(2) ICC Rules, whereunder a tribunal may take account of “*the relevant trade usages*”.

When applying the doctrine of veil piercing to the specific facts of the case, the tribunal cautioned not to automatically compel a manager to arbitrate who formally acted in this capacity on behalf of a principal. Any such extension presupposed that the legal entity was nothing but a business instrument of the individual and the line between the signatory and non-signatory was further blurred, so that one could accredit the contracts signed by the legal entity to the individual. The tribunal concluded that it was not certain whether C intended to deal with Z through X, or whether Z intended to be personally bound by the arbitration clause, and thus refused to extend the arbitration clause to Z. The tribunal added, moreover, that the extension of an arbitration clause could not be considered as a sanction for liability, but must have a voluntary basis, and the determination of liability, in this case, remained with the competent national courts.⁴³

In *ALPHA S.A. v. BETA & Co., State Company of Ruritanian Law*,⁴⁴ the tribunal pierced the corporate veil of the signatory state-owned entity to bind its non-signatory corporate parent to the arbitration agreement entered into by its subsidiary. The tribunal discussed case law and doctrine developed in connection with Swiss company law, in particular for so-called "one-man companies", and summarized that piercing the corporate veil was only warranted where (i) a shareholder had total control over an entity, evinced by insufficient capitalization, confusion in the administration and management, and confusion of assets, and (ii) the totality of circumstances constituted an abuse of rights.

In its analysis, the tribunal found that ZETA was a wholly owned subsidiary of ETA established for the sole purpose of one transaction; ZETA's capitalization was inadequate in view of the nature and value of the transactions; ZETA never had any business premises or adequate staffing, but was established and managed (also financially) by A, the legal counsel of ETA, and D, another person mandated by ETA. Moreover, ETA took all decisions in running and dissolving ZETA in disregard of the applicable corporate law, utilizing ZETA as a mere "internal department", without any formal and legal independence; ZETA, further, had no assets of its own other than a claim against ETA from a sale of machinery; and ZETA's assets were channeled to ETA when it was dissolved. Finally, the overall abuse of rights was established by the fact that the main creditor, ALPHA, was never even contacted when ZETA was dissolved, let alone was a call for creditors made.

⁴³ ICC Awards 1986-1990, 405. This important distinction was also made by the Federal Supreme Court in its final decision in the *Westland* matter. See BGE 120 II 172; cf. also POUURET/BESSON, N 258 p. 234.

⁴⁴ Summarized in chapter II.D above.

The Federal Supreme Court took a more restrictive view in *Butec*.⁴⁵ It emphasized that an affiliation to a group per se never resulted in unconditional liability - or a claim - of the parent company based on contracts of its subsidiary, but that an independent "consensual obligation" (*konsensuale Bindung*) was required between the parent company and the third party. An exception only applied if the parent availed itself of the legal independence of its subsidiary in an abusive way.⁴⁶ The Court carefully distinguished piercing the corporate veil, where the legal independence of the subsidiary is disregarded and the parent company held liable instead of its subsidiary, from situations where the parent is liable in addition to its subsidiary, for example, where the independent liability of the parent company is based on third party reliance (*Konzernvertrauenshaftung*); manifestations of the parent company reveal that it intends to be bound; provisions of law apply not only to the subsidiary, but also directly to the parent company; a commingling of rights and assets among the parent company and the subsidiary precludes invoking any legal independence; or a subsidiary is undercapitalized.

As for the category of undercapitalization, the Court was not prepared to grant an unlimited external liability of the parent company but only an internal duty of the parent company to cover losses, a kind of guarantor's liability in case of insolvency of the subsidiary. To assume external liability, a parent company must display intent to be bound by the arbitration clause. In the case at hand, the Court could not identify intent by the parent company Saipem SpA and thus upheld the arbitral award.⁴⁷

Swiss arbitral doctrine has been careful not to overstretch veil piercing and continues to distinguish it from the group of companies doctrine which has not been adopted in Swiss arbitral jurisprudence. In addition, the Federal Supreme Court has resisted to equate a finding of liability with an extension of the arbitration agreement.

F. Estoppel

While so far no Swiss non-signatory cases have been decided on a general notion of a prohibition of contradictory behavior as this is the case under the American concept of estoppel,⁴⁸ the prohibition of "abuse of rights"

⁴⁵ ASA Bull 3/1996, 496; section II.B above.

⁴⁶ Id. at 503-504.

⁴⁷ Id. at 504-506.

⁴⁸ Estoppel denies a party who has accepted the benefits of a contract containing an arbitration clause the defense that such arbitration clause is not applicable to that party. See, e.g., *Intergen N.V. v.*

is omnipresent and permeates the Swiss legal tradition.⁴⁹ The Federal Supreme Court has mentioned the concept *obiter* in connection with the general prohibition of contradictory behavior (*Verbot widersprüchlichen Verhaltens*), indicating that these concepts might be universally valid.⁵⁰ In light of some recent decisions based on rather "constructed" notions of (implied) consent to include a non-signatory in the scope of an arbitration agreement, it is not inconceivable that future decisions might instead focus on this more general notion of "estoppel".

G. Denial of Justice and Procedural Efficiency

While concerns of equity cannot discharge arbitrators of their duty to apply the relevant legal norms (unless they are deciding *ex aequo et bono*), justice and fairness have a place in international arbitration. The all-too-human approach of accommodating legal reasoning to concerns of equity may be criticized by some as intellectual laziness. On the other hand, arbitrators are not operating in a "social vacuum", and it should go without saying that large economic disputes and fairness are not mutually exclusive.⁵¹

Courts alike have a similar tendency to strive for an equitable resolution of disputes, but tend to be more reluctant to say so and thus tend to treat these decisions under the label of procedural efficiency. In *X SA and A v. Y AG*,⁵² for example, the Federal Supreme Court held that a joinder of proceedings (in one arbitration matter) was justified, among other reasons, by procedural efficiency and to prevent conflicting decisions.⁵³ In *T v. H and S*,⁵⁴ the tribunal held that T, which had used its own standard form for the conclusions of the contracts with the beneficial owners, could not reasonably

Grina, 344 F.3d 134, 145 (1st Cir. 2003). See also, e.g., SENTNER, 58-66 (with an overview of U.S. case law); HOSKING, 293-294. Certain estoppel applications have been the subject of intense academic debate. See, e.g., ULOTH/RIAL, 604-624 (tracing the development of what is referred to as "intertwined claims estoppel").

⁴⁹ Cf. e.g. Hausheer/Jaun, *Stämpflis Handkommentar*, Art. 2 ZGB, N 89-151. The corporate context, moreover, provides ample examples for abuse of rights situations where the confusion of companies is intentional. HANOTIAU, N 92, referring to *Orrri* (ICC Case No. 5730, ICC Awards 1986-1990, 410). The abuse of rights is particularly apparent where "foreign trustee companies" are set up to evade a third country's regulations or to hide assets. See HABEGGER, *Group of Companies*, 529-531. Cf. also HABEGGER, Case Note, 401 fn. 18, limiting the extension by way of veil piercing to clear cases of abuse of rights. For a comparative law study on dummy corporations in the non-signatory context, see HOLEWEG, 100-162.

⁵⁰ See *China National*, fn. 11 above, ASA Bull 4/1996, 627 (cons. 3c).

⁵¹ *Westland*, YB Comm. Arb. XI (1986), 131 N 18: "Finally, mention must be made of the practical reasons and considerations of equity which have motivated the arbitrators in this matter, quite apart from the legal ground."

⁵² Fn. 19 above.

⁵³ ASA Bull 2/2004, 348-349 (cons. 4.2).

⁵⁴ Fn. 18 above.

contend that, in case of a dispute, it would have preferred to conduct arbitral proceedings with the beneficial owners on one side and court proceedings against the offshore companies H and S, established by these very beneficial owners, on the other.

A similar approach has found its way into U.S. arbitration jurisprudence. In *J.J. Ryan*,⁵⁵ the U.S. Court of Appeals for the Fourth Circuit, for example, allowed a non-signatory parent company to participate in an arbitration arising from a contract entered into by its subsidiaries where the claims against it and its subsidiaries were based on the same facts and inherently inseparable. The underlying notion in *J.J. Ryan* was that if the parent company was forced to otherwise try the case before a national court, the arbitral proceedings of the subsidiary company would be rendered meaningless and the federal policy in favor of arbitration thus thwarted.⁵⁶ The determination of the signatory parties' original intent as regards the agreement to arbitrate was not the primary concern of the court.⁵⁷

While the extension of an arbitration agreement based on a "policy in favor of arbitration" alone would unlikely find support under Swiss arbitral jurisprudence in light of its strong support of the independence of corporate entities and the privity of contracts, the recent considerations in *X SA and A v. Y AG* and *T v. H and S* suggest that the rationale of procedural efficiency and a concern for inconsistent decisions underlying *J.J. Ryan* are not completely foreign to a Swiss court when deciding whether to extend an arbitration agreement to a third party.⁵⁸

3. Conclusion

While non-signatory decisions always turn on the very particular facts of each case, a very general cascade percolates from the cases discussed. Courts and arbitral tribunals, in their analysis as to whether, from a material point of view (as per Art. 178(2) PILS), an arbitration agreement encompasses claims by or against a non-signatory party, tend to go through the following steps:

⁵⁵ *J.J. Ryan & Sons v. Rhone Poulenc Textile SA*, 863 F.2d 315 (4th Cir. 1988); cf. HOSKING, 294-295, citing further decisions of the 4th Circuit Court of Appeals.

⁵⁶ 863 F.2d 315, 320-321.

⁵⁷ Intertwined claims estoppel, as this is referred to by some U.S. scholars, however, remains a hotly debated concept, especially in domestic arbitral practice where it is applied in its broadest form. See, e.g., ULOTH/RIAL, 604-624.

⁵⁸ In the cases *X SA and A v. Y AG* and *T v. H and S* discussed above, procedural efficiency was only one of many grounds mentioned, while the decision was first and foremost based on the implied consent of the parties.

1. *The parties' intent, actual or implied*: As with all issues of consent in contract matters, the point of departure in any case is the parties', or alleged parties', actual or implied intent.
2. *Accountability*: Where the parties' intent is not ascertainable, as a next step, a non-signatory will be compelled to arbitrate with a signatory and, likewise, a signatory will be compelled to arbitrate with a non-signatory where it has created the impression to be bound by an arbitration clause and its counterparty has relied on this impression to its detriment.
3. *Abuse of Rights*: Finally, a non-signatory will be bound to an arbitration agreement, and a signatory will be bound to arbitrate with a non-signatory, if the respective party's actions amount to an abuse of rights or to fraud.

Our attempt to identify specific non-signatory fact patterns and general rules very much remains a "work in progress" as the fact specific nature of the problem is its most prominent common element.⁵⁹ In its core, however, the non-signatory issue boils down - as most other matters in international arbitration - to a common sense inquiry into the parties' genuine intentions in light of good faith. With exceedingly frequent non-signatory decisions, moreover, international arbitration is on a path to gradually approach the most precious of all grounds in dispute resolution: predictability.

Bibliography

BLESSING Marc, *Extension of the Arbitration Clause to Non-Signatories*, ASA Special Series No. 8 (1994), 151-164 (cited "Blessing, Extension"); BLESSING Marc, *The Arbitration Agreement - Its Multifold Critical Aspects*, ASA Special Series No. 8 (1994), 7-22 (cited "Blessing, Aspects"); BUSSE Daniel, *Die Bindung Dritter an Schiedsvereinbarungen*, SchiedsVZ 3/2005, 118-123 (cited "Busse, Non-Signatories"); GAFFNEY John, *The Group Of Companies Doctrine And The Law Applicable To The Arbitration Agreement*, Mealey's Int'l Arb. Rep. 6/2004, 1-9; HABEGGER Philipp, *Arbitration and Groups of Companies - the Swiss Practice*, European Business Organization Law Review 3/2002, 517-551 (cited "Habegger, Groups of Companies"); HABEGGER Philipp, *Extension of arbitration agreements to non-signatories and requirements of form*, ASA Bull 2/2004, 398-410 (cited "Habegger, Case Note"); HANOTIAU Bernard, *Complex Arbitrations (Multiparty, Multicontract, Multi-issue and Class Actions)*, The Hague 2005; HOLEWEG Annette, *Schiedsvereinbarungen und Strohmann-gesellschaften: die Erstreckung von Schiedsvereinbarungen auf Dritte*, Heidelberg 1997; HOSKING James, *Non-Signatories and International Arbitration in the United States: the Quest for Consent*, ArbInt 3/2004, 289-303; LEADLEY/WILLIAMS, Peterson Farms: *There is No Group-of-Companies Doctrine in English Law*, IntALR 4/2004, 111-114; POUURET/BESSION, *Droit comparé de l'arbitrage international*, Zurich 2002; POUURET Jean-François, *L'extension de la clause d'arbitrage: approches française et suisse*, Journal de droit international 4/1995, 893-915 (cited "Poudret, Extension"); POUURET Jean-François, *Un statut privilégié pour l'extension de l'arbitrage aux tiers?*,

⁵⁹ A break down of the cases into identifiable fact patterns is further complicated by the fact that there is considerable overlap between the different scenarios and the legal theories applied.

ASA Bull 2/2004, 390-397 (cited "Poudret, Case Note"); SALOMON/STERKEN, *Second Circuit holds that whether a US parent company is bound to arbitrate is a question of US law*, IBA Arbitration Committee Newsletter, September 2005, 39-40; SANDROCK Otto, *Die Aufweichung einer Formvorschrift und anderes mehr*, SchiedsVZ 1/2005, 1-10 (cited "Sandrock, Case Note"); SANDROCK Otto, *Extending the Scope of the Arbitration Agreement to Non-Signatories*, ASA Special Series No. 8 (1994), 165-180 (cited "Sandrock, Extension"); SENTNER James, *Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories*, Business Law International 1/2005, 55-75; ULOTH/RIAL, *Equitable Estoppel as a Basis for Compelling Non-signatories to Arbitrate - A Bridge too far?*, Review of Litigation 2002, 593; WILSKE/SHORE, *The Rise and Fall of the "Group-of-Companies" Doctrine - A Comment on Sarhank Group v. Oracle Corp.* (2nd Cir. April 14, 2005), IDR 4/2005, 157-160.

Tobias ZUBERBÜHLER, *Non-signatories and the Consensus to Arbitrate*

Summary:

The extension, and its limits, of arbitration clauses to non-signatories is one of the thorny issues in international arbitration. The author examines the concepts and legal theories relevant to the issue, including agency, intervention, implied guarantees, groups of companies, piercing of the corporate veil, and estoppel. The author focuses on Swiss case law, considered in the context of US and UK legal precedents.

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