



EXTENSION OF THE ARBITRATION CLAUSES FOR THIRD PARTIES NON-SIGNATORIES OF THE ARBITRATION CONVENTION UNDER THE CONDITIONS OF THE DOCTRINE OF THE GROUP OF COMPANIES

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Abstract *The legal issue that we bring to attention within this study refers to the possibility that an arbitration convention signed by two parties may be also extended towards a third party which is a part of the group of one of the signatories.*

Keywords

Arbitration clause, competence, group of companies, third parties

1. Extension of the arbitration clause to third parties non-signatories in the doctrine and foreign jurisprudence

In French law, it is possible for a non-signatory of the arbitration convention to take part in the arbitration, either as Claimant, or Defendant, according to the „doctrine of the group of companies”. When a signatory of the convention is part of a group of companies, the doctrine extends the application of the arbitration convention on one or more companies that are part of the signatory group.

Therefore, the French Courts and the Arbitration Tribunal have extended the convention also towards other companies from the same group, by complying with the following conditions:

- The non-signatory of the convention is connected to the conclusion, execution or termination of the agreement that contains the arbitration clause;
- It was the common intention of the parties that the non-signatory to be obliged by the agreement and by its arbitration clause.

Within a case solved under the jurisdiction of the International Arbitration Court from Paris, two companies of the Dow Chemical Group have concluded agreements with more companies whose rights were subsequently taken over by Isover-Saint-Gobain. Each agreement contained an arbitration clause. After a conflict appeared, the arbitration procedures were commenced not only by the two signatory companies (which were part of the same group), but also by the parent company and another subsidiary. Isover-Saint-Gobain disputed the requests introduced by the companies which were non-signatories of the agreements containing arbitration clauses. The

Arbitration Tribunal rejected the appeal, considering that:

- One of the non-signatory companies was actually the one which delivered to Isover-Saint Gobain the goods to which the agreement was referring to;
- The other non-signatory company was the parent company of one of the signatories, the owner of the brand under which the products were commercialized and had absolute control over the subsidiaries, which were directly involved or might have been involved (according to the agreement) in the conclusion, execution or termination of the distribution agreements (ICC Case no. 4131 Dow Chemical).

The Tribunal concluded that, considering the role of the non-signatory companies in the conclusion, execution and termination of the agreements in which the arbitration clause was inserted, as well as the common intention of the parties, the non-signatory companies are held by the arbitration clauses contained by these agreements (Bamforth *et al.*, 2008).

In this case, the participation to commercial transactions generated by the agreement was enough to deduct the common intention of the parties for the non-signatory to avail itself from the arbitration clause.

The decision of the Arbitration Tribunal in the above case was mentioned by the Court of Appeal from Paris (CA Paris, 21 Oct 1983, Isover-Saint-Gobain v Dow Chemical France).

Within another case pending before ICC Paris, the Arbitration Tribunal rejected the extension of the arbitration clause over a non-signatory company, part of the group from which one of the partners of the agreement was a part, on the grounds that it could not be established if the non-signatory would have

accepted the arbitration clause if it would have been a part of the agreement (ICC Case No. 2138 of 1974).

In other situations, the Tribunal stated: „the security of the international commercial relationships imposes the consideration of economic realities and that all the companies in a group of companies are jointly liable for the debts from which they benefited, directly or indirectly” (ICC Awards no. 5103, Clunet 1988).

The participation of the third party to the negotiation of the agreement represents another important mark for the admittance or rejection of the extension of the arbitration clause. „The arbitration clause may be applied only to the companies in the A Group, which effectively took part to the negotiations that have generated the agreement, or that are directly interested by the agreement, except for those which were simple tools of the main shareholder in order to perform certain financial transactions. [...] Only those companies that took part to the negotiation, conclusion, and termination of the agreement can be held by the arbitration clause, which, at the moment of Agreement’s conclusion, linked the economic entity constituted as a group. Except for this general principle, the arbitrators should consider, concretely, not only the intention of the companies that are members of the group to act as a whole, but also if this intention exists at the level of every company of the group, regarded individually” (ICC 6519/1991, 118 *Journal du Droit International* 1065).

These decisions confirm the applicability of the doctrine, but at the same time increase the strictness of the applicability, because it focuses on the participation to the agreement, and the simple affiliation or control are not enough to be applied also to a non-signatory entity of the group (Tang, 2009).

In exchange, in England, the doctrine of the group of companies is not accepted, as the decision in the case of *Peterson Farms* states very clearly that „when an arbitration agreement, or the contract in which it is included, falls under the incidence of the English law [...] an ICC Arbitration Tribunal does not have the competence to apply <the doctrine of the group of companies>” (*Peterson Farms Inc. v. C & M Farming Ltd.* [2004] EWHC 121, [2004] 1 *Lloyd’s L. Rep.* 603, 2004 WL 229138, 7 *Int’l Arb. L. Rev.*, p. 111 (2004), Q.B. Div., 2004).

UNCITRAL Working Group on Arbitration states that the application of the doctrine needs to verify the following:

- a) The third party is part of a group of companies which constitutes a sole economic reality;
- b) The third party has played an active role on the conclusion and the execution of the agreement;
- c) The arbitration clause reflects the common intention of all the parties involved in the procedure (Yaraslau, 2011).

The economic reality is an important factor that has to be analyzed by the Arbitration Court regarding the doctrine of the group of companies, because it is very suggestive in reflecting the true intentions the companies had at the moment of concluding the agreement (Rodler; Figueroa Valdés, 2015).

The arbitration litigation may be extended regarding other affiliated companies or towards the parent company, providing that the non-signatory party is involved in the negotiation, execution or termination of the agreement (Wilske *et al.*, 2006).

Also, the relationship between the contracting party and the non-signatory has to be analyzed, as in the doctrine it is considered that it is necessary that the signatory company exercises a certain control over the non-signatory.

It is estimated that the French Courts are more flexible, establishing the validity of the arbitration clauses that do not fall under the incidence of the national law of any state, only in the terms of the will of the parties and usages, being rather easy to invoke usages, even unwritten, so that the simple appurtenance to a group of companies of a non-signatory be considered strong enough to extend the litigation towards the third party non-signatory of the agreement (Pavic, 2009).

In ICC cases No. 5721 and 5730, the Tribunal has decided that an arbitration clause signed by the subsidiary also applies to the parent company. In ICC case No. 5103, the Arbitration Tribunal has decided that the companies’ group has to be seen as an economic whole (a single unit), since the companies composing it have an active participation to the complex relationships of international affairs, as well as for the interests of the group prevail over the interest of each company individually. The stability of international economic relationships imposes to take the economic reality into consideration, so that all companies that obtained benefits have to be liable for the obligations. In ICC case No. 6519 the Arbitration Court applied extensively the arbitration clause only regarding one of the companies member of the group of companies which „was effectively or implicitly represented or which played an active role in the negotiations which preceded the conclusion of the agreement, or it was directly involved in the execution of the agreement”. In ICC cases No. 7604 and 7610, it was admitted the extension of the clause’s applicability, because in a legal procedure, the parent company acting on the behalf of the subsidiary, it has invoked the arbitration clause, from where it is concluded that the parent company (third party non-signatory of the agreement), has implicitly accepted the arbitration clause from the agreement signed by its subsidiary. An important author (Pavic, 2009) concludes that the doctrine of „the group

of companies” was used in a consistent number of arbitration litigations in order to justify the extension of the clause towards the third parties non-signatories, therefore allowing them to take more informed and more balanced decisions.

2. Conclusions

In conclusion, the doctrine of the group of companies represents a modern and normal tendency, at least in Continental Law, and we appreciate the existence of premises that the Arbitration Tribunals in Romania may have the openness that, under well determined circumstances (the participation of the third party at the conclusion and execution of the agreement) to admit it, and the Courts to validate it by rejecting the potential actions for cancelling those situations in which only an excessive formalism might consider the arbitration convention as inoperative towards a non-signatory third party.

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