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KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

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All correspondences are addressed to:

The Editor-in-Chief
Kampala International University Law Journal,
School of Law,
Kampala International University,
P.O. Box 20000 Kampala,
Uganda.
valentine.mbeli@kiu.ac.ug
Tel: (+256) 0706970595
Website:www.kiulj.kiu.ac.ug

Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ*)*** is to provide a platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

VALENTINE T. MBELI (Ph.D)

Editor-in-Chief.

e-mail:valentine.mbeli@kiu.ac.ug

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INTERROGATING THE EFFECTS OF ARBITRATION AGREEMENT ON THIRD PARTIES

JOHN FUNSHO OLORUNFEMI, Ph.D.[*] & GODWIN MUSA OMALE Ph.D.[**]

Abstract

Although the parties to an arbitration agreement are the first category of persons to be bound by an arbitration agreement, the less obvious category of entities that are integral to the resolution of the dispute may generate concerns. This is yet to be appreciated by many. The focus of this paper is to determine the extent to which an arbitration agreement can affect the rights of an interested third party in order to recommend appropriate legislative measures. It finds that the growing complexity in contemporary international business relations, and the need to further promote arbitration to effectively settle commercial disputes, creates the need to recognize the interests and rights of third parties to join or be joined in arbitration process, in deserving circumstances. It reveals that contemporary commercial realities seem to make it expedient to extend the frontiers of an arbitration agreement to affect third party interest. It therefore, recommends that this growing phenomenon should be reflected in national arbitration laws to cater for third party interest especially in the composition of arbitral tribunal, conduct of arbitral proceedings and enforcement of arbitral awards.

Keywords: Arbitration Agreement; English Arbitration Act; Third Parties; Non-signatories; UNCITRAL Model Law.

Introduction

Parties on arbitration agreement are legally bound and the arbitration agreement can therefore be enforced by or against the parties.[1] Although the parties are the first category of persons to be bound by the arbitration agreement, the less obvious category of entities that are integral to the resolution of the dispute may generate concerns. This is yet to be appreciated by many. There have been divergent judicial approaches across jurisdictions to the problem of the effect of an arbitration agreement that implicates a third party interest which has made it difficult to formulate uniform standard for the enforcement of an arbitration agreement specially agreements with an international flavour.

[*] Lecturer, Faculty of Law, University of Nigeria, Enugu Campus, Nigeria. Email- john.olorunfemi@unn.edu.ng Tel: +2348068268500

[1] *Heyman v. Darwins*(1942) A.C. 356; *Royal Exchange Assurance v. Bentworth Finance (Nig.) Ltd*, (1976) 11 S.C.183.

Two cases in Nigeria with similar facts[2] illustrate this point; there are *Federal Inland Revenue Service (FIRS) v NNPC & 2 Ors*[3] and *FIRS v NNPC & 4 Ors*[4] involving an arbitration agreement where there was an arbitration on the allegation of breach of Production Sharing Contract (PSC) agreement between NNPC and other respondents in which NNPC was, among other issues, accused of lifting more oil than required for the purpose of tax (tax oil) on behalf of FIRS, on their exploration activities of the joint venture. FIRS instituted an action to restrain the arbitration proceeding. Some of the respondents raised preliminary objection arguing that FIRS, not being a party to the arbitration agreement, had no *locus standi* to bring the action as it lacked the power to interfere with the arbitration agreement between only the respondents. FIRS on the other hand maintained the position that its powers and duties as the tax agent of the Federal Government would be affected by the resultant arbitral award. It was held in both cases that FIRS by virtue of its statutory function, though a third party to the arbitration agreement between the respondents, had the *locus standi* to maintain the actions. The court was convinced that the outcome of the arbitration proceeding will affect the power (interest) of FIRS. It therefore granted the declarations sought, nullified the arbitration agreement and held that jurisdiction over tax disputes has been exclusively vested on the Federal High Court by virtue of section 251(1) of the Constitution of Federal Republic of Nigeria, 1999 (as amended) and therefore it is not subject to arbitration, and this decision has been upheld by the Nigerian Court of Appeal.[5]A fair consideration of the theories considered below, such as that of third party beneficiaries and agency, would have produced a different result.

An Australian case which illustrates the problem of third-party interest in arbitration is *Altain Khuder LLC v. IMC Mining Inc. & Anor,*[6] where the agreement to arbitrate did not name the second defendant, IMC Solutions, as a party. The agreement to arbitrate was contained in an Operations Management Agreement (OMA), dated 13 February, 2008, between the plaintiff and the first defendant, IMC Mining. The OMA included terms whereby IMC Mining agreed to prepare mine plans, operations plans and budgets for a proposed iron ore mine at the Bulgan Altain Khuder Iron Project (also known as the Tayan Nuur Iron Ore Project), and to perform operational services in relation to that mine. Under the terms of the OMA,

[2]Disputes had arisen between NNPC and Shell, Esso, Nigerian Agip, and Total Exploration over Production Sharing Contract (PSC) entered into on 19 April 1993 over Oil Mining Lease, OML, 118 in Bonga oil field. A claim was filed against NNPC before the arbitration tribunals sitting outside the country. The oil companies were contesting the computation by NNPC of the amount due as Petroleum Profit Tax (PPT), Royalty, Education Tax, Investment Tax Credit (ITC) due pursuant to the PSC, the Petroleum Profit Tax Act (PPTA) and Deep Offshore and Inland Basin Production Sharing Contracts Act. It was their contest that the taxes as calculated by NNPC were inaccurate and that as contractor under the PSC, they had the exclusive right to compute those taxes and make returns which the NNPC was obliged to send to FIRS without any amendments. They also accused NNPC of lifting oil in excess of the amount allocated to it by the oil companies for defraying the above taxes.

[3](2012) 6 TLRN 1.

[4](2012) 6 TLRN 87.

[5]*Statoil (Nig) Ltd &Anor. v. FIRS &Anor* (2014) LPELR-23144(CA).

[6]Victoria Supreme Court, Australia, [2011] VSC1 and [2011]VSC12. Hereinafter, *IMC Solution.*.

the plaintiff agreed to advance the sum of $US 6.2 million to IMC Mining for the purpose of carrying out specified obligations under the OMA. The subject of the arbitration was, in broad terms, a claim by the plaintiff that these obligations had not been performed and consequently, the plaintiff was entitled to be repaid these moneys.

The arbitral tribunal delivered an award in favour of the plaintiff and the enforcing court granted an order for enforcement of the award, and held that the onus of proof was on the second defendant to show that the award ought not to be enforced against it. The Court of Appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder*[7] treated the matter as a threshold issue, and held that the award creditor had the legal burden of establishing before the trial judge, on the balance of probabilities, that IMC Solutions was a party to the arbitration agreement in pursuance of which the Award was made. The court therefore, ordered that the case be retried by the trial court. The Appeal Court distinguished the cases of *Dardana Ltd v.Yukos Oil Co*[8] and *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*[9] from that of *IMC Solution* in which section 101(1) of the English Arbitration Act 1996 which is the equivalent provision of section 8 (1) of the Australian International Arbitration Act, 1974 (as amended) and Section 103 of the English Arbitration Act 1996, were construed. In the words of the Appeal Court:

> *S 8(1) makes a foreign arbitral award 'binding by virtue of this Act … on the parties to the arbitration agreement in pursuance of which it was made' (emphasis added), not on the parties to the award. In contrast, S 101(1) of the United Kingdom Act provides that 'an award shall be recognized as binding' not on the parties to the applicable arbitration agreement, but 'on the persons as between whom it (the award) was made'. To the extent that those contrasting provisions compel differing results, this Court is required to give effect to the Act rather than follow Dardana or Dallah.*

On a further appeal to the Supreme Court of Victoria,[10] the court held that the application for enforcement order ought to have been rejected. The court reasoned that the Australian principles of estoppel are not necessarily identical to those applicable in other jurisdictions.

It appears that the decision of the Supreme Court in *IMC Solution* did not decide that the effect of an arbitration agreement cannot be extended to affect the interest of third parties. This is because the court found that the Tribunal made the Award,

[7]LLC [2011] VSCA 248 (22 August 2011).
[8][2002] EWCA Civ 543, [2002] 2 Lloyd's Rep 326.
[9][2010] UKSC 46 (3 November 2010).
[10]*IMC Aviation Solutions Pty Ltd v Altain Khuder Llc [2011] Vsca 248; 38 Vr 303; 282 Alr 717.*

without giving prior notice to IMC Solution, that it proposed to make any order against it, and accordingly the Tribunal breached the rules of natural justice, and consequently enforcement of the Award in Australia would be contrary to public policy. Being a convention award, this article agrees with this decision to the extent that the enforcement of the award against IMC Solution who was not given a notice to participate in the arbitral proceedings is a good ground for refusing the recognition of arbitral award under Articles V(1)(b) and V(2)(b) of the New York Convention and even Articles 36(1)(a)(ii) and 36(2)(b)(ii) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 2006[11]. In contrast, the case of *Sarhank Group v Oracle Corporation*[12] (the Sarhank case) was a particularly interesting one. The facts were that in 1991, Sarhank Group (Sarhank), an Egyptian corporation, entered into a contract with Oracle Systems Inc. (Systems), which provided for arbitration in Egypt. Systems was a wholly owned subsidiary of Oracle Corporation (Oracle). The contract was governed by Egyptian law. In 1997, a dispute arose between Sarhank and Systems, and Systems eventually terminated the contract. Sarhank then commenced arbitration proceedings against both Systems and Oracle at the Cairo Regional Centre for International Commercial Arbitration. Oracle objected to the arbitration, alleging that it was not a signatory to the contract. In 1991, the arbitral tribunal issued a unanimous decision against both Oracle and Systems. The arbitrators held that the arbitration clause in the contract between Sarhank and Systems was binding upon Oracle because Oracle was a partner with Systems in relation with Sarhank. Oracle sought an annulment of the award before the Cairo Court of Appeal but the award was upheld. Sarhank then sought enforcement of the Egyptian award before the US District Court for the Southern District of New York.

The District Court granted enforcement. It dismissed Oracle's argument that the court should decide whether the arbitration agreement between the parties was valid, in order to determine whether it had subject matter jurisdiction to enforce the award under the Convention. The court reasoned that it was not asked to compel arbitration, in which case it would need first to decide whether the parties had agreed to arbitrate. Rather, the court was asked to enforce a foreign award in which the validity of the arbitration agreement had already been established under the laws of Egypt. The District Court concluded that in such a case it had original subject matter jurisdiction under the Convention and turned on to consider whether Oracle could establish any grounds for refusal of enforcement.

The focus of this paper is to determine the extent to which an arbitration agreement can affect the rights of an interested third party in order to recommend appropriate legislative measures. From this introduction, part two of this article considers the

[11]Hereinafter, 2006 UNCITRAL Model Law
[12]404 F3d 657 (second circuit, 2005).

theories employed by the courts to accommodate the interest of third parties in commercial arbitration and part three discusses the need for relevant legislative reforms while part four contains the concluding remarks.

Legal Theories for Binding Third Parties to Arbitration

Disputes involving third parties are inevitable especially in the context of business transactions involving multiple agreements and the intermingling legal obligations of numerous interrelated entities. For example, in a multi-party contract such as a building contract between an engineer, a material supplier and a builder, it is possible for a dispute between two of the parties to affect the interest of any other party to the contract. If the builder and the supplier are in arbitration regarding the provision of improper materials, and they discover that the engineer actually gave the supplier plans calling for the wrong material, it may be expedient for the first two parties to be able to compel the engineer into arbitration to address the relevant concerns. [13]

It has been argued that 'an over-zealous approach to "extending" the arbitration agreement to non-signatories may undermine consent which has been regarded as the fundamental touch stone of arbitration'**.** The increasing commercial realities have however, compelled the courts, in certain jurisdictions, to develop third party participation in arbitration. According to Hosking:[14]

> *Due to the ever-increasing complexity on contractual frameworks and corporate structures, a range of theories have been developed and recognized in countries like United States and Canada to hold an interested third party bound by an arbitration agreement under estoppels. Thus, if a non-signatory knowingly accepts direct benefit under a contract containing an arbitration agreement, such non-signatory can be compelled to arbitrate, by a signatory.*

The non-signatory problem has long been associated with bills of lading and construction sub-contract disputes. However, it is now also found in arbitrations concerning reinsurance agreements, internet-based software licences and investment

[13] David C. Sawyer, "Revising the UNCITRAL Arbitration Rules seeking Procedural Due Process under the 2010 UNCITRAL Rules for Arbitration", *International Commercial Arbitration Brief 1* No.2 (2011) pp. 24-31 at 30 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1023&context=ab> accessed 27 September 2021; see also David Tupper and Stefani Wesley "Third Parties to Arbitration Agreements" *ADR Institute of Canada* <https://adric.ca/third-parties-to-arbitration-agreements/> accessed 27 September 2021; and Stavros Brekoulakis, "The Effect Of An Arbitral Award And Third Parties In International Arbitration: Res Judicata Revisited" *The American Review Of International Arbitration* Vol. 16 2005, <https://www.international-arbitration-attorney.com/wp-content/uploads/res_Judicata_and_third_parties-libreinternational_arbitration.pdf > accessed 27 September 2021.

[14] J. M. Hosking, "The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent", *Pepperdine Dispute Resolution Law Journal, Vol. 4, Issue 3*, (4/1/2004), <http://digitalcommons.pepperdine.edu/drlj/vol4/iss3/6>, accessed 27 September 2021; see also Robert Merkin, *Arbitration Law*, (UK: Informa Plc, 2021) Service Issue 88-July 2021 <https://www.i-law.com/ilaw/doc/view.htm?id=131202> accessed 27 September 2021.

treaties. Hence, a number of theories to enable the participation of third parties in deserving circumstances have evolved. These theories include equitable estoppel, third party beneficiary, group of companies, veil piercing/alter ego, agency, and incorporation by reference, and assignment.[15]

Equitable Estoppel Theory

Equitable Estoppel theory has been recognized in United States and Canada. The theory is based on equity and fairness. In *International Paper Company v Schwabedissen Maschinen & Anlagen GMBH*[16] the court stated that:

> *Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.*

Equitable estoppel theory can be applied where a non-signatory knowingly accepts direct benefits (as opposed to incidental benefits[17]) of a contract containing an arbitration agreement. Therefore, a third party that claims direct benefit from a contract which contains arbitration agreement will not be permitted at the same time to avoid the burden of the arbitration agreement contained therein.[18] It can also be applied by a non-signatory to compel arbitration with a signatory when the issues the non-signatory is seeking to resolve are inherently inseparable or inextricably intertwined with the agreement.

In *Barton Enterprises, Inc. v. Cardinal Health, Inc,*[19] because the claims of *Barton* against Cardinal Health depend on the interpretation of fee terms found in the license agreement, it would be unfair to allow Barton Enterprises to rely on these terms for its complaint, yet disavow the arbitration terms found in the very same license agreement. But in *Zurich American Ins. Co. v Watts and Jones,*[20] where Zurich insured both Watts and its subsidiary Jones, only Watts (not Jones), entered into deductible agreements with Zurich and these agreements contained arbitration clauses. When a dispute arose over deductibles, Zurich moved to compel Jones to arbitrate relying on equitable estoppel since Jones had benefited from the insurance

[15] *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 776 (2d Cir. 1995).
[16] 206 F.3d 411 (4th Cir., 2000).
[17] *Cargill International SA v. M/T Pavel Dybenko*, 991, F2d 1019 (2nd Cir. 1993).
[18] *Washington Mutual Financial Group LCC v. Bailey* 364 F 3d 260 (5th Cir 2004).
[19] 2010 WL 2132744, *4 (E.D. Mo. May 27, 2010); *Lexington Ins. Co. v. Alliance Residential Mgmt., LLC*, 2010 WL 4226460, *5-6 (S.D. Tex. Oct. 20, 2010)*; International Ins. Agency Services LLC v. Revios Reinsurance U.S., Inc.*, 2007 U.S. Lexis 2229 (N.D. Ill.); *American Bureau of Shipping (ABS) v. Tencara Shipyard S.P.A* 170 F.3d 349 (1999).*; HRH Construction LLC (HRH) v. Metropolitan Transportation Authority (MTA)* 33 A.D.3d 568, 569 (1st Dep't 2006).
[20] 417 F.3d 682 (7th Cir. 2005).

policy. The court denied the application ruling that Jones has not sought to enforce any rights it has under the deductible agreements, and in fact there would be no benefit to Jones under those agreements. It further held that even assuming that Jones has benefited from the deductible agreements by paying lower insurance premiums based on the deductibles, this benefit is too attenuated and indirect to force arbitration under an estoppel theory.

Theory of Third-Party Beneficiary

The intention of the parties at the time of executing the contract is the determining element under the theory of third-party beneficiary, as a mere interest is insufficient.[21] The primary test to ascertain a third-party beneficiary interest is whether the non-signatory can file a claim against one of the signatory parties.

In the United States (US), a Federal Court in *Mississippi Fleet Card v Bilstat Inc*.[22] formulated three tests for establishing that an entity is a third-party beneficiary as follows:

(a) The terms of the contract are expressly broad enough to include the third party either by name or as one of a specified class;

(b) if the said third party was evidently within the intent of the terms so used, the said third party will be within its benefits; and

(c) the promise had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract.

In *Selby v. Deutsche Bank Trust Co. Americas,*[23] the arbitration clause in the plaintiff's credit card agreement permitted **'**any involved third party' to elect binding arbitration**.** The court held that the indenture trustee and successor servicers to the signatory bank could compel arbitration of plaintiff's claim, even though they were not signatories to the agreement. But in *John F. Dodds, Jr. et al v. Pulte Home Corp. et al*.,[24] substantial identity between a signatory and a non-signatory made use of third-party beneficiary principles unnecessary. Also, in the most recent case of *Global Pacific, L.L.C v. Kirkpatrick*[25] the court, on appeal, declined to extend the effect of arbitration agreement to third party beneficiary based on the facts when it held that:

> *The record indicates that Blue Line has not claimed any third-party beneficiary rights, has not tried to enforce any rights allegedly*

[21]See, *Fleetwood Enterprises Inc. v. Gaskamp*, 280 F. 3d 1069, 1075 (5th Cir. 2002).
[22]175 F.Supp.2d 899 (S.D. Miss.2001); *London Drugs Ltd v. Kuehne & Nagel International Ltd* (1992) 3 SCR 299; *Doeff v.Transatlantic Reins. Co* 2007 U.S. Dist. Lexis 91879 (E.D. PA)*;(Bank of Am. Nat. Ass'n v. Bassman FBT, L.L.C., 2012 IL App (2d) 110729 (2012) 2; City of Yorkville ex rel. Aurora Blacktop Inc. v. Am. S. Ins. Co., 654 F.3d 713, 716–17 (7th Cir. 2011).*
[23]No. 12-01562, 2013 WL (SD Cal).
[24]909 A.2d 348 (Sup.Ct.P. 2006).
[25]2017-Ohio-1332.

created by the agreement, nor has it attempted to assert a claim or defence based on the 2006 R&K Operating Agreement. As such, there is no indication in the record to suggest that Blue Line was an intended third-party beneficiary to the R&K Operating Agreement.

Theory of Incorporation by Reference

The theory of incorporation by reference is applicable where a contract does not specifically include the arbitration clause but, contains a term that refers to another document which contains arbitration clause. In *Continental Ins. Co. v Polish Steamship Co.,*[26] the parties executed bills of lading that clearly and unequivocally incorporated other agreements by reference that contained mandatory arbitration clauses. Disputes arose and one of the parties claimed that it was not bound by the arbitration agreement. The Court held that by executing an agreement that expressly incorporated by reference another agreement that included an arbitration clause, the third party demonstrated an intent to be bound by the arbitration provision.

Difficulty may however, arise where there is no clear and direct reference to the arbitration agreement. In *Cooperativa Agraria Industrial Naranjillo Ltda. v. Transmar Commodity Group, Ltd.,*[27] the Court held that, under New York law, **"***a paper referred to in a written instrument and sufficiently described" may be incorporated by reference, but it must be clear that "the parties knew of and consented to the terms to be incorporated by reference*…**"**

Among other considerations, it is essential under New York law:

(i) That the principal agreement sufficiently describes the document to be incorporated such that the referenced document may be identified beyond all reasonable doubt, and

(ii) That the parties to the principal agreement clearly had knowledge of and assented to the incorporated terms. But in *Sanchez v. Valencia Holding Co.,*[28] the California Supreme Court, reversing a lower court decision, held that Sanchez's failure to read the contract was unreasonable, and that California law did not require the seller to call the arbitration clause to Sanchez's attention.

In order to ensure that the arbitration provision will be given full effect, it is desirable that when an arbitration clause is to be incorporated by reference, the principal contract should expressly state that fact.

[26]346 F.3rd 283 (2d Cir., 2003). *JS & H Construction Company. v. Richmond County Hospital* 473 F. 2d 212 (5th Circuit, 1973).
[27]*2016 U.S. Dist. LEXIS 129969* (Sept. 22, 2016).
[28]61 Cal.4th 899 (2015)190 Cal.Rptr.3d 812 353 P.3d 741.

Group of Companies Theory

Under this theory, several companies that form part of a larger corporate group may be regarded as a single legal entity or *"unerealitee conomique unique*[29] where the circumstances show that the companies despite their separate legal personalities constitute one and the same economic reality. Factors to consider in application of this theory include the degree of control or participation of the group of companies in the conclusion of the contract, the performance of the obligations under the contract and its termination.

In essence, this doctrine insists that when a non-signatory company of group of companies is an active participant in the contractual relationship, then the arbitration agreement can be extended to it. When this theory is successfully applied, a third party such as affiliate/ parent company of a signatory to an arbitration agreement or even in some cases, a natural person who is the group's ultimate controlling shareholder may compel or be compelled to arbitration. The goal of this theory is to bind 'true' party in interest and/or a more credit worthy member of the relevant group of companies.

In *Dow Chemical France & 3 Ors v. Isover Saint Gobain,*[30] there was an arbitration before the International Chambers of Commerce (ICC) tribunal in which an American parent company (Dow USA) and its French subsidiary (Dow France) sought to benefit from an arbitration clause contained in agreements that affiliates (Dow AG and Dow Europe) had signed with companies whose rights were later transferred to Isover Saint Gobain. The party, Isover Saint Gobain resisted the joinder on the ground that arbitration agreement was with only the affiliates, Dow AG and Dow Europe. The ICC arbitral tribunal after examining the circumstances in which the underlying contracts had been entered into, and found that the parent, Dow Chemical Company (USA), exercised absolute control over its subsidiaries, have signed the relevant contracts and like Dow Chemical France, effectively and individually participated in conclusion of contracts, their performance, and termination. It was in evidence that Dow Chemical (USA) played a central role in the contractual relationship entered by its affiliates. The tribunal held that these facts are various indication of the parties' true intent that the third parties are also bound by the contracts and the arbitral clause therein and therefore Isover St. Gobain cannot deny arbitration with Dow USA and Dow Europe. Dissatisfied with the award, an action for setting aside was commenced by Societe Isover St. Gobain

[29] Also known in French as *théorie de la réalitéé conomique du groupe* or *théorie de l'unité du groupe.*

[30] (1983) 110 JD1 889. The claimants were 1. Dow Chemical France (France) 2. The Dow Chemical Company (USA) 3. Dow Chemical A.G. (Swiss) 4. Dow Chemical Europe (Swiss), while the defendant was Isover Saint Gobain.

in French Court[31] which endorsed the application of the doctrine of group of companies and refused to set aside the award.

For group of companies' theory to apply, it must be shown that the third party took active part in the contract which contains the arbitration agreement as mere affiliations of the companies are not enough. This was illustrated in the ICC Award No 6519.[32] In that case, Mr. A and Company B entered into a contract containing an arbitration clause with the purpose that Mr. A and Company B agreed to transfer their shares in different companies to Company AY. Mr. A then transferred his shares of the companies AZ and AX but when doing so, Company B withdrew from the contract. Mr. A, together with company AY, AZ and AX then tried to invoke arbitration against Company B and claimed damages for breach of contract. The question for the arbitral tribunal was whether all the four entities (together known as Group X) could proceed with arbitration arising from the contract entered only between Mr. A and Company B. The tribunal held:

> *As things stand, the arbitration clause can only be applied to the companies of group X which did effectively take part in the negotiations which led to the signature of the Protocol or which are directly concerned by it, to the exclusion of those which were nothing but instruments of a financial transaction between the hands of a majority shareholder*[33]

UNCITRAL Working Group on Arbitration in its report has outlined the following as ingredients to be proved before a third party can be joined to arbitration under the theory:

a) The legally distinct company being brought under the arbitration agreement is part of a group of companies that constitutes one economic reality;
b) That the company played an active role in the conclusion and performance of the contract; and
c) That including the company under the arbitration agreement reflects the mutual intention (express or implied) of all parties to the proceedings.

Other ICC cases where group of companies' theory has been applied include:

a) ICC case No. 4972 – where the arbitral tribunal decided that the arbitration clause signed by the controlling company was extendable to its subsidiaries;
b) ICC cases No. 5721 and 5730 - the arbitral tribunal concluded that the arbitration clause that had been signed by the subsidiary company also was applicable to the parent company;
c) ICC cases No. 7604 and 7610, etc.

[31] *SocieteIsover Saint Gobain v. Societe Dow Chemical France 3 Ors*(1984) Rev. Arb. 98 at 100–101.
[32] Award in ICC Case No 6519, 1991, reported in *Journal du Droit International* 1065.
[33] *Ibid.*

d) In ICC case, No. 5103, the tribunal after analysing the background of the contract, decided that a group of companies had to be considered as an economic unity since all of the companies that belonged to it had the same participation in a complex international business relationship, and that the interest of the group prevailed over the interests of each company of the group. It further held that the certainty of international economic relations demanded to take into account the economic reality and also that all the companies that had obtained benefits had to respond for the debts.

Born[34] discusses ICC cases where third or non-signatory parties were held bound by the arbitration agreement and awards entered either for or against them. Born acknowledges that determining the identity of parties to the arbitration agreement is a threshold issue in international arbitration, and that virtually all national legal regimes regard arbitration as consensual; but that in deserving cases, third parties by the instrumentality of some legal theories can compel or be compelled to arbitrate.

The court in *Peterson Farms Inc. v C & M Farming Ltd*[35] has held that the group of companies' theory has no place in English law. English law recognizes the autonomous nature of the arbitration agreement. An express provision as to the law applicable to the interpretation and construction of the main contract was held also to govern the arbitration clause.

Theory on Veil Piercing

Veil piercing theory, like group of companies' theory, developed from ordinary contract and agency principle that in certain circumstances, the separate corporate personality of companies as enunciated in *Salomon v Salomon*[36] may be disregarded in the interest of justice. As it relates to arbitration agreement, a corporate entity may be bound by an arbitration agreement entered into by its subsidiary, notwithstanding that the subsidiary purports to bind only itself to the terms of the contract. This is possible where by the conduct of the companies, there is evidence showing that the separateness of the companies has been undermined or abandoned. The third party that may be bound under this doctrine may be a parent company, director or shareholder who by his activities in the company's affairs has undermined the separate corporate personality of the signatory company. It may happen that the purpose of establishing the corporate form is to pose as a front for fraud or other wrongs on unsuspecting party. In that instance, the court or arbitral tribunal may pierce the corporate veil to hold the incorporators (e.g. shareholders or parent company) bound to the contract and arbitration clause contained therein. In

[34]Gary B. Born.
[35][2004] EWHC 121.
[36](1897) AC 22; 45 WR 193.

most cases of piercing the corporate veil, the facts revolve around issues of control, fraud and manipulation.

In *Bridas S.A.P.I.C. v. Government of Turkmenistan*[37] the US Court of Appeal held that the Government of Turkmenistan is bound to arbitrate as an alter ego of State Concern Turkmenneft citing the manipulation of the oil company by the government to prevent plaintiff from recovering any substantial damage from the contract with the State company as an indication that the government by way of such control aimed at committing fraud or related wrongs on the plaintiff. On the other hand, in *Global Commodities Grp., LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh*[38] the court declined to compel arbitration because there were disputed issues of fact regarding the veil-piercing/alter ego factors. The court noted that, if issues of fact remained after discovery and a consideration of the evidence, it would hold a trial to determine whether non-signatories were alter egos of the insured parties and should be compelled to arbitrate.

Theory of Agency

Non-signatories can be compelled to arbitrate if the party is bound to an arbitration agreement under ordinary contract and agency principles.[39] This is usually a question of fact depending on the circumstances of each case such as where, though the agent acted without either actual or apparent authority, the principal later ratified his action. In contrast, a court did not find the evidence, that one multi-national corporation who has negotiated joint venture agreements in the past, and the other, a sovereign nation, both represented by able counsel, intended the party to sign the joint venture agreement as an agent of the Government in the absence of clearer language to that effect, and that such was sufficient to prove an agency relationship.[40]

However, it is not in all cases that a third-party agent can compel arbitration signed by the principal.[41] Thus the court has also held in *Flink v. Carlson*[42] that an agent for a disclosed principal may not be bound to arbitrate personally; rather, only the non-signatory principal maybe bound. This authority shows that one factor to be taken into account when establishing whether the agent and the principal are bound to arbitrate, is whether the principal was disclosed or undisclosed at the time the contract was entered into, for if the principal is disclosed, the agent ought not to be bound.

[37]447 F.3d411(5th Cir.2006); ICC Case No. 5730; ICC Case No. 8385.
[38]PA, 2013 WL 4713547 (S.D.N.Y. Aug. 29, 2013).
[39]*Peters v. Columbus Steel Castings Co.*,10th Dist. Franklin No. 05AP-308, 2006-Ohio-382; *Greene v.Great American E & S Ins. Co.*, 321 F.Supp.2d 717 (D. N.C. 2004); *Inter Gen N.V. v. Grina* 344 F.3d 134 (1st Cir. 2003).
[40]*Bridas Sapic v. Government of Turnmenistan*, 345 F.3d 347 (5th Cir. 2003*).*
[41]*Westmoreland v. Sadoux*, 299 F.3d 462 (5th Cir. 2002).
[42]856 F.2d 44 (8th Cir. 1998).

Assignment Theory

Under the assignment theory, a third-party assignee of a contract that contains an arbitration clause inherits the arbitration agreement. Such arbitration agreement is enforceable by or against him. The presumption can only be rebutted if the initial contracting party is able to establish that the arbitration agreement is entered into in consideration of the identity of the original contracting party (i.e. the assignor).[43] A different conclusion was reached in *Stewart v. McKenna & Ors,*[44] where the court held that the assignees of an insurance policy were not bound by the arbitration clause since they were not party to the policy.

The Need for Reform

The aforementioned theories and the different judicial approach across jurisdictions such as Nigeria, Australia and Egypt discussed above have shown that third parties can be affected by an arbitration agreement, and in some jurisdictions, recent developments indicate that a third-party interest can also affect an arbitration agreement. Lack of uniform rules is an indication of different perspective and approaches taken. The critical question is whether the non-uniformity of rules will inhibit the enforcement of arbitral awards in jurisdictions practicing different approaches. On examination of different national arbitration laws and institutional rules, that a third party is not expressly accommodated in the appointment process of arbitrators. This is prejudicial to boosting the confidence of the third party in the arbitration and ultimately guaranteeing acceptance of the eventual award. Consequently, where a third party is compelled to arbitrate or a third party successfully compels a party to arbitrate, he should be entitled to participate in the appointment of the arbitrator(s); this can be achieved by the amendment of the national arbitration laws and institutional rules so as to fully accommodate third party interest in this regard.

Furthermore, lack of uniform rules on the conditions for enforcement of arbitral awards poses a limitation on third parties who seek to enforce the arbitral awards of the arbitration process they participated in. Under the 2006 UNCITRAL Model Law, the only condition required is that the party relying on an award or applying for its enforcement shall supply the original award or a copy thereof.[45] Under the New York Convention, the conditions to be satisfied by a party seeking enforcement of the New York Convention award are:

(a) A duly authenticated original award or a duly certified copy thereof; and

[43] *See* Redfern and Hunter,179; English Law of Property Act, 1925, section 136.
[44] (2014) IEHC 301; *Association of New Jersey Chiropractors et al v. Aetna, Inc. et al*, No. 3:2009cv03761. Document 135 (D.N.J. 2012).
[45] Article 35 (2) 2006 UNCITRAL Model Law.

(b) The original agreement referred to in article II or a duly certified copy thereof.

The 2006 UNCITRAL Model Law's provision is favourable in terms of enforcing arbitration award for/against a third party. However, the second condition contained in the New York Convention poses a problem in relation to enforcement of an award for/against a third party.

The 2006 UNCITRAL Model Law recognizes that once a third party joins the proceedings and participates alongside with other parties in the arbitration, it will not be able to claim in the future that it had not been a party to the original agreement so as to invalidate the enforcement of the award made against it.[46] In the same manner, the other parties cannot claim that a third party who took part in the proceeding seeking enforcement of an award made in favour of it shall not succeed simply because there was no agreement between them.

To overcome the limitation posed by the second condition in the New York Convention, an arbitration agreement may be evidenced by the ruling by the tribunal or order of the court as the case may be, in which a third party is compelled to arbitration, and the arbitral tribunal may also need to explain in the award very clearly the considerations and arguments that justifies the award to affect the interest of a third party. Thus, a third party seeking to enforce the convention award may supply the decision of the court or tribunal from which he assumed a party to the arbitration. On the other hand, a party seeking to enforce an award against a third party can equally produce the decision joining the third party to arbitration to comply with the requirement of the convention.The requirement to supply the original arbitration agreement has been held not to entitle a court to examine the validity of the arbitration agreement on its own motion.[47] Nonetheless, the courts in countries where the national law does not require the claimant to supply the original arbitration agreement or a certified copy may dispense with this requirement altogether in application of the more-favourable-right principle in Article VII of the New York Convention.[48]

[46]*Gvozdenovic v United Air Lines Inc.* 933 F2d 1100 (2nd Cir 1991*)* in which the claimants appealed a judgment of the trial court dismissing a class action they had brought seeking to vacate an arbitral award. They argued that the trial court had improperly dismissed their petition for vacating the award arguing that they were not parties to the arbitration agreement. However, the Second Circuit Court found that the claimants had been represented in the arbitration by a counsel who had been selected and instructed by a committee specifically designated by the claimants to represent them in the arbitration proceedings. The Court held that the claimants had voluntarily participated in the arbitral proceedings and were therefore bound by its outcome as if they had been signatories to the arbitration agreement.

[47]*AloeVera of America, Inc v. Asianic Food (S) Pte Ltd &Anor*) Yearbook Commercial Arbitration XXXII (2007),489-506 (Singapore no. 5); in which the High Court held that the enforcement process is a mechanistic one. Consequently, the obligation for the applicant to submit the arbitration agreement does not require a judicial investigation by the court into the existence of the arbitration agreement. It is for the party opposing enforcement to prove that one of the grounds for resisting enforcement exists, i.e. that the tribunal lacked jurisdiction.

[48] Oberlandesgericht, Munich, 12 October 2009 (*Swedish Seller v. German Buyer*) Yearbook Commercial Arbitration XXXV (2010), 383-385 (Germany no. 134).

Conclusion

Awards rendered against non-signatories, which cannot be considered to be parties to the arbitration agreement, have in general not been declared enforceable.[49] However, as we noted above, an arbitral award may be enforced against a non-signatory in some exceptional circumstances where the non-signatory was held bound by the arbitration agreement under certain legal theories. The application of the theories is increasingly being recognized in many jurisdictions as a practical and expedient response to the demand of contemporary complex commercial relations, so as to make arbitration institution robust enough to effectively settle commercial disputes in a just manner. Where a non-signatory or third party has been compelled to arbitration under the theories discussed above, the court of enforcement does not have the power to permit an unsuccessful party to re-open the issue of non-existence of valid arbitration again. Evidence of such decision compelling the non-signatory/third party to arbitration should suffice for the abidingness of the award on him

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[49] *Structural Construction Co. Ltd v. International Islamic Relief*, High Court, Nairobi, Kenya, 6 October 2006,Miscellaneous Case 596 of 2005, cited in UNCITRAL 2012 Digest of Cases, 176.

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