The Extension of the Arbitration Clause: Update from Portugal

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1. I have written elsewhere about the extension of the arbitration clause to non-signatories in situations that have been identified as the doctrines of the "group of companies" and the assumption of debts.[fn]"The extension of arbitration agreements: a 'glimpse' of connectivity?" 32(1) ASA Bull. 18 (2014).[/fn] In that particular case, the circumstances of the facts surrounding a possible extension of the arbitration agreement led me to conclude that the state court should have had a broader perspective and should not have raised the level of the threshold to refer the parties to arbitration. The rationale is quite simple: if the objection consisting of the existence of an arbitration clause is raised before the state court, the court shall apply a lower criterion in referring the parties to arbitration. Indeed, due to the "favor arbitrandum" philosophy of the New York Convention of 1958 and the principle of "Competenz Competenz" in almost every jurisdiction, it is sufficient for there to be a glimpse of connectivity between the parties, the arbitration agreement and the dispute for the court to be compelled to refer the parties to arbitration. On the other hand, if the issue is raised before the arbitral tribunal, the threshold level must be increased and not every connection will suffice to establish the competence of the arbitral tribunal.

The facts at hand in that particular dispute showed that there was a kind of involvement of the "third party" in the performance of the underlying agreement and, therefore, the courts should have resorted the parties to arbitration.

However, the rationale above is far from being accepted by the Portuguese courts. Quite to the contrary

Indeed, in a very recent case, the Lisbon Court of Appeal had the opportunity to revisit this issue and set forth a very strict criterion to assert the extension of an arbitration clause. I am not sure about the factual situation leading to the denial of the extension of the arbitration agreement to a third party. To be more precise, the decision does not state the facts that existed or did not exist to deny or allow such extension. The Lisbon Court of Appeal merely set forth a general and abstract principle related to this issue. In any event, I will try to summarise the case and extrapolate some considerations about the extension of the arbitration agreement.

2. On 21 August 2007, Party A entered into a contract with Party B which apparently was breached by Party B. Such contract contained an arbitration clause with the following (unusual, I must say) wording:

> *"The Parties grant the arbitrators the vital role of fully deciding any dispute that may arise between them" and "any question that cannot possibly be solved between the Parties, notwithstanding their best efforts to do so, shall be necessarily decided by an arbitral tribunal in a binding way".*

Party A and another undisclosed party (Party C) brought a lawsuit in a state court against Party B claiming compensation. Party B objected to the jurisdiction of the state court, contending that the arbitration clause was valid and binding on all the parties, including Party C. These petitioners contested the validity of the arbitration clause and, more specifically, Party C alleged not to be or have been party to that arbitration clause, and not to have consented to arbitrate any dispute. Therefore, Party C contested that it could not be bound by such arbitration agreement. The court of first instance decided that the arbitration clause was binding on all the parties and referred them to arbitration. Party A and Party C filed an appeal before the Lisbon Court of Appeal.

By a decision rendered on 24 March 2015, the Lisbon Court of Appeal reversed the decision of the lower court as to Party C but upheld the decision regarding Party A. In other words, it considered that Party A was bound by the arbitration clause whereas Party C was not, which meant that the Court of Appeal did not grant the extension of the arbitration clause to that party.

Again, it is not possible to ascertain whether or not that denial of the extension was correctly decided because the report of the decision does not state the entirety of the factual basis of the case. I will not entertain here any speculation and, therefore, I will limit myself to citing the abstract and generic principle that was drawn by the Lisbon Court of Appeal in this respect.

Indeed, the Court of Appeal considered that,

> *"An arbitration clause contained in a contract binds the signatory parties of such contract only (art. 406 of the Portuguese Civil Code). Notwithstanding, one may admit the extension of such clause to a third non-signatory party if the signatory parties consent to such extension and if the third party has joined whether expressly or implicitly to such arbitration clause.*
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> *The implied joinder "(implied consent")[fn]English expression used in the decision.[/fn] must arise from facts that demonstrate such joinder with a considerable level of probability (art. 217(1), final, of the Portuguese Civil Code); in order to conclude for the existence of such implied consent, it will not be sufficient for the third non-signatory to have intervened in the negotiation and performance phases of the contract in which the arbitration clause was inserted; it is necessary that one can ascertain that such third non-signatory party has had actual knowledge of the existence of the arbitration clause and that the third party was aware that any dispute arising from that contract would be referred to arbitration, therefore allowing to infer its accession to that arbitration clause."*

3. I will not elaborate much further on this topic but merely point out that this understanding of the Lisbon Court of Appeal is in line with an ancestral understanding of the validity and efficacy of the arbitration agreement. For instance, it was decided that "the law of arbitration, based on the consensual nature of the arbitration clause, does not allow to extend to third parties, foreign to the contract, the effects of the disputed contract, and bars any forced intervention or guarantee procedures".[fn]Decision of the "Paris Cour d'appel" of 19 December 1986, OIATE v. SOFIDIF, 1987, Rev. Arb. 359, 363.[/fn]

However, recent commentary and case law has shown us that the extension of the arbitration clause is being admitted under several doctrines, not all of them related to an "implied consent" (let alone to a strict understanding of that "implied

consent”). Such are the cases of the doctrines of “agency (actual and apparent), alter ego, (…) group of companies, estoppel, third party beneficiary, guarantor, subrogation, legal succession and ratification or assumption.”[fn]See Gary Born, International Commercial Arbitration, Vol. I, 2nd Edition, Wolters Kluwer, The Netherlands, 2014, at 1413.[/fn]

As said, the report of the factual basis does not allow us to go further in analysing the decision but what it is interesting to point out is that the Portuguese Courts have been adopting a strict understanding in relation to the extension of the arbitration clause to non-signatory parties, requiring the existence of a level of “consent” which is not in line with a more recent and widespread understanding of this issue. More to the point, as a result of this understanding of the Lisbon Court of Appeal, as involved as a non-signatory may have been in the execution and performance of a contract, that will not suffice.

I do not contend to adhere to a liberal approach to this topic, and let alone do I argue that the arbitration clause should apply to whomever wishes to benefit from it or to any other non-signatory only by virtue of a mere application of another signatory party.

However, I think that the arbitral tribunal is the competent entity to decide these issues and whenever there is a link between the parties in dispute (including the non-signatory), the dispute and the underlying legal relationship, the court judge must resort the parties to arbitration after being timely asked to do so, unless of course the arbitration agreement is patently void, null or incapable of being performed, or if it simply does not exist. That is the understanding deriving from the New York Convention of 1958 and in most, if not virtually all, jurisdictions recognising the principle of Competenz – Competenz. Again, the threshold level should be less strict in a court of law and should be increased in the arbitral tribunal.