

Relooking at Consent in Arbitration

Kluwer Arbitration Blog

February 12, 2019

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Please refer to this post as: Benson Lim (Assistant Editor for East and Central Asia) and Adriana Uson, 'Relooking at Consent in Arbitration', Kluwer Arbitration Blog, February 12 2019, <http://arbitrationblog.kluwerarbitration.com/2019/02/12/relooking-at-consent-in-arbitration/>

Consent has long been accepted as the cornerstone of arbitration, until recently. The evolution and expansion of arbitration brought about diverging opinions on the consensual character of arbitration. For example, Stavros Brekoulakis suggested that “[w]hile ... a functional concept of consent may enhance the effectiveness of arbitration clauses in complex transactions, it is very difficult to reconcile with fundamental principles of consent.” [fn] Brekoulakis S, “Parties in International Arbitration: Consent v Commercial Reality” (2015) Presentation at the 30th Anniversary School of International Arbitration [/fn] In the context of binding non-signatories in an arbitration, Brekoulakis also suggested that “what matters is not whether a non-signatory can demonstrate consent for arbitration, but whether it is inextricably implicated in a dispute which is the subject matter of an arbitration.” [fn] See discussion in Brekoulakis S, “Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories” (2017) 0,1-34 Journal of International Dispute Settlement[/fn]

We discuss whether consent in arbitration is now merely a legal fiction.

International treaties and national laws have consistently required consent as a precondition to arbitration. Thus, a party can only bring its dispute to arbitration – and bar either party from invoking the jurisdiction of otherwise competent courts – where there is an agreement to arbitrate. The New York Convention requires a written arbitration agreement or clause within an agreement, i.e. record of consent, for an arbitral award to be enforceable.[fn] New York Convention, Art. II (1, 2), Art V. [/fn] The UNCITRAL Model Law on International Commercial Arbitration, which has been adopted by numerous states around the world, likewise provides that an arbitral award may be refused recognition and enforcement if the parties to the arbitration agreement were under some incapacity, or if the agreement was not valid under its own governing law.[fn] UNCITRAL Model Law on International Commercial Arbitration, Art. 35. [/fn] The English Arbitration Act 1996 provides that ‘parties should be free to agree how their disputes are resolved.’ [fn] s. 1(b) of the Arbitration Act 1996.[/fn] In the case of *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2013] 226 SGCA 57, the Singapore Court of Appeal stated that: ‘[a]n arbitral award binds the parties to the arbitration because the parties have consented to be bound by the consequences of agreeing to arbitrate their dispute. Their consent is evinced in the arbitration agreement.’ The US Supreme Court in *Volt Information Sciences v Leland Stanford, Jr. University* [1989] 489 U.S. 468 recognized that ‘[a]rbitration under the [Federal Arbitration Act] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit...’

However arbitration, which has long been seen as a consensual exercise, has increasingly been viewed as a mechanism borne out of compelled consent. This is especially so when parties have

unequal bargaining positions. In sports arbitration, for instance – the Swiss Federal Supreme Court in *Guillermo Cañas v ATP Tour*^[fn] ATF 133 III 235, 243 para. 4.3.2.2 [Guillermo Cañas v. ATP Tour], 25 ASA BULL. 592, 602 (2007), as translated in 1 SWISS INT’L ARS. L. REP. 65, 84-85 (2007). ^[/fn] recognized that ‘any athlete wishing to participate in organised competition under the control of a sports federation whose rules provide for recourse to arbitration will not have any choice but to accept the arbitral clause.’ Germany’s Federal Court of Justice (the Bundesgerichtshof) took a similar stance in *Az. KZR 6/15, Pechstein v. International Skating Union*, 7 June 2016, finding that agreements referring disputes between athletes and sports federations to the Court of Arbitration for Sport in Lausanne was consensual and lawful, despite the fact that any professional sportsperson who wished to compete was required to agree to arbitration. In the US, mandatory (non-negotiable) arbitration agreements are found in employment contracts, which the US Courts uphold such as in the case of *Gilmer v Interstate Johnson / Lane. Corp.*, *Rent-A-Center v Jackson*, and *AT&T Mobility v Conception*.^[fn]See discussion in Giles T and Bagley A “Mandatory Arbitration of Employment Disputes: What’s New and What’s Next?” (2013) 22(3) at p.39 Employee Relations Journal^[/fn]

Another source of increasing doubt in the consensual nature of arbitration comes from the expansion of arbitration from resolving disputes between two parties to complex multi-party arbitrations and third-party joinders, where arbitrators hear claims by or against someone who never signed the relevant contract, therefore, not giving consent to arbitration.

That said, we believe that this seeming paradigm shift from consensual to compulsory or the so-called ‘compelled consent’ does not mean that the principle of consent has been extinguished. For arbitrations borne out of compelled consent, the problem is essentially one of abuse of unequal bargaining powers, which should be reconsidered by legislatures. For example, a legislature may decree that disputes of a small quantum and arising from an average consumer transaction shall be non-arbitrable. For multi-party arbitrations and third-party joinders, a “non-signatory” might still be bound by an arbitration agreement because consent to arbitrate was given through some other means other than the formality of a signature. ^[fn] Park W, “Non-Signatories and International Contracts: An Arbitrator’s Dilemma”, in “Multiple Party Actions in International Arbitration” 3 (Permanent Court of Arbitration, 2009), adapted from Non-Signatories and International Arbitration, in *Leading Arbitrators’ Guide to International Arbitration* 707 (L. Newman & R. Hill, 3d ed. 2014); 2 *Dispute Res. Int’l* 84 (2008) ^[/fn]

Therefore we do not agree that “arbitration without consent exists”.^[fn] Kaufmann-Kohler G and Peter H, “Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution” (2001) 17(2) *Arbitration International* at p. 186 ^[/fn] We think it is more accurate to refer to a modern approach to consent that is more focussed on facts and more aligned with commercial practice, economic reality and trade usages.

In fact, marginalising consent^[fn] See e.g. Youssef K, ed. by Mistelis L, Brekoulakis S, “The Death of Arbitrability” in *Arbitrability: International and Comparative Perspectives* (2009), Kluwer Law International at pp. 47-68.^[/fn] or any other fundamental principle of arbitration to address these changing needs is inimical to the development of arbitration because it detracts from the fundamentals which made arbitration popular to commercial parties in the first place. Instead, a more nuanced adaptation of the concept of consent is required to accommodate the consideration of a multitude of circumstances in law, fact, or equity, which may evince the parties’ consent to arbitration or lack thereof.

The needs of arbitration users have changed since the drafting of the New York Convention in 1958 and these needs are not best addressed by a rigid and dogmatic adherence to arbitration principles and practices. For example, in respect of multi-party arbitrations, it remains to be seen whether an award can be enforced against a losing party joined to an arbitration against its will when that party

cannot select the tribunal.[fn] See e.g. Van den Berg AJ, "Consolidated arbitrations and the 1958 New York Arbitration Convention" (1986) 2(4) *Arbitration International*, at pp 367-369 [/fn] As the *raison d'être* of international arbitration is the greater predictability of global enforcement of an award, parties' concerns about such issues of award enforcement in multi-party arbitrations are real and can only be resolved by relooking at traditional arbitration principles.

Consent in arbitration must also address the new economic reality of more complex commercial practices. The close interactions of today's global economies and the greater economic convergence in today's markets have led to a greater prevalence of international trade and complicated projects around the world involving multi-party transactions and contracts. Groups of companies are not the exception but the present norm in major international projects as commercial parties seek to manage their risks and resources better. These multi-party transactions and contracts have in turn given rise to more multi-faceted and multi-party international trade disputes. The concept of consent must accurately reflect the economic functions of global entities and the complex structures of modern-day projects.

Such a nuanced approach towards the concept of consent will ensure the relevance of arbitration as the preferred international dispute resolution mechanism for modern-day parties.