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Agency as a mechanism for compelling a non-signatory to join arbitral proceedings

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Agency as a mechanism for compelling a non-signatory to join arbitral proceedings
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International investors, and those who advise them, continue to be vexed by the question of when a non-signatory, such as a sovereign state, can be compelled to join arbitral proceedings.

A typical scenario involves a private investor who has entered into an arbitration agreement with a wholly state-owned entity, but seeks to join the state into the proceedings. This is particularly common in the field of energy and infrastructure projects, where the investor may anticipate difficulties in enforcing any award against the state entity alone if the entity's assets are transferred away or frozen, leaving a mere corporate shell behind. The *SPP v the Arab Republic of Egypt* (February 1983), *Westland Helicopters Ltd v the Arab Organization for Industrialization et al* (March 1984), *Joint Venture Yashlar and Bridas SAPIC v Turkmenistan* (June 1999) and *Bridas SAPIC v Turkmenistan* (June 1999) ICC arbitrations concern variants of this scenario.

The legal mechanisms for compelling a non-signatory to join arbitral proceedings are numerous and include agency, assignment, group of companies, alter ego, estoppel and state responsibility theories. Agency is often thought to be the simplest and least controversial theory particularly under English law (which considers the identification of the parties to an agreement to be a question of substantive, not procedural law), and therefore the investor's likeliest ally.

As a matter of English law, an agency relationship arises when one person, called the principal, authorises another, known as the agent, to act on its behalf, and the other agrees to do so. An entity may therefore be bound as the principal by an arbitration agreement which it has not physically signed, but which the agent has executed on its behalf. This was argued and agreed by arbitral tribunals for example in *Antoine Biloune v Ghana Investment Centre*, Ad Hoc Awards (October 1989 and June 1990).

Although agency is an established common law principle, there is little English law authority on the application of the theory in the context of an attempt to join a non-signatory to arbitral proceedings, with the possible exception of the High Court case *Peterson Farms Inc v C&M Farming Ltd [2004] EWHC 121*. But even in that case, the question was whether an agency relationship existed within a group of companies, rather than whether one could be found between a state and a state-owned entity.

Against that background, it is perhaps time to shine a fresh light on the 1954 House of Lords decision in *Bank Voor Handel En Scheepvaart, NV v Administrator of Hungarian Property [1954] 1 All ER 969*, which is cited as legal authority for the principle that public corporations created by statute are sometimes regarded as agents of the Crown.

In Bank Voor Handel En Scheepvaart, gold belonging to a Dutch banking company was stored in a safe in the City of London. When Germany invaded the Netherlands in May 1940, the gold became "enemy property" under the Trading with the Enemy Act 1939 and was transferred to the Custodian of Enemy Property for England and Wales. In 1951, the Dutch banking company obtained a High Court judgment awarding it the proceeds which the custodian had derived from the gold. The company argued that it was entitled to the sums without deduction of the income tax paid by the custodian in respect of the profits. This was on the basis that Crown status attached to the custodian who therefore was not liable to pay income tax.

The House of Lords found the custodian to be an agent of the Crown with reference to the following reasons:

• Appointment. The custodian was appointed by statute.

• Nature of rights and duties. The House thought that "the definition in the statute of [the custodian's] rights, duties and obligations is highly important". The custodian's duties were enshrined in the Trading with the Enemy (Custodian) Order 1939 made by the Board of Trade, which included holding money paid to him and transferring property vested in him under a vesting order. It was considered particularly significant that the custodian asserted these powers on behalf of, and for the benefit of, the Crown.

• Degree of discretion. The pivotal question in the view of Lord Reid was to what extent discretion was bestowed upon the custodian by statute: "the grant of any substantial independent discretion takes the officer out of the category of servants of the Crown". The Court found the discretionary powers negligible as the custodian did not, for example, determine which properties were to vest in him and for what duration.

• Role within government. Finally, the House of Lords thought it significant that the custodian was a "necessary part of the machinery of modern government" and a "cog in governmental machinery devised in modern conditions for performing the former prerogative functions of the Sovereign".

Even though the facts of the case are highly specific, the Court's reasoning is perhaps worthy of consideration in a modern context where a party to an oil or infrastructure project seeks to introduce a sovereign state into the proceedings.

Applying the Court's test, a state entity is often established by a legislative measure. Its rights and duties are usually clearly defined in an enactment, and entitle the corporation to assert its powers on behalf of, and for the benefit of, the government in overseeing foreign direct investment projects. The entity also typically collects taxes or other payments from the investor for the benefit of the government.

As to the entity's degree of discretion, its board of directors commonly includes ministers who exercise governmental oversight. Statute may also define precisely the entity's permissible discretion. For instance, the entity may be authorised to make by-laws but have a corresponding obligation to seek the approval of a ministry for such laws. Moreover, a power to enter into

contracts may be curtailed by a requirement that contracts above a certain value be approved by the government.

Finally, a state-entity overseeing significant foreign direct investments characteristically performs a necessary part of the machinery of that government. Its website, brochures and other official materials may include statements to this effect.

Thus, where a party to an oil or infrastructure project seeks to introduce a non-signatory state into the arbitral proceedings, the authority of Bank Voor Handel En Scheepvaart suggests that a relationship of agency may be made out.

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