Double difficulty for non-signatory parties to multiparty ICC arbitrations

Manuel P Barrocas
Barrocas Sarmento Neves, Lisbon
info@barrocas.com.pt

Generally, an arbitration clause binds only the persons or companies who sign the agreement containing it. This principle reflects the fact that arbitration is consensual in nature and dependent upon the parties' agreement. There are, however, exceptions to this principle in the rules of a number of arbitration institutions, including the ICC. For example, a non-signatory parent company may be required to participate, either with or without the agreement of the signatories, in an arbitration where one of the signatories to a contract is or was its subsidiary. This is often referred to as the 'group of companies' doctrine. Similarly, a non-signatory company may be required to participate in an arbitration if it is the alter ego of an affiliate company, which signed the arbitration agreement. This is commonly called 'piercing the corporate veil'. Finally, an arbitral agreement may be held to require non-signatories to arbitrate when assent to that agreement may fairly be implied by the non-signatories' conduct, such as actively participating in the negotiation and/or executing the contract that is the subject matter of the dispute. This situation is also usually connected with the group of companies doctrine.

Where a non-signatory is required to arbitrate, questions may arise as to the amount of input it is permitted to have in structuring the arbitration proceeding. Generally, the non-signatory should be able to choose the arbitrator with the agreement of the remaining respondents.[1] But the ICC Rules do not give a non-signatory party any power to influence the arbitration seat if there is a previously chosen location. This circumstance, if not considered by the ICC Court, is likely to lead to inequality between the parties and will constitute a double burden for the non-signatory. In practice, a non-signatory may be compelled to participate in an arbitration to which it never agreed, without many of the safeguards and rights that are afforded to the signatory parties.

A non-signatory party, particularly where it is not part of a group of companies that signed the arbitration agreement, may be forced into the potentially prejudicial situation of having to accept an arbitration seat that is hostile to its interests. The independence and neutrality of the arbitration seat may be compromised because a foreign party may be effectively compelled to participate in what is truly a domestic arbitration – the arbitration seat, *lex causae* and *lex arbitii*, and nationality of the signatory parties may all correspond to the nationality of the arbitration seat.

This very point was recently submitted to the ICC Court in regard to an arbitration pending in Sao Paulo, Brazil. The arbitration was between a Brazilian commercial aviation company that was a subsidiary of the GOL Group and a number of Brazilian companies. The non-signatory third party, Mattlin Patterson Funds, was based in the United States. The transaction at issue in the dispute was the sale of shares in Varig, a Brazilian airline.

The court decided to follow the signatories' agreement literally and upheld the arbitration seat they chose. The ICC Court took no notice of the fact that the non-signatory party, a US company, had been compelled to participate in an arbitration in a seat completely alien to it by signatories who were both native to Brazil. In summary, the court deemed the parties' choice of arbitration seat to be set in stone and showed no tolerance or flexibility towards the position of the non-signatory party.

The author disagrees with the ICC Court's position. This inflexible approach results in a non-signatory party being unprotected and the neutrality of the forum potentially being compromised. The non-signatory party faces a double difficulty: it is compelled to participate in an arbitration not of its choosing, often against its will; and it is denied the opportunity to have its case heard and determined in a neutral arbitration seat. The court needs to urgently review its approach and policies in these cases. The intervention of a third party in an arbitration should have a direct impact on the choice of the arbitration seat. The duty to ensure the neutrality of the seat for all parties concerned must prevail over the signatory parties' prior choice of seat. The non-signatory is participating in the arbitration and is directly impacted by its seat.

Given the increasing tendency to join non-signatories in arbitration, the ICC Court should carefully review, on a case-by-case basis, when it should follow the signatory parties' choice of the arbitration seat if the non-signatory disagrees with that choice.[2] This consideration is essential to uphold the ICC's principles and reputation for equality and fairness.

Notes

1 See Article 10 of the ICC Arbitration Rules.

2 Article 14 of the ICC Arbitration Rules allows the ICC Court to fix the place of arbitration where the parties have not done so. It could be argued that when a non-signatory is compelled to arbitrate, not all of the parties have agreed on the place of arbitration, even if the parties who signed the arbitration agreement have. The ICC Court has the power under Article 6(2) to resolve disputes about the scope or validity of the arbitration agreement.